July 2015

Hate Speech, Free Speech and The University

Robert W. McGee

HATE SPEECH, FREE SPEECH AND THE UNIVERSITY

by

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INTRODUCTION

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."[1]

> One attends college, presumably, to learn. Students today are learning strange lessons, like how to restrict free speech in the name of academic freedom. It's as if Big Brother had taken over the universities . . .[2]

From the language of the first amendment, it would seem clear that government cannot infringe on the rights of individuals to speak or write what is on their minds.[3] Yet free speech and academic freedom[4] are under siege in our universities.[5]

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[1] U.S. CONST. amend. I.

[2] Thorne, *The Orwellian University*, 3 LIBERTY 41, 41 (1990).

[3] Although the first amendment prohibits only Congress from infringing on free speech, the fourteenth amendment extends this prohibition to state legislatures. But the prohibition does not extend to individuals and nongovernmental entities, so a Catholic university, for example, can prohibit one of its faculty members from saying positive things about abortion in the classroom and a fundamentalist Christian university can prohibit its faculty and students from swearing, drinking and playing cards. Such activities are contractual matters, not covered by the First Amendment.

Early case law treated such relationships, in both private and public institutions, as that of master and servant. "There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him." McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892). However, there are now many exceptions to that general rule, especially if the employee works for government. "[A] State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." Rankin v. McPherson, 107 S. Ct. 2891, 2896 (1987). Unions, employment contracts and tenure rules also protect the freedom to speak in varying degrees.

The fact that a private university may receive tax money or may have other connections with government does not mean that it is engaged in state action and subject to the same First Amendment guarantees as a public university. Krohn v. Harvard Law School, 552 F.2d 21 (1st Cir. 1977). For a brief discussion of the state action doctrine as applied to universities, see Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 299-300 (1989).

[4] For a discussion of the factors that led to the movement for academic freedom in the United States, see R. Hofstadter and W. Metzger, The Development of Academic Freedom in the United States (1955). For a detailed discussion of academic freedom and the First Amendment, see Byrne, *supra* note 3, at 251-340.

[5] For a detailed discussion of the attack on academic freedom in the universities, see ACADEMIC LICENSE: THE

Students and faculty face possible retribution for expressing unpopular ideas, making statements that may be offensive to someone,[6] or even for asking legitimate questions that deal with race, sex, ethnicity or sexual preference. A "thought police" mentality has infested the university, just as McCarthyism[7] did in the 1950s.[8] This article explores the current state of this mentality and discusses the problems inherent in trying to preserve and protect the right of free speech in the university.

THE STATE OF THE LAW

Although some of our founding fathers interpreted the first amendment to be absolute,[9] courts and governments have treated free speech as having limits.[10] Courts have used a "balancing test" to determine whether certain rights take

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WAR ON ACADEMIC FREEDOM (L. Csorba, III ed. 1988); R. KIMBALL, TENURED RADICALS (1990); C. SYKES, THE HOLLOW MEN: POLITICS AND CORRUPTION IN HIGHER EDUCATION (1990).

[6] The University of Michigan prohibits speech that stigmatizes or victimizes individuals on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status. For a discussion of this policy, see Finn, *The Campus: "An Island of Repression in a Sea of Freedom"*, 86 COMMENTARY 17 (September, 1989). The Fall, 1990 issue of *Campus* is devoted to the topic of free speech on campus.

[7] For a discussion of McCarthyism on campus, see E. SCHRECKER, NO IVORY TOWER (1986).

[8] Michael Novak discusses the thought police aspect of university free speech policies in *Thought Police*, FORBES 212 (October 1, 1990).

[9] The clear wording of the first amendment would also indicate that the right is absolute. As Justice Black stated in Mishkin v. New York, 383 U.S. 502, 518 (1966),

> I think the Founders of our Nation in adopting the First Amendment meant precisely that the Federal Government should pass 'no law' regulating speech and press but should confine its legislation to the regulation of conduct So, too, that policy of the First Amendment made applicable to the States by the Fourteenth, leaves the States vast power to regulate conduct but no power at all, in my judgment, to make the expression of views a crime.

Black was of the view that the First Amendment guaranteed complete freedom of expression for all ideas, not just those that were of a political nature or that had some socially redeeming value. Yates v. U.S., 354 U.S. 298, 343-44 (1957). Justice Douglas agreed that the Founding Fathers intended the First Amendment to be absolute. Bransburg v. Hayes, 408 U.S. 665, 713, 716 (1972). For another statement of Black's absolutist position regarding free speech, see Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960). For an article defending Black's position and adding a few twists, see Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

[10] For example, see Schenck v. United States, 249 U.S. 47 (1919); Whitney v. California, 274 U.S. 357 (1927); Stromberg v. California, 283 U.S. 359 (1931); Near v. Minnesota, 283 U.S. 697 (1981); De Jonge v. Oregon, 299 U.S. 353 (1937); Herdon v. Lowry, 301 U.S. 242; Cantwell v. Connecticut, 310 U.S. 296 (1940). Some writers have argued that the extent of free speech should be based on the purpose of the speech. For an exposition of this view, see F. CANAVAN, FREEDOM OF EXPRESSION: PURPOSE AS LIMIT (1984), especially 1-40. Numerous court cases have expounded the view that limits should be placed on free speech. For example, in 1961, Justice Harlan stated in Konigsberg v. State Bar of California, 366 U.S. 36 at 49-51 (1961):

> At the outset we reject the view that freedom of speech and association, ... as protected by the First and Fourteenth Amendments, are "absolutes", not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment. Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk.

precedence over the right of free speech.[11] Individuals have been prosecuted for

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> On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection . . . . On the other hand, general regulatory statutes, not intended to control the content of speech, but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.

Justice Murphy expressed a similar view a few decades earlier in Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942):

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problems. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Some commentators point to the famous example that no one has the right to falsely yell "fire" in a crowded theater as evidence that the right of free speech is not absolute. But, as Rothbard points out in ROTHBARD, FOR A NEW LIBERTY 43-44 (1978) [45-46 of the 1973 edition], this argument is a false one because it confuses free speech with property rights. Rothbard's position is that there are no human rights that are separate from property rights and that the right of free speech is merely the property right to hire an assembly hall from someone or to own one oneself. The right of free speech is not an extra right apart from the property rights that can be enumerated in a given case. In the theater example, anyone who falsely shouts "fire" is violating someone's property rights. If the theater owner falsely shouts "fire," he is breaching his contract with the patrons to let them see the performance they have paid for. He has, in effect, stolen their money. If a patron is the one who shouts fire, the property rights of both the owner and the patrons are being violated. As Rothbard says at page 44 of the 1978 edition:

> There is no need, therefore, for individual rights to be restricted in the case of the false shouter of "fire." The rights of the individual are *still* absolute; but they are *property* rights. The fellow who maliciously cried "fire" in a crowded theater is indeed a criminal, but *not* because his so-called "right of free speech" must be pragmatically restricted on behalf of the "public good"; he is a criminal because he has clearly and obviously violated the property rights of another person.

Rothbard discusses the same point in THE ETHICS OF LIBERTY 113-17 (1983) and POWER AND MARKET 177 (1970). Justice Black agrees with Rothbard on this point. *See* One Man's Stand for Freedom 477-78 (Irving Dillird ed. 1963), cited in ROTHBARD, THE ETHICS OF LIBERTY 114-15, 119 n. 6 (1982). Black points out that the issue is not whether one has a right to shout "fire" in a crowded theater but whether one has a right to shout at all.

[11] Justices Black and Douglas, among others, have denounced the balancing test when applied to free speech and press cases. See Konigsberg v. State Bar of California, 366 U.S. 36, 61-62 (1961); In re Anastaplo, 366 U.S. 82, 110-12 (1961); Scales v. U.S., 367 U.S. 203, 261, 270-71 (1961); Time v. Hill, 385 U.S. 374, 399-400 (1967); Garrison v. Louisiana, 379 U.S. 64, 80-83 (1964). In their view, any balancing that needed to be done was already done by the Founding Fathers when they wrote the First Amendment, which cast the First Amendment as absolute and not subject to subordination by any other rights.

speaking out against war,[12] for publishing obscene materials,[13] for advocating the violent overthrow of the government,[14] or for uttering speech that presents a clear and present danger.[15] Limits are also placed on commercial speech.[16]

A number of recent cases and incidents[17] have served to place further restrictions on free speech in the university as university officials and others attempt to prevent students or faculty from expressing themselves in ways that offend others, or make them pay a price if they do.[18] In 1988, a Harvard Law School professor was attacked by the leader of a women's group for quoting a passage from Byron that contained a sexual innuendo.[19] Another Harvard professor was accused of racial insensitivity for reading to a history class excerpts from white plantation owners' journals without also giving the slaves' point of view.[20]

The case of Murray Dolfman is perhaps one of the most outrageous illustrations of free speech and academic freedom abuses against a professor.[21] Dolfman, a practicing lawyer, had been a part-time lecturer at the Wharton School of the University of Pennsylvania for 22 years. No one had ever filed a complaint against him and his student course evaluations were outstanding.

While lecturing about personal service contracts, he pointed out that individuals may not be forced to work against their will, even if they had signed a contract.

[12] R. HIGGS, CRISIS AND LEVIATHAN 149 (1987). Schenck v. United States, 249 U.S. 47 (1919) is a case in point. In that case, individuals were punished for speaking out against World War I, mailing antidraft literature and questioning the constitutionality of military conscription.

[13] Hannagan v. Esquire, Inc., 327 U.S. 146 (1946); Roth v. U.S., 354 U.S. 476 (1957); Byrne v. Karalexis, 396 U.S. 976 (1969). However, Justice Douglas has stated that obscenity is not an exception to the first amendment. See his dissenting opinion in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 70 (1973).

[14] Communist Party v. S.A.C. Board, 367 U.S. 1, 147 (1961); Dennis v. U.S., 341 U.S. 494 (1951).

[15] Bridges v. California, 314 U.S. 252 (1941); Dennis v. U.S., 341 U.S. 494 (1951); Beauharnais v. Illinois, 343 U.S. 250 (1952). Justice Douglas and Black came to reject the clear and present danger test as a rationale for limiting free speech. *See* Brandenburg v. Ohio, 395 U.S. 444, 449, 454 (1969).

[16] Kozinski & Banner, *Who's Afraid of Commercial Speech?* 76 VA. L. REV. 627-53 (1990).

[17] Some of these incidents are discussed in Note, *Racism and Race Relations in the University*, 76 VA. L. REV. 295-335 (1990); Langavin &. Kayser, *Sexual Discriminatory Harassment*, 16 J.C.U.L. 311-24 (1989); Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323-49 (1988); Yudof, *Intramural Musings on Academic Freedom: A Reply to Professor Finkin*, 66 TEX. L. REV. 1351-57 (1988). For a comment of the Finkin article, see P. Brest, *Protecting Academic Freedom Through the First Amendment: Raising the Unanswered Questions*, 66 TEX. L. REV. 1359-62 (1988).

[18] Luckily, courts sometimes offer protection. For example, in Papish v. Board of Curators, 410 U.S. 667, *reh'g denied*, 411 U.S. 960 (1973), the Court held that the First Amendment prohibits speech on a university campus from being punished if the speech would not be punishable off campus. In Glover v. Cole, 762 F.2d 1197 (4th Cir. 1985) and Cooper v. Ross, 472 F. Supp. 802 (E.D. Ark. 1979), the Court held that state colleges and universities are not immune from the First Amendment. Saunders v. Virginia Polytechnic Inst., 417 F.2d 1127 (4th Cir. 1969) held that college students have a basic right to express peaceful dissent on campus. Sinn v. Daily Nebraskan, 638 F. Supp. 143 (D. Neb. 1986) held that the campus newspaper of a state school has the same freedom of press rights as other newspapers, including the right of the editors to express their opinions.

[19] Bernstein, *On Campus, How Free Should Free Speech Be?*, The New York Times, September 10, 1989, at F-5, col. 1.

[20] *Id.*

[21] Nat Hentoff, *Free Speech on the Campus*, THE PROGRESSIVE 12,13 (May, 1989).

Forcing someone to work would smack of "involuntary servitude," he said.[22] He then mentioned that involuntary servitude was prohibited by the Thirteenth Amendment, which no one in the class seemed to know. He then proceeded to tell them that he and other Jews were ex-slaves and spoke of that fact at Passover. Then he made a fatal statement: "We have ex-slaves here . . . who should know about the Thirteenth Amendment."[23] He then asked some black students if they knew what the Thirteenth Amendment was all about. When none of them did, he read it aloud to the class.

The black students later complained to the university that they had been hurt and humiliated by his referral to them as ex-slaves. When told of the complaint, Dolfman apologized to the students and said he meant no offense. Neither the black students nor the administration thought that an apology was sufficient. "Furthermore, there were mounting black-Jewish tensions on campus, and someone had to be sacrificed. Who better than a part-time Jewish teacher with no contract and no union?"[24]

He was forced to publicly apologize to the entire university, not just to the black students who were offended by his remark. He was also forced to attend a "sensitivity and racial awareness" session. He was then banned from teaching at the school for a year.[25] All for making a comment that was supposed to help make the students in question more aware of their black heritage. One wonders whether these students would have been offended were the same remark made in a class on black studies, or if the professor would have been reprimanded if someone were offended.

Some professors have stopped teaching controversial courses because they fear being labeled racist or sexist.[26] A sociology professor at the University of Michigan who taught a course on race relations for nine years decided to stop teaching the course after some students accused him of being a racist for assigning his class a reading that defended slavery.[27] "Given the climate at Michigan, I could be hassled for anything I do or don't say in that class . . . I decided to drop the course. It certainly isn't worth it."[28]

Universities that have adopted anti-harassment policies take one of two approaches. They either penalize students for physically or verbally attacking students directly or for engaging in offensive behavior of any sort whether it is directed at a particular individual or not.[29] The second type of policy has come under

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[22] *Id.*

[23] *Id.*

[24] *Id.* He was sentenced by the Committee on Academic Freedom and Responsibility.

[25] *Id.*

[26] Wilson, *Colleges' Anti-Harassment Policies Bring Controversy Over Free-Speech Issues*, Chron. Higher Educ., October 4, 1989 at A-38, col. 5.

[27] *Id.* at A-39, Col. 2.

[28] *Id.*

[29] *Colleges Take 2 Basic Approaches in Adopting Anti-Harassment Plans*, Chron. Higher Educ., October 4, 1989, at A-38, col. 1.

attack because it penalizes students not only for personal habits but also for scrawling epithets in residence halls, erecting posters that include racial slurs and wearing T-shirts that offended women.[30] Students at the University of Connecticut may be expelled for using derogatory names, inappropriately directed laughter, inconsiderate jokes or conspicuous exclusion of another student from a conversation.[31] Students at the University of Pennsylvania can be punished for verbal or physical behavior that stigmatizes or victimizes individuals or creates an intimidating or offensive environment.[32] In one incident, two University of Pennsylvania students were forced out of a residence hall because they yelled racial epithets at black students who were pledging a black fraternity.[33] At Tufts University, students are safe if they use slurs or insults in a student newspaper article, on the campus radio station or during a public lecture, but may be punished for saying the same things in a residence hall or classroom.[34] Presumably, this means that a student can be punished for reading an article from the student newspaper out loud in class.

At Vassar, two editors and the publisher of a conservative newspaper were accused of harassment for printing an editorial that criticized a student government official for bragging about successfully defunding the campus conservative club.[35] The three were subject to "hours of grueling hearings during finals time."[36] A UCLA student editor was relieved of his duties for printing a cartoon questioning the merits of affirmative action quotas.[37] An editor at California State University at Northridge was removed from the newspaper staff for running an editorial on the UCLA case and the offensive cartoon.[38] The Phi Delta fraternity at Claremont was censured for having an "offensive" poster. The "offensive" poster included a camel like the one from the Camel cigarette campaign, and was used to advertise their annual Lord Chesterfield party. The protesters said the ad was "sexist" because the Camel's nose allegedly resembled ". . . a large phallic symbol."[39] They also said that ". . . the

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[30] *Id.*

[31] *Id.* This last offense is particularly offensive. Being punished for excluding someone from a conversation constitutes a direct attack on freedom of association. Such policies infer that individuals have some inherent right to be included in a conversation even if the other participants do not want that individual to be included.

[32] *Colleges Take 2 Basic Approaches in Adopting Anti-Harassment Plans*, *supra* note 29, at A-38, col. 1.

[33] *Id.* Curiously, no one thought to challenge the fact that the fraternity limited its membership to blacks. Had the fraternity limited its membership to whites, it might easily have been attacked as being a racist organization.

[34] *Id.*

[35] *Free Speech in Trouble on Campus*, CAMPUS 1 (Fall, 1990).

[36] Zappia, *Free Speech Violations: A Sampling*, CAMPUS 6 (Fall, 1990). This incident brings up a disturbing fact about spurious harassment cases. Even if the alleged perpetrator is finally cleared of all charges, there can be an emotional drain as well as a distraction from studies. And if an attorney needs to become involved, the expense can be as much as a few semesters of tuition.

[37] *Free Speech in Trouble on Campus*, *supra* note 35. In the cartoon, a student stopped a rooster on campus and asked it how it got into UCLA. It's reply was "affirmative action." Hentoff, *supra* note 21, at 12 (May, 1989). Presumably, a student could be punished for voicing opposition to affirmative action, either orally or in print.

[38] *Free Speech in Trouble on Campus*, *supra* note 35.

[39] *Id.*

picture is part of the Camel campaign, which defines the 'smooth character' as a man who can, in part, rape women."[40]

A Tufts University student was placed on probation for poking fun at a friend who wore a bandana. He said "Hey, Aunt Jemimah" and in doing so, offended a bystander for what she perceived to be a racist remark. She file a harassment charge. The student was found guilty of harassment even though the administration found that "We did not find evidence to support [the] accusation [of harassment], nevertheless we decided [the student] still had no right to make the remark."[41]

At Georgetown University, perceived by many to be a good Catholic University, a freshman was given a three-hour work sanction for not attending a mandatory AIDS awareness presentation. The presentation included a film about a male student who pressures a virgin to have sex with him. She contracts AIDS from the encounter. Following the film, there was a condom presentation, using a cucumber, banana or similar object and frank talk about safe-sex. The student refused to attend the presentation because he considered the presentation to be inconsistent with Catholic Church teaching and unconducive to purity of mind. Yet he was punished for his religious beliefs.[42]

At the University of Pennsylvania, even the use of the word "individual" can be considered racist.

An undergraduate on the university's "diversity education" planning committee mentioned in a memo her "deep regard for the individual and [her] desire to protect the freedom of all members of society." A left-wing administrator responded in writing, underlining the word "individual," and commenting "This is a 'Red Flag' phrase today, which is considered by many to be RACIST. Arguments that champion the individual over the group ultimately privileges [sic] the 'individuals' belonging to the largest or dominant group."[43]

A policy statement at the University of Michigan cited examples of conduct that would be considered harassment.[44] The policy stated that students could be punished for inviting everyone to a floor party except one person who they thought might be a lesbian.

Such a policy is clearly an assault on the freedom of association. The Michigan policy would also punish a male student for making certain remarks in

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[40] *Id.*
[41] Zappia, *supra* note 36.
[42] *Id.*
[43] *Id.*
[44] *Colleges Take 2 Basic Approaches in Adopting Anti-Harassment Plans*, *supra* note 29, at A-38, col. 2. This pamphlet was later withdrawn.

class, such as "Women just aren't as good in this field as men."[45] Thus, students can be punished for speaking the truth. It would not be untrue to say that, in general, men are faster runners and swimmers than women, and are better at basketball, football and baseball. A look at the Olympic record book will show that men have better times than women. This fact does not mean that all men are better than all women at a particular sport. Some women can run faster or swim faster than some men. But the fact remains that the fastest men are faster than the fastest women in running and swimming. Maybe men are faster because of inherent physical differences, maybe because of environment or encouragement or maybe for some other reason. But it is true that "women just aren't as good in this field as men" and no one should be punished for making the statement. Even if the statement weren't true, punishing people for making statements constitutes a direct assault on freedom of speech and academic freedom.

Gerald Gunther, a professor of constitutional law at Stanford University, points out that:

> It is very difficult today to get open discussion going on such issues as anti-pornography and affirmative action because people are sensitive about the feelings of minority members . . . . It isn't a good teaching situation if you are inhibited because you feel somebody else's feelings are hurt.[46]

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[45] *Id.* at col. 3. Would a female student be punished for making the same remark? One lawyer who helped draft Michigan's policy wanted to apply an affirmative action rationale that would prevent minorities from being punished for using discriminatory expressions. He was not opposed to punishing a male student for making statements like "women are unable to compete with men in the business world" but was opposed to punishing a woman who responded with a perjorative generalization about men. C. Thorne points out this lawyer's view in The Orwellian University, *supra* note 2, at 42:

> [i]f a woman knows that a male classmate has been disciplined for vigorously and repeatedly insisting that women are unable to compete with men in the business world, a comment which relies on an arbitrary and inappropriate criterion, will she hesitate to suggest that men are unable to recognize the pervasive effects of sexism on the number of types of business opportunities which still remain inaccessible to women. Her comment relies on the same arbitrary criterion, sex, yet few would suggest that it should be restrained.

However, this lawyer's view did not prevail, at least not officially. Michigan's policy was used against a black student who used the phrase "white trash" in a verbal exchange with another student. *Id.* at 43.

Another example of this double-standard hypocrisy took place at George Washington University when an all-white fraternity held a "White History Week" party during Black History Month. Black students protested the White History Week party as racist, yet no one dared call Black History Month racist. *See* Horwitz, *Black Students Protest GWU Party*, Wash. Post, Feb 8, 1987, at A15, col. 1; Fisher, *Blacks Seek Visibility on GWU Campus*, Wash. Post, March 23, 1987, at D1, col. 1, *cited in* 76 VIRG. L. REV. at 316, n. 77 (1990).

[46] Wilson, *supra* note 26, at A-39, cols. 2-3. A campus group at the University of Michigan "has labeled opposition to affirmative action as racist." Thorne, *supra* note 2, at 42. Presumably, someone could be punished for being critical of affirmative action if the University of Michigan also regarded such opposition as racist.

Some individuals have been forced to undergo sensitivity training and/or ridicule as punishment for having said or done something that was offensive to others. For example, two students at one university were assigned to a dormitory that was celebrated for housing many gay students. They placed a sign on their door that said "This room is straight." Their punishment for this offense was to attend 20 hours of "counseling." At one of those sessions, when asked what they thought about homosexual behavior, one student responded that it was a sin. One of the counselors proceeded to ridicule his response,[47] saying that such a belief was superstition and that he shouldn't condemn it until he has tried it.[48]

At the University of Michigan, a student wrote a limerick that implied an Olympic sports star was a homosexual. Although the limerick was part of a class assignment, the student was forced to attend a group discussion led by gay students and was also forced to have an apology published in the student newspaper.[49]

Sensitivity training is sometimes required even for students who have not been found guilty of being racially or sexually insensitive.[50] The University of Pennsylvania requires all freshmen to attend a "diversity-education" program before the start of the fall semester. At this program, students perform skits that act out appropriate (by whose standards?) and inappropriate behavior regarding racism, sexism and homophobia. The freshmen are then encouraged to discuss their reactions to the skits.[51] The University of Michigan also has such a program.[52] The movement by Stanford University and other universities to water down their western civilization courses by including certain authors on the basis of race or sex rather than quality might also be seen as an attempt at sensitivity training in a more subtle form.[53]

Universities sometimes require students to attend group discussions where

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[47] The student who thought homosexual conduct was a sin was expressing a religious belief. The student who criticized his statement was thus criticizing his religious beliefs. Yet no one protested the fact that a student's religious beliefs were being ridiculed. It seems that, in a university, it is a sin to criticize homosexual conduct but not religious beliefs.

[48] Novak, *supra* note 8.

[49] *Colleges Take 2 Basic Approaches in Adopting Anti-Harassment Plans*, *supra* note 29, at A-38, col. 1.

[50] The Michigan Civil Rights Commission would like colleges and universities to adopt a "zero-tolerance" policy that makes unlawful and unacceptable " expressions and acts based on racist attitudes and behaviors, and that makes such expressions and acts subject to specific university sanctions." *See* MICHIGAN CIVIL RIGHTS COMMISSION, FINAL REPORT: CIVIL RIGHTS IN HIGHER EDUCATION, December, 1989 at 34. It would also like to see institutions of higher education "implement sensitivity training for boards of trustees, administrators, faculty, staff, campus security/police, students and the surrounding community to improve awareness of the issues and concerns of racial and ethnic minorities, women, individuals with disabilities and gay men and lesbians." *Id.*

[51] Presumably, these students are subject to punishment if their views happen to offend anyone.

[52] Wilson, *supra* note 26, at A-39, col. 1.

[53] The author does not necessarily support the attempt by universities to cram western civilization (or any other course) down the throats of students. But if a university offers a course in western civilization, it is not appropriate to water down the course with second-rate authors just because they happen to be of a certain race, sex or sexual orientation. Other courses would be more appropriate for exposing students to the ideas of such authors.

administrators and students discuss racism, violence against homosexuals, etc. Some universities go even further by threatening to expel students who harass others.[54] A few universities that have taken some form of action include Emory University, Brown University, Pennsylvania State University, Tufts University, Trinity College, and the Universities of California, Connecticut, Michigan, North Carolina at Chapel Hill, Pennsylvania and Wisconsin.[55] The anti-harassment policies at these schools, rather than encouraging open discussion, put a chilling effect on open discussion and give minority students, women, gays and fellow travelers ammunition to label comments they don't like as racist, sexist or homophobic.[56]

Part of the problem with anti-harassment policies is that they are vague. No one knows what kind of behavior violates the policy. This vagueness makes enforcement difficult and puts a chilling effect on freedom of speech, expression and the press.[57] The belief of many individuals on this point is summed up by Harvard professor Nathan Glazer:

> I am against slurs on the basis of race, sex, or whatever, but I think it is very hard to legislate against it and draw the line between what some people might consider a slur and others might consider a legitimate comment or humor.[58]

DOE V. UNIVERSITY OF MICHIGAN

Facts of the Case

The University of Michigan instituted a policy to punish students who create a "hostile or demeaning environment" by making harassing or discriminatory remarks.[59] Other universities have similar policies.[60] This policy, challenged in *Doe v. University of Michigan*,[61] was held to be overbroad and so vague that enforcement

[54] Wilson, *supra* note 26, at A-38, col. 5.

[55] *Id.*

[56] *Id.* at A-39, col. 1. Some commentators would like to see tort law expanded to punish individuals for offensive speech. For example, see Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

[57] Vagueness is also a problem with some statutes. "No one may be required at the peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Lazetta v. New Jersey, 306 U.S. 451, 453 (1939).

[58] *Colleges Take 2 Basic Approaches in Adopting Anti-Harassment Plans*, *supra* note 29, at A-38, col. 2.

[59] *U. of Michigan Scales Back Its Rules on Discrimination and Harassment*, Chron. Higher Educ., September 27, 1989, at A-3, col. 2.

[60] Wilson, *supra* note 26, at A-1, col. 2. Although a number of other colleges have anti-harassment policies, the University of Michigan is apparently the first university to have its policy tested in court on First Amendment grounds. *See First Amendment—Racist and Sexist Expression on Campus — Court Strikes Down University Limits on Hate Speech — Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989), 103 HARV. L. REV. 1397, 1397 (1990).

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

would violate due process.[62]

The facts of the case are as follows. The University of Michigan adopted a *Policy on Discrimination and Discriminatory Harassment of Students in the University Environment* (Policy) in an attempt to curb what some perceived to be a rising tide of racial intolerance and harassment on campus.[63] The Policy sanctioned students who "stigmatized" or "victimized" individuals or groups on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status.[64] The *Doe* Court,[65] found the Policy punished a significant amount of verbal conduct and verbal behavior, which is protected by the First Amendment, and issued a permanent injunction against enforcing the portion of the Policy that restricted speech. However, the court denied relief from the portions of the Policy that regulated physical conduct.[66]

In the past several years, incidents of racial harassment and racism appeared to be increasing at the University of Michigan. In one incident, unknown persons distributed fliers that declared "open season" on blacks, which it called "saucer lips, porch monkeys, and jigaboos."[67] Eight days later, a student disc jockey at the campus radio station broadcast racist jokes. Someone displayed a Ku Klux Klan uniform from a dormitory window at a demonstration held to protest these incidents.[68]

As a result of these and other incidents, the University's president issued a statement that expressed outrage and affirmed the university's commitment to maintain a racially, ethnically and culturally diverse campus.[69] But this statement was deemed to be too bland and the state legislature threatened to withhold funding unless the university took a more aggressive position regarding racism on campus.[70] The acting president[71] later circulated a confidential memo to the university's executive officers that detailed a proposal for an anti-discrimination policy that

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[62] *Id.* at 852.
[63] *Id.* at 854.
[64] *Id.* at 853.
[65] The student wishes to remain anonymous to preserve his privacy and protect against adverse publicity.
[66] 721 F. Supp. at 854.
[67] *Id.*
[68] *Id.*
[69] This goal could be criticized, since maintaining diversity might mean that some students, faculty or administrators would have to be hired or enrolled on the basis of race, sex, etc., rather than ability. For critiques of affirmative action/reverse discrimination policies, see T. SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? (1984); R. FULLINWIDER, THE REVERSE DISCRIMINATION CONTROVERSY (1980); DISCRIMINATION, AFFIRMATIVE ACTION, AND EQUAL OPPORTUNITY (W. Block & M. Walker eds. 1982); Sowell, "Affirmative Action": A Worldwide Disaster, 88 COMMENTARY 21-41 (December, 1989); Williams, *The False Civil Rights Vision*, 21 GA. L. REV. 1119-39 (1987).
[70] Doe v. University of Mich., 721 F. Supp. 852, 854 (E.D. Mich. 1989).
[71] The individual who was president when the controversy began resigned and was replaced by an acting president.

prohibited "[h]arassment of anyone through word or deed or any other behavior which discriminates on the basis of inappropriate criteria."[72] While he realized that this proposed policy would engender First Amendment problems, he reasoned that

> just as an individual cannot shout "Fire!" in a crowded theater and then claim immunity from prosecution for causing a riot on the basis of exercising his right of free speech, so a great many American universities have taken the position that students at a university cannot by speaking or writing discriminatory remarks which seriously offend many individuals beyond the immediate victim, and which, therefore detract from the necessary educational climate of a campus, claim immunity from a campus disciplinary proceeding. I believe that position to be valid.[73]

The proposal went through twelve revisions[74] before being finalized and published in the *University Record*.[75] Comments were solicited and changes were later made based on the comments.[76] The final Policy established a multi-tiered set of rules whereby the degree of regulation depended on the location of the conduct. Free speech and dialog were most safe[77] (subject to the least regulation) in public areas of the campus. Only acts of physical violence or destruction of property were punished in these areas. Certain university publications were not subject to regulation. The Policy apparently applied to the conduct of persons who lived in university housing.[78] The Policy specifically applied to "[e]ducation and academic centers, such as classroom buildings, libraries, research laboratories, recreation and study centers[.]"[79] In any of these areas, individuals could be disciplined for:

1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital state, handi-

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[72] 721 F. Supp. at 855.

[73] *Id.* This statement is flawed on several grounds. For one thing, he has fallen prey to the false "fire in the theater" argument, which has been refuted by Rothbard and Justice Black, among others. *See supra* note 10. For another, he fails to realize that placing such restrictions on expression will have a chilling effect on speech and intellectual inquiry, which is exactly what he wished not to happen.

[74] When the first draft was made public, *The Michigan Daily*, the student newspaper, published a page one editorial denouncing the policy as an abridgment of First Amendment rights. Other student groups, including the United Coalition Against Racism, expressed vocal opposition. Thorne, *supra* note 2, at 42 (July, 1990).

[75] Doe v. University of Mich., 721 F. Supp. 852, 855 (E.D. Mich. 1989).

[76] *Id.* at 855-6.

[77] "Tolerated" was the term used in the case.

[78] Lease agreements can validly regulate certain conduct, such as noise levels and decorations on the landlord's property. The University's harassment policy apparently covered living quarters in a vague sort of way.

[79] 721 F. Supp. at 856. Curiously, this Policy might realistically be interpreted to mean that free speech is protected in public forums but not in the classroom.

cap or Vietnam-era veteran status, and that:

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

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

c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.

2. Sexual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual on the basis of sex or sexual orientation where such behavior:

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

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

c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.[80]

The University later announced that it was withdrawing section 1(c) but it allowed section 2(c) to stand. A variety of possible sanctions existed for violation of the Policy, depending on intent, the effect of the conduct and whether the individual was a repeat offender. The Policy allowed the following sanctions to be imposed: (1) formal reprimand; (2) community service; (3) class attendance;[81] (4) restitution; (5) removal from University housing; (6) suspension from specific courses and activities; (7) suspension; (8) expulsion.[82]

Shortly after the Policy's promulgation, the University's Office of Affirmative

[80] *Id.*

[81] This sanction could not be imposed "in an attempt to change deeply held religious or moral convictions." *Id.* at 857.

[82] *Id.* at 857.

Action issued an interpretive Guide entitled *What Students Should Know about Discriminatory Harassment by Students in the University Environment.* This Guide was billed as an authoritative interpretation of the new Policy and included examples of sanctionable conduct, such as:[83]

- Distributing a flyer containing racist threats in a residence hall.
- Writing racist graffiti on the door of an Asian student's study carrel.
- A male student remarking in class, "Women just aren't as good in this field as men," thus creating a hostile learning atmosphere for female classmates.
- Students in a residence hall plan a floor party and invite everyone on the floor except one person who they think might be a lesbian.
- Two white students confronting and racially insulting a black student in a campus cafeteria.
- Male students leaving pornographic pictures and jokes on the desk of a female graduate student.
- Two men demanding that their roommate in the residence hall move out and be tested for AIDS.[84]

The Guide's section entitled "You are a harasser when..." gave the following examples of discriminatory conduct:

- You exclude someone from a study group because that person is of a different race, sex, or ethnic origin than you are.[85]

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[83] *Id.* at 858.

[84] *Id.*

[85] One wonders whether this conduct would be considered objectionable if the group involved consisted entirely of black students and a white student wanted to join the group. All-black fraternities are allowed to exist on campus, but any fraternity that wants to exclude blacks will be dealt with harshly. By raising this point, the author does not advocate forcing a black fraternity to include anyone it does not want to include. Ideally, individuals of all categories, whether students or otherwise, should be able to associate, or not associate, with anyone they want for any reason they want, without being subjected to force or sanctions by government or a private agency such as a university. The right of association is a very personal right and anyone who tells you that you must associate with someone is sticking his nose where it does not belong. A number of cases and authors would disagree with this "absolutist" position on the right of association. For example, see Kay, *Private Clubs and Public Interests: A View from San Francisco*, 67 WASH. U. L. Q. 855-62 (1989); Freeman, *Justifying Exclusion: A Feminist Analysis of the Conflict between Equality and Association Rights*, 47 U. TORONTO FAC. L. REV. 269-316 (1989); Roberts v. United States Jaycees, 468 U.S. 609 (1984); (Constitutional Law — Freedom of Association — Act Requiring The United States Jaycees To Admit Women as Full Voting Members Does Not Violate The First And Fourteenth Amendment Rights Of The Organization's Members.); 10 T. MARSHALL L. REV. 645-55 (1985); Laframboise & West, *The Case of All-Male Clubs: Freedom to Associate or License to Discriminate?* 3 CAN J. WOMEN & L. 335-61 (1987/88); Buss, *Discrimination by Private Clubs*, 67 WASH. U.L.Q. 815 (1989); Rumsey, *Legal Aspects of the Relationship Between Fraternities and Public Institutions of Higher Education: Freedom of Association and the Ability to Protect Campus Presence or Student Membership*, 11 J.C.U.L. 466 (1985); Marshall,

- You tell jokes about gay men and lesbians.
- Your student organization sponsors entertainment that includes a comedian who slurs Hispanics.[86]
- You display a confederate flag on the door of your room in the residence hall.[87]
- You laugh at a joke about someone in your class who stutters.[88]
- You make obscene telephone calls or send racist notes or computer messages.
- You comment in a derogatory way about a particular person or group's physical appearance or sexual orientation, or their cultural origins, or religious beliefs.

The University withdrew the Guide shortly after it was issued because "the

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Discrimination and the Right of Association 81 NW. U. L. REV. 68 (1987); Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights and Opportunities, 204 Conn. 287, 528 A.2d 352 (1987); New York State Club Association v. City of New York, 108 S. Ct. 2225 (1988); Sigma Chi Fraternity v. Regents of University of Colorado, 258 F. Supp. 515 (D. Colo. 1966). Such relativists usually wrap their arguments in terms of the false theory of positive rights — the "right" to a job, the "right" not to be discriminated against by private individuals, etc. While the Constitution prohibits discrimination by government, it says nothing about private discrimination. However, courts, over the years, have interpreted the constitution to include the protection of individuals against private discrimination. The author views this interpretation to be erroneous and harmful to the preservation of the free society.

[86] This prohibition probably runs afoul of the AAUP standard on academic freedom. The American Association of University Professors takes the position that college and university students have the right to listen to anyone whom they wish to hear, "and affirms its own belief that it is educationally desirable that students be confronted with diverse opinions of all kinds . . . any person who is presented by a recognized student or faculty organization should be allowed to speak on a college or university campus." 43 AAUP BULL. 363 (Summer, 1957), reprinted in ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS 112-13 (L. Joughlin ed. 1969). This prohibition would probably also prevent Andrew Dice Clay, Robin Williams, Jackie Mason and many other comedians from appearing on campus, which might violate their free speech rights.

[87] This prohibition is especially interesting. Presumably, there would be no retribution for displaying a Cuban or Chinese flag, yet students can be punished for displaying a Confederate flag. The State flags of Georgia and Mississippi are remarkably similar to the Confederate flag. Would a student be subject to punishment for displaying one of these flags? The Supreme Court has ruled that one may burn a flag without being prosecuted, which leaves one in the curious position of being able to burn a flag but not display one.

Darryl Brown discusses the Confederate flag issue in Note, *Racism and Race Relations in the University*, 76 VA. L. REV. 295, 311-12 (1990). White students and alumni have been criticized for waiving the Confederate flag during Citadel football games. Aitken, *Racism on Campus: Beyond the Citadel*, PEOPLE MAGAZINE, December 15, 1986 at 58, 66. Attempts have been made to have the Confederate flag removed from the Alabama State capitol and other public places. *Confederate Flag in Norfolk Draws Protests*, Wash. Post, Feb. 14, 1988, at B2, col. 6, *cited in* 76 VA. L. REV. at 311 n. 59. The following articles were also cited in 76 VA. L. REV. at 311 n. 59: Rowan, *Take That Confederate Flag Down*, Wash. Post, Feb. 9, 1988, at A23, col. 1; Hill, *Symbol of Dixieland Has Blacks Seeing Red*, Wash Post, Jan. 15, 1988, at A3, col. 1; *The Stars and Bars Is Not a Racist Symbol*, Wash. Post, Feb. 13, 1988, at A17, col. 1.

[88] Would someone be subject to punishment for laughing at someone who has an amusing regional or foreign accent? Presumably, yes.

information in it was not accurate."[89] However, the University did not announce that the Guide had been withdrawn, which left students in the position of thinking that the Guide was still in force.[90]

The University of Michigan's harassment policy was questioned by a graduate psychology student.[91] Doe[92] specialized in biopsychology, which is the interdisciplinary study of the biological bases of individual differences in personality traits and mental abilities. Doe brought an action against the University because he feared that an open discussion of some of the more controversial theories in the field, such as biologically-based differences between the sexes and races, might be perceived as sexist and racist, which would run him afoul of the University's harassment Policy. Doe argued that his right to speak openly and freely on these subjects was impermissibly chilled by the University's Policy, and asked that the Policy be declared unconstitutional and enjoined for vagueness and overbreadth.[93]

The Standing Issue

The Constitution[94] limits the federal courts' power to the hearing of live cases

[89] Doe v. University of Mich., 721 F. Supp. 852, 858 (E.D. Mich. 1989).

[90] C. Thorne points out that this withdrawal was a charade in *The Orwellian University*, *supra* note 2, at 44 (July, 1990).

> This "withdrawal" was something of a charade, however, because, as of the day of the hearing, the university had never publicly declared the guide to be invalid, but had merely stopped distributing it. The university could hardly contend that it had rectified any "chilling effect" on free speech caused by the guide if the tens of thousands of students who had previously received it had never been advised of its inapplicability.

[91] 721 F. Supp. at 858.

[92] Doe is not the student's real name. The plaintiff used the name John Doe to preserve his privacy and protect himself from adverse publicity. *Id.* at 854 n. 1.

[93] *Id.* at 858. Although this case involves the Constitution and First Amendment rights, an even larger issue is involved here, that of academic freedom. While state schools must comply with the First Amendment, private institutions need not, so individuals at private universities cannot use the First Amendment for protection. If the University of Michigan had a proper policy on academic freedom, there would be no need for a faculty member or student to have to resort to the First Amendment for protection. The American Association of University Professors is quite clear on this point.

> The Constitutional guarantee of free speech implies only that one who says unpopular or supposedly dangerous things will not be punished by the government, and that the Congress will not make any laws to interfere with free speech. Professors need more than this absence of governmental sanctions, more than a guarantee that they will not be jailed for the expressions of their thoughts. If they are to be encouraged to pursue the truth wherever it may lead, to "follow out any bold, vigorous, independent train of thought," braving the criticism, ridicule, or wrath of their colleagues, they need protection from all more material sanctions, especially from dismissal. The dismissal of a professor from his post not only prevents him from performing this function in society, but, by intimidating thousands of others and causing them to be satisfied with "safe" subjects and "safe" opinions, it also prevents the entire profession from effectively performing its function.
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> ACADEMIC FREEDOM AND TENURE 180 (L. Joughin ed. 1969).

[94] U.S. CONST. art. III.

and controversies. Courts have traditionally barred cases where the party did not have a sufficient stake in the outcome "as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions."[95] The University challenged Doe's standing to bring suit, stating that the Policy has never been applied to sanction classroom discussion of legitimate[96] ideas and that he did not demonstrate a credible threat of enforcement against himself.[97] The University also claimed that Doe could not base his claim on the free speech interests of unspecified third parties. To show such an interest in this case, Doe had to show that he had suffered some actual or potential injury from the University's illegal conduct, that the injury could be traced to the illegal conduct and that it would be redressed by a favorable decision.[98] The challenged conduct must cause or threaten to cause a direct injury[99] that is distinct and palpable.[100] The Court held that Doe clearly met this standard.[101]

Courts have long held that individuals have standing to challenge a statute's constitutionality if they can demonstrate that there is a real and credible threat of enforcement.[102] However, a mere possibility that a plaintiff might be subject to a statute's sanctions is insufficient.[103] To be sufficient, the enforcement threat must be directed and specific and against a particular party.[104] But an individual need not first be exposed to prosecution in order to have standing to challenge a statute that allegedly chills the exercise of constitutional rights.[105]

Had the Court looked at the Policy's language, it might have ruled in favor of the University, since it appeared that Doe could not realistically allege a genuine and credible threat of enforcement. The Policy's vague language prohibited conduct that "stigmatized" or "victimized" students on various bases—terms left undefined in the Policy. The terms could be understood only by reference to some exogenous value system. What might be "victimizing" or "stigmatizing" to one student might not be to another. Thus, the possibility of having a complaint filed as a result of a statement made by Doe in class was speculative at best. And even if a complaint were filed, an administrator might still determine that Doe's comments were protected by the First Amendment or academic freedom.

But the Court did not limit itself to the Policy's language. It also looked at the

[95] Baker v. Carr, 369 U.S. 186, (1962), *cited in* 721 F. Supp. at 859.
[96] This defense might lead one to wonder whether the Policy would be used to sanction the discussion of illegitimate ideas, and if so, who would determine which ideas were legitimate and which were not.
[97] Doe v. University of Mich., 721 F. Supp. 852, 858 (E.D. Mich. 1989).
[98] Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472, (1982), *cited in* 721 F. Supp. at 859.
[99] Laird v. Tatum, 408 U.S. 1, 14 (1972), *cited in* 721 F. Supp. at 859.
[100] Allen v. Wright, 468 U.S. 737, 751 (1984), *cited in* 721 F. Supp. at 859.
[101] 721 F. Supp. at 859.
[102] Steffel v. Thompson, 415 U.S. 452 (1974).
[103] United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984).
[104] Houston v. Hill, 482 U.S. 451, 451 n. 7, (1987).
[105] Doe v. Bolton, 410 U.S. 179, 188 (1973).

Guide, the Policy's legislative history and a number of instances where the Policy had been called on to determine cases of harassment since the Policy had been implemented a year earlier. From the record, the Court determined that there was a realistic and credible threat that Doe could be sanctioned for discussing controversial biopsychological theories.[106] An examination of the legislative history showed that the Policy was conceived to remedy racially insensitive and derogatory remarks that students found offensive. A memo by the acting president confirmed this view. The memo stated that the proposed Policy would sanction "remarks which seriously offend many individuals beyond an immediate victim, and which, therefore detract from the necessary educational climate of the campus."[107]

The Guide provided further evidence that Doe faced a real possibility of being sanctioned, since one example stated that sanctionable conduct would include:

> A male student makes remarks in class like "Women just aren't as good in this field as men," thus creating a hostile learning atmosphere for female classmates.[108]

In an affidavit, Doe said that he wished to discuss questions relating to sex and race differences in a class he was teaching, Comparative Animal Behavior.[109] He stated that:

> An appropriate topic for discussion in the discussion groups is sexual differences between male and female mammals, including humans. [One]. . . hypothesis regarding sex differences in mental abilities is that men as a group do better than women in some spatially related mental tasks partly because of a biological difference. This may partly explain, for example, why many more men than women choose to enter the engineering profession.[110]

Doe feared that he might be charged with a violation of the Policy, since some students and faculty regarded such theories as sexist. His fears could not be dismissed as speculative or conjectural because the Guide seemed to indicate that such discussions would run afoul of the Policy. He faced a very real threat of prosecution if he discussed them.

The University responded that it withdrew the Guide because it had some

[106] Doe v. University of Mich., 721 F. Supp. 852, 859-60 (E.D. Mich. 1989).

[107]. This memo was dated December 14, 1987 and was from the acting president to the university's executive offices. 721 F. Supp. at 860. Although the Policy went through numerous revisions between the time this memo was issued and the time the final Policy was adopted, the Court held that the memo demonstrated the legislative intent, which was not subsequently contradicted. Other records also indicated that the university's intent was to sanction speech for being offensive.

[108] 721 F. Supp. at 860.

[109] Doe was a teaching assistant.

[110] 721 F. Supp. at 860.

inaccuracies. However, as of the date the lawsuit was filed, the fact of its withdrawal was conveyed only to department heads and a few others, not to the student body as a whole. Therefore, the University's action did not render Doe's fear of enforcement illusory for purposes of determining whether Doe had standing.[111]

Another factor in Doe's favor was the history of the Policy's enforcement. In the past, students who offended others by discussing controversial ideas in class or in a research setting were subjected to disciplinary action. Several students had been prosecuted in the past year for Policy violations.[112] In one case, a student was prosecuted for stating that he believed homosexuality was a disease that could be psychologically treated.[113] Based on all the facts and circumstances, the Court found that Doe had standing to challenge the policy.[114]

The Vagueness and Overbreadth Issues

Doe alleged that the Policy was unconstitutionally vague and overbroad and sought a preliminary injunction against its enforcement. He also alleged that the Policy had a chilling effect on speech and conduct protected by the First Amendment.[115] The University responded that its Policy was never applied to reach protected speech and asked that the preliminary injunction be denied.[116] However, the Court combined the hearing on Doe's motion for a preliminary injunction with the trial on the merits pursuant to Fed.R.Civ.P. 65(a)(2).[117]

Doe claimed the Policy was invalid because it was overbroad on its face.[118] Courts have determined that a law regulating speech is overbroad if it sweeps a substantial amount of protected speech within its ambit in addition to that which it may legitimately regulate.[119] The United States Supreme Court has held laws to be unconstitutionally overbroad if they punish speech or conduct solely because the speech or conduct is unseemly or offensive.[120] Individuals may constitutionally criticize or insult police officers,[121] or use opprobrious words or abusive language

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[111] *Id. See also* United States v. W.T. Grant & Co., 345 U.S. 629 (1953).
[112] The Policy was used 42 times, according to the university's legal briefs. The Court chose to focus on three cases for purposes of discussion. Thorne, *supra* note 2, at 44.
[113] Doe v. University of Mich., 721 F. Supp. 852, 861 (E.D. Mich. 1989).
[114] *Id.* Since there was a substantial possibility that the Policy would be enforced against Doe, the Court did not feel the need to consider whether he had standing to assert the rights of third parties. *See* 721 F. Supp. at 861 n. 9; Barrows v. Jackson, 346 U.S. 249 (1953). Also, the Court felt no need to decide whether the Policy sufficiently chilled the intellectual atmosphere at the university to make out a concrete injury-in-fact. See 721 F. Supp. at 861 n. 9; Sierra Club v. Morton, 405 U.S. 727 (1972).
[115] 721 F. Supp. at 861.
[116] *Id.*
[117] *Id. See also* Mason County Medical Association v. Knebel, 563 F.2d 256 (6th Cir. 1977).
[118] Doe v. University of Mich., 721 F. Supp. 852, 864 (E.D. Mich. 1989).
[119] *Id.*; Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973); Houston v. Hill, 482 U.S. 451, 458-60 (1985); Kolender v. Lawson, 461 U.S. 352, 359 n. 8 (1983); Gooding v. Wilson, 405 U.S. 518, 521-22 (1972).
[120] 721 F. Supp. at 864.
[121] Houston v. Hill, 482 U.S. 451 (1985).

that tends to cause a breach of the peace.[122] The Court ordered a university student who distributed an underground newspaper with the headline "Motherfucker acquitted" to be readmitted because "the mere dissemination of ideas — no matter how offensive to good taste — on a state university campus may not be shut off in the name alone of conventions of decency."[123]

The *Doe* Court concluded that

> . . . the state may not prohibit broad classes of speech, some of which may indeed be legitimately regulable, if in so doing a substantial amount of constitutionally protected conduct was also prohibited. This was the fundamental infirmity of the Policy.[124]

The University argued that its Policy did not apply to speech protected by the First Amendment and that the Court should disregard the Guide and look to "the manner in which the Policy has been interpreted and applied by those charged with its enforcement."[125] However, the Court determined that the Policy was in fact consistently applied to reach protected speech.[126]

One instance the *Doe* Court relied upon to reach this conclusion was that of a graduate student who allegedly harassed students based on sexual orientation and sex. The student's "sin" in this case is that he said homosexuality was a disease and that he intended to develop a way to change gay clients into "straights."[127] He also mentioned that he was counseling gay patients based on his belief. At a hearing, the panel found him guilty of sexual harassment, but not of harassment on the basis of sexual orientation.

In another case, a student in a business school class was accused of violating the Policy by reading a homophobic limerick that ridiculed a well known athlete for his presumed sexual orientation.[128] The matter was informally resolved when the student agreed to attend a gay rap session, write a letter of apology in the school newspaper and apologize to the class.

Another incident the *Doe* Court examined involved a comment made in a dental class with a reputation for difficulty. During a small group discussion, one student said that he "heard that minorities had a difficult time in the course and that he had heard that they were not treated fairly."[129] A complaint was filed by a minority

[122] Gooding v. Wilson, 405 U.S. 518 (1972).
[123] 721 F. Supp. at 864; Papish v. University of Missouri, 93 S. Ct. at 1197 (1973).
[124] 721 F. Supp. at 864.
[125] *Id.* at 864-65.
[126] *Id.* at 865.
[127] *Id.* A number of deeply religious individuals would also say that homosexuality was a disease — or an abomination. Presumably, they could be punished for stating their religious beliefs.
[128] *Id.*
[129] *Id.* at 866.

professor who was teaching the class on the grounds that "the comment was unfair and hurt her chances for tenure."[130] The student who made the comment was "counseled" (browbeaten?) and later agreed to write a letter of apology.

The *Doe* Court determined that the University considered serious comments made in class to be sanctionable under its Policy. The intent of the speaker apparently played no part in determining whether the action should be pursued. Furthermore, the administrator in charge of enforcing the Policy generally did not consider whether the comment in question was protected by the First Amendment.[131] While the administrator attempted to persuade students to accept voluntary sanctions, there was the threat that failure to accept voluntary sanctions might result in a formal hearing.

> The Administrator's manner of enforcing the Policy was constitutionally indistinguishable from a full blown prosecution. The University could not seriously argue that the policy was never interpreted to reach protected conduct. It is clear that the policy was overbroad both on its face and as applied.[132]

Doe also charged that the Policy should be struck down because it was impermissibly vague.[133] To avoid the charge of vagueness, "men of common intelligence" must not have to guess at the statute's meaning, the statute must give adequate warning of the prohibited conduct and must set out explicit standards for those who are to apply it.[134]

> No one may be required at the peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.[135]

These considerations are especially important when the statute inhibits freedoms that are affirmatively protected by the constitution.[136] The chilling effect must be substantial and real[137] and there must be no narrowing construction before

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[130] *Id.*

[131] In one instance, the administrator did dismiss a complaint because the speech was protected by the First Amendment. In that case, a Jewish student filed a complaint because another student suggested that Jews cynically used the Holocaust to justify Israel's policies toward the Palestinians. *Id.* at 866 n. 14.

[132] *Id.* at 866 n. 15, citing Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 493-503 (1985). The Court pointed out that its finding that the University of Michigan's interpretation of the Policy to reach constitutionally protected speech made it unnecessary to consider whether the Policy was susceptible to a saving construction.

[133] Doe v. University of Mich., 721 F. Supp. 852, 866 (E.D. Mich. 1989), *citing* Broadrick v. Oklahoma, 413 U.S. at 607. It was pointed out that a statute is unconstitutionally vague when "men of common intelligence must necessarily guess at its meaning."

[134] 721 F. Supp. at 866.

[135] Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939), *cited in* 721 F. Supp. at 866.

[136] Smith v. Goguen, 415 U.S. 566, 573 (1974).

[137] Young v. American Mini-Theatres, 427 U.S. 50 (1976).

a court will set the statute aside.[138]

The Court determined that it was impossible to determine any limitations on the Policy's scope from looking at its plain language. While the language must "stigmatize" or "victimize" an individual, these terms are general and elude precise definition. Even if a statement did stigmatize or victimize an individual, the statement might still be protected by the First Amendment. And it was unclear what conduct would constitute a "threat" to an individual's academic efforts, although such conduct was sanctionable under the language of the Policy. The fact that the University withdrew the Guide, which provided examples of such conduct, was further evidence that the meaning was vague even for the University. The University never distinguished sanctionable from protected speech.

> Students of common understanding were necessarily forced to guess at whether a comment about a controversial issue would later be found to be sanctionable under the Policy. The terms of the Policy were so vague that its enforcement would violate the due process clause.[139]

> Not only has the administrative enforcement of the Policy been wholly inconsistent with counsel's interpretation, but withdrawal of the Guide . . . and the eleventh hour suspension of section 1(c) . . . suggests that the University had no idea what the limits of the Policy were and it was essentially making up the rules as it went along.[140]

Based on the facts in this case, the Court had no choice but to hold that the University's policy violated Doe's First Amendment rights. However, that holding alone does not necessarily mean that all such speech is categorically protected by the First Amendment. By declaring that the Policy was overbroad and vague, the Court was able to sidestep the issue of whether the speech was protected.[141] Doe's rights were violated only because the Constitution prohibits overbroad and vague statutes.[142]

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[138] Screws v. United States, 325 U.S. 91, 98 (1945).

[139] 721 F. Supp. at 867. *See also* Cramp v. Board of Public Instruction, 368 U.S. 278, 285-88 (1961).

[140] 721 F. Supp. at 868.

[141] Courts often use the overbroad and vagueness rules to escape from having to decide whether certain speech is protected by the First Amendment. *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 16 (1970); Sweezy v. New Hampshire, 354 U.S. 234 (1957), where the court failed to state that statements that advocated communism were fully protected.

[142] The University of Michigan decided not to appeal this case. It changed the wording of its policy to prohibit "physical acts or threats or verbal slurs, invectives or epithets referring to an individual's race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age or handicap made with the purpose of injuring the person to whom the words or actions are directed and that are not made as part of a discussion or exchange of an idea, ideology or philosophy." *Quoted in* Thorne, *supra* note 2, at 48. One problem with this new policy is the meaning of the term psychological injury unless the individual was pathologically sensitive. And if the injury were short-term, it would seem to fall within the category of offensive speech, which is protected by the First Amendment. Thus, Michigan's new policy suffers from the same problem of unconstitutionality as its old policy. Furthermore, the student who recited the limerick

HARASSMENT POLICIES AT OTHER UNIVERSITIES

A number of other colleges and universities have adopted harassment and conduct policies of various kinds, although many of them will likely have to be rewritten after *Doe v. University of Michigan.* A summary of several of these policies follows.

The University of Wisconsin

The University of Wisconsin policy[143] would discipline students in the following situations:

> USW 17.06(1) For intentional conduct which constitutes a serious danger to the personal safety of other members of the university community or guests.
>
> (1)(a) A student would be in violation if he or she attacked or otherwise physically abused, threatened to physically injure, or physically intimidated a member of the university community or a guest because of that person's race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age.
>
> UWS 17.06(2)(a) For racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets, other expressive behavior or physical conduct intentionally:
>
> 1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
> 2. Create an intimidating, hostile or demeaning environment for education, university related work, or other university-authorized activity.
>
> (b) Whether the intent required under par. (a) is present shall be determined by consideration of all relevant circumstances.

The University of Wisconsin policy gives several examples of conduct that

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in class would not be protected under the new policy because the limerick was recited as part of a public speaking exercise and was not "part of a discussion or exchange of an idea."

[143] *Discriminatory Harassment: Prohibited Conduct Under Chapter UWS 17 Revisions*, a brochure distributed by the University of Wisconsin System. In another brochure, *Sexual Harassment: What It Is and What You Can Do About It*, a person would be guilty of sexual harassment for hanging "girlie" calendars in the office, telling dirty jokes or making sexual innuendoes.

would violate its harassment policy.[144]

> 1. A student would be in violation if:
>
> a. He or she intentionally made demeaning remarks to an individual based on that person's ethnicity, such as name calling, racial slurs, or "jokes"; and
>
> b. His or her purpose in uttering the remarks was to make the educational environment hostile for the person to whom the demeaning remark was addressed.
>
> 2. A student would be in violation if:
>
> a. He or she intentionally placed visual or written material demeaning the race or sex of an individual in that person's university living quarters or work area; and
>
> b. His or her purpose was to make the educational environment hostile for the person in whose quarters or work area the material was placed.
>
> 3. A student would be in violation if he or she seriously damaged or destroyed private property of any member of the university community or guest because of that person's race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age.
>
> 4. A student would not be in violation if, during a class discussion, he or she expressed a derogatory opinion concerning a racial or ethnic group. There is no violation, since the student's remark was addressed to the class as a whole, not to a specific individual. Moreover, on the facts stated, there seems no evidence that the student's purpose was to create a hostile environment.

The Wisconsin Policy then proceeds to a "question and answer" format that provides additional illustrations. For example, in a class discussion concerning women in the workplace, a male student states his belief that women are by nature better equipped to be mothers than executives, and thus should not be employed in upper level management positions. This statement does not violate Wisconsin's policy because it is an expression of opinion, contains no epithets, is not directed to a particular individual, and does not, standing alone, evince the requisite intent to demean or to create a hostile environment.[145]

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[144] The American Civil Liberties Union and a student coalition have challenged the rules in court. Nowlen, *Racism Rules Could be Set by September*, Wisconsin Week, July 25, 1989; Gribble, *Student Coalition Sues UW Over Racial Harassment Rule*, Madison Journal, March 30, 1990. Professor Gordon Baldwin thinks that the Wisconsin policy would withstand a challenge on constitutional grounds because it emphasized intentional, one-on-one insults, whereas the Michigan rules do not. *See* Schumacher, *Student Conduct Rules: No Threat to Free Speech*, Wisconsin Week, September 13, 1989. But one of the Regents disagreed with this assessment. "This is a step backwards ... The goals are laudable, but the cure is worse than the disease. This is not constitutional and, furthermore, not workable." Worthington, *Wisconsin Acts to Curb Racism on Campus*, Chicago Tribune, April 12, 1989.

[145] The author was once in a classroom with a student who made a similar statement. The room was filled with feminists and he was nearly lynched on the spot. His statement triggered much verbal abuse and name-

In another example, a student living in a university dormitory continually calls a black student living on his floor "nigger" whenever they pass in the hallway. The university may take action against the name-caller because the word "nigger" is an epithet[146] and is directed specifically at an individual. Its use and continuous repetition demonstrate the required intent on the part of the speaker to demean the individual and create a hostile environment for him.[147]

In the third example, two university students become involved in an altercation at an off-campus bar. During the fight, one student uses a racial epithet to prolong the dispute. It is unclear whether the University may invoke disciplinary action in this case. The use of the epithet, and its direction to an individual, suggest a potential violation of the Wisconsin policy. However, because the episode occurred off campus, the intent to create a hostile environment for university-authorized activities would be difficult to demonstrate. The brochure states that additional facts would have to be developed if disciplinary action were to be pursued.

In the fourth example, a group of students disrupts a university class, shouting discriminatory epithets. The question is whether they would be subject to disciplinary action under the regulation related to the regulation of expressive behavior. The brochure states that they might be. It is clear that they would be subject to disciplinary action for disrupting a class. The question is whether they have also violated the provision regarding expressive behavior, because they shouted epithets while in the course of other misconduct. If the epithets were directed at other students in the class, and were intended to demean them and create an intimidating environment, then the behavior might also be in violation of the provisions concerning expressive conduct, according to the brochure.

The fifth example questions whether a faculty member in a genetics class who suggests that certain racial groups seem to be genetically pre-disposed to alcoholism

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calling and created a chilling effect on the few nonfeminists who were in the class. It is curious to speculate whether his statement might constitute "fighting words" if uttered in the presence of such a group of militant feminists who seemed downright paranoid about any reference to sex in any form. Several members of this group took pride in correcting the language of the others in the group when they said "he" instead of the preferred "he or she" or "mankind" instead of "humankind." One feminist referred to a project she was working on as a "herstory" project instead of a history project. It is comforting to see that Wisconsin's policy would not punish a student for making such a comment. Unfortunately, a class filled with students like those the author experienced would not be so tolerant.

[146] Some critics of the Wisconsin policy oppose it because it would prohibit students from using epithets. For example, Wisconsin Democratic State Senator Lynn Adelman stated that: "The 1st Amendment protects speech, and epithets are speech. And I don't think that universities ought to be in the business of regulating speech by students. It runs counter to what universities are all about." *See* Worthington, *supra* note 144.

[147] One may speculate whether the student would have been in violation of the policy if both students had been black, since blacks often refer to each other as "niggers" among themselves. Were this the case, the speaker would not have an intent to demean or to create a hostile environment. Used in this context, use of the word "nigger" could be construed as a form of male bonding intended to create a friendly environment.

would be subject to discipline. The answer given is "no" since the statement is an expression of an idea, which is protected.

In a University of Wisconsin News Release dated May 22, 1989 issued to explain the policy when it was in the debating stage,[148] UW-Madison Chancellor Donna E. Shalala is quoted as saying: "The proposal is narrowly constructed so that behavior with social value — broadly interpreted — would be protected from sanctions." Shalala's statement is disturbing because it seems to say that behavior that is without social value would *not* be protected, which leads one to the obvious question of "what is social value?" The news release goes on to quote Ted Finman, a law professor who helped review the proposal, who said, "There is virtually no limitation on the interchange of ideas . . . and only a very small limitation on a person's individual liberty to insult other people." His statement is also disturbing because such speech is generally protected by the First Amendment.[149]

Carol Tebben, a political science professor at the University of Wisconsin, believes that university administrators:

> . . . are getting confused when they are acting as censors and trying to protect students from bad ideas. I don't think students need to be protected from bad ideas. I think they can determine for themselves what ideas are bad.[150]

There is some indication that the policy is already having a chilling effect on free speech. The editor of the *UWM Post* has said that he feels students have become less willing to speak frankly since the rule went into effect.[151] He also said that "Our letters to the editor are not quite as vehement as they've been in the past."[152]

Trinity College (Hartford)

Trinity College in Hartford, Connecticut adopted a racial harassment policy that was based on Brown University's policy.[153] In pertinent part, that policy states:

> Trinity College regulations provide for any member of the community to bring a charge against an individual or group who has committed any act of harassment. . . Racial harassment encompasses a range of hostile behaviors motivated by an intention on the part of the harasser to make another feel unwelcome or inferior on the basis of race. Racial

[148] *Misconceptions Cloud Debate Over UW Racism Rules*, UW News, News Release dated May 22, 1989 (available from University of Wisconsin-Madison News Service).

[149] The "fighting words" doctrine of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), is an exception.

[150] Hentoff, *supra* note 21, at 12.

[151] Gribble, *supra* note 144.

[152] *Id.*

[153] *Against Racism: Policy And Procedures on Racial Harassment*, Trinity College, Hartford, Connecticut, 1989-90.

harassment may include the use of racial or ethnic epithets, racially insensitive comments toward another person or group, anonymous hostile messages, vandalism, pranks, and graffiti.

After this policy was issued, the Racial Harassment Committee modified the policy and adopted a narrow interpretation that (it says) accommodates the principles of free speech and academic freedom. The Committee now sees harassment as "fighting words which have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."[154]

Tom Gerety, the President of Trinity College, has pointed out that Trinity, as a private institution, is not subject to the full force of the First Amendment as would be a public institution, but that Trinity has decided to be as open to free speech as possible, although it will not condone speech that amounts to "fighting words."[155] He later softens that statement by saying that those who violate this policy may not be punished on the first offense.[156] While Trinity's policy and the President's statement indicate that Trinity will be liberally tolerant of offensive speech, the policy might still result in chilling some forms of speech.

Some members of the Trinity community think the harassment policy is not restrictive enough. Minister Don Muhammad of the Nation of Islam was found guilty of racial harassment after giving a speech on campus because of an anti-semitic statement he made during the question and answer period.[157] Yet he was allowed to speak on subsequent occasions and was not punished for his speech.[158] An assistant professor of religion at Trinity wrote an article stating that such tolerance is not called for at Trinity, which is not subject to First Amendment restrictions on free speech.[159] He suggested that those who espouse hatred should be banned from the college.

One student who thought the harassment policy was too restrictive had this to say:

As a Jew, I am obviously sensitive to any claim of anti-Semitism, but

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[154] Churchill, *The First Amendment Under Fire*, 20 TRINITY REPORTER 11 (Spring, 1990). Basically, this is the *Chaplinsky v. New Hampshire* rule.

[155] Tom Gerety, *Free Speech on Campus*, 20 TRINITY REPORTER 12, 13 (Spring, 1990).

[156] 20 Trinity Reporter at 13 (Spring, 1990). *Id.*

[157] *Speaker Found Guilty Of Racial Harassment*, 20 TRINITY REPORTER 6 (Spring, 1990).

[158] One wonders whether someone from the Ku Klux Klan would be invited back — or even invited in the first place — for making similar comments. A University of Kansas student who produced and hosted the school's radio news program was forbidden by university officials from interviewing a Ku Klux Klan leader. So much for tolerance. Hentoff, *supra* note 21, at 12.

[159] Kiener, *No Room for Hatred*, 20 TRINITY REPORTER 14 (Spring, 1990). He pointed out that Louis Farrakhan and The Nation of Islam engage in reverse racism, promote violence and hatred, issued a death threat against a black reporter during the 1984 presidential campaign, call Judaism a "gutter religion," praise Adolf Hitler as "a great man," describe Jews as "wading through the blood of the black man," and state that "Jewish doctors are infecting black babies with AIDS." Surely, inviting members of this group to speak on campus may be outrageous and disgusting to some, but should such speakers be banned?

> I will evaluate any such claim myself; and to do so I must hear the view in question. I am loathe to let anyone restrict what I say and hear; the right of Don Muhammad to air his views and my right to hear his views transcend any threat from the "unacceptable" message of "hatred" alleged therein. And just as Don Muhammad has the right to speak here, so does the Grand Dragon of the Ku Klux Klan. They both have the right to speak, and I have the right to hear them both, and I feel it is inappropriate for others to instruct me how to interpret any speech before it is actually given. It is my right to draw conclusions and ask questions where I see fit; others should not try to drum into me their own assumptions in infallibility which amount to little more than partially-informed preconceived notions . . . . I think that going to the lecture and peeling back Conrad Muhammad's layers of rhetoric was a valuable experience, because I was able afterwards to robustly debate with others about what I perceived to be the underlying themes of Conrad Muhammad's position.[160]

Herr expresses an interesting view, that those in power are preventing a powerless individual from hearing views and opinions. At the heart of it, that is what the First Amendment is all about and that is what our Founding Fathers sought to protect. Although private colleges are not subject to the First Amendment, they should take this view into account before they make policies that restrict speech on campus.

CONCLUSION

While the Court in the University of Michigan case arrived at the correct result, its holding does not constitute a sufficiently strong sword to protect similar university policies from being enforced against the free speech utterances of students and faculty at other universities.[161] Presumably, a university anti-harassment policy that is more carefully drawn might be upheld by some future court, at the expense of free speech and academic freedom.[162] And in cases where the policy is one

[160] Herr, *Trinity Areopagitica*, 20 TRINITY REPORTER 15, 15 (Spring 1990).

[161] A few days after the University of Michigan case was settled, a student at the University of Connecticut was prosecuted and expelled from her dormitory for posting a sign on her dormitory room door stating that "homos" would be shot on sight. After seeing the result in the University of Michigan case, the University of Connecticut settled out of court, agreeing to restore her dormitory privileges. It also revised its anti-discrimination code, which was similar to the University of Michigan's. Thorne, *supra* note 2.

[162] Academic freedom might call for an even more tolerant treatment of speech and expression than the courts presently provide. While the Supreme Court has recognized the connection between academic freedom and the First Amendment at least since 1967 [*see* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)], some commentators have pointed out that First Amendment protection is not enough. *See* Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323 (1988); Katz, *The First Amendment's Protection of Expressive Activity in the University Classroom: A Constitutional Myth*, 16 U.C. DAVIS L. REV. 857 (1983); Malin and Ladenson, *University Faculty Members' Right to Dissent: Toward a Unified Theory of Contractual and Constitutional Protection*, 16 U.C. DAVIS L. REV. 93 (1983); Yudof, *Intramural Musings on Academic Freedom: A Reply to Professor Finkin*, 66 TEX. L. REV. 1351 (1988).

adopted by a private institution, the question of the First Amendment might not even arise.

In this author's opinion, a more absolutist view is called for. In order to protect *valuable* speech from attack, it is necessary to protect speech that is *valueless* as well.[163] Otherwise, it will be up to the courts to determine what is valueless and what has value.[164] This ambiguity in and of itself produces a chilling effect on free speech and expression.

While it may seem outrageous that students at a state university[165] be allowed to call someone "saucer lips," "kike," "nigger," or "faggot," such speech is protected, as well it should be. It is part of the price we must pay for a free society. Furthermore, punishing someone for not inviting a suspected lesbian or gay to a party violates the freedom of association in a most basic way. It may also violate the freedom of religion if a gay or lesbian is not invited because the invitor regards such conduct as

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[163] Other commentators have reached a similar conclusion. For example, see Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 474 (1985); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1495 n. 53; L. BOLLINGER, THE TOLERANT SOCIETY 53-58 (1986).

[164] Courts must "extend the boundary of . . . protected speech into the hinterlands of speech in order to minimize the potential harm from judicial miscalculation and misdeeds." Doe v. University of Mich., 721 F. Supp. 852, 853 (E.D. Mich. 1989), *quoting* Bollinger, *supra* note 163, at 78.

[165] Private universities have more flexibility to restrict speech than do state universities because state university actions can be considered state action, while private universities are governed by contract law. In other words, private universities can require students to refrain from exercising certain free speech rights because that was part of the deal they accepted when enrolling in the university. State universities cannot use contract law to restrict speech because the Constitution protects student free speech rights at state institutions. Likewise, students at private religious institutions might receive active encouragement from their school to make disparaging remarks about certain groups, especially gays, since fundamentalist Christians and Moslems regard homosexuality to be an abomination. Likewise, students at fundamentalist religious schools might be expelled for uttering what school officials regard as blasphemy. Student at state institutions would be protected from expulsion on these grounds.

Private institutions face another threat, though. Although the First Amendment may not apply to their institutions, government can still influence conduct at private institutions by threatening to cut off funding if they do not subscribe to some government policy or directive. This fact might lead one to conclude that the only way to protect academic freedom from encroachment by government is to totally privatize education — get government out of it completely. While this solution might seem radical, at least one Nobel laureate economist has advocated privatization and the idea is gaining ground. *See* M. & R. FRIEDMAN, FREE TO CHOOSE 150-88 (1980); M. FRIEDMAN, CAPITALISM & FREEDOM 85-107 (1962). Privatization would reduce the cost of education and improve quality while offering educational consumers more choices. Funding a totally private educational system can take many forms. Friedman advocates the voucher system, whereby tax money would be given to parents in the form of a voucher, which they could use to pay for education at the school of their choice. While a voucher system might be the most practical way to private education in the short-run, it would not completely solve the problem of government interference because government would still be involved and could still regulate education by threatening to withhold funding unless certain regulations are complied with. A better system would be to let those who use the system pay for it. That way, no one would be forced to pay for the education of other people's children. While this approach has been criticized for ignoring the needs of those who cannot afford to pay for their children's education, a number of studies have pointed out that the market can find ways to solve this problem. *See* F. FORTKAMP, THE CASE AGAINST GOVERNMENT SCHOOLS (1979); E.G. WEST, EDUCATION AND THE STATE (2d ed. 1970). For a philosophical argument, see J. HOSPERS, LIBERTARIANISM 374-85 (1971).

an abomination on religious grounds. In a free society, individuals should be able to associate or not associate with anyone they want, for any reason they want, without fear of punishment from the state. All acts between consenting adults should be allowable without sanction no matter how outrageous such acts might be to some individuals.[166] The absolutist view of Rothbard,[167] Black[168] and others is more in keeping with the maintenance of a free society than is the "balancing of interests" view currently held by most members of the judiciary. The Founding Fathers have already "balanced" the rights of free speech and association against other rights and found that free speech and association win every time.[169]

[166] This view encompasses the belief that other acts between consenting adults, such as prostitution, oral (or any kind of) sex, selling drugs, gambling, dwarf tossing, private discrimination, selling body parts, surrogacy, suicide, ticket scalping, insider trading that does not involve fraud or breach of contract, immigration and other victimless crimes should also be legal.

[167] *See* M. ROTHBARD, FOR A NEW LIBERTY 43-44 (1978); THE ETHICS OF LIBERTY 113-17 (1983); POWER AND MARKET 177 (1970).

[168] *See* Konigsberg v. State Bar of California, 366 U.S. 36, 61-62 (1961); *In re* Anastaplo, 366 U.S. 82, 110-12 (1961); Scales v. U.S., 367 U.S. 203, 261, 270-71 (1961); Time v. Hill, 385 U.S. 374, 399-400 (1967); Garrison v. Louisiana, 379 U.S. 64, 80-83 (1964).

[169] Even though court decisions prevent state universities from adopting this "pro-freedom" view, private institutions have more flexibility in this regard. Unfortunately, some commentators advocate that universities should punish private groups that exercise their right to associate rigorously. For example, see *Student Discriminatory Harassment*, 16 J.C.U.L. 311, at 321 (1979).