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# Zoned Out! Examining Campus Speech Zones

Carol L. Zeiner \*

## I. INTRODUCTION

In March 2002, twelve students were arrested at Florida State University for protesting outside the university's designated speech zone.<sup>1</sup> The same spring, students at West Virginia University were intimidated for engaging in political speech outside that institution's two free speech zones.<sup>2</sup> On November 13, 2002 pro-life demonstrators were arrested when they stepped outside the free speech zone of California's Citrus Community College. A student filed suit on May 20, 2003, challenging the regulation.<sup>3</sup> On March 6, 2003 suit was filed on behalf of students of the University of Maryland at College Park challenging that university's speech zone regulations governing public speaking and leafleting.<sup>4</sup> A

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1. See Alisa Ulferts, *Protesters Who Put Up Tents in FSU Walkway Acquitted of Trespassing*, St. Petersburg Times, Sept. 26, 2002, at 5B. See also, Press Release, Foundation for Individual Rights in Education (FIRE), *Victory at West Virginia University: The End of a Censorship Zone* (Dec. 5, 2002), available at <http://www.thefire.org/index.php/article/55.html> [hereinafter *Victory*].

2. See *Victory*, *supra* note 1.

3. See Press Release, Foundation for Individual Rights in Education (FIRE), *Lawsuit Challenges California Speech Code* (May 20, 2003), available at <http://www.thefire.org/index.php/article/37.html>.

4. See ACLU, *Freedom Under Fire: Dissent in Post-9/11 America* 6 (2003).

student at the University of Texas at El Paso sued on similar issues in May 2003,<sup>5</sup> and a student at Texas Tech University's law school sued in June 2003. On September 30, 2004 the federal district court in the latter case found a portion of the Texas Tech speech zone policy unconstitutional.<sup>6</sup> In early 2005, after a controversial student protest against illegal immigration, the president of a Latino organization at the University of North Texas called for more university oversight of student speech, asking specifically that the university administration preview the content of expressive activities scheduled for the university's speech zones.<sup>7</sup> These are but a few of the incidents involving many institutions in recent years. Controversy has also occurred at: Shippensburg State University in Pennsylvania,<sup>8</sup> the University of Houston,<sup>9</sup> the University of South Florida,<sup>10</sup> Miami-Dade Community College,<sup>11</sup> Appalachian State University,<sup>12</sup> Tufts University,<sup>13</sup> and the University of Wisconsin at Whitewater.<sup>14</sup>

An article in *Trusteeship* magazine declared: "To a greater degree than at any time in recent memory, the actions and policies of higher education institutions concerning student speech not only are being scrutinized, but they also are becoming the subject of legal challenge with potentially grave consequences."<sup>15</sup>

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5. See *Schools Under Fire for 'Free Speech Zones'*, May 30, 2003, <http://www.cnn.com/education>, at 1 (on file with author).

6. *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004).

7. See Robert Shibley, *Calls for Censorship in Texas*, *The Torch*, Feb. 21, 2005, <http://www.thefire.org/index.php/article/5336.html>.

8. See Press Release, Foundation for Individual Rights in Education (FIRE), *A Great Victory for Free Speech at Shippensburg* (Feb. 24, 2004), available at <http://www.thefire.org/index.php/article/162.html>.

9. *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575 (S.D. Tex. 2003).

10. See Thor L. Halvorssen, *Censorship Zones Flourish on American Campuses, Issue & Views*, <http://www.issues-views.com/index.php/sect/1001/article/1027> (last visited Sep. 22, 2005).

11. *Consent Decree Order of Settlement, Cumana v. Bucelo*, No. 99-2107 (S.D. Fla. 2002) (on file with author).

12. See *Victory*, *supra* note 1.

13. See Halvorssen, *supra* note 10.

14. See Student Press Law Center, *"Free-speech Zones" at Texas, Wis. Universities Challenged*, Feb. 14, 2002, [http://www.splc.org/news\\_flash.asp?id=363&year=2002](http://www.splc.org/news_flash.asp?id=363&year=2002).

15. Robert M. O'Neil, *Walking the Talk on Campus Speech*, *Trusteeship*, Mar./Apr. 2004, at 2. *Trusteeship* is a publication of the Association of Governing Boards of Universities and Colleges (AGB), a national organization

Incidents involving campus speech zones<sup>16</sup> are frequently followed by a contentious battle involving the university,<sup>17</sup> the students, and sometimes a free speech advocacy organization. Civil activist groups, such as the FIRE,<sup>18</sup> the ACLU, and the Rutherford Institute, often become involved. Regardless of whether a lawsuit is filed, the confrontation is often followed by a media campaign initiated by those opposing the university's policy. The media campaign will likely disparage the university, accusing it of willfully disregarding the United States Constitution and the free speech rights of its own students. This strategic tactic is intended to focus negative attention on the university, with the goal of causing public embarrassment. The media campaign

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dedicated to strengthening the performance of boards of public and private higher education. AGB provides resources to presidents, board chairs, and individual trustees to educate them on matters affecting their institutional oversight, at <http://www.agb.org/content/fexplore.cfm> (last visited Oct. 10, 2005).

16. Campus speech zones may also be given a variety of other names such as free speech zones, designated speech zones, and open forums. These zones are specific locations on campus designated by an institution of higher education for free expression activities. Campus speech zones are typically created through a regulation or policy promulgated by the institution. Persons violating the regulation or policy can be subject to university discipline (in the case of students) or enforcement activities up to and including arrest (for students and outsiders). Thus, such a regulation or policy constitutes a governmental regulation for purposes of First Amendment analysis. Although campus speech zones are not used by all institutions of higher education in the United States, many employ them. The scope of such regulations varies widely. For example, some require that all expressive activities such as speech-making, leafletting, demonstrations, and displays take place only within the institution's designated speech zones. Others require that only gatherings of a certain size, involving sound amplification, or large displays be confined to campus speech zones. Some institutions require submission of an application in order to use the campus speech zones. Some applications require that the applicant identify the subject matter. Others even require that a copy of whatever materials might be handed out be attached to the application. The variations are as broad as can be imagined.

17. This article deals with the campus speech zones at public institutions of higher education in the United States because the First Amendment is directly implicated and state action is clearly present. In this article, the term "university" refers to all public institutions of higher education in the United States.

18. The Foundation for Individual Rights in Education (FIRE), <http://www.thefire.org> (last visited Mar. 2, 2005).

generally succeeds in achieving this goal. Such a campaign can have serious adverse effects on a public institution that depends on state appropriations, grants, and donations for its funding.<sup>19</sup> It can also negatively impact the reputation of the university and harm its ability to recruit students and faculty.<sup>20</sup> Clearly, use of campus speech zones by universities is a “hot topic,” one which will likely continue to be the subject of controversy and litigation.

What is a responsible, law-abiding public university to do about campus speech zones? Simply eliminate its use of campus speech zones before an issue arises? Wait to see whether it is sued, then react? Perhaps the university should “keep its head down” and see if this is merely another short-lived higher education phenomenon. After all, current law does not necessitate the elimination of all campus speech zones.<sup>21</sup> How much time, possibly the most valuable resource of today’s over-extended university official, ought to be devoted to this question in light of other seemingly more urgent questions confronting university officials?

The issue of whether universities should eliminate their use of campus speech zones does not arise in a vacuum. Not only does it have First Amendment free speech implications, it is also often connected to the problem of hate speech and the controversial issue

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19. Carol L. Zeiner, *Monetary and Regulatory Hobbling: The Acquisition of Real Property by Public Institutions of Higher Education in Florida*, 12 U. Miami Bus. L. Rev. 103, 115–19, 121–28, 157–58 (2004) (describing the funding for higher education in Florida, particularly for land acquisitions and facilities projects, the political process for obtaining funding for such projects, and the need for public institutions to develop legislative plans and to engage in public information efforts to address these shortfalls). Universities also engage in lobbying to avoid reductions in funding. *Id.* at 158. *See also*, Evan G. S. Siegel, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 Emory L. J. 1351, 1359 (1990) (stating that escalating hate speech at the University of Michigan in the late 1980s drew charges that the university administration was not doing enough to create a racially harmonious atmosphere). A powerful legislator, the Chair of the Appropriations Subcommittee on Higher Education, hinted broadly that the legislature might cut funding for the university unless the administration intensified its commitment to the eradication of campus racism. *Id.* at 1359.

20. The media campaign against the university tends to be a tactical move by the opponent or an opposing advocacy organization to bear pressure on the institution in order gain the advantage in the dispute or litigation, possibly resolving the controversy promptly without the cost of trial.

21. Carol L. Zeiner, *Speaking Out on Campus Speech Zones*, 26<sup>th</sup> Annual National Conference on Law and Higher Education, Vol. II (on file with author).

of whether universities can or should have speech codes. This “hot topic” also arises against the backdrop of post-9/11 America, a time when many Americans feel vulnerable and have heightened concerns about safety. Universities and society in general are concerned about the threat of terrorist attacks against soft targets such as universities. Some are also concerned, however, about the implications of more governmental intrusion into everyday life and the potential impact of the Patriot Act<sup>22</sup> on universities and society in general.<sup>23</sup> Now is a time of heightened international tensions, concern, patriotism, nationalism, distrust, feelings of vulnerability, and perhaps animosity toward certain foreigners and controversial ideas.<sup>24</sup>

All of these emotions are occurring during an era when the respective rights and responsibilities of the university, its students, and the community are already in flux and likely to change further. Moreover, the last several years have been times of especially scarce state funding for public higher education,<sup>25</sup> during which the cost of tuition is rising at a rate higher than inflation.<sup>26</sup> This raises questions as to the best allocation of resources. Will the costs for security be higher if individuals can distribute leaflets and engage in confrontational debates all over campus rather than in one defined and more easily secured location? What about large gatherings and demonstrations? Would it be easier and less costly to provide for security if these events are confined to one area of

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22. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001*, Pub.L. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S.C.).

23. See, e.g., Lauren Gilbert, *Mocking George: Political Satire as “True Threat” in the Age of Global Terrorism*, 58 U. Miami L. Rev. 843 (2004); Leah Sandwell-Weiss, *A Look at the USA Patriot Act Today*, AALL [Amer. Assoc. of Law Librarians] Spectrum, July 2004, at 10.

24. For example, recent calls for the firing of a tenured professor at the University of Colorado due to controversial remarks likening workers in the World Trade Towers to the Nazi, Adolf Eichmann.

25. Brendon Fleming, *Public Colleges Raise Tuition Sharply, but Not as Much as in Recent Years*, Chron. of Higher Educ., Sept. 10, 2004, at A22; Peter Schmidt, *Paying the Price for Tuition Increases*, Chron. of Higher Educ., Sept. 10, 2004, at A20.

26. Schmidt, *supra* note 25; Fleming, *supra* note 25; Michael Arnone, *Students Face Another Year of Big Tuition Increases in Many States*, Chron. of Higher Educ., Aug. 15, 2003, at A24 (“Double-digit percentage increases in tuition for the second straight year, by the largest margins ever at some institutions, were common across the country.”); Kathleen Madigan, *It Sure Doesn’t Feel Like Low Inflation*, Bus. Wk., May 19, 2003, at 39.

campus? What about the likelihood of large numbers of dropped leaflets everywhere if leafleting is permitted all over campus? Will clean-up costs be higher? Will slip-and-fall accidents occur if students or others slip on glossy leaflets dropped on staircases or elsewhere? It will be costly for the university to quickly dispatch workers to clean up large quantities of dropped leaflets to prevent such occurrences. Of course, if someone is injured because the dropped leaflets were not picked up quickly enough, the university could face liability for the victim's injuries, thus creating another potential financial drain on an already decimated university budget.<sup>27</sup>

What about noise and disruption? The concept of campus speech zones developed during the turbulent years of the 1960s and early 1970s so that campus unrest would not interfere with classes, study areas, student dormitory life, and the general business operations of universities.<sup>28</sup> These concerns still exist today.

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27. Practical concerns such as avoiding accidents that could cause injuries are appropriate concerns of universities. *See, e.g.*, Robert D. Bickel & Peter F. Lake, *The Rights and Responsibilities of the Modern University* 4 (1999) ("Student safety has become a core issue for modern universities."); Robert C. Cloud, *Safety on Campus*, 162 Ed. L. Rep. 1, 1-27, 162 (2002). Student safety is an appropriate concern at all times, but it takes on an added dimension when higher education administrators attempt to cope with inadequate state funding. Choices having serious implications for classroom instruction and the total educational experience must be made. Rather than allowing the costly situation of dispatching workers to clean up leaflets dropped all over campus before someone slips and falls, would it not be a more prudent use of scarce funding to employ constitutionally allowable means to create a less costly situation, and thus controlling expenditures for cleanup? That money could then be spent for items directly impacting classroom instruction, such as hiring another adjunct professor so that another section of a required course could be offered to students. Or, it might seem to be a more prudent use of funds if the saved money was spent on making the university's facilities more accessible to handicapped students. The problem is frustrating for university leadership because legal challenges to campus speech zones are most likely to be based on the First Amendment. Trial counsel for students opposing the regulation are likely to argue that *control* of litter, even control of litter likely to contribute to accidental injuries, does not constitute a sufficiently important government interest to justify the regulation for constitutional purposes. Many First Amendment scholars would agree.

28. William A. Kaplin & Barbara A. Lee, *The Law of Higher Education* 500 (3rd ed. 1995).

As if the foregoing was not enough, issues beyond day-to-day operations demand the time and attention of university administrators. The leaders of public universities engage constantly in efforts to obtain adequate funding from legislatures, to raise funds from donors, and to obtain grants from foundations and the government.<sup>29</sup> Higher education institutions must also constantly review, revise, expand, and sometimes eliminate programs, based on factors such as community and industry needs, enrollment, and funding.<sup>30</sup> Additionally, whether they are willing to admit it or not, American institutions of post-secondary education are in competition with entities offering the corporate training model of education. When confronted by these daily dilemmas, it is no wonder that some university officials feel campus speech zones are the least of their worries.

So what is a university to do? Despite the demands of time, the campus speech zone issue deserves, and in fact requires, attention. Freedom of speech is inextricably connected with the essential character and purpose of the university as well as constituting one of the most treasured values of American society. Effective analysis is best accomplished when this topic receives the time and focused attention necessary to the task, without the distractions, pressure, and hype that have become common in First Amendment controversies involving universities.

Without question, a public university's campus speech zone policy must comply with First Amendment standards. Adherence to constitutional requirements is as essential to the process of drafting a university speech zone regulation as meeting the university's other objectives. Scholarly writing on campus speech issues focuses, understandably, on constitutional issues.<sup>31</sup> The only

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29. The very process of having to chase after money, whether in the form of lobbying for state appropriations, seeking donors, pursuing grants, or undertaking entrepreneurial activity, poses risks to the university. Rodney A. Smolla, *Academic Freedom, Hate Speech and the Idea of a University*, 53 *Law & Contemp. Probs.* 195 (1990).

Campuses today are under pressure from many quarters to compromise the noble idea of the university as an island of intellectual inquiry and robust discourse that ought to maintain some degree of separation from the commands of the sovereign, the tantalizing seductions of gigantic financial grants, and the whimsical ebbs and flows of mass politics and prejudice.

*Id.* at 216.

30. See, e.g., Zeiner, *supra* note 19, at 115, 149 n.227.

31. Generally, the focus is on the First Amendment. Literature on campus hate speech also addresses equal protection claims. For articles on hate speech, see *infra* note 98.



article specifically devoted to campus speech zones found by this author analyzes the topic primarily upon First Amendment public forum doctrine.<sup>32</sup> Likewise, case law on campus speech zones focuses almost solely on the First Amendment aspects of the issue.<sup>33</sup> Such case law, as well as case law on student free speech in higher education in general, may make mention of universities as “the marketplace of ideas,”<sup>34</sup> but constitutional concerns, particularly the First Amendment, remain the focal point.

Court decisions determine whether a specific university’s particular iteration of a campus speech zone policy is constitutional,<sup>35</sup> and thus provide guidance for the drafting and design of campus speech zone regulations. They do little to help universities decide a more basic question, whether they should utilize campus speech zones at all. This crucial question has not received adequate attention. Discussion of campus speech zones is largely subsumed by discussion of student speech issues in general, and scholarly legal writing on student speech issues continues to keep constitutional issues, particularly First Amendment analysis, in the spotlight.<sup>36</sup> The importance of compliance with constitutional standards is undisputable; it is absolutely mandatory and, more importantly, essential to the American way of life. However, in regards to campus speech zones, we ought not limit the discussion to constitutionality. Even if a campus speech zone regulation is properly formulated, well-drafted, supported by adequate substantial government interests, and otherwise constitutional, the analysis remains incomplete. There still remains an inadequately examined underlying question: Should a university utilize campus speech zones, and if so, how? This article focuses on that largely ignored, but fundamental question.

A new analytic framework is necessary to examine campus speech zones. Specifically, decision-making with respect to these zones should be through a two-step process. Step one asks the fundamental policy questions: whether the particular university

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32. Thomas J. Davis, Note, *Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum Doctrine*, 79 Ind. L. J. 267 (2004).

33. *E.g.*, *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004).

34. *Healy v. James*, 408 U.S. 169, 180, 92 S.Ct. 2338, 2346 (1972) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512, 89 S.Ct. 733, 739 (1969)). This famous phrase is often repeated.

35. *E.g.*, *Roberts*, 346 F. Supp. 2d 853. There is not a wealth of case law examining campus speech zones; perhaps many disputes are resolved prior to trial via the media campaign tactic.

36. *See, e.g.*, Kaplin & Lee, *supra* note 28, at 500–16.

should utilize campus speech zones, and if so, how.<sup>37</sup> Step two consists of designing and drafting a university campus speech zone policy that adheres to all constitutional requirements. The process should work as follows. If the answer to the essential step one question is yes, then the university should utilize that information to decide what general variety of campus speech zones meets its important interests. Only then should the decision-making progress to step two. At step two, the university designs its specific formulation of campus speech zones and drafts its regulations, ensuring that the regulations meet all constitutional requirements while also avoiding constitutional failings. At this point, the zones, as first envisioned at step one, may have to be fine-tuned to meet both constitutional standards and university needs.

It is critical that the fundamental step one question be answered first. Step one enables a university to discover its true purposes for utilizing campus speech zones, to verify that those purposes align with the character of universities and the important current issues affecting the specific university, and to confirm that its campus speech zones pass constitutional muster. Although other scholars have examined step two, a comprehensive analysis of step one is surely needed. This article proposes this new analytic model and takes on the challenge of examining the essential policy question that constitutes step one.

Every university is unique;<sup>38</sup> therefore, no universally applicable answer to the step one question<sup>39</sup> is possible. Each university presently employing or considering using campus speech zones should undertake a thorough step one analysis

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37. Respect for both the letter and the spirit of constitutional standards is a factor at step one, but is not the sole determinant. Campus speech zones, if properly drafted and supported by adequate governmental interests, are constitutional. But this does not necessarily mean that all universities ought to adopt campus speech zone regulations. Likewise, the ideal of free speech would be more fully implemented if there were no limitations, whether those limitations are campus speech zones or any other limitation. This does not mean that no university should utilize campus speech zones. Thus, more analysis is needed to answer this crucial question.

38. Michael A. Olivas, *The Political Economy of Immigration, Intellectual Property and Racial Harassment*, 63 J. of Higher Ed. 570 (1992); Bickel & Lake, *supra* note 27, at 182, 200; Davis, *supra* note 32, at 268.

39. Should a particular university employ campus speech zones, and if so, how?

specific to its own unique institution.<sup>40</sup> This article does not attempt to provide a "one-size-fits-all" answer to a question for which no single answer exists. Rather, it creates a framework, then carries out a comprehensive analysis of that framework to serve as a guide to universities as they undertake step one and examine the fundamental question of whether their university should utilize campus speech zones, and if so, how.

The Introduction to this article outlines the problem of campus speech zones. It identifies that an essential question, namely, whether or not a university should use campus speech zones, has been lost amid the constitutional discussion in prior writings examining free speech on campus. Because there is no single, simple answer to this question, each institution must perform its own analysis. Next, Part II identifies the proposed analytic framework. Part III provides background information. This section describes the demise of the traditional *in loco parentis* philosophy, students' attainment of basic civil rights in their relationship with their university, and basic concepts of First Amendment law necessary to the following discussion. Part III also provides background detail on several current high profile problems impacting universities. Part IV builds the framework for analysis, then undertakes a comprehensive analysis based on that framework. As already stated, this article does not attempt to provide a single answer applicable to all universities. Rather, it provides and analyzes the framework within which each university can make its own complex, individualized analysis. As a result, this article provides a thorough, much needed examination of a fundamental policy question that previously has been obscured. Finally, Part V consists of a summary conclusion of the work.

## II. IDENTIFYING THE FRAMEWORK

Universities need to examine the issue of campus speech zones in a two step process. This process should proceed as follows. In step one, the university answers the critical policy question of whether or not, in its unique circumstances, it should utilize campus speech zones. If the answer to this essential question is in the affirmative, the university then determines, based on the understanding gained through its analysis of the step one question,

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40. Obviously, the analysis should be made before an institution implements campus speech zones. If an institution is already using such zones, the analysis should be completed and the use of the campus speech zones continued, modified, or eliminated based on that analysis, before a dispute arises.

what variety of campus speech zones will best meet its important university interests. The university then knows whether it ought to establish, continue, modify, or eliminate use of campus speech zones. Within step two, if the answer to the key step one question is "yes," and the university has decided on the general types of campus speech zones that it will use, the university then devises its specific formulation of campus speech zones and drafts its campus speech zone regulation, making sure that the regulation conforms with all constitutional requirements and avoids all shortcomings that would render it unconstitutional.<sup>41</sup> At step two, the general plan developed at step one will likely have to be adjusted. This must be a delicate process in order to ensure that the final arrangement will continue to fulfill the institution's important interests while complying with all the rules necessary for constitutional compliance.

The essential step one question, whether a university should employ campus speech zones, and if so, how, does not arise in isolation. Few, if any, well-founded decisions with respect to university policy can be reached in a vacuum. Accordingly, the question must be examined in context in order to reach a well-reasoned conclusion. In order to properly analyze the issue of campus speech zones, it is necessary to consider the interrelationship between that issue and all the many factors and variables that arise within the setting of a particular university. Such a comprehensive, contextual analysis constitutes the framework for the first step.

What is the context within which the question of campus speech zones arises? It consists of a dynamic interrelationship among many factors. First, it includes the underlying nature and purpose of the university, together with all of the day-to-day operational realities encountered by the modern university. The analysis must include and accommodate the needs, attitudes, and expectations of today's students. The context must also include institutional respect for both the letter and the spirit of constitutional standards. Additionally, it is critical that current high profile problems confronting universities be included. The context likewise involves those factors common to universities in general and those unique to the specific university undertaking the analysis. It includes the specific mission of the particular university and each of the schools comprising the university.

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41. This article is not intended to provide an exhaustive discussion of the constitutional aspects of campus speech issues. Before drafting a campus speech policy, one would be well advised to consult resources devoted to these constitutional considerations.

Finally, the context includes the university's particular academic, legal, financial, geographic, enrollment, student, public relations, and other practical considerations.

Some background information will be helpful in undertaking this comprehensive, contextual analysis.

### III. BACKGROUND

#### *A. The Demise of in Loco Parentis and the Rise of Students' Rights on the Public University Campus*

The First Amendment to the United States Constitution states in pertinent part that "Congress shall make no law . . . abridging the freedom of speech."<sup>42</sup> This Amendment applies to the states through the Fourteenth Amendment.<sup>43</sup>

Commentators have pointed out that the Bill of Rights, in general, and free speech, in particular, did not receive significant attention as a legal issue until World War I. The current legal doctrine of free speech has developed only over the past seventy-five years.<sup>44</sup> It is interesting to note that a significant portion of free speech jurisprudence developed out of student involvement in the civil rights movement and student unrest resulting from opposition to the war in Vietnam.<sup>45</sup>

Legal doctrine governing the general relationship between a university and its students also underwent a major transformation as a result of students' civil rights and Vietnam War era efforts to secure their basic constitutional rights.<sup>46</sup> It is typically said that "prior to 1960 the university stood *in loco parentis* to its students."<sup>47</sup> *In loco parentis* conferred on universities the power to discipline, control, and regulate their students to a high degree, as

42. U.S. Const. amend. I.

43. *Duncan v. Louisiana*, 391 U.S. 145, 148, 88 S.Ct. 1444, 1447 (1968), *Healy v. James*, 408 U.S. 169, 171, 92 S.Ct. 2338, 2341 (1972); Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 15.6 (3rd ed. 1999); Daniel A. Farber, *The First Amendment* 11 (2d ed. 2003). Free speech finds protection in state constitutions as well. *E.g.*, Fla. Const. art. 1 § 4 (amended 1968).

44. John Nowak, *The "Sixty-Something" Anniversary of the Bill of Rights*, 1992 U. Ill. L. Rev. 445 (1992); Farber, *supra* note 43.

45. Note the timing described in Bickel & Lake, *supra* note 27, at 7-8, 35-42.

46. Bickel & Lake, *supra* note 27, at 35-41.

47. *Id.* at 17. *In loco parentis* is defined, "in the place of a parent." Black's Law Dictionary 803 (8th ed. 2004).

well as considerable immunity from liability and insularity from judicial review.<sup>48</sup> During the era of *in loco parentis*, universities generally were not held responsible in litigation arising out of student injuries on campus; however, few cases went to court, possibly because of the insularity of universities.<sup>49</sup> Likening the university to a family, university matters were generally considered to be nonjusticiable issues best resolved within the university.<sup>50</sup> This stance allowed universities great latitude in regulating students' conduct.<sup>51</sup>

Most university law commentators view *Dixon v. Alabama State Board of Education*<sup>52</sup> as the decision that set the stage for the demise of *in loco parentis*.<sup>53</sup> The *Dixon* plaintiffs, six African American students, were summarily expelled from Alabama State College by means of a letter, without prior notice or a hearing, apparently in response to their participation in civil rights demonstrations seeking desegregation of a lunch counter. As a result of this case, students at tax-supported institutions won the basic due process right to notice and a hearing prior to expulsion for misconduct. Subsequently, courts accepted and decided a considerable volume of cases involving student constitutional rights at public universities. According to Professors Bickel and Lake, the Supreme Court engineered a radical revision of student constitutional rights through *Scheuer v. Rhodes*,<sup>54</sup> decided in the

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48. Bickel & Lake, *supra* note 27, at 22-33. Some commentators have indicated a belief that the *in loco parentis* era imposed duties on universities for student safety, as well as conferring on universities the power to discipline, control, and regulate students. Other commentators, such as Professors Bickel and Lake, strongly disagree with this contention. Nevertheless, the commentators are in agreement that *in loco parentis* enabled universities to exercise a high level of control over their students and take unilateral disciplinary action if the university determined that an infraction had occurred. *Id.* at 49.

50. *Id.*

51. *Id.*; see also *Gott v. Barea Coll.*, 161 S.W. 204 (Ky. 1913) (students were disciplined for going to certain off-campus locations); *Stetson Univ. v. Hunt*, 102 So. 637 (Fla. 1924) (students were disciplined for disruptive behavior in the dormitory).

52. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930, 82 S. Ct. 368 (1961).

53. Bickel & Lake, *supra* note 27, at 37.

54. 416 U.S. 232, 94 S. Ct. 1683 (1974).

wake of the Kent State killings of 1970.<sup>55</sup> As a result of these types of cases, students won fundamental civil rights in their dealings with public universities—basic due process before expulsion, freedom of speech, freedom of association, and the right to assemble.<sup>56</sup> Free speech zones thus developed as a means of regulating student protest activities on campus during the social upheavals of the 1960s<sup>57</sup> at the intersection of two rapidly changing areas of law, First Amendment law and higher education law.

With respect to the relationship between a university and its students during the demise of *in loco parentis*, “[s]tudents picketed, rioted, sat in, organized, marched and litigated. Students asked the courts to intervene in university life [and] . . . the courts accepted the invitation. The era of insularity was over; university life would be increasingly justiciable.”<sup>58</sup> Bickel and Lake wrote that universities entered a period of transition that continues today. Although attempts have been made to create a new image or legal model of the university, none have been as strong, enduring, or useful as was *in loco parentis*.<sup>59</sup>

### B. *The First Amendment on Campus*

The basic concepts of current First Amendment jurisprudence apply to freedom of speech on public university campuses, in general,<sup>60</sup> and to campus speech zones, in particular.

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55. Four student protestors who presented no threat of deadly force were shot and killed by Ohio National Guardsmen at Kent State University on May 4, 1970.

56. Bickel & Lake, *supra* note 27, at 41.

57. O’Neil, *supra* note 15, at 2; *see also* Kaplin & Lee, *supra* note 28, at 500 (placing the date as the late 1960s and early 1970s).

58. Bickel & Lake, *supra* note 27, at 36.

59. *Id.* at 13. In their book, Professors Bickel and Lake develop and propose the facilitator university model to serve as a paradigm and legal model to guide part of the relationship between a university and its students. The facilitator university is an adaptable model that proposes shared responsibility between the university and the student for basic safety and security on campus and during off-campus student events.

60. *Healy v. James*, 408 U.S. 169, 180, 92 S. Ct. 2338, 2345 (1972) (“At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment. ‘It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’” (quoting *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503, 506, 89 S. Ct. 733, 736 (1969))).

Government actors can regulate conduct, as differentiated from speech, without running afoul of the free speech protections of the First Amendment.<sup>61</sup> This authority applies on campus as well as in American society in general.<sup>62</sup> For First Amendment purposes, however, the term “speech” includes expressive conduct<sup>63</sup> as well as the spoken or written word.<sup>64</sup>

Free speech activities on the campus of a public university obviously involve speech on public property. That speech may be protected speech or unprotected speech.<sup>65</sup> It is well settled that “[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>66</sup>

61. *Virginia v. Black*, 538 U.S. 343, 395, 123 S. Ct. 1536, 1566 (2003) (Thomas, J., dissenting) (concluding that the statute under consideration “addresses only conduct, [and as a result,] there is no need to analyze it under any of our First Amendment tests.”).

62. *Wozniak v. Conry*, 236 F.3d 888 (7th Cir.), *cert. denied*, 533 U.S. 903, 121 S. Ct. 2243 (2001) (holding that when a faculty member was reassigned to non-teaching duties after refusing to submit grading materials required by the university to show consistency with the prescribed grade curve, the university was regulating and taking action against conduct, not as a penalty for professor’s speech about that behavior); Siegel, *supra* note 19, at 1366 (“At the outset of the *Doe* decision, the court drew a distinction between first amendment protection of ‘pure speech’ and conduct. Discriminatory conduct, . . . is not shielded by the Constitution.” (citing *Doe v. Univ. of Mich.* 721 F. Supp. 852, 865–67 (E.D. Mich. 1989))).

63. Expressive conduct is sometimes referred to as a “symbolic act,” *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503, 505, 89 S. Ct. 733, 736 (1969), or “symbolic speech.” *Id.* at 516, 89 S. Ct. at 741 (Black, J., dissenting).

64. Various forms of conduct have been argued to constitute speech. *See, e.g., id.* at 503, S. Ct. 733 (majority) (wearing armband); *United States v. O’Brien*, 391 U.S. 367, 88 S.Ct. 1673 (1968) (burning draft card); *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533 (1989), *and United States v. Eichman*, 496 U.S. 310, 110 S.Ct. 2404 (1990) (flag burning); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065 (1984) (sleeping in park).

65. Speech, as defined by the courts, is divided into two major categories: unprotected speech, which after various court rulings, is more accurately described today as constitutionally less protected speech; and, fully protected speech, which is actually still subject to some kinds of regulation. Constitutionally favored speech falls outside the categories of unprotected speech. Farber, *supra* note 43, at 13–14. Although constitutionally favored speech is often of an artistic, scientific, or political nature, it is not necessary that speech have some lofty purpose in order to be protected. Smolla, *supra* note 29, at 197.

66. *Tinker*, 393 U.S. at 506, 89 S. Ct. at 736; *Healy v. James*, 408 U.S. 169, 180, 92 S. Ct. 2338, 2345 (1972) (found applicable to higher education).



The public forum doctrine explains the standards for determining the constitutionality of government restrictions on free speech and expressive activity on government-owned property.<sup>67</sup> Although the public forum doctrine is undergoing change and has been criticized,<sup>68</sup> it continues to be used with respect to campus speech zones.<sup>69</sup> Commentators, as well as recent case law, have stated that the college campus typically consists of a variety of fora.<sup>70</sup>

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67. *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 103 S.Ct. 948 (1983). The level of judicial scrutiny as well as the degree of governmental interest that must be present in order to justify a regulation varies with the type of forum in which the speech takes place. See Smolla, *supra* note 29, at 217–24 and Davis, *supra* note 32, at 270–72 (explaining the public forum doctrine).

68. *E.g.*, Farber, *supra* note 43, at 189–91 (criticizing the doctrine as being unduly complicated and unnecessary).

69. See *Roberts v. Haragan*, 346 F. Supp. 2d 853, 869–70 (N.D. Tex. 2004). The categories “designated public forum” and “limited public forum” both appear in case law. The Fifth Circuit, as explained in *Roberts*, utilizes both concepts and differentiates between the two.

70. Smolla, *supra* note 29, at 218; Davis, *supra* note 32, at 274–75. See also *Roberts*, 346 F. Supp. 2d at 861. However, it is not a foregone conclusion. See *Galdikas v. Fagan*, No. 01-C4268, 2001 WL 1223539 at \*3 (N.D. Ill. Oct. 12, 2001) (“GSU is a state institution and its campus may be considered a public forum. Even assuming the campus is a non-public forum, plaintiffs may be able to show that removing them from the campus was unreasonable, overly broad, viewpoint based suppression of speech that violated their First Amendment rights.”).

Provided that it is not constitutionally overbroad<sup>71</sup> or vague,<sup>72</sup> is not an unconstitutional prior restraint,<sup>73</sup> and is supported by important governmental interests, a campus speech zone policy can constitute a constitutionally permissible, content-neutral time, place, and manner regulation of protected speech<sup>74</sup> in the public fora of a public university.<sup>75</sup> The policy must be<sup>76</sup> (1) “justified

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71. “An overbroad statute is one that is designed to burden or punish activities that are not constitutionally protected, but the statute includes within its scope activities that are protected by the First Amendment.” Rotunda & Nowak, *supra* note 43, § 20.8, at 263–64. See also *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 2916 (1973). Such a statute would proscribe, although possibly unintentionally, a substantial amount of speech that is protected by the First Amendment. *Houston v. Hill*, 482 U.S. 451, 459, 107 S. Ct. 2502, 2508 (1987).

72. A statute is impermissibly vague in violation of the constitution when a person “of common intelligence must necessarily guess at its meaning.” *Broadrick*, 413 U.S. at 607, 93 S. Ct. at 2912 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). It too, has a chilling effect on speech. Moreover, it fails to place persons on notice as to precisely what activities constitute violations. Siegel, *supra* note 19, at 1373. An unconstitutionally vague statute fails to provide adequate guidance to law enforcement authorities creating the possibility that they might engage in selective enforcement based on whether they agree or disagree with the content of the speaker’s message. *Broadrick*, 413 U.S. at 607, 93 S. Ct. at 2912; Siegel, *supra* note 19, at 1373.

73. Prior restraints are governmental regulations (such as university policies requiring a permit for use of a campus speech zone) that restrict free speech prior to the occurrence of the speech, rather than imposing sanctions after the expression has taken place. For a classic article on prior restraints see, Vince Blasi, *Prior Restraints on Demonstrations*, 68 Mich. L. Rev. 1481 (1969–1970). In *Kunz v. New York*, 340 U.S. 290, 71 S. Ct. 312 (1951), the Court found a city ordinance unconstitutional because “[o]rdinances giving discretionary power to administrative officials over a citizen’s right to speak about religion on the city streets [are] . . . an invalid prior restraint on a First Amendment right.” Rotunda & Nowak, *supra* note 43, § 20.8, at 265 (citing *Kunz*, 340 U.S. at 293, 71 S. Ct. at 314). A regulation that provides for no administrative appeal of a denial can be unconstitutional. *Kunz*, 340 U.S. at 294–95, 71 S. Ct. at 315; *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 584 (S.D. Tex. 2003). A prior restraint is unconstitutional if it states impermissible standards for approval or denial of a license. *Shamloo v. Mississippi State Bd. of Trustees*, 620 F.2d 516, 524 (5th Cir. 1980) (university policy granted permits only for speech considered “wholesome” by university administrator); *but see Thomas v. Chicago Park Dist.*, 534 U.S. 316, 122 S. Ct. 775 (2002).

74. See *supra* note 65 and accompanying text.

75. In the Fifth Circuit, this standard also applies to the designated public fora of a university. *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004).

without reference to the content of the regulated speech,"<sup>77</sup> (2) "narrowly tailored to serve a significant governmental interest,"<sup>78</sup> and (3) "leave open ample alternative channels for communication of the information."<sup>79</sup> A regulation is considered narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation."<sup>80</sup> Nevertheless, "this standard does not mean that a time, place or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."<sup>81</sup> The standard for constitutional review of content-neutral regulations in public fora is intermediate scrutiny; the regulation must serve an important government interest in order to be constitutional.<sup>82</sup>

Based on the foregoing, it is both theoretically and actually possible for a university to adopt a campus speech zone policy that will withstand constitutional scrutiny. The project requires extensive collaboration among various university administrators and skilled counsel. The policy requires knowledgeable design and careful, well-informed drafting. Although it is by no means a simple task, a campus speech zone policy that meets both constitutional standards and serves the university's important interests *can* be developed.

### C. *The Problem of Hate Speech on Campus*

"Hate speech" has been the source of problems and controversy on university campuses and in society in general for a number of years.<sup>83</sup> It is highly relevant to a university's analysis

76. These elements are stated in Davis, *supra* note 32, at 276-77.

77. Clark v. Cmty. For Creative Non-Violence, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069 (1984).

78. *Id.*

79. *Id.*

80. Ward v. Rock Against Racism, 491 U.S. 781, 799, 109 S. Ct. 2746, 2758 (1989) (quoting United States v. Albertini, 472 U.S. 675, 689, 105 S. Ct. 2897, 2906 (1985)).

81. *Id.*

82. If a university campus speech zone policy is content-based, the standard for constitutional review is that of a compelling governmental interest.

83. "The social climate at colleges and universities across the United States [grew] inhospitable to minority students [during the 1980s and early 1990s]."

and decisions with respect to campus speech zones.<sup>84</sup> Professors Kaplin and Lee describe hate speech as follows:

“Hate speech” is an imprecise catch-all term that generally includes verbal and written words and symbolic acts that convey a grossly negative assessment of particular persons or groups based on their race, gender, ethnicity, religion, sexual orientation, or disability. Hate speech thus is highly derogatory and degrading, and the language is typically coarse. The purpose of the speech is more to humiliate or wound than it is to communicate ideas or information. Common vehicles for such speech include epithets, slurs, insults, taunts and threats. Because the viewpoints underlying hate speech may be considered “politically incorrect,” the debate over hate speech codes has sometimes become intertwined with the political correctness phenomenon on American campuses.<sup>85</sup>

While accurate, definitions and most scholarly discussions of hate speech seem antiseptic and distant from the gut wrenching, sharp realizations of fear that assault the psyche of the persons targeted by hate speech. The intellectual detachment of the process of definition dilutes the actual shock and horror that constitute essential elements of the majority of hate speech.<sup>86</sup>

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Siegel, *supra* note 19, at 1351. See also Olivas, *supra* note 38, at 580 (“One reaction on some campuses to the modest rise of minority undergraduate students has been the increase in racial violence, particularly the racial harassment of minority students.”); Arthur Levine & Jeanette S. Cureton, *When Hope and Fear Collide: A Portrait of Today’s College Student* 77 (1998) (“[T]he most vicious graffiti and name calling is usually reserved for women and gays.”); see also Rodney A. Smolla, *Free Speech In An Open Society* 152-54 (1992).

84. The problem of hate speech is particularly troublesome for American universities. Professors Kaplin and Lee point out that “[a]ll these various harms of hate speech implicate deeply held values of equality and individual dignity . . . . [H]owever, free speech values become implicated as well . . . . [B]oth sets of values are at stake—and . . . the resulting value clashes raise complex issues concerning the mission of higher education . . . .” Kaplin & Lee, *supra* note 28, at 519.

85. *Id.* at 509.

86. It appears that other commentators would agree with my assessment. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 Mich. L. Rev. 2320 (1988–1989).

The law makes clear that an institution cannot discriminate in providing educational opportunities based on the race, ethnicity, or other protected characteristics of students.<sup>87</sup> A university likely has the goal of, and a substantial interest in, "maintaining an environment free of discrimination and racism, and in providing gender-neutral education."<sup>88</sup> Moreover, it has been said that "it is the [u]niversity officials' responsibility, even their obligation, to achieve the goals they have set."<sup>89</sup>

Commentators have pointed out that hate speech, particularly repeated incidents of hate speech, can produce feelings of fear, vulnerability, and resentment among members of the targeted minority group.<sup>90</sup> A constant barrage of hate speech can damage the victim's self image and cause psychological harm. Aside from the emotional impact, constant exposure to epithets can interfere with minority persons' access to, full use of, and enjoyment of educational facilities and opportunities.<sup>91</sup> In addition, it has been argued that hate speech hampers the university's efforts to enhance diversity in higher education.<sup>92</sup>

Universities have responded to the problem of hate speech on campus<sup>93</sup> in a number of ways. Some public institutions have

87. See, e.g., U.S. Const. amend. XIV; 42 U.S.C. §§ 2000c (2000) (education), 2000d (2000) (government benefits); *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S. Ct. 686, 691 (1954) ("[An] opportunity [for education] where the state has undertaken to provide it, is a right which must be made available to all on equal terms.").

88. *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 393 (4th Cir. 1993) (determining that an offensive caricature of a black woman in a skit at a fraternity "ugly woman contest" constitutes expressive conduct). Thus, university sanctions on the fraternity constituted a constitutionally prohibited content-based restriction on speech. Despite the university's obligations with respect to discrimination, the court found that the "university should have accomplished its goals in some fashion other than silencing speech on the basis of its viewpoint." *Id.* at 393.

89. *Id.*

90. Kaplin & Lee, *supra* note 28, at 509; Farber, *supra* note 43, at 116, 119. William A. Kaplan, *A Proposed Process for Managing First Amendment Aspects of Campus Hate Speech*, 63 J. Higher Educ. 517, 519 (1992).

91. Kaplin & Lee, *supra* note 28, at 509; Farber, *supra* note 43, at 116, 119.

92. Farber, *supra* note 43, at 112; *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 862-63 (D. Mich. 1989).

93. The incidence of hate speech varies tremendously among institutions. On some campuses it is non-existent. The prevalence and extent of hate speech runs along a continuum from no problem to such an extreme problem as to generate comment in the state legislature. *Doe*, 721 F. Supp. 852.

enacted speech codes to address the problem.<sup>94</sup> In essence, speech codes are university regulations that prohibit language that stigmatizes or victimizes an individual based on race or other protected characteristics and impairs the victim's access to educational opportunities.<sup>95</sup> The codes also impose penalties for violations.<sup>96</sup>

The enactment of speech codes has generated considerable scholarly debate<sup>97</sup> on both sides of the issue<sup>98</sup> as well as attention

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94. Siegel, *supra* note 19, at 1375–76 n.137; Case Comment, *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 n.1 (1990); Olivas, *supra* note 38, at 582–83; Scott Norville, Fox News, *Campus Clamps Free Speech, Poster Problems*, Nov. 1, 2004, <http://www.foxnews.com/story/0,2933,137198,00.html>.

95. Many countries in Europe do not afford protection to racial and ethnic hate speech. Cass R. Sunstein, *Liberalism, Speech Codes, and Related Problems*, 79 *Academe* 14, 18 (Jul./Aug. 1993).

96. This explanation is intended only as a broad description of speech codes. Like any governmental enactment, such regulations can be drafted in many ways and from various approaches. Some are more detailed and precise than others. For example, while the University of Michigan speech code was worded comparatively generally, the University of Wisconsin code was drafted more narrowly, possibly in an attempt to avoid constitutional infirmity. See *supra* notes 93–95 and accompanying text. See also Siegel, *supra* note 19, at 1375–76 n.137.

97. “[A] veritable feast of scholarly law review articles has come forth.” Olivas, *supra* note 38, at 580.

98. Arguments against speech codes include: Siegel, *supra* note 19, at 1375–76 n. 137; Lee Ann Rabe, *Sticks and Stones: The First Amendment and Campus Speech Codes*, 37 *J. Marshall L. Rev.* 205 (2003) (concluding that “speech regulations adopted by universities are inappropriate”); *Id.* at 222 (“[F]ree speech cannot and should not be trammled in the name of student equality.”) (citing Smolla, *supra* note 29, at 169); Suzanna Sherry, *Essay, Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech*, 75 *Minn. L. Rev.* 933, 941 (1990) (“[U]niversities are attempting to coerce particular values rather than merely to create a civil environment.”), 942 (“The regulations are an attempt to dictate primarily how students (and faculty) think, and only secondarily (if at all) how they behave. As such, the regulations are a part of the larger movement in higher education toward enforcement of a ‘politically correct’ orthodoxy.” (citing Bernstein, *The Rising Hegemony of the Politically Correct*, *N.Y. Times*, Oct. 28, 1990, at D1)); Smolla, *supra* note 29, at 224 (“Hate speech is an abomination, a rape of human dignity. And let there be no inhibition in punishing hate speech in any of the contexts in which speech may be punished under recognized first amendment doctrines . . . . But outside those narrowly defined first amendment categories, the battle against hate

by the media.<sup>99</sup> It has also generated litigation raising First Amendment free speech issues. Federal district courts struck down the speech codes of both the University of Michigan<sup>100</sup> and the University of Wisconsin<sup>101</sup> in the late 1980s and early 1990s. In both instances, the courts found that the codes violated the First Amendment. The University of Michigan policy was found to be unconstitutionally overbroad, both on its face and as applied, because it sought to sweep up and punish substantial amounts of constitutionally protected speech.<sup>102</sup> The policy was also found to be unconstitutionally vague on its face.<sup>103</sup> The University of Wisconsin hate speech policy was also invalidated on grounds of overbreadth and vagueness.<sup>104</sup> The litigation and the trend

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speech will be fought most effectively through persuasive and creative educational leadership rather than through punishment and coercion.”)

Arguments in favor of speech codes include: Sunstein, *supra* note 95, at 14 (in favor of narrowly limited speech codes); Case Comment, *supra*, note 94 (criticizing the outcome and the court’s use of categorization analysis; suggesting contextual analysis: “[c]ategorization surely promotes powerful free expression values, but the desire to minimize *potential* harm to valued speech does not justify excluding from analysis *real* harm to minorities and women. In the campus setting, categorization disregards the ‘fundamental, overriding interest in eradicating . . . discrimination in education.’” (quoting *Bob Jones Univ. v. United States*, 461 U.S. 574, 604, 103 S. Ct. 2017, 2035 (1983))); Matsuda, *supra* note 86, at 2321 (suggesting the criminalization of such expression in society at large; thus it seems she would also be in favor of campus speech codes).

99. Van Woodward, N.Y. Times, *Freedom of Speech, Not Selectively*, Oct. 15, 1986 at A27.

100. *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (D. Mich. 1989).

101. *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wis. 1991).

102. *Doe*, 721 F. Supp. at 866.

103. *Id.* at 867.

104. *UWM Post*, 774 F. Supp. at 1181. Unlike the University of Michigan code, the University of Wisconsin code was drafted with much more specificity and there was more in the record evidencing efforts to avoid First Amendment infirmity. Nevertheless, it covered expression both likely and unlikely to incite an immediate breach of the peace. Thus, it was unconstitutionally overbroad despite the University’s substantial interest in providing educational opportunities free from discrimination. The Court also noted that discriminatory impact resulted from the viewpoints of individuals, not from the activities of the university state actor.

continue.<sup>105</sup> More recently, Texas Tech University's application of its speech code to campus public forum areas<sup>106</sup> was found to be unconstitutional based on overbreadth.<sup>107</sup> The court also found that even if the policy constituted a content-neutral, time, place, and manner regulation as written, it was unconstitutional as to the

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105. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S. Ct. 2538 (1992), which dealt with a city ordinance, further complicated matters for university speech codes. The ordinance made it a misdemeanor to "place on public or private property a symbol . . . including, but not limited to, a burning cross" if "one knows or has reasonable grounds to know" that it "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender." *Id.* at 380, 112 S. Ct. at 2541. The Minnesota Supreme Court found the ordinance to be valid based upon a limiting construction that it proscribed only constitutionally unprotected speech, fighting words, which also fell within the parameters of other prohibitions of the ordinance. The United States Supreme Court reversed, stating that the government cannot differentiate among fighting words based on viewpoint so as to punish speakers "based on hostility—or favoritism—towards the underlying message expressed." *Id.* at 386, 112 S. Ct. at 2544. Specifically, the Court explained:

Those who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.

*Id.* at 391, 112 S. Ct. at 2547.

The Supreme Court's subsequent decision in *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536 (2003), concerning another cross-burning proscription, emphasized that the First Amendment does not prohibit all forms of content-based discrimination within a proscribable area of speech. *Id.* at 361, 123 S. Ct. at 1549. Nonetheless, this case provides only slight assistance for university officials who wish to enact a speech code to address the educational problems caused by hate speech. A divided Court clarified that *R.A.V.* specifically states that not all content discrimination would violate the First Amendment. Rather, the Court explained:

When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.

*Id.* at 361–62, 123 S. Ct. at 1549 (citing *R.A.V.* at 388, 112 S. Ct. at 2538).

106. "Campus public forum areas" encompass those areas as interpreted by the Fifth Circuit.

107. *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872–73 (N. D. Tex. 2004).



campus public forum areas because it was not justified by a significant government interest.<sup>108</sup>

Commentators have noted that it would be extremely difficult for a public university to draft a speech code that would survive constitutional scrutiny<sup>109</sup> under current law.<sup>110</sup> Nevertheless, the problem of hate speech persists<sup>111</sup> and universities must find ways to deal with it. A number of approaches have been suggested and attempted.<sup>112</sup> The presence of hate speech and the potential

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108. *Id.* at 873.

109. Kaplin & Lee, *supra* note 28, at 513 states this directly: "The three campus cases [*Doe*, *UWM Post*, and *Iota Xi*] combined with *R.A.V.*, make clear the exceeding difficulty public institutions face in attempting to promulgate hate speech regulations that would survive First Amendment scrutiny." Professor Farber comes to the same conclusion, but does not express it quite so directly:

[T]he Court has narrowly defined the situations in which hate speech may be regulated . . . [E]ven where offensive speech is subject to regulation, the Court has made it difficult to single out racist statements for special treatment . . . The Supreme Court has left only very limited room for the government to protect individuals from exposure to assaultive speech.

Farber, *supra* note 43, at 103. "The overbreadth theory may make it nearly impossible to write a campus speech code that would survive a constitutional challenge." Rabe, *supra* note 98, at 212 (2003).

110. Kaplin & Lee, *supra* note 28, and Farber's, *supra* note 43, works predate the Court's decision in *Virginia v. Black*, 538 U.S. 348, 123 S. Ct. 1536 (2003). Nevertheless, these authors would likely come to a similar conclusion after that case, namely, that it remains difficult for a university to apply a speech code targeted at animus based on race or other minority characteristics on a campus-wide basis. The outcome of the recent case, *Roberts*, 346 F. Supp. 2d 853, supports this author's conclusion, but would allow application of a speech code in the non-public and limited public fora of the university.

111. Professor Olivas describes a survey analyzing over 150 university policies and notes:

Although some campuses have reacted relatively swiftly to promulgate racial harassment policies, there are still many institutions that have [none] and no apparent plans to initiate them . . . [Some decided against a code] either for fear of conceding the possibility of racial unrest or of not wanting to appear that they were violating the first amendment; most cited the University of Michigan or University of Wisconsin cases as evidence of how a code would be treated in their legal situation.

Olivas, *supra* note 38, at 581-82.

112. See William A. Kaplin, *A Proposed Process for Managing the First Amendment Aspects of Campus Hate Speech*, 63 J. of Higher Ed. 517 (1992) (discussing non-regulatory and regulatory approaches to hate speech and processes for reaching policy decisions). The date of the article and subsequent legal developments should be taken into consideration by those wishing to adopt or adapt it. Professors Smolla and Farber also suggest a combination of means

impact, if any, of campus speech zones on the problem of hate speech needs to be examined as a university considers whether or not to utilize campus speech zones.

*D. The Post 9/11/01 University; the War on Terrorism*

The war on terrorism, issues of homeland security, the Patriot Act,<sup>113</sup> and subsequent enactments have become important current concerns for universities. In deciding whether to utilize designated zones, a university needs to consider the interrelationship among these important considerations and campus speech zones.

To a casual observer strolling through an American campus, things may seem much the same as before 9/11, but changes have occurred.<sup>114</sup> One author notes: “[U]niversities have had to evaluate whether their campuses are security risks,”<sup>115</sup> and the “[Patriot] Act has changed their relationship with law enforcement agencies, especially with the FBI.”<sup>116</sup>

The Patriot Act, “passed quickly in the wake of 9/11, was not directed specifically at colleges.<sup>117</sup> Rather, it is a 132-page compilation of amendments to existing laws, some new provisions, and extremely complicated explanations. Few academics were familiar with all of its provisions when they were being

to deal with hate speech. Smolla, *supra* note 29, at 224; Farber, *supra* note 43, at 114–17.

113. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001, Pub.L. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S.C.). Signed by President Bush October 26, 2004, the Act was “motivated by a desire to address two fundamental concerns: first, that law enforcement lacked adequate tools to gather intelligence regarding terrorism; and second, that various branches of government were not effectively communicating with one another.” Nancy Tribbensee, *Privacy and Security in Higher Education Computing Environments After the USA Patriot Act*, 30 J.C. & U.L. 337, 338 (2004).

114. Scott Jaschik, *Homeland Security and the American Campus*, 23 Ass’n of Governing Boards, Priorities, Spring, 2004, at 1.

115. *Id.*

116. *Id.*

117. Although the Patriot Act was not specifically directed at universities, commentators have pointed out that immediately following 9/11 the possibility of links between terrorists and universities was mentioned. Tribbensee, *supra* note 113, at 341.

debated.”<sup>118</sup> This Act, together with several other “federal laws and policies [has] brought detailed and prescriptive requirements into research laboratories, student life, admissions and counseling offices, international scholars’ and students’ offices, sponsored research offices, and basic contracts and administrative processes of colleges and universities across the United States.”<sup>119</sup> Not surprisingly, reactions to the Act have been strong and varied.<sup>120</sup>

The Patriot Act’s measures that expand federal law enforcement agencies’ powers with respect to criminal investigations, its amendments to FERPA,<sup>121</sup> and its provisions for protection of and government access to information stored on computer systems and networks have great potential implications with respect to free speech at public universities.<sup>122</sup> Some of these provisions also have implications, although mostly indirect, for campus speech zones.<sup>123</sup> This article will treat the Patriot Act’s amendments to laws giving the federal government greater access to conduct surveillance on computing environments<sup>124</sup> and to make

118. Jaschik, *supra* note 114, at 3.

119. Jamie Lewis Keith, *The War on Terrorism Affects the Academy: Principal Post-September 11, 2001 Federal Anti-Terrorism Statutes, Regulations and Policies that Apply to Colleges and Universities*, 30 J.C. & U.L. 239, 239 (2004).

120. “The provisions of the Act that were drafted to address these issues have raised concerns about the implications for civil liberties for U.S. citizens and those lawfully present in the United States.” Tribbensee, *supra* note 113, at 338. See, e.g., Michael A. Olivas, *The War on Terrorism Touches the Ivory Tower—Colleges and Universities after September 11: An Introduction*, 30 J.C. & U.L. 233 (2004).

121. The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (2000) and its regulations at 34 C.F.R. pt. 99, commonly referred to in education circles as “FERPA.”

122. The Patriot Act and related legislation also impact university life in a number of other ways less likely to be connected with free speech issues or the question of whether a particular university should keep or eliminate its campus speech zones. E.g., Olivas, *supra* note 120, at 237; Keith, *supra* note 119, at 244–45 (scientific research); Cynthia J. LaRose, *International Money Laundering Abatement and Anti-Terrorism Financing Act of 2001*, 30 J.C. & U.L. 417 (2004) (university business and financial operation, credit unions, student loan, and financial aid operations).

123. A greater direct impact on free speech and campus speech zones arises from the possibility, however imminent or remote, of terrorist, domestic or foreign, attacks on university campuses, the concern of students, parents, and employees as to such attacks, and the nationalism and direct or subtle repression of dissenting opinions that tend to arise in wartime.

124. See Tribbensee, *supra* note 113, at 338.

demands on university libraries, a hot topic in academe,<sup>125</sup> as part of the Act's overall expansion of law enforcement authority and ability to "investigate federal crimes and to obtain information relevant to foreign intelligence and to enhance federal law enforcement's ability to share information obtained in federal law enforcement and intelligence investigations."<sup>126</sup> The Patriot Act amendments to FERPA<sup>127</sup> also fall within the scope of the Patriot Act's investigative plan. This article mentions FERPA separately because it is unique to the educational setting and familiar to most educators. Jaschik's article for the Association of Governing Boards explained some of the other ways in which the Patriot Act's investigatory provisions impact higher education:

- Organizations are required to share "business records" of people being investigated by federal authorities for possible terrorism links . . . . [This is where library records come in].
- Federal agents are allowed to obtain stored Voicemail . . . .
- Internet service providers (likely including colleges) are required to turn over to federal agents who show a subpoena extensive information about subscribers' usage of electronic communications.<sup>128</sup>
- Federal agents also are permitted to set up tools to intercept and collect Internet traffic and to track data or other information sent online.
- American groups are banned from providing assistance to any group deemed to be a terrorist group. (While on its face this may not seem controversial, some

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125. See generally Lee S. Strickland et al., *Patriot in the Library: Management Approaches When Demands for Information are Received from Law Enforcement and Intelligence Agents*, 30 J.C. & U.L 363 (2004).

126. Keith, *supra* note 119, at 299 (noting the stated purpose of the Patriot Act).

127. The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g.

128. A portion of the Patriot Act dealing with a National Security Letter, in effect an administrative subpoena, sent to an internet access firm was found unconstitutional by a federal district court. *Doe v. Ashcroft*, 344 F. Supp.2d 471 (S.D. N.Y. 2004).

Americans believe that some groups are incorrectly classified as terror groups and that academics should be free to maintain links to them).

- Colleges and other entities in many cases are barred from telling anyone that they have cooperated with federal officials in any of the foregoing situations.<sup>129</sup>

In general, FERPA<sup>130</sup> requires that a university provide notice to the student before it discloses certain individually identifiable records of a student that are maintained by the institution.<sup>131</sup> These records are defined as “education records.”<sup>132</sup> The Patriot Act amends FERPA by adding a new subsection to permit certain disclosures of education records without the prior written consent of the student, notwithstanding FERPA’s general prohibition against such disclosures or any applicable provisions of state law.<sup>133</sup> Under this new subsection, “[a] school probably is prohibited from giving notice [to the student] if a court issuing a [court order under the new subsection] orders that no notice be given.”<sup>134</sup>

Jaschik’s article states, “Many times, the federal authorities mentioned in the Patriot Act are FBI agents. And the FBI is stepping up work with campus law-enforcement agents . . . .”<sup>135</sup> Moreover, despite the skepticism<sup>136</sup> of many academics toward the FBI’s role on campus,

Post-9/11, many colleges and universities have created “FBI liaisons” who work with local bureau officials and keep them posted on events on campus that may pose security risks. These liaisons in turn receive FBI alerts about risks and advice about measures campuses might take

129. Jaschik, *supra* note 114, at 3 (footnotes added).

130. The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g.

131. Prior to enactment of the Patriot Act, FERPA contained some exceptions to non-disclosure.

132. 20 U.S.C. §§ 1232g (a)(4)(A), (B).

133. State statutes may also provide for non-disclosure of student records.

134. Keith, *supra* note 119, at 297.

135. Jaschik, *supra* note 114, at 5.

136. In addition to skepticism, Jaschik notes academics have even been hostile toward the FBI’s role on campus. *Id.* at 7.

to protect themselves.<sup>137</sup> Campuses with FBI liaison offices insist that they do not report on people just because they criticize the U.S. government and that the FBI does not request information about such criticism. But concern remains among many civil libertarians about the effect of these liaisons. One key difference among [institutions]—in addition to whether they have liaison positions—is the degree to which the institution cooperates with the bureau.<sup>138</sup>

Aside from controversy surrounding either the Patriot Act or the increased presence of law enforcement on campus, universities in the United States need to be concerned with respect to the war on terrorism. It adds a new dimension to campus security. No longer are universities concerned only with premises safety or general crime issues.<sup>139</sup> A university would make an appealing soft target for a terrorist attack. Such an attack would strike directly at persons and values Americans dearly cherish—their children and education.<sup>140</sup> A knapsack left behind<sup>141</sup> can pose a security risk that “isn’t just theoretical: Terrorists used such an

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137. Could these “measures campuses might take to protect themselves” include those utilized at the 2004 Democratic and Republican National Conventions or at other National Security Special Events (NSSEs)?

138. Jaschik, *supra* note 114, at 7 (footnotes added).

139. For example, in the past, universities’ concerns were more likely centered upon matters such as alcohol abuse at student functions, fraternity hazing, poorly lit parking lots, slippery pavement, broken locks on doors, and the presence of persons with violent tendencies on campus.

140. While security has long been a part of national leaders’ appearances on campuses, it has taken on new dimensions post 9/11. Among such measures taken for the Presidential Candidates’ Debate, September 30, 2004, at the University of Miami, Coral Gables, Florida, students were told to treat the entire campus as if it were an airport terminal—no unattended bags were allowed, access to certain areas was denied, etc. For several days, all University employees and students were required to wear their campus identification cards at all times when on the campus. On the day of the debate, only students and employees wearing identification were allowed on campus; no guests or visitors of any sort were permitted. No vendors, delivery persons, or business invitees were allowed. Mail delivery was reduced and non-existent near the debate site. Parking lots were closed; any remaining cars were towed. Roads adjacent to the debate site were closed, and the county’s light rail system was shut down in the vicinity of the campus. A contribution of \$1,000,000 from Florida’s Tribe of Miccosoukkee Indians helped cover costs associated with the debate.

141. Such was the case in the bombing at the 1996 Olympics in Atlanta, Georgia.

approach in a deadly attack in 2002 at Hebrew University of Jerusalem. And knapsacks were used in the [2004] bombings in Madrid.”<sup>142</sup> In addition to international terrorists, university administrators must also keep in mind threats from domestic sources such as those opposing the university’s research agenda. Currently, university administrators need to evaluate their specific campus’ vulnerabilities. As Jaschik poses the question, “How literally is someone going to want to target the University of ‘Fill in the Blank?’”<sup>143</sup> In reaching its decision with respect to campus speech zones, a university must consider whether use of campus speech zones for group demonstrations and speech activities increases the risks or facilitates safety and security measures.

### *E. The Litigious Climate*

In the not too distant past, universities seemed almost immune<sup>144</sup> from litigation.<sup>145</sup> Whether due to the then-prevailing doctrine of *in loco parentis*<sup>146</sup> or to a widely-held perception that universities were the institutional equivalent of motherhood and apple pie, little litigation was instituted against universities. Today, the situation is very different. Universities are considered deep pockets and lawsuits against universities are commonplace.<sup>147</sup> Higher education law has become a growth industry.<sup>148</sup> Students sue over grades, academic or disciplinary dismissal, curricular changes such as the elimination of programs, personal injuries, campus safety and security issues, the institution’s admissions practices, intercollegiate athletics, the awarding of scholarships, issues

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142. Jaschik, *supra* note 114, at 2.

143. *Id.* (quoting Susan Riseling, Chief of Police at the University of Wisconsin-Madison).

144. The word “immune” is used in the layman’s sense, although immunity in the legal sense formerly played a central role in the legal status of universities.

145. See Peter H. Ruger, *The Practice and Profession of Higher Education Law*, 27 *Stetson L. Rev.* 175 (1997). He notes that “Until the early 1960s, the legal needs of colleges and universities were limited.” *Id.* at 176. In short, he concludes, “litigation was rare.” *Id.* at 177. Ruger goes on to support his contention by comparing the increase in the number of pages devoted to the topic “colleges and universities” in legal digests, such as the Decennial Digests in recent years. *Id.*

146. See *supra* Part III.A.

147. *Legal Issues in the Community College: New Directions for Community Colleges 1* (Robert C. Cloud ed., Jossey-Bass 2004).

148. Ruger, *supra* note 145, at 177.

relating to discrimination, sexual harassment, and extra-curricular activities, to name just a few.<sup>149</sup> Employees<sup>150</sup> sue with respect to a myriad of academic or employment issues ranging from hiring practices, promotion practices, discrimination issues, unfair labor practices, reductions in force and academic freedom, to safety and security.<sup>151</sup> Vendors sue with respect to the institution's purchasing practices and contracts.<sup>152</sup> Visitors sue over slips and falls, premises safety, and accessibility issues. Towns dispute with universities about infrastructure, the payment of ad valorem taxes, and concurrency and safety issues. In short, today it seems the public university is confronted with as many disputes and as much litigation as businesses and governmental entities in general.<sup>153</sup>

As a result, risk management has become an important aspect of higher education administration.<sup>154</sup> On the positive side, litigation has made universities more cognizant of and willing to address important issues. Examples include campus safety, halting discriminatory practices in the workplace, and complying with the access requirements of the Americans with Disabilities Act.<sup>155</sup> On the negative side, college administrators, who are not typically attorneys, may hesitate to take action out of confusion as to their legal obligations or out of fear that they may expose their institution to liability.<sup>156</sup>

With respect to campus speech issues, an article in *Trusteeship* magazine reflected the quandary of many university administrators:

September 2003 was an especially turbulent month for speech on the American college campus . . . . For example, the University of Hawaii was successfully sued in state court by a basketball fan who, at a game several years ago,

149. In addition, student freedom of speech litigation is prevalent.

150. With respect to hiring practices, this also includes applicants for employment.

151. See generally, Ruger, *supra* note 145.

152. See, e.g., *Silver Express Co. v. Miami-Dade Community College*, 691 So.2d 1099 (Fla. 3d Dist. Ct. App. 1997).

153. This is but one aspect of the increase in legalization on campus. See Olivas, *supra* note 38, at 571. There have been no "large-scale studies of the effect of legalization" on higher education—institutional capacity to implement legal change and how interests of the institution and policy change are balanced." He suggests a "preliminary framework for measuring the effect of legal changes upon colleges." *Id.*

154. Legal Issues, *supra* note 147, at 1.

155. Bickel & Lake, *supra* note 27, at 5.

156. *Id.* at 7.



had been offended when the team's student manager uttered audible racial slurs . . . . In Pennsylvania, a federal judge ruled that Shippensburg State University could not invoke certain student-conduct policies directed against "acts of intolerance." The court treated such provisions in the student handbook as a restrictive "speech code," . . . . [T]he judge found that these policies (which he conceded to be "well intentioned") violated the free-speech rights of several Shippensburg students. That same month, California Polytechnic University-San Luis Obispo was taken to court under the First Amendment for targeting a white student because he had posted a flier outside the campus multicultural center that many minority students found deeply offensive.<sup>157</sup>

The article continues by stating, "[t]he lessons learned from these concurrent legal events are at best confusing and at worst bewildering."<sup>158</sup> While the distinctions among these situations may be logical to college attorneys, laymen understandably may find the seemingly conflicting outcomes, all relating to discriminatory expression of students, quite baffling.

#### *F. The Public University and its Relationship with Students*

In the decades since the fall of *in loco parentis*, the relationship between a university and its students and the attitudes and expectations of students themselves have shifted significantly.

As the twentieth century ended and the twenty-first century has begun, higher education is no longer solely a privilege of the elite, but has become widely accessible and nearly a necessity for the futures of most young adults.<sup>159</sup> The United States' community colleges, in particular, have done much to make higher education accessible.<sup>160</sup> Despite its accessibility, the cost of higher education is a burden to scores of students.<sup>161</sup> Many students must work while attending school to pay for college; a significant number

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157. O'Neil, *supra* note 15, at 1.

158. *Id.* at 2.

159. Levine & Cureton, *supra* note 83, at 154–55. Many undergraduates now view a master's degree, rather than a bachelor's degree, as the entry credential for professional jobs. *Id.*

160. John E. Roueche and George E. Baker, III, *Access & Excellence: The Open Door College* 3–4 (1987).

161. Peter Schmidt, *Paying the Price for Tuition Increases*, *Chron. of Higher Educ.*, Sept. 10, 2004, at A20.

must work full-time.<sup>162</sup> With student populations more closely resembling society in general, the problems of society have come to campus.<sup>163</sup>

Levine and Cureton's work<sup>164</sup> reveals that many undergraduates come to campus with grave concerns about the economy, their futures, their families, and their prospects for a lasting, satisfying marriage. They fear the toll that environmental damage has taken on the world and dread environmental catastrophe. They are concerned about political upheaval throughout the world, fear wars and terrorism,<sup>165</sup> and believe, with a certain amount of resentment, that they must now solve grave problems created by prior generations.<sup>166</sup> They have lost faith in politicians, in government, and in traditional social institutions, including the university. Students follow the doctrine of *caveat emptor* with respect to the university.<sup>167</sup> A student attitude of consumerism prevails, insisting upon convenience and eschewing unnecessary frills.<sup>168</sup> Given many students' concerns about their financial futures and a prevailing belief among students that they must be financially well-off in order to achieve their goals,<sup>169</sup> it is not surprising that many students are career-oriented and dismiss the idea of learning for learning's sake.<sup>170</sup>

162. Levine & Cureton, *supra* note 83, at 118 (sixty percent part-time and twenty-four percent full-time).

163. *Id.* at 94–96 (describing psychological problems, financial problems related to job lay-offs and economic downturns, family problems, etc.).

164. *Id.* at 94.

165. *Id.* at 141–42. The research was completed and published pre-9/11/01. That event and wars in Afghanistan and Iraq have likely exacerbated their concerns. *Id.* It is possible that recent natural disasters, such as the Tsunami in Southeast Asia in December, 2004, Hurricane Katrina's devastation of the Gulf Coast in August, 2005, and the severe earthquake in Pakistan and neighboring countries of October, 2005, have added to the level of concern.

166. *Id.* at 35–36.

167. *Id.* at 52.

168. *Id.* at 50.

169. And also because they now view college as a necessity for employment.

170. *Id.* at 49. According to Jaroslav Pelikan, learning for learning's sake and esteem for a "liberal education" was, in the mid-1800s, central to the essence of the university described by John Henry Newman. Pelikan, *The Idea of the University—A Reexamination* 7 (Yale University Press 1992). The emphasis on higher education as career preparation has been prevalent since the late 1970s. Levine and Cureton note that as of the late 1990s, the pendulum may have swung to its extreme and might be reversing based on an increase in

According to Levine and Cureton, as of the late 1990s, students say they have little time for fun. Jobs consume a considerable amount of time. As for fun, students report that sleeping, studying, and drinking<sup>171</sup> are popular activities. Socially, undergraduates seem to be loners, more socially isolated from one another than previous generations of students.<sup>172</sup> More students also tend to live and socialize off campus.<sup>173</sup> Co-curricular organizations tend to be smaller and focused on narrowly defined interests. Organizations and support groups based on career interests, gender, race, ethnicity, religion, and sexual preference are popular.<sup>174</sup> Furthermore, these groups tend to subdivide into smaller and smaller special interest or niche entities, resulting in less interaction among persons of different backgrounds.

As one might surmise from the above discussion of hate speech, Levine and Cureton report that multiculturalism and issues of race, gender, and ethnicity were sources of tension and concern for undergraduates in the late 1990s. Students hesitated to talk to researchers about the topic and felt unsure of how to deal with the issues.<sup>175</sup> Levine and Cureton found that campuses tended to become voluntarily segregated in terms of gathering places and activities, and that students seemed to be especially sensitive, with emotions easily aroused on topics of race, gender, ethnicity, inequality, and victimization.<sup>176</sup>

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the percentage of students seeking liberal arts majors. Levine & Cureton, *supra* note 83, at 122.

171. Levine and Cureton report an increase in binge drinking. Levine & Cureton, *supra* note 83, at 106. Bickel and Lake note alcohol abuse as a major factor in student injuries and death. Bickel & Lake, *supra* note 27, at 50. Alcohol abuse has been of concern at meetings of the National Association of College and University Attorneys (NACUA).

172. Levine and Cureton report that individual activities are more popular than team sports and that traditional dating is greatly reduced. Students go out in groups. Levine & Cureton, *supra* note 83, at 100. Levine and Cureton surmise that, having seen so many failed adult relationships, undergraduates are reluctant to form intimate relationships. Nevertheless, sexual activity continues, although frequently without intimate emotional relationships and despite concern about AIDS.

173. Levine & Cureton, *supra* note 83, at 102.

174. *Id.*

175. *Id.* at 72–74. These findings correlate positively with the observations of commentators writing on hate speech issues.

176. *Id.* at 74–78.

At the close of the twentieth century, almost one-half of the nation's undergraduates are non-traditional students who are older; many attend school part-time, live off-campus, and have jobs and families. For many, their university experience is merely one of the activities in which they engage, and not necessarily their central activity.<sup>177</sup>

Despite these seemingly discouraging findings, Levine and Cureton saw cause for optimism in undergraduates of the mid-to-late 1990s as compared to other generations of students since the late 1970s. This generation of students is optimistic about their personal futures. More importantly, rather than hiding from the problems and issues of our times, this generation intends and expects to do something to resolve them. With respect to almost any complicated issue, they recognize that there are no quick, easy answers.<sup>178</sup> They are practical and committed. Volunteer community service is widespread and valued among undergraduates, even those who work full-time. Because of their practicality, the focus of both community service and activism tends to be local. Levine and Cureton report that student activism at the close of the twentieth century is at approximately the same level as in 1969, the previous high. The issues generating campus activism in the mid-to-late 1990s, however, tend to be local concerns such as the cost of higher education, faculty-related issues, and the interests of specific affinity groups on campus.<sup>179</sup>

The generalized portrait of today's undergraduates by Levine and Cureton has many points in common with the description of student life contained in the work of Professors Bickel and Lake on student safety and campus security.<sup>180</sup>

#### IV. ANALYSIS

Part I, proposed a two step analytic model for examining campus speech zones, and stated that this article will take on the

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177. *Id.* at 49.

178. *Id.* at 36.

179. *Id.* at 64.

180. Bickel and Lake cite the work of Levine and Cureton and draw upon it. Bickel and Lake seek a model to replace *in loco parentis* specifically to address the torts issues of campus security and student safety. Bickel & Lake, *supra* note 27. They develop the image and analytic model of the facilitator university for that narrow purpose. Although outside the scope of this article, the facilitator university model might be expanded and adapted beyond the narrow purpose for which Bickel and Lake designed it in order to address and analyze other university, student, and community issues.

challenge of probing the essential policy question that is presented at step one. That question, whether or not a university should utilize campus speech zones, and if so, how, is fundamental. Yet, it has been largely ignored while scholarly literature focuses on First Amendment constitutional analysis.<sup>181</sup>

Part II, proposed that the analytic framework for examining step one's fundamental question is a comprehensive, contextual analysis.<sup>182</sup> The high-profile problems described in Part III and the ordinary day-to-day activities<sup>183</sup> undertaken by administrators, faculty, staff, and students at the university play out against and within, sometimes achieving and sometimes threatening, the underlying nature of the university. These factors, together with the underlying character and purpose of the university, and the ongoing dynamic among them, constitute the analytic framework for examining the essential step one question. While it would be helpful if there were a descriptive and prescriptive model that

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181. When first considering the issue of campus speech zones for this article, I initially thought that they were relics of the past, unnecessary impediments that should be eliminated because of the primacy of the First Amendment and the crucial role of full and free debate in higher education. At that time, I felt that if appropriate regulations prohibiting disruptions were adopted, any problems could be remedied by after-the-fact disciplinary measures on disruption rather than via the before-the-fact limitation of speech zones. Shortly thereafter, I read Thomas J. Davis' student note, which, to date, is the only article that I have found that is specifically on the issue of campus speech zones. See Davis, *supra* note 32. Mr. Davis argues that campus speech zones, "are a terrible idea." *Id.* at 297. He proposes "reasonable time, place and manner restrictions on disruptive activities, while allowing peaceful, non-disruptive students the right [to engage in free expression activities without place limitations]." *Id.* at 270. I reinterpreted Mr. Davis' solution to be much like my own initial reaction. However, Mr. Davis' article, as well as my reinterpretation of it, looks at the question from only the limited perspective of the First Amendment, particularly public forum analysis, and fails to look at the question of campus speech zones in its entirety. Given the importance of what is at stake, I soon rejected that limited approach and realized that the question deserved comprehensive analysis.

182. See *supra* Part II for a complete description of the two-step process and an introduction to the analytic framework for analyzing step one.

183. Certain on-going systemic problems plaguing public higher education in the United States, such as inadequate public funding, students' tuition costs rising at a rate greater than inflation, and lack of student readiness for college-level study, have continued for so long that now coping with them is a routine day-to-day activity for higher education faculties and administrators. The problems are nonetheless serious and require answers.

could be used along with the analytic framework, no enduring and complete model has been developed to replace *in loco parentis*.

Universities are complex institutions unlike any other in American society. Public universities are governmental entities subject to the requirements of law applicable to governments.<sup>184</sup> Universities are businesses whose products are services.<sup>185</sup> They are premises owners for tort purposes and landowners for property law purposes, and if they are residential universities, they are providers of housing. A sub-specialty of law, higher education law, has developed to meet universities' distinctive needs.<sup>186</sup> In short, while universities share certain characteristics with a variety of institutions, above all, they are "universities" with a combination of characteristics unique unto themselves. Although universities share many characteristics with one another, each university is unique and changes over time. Each university and the various schools within the university have a unique mission that differentiates it from all others. Each student body and every faculty and staff is different from all others. The location, geography and facilities of each university is unique, along with its relationships with the community in which it is located, with its alumni, donors, the state legislature that provides funding, with grant funding organizations, with industry and with the media. There are different funding formulas among public universities and each university has its own individual hot topics and reactions to nationwide and worldwide concerns. Accordingly, there is no single, definitive, one-size-fits-all answer to the underlying policy question<sup>187</sup> essential to step one of the process proposed.

This article undertakes a thorough contextual analysis on a general basis, rather than an institutional level, to offer guidance that may prove useful to specific institutions as they undertake their own analysis of the question. The process of answering the step one question is crucial. Upon completing step one, a university will know definitively whether it should establish,

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184. Technically, some may be state agencies while others may be political subdivisions of the state, or public bodies corporate.

185. However, students are more than consumers. They are more than frequent customers during their studies. It is here, in particular, that the business model fails to reflect the essence of the university and therefore fails as a descriptive and prescriptive model. University students are participants in a reciprocal experience of development with their institution, their faculty, and their fellow students.

186. Ruger, *supra* note 145.

187. Whether a particular university should utilize campus speech zones, and if so, how?

continue, modify, or discontinue campus speech zones. It will have had the opportunity to detect and eliminate any improper motives that might have otherwise driven its decision-making. The university will know its true purposes for utilizing campus speech zones and can evaluate whether these goals constitute important government interests for constitutional purposes.

It is essential that each university's decision on campus speech zones be consonant with the purpose, role, and character of universities in society. Despite their predominant focus on First Amendment concerns in deciding student speech issues, court opinions refer to universities as the "marketplace of ideas,"<sup>188</sup> a commonly held view. Scholarly examination of the university magnifies the importance of this point and shows that, if anything, the courts' phrase is an understatement. Thus, the issue of campus speech zones, which directly implicates the university's role with respect to inquiry, expression, academic freedom, and consideration of ideas, demands deep philosophical consideration of the "idea of the university,"<sup>189</sup> its history, its current character and role in human society, where the "idea of the university" should be going in the future, and how the decisions to be made will shape that future.

A number of scholars have examined the nature of the university and tried to describe and define it. Jaroslav Pelikan's book, "The Idea of the University—A Reexamination,"<sup>190</sup> has particularly influenced this analysis. Pelikan's book engages in a thoughtful, scholarly, and thorough examination of the character and aims of the university.<sup>192</sup> Pelikan concludes, *inter alia*, that the university is a key institution in society and has a pivotal role in shaping mankind's future.<sup>193</sup> Based on Pelikan's book as a whole, as well as distinct points made in his various discourses, one reaches the inescapable conclusion that open inquiry, dialogue,

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188. See, e.g., *Healy v. James*, 408 U.S. 169, 180, 92 S. Ct. 2338, 2346 (1972).

189. This phrase is derived from the respective works of John Henry Newman, *supra* note 170, and Jaroslav Pelikan, *supra* note 170.

190. Pelikan, *supra* note 170.

192. Pelikan engages in an ongoing discourse with the earlier book of John Henry Newman, written in the mid-1800s, from which Pelikan derived the title for his book. See *id.* Pelikan engages in eighteen discourses, each examining another facet of the idea of the university. Each of Pelikan's titles is derived from an idea discussed in Newman's text. See *id.*

193. According to Pelikan, Newman reached a similar conclusion in his own era. See *id.* at 137.

and dialectic are at the very heart of the university. This factor is critical to decision-making with respect to campus speech zones.

Pelikan examines the variety of roles and purposes which combine to form the idea of the university. He asserts that the business, and therefore the definition of the university, should include:

advancement of knowledge through research; extension of knowledge through undergraduate and graduate teaching; training that involves both knowledge and professional skill in the professional programs or schools of the university; preservation of knowledge in libraries, galleries, and museums; and diffusion of knowledge through scholarly publication.<sup>194</sup>

All require absolute freedom of thought, inquiry, and expression. Pelikan notes also that the university is the fulcrum for the interaction of research among: the university where basic research is a mission of the institution for faculty of arts and sciences, and applied research is an important function of the professional schools; and, the research enterprises of private industry, individual governments, and international agencies.<sup>195</sup> These efforts play critical roles in fighting worldwide hunger, disease,<sup>196</sup> and other problems. They too require freedom of thought, inquiry, and expression.<sup>197</sup>

The university also has a role in promoting international understanding.<sup>198</sup> Intellectual exchanges among scholars through their writings, collaborations, and symposia provide a dialectic that can investigate problems, seek solutions, and accommodate both harmony and disagreement without war. Moreover, universities

194. *Id.* at 76. This description is in accord with other scholars, e.g., Olivas, *supra* note 38.

195. Pelikan, *supra* note 170, at 17. Commentators have warned against the "corporatization" of the university. They caution that if universities assume too much of an entrepreneurial focus as to the research, scholarship and teaching they support, and adopt a corporate business model of decision-making, the university is at risk of abandoning certain aspects of its role that are critical to mankind. A lack of adequate public funding for public higher education is largely, but not solely, to blame.

196. *Id.* at 17-19.

197. The freedom should be limited to protect trade secrets developed for profit. See *supra* text accompanying note 195. Ownership of intellectual property developed by faculty is discussed, *inter alia*, in Olivas, *supra* note 38.

198. Pelikan, *supra* note 170, at 16 ("the university as the primary staging area for peace through international understanding . . .").



are fora for generating economic development, both following and instead of war. Following almost every international conflict, "postwar planners have looked to cooperation between universities across national boundaries for healing the wounds of the past and for helping to prevent war in the future."<sup>199</sup> The presence of international scholars and students for research, teaching, and study at universities is critical to producing understanding. Dialogue based on freedom of thought, inquiry, and expression is an important ingredient of the extremely valuable university function of airing, probing, examining, and discussing opposing views without resorting to war, and of the healing process following war.

The university also plays a pivotal role in change. During periods of "revolutionary social change . . . the university . . . is at one and the same time [both] a seedbed of revolution and an object of attack by the revolution," as a pillar of the Establishment.<sup>200</sup> Pelikan points out, nevertheless, that, "all over the world the university has become an agent of social change and of violent protest against the Establishment."<sup>201</sup> In order to make his point, Pelikan notes the role played by universities during the French Revolution and in the development of Marxism.<sup>202</sup> Pelikan further reminds us that, "[t]he Reformation of the sixteenth century . . . began in the university, and its chief protagonist was a university professor[,] Martin Luther."<sup>203</sup>

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199. *Id.* at 16.

200. *Id.* at 157.

201. *Id.* at 158. Pelikan notes that, at times, the universities can be ambivalent about their position regarding radical social change. Perhaps the university's position as a "pillar" of the Establishment explains universities' attitude of resistance when faced with students (some of whom have been inspired to action by virtue of their university experience) who want to express themselves on radical social change. For example, consider the reaction of many American universities to students' desires to demonstrate against segregation or the Vietnam war. Bickel and Lake note that it was the students' desires versus the universities' abusive overreaction that brought about the demise of *in loco parentis*. Bickel & Lake, *supra* note 27, at 104.

202. Pelikan, *supra* note 170, at 157-59.

203. *Id.* at 13. Pelikan says that the university is in crisis, at the time of his writing in 1992 (incidentally, near the height of furor over hate speech, speech codes, and political correctness) and at many times in the past. He notes, "[h]istorically, the larger issues of at least some centuries have in fact been directly brought on by a crisis in the university, and have in turn gone on to precipitate such a crisis." *Id.* He points to the Reformation as an example. *Id.*

Change does not come about by a university itself demanding change, but rather because new ideas can be examined, flourished, and inspired in the university environment. It has been observed that “an exposure, usually at the university, to [scholarship on revolutions and their history] . . . has stimulated . . . [future social activists] both to reflection and to eventual action to change society, presumably for the better.”<sup>204</sup> Pelikan inquires as to what part institutions of higher learning, which produce the leaders of revolutions, should play in the process of revolutionary social change.<sup>205</sup> His response to this question is unequivocal. The study of revolutionary social change and the lessons about social change to be derived from the history of revolution is the business of university professors.<sup>206</sup> “But those lessons, whatever they may be, will come . . . from the kind of care in research and freedom in interpretation that only the university is able to provide on a continuing basis.”<sup>207</sup> Pelikan adds:

The university’s responsibility in relation to the spread of revolutionary doctrines is dialectical: to provide intellectual and philosophical nurture for the moral outrage and social idealism of its students, by exposing them to a wide range of serious reflection . . . and by aiding them to develop rational methods of analysis for relating such reflection to social and political reality[.] [B]ut, at the same time [the university must] provide them with the instrumentalities by which reason can continue to stand guard through moderating the visions and expectations of unthinking revolutionaries, [so that] . . . “the [r]evolution [is] a parent of settlement, and not a nursery of future revolutions.”<sup>208</sup>

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This appears to be in accord with Levine and Cureton’s and Bickel and Lake’s beliefs that the university is in a time of transition.

204. *Id.* at 161.

205. *Id.* at 159.

206. *Id.* at 160.

207. *Id.*

208. *Id.* at 163 (quoting Edmond Burke’s *Reflections on the Revolution in France*). In Chapter 13, a discourse on “Duties to Society,” Pelikan observes, quoting from a speech by the president of the University of Chicago in 1968, that movements for revolutionary social change “tend to reject reason, which is the way of education. They buttress this rejection by replacing reason with personal qualities thought to be more than adequate substitutes.” *Id.* at 139. Thus, presumably, the university is to fill the gap. Pelikan notes that, “[i]n

Pelikan emphasizes that:

[T]he university is rendering a grave disservice to its students when it serves only one pole of this dialectic, either by becoming itself an apologist for an unjust society or even an accomplice in the politics of repression, or by surrendering its scholarly and rational mission by being swept away in the tide of revolutionary doctrine and social change.<sup>209</sup>

Pelikan also provides:

[S]o easily, however, can diagnosis turn into advocacy, and so subtly can a center of research on social change transform itself—or allow itself to be transformed—into a cell for galvanizing a society into action to accomplish such change, that the university urgently needs to find new ways of protecting the freedom of inquiry without allowing itself to become a tool of the polarities of nation, class, and gender that will continue to shape the ideological climate both outside and inside the academy.<sup>210</sup>

Pelikan's position with respect to freedom of thought, inquiry, and expression is obvious: They are essential to the university's role. Not only must thought and expression be free,<sup>211</sup> but the university should not allow itself to become an advocate of one

historical perspective it does seem that it has usually been the more immediate societies of the university that have tended, for obvious reasons, to lay the more demanding claims upon it." *Id.*

209. *Id.* at 163.

210. *Id.* at 160. At professional schools within universities, Pelikan notes:

[T]he dialectic takes the special form of being obliged to train students for membership in the profession as that profession is understood by its practitioners and their accrediting associations, and at the same time of equipping them for critical and innovative participation in the profession. [T]hat dialectic . . . gives the professional school of the university a unique opportunity to make a concrete difference in the profession, and through it in the society.

*Id.* at 165. "As the history of schools of law at various universities demonstrates, the presence on the faculty of scholars and social philosophers with a specific agenda for social change can have a profound and direct influence on the public careers of their students, but also upon the judiciary."

*Id.* at 164.

211. *See supra* text accompanying note 195.

polarity of the dialectic. Pelikan seems also to be saying that while there must be room for passionate expression, scholarly, rational examination of opposing views is critical and ought to take precedence in the role of the university. The former cannot be allowed to squeeze out the latter. To me, this speaks volumes on the subject of campus speech zones.

Pelikan points out that the university has duties to society as well as to the individual student.<sup>212</sup> He identifies three such societies: local,<sup>213</sup> national,<sup>214</sup> and international.<sup>215</sup> Here again, society benefits from the international context of research and publication, and the intellectual invigoration to be gained from the presence of students and senior scholars from other countries.<sup>216</sup> Pelikan observes<sup>217</sup> that the university has duties to its immediate society within the institution, to the local, national and international societies; and to all mankind. The university is involved in a relationship, described as a partnership, with all scholarly disciplines, every virtue, with all perfection, and with all generations—those of the past, those now living, and those yet to be born.<sup>218</sup> The university thus has something of a moral contract

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212. Pelikan, *supra* note 170, at 137–45.

213. The university is not only a source of intellectual cultivation; it is an employer, property-owner, and purchaser of goods and services. *Id.* at 138. The relationship between a university and the local community can be mutually beneficial or not. In times of revolutionary social change, such as the 1960s, local communities sometimes felt that the unrest belonged on campus and was education's problem. *Id.* Some thought that the university was the problem. The relationship between the university and its local community absorbs the time of university administrators. More recently, local communities have tried to use the university (even if a public institution) as a source of tax revenue. *See Tax & Spend: Local Taxation of University Property and Payments in Lieu of Taxation*, NACUA Institute for Law and Higher Education Workshop, *The College and The Community: Cooperation and Conflict*, March 22–24, 2001, Miami, FL (on file with author).

214. For a variety of reasons, the predominant “duties to society” in the research enterprise of universities and in their scholarly publishing have been the “duties of the university to its national society.” Pelikan, *supra* note 170, at 140.

215. *Id.* at 138.

216. *Id.* at 142. Recently, the Patriot Act has complicated and slowed the process by which United States institutions draw foreign nationals. Jaschik, *supra* note 114.

217. Drawing upon the thoughts of others such as Edmund Burke. Pelikan, *supra* note 170, at 139.

218. *Id.* at 139.

with all of society and mankind.<sup>219</sup> Therefore, the university has a responsibility to see that all three societies—local, national and international—“are adequately represented in those whom it teaches and in what it teaches them.”<sup>220</sup> As such, “societies that are less immediately visible, lacking vocal advocacy and political clout, have had to depend for their defense on the university.”<sup>221</sup>

This brings us to another role of the university, one with respect to equality of opportunity. This is particularly relevant to decision-making on campus speech zones. Pelikan points out that it is “essential . . . to be reminded that the university is uniquely ‘the ground of promise in the future,’”<sup>222</sup> for all of the societies served by the university, but especially for those within the societies who have been victims of discrimination and repression. Higher education is a means for them to achieve acceptance as equal members of society and to obtain access to the benefits previously denied to them. The university is seen as the channel of opportunity throughout the world.<sup>223</sup> The trained mind, which is the business of the university, is both an intellectual and a social force in the world, and it has been within the ambit of the university to provide the opportunity to develop intellectual talent regardless of race, class, gender, ethnicity, or beliefs.<sup>224</sup> The concept of opportunity is therefore part of the essential character of the university.<sup>225</sup> Thus, “universit[ies] must exercise a major share of [the] leadership”<sup>226</sup> in assuring that educational opportunities for individuals possessing the necessary intellectual talent

truly become equally available . . . . In so doing, the university must go on striving to eliminate from its own programs of student admissions and faculty appointments as well as from its curriculum the vestiges of discrimination and prejudice against race, class or gender that still remain, and in societies as divergent as those of the United States, South Africa, and Eastern Europe . . . .<sup>227</sup>

219. *Id.*

220. *Id.* at 142.

221. *Id.* at 139.

222. *Id.* at 147 (utilizing the phrase of John Henry Newman, both as the title of Pelikan’s Chapter 14, and as the basis for discussion).

223. *Id.* at 148.

224. *Id.* at 152–53.

225. *Id.* at 148.

226. *Id.* at 152.

227. *Id.*

Historically, today at the beginning of the twenty-first century and beyond, intellectual cultivation remains vital to the character and nature of the university. Intellectual cultivation differentiates the university from the corporate training model of learning. Corporate training teaches students to master those specific skills necessary to perform a particular task. The university, on the other hand, teaches students how to think—how to process, dissect, and evaluate ideas, keeping and building upon those ideas that are worthy and meritorious, while discrediting and discarding those that are not. The university teaches the student how to be a lifelong learner,<sup>228</sup> in addition to providing whatever professional skills might comprise the student's immediate personal goals.<sup>229</sup> Neither the students' development nor the faculty's work can flourish without intellectual cultivation. Intellectual cultivation requires ongoing dialectic which, in turn, requires the critical evaluation of ideas. Whatever the decision of a specific university about campus speech zones, it must honor and support the dialectical nature of the university or risk the very essence of the idea of the university.

A number of conclusions about campus speech zones can be drawn from this analysis of Pelikan's work. Dialogue leading to intellectual cultivation is the lifeblood of the university. Meaningful dialectic is essential to the many roles of the university. It is axiomatic that freedom of thought, inquiry, and expression are indispensable. Without these freedoms, the university would no longer be the university. Freedom of expression does not, however, dictate a cacophony of voices, each trying to out-shout the others. Intellectual cultivation is not typically derived from high volume or hyperbole, but in some instances it might result. Pelikan stresses the need for dialectic and rational methods of analysis.<sup>230</sup> A meaningful, thoughtful exchange of ideas, careful scrutiny, and probing questions are necessary. Moreover, the character and nature of the university are

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228. See, e.g., Mardee S. Jenrette and Vince Napoli, *The Teaching Learning Enterprise: Miami-Dade Community College's Blueprint for Change*, app. A11 at 154. Although community colleges tend to be teaching institutions without the research and publication aspects common to universities, today both types of higher education institutions emphasize preparing their students to be lifelong learners.

229. Levine and Cureton note that these are among the skills that are essential to the higher education of undergraduates at the turn of the millennium. They recommend curricular changes to assist in the development of appropriate skills. See Levine & Cureton, *supra* note 83, chap. 8.

230. See Pelikan, *supra* note 170, chap. 15.

undermined if the university itself becomes an advocate of any of the polarities of ideology. According to Bickel and Lake, a university ought to facilitate an enriching higher education learning experience in a reasonably safe, if not always calm or pleasant, environment for all students.<sup>231</sup> How do the essential characteristics and many roles inherent in the "idea of the university" impact a specific university's decision with respect to speech zones? It seems to me that the university needs to accommodate formal scholarly debate, situations in which the exchange of ideas could be quiet, reasoned and dialectical, or perhaps louder and more impassioned, without disturbing the classroom activities, dormitory life, or business offices of the university, and without rendering impossible more moderated,<sup>232</sup> informal discussion of ideas throughout the campus. While the phrase "freedom of thought, inquiry and expression," standing alone, seems to argue against campus speech zones, an analysis of characteristics essential for meaningful dialectic seems to open the door for campus speech zones. In fact, the purpose of the university as elucidated by Pelikan would seem to argue in favor of carefully crafted campus speech zones that would facilitate impassioned expression, vigorous debate, informal discussion of ideas, and quiet contemplation on campus.

Just as freedom of thought, inquiry, and expression, and the importance of open dialogue and dialectic, lie at the heart of the idea of the university, equality of opportunity lies there as well. "The concept of opportunity is therefore essential to the definition of the idea of the university."<sup>233</sup> It is clear both in the university's "duties to society"<sup>234</sup> and its position as a "ground of promise [for] the future"<sup>235</sup> that higher education for all students of academic ability is a means for those persons and groups within society who are victims of discrimination and exclusion to achieve access to the social and economic benefits enjoyed by the majority. Universities are to assume a position of leadership in this area. This being the case, it is easy to understand why the issues of hate speech and university speech codes are controversial in higher education.<sup>236</sup> Simply put, the conflict exists because the role of the university is

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231. Bickel & Lake, *supra* note 27, at 203.

232. In volume and number of participants.

233. Pelikan, *supra* note 170, at 148.

234. Title of Pelikan's chapter 13. *Id.*

235. Title of Pelikan's chapter 14. *Id.*

236. See discussion *supra* Part III.

in conflict on this point,<sup>237</sup> just as, according to some commentators, the First and Fourteenth Amendments to the United States Constitution<sup>238</sup> are in conflict on this point.<sup>239</sup> If vile expressions of hatred impair equal access to educational opportunity by members of the targeted group, does this not undermine both the constitutional ideal and the equality of opportunity inherent in the idea of the university? But, if abhorrent ideas cannot be expressed, how can they be subjected to dialectic rigor so that they can be debated and their falsity illuminated? Do campus speech zones have any relevance at all to this vexing problem? If so, would they exacerbate or ameliorate the problem? Campus speech codes have not proved to be a viable means of coping with hate speech<sup>240</sup> in the United States.<sup>241</sup> A number of commentators have suggested a variety of regulatory and non-regulatory means to attempt to address the problem of hate speech.<sup>242</sup> There may be one miniscule way in which campus

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237. Proponents of speech codes might argue that speech limits victims' access to educational opportunity; that universities' role includes eliminating visages of discrimination and providing a "ground of promise;" that universities are to generate intellectual cultivation, a quality missing from much vile hate speech. Opponents might counter that, thus far in United States' courts, free speech trumps the equal opportunity argument; that freedom of expression is so indispensable to the character of the university that, without it, the university would no longer be the university; and that the university could not fulfill its role if revolutionary doctrines could not be examined. They might assert that a world, or even a society, totally devoid of racism, sexism, and repression of minority groups is itself still an aspirational ideal, not yet achieved, and quite a revolutionary idea when looking at the history of mankind. Open dialectic of the university may have played a role in the elimination of slavery and is needed today to discredit hatred and discrimination and to enable the revolutionary idea of equality of opportunity to accomplish revolutionary social change. Advocates of speech codes might rebut that such limitations on racist speech exist in Europe and that universities continue to function on that continent. Opponents might respond that First Amendment freedoms are uniquely American and must be preserved in public universities in the United States.

238. U.S. Const. amends. I, XIV.

239. Smolla, *supra* note 29 and Kaplin & Lee, *supra* note 28, are in accord.

240. Following the logic of Crane Britton, perhaps outlawing hate speech could have the unintended result of making leaders of the hate movement into martyrs, and thus heroes, who impart energy to and galvanize the movement. Crane Britton, *Anatomy of a Revolution* (Vintage Books 1952) (1938).

241. See discussion *supra* Part III.

242. See *supra* note 112. Pelikan notes we must not fall into the trap of allowing the university to become a tool of either polarity on this issue. Pelikan, *supra* note 190, at 160.



speech zones can augment other constitutionally allowable measures to address hate speech. It would seem that large gatherings of persons<sup>243</sup> expressing racist, sexist, or otherwise discriminatory ideas might be especially intimidating and hurtful to the targeted<sup>244</sup> students<sup>245</sup> who would, of necessity, have to pass by the gathering in order to get to their dormitories or classes,<sup>246</sup> just as it would seem that large gatherings of individuals expressing supportive ideas might be encouraging. Perhaps it would be helpful if those students and others who did not want to be exposed to particular speech activities were not forced into extremely close proximity with large events by virtue of the physical means of access to key areas of campus. If large gatherings must congregate in campus speech zones to carry on their free expression activities, regardless of content, and if the university provides other avenues to gain access to key areas of the campus, then targeted students<sup>247</sup> could select which gatherings that they wish to encounter and avoid those that are repugnant or intimidating.<sup>248</sup> This suggestion is meant only as a possible miniscule measure to address the issue of especially loud, overpowering expression by large groups, and I recognize that it does nothing to deal with the underlying problem of hatred.<sup>249</sup> The "other avenues" must be attractive and

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243. Or those involving sound amplification or large scale displays and demonstrations.

244. Whether minority or not.

245. And those sympathetic to the plight of the targeted persons.

246. The Court has said that individuals who find another's exercise of free speech to be repugnant can avert their eyes. *Cohen v. California*, 403 U.S. 15, 20, 91 S. Ct. 1780, 1786 (1971).

247. As well as others who did not want to be subjected to hearing vile or demeaning aural assaults.

248. This is not to be taken to suggest that one-on-one, personally delivered expressions of hatred are not harmful or intimidating, or that smaller groups engaging in hate speech would not be equally as hurtful and potentially dangerous as a large group. However, restrictions on small group or one-on-one discussions and confrontations may impinge too greatly on the dialectic essential to the university, and might play directly into the argument that the campus, outside of campus speech zones is a no speech zone. Thus, admittedly and by design, this approach seeks to balance the competing important interests.

249. Therefore, this suggestion has some obvious shortcomings, as do many other tactics that have been tried, such as speech codes. This suggestion is not a solution, but perhaps provides some minuscule assistance.

reasonably convenient. If they are unattractive or inconvenient,<sup>250</sup> any benefit to be gained by this suggestion would be eradicated, and the impact might, although unintentionally, reinforce the messages of subordination being expressed by the speakers.<sup>251</sup> It is important however, that campus speech zones not be relegated to remote areas of the campus where their communicative purpose would be unduly hampered.<sup>252</sup>

In assembling their portrait of undergraduates in the United States, Levine and Cureton noted that students in the late 1990s seemed to be especially sensitive, with emotions easily aroused on topics of race, gender, ethnicity, inequality, and victimization.<sup>253</sup> In reaching a decision about campus speech zones, a university must gauge the needs and attitudes of its particular student body and whether campus speech zones would be helpful with respect to this delicate student issue. Would carefully designed campus speech zones such as those described in the preceding paragraph allow students to voice their strong feelings while simultaneously enabling others to examine, address, and possibly resolve their concerns in informal, non-confrontational settings? Levine and Cureton applaud the bravery and willingness of today's college students to tackle the problems confronting society in order to find answers.<sup>254</sup> In performing its contextual analysis of student speech zones, a university might perform a great service to its students and society, in keeping with the underlying role of the university, if it considers whether any variety of campus speech zones would assist students in finding solutions to this problem.

Public universities in the United States are clearly obligated to comply with constitutional requirements. Respect for both the letter and the spirit of constitutional standards is an element of the contextual analysis that constitutes the framework for analyzing the question of campus speech zones. There is a wealth of scholarly literature examining student speech issues from various constitutional perspectives. It need not be repeated here, but ought to be consulted by a university as it makes its individual analysis of

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250. It would be especially harmful, eradicating any possible benefit of the suggestion if the "other avenues" were through traditional service areas of the campus such as service entrances.

251. Some critics might find even the suggestion of not forcing students to walk through or adjacent to the campus speech zone and instead providing students and others with alternate routes by which to arrive at their destinations to be discriminatory.

252. See *supra* text accompanying note 71.

253. Levine & Cureton, *supra* note 83, chap. 4.

254. *Id.* at 141.

whether it should utilize campus speech zones, and if so, how. It is possible for universities to formulate constitutional policies for a variety of different types of campus speech zones. It is also possible, and frankly easier, for a university to inadvertently formulate a campus speech zone policy that runs afoul of the First Amendment.

Every university considering the use of campus speech zones should examine itself carefully and guard against the hazard that a campus speech zone policy, wrongfully used, could operate as a subterfuge for cracking down on students or anyone else who might want to express controversial ideas. Finally, on the subject of constitutional considerations, it is both intriguing and comforting that key freedoms essential to American life—freedom of thought, inquiry and expression, and equality of opportunity—are also central to the nature of the university.

It is important that a university take the needs and attitudes of its students into account as it considers campus speech zones. The work of Levine and Cureton makes some observations about undergraduates in the mid-to-late 1990s that are relevant to the question. However, each institution must perform its analysis with its own students in mind. Students surveyed by Levine and Cureton were under a significant amount of pressure.<sup>255</sup> Many of these pressures continue to impact current students and may have increased.<sup>256</sup>

Undergraduates tend to be more isolated from one another than in past generations. Many more of them live off-campus and more of them need to work to pay for their education, support their families, or both. They have less free time. Campus-wide co-curricular activities have diminished in popularity while increasingly smaller and more narrowly focused groups have gained in popularity. Students tend to center their social activities off-campus. A larger proportion of the student body consists of older non-traditional students for whom college life is not the central factor in their daily lives. These observations would lead one to conclude that there is significantly less of an atmosphere of community on campus. Yet, participation in the dialogue and dialectic to be gained from being a member of a community of learners is an important aspect of the university experience. Therefore, a desire to generate a community of learners among its

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255. Financial pressures, impact of broken families, risk of terrorism, etc. *Id.* at 141–42.

256. Although I will not continue to specify the time frame, these comments are based on observations of students contained in Levine & Cureton, *supra* note 83.

students and faculty is an important factor to be considered in an institution's decision-making with respect to campus speech zones.<sup>257</sup>

Opponents of campus speech zones have argued that the very existence of such zones implies that the rest of the campus is a "no speech"<sup>258</sup> or "censorship"<sup>259</sup> zone. While it is not my experience that universities create campus speech zones to prevent speech or purposefully try to eliminate the exchange of ideas on campus,<sup>260</sup> it is possible for a university mistakenly to enact campus speech zones merely for convenience of management and to save on costs for clean-up. This is why undertaking the step one analysis is essential. Step one helps a university in two especially important regards. Step one helps a university discover its true purpose for considering campus speech zones. Once its purposes are revealed, the university can analyze the adequacy of those purposes against constitutional standards and avoid enacting campus speech zones if the zones would be based on constitutionally inadequate grounds. In addition, step one requires that a university examine its intentions with respect to campus speech zones vis-à-vis the essential character of universities, its own educational objectives, and its own specific hot topics. With this information available, a university can avoid those varieties of campus speech zones that would be counterproductive. Moreover, with all the information generated by the step one analysis in view, a university can consider whether certain varieties of campus speech zones, those without counterproductive elements, could actually enhance the educational experience by providing opportunities for both thought-provoking and thoughtful dialectic. When examined, speech zone regulations are characterized as content-neutral regulations that restrict speech. While they do regulate and therefore restrict speech in the technical sense, it is questionable whether properly designed zones *necessarily* reduce speech. For

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257. This discussion, itself, could generate interesting dialogue. Is it better to dispense with speech zones in the hope that this decision would nurture the development of group dialogue anywhere on campus, or would students be more likely to benefit from dialogue if at least the more robust versions were taking place at a "destination?"

258. See Davis, *supra* note 32, at 267–68.

259. See Victory, *supra* note 1, at 1.

260. One can envision a university trying to relegate all free speech activities, on a content-neutral basis, to zones in an attempt to curb hate speech. While this might be less obviously unconstitutional than a content-based policy requiring that hate speech be expressed only in campus speech zones, the former might face challenges on constitutional grounds.

example, it seems that properly designed campus speech zones could be popular destinations on campus to draw students into thought-provoking dialogue, thus enabling a key purpose of universities. There could be areas designed to facilitate exciting, impassioned expression. Areas could also be designed for more moderated dialectical exchanges. An area of tables and benches, with a speakers stand,<sup>261</sup> could be designed on an outdoor plaza to approximate coffeehouses of past generations. Members of the university community could be encouraged to use it for comparatively quiet dialogue.

There are, nevertheless, and historically have been, some limitations on the exchange of ideas on campus.<sup>262</sup> The courts and legislatures have found that there is no right to disrupt the business of educational institutions.<sup>263</sup> Although Pelikan does not specifically discuss it in his discourses on the idea of the university, one could venture a guess that he would be in accord. Avoiding disruption is yet another factor for universities to take into consideration in their decision-making.

Today's students demand education that is practical with respect to their career goals and that assists them in reaching their personal dreams. The emphasis is on convenience, elimination of unnecessary frills, and practicality. Many students, both traditional and non-traditional, view their university education from the perspective of consumers whose stated need for a practical education that enables them to reach their career and personal aspirations, must be met.<sup>264</sup> Examining the situation from a perspective of consumerism, information, and marketing, it seems that today's consumers expect service providers to inform them of additional needs that can be met, including possibilities that these consumers have not yet considered.<sup>265</sup> Among these additional needs is the ability of the university to assist students in developing skills to confront and resolve problems. Students at the turn of the century, although wary of established social institutions, including

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261. All bolted-down in case discussions get too impassioned.

262. This article limits itself to campus speech zones and therefore does not reach the question of expression within the classroom and academic freedom within that setting.

263. Davis, *supra* note 32, at 268 n.12 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512-13, 89 S. Ct. 733, 739-741 (1969)).

264. See *supra* text accompanying note 195 cautioning against a pure business model.

265. This is the essence of marketing, something with which students are very familiar. Students are accustomed to, and receptive to, being informed of their needs.

the university, expect to confront and resolve the pressing issues that face our society.<sup>266</sup> Undergraduates feel optimistic and believe that their generation is up to the challenge. Thus, although many students reject the idea of learning for learning's sake,<sup>267</sup> a majority of them seek practical, relevant education and want to address society's problems. Universities ought to be informing students that by engaging in meaningful, effective dialectic, they can obtain information, learn problem-analyzing and problem-solving skills, and gain new insights on problems through the exchange of ideas. These activities are indispensable to generating solutions to society's problems—problems which students readily admit do not have simple solutions.<sup>268</sup> It is the business of the university to facilitate this type of educational opportunity for today's students. This fact is therefore relevant to a university's decision-making on the establishment, continuation, modification, or elimination of campus speech zones.

While commentators note the tendency of students to act as solitary, unrelated consumers lacking a sense of belonging to a community of learners, Levine and Cureton also report that student activism at the end of the 1990s was as high as in 1969, the previous high in recent generations.<sup>269</sup> Students view volunteer activities as a way to begin to resolve problems and participate in volunteer activities at a high level. There seems to be an opportunity for students to harness these strengths along with the benefits of dialectic in order to seek solutions to society's pressing problems. Thus, universities should be providing means by which meaningful dialectic can best take place, an important factor that must be considered as a university approaches the issue of campus speech zones. Interestingly, providing students with relevant education to inform them of the means by which problems can be solved and change can be accomplished seems to be part of the essence of the university as described by Pelikan. It is also practical, relevant education as desired by students; even if not directly derived from the career perspective, then certainly from the problem-solving perspective. It resonates of some of the curricular changes recommended by Levine and Cureton.<sup>270</sup> Thus, a university should approach the issue of whether or not to have

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266. Levine & Cureton, *supra* note 83, at 33–36.

267. Although this was, according to some, a hallmark of the university. See discussion *supra* note 170.

268. Levine & Cureton, *supra* note 83, at 36.

269. The topics tend to be local and personal in nature versus the pressing social issues that were the subject of student activism in 1969. *Id.*

270. *Id.* at 161.

campus speech zones, and the specifics of implementation, in the context of facilitating this type of educational experience.

General campus security and student safety are the tort law factors that provided the original basis for Bickel and Lake to develop the facilitator university model.<sup>271</sup> With respect to the cost of providing security personnel and clean-up after free speech events, it is apparent that the costs and the demands would be lower if speech zones were utilized. It could be argued that cost and operations factors indicate that campus speech zones should be used for all expressive activities.<sup>272</sup> Although operationally cost efficient and convenient, such a requirement might interfere with overriding university concerns and constitutional concerns. From an educational perspective, the overriding concern is for facilitating an educational experience that provides optimal opportunities for dialectical exchange of ideas and well-reasoned critical analysis of various theories. From a constitutional perspective, any limitation on speech must be based on a constitutionally adequate government interest. From a general safety perspective, a university is obligated to provide a reasonably safe campus for students.<sup>273</sup> Thus, the best answer must meet the educational objectives in a reasonably safe environment that complies with all constitutional standards without financially decimating the institution or making the cost of education so high that the government interest of affordable, financially accessible public higher education is lost.<sup>274</sup> This is no small task and hence the dilemma.

Both the exchange of ideas and equality of opportunity are essential to the idea of the university. Informal discussion of ideas and creation of a community of learners should be cultivated. A proper balance is needed. For some institutions, the balance might favor use of campus speech zones for larger gatherings as areas where appropriate facilities and security could be provided and the exchange of ideas could be quiet, reasoned and dialectical, or loud

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271. Bickel & Lake, *supra* note 27, at 163.

272. The Court has pointed out that convenience and good order are not sufficient reasons to suppress speech. Free speech can be messy and inconvenient. *See* *Edwards v. South Carolina*, 372 U.S. 232, 237-38, 83 S.Ct. 680, 684-85 (1963) (quoting *Terminello v. Chicago*, 337 U.S. 1, 4-5, 69 S.Ct. 894, 893-96 (1949)).

273. There are many aspects to safety. Among them are reducing unreasonable risks of harm from unlawful criminal acts, and providing reasonably safe premises.

274. Reducing litter, without more, should not be a government interest important enough to justify suppression of speech.

and more impassioned without disturbing the classroom activities, dormitory life, or business offices of the university, and without rendering impossible more moderated,<sup>275</sup> informal discussion of ideas throughout the campus. The question then becomes, at what size or type of gathering should recourse to campus speech zones be required? Should more than one zone be utilized? How large should the campus speech zones be? Where should they be located? I believe the specific answers for any particular university should turn on educational considerations<sup>276</sup> rather than institutional convenience.

Unfortunately, the possibility of terrorist acts must be considered as well as more general concerns under the heading of campus safety and security. As pointed out in Part III.D,<sup>277</sup> there are risks posed by international and domestic terrorist groups.<sup>278</sup> Obviously, large gatherings constitute a particularly attractive target for terrorists, although any site on a university campus might be considered attractive by those bent on attacking the American way of life. On the one hand, this would seem to suggest that campus speech zones enable terrorists to know which areas of campus might be likely targets and suggests that campus speech zones should be eliminated so that free speech events could occur spontaneously anywhere on campus, and terrorists would not have time to plan an attack. However, it does not take much advance planning to carry a weapons-laden knapsack into a crowd. Thus, perhaps it is more important for security personnel to have the benefit of advance planning. Moreover, security features could be designed into the physical characteristics of designated speech zones more practically than could be accomplished if large gatherings for speech activities could occur anywhere on campus.

This then brings up the issue of campus security cameras, in general, and in the context of the Patriot Act<sup>279</sup> and other anti-terrorism laws. While most provisions of the Patriot Act that apply to universities have only indirect, if any, bearing<sup>280</sup> on campus

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275. In volume and number of participants.

276. While simultaneously meeting constitutional requirements.

277. See *supra* notes 133–143 and accompanying text.

278. An example of the latter is extremists opposing the research of the university.

279. See *supra* text accompanying note 122.

280. The Patriot Act's prohibitions against providing assistance to any terrorist group could bear on the selection of speakers or denial of a platform to certain speakers. Clearly this has First Amendment implications. However, this is beyond the scope of this article's limited topic of campus speech zones.



speech zones,<sup>281</sup> tapes from campus security cameras might well constitute business records that could be obtained under the Patriot Act. The spectre of the government surreptitiously spying on lawful free speech activities recalls the McCarthy era and Vietnam War era activities of government.<sup>282</sup> The use of security cameras is an issue that must be confronted as a university considers the question of campus speech zones and free speech on campus more generally. If a university were to do away with campus speech zones entirely, the issues of cameras on campus and the reach of the Patriot Act to obtain tapes still remain. The issue is more serious, however, when a government actor, namely a public university, requires that certain speech activities take place in zones equipped with cameras that could be used as surveillance cameras. While the issue could be most acute if a university were to require that all expressive activities take place within camera-equipped designated campus speech zones, the issue is still present if such speech zones are required only for large gatherings. This issue must be addressed. Should security cameras be entirely eliminated from campus? Should they be eliminated from designated speech zones? What is the impact of their elimination on general campus safety and security and the additional risks now posed by terrorism? While one cannot presume to answer these questions for any particular university, it would seem that a university would approach the issue from the combined perspectives of the educational experience it intends to facilitate, the general obligations to provide a reasonably safe campus,<sup>283</sup> and any additional precautions that might be considered against heightened risks of terrorism. Thus, it would seem that if cameras were considered necessary for general safety and have been used effectively on campus for that purpose, they should remain. However, the additional factor of possible government access to tapes of security cameras might add weight to the conclusion that campus speech zones are not necessary for small group expressive activities. The question is then narrowed: If larger group activities are to take place in designated campus speech zones, should those zones be camera-equipped or camera-free? Or, should cameras be turned off during gatherings of security personnel providing crowd control and general security are present in person? If a university establishes multiple speech zones on campus,<sup>284</sup> should some have cameras and others be camera-free so that speakers

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281. See discussion *supra* Part III.D.

282. Jaschik, *supra* note 114, at 5.

283. See discussion *supra* Part III.D.

284. See discussion of the design of campus speech zones *infra* pp. 57-58.

have a choice? If so, what about general safety concerns and the threat of terrorism?<sup>285</sup> Would prominently placed notices that a speech zone does not have security cameras provide sufficient information for students to make responsible individual decisions for their safety?<sup>286</sup> Or, are camera-free campus speech zones inappropriate due to the heightened risk of terrorist attacks on larger gatherings? Would prominently placed notices advise non-terrorist criminals of the best locations for purse-snatchings, muggings, and rapes? Each of these questions is best decided by the individual university in the unique context of its own circumstances.

Since 9/11, universities have more contact with law enforcement, particularly federal agencies such as the FBI. Some universities have established law enforcement liaisons; they receive information as to risks and security measures from law enforcement and address investigatory matters.<sup>287</sup> The extent to which universities cooperate with law enforcement agencies varies tremendously among universities.<sup>288</sup> Each university will need to decide the degree of cooperation it will tolerate or foster with government authorities concerning speech activities on campus. To what extent will the presence of, or communication with, law enforcement have a chilling effect on campus speech? Could this presence have an effect on the sense of freedom in dialogue and thus have a negative impact on the educational experience?<sup>289</sup>

In addition to the considerations already discussed, once a university decides that campus speech zones would enhance the educational experience of its students, further decisions are needed as to the policy to be implemented. How many zones should be established? Where should they be located?<sup>290</sup> What physical facilities and security measures<sup>291</sup> should be in place? What size or sizes are best for campus speech zones? Should sound amplification be allowed in all, or in some, or in none of the areas? What about lighting and displays? How will security personnel be provided? What is the appropriate role of security personnel? Should applications be required for all campus speech zones or

285. A camera-free speech zone might make an easier target.

286. Would publicized camera-free zones create an unreasonable risk of "normal" crime in these areas?

287. Jaschik, *supra* note 114, at 7.

288. *Id.*

289. See analysis on freedom to explore ideas as to the essence of the idea of the university discussed *supra* Part IV.

290. See *supra* text accompanying note 255.

291. See discussion *supra* notes 279–86.

will there be one or more zones available on a first come, first served basis? If applications are required, what information should be required in order to allow the university to appropriately consider the request, plan safety, security, and facilities needs for the event, yet not violate constitutional standards?<sup>292</sup> Can there be denials of the use of zones? If so, then an appeals process should be considered.<sup>293</sup> Will demonstrations and counter-demonstrations be allowed in the same campus speech zone? If so, does this raise implications for the design of the physical facilities within such speech zones? While the details of implementation and the actual drafting of a speech code regulation take place in step two of the process as discussed, step one includes policy level consideration of what types of zones and regulations would best meet the university's identified objectives.

For example, an article by Whitehead and Knicely sharply criticized the locations and physical attributes of speech zones and the actions of law enforcement at the 2004 national presidential nominating conventions and other recent high profile events.<sup>294</sup> At the 2004 Democratic Convention in Boston, those wishing to exercise their rights to free speech or demonstrate were required or coerced to use fully enclosed wire cages that featured ceilings and cloth mesh around the cages, thus making it difficult to communicate.<sup>295</sup> Moreover, the zones were placed in physically remote, unattractive surroundings.<sup>296</sup> At other events, government authorities used mesh pens to contain demonstrators and utilized preemptory tactics such as arrests. The article claims that federal authorities are training local law enforcement in the use of these and other measures to protect against terrorist activities.<sup>297</sup> Could the increased involvement of federal authorities with universities include training or recommendations with regard to use of such tactics? University officials need to give careful consideration to the locations and physical attributes of speech zones. The purpose of speech zones in the university setting is to facilitate dialectic, the critical evaluation of ideas, and other critical thinking and

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292. See text accompanying *supra* note 73 on prior restraints.

293. See *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 584 (S.D. Tex. 2003) (citing *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322–26, 122 S.Ct. 775, 780–81 (2002)).

294. James J. Knicely and John W. Whitehead, *The Caging of Free Speech in America*, 14 *Temp. Pol. & Civ. Rts. L. Rev.* (forthcoming 2005) (on file with author).

295. *Id.*

296. *Id.*

297. *Id.*

problem-solving activities essential to the idea of a university. The notion of cages seems woefully out of place and would tend to stigmatize the ideas of the speakers. Moreover, these cages might seem to anticipate and thus almost invite bad conduct. It is especially important for a university considering use of campus speech zones to review the issues presented in that article. Use of some of the tactics described would be contrary to the idea of the university. Except in exceptional circumstances,<sup>298</sup> campus speech zones should be attractive and designed to encourage rational exchanges yet also accommodate more robust<sup>299</sup> and possibly impassioned events. As to location and as previously stated, universities should consider the possibility of utilizing campus planning to provide alternate routes to gain access to classrooms, dormitories, eating facilities, libraries, etc. that do not require students to walk through or immediately adjacent to campus speech zones. This could be a minute addition to other allowable measures to provide a bit of insulation from hate speech for those students who do not wish to be present at such events.<sup>300</sup> Conversely, campus speech zones need to be located so that meaningful communication with the intended audience can take place; this is necessary both for constitutional reasons and so that speech areas can serve their communicative function in university education. Relegating campus speech areas to remote portions of the campus with little or no likelihood of communicative impact is not appropriate.

A university must also consider the possibility of litigation.<sup>301</sup> First Amendment activist organizations oppose restrictions on free speech and may file suit against a university that establishes or

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298. One possible exceptional circumstance is NSSEs held on campus that pose a high threat of violent reaction.

299. By "robust" I mean gatherings that are loud and possibly controversial or confrontational, but non-violent.

300. See discussion *supra* Part IV. Please note that this article does not recommend that this approach necessarily be adopted. The suggestion has weaknesses as well as strengths. It reduces communication achieved via campus speech zones if students can avoid them, rather than being coerced, as a matter of campus design, to hear the messages. Reducing the amount of communication could adversely impact the amount of dialectic that takes place. Moreover, some might find offensive the mere suggestion that alternate routes be made available. Finally, universities do not have unlimited flexibility in campus design.

301. In the modern American university, risk management impacts even theoretical contextual analysis.

continues in the use of campus speech zones.<sup>302</sup> A media campaign often accompanies the filing of a lawsuit, and the university is likely to find itself portrayed as violating the constitutional free speech rights of students.<sup>303</sup> This is strategically meant to embarrass the institution, and get attention. A university ought to anticipate that the media campaign will succeed in attracting attention; it may also be successful in creating embarrassment. Therefore, a university that might utilize campus speech zones ought to recognize this possibility and would be well-advised to educate its board of trustees, and possibly the university community, on the topic in advance and to have on-hand responses to likely accusations and media inquiries.

Obviously, litigation is expensive and risk management is, or ought to be, a major activity of universities today.<sup>304</sup> Nevertheless, litigation, or the possibility of litigation should not prevent a university from doing that which is legal, appropriate, enhances the educational experience of students, and advances the essence and role of the university in society. A university should reach its conclusion—whether or not to utilize campus speech zones and the details of implementation—based on its educational objectives and guiding legal principles. If the university has carefully considered all the factors bearing upon its unique institution in reaching its conclusion, it should be ready to defend the choices that it has made and to inform the court and the public of its reasoning.

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302. See discussion *supra* Part I.

303. There has been at least one instance in which an institution first learned that a lawsuit had been filed when a reporter called to ask how the institution wanted to respond to the charge that it regularly violated students' constitutional rights. The activist group had filed the lawsuit and simultaneously issued a press release, but had not provided the institution with a courtesy copy of its complaint nor did it serve the complaint.

304. Bickel & Lake, *supra* note 27, at 212 (the authors state that litigation should be viewed positively). Given the expense, upheaval, time and distraction caused by litigation, I cannot envision a university characterizing litigation as welcome. Effectuating change through litigation is not the most cost-effective use of taxpayers' money to accomplish change. Nevertheless, I can agree that some of the change wrought by litigation has been positive and that universities should use the mandates of law in order to guide them in the effort to provide a reasonably safe educational experience that facilitates learning.

## V. CONCLUSION

Public universities are complex business, social, and governmental entities that must focus on the essence of the university in order to serve their role in society. While it might be tempting and far easier to merely view campus speech zones as an outdated impediment to free speech, a more thorough analysis of the law, the role and purpose of the university in our society, and other critical factors impacting public universities today reveals that campus speech zones may well continue to be beneficial. When considering the question of campus speech zones, each public university ought to carefully analyze the question in light of its own particular situation.

