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FURTHER DEVELOPMENTS ON PREVIOUS SYMPOSIA

THE UNIVERSITY AS AN INDUSTRIAL PLANT: HOW A WORKPLACE THEORY OF DISCRIMINATORY HARASSMENT CREATES A "HOSTILE ENVIRONMENT" FOR FREE SPEECH IN AMERICA'S UNIVERSITIES

ROBERT W. GALL*

I

INTRODUCTION

The Summer 1990 issue of *Law and Contemporary Problems* addressed the issue of academic freedom on university and college campuses. In an article entitled *Academic Freedom, Hate Speech, and the Idea of a University*, Professor Rodney A. Smolla examined First Amendment theory and jurisprudence regarding hate speech on campus.[1] Professor Smolla was particularly concerned with answering two questions: "Do the free speech rules prevailing in the general marketplace apply with equal force on university campuses? Or are there [F]irst [A]mendment principles that either require or permit a different response to hate speech on campus than current [F]irst [A]mendment doctrines allow in other contexts?"[2]

In attempting to answer these questions, Smolla compared what he called the two ideas of the university. The first of these ideas is the university as a place of "unfettered expressive freedom" that truly resembles a marketplace of ideas and a place of comfort for First Amendment absolutists.[3] The second of these ideas is the university as a community of scholars and "an island of equality, civility, tolerance, and respect for human dignity; a place where the contemplative and rational faculties of man should triumph over blind passion

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* J.D. Candidate, Duke University School of Law, May, 1999.
The author would like to thank Professor William Van Alstyne for his advice and helpful comments during the preparation of this note. Any errors are, of course, my own. For purposes of this note, the term "universities" encompasses all institutions of higher learning, including colleges.

1. *See* 53 LAW & CONTEMP. PROBS. 195 (Summer 1990).
2. *Id.* at 196.
3. *Id.* at 216-17.

and prejudice."[4] Smolla suggested that the idea of the university as a community of scholars might allow restrictions on hate speech that would not be permissible outside the university context.[5] Without answering, he asked whether the notion of a university community might allow a university to curb hate speech on campus by giving the university the role of "an inculcator of what might be called academic values, as opposed to academic freedom."[6] He also asked:

> Might not the university say that part of its legitimate mission is to teach students how to contend vigorously within the marketplace of ideas while nevertheless observing certain norms of civility? Might not the university claim that part of its mission is to encourage the triumph of the rational and contemplative sides of the intellect over passion and prejudice?[7]

Certainly, university administrators have answered these questions with a "yes" as they have formulated speech codes for their campuses and attempted to balance the two competing ideas of the university. Also driving their creation of speech codes are Title VI[8] and Title VII[9] of the 1964 Civil Rights Act, Title IX of the Education Amendments,[10] and their collective command (through Title VII harassment jurisprudence,[11] the Equal Employment Opportunity Commission's ("EEOC") Guidelines on sexual harassment in the workplace,[12] and the Department of Education's ("DOE") guidelines for the investigation of Title VI and Title IX claims[13]) to universities and colleges to ensure that women and minorities need not contend with discrimination in the form of "hostile environment" harassment on campus.[14] A university or college that fails to ensure that its campus is not a hostile environment for women and minorities faces lawsuits and the loss of federal funds.[15] Fear of potential liability

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4. *Id.* at 217.
5. *See id.* at 223.
6. *Id.*
7. *Id.* at 223-24.
8. *See* 42 U.S.C. § 2000d (1994).
9. *See* 42 U.S.C. §§ 2000e to e-17 (1994).
10. *See* 20 U.S.C. §§ 1681-88 (1994).
11. *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986); Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971).
12. *See* 29 C.F.R. § 1604.11 (1997).
13. *See* Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11,448 (1994); Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (1997).
14. Title VII only speaks of discrimination. Subsequent case law, *see supra* note 11, and the EEOC's guidelines on sexual harassment, *see supra* note 12, classified harassment as discrimination and developed the idea of hostile work environment harassment. In its internal guidelines for the investigation of racial and sexual harassment claims under Title VI and Title IX, the Office for Civil Rights at the DOE draws on the Title VII hostile environment standard, justifying its decision in part on cases that have attempted to pull the standard into the education context. *See* 59 Fed. Reg. 11,448, 11,451 n.1 (1994); 62 Fed. Reg. 12,034, 12,046 n.2 (1997).
15. The EEOC Guidelines on sexual harassment for Title VII claims forbid the presence of an "intimidating, hostile, or offensive environment." 29 C.F.R. § 1604.11(a)(3) (1997). The DOE's guidelines for the investigation of racial harassment forbid a "hostile environment." 59 Fed. Reg. 11,448, 11,449 (1994). The DOE's guidelines on sexual harassment by school forbid a "hostile or abusive educational environment." 62 Fed. Reg 12,034, 12,038 (1997). While universities face legal dam-

probably explains why many universities and colleges still have speech codes despite the federal courts' striking many of them down on First Amendment grounds in cases such as *Doe v. University of Michigan*,[16] *UWM Post, Inc. v. Board of Regents*,[17] and *Dambrot v. Central Michigan University*.[18]

Hostile environment theory, which assumes that language can create an environment so charged with racism or sexism that its presence constitutes discriminatory harassment, developed within the workplace.[19] It prohibits a great deal of speech by forcing employers to censor the speech of the "Archie Bunkers" who create a hostile environment by making racist and sexist comments in the office.[20] Commentators such as Kingsley Browne and Eugene Volokh have already noted that its application in the workplace setting is tantamount to applying vague, content- and viewpoint-based restrictions on employee speech that cannot be justified under presently existing exceptions to the First Amendment.[21]

Because hostile environment theory grew up within the workplace, university administrators should ask themselves about its appropriateness within the university.[22] If Title VII's prohibition of hostile environment harassment is troublesome on First Amendment grounds in the workplace, the incorporation of such a prohibition into a speech code is much more disturbing in the university, a place that supposedly values academic freedom and the unfettered exchange of ideas.[23] Indeed, the Supreme Court's jurisprudence on academic freedom—both for students and teachers—suggests that the university is a special setting where a premium is to be placed on free expression so that a "pall of orthodoxy" does not descend upon the classroom.[24] If the university is indeed different than the traditional workplace—if it is a place to question and learn rather than merely a place of "getting the job done"—then university administrators should take this difference into account by eschewing a hostile environment theory that was not designed for the university as they attempt to

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ages if they violate Title VII, they also face a loss of funding as a sanction under both Title VI and Title IX.

16. 721 F. Supp. 852 (E.D. Mich. 1989).

17. 774 F. Supp. 1163 (E.D. Wis. 1991).

18. 55 F.3d 1177 (6th Cir. 1995).

19. *See* Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 485 (1991).

20. *See* Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1793 (1992).

21. *See* Browne, *supra* note 19, at 512-13; Volokh, *supra* note 20, at 1819.

22. As I will discuss later, even the DOE guidelines for the investigation of Title VI and IX claims recognize that "hostile environment" theory must take into account the special free speech concerns of a university.

23. Most disturbing of all is when a university drafts its prohibition against sexual harassment by copying verbatim the EEOC workplace guidelines on sexual harassment, thereby failing to recognize the difference between itself and an industrial plant. As I will show later, even the DOE guidelines on racial harassment pay lip service to such a recognition. *See infra* text accompanying notes 166-75.

24. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). A brief discussion of *Keyishian* and some of the other case law on academic freedom can be found at the text accompanying notes 64-90.

create an educational environment where discrimination is minimal and speech is free.

The Office for Civil Rights at the DOE, which investigates Title VI and Title IX harassment claims on campus, has recognized in its investigatory guidelines for such claims that hostile environment theory must be modified within the university setting in order to protect free speech on campus.[25] Although the DOE's modified hostile environment theory still raises First Amendment concerns, universities that fail at least to incorporate this modification into their speech codes are banning more speech than the government requires them to prohibit. When a pure incorporation of "hostile environment" theory from the workplace into a speech code is allowed to serve as a proxy for the "community" idea of the university, the free speech rights of students and faculty are threatened. Hostile environment theory destroys the delicate balancing act of the two ideas of the university and replaces it with a foreign concept that gives short shrift to free speech and the less draconian means by which a university community can address the problem of hate speech.

The next three parts of this note argue that campuses should not import the hostile environment theory into their speech codes. Part II will attempt to show why free speech on university and college campuses deserves more, not less, protection than in contexts such as the workplace. Part III will trace the federal courts' speech-code jurisprudence and discuss what implications it holds for hostile environment theory on campus. It will then show how the DOE's guidelines for the investigation of racial and sexual harassment claims on campus appear to have taken notice of at least some of these implications. Part IV will review the speech codes of six universities, colleges, and community colleges and focus on the extent to which each university or college has paid attention to the differences between it and an industrial plant. This note concludes with the observation that universities and colleges that fail to pay attention to these differences risk betraying their commitments to academic freedom and free speech.

II

WHY FREE SPEECH DESERVES MORE PROTECTION IN THE UNIVERSITY CONTEXT THAN IN THE WORKPLACE

A. Hostile Environment Theory in the Workplace

Before one examines the special free speech and academic freedom concerns that make hostile environment theory especially troublesome in a university speech code, he should take care to realize that a great deal of criticism can be leveled at the theory even when those concerns are not present and the setting is the industrial plant.

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25. *See infra* text accompanying notes 166-75.

Title VII forbids an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."[26] Courts, as well as the EEOC, have interpreted the statute to prohibit two forms of harassment. The first form, which raises no free speech concerns because it involves coercive threats and extortion,[27] is quid pro quo harassment.[28] This type of harassment involves an employer conditioning an employee's continued employment, benefits, or prospects for promotion on her submission to sexual advances.[29] The second type of harassment, "hostile work environment" harassment, occurs when an employee claims that the workplace is so charged with racial or sexual hostility that it alters his or her "terms, conditions or privileges of employment."[30] The Supreme Court has explicitly stated that the phrase "terms, conditions or privileges of employment" describes not only tangible economic benefits, but also a person's right not to submit to discrimination in the form of a "hostile or abusive"[31] environment that harms his or her work performance and offends "Title VII's broad rule of workplace equality."[32]

Two commentators in particular have argued that trying to achieve "Title VII's broad rule of workplace equality" by applying the hostile environment theory of discrimination in the workplace threatens the First Amendment freedoms of workers. Kingsley Browne and Eugene Volokh have argued that the hostile environment theory flowing from the EEOC's guidelines on sexual harassment and the judicially recognized concept of a racially or sexually hostile work environment imposes impermissible content- and viewpoint-based restrictions on workplace speech.[33] According to their arguments, hostile environment theory is an underinclusive, content-discriminatory restriction on speech because it prohibits only harassing speech that "harms" co-workers because of their race, sex, religion, or national origin.[34] Harassing, non-bigoted speech that harms co-workers because of a personal grudge, their choice of clothing, or annoying habits falls outside the scope of the restriction.[35] Hostile environment theory is a viewpoint-based restriction on employee speech because, while it forbids speech sending a negative message based on race and sex (for example,

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26. 42 U.S.C. § 2000e-2(a)(1) (1994).

27. *See* Volokh, *supra* note 20, at 1800.

28. *See id.*

29. This form of harassment is forbidden by the EEOC Guidelines on sexual harassment: "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual . . . ." 29 C.F.R. § 1604.11(a) (1997).

30. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

31. *Harris*, 510 U.S. at 21 (quoting *Meritor*, 477 U.S. at 64).

32. *Id.* at 22.

33. *See generally* Browne, *supra* note 19; Volokh, *supra* note 20.

34. *See* Volokh, *supra* note 20, at 1843.

35. *See id.*

"Women and blacks just aren't as good attorneys as white men."), it permits speech that sends a positive message ("Women and blacks make just as good, if not better, attorneys than white men.").[36] Because the theory prohibits some statements about race or sex on the grounds that it disapproves of their messages, it violates an established principle of Supreme Court jurisprudence that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[37]

Also disturbing to Browne and Volokh is that hostile environment theory forces employers to be proactive censors of their employees' speech.[38] The EEOC's guidelines on hostile environment sexual harassment forbid "verbal . . . conduct" of a sexual nature that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[39] As Browne and Volokh point out, standards such as this are vague; they give neither employer nor employee enough advance warning as to exactly what speech will be permitted and what speech must be censored if a violation of Title VII is to be avoided.[40] As Volokh has demonstrated, courts have been all too willing to interpret these standards broadly in order to ban certain political, religious, and social commentary from the workplace because messages conveyed by this commentary were found to be disagreeable or offensive. Volokh has discovered cases in which courts, complainants, and government agencies have treated as discriminatory harassment the placement of religious articles in an employee newsletter, the use of terms such as "foreman," "draftsman," and "Men Working" instead of their gender-neutral equivalents, the display of an Impressionist painting featuring a partially clad woman, and crude political commentary about the public activities of figures such as Jesse Jackson and Pat Schroeder.[41]

Since an employer receives no direct economic benefit from his employee's free speech, but can face civil liability under the EEOC Guidelines if his workers' statements on politics, religion, or sex are construed by the courts as creating "an intimidating, hostile, or offensive working environment," the employer's incentive is to overcensor his employees' speech.[42] Even if the probability of liability is small—and Volokh's examples suggest that this probability is not as small as one might imagine—the employer has an incentive to censor the speech anyway. As Volokh notes, an employer cannot simply admonish his employees to make sure that their expression, taken as a whole, does not create a hostile environment.[43] It is not feasible for him to monitor

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36. *See* Browne, *supra* note 19, at 500-01; Volokh, *supra* note 20, at 1854-55.

37. Texas v. Johnson, 491 U.S. 397, 414 (1989).

38. *See* Browne, *supra* note 19, at 504-10; Volokh, *supra* note 20, at 1809-13.

39. 29 C.F.R. § 1604.11(a) (1997). In footnote 11, these guidelines point out that they also apply to Title VII claims of racial harassment.

40. *See* Browne, *supra* note 19, at 502; Volokh, *supra* note 20, at 1812.

41. *See* Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627 (1997) (listing these examples and others throughout the article).

42. *See* Browne, *supra* note 19, at 505-10; Volokh, *supra* note 20, at 1812-13.

43. *See* Volokh, *supra* note 20, at 1812.

harassing statements at the office, decide that the workplace is on the verge of becoming an intimidating, hostile, or offensive environment, and then start to forbid individual incidents of speech. Since he cannot be certain as to what a future trier of fact will determine to be an intimidating, hostile, or offensive environment, he must make sure that individual incidents of verbal harassment do not occur in the first place.[44] If that means banning speech that is protected—such as political speech, which is at the core of the First Amendment—in order to prohibit speech that is not, then hostile environment theory is actually serving as an overbroad restriction of speech.

The First Amendment concerns that hostile environment theory raises in the workplace should serve two purposes as we observe that theory's move into university speech codes. First, these concerns remind us that there are rather powerful First Amendment criticisms of the theory that exist independently of academic freedom and whatever special free speech protection one believes the university should receive. Second, these concerns prompt us to consider how they may become even more troubling in the university, a place where free speech seems inextricably tied to its primary function of spreading, questioning, and pursuing ideas.

B. Hostile Environment Theory Goes to College

When the focus shifts from the workplace to the university, one must look not only to Title VII, which is the catalyst for harassment claims by university employees against other university employees, but also to Title VI of the 1964 Civil Rights Act and Title IX of the Education Amendments. These two statutes threaten a university with civil liability and the loss of federal funds if it discriminates against its students on the basis of race[45] or sex.[46] In its guidelines governing the investigation of discrimination claims on university campuses, the Office for Civil Rights at the DOE has recognized hostile environment harassment as a type of discrimination forbidden by both Title VI[47] and Title IX.[48] Just as the Supreme Court has construed Title VII as making employers liable for hostile environment harassment that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,"[49] the DOE has construed both Title VI and Title IX to make

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44. *See id.*

45. See 42 U.S.C. § 2000d (1994), which provides that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." A federal agency may cut its funding to a program that is engaging in such discrimination. *See* 42 U.S.C. § 2000 d-1 (1994).

46. See 20 U.S.C. § 1681(a) (1994), which states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." A federal agency may cut its funding to a program that is engaging in such discrimination. *See* 20 U.S.C. § 1682 (1994).

47. *See* 59 Fed. Reg. 11,448, 11,449 (1994) (racial harassment claims under Title VI).

48. *See* 62 Fed. Reg. 12,034, 12,038 (1997) (sexual harassment claims under Title IX).

49. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (citations omitted).

universities liable for harassment by faculty members, university employees, and students that is "sufficiently severe, pervasive, or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from" the services and activities of an educational program.[50] The university is liable not only for hostile environment racial harassment of students by teachers and students by other students, but it can also be found liable for a sexually or racially hostile environment that is created by guest speakers and other visitors to the university.[51]

As discussed more fully below, the federal case law on university speech codes has probably had some impact on the wording of the DOE's guidelines for the investigation of racial and sexual harassment claims. Most importantly, in addition to recognizing the need to protect free speech on campus, the Department has modified the theory by banning the presence of a hostile environment on campus rather than copying the EEOC Guidelines on sexual harassment in the workplace by banning an "intimidating, hostile, or offensive environment." In order to understand the significance of this modification—and how it still falls short of protecting the free speech rights of students and faculty—one must first attempt to understand what makes the university different from the workplace.

C. The University's Spirit of Free Inquiry

In addressing the problem of hate speech on campus, several commentators have framed their discussion in terms of the following question: How can the university balance the competing values of freedom of speech and equality (in the form of freedom from harassing speech)?[52] A useful inquiry into the appropriateness of hostile environment theory in university speech codes cannot begin with this question or any other one that views free speech and freedom from harassment as competing values to be balanced against each other. While the question acknowledges that this balancing test is performed within a special educational setting, it fails to give sufficient weight to the idea that free speech and academic freedom are so fundamental to the successful functioning of a university that compromising them, for whatever reason—no matter how noble

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50. 59 Fed. Reg. 11,448, 11,449 (1994); 62 Fed. Reg. 12,034, 12,038 (1997) (substituting the phrase "a student's ability to participate" for "the ability of an individual to participate"). The DOE's guidelines on sexual harassment maintain that Title IX can be used to make universities liable for peer sexual harassment. *See* 62 Fed. Reg. 12,034, 12,036 (1997). However, recent cases from the Eleventh and Fifth Circuits have held that Title IX does not impose such liability. *See* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996). In its guidelines on sexual harassment, the DOE asserts that *Rowinsky* was wrongly decided. *See* 62 Fed. Reg. 12,034, 12,036 (1997).

51. *See* 62 Fed. Reg. 12,034, 12,040 (1997); 59 Fed. Reg. 11448, 11450 (1994).

52. *See, e.g.*, Beverly Earle and Anita Cava, *The Collision of Rights and a Search for Limits: Free Speech in the Academy and Freedom from Sexual Harassment on Campus*, 18 BERKELEY J. EMP. & LAB. L. 282, 291, 322 (1997); Charles L. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 446-47; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2370-72 (1989) (arguing that, in the university especially, society should balance the rights of "verbal attackers" against those of their "targets").

that reason may seem—may fundamentally damage one of the university's essential characteristics, its "spirit of free inquiry."[53] Indeed, the idea that free speech and academic freedom are a necessary precondition to a university's success, rather than abstract values that must compete with others on a pluralistic battleground, draws a great deal of support from the Supreme Court's case law.[54] An examination of some of this jurisprudence will reveal that this idea is inextricably tied to the Court's concern that the university be true to a "spirit of free inquiry" that spurs it on to challenge society's orthodoxies.

1. *The University Is Not a Place for "Inculcating Community Values."* In *Tinker v. Des Moines Independent Community School District*,[55] the Supreme Court ruled that political expression on public school grounds could not be restricted beyond what was necessary to prevent disruption of other students' classwork and the operation of the school.[56] Forbidding the school board from punishing the petitioning students for wearing black armbands to school in order to protest the Vietnam War, the Court offered one of its most quoted statements: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[57] In other words, the Court was unwilling to find that the academic setting (in this case, a public school where attendance was compulsory) substantially reduced the level of First Amendment protection that students and teachers would receive if the setting of their speech was a public square rather than a public school. Although school administrators can regulate speech to the extent necessary to prevent a substantial interference with school operations and discipline, they cannot regulate or forbid it because of an "undifferentiated fear or apprehension of disturbance."[58]

Of course, *Tinker* involved a public school, not a public or private university. This fact actually works to give university faculty and students a higher degree of protection of free speech than their counterparts in public schools. As Professor Fletcher Baldwin has pointed out, the *Tinker* Court took great pains to acknowledge the authority of school officials to "prescribe and control conduct in the schools."[59] The Court followed up this statement with its recog-

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53. Sweezy v. New Hampshire, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring) (citation omitted).

54. Some of this case law will be reviewed shortly. *See infra* notes 64-90. The idea also draws support from the statement on speech codes issued by the American Association of University Professors, *On Freedom of Expression and Campus Speech Codes*, in the AAUP's 1995 edition of Policy Documents and Reports. The statement says, "Free speech is not simply an aspect of the educational enterprise to be weighed against other desirable ends. It is the very precondition of the enterprise itself."

55. 393 U.S. 503 (1969).

56. *See id.* at 512-13.

57. *Id.* at 506.

58. *Id.* at 508.

59. Fletcher N. Baldwin, *The Academies, "Hate Speech" and the Concept of Academic Intellectual Freedom*, 7 U. FLA. J.L. & PUB. POL'Y 41, 62 (1994-95) (quoting Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 507 (1969)).

nition, in cases such as *Pico v. Board of Education*[60] and *Hazelwood v. Kuhlmeier*,[61] that the State has a compelling interest in inculcating its students with community values. In fact, the plurality opinion in *Pico* conceded that a school board has both the duty and the unfettered discretion to transmit community values in matters of curriculum; its discretion ends only where the "compulsory environment of the classroom" gives way to the school library and its "regime of voluntary inquiry."[62] In *Hazelwood*, the Court's holding that a school principal could censor certain articles in the school's newspaper turned on its willingness to find that, far from being a public forum, the paper was a part of the curriculum and therefore not entitled to the First Amendment protection it might receive outside the schoolhouse gate.[63]

2. *Academic Freedom and the University's Spirit of Free Inquiry.* Part of a public school's mission is to inculcate community values within the children whom the state's compulsory attendance laws have swept within its gates. This mission naturally requires it to preach certain orthodoxies to its students and to leave certain "truths" unquestioned and beyond the realm of debate. However, the Supreme Court's jurisprudence on academic freedom makes it clear that the enforced orthodoxy of the public school classroom is strictly forbidden within its university counterpart. Indeed, the Court actually expects universities to challenge orthodoxy.

In *Sweezy v. New Hampshire*,[64] the Court overturned the contempt conviction of a socialist university professor who refused to answer questions about the content of his lectures before an investigatory hearing. Suggesting that forcing the professor to answer these questions would invade his liberties in the area of political expression and academic freedom, the Court implied that America's universities are supposed to question constantly accepted absolutes in our society so that teachers and students may "gain new maturity and understanding."[65] If this function is interfered with or denied, the consequences to society could be grave:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[66]

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60. 457 U.S. 853 (1982).
61. 484 U.S. 260 (1988).
62. *Pico*, 457 U.S. at 869.
63. *See Hazelwood*, 484 U.S. at 268-270.
64. 354 U.S. 234 (1957).
65. *Id.* at 250.
66. *Id.*

Justice Frankfurter echoed these sentiments in his concurring opinion, but he explicitly linked the challenging of orthodoxy to his understanding of the nature of the university. Frankfurter quoted at length from a statement by the open universities of South Africa that was issued in protest of that country's policies toward its universities.[67] For him, this passage made it clear that the "free[dom] to inquire, to study and evaluate, to gain new maturity and understanding" can be secured only when the university behaves as an intellectual free agent:

> In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates—"to follow the argument where it leads." This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university. The concern of its scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself . . . . It is the business of the university to provide that atmosphere which is most conducive to speculation, experiment, and creation.[68]

This passage suggests that the university, in order to be true to itself, must, in a sense, function as a devil's advocate that continually questions society's orthodoxies.[69] Indeed, the passage squares nicely with Professor William Van Alstyne's description of the task of a university faculty as "primarily one of critical review: to check conventional truth, to reexamine ('re-search') what may currently be thought sound but may be more or less unsound. Its purpose is likewise to train others to the same critical skills."[70] Because critical review of orthodoxy by faculty and students will often anger the guardians of orthodoxy, the notion of academic freedom is needed to safeguard the integrity of the review from these guardians—whether these guardians are found outside or inside the university walls.

While the *Sweezy* Court clearly recognized a teacher's right to academic freedom—and, to a lesser extent, the potential academic freedom claims of students[71]—its decision ultimately turned on other grounds. Still, the decision helped set the stage for the Court's seminal decision on academic freedom in the university context: *Keyishian v. Board of Regents*.[72]

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67. *See id.* at 262-63.

68. *Id.*

69. In the Roman Catholic Church, the job of the "devil's advocate" is to examine critically and rigorously the lives and miracles of individuals proposed for sainthood. His office—one of institutionalized questioning and doubt—prevents the church from canonizing unqualified individuals. What the devil's advocate is to the Church, the university is to society—but only when it critically examines society's accepted truths rather than embracing them out of faith.

70. William Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79, 87 (Summer 1990); *see also* KARL JASPERS, THE IDEA OF THE UNIVERSITY 62 (1959) ("The university is the place where truth is sought unconditionally in all its forms.").

71. *See Sweezy*, 354 U.S. at 250 (1957) ("Teachers *and* students must always remain free to inquire . . . .") (emphasis added).

72. 385 U.S. 589 (1967).

In *Keyishian*, the Court struck down as void on its face a New York law that required university professors, along with other state employees, to sign loyalty oaths declaring that they were not Communists and to face the threat of termination from employment if they uttered "treasonable" or "seditious" words. The Court believed that the vagueness of the statute's provisions created a chilling effect on speech that did not give it the "breathing space" it needed to survive.[73] The law could have granted this breathing space only if it had clearly and precisely spelled out what speech it proscribed.[74] The Court was concerned that the "intricacy" of the law, its regulations, and the "uncertainty as to the utterances and acts proscribed" would chill the speech of all but the bravest teachers.[75] In the most quoted passage from the opinion, the Court's discussion of free speech and academic freedom cannot be separated from its concerns that the university remain a researcher and challenger of orthodoxy rather than its blind ally:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is particularly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.[76]

The Court makes it clear that more is at stake than the free speech rights of any one individual. A teacher's academic freedom is not a good in itself. As the Court notes, academic freedom "is of transcendent value to us all and not merely to the teachers concerned." Our nation's future depends on the teacher's students, the leaders of tomorrow who need exposure to a variety of ideas if our civilization is to flourish rather than "stagnate and die."

It hardly seems bold to assert that this wide exposure can occur only if the university researches and reexamines orthodoxy rather than reinforces it. Recall how the statement of the open universities in South Africa from which Frankfurter quoted in *Sweezy* stressed the importance of a "spirit of free inquiry" within a university that forces it to reject certain accepted beliefs and to modify accepted frameworks if a scholarly argument leads in that direction.[77] The notion of a university's "spirit of free inquiry" and *Keyishian*'s characterization of the university classroom as a "marketplace of ideas" where the truth emerges from a "robust exchange of ideas" are mutually reinforcing concepts. A university's "spirit of free inquiry" can only "follow the argument where it leads" in a wide-open marketplace where the "pall of orthodoxy" is not present. Conversely, the "marketplace of ideas" in the university will be a rather

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73. *Id.* at 604.
74. *See id.* at 603-4.
75. *Id.* at 601.
76. *Id.* at 603 (internal quotation marks and citations omitted).
77. Sweezy v. New Hampshire, 354 U.S. 234, 262 (1957).

barren and stagnant one for teachers and students unless the "spirit of free inquiry" is allowed to generate new ideas and challenge old ones.

Up to this point, my examination of the Supreme Court jurisprudence on academic freedom has focused on the concept of academic freedom as it has traditionally been understood: a teacher's freedom from interference as he performs his professional duties of teaching and researching.[78] However, the notion of student academic freedom has also been recognized by the Supreme Court.[79] Students' claims to academic freedom can arise in one of two instances. In the first instance, students may claim that restrictions on a faculty member's academic freedom compromise his educational relationship with them and therefore harm the free exchange of ideas they expect in the classroom.[80] As Professor Van Alstyne has said, this kind of academic freedom claim by a student and a teacher's academic freedom claim "are exactly consistent in seeking an educational environment in which the good faith critical professional skills of the faculty are not foreclosed by hostile state action from being available to the students in the manner of instruction they receive and their professional interaction with the faculty."[81]

The second instance that can give rise to students' claims of academic freedom involves student speech and has an existence independent of a faculty's academic freedom; it found recognition in the case of *Healy v. James*.[82] The case involved a chapter of one of the New Left's main national student groups, Students for a Democratic Society ("SDS"), and its attempt to gain recognition as an official student organization on the campus of Central Connecticut State College. The president of the college refused to grant recognition to the chapter because he believed that it adhered to the national organization's "philosophy of disruption and violence" and, ironically, that this philosophy repudiated the college's commitment to academic freedom and infringed upon the right of all students to peacefully exercise their freedom of speech.[83]

The Court decided that the president of the state college could not deny to the local chapter the benefits of recognition, which included access to the college's newspaper, bulletin boards, and facilities.[84] The Court held:

> The mere disagreement of the [p]resident with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been, especially to one with President James'[s] responsibility, the mere expression of them would not justify the denial of First Amendment rights. Whether petitioners did in fact advocate a philosophy of "destruction" thus becomes immaterial. The College, acting here as

78. This, roughly, is the definition of academic freedom given by the American Association of University Professors in its 1940 Statement of Principles on Academic Freedom and Tenure.

79. *See* Van Alstyne, *supra* note 70, at 117, 125.

80. *See id.* at 116-17 (discussing Baggett v. Bullitt, 377 U.S. 360 (1964)).

81. *Id.* at 117.

82. 408 U.S. 169 (1972).

83. *Id.* at 176 n.4.

84. *See id.* at 176.

> the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.[85]

The Court noted that if there had been evidence on the record that the chapter posed a substantial threat of material disruption that would deprive other students of their free speech rights, disrupt classes, or damage property, the president would have had sufficient grounds to deny the chapter recognition.[86] The Court thought it reasonable that student groups be required to obey reasonable rules that regulate the time, place, and manner of their member's speech and forbid them from destroying property or disrupting classes.[87] However, restricting students' right to assemble in a group simply because of their philosophy and the content of the group's speech is unconstitutional.

As Professor Van Alstyne has suggested, *Healy*, along with *Tinker*, can be viewed as assuring "students of some right to fashion what is in some loose sense a constitutionally protected cocurriculum on campus—the teaching agendas and learning experiences of their own actions—carried on in a manner that may well influence the official curriculum as well."[88] This view of the case is certainly consistent with the Court's concern that denying the chapter the benefits of recognition would harm its "ability to participate in the intellectual give and take of campus debate."[89] Combining this recognition with the following statement from Justice Douglas' concurrence makes it clear why the second type of student claim of academic freedom is complementary to—and perhaps indispensable to—the university's reexamination of orthodoxy in its role as society's devil's advocate:

> The customary technique has been to conceive of the minds of students as receptacles for the information which the faculty have garnered over the years. Education is commonly thought of as the process of filling the receptacles with what the faculty in its wisdom deems fit and proper. Many, inside and out of faculty circles, realize that one of the main problems of faculty members is their own re-education and reorientation. Some have narrow specialties that are hardly relevant to modern times. History has passed others by, leaving them interesting relics of a bygone day. More often than not they represent those who withered under the pressures of McCarthyism or other forces of conformity and represent but a timid replica of those who once brought distinction to the idea of academic freedom.[90]

The implications of this passage are clear: To chill student speech may, in many instances, leave the orthodoxies of a complacent faculty unchecked and therefore strike at the heart of the university's ability to shake complacency and question orthodoxy.

I should make it clear that I am not suggesting that every time a professor or student opens his mouth, academic freedom reinforces his free speech claim. Obviously, there will be instances where a faculty member's speech is not re-

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85. *Id.* at 187-88.
86. *See id.* at 188-89.
87. *See id.* at 192-93.
88. Van Alstyne, *supra* note 70, at 125.
89. *Healy*, 408 U.S. at 181.
90. *Id.* at 196-97.

lated to his professional teaching concerns.[91] Perhaps there will be many more instances where students would be hard-pressed to argue that their speech formed a "constitutionally protected co-curriculum" protected by student academic freedom.[92] However, the foregoing discussion on academic freedom reveals the Court's most pressing concern is that universities do not succumb to a "pall of orthodoxy." The Court does not value academic freedom as an end in itself, but as a means necessary to ensure that universities remain a place where the truth—even if it shatters conventional wisdom—is discovered "out of a multitude of tongues rather than through any kind of authoritative selection."[93] In *Sweezy*, the Court explicitly stated that a university's truth-seeking nature is needed to renew our society's intellectual vigor; to infringe upon the freedom of the university to explore and question is to "imperil the future of our Nation" and to risk the possibility that "our civilization will stagnate and die."[94] It follows that, if universities wish to preserve their truth-seeking nature and save society from intellectual stagnation, they should always hesitate before taking action that might chill speech on campus, whether or not the speaker can invoke academic freedom to protect himself.

Indeed, even when they do not have a speech code, public universities are bound by general First Amendment principles not to punish an employee solely on the basis of the content or viewpoint of his speech. A public university cannot discharge or discipline an employee for his speech on a matter of public concern unless it can demonstrate that its interest in promoting the efficiency and effectiveness of the service it performs is greater than the employee's free speech interest.[95] In other words, a public university cannot punish an employee for his speech unless its interest in preventing a disruption of its mission is greater than the free speech interests of its employee. Even where a federal court has permitted a faculty member to be disciplined for his off-campus speech on a matter of public concern because of the university's reasonable fear that the speech would cause disruption to university operations, the court made it clear that the university could not have punished the professor simply because it disagreed with the viewpoint he expressed.[96] The court was not sanctioning a heckler's veto; it did not proclaim that the threat of a protest by a student group would have been a sufficient reason to punish a professor's speech.

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91. *See, e.g.*, Dambrot v. Central Mich. Univ., 55 F.3d 1177, 1190-91 (6th Cir. 1995) (holding that a basketball coach's use of the word "nigger" as a motivational tool was not protected by academic freedom). *See generally* William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, *in* THE CONCEPT OF ACADEMIC FREEDOM 59 (Edmund L. Pincoffs ed., 1975) (arguing that the protection given to faculty members by academic freedom is diluted when it is invoked to protect their rights to engage in aprofessional political activities).

92. *See, e.g.*, Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993) (ruling that the First Amendment protected the right of the fraternity to host an "ugly woman contest," but not invoking the concept of student academic freedom).

93. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

94. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

95. *See* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

96. *See* Jeffries v. Harleston, 52 F.3d 9, 13 (2d Cir. 1995).

In a recent case, another federal court has noted that, although the speech of one faculty member on a matter of public concern may disturb another faculty member and be seen as creating an "inefficient and negative working and learning environment" that interferes with university operations, allowing the disturbed faculty member's vehement opposition to the speech to overcome the speaker's freedom of speech creates a dangerous heckler's veto that allows speech to be censored on the basis of its content.[97] Although private universities are not required, as are their public counterparts, to refrain from punishing speech on the basis of content or viewpoint, they risk damaging their spirit of free inquiry and reducing their ability to challenge orthodoxy.

When universities do choose to have speech codes, which proscribe speech rather than punish it on an *ad hoc* basis, they harm their function of reviewing and challenging orthodoxy if they import hostile environment theory into their codes from the workplace. Orthodoxy in the workplace may be damaging for morale, but ultimately it does not damage the workplace's essential function: to get the job done or to make the client happy. Universities simply cannot tolerate vague, overbroad, content- and viewpoint-based restrictions on faculty and student speech if they are to preserve their essential function of reviewing and challenge the orthodoxies of the day. If vague restrictions chill speech by making faculty and students guess which speech is permitted and which is not, and certain subjects and opinions about matters of race or sex are considered off-limits, then the university is declaring that there are some orthodoxies that will remain unquestioned within its confines—that there are some questions that should not be pursued, no matter where the answers might take us.

The workplace is in grave danger if it cannot meet its bottom line. Free speech and the controversy created by a diversity of opinions are not necessarily essential in order for it to do that. Because the university must, according to the Supreme Court, discover truth out of a cacophonous symphony of voices rather than through "authoritative selection,"[98] the university necessarily must tolerate the controversy created by these voices if it wishes to be a researcher and challenger of conventional wisdom rather than a storehouse of orthodoxy. The university is in real danger of becoming the latter rather than the former if it abandons the tools of free speech and academic freedom. As noted earlier, it is impossible to separate the Court's concern for free speech and academic freedom from its discussion of the university as a place of free inquiry where dogma and unchallenged orthodoxy have no place. When one views free speech and academic freedom as necessary to preserving the university's spirit of free inquiry, a spirit that often places it in the role of society's devil's advocate, she is less likely to view these two concepts as abstract values that should be balanced against other values that may periodically compete for attention.

97. Burnham v. Ianni, 119 F.3d 668, 680 (8th Cir. 1997).
98. *Keyishian*, 385 U.S. at 603 (citation omitted).

III

SPEECH CODES, THE FEDERAL COURTS, AND CONFLICTING SIGNALS

Part II argued that the university's essential characteristic of reviewing and challenging orthodoxy entitles it to a level of First Amendment protection that hostile environment theory cannot possibly give it. This section will review four federal cases involving speech codes in order to see what implications they hold for the movement of hostile environment theory from the workplace to the academy. When viewed in light of the Court's decision in *R.A.V. v. City of St. Paul*,[99] these cases send the academy conflicting signals about how speech may be regulated on campus. These signals can be resolved only if universities decide to embrace fully their spirit of free inquiry which makes them unafraid to "follow the argument where it leads."[100] Part III will conclude with a discussion of how the DOE's guidelines on racial and sexual harassment, which appear to have modified hostile environment theory in light of the federal court's speech-code decisions, can both help and hinder universities as they attempt to fulfill their roles as society's devil's advocates.

A. Speech Codes in the Federal Courts

1. *Doe v. University of Michigan.* Responding to a series of racially charged incidents on campus and political pressure from state legislatures to do something about the problem of racism on campus, the University of Michigan issued a policy on discriminatory harassment for the entire university community, which was to be in force in, among other areas, university classrooms.[101] The policy promised to discipline the following types of behavior:

> 1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that
>
> > a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
> >
> > b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
> >
> > c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.

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99. 505 U.S. 377 (1992).

100. *Sweezy*, 354 U.S. at 262 (citation omitted).

101. *See* Doe v. University of Mich., 721 F. Supp. 852, 856 (E.D. Mich. 1989). The policy in this case, like the other harassment policies reviewed in this section, is a speech code because it attempts to proscribe speech (described in many policies as "verbal behavior") that offends or somehow harasses individuals. University speech codes frequently take the form of harassment policies.

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

a. [The same wording as in 1.a.]

b. [The same wording as in 1.b.]

c. [The same wording as in 1.c.][102]

Doe was a psychology graduate student who feared that his discussion of theories that posited the existence of biologically-based differences between men and women might be labeled as sexist and that he might be disciplined under the policy.[103] He sued for a preliminary injunction against the policy's enforcement in federal district court.

In striking down the policy, which will be called a speech code for the purposes of this note because its terms explicitly allowed administrators to ban the utterance of certain words and ideas, the district court said that it was impermissibly overbroad and vague. Although the court believed that, by itself, the language of the policy could not be used to reach protected speech, it decided that the policy was overbroad after noting that, in practice, the code had been applied in such a manner as to reach "serious comments made in the context of classroom discussion."[104] The court also noted that the policy's guidelines, which the university withdrew as being an inaccurate description of the policy, listed examples of actionable classroom speech that the court also believed to be protected.[105] Particularly relevant to Doe's complaint was the guidelines' use of the following example as actionable speech under the policy: "A male student makes remarks in class like 'Women just aren't as good in this field as men,' thus creating a hostile learning atmosphere for female classmates."[106]

Although willing to concede that the university could have written a code that passed constitutional muster if it had forbidden the utterance of only fighting words, the court found that the university was trying to regulate speech outside of this narrow category of words on the basis of the content of the speech's message.[107] The court expressly found that the university's anti-discrimination policy "had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed."[108] Citing for its authority such Supreme Court cases as *Cohen v. California*[109] and *Terminiello v. Chicago*,[110] the court said that this kind of regulation was impermissible.[111] Furthermore, the court also found impermissible the policy's attempt to ban

102. *Id.* During the litigation, the university removed section 1.c. from the policy.
103. *See id.* at 858.
104. *Id.* at 866.
105. *See id.* at 860.
106. *Id.*
107. *See id.* at 863.
108. *Id.*
109. 403 U.S. 15 (1971).
110. 337 U.S. 1 (1949).
111. *See Doe*, 721 F. Supp. at 863.

certain speech simply because some people may find that speech offensive.[112] In support of this proposition, the court cited *Terminiello*, a case in which the Supreme Court said that free speech serves a high, protected purpose when it provokes and unsettles holders of "prejudice and preconceptions."[113] The court then stated that "[t]hese principles [that a state actor cannot regulate speech because it disagrees with its message or because some people find the speech offensive] acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission."[114]

The court also found the policy vague because its language made it "simply impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct."[115] "Stigmatize" and "victimize" are general terms that lack precise definition; furthermore, the court noted that the fact that words may stigmatize or victimize someone does not strip away their First Amendment protection.[116] Also, the court thought the policy was imprecise in spelling out exactly what conduct would constitute a "threat to" or "interfere with" a student's academic efforts.[117]

2. *UWM Post, Inc. v. Board of Regents.* In *UWM Post, Inc. v. Board of Regents*,[118] a federal district court in Wisconsin struck down another speech code on grounds of overbreadth and vagueness after a campus newspaper and a group of students challenged it. The challenged code, which applied to the campuses in the University of Wisconsin system, promised to punish students

> [f]or racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets or other expressive behavior or physical conduct intentionally:
>
> 1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
>
> 2. Create an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.[119]

In finding the code unconstitutionally overbroad, the court rejected the university's argument that its code only banned words likely to incite an immediate breach of the peace (fighting words).[120] In rejecting the university's argument, the court noted that "[s]peech may demean an individual's characteristics without tending to incite . . . an immediate breach of the peace."[121] Further-

112. *See id.*
113. *Terminiello*, 337 U.S. at 4.
114. *Doe*, 721 F. Supp. at 863.
115. *Id.* at 867.
116. *See id.*
117. *See id.*
118. 774 F. Supp. 1163 (E.D. Wis. 1991).
119. *Id.* at 1165.
120. *See id.* at 1172-73.
121. *Id.* at 1172.

more, in a remark demonstrating that hostile environment theory cannot be understood as only a restriction of fighting words, the court said the term "hostile" covers non-violent as well as violent situations and that an "intimidating" or "demeaning" environment was unlikely to cause a breach of the peace.[122]

Running throughout the court's opinion was its disapproval of the manner in which the university had attempted to regulate campus speech on the basis of content and viewpoint. The court explicitly recognized that the university's speech code attempted to enforce an official point of view about certain subjects when it disapprovingly noted that "[t]he rule disciplines students whose comments, epithets, or other expressive behavior *demeans* their addressees' race, sex, religion, etc. However, the rule leaves unregulated comments, epithets and expressive behavior which *affirms* or does not address an individual's race, sex, religion, etc."[123] Like the *Doe v. University of Michigan* court, the court in *UWM Post* recognized that speech rules that prohibit speech because the institution disapproves of its message are especially troubling in a university setting, noting that the University of Wisconsin's rule "limit[ed] the diversity of ideas among students and thereby prevents the robust exchange of ideas which intellectually diverse campuses provide."[124]

The court also found the code unconstitutionally vague. However, it did not do so because it thought the definitions of the word "demean" or the phrase "discriminatory comments, epithets, and abusive language" eluded precise definition. To the contrary, it believed that the code did give its reader adequate notice as to what language it prohibited.[125] The court thought that the code was vague because, when read alongside its interpretative guidelines, the rule was "ambiguous as to whether the regulated speech must actually demean the listener and create an intimidating, hostile, or demeaning environment for education or whether the speaker must merely intend to demean the listener and create such an environment."[126]

3. *Dambrot v. Central Michigan University.* Overbreadth and vagueness were also the reasons the United States Court of Appeals for the Sixth Circuit gave in finding a university speech code unconstitutional in *Dambrot v. Central Michigan University.*[127] The university speech code in this case prohibited racial and ethnic harassment, which it defined as

> any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile, or offensive educational, employment, or living environment by . . . (c) demeaning or slurring individuals through . . . written literature because of their racial or ethnic affiliation; or (d) using symbols, [epithets] or slo-

122. *See id.* at 1172-73.
123. *Id.* at 1174 (emphasis added).
124. *Id.* at 1176 (internal quotation marks omitted).
125. *See id.* at 1179-80.
126. *Id.* at 1180.
127. 55 F.3d 1177 (6th Cir. 1995).

> gans that infer negative connotations about the individual's racial or ethnic affiliation.[128]

Keith Dambrot, the head men's basketball coach at the university, was fired from his post after telling his team that they needed to play like "niggers" if they wanted to win games.[129] He sued the university for wrongful discharge, and several of his players joined him in trying to get a preliminary injunction to stop the university from enforcing the policy.

The court held that the code was unconstitutionally overbroad on its face because there was "nothing to ensure the University will not violate First Amendment rights even if that is not their intention. It is clear from the text of the policy that language or writing, intentional or unintentional, regardless of political value, can be prohibited upon the initiative of the university."[130] The court also held that because the policy's language was so sweeping as to capture much constitutionally protected speech, its overbreadth could not be cured by its statement that it would not be applied in such a way as to interfere with anyone's free speech rights.[131]

Sensing an attempt to punish Dambrot's speech because of its message, the court quoted the *Doe v. University of Michigan* court's statement that a university may not regulate speech because it disagrees with the speech's ideas or messages or finds the speech offensive.[132] The court also rejected the university's attempt to characterize its harassment policy as only banning the utterance of fighting words. It noted that even if the policy were given the benefit of such a construction, it would still fail because of the Supreme Court's holding in *R.A.V.* that a state actor cannot engage in content and viewpoint discrimination by imposing "special prohibitions on those speakers who express views on disfavored subjects."[133] The court noted that, like the St. Paul Bias-Motivated Crime Ordinance struck down in the *R.A.V.* decision, the Central Michigan University's policy ran afoul of that holding. Under the policy, as under the ordinance, a person could be punished because he dared to take an unpopular or "politically incorrect" view on the subject of race. An examination of the policy reveals the possibility that, while a person shouting fighting words—or just plain "offensive" or "demeaning"—words at a person because of his political affiliation would go unpunished, a person shouting fighting words at a person because of his race would be punished. This content discrimination is accompanied by viewpoint discrimination. A person hurling fighting or offensive words at a student because of his race can be punished for his speech; however,

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128. *Id.* at 1182.
129. *See id.* at 1180-81.
130. *Id.* at 1183.
131. *See id.*
132. *See id.*
133. *Id.* at 1184 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992)).

if the same words are yelled back at him in the name of racial equality and tolerance, they are not punishable speech.[134]

The court also found that the speech code was void on its face for vagueness because it did not give fair notice of what language would cause a violation. Most importantly, the policy left entirely too much discretion in the hands of administrators to determine what words are "negative" or "offensive" and what words are not.[135] Because the terms "negative" and "offensive" are so subjective, and because some people find certain words "offensive" while others do not, the potential was great for discriminatory application of the code.

4. *Silva v. University of New Hampshire*. Unlike the first three cases reviewed in this section, which dealt with speech codes in the form of racial harassment policies, at issue in this case was a sexual harassment policy that attempted to restrict speech. *Silva v. University of New Hampshire*[136] involved a professor whose teaching style was, to say the least, unconventional. During his technical writing class at the university, Professor Silva attempted to explain certain concepts by comparing them to sex. For example, in one class, he said:

> I will put focus in terms of sex, so you can better understand it. Focus is like sex. You seek a target. You zero in on your subject. You move from side to side. You close in on the subject. You bracket the subject and center on it. Focus connects experience and language. You and the subject become one.[137]

Taking offense at this statement and one in which, in order to explain the concept of a metaphor, Silva compared belly dancing to a plate of jello with a vibrator underneath it,[138] several of his female students complained to the university administration. The administration sought to discipline Professor Silva for violating the school's sexual harassment policy, part of which read:

> Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitutes sexual harassment when:
>
> > such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating a hostile or offensive working or academic environment.
> >
> > submission to or rejection of such conduct by an individual is used as the basis for employment or academic decisions affecting that individual.

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134. In *R.A.V.*, the Court characterized this type of viewpoint discrimination as "licens[ing] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules." 505 U.S. at 392. For a similar case that did not involve a speech code, but did involve a university administration trying to punish speech because it disagreed with its views, see *Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993). In that case, the court said that a university could not punish "those who scoffed at its goals of racial integration and gender neutrality, while permitting, even encouraging, conduct that would further the viewpoint expressed in the University's goals and probably embraced by a majority of society as well." *Id.* at 393; *see also* Burnham v. Ianni, 119 F.3d 668, 680 (8th Cir. 1997) (holding that the removal of photographs from a university history department's display case constituted impermissible viewpoint discrimination).

135. *See Dambrot*, 55 F.3d at 1183-84.

136. 888 F. Supp. 293 (D.N.H. 1994).

137. *Id.* at 299.

138. *See id.*

> submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or academic work.[139]

In federal district court, Professor Silva sought a declaratory judgment that the university's attempt to punish him infringed upon his freedom of speech. The court found that, although the policy did attempt to address the "legitimate pedagogical concern of providing a congenial academic environment," the policy was vague as applied to Professor Silva's case.[140] The court decided that, although Professor Silva's statements referred to sex, they were not of a sexual nature.[141] (Specifically, the court found that the complaining students were mistaken in their belief that the word "vibrator" always refers to a sexual device.[142]) Citing *Keyishian*'s admonition that restrictions of speech in the university be narrowly tailored in order to give faculty members fair notice of what speech is proscribed so that there will not be a general chilling of speech, the court decided that Professor Silva had not received fair notice that his speech, which was not of a sexual nature, was forbidden.[143]

The court believed that, in this case, the university was interpreting its policy in such a way as to punish speech its students found to be outrageous or offensive.[144] Echoing the holding of *Doe v. University of Michigan*, the court said that the suppression of speech because some people find its content offensive is constitutionally impermissible.[145] Like the *Doe v. University of Michigan* court, the *Silva* court indicated that such suppression is particularly dangerous in the university context.[146] According to the court, the policy "fail[ed] to take into account the nation's interest in academic freedom."[147]

5. *Common Threads and Conflicting Signals of the Cases.* The common threads that run through *Doe v. University of Michigan*, *UWM Post*, *Dambrot*, and *Silva* are useful to our discussion of why hostile environment theory is inappropriate within university speech codes. Vagueness was a constitutional infirmity of the codes in all four cases. All the cases made it clear that this feature of the codes failed to give faculty and students fair notice of what

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139. *Id.* at 298.
140. *Id.* at 314.
141. *See id.* at 312-13.
142. *See id.* at 313.
143. *See id.* at 312-13.
144. *See id.* at 313-14.
145. *See id.* at 314.
146. Not only is this suppression dangerous to the intellectual life of the university, it is also legally dangerous to the university official who is the instrument of that suppression. In *Silva*, the district court denied the defendants the protection of qualified immunity, holding that "the law governing Silva's First Amendment claims . . . was clearly established at the time of defendants' conduct and that a reasonable University official would not have believed his or her actions, in disciplining plaintiff because of his classroom statements, were lawful in light of this clearly established law." 888 F. Supp. at 328; *see also* Burnham v. Ianni, 119 F.3d 668, 680 (8th Cir. 1997) (making a university chancellor personally liable for plaintiffs' damages by denying him qualified immunity after finding that his removal of photographs from a history department display case—photographs which offended some female members of the faculty—violated plaintiffs' rights of free speech and academic freedom).
147. *Silva*, 888 F. Supp. at 314.

speech they proscribed. Words such as "offensive," "stigmatize," "victimize," and "negative" were decried as subjective standards that left too much discretion in the hands of university officials to decide, on an *ad hoc* basis, what speech would result in the punishment of its speaker. The *Silva* court linked this line of criticism to the Supreme Court's concern in *Keyishian* that restrictions of speech on campus be narrowly tailored so that a general chilling effect does not take hold of the campus.[148]

In three of the cases, *Doe v. University of Michigan*, *UWM Post*, and *Dambrot*, overbreadth was a constitutional infirmity. The courts in these cases were concerned that, in their zeal to proscribe general classes of speech, such as fighting words, universities were also banning constitutionally protected speech such as "serious comments made in the context of classroom discussion"[149] or other forms of campus speech, such as political statements.

The final, and perhaps most important problem with the speech codes in the four cases was their attempt to ban certain speech because of the universities' disagreement with the message or because of their concern that some people might find the speech offensive. The *Dambrot* court expressed its concern about this problem by echoing *R.A.V.*'s holding that a state actor may not "[impose] special prohibitions on those speakers who express views on disfavored subjects."[150] To the extent these cases stand for the proposition that a state actor may not ban speech simply because he finds it offensive or disagrees with its content and viewpoint, they did not break any new constitutional ground.[151] However, they did serve to put university administrators on notice that this proposition "acquire[s] a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission."[152] These cases tell universities that, in the name of banning hate speech, they must not stifle the free expression of ideas by chilling the speech of those who harbor "offensive" or unpopular ideas on topics such as race, sex, or religion that do not square with "official" points of view.

Based on their expressed concern for preserving the "marketplace of ideas" within the university, the cases might be imagined to raise a firewall between the university and hostile environment theory. After all, although none of the courts in the cases acknowledge it, the hostile environment theory that is in all of the codes is the potential source of at least some of the constitutional infirmities they condemn—overbreadth, vagueness, and prohibition of speech because of a disagreement with its message or its perceived offensiveness. A

148. *See id.*

149. Doe v. University of Mich., 721 F. Supp. 852, 866 (E.D. Mich. 1989).

150. Dambrot v. Central Mich. Univ., 55 F.3d 1177, 1184 (6th Cir. 1995) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992)).

151. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989).

152. *Doe*, 721 F. Supp. at 863.

quick study of all of the codes in these cases shows that they are modeled after the EEOC guidelines on hostile environment sexual harassment, which forbid conduct of a sexual nature that has "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[153] These guidelines, as I suggested earlier, are not only vague and subject to overbreadth problems, but they also attempt to suppress statements about sex simply because some people find these statements disagreeable or offensive.

What, exactly, is an offensive environment? As noted earlier, the Court has repeatedly ruled that one cannot ban speech simply because it is offensive.[154] It hardly seems that a university could prevent a "pall of orthodoxy" from descending upon it if certain ideas were deemed too offensive to be expressed or if the university sanctioned some points of view while condemning others. Besides, the word "offensive" is of a class of vague, subjective standards that the cases in this section have condemned. The same statement can also be made about the word "hostile"—what, exactly, is a hostile environment? As far as overbreadth is concerned, although the concept of speech that creates an "intimidating, hostile, or offensive environment" probably captures certain constitutionally proscribable categories of speech such as fighting words or threats, it requires little effort to see that the concept can also capture words spoken during the course of a classroom debate or a campus discussion of political issues.

The hostile environment standard may well be a vague one that attempts to prohibit speech simply because it contains a disagreeable or "offensive" message about the topics of race and sex. However, the Supreme Court has strongly suggested that it can probably withstand constitutional scrutiny in the workplace if courts view it as a regulation of conduct (in this case, discriminatory harassment) that is justified without reference to the content of the speech it prohibits. In *R.A.V.*, the Supreme Court, referring specifically to Title VII discrimination law, said that some words can be regulated on the basis of content if the law that does so is aimed at conduct rather than speech.[155] In other words, if a law regulates the secondary effects of speech, rather that speech itself, then it is constitutionally permissible that the law has the effect of banning some speech on the basis of content.[156] The Court noted that "sexually derogatory fighting words, among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices."[157] It also said that "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because

153. 29 C.F.R. § 1604.11(a)(3) (1997)

154. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989); Cohen v. California, 403 U.S. 15 (1971); Terminiello v. Chicago, 337 U.S. 1 (1949).

155. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992).

156. *See id.*

157. *Id.* (internal quotation marks omitted).

they express a discriminatory idea or philosophy."[158] Therefore, so long as the hostile environment theory is seen as targeting the conduct of discrimination, it is okay that it sweeps up "incidentally" certain speech that women and minorities may find offensive.

Justice White, who concurred in the Court's judgment, but not its reasoning, believed the majority misunderstood the secondary effects doctrine. He noted that hostile work environment claims under Title VII are not "keyed to the presence of or absence of an economic quid pro quo."[159] Rather, they are tied to "the impact of the speech on the victimized worker."[160] He referred the Court to the section of its opinion where it stated that a listener's emotional reaction to speech does not constitute a secondary effect.[161] He, along with Professors Volokh and Browne, understands the hostile environment standard to be a regulation of speech, not conduct or secondary effects.[162]

In the federal speech code cases reviewed above, the courts failed to recognize the hostile environment standard as a source of the constitutional problems of the codes they struck down. Combining this failure with the *R.A.V.* majority's statement about the constitutionality of workplace hostile environment discrimination claims serves to send universities and colleges conflicting signals about the propriety of hostile environment theory on campus. On the one hand, the theory was the source of at least some of the constitutional infirmities of the codes in the cases. On the other hand, the cases refused to recognize it explicitly as the source of these infirmities. Only the court in *UWM Post, Inc.* hinted that Title VII's prohibition of speech creating a hostile environment violates the First Amendment; however, its hint was both brief and indirect.[163] Of course, to recognize that the infirmities flow from the nature of the theory itself, no matter what its setting, might now be impossible, given the Supreme Court's affirmance of its constitutionality in the workplace in cases such as *Harris v. Forklift Systems, Inc.*[164] and the *R.A.V.* dicta reviewed above.

Still, the courts in the speech code cases in this section, although constrained from condemning the unconstitutionality of hostile environment theory in all contexts by Supreme Court precedent, could have explicitly recognized what their opinions seem to imply—that the university setting is an inappropriate place for hostile environment theory's use within a speech code. After all, because it developed within the workplace, the theory treats universities like industrial plants rather than places "where the free and unfettered interplay of competing views is essential to the institution's educational mission."[165]

158. *Id.* at 390.
159. *Id.* at 410.
160. *Id.*
161. *See id.*
162. *See id.*; *see also* Browne, *supra* note 19; Volokh, *supra* note 20.
163. *See* UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991).
164. 510 U.S. 17, 21 (1993).
165. Doe v. University of Mich., 721 F. Supp. 852, 863 (E.D. Mich. 1989).

B. The Government's Modification of Hostile Environment Theory Within Educational Settings

To its credit, the federal government seems to have recognized, at least partially, that workplace harassment theory is inappropriate in the university setting. In fact, a study of its guidelines for the investigation of racial and sexual harassment claims suggests that these guidelines have been influenced by the federal court's jurisprudence on speech codes and its emphasis on the importance of free speech within the university. For example, the DOE's guidelines on the investigation of sexual harassment of students by school employees and their peers declare that "Title IX is intended to protect students from sex discrimination, not to regulate the content of speech."[166] In its guidelines for the investigation of racial harassment against students, the Department says that "[i]n cases in which verbal statements or other forms of expression are involved, consideration will be given to any implications of the First Amendment to the United States Constitution."[167]

More significant than this payment of lip service to the value of the First Amendment within the educational context is the guidelines' modification of workplace hostile environment theory. While the EEOC Guidelines have construed Title VII to forbid "verbal . . . conduct" of a racial or sexual nature that has the "purpose or effect of . . . creating an intimidating, hostile, or offensive working environment,"[168] the DOE's guidelines have dropped the words "offensive" and "intimidating" in describing the kind of educational environment that is forbidden. The guidelines for racial harassment claims ban a "hostile environment,"[169] while the guidelines for sexual harassment claims ban a "hostile or abusive educational environment."[170] In its sexual harassment guidelines, the Department declares that a statement's offensiveness to some students is "not a legally sufficient basis to establish a sexually hostile environment under Title IX."[171] In doing so, the Department seems to be responding to the concern of federal courts in the speech-code cases that universities do not draft speech rules that allow speech to be banned simply because some individuals find it offensive; a speech code following the Department's guidelines need not violate this commandment in order to save its university from a violation of Title VI or IX.

To be sure, this change by the guidelines does not cleanse the hostile environment standard from its problems of overbreadth, vagueness, and the prohibition of speech simply because of a disagreement with the ideas it contains. Even without the words "offensive" or "intimidating," the standard could still be used to reach constitutionally protected speech (for example, statements in a

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166. 62 Fed. Reg. 12,034, 12,045 (1997).
167. 59 Fed. Reg. 11,448, 11,489 n.1 (1994).
168. 29 C.F.R. § 1604.11(a)(3) (1997).
169. 59 Fed. Reg. 11,448, 11,449 (1994).
170. 62 Fed. Reg. 12,034, 12,038 (1997).
171. *Id.* at 12,045.

heated debate about biological differences between the sexes). The standard is still vague because it is impossible to define exactly what constitutes a hostile environment. Indeed, as Justice Scalia noted in his concurrence in *Harris*, he accepts the phrase "hostile or abusive" as a standard even though he is aware that it is an imprecise and vague one that gives juries no guidance in evaluating hostile environment harassment claims.[172]

As far as prohibiting speech because of its disagreeable nature is concerned, the Department's guidelines on the investigation of racial harassment claims are not shy about admitting that they favor some viewpoints about race over others. Ironically, this admission occurs during the guidelines' promise to take into account "the unique setting and mission of an educational institution." Upon further reading, it becomes clear that this promise is not intended to echo the *Doe v. University of Michigan* court's statement that proscriptions of speech based on disagreement with a statement's message or offensiveness are particularly troublesome in the university setting. According to the guidelines,

> [a]n educational institution has a duty to provide a nondiscriminatory environment that is conducive to learning. In addition to the curriculum, students learn about many aspects of human life and interaction from school. The type of environment that is tolerated or encouraged by or at a school can therefore send a particularly strong signal to, and serve as an influential lesson for, its students.[173]

If the Department's guidelines are truly concerned with the message that behavior sends to students, then the inescapable conclusion is that the DOE wants universities to regulate the speech of both students and faculty members on the basis of whether the view that speech conveys about matters of race is favored or disfavored. Despite the lip service its guidelines pay to First Amendment principles, the guidelines admit that they discriminate among different viewpoints that a student may receive by acknowledging that some messages are better than others. Obviously, the DOE believes such regulation is possible through its modified "hostile environment" standard despite the absence of the word "offensive" from that standard. Therefore, while the Department may have learned from federal speech-code jurisprudence that speech should not be banned simply because some people find it offensive, it has not learned the equally important lesson that a university should not ban certain speech simply "because it disagree[s] with ideas or messages sought to be conveyed."[174]

The DOE's guidelines on the investigation of racial and sexual harassment claims can certainly aid universities in distinguishing themselves from industrial plants as they create harassment policies in the form of speech codes. However, they fail to make this distinction complete by leaving intact hostile envi-

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172. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 24 (1993).

173. 59 Fed. Reg. 11,448, 11,449 (1994). It is interesting to note that while the guidelines say that the concern about this "strong signal" is greater the younger a student is, the language of the guidelines seems to imply that the concern is present at all levels of education, including the university. The guidelines say only that the fact that students learn from tolerated behavior is "especially true" for younger children, not that this concern is absent from the university setting.

174. Doe v. University of Mich., 721 F. Supp. 852, 863 (E.D. Mich. 1989).

ronment theory's ability to favor some statements, and disfavor others, on the basis of the views they take on subjects such as race and sex.

Despite this flaw in the DOE's guidelines, they at least signal universities that, in order to avoid liability for discrimination under Title VI and Title IX, they need not import an unmodified version of workplace "hostile environment" theory into their speech codes. At the very least, the Department's modified theory should serve as a baseline upon which universities should improve if they wish to distinguish themselves from industrial plants in order to preserve the spirit of free inquiry that allows them to review and challenge orthodoxy. Unfortunately, four of the schools whose codes are reviewed in the next section have fallen below this baseline.[175] They have adopted, with little or no modification, the language from the EEOC's guidelines on hostile environment sexual harassment in the workplace to cover claims arising under Title VI and Title IX, as well as Title VII.

IV

CURRENT SPEECH CODES: HONORING FREE SPEECH, OR TRANSFORMING THE CAMPUS INTO A FACTORY FLOOR?

This section will review the speech codes of one public university, three private universities, and two public community colleges. These schools were chosen because they represent three different approaches that universities, as they attempt to comply with their legal obligation to prevent discrimination, can take in dealing with the First Amendment concerns raised by the speech-code cases. The first approach simply ignores these concerns; it involves a school's total adoption of the workplace concept of "hostile environment" harassment into its harassment policy. This adoption is unaccompanied by remarks suggesting that the policy must be interpreted with the principles of free speech and academic freedom in mind. The second approach involves a middle-ground strategy that is ultimately unsatisfying. Under this approach, a university adopts the hostile environment harassment concept into its policy, but at least pays homage to free speech and academic freedom within the policy and suggests that these concepts are to be respected in its application. Only one of the three universities in this section, Duke University, backs up this tribute to free speech by following the DOE's lead and eliminating the word "offensive" from its hostile environment standard. Under the third approach, a university chooses not to use the hostile environment harassment concept, whether modified or not, to regulate speech on campus. As I will argue later, the one university in this section taking that approach has done the best job of distinguishing itself from the workplace by honoring its spirit of free inquiry while not forgetting its obligation toward fighting discrimination. It has also done the best job of truly attempting to balance the two ideas of the university discussed by Pro-

175. I am including Princeton in this group because, as I will soon show, while its policy of racial harassment does not use the word "offensive," its policy on sexual harassment does.

fessor Smolla without forgetting that, among the values a university may have, free speech is first among equals.

A. The First Approach: Is This a Campus or a Factory?

The sexual harassment policy of Piedmont Community College in Roxboro, North Carolina, is almost a carbon copy of the EEOC Guidelines. Not only does it track the EEOC's statements about quid pro quo harassment, but in its "hostile environment" harassment section it bans "verbal . . . conduct" that "has the purpose or effect of unreasonably interfering with an employee's or student's performance, or creating an intimidating, hostile, or offensive work or study environment."[176] All the college has done is add the words "or student's" and "or study" to the Guidelines. It does not discuss the virtues of free speech or academic freedom within the policy, or say anything else that might distinguish it from a workplace.

Cape Fear Community College in Wilmington, North Carolina, has also adopted the language of the EEOC Guidelines into its sexual harassment policy without stressing the differences between itself and a workplace. It forbids "verbal . . . conduct" that "has the purpose or effect of interfering with an individual's performance or creating an intimidating, hostile, or offensive environment in the workplace or the classroom."[177] Its policy makes no mention of the importance of free speech or academic freedom to the mission of the university. Like the policy of Piedmont Community College, Cape Fear Community College's policy fails to modify its hostile environment standard by following the Department of Education's lead in dropping the word "offensive" from that standard. Therefore, both policies actually forbid more speech than the government requires them to restrict in order to avoid liability for hostile environment harassment under Title IV and Title IX. Because they make no mention of the importance of free speech to the intellectual life of their colleges, it is indeed possible that these policies could be used to prohibit, on the basis of its content and viewpoint, speech that is part of a campus debate on subjects such as date rape or what the *Doe v. University of Michigan* court labeled "serious comments made in the context of classroom discussion."[178]

B. The Second Approach: Middle Ground Is Not Solid Ground

The University of Connecticut does only a slightly better job of distinguishing itself from the workplace. The President's Policy on Harassment says the following:

> Harassment consists of abusive behavior or actions directed toward an individual or group because of race, gender, ethnicity, ancestry, national origin, religion, sexual orientation, age, physical or mental disabilities, including learning disabilities, mental re-

176. PIEDMONT COMMUNITY COLLEGE, POLICY MANUAL § 2.19 (1991).

177. CAPE FEAR COMMUNITY COLLEGE, 1997-98 CATOLOG AND STUDENT HANDBOOK 111 (1997).

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

> tardation, and past/present history of a mental disorder. The University (a) strictly prohibits making submission to harassment either explicitly or implicitly a term or condition of employment, performance appraisal, or evaluation of academic performance; and (b) forbids harassment that has the effect of interfering with an individual's performance or creating an intimidating, hostile, or offensive environment.[179]

In addition, the policy forbids both quid pro quo harassment and hostile environment sexual harassment, which it defines as conduct, both expressive and non-expressive, that has the "effect of interfering with an individual's performance or creating an intimidating, hostile, or offensive environment."[180]

The policy can be fairly read as suggesting that the elimination of harassment is a means toward achieving the goal of "a social environment in which people are free to work and learn."[181] One can credit the policy for recognizing that it is trying to achieve an environment conducive to the university's spirit of free inquiry and its ability to challenge orthodoxy. However, she must wonder why the policy's drafters think that such an environment can be achieved by banning "abusive behavior"—a term that can embrace speech—with a standard like "intimidating, hostile, or offensive environment." As noted earlier, this standard is all too capable of being used to prohibit certain statements simply because the ideas they contain are offensive or because they do not represent the "correct view" of the topics listed in the policy. The suggestion that an environment of where people are "free to . . . learn" can be achieved with a policy that is sure to chill speech on these topics is, to say the least, Orwellian, especially when the policy fails to follow the DOE's lead in dropping the word "offensive" from its hostile environment standard.

Under the rule's definition of harassment, students who are harassed for reasons other than the ones listed do not receive protection from harassing speech. Only if the harassing speech offends them because it is about a particular subject can they seek protection under the rule. It is fair to suggest that here, as in the hate speech ordinance struck down by the Court in *R.A.V.*, the only purpose "served by the content limitation is that of displaying . . . special hostility towards the particular biases thus singled out."[182] As the Court pointed out, such content discrimination is impermissible.[183] Also, the speech rule here allows university administrators to engage in impermissible viewpoint discrimination. For example, a student or faculty member could be punished under the rule if, when discussing his opposition to racial preferences, a minority student believes that his speech creates a hostile or offensive racial environment. That same minority student can respond with language that offends the first speaker so long as it is not offensive on the basis of race or another protected category—perhaps by calling the first speaker a bigot. As the Court made clear in *R.A.V.*, a state actor cannot handicap speakers on disfavored

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179. UNIVERSITY OF CONNECTICUT, 1998-99 STUDENT HANDBOOK 53 (1997).

180. *Id.*

181. *Id.*

182. R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992).

183. *See id.*

subjects by "licens[ing] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules."[184] It is only because the policy at least mentions the need for an environment where people are "free to . . . learn" and that a generous reading of it might suggest it will honor that need in its application that I have placed it within this section instead of the first.

Unlike the University of Connecticut, Princeton University implicitly acknowledges that its harassment policy conflicts with the free speech principles that allow it to maintain an open atmosphere for discussion. The policy states that "[a]s an intellectual community, [Princeton] attaches great value to freedom of expression and vigorous debate, but it also attaches great importance to mutual respect, and it deplores expressions of hatred directed against any individual or group."[185] While this statement might provide some assurance that university administrators will remember the "great value" of free speech and debate as they apply the harassment policy, this assurance is tempered when one reads the policy's definitions of sexual and racial harassment.

In addition to tracking the EEOC's guidelines on quid pro quo harassment, Princeton's sexual harassment policy, like all of the policies reviewed so far in this section, tracks, with some deviation, the EEOC's definition of hostile environment harassment by banning "verbal . . . conduct" that "has the effect of unreasonably interfering with an individual's work, academic performance, or living conditions by creating an intimidating, hostile, or offensive environment."[186] To some extent, replacing the "or" just before the phrase "intimidating, hostile, or offensive environment" with a "by" represents an improvement over the EEOC Guidelines for the workplace. Under the new language, a person cannot be punished if his speech has had the effect of interfering with someone's performance unless his speech has done so by creating an "intimidating, hostile, or offensive environment." Under the EEOC Guidelines, the effect of interference—or a mere purpose to interfere, regardless if the interference is successful—without the presence of the environment, would be enough to make one's speech punishable. Recall from *Doe v. University of Michigan* the court's concern that the policy was vague because it did not spell out precisely what conduct would interfere with a person's performance. Princeton at least tries to overcome this concern, even if in trying to define "interfere" it uses the vague concept of an "offensive, intimidating, or hostile environment."

Furthermore, the policy implies that a person's creation of an "offensive, intimidating, or hostile environment," standing alone, will not violate the policy. The environment must have the effect of interfering with someone's perform-

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184. *Id.* at 392.

185. This statement introduces the university-wide regulations on racial and sexual harassment in Princeton's policy manual. *See* PRINCETON UNIVERSITY, RIGHTS, RULES, AND RESPONSIBILITIES 4 (1997).

186. *Id.* at 5.

ance. This wording of the policy seems consistent with the intent of Title IX, which is not to eliminate "offensive, intimidating, or hostile" environments, but to ensure that women can receive the full benefits of a university education without suffering discrimination. The prevention of a hostile environment is only a means to that end. Still, Princeton's modification of the Guidelines only marginally improves them. Whether a person intends to create an "intimidating, hostile, or offensive environment" or not, he can be punished as long as his speech has the effect of doing so. Furthermore, Princeton's policy has failed to follow the DOE's lead in dropping the word "offensive" from its hostile environment theory.

Princeton's policy on racial and ethnic harassment regards as serious offenses "[a]ctions which make the atmosphere intimidating, threatening, or hostile to individuals."[187] Clearly, if the word "actions" is meant to describe only conduct, such as assaulting an individual, then the policy cannot be viewed as attempting to prohibit speech. However, because the policy is mostly focused on explaining how "[e]xpressions of racial or ethnic bias directed at individuals or groups undermine the civility and sense of community on which the well-being of the University depends,"[188] the word "actions" is probably intended to encompass speech.

Unlike the hostile environment standard set forth by its sexual harassment policy, Princeton's hostile environment standard for racial harassment has at least dropped the word "offensive." However, like the modified hostile environment standard in the DOE's guidelines, Princeton's standard implies that some points of view about race are more favored than others. Its prohibition of a hostile atmosphere could be used to punish students who, in the midst of a campus political debate or a classroom discussion of *The Bell Curve*,[189] reveal some "politically incorrect" views that minorities find offensive or believe to show hostility toward members of their race.

If Princeton were a public university, its racial harassment policy might be successfully challenged on the ground that, although it seeks to serve a compelling interest—preventing the harassment of students which deprives them of educational opportunities—by regulating speech on the basis of content, Princeton could serve the same interest equally well by having a general harassment policy. In fact, the Supreme Court struck down the St. Paul Bias-Motivated Crime Ordinance in *R.A.V.* on the similar grounds that it could have accomplished its goals without limiting the speech it punished to matters or race, religion, or gender. The Court noted that the only purpose

> served by the content limitation [in the ordinance] is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express

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187. *Id.* at 4.
188. *Id.*
189. RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE (1994).

> that hostility—but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.[190]

Similarly, Princeton administrators who wish to express disdain for ideas they deem racist should not do so by enacting speech restrictions that cast a "pall of orthodoxy" over campus debate and classroom discussion on matters of race by effectively silencing those who dissent from "politically correct" points of view.[191] Like the University of Connecticut, Princeton has a speech rule that puts speakers with certain viewpoints at a disadvantage within the intellectual give and take that is supposed to characterize campus debate.

Duke University's harassment policy includes the following passage about its commitment to free speech and academic freedom:

> Duke University is committed to protecting the academic freedom and freedom of expression of all members of the university community. This policy against harassment shall be applied in a manner that protects the academic freedom and freedom of expression of all parties to a complaint. Academic freedom and freedom of expression include, but are not limited to, the expression of ideas, however controversial, in the classroom, in residence halls, and, in keeping with different responsibilities, in work places elsewhere in the university community.[192]

This tribute to academic freedom and free speech is supplemented by a statement recognizing that "[i]nstructional responsibilities require appropriate latitude for pedagogical decisions concerning the topics discussed and methods used to draw students into discussion and full participation."[193] In a bow to student's free speech, and perhaps their academic freedom as well, the policy expresses a hope that it will be used infrequently among students: "In interactions of students and other members of the Duke community in social and living situations, the university believes it is generally more appropriate to encourage and nurture positive interactions than to invite charges of harassment for individual episodes of hostile, disrespectful, or intimidating speech."[194] A generous reading of this statement of principle would construe it as an echo of Justice Brandeis' famous statement that the cure for speech filled with "falsehood and fallacies" is "more speech, not enforced silence."[195]

The policy's tribute to free speech and academic freedom on campus literally surrounds the policy's definition of harassment. Harassment at Duke is

> A. The creation of a hostile or intimidating environment, in which verbal or physical conduct, because of its severity and/or persistence, is likely to interfere significantly with an individual's work or education, or affect adversely an individual's living conditions.

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190. R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992).

191. They should not do this even though they can argue that their policy is a regulation of conduct, not speech, that is permitted by the *R.A.V.* dicta on federal harassment law. Even if the *R.A.V.* dicta would save the policy—and under Justice White's view of the case, it would not—it is still apparent that the policy's content and viewpoint discrimination harms the university's spirit of free inquiry by establishing an official point of view on matters of race.

192. DUKE UNIVERSITY, 1997-98 BULLETIN OF DUKE UNIVERSITY: INFORMATION AND REGULATIONS 63 (1997).

193. *Id.*

194. *Id.*

195. Whitney v. California, 274 U.S. 357, 377 (1927).

> B. Sexual coercion is a form of harassment with specific distinguishing characteristics. It consists of unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when:
>
> > 1. submission to such conduct is made explicitly or implicitly a term or condition of an individual's employment or education; or
> >
> > 2. submission or rejection of such conduct is used as a basis for employment or educational decisions affecting an individual.[196]

The policy's statements on sexual coercion are unremarkable because they regulate quid pro quo harassment, a form of extortion whose punishment does not raise the eyebrows of First Amendment absolutists. The policy's statements on hostile environment harassment, however, deserve more than a passing remark. Like Princeton's definition of sexual harassment, this policy implies that it is the interference with a person's performance that the university is concerned about; monitoring the educational environment is only a means to achieving the end of avoiding such interference. Also like Princeton's policy on sexual harassment, the Duke harassment policy implies that, in order to have interfered with a person's education, one must first be found to have created a forbidden educational environment. It is not enough that one's speech has the effect of interfering with someone's education. Of course, like Princeton's sexual harassment policy, Duke's harassment policy is troubling because it is one of strict liability. If one's speech has the effect of creating a hostile environment likely to interfere with a person's education, he is guilty of infringing the policy.

However, Duke's policy does a better job than Princeton's of distinguishing its campus from the floor of a factory. Duke, unlike Princeton, does not forbid the creation of a "hostile, intimidating, or offensive environment" in the context of Title VI and Title IX claims. Like the DOE's guidelines on the investigation of racial and sexual harassment claims, the Duke harassment policy drops the word "offensive" from its hostile environment standard. It forbids only the creation of a "hostile or intimidating environment," not an offensive one. Unlike those guidelines and Princeton's sexual and racial harassment policies, Duke's general harassment policy does not single out speech on certain topics for special regulation and suggest that certain views on those topics will be disfavored. It does not commit the sin of "impos[ing] special prohibitions on those speakers who express views on disfavored subjects."[197]

The only way in which Duke's harassment policy falls short of completely distinguishing Duke from an industrial plant is its use of the phrase "hostile or intimidating environment" to define the harassment it prohibits. As noted above, at least one member of the Supreme Court has conceded that the phrase "hostile environment" is a vague and unclear one that gives juries little guidance as to how to apply it in actual cases. It would seem that, because the standard gives little guidance as to its application, it also gives to those who enforce

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196. DUKE UNIVERSITY, *supra* note 192, at 63.
197. R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).

it the discretion to punish speech with which they disagree or find offensive. In a way, then, the vagueness of the phrase "hostile environment" actually allows the word "offensive" to slip back into the hostile environment standard on an *ad hoc* basis. Such vagueness cannot be tolerated in the university, a place where regulation of speech must be both narrow and precise.[198]

Ultimately, the middle ground approach taken by the University of Connecticut, Princeton University, and Duke University is unsatisfactory. Even when Duke or another university modifies hostile environment theory in such a way so that, on its face, its harassment policy avoids the evils of prohibiting speech because of disagreement with the ideas it contains or its perceived offensiveness, "hostile environment" theory creates a fuzzy, prohibited zone of speech of which teachers and students must steer clear if they are not to be punished. Too much discretion is vested in those who, with the best of intentions, may choose to use the policies to ban speech which they believe offends "enlightened" sensibilities. This discretion is a tool capable of casting a "pall of orthodoxy" over a university. Also highly unsettling about this discretion is that, often, it is turned on the very minorities that it is meant to protect. For example, as Nadine Strossen, president of the American Civil Liberties Union, has pointed out, the Michigan speech code struck down by the court in *Doe v. University of Michigan* was invoked over twenty times by whites who charged blacks with using racist speech.[199]

C. Keeping Hostile Environment Theory Off Campus

Like the schools using the middle-ground approach, the University of Chicago includes in its policy on non-discrimination and harassment a tribute to free speech on campus. Unlike those universities, however, it explicitly recognizes free speech to be essential to the continuing vitality of its spirit of free inquiry:

> At the University of Chicago, freedom of expression is vital to our shared goal of the pursuit of knowledge, as is the right of all members of the community to explore new ideas and learn from one another. To preserve an environment of spirited and open debate, we should all have the opportunity to contribute to intellectual exchanges and participate fully in the life of the University.
>
> The ideas of different members of the University community will frequently conflict, and we do not attempt to shield people from ideas that they may find unwelcome, disagreeable, or even offensive. Nor, as a general rule, does the University intervene to enforce social standards of civility.[200]

With this statement, the University reaffirms the importance of free speech to its intellectual life. Not only does it distinguish itself from the workplace by acknowledging that speech is essential to its "goal of the pursuit of knowledge,"

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198. *See* Keyishian v. Board of Regents, 385 U.S. 589, 603-04 (1967).

199. *See* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?* 1990 DUKE L.J. 484, 557. This bit of irony is heightened if one remembers that in *Wisconsin v. Mitchell*, the case in which the Court upheld a penalty enhancement scheme where a defendant's sentence was increased if he chose his victim on the basis of race, the defendant, not the victim, was black. 508 U.S. 476 (1993).

200. UNIVERSITY OF CHICAGO, 1997-98 STUDENT INFORMATION MANUAL 42 (1997).

but it also announces that it will not treat its campus like a secondary school. Unlike a school board, which may attempt to inculcate community values, the administration at the University generally declines to "enforce social standards of civility."

However, there are some minimum social standards the University does enforce:

> There are . . . some circumstances in which behavior so violates our community's standards that formal University intervention may be appropriate. Acts of violence, and explicit threats of violence directed at a particular individual that compromise that individual's safety or ability to function within the University setting are direct affronts to the University's values and warrant intervention by University officials. Abusive conduct directed at a particular individual that compromises that individual's ability to function within the University setting and that persists after the individual has asked that it stop may also warrant such intervention.[201]

The University's desire to punish acts of violence certainly raises no First Amendment concerns. After all, the Supreme Court has recognized that threats of violence are within a class of unprotected speech,[202] and no reasonable person need guess as to what, exactly, a threat of violence is.

The policy's next sentence, which forbids "abusive conduct directed at a particular individual that compromises that individual's ability to function within the University setting," seems, on its face, to regulate conduct rather than speech. To the extent that it does regulate speech, it does not run afoul of the concerns expressed by the federal courts in their speech-code jurisprudence. Like Duke's harassment policy, the sentence does not single out certain categories, such as race, and attempt to enforce a certain viewpoint about that category. Furthermore, the policy makes it clear that it does not seek to regulate speech because its message is offensive to certain individuals. Unlike the Duke harassment policy, the Chicago rule does not use the vague concept of a hostile environment—a concept vague enough that an administrator could feasibly use it to punish classroom discussion or campus debate on any variety of topics.

Because it avoids the vagueness problem of the Duke rule and does not prohibit speech because the administration disagrees with its message or perceives it to be offensive, it seems that Chicago's general harassment policy cannot be used to censor those who would take an unpopular view during a rally in the university square or a classroom discussion. However, the policy can be used to punish those students or faculty who, in a situation far removed from the intellectual give and take of campus debate addressed in *Healy*, direct their speech at a student simply in order to bully him and interfere with his ability to function as a student.[203] Because this kind of directed, abusive, and bullying

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201. *See id.*

202. *See* Watts v. United States, 394 U.S. 705, 707 (1969); R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).

203. A student who takes a public stance on campus political issues must, like any other person, expect to be on the receiving end of harsh, even crude, commentary in the school newspaper and elsewhere. *See* Hustler Magazine v. Falwell, 485 U.S. 46, 51 (1988) (recognizing that "[t]he sort of robust

speech does not contribute to the university's spirit of free inquiry, its ability to review and challenge orthodoxy, or the intellectual give and take of campus debate, the University of Chicago is not dishonoring the Supreme Court's jurisprudence on academic freedom by attempting to punish it. It is not prohibiting speech on a content- or viewpoint-discriminatory basis that has the effect of leaving some orthodoxies unquestioned.[204]

Contained within its general policy on non-discrimination and harassment is the University's policy on sexual harassment:

> Sexual advances, requests for sexual favors, or sexually-directed remarks constitute harassment when either:
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> 1. submission to such conduct is used or threatened to be used as the basis for academic or employment decisions; or
>
> 2. such conduct directed at an individual persists despite its rejection.[205]

The first part of this policy is essentially little more than a restatement of the EEOC's ban on quid pro quo harassment, a type of harassment that no sensible university should hesitate to ban because it involves extortion and threats, speech that is not constitutionally protected.

The second part of the policy constitutes a ban on persistent and unwelcome "sexual advances, requests for sexual favors, and sexually-directed remarks." To be sure, this part of the policy, like the University's general harassment policy, can be used to punish some speech outside the context of quid pro quo harassment. However, this part of the policy also resembles the general harassment policy in that it provides both narrow and precise proscriptions of speech. The proscriptions of speech in both policies appear to be aimed at those who attempt to bully a student and interfere with her ability to function as a student, not at those whose speech constitutes part of the intellectual give and take of campus debate discussed in *Healy*. By forbidding persistent and unwelcome sexual advances and requests for sexual favors, the University is not attempting to stifle its spirit of free inquiry. After all, unwelcome sexual advances and requests for sexual favors generally do not have as their purpose or effect the stimulation of intellectual discussion. Furthermore, the policy painstakingly stresses that it should be interpreted in such a way as to protect

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political debate encouraged by the First Amendment" produces speech critical of those taking a stance on important public issues and that this speech will often be immoderate and unpleasant). In that situation, even intentionally injurious attacks on him made because of his stance become part of an ongoing political debate that needs "breathing space" if it is to survive. On the other hand, if one student bullies another—in a setting far removed from the campus debate on political issues—simply in order to make his life miserable or drive him from campus, then one is hard-pressed to argue that an administration which punishes him is stagnating the university's "marketplace of ideas."

204. Note that the Chicago speech rule eschews any attempt to ban fighting words on campus in its harassment policy. Has the University recognized a point that Professor Charles Lawrence recognized some time ago: that banning fighting words will not solve the problem of hate speech because abusive epithets, more often than not, cause their hearer psychological damage that is unaccompanied by an immediate desire to strike back with violence? *See* Charles L. Lawrence III, *supra* note 52, at 452-53.

205. UNIVERSITY OF CHICAGO, *supra* note 200, at 44.

the "uninhibited, robust and wide-open pursuit of ideas."[206] This statement strongly suggests that the University will not employ the phrase "sexually-directed remarks" to punish offensive or unorthodox ideas on the topic of sex that are raised within the context of campus debate.[207]

Ultimately, the University's sexual harassment policy shares with its general harassment policy the chief virtue of crafting narrow proscriptions of speech rather than incorporating hostile environment theory into its definition of harassment. The University, in seeking to eliminate quid pro quo sexual harassment and unwelcome and persistent sexual advances, has chosen not to forbid the creation of an "intimidating, hostile, or offensive environment," a "hostile or intimidating environment," or a "hostile environment" despite the fact that it is subject to the same liability as all the other schools in this section.[208]

At the University of Chicago, speech—even harassing speech—is not chilled by a theory of discrimination born in the workplace that can punish speakers for taking unpopular or "offensive" positions on delicate issues such as race and sex. The University of Chicago has apparently decided that, if one's goal is to prevent the emergence of a discriminatory atmosphere—or "hostile environment," or "intimidating, hostile, or offensive environment"—that denies women and minorities the benefits of a university education, there are other, less speech-restrictive means available to keep such an atmosphere at

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206. *Id.* at 44. Remember, in its general harassment policy, the University declares that it does "not attempt to shield people from ideas that they may find unwelcome, disagreeable, or even offensive." *Id.* at 42.

207. At this point, the First Amendment absolutists among us should point out that the sexual harassment policy, like any sexual harassment policy, is by definition, not content-neutral. However, one cannot convincingly show that the only purpose "served by the content limitation is that of displaying . . . special hostility towards the particular bias[ ] thus singled out." R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992). Most likely, the University singles out sexual harassment for consideration because a general harassment policy could not adequately address problems that simply do not arise in areas such as racial or ethnic harassment. For example, one rarely, if ever, hears of quid pro quo ethnic harassment, national origin advances, and requests for racial favors.

208. While the policy does not ban hostile environment harassment by defining sexual harassment as the creation of an "intimidating, hostile, or offensive environment," it does note that the sexual harassment of a student by a faculty member or another person with authority over the student "may easily create an intimidating, hostile, or offensive environment." UNIVERSITY OF CHICAGO, *supra* note 200, at 44. Essentially, all this statement does is acknowledge that the quid pro quo sexual harassment of a student by a faculty member, which consists of extortionary speech not protected by the First Amendment, may produce an environment that is intimidating, hostile, or offensive. This commonsense observation is just that, an observation. It simply notes that sexual harassment, which the policy defines narrowly and without the aid of hostile environment theory, may produce an unpleasant environment. Because it, unlike some of the policies reviewed above, does not define harassment as the creation of an "intimidating, hostile, or offensive environment," the policy does not license university administrators to ban offensive or unorthodox speech because the speech's offensiveness creates such an environment.

Quid pro quo sexual harassment of a student by a faculty member certainly does create an unpleasant environment. However, the speech accompanying this harassment is stripped of its constitutional protection because it constitutes extortion which threatens educational opportunity, not because it is offensive or unorthodox. Defining discriminatory harassment narrowly and then simply noting that it may create an unpleasant environment is one thing; defining discriminatory harassment broadly to include offensive or unorthodox speech that creates an "intimidating, hostile, or offensive environment" is quite another. The first option, which the University of Chicago has chosen, does not menace free speech. The second option does.

bay than importing hostile environment theory into its harassment policy. In other words, it has decided that the best way to prevent the emergence of a hostile environment on campus and to protect free speech in the university is to eschew hostile environment theory.

V

CONCLUSION

In order for our nation's colleges and universities to preserve their spirit of free inquiry, and to avoid becoming the tools of the "[c]hurch, state, or any sectional interest,"[209] they must recognize the importance of free speech and academic freedom to that spirit and guard them zealously. If a university regards free speech merely as a value to be balanced against other desirable values, then it is in danger of promoting some orthodoxies instead of challenging all of them. To require that speech on campus not create a "hostile environment" or an "intimidating, hostile, or offensive environment" is to suggest to students and faculty that there are some questions that the university has answered for them—that there are some avenues of inquiry and debate that remain closed. Worse yet, the vagueness of "hostile environment" theory may, in many cases, leave all but the most "politically correct" students and faculty guessing exactly which opinions are okay to discuss publicly and which are not. While the workplace may be able to chug along and meet its goals in such a situation, the university cannot. The idea of the university as a place of "unfettered expressive freedom" is undermined by these conditions.

At this point, one may well ask, what about the second idea of the university discussed by Professor Smolla—the idea of the university as a community of scholars where "the contemplative and rational faculties of man triumph over blind passion and prejudice"?[210] If it is to be honored, must not the university place some speech off-limits and allow only certain views of the world to be discussed? Might not "hostile environment" theory be imported into the university setting from the workplace in order to honor this idea?

A university that honors the second idea of the university in this way will not be able to create a vibrant community of scholars who feel as though they may follow the answers to a question wherever they may take them. All universities should strive for an atmosphere of civility and tolerance. University administrators can help create such an atmosphere by stressing the need for polite discourse and tolerance on campus and by following the University of Chicago's example of using narrow proscriptions of speech in their harassment policies. They cannot create this atmosphere by using a workplace theory of discrimination to ban or punish the mention of certain views. If they do, they create a community where some members resent the fact that they must remain

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209. Sweezy v. New Hampshire, 354 U.S. 234, 262 (1957) (citation omitted).
210. Smolla, *supra* note 1, at 217.

silent about their views and ideas. Such a community is in danger of becoming an intellectually stagnant place.

In order to honor both ideas of the university, universities must recognize that free speech and academic freedom are essential to preserving the spirit of free inquiry that allows them to serve as fearless reviewers and challengers of orthodoxy. To be sure, creating a cohesive community in the midst of the controversy that this reviewing and challenging can generate is a difficult task. However, universities only increase the level of difficulty when they attempt to regulate the marketplace of ideas with a workplace theory of discrimination that chills the speech of some community members, spreading the fear that the expression of certain views will meet with punishment. The continuing vitality of the idea that a community can be built upon such fear among some proponents of speech codes is a testament to man's ability to ignore the experience of history—especially the history of our own tumultuous century.