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## Article

# Campus Speech and Harassment

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University authorities face a twofold dilemma of operating institutions that are committed to free speech and obligated to investigate and address hostile environment claims. Those who administer the effectiveness of young adults’ educational experiences must walk a tightrope of providing their charges with the means to discuss controversial issues while preventing debate from deteriorating into harassment.

An assessment of whether public universities have the obligation to restrict dangerous communications should reflect

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several overlapping and sometimes contradictory constitutional, statutory, and regulatory topics. Principally the controversy about the legitimacy of such restrictions invokes concerns for free speech, which under ordinary circumstances is protected by the First Amendment except in some exceptional circumstances. Different opinions of the extent to which provocative statements appearing on campuses can constitutionally be sanctioned raise liberty and equality concerns. Certain forms of expression involve conflicting claims from students subjected to degradation and those facing silencing for voicing controversial opinions. The controversy runs the gamut from mildly offensive name-calling to intentionally targeted threats. Painting the contours of a comprehensive legal framework is critical for maintaining educational civility while respecting the expressive rights of the campus community.

Some scholars argue that certain equality considerations justify the enforcement of campus speech codes. For example, Cass Sunstein has pointed out that the Fourteenth Amendment's "anticaste principle" empowers governmental entities to regulate campus hate speech in order to prevent the subordination of one group to another "with respect to basic human capabilities and functionings."<sup>1</sup> Richard Delgado takes a similar position, arguing that universities can sanction stigmatizing speech consistently with the equality principles of the Fourteenth Amendment.<sup>2</sup> Their perspectives comport with those of other scholars who regard the regulation of hate speech to arise from the public obligation to cultivate inclusive democracy.<sup>3</sup> On the other side of the argument are academics—such as Erwin Chemerinsky and David Bernstein—who view campus restrictions on communications to be significant interferences with free speech principles.<sup>4</sup>

In addition to the cauldron of constitutional controversies stirred up by regulating heated and often vitriolic debates, campus speech codes raise complex statutory questions about

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1. Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 798–802 (1993).

2. Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 381 (1991).

3. See, e.g., Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 784–87 (1987).

4. See David E. Bernstein, *Defending the First Amendment from Antidiscrimination Laws*, 82 N.C. L. REV. 223, 240–41 (2003); Erwin Chemerinsky, *Unpleasant Speech on Campus, Even Hate Speech, Is a First Amendment Issue*, 17 WM. & MARY BILL RTS. J. 765, 770 (2009).

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when and whether anti-harassment principles of the Civil Rights Act of 1964, Title VI, and related regulations mandate university initiatives to address bellicose rhetoric. Whether free speech claims trump the federal prohibition against harassment is not a simple algorithmic problem. Its solution requires an analysis of whether campus speech codes facially violate the First Amendment, and, if not, whether their enforcement unconstitutionally undermines specific students' expressive freedoms. Heated debate over these matters has in recent years drawn journalistic and legal attention with the burgeoning of clamorous national and local movements calling for university administrators to suppress microaggressions, issue trigger warnings, and designate safe spaces.<sup>5</sup> These clamorous efforts to advance campus civility raise significant First Amendment quandaries. In order to deal with complex tradeoffs between campus safety, educational needs, and self-expression this Article seeks to articulate a clear framework for resolution, consistency, and predictability.

Part I of the Article begins with a discussion of contemporary issues recently arising from charged verbal confrontations on U.S. campuses. It includes sociological studies of safe spaces, trigger warnings, and hate speech. Part I also examines whether there is any historical reason to believe the harm of student incitements and threats can corrode social and educational conditions. Following this discussion of student vitriol, Part II of the Article begins with an evaluation of pertinent Supreme Court and lower court opinions. It then shows how First Amendment doctrines should inform the creation of effective campus codes. Part II also elaborates the provisions of a pertinent federal anti-harassment statute. It argues that federal civil rights law requires colleges to take affirmative steps to prevent harassment. Part II concludes by parsing and critiquing several lower court opinions that have ruled on the constitutionality of campus codes. Part III examines and analyzes the constitutionality of campus speech codes from universities around the country, including the University of Chicago and the University of California.

### I. ABUSE ON COLLEGE CAMPUSES

A breadth of speech-related controversies regularly arise on U.S. college campuses. They range from complaints by over-

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5. See, e.g., *infra* notes 16–18 and accompanying text.

ly sensitive accusers being offended by comical comments to students terrorized by intimidating, racist slurs being scrawled on their dormitory room doors. The purpose of this Article is to identify whether it is constitutionally justifiable to regulate extreme forms of verbal abuse without undercutting an essential function of university studies, the fostering of debates about controversial topics.

The power of speech in educational settings cannot be overemphasized. Discourse expands audiences' intellectual and public perspectives by exposing them to diverse and novel points of view or confirms prior convictions. On campuses, students, professors, and guest speakers can be heard articulating diverse opinions in classrooms, outdoor fora, student unions, and at organized lecture series. The liberty of open dialogue, however, is sometimes abused to insult individuals or groups. Occasionally degrading slurs, slanders, stereotypes, and defamations are also heard on college campuses.

In the United States, universities have always been repositories of knowledge and wisdom. But at times universities have also been the incubators of proslavery and racist ideologies. This was particularly the case during the nineteenth and early twentieth centuries, when proslavery and segregationist ideologies often found receptive audiences among students and college officials.<sup>6</sup> The situation around the world has been even graver than in the United States: there are numerous examples of student organizations participating in violent protests that spur others to commit similar actions.<sup>7</sup> The lesson to be drawn, therefore, is that unchecked student incitement is not benign but can lead to dangerous consequences. Administrators' efforts to maintain order on campus are rooted in historical experienc-

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6. See *Sweatt v. Painter*, 339 U.S. 629, 633–36 (1950) (holding that the University of Texas Law School's denial of admission to blacks without offering equal educational opportunities violated the Equal Protection Clause); Alfred L. Brophy, *The Republics of Liberty and Letters: Progress, Union, and Constitutionalism in Graduation Addresses at the Antebellum University of North Carolina*, 89 N.C. L. REV. 1879, 1958 (2011) (writing of proslavery thought at Southern and Northern colleges); Paul Finkelman, *Thomas R.R. Cobb and the Law of Negro Slavery*, 5 ROGER WILLIAMS U. L. REV. 75, 89 (1999) (mentioning the forerunning of the University of Georgia School of Law becoming a major training ground for Southern, proslavery lawyers); William C. Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950–2000*, 19 HARV. BLACKLETTER L.J. 1, 5 (2003) (writing of Jim Crow admissions standards at the University of Florida College of Law).

7. See *infra* text accompanying notes 89–119.

es with the extremes to which indiscriminate harassment can be taken. However, when taken too far, these efforts can be abused to suppress the dissemination of ideas.

#### A. U.S. COLLEGE CAMPUSES

Student life at any university is filled with communications. Students engage in discussions, debates, and persuasions in classrooms, outdoor spaces, coffee shops, and cafeterias. Conflicts are inevitable among young persons who come from diverse backgrounds, races and ethnicities, communities, regions, and political leanings. Their different outlooks, approaches to life, and temperaments may be irrelevant to interactions with fellow students or they may lead to sustained conflicts. Universities' fiduciary duties to students<sup>8</sup> raise questions of whether they can and should intervene in abrasive interpersonal conflicts without violating the First Amendment. Administrators have an obligation to provide safe campus environments conducive to education, where ideas are shared but dangerous forms of speech, such as threats, are subject to a proportionate censure or counter-speech.

Scholars who write in this area of law tend to adopt polarized points of view. On one end of this polarity are those who believe that restrictions on speech are imperative to curb campus racism,<sup>9</sup> and those on the other who raise dire warnings about the dangers of viewpoint suppression resulting from the enforcement of campus codes.<sup>10</sup> The truth is more nuanced, with examples of university administrators' overzealous responses, on the one hand, and administrative laxness, on the other.

##### 1. "Safe Spaces" and "Trigger Warnings"

Some student groups have advocated for the creation of designated buffer zones against hostile environments on college

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8. See generally Kent Weeks & Rich Haglund, *Fiduciary Duties of College and University Faculty and Administrators*, 29 J.C. & U.L. 153 (2002) (discussing university fiduciary duties arising from university-student relationship).

9. See, e.g., Angela Mae Kupenda & Tiffany R. Paige, *Why Punished for Speaking President Obama's Name Within the Schoolhouse Gates? And Can Educators Constitutionally Truth-en Marketplace of Ideas About Blacks?*, 35 T. MARSHALL L. REV. 57, 68 (2009).

10. See, e.g., Stephen Fleischer, *Campus Speech Codes: The Threat to Liberal Education*, 27 J. MARSHALL L. REV. 709, 739 (1994).

campuses; others argue to the contrary that safe spaces are segregated environments that do not belong on campuses.<sup>11</sup> The terms “safe spaces” and “trigger warnings” sometimes include a variety of common sense rules about communications in classrooms, such as having students think before speaking, being empathic when speaking about sensitive topics, and discussing students’ sense of harm in response to various complex social issues.<sup>12</sup> “Trigger warnings” are explicit statements that certain material discussed in an academic environment might upset sensitive students, especially those who have been traumatized by such harms as rape or discrimination.<sup>13</sup> The administration of trigger warnings includes allowing students uncomfortable with classroom materials to leave and not participate.<sup>14</sup> “Safe spaces” refers to a range of environments where students join likeminded companions at particular locations on campus.

It makes sense for faculty and students to avoid misethnic or chauvinistic phrasing to better establish and maintain a vibrant, interactive environment, one that respects other members of the student body.<sup>15</sup> But such warnings should be voluntary and based on professors’ sensibilities about the delivery of materials to diverse audiences. Moreover, students’ personal spaces—be it dormitory rooms, lockers, or mailboxes—are meant to provide privacy without being subject to mean-spirited verbal attacks. So too specialized student organizations—such as black student societies or women’s organizations—help participants congregate for specific purposes. But these should remain open to all and not be segregated.

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11. Meera E. Deo, *Two Sides of a Coin: Safe Space & Segregation in Race/Ethnic-Specific Law Student Organizations*, 42 WASH. U. J.L. & POL’Y 83, 123 (2013).

12. Sean Darling-Hammond & Kristen Holmquist, *Creating Wise Classrooms To Empower Diverse Law Students: Lessons in Pedagogy from Transformative Law Professors*, 17 BERKELEY J. AFR.-AM. L. & POL’Y 47, 74–75 (2016).

13. See Jennifer Medina, *Warning: The Literary Canon Could Make Students Squirm*, N.Y. TIMES (May 17, 2014), <https://www.nytimes.com/2014/05/18/us/warning-the-literary-canon-could-make-students-squirm.html>.

14. See *id.*

15. See Mae Kuykendall & Charles Adside, III, *Unmuting the Volume: Fisher, Affirmative Action Jurisprudence, and the Legacy of Racial Silence*, 22 WM. & MARY BILL RTS. J. 1011, 1023 (2014). For a proposal to codify a broad-based statute prohibiting expressions such as unwanted catcalls, sexual commentary, and solicitation of sex that are made in public places, see Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 575–76 (1993).

At university campuses around the country, certain student organizations vociferously and sometimes violently have demanded that administrators silence speakers whom they perceive to be making unwelcome and emotionally disturbing statements.<sup>16</sup> There is no basis in the Constitution nor statutory authorities to require universities to cater to the demands of student or faculty groups, seeking to censure speakers who are offensive, bombastic, or inappropriate, but pose no physical or educative threat. A Northwestern University professor was recently investigated and charged for sexual harassment after she published an article mocking the university's sexual harassment policy.<sup>17</sup> At Amherst College, some students demanded the promulgation of a campus speech code that would punish other students who had put up an "All Lives Matter" poster.<sup>18</sup>

Uses of "safe spaces" and "trigger warnings" to silence and censor opponents are both exclusionary and harmful to open discourse. Confusing their personal sensibilities with hate speech, some students have demanded that schools maintain safe spaces, reminiscent of hermetically sealed echo chambers of like-minded individuals.<sup>19</sup> These safe spaces are by design

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16. See Wendy Kaminer, *The Progressive Ideas Behind the Lack of Free Speech on Campus*, WASH. POST (Feb. 20, 2015), [http://www.washingtonpost.com/opinions/the-progressive-ideas-behind-the-lack-of-free-speech-on-campus/2015/02/20/93086efe-b0e7-11e4-886b-c22184f27c35\\_story.html](http://www.washingtonpost.com/opinions/the-progressive-ideas-behind-the-lack-of-free-speech-on-campus/2015/02/20/93086efe-b0e7-11e4-886b-c22184f27c35_story.html).

17. *Professors Cannot Fully Participate in Student Activism*, WELLESLEY NEWS (Mar. 16, 2016), <https://thewellesleynews.com/2016/03/16/professors-cannot-fully-participate-in-student-activism>.

18. Nina Burleigh, *Fightin' Words*, NEWSWEEK, June 3, 2016, at 24, 30; Matt Johnson, *The Rapid Decline of Free Expression on Campus*, TOPEKA CAPITAL-J. (June 11, 2016), <http://cjonline.com/opinion/2016-06-11/matt-johnson-rapid-decline-free-expression-campus>.

19. See, e.g., Scott Jaschik, *Oberlin President Says No to Students' Demands*, PBS NEWSHOUR: THE RUNDOWN (Jan. 22, 2016), <http://www.pbs.org/newshour/rundown/oberlin-president-says-no-to-black-students-demands>. A curious point about the Oberlin demands was that they were not only filled with hubris about the rightness of the students' position, about such matters as whom the university should fire and whom they should promote, but also contained an element of bias. The only country the Oberlin student activists targeted was a democracy, demanding the boycott of Israel, while making no similar demand for any gross human rights abusers, such as Iran, Afghanistan, or Syria. See Memorandum to Bd. of Tr., President, Vice President, Oberlin College (Jan. 2016), <https://new.oberlin.edu/petition-jan2016.pdf>. To my mind, the only reason for such an irrational focus on Israel stems from its Jewish character and the historical stereotype of Jews being the predominant source of evil in the world. See KENNETH L. MARCUS, *JEWISH IDENTITY AND CIVIL RIGHTS IN AMERICA* 180 (2010). On the assertions of blatantly antisemitic sentiments at Oberlin, see Jeffrey Salkin, *No 'Safe Space' at Ober-*

exclusive. At Scripps College in California, administrators set aside an official time and location “for people of color” and their invited allies to “decompress, discuss, grieve, plan, support each other, etc. in solidarity.”<sup>20</sup> In places like Pomona College, which like Scripps is part of the Claremont Colleges consortium, these spaces operate on segregated bases, for the exclusive congregation of “students of color,” an ambiguous term referring to historically marginalized groups, to commiserate alone.<sup>21</sup> The University of Connecticut has taken matters a step further, planning to offer students segregated campus housing dorms, exclusively for black students.<sup>22</sup> The UCLA Afrikan Student Union made the demand for a segregated safe space, on a separate dormitory floor where only black students would be permitted to live.<sup>23</sup> At the University of California, Berkeley, a large group of students demanded that safe spaces be set aside for students of color and other minorities. They blocked campus sidewalks, requiring pedestrians to make their way through campus along an unpaved path and menacing those who tried to break their human chain. The protestors then boycotted a store in a prominent entrance of campus, demanding it close down and vacate space for the alliance of students of color and LGBTQIIA.<sup>24</sup> Student leaders next moved their boisterous protest into the Associated Students of University of California Student Union, where they disrupted students who were studying.<sup>25</sup> Students have also made demands for racially, sexually, and ethnically segregated spaces at Amherst College; California State University, East Bay; California State University,

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lin for Jewish Students Who Back Israel, RELIGION NEWS SERV. (Mar. 8, 2016), <http://religionnews.com/2016/03/08/178630>.

20. Steven Glick, *Safe Spaces Segregate the Claremont Colleges*, CLAREMONT INDEP. (Nov. 17, 2015), <http://claremontindependent.com/safe-spaces-segregate-the-claremont-colleges>.

21. *Id.*

22. Cody Derespina, *University Living Space Gives Priority to Black Male Students, Sparking Controversy*, FOX NEWS (Feb. 2, 2016), <http://www.foxnews.com/us/2016/02/02/uconn-building-black-only-living-space-to-promote-scholarship.html>.

23. *Afrikan Student Union at UCLA Releases Demands*, NOMMO (Oct. 23, 2015), <http://nommomagazine.com/?p=2580>.

24. LGBTQIIA is an acronym that stands for: Lesbian, Gay, Bisexual, Transgender/Transsexual, Queer/Questioning, Intersex, Intergender, Asexual.

25. Lukas Mikelionis, *Berkeley Protesters Demand ‘Spaces of Color,’ Harass White Students Trying To Pass*, FOX NEWS U.S. (Oct. 24, 2016), <http://www.foxnews.com/us/2016/10/24/berkeley-protesters-demand-spaces-color-harass-white-students-trying-to-pass.html>.

Los Angeles; Clemson University; New York University; and at several other universities in the United States.<sup>26</sup> These are not simply requests for safe dormitories, where one can feel comfortable without being harassed by racist or sexist roommates,<sup>27</sup> but something exclusionary and detrimental to student integration. They are efforts to use university facilities without allowing disfavored persons to join. Universities would be amiss to buckle to these demands.

To the contrary, the Supreme Court has found that universities can prohibit organizations from using funds, facilities, and official channels of communication if membership is predicated on discriminatory criteria.<sup>28</sup> Moreover, any public university that agrees to separate persons on the basis of racial characteristics would need to explain the policy to be compelling and narrowly tailed to the evil. It is highly unlikely that any state entity could prove any such compelling reason since classroom, dorm room, or university activity segregation would perpetuate one of the greatest evils in our national history.<sup>29</sup>

The “trigger warnings” movement is also part of an empathic strategy to create an ostensibly more inclusive environment, but in its extreme form it also demands the repression of

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26. *Our Demands*, BLACK LIBERATION COLLECTIVE, <http://www.blackliberationcollective.org/our-demands> (last visited Apr. 4, 2017).

27. In a recent Internet post, Mark Tushnet suggested it is “basically quite stupid” for a university to deny students safe spaces. Mark Tushnet, *More on the University of Chicago Letter on “Safe Spaces” [I]*, BALKINIZATION (Aug. 27, 2016), <http://balkin.blogspot.com/2016/08/more-on-university-of-chicago-letter-on.html>. As a *reductio ad absurdum*, he asserts that if such a policy were in place, university housing administrators would be prohibited or simply unwilling to respond to the complaint of a person with an offensive roommate who requested to move to different, less acrimonious accommodations. *Id.* But Tushnet’s post does not provide any examples of actual student requests for safe spaces, and therefore misses the racially exclusionary nature of actual student requests for safe spaces.

28. See Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 561 U.S. 661, 662, 697 (2010) (finding a university could reasonably require a religious student organization to comply with its nondiscrimination policy imposed on officially recognized student organizations).

29. Looking to precedents for guidance, it is unlikely such university segregation would be upheld given that even a state’s attempt to segregate persons to diminish the risk of gang violence in jails was deemed to be insufficiently compelling to overcome the strict scrutiny standard. *Cf.* Johnson v. California, 543 U.S. 499, 504–05, 509 (2005) (overruling the court of appeals for not applying strict scrutiny, where the court of appeals applied a more deferential standard and discussed the issue being a “close case” even under that deferential standard). State-created spaces for campus segregation is less compelling because it does not involve any possibility of physical violence.

disfavored speech. There are no current empirical studies demonstrating the educative value of trigger warnings; indeed, they do not get at the underlying problems—such as sexism and racism—its advocates seek to alleviate.<sup>30</sup> While issuing trigger warnings might protect select groups from emotional distresses, they are also likely to stilt literary discussions. Furthermore, students who would upon their own demand leave class to avoid offense would likely miss valuable lecture and discussion times, which are critical to learning. The study of human character in much literature is violent and purposefully disturbing. Fyodor Dostoyefsky's *Crime and Punishment*, Homer's *Iliad*, Richard Wright's *Native Son*, Ken Kesey's *One Flew over the Cuckoo's Nest*, and Pearl Buck's *The Good Earth* come immediately to mind: all these books contain disturbing narratives. Signaling each shocking passage in them would impose the teacher's opinion and would likely increase a professor's ideological control rather than creating an environment open to discourse and student involvement. The pain depicted in these great novels is well known to promote character and cultural development; in other words, the trauma they invoke is intrinsic to the experience of reading deeply.<sup>31</sup> That is not to say that trigger warnings never have a place. Indeed, a professor who finds an appropriate spot, whether on a syllabus or at some point in her course, might well help facilitate learning by using them. But enforced trigger warnings are academically and, at public universities, constitutionally suspect. They raise the worrisome specter of universities imposing government viewpoints on scholars and requiring them to transmit the accepted line to students.

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30. LORNA VERALDI & DONNA M. VERALDI, IS THERE A RESEARCH BASIS FOR REQUIRING TRIGGER WARNINGS? 1, 6–7 (2015), <http://www.forensicpsychology.org/VeraldiVeraldiTriggerWarningsHandout.pdf> (“Instead of a futile and chilling crusade to rid the curriculum of potential trauma triggers, American colleges and universities seeking to help traumatized students find treatment for PTSD would do well to focus on insuring that they do not face such obstacles in getting the assistance they need to begin to heal their wounds.”).

31. See Laurie Essig, *Trigger Warnings Trigger Me*, CHRON. HIGHER EDUC. (Mar. 10, 2014), <http://chronicle.com/blogs/conversation/2014/03/10/trigger-warnings-trigger-me> (“Trigger warnings are a very dangerous form of censorship because they're done in the name of civility. Learning is painful. It's often ugly and traumatic. How different my life would be if I hadn't read *Crime and Punishment* because it's misogynist and violent. How terrible my teaching would be if I hadn't spent years researching spectacle lynchings and eugenics and freak shows in order to teach courses on race and American culture.”).

At some campuses—most prominently Columbia University, Oberlin College, Rutgers University, and the University of California—students have demanded that instructors and professors issue prior warnings before embarking on materials that might set off negative associations of sexism, racism, or similar discriminations. Enterprising students attending Columbia University, one of the powerhouses of world’s classical literature,<sup>32</sup> decided that standard texts—such as Ovid’s *Metamorphoses*—should be taught with supplementary alerts pointing to what some may consider disturbing depictions of rape.<sup>33</sup> Four student members of Columbia’s Multicultural Affairs Advisory Board believed *Metamorphoses* to be part of a body of Western canon that “contains triggering and offensive material that marginalizes student identities in the classroom,” advancing “histories and narratives of exclusion and oppression.”<sup>34</sup> The Oberlin College administration warned that even great works of literature, such as Chinua Achebe’s *Things Fall Apart*, could trigger harsh feelings from “experienced racism, colonialism, religious persecution, violence, suicide, and more.” These proposals have raised some effective opposition. In the wake of an Oberlin faculty protest, the administration retracted those guidelines.<sup>35</sup>

Other universities have also grappled with students who sought faculty warnings about content that some might find disturbing in light of historical prejudices and discriminations. For instance, at Rutgers University a group of students demanded faculty to issue trigger warnings about Virginia Woolf’s *Mrs. Dalloway*, because it deals with “suicidal inclinations,” and F. Scott Fitzgerald’s *The Great Gatsby*, because it had “a variety of scenes that reference gory, abusive and misogynistic violence.”<sup>36</sup> The student senate of the University of Cal-

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32. *Ranking of Best Graduate English Programs*, U.S. NEWS & WORLD REP., <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-humanities-schools/english-rankings> (last visited Apr. 4, 2017).

33. Michael E. Miller, *Columbia Students Claim Greek Mythology Needs a Trigger Warning*, WASH. POST. (May 14, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/05/14/columbia-students-claim-greek-mythology-needs-a-trigger-warning>.

34. *Id.*

35. Colleen Flaherty, *Trigger Unhappy*, INSIDE HIGHER ED (Apr. 14, 2014), <https://www.insidehighered.com/news/2014/04/14/oberlin-backs-down-trigger-warnings-professors-who-teach-sensitive-material>.

36. Tony Allen-Mills, ‘Gory’ *Gatsby* Is Too Violent for US Students, SUNDAY TIMES (Apr. 27, 2014), [http://www.thesundaytimes.co.uk/sto/news/world\\_news/Americas/article1404301.ece](http://www.thesundaytimes.co.uk/sto/news/world_news/Americas/article1404301.ece); Valerie Strauss, *What ‘Trigger*

ifornia at Santa-Barbara issued “A Resolution to Mandate Warnings for Triggering Content in Academic Settings,” which sought to require pedagogues to indicate on syllabi any assignments that might cause students emotional trauma.<sup>37</sup> The pedagogical inopportuneness of trigger warnings delimited by special interest student groups is evident from the type of curricular changes students have promoted around the country. These demands show little understanding that literature is meant to jar and make people uncomfortable. Triggers of strong emotions, including love, happiness, and sometimes revulsion, are part of the purpose of good literature. Authors explore diverse characters, enabling the audience to better comprehend human interactions, foibles, flaws, conditions, and idiosyncrasies.

In addition, demands for exclusionary public safe spaces and encompassing trigger warnings threatens to drive wedges between students, to stifle open discussions, and to separate groups rather than drawing them together for deliberation. These modern-day censorial approaches pose a particular threat to untenured and non-tenure-track faculty members.<sup>38</sup> Their reluctance to broach controversial subjects will be costly to intellectual pursuits and students’ abilities to engage in open classroom discussions. A less obvious harm resulting from these complaints against ordinary abrasions of human communications is the distraction from much more serious incidents of hostile discourse on university campuses.<sup>39</sup>

The expression of ideas, even obnoxious ones that make certain people feel uncomfortable, are not actionable; they are

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*Warning’ Would the Bible Get?*, WASH. POST (May 23, 2014), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/05/23/what-trigger-warning-would-the-bible-get>.

37. For a statement of the UC-Santa Barbara student who initiated the student resolution, see Bailey Loverin, *Trigger Warnings at UCSB*, DAILY NEXUS (Mar. 11, 2014), <http://dailynexus.com/2014-03-11/trigger-warnings-at-ucsb>.

38. Elizabeth Freeman et al., *Trigger Warnings Are Flawed*, INSIDE HIGHER ED (May 29, 2014), <https://www.insidehighered.com/views/2014/05/29/essay-faculty-members-about-why-they-will-not-use-trigger-warnings>.

39. See Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 753 (2016) (“Suppressing or chilling speech with trigger warnings because of its communicative, nonconduct harms [to emotions] necessarily prioritizes the emotions of some over others in an unavoidably subjective way that may serve as a pretext for viewpoint discrimination instead of alleviating tangible harm.”).

protected by the First Amendment.<sup>40</sup> A requirement that all professors include trigger warnings for emotionally charged content would no doubt chill education. Professors would be unlikely to include controversial materials in their syllabi. In the words of the American Association of University Professors:

Some discomfort is inevitable in classrooms if the goal is to expose students to new ideas, have them question beliefs they have taken for granted, grapple with ethical problems they have never considered, and, more generally, expand their horizons so as to become informed and responsible democratic citizens. Trigger warnings suggest that classrooms should offer protection and comfort rather than an intellectually challenging education.<sup>41</sup>

Even classic novels, which are invaluable for pedagogy and learning, sometimes do not fare well under the subjective scrutiny of administrators and students. There is a distinction between the study of disturbing materials and repeated harassment, with only the latter being an unprotected type of discourse.<sup>42</sup>

Trigger warnings can no doubt be instructive when pedagogues believe they will enrich the classroom with sensitive perspectives, but where they are administrative mandates on university faculty to present specific viewpoints in classrooms or at university events, then they constitute unconstitutional censorship. It is one thing to require faculty to teach the subjects they have been assigned, and quite another to demand that they mimic the administration's favored perspectives. In ordinary government employee settings, such as those involving postal workers or government attorneys, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."<sup>43</sup> However, the Court has

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40. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) ("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."); *cf.* *City of Houston v. Hill*, 482 U.S. 451, 472 (1987) ("[T]he First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.")

41. *On Trigger Warnings*, AM. ASS'N U. PROFESSORS (Aug. 2014), <https://www.aaup.org/report/trigger-warnings>.

42. *See infra* Part II.A.4.

43. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

also recognized in dictum that “[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.”<sup>44</sup> Robert Post has elaborated on this thought, writing that university faculty’s role is not to simply transmit the views of university administrators but to “expand knowledge” and apply “independent professional, disciplinary standards” in order to advance students’ democratic competence.<sup>45</sup>

## 2. Expressions of Racism, Xenophobia, and Antisemitism

Distinguishable from isolated microaggressions are expressions, gestures, and non-verbal communications that are meant to harass or intimidate. Persons who overtly or subtly intimidate, threaten, and disrupt education target individuals’ sense of tranquility and disrupt learning.<sup>46</sup>

The most common hate crimes committed in 2013 on university campuses, according to the National Center for Educational Statistics and the Bureau of Justice Statistics, were vandalism, group-targeted intimidation, and group-targeted assault.<sup>47</sup> Of hate crime intimidations, most pertinent to this Article, “17 percent were associated with ethnicity . . . , 13 percent with gender . . . , 8 percent with religion . . . , and 2 percent with disability.”<sup>48</sup> One incident of racial intimidation occurred when black teen high school students visited the Texas A&M campus. They were reportedly accosted by several whites shouting racist epithets and taunting them with a Confederate flag.<sup>49</sup> The flag symbolizes support for states that seceded dur-

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44. *Id.* at 425.

45. ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 92 (2012).

46. On the universities’ mission to provide a tranquil educational environment, see *Spartacus Youth League v. Board of Trustees*, 502 F. Supp. 789, 799 (N.D. Ill. 1980) (“[A] university may promulgate reasonable rules and regulations governing conduct within the university. It has the right to protect its property, avoid disruptions of the educational process and maintain order—i.e. it may preserve such tranquility as the facilities’ central purpose requires.” (citations omitted)).

47. ANLAN ZHANG ET AL., INDICATORS OF SCHOOL CRIME AND SAFETY: 2015, at 116 (2016), <http://nces.ed.gov/pubs2016/2016079.pdf>.

48. *Id.*

49. Eva-Marie Ayala, *One A&M Student Gone After Racist Confrontation with Dallas Teens, but School Won’t Say More*, DALL. MORNING NEWS (Mar. 2, 2016), <http://www.dallasnews.com/news/news/2016/03/02/texas-am-student>

ing the Civil War from the Union in order to retain slavery. In the twentieth century it became symbolic for support of racial segregation.<sup>50</sup> Texas A&M launched an investigation to determine what students were involved and whether the taunters violated campus rules.<sup>51</sup> The University of South Carolina suspended a student for writing racial epithets in a study room. The university president, Harris Pastides, found the “[r]acist and uncivil rhetoric” to violate the Carolinian Creed.<sup>52</sup> In another incident, at Bucknell University, three students were expelled for a radio broadcast that included the racist comments that “black people should be dead” and “lynch ’em.”<sup>53</sup> If unaddressed, racist harassment can negatively impact college safety, pedagogy, and class attendance.<sup>54</sup>

Public universities face the double dilemma of being bound by the First Amendment to protect free speech rights and yet also needing to create guidelines to avoid losing federal funding and being subject to federal causes of action. In 2015, several former players from the University of Illinois women’s basketball program filed a lawsuit alleging that athletic coaches segregated them on the basis of race.<sup>55</sup> In a federal court claim, the

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-involved-in-racial-slurs-against-dallas-teens-no-longer-enrolled; *Video May Identify Texas A&M University Students Accused of Yelling Racist Slurs*, CBS DFW (Feb. 11, 2016), <http://dfw.cbslocal.com/2016/02/11/video-may-identify-texas-am-university-students-accused-of-yelling-racist-slurs>.

50. Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 595–607 (2002).

51. Ayala, *supra* note 49. The police also launched a criminal investigation into the event.

52. Allen Wallace, *UPDATE: USC Suspends Student After Photo Surfaces of Racial Slur Written on Study Room Whiteboard*, COLADAILY.COM (Apr. 3, 2015), <http://coladaily.com/2015/04/03/usc-investigates-allegations-of-racial-slur-written-on-classroom-whiteboard>; *Statement from President Harris Pastides – Reaffirming Our Values*, U.S.C., [http://www.sc.edu/about/our\\_leadership/president/speeches/2015\\_04\\_statement.php](http://www.sc.edu/about/our_leadership/president/speeches/2015_04_statement.php) (last visited Apr. 4, 2017). Among its other provisions, the Carolinian Creed requires students to respect “the dignity of all persons” and to “practice personal and academic integrity.” *Carolinian Creed*, U.S.C., <https://www.sa.sc.edu/creed> (last visited Apr. 4, 2017).

53. Peter Holley, *University of South Carolina Student Suspended After Racist Photo Goes Viral*, WASH. POST (Apr. 5, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/04/05/university-of-south-carolina-student-suspended-after-racist-photo-goes-viral>.

54. *Cf.* Paula C. Fletcher & Pamela J. Bryden, *Preliminary Examination of Safety Issues on University Campus: Personal Safety Practices, Beliefs, & Attitudes of Female Faculty & Staff*, 43 C. STUDENT J. 181 (2009) (discussing the impact of campus harassment and safety).

55. Brendan O’Brien, *Former University of Illinois Women Basketball*

women sought \$10 million in damages from the university for promoting a racially hostile environment in violation of Title VI of the Civil Rights Act of 1964.<sup>56</sup> Among their claims litigants asserted that white players who associated with black players were shamed, that black players were consistently treated more harshly in practices than their white counterparts, and were targeted by mocking name calling.<sup>57</sup>

Some incidents are less confrontational but have recognizable misethnic characteristics. At Samford University, located in Birmingham, Alabama, the administration rejected a t-shirt design by the chapter Alpha Delta Pi sorority advertising its dance formal.<sup>58</sup> Disregarding the university's earlier directive, some of the sorority's sisters printed the controversial depiction. The design showed a map of Georgia. Within its borders were several drawings, including ones of slaves picking cotton and an exaggerated caricature of a black man eating watermelon. Subsequently, the international president of Alpha Delta Pi and the president of Samford, Andrew Westmoreland, strongly condemned the chapter's actions.<sup>59</sup> Such hate-filled caricatures are not confined to the Deep South. At Northwestern University, antisemitic and black graphics were twice drawn on campus property.<sup>60</sup> Fraternity brothers at the Uni-

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*Players File Suit Against School*, REUTERS (July 1, 2015), <http://www.reuters.com/article/us-usa-illinois-basketball-idUSKCN0PB66P20150701>.

56. Kami Mattioli, *Seven Former Illini Players File \$10M Federal Suit Claiming 'Racially Hostile' Program*, SPORTING NEWS (July 1, 2015), <http://www.sportingnews.com/ncaa-basketball/news/illinois-womens-basketball-team-lawsuit-race-matt-bollant-illini/1sjf7lntdyww11glwuz4nrob99>; O'Brien, *supra* note 55.

57. Shannon Ryan, *Former Illini Women's Basketball Players File \$10 Million Federal Suit*, CHI. TRIB. (July 1, 2015), <http://www.chicagotribune.com/sports/college/ct-illinois-basketball-lawsuit-20150701-story.html>.

58. Elizabeth Chuck, *Samford University Apologizes over Sorority's T-Shirt with Racist Imagery*, NBC NEWS (May 14, 2015), <http://www.nbcnews.com/news/nbcblk/samford-university-apologizes-over-sorority-s-t-shirt-racist-imagery-n574131>.

59. Brendan O'Brien, *Sorority Apologizes for Racist T-Shirt Made by Chapter in Alabama*, HUFFINGTON POST (May 16, 2016), [http://www.huffingtonpost.com/entry/sorority-apologizes-for-racist-t-shirt-made-by-chapter-in-alabama\\_us\\_5739cd87e4b060aa781ab580](http://www.huffingtonpost.com/entry/sorority-apologizes-for-racist-t-shirt-made-by-chapter-in-alabama_us_5739cd87e4b060aa781ab580).

60. Brian L. Cox, *More Racist, Anti-Semitic Graffiti Found at Northwestern University*, CHI. TRIB. (June 12, 2015), <http://www.chicagotribune.com/suburbs/evanston/news/ct-northwestern-graffiti-met-20150611-story.html>; William Lee, *Northwestern University Students Charged with Hate Crime, Vandalism to Chapel*, CHI. TRIB. (Mar. 12, 2016), <http://www>

versity of Oklahoma chanted racist slogans and three Muslims were fatally shot in Chapel Hill, North Carolina.<sup>61</sup> In an effort to deter hate crimes by promoting dialogue, the University of Pittsburgh student council developed an internal diversity organization, consisting of twenty-two student groups, to promote inter-ethnic awareness.<sup>62</sup>

Particularly crude and academically disruptive are professors who use racial stereotypes. Some have taken to social media to express their thoughts. While still a graduate student, now assistant professor at Boston University Saida Grundy offered the following racist observations to her followers on Twitter: “Why is White America so reluctant to identify White college males as a problem population?”<sup>63</sup> In another she wrote: “Every MLK week I commit myself to not spending a dime in White-owned businesses. And every year, I find it nearly impossible.”<sup>64</sup> In a third tweet, she wrote, “Deal with your Whitesh\*t [sic], White people. Slavery is a Y’all thing.”<sup>65</sup> In yet another tweet, Grundy wrote, “[W]hite masculinity isn’t a problem for america’s [sic] colleges, white masculinity is THE problem for america’s [sic] colleges.”<sup>66</sup> These tweets put in doubt Grundy’s objectivity, equal treatment of white male students, and the sense of belongingness all students can feel in her class. Grundy later wrote that she regretted speaking indelicately in her messages; however, in a subsequent interview she was completely unapologetic, chalking-up the criticism to society’s lack of willingness to be self-critical.<sup>67</sup> Just before she

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.chicagotribune.com/news/local/breaking/ct-50k-bails-for-northwestern-university-students-accused-of-chapel-vandalism-20160312-story.html.

61. Ralph Ellis, *Racist SAE Chant Was Taught at National Leadership Event*, *Fraternity Says*, CNN (Mar. 27, 2015), <http://www.cnn.com/2015/03/27/us/oklahoma-sae-fraternity-racist-chant>; Margaret Talbot, *The Story of a Hate Crime*, *NEW YORKER* (June 22, 2015), <http://www.newyorker.com/magazine/2015/06/22/the-story-of-a-hate-crime>.

62. Mahita Gajanan, *Pitt Students Form Diversity Council*, *PITT. POST-GAZETTE* (Apr. 12, 2015), <http://www.post-gazette.com/news/education/2015/04/12/Pitt-students-form-diversity-council/stories/201503300007>.

63. *Incoming Boston University Scholar’s Tweets on Race Create Controversy*, *J. BLACKS HIGHER EDUC.* (May 15, 2015), <https://www.jbhe.com/2015/05/incoming-boston-university-scholars-tweets-on-race-create-controversy>.

64. *Id.*

65. *Id.*

66. Art Jahnke, *President Brown Addresses Issue of Racially Charged Tweets*, *BU TODAY* (May 13, 2015), <http://www.bu.edu/today/2015/racially-charged-tweets-saida-grundy>.

67. Scott Jaschik, *Saida Grundy, Moving Forward*, *INSIDE HIGHER ED* (Aug. 24, 2015), <https://www.insidehighered.com/news/2015/08/24/saida>

joined the sociology department, Boston University President Robert Brown thought it necessary to issue a public rebuke: “We are disappointed and concerned by statements that reduce individuals to stereotypes . . . I believe Dr. Grundy’s remarks fit this characterization.”<sup>68</sup>

Antisemitism on U.S. campuses has grown at a disturbing rate in recent years.<sup>69</sup> A case that received national news coverage occurred in Oberlin, a college with an otherwise impressive history of civil rights activism. It is illustrative of a trend on some campuses to verbally attack Jews with minimal repercussion.<sup>70</sup> As the former United States Secretary of the Treasury Lawrence Summers points out, “[W]ith very few exceptions, university leaders who are so quick to stand up against microaggressions against other groups remain silent in the face of antisemitism.”<sup>71</sup> Indicative of this trend, a select group of students and faculty at Oberlin have demanded that Assistant Professor Joy Karega continue to be considered for tenure.<sup>72</sup> The groundswell of support grew after the discovery of several

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-grundy-discusses-controversy-over-her-comments-twitter-her-career-race-and.

68. Laura Krantz, *Incoming BU Professor Defends Racially Tinged Twitter Posts*, BOS. GLOBE (May 12, 2015), <https://www.bostonglobe.com/metro/2015/05/12/incoming-professor-defends-racially-tinged-twitter-posts/uhAFGDr6HnHypYM5TlZPKM/story.html>.

69. Uri Wilensky, *The Most Hated People in the United States May Not Be Who You Think*, HUFFINGTON POST (Feb. 26, 2016), [http://www.huffingtonpost.com/uri-wilensky/the-most-hated-people-in-\\_b\\_9327362.html](http://www.huffingtonpost.com/uri-wilensky/the-most-hated-people-in-_b_9327362.html) (“In late January, acts of vandalism were discovered in a historic Jewish cemetery in Connecticut. Also in January, graffiti with Swastikas, the phrase ‘Hitler was a hero’ and more were scrawled on the front door of a Brooklyn building belonging to Hassidic Jews. A Tampa synagogue was recently targeted by vandals during the Gasparilla celebrations. The hate crimes go beyond vandalism into threats and violence, like when a man killed three people at two different Jewish centers near Kansas City in 2014.”). According to FBI statistics, Jews are by far the most targeted group for racial animus. *Id.*

70. Alexander Tsesis, *Burning Crosses on Campus: University Hate Speech Codes*, 43 CONN. L. REV. 617, 622 (2010) (“Jewish students at several U.S. universities have recently been the targets of a growing number of antisemitic incidents. An Anti-Defamation League audit found there were ninety-four antisemitic incidents on U.S. campuses in 2007, representing about six percent of total anti-Jewish harassment and vandalism that year.”).

71. Lawrence Summers, *Larry Summers: Colleges Have Become Hypersensitive to Racial Prejudice. Why Not Anti-Semitism?*, WASH. POST (Mar. 31, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/03/31/larry-summers-colleges-have-become-hypersensitive-to-racial-prejudice-why-not-anti-semitism>.

72. Sophie Weinstein et al., *Jewish Students Oppose College’s Response to Karega Case*, OBERLIN REV. (Mar. 15, 2016), <http://oberlinreview.org/10028/opinions/jewish-students-oppose-colleges-response-to-karega-case>.

of Karega's Facebook postings, wherein she claimed that Israel is the mastermind of ISIS and that the terrorist attack in France on the *Charlie Hebdo* magazine was perpetrated by the Israeli security service, Mossad.<sup>73</sup> In other social media postings, Karega declared Nation of Islam Minister Louis Farrakhan to have been correct in proclaiming that "Israeli and Zionist Jews" played "key roles in the 9/11 attack" against the New York Twin Towers.<sup>74</sup> She also relied on a historical antisemitic stereotype of Jewish privilege by blaming the Rothschild family, long a symbol of Jewish power and money,<sup>75</sup> for manipulating of world financial markets.<sup>76</sup> Karega continued with another shrill claim, presumably attributing it to Jews as a whole: "We own your news, the media, your oil and your government."<sup>77</sup> She followed up by asserting that "the same people [are] behind' the . . . shooting down [of] a Malaysian airline over Ukrainian."<sup>78</sup> Karega's antisemitic diatribes were predicated on historical stereotypes about Jewish mendacity, which she thinly veiled as political commentary about Israel. As others do in the new antisemitism movement, Karega styles herself anti-Zionist, but her expression of hatred draws from historic stereotypes of Jews to criticize Israel.<sup>79</sup>

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73. David Gerstman, *Oberlin Professor Claims Israel Was Behind 9/11, ISIS, Charlie Hebdo Attack*, TOWER (Feb. 25, 2016), <http://www.thetower.org/3012-oberlin-professor-claims-israel-was-behind-911-isis-charlie-hebdo-attack>.

74. *Id.*

75. HARRY W. PAUL & HENRI DE ROTHSCHILD, 1872–1947: MEDICINE AND THEATER 275 (2011); GREGORY PAUL WEGNER, ANTI-SEMITISM AND SCHOOLING UNDER THE THIRD REICH 152 (2002); Pierre Birnbaum, *Grégoire, Dreyfus, and the Rue Copernic: Jews at the Heart of French History*, in 1 REALMS OF MEMORY 379, 383 (Arthur Goldhammer trans., 1996).

76. Gerstman, *supra* note 73. The Rothschild stereotype derives from the ancient canard of Jewish control of financial institutions and their manipulation for the oppression of non-Jews. See LEONARD DINNERSTEIN, ANTI-SEMITISM IN AMERICA 21 (1994) (describing the impression of the Rothschilds); JESSICA HILLMAN, ECHOES OF THE HOLOCAUST ON THE AMERICAN MUSICAL STAGE 132–33 (2012) (describing antisemitism in the play *The Rothschilds*); ANDRE OBOLER, MEASURING THE HATE: THE STATE OF ANTI-SEMITISM IN SOCIAL MEDIA 34 (2016), <http://ohpi.org.au/measuring-antisemitism> (describing the "Jewish control of America conspiracy" and the "Rothschild conspiracy").

77. Gerstman, *supra* note 73.

78. *Id.* Karega later took down the offending posts on her Facebook account, but the cached versions can still be viewed online. See *id.* (showing cached versions).

79. See Abraham Socher, *Karega-Mason's Facebook Posts Anti-Semitic*, OBERLIN REV. (Mar. 14, 2016), <http://oberlinreview.org/9897/opinions/karega>

To the credit of Oberlin's administration, it reprimanded Professor Karega. The college president, Marvin Krislov, issued a statement denouncing her "anti-Semitic conspiracy theories,"<sup>80</sup> realizing how alienated Jewish students had been on campus where their complaints were typically discounted as the outcry of privileged whites. Subsequently, a majority of Oberlin's faculty issued a written statement condemning Karega's Facebook posts and reassuring the student body that such bigotry is out of step with Oberlin's values.<sup>81</sup> However, a group of undergraduates and a few members of the faculty took the condemnation of antisemitism to be "anti-Black and anti-BDS."<sup>82</sup>

Oberlin's Board of Trustees reacted strongly, especially given the other hostility toward Jewish students on campus. The Trustees chairman, Clyde McGregor, unambiguously stated, "These postings are anti-Semitic and abhorrent. We deplore anti-Semitism and all other forms of bigotry. They have no place at Oberlin. . . . [T]he Board has asked the administration and faculty to challenge the assertion that there is any justification for these repugnant postings and to report back to the Board."<sup>83</sup> The college later initiated a faculty investigation and suspended Karega without pay to determine whether these or any other comments she made on campus have caused a hostile environment in Oberlin.<sup>84</sup> The question for Oberlin's faculty investigators was whether she had "violated the fundamental responsibilities of Oberlin faculty members—namely, adherence to the Statement of Professional Ethics of the American Association of University Professors."<sup>85</sup> After an extensive review pro-

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-masons-facebook-posts-anti-semitic (criticizing Professor Karega's Facebook posts).

80. Valerie Strauss, *Professor Slammed for 'Anti-Semitic and Abhorrent' Posts on Social Media*, WASH. POST (Mar. 6, 2016), <https://www.washingtonpost.com/news/answer-sheet/wp/2016/03/06/professor-slammed-for-anti-semitic-and-abhorrent-posts-on-social-media>.

81. Colleen Flaherty, *Condemning a Colleague*, INSIDE HIGHER ED (Apr. 12, 2016), <https://www.insidehighered.com/news/2016/04/12/oberlin-professors-condemn-colleagues-controversial-remarks-others-defend-them>.

82. *Id.*

83. *Statement from Board Chair Clyde McGregor on Anti-Semitic Social Media Posts*, OBERLIN NEWS CTR. (Mar. 5, 2016), <http://news.oberlin.edu/articles/statement-board-chair-clyde-mcgregor-anti-semitic-social-media-posts>.

84. Colleen Flaherty, *Oberlin Ousts Professor*, INSIDE HIGHER ED (Nov. 16, 2016), <https://www.insidehighered.com/news/2016/11/16/oberlin-fires-joy-karega-following-investigation-her-anti-semitic-statements-social>.

85. *Board of Trustees Statement on Assistant Professor Joy Karega*,

cess, during which Karega was afforded the right to counsel and to cross-examine her detractors, the Oberlin Board of Trustees terminated her employment for “failing to meet the academic standards that Oberlin requires of its faculty and failing to demonstrate intellectual honesty.”<sup>86</sup> To put itself on firmer legal ground against any retaliatory lawsuit by Karega, Oberlin would have done well to decide the case on the basis of Title VI harassment law.

#### B. IS HATE SPEECH WORTH THE WORRY?

As disturbing as are individual racist, xenophobic, and ethnocentric events at U.S. college campuses, they have not shifted into extreme forms that other countries have experienced. Where hatred has been given free reign, student movements have too often transitioned from speech to violence.<sup>87</sup> In the United States, as in other parts of the world, campus speech codes are meant to prevent the verbal instigations of violence and discrimination, to instill respect for a diverse student body, and to maintain a supportive environment conducive for education.<sup>88</sup>

This Section examines some extreme historical examples of student speech that incited student-coordinated extremist violence. While this correlation by no means implies that all or even most unbridled student hate speech will transition into violence, the examples covered in this part are meant to give some pause to the civil libertarian narrative which claims that college speech codes are unnecessary except in circumstances of immediate danger. There can be no doubt that the unique cultural experiences of countries makes each of them differently susceptible to student instigated violence; nevertheless, an international survey demonstrates the power of malevolent words on impressionable student populations. I provide four examples—taken from Rwandan, German, Indonesian, and Chinese histories—of extremist student movements who found speech to be indispensable for the creation of a hostile environment and later to the organization of violence against perceived enemies.

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OBERLIN NEWS CTR. (Nov. 16, 2016), <http://news.oberlin.edu/articles/board-trustees-statement-assistant-professor-joy-karega>.

86. *Id.*

87. *See infra* Part II.B.

88. *See generally* JOSEPH E. GARCIA & KAREN J. HOELSCHER, *MANAGING DIVERSITY FLASHPOINTS IN HIGHER EDUCATION* (2008) (addressing diversity in higher education and giving steps to improve higher education).

This Article is primarily about policy, not history; therefore, my overview is no more than a survey, saving for another article a robust discussion of these events. The central point these examples are meant to illustrate is that university administrators should be vigilant in assessing how likely incendiary student rhetoric is to instigate violence. Simply ruling out the likelihood that incendiary words can directly or indirectly stir violence is too categorical to accurately gauge the potential of vitriolic speech to incite conduct; instead, administrators should closely assess the context of utterances.

In the final decade of the twentieth century, a significant number of Rwandan university students and professors engaged in vicious verbal and then physical ethnocentric attacks against other students.<sup>89</sup> Long before the 1994 genocide of 800,000 Tutsis in Rwanda, Hutu student movements targeted Tutsi students.<sup>90</sup> In one example of how expressive conduct can cause harms on campus, shortly after 1962 Hutu students began to independently enforce a government-created ethnic quota of only nine percent Tutsi enrollment.<sup>91</sup> In addition to checking up on ethnicities, Hutu students also posted lists of Tutsi students in an effort to ostracize them.<sup>92</sup> This expressive conduct was not benign; to the contrary, the intolerant environment led to diminished Tutsi access to education.<sup>93</sup> The Hutu students' conduct by itself was not the sole trigger for exclusionary practices. It came at a time when the Hutu president,

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89. See SHAHARYAR M. KHAN, *THE SHALLOW GRAVES OF RWANDA* 16 (2000) (describing a dean who killed five of his professors); ELISABETH KING, *FROM CLASSROOMS TO CONFLICT IN RWANDA* 73 (2014) (describing treatment of Tutsis in schools in Rwanda); JOHAN POTIER, *RE-IMAGINING RWANDA: CONFLICT, SURVIVAL AND DISINFORMATION IN THE LATE TWENTIETH CENTURY* 60 (2002) (discussing a history professor's radio broadcast that sparked a massacre); KYRSTEN SINEMA, *WHO MUST DIE IN RWANDA'S GENOCIDE?: THE STATE OF EXCEPTION REALIZED* 27 (2015) (describing an interview with a professor trying to incite fear prior to the Rwandan genocide).

90. See IAN LAW, *RACISM AND ETHNICITY: GLOBAL DEBATES, DILEMMAS, DIRECTIONS* 80 (2013) ("This genocide resulted from the deliberate choice of a modern elite to foster hatred and fear to keep itself in power.").

91. FRED GRÜNFELD & ANKE HUIJBOOM, *THE FAILURE TO PREVENT GENOCIDE IN RWANDA: THE ROLE OF BYSTANDERS* 31 (2007).

92. *Id.* For many Hutus, education was a point of anger because when the Belgians colonized Rwanda they had favored Tutsi students and, some believed, had thereby created an imbalance in social standing. ALAIN DESTEXHE, *RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY* 41 (Alison Marschner trans., 1995).

93. *Cf.* GRÜNFELD & HUIJBOOM, *supra* note 91 (describing the impact of the conduct).

Gregoire Kayibanda, publically stated in 1964, “[I]f the Tutsi ever seek to obtain political power again they will find that the whole Tutsi race will be wiped out.”<sup>94</sup> Shortly before the genocide, the broadly distributed and brutally racist magazine *Kangura* published the “Ten Commandments,” among which was the demand that “[i]n the Education sector, (pupils, students, teachers) must be in the majority Hutu.”<sup>95</sup>

The indoctrination of Hutu university students was critical to the instigation of violence against Tutsis. The years before the genocide also witnessed the growth of the racist Bahutu movement, Interahamwe, and their open death threats and incitation on campus against Tutsis.<sup>96</sup> Professors joined in the stereotyping of Tutsi students, dehumanizing them, making them feel like outsiders, and facilitating the alienation of the two dominant groups in Rwanda.<sup>97</sup> The dehumanization of Tutsis on university campuses was part of a broader phenomenon of destructive messages throughout Rwandan society. Bahutu radio programs, the most popular form of broadcast media among ordinary people,<sup>98</sup> regularly dehumanized Tutsis by calling them “cockroaches” worthy of extermination.<sup>99</sup>

The extremes to which university students can go when emboldened by ideology is likewise evident from the pre-World War II example of nationalistic movements in Germany. The long incubation of antisemitism in university fraternities and their adult analogues, patriotic societies, critically contributed to the development of an educated social elite who accepted and disseminated negative conspiratorial beliefs about Jewish citi-

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94. *Id.*

95. *Id.* at 22. See generally Richard Ashby Wilson, *Inciting Genocide with Words*, 36 MICH. J. INT'L L. 277, 289–91 (2015) (discussing the Bahutu movement's reliance on *Kangura* to incite violence).

96. For a survivor's account of this period, see Interview by Samuel Totten with Umulisa (May 7, May 13 & June 2, 2008), in WE CANNOT FORGET: INTERVIEWS WITH SURVIVORS OF THE 1994 GENOCIDE IN RWANDA 42–43 (Samuel Totten & Rafiki Ubaldo eds., 2011).

97. *Id.* at 41.

98. Darryl Li, *Echoes of Violence*, in THE NEW KILLING FIELDS: MASSACRE AND THE POLITICS OF INTERVENTION 117, 125 (Nicolaus Mills & Kira Brunner eds., 2002); see also THARCISSE GATWA, THE CHURCHES AND ETHNIC IDEOLOGY IN THE RWANDAN CRISES 1900–1994, at 150 (2005) (discussing the development of broadcast media in Rwanda).

99. JEAN HATZFELD, MACHETE SEASON: THE KILLERS IN RWANDA SPEAK 55 (Linda Coverdale trans., 2005); MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA 212 (2001).

zens.<sup>100</sup> By the time the Weimar administration took the reins of power, at the conclusion of World War I, virulently antisemitic student organizations and student bodies were commonplace throughout the country.<sup>101</sup> Among fraternities that demanded restrictions on Jewish professionals and civil servants, the Union of German Students (*Verein deutscher Studenten*), spread popular antisemitic slogans, such as historian Professor Heinrich von Treitschke's brainchild, "[t]he Jews are our misfortune," from the group's place of origin in Berlin to chapters around the country.<sup>102</sup> The spread of antisemitism as a dominant force in student bodies was not immediate. Indeed, many nineteenth century antisemitic German student associations disbanded.<sup>103</sup>

However, in the aftermath of World War I, in the social milieu of anger at the terms of the Treaty of Versailles of 1919, the nationalist and Volkist movements gained force throughout the country. For example, student assemblies at Technical University of Dresden, Königsberg University, and elsewhere passed resolutions limiting the number of Jewish students to their ratio in the general population.<sup>104</sup> While perhaps the predominant factors in the growth of antisemitism at universities were the recessive German economy;<sup>105</sup> Wagnerian nationalism;<sup>106</sup> and collective animus about the imposed terms of

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100. DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 60 (1997).

101. *Id.* at 83.

102. Gerald Adler, *Curating the Social, Curating the Architectural*, in *CURATING ARCHITECTURE AND THE CITY* 171 (Sarah Chaplin & Alexandra Stara eds., 2009); GORDON A. CRAIG, *GERMANY 1866–1945*, at 154, n.40 (1978); Lisa Swartout, *Culture Wars: Protestant, Catholic, and Jewish Students at German Universities, 1890–1914*, in *RELIGION UND NATION, NATION UND RELIGION: BEITRÄGE ZU EINER UNBEWÄLTIGTEN GESCHICHTE* 157, 169–70 (Michael Geyer & Hartmut Lehmann eds., 2004).

103. *Cf.* Adler, *supra* note 102, at 171–73 (describing resistance that early antisemitic German student associations faced).

104. Uwe Lohalm, *Völkisch Origins of Early Nazis: Anti-Semitism in Culture and Politics*, in *HOSTAGES OF MODERNIZATION: STUDIES ON MODERN ANTISEMITISM 1870–1933/39: GERMANY—GREAT BRITAIN—FRANCE 188–89* (Herbert A. Strauss ed., 1993).

105. *See generally* THEO BALDERSTON, *ECONOMICS AND POLITICS IN THE WEIMAR REPUBLIC* (2002) (describing the German economy during the period).

106. PETER VIREECK, *METAPOLITICS: FROM WAGNER AND THE GERMAN ROMANTICS TO HITLER*, at lxxvii (2004); Andrea Franzius, *Forging Music into Ideology: Charles Seeger and the Politics of Cultural Pluralism in American Domestic and Foreign Policy*, 56 *AMERIKASTUDIEN / AM. STUD.* 347, 349 (2011).

peace;<sup>107</sup> the maligned specter of the Jewish pariah became the cultural and political target of opprobrium. During the Weimar years into the early 1930s, the vociferous hatred and disgruntlement against Jewish students had not yet become systematically violent.<sup>108</sup> Nevertheless, before the Nazis won elections in 1933, the strongest student association, the *Deutsche Hochschulring* (German University Circle), treated Jews as non-Germans who had no part to play in the nation's community of peoples.<sup>109</sup> A gradual rise in the number of student organizations determined to treat Jews as outsiders, rendered commonplace the calls for complete expulsion of Jews from civic society under the Nazis. Ideas engage, energize, and convince, and at universities they can influence young persons and incite them to action.

The potential of extreme, animus-filled hate speech morphing from debate into discriminatory conduct is not confined to the Rwandan and German examples. In China, during the brutal Cultural Revolution, which Mao Tse-tung unleashed in the mid-1960s, the fanatically destructive Red Guards (*Hong Weibing*) student movement was critical to the spread of Maoist propaganda, functioning effectively as a wing of the Central Cultural Revolutionary Group.<sup>110</sup> The Red Guards were not only a megaphone for revolutionary, rightist, and anti-class ideology, but they also actively stifled all opposition to the Communist Party by degrading and hurling verbal abuse and perpetrating brutal acts of physical violence.<sup>111</sup> What began as

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107. ERIC D. WEITZ, *WEIMAR GERMANY: PROMISE AND TRAGEDY* 83 (2007).

108. DONALD L. NIEWYK, *THE JEWS IN WEIMAR GERMANY* 64–68 (2001) (describing, inter alia, the efforts of professors in the Weimar Republic to institute a “moderate Judeophobia” in academia and isolate universities from “radical anti-Semitism”).

109. MICHAEL WILDT, *HITLER'S VOLKSGEMEINSCHAFT AND THE DYNAMICS OF RACIAL EXCLUSION: VIOLENCE AGAINST JEWS IN PROVINCIAL GERMANY, 1919–1939*, at 120 (Bernard Heise trans., Berghahn Books 2012) (2007) (describing the exclusionary policies of the *Deutsche Hochshulring* as being based on the idea that “Jewish Kind [was] not German kind”).

110. ROBESON TAJ FRAZIER, *THE EAST IS BLACK: COLD WAR CHINA IN THE BLACK RADICAL IMAGINATION* 115 (2015) (“[T]he Red Guards . . . took it upon themselves to bring Mao and the CCRG's decree[s] to life.”). The Red Guards were originally composed of university and middle school students, but the group soon expanded to include industrial workers. Harry Harding, *The Chinese State in Crisis, 1966–1969*, in *THE POLITICS OF CHINA: SIXTY YEARS OF THE PEOPLE'S REPUBLIC OF CHINA* 185 (Roderick MacFarquhar ed., 3d ed. 2011).

111. GAO YUAN, *BORN RED: A CHRONICLE OF THE CULTURAL REVOLUTION*, at xviii–xx (1987) (“Red Guards . . . took up the Mao's call to battle against the

student-led condemnations of cultural elitism soon turned into an additional tool for Mao to attack and purge alleged capitalists and counterrevolutionaries,<sup>112</sup> eventually turning from propaganda to the ideologically enflamed destruction of Chinese and Tibetan culture and violence perpetrated against perceived class enemies and opposition members of the Communist Party.<sup>113</sup>

At the opposite end of the Chinese political spectrum, in Indonesia, during the bloody dictatorship of President Suharto, the violently anti-communist student organization, the Joint Action Front of Indonesian University Students (*Kesatuan Aksi Mahasiswa Indonesia*, (KAMI)), terrorized anyone they associated with communism.<sup>114</sup> KAMI arose in universities and eventually spread around the country, at first as a federation of students who opposed communism and sought an end to the rein of former President Sukarno's government.<sup>115</sup> In time, however, moved by ostensible calls of reform and expressions of grievances leveled against the Sukarno government's crack-down against non-Marxists, KAMI began destroying Chinese and Russian literature, arguing that it was harming the minds of Indonesian youths,<sup>116</sup> coupled with protests demanding prices to be brought down and expressing political disapproval of Sukarno.<sup>117</sup> In the Army the student movement found a willing partner in the agitation against ethnic Chinese and communist leaders, inciting violent gatherings against Chinese-owned businesses, and ultimately agitating for the murder and imprisonment of communist leaders, their associates, and follow-

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enemies of socialism.”).

112. JOEL ANDREAS, *RISE OF THE RED ENGINEERS: THE CULTURAL REVOLUTION AND THE ORIGINS OF CHINA'S NEW CLASS* 100 (2009) (“First Mao used the Red Guards to attack the reactionary academic authorities, and then he used us rebels to attack the capitalist roaders.”).

113. REBECCA KNUTH, *LIBRICIDE: THE REGIME-SPONSORED DESTRUCTION OF BOOKS AND LIBRARIES IN THE TWENTIETH CENTURY* 217–21 (2003) (describing the looting and destruction of Tibetan cultural artifacts).

114. Justus M. Van Der Kroef, *The Sino-Indonesian Rupture*, 33 *CHINA Q.* 17, 21–30 (1968) (describing the anti-communist activities of KAMI).

115. MASUHARA AYAKO, *THE END OF PERSONAL RULE IN INDONESIA: GOLKAR AND THE TRANSFORMATION OF THE SUHARTO REGIME* 247 n.2 (Yuri Kamada trans., 2015) (describing the KAMI as a federation of “anti-communist” students); Guy J. Pauker, *Toward a New Order in Indonesia*, 45 *FOREIGN AFF.* 503, 503, 505 (1967) (describing the KAMI as opponents of the Sukarno regime).

116. *Continuing Student Agitation in Indonesia*, 5 *MINERVA* 116, 116 (1966).

117. *Id.* at 119.

ers as well as expulsion of Chinese nationals.<sup>118</sup> In all, with the aid of KAMI attacks in cities such as Jakarta, the Suharto-led government was blamed for five hundred thousand to one million executions of communists and their family members.<sup>119</sup>

These examples of verbal student activism are logarithmically more extreme than anything currently taking place on U.S. campuses. However, they serve as warnings of how far student organizations can deteriorate without standards of decency, respect, tolerance, and pluralism. In drafting campus speech codes, university administrators and boards of trustees should develop standards to protect the political, intellectual, and self-assertive powers of individual students and of student organizations. The power of these codes should be to communicate norms and to create a system of punishments that are consistent with First Amendment principles and in accord with pertinent statutes.

## II. FIRST AMENDMENT DOCTRINE

Free speech plays a preeminent role in U.S. constitutional culture. The critical role of speech in a representative democracy was brilliantly articulated by Justice Louis Brandeis: "It is hazardous to discourage thought, hope and imagination; that fear breeds repression; repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies."<sup>120</sup> The drafters of the United States Constitution believed that liberties, such as the freedom to think and speak, are essential for the elucidation of political truths and the maintenance of happiness.<sup>121</sup> These principles of free speech

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118. Pauker, *supra* note 115, at 503 (describing violence against communist leaders); Van Der Kroef, *supra* note 114 ("[KAMI and its counterparts] demanded the expulsion of all Chinese nationals from Indonesia and urged the government to seize Chinese-owned businesses.").

119. Marilyn Berger, *Suharto Dies at 86; Indonesian Dictator Brought Order and Bloodshed*, N.Y. TIMES (Jan. 28, 2008), <http://www.nytimes.com/2008/01/28/world/asia/28suharto.html> ("Estimates of the number of dead have ranged from 500,000 to as many as one million.").

120. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled on other grounds by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

121. *See id.* at 375 ("[The founders] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that

doctrine apply also to universities, especially those subsidized by public funding.

The functionality of public universities relies on free and open dialogue for the acquisition of knowledge and development of a politically conscious citizenry. Disputes are inevitable on campuses because the subjects of studies and discussions are often some of the most contentious in politics, culture, history, and the like. While inside classrooms, professors and students can be held to professional and pedagogical standards,<sup>122</sup> in public places like sidewalks and student unions even inaccurate or exaggerated statements can contribute to public discourse about such matters as campus policies or political candidates. Administration of colleges requires leadership that is tolerant of different points of view, even when they may seem farfetched. As is the case in public spaces outside the university, the heckler's veto, which refers to the demand that speech be suppressed to avoid making listeners uncomfortable or angry, does not trump the rights to debate, discuss, and spread information.<sup>123</sup> That is not to say that audience reaction never matters; indeed, where there is a high likelihood that particular statements or symbols will cause imminent violence or harassment, college administrators are justified in preventing their dissemination.<sup>124</sup>

Campus codes governing public universities must adhere to the First Amendment. Decisions on whether speech on campus can be censored must be predicated on relevant Supreme Court doctrines. This Part reviews three pertinent doctrines: incitement, true threats, and fighting words. They provide es-

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this should be a fundamental principle of the American government.”). Brandeis's high-minded reliance on the moral testament of the founders should be tempered by the fact that most of them countenanced and in many cases condoned the institution of slavery in a country whose Declaration of Independence and Constitution committed the country to equality, liberty, and general welfare.

122. POST, *supra* note 45, at 67 (arguing that universities do not violate First Amendment democratic principles when they use professional assessments in academic decisions about hiring, tenure and promotion, and pay raises).

123. See *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (“[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”).

124. See *Virginia v. Black*, 538 U.S. 343, 360–63 (2003) (finding that a state can pass a criminal statute prohibiting cross burning intentionally meant to threaten others with violence).

stantial guidelines for understanding how to draft constitutionally justifiable campus speech codes. I then address the application of Title VI to on-campus harassment. This Part concludes with a critique of lower court opinions that struck down several university speech codes. They provide some guidelines on how to avoid the pitfalls of drafting. After laying out the pertinent legal premises in this portion of the Article, Part III reviews and critiques several campus speech codes. Administrators must carefully balance the fundamental right of speech, which the Court has never found to be absolute,<sup>125</sup> with other educational concerns on matters such as civility, self-advancement, creativity, open dialogue, pursuit of social justice, informational acquisition, scholarship, innovation, and acculturation.<sup>126</sup>

#### A. SUPREME COURT DOCTRINE

The Supreme Court has provided guidance about what forms of speech the state can prohibit without violating the First Amendment. This Section discusses three forms of speech that the Free Speech Clause does not protect. It also identifies a statutory mandate for public universities to censure harassment in academic environments.

##### 1. Imminent Threat of Harm

The imminent threat of harm doctrine places one of the pertinent restrictions on government's ability to abridge free speech. It refers to a rigorous evaluative method for determining whether a statement poses a significant enough danger to the public to warrant police intervention. Ordinary speech, including hyperbolic or even obnoxious statements, cannot be abridged without infringing constitutional free speech rights.<sup>127</sup>

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125. *Id.* at 358 (“The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution.”); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (“[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.”); *cf.* *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1441 (2014) (“The right to participate in democracy through political contributions is protected by the First Amendment, but that right is not absolute.”).

126. See R. George Wright, *Campus Speech and the Functions of the University* 5–21 (Ind. Univ. Robert H. McKinney Sch. of Law Research, Paper No. 2016-15, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2742891](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2742891) (describing various functions of universities).

127. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (“The constitution-

Incitement is actionable only when it is directed at and “likely to incite or produce” imminent lawless action.<sup>128</sup> The state can prohibit a speaker from intentionally instigating an imminent disorder that is likely to happen.<sup>129</sup>

The rigorous standard of proof built into the incitement doctrine is designed to shield persons from being prosecuted for making rude, obnoxious, and insulting statements. For universities to restrict student incitement, there must be a high likelihood that uncensored advocacy will result in imminent illegal conduct or that it will instigate violence.<sup>130</sup> Moreover, for an utterance to be punishable by a public university “substantive evil must be extremely serious and the degree of imminence extremely high.”<sup>131</sup> Thus, a remote or speculative possibility that a student’s or organization’s statement might be dangerous will not suffice.<sup>132</sup> By placing emphasis on imminence, the Court makes clear that the assertion of opinions, even ones expressing general support for heinous criminality, is constitutionally not actionable. However, there are alternative First Amendment considerations that allow college administrators to limit other forms of low value speech, even in the absence of imminent illegality.

## 2. Threatening Other Students

The true threats doctrine allows university administrators to punish intentionally threatening student speech, even when it does not pose an imminent threat of violence. This allows for

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al guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action.”).

128. *Id.*

129. *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (holding that words must be “likely to produce, *imminent* disorder” to be punishable by a state).

130. Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, 240–41 (“[T]he immediate law violation must be likely to occur.”).

131. *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 845 (1978) (quoting *Bridges v. California*, 314 U.S. 252, 263 (1941)).

132. Frederick Schauer, *Is It Better To Be Safe than Sorry?: Free Speech and the Precautionary Principle*, 36 PEPP. L. REV. 301, 306 n.26 (2009) (“By insisting that potentially danger-causing speech not be restricted unless the danger is likely, the danger truly grave, the advocacy explicit, and the temporal connection imminent, *Brandenburg* demands that we accept that causal speech whose serious causal consequences are, for example, likely but temporally remote, immediate but unlikely, and perhaps most seriously, both likely and non-remote, but produced by something other than speech explicitly urging the consequences.”).

the enforcement of disciplinary actions against parties who do not pose an emergent harm but exploit university equipment, facilities, or common areas to menace other students, university staff, or even persons off campus.<sup>133</sup> The earliest case to rely on the true threats doctrine, *Watts v. United States*, found that judges should engage in true threat assessment by evaluating the surrounding circumstances in which the statement had been made, whether the speaker was in a public or private forum, his or her intent, whether the threat was direct or conditional, and how the audience reacted.<sup>134</sup> According to this doctrine, a university can adopt a true threat provision in its student code, but any disciplinary actions pursuant to it would first require officials to create a proceeding record carefully parsing the circumstances leading to the decision to censure.<sup>135</sup>

The Court refined the meaning of true threats in *Virginia v. Black*. For a statement of this type to lose First Amendment protection, the speaker must mean to communicate the “intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>136</sup> Any administrative attempt to punish such statements cannot encroach on students’ abilities to assert political or personal opinions.<sup>137</sup> The democratic process, with its emphasis on debate for resolving disputes, provides constitutional protections for the expression of vituperation and opprobrium, but not for actual threats made to specific persons.<sup>138</sup>

Statements that are crudely offensive are not actionable if they simply make others feel uncomfortable.<sup>139</sup> Neither can a university sanction someone for making harsh or unpleasant generalized statements, much less for assigning a controversial

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133. *United States v. Fullmer*, 584 F.3d 132, 156 (3d Cir. 2009) (asserting that true threats are outside First Amendment protection and can involve instilling “fear in future targets”); *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996) (finding true threats to be unprotected when “in the light of [the] entire factual context” the speaker meant to express the determination or intent to commit future or present injury).

134. *See Watts v. United States*, 394 U.S. 705, 707–08 (1969) (examining the context behind the speech at issue to determine whether a true threat exists).

135. *Cf. id.*

136. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

137. *See Watts*, 394 U.S. at 707–08 (1969) (overturning a conviction for true threats because the speaker engaged in political hyperbole).

138. *See id.* (“What is a threat must be distinguished from what is constitutionally protected speech.”).

139. *See id.*

book to students or for articulating something that an eggshell listener perceives to be a microaggression. The key question for judges to evaluate is whether the speaker sought to menace a group or an individual.<sup>140</sup> The communicator may not have even actually meant to carry out the threat but, rather, to put another into apprehension of violence.<sup>141</sup> Anyone who intentionally intimidates another by word or symbol can be held liable, regardless of whether the speaker actually plans to carry out the threat.<sup>142</sup> To be more expositive, as the Supreme Court defined it in *Black*, true threats are “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>143</sup> Racist, xenophobic, and antisemitic expressions of the type described in Part I.A.2 are, therefore, actionable when they are intentionally intimidating.

The Supreme Court’s most recent iteration of the true threats doctrine, which it made in *Elonis v. United States*,<sup>144</sup> dealt with statutory rather than constitutional interpretation. The federal law at bar in that case created a criminal penalty of up to five years imprisonment for transmitting a threatening message in interstate or foreign commerce.<sup>145</sup> And the majority made clear that only speakers who are conscious of the threatening nature of the expression can be convicted.<sup>146</sup> In dictum, Chief Justice John Roberts wrote for the Court that true threats are not covered by the First Amendment because they “inflict great harm and have little if any social value.”<sup>147</sup> True threats are so low in the hierarchy of value of speech because they create potential dangers and “may cause serious emotional stress for the person threatened.”<sup>148</sup>

In *Black* and *Elonis*, the Court dealt with criminal statutes, which subjected convicted parties to prison terms. *Black* reviewed a criminal statute that rendered convicted parties

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140. See *Black*, 538 U.S. at 359–60 (requiring a “serious expression” under the true threats doctrine).

141. See *id.* at 360 (“The speaker need not actually intend to carry out the threat.”).

142. See *id.*

143. See *id.* at 359.

144. 135 S. Ct. 2001 (2015).

145. 18 U.S.C. § 875(c) (2012).

146. *Elonis*, 135 S. Ct. at 2009 (“[W]rongdoing must be conscious to be criminal.” (quoting *Morrisette v. United States*, 342 U.S. 246, 252 (1952))).

147. *Id.* at 2016.

148. *Id.*

subject from one to five years of imprisonment.<sup>149</sup> As we saw, *Elonis* also dealt with a criminal statute with a two-year maximum term of imprisonment.<sup>150</sup> By contrast, campus speech codes include punishments with significantly lesser repercussions on personal liberties.

Whether a court reviewing the facial constitutionality of a campus speech code with a true threat provision would require the same intent scienter or find that negligence would suffice to meet First Amendment requirements has never been tested in a court. We can only speculate whether any mens rea other than intent would suffice to subject a threatening speaker to civil university punishments. University speech codes would, of course, carry no possibility of a liberty deprivation analogous to penal punishment. At most, they might inhibit the speaker's liberty of movement by prohibiting his or her reentry onto campus, more likely punishments are educational suspension, community service, or official reprimand on the transcript. Therefore, faced with a true threat on a college campus, a judge will need to analogize the *Black* and *Elonis* holdings to a civil case. Conjecturally, the court is likely to find that while some culpability—negligence, or perhaps knowledge or recklessness—would be required to administer appropriate non-criminal sanctions for truly threatening campus speech—a university would not likely need to prove a speaker's purpose to be subject to administrative discipline.

### 3. Fighting Words Doctrine

The long-established fighting words doctrine is the third pertinent doctrine for college administrators to incorporate into their efforts to prevent a narrow category of discriminatory statements. The seminal case here is *Chaplinsky v. New Hampshire* in which the Supreme Court upheld the conviction of a Jehovah's Witness who had verbally accosted a city marshal for failing to protect him against a ruckus, bigoted crowd.<sup>151</sup> The defendant had been charged under the state pub-

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149. Punishment for Conviction of Felony, VA. CODE § 18.2-10(f), <http://law.lis.virginia.gov/vacode/18.2-10> (defining the sentence for a Class 6 felony); *Virginia v. Black*, 538 U.S. 343, 348 (2003) (quoting a Virginia statute that created a Class 6 felony for cross burning).

150. 18 U.S.C. § 875(d).

151. 315 U.S. 568, 569–70 (1942). Prior to *Chaplinsky's* angry retort to the city marshal, a mob had assailed him with invective and—allegedly—one of his detractors tried to impale him with a flag pole. See Michael J.

lic incitement ordinance.<sup>152</sup> The Court explained that fighting words are not protected by the First Amendment because “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”<sup>153</sup> The opinion was further based on a social balancing that found the regulation of historical and traditional categories of low-value speech to be “clearly outweighed by the social interest in order and morality.”<sup>154</sup> The Court later announced that fighting words laws cannot discriminate based on a speaker’s viewpoint but must use neutral criteria for identifying the likelihood that a face-to-face verbal confrontation will instigate physical altercations.<sup>155</sup>

There can be little doubt that a campus speech code with a fighting words provision would survive constitutional challenge.<sup>156</sup> The category should encompass expressions that are likely to instigate a reasonable listener to respond violently; however, merely vulgar insults will not suffice.<sup>157</sup>

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Mannheimer, Note, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1534 n.49 (1993).

152. *Chaplinsky*, 315 U.S. at 569, 572–73.

153. *Id.* at 571–72.

154. *Id.* at 572.

155. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) (distinguishing between “advocacy” and “provoc[ation]” of violence); *Gooding v. Wilson*, 405 U.S. 518, 522–25, 528 (1972) (rejecting interpretations of an incitement statute which construed the fighting words doctrine too broadly).

156. Some scholars have questioned the continued validity of the fighting words doctrine. *See, e.g.*, LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 929 (2d ed. 1988) (claiming that the Court’s decision in *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964), “called into question the whole structure of [F]irst [A]mendment rights erected on the *Chaplinsky* foundation, and ever since, that structure has been coming apart”). But there is no reason to believe *Chaplinsky* was ever overturned. The Supreme Court continues to cite to the opinion for its precedential value. *See Snyder v. Phelps*, 562 U.S. 443, 465 (2011) (Alito, J., dissenting); *United States v. Stevens*, 559 U.S. 460, 470 (2010); *Virginia v. Black*, 538 U.S. 343, 358–59 (2003); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992).

157. *See* Rodney A. Smolla, *Words “Which By Their Very Utterance Inflict Injury”: The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 331 (2009) (“No longer, the Court made clear, could vulgar words be equated with fighting words as that phrase had been used in *Chaplinsky*. Henceforth, the Court made clear, to qualify as ‘fighting words’ the statements must constitute ‘a direct personal insult’ directed at a specific person.” (quoting *Cohen v. California*, 403 U.S. 15, 20 (1971))).

#### 4. Hostile Environment on Campus

In addition to constitutional doctrines, statutory interpretation of harassment should inform college administrators in their efforts to enforce effective and legally justifiable campus speech codes. Federal law requires educational institutions to maintain nondiscriminatory environments. Title VI was first promulgated as part of the omnibus Civil Rights Act of 1964.<sup>158</sup> It prohibits any institutional recipient of federal assistance from excluding persons based on race, color, or national origin from “any program or activity receiving Federal financial assistance.”<sup>159</sup> In addition to this list, the Supreme Court further recognized Congress’s authority to create a cause of action for the victims of religious discrimination experienced in the academic community.<sup>160</sup> The Spending Clause provided Congress with the constitutional authority to pass the statute.<sup>161</sup> The law applies to a variety of federally funded institutions, including private and public universities.<sup>162</sup> The Attorney General can file a lawsuit when a party first brings a meritorious, written discrimination complaint to the Department of Justice’s attention; the complainant cannot otherwise pursue a private remedy; or the complaint would help advance the national policy of desegregation.<sup>163</sup> While tremendously important for combating higher education discrimination, Justice Department enforcement is time consuming and costly. The enforcement of university code prohibitions against harassment is a more efficient means of advancing Title VI policy.

The Department of Education has for decades interpreted Title VI to include a prohibition against recipient institutions creating or being responsible for maintaining a hostile environment, which is defined as one where “harassing conduct (e.g., physical, verbal, graphic, or written) . . . is sufficiently se-

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158. Pub. L. No. 88-352, 78 Stat. 252 (codified at 42 U.S.C. § 2000d (2012)).

159. 42 U.S.C. § 2000d.

160. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 709 (1979) (“[V]ictims of discrimination on the basis of race, religion, or national origin have had private Title VI remedies available at least since 1965 . . .”).

161. *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (“Title VI invokes Congress’s power under the Spending Clause.”); *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 598 (1983) (“I note . . . that Title VI is spending-power legislation.”).

162. For an overview of where federal funding goes, see *Where Is the Money Going*, USA SPENDING, <https://www.usaspending.gov/transparency/Pages/default.aspx> (last visited Apr. 4, 2017).

163. 42 U.S.C. § 2000c-6 (2012).

vere, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient.”<sup>164</sup> Legally cognizable claims arise when the institution fails to resolve disparate treatment of and disparate effect on protected categories of students. Liability can also attach when an

agent[] or employee[], acting within the scope of his or her official duties, has treated a student differently on the basis of race, color, or national origin in the context of an educational program or activity without a legitimate, nondiscriminatory reason so as to interfere with or limit the ability of the student to participate in or benefit from the services, activities or privileges provided by the recipient.<sup>165</sup>

In addition, the institution receiving federal funding must take reasonable measures to investigate notifications of a hostile environment.<sup>166</sup>

Gerald Reynolds of the Department of Education’s Office of Civil Rights (OCR) reminded all educational institutions that receive federal funding to “apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech.”<sup>167</sup> The OCR guideline warns that the definitions of harassment used by “[s]ome colleges and universities” go too far by including “all offensive speech regarding sex, disability, race or other classifications.”<sup>168</sup> OCR follows speech protective precedents in asserting that “the mere expression of views, words, symbols or thoughts that some person finds offensive” is not actionable.<sup>169</sup> Harassment only becomes actionable when it is so abusive as to “limit a student’s ability to participate in or benefit from the educational program.”<sup>170</sup>

In 2010, the Department of Education issued a Dear Colleague letter to explain what verbal behaviors may be actionable forms of harassment.<sup>171</sup> The letter demonstrates great sensi-

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164. Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11448, 11449 (Mar. 10, 1994).

165. *Id.* at 11448.

166. *Id.* at 11450.

167. Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary*, U.S. DEP’T EDUC. (July 28, 2003), <http://www2.ed.gov/about/offices/list/ocr/firstamend.html>.

168. *Id.*

169. *Id.*

170. *Id.*

171. Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights*, U.S. DEP’T EDUC. (Oct. 26, 2010), <http://www2.ed.gov/about/>

tivity to the possibility of certain forms of campus speech harming students' academic achievements. It explicitly adopts the Department's 2003 language, but the 2010 letter concedes:

Harassing conduct may take many forms, including verbal acts and name calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents. Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school. When such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that OCR enforces.<sup>172</sup>

This statement clarifies that while universities that receive federal funding must prohibit verbal harassment, they cannot do so in a manner that violates First Amendment doctrine.

Harassment is a form of verbal conduct that is unprotected by the Free Speech Clause. It would probably be frivolous to raise a First Amendment facial challenge to campus harassment codes.<sup>173</sup> While First Amendment defenses are sometimes raised in sexual harassment law suits, courts have found verbal discrimination, at least in workplace settings, to be unprotected.<sup>174</sup> The Supreme Court has found the issue so much a non-starter that even when both sides briefed the matter during the course of litigation, the Justices refused to address a First Amendment attack to Title VII's prohibition on workplace harassment and hostile environments.<sup>175</sup> Educational harassment

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offices/list/ocr/letters/colleague-201010.pdf.

172. *Id.* at 2.

173. See Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1614–16 (2015) (cataloging opportunistic uses of First Amendment defenses in cases involving such things as mandatory financial disclosure of publicly traded companies, pharmaceutical industry disclosures of conflicting interests, professional licensing requirements, anti-competition franchising prohibitions, and many other types of suits that were unrelated to authentic First Amendment values).

174. See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991).

175. See Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 13 (“[T]he Supreme Court’s failure to notice a First Amendment question would signal its unanimous view that there was no question to be noticed—a judgment that the prohibited category was so clearly unrelated to the First Amendment’s purposes that it should not be dignified with an explanation as to why it constituted an ‘exception.’”). Compare Brief for Respondent at 31, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (No. 92-1168), 1993 WL 302223

that intimidates, threatens, or coerces persons based on their group status can interfere both with studies and the ability of people to train for the workplace. This is analogous to how hostile workplace environments interfere with individuals' abilities to perform their jobs.<sup>176</sup>

From the Court's posture, it is clear that harassment, at least in the work environment, is outside the realm of constitutionally protected expression. In fact, the First Amendment has never been interpreted to grant an absolute right to communicate.<sup>177</sup> To the contrary, the Court has identified a variety of constitutionally unprotected modes of communication. For instance, trademark and copyright infringements are not protected, even though they both regulate content-based expression.<sup>178</sup> Harassment is unprotected: laws prohibiting it in workplaces and on campuses is on a par with a small number of other legitimate content restrictions, such as those for regulating contract negotiations and formation,<sup>179</sup> defamatory statements,<sup>180</sup> and false advertisements.<sup>181</sup>

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(briefing First Amendment implications), *and* Reply Brief of Petitioner at 10, *Harris*, 510 U.S. 17 (No. 92-1168), 1993 WL 632335 (same), *with Harris*, 510 U.S. 17 (not discussing First Amendment concerns).

176. See Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 92 (2009).

177. A variety of limitations on the content of speech are constitutional. These limitations include the power of states to zone the secondary effects of adult theaters, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54–55 (1986); to restrict electioneering within 100 feet of a polling place on election day, *Burson v. Freeman*, 504 U.S. 191, 206, 211 (1992); to prohibit deceptive and misleading uses of trade names, *Friedman v. Rogers*, 440 U.S. 1, 15 (1979); to prohibit willful or destructive conduct even when communicative in nature, such as the burning of draft cards during an anti-war protest, *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968); and to outlaw distribution of obscene material that “appeal[s] to prurient interest in sex and portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value,” *Miller v. California*, 413 U.S. 15, 23–24 (1973).

178. *Golan v. Holder*, 132 S. Ct. 873, 890–91 (2012) (finding that the Uruguay Round Agreements Act contains implicit free speech protections and therefore refusing to use First Amendment scrutiny).

179. Even a simple contract case involves communication about terms and the expectations of the parties, but raises no First Amendment issues. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 9 (2000) (“The process of contract formation, for example, consists entirely of communication, but its regulation does not trigger First Amendment scrutiny. Such scrutiny is brought to bear only when the regulation of communication affects a constitutional value specifically protected by the First Amendment.”); see Roscoe Pound, *The End of Law as Developed in Juristic Thought*, 27 HARV.

The dichotomy between harassment and free speech is eloquently articulated in *Robinson v. Jacksonville Shipyards, Inc.*<sup>182</sup> While the decision was rendered by a district court and deals with Title VII rather than Title VI, it contains deeply influential reasoning on the distinction between free speech values and harassment.<sup>183</sup> The district court found that the First Amendment's guarantee of free speech did not preclude litigants from obtaining redress for harassment. The case deals with workplace harassment, therefore here I only touch on those rationales pertinent to campus speech harassment.<sup>184</sup> Important for our purposes, the court first explained that employers can demand that employees refrain from sexually harassing speech in order to maintain workplace discipline.<sup>185</sup> Likewise, an educator might demand students or professors desist from harassment based on race, nationality, religion, ethnicity, or color in order to maintain equal educational opportunity.<sup>186</sup> At a minimum, universities can maintain discipline in formal settings such as classrooms, the library, university events, and other official functions. College speech codes throughout the country recognize the legitimacy of discipline in formal educational settings;<sup>187</sup> otherwise, educators would be helpless in the face of students insulting other members of the classroom with

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L. REV. 605, 619 (1914) (contrasting the right to free speech and the right to contract).

180. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985) (setting the plaintiff's burden of proof for private defamations against private persons at a lower threshold than for covered false statement about a public figure and on a public matter).

181. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) ("Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem.").

182. 760 F. Supp. 1486 (M.D. Fla. 1991).

183. The opinion has been cited over 1750 times on Westlaw.

184. Untouched in this Article is the *Robinson* court's explanation that an employer who does not claim to have intentionally expressed sexualized speech is not covered by the First Amendment. *Robinson*, 760 F. Supp. at 1534–35. Nor do I think relevant to my discussion the court's adoption of the public employee analogy, *id.* at 1536, because students are not in the same relationship to the university.

185. *Id.*

186. See Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 961–62 (2009) ("Just as a hostile environment can prevent full participation in the workplace, a hostile environment can prevent full participation in the educational process.").

187. See *supra* Part II.A.2.

discriminatory language. That would surely not be conducive to study and within a university's power to prevent.

Second, finding hostile discrimination can function as discriminatory conduct, the *Robinson* court cited Supreme Court precedent that had found "potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection."<sup>188</sup> Likewise, pervasively degrading and humiliating statements on campus can similarly create barriers to the equal and open education of all students at universities receiving public funding.

Third, the *Robinson* court found that harassment restrictions were appropriate time, place, and manner regulations on speech,<sup>189</sup> similar to those upheld by the Supreme Court in contexts where conviction was based on expressive conduct.<sup>190</sup> In order to incorporate this criteria universities would likely be well within their discretion to create locational regulations prohibiting substantially negative educational impact resulting from slurs made in teaching environments, library settings, at orientation, town hall meetings, alumni functions, during campus tours, in dorms, and other official events and locations. It is worth observing that some of the events on my list can occur both in public spaces, such as sidewalks running through campus; designated public spaces, such as auditoria; limited public fora, dedicated to specific events like topical speeches or invited lecturers; and private spaces, such as sleeping areas.

*Robinson's* fourth relevant factor—that hostile work environments can involve a captive audience<sup>191</sup>—is likewise pertinent in several campus contexts related to the third criteria, such as dorms or classrooms. Where the campus hostility is likely to negatively affect the educational environment and administration has actual or constructive notice of it, campus codes should be used to provide adequate redress.<sup>192</sup>

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188. *Robinson*, 760 F. Supp. at 1535 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984)).

189. *Id.*

190. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

191. *Robinson*, 760 F. Supp. at 1535–36.

192. I am developing ideas from a Department of Education Office for Civil Rights investigative guideline, which provides the following: "To establish a violation of [T]itle VI under the hostile environment theory, OCR must find that: (1) A racially hostile environment existed; (2) the recipient had actual or constructive notice of the racially hostile environment; and (3) the recipient

It should be noted that restraint on the content of speech in classrooms is not a true time, place, and manner restriction, which ordinarily refers to content neutral regulations.<sup>193</sup> Rather, the educational requirement of class attendance creates a captive audience that the university can protect against intimidating hecklers in enclosed spaces such as dorms or even at the entrances to dorms.<sup>194</sup> The campus is not strictly a public forum although it has characteristics of a marketplace of ideas.<sup>195</sup> The same prohibition against harassment applies to voluntary assemblies that the entire student body should be free to attend, gain knowledge from, and intellectually partake in without being taunted, heckled, or badgered.

#### B. LOWER COURT OPINIONS

Several lower court opinions provide insights into how universities can draft campus codes without violating the Free Speech Clause. In particular, it is instructive to reflect on cases that struck down portions of or the entirety of several campus speech codes. Scrutiny of the holdings and rationales can provide guidance to administrators for avoiding constitutional pitfalls.

In a 1989 decision, *Doe v. University of Michigan*, a challenge was brought to a University of Michigan policy that prohibited discrimination and discriminatory harassment.<sup>196</sup> Its code of conduct was most protective of dialogue and debate in

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failed to respond adequately to redress the racially hostile environment.” 59 Fed. Reg. 11448, 11449 (Mar. 10, 1994).

193. See *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 323 (2002) (finding that time, place, and manner restrictions are subject to judicial review).

194. See *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (“The First Amendment permits the government to prohibit offensive speech as intrusive when the ‘captive’ audience cannot avoid the objectionable speech.”); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302–04 (1974) (relying on the captive audience doctrine to uphold a content-based restriction on the display of political advertisements on municipal buses).

195. *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (“The Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum. . . . At the same time, however, our cases have recognized that First Amendment rights must be analyzed in light of the special characteristics of the school environment. We continue to adhere to that view. A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university’s mission is education, and decisions of this Court have never denied a university’s authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.”).

196. 721 F. Supp. 852, 856 (E.D. Mich. 1989).

public spaces.<sup>197</sup> The university's stringent restrictions were reserved for harassing communications in dormitories and in other parts of campus housing, where the university's leasing terms governed.<sup>198</sup> In classrooms, study halls, libraries, and similar spaces, the university also had an interest in maintaining amicable relations among various student groups, ethnicities, religions, and nationalities.<sup>199</sup>

Despite these carefully conceived safety measures, the court found the university's policy to be an overbroad suppression of controversial and unorthodox ideas.<sup>200</sup> For example, a university disciplinary panel had found a graduate social worker to have violated the code against sexual harassment for openly asserting that a therapist should try to "chang[e] gay clients to straight."<sup>201</sup>

The district court found the University of Michigan's policy to be overbroad in its coverage to the point of hampering the expression of protected speech. It held the discrimination and anti-harassment policy under review to be overreaching for prohibiting the "stigmatizing or victimizing" of groups or individuals,<sup>202</sup> however, "[u]nder certain circumstances racial and ethnic epithets, slurs, and insults might fall within this description and could constitutionally be prohibited by the university."<sup>203</sup> While the university could regulate collateral effects of certain forms of extreme speech, it could not simply suppress ideas or messages with which it disagreed.<sup>204</sup>

Public university anti-harassment policies should be found to be constitutional if they are narrowly tailored against unprotected speech—such as harassment, incitement, true threats, or fighting words—and not so ambiguous as to punish merely offensive expression that, like microaggressions, does no more than hurt students' or professors' feelings. In a setting of young creative thinkers, discomfort is inevitable about some other people's stated views. Carefully crafted anti-harassment policies can nevertheless advance the university's interest in educational tranquility. In terms of constitutionality, at least a

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197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 864–65.

201. *Id.* at 865.

202. *Id.* at 867.

203. *Id.* at 862.

204. *Id.* at 863.

portion of the University of Michigan code was constitutional: for example, a section of it prohibited verbal or physical behavior that contained “an express or implied threat to an individual’s academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety,”<sup>205</sup> which is certainly justifiable under the true threats doctrine.<sup>206</sup>

Furthermore, in the classroom even offensive and hurtful expressions of hatred, animosity, and mockery suffice for educators to suspend, remove, or reprimand students. Administrators can also create non-content based time, place, and manner regulations on the use of public university spaces. Circumstances may even arise in public spaces where posting or shouting threatening, intimidating, or harassing messages impedes others from getting to classes or reaching other educational functions.

Contrary to the narrowly tailored approach I am proposing, the court in *Doe* found the University of Michigan’s policy to be overbroad and therefore unconstitutional because it authorized officials to prohibit speech they found to be offensive.<sup>207</sup> To some degree, this holding is consistent with contemporary jurisprudence. Today, twenty-eight years after the holding, the Supreme Court maintains that upsetting or contemptuous speech is protected under the First Amendment.<sup>208</sup> The district court would have done better, however, to sever the unconstitutional portions of the University of Michigan’s policy from its constitutionally justifiable provisions. Indeed, nothing in *Doe* indicates that a well-drafted speech code would violate the First Amendment. In fact, the district court acknowledged that it was constitutional for the university to prohibit the use of lewd, obscene, and fighting language.<sup>209</sup> The university policy, however, was in part too vague to “discern any limitation on its scope or any conceptual distinction between protected and unprotect-

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205. *Id.* at 856.

206. *See id.* at 862.

207. *Id.* at 863 (“Nor could the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people.”).

208. *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (“[S]peech cannot be restricted simply because it is upsetting or arouses contempt.”); *see also Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“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.”).

209. *Doe*, 721 F.Supp. at 862.

ed conduct.”<sup>210</sup> Still, it is important to note that the court made clear a policy more narrowly focused on the values of free speech and unprotected low-value speech categories would have been more likely to survive judicial scrutiny.

A different district court, in *UWM Post, Inc. v. Board of Regents of University of Wisconsin*, found the University of Wisconsin’s speech code to be unconstitutional.<sup>211</sup> The campus rule prohibited the use of racist or discriminatory comments to demean others based on “race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age.”<sup>212</sup> It further prohibited students from creating “an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.”<sup>213</sup> As with the University of Michigan policy, a district judge found the Wisconsin code to be vague.<sup>214</sup> The policy prohibited intentionally making comments that degraded persons based on race, sex, religion, “color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals.”<sup>215</sup> Despite the inclusion of an intent component, as in *Watts* and *Black*<sup>216</sup> (with the latter case being decided after *UWM Post*), the district court for the Eastern District of Wisconsin found the university policy was overbroad because the prohibitions against intentionally demeaning and discriminatory comments went beyond the fighting words doctrine.<sup>217</sup> The holding in *UWM Post, Inc.* does not, however, preclude the University of Wisconsin from enforcing a more rigorously drafted speech code. And as we will see in Part III, the University of Wisconsin continues to have provisions against more narrow and specific categories of expression. Moreover, federal policy against campus harassment, discussed in Part II.A.4, is in conflict with this district court’s holding. The University of Wisconsin code in *UWM Post, Inc.* found a provision prohibiting the creation of a hostile campus environment to be vague because not all hostility leads to violence.<sup>218</sup> But this equation of hostile

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210. *Id.* at 867.

211. 774 F. Supp. 1163 (E.D. Wis. 1991).

212. *Id.* at 1165.

213. *Id.*

214. *Id.* at 1180.

215. *Id.* at 1165.

216. *See supra* text accompanying notes 124, 134.

217. *UWM Post, Inc.*, 774 F. Supp. at 1180–81.

218. *Id.* at 1172.

environment, which is covered by Title VI,<sup>219</sup> with incitement, which is defined by *Brandenburg*,<sup>220</sup> convoluted two distinct doctrines.

An additional case often cited as indicative of lower court disapproval of college campus speech codes is *Dambrot v. Central Michigan University*.<sup>221</sup> That case involved a sports coach who called his players “niggers.”<sup>222</sup> He claimed to have done so to instill confidence and esprit de corps among their ranks.<sup>223</sup> The coach’s use of a racist epithet violated the university’s policy against “intentional, unintentional, physical, verbal, or non-verbal 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.”<sup>224</sup> After a university affirmative action officer learned of the incident, he and the coach agreed to a disciplinary punishment for the infraction; subsequently, the coach’s contract was not renewed.<sup>225</sup>

The Fifth Circuit found the Central Michigan policy to be vague because the terms “negative” and “offensive” were undefined, and left an unacceptable amount of interpretive discretion at the hands of university officials.<sup>226</sup> The circuit court distinguished the university’s policies from viewpoint neutral prohibitions on fighting words.<sup>227</sup> The coach’s use of the pejorative was insensitive and offensive, but it was likely protected by the First Amendment. The coach’s crass attempt at a motivational speech did not constitute a true threat, an incitement, nor instigation to a fight. Moreover, the district court understood Central Michigan’s harassment policy to have been overbroad in censoring “a substantial amount of constitutionally protected speech.”<sup>228</sup> The court was particularly concerned that the policy required administrators to use “subjective reference

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219. See *supra* text accompanying note 159.

220. See *supra* text accompanying note 120.

221. 55 F.3d 1177 (1995).

222. *Id.* at 1180.

223. *Id.*

224. *Id.* at 1182.

225. *Id.* at 1181.

226. *Id.* at 1184.

227. *Id.*

228. *Id.* at 1182.

in identifying prohibited speech under the policy,” which left too much risk of constitutional violation.<sup>229</sup>

Even after the issuance of these lower court decisions, colleges and universities have continued to promulgate speech codes, albeit using more refined formulations than their ambiguous progenitors. The new codes’ failures or successes must be assessed through the lens of First Amendment doctrine and harassment law. Part III reviews several extant campus speech codes and evaluates their constitutionality.

### III. CAMPUS SPEECH CODES

This Part of the Article reviews several U.S. campus codes. Universities throughout the country have adopted a variety of regulations governing campus behavior. They set enforceable standards and rules in an effort to deter and punish various threatening and hostile forms of communications. Universities—including the University of Wisconsin,<sup>230</sup> University of Michigan,<sup>231</sup> and Central Michigan University<sup>232</sup>—continue to maintain policies against verbal harassment and bullying. They do not regard the lower court opinions reviewed in Part II to be absolutist in their findings on speech. Those holdings are not barriers to carefully crafted restrictions on incitement or truly threatening communications on campus. Existing university codes are only valid to the extent that they do not violate First Amendment doctrine. It is impossible to review all universities’ speech codes, for that a lengthy book would be re-

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229. *Id.* at 1184.

230. *See infra* text accompanying note 241.

231. Office of Student Conflict Resolution, *Statement of Student Rights and Responsibilities, Violations*, U. MICH. (2016), <https://oscr.umich.edu/Violations> (prohibiting “[h]arassing or bullying another person—physically, verbally, or through other means”).

232. Among limitations on harmful speech is a provision against threats commensurate with the true threats holding in *Virginia v. Black*. *See* Office of Student Affairs, *Code of Student Rights, Responsibilities and Disciplinary Procedures* § 3.2.7, CENT. MICH. U. (2014), <https://www.cmich.edu/ess/studentaffairs/Pages/Responsibilities-of-Students.aspx> (“A student shall take no action that threatens or endangers the safety, health, or life, or impairs the freedom of any person, nor shall a student make any verbal threat of such action. This includes actions commonly understood to constitute assault or battery.”). This provision lacks an intent component, which should be inferred into the general prohibition against threats. *Cf.* *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“The fact that the statute does not specify any required mental state, however, does not mean that none exists. We have repeatedly held that ‘mere omission from a criminal enactment of any mention of criminal intent’ should not be read ‘as dispensing with it.’”).

quired; therefore, in this Article I selectively pick only representative examples.

In 2015, the University of Chicago issued a publically available faculty report on free speech to the praise of civil liberties groups such as the Foundation for Individual Rights in Education (FIRE).<sup>233</sup> The statement acknowledges the importance of civility on campus, but rejects the microaggression/trigger warning movement's demands. While the University of Chicago statement describes itself as an institution with "a climate of mutual respect," its administration refuses to shield students from hearing "disagreeable, or even deeply offensive" views.<sup>234</sup> The writers of the report avowedly wish to protect dialogue. Even though some listeners will find controversial statements to be emotionally unpleasant and discomfiting, campus must remain a quintessential place for student growth, research, and scholarship.

Despite its overriding respect for open discussion, the University of Chicago maintains the authority to

restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, that unjustifiably invades substantial privacy or confidentiality interests, or that is otherwise directly incompatible with the functioning of the University. In addition, the University may reasonably regulate the time, place, and manner of expression to ensure that it does not disrupt the ordinary activities of the University.<sup>235</sup>

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233. *University of Chicago Reforms All Speech Codes, Earns FIRE's Highest Free Speech Rating*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Apr. 26, 2016), <https://www.thefire.org/university-of-chicago-reforms-all-speech-codes-earns-fires-highest-free-speech-rating>.

234. Geoffrey R. Stone et al., *Free Speech on Campus: A Report from the University Faculty Committee*, U. CHI. L. SCH. (Jan. 6, 2015), <http://www.law.uchicago.edu/news/free-speech-campus-report-university-faculty-committee>. The statement continues by explicitly rejecting the limiting of speech in which an audience may find that concern about civility, and affirms it "can never" be used as an excuse for restricting speech. Here is the full statement on this subject, which has clear implications for students who would demand the university use trigger warnings:

Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.

*Id.*

235. *Id.*

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While styling these limits as “narrow exceptions,”<sup>236</sup> the university retains significant power to pursue administrative sanctions against offenders. Its statement of authority to restrict certain forms of expression is tightly connected to First Amendment jurisprudence, which recognizes the relatively low social value of threats, harassments, and intrusions upon seclusion.<sup>237</sup> This part of the statement is content based. The University of Chicago code also recognizes the legitimacy of limited time, place, and manner restrictions, which are based on non-content, neutral norms of educational governance.

The University of Chicago examples of actionable behavior do not exhaust the range of speech universities can regulate. They can, for example, additionally sanction students who commit copyright or patent violations.<sup>238</sup> Likewise, a campus prohibition against defamation is an obviously legitimate regulation, in and out of the university setting, because it has ancient roots in common law. The University of Chicago recognizes that personal defamation is unacceptable in an academic setting but should additionally include a statement against such group defamations as racist, antisemitic, homophobic, and chauvinistic speech. Furthermore, university codes can restrict uses of university property, which can enable educators and administrators to maintain discipline during class and town hall meetings.<sup>239</sup>

Conduct review committees should contextually evaluate alleged violations. They should examine the circumstances under which destructive statements are made, the countervailing speech rights, the historic and traditional role of education, the common good of the university community, and whether there are alternative avenues available for the communication. In cases when speech threatens an imminent harm or poses a true threat even one statement is likely to be actionable; however, in harassment cases a persistent pattern is likely necessary before a university can take action.

The University of Idaho code seeks to avoid the chilling effects of punishing minor microaggression type of policies. Its campus rules prohibit “[p]ersistent or severe, verbal abuse,

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236. *Id.*

237. *See generally* United States v. Stevens, 559 U.S. 460 (2010) (identifying threats among categories of “low value” speech).

238. *See, e.g., Student Code of Conduct*, U.C., BERKELEY (2016), <http://sa.berkeley.edu/student-code-of-conduct>.

239. *See, e.g., id.*

threats, intimidation, harassment, coercion, bullying, derogatory comments, vandalism, or other conduct that threatens or endangers the mental or physical health or safety of any person or causes reasonable apprehension of such harm.” But the Idaho code goes on to state that “a single instance” of that use of language “may be considered severe enough to merit sanctions.”<sup>240</sup> While some of the provisions in this code comport with free speech doctrines—at least those prohibiting severe threats, intimidation, coercion, and vandalism—others—particularly the prohibition against derogatory comments—are unlikely to survive a First Amendment challenge.

Student codes at other universities are variously worded. In reviewing codes at public universities, it is essential for judges to consider whether they violate any of the three doctrines reviewed in Part II.A—incitement, true threats, or fighting words—or any statutory prohibitions against harassment. The University of Wisconsin Code of Conduct proclaims that “respect for human dignity is essential to the university environment.”<sup>241</sup> As part of its effort to secure that umbrella goal, the handbook prohibits “discriminatory harassment.”<sup>242</sup> Notice that this term is a modification that the university adopted in response to the finding in *UWM Post, Inc. v. University of Wisconsin*, which invalidated an earlier version of its student code that had prohibited “discriminatory comments, epithets and expressive behavior.”<sup>243</sup> By using “harassment,” the University of Wisconsin seems to have adopted terminology from antidiscrimination law, Title VI of the Civil Rights Act of 1964.<sup>244</sup> The term “discriminatory harassment” includes

intentional conduct, either verbal or physical, that explicitly demeans the race, sex, religion, color, creed, disability, sexual orientation, gender, national origin, ancestry, or age of an Individual or individuals, and (1) has the purpose or effect of interfering with the education, university-related work, or other university-authorized activity of a university student, employee, official, or guest; or (2) creates an in-

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240. *Student Code of Conduct: Proscribed Conduct*, U. IDAHO, <https://www.uidaho.edu/student-affairs/dean-of-students/student-conduct/student-code-of-conduct>.

241. UNIV. OF WIS. COLLS., *STUDENT RIGHTS AND REGULATIONS HANDBOOK 4* (2016–2017), [https://www.uwc.edu/sites/uwc.edu/files/imce-uploads/students/handbook-policies/\\_files/handbookfinal.pdf](https://www.uwc.edu/sites/uwc.edu/files/imce-uploads/students/handbook-policies/_files/handbookfinal.pdf).

242. *Id.*

243. 774 F. Supp. 1163, 1180 (E.D. Wis. 1991).

244. For a discussion of Title VI complaints, see *supra* text accompanying note 157.

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timidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.<sup>245</sup>

This provision deters members of the university community from communicating or conducting themselves in a manner that will create a hostile or offensive environment for others. The University of Wisconsin also prohibits the use of campus spaces during the course of picketing, rallying, congregating or parading in a manner that “constitute[s] an immediate threat of force or violence, against members of the university community or university property.”<sup>246</sup> The University of Wisconsin should also add a provision against picketing, rallying, congregating or parading with the intent to prevent students from participating in educational programs.

The University of Washington has a campus code that also prohibits the use of discriminatory harassment in the form of

language or conduct directed at a person because of the person’s race, color, creed, religion, national origin, citizenship, sex, age, pregnancy, marital status, sexual orientation, gender identity or expression, disability, or veteran status that is unwelcome and sufficiently severe, persistent, or pervasive such that it could reasonably be expected to create an intimidating, hostile, or offensive environment, or has the purpose or effect of unreasonably interfering with a person’s academic or work performance, or the person’s ability to participate in or benefit from the university’s programs, services, opportunities, or activities.<sup>247</sup>

In addition, the code prohibits the “[u]se of university computing facilities or resources to send intimidating, harassing, or threatening messages.”<sup>248</sup> The University of Washington campus code, therefore, contains components against verbal harassment and threats.

The Student Conduct & Honor Code of the University of Florida is quite specific about the required scienter to trigger disciplinary proceedings. It creates sanctions for harassment and threats, which are defined as

[v]erbal or written threats, coercion or any other conduct that by design, intent or recklessness places another individual in reasonable fear of physical harm through words or actions directed at that person, or creates a hostile environment in which others are unable reasonably to conduct or participate in work, education, research, living,

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245. UNIV. OF WIS. COLLS., *supra* note 241, at 4.

246. *Id.* at 32.

247. WASH. ADMIN. CODE § 478-120-024 (9) (2016), <http://apps.leg.wa.gov/WAC/default.aspx?cite=478-120-024>.

248. *Id.*

or other activities, including but not limited to stalking, cyberstalking, and racial harassment.<sup>249</sup>

The “design, intent or recklessness” element of the Florida code offense would most likely pass the true threat definition of *Virginia v. Black*.

It is helpful to distinguish the University of Florida approach from student codes at other institutions without the scienter requirement. For instance, Indiana University’s Code of Student Rights, Responsibilities, & Conduct contains the following harassment prohibition:

Discriminatory harassment is defined as conduct that targets an individual based upon age, color, religion, disability, race, ethnicity, national origin, sex, gender, gender identity, sexual orientation, marital status, or veteran’s status and that adversely affects a term or condition of an individual’s education, housing, or participation in a university activity; or has the purpose or effect of unreasonably creating an intimidating, hostile, or offensive environment for academic pursuits, housing, or participation in university activities.<sup>250</sup>

The Indiana University language has no scienter element that is so conspicuous in the University of Florida regulation. The Indiana campus code, to the contrary, requires only proof of unreasonableness, a much less rigorous standard and is quite different from the Supreme Court definition in *Black* and *Elonis*. Moreover, “unreasonableness” is an ambiguous term. Even the use of “has the purpose” is ambiguous because it is used in the passive voice, instead of clearly referring to the actor’s state of mind.

The University of California, Berkeley student code uses very direct language, prohibiting “terrorizing conduct.” The term is defined in verbal terms and contains a clear scienter element:

Conduct, where the actor means to communicate a serious expression of intent to terrorize, or acts in reckless disregard of the risk of terrorizing, one or more University students, faculty, or staff. “Terrorize” means to cause a reasonable person to fear bodily harm or death, perpetrated by the actor or those acting under the actor’s control. “Reckless disregard” means consciously disregarding a substantial risk.<sup>251</sup>

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249. UNIV. OF FL., STUDENT CONDUCT CODE § 6C1-4.041, <http://regulations.ufl.edu/wp-content/uploads/2012/09/4041.pdf>.

250. *Code of Student Rights, Responsibilities, & Conduct: Right to Freedom from Harassment*, IND. UNIV., <http://studentcode.iu.edu/rights/harassment.html> (last visited Apr. 4, 2017).

251. *Code of Conduct – Jurisdiction* § 102.24, U.C., BERKELEY, <http://sa.berkeley.edu/student-code-of-conduct-section5> (last visited Apr. 4, 2017).

This provision should be translated through the lens of *Black*, which defines “true threats” as “[t]hose statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>252</sup> The “intent” and “reckless disregard” portions of the UC-Berkeley code speaks to the intent component of the constitutional doctrine, which the *Black* Court found to be a constitutionally warranted level of culpability.<sup>253</sup> The Supreme Court in *Black* further clarified that states can criminalize true threats even if the speaker did “not actually intend to carry out the threat.”<sup>254</sup>

Of late, the University of California Board of Regents adopted a provision condemning antisemitism on campus that immediately drew the ire of free speech libertarians. The contested language reads: “Anti-Semitism, anti-semitic forms of anti-Zionism and other forms of discrimination have no place at the University of California.”<sup>255</sup> However, matters were not left there: the Board of Regents recognized that while blatant antisemitism is no longer common, persons can frame “policy positions” in ways that invoke stereotypes and can be prejudicial and intolerant to Jews.<sup>256</sup> As with other universities surveyed in this Part, but with even greater rhetorical clarity, the University of California Regents recognized that “historical biases, stereotypes, or prejudice undermine the equal and welcoming learning environment.”<sup>257</sup> The latter statement is a holistic observation about education.

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252. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

253. The majority on this point was formed from four Justices in the plurality and a dissenting Justice. *Id.* at 363–68, 382, 385. *Virginia v. Black* was a case concerning the constitutionality of a state cross burning statute that contained a prima facie element. While the plurality argued that the statute needed to be rewritten to add an explicit burden of proof on the prosecution to prove up intent, rather than to simply infer it, Justice Scalia believed the prima facie element to likely be sufficient to meet First Amendment requirements, but sought to remand the case to enable the Supreme Court of Virginia to issue an interlocutory state law clarification. *Id.* at 369–80. The Model Penal Code defines intentional culpability as purpose, knowledge, recklessness, or negligence. MODEL PENAL CODE § 2.02 (1962).

254. *Black*, 538 U.S. at 359–60 (“The speaker need not actually intend to carry out the threat.”).

255. For a definition of antisemitism and connection with some forms of anti-Zionism, see COMM. ON EDUC. POLICY, ADOPTION OF THE REPORT OF THE REGENTS WORKING GROUP ON PRINCIPLES AGAINST INTOLERANCE 2 (2016), <http://regents.universityofcalifornia.edu/aar/mare.pdf>.

256. *Id.* at 6.

257. *Id.* at 10.

Inclusion of the “anti-semitic forms of anti-Zionism” language was a modification of the more rigid U.S. State Department definition. Antisemitism is such an ancient hatred that its manifestations vary. The State Department has adopted a Working Definition of Anti-Semitism by the European Monitoring Center on Racism and Xenophobia, defining antisemitism as “hatred toward Jews” that may manifest in rhetorical and physical forms.<sup>258</sup> The State Department’s definition contains various examples of contemporary antisemitism that help to better foresee how administrators of the University of California system might understand and enforce the new guidelines. Antisemitism can either be overt, in extreme cases when it calls for the murder or injury of Jews, or more subtle, in its more common form asserting “mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews” individually or collectively, and extrapolating the wrong of a single Jew and blaming the entire group.<sup>259</sup> Recognizing what has been called “new-antisemitism,” analogous to “new racism,”<sup>260</sup> the State Department recognizes that antisemitism can also manifest itself as accusation of the Jewish people, “or Israel as a state, of inventing or exaggerating the Holocaust.”<sup>261</sup> In demonizing Israel, antisemitism can take the form of “symbols and images associated with classic anti-Semitism to characterize Israel or Israelis, [d]rawing comparisons of contemporary Israeli policy to that of the Nazis, [or] [b]laming Israel for all inter-religious or political tensions.”<sup>262</sup> In those cases, criticisms of Israel are not merely political but manifestations of antisemitism. In December 2016, the Senate passed a bill, “Anti-Semitism Awareness Act of 2016,” which would, if it becomes statute, require that in appropriate Title VI cases, the Justice Department and

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258. Press Release, U.S. Dep’t of State, Fact Sheet: Special Envoy to Monitor and Combat Anti-Semitism (June 8, 2010), <https://2009-2017.state.gov/jdr/rls/fs/2010/122352.htm> [hereinafter Special Envoy].

259. *Id.*

260. KENNETH L. MARCUS, THE DEFINITION OF ANTI-SEMITISM 68 (2016). In the words of Per Ahlmark, a Swedish author and one-time Deputy Prime Minister, “[C]ompared to most previous anti-Jewish outbreaks, this one is directed less toward individual Jews. Instead, its attacks focus on the collective Jew—the State of Israel. Such attacks spark a chain reaction of assaults on individual Jews and Jewish institutions.” *Id.* at 151.

261. Special Envoy, *supra* note 258.

262. *Id.*

Department of Education use the State Department definition of antisemitism.<sup>263</sup>

Perhaps the strongest opposition to the University of California's definition has been voiced by Professor Eugene Volokh. He generally supports the country of Israel, but argues the "regents are flat wrong to say that 'anti-Zionism' has 'no place at the University of California'. . . . this debate must remain free, regardless of what the regents or I think is the right position in the debate."<sup>264</sup> But Volokh's argument is a red herring. He claims the Regent's policy stifles any debate about "[w]hether the Jewish people should have an independent state," which he writes, "is a perfectly legitimate question to discuss—just as it's perfectly legitimate to discuss whether Basques, Kurds, Taiwanese, Tibetans, Northern Cypriots, Flemish Belgians, Walloon Belgians, Faroese, Northern Italians, Kosovars, Abkhazians, South Ossetians, Transnistrians, Chechens, Catalonians, Eastern Ukrainians and so on should have a right to have independent states."<sup>265</sup> Volokh has created a strawman argument, and one that he rightly condemns to the flames on First Amendment grounds: the problem is that he misstates the university's policy and thereby misses the point of its underlying purpose, text, and meaning.

Contrary to Volokh's claim, the Regents did not prohibit all forms of "anti-Zionism" on campus. Nothing in the Regents' new principles against intolerance prohibits robust debate about the legitimacy of a sovereign Jewish state.<sup>266</sup> The Regents' statement is unambiguous and not at all vague on this point, it explicitly condemns "anti-semitic forms of anti-Zionism."<sup>267</sup> This is a narrow category that does not prevent anyone—student or faculty—from generally debating the validity of the Zionist political movement. What it does do is to condemn the use of anti-Zionism as a means of obfuscating stereo-

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263. S. 10, 114th Cong. (2d Sess. 2016).

264. Eugene Volokh, *University of California Board of Regents Is Wrong About 'Anti-Zionism' on Campus*, WASH. POST: VOLOKH CONSPIRACY (Mar. 16, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/03/16/university-of-california-board-of-regents-is-wrong-about-anti-zionism-on-campus>.

265. *Id.*

266. It is conceivable that an instructor of political science or history who deliberately teaches students that Israel is not a sovereign state, without any demonization of Jews, would be violating educational norms of teaching students true materials.

267. COMM. ON EDUC. POLICY, *supra* note 255.

types and demonization of the Jewish people. Further, it prevents characterizing them as mendacious in written or oral statements that incorporate historically charged stereotypes—about such things as worldwide control and money market manipulations—to create a hostile, exclusionary, and prejudicial environment on campus.

### CONCLUSION

University campuses are critical for the development of debates, culture, personal opinions, and scientific knowledge. Robust dialogue is essential to all aspects of the educational mission. Racist, xenophobic, and sexist speech inhibits the free exchange of ideas about topics as diverse as politics, history, and art. Threats, incitements, and instigations of fights create an atmosphere of exclusion, intimidation, and harassment that undermines the ability of students, faculty, and staff to engage in the marketplace of ideas at locations where they fear entering or remaining. Shouting down or demeaning other speakers, by disrupting classrooms and community gatherings, to make a point is also a form of bullying that has no place on university campuses because it rejects the free exchange of views and information, hoping to stifle them by sheer brashness and audaciousness.

Equating harassment on campus with core First Amendment values creates a false analogy between the dissemination of information, discourse, and self-fulfillment and vitriolic attacks aimed at disturbing targeted students until they withdraw, avoid locations on campus, or suffer health problems. On the other hand, students must be ready and free to joke, voice their opinions, use parody as a form of social commentary, and clash over politics. These exchanges often become heated and uncomfortable. But that is the nature of debate. Thus the idea of safe spaces in public locations or trigger warnings controlled by the subjective perceptions of extra-sensitive students also detracts from the student bodies' ability to learn from the rich pluralistic milieu of campus life. A balance must be struck, one that will almost always favor speech as a quintessential constitutional right but that will also balance countervailing interests to better achieve the educational purpose of higher education, to help students' develop their characters, become civic minded, gain professional acumen, and hone interpersonal skills.