Anti-Harrassment Disciplinary Policies: A Violation of First Amendment Rights on the Public University Campus?

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I. INTRODUCTION

The morning before a law school final examination, Jewish students received swastikas in their campus mailboxes. At an undergraduate party, blackened-faced fraternity brothers held a mock slave auction. Dozens of posters at a university campus urged students to murder gays and lesbians. In a university newspaper editorial, a student accused female students of overreacting to an article entitled “100 ways to maim a woman.” An African-American student viewed the following on the classroom blackboard: “A mind

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1 Harvard University Kennedy School of Government lecture, ARCO Forum, Racial and Sexual Harassment v. First Amendment on Campus (Oct. 19, 1989) (comment by former City University of New York Law School student) (videotape available at Harvard University, Kennedy School of Government Media Services) [hereinafter Harvard Lecture].
2 Cultural Revolutions, CHRONICLES MAGAZINE, July 1989, at 5.
4 Harvard Lecture, supra note 1 (comment by Professor Louise Fitzgerald, Assistant Professor of Psychology at the University of Illinois, regarding an incident at the University of Iowa).
is a terrible thing to waste—especially on a nigger." These illustrate a few of the many reported incidents of recent racist, sexist, homophobic, and anti-Semitic acts on college campuses. The National Institute Against Prejudice and Violence reports that racial incidents have occurred at approximately 250 colleges and universities since the fall of 1986. Furthermore, the Institute notes that this figure does not account for the forty to fifty percent of all incidents that go unreported by the victims of racial violence. Because no quantifiable figure exists for comparative purposes, it is inconclusive whether these statistics reflect an increase over past years. Such incidents, however, do reflect a serious problem on college campuses today. Between twenty to twenty-five percent of all minority students have been victimized at least once during their years on campus.

In response to this harassment, several universities have taken steps to protect target groups from a hostile, intimidating environment. Universities have added ethnic studies requirements to their curricula, promoted cultural diversity workshops to elevate students’ awareness, and recruited more minority faculty. Some universities have attempted to counteract the abusive speech and ac-

5 Lawrence, If He Hollers Let Him Go: Regulating Racist Speech on Campus (article forthcoming in Duke L.J., 1990, no. 3).
7 Telephone interview with Howard Ehrlich, Research Director of the National Institute Against Prejudice & Violence (Sept. 26, 1990).
8 Id. Despite the large number of incidents, one cannot conclude that they are increasing as there is no baseline data from which to compare. In addition, as universities have developed procedures for dealing with such incidents, victims have had a place to turn, which has increased reporting of incidents. Id.
9 See generally Note, Racism and Race Relations in the University, 76 Va. L. Rev. 295 (1990) (recent account of racist speech in the university context and its serious consequences).
11 See Harvard Lecture, supra note 1 (comments by Professor Sedler [hereinafter Sedler Comments], Professor of Law at Wayne State University Law School and co-counsel for plaintiff in Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989) (graduate student challenged the constitutionality of the anti-harassment policy at the University of Michigan)); see, e.g., Policy Statement, The University of Michigan Interim Policy on Discrimination and Discriminatory Conduct by Students in the University Environment, Sept. 1989 (hereinafter Revised Policy). An excerpt from the policy’s preamble states that discriminatory “behavior threatens to destroy the environment of tolerance and mutual respect which must prevail if a university is to fulfill its purpose.” Id. at 1. For a discussion of this policy, see infra note 15 and accompanying text.
tions by establishing racism hotlines. Moreover, in an attempt to prevent prejudicial speech, some universities have enacted anti-harassment disciplinary policies. The latter of these methods, the enactment of disciplinary policies to punish racist, sexist, anti-Semitic, and homophobic speech and conduct, poses serious constitutional questions in the context of public universities. These policies delineate parameters for punishable speech and conduct, establish adjudicatory mechanisms to deal with registered complaints, and set forth sanctions. Some policies

13 Id.
14 Wilson, Colleges' Anti-Harassment Policies Bring Controversy over Free-Speech Issues, Chronicle of Higher Educ., Oct. 4, 1989, at A1, col. 2. Schools that have adopted or are considering such policies include: Arizona State University, Brown University, Eastern Michigan University, Emory University, Pennsylvania State University, Stanford University, Tufts University (withdrawn Oct. 4, 1989), Trinity College, University of California, University of Connecticut (Storrs), University of Michigan, University of North Carolina (Chapel Hill), University of Pennsylvania, University of Texas (Austin). University of Wisconsin. Id. at A38, col. 5.
15 For example, the University of Michigan initially published a policy statement on April 15, 1988, entitled Discrimination and Discriminatory Harassment by Students in the University Environment [hereinafter Initial Policy] which classified the following as discriminatory if done in an educational or academic center:

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

Initial Policy, supra, at 2. The Board of Regents later revised their Initial Policy in response to Doe v. University of Michigan, 721 F. Supp. 852, 866 (E.D. Mich. 1989), which had ruled that the policy was unconstitutionally overbroad. Telephone interview with Elsa Kircher Cole, General Counsel, University of Michigan (October 3, 1989) [hereinafter Cole Interview]. The Revised Policy, enacted in September of 1989 and as yet untested, replaced the above wording with the following:

[T]he University has a compelling interest in assuring an environment in which learning may thrive. Such an environment requires free and unfettered discussion of the widest possible nature, encouraging expression of all points of view. The University acknowledges that the frank and open discussion of social, cultural, artistic, religious, scientific and political issues may be disturbing and even hurtful for some individuals. In such instances, the principle of free exchange and inquiry takes precedence as it is so fundamental to the educational enterprise.

Discrimination and discriminatory harassment have no place in this educational enterprise. Physical acts or threats or verbal slurs, invectives or epithets referring to
differentiate among three "zones of protection:" the public forum (newspaper, park areas), the educational and academic areas, and the dormitories. Others do not specify location. Some policies provide examples of sanctionable behavior.

an individual's race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age or handicap made with the purpose of injuring the person to whom the words or actions are directed and that are not made as a part of a discussion or exchange of an idea, ideology or philosophy are prohibited. Revised Policy, supra note 11, at 2. Both the Initial and Revised Policies strongly urged informal mechanisms of dispute resolution but at the same time constructed a formal disciplinary proceeding, which required filing a formal complaint and providing notice, and which established requirements with respect to the hearing process itself. Initial Policy at 5; Revised Policy, supra note 11, at 4-5. Both policies establish a range of sanctions, from formal reprimand, public service, and education, to suspension or expulsion. Initial Policy at 7–8; Revised Policy, supra note 11, at 6.

The Initial and Revised Policies delineate between these three zones. In the first zone, the public forum areas, "[t]he broadest range of speech ... will be tolerated." Initial Policy, supra note 15, at 2; Revised Policy, supra note 11, at 2. The second category, the educational and academic centers, is discussed supra note 15. The policy for the dormitories, the third category, is based on a contractual arrangement with respect to the students' leases. Initial Policy, supra note 15, at 3; Revised Policy, supra note 11, at 3.

The policy of the University of Wisconsin [hereinafter University of Wisconsin policy], Chapter UWS § 17.06(2) (a), at 65, mentions many instances in which it may discipline its students, but does not distinguish location. It provides sanctions for:

racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets, other expressive behavior or physical conduct intentionally:

1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
2. Create an intimidating, hostile or demeaning environment for education, university related work or other university-authorized activity.

Id.

In March 1990, a lawsuit was filed that challenged the constitutionality of the University of Wisconsin policy. UWM Post v. Board of Regents of the Univ. of Wis. Sys., No. 90–C–0328 (E.D. Wis. 1989). The plaintiffs, seeking declaratory and injunctive relief, claim that the policy violates the first and fourteenth amendments of the U.S. Constitution and sections of the Wisconsin Constitution, and is overbroad and vague. As of this writing, the case is pending. See Hodulik, Prohibiting Discriminatory Harassment By Regulating Student Speech: A Balancing of First-Amendment and University Interests, 16 J.C.U.L. 573 (1990) (description of the University of Wisconsin's attempts to draft its anti-harassment disciplinary policy).

Revised Policy, supra note 11, gives the following as an example of a violation of the policy: "before an exam, a white student uses a racial epithet to [an African-American] student and tells her to go home and stop using a white person's space." Id. at 2. Since the exchange affected the student's performance on an exam and was not part of a classroom discussion, this would violate the policy. On the other hand, a comment made during a classroom discussion, which was not intended to injure an individual student, such as the Holocaust "was a good thing because it destroyed members of an inferior religion" or that "the average size of the craniums of each race is related to the average intelligence of that
Although commendable with respect to protecting the rights of its students of nondominant groups, college administrators' efforts to curtail hurtful speech may conflict with other students' rights to express themselves freely under the first amendment to the United States Constitution. Administrators must balance the extent to which targeted groups are entitled to a harassment-free campus environment against the free speech rights of the verbal attackers. This conflict has provoked battles on many university campuses. Conservatives have joined with the American Civil Liberties Union, the former to combat what they feel to be "minority assertiveness" on campus, the latter to protect an absolute right of free expression. Recently, this conflict has reached the courts. In September 1989, a Michigan federal district court held that the University of Michigan's disciplinary policy as originally drafted violated the first amendment. Soon thereafter, the University's

race," is protected under the policy. The University of Wisconsin policy, supra note 17, states the following examples:

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

Id. at 66.

19 The first amendment states in part: "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The Court extended the first amendment's prohibitions to the states through the fourteenth amendment's due process clause. Gitlow v. New York, 268 U.S. 652, 666 (1925).


21 Id.


23 Id. at 864, 867.
Board of Regents responded by rewriting its policy to comply with the court's decision.  

This Note will analyze the constitutionality of anti-harassment disciplinary policies at public universities. Part II will analyze speech exempt from university regulation—that is, constitutionally protected speech—by discussing content neutrality, offensive speech, and heightened protection of expression in an academic setting. Part III will discuss the narrow exceptions to the first amendment in which universities may have some regulatory power. These include: “fighting words,” intentional infliction of emotional distress, group libel, and incitement to imminent lawless action. Part IV will analyze how universities must draft policies to avoid claims of overbreadth and vagueness. In Part V, this Note will attempt to reconcile the freedom of equality for all citizens guaranteed by the fourteenth amendment with the freedom of expression guaranteed by the first amendment. This part will consider recent commentary arguing for the inclusion of the victims’ perspective in the balancing of the first and fourteenth amendments. The purpose of this Note is to provide some guidance to university officials who wish to counter hurtful speech by drafting a constitutionally permissible anti-harassment policy.

II. Protected Free Speech

A. Philosophical Background

Philosophers of first amendment jurisprudence have justified our society's dedication to unregulated freedom of expression in many ways. Philosopher John Stuart Mill emphasized the impor-

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24 Cole Interview, supra note 15. Ms. Cole stated that the Revised Policy was rewritten and adopted in September 1989.

25 This Note will focus on curtailment of speech solely at public universities. Because of the "state action doctrine," the first amendment does not apply to private universities, even though most follow the tenets of the first amendment for philosophical or, if mentioned in the college catalogue, for contractual reasons. Harvard Lecture, supra note 1, comments by Professor Randall Kennedy, Professor of Law at Harvard Law School. State constitutions, as opposed to the U.S. Constitution, may apply to private institutions. Law and Policy Implications for Private Institutions, 1 SYNTHESIS: L. & POL’Y IN HIGHER EDUC. 4 (1989). William Kaplin, Professor of Law at The Catholic University of America, stated in an interview regarding the state action test: "There must be a direct connection between the activity of government and the particular decision that the institution made. It's not enough that the government provides some monetary support." Id.

tance of free speech as a search for truth in society. Justice Oliver Wendell Holmes adopted this philosophy in his dissent in Abrams v. United States, in which he stated: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." Although truth will not always emerge from full discussion, believers in this rationale claim that free debate will more often lead to the truth than if the government or another group determines which ideas are valid. It follows that the government must remain "neutral" in this marketplace of ideas. A second rationale supporting freedom of expression is self-governance, the notion that government must allow members of society to express their opinions so that they can consent to be governed. In a democracy, "even the most odious ideas must be afforded constitutional protection if the society is to retain its essential characteristic of popular self-governance." A third rationale is that unfettered speech leads to self-fulfillment, the development of one's own character in society. The basic assumption behind self-fulfillment is that every individual has the right to develop her own character in society by first forming her own opinions, then expressing them. A fourth rationale is that freedom of expression in an open society promotes flexibility in the government in that it maintains a "balance between stability and change." A society based on suppressed speech would stagnate because of its inflexibility. Free discussion provides the moving force behind social change, ensuring that society progresses. These traditional justifications for free expres-

28 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
29 Letter from Derek Bok, President of Harvard University, to the Harvard Community 2 (Sept. 21, 1984) (Reflections on Free Speech: An Open Letter to the Harvard Community) [hereinafter Bok Letter].
34 Emerson, supra note 26, at 879.
35 Id. at 884.
36 Id.
37 Id. Emerson argues that the outcome of prohibiting free speech in this instance would be increased rigidity in our society: "[a]titudes and ideas become stereotyped; institutions lose their vitality." Id. His reasoning is ironic in this context. If we as a society permit full expression without restraint for all racial, sexist, and homosexual remarks, we may reinforce
sion—the marketplace of ideas, self-governance, self-fulfillment, and change—represent an underlying idealistic vision of a tolerant society from which a "rational and enlightened civilization" will emerge.38

From this philosophical backdrop, certain legal theories have evolved. The first, commonly referred to as "content neutrality," maintains that the government cannot pass laws banning speech because of its content.39 Under the second theory, the United States Supreme Court has guaranteed first amendment protection to offensive speech.40 The third is the Court's heightened commitment to first amendment principles in the academic community.41 Universities must keep in mind these three legal theories of the first amendment when enacting anti-harassment disciplinary policies.42 The next section will discuss each of these theories in turn: content neutrality, offensive speech, and academic setting.

B. Legal Theories

1. Content Neutrality

The Supreme Court has held that the government cannot restrict individual expression because of its message, ideas, subject matter, or content.43 In so holding, the Court has affirmed our country's commitment to uninhibited debate guaranteed by the first amendment.44 Operating under the premise that no idea is false,45 stereotyped ideas and attitudes. Additionally, if universities lose some of their diversity because of hurtful speech, they also lose some of their vitality.

38 Id. at 886.
39 Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).
41 Shelton v. Tucker, 364 U.S. 479, 487 (1960) (Arkansas statute requiring teachers to list affiliations as a condition of employment held invalid).
43 Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972); Cohen v. California, 403 U.S. 15, 24 (1971).
44 Mosley, 408 U.S. at 96; Cohen, 403 U.S. at 24–25.
courts prohibit governmental regulation of "hate speech." With any content-based regulation, the Court will strictly scrutinize the state's interest in restricting expression.

In enacting anti-harassment policies, some universities limit speech by distinguishing acceptable from unacceptable content of expression. In effect, they dictate an "orthodoxy" for their students, determining that speech against another's race, gender, sexuality, national origin, or religion does not necessitate first amendment protection. The United States Supreme Court would most likely classify university policies that promote a certain orthodoxy as content-based restrictions. In trying to protect the rights of minority students with disciplinary policies, university officials risk unlawfully curtailing speech, the content of which is antithetical to campus harmony.

There is a danger in imposing such restrictions on speech because the policies extend beyond the scope of protecting certain students. Additionally, imposing restrictions on speech in this manner risks stifling all students, not just those whose views are repugnant to the university. As Chester Finn, Jr., former United States Assistant Secretary of Education, stated: "[n]or do the narrowing limits on free expression lead only to penalties for individuals who engage in 'biased' talk or 'hostile' behavior. They also leave little room for opinion that deviates from campus political norms or for grievances from unexpected directions." As these policies may restrict students' rights to expression based on the content of their message, courts would subject the university's interest in preserving campus harmony to the "most exacting scrutiny."

46 See Collin v. Smith, 578 F.2d 1197, 1203 (7th Cir. 1978). The court held that Skokie, Illinois, ordinances prohibiting members of the Nazi party from invoking racial and religious hatred by marching in a predominantly Jewish neighborhood were unconstitutional. See also Cohen, 403 U.S. at 26.


48 See Initial and Revised Policies, supra note 15; see also supra note 18 for examples of acceptable and unacceptable behavior at the University of Michigan and the University of Wisconsin.

49 Sedler Brief, supra note 42, at 15.

50 See West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .").


2. Offensive Speech

Similarly, the Supreme Court has held that the government cannot prohibit offensive expression merely because it is offensive.53 In fact, the Court has advocated more speech, not less, to combat offensive speech.54 In *Cohen v. California*,55 the Court held that offensive, profane language was protected free speech.56 The Court reasoned that although the expletive "Fuck the Draft" written on the defendant's jacket was "distasteful," the government could not regulate his taste and style.57 Rather than a government-imposed standard, this determination should be left to the individual.58 The Court reasoned that the government cannot suppress certain words it considers offensive without the risk of suppressing ideas protected by the first amendment at the same time.59 The Court reaffirmed this proposition in its recent first amendment decision, *Texas v. Johnson*.60 The decision states: "[i]f 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."61

In light of this premise, university disciplinary policies would be unconstitutional if they attempted to legislate against speech scrutiny standard, the Supreme Court would uphold a statute only where there was a compelling government interest and when the statute is drafted narrowly to achieve that interest. *Widmar v. Vincent*, 454 U.S. 263, 270 (1981) (state's interest in maintaining separation of church and state on a public university campus not sufficiently compelling to justify content-based restriction on speech).


56 *Id.* at 24–25.

57 *Id.* at 16, 25.

58 *Id.* at 25.

59 *Id.* at 26.


61 *Id.* but cf. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). In *Pacifica*, the Court allowed the FCC to regulate an indecent, offensive radio broadcast. While upholding the offensiveness standard, stating that the government must remain neutral in the "marketplace of ideas," the Court compared this speech to obscenity and reasoned that it is "not entirely outside the protection of the First Amendment." *Id.* at 745–46. The Court reasoned that protection under the first amendment varies as to the context (as opposed to content) of speech, *id.* at 748–49; in *Pacifica*, the broadcast occurred on a Tuesday afternoon when children may easily have listened to the broadcast, *id.* at 749–50.
simply because it was offensive. As the Court noted in *Papish v. Board of Curators*, "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" Although epithets against other students are offensive, a proposition with which most of society would agree, refusing to suppress offensive speech is a "central test" of our commitment to free speech.

Even if the Court allowed the prohibition of certain speech on campus, it is uncertain in whom the university would entrust the censoring power. The possible censoring bodies—administration, faculty, or students—are unsatisfactory in light of the constitutional issues at stake. With the enactment of anti-harassment policies on college campuses, and the ensuing litigation they provoke, judges will most likely play a more active role in determining which speech universities may prohibit. Judges, however, are also unsatisfactory censors. As Dean Lee Bollinger wrote: "judges, being human, will not only make mistakes but will sometimes succumb to the pressures exerted by the government to allow restraints [on speech] that ought not to be allowed. To guard against these possibilities we must give judges as little room to maneuver as possible . . . ."  

3. Heightened Protection of Expression in the Academic Atmosphere

The heightened protection of expression in the academic setting follows from the special nature of universities. Thomas Jefferson stated with respect to the concept of the university: "[Here] we are not afraid to follow truth, wherever it may lead, nor to tolerate . . . ."

62 410 U.S. 667 (1973) (because political cartoon depicting policeman raping the Statue of Liberty was not constitutionally obscene, public university officials could not expel its distributor).

63 Id. at 670. Since this was decided prior to Justice Rehnquist's elevation to Chief Justice, it may be useful to include his views on this subject. In dissent, Rehnquist argued that governing officials at a public university have more authority to control the school's environment, in this case by suppressing the allegedly obscene newspapers, even if the first amendment would bar the state's authority to punish the distributor criminally. Id. at 677 (Rehnquist, J., dissenting).


65 Bok Letter, supra note 29, at 2.

66 L. BOLLINGER, THE TOLERANT SOCIETY 78 (1986). Professor Bollinger is a Dean and Professor of Law at the University of Michigan Law School.
error so long as reason is left free to combat it.” 67 This theoretical belief in open discourse remains true in the modern university as well. Harvard University President Derek Bok explains that universities must allow expression to flourish in order to uphold their mission:

Universities have a special interest in upholding free speech. Educational institutions exist to further the search for truth and understanding and to encourage the personal development of all who study and work within their walls. Because the right to speak freely and the opportunity to enjoy an open forum for debate are so closely related to these central purposes, the university has a stake in free speech that goes beyond the interest of its members. Its integrity as an institution is bound up in the maintenance of this freedom, and each denial of the right to speak diminishes the university itself in some measure. 68

The Court has specifically affirmed this commitment to free speech inherent in our education system. 69 In Shelton v. Tucker, 70 the Court noted that “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” 71 Although it is important that school administrators have the right to control conduct in public schools, 72 the Court has also recognized that the administrators must abide by the first amendment, as its protections apply in that setting. 73 When applying first amendment rights, the government must consider the special circumstances of the environment involved in the case. 74 In the public university environment, the Court has recognized the importance of “safeguarding academic freedom” for the “marketplace of ideas” found in the university classroom and community. 75

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68 Bok Letter, supra note 29, at 2.
69 Shelton v. Tucker, 364 U.S. 479 (1960); see Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969) (students and teachers should not have to “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”).
70 364 U.S. 479 (1960).
71 364 U.S. at 487.
72 Tinker, 393 U.S. at 507.
74 Tinker, 393 U.S. at 506.
Thus, the Court will not allow laws that "cast a pall of orthodoxy over the classroom" by violating the first amendment. Some commentators go further and argue that the anti-harassment policies adopted by some universities attempt to promote an orthodox ideology, which will not tolerate homophobic, racist, sexist, or anti-Semitic speech. Thus, they perceive the policies to be in violation of both the first amendment and the mission of an academic institution. Policies which may have a "chilling effect" on free speech are antithetical to this pursuit of truth through unfettered speech.

III. Exceptions to Free Speech

A. Background

As discussed above, there exists a strong presumption in favor of free speech. The Supreme Court has stated, however, that free speech is not absolute. The Court has carved out a few narrow exceptions to which the first amendment does not apply. In so doing, the Court has allowed the government to regulate speech that falls within these unprotected exceptions. There are three exceptions that are pertinent in the regulation of speech on the public university campus: so-called "fighting words," group libel, and speech which incites imminent lawless action. The following government as ... school administrator may impose upon ... students reasonable regulations that would be impermissible if imposed by the government upon all citizens.

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76 Keyishian, 385 U.S. at 603.
77 Kors, It's Speech, Not Sex, the Dean Bans Now, Wall St. J., Oct. 12, 1989, at A16, col. 3. The enactment of policies that favor the ideological agenda of the "victims" in society, guaranteeing them a community free from sexism, racism and homophobia, chills the speech of anyone who might offend such groups. Id. See generally Finn, supra note 51.
78 Kors, supra note 77; see also Cultural Revolutions, supra note 2; Goldman, supra note 67, at 643 ("it is in the area of student expression and association that the university's disciplinary power poses its greatest potential threat to society, to the university itself and possibly to the individual student").
79 Schenck v. United States, 249 U.S. 47, 52 (1919). In Schenck, the Court affirmed appellants' conspiracy conviction for distributing leaflets against military recruiting. Although ordinarily the leaflets would have been protected by the first amendment, the Court ruled that the wartime leaflets posed a national security risk. Id.
80 In addition to the exceptions discussed in this section, these include: obscenity, Roth v. United States, 354 U.S. 476 (1957), and commercial speech, Friedman v. Rogers, 440 U.S. 1 (1979).
81 Roth, 354 U.S. at 485; Friedman, 440 U.S. at 9.
82 In addition to relying on punitive sanctions from such university policies, victimized students may also attempt to collect civil damages from a perpetrator based on the common law action of intentional infliction of emotional distress. Such a remedy is beyond the scope of this Note. See generally Delgado, supra note 31; Note, First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress, 85 COLUM. L. REV. 1749 (1985).
discussion will apply each exception to the power of the university to regulate speech.

B. Fighting Words

The Court developed the “fighting words” doctrine in *Chaplin­sky v. New Hampshire.* The Court defined “fighting words” as those words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” In *Chaplinsky,* a police officer arrested the defendant for breach of the peace after the defendant had called the city marshall a “[g]od damned racketeer” and a “damned [f]ascist.” The Court held that such words are beyond the protections of the first amendment’s right to free speech because they do not promote “any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

Because such words are not communication, but “in­struments of assault,” they are not entitled to first amendment protection. Since the first amendment does not apply to “fighting words,” it follows that the government can regulate them with narrowly drawn statutes. The Court in *Chaplinsky* upheld defendant’s conviction based on this “fighting words” exception and the narrowly drawn New Hampshire statute.

Although the Court has continued to recognize the “fighting words” doctrine as a valid exception, the Court has narrowly con­strued it. In some subsequent cases, it has declined to classify the challenged speech as “fighting words.” In *Cohen v. California,* the

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83 315 U.S. 568 (1942).
84 Id. at 572.
85 Id. at 569.
86 Id. at 572.
88 Chaplinsky, 315 U.S. at 573.
89 Id.
90 *Punishing Racist Speech,* 1 SYNTHESIS: L. & POL’Y IN HIGHER EDUC. 3 (1989) [hereinafter *Racist Speech*]; see also NOWAK, ROTUNDA, AND YOUNG, CONSTITUTIONAL LAW 944 (3d ed. 1986) [hereinafter *Nowak*].
91 Street v. New York, 394 U.S. 576, 592 (1969) (flag statute making it a misdemeanor to cast contempt by words or acts on the American flag held unconstitutional because, even though inflammatory, these words would not rise to the level of fighting words); Bachellar v. Maryland, 397 U.S. 564, 567 (1970) (anti-Vietnam War demonstration in front of an Army recruiting station, which involved inflammatory posters and an exchange between demon­strators and the public, did not rise to the level of “fighting words”); Cohen v. California, 403 U.S. 15, 20 (1971).
Court refused to apply the "fighting words" doctrine to an epithet written on defendant's jacket.\textsuperscript{92} At the same time, the Court further refined its definition of "fighting words."\textsuperscript{93} In Cohen, the Court reasoned that the words "Fuck the Draft" were not "fighting words" because no individual "could reasonably have regarded the words on appellant's jacket as a direct personal insult."\textsuperscript{94} Additionally, the state failed to show that defendant intended to provoke an immediate, violent breach of the peace.\textsuperscript{95}

Thus, in order to justify a curtailment of free speech under the "fighting words" doctrine, it seems that the speaker must fall within the Chaplinsky definition of "fighting words," narrowed by Cohen "to face to face encounters in which unusually provocative words have a direct tendency to provoke an immediate act of violence by a person to whom, individually, the words are addressed."\textsuperscript{96} When the listener could have simply avoided eye contact, the Court will not invoke the "fighting words" doctrine.\textsuperscript{97}

In other subsequent cases, where the "fighting words" doctrine was arguably applicable, the Court has avoided the issue by overturning defendants' convictions based on the statutes' overbreadth rather than for failure to meet the "fighting words" standard.\textsuperscript{98} Some critics argue that the "fighting words" doctrine is dead as the Court has not upheld a conviction for the use of such words since Chaplinsky.\textsuperscript{99} Although the Court has continued to reaffirm the "fighting words" doctrine,\textsuperscript{100} it has chosen not to apply the doctrine.

\textsuperscript{92} Cohen, 403 U.S. at 20.
\textsuperscript{93} Id.
\textsuperscript{94} Id. (emphasis added).
\textsuperscript{95} Id.
\textsuperscript{96} Racist Speech, supra note 90, at 3; Gard, supra note 32, at 572–73.
\textsuperscript{97} Cohen, 403 U.S. at 21.
\textsuperscript{98} Terminiello v. Chicago, 337 U.S. 1 (1949). In Terminiello, the Court reversed the conviction of a suspended Catholic priest, arrested for yelling at his adversaries, due to the overbreadth of the city breach of peace ordinance. The ordinance read in part: "All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, . . . shall be deemed guilty of disorderly conduct . . . ." § 1(1), ch. 193, Rev. Code 1939, City of Chicago, quoted in Terminiello, 337 U.S. at 2 n.1. In Gooding v. Wilson, 405 U.S. 518 (1972), the Court overturned the convictions of a verbally abusive anti-Vietnam War protestor because of an overbroad statute. The statute read in part: "Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor." Ga. Code Ann. § 26–6303, quoted in Gooding, 405 U.S. at 518–19. See also Lewis v. City of New Orleans, 415 U.S. 130 (1974).
\textsuperscript{99} See Gard, supra note 32, at 535; Gooding, 405 U.S. at 537 (Blackmun, J., dissenting) ("[T]he Court . . . is merely paying lip service to Chaplinsky.").
in situations analogous to Chaplinsky. In fact, the Court has only invoked the doctrine once, to uphold the Chaplinsky conviction. Since that time, the Court has narrowed the doctrine and voided the applicable statutes for overbreadth. The Court's reluctance to apply the doctrine implies that this exception does not hold much weight.

Thus, disciplinary policies which carve out narrowly defined "fighting words" exceptions probably are constitutional; however, courts will be reluctant to validate policies unless they follow the narrow definition of Cohen discussed above. Words that merely anger, without immediately provoking violence in a direct personal encounter, would not be punishable. Even though narrowly drafted provisions prohibiting "fighting words" on campus would be constitutional, it seems likely that the Court would rule only on a challenged policy's overbreadth. Thus, in developing an anti-harassment policy, universities should not rely heavily on the Chaplinsky rationale of fighting words.

A caveat should be added. Despite the fact that the Supreme Court interprets the "fighting words" doctrine narrowly, requiring that the words provoke an immediate act of violence in the listener, some state courts have applied the "fighting words" doctrine in a broader manner. Most of these state cases that rely on a broad interpretation involved convictions for verbal epithets against a police officer. As a person trained to encounter such speech, a police officer would most likely not react in a violent manner. By allowing regulation of such words, these state courts

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102 See supra note 98 and accompanying text.
103 Cohen, 403 U.S. at 20.
104 Racist Speech, supra note 90, at 3.
105 Cohen, 403 U.S. at 20.
106 In the dissenting opinion of Karlan v. City of Cincinnati, 416 U.S. 924, 928 (1974) (Douglas, J., dissenting), Justice Douglas noted that state courts have failed to apply the overbreadth analysis to statutes in "fighting words" cases: "state courts . . . have consistently shown either inability or unwillingness to apply its teaching." Id.
108 Shea, supra note 87, at 22. Professor Shea writes: "a legless cripple, a feeble old woman and a dedicated police officer are fair game for the vilest personal verbal abuse because they are . . . unlikely to retaliate physically." Id. Contrary to the broad interpretation of some states, the Supreme Court's narrow interpretation would not classify such words as "fighting words" in the above-mentioned situations. Id.
have invoked the "fighting words" doctrine more often than Supreme Court precedents would indicate. University administrators, however, should not rely on this generous and factually specific interpretation of the exception, which might allow them to regulate speech more liberally, as the Court has the authority to ensure that state acts comport with the United States Constitution.

C. Group Libel Laws

The Court determined in Beauharnais v. Illinois111 that the first amendment does not protect group libel—statements that defame designated groups. In Beauharnais, the police arrested a White Circle League president for distributing a racist leaflet. The Illinois statute under which the defendant was convicted declared illegal any publication which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion . . . ." The Court extended the reach of individual libel to libelous utterances directed at a group. Reasoning that such libelous activity fell outside of first amendment protections, the Court upheld the statute as constitutional.115 Although Beauharnais has never been overruled, the Court implicitly limited the doctrine in New York Times Company v. Sullivan.116 That case restricted state law claims for libel and slander by public officials against the press. The Court reasoned that the freedoms embod-

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109 Gard, supra note 32, at 564.
111 343 U.S. 250 (1952).
112 Id. at 251, 266-67.
113 Id. at 252.
114 Id. at 251. Other states and some foreign countries have enacted similar group libel laws. Lasson, Racial Defamation as Free Speech: Abusing the First Amendment, 17 Colum. Hum. Rts. L. Rev. 11, 30, 50-53 (1985); Haiman, supra note 54, at 89-90. These include Connecticut, Massachusetts, Montana, and Nevada. Lasson, supra, at 30 n. 131. Denmark, Sweden, and England (Race Relations Act, 1965) have enacted limitations on group libel as well. Id. at 50-53; Haiman, supra note 54, at 90. Haiman notes, however, that the statute in England has not made the country "any freer of racial conflict in the streets than has the United States." Haiman, supra note 54, at 94.
115 Beauharnais, 343 U.S. at 266-67.
116 New York Times Co. v. Sullivan, 376 U.S. 254 (1964); see also Nowak, supra note 90, which states, "Although Beauharnais v. Illinois has never been explicitly rejected, it should not represent present law in light of New York Times v. Sullivan." Id. at 926. In addition, other courts have questioned the constitutional validity of Beauharnais in light of recent case law. See, e.g., Collin v. Smith, 578 F.2d 1197, 1204 (7th Cir. 1978).
ied in the first amendment necessitated such restrictions. 118 Because it appears that broad statutes aimed at criminalizing group defamation are probably not constitutional after New York Times, 119 university officials should not rely on the holding in Beauharnais when drafting an anti-harassment policy. 120 Thus, policies which prohibit group libel, specifically the distribution of racist or anti-Semitic publications, would most likely not be valid.

D. Inciting Imminent Lawless Action

Another exception to the constitutional principles of unfettered free expression is speech that causes imminent lawless action. 121 In Brandenburg v. Ohio, 122 the Supreme Court held that it would permit government regulation of expression when the expression reaches the level of “inciting or producing imminent lawless action and is likely to incite or produce such action.” 123 In Brandenburg, the Court distinguished between “mere advocacy,” which the government cannot punish, and inciting a group to violence, which the government can permissibly regulate. 124

The Brandenburg case involved an Ohio statute criminalizing conduct that encouraged the commission of violence to accomplish political reform. 125 State officials charged the defendant, a Ku Klux Klan leader, with violating the statute. 126 He was later convicted. 127 On appeal, the Court struck down the statute, reasoning that it impermissibly swept within its regulatory power “the mere abstract teaching” of violent political upheaval. 128 The Court reasoned that a statute which “sweeps within its condemnation speech which our Constitution has immunized from governmental control” is uncon-
Thus, by mandating that legislatures draft narrow statutes to prohibit only that expression that incites imminent lawless action, *Brandenburg* provided broad protection for free expression.\(^{129}\)

After *Brandenburg*, the Court has strictly interpreted this standard, requiring a "careful consideration" of the facts and circumstances surrounding such expression.\(^{130}\) In *Hess v. Indiana*,\(^ {131}\) the police arrested the defendant, an anti-war demonstrator, for disorderly conduct for shouting "[w]e'll take the fucking street later [or again]" after police officers had cleared demonstrators off a street.\(^ {132}\) The Court held that because "at worst, [defendant's speech] amounted to nothing more than advocacy of illegal action at some indefinite future time," the defendant's expression did not incite imminent action.\(^ {133}\) Moreover, as defendant did not direct his statement to any specific persons in the crowd, the Court reasoned that he was not even advocating action.\(^ {134}\)

In order to protect against student expression advocating violence against women, homosexuals, or minorities, universities would have to tailor their policies narrowly to guard against only imminent, lawless incitement to action. Given that the Court has carefully protected speech in its application of the standard, drafting a constitutionally permissible policy would be difficult. Even so, unless policy drafters incorporated the *Brandenburg* language into the policy, a court would likely rule that the regulation was too broad.

In summary, as a general rule, the government cannot regulate speech because of its content or because it is offensive.\(^ {135}\) If speech falls into one of the exceptions to this rule, however, the government may regulate it.\(^ {136}\) The government may regulate speech where it constitutes "fighting words"\(^ {137}\) or where it incites the listener to imminent action.\(^ {138}\) On the other hand, the Supreme Court would most likely find regulation of group libel unconstitutional.\(^ {139}\)

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\(^{129}\) Id.

\(^{130}\) See Nowak, supra note 90, at 864.


\(^{133}\) Id. at 107 (last words of defendant's statement were unclear at trial).

\(^{134}\) Id. at 108.

\(^{135}\) Id. at 108–09.

\(^{136}\) Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

\(^{137}\) See supra notes 80 and 81 and accompanying text.


\(^{140}\) See supra note 116 and accompanying text.
IV. Scope of Anti-Harassment Policies

A. Overbreadth

Even though the government may constitutionally prohibit speech in the exceptions mentioned above, it may only regulate with "narrow specificity."\(^\text{141}\) When a regulation not only affects the regulable exceptions to free speech but also the constitutionally protected speech, with no provision for severing the latter unconstitutional application, it is overbroad and void in its entirety.\(^\text{142}\) By prohibiting overbroad statutes, the Court protects against the "chilling effect" on speech that such statutes would likely cause.\(^\text{143}\) Because allegedly overbroad statutes may encroach on the first amendment, the Court does not hesitate "to take into account possible applications of the statute in other factual contexts besides that at bar" when reviewing a statute.\(^\text{144}\) The Court has adopted a strict evaluative standard by placing the burden on the government to "show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."\(^\text{145}\)

In September 1989, the Federal District Court for the Eastern District of Michigan applied this standard to the University of Michigan's initial anti-harassment policy in \textit{Doe v. Michigan}.\(^\text{146}\) The plaintiff in \textit{Doe}, a biopsychology graduate student studying the individual differences in personality traits and mental abilities, feared sanctions by the university because of classroom discussions about race and gender differences.\(^\text{147}\) He claimed that the policy impinged upon his first amendment right to discuss these controversial theories freely.\(^\text{148}\) He asserted that the policy was unconstitutional due


\(^{142}\) \textit{See Thornhill v. Alabama}, 310 U.S. 88, 97–98 (1940) (statute prohibiting all types of picketing, peaceful or otherwise, was void due to overbreadth); \textit{cf.} \textit{Broadrick v. Oklahoma}, 413 U.S. 601, 615–16 (1973) (Court limited the overbreadth test by stating that overbreadth of a statute must be substantial in order for it to be unconstitutional; however, the Court seems to apply this limitation to statutes involving only conduct, not mere speech).


\(^{144}\) \textit{NAACP}, 371 U.S. at 432.

\(^{145}\) \textit{Widmar v. Vincent}, 454 U.S. 263, 270 (1981); \textit{see also} \textit{NAACP}, 371 U.S. at 433. This language is also used in fourteenth amendment equal protection analysis. \textit{See Nowak, supra} note 90, at 530.


\(^{147}\) \textit{Doe}, 721 F. Supp. at 858.

\(^{148}\) \textit{Id.}
to its overbreadth and vagueness.\textsuperscript{149} The court agreed that the initial policy was overbroad, reasoning that the university had prohibited both unprotected and a "substantial amount of constitutionally protected" expression.\textsuperscript{150}

The court cited three examples of the university using the policy to regulate speech that should have been protected by the first amendment.\textsuperscript{151} First, in a social work class discussion, a graduate student had several "heated discussions" with his classmates in defending his belief that homosexuality was a disease.\textsuperscript{152} The hearing panel charged the student with sexual harassment, but acquitted him on a sexual orientation harassment claim.\textsuperscript{153} The court pointed out, however, that the panel did not claim any first amendment violation on the part of the university in "forcing the student to a hearing to answer for allegedly harassing statements made in the course of academic discussion and research."\textsuperscript{154} A second case involved the informal sanctioning of a business school student who, in an in-class public speaking exercise, recited a limerick that mocked an athlete for his alleged homosexuality.\textsuperscript{155} After a series of formal apologies, first to the class and then in the school newspaper, and the speaker's attendance at an educational forum on homosexuality, the complaint was dropped.\textsuperscript{156} A third incident involved an in-class statement by a dentistry student, who commented that "he had heard that minorities had a difficult time in the course and that he had heard that they were not treated fairly."\textsuperscript{157} In response to a complaint lodged by the professor of the class, the student had to attend counseling sessions and apologize formally.\textsuperscript{158} Such incidents illustrate that the university policy covered classroom discussions which are clearly within the protected realm of free speech.\textsuperscript{159} Moreover, they show that the university did not even require an analysis of the first amendment considerations of each

\textsuperscript{149} Id.
\textsuperscript{150} Id. at 864.
\textsuperscript{151} Id. at 865–66.
\textsuperscript{152} Id. at 865.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id. at 866 (quoting Complaint No. 88–9–07).
\textsuperscript{158} Id.
\textsuperscript{159} Id. at 865.
complaint before giving notice to the accused that a complaint was filed.\textsuperscript{160}

Thus, in drafting a policy, a university can only legislate against unprotected speech. A university cannot draft a far-reaching policy that affects speech protected by the first amendment. Additionally, the policy must establish a method of reviewing complaints for constitutionality, perhaps by a mandatory review by university counsel, before sending notice of the complaint to the alleged perpetrator.

\textbf{B. Vagueness}

The Court has also held that vague statutes, like those that are overbroad, are void.\textsuperscript{161} The Court will void a statute for vagueness if “men of common intelligence must necessarily guess at its meaning.”\textsuperscript{162} The Court has held that legislators must draft statutes in such a way that the “ordinary person exercising ordinary common sense can sufficiently understand and comply . . . .”\textsuperscript{163} Because these definitions of vagueness are themselves unclear, the Court has attempted to clarify this concept. In \textit{Grayned v. City of Rockford}\textsuperscript{164} and \textit{Broadrick v. Oklahoma},\textsuperscript{165} the Court held that legislators must draft statutes so that potential violators will understand which are prohibited activities and so that public officials will have explicit standards to follow.\textsuperscript{166} This is particularly true when the challenged regulation “is capable of reaching expression sheltered by the [first] amendment.”\textsuperscript{167} According to Professor Laurence Tribe, however, the Court is unlikely to find a statute void for vagueness unless “the individual challenging the statute is indeed one of the entrapped innocent, and that it would have been practical for the legislature to draft more precisely.”\textsuperscript{168}

\begin{footnotes}
\footnote{\textit{Id.} at 866.}
\footnote{Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).}
\footnote{\textit{Id.}}
\footnote{\textit{Id.}}
\footnote{United States Civil Serv. Comm’n v. National Ass’n of Letter Carriers, AFL-CIO, 413 U.S. 548, 579 (1973).}
\footnote{408 U.S. 104 (1972).}
\footnote{413 U.S. 601 (1973).}
\footnote{\textit{See Grayned}, 408 U.S. at 108–09 (1972); \textit{Broadrick}, 413 U.S. at 607 (1973).}
\footnote{Smith v. Goguen, 415 U.S. 566, 573 (1974).}
\footnote{L. Tribe, \textit{American Constitutional Law} § 12–31, at 1034 (2d ed. 1988) (footnotes omitted); see United States v. Petrillo, 332 U.S. 1, 7 (1947); see generally, Note, \textit{The Void-for-Vagueness Doctrine in the Supreme Court}, 109 U. Pa. L. Rev. 67 (1960).}
\end{footnotes}
In Doe, in addition to finding the University of Michigan policy overbroad, the district court ruled that enforcement of the policy would violate the due process clause because its terms were so vague. The policy was not limited in its scope nor did it distinguish between regulable speech and constitutionally protected speech. In order to conclude that the policy was vague, the court analyzed both elements necessary to state a prima facie case of harassment under the policy—cause and effect. The court looked first to the policy's cause section, which stated that language must "stigmatize" or "victimize" a person. The court reasoned that such terms could only be defined vaguely. The court reasoned that simply because language violates the "stigmatize" or "victimize" test does not mean that it is automatically unprotected by the first amendment. The university did not clearly state the differences between offensive speech, which is protected under the first amendment, and the "stigmatized" speech prohibited by the policy. Second, the court reasoned that the policy's effects section did not clearly delineate which speech was protected and which was not, giving students "no inherent guidance." Additionally, although the university provided an accompanying pamphlet containing examples of prohibited conduct and speech with the initial policy, it withdrew the pamphlet later in the semester. Since "the University never articulated any principled way to distinguish sanctionable from protected speech," students at the university had no clear method of understanding what speech would later be sanctioned.

Thus, a university interested in drafting a policy restricting speech must ensure that the wording of its policy does not allow vague interpretations such as the initial policy at the University of Michigan. To provide warning to its students, a university should include examples of sanctionable conduct in a policy. In addition,
a policy should explicitly delineate standards to which university officials should adhere in discerning what conduct is protected by the first amendment and what is not.

V. The Victim's Perspective

Even though policies may conflict with the first amendment, university officials enact such restrictions to provide students with an equal access to education and an academic environment free from interference. These policies, exemplifying a university's desire to provide a community free of discrimination that fosters and celebrates diversity, are symbolic of our nation's commitment to equality and freedom from harassment embodied in the fourteenth amendment and civil rights statutes. Enacted in an institution that is symbolic of free inquiry, however, the policies bring head to head the "competing visions" of freedom of speech and freedom of equality for all citizens. The difficult quandary is how to reconcile these compelling, yet conflicting, goals.

The Federal District Court for the Eastern District of Michigan recently faced this conflict and ruled that the initial policy at the University of Michigan was unconstitutionally vague and overbroad because it regulated constitutionally protected speech as well as regulable speech. Interestingly, however, the court submitted an addendum to its decision. The court admitted that a recent article by Professor Mari Matsuda, which had reached its chambers after

181 Hodulik, supra note 17, at 576.
182 The fourteenth amendment states in part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Ratified during the same period were amendments XIII (abolishing slavery) and XV (granting African-Americans the right to vote) to the Constitution. In addition, Congress enacted the Civil Rights Acts of 1866, 1870, 1871, and 1875 (codified as amended at 42 U.S.C. § 1971 et seq., 1981 et seq. (1982)). Eight decades later, with impetus from Brown v. Board of Education, 347 U.S. 483 (1954) (applying the fourteenth amendment, the Court ruled that schools did not provide equal educational opportunities for African-Americans), Congress passed the Civil Rights Act of 1964, 42 U.S.C. §§ 1981–2000h(6) (1982), and the Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 to 1973p (1982)). Other federal legislation and state statutes may also mandate equal access to education. See, e.g., Hodulik, supra note 17. As counsel for the University of Wisconsin, Ms. Hodulik described the statutes upon which the university based its policy. Id. at 576–77.
183 Flint, A Din on the Campus, Boston Globe, Oct. 8, 1989, at A25, col. 2 (quoting Professor Laurence Tribe).
185 Id. at 869.
the docketing of its opinion, would have indeed "sharpened the Court's view of the issues." The court's late recognition of Matsuda's work suggests that perhaps it may have been willing to carve out some exception to first amendment rights by balancing them against fourteenth amendment considerations.

Professor Matsuda argues in favor of a free speech exception for a narrowly defined class of hate speech that "acknowledges both the civil libertarian's fear of tyranny and the victims' experience of loss of liberty in a society that tolerates racist speech." Reasoning from the victim's perspective, she notes that the victims in our society bear much of the burden of maintaining unfettered free speech. Since the psychological and sociological damage caused by racist slurs is great while the societal value in such speech is low, government should be able to regulate a narrowly defined class of racist words. She argues for a legal answer to racist speech by specifically allowing the government to regulate speech if the "message is of racial inferiority; ... directed against a historically oppressed group; and ... is persecutorial, hateful, and degrading." In the university setting, she argues, it is even more important to prohibit racist speech because students depend on the university for their sense of community. Allowing such speech at a university harms the attackers by allowing them to believe their actions will be tolerated for the rest of their lives. It harms the institution itself, as such speech is antithetical to the mission of a university. Most of all, however, it hurts the victims, as they have no recourse. Not only have the victims been verbally abused, they have been victimized by a university that has chosen not to respond in the name of tolerance. Thus, the state should be permitted to restrict the first

188 Matsuda, supra note 186, at 2380.
189 Id. at 2376.
190 Id. at 2340.
191 Id. at 2357.
192 Id. at 2370; see also Smolla, Rethinking First Amendment Assumptions About Racist and Sexist Speech, 47 WASH. & LEE L. REV. 171, 207 (1990) ("[a] university ... is also a unique community in which the state should be permitted to require of its members higher levels of rationality and civility than the state may impose on the general population.").
193 Matsuda, supra note 186, at 2371.
194 Matsuda discusses the effects of governmental tolerance of racist speech. Id. at 2338. She also discusses the specific tolerance by university officials that is "more harmful than generalized tolerance in the community-at-large." Id. at 2371; see Wright, Racist Speech and the First Amendment, 9 MISS. C.L. REV. 1 (1988). Wright discusses judicial toleration, reasoning that toleration of racist speech indicates not so much "the virtue of tolerance" as it does "indifference and insensitivity" to nondominant groups. Id. at 28.
amendment rights of verbal attackers "as a condition for [their] entry into this special community." Matsuda concludes that government should combat hateful speech, "not because it isn't really speech, not because it falls within a hoped-for neutral exception, but because it is wrong." Other commentators have also tried to reconcile these two commitments, free speech and equality, with respect to racist speech. As Professor Charles Lawrence argued, "[t]o engage in a debate about the first amendment and racist speech without a full understanding of the nature and extent of the harm of racist speech risks making the first amendment an instrument of domination rather than a vehicle of liberation." He speaks poignantly about the difference between offensive, impolite language as found in Cohen and the harms caused by racist slurs: psychic injury, shame, vulnerability, and fear. He would solve this balancing test by expanding the "fighting words" exception to include racist speech. He differentiates the traditional "fighting words" doctrine requirement of an uncontrollable violent reaction, with the typical response by the victim of a racial epithet, flight or silence. He argues that this response is just as severe as a violent reaction. Victims are left speechless, powerless, and fearful of physical abuse. Anti-Semitic, racist, or sexist verbal abuse causes actual physical symptoms, temporarily disabling and muting the victim. Regulations that curtail such speech are therefore "clearly within the spirit, if not the letter, of existing first amendment doctrine."

To counter this argument, some commentators argue that the extension of the "fighting words" exception to include racist speech would be detrimental in several ways. First, the drafting of such

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195 Smolla, supra note 192, at 207.  
196 Matsuda, supra note 186, at 2380.  
197 Kretzmer, Freedom of Speech and Racism, 8 Cardozo L. Rev. 445 (1987); Lawrence, supra note 5; Wright, supra note 194; Smolla, supra note 192.  
198 Lawrence, supra note 5.  
199 Id.  
200 Id.  
201 Id.  
202 Id.  
203 Id.  
204 Id.  
205 Id.  
206 See, e.g., Address by Nadine Strossen, ACLU Biennial Conference, at 8 (June 15, 1989). Ms. Strossen is General Counsel for the ACLU.
narrow policies is nearly impossible, and would give too much discretion to those enforcing it. Second, the racist speakers may themselves become martyrs of the first amendment, increasing the publicity of, and sympathy for, their racist message. Last, the policy would only cover open, public racist speech, not eliminating the "more subtle, . . . more invidious, forms . . . ."

Although first amendment doctrine indicates that universities must draft narrow, unambiguous policies in order to regulate in a constitutionally permissible manner, the district court in Doe indicated its willingness to factor in fourteenth amendment considerations in its analysis of the issue. Matsuda's and Lawrence's views of victims' rights deserve to be heard on the university campus to enlighten the university community as to the effects of racist speech. As universities attempt to provide a harassment-free environment for their students by enacting disciplinary policies, they will provide a testing ground for a rethinking of first amendment doctrine. As commentators noted in the preceding section have suggested, such a rethinking should not ignore the victims' perspective in the name of toleration.

VI. Conclusion

In an effort to guide university administrators, this Note has analyzed the constitutionality of university anti-harassment policies designed to counteract racist, anti-Semitic, sexist, and homophobic expression on campus. As an overriding principle, the Court has upheld the first amendment guarantees of free speech in a broad manner. Government cannot suppress speech due to its content or offensiveness, especially in an educational environment where uninhibited dialectic is paramount. The Court has carved out a few narrow exceptions to this broad principle in which government, in the form of a public university, may regulate.

First, a university may regulate expression when the attacker uses "fighting words." The Court has interpreted such words narrowly, only prohibiting expression in face-to-face encounters in which unusually provocative words addressed to a victim provoke an uncontrollable, immediate act of violence in that victim. Second,

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207 Id.
208 Id.
209 Id.
210 See generally Smolla, supra note 192.
a university may regulate expression that incites or produces imminent lawless action in a group, as long as policies do not prohibit mere advocacy. On the other hand, university administrators should not include broad provisions aimed at criminalizing group defamation as it appears that such statutes are probably not constitutional.

If a university chooses to enact a policy, it must draft the policy narrowly so that it does not affect speech protected by the first amendment. Also, drafters must ensure that the narrow wording will not be interpreted vaguely. University officials admit that narrow drafting would not permit the university to prohibit most speech. Ironically, it is unlikely that such narrow policies would cover the types of speech that led to the policy's creation. 211

Even narrowly tailored policies, however, at least symbolize that universities are concerned about their underrepresented groups, even though the policies may not reduce racist behavior significantly. In addition to narrow drafting, the policy should also explicitly delineate standards to which university officials must adhere in discerning what conduct the first amendment protects. At the very least, universities must include a method of reviewing complaints for constitutionality before sending notice of the complaint to the alleged perpetrator. Last, to provide warning to their students, universities should include examples of sanctionable conduct in a policy.

Although universities cannot legislate against most racist speech under current jurisprudence, the unfortunate recent rise in reported incidents and the emergence of progressive legal commentary may provide the impetus for a change in the law toward regulation of hate speech in narrow instances. In any event, administrators should realize that disciplining a narrow classification of speech is not the entire solution. Universities, which have an important function in our society as institutions dedicated to higher learning and truth, must enlighten their students by implementing educational programs in their curricula and providing seminars that raise cultural awareness. Universities should not only educate their students as to the roots of racism, anti-Semitism, sexism, and homophobia, but they should also force students to grapple with our country's competing commitments of equality and free speech. Most importantly, even though universities must tolerate constitu-

211 Hodulik, supra note 17, at 587.
tionally protected speech, the Constitution does not mandate that they agree with it. If they are truly committed to combating racism, sexism, anti-Semitism, and homophobia on campus, universities should not hesitate to exercise their own first amendment rights of free speech to denounce unconscionable student behavior.

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