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John T. Shapiro

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The Call for Campus Conduct Policies: Censorship or Constitutionally Permissible Limitations on Speech

A flyer proclaiming "open season on Blacks" and referring to blacks as "saucer lips, porch monkeys and jigaboos" is slipped under the door of a dormitory lounge where black students are meeting.1 A black student hurls anti-Semitic insults at a Jewish student, including "dirty Jew," "stupid Jews," and "fucking Jew."2 The Jewish Student Union at Memphis State University is spray-painted with swastikas and the words "Hitler is God."3 Asian-American students are harassed and spat on4 and a member of the Asian Pacific American Law Students Association finds a laundry ticket on that club's bulletin board.5 Members of a fraternity burst into an African Languages and Literature classroom, yelling racist remarks and disrupting the class.6 Two white men taunt a black woman student as she walks past a university residence hall, and pour urine on her as they lean out their dormitory room window.7

These stories coincide with an increasing number of student-to-student harassment incidents on university campuses across the country.8 In an effort to control harassment of stu-
dents, universities are promulgating conduct codes that, in varying degrees, restrict speech and activities in the academic environment. The University of Michigan promulgated such a policy only to have a court strike it down as unconstitutionally vague and overbroad.

University administrators face the continuing problem of controlling harassment on campus without violating first amendment interests in freedom of speech. On the one side is the university's established right to regulate student activities. A university may promulgate regulations to further its academic mission and to protect the educational opportunities of students attending the institution. In light of principles of ac-

1984, the ADL recorded incidents of bigotry at six colleges nationwide. "This figure doubled to 10 in 1985 and increased again to 19 in 1986. By 1988 the number jumped to 38 ..." ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, CIVIL RIGHTS DIVISION POLICY BACKGROUND REPORT, CAMPUS ANTI-BIAS CODES: A NEW FORM OF CENSORSHIP? 1 (1989). The U.S. Department of Justice Community Relations Service reported a large increase in racial tension related cases at institutions of higher education for fiscal year 1988. Similarly, the National Gay and Lesbian Task Force reported a rise in reports of bias-motivated harassment of homosexual students.

9. Institutions that have adopted policies specifically dealing with student-created harassment speech include Brown University, Emory University, Pennsylvania State University, Tufts University, Trinity College, the University of California, the University of Connecticut, the University of North Carolina at Chapel Hill, the University of Michigan, the University of Pennsylvania, and the University of Wisconsin. Several institutions are considering implementing an anti-harassment policy, including Arizona State University, Eastern Michigan University, the University of Texas at Austin, Stanford University, Wilson, supra note 7, at A38, col. 5, and the University of Minnesota, Seebach, U Considering Controversial Racial, Ethnic Slur Policies, Minn. Daily, Sept. 22, 1989, at 1, col. 4.


11. Esteban v. Central Missouri State College, 415 F.2d 1077, 1089 (8th Cir. 1969) (holding that "a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct"), cert. denied, 398 U.S. 965 (1970), quoted in Healy v. James, 408 U.S. 169, 192 (1972); see also Speake v. Grantham, 317 F. Supp. 1253, 1265 (S.D. Miss. 1970) (finding that "[a] college or university has the inherent power to promulgate rules and regulations; the right to discipline; the right to protect itself and its property through lawful means; and the right to expect its students to adhere generally to accepted standards of conduct commensurate with their approaching maturity and majority").

12. Shelton v. Trustees of Indiana Univ., 891 F.2d 165, 167 (7th Cir. 1989) (noting that "[a] public university does not violate the First Amendment when it takes reasonable steps to maintain an atmosphere conducive to study and learning by designating the time, place, and manner of verbal and especially
academic freedom, the Supreme Court requires that courts defer broadly to universities in upholding reasonable regulations. Juxtaposed against the university’s goal of providing hospitable academic environment are the principles of free expression and inquiry. Students should be able to hold, vigorously defend, nonverbal expression”). Universities have the responsibility to promote equal access to educational opportunities. Each student has the right of equal access to an education without discrimination on the basis of race, sex, religion, disability, sexual orientation, national origin, ancestry, or ethnic origin. See Cisneros v. Corpus Christi Indep. School Dist., 330 F. Supp. 1377, 1389 (S.D.N.Y. 1971) (finding that all persons should have equal access to the educational opportunity public schools offer because public schools exist for the benefit of all persons. Any system of segregation of various groups, whether through overt segregation or harassment, undermines that equality).

Charles Lawrence, professor of law at Stanford University, argues that universities are responsible for securing an equal educational opportunity for all students, and that this obligation provides a compelling justification for campus conduct codes that ensure students safe passage in university common areas. Lawrence, The Debates Over Placing Limits on Racist Speech Must Not Ignore the Damage It Does to Its Victims, Chron. Higher Educ., Oct. 25, 1989, at B1, col. 2. Lawrence believes that minority students who choose to be on campus should not have to risk being subjected to harassment speech. Id.

13. Id. (noting that “the principles of academic freedom counsel courts to defer broadly to a university’s determination of what those steps are”).

14. For a discussion regarding balancing of interests, see infra notes 39-43 and accompanying text.

Many students, faculty, and commentators, responding to the promulgation of campus conduct codes that prohibit harassment speech, argue that the codes are too restrictive, and violate the free speech clause of the first amendment. See Page, Liberals mounting own hateful assault on 1st Amendment, Chi. Trib., July 4, 1990, § 1, at 13, col. 1 (arguing that policies restricting speech that someone finds offensive are themselves offensive because such speech contains ideas and is hard to define); Dembart, At Stanford, Leftists Become Censors, N.Y. Times, May 5, 1987, at A35, col. 2 (arguing that silencing adversarial speech is the wrong way to combat hateful speech and that, because polite, popular speech is never in danger, ugly and repugnant speech is the only kind of speech that needs protection); France, Hate Goes To College, A.B.A. J., July 1990, at 48-49 (citing Alan Borovoy, general counsel of the Canadian Civil Liberties Association, who argues that criminal-type laws are not good tools with which “to distinguish destructive hatred from constructive tension,” and Alan Keyes, a former Reagan administration official, who finds campus conduct codes to be a “patronizing and paternalistic form of a well intentioned racism that cripples blacks”).

Professor Gerald Gunther, specifically commenting on a proposed conduct code at Stanford University, argues that speech cannot and should not be banned “simply because it is ‘offensive’ to substantial parts or a majority of a community.” Letter from Professor Gerald Gunther, Stanford University, to Professor George Parker, Chair of the Student Conduct Legislative Council, Stanford University (Mar. 10, 1989), reprinted in CAMPUS REPORT, March 15, 1989, at 16. He contends that “[m]ore speech, not less, is the proper cure for offensive speech, unless and until the controversial speech runs into such narrow constraints as the barrier to incitement to immediate illegal action.” Id. Gunther further argues:
and promote their ideas in the university setting. Ideas should

Among the core principles is that any official effort to suppress expression must be viewed with the greatest skepticism and suspicion. Only in very narrow, urgent circumstances should government or similar institutions be permitted to inhibit speech. True, there are certain categories of speech that may be prohibited; but the number and scope of these categories has steadily shrunk over the last 50 years. Face-to-face insults are one such category; but opinions expressed in debates and arguments about a wide range of political and social issues should not be suppressed simply because of disagreement with those views, disagreement with the content of the expression.

Professor William Cohen, specifically commenting on a proposed conduct code at Stanford University, argues that personal face-to-face attacks based on race, religion, national origin, sexual orientation, or gender can be prohibited if the prohibiting statute is narrowly tailored and precisely drafted, enabling students to know what is permissible and what is prohibited, but that more general offensive speech that is offensive should not and cannot be prohibited. Letter from Professor William Cohen, Stanford University, to Professor George Parker, Chairman of the Student Conduct Legislative Council, Stanford University (Mar. 10, 1989).

To suggest that the proper cure for abhorrent speech is the prohibition of all expression is a flagrant rejection of first amendment norms. "For the colleges not to deal with the racial prejudice on campus is an abdication of their responsibility in a free society. . . . They've got to address those things, but not this way [conduct codes that prohibit offensive speech], both because it doesn't work and because it's incompatible with freedom of speech and religion. When you pass a rule which represses speech, you are avoiding dealing with the underlying problem and you’re passing a rule whose sweep is going to be broader than the things you’re trying to contain."

Barringer, Free Speech and Insults on Campus, N.Y. Times, Apr. 25, 1989, at A20, col. 1 (quoting Ira Glasser, executive director of the American Civil Liberties Union).

As one Stanford student stated, "‘in this whole thing, people seem to think first of the pain caused, not the freedom involved. . . . That’s reasonable. I understand that. But it’s a dangerous kind of perspective to have,’” Id. (quoting Michael Laris, Stanford sophomore and founder of the Committee to Protect Free Speech, the campus organization at the forefront of the opposition to the anti-harassment proposal); see also Wilson, supra note 7, at A1, col. 2 (stating that some university officials are concerned that discussion of sensitive subjects on campuses is being squelched by anti-harassment policies and that the way to fight discrimination is by discussing issues, not by penalizing students). But see Lawrence, supra note 12, at B1, col. 2 (arguing that if the purpose of the first amendment is to support the greatest amount of speech, harassment speech does not further this goal). Lawrence argues that harassed persons perceive derogatory comments as a slam, rather than as the exposition of an idea, and once an invective is uttered, dialogue is not likely to follow. Id. “‘Equality is a necessary precondition to free speech,’” according to Lawrence and he suggests that "‘content regulation of racist speech is not just permissible but, in certain circumstances, may be required by the Constitution.’” Statement of law Professor Charles Lawrence, Stanford University, quoted in France, supra, at 48. Lawrence further argues that such insults are particularly undeserving of first amendment protection because such expression is in-
prosper or wane according to their merits. Respect for this right requires that students tolerate expressions or opinions they find abhorrent.

This Note suggests that existing hostile environment harassment jurisprudence is helpful in resolving these conflicting interests. The standards used in analyzing Title VII workplace hostile-environment harassment and Title IX academic hostile environment harassment provide a guide for determining when a university's interest in maintaining a non-hostile environment overcomes the first amendment presumption against restriction of free expression.

Part I looks at the problems university administrators encounter in combatting campus harassment, describing the extent of serious harassment on campus and outlining existing first amendment jurisprudence dealing with freedom of expression on campus. Part II offers a regulatory solution for campus harassment. This Note concludes that carefully drafted campus harassment policies that incorporate Title VII and Title IX hostile environment concepts may alleviate serious harassment incidents on campus while preserving students' free speech rights under the first amendment.

I. THE PROBLEM: ADDRESSING HARASSMENT

A. CAMPUS HARASSMENT AND THE UNIVERSITY RESPONSE

In recent years, universities have witnessed an increasing

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16. Id.


19. The purpose of this Note is to suggest one way to approach the harassment problems on university campuses. This Note does not attempt to define the constitutional limits of speech in the university context. Instead it demonstrates that at least one functional approach to the problem of harassment on campus is mindful of first amendment principles.
A number of harassment incidents on their campuses. These incidents have ranged from hate-filled graffiti and distribution of hate-filled fliers to destruction of anti-apartheid shanties, displaying of Ku Klux Klan robes at anti-apartheid rallies, and shouting anti-Semitic insults at students. For example, a fraternity at the University of Wisconsin threw a “Fiji Island Party,” painted themselves in blackface, and set up a large caricature cutout of a black man with a bone through his nose on the lawn outside their fraternity house. A black student at Vassar College hurled anti-Semitic insults such as “dirty Jew,” “stupid Jews,” and “fucking Jew” at a Jewish student. University of Delaware campus sidewalks were defaced with anti-gay slogans such as “Step Here, Kill a Queer” and “Stay in the Closet Fag.” Students driving by a black student walking home from a campus bar yelled “Niggers, go home” and “Niggers, we ought to lynch you.”

20. Hate or bias incidents are motivated by an animus against the victim because of the victim’s religion, sexual orientation, ethnicity, or national origin. Anti-Defamation League of B’nai B’rith, Hate Crimes: Policies and Procedures for Law Enforcement Agencies 1 (1988) [hereinafter Policies and Procedures for Law Enforcement].

21. For statistics regarding harassment on university campuses, see supra note 8.


24. Williams, supra note 2, at 36.


26. Id. Many more incidents probably go unreported, or at least unpublicized. Incidents that have been publicized include the following examples from the University of Michigan: the campus radio station broadcast of racist jokes by student callers; a flyer containing a poem telling black Americans to go back to Africa slipped under the door of a black student’s dormitory room; graffiti in a graduate student’s library carrel that stated, “Die, Chink. Hostile Americans want your yellow hide;” posters or walls defaced with “Kill fags,” and “Jesus hates niggers;” and a bouquet of helium-filled condoms pinned to the door of a student’s room with the message “Jewish slut.” See Defendant’s Brief in Opposition to Plaintiff’s Motion for Preliminary Injunctive Relief, supra note 22, at 7-8.

A University of Wisconsin fraternity had its pledges dress up in afro wigs and blackface and hold a slave auction. Coniff, supra note 23, at 33. At Smith College, the words “niggers, Spics, and Chinks Quit Complaining or Get Out” were painted on a campus building. Williams, supra note 2, at 36. At the University of California, Berkeley, “Nips Go Home” was scrawled on a wall. Id. A leaflet opposing Holocaust studies and a swastika painted on the wall were found at Stanford University. Id.

In January, 1988 and in August, 1989, Rutgers’ B’nai B’rith Hillel Foundation building was defaced with swastikas and anti-Semitic slogans such as “Die Jew.” Combating Bigotry on Campus, supra note 3, at 2. In April 1988, a
Hate or bias incidents — those motivated by an animus against the victim’s race, religion, sexual orientation, ethnicity

A Boston University male student called lesbian students meeting in a dorm lounge “fucking dykes.” He then grabbed one of the women, threw her against a glass wall, and threatened to kill another of the women who tried to intervene. Id. A Native American student received several hate mailings while serving as the Macalester College Community Council President. One mailing read:

You are a red-skinned bitch, and Custer should have finished off your entire degenerate race. . . . Why don’t you go home to the reservation — get drunk, and pack your whole miserable, alcoholic family into a rusty 1967 Chevy pick-up — and drive off a bridge.

At Northern Illinois University, white students hollered racial epithets at black students attending a speech by the Rev. Jesse Jackson. Bowen, Wrong Message from Academe, TIME, Apr. 6, 1987, at 57. An unsanctioned Northern Illinois University student publication printed degrading verse: “O.K.,/Look nigger,/we are white/white is supreme./Jesus was white./God is white./All of our Presidents have been white./Thank you God.” Id. Additionally, Northern Illinois University buses were littered with swastika-adorned flyers proclaiming “NIGGERS GET OUT.” Id.

An Emory University student returned to her dorm room to find her teddy bear slashed, her clothes drenched with bleach, and “Nigger Hang” written on the wall. As she prepared to move out of the dorm a month later because of additional threats received, the student lifted her rug and found “Die Nigger Die” written on the floor. Gibbs, Bigots in the Ivory Tower, TIME, May 7, 1990, at 104.

Five white cadets dressed like Ku Klux Klansmen burst into a sleeping black cadet’s room at the Citadel. After a scuffle, the intruders fled, leaving behind a charred paper cross. Clendinen, Citadel’s Cadets Feeling Effects of a Klan-Like Act, N.Y. Times, Nov. 23, 1986, § 1, at 26, col. 1.

Racially motivated fighting broke out at the University of Massachusetts after the New York Mets defeated the Boston Red Sox in the seventh game of the World Series, leaving ten people injured, including a black student who was beaten unconscious. It appeared that white students perceived the Mets as a black team and looked for a surrogate, black students, on which to take revenge. Wald, Racism Blamed for Brawl at U. of Massachusetts, N.Y. Times, Feb. 6, 1987, at A12, col. 2.
or national origin — can have a unique emotional and psychological impact on the victim and the university community. These incidents can “exacerbate racial . . . tensions, and lead to reprisals by others in the community, thereby . . . escalating violence and turmoil.”27 The problem worsens when particularly isolated and vulnerable individuals lose faith in the institution’s willingness or ability to ameliorate the situation.28

Administrators at numerous universities and colleges are searching for appropriate constitutional methods for regulating harassment on campus.29 Drafting regulations that comport with the Constitution, however, is a difficult task.30 Many institutions have adopted varying anti-harassment conduct codes.31 Some conduct codes impose an outright ban on offensive expression in certain contexts.32 For example, the University of Connecticut expels students from classes if students use disparaging names, inappropriately directed laughter, insensitive


28. The damage from hate or bias incidents cannot be measured solely in physical or economic terms. Id. Many students are away from home for the first time and are in a vulnerable stage of development. Matsuda, Public Response to Racist Speech: Considering the Victim’s Story, 87 Mich. L. Rev. 2320, 2370 (1989). This vulnerability may increase the risk of alienation and imply a greater susceptibility to harassment speech. Hate or bias incidents may intimidate other members of a minority group, leaving them feeling isolated. See id. Allowing members of minority communities to become fearful, angry, and suspicious of other groups and of the power structure that is supposed to protect them, can damage and fragment a university community and interfere with the university’s mission of providing minority students with equal access to a non-discriminatory education. Id. at 2370-71. Some minority students are avoiding predominantly white universities. Id. at 2371 n.251. Some students might even avoid attending school because of the threat of harassment. This result is especially likely if the targeted group perceives inaction on the part of university officials. Id. University inaction also may make perpetrators believe that their behavior is acceptable. Id. at 2371.

29. For a list of universities that have promulgated or are considering campus conduct codes, see supra note 9.

30. For a discussion of the University of Michigan’s failed attempt to draft a constitutional campus conduct code, see infra notes 66-85 and accompanying text.

31. See supra note 9.

32. “Flat ban” policies prohibit students from engaging in any kind of offensive behavior, whether or not it is directed against a particular individual. An institution with such a ban would not only penalize a student for directly physically or verbally attacking other students, but also for scrawling epithets on university property, putting up posters on campus that include racial slurs, or wearing T-shirts that are offensive to a recognized group. Wilson, Colleges Take 2 Approaches in Adopting Anti-Harassment Plans, Chron. Higher Educ., Oct. 4, 1989, at A38, col. 1.
jokes, or conspicuously exclude another student from conversation.\footnote{33} The University of Pennsylvania penalizes students for "any behavior, verbal or physical, that stigmatizes or victimizes individuals' and 'creates an intimidating or offensive environment.'\footnote{34} At Tufts University, students are penalized for using slurs in classrooms or residence halls, but students may use the same insults in student newspaper articles, on the campus radio station, or in a public lecture.\footnote{35}

Other universities attempt to mediate when a group on campus finds certain speech or actions offensive.\footnote{36} In these instances, the conduct codes focus on restricting the place and manner of expression, rather than on restricting the right of expression per se. For example, a confederate flag flying outside a white fraternity house disturbed black students at Clemson University. The fraternities met with school administrators and reached a compromise: the flag would be hung inside the house.\footnote{37}

B. THE FIRST AMENDMENT AND THE UNIVERSITY: TIME, PLACE, AND MANNER RESTRICTIONS

The Supreme Court is cautious when resolving freedom of expression cases arising in an academic community context.\footnote{38} The Court's deliberations involve two competing interests. First, students, faculty, and administrators have a mutual interest in having an environment free from disruption of the educational process.\footnote{39} In addition, the academic community has an innate interest in the greatest liberty for "free expression and debate consonant with the maintenance of order."\footnote{40}

\footnote{33} Id.
\footnote{34} Id.
\footnote{35} Id.
\footnote{36} See Lessons From Bigotry '101, supra note 8, at 49.
\footnote{37} Id.
\footnote{38} Healy v. James, 408 U.S. 169, 171 (1972).
\footnote{39} Id. at 171; see also Wright, The Constitution on the Campus, 22 VAND. L. REV. 1027, 1041-42 (1969) (stating that there is no first amendment objection to limiting use of public academic facilities to the purpose for which they have been designed).
\footnote{40} Healy, 408 U.S. at 171. Although acknowledging the need for campus order, the Court believes that universities should not apply first amendment protections with any less vigor than does the community at large. Id. at 180. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Shelton v. Tucker, 364 U.S. 479, 487 (1960). "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground reaffirming this Nation's dedication to safeguarding academic freedom." Healy, 408 U.S. at
Supporting the first interest, universities have the authority to “enforce reasonable rules governing student conduct.”41 Universities are not exempt, however, from the first amendment’s mandate of free expression.42 Balancing both interests, universities may make reasonable time, place, and manner regulations.43 To pass constitutional muster, however, such regulations may not restrict speech based on content.44

Several Supreme Court cases reflect this balance of interests, and show the Court’s use of time, place, and manner restrictions. In Healy v. James,45 the plaintiffs attempted to organize a chapter of Students for a Democratic Society at Central Connecticut State College. The College refused to recognize the group because the College’s administration believed the group would advocate disruption and violence at the school.46 The student group filed suit, alleging that the Col-

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42. Id. at 670.
43. Id. Universities must balance first amendment principles of freedom of speech against their interest in providing all students with an academic environment conducive to learning. Although free speech is essential to our democratic society, that fact alone does not mean that people are free to express their beliefs at any time or in any place. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976) (concluding that the Court is more likely to validate time, place, and manner restrictions on speech if the restrictions are not merely an attempt to regulate the content of the speech, and if the regulations leave open ample alternative channels for communication of the information); Adderley v. Florida, 385 U.S. 39, 47-48 (1966) (finding that the first amendment does not guarantee the right to communicate one’s view whenever, wherever, or however one pleases); Cox v. Louisiana, 379 U.S. 536, 554 (1965) (finding that “[t]he rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time”); Poulos v. New Hampshire, 345 U.S. 395, 405 (1953) (same); see also Healy, 408 U.S. at 192-93 (finding that “reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected”).
44. See infra notes 59, 63.
45. 408 U.S. 169 (1972).
46. Id. at 174-76. The school president found the organization’s philosophy antithetical to the school’s policies, and believed the group’s independence
lege's refusal violated the students' first amendment rights of expression and association.\textsuperscript{47} The Supreme Court ruled for the students, but remanded the case for a more exacting determination of the facts.\textsuperscript{48} The Court found that the lower courts had made a fundamental error in not recognizing the students' first amendment interests.\textsuperscript{49} It also found, however, at least one acceptable ground that would support the College's action: If the factual record supported the College's claim that the student political group would be a disruptive influence on campus, the president could deny the group official recognition.\textsuperscript{50} The Court ruled that the College may prohibit actions that "materially and substantially disrupt the work and discipline of the school."\textsuperscript{51} A university does not have to tolerate activities when "they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."\textsuperscript{52} Such a regulation is directed against disruption of reasonable academic policies, not against the expression's content.\textsuperscript{53}

Similarly, the Eighth Circuit found that university admin-

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\textsuperscript{47} Id. at 176.
\textsuperscript{48} Id. at 177.
\textsuperscript{49} Id. at 184-85.
\textsuperscript{50} Id. The College denied abridging the students' constitutional rights, and the lower courts upheld the university's view. The lower courts concluded that the students were denied only the "administrative seal of official college respectability." Id. at 182 (quoting Healy v. James, 319 F. Supp. 113, 116 (D. Conn. 1970)).
\textsuperscript{51} Id. at 185.
\textsuperscript{52} Id. at 188-89. After the lower court hearing, the school president stated that he rejected recognizing the group because he concluded that this group would disrupt school activities. Id. at 188.
\textsuperscript{53} Id. at 189 (citing Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 513 (1969)). The Court also found that the College could have refused to recognize the group if the College determined that the group did not intend to abide by reasonable campus rules. Id. at 191-94.
\textsuperscript{54} Any speech that disrupts academic policies can be subject to time, place, and manner restrictions, not because the president disagreed with the content of the speech, but because the speech disrupts the academic atmosphere. See Healy v. James, 408 U.S. 169, 192-93 (1972) (finding that although a university cannot block a group's associational rights because of the nature of the group, a university can require a group to adhere to reasonable time, place, and manner restrictions); Papish v. Board of Curators, 410 U.S. 667, 670 (1973) (finding that a university cannot ban the dissemination of ideas, no matter
Administrators could prohibit campus distribution of a student newspaper that university officials thought contained an inappropriate and obscene headline not conducive to the school's educational mission in Papish v. Board of Curators. The court did not decide whether the headline was obscene; rather, it found the student's right to choose the manner of expression subordinate to the university's right to protect its academic environment, provided that the university did not seek how offensive, because of the ideas' content, but that reasonable time, place, and manner restrictions on the dissemination are permissible).

55. 464 F.2d 136, 142-44 (8th Cir. 1972), rev'd per curiam, 410 U.S. 667 (1973). In this case, the University of Missouri expelled a graduate student for distributing a newspaper that featured the headline "motherfucker acquitted" and a cover page with a cartoon showing a clubwielding policeman raping the Statue of Liberty and the Goddess of Justice. Id. at 138-41. The University claimed that the distribution of the publication violated a rule requiring students to conduct themselves in a manner compatible with the University's functions and mission as an educational institution. Id.

The graduate student sued the University, claiming that the University impermissibly expelled her for exercising first amendment guaranteed freedoms. She also alleged that the University's rules were unconstitutionally vague and that the language of the rule under which she was dismissed was overbroad. Id. at 141. The Eighth Circuit found little merit in her claim and found the University's dismissal constitutional. Id. at 145.

56. Id. at 145. Citing one of its earlier opinions dealing with university regulations, the court first held the rule not unconstitutionally vague. Id. at 142-43 (citing Esteban v. Central Missouri State College, 415 F.2d 1077, 1088 (8th Cir. 1969)). The court found the rule at issue did invest university officials with some flexibility in its application, but that it was not unconstitutionally vague, nor would it invite invidious censorship. Id. at 143. The rule, the court found, was easy to understand, and the Constitution requires no more. Id.

The court also found the rule was not unconstitutionally overbroad. The court held the rule did not confer unbridled power on university officials to suppress conduct or speech they found distasteful. Id. Rather, the court found "the rule serves the narrow purpose of authorizing punishment only of those who engage in conduct or speech that detracts from the effectiveness of the educational process." Id.

The Supreme Court held in Broadrick v. Oklahoma, 413 U.S. 601 (1973), that a state regulation will not be struck down as facially overbroad when there is a substantial core of activity to which it may be properly applied relative to its possible unconstitutional applications.

[The plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of prac-
to restrict the substantive message of the speech.57 On review, the Supreme Court reversed on the particular facts of the case, finding that the University of Missouri had prohibited the newspaper's distribution because University officials disliked the headline — a content-based restriction that violated the first amendment.58 Despite the reversal, the Court reaffirmed a university's authority to promulgate reasonable time, place, and manner restrictions on student speech as long as such rules do not contravene the first amendment.59

the function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct — even if expressive — falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect — at best a prediction — cannot with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to prescribe.

57. The court did find, however, that a university may not punish a student for advocating a particular idea. Papish, 464 F.2d at 144. Under these facts, the Eighth Circuit found that the University was not punishing the student for the content of her speech, but for the manner in which she sought to express her opinions. Id. The court found that a university constitutionally can regulate the means by which students express views, as long as the regulation does so without effectively repressing students' ability to advocate their causes. Id. at 144-45. Finally, the court found that the Constitution does not place such a great value on freedom of expression that it can never be subordinated to other interests, such as the use and display of language on a university campus. Id. at 145.

58. The Supreme Court overruled the Eighth Circuit in Papish v. Board of Curators, 410 U.S. 667, 671 (1973) (per curiam). The Court found that although a state university has the "undoubted prerogative to enforce reasonable rules governing student conduct," such rules may not contravene the scope of the first amendment. Id. at 669-70.

59. The Court left the Eighth Circuit's legal analysis intact. Id. at 671-74. The implication, therefore, is that a university may reasonably restrict the context of speech as long as it does not proscribe the content of the speech. See also Healy v. James, 408 U.S. 161, 192-93 (1972) (finding that a state university may impose reasonable rules of student conduct provided the policy does not limit the content of expression); Cox v. Louisiana, 379 U.S. 536, 558 (1965) (discussing time, manner, and place restrictions). The Cox Court held:

It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, discretion or manner of use of the streets for public assemblies may be vested in administrative officials, provided that such limited discretion is "exercised with 'uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considera-
Finally, in the Supreme Court's most recent decision dealing with freedom of expression at universities, *Widmar v. Vincent*, the University of Missouri at Kansas City refused to renew permission for a student religious group to hold meetings in University facilities. Members of the group sued, alleging that the regulation violated their first amendment rights to freedom of religion and speech. The Supreme Court held that the University's exclusionary policy violated the first amendment principle requiring speech regulations to be content neutral. The Court specifically noted the narrowness of its holding, however, adding that it did not intend its holding to frustrate a university's right to promulgate reasonable time, place, and manner regulations. Further, the Court confirmed the validity of cases recognizing a university's right to exclude even first amendment protected activities that violate reasonable campus rules or that substantially interfere with the opportunity of other students to obtain an education.

*Healy, Papish*, and *Widmar* suggest that the Supreme Court is receptive to time, place, and manner restrictions on campus speech as long as the regulations parallel the institutions and from unfair discrimination'. . . [and with] a 'systematic, consistent and just order of treatment, with reference to the convenience of public use of highways . . . .'"  

Id. (citations omitted).  
For a discussion of a university's right to regulate students' activities, see *supra* notes 11-12.

61. Id. at 265. The University adopted a regulation that prohibited use of University buildings or grounds "for purposes of religious worship or religious teaching." Id. (quoting Board of Curators Regulation 4.0314.0107 (1972)).
62. Id. at 266.
63. Id. at 267-77. The Court found that the University had created a forum generally open for use by student groups. Id. at 267. The University discriminated, however, against student groups and speakers expressing a desire to use the open forum for religious discussion. Id. at 269. The Court found that to justify such a restriction, the University had to show that the regulation is necessary to serve a compelling state interest and that the regulation was narrowly drawn to achieve that end. Id. at 270 (citing *Carey v. Brown*, 447 U.S. 455, 461, 464-65 (1980)). The University argued that it had an interest in promoting a secular rather than religious education. Id. at 270-74. The Court found that this was not sufficient to overcome the burden the policy imposed on the students' first amendment rights. Id. at 273-74.
64. Id. at 276-77; see also *Grayned v. City of Rockford*, 440 U.S. 104, 116 (1972) (stating that "[t]he nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable'" (quoting *Wright*, *supra* note 39, at 1042)).
tion's educational mission and remain content neutral. Although the Supreme Court has not yet directly addressed whether campus conduct policies that restrict expression would fit under a time, place, and manner scheme, a federal district court recently addressed the closely related issue of when a university constitutionally may prohibit speech in order to facilitate a productive academic atmosphere.66

C. **DOE v. UNIVERSITY OF MICHIGAN**

In 1988, the Board of Regents of the University of Michigan promulgated the “Policy on Discrimination and Discriminatory Harassment by Students in the University Environment” (Michigan Policy or Policy). The Policy regulated the statements and associations of all students in public forums, educational and academic centers, and in University housing. It prohibited speech that stigmatizes an individual based on an immutable characteristic,67 or speech that creates an intimidating, hostile, or demeaning environment for educational pursuits.68 Violation of the Policy subjected a student to a wide

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67. The characteristics included race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status. *Id.* at 856.
68. The Michigan Policy established a three-tiered system based on the location of the conduct at issue. The University tolerated a broad range of speech in public parts of the campus. *Id.* Only an act of physical violence or destruction of property was considered sanctionable in these areas. *Id.* University sponsored publications constituted the second tier of the policy, and were not subject to regulation under the policy. The third tier of the policy applied to “educational and academic centers, such as classroom buildings, libraries, research laboratories, recreation and study centers.” *Id.* In these areas, persons were subject to discipline for:

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

2. Sexual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual on the basis of sex or sexual orientation where such behavior:
range of sanctions, including expulsion.\textsuperscript{69}

Doe,\textsuperscript{70} a graduate student in biology, challenged the Michigan Policy, asserting that its enforcement violated his right of freedom of expression.\textsuperscript{71} Doe feared that discussion of certain controversial theories positing biologically-based differences between the sexes might violate the code.\textsuperscript{72} The University argued that its Policy restricted constitutionally unprotected speech, or speech justifying little protection.\textsuperscript{73} The code prohib-

\begin{itemize}
\item a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
\item b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
\item c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.
\end{itemize}

\textit{Id.}

On August 22, 1989, the University withdrew § 1(c) to further clarify and explain the provision. \textit{Id.} The University did not, however, withdraw the identical provision in § 2(c). \textit{Id.} The University gave no explanation for the inconsistency. \textit{Id.} One possible explanation is that courts routinely uphold prohibition of hostile environment harassment under Title VII, and § 2(c) closely parallels parts of Title VII.

69. \textit{Id.} at 857. Under the Policy, one or more of the following sanctions could have been imposed, depending on the severity of the infraction: formal reprimand, community service, class attendance, restitution, removal from specific courses and activities, suspension, or expulsion. Suspension or expulsion could be imposed only for violent or dangerous acts, repeated offenses, or a willful failure to comply with a lesser sanction. \textit{Id.}

70. Doe is the fictitious name of a psychology graduate student at the University of Michigan: \textit{Id.} at 852.


72. Doe claimed that controversial theories positing biologically-based differences between sexes and races, which Doe wanted to discuss in class, could be sanctionable under the Policy as sexist or racist. \textit{University of Michigan}, 721 F. Supp. at 858. Doe argued that the Michigan Policy chilled free expression because of the Policy's breadth and vagueness. Doe alleged that the underlying premises of the Policy were totally inconsistent with three fundamental first amendment principles: 1) restrictions on expression must be, as a general rule, content neutral; 2) expression does not lose its protected status simply because of its offensiveness; and 3) expression is entitled to heightened protection in the academic context. Plaintiff's Brief in Support of Plaintiff's Motion for Preliminary Injunction at 12-14, Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989) (No. 89-71683).

73. Defendant's Brief in Opposition to Plaintiff's Motion for Preliminary Injunctive Relief, supra note 22, at 13.

The Policy affects only unprotected speech under two related and constitutionally sound theories: (1) the speech covered is no essential part of any exposition of ideas and its very utterance inflicts injury;
HATE SPEECH

HATE SPEECH is speech that inflicts injury on an individual and the University argued that such expressions are fighting words and thus not entitled to the protection of the first amendment.

A federal district court struck down the Michigan Policy as an unconstitutional infringement on Doe's first amendment rights. The court noted that the Policy proscribed a significant range of protected verbal conduct and consequently held

and (2) the context of the racist speech renders it unprotected or minimally protected under the Court's captive audience doctrine.

Id.

74. Id.
The Supreme Court has never held a law unconstitutional where the challenged law penalized the use of words that inflict injury on a particular person, especially where the words used are invectives or epithets. To the contrary, the Supreme Court has held that the use of words as weapons which inflict injury may be constitutionally prohibited. "It is not plausible to uphold the right to use words as projectiles where no exchange of views is involved."

Id. (citing L. Tribe, American Constitutional Law 837 (2d ed. 1988)).

75. Id. at 14. The University likened racist and similar expression prohibited under the Policy to the type of expression the Supreme Court left unprotected in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). Under the Chaplinsky "fighting words" exception, statements directed at individuals who had not voluntarily exposed themselves to the invective are equated with injurious speech aimed at a captive audience. See Chaplinsky, 315 U.S. at 572. A well known example was given by Justice Holmes: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.). Fighting words have the same element of surprise and will likely provoke a violent response from the listener who had no chance to avoid listening. See Lesson, Group Libel Versus Free Speech: When Big Brother Should Butt In, 23 DUQ. L. REV. 77, 92 (1984) (suggested applying the "fighting words" exception to the Nazi march through Skokie, Ill.).

The district court found that under certain circumstances racial and ethnic statements might constitute "fighting words." University of Michigan, 721 F. Supp. at 852. The court failed to specify, however, what statements would fall into such a category. The court also found that speech likely to incite imminent lawless action and that has that effect may be prohibited. Id. at 862-63 (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)). The first amendment does not protect legally obscene speech. Id. (citing Miller v. California, 413 U.S. 15, 22 (1973)). Nor does it necessarily protect speech that is "vulgar," "offensive," or "shocking." Id. (citing Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986)). Once again, the district court did not cite examples of speech that would fall into these categories of unprotected speech.


77. Id. The University challenged Doe's standing, alleging that the Policy had never been applied to proscribe classroom discussion of legitimate ideas and that Doe did not demonstrate a credible threat of enforcement against him. Id. at 858. The court, however, found Doe had standing. Based on the legislative history of the Policy and a guide issued concurrently by the University (the University later repudiated the guide), the court held that Doe demonstrated a realistic and credible threat of enforcement. Id. at 859-60.
the Policy overbroad both on its face and as applied.\textsuperscript{78} The court also found the enforcement of the Policy would violate due process rights, because the terms of the Policy were so vague that it was impossible to discern any limitation on the Policy's scope or any conceptual distinction between protected and unprotected speech.\textsuperscript{79} Further, the University of Michigan's Policy failed to comply with first amendment principles because it prohibited the expression of racist and sexist ideas rather than merely restricting the time and place that ideas could be expressed.\textsuperscript{80}

The district court, asserting first amendment principles, appropriately rejected the University's attempt to reconcile combatting harassment.\textsuperscript{81} The attempt to classify the Policy as merely a fighting words prohibition failed because the Policy did not adequately define what speech constituted fighting words. Without such a definition, the Policy swept protected speech into unprotected speech categories.\textsuperscript{82} Further, the court found the task of defining broad categories of speech to fall into the narrow fighting words exception is an almost insurmountable assignment.\textsuperscript{83}

The district court did not preclude, however, the possibility that a university could promulgate a harassment policy that would survive constitutional review. The court found that a university could establish internal policies that sanctioned the exposure of women or minorities to hostile or offensive workplace environments.\textsuperscript{84} Similarly, the court noted a university may subject all speech and conduct to reasonable and nondiscriminatory time, place, and manner restrictions that are narrowly tailored and allow for ample alternative means of

\textsuperscript{78} Id. at 866.

\textsuperscript{79} Id. at 866-67.

\textsuperscript{80} Metz, Bad Apples, Evil Deeds, STUDENT LAW., Feb. 1990, at 33.

\textsuperscript{81} University of Michigan, 721 F. Supp. at 868 (finding no evidence that anyone at the University ever seriously attempted to reconcile the goal of combatting harassment with first amendment principles).

\textsuperscript{82} Id. at 867.

\textsuperscript{83} Id.

\textsuperscript{84} Id. at 862 (holding that the first amendment "presents no obstacle to the establishment of internal University sanctions as to any of these categories of conduct, over and above any remedies already supplied by state or federal law") (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986)).
A policy designed to control harassing speech on university campuses must consider first amendment values and, in light of these values, clearly define impermissible expression.

II. A PROPOSED SOLUTION

The problem at hand is curing the legal infirmities of the University of Michigan Policy. How does a university balance first amendment rights with academic interests to promulgate a policy adequately encompassing these interests? Courts have already addressed similar questions in another area of law — workplace hostile environment harassment. Workplace hostile environments pit the victim's right to freedom from harassing expression against an alleged harasser's free speech right. To deal with this situation, the Supreme Court has sanctioned a type of time, place, and manner restriction. Universities may

85. Id. at 863 (citing Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640 (1981)). The district court held that a university may not establish an anti-discrimination policy that has the effect of prohibiting certain speech because the school disagrees with the ideas or messages conveyed or that prohibits speech because it is offensive to students. Id. at 863 (citing Texas v. Johnson, 109 S. Ct. 2533, 2544-45 (1989)). The district court noted that principles of freedom of expression take on a special significance in a university environment because "free and unfettered interplay of competing views is essential to the institution's educational mission." Id. (citing Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)). For additional discussion of time, place, and manner restrictions on university campuses, see supra notes 45-64.

86. The first amendment does not apply to the private workplace. The courts' analyses of the balance of interests, however, are the same as in a public sector first amendment context. See United Steelworkers of America, AFL-CIO-CLC v. Sadlowski, 457 U.S. 102, 111 (1982) (finding that the first amendment is not necessarily relevant in the private sector labor context).

87. For a discussion of hostile environments, see infra notes 88-114 and accompanying text. Professor Charles Lawrence of Stanford University suggests that hostile environment analysis may be applied in the university context. Lawrence, supra note 12, at B2, col. 3. Lawrence notes the Supreme Court recognized that black school children did not have equal educational opportunities if subjected to the mental assault contained in a system of segregation in Brown v. Board of Educ., 347 U.S. 483 (1954). Lawrence states that university students face similar circumstances when forced to live and work in an environment where they could be subject to harassing speech at any time. Lawrence, supra note 12, at B2, col. 3. Lawrence implies that Title VII hostile environment analysis may be used in the university context to cure academic hostile environments, stating that the Supreme Court addressed the same type of injury when it held that sexual harassment that creates a hostile work environment violates the ban on sexual discrimination in employment under Title VII of the Civil Rights Act of 1964. Id.
adapt the same analysis from hostile environment cases to control egregious harassment on campus.

A. TITLE VII AND TITLE IX HOSTILE ENVIRONMENT HARASSMENT

Title VII of the Civil Rights Act of 1964,88 and Title IX of the Educational Amendments of 1972,89 are federal statutes designed to attack or prevent discrimination.90 Courts interpret both Title VII and Title IX to preclude harassment as a form of discrimination.91 Title VII prohibits workplace discrimination based on race, sex, religion, or national origin.92 Title IX prohibits discrimination in educational institutions on the basis of sex.93 To determine whether an action violates Title VII or Title IX, courts may look for a hostile environment. Courts find hostile environments when a person is subjected to demeaning and offensive slurs, epithets, suggestions, or similar statements.

90. For a discussion of the language of Title VII and Title IX, see infra notes 92 and 93, respectively.

The relevant portion of Title VII states:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). The Equal Employment Opportunity Commission and the courts have both interpreted the statute's language to proscribe sexual harassment. See Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604 II (1989); see also Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986) (holding a hostile environment claim actionable under Title VII); Henson v. City of Dundee, 682 F.2d 897, 899 (11th Cir. 1979) (holding that sexual harassment in the workplace can violate Title VII); Miller v. Bank of America, 600 F.2d 211, 214 (9th Cir. 1979) (holding that dismissal of a black woman because she refused sexual overtures of a supervisor violated Title VII).

93. 42 U.S.C. § 1681(a) (1988). Title IX provides, in relevant part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."

Id.
or acts that alter the conditions of the work environment.\textsuperscript{94} The legal analyses used in Title VII and Title IX hostile environment harassment cases provide guidance for constructing constitutional campus harassment policies.\textsuperscript{95}

1. Title VII

The courts first applied hostile environment analysis to harassment allegations in race, religion, and national origin cases.\textsuperscript{96} For example, in \textit{Rogers v. EEOC},\textsuperscript{97} an Hispanic employee brought a Title VII suit against her former employer, an optical company that had segregated patients by national ori-

\textsuperscript{94} \textit{Meriton,} 477 U.S. at 57.

\textsuperscript{95} The analysis uses cases from both the private and public sector. In \textit{Jordan v. Clark,} 847 F.2d 1368 (9th Cir. 1988), the Ninth Circuit held that Title VII protects government employees from sexual harassment to the same extent private employees are protected. \textit{Id.} at 1372. Thus, for purposes of analysis, it does not make a difference whether the cases are from private or public entities.

A private university may fall under Title IX if it receives some sort of federal funding. In \textit{Grove City College v. Bell,} 465 U.S. 555, 557 (1984), the Supreme Court found that Title IX applied to a college if the school received any type of federal funding, including Basic Education Opportunity Grants (BEOG). The decision's scope was limited, however, because the Court also held that Title IX's coverage in this case was not institution-wide: Because the purpose and effect of a BEOG is to provide financial assistance to the college's financial aid program, only that financial aid program is subject to Title IX regulation. \textit{Id.} Congress passed a law to negate that decision, however, so that the entire institution comes under Title IX's auspices if any part receives federal aid. 20 U.S.C. § 1687 (1988).

\textsuperscript{96} \textit{See generally Cariddi v. Kansas City Chiefs Football Club, Inc.,} 588 F.2d 87, 88 (8th Cir. 1977) (holding that ethnic slurs can be so demeaning as to create hostile environment national origin discrimination in violation of Title VII); \textit{Firefighters Inst. for Racial Equality v. City of St. Louis,} 549 F.2d 506, 514-15 (8th Cir. 1977) (holding that fire station supper clubs create a hostile environment racial discrimination in violation of Title VII when they exclude minorities); \textit{Gray v. Greyhound Lines, Inc.,} 545 F.2d 169, 176 (D.C. Cir. 1976) (holding that subjecting an employee to a pattern of racial slurs violates the employee's right to a non-discriminatory work environment); \textit{Rogers v. EEOC,} 454 F.2d 234, 238 (5th Cir. 1971) (finding national origin employment discrimination), \textit{cert. denied,} 406 U.S. 957 (1972); \textit{Weiss v. United States,} 595 F. Supp. 1050, 1056 (E.D. Va. 1984) (finding hostile environment religious discrimination); \textit{United States v. City of Buffalo,} 456 F. Supp. 612, 631 (W.D.N.Y. 1978) (finding racial employment discrimination); \textit{Compston v. Borden, Inc.,} 424 F. Supp. 157, 160-61 (S.D. Ohio 1976) (holding that demeaning religious slurs created hostile environment religious discrimination violating Title VII). \textit{But cf. Vaughn v. Pool Offshore Co.,} 683 F.2d 922, 923-25 (5th Cir. 1982) (holding that derogatory racial remarks did not create an unlawful work environment because all employees were subject to similar treatment).

\textsuperscript{97} \textit{454 F.2d 234} (5th Cir. 1971), \textit{cert. denied,} 406 U.S. 957 (1972).
gin. The Fifth Circuit concluded that Title VII protected the employee's psychological, as well as economic, fringe benefits. Similarly, a federal district court held that Title VII may be applied to protect an employee who is subject to religious intimidation in the workplace in Weiss v. United States.

The Supreme Court more clearly outlined the factors that must be proven to establish a hostile environment in a workplace sexual harassment case in Meritor Savings Bank v. Vinson. The Meritor Court specified that Title VII applies to a

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98. Id. at 236. The lower court held that the plaintiff had not alleged facts sufficient to state an unlawful employment practice that would enable the EEOC to investigate the employer and gain access to its employment applications. Id. at 237.

99. Id. at 238. The Fifth Circuit found that the segregation of patients by national origin could violate Title VII because of the negative psychological effects of the segregation on employees. Id. at 237-41. The Fifth Circuit, in this early case, sharply limited the reach of a hostile environment claim.

I do not wish to be interpreted as holding that an employer's mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee falls within the proscription of section 703 [Title VII]. But by the same token I am simply not willing to hold that a discriminatory atmosphere could under no set of circumstances ever constitute an unlawful employment practice. One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think... Title VII was aimed at the eradication of such noxious practices.

Id. at 238.

In another early Title VII hostile environment claim, also based on race, the Eighth Circuit concluded that employers have a duty to provide a nondiscriminatory work environment. Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506, 514-15 (8th Cir.), cert denied, 424 U.S. 819 (1977). In Firefighters, the court found that the supper clubs established by firemen to prepare dinners at the firehouses intentionally excluded minority members. Id. at 514. The segregated eating facilities created a discriminatory hostile environment.

Id. The Eighth Circuit remanded ordering the district court to direct the fire department to promulgate regulations either requiring the supper clubs to include minorities or prohibit the supper clubs from using city facilities. Id. at 515.

100. 595 F. Supp. 1050, 1054-56 (E.D. Va. 1984) (stating that “when an employee is repeatedly subject to demeaning and offensive religious slurs... by his supervisor, such activity necessarily has the effect of altering the conditions of his employment within the meaning of Title VII”).

101. 477 U.S. 57 (1986). The hostile environment sexual harassment analysis was first applied in Bundy v. Jackson, 641 F.2d 934, 943-46 (D.C. Cir. 1981). Other cases employing hostile environment analysis to decide sexual harassment cases include Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983) (holding that the plaintiff, a former air traffic controller who had been the object of sexual slurs, insults, and innuendo, was the victim of sexual harassment); Henson v. City of Dundee, 682 F.2d 897, 901-02 (11th Cir. 1982) (holding that sexual harassment in the workplace may create a hostile environment in violation of Title VII).
hostile or offensive work environment, and it is not limited to
"economic" or "tangible" discrimination. Title VII grants
employees the right to work in an environment free from dis-

crimination, intimidation, derision, and insult. Sexual mis-

conduct creates prohibited sexual harassment when such

conduct unreasonably hinders an individual's work per-

formance or creates an intimidating, hostile, or offensive working

environment.

The Supreme Court found that not all "harassment" af-

fects a term, condition, or privilege of employment within the

meaning of Title VII. Harassment is not actionable under

hostile environment analysis unless its severity or pervasive-

ness alters the conditions of the victim's employment and cre-

ates an abusive working environment.

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quist cites cases involving race, religion, and national origin to illustrate that
courts apply hostile environment analysis in Title VII harassment cases. Id.

For cases involving race, religion, and national origin discrimination, see supra

note 96.

103. Meritor, 477 U.S. at 65. The Court stated that in determining that host-

ile environment harassment violates Title VII, the EEOC drew upon judicial

and EEOC precedent holding that employees have "the right to work in an envi-

ronment free from discriminatory intimidation, ridicule, and insult." Id.

104. Id. (citing EEOC Guidelines on Sex Discrimination, 29 C.F.R.

§ 1604.11(a)(3) (1985)). The EEOC Guidelines on Sex Discrimination state:

Harassment on the basis of sex is a violation of Sec. 703 of Title VII.

Unwelcome sexual advances, requests for sexual favors, and other

verbal or physical conduct of a sexual nature constitute sexual harass-

ment when . . . such conduct has the purpose or effect of unreasona-

bly interfering with an individual's work performance or creating an

intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a)(3).

105. Meritor, 477 U.S. at 67-68.

106. Id. at 67 (citing Henson v. City of Dundee, 682 F.2d 892, 904 (11th Cir.

1982)). The Court found that sexual harassment must be so severe or perva-
sive as to alter the conditions of the victim's employment, creating an abusive

working environment to be actionable. Id. The mere utterance of an ethnic

or racial epithet that engenders offensive feelings in an employee would not suf-
ficiently affect the conditions of employment as to violate Title VII. Id. (quot-
ing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)).

Title VII was not designed to protect the unduly sensitive from a foresee-
able level of workplace harassment. M. PLAYER, EMPLOYMENT DISCERN,

MA ENT LAW 252 n.74 (1988). Therefore, an isolated joke, crude statement, or

sexual inquiry, even though insulting and offensive, will not create a hostile

working environment. Insults, jokes, comments, and the like must be re-
peated with sufficient regularity to become part of the regular working envi-
ronment before they will be found to create a hostile working environment.

Id. (citing Jones v. Flagship Int'l, 793 F.2d 714, 720 (5th Cir. 1986); Cariddi v.

Kansas City Chiefs Football Club, 568 F.2d 87, 88 (8th Cir. 1977); see also Gil-
bert v. City of Little Rock, 722 F.2d 1390, 1394 (8th Cir. 1983) (stating that
be so degrading or tainted with harassment that the psychological well-being of a reasonable employee would be affected adversely.\textsuperscript{107}

2. Title IX

Title IX was intended to prohibit institutions of higher learning from discriminating on the basis of gender.\textsuperscript{108} Only a

more than a few isolated incidents of harassment must have occurred to establish a Title VII violation). Further, a plaintiff who participates fully in the harassing actions or expressions, or who encourages or condones a harasser's conduct cannot claim that the working environment is inhospitable. M. Player, supra, at 253.

Some commentators and decisions, however, have found that harassment does not have to be repeated in order to be actionable. See Marinelli, Title VII: Legal Protection Against Sexual Harassment, 20 Akron L. Rev. 375, 384 (1987) (arguing that the extreme and outrageous nature of the conduct is relevant and should not have to be repeated before the behavior can constitute actionable harassment); see also Note, Employer Liability for Coworker Sexual Harassment Under Title VII, 13 N.Y.U. Rev. L. & Soc. Change 83, 93-95 (1984-85). The Note states that the EEOC has found that a single incident of environmental harassment can violate Title VII, and cites a number of EEOC decisions to support this assertion. Id. at 94-95. For example, a violation occurs when a supervisor refers to an employee as a “nigger,” and the employee feels insulted or intimidated. Id. at 94 & n.68. The Note also cites examples of Title VII violations even where the injured employee was characterized as “hypersensitive,” where the harassment was intended as a joke, or the harassment was directed at individuals other than the party who took offense. Id. at 94 & nn.67-69. The author concludes that courts should adopt the EEOC test for finding a hostile workplace environment. Id. at 95.

\textsuperscript{107} M. Player, supra note 106, at 253. Player bases this assertion on the following statement from Meritor: “The correct inquiry is whether [the victim] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.” Id. at 252-53 (citing Meritor, 477 U.S. at 68); see also Schnelder, Sexual Harassment and Higher Education, 65 Tex. L. Rev. 525, 556 n.187 (stating that the standard is apparently objective, although there are inconsistencies in the legal analysis applied by the Meritor Court); but see Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988) (finding that Meritor’s holding leaves open the question of whether the victim or harasser perspective should be used in determining unwelcomeness of the harassment).

\textsuperscript{108} Title IX of the Educational Amendments of 1972 provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a) (1988) (exceptions omitted).

Title IX requires that academic institutions receiving federal funding establish a sexual harassment policy and grievance procedure and appoint an employee responsible for investigating complaints and coordinating compliance efforts. 34 C.F.R. § 106.8(a)-(b) (1988). If a victim feels that the institution has not complied with Title IX, the Office of Civil Rights (OCR) of the Department of Education is required to investigate and resolve the complaint. Id. § 100.7(c). If the OCR determines that the grievance has not been resolved,
few plaintiffs, however, have presented claims of sexual harassment under Title IX making hostile environment analysis under Title IX unclear.\textsuperscript{109} It is uncertain whether Title IX requires a showing of tangible harm to establish a valid claim of sexual harassment, or whether the creation of a hostile environment is sufficient.

One court ruling in a case that has aspects of both workplace and educational institution harassment concluded that a quasi-student/employee may bring suit based on a sexually hostile environment. The First Circuit found that the Title VII hostile environment standard for proving discrimination applies to claims arising under Title IX in \textit{Lipsett v. University of Puerto Rico}.\textsuperscript{110} Applying the Title VII standard to this Title IX claim, the court found that a female resident in a medical program established a prima facie case of hostile environment harassment when she presented to the court overwhelming evidence of a sexually hostile environment.\textsuperscript{111} The court found

\footnotesize{it may seek termination of government funding, or it may ask the Department of Justice to bring a suit to enforce the Title IX prohibitions. See 20 U.S.C. § 1682 (1988); 34 C.F.R. § 100.8(a)(1) (1988). Termination of funding does little to help the victims, however, and in fact may hurt them because termination of funding may force a university to eliminate some programs. Schneider, supra note 107, at 532 n.35.}

Instead of seeking an OCR investigation, a student may bring a suit against the university. In Cannon v. University of Chicago, 441 U.S. 677, 717 (1979), the Supreme Court found an implied private cause of action under Title IX. The exact nature of the relief granted in such instances, however, is unclear. Cannon did not resolve the issue of availability of monetary relief, and the Supreme Court has not addressed the remedy issue under Title IX. Schneider, supra note 107, at 572-74.

109. For cases presenting sexual harassment hostile environment claims under Title IX, see generally Lipsett v. University of Puerto Rico, 864 F.2d 881, 897 (1st Cir. 1988), discussed infra notes 110-14 and accompanying text; Alexander v. Yale Univ., 631 F.2d 178, 185 (2d Cir. 1980) (holding that former students' claims of sexual harassment were nonjusticiable due to the students' graduation and the speculative nature of the alleged injuries); Moire v. Temple Univ. School of Medicine, 613 F. Supp. 1360, 1367-70 (E.D. Pa. 1985) (holding that medical student had failed to establish her claim of harassment under Title IX), aff'd, 800 F.2d 1136 (3d Cir. 1986).

110. 864 F.2d 881, 896-97 (1st Cir. 1988); see also Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987) (noting that because Title VII prohibits the identical conduct prohibited by Title IX, the standards employed in a Title VII claim may be used in a Title IX case), cert. denied, 484 U.S. 849 (1987); O'Connor v. Peru State College, 781 F.2d 632, 642 n.8 (8th Cir. 1986) (dealing with sex discrimination in employment and implying that the standards governing claims under Title VII and Title IX are the same).

111. \textit{Lipsett}, 864 F.2d at 897-907. Sexual hostile environment harassment occurs when one or more supervisors or co-workers create an atmosphere so
that the resident, whose position made her both an employee and a student of the university, had been subjected to an atmosphere that was so blatantly hostile the defendants had constructive notice that sex discrimination permeated the residency program. Under these circumstances, the court concluded that the directors' inaction condoned, acquiesced in, or even encouraged the illegal behavior.

Hostile environment analysis under Title VII and Title IX demonstrates that speakers are free to utter words and phrases of their choice, no matter how abhorrent to listeners, until those utterances go beyond mere verbalization and create a hostile environment. Universities should borrow this hostile environment concept to draft constitutional campus conduct codes.

B. **Title VII and Title IX Hostile Environment Analysis is Analogous to Campus Harassment**

Critics may argue that the workplace is not analogous to the academic environment. They may argue that the workplace is more routinized, and that it is more difficult to avoid harassment in the workplace because of its limited physical

infused with hostility toward members of one sex that they alter the conditions of employment for members of that sex. Id. at 897. The plaintiff alleged that the university discharged her subsequent to harassment she received while attending a program at the university hospital. Id. at 894. The plaintiff also alleged that the complaints used as a basis for her discharge were infused with discriminatory bias. Id. at 907-08. The court of appeals held that the plaintiff’s specific allegations of sexual harassment made out a prima facie case of hostile environment harassment. Id. at 905. To establish a prima facie case of hostile environment harassment under Title IX, the plaintiff must allege unwelcome sexual advances so severe or pervasive that the advances alter the working or educational environment. Id. at 898.

The court pointed to the following evidence in support of the plaintiff’s hostile sexual environment claim: a barrage of medical residents’ comments that women in general, and the plaintiff in particular, should not be surgeons; residents’ pointed threats that the plaintiff would be driven out of the residency program; the residents’ repeated and unwelcome sexual advances toward the plaintiff; the hostile behavior directed against the plaintiff by the residents once it became clear that she would not accede to their sexual demands; degrading pin-ups (including Playboy centerfolds, a sexually explicit drawing of plaintiff’s body, and a list containing sexually charged nicknames of the female residents) plastered on the wall of the residents’ rest facility; and finally, the plaintiff’s nickname, “Selastraga,” which translated literally means “she swallows them.” Id. at 903.

112. The defendants were university and hospital officials who, in their official capacities, permitted the maintenance of a hostile environment. Id., 864 F.2d at 884-85.

113. Id. at 906.

114. Id. at 907.
area. On a university campus, however, there are greater opportunities to avoid harassment. More importantly, critics may argue that first amendment concerns are greater in the academic community than in the workplace because the workplace is concerned mostly with productivity, while the academic environment is concerned with the robust debate of ideas.115

Such criticisms are not necessarily valid. The physical layout of campuses and academic facilities often provide only one path, one lab, or one library, necessarily limiting the areas that students traverse and frequent. Students are assigned to particular classrooms and dorm rooms, and are limited to specific libraries and buildings by the nature of their research, effectively eliminating choice of locale. In this fashion, a student's day on campus may be more routinized than a day in the workplace. Further, unlike a workplace, students often live on or near campus, thus making the environment even harder to escape.

Because first amendment concerns may be greater on a

115. The first amendment has a heightened value in the academic context, especially with respect to professors' rights to make particular statements or teach certain theories. The Supreme Court frequently has reiterated the United States' deep commitment to safeguarding academic freedom, "which is of transcendent value to all of us and not merely to the teachers concerned." Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). In Sweezy v. New Hampshire, 354 U.S. 234 (1957), the Court stated:

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

Id. at 250.

In Kim v. Coppin State College, 662 F.2d 1055 (4th Cir. 1981), the Fourth Circuit found that our nation relies on academic institutions to encourage independent thinking, and that independent thinking can only be developed through constant questioning, the expression of new, untried and heterodox beliefs and the willingness to tolerate experimentation — in sum, the traditions upon which the first amendment rests. It follows that our schools, particularly our universities, must serve as great bazaars of ideas where the heavy hand of regulation has little place. Like other bazaars, they may seem rude, cacophonous, even distasteful at times; but they are necessary predicates to the more orderly market of ideas in our public life.

Id. at 1064.
university campus due to the institutional interest in promoting vigorous debate, the hostile environment concept employed in this Note is designed to protect that interest. By limiting only sufficiently egregious or pervasive harassment speech, the hostile environment concept distinguishes the expression of ideas — no matter how abhorrent to the listener — from harassment. Hostile environment jurisprudence protects workplace productivity by maximizing workers' freedom of expression. It creates a productive work atmosphere by balancing workers' freedom of expression against the violation of other workers' work environments. The hostile environment concept similarly would ensure an academic environment conducive to learning. Applying hostile environment analysis in a university context would balance all students' rights to debate and to express ideas against all students' rights to be free from hostile learning environments.\(^\text{116}\)

One commentator suggests that recognition of environmental harassment claims in the academic setting is even more important than in the workplace.\(^\text{117}\) If a university cannot regulate harassment on campus, it may not be able to fulfill its mission — the creation and fostering of an environment conducive to intellectual growth.\(^\text{118}\) An abusive environment may inhibit harassed students from fully developing their intellectual potential and from receiving the complete benefit of the academic program.\(^\text{119}\) Any pollution of that academic environment because of racial or sexual harassment is a reduction in the educational benefit that the student receives.\(^\text{120}\)

\(^{116}\) For a discussion of the effect of harassment on students, see supra note 28, infra notes 119-20 and accompanying text.

\(^{117}\) Schneider, supra note 107, at 551 (speaking of sexual harassment).

\(^{118}\) Id.

\(^{119}\) Id. The psychological harms caused by racial stigmatization often can be more severe than those created by other stereotyping actions. Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 HARV. C.R.-C.L. L. REV. 133, 136 (1982). Unlike many characteristics on which stigmatization may be based, racial characteristics are unalterable, and therefore the harassment may be magnified because of a consciousness of unalterability. Id. The psychological responses to such stigmatization may consist of feelings of humiliation, isolation, or self-hatred and a lack of self-worth. Id. at 137. This feeling of self-hatred and lack of self-worth may lead to further isolation by injuring relationships between members of the victim group, and further aggravating tensions between members of the victim group and members of the harassment group. Id. Racial stigmatization also may damage the victim's pecuniary interests. Id. at 139.

\(^{120}\) See Schneider, supra note 107, at 540. Hate messages can have immediate effects on victims. See, e.g., Wade v. Orange County Sheriff's Office, 844 F.2d 951, 955 (2d Cir. 1988) (African-American deputy sheriff suffered emo-
Even if Title VII and Title IX hostile environment harassment and campus harassment are not completely analogous, the Supreme Court has held that universities may still issue campus conduct codes imposing reasonable time, place, and manner restrictions on expression when that expression interferes with a substantial academic interest. Combining time, place, and manner restrictions with hostile environment analysis permits universities to determine the proper balance between a university's duty to promote the free exchange of ideas and the university's goal of providing all students with a non-discriminatory learning environment. The next section of this Note provides a model campus conduct policy that reflects hostile environment analysis.

C. A MODEL CAMPUS CONDUCT POLICY

The district court in Doe v. University of Michigan left open the possibility that the academic community's need for a non-hostile campus environment could overcome the presumption of absolute first amendment protection for utterances. Thus, University of Michigan suggests that the University of Michigan could have pursued reasonable time, place, and manner restrictions that would survive constitutional review. When it finalized its harassment policy, however, the University deleted a section that, as originally drafted, would have prohibited the creation of academic hostile environments.

The Model Policy proposed below attempts to cure the

121. Application of hostile environment harassment to Title IX assumes that Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988), is good law. For an analysis of Lipsett, see supra notes 110-14 and accompanying text.
122. See supra notes 43-65 and accompanying text.
124. Apparently, the University of Michigan attempted to classify its policy as a fighting words restriction. Id. at 864-68. The district court held the policy unconstitutional because it was vague and overbroad. Id. at 864-67.
126. For an explanation of the Michigan Policy, see supra note 68.
problems with the Michigan Policy. The Model Policy, however, does not deal with a number of important issues regarding the effectiveness of codes. Each institution must incorporate its policy into a structure that fits the institution's needs. This model language considers only those first amendment issues that are likely to arise in drafting such a policy.

I. This University is committed to the values and ideals of the first amendment. Nowhere is the commitment to free speech more important than at a university, where the search and advancement of knowledge depend on the free exchange and consideration of ideas. Due to the need to foster an environment of creativity and diversity, members of the University community must expect to encounter, and are expected to tolerate, ideas and concepts with which they disagree or which they find abhorrent. In furtherance of the University's academic mission, no member of the community has the right to prevent another from holding an opinion or expressing a view in a way that is appropriate to explore, promote, or defend the view. Intimidation of members of the University community to prevent the expression of these views is a violation of this Policy.

II. The University is committed to the principles and values of equal access, equal opportunity, and non-discrimination in education. Each student has the right to an education without discrimination on the basis of race, sex, religion, disability, sexual orientation, national origin, ancestry, or ethnic origin. Pervasive or severe harassment of members of the University community by other members of the community may create a hostile educational environment that infringes on a University member's right to an education. Such discriminatory harassment is considered a violation of this Policy.

III. Protected free expression ends and prohibited discriminatory harassment begins when vilification of, or threats of violence against, members of the University community on the basis of

127. For example, the proposal does not address due process concerns. Selection of a committee to review allegations against alleged harassers is another important consideration that the proposal does not address. For discussion of the importance of selecting an appropriate review committee, see Schneider, supra note 107, at 574-82.

128. Any policy should explicitly prohibit physical or threatened physical abuse of any member of the university community, or of a guest of a member of the community, if that physical abuse or threat is based on a person's race, religion, national origin, sex, sexual orientation, disability, ancestry, or age. This list is not exhaustive; a university should include any additional characteristics it deems appropriate.

Furthermore, physical abuse or threatened violence not based on one of the above categories still would be a violation of a campus conduct code. This Note does not discuss this topic.

Finally, the author notes that some of the language in the Model Policy reflects language that some universities have adopted, or that is currently under consideration. The borrowed language in the Model Policy has been altered to reflect a hostile environment analysis.
race, sex, religion, disability, sexual orientation, national origin, ancestry, or ethnic origin creates a hostile environment. Speech or other expression constitutes hostile environment harassment if it is:

A. Intended to insult or stigmatize an individual or a small, identifiable group of individuals on the basis of their race, sex, religion, disability, sexual orientation, national origin, ancestry, or ethnic origin;
B. Is addressed directly to the individual or individuals whom it insults or stigmatizes; and
C. Amounts to fighting words or is so pervasive or severe that it creates a hostile academic environment. These expressions, in addition to their insulting or stigmatizing content, must be commonly understood to convey, in a direct and visceral way, hatred or contempt for an individual or identifiable small groups based on of their race, sex, religion, disability, sexual orientation, national origin, ancestry, or ethnic origin in question.

IV. Whether certain behavior constitutes harassment must be examined in light of the particular incident. A single harassing act may be so severe or pervasive as to constitute a hostile environment in violation of this Policy.

V. Intent to discriminate on the basis of race, sex, religion, disability, sexual orientation, national origin, ancestry, or ethnic origin is necessary to sanction a person under this Policy. Intent will be determined by consideration of all of the relevant circumstances.

A. If a member of the University community asks another member of the community to stop a harassment action or expression, and that person continues the action, intent will be presumed.
B. Expression of an opinion, no matter how abhorrent to the community, which does not contain epithets, is not directed to a particular individual or identifiable group, and does not demonstrate intent to harass when all the circumstances are considered, is not a violation of this Policy.

VI. An objective legal standard will be used to help define and evaluate harassment claims.

VII. This Policy applies to every member of the University community, including students, faculty, and staff. This Policy will be in effect in every University-owned or operated facility, including classroom and administrative buildings, research facilities, libraries, and athletic and recreation centers. This Policy does not apply to university sponsored publications or open spaces on campus grounds, but the University reserves the right to make reasonable time, place, and manner restrictions in keeping with existing legal precedent.

D. THE MODEL POLICY: CONSTITUTIONAL AS APPLIED

The Model Policy meets the Supreme Court’s existing time, place, and manner standards. Sections I and II of the
Model Policy explicitly recognize the issues at stake in making a time, place, and manner restriction: balancing first amendment concerns against the governmental interest. In so doing, these provisions inform the academic community of the policy considerations behind application of the Model Policy. Only harassment of academic community members that is so severe or pervasive as to create a hostile environment, thus infringing on another's right to an education, will be subject to university restriction.

The proposed Model Policy does not suffer from the constitutional maladies of the Michigan Policy. It is neither unconstitutionally vague nor overbroad because it specifies what conduct will be deemed unacceptable. Sections III and IV of the Model Policy outline when speech no longer will be protected. Protected free expression ends and discriminatory harassment begins when threats against or vilification of a university member based on an immutable characteristic create a hostile environment. The perpetrator must intend to insult the victim, must address the insults at the victim, and the insults must result in the creation of a hostile environment.

129. For a discussion of the balance of interests in restricting first amendment speech, see supra notes 39-44.
130. For a discussion of the factors that must be present for the creation of a hostile environment, see supra notes 106-107 and accompanying text.
131. See supra notes 76-82 and accompanying text.
132. See Model Policy § III, supra pp. 230-31. One commentator, Mari Matsuda, suggests that a campus conduct policy must have a very narrow definition of harassment speech to respect first amendment values. See Matsuda, supra note 28, at 2357. Matsuda suggests that in order to distinguish the worst forms of harassment speech from other forms of speech, a definition must contain three identifying characteristics: 1) a message of inferiority; 2) the message contained in the targeted speech must be directed at a historically oppressed group; and 3) the message of the speech must be persecutorial, hateful, and degrading. Id. Matsuda argues that making the presence of all of these elements a prerequisite to prosecution will prevent undue censorship. Id. at 2358.

Matsuda defends the first element as the primary identifier of racist speech; racist speech proclaims racial inferiority and denies the personhood of target group members. Id. All members of the targeted group are at once considered homogenous and inferior. Matsuda's second element attempts to further define racism by recognizing the connection of racism to power and subordination. Id. Racism is more than race hatred or prejudice; it is the structural subordination of a group based on an idea of racial inferiority. Racist speech is particularly harmful because it is a mechanism of subordination, reinforcing a historical vertical relationship. The final element is related to the "fighting words" idea. Id. The language used in the worst forms of racist speech is language that is, and is intended as, persecutorial, hateful, and degrading.

To help ensure that members of the university community are aware of what constitutes acceptable expression, thus avoiding the constitutional infirmity of vagueness, a university should attach a commentary to its campus conduct policy and disseminate both the policy and commentary to all university community members. The attachment should cite examples of both acceptable and nonacceptable behavior and delineate the possible sanctions for various types of unacceptable behavior. The commentary should, as clearly as possible, define the type of expression that may result in the creation of a hostile environment. Further, the commentary’s examples should be as precise as practical to guarantee that members of the university are not misled, although some degree of flexibility is permissible. The University of Michigan issued such a commentary, but later recalled it due to inaccuracies.

134. The commentary should follow closely the factors and incidents that courts have used to decide both Title VII and Title IX hostile environment harassment cases. For a discussion of the factors that courts employ to decide hostile environment harassment cases, see supra note 106-07 and accompanying text.

135. This Note does not address appropriate sanctions for violations of the Model Policy. Sanctions, however, should range from official reprimand to expulsion, depending on the severity of the offense and the recidivism of the offender.

136. The definition must state what type of behavior constitutes harassment. Although no definition can state explicitly what words or acts constitute harassment, a policy should at least outline the broad categories of proscribed activities. Speech or other expression constitutes harassment if it is intended to insult or stigmatize an individual or an identifiable group of individuals on the basis of an immutable characteristic. The definition of harassment should encompass non-verbal symbols such as pictures or other symbols that by virtue of their form are commonly understood to convey direct and visceral hatred or contempt for individuals on the basis of an immutable characteristic. A policy containing a definition of harassment along these lines, would probably withstand a constitutional challenge on the grounds of vagueness and overbreadth. As held in Papish v. Board of Curators, 464 F.2d 136 (8th Cir. 1972), rev'd per curiam, 410 U.S. 667 (1973), a harassment policy can retain some flexibility and still withstand a constitutional challenge. Id. at 142-44. For an additional discussion of flexibility of regulations, see supra note 56.

137. Despite the need for precision in the commentary, the explanation must nevertheless envision a broad range of unwelcome behavior, from verbal innuendo to overt conduct. See Note, Sexual Harassment and Title VII, 51 N.Y.U. L. Rev. 140, 164 n.76 (1976) (comparing sexual harassment to racial harassment and postulating that while a derogatory epithet generally is known to be unwelcome, sexual advance is not).

138. Doe v. University of Michigan, 721 F. Supp. 852, 860 (E.D. Mich. 1989). The commentary was the University’s authoritative interpretation of its harassment policy. One example from the commentary, directly applicable to Doe’s case, stated: “A male student makes remarks in class like ‘Women just
Despite attempts at precision, however, each particular situation must be evaluated independently to determine if the challenged behavior constitutes harassment. Drawing a line between the permissible and impermissible is difficult in the abstract. Merely telling an ethnic joke or repeating a racial epithet may not be sufficient to support a claim of harassment. Harassment must be severe or pervasive enough to contaminate a student's learning environment. The atmosphere must be so degrading that a reasonable student in a similar situation would be affected adversely. Campus conduct policies should not be designed to protect overly sensitive students from a foreseeable level of academic harassment. Thus, most isolated jokes or statements, although insulting or

aren't as good in this field as men,' thus creating a hostile learning atmosphere for female classmates." The University argued in court that it had withdrawn the commentary because it contained several inaccuracies. The decision to withdraw the commentary, however, was not announced campus-wide. Therefore, many students necessarily would have worried about being charged with harassment under the Michigan Policy.

The University of Wisconsin distributed a similar commentary along with its discriminatory harassment policy. An example from the commentary is as follows:

Question: In a class discussion concerning women in the workplace, a male student states his belief that women are by nature better equipped to be mothers than executives, and thus should not be employed in upper level management positions. Is this statement actionable under proposed UWS 17.06(2)?

Answer: No. The statement is an expression of opinion, contains no epithets, is not directed to a particular individual, and does not, standing alone, evince the requisite intent to demean or to create a hostile environment.


139. Schneider, supra note 107, at 533 (citing EEOC Guidelines on Sex Discrimination, 29 C.F.R. § 1604.11(b) (1985)).
140. Henson v. City of Dundee, 682 F.2d 897, 904 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)). The court in Rogers concluded that the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" does not affect the terms, conditions, or privileges of employment to a sufficiently significant degree to violate Title VII. Id. For further discussion of this issue, see supra note 106.
141. See supra note 106.
142. See Henson, 682 F.2d at 904 (stating that to violate Title VII, the harassment must be sufficiently severe to create an abusive work environment); cf. Meritor Sav. Bank v. Vinson, 477 U.S. at 57, 67-68 (1986) (finding that sexual harassment must be so severe or pervasive as to alter the conditions of the victim's employment, creating an abusive working environment to be actionable); see also supra notes 106-07 and accompanying text.
143. For a discussion of the standards used in a Title VII claim, see supra notes 106-07.
offensive, would not rise to the level of impermissibly interfering with the academic environment.\textsuperscript{144}

Although isolated statements are probably not actionable, a harassment policy that reprimands an individual only after that individual repeatedly commits harassing acts is difficult to enforce. To deal with this situation, the First Circuit in \textit{Lapsett},\textsuperscript{145} found a hostile sexual environment because of the conduct of a specific group of residents, rather than a single person.\textsuperscript{146} Similarly, on a campus as a whole, a hostile environment can arise from single acts of discrimination and harassment on the part of many unrelated individuals.\textsuperscript{147} Section IV of the Model Policy acknowledges that a single act may violate the policy. The Equal Employment Opportunity Commission found that a single incident of environmental harassment can violate Title VII.\textsuperscript{148} The egregious nature of the conduct is relevant;\textsuperscript{149} the conduct may be so offensive that the individual act itself is sufficient to constitute hostile environment harassment.\textsuperscript{150} An outrageous expression should not have to be repeated to constitute actionable harassment.

Section V of the Model Policy protects against undue restriction of expression when the alleged harasser did not intend to harass. Section V anticipates disciplinary action only against a student who intends to create a hostile environment. Students who insensitively use derogatory remarks without intent to harm someone or some group should be educated, but not punished. The threat of prosecution for thoughtless or insensitive misuse of expression creates the risk of chilling campus

\begin{itemize}
\item \textsuperscript{144} For a discussion of the standards used to determine hostile environment harassment, see \textit{id}.
\item \textsuperscript{145} 864 F.2d 881 (1st Cir. 1988).
\item \textsuperscript{146} \textit{id} at 903; see \textit{supra} notes 111-12 and accompanying text.
\item \textsuperscript{147} See T. Grey, \textit{supra} note 15, at 5-6.
\item \textsuperscript{148} See \textit{Bundy} v. Jackson, 641 F.2d 934, 944 (D.C. Cir. 1981); see also \textit{supra} note 108 and accompanying text.
\item \textsuperscript{149} \textit{Bundy}, 641 F.2d at 944.
\item \textsuperscript{150} Note, \textit{supra} note 137, at 164 n.76 (stating that to allow a single incident of sexual harassment to constitute a violation of Title VII would create a problem, because while derogatory epithets are generally known to be unwelcome, a supervisor may not realize that his or her attentions will be unwelcome prior to the first advance). When sexual attentions take an extreme or coercive form, however, even one incident may be too many. \textit{id}. A single physical or verbal offense made in a harassing manner may have serious psychological effects. \textit{id}. The author concludes that in such cases Title VII should offer immediate relief. \textit{id}. This change in the law would not create a flurry of litigation because few victims would bring suits based on one isolated incident. \textit{id}.
\end{itemize}
political or academic debate regarding sensitive issues. Confining disciplinary proceedings to intended harassment should prevent any serious chilling effect.

Statements directed to the campus in general or the public at large, even if disparaging to a certain group, should not come under a conduct code. Refusing to extend a conduct code to such expression gives extra room to promote vigorous public debate on campus, protecting even extreme and offensive expressions in the public context against the potentially chilling effect of disciplinary procedures. For harassment to be actionable under section V, it must be directed at a particular person or an identifiable group of people.

Section VI of the Model Policy states that an objective legal standard should be employed to define harassment and to evaluate claims. Evaluating behavior by an objective standard instead of the subjective perception of the victim provides a greater degree of certainty in establishing the contours of prohibited conduct. An objective standard has two benefits: it will protect victims from the defense that the accused viewed


152. See Note, Sexual Harassment Claims of Abusive Work Environment Under Title VII, 97 HARV. L. REV. 1449, 1459 (1984) (arguing that in order to evaluate the offensiveness of the challenged conduct, the proper perspective is that of a reasonable victim, because this would protect both the accused and the victim from divergent perceptions of appropriate behavior); see also Schneider, supra note 107, at 536-37. Schneider points out that the objective standard is used in the tort analyses of negligence and assault and battery. Schneider argues that assault and battery provide a good analogy because, like harassment, assault and battery involve an affront to one's dignity. Id. In determining the existence of an assault, courts have used the reasonable person test to determine whether the apprehension of the victim normally would be experienced in that particular situation. The court focuses on the reasonable victim rather than on the intent of the perpetrator. Id.

Schneider also argues, however, that the reasonable student standard should be subject to an exception when the defendant intends to evoke a particular reaction, even if the victim's reaction is unreasonable. Id. at 538. Therefore, if a harasser has knowledge of a victim's unusual sensitivity and provokes the victim based on this knowledge, the harasser would be guilty of violating the policy regardless of the reasonable student standard.

Schneider notes that the Supreme Court has not addressed the issue of the appropriate standard directly. In Meritor, the Supreme Court used ambiguous language. In one section of the opinion, the Court established the standard from the perpetrator's perception of the victim's conduct. Id. at 536-37 ("the correct inquiry is whether [the plaintiff] by her conduct indicate[s] that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary" (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66-67 (1986))). In another sentence, however, the Supreme Court evaluated the behavior from the subjective perspective of the victim. Id. at 538 ("[a] complainant's sexually provocative speech or dress is [not neces-
the behavior as appropriate, but it will not penalize defendants whose victims are unusually sensitive.\footnote{153} If a defendant persists in abusive conduct after the victim has notified the defendant that the victim finds the conduct offensive, the Model Policy will be violated, thereby protecting the sensitive victim.\footnote{154}

In addition, under Section VII of the Model Policy, harassment expressions are sanctionable only in university facilities that members of the university community must use to facilitate their work. Public places, such as the quadrangle or playing fields that can be avoided, are not subject to the automatic restrictions of the Model Policy, and restrictions in such areas would have to be particularized to each situation.\footnote{155} Under the Model Policy, John Doe, the University of Michigan plaintiff, would have been able to express his academic theories in class without fear of censorship. Academic theories in the classroom, no matter how abhorrent to other students, are not sanctionable unless they are intended to insult another student and are severe or pervasive enough to create a hostile environment.

\section*{CONCLUSION}

A university may proscribe harassment speech through a campus policy that restricts the manner in which expression is made but does not attempt to regulate the advocacy of a particular idea. Universities have the obligation to promulgate campus conduct policies that protect the educational environment. To withstand constitutional challenge, the policies must not prohibit the communication of a constitutionally protected idea. This Note suggests affording university students the same pro-

\footnote{153. Id.; Schneider, supra note 107, at 536.}

\footnote{154. See Note, supra note 152, at 1459.}

\footnote{155. In Papish v. Board of Curators, 410 U.S. 667 (1973), the Supreme Court held that reasonable time, place, and manner restrictions are permissible if they further the university's academic mission or enhance the academic environment. Id. at 670. For a further discussion of this issue, see supra notes 43, 54, 59, and accompanying text.}
tection from all forms of discriminatory harassment that employees receive. Title VII and Title IX provide a framework universities use to satisfy first amendment concerns.

By carefully balancing the first amendment's principle of freedom of expression, especially in the academic context, against the importance of providing a non-discriminatory academic environment, universities may draft constitutional regulations that will restrict harassment expressions without resorting to censorship. This Note suggests a Model Policy. Such policies are needed to promote understanding and educate people about hatred, facilitate the exchange of ideas, and to provide equal access to education.

John T. Shapiro