

**REGULATING CAMPUS DISCORD IN AN ERA OF FREE SPEECH:  
THE HOSTILE WORK ENVIRONMENT ANALOGY**

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Reflecting the racial, ethnic, gender, and religious turmoils of our pluralistic culture, the campus in recent years has seen growing social discord.<sup>1</sup> Numerous examples of racial epithets, sexual taunts, and religious insults bear witness to a rising incidence of verbal harassment.<sup>2</sup> A voluminous scholarly literature and at least three court cases have discussed the constitutional implications of limiting discord through various hate speech codes.<sup>3</sup> Scholars and judges have

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<sup>1</sup> That campus social discord has grown in recent years is chronicled in Lauri A. Ebel, *University Anti-Discrimination Codes v. Free Speech*, 23 N.M.L. REV. 169 n.5 (1993).

<sup>2</sup> Recent examples and discussions of verbal harassments are *Black-Jewish Tension Still Brewing at Kent*, *Associated Press*, Oct. 10, 1994, available in LEXIS, News Library; Berny Morson, *CU No Stranger to Controversial Speakers*, *Rocky Mountain News*, Nov. 17, 1994, at 36A; *Sanity May Yet Reign at City College*, *News & Record*, Nov. 16, 1994, at A16; *The South Mountain Incident*, *Phoenix Gazette*, Oct. 15, 1994, at B6; and Nolan Zavoral, *Go West Young Men*, *Star Tribune*, Nov. 4, 1994, at 7C.

<sup>3</sup> For a discussion of the cases see *infra* notes 13-72 and accompanying text. The significant articles include Joseph W. Bellacosa, *The Regulation of Hate Speech by Academe vs. The Idea of a University: A Classic Oxymoron?*, 67 ST. JOHNS L. REV. 1

(1993); J. Peter Byrne, *Legal Insults and Free Speech Within the University*, 79 GEO. L. J. 399 (1991); Alan E. Brownstein, *Hate Speech and Harassment: The Constitutionality of Campus Codes That Prohibit Racial Insults*, 3 WM. & MARY BILL OF RIGHTS J. 179

(1994); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*,

85 NW. U. L. REV. 343 (1991); Ebel, *supra* note 1; Stephen Fleischer, *Campus Speech Codes: The*

*Threat to Liberal Education*, 27 J. MARSHALL L. REV. 709 (1994); Lawrence Friedman, *Regulating*

*Hate Speech at Public Universities After R.A.V. v. City of St. Paul*, 37 HOW. L. J. 1 (1993);

Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990

DUKE L. J. 431; Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech*

*Dilemma*, 32 WM. & MARY L. REV. 211 (1991); Calvin R. Massey, *Hate Speech, Cultural Diversity,*

*and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103 (1992); Cary Nelson,

*Hate Speech and Political Correctness*, 1992 U. ILL. L. REV. 1085 (1992); Ronna Greff Schneider,

*Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525 (1987); Ronald Turner, *Hate*

*Speech and the First Amendment: The Supreme Court's R.A.V. Decision*, 61 TENN. L. REV. 197

(1993); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE

L. J. 484; Symposium, *Campus Hate Speech and the Constitution in the Aftermath of Doe v.*

*University of Michigan*, 37 WAYNE L. REV. 1309 (1991).

plumbed the First Amendment, each finding in its murky depths support for their views on whether and to what extent academia may constitutionally limit hate speech.

Into the fray comes this article. It offers a middle ground in the debate over the regulation of verbal discord. It argues that although the constitutional principle of free speech guarantees the untrammelled discussion of opinions and ideas, the campus, like the workplace, represents a social microcosm where under positive law those who appropriately study or work are protected from harassment in exercising equal opportunity, even if the harassment involves speech. Title VI and Title IX of the Civil Rights Act mandate that campus officials protect students from harassing discrimination to promote equality of educational opportunity, even as Title VII requires employers to protect employees from similar discrimination to promote equality of employment opportunity.<sup>4</sup> The desire to ensure freedom of speech should not interfere with the lawful mandates to protect students from harassing discrimination that can thwart equality of educational opportunity, an equality itself with constitutional dimension.<sup>5</sup>

In its analysis this article (1) discusses the twin social goods of education and employment in the context of equality of opportunity, (2) examines three efforts to regulate campus discord that interferes with equality of educational opportunity and considers the cases that have struck them down on First Amendment grounds, (3) explores the future regulation of campus hate speech, and (4) proposes an analogy between Title VII and Titles VI and IX of the Civil Rights Act of 1964, focusing in particular on the similarity of the discriminatory harassments of the hostile work environment and the hostile educational environment. This analogy provides the middle ground for handling campus discord by emphasizing regulation of harassment rather than speech regulation.

Such an approach to campus discord will not please everyone, but it should pass constitutional muster if properly applied. It will also promote the important social and legal good of equal educational opportunity.

4. For a discussion of the analogy between Titles VI and IX and Title VII see *infra* notes 93-128 and accompanying text.

5. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954), represents the most seminal statement of that constitutional dimension.

## I. EQUALITY OF OPPORTUNITY IN EDUCATION AND EMPLOYMENT

Equality is a hallmark of democratic society.<sup>6</sup> Hardly anyone would assert the contrary. What equality means, however, is a subject of considerable debate. For many of the constitutional framers, the practice of slavery was apparently consonant with the statement that "all men are created equal." During the same era, the regulation of women to second-class political status was an undeniable fact. No women signed the Declaration of Independence nor participated in the debates of the constitutional convention.

Time has changed the views of the colonial era. The Civil War and the Thirteenth Amendment freed African Americans from slavery, and the Nineteenth Amendment constitutionally guaranteed women the right to full legal participation in the election process. Currently, however, the prejudices and biases of various groups about and against other groups leaves much unaccomplished in the matter of social integration. The debate continues over the meaning of equality.

In this century a major focus of constitutional equality has become the equality of *opportunity* for various groups,<sup>7</sup> especially groups with invidious characteristics like race, color, gender, ethnic origin, handicap, age or religious background. In turn, equality of opportunity has focused on two social goods: education and employment.

*Brown v. Board of Education*<sup>8</sup> represents the primary constitutional statement regarding equality of educational opportunity. In *Brown* the Supreme Court concluded that:

[E]ducation is perhaps the most important function of state and local governments... . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an oppor-

<sup>6</sup> See, e.g., RICHARD HARRIS, *THE QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS, AND THE SUPREME COURT* 4 (1960) ("Equality is at least coeval with if not prior to liberty in the history of Western political thought... ."); Erwin Chermersky, *In Defense of Equality*, 81 MICH. L. REV. 575 (1983) ("No value is more thoroughly entrenched in Western culture than is the notion of equality."); Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245 (1983) ("The idea of equality is one of the great themes of American public life.").

<sup>7</sup> See, e.g., Michael Rosenfeld, *Substantive Equality and Equal Opportunity: A Substantive Appraisal*, 74 CAL. L. REV. 1687 (1986) ("The belief in equality of opportunity ranks among the most deeply entrenched tenets of political ideology.").

<sup>8</sup> 347 U.S. 483 (1954).

tunity... where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>9</sup> Although the *Brown* decision specifically referenced race, its assertion of equal educational opportunity may also be applied with various degrees of force to other groups as well.

In important part the Supreme Court wrote *Brown's* equal educational opportunity doctrine into constitutional law because Congress had not legislated it. *Brown* broke through the paralysis of federal inaction that allowed schools in the Deep South to remain racially segregated by state law well past mid-century. However, there was no such paralysis with equal employment opportunity.

After much debate, Congress passed the Civil Rights Act of 1964<sup>10</sup> with its important prohibitions against employment discrimination. Title VII of the act states that:

[I]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin...

Except for similar acts prohibiting discrimination on the basis of age and disability, the Civil Rights Act, as amended, represents the primary legislative support for equal employment opportunity.

A strong interrelationship arises between equalities of opportunity in education and employment. In modern political theory both equalities are important social goods upon which democratic society is based. Likewise, individual self development and economic security depend in democratic society upon personal opportunities for education and employment. Education prepares youth for success in the workforce, and new technologies in the marketplace drive the need for more and better education. Finally, in passing the Civil Rights Act, Congress recognized the interrelationship by including not only Title VII prohibiting employment discrimination but also Titles VI and IX prohibiting discrimination from those who receive federal grants,<sup>12</sup> a prohibition directly affecting most educational institutions.

<sup>9</sup> *Id.* at 493.

<sup>10</sup> 42 U.S.C. § 2000e-2(a)(1) (1990).

<sup>11</sup> *Id.*

<sup>12</sup> For a discussion of the analogy between Titles VI and IX and Title VII see *infra* notes 93-128 and accompanying text.

The interrelationship between equalities of opportunity in education and employment supports the argument for analogizing Title VII interpretation of discriminatory harassment to Titles VI and IX, and it provides a context for rationalizing the regulation of discriminatory discord that includes hate speech. Now, it is time to examine three efforts to regulate campus discord by regulating hate speech and the cases striking down these efforts as denying First Amendment rights to members of the academic community.

## II. HATE SPEECH POLICIES AND COURT RESPONSES

Although the campus hate speech policies discussed here and the court decisions striking them down are now several years old, their impact is still reverberating through higher education. In spring 1994, the University Council of the University of Georgia declined to adopt a speech policy, principally due to these court decisions. Thus, even now they warrant review and discussion.

### A. *DOE V. UNIVERSITY OF MICHIGAN*<sup>13</sup>

Following several racial incidents at the campus of the University of Michigan, the Michigan legislature held hearings and a campus anti-discrimination group threatened a class action civil rights suit.<sup>14</sup> Subsequently, the university's acting president appointed the director of the office of affirmative action to draft a policy to show that the university "was willing to do something about this issue."<sup>15</sup>

As drafted the policy established a three-tiered system of regulation. The part of the policy that was eventually challenged applied to "[educational and academic centers, such as classroom buildings, libraries, research laboratories, recreation and study centers..."<sup>16</sup> In relevant part the policy made persons subject to discipline for:

[A]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status and that:

<sup>13</sup> 721 F. Supp. 852 (E. D. Mich. 1989).

<sup>14</sup> *Id.* at 854.

<sup>15</sup> *Id.* at 855.

<sup>16</sup> *Id.* at 856.

- 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.<sup>17</sup>

Hearing procedures and sanctions for policy violations were established and an authoritative interpretive guide was issued. The guide contained examples of sanctionable conduct, which included making classroom remarks like "women just aren't as good in this field as men," telling jokes about gay men and lesbians, displaying a confederate flag on doors of a residence hall, and excluding someone from a study group because that person is of a different race, sex, or ethnic origin.<sup>18</sup>

A psychology graduate student at the university, identified only as "John Doe," challenged the policy in court on First Amendment grounds. He alleged that certain controversial theories positing biologically-based racial or gender differences might be sanctionable under the policy, thus impermissibly chilling his rights to discuss these theories freely and openly.

Examining the evidence before it, the federal district court stated:

[W]ere the court to look only at the plain language of the policy, it might have to agree with the University that Doe could not have realistically alleged a genuine and credible threat of enforcement... The slate was not so clean, however. The Court had before it not only the terms of the policy, but also its legislative history, the Guide, and experiences gleaned from a year of enforcement.<sup>19</sup>

Thus, on the basis of considerations substantially other than the policy itself, the policy violated freedom of speech.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 857. <sup>19</sup> *Id.* at

The court recognized that not all "verbal conduct and verbal acts" are protected by the First Amendment.<sup>20</sup> It acknowledged that "most extreme and blatant forms of discriminatory conduct are not protected by the First Amendment... . Discrimination in employment, education, and government benefits on the basis of race, sex, ethnicity, and religion are prohibited by the constitution and both state and federal statutes."<sup>21</sup> However, as applied the policy of the university was both unconstitutionally overbroad and vague.

The "fundamental infirmity" of the policy was overbreadth, the tendency to sweep "within its ambit a substantial amount of protected speech along with that which it may legitimately regulate."<sup>22</sup> The court concluded that the policy "was consistently applied to reach protected speech,"<sup>23</sup> citing several examples. For instance, a graduate student was charged for openly stating "his belief that homosexuality was a disease and that he intended to develop a counseling plan for changing gay clients to straight."<sup>24</sup>

In another example, the policy administrator was able to "persuade" a business student who had read an "allegedly homophobic limerick" during a class public speaking exercise to attend a reeducation session and to write letters of apology.<sup>25</sup> Finally, a minority professor filed a charge against a dental student for making a comment in an orientation meeting. The student stated "he had heard that minorities had a difficult time in the course and that he had heard that they were not treated fairly."<sup>26</sup> The student was counseled and agreed to write a letter of apology.

The court determined that "[t]he manner in which these three complaints were handled demonstrated that the university considered serious comments made in the context of classroom discussion to be sanctionable under the policy."<sup>27</sup> On the basis of its analysis, the court found that the policy was overbroad. It stated that the fact the university applied the policy "to reach constitutionally protected speech makes it unnecessary to consider whether the policy was susceptible to a saving construction."<sup>28</sup>

<sup>20</sup> *Id.* at 861.

<sup>21</sup> *Id.* at 864.

<sup>22</sup> *Id.* at 865.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 866.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 866

The court also determined that the policy's language was unconstitutionally vague. It observed that the policy required that the prohibited "language must 'stigmatize' or 'victimize' an individual."<sup>29</sup> The court asserted that "both of these terms are general and elude precise definition."<sup>30</sup>

Further, in order to be sanctionable, the stigmatizing and victimizing statements had to either "involve an express or implied threat to" or have 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."<sup>31</sup> The court observed that the university had never articulated any principled way to know what type of conduct a "threat" might constitute nor when conduct might "interfere" with an individual's academic efforts.<sup>32</sup> On the basis of this asserted vagueness, the court asserted that "[t]he terms of the policy were so vague that its enforcement would violate the due process clause."<sup>33</sup>

**B. *UWM POST V. BOARD OF REGENTS OF UNIVERSITY OF WISCONSIN***<sup>34</sup>

In May, 1988, the Board of Regents of the University of Wisconsin adopted Design for Diversity,<sup>35</sup> a plan to increase minority representation, multi-cultural understanding, and greater diversity throughout the state's twenty-six campuses. Pursuant to the plan and in response to the increasing number of incidents of racial and discriminatory harassment,<sup>36</sup> the Board of Regents adopted a rule promulgated by several law professors.

In relevant part the rule established that the University of Wisconsin might discipline a student:

- (2) (a) For racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical con

<sup>29</sup> *Id.* at 867.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> 774 F. Supp. 1163 (E.D. Wis. 1991).

<sup>35</sup> *Id.* at 1164.

<sup>36</sup> *Id.* at 1165.

duct, if such comments, epithets or other expressive behavior or physical conduct intentionally:

1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and

2. Create an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.<sup>37</sup>

Several examples illustrated the rule, including one that emphasized that:

[A] student would not be in violation if, during a class discussion, he or she expressed a derogatory opinion concerning a racial or ethnic group. There is no violation, since the student's remark was addressed to the class as a whole, not to a specific individual. Moreover, on the facts as stated, there seems no evidence that the student's purpose was to create a hostile environment.<sup>38</sup>

On March 29, 1990, various plaintiffs filed suit in federal district court seeking a declaratory judgment that the rule violated free speech and equal protection of the laws.

At the time the court wrote its opinion, nine students had been sanctioned under the rule for language use. Most incidents involved angry confrontations and language like "shakazulu," "fucking bitch" and "fucking cunt," "piece of shit nigger," "Death to all Arabs! Die Islamic scumbags!," "fat-ass nigger," and "you've got nice tits."<sup>39</sup> On the basis of the rule and its applications the court struck down the rule as constitutionally overbroad.

The court recognized the Supreme Court has stated that "the overbreadth doctrine is 'strong medicine' " and that it should be used "with hesitation, and then 'only as a last resort.'"<sup>40</sup> The court emphasized, however, that it considered the rule to be content based and that the Supreme Court has explained "the great import of protecting speech from content-based regulation."<sup>41</sup>

<sup>37</sup> *Id.* at 1166.

<sup>38</sup> *Id.* at 1167-68.

<sup>39</sup> *Id.* at 1169.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

The board of regents argued that the rule prohibited only “fighting words.”<sup>42</sup> To this argument the court responded that the Supreme Court limited the fighting words doctrine to words that “naturally tend to provide violent resentment” and are “directed at the person of the hearer.”<sup>43</sup> The court noted that the rule’s regulation “intimidating,” “hostile” and “demeaning” language was broader than the regulation of words that “naturally tend to provide violent resentment.”<sup>44</sup> The Board of Regents next argued that the rule regulated only speech “with minimum social value and which has harmful social effects.”<sup>45</sup> The court termed this a “balancing approach” appropriate only for a content neutral speech regulation.<sup>46</sup> It reemphasized that by regulating demeaning speech because of race, sex, religion, etc., and by leaving unregulated “expressive behavior which affirms or does not address an individual’s race, sex, religion, etc.”<sup>47</sup> the rule was content based rather than content neutral.

The court further asserted that most students punished under the rule “are likely to have employed comments, epithets or other expressive behavior to inform their listeners of their racist or discriminatory views and that the rule did nothing to prevent the regulation of speech “which is intended to convince the listeners of the speaker’s discriminatory position.”<sup>48</sup> The court pointed out that even if the rule “did not regulate speech intended to inform or convince the listener, the speech the rule prohibits would be protected for its expression of the speaker’s emotions.”<sup>49</sup>

Apparently, in an attempt to overcome the argument that its rule was content based, the Board of Regents contended that there were compelling state interests supporting the rule. These interests boiled down to the provision of equal educational opportunities in accordance with the Fourteenth Amendment.<sup>50</sup> The court acknowledged the significance of *Brown*, but stated: Any inequality in educational opportunities addressed by the UW Rule is due to the discriminatory activity of students, not University of Wisconsin System employees.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1170. “Fighting words” are constitutionally unprotected speech. See *Chaplinsky v. New Hampshire*, 315 U.S. 586 (1942).

<sup>44</sup> *Id.* at 1172.

<sup>45</sup> *Id.* at 1173.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1174.

<sup>48</sup> *Id.* at 1175.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1176.

Since students are generally not state actors, the Board’s Fourteenth Amendment equal protection argument is inapplicable to this case.”<sup>51</sup> Finally, the Board of Regents analogized between its rule prohibiting discriminatory speech that creates a hostile environment and Title VII’s prohibition of illegal harassment. The court dismissed the analogy by responding that (1) Title VII addresses employment, not education, (2) the agency theory that holds employers liable for their employees’ actions under Title VII is inapplicable to a university’s relationship with its students, and (3) Title VII, even if applicable, “cannot supersede the requirements of the First Amendment.”<sup>52</sup>

Having found the rule unconstitutionally overbroad and the Board of Regents’ justification of it inconsequential, the court turned briefly to whether or not the rule was unconstitutionally vague. The court determined that, contrary to UWM Post’s contention, “the phrase ‘discriminatory comments, epithets and expressive behavior’ and the term ‘demean’ do not appear to have vagueness difficulties.”<sup>53</sup>

The court did concur with the plaintiffs that the rule was ambiguously vague “as to whether the regulated speech *must actually demean* the listener and create an intimidating, hostile, or demeaning environment for education or whether the speaker must merely *intend to demean* the listener and create such an environment.”<sup>54</sup> The court acknowledged that the vagueness could be corrected through interpretation, but as it had already found the rule overbroad, declined to do so.

### C. *DAMBROT v. CENTRAL MICHIGAN UNIVERSITY*<sup>55</sup>

In a talk he gave to his players and staff during the 1992-93 basketball season, the plaintiff Keith Dambrot used the word “nigger.”<sup>56</sup> Although both the context of usage and Coach Dambrot’s meaning in using the word were unclear, the fact that he had used the word eventually became public knowledge. The Central Michigan University’s affirmative action officer recommended that Dambrot be disciplined, and Dambrot acquiesced to a five-day suspension without pay.<sup>57</sup>

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1177.

<sup>53</sup> *Id.* at 1180.

<sup>54</sup> *Id.* (emphasis added).

<sup>55</sup> 839 F. Supp. 477 (E. D. Mich. 1993).

<sup>56</sup> *Id.* at 479.

<sup>57</sup> *Id.*

That Dambrot had used the word continued to disturb the campus. Some students staged a demonstration against him, and the incident became the object of local, regional, and national news coverage. On April 12, 1993, the athletic director informed Dambrot that his contract would not be renewed for the 1993-94 season. Dambrot sued, alleging among other things that he was discharged because he used the word "nigger" and that the termination violated his First Amendment rights to free speech.<sup>58</sup>

At issue was the university's affirmative action policy, which prohibited in relevant part:  
any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by... demeaning or slurring individuals through... written literature because of their racial or ethnic affiliation; or... using slogans, epitaphs [sic] or words that infer negative connotations about an individual's racial or ethnic affiliation.<sup>59</sup>

The court concluded that the policy (1) was overbroad on its face, (2) contained limitations on content and viewpoint that rendered it facially unconstitutional, and (3) was unconstitutionally vague. The court permanently enjoined the policy's enforcement.

In considering overbreadth, the court noted that the university's grasp of what subjected "students, faculty or staff" to an "offensive environment" was "hazy at best."<sup>60</sup> The university's president and the affirmative action officer testified "somewhat cryptically" that an offensive environment constituted "behavior which a person 'feels' has affronted either him or some group, predicated on race or ethnicity."<sup>61</sup> The court noted that the policy introduction identified as violating the policy any "[discriminatory harassment, whether or not it rises to a level of legally forbidden discrimination."<sup>62</sup>

Rhetorically asking whether there was a "realistic danger" that this policy compromised First Amendment protections, the court stated that it was "not much of a stretch" to imagine a treatise, a student's term paper, or even a cafeteria bull session being judged "to violate the CMU policy since it potentially 'demeans' or 'slurs' various

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 481. The rule likely means to prohibit "epithets... that imply" rather than "epitaphs that infer..."

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

individuals 'because of their racial or ethnic affiliation.'<sup>63</sup> The court concluded: "It suffices to say that speech which enjoys fundamental First Amendment protection can be effectively suppressed by the policy at issue. On its face this policy is overbroad."<sup>64</sup>

The court also held that the policy contained content and viewpoint limitations that rendered it facially unconstitutional.<sup>65</sup> As to content the court observed that as the CMU policy targeted specific topic content: race and ethnicity. Even if the CMU policy was limited to the prohibition of fighting words, it would fail constitutionally because it created "officially condemned" topics based on racial and ethnic content.<sup>66</sup>

According to the court, the challenged policy also required constitutionally impermissible viewpoint limitations. Whereas speakers at the university might convey positive or neutral messages on race or ethnicity, they might not convey "negative connotations" about race or ethnicity. The court quoted the Supreme Court: "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds it offensive or disagreeable."<sup>67</sup> This official prohibition of ideas about race or ethnicity that are offensive, demeaning, or slurring is what the court considered viewpoint limitation.

The court also declared that the policy was unconstitutionally vague. The court identified two types of vagueness: (1) the denial of "fair notice of the standard of conduct to which a citizen is held accountable,"<sup>68</sup> and (2) "an unrestricted delegation of power, which in practice leaves the definition of its terms to law enforcement officers, and thereby invites arbitrary, discriminatory and overzealous enforcement."<sup>69</sup> The court found the first type of vagueness in the terms "offensive" and "negative," which the court stated "are as vastly divergent as are individual tastes and personalities."<sup>70</sup> It illustrated this point by asserting that the basketball players to whom Coach Dambrot had made his remark testified that they did not find it offensive, although other persons did. The court further observed that when asked the university's president "was utterly incapable of defining the terms of the policy."<sup>71</sup> As to the second type of vagueness, the

<sup>63</sup> *Id.* at 482.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 483.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

<sup>68</sup> *Id.* at 484.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

court stated that it was “confident that a careful examination of the history of Dambrot’s censure for these locker room comments would reveal an example or two of what the Supreme Court meant by ‘overzealous enforcement’ of a ‘vague policy.’”<sup>72</sup>

The *Doe*, *UWM Post*, and *Dambrot* cases represent the only judicial pronouncements on the regulation of the discord caused by hate speech on campus. It is now time to turn to the implications these cases hold for future regulation.

### III. WITHER THE REGULATION OF CAMPUS HATE SPEECH?

Considering the *Doe*, *UWM Post*, and *Dambrot* cases, one must conclude that the regulation of campus hate speech *qua* hate speech is endangered.<sup>73</sup> If hate speech is broadly regulated, the regulation can be attacked as constitutionally overbroad and vague. If such speech is narrowly and specifically regulated, it can be attacked as content and viewpoint discriminatory.

Although the Supreme Court has not spoken on the regulation of hate speech in the university setting, it has addressed hate speech in the wider societal context. In *R.A.V. v. City of St. Paul*,<sup>74</sup> the Court confronted the following city ordinance of St. Paul, Minnesota:

[Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.<sup>75</sup>

The case arose after the petitioner burned a cross in his African American neighbor’s yard. Justice Scalia wrote the majority opinion in the case, and Justices White and Stevens wrote concurring opinions joined by Blackmun and O’Connor. *R.A.V.* represents the most significant High Court pronouncement yet on the subject of hate speech.

<sup>72</sup>*Id.*

<sup>73</sup> These First Amendment cases conflict with cases analyzing Title VI, Title VII, and Title IX. See *infra* notes 94-124 and accompanying text.

<sup>74</sup>112 S. Ct. 2538 (1992).

<sup>75</sup> *Id.* at 2541.

The majority opinion began with a reiteration of an important free speech principle: “The First Amendment generally prevents government from proscribing speech (citations omitted), or even expressive conduct (citations omitted), because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.”<sup>76</sup> It acknowledged that some categories of speech like obscenity, defamation, and fighting words have only a “slight social value as a step to truth.”<sup>77</sup> It argued, however, that in spite of previous statements asserting such speech to fall outside the area of constitutionally protected speech, what the Court had really meant was that “these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.”<sup>78</sup>

The opinion illustrated this point by asserting that libel may be prohibited but not just libel critical of the government.<sup>79</sup> This line of argument leads to the position that whereas fighting words may be constitutionally banned, fighting words about race may not. “The government may not regulate use based on hostility - or favoritism - towards the underlying message expressed.”<sup>80</sup>

The majority recognized two exceptions to this content discrimination principle: “When the basis for the content discrimination consist entirely of the very reason the entire class of speech is proscribable, no significant danger of idea or viewpoint discrimination exists.”<sup>81</sup> Thus, the state “might choose to prohibit only that obscenity which is the most patently offensive in its prurience... But it may not prohibit... only that obscenity which includes offensive political messages.”<sup>82</sup> “Another valid basis for according differential treatment to even a content defined subclass of proscribable speech is that the subclass happens to be associated with particular ‘secondary effects’ of the speech, so that the regulation is ‘justified without reference to the content of the... speech’” (citations omitted).<sup>83</sup> For example, the state can prohibit all obscene live performances involving minors, but permit adults to participate in them.

<sup>76</sup> *Id.* at 2542.

<sup>77</sup> *Id.* at 2543.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 2545.

<sup>81</sup> *Id.* at 2546.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

The majority also recognized that “words can in some circumstances violate laws directed not against speech but against conduct...”<sup>84</sup> In light of attempts to regulate campus discord, the example the opinion uses to illustrate this recognition is revelatory indeed. The opinion states: “Thus, for example, sexually derogatory ‘fighting words,’ among other words, may produce a violation of Title’s VII’s general prohibition against sexual discrimination in employment practices (citations omitted). Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.”<sup>85</sup> This means that conduct prohibitions also incidentally prohibiting speech are constitutionally acceptable, and its use of the Title VII analogy to discrimination as conduct may mean that it would accept a similar analogy to Title IX.

Finally, since the Minnesota Supreme Court had ruled that the ordinance prohibited only fighting words, the High Court determined that “the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination.”<sup>86</sup> The ordinance permitted fighting words in favor of “racial, color, etc. tolerance and equality” but not against it.<sup>87</sup> The Court illustrated: “One could hold up a sign saying, for example, that all ‘anti-Catholic bigots’ are misbegotten; but not that all ‘papists’ are, for that would insult and provoke violence ‘on the basis of religion.’”<sup>88</sup> On the basis of both viewpoint and content discrimination, the Court ruled the hate ordinance violated the First Amendment.

The concurring opinions in *R.A.V.* disagreed with various aspects of the majority’s content and viewpoint discrimination analysis, but even the concurring opinions agreed that the ordinance in question was unconstitutionally overbroad under more traditional analysis.<sup>89</sup> Since *R.A.V.* Justice Ginsburg has replaced Justice Blackmun, but the composition of the *R.A.V.* majority on the Court has not changed. The assumption is that pronouncements in the Court’s content and viewpoint discrimination still represent the majority view.

As a result, campus hate codes that proscribe speech on the basis of race, religion, sex, or ethnicity are likely to remain vulnerable to constitutional challenge. The *R.A.V.* majority opinion suggests this

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 2546-47.

<sup>86</sup> *Id.* at 2547.

<sup>87</sup> *Id.* at 2548.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 2558 (White, J., concurring).

conclusion, as do the concurring opinions in that case and the rulings in *Doe*, *UWM Post*, and *Dambrot*.

Campus officials, however, should not assume that they lack the power to regulate all campus speech. For instance, previously campus officials could regulate fighting words. As outlined in *UWM Post*, the fighting words doctrine allows the prohibition of words that (1) “naturally tend to provoke violent resentment” and (2) are “directed at the person of the hearer.”<sup>90</sup>

Under the fighting words doctrine, many racial insults directed at individuals can be seen as naturally tending to provoke violent resentment. As stated in *R.A.V.* the fighting words doctrine must be applied without content or viewpoint discrimination to be constitutional. Thus, campus officials writing a policy must prohibit *all* fighting words, not just those that insult or demean specific groups, but having prohibited all fighting words, the authorities can certainly enforce the policy against fighting words deriving from race, gender, religion, or sexual orientation. Guidelines illustrating the policy can give as examples fighting words deriving from race, gender, etc., as well as fighting words deriving from political or familial insult.

Additionally, other speech-related doctrines can also be used to limit speech constitutionally. Officials can use these doctrines in regulating campus hate speech. These doctrines include defamation or a holding of individuals up to contempt or ridicule, which can be used to reach speech that accuses others of being immoral, dishonest, and disease carrying.<sup>91</sup> Defamation reaches such gender-oriented words as “whore” and “slut.” It also applies to statements directed toward others on the basis of sexual orientation that state or imply they carry the AIDS virus.

Still another speech-regulating doctrine constitutionally available in circumscribing campus hate speech is that prohibiting the making of terroristic threats. “Die (Jewish, Islamic, Baptist), scum” or “I’ll kill you, you (racial slur, gender slur, sexual orientation slur)” is not language protected under the First Amendment. In fact, it is a crime to make such threats.<sup>92</sup> Certainly, campus officials can remind students and staff of the relevant state law in this regard without compromising free speech rights.

Even after *R.A.V.* and lower court cases like *Dambrot*, campus officials can constitutionally regulate much hate speech. The lesson of these cases is primarily that officials must keep the courts from per-

<sup>90</sup> *UWM Post*, 774 F. Supp. at 1170.

<sup>91</sup> See generally W. PAGE KEETON et al., PROSSER AND KEETON ON TORTS § 111 (5th ed. 1984).

<sup>92</sup> See, e.g., Model Penal Code § 211.3 (1985).

ceiving them as regulating expression of the ideas that underlie hate speech. Officials cannot regulate assertions of racial or gender difference or that gender orientation is socially rather than biologically determined. To make certain of a firm constitutional basis for speech regulation, officials should (1) use traditional speech-regulating doctrines, for example those addressing fighting words and defamation, that have express or implied constitutional acceptance, and (2) ensure that campus speech regulations and guidelines do not contain content or viewpoint infirmities that focus on slurring, demeaning, or merely offensive statements made about specific groups.

Yet another approach exists for regulating the pernicious effects of campus hate speech. It is suggested by the Court's intimation in *R.A.V.* that the regulation of certain language in the context of regulating discrimination under Title VII may be constitutionally acceptable.<sup>93</sup> This approach focuses on prohibiting discriminatory conduct rather than on prohibiting speech. The next section develops this approach, which may be used to complement the direct regulation of speech as a means for limiting campus discord.

#### IV. The Civil Rights Act and the Hostile Educational Environment

If campus officials are truly concerned with controlling campus discord, rather than with appearing politically correct by banning hateful expression about various groups, there is an important alternative to regulating speech: regulating discriminatory conduct. Campus officials are already under a duty to provide equal educational opportunity by preventing discrimination.<sup>94</sup> Since the regulation of discrimination may include the regulation of hostile and harassing words,<sup>95</sup> it provides a constitutionally safe alternative to speech regulation *per se*. Further, the regulation of discrimination has well-established judicial recognition, especially in guaranteeing equal employment opportunity.

The issue arises as to whether or not the regulation of employment discrimination is appropriately analogous to the regulation of dis-

<sup>93</sup> See *supra* note 85 and accompanying text.  
<sup>94</sup> The constitutional duty arises out of *Brown v. Bd. of Educ. of Topeka* 347 U.S. 483, 493 (1954). The legislative duty arises out of Titles VI and IX of the Civil Rights Act of 1964. See *infra* notes 96-97 and accompanying text.  
<sup>95</sup> See, e.g., *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 368 (1993) (statements included calling plaintiff "a dumb ass woman" and "You're a woman what do you know?").

crimination in education. Here the interrelationship becomes significant between the constitutional duty of the state to provide equal educational opportunity and the legally imposed duty of private employers to provide equal employment. The hub of the interrelationship lies in the Civil Rights Act of 1964.

Title VII of the Civil Rights Act of 1964 makes it an "unlawful employment practice for employers... to discriminate against any individual with respect to... conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin...,"<sup>96</sup> The Civil Rights Act, as amended by Titles VI and IX, also asserts that no one shall "be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" based on race, color, sex, or national origin.<sup>97</sup> A long judicial history interprets the meaning of Title VII discrimination, including Supreme Court decisions establishing that an offensive work environment is illegally discriminatory harassment under Title VII.<sup>98</sup> Application of this judicial history to Titles VI and IX would provide significant insights for the regulation of campus discord.

Is Title VII analysis appropriately analogous to analysis under the language of Titles VI and IX? Several arguments suggest an affirmative answer. First, the legislative history of Title IX indicates that it, and by implication the identically worded Title VI, was patterned after Title VII. The legislative history states that:

[O]ne of the most important pieces of legislation which prompted the cause of equal employment opportunity is Title VII of the Civil Rights Act of 1964 which... prohibits any practice by employers which would tend to discriminate against an employee... on the basis of race, religion, sex or national origin. Title VII, however, specifically excludes educational institutions from its terms. [Title IX] *would remove that exemption and bring those in education under the equal employment provisions.*"

<sup>96</sup> 42 U.S.C. § 2000e-2(a)(1) (1990).

<sup>97</sup> See 42 U.S.C. § 2000d (1990) (Title VI); 20 U.S.C. § 1661 (1990) (Title IX).

<sup>98</sup> The primary hostile employment environment cases are *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993) and *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

<sup>99</sup> H.R. Rep. No. 554, 92d Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2462,2512 (emphasis added).

Although this legislative reference analogizing Title IX to Title VII is a bit thin, and could be interpreted as applying only to discrimination in educational employment, no legislative history suggests that judges or campus officials should not apply Title VII interpretation to Titles VI and IX.

Second, Supreme Court analysis suggests an interrelationship between these Civil Rights Act provisions. In *Franklin v. Gwinnett County Public Schools*<sup>100</sup> the Supreme Court faced whether Title IX permits damages in a case involving a teacher's sexual harassment of public school students. The lower court had refused to apply Title VII analysis and had ruled that damages were unavailable to the plaintiff.<sup>101</sup>

The Supreme Court reversed. Although the Court declined to reach Franklin's argument that the remedies should be the same under Titles VII and IX,<sup>102</sup> it turned to Title VII to explain its ruling on the plaintiff's Title IX harassment claim:

Unquestionably, Title IX placed on the Gwinnett County Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex." Meritor Savings Bank, FSB v. Vinson (citation omitted). We believe the same rule should apply when a teacher sexually harasses and abuses a student.<sup>103</sup>

In applying Title VII analysis to the plaintiff Franklin in a Title IX case, the Court confronted hostile educational environment facts. The teacher had not harassed the student in a *quid pro quo* exchange for grades, but had harassed her physically and verbally so as to create an abusive educational environment. Although the hostile environment was created by a teacher in this case, no compelling reason convinces that the Court would refuse to recognize the discrimination caused by a student-to-student hostile educational environment.

Next, lower court decisions have adopted Title VII standards in interpreting Title IX. In *Lipsett v. University of Puerto Rico*,<sup>104</sup> the United States Court of Appeals for the First Circuit ruled that Title IX covers hostile environment sexual harassment claims and adopted

<sup>100</sup>112 S. Ct. 1028 (1992).

<sup>101</sup> *Franklin v. Gwinnett County Public Schools*, 911 F.2d 617,622 (11th Cir. 1990).

<sup>102</sup> *Franklin v. Gwinnett County Public Schools*, 112 S. Ct. 1028,1032 n.4 (1992).

<sup>103</sup>*Id.* at 1037.

<sup>104</sup> 864 F.2d 881, 901 (1st Cir. 1988).

Title VII's standards for determining these claims. The Second Circuit stated:

Title IX was enacted to supplement the Civil Rights Act of 1964's bans on racial discrimination in the workplace and in universities. Because the statutes share the same goals and because Title IX mirrors the substantive provisions of Title VI... (citation omitted), courts have interpreted Title IX by looking to the body of law developed under Title VI, *as well as the case law interpreting Title VII*.<sup>105</sup>

Similarly, the Tenth Circuit in a Title IX gender discrimination suit "found no persuasive reason not to apply Title VII's substantive standards regarding sex discrimination to Title IX suits."<sup>106</sup> Several federal district courts have also noted the interrelationship between Title VII and Title IX.<sup>107</sup>

Although these cases have focused primarily on teacher-student or administrator-student harassment under Title IX, at least one case focuses directly on student-student hostile environment harassment. *Doe v. Petaluma City School District* involved repeated verbal harassments of one student by other students.<sup>108</sup> Comments such as "hot dog bitch," "slut," and "hoe" were made by both male and female students against plaintiff Doe.<sup>109</sup> The court stated: "Surely one is 'denied the benefits of, or subjected to discrimination under' an education program on the basis of sex when . . . she is driven to quit an education program because of the severity of the sexual harassment she is forced to endure."<sup>110</sup> The court recognized that Title VII interpretation could apply to Title IX.<sup>111</sup>

Several courts have declined to apply Title VII interpretation to Title IX cases. In *Franklin v. Gwinnett County Public Schools*<sup>112</sup> the Eleventh Circuit stated: "We do not believe applying Title VII to Title IX would result in the kind of orderly analysis so necessary in this

<sup>105</sup> *Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994) (emphasis added).

<sup>106</sup> *Mabry v. St. Bd. of Community Colleges and Occupational Educ.*, 813 F.2d 311, 316 (10th Cir. 1987), *cert. denied*, 484 U.S. 849 (1987).

<sup>107</sup> See, e.g., *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1290 (N. D. Cal. 1993); *Moire v. Temple Univ. Sch. of Medicine*, 613 F. Supp. 1360, 1366-1367 n.2 (E. D. Pa. 1985), *aff'd mem.*, 800 F.2d 1136 (3d Cir. 1985).

<sup>108</sup> 830 F. Supp. 1560 (N. D. Cal. 1993).

<sup>109</sup> *Id.* at 1565.

<sup>110</sup> *Id.* at 1575.

<sup>111</sup> *Id.* at 1572.

<sup>112</sup> 911 F.2d 617 (11th Cir. 1990).

confusing area of the law."<sup>113</sup> The Supreme Court reversed the Eleventh Circuit. Although as stated previously the Court did not explicitly address the relationship between Title VII and Title IX, it turned to Title VII case law to explain its harassment ruling on the Title IX case.<sup>114</sup>

A federal district court in *Bougher v. University of Pittsburg*<sup>TM</sup> found that Title IX reaches *quid pro quo* sexual harassment but concluded that, unlike Title VII, Title IX does not permit a hostile environment claim. In affirming the district court on a statute of limitations issue, the Third Circuit stated that it declined to adopt the district court's reasoning "in toto" and found it "unnecessary to reach the question... whether evidence of a hostile environment is sufficient to sustain a claim of sexual discrimination in education in violation of Title IX."<sup>116</sup>

In *Seamons v. Snow*<sup>117</sup> a federal district court refused to apply Title VII to a Title IX student-student hostile environment case, finding "important distinctions" between the two titles. The court expressed concern that Title IX was enacted under Congress' spending power rather than under the Commerce Clause, like Title VII.<sup>118</sup> The court asserted that Congress must be "explicit and unambiguous when it conditions the grant of federal moneys."<sup>119</sup> It would thus "be inappropriate for this Court to import the doctrine of hostile environment sexual harassment from Title VII into this Title IX action."<sup>120</sup> However, the *Seamons* case runs counter to the majority of cases.

The Fifth Circuit articulated a better view in *Doe v. Taylor Independent School District*.<sup>121</sup> In a sexual harassment case decided under equal protection laws, the court wrote: "[T]here is no meaningful distinction between the work environment and school environment which would forbid such discrimination in the former context and tolerate it in the latter. Women need not endure sexual harassment by state actors under any circumstances, the school setting included."<sup>122</sup> The *Seamons* court observed that students were not state actors and that the agency context which permits the imputa

<sup>113</sup> *Id.* at 622.

<sup>114</sup> See *supra* note 103 and accompanying text.

<sup>115</sup> 713 F. Supp. 139,145 (W. D. Pa. 1988).

<sup>116</sup> *Bougher v. Univ. of Pittsburg*, 882 F.2d 72, 77 (3d Cir. 1989).

<sup>117</sup> 864 F. Supp. 1111,1118 (1994).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> 975 F.2d 137 (5th Cir. 1992).

<sup>122</sup> *Id.* at 149.

tion of employees' discriminatory conduct to employers is not present in student-student discrimination.<sup>123</sup> However, like Title VII, Titles VI and IX are not limited to discrimination by state actors, and Title VII protects employees from discrimination not only from fellow employees and superiors but also from others in the business setting, for example, customers.<sup>124</sup> By similar analogy Title IX protects students from discriminatory harassments by other students in the campus context.

Assuming that Title VII interpretations appropriately analogize to Titles VI and IX, we find that the contours of an acceptable Title VII regulation of hostile environment are set forth by the Supreme Court in *Harris v. Forklift Systems, Incorporated*.<sup>125</sup> There, the Court asserted that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."<sup>126</sup> *Meritor Savings Bank v. Vinson*<sup>127</sup> further adds that to be actionable the hostile environment must be sufficiently severe or pervasive to alter the conditions of employment. As stated in *Meritor*, however, and reasserted in *Harris*, "mere utterance of an... epithet which engenders offensive feelings in an employee... does not sufficiently affect the conditions of employment to implicate Title VII."<sup>128</sup> Also, "if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation."<sup>129</sup>

As guidance for campus officials, Title VII hostile environment analogy to regulatory obligations under Titles VI and IX includes the following: (1) whether or not a hostile environment exists can be determined only by looking at all of the circumstances, including the use of abusive language; (2) a single offensive encounter is not likely to constitute hostile environment discrimination unless it is unusually severe or physically threatening; (3) continuing, pervasive conduct is usually required for a hostile environment to be actionable; (4) a

<sup>123</sup> *Seamons v. Snow*, 864 F. Supp. 1111, 1119 (1994).

<sup>124</sup> See Robert J. Aalberts & Lorne H. Seidman, *Sexual Harassment of Employees by Nonemployees: When Does the Employer Become Liable?*, 21 PEPP. L. REV. 447 (1994); Joseph G. Allegretti, *Sexual Harassment by Nonemployees*, 9 EMPLOYEE REL. L. J. 98 (1983).

<sup>125</sup> 114 S. Ct. 367 (1993).

<sup>126</sup> *Id.* at 371.

<sup>127</sup> 477 U.S. 57,67 (1986).

<sup>128</sup> 114 S. Ct. 367, 370 (1993).

<sup>129</sup> *Id.*

hostile environment exists when verbal or nonverbal discriminatory conduct unreasonably interferes with a student's educational performance; and (5) for conduct to constitute actionable hostile environment discrimination, it must be perceived as such by a student to whom the conduct, verbal or nonverbal, is directed.

To appreciate Title IX's potential for regulating discriminatory campus discord, campus officials should recognize also that students can be counseled and warned about conduct that has not yet proceeded far enough to become actionable hostile environment. Just as an employer may take steps to sensitize employees to the verbal and nonverbal behaviors that may lead to a hostile environment, so, too, campus officials may choose, as part of an antidiscrimination program, to sensitize students about similar verbal and nonverbal behaviors. Included should be the power on the part of campus officials to warn students about their conduct, which although it has not yet risen to the level of actionable hostile environment, might become actionable if repeated. Thus, students may appropriately be warned about the use of discriminatory epithets or symbols, as well as warned about more overt conduct, that if it becomes pervasive will constitute hostile environment.

Unfortunately, campus officials do not yet appear to understand their obligations under Titles VI and IX through analogy to Title VII, nor do they grasp well how the First Amendment protects the expression of even unpopular ideas. The problem has been the propensity of such officials to draft codes targeted to speech that are overbroad and content biased. The concern created by the problem has been realized in the application of these codes to the expression of discriminatory ideas. Yet just as employers must guarantee employees equality of employment opportunity so also must campus officials provide students with equality of educational opportunity. In each instance equality comprehends the freedom from hostile and abusive environments, and the Civil Rights Act imposes on both employers and campus officials the duty to keep workplaces and campuses free from hostile environment discrimination. What campus officials must do to avoid successful First Amendment challenge to their regulations is to focus on discriminatory conduct rather than on speech and to make the regulation of speech incidental to the regulation of discriminatory conduct. Campus officials must see to it that regulations are not only drawn properly but applied properly to avoid prohibiting the expression of constitutionally protected ideas.

## V. Conclusion

Almost inevitably, interests representing equalities of opportunity and the First Amendment will collide over the regulation of campus discord. In a larger sense the collision marks a continuing national discussion over the appropriate direction of the civil rights revolution and the extent to which government should impose social policy on citizens. Campus officials will unavoidably be caught in the crosswalk when these interests collide.

That the courts may strike down some regulations of campus discord as overbroad and infringing on freedom of speech should not deter campus officials from drafting other regulations that focus on discriminatory conduct, but which may incidentally impact speech. Equality of educational opportunity is also constitutionally guaranteed. Pervasive discriminatory conduct by students, students who are under the educational authority of the state, violates the equal educational opportunity of other students who are discriminatorily harassed. Further, educational institutions, whether public or private, who accept monies from the federal government are mandated by Titles VI and IX, even as employers are required by Title VII, to ensure equality of opportunity in their domains. No less than in the workplace, positive law requires that citizens on campus be protected from harassing discrimination and a hostile environment. Indeed, educational institutions may face legal consequences for failing in their duty.