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STICKS AND STONES: THE FIRST AMENDMENT AND CAMPUS SPEECH CODES

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"The only effective method of altering a world view that is deemed pernicious is to provide a persuasive response–that is, 'more speech.' 'Shut up!' is not a persuasive response."[1]

I. INTRODUCTION

Over the past few decades, American universities have experienced an increasingly diverse population in terms of race, gender, religious belief, sexual orientation, and other demographic categories. Few would argue that increasing diversity on the country's college campuses is anything but beneficial. Students from a wide variety of backgrounds can provide a wide range of viewpoints that add to the marketplace of ideas exchanged in the university setting. In turn, this open exchange can lead to increased understanding and tolerance in our society.

Yet, this increasing diversity also brings with it the potential for increasing fetters on the constitutional rights of students. In the interest of providing a safe and supportive atmosphere for all students, regardless of their background, many university administrators have adopted some form of campus speech code for their schools. Such speech codes are aimed at preventing the use of hurtful, derogatory terms to denigrate the race, ethnicity, or gender of students attending that university. Administrators seek to protect their students from the offensive words that may be directed at them by their more intolerant counterparts. No matter how noble the goal, however, the cure may be worse than the disease.[2]

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1. Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 550 (1991).

2. Some commentators have suggested that revealing these attitudes, rather than forcing them underground, is the best path to eventually

Campus speech codes present both constitutional and policy difficulties.[3] Part II of this Article examines the Supreme Court's recent jurisprudence concerning content-based regulation of speech. Part III considers the additional constitutional problems posed by overly broad and vague speech regulations. With this legal background, Part IV examines the policy considerations and additional case law that suggests speech regulations adopted by universities are inappropriate.

II. REGULATION BY CONTENT AND THE "FIGHTING WORDS" DOCTRINE

First Amendment speech protection clashes with the desire of university administrators to provide a safe and supportive learning environment for all students, making the creation and maintenance of speech codes problematic. The Supreme Court has historically been hostile to content-based regulations of speech.[4] Regulating speech on the basis of what is said, or the message that is communicated,, strikes at the very heart of the free speech protections guaranteed in the Constitution. Speech generally cannot be prohibited based solely on the regulator's dislike for the ideas expressed, much to the dismay of administrators seeking to ensure civility among the university's students. Speech codes, which are by definition content-based, raise constitutional red flags when the ban might also sweep in protected speech alongside unprotected speech.

A First Amendment exception might have provided solace for university administrators. While retaining its hostility to content-based regulation, the Supreme Court has established a limited number of categories of speech that receive little or no protection under the First and Fourteenth Amendments.[5] The Court

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eliminating them through education and discussion. *See, e.g.*, Charles R. Calleros, *Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun*, 27 ARIZ. ST. L.J. 1249, 1271-72 (1995) (arguing that rules against hateful speech deprive universities of information about discrimination).

3. The arguments in this article apply solely to public universities, which may be seen as state actors and therefore subject to the restrictions imposed by the Constitution. Private universities have much greater latitude to enact and enforce speech codes for their own campuses. Despite the lack of a constitutional barrier, however, private universities might rightfully be wary of enacting regulations that would not be upheld at a public school.

4. *See, e.g.*, Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y., 447 U.S. 530, 536 (1980) (holding that a prohibition of discussions of controversial issues in utility bills violates the First and Fourteenth Amendments).

5. These categories include obscenity, libel/slander, profanity, and "fighting words." Other than "fighting words" and obscenity, this two-class treatment of speech has largely been overturned; even the two remaining categories have been limited by subsequent Supreme Court decisions.

established the first of these categories, "fighting words," in *Chaplinsky v. New Hampshire*.[6] While recognizing freedom of speech and freedom of the press as "fundamental personal rights and liberties which are protected . . . from invasion by state action," the Court also recognized that these rights were not absolute.[7] The Court defined "fighting words" as those words that would be understood by the average man to provoke the listener to fight, and those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[8] The Court considered such words to have "such slight social value as a step to truth" that they were outside the protections granted by the Constitution.[9] After *Chaplinsky*, it was understood that speech could be regulated and prohibited if it fell within the category of "fighting words."

Administrators found the "fighting words" doctrine to be just the First Amendment exception needed to enact speech codes. After all, they wished to prohibit the type of speech that caused injury to those it was directed towards. Since the creation of the "fighting words" category in *Chaplinsky*, however, the Court has been reluctant to expand the doctrine and in fact has limited the applicability of the exception through subsequent decisions. The Court has not explicitly overruled *Chaplinsky*, choosing instead to strike down "fighting words" laws on overbreadth and vagueness grounds[10] or by stating that the interests the state sought to serve were not sufficiently compelling to overcome the First Amendment protection.[11] For example, in *Cohen v. California*,[12] the Court narrowed "fighting words" to words clearly "directed to the person of the hearer" or words intended to provoke an immediate, violent

6. 315 U.S. 568, 572 n.3 (1942). Chaplinksy was arrested for violating a state statute prohibiting speech that was "offensive, derisive, or annoying," including "any offensive or derisive name[s]." He called the complainant a "God damned racketeer" and "a damned Fascist." *Id.* at 569.

7. *Id.* at 571.

8. *Id.* at 572-73.

9. *Id.* at 572 (stating that the interest in protecting such speech was "clearly outweighed by the social interest in order and morality").

10. *See* discussion *infra* Part III.

11. "Fighting words" were originally thought not to have any First Amendment protection because of their low or non-existent social value. However, much of the speech that falls under the "fighting words" doctrine *can* be considered to have at least some social value. "The First Amendment does not permit society to require that speakers have socially *useful* messages, and that is why most hate speech must be protected." RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 166 (1992).

12. 403 U.S. 15 (1971). Paul Cohen walked into a courthouse wearing a jacket with the slogan "Fuck the Draft" emblazoned on the back. He was arrested and convicted under a statute prohibiting "offensive conduct." *Id.* at 16-17.

reaction.[13] According to the Court in *Cohen,* in order for speech to fall into the category of "fighting words," the speaker has to intend to provoke a hostile response from his or her listeners.[14] The speech must also present a "clear and present danger" of provoking that response, rather than some more attenuated idea of potentially offending a listener.[15]

The evolution of a narrow definition for "fighting words" may make a real world application of the doctrine extremely difficult, at least in a campus speech code setting. Only words that clearly incite listeners to immediate violence will fall within the category and therefore lose First Amendment protection.[16] Without a clear delineation of what is prohibited speech, both to protect as much speech as possible and to give notice of what speech constitutes a violation, the Court has been extremely reluctant to permit such prohibitions. The conflict between the narrow scope of the "fighting words" doctrine and the wider range of speech university administrators seek to prohibit makes the possibility of a clear delineation unlikely.

This reluctance to place speech outside the protection of the First Amendment reflects both distaste for content-based regulation and an unwillingness to criminalize speech just because of the listeners' reactions.[17] Before the Court would hold that speech is within the doctrine, and therefore due a lesser level of protection, it requires the State to carefully consider whether the speech prohibited can be reasonably perceived as "a direct

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13. *Id.* at 20 (observing that no one who saw Cohen's jacket reacted violently and that there was no showing that he intended to provoke such a reaction).

14. *Id.* at 23. The *Cohen* Court stated:

> We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen . . . The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one *who has not sought to provoke such a response* . . . the States may more appropriately effectuate that censorship themselves.

Id.

This standard established by the Court suggests that the test from *Brandenburg v. Ohio*, 395 U.S. 444 (1969), requiring incitement to immediate violence, will apply in "fighting words" cases.

15. *Brandenburg*, 395 U.S. at 447-48.

16. The incitement to violence by the speaker must be aimed at a third party; a hostile reaction from the crowd toward the speaker is not sufficient to constitute the type of imminent violence anticipated by the Court. *See, e.g.*, Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 134-35 (1992) (stating that "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob").

17. RONALD D. ROTUNDA, TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE § 20.40 (3d ed. 1999).

personal insult or an invitation to exchange fisticuffs."[18] While this definition might cover an extremely small subset of the speech that university administrators seek to prohibit, it certainly could not be stretched to cover it all.[19]

Two more recent examples of the Court's reluctance to apply the "fighting words" doctrine are contained in *United States v. Eichmann*[20] and *Hustler Magazine v. Falwell*.[21] In *Eichmann*, the Court refused to apply the doctrine to a federal statute banning flag burning.[22] The Court instead declared the speech to be protected, despite noting that "the desecration of the flag is deeply offensive to many. But the same might be said, for example, of virulent ethnic and racial epithets . . . vulgar repudiations of the draft . . . and scurrilous caricatures."[23] The explicit mention of ethnic and racial epithets in conjunction with flag burning, which the Court was upholding as protected speech, suggested that such epithets might also be protected.

The Court further limited the potential reach of the "fighting words" doctrine in *Hustler Magazine*, stating that emotional impact or "outrageousness" was not a sufficient ground for banning speech.[24] These and other decisions provide little solace to

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18. Texas v. Johnson, 491 U.S. 397, 409 (1989). The Court overturned the defendant's conviction for burning the American flag, stating that the expression at question did not fall into the narrow category of "fighting words." *Id.*

19. *Id.* at 409. For example, a public university might be able to prohibit the use of certain epithets, on the grounds that they would provoke the reasonable listener into a violent response. However, the epithets would need to be directed at an individual, profanity scrawled on a bathroom wall would probably not suffice as a "direct personal insult." *Id.* at 398. Also, the university could probably not ban, for example, requests for sexual acts, as such speech would not reasonably be seen as "a direct personal insult or an invitation to exchange fisticuffs," no matter how crudely stated. *Id.*

20. United States v. Eichmann, 496 U.S. 310 (1990).

21. Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

22. *Eichmann*, 496 U.S. at 319. The Court stated that "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* (citing *Johnson*, 491 U.S. at 414).

23. *Id.* at 318-19 (stating that "[t]hat the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength . . . so long as the means are peaceful, the communication need not meet standards of acceptability").

24. *Hustler*, 485 U.S. at 55-56. The Court recognized that:

> "[o]utrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

Id. (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886. 910 (1982)

university administrators seeking to enforce a level of civility on their campuses. If "virulent ethnic and racial epithets" cannot be prohibited through a speech code, it is unlikely that other, more neutral speech can be proscribed.

In 1992, the Court articulated additional restrictions on the "fighting words" doctrine. In *R.A.V. v. City of St. Paul*,[25] a divided Court[26] struck down a Minnesota statute prohibiting expression that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[27] The state sought to justify the statute on the "fighting words" doctrine claiming that such expression had so little value that it could be prohibited.[28] The majority, however, held that the statute was "underbroad": that is, it included some words that might provoke anger or retaliation but not others.[29] The content of the speech, whether it involved race, color, or one of the other listed discriminatory bases, was the basis for determining whether it was prohibited.[30] The majority found this content-based regulation unacceptable, even assuming that the speech regulated fell under the "fighting words" doctrine.[31]

"Fighting words" can be regulated, according to the Court, not because of the message they send, but due to the method in which it is sent.[32] The majority in *R.A.V.* declared fighting words to be a "nonspeech" element of communication and thus outside the scope

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(writing "[s]peech does not lose its protected character. . . simply because it may embarrass others or coerce them into action"); FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978)

> [T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.

Street v. New York, 394 U.S. 576, 592 (1969) (stating "It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers").

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

26. *See id.* at 381-82 (striking down the Minnesota ordinance). The Court, however, was split five to four over the proper rationale for the outcome. *Id.* at 378.

27. *Id.* at 380.

28. *Id.*

29. *Id.* at 391-92. Justices Scalia, Rehnquist, Thomas, Souter, and Kennedy comprised the majority. Justice Scalia wrote the majority opinion. The concurring Justices White, Blackmun, O'Connor, and Stevens, rejected the "underbroad" argument stated by the majority. Instead, they would have struck down the statute on the grounds that it was overbroad. See Part III of this Article for a fuller explanation of the concurring rationale.

30. *Id.* at 384.

31. *See R.A.V.*, 505 U.S. at 386 (stating that "[t]he government may not regulate use based on hostility, or favoritism, towards the underlying message expressed"). The majority further stated that the State is in fact engaging in viewpoint discrimination, even beyond content discrimination. *Id.* at 391.

32. *Id.* at 385-86.

of the First Amendment. As it stood, the Minnesota statute prohibited speech involving race, color, creed, religion, or gender, but did not prohibit other "[d]isplays containing abusive invective, no matter how vicious or severe."[33] The majority said that this content discrimination was unacceptable.[34] The majority delineated two exceptions to this rule: first, certain speech might be prohibited if the "basis for the content discrimination consists entirely of the very reason the entire class of speech is proscribable," and second, if the subclass of speech is associated with "secondary effects" that the government is attempting to prevent.[35]

Campus speech codes are unlikely to fit under either of these exceptions. In the first exception, a subclass of "fighting words" may be prohibited if it is somehow a more extreme example of the reason for the original creation of the category.[36] University administrators seeking to prohibit speech that involves overtones of racial or sexual discrimination will be hard-pressed to show that speech with those overtones is more likely to incite violence than slurs without racial or sexual discriminatory overtones.[37] The Court's holding in *R.A.V.* supports this because it specifically struck down an ordinance that attempted to differentiate among "fighting words" on similar bases.[38]

For the second exception to apply, the administrators would need to show that they were targeting some kind of "secondary effects" and not the content of the speech itself. The hurt feelings and psychological damage to those who hear the speech do not suffice to qualify speech for this exception. The Court has explicitly stated that such effects are not "secondary effects."[39] With these two narrow exceptions being the only avenues currently available to administrators attempting to limit speech,[40]

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33. *Id.* at 391.

34. *Id.* at 393 (writing "The First Amendment cannot be evaded that easily.").

35. *Id.* at 388-89. The majority found that neither of these exceptions applied to the Minnesota ordinance.

36. *Id.* at 389.

37. *See* Evan G.S. Siegel, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L.J. 1351, 1365-70 (1990) (discussing some of the difficulties that university administrators face in regulating speech).

38. *Id.* at 391.

39. *Id.* at 394 (citing *Boos v. Barry*, 485 U.S. 312, 334 (1988)). "The emotive impact of speech on its audience is not a 'secondary effect.'" *Id.*

40. The Court will shortly address this issue again, in *Black v. Commonwealth of Virginia.*, 553 S.E.2d 738 (Va. 2001), *cert. granted sub nom. Virginia v. Black*, 535 U.S. 1094 (2002). The statute prohibited burning a cross "with the intent of intimidating any person or group of persons." VA. CODE ANN. § 18.2-423 (Michie 2002). In *Black*, the Virginia Supreme Court held that the statute was facially unconstitutional under the First

campus speech codes are not likely to survive the Court's "underbreadth" test, even if aimed at "fighting words."

III. OVERBREADTH AND VAGUENESS: SPEECH CODES THAT COVER EVERYTHING AND NOTHING

Content-based regulation is not the only stumbling block faced by those who would institute campus speech codes. Another crucial problem with campus speech codes is that they are both overbroad and vague because the codes prohibit protected speech as well as speech outside the protection of the First and Fourteenth Amendments. Also, the exact language prohibited by the codes can be hard to define, giving those students punished under the codes little or no advance notice as to exactly what speech has been prohibited.

Several Justices disagreed with the majority's rationale in *R.A.V.*, but agreed with the result.[41] Instead of using the "underbreadth" theory presented by the majority, these Justices would have struck down the Minneapolis ordinance because it was overbroad.[42] In addition to prohibiting a narrow category of "fighting words," the ordinance also prohibited "a substantial amount of expression that, however repugnant, is shielded by the First Amendment."[43] Justice White reiterated the Court's long-standing position that hurt feelings alone are not sufficient grounds for removing First Amendment protection from speech.[44] The ordinance was "fatally overbroad and invalid on its face"[45] because so much protected speech was affected by the ordinance. The overbreadth theory may make it nearly impossible to write a campus speech code that would survive a constitutional challenge; any such code needs to be extremely narrowly tailored to avoid sweeping in protected, if "repugnant," speech.

Amendment. The United States Supreme Court granted certiorari and heard oral arguments on December 11, 2002. As the Virginia Supreme Court specifically cited to *R.A.V.* in striking down the statute, the Court may take the opportunity, and in fact did so in 123 S. Ct. 1536, 1549 (2003) (stating that the state may ban cross burning done with the intent to intimidate because Virginia bans burning of crosses for many reasons).

41. 505 U.S. at 397.

42. *Id.* at 411 (White, J., concurring) (joined by Justices Blackmun, O'Connor, and Stevens). Justice White further stated that the invention of the new doctrine of "underbreadth" would unnecessarily confuse the lower federal courts. *Id.* at 415.

43. *See id.* at 413 (noting that the case could be easily decided within the contours of the "overbreadth" doctrine, and that invention of the "underbreadth" doctrine would unnecessarily confuse the lower courts).

44. *Id.* at 414 ("[S]uch generalized reactions are not sufficient to strip expression of its constitutional protection. The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected").

45. *Id.*

Federal district courts have cited to the overbreadth problem when striking down campus speech codes. In *Doe v. University of Michigan*,[46] the district court declared the speech code adopted by the University of Michigan to be unconstitutional.[47] The court first drew a distinction between "pure" speech and conduct, stating that the latter was open to prohibition and punishment while speech alone generally was not.[48] The court went on to discuss the types of speech that the university might be able to regulate, including "fighting words" and speech "which has the effect of inciting imminent lawless action."[49]

Regulations aimed at prohibiting such speech must be carefully targeted so it affects only the unprotected speech. If the regulation also bans a significant amount of speech protected by the First Amendment, the regulation is overbroad and cannot withstand constitutional challenge. The Michigan speech code was not so carefully targeted. Instead it prohibited both protected speech and potentially unprotected speech.[50] The University's code vaguely described which types of speech were prohibited and the administration never considered whether the speech complained of might be protected by the First Amendment.[51] The University noted that speech that did violate the code included classroom discussions on the origins of homosexuality[52] and informal

46. Doe v. Univ. of Mich., 721 F. Supp. 852, 868 (E.D. Mich. 1989).

47. *Id.* at 861. The speech code prohibited "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" when the behavior included a threat, interfered with any aspect of university life, or created a hostile environment. The code also had a largely identical section prohibiting "sexual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes . . . on the basis of sex or sexual orientation."
Id. at 856.

48. *See id.* at 861-62 (citing the forms of discriminatory *conduct* that can be and are regulated, including employment discrimination, assault, vandalism, conspiracy to deprive others of constitutional rights, abduction, rape, and *quid pro quo* sexual harassment. The court notes that the First Amendment would not present an obstacle to regulating these forms of conduct).

49. *See id.* at 862-63 (noting, however, that the university may not prohibit speech based on the content of the speech, or merely because the speech is offensive or potentially offensive to some listeners).
See Part II, *supra*, for a discussion of content-based regulation of speech.

50. *Doe*, 721 F. Supp. at 864.

51. *Id.* at 862-64.

52. *See id.* at 865 (stating his belief that homosexuality was a disease and that he intended to establish a counseling program to cure gay individuals. After several "heated discussions" on this subject, the student was summoned to a hearing on the matter. The hearing panel found that the student was guilty of sexual harassment but not harassment on the basis of sexual orientation; there was no indication that the administration ever considered the potential First Amendment protections for his statements).

discussions about the challenges faced by dentistry students.[53] Intense debate over the treatment of minorities in an academic program or the reasons an individual is homosexual are not the kind of speech contemplated by the "fighting words" doctrine.[54] Yet those topics were exactly the kind of speech the university saw as sufficiently harmful to warrant full hearings, counseling, and forced apologies.[55] Such an overbroad scope ensured the unconstitutionality of the speech code because it conflicted with the protections of the First Amendment.[56]

The district court also held that the Michigan speech code was void for vagueness because it was not sufficiently clear to put students on notice as to what was prohibited.[57] When a regulation places limits on a constitutional right, the standards by which the regulation will be applied must be even clearer.[58] The University attempted to set the standards by noting that if the effects were to "stigmatize" or "victimize" an individual, then such language was not protected. However, the general terms "stigmatize" and "victimize" were held to be too vague to give students a clear understanding of what was prohibited by the Michigan speech code.[59] No clear standards for distinguishing between protected and unprotected speech were ever established.[60] Absent clear standards as to what language was permissible and what was not permissible, the court was unwilling to allow the university to limit its students' First Amendment rights and found the code unconstitutional.

In 1991, the Court struck down the speech code adopted by the University of Wisconsin as unconstitutionally overbroad.[61] Wisconsin's speech code was created to prohibit the use of demeaning language to create a hostile environment for other students.[62] The district court, however, held that the code

53. *See id.* at 865-66 (stating "he had heard that minorities had a difficult time in the course and that he had heard that they were not treated fairly." In response to a complaint about this statement, the student was "counseled" regarding the speech code and required to make a written apology for the statement).

54. *Id.* at 862.

55. *See supra* notes 52-53.

56. *Id.* at 866.

57. *Id.* at 867.

58. *Id.* at 866 (citing Smith v. Goguen, 415 U.S. 566, 573 (1974)).

59. *See id.* at 867 (stating "[b]oth of these terms are general and elude precise definition").

60. *Id.* at 867.

61. UWM Post, Inc. v. Bd. of Regents, 774 F. Supp. 1163, 1181 (E.D. Wis. 1991).

62. *Id.* at 1165. Specifically, the code prohibited speech that: (1) was racist or discriminatory; (2) was directed at an individual; (3) was demeaning on the basis of race, sex, etc.; and (4) created a hostile environment for the targeted student. *Id.* at 1166.

prohibited more speech than was permissible and that the restricted speech went beyond the "fighting words" exception.[63] "Fighting words" only includes those words that have a tendency to incite a violent reaction, and the Wisconsin code attempted to regulate speech regardless of the possibility for violence.[64] Any psychological or emotional harm suffered by the listener was not a sufficient reason to prohibit the speech in question.[65] The broad scope of the Wisconsin speech code included enough protected speech that the district court held it was unconstitutionally overbroad.[66]

The code's failure to differentiate intent from effect was also a concern for the district court. First, the court held that the phrase "discriminatory comments, epithets or other expressive behavior" was not vague but was "clear and definite in the context of the phrase and the rule."[67] The court also found that the term "demean" was not vague in the context of the rule.[68] However, the court held that the standards for determining when speech was prohibited were ambiguous.[69] The court held that the code did not make clear "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."[70] Regardless of the interpretation of the standard, the code retained its overbroad scope and, therefore, the court refused to interpret the speech code.[71]

These two cases remain the only two challenges to campus speech codes in federal court. In both cases, the district courts

63. *Id.* at 1172. Speech punished by the university included one white student telling an Asian student that "It's people like you, that's the reason this country is screwed up" and "you don't belong here"; one male student was punished for yelling "you've got nice tits" at a female student. Other punished incidents involving at least an element of speech included harassment of a Turkish-American student by another student pretending to be an immigration official and the theft and use of a Japanese student's bank card. *Id.* at 1167-68. While these comments and actions are reprehensible, they do not rise to the level of "fighting words." *Id.* at 1173.

64. *Id.* at 1172-73.

65. *Id.* at 1172 n.7. "[S]peech does not lose its protected status merely because it inflicts injury or disgrace onto its addressees." *Id.*

66. *Id.* at 1177. The court also briefly examined a parallel between the speech code and Title VII's hostile environment provision. The court stated that such an analogy was not appropriate for three reasons: the speech code does not regulate an employment setting; students are not agents for the university as employees can be for an employer, and a statute such as Title VII cannot supercede the First Amendment. *Id.*

67. *Id.* at 1179.

68. *Id.* at 1180.

69. *Id.* at 1180-81.

70. *Id.* at 1180.

71. *Id.* at 1181.

struck down the codes as unconstitutionally vague and overbroad. This track record does not bode well for public university administrators who seek to protect their campus and students by limiting student speech. The speech that administrators want to prohibit through speech codes is difficult to precisely define. If the code covers too much speech, the courts are likely to find that the code is overbroad. If the code covers too little speech, administrators are unlikely to achieve their goal of a safer campus because much of the speech they seek to prohibit will be allowed. If the speech code seeks to be undefined enough to cover all the speech the administrators find harmful, the courts are likely to find that the code is unconstitutionally vague. If speech codes can be written in a way that satisfies both the Constitution and the goal of a safe and supportive campus, the road to such a code is a narrow one indeed.

IV. CAMPUS SPEECH CODES: RESTRICTIONS IN THE LEAST LIKELY PLACES

Beyond the legal restrictions, the unique setting presented by the university can present further problems with instituting speech codes aimed at preventing "undesirable" speech. Universities are seen as places where a free exchange of ideas can and should take place. Restrictions on speech through the adoption of speech codes can hamper the free exchange of ideas, at least when the ideas at issue may be offensive to some parties. The university setting can be further divided into two main areas: inside the classroom (where some restrictions on speech may be permissible to maintain order) and outside the classroom.

A. Speech Codes and Academic Freedom

One area in which universities have attempted to regulate speech is inside the classroom. To protect the minority students attending class, universities have placed limits on what professors and other students may say in the context of a class. These limits are aimed at preventing the creation of a hostile learning environment for students, in particular minorities. The unique setting of the classroom, where the professor stands as an authority figure and the students are arguably a captive audience, suggests that a higher level of speech restriction may be possible.[72]

A number of questions arise when considering academic freedom in the classroom setting such as (1) how closely tied to "legitimate" academic goals must potentially offensive language be

72. *See* William Shawn Alexander, *Regulating Speech on Campus: A Plea for Tolerance*, WAKE FOREST L. REV. 1349, 1358 (1991) (discussing that such restriction might well fall under a "time, place, manner" restriction and therefore be upheld as constitutional if not overly sweeping).

to gain protection; (2) the definition of "legitimate" goals; (3) whether isolated instances of offensive speech sufficient to garner sanctions or, conversely, whether an ongoing pattern of discrimination must be shown? A delicate balance must be maintained to preserve the free exchange of ideas, even offensive ideas, as well as a learning environment that does not alienate certain individuals.[73] The Supreme Court has spoken firmly about the need to preserve academic freedom in American classrooms:

> "[Academic] freedom is . . . a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"[74]

This cherished academic freedom is not, however, the only value at issue in the classroom. Two recent appellate cases discussed the tension created between the First Amendment rights of professors to speak freely in class and the university's desire to provide a learning environment free from discriminatory language. Both cases involved alleged sexually harassing behavior by professors in the classroom. In *Bonnell v. Lorenzo*,[75] Bonnell, a professor at a community college, was accused of creating a hostile environment for women in his classes for allegedly using obscene language, lewd and sexually explicit comments, and stories with sexual innuendoes.[76] Bonnell also circulated a paper discussing the allegations against him.[77] After the college brought disciplinary action against Bonnell, he sued the college, claiming

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73. *See generally* NAT HENTOFF, FREE SPEECH FOR ME – BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER, 114 (1993). Yale professor Donald Kagen writes:

> Freedom of speech is vital, but it is not free; it has a high price. It compels us to go against our natures, to hear unpleasant and even hateful things, to tolerate unpleasant and even hateful people. It requires us to take stern measures against our own, and even ourselves.

Id.

74. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967). The Court struck down a New York law that allowed a university to fire a professor for refusing to sign a statement certifying that he was not a Communist and noting that there is a corollary relationship between the importance of preventing violence and the imperative to protect free speech. *Id.* at 602.

75. Bonnell v. Lorenzo, 241 F.3d 800 (6th Cir. 2001).

76. *Id.* at 803-05 (detailing several students' complaints about Professor Bonnell).

77. *Id.* at 805. Bonnell distributed his paper, *An Apology: Yes, Virginia, There is a Sanity Clause,* along with copies of the complaint against him to more than two hundred faculty members at the community college.

that his speech was protected by the First Amendment.

Justice Clay of the Sixth Circuit noted the conflict between promoting a free exchange of ideas on a college campus and ensuring an environment free from sexual harassment.[78] The court held that the First Amendment protected the paper Bonnell had distributed, but the use of profanity during his classes was not protected.[79] Noting that the language used by Bonnell was constitutionally protected, the court went on to hold that he did not have the "constitutional right to use [it] in a classroom setting where they are not germane to the subject matter."[80] The captive audience in Bonnell's classroom, combined with the college's sexual harassment policy, prohibited him from using language that created a hostile environment for his students and did not advance his educational goals.[81] The court concluded that each use of language that may rise to the level of sexual harassment must be evaluated on its own merits, balancing the concerns of academic freedom for the professor with the college's interest in maintaining a hostility-free learning environment.[82]

First Amendment concerns were also at issue in *Vega v. Miller*.[83] Professor Edward Vega taught a remedial composition class.[84] During one session of the class, he led a "free-association" exercise in which students were to call out words related to a topic.[85] The students selected "sex" as their topic and eventually called out a number of potentially offensive words and phrases.[86] The college terminated Vega's employment, citing his use of sexually explicit language and sexual themes in the classroom.[87] Vega sued the college, stating that the college had violated his academic freedom and First Amendment rights.[88] The college

78. *Id.* at 810.

79. *Id.* at 821.

80. *Id.* at 820-21.

81. *Id.* The court noted that a free exchange of ideas, even controversial ones, should still be encouraged in college classrooms. Profanity simply does not hold the same constitutional protection and can therefore be limited in this setting. The court seemed to focus on the fact that Bonnell's students could not just "avert their [ears]" to avoid the profanity. *Id.*

82. *Id.* at 823-24. In this instance, the court held that this balance tipped narrowly in favor of the college, given the specific facts of the case.

83. Vega v. Miller, 273 F.3d 460 (2d Cir. 2001).

84. *Id.* at 462.

85. *Id.* The students were then to group the words in "clusters." The purpose of the exercise was to help students learn to be less repetitive with their word choices.

86. *Id.* at 463. The students started with words such as "marriage" and "children," but progressed to vulgar phrases referring both to the sexual act and to male and female genitalia. *Id.* None of the students ever complained about the exercise, but the college became aware of it through an investigation of another matter. *Id.*

87. *Id.*

88. *Vega*, 273 F. 3d at 464.

claimed qualified immunity "on the ground that the law concerning Vega's claims was not clearly established [when the college terminated his contract]."[89] The Second Circuit held that the college could reasonably have believed that it was not violating Vega's First Amendment rights, given the state of the law concerning academic freedom.[90] While the court refused to specifically decide whether the college's actions were unlawful, it did hold that the incident in Vega's classroom was unnecessary and unrelated to his legitimate academic goals.[91]

The outcomes in these cases suggest that courts will pay special attention to the "captive audience" that professors have in their classrooms when evaluating claims of academic freedom. The conflict with the desire to protect students from offensive speech may be resolved on the issue of what constitutes a "legitimate" academic goal.[92] The issue of what goals are "legitimate" has yet to be resolved and will present a difficult challenge if and when courts address it. Some limits, however, are likely to be permissible in the classroom setting, even if they are restricted to the most outrageous and offensive speech that lack academic merit. Administrators and courts must take care, however, that the limits do not unduly restrict academic ideas and speech solely because they might offend someone.[93] Furthermore, these cases indicate there may be a significant distinction between university speech codes that address student speech inside the classroom versus outside the classroom, and codes that address the speech of professors.

B. An Equal Playing Field? Speech Outside the Classroom

Student speech outside the classroom setting presents a more difficult situation for university regulation. The concern over a

89. *Id.*

90. *Id.* at 468.

91. *Id.* Judge Cabranes, in dissent, would have denied qualified immunity to the defendants on the grounds that, inter alia, the sexual harassment policy was unconstitutionally overbroad and vague. *Id.* at 480.

92. *See* Frisby v. Schultz, 487 U.S. 474, 487, 491 (1980) (holding that the First Amendment allows the government to censor objectionable speech when a captive audience cannot avoid it in order to serve a legitimate goal).

93. *See, e.g., National Public Radio: All Things Considered* (NPR radio broadcast, Sept. 10, 2002), *available at* http://www.thefire.org/issues/npr_110902.php3 (last visited Sept. 10, 2003). Professor Berthold, in reaction to the terrorist attacks on the World Trade Center and Pentagon, made an off-the-cuff remark: "Anybody who blows up the Pentagon gets my vote." The comment led quickly to angry phone calls and emails, death threats, and a university investigation of Professor Berthold. He was allowed to retain his position, but is now prohibited from teaching freshman history. Other professors at other universities were also denounced for asking their classes critical questions about Muslims, Israel, and the United States' Middle East policy in the days following the attacks.

"captive audience" that plays such a large role in the classroom setting is not present, nor do students have the same power over one another that a professor can exert. With these countervailing interests removed, the interest in a free and robust exchange of ideas holds even greater influence.[94] Universities have little legitimate interest in sanitizing and unifying the viewpoints held outside the classroom and on campus simply to avoid hurting anyone's feelings.[95] Therefore universities have less justification for imposing speech codes outside the classroom.[96]

Even the best intentions can lead university administrators astray. In 1975, Yale University adopted the Woodward Report, a report emphasizing the importance of free speech in the university setting.[97] The report acknowledged the need to strive for equality on campus, but placed free speech as a higher value, "a vital, indispensable need for a free university."[98] Ironically, Yale became the setting for a free speech conflict just a little over a decade after the Report had been adopted. Wayne Dick, a Yale undergraduate student, posted flyers around campus that parodied an upcoming gay and lesbian awareness week.[99] While the text of the flyers was not legally obscene or defamatory, it offended many people at Yale.[100]

While Dick had published the flyer anonymously, the person who had copied the flyer for him eventually identified him.[101] Dick received a letter from an associate dean, notifying him that a complaint had been filed about the posters, that a committee had decided the complaint had merit, and that the case would be submitted to the Yale College Executive Committee.[102] This

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94. *See* Healy v. James, 408 U.S. 169, 187-88 (1972) (noting that "[t]he College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent").

95. *See* HENTOFF, *supra* note 73, at 116 (quoting Professor Kagan as saying:

> Shock, hurt, and anger are not consequences to be weighed lightly. No member of the community with a decent respect for others should use, or encourage others to use, slurs and epithets intended to discredit another's race, ethnic group, religion, or sex. [Yet] it may sometimes be necessary in a university for civility and mutual respect to be superceded by the need to guarantee free expression).

96. *Id.*

97. *Id.* at 117.

98. *Id.* (citing C. Vann Woodward, Chair of the Woodward Report).

99. *Id.* at 118-19. The flyers advertised a fictitious event called "BAD Week" and was inspired by the real event, "GLAD" (Gay and Lesbian Awareness Days). *Id.* at 119.

100. *Id.*

101. HENTHOFF, *supra* note 73, at 119.

102. *Id.* at 121. Dick was informed that he might have violated a university regulation that prohibited "[p]hysical restriction, assault, coercion, or intimidation of any member of the community . . . [including] any act of

committee "conducted their proceedings in secret [and] issued no written opinions or . . . even a count of the final vote."[103] Dick wrote a letter to this committee, as he was requested to do, asserting that the Report protected his flier.[104] The committee disagreed.

Wayne Dick was told that his flyer was "worthless speech" and therefore not protected.[105] He was found guilty of violating the university's regulations and was placed on two years of probation.[106] If he committed a "serious offense" (a term which was never defined) while on probation, he would be suspended or expelled.[107] His probationary status would also be noted on his transcript and in any letters of recommendation sent by the university or his professors.[108] When Dick wrote the president of Yale, asking for an explanation of what would constitute a "serious offense," the reply he received was not enlightening.[109] He was told that the university felt his freedom of expression was important and that his "right to free expression of opinions, on any issue, [would] be protected by the University in the future as it [had] been in the past."[110] Apparently, "any issue" meant any issue on which Dick's views aligned with the accepted views on campus.

Wayne Dick's story illustrates what can happen when university administrators try to censor speech based on the unpopularity of the views being expressed. While Yale decided several months later to reverse its decision about Dick's flyer, he was still subjected to harassment, a secret trial, and a vague and ominous punishment, simply because he expressed a view counter to the accepted norm on campus.[111]

The Supreme Court has a long-standing commitment to the idea that diversity of opinion should be welcomed in educational settings, even if some of those opinions may be unpopular or even offensive.[112] Especially outside of the classroom, where students

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harassment, intimidation, coercion, or assault, or any other act of violence against any member of the community, including sexual, racial, or ethnic harassment." *Id.* (citing Chapter I, Section B, pages 6-7 of the Yale College regulations).

103. *Id.*

104. *Id.* at 122.

105. *Id.*

106. *Id.* at 123-24.

107. HENTHOFF, *supra* note 73, at 124.

108. *Id.*

109. *Id.* at 124-26.

110. *Id.* at 125-26 (citing the letter from Yale's president to Wayne Dick).

111. *Id.* at 129. The decision was only reversed after C. Vann Woodward, the author of the Woodward Report, became Dick's advocate on this issue. The reversal was not uniformly welcomed; representatives of minority groups on campus pointed to the decision as an example of minority issues not being taken seriously. *Id.* at 129-30.

112. *See, e.g.,* Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503,

may feel more free to express themselves without fear of official academic repercussions, university administrators should be extremely cautious before moving to silence that expression.[113] Despite the excellent intentions of those involved,[114] free speech cannot and should not be trammeled in the name of student equality.[115]

C. Sexual Harassment: Special Circumstances?

Sexual harassment, in the context of campus speech codes, presents an additional problem. Many expressions relating to sex are, even if offensive, not actionable.[116] Much of the sexual speech that occurs on a college campus is consensual and not harassment.

508-09 (1969) (noting that "[a]ny variation from the majority's opinion may inspire fear. Any word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . and our history says that it is this sort of hazardous freedom . . . that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." (citing Terminiello v. City of Chicago, 377 U.S. 1, 2 (1949))). *See also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943) (stating "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard.").

113. *See* Debra J. Saunders, *Academia's Swindle*, THE S.F. CHRON. (Aug. 13, 2002). (demonstrating that students in positions of power must also take care not to unduly burden their fellow students' rights). At the University of California at Berkeley, the student senate voted to raise the school newspaper's rent unless it "printed an apology for the cartoon [dealing with the terrorist attacks of 9/11] and adopted 'voluntary diversity training.'" *Id.* The Student Senate said "they didn't want to suppress differing viewpoints, but that for the public good, it was their duty to prevent speech that is racist, divisive or likely to lead to violence." *Id.*

114. *See, e.g.*, Caleros *supra* note 2, at 1274-75 (noting that how "excellent" those intentions [of the administrators] are has been questioned, especially in the time since the two federal courts struck down campus speech codes). University administrators may be aware that speech codes will not pass the constitutional test, but enact them regardless to satisfy vocal groups on campus calling for a sanitizing of campus speech. *Id.* Alternatively, they may not care that the codes are unconstitutional, enacting them with the expectation that no student will actually bring the constitutional challenge needed to strike them down. Calleros quotes a university administrator on regulating speech: "I believe in pushing for discipline of the speaker in such a case, regardless of the legal problems. Our action might get struck down as unconstitutional, but at least we'll go down swinging, and the students will know that we went to bat for them." *Id.* at 1274.

115. SMOLLA, *supra* note 11, at 169. Smolla summarized it well: "In a just society, reason and tolerance must triumph over prejudice and hate. But that triumph is best achieved though education, not coercion. Tolerance should be a dominant voice in the marketplace of ideas, but it should not preempt that marketplace." *Id.*

116. Few would argue that a single request for a date, a bawdy joke, or an admiring comment aimed at an attractive fellow student should constitute the grounds for disciplinary action. Yet a speech code drawn too broadly might well encompass these and other similarly innocuous speech.

On the other hand, it is difficult to imagine any speech that is considered harassment on racial or ethnic grounds being consensual. This situation raises the question of how to determine when sexual speech has become harassing and not "merely" offensive and therefore punishable under a speech code. After all, "one man's vulgarity is another's lyric."[117] Proponents of campus speech codes must also struggle with the issue of whether sexual speech alone can cross the line into harassment.

One possible dividing line for determining when sexual comments become harassing is the "unwelcomeness" standard used in the Title VII context. Under Title VII, the Supreme Court has held that part of the standard for whether actions rise to the level of sexual harassment is whether the actions were unwelcome to the recipient.[118] Unwelcomeness, however, can be a difficult quality to determine. At some level, it becomes a question of subjectivity or objectivity: if the recipient of the action did not demonstrate to the alleged harasser that his or her actions were unwelcome, were they actually welcome? Or must the internal thoughts of the recipient be considered in evaluating the actions, even if he or she did not in any way convey those thoughts? The entire situation surrounding the alleged sexual harassment will be examined in an attempt to answer the question of whether the actions were welcome or not. The burden is placed on the plaintiff in a Title VII case; he or she must show that the actions of the alleged harasser were not welcome.[119] While it may seem harsh to force the alleged victim to prove that he or she did not welcome the conduct, this standard avoids punishing individuals for conduct they may not have known was perceived as harassment.

Later Title VII cases have tried to further define "unwelcomeness." In *Burn v. McGregor*,[120] the court found that . . . [w]elcomeness cannot necessarily be assumed because of the recipient's own prior actions, such as "use of foul language or sexual innuendo in a consensual setting."[121] However, evidence of the recipient's "willing and welcome" participation in the actions at issue can be used to show that the actions were welcome, at

117. Cohen v. California, 403 U.S. 15, 25 (1971). The Court was examining the difficulty of determining what speech is "offensive" and therefore affected by the California statute at issue. The Court noted that "[s]urely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." *Id.*

118. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986).

119. *See, e.g.*, Burns v. McGregor, 989 F.2d 959, 964 (8th Cir. 1993) (listing elements of plaintiffs burden of proof).

120. *Id.*

121. *Id.* at 963. *See also* Swentek v. USAIR, Inc., 830 F.2d 552, 557 (4th Cir. 1987) (stating that one's previous actions do not establish that allegedly harassing conduct is welcome).

least at the time they were carried out.[122] The court can evaluate the recipient's "words, deeds, and deportment" to determine if the conduct was welcomed.[123]

This "unwelcomeness" standard might provide some guidance if university administrators insist on attempting to regulate student speech, especially sexual speech.[124] If speech is to be prohibited, it must be clear that the speech falls outside First Amendment protection. The more objective standard of "unwelcomeness", examining the entire situation to determine if the recipient welcomed the speech, might help clarify when sexual speech is and is not protected. If the speech is only borderline offensive, so that only the recipient of the speech "knows" it is offensive, administrators will have a harder time enforcing a speech code that bans that speech. The inherent vagueness in prohibiting speech offensive to the listener prevents administrators from clearly defining what speech will be prohibited, exposing the code to a (most likely successful) constitutional challenge for vagueness.

In addition to the difficulty faced in dividing welcome from unwelcome sexual speech, proponents of speech codes face another difficult question: is speech alone enough? A number of speech code supporters have suggested that speech is enough because speech can cause sufficient harm and therefore it should be regulated.[125]

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122. Reed v. Shepard, 939 F.2d 484, 491 (7th Cir. 1991). The Seventh Circuit held that the plaintiff had welcomed a wide variety of conduct from her co-workers, therefore failing to state a claim of sexual harassment. This conduct included sexual jokes and innuendo, having her head forcibly placed in a co-worker's lap, having a cattle prod placed between her legs, being handcuffed to a toilet, and being maced. *Id.* at 486.

123. Carr v. Gen. Motors Corp., 32 F.3d 1007, 1011 (7th Cir. 1994). The court found that the co-workers' conduct was unwelcome despite the plaintiff's own "unladylike" behavior. *Id.*

124. The standard from Title VII cases is unlikely to be imported directly to campus speech code cases because of several key differences. For students, the university is not an employment setting, and students are not agents of the university in the same way that employees may be considered agents of the employer. The "unwelcomeness" standard from Title VII might, however, provide a starting point for speech code cases.

125. In fact, some universities have decided that sexual harassment can occur without even speech. At the University of Nevada-Las Vegas Law School, a student was disciplined for viewing the *Maxim* website, a men's magazine, on his laptop computer while on a class break. Two female students looked over his shoulder at the screen and were offended by what they saw. The students complained to their professor and the male student was asked to attend a diversity awareness seminar and write an email apologizing for his conduct. If he did not, he would face formal charges from the law school. *See* Steve Sebelius, Editorial, LAS VEGAS REVIEW-JOURNAL Oct. 10, 2002, at 9b (defending the student's First Amendment right to view the web page).

The Supreme Court, however, has strongly suggested that speech alone will not be enough in the Title VII setting (and, by extension, in the speech code setting).[126] The Court has stated that some speech, such as sexually harassing speech, may be regulated because it is "swept up incidentally" with the regulation of conduct.[127] This regulation is only possible in situations in which "the government does not target conduct on the basis of its expressive content."[128] Speech alone, without accompanying discriminatory or harassing conduct, may be beyond the regulatory power of state actors.

As the constantly shifting definition of "unwelcomeness" in the Title VII setting shows, it can be extremely difficult to separate consensual sexual conduct from non-consensual, harassing conduct. That line becomes more crucial, yet harder, to draw when the "conduct" is solely speech. A standard that both preserves the First Amendment rights of students and protects those students from sexually harassing speech is hard to imagine. Students should not be punished for speech protected by the First Amendment. In Title VII cases and perhaps in speech code cases, the Court seems ready to define sexual harassment as, at a minimum, speech plus some conduct.

V. CONCLUSION

Campus speech codes present numerous problems for public universities. These codes tend to be overbroad, trying to eliminate any potentially offensive speech from the campus. The broad sweep of these codes keeps them from surviving a constitutional challenge. The codes also are, of some necessity, vague. It is probably impossible for a university to list all types of speech prohibited by such a code; however, conversely, when prohibited speech is not specified the codes are unconstitutional. These two barriers to speech codes, overbreadth and vagueness, create a narrow definition of what a constitutional speech code is and illustrates the difficulty posed by the creation of such codes.

First, who decides what is offensive? If the majority decides, unpopular speech may be censored simply for being out of favor.[129] If the minority decides, speech that seems innocent to the majority may, unexpectedly, be found to be offensive and therefore

126. *R.A.V.*, 505 U.S. at 389-90.

127. *Id.* at 389.

128. *Id.* at 390.

129. Consider, for example, Wayne Dick's signs. In an earlier time, the posters would have represented the dominant view toward homosexuality on most campuses and would likely have gone unnoticed, or at least unpunished. Now that views have changed, his now minority view is singled out by the administration for punishment.

punishable.[130]

Second, even if university administrators could silence expression that is unpopular or offensive, should they? The usual justification for campus speech codes is that the university is attempting to preserve an equal playing field for its students, one in which all students feel safe and supported in their academic pursuits. But is this protection really needed? This theory assumes that certain students cannot survive hearing verbal attacks on their religion, race, gender, sexuality or ethnicity. Such an assumption insults those who are able to hear this offensive speech without suffering the permanent, crippling psychological wounds that they are told are inevitable.[131]

Finally, sanitizing campus speech to eliminate "offensive" comments fails to address the underlying problems.[132] Driving racist, sexist, and other discriminatory speech underground will not necessarily eliminate a student's thoughts and emotions. In fact, students who come to campus holding such beliefs may feel persecuted by the university's edict forbidding those beliefs, or at least, their expression, and may therefore cling more tightly to them than if they had been permitted to voice their opinion. It could result in physical, potentially violent expressions that would otherwise be verbal. Allowing those views to be aired also gives opponents the opportunity to engage in counterspeech, exposing the weaknesses of the offensive views and providing a much better opportunity to challenge or change a student's underlying beliefs.[133]

The struggle over free speech continues at universities today. In addition to speech codes, some universities have adopted "free

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130. *See, e.g.*, Dale Russakoff, *Penn Women Drop Racial Charge*, THE WASH. POST, May 25, 1993, at A3 (describing a situation where a University of Pennsylvania student risked expulsion for calling several black female students "water buffaloes"). While he insisted the term was insulting but not racially-derogatory, the university chose to believe the black students who insisted it was a racial epithet. The black students eventually dropped their charges against the male student, claiming that the media was biased against them and that they could not receive a fair hearing on their charges.

131. *See generally* Bryan Christopher Adams, *Shouting Epithets on a Crowded Campus–A Lesson in Tolerating Intolerance*, 44 ALA. L. REV. 157, 174-75 (1992) (discussing the potentially stigmatizing effect of speech codes).

132. *Id.* at 171-73. Some commentators have suggested that the move toward promoting equality on campus at the expense of free speech may have created an atmosphere where an open discussion of the lingering problems of racism, sexism, and other forms of discrimination cannot take place.

133. *See, e.g.*, Alexander, *supra* note 72, at 1349 (expressing the fear that speech codes will prevent educated individuals from "rais[ing] the level of public discourse about topics like race, gender, and human sexuality"); Calleros, *supra* note 2, at 1256-63 (discussing the efficacy of counterspeech); Benjamin Thompson, *U. Wisconsin Betrays Both Campus Climate, Free Speech*, U-WIRE, May 8, 2002 (explaining the need of free speech in campus settings).

speech zones."[134] In these zones, students and other protesters are free to express themselves on any issue they choose. After creating these zones, the universities then use them as leverage to justify limiting speech on other parts of the campus.[135] These "free speech zones" have not yet been challenged in court, but they are as unlikely to withstand constitutional challenge as are speech codes. Donna Shalala, as Chancellor of the University of Wisconsin in 1988, spoke about universities and the First Amendment:

> The First Amendment is not something that we can honor when we choose and disregard when we do not like what we hear . . . freedom is never easy, and a great university is not a place to play with constitutional rights. It is a laboratory for open debate, a haven for diverse opinions. It must be a special place where those rights are protected and where principles of freedom are taught to citizens . . . [U]niversity administrators cannot abandon those principles to satisfy the will of a few, or even of many, at the expense of civil rights guaranteed to us all.[136]

A robust exchange of ideas, even offensive, sometimes hurtful ideas, is a central part of the learning and intellectual exploration essential on university campuses. While preserving civility on campuses is a noble goal, it is a goal that must take second place to the freedoms guaranteed by the First Amendment.

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134. *See, e.g.*, Harvey A. Silverglate & Joshua Gewolb, *Universities are Stifling Speech on Campus Less*, FULTON COUNTY DAILY REPORT, Oct. 8, 2002 (discussing the implementation of free speech zones on college campuses).

135. Some administrators justify the zones with a claim of public safety. *See, e.g., College students protest against so-called free speech zones at their campuses, saying that they violate their First Amendment rights*, (NPR: Morning edition radio broadcast, Apr. 26, 2002 (citing West Virginia University President David Hardesty).

136. Kiki Jameson, *Paved With Good Intentions: The University of Wisconsin Speech Code*, HATE SPEECH ON CAMPUS 171 (citing WISCONSIN STATE JOURNAL, Nov. 13, 1988, at 18A).