White Papers

Circumventing the "True Threat" Standard in Campus Hate Speech Codes

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Abstract

With a series of decisions striking down speech codes on campuses, the Supreme Court has made dealing with hate speech very difficult. Speech must present a "true threat" in order to be regulated. On the other hand, the Court has been more permissive when it comes to regulations regarding sexual harassment. This study proposes using the Court's model of sexual harassment for hate speech in work and learning environments to circumvent the "true threat" standard.

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> *"By words one person can make another person blissfully happy or drive them to despair, by words the teacher conveys his knowledge to his pupils, by words the orator carries his audience with him and determines their judgments and decisions. Words provoke affects and are in general the means of mutual influence among men."*[1]

Hate speech is a pervasive problem suffered particularly by ethnic and sexual minorities. It can undermine self esteem, cause isolation, and result in violence. Words can be damaging and the damage can be heightened by emotion and other contextual factors.[2] Unfortunately, hate crimes are the on rise. According to FBI figures released on November 22, 2004, hate crimes rose from 7,462 in 2002 to 7,489 in 2003. Half of these crimes targeted racial groups; 2,548 against Blacks, 830 against whites, 231 against Asians. Religious intolerance was the cause of 1,343 crimes, and of these, 927 targeted Jews. Attacks based on sexual orientation amounted to 1,239 cases.

Words can reinforce and/or maintain social inequality in the home, in the classroom, in the workplace, and in social settings. Hate messages are real and immediate for victims. In her article in the *Miami Law Review*, Professor Patricia Williams called hate messages "spirit murder."[3] According to research completed by professors Kitano and Allport, the effects of hate speech include displaced aggression, avoidance, retreat, withdrawal, alcoholism, and suicide. The special report of the Attorney General of California [1988] demonstrates that epithets and harassment "often cause deep emotional scarring and bring feelings of intimidation and fear that pervade every aspect of a victim's life." In his book *Words that Wound*, Professor Delgado demonstrates that hate speech victims suffer high blood pressure and loss of self-worth. In the *Journal of Social Psychiatry*, Professor Hafner demonstrates that psychological disturbances including headaches, social withdrawal, depression, and anxiety attacks result from working or learning in a hostile environment. Other reports clearly demonstrate that hate speech results in feelings of ethnic or gender inferiority. In the *Journal of Experimental Sociology* (1985), Greenberg and Pysczynski [Piszynski] demonstrate that overhearing a racist slur causes the listener to evaluate members of the slurred group more harshly in the future. Hostile environments trigger avoidance strategies that limit personal freedom and have serious economic consequences. Students who are victims of hate speech often avoid classes and other places of hate speech such as food courts and libraries. Their grades then suffer along with their socialization into a healthy diverse community. According to Lieberson, *Stereotypes: The Consequences for Race and Ethnic Interaction* in Marrett & Leggon, eds (1985) *Research on Race and Ethnic Relations*).

Yet the First Amendment of the constitution protects freedom of expression, thereby guaranteeing protection for hate speech unless it presents a clear and present danger, is obscene, libelous, slanderous, or an imminent, "true" threat. This standard presents campus officials with a difficult dilemma. In accordance with strict readings of the First Amendment by the courts, officials must protect all speech not regulated by time, place and manner "content neutral" restraints, unless it can be shown that the speech presents a "true threat."[4] Such a rigorous standard places a heavy burden of proof on the attacked and on school officials. The standard is the reason that no campus codes have passed constitutional muster to date, though some have yet to be challenged.

The purpose of this study is review the law surrounding hate speech and to start a conversation about a third way to regulate hate speech. The study proceeds in several stages. First, it reviews the current status of hate speech rulings in several venues. It deals with a vast array of descriptors which have been used in the hate speech debate including racist and sexist speech, harassing speech, inappropriate and/or insensitive speech, insulting speech, verbal attacks on groups, fighting words, and performative utterances. Second, in order to overcome the chaos resulting from these myriad terms, this study builds an analog to sexual harassment law that legally proscribes hate speech on campuses without violating the First Amendment or placing an impossible burden of proof on the offended. The key to overcoming the semantic problems is to transcend them by creating a context driven system that relies on proof that a hostile learning environment exists. Third, the study concludes by suggesting constitutional, campus-based solutions to the hate speech problem that stem from this analysis.

Hate Speech in Non-Campus Venues

To escape some free speech dilemmas the Court has established standards based on a line of cases extending back to *Brandenburg v. Ohio* (1969), a unanimous decision by the Supreme Court that overturned Klan leader Brandenburg's conviction for having advocated anti-black, and anti-Semitic violence at a gathering of the Ku Klux Klan. Brandenburg's most inflammatory language included these passages:

> *[I]f our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revenge taken.... Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel.*[5]

The Court ruled that "a State [may not] forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action, and is likely to produce such action..."[6] In a series of subsequent decisions, the Court has tried to clarify this decision by arguing that speech is protected by the First Amendment if it is not obscene, libelous, slanderous, treasonable, or presents a "true threat" to person.

These rulings go to the heart of hate speech laws and campus codes which seek to punish hate speech to teach people that racism is unacceptable and harmful.[7] These decisions make writing such codes a near impossibility. They begin with cases which most scholars agree were meant to protect dissent. For example, in *Hess v. Indiana* (1973), Gregory Hess was brought to trial for encouraging anti-war demonstrators to escalate their activities. At one point, he yelled, "We'll take the fucking street later."[8] The Supreme Court overturned Hess' conviction on the grounds that his speech was protected because it was not "obscene," did not constitute "fighting words," and was unlikely to produce imminent lawless action.

Terminiello v. The City of Chicago (1948) is one of the *stare decisis* precursors to *Hess*. This oft- cited decision overturned a conviction because the sitting judge had instructed the jury that all the prosecution needed to prove was that the speech in question "stirs the public to anger, invites disputes, brings about a condition of unrest, or creates a disturbance."[9] Writing for the majority, William O. Douglas argued that free speech often invites dispute:

> *It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions ... or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.*[10]

Douglas then specifically mentions classes, lunchroom and campuses where "our Constitution says we must take this risk."[11]

Campus Applications

However, the limitation on speech codes has been expanded in more recent decisions. Those seeking to restrict sexual and/or racial harassment have been discouraged by such cases as *Doe v. University of Michigan*.[12] In 1989, a federal district court held that the University's "Policy on Discrimination and Discriminatory Harassment of Students in the University Environment" was unconstitutional because it was too vague and over-broad. The policy prohibited any behavior, verbal or physical, that stigmatized or victimized an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or veteran status, and proscribed verbal or physical conduct that stigmatized or victimized an individual on the basis of sex or sexual orientation. The policy was brought down by a biology graduate student who insisted on his right to discuss certain controversial theories positing biologically based differences between sexes and races. The court ruled that the "University could not ... establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages ... to be conveyed."[13] The court did this while recognizing that "fighting words" and "[c]ertain kinds of libel and slander are not protected" under the First Amendment.[14] However, it should be clear from this example and the ones that follow that the Court has severely narrowed what qualifies as fighting words.[15]

In 1988 the University of Connecticut at Storrs expelled a junior named Nin Wu from the dormitories for taping a poster to her door which listed types of persons who should be "shot on sight." The list included "bimbos," "preppies," "racists," and "homos." The federal district court in Hartford reinstated Wu arguing her First Amendment rights had been violated. In 1991 another federal district court stopped George Mason University in Virginia from imposing any discipline on a fraternity for engaging in expressive conduct that perpetuated racial and sexual stereotypes.[16] In this instance fraternity members dressed up as "ugly women" using blackface, pillows, and other articles of apparel that suggested racial stereotypes. The court said, "The First Amendment does not recognize exceptions or ideas or matters some may deem trivial, vulgar or profane .... [A] state university may not hinder the exercise of First Amendment rights simply because it feels that exposure to a given group's ideas may be somehow harmful to certain students."[17] Similar rulings occurred in the cases of the Zeta Beta Tau fraternity at California State University at Northridge and Phi Kappa Sigma at the University of California at Riverside. In February of 1995, the California Supreme Court found the Stanford University code to be "overbroad" and a clear violation of standards set down in *R.A.V. v. City of St. Paul* (1992). In 2001 in *Clark County v. Breeden*, the Supreme Court made clear that a single crude remark by a supervisor is not enough to trigger a sexual harassment lawsuit.[18]

Speech codes must not only meet "the most exacting scrutiny," but the university must prove that the codes will result in a change of atmosphere and belief. That is, they must advance the cause the university believes is in the government's interest.[19] This position was no doubt reinforced by *R.A.V. v. City of St. Paul* (1992), in which the Supreme Court struck down a city ordinance that made it a misdemeanor to place "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 ..." [20] Writing for the majority, Justice Scalia claimed that the ordinance was unconstitutional because:

> *displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered.... Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas.*[21]

While this decision was somewhat modified by *Mitchell v. Wisconsin* in 1993, which allows for enhanced sentencing when crime is committed in the context of hate speech, it still made it almost impossible for a campus to write speech codes.

In *Mitchell*, the Court upheld a Wisconsin statute that allowed for the enhancement of a penalty for aggravated battery on the grounds that Mitchell's selection of a victim was based on race.[22] An African-American male, Todd Mitchell, was arrested for beating a white youth; upon conviction, he was sentenced to an additional two years because the crime was racially motivated and therefore fell under the Wisconsin law which allowed for extended sentencing if the victim had been targeted on the basis of "race, religion, color, disability, sexual orientation, national origin, [and/or] ancestry." The Wisconsin Supreme Court reversed the sentencing; however, a unanimous U.S. Supreme Court re-instated the sentence and argued that judges have been given latitude in sentencing including taking into account racial hatred.[23] Furthermore, in writing the decision, Chief Justice Rehnquist argued that the statute had no "chilling effect" on free speech and was therefore not overly broad: pure expression may not be prohibited even if racially offensive, but if a crime is committed and it can be shown that the perpetrator was racially motivated, the penalty for the crime can be increased. Relying on precedents that establish judicial flexibility in sentencing,[24] Rehnquist wrote:

> *Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant. The defendant's motive for committing the offense is one important factor.... [I]t is equally true that a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge.... [However] Title VII, for example, makes it unlawful for an employer to discriminate against an employee "because of such individual's race, color, religion, sex, or national origin." In* Hishon*, we rejected the argument that Title VII infringed employers' First Amendment rights.*[25]

Thus, while the Supreme Court has opened the door to penalizing hate speech when it occurs in the context of another crime, it has generally restricted speech codes per se. In other words, campuses are free to enhance penalties for non-speech crimes such as assault, if they can prove that the assault was motivated by racial, religious or gender bias.[26] They were restricted when it came to hate speech that was not linked to criminal action.

All that changed with the decision in *Virginia v. Black* in 2003. In this case, the Court struck down a Virginia law banning the burning of crosses per se, but upheld laws in California and other states that ban cross-burning that intimidates. In the other words, the Court ruled that action which could be proved to convey an "intent to intimidate" was not protected by the First Amendment. The 6-3 ruling upheld laws that target cross burning and the use of Nazi swastikas to "terrorize" residents, even if such displays are on private property. The ruling revealed deep divisions on the Supreme Court. Five justices, led by Justice O'Connor, would ban cross burnings and the like if they carry a provable intent to intimidate. She wrote, "Threats of violence are outside the First Amendment.... The burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm.... In light of cross-burning's long and pernicious history as a signal of impending violence ... Virginia may choose to regulate these messages." Justice Thomas in his concurrence said he would ban all cross-burnings regardless of intent. Justices Souter, Kennedy and Ginsburg dissented; they would protect cross-burning because the law is singling it out because of its protected message content.

Along with the restrictions I have reviewed above, we need to be aware of a string of decisions over the years in which courts decided that the following words are opinions and neither fighting words nor slanderous, nor libelous: bigot, horse's ass, jerk, idiot, con artist, charlatan, Marxist, liar, Fascist, racist.[27]

The Problem of Hate Speech on the Internet

While private online systems have the right to censor and ban a user's speech,[28] the case is murkier for universities that are publicly funded. Their rules must be content-neutral under First Amendment precedents, particularly those set in "hate speech" cases wherein judges found codes to be overly broad and vague, and thus open to arbitrary and capricious application. Furthermore, we should not be surprised if the courts added the Fourth Amendment right of privacy to the First Amendment right of freedom of expression when questioning campus policies with regard to e-mail.[29] The right to publish privately and anonymously was born during the revolution and sustained during the debate over the Constitution and the Bill of Rights. There can be little doubt about the original intent of the Founders on this issue. That is why so-called "acceptable use" policies now in place are unlikely to survive constitutional scrutiny. Government—or by extension university—use of filters and censorship standards certainly invades privacy and chills free speech.

Legislators have rationalized government censorship of the Internet in many ways including prevention of terrorism, stopping the distribution of obscene or indecent material to children, detection of computer hackers, and the position that all new media should be regulated until their impact is known. Thus, some legislators believe that a new regulatory model should be developed for electronic communications providers. Their call for reform raises several questions: What level of responsibility will universities bear for communications initiated by their students? Will communications retain traditional academic freedom once they leave the campus?

Two cases in this area deserve mention. The first involves a two million dollar lawsuit for damages to his career by a graduate student at the University of Texas, Dallas. The student, Gregory Steshko, was deprived of e-mail privileges by the university because he was using his account to broadcast political messages critical of Boris Yeltsin's alleged sexual predilections. Since the University of Texas is government supported, it must answer to the charge that its restrictions on e-mail violate the First Amendment protection of content. Is an e-mail account an automatic right for graduate students? Is it an open forum protected by the First Amendment? Or is it a privilege that can be revoked at

any time?[30] This is an important question because e-mail has become a vehicle for hate speech, whether signed or anonymous.

A second case serves to clarify the courts' position. It involves a University of Michigan student who exchanged e-mail with a man in Canada describing their mutual sexual interest in violence against women and girls.[31] Additionally, the student posted a story to an Internet news group describing violent sexual acts. The female character in the story bore the name of one of his classmates. The district judge dismissed the charges against the student because the communications failed to create a "true threat" as required by First Amendment jurisprudence. The district judge noted that the First Amendment requirements must be met regardless of the mode of communication.

Even where the courts have accepted that students are a captive audience, they have been strict about the burden of proof that is placed on school administrators. This position was clarified in a five-to-four ruling in 1999 in *Davis v. Monroe County Board of Education*.[32] But before we can look at that clarification, we need to examine the *Gebser* decision a year earlier upon which *Davis* was based. *Gebser* argues that Title IX "was modeled after Title VI" and that the two statutes are "parallel," with Title IX covering gender discrimination and Title VI covering racial discrimination in federally funded education programs. In *Gebser* the Court limited employer liability to employer fault after notification:

> *It would be unsound, we think, for a statute's* express *system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially* implied *system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice.* (Emphasis theirs).[33]

That is, the Supreme Court tried to reconcile a regulation that required that the accused be given a chance to reform with a regulation that held the accused responsible no matter what. Obviously, this left the lower courts a bit adrift.

Thus, the Court took up the *Davis* case to provide guidance. Justice O'Connor wrote the majority decision in *Davis* which once again held that if a school official is notified of harassment and chooses to do nothing about it, then the school is liable for damages. However, it was the burden of the accuser to provide evidence that the administration had been notified. Under this ruling, schools can be held liable "only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive and objectively offensive that it can be said to deprive victims of access to educational opportunities." Thus, despite slits of opportunity for regulation of hate speech on campuses,[34] the burden of proof on the person offended remains prohibitively heavy. Worse yet victims who are of lower status than perpetrators, for example an untenured versus a tenured professor, may be deterred from reporting hate or harassing speech because they fear their anonymity will be compromised, that the perpetrator might not be disciplined, or that even if disciplined the perpetrator will continue to harass or take revenge. As Fisk and Chemerinsky have written, "The Court's holding in *Gebser* ... says that schools usually are not responsible for the harms students suffer at school. This holding is astounding given that the victims of harm are children and that the law requires them to spend most their waking hours in the school's care."[35]

The Haiman Solution

The rationale behind restricting the use of the "fighting words" standard was outlined by Franklyn Haiman in *Speech Acts and the First Amendment* (1993) in his response to Catharine MacKinnon's call for considering speech a performative utterance.[36] Her standard was born from a school of thought that asserts that certain phrases are in fact "performative utterances." Philosophers such as Ludwig Wittgenstein, J. L. Austin, and John Searle argue that words are often deeds. For example, when the president of a university confers degrees, he/she not only speaks words, he/she makes graduation official. So why isn't it equally clear that when one person insults another, that person is also performing an act that can be punished in the way assault is? The answer lies in the analysis of the original example. Haiman points out that if the president of the university had a snit and decided not to confer degrees, they would not be invalidated. Any more than if one tells a colleague to go to hell, he or she actually will. Thus, the Courts have continually restricted the fighting words standard in part because swear and other words are commonly used. As Haiman points out, in 1972 the Supreme Court narrowed fighting words to be only those that "tend to incite an immediate breach of the peace."[37] Even in the case of malicious language, one must show that the "stimulus had been followed by palpable injury, such as a heart attack or a physiological nervous breakdown" to collect damages.[38]

Using Haiman as a guide, Ann Gill has proposed a "more speech is better than less speech" doctrine. Responding to *Connick v. Myers* (1983) which prohibits universities from limiting the expression of its employees on "political, social or other concerns to the community,"[39] Gill would encourage campuses to provide for contrasting views to those who utter hate speech.[40] She builds her case by arguing that "In the absence of coercion, the Constitution does not prohibit the university from expressing its own opinion or sponsoring particular points of view."[41]

The first problem with this plan is the prepositional phrase "in the absence of coercion." When would it not be coercible for a university to state its own position on an issue? How much would the untenured professor risk in opposing the university line? In fact, what Gill is proposing by her own admission is a "Campus Fairness Doctrine,"[42] which no doubt would bring with it the chilling effect of the doctrine that was imposed on broadcasters from 1949 to 1987. The fairness doctrine required broadcaster to air "important" issues along with "contrasting views" on those issues. This content requirement, which was struck down for newspapers in *Miami Herald v. Tornello* (1974), had a chilling effect on the discussion of issues in news programs, advertisements, and other broadcast forums for fear of investigation by the Federal Communications Commission and possible litigation. The over-broad and content-oriented fairness doctrine raised such questions as: Who decides what an important issue is? (A small group in the community? A representative minority? A majority of citizens? A single concerned citizen?) How do important issues get prioritized? (Do we take up traffic signals before school funding?) Who decides who is afforded the right to present contrasting views? How many potential contrasting views are there? Given the academy's penchant for splitting hairs, one could imagine a proliferation of views that could well take several days of programming on the minutest of issues under Gill's proposal. It is not difficult to see how arduous administrating such a program would be.

Finally, the Court has ruled that verbal attacks on groups are not actionable because that would "render meaningless the right guaranteed by the First Amendment to explore issues of public import."[43] Kent Greenawalt writes, "When a law is directed at group epithets and slurs, words are made illegal because they place people in certain categories and are critical of members of those categories. This is clearly content discrimination."[44]

Hate Speech as Harassment: The Question of Context

To this point, we have seen that those writing hate speech codes face at least two major problems. First, there are many different definitions of hate speech, so many that a catalogue of offenses might prove impossible to write. Second, the courts have placed a very high burden of proof on those who would curtail hate speech. They must show that rules will not be used in an arbitrary and capricious manner. They must show that they have a compelling interest to advance. They must show that the speech they are attempting to restrict is not protected in one fashion or another by the Constitution, that is, that it is "true threat."

Several of the cases we have reviewed, however, open the door to context driven speech codes. By placing the burden of proof on the context—for example, proving there was a hostile work environment—speech codes can transcend specific language—though it would still be used as evidence—and move instead to specific situations. For example, Chaplinski's conviction was overturned because in the context in which the words were spoken, he was deemed to have been attacked. Twenty-three years earlier, Justice Holmes used a similar standard in his famous ruling in *Schenck v. United States*:

> *[T]he character of every act depends upon the circumstances in which in was done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and cause a panic. It does not even protect a man from an injunction against uttering words that have all the effect of force.*[45]

In one of its most recent decisions, *Hill v. Colorado*, the Supreme Court ruled that one of the determinants of context is whether the audience is being held captive in some fashion: "[T]he protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it."[46] In fact, the Fifth Circuit in *Martin v. Parrish* took into account the unique context in which a college professor speaks such that his students are a "captive audience" who may find themselves intimidated by the person who has the ability to give them grades.[47] Specifically, the court held that the teacher's "language is unprotected ... because, taken in context, it constituted a deliberate, superfluous attack on a 'captive audience' with no academic purpose of justification."[48]

Thus, instead of using either MacKinnon's performative model or Gill's "fairness model," this study suggest we use the context driven sexual harassment model to build a hate speech analog. Let's begin with the sexual harassment model as crafted by the Supreme Court. In *Meritor Savings Bank v. Vinson*[49] the Supreme Court unanimously ruled that illegal sex discrimination is "not limited to economic or tangible discrimination";[50] it also covers sexual harassment that creates a "hostile environment." To put it another way, the *Meritor Savings* case translated Title VII of the Civil Rights Act of 1964 as making employers liable in terms of compensation for actions or words that interfere with an employee's ability to *perform work, or that create an intimidating or hostile work environment.*

In this case the plaintiff claimed that she submitted to sexual intercourse for fear of losing her job. She also claimed to have been fondled in front of other employees and followed into the women's restroom. In a more subtle case, *Broderick v. Ruder* (1988), the Court ruled that an employer creates a hostile work environment by affording preferential treatment to female employees who submit to sexual advances.[51] Meritor was extended to campuses in *Franklin v. Gwinnett County Public Schools* where in the Court ruled that school districts are liable under Title IX for damages for teacher harassment of pupils.[52]

These decisions resolved a tension that exists between protection of freedom of expression and protection from sexual, ethnic, or racial harassment. Perhaps that is why when a federal appeals judge in Cincinnati ruled that women who work in male-dominated environments have to tolerate "rough-hewn and vulgar language," the Supreme Court granted *certiorari*. That case, *Teresa Harris v. Forklift Systems*, allowed the Supreme Court to clarify lower court rulings. The history of the case is instructive. Both sides stipulated that Harris' employer Charles Hardy made many statements to her that had sexual overtones; they included, "Let's go to the Holiday Inn to negotiate your raise.... You're a dumb-ass woman.... We need a man [in your job]."[53] Hardy thought it humorous to ask women to fetch coins from his pants pockets. When Harris complained and threatened to resign, Hardy promised to reform what he called his joking ways. He also noted that on occasion Harris had stayed after work to have beers with other employees in a setting where sexual references were frequent. A few weeks later when Harris brought in a new contract, Hardy said to her, "What did you do, promise him [sex] on Saturday night?"[54] Harris quit and filed a sexual harassment suit.

In the first trial, the judge was critical of Hardy but dismissed Harris' claim because Hardy's harassment was not "so severe as to ... seriously affect [her] psychological well- being."[55] A panel of three judges for the Cincinnati appeals court upheld the dismissal without comment. Harris then appealed to the Supreme Court. In questioning of attorneys, Justices Ginzburg and Scalia clashed over who had what burden of proof. Ginzburg implied that those seeking redress for sexual harassment should have no greater burden of proof than those bringing suit under the Civil Rights Act of 1991, which increased damages for job discrimination. Scalia's questioning indicated that making someone uncomfortable on the job was not enough to warrant restricting someone's First Amendment rights.

In November of 1993, the Court ruled 9-0 that Harris did not need to prove that she suffered psychological harm; her burden was to prove that the harassment was frequent, severe, humiliating, and an unreasonable interference with her performance in the context of her work place. The decision written by Justice Sandra Day O'Connor was meant to clarify a 1991 amendment to job bias laws which allowed employees to sue for up to $300,000 in damages for job discrimination including sexual harassment. In taking the "middle path," O'Connor asked whether a "reasonable person" would have viewed Harris' workplace as a "hostile or abusive work environment."[56] O'Connor ruled out off-hand remarks and "mere offensive utterances ... or jokes" as grounds for damages.[57] She continued, "Likewise, 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."[58]

Seizing the moment, the Department of Education of the U. S. Government issued guidelines for determining if harassment had taken place on a campus: "In order to give rise to a complaint ... sexual harassment must be sufficiently severe, persistent, or pervasive that it adversely affects a student's education or creates a hostile or abusive educational environment."

The Court next ruled that students who are victims of sexual discrimination or harassment may be entitled to damages. In *Christine Franklin v. Gwinnett County Schools* (1992), the Court handed down a unanimous decision that allowed an Atlanta woman to seek damages beyond back pay and prospective relief from her high school under Title IX of the 1980 Education Act. Until this decision, schools or colleges found to have violated Title IX were threatened only with a loss of federal funds.

Title VII has also recently been extended to harassment by someone of the victim's own sex in *Oncale v. Sundowner Offshore Services, Inc.*,[59] which also held that an employer is liable for sexual harassment even though no job action took place.[60] Joseph Oncale was sexually assaulted by other male workers and threatened while working on an off-shore oil rig. His complaints to supervisors fell on deaf ears. The *Oncale* ruling is important because Justice Scalia writing for a unanimous Court emphasizes that sexual harassment is discriminatory. Using Title VII, section 703(a)(1), the same section used in the *Meritor* decision, Scalia argued that the plaintiff has the burden of showing that discrimination was based on sex and had an effect on compensation, terms, conditions, *or* privileges of employment.

Racial harassment may parallel sexual harassment in workplace cases. The most important recent case focusing on racial harassment is *Aguilar v. Avis Rent-A-Car Systems*[61] from the California Court of Appeals. Seventeen Hispanic drivers for Avis Rent-A-Car at San Francisco Airport claimed to have been severely ridiculed, insulted and intimidated. The jury agreed and the judge ordered Avis to "cease and desist from using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees.... [and to] further refrain from any uninvited intentional touching of" those employees.[62] The appeals court upheld the ruling but narrowed the judge's injunction to the workplace.

The latest ruling on this issue by the Supreme Court came on June 14, 2004 in the case of Nancy Drew Suders, a communication operator who quit her job because of harassment. In the 8 to 1 decision for Suders, Ruth Bader Ginsburg ruled that "Under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions" will be treated by the courts as if she had been fired. "Did the working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" Thus, employees who quit due to harassment may now take their companies to court for damages. Employers, on the other hand, shall be afforded the opportunity to prove that they did everything possible to prevent sexual harassment in the work place. For example, they can rely on a system of reporting harassment if such a system is in place. The Court thus recognized Title VII's "constructive discharge" language.

Solutions

Based on this analysis of case law, campuses can proscribe repeated hate speech by using the context driven workplace model with some modification. For example, if one considers students in the classroom to be a captive audience, as the courts have, because of graduation requirements and the like, then in-class or class related hate speech becomes easier to regulate because the courts have been very clear that when an audience is captive, the speaker enjoys less protection under the First Amendment. In *Resident Advisory Board v. Rizzo*[63] the court ruled that employees were a captive audience because they could not avoid being subjected to unseemly language without walking off the job. As we have seen, students fall into this same category. Even if a professor does not take attendance, the students are captive in the sense that absence would affect their ability score well on class assignments. *R.A.V. v. City of St. Paul* made clear that officials may restrict speech to protect members of a captive audience.[64]

Furthermore, *Meritor Savings* opened the way to protect employees in the workplace from "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature... [that] has the purpose or effect of unreasonably interfering with an individual work performance..."[65] It is not a large step to translate that into a regulation that prohibits interfering with a students educational performance in their workplaces, that is, on the campus including cafeterias, libraries, and other places of study.

The *Harris* ruling reinforces the framework for such regulations by pointing out that behavior that is "sufficiently severe or pervasive" to create a hostile work (read "learning") environment is in violation of Title VII.[66] If one were to apply the *Harris* formulation to the academic environment, one would have to prove that the words or behavior detracted from the student's performance, encouraged the student to leave the classroom or other academic environment, or kept them from completing the class or the degree. To meet this burden of proof, students could supply evidence of how they were hampered in their studies, how their grades had dropped, how their self-esteem had suffered, how they felt intimidated, and so forth, all of which were *accepted as evidence* in the *Harris* case to re-construct the context.

The solution advocated here parallels a recent decision from the United States Court of Appeals for the Sixth Circuit, *Bonnell v. Lorenzo*.[67] John Bonnell, a instructor of English literature at Macomb Community College in Michigan used words such as "fuck," "pussy," and "cunt" in his classroom when those words not "germane" to the subject matter. After several student complaints and a warning from the administration, Bonnell continued this practice and was suspended. He sued claiming his First Amendment rights had been violated and was upheld by the district court. But the Court of Appeals reversed on the following grounds:

> *As a pubic employee, in order to establish a likelihood of success on his section 1983 claim that Defendants denied Plaintiff his First Amendment right to free speech, Plaintiff has to demonstrate that 1) he was disciplined for speech that was directed toward an issue of public concern, and 2) that his interest in speaking as he did outweighed the College's interest in regulating his speech.... Plaintiff may have a constitutional right to use words such as "pussy," "cunt," and "fuck," but he does not have a constitutional right to use them in a classroom setting where they are not germane to the subject matter, in*

contravention of the College's sexual harassment policy.... Although we do not wish to chill speech in the classroom setting, especially in the unique milieu of a college or university where debate and the class of viewpoint are encouraged—if not necessary—to spur intellectual growth, it has long been held that despite the sanctity of the First Amendment, speech that is vulgar or profane is not entitled to absolute constitutional protection.

The decision concludes by citing a campus' need to maintain "a hostile-free learning environment." Using the balancing test established in Supreme Court precedent, the appeals court defends a "student's right to learn in a hostile-free environment." The First Amendment is not be used to shield harassers.

Many campuses already have judicial systems in place to hear hate speech complaints. However, many of these systems have neither been tested in court nor scrutinized for the possibility of abuse. Only a handful have considered the analogy with work place harassment and the hostile environment model.[68] For that reason, this study concludes with several possible ways by which a sexual harassment analogue could be built by campuses, particularly since the Sixth Circuit decision mentioned above.

1. The most common solution to the problem of hate speech is create a forum where free speech is encouraged and sometimes answered. This notion flows from Haiman's call for more speech rather than restrictions to deal with the problem of offensive speech. It should be possible to warn that what is said may be offensive and that those saying it may be recorded. Providing an outlet for hate speech in a designated area strengthens the case one can make that hate speech in another part of the work place is part of a pattern that is aimed at creating a hostile environment. Such a location would surface the intolerant, the bigoted, and the problematic for further scrutiny, which is perfectly constitutional under the *Davis v. Monroe County Board of Education* ruling of 1999.

2. Condemn hate speech with moral force rather than restrictions. While some hate speech will always be protected, a campus can build a context in which it is condemned if not punished by peers and supervisors. The power of moral suasion should be particularly attractive to communication scholars who are familiar with the influence of modeling, peer pressure, and societal sanctions. It is possible that some who engage in hate speech "don't know any better" because of the places from which they have come. Part of the learning experience in the new campus environment is socialization into societal norms.

3. Along the lines of sexual harassment, establish records of sustained patterns of hate speech which create a hostile learning environment and punish those guilty of creating such environment. In other words, if one could argue that a record of hate speech interferes with a student's ability to gain an education, do his or her homework, attend class, etc., it would no longer be protected speech. Establishing a record of sustained patterns that create a hostile environment might allow the university to create a points system, not unlike some states use for drivers' licenses. Should the offender take a workshop on tolerance, he or she would have their record cleared. Such a system would have the advantage of encouraging offenders to participate in educational programs that might help them overcome their biases while avoiding other legal sanctions. Should no offense occur over a period of time, points could be removed the record.

   One draw back of such a program is that it must be very specific in terms of what words and phrases are unacceptable in what contexts. Unless the restrictions are narrowly drawn, courts might find them arbitrary and capricious. These labels, terms, and phrases should be clearly listed so that any regulations regarding them cannot fall into the abyss of "over broad regulations." However, the recent ruling in the Sixth Circuit of the U.S. Court of Appeals (see above) indicates that such a scheme is possible.

4. Relying on *Mitchell v. Wisconsin*, officials could allow for the imposition of stiffer penalties when a campus offense is committed in the context of hate speech. Because freedom of expression has rightly been given priority over many other rights and is constitutionally protected, it is difficult to restrict. Even the National Board of the ACLU has been divided on the constitutionality of enhancing penalties for crimes where the guilty party has uttered hate speech. The Supreme Court on the other hand has stood by its decision allowing high penalties for crime committed by those who engage in hate speech. As we have seen, the court requires that the context be clear and the case that hate speech was uttered be made cleanly under the "reasonable person" standard. Since in the case of other crimes, such as murder, the penalties can be enhanced when the circumstances surrounding the crime are taken into account, the Court reasons that hate speech can be considered by judges in the same way. Thus, a campus could develop a code against hate speech that read in part that anyone being penalized for any violations on the campus could have their penalties enhanced if in the commission of the violation they engaged in hate speech.

A careful review of court decisions, particularly those regarding sexual harassment provide a narrow avenue for action on campuses. The path recommended in this study is the least restrictive and most open means to achieve civility, vent frustrations, educate the ignorant, and diminish hate speech. If a university embarked on such a path, the university would not only show good faith, it would protect itself from charges that it allowed a hostile environment to exist and hate speech to fester. It would provide a way to educate the prejudiced and to avoid legal action on all sides.

Endnotes

[1]. Sigmund Freud, *Introductory Lectures on Psycho-Analysis* (1916) reprinted in *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, 15, James Strachey, ed. (1963), p. 15.

[2]. Samuel Walker, *Hate Speech: The History of American Controversy* (1994) Walker includes a chapter on "The Campus Speech Codes," which is relevant to the present study.

[3]. *Miami Law Review* 42 (1987): 127-57.

[4]. This position is supported by a number scholars. See for example, Kingsley E. Browne, "Title VII as Censorship: Hostile-Environment Harassment and the First Amendment," *Ohio State Law Journal*, 52 (1991): 481-99; Jules B. Gerard, "The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment," *Notre Dame Law Review*, 68 (1993): 1003-1021; Larry Alexander, "Banning Hate Speech and the Sticks and Stones Defense," *Constitutional Commentary*, 13 (1996): 71-92; Walker, 141ff.

[5]. 395 U.S. 446-47 (1969).

[6]. 395 U.S. 444 (1969), at 447.

[7]. See, for example, Richard Delgado, "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling," *Harvard Civil Rights-Civil Liberties Law Review*, 17 (1982): 133-181.

[8]. See also *Hernandez v. Loury*, 1937.

[9]. 337 U.S. 3.

[10]. 337 U.S. 3, 4.

[11]. 337 U.S. 1, 69. (1949). In *Shelton v. Tucker*, the Supreme Court ruled that "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools" (364 U.S. 479, 487 (1960).)

[12]. See John Hulshizer, "Securing Freedom from Harassment without Reducing Freedom of Speech: Doe v. University of Michigan," *Iowa Law Review* (January, 1991), pp. 392-98. See also Richard Delgado, "Campus Anti-Racism Rules: Constitutional Narratives in Collusion," *Northwestern University Law Review* (Winter, 1991), pp. 375-378; J. Peter Byrne, "Racial Insults and Free Speech Within the University," *Georgetown Law Journal* (February, 1991), pp. 425-30; Rodney A. Smolla, "Academic Freedom, Hate Speech, and the Idea of a University," *Law and Contemporary Problems* (Summer, 1990), pp. 211-16.

[13]. 721 F.Supp. 863 (E.D. Mich. 1989).

[14]. The federal court cited *Chaplinsky v. New Hampshire* (1942) and *Beauharnais v. Illinois* (1952). In *Chaplinsky*, the Supreme Court said: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." (315 U.S. 571-572.) More recent cases can be read to have narrowed the application of *Chaplinsky*. Summarizing the results of *Gooding v. Wilson* (1972), *Brown v. Oklahoma* (1972), and *Eaton v. City of Tulsa* (1974), Archibald Cox wrote: "Later cases place more reliance upon the doctrine of over breadth or the duty of a policeman to suffer verbal abuse, but upon one ground or another they reverse convictions for such utterances as 'white son of a bitch, I'll kill you' and 'm----r f----r fascist pig cops' or calling a prosecution witness 'chickenshit'...." See *Freedom of Expression* (1981), p. 51. In 1994 the Supreme Court of California recently struck down Stanford University's speech code on similar grounds to the Michigan case.

[15]. See *Gooding v. Wilson* (1972), *Brown v. Oklahoma* (1972), and *Eaton v. City of Tulsa* (1974).

[16]. *Iota XI Chapter of Sigma Chi Fraternity v. George Mason University* 733 F.Supp. 792 (E.D. Va. 1991).

[17]. Ibid., at 793. See also *UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*.

[18]. Slip op., 00-866. In this unsigned opinion, the justices unanimously overruled the Ninth Circuit of the U.S. Court of Appeals for setting too low a standard of harassment in Shirley Breeden's case, which began in 1997 when she filed suit. Her supervisor had said, "I hear making love to you is like making love to the Grand Canyon."

[19]. See *Boos v. Barry*; *Police Department of Chicago v. Mosley*; *Linmark Associates v. Township of Willingboro*; *First National Bank of Boston v. Bellotti*; *Central Hudson Gas Company v. Public Utility Commission*.

[20]. See Justice Scalia's opinion, pp. 1-2 of slip opinion no. 90-7675. I should note that the majority in this case was supported by two very different rationales. The moderates supported overturning the law on the grounds that it reached beyond "fighting words." The conservatives, led by Scalia, objected to the law because it banned only particular categories of fighting words to the exclusion of others.

[21]. Many legal scholars believe that *R.A.V.*, named for Robert Allen Viktora, was clarification of a well-known ruling by the Court of Appeals for the Seventh Circuit which held that the First Amendment protected a neo-Nazi group from prior-restraint, and hence allow them to march through a Skokie neighborhood populated by Jews, many of whom had been prisoners in German concentration camps. That decision *Collin V. Smith* (578 F. 2d 1197, 7th Cir. 1978, cert. denied, 439 U.S. 916 (1978)) invalidated Skokie's anti-defamation law. See, for example, Sionaidh Douglas-Scott, "The Hatefulness of Protected Speech: A Comparison of the American and European Approaches," *William and Mary Bill of Rights Journal*, 7 (1999): 305-346.

[22]. The statute provided: "(1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sec. (2): (a) Commits a crime under chas. 939 to 948. (b) Intentionally selects the person against whom the crime under par. (a) is committed or selected the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property. (2)(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000, and the revised maximum period of imprisonment is one year in the county jail. (b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years. (c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime my be increased by not more than $5,000 and the maximum

period of imprisonment prescribed by law for the crime may be increased by not more than 5 years."

[23]. See *Dawson v. Delaware*, 503 U.S. XXX (1992) and *Barclay v. Florida*, 463 U.S. 939 (1983).

[24]. *U.S. v. Tucker*, 404 U.S. 443, 446 (1972); *Williams v. New York*, 337 U.S. 241, 246 (1949).

[25]. 506 U.S. 476, 489 (1993)

[26]. Franklyn Haiman reluctantly agreed that the *Mitchell* ruling was constitutional:"I, like a majority of my colleagues on the national ACLU Board, after much intense and enlightening debate, became persuaded that laws which enhanced penalties for hate crimes, if carefully drafted to avoid guilt by association or because of generally held ideologies, and if they punished only those whose criminal acts were directly, immediately, an demonstrably attributable to group hatred, were constitutional." In "Hate Crimes," a book review in *The Free Speech Yearbook* (Annandale, VA: NCA, 1998), p. 161. But Haiman said he had changed his mind after reading James B. Jacobs & Kimberly Potter, *Hate Crimes* (New York: Oxford U. Press, 1998). Jacobs and Potter argue against decisions such as *Mitchell* on the grounds that hate speech is poorly defined and highly ambiguous, that hate speech is exaggerated by the media and identity politics, and that *Mitchell* will lead to erratic enforcement.

[27]. See *Sall v. Barber*, 782 F. 2d 1216 (1989); *Buckley v. Littell*, 539 F. 2d 882 (1976), cert. denied, 429 U.S. 1062 (1977); *Blouin v. Anton*, 431 A. 2d 439 (1981); *Ferguson v. Dayton Newspapers*, 7 Med. L. Rptr. 2502 (1981); *Stevens v. Tillman*, 855 F. 2d 394 (1988); *Kirk v. CBS*, 14 Med. L. Rptr. 1263 (1987); *Ollman v. Evans*, 750 F. 2d 970 (1984). It is possible that the decision regarding "racist" may be overturned on appeal, but the cost of legal action for the offended party will still be enormous.

[28]. The issue of privacy on these system is addressed in the Electronic Communication Privacy Act of 1986.

[29]. See, for example, *NAACP v. Alabama* (1958), on the privacy issue. See also *McIntyre v. Ohio Elections Commission* (1995).

[30]. See also D. L. Wilson, "Suit Over Network Access," *Chronicle of Higher Education* (November 24, 1993), pp. A16-17.

[31]. *U.S. v. Baker*, No. 95-80106 (E.D. Mich June 21, 1995).

[32]. 97-843. See also *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989 (1998). The Court ruled that employers are liable under Title IX only if they have knowledge of sexual harassment by employees and are deliberately indifferent to such harassment.

[33]. *Gebser* at 1999.

[34]. For example, the Supreme Court rejected the "view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968).

[35]. p. 793.

[36]. Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979).

[37]. *Speech Acts and the First Amendment* (Carbondale: Southern Illinois University Press, 1993), p. 22.

[38]. Haiman, p. 30.

[39]. 461 U.S. 146.

[40]. See "Revising Campus Speech Codes," *Free Speech Yearbook*, 31 (1993), pp. 124-137.

[41]. Gill, p. 128.

[42]. Gill, p. 130.

[43]. See *Khalid Absullan Tario Al Monsour Faissal Fahd Al Talal v. Fanin*, 506 F. Supp. 187 (1980).

[44]. In "Insults and Epithets: Are They Protected Speech?" *Rutgers Law Review*, 42 (1990), 304.

[45]. 249 U.S. 47, 52 (1919).

[46]. 530 U.S. 703 (2000).

[47]. 805 F.2d 583, 584-85 (5th Cir., 1995). Martin had put down his students and their work with such otherwise protected epithets as "bullshit," "hell," "damn," and "sucks."

[48]. 805 F.2d 583, 585 (5th Cir., 1995). The Sixth Circuit then followed suit in *Drambrot v. Central Michigan U.*, 55 F. 3d 1177, in a case where a coach used the word "nigger" to motivate his players during a locker room speech.

[49]. See particularly 477 U.S. 57, 60 (1986).

[50]. G477 U.S. 57, 64 (1986).

[51]. Previous cases include *Katz v. Dole* (1983), and *Henson v. City of Dundee* (1982)

[52]. 503 U.S. 60, 75 (1992).

[53]. 510 U.S. 17, (1993).

[54]. 510 U.S. 17, (1993).

[55]. 510 U.S. 17, (1993).

[56]. 510 U.S. 17, 21 (1993).

[57]. In other cases based on Title VII courts have ordered certain conduct curtailed. See for example *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991).

[58]. 510 U.S. 17, 21-22 (1993).

[59]. *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. at 1001-02. The full implications of this decision are discussed by Steven L. Willborn, "Taking Discrimination Seriously: Oncale and the Fate of Exceptionlism in Sexual Harassment Law," *William and Mary Bill of Rights Journal*, 7 (1999): 677-721. Willborn believes the decision reduces sexual harassment to a subset of other forms of discrimination.

[60]. *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998); *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998). For a closer analysis of these rulings, see Rebecca Hanner White, "There's Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment," *William and Mary Bill of Rights Journal*, 7 (1999): 725-54.

[61]. 53 Ca. Rptr. 2d at 606-608.

[62]. at 603.

[63]. 503 F. Supp. 383 (E.D. Pa. 1976), modified, 564 F. 2d 126 (3d Cir. 1977), and cert. denied, 435 U.S. 908 (1978).

[64]. at 414 n. 13 (White, J., concurring). See also Catherine Fisk & Erwin Chemerinsky, "Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX," *William and Mary Bill of Rights Journal*, 7 (1999):755-800, who argue that employers should be strictly liable under Title VII for supervisors' harassment and schools should be liable under Titel IX for teachers' harassment of students.

[65]. at 65.

[66]. at 21-22.

[67]. Electronic Citation: 2001 FED App. 0057p (6th Cir.).

[68]. Currently, the University of California at Berkeley has a speech code that borrows from the language of the Chaplinski decision and treats hate speech as a form of harassment.

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