Defying the Constitution
The Rise, Persistence, And Prevalence Of Campus Speech Codes

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INTRODUCTION

America's colleges and universities have historically been treated as havens for free speech, laboratories of thought where diverse viewpoints and ideas can be discussed and debated in an endless search for truth and knowledge. The Supreme Court has long recognized that our institutions of higher education serve an important societal purpose beyond classroom instruction, that the modern university campus "is peculiarly the 'marketplace of ideas.'"[1] Therefore, the Court has traditionally held that college students are entitled to robust speech rights so that they may speak freely and contribute to the exchange of ideas.[2]

However, a major threat to this model of the American university has presented itself: Colleges and universities across the country have enacted "speech codes" broadly regulating how students are allowed to speak on campus. Speech codes are "university regulations prohibiting expression that would be constitutionally protected in society at large,"[3] or "any campus regulation that punishes, forbids, heavily regulates, or restricts a substantial amount of protected speech."[4] Speech codes violate students' free speech rights,[5] often by taking aim at any expression deemed by university administrators to be uncivil, offensive, or disagreeable. They have proliferated on college campuses despite the fact that the courts have indicated that "[s]peech codes are disfavored under the First Amendment because of their tendency to silence or interfere with

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1. Healy v. James, 408 U.S. 169, 180 (1972). The basic premise of the marketplace of ideas model is that well-founded, well-supported arguments will ultimately prevail in campus debate, while faulty or misguided views will be unable to withstand the scrutiny and close analysis that comes with rigorous debate. Therefore, ideas will succeed or fail in reaching people solely on the basis of their merits.

2. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 487 (1960) ("the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools"); Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667, 670 (1973) ("the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"); *Healy*, 408 U.S. at 180 ("state colleges and universities are not enclaves immune from the sweep of the First Amendment . . . the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.").

3. FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (FIRE), SPOTLIGHT ON SPEECH CODES 2009: THE STATE OF FREE SPEECH ON OUR NATION'S CAMPUSES 9 (2008), *available at* http://www.thefire.org/Fire_speech_codes_report_2009.pdf [hereinafter FIRE, SPOTLIGHT ON SPEECH CODES 2009].

4. DAVID A. FRENCH, GREG LUKIANOFF & HARVEY A. SILVERGLATE, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, FIRE'S GUIDE TO FREE SPEECH ON CAMPUS 130 (2005).

5. Students at public colleges and universities, which are legally bound by the Constitution as state institutions, enjoy the full protection of the First Amendment. *See supra* note 2. By contrast, private institutions are not bound by the First Amendment, since they are not governmental entities. However, they typically promise their students extensive speech rights in school materials such as student handbooks, recruiting brochures, and codes of conduct. Courts have held in several cases that private institutions must live up to these types of promises, based on a "contract theory." *See* Tedeschi v. Wagner College, 49 N.Y.2d 652 (Ct. App. 1980); McConnell v. Le Moyne College, 808 N.Y.S.2d 860 (N.Y. App. Div. 2006); Schaer v. Brandeis Univ., 735 N.E.2d 373 (Mass. 2000). *See also* Ross v. Creighton Univ., 957 F.2d 410, 416 (7th Cir. 1992) ("It is held generally in the United States that the 'basic legal relation between a student and private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract.'").

protected speech."[6]

Indeed, the fact that every single legal challenge to a speech code to date has been successful[7] counsels strongly against their continued presence on college campuses. Over the past two decades, courts have uniformly invalidated speech codes facing a constitutional challenge, with the Third Circuit's 2008 decision in *DeJohn v. Temple University*[8] being the most significant among the recent decisions. As a strongly worded federal circuit court decision, *DeJohn* should send an unequivocal message to university administrators that speech codes are legally untenable in the university setting.

Currently, however, speech codes are commonplace on college campuses, and they severely restrict the ability of students to participate in, and contribute to, a true marketplace of ideas. Johns Hopkins University, for instance, maintains a speech code prohibiting all "[r]ude, disrespectful behavior."[9] Texas A&M University prohibits its students from violating others' rights to "respect for personal feelings" and "freedom from indignity of any type."[10] Lewis-Clark State College defines "harassment" to include any speech that "detains, embarrasses, or degrades" another individual.[11] Ohio State University maintains a housing policy which instructs students, "Do not joke about differences related to race, ethnicity, sexual orientation, gender, ability, socioeconomic background, etc."[12] Rhode Island College states that it "will not tolerate actions *or attitudes* that threaten the welfare" of other students.[13]

Perhaps even more striking than these examples are some of the instances in which colleges and universities have applied their speech codes to suppress or punish clearly protected expression. For example, a student at the University of Central Florida was charged with harassment through "personal abuse" for Internet speech in which he opined that a student government candidate was a "jerk and a fool."[14] The University of New Hampshire found a student guilty of harassment for posting satirical flyers joking about freshmen women and weight loss, and subsequently expelled him from his dormitory.[15] A student at William

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6. Sypniewski v. Warren Hills Reg'l. Bd. of Educ., 307 F.3d 243, 260 (3d Cir. 2002).

7. *See infra* Part I.B.

8. 537 F.3d 301 (3d Cir. 2008).

9. Johns Hopkins University, *Principles for Ensuring Equity, Civility and Respect for All*, *available at* http://www.jhu.edu/news_info/policy/civility.html (last visited Sept. 2, 2008).

10. Texas A&M University, *Student Rights and Obligations*, *available at* http://www.tamus.edu/offices/policy/policies/pdf/13-02.pdf (last visited Sept. 2, 2008).

11. Lewis-Clark State College, *Student Handbook: Code of Conduct*, *available at* http://www.lcsc.edu/osl/SHB/CodePage4.htm (last visited Sept. 2, 2008).

12. Ohio State University, *Diversity Statement*, *available at* http://housing.osu.edu/posts/documents/University%20Housing%20-%20Diversity%20Statement.pdf (last visited Sept. 2, 2008).

13. Rhode Island College, *Resident Student Handbook 2008–2009*, *available at* http://www.ric.edu/Residential-Life/pdf/ResidentStudentHandbook08-09.pdf (last visited July 13, 2009) (emphasis added).

14. Press Release, Foundation for Individual Rights in Education (FIRE), *Student Wins Facebook.com Case at University of Central Florida* (2006), http://www.thefire.org/index.php/article/6867.html.

15. Press Release, Foundation for Individual Rights in Education (FIRE), *University of New Hampshire Evicts Student for Posting Flier* (Oct. 28, 2004), http://www.thefire.org/index.php/article/5005.html (last visited Sept. 2, 2008).

Paterson University was charged with sexual harassment for replying to his professor in a private e-mail that his religious beliefs opposed homosexuality and viewed it as a perversion.[16] These cases illustrate that, not only do speech codes chill protected expression by their very existence, they are also often enforced in such a manner as to censor protected expression.

The topic of speech codes has been covered in both legal scholarship[17] and in mainstream publications.[18] However, there is a surprising dearth of legal scholarship attempting to comprehensively analyze the continued prevalence of speech codes and their impact on campus speech, as well as to effectively answer their proponents. This article seeks to fill the gap in the literature.

Part I of this article details several theories commentators have posited to explain the emergence of speech codes. It then outlines the case law on speech codes, under which courts have uniformly struck down speech codes challenged through litigation. Part II of the article discusses the First Amendment doctrinal problems presented by speech codes: overbreadth, vagueness, and content- and viewpoint-based discrimination. It proceeds to analyze the ways in which speech codes have led to the restriction of free speech in higher education.

Part III debunks common justifications for speech codes and demonstrates that speech codes do not offer the benefits that their proponents claim. Part IV demonstrates that speech codes are still prevalent at colleges and universities nationwide, using data from the Foundation for Individual Rights in Education's (FIRE) most recent annual speech codes report.[19] In that section, I will also respond to arguments that speech codes are not as prevalent as FIRE's research indicates, by demonstrating that FIRE's methodology offers the most accurate assessment of schools' policies toward student speech.

Part V offers several potential solutions to the problems discussed in the article. The most direct of these is to continue to challenge the constitutionality of speech codes in court. A second measure is public exposure of speech codes, since they tend to be heavily disfavored by the public at large and universities

16. Press Release, Foundation for Individual Rights in Education (FIRE), *William Paterson University Tramples Student's Constitutional Rights* (July 20, 2005), http://www.thefire.org/index.php/article/6119.html (last visited Sept. 2, 2008).

17. *See, e.g.*, Lee Ann Rabe, *Sticks and Stones: The First Amendment and Campus Speech Codes*, 37 J. MARSHALL L. REV. 205 (2003); Jeanne M. Craddock, *Words That Injure, Laws That Silence: Campus Hate Speech Codes and the Threat to American Education*, 22 FLA. ST. U.L. REV. 1047 (1995); William S. Alexander, *Regulating Speech on Campus: A Plea for Tolerance*, 26 WAKE FOREST L. REV. 1349 (1991); Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Jon B. Gould, *The Precedent That Wasn't: College Hate Speech Codes and the Two Faces of Legal Compliance*, 35 LAW & SOC'Y REV. 345 (2001).

18. *See, e.g.*, ALAN CHARLES KORS & HARVEY A. SILVERGLATE, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES (1998); ROBERT O'NEIL, FREE SPEECH IN THE COLLEGE COMMUNITY (1997); Harvey A. Silverglate and Greg Lukianoff, *Speech Codes: Alive and Well at Colleges*, THE CHRONICLE OF HIGHER EDUCATION, Aug. 1, 2003, at 7; Michael C. Moynihan, *Flunking Free Speech: The Persistent Threat to Liberty on College Campuses*, REASON ONLINE, Dec. 24, 2007, http://www.reason.com/news/show/124072.html; David E. Bernstein, *Campus Speech Code Warning*, WASH. TIMES, Aug. 18, 2003, at A12.

19. FIRE, SPOTLIGHT ON SPEECH CODES 2009, *supra* note 3.

frequently wish to avoid the negative publicity generated by such exposure. Finally, a change in our nation's cultural norms will ultimately be necessary to defeat speech codes in the long run and restore a robust right to free expression on campus.

I. THE ORIGINS AND LEGAL HISTORY OF SPEECH CODES

In this section, I will begin by tracing the origins of speech codes, which began to appear on college campuses roughly two decades ago and proliferated quickly. I will then lay out the case law on speech codes, under which every single legal challenge to a speech code has been decided in favor of free speech.

A. The Sudden Rise of Speech Codes

Starting roughly two decades ago, speech codes seemingly appeared out of nowhere and began to proliferate across college campuses. There is no consensus to explain why this occurred, and commentators have posited various theories to account for the development. What is uncontroverted is that once they began to appear, they spread rapidly. For instance, one estimate is that between the years of 1986 and 1991 alone, 137 colleges and universities adopted new speech codes.[20] Another commentator observed in 1992 that "more than 200 campuses have instituted speech codes punishing racist or otherwise derogatory language."[21] Still another commentator estimated that by the early 1990s, at least 60 percent of all universities prohibited racist speech on campus.[22] The explanations for these trends can be placed into three major categories.

The first category argues that speech codes were a nationwide response to violent episodes of racial and other intolerance which took place on many college campuses in the 1980s and early 1990s, creating a generally unreceptive environment for racial and ethnic minorities, female students, and other historically disadvantaged groups. Commentators espousing this theory start with the backdrop of increased enrollment and access to education for minority groups over the previous decades.[23] As these groups gained an increased presence on campus and diversified the educational environment, some students began to exhibit their resentment, leading to an "increase in racial, ethnic, religious, sexist and homophobic incidents."[24] One study from the early 1990s found that 71 percent of schools surveyed had had at least one reported incident of

20. Jon Gould, *The Triumph of Hate Speech Regulation: Why Gender Wins But Race Loses in America*, 6 MICH. J. GENDER & L. 153, 158 (1999).

21. Steven R. Glaser, *Sticks and Stones May Break My Bones, But Words Can Never Hurt Me: Regulating Speech on University Campuses*, 76 MARQ. L. REV. 265, 267 (1992).

22. Carolyn M. Mitchell, *The Political Correctness Doctrine: Redefining Speech on College Campuses*, 13 WHITTIER L. REV. 805, 818 (1992).

23. Rabe, *supra* note 17, at 205.

24. Catherine B. Johnson, *Stopping Hate Without Stifling Speech: Re-Examining the Merits of Hate Speech Codes on University Campuses*, 27 FORDHAM URB. L.J. 1821, 1823 (2000).

"ethnoviolence" during the past year, defined as "acts motivated by prejudice . . . intended to cause physical or psychological harm to persons because of their actual or perceived membership in a group."[25] Therefore, due to the increasing tensions on campus, and in order to protect students from more of these incidents, many schools drafted speech codes aimed at racist, sexist, and sometimes merely offensive speech.[26]

The second category of explanations is related to the first, as some commentators have asserted that, rather than attempting to truly address the problem of campus intolerance and violence, speech codes were merely symbolic gestures aimed at placating those who decried such incidents. According to these commentators, university administrators enacted speech codes essentially to "appease" civil rights groups and other critics,[27] as a "quick response to negative media attention and to criticisms that the colleges [had] not effectively responded to incidents on their campuses."[28] Put another way, "[t]he incidents meant that administrators had to do something, and if only to quiet campus, they were willing to act." Thus, according to this line of argument, administrators, instead of (or perhaps in addition to) seeking to eliminate violence and prejudice on their campuses, drafted speech codes in order to stem the tide of negative publicity and criticism directed towards their institutions.[29]

The third type of explanation argues that the rise of speech codes did not come about as a result of campus intolerance and discrimination, but rather was related to a more general political correctness trend. According to commentators in this group, speech codes represented "attempts by universities to act as 'thought police'" in order to get students to "adopt the 'proper' university viewpoint."[30] In the prevailing politically correct climate of the late 1980s and early 1990s, universities deemed everyone on campus to be "so 'thinskinned' even the most harmless and innocuous remark may cause an uproar the speaker neither foresaw nor intended."[31] The ideology of political correctness places a "general limitation on any kind of speech that excludes a class or individual

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25. *Id.* at n.5.

26. Melanie A. Moore, *Free Speech on College Campuses: Protecting the First Amendment in the Marketplace of Ideas*, 96 W. VA. L. REV. 511, 514–16 (1993); *see also* Gould, *supra* note 20 ("An academic study has found that ten of the twenty largest American universities developed speech codes during 1986 to 1991, and the vast majority of these followed racial incidents that occurred on campus.").

27. S. Douglas Murray, *The Demise of Campus Speech Codes*, 24 W. ST. U.L. REV. 247, 250 (1997).

28. Gould, *supra* note 20.

29. As evidence of universities' general lack of commitment to their speech codes, at least one commentator has pointed to the fact that only one university which had lost a speech code case as of his writing made the decision to appeal the ruling. *Id.* None of the other schools made the effort to defend their speech codes at the appellate level, perhaps indicating that speech codes were "only intended as a symbolic statement by university administrators to show passing concern" for minority groups on campus. *Id.*

30. Murray, *supra* note 27, at 249.

31. *Id. See also* Craddock, *supra* note 17, at 1053 (characterizing speech codes as "an attempt to protect individuals within specific groups from hearing or otherwise experiencing offensive speech in the academic environment"); Thomas A. Schweitzer, *Hate Speech on Campus and the First Amend-*

based on particular characteristics" and leaves room only for "preferred views."[32] Therefore, according to commentators in this group, it resulted in universities implementing broad restrictions on what students could say on campus.

Regardless of the true impetus and purpose behind speech codes, it is undeniable that they spread rapidly and, moreover, were often "hastily drawn" and "carelessly drafted,"[33] leading to constitutional infirmities. As I shall later discuss,[34] they have had a tremendously harmful impact upon the state of free speech on campus. But first, I turn to the legal history of speech codes in the courts.

B. The Case Law on Speech Codes: A Uniform Rejection

It did not take long after the rise of speech codes on campuses nationwide for plaintiffs to begin successfully challenging their constitutionality in court.[35] The uniformity of this body of case law cannot be overstated; accordingly, colleges and universities should not only be cognizant of these decisions, but should realize that their own speech codes are likely to suffer a similar fate if challenged in court.

The first decision, *Doe v. University of Michigan*,[36] was handed down in 1989. It involved a challenge to the university's Policy on Discrimination and Discriminatory Harassment, which prohibited, in pertinent part, "[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex," and other listed traits and that "[c]reates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities."[37] The plaintiff, a graduate student specializing in biopsychology, claimed that under the terms of the policy, he feared that "certain controversial theories positing biologically-based differences between sexes and races might be perceived as 'sexist' and 'racist' by some students" and that therefore "his right to freely and openly discuss these theories was impermissibly chilled."[38] In other words, he argued that the policy stifled classroom discussion of legitimate academic ideas and theories. A federal district court found that the policy was facially vague[39]

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ment: Can They Be Reconciled?, 27 CONN. L. REV. 493, 509 (1995) (citing one speech code critic for the argument that speech codes came about because "people are unbelievably thin-skinned today").

32. *Id.*

33. Murray, *supra* note 27, at 251.

34. *See infra* Part II.B.

35. I shall fully discuss the doctrinal problems presented by speech codes—including vagueness, overbreadth, and content-based and viewpoint-based discrimination—in the following section. *See infra* Part II.A. In this section, I wish to focus on the uniform results of speech code litigation to demonstrate that the courts have, without exception, found them to be constitutionally flawed and untenable under the obligation of universities to uphold students' First Amendment rights.

36. 721 F. Supp. 852 (E.D. Mich. 1989).

37. *Id.* at 856.

38. *Id.* at 858.

39. *Id.* at 867. A statute or regulation is unconstitutionally vague when "men of common intelligence must necessarily guess at its meaning." Broadrick v. Oklahoma, 413 U.S. 601, 607 (1973) (internal

as well as overbroad[40] because it stifled protected speech, both within and outside classroom discussion, on the basis of its mere offensiveness. The court reasoned that terms such as "stigmatizes" and "victimizes" were "general and elude[d] precise definition" and that the university "never articulated any principled way to distinguish sanctionable from protected speech," meaning that students were "necessarily forced to guess at whether a comment about a controversial issue would later be found to be sanctionable."[41] Therefore, the policy could not be given a constitutionally permissible reading, and the court permanently enjoined the university from enforcing it against any verbal expression.[42]

Two years after *Doe*, in *UWM Post, Inc. v. Board of Regents of the University of Wisconsin*,[43] a federal district court struck down a discriminatory harassment policy prohibiting "racist or discriminatory comments, epithets or other expressive behavior" if such conduct intentionally "demean[ed] the race, sex, religion," or other listed characteristics of an individual or "[c]reate[d] an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity."[44] The court found the policy to be unconstitutionally vague and overbroad, rejecting the university's defense that the policy was aimed only at unprotected speech under the "fighting words" exception and therefore had steered clear of any First Amendment violation.[45] On this point, the court reasoned that the language of the policy "regulates discriminatory speech whether or not it is likely to provoke" a violent response and "covers a substantial number of situations where no breach of the peace is likely to result," thus failing the requirements of the fighting words doctrine.[46]

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citations omitted). In order to escape the vagueness doctrine, a statute or regulation must "give adequate warning of what activities it proscribes" and "set out 'explicit standards' for those who must apply it." *Id.* Significantly, the Supreme Court has held that "a more stringent vagueness test" should apply to laws that interfere with the right of free speech. Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

40. *Doe*, 721 F. Supp. at 866. A statute or law regulating speech is unconstitutionally overbroad "if it sweeps within its ambit a substantial amount of protected speech along with that which is may legitimately regulate." *Id.* at 864. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." NAACP v. Button, 371 U.S. 415, 433 (1963). Therefore, "statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick*, 413 U.S. at 611–12. As is the case with the vagueness doctrine, "[t]he doctrine of overbreadth, while extremely circumscribed in most applications, is generally afforded a broader application where First Amendment rights are involved." Roberts v. Haragan, 346 F. Supp. 2d 853, 871–72 (N.D. Tex. 2004) (citing *Broadrick*, 413 U.S. at 612).

41. *Doe*, 721 F. Supp. at 867.

42. *Id.* at 869.

43. 774 F. Supp. 1163 (E.D. Wisc. 1991).

44. *Id.* at 1165.

45. *Id.* at 1172.

46. *Id.* at 1173.

Dambrot v. Central Michigan University[47] was the first speech code case decided by a federal appellate court. The challenged speech code was a discriminatory harassment policy which defined racial and ethnic harassment as "any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by . . . demeaning or slurring individuals . . . or . . . using symbols, [epithets] or slogans that infer negative connotations about the individual's racial or ethnic affiliation."[48] As with the first two speech codes cases, the Sixth Circuit found the policy to be both unconstitutionally vague and overbroad.[49] The Court stated, "It is clear from the text of the policy that language or writing, intentional or unintentional, regardless of political value, can be prohibited upon the initiative of the university."[50] Additionally, responding to the university's argument that the policy only prohibited fighting words, the Sixth Circuit held that, even assuming this argument to be true, "the CMU policy constitutes content discrimination because it necessarily requires the university to assess the racial or ethnic content of the speech."[51] As such, the policy was unconstitutional on its face.

Also in 1995, a California state court decided the first (and to date only) speech code case involving a private university, *Corry v. Leland Stanford Junior University*.[52] At issue was Stanford University's policy on "harassment by personal vilification," which prohibited speech "intended to insult or stigmatize an individual . . . on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin."[53] Again, the university argued that its policy targeted only fighting words.[54] The court responded that the policy, even if limited to fighting words, did not prohibit all fighting words, but only those words based on the enumerated categories, violating the First Amendment's requirement of content neutrality.[55] Secondly, the court held that the policy in fact prohibited more than just fighting words, rendering it unconstitutionally overbroad.[56] This decision is also noteworthy because the court relied on California's "Leonard Law,"[57] which provides students attending private institutions in California with the same free speech rights as those attending public institutions.[58]

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47. 55 F.3d 1177 (6th Cir. 1995).
48. *Id.* at 1182.
49. *Id.* at 1183–84.
50. *Id.* at 1183.
51. *Id.* at 1184.
52. No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip opinion).
53. *Id.*, slip op. at 1.
54. *Id.*, slip op. at 2.
55. *Id.*, slip op. at 41.
56. *Id.*
57. Cal. Educ. Code § 94367 (2008).
58. *Id.* While most states do not have an equivalent to the "Leonard Law," private institutions should learn from the experience of the University of Pennsylvania, which redacted its speech code in 1993 in

In *Booher v. Board of Regents of Northern Kentucky University*,[59] a federal district court declared a sexual harassment policy to be both overbroad and vague for prohibiting, in pertinent part, expression which "unreasonably affects your status and well-being by creating an intimidating, hostile, or offensive work or academic environment."[60] In particular, the policy "fail[ed] to draw the necessary boundary between the subjectively measured offensive conduct and objectively measured harassing conduct,"[61] giving one "the impression that speech of a sexual nature that is merely offensive would constitute sexual harassment because it makes the individual hearer uncomfortable to the point of affecting her status and well-being."[62] This made the policy clearly capable of reaching protected speech and therefore overbroad.[63] The court also found that the policy "fail[ed] to give adequate notice regarding precisely what conduct is prohibited" and "delegate[d] enforcement responsibility with inadequate guidance,"[64] rendering it unconstitutionally vague.

Bair v. Shippensburg University,[65] a 2003 decision, involved a speech code with several flawed provisions. Shippensburg University's Code of Conduct required students to speak in a manner that "does not provoke, harass, intimidate, or harm another" and included, in its preamble, a prohibition on "acts of intolerance."[66] Additionally, the school's Racism and Cultural Diversity Statement defined racism to include "any activity . . . that causes the subordination, intimidation and/or harassment of a person or group based upon race, color, creed, national origin, sex, disability or age," and even required students to "mirror[]" the school's commitment to "racial tolerance, cultural diversity and social justice" in their "attitudes and behaviors."[67] The two student plaintiffs alleged that, owing to the terms of the policies, they feared that discussion of their "social, cultural, political, and/or religious views" were sanctionable, making them "reluctant to advance certain controversial theories or ideas regarding any number of political or social issues."[68] The court rejected the university's defense that the speech code provisions were "merely aspirational and precatory," and held that the policies were facially overbroad.[69]

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response to a great deal of negative publicity. The controversy arose when a student at the school was charged with racial harassment for using the term "water buffalo" against a group of students. The university incurred widespread criticism for its disregard of the student's free speech rights, eventually culminating in the charge being dropped and the speech code rescinded. *See also* Moore, *supra* note 26, at 517, 519. *See generally*, KORS & SILVERGLATE, *supra* note 18.

59. No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998).
60. *Id.* at *3.
61. *Id.* at *28.
62. *Id.* at *30.
63. *Id.* at *30–31.
64. *Id.* at *31–32.
65. 280 F. Supp. 2d 357 (M.D. Pa. 2003).
66. *Id.* at 362–63.
67. *Id.* at 363.
68. *Id.* at 365 (internal citation omitted).
69. *Id.* at 373.

In *Roberts v. Haragan*,[70] a federal district court considered a speech code banning the use of "physical, verbal, written or electronically transmitted threats, insults, epithets, ridicule or personal attacks" that are "personally directed at one or more specific individuals based on the individual's appearance, personal characteristics or group membership, including, but not limited to, race, color, religion, national origin, gender, age, disability, citizenship, veteran status, sexual orientation, ideology, political view or political affiliation."[71] The court held the speech code to be facially overbroad in covering "much speech that, no matter how offensive, is not proscribed by the First Amendment."[72]

In *College Republicans v. Reed*,[73] a 2007 case, a federal court issued a preliminary injunction enjoining the enforcement of several speech code provisions, finding that the overbreadth challenges to them were likely to prevail on the merits.[74] The court enjoined the enforcement of a policy requiring students to act in accordance with the university's "goals, principles, and policies," as well as a policy requiring students "to be civil to one another."[75] Additionally, the court held that another provision banning "[c]onduct that threatens or endangers the health or safety of any person within or related to the University community, including physical abuse, threats, intimidation, harassment, or sexual misconduct" could not, consistent with the First Amendment, be construed to encompass all forms of "intimidation" and "harassment."[76] The court limited the university's ability to apply this policy to only those sub-categories of intimidation and harassment that "threaten[] or endanger[] the health or safety of any person," because the terms intimidation and harassment, standing alone, could be applied against protected speech.[77]

Next came the Third Circuit's important recent decision in *DeJohn v. Temple University*,[78] arising from a facial overbreadth challenge to a sexual harassment policy. At issue in *DeJohn* was a policy defining sexual harassment to include "expressive, visual, or physical conduct of a sexual or gender-motivated nature, when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work, educational performance, or status; or . . . has the purpose or effect of creating an intimidating, hostile, or offensive environment."[79] Under the terms of the sexual harassment policy, the plaintiff, a graduate student in history and former member of the military, claimed that he "felt inhibited in expressing his opinions in class concerning women in combat

70. 346 F. Supp. 2d 853 (N.D. Tex. 2004).
71. *Id.* at 866–67.
72. *Id.* at 872.
73. 523 F. Supp. 2d 1005 (N.D. Cal. 2007).
74. *Id.* at 1016–24.
75. *Id.* at 1016, 1023–24.
76. *Id.* at 1021.
77. *Id.* at 1023.
78. 537 F.3d 301 (3d Cir. 2008).
79. *Id.* at 305.

and women in the military" and felt "concerned that discussing his social, cultural, political, and/or religious views regarding these issues might be sanctionable by the University."[80]

The Third Circuit found the policy to be untenable for several reasons. First, it observed that under the policy's "purpose or effect" prong, "a student who sets out to interfere with another student's work, educational performance, or status, or to create a hostile environment would be subject to sanctions regardless of whether these motives and actions had their intended effect."[81] As a result, the policy violated the requirement that a school "must show that speech will cause actual, material disruption before prohibiting it."[82] Additionally, the policy's use of terms which were not clearly self-limiting, such as "hostile," "offensive," and "gender-motivated," rendered it "sufficiently broad and subjective" that it "could conceivably be applied to cover any speech of a gender-motivated nature the content of which offends someone."[83] Critically, "[t]his could include 'core' political and religious speech, such as gender politics and sexual morality."[84] Thus, the Third Circuit concluded that "the policy provides no shelter for core protected speech."[85] The court ultimately held the policy to be facially overbroad and permanently enjoined the university from re-implementing or enforcing the policy.[86] As a strongly-worded federal circuit court opinion, *DeJohn* carries much significance and should clearly and powerfully convey the message to university administrators that speech codes are unconstitutional.

The most recent speech code decision was handed down in 2009 by a California federal district court in *Lopez v. Candaele*.[87] *Lopez* invalidated a sexual harassment policy in the Los Angeles Community College District which prohibited conduct having the "purpose or effect of having a negative impact upon the individual's work or academic performance" and defined sexual harassment to include "insulting remarks," "intrusive comments about physical appearance," and "humor about sex."[88] Just as in *DeJohn*, the *Lopez* court held that the policy's focus on the purpose *and* effect of conduct rendered it unconstitutionally overbroad.[89] Finding that the policy reached a substantial amount of protected speech that is "merely offensive to some listeners," the court importantly stated that although "it may be desirable to promote harmony and civility, these values cannot be enforced at the expense of protected speech

80. *Id.*
81. *Id.* at 317.
82. *Id.*
83. *Id.* (internal quotations omitted).
84. *Id.*
85. *Id.* at 317–18.
86. *Id.* at 320.
87. No. CV 09-0995-GHK (C.D. Cal. July 10, 2009).
88. *Id.* (citation omitted).
89. *Id.* (citing DeJohn v. Temple University, 537 F.3d 301, 317 (3d Cir. 2008)).

under the First Amendment."[90] *Lopez* thus became the latest decision to hold a speech code facially unconstitutional.

The speech codes case law, ranging from *Doe* in 1989 to *Lopez* in 2009, is remarkable for its uniform rejection of speech codes and consistent upholding and protection of students' speech rights.[91] These decisions should send a strong signal to institutions across the nation that their own speech codes are unlikely to withstand a similar legal challenge.

II. WHAT MAKES SPEECH CODES SO HARMFUL?

A. Doctrinal Problems

As demonstrated by the case law outlined in the previous section, speech codes present several doctrinal problems under the First Amendment, most fundamentally overbreadth, vagueness, and content-based and viewpoint-based discrimination.

1. Overbreadth

As previously discussed,[92] a statute or law regulating speech is overbroad "if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate."[93] The courts have indicated that "[t]he doctrine of overbreadth, while extremely circumscribed in most applications, is generally afforded a broader application where First Amendment rights are involved."[94] Therefore, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[95]

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90. *Id.*

91. Significantly, it is not only in the university context that courts have struck down speech codes. In *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001), the Third Circuit invalidated a public school district's anti-harassment policy. The policy sought to prevent students from engaging in "verbal or physical conduct" based on another's race, gender, and other listed personal characteristics, when such conduct "has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment." *Id.* at 202. This included conduct which "offends, denigrates or belittles an individual" on the basis of the listed characteristics, with examples provided such as "unsolicited derogatory remarks," "jokes," "demeaning comments or behaviors," "mimicking," "name calling," and "innuendo." *Id.* at 202–03. The Third Circuit held that the policy encompassed a substantial amount of protected speech and was therefore unconstitutionally overbroad, reasoning that the First Amendment protects "a wide variety of speech that listeners may consider deeply offensive." *Id.* at 206. Moreover, the policy's speech restrictions were not necessary to prevent "substantial disruption" or interference with the school environment or the rights of other students. *Id.* at 216–17.

92. *See supra* note 40.

93. *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 864 (E.D. Mich. 1989).

94. *Roberts v. Haragan*, 346 F. Supp. 2d 853, 871–72 (N.D. Tex. 2004) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)). Conversely, "where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615.

95. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Courts invoked the overbreadth doctrine to strike down speech codes in *Booher*, *Bair*, *Roberts*, and other cases.[96] Nonetheless, numerous universities continue to maintain overbroad speech codes. For instance, San Jose State University's policy on "Harassment and/orAssault" prohibits "verbal remarks" and "publicly telling offensive jokes."[97] Coast Community College District, a consortium of three California community colleges, bans "[h]ateful behavior aimed at a specific person or group of people" as well as "habitual profanity or vulgarity."[98] The Lone Star College System, a five-campus community college system in Texas, similarly prohibits engaging in any "vulgar" or "indecent" expression.[99]

These and many other existing speech codes bring within their ambit speech which easily falls under the protection of the First Amendment. A publicly told offensive joke or the use of vulgar or indecent language, for example, would not come close to meeting any of the carved-out exceptions to the First Amendment.[100] Likewise, terms such as "verbal remarks" quite obviously encompass much expression which is protected by the First Amendment. Universities would be hard-pressed to distinguish such policies appreciably from the speech codes which have previously been struck down on overbreadth grounds.

Indeed, legal commentators have recognized that speech codes "tend to be overbroad, trying to eliminate any potentially offensive speech from the campus," and that "[t]he broad sweep of these codes keeps them from surviving a constitutional challenge."[101] Speech codes impermissibly "attempt to 'cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.'"[102] Thus, speech codes routinely encompass campus expression meriting First Amendment protection, creating a fundamental overbreadth problem.

2. Vagueness

Second, university speech codes are often unconstitutionally vague. A statute or regulation is void for vagueness when "men of common intelligence must necessarily guess at its meaning."[103] In order to escape the vagueness doctrine,

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96. *See supra* Part I.B.

97. San Jose State University, *Residence Hall &Campus Village Community Living Handbook 2007–2008*, *available at* http://housing.sjsu.edu/documents/Handbook.pdf (last visited July 13, 2009).

98. Coast Community College District, *Student Code of Conduct and Disciplinary Procedures*, *available at* http://www.orangecoastcollege.edu/student_services/student_life/deanofstudents/CCCD+Student+Code+of+Conduct.htm (last visited Sept. 2, 2008).

99. Lone Star College System, *Student Code of Conduct: Non-Academic Misconduct*, *available at* http://www.lonestar.edu/146126/ (last visited Feb. 20, 2009).

100. The recognized exceptions to the First Amendment are fighting words, obscenity, defamatory speech, *see R.A.V. v. St. Paul*, 505 U.S. 377, 382–83 (1992), incitement to imminent lawless action, *see Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), and true threats and intimidation., *see Virginia v. Black*, 538 U.S. 343, 359–60 (2003).

101. Rabe, *supra* note 17, at 225.

102. Craddock, *supra* note 17, at 1075 (internal citations omitted).

103. *See* Broadrick v. Oklahoma, 413 U.S. 601, 607 (1973) (internal citations omitted).

a statute or regulation must "give adequate warning of what activities it proscribes" and "set out 'explicit standards' for those who must apply it."[104] Significantly, the Supreme Court has held that "a more stringent vagueness test" should apply to laws that interfere with the right of free speech.[105]

Courts struck down speech codes on vagueness grounds in *Doe*, *UWM Post*, *Dambrot*, and other decisions.[106] Nevertheless, universities continue to maintain vague speech codes. Texas Southern University, for example, prohibits "causing or attempting to cause . . . emotional, mental, physical or verbal harm to another person," and provides such examples of this behavior as "emotional force, embarrassing, degrading or damaging information, assumptions, implications, remarks, or fear for one's safety."[107] Northeastern University bans students from using the school's information systems or facilities to "[t]ransmit or make accessible material, which in the sole judgment of the University is offensive" or "annoying."[108] Macalester College defines racial harassment to include "speech acts which are intended to insult or stigmatize an individual or group of individuals on the basis of their race or color, or speech that makes use of inappropriate words or non-verbals."[109]

These and many other speech codes are void for vagueness because they do not give students adequate warning of the speech to be prohibited and do not provide university administrators with specific standards for enforcement. Under the Texas Southern policy, for example, it is not immediately clear what type of verbal conduct would constitute an attempt to cause emotional or mental harm. The Northeastern and Macalester policies fail to provide a standard for "offensive" and "inappropriate" speech, respectively. Students at these institutions are left to guess at the intended meanings of the policies, while the definition in any particular case is left to the whims of the university's administration. Indeed, the Northeastern policy explicitly reserves "sole judgment" to the university. Policies such as these are far too vague to withstand a constitutional challenge.[110]

Legal commentators have recognized the vagueness problem associated with

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104. *Id.*

105. Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

106. *See supra* Part I.B.

107. Texas Southern University, *Student Code of Conduct: Intentional Mental or Physical Harm*, *available at* http://www.tsu.edu/pdffiles/about/administration/general/POLICIES/StudentCodeofConduct8-2007.pdf (last visited Sept. 2, 2008).

108. Northeastern University, *Undergraduate Student Handbook 2007–2008: Appropriate Use of Computer and Network Resources Policy*, *available at* http://www.northeastern.edu/admissions/pdfs/NEU_Student_Hdbk.pdf (last visited Sept. 2, 2008).

109. Macalester College, *Student Handbook: Racial Harassment Policy*, *available at* http://www.macalester.edu/deanofstudents/handbook/harassment.htm (last visited Sept. 2, 2008).

110. In this section, I have included policies from private institutions purely because they are illustrative of the vagueness problem presented by many speech codes. As previously discussed, private colleges and universities are not legally bound by the First Amendment. *See* French, *supra* note 4, at 49. While their policies are therefore not susceptible to a constitutional challenge, the examples I have provided in this section are meant to illustrate the general vagueness problem associated with university

speech codes. As one commentator writes, "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."[111] Another commentator similarly observes, "Students, faculty, and administrators must necessarily guess as to what speech is permitted and what is prohibited by the codes."[112] Nonetheless, despite the consensus in legal scholarship and in the case law, colleges and universities continue to draft and enforce unconstitutionally vague speech codes.

3. Content- and Viewpoint-Based Discrimination

Third, many speech codes impermissibly discriminate against speech on the basis of content or viewpoint. The Supreme Court has stated that "[c]ontent-based regulations are presumptively invalid."[113] This holds true with particular force on a college campus, as the Court has indicated that the "campus of a public university, at least for its students, possesses many characteristics of a public forum."[114] To the extent that areas on a campus are traditional or designated public fora,[115] content-based restrictions on speech are invalid unless they are "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end."[116] Even in those campus areas that are more aptly character-

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regulations on speech. In other words, the same policy, if maintained at a public college or university, would be susceptible to a vagueness challenge.

111. Rabe, *supra* note 17, at 212.

112. Craddock, *supra* note 17, at 1049. *See also* Rabe, *supra* note 17, at 225 ("[W]hen prohibited speech is not specified the codes are unconstitutional.").

113. *R.A.V.*, 505 U.S. at 382. Elsewhere, the Court has indicated that content-based restrictions on speech are subject to "the most exacting scrutiny." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 66 (1983). This is due to the fact that "[a]ny restriction on expressive activity because of its content would completely undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (internal citations omitted).

114. Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981). In *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004), a federal district court reached the following conclusions regarding a public university's campus: "to the extent the campus has park areas, sidewalks, streets, or other similar common areas, these areas are public forums, at least for the University's students, irrespective of whether the University has so designated them or not. These areas comprise the irreducible public forums on the campus. Of course, the University, by express designation, may open up more of the residual campus as public forums for its students, but it can not designate less . . . This assumption necessarily implies its converse: not all places within the boundaries of the campus are public forums. Those areas not public forums, either by virtue of their correspondence to traditional public forums, or by express designation, are therefore either non-public forums or limited public forums." 346 F. Supp. 2d at 861–62.

115. Traditional public fora are areas which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939). Designated public fora are areas which "the State has opened for use by the public as a place for expressive activity. *Perry*, 460 U.S. at 45. "Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum." *Id.* at 46.

116. *Perry*, 460 U.S. at 45–46.

ized as limited public fora or nonpublic fora,[117] content-based regulations must be "reasonable" in light of the intended purposes of the forum and "not viewpoint-based."[118] Moreover, viewpoint-based restrictions on speech are forbidden in all public, designated public, limited public, and nonpublic fora.[119]

Courts struck down speech codes at least partly on the grounds of content-based discrimination in *Corry* and *Dambrot*.[120] Significantly, these decisions applied the holding from the Supreme Court's landmark decision in *R.A.V. v. St. Paul*[121] that, even within otherwise proscribable classes of speech such as fighting words, the state cannot discriminate on the basis of content or viewpoint by, for instance, prohibiting the expression of fighting words directed at particular groups while allowing similar expression directed at other groups.[122] *R.A.V.*, while not a speech code case, carries significant constitutional ramifications for speech codes and should counsel universities against the practice of discriminating on the basis of expressive content or viewpoint.[123]

Yet in spite of these indications from the courts, universities continue to maintain speech codes that discriminate against speech on the basis of content or viewpoint. Kansas State University, for instance, prohibits "generalized sexist statements and behavior that convey insulting or degrading attitudes

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117. Limited public fora are areas "opened for public expression limited to particular groups or to particular topics." Roberts v. Haragan, 346 F. Supp. 2d 853, 860 (N.D. Tex. 2004). Nonpublic fora are those areas "where there is clear evidence that the state did not intend to create a public forum or where the nature of the property at issue is inconsistent with the expressive activity, indicating the government did not intend to create a public forum." *Id.* (internal citations omitted).

118. *Id.*

119. *Id.*; *Perry*, 460 U.S. at 46; Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001); Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 806 (1985).

120. *See supra* Part I.B for a discussion of *Corry v. Leland Stanford Junior Univ*., No. 740309 (Cal. Super Ct. Feb. 27, 1995), and *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1184 (6th Cir. 1995).

121. *R.A.V. v. St. Paul*, 505 U.S. 377, 383–84 (1992).

122. *Id.* at 383–84; *Corry*, No. 740309 at *19; (slip opinion); *Dambrot*, 55 F.3d at 1184.

123. In *R.A.V.*, the Court indicated that there are two exceptions which allow the state to censor a subclass of expression on the basis of its content. The first occurs "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech is proscribable." 505 U.S. at 388. The second occurs when "the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is '*justified* without reference to the content of the . . . speech.'" *Id.* at 389 (internal citations omitted). As legal commentators have previously discussed, speech codes discriminating on the basis of expressive content do not meet either of these exceptions. *See, e.g.*, Rabe, *supra* note 17, at 211 ("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. 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 . . . . 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."); Craddock, *supra* note 17, at 1070 ("Campus hate speech codes aimed at protecting students from psychological injury do not meet the content-neutral requirement of the secondary effects doctrine, because each is aimed at curbing the emotive impact of speech upon its listener.").

about women."[124] This policy favors speech that conveys positive attitudes about women over speech that is deemed sexist. Jackson State University bans expression which "degrades, insult[s], taunt[s], or challenges another person" and "derogatory comments or remarks."[125] This policy favors speech carrying a positive message over speech conveying a disparaging or derogatory message. As a result, it too presents the danger of guiding campus dialogue in a particular direction.

Legal commentators have recognized that many speech codes discriminate against expression on the basis of content or viewpoint. One commentator writes that speech codes "are by definition content-based."[126] Another commentator argues that many speech codes are "content-based restrictions on speech that select a particular viewpoint as the official government or university message on issues important in undergraduate and graduate education."[127] Far too often, a speech code "selects a preferred view and limits speech that is counter to that view."[128] These observations have been borne out in the case law and reiterated in other legal scholarship,[129] yet universities continue to draft and enforce speech codes which discriminate on the basis of expressive content or viewpoint.

B. Impact on Campus Speech

Due to their many constitutional flaws, speech codes have had, and continue to have, a severely harmful impact on campus speech. First, speech codes create a "chilling effect" on much campus speech, whereby students in many instances censor themselves or refrain from speaking altogether. Second, speech codes suppress disfavored speech. Third, speech codes invite a feeling of entitlement, or a perceived right not to be offended, among many students. Fourth, by stifling campus speech so pervasively, speech codes threaten the very vitality and functioning of America's colleges and universities.

1. The Chilling Effect

As discussed in the previous section, speech codes are often overbroad or vague or both. They typically fail to provide students with adequate notice of the categories of speech that are prohibited and the forms that remain permissible. Students must necessarily guess as to the scope of the speech code, and additionally, an administrator attempting to enforce the speech code in a particular case must arbitrate the imprecise language and uncertain reach of the code.

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124. Kansas State University, *Types of Sexual Harassment Covered by the Policy: Gender Harassment*, *available at* http://www.k-state.edu/dh/sex_harass/types.html (last visited Sept. 2, 2008).

125. Jackson State University, *2007–2009 Student Handbook: Harassment (Verbal and/or Physical)*, *available at* http://www.jsums.edu/studentlife/pdf/06BookProof.pdf (last visited Feb. 20, 2009).

126. Rabe, *supra* note 17, at 206.

127. Craddock, *supra* note 17, at 1057–58.

128. *Id.* at 1058.

129. *See, e.g.*, Johnson, *supra* note 24, at 1842.

Under these circumstances, "[m]embers of the university community may well err on the side of caution to avoid being charged with a violation."[130] Some potential speakers may even refrain from speaking out altogether, as they become "so fearful of offending any person or group that they will effectively exercise self-censorship."[131] This chilling effect prevents many crucial forms of discussion and debate from taking place, detracting from the university campus's function as a true marketplace of ideas. Such chilling of expression is fundamentally impermissible under First Amendment law.[132]

The chilling effect is made even worse by the use of "implicit speech codes," whereby universities, rather than maintain a written policy to be followed, selectively punish speech on a case-by-case basis.[133] Implicit speech codes are informal mechanisms through which administrators, on an ad hoc basis, seek to censor and punish speech which they dislike. They represent a blatant attempt to evade the constitutional scrutiny attached to written speech codes.[134] Whereas written speech codes, it can be argued, "at a minimum, are informative of what speech or viewpoint is prohibited even if they are overbroad," implicit speech codes are "inherently vague because they provide no set of rules to follow."[135] This means that students "are not given adequate warning that their speech could result in sanctions."[136] As a result, "a strong likelihood exists that speech will be chilled because people will be overly cautious so as to avoid being sanctioned."[137] Therefore, the use of implicit speech codes contributes to the chilling effect on student speech, further hindering the free flow of ideas on campus.[138]

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130. Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L.J. 484, 521.

131. Murray, *supra* note 27, at 249. *See also* Moore, *supra* note 26, at 517 (observing that "speech on today's campuses is being severely chilled"); Bair v. Shippensburg Univ., 280 F. Supp. 2d 357, 372–73 (M.D. Pa. 2003) (holding that plaintiffs had met the "irreparable harm" element by demonstrating the speech code's chilling effect on campus speech).

132. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 630 (1973) (Brennan, J., dissenting) (recognizing that "overbreadth review is a necessary means of preventing a 'chilling effect' on protected expression"); Laird v. Tatum, 408 U.S. 1, 11 (1972) (recognizing that "constitutional violations may arise from the deterrent, or 'chilling,' effect of government regulations that fall short of a direct prohibition against the exercise of First Amendment rights"); College Republicans v. Reed, 523 F. Supp. 2d 1005, 1024 (N.D. Cal. 2007) (enjoining university from enforcing regulations on speech based on "[t]he real prospect of . . . a substantial chill of First Amendment rights").

133. Murray, *supra* note 27, at 266–67; Craddock, *supra* note 17, at 1053–55.

134. Murray, *supra* note 27, at 267; Craddock, *supra* note 17, at 1054.

135. Murray, *supra* note 27, at 267.

136. *Id. See also* Craddock, *supra* note 17, at 1055 ("This type of ad hoc implicit hate speech code may pose an even greater danger to speech since the university offers no set of defined rules prohibiting such speech, but rather selectively enforces sanctions based on the nature of the speech, the victim, and the speaker.").

137. Murray, *supra* note 27, at 267.

138. A good example of the harms perpetrated by implicit speech codes is the case of *Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993). In that case, the Fourth Circuit overturned a university's sanctions against a fraternity for holding a campus performance event to which some members of the student body objected. The event, which was staged both for

2. Suppression of Disfavored Topics and Viewpoints

Second, speech codes suppress the discussion of disfavored topics and expression of disfavored viewpoints. As previously discussed, many speech codes discriminate against expression on the basis of content or viewpoint. When universities maintain and enforce such policies, they effectively drive certain beliefs and ideas out of campus discussion. The practice of censoring and punishing speech on a selective basis leads to "intellectual pacifism,"[139] whereby those with disfavored views are chilled from speaking out for fear of prosecution and punishment. This results in a one-sided debate on particular issues and thus an incomplete marketplace of ideas.

One commentator has labeled this phenomenon the "standardization of opinions and ideas" and, more directly, a form of thought control.[140] Important contributions to the development and debate of ideas are essentially curtailed in the very environment where they should originate, meaning that society is ultimately deprived of many potential solutions and innovations for the future.[141] After all, "[t]he pursuit of truth requires not only an unfettered freedom of ideas, but also honesty, fidelity to reason, and respect for method and procedures."[142] Truth is discovered and knowledge is advanced through "a multitude of tongues," not through any kind of "authoritative selection."[143] These ideals, unfortunately, are undermined by the presence of speech codes on campus.

Furthermore, when campus debate is restricted to only that which is comfortable and orthodox, those who hold those prevailing views are themselves harmed. This is due to the fact that unchallenged viewpoints tend to be poorly thought-out and weakly constructed, and therefore easily discredited.[144] Conversely, when an idea is challenged and debated thoroughly, the speaker is

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purposes of entertainment and to raise money for charity, included an "ugly woman contest" in which members of the fraternity "dressed as caricatures of different types of women," and the fraternity later conceded that the contest was "sophomoric and offensive" in nature. *Iota Xi*, 993 F.2d at 387–88. The university, in imposing its sanctions, did not cite the violation of any written speech code, but simply found that the event "created a hostile learning environment for women and blacks, incompatible with the University's mission." *Id.* at 388. The university described its mission as seeking to "create a non-threatening, culturally diverse learning environment for students of all races and backgrounds, and of both sexes." *Id.* at 389. Ultimately, the Fourth Circuit held that the performance event, while offensive to some, was clearly protected expression, leading it to nullify the sanctions imposed upon the fraternity.

139. Glaser, *supra* note 21, at 270.

140. *Id.* at 270, 292.

141. *Id.* at 271. The author illustrates this problem within the context of law schools: "Discussion in law school classrooms will be inhibited as a result of the codes. It will be difficult to analyze and discuss controversial cases, such as affirmative action and set-aside cases, when students fear offending minority students. This is extremely detrimental because new solutions will no longer be introduced for fear of offending someone." *Id.* at 288.

142. Robert C. Post, *Free Speech and Religious, Racial, and Sexual Harassment: Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 324 (1991).

143. *Id.* at 323 (internal citations omitted).

144. Glaser, *supra* note 21, at 283.

forced to answer those challenges and in the process strengthens and improves the idea.[145] Moreover, "[i]t is through challenging and considering disfavored ideas that a person may develop an independent mind and the opportunity to achieve social change."[146] Speech codes by and large prevent this process from taking place. The end result, then, is that the goals of debate and improvement are defeated, overtaken by "intellectual stagnation."[147]

3. The Supposed Right Not to be Offended

Speech codes have contributed heavily to a prevailing notion among college students that there is a general "right not to be offended,"[148] giving them a sense of entitlement to be free of any speech that they find disagreeable or offensive. Far too typically, a campus speech code "purports to create a personal right to be free from involuntary exposure to any form of expression that gives certain kinds of offense."[149] This is demonstrated by the previously mentioned speech codes prohibiting "rude, disrespectful behavior,"[150] any violation of "respect for personal feelings" and "freedom from indignity of any type,"[151] and speech that "detains, embarrasses, or degrades" another person.[152]

Through the enactment and enforcement of speech codes aimed at offensive or uncivil speech, university administrators "increasingly coddle and even reward the hypersensitive and easily outraged, perversely encouraging more people to be hypersensitive and easily outraged."[153] This means that one can expect the number of complaints and instances of censorship to increase over time, not decrease, making conditions worse for free speech on campus. Moreover, these speech codes encompass clearly protected expression and contravene longstanding jurisprudence holding that there is no exception to the First Amendment for speech which is merely offensive, prejudicial, or vile.[154]

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145. *Id.*

146. Craddock, *supra* note 17, at 1049.

147. Glaser, *supra* note 21, at 271.

148. In *The Shadow University*, the authors take note of this phenomenon: "At almost every college and university, students deemed members of 'historically oppressed groups' . . . are informed during orientations that their campuses are teeming with illegal or intolerable violations of their 'right' not to be offended." KORS & SILVERGLATE, *supra* note 18, at 99. They write, "What an astonishing expectation (and power) to give to students: the belief that, if they belong to a protected category, they have a right to four years of never being offended." *Id.*

149. Strossen, *supra* note 130, at 530 (internal citations omitted).

150. *See supra* note 9.

151. *See supra* note 10.

152. *See supra* note 11.

153. David E. Bernstein, *Defending the First Amendment from Antidiscrimination Laws*, 82 N.C. L. REV. 223, 245 (Dec. 2003).

154. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Virginia v. Black, 538 U.S. 343, 358 (2003) ("The hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting."); *Iota Xi*, 773 F. Supp. at 795 ("The First Amendment does not recognize exceptions for bigotry, racism, and religious

Speech codes provide an institutional endorsement of the notion that students have a right not to be offended, leading students to believe they have a right to suppress any expression they may find disagreeable. This is harmful in that a modern liberal arts education requires exposure to, and tolerance of, a wide range of ideas and interactions, some of which may be disagreeable or offensive. The very speech curtailed by these speech codes is often what should be at the center of discussion during one's collegiate years.[155] Robert Post argues that restricting speech in this manner undermines the university goal of "critical education," through which institutions "discover and disseminate knowledge by means of research and teaching."[156] As Post writes, "[s]peech can be uncivil for many reasons, including the assertion of ideas that are perceived to be offensive, revolting, demeaning, and stigmatizing. Critical education, however, would require the toleration of all ideas, however uncivil."[157]

Further, the notion that one can simply censor speech one does not like ill serves students as they transition from the relatively insulated college setting to the larger society. As they are granted this power to censor, students gain a "false sense of security unavailable outside of the college environment."[158] Instead of learning to "cope with speech they find offensive" and to "survive in the broadly diverse communities that exist on campus as well as off campus," students are largely "turning to school officials for protection."[159] In the process, students are losing valuable life lessons about interacting with others and understanding and overcoming differences, even fundamental ones. Simply claiming offense and demanding that a university administration intervene, on the other hand, does not benefit them in the long run. Thus, the perceived right not to be offended perpetrates significant harm on the college campus.

4. The Vitality and Functioning of Our Universities

By chilling much campus speech, restricting the expression of disfavored ideas and viewpoints, and contributing to a perceived right not to be offended,

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intolerance or ideas or matters some may deem trivial, vulgar or profane."); Saxe v. State College Area School District, 240 F.3d 200, 204, 209 (3d Cir. 2001) ("There is no categorical 'harassment exception' to the First Amendment's free speech clause . . . '[h]arassing' or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections."); Silva v. Univ. of New Hampshire, 888 F. Supp. 293, 314 (D. N.H. 1994) ("The fact that society may find speech offensive is not a sufficient reason for suppressing it"); Cohen v. California, 403 U.S. 15 (1971) (reversing defendant's conviction for disturbing the peace for wearing a jacket in a courthouse bearing the words "Fuck the Draft"); Terminiello v. Chicago, 337 U.S. 1 (1949) (reversing defendant's conviction for disorderly conduct for delivering a public speech with racist and prejudicial messages).

155. Moore, *supra* note 26, at 547–48. *See also* Craddock, *supra* note 17, at 1049 ("University education . . . requires that students confront and engage in speech that is often offensive and disagreeable. The heart of undergraduate and graduate education takes place in the context of wide open debate.").

156. Post, *supra* note 142, at 322.

157. *Id.* at 323–24.

158. Alexander, *supra* note 17, at 1375.

159. Moore, *supra* note 26, at 547.

speech codes have caused and continue to cause tremendous cumulative harm on college campuses. As such, they threaten the very vitality and proper functioning of our nation's colleges and universities and undermine the crucial role played by these institutions in our society.

America's universities are meant to be "bastions of free thought" which prepare students for life in the larger society.[160] They traditionally "educate students not only in areas of substantive import but also, and more fundamentally, by training students to think and reason independently."[161] In order to fulfill their missions, universities must allow students to develop the skills of reasoning and analysis and to challenge "preconceived notions and the existing set of social and political mores."[162] Freedom of speech is a necessary prerequisite to this objective, as it "ensures individual self-fulfillment by assisting the development of the individual character."[163] As other commentators have recognized, the goals of the American university are therefore "best accomplished by promoting the pursuit of knowledge and truth by the consideration of diverse opinions and the free and unfettered exchange of ideas."[164]

In clear contravention of these principles, speech codes teach college students all the wrong lessons—to quickly claim offense, to censor individuals espousing views with which they disagree, to interpret expression which is even remotely controversial or offensive as "hate speech" or "politically incorrect" speech, and to stifle expression which questions and challenges the prevailing orthodoxy. Speech codes have "'cast a pall of orthodoxy' over university classrooms and campus life."[165] The regrettable result is that "[i]nstead of learning how to think and reason independently, students are taught that the act of questioning should be punished. . . . A university education then becomes indoctrination rather than development of the mind to challenge what is and to discover what ought to be."[166]

The consequences are ultimately felt in society's ability to develop a capable citizenry. Colleges and universities are vital parts of the educational system which "is 'in most respects the cradle of our democracy'"[167] and "essential to the maintenance of 'our vigorous and free society.'"[168] Commentators have recognized that our system of education must aim for "the creation of autonomous citizens, capable of fully participating in the rough and tumble world of

160. Glaser, *supra* note 21, at 282–83 (internal citations omitted).

161. Craddock, *supra* note 17, at 1048.

162. *Id.* at 1086–87.

163. Moore, *supra* note 26, at 531.

164. Glaser, *supra* note 21, at 283. *See also* Craddock, *supra* note 17, at 1087 ("Higher education is the one place in America where one's primary purpose is not only to make one's voice heard, but also to question one's ideas and the ideas of others. The university's fundamental mission is 'to search for truth and a university is a place where people have to have the right to speak the unspeakable and think the unthinkable and challenge the unchallengeable.'") (internal citations omitted).

165. Craddock, *supra* note 17, at 1048 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).

166. *Id.* at 1059.

167. Post, *supra* note 142, at 321 (quoting Adler v. Board of Educ., 342 U.S. 485, 508 (1952) (Douglas, J., dissenting)).

168. *Id.* at 322 (quoting Healy v. James, 408 U.S. 169, 194 (1972)).

public discourse,"[169] because "[d]emocratic government works better when independent-thinking individuals become active in lawmaking" and public debate.[170] We as a society must therefore remain committed to maintaining an open atmosphere for debate, discussion, and disagreement. Deviation from this commitment will only lead to a society "composed of individuals lacking the skill or educational background to challenge governmental authority and improve the functioning of a free society."[171] Because speech codes "teach individuals to think of government and authority with Orwellian fear,"[172] they represent a significant threat to the development of capable citizens.

Moreover, speech codes hinder the development of effective leaders for the future. In the Supreme Court's words, "[t]he Nation's future depends upon leaders trained through wide exposure to [the] robust exchange of ideas."[173] One commentator echoes that "[a] limited education for the next generation will cause far-reaching problems because the leaders of tomorrow will be unable to adequately address the problems facing them," making freedom of speech on campus "vital to the survival and success of our country and the world."[174] Rather than insulate students with speech codes and protect them from even slight offenses, we should allow them the freedom to make intelligent decisions for themselves when confronted with various viewpoints and modes of expression—and to gain the sheer experience of doing so. Students "will eventually have to do this every day of their lives and protecting them from unpopular ideas through the regulation of speech will only serve to ill-prepare them for the world after graduation."[175] Speech codes have precisely this coddling effect and therefore should be eradicated from the college environment.

III. DEBUNKING SOME COMMON JUSTIFICATIONS: RESPONSES TO SPEECH CODE PROPONENTS

In spite of the myriad problems presented by speech codes, as well as their uniform rejection by the courts, some legal commentators have defended their use in higher education. These commentators have put forth several arguments that, taken in conjunction with each other, attempt to justify their continued presence on college campuses. In this section, I will respond to these arguments by demonstrating that speech codes in fact do not offer the benefits that their proponents claim and that, rather, the harms they create strongly counsel against

169. *Id.* at 321.

170. Craddock, *supra* note 17, at 1048.

171. *Id.* at 1089.

172. *Id.* at 1088.

173. *Keyishian*, 385 U.S. at 603. *See also* Glaser, *supra* note 21, at 284 ("America's universities are the classrooms of our country's future leaders, making it essential to the continuing survival of our country that our leaders receive the best education possible. Limiting the ideas available to today's students will inevitably lead to the degeneration of the quality of life in our country.").

174. *Id.* at 284.

175. *Id.*

their continued enactment and application.

There are five major arguments that I will address in this section. While none of them are dispositive on their own, in the aggregate, they attempt to show that the benefits offered by speech codes outweigh the harms. The first argument is that speech codes actually operate in favor of campus speech by providing clear notice of what is protected speech and what is prohibited. Second, some commentators posit that sexist, racist, and other prejudicial or demeaning speech is of low social value and thus may rightfully be banned. Third, other theorists argue that speech codes are necessary to protect historically disadvantaged minorities from injurious speech. Fourth, still others make the argument that speech codes combat racism, sexism, and other forms of prejudice in our society. The fifth and final argument which I will address is that speech codes are rarely enforced and therefore do not pose a major threat to free expression.

A. Speech Codes Provide Clear Notice to Speakers

Some argue that speech codes are actually beneficial to campus speech because they provide speakers with some notice about what speech is permissible and what is prohibited. According to this argument, speech codes remove or minimize the ambiguity and uncertainty that may exist regarding a university's regulation of speech and thereby prevent student speech from being chilled.

Thomas Grey, one of the drafters of the Stanford University policy struck down in *Corry*,[176] espoused this view in defending that policy.[177] He argued that "the values of free speech themselves, especially important in a university, are better served by clear definition in advance of the speech to be regulated, when regulation is necessary. . . . The alternative to defining that speech is uncertainty about how far the regulation extends, and this casts a chill on speech."[178] Justifying Stanford's erstwhile policy, Grey wrote that "[i]f free campus debate was to be protected, the limits of what could count as punishable verbal abuse needed to be spelled out carefully."[179] In his view, "this just follows standard civil-libertarian strictures about the dangers of vagueness and chilling effect."[180]

There are several important counterarguments to this point. As an initial matter, far too many speech codes are in fact unconstitutionally vague, as demonstrated by the speech codes case law[181] as well as by several of the sample policies I have provided in this article.[182] As discussed *supra*, the courts, when confronted with facial challenges to speech codes, have found a number of them to be void for vagueness, and many more unconstitutionally vague

176. *See* Corry v. Leland Stanford Junior Univ., No. 740309 (Cal. Super Ct. Feb. 27, 1995).

177. *See* Thomas Grey, *How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience*, 29 U.C. DAVIS L. REV. 891 (1996).

178. *Id.* at 901.

179. *Id.* at 903.

180. *Id.* at 940.

181. *See supra* Part I.B.

182. *See supra* Part II.A.2.

speech codes remain in force at universities, having not yet been challenged in court. To the extent that speech codes are unconstitutionally vague, they fail to provide adequate guidance with respect to prohibited speech and therefore contribute significantly to a chilling effect on campus speech. Grey himself recognized the existence of this problem—acknowledging that "[s]ome of the campus anti-harassment regulations do cast a serious chill over ordinary cultural and political debate"[183]—but not its broad scope.

Additionally, even when speech codes avoid the vagueness problem by providing clear, concrete statements of what is prohibited and what is not, they often encompass protected speech and thus fail the overbreadth doctrine or constitute content- or viewpoint-based discrimination. This too has been borne out in the case law[184] and also can be seen in some of the example policies discussed in this article.[185] Thus, the fact that some speech codes provide notice to speakers of prohibited expression does not change the reality that they violate students' First Amendment rights due to other doctrinal flaws. This explains why other commentators have rejected arguments touting the benefits of speech codes for campus speech. One commentator writes that "[i]ronically, universities have attempted to improve speech through speech codes. However, the only way to improve speech is to abolish all speech codes. Not improve. Abolish."[186] Therefore, Grey's justification is at best incomplete, as it fails to account for the other doctrinal difficulties posed by speech codes.

Finally, Grey's argument does not account for the use of "implicit speech codes" on college campuses,[187] which do not provide any notice to students and allow for ad hoc, selective enforcement. As illustrated in the aforementioned *Iota Xi* case,[188] implicit speech codes allow university administrators to selectively censor expression which they deem to be disagreeable or unwanted. In the process, there is no notice provided to students that their speech may be subject to punishment and there is no indication of the types of speech which are prohibited and the types that are allowed. This certainly has a chilling effect on campus speech, as students are left to guess whether they will face censorship and punishment for particular expression. Thus, the use of implicit speech codes presents another flaw in the argument that speech codes are beneficial in providing clear notice to campus speakers.

B. The "Social Value" Argument

Another oft-cited justification for speech codes is that because sexist, racist, and other prejudicial or demeaning speech is of low social value, it may legitimately—and indeed, it should—be prohibited. According to this argument,

183. Grey, *supra* note 177, at 944.
184. *See supra* Part I.B.
185. *See supra* Parts II.A.1, II.A.3.
186. Craddock, *supra* note 17, at 1088.
187. *See supra* Part II.B.1.
188. Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993).

these forms of expression add so little to the marketplace of ideas that they do not deserve protection. As part of the social value argument, some commentators argue that speech codes reflect a "societal consensus" against racism, sexism, and other forms of prejudice. Therefore, the argument proceeds, speech codes do not truly harm campus debate and discussion because they merely seek to eradicate speech which society deems to be unworthy and indefensible.

Mari Matsuda has been one of the foremost proponents of censoring prejudicial speech. Matsuda argues, for instance, that "[r]acist speech is best treated as a *sui generis* category, presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse."[189] She opines that racist speech "edge[s] close" to unprotected forms of expression such as "[s]peech infringing on public order," "[b]omb threats, incitement to riot, 'fighting words,'" and obscenity.[190] In her view, these categories of expression are all comparable in terms of their lack of merit and value and thus their inability to contribute anything meaningful to campus dialogue.

Richard Delgado similarly posits that "with systemic social ills like racism and sexism, the marketplace of ideas is much less effective."[191] Another commentator, Rodney Smolla, writes that "[t]he civil libertarian cannot in his or her heart truly imagine that the speech of the Ku Klux Klan or the Nazis can have any redeeming social value."[192] While Smolla's choice of examples may be extreme, the point he seeks to make is that prejudicial speech does not ultimately advance truth and knowledge, making it undeserving of protection.[193] Moreover, according to these theorists, prejudicial speech can only serve to harm and deter the free flow of ideas by discouraging at least some students from participating in campus dialogue. For this reason, Jon Gould argues that for the sake of "public discourse, civility restraints are appropriate . . . to prevent the type of poisoned attacks that destroy rational deliberation and the 'possibility of constructive engagement.'"[194] Under this approach, speech codes can be rationalized due to the need to eliminate prejudicial and other "low-value" speech from the college campus.

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189. Mari Matsuda, *Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2357 (1989).

190. *Id.* at 2355.

191. Richard Delgado, *First Amendment Formalism is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.-C.L. L. REV. 169, 171 (1994).

192. Rodney A. Smolla, *Academic Freedom, Hate Speech, and the Idea of a University*, 47 WASH. & LEE L. REV. 171, 175 (1990).

193. *See also* Craddock, *supra* note 17, at 1057 ("Proponents of hate speech codes argue that speech which does not contribute to the uncovering of truth is not speech at all, and is therefore not entitled to the protection of the First Amendment. For example, racist or sexist epithets do not try to inform or convince the listener. Such speech does not contribute to a healthy discourse and dialogue because the offended party has no opportunity for response or reflection. Proponents claim that an individual yelling racist speech does not intend to 'discover truth or initiate dialogue but to injure the victim.'") (internal citations omitted).

194. Gould, *supra* note 20.

1. Many Speech Codes Go Beyond Prohibiting "Low-Value" Speech

As an initial matter, the "social value" argument does not justify the many speech codes encompassing expression which is not racist, sexist, or otherwise prejudicial. The aforementioned examples from Johns Hopkins University,[195] Texas A&M University,[196] San Jose State University,[197] and Texas Southern University,[198] among others, demonstrate that speech codes, rather than being limited to these areas, have been used to cover various other types of speech, including perfectly innocuous speech. Johns Hopkins' ban on "[r]ude, disrespectful behavior" and Texas A&M's ban on speech which violates "respect for personal feelings" and "freedom from indignity of any type" are clearly not narrowly limited to addressing racist or sexist speech. Other examples in this vein exist. The University of Maine-Presque Isle, for instance, suggests that an "off-hand comment or joke" can constitute harassment even if it is unintentional.[199] West Chester University defines harassment to include "written or verbal acts . . . which may result in personal indignity."[200] These and many other speech codes go beyond merely targeting racist, sexist, or otherwise prejudicial speech. As such, they cannot be justified under the rationale of eliminating prejudicial and other low-value expression on campus.

2. The First Amendment Protects the Right to Engage in "Low-Value" Speech

Secondly, it is simply not the case that only innocuous or pleasant forms of speech are constitutionally protected. As previously discussed, there is no exception to the First Amendment for speech which is prejudicial, offensive, bigoted, or vile.[201] This includes explicitly racist and sexist expression.[202] Consequently, colleges and universities cannot, consistent with the First Amendment, take aim at prejudicial or offensive views, regardless of the social value involved.

Courts have upheld these principles, and thus rejected the idea of assessing

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195. *See supra* note 9.

196. *See supra* note 10.

197. *See supra* note 97.

198. *See supra* note 107.

199. University of Maine-Presque Isle, *Residence Hall Guide: Physical Violence or Harassment*, *available at* http://www.umpi.maine.edu/reslife/ResHallGuideSep06.pdf (last visited Sept. 8, 2008).

200. West Chester University, *Ram's Eye View: Student Code of Conduct 2007–2008*, *available at* http://www.wcupa.edu/_services/stu/ (last visited Sept. 8, 2008).

201. *See supra* note 154.

202. *See, e.g.,* Terminiello v. Chicago, 337 U.S. 1 (1949) (reversing defendant's conviction for disorderly conduct for delivering a public speech with racist and prejudicial messages); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), cert. denied, 439 U.S. 916 (1978) (overturning a city's denial of a permit to a Nazi group seeking to hold a demonstration in front of city hall, where the city alleged that the group's views of racial hatred would upset city residents); Brandenburg v. Ohio, 395 U.S. 444 (1969) (overturning the criminal conviction of a Ku Klux Klan member for the expression of racist views advocating the use of force and violence); Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993) (overturning a public university's sanctions against a fraternity for holding a campus performance event which was deemed to be sexist and racist).

the social value of particular expression, within the specific context of speech codes cases. In *UWM Post*,[203] for example, the court recognized that "the Constitution does not make the dominance of truth a necessary condition of freedom of speech. To say that it does would be to confuse an outcome of free speech with a necessary condition for the application of" the First Amendment.[204] Similarly, the court in *Bair*[205] observed that "'the Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it.'"[206] The jurisprudence on this point is long-standing and unequivocal, leaving no room for the approach advocated by Matsuda, Delgado, and others. Therefore, even if these theorists were correct that speech of supposedly low social value should be proscribable, the Supreme Court and lower federal courts have long made it clear that this approach will not be adopted. Barring constitutional amendment, the fact remains that even repugnant speech is entitled to protection.

Moreover, even if speech codes could lawfully be used to take aim at prejudicial, offensive, and other low-value speech, it is not immediately clear on what basis they could do so. It is unclear, first, who would be best suited to be the ultimate arbiter of offensive, sexist, racist, or prejudicial speech and, second, what the proper standards would be for separating speech falling into these categories from speech deserving protection. Put differently, drawing a line between sufficiently low-value speech and speech deserving of protection is inherently difficult, if not impossible as a practical matter.

On the one hand, making the government the sole arbiter is dangerous because, as one commentator, J. Peter Byrne, has posited, "government has no acceptable criteria for distinguishing between valuable and worthless speech. Even a well-meaning censor cannot in principle distinguish between an insult and a good faith assertion that is controversial and offensive to members of a racial group."[207] Byrne uses the example of "speech arguing that affirmative action has damaged performance in some city offices because blacks with substandard test scores have been hired."[208] Speech espousing such a view may very well be deemed by a university to be sufficiently prejudicial to warrant

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203. UWM Post, Inc. v. Board of Regents of the University of Wisconsin, 774 F. Supp. 1163 (E.D. Wisc. 1991).

204. *Id.* at 1175 (quoting American Booksellers Assoc. v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985)).

205. Bair v. Shippensburg University, 280 F. Supp. 2d 357 (M.D. Pa. 2003).

206. *Id.* at 369.

207. J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399, 402–03 (1991). *See also* Glaser, *supra* note 21, at 273 ("If speech is regulated merely because it is offensive, the unavoidable vagueness of an 'offensive' standard will lead to the imposition of judges' specific subjective preferences and opinions about what is acceptable . . . . Therefore, we must ask who is qualified to determine what is acceptable and whether we are willing to invest this decision in our judiciary.").

208. *Id.* at 403.

censorship, even though it is not meant as a racially motivated insult and has legitimate academic merit regarding the important social issue of affirmative action. Likewise, particular viewpoints on the issue of abortion may be deemed to be sexist or misogynist, though they too convey legitimate social and political arguments. These types of speech are highly protected under the Constitution and have clear social value, yet they are prone to censorship under any approach broadly seeking to eradicate sexist and racist speech.[209]

It is equally dangerous to attempt to read in exceptions for low-value speech on the basis of a societal consensus. One commentator observes that "[i]t is precisely when a powerful consensus exists that the censorial impulse is most dangerous," due to the risk of "majorities seeking to establish an orthodoxy for all society."[210] The very fact that there is a societal consensus against certain types of speech provides a strong reason to protect such speech against censorship and punishment. Therefore, attempting to read certain exceptions into First Amendment law on the basis of societal views would also be inherently problematic.[211] Once again, the same danger exists that particular viewpoints on important social and political issues such as affirmative action and abortion may be branded as racist or sexist on the basis of societal consensus and thus made

209. The speech code case of *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989), illustrates this danger. The plaintiff in *Doe* argued that he feared punishment under the university's Policy on Discrimination and Discriminatory Harassment for classroom speech espousing "certain controversial theories positing biologically-based differences between sexes and races," even though these theories were germane to his field of study. *Id.* at 858. The court found these concerns to be reasonable, observing that "the record of the University's enforcement of the Policy . . . suggested that students in the classroom and research setting who offended others by discussing ideas deemed controversial could be and were subject to discipline." *Id.* at 861. The court concluded that the university "considered serious comments made in the context of classroom discussion to be sanctionable under the Policy," and that "[t]he innocent intent of the speaker was apparently immaterial to whether a complaint would be pursued." *Id.* at 866.

210. Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 547 (1991). *See also* Glaser, *supra* note 21, at 271 ("Although many people argue that we should be able to regulate speech that the majority of society finds unacceptable, they fail to recognize the dangers of the 'domino effect': 'Admitting one exception will lead to another, and yet another, until those in power are free to stifle opposition in the name of protecting democratic ideals.' Regulating racist or derogatory speech will begin the treacherous slide down the slippery slope of censorship.").

211. The examples used by Mari Matsuda illustrate the very dangers involved. She argues, for instance, that "[r]acial supremacy is one of the ideas we have collectively and internationally considered and rejected," and that, consequently, there is no problem with censoring such expression and treating it separately. Matsuda, *supra* note 189, at 2360. She contrasts such viewpoints with Marxist speech, which is "not universally condemned" and thus deserving of protection. *Id.* at 2359. In other words, Matsuda advocates restricting academic discourse and campus speech on the basis of inherently politicized and content-based criteria. When colleges and universities take this approach, they risk creating an intellectual orthodoxy on campus. Later in the same article, Matsuda argues that "[p]oorly documented, racially biased work does not meet the professional standards required of academic writing" and therefore does not deserve "the dignity of an academic forum," in contrast to "a theory of racial inferiority supported by credible evidence," which "may deserve a forum." *Id.* at 2365. Once again, the question becomes how, and on what basis, a university would decide that particular expression is poorly documented or supported by credible evidence, as these amorphous standards do not lend themselves to evenhanded and principled decision-making.

prone to censorship. Consequently, speech codes cannot be justified by the idea of creating First Amendment exceptions for offensive, prejudicial, and other low-value speech, whether these exceptions would be based on governmental criteria or societal consensus.

3. "Low-Value" Speech Can Contribute to the Marketplace of Ideas

Thirdly, and perhaps most importantly, the "social value" argument completely abandons the hope that allowing for the unfettered exchange of ideas and opinions, and allowing other speakers to respond to prejudicial or offensive speech with counter-speech, can have a positive impact on the marketplace of ideas by informing people in meaningful and important ways and exposing them to new lines of thought. Conversely, prohibiting the expression of prejudicial views represents a missed opportunity to take these views head-on, to understand where they are coming from, and to respond to them effectively. As Nadine Strossen writes, even though racist speech may be "[u]gly and abominable," it "undoubtedly [has] the beneficial result of raising public consciousness about the underlying societal problem of racism . . . the public airing of racist and other forms of hate speech catalyzes communal efforts to redress the bigotry that underlies such expression and to stave off any discriminatory conduct that might follow from it."[212] Another commentator echoes this sentiment, arguing that "hearing such statements in their baldest form may have the effect of demonstrating the poverty of the beliefs expressed,"[213] thereby reaching and convincing individuals in ways that polite conversation never could. This is sometimes known as the "fresh air" argument[214]: when people are confronted with an odious viewpoint, they will organize against it, whereas suppressing the expression of that viewpoint and driving it underground does not truly change or impact anyone's thinking and will simply result in the unchallenged survival of that viewpoint.

In addition to raising awareness of the underlying issues, the expression of prejudicial or offensive views often spurs campus discussion and debate and thus contributes to the marketplace of ideas. This is the Mill-ian "downstream effect" of constructive discussion, whereby students respond to speech with which they disagree by airing their own views and engaging in counter-speech.[215] In allowing this process to take place, universities "realize Mill's ideal of enjoying 'the fuller understanding of truth which comes from its

212. Strossen, *supra* note 130, at 560.

213. Browne, *supra* note 210, at 542. *See also* Craddock, *supra* note 17, at 1058 ("Although the need for equality in all segments of society is of great importance, the need to enhance an individual's education through the introduction of new, and sometimes offensive, ideas is at least equally important.").

214. Matsuda, *supra* note 189, at 2352.

215. *See* JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 59 (John Gray ed., Oxford Univ. Press 1998) (1859).

conflict with error.'"[216] This refutes the idea that prejudicial and offensive speech has non-redeeming social value and demonstrates that it actually is a step towards truth and knowledge. Indeed, the Supreme Court has unequivocally stated that "utterances honestly believed contribute to the free interchange of ideas and ascertainment of truth."[217] Within the context of speech code litigation, the *Bair* court similarly espoused the view that "[c]ommunications which provoke a response, especially in the university setting, have historically been deemed an objective to be sought after rather than a detriment to be avoided."[218] Taking this approach reveals confidence in the operation of the marketplace of ideas. As Strossen has argued, "we need a free marketplace of ideas, open even to the most odious and offensive ideas and expressions, because truth ultimately will triumph in an unrestricted marketplace."[219] To hold otherwise is to impede the proper functioning of the marketplace of ideas. Therefore, the expression of prejudicial and offensive views should be permitted because it is ultimately beneficial to the university campus.

C. Protecting Minority Students from Injurious Speech

The third major argument put forth in defense of speech codes is that they are necessary to prevent injurious speech directed towards historically disadvantaged minority groups on campus. According to those who hold this view, speech codes do not stifle campus discussion or suppress unpopular ideas, but rather protect vulnerable subsets of the student population from fellow students' messages of hate, intolerance, and ridicule.

Mari Matsuda states that minority students "often come to the university at risk academically, socially, and psychologically."[220] Alice Ma notes that they are "especially vulnerable since they may be far from home and in an environment much different" from the ones they are used to.[221] Consequently, when they are confronted with prejudicial or hateful speech, these students "experience debilitated access to the full university experience."[222] According to Ma, they often react with "passivity, reticence, and self-imposed anonymity," as injurious speech "silences both physically, through intimidation and threats of

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216. Charles R. Calleros, *Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun*, 27 ARIZ. ST. L.J. 1249, 1269 (1995) (internal citations omitted). The author provides an example of downstream discussion at work, stemming from the posting of racist literature on the campus of Arizona State University. According to Calleros, "the campus community used the racist poster as a 'wake-up call' about the need for multicultural diversity. In initial discussions about the poster, students concluded that it reflected fear and ignorance and that it revealed a general gap in the education of many students. The need for multicultural education consequently became a theme of the campus counterspeech . . . ." *Id.* at 1269.

217. *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964).

218. 280 F. Supp. 2d at 370–71.

219. Strossen, *supra* note 130, at 535.

220. Matsuda, *supra* note 189, at 2371.

221. Alice K. Ma, *Campus Hate Speech Codes: Affirmative Action in the Allocation of Speech Rights*, 83 CALIF. L. REV. 693, 703 (1995).

222. Matsuda, *supra* note 189, at 2372.

further harassment or actual violence, and spiritually, by demoralizing its victims."[223] This leads the students to struggle with "inner turmoil" and in some cases to reject and disassociate themselves from their racial identity.[224] They tend to "internalize the feelings of inferior self-worth and self-hatred," which "in turn affects their relationships with others, their job performance, [and] educational endeavors."[225]

According to proponents of this argument, the harm of prejudicial and hateful speech goes beyond the individual students targeted. Rather, it extends to entire social groups. Richard Delgado argues that in expressing such views, campus speakers create "instruments of positive harm" against a particular group, "construct[ing] social reality so that members of that group are always one-down."[226] Delgado and David Yun posit that "[p]ermitting one social group to speak disrespectfully of another habituates and encourages speakers to continue speaking that way in the future," as racist, sexist, and otherwise prejudicial viewpoints "become[] normalized, inscribed in hundreds of plots, narratives, and scripts," and even become "part of culture."[227] Racist speech is deemed to be especially harmful "because it locks in the oppression of already marginalized groups,"[228] thus becoming "a mechanism of subordination, reinforcing a historical vertical relationship."[229] Therefore, according to many commentators, the expression of hateful and intolerant views has severe repercussions which extend beyond the individual students targeted and, indeed, beyond the college campus.

1. Many Speech Codes Are Not Narrowly Aimed at Preventing Injurious Speech

As an initial matter, many speech codes simply are not narrowly aimed at protecting historically disadvantaged minorities from intolerant, hateful, or prejudicial speech. Rather, by their very terms they often encompass much more innocuous expression. To the extent that speech codes suffer from this flaw, therefore, they cannot be justified under the rationale of protecting minority students from injurious speech. Many of the speech codes discussed in this article serve as useful illustrations, including the aforementioned policies at the

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223. Ma, *supra* note 221, at 703. *See also* Matsuda, *supra* note 189, at 2336 (stating that targets of prejudicial speech "have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide.").

224. Matsuda, *supra* note 189, at 2337.

225. Johnson, *supra* note 24, at 1844.

226. Delgado, *supra* note 191, at 171–72.

227. Richard Delgado and David Yun, *"The Speech We Hate": First Amendment Totalism, the ACLU, and the Principle of Dialogic Politics*, 27 ARIZ. ST. L.J. 1281, 1296–97 (1995). *See also* Matsuda, *supra* note 189, at 2339 ("at some level, no matter how much both victims and well-meaning dominant-group members resist it, racial inferiority is planted in our minds as an idea that may hold some truth.").

228. Post, *supra* note 142, at 273.

229. Matsuda, *supra* note 189, at 2358.

University of Maine-Presque Isle,[230] Johns Hopkins University,[231] Texas Southern University,[232] and Northeastern University.[233] Northeastern's ban on dissemination of "offensive" or "annoying" material, for instance, is not at all narrowly aimed at protecting minority students from harm. Another good example comes from Mesa State College, which informs students that "[h]arassment can be construed from any intimidating behavior to individuals feeling uncomfortable with behaviors of others."[234] Frostburg State University's Responsible Computing policy, meanwhile, directs students to "[u]se appropriate language" and "[a]void offensive or inflammatory speech."[235] These and many other existing speech codes cover various forms of innocuous speech and therefore cannot be justified under the rationale of preventing injurious speech targeted at minority students.

2. Existing First Amendment Exceptions and True Harassment Codes Are Sufficient to Prevent Truly Injurious Speech

Secondly, speech codes are not necessary to protect historically disadvantaged minorities from harmful speech because existing First Amendment exceptions and true harassment codes address virtually all verbal conduct which is truly injurious to targeted individuals.

Of the exceptions to the First Amendment,[236] "incitement to imminent lawless action" and "true threats and intimidation" are most relevant here, in terms of the harm created by prejudicial and hateful messages. Incitement to imminent lawless action encompasses advocacy of the use of force or of law violation "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[237] True threats consist of "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[238] Within this last exception, intimidation is "a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[239]

Put together, these exceptions encompass much of the verbal conduct which truly can be considered injurious to the intended targets under the First Amendment, as injured sensibilities and hurt feelings are simply insufficient justifica-

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230. *See supra* note 199.
231. *See supra* note 9.
232. *See supra* note 107.
233. *See supra* note 108.
234. Mesa State College, *2008–2009 Maverick Housing Guide: Harassment*, *available at* http://www.mesastate.edu/housing/documents/Handbook2008-2009.pdf (last visited July 14, 2009).
235. Frostburg State University, *Responsible Computing at Frostburg State University*, *available at* http://www.frostburg.edu/admin/policies/fsupolicy/2_046.pdf (last visited Sept. 8, 2008).
236. *See supra* note 100.
237. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
238. Virginia v. Black, 538 U.S. 343, 359 (2003).
239. *Id.* at 360.

tions for censorship under the law. The exception for incitement to imminent lawless action would apply to the type of situation where a speaker urges a crowd of listeners to immediately disperse across campus and commit acts of violence against students of a particular race, ethnicity, or religion. Therefore, universities, in their efforts to protect minority groups on campus, do not need to draft and enforce speech codes proscribing any and all provocative, uncivil, or antagonistic speech, even where the speech takes a favorable position toward the use of violence.[240] Not only are such regulations superfluous, they invite trivialization and administrative abuse. Meanwhile, the exception for true threats and intimidation would apply to those circumstances where an individual attempts to use a threat of violence or bodily harm to coerce a minority student into withdrawing from an academic program, relinquishing a position within a student organization, or taking some other action which he or she does not wish to take.[241] Consequently, there is no need for universities to maintain speech codes which construe clearly protected forms of speech as threatening or intimidating in the constitutionally proscribable sense.

Additionally, true harassment codes address the types of verbal conduct which prevent another student from obtaining the benefits of a university education. The Supreme Court has held that for student-on-student conduct to constitute actionable harassment in the educational setting, such conduct must be "so severe, pervasive, and objectively offensive, and . . . so undermine[] and detract[] from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[242] University policies tracking the Supreme Court's narrow harassment standard address that behavior which has the effect of depriving the victim of the right to an education, while at the same time avoiding the infringements upon protected expression which characterize speech codes. In other words, sexual and racial harassment policies, properly defined and enforced, prevent genuinely harassing patterns of conduct without violating students' free speech rights. They are therefore, in combination with the First Amendment exceptions discussed above, sufficient to protect minority students from truly injurious speech.

In addition to the fact that universities do not need speech codes to protect minority student groups from harm, it is equally critical that they cannot, consistent with the First Amendment, restrict speech beyond the categories

240. *See Brandenburg*, 395 U.S. at 448 ("'the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action' . . . A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.").

241. *See Black*, 538 U.S. at 359–60 ("The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protects individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'") (internal citations omitted).

242. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 651 (1999).

discussed above, no matter how laudable their purpose. There is no exception to the First Amendment for prejudicial, offensive, or hateful speech,[243] even where one's sensibilities are injured. Unless verbal conduct falls under one of the aforementioned exceptions to the First Amendment or contributes to a pattern of truly harassing conduct, it simply must be protected under the Constitution. Moreover, even if First Amendment law could be modified to allow for further exceptions, it is plainly dangerous to attempt to do so on the basis of listener reactions. As one commentator has written, "[i]f the First Amendment is going to turn on relative use of emotion, insult, injury to sensibilities of listener, the nature of speech will change in the direction of the bland and the mediocre."[244] Even if there is "no doubt that racist and sexist insults and epithets harm the listener, and harm society[,] . . . if harm to the listener is the measure by which we regulate speech, there will be nothing left of the First Amendment."[245] As tempting as it may be for some to erode away at the First Amendment in this manner, taking such an ad hoc, unprincipled approach represents a dangerous step in the wrong direction.

Therefore, universities should not continue to maintain speech codes under the rationale of insulating historically disadvantaged minority students from allegedly injurious speech because existing First Amendment exceptions and true harassment codes are sufficient for the purpose of protecting students and because it is imprudent under the First Amendment to restrict speech any further.

3. Counterspeech is the Most Effective Response

The third and final reason that the rationale of protecting minority students from harm fails to justify the presence of speech codes on campus is that the most effective response to the expression of hateful and prejudicial views is not to censor, but rather to engage in counterspeech.[246] By responding with counterspeech, minority students can point out the deficiencies in those views and ultimately defeat them in the marketplace of ideas, thereby reaching a wide campus audience and informing it in meaningful and important ways. Moreover, if there truly is a societal consensus against prejudice and intolerance, these students should have no trouble expressing their views and having them heard. Therefore, commentators have recognized that "noxious ideas should be

243. *See* Craddock, *supra* note 17, at 1049.

244. Nicholas Wolfson, *Free Speech Theory and Hateful Words*, 60 U. CIN. L. REV. 1, 21 (1991).

245. *Id.*

246. *See* Calleros, *supra* note 216, at 1249–50 ("Those who continue to focus single-mindedly on the 'top-down' solution proposed by disciplinary codes not only raise constitutional problems, but also ignore a potent weapon against discrimination and hostility: a 'grassroots' movement leading to continuous community work in the form of education, counseling, and counterspeech."). *See also id.* at 1258 (stating that counterspeech is "designed to expose the moral bankruptcy of the hateful ideas, to demonstrate the strength of opinion and numbers of those who deplore the hateful speech, and to spur members of the campus community to take voluntary, constructive action to combat hate and to remedy its ill effects.").

countered through juxta-position with good ideas in the hope that the bad ideas will lose out in the marketplace of ideas."[247] Nadine Strossen argues that "education, free discussion, and the airing of misunderstandings and failures of sensitivity are more likely to promote positive intergroup relations than are legal battles," which, conversely, will only serve to "exacerbate intergroup tensions."[248] Another commentator echoes the hope that counterspeech will often "be effective to gradually build support by winning converts," and argues that this can happen even on campuses with "high levels of hostility."[249]

Moreover, the counterspeech approach can have significant benefits for minority students. One commentator writes that "[o]nly by pointing out the weaknesses and the moral wrongness of an oppressor's speech can an oppressed group realize the strength of advocating a morally just outcome."[250] As is the case whenever one participates in campus dialogue and debate, minority students can expect to bolster their arguments and sharpen their views; "[t]hrough the active, engaging, and often relentless debate on issues of social and political concern," they "learn the strengths of their own arguments and the weaknesses of their opponents'. With this knowledge, these groups are better able to strike at the heart of a bigoted argument with all of the fervor and force necessary to combat hateful ideas."[251] Therefore, the experience and knowledge gained through the process of debate and discussion will serve minority students well in the long run.

Minority students also benefit in that engaging in counterspeech, rather than appealing to the authorities for protection, may provide a strong sense of self-autonomy and empowerment. The efforts of minority students will often be met by a receptive campus audience, one which is curious to hear how they respond to hateful and prejudicial messages, affording these students the opportunity to meaningfully impact the way many individuals on campus think about important issues.[252] Counterspeech "can serve to define and underscore the

247. Browne, *supra* note 210, at 548.

248. Strossen, *supra* note 130, at 561.

249. Calleros, *supra* note 216, at 1262–63.

250. Craddock, *supra* note 17, at 1070.

251. *Id*. at 1089.

252. Charles Calleros provides two illustrative examples of such an opportunity. The first arose at Arizona State University, where one of a group of female African-American students who found a racist poster in a dormitory convinced one of the students who had put up the poster to voluntarily take it down, then sent a copy of the poster to the campus newspaper along with a letter discussing its racist stereotypes. Calleros, *supra* note 216, at 1259. She also requested action from the director of the residence hall, which resulted in a residents' group meeting to discuss the issues involved. *Id.* Ultimately, "[t]he result was a series of opinion letters in the campus newspaper discussing the problem of racism, numerous workshops on race relations and free speech, and overwhelming approval in the Faculty Senate of a measure to add a course on American cultural diversity to the undergraduate breadth requirement." *Id.* The second episode took place at Stanford University. There, students, faculty, and administrators at the law school responded to a student's homophobic speech by sending opinion letters to the campus newspaper, writing comments on a poster board at the law school, and signing a published petition disassociating the law school from the speaker's message. *Id.* at 1261. Several students even wrote a letter reporting the incident to a prospective employer of the speaker. *Id.*

community of support enjoyed by the targets of the hateful speech, faith in which may have been shaken by the hateful speech."[253] Consequently, when minority students respond to hateful speech with counterspeech, successfully engage the campus community, and inform their fellow students' views, they gain "a sense of self-reliance and constructive activism" as well as "a sense of community support and empowerment."[254] Nadine Strossen asserts that, for this reason, counterspeech "promotes individual autonomy and dignity."[255] These are significant benefits that other methods of responding to hateful speech do not offer, and it is difficult to place a value or measure on the positive impact this can have on students' lives.

In stark contrast to counterspeech, broad censorship paternalistically suggests that minority student groups are incapable of defending themselves and entrenches a sort of "learned disability." As one commentator argues, "[t]he intuitive fallacy of campus speech codes is that they 'weaken those they ostensibly protect by not enabling them to protect themselves.'"[256] The use of speech codes "assumes that certain students cannot survive hearing verbal attacks on their religion, race, gender, sexuality or ethnicity," an assumption that "insults those who are able to hear this offensive speech without suffering the permanent, crippling psychological wounds that they are told are inevitable."[257] Nadine Strossen notes that "[s]ome black scholars and activists maintain that an anti-racist speech policy may perpetuate a paternalistic view of minority groups, suggesting that they are incapable of defending themselves against biased expressions."[258] Given these realities, counterspeech is a much more effective response to hateful and prejudicial speech than censorship. For this and the other reasons discussed in this section, the continued existence of speech codes cannot be justified by the rationale of protecting minority student groups from injurious speech.

D. Eliminating Prejudice and Advancing Equality

The fourth major argument in defense of speech codes is that they combat the existence of racism, sexism, and other forms of prejudice in our society. According to proponents of this argument, speech codes, by prohibiting the expression of prejudicial and hateful views and punishing speakers who engage in such expression, discourage prejudicial thinking among university students. Ultimately, the theory goes, speech codes advance equality and result in a society less burdened with prejudice and intolerance.

These two experiences, by their very facts and the results achieved, speak volumes about the effectiveness of counterspeech when used to respond to hateful messages.

253. *Id*. at 1258.

254. *Id.* at 1260.

255. Strossen, *supra* note 130, at 535.

256. Craddock, *supra* note 17, at 1088 (internal citations omitted).

257. Rabe, *supra* note 17, at 226.

258. Strossen, *supra* note 130, at 561.

Proponents of this justification for speech codes believe that colleges and universities have a duty toward their students "to act affirmatively as a teacher of social mores and behavior that contribute positively to the overall societal goal of equality."[259] In the face of this obligation, to "'tolerate an equal speaking to another equal in a way that denies the dignity and truth of equality is an implicit betrayal of the whole body politic, hampering positive social evolution.'"[260] According to these proponents, speech codes are therefore justifiable because they discourage prejudice and intolerance among university students. By prohibiting the expression of prejudicial and hateful views, speech codes will lead students to abandon these types of beliefs and to support and uphold the equality of all members of society. Surprisingly, these arguments have found some credence in the courts, as well. The Sixth Circuit has stated, for instance, that "[b]y informing people that the expression of racist or sexist attitudes in public is unacceptable, people may eventually learn that such views are undesirable in private, as well."[261]

At an extreme, some commentators have argued that the equality purportedly created by speech codes is necessary before freedom of speech can exist at all. Alice Ma writes, "equality will not be possible without temporary inequality in the form of . . . hate speech regulations."[262] This equality, in turn, makes truly free speech possible. As Ma argues, "free speech is illusory unless each individual has equal opportunity to speak."[263] Richard Delgado similarly posits that "equality is a precondition of effective speech."[264] In other words, not only do speech codes eliminate prejudice and advance equality in society, they allow for true freedom of expression. This is because speech codes "increase the participation of minority students in the debate and dialogue that is central to college life."[265] Therefore, according to this line of reasoning, it is justifiable for universities to use speech codes to dictate what may or may not be said on campus, because this ultimately advances social equality, thereby making free speech truly possible.

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259. Craddock, *supra* note 17, at 1057.

260. *Id* (quoting Alexander, *supra* note 17, at 1371).

261. *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 350 (6th Cir. 1988). *Davis* did not arise in the context of higher education, but rather involved, inter alia, two individuals' racial harassment claim against their former employer under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Even though the Sixth Circuit was not discussing university speech codes, it is nevertheless instructive that it opined, "Title VII may advance the goal of eliminating prejudices and biases in our society." *Davis*, 858 F.2d at 350. This reflects the court's belief that regulation of speech in the work environment would lead to less prejudice and intolerance among employees. This same line of reasoning is behind the argument in favor of speech codes, which I address in this section.

262. Ma, *supra* note 221, at 713–14. Ma even acknowledges that, under the approach she advocates, "whites would be prohibited from using hate speech against minorities, but minorities would not be prohibited from using such speech against whites," and that this seems "anomalous" and "contrary to our ultimate goal of mutual respect and understanding among racial and ethnic groups." *Id.* at 714.

263. *Id.* at 696.

264. Delgado, *supra* note 191, at 173.

265. Ma, *supra* note 221, at 719.

1. Prejudicial Views Cannot Be Eliminated Through Censorship

The first major flaw in this justification is that, intuitively, one cannot eliminate racist, sexist, and otherwise prejudicial viewpoints simply by prohibiting their expression. It is one thing to recognize that "[t]here is a great deal of intolerance in today's society" and that "the problems need to be acknowledged and addressed in order to produce effective policy solutions."[266] However, "[r]epressing views does not solve the problem, but merely curtails minor symptoms and prevents true discussion of real solutions."[267] In suppressing the expression of certain views, speech codes merely create a "fictional 'equality.'"[268] The reality is that, regardless of the extent to which universities use speech codes to regulate campus speech, "incidents of hatred will continue because prohibiting certain speech will not eliminate the feelings and emotions underlying the speech."[269] As legal commentators have recognized, "[d]riving racist, sexist, and other discriminatory speech underground will not necessarily eliminate a student's thoughts and emotions."[270]

Nadine Strossen argues that "no law could possibly eliminate all racist speech, let alone racism itself. If the marketplace of ideas cannot be trusted to winnow out the hateful, then there is no reason to believe that censorship will do so."[271] Strossen points to the fact that "there is no persuasive psychological evidence that punishment for name-calling changes deeply held attitudes" and that, rather, psychological studies "show that censored speech becomes more appealing and persuasive to many listeners merely by virtue of the censorship."[272] She also points to the dearth of empirical evidence, from nations which do prohibit racist speech, that censorship is an effective method of combating racism.[273] For example, she points out that in Great Britain, which began to prohibit racist defamation in 1965, censorship of racist speech "has had no discernible adverse impact on the National Front and other neo-Nazi groups active in Britain."[274] She writes that not only has censorship "had no

266. Glaser, *supra* note 21, at 287.

267. *Id.*

268. Craddock, *supra* note 17, at 1075.

269. Glaser, *supra* note 21, at 292.

270. Rabe, *supra* note 17, at 226. *See also* Browne, *supra* note 210, at 541–42 ("Yet, it is far from obvious that regulation of offensive speech achieves the goals of eliminating prejudice."); Craddock, *supra* note 17, at 1088 ("One must wonder how giving offensive power to some can possibly improve the lot of the oppressed.").

271. Strossen, *supra* note 130, at 560.

272. *Id.* at 554 (citing Brock, *Erotic Materials: A Commodity Theory Analysis of Availability and Desirability,* in 1 TECHNICAL REPORT OF THE U.S. COMM'N ON OBSCENITY & PORNOGRAPHY 131, 132 (1971); Tannebaum, *Emotional Arousal As a Mediator of Communication Effects,* in 8 TECHNICAL REPORT OF THE U.S. COMM'N ON OBSCENITY & PORNOGRAPHY 326–56 (1971); Worchel & Arnold, *The Effects of Censorship and Attractiveness of the Censor on Attitudinal Change,* 9 J. EXPERIMENTAL SOC. PSYCHOLOGY 365 (1973)).

273. *Id.*

274. *Id.* at 554–55 (citing ARYEH NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM 154–55 (1979)).

effect on more subtle, but nevertheless clear, signals of racism," but in fact "[s]ome observers believe that racism is more pervasive in Britain than in the United States."[275] Therefore, she concludes, "those who share the dual goals of promoting racial equality and protecting free speech must concentrate on countering racial discrimination, rather than on defining the particular narrow subset of racist slurs that constitutionally might be regulable."[276] Generalizing from Strossen's insights regarding racist speech, censorship is not an effective method of eliminating or reducing societal prejudice in its various forms. Speech codes therefore cannot be justified on this basis.

2. Censorship Leads to Dangerous and Counterproductive Outcomes

Secondly, the justification that speech codes will eliminate prejudice and advance equality fails to recognize that censorship actually leads to dangerous and counterproductive outcomes. Legal commentators have recognized that free speech serves a "safety valve" function in that it "encourage[s] expression of feelings of frustration and thereby decrease[s] resort to violence."[277] This can also be thought of as the "emotive function of speech," whereby "[f]ree speech is a necessary emotional outlet."[278] Very often, the "release" of engaging in free speech "reduces the speaker's need to verbally or physically 'vent' on others in a confrontational manner."[279] Thus, when universities use speech codes to suppress and punish various forms of protected expression, they take away these crucial benefits of free speech.

As a consequence, when students are not allowed to engage in free speech, there are several undesirable results. One is that those students holding beliefs the expression of which is restricted "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."[280] Such hardening of views and perpetuation of stubborn thinking is extremely counterproductive and, moreover, fundamentally at odds with the university's marketplace of ideas ideal. These students may also feel increased resentment towards groups on campus they perceive to be receiving preferential treatment in the form of protective speech codes.[281] This, too, is to be avoided if one wishes to promote inter-group dialogue and understanding.

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275. *Id.* at 555. Strossen cites a *New York Times* article in which a member of the British House of Commons says about incidents of violence against minorities in London, "[This] violence is linked to the deeper patterns of prejudice in a society in which racist behavior is more socially acceptable than in the United States . . . . We should not underestimate the degree to which greed and racism have become legitimate in Britain." *Id.* at 555, n.364 (citing Raines, *London Police Faulted as Racial Attacks Soar*, N.Y. TIMES, Mar. 24, 1988, at A1).

276. *Id.* at 550.

277. Browne, *supra* note 210, at 541.

278. Glaser, *supra* note 21, at 279–80.

279. Calleros, *supra* note 216, at 1268.

280. Rabe, *supra* note 17, at 226.

281. Browne, *supra* note 210, at 541.

The second counterproductive result of censorship is that it drives much "thought and expression underground, where it [will] be more difficult to respond to such speech and the underlying attitudes it expresses."[282] Once again, this is contrary to the university's function as a marketplace of ideas; the ideal of rigorous and open debate is defeated when some views never enter the marketplace and students are deprived of an opportunity to learn from, and respond to, these views. Moreover, "revealing [prejudicial] attitudes, rather than forcing them underground, is the best path to eventually eliminating them through education and discussion."[283] When students holding prejudicial and hateful views simply respond to censorship by voicing them through alternative means and in alternative forums, those views essentially go unchallenged, allowing ignorance and bias to survive.

The third and final dangerous outcome of censorship is that it may increase the likelihood of dangerously disruptive or even violent outbursts on campus. Perhaps owing to the frustration felt by some students due to perceived persecution by the university administration for their beliefs, as well as resentment felt by those students towards particular groups on campus, censorship often creates optimal conditions for violent behavior. One commentator therefore asserts that censorship can lead to "physical, potentially violent expressions that would otherwise be verbal."[284] Another similarly observes, "Regulation of speech serves only to silence the verbal cacophony of ignorance. The vapid thoughts of hatred will only be submerged temporarily, festering and multiplying, preparing to erupt as actions and deeds much worse than mere words and language."[285] Thus, on at least some occasions the devastating result of censorship may be campus violence. This is obviously a result to be avoided at great costs, as it does an immeasurable amount of harm to the lives of the students involved, to the state of inter-group relations on campus, and to the overall reputation and stature of the university.

3. Counterspeech is the Most Effective Response

In addition to the fact that censorship of prejudicial speech fails to address the underlying beliefs and actually leads to counterproductive outcomes, there is a third flaw with this justification for speech codes: it ignores the fact that counterspeech is the more effective method of responding to the expression of hateful views. As I discussed in the previous section with respect to the rationale of protecting minority students from injurious speech, there are significant benefits to combating hateful speech with counterspeech rather than with censorship.[286] One theorist argues, "The fallacy of the speech code arguments is

282. Strossen, *supra* note 219, at 560.
283. Rabe, *supra* note 17, at 205 n.2.
284. *Id.* at 226.
285. Glaser, *supra* note 21, at 288–89.
286. *See supra*, Part III.C.

the assertion that equality and an end to oppression will be achieved through unilateral speech regulation. Instead, the answer to the scurrilous problems of bigotry and hatred must be more speech and better speech. The force of speech and counter speech in the push for social change cannot be underestimated."[287] Another commentator similarly notes that "[t]o eliminate intolerance and hatred we must expose the falsehoods and inconsistencies of those arguments supporting hatred," because these views "will fall out of favor and become increasingly unacceptable to all of society as a result of the public being exposed to and recognizing the problems and weak foundations of the hate speech argument."[288]

By contrast, "[s]peech codes are an unprincipled way out, and actually contribute to the dilemma by stifling healthy debate."[289] The use of speech codes "stultifies the candid intergroup dialogue concerning racism and other forms of bias that constitutes an essential precondition for reducing discrimination."[290] Therefore, universities should recognize that whereas censorship does nothing to address the underlying problems of prejudice and hate, counterspeech can actually change some people's thinking and in the process create meaningful progress. This holds true even if prejudicial viewpoints initially survive and linger in the marketplace of ideas, because it reflects the unfortunate reality that some individuals are ignorant about other people and cultures.[291] Ultimately, counterspeech can successfully make a difference in people's views and thereby combat the existence of intolerance and hatred in society. Speech codes, conversely, are ill-equipped for this purpose. Consequently, the existence of speech codes on the college campus cannot be justified under the rationale of eliminating societal prejudice and advancing equality.

E. Speech Codes Are Rarely Enforced

The fifth and final justification for speech codes which I wish to address is that speech codes are rarely enforced and therefore do not pose a major threat to free speech. According to proponents of this argument, although many universities maintain speech codes in their student handbooks, codes of conduct, and other policy materials, they rarely, if ever, actually apply them against any particular student expression. Since speech codes are rarely used to censor or punish student speech, the argument proceeds that speech codes do not truly undermine free speech rights on campus.

Stanley Fish advocated this position in a 2007 article in *The New York*

287. Craddock, *supra* note 17, at 1058. *See also id.* at 1070 ("Counterspeech is the most powerful instrument available for gaining equality and curbing the secondary effects of offensive speech."); *id.* at 1056, n.56 ("equality cannot be reached through the subordination of one group's speech to another group's speech. Equality can be gained through the empowerment that comes through counter speech.").

288. Glaser, *supra* note 21, at 290.

289. *Id.* at 290–91.

290. Strossen, *supra* note 219, at 561.

291. Glaser, *supra* note 21, at 292.

Times.[292] In the article, Fish labeled speech codes "a fake issue," arguing that "[e]ven though there are such codes on the books of some universities, enforcing them will never hold up."[293] He reasoned that every speech code to be litigated in the courts has been struck down, and that universities therefore know better than to attempt to enforce them.[294] According to Fish, "[s]tudents don't have to worry about speech codes,"[295] because they will rarely, if ever, be applied against any particular expression. Consequently, speech codes do not truly jeopardize freedom of speech on the college campus.

1. Speech Codes Are In Fact Routinely Enforced

To begin with, the argument that speech codes are rarely enforced is plainly wrong. Universities in fact enforce their speech codes routinely and, as demonstrated in the case law, often do so against protected speech. The speech codes decisions in *Doe*,[296] *UWM Post*,[297] and *Reed*,[298] for example, all involved challenges to university speech codes that were applied to constitutionally protected student expression. The aforementioned *Iota Xi* decision[299] is another example of an "as applied" challenge, in that case to an implicit speech code. The argument that speech codes are rarely enforced is also undermined by numerous other campus controversies involving the application of speech codes against protected expression. At Johns Hopkins University, for instance, a student was deemed to have violated the university's anti-harassment policy as well as a policy on "intimidation" after he posted an online party invitation which the university administration deemed offensive and racially insensitive.[300] Colorado College found two students to have violated the school's policy on "violence" for distributing a satirical flyer mocking a campus publication, due the flyer's references to "chainsaw etiquette" and the shooting range of a rifle.[301] Tufts University determined that a student publication was guilty of harassment and creating a hostile environment after it published political satire commenting on

292. Stanley Fish, *Yet Once More: Political Correctness on Campus*, N.Y. TIMES blog Think Again, http://fish.blogs.nytimes.com/2007/10/14/yet-once-more-political-correctness-on-campus/ (Oct. 14, 2007).

293. *Id.*

294. *Id.*

295. *Id.*

296. Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989).

297. UWM Post, Inc. v. Board of Regents of the University of Wisconsin, 774 F. Supp. 1163 (E.D. Wisc. 1991).

298. College Republicans v. Reed, 523 F. Supp. 2d 1005 (N.D. Cal. 2007).

299. Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993).

300. Press Release, Foundation for Individual Rights in Education (FIRE), Johns Hopkins University Suspends Student for One Year for 'Offensive' Halloween Invitation (Nov. 30, 2006), *available at* http://www.thefire.org/index.php/article/7534.html.

301. Press Release, Foundation for Individual Rights in Education (FIRE), Colorado College Punishes, Deems Students 'Violent' for Satirical Flyer (Mar. 31, 2008), *available at* http://www.thefire.org/index.php/article/9096.html.

the issues of affirmative action and violence in Islam.[302] Finally, California Polytechnic State University found a student guilty of "disruption of a campus event" for posting fliers which advertised a campus speaker event and contained the title of the speaker's book.[303] In these and many other instances, university administrators have utilized speech codes to attempt to censor and punish student expression.

Significantly, courts deciding speech code cases, when faced with the same argument made by Fish, have rejected it and recognized that universities do enforce their speech codes. In *Bair*,[304] for example, Shippensburg University argued that the speech code provisions at issue were merely aspirational and precatory and had not in practice been used to restrict or punish student speech. The court responded, "Certainly during President Ceddia's tenure the Speech Code has not been used, and likely will not ever be used, to punish students for exercising their First Amendment rights. However, given that this is a facial challenge, our inquiry must assume not the best of intentions, but the worst."[305] Later in its opinion, the court reiterated, "While we recognize that citing students under the suspect provisions has not been a common practice, in the hands of another administration these provisions could certainly be used to truncate debate and free expression by students."[306] Thus, the *Bair* court recognized that universities have enforced their speech codes, and that a disavowal of future enforcement should not be sufficient to save protect a speech code from a constitutional challenge.

Likewise, in *Dambrot*,[307] the Sixth Circuit rejected Central Michigan University's argument that the speech code in question "does not present a 'realistic danger' of compromising First Amendment rights because . . . there is no enforcement mechanism."[308] The circuit court found this defense "not persuasive," reasoning that "[a]lthough there are no formal mechanisms of enforcement, it is clear from the sanctions imposed on Dambrot that the university can pursue violations to the policy."[309] In other words, the fact that the university had applied the speech code in the instant case demonstrated that it was fully capable and willing to enforce the speech code and that it was not likely in future instances to simply allow the speech code to remain on the books unused. Thus, both *Bair* and *Dambrot* represent a clear repudiation of the argument that speech codes do not truly jeopardize campus speech because they are rarely enforced.

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302. Press Release, Foundation for Individual Rights in Education (FIRE), Tyranny at Tufts (May 11, 2007), *available at* http://www.thefire.org/index.php/article/8045.html.

303. Press Release, Foundation for Individual Rights in Education (FIRE), Cal Poly in Court for Violating First Amendment (Sept. 25, 2003), *available at* http://www.thefire.org/index.php/article/25.html.

304. *Bair v. Shippensburg Univ.,* 280 F. Supp. 2d 357 (M.D. Pa. 2003).

305. *Id.* at 367.

306. *Id*. at 373.

307. *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

308. *Id.* at 1182.

309. *Id.* at 1183.

2. Speech Codes Are Harmful By Their Very Existence

Fish's justification for speech codes fails for a second major reason: it does not account for the fact that, even when speech codes are not enforced, they are harmful by their very existence. Speech codes have major doctrinal flaws; they tend to be constitutionally overbroad or vague, or both, and they tend to discriminate against speech on the basis of content or viewpoint.[310] As a result of these deficiencies, speech codes do considerable harm to the functioning of the university campus as a true marketplace of ideas, in several ways. While these harms have been covered in detail previously,[311] I wish to merely reiterate them here in order to respond to Fish's argument.

First, speech codes have a "chilling" effect on campus speech.[312] When students are not provided adequate guidance regarding prohibited speech, as is the case with unconstitutionally vague speech codes, they will necessarily have to guess at the uncertain contours of the regulation and at the types of speech that are prohibited therein. Rather than risk the possibility of punishment, many speakers will exercise self-censorship and refrain from expressing their views altogether, or will curb their speech in order to steer clear of any possible violation. In doing so, they will have in many instances refrained from engaging in clearly protected speech. Similarly, when students face an overbroad speech code, they are left to guess whether certain speech, though constitutionally protected, may be punished because it falls within the proscriptions of the speech code. Once again, the result is often self-censorship. This result is inimical to the university's goal of fostering open debate and dialogue on campus, rendering it impossible for the university campus to serve as a true marketplace of ideas.

Second, speech codes suppress the expression of disfavored viewpoints.[313] When speech codes discriminate against speech on the basis of content or viewpoint, they effectively drive certain ideas and viewpoints out of campus discussion. Due to the very existence of these types of speech codes, speakers become wary of espousing the "wrong" opinions or beliefs. This results in an incomplete and flawed marketplace of ideas, as student speech is limited to those views which have favored status with the university.

Third, speech codes perpetuate the myth that students have a right not to be offended by their peers.[314] By the mere act of maintaining speech codes aimed at all offensive or disagreeable speech, universities send a signal to students that they are not expected to tolerate the expression of views which may be different from their own or which make them uncomfortable. This could not be further from the true lesson that students should gain from their collegiate experience:

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310. *See supra* Part II.A.
311. *See supra* Part II.B.
312. *See supra* Part II.B.1.
313. *See supra* Part II.B.2.
314. *See supra* Part II.B.3.

that, in a free society, one must be able to tolerate many types of views, some of which may be deeply offensive. Thus, perpetuation of the perceived right not to be offended is a major harm created by speech codes.

Fourth, combining the chilling effect on speech, suppression of disfavored viewpoints, and perpetuation of the supposed right not to be offended, speech codes encumber the very functioning and vitality of our nation's colleges and universities.[315] They inhibit the ability of these institutions to provide the best education possible, both inside and out of the classroom, to their students; to inculcate students with the proper values for living in a free society; and to, ultimately, produce capable, responsible citizens and leaders for the future. These are grave problems indeed, and they should not easily be aside under the rationale that some universities might not enforce their speech codes. Ultimately, Stanley Fish's argument that speech codes are "a fake issue" is untenable; speech codes in fact present a major problem on campus and therefore need to be eradicated.

IV. SPEECH CODES HAVE PERSISTED DESPITE THE ADVERSE LEGAL RULINGS

I turn now to examining the continued prevalence of speech codes on college campuses. In the first part of this section, I will demonstrate that speech codes remain present at the vast majority of colleges and universities across the nation, using data from FIRE's most recent annual speech code report. In the second part of this section, I will respond to arguments that speech codes are not as prevalent as FIRE's research indicates by demonstrating that FIRE's methodology offers the most accurate assessment of schools' policies toward campus speech.

A. The Continued Prevalence of Speech Codes

In spite of the important lessons to be drawn from the case law in its uniform rejection of speech codes, colleges and universities overwhelmingly continue to maintain speech codes on their campuses. These speech codes contain the same doctrinal flaws and have much the same detrimental impact on speech rights as the ones which have been invalidated in court. The continued prevalence of speech codes is documented in FIRE's most recent annual speech code report, *Spotlight on Speech Codes 2009: The State of Free Speech on Our Nation's Campuses*.[316]

FIRE's 2009 report is a survey of the speech policies at 364 colleges and universities nationwide, both private and public.[317] Based on these speech policies, the report categorizes each institution as a "red-light," "yellow-light," or "green-light" school. A red-light institution is defined as having "at least one

315. *See supra* Part II.B.4.
316. FIRE, SPOTLIGHT ON SPEECH CODES 2009, *supra* note 3.
317. *Id.* at 2.

policy that both clearly and substantially restricts freedom of speech."[318] A "clear" restriction is one that "unambiguously infringes on protected expression," meaning that "the threat to free speech . . . is obvious on the face of the policy and does not depend on how the policy is applied,"[319] whereas a "substantial" restriction is one that "is broadly applicable to important categories of campus expression."[320] A yellow-light institution is defined as having "policies that could be interpreted to suppress protected speech or policies that, while restricting freedom of speech, restrict only narrow categories of speech."[321] Yellow-light policies may still be unconstitutional and are therefore not condoned by FIRE, but the distinction is that they "do not clearly and substantially restrict speech in the manner necessary to warrant a red light."[322] An institution received a green-light rating if FIRE found "no policies that seriously imperil speech."[323] The green-light rating does not indicate that an institution "actively supports free expression," but rather means that FIRE "has not found any publicly available written policies violating students' free speech rights on that campus."[324] Finally, a private university received no rating from FIRE if it "states clearly and consistently that it holds a certain set of values above a commitment to freedom of speech,"[325] because students at such schools would have no reasonable expectation of enjoying robust speech rights.

Of the 364 colleges and universities surveyed for the 2009 report, an overwhelming 270 institutions received a red-light rating, representing approximately 74 percent of the field.[326] An additional 21 percent, or 78 institutions, received a yellow-light rating.[327] Conversely, a mere 2 percent, or 8 schools, received a green-light rating, and another 2 percent, or 8 schools, received no rating.[328] The report also found that, surprisingly, public institutions were more restrictive of speech than private institutions, despite being legally bound by the First Amendment. Among the 104 private colleges and universities surveyed, 67 percent received a red-light rating, 24 percent received a yellow-light rating,

318. *Id.*
319. *Id.*
320. *Id.* The report provides the example of a ban on "offensive speech," which would be both "a clear violation (in that it is unambiguous) as well as a substantial violation (in that it covers a great deal of what would be protected expression in the larger society)," and thus would earn its institution a red-light rating. *Id.*
321. *Id.*
322. *Id.* The report provides two examples of yellow-light policies. One is a policy banning "verbal abuse"; such a policy would have "broad applicability and would pose a substantial threat to free speech, but would not be a clear violation because 'abuse' might refer to unprotected speech, such as threats of violence or genuine harassment." The other example is a policy banning "posters promoting alcohol consumption"; while this type of policy "clearly restricts speech, it is limited in scope." *Id.*
323. *Id.*
324. *Id.*
325. *Id.*
326. *Id.* at 3.
327. *Id.*
328. *Id.*

3 percent received a green-light rating, and 6 percent received no rating.[329] Meanwhile, of the 260 public institutions surveyed, 77 percent received a red-light rating, 20 percent received a yellow-light rating, and only 2 percent received a green-light rating.[330]

It is difficult to overstate the significance of the findings contained in the 2009 report. Perhaps the most important figure is that 74 percent of all colleges and universities surveyed, as indicated by their red-light status, had at least one policy which "both clearly and substantially restricts freedom of speech," thus presenting a major impediment to the free flow of ideas on those campuses. Combining that figure with the percentage of yellow-light institutions, a staggering 95 percent of schools maintained policies infringing upon the right of students to engage in expression which would be protected outside of campus. Thus, very few institutions could legitimately claim that they had no policies restricting the ability of students to engage in constitutionally protected speech.

The findings contained in the 2009 report repudiate arguments made by some commentators that speech codes are a diminished or overstated phenomenon, that they are essentially a problem of the past. Robert O'Neil wrote as early as over a decade ago that the Supreme Court's decision in *R.A.V.*[331] "seemed to sound the death knell for most campus speech codes. . . . [Colleges and universities] read a clear message, that few codes drawn along such lines could survive the Supreme Court's broader First Amendment ruling. Many colleges and universities either repealed speech codes or allowed them to languish. . . . [M]ost of the codes were either given a decent burial by formal action or were allowed to expire quietly and unnoticed."[332] The optimistic tone taken by O'Neil is contradicted by the stark reality of the 2009 report, as it demonstrates that the case law has not led to a widespread removal and extinguishing of speech codes.

Indeed, the report's findings confirm the suspicions long held by those who have written about the poor state of free speech on campus. One commentator, Jon Gould, previously wrote that speech codes "are far from dead," that they "not only persist, but they have actually increased in number following a series of court decisions that ostensibly found many to be unconstitutional."[333] Gould's assertion finds much support in FIRE's report. It is therefore surprising that Gould himself has challenged FIRE's methodology and the accuracy of its findings. As I shall demonstrate, however, FIRE's methodology provides the most accurate assessment to date of the presence of speech codes on the college campus.

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329. *Id.* at 4.
330. *Id.*
331. R.A.V. v. St. Paul, 505 U.S. 377 (1992).
332. O'NEIL, *supra* note 18, at 20–21.
333. Gould, *supra* note 17, at 345.

B. Issues of Methodology

FIRE's methodology and findings in its speech code report have come under attack from some quarters. Jon Gould, most notably, wrote an article in 2007 for *The Chronicle of Higher Education*[334] in which he challenged the accuracy of the findings in FIRE's 2006 speech code report.[335] Drawing upon data taken from his own legal scholarship from 2001,[336] Gould asserted that speech codes are far less prevalent than FIRE suggests. Gould charged FIRE with drawing "overly broad conclusions" and "exaggerat[ing] the facts to make political hay."[337] He argued that FIRE had distorted the report's findings by "failing to distinguish enforceable rules from exhortative statements, confusing examples with definitions, and taking statements out of context."[338] He quoted Robert O'Neil as similarly disagreeing with FIRE's assessment of the prevalence of speech codes[339] and even stated that "most college speech policies [are] constitutional."[340] Therefore, Gould concluded, "contrary to the group's contention, academic freedom and open discourse are not seriously threatened at American colleges."[341]

There are four main points I wish to raise regarding Gould's assertions. Through a discussion of these four points, I will demonstrate that FIRE's methodology provides a highly accurate assessment of the prevalence of speech codes, and one that is far more accurate than the results of Gould's research.

1. Larger Sample Size

First, FIRE's speech code reports draw their findings from a larger sample of colleges and universities than does Gould's study. The 2006 report surveyed a total of 334 institutions,[342] while the 2007 report analyzed policies at 364

334. Jon B. Gould, *Returning Fire*, THE CHRONICLE OF HIGHER EDUCATION, April 20, 2007, at B13.

335. Foundation for Individual Rights in Education (FIRE), *Spotlight on Speech Codes 2006: The State of Free Speech on Our Nation's Campuses* (2006), *available at*, http://www.thefire.org/public/files/FINAL_FREE_SPEECH_REPORT_2006.pdf. Each of FIRE's annual speech code reports, including the 2006 and 2009 reports, uses essentially the same research methods in surveying the state of free speech on college campuses, and the 2009 report is the latest update of the 2006 report's findings. Therefore, the criticisms targeted at the 2006 report are applicable to the 2009 report as well, and my goal is to demonstrate the accuracy of the methodology used for both reports.

336. Gould, *supra* note 17, at 345.

337. Gould, *Returning Fire*, *supra* note 334.

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. FIRE, *Spotlight on Speech Codes 2006*, *supra* note 335. FIRE's 2006 report states the following about its sample selection: "FIRE surveyed publicly available policies at the 100 'Best National Universities' and at the 50 'Best Liberal Arts Colleges,' as rated in the August 29, 2005 'America's Best Colleges' issue of *U.S. News & World Report*. FIRE surveyed an additional 184 major public universities (FIRE's research focuses in particular on public universities because, as explained in detail later in this report, public universities are *legally* bound to protect students' right to free speech)." *Id.* at 2.

schools.[343] Gould, by contrast, examined 100 colleges and universities for his study.[344] The disparity in sample size is notable, and it stands to reason that a much larger sample will yield more accurate findings about the prevalence of speech codes on college campuses.

2. More and Different Types of Policies Examined

Second, FIRE's methodology entails analysis of a greater number of policies at each institution as well as analysis of many different types of policies which may be used to restrict speech, whereas Gould's study examines a comparatively narrow set of university policies. FIRE analyzes all "publicly available" policies at the institutions surveyed,[345] not just those policies which are explicitly labeled as speech policies or which fit the traditional notion of a speech policy. Thus, FIRE's research for its annual reports has included such policies as Northeastern University's aforementioned "Appropriate Use of Computer and Network Resources Policy" and the aforementioned "Diversity Statement" promulgated by Ohio State University's Office of University Housing.[346]

On their face, such policies may not immediately strike one as problematic speech codes, since they govern specific aspects of university life such as computer use and student interactions within university housing, respectively. However, inclusion of such policies in FIRE's research reflects the reality that they can very easily be utilized to censor students and can have a chilling effect on campus expression. A student who is censored or punished under such a policy for engaging in protected speech is being deprived of his or her rights in much the same manner as a student punished under a more "obvious" or "traditional" speech policy. Thus, inclusion of these types of policies in FIRE's research allows FIRE to provide a comprehensive and accurate assessment of the approach to campus speech at the institutions surveyed.

Conversely, Gould has a narrower conception of the types of policies to be examined. His study improperly focuses on "hate speech codes" or "speech

343. FIRE, SPOTLIGHT ON SPEECH CODES 2009, *supra* note 3, at 2. FIRE's 2009 report states the following about its sample selection: "FIRE surveyed publicly available policies at the 100 'Best National Universities' and at the 50 'Best Liberal Arts Colleges,' as rated in the August 27, 2007 'America's Best Colleges' issue of *U.S. News & World Report*. FIRE also surveyed an additional 207 major public universities. Our research focuses in particular on public universities because, as explained in detail later in this report, public universities are *legally* bound to protect students' right to free speech." *Id.* The 2009 report also includes a list of every institution surveyed. *Id.* at B1–B5.

344. Gould, *supra* note 17, at 350. Gould summarizes his sample set as "a stratified random sample of one hundred four-year institutions drawn from the 1987 Classification of Institutions of Higher Education produced by the Carnegie Foundation." *Id.*

345. FIRE, SPOTLIGHT ON SPEECH CODES 2009, *supra* note 3, at 2; FIRE, *Spotlight on Speech Codes 2006*, *supra* note 335, at 2.

346. Foundation for Individual Rights in Education (FIRE), SPOTLIGHT ON SPEECH CODES 2007: THE STATE OF FREE SPEECH ON OUR NATION'S CAMPUSES, at 1 (2007), *available at* http://www.thefire.org/Fire_speech_codes_report_2007.pdf. For the texts of these policies, *see supra* note 108 and note 12, respectively.

policies,"[347] though he never actually defines these terms or explains the types of policies that were analyzed for purposes of his study. His study is, in other words, surprisingly vague about its scope. In any event, as the study seems to include only the more "obvious" or "traditional" speech policies, it fails to account for the various other types of policies, such as the examples just discussed, which are often utilized to censor and punish protected speech.[348]

3. The Correct Approach Towards Harassment Policies

The third major difference between FIRE's methodology and Gould's methodology is that FIRE's speech code reports reflect a proper understanding of harassment law and of the fact that many university harassment policies, by encompassing protected speech, are unconstitutional speech codes. As FIRE states in its 2009 report, "[a]ctual harassment is not protected by the First Amendment. In the educational context, the Supreme Court has defined student-on-student harassment as conduct 'so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.'"[349] This is a narrow standard, one that should not be interpreted to reach various forms of protected speech. FIRE's 2009 report is clear on this point, positing that harassment law requires "conduct far beyond the dirty joke or 'offensive' op-ed that is often called 'harassment' on today's college campuses. Harassment is extreme and usually repetitive behavior—behavior so serious that it would interfere with a reasonable person's ability to get his or her education."[350]

Yet university harassment policies frequently contravene these principles. As the 2009 report recognizes, "hundreds of universities persist in maintaining ludicrously broad definitions of harassment and in punishing students and faculty members for constitutionally protected speech."[351] These universities are very much maintaining and enforcing speech codes, and the oft-proffered justification of attempting to address and prevent student harassment does not change this fact. The reality is that university harassment policies are some of

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347. Gould, *supra* note 17, at 350.

348. Moreover, Gould's focus on so-called "hate speech codes" is troublesome in that it seems to suggest that "hate speech," a term taken from the popular lexicon, carries some constitutional significance. In the *Chronicle of Higher Education* article, Gould defines hate speech as "verbal attacks that target others on the basis of their immutable characteristics." Gould, *Returning Fire*, *supra* note 334. However, there are no First Amendment exceptions for speech which is merely prejudicial, bigoted, or hateful. *See supra* note 100. Therefore, Gould's methodology not only fails to provide a comprehensive analysis of universities' approaches toward campus speech, it reflects an improper understanding of First Amendment principles. This is manifested by his assertion that, according to his 2001 study, 46 percent of institutions surveyed "had policies that could be used to restrict 'hate speech,'" while only 23 percent of institutions surveyed "had rules that were inconsistent with the First Amendment." *Id.* Given that prohibiting "hate speech," as a category in and of itself, is by definition inconsistent with the First Amendment, the second figure should be larger than the first one.

349. FIRE, SPOTLIGHT ON SPEECH CODES 2009, *supra* note 3, at 17 (quoting Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 651 (1999)).

350. *Id.*

351. *Id.* at 18.

the worst offenders of students' speech rights. In fact, every single speech code decision to date has involved a challenge to a harassment policy.[352] Thus, by taking into full account the propensity of colleges and universities to misapply harassment law to the detriment of student expression, FIRE's methodology accurately assesses the prevalence of speech codes on campus.

Gould, by contrast, essentially gives a free pass to university harassment policies by accepting that any policy targeted at "harassment" bans only unprotected speech, regardless of the actual terms of the policy. He criticizes FIRE for including within the scope of its reports university harassment policies, writing, "Where FIRE's estimates are exaggerated, the reason can often be traced to the group's categorization of sexual-harassment policies as 'speech codes.' FIRE apparently fails to recognize that American constitutional law has changed in the last 20 years to prohibit, as discrimination, sexually harassing speech."[353] He argues that "[a]lthough people should be free to think what they want" in the university setting, "that does not mean that we should follow FIRE's lead and merely punt when faced with verbal harassment or discrimination."[354] However, it is actually Gould who punts on the issue. Gould fails to consider that a university's mere act of labeling a policy as a harassment policy does not automatically mean that it does not encompass protected speech. He appears to believe that when a university regulates student expression and conduct through a harassment policy, any regulation contained within that policy is somehow made legitimate.[355] As already covered, harassment policies are in fact some of

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352. *See* DeJohn v. Temple University, 537 F.3d 301 (3d Cir. 2008) (sexual harassment policy); Lopez v. Candaele, No. CV 09-0995-GHK (C.D. Cal. July 10, 2009) (sexual harassment policy); College Republicans v. Reed, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) ("intimidation" and "harassment" policy); Roberts v. Haragan, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (sexual harassment policy); Bair v. Shippensburg Univ. 280 F. Supp. 2d 357, 372–73 (M.D. Pa. 2003) ("racism and cultural diversity" policy); Booher v. Board of Regents of Northern Kentucky University, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998) (sexual harassment policy); Corry v. Leland Stanford Junior Univ., No. 740309 (Cal. Super Ct. Feb. 27, 1995) ("harassment by personal vilification" policy); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1184 (6th Cir. 1995) ("discriminatory harassment" policy); UWM Post, Inc. v. Board of Regents of the University of Wisconsin, 774 F. Supp. 1163 (E.D. Wisc. 1991) ("discriminatory harassment" policy); Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989) ("discrimination and discriminatory harassment" policy). *See also* Saxe v. State College Area School District, 240 F.3d 200 (3d Cir. 2001) ("anti-harassment" policy at the secondary school level).

353. Gould, *Returning Fire*, *supra* note 334.

354. *Id.* In the same article, Gould writes that colleges and universities "*are social institutions, similar to other influential bodies in civil society*, reflecting a popular norm and enforcing the prevailing law with respect to harassment and discrimination." *Id.* (emphasis added). Not only does this argument ignore the fact that university harassment policies routinely restrict protected speech, it additionally fails to consider the special status of the modern university as a fertile ground for robust debate and dialogue, in other words as a true marketplace of ideas. *See supra* notes 1, 2. Therefore, even if it were true that universities faithfully follow harassment law, Gould's argument, in equating universities to other social institutions, does not take into consideration the unique role played by universities in the larger society.

355. This is even more perplexing given that Gould quotes the Supreme Court's standard from *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), for student-on-student sexual harassment in his *Chronicle* article. Gould, *supra* note 334. Since he is aware of the parameters of harassment law in

the worst offenders of free speech rights on college campuses, and universities routinely abuse the definition of harassment to the detriment of student speech rights.[356] Therefore, by giving a free pass to university harassment policies, Gould's methodology drastically under-reports the prevalence of speech codes.

4. Conflicting Statements and Explanations

The fourth and final difference between FIRE's methodology and Gould's methodology is that FIRE recognizes that conflicting statements and explanations within a university policy do not save it from constitutional infirmity, whereas Gould takes the position that such "savings clauses" negate any doctrinal problems presented. Gould criticizes FIRE for "failing to distinguish enforceable rules from exhortative statements, confusing examples with definitions, and taking statements out of context."[357] Additionally, he quotes a university spokesman as saying, "'Most if not all of the quotes listed by FIRE are seriously misleading, in that they are taken out of context. In some cases the next sentence [in the policy] modifies the meaning significantly.'"[358]

Gould's position is essentially that when a university regulation includes an explanatory clause purporting to affirm the university's general commitment to free speech, that clause negates any doctrinal problems created by the regulation itself. By way of example, Gould points to FIRE's objection to a University of Michigan policy declaring, "Individuals should not be unwittingly exposed to offensive material by the deliberate and knowing acts of others."[359] Even

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the educational context, it is perplexing to see Gould categorically take issue with FIRE's "categorization of sexual-harassment policies as 'speech codes.'" *Id.* Moreover, Gould's argument is reminiscent of the position taken by the Attorney General of New Jersey in the aforementioned William Paterson University case. *See supra* note 16. In defending William Paterson's decision in that case to find the student guilty of harassment, the Attorney General noted that the university was legally bound by a New Jersey state policy addressing "Discrimination, Harassment or Hostile Environments in the Workplace" and that the policy prohibited "derogatory or demeaning" speech aimed at members of protected groups. Letter from New Jersey Attorney General Peter Harvey to FIRE (July 15, 2005), *available at* http://www.thefire.org/index.php/article/6116.html (last visited Sept. 6, 2008). The Attorney General asserted, "Clearly speech which violates a non-discrimination policy is not protected" under the First Amendment. *Id.* According to the Attorney General, the fact that certain speech was prohibited under the state policy rendered it constitutionally unprotected, irrespective of existing First Amendment doctrine. Gould likewise defers to universities' definitions of harassment without regard to the possibility that these definitions may come into conflict with well-established First Amendment doctrine.

356. Davidson College, for example, prohibits "[c]omments or inquiries about dating," "[p]atronizing remarks," "[i]nnuendoes," and "dismissive comments." Davidson College, *Student Handbook: Definition of Harassment*, available at http://www3.davidson.edu/cms/x8905.xml (last visited Sept. 6, 2008). Murray State University defines sexual harassment to include "[c]alling a person a doll, babe, or honey," and "[m]aking sexual innuendoes." Murray State University, *Women's Center: Sexual Harassment*, *available at* https://www.murraystate.edu/womenscenter/MSUWomensCenterSexualHarassment.htm (last visited Feb. 20, 2009). These policies, much like other examples discussed throughout this article, highlight the abuse of harassment law on college and university campuses.

357. Gould, *supra* note 334.

358. *Id.*

359. *Id.*

though censorship of "offensive" speech at a public university presents an obvious First Amendment problem and would seem to render the policy facially overbroad, Gould argues that the policy is saved because it contains the following declaration: "Freedom of expression and an open environment for sharing information are valued, encouraged, supported, and protected at the University of Michigan. Censorship is incompatible with the goals of an institution of higher education."[360] According to Gould, this general statement suffices to remove the constitutional infirmity of the previous clause.

However, FIRE correctly recognizes that conflicting statements and explanations do not save a university policy from constitutional infirmity. It stands to reason that a general statement affirming the university's commitment to free speech does not modify the specific restrictions imposed by an overbroad policy, because the general affirmation does not truly "answer" or "negate" the particular language. Moreover, under standard canons of statutory construction, specific provisions take precedence over general provisions.[361] Finally, even where a "savings clause" purports to avoid the overbreadth problem with language which is equally specific as the initial regulation, it creates a fundamental vagueness problem by producing conflicting indications of what is prohibited and what is allowed. This fails to provide students with adequate notice and guidance, resulting in a chilling effect on campus speech.

These problems were recognized in *College Republicans v. Reed*,[362] a speech code case in which the university attempted to defend a policy requiring students "to be civil to one another." The *Reed* court found that such an overbroad proscription "will inhibit or deter" many forms of student communication that are among "the most valued and the most effective."[363] The university argued that the constitutionality of the civility requirement was saved by a sentence, located at the end of the regulation, announcing, "Nothing in this Code may conflict with Education Code Section 66301 that prohibits disciplinary action against students based on behavior protected by the First Amendment."[364] The court responded, however, that "[t]his sentence communicates virtually nothing."[365] The court asked rhetorically, "How are college students to be able to determine (when judges have so much difficult doing so) whether any particular speech or expressive conduct will be deemed (after the fact) to fall

360. *Id.*

361. *See, e.g., Morales v. TWA*, 504 U.S. 374, 384 (1992) (stating that "it is a commonplace of statutory construction that the specific governs the general") (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)). In *Morales*, the Supreme Court held that a general "saving clause cannot be allowed to supersede" a "specific substantive pre-emption provision," 504 U.S. at 385, adding that "we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause." *Id.* (internal quotations and citation omitted).

362. *College Republicans v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007).

363. *Id.* at 1019.

364. *Id.* at 1020.

365. *Id.* at 1021.

within the protections of the First Amendment?"[366] It reasoned that a college student was clearly "more likely to feel that she should heed the relatively specific proscriptions" of the initial regulation than to "feel that she can engage in conduct that violates those proscriptions (and thus is risky and likely controversial) in the hope that the powers-that-be will agree, after the fact, that the course of action she chose was protected by the First Amendment."[367] To the court, any question about the relative likelihood of these alternatives was "self-answering—and the answer condemns to valuelessness the allegedly 'saving' provision."[368] FIRE's speech code reports follow the same logic as the *Reed* decision and recognize that savings clauses do not remove the constitutional infirmities of a speech regulation. For this reason as well, FIRE's methodology provides the most accurate assessment to date of the prevalence of speech codes.

V. POTENTIAL SOLUTIONS

Having documented the fact that speech codes, despite their many flaws, remain prevalent at colleges and universities across the nation, I turn now to a discussion of available methods for improving the situation on campus. None of the solutions which I propose is likely by itself to lead to the complete eradication of speech codes, but taken together, they present the possibility of ridding America's institutions of higher education of speech codes once and for all.

A. Continued Speech Code Litigation

To this point in time, speech code litigation has been unanimously successful in achieving the invalidation of university speech codes. From *Doe*[369] in 1989 to *Lopez*[370] in 2009, courts have uniformly struck down speech codes facing a constitutional challenge. In light of this history, further litigation is likely to lead to the invalidation of more speech codes. It is essential to the ultimate defeat of speech codes that university students continue to bring legal challenges against them in court.

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366. *Id.*

367. *Id.* At another point, the court reasoned that the purported savings clause "appear[s] at the end of a long regulation and in a paragraph [which] is separated from the regulation's substantive proscriptions. There is no clue or signal in the initial paragraphs or in the substantive proscriptions of the regulation that there might be set forth at the end some clarification of or limitations on the regulation's mandates. So it would not be obvious to a student who is consulting the substantive proscriptions (e.g., to determine whether some contemplated conduct is permitted) to turn to this last separate paragraph." *Id.* at 1020. Once again, the court's concern here lies with adequate guidance and notice to students. Aside from the fact that it is unrealistic to expect students to navigate their way through conflicting statements and conform their expression and behavior accordingly, the court recognized that some students may simply never see the purported savings clause. This too is a fundamental problem with the justification of using such clauses to remedy a speech code's doctrinal flaws.

368. *Id.*

369. Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989).

370. Lopez v. Candaele, No. CV 09-0995-GHK (C.D. Cal. July 10, 2009).

Significantly, many schools still maintain policies mirroring some of the very speech codes which have previously been struck down, making these institutions particularly susceptible to a legal challenge. For instance, Le Moyne College bans "[s]tigmatizing or disparaging statements related to race, gender, ethnicity," and other personal characteristics.[371] The University of North Carolina at Charlotte, likewise, defines racial harassment to include behavior that "stigmatizes or victimizes an individual on the basis of race, ethnicity, or ancestry."[372] Westfield State College prohibits its students from "making disparaging remarks that insult or stigmatize a student's cultural background or race."[373] Each of these three policies, in addition to being remarkably similar, mirrors the University of Michigan speech code struck down in *Doe* as well as the Stanford University speech code struck down in *Corry*.[374] Given the similarities in language between these policies and the speech codes at issue in *Doe* and *Corry*, it would seem that the former are equally as susceptible to a legal challenge. Thus, the tendency on the part of many institutions to maintain policies mirroring previously invalidated speech codes increases the likelihood that further litigation will result in additional victories and more speech codes being struck down.

Additionally, as plaintiffs continue to challenge speech codes and the case law on speech codes becomes even clearer and more compelling, the courts should deny qualified immunity to university administrators whenever a student seeks damages for the deprivation of his or her First Amendment rights. By taking this important step, the courts would force college and university officials to logically think twice before violating a student's speech rights, knowing that they will not be able to hide behind the defense of qualified immunity when sued in their personal capacity. While this solution addresses only those institutions that are subject to the Constitution,[375] it would nonetheless have a significant impact on the tendency of universities to apply speech codes against protected speech.

When a student at a public university has been deprived of a constitutional right, such as the right to free speech, by reason of official action, he or she has

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371. Le Moyne College, *Student Handbook 2007–2008: Misconduct Subject to Disciplinary Action*, *available at* http://www.lemoyne.edu/student_life/Student_Handbook.pdf (last visited Sept. 9, 2008).

372. University of North Carolina at Charlotte, *Full-time Faculty Handbook*, *available at* http://www.uncc.edu/handbook/fac_and_epa/full_time_handbook.htm (last visited Sept. 9, 2008).

373. Westfield State College, *Student Handbook: Discrimination Based on Race, Religion, National or Ethnic Origin*, *available at* http://www.wsc.ma.edu/Current%5FStudents/Student_Handbook/Equal_Opportunity/index.html (last visited Sept. 9, 2008).

374. Michigan's Policy on Discrimination and Discriminatory Harassment prohibited, in pertinent part, "[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex," and other listed traits. *See* Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989). Stanford's speech code prohibited speech "intended to insult or stigmatize an individual . . . on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin." *See* Corry v. Leland Stanford Junior Univ., No. 740309 (Cal. Super Ct. Feb. 27, 1995).

375. *See supra* note 5.

recourse to a Section 1983 suit.[376] This remedy allows the student to collect monetary damages from the responsible official or officials in their personal capacity, provided that the official exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[377] This requirement is certainly met in the case of an administrator at a public university who harms a student by maintaining or enforcing a speech code in violation of his or her freedom of speech, because the act is made entirely possible by the administrator's governmental authority at a state university.

When facing a Section 1983 suit for damages, one of the defenses available to a state official is qualified immunity, which shields government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[378] The Supreme Court has adopted a two-part test for qualified immunity: (1) whether the facts as alleged demonstrate violation of a constitutional right, and (2) whether that right was clearly established at the time, such that it would have been clear to a reasonable official that the alleged conduct was unlawful under the circumstances.[379] This inquiry entails consideration of both clearly established law and the factual information possessed at the time, and therefore must be "undertaken in light of the specific context of the case, not as a broad general proposition."[380] Ultimately, Supreme Court jurisprudence commands government officials to look to "cases of controlling authority in their jurisdiction" or "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful."[381]

The courts, in applying the doctrine of qualified immunity whenever it is raised as a defense in a university student's Section 1983 suit, should hold that

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376. The cause of action comes from the federal Civil Rights Act of 1871, 42 U.S.C. § 1981 *et seq.*, which states, "Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

377. West v. Atkins, 487 U.S. 42, 49 (1988) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

378. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

379. Saucier v. Katz, 533 U.S. 194, 201 (2001). In *Saucier*, the Court mandated that lower courts apply the two-part test for qualified immunity in the order indicated above. That is, a court had to first decide whether the alleged facts demonstrated violation of a constitutional or statutory right before it could proceed to deciding whether the law had clearly established that right. *Id.* at 201. Under the *Saucier* protocol, if no violation of a right was demonstrated based on the alleged facts, then there would be no need to analyze whether the law was clearly established at the time. *Id.* However, in its recent decision in *Pearson v. Callahan*, 129 S. Ct. 808 (2009), the Court overruled *Saucier* on this point, holding that lower courts should have the discretion to decide the order in which to apply the two-part test. Thus, while courts remain free to follow the *Saucier* protocol, after *Pearson* they may also proceed directly to the second prong without answering the first.

380. *Saucier*, 533 U.S. at 201.

381. Wilson v. Layne, 526 U.S. 603, 617 (1999).

depriving a university student of his or her constitutional right to free speech is a violation of clearly established law. The protections for free speech set forth in the First Amendment are most certainly clearly established rights within our society and apply with particular rigor in the college setting, in light of the importance of allowing for the unfettered exchange of ideas on campus. As previously discussed, the Supreme Court and lower federal courts have traditionally attached much significance to the modern university's role in our society as a true marketplace of ideas.[382] These and similar judicial pronouncements not only span several decades, they have been widely upheld and cited in case law involving varying fact patterns and legal issues,[383] providing university officials with the requisite notice about the sacrosanct status of free speech on campus. Moreover, the uniform rejection of speech codes in the courts counsels strongly against their continued presence on the college campus. While there have been a finite number of speech code decisions to date, the fact remains that every single one of them resulted in the invalidation of a speech code. Given these consistent results, university officials cannot reasonably argue that the courts have not provided them with a clear indication; the case law on speech codes is simply over-determined. There is therefore no justification for university officials being unaware of, or insensitive to, the heightened protection that courts have given to expressive rights in the college setting.

By rejecting the qualified immunity defense, the courts would dramatically alter the incentives that administrators currently have when deciding whether to censor and punish student expression under a speech code. If administrators know that they face the prospect of paying monetary damages to a student who has been harmed in the exercise of his or her First Amendment rights, they will likely be much more careful in their actions. They will more closely scrutinize the possibility of infringing upon protected expression and thereby inviting a lawsuit. This will result in administrators choosing more often not to maintain or apply a speech code against protected speech, allowing for much-needed breathing room for student expression on campus.

B. Public Exposure and Advocacy

However, continued litigation is not sufficient on its own to defeat speech codes permanently. Colleges and universities have by and large chosen to ignore the case law on speech codes, in spite of its uniformity and strength. Moreover,

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382. *See supra* notes 1, 2.

383. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 835 (1995) (citing *Healy* for the proposition that the danger of chilled speech is "especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition"); Ornelas v. Regents of the Univ. of N.M., 2000 U.S. App. LEXIS 21151 (10th Cir. 2000) (citing *Papish* to argue that a state university cannot expel a student in retaliation for engaging in legitimate First Amendment activity); Stanley v. Magrath, 719 F.2d 279, 282 (8th Cir. 1983) (citing *Papish* for the argument that a public university may not take adverse action against a student newspaper because it disapproves of the content of the paper).

it is simply not possible to litigate against every single institution maintaining an unconstitutional speech code. Consequently, other solutions are needed to supplement further litigation.

One such measure is public exposure of speech codes and public advocacy against their continued presence on campus. Speech codes tend to be heavily disfavored by the public, given their incompatibility with the ideal of the marketplace of ideas.[384] Opponents of speech codes can thus capitalize on public opinion, since universities frequently wish to avoid the negative publicity generated by exposure of their unconstitutional policies. Consequently, public exposure and advocacy is a viable means for students, activists, and others to persuade colleges and universities to voluntarily remove their speech codes.

FIRE is one example of an organization which utilizes public exposure and advocacy toward the defeat of speech codes. FIRE's Spotlight database, available on its website, catalogues schools' speech regulations, so that students,

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384. The fact that speech codes are largely disfavored by the public can be seen, among other places, in the amount of negative coverage they have received in the mainstream and online media. *See supra* note 18. *See also* Sara Dogan, *Speech Codes 101*, FRONTPAGE MAGAZINE, Dec. 22, 2008; *3 of 4 Universities Censor Speech*, WORLDNETDAILY, Dec. 15, 2008; Ray Nothstine, *Speech Codes Limit Campus Freedom*, Acton Institute Commentary, Dec. 3, 2008; Editorial, *Free Speech on Campus*, WASH. TIMES, Aug. 13, 2008; Dorothy Rabinowitz, *American politics aren't 'post-racial'*, WALL ST. J., July 7, 2008 at A13; Alan Charles Kors, *On the Sadness of Higher Education*, WALL ST. J., May 27, 2008, *available at* http://online.wsj.com/article/SB121184146283621055.html; Associated Press, *College Faculty in Bergen Oppose Proposed Code of Conduct*, NEWSDAY, Jan. 11, 2008; Michael Moynihan, *Flunking Free Speech: The persistent threat to liberty on college campuses*, REASON ONLINE, Dec. 24, 2007, *available at* http://www.reason.com/news/printer/124072.html; David E. Bernstein, *What About Larry?*, L.A. TIMES, Sept. 19, 2007, *available at* A21; John Sweeney, *There's a Code of Correctness at Colleges*, NEWS JOURNAL, May 11, 2007.

Speech codes have also received much criticism in the student press. *See, e.g.,* Adam Kissel, Editorial, *University Should Solve Censorship Issue*, THE JUSTICE, Feb. 10, 2009; Kelly McEvoy, *FIRE Labels College 'Red Light' School*, THE FLAT HAT, Jan. 27, 2009; Ben Skalina, *Director: PSU Limits Students' Free Speech*, DAILY COLLEGIAN ONLINE, Dec. 12, 2008; Michael Davidson, *The Hidden Scandal of Princeton's Speech Code*, DAILY PRINCETONIAN, Sept. 11, 2008; Anya Bergman, *Free Speech 'Dead' on Campuses*, THE JUSTICE, March 18, 2008; Christine McCurdy, *Set Speech Free at Hopkins*, JOHNS HOPKINS NEWS-LETTER, Feb. 28, 2008; Brian Mink, *Campus Conduct Reviewed*, THE RED AND BLACK, Feb. 26, 2008.

Finally, the public consensus against speech codes is reflected in the fact that Congress has twice in the past eleven years adopted "sense of Congress" resolutions affirming the importance of freedom of speech in higher education and critiquing campus censorship. These resolutions attest to the fact that there is very little constituency for the types of speech restriction made possible by speech codes. In its reauthorization in 2008 of the Higher Education Act of 1965, 20 U.S.C. § 1001 et seq., Congress included a provision stating that "an institution of higher education should facilitate the free and open exchange of ideas" and that "students should not be . . . discouraged from speaking out." Pub. L. No. 110-315 (2008). Previously, Congress had revised the Higher Education Act in 1998 to include a provision stating that "no student attending an institution of higher education on a full- or part-time basis should, on the basis of participation in protected speech or protected association, be excluded from participation in, be denied the benefits of, or be subjected to discrimination or official sanction under any education program, activity, or division of the institution directly or indirectly receiving financial assistance under this Act." Pub. L. No. 105-244 (1998). While "sense of Congress" provisions are non-binding guidelines, it is nonetheless significant that Congress weighed in on this issue twice within a decade, adding another layer to the public consensus against the restriction of campus expression made possible by speech codes.

parents, alumni, and other interested parties can educate themselves on their respective institution's approach to campus speech. FIRE also highlights particularly egregious speech policies through its Speech Code of the Month program. Finally, FIRE's annual speech code reports provide a detailed and comprehensive analysis of the current state of free speech on our nation's campuses. Through these efforts, FIRE exposes the fact that many institutions continue to maintain unconstitutional speech codes, thereby stifling student speech, and publicly advocates for these institutions to correct themselves.

Second, in connection with these efforts, FIRE has sought to develop a strong coalition of students and activists through its Campus Freedom Network. By educating CFN members about the speech rights to which they are entitled and the manner in which speech codes abrogate these rights, FIRE has strived to develop a broad base of support on the nation's campuses. CFN members are then empowered to educate others on their respective campuses, as well as to apply pressure on their institution's administration to repeal existing speech codes.

Finally, FIRE has reached out to, and worked with, university administrators and attorneys. FIRE has led seminars and conferences aimed at educating university administrators about upholding and respecting student speech rights. Another crucial measure would be to establish a continuing legal education program for university attorneys in the future. The most significant step in this direction would be an opportunity to work directly with the National Association of College and University Attorneys, the umbrella organization for university attorneys and general counsels. By providing university attorneys and administrators with the proper knowledge regarding student speech rights, FIRE would enable universities to create meaningful policy change at the administrative level. In combination with the other public advocacy and outreach efforts discussed above, this would greatly contribute to the ultimate defeat of speech codes.

C. Changing the Cultural Norms

In addition to the solutions discussed above, a shift in our nation's cultural norms is ultimately necessary to defeat speech codes. To this end, more Americans must learn to conceptualize the university campus as a true marketplace of ideas rather than a protective bubble insulating students from all offense and to tailor their expectations accordingly. If students and parents make it clear to their respective universities that they do not expect or desire administrators to regulate campus expression for mere offense, it would likely play a significant role in shaping institutional policy. Colleges and universities reflect the general norms of the society in which they exist and tend to follow the basic preferences of their constituencies; therefore, it is reasonable to expect that they would follow the larger society in taking a more tolerant approach towards speech.

This solution does not have any obvious starting points or easy means of implementation. Rather, the idea of transforming Americans' conceptions and

expectations of the university environment is one that requires a comprehensive approach. Continued education and outreach of the type engaged in by FIRE will be necessary, but at an earlier point in people's lives. Students in the public schools should be taught about the fundamental importance of the freedom of speech and adequately prepared to take advantage of this freedom when they enter higher education. Meanwhile, parents of college students must understand that students may sometimes be offended by what they see or hear on campus. They must understand that "[a] robust exchange of ideas, even offensive, sometimes hurtful ideas, is a central part of the learning and intellectual exploration essential on university campuses,"[385] and that "preserving civility on campuses . . . is a goal that must take second place to the freedoms guaranteed by the First Amendment."[386]

These are vital lessons to be learned if we as a nation are to create a true marketplace of ideas on the college campus, and they need to be disseminated widely and unequivocally. Only by convincing people of the need to improve the state of free speech on campus can we succeed in restoring institutions of higher education to their proper role in the larger society. Again, this will by no means be an easy task, nor can it be accomplished in a short period of time, but it is a necessary aspect of any long-term answer to the problem of speech codes.

CONCLUSION

In this article, I have sought to provide a thorough discussion of the presence of speech codes on college campuses, the problems they present, and the many legal and moral issues involved. Although no single article can be truly exhaustive on this important topic, I hope to have provided some useful history, documentation, and analysis.

While the origins of speech codes owe to several factors, perhaps varying from one institution to the next, what is much clearer is their legal history in the courts. Speech codes facing constitutional challenges have been uniformly struck down in recognition of the fact that they violate the fundamental expressive rights of students. As these cases have demonstrated, speech codes are constitutionally infirm on the grounds of overbreadth, vagueness, content-based and viewpoint-based discrimination, or a combination thereof. Due to these doctrinal flaws, speech codes have caused severe harms on the university campus: the chilling effect on student speech, suppression of disfavored ideas, perpetuation of a supposed right not to be offended, and, ultimately, an undermining of the vitality and functioning of the university in its role in the larger society.

Even though the legal history of speech codes counsels so heavily against their continued existence, they have persisted on campuses across the country.

385. Rabe, *supra* note 17, at 227.
386. *Id.*

As documented in FIRE's annual speech code reports, colleges and universities, by maintaining and enforcing speech codes, have continued to deny their students the speech rights to which they are entitled. To combat this, I have proposed a few solutions in this article. The most direct and obvious solution is continued litigation against speech codes, which will likely result in more speech codes being struck down by the courts. Additionally, the courts' denial of qualified immunity to university administrators in lawsuits alleging deprivation of First Amendment rights would allow students to hold these individuals personally accountable for their decisions regarding campus speech rights. Second, public exposure and advocacy can contribute heavily to the ultimate defeat of speech codes. Third, a change in our nation's cultural norms is ultimately necessary to defeat speech codes. Only by changing people's conceptions of the true purposes served by the modern university can we as a nation rid our colleges and universities of speech codes permanently, thus making it possible for these institutions to play their proper role in the larger society. The benefits will be reaped by all.