

The Collision of Rights and a Search for Limits: Free Speech in the Academy and Freedom From Sexual Harassment on Campus

Beverly Earle*

Anita Cava**

In this article, Professor Earle and Professor Cava explore the conflict between free speech guarantees, academic freedom, and the rights of students, faculty, and employees to work and study without being subjected to sexual harassment. The authors analyze the jurisprudence of the First Amendment and the law of sexual harassment, both Title VII and Title IX. Earle and Cava then focus on the courts' application of these laws in the university context. They next examine the proliferation of university codes created in response to the conflict between these areas of the law, focusing primarily on the codes utilized by Stanford and Harvard. The authors conclude with some recommendations to help colleges and universities negotiate this minefield of conflicting rights.

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* Associate Professor of Law, Bentley College, Waltham, MA. B.A. from the University of Pennsylvania, J.D. from Boston University School of Law. Special thanks to Margo Reder, J.D., Research Associate, Bentley College, for her assistance in research.

** Associate Professor of Business Law, University of Miami School of Business Administration. B.A. from Swarthmore College, J.D. from N.Y.U. School of Law and Hays Fellow. Special thanks to Lynn Russell for her technical assistance beyond the call of duty.

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What is a college to do when faced with a professor whose vision of teaching writing involves sexual references to a plate of jello, which offends some undergraduates in his class?¹ What action can an administrator take to assuage student anger when a coach attempts to motivate his players by using a racial epithet?² How should a university react when a student calls another a name that is taken as offensive and makes national news?³

Currently, a debate rages concerning the degree to which speech that is sexually or racially harassing is protected. And nowhere is that debate more heated than on university campuses, historically committed to unrestricted inquiry and exploring ideas, yet morally obligated to promoting respect, and legally forbidden from permitting sexual harassment under Title VII⁴ and Title IX⁵.

In American jurisprudence, the collision of conflicting rights is not an anomaly. Neo-Nazis march in Skokie, Illinois, trampling the rights of concentration camp survivors and all who remember with particular pain the Nazi reign of terror and extermination.⁶ A parent exercises religious freedom and insists upon prayer to cure her diabetic child, leading to the

1. See *Silva v. Univ. of New Hampshire*, 888 F. Supp. 293 (D.N.H. 1994).

2. See *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

3. See *Ex-student Files Suit in "Water Buffalo" Case*, WASH. TIMES, Apr. 7, 1996, at A2, (concerning Eden Jacobowitz who, in 1993, made national news after he shouted at three black sorority sisters who were making noise outside his window late one night, "Shut up, you water buffalo. If you're looking for a party, there's a zoo a mile from here.").

4. Civil Rights Act of 1964, 42 U.S.C.A. § 2000e (1994).

5. Title IX, 20 U.S.C.A. § 1681 (1994).

6. See *Collin v. Smith*, 578 F.2d 1197, 1205-07 (7th Cir.), cert. denied, 436 U.S. 953 (1978); *Village of Skokie v. Nationalist Socialist Party*, 373 N.E.2d 21 (Ill. 1977), cert. denied, 432 U.S. 43 (1978) (discussing American Nazi Party's march in Skokie, Illinois, where a high percentage of residents are survivors of the Holocaust). For criticism of *Skokie*, see CATHERINE A. MACKINNON, ONLY WORDS 105 (1993), in which she draws a parallel between the Jews in Skokie and victims of rape and sexual abuse and pornography.

youngster's death despite proven life-saving medical treatment.⁷ A candidate for a union office distributes sexually explicit photographs upon which his opponent's face is superimposed, causing her to sue for emotional distress.⁸ A protester burns the American flag in front of city hall, affronting many patriotic Americans.⁹ Balancing these conflicting rights has generated much debate and disagreement as judges prioritize and resolve difficult issues on a case by case basis.

Within the academy, some, seeking to ensure a discrimination-free environment, advocate the development and implementation of harassment codes.¹⁰ Others challenge such codes as overbroad, asserting that they trample rights of free speech and academic freedom despite the laudable goal of trying to eradicate harassment and create a comfortable learning environment.¹¹ Even the most traditional liberals¹² are troubled by this dilemma and warn of the "slippery slope"¹³ of designing speech codes.

This paper seeks to add to the literature on campus harassment codes¹⁴ by focusing on specific attempts to mediate the tension created by the collision of rights described above. The concept of academic freedom and the right to engage in lively and provocative debate is a long-cherished

7. See *Lundman v. McKown*, 530 N.W.2d 807 (Minn. App. 1995) (upholding the award of \$1.5 million in compensatory damages to the father of a deceased child, after the child's mother and stepfather followed Christian Science practices in an unsuccessful attempt to heal the boy's diabetes, when medical attention likely would have saved him), *cert. denied*, ___ U.S. ___, 116 S. Ct. 828 (1996). Stephen Carter, Professor at Yale University, criticizes this decision in Stephen Carter, *The Power of Prayer Denied*, N.Y. Times, Jan. 31, 1996, at A17.

8. See *Bowman v. Heller*, 651 N.E.2d 369 (Mass. 1995) (upholding award of \$35,000 to one worker who sued another for sexual harassment and intentional infliction of emotional distress), *cert. denied*, 116 S. Ct. 682 (1995).

9. See *Texas v. Johnson*, 491 U.S. 397 (1989).

10. See generally MACKINNON, *supra* note 6, at 71 (1993) ("The law of equality and the law of freedom of speech are on a collision course in this country.").

11. For cases in which speech codes have been challenged, see *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (striking down a university's discriminatory harassment policy as unconstitutionally vague and overbroad); *UWM Post v. Bd. of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991) (also striking down university's discriminatory harassment policy as unconstitutionally vague and overbroad); *Corry v. Stanford Univ.*, No. 740309 (Cal. Sup. Ct., Feb. 27, 1995) (order granting preliminary injunction).

12. See, e.g., Anthony Lewis, *Abroad at Home; Living in a Cocoon*, N.Y. TIMES, Nov. 27, 1995, at A15. In his Op-ed piece he asks:

"Do the drafters [of speech codes] have no knowledge of history? One wonders. [There is] no understanding that freedom requires, as Justice Holmes said, 'freedom for the thought we hate.'" Lewis notes that many faculty members object to broad based codes, quoting one professor who asserts that the university's job is "not to impose 'comfort' levels, [but] that civility and suasion, not rules and regulations, are the way to shape the tone of the community."

13. See generally Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 362 (1985).

14. See, e.g., Jeanne M. Craddock, Comment, *Words that Injure; Laws that Silence: Campus Hate Speech and the Threat to American Education*, 22 FLA. ST. U. L. REV. 1047 (1995); Jules B. Gerard, *The First Amendment in A Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1003 (1993); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991).

tradition in our jurisprudence.¹⁵ Free speech is an important value but it is not absolute; not all speech is protected, and speech may not be protected in all contexts. Indeed, even cherished freedoms under the First Amendment, including speech, are subject to limits. The classic case of shouting "fire" in a crowded theater has been held not to be protected speech.¹⁶ Similarly, obscene speech¹⁷ is not accorded full constitutional protection, and neither is defamatory speech¹⁸ nor child pornography.¹⁹ Accordingly, it is proper to entertain the notion that even a university might permissibly restrict speech. As a comparison, statutory prohibitions against sexual harassment in the workplace restrict speech and thus pose a similar potential conflict with the First Amendment. Nevertheless, the Supreme Court has upheld these prohibitions in the employment context.²⁰

But examining the conflict between protections against sexual harassment and freedom of speech in the academic context raises additional issues beyond the usual employment setting because of the central value of academic freedom and because of the university's commitment to unfettered debate. Although there should be more latitude in an academic setting, particularly in the classroom and in campus fora, there are still limits to behavior and speech in the education context. Indeed, even academic freedom cannot be used to justify harassment. Defining these limits to behavior and speech is particularly challenging. After reviewing the case history of Title VII and IX, and the use of codes at several institutions including Stanford University, we examine the Harvard University Law School Guidelines in detail and demonstrate why these Guidelines provide a model for other institutions. Harvard's Guidelines are

15. See Craddock, *supra* note 14, at 1081-82; Julius G. Getman & Jacqueline W. Mintz, *Symposium on Academic Freedom, Forward: Academic Freedom in a Changing Society*, 66 *Tex. L. Rev.* 1247, 1248 (1988). For a cogent analysis of the contours of this principle, see *Cohen v. San Bernardino Valley College*, 883 F. Supp. 1407, 1412-14 (C.D. Cal. 1995).

16. *Schenck v. United States*, 249 U.S. 47 (1919) (affirming conviction under Espionage Act of defendants who sought to obstruct recruiting and enlistment of men during World War I). There, Justice Holmes wrote:

We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it was done (citations omitted). The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

17. *Miller v. California*, 413 U.S. 15 (1973).

18. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). For a discussion of defamation and all the accompanying issues, see *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

19. *New York v. Ferber*, 458 U.S. 747 (1982).

20. See *Harris v. Forklift Systems*, 510 U.S. 17 (1993) (confirming that verbal harassment in the employment context is actionable under a hostile environment theory); see also discussion *infra* notes 61-66 and accompanying text.

useful for their focus on situations where an authority figure takes advantage of a relationship of unequal power, or when individuals make pervasive and severe comments and actions that single out other individuals. At the same time, the Guidelines strike a balance by giving greater latitude to speech in the classroom and in off-campus, private settings.

Harassment law is not meant to shield the timid from offensive ideas. In an academic context, freedom of speech takes on great importance, not only for the security of the professor's job, but also to ensure that students hear and participate in discussions of controversial topics. Racial integration of public accommodations may have been offensive to some in 1961, just as discussion of abortion, homosexuality, clitorrectomy, and false rape claims may be today.

Yet does the academic freedom mantle protect every utterance within a classroom? Is there nothing, no line, that limits the professor's freedom to engage in ridiculous and harassing discourse? Further, does the identity of the speaker make a difference? May an African American professor be able to use racial epithets not permissible if used by a Caucasian professor; may a Jewish professor make references that would be offensive if made by one of another faith?

The answers to these questions depend, in part, upon interpretation of statutes intended to protect individuals from harassment in the workplace. University employees, including professors, administrators, and staff, who are subjected to harassing threats or a hostile environment, can find relief within the context of Title VII.²¹ Students in this predicament can turn to Title IX, which requires educational institutions that receive federal funds to provide a learning environment free of sex discrimination, including sexual harassment.²² We now turn to this examination.

I

CONTOURS OF THE FIRST AMENDMENT

A. *Fighting Words, Hate Speech And Other Conduct*

The First Amendment of the U.S. Constitution, adopted in 1791, states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press²³

Relevant to our inquiry, the Supreme Court carved out a "fighting words" exception to the First Amendment in *Chaplinsky v. New Hamp-*

21. 42 U.S.C.A. § 2000e (1994).

22. 20 U.S.C.A. § 1681 (1994)(requiring sex equality in education).

23. U.S. CONST. Amend. I.

shire.²⁴ “[I]nsulting or ‘fighting words’, those which by their very utterance inflict injury or tend to incite an immediate breach of the peace” were held to be outside the protection of the Constitution.²⁵ The case dealt with a New Hampshire statute and its application to Mr. Chaplinsky, who uttered, “You are a God damned racketeer and damned Fascist” to the local fire marshall.²⁶ Subsequently, in *Gooding v. Wilson*,²⁷ the Supreme Court limited the reach of the “fighting words” doctrine. There, a man had said to police officers, “[W]hite son of a bitch, I’ll kill you You son of a bitch, if you ever put your hands on me again, I’ll cut you all to pieces.”²⁸ The speaker’s conviction was overturned because the statute under which he was convicted was overbroad.²⁹ According to the Court, fighting words must “tend to incite an immediate breach of the peace.” Commentators note, however, that this construction is so narrow that every “fighting word” conviction has been overturned, and thus question the continued relevance of the case.³⁰ Another form of ‘fighting conduct’ was considered by the Supreme Court in 1992, when it decided *RAV v. City of St. Paul*³¹, in which several teenagers burned a cross made of chair legs inside the fenced yard of a black family and were charged with a violation of the city’s Bias Motivated Crime Ordinance, which read:

Whoever places on public or private property a symbol, object, appellation, characterization, or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.³²

The Minnesota trial court found the statute overbroad and its content-based restrictions violative of the First Amendment. The Minnesota Supreme Court reversed on the grounds that the statute was limited to “fighting words” and thus reached only words the First Amendment does not protect.³³ It reasoned that the “ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias motivated threats to public safety and order.”³⁴ The United States Supreme Court rejected this analysis, concluding the statute was “facially unconstitutional in that it prohibits otherwise permitted

24. 315 U.S. 568, 572 (1942).

25. *Id.*, (quoting CHAFEE, *FREE SPEECH IN THE UNITED STATES* 149 (1941)).

26. *Id.* at 569.

27. 405 U.S. 518 (1972).

28. *Id.* at 519-20 n.1.

29. *Id.* at 520.

30. See Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L. J. 484, 510 (1990).

31. 505 U.S. 377 (1992).

32. St. Paul Bias-Motivated Crime Ord., (St. Paul, Minn.) Leg. Code § 292.02 (1990).

33. 505 U.S. at 380.

34. *Id.* at 380.

speech solely on the basis of the subjects the speech addresses.”³⁵ While the Court acknowledged that fighting words could be restricted based on the mode of speech involved,³⁶ St. Paul’s statute appeared to create content discrimination. The Court was troubled that under the ordinance, one could take one side of the debate but not another.³⁷

Let there be no mistake about our belief that burning a cross on someone’s front yard is reprehensible. But St. Paul had sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.³⁸

However the Court did note that it was legitimate to regulate certain speech that may have “secondary effects” and that “the regulation is justified without reference to the content of the . . . speech.”³⁹ Justice Scalia elaborated on this concept in the context of Title VII’s protections, noting:

Thus, for example, sexually derogatory “fighting words,” among other words, *may* produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices. [citations omitted] Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.⁴⁰

The Court accepts that in the workplace context, it is well established law to restrict even words deemed “sexually derogatory fighting words.”⁴¹

In an earlier 5-4 opinion, the Supreme Court had struck down a protester’s conviction under a Texas statute prohibiting desecration of a venerated object.⁴² Johnson had burned the United States flag in protest during the Republican National convention in Dallas in 1984.⁴³ The Court noted:

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.⁴⁴

Applying the most “exacting scrutiny,”⁴⁵ the Court affirmed that the statute was unconstitutional as applied:

The First Amendment does not guarantee that other concepts virtually sacred to our nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas. [citations omitted] We decline, therefore, to create for

35. *Id.* at 381.

36. *Id.* at 386 (comparing fighting words to a “noisy sound truck”).

37. *Id.* at 391-92.

38. *Id.* at 396.

39. *Id.* at 389.

40. *Id.* at 389-90.

41. *Id.* at 389.

42. *Texas v. Johnson*, 491 U.S. 397, 418 (1989).

43. *Id.* at 399.

44. *Id.* at 414.

45. *Id.* at 412.

the flag an exception to the joust of principles protected by the First Amendment.⁴⁶

In concluding, the Court noted a way to answer anticipated criticism of the decision:

We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial.⁴⁷

Dissenting, Chief Justice Rehnquist reviewed the history of the flag and its revered place in America's consciousness and argued:

Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people — whether it be murder, embezzlement, pollution or flag burning.⁴⁸

Justice Stevens noted in his separate dissent:

If these ideas are worth fighting for—and our history demonstrates that they are—it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.⁴⁹

The Supreme Court, in an earlier case, *Healy v. James*,⁵⁰ dealing with the denial of recognition to the Students for a Democratic Society (SDS), found that the denial violated First Amendment principles because it was based on disagreement with the group's philosophy.⁵¹ However, the Court left a door open, noting that refusal to abide by campus regulations could be a basis for denial of recognition. The case concluded by stating:

[T]he wide latitude accorded by the Constitution to the freedoms of expression and association is not without its costs in terms of risk to the maintenance of civility and an ordered society. Indeed, this latitude often has resulted, on the campus and elsewhere, in the infringement of the rights of others. Though we deplore the tendency of some to abuse the very constitutional privileges they invoke, and although the infringement of rights of others certainly should not be tolerated, we reaffirm this Court's dedication to the principles of the Bill of Rights upon which our vigorous and free society is founded.⁵²

46. *Id.* at 418.

47. *Id.* at 420.

48. *Id.* at 435 (Rehnquist, J., dissenting).

49. *Id.* at 439 (Stevens, J., dissenting).

50. 408 U.S. 169 (1972).

51. *Id.* at 194.

52. *Id.*

B. Indecent Speech

A recent case, *ACLU v. Reno*,⁵³ raises a constitutional challenge to the Communications Decency Act of 1996 ("CDA"),⁵⁴ which prohibits "indecent" speech on the internet and makes it punishable by two years in jail and a fine of \$250,000. Two challenged provisions are summarized in *Reno* as follows:

Section 223(a)(1)(B) provides in part that any person in interstate or foreign communications who "by means of a telecommunications device," (footnote omitted) "knowingly . . . makes, creates, or solicits" and "initiates the transmission" of any "comment, request, suggestion, proposal, image or other communication which is obscene or *indecent*, knowing that the recipient of the communication is under 18 years of age," "shall be criminally fined or imprisoned."

Section 223(d)(1) ("the patently offensive provision") makes it a crime to use an "interactive computer service" [footnote omitted] to "send" or "display in a manner available" to a person under age 18, "any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication."⁵⁵

The trial court found that the plaintiffs, having established a probability of success on the merits and having shown irreparable injury, were entitled to an injunction of the statute as unconstitutional on its face. In his supporting opinion, Judge Dalzell concluded:

Cutting through the acronyms and *argot* that littered the hearing testimony, the Internet may fairly be regarded as a never-ending worldwide conversation. The Government may not, through the CDA, interrupt that conversation. As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion.

True it is that many find some of the speech on the Internet to be offensive, and amid the din of cyberspace many hear discordant voices that they regard as indecent. The absence of governmental regulation of Internet

53. *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996)(granting a preliminary injunction to prohibit enforcement of certain provisions of the CDA, *infra* note 54).

54. Title V of 1996, Pub. L. No. 104-104, 110 Stat. 55, 133-35 (codified at 47 U.S.C. § 223(a)-(h) (1996)). See generally *Free Speech Flaps*, WALL ST. J., June 24, 1996, at A14 (editorial) stating:

But bad jurisprudence that tramples on community standards doesn't justify bad laws that trample on the First Amendment . . . (discussing the CDA). The Third Circuit was right to put a quick stop to this grandstanding. That doesn't mean however that we should throw out all controls on our popular culture The key, whether it comes to tobacco advertising or internet content, is not to get Uncle Sam involved as a super nanny. If Washington has trouble delivering the mail on time it's certainly in no position to bring moral uplift to our living rooms.

55. *Reno*, 929 F. Supp. at 828-29.

content has unquestionably produced a kind of chaos, but as one of the plaintiffs' experts put it with such resonance at the hearing:

What achieved success was the very chaos that the Internet is. The strength of the Internet is that chaos.

Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects.

For these reasons, I without hesitation hold that the CDA is unconstitutional on its face.⁵⁶ Very recently, in *Denver Area Consortium v. Federal Communications Commission*,⁵⁷ the Supreme Court issued a fractured decision regulating the arena of indecent speech. By a vote of 6-3, it struck down a 1992 state law requiring the scrambling of "patently offensive" programming by commercial providers. By a 5-4 margin, the Court also struck down a provision that would keep "indecent" programming off public access channels. But, by a 7-2 majority, the Court upheld a provision that would keep "indecent material" off leased channels.⁵⁸ Justice Kennedy, concurring in part and dissenting in part, points out that the plurality seems "distracted":

The straightforward issue here is whether the Government can deprive certain speakers, on the basis of the content of their speech, of protections afforded all others. There is no reason to discard our existing First Amendment jurisprudence in answering this question.⁵⁹

Thus, the interpretation of First Amendment is not unanimous and not without fractious dissent. The difficulty of applying principles of free speech to the newer technologies like cable and the internet, are clear. How the Supreme Court will resolve the conflict vis-a-vis the internet will await this year's decision balancing the compelling but potentially competing interests of protecting children and protecting First Amendment freedom.⁶⁰ The balancing of these interests is similar to the delicate balance the courts and colleges have tried to strike between the First Amendment and academic freedom and freedom from sexual harassment. The application of the First Amendment to the college environment must be understood in light of the reluctance to silence speech, even indecent and offensive speech. But campus communities have undertaken to do just that. The results have been mixed.

56. *Id.* at 883.

57. 1996 U.S. LEXIS 4261 (1996).

58. *Id.*

59. *Id.* at 2406 (Kennedy J., concurring in part and dissenting in part).

60. *Reno v. ACLU*, 117 S. Ct. 554 (1996)(noting probable jurisdiction).

II

SEXUAL HARASSMENT: STANDARDS IN THE ACADEMIC SETTING

A. *An Overview of Sexual Harassment Law*

Ten years ago, in *Meritor Savings Bank v. Vinson*,⁶¹ the Supreme Court recognized a cause of action for sexual harassment in the workplace under Title VII of the Civil Rights Act of 1964.⁶² *Meritor* outlined two possible prongs to a claim of sexual harassment: quid pro quo and hostile environment. The former is the familiar paradigm that arises when a defendant's "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" are directly connected with the plaintiff's receipt of a job or education related benefit.⁶³ The latter consists of a more amorphous situation, which the Court initially described as harassment that alters the conditions of employment and creates an abusive working environment.⁶⁴ In 1993, after eight years of judicial discussion⁶⁵ and public debate, the Court once again evaluated the legal basis of sexual harassment in the workplace. In *Harris v. Forklift Systems, Inc.*,⁶⁶ plaintiff complained of repeated instances of verbal harassment, sometimes accompanied by expressive conduct, by her company president.⁶⁷ The Court resolved an emerging conflict within the circuits by holding that evidence of psychological injury is not required to find an impermissible hostile environment.

1. *Quid Pro Quo Claims under Title VII*

Quid pro quo harassment seems straightforward and not fertile ground for spawning the conflicting rights being analyzed here. Nonetheless, recent judicial commentary has refined the contours of this prong in relevant ways. Given the actual or apparent power to alter terms and conditions of employment that is wielded by a quid pro quo harasser, courts are imposing

61. 477 U.S. 57 (1986).

62. 42 U.S.C.A. § 2000e (1994).

63. *Meritor*, 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11 (a)(1996)).

64. *Id.* 477 at 67.

65. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (concluding that hostile environment is to be decided by reasonable woman standard); *King v. Board of Regents*, 898 F.2d 533, 537 (7th Cir. 1990) (deciding sexual harassment is to be evaluated under reasonable person standard and by effect on particular plaintiff); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990) (holding sexual harassment to be judged by standard of reasonable person of the same sex).

66. 510 U.S. 17 (1993).

67. Specifically, plaintiff was told, in the presence of others, "You're a woman, what do you know?" and "[w]e need a man as the rental manager." Harris was called "a dumb ass woman," was asked to retrieve coins from the president's front pants pocket, and was asked to pick up objects thrown on the ground in front of her. The president suggested that they "go to the Holiday Inn to negotiate [Harris'] raise" and, regarding a deal Harris was arranging, remarked "what did you do, promise the guy . . . some [sex] Saturday night?" *Id.* at 19.

a degree of strict liability on the employer in such cases.⁶⁸ In a recent case involving a claim against Columbia University, the Second Circuit explored the question of whether evidence of actual, rather than threatened, economic loss is necessary to state a valid claim of *quid pro quo* harassment.⁶⁹ Reversing the trial court, the Second Circuit clarified language used in two earlier decisions⁷⁰ and explained:

[I]mposing an "actual economic loss" requirement in a *quid pro quo* case where the employee submits to the unwelcome sexual overtures of her supervisor places undue emphasis on the victim's response to the sexual harassment. The focus should be on the prohibited conduct, not the victim's reaction. . . . [T]he question whether [there existed] reasonable fear of some job-related reprisal is properly one for the finder of fact.⁷¹

Accordingly, where the threat at hand involves not necessarily money, but preferences in course or committee assignments, access to equipment or supplies, and, for students, grades or evaluations,⁷² the *quid pro quo* is more easily established.

2. Hostile Environment Claims under Title VII

The more difficult prong of Title VII sexual harassment law is the showing of a hostile environment; the lower courts have struggled to give content to this type of claim. In general, for such a claim the plaintiff must show:

- (1) employees suffered intentional discrimination because of their sex;
- (2) the discrimination was pervasive and regular;
- (3) the discrimination detrimentally affected the plaintiff;
- (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and
- (5) the existence of respondeat superior liability.⁷³

Examining the claim in an educational environment, the Fourth Circuit has characterized the Title VII hostile environment analysis as a two-step undertaking:

68. See, e.g., *Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir. 1994)(citing *Kotcher v. Rosa and Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992)), *cert. denied*, 114 S.Ct. 2693.

69. *Karibian*, 14 F.3d at 778-79.

70. *Kotcher*, 957 F.2d at 62 ("The plaintiff-employee must establish that she was denied an economic benefit either because of gender or because a sexual advance was made by a supervisor and rejected by her"); *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 579 (2d Cir. 1989)("The gravamen of a *quid pro quo* claim is that a tangible job benefit or privilege is conditioned on an employee's submission to sexual blackmail and that adverse consequences follow from the employee's refusal.").

71. *Karibian*, 14 F.3d at 779.

72. See, e.g., *Saville v. Houston County Healthcare Auth.*, 852 F. Supp. 1512, 1527 (M.D. Ala. 1994)("While this is not the classic *quid pro quo* case, a jury could conclude that [defendant's] poor evaluations, and ultimate discharge [of plaintiff], resulted from her refusal to acquiesce to [defendant's] sexual innuendo and touching.").

73. See *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 860 (3rd Cir. 1990)(cited in *Garvey v. Dickinson College*, 775 F. Supp 788, 800 (M.D. Pa. 1991)). *Accord*, *Hall v. Gus Const. Co.*, 842 F.2d 1010, 1013 (8th Cir. 1988).

First, to be actionable, an educational environment must exhibit “‘discriminatory intimidation, ridicule, and insult’ that is sufficiently severe or pervasive to alter the conditions” of the plaintiff’s education or create an abusive atmosphere [citation omitted]. A cause of action for hostile educational environment will not lie where the acts complained of are “isolated or genuinely trivial” [citations omitted]. Second, the plaintiff “must demonstrate that the employer either knew or should have known” of the allegedly hostile environment *and* “took no prompt and adequate remedial action.”⁷⁴

The dimensions of this standard seem elusive. How “isolated” is a single, highly offensive encounter or remark and how does one show “the employer knew or should have known” of the problem? The latter is important, because “a plaintiff seeking to establish harassment under a hostile environment theory must demonstrate some specific basis to hold the employer liable for the misconduct of its employees.”⁷⁵ These questions have been specifically addressed in cases involving institutions of higher learning. Where a professor of exercise physiology, in the context of teaching students how to use electrocardiogram equipment, removed a tee shirt covering a student’s bare breast and commented that she was “no Dolly Parton,” the Supreme Court of Tennessee dismissed his isolated incident defense.⁷⁶ The court wrote: “If a single incident is severe, it may be actionable as sexual harassment despite the fact that the conduct was not repeated. In other words, conduct may be actionable because of frequency or gravity. A single incident, of sufficient gravity, may constitute sexual harassment.”⁷⁷ And, in examining Columbia University’s liability for the hostile environment created by a supervisor, the Second Circuit shed light on the standard for employer liability. Conduct by low-level supervisors and co-workers is generally not imputed to the employer unless there is no reasonable way to complain or unless the employer knew of the misconduct and did nothing about it.⁷⁸ However, where the harasser in fact creates a hostile work environment “through the use of his delegated authority[,] [c]ommon law principles of agency suggest that in such circumstances the employer’s liability is absolute.”⁷⁹

3. *Protection Against Sexual Harassment under Title IX*

Title IX of the 1972 Education Amendments prohibits sex discrimination against students and employees of educational institutions.⁸⁰ An indi-

74. *Kadiki v. Virginia Commonwealth Univ.*, 892 F. Supp. 746, 753 (E.D. Va. 1995).

75. *Karibian*, 14 F.2d at 779, (citing *Kotcher*, 957 F.2d at 62).

76. *McClellan v. Bd. of Regents*, 921 S.W.2d 684, 686 (Tenn. 1996).

77. *Id.* at 692.

78. *Karibian*, 14 F.3d at 780 (citing *Kotcher*, 957 F.2d at 63).

79. *Id.*

80. 20 U.S.C.A. §§ 1681-88 (1990) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance” *Id.* at § 1681(a)).

vidual can enforce Title IX through an implied private right of action.⁸¹ Further, private plaintiffs can seek monetary damages against a school for intentional discrimination against a student by a teacher.⁸² Note, however, that Title VII may be the exclusive remedy for claims sounding exclusively in employment, such as the denial of tenure in a publicly funded university.⁸³ Although the Supreme Court has reserved the question whether Title IX actions are governed by Title VII standards,⁸⁴ many lower courts have explicitly turned to Title VII for guidance in Title IX cases.⁸⁵ Relying on a well-established Supreme Court statement that Title IX should be given "a sweep as broad as its language,"⁸⁶ one court recently concluded that "Title VII standards and the judicial interpretation thereof 'provide a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX,' whether such action is brought by an employee or a student."⁸⁷ State officials might enjoy certain immunity for their actions under Title IX. In *Doe v. Petaluma City School District*, a claim against a counselor for his failure to stop student-to-student harassment, the Ninth Circuit granted qualified immunity on the grounds that the state of the law at the time of the events did not establish a clear duty to act.⁸⁸ However, the court noted that if defendant "engaged in the same conduct today, he might not be entitled to qualified immunity"⁸⁹ and might be required to prevent harassment by the student's peers. The dissent in *Petaluma* points to an established line of cases linking Title IX to sexual harassment claims.⁹⁰ Interestingly, a federal district court in New York held that where Title VII claims were barred by the statute of limitations,

81. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 715-16 (1979).

82. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75-76 (1992).

83. *See, e.g., Lakoski v. Univ. of Texas*, 66 F.3d 751 (5th Cir. 1995).

84. *Franklin*, 503 U.S. 60, 65 n.4 (1992).

85. *See, e.g., Preston v. Virginia*, 31 F.3d 203, 207 (4th Cir. 1994); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 896-97 (1st Cir. 1988).

86. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982)(quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

87. *Kadiki v. Virginia Commonwealth Univ.*, 892 F. Supp. 746, 750 (E.D. Va. 1995)(quoting *Preston*, 31 F.3d at 207). *Accord Murray v. New York Univ.*, 57 F.3d 243, 249 (2d Cir. 1995)("[I]n a Title IX case for gender discrimination based upon the sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII.").

88. 54 F.3d 1447, 1451 (9th Cir. 1995). *See also, Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162, 169-170 (N.D.N.Y. 1996) and cases cited therein ("Title VII legal standards apply to an analysis of Title IX claims . . . [as] a guide [A] Court should not blindly apply Title VII to determine the issues raised in a Title IX case.").

89. *Petaluma*, 54 F.3d at 1452. *Accord, Bruneau*, 935 F. Supp. at 178.

90. *Petaluma*, 54 F.3d at 1454 (citing *Alexander v. Yale*, 459 F. Supp. 1 (D. Conn. 1977)(holding that a professor who linked a student's academic advancement to submission to sexual pressures violated laws against sex discrimination in education), *aff'd*, 631 F.2d 178 (2d Cir. 1980); *Moire v. Temple Univ.*, 613 F. Supp. 1360, 1367 (E.D. Pa. 1985)(holding that a medical student subjected to sexually hostile environment created by her professor has an actionable claim under Title IX), *aff'd*, 800 F.2d 1136 (3d Cir. 1986).

plaintiffs' case against a professor and the college under Title IX would be dismissed for failure to follow the established procedures for investigating allegations of sexual harassment.⁹¹ The court remarked:

Iona College complied in full with its obligations under the law by providing a policy against sexual harassment and a complaint procedure, copies of which were properly provided to all students and faculty The conflict between the obligations of a teaching institution under Title IX and its obligations to its faculty members under the First and Fourteenth Amendment and the principles of academic freedom which necessitate faculty tenure, were known to Congress in enacting Title IX and are a part of the historical and factual background against which the adequacy of the response of the College is to be judged.⁹²

4. Equal Protection Applicability

Another aspect of constitutional dimension is the application of the Fourteenth Amendment in Title VII cases involving public employees. In *Saville v. Houston County Healthcare Authority*,⁹³ the district court cogently reviews the standards governing protection under Title VII and protection under the equal protection clause as enforced under 42 USC § 1983. Citing six circuit courts holding that sexual harassment is actionable under the equal protection clause,⁹⁴ the court makes an important caveat: While the law is not clear, arguably only *intentional* harassment is impermissible under the equal protection clause.⁹⁵ In addition, the due process clause applies to employees in public as opposed to private institutions, raising important issues of procedural legitimacy.⁹⁶

B. A Note on Constitutional Defenses to Harassment Claims in the Academy

As has been explored, when speech is restricted on a university campus, one of the first defenses raised is the constitutional right to free speech and academic freedom. The commitment through policy to academic freedom in American colleges and universities is significant. The American Association of University Professors (AAUP) defines it, in part, as:

The teacher is entitled to full academic freedom in research and in the publication of the results subject to the adequate performance of his other

91. *Pallett v. Palma*, 914 F. Supp. 1018, 1020 (S.D.N.Y. 1996).

92. *Id.* at 1025.

93. 852 F. Supp. 1512 (M.D. Ala. 1994).

94. *Id.* at 1531-32 (and cases cited therein).

95. *Id.* at 1532-33 (emphasis added.)

96. *See generally* Board of Regents v. Roth, 408 U.S. 564 (1972); *see also* *McDaniels v. Flick*, 59 F.3d 446 (3d Cir. 1995) (holding that state community college did not deny procedural due process to professor discharged for sexual harassment), *cert. denied* ___ U.S. ___, 116 S.Ct. 1017 (1996); *Shub v. Hankin*, 869 F.Supp. 213 (S.D.N.Y. 1994) (finding no denial of due process by state community college in temporarily suspending professor while investigating allegations of sexual harassment).

academic duties The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject (see interpretative note).⁹⁷

In addition, as a principle of First Amendment law, employees in a public institutions have protection regarding speech concerning matters of public concern. As explained in *Jordan v. Marin Community College*:⁹⁸

The U.S. Supreme Court struck the balance between a public employee's interest in free speech and a public employer's interest in regulating speech in *Connick v. Myers*. [citations omitted] The Court held that a public employee did not have a cause of action against a state employer for restriction of her right to freedom of speech unless the speech at issue addressed a matter of public concern. The Ninth Circuit has defined speech on a matter of public concern as "speech that concerns issues about which information is needed or appropriate to enable members of society' to make informed decisions about the operation of their government."⁹⁹

In *Jordan*, the court had no trouble finding that plaintiff, a full-time tenured instructor, had no First Amendment speech protection in sending unwanted birthday greetings to a colleague who complained of harassment.¹⁰⁰ Similarly, a professor's use of profanity in the classroom is not a matter of public concern.¹⁰¹ However, comments on pornography and other sexual concerns in a classroom discussion "designed to shock . . . students and make them think and write about controversial subjects"¹⁰² can rise to this level of first amendment protection.¹⁰³ Students are a captive audience and may be unable to escape the comments of either the professor or their classmates. Thus, understanding the nexus between one's free speech rights

97. The 1970 Interpretative Comments on the 1940 Statement of Principles on Academic Freedom and Tenure, ACADEME Vol. 76, May-June 1990, 37-41, state in clarification:

The intent of this statement is not to discourage what is "controversial." Controversy is at the heart of free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for the teacher to avoid persistently intruding material which has no relation to his subject.

See also *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)(holding unconstitutional a requirement that faculty sign a "Feinberg Certificate," asserting that the signator is not a member of the Communist Party). "Our nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id.* at 603.

98. 1993 U.S. Dist. LEXIS 16896 (N.D. Cal. Nov. 22, 1993)(finding that suspension of a faculty member for repeatedly sending greeting cards to a colleague, did not touch upon a matter of public concern).

99. *Id.* at *8-9.

100. *Id.* at *9.

101. See *Martin v. Parrish*, 805 F.2d 583, 585 (5th Cir. 1986)(finding that use of profane words to castigate students does not address a matter of public concern).

102. *Cohen v. San Bernardino Valley College*, 883 F. Supp. 1407, 1410 (C.D. Cal. 1995)(holding that the policy at issue was unconstitutionally vague), *rev'd in part*, 92 F.3d 968 (9th Cir. 1996), *cert. denied*, 1997 WL 49610.

103. *Id.* at 1417.

and another's right to be free from harassment is particularly difficult balance.

It is important to underline that these issues are not the same as those raised by workers in a private workplace. Such employees understand that their privacy and First Amendment rights are circumscribed by their employment. What they can say or do on Boston Common on Saturday is different from what would be considered permissible during working hours on company property, where the First Amendment does not attach. Thus, it is much clearer that speech may be legally curtailed to prevent harassment in private business than in public employment.¹⁰⁴

But what if the employment setting is an academic institution? Perhaps by an academic freedom policy, tenure, state law or faculty handbook, the individual's speech and actions are protected. Indeed, the academic environment is unique. As mentioned above, nowhere in our society is there such a commitment to the unrestricted inquiry and exploration of ideas. We now turn to conflicts in the academy between these principles.

C. *Sexual Harassment Claims in the University Community*

As is obvious, the academic environment is not immune from claims of sexual harassment. Examples of every possible permutation involving students and professors permeate the cases, underlining the tension between the right to be free from harassment and the right to speak freely, which is especially treasured in the halls of academe. The crux of the matter is whether these halls of academe might be—or perhaps should be—more tolerant of certain behavior, given the mission of the enterprise? Courts seem to be feeling their way, as they often do, on a case-by-case basis.

1. *Claims by Professional Colleagues*

One group of cases concerns harassment between professors and claims by professors against administrators. These cases usually allege both quid pro quo and hostile environment harassment, although the particularly tolerant environment of a university requires courts to wrestle with defenses not usually raised with vigor in Title VII claims.

Perhaps the best opinion exploring the issue under consideration here is *Jew v. Univ. of Iowa*.¹⁰⁵ There, the court had no trouble finding a hostile environment was created by (1) cartoons posted outside a medical school

104. See generally Amy Horton, Comment, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403, 408 (1991)(arguing employees in the private sector do not enjoy First Amendment protection). This approach is criticized in Jessica M. Karner, Comment, *Political Speech, Sexual Harassment and a Captive Workforce*, 83 CAL. L. REV. 637, 648-50 (1995). For recent discussion of concern regarding the power of business to curtail activities that would be legal outside the workplace see Walter Olson, *The Long Arm of Harassment Law*, N.Y. TIMES, July 7, 1996 § 4 (Week in Review), at 9.

105. 749 F. Supp. 946 (S.D. Iowa 1990).

professor's laboratory concerning an alleged sexual liaison with plaintiff, a female medical school professor of Chinese descent who worked in the department; (2) numerous other instances of insinuations and remarks concerning a sexual affair, including the speculation that "students . . . [would not] be seeing much of Dr. Jew because she would be staying with Dr. Williams at the meetings"; and (3) jokes and references to plaintiff as a "chink" and a "whore" by persons who later voted to deny her promotion to full professor.¹⁰⁶ In addressing the defense of freedom of speech, the court noted:

Free speech and academic freedom considerations might preclude Title VII liability if the sexual relationship rumors were true, but . . . [they] were not true. Rights of free speech and academic freedom do not immunize professors from liability for slander nor their universities from liability for a hostile work environment generated by sexual-based slander.¹⁰⁷

Several areas of concern appropriate for consideration under a campus speech code are raised by this case. All the speech at issue here took place outside the classroom setting, and served no discernible educational purpose. The atmosphere created by cartoons, jokes, and racial epithets all served to underscore the inequality of plaintiff's position vis-a-vis her colleagues. Further, the remarks and actions were part of a continuous stream, not isolated or incidental events. To the extent that these events took place while plaintiff and her colleagues were at off-campus meetings, they are linked to the power/pervasive nexus that perhaps justifies limitations of free speech.

On the other hand, given the high stakes surrounding allegations of retaliatory behavior following sexual harassment claims, including the possible denial or deprivation of tenure, courts in academic Title VII cases pay close attention to plaintiff's use of grievance procedures and defendant's attention to internal procedures and documentation of decisionmaking.

Sheila Garvey, a drama professor, sued Dickinson College alleging sexual harassment by her colleagues and dismissal from her job in retaliation for reporting harassing behavior of her immediate supervisor.¹⁰⁸ The court carefully reviewed her file, including evaluations from her first year, to support its finding that her termination was not retaliatory in nature.¹⁰⁹ It also rejected her hostile environment claim, finding insufficient evidence and even that "Garvey herself contributed to this situation by refusing to make a sincere effort to work harmoniously with her colleagues and put her personal feelings aside for the good of the department."¹¹⁰ Balancing harassment allegations against subsequent claims of retaliation requires courts

106. *Id.* at 949-51.

107. *Id.* at 961.

108. *Garvey v. Dickinson College*, 775 F. Supp. 788 (M.D. Pa. 1991).

109. *Id.* at 792, 797-98.

110. *Id.* at 800.

to attempt to penetrate the tenure and promotion process. This can be very difficult when the record lacks evidence of a clear violation of Title VII, such as the type of behavior described in *Jew*. Without a strong case, a court might simply defer to the institution that has built a strong defense in the form of a well-documented file. For example, in *Chan v. Miami University*,¹¹¹ the Ohio Supreme Court gave strong weight to the school's own procedures for terminating professors and held that a less stringent procedure for resolution of sexual harassment complaints could not substitute for the former.

Research reveals few other relevant discussions of harassment versus free speech in the context of professors raising claims against university administration. Where a university suspended a professor for four days without pay for sexual harassment of a colleague, the professor sued his employer under Title VII, among other claims, for discrimination against "straight white male employees."¹¹² There, the court found no basis for such a suit. In a recent decision, a professor who alleged he was denied tenure in part because of his opposition to sexual harassment and discrimination on campus was permitted to pursue his claim of unlawful retaliation under Title IX, although his free speech and breach of contract claims were dismissed.¹¹³ It seems that cases involving charges of sexual harassment between professional colleagues do not seem to pose stark problems for courts. The First Amendment concerns articulated by the court in *Jew* (underscoring the protection that might be offered to true by potentially harassing speech in the academic workplace)¹¹⁴ appear to be uncommon in the context of professional colleagues.

In sum, cases involving charges of sexual harassment between professional colleagues do not seem to pose stark problems for courts outside of the general First Amendment concerns that sexual harassment law seeks to penalize and curtail some speech that rises to the level of harassment. The problems, however, seem much more acute where professors are alleged to have harassed students.

2. *Claims by Students Against Professors*

Professors are paid to be provocative. The question of sexual harassment arises when the provocation becomes overly charged and students become intimidated, or when the professor demands sexual favors from students. While the relationship between students and professors histori-

111. 652 N.E.2d 644, 649-50 (Ohio 1995), *recons. denied*, 655 N.E.2d 188 (Ohio 1995).

112. *Jordan v. Marin Community College*, 1993 U.S. Dist. LEXIS 16896, at *11-12 (N.D. Cal. Nov. 22, 1993).

113. *Nelson v. Univ. of Maine*, 923 F. Supp. 275, 278, 284-289 (D. Me. 1996).

114. *Jew v. Univ. of Iowa*, 749 F. Supp. 946 (S.D.Iowa 1990).

cally has been fraught with sexual overtones,¹¹⁵ the current concern with legal liability has rendered certain behavior unacceptable, at least in the eyes of the institution. Sometimes, courts do not agree. For example, Professor J. Donald Silva of the University of New Hampshire, illustrating a simile for students in a technical writing class, quoted the belly dancer Little Egypt: "Belly dancing is like jello on a plate with a vibrator under the plate."¹¹⁶ He also used sexual innuendo to explain the notion of "focus" in a statement to his class:

I will put focus in terms of sex, so you can better understand it. Focus is like sex. You seek a target. You zero in on your subject. You move from side to side. You close in on the subject. You bracket the subject and center on it. Focus connects experience and language. You and the subject become one.¹¹⁷

Several women in the class complained. A hearing panel found the remarks constituted verbal sexual harassment and recommended that Professor Silva be suspended from his classroom teaching and that he undergo counseling. An Appeals Board upheld the recommendation. Silva sued, alleging violation of his rights under the First Amendment's protection of free speech and academic freedom. In a careful opinion, the district court upheld the professor's claims and ordered reinstatement, finding the speech protected, the sexual harassment policy under which he was suspended constitutionally infirm and the formal hearing violative of due process.¹¹⁸ The court's analysis provides insight into the balancing process necessary to achieve a workable model for campus speech codes. On the one hand, the University of New Hampshire had a sexual harassment policy in place, which prohibited conduct "creating a hostile or offensive working or academic environment."¹¹⁹ The court acknowledged that the six adult women who complained may well have found the professor's conduct "outrageous"¹²⁰ and may have felt intimidated as a result. On the other hand, however, the primacy of free speech principles cannot be overlooked, especially free speech in the academy. The court noted that the "First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom"¹²¹ and that "[t]o impose any strait (sic) jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation"¹²² The court then held the sexual harassment policy imper-

115. Title IX cases alleging quid pro quo and hostile environment claims by students against professors predate *Meritor* by ten years. See, e.g., *Alexander v. Yale Univ.*, 459 F. Supp. 1 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980).

116. *Silva v. Univ. of New Hampshire*, 888 F. Supp. 293, 299 (D.N.H. 1994).

117. *Id.* at 299.

118. *Id.* at 311.

119. *Id.* at 298.

120. *Id.* at 313.

121. *Id.* at 314 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

122. *Silva* at 314 (quoting *Keyishian*, 385 U.S. at 603).

missibly subjective in that it "failed to take into account the nation's interest in academic freedom."¹²³ Here, then, classroom speech used to further a legitimate pedagogical purpose could not be throttled despite that fact that it was sexual in nature and offensive to students. That the students in question were adults may have been a factor in this court's balancing of the competing concerns.

This case draws an important line respecting academic freedom in the classroom. Professor Silva's choice of sexual references to illustrate the writing process without more was not sexual harassment. This case also illustrates an overzealous administration either anxious to root out sexual harassment and somewhat confused about what constitutes sexual harassment, or anxious to find an excuse to be rid of Professor Silva due to a general discomfort with his style of interaction with students. The motivation is not reflected in the record and we may only conjecture. Even if there were some concerns about Professor Silva's style, the decision protects all faculty who may bring up unpopular subjects in an increasingly conservative community.

A curious opinion further illustrates the uncertainty courts seem to experience when considering claims of sexual harassment in the university. Although one might assume that a professor who spans a student automatically is liable for harassment, *Kadiki v. Virginia Commonwealth University*¹²⁴ reflects a peculiar degree of reserve. Kadiki alleged that a biology professor spanked her in his office when she failed a make-up exam, then told her she could try again the next day, advising her to bring a hairbrush and to be prepared for another spanking if she did not reach an acceptable score. Subsequently, she alleged, he offered her an A in the course if she did not bring charges against him. Applying the legal framework for quid pro quo harassment, the court had difficulty reconciling plaintiff's reference to the incident as "a joke" in a deposition and her assertion that the conduct was "sexual" elsewhere;¹²⁵ it denied summary judgment to both parties on this claim. However, the court granted summary judgment to the university on the hostile environment claim, pointing out that the school had acted immediately to remedy the situation.¹²⁶ Although the facts of this case are bizarre in a university setting, the result may turn more on the apparent conflict in the plaintiff's deposition between appreciating the act both as a "joke" and as "sexual". Thus, it is difficult to draw any significant conclusions because of the questions about the facts which go to the heart of whether the behavior was welcomed. Plaintiff Kadicki did not pursue her claims under the school's sexual harassment policy, choosing instead to

123. *Id.*

124. 892 F. Supp. 746 (E.D.Va. 1995).

125. *Id.* at 751.

126. *Id.* at 753.

proceed under the university's rules and procedures manual and Title IX.¹²⁷ The opinion makes no reference to First Amendment concerns, instead analyzing the issue under the Title VII framework. Inasmuch as the professor's defense appears to have been limited to an assertion that the conduct was paternal, not sexual, the court's decision to permit the issue to go forward seems peculiar. Why not take a firm stand against this behavior, which is clearly outrageous? This court's reluctance might be representative of an underlying and perhaps unconscious concern for the protection of academic freedom. Plaintiff must now make her charges in open court and explain the circumstances leading up to this incident.

A different view of the status of the student is evident in *McClellan v. Board of Regents*.¹²⁸ There a professor touched a student's bare breast in the process of demonstrating the use of certain cardiac monitoring equipment. While so doing, he commented that she was "no Dolly Parton."¹²⁹ He later described the remark as "flippant" and "facetious," arguing that it "strains credulity that a reasonable person could be affected" and that the behavior, while rude, did not rise to the level of harassment because of the absence of prurient interest.¹³⁰ The court looked to the effect of the conduct upon the victim, not at the intent of the actor.¹³¹ Thus, that the student received an A in the exercise physiology course did not obviate the fact that she suffered to the point of seeking counseling and treatment for depression from the experience of having the professor intrude upon a practice EKG and make a remark about her bared breast.¹³² These comments, though not repeated, were pointed and personal, and derived their impact in part from the power that the professor had over the student in that academic context.

Adult students are not immune from harassment by professors. A woman with eleven years of experience in critical care nursing sued a school of nursing anesthesia and an instructor supervising her clinical program under Title VII and Title IX, alleging both hostile work environment and quid pro quo harassment.¹³³ Plaintiff alleged the instructor's behavior included unwelcome remarks, sexual innuendo and advances, public touching and humiliation resulting from insinuations about her sexual preference. After being admonished to stop by the school's administration, the instructor behaved as a "perfect gentleman" — but gave plaintiff increasingly negative performance evaluations.¹³⁴ A series of negative evaluations culminated in plaintiff being dismissed from the program. These allega-

127. *Id.* at 751.

128. *McClellan v. Board of Regents*, 921 S.W.2d 684, 692 (Tenn. 1996).

129. *Id.* at 686.

130. *Id.* at 692.

131. *Id.*

132. *Id.*

133. *Saville v. Houston County Healthcare Auth.*, 852 F. Supp. 1512, 1521 (M.D. Ala. 1994).

134. *Id.* at 1520.

tions survived defendant's motion for summary judgment, but plaintiff's claim under the First Amendment did not. And, of course, an adult male student made national news with his threat to file a complaint for a hostile environment created by Professor Joanne Morrow's lecture on female sexuality at California State University in Sacramento. He argued that he felt "raped" by her graphic description of masturbation and her slides of female sexual organs.¹³⁵ Though there is no published resolution or decision in this matter, the professor may argue that because these events took place during a lecture and were arguably relevant, they are the most broadly protected under the banner of Academic Freedom and the First Amendment.

These cases reveal that universities have not been immune from the increasing national concern with sexual harassment issues. Title VII protections, sometimes filtered through Title IX, are being brought to bear as a weapon of change in the classroom and on campus. Academic discourse and professorial discretion are being challenged to conform to certain societal expectations, sparking a debate about how those standards of behavior can be balanced against protected classroom discussion. The cases concerning professor-student relationships discussed above shed light on the contours of the debate, separating in various ways the role of the professor in class, in demonstrations, and in the office. Any rational attempt to shape a model campus speech code would of necessity need to identify the differing requirements of these different roles and venues.

3. *Claims by Students Against Students*

Students increasingly target other students as the focus of legal action for harassment. Behavior that might have been viewed as a youthful prank or simply immature has become a basis for legal action in today's environment. Court decisions in the university context are few, but reported instances of lawsuits being threatened or filed abound. Within these reports, one gets a sense that hostile environment claims under Title IX are becoming a weapon of choice for those who wish to curb disturbing speech on campus.

Cases arising in the public school setting are testing the parameters of institutional liability for peer sexual harassment. The Fifth Circuit in *Rowinsky v. Bryan Independent School District*¹³⁶ refused to impose liability on a school district for peer sexual harassment where eighth-grade girls were repeatedly touched on their buttocks and breasts by boys on the schoolbus. The court held that Title IX does not impose liability on a school district for peer sexual harassment "absent allegations that the school

135. See *ABC News 20/20: The Speech Police - Is Sexual Speech Sexual Harassment?* (ABC television broadcast, May 12, 1995)(transcript # 1519-3), available in LEXIS, News Library, Script File.

136. 80 F.3d 1006 (5th Cir. 1996), cert. denied, 117 S.Ct. 165 (1996).

district itself directly discriminated based on sex.”¹³⁷ In so holding, the Fifth Circuit explicitly rejected¹³⁸ the Eleventh Circuit’s analysis in *Davis v. Monroe County Board of Education*,¹³⁹ in which a school district was found liable under Title IX for peer sexual harassment. The *Rowinsky* court’s refusal to import the prohibitions of sexual harassment into the context of peer harassment is grounded on the following logic:

At a theoretical level, the problem with sexual harassment is “the unwanted imposition of sexual requirements in the context of unequal power.” [citation omitted] In an employment context, the actions of a co-worker sometimes may be imputed to an employer through a theory of respondeat superior.

In an educational setting, the power relationship is the one between the educational institution and the student. [citation omitted] In the context of two students, however, there is no power relationship, and a theory of respondeat superior has no precedential or logical support. Unwanted sexual advances of fellow students do not carry the same coercive effect or abuse of power as those made by a teacher, employer or co-worker. This is not to say that the behavior does not harm the victim, but only that the analogy is missing a key ingredient — a power relationship between the harasser and the victim.¹⁴⁰ Other cases involving peer sexual harassment have received national attention, including a recent situation in which a gay teenager successfully sued his Wisconsin high school administrators for failing to protect him from abuse. After a jury found the school liable, the defendant settled for \$900,000 before the jury could determine damages.¹⁴¹

Inasmuch as these case have turned on the application of Title IX in a particular public school environment, their application to the university community is still an open question. Recent cases being announced or filed but not yet decided seem to allege emotional distress and violation of internal university rules and regulations as adopted to assure compliance with Title VII and Title IX. For example, three women on Temple University’s crew team have sued the school for allowing the men’s crew team to sexually harass them. According to a news report, male crew members allegedly put “‘obscene and sexually offensive graffiti’ on the walls of the women’s workout room, sometimes referring to ‘women’s crew team members and their bodies.’”¹⁴² Further, they allege, the problem was not remedied by the administration and became worse in retaliation for the publicity.

137. *Id.* at 1008.

138. *Id.* at 1011, n.11.

139. 74 F.3d 1186, 1193 (11th Cir. 1996), *vacated*, 91 F. 3d 1418 (11th Cir. 1996).

140. *Rowinsky*, 80 F.3d 1006, 1011 n.11 (5th Cir. 1996).

141. David E. Ravella, *Harassment Cases Create School Daze*, NAT’L L.J., Dec. 23, 1996, at A6.

142. Shannon P. Duffy, *Women’s Crew Members Join Harassment Suit Against Temple*, THE LEGAL INTELLIGENCER, May 24, 1996, at 3.

And Eden Jacobowitz, the foreign student who called some noisy female students "water buffalo" and generated significant media attention, has recently filed suit in Pennsylvania Court of Common Pleas, charging the University of Pennsylvania with an array of claims and seeking \$50,000 in damages.¹⁴³ He was subjected to student disciplinary action because the women students claimed that the term "water buffalo" was derogatory, likening women to some beast of burden. This case illustrates the difficult position of a university trying to navigate through the shoals of conflicting rights.

The parameters of protection against harassment on campus offered by Title VII and Title IX seem consistent with standards established for the workplace: one instance of bad judgment will not rise to the level of sexual harassment unless it is extremely severe in its manifestation and usually unless it entails action as well as words. When it comes to borderline behavior in a classroom, however, the courts have attempted to ensure the academic freedom of professors and minimize administrative restriction of free speech. Thus, it remains for the courts to enunciate the line delimiting where freedom of speech and academic freedom ends and an individual's right to be free of sexual harassment begins. Until then college administrators will try their best to interpret and enforce their perception of the law.

III

THE RESPONSE: CAMPUS CODES

A. *Legal Challenges to Campus Codes*

In response to these concerns about harassment in the workplace and in order to comply with the perceived requirements of Title IX, many colleges and universities have developed codes governing sexual and racial harassment.¹⁴⁴ Many colleges simply took the EEOC guidelines on harassment and adapted the language to apply to an academic environment. However, a number of legal challenges were mounted against these codes by the

143. See "Water Buffalo," *supra* note 3.

144. See, e.g., Tufts University Policy, which states in part: "Sexual harassment is a form of sex discrimination and is thus violative of university policy as well as federal and state statutes." *But cf.* the recent Op-Ed column by the President of Tufts University, John DiBiaggio, *The Antidote to Hate Speech: Education*, BOSTON GLOBE, Mar. 17, 1996, at 75 (arguing that universities should not "muzzle offensive speakers.") Note that DiBiaggio does not address the nexus of conflicting rights nor whether discrimination law places limits on free speech. See also, Harvard Law School Sexual Harassment Guidelines (hereinafter "Harvard Guidelines"), which state:

This guideline largely follows the model of the guidelines promulgated by the Equal Employment Opportunity Commission to define sexual harassment (other than "quid pro quo" harassment. . .) that is prohibited in the workplace by Title VII. The EEOC guidelines have also been adapted by a number of courts to define prohibited sexual harassment in educational institutions under Title IX Second, [these guidelines] complement, rather than derogate from, traditions of uncensored debate on matters of public concern and especially of academic freedom. The guideline is also consistent with the Massachusetts Civil Rights Act, which prohibits coercive interference with freedom of expression, regardless of whether state action is present.

ACLU and individuals who viewed them as violative of the constitutional freedoms of speech.¹⁴⁵

One of the early cases testing the validity of a campus hate speech code involved a well respected public institution, the University of Michigan.¹⁴⁶ Although motivated by good intentions, namely, "to curb . . . a rising tide of racial intolerance and harassment on campus," the court issued an injunction against the policy which *inter alia* restricted speech activity.¹⁴⁷ The policy had been adopted following a spate of incidents on campus including racial jokes on the campus radio station and a Klu Klux Klan uniform display.¹⁴⁸ Doe was a psychology graduate student who was concerned that his views on biological differences in personality and mental ability could be viewed as racist or sexist by some. The ACLU brought suit, using a pseudonym to protect the plaintiff from any adverse consequences at the university. The Acting President recognized the First Amendment problems of the Code, but reasoned that

[J]ust as an individual cannot shout "Fire" in a crowded theater and then claim immunity from prosecution for causing a riot on the basis of exercising his rights of free speech, so a great many American universities have taken the position that students at a university cannot, by speaking or writing discriminatory remarks which seriously offend many individuals beyond the immediate victim, and which, therefore detract from the necessary educational climate of a campus, claim immunity from a campus disciplinary proceeding.¹⁴⁹

The policy applicable to the entire university community stated:

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

145. See *Dambrot v. Central Mich. Univ.*, 839 F. Supp. 477 (E.D. Mich. 1993), *aff'd*, 55 F.3d 1177 (6th Cir. 1995); *UWM Post, Inc. v. Bd. of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

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

147. *Id.* at 853.

148. *Id.* at 854.

149. *Id.* at 855.

2. Sexual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual on the basis of sex or sexual orientation where such behavior:

a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety;

b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.

Note: On August 22, 1989 1(c) was rescinded by the university but 2(c) was left in place.¹⁵⁰ Nodding to First Amendment concerns, the court noted:

The Policy by its terms recognizes that certain speech which might be considered in violation may not be sanctionable by stating: "The office of General Counsel will rule on any claim that conduct which is the subject of a formal hearing is constitutionally protected by the First Amendment."¹⁵¹

Doe brought the action because he believed that his study of the biological base of individual differences was chilled by this policy. He challenged it on the basis of vagueness and overbreadth. The court examined whether the language used in the code "stigmatizes or victimizes."¹⁵²

The guide originally developed to explain the policy, but subsequently withdrawn, included this example of sanctionable conduct:

A male student makes remarks in class like "Women just aren't as good in this field as men" thus creating a hostile learning atmosphere for female classmates.¹⁵³

The court first drew a distinction between "pure speech" and "mere conduct," recognizing that conduct can be restricted without running afoul of the First Amendment. The court noted that speech, too, could be regulated, but only under limited circumstances, e.g., fighting words, threats of violence, lewd and obscene speech.¹⁵⁴ A university may also implement non-discriminatory time, place, and manner restrictions on speech.

What the University could not do, however, was establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed . . . If there is any star fixed in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, national-

150. *Id.* at 856.

151. *Id.* at 856-57.

152. *Id.* at 867.

153. *Id.* at 858.

154. *Id.* at 862.

ism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. [citation omitted]

Nor could the University proscribe speech simply because it was found too offensive, even gravely so, by large numbers of people

. . . .It is firmly settled under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers. [citation omitted]

These principles acquire a special significance in the university setting where the free and unfettered interplay of competing views is essential to the institution's educational mission.¹⁵⁵

Holding the policy overbroad on its face and as applied,¹⁵⁶ the court found the words "stigmatize and victimize . . . elude precise definition."¹⁵⁷ The court could not discern how the University of Michigan would distinguish protected offensive speech and actionable speech, and found the policy vague and violative of the due process clause. Interestingly, during the brief time the policy was in effect, it was used twenty times by whites charging blacks with racist speech.¹⁵⁸ Also, the only times sanctions were actually applied were in cases where white students filed complaints against black students.¹⁵⁹ Preventing discussion is a greater evil than preventing speech that exceeds the bounds of moderation. However, this does not mean that it is not possible to attempt to draw a line clarifying what is harassment or that victims of harassment have no avenues of redress.

This case was followed by similar action in Wisconsin in *UWM Post v. Board of Regents*.¹⁶⁰ In that case, the campus newspaper and a number of students brought an action seeking to declare the University of Wisconsin Rule 17.06 unconstitutional and to vacate disciplinary action against a student, Doe, taken by the university based upon the rule. Doe had yelled for ten minutes at a woman "fucking cunt" and "fucking bitch" because he was angered by what she had said in the school newspaper about the athletic department. The plaintiffs argue that the Wisconsin rule under which Doe was disciplined was vague and overbroad. The UW Rules state in part that:

The University may discipline a student in non-academic matters in the following situations:

(2)(a) For racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals or for physical conduct. If such comments, epithets or other expressive behavior or physical conduct intentionally:

155. *Id.* at 863.

156. *Id.* at 866.

157. *Id.* at 867.

158. See generally discussion in *Doe*, 721 F. Supp at 865-866. See also Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L. J. 484, 557, (citing Jeff Gottlieb, *Banning Bigoted Speech: Stanford Weighs Rules*, SAN JOSE MERC. NEWS, Jan. 7, 1990, at 3).

159. Strossen, *supra* note 158, at 557.

160. 774 F. Supp. 1163 (E.D. Wis. 1991).

1. Demean the race, sex, religion color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals and
2. Create an intimidating, hostile or demeaning environment for education, university related work, or other university authorized activity.

(b) whether the intent required under par. (a) is present is to be determined by consideration of all the circumstances.¹⁶¹

The word “demean” is used and yet its meaning is ambiguous. Must speech actually demean or must the speaker just intend to demean? Nine students had been sanctioned under these rules. The court recognized the cost of certain offensive speech to individuals but noted “speech does not lose its protected status merely because it inflicts injury or disgrace onto its addressees.”¹⁶² The court noted further:

Since the UW Rule covers a substantial number of situations where no breach of the peace is likely to result, the rule fails to meet the requirements of the fighting words doctrine¹⁶³ This commitment to free expression must be unwavering because there exist many situations where in the short run it appears advantageous to limit speech to solve pressing social problems such as discriminatory harassment. If a balancing approach is applied these pressing and tangible short run concerns are likely to outweigh the more amorphous and long run benefits of free speech.¹⁶⁴

Although the motivation for the code was to foster diversity, it in fact injured diversity, according to the court:

By establishing content-based restriction on speech, the rule limits the diversity of ideas among students and thereby prevents the “robust exchange of ideas” which intellectually diverse campuses must provide.¹⁶⁵

The court found the code overbroad,¹⁶⁶ and concluded in a similar vein:

The problems of bigotry and discrimination sought to be addressed here are real and truly corrosive of the educational environment. But freedom of speech is almost absolute in our land and the only restriction the fighting words doctrine can abide is that based on the fear of violent reaction. Content-based prohibitions such as that in the UW Rule, however well intended, simply cannot survive the screening which our Constitution demands.¹⁶⁷

The Court found that Title VII was not applicable, distinguishing the educational from the employment setting. The Court noted that “agency theory would generally not hold a school liable for its students['] actions

161. *Id.* at 1165.

162. *Id.* at 1172 n.7.

163. *Id.* at 1173.

164. *Id.* at 1174 n.9.

165. *Id.* at 1176.

166. *Id.* at 1177.

167. *Id.* at 1181.

since students are not agents of the school." The court also noted that Title VII can not "supersede the requirements of the First Amendment."¹⁶⁸

Furthermore the court did not explore the mandates of Title IX either. It enjoined the rule for vagueness and overbreadth.¹⁶⁹ This trend has continued. In *Dambrot v. Central Michigan University*,¹⁷⁰ a coach who tried to motivate his basketball players by using the word "nigger" was dismissed in part on the basis of a harassment policy. The coach and the basketball players brought the action alleging the discharge violated the First Amendment and the Harassment policy violated the Constitution. The lower court found the policy constitutionally infirm, but held that the discharge of the coach raised no constitutional problems. On appeal, the challenge was whether the harassment policy violated the First Amendment. There, the court agreed that the policy was vague, overbroad and not a valid prohibition on fighting words. Nevertheless, the coach's argument that his use of the word "nigger" was protected under the mantle of academic freedom was unsuccessful. Although he claimed he was guided by good intentions, his use of the word and attempt to say it was good to act like "one" on the field but not one in the classroom did not provide a defense to the University's right to terminate him.¹⁷¹ Central Michigan University's policy stated that racial and ethnic harassment is defined as:

[A]ny intentional, unintentional, physical, verbal or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by . . . (c) demeaning or slurring individuals through . . . written literature because of their racial or ethnic affiliation; or (d) using symbols, [epithets] or slogans that infer negative connotations about the individual's racial or ethnic affiliation.¹⁷²

The following proviso attempted to cure any constitutional defects in the policy:

The University will not extend its application of discriminatory harassment so far as to interfere impermissibly with individuals rights to free speech.¹⁷³

In this situation, an "instructor's choice of teaching method does not rise to the level of protected expression."¹⁷⁴ In other words: "The University has a right to disapprove of the use of the word 'nigger' as a motiva-

168. However, this decision preceded the *RAV* Supreme Court decision, in which the Court held that Title VII could limit speech that amounted to sexual harassing conduct. See *supra* note 40 and accompanying text.

169. *Id.*

170. 55 F.3d 1177 (6th Cir. 1995).

171. *Id.* at 1181-82.

172. *Id.* at 1182.

173. *Id.* at 1183.

174. *Id.* at 1190 (referring to *Hetrick v. Martin*, 480 F.2d 705, 708-709 (6th Cir. 1973)(holding that a university's nonrenewal of an untenured teacher based on her teaching style did not violate the teacher's constitutional rights to freedom of speech).

tional tool just as the college in *Martin* was not forced to tolerate profanity."¹⁷⁵ Finally, the court conclusively noted that the coach's speech did not raise any academic freedom concerns.¹⁷⁶

B. Stanford's Code

In 1995, a superior court in California struck down Stanford University's Code, using a state law to reach action at a private university. Robert Corry and others brought the action alleging that Stanford's Code illegally restricted their free speech rights.¹⁷⁷ Stanford's intent in drafting the speech code was "to clarify the point at which free expression ends and prohibited discriminatory harassment begins."¹⁷⁸ The Code stated, in part, that:

[Prohibited sexual harassment includes] discriminatory intimidation by threats of violence and also includes personal vilification of students on the basis of their sex, race, color, handicap, religion, sexual orientation or national and ethnic origin.

Speech or other expression constitutes harassment by personal vilification if it:

a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and

b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and

c) makes use of insulting or "fighting words" or non-verbal symbols.

Fighting words or nonverbal symbols are those:

"which by their very utterance inflict injury or tend to incite to an immediate breach of the peace," and which are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation or national and ethnic origin.¹⁷⁹

Stanford defended the code arguing that it only proscribed fighting words.¹⁸⁰ However, like Dambrot, plaintiff argued that under *RAV v. City of St. Paul*,¹⁸¹ the code involved content-based restriction and was thus defective.¹⁸² The Stanford code punishes students whose words convey a message of hatred:

175. *Id.* at 1190-91.

176. *Dambrot*, 55 F.3d at 1191. The court dismissed the academic freedom concern. Dambrot was a coach without a contract, an at-will employee, and his speech was not part of a class presentation. Thus, some of the more difficult issues were not presented in this case.

177. *Corry v. Stanford Univ.*, No. 740309 (Cal. Sup. Ct. Santa Clara County, Feb. 27, 1995)(order granting preliminary injunction).

178. Stanford Code (1990).

179. *Id.*

180. *See Corry*, N. 740309 (Cal. Sup. Ct. Santa Clara County) at 3.

181. 505 U.S. 377 (1992).

182. *Id.* at 3.

The speech code prohibits speech based on the content of the underlying expression and is not directed at conduct. It punishes those who express views on the disfavored subjects of race, gender and the like yet permits fighting words which do not address these topics Lastly, the speech code does not meet strict scrutiny judicial review.¹⁸³

The Leonard Law, a California statute, prohibits a private educational institution from taking a disciplinary action based upon speech.¹⁸⁴ The court issued a preliminary injunction stating that the code was too broad even though carefully drafted. Thus, although the court found no state action, the Leonard Law extended protections of the First Amendment to private universities.¹⁸⁵

C. Harvard's Attempt To Formulate a Code

Harvard Law School entered the fray when it published its Sexual Harassment Guidelines, which state:

Harvard Law School is committed to maintaining a learning and work environment free from sexual harassment. The following guidelines, which define sexual harassment as prohibited by the Law School, both express institutional values and carry out mandates of state and federal law.

As a reflection of institutional values, the guidelines uphold traditions of academic freedom and uncensored debate on matters of public concern. They effect no compromise of freedom of thought, inquiry, or debate. Rather, the guidelines seek to ensure an environment in which education, work, research and discussion are not corrupted by sexual harassment.

The guidelines establish institutionally enforceable prohibitions, not aspirational standards. They do not preclude other, non-disciplinary efforts to resolve interpersonal grievances or to create a hospitable work and educational environment for all members of the Law School Community, regardless of gender or sexual orientation.¹⁸⁶

Not surprisingly, much media attention followed Harvard's action. In a series of letters published in the Wall Street Journal, Professor Alan Dershowitz explained his support of the controversial Guidelines.¹⁸⁷ On the other hand, attorney Harvey Silverglate has criticized the Harvard Guide-

183. *Id.* at 20.

184. Cal. Ed. Code § 94367 (Deering 1996).

185. *Corry*, N. 740309 (Cal. Sup. Ct. Santa Clara County) at 33, stating:

Plaintiffs argue that the Defendants are not penalized under the Leonard Law on the basis of the views they express; rather, students are entitled to engage in speech protected by the First Amendment, independent of the views expressed by Defendants. As such, the law is content-neutral in its application against Defendants. Plaintiffs are correct.

186. *Introduction* to Harvard Guidelines.

187. *See, e.g.*, Alan Dershowitz, Letter to the Editor, WALL ST. J., Jan. 19, 1996, at A11; *See also* Robert C. Clark (Dean of Harvard Law School), Letter to the Editor, WALL ST. J., Jan. 19, 1996, at A11. For a critical response to these letters, see David Rosenberg, WALL ST. J., Jan. 31, 1996, at A15. *But cf.* Alan Dershowitz, *Justice*, (visited March 25, 1997) <www.vix.com/men/harass/dershowitz.html>(cautioning against an expanded definition of harassment). Dershowitz recounts an incident in which a group of "feminists" in his law class threatened to bring harassment charges against him,

lines as well-meaning but violative of individual rights due to their content-based speech restrictions.¹⁸⁸

The Guidelines focus on sexual harassment. Harassment is subdivided into conduct or speech of "explicitly sexual nature" and actions that are "not inherently sexual" but target individuals because of "gender or sexual orientation."¹⁸⁹ The Introduction to Part I, Guidelines Concerning Sexual Harassment, offers a rationale for the two-pronged approach:

A preliminary comment on this distinction may be appropriate. In common parlance, the term "sexual harassment" may well encompass harassment that is "sex based" as well as inherently sexual. Certainly the Supreme Court's "sexual harassment" cases have not distinguished between these two forms of harassment. Because the Court clearly regards Title VII as creating rights to freedom from both, its broad use of the term "sexual harassment" to include both has been wholly understandable. In the context of a university, however, interests in free expression are of central impor-

asserting that the class discussion of false rape charges created a hostile environment. They did not bring charges, but Dershowitz argues:

The hostile-environment angle also gives special power to women that is not available to others who may be the subjects of discrimination. Consider this scenario: A factory owned by bigots has reluctantly added several women, blacks, Latinos and Jews to what was previously an all-male, all-white, all-Christian work force. In a deliberate effort to encourage these newcomers to quit, the owners place offensive signs throughout the factory. These signs are sexist, racist and anti-Semitic. Under the hostile-environment sub-category of sexual harassment, only the offended women would have the right to sue, because they have been *sexually harassed*, while others have just been deliberately offended By extending the core concept to include verbal conduct that has nothing to do with sexual favors, radical feminists are trivializing real sexual harassment and creating an unnecessary conflict between protecting vulnerable women from unwanted sex and important protections of our Constitution.

188. Harvey Silverglate, *Harvard Law Caves in to The Censors*, WALL ST. J., Jan 8, 1996, at A18. See also Harvey Silverglate's *Letter to CMU*, (visited March 25, 1997) <<http://joc.mit.edu/silverglate.112795.html>>, noting that he is writing a book on this topic and has defended several students accused of harassment, including Eden Jacobowitz, discussed *supra* note 3. Mr. Silverglate states in part:

I understand, of course, that CMU [Carnegie Mellon University] is a private institution as such is exempt from the limitations imposed upon governmental entities by the First Amendment. . . [h]owever. . . [i]t is sad. . . that private universities like CMU see fit to adopt speech-restrictive codes that state-run universities may not impose because of the First Amendment. For a private university to use that freedom that accompanies being a private rather than a public institution, in order to limit rather than to enlarge the sphere of liberty on campus, is shameful and perverse.

Compare Silverglate's Memorandum to Daphne Patai of the University of Massachusetts at Amherst regarding its harassment policy, (visited March 25, 1997) <<http://joc.mit.edu/amherst/silverglate.112495.txt>>. Mr. Silverglate criticized the proposed policy and noted:

Indeed, because universities are governed by principles of academic freedom, one would think that there should be more, not less, protection given to speech and other activities which might tend to make some people uncomfortable. Constitutional protections, therefore, constitute the minimum protection that must be accorded to speech and other expressive activities on a campus of higher learning. Ideally principles of academic freedom should allow for even a broader scope of protected speech and expressive activity on campus than off, since in the greater society only the constitution, not academic freedom, governs.

Put another way—if I am allowed to say something on the street corner, in a letter-to-the-editor of a newspaper, or on a radio talk-show, surely I should be allowed to say it on the campus of the University of Massachusetts!

189. Harvard Guidelines.

tance, and must be weighed against interests in freedom from harassing speech. The analytical distinction between "sexual harassment" and harassment that is "sex-based" helps to clarify the collision of competing values and makes it possible to define protected and prohibited categories with enhanced precision.¹⁹⁰

This distinction may have been very compelling to the Harvard Faculty, but seems less persuasive once removed from arcane discourses and debate. Was their intention to separate the issues of sexual orientation from speech in the classroom?¹⁹¹ Whatever the intent, the distinction they were trying to make is not clear from the language. The Guidelines also state in a commentary to Part II, Sex-Based Harassment by Discriminatory Conduct:

Though appropriately broad on a university campus, the right of free expression does not encompass a right to engage in abusive or intimidating conduct or to deface or intentionally or recklessly damage the property of others. The Guideline prohibits acts of physical harassment or intimidation that are directed against people because of their gender or sexual orientation regardless of whether the acts express the beliefs or attitudes of their perpetrators.¹⁹²

The Guidelines maintain the definition of quid pro quo harassment, but adapt it to the academic context to include grades and other academic performance issues. The Guidelines clearly state that a professor cannot solicit a sexual relationship with a student in the class and eliminates the use of the Title VII term "unwelcome" in this context.¹⁹³ At some point, however, the prohibition ends by recognizing that graduate students may go on to choose voluntarily romantic and or sexual relationships with their former professors. "A lifetime prohibition against romantic relations between faculty and former students would represent an intolerable infringement on personal freedom."¹⁹⁴ This prohibition does not preclude lunches or dinner.

Part I, Section 3 of the Guidelines prohibits harassment through "request for sexual favors, sexual advances or other speech or conduct of a sexual nature."¹⁹⁵ Three conditions help define harassment: unwelcome, abusive and unreasonably recurring and invasive.¹⁹⁶ However, "no speech and conduct shall be deemed violative of these guidelines if it is reasonably designed or intended to contribute to legal or public education academic inquiry or reasoned debate on issues of public concern or is protected by the Mass Civil Rights Act or the First Amendment."¹⁹⁷

190. *See id.*

191. *See generally* the Clark and Dershowitz letters, discussed *supra* note 187.

192. Harvard Guidelines, at 10.

193. *Id.* at 2.

194. *Id.*

195. *Id.* at 3.

196. *Id.* at 4.

197. *Id.* at 4.

The Guidelines note three other relevant concepts: superior/subordinate status, on campus versus off campus location, and expectation of privacy.¹⁹⁸ First, superior/subordinate relationships will be more carefully scrutinized because of the inherent difference in power and potential for coercion. Second, actions at off-campus events, including parties, will be given more latitude than actions that occur on campus. Third, the expectation of privacy is a strong and overarching concern. For example, pornographic pictures might be displayed with impunity in one's dorm room.

Speeches and campus fora are outside the scope of these guidelines, always giving way to the importance of freedom of speech in an academic setting. Examples used to illustrate the application of the Guidelines include a famous story from the Talmud, a collection of writings constituting Jewish civil and religious law. In the story, a man falls from a roof and onto a woman in such a way that sexual intercourse occurs even though it was an accident.¹⁹⁹ The story is used to illustrate that one's mental state has a bearing on one's legal responsibility. The Guidelines note that it would not be abusive if a professor were to use this as an example in class, as one at another university did. It is not directed at an individual or small group and it would be seen as a single remark, not severe or pervasive speech. This provision is perhaps most important, although it falls within the scope of what might be termed "academic privilege" designed to "contribute to legal . . . education . . . or reasoned debate on issues of public concern."²⁰⁰ Thus, under the Guidelines, the classroom is a virtual sanctuary, free from review as long as the discourse serves the above-referenced academic purpose.

However, by way of example, would it be harassment if a professor referred to his students as "bitches, cunts and hos"? Under the Guidelines, such a statement meets the criteria of abusive, directed, and severe unless, of course, he or she were reading from a play or engaged in some academic exercise about stereotypes and language. Academic freedom does not protect such speech. Similarly, under the Guidelines, a professor could not use the words "kikes or niggers" in class unless there were some unusual educational purpose. However, it would not necessarily be harassment if, in another class, a professor attempts to wake up the class by telling the joke "you have heard the definition of rape? Assault with intent to please." While this would no doubt offend many, a single remark alone will not equal harassment under the Guidelines. The crucial touchstones are the abusiveness, severity, and pervasiveness of the speech.

Professor Dershowitz was concerned about feminist—à la Andrea Dworkin and Catherine MacKinnon—censorship, particularly after several

198. *Id.* at 5 (discussing section 3 (iv)).

199. *Id.* at 6. See also Kenneth Jost, *Questionable Conduct*, 79 A.B.A.J. 71 (1993) (discussing Chicago Theological Seminary's litigation with Graydon Snyder, who filed a libel suit against the Seminary after being reprimanded for telling the story from the Talmud.)

200. Harvard Guidelines, at 4.

classes were devoted to the issue of false rape charges and students considered filing a complaint against him. He is allegedly comfortable because Harvard's Guidelines make clear his classroom discussion is protected.²⁰¹ The Guidelines also address student-on-student harassment, providing an example in which students repeatedly ask one woman student "how's the hot dog in your underwear?"²⁰² How sophomoric, but these comments can interfere with a student's ability to learn.²⁰³ Such speech is actionable sexual harassment under the Guidelines.

Part II of the Guidelines prohibits physical contact or interference with freedom of movement, defacing of property or "engag[ing] in any . . . conduct and speech that would be viewed by a reasonable person as physically intimidating under the circumstances and that has the purpose or effect of unreasonably interfering with an individual's work or academic performance or of creating an intimidating . . . degrading . . . or otherwise seriously offensive working or educational environment"²⁰⁴ Does the addition of the term "seriously" to modify "offensive" remedy any overbreadth or vagueness problem? Because Harvard is a private university and does not trigger state action concerns, the analysis is more akin to the one utilized in the Stanford case.

In contrast to the Harvard code, the Stanford code focused on personal vilification that might "insult or stigmatize . . . if addressed directly to the individual or small group . . . or uses insulting or fighting words or non verbal symbols." Harvard's Guidelines pursued a different path by specifically protecting most activities in the classroom and other campus fora. No court to date has decided the legality of the Guidelines; currently, they are in force.

Part III of the Guidelines are the Implementing and Enforcement Procedures. The procedure spells out an informal process and timetable. For example, complaint should be brought within one year of the alleged violation. The procedure also outlines a formal complaint process which incorporates basic due process guarantees, articulation of the burden of proof as one of "clear and convincing evidence," as well as provision for any party to have an "advisor" drawn from the ranks of volunteers on file at the law school. The Guidelines recognize that under unusual circumstances

[T]he decisionmaker shall have discretion to provide for the payment of the reasonable attorney's fees of either a complainant or an alleged harasser or both if considerations of justice so require.²⁰⁵

201. See Dershowitz, *supra* note 187.

202. The example is reminiscent of the facts in *Doe v. Petaluma City Sch. Dist.*, 54 F.3d at 1455 (stating that student was taunted with remarks about a "hot dog" in her pants).

203. Harvard Guidelines, at 7.

204. *Id.* at 9-10.

205. Harvard Guidelines, at 19.

For many colleges this last provision would seem burdensome and expensive and yet the Guidelines recognize that safeguarding all the parties rights is in the best interest — including the financial interest — of the university in the long run. A poorly handled sexual harassment complaint can mushroom into expensive subsequent litigation.

Not everyone agrees that Harvard has managed to draw a precise and legally defensible line between harassment and free speech. David Rosenberg, professor at Harvard Law School, noted:

The strategy of controlled self censorship to ward off something worse from outside is depressingly familiar.²⁰⁶

However, by excluding virtually all classroom discussions and speeches, it arguably has cured the defects in previous codes. The Harvard Guidelines give the greatest protection to free speech in the classroom when the words are connected to academic inquiry. Despite critics' claims, Harvard has drafted a policy that clears the hurdles of overbreadth and vagueness. Indeed, Harvard appears to have walked the legal tightrope between protecting individuals against harassment and ensuring the protection of the free speech.

IV. CONCLUSION

In our zeal to create a world of equity and non-discrimination, it is imperative that we not trammel other important and fundamental rights. The line between promoting a comfortable work and academic environment for all and free speech and academic freedom is important.

Whether speech is obnoxious depends upon one's perspective. Anti-abortion demonstrators, AIDS activists, Nazis, skinheads and Confederate flag bearers provoke deep feelings in a diverse group of people. Yet is a totalitarian response—to ban certain expression—the answer? We think this solution, though immediately appealing, offers a dangerous precedent that can be used against many espousing unpopular views. As Justice Brandeis said, "[T]he remedy to be applied is more speech, not enforced silence."²⁰⁷ In this context it is important to remember that protections on speech often succor the unpopular voice—whether it be of the extreme right or left, radical feminist, Zionist, Muslim, Christian, neo-Nazi, Ku Klux Klan, or freeman militia. It is also important to understand that restrictions often come back to haunt those who have proposed them.

Well-meaning people of all political persuasions are troubled by the impulse of some to restrict speech based upon offensiveness to the listener. Clearly, this approach is soothing to those most vulnerable to harassment;

206. Rosenberg, *supra* note 187.

207. *Whitney v. California*, 274 U.S. 357, 377 (1927)(Brandeis, J., concurring).

however, it may come back to haunt its advocates.²⁰⁸ Although we have long recognized the right of business to curb employees' rights during working hours, the academic context is more problematic. Not only are there First Amendment issues and possible state guarantees well, but the overlay of academic freedom is a serious concern. But under these codes do professors who discuss the African tribal practice of clitorrectomy in the context of a class become guilty of sexual harassment? The authors do not want content to be used as a basis for a conservative ideological standard of appropriateness, which might stifle debate. On the other hand, if we allow discussion of sexual practices, we must also allow discussion about the role of women, even if one does not agree with the points of view being expressed. Similarly, Ku Klux Klan members have a right to speak in public, but they will be in violation of content neutral anti-hood legislation if they appear with a hood obscuring their identity.

The Harvard Guidelines represent an important first step in the search for a code that is specific in targeting as actionable only clearly defined behavior and words. The problem, however, is that it is specific only to sexual harassment. The Guidelines should be broadened to include generic harassment, including religious and racial, so that the result is not a content-based restriction.

For example, suppose a group of students targets another group of students and begins to harass and intimidate them, saying that they are dumb and will not be at school after exams. Clearly, if such behavior were repeated, abusive, and intimidating, and in fact interfered with the targeted students ability to complete their studies, the college should be able to address this harassment as well. The difficult problem is not how to construct a fair hearing procedure, but rather how to define which offenses trigger the hearing procedure. In other words, what is harassment?

Professor Mari Matsuda advocates the "necessity of creating a legal response to racist speech—not because it isn't really speech, not because it falls within a hoped-for exception, but because it is wrong."²⁰⁹ Unfortunately, no policy is going to eradicate racism and sexism without also shredding the First Amendment and several other freedoms that we hold dear, just as, in the name of revolution, some countries have enforced a rigidity of thought that is far more pernicious than the aforementioned evil. The problem with Matsuda's argument is that it stems from a dangerous assumption that if we have God on our side we can just do it. Consider, however, what has been justified by the simple leap that it is "right." Segregation was justified as part of the natural order of things. The subjugation of women has been defended on the basis of God's will. We must note

208. For concurring viewpoint, see NADINE STROSSEN, *DEFENDING PORNOGRAPHY* 199-215 (1995).

209. Mari J. Matsuda, *Legal Storytelling: Public Response to Racist Speech: Considering The Victim's Story*, 87 MICH. L. REV. 2320, 2380 (1989).

God's apparent unwillingness to confirm or deny such positions in a public forum. In a vein akin to Matsuda's, Professor Randall Kennedy asserts that private universities have greater freedom from regulation and should utilize it. We do not disagree that there may be greater freedom in a private university, but that latitude should not be used to restrict academic freedom. Kennedy says:

What the ACLU overlooked is that diversity demands accommodation for the intolerant and that freedom requires proper limits on government. In some contexts, in other words, we must permit repression to nourish freedom and allow exclusion to encourage diversity.²¹⁰

The tautology is inescapable. We must protect students and faculty, but not let the shibboleth of political correctness prompt us to enact overbroad policies. Nor must we decide that First Amendment principles and academic freedom make it an impossible task and run from the challenge. Academic freedom must not be used to shield the abuse of a captive audience by racially or sexually derogatory epithets.

As the ACLU Executive Director of Greater Pittsburgh, Witold Walczak, stated in a letter to the Carnegie Mellon University Faculty Senate Chair considering a code:

A sexual harassment policy, especially outside of the workplace in an academic setting, must be drawn very narrowly. A policy against sexual harassment outside the workplace should be limited to situations where a pattern and practice of sexual conduct or sexually demeaning or derogatory comments is directed at a specific student, or is so pervasive and abusive as to demonstrably hinder the learning experience.²¹¹

Thus, at least some ACLU chapters recognize that the problem could be addressed by a narrowly drafted code, arguably as Harvard has done.

The AAUP published "On Freedom of Expression and Campus Speech Codes," generally condemning all speech codes yet noting:

Institutions should adopt and invoke a range of measures that penalize conduct and behavior, rather than speech, such as rules against defacing property, physical intimidation or harassment or disruption of campus activities * * * [F]reedom of expression requires toleration of "ideas we hate," as Justice Holmes put it. The underlying principle does not change because the demand is to silence a hateful speaker, or because it comes from within the academy. Free speech is not simply an aspect of the educational enterprise to be weighed against other desirable ends. It is the very precondition of the academic enterprise itself.²¹²

210. Randall Kennedy, *Freedom of Expression: Some Uncomfortable Paradoxes*, 11 FOCUS ON LEGAL STUD. Spring 1996, at 5.

211. Letter of November 29, 1995 (visited March 25, 1997) <<http://nam.mit.edu/docs/aclu.112995.txt>>.

212. ACADEME, July-August 1992, <<http://www.mit.edu:8001/activities/safe/safe/writings/speech-codes/aaup-st-on-free-speech>>(noting that institutions should penalize conduct and behavior including harassment).

Thus while accepting the idea of codes, the AAUP has very narrowly limited their scope. We disagree with this restrictive view of what is legally permissible.

While the Harvard Guidelines have gone beyond simply focusing on conduct and behavior, they are still defensible. In searching for limits, we have found that if Harvard's Guidelines were expanded to include all types of harassment, the Guidelines would offer a solution to the harassment, academic freedom, and freedom of speech minefield.

Accordingly, it would seem appropriate for universities to review their current policy in light of the following considerations gleaned from our study:

1. Focus on the definition of harassment and draft speech restrictions in the most narrow possible way, protecting the integrity of provocative classroom debate and campus speakers, meetings, discussion groups, etc. There should be protection against coercion in an academic setting as between professor and student akin to quid pro quo protection as well as a sensitivity that certain professorial conduct could create a hostile environment in the classroom. Harvard's focus on the following criteria differentiate the Guidelines from other unsuccessful attempts:

- (1) the greatest latitude is given to speech in the classroom and in the broader academic context preserving the core value of academic freedom (however this is not absolute)

- (2) the inequality in power relationships where the authority takes advantage of the position in a coercive manner (employer/employee or faculty/student)

- (3) pervasive and severe comments and actions that single out individuals are restricted but not isolated incidents of rude or injudicious behavior and comments

- (4) off-campus private activities are often left to the individuals and subject to minimal review unless connected by b and c above.

2. Insure procedural fairness to all parties by assuring adequate notice, opportunity to be heard, and availability of all relevant documents. Well trained high level staff known for their judicious temperament and fairness should be charged with implementation. There should be education within the community about what constitutes harassment so that all are afforded fair notice as well as training preceding specific hearings.

3. Consider legal representation for parties, an option under the Harvard Guidelines that is perhaps easier to fulfill at Harvard Law School than at many other places.

4. Determine if there are any particular state law issues affecting the code.

Our recommendations will have to be tested by some court in the future. However in the meantime, the large sums of money awarded in both sexual harassment employment cases and student cases will continue to rivet the academic communities' attention.

Not every wrong has a remedy. We live in an imperfect world where we will all hear things that jar and offend us. Seeking redress for harassment is not like trying to make thoughts a crime. Academic freedom is not a shield from all scrutiny. Although academic freedom, the First Amendment, and state laws like the Leonard Law and Massachusetts Civil Law protect free expression on campus, they do not do so without limit. Colleges will aggressively have to confront harassment, whether sexual or racial, or be found to have violated Title IX or state or federal law. This is not the first time the university has had to walk a legal tightrope. Nevertheless, Harvard's Guidelines are evidence that a balancing is possible.