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Bridget Hart

# A BALANCING ACT FOR AMERICAN UNIVERSITIES: ANTIHARASSMENT POLICY V. FREEDOM OF SPEECH

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*Legal scholars, educational administrators, journalists, and students have all witnessed a rise in students being disciplined by university officials for speech and conduct deemed inappropriate for college campuses. In endeavoring to explain this trend, some academics point to the disconnect between the Department of Education and university administrators regarding the legal standards for campus antiharassment policies. The lack of clarity regarding what constitutes harassment on college campuses has resulted in the punishment of students by universities for speech and conduct that is normally considered to be protected speech under the First Amendment. This Note first provides an overview of the First Amendment and its application to students. It then examines why colleges and universities are perplexed about the standards that should guide their antiharassment policies. Lastly, this Note introduces a solution to the confusion, one that includes a well-supported, formal standard for evaluating peer-on-peer harassment, but also incorporates existing First Amendment jurisprudence. This solution would hopefully allow universities to better balance the equally important interests of protecting students from legitimate harassment and fostering free speech and free expression on college campuses.*

## INTRODUCTION

The state of free speech and expression, and the potential decline in the protection of such speech due to an emphasis on political correctness, on college campuses has dominated headlines for the

past few years.[1] President Barack Obama, during a town hall meeting in Des Moines, Iowa in September 2015, became yet another commentator on the matter of free speech on our nation's university campuses.[2] President Obama adamantly asserted that:

> The purpose of college is not just to transmit skills. It's also to widen your horizons; to make you a better citizen; to help you to evaluate information, to help you make your way through the world; to help you be more creative . . . I don't agree that you—when you become students at colleges—have to be coddled and protected from different points of view.[3]

Discussion and debate centered on free speech in higher education have engaged educators, lawmakers, scholars, and

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* J.D. Candidate Brooklyn Law School, 2017; B.A. in Political Science, Villanova University, 2014. Thank you to my family and friends, most notably my parents, Nancy and David Hart, for their endless support and encouragement. Thank you to the *Journal of Law and Policy* executive board and staff for their thoughtful editing and insight.

[1] *See, e.g.*, Jonathan Chait, *Not a Very P.C. Thing to Say: How the Language Police are Perverting Liberalism*, N.Y. MAG. (Jan. 27, 2015), http://nymag.com/daily/intelligencer/2015/01/not-a-very-pc-thing-to-say.html (discussing the return of political correctness to college campuses and the "challenge of balancing freedom of expression against other values such as societal cohesion and tolerance"); David Schaper, *University of Chicago Tells Freshmen It Does Not Support 'Trigger Warnings'*, NPR (Aug. 26, 2016), http://www.npr.org/2016/08/26/491531869/university-of-chicago-tells-freshmen-it-does-not-support-trigger-warnings (discussing a letter sent by the University of Chicago to its new students explaining that the school does not support "trigger warnings" due to its commitment to free speech and expression); Judith Shulevitz, Opinion, *In College and Hiding From Scary Ideas*, N.Y. TIMES (Mar. 21, 2015), http://www.nytimes.com/2015/03/22/opinion/sunday/judith-shulevitz-hiding-from-scary-ideas.html?_r=0 (discussing safe spaces on college campuses and how "the notion that ticklish conversations must be scrubbed clean of controversy has a way of leaking out and spreading").

[2] *President Obama: College Students Shouldn't Be 'Coddled and Protected From Different Points of View'*, FIRE (Sept. 15, 2015), https://www.thefire.org/president-obama-college-students-shouldnt-be-coddled-and-protected-from-different-points-of-view/.

[3] Barack Obama, Opinion, *President Obama Stands Up for Free Speech on Campus*, N.Y. POST (Sept. 15, 2015, 7:09 PM), http://nypost.com/2015/09/15/president-obama-stands-up-for-free-speech-on-campus/.

Supreme Court justices for decades.[4] Recently, however, the conversation has taken up a particularly pervasive nature, as it appears that "something strange is happening at America's colleges and universities."[5]

In the September 2015 issue of *The Atlantic*, the cover story, titled "The Coddling of the American Mind," explored what the authors of the piece claim is "a movement . . . undirected and driven largely by students, to scrub campuses clean of words, ideas, and subjects that might cause discomfort or give offense."[6] This movement is being characterized as a kind of "resurgence of political correctness,"[7] which has manifested itself in the form of "trigger warnings" by professors in the classroom,[8] student disapproval and action against "microaggressions,"[9] and a general intolerance of offensive speech and conduct by university administrations.[10] While a great deal of the speech targeted by this movement may indeed be generally offensive, distasteful, and

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[4] *See, e.g.*, Healy v. James, 408 U.S. 169 (1972) (discussing the issue where a university president denied a student group recognition due to the organization's philosophy being antithetical to the university's policies); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (discussing the issue where students were suspended for wearing black armbands in school to publicize their objections to the hostilities in Vietnam); Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563 (1995) (discussing free speech and workplace harassment law) [hereinafter Volokh, *Harassment Law*]; U.S. Dep't of Educ., Office for Civil Rights, First Amendment: Dear Colleague Letter (July 28, 2003), http://www2.ed.gov/about/offices/list/ocr/firstamend.html (requiring, by a letter written by the Office for Civil rights, distancing of the department from decisions made by private institutions that limit free speech) [hereinafter Dear Colleague Letter].

[5] Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 2015), http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/.

[6] *Id.*

[7] *Id.*

[8] Lukianoff and Haidt, in *The Coddling of the American Mind*, define "trigger warnings" as "alerts that professors are expected to issue if something in a course might cause a strong emotional response." *Id.*

[9] "Microaggressions" can be defined as "small actions or word choices that seem on their face to have no malicious intent but that are thought of as a kind of violence nonetheless." *Id.*

[10] *Id.*

repugnant, the movement has also given way to concerns voiced by free speech advocates, who find that because of this "new climate that is slowly becoming institutionalized," students are being punished by their colleges and universities for speech and conduct that is protected by the First Amendment.[11]

During the summer of 2015, a Texas Christian University student was disciplined by the college administration with a "suspension in abeyance" and "disciplinary probation" until the student's graduation, following a series of racist tweets found on the student's Twitter page.[12] One tweet at issue read "#Baltimore in 4 words: poor uneducated druggy hoodrats," in response to the highly publicized riots in Baltimore, Maryland.[13] On March 18, 2015, George Washington University suspended and temporarily evicted a Jewish student after he posted a "small souvenir swastika" on a residence hall bulletin board.[14] That same month, two students were expelled from the University of Oklahoma following the leak of a now infamous video of the expelled students and their fraternity brothers on a bus singing a disturbing song littered with racial slurs and verses making reference to the lynching of African Americans.[15] These incidents are merely a brief sampling of a long list of students at American universities who have been penalized, quite seriously, for speech and conduct that is typically characterized as free

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[11] *Id.*; *accord* Eugene Volokh, *No, It's Not Constitutional for the University of Oklahoma to Expel Students for Racist Speech*, WASH. POST: VOLOKH CONSPIRACY (Mar. 10, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/10/no-a-public-university-may-not-expel-students-for-racist-speech/ [hereinafter Volokh, *University of Oklahoma Expulsion*].

[12] Deanna Boyd, *TCU, Student at Odds Over Comments on Social Media*, STAR-TELEGRAM (July 30, 2015), http://www.star-telegram.com/news/local/community/fort-worth/article29592781.html.

[13] *Id.*

[14] *George Washington University: Jewish Student Suspended for Displaying Souvenir Indian Swastika*, FIRE, https://www.thefire.org/cases/george-washington-university-jewish-student-suspended-for-displaying-souvenir-indian-swastika/ (last visited Sept. 23, 2016) [hereinafter *Jewish Student Suspended*].

[15] Manny Fernandez & Richard Pérez-Peña, *As Two Oklahoma Students Are Expelled for Racist Chant, Sigma Alpha Epsilon Vows Wider Inquiry*, N.Y. TIMES (Mar. 10, 2015), http://www.nytimes.com/2015/03/11/us/university-of-oklahoma-sigma-alpha-epsilon-racist-fraternity-video.html?_r=0.

speech.[16] While it might strike some as expected and just for such offensive speech and conduct to be punished in some capacity by an academic institution, critics are deeming these punishments to be violations of the affected students' First Amendment rights.[17]

Among the questions and concerns raised by free speech defenders and interested academics is: why exactly are students being so rigorously disciplined for their speech both on and off campus?[18] One current and prevailing theory hinges on university antiharassment policies and a general confusion and disconnect between the Department of Education ("DOE") and universities and colleges regarding current antiharassment and antidiscrimination law.[19] Not only is there confusion regarding what specifically

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[16] *See, e.g.*, Will Creeley, *Journalism Student Suspended for Offending Hockey Coaches*, HUFFINGTON POST (Nov. 14, 2012, 11:06 AM), http://www.huffingtonpost.com/will-creeley/suny-oswego-journalism-alex-myer_b_2121906.html (discussing the suspension of a SUNY Oswego journalism student for "disruptive behavior" which followed the student's email inquiry into the college's hockey coach); Katherine Timpf, *Sorority in Big Trouble After Taco Tuesday Event Deemed Racist*, NAT'L REV. (Sept. 15, 2014), http://www.nationalreview.com/article/387987/sorority-big-trouble-after-taco-tuesday-event-deemed-racist-katherine-timpf (discussing California State University Fullerton's sanctions imposed on one of the university's sororities following the organization's "Taco Tuesday event where attendees wore 'culturally insensitive attire' such as sombreros"); *University of Tulsa: Student Suspended for Husband's Facebook Posts*, FIRE, https://www.thefire.org/cases/university-of-tulsa-student-suspended-for-husbands-facebook-posts/ (last visited Sept. 23, 2016) (discussing the suspension of University of Tulsa student George Barnett following Facebook posts written by his husband criticizing another student and two University of Tulsa faculty members).

[17] *See* Volokh, *University of Oklahoma Expulsion*, *supra* note 11; *see also George Washington University: Jewish Student Suspended*, *supra* note 14; *see generally Hate Speech on Campus*, AM. C.L. UNION, https://www.aclu.org/other/hate-speech-campus (last visited Jan. 12, 2017) (adopting the belief that "all campuses should adhere to First Amendment principles because academic freedom is a bedrock of education in a free society" and that the constitutional protections afforded to inoffensive speech are similarly afforded to "speech that deeply offends our morality or is hostile to our way of life").

[18] *See* Lukianoff & Haidt, *supra* note 5.

[19] Will Creeley, *A Year Later, Impact of Feds' 'Blueprint' Comes into Focus*, FIRE (Aug. 28, 2014), https://www.thefire.org/year-later-impact-feds-blueprint-comes-focus/ [hereinafter Creeley, *A Year Later*]; Lukianoff & Haidt, *supra* note

constitutes peer-on-peer harassment and discrimination in university settings, which is largely due to a series of changes in the DOE's policies on harassment and discrimination in the context of higher education over the past twenty years,[20] there is also a disconnect between the standards recently promulgated by the DOE and those set forth by the Supreme Court.[21] The lack of clarity surrounding antiharassment policies can result either in colleges and universities implementing policies that are too broad in their definitions of harassment, or in universities punishing conduct that is not necessarily prohibited by their own policies, but might not conform to the policies supported by the DOE. Both of these scenarios undoubtedly result in constitutionally protected speech getting swept up with legitimate harassment and discrimination so that universities can rest assured that they have not left themselves subject to criticism or vulnerable to litigation.[22]

This Note will evaluate former and current antiharassment policies on college and university campuses, as well as the body of law that governs these policies. While some scholars find that reverting back to the existing standard for peer-on-peer harassment set forth by the Supreme Court in *Davis Next Friend LaShonda D. v. Monroe County Board of Education* would be the optimal way to

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5; Azhar Majeed, *How Colleges Label Protected Speech as Harassment—And Why the DOJ and ED Have Made Matters Worse*, HUFFINGTON POST (June 12, 2013, 4:36 PM), http://www.huffingtonpost.com/azhar-majeed/how-colleges-label-protec_b_3430109.html [hereinafter Majeed, *Colleges Label Protected Speech as Harassment*].

[20] *See* Lukianoff & Haidt, *supra* note 5; Dear Colleague Letter, *supra* note 4. *See generally* Letter from Anurima Bhargava, Chief, U.S. Dep't of Justice, and Gary Jackson, Regional Director, U.S. Dep't of Educ., to Royce Engstrom, President, U. of Mont., and Lucy France, U. Counsel, U. of Mont., U.S. DEP'T OF JUST. (May 9, 2013), http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf [hereinafter Findings Letter] (discussing the confusion that results from overbroad definitions of harassment and discrimination policy in a university setting).

[21] *See* Davis v. Monroe Cty. Bd. Of Educ., 526 U.S. 629, 651 (1999); Findings Letter, *supra* note 20.

[22] Creeley, *A Year Later*, *supra* note 19.

settle the confusion,[23] this Note argues that that standard is insufficient alone, but could benefit from the incorporation of existing First Amendment jurisprudence. This solution would relieve universities of the fear of investigation and litigation, which has led to the infringement of students' rights to engage in free speech, expression, debate, and the free exchange of ideas, while still ensuring that those students who have indeed been subjected to harassment or discrimination feel safe and are adequately protected at their institutions.

Part I of this Note examines the First Amendment and some of its fundamental principles, as well as how the First Amendment has been applied by the Supreme Court within the context of free speech in higher education. Part II includes a summary of the relevant laws, regulations, and government bodies that guide antiharassment policies at institutions of higher learning. This Part also discusses the fluctuations in this area of the law, most notably those that were set forth in a 2013 DOE investigation's findings letter ("findings letter"), which has been a significant factor in the confusion plaguing university administrators. Part III explores university reactions following the 2013 findings letter and illustrates how this letter has affected the antiharassment policies of colleges and universities, as well as the general atmosphere at these institutions following the letter's publication. Part IV identifies the weaknesses of the Supreme Court's *Davis* standard,[24] an oft discussed solution to the issues that universities and colleges are encountering, and suggests an alternative solution which would incorporate well-settled areas of First Amendment law, such as the law of true threats and fighting words, into a standard like the *Davis* standard to balance the protection of free speech with the protection against

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[23] Joseph Cohn, *Schools Should Realize that Davis is the Solution*, FIRE (July 16, 2013), https://www.thefire.org/schools-should-realize-that-davis-is-the-solution/; Lukianoff & Haidt, *supra* note 5.

[24] The *Davis* standard originates from the Supreme Court's decision in *Davis v. Monroe County Board of Education*, in which the Court supported the following standard for claims of peer-on-peer sexual harassment: "[A] plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis*, 526 U.S. at 651.

legitimate harassment and discrimination. This Note closes with Part V, which briefly suggests more efficient and clearer ways to notify universities of changes in DOE policy, and concludes with final considerations of free speech on college campuses, including its benefits.

## I. THE FIRST AMENDMENT AND HIGHER EDUCATION

The First Amendment to the U.S. Constitution reads, in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press."[25] This text, known as the Free Speech Clause, has been debated, discussed, and analyzed by judges and justices since at least the early part of the twentieth century.[26] Since then, the Supreme Court has often attempted to distinguish what kind of speech is protected by the First Amendment. The Court has deliberated the Free Speech Clause in the context of pornography and obscenity,[27] speech involving imminent danger,[28] symbolic

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[25] U.S. CONST. amend. I.

[26] *See, e.g.*, Abrams v. United States, 250 U.S. 616 (1919) (analyzing whether amendments to the Espionage Act and the application of those amendments, which made it a crime to incite resistance to the war against Germany and urge curtailment of the production of essential war material, violated the Free Speech Clause); Debs v. United States, 249 U.S. 211 (1919) (discussing whether Debs' conviction under the Espionage Act of 1917 violated his First Amendment rights to freedom of speech); Schenck v. United States, 249 U.S. 47 (1919) (discussing whether Schenck's charge of conspiracy to violate the Espionage Act of 1917 by attempting to cause insubordination in the military and to obstruct military recruitment by mailing circulars to draftees violated the Free Speech Clause).

[27] *See, e.g.*, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (determining whether the Child Pornography Prevention Act of 1996 abridged freedom of speech under the First Amendment); Miller v. California, 413 U.S. 15 (1973) (discussing whether the sale or distribution of obscene materials by mail is protected by the Free Speech Clause).

[28] *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (considering whether demonstrators in a boycott can be held liable for damages caused to a business as a result of the boycott without abridging their rights to freely associate); Hess v. Indiana, 414 U.S. 105 (1973) (determining that Hess's conviction for disorderly conduct was an abridgement of his First Amendment rights).

speech,[29] and speech in the workplace.[30] The Supreme Court has also discussed free speech specifically within the context of schools and institutions of higher education.[31] In *Tinker v. Des Moines School District*, one of the earliest cases to tackle the issue of free speech and expression in an educational setting,[32] Justice Fortas famously proclaimed that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[33] While *Tinker* explicitly dealt with high school students and their protest of the Vietnam War,[34] the case generally stands for the proposition that students at public schools maintain the constitutional rights to free speech provided by the First Amendment, even when they speak within the confines of their educational institution.[35]

Shortly after *Tinker*, the Supreme Court decided two cases that, unlike *Tinker*, arose within the context of higher education.[36] In *Healy v. James*, the petitioners, who were students at Central Connecticut State College seeking to form a campus chapter of Students for a Democratic Society, were denied "official

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[29] *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968) (discussing whether a federal law that made the destruction or mutilation of drafts cards a crime was in violation of the First Amendment).

[30] *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410 (2006) (holding that speech by a public official or employee is only protected if the speech is engaged in as a private citizen).

[31] *See, e.g.*, Healy v. James, 408 U.S. 169 (1972) (holding that a school's refusal to recognize a student organization violated the First Amendment); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (holding that students do not automatically surrender their First Amendment rights to freedom of speech when they step onto school property).

[32] *See Tinker*, 393 U.S. 503. Despite a school's policy banning a display of black armbands in protest of the Vietnam War, several students wore black armbands and were suspended from school. *Id.* at 504.

[33] *Id.* at 506.

[34] *Id.* at 504.

[35] *See id* at 506.

[36] *See generally* Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667 (1973) (holding that the proliferation of ideas on a state university campus, regardless of the offensiveness of such ideas, cannot be prohibited merely due to the general "conventions of decency"); *Healy*, 408 U.S. 169 (holding that Central Connecticut State College's refusal to recognize the Students for a Democratic Society as an official student organization was unconstitutional).

recognition" as a student group by the college.[37] The Court noted that, "state colleges and universities are not enclaves immune from the sweep of the First Amendment"[38] and reiterated the contention that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[39] The Court further articulated the oft-quoted "marketplace of ideas" theory,[40] coined by Justice Holmes, that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[41] The Court stated that the "college classroom" is one place in particular where the marketplace of ideas is so significant.[42]

One year later, the Court again ruled on an issue of free speech relating specifically to colleges and universities in *Papish v. Board of Curators of University of Missouri*.[43] In *Papish*, the Court examined the expulsion of a journalism student at the University of Missouri who distributed a campus newspaper, which "reproduced a political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice."[44] The Court, relying on the *Healy* standard,[45] insisted that *Healy* undoubtedly represented the notion that the "mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"[46] Through these cases, the Court made it clear that although the student speech in question might be deemed blatantly offensive, the door is not necessarily opened to unchecked punishment imposed by public

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[37] *Healy*, 408 U.S. at 170, 172–74.

[38] *Id.* at 180.

[39] *Id.* (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

[40] *Id.*

[41] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also* W. Robert Gray, *Public and Private Speech: Toward a Practice of Pluralistic Convergence in Free-Speech Values*, 1 TEX. WESLEYAN L. REV. 1, 8 (1994) (discussing Justice Holmes' famous dissent in *Abrams* and the emerging theory of the "marketplace of ideas").

[42] *Healy*, 408 U.S. at 180.

[43] *See* Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667 (1993).

[44] *Id.* at 667.

[45] *See Healy*, 408 U.S. 169.

[46] *Papish*, 410 U.S. at 670.

universities and colleges.[47] Further, these cases affirmed the notion that students, just like average American citizens, are entitled to First Amendment protections, regardless of whether their speech occurs on campus.[48]

A discussion of First Amendment jurisprudence within the context of education would be incomplete without noting the significant decisions of *Bethel School District No. 403 v. Fraser* and *Hazelwood School District v. Kuhlmeier*. Despite the Supreme Court's insistence that students maintain the right to free speech on school property,[49] the Court first limited this proposition in *Bethel School District*.[50] The Court upheld the suspension of a high school student following the student's sexually suggestive speech at a school assembly.[51] The Court found that, while students certainly possess First Amendment rights, the state has a significant interest in "teaching students . . . socially appropriate behavior."[52] Thus, the Court held that the First Amendment does not prohibit schools from barring "vulgar speech and lewd conduct [that] is wholly inconsistent with the 'fundamental values' of public school education."[53]

Two years later, the Court was again confronted by the issue of a public school's restrictions on student speech in *Hazelwood*.[54] In this case, a school principal removed articles from the student-run school newspaper that dealt with potentially provocative topics such as teenage pregnancy and divorce.[55] Again, the Supreme Court acknowledged that students possess constitutional rights to free speech; however, the Court held "that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate

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[47] *See Healy*, 408 U.S. 169; *Papish*, 410 U.S. 667.

[48] *See Healy*, 408 U.S. at 180 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)); *Papish*, 410 U.S. at 671.

[49] *Tinker*, 393 U.S. at 506.

[50] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

[51] *Id.* at 685–86.

[52] *Id.* at 681.

[53] *Id.* at 685–86.

[54] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

[55] *Id.* at 262–64.

pedagogical concerns."[56] *Hazelwood* has endured as an essential case in evaluating First Amendment concerns within the context of primary and secondary education; however, the Court in *Hazelwood* explicitly declined to determine whether the standards set forth in that case would extend to similar concerns on college and university campuses.[57] Legal scholars have agreed that the Supreme Court would not extend the standards set forth in *Hazelwood* to cases in which the speakers are college students.[58] Thus, we are left with the Court's decisions in *Healy* and *Papish* to guide our understanding of students' First Amendment protections within the context of higher education.

## II. ANTIHARASSMENT AND POLICY IN HIGHER EDUCATION: LAW, REGULATIONS, AND GOVERNING BODIES

### *A. Title IX, Title VI, and Higher Education's Governing Bodies*

Despite the Supreme Court's insistence that student speech is protected by the First Amendment, student speech and conduct may

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[56] *Id.* at 266, 273.

[57] *Hazelwood Sch. Dist.*, 484 U.S. at 273 n.7 ("We need not now decide whether the same degree of deference [to school administrators] is appropriate with respect to school-sponsored expressive activities at the college and university level."); *see also* Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School - Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 739 (2009) ("[M]any lower courts have interpreted the Hazelwood standard to require the serious review of some restrictions limiting student speech in school-sponsored activities."); Laura K. Schulz, *A "Disacknowledgement" of Post-Secondary Student Free Speech – Brown v. Li and the Applicability of Hazelwood v. Kuhlmeier to the Post-Secondary Setting*, 47 ST. LOUIS L.J. 1185, 1199 (2003) ("[I]n applying *Hazelwood* to the high school setting, many courts have interpreted *Hazelwood* very expansively.").

[58] *See* J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, 1988 DUKE L.J. 706, 728 (1988) ("Although many university administrators may attempt to use *Kuhlmeier* as a green light for censorship in higher education, the courts will likely use *Kuhlmeier*'s footnote 7 to limit the case's impact to the high-school level.").

not be protected if it is harassing or discriminatory in nature.[59] The legal bases for regulations and policies at institutions of higher education that aim to deter peer-on-peer harassment and to punish those who engage in this undesirable conduct are Title IX of the Education Amendments of 1972[60] and Title VI of the Civil Rights Act of 1964,[61] federal laws which apply to all public universities in the United States.[62]

Title IX states, in pertinent part, that "[n]o 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."[63] The applicable section of Title VI states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[64] The DOE is the government body, which, among many other tasks, serves to ensure that public colleges and universities, as well as those institutions that receive federal funding, comply with the requirements of both Title IX and Title VI.[65]

The DOE delegates this particular responsibility to the Office for Civil Rights ("OCR").[66] The OCR has significant power and

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[59] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2006); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2000); *see Tinker*, 393 U.S. at 506; Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999) (holding that under Title IX, private damages action may lie against a public school board in cases of student-on-student harassment under limited circumstances).

[60] 20 U.S.C. § 1681(a).

[61] 42 U.S.C. § 2000d.

[62] *See* 20 U.S.C. § 1681(a); 42 U.S.C. § 2000d.

[63] 20 U.S.C. § 1681(a).

[64] 42 U.S.C. § 2000d.

[65] 20 U.S.C. § 1682 (2012); U.S. Dep't of Educ., Office for Civil Rights, Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance (Mar. 10, 1994), https://www2.ed.gov/about/offices/list/ocr/docs/race394.html [hereinafter DOE Investigative Guidance].

[66] *See, e.g.*, Memorandum of Understanding Between the U.S. Dep't of Educ., Office for Civil Rights, and the U.S. Dep't of Justice, Civil Rights

responsibility in ensuring compliance, including the power to investigate complaints of noncompliance with Title IX, Title VI, and other DOE regulations at public universities.[67] Furthermore, the OCR maintains the power to determine whether federal funding should be withdrawn from a particular university due to this noncompliance and the power to refer cases of noncompliance to the Department of Justice ("DOJ") for litigation.[68]

The DOE and the OCR, in order to provide guidance to educational institutions regarding federal harassment policy, publish reports and letters as they see fit,[69] often to clarify the standards and procedures that will guide both agencies when investigating and evaluating harassment claims under Title IX and Title VI.[70] In 1994,

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Division, (Apr. 29, 2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/04/28/ED_DOJ_MOU_TitleIX-04-29-2014.pdf (stating that the "OCR, led by its Assistant Secretary for Civil Rights, exercises all functions previously administered by or with respect to the Office for Civil Rights at the Department of Health, Education, and Welfare" and that "[t]his includes but is not limited to OCR authority to directly enforce Title IX against recipients of federal financial assistance from the Department of Education (ED) through complaint investigations and compliance review") ; 34 C.F.R. § 106.31 (2000) (discussing the prohibition of discrimination on the basis of sex in education programs or activities); 34 C.F.R. § 100.6 (2000) (discussing requirements of compliance of nondiscrimination in accordance to Title VI).

[67] Katie Jo Baumgardner, *Resisting Rulemaking: Challenging the Montana Settlement's Title IX Sexual Harassment Blueprint*, 89 NOTRE DAME L. REV. 1813, 1815 (2014); DOE Investigative Guidance, *supra* note 65; U.S. DEP'T OF EDUC., TITLE IX AND SEX DISCRIMINATION, http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last modified Apr. 29, 2015).

[68] Baumgardner, *supra* note 67, at 1815; *see* DOE Investigative Guidance, *supra* note 65.

[69] *See generally* U.S. DEP'T OF EDUC., SEX DISCRIMINATION: POLICY GUIDANCE, http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html (last visited Sept. 23, 2016) ("[M]aterials serve an important function: to notify schools and other recipients of federal funds of their legal obligations and the ways OCR enforces federal civil rights laws, helping them to comply with the law.") [hereinafter SEX DISCRIMINATION: POLICY GUIDANCE].

[70] *See, e.g.*, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (explaining, via letter from the OCR, schools' responsibilities to take immediate steps to end sexual harassment and violence and providing examples of ways

the DOE published one such report to "outline the procedures and analysis" used by the OCR when investigating claims of racial harassment under Title VI.[71] This report outlined that creating a racially hostile environment, conduct that is central to a Title VI violation,[72] will only be determined if the racial harassment is "severe, pervasive, or persistent."[73] The DOE stated that, "as with other forms of harassment," the standard for evaluating racial harassment is a reasonable person standard, but one that integrates the age, experience, and race of a student to their perceptions under similar circumstances.[74]

### *B. The Supreme Court's Role and the Introduction of the Davis Standard*

In 1999, an important development in antiharassment and antidiscrimination law occurred outside the confines of the legislature and the DOE.[75] The Supreme Court determined the outcome of *Davis v. Monroe County Board of Education*, where Davis brought suit against the Board on behalf of her fifth grade daughter LaShonda, asserting that the Board failed to prevent the

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schools can prevent sexual harassment and violence); Dear Colleague Letter, *supra* note 4 (asserting, via letter from the Assistant Secretary of the OCR, that "OCR's regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution" and that "the statutes that it enforces are intended to protect students from invidious discrimination, not to regulate the content of speech"); OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (Jan. 2001), http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [hereinafter REVISED SEXUAL HARASSMENT GUIDANCE] (issuing, by the OCR, a revised document to provide guidance to schools on how to recognize and respond to sexual harassment of students); DOE Investigative Guidance, *supra* note 65. These reports and letters are not formal law; however, in light of the OCR's ability to withhold federal funding and the DOJ's ability to conduct compliance reviews, institutions of higher education often treat this guidance as formal law for implementation purposes.

[71] DOE Investigative Guidance, *supra* note 65.

[72] *See* 42 U.S.C. § 2000d (2000).

[73] DOE Investigative Guidance, *supra* note 65.

[74] *Id.*

[75] Davis. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 643 (1999).

sexual harassment of LaShonda by another Monroe County student.[76] The Court, in holding that a public school could be liable for harassment claims that went unanswered by the school's administration under certain circumstances,[77] set forth a standard for peer-on-peer sexual harassment:

> [A] plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities.[78]

Stated differently: "a single comment or thoughtless remark by a student does not equal harassment."[79] The Court further emphasized that "harassment requires a pattern of *objectively* offensive behavior."[80] This standard is noticeably quite high and maintains a great deal of free speech protection. Within a couple of years of the Supreme Court's decision in *Davis*, the DOE published a report on sexual harassment with the purpose of guiding public schools on sexual harassment laws.[81] The report specifically stated that the DOE and OCR would adhere to the standard set forth by the *Davis* Court.[82]

In 2003, the OCR further clarified its understanding of the *Davis* standard in the form of a letter from the Assistant Secretary for Civil Rights.[83] In the letter, the Assistant Secretary wrote that in order for speech to be disciplined, the speech at issue would have to exceed "the mere expression of views, words, symbols, or thoughts that some person finds offensive," reaffirming the DOE's previous position that "speech must be 'objectively offensive' before it can be deemed actionable sexual harassment."[84] This letter also

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[76] *Id.* at 633–34.

[77] *Id.* at 633.

[78] *Id.* at 651.

[79] Lukianoff & Haidt, *supra* note 5 (citing *Davis*, 526 U.S. at 653).

[80] Lukianoff & Haidt, *supra* note 5 (emphasis added) (citing *Davis*, 526 U.S. at 650).

[81] REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 70.

[82] *Id.*

[83] Dear Colleague Letter, *supra* note 4.

[84] *Id.*; Lukianoff & Haidt, *supra* note 5.

explicitly discussed these standards as they interacted with the First Amendment, and stressed that the DOE and OCR's policies "are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution."[85] The letter further explained that "Title IX and Title VI are 'intended to protect students from invidious discrimination, not to regulate the content of speech,'" meaning that "the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment."[86] Until 2013, this 2003 letter constituted the DOE's most recent guidance regarding the standards of sexual harassment in school settings.[87]

However, the DOE and DOJ's 2013 findings letter following an investigation at the University of Montana caused widespread confusion regarding the appropriate standards for evaluating harassment on university campuses. In 2011, the University of Montana hired former Montana Supreme Court Justice Diane Barz to investigate reports surrounding the alleged sexual assault of two female students.[88] During the investigation, the University was notified of several other instances of "student-on-student sexual assault" that had occurred during the 2010–2011 school year.[89] Barz submitted a final report in January 2012, which determined that the University had a problem with sexual assault on campus that needed to be addressed.[90]

In May 2012, the DOJ began an "investigation of the University's handling of sexual assault and harassment involving

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[85] Dear Colleague Letter, *supra* note 4.

[86] Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J.C. & U.L. 385, 426 (2009) (quoting Dear Colleague Letter, *supra* note 4).

[87] *See, e.g.*, Dear Colleague Letter, *supra* note 4 (demonstrating a 2003 statement from DOE regarding the standards of sexual harassment in school settings); *Sexual Harassment: It's Not Academic*, U.S. DEP'T OF EDUC. (2008) http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.html (demonstrating a 2008 statement from DOE on sexual harassment in schools); Findings Letter, *supra* note 20 (demonstrating a 2013 statement from DOE regarding the standards of sexual harassment in school settings).

[88] Findings Letter, *supra* note 20, at 2.

[89] *Id.*

[90] *Id.* (citing Justice Diane G. Barz, *Investigation Report* (Jan. 31, 2012), http://www.umt.edu/president/docs/DBarzInvestigationReport.pdf).

students under Title VI and a compliance review under Title IX."[91] The DOE and DOJ sent the University their findings in May 2013.[92] Their thirty-one-page findings letter stated that "sexual harassment [policy] should be more broadly defined as 'any unwelcome conduct of a sexual nature' including 'verbal conduct.'"[93] Furthermore, the letter found that the University "improperly suggests that the conduct does not constitute sexual harassment unless it is objectively offensive . . . [w]hether conduct is objectively offensive . . . is not the standard to determine whether conduct was 'unwelcome conduct of a sexual nature' and therefore constitutes 'sexual harassment.'"[94] The letter explained that the "allegedly harassing expression need not even be offensive to an 'objectively reasonable person of the same gender in the same situation.'"[95] Conclusively, the findings letter explicitly stated that "the agreement [would] serve as a blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault."[96] The findings letter would prove to be perplexing and concerning for administrators across the country, due to its inconsistency with guidance that had been formerly established by the DOE.[97]

Since its release, the findings letter has greatly concerned free speech advocates,[98] as it drastically altered several aspects of the

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[91] *Id.* at 3.

[92] *See id.*

[93] *Federal Government Mandates Unconstitutional Speech Codes at Colleges and Universities Nationwide*, FIRE (May 10, 2013), https://www.thefire.org/federal-government-mandates-unconstitutional-speech-codes-at-colleges-and-universities-nationwide/ [hereinafter *Unconstitutional Speech Codes*]; Findings Letter, *supra* note 20, at 8.

[94] Findings Letter, *supra* note 20, at 9 (referencing the University of Montana's policies on sexual harassment).

[95] *Unconstitutional Speech Codes*, *supra* note 93.

[96] Findings Letter, *supra* note 20, at 1.

[97] *Compare* Findings Letter, *supra* note 20, at 8 (stating that "sexual harassment should be more broadly defined as 'any unwelcome conduct of a sexual nature'"), *with* Dear Colleague Letter, *supra* note 4 (asserting that harassment "must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive").

[98] *See Unconstitutional Speech Codes*, *supra* note 93; Majeed, *Colleges Label Protected Speech as Harassment*, *supra* note 19.

2003 letter.[99] The 2013 findings letter not only broadened the definition of sexual harassment to any "unwelcome conduct of a sexual nature," including verbal conduct, but also rejected the objective *Davis* standard reiterated in the 2003 letter.[100] These contradictions sparked the mass confusion, plaguing college and university administrators who are attempting to conform to and comply with the DOE's standards. The confusion has only continued since the findings letter, as universities are unsure whether the standards set forth in the findings letter are to be construed as current federal law.[101]

Immediately following the release of the findings letter, the DOE and DOJ suffered intense criticism from free speech advocates like the Foundation for Individual Rights in Education ("FIRE")[102], among other commentators.[103] However, the DOE and DOJ continued to defend the findings letter as a blueprint for colleges and universities.[104] Yet, in a letter to FIRE's President in November of 2013, OCR appears to have abandoned its stance that the 2013 findings letter would serve as a blueprint for other universities, as the letter expressed that "the agreement in the Montana case represents the resolution of that particular case, and not OCR or DOJ

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[99] *See* Findings Letter, *supra* note 20; Dear Colleague Letter, *supra* note 4.

[100] *See* Findings Letter, *supra* note 20; Dear Colleague Letter, *supra* note 4.

[101] *See* Creeley, *A Year Later*, *supra* note 19.

[102] "FIRE was founded in 1999 by University of Pennsylvania professor Alan Charles Kors and Boston civil liberties attorney Harvey Silverglate." *Mission*, FIRE, https://www.thefire.org/about-us/mission/ (last visited Sept. 23, 2016). The organization's mission is "to defend and sustain individual rights at America's colleges and universities," which "include[s] freedom of speech, legal equality, due process, religious liberty, and sanctity of conscience—the essential qualities of individual liberty and dignity." *Id.*

[103] *Facing National Criticism, Feds Attempt to Defends Controversial Campus Blueprint*, FIRE (May 30, 2013), https://www.thefire.org/facing-national-criticism-feds-attempt-to-defend-controversial-campus-blueprint/ [hereinafter *Facing National Criticism*]; Wendy Kaminer, *No Sex Talk Allowed*, ATLANTIC (May 15, 2013), http://www.theatlantic.com/sexes/archive/2013/05/no-sex-talk-allowed/275782/; *Unconstitutional Speech Codes*, *supra* note 93.

[104] *Facing National Criticism*, *supra* note 103.

policy."[105] In a press release, FIRE's President, Greg Lukianoff, asserted that "[c]olleges have been bewildered trying to reconcile their obligations under the First Amendment with the requirements of the 'blueprint' – essentially an impossible task. OCR and the DOJ now need to directly inform our nation's colleges and universities that they need no longer face that dilemma."[106]

Unfortunately, the OCR and the DOE have not issued any guidance to clarify their position on which standard should govern antiharassment and antidiscrimination policies on college campuses, putting administrations in the difficult position of merely making educated guesses as to which standards apply and attempting to comply accordingly. In discussing similar issues, prominent First Amendment scholar and law professor Eugene Volokh[107] stated that

> [a] law's 'uncertain meaning' requires people "to 'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked. Those . . . sensitive to the perils posed by . . . indefinite language, avoid the risk . . . only by restricting their conduct to that which is unquestionably safe."[108]

Volokh's comment is especially relevant to this problem, as the "uncertain meaning" of the findings letter generally leaves two options for colleges and universities. First, adhere to the standards set forth by the Supreme Court in *Davis*[109] and the DOE in their 2003 letter.[110] This potentially opens them to investigations, sanctions, and litigation initiated by the DOE, the OCR, or students claiming to have been unprotected by a lower-than-legal standard of

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[105] Letter from Department of Education Office for Civil Rights Assistant Secretary, U.S. DEP'T OF EDUC. (Nov. 14, 2013), https://www.thefire.org/letter-from-department-of-education-office-for-civil-rights-assistant-secretary-catherine-e-lhamon-to-fire/ [hereinafter Letter from DOE].

[106] Creeley, *A Year Later*, *supra* note 19.

[107] UCLA FACULTY PROFILES, EUGENE VOLOKH, https://law.ucla.edu/faculty/faculty-profiles/eugene-volokh/ (last visited Sept. 23, 2016).

[108] Volokh, *Harassment Law*, *supra* note 4, at 568–69 (citing Baggett v. Bullitt, 377 U.S. 360, 372 (1964)).

[109] See *supra* notes 75–78 and accompanying text for discussion of standard set forth in Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 651–52 (1999).

[110] See *supra* notes 79–81 and accompanying text for discussion of the First Amendment: Dear Colleague Letter.

harassment and discrimination. Second, adhere to the standards set forth in the findings letter.[111] This precaution will ensure that all potential viable standards are being met, while inevitably prohibiting and punishing speech and conduct that would otherwise be permissible under a lower standard and which is permissible under the Constitution. It seems that many colleges and universities, crippled by the lack of clarity and fear of litigation, are opting for the second of these two options, which is evident considering the "new policies [which] are being rolled out at campuses nationwide that contain the blueprint's broad definition of sexual harassment."[112]

## III. COLLEGES AND UNIVERSITIES FOLLOWING THE FINDINGS LETTER

### *A. University Reactions to the Findings Letter*

In June 2013, a month after the release of the University of Montana findings letter, the National Association of College and University Attorneys ("NACUA")[113] published a note discussing the potential impact of the findings letter on colleges and universities.[114] The authors of the note conceded that, while the OCR's letter and agreement with the University of Montana was "not legally binding on other higher education institutions," the letter did articulate the OCR and DOE's expectations with respect to sexual harassment policies on college campuses.[115] Accordingly, the attorneys who coauthored this note suggested that higher

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[111] See *supra* notes 79–93 and accompanying text for discussion of the DOE Findings Letter.

[112] Creeley, *A Year Later*, *supra* note 19.

[113] The purpose of the NACUA is "to enhance legal assistance to colleges and universities by educating attorneys and administrators as to the nature of campus legal issues." *About NACUA*, NACUA, http://www.nacua.org/about-nacua (last visited Sept. 23, 2016).

[114] AMANDA ABSHIRE ET AL., THE IMPACT OF THE MAY 2013 MONTANA "BLUEPRINT" ON THE SEXUAL HARASSMENT-RELATED OBLIGATIONS OF COLLEGES AND UNIVERSITIES, 11 NACUA NOTES 12 (June 14, 2013), https://ogc.byu.edu/NACUANotes/NACUANote-Montana.pdf.

[115] *Id.*

institutions consider revising their policies so that they would be consistent with the standards pronounced in the findings letter.[116]

Spurred by opinions like that of the NACUA and the language set forth by the findings letter, universities across the country began to revise existing antiharassment policies in favor of new policies that employ the exceedingly broad language developed in the findings letter.[117] In July 2014, Harvard University President Drew Faust announced a new sexual harassment and assault policy that would be in effect by the commencement of the Fall 2014 semester and would be adopted by each of Harvard's thirteen schools.[118] These new policy considerations, which have since been implemented,[119] were influenced, not only by OCR's investigations of Harvard and at least sixty other colleges,[120] but also by the

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[116] *Id.*

[117] *Compare* STUDENT DISCIPLINARY CHARTER AMENDMENT, U. PENN. (Feb. 1, 2015), http://www.upenn.edu/almanac/volumes/v61/n20/pdf/012715supplement.pdf (creating its Office of the Sexual Violence Investigative Officer to handle complaints in light of new OCR guidelines), *with Sexual Harassment Guide*, U. PENN., http://www.upenn.edu/affirm-action/introsh.html (last visited Sept. 23, 2016) (defining sexual harassment, broadly, as involving "unwelcome sexual advances, requests for sexual favors or verbal or physical conduct of a sexual nature"). *See, e.g.*, Letter from Russel Carey et al., Members of the Sexual Assault Task Force of Brown University, to Christina Paxson, President of Brown University (Dec. 16, 2014), http://www.brown.edu/web/documents/president/SATF-Interim-Report-December-2014.pdf (stating that the Sexual Assault Task Force was created in the context of "[e]merging and changing federal guidance" and "investigations by the [OCR]"); *Policy Prohibiting Sexual Harassment*, GA. SOUTHERN U. (July 20, 2015), http://president.georgiasouthern.edu/diversity/policy-and-procedures/sexual-harassment/ (revising the 2013 to 2014 policy's narrow definition of sexual harassment to define it broadly as "unwelcome conduct of a sexual nature," as suggested in the findings letter).

[118] Matt Rocheleau, *Harvard Overhauls Handling of Sexual Assault Reports*, BOSTON GLOBE (July 2, 2014), http://www.bostonglobe.com/metro/2014/07/02/harvard-overhaul-way-handles-sexual-assault-reports/f9vQgdGeHTeg3vByODQ7jO/story.html.

[119] *Sexual and Gender-Based Harassment Policy*, HARV. U., http://titleix.harvard.edu/policy (last visited Sept. 23, 2016); *see* OVERVIEW OF FAS POLICY ON SEXUAL AND GENDER-BASED HARASSMENT, HARVARD UNIV., http://www.fas.harvard.edu/files/fas/files/appendix_a1_overview_of_fas_policy.pdf?m=1422897368 (last visited Sept. 23, 2016) [hereinafter FAS POLICY].

[120] *See* Rocheleau, *supra* note 118 ("The university is revamping its policies as colleges face intense scrutiny on how they handle sexual assaults. Harvard's

findings letter, demonstrated by the letter's recognizable language adopted by the Harvard administration.[121] Harvard stated that it would "adopt a standard of 'unwelcome conduct of a sexual nature.'"[122] Under this new policy, "conduct is unwelcome if a person did not request or invite it and regarded the conduct as undesirable or offensive."[123] This standard is undoubtedly inspired by the findings letter. Despite the OCR's apparent abandonment of the findings letter as a blueprint for colleges and universities,[124] Harvard appears to have felt that it was better to err on the side of caution by essentially "adopting an overly broad definition of sexual harassment [which] serves as a preventive measure against lawsuits, negative media attention, and possibly even federal investigation."[125] This broad definition of sexual harassment remains the standard published on the Harvard University website today.[126]

Furthermore, it is evident that the language from the findings letter has influenced not only university sexual harassment policies, but also harassment policies in general. For example, the University of Missouri defines harassment as:

> unwelcome verbal or physical conduct, on the basis of actual or perceived membership in a protected class as defined in the University's anti-discrimination policies, that creates a hostile environment by being sufficiently severe or pervasive and objectively offensive that it interferes with, limits or denies the ability of an individual to participate in or benefit from educational programs or activities or employment access, benefits or opportunities.[127]

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undergraduate college and its law school are among more than 60 colleges across the country under investigation by the US Department of Education's Office for Civil Rights.").

[121] *See* FAS POLICY, *supra* note 119.

[122] Rocheleau, *supra* note 118.

[123] *Id.*

[124] *See* Letter from DOE, *supra* note 105, at 2.

[125] Creeley, *A Year Later*, *supra* note 19.

[126] FAS POLICY, *supra* note 119.

[127] *Standard of Conduct*, U. OF MO., http://mbook.missouri.edu/standard-of-conduct/ (last visited Sept. 23, 2016).

This definition uses the broad "unwelcome conduct" language from the findings letter as the standard for all harassment, as opposed to only sexual harassment as the findings letter did.[128] Universities and colleges seem to be willing to forego crucial protections for free speech if it keeps them out of courtrooms and free from controversy and criticism.

### *B. The University Atmosphere Post-Findings Letter*

Mere days after the 2013 findings letter was released, FIRE President Greg Lukianoff countered with an apprehensive and disturbed response in the Wall Street Journal.[129] Lukianoff expressed his fears that this "stunningly broad definition of sexual harassment" would result in an interference with an individual's right to freedom of speech.[130] To illustrate the potential scope of the far-reaching definition of sexual harassment propagated by the DOE and the OCR, Lukianoff offered some instances of behavior that would, in theory, violate the findings letter standard.[131] For example, "any request for dates or any flirtation that is not welcomed by the recipient of such a request or flirtation" could be deemed a violation under this new standard of sexual harassment.[132] Further, "a campus performance of 'The Vagina Monologues,' a presentation on safe sex practices, a debate about sexual morality, a discussion of gay marriage, or a classroom lecture on Vladimir Nabokov's *Lolita*," all of which could be considered "unwelcome" conduct with the potential to offend, could be punished by university administrators on campuses who strictly adhered to the findings letter definition of sexual harassment.[133] While these scenarios might appear to be mere hyperboles, they effectively illustrate the problematic breadth of the standard formulated by the DOE and the OCR in the findings letter.

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[128] Findings Letter, *supra* note 20, at 4; *accord Standard of Conduct*, *supra* note 127.

[129] Greg Lukianoff, *Feds to Students: You Can't Say That*, WALL STREET J. (May 16, 2013), http://www.wsj.com/articles/SB10001424127887323582904578485041304763554.

[130] *Id.*

[131] *Unconstitutional Speech Codes*, *supra* note 93.

[132] *Id.*

[133] *Id.*

This breadth gives university administrators vast discretion when it comes to punishing students for their behavior and speech and inevitably leads to punishment, or the unwarranted fear of punishment, for speech and expression that is protected under the First Amendment.

Racially offensive tweets have been punished with suspension,[134] a souvenir swastika posted on a school's bulletin board by a Jewish student was met with temporary eviction from school housing,[135] and a fraternity's ugly performance of a racist song was disciplined with expulsion.[136] The words and expressions surrounding these incidents are certainly offensive and repugnant; however, despite the shock and hurt that those who are subjected to these words and expressions might experience, and despite urges not to tolerate such expression, the expression is frankly protected under the First Amendment.[137]

The threats of punishment of protected speech do not end with the above cases. In the wake of intense racial tension and student protest at the University of Missouri in November 2015, the Missouri University Police Department sent a campus-wide email to warn against "hateful and hurtful speech."[138] The email

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[134] *See* Boyd, *supra* note 12.

[135] *Jewish Student Suspended*, *supra* note 14.

[136] Fernandez & Pérez-Peña, *supra* note 15.

[137] *See generally* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (discussing that while cross burning is reprehensible, it is still protected under the First Amendment). Below, this Note will discuss two important cases of First Amendment jurisprudence, *Virginia v. Black* and *Chaplinsky v. New Hampshire*. Both of these Supreme Court cases limit the protections of the First Amendment when the speech in question falls into the categories of "true threats" or "fighting words." *See generally* Virginia v. Black, 538 U.S. 343 (2003) (explaining that cross burnings done with intent to intimidate can be prohibited); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (discussing that punishing verbal acts which could provoke fighting is permissible). While the speech and conduct of the students described in the examples at the onset of this Note could arguably be considered true threats or fighting words, that speech would likely not meet the high standards of these First Amendment limitations.

[138] David A. Graham, *When Campus Hate-Speech Rules Go Further Than the Law*, ATLANTIC (Nov. 10, 2015), http://www.theatlantic.com/politics/archive/2015/11/hate-speech-on-campus/415200/; *accord AP News Guide: The Essential Information Regarding the Issues at the University of Missouri*, U.S. NEWS (Nov. 13, 2015),

encouraged individuals who witness incidents of hateful or harmful speech to contact the police immediately.[139] The author of the email concluded by noting that while hateful and/or hurtful speech is not a crime, "[the University of Missouri's] Office of Student Conduct can take disciplinary action."[140] "Harassment," generally, is defined in the University's Standard of Conduct as, "unwelcome verbal or physical conduct, on the basis of actual or perceived membership in a protected class as defined in the University's anti-discrimination policies"—a definition that undoubtedly encompasses hurtful or hateful speech.[141]

An overbroad harassment policy, like the one articulated by the University of Missouri, threatens the free speech rights of students of all races, backgrounds, and ethnicities. The overbreadth of such policies will not necessarily help to eradicate sexual violence, discrimination, or institutional racism from our nation's campuses. These policies might aid in silencing something as disturbing as a song beset with atrocious racial slurs,[142] which to many might seem appropriate and acceptable, despite its receiving constitutional protection. Yet, what if the "unwelcome" and subjectively offensive expression was a demonstration by students of color on a college campus meant to protest racial discrimination? Consider the "die-in" demonstrations[143] that occurred across college campuses in America following the death of unarmed teenager Michael Brown in Ferguson, Missouri after he was shot by a white police officer.[144]

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http://www.usnews.com/news/us/articles/2015/11/13/ap-news-guide-a-look-the-university-of-missouris-issues.

[139] Graham, *supra* note 138.

[140] *Id*. The Office of Student Conduct at the University of Missouri can in fact take disciplinary action, according to the university's "Standards of Conduct." *Standard of Conduct*, *supra* note 127.

[141] *Standard of Conduct*, *supra* note 127.

[142] *See* Fernandez & Pérez-Peña, *supra* note 15.

[143] Tyler Kingkade, *College Students Stage 'Die-In' Following Ferguson Decision at Several Campuses*, HUFFINGTON POST (Dec. 4, 2014), http://www.huffingtonpost.com/2014/12/02/college-students-die-in-ferguson_n_6257134.html.

[144] *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?_r=0; Kiera Blessing, *Harvard Students Stage 'Die-In' to Protest Ferguson, NYC Cases*, BOS. GLOBE (Dec. 10, 2014),

These demonstrations often involved students, dressed in all black, lying on the ground for a specified amount of time, representing the body of Michael Brown after he was shot.[145] One can imagine how, under a broad harassment policy, such demonstrations could be deemed expression and speech punishable by university administrations. This certainly should not be the type of speech and expression the federal government seeks to eliminate through the DOE's standards for antiharassment policies. Such a policy would be contrary to the important free speech values fundamental in this country.[146]

The challenge then, is to draft policies and legislation that effectively protect students exposed to harassment, while also protecting the free flow of ideas and expression that is highly desired on college campuses. In discussing the incidents at the University of Missouri, one journalist wrote, "Mizzou, like all universities, has a legitimate interest in fostering a campus climate where students feel safe and included. Yet Mizzou, like all universities, also has a legitimate interest in encouraging an open and robust discourse."[147] Similar to many universities across the country, "[t]he university has [not] yet found a good way to balance those interests."[148]

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https://www.bostonglobe.com/metro/2014/12/10/harvard-medical-school-students-stage-die-protest-ferguson-nyc-cases/WeW5pefmWzbTTpgJwVk1KJ/story.html; Chris Bowling, *UNL Students Stage 'Die-In' In Protest to New York, Ferguson Deaths*, DAILY NEBRASKAN (Dec. 10, 2014), http://www.dailynebraskan.com/news/unl-students-stage-die-in-in-protest-to-new-york/article_d0ea5f82-801a-11e4-b41a-63ffc7761c98.html; Kingkade, *supra* note 143.

[145] Kingkade, *supra* note 143.

[146] *See generally* Healy v. James, 408 U.S. 169 (1972) (stating that "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large"); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (stating that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").

[147] Graham, *supra* note 138.

[148] *Id.*

## IV. THE WEAKNESSES OF THE *DAVIS* STANDARD AND AN ALTERNATIVE SOLUTION

### *A. The* Davis *Standard and its Weaknesses*

Some of the greatest critics of the antiharassment standards that resulted from the findings letter are the strongest proponents of the *Davis* standard serving as the proper standard for peer-on-peer harassment in the context of education.[149] In *Davis v. Monroe Country Board of Education*, the Supreme Court established a standard for evaluating peer-on-peer sexual harassment claims[150] and held that "a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[151] This standard was endorsed by the DOE in 2001[152] and was again endorsed, as well as clarified, by the DOE in 2003.[153]

Those who recommend that the *Davis* standard be reinstated as the standard for sexual harassment in the context of education tend to believe that the definition of harassment set forth in *Davis* "strikes the right balance between prohibiting actual harassment and protecting the robust exchange of ideas . . . that higher education is uniquely suited to foster and sustain."[154] One supporter of the *Davis* standard believes that a college that adopts the *Davis* standard communicates to its students an important lesson that "[j]ust because you don't like some gender- or sex-related speech doesn't render it actionable as harassment."[155] The *Davis* standard is certainly protective of free speech and expression and demands a lot of plaintiffs seeking to bring forth a claim of sexual harassment. However, it is questionable whether this standard does enough to

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[149] Cohn, *supra* note 23; Lukianoff & Haidt, *supra* note 5.

[150] Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629 (1999).

[151] *Id.* at 651.

[152] *See* REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 70.

[153] Dear Colleague Letter, *supra* note 4.

[154] *See* Creeley, *A Year Later*, *supra* note 19.

[155] *Id.*

protect the victims of legitimate harassment at the hands of their peers on college and university campuses.

The *Davis* standard appears to be lacking in two critical ways: (1) the emphasis on pervasiveness detracts from legitimate harassment that may have been severe, but not systemic, systematic, or long-term; and (2) the term "objective" used to describe the standard does not account for the inherently subjective nature of harassment. The first deficiency in the *Davis* standard is its focus on pervasiveness. This element of the standard is highly protective of free speech and ensures that "a single comment or thoughtless remark by a student does not equal harassment."[156] Under this standard, however, one or two truly frightening sexually or racially charged incidents executed by one individual or a group against a peer would not be considered harassment.[157] It is not unreasonable for students to demand protection from such incidents and university administrators certainly aspire to protect their students from any such trauma. Yet, the *Davis* standard would not serve this purpose, as one or two incidents would not amount to pervasive conduct. Second, simply declaring that the *Davis* standard is an objective one does not adequately protect students from harassment due to the inherent subjectivity of racially and sexually charged comments and conduct. It is imperative that the standard be defined as a reasonable person standard that additionally integrates the age, experience, and race of a student to their perceptions under similar circumstances, as articulated by the DOE in explaining the standard for racial harassment in a 1994 guidance letter.[158] While some scholars and other interested parties are adamant that the *Davis* standard is the answer,[159] it is evident that the *Davis* standard alone is not at all sufficient.

### *B. The Solution:* Davis *"Plus"*

At the heart of the issues raised in this Note is an attempt to balance the legitimate interest of maintaining a free flow of ideas and expression on college campuses with the second, and equally

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[156] Lukianoff & Haidt, *supra* note 5.

[157] *See* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 651 (1999).

[158] DOE Investigative Guidance, *supra* note 65.

[159] Cohn, *supra* note 23; Lukianoff & Haidt, *supra* note 5.

important, legitimate interest of protecting students and maintaining a safe atmosphere to learn and grow. The *Davis* standard has provided a base for balancing these interests; however, it is a base that seems to tip slightly in favor of free speech at the detriment of protection for students. On the other hand, the standard pronounced in the findings letter tipped much too far in the opposite way, engulfing an immense amount of protected speech in its wake.[160] In seeking a standard that might better protect each of these significant interests, it is worthwhile to consider other areas of free speech law, outside of the context of institutions of higher education, in which free expression and protection from harm also intersect.

The most relevant areas of First Amendment jurisprudence that should be considered to solve this conundrum are the areas of true threats and fighting words. These areas of the law focus on incidents when speech and expression lose their First Amendment protection because they threaten the safety of those subjected to the speech or expression.[161] As defined by the Supreme Court in *Virginia v. Black*, true threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[162] The Court asserted that "[t]he speaker need not actually intend to carry out the threat" and stated that "a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur."[163]

Fighting words, another category of unprotected speech, were discussed by the Supreme Court in *Chaplinsky v. New Hampshire*.[164] The Court in *Chaplinsky* unanimously held that

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[160] *Unconstitutional Speech Codes*, *supra* note 93.

[161] *See generally* Virginia v. Black, 538 U.S. 343 (2003) (holding, in part, that a state may ban cross burning carried out with the intent to intimidate without violating the First Amendment); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (explaining that fighting words, or words that tend to incite an immediate breach of peace, are not subject to the protections of the First Amendment).

[162] *Virginia*, 538 U.S. at 359.

[163] *Id.* at 359–60 (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)).

[164] *See Chaplinsky*, 315 U.S. 568. Mr. Chaplinksy called a city marshal a "God-damned racketeer" and "a damned Fascist," while standing out on public

fighting words, "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace," are not protected under the First Amendment.[165] Decades after *Chaplinsky*, the Court sought to clarify some of the applications of the fighting words doctrine and held that "the reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies . . . [an] intolerable . . . *mode* of expressing . . . [that] idea."[166]

These doctrines emphasize that, although free speech exists as a general concept in the United States under the Constitution, words and expression cannot be used in a manner that is meant to intimidate, physically harm, or incite a violent reaction by the listener or onlooker.[167] The principles behind true threats and fighting words, while still the occasional subject of clarification and question,[168] have been accepted as law and are important to consider when reevaluating university antiharassment policies. These doctrines, if considered alongside the existing *Davis* standard, could aid in creating antiharassment policies that account for both pervasive harassment and isolated, but severe incidents that might have been overlooked under the *Davis* standard alone. Incorporating this body of law and its language into university antiharassment policies would help to ensure that the policies are both consistent with First Amendment law and maintain protection and safety for potential victims of harassment.

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streets, and was arrested and convicted under a state statute for violating a breach of the peace. *Id.* at 569.

[165] *Id.* at 572.

[166] *R.A.V.*, 505 U.S. at 393 (emphasis in original).

[167] *See Virginia*, 538 U.S. at 359; *R.A.V.*, 505 U.S. 377; *Chaplinsky*, 315 U.S. at 573.

[168] *See, e.g.*, Elonis v. United States, 135 S. Ct. 2001 (2015) (showing that the dissenting judge disagreed with the true threats principal); Gooding v. Wilson, 405 U.S. 518, 529–30 (1972) (finding that a Georgia statute, which prohibited the use of abusive language that tended to cause a breach of peace, was unconstitutionally overbroad and vague).

## V. A CALL FOR CLEARER IMPLEMENTATION OF DOE STANDARDS AND FINAL CONSIDERATIONS

### *A. Procedure for Implementing New Standards*

Regardless of which standards for antiharassment policies the DOE ultimately decides to support, it is crucial that the DOE and its specialized divisions, like the OCR, adopt a more efficient and less ambiguous way to implement their own policies than letters and informal documents. As previously noted, the findings letter expressed that it would serve as a "blueprint for colleges and universities" in protecting students from sexual harassment.[169] While the OCR eventually deemed the findings letter merely a resolution between the department and a particular university, as opposed to the OCR's policy,[170] it did so months after releasing the document and never released further guidance to what the existing policy was. Guided only by the advice of attorneys,[171] colleges and universities were left in the position of having to assess their existing policies and make educated guesses as to whether the DOE and the OCR would approve. This system is inappropriate and inefficient, especially when it is done so frequently.[172]

The DOE and the OCR use letters titled "Dear Colleague" Letters or Guidance Letters to clarify existing law and policy and to help universities and colleges better understand the DOE regulations.[173] Because these documents are produced and released for a myriad of reasons by several different departments,[174] one can understand why university administrators might be perplexed as to whether these letters are to be considered mere suggestions or legitimate law. Furthermore, as one professor anonymously declared following a "Dear Colleague" letter released by the OCR in 2011, input and involvement from colleges and universities is

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169 Findings Letter, *supra* note 20, at 1.

170 Letter from DOE, *supra* note 105, at 2.

171 *See* ABSHIRE ET AL., *supra* note 114, at 2.

172 *See* SEX DISCRIMINATION: POLICY GUIDANCE, *supra* note 69.

173 *Id.*

174 *Id.*

missing from the formulations of these documents.[175] This lack of involvement results in the bewilderment of institutions and a general lack of notice of changes in DOE policy. Policy changes that directly alter existing DOE and OCR policy, or which contradict case law, should be set forth in a formal document that is understood to signify a change in law and policy by all parties involved. Attempting to implement policy changes through settlement agreements, which is arguably what occurred with the 2013 findings letter, is an unacceptable method. If a settlement agreement or findings letter does in fact reflect a shift in policy that the DOE and OCR intend to follow, this change should be rearticulated in a formal document to avoid the confusion that occurred following the findings letter. The DOE must come forward and explain to universities and administrations in a straightforward manner which documents should be regarded as formal documents moving forward.

### *B. Final Considerations*

Without speech codes or policies prohibiting offensive speech, hateful speech may go unpunished on university and college campuses due to the First Amendment's free speech protections.[176] While this might not appear desirable upon first consideration, this should not be an objectionable prospect. Encouragement of free expression both promotes a society with diverse points of view[177] and aids in exposing bigotry.[178] John Stuart Mill, a prominent English philosopher who wrote extensively about social and political theory as well as theories of liberty,[179] ferociously supported free expression as a means to a more knowledgeable

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[175] *An Open Letter to OCR*, INSIDE HIGHER ED (Oct. 28, 2011), https://www.insidehighered.com/views/2011/10/28/essay-ocr-guidelines-sexual-assault-hurt-colleges-and-students.

[176] *See Hate Speech on Campus*, *supra* note 17.

[177] Keith N. Hylton, *Implications of Mill's Theory of Liberty for the Regulation of Hate Speech and Hate Crimes*, 3 U. CHI. L. SCH. ROUNDTABLE 35, 38 (1996).

[178] *Hate Speech on Campus*, *supra* note 17.

[179] *John Stuart Mill*, INTERNET ENCYCLOPEDIA OF PHIL., http://www.iep.utm.edu/milljs/ (last visited Sept. 23, 2016).

society.[180] In Mill's ideal society, competing truths and hypotheses could be expressed freely with the inevitability that they would be discussed by the masses.[181] Mill believed that "[i]f government restrain[ed] expression, we [would] hold on to inferior hypotheses sets out of ignorance."[182] By allowing college and university administrations to punish hateful or offensive speech, which is tremendously challenging to define, we run the risk of punishing or silencing speech that might otherwise be accepted by society or at the very least expand awareness of diverse viewpoints.

In addition to promoting a society with diverse viewpoints, acceptance of free speech also helps expose bigotry.[183] One critic of campus speech codes aimed at punishing bigoted speech aptly stated that "[v]erbal purity is not social change."[184] Supporters of this perspective assert that "[c]odes that punish bigoted speech treat only the symptom" and that "[t]he problem itself is bigotry."[185] The best alternative to speech codes is instead more speech, which can "counter bad attitudes and possibly change them."[186] Punishing offensive and hateful speech does not eliminate the types of thoughts behind the speech, but rather ensures that this speech occurs behind closed doors, where it cannot be criticized for its ignorance.

Universities and students are not powerless against offensive and hateful speech. For instance, the American Civil Liberties Union has suggested that "instead of opting for gestures that only appear to cure the disease, universities have to do the hard work of recruitment to increase faculty and student diversity; counseling to raise awareness about bigotry and its history, and changing curricula to institutionalize more inclusive approaches to all subject matter."[187]

Additionally, universities have the power to communicate with their students and faculty and to initiate conversations with their school community about potential harmful or hurtful speech. The following illustration of such communication, aside from it being

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[180] *See* Hylton, *supra* note 177, at 37.

[181] *Id.* at 37–38.

[182] *Id.* at 37.

[183] *Hate Speech on Campus*, *supra* note 17.

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id.*

the origin of controversy and intense racial debate at Yale University since October 2015,[188] displays the type of communication that universities should be engaging in with their students. Prior to October 31, 2015, the Intercultural Affairs Committee at Yale University sent an email to its students regarding offensive Halloween costumes.[189] The email expressed concerns about insensitive Halloween costumes donned in the past including "feathered headdresses, turbans, wearing 'war paint' or modifying skin tone or wearing blackface or redface."[190] The email expressly stated that "Yale is a community that values free expression as well as inclusivity"[191] and noted that "while students, undergraduate and graduate, definitely have a right to express themselves," the committee hoped that students would avoid wearing costumes that "disrespect, alienate or ridicule segments of [the] population based on race, nationality, religious belief or gender expression."[192] While this email certainly made clear that such expressions would be frowned upon on Halloween, nowhere did the email state that these expressions would not be tolerated or would be punished by the university.[193]

A faculty member and residence hall administrator responded to this email, supporting the students' rights to wear whatever they desired on Halloween, offensive or not.[194] The email questioned whether there was still room for a young person to be a little obnoxious or offensive on today's college campuses[195] and expressed concern that college campuses were "becoming places of

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[188] *See, e.g.*, Liam Stack, *Yale's Halloween Advice Stokes a Racially Charged Debate*, N.Y. TIMES (Nov. 8, 2015), http://www.nytimes.com/2015/11/09/nyregion/yale-culturally-insensitive-halloween-costumes-free-speech.html?_r=0 (discussing a dispute between Yale University's faculty and it's students in response to an email sent by the university's Intercultural Affairs Community regarding offensive Halloween costumes).

[189] Email from Intercultural Affairs Committee to Yale Students, FIRE (Oct. 27, 2015), https://www.thefire.org/email-from-intercultural-affairs/ [hereinafter Email to Yale Students].

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *See id.*

[194] Stack, *supra* note 188.

[195] *Id.*

censure and prohibition."[196] This email response ignited debates across Yale's campus and across the country.[197] The debate pitted free speech on college campuses[198] against the concerns of marginalized students who felt as though their concerns were taking a back seat to the right to be offensive.[199] The issues that this debate at Yale exposed are profound and will not dissolve in the near future. However, regardless of which side of the debate one falls, it is evident that the Yale administration succeeded in at least one respect, which was to communicate, as opposed to punish.[200] Proactively informing students and peers about potential sources of offense, maintaining open channels of communication and debate, and ultimately allowing students to express themselves freely, is, and will remain, one imperative approach for universities and colleges when seeking a balance between protecting free speech and protecting their students.

## CONCLUSION

Promoting and maintaining an appropriate balance between protecting free speech and expression and protecting student-body safety has proven a difficult task for colleges and universities. Difficulties in attaining said balance have only been exacerbated by inconsistencies in DOE antiharassment policy and poor communication between the DOE, its subordinate departments, and college and university administrators. While some observers support a reversion to former antiharassment policies and standards like the *Davis* standard, many students are rightly petitioning for higher and more protective standards for those affected by harassment and discrimination.

It is acceptable for the DOE to support a standard with a foundation in the *Davis* standard; however, it is essential that this

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196 *Id.*

197 *Id.*

198 *Id.*

199 *See, e.g.*, Ryan Wilson, *Open Letter to Associate Master Christakis*, DOWN MAG. (Oct. 31, 2015), http://downatyale.com/post.php?id=430 (showing a letter written by students to Associate Master Christakis discussing their concerns and disappointment in how Yale was dismissive of their concerns and feelings).

200 Email to Yale Students, *supra* note 189.

standard, which is highly protective of speech, be adjusted to accommodate student safety. An adjusted standard would embrace a reasonable person standard, but one that integrates the age, experience, and race of a student to their perceptions under similar circumstances,[201] and would include influences from other significant areas of First Amendment law, most notably true threats and fighting words. These modifications would extend protections against legitimate harassment claims, while still protecting the free speech of students. In addition to incorporating these adjustments into the standard for antiharassment and discrimination claims, the DOE must come forward with a clear method for communicating and implementing policy changes to avoid future confusion. Ultimately, colleges and universities must understand that despite some speech being offensive or hurtful, the First Amendment provides significant protections for speech and expression that are difficult to overcome. As Justice Holmes appositely proclaimed in illustrating his perceptions of free speech, "it is the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate."[202]

[201] DOE Investigative Guidance, *supra* note 65.

[202] United States v. Schwimmer, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting).