Assaultive Words and Constitutional Norms

Catherine J. Ross

On college campuses across the nation people have sought to silence words that wound. They strive to ban expression they blame for contributing to a "rape culture." Some students demand that colleges censor student speech that appears to denigrate individuals or groups. The question I tackle here is what—if anything—the Constitution permits authorities to do about assaultive student speech in the venues governed by the First Amendment.

Expression that may be regarded as assaultive is usually protected by the First Amendment—at least at public colleges and universities, which are units of the state. Protecting offensive speech from censorship also promotes higher education's norms, which is why most private institutions of higher learning have voluntarily bound themselves to free-speech principles.[1]

Campuses are rocked by racially and sexually offensive speech and counter speech. Offensive speech and counter speech, including demonstrations and calls for policies that shield the vulnerable and repercussions for offenders, are both protected by the Constitution. Yet some college administrations regulate this protected speech. Expression on both sides of a cultural and political divide brings to the fore a conflict that has been simmering in legal commentary for about two decades: the tension between the often competing demands of the First Amendment's express guarantee of free speech and the Fourteenth Amendment's implicit promise of dignity and equality. This clash between two fundamental principles seems to have been exacerbated recently by a renewed focus on identity politics both on campus and in national and international affairs.

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1. When I speak of the First Amendment on college campuses, I will not always distinguish between public institutions and private schools that have pledged to honor free speech. More than three-quarters of the nation's college students are enrolled in public community or four-year colleges and public universities (collectively, "colleges"). Where private colleges have undertaken to honor free speech, I have argued that First Amendment doctrine provides the best guidance as to what such a commitment means. Catherine J. Ross, *Common Sense about the Chilling of Campus Speech*, Cato Unbound (Jan. 14, 2016), https://www.cato-unbound.org/2016/01/14/catherine-j-ross/common-sense-about-chilling-campus-speech.

The First and Fourteenth Amendments bind only the government. Students on both sides of the controversy over assaultive speech avail themselves of free speech, and some (notably minorities and women) are also beneficiaries of the Fourteenth Amendment and statutes that promote the Fourteenth Amendment's anti-discriminatory aims. When students speak or act, however, they do so as private parties, free of constitutional constraints, though not necessarily of all legal accountability.

In discussing assaultive speech I focus on violent words through the lens of the First Amendment, which strictly limits the capacity of college administrators to regulate offensive expression or to accede to student demands that they do so. Unlike some intellectually provocative efforts to challenge or work around existing constitutional requirements, imagining a better kind of law,[2] I aim to contribute to this symposium by reminding those who come at the issues from other directions of the constraints the Speech Clause imposes on efforts to control what people say to one another, even on college campuses.

Section I briefly introduces the problem of derogatory expression. Section II addresses the reported diminution of concern about free expression among at least some college students. Section III reviews the centrality of the free exchange of ideas to higher education's unique mission: teaching and research to promote new understanding through critical thinking that tests existing orthodoxies. The section introduces three seminal reports on free expression in universities that—together with constitutional imperatives—provide the starting point for my analysis. In Section IV I turn to regulation of student speech embodied in campus speech codes, subjecting common provisions of such codes to First Amendment analysis, and discussing the constitutional impediments to bans on hate speech and harassment in any setting, including elementary and secondary schools, largely (though not exclusively) drawing on controversies about racial disparagement. Section V expressly addresses gendered verbal assaults and the conundrum that results as colleges confront federal demands that colleges control what students say to one another to avoid creating a hostile environment, even as administrators must respect students' expressive rights. In Section VI, I examine the implications of the fact that a college is more than a public space or workplace—it may also be a student's home; different First Amendment principles may affect the rights of listeners confronted with unwelcome speech in their homes, and of speakers expressing themselves in the privacy of their homes. Finally, Section VII proposes some solutions by analyzing what college administrators, faculty, and students can do within the confines of constitutional doctrine to temper the incidence of and harms caused by verbal assaults, closing with proposals directed at law schools.

2. *E.g.*, Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harvard C.R.-C.L. L. Rev. 133 (1982); Mari J. Matsuda, et al., Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment (1993).

I. Demeaning Expression

No one should entertain any doubt that words can wound. "Sticks and stones," the children's rhyme, is simply wrong: Words can hurt as much or more than sticks and stones, as asserted in the competing saying, "The pen is mightier than the sword." This much has been clear in scholarly work and case law for decades.[3] It has been apparent to sensitive humans for much longer.

Insults and derogatory comments addressed to groups or individuals can feel assaultive, and may even be intended as assaults. Targets and other listeners may justifiably perceive demeaning, derogatory expression as verbal assaults. As Justice Breyer observed, speech can be like an "assault, seriously harm[ing] a private individual."[4] The harms often linger.

I am deeply, personally aware of what name-calling means and what it can lead to. At the risk of implicating Godwin's Law, when my father was growing up in what is now Gdansk, Jews were thrown out of the public schools. Until he was sent abroad so that he could attend school himself, my father was tasked with escorting his younger brother to the newly established Jewish school as people threw rocks at them shouting "Jew" and less genteel pejoratives. My father, his parents, and his brother ultimately reached the U.S. in December 1940. When the Second World War ended they had lost some fifty close relatives to the Holocaust.

In the contemporary United States, racist expression on campuses drew national attention in the fall of 2015, beginning with demonstrations at the University of Missouri, Columbia, protesting the university's passivity in response to racist expression and conduct (including smearing feces to draw a swastika on university property). Demonstrations and resignations rippled across the nation's colleges. And the incidents—both the expression of racist sentiments and the demonstrations and demands for action they elicited—have not abated.

One week before the conference that gave rise to this symposium, a column titled "Slurs and Insults, Again" in the Chronicle of Higher Education listed events of the preceding week, a particularly active one in the arena of reported slurs: At the University of Missouri, "members of a fraternity allegedly shouted racial slurs and obscenities at two black students;" at the University of Michigan, fliers "urged white women not to date black men" and encouraged " 'Euro-Americans' to stop 'denying their heritage' "; students at the University of North Dakota posted photos of white women in blackface on Snapchat, captioned "Black Lives Matter"; and at the University of Mississippi, a Facebook post "appeared to advocate lynching."[5] Those were the incidents of racist expression by students captured in just one column about the "past

3. At least since Kenneth Clark's research on internalization of assaults on dignity based on race. *See* Delgado, *supra* note 2, at 137-38.

4. Snyder v. Phelps, 562 U.S. 443, 461 (2011) (Breyer, J., concurring).

5. Lawrence Biemiller, *What You Need to Know About the Past 7 Days*, Chron. Higher Educ. (Oct. 2, 2016), http://www.chronicle.com/article/What-You-Need-to-Know-About/237949.

7 days." But there was more. At East Tennessee State, a freshman tried to provoke Black Lives Matters demonstrators by taunting them; dressed in a gorilla suit, he waved bananas and ropes in their faces.[6]

Those were only the student speakers. That same week, University of Tennessee College of Law Professor Glenn Reynolds tweeted that drivers should run over protesters who had swarmed a highway in Charlotte, North Carolina, after police shot yet another black man (Reynolds later apologized).[7] Those attending the meeting of the National Association for College Admissions Counseling were roiled when the association's president said "all lives matter," in what he intended as a gesture of "sympathy and solidarity." "I wasn't aware of the code," he said. He didn't realize his words would be understood as a rejection of Black Lives Matter. In context, his goals should have been clear—he was discussing his dismay over the death of a black teenager shot by police.[8]

Since October 2016, when this symposium was held at Georgetown, public norms seem to have deteriorated further. Following the 2016 election, reports of hostile speech based on race and ethnicity, along with hate crimes, skyrocketed. Campuses serving students in every age group have been affected.[9] These unfolding developments make it even more imperative that campus officials comprehend the limitations the First Amendment imposes on their ability to silence derogatory speech.

II. Reported Student Devaluation of Free Expression

It seems that too often, too many contemporary college students have little comprehension of or devotion to free speech—a founding principle of liberty in all its dimensions. According to a 2015 Pew poll, forty percent of millennials believe society should prevent speech that offends minority groups.[10] A survey administered the same year by Yale's Buckley Center found that seventy-two

6. David Floyd, *ETSU Student in a Gorilla Mask Confronts Black Lives Matter Demonstrators*, East Tennessean (Sept. 28, 2016), http://easttennessean.com/2016/09/28/man-in-a-gorilla-mask-confronts-black-lives-matter-demonstrators-at-etsu/.

7. Katherine Mangan, *A Gorilla-Masked Student's Attempt to Provoke Is Met with Peace: At East Tennessee State, an Offensive Stunt Leads to a Larger Conversation about Race Relations*, Chron. Higher Educ. (Oct. 3, 2016), http://www.chronicle.com/article/A-Gorilla-Masked-Student-s/237964.

8. Eric Hoover, *How 3 Words Roiled an Education Conference*, Chron. Higher Educ. (Sept. 26, 2016), http://www.chronicle.com/article/How-3-Words-Roiled-an/237898.

9. *See* Caitlin Dickerson & Stephanie Saul, *Hostile Acts Against Minorities, Often Invoking Trump, Erupt Across U.S.*, N.Y. Times, Nov. 11, 2016 at P12 (discussing incidents and responses on college campuses); Maureen B. Costello, *The Trump Effect: The Impact of the 2016 Presidential Election on our Nation's Schools*, Southern Poverty L. Ctr. (Nov. 28, 2016), https://www.splcenter.org/20161128/trump-effect-impact-2016-presidential-election-our-nations-schools (reporting incidents involving "slurs and derogatory language, and disturbing incidents involving swastikas, Nazi salutes and Confederate flags" in grades K-12).

10. *See* Jacob Poushter, *40% of Millennials OK with Limiting Speech Offensive to Minorities*, Pew Res. Ctr. (Nov. 20, 2015), http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/.

percent of college students in the U.S. support disciplinary action against "any student or faculty member on campus who uses language that is considered racist, sexist, homophobic or otherwise offensive."[11]

Reports of diminished student concern about freedom of speech are a startling turnabout. In the 1960s students feared that administrators would silence their speech as students pressed for more personal liberty on every front—liberty to challenge authority, engage in political protest on campus, disrupt classes and ROTC; and freedom to enjoy sex, drugs and rock 'n' roll—a battle they largely won.

As recently as the spring of 2015, when historian Joan Wallace Scott addressed the Association of American University Professors on the topic of "The New Thought Police," censorious college administrators seemed to pose the primary risk to campus expression. Scott focused on deans and college presidents who silence faculty members under the guise of enforcing "civility."[12] (There is much to be said about efforts by administrators, state legislators and officials, and even peers who intimidate or penalize faculty members for their expression, but I will leave that rich topic to another day.)

Today, as First Amendment scholar Geoffrey Stone summarized it, we find ourselves "in an era of political correctness in which students themselves demand censorship, and colleges and universities, afraid to offend their students, too often surrender academic freedom to charges of offense."[13] The latest iteration of student activists demands that college administrators silence their peers and, sometimes, their professors. Many, perhaps most, of the controversies on college campuses from 2015 until now have centered on or implicated free speech. As First Amendment scholar and Columbia University President Lee Bollinger explained recent events, turmoil has surrounded "the speech of fellow students, of residence hall administrators, of faculty, of institutions through the naming of buildings and the display of pictures, and of outside people invited to campus." "Sometimes," he said, "there were calls for bans on speech and official punishments."[14]

Responding to student concerns, diversity and sensitivity officers are advising students and faculty alike to use words cautiously, and to avoid the newly minted category of speech known as "micro-aggressions." Don't say

11. Greg Lukianoff, *Campus Free Speech Has Been in Trouble for a Long Time*, Cato Unbound (Jan. 4, 2016), https://www.cato-unbound.org/2016/01/04/greg-lukianoff/campus-free-speech-has-been-trouble-long-time (Yale's William F. Buckley, Jr. program survey). *See also* Poushter, *supra* note 10.

12. Joan W. Scott, *The New Thought Police: Why are Campus Administrators Invoking Civility to Silence Critical Speech?*, Nation, May 4, 2015, at 13.

13. U. Chicago L. Sch., Prof. Geoffrey Stone Discusses Free Speech on Campus at the American Law Institute (June 6, 2016), http://www.law.uchicago.edu/news/prof-geoffrey-stone-discusses-free-speech-campus-american-law-institute.

14. Lee C. Bollinger, *Commentary: The No-Censorship Approach to Life*, Chron. Higher Educ. (Sept. 18, 2016), http://www.chronicle.com/article/The-No-Censorship-Approach-to/237807.

"you guys" if women are in the group. Don't ask where someone grew up.[15] Use the correct pronoun, but you might get in trouble if you ask someone which pronoun best captures his/her/their/ze identity, as one faculty member did. While rejecting the notion that rampant political correctness has created a "pervasive crisis" of free speech on campus, a nuanced 2016 PEN America report warned that a pattern of students suppressing the expression of their peers "is at risk of escalating absent concerted action."[16]

Recently, students have been in the vanguard, demanding that offensive, speech be silenced. Students ask to be protected from hurtful words, sentiments, even gestures, and inadvertent facial clues or rolling eyes that communicate dismissal.[17] They seek the coercive power of authority to enforce laudable social norms—respect, dignity, and equality regardless of race, ethnicity, gender, gender identity, and so forth. Meritorious as these proclaimed goals are, the rules and penalties some students lobby for would suppress the expressive rights of others including students, faculty, and invited guests, a particularly disturbing prospect at an institution devoted to the academic enterprise.

III. The University's Unique Mission

In the past half-century, private universities produced three foundational reports on the role of free expression in the academy. These documents, which explain why free expression matters so much in higher education, set out some of the principles beyond the law that inform my discussion. All of them are infused with the goals of classical liberal arts education, including teaching students how to think critically.

A. Yale's Woodward Report

In 1974, following a widely noted incident in which hecklers prevented a scheduled debate featuring an outside speaker known for his view that blacks were genetically inferior to whites, Yale President Kingman Brewster appointed C. Vann Woodward, a historian of the American South well-versed in the meaning of protest, to chair an inquiry into the "measures deemed necessary to maintain" adherence to principles of free expression on campus. The resulting Woodward Report lamented the perilous condition of important

15. Stephanie Saul, *Campuses Cautiously Train Freshmen Against Subtle Insults*, N.Y. Times (Sept. 6, 2016), https://www.nytimes.com/2016/09/07/us/campuses-cautiously-train-freshmen-against-subtle-insults.html.

16. PEN America, And Campus for All: Diversity, Inclusion, and Freedom of Speech at U.S. Universities 62 (Oct. 17, 2016), https://pen.org/wp-content/uploads/2017/05/PEN_campus_report_05.19.2017.pdf.

17. *See* Robert Shibley, *Free Speech: Not Just a 'Diversion' from Campus Protests*, FIRE (Dec. 4, 2015), https://www.thefire.org/free-speech-not-just-a-diversion-from-campus-protests (discussing protesters' demands for speech codes penalizing "unintentional" behaviors, including "gestures" at Emory and other colleges); Nina Burleigh, *The Battle Against 'Hate Speech' on College Campuses Gives Rise to a Generation that Hates Speech*, Newsweek (June 3, 2016) (numerous campus restrictions on jokes, gestures), http://www.newsweek.com/2016/06/03/college-campus-free-speech-thought-police-463536.html.

values on campus—"free expression, peaceful dissent, mutual respect and tolerance"—but insisted that free speech trumps all other priorities, including most centrally the "important" value of "a decent respect for others."[18]

The Woodward Report rests on the premise that intellectual freedom and "growth and discovery" require "the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable." That belief, the committee wrote, is "embodied in American constitutional doctrine but not widely shared outside the academic world."[19]

A university, the committee explained, is distinguished by its "central purpose"—the "discovery and dissemination of basic knowledge with teaching." To that end, the report posited in words that still resonate today, the university can never let other "important values," *including* "friendship, solidarity, harmony, civility, or mutual respect," take precedence over its commitment to unfettered intellectual inquiry. The report highlighted the university's commitment to protecting speakers whose views contradict majority opinion. When tough choices need to be made, "It may sometimes be necessary in a university for civility and mutual respect to be superseded by the need to guarantee free expression."[20] Joining a university community constitutes an undertaking to live by that principle.

B. The University of Chicago

It seems fitting that two of the leading examinations of free speech and universities emanate from the University of Chicago, often regarded as the nation's first modern research university.

In 1967, at the height of a wave of student activism aimed at achieving civil rights for African-Americans, ending the war in Vietnam, and supporting a burgeoning feminist movement, the University of Chicago appointed law professor and First Amendment scholar Harry Kalven to chair a committee charged with analyzing "the University's role in political and social action."[21]

The Kalven Committee's starting place was the same as the premise of the Woodward Report: The "distinctive mission" of a university, distinguishing it from all other institutions, is promoting knowledge. Universities offer "challenges to social values, policies, practices, and institutions" through the instrumentality of "the individual faculty member or the individual student." Serious intellectual inquiry requires that the university "be hospitable to, and

18. Yale College, Report of the Committee on Freedom of Expression at Yale (Dec. 23, 1974) [hereinafter Woodward Report] at §§ 1, 2, http://yalecollege.yale.edu/deans-office/policies-reports/report-committee-freedom-expression-yale.

19. *Id.*

20. *Id.*

21. U. of Chicago, Kalven Committee, Report on the University's Role in Political and Social Action (Nov. 11, 1967) [hereinafter Kalven Report], https://provost.uchicago.edu/reports/report-universitys-role-political-and-social-action.

encourage the widest diversity of views within its own community," in order to serve its unique communal mission of "teaching and research."

The requirement that universities encourage challenges to received wisdoms precludes a university from taking a stance on the "pressing issues of the day." To do so, the Kalven Report emphasized, would "endanger[]" the very conditions that allow "that full freedom of dissent on which [the university] thrives." A university, the report concluded: "cannot insist that all its members favor a given view of social policy, . . . however compelling and appealing [that view] may be . . . . It must respect . . . a diversity of viewpoints."[22]

A new generation revisited these issues in 2014 when the President of the University of Chicago appointed Geoffrey Stone to chair another committee, charged with "articulat[ing] the University's overarching commitment to free, robust, and uninhibited debate."[23]

The Stone Report reiterated familiar principles: "It is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive." Rather, individuals on the campus must assess one another's expression and, the Stone Report urged, respond where needed, "not by seeking to suppress speech, but by openly and vigorously contesting the ideas they oppose."[24]

This is classic free-speech doctrine, without exception or gloss, applied to the college campus: The best response to bad speech is more and better speech. And it provides the needed context for understanding a much-discussed letter a dean at Chicago wrote to admitted undergraduates who were about to matriculate in 2016. It warned that upon enrolling they should anticipate "challenge" and "even discomfort."[25]

C. Reactions

Some commentators reject the basic premises of these three seminal reports. Responding to campus brouhahas, Jelani Cobb, writing in *The New Yorker*, accused defenders of free speech of using a diversionary tactic, and of seizing a "default for avoiding discussion of racism."[26] A professor of history and African-American studies at Georgetown argued that free speech was hardly

22. *Id.*

23. Geoffrey R. Stone et al., Free Speech on Campus: A Report From the University Faculty Committee, (Jan. 6, 2015) [hereinafter Stone Report], http://www.law.uchicago.edu/news/free-speech-campus-report-university-faculty-committee.

24. *Id.* at 2.

25. John Ellison, Dean of Students in The College, The Chicago Maroon (@ChicagoMaroon), Twitter (Aug. 24, 2016, 2:31 PM), https://twitter.com/ChicagoMaroon/status/768561465183862785/photo/1?ref_src=twsrc%5Etfw.

26. Jelani Cobb, *Race and the Free-Speech Diversion*, New Yorker (Nov. 10, 2015), http://www.newyorker.com/news/news-desk/race-and-the-free-speech-diversion.

sacrosanct: "Each campus has to decide if regulating free speech is the best choice for its own community."[27]

Most dramatically, perhaps, in 2016 Morton Schapiro, the President of Northwestern University, defending "safe spaces," dismissed First Amendment concerns as those of "lunatics" and "idiots."[28] Those objections cannot be permitted to gain traction. The jurisprudence is clear. First Amendment doctrine has never entertained the prospect that other worthy values, including equality and dignity, could outweigh freedom of expression.[29]

In short, as the seminal reports underscore, free expression in college is not just a matter of law or luxury. The academy's central mission is to promote critical thinking in teaching, learning and research: grappling with unsettling views and information, suspending beliefs, challenging long-held truths, and seeking to refine and articulate new, more complex understandings. This requires students (and faculty) to challenge and be challenged. One cannot say it too often: "A good university, like Socrates, will be upsetting."[30]

IV. Campus Speech Codes and the First Amendment

Despite the centrality of free speech to the mission of higher education, common provisions of college codes aim to suppress offensive expression, or, more accurately, expression that might offend an identifiable group. Many of these regulations aim to stamp out expression that the First Amendment protects—the only expression I am concerned with here.

As many readers of this article know, some categories of expression are excluded from the First Amendment's protections. The state does not need to tolerate such unprotected expression anywhere, including on college campuses. Among the limited categories of unprotected speech the most important for our purposes here are "true threats," "incitement," and "fighting words."

A college does not violate speech rights when, for instance, it suspends and bars from campus a student who sent threatening messages to a peer, including

27. Marcia Chatelain, *The Free Speech Straw Man*, Dissent Magazine (Apr. 26, 2016), https://www.dissentmagazine.org/online_articles/free-speech-campus-straw-man.

28. Peter Kotecki, *Schapiro to Freshmen: People Criticizing Safe Spaces 'Drives Me Nuts,'* Daily Northwestern (Sept. 21, 2016), https://dailynorthwestern.com/2016/09/21/campus/schapiro-to-freshmen-people-criticizing-safe-spaces-drives-me-nuts/.

29. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) and discussion *infra* pp. 18, 21-22. *See also* Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986) (non-obscene speech objectifying and demeaning women is protected).

30. Kalven Report, *supra* note 21.

"I'll kill you nigger."[31] That statement meets the demanding definition of a true threat.[32]

The First Amendment also distinguishes between expression and conduct, though that line is often murky. Conduct that violates constitutionally permissible rules and statutes may always be punished without violating a speaker's rights. Some, perhaps many, incidents involve a mix of conduct and expression.[33]

For example, when a student at Ole Miss and a companion hung a noose on the campus statue of James Meredith, the African-American who integrated the campus in 1962, they engaged in illegal conduct as well as symbolic expression. Under federal law, they conducted a "symbolic lynching," calculated to threaten and intimidate black students; they were prosecuted under federal civil rights law and ultimately pled guilty to a misdemeanor offense.[34]

A. Hate speech and harassment.

The targets of regulations on speech by college students are variously described as hate speech, harassment, and speech that creates a hostile environment, which are legally distinct categories of expression.

Two justifications are commonly offered for restricting certain controversial but constitutionally protected campus speech. First, these limitations on expression are motivated by the best sort of paternalism. The drafters seek to protect the intended targets, members of vulnerable groups and individuals, from assaults on their dignity. Second, the proponents of regulation emphasize the risk that hateful expression will encourage, justify or support violent acts aimed at the targets of hostile speech, a concrete harm that Jeremy Waldron and others have emphasized is substantiated by history.[35]

Indeed, the lessons of history have led most other Western democracies to ban hate speech. But those countries don't have our First Amendment.

In the United States, the First Amendment erects a barrier to government regulation until the hate-filled expression rises to the level of incitement to

31. Nadia Dreid, *U. of Alabama Student Is 'Removed from Campus' After Racist Threat*, Chron. Higher Educ. (Oct. 5, 2016), http://www.chronicle.com/blogs/ticker/u-of-alabama-student-is-removed-from-campus-after-racist-threat/114940.

32. To qualify as a true threat, the words must "communicate a serious . . . intent to commit an act of unlawful violence to a particular individual or group of individuals." Virginia v. Black, 538 U.S. 343 (2003). The circuits are split over whether true threats should be analyzed under an objective or subjective standard in order to determine whether the statement conveys a threat of injury. Elonis v. United States, 135 S. Ct. 2001 (2015).

33. The nuances and difficulties of distinguishing the nonexpressive parts of conduct from expressive acts are beyond the scope of this article.

34. Susan Svrluga, *Former Ole Miss Student Pleads Guilty to Hanging Noose Around Statue Honoring the First Black Student*, Wash Post (Mar. 24, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/03/24/former-ole-miss-student-pleads-guilty-to-hanging-noose-around-statue-honoring-the-first-black-student/?utm_term=.f81461b35b4c.

35. Jeremy Waldron, The Harm in Hate Speech (2012).

criminal activity, a standard almost impossible to meet. Justice Kagan, while she was a law professor, concluded that an "exceedingly narrow speech code" aimed at discriminatory harassment, including racist hate speech, might satisfy what she called "a reasonable system of First Amendment law," but would not withstand scrutiny under our speech doctrine.[36]

In *R.A.V. v. St. Paul* the Supreme Court eliminated any uncertainty about whether the Speech Clause protects racist speech: it does. *R.A.V.* overturned a municipal statute criminalizing hate speech. The Court held that the law violated the Speech Clause by singling out for prohibition speech that would "arouse anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender." The statute specifically mentioned Nazi swastikas and cross-burning as the kind of expression the city wished to inhibit.[37]

The statute permitted positive references to the listed characteristics, the Court concluded, but deprived *opponents* of "tolerance and equality" of tools for expressing their views. The Court held that St. Paul violated speech rights by selecting certain viewpoints for opprobrium and criminal penalty—that is, biases against selected groups, including those at the heart of the Fourteenth Amendment. Moreover, the Court stated, the municipality had "sufficient means at its disposal to prevent such behavior" (the "reprehensible" *conduct* of "burning a cross in someone's front yard") without imposing the majority's views about "group hatred" on those who disagreed, no matter how "benighted" their views.[38]

Commentators have criticized *R.A.V.*, but it is very difficult to distinguish the goals of St. Paul's ordinance from those that underlie campus anti-harassment codes. To the extent that campus speech codes reach a much broader swath of expression than the ordinance at issue in St. Paul, by banning micro-aggressions, debates about affirmative action and so forth,[39] the St. Paul statute stood on much firmer First Amendment ground than the prototypical campus code.

Many people question whether rude epithets, crude jokes, and disparaging statements are the kind of expression that merits First Amendment protection. The Supreme Court has long held the Constitution protects the right to speak "foolishly and without moderation."[40] You might maintain that racist, misogynist and other vile speech makes no contribution at all to the exchange of ideas—but the Speech Clause protects even so-called low-worth expression, in large part because no public authority can be trusted to distinguish valuable

36. Elena Kagan, *When a Speech Code Is a Speech Code: The Stanford Policy and the Theory of Incidental Restraints*, 29 U.C. Davis L. Rev. 957 (1996).

37. R.A.V., 505 U.S. at 377.

38. *Id.* at 396 (emphasis added).

39. Nina Burleigh, *The Battle Against 'Hate Speech' on College Campuses Gives Rise to a Generation that Hates Speech*, Newsweek, May 26, 2016.

40. Cohen v. California, 403 U.S. 15, 26 (1971) (quoting Baumgartner v. United States, 322 U.S. 665 (1944)).

from worthless expression.[41] The government cannot ban hateful expression, no matter how hurtful.

Indeed, in *Snyder v. Phelps*, the Supreme Court held that deeply wounding personal abuse is even immune to civil actions by those it targets. The Court recognized the harms such expression causes: "Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain." But, considering the Westboro Baptist Church's provocative picket signs near a military funeral, the Chief Justice continued, "On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[42] Those expressing racist, misogynist, anti-Semitic, anti-immigrant or other views widely regarded as vile," the Court cautioned, may argue that their words address matters "of political, social, or other concern to the community."[43] Respecting the rights of such speakers is, the Chief Justice wrote, the only way to "provide adequate 'breathing space' to the freedoms protected by the First Amendment."[44]

In 2017, as this article was going to press, the Supreme Court forcefully reiterated the principle yet again in *Matal v. Tam*, a case involving the same kind of racially disparaging content that has provoked so much campus controversy.[45] Tam, an Asian-American musician, had sought to trademark the name of his band, THE SLANTS, a "derogatory term", the Court explained, "for persons of Asian descent;" Tam adopted the name to strip the slur of "its denigrating force" and "reclaim" it.[46] The U.S. Patent Office refused to grant trademark registration based on a provision of the federal trademark statute (the Lanham Act) that required it to deny registration to disparaging marks.[47]

41. *Id.* at 25 ("governmental officials cannot make principled distinctions in this area").

42. Snyder v. Phelps, 562 U.S. 443, 460-61 (2011) (picket signs included "Thank God for IEDs," "Thank God for Dead Soldiers," and "God Hates Fags").

43. *Id.* at 444.

44. *Id.* at 458 (citations omitted).

45. Matal v. Tam, 137 S. Ct. 1744 (2017), *affirming* In re Tam, 808 F.3d 1321, 1328 (Fed. Cir. 2015). Other purported slurs the PTO refused to register include Redskins, The Christian Prostitute, and Mormon Whiskey; the PTO registered marks for Mormon Savings, Dykes on Bikes, and Squaw Valley (a ski resort). *See* In re Tam, 808 F.3d at 1329-37. The Tam decision led civil litigants to abandon efforts to block a National Football League team's use of the name Redskins, ending a dispute that began in 1972. Ian Shapira and Ann E. Marimow, Washington Redskins win trademark fight over the team's name, Wash. Post (June 29, 2017), https://www.washingtonpost.com/local/public-safety/2017/06/29/a26f52f0-5cf6-11e7-9fc6-c7ef4bc58d13_story.html?utm_term=.9c9cf102d6d9.

46. *Matal*, 137 S. Ct. at 1750.

47. 15 U.S.C. § 1052(a) (Section 2(a) of the Lanham Act). In re Lebanese Arak Corp., 94 U.S.P.Q. 2d 1215, 1217 (T.T. A. B. 2010) (§ 2(a) bars marks that "may be disparaging to a substantial composite of the referenced group.").

Tam pursued his claim in court, and the Federal Circuit sitting *en banc* found that the statute's disparagement clause violated the First Amendment.[48]

The Supreme Court affirmed, holding that the statute's disparagement clause violated the Speech Clause because, "It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."[49] "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground," Justice Alito wrote, "is hateful, but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought we hate.' "[50]

The Lanham Act's definition of disparagement depended in large part on whether a substantial portion of the referenced vulnerable group, " 'would find the proposed mark . . . to be disparaging in the context of contemporary attitudes.' "[51] This, the Court held, was nothing less than viewpoint discrimination that violated the rights of private speakers.[52] Although the statute "evenhandedly prohibits disparagement of all groups," Justice Alito wrote, and "applies equally" to "both sides of every issue," it was doomed because: "Giving offense is a viewpoint."[53]

Outside the trademark context, returning to speech between everyday people (including on college campuses), offensive speech about race, gender or ethnicity might be treated as harassment, but only if it meets the legal definition of harassment under federal or state law. Most civil and criminal anti-harassment laws limit their reach by requiring that harassing speech must be repeated, not a one-off, and must be directed at a specific individual in a pervasive or severe way. If offensive speech on college campuses satisfies the state's definition of harassment, the school may refer the speaker to law enforcement for prosecution or assist the target in filing a civil lawsuit seeking a restraining order and/or damages.

B. Student speech rights in elementary and secondary schools

Speech that appears to, or intends to, disparage racial or other groups, or that harasses, or offends in other ways, is constitutionally protected even when the speakers and targets are much younger: public school students in grades

48. *In re Tam*, 808 F.3d at 1321.

49. *Matal,* 137 S. Ct at 1751.

50. *Id*. at 1764 (Alito, J.) (*quoting* United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J.).

51. *Id*. at 1754 (quoting the Trademark Manual of Examining Procedure (Apr. 2017)).

52. *Id*. at 1749, 1763 (Alito, J.), Opinion of Kennedy, J. (concurring) at 1750, 1765 (viewpoint discrimination disposes of the issues).

53. *Id*. at 1763 (Alito, J.) (listing numerous cases standing for the proposition that speech "'may not be prohibited merely because the ideas are themselves offensive to some'" listeners). The Court concluded, without determining what standard of review applied to infringements of expression in the context of trademarks, that the disparagement clause did not survive the intermediate review applicable to commercial speech. *Id*. at 1763-64 (Alito, J.)

K-12. In *Saxe v. State College Area School District*, decided in 2001, the Third Circuit overturned a high school "anti-harassment" code that was indistinguishable from a standard college speech code. The goal was laudable, the court said, and familiar to those demanding respect on college campuses: to "provid[e] all students with a safe, secure, and nurturing school environment." To that end, the rules outlawed "verbal or physical conduct based on . . . actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, . . . which has the purpose or effect of . . . creating an intimidating, hostile or offensive environment."[54]

Writing the opinion in *Saxe* while he sat on the Third Circuit, Justice Alito emphatically rejected the proposition that harassing speech can be silenced based on its content, viewpoint, or impact. The code could not survive First Amendment analysis, even the special, easier-to-satisfy version applicable to secondary schools (discussed below). The code, Justice Alito explained, had no boundaries: It "could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which offends someone."[55]

The court tackled the dilemma directly: There is a "very real tension between anti-harassment laws and the Constitution's guarantee of freedom of speech." Justice Alito underscored, "There is no categorical 'harassment exception' to the First Amendment's free speech clause." Years before he authored the Court's decision in *Matal v. Tam*, Justice Alito explained that "'Harassing' or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections."[56]

Other lower courts agreed. Recognizing that insults wound, the Seventh Circuit held that a high school speech code offends the First Amendment when it infringes on slogans appearing to disparage LGBTs. Even in a high school, where most students are minors, the targets of disparagement have no legal right to be protected from hurt feelings, or from "criticism of their beliefs or for that matter their way of life" at the hands of their peers.[57]

Judge Richard Posner initially entertained the view that the words "Be Happy, Not Gay," if found to be disparaging, could be censored because they had the potential to profoundly undermine the education of LGBT students. Ultimately, however, he authored the court's opinion holding that the First Amendment protects disparaging T-shirts, presumably including those bearing two more direct hypothetical put-downs he considered

54. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 202 (3d Cir. 2001).

55. *Saxe*, 240 F.3d at 217. The plaintiffs were religious Christians who alleged their school's rules prevented them from speaking out against homosexuality as they believed their religion required. College students may also argue that their religious beliefs require them to speak out about certain practices.

56. *Saxe*, 240 F.3d at 209. *See* discussion of Matal v. Tam *supra* pp. 20-23.

57. Nuxoll v. Indian Prairie Sch. Dist. # 204, 523 F.3d 668, 672 (7th Cir. 2008).

indistinguishable in their impact from Be Happy, Not Gay: "blacks have lower IQs than whites" and "a woman's place is in the home."[58]

The cases I have been discussing exemplify deeply embedded, foundational First Amendment principles. The Supreme Court did not abandon these principles when it crafted the special doctrine governing student speech in elementary, middle and secondary schools. A brief overview of school speech doctrine illuminates the First Amendment stakes in potentially wounding words, especially those that offend prevailing wisdoms.

In 1969 the Supreme Court upheld the right of students in grades K-12 to wear black armbands to protest the war in Vietnam, seizing the opportunity to emphasize that controversy about deeply held beliefs is exactly what the Speech Clause protects. The right to contest accepted wisdom is a critical part of what makes the United States such a vibrant society, as the Court explained in *Tinker v. Des Moines*:

> Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[59]

Under *Tinker,* officials violate the Constitution when they censor the personal expression of students in grades K-12 unless the school can show that it reasonably anticipated the student expression would materially disrupt the school's educational mission. While the Court subsequently gave schools great discretion to silence certain categories of student speech (lewd, school-sponsored and pro-drug),[60] student speech that disparages groups or individuals is generally the student's own non-lewd speech, which has constitutional protection unless it threatens material disorder.[61]

The *Tinker* opinion expressly rebuked school officials who claimed they had censored the antiwar sentiments in part to spare the feelings of students who were friends with a recent graduate who had died in the war. That concern, without evidence of impending disruption, amounted to no more that the illicit desire to "avoid the controversy" armbands might provoke. Hurt feelings

58. *Nuxoll,* 523 F.3d at 674.

59. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 503 (1969).

60. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Morse v. Frederick, 551 U.S. 393 (2007).

61. Catherine J. Ross, Lessons in Censorship: How Schools and Courts Subvert Students' First Amendment Rights (2015).

and arguments, the Court exhorted, are a price of liberty: "[O]ur Constitution says we must take this risk."[62]

Under *Tinker* and its progeny, words barred by many college codes are constitutionally protected even in grades K-12 unless they are likely to create substantial disorder. This means, for example, that a school must allow students to wear Confederate symbols unless it has a history of serious racial conflict, including violent incidents. An elementary or secondary school must expect its students to tolerate display of a symbol that upsets them, unless its use threatens to materially disrupt the campus. The question of whether officials reasonably anticipate material disruption turns on the specific history of race relations in the school and the community.[63]

What about the boy who purchased a controversial T-shirt at a church fair and wore it to school? The shirt proclaimed: "Homosexuality is a sin! Islam is a lie! Abortion is murder!" A federal court ruled that the teenager had the right to wear his shirt, even though it could be expected to offend several groups of people.[64] Efforts to silence similar sentiments in the name of supporting diversity at another school led a different judge to condemn the teacher who had "modeled oppression and intolerance."[65]

That approach means that schools may not permissibly shelter students in grades K-12 when words cause hurt feelings—whether the verbal assault consists of racial epithets, anti-immigrant sentiment or slut-shaming. It is unconstitutional for K-12 public school principals to punish children who hurl racist and sexist insults at classmates unless the slur is accompanied by physical acts. Without physical assault, hurtful words are, in the words of a Supreme Court opinion, "simple acts of teasing and name-calling" that even elementary schools are not legally required to prevent notwithstanding executive branch edicts to the contrary.[66] More than that, if bullying consists of words alone—no matter how toxic—the Speech Clause usually protects the speaker and prevents the state from imposing punishment.

Constitutional doctrine asks our youngest students to use the traditional constitutional responses to vile speech: Walk away, don't listen, or respond with "more and better speech." These general First Amendment principles apply with at least as much vigor to college campuses, where most students are adults, not schoolchildren, the guiding ethos of higher education supplements constitutional mandates, and students are not compelled to attend. Looking at what the Constitution requires in grades K-12 reveals a lot about what we should expect the adults enrolled in college to have the capacity to withstand.

62. *Tinker*, 393 U.S. at 508.

63. Ross, *supra* note 61, at 168-86.

64. Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 967 (S.D. Ohio 2005).

65. Glowacki v. Howell Pub. Sch. Dist., No. 2:11-cv-15481, 2013 WL 3148272, at *4 (E.D. Mich. June 19, 2013).

66. Ross, *supra* note 61, at 160-63, 196-205 (2015) (quoting Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 651-52 (1999)).

Since our constitutional framework expects this degree of coping from children beginning in elementary school, it is not asking too much of college students to handle offensive sentiments by using the standard First Amendment tools: Walk away, throw the pamphlet in the trash, get off the screen or, even better, tackle objectionable speech with more and better speech.

Whether in the world at large or in elementary and secondary schools, *R.A.V.*, *Tam*, *Saxe*, and school speech doctrine make clear that hate speech codes aimed at speech the government condemns based on viewpoint are presumptively unconstitutional. In holding that the Speech Clause protects the expressive aspects of flag-burning, even though burning the flag offends and can provoke observers to anger, the Court underscored: "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."[67]

C. College speech codes

And yet schools at every level, from the elementary grades through graduate training, persist in adopting codes of conduct that reach a great deal of constitutionally protected speech.[68] Indeed, they do so often knowing that disciplinary codes (those that are more than aspirational) face virtually insurmountable First Amendment obstacles if challenged in court.

Federal courts have overturned *every* college speech code or rule that provided penalties for expression variously identified as "demeaning," "derogatory," "stigmatizing," and the like.[69] The earliest cases involved the first round of

67. Texas v. Johnson, 491 U.S. 397, 414 (1989).

68. Foundation for Individual Rights in Education (FIRE), https://www.thefire.org. Greg Lukianoff, FIRE's President, notes more optimistically elsewhere that the proportion of campuses it labels "red light" based on substantial restrictions of speech has declined from 62.1 percent in 2013 to 49.3 percent in 2016. *See* Lukianoff, *supra* note 11.

69. Bair v. Shippensburg Univ., 280 F. Supp. 2d 357 (M.D. Pa. 2003) (upholding only one section of the code because it did not include disciplinary provisions). A code may also survive if it appears to reach only unprotected speech. Coll. Republicans at S.F. State Univ. v. Reed, 523 F. Supp. 2d 1005, 1007 (N.D. Cal. 2007) (barring "intimidation" and "harassment" limited to speech that threatens the health or safety of others). The gamble may be that the code will escape judicial review, perhaps because students have little incentive to become plaintiffs given their temporary status at a school and risk facing high personal costs when they take on the college in which they are enrolled, or because colleges have presumed that students would have difficulty finding legal representation. More recently, FIRE has tracked and publicized college speech codes based on whether it concludes the code satisfies free-speech requirements. FIRE's efforts (complemented by litigation and threats of litigation) have been accompanied by a reduction in the number of colleges its annual survey deems in the "red light" zone of First Amendment reprobates. *See, e.g.*, FIRE, Spotlight on Speech Codes 2017, https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2016/12/12115009/SCR_2017_Full-Cover_Revised.pdf (last visited June 8, 2017) (A "red light" institution is defined as having "at least one policy both clearly and substantially restricting freedom of speech, or that bars public access to its speech-related policies," and a "ban on 'offensive speech' is a 'clear violation.'"). The 2017 Spotlight reports that the percentage of red-light schools has declined for the ninth year in a row. The decline has been especially striking at

modern college speech codes, adopted in the 1980s primarily out of concern for a growing influx of African-American students. An examination of those early cases suggests that little progress has been made in the last three decades: Code proponents have not learned much about the constitutionality of the impulse animating speech codes, about how to draft more deftly, or about the complexity of applying codes without trampling rights, sometimes asserted by members of the very groups the codes intended to safeguard.

In one of the earliest cases, litigated before *R.A.V. v. St. Paul, Matal v. Tam* and some of the other seminal Supreme Court cases discussed above were decided, a federal court overturned as vague and overbroad a University of Michigan code adopted in response to perceptions of "a rising tide of racial intolerance and harassment on campus." The court explained, "[T]he terms 'stigmatize' and 'victimize' are not self defining . . . . What one individual might find victimizing or stigmatizing, another individual might not."[70] And speech rights of speakers may not be limited based on the responses their expression elicits from listeners. Deference to listeners' sensibilities holds echoes of the forbidden heckler's veto, but is even more nefarious where the code finds a violation if even one listener reports being offended.[71]

The University of Michigan provided a guide containing examples of speech and conduct that would violate the code. Several of the hypotheticals so transparently violated speech rights that the university withdrew it while the litigation was ongoing. One example of a sanctionable offense was: " 'A male student makes remarks in class like " 'Women just aren't as good in this field as men,' " deemed to " 'creat[e] a hostile learning atmosphere for female classmates.' " The court agreed with the graduate student who challenged the code that it would prevent him from discussing questions relating to gender and race differences in his course on comparative animal behavior.[72]

The Michigan guide warned students that they would be considered "harassers" if they "tell jokes about gay men and lesbians" or "laugh at a joke" someone else told about a person with a disability, or "display a [C]onfederate flag" on a dorm room door.[73] Similar provisions are found in college speech codes today.[74]

Six years later, African-American athletes at Central Michigan University successfully challenged a code that banned, among other things, intentional and unintentional "verbal behavior" that permitted listeners to "infer negative connotations about the individual's racial or ethnic affiliation." The facts seem

public colleges (from seventy-nine percent to thirty-three percent).

70. Doe v. Univ. of Mich., 721 F. Supp. 852, 859 (E.D. Mich. 1989).

71. *Id.* at 860 (the university's goal was to reach speech that was "only . . . offensive" and therefore could not be regulated without violating speech rights).

72. *Id.* at 858.

73. *Id.*

74. FIRE, Spotlight on Speech Codes 2017, *supra* note 69.

analogous to Simon Shiao Tam's reappropriation of the term Slants: Central Michigan basketball players sued the university because the code banned the word "nigger," which they themselves used. The district court held that the policy violated the First Amendment because it reached "a substantial amount of protected speech," including politically valuable speech. Moreover, university officials retained too much discretion to decide what amounts to "negative" or "offensive" speech. Consistent with Justice Harlan's famous observation that "one man's vulgarity is another's lyric," the court reasoned, "different people find different things offensive."[75] Illustrating the dilemma, the athletes who sued were divided: Some found it objectionable when their white coach used the term nigger, and others did not.[76]

V. Gendered Assaults and Speech that Creates a Hostile Environment

Verbal disparagement and hostility based on gender (like hostility based on race or ethnicity) demean and undermine. This reality makes efforts to rein in verbal attacks based on gender critical to discussions of how to prevent sexual assaults by and against students.

When I was an undergraduate in the first class of women to graduate from Yale College, my assigned advisor for my major (the very first Yale professor I met with), handed me a pin he had been given at a restaurant, suggesting it was better-suited to me than to him. It read: "Eat me." I confess that back then, it never occurred to me to report the incident. We were supposed to soldier on. I just told him to sign my program and not to expect to see me again. Today, I consider his words a macro-aggression. I should have complained to someone. He was a faculty member, not a fellow student. Different rules apply.

When I told this story while speaking about universities and free speech at a 2016 reunion, most of the women in the room responded, "Similar things happened to me and I never told anyone." The reaction illustrated how powerfully hurtful words stick with us, just as the outpouring of women's recollections of unwanted touching at the hands of strangers followed the airing of Donald Trump's "grab 'em by the pussy" remarks, which many properly regard as a verbal sexual assault.

No student ever said anything nearly so offensive to me. But imagine if the speaker had been a peer. Or if one of them, anticipating our current President, had asserted in the dining hall, even jokingly: "I love to 'grab some pussy!' " Can a college penalize such expression by one student to another?

No court appears to have decided whether colleges violate students' First Amendment rights by punishing them for sexualized, insulting or disparaging speech directed at other students.[77] But there are plenty of reported allegations to help us analyze the question based on the framework I have laid out.

75. Cohen v. California, 403 U.S. 15, 25 (1971); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1184 (6th Cir. 1995).

76. *Dambrot*, 55 F.3d at 1182-83.

77. Cases under Title IX tend to involve allegations that faculty members created a hostile

Perhaps one of the best-known is the 2010 incident in which inebriated, newly-admitted members of one of Yale's few fraternities marched around the area housing freshmen with banners and chants: "Yes means no, no means anal." The misogynistic rhetoric was widely regarded as mass sexual harassment. Yale promised to reprimand those involved, a process that remains confidential. The incident brought revelations that the U.S. Department of Education ("DOE") was already investigating Yale for failing to rein in a hostile sexual environment created by reported incidents ranging from "taunts to assaults" over a seven-year period.[78] But a bright line divides "taunts" from assaults and rape. The latter are criminal acts. The former may be protected expression even if it is "stupid," "raunchy," and deeply unsettling.[79]

As commentators around the country debated the significance of the Yale chant, and the fraternity apologized for its actions in the wake of criticism (including from two other Yale fraternities), one online comment asked why nobody at the national governing body of Delta Kappa Epsilon or on the campus had "said something and intervened."[80] One Yale undergraduate woman told *The New York Times* that, like many others, when she heard the chants, she "thought it was really obnoxious and closed the window."[81] Both responses are completely consistent with best First Amendment practices.

Here's a harder case.

In 2007 Jennifer Dibbern entered the Material Science and Engineering Ph.D. program at the University of Michigan, where she was one of five women among twenty-five graduate students. She was forced out of the program before completing her degree. When Dibbern filed a sexual harassment complaint in federal court she alleged the following:[82]

As soon as she enrolled, the male students in her programs began harassing her, with statements including these:

" 'Real women aren't engineers.' "

educational environment, that the university failed to respond to reports of a sexually hostile environment, or that a student was retaliated against for reporting a sexually hostile environment.

78. Lisa W. Foderaro, *At Yale, Sharper Look at Treatment of Women*, N.Y. Times (Apr. 7, 2011), http://www.nytimes.com/2011/04/08/nyregion/08yale.html; Sandra Y.L. Korn, *When No Means Yes*, Harv. Crimson (Nov. 12, 2010), http://www.thecrimson.com/article/2010/11/12/yale-dke-harvard-womens/.

79. Foderaro, *supra* note 78.

80. Sethavakian, Comment to *When No Means Yes*, Harv. Crimson (Nov. 12, 2010, 9:46 AM), http://www.thecrimson.com/article/2010/11/12/yale-dke-harvard-womens/ (referencing the author's site http://www.menspeakup.org).

81. Foderaro, *supra* note 78.

82. Dibbern v. Univ. of Mich., No. 12-15632, 2013 WL 6068808 (E.D. Mich. Nov. 18, 2013) (denying defendants' motion to dismiss).

" 'Engineering women are . . . not normal . . . they aren't like real girls.' "

" 'You're less qualified but still able to get in because you're a girl.' "

Worse, male graduate students told her "they masturbated with her in mind and planned to call her at climax." When Dibbern reported these verbal attacks to her advisor, she was told "boys can be like that."

Dibbern began to keep a record of these comments and incidents. After one of her peers threatened to rape her and described how he would do it, Dibbern reported him to university officials, and went once more to her advisor, who told her it was important to "get back to the lab." When Dibbern finally went to the university's Title IX coordinator, after the incidents escalated to include physical contact and stalking, he warned her that people "assume women false report" and that "some women . . . are overly sensitive . . . can't take a joke and feel offended."

The harassment continued. One male graduate student persistently made "inappropriate comments" about Dibbern's appearance and about the attractiveness of other female students.

I've largely omitted conduct by Dibbern's graduate student peers to center the discussion on the speech of her fellow students. Imagine if, instead of ignoring Dibbern's complaints, and allegedly retaliating against her for reporting the department and for organizing with other women students, the university had silenced the male graduate students who made discriminatory and harassing remarks or removed them from the Ph.D. program.

Imagine further that those students asserted the university had violated their speech rights. This is the dilemma colleges face as they attempt to respond to the demands of the federal government that they silence sexually assaultive expression.

Before I analyze the Dibbern facts, I need to summarize the governing law.

Davis v. Monroe Board of Education (1999), the seminal case addressing whether schools have a duty to protect students from hostile environments created by peers, provides the standard in cases involving peer-on-peer harassment in colleges, although it involved speech and conduct aimed at a fifth-grade girl.[83] Davis alleged that another student, a sexual bully, harassed her for several months on the school bus and in class, rubbing his body against hers and peppering her with vulgar statements such as "I want to get in bed with you," and "I want to feel your boobs" (while he attempted to grab them).[84]

A divided Court held that the Davis family could sue her school for "deliberate indifference" in failing to respond to this harassment, but *only because* the bully engaged in assaultive physical conduct as well as verbal assaults. Damages would not be available unless the "harassment" proved "so severe,

83. Papelino v. Albany Coll. of Pharmacy of Union Univ., 633 F.3d 81 (2d Cir. 2011) (*Davis* provides the standard for finding a hostile environment at a college under Title IX).

84. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999).

pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity."[85]

In case these legal boundaries might be misunderstood or swept aside, the Court underscored it had no intention of allowing the law to reach "simple acts of teasing and name-calling among school children . . . even where these comments target differences in gender."[86]

The federal government has gone much further than the Supreme Court in holding schools responsible for what students say to one another. As documented in the 2016 Association of American University Professors ("AAUP") Council report on *The History, Uses, and Abuses of Title IX* (the "AAUP Report"), since 2011 the Office of Civil Rights within DOE ("OCR") has adopted an activist stance with respect to the culture of gender as well as gender discrimination and sexual assault.[87] It has largely disregarded the boundaries *Davis* established by (i) eliminating the conduct requirement so that schools will be held accountable for peer-on-peer verbal assaults; and (ii) diluting the required showing that the verbal assault effectively barred the target's access to an educational opportunity, instead requiring only that it create a "hostile environment." A hostile environment, in turn, has not been defined consistently.[88]

At the same time, the AAUP Report argues, OCR has "broadened" its definition "of sexual harassment in ways that limit the scope of permissible speech."[89]

In fact, for nearly fifteen years, OCR has cavalierly disregarded the conflict between speech rights and efforts to rein in purely verbal bias addressed by one student to another. As early as 2003 college administrators sought guidance from DOE about the relationship between students' First Amendment rights and what seemed to be a federal requirement under Title VII (which addresses racial discrimination) that institutions of higher education impose hate speech codes. Specifically, they asked whether the government intended universities to intrude on First Amendment rights to comply with emerging DOE requirements. DOE responded through a "Dear Colleague" letter, an advisory statement addressed to educational institutions, issued outside the

85. *Id.* at 629.

86. *Id.* at 653.

87. Since this Symposium took place in 2016, the Presidency has changed hands, and executive branch policies may well be rapidly transformed. Sheryl Gay Stolberg, DeVos Says She Will Revisit Obama-Era Sexual Assault Policies, N.Y. Times, July 13, 2017. https://nytimes.com/2017/07/13/us/devos-college-sexual-assualt.html, (The Secretary of Education is considering whether to rescind the Dear Colleague letter governing sexual assault (*see infra* note 88, the applicable evidentiary standards and related DOE policies).

88. Am. Assoc. U. Professors (AAUP), The History, Uses, and Abuses of Title IX 76 (June 2016) [hereinafter AAUP, Title IX].

89. *Id.* at 77.

normal administrative procedures and lacking the force of law; nonetheless, it can be used to threaten schools with the potential loss of federal funds.

DOE's 2003 answer to whether it required colleges to violate students' speech rights boiled down to "of course not." It failed to offer any legal guidance, or even to refer to First Amendment standards. It did not make any effort to help administrators distinguish what *Davis* called "simple acts of teasing and name-calling" from grave verbal attacks that a school might regulate without violating the First Amendment.[90] Nor has it provided any additional guidance on this delicate problem in the intervening years.

Colleges seem to have addressed the deficits in the 2003 "Dear Colleague" letter by embedding rules that bar students from creating a hostile educational environment for their peers within the anti-harassment section of the institutional code. That may satisfy the federal government, but it does not make the code compliant with the Speech Clause.

Moving from race to gender, beginning in 2011 the OCR conflated sexual violence covered by the criminal code with sexual harassment (including a hostile environment based on speech).[91]

By 2013 OCR went even further. Summarizing its findings that the University of Montana had violated Title IX, it defined sexual harassment to include "verbal . . . conduct of a sexual nature" that is unwelcome, "*whether or not* it creates a hostile environment" if it is *either* "severe or pervasive." [92] In 2016 the Department of Justice joined OCR in "defining sexual harassment as 'unwelcome conduct of a sexual nature,' *including* 'verbal conduct' and '*regardless of whether* it causes a hostile environment.'"[93] Labeling speech "verbal conduct" does not transform expression—protected by the First Amendment—into conduct, which the First Amendment does not immunize and which, if legitimately proscribed, is always subject to penalty.

Those regulations and *Davis* provide some of the guidance we need to analyze the *Dibbern* problem set forth above. The derogatory and sexually charged expression directed at Dibbern by her male peers clearly constituted forbidden expression under definitions promulgated by OCR and DOJ. Under this view, the comments amounted to unwelcome verbal sexual violence.

90. Letter from the Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., First Amendment: Dear Colleague (July 28, 2003) [hereinafter "Dear Colleague" letter] (the reference to constitutional constraints read in full "harassment may implicate First Amendment rights to free speech or expression"), https://www2.ed.gov/about/offices/list/ocr/firstamend.html.

91. AAUP, Title IX, *supra* note 88, at 77 and "Dear Colleague" letter, *supra* note 90.

92. Letter from U.S. Dep't of Justice Civil Rights Division and U.S. Dep't of Educ. Office for Civil Rights to President Royce Engstrom of the University of Montana (May 9, 2013) at 1, 4-5 (emphasis added) (the government described the letter as "a blueprint for colleges and universities throughout the country to protect students"), http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf.

93. AAUP, Title IX, *supra* note 88, at 78 (emphasis added).

And those comments combined with additional conduct I have edited out of the facts surely could meet the higher standard set out in *Davis*, assuming that Dibbern could establish at trial that the sexually harassing speech of her colleagues was "so severe, pervasive, and objectively offensive" that it effectively barred her access to an educational opportunity. It seems that if she could prove her allegations, Dibbern could show that the verbal attacks she experienced made it impossible for her to spend sufficient time in the laboratory, like the hypothetical exclusion from a computer lab Justice O'Connor offered in *Davis* to illustrate denial of educational opportunity.[94]

But even assuming that the verbal assaults aimed at Dibbern were sufficiently "severe, pervasive and objectively offensive," that they satisfy *Davis* (and if these facts don't amount to denial of educational opportunity, it is hard to imagine what would), that would mean only that the university had a legal responsibility to protect Dibbern from verbal assaults at the hands of her fellow students.

That conclusion does not resolve the central question that concerns us here: The school may be legally obliged to curtail the speech of the male graduate students, but can it do so without violating their expressive rights? Only if the speech amounts to harassment under the law. *Dibbern* involves much more than the "hurt feelings" courts have said won't erect a defense when a school silences protected speech. (Here, the students stalked and threatened Dibbern, presumably crossing the line to harassment).

Because almost all lawsuits involving bullying and harassment involve conduct as well as expression, no court has answered this question to date. For records involving less dramatic facts than *Dibbern*, the answer should be clear from my earlier discussion of hate speech and harassment: There is no hate speech or harassment exception to First Amendment rights, even where the public institution is required to protect the target of assaultive speech.

One foundational principle of speech jurisprudence is that we cannot trust the government to distinguish among topics, viewpoints, or manner of expression. Yet college students who demand reforms aimed at curbing what they see as noxious campus environments seem to trust college administrators to distinguish what I have called the "tepid" from the "scalding," or what the Supreme Court has called the "intolerable" verbal invasion (which it did not define), or the micro-aggression (perhaps unintended but causing cumulative harm) from the macro-aggression that could permissibly be silenced after a single verbal incident.[95] In the lower grades, schools have suspended a six-year-old for calling a peer a "poo-poo head" (tepid), but have failed to rein in students who called a high school classmate a "cum-guzzling slut" (scalding).

94. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 651 (1999). The allegations in *Dibbern* offer another layer of complexity. Dibbern argued that the Ph.D. program kicked her out even though she had managed to complete all of her work despite the harassment she experienced every time she entered the lab. If that is the case, her grit undermines a claim that the harassment deprived her of educational opportunity.

95. Ross, *supra* note 61, at 160, 195, 202; Cohen v. California, 403 U.S. 15, 21 (1971).

I doubt that colleges will prove more adept than K-12 officials at sorting out these categories, or knowing what the First Amendment permits them to do.

Colleges appear to validate the First Amendment's skepticism about the judgment and motives of government officials by distrusting students' discretion and resiliency. Even elite universities treat students like children when expression is at issue. Harvard psychologist Steven Pinker is reported to have "bemoan[ed] that Harvard students are 'pressured to sign a kindness pledge suitable for kindergarten' and 'muzzled by speech codes that would not pass the giggle test if challenged on First Amendment grounds.' "[96]

He is right. As I have shown, First Amendment doctrine places heavy demands on students regardless of age, grade, or sophistication. In the process, it offers an opportunity to learn how to cope with and respond to difference and to tumult.

Once the principles I have discussed so far are understood, it should prove much easier to sort out what the First Amendment requires (or permits) in the myriad battlegrounds of contemporary campus life, some of which I turn to now.

VI. Uncomfortable Spaces

First Amendment doctrine contemplates speech in public spaces. Campus speech is complicated by the reality that a campus includes many different types of spaces, devoted to different uses. Some are public (whether open to the public at large or the college community), some are dedicated to certain uses that may require controlling access and activities (e.g., research labs, archival collections), and others—most notably dormitory rooms—are meant for private use. A campus is often both a workplace and a residence.

Is a college unable to shelter a student who lives in a dorm from being assaulted by offensive chants outside her window? What about noxious comments voiced loudly in the corridor outside her room? Assuming that a college could successfully control offensive comments in public spaces on campus, should students who want to act like verbal hooligans have the liberty to say whatever they want in the privacy of their dorm rooms?

The argument that a college is a student's home cuts both ways. Speakers have no right to intrude into the privacy of a home, but people have a right to receive and peruse (and its reciprocal, a right to voice) in their own homes

96. Bryan Schonfeld, *Campus Censors Do N. Korea Proud*, N.Y. Daily News (Dec. 29, 2014), http://www.nydailynews.com/opinion/bryan-schonfeld-campus-censors-n-korea-proud-article-1.2057591 (quoting Harvard psychologist Steven Pinker). Seven of the eight justices who signed opinions in Matal v. Tam, 137 S. Ct. 1744 (2017) took a similar view of the Lanham Act's disparagement clause. *Id.* at 1765 (Alito, J.) ("It is not an anti-discrimination clause; it is a happy-talk clause."); *Id.* at 1766 (Kennedy, J.) (the provision "mandat[es] positivity"). Justice Gorsuch did not participate in the case. With the exception of Justice Thomas, the remaining justices signed either the section of Justice Alito's opinion for the court including the cited page or Justice Kennedy's concurrence.

even communications that the First Amendment does not protect.[97] Some have analogized noxious speech that can be overheard to secondhand smoke, arguing that people should not be endangered by others' poor choices. But there is no constitutional right to smoke.

This does not mean that students who feel assaulted by repeated racist, gendered, or other comments that target them are without recourse. The rights of speakers don't extend to forcing someone to continue to room with, live next door to, or otherwise be kept in proximity to a student whose words and ideas feel noxious. The student who feels under attack can request, and the college can grant, assignment to a different roommate or a different residence hall without violating the speaker's rights. There is no right to accost unwilling listeners in the privacy of their homes.

VII. Solutions

College officials are not helpless in the face of assaultive speech or speech that wounds the speakers' peers. No constitutional hurdle restrains administrators and individual faculty members or resident counselors in dormitories from promoting chosen messages, including exhortations that encourage empathy, sensitivity, tolerance of difference, and civil norms. And nothing keeps them from finding ways to turn volatile moments that divide communities into teachable moments designed to nourish young people, as many college deans and presidents have done, even while recognizing the offender's constitutional right to provoke.

Exhortations about speech can contain two messages that may initially appear contradictory but are in fact complementary.

First, colleges should educate students about the meaning of the First Amendment, about their own speech rights, and about the speech rights of peers with whom they disagree. Orientation should expose students to the constitutional requirements and norms of free expression, which they likely have not acquired by the time they graduate from high school.[98]

Lectures and materials can also reassure those whose personal beliefs do not run to tolerance that they are entitled to their own views. This is the paradox of tolerance for intolerance, so long as it is limited to belief and expression, and does not cross over into discriminatory conduct that violates the law or college rules. And this approach provides a helpful barrier against accusations that colleges are nothing more than instigators of liberal brainwashing.[99]

Second, schools can encourage students to use expressive rights responsibly, to consider how their words affect others, and particularly to avoid slurs and name-calling. Colleges by all means should exhort students not to succumb to any aspect of campus culture that promotes sexism or racism. But officials

97. Stanley v. Georgia, 394 U.S. 557 (1969) (right to possess obscene material in the home).

98. Catherine J. Ross, *College Is Too Late to Teach Free Speech*, Chron. Higher Educ. (Feb. 12, 2017), http://www.chronicle.com/article/Collge-Is-Too-Late-To-Teach/239147.

99. *E.g.*, Kirsten Powers, The Silencing: How The Left is Killing Free Speech (2015).

cannot penalize students who decline to recalibrate their own beliefs, give lip service to what they don't believe, or adopt community norms.

Public colleges can also let students know that while the First Amendment bars the school from punishing students for their protected expression, employers—whether private or public—are not constrained in their ability to punish offensive speech by declining to hire in the first instance, denying raises and promotions, or terminating employment. Indeed, federal law may require employers to discipline workers for speech that creates a hostile environment.[100]

College leaders can also teach by example. In March 2015 some forty or fifty Emory students protested, "We are in pain!" after someone chalked "Trump 2016" around the campus. To be fair, the complaining Emory students recognized the anonymous scrawler's free-speech rights. At the same time, convinced that Trump incites "hate against others," they found his very name "threatening." They told the university President that they "perceived intimidation." The university distinguished the conduct of temporarily defacing university buildings with chalk from the content of the message, declined to erase the Trump signs or to pursue the chalker's identity, and simultaneously urged the community to "recognize, listen to, and honor the concerns" the minority students voiced. The President reiterated the importance of working toward a more inclusive campus. What's more, President Wagner himself chalked: "Emory stands for free expression!" with video cameras rolling.[101]

Other administrators have led by positive example, as did Texas A&M's President, Michael Young (the former dean of my law school). When someone invited white nationalist Richard Spencer to speak at Texas A&M in December 2016, Young invited everyone on campus to join him at "Aggie United," a counter event scheduled at the same time and directly across the street from Spencer's lecture. Young described Aggie United as a stand against divisive rhetoric he characterized as "beneath contempt," and a stand for inclusiveness. The protest against Spencer's racist talk drew a crowd several times larger than the one that listened to Spencer, who, according to a reporter, "sprinkled [his] racist, sexist comments with fat jokes."[102] The competing event Young organized demonstrated the principles of more and better speech and the free-speech commitment that hecklers not be allowed to veto speakers. It also reassured the students targeted by Spencer and his ilk that their community supported them.

100. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000(e) et seq.

101. Susan Svrluga, *Someone Wrote 'Trump 2016' on Emory's Campus in Chalk. Some Students Said They No Longer Feel Safe*, Wash. Post (Mar. 24, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/03/24/someone-wrote-trump-2016-on-emorys-campus-in-chalk-some-students-said-they-no-longer-feel-safe/?utm_term=.19779a6923e7; Nina Burleigh, *The Battle Against 'Hate Speech' on College Campuses Gives Rise to a Generation that Hates Speech*, Newsweek, June 3, 2016, at 1.

102. Katherine Mangan, *At Texas A&M, a White Supremacist's Visit Incites a Crowd*, Chron. Higher Educ., Dec. 16, 2016, at A30.

Support for the vulnerable also originates from students themselves. A week after the 2016 election, Natasha Nkhama, a black student at Baylor University in Waco, Texas, was forced off a campus sidewalk by someone who addressed her with a racial slur and said, "I'm just trying to make American great again." After Natasha's friend posted a video of the incident, "hundreds of students and faculty members walked Natasha to class."[103]

A. Speaking out.

Honoring free speech leaves students at liberty—indeed encourages them—to direct more and better speech to supporting vulnerable peers, and to self-defense: to speak out against wounding expression, to confront peers whose words or Halloween costumes offend, and to demand action or retractions from administrators, as the Yale student captured on YouTube accosting the faculty head of her residential college did, however intemperately.[104]

Exercising their rights to free speech and association, students can take stands that a public college cannot. Students have demanded that their peers be punished for using racist speech in a dining hall or residency, but they are in a better practical position than college administrators to identify and challenge such expression (even if the college could punish racial epithets without violating constitutional rights).

Students offended by speech in the dining hall that appears to be racist (or misogynistic), black or white, women or men, have several options. They can confront the speaker directly. They can ostracize the speaker by not sitting with him or her. They can send a blast email calling attention to what they heard and explaining why and how the speech hurt them.

Colleges can encourage the targets of hatred to speak out, and support them when they do. Anecdotal evidence suggests standing up can be effective. Reflecting on calls by Yale students to silence racist speech on campus, political scientist Jim Sleeper recalled that students handled such matters themselves in the past:

> [I]n 1965, . . . one of my college roommates [a Jew] happened upon another student wearing a Nazi arm-band and mimicking a "Sieg Heil" salute to the accompaniment of a recording of Der Fuehrer himself. My roommate . . . never thought of running to a dean . . . . "Why don't you stop that and turn it off," he said, quietly, firmly.
>
> The miscreant smirked, but . . . he stopped.[105]

103. Adeel Hassan, *Refugees Discover 2 Americas: One That Hates, One That Heals*, N.Y. Times, Nov. 15, 2016, at A1.

104. David W. Drezner, *A Clash Between Administrators and Students at Yale Went Viral: Why That is Unfortunate For All Concerned*, https://www.washingtonpost.com/posteverything/wp/2015/11/09/a-clash-between-administrators-and-students-at-yale-went-viral-why-that-is-unfortunate-for-all-concerned/?utm_term=.fe2fe904a9ba.

105. Jim Sleeper, *The 'Blame the Campus Liberals' Campaign Targets Yale*, Huffington Post (Feb. 12,

Reminding us that we have no data about how widespread micro-aggressions are on campuses or about how the "average" student reacts in the face of such incidents, a Stanford professor offers a story suggesting that prudence sometimes favors restraint rather than confrontation, and that students may have more wisdom than we sometimes acknowledge. On campus, the professor ran into an acquaintance, a retired Eastern European diplomat, whom he introduced to another acquaintance, a woman student steeped in women's studies. As they chatted, the diplomat shook the man's hand with his own gloved hand, and then removed his glove to shake the woman's hand. The professor mused, "[Y]ou can imagine what happened next. The woman recoiled from the gendered micro-aggression and lambasted the diplomat: 'Do you think women are too frail to touch a gloved hand or is this some type of creepy come on?!!'." In fact, he reports, after the diplomat boarded the shuttle bus, as the two wondered where the custom of removing the glove had come from, the woman said: "He's a sweet old man and I could tell it was his way of being gallant."[106]

Gendered gloveless handshaking seems to me the micro-est of plausible aggressions, quite distinct from what I think of as verbal macro-aggressions: calling a black man "boy" or "nigger," calling a woman a "slut" or a "cunt," or singling out either of them to ask if they can follow the lecture in a math class (as also happened to me in a class full of men the first year women attended Yale College).

Just as elderly European diplomats bring unknown customs with them, colleges far from home where students live on campus frequently provide young people with their first deep exposure to people who are different from them: persons of different colors, religions, ethnicities, and beliefs. The godson of white nationalist David Duke recounted how he came to abandon his godfather's movement—a movement in which he had once been regarded as a presumptive heir. "I began attending a liberal college," R. Derek Black recalled, "where my presence prompted huge controversy." By talking with many "diverse" people "who chose to invite me into their dorms and conversations rather than ostracize me—I began to realize the damage I had done."[107]

More support for the principle of more and better speech.

B. Bystanders.

Understandably, the most vulnerable students—the targets of verbal and sometimes physical assault—are often cowed, and may be reluctant to engage

2017), http://www.huffingtonpost.com/jim-sleeper/the-blame-the-campus-libe_b_9219598.html.

106. Keith Humphreys, *An Anecdote About Campus Microgressions and Intolerance*, Wash. Monthly (Jan. 2, 2017), http://washingtonmonthly.com/2017/01/02/an-anecdote-about-campus-microgressions-and-intolerance/.

107. R. Derek Black, *Why I Left White Nationalism*, N.Y. Times, Nov. 27, 2016, at SR6.

with their perceived tormenters. And the harm assaultive speech causes affects the whole community, not just the intended targets. The victims should not be expected to shoulder the additional burden of responding to speech that denigrates them.

This makes bystander intervention especially important. Bystanders with no skin in the game can have an even greater impact on expression that trespasses community norms of mutual respect than is possible for the presumptive targets to achieve. The literature on bullying shows that many bullies fear being on the receiving end of confrontation. Students can step up to shame peers who persist in verbal denigration—an approach that has proved successful in discouraging bullying among younger students.[108]

Supportive bystanders may have a critical role to play in efforts to transform campus culture to reduce the risk of sexual or racial assaults. A 2015 controlled study suggests a "socio-ecologic model" that can help to transform not just the individuals who may become perpetrators of sexual assault but also "the context of relationships, communities, and the larger society." This approach requires active participation of bystanders in rejecting violations of positive norms and promoting models of respect and healthy interaction. Still, the author cautions, even if universities put all of these elements in place, "[t]here are no easy solutions."[109]

Because First Amendment analysis is highly dependent on facts and context, it is important to disaggregate a number of factors, including who is speaking, and where the expression takes place. I've primarily been exploring the speech rights of individual college students, but let me briefly explore two slightly different scenarios, both involving speech by groups.

C. Groupspeak.

Sometimes, as illustrated by the case of Yale's chanters, the speaker is actually a group. Of course, groups have speech rights, whether they are informal gatherings, chartered organizations, or corporations. Many people behave worse in groups than they do on their own, egged on by group dynamics. When groups rather than individuals speak on campus, reactions tend to be more intense. The context may affect the constitutional analysis.

When members of a fraternity engage in offensive speech, as DKE did at Yale, and as the Texas Tech chapter of Phi Delta Theta ("PDT") did when it hoisted a banner repeating the chant that had gotten DKE into trouble several years earlier, they can and sometimes do lose their national charters. PDT International Fraternity suspended the Texas Tech chapter (as Delta Kappa Epsilon did at Yale and SAE did at the University of Oklahoma following a YouTube video showing members in a racist rant). After a review, PDT placed

108. Elizabeth Kandel Englander, Bullying and Cyberbullying: What Every Educator Needs To Know (2013).

109. Kathleen C. Basile, *A Comprehensive Approach to Sexual Violence Prevention*, 372 New Eng. J. Med. 2350 (2015).

its Texas Tech chapter in escrow, removed its leaders and did something more: It required all members of the Texas Tech chapter to complete training in sexual assault prevention and bystander intervention. The fraternity joined other Greek organizations in forming a "Fraternal Health and Safety Initiative" to address campus rape culture.[110]

Private organizations, including fraternities and sororities, have the legal power to enforce such codes of behavior on affiliates and individual members. They can also, for example, bar the display of insignia such as the Confederate flag or the swastika. And I don't see any problem if college administrators solicit the help of national membership groups in achieving what the college itself is not allowed to do.

Things get more complicated when we turn to groups that are funded and sponsored by the college itself, organizations that observers may believe officially represent the institution.

During the 2016-17 academic year, Harvard alumnae who had played on the 2012 women's soccer team published an op-ed in the university newspaper documenting that male athletes had ranked their women counterparts based on appraisals of their bodies and sex appeal. Refusing to be shamed, and labeling the men's behavior "an aberrant display of misogyny," the women demanded a response. Following an investigation, Harvard suspended the soccer season of the current men's team, which had updated the so-called "scouting report" on Google, including jokes about the women's preferred sexual positions and activities. Other colleges also suspended teams in 2015 after uncovering denigrating speech by athletes.[111]

These episodes raise two important questions. First, on what basis may the university strip athletes of their opportunity to compete based on constitutionally protected expression? Arguably, the athletes represent their institutions when they face other colleges. Schools actively recruit and support athletes, and train them to play wearing the school's insignia and colors.

Administrators might be able to corral each of these incidents within the notion of "school-sponsored" speech, a concept the Supreme Court developed

110. Tara Culp-Ressler, *Fraternity Loses Its Charter After Displaying 'No Means Yes' Banner at a Party*, ThinkProgress (Oct. 8, 2014), https://thinkprogress.org/fraternity-loses-its-charter-after-displaying-no-means-yes-banner-at-a-party-9a7522f1181c#.g084ta0ta. The President of the University of Oklahoma had initially suspended two fraternity leaders, only to rescind his action after realizing the First Amendment stood in the way. Geoffrey R. Stone, *Racist Rants and the University of Oklahoma: Getting It Wrong*, Huffington Post (May 11, 2015), http://www.huffingtonpost.com/geoffrey-r-stone/racist-rants-and-the-univ_b_6844500.html.

111. Robin Wilson, *Harvard Women Take a Stand Against Lewd Report*, Chron. Higher Educ., Nov. 18, 2016, A26 (the former men's cross country team had a similar document); Christopher Mele, *Princeton Is Latest Ivy League School to Suspend Team Over Vulgar Materials*, N.Y. Times, (Dec. 15, 2016), https://www.nytimes.com/2016/12/15/sports/princeton-mens-swimming-suspended.html (Princeton suspended its swimming and diving team for electronic correspondence that was "vulgar and offensive as well as misogynistic and racist," summed up as "antithetical" to the athletic program's "values"; Columbia suspended the wrestling season based on text messages containing "racist, misogynistic and homophobic terms").

in *Hazelwood v. Kuhlmeier,* a case involving a high school newspaper. *Hazelwood* gives elementary schools and high schools wide discretion to discipline expression for reasons "related to legitimate pedagogical concerns" if observers might conclude the speech bore the school's imprimatur.[112] Although, as I have argued, the rationales that the Supreme Court offered for crafting a unique speech doctrine for elementary and secondary schools should not apply to higher education, many courts apply *Tinker* and its progeny when they analyze whether colleges have violated students' speech rights.[113]

Yet the Harvard athletes' controversial expression took place backstage, not as part of the team's public performance. Here, constitutional facts matter. It appears the Harvard soccer scouting report was available to the public on Google documents. If colleges cannot discipline athletic teams for group speech that outsiders, including donors and alumni, might think the school endorses, no one else has the power to do that.

For these reasons, athletic teams may be distinguishable from social organizations like fraternities. When members of a University of Oklahoma fraternity sang a racist song on a bus, recorded and displayed on YouTube, they were joining together in exercise of their individual speech rights, albeit in an ugly manner. Recall that private national organizations had the legal power to censure them.

That distinction sounds good until we look a little closer. The Harvard recruiting report reflected rank sexism, even if the young men intended it as humor. No one defended its contents.

But some groupspeech by organizations that may seem to represent a college has more laudable and even political aims and yet offends observers. In the fall of 2016, nineteen members of East Carolina University's marching band kneeled during the national anthem in protest against police violence against unarmed black men, inspired by San Francisco 49ers' quarterback Colin Kaepernick. The crowd booed. The nineteen protesters and those who booed were all engaging in free speech. So were two other band members who unfurled an American flag and held it high while others knelt. This was a robust conversation.

Fortunately, the university's chancellor supported the speech rights of the kneelers, but he might not have. School sponsorship might have provided a defense if he had penalized them. And the band's director threatened: "[S]imilar protests 'will not be tolerated moving forward.' "[114] I, for one, would not favor suppressing the band members' speech, and believe that reasonable observers understand that neither the protest nor the Harvard men's soccer

112. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270-73 (1988) (allowing censorship of a high school newspaper produced by a journalism class).

113. *E.g.*, Keefe v. Adams, 840 F. 3d 523, 531 (8th Cir. 2016); Tatro v. University of Minnesota, 816 N.W. 2d 509, 520 (Minn. 2012).

114. Editorial, *At ECU Protest, Students Get and Give a Lesson About Free Speech*, Charlotte Observer, (Oct. 6, 2015), http://charlotteobserver.com/opinion/editorials/article106494972.html.

team's ranking of women players spoke for the universities whose uniforms the students wear.

This brings me to the second question: What is the most effective institutional response? At Harvard, the women who exposed the problem called on men to join them in combating sexism and misogyny on campus. Male soccer players publicly undertook to do that. Experts on gender disagreed with one another about whether public shaming and social stigma for sexist athletes or "meaningful consequences" like a lost season were more powerful motivators of change. One expert on gender predicted that punishment and "public humiliation" would only make "offensive behavior . . . even more private,"[115] just as laws against hate speech in Europe may push such expression underground.

D. Modest proposals.

At the symposium that led to this issue, organizers and others urged me to move beyond my analysis of what existing jurisprudence requires. In this concluding section I offer two proposals aimed primarily at law schools.

The first proposal responds to that invitation in the playful spirit I often urge on my students. But I must offer an important caveat: I do not endorse the first proposal, and am unprepared to do so until further analysis resolves the myriad First Amendment issues it presents. The second proposal is more straightforward and easily accomplished.

1. Holding professional degree students to professional codes

Professional schools in various fields assert that they may hold degree candidates to the ethical and practice norms of the professions students are preparing to enter, including norms that limit expression in the work context. Accepting this principle, judges have upheld administrators' decisions to remove students from professional programs, rejecting allegations that the student's speech was constitutionally protected.[116]

For example, the Eighth Circuit held that a community college did not violate Craig Keefe's expressive rights when it removed him from an associate degree nursing program. Keefe had posted comments on his personal Facebook page that upset other students. The comments were not part of his curricular work, but criticized the program and other students; some statements seemed threatening. The nursing program concluded that Keefe had problems managing his anger and accepting professional boundaries. He ignored a

115. Wilson, *supra* note 111.

116. *E.g.*, Keefe v. Adams, 840 F.3d 523, 526-33 (8th Cir. 2016) (relying on the Nurses Association Code of Ethics and citing cases), *cert. denied*, 137 S. Ct. 1448 (2017); Tatro v. University of Minnesota, 816 N.W.2d 509 (Minn. 2012) (professional requirements of the mortuary profession). *Cf.* Christian Legal Society v. Martinez, 130 S. Ct. 2971, 2988-89 (universities are not entitled to deference on whether they have "exceeded constitutional constraints," but courts will accord "decent respect" to the "pedagogical approaches" of a professional program).

professional requirement that nurses show respect for others. Supervisors were concerned that peer discomfort arising from Keefe's comments would interfere with patient care. The dean of students focused on Keefe's "lack of remorse, lack of concern" that the posts were "unprofessional."[117]

Rejecting Keefe's First Amendment claims, the court joined other jurisdictions in deferring to the discretion of schools that train health professionals to assess academic performance based in part on "character" related to professional requirements. It recognized that applying such standards might restrict speech that would otherwise be protected: Where professional ethics standards are a "permissible academic requirement, then determinations of non-compliance will almost always be based at least in part on a student's speech."[118]

This line of cases suggests that law students too could be held to the same standards as practicing attorneys and judges, who risk censure when, in their professional capacity, they disparage others based on race, gender and other aspects of identity.

Rule 8.4 (g) of the Model Rules of Professional Conduct, promulgated in 2016, supports exploration of this approach. Imposing a black letter requirement to replace previous guidance about what is expected of licensed attorneys, the new rule bars "harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." The rule creates a legally enforceable national standard in line with requirements that were already in place in twenty-five jurisdictions.[119]

At a minimum, professional responsibility courses should seize the opportunity of teaching Rule 8.4 (g) to probe more deeply into inadvertent and unexplored derogatory attitudes and expression. (This educational approach is consistent with the suggestions for proactive engagement offered in Section VI). Numerous reported instances of professional discipline for speech that would violate Rule 8.4 (g) already can be gleaned from the states whose rules have been in place longer.

In one instance, a California judge sanctioned a male attorney who, in the court's words, "stooped to an indefensible attack on opposing counsel," when he responded to her request that he stop interrupting her: "[D]on't raise your voice to me. It's not becoming of a woman." The judge admonished: "A sexist remark is not just a professional discourtesy." Such "comments," he continued, "reflect and reinforce the male-dominated attitude of our profession." Judge Paul Grewal made the punishment fit the crime by requiring the offending

117. *Keefe*, 840 F.3d at 526-31.

118. *Id.*

119. Model Code of Prof'l Conduct, r. 8.4(g) (Am. Bar Ass'n 2016).

attorney to donate money to the Women Lawyers' Association of Los Angeles Foundation.[120]

Comment 3 to Rule 8.4 (g) clarifies that it is intended to reach "verbal conduct."[121] As I have argued, however, conflating speech and conduct does not turn expression into conduct that can be punished without violating expressive rights.[122] The drafters urged that expression would be protected since the rule does not interfere with lawyers' ability to say what they want when they are not engaged in conduct related to the practice of law. The Supreme Court, however, has never located "the point where regulation of a profession leaves off and prohibitions on speech begin" under the professional speech doctrine.[123] This issue requires further exploration.

I have not found any reported cases involving law school discipline based solely on verbal manifestations of discrimination,[124] but law schools have long cautioned students that their behavior after matriculation might create impediments to bar admission.[125] Bar admissions proceedings provide a useful analogy to law school discipline.

The egregious case of white supremacist Matthew Hale, denied admission to the Illinois bar in 1998, remains the leading example of expression deemed evidence that an applicant to the bar lacked the requisite character. Hale, an avowed racist and anti-Semite, headed an organization that sought to gain power by "peaceable means" and then to deport "Jews, blacks and others [he referred to as] the 'mud races.' " Hale nonetheless asserted he could take the oath to join the bar "in good conscience" and would abide by rules barring "discriminatory treatment" of persons engaged with the justice system. But,

120. Claypole v. County of Monterey, No. 14-cv-02730-BLF, 2016 BL 9428 (N.D. Cal. Jan. 12, 2016).

121. *Id.*

122. *See also* Pickup v. Brown, 740 F.3d 1208, 1215-21 (9th Cir. 2013) (O'Scannlain, J., dissenting from denial of rehearing en banc) (criticizing the lack of a "principled doctrinal basis" when considering professional speech for separating "utterances that are truly 'speech," from those that are "somehow 'treatment' or 'conduct'").

123. Lowe v. SEC, 472 U.S. 181, 232 (White, J., concurring); Wollschlaeger v. Governor of Florida, 848 F.3d 1293, 1310 (11th Cir. 2017) (en banc) (the Supreme Court has never clarified what standard applies when reviewing inhibitions of professional speech).

124. The cases involve conduct as well as expression. E.g., Willet v. City University of New York, 1997 WL 104769 (Feb. 18, 1997) (denying further leave to amend the complaint and dismissing action where law student was disciplined for falsifying his grade point average when applying, was not a resident of New York as required for attendance, and, among other things, claimed he was disciplined for calling the children of a classmate "zebra children," where the offensive remark did not provide the motive for his suspension).

125. I thank Renee DeVigne and Robert Tuttle for thoughtful conversations related to the material in this section. In 1990, Gerald Uelmen reported that the State University of New York, Buffalo affirmatively asked "state bars to deny admission to former students who violate[d] its hate speech code." Gerald Uelmen, *Campus Hate Speech Codes: A Pro-Con Discussion of Speech Codes and Free Speech*, Santa Clara U. Character Educ. (Nov. 15, 1990), https://www.scu.edu/character/resources/campus-hate-speech-codes/.

Hale warned, he would not be bound by the state's constitutional ban on "communications" that incited hatred based on "reference to religious, racial, ethnic … affiliation," which he regarded as unlawfully abridging his First Amendment rights.[126]

The Committee on Character and Fitness concluded that there was no room in the legal profession for a person whose "life mission" was to "deny the equal protection of the laws" to all who were not within his definition of the "white race," albeit using non-violent and legal means. Such views, the committee concluded, could not be reconciled with the moral character required of lawyers, in light of the unique obligations imposed on officers of the court to preserve certain "fundamental truths" about "individual dignity." Such incontrovertible truths, the report continued, include the principle that persons are not to be "judged on the basis of . . . skin color, race, ethnicity, religion or national origin." In short, "Mr. Hale's life mission, the destruction of the Bill of Rights, is inherently incompatible with service as a lawyer . . . who is charged with safeguarding those rights."[127]

The facts in *Hale* are as extreme as the candidate himself, suggesting the risk that the old maxim "hard cases make bad law" applies. Is *Hale sui generis*? If not, where would the boundary lie? Is it possible to identify objective criteria to determine what dissident views are so extreme they disqualify a candidate from bar admission? Recall that Matthew Hale disavowed violence.

Consider a different set of circumstances, in a state that follows the letter of *Obergefell v. Hodges* by allowing same sex couples to marry but denies married same sex partners the usual privileges that flow with marriage. Would it be constitutionally permissible to withhold bar admission from a law-abiding young person who just passed the bar exam and plans a career supporting the rights of same sex married persons, including the right to list both spouses on birth certificates and other civil privileges flowing from marital status?[128] Or for a bar admission committee in the deep South of the 1950s to withhold admission from a prospective civil rights attorney who had never been arrested for civil disobedience?

Dissenting, one member of the *Hale* panel urged that the applicant be taken at his word that he could both "hold racist views and practice law in accordance with his oath as an attorney" until his conduct in practice proved

126. Geoffrey C. Hazard et al., The Law of Ethics and Lawyering 1045, 1046-47 (2010) (quoting In re Hale, Committee on Character and Fitness for the Third Appellate District of the Supreme Court of Illinois (1998)).

127. *Id.* at 1051, 1053.

128. Obergefell v. Hodges, 576 U.S. ____, 135 S. Ct. 2071 (2015), V.L. v. E.L, 136 S. Ct. 1017 (2016) (reversing Georgia Supreme Court ruling denying a lesbian the right to adopt her partner's children); Smith v. Pavon, 505 S.W. 3d 169 (Ark. 2016), *cert. granted sub nom Pavan v. Smith,* 137 S. Ct. 2015, 2077 (2017) (per curiam) (reversing opinion below on the ground that *Obergefell* requires that states apply the "same constellation of benefits" to all spouses, including the right of a spouse to be listed on the birth certificate of a child conceived with donated sperm).

otherwise.[129] Distinguished commentators agreed with Matthew Hale that the ruling impermissibly penalized his expression: Alan Dershowitz offered to take up the case, so long as he could be assured that Hale eschewed racial violence.[130]

In the event that law schools rely on Rule 8.4 (g) to discipline students for purely verbal "harassment or discrimination"[131] they need not always employ the maximum penalties of suspension or expulsion. The realm of disparaging speech is well suited to mediation to promote better understanding of the harms words cause, or restorative justice approaches like those discussed in Joan Howarth's contribution to this issue, which would promote healing for the speaker, the wounded and the entire community.[132]

2. Counsel and guide the university community

To promote wider understanding of what the First Amendment requires, I encourage law school faculty members to engage with university administrators, faculty in other disciplines, and students in every part of the university. The knowledge and experience of the law school faculty should be brought to bear in creating a university-wide culture that respects both free expression and the dignity of all constituent groups. Law school professors have unique skills that can to help administrators keep free-speech principles squarely in mind and navigate the complexities of legal doctrine as they seek to contain campus cultures that may be seen as conducive to group disparagement and assaultive conduct.

129. *Id*. at 1053 (Baxter, dissenting).

130. Pam Bellock, *Racist Barred From Practicing Law; Free Speech Issues Raised*, N.Y. Times, Feb. 10, 1999. In 2004, Hale was convicted of soliciting the murder of a federal judge who presided over a copyright lawsuit in which Hale was found to have violated a copyright to the name of the white supremacist church he presided over. He is currently serving a 40-year prison term. *Matt Hale*, Southern Poverty L. Ctr., https://www.splcenter.org/fighting-hate/extremist-files/individual/matt-hale (last visited June 8, 2017).

131. The Report that accompanied Rule 8.4 (g) explained that adopting a black letter rule would make "an important statement to our profession and the public that the profession does not tolerate prejudice, bias, discrimination and harassment." It also "clearly puts lawyers on notice that refraining from such conduct is . . . a specific requirement." A.B.A. Standing Committee on Ethics and Professional Responsibility et al., Report to the House of Delegates 4 (August 2016). It is limited to "'conduct related to the practice of law" when the lawyer knew or reasonably should have known the conduct was harassment or discrimination." *Id*. at 8. Harassment and discrimination are "defined to include verbal . . . conduct against others." *Id*. Conflating speech and conduct does not, however, turn expression into conduct that can be punished without violating expressive rights, as I have argued. The drafters take the position that it is sufficient protection for expression to allow lawyers to say what they want when they are not engaged in conduct related to the practice of law. This may require further exploration.

132. Joan W. Howarth, *Shame Agent*, 66 J. Legal Educ. 717 (2017).

Conclusion

Most of the Supreme Court's seminal First Amendment cases involved political dissent and advocacy for legal and social change, such as the civil rights movement. In the 1950s and '60s many white observers, especially in the deep South, found deeply offensive the protests by African-Americans and their white supporters who sought integration of public accommodations and schools, and who demanded voting rights. Proponents of women's suffrage and the earliest advocates of rights for LGBTs similarly offended majoritarian views. The battle over what bathrooms transgendered people should use continues to arouse fierce sentiments. The Spanish religious inquisitors, Nazis, Stalinists and others who thought they possessed "truth" stand as examples of the dangers of squelching opposition and difference.[133]

Every time we think about the state as a potential ally in limiting someone's speech to accomplish laudable aims, we must test that temptation against the notion that the person who decides what speech will be tolerated will always be fair, wise, and on the side history will prove was "correct," however we define "correctness." Free-speech doctrine rejects any notion that the state may ever be the arbiter of truth, however laudable the cause, including making students of every background feel safe—and be safe—on campus. Where words are the weapons, the Constitution requires that this important battle be fought from the ground up.

133. West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).