INTRODUCTION

Questions of how to deal with hate speech and other offensive expression on college and university campuses are one of the constants of higher education law and policy. The nature and content of what is considered hate speech or offensive expression may change over time and reflects larger societal and historical trends and issues, but the need to figure out how to maintain an educational environment that is conducive to learning is an ever-present challenge that requires continuing vigilance. Issues of free expression go to the very heart of the educational mission, and college and university campuses have long been viewed as places where the most important and controversial issues of the time can and should be discussed and debated. The increasing diversity among students, faculty, and staff on our campuses has increased the pressure on our institutions to find ways to allow for the marketplace of ideas to flourish without making certain groups of people feel marginalized.

This outline will provide a brief overview of legal and policy issues related to the reaction to, and regulation of, hate speech and other offensive expression on campus. This outline will focus on some of the key current debates. Issues related to political and religious expression have been among the most significant flashpoints on campuses recently and therefore are a focus of much of the discussion. Although this overview will focus on U.S. law and institutions, it is worth noting in this age of increasing globalization that colleges and universities around the world are also wrestling with these same issues. See, e.g., “British University Bars Muslim Group From Campus and Suspends Student Who Invited It,” The Chronicle of Higher Education: Academe Today, Sep. 23, 2005 (university ordered student union to rescind invitation to speaker from controversial Muslim organization with alleged links to terror); “Anti-Religion Speech Ban Protested,” Associated Press (Feb. 1, 2006) (discussing proposed legislation in Britain that would bar speech considered to incite religious hatred).

APPLICABLE LAW

When institutions attempt to address incidents of offensive speech on campus, two fundamental legal principles intersect and often seem to be in conflict: i.e., the rights of free expression and freedom from discrimination. Sustenance of a healthy and robust educational environment at the postsecondary level requires careful attention to both of these principles, which are briefly outlined below.

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1 The views expressed herein are those of the author and do not necessarily reflect the views of Rutgers, The State University of New Jersey.
FREE SPEECH

First Amendment

Although the First Amendment to the U.S. Constitution is most often cited as the legal source of protection for free speech in higher education, it applies only to “state actions,” see In re Civil Rights Cases, 109 U.S. 3 (1993), and hence to the rights of individuals vis-à-vis public institutions. As discussed below, however, private institutions may be bound to provide similar protections under: (1) state law; (2) church-related regulations; or (3) other policies and contractual provisions that may have the force of law.

The First Amendment applies to a broad array of expression, including symbolic speech that can take many forms (such as artistic expression, flags, T-shirts, etc.). See, e.g., Tinker v. Des Moines School District, 393 U.S. 503 (1969) (students’ wearing of black armbands in school as symbol of opposition to Vietnam War was protected expression).

On the other hand, the U.S. Supreme Court has recently reiterated that not all conduct that is intended to express an idea constitutes protected expression. In Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 126 S. Ct. 1297 (2006), the Court rejected the argument that the Solomon Amendment (requiring equal access for military recruiters on campus) regulates speech, and also held that the expressive nature of the conduct regulated by the statute (i.e., law school policies that forbade military recruiters from on-campus interviewing on the basis that the military’s policy on homosexuals violates the schools’ own anti-discrimination policies) does not bring that conduct within First Amendment protection.

[W]e rejected the view that ‘conduct can be labeled ‘speech’ whenever the person engaging in the conduct thereby intends to express an idea.’ Instead, we have extended First Amendment protection only to conduct that is inherently expressive. …

The expressive component of a law school’s actions is not created by the conduct itself but by the speech that accompanies it. … If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into ‘speech’ simply by talking about it. (citations omitted)

See id. at 1310-1311. Thus, one of the threshold questions in many instances of offensive behavior is whether the behavior constituted “speech” or “expression” protected by the First Amendment, or “conduct” that is not protected.

Students, faculty and staff at public institutions all enjoy First Amendment rights, of course, but in each case there are limitations on these rights. For example, under the First Amendment, protection for employees at public institutions is limited to speech on matters of “public concern.” See Connick v. Myers, 461 U.S. 138 (1983). Speech that pertains only to issues of personal interest is not protected under the First Amendment. See id. Matters of public concern have been defined as those which can be “fairly considered as relating to any matter of political, social, or other concern to the community.” See id. If speech is determined to be on a matter of public concern, then a balancing test is applied as follows: is the interest of the public employee as a citizen in commenting on the matter outweighed by the interest of the state as an employer in promoting effective and efficient public service? See Pickering v. Board of Educ., 391 U.S. 563, 573 (1968); see also Waters v. Churchill, 511 U.S. 661 (1994). The question of what it means to “disrupt” effective and efficient service must also be
considered within the specific context—i.e., in higher education, the nature and purpose of the environment (in fostering the discussion and debate of ideas, even those that are unpopular, controversial or offensive) is not the same as in other public sector settings. The mere expression of controversial or unpopular points of view, therefore, cannot be relied upon as a rationale for a public college or university in prohibiting or punishing such speech.

**Academic Freedom**

Academic freedom is a core principle that reflects and reinforces the very mission of higher education. It is not, however, coextensive with the First Amendment, as they serve different purposes. Academic freedom protects the “marketplace of ideas” in the specific context of the educational environment, whereas the First Amendment protects speech on all sorts of issues in all sorts of contexts but is subject to various limitations for public policy reasons. For an excellent overview of academic freedom as a legal principle, see “Culture Wars and Freedom of Expression on Campus,” Lawrence White, National Association of College and University Attorneys 45th Annual Conference (June 2005).

Academic freedom has been enshrined in policy statements in varying degrees at virtually all colleges and universities—public and private alike. Academic freedom for faculty and students may be protected by a variety of means (e.g., in collective bargaining agreements, institutional policies, faculty and student handbooks, etc.) that are legally enforceable to varying degrees.

**Faculty Rights and Responsibilities**

Virtually all public and private colleges and universities provide some protection for academic freedom rights of faculty members. Many institutions have adopted the American Association of University Professors’ seminal 1940 Statement of Principles on Academic Freedom and Tenure, which states in part as follows:

Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights. …

(a) Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

(c) College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special
obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.


The statement is worth examining carefully for its balance of rights and responsibilities. It does not treat the notion of faculty academic freedom in a vacuum; instead, it recognizes that faculty members are part of a larger educational community. The notion that professors can be required to focus on the subject matter of their courses/fields of study (see (b) above), for example, means that faculty do not have an unfettered right to talk about anything and everything in the classroom. See, e.g., Edwards v. California U. of Pennsylvania, 156 F.3d 488 (3d Cir. 1998), cert. denied, 525 U.S. 1143 (1999).

As noted in section (c) above, the role in which a faculty member is speaking (e.g., as a citizen, as a faculty member, as a department chair, etc.) is also particularly important. See Jeffries v. Harleston, 52 F.3d 9 (2d Cir.), cert. denied, 516 U.S. 862 (1995) (distinguishing between protection for professor’s speech as a faculty member v. his administrative role as a department chair, in which he acts on behalf of the institution).

These issues can of course be especially contentious at religiously-affiliated institutions. The so-called “Limitations Clause” cited in (b) above asserts that any limitations on academic freedom based on religious principles should be clearly stated in writing when someone is hired.

In the Classroom (and Other Interactions with Students)

A number of recent reports and studies have claimed that conservative scholars are less likely to be hired and promoted in academe. Other articles have questioned the assumptions behind these studies and have argued that self-selection is a better explanation for the comparative underrepresentation of conservative faculty members at colleges and universities. See, e.g., “New Paper Assails Report That Said Bias Against Conservative Professors Is Common in Academe,” The Chronicle of Higher Education: Academe Today (Aug. 9, 2005). Still other scholars have argued that professors in certain disciplines have a duty to be open about their political positions and beliefs when they teach, and perhaps even to make an impact on their students’ attitudes toward politics. See, e.g., Avner De-Shalit, “Teaching Political Philosophy and Academic Neutrality,” 3 Theory and Research in Education 97 (2005).

David Horowitz, president of the Center for the Study of Popular Culture, has led a national campaign to urge federal and state legislators to pass the so-called “Academic Bill of Rights,” which would require public universities to expose students to a diversity of views in curricula, reading lists, and campus speakers. The document also calls for the prohibition of the grading of students and the hiring or firing of professors based on their political or religious beliefs. The proposal has been sternly criticized by the American Association of University Professors and other higher education organizations and leaders as an infringement on academic freedom by legislating that particular types of views be formally incorporated in higher education, even if faculty experts believe that the inclusion of such views may be inconsistent with rigorous standards for scholarship or appropriateness in their fields of expertise. See, e.g., Ann Marie B. Bahr, “The Right to Tell the Truth,” The Chronicle of Higher Education (May 6, 2005); Jacobson, Jennifer, “Opponents of ‘Academic Bill of Rights’ Form a Coalition to Fight It More Effectively,” id. (March 16, 2006). The measure was incorporated as a “sense
of Congress” by the House majority in legislation to renew the Higher Education Act, albeit without any enforcement mechanism. Similar legislation has been introduced in over a dozen states.

In response to the increasing attention to these issues from all sides, the American Council on Education and 27 other higher-education groups, including the American Association of University Professors, issued a “Statement on Academic Rights and Responsibilities,” outlining principles to protect academic freedom and intellectual pluralism (see www.acenet.edu). That statement was in turn criticized by the American Federation of Teachers and others as being insufficiently protective of academic freedom. See “Academic Groups’ Statement on Rights and Freedoms is Criticized as Too Weak,” The Chronicle of Higher Education: Academe Today (July 1, 2005). University presidents from 16 leading research universities around the world also released a statement in summer 2005 that focused on academic autonomy through the rights and responsibilities of scholars, students, and universities. See “University Presidents From Around the World Issue Statement Supporting Academic Freedom,” The Chronicle of Higher Education: Academe Today (June 30, 2005).

Recently many institutions have faced accusations that their faculty or staff are imposing their religious or political viewpoints on students. Here are a few prominent examples:

The University of Montana agreed to permanently appoint a professor to teach constitutional law who had previously been barred from doing so because of his conservative views, based upon the recommendation of an outside committee charged with evaluating the professor’s teaching, scholarship, and service to the university. “U. of Montana Accepts Panel’s Ruling and Appoints Conservative Professor to Teach Constitutional Law,” The Chronicle of Higher Education: Academe Today (July 19, 2005).

The U.S. Air Force Academy faced a series of allegations claiming that it does not respect religious differences, and that it encourages Christians on campus to proselytize others. An Air Force report found that the academy needs to do more to promote religious tolerance, although it found no overt religious discrimination. See Barry S. Fagin, “Faith and Tolerance at the Air Force Academy,” The Chronicle of Higher Education (July 29, 2005).

A federal appeals court ruled in 2005 that Washburn University did not violate the Constitution in placing a sculpture (of a scowling Roman Catholic clergyman) that some deemed anti-Catholic on its campus. The sculpture included a caption from the artist, indicating that it represented his fear in entering the confessional booth for the first time. A professor and student sued, accusing Washburn of violating their rights under the establishment clause of the First Amendment by exhibiting a statue hostile to Catholicism. The court found that a reasonable observer in that context would not interpret the statue’s placement on campus as an endorsement of its message by the university. See “Controversial Sculpture at Washburn U. Did Not Violate Constitution, Federal Court Finds,” The Chronicle of Higher Education: Academe Today (Aug. 2, 2005); “Justices Let Stand Rulings on Campus Sculpture Offensive to Some Catholics,” id. (Mar. 17, 2006).
Speech Beyond the Classroom

Issues have arisen about faculty speech and conduct related to religion and politics outside the classroom as well. Here are some recent examples:

After leading a public prayer for both men and women, a Muslim, female professor at Virginia Commonwealth University was barraged with critical and threatening messages. See “The Quiet Heretic,” The Chronicle of Higher Education: Academe Today (Aug. 12, 2005). The professor had chosen to do so to express her understanding of how Islam should be interpreted. The university was asked to cancel her courses, but instead ultimately decided to have her teach her courses from home using a video link.

The writings of Ward Churchill, a professor at the University of Colorado at Boulder, created a firestorm earlier in 2005 when it came to light that he wrote (in an essay more than three years earlier) that those who died in the September 11 attack on the World Trade Center were somehow part of the military-industrial complex that produced the hatred that caused the attack. The essay received significant national attention after various institutions invited him as a guest speaker, and he eventually resigned as chair of the ethnic-studies department as a result of the firestorm that developed over his writings. The university subsequently initiated proceedings to dismiss Professor Churchill based on allegations that he had plagiarized and fabricated material in his research. See, e.g., “U. of Colorado Begins Process to Fire Ward Churchill,” The Chronicle of Higher Education: Academe Today (July 7, 2006).

Student (and Student Organization) Rights and Responsibilities

As student bodies become increasingly diverse, issues related to political and religious expression are also becoming more common (and perhaps often more contentious as well). The Joint Statement on Rights and Freedoms of Students outlines general rights and responsibilities of students in various contexts in higher education and can serve as a useful starting point for consideration of these issues:

In The Classroom

Students should be free to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion, but they are responsible for learning the content of any course of study for which they are enrolled.

…

Student Records

Information about student views, beliefs, and political associations which professors acquire in the course of their work as instructors, advisers, and counselors should be considered confidential. Protection against improper disclosure is a serious professional obligation.

…

No [student] records should be kept which reflect the political activities or beliefs of students.
Student Organizations

Freedom of Association

Campus organizations, including those affiliated with an extramural organization, should be open to all students without respect to race, creed, or national origin, except for religious qualifications which may be required by organizations whose aims are primarily sectarian. (footnote omitted)

Freedom of Inquiry and Expression

(a) Students and student organizations should be free to examine and discuss all questions of interest to them and to express opinions publicly and privately. They should always be free to support causes by orderly means which do not disrupt the regular and essential operations of the institution. At the same time, it should be made clear to the academic and larger community that in their public expressions or demonstrations students or student organizations speak only for themselves.

(b) Students should be allowed to invite and to hear any person of their own choosing. Those routine procedures required by an institution before a guest speaker is invited to appear on campus should be designed only to ensure that there is orderly scheduling of facilities and adequate preparation for the event, and that the occasion is conducted in a manner appropriate to an academic community. The institutional control of campus facilities should not be used as a device of censorship. It should be made clear to the academic and larger community that sponsorship of guest speakers does not necessarily imply approval or endorsement of the views expressed, either by the sponsoring group or by the institution.

AAUP Policy Documents & Reports at 261-7 (9th ed. 2001).

Students and Their Academic Activities

In many instances, students claim that they have a right not to be exposed in their academic studies to works (books and other reading materials, plays, movies, etc.) when the content or message somehow violates their religious beliefs. See, e.g., Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004) (student at University of Utah requested a modified curriculum in actor training program to avoid having to perform offensive language in plays). In these instances, institutions must decide whether the work is somehow essential to the learning experience in the course and/or field of study, and whether some sort of accommodation can be made without sacrificing core educational objectives. Among others, factors to consider in such circumstances might include whether the course is basic, foundational, and/or a prerequisite within a field of study or an advanced and/or elective course, whether other sections or options are available, etc. Where specific requirements or assignments may not be fundamental to the educational experience or curriculum, institutions might also ask what (if any) accommodations might be possible.

Students sometimes also complain about retaliation by faculty and administrators in response to expressions of their personal political or religious beliefs. A student at Le Moyne College in New York, for example, was expelled by the institution after advocating corporal punishment in a paper for one of his teaching classes. The student filed suit, alleging that the college was “spitting” on his evangelical Christian beliefs. A New York appeals court ordered that he be reinstated, holding that the college had
violated his due-process rights and its own regulations. See Jacobson, Jennifer, “Pro-Paddling Student Wins Court Battle,” The Chronicle of Higher Education: Academe Today (Feb. 3, 2006). This sort of suit could raise difficult questions about the boundaries of student academic freedom in classroom work, and about the appropriate limits that may be placed on them based upon professional standards in various fields of study.

In addition to the Academic Bill of Rights (discussed above) and related legislative efforts, a number of organizations have recently sprung up to provide conservative students with information and resources so as to empower them to participate more openly and vigorously in campus debates on political and religious topics. For example, the Center of the American Experiment, a group devoted to conservative and free-market ideas, started a website called “Intellectual Takeout” to help students find conservative speakers, figure out how to approach professors with whom they disagree, etc. Many conservative Christian students from around the country attend the annual Summit Ministries workshop in Colorado to discuss how to defend their faith in college. See “Faith Camp,” Chronicle of Higher Education (Sep. 23, 2005).

Outside the Classroom

Clashes on religious, political, and other social questions can also occur in student life outside the classroom. In such situations, the rights of all parties involved must be carefully weighed and balanced, and the staff with responsibility in such areas must be sensitized to First Amendment issues and concerns in responding.

Student publications can provide particular challenges to institutions, especially publications that see it as their mission in part to stir controversy on difficult political and other topics. The editor in chief of the Middlebury College student newspaper resigned in early 2005 after publishing a doctored photograph portraying the college’s upcoming commencement speaker, former New York City mayor Rudolph Giuliani, as Adolf Hitler. Many other student newspapers have published controversial and offensive stories and cartoons touching upon topics such as the Holocaust, affirmative action, the Iraq War, etc.

DISCRIMINATION

Discrimination Statutes

In addition to the general Equal Protection Clause in the U.S. Constitution (which applies to public institutions only), federal, state and local discrimination statutes may also come into play when dealing with incidents of offensive expression and behavior on campus. See, e.g., Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d (federal statute which addresses race and national origin discrimination in educational programs and activities); Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a) (federal statute which protects against sex discrimination in educational programs and activities). Forms of discriminatory conduct under these statutes that may include expressive elements include different treatment and the establishment of a hostile environment. See, e.g., Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 65 Fed. Reg. 66092 (U.S. Department of Education, Nov. 2, 2000) (guidance from the U.S. Department of Education’s Office for Civil Rights (OCR) discussing sexual harassment standards under Title IX); Racial Incidents and Harassment Against Students at Educational Institutions, 59 Fed. Reg. 11448 (U.S. Department of Education, March 10, 1994) (guidance from OCR on standards applicable to racial harassment under Title VI).
UNIVERSITY POLICIES:
DRAWING THE LINE BETWEEN FREE SPEECH AND DISCRIMINATORY CONDUCT

The challenge for colleges and universities, of course, is how and when to draw the line between expression that is protected under free speech principles and conduct that is considered discriminatory and actionable under discrimination law. Colleges and universities have struggled over the years in trying to draw this line. Scholar Jon Gould estimates that nearly one-third of American colleges and universities adopted some form of hate speech code in the period between 1987 and 1992. See Gould, Jon B., Speak No Evil: The Triumph of Hate Speech Regulation (University of Chicago Press, 2005). This period was marked by severe political tensions on campuses related in part to increasing racial and ethnic diversity and to debates about affirmative action in higher education. As incidents of hate speech on college campuses gained headlines across the nation, institutions faced significant pressure to develop policies to address this behavior and to ensure a welcoming environment for students of all backgrounds.

When institutions have attempted to write policies that regulate offensive expression rather than discriminatory conduct, they have often run afoul of the First Amendment or other academic freedom and free speech principles. See, e.g., UWM Post, Inc. v. Board of Regents of Univ. of Wisc. Sys., 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. Univ. of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989). The courts are likely to look carefully at the language of such policies, and to apply the constitutional standards of overbreadth and vagueness to the words and phrases used in such policies. See, e.g., Coleman, Arthur L, and Alger, Jonathan R., Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses, 23 J.C.U.L. 91-132 (Summer 1996). For example, general prohibitions against the use of “demeaning” or “offensive” language that might lead to subjective interpretations will not pass constitutional muster, as there are many instances when the use of such language on a campus would not by itself constitute harassment as defined under federal law. See id. The Foundation for Individual Rights in education (“FIRE”), which describes itself as a watchdog for free speech on campuses, recently released a report asserting that hundreds of institutions continue to maintain policies or speech codes that prohibit speech that is protected by the First Amendment. See “Spotlight on Speech Codes 2006: The State of Free Speech on Our Nation’s Campuses,” Foundation for Individual Rights in Education (Dec. 6, 2006).

Institutional policies prohibiting harassment or expression in various forms cannot be based solely on subjective listener reaction—they must incorporate “some threshold showing of severity or pervasiveness” such that the conduct in question would objectively interfere with an individual’s participation in educational programs or activities. See Saxe v. State College Area School District, 240 F.3d 200, 202 (3d Cir. 2001) (striking down a public high school’s anti-harassment policy because it “could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which offends someone”). The court in the Saxe case emphasized that “it is certainly not enough that the speech is merely offensive to some listener.” Saxe, 240 F.3d at 217. See also Bair v. Shippensburg Univ., 280 F. Supp. 2d 357, 369 (M.D. Pa. 2003) (“regulations that prohibit speech on the basis of listener reaction alone are unconstitutional both in the public high school and university settings”).

Institutional attempts to regulate hate speech must also take into account the strong protection for parody and satire recognized under the First Amendment. See, e.g., Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (upholding Hustler’s right to publish a parody suggesting that Jerry Falwell’s first sexual experience was a drunken tryst in an outhouse with his own mother).
To make matters even more complicated in this area, codes aimed at offensive expression can also be underinclusive, as well as overinclusive, in terms of the type of expression at which they are aimed. In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the U.S. Supreme Court held that even when government is regulating a supposedly “unprotected” category of speech (e.g., “fighting words”), it cannot do so in a content-based manner. The case involved a city ordinance stating that

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

*See id.* In that case, the city had attempted to be carefully restrictive by prohibiting only certain types of fighting words, but the Court indicated that they could not pick and choose among different types of fighting words based on content or viewpoint.

The Court later held, however, that *R.A.V.* does not invalidate statutes that punish other existing crimes (such as vandalism or arson) more seriously if the prosecution shows that the crime was motivated in part by one of the listed types of bias (e.g., based on race, gender, etc.). *See Wisconsin v. Mitchell*, 508 U.S. 476 (1993). Furthermore, the Court has subsequently held that all instances of a certain type of expressive act—such as cross-burning—may be prohibited if done for the purpose of intimidation or threat, even if other intimidating acts with expressive conduct are not prohibited. *See Virginia v. Black*, 123 S.Ct. 1536 (2003) (upholding a statute that made it a crime to burn a cross in a public place or on the property of another, if done “with the intent of intimidating any person or group of persons”).

In a July 28, 2003 “Dear Colleague” letter to colleges and universities, the U.S. Department of Education’s Office for Civil Rights attempted to provide some guidance on the distinction between speech and conduct with regard to enforcement of the discrimination statutes under its jurisdiction:

> Some colleges and universities have interpreted OCR’s prohibition of “harassment” as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR’s jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. **Under OCR’s standard, the conduct must also be considered sufficiently serious to deny or limit a student’s ability to participate in or benefit from the educational program.** Thus, OCR’s standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim’s position, considering all the circumstances, including the alleged victim’s age. (emphasis added)

In other words, the key to a finding of discrimination is a showing that conduct has resulted in a denial of educational participation or benefits, and that this denial would have affected a reasonable person in light of all the facts and circumstances. *See also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999) (discussing standard for proving sexual harassment in the educational setting). This standard is intended to avoid findings of discrimination based on offensive expression that leads to overreactions by so-called “hypersensitive” complainants.
This approach has been reflected in OCR’s handling of some controversial complaints. Among the most difficult cases have been those involving the use of Native American mascots and symbols on college campuses—a topic that has also recently been addressed by the National Collegiate Athletics Association. See Wolverton, Brad, “NCAA Restricts Colleges with Indian Nicknames and Mascots,” The Chronicle of Higher Education: Academe Today (Sep. 2, 2005). In a case involving allegations that (among other things) the widespread use of such a mascot and symbols on a campus created a racially hostile environment, OCR found that mere offensiveness is not enough to establish a violation of Title VI. See University of Illinois at Urbana-Champaign, OCR Case No. 05-94-2104 (Nov. 30, 1995).

Even though the First Amendment applies to public institutions only, that same OCR “Dear Colleague” letter (July 28, 2003) also indicated that OCR’s regulations should not be interpreted by private institutions so as to inhibit free speech protections:

There has been some confusion arising from the fact that OCR’s regulations are enforced against private institutions that receive federal funds. Because the First Amendment normally does not bind private institutions, some have erroneously assumed that OCR’s regulations apply to private federal-funds recipients without the constitutional limitations imposed on public institutions. OCR’s regulations should not be interpreted in ways that would lead to the suppression of protected speech on public or private campuses. Any private post-secondary institution that chooses to limit free speech in ways that are more restrictive than at public educational institutions does so on its own accord and not based on requirements imposed by OCR.

In recent years, several advocacy organizations have emerged with a mission of monitoring public and private college and university attempts to develop or apply policies that might (in the views of the advocacy groups) inhibit free expression. For example, the Foundation for Individual Rights (FIRE) is a well-known national organization that has come to the defense of conservative students and faculty members, threatening to file lawsuits against colleges and universities whose policies allegedly discriminate against individuals based on their political or religious beliefs. See http://www.thefire.org. FIRE has publicized and challenged policies at particular public and private institutions that it believes violate First Amendment standards. See, e.g., FIRE Letter to Phi Beta Kappa Secretary John Churchill (Nov. 29, 2005), http://www.thefire.org/index.php/article/6482.html. A new group called the Alliance Defense Fund, a conservative, Christian legal-advocacy group in Arizona, recently filed lawsuits against Pennsylvania State and Temple Universities, alleging that these institutions have “speech codes” that violate students’ First Amendment rights. See Jacobson, Jennifer, “Twin Lawsuits Accuse Penn State and Temple Universities of Using ‘Speech Codes’ to Stifle Students’ Rights,” The Chronicle of Higher Education: Academe Today (Feb. 24, 2006). Penn State subsequently revised its policies on nondiscrimination and intolerance to clarify what constitutes harassment and protected speech on its campuses (although the university said that the changes were not prompted by the lawsuit). See Jacobson, Jennifer, “Penn State Revises Policies on Nondiscrimination and Intolerance,” The Chronicle of Higher Education: Academe Today (May 25, 2006).

FIRE and other organizations like it have developed tools and resources and encouraged faculty members and students to challenge their institutions when they feel that their rights of free expression have been violated out of so-called “political correctness.” See, e.g., French, David, Lukianoff, Greg, and Silverglate, Harvey, FIRE’s Guide to Free Speech on Campus (Nov. 30, 2004). As the interim president of FIRE recently said, “Being offended is part of college. The joke I make is: If you make it through four years of college without being offended, ask for your money back.” FIRE: News in brief from central Pennsylvania (March 6, 2006). Advocacy organizations such as FIRE and the American
Council of Trustees and Alumni have also supported alumni candidates for college and university governing boards who have argued that these institutions are restricting free speech and intellectual diversity. See, e.g., Fain, Paul, “Renegades Shake Up Trustee Elections,” The Chronicle of Higher Education: Academe Today (March 10, 2006). The American Association of University Professors has also issued a policy statement that defends the rights of campus groups to invite provocative speakers to their colleges and universities. See “Academic Freedom and Outside Speakers,” http://www(aaup.org/statements/SpchState/Statements/AFandOutsideSpeakers.htm.

As the ways in which students and faculty communicate and interact change, institutions have also struggled with how to adapt their policies to new modes of communication and education. Rules and regulations that might make sense for face-to-face interaction in the classroom may need to be adapted for the online context, for example, to take into account the ways in which the educational environment needs to be protected in such a context. See, e.g., Gonzales, Jamie, “Code of Conduct Revisions Hit Students’ Cyber World,” State Hornet (Feb. 7, 2006) (describing California State University Student Conduct Code modifications for modern technology and behavior off campus, specifically cyberspace behavior such as the posting of obscene content on a website).

**SOME PRACTICAL SUGGESTIONS**

In light of the legal principles discussed above, here are some practical suggestions for balancing rights and responsibilities with regard to free speech and freedom from discrimination.

(1) **Articulate values of tolerance and civility, and respond with “more speech” when controversial or offensive speech occurs.**

Colleges and universities can and should articulate core values that create the foundation for a learning environment in which faculty and students from all backgrounds and perspectives can participate and learn. These core values may include tolerance and civility. These values may be articulated as general principles in mission and vision statements, rather than as vague or overbroad standards in rules and regulations which are meant to be enforced in very specific ways (and which potentially carry specific penalties for non-compliance). This distinction is especially important for public institutions that are subject to First Amendment constraints, because rules and regulations that are vague and overbroad may be found to be unconstitutional (e.g., such as campus “speech codes” that have focused on banning controversial or offensive speech).

An institution and its representatives can also exercise their own free speech rights to disagree with or denounce offensive or denigrating comments made by faculty, students, guest speakers, or others—even if they are constrained by First Amendment principles from limiting or regulating objectionable speech on the basis of its content. The most effective antidote to offensive speech is more speech within the marketplace of ideas. See, e.g., Pavela, Gary, “Only Speech Codes Should Be Censored,” The Chronicle of Higher Education: Academe Today (Dec. 1, 2006). Protection of academic freedom and free speech rights does not mean that controversial viewpoints and expression need to go unchallenged in the academic environment. Many institutional leaders avoid referring to difficult topics and expression altogether in order to avoid a chilling effect on campus discussions. While this goal is a laudable one, there may be times when it may be entirely appropriate for administrators or other campus leaders to disagree publicly with particular viewpoints and to emphasize that they protect even some speech with which they disagree and/or find hostile or offensive.
(2) Take advantage of “teachable moments.”

On many occasions, offensive or controversial speech provides the impetus for teaching opportunities in formal and less formal settings. For example, after an incident at Rutgers University-Newark involving a graduation speaker who gave a speech focusing largely on his religious beliefs and their supremacy, the University convened a series of campus forums to allow faculty, staff and students to meet and talk about the issues raised by the speech and its aftermath.

When these difficult circumstances arise on campus and tensions are high, institutions can use their responses to these situations to model the values at the core of the educational mission. Leaders of colleges and universities have a special responsibility to lead by example in establishing a civil, tolerant, and open educational climate and atmosphere that is conducive to learning and participation by all students, and that welcomes and encourages discussion of diverse issues and viewpoints. In his recent book, *Restoring Free Speech and Liberty on Campus* (The Independent Institute, 2005), Donald Alexander Downs—an ardent critic of speech codes—makes the point that encouragement of more speech, rather than suppression of speech, is a way of treating postsecondary students with respect while reinforcing the educational mission:

> A university is a humanitarian institution that has several values that are sometimes in conflict: pursuing truth, preparing students for competent participation in constitutional citizenship, and promoting civility and mutual respect. … [Speech codes] have promoted limited political agendas over the pursuit of truth, and do not envision or treat students as young adults who possess the inherent strength to handle the responsibilities of constitutional citizenship.

*Id.* at 271.

(3) Ensure that anti-discrimination and harassment policies explicitly track applicable discrimination statutes, and relate specifically to standards applicable to the educational context.

Institutions can and should have policies that prohibit discrimination as defined by federal, state or local law, including harassment that constitutes discrimination on the basis of race, sex, etc. In developing such policies, however, institutions (particularly public institutions that must comply with the First Amendment) should not reinvent the wheel by coming up with their own definitions of discrimination or harassment; rather, they should stick closely to the specific legal standards articulated by the statutes themselves and by court interpretations thereof. *See* Coleman, Arthur L., and Alger, Jonathan R., *Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses*, 23 J.C.U.L. 91 at 123-128 (Summer 1996) (“[I]t is impossible to develop a list of categories of expression, or words and phrases, that may always or automatically be proscribed at an institution of higher education.” *Id.* at 124.).

Policies may also be more effective if they make positive statements about the nature and extent of the benefits protected in the various contexts within higher education (e.g., employment, the classroom, residence halls, etc.), thereby providing some clarity and specificity.

For example, the use of different teaching techniques and curricular materials could be explicitly noted as within the realm of professors’ discretion in the classroom, as judged by peer review within the field of expertise for competence and relevance to the subject matter. …
If a discrimination policy provides an indication of the nature and extent of the benefits it is meant to protect in the different contexts in which it applies, then it stands a better chance of passing legal muster—while also conveying a positive signal of the institution’s attitude toward fostering and maintaining an open, participatory educational environment.

_Id._ at 128.

(4) **Train institutional leaders and employees to recognize free speech and academic freedom principles and issues.**

Many free speech issues on campuses get out of hand quickly because well-meaning people feel that they must respond quickly and decisively to any allegations of potential harassment, or to bias-related incidents more generally. Often, a first response is to seek ways to shut down offensive expression before it spreads further in a campus community. When this happens, however, speakers with controversial viewpoints who have engaged in offensive or provocative expression may become martyrs or lightning rods who draw even more attention as examples of the suppression of civil liberties on campus. Once the possible suppression of civil liberties becomes the issue, relatively minor incidents can take on a much larger life of their own.

Institutions cannot assume that all leaders, managers and members of the campus community know and understand the legal nuances and differences between free speech and discriminatory conduct. Accordingly, providing training and resources on these issues on a regular basis can be very helpful in raising campus awareness of these legal principles. Institutional counsel may be able to play an important and proactive role in this regard.

(5) **Consider formation of campus entities that can provide proactive outreach on these issues, and that can react swiftly to campus incidents.**

Incidents involving offensive expression can quickly spiral out of control by sparking protests or other offensive expression. The typical processes in place at institutions of higher education to investigate such incidents, and perhaps discipline the offending parties, are often ill-equipped to address the need for a rapid and strategic response. Thus, in addition to normal investigatory and disciplinary processes to handle complaints of discrimination or other policy violations, institutions may want to consider the establishment of less formal entities that can intervene in a positive way to foster campus dialogue and healing. For example, after a series of incidents of offensive expression at Arizona State University, that institution formed a broad-based Campus Advisory Team, which is advisory to the university president and has as its mission to: (1) create and maintain a civil and just campus environment that values diversity, (2) promote respect for all individuals regardless of their status, (3) protect free speech and academic freedom, and (4) promote the pursuit of individual goals without interference from discriminatory harassment. See http://www.asu.edu/president/cet/cetsum.htm.

(6) **Be clear about the roles in which people are speaking, and on whose behalf they speak.**

Especially when dealing with complicated and controversial issues related to speech and religion, it is critical for institutional staff members (including administrators and faculty members) to be clear when they are speaking on behalf of the institution in an official capacity, versus when they are speaking on their own in a strictly individual capacity. It may be especially difficult for department chairs, for example, because of the fact that their positions require management responsibilities as well as some other traditional faculty responsibilities.
(7) Use content-neutral policies whenever possible (e.g., time, place and manner restrictions).

In many instances of potentially offensive or inappropriate conduct, content-neutral policies (e.g., on disorderly conduct, disruption of educational activities, drug or alcohol abuse, vandalism, disturbing the peace, etc.) might come into play – rather than constitutionally sensitive restrictions on the content of speech or the practice of religion. Public institutions that are subject to the First Amendment may use content-neutral time, place and manner regulations when they are narrowly tailored to serve a significant governmental interest unrelated to the suppression of speech, see, e.g., Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984), so long as they “[l]eave open alternative channels for communication of the information.” Metromedia, Inc. v. San Diego, 453 U.S. 490, 516 (1991) (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976) (citation omitted). Institutions should always keep in mind the ability to discipline students, faculty or staff for conduct rather than the content of their speech.

(8) Consider prohibitions against violence and intimidation against any person, without reference to the actor’s motivation of the content of his or her speech.

In light of the Supreme Court’s holding in Virginia v. Black, 123 S.Ct. 1536 (2003) (holding that a properly-constructed statute may ban a particular form of intimidating expression—such as cross-burning—even if other types of intimidating with expressive content are not prohibited), institutions may consider content-neutral prohibitions against certain types of violent and intimidating acts directed at other people. Any such prohibitions must use definitions of actionable conduct that are focused on behavior that is not inherently and primarily expressive, and must employ terms that will not be subject to vagueness or overbreadth challenges because they could be construed to cover some protected expression.

(9) Consider enhancement of penalties for code of conduct violations where the act was motivated by bias.

In light of the Supreme Court’s holding in Wisconsin v. Mitchell, 508 U.S. 476 (1993) (upholding a state statute that punished existing crimes like vandalism and arson more seriously if the prosecution shows that the crime was motivated in part by one of several listed forms of bias), institutions might consider enhancing penalties for violations of campus codes of conduct where the violation is demonstrated to have been motivated by some sort of bias (e.g., based on race, sex, etc.). The underlying code violation, however, must constitute a form of conduct that itself is not inherently expressive (such as arson or vandalism). Although the Supreme Court has not ruled on a case applying this penalty-enhancement theory to bias-based incidents on college and university campuses, the concept has been considered by some institutions as a way to reflect their concern with the seriousness of such incidents.

(10) Train and coordinate with campus law enforcement officers.

In many instances involving alleged hate speech, campus security and/or police become involved. Such incidents might or might not involved potential criminal activity. Accordingly, campus law enforcement officers need to be familiar with applicable law and rules regarding protection of free expression. Likewise, other campus officials (e.g., in student affairs) need to be aware of when and how to involve security and police in such instances because of possible criminal activity. Law enforcement
officials can also play an important part in campus dialogue on how to respond to such incidents, and can help to educate campus constituencies about conduct that violates state or federal law.

(11) Develop protocols for various educational settings (including cyberspace).

General rules or standards applicable to conduct in the classroom may not adequately address situations that can arise in other settings where teaching and learning are taking place—particularly in light of new technology and modes of instruction. Constraints and norms that might inhibit some forms of offensive expression in the traditional classroom might not be applicable in cyberspace, for example (e.g., on a course website). Faculty and students alike might be tempted to say something in an e-mail message or electronic bulletin board that they would not say in a face-to-face discussion. Furthermore, the tone intended by a remark (e.g., one of sarcasm or humor) may be completely lost in an electronic communication. The mere fact that professional norms must be defined carefully and with nuance in such contexts, however, should not mean that institutions abdicate their responsibility to draw any lines whatsoever. See Bollinger, Lee C., “The Value and Responsibilities of Academic Freedom,” The Chronicle of Higher Education (Apr. 8, 2005). Accordingly, it may be helpful to consider content-neutral protocols that protect educational purposes in other, less traditional settings (e.g., rules requiring that electronic postings be related to the course subject matter, that they conform with classroom norms in terms of respect for the opinions and thoughts expressed by others, etc.).

(12) Ensure that rules have a nexus to the educational environment.

Institutions must be especially careful with policies that purport to regulate expression off-campus when faculty members or students are acting in their roles as citizens. Institutional regulations should always have a direct nexus to some impact on the educational environment, even if they can be construed to reach some conduct which occurs off-campus or online.

(13) Treat groups consistently.

Whenever requests are received from particular religious or political groups (e.g., to get money, hold events, etc.), the answer should always take into account an analysis of how the decision would have been made if it had to be applied to groups all across the religious and political spectra.

(14) Be sure adequate grievance procedures exist for faculty and students with complaints regarding religious and political/viewpoint discrimination.

Many schools already have policies and procedures in place to address complaints in this area, but sometimes forget when these policies and procedures might be applicable in particular cases. See, e.g., “Academic Freedom” (in State Digest section), The Chronicle of Higher Education: Academe Today (Sep. 23, 2005) (An Ohio lawmaker dropped proposed legislation to protect students with unpopular beliefs from bias, and to prevent professors from discussing controversial topics unrelated to their courses, after the Inter-University Council of Ohio agreed to adopt a resolution urging colleges to respect opinions of students and faculty members and not to judge them on their political beliefs. The resolution, based on a 2005 statement by the American Council on Education, also calls on colleges to create grievance procedures for students and instructors who feel mistreated because of their views.) The “Statement on Academic Rights and Responsibilities” from the ACE et al. says that “[a]ny member of the campus community who believes he or she has been treated unfairly on academic matters must have access to a clear institutional process by which his or her grievance can be addressed.” For an example of such a policy, see Temple University’s recently enacted policy on “Student and Faculty
(15) Consider curricular and extracurricular opportunities to discuss difficult issues.

As student and faculty populations become more diverse, institutions should look carefully at how examination of various religious and political perspectives can be examined thoughtfully in the curriculum, as well as in safe spaces and events on campus that allow for dialogue on difficult issues (with trained discussion leaders to ensure that all perspectives are respected and heard). The University of North Carolina, for example, has prepared background materials for faculty members who teach about controversial issues to help them think about how to engage students and create a classroom climate that is safe for vigorous discussion and disagreement. See http://ctl.unc.edu/fyc21.html.

(16) Foster inclusiveness with campus celebrations of a variety of cultures, contributions, etc.

Institutions can raise awareness of various religious (and other groups) by ensuring that visible campus events are held to celebrate or commemorate the contributions, culture, or history of various groups.
RESOURCES

Here is just a small sample of the many resources dealing with academic freedom and offensive expression on campus. By listing these resources, the author of this outline is not endorsing the particular viewpoints or expression therein.

The American Association of University Professors (www.aaup.org) – website includes policy statements related to academic freedom of faculty and students.


Bernstein, David E., You Can’t Say That! (Cato Institute 2003).

Campus Environment Team, Arizona State University – a presidentially-appointed team of faculty, staff, and students created to address “campus climate issues and to serve as a proactive force on campus to prevent acts of insensitivity, deal with issues of free speech, and promote an environment that values and respects diversity.”


Downs, Donald Alexander, Restoring Free Speech and Liberty on Campus (The Independent Institute, 2005).

The Freedom Forum (www.freedomforum.org) – a nonpartisan, international foundation advocating free speech and press rights.

First Amendment Center at Vanderbilt University (www.firstamendmentcenter.org) – includes comprehensive research coverage of key First Amendment issues and topics.


Heumann, Milton, and Church, Thomas W. ed., Hate Speech on Campus: Cases, Case Studies, and Commentary (Northeastern University Press, 1997).


HYPOTHETICALS

Here are several samples of policy statements from public universities. In each instance, do you think the policy raises any legal concerns?

1. One public university prohibits “physical acts or threats or verbal slurs, invectives, or epithets referring to an individual’s race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age or handicap made with the purpose of injuring the person to whom the words or actions are directed and that are not made as part of a discussion or exchange of an idea, ideology or philosophy.”

2. Another public university campus code of conduct states that “no student shall threaten, offend, or degrade anyone on university owned or operated property. Forms of sexual harassment are a violation of this policy.”

3. Still another public university has a policy for students living in its residence halls that warns students, “[d]o not joke about differences related to race, ethnicity, sexual orientation, gender, ability, socioeconomic background, etc.” The policy also provides that “words and phrases that can be interpreted as harassing or intimidating are not acceptable” in the residence halls.

4. A university server website for students, faculty and staff has a policy that states that no viruses, “obscene, pornographic or excessively violent materials” will be allowed for submission to create personal web pages.

5. In a classroom discussion on the subject of affirmative action, the professor states his belief that many of the students of color would not be at the college but for the institution’s race-conscious admissions policy. The professor goes on to criticize the policy, saying that it waters down the institution’s standards and leads to the admission of less qualified students. Several students complain to the department chair. What should the chair do? What other facts might you like to know before responding?

6. At the height of the international controversy surrounding the Mohammed cartoons, an adjunct professor of geography became concerned that most students had not even seen the cartoons and would therefore be unable to evaluate them intelligently. She posted the cartoons, related news articles, and blank comment sheets on a bulletin board near her office where various faculty members posted items of interest. The cartoons were repeatedly and anonymously torn down, causing a considerable stir on campus. She then posted them behind a curtain so that passers-by would not be offended. Can the administration ask her to stop posting the cartoons? Does it matter how and where they are placed?

7. A history professor known for his casual teaching style at a community college uses a slang term for sexual intercourse in class. Many of the students are offended and complain. Can the college act to discipline the professor?

8. In an off-campus speech, a professor argues that Zionism is the force that led to the events of 9/11, and that America’s support for Israel is to blame for the attacks. After the speech is reported in the newspaper, outraged alumni and students demand the firing of the faculty member. How should the administration respond? What other facts would you like to know?
9. A student government leader was asked to give a short speech at a graduation ceremony. The student, a Christian, made reference to Jesus Christ as our savior as the larger context for this event, and said that Christ was the only true path to success. He also spoke of the unjust crucifixion of Christ. In protest, a number of faculty and students walked out of the ceremony. At the campus where the incident occurred, 11% of the students are Hindi and 9.1% are Muslim, and there are also significant numbers of Jewish and Buddhist students. Afterward, many people called on the university administration to punish the student or otherwise denounce his speech. What would you recommend to the administration?

10. A student newspaper publishes a cartoon under the headline “Holocaust Remembrance Week,” in which it portrayed a carnival-style scene of a bearded Jewish man sitting above an oven, with a person throwing a ball at him. The caption read: “Knock a Jew in the oven! Three throws for one dollar! Really!” The administration receives many complaints from students, alumni, and community groups, demanding that the paper be shut down. How should the administration respond?

11. Several mobile food vendors have contracts with a university that allows them to sell food on the campus. The vendors sell sandwiches with offensive names that refer to national origin or gender in demeaning ways. The contracts specify that the mobile truck owners are to treat members of the university community with respect. In response to demands from some student organizations, an official insists that the vendors cover up these sandwich names and come up with new ones. The vendors complain to the administration, and to the media. How would you advise the administration?

12. A loud rock band that is considered by many people to have offensive, white supremacist lyrics has been invited by a student organization to play at an on-campus facility. The facility has several other functions scheduled for that same evening, and the other sponsoring organizations of those functions complain to the administration about the band and the adverse impact it will have on their own events. Can the institution force the student organization to cancel the invitation?

13. In an online discussion on the course website in a Middle Eastern history class, a student (“A”) makes a large number of postings describing his own religious views and ridiculing Muslim beliefs and practices. Some other students in the course respond angrily in their own postings, one of whom uses an ethnic slur directed at student A. Still other students complain to the professor that they do not want to participate in the online discussion because they are offended by the content of the messages, and feel that the discussion has become dominated by this single student (A) and the debate about his views. Participation in the online discussion is a mandatory part of the course. What should the professor do?

14. A public university professor teaches a course required for an art degree and receives requests from students to opt out, on religious grounds, from part of the class involving drawing figures from nude models. What should the professor do? Would your advice differ if the course was optional?