Hate Speech versus Free Speech on College Campuses: Exploring the Viability of a Constitutional and Sustainable Campus Speech Code

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Abstract

This article explored the viability of a Constitutional and sustainable campus speech code. Specifically, this article used the website and rating system of the organization Freedom for Individual Rights in Education (FIRE) as the source for the pilot analysis. Southeastern Conference and Pacific 10 Conference universities were chosen as the sample, and both the overall university and individual codes were examined for violations of free speech. For the purpose of this article, codes that were found to have no violations were presented. This article found that based on the chosen sample, no Constitutional and sustainable campus speech code is currently viable. However, analysis of a broader sample is recommended.

Keywords: campus speech codes, hate speech, free speech

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I. INTRODUCTION

Throughout history racial and ethnic slurs have ignited a fire in man so deep that lives have been lost. Hate speech is an old phenomenon, but since the 1980's, hate speech regulation on university campuses has caused much debate for students, faculty, staff, administrators, and lawmakers, and judges. Incidents from universities around the country have led administrators to take action.

One such incident occurred at the University of Southern California in 2005. "At an Alpha Epsilon Pi party with the theme Once Upon a Time in Mexico, the fraternity set up a makeshift replica of the U.S.-Mexico border, with barbed wire looped around the top of a rented six foot fence. Next to the fence was a flashing red light and a cardboard sign that read 'Welcome to Mexico."[1]

According to a 2011 article in the Knoxville News Sentinel, in 2010, at the University of Tennessee,

> when more than a hundred prospective students walked across the street near the Black Cultural Center last February, Ja'Nay Bryant was giving a tour to encourage the high school students to become Volunteers. The university recruiting organization bused the students to Knoxville from around the state in order to offer them a campus visit that they might not have had otherwise. Luckily, Bryant said, most of the visitors didn't notice the bananas hurled in their direction. But she and other students leading the tour did.[2]

While advocates for hate speech regulations assert that equality matters most, critics—including the courts—conclude that freedom of speech trumps equality. Hate speech regulations, or codes, repeatedly have been written, tried, and then rejected or diluted by court challenges.

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[1] Stop the Hate: Fraternity and Sorority Action Guide, 2006. Retrieved from April 18, 2011 from www.stophate.org.

[2] Meghan Boehnke, (January 17, 2011), *UT takes a look at diversity: Panel pushes awareness initiatives after episode of racial intolerance*. Retrieved April 18, 2011 from www.knoxnews.com.

While civility is a key value, risks of impairing constitutionally protected expressive freedoms seem to weigh more heavily in judicial scales. So what is a speech regulation, or speech code? According to the Freedom for Individual Rights in Education organization, a speech code is "any university regulation or policy that prohibits expression that would be protected by the First Amendment in society at large."

This article seeks to provide a historical overview of struggles to create and enforce—and to justify—hate speech codes at Southeastern Conference and Pacific Ten universities. First, efforts to define hate speech will be discussed. Then, key court decisions striking down or severely limiting campus speech codes are examined as a framework for a content analysis of SEC and PAC-10 speech codes.

As universities attempt to regulate hate speech through speech codes, the issue of defining hate speech arises for without a clear definition of hate speech, what are speech codes actually regulating. According to Paul McMasters, First Amendment ombudsman, "hate speech is that which offends, threatens, or insults groups based on race, color, religion, national origin, gender, sexual orientation, disability, or a number of other traits."[3] According to Scott Rubin, head of global communications and public affairs for Google and YouTube, hate speech is that which "attacks or demeans a group based on race or ethnic origin, religion, disability, gender, age, veteran status and sexual orientation or gender identity."[4] While the definitions are similar in identifying the targets, that is as far as the similarity goes. Some feel that hate speech is content based. Others believe it can be identified by intent. Still others believe hate speech is centered upon the core meaning behind the message. This variety, if nothing else, should be a hint at just how complicated the debate on hate speech codes really is.

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[3] Retrieved April 3, 2011 from www.firstamendmentcenter.org.

[4] Theresa Howard, (October 1, 2009), Online hate speech: It's difficult to police; It also can be difficult to agree on a definition, *USA Today*, Life, 4D.

According to Shiell, in his 2009 book *Campus Hate Speech on Trial*, "the debate between the two sides…hit the public eye in a big way from 1989-1992 as literally hundreds of articles appeared in national and local newspapers and magazines, academic newsletters and journals, publications of professional organizations, law reviews, alumni newsletters, and other places."[5] This exploratory study examines both sides of the debate looking at case studies and court rulings that have impacted the history of this debate. To this point, no campus speech code has been upheld in court. After a brief historical overview, a qualitative analysis of speech regulations of SEC and Pac 10 schools will follow. The goal of this exploratory study is to create a "how to" for campus administrators to develop a constitutional and sustainable speech code.

II. HISTORICAL OVERVIEW

Speech Regulations

In *Doe v. University of Michigan*[6], "a federal court struck down the university's code when an unidentified graduate student in psychology, represented by the ACLU, argued that the code violated his First Amendment right to discuss in the classroom controversial theories positing biologically based differences between sexes and races."[7] The courts ruled the code unconstitutional for a variety of reasons. The ruling identified the distinction between speech and conduct, the latter of which is open to regulation based on fighting words[8] and incitement.[9] After identifying the underlying issue, the court addressed the ruling of the code

[5] Timothy C. Shiell, *Campus Hate Speech on Trial*, Second Edition, Revised (University Press of Kansas, 2009), 5.

[6] See Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989).

[7] Timothy C. Shiell, *Campus Hate Speech on Trial*, Second Edition, Revised (University Press of Kansas, 2009), 8.

[8] See Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[9] See Gooding v. Wilson, 405 U.S. 518, 523 (1972).

being vague and overbroad.[10] This case was the first to address the constitutionality of hate speech codes as this was the first code challenged by a student.

The Wisconsin case soon followed. The University of Wisconsin code, written by several law professors, attempted to write a constitutional code, taking what was learned from the *Doe v. University of Michigan* case. In *UWM Post v. Board of Regents of University* of Wisconsin, the court ruled in a 5-2 decision that the code, though less broad than the previously mentioned case, was overbroad and vague. The issue of fighting words was revisited, but this ruling also rejected the hostile environment argument.[11]

Similar rulings were made in *R.A.V. v. City of St. Paul*[12], which did not address campus speech codes but speech codes in general, *Dambrot v. Central Michigan University*[13], which addressed the constitutionality of regulating speech based on content, and *Iota Xi Chapter v. George Mason University*[14], in which the university's actions were deemed unconstitutional. In this case, the University did not have an explicit speech code and instead assigned consequences on a case-by-case basis. *Corry v. Leland Stanford Junior University*[15] was the first case to address the constitutionality of speech codes as private universities. It is important to note that private universities are not required to adhere to constitutional demands as public institutions. This code was the narrowest in scope, but with this ruling, the court left universities with the

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[10] Lee Ann Rabe, "Sticks and Stones: The First Amendment and campus speech codes," John Marshall Law Review, 37(1), 2003, 205-227.

[11] S. Douglas Murray, "The demise of campus speech codes," *Western State University Law Review,*24(2), 1997, 247-281.

[12] See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

[13] See *Dambrot v. Central Michigan University*, 839 F. Supp. 477 (E.D. Mich. 1993).

[14] See *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*, 773 F. Supp. 792 (E.D. Va. 1991).

[15] See *Robert Corry et al. v. Leland Stanford Junior University*, County of Santa Clara Superior Court, Case no. 740309, February 27, 1995.

impression that no speech code would hold up in court.[16] In *Silva v. University of New Hampshire*[17], the constitutionality of the university's sexual harassment code specifically was questioned. This code, as analyzed by the court, was consistent with Title VII and challenged the court to examine similarities and differences between workplace and campus hostile environments.[18]

Hate Speech through University Email

Hate mail via the Internet is a prominent problem for university administrators. As one article states, "e-mail threats or hate messages motivated by race, religion or sexual orientation on college campuses have put administrators in a sticky situation as they try to combat these high-tech crimes without infringing on free speech or limiting students' access to the Internet."[19]

In 1997, the first Internet hate crime trial was brought before the federal government. Richard Machado, a student at the University of California at Irvine, sent a racist and profane email twice to approximately 60 Asian-American students in one of the university computer labs. He was found guilty of a misdemeanor violation.[20]

Theresa Howard's study of hate speech reported, "The Anti-Defamation League, which monitors hate speech on the Web, says complaints are up this year [2009] more than 200% through July, to 1,512 complaints. 'This whole era of cyberhate is one of the biggest challenges we face,' says Deborah Lauter, civil rights director of the league. 'We've gotten to a place where we made it unacceptable for haters to hate in the public space.' So they turn to the Web, where

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[16] S. Douglas Murray, "The demise of campus speech codes," *Western State University Law Review,*24(2), 1997, 247-281.

[17] See *Silva v. University of New Hampshire*, 888 F. Supp. 293 (D.N.H. 1994).

[18] Jeanne M. Craddock, "Constitutional Law – 'words that injure; laws that silence:' campus hate speech codes and the threat to American education," Florida State University Law Review, 22, 1995, 1047-1089.

[19] Mayk, Lauren. (March 27, 2000). Diversity vs. hate speech on university campuses: The College of New Jersey is confronting racist messages sent over the Internet. Initiatives on race relations will start today. The Philadelphia Inquirer, South Jersey, B01.

[20] See *U.S. v. Richard Machado,* 195 F.3d 454 (1999).

they can be anonymous.[21]

However, the consequences of such action were not all for the worst, despite the unsuspecting victims. For example,

> In April 1994, someone stole a University of Michigan student's computer account name and password to gain access to the Internet. A group purporting to be the Organization for Execution of Minorities posted a list of vicious threats against African Americans. The messages automatically included the student's electronic mail address. The next morning, hundreds of angry messages were flooding into the university. "It's a cold, sad, ruthless thing," the student, who requested anonymity, said in a recent interview. "But the way the Net responded with outrage and directness was the best thing."[22]

As social media has joined university accounts as channels for hate speech, such organizations have implemented procedures to address complaints. Facebook has a hate and harassment team that evaluates messages, videos and the like based on its terms of service. Similarly, YouTube content is reviewed by its customer support department based on its terms of service. In both cases, if terms of service are violated, the content will be removed. However, YouTube also provides the opportunity for users to flag content involving pornography, graphic violence, illegal acts, and the like, for review of the customer support department.[23]

Hate Crime Statistics

In 2009, 11.4 percent of hate crimes occurred at schools or colleges. Of the 3,199 motivated by racial bias, 12.4 percent occurred at schools or colleges. Of the 1,303 motivated by religious bias, 12.9 occurred at schools or colleges. Of the 1,223 motivated by sexual-orientation

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[21] Howard, Theresa. (October 1, 2009). Online hate speech: It's difficult to police; It also can be difficult to agree on a definition. USA Today, Life, 4D.

[22] Kovaleski, Serge F. (August 4, 1995). Universities vexed by use of their Internet connections for hate mail. The Washington Post, A04.

[23] Zeller Jr., Tom. (October 9, 2006). A slippery slope of censorship at YouTube. The New York Times, Business/Financial Desk, C5.

bias, 10.1 percent occurred at schools or colleges. Of the 777 motivated by ethnicity/national origin bias, 8.2 percent occurred at schools or colleges.[24]

A Note on International Viewpoint

An article by Harris, Rowbatham, and Stephenson looks at the various international stances on hate speech regulation and the Internet. They assert that the focus of the United States regulation of hate speech is on individual rights. For the United Kingdom, censorship and restriction of expression is permitted. For Germany, even greater restrictions are permitted as their focus is on equality. Like the US, international parties have attempted to create uniformity to hate speech regulations, but, also like the US alone, this uniformity is yet to be attained. [25]

"William & Mary's Smolla acknowledges that 'virtually every other country in the world bans hate speech.' But the law professor, pointing to ethnic strife in the Soviet Union, Yugoslavia, and elsewhere throughout Europe, says, 'Official bans on hate speech seem to have done less to eliminate intolerance in those countries than free speech has accomplished in the United States."[26] With that in mind, this exploratory study takes up the legal history of why efforts to create a constitutional and therefore sustainable campus speech code have come to naught.

III. METHODOLOGY

The author has chosen to support her historical analysis by offering a content analysis drawn from a secondary source, the website for and completed by the organization for Freedom for Individual Rights in Education (FIRE). The website was completed in 2009. A content

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[24] FBI Hate Crime Statistics. Retrieve April 19, 2011 from www2.fbi.gov/ucr/hc2009/locationtype.html.

[25] Candida Harris, Judith Rowbatham, & Kim Stevenson. (June 2009). Truth, law and hate in the virtual marketplace of ideas: perspectives on the regulation of Internet content. *Information & Communications Technology Law, 18*(2), 155-184.

[26] Andrew, James H. (November 12, 1991). Free speech: How free is too free? Christian Science Monitor, The U.S., p. 7.

analysis of speech regulations is drawn from the website for the organization Freedom for Individual Rights in Education (FIRE)[27] which rates each school and each code with a green, yellow, or red light. According to the FIRE website, a "green light" institution has policies that "do not seriously imperil speech." A "yellow light' institution is one whose policies restrict a more limited amount of protected expression or, by virtue of their vague wording, could too easily be used to restrict protected expression." Finally, a "red light' institution has at least one policy that both clearly and substantially restricts freedom of speech. A 'clear' restriction is one that unambiguously infringes on what is or should be protected expression." It is important to note that both public and private universities are rated under the same standards.

Similarly, each code division has also been rated green, yellow, or red by FIRE. These divisions include harassment; internet usage; free speech zones; freedom of conscience; bias and hate speech; tolerance, respect, and civility; posting; other speech codes; and advertised commitments to free speech. FIRE's overall rating of each university as well as a breakdown of code divisions will be analyzed for Southeastern Conference and Pacific Ten Universities. The SEC and Pac 10 divisions were chosen for analysis because they both include at least one private school, they represent different areas of the United States, and historically they have notable histories of academic and athletic accomplishment.

Schools of the SEC include Auburn University, Louisiana State University, Mississippi State University, University of Alabama, University of Arkansas, University of Florida, University of Georgia, University of Kentucky, University of Mississippi, University of South Carolina, University of Tennessee, and Vanderbilt University. Pac 10 schools include Arizona State University, Oregon State University, Stanford University, University of Arizona,

[27] Freedom for Individual Rights in Education. This organization's website was accessed on numerous occasions for a content analysis on campus speech code ratings. Retrieved from www.thefire.org.

University of California, University of California – Los Angeles, University of Oregon, University of Southern California, University of Washington, and Washington State University. Of these universities, Stanford University, University of Southern California, and Vanderbilt University are private.

While no schools in these conferences possess a specific "speech code," the regulations presented and analyzed by FIRE, such as conduct codes, Internet usage codes, etc., are those that focus specifically on speech or expression. By examining the "green light" regulations specifically, it may be possible to create a speech code in its entirety.

IV. RATINGS

FIRE provides an excellent breakdown of regulations of speech for campuses nationwide. According to FIRE, of the Pac 10 Schools, six are given a red light (Oregon State University, University of Arizona, University of Oregon, University of Southern California, University of Washington, and Washington State University), three are given a yellow light (Stanford University, University of California, and University of California – Los Angeles), and one is given a green light (Arizona State University). In comparison, of the SEC schools, ten are given a red light (Auburn University, Louisiana State University, Mississippi State University, University of Alabama, University of Arkansas, University of Florida, University of Georgia, University of Mississippi, University of South Carolina, and Vanderbilt University), one is given a yellow light (University of Kentucky), and one is given a green light (University of Tennessee).

Though the overall ratings for each institution are given, FIRE also examines codes of each institution with the green, yellow, and red light rating system and provides a more in depth comparison. FIRE divides codes into several categories, again: harassment; internet usage; free

speech zones; freedom of conscience; bias and hate speech; tolerance, respect, and civility; posting; other speech codes; and advertised commitments to free speech While not each code division is presented for every institution, the codes that FIRE deems noteworthy are included. With each division, examples taken directly from institutional codes are given as clarification for the rating. This is of particular importance as some of the code divisions are broken down to subdivisions with different ratings.

Of the Pac 10 and SEC schools, eight are included in the "bias and hate speech" division, six of which come from Pac 10 schools. Under this division, no school received a green light, five received a yellow light (University of California, University of California – Los Angeles, University of Oregon, University of South Carolina, and University of Washington), and three received a red light (Louisiana State University, University of Arizona, and Washington State University). Therefore, all of the universities' speech codes regarding bias and hate speech were found to hinder free speech in some way.

The University of Tennessee is the only Pac 10 or SEC school that is included in the "other speech codes" division. For this division, the University of Tennessee is given a green light. Taken from its student handbook under freedom of expression and speech policy, the code states

> In a situation attended by strong emotional feeling, or where there is a past history of obscenity or indecency associated with a speaker selected by a registered student organization, the Dean of Students, after finding that such a situation or history exists, shall prescribe conditions for the orderly and scholarly conduct of the speaking event. The conditions may include limiting the audience to the inviting organization's membership or to members of the university's academic community, appointing an experienced senior professor to preside over the meeting, requiring a statement from the offices of the sponsoring organization certifying that they have discussed the appearance of the speaker with the Vice Chancellor of Student Affairs, and authorizing a search of all persons entering the arena of the speech and such other conditions as the agency deems advisable.

Of the Pac 10 and SEC schools, nine are included in the "posting" division. Under this division, two received a green light (Arizona State University and University of Arizona), five received a yellow light (Auburn University, Mississippi State University, University of Alabama, University of California, and University of California – Los Angeles), and two received a red light (University of Georgia and University of Southern California).

Taken from the Student Organization Resource Center: Advertising and Posting Regulations 2010-2011, Arizona State University's posting policy states, "All advertising should be consistent with ASU's policy of discouraging the excessive use of alcohol and demeaning, sexual or discriminatory portrayal of individuals or groups."

The University of Arizona's posting code, taken from the Community Living Guide: Room Decorations 09-10 regulation, states, "Limit room decorations to the interior of your room; they may not extend into the hallway. Staff may ask you to remove door decorations deemed sexually explicit."

Of the Pac 10 and SEC schools, eleven are included in the "tolerance, respect, and civility" division. Under this division, no institution received a green light, eight received a yellow light (Stanford University, University of Alabama, University of California, University of Kentucky, University of Mississippi, University of Oregon, University of Southern California, and Vanderbilt University), and three received a red light (University of Arizona, University of Arkansas, and University of Florida). Therefore, like the "bias and hate speech" division, the codes written for this division were found to restrict free speech.

Of the Pac 10 and SEC schools, twelve are included in the "free speech zones" division. Under this division, one received a green light (Louisiana State University), eleven received a yellow light (Auburn University, Stanford University, University of Alabama, University of

Arizona, University of Arkansas, University of California, University of Georgia, University of Kentucky, University of Mississippi, University of South Carolina, and Vanderbilt University), and no institution received a red light.

Louisiana State University's free speech zone regulation can be found in its Peaceful Assembly 2009-2010 code.

> Peaceful assemblies of students are not required to be scheduled or registered with the Office of the Dean of Students unless the event meets one or more of the following criteria:
> (1) The event will be held in a building on campus.
> (2) The event will utilize a designated area, site or location on campus reasonable adjacent to facilities that are regularly scheduled for use by the University.
> (3) The event will utilize a designated area, site or location on campus at which events are typically scheduled.
> (4) The event may reasonable require involvement of a service department of the University, e.g., the directly of traffic and/or parking, managing a crowd, the turning on of electricity or the providing of electricity to the site, marking of playing fields, blocking of streets, setting up stages or platforms, placing special trash receptacles in the area, providing tables and/or chairs and inspection and/or cleanup after the event.
> (5) Any event involving a table, display, or any other structure.
> (6) Any event involving amplified sound or sound that is otherwise sufficiently loud to cause a disturbance.
> (7) Any event involving the distribution of food or beverages. (See PS-78 for events involving alcohol.)
> (8) Any event that poses reasonable safety concerns.
> (9) Any event that will involve out-of-pocket costs to the University. (Any such cost must be reimbursed by the user.)

Of the Pac 10 and SEC schools, twelve were rated under the "internet usage" division. Of these schools, three received a green light (Arizona State University, Stanford University, and University of South Carolina), five received a yellow light (University of Alabama, University of California – Los Angeles, University of Florida, University of Southern California, and University of Tennessee), and three received a red light (Mississippi State University, University of Arkansas, and University of Mississippi). Two institutions received a mixed rating. The University of Georgia received both a yellow and red light for this division while Oregon State

University received both a green and red light for this division. Mixed ratings were given when segments of the codes were found to be more constitutionally sound than others.

Taken from University Technology Services: Student Guidelines for Responsible Computing 2010-2011, the policy of the University of South Carolina states, "The University gives full support to investigations of messages described as obscene, harassing, and/or threatening. Do not send or forward harassing, fraudulent, obscene, threatening, or defamatory messages or materials to anyone."

Taken from Arizona State University's Computer, Internet, and Electronic Communications code 2010-2011, "Unlawful communications, including threats of violence, obscenity, child pornography, and harassing communications are prohibited."

Stanford University's code, taken from Office of Judicial Affairs: Computer Network and Usage Policy 2010-2011, states,

> Prohibited Use – Use of the University's computers, network or electronic communication facilities (such as electronic mail or instant messaging, or systems with similar functions) to send, view, or download fraudulent, harassing, obscene (i.e., pornographic), threatening or other messages or material that are a violation of applicable law or University policy, such as under circumstances that might contribute to the creation of a hostile academic or work environment, is prohibited.

Harassment is the only division in which all Pac 10 and SEC schools are included. This is also the most complex division as a variety of subdivisions are examined resulting in multiple ratings for the overall division. For institutions with single ratings, five green lights were given (Arizona State University, Oregon State University, Stanford University, University of Tennessee, and Washington State University), one yellow light was given (University of Arkansas), and no red lights are given. For institutions with double ratings, five received a green and yellow rating (University of Arizona, University of California, University of California – Los Angeles, University of Georgia, and University of Kentucky), four received a green and red

rating (Auburn University, Louisiana State University, University of Mississippi, and Vanderbilt University), and three received a yellow and red rating (University of South Carolina, University of Southern California, and University of Washington). Finally, four schools received all three ratings (Mississippi State University, University of Alabama, University of Florida, and University of Oregon).

Harassment

The University of California – Los Angeles Student Conduct Code 2010-2011 states,

> Harassment is defined as conduct that is so severe and/or pervasive, and objectively offensive, in that so substantially impairs a person's access to University programs or activities, that the person is effectively denied equal access to the University's resources and opportunities on the basis of her or his race, color, national or ethnic origin, alien niche, sex, religion, age, sexual orientation, gender identity, marital status, veteran status, physical or mental disability, or perceived membership in any of these classifications.

University of California's Code of Student Conduct: Sexual, Racial and Other Forms of Harassment (Interim) 2010-2011 states,

> When employed by the University of California, and acting within the course and scope of that employment, students are subject to the University of California Policy on Sexual Harassment. Otherwise, Section 102.09, above, is the applicable standard for harassment by students…. Harassment is defined as conduct that is so severe and/or pervasive, and objectively offensive, and that so substantially impairs a person's access to University programs or activities, that the person is effectively denied equal access to the University's resources and opportunities on the basis of his or her race, color, national or ethnic origin, alienage, sex, religion, age, sexual orientation, gender identity, marital status, veteran status, physical or mental disability, or perceived membership in any of these classifications.

Taken from Arizona State University's Campus Environment Team: University Policy Prohibiting Harassment 2010-2011,

> Actions constitute harassment if
> 1. they substantially interfere with another's educational or employment opportunities, peaceful enjoyment of residence, or physical security, and
> 2. they are taken with a general intent to engage in actions and with the knowledge that the actions are likely to substantially interfere with a protected interest identified in

> subsection (1) above. Such intent and knowledge may be inferred from all the circumstances.

Taken from Vanderbilt's Student Handbook, a portion of the student conduct code on threat, harassment, stalking, or intimidation states "Harassment of any individual based on sex, race, color, religion, national origin, age, or disability is unacceptable and grounds for disciplinary action, and may constitute a violation of federal law. Equally unacceptable within the university is the harassment of any individual on the basis of sexual orientation, or perceived sexual orientation."

Oregon State University's Student Conduct Regulations: Offenses Proscribed by the University 2010-2011 states,

> Harassment, defined as conduct of any sort directed at another that is severe, pervasive or persistent, and is of a nature that would cause a reasonable person in the victim's position substantial emotional distress and undermine his or her ability to work, study or participate in his or her regular life activities or participate in the activities of the University, and actually does cause the victim substantial emotional distress and undermines the victim's ability to work, study, or participate in the victim's regular life activities or participate in the activities of the University. Stalking behavior that meets this definition constitutes Harassment within the meaning of this rule.

From the Judicial Affairs: Student Conduct Code of the University of Florida,

> Verbal or written threats, coercion or any other conduct that by design, intent or recklessness paces another individual in reasonable fear of physical harm through words or actions directed at that person, or creates a hostile environment in which others are unable reasonably to conduct or participate in work, education, research, living, or other activities, including but not limited to stalking, cyber-stalking, and racial harassment.

Washington State University's Standards of Conduct for Students: Harassment 2009-2010 states,

> Conduct by any means that is severe, pervasive, or persistent, and is of such a nature that it would cause a reasonable person in the victim's position substantial emotional distress and undermine his or her ability to work, study, or participate in his or her regular life activities or participate in the activities of the university, and actually does cause the victim substantial emotional distress and undermines the victim's ability to work, study,

> or participate in the victim's regular life activities or participate in the activities of the university.

From University of Mississippi's Policies Affecting Students: Harassment, Including Stalking 2009-2010,

> For conduct to violate this policy, the conduct must be more than merely offensive. Examples of conduct prohibited by this policy include, but are not limited to the following: intentionally inflicting severe emotional distress or harm; fighting words (words that actually tend to provoke immediate violent reaction); obscene, lewd or lascivious conduct, including communications by electronic or other means, with the intent to abuse, threaten or harass another; stalking; defaming another (a false statement that harms the reputation of another); and speech or conduct based upon race, color, gender, national origin, religion, age, disability, veteran status, or sexual orientation that is so objectively offensive and repeated, pervasive, or severe that it effectively denies the victim access to the University's resources and opportunities, unreasonably interferes with the victim's work or living environment, or deprives the victim of some other protected right.

Taken from Mississippi State University's Office of Diversity and Equity Programs: Guidelines for Resolution of Discrimination and Harassment Complaints 2010-2011,

> Hostile Environment harassment consists of unwelcome conduct when:
>
> *such conduct has the effect of unreasonably interfering with an individual's work or academic performance, thereby creating an intimidating, hostile or offensive working or learning environment, and
>
> *such conduct is so objectively and subjectively offensive as to alter the conditions of the person's employment or academic advancement [conduct that a reasonable person would find hostile or abusive and one that the victim does in fact perceive to be so. Hostile environment harassment is usually repeated and unwanted behavior, although a sufficiently serious, isolated incident may constitute harassment.

University of Georgia's Non-Discrimination and Anti-Harassment Policy 2009-2010 states,

> Unwelcome verbal or physical conduct which is directed at a person because of their race, color, religion, national origin, sex, sexual orientation, age, veteran status, or disability, when:
>
> 1. Such conduct has the purpose or effect of unreasonably interfering with the individual's work or educational performance;
> 2. Such conduct creates or has the intention of creating an intimidating, hostile, or offensive working and/or learning environment; or

3. Such conduct unreasonably interferes with one's ability to participate in or benefit from an educational program or activity.

Sexual Harassment

Taken from Arizona State University's Academic Affairs Manual: Sexual Harassment Policy 2010-2011, "The following conduct shall constitute violation of this policy…making sexual advances, requesting sexual favors, or otherwise discriminating on the basis of gender in a manner that unlawfully creates an intimidating, hostile, or offensive working, residential, or educational environment at the university or that otherwise unlawfully interferes with an individual's work or educational performance."

Taken from Oregon State University's Office of Affirmative Action and Equal Opportunity: Sexual Harassment Policy 2010-2011,

> Sexual harassment is defined as: Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:
>
> - Such conduct is sufficiently severe or pervasive that it has the effect, intended or unintended, of unreasonably interfering with an individual's work or academic performance because it has created an intimidating, hostile, or offensive environment and would have such an effect on a reasonable person of that individual's status.

University of Tennessee's Student Handbook: Sexual Harassment Policy 2009-2010 states,

> Sexual harassment of students is a violation of Title IX of the Education Amendments of 1972, which prohibits sex discrimination in education. Unwelcome sexual advances, requests for sexual favors, and/or other verbal or physical conduct of a sexual nature constitute sexual harassment when (a) grades or educational progress are made contingent upon submission to such conduct, (b) when the conduct substantially interferes with the individual's academic performance or educational opportunities, or (c) when the conduct is severe or pervasive enough to create an intimidating, hostile, or offensive educational environment.

Taken from Stanford University's Office of Judicial Affairs: Sexual Harassment 2010-2011, "Unwelcome sexual advances, requests for sexual favors, and other visual, verbal or physical conduct of a sexual nature constitute sexual harassment when:

- The conduct has the purpose of effect of unreasonable interfering with an individual's academic or work performance or creating an intimidating or hostile academic, work or student living environment."

University of Kentucky's Code of Student Conduct: Freedom from Discrimination/Harassment 2009-2010 states,

> Sexual harassment--a form of sex discrimination--includes unwelcome sexual advances, requests for sexual favors, or other verbal or physical actions of a sexual nature when submission to such conduct is made explicitly or implicitly a term or condition of the student's status in a course, program or activity; or is used as a basis for academic or other decisions affecting such student; or when such conduct has the purpose or effect of substantially interfering with the student's academic performance, or creates an intimidating, hostile, or offensive academic environment.

The Policy Regarding Harassment and Discrimination of Students 2009-2010 from Auburn University's Tiger Cub Student Handbook states,

> Sexual harassment in academic settings and in the employment arena where students are involved is defined as unwelcome sexual advances, requests for sexual advances, requests for sexual favors, and other verbal, graphic, or physical conduct of a sexual nature when:
>
> - Such conduct has the purpose or effect of substantially interfering with a student's employment or academic performance or creates an intimidating, hostile, or offensive work or educational environment.

University of Alabama's Student Handbook: Policies and Procedures for Students-Definition of Sexual Harassment 2009-2010 states,

> An isolated incident of hostile behavior, although offensive, usually will not be sufficient to establish a claim of illegal harassment. For example, generally, a single sexual joke, offensive epithet, or request for a date does not constitute sexual harassment; however, being subjected to such jokes, epithets or requests repeatedly may constitute sexual harassment….Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when ... such conduct has the purpose or effect of unreasonably interfering with an individual's performance as an employee or student or creating an intimidating, hostile, or offensive working or learning environment.

Washington State University's Standards of Conduct for Students: Sexual Harassment 2009-2010 states, "Sexual harassment is any unwelcome sexual advance, request for sexual favor, or other verbal or physical conduct in which: ... Such conduct has the purpose of unreasonably interfering with an individual's work or educational performance or creating an intimidating, hostile, or offensive environment." Similarly, the university's Policy Prohibiting Discrimination and Sexual Harassment 2009-2010 states,

> Sexual harassment encompasses unwelcome sexual advances, unwelcome requests for sexual favors or requests for sexual favors in exchange for some benefit, and/or unwelcome verbal or physical conduct of a sexual nature by a male or a female. Sexual harassment occurs when…A behavior is sufficiently severe and pervasive to interfere with any individual's work or educational performance, or create an intimidating, hostile, or offensive work or educational environment.
>
> Examples of behaviors that may rise to the level of sexual harassment and, therefore, are prohibited by this policy include but are not limited to the following: ... A pattern of behaviors that is unwelcome and severe or pervasive, resulting in unreasonable interference with the work or educational environment or creation of a hostile, intimidating or offensive work or educational environment, and may include but is not limited to the following:
>
> *Comments of a sexual nature;
> *Sexually explicit statements, questions, jokes, or anecdotes;
> *Unnecessary or undesirable touching, patting, hugging, kissing, or brushing against an individual's body;
> *Remarks of a sexual nature about an individual's clothing, body, or speculations about previous sexual experiences;
> *Persistent, unwanted attempts to change a professional relationship to an amorous relationship;
> *Subtle propositions for sexual activity or direct propositions of a sexual nature; and/or
> *Uninvited letters, e-mails, telephone calls, or other correspondence referring to or depicting sexual activities.

Discriminatory Harassment

Washington State University's Policy Prohibiting Discrimination and Sexual Harassment 2009-2010 states, "Under this policy, discriminatory harassment is identified as conduct toward a particular individual, individuals, or groups on the basis of a protected status that is sufficiently

severe or pervasive that it has the purpose or effect of: ... Unreasonably interfering with the work, academic performance, living environment, personal security, or participation in any University-sponsored activity of individuals or groups."

Taken from Oregon State University's Office of Affirmative Action and Equal Opportunity: Discriminatory Harassment Policy 2010-2011, "Oregon State University policy prohibits behavior based on another's protected state that is sufficiently severe or pervasive that it has the effect, intended or unintended, of unreasonable interfering with an individual's work or academic performance because it has created an intimidating, hostile, or offensive environment and would have such an effect on a reasonable person of that individual's status."

Taken from University of Arizona's Nondiscrimination and Anti-Harassment Policy-Interim Revised 2009-2010,

> Harassing conduct may take many forms, including verbal acts and name calling, as well as nonverbal behavior, such as graphic, electronic, and written statements, or conduct that is physically offensive, harmful, threatening, or humiliating….Harassment is a specific form of discrimination. It is unwelcome behavior based on a protected classification that is sufficiently severe or pervasive to create an intimidating, hostile, or offensive environment for academic pursuits, employment, or participation in University sponsored activities.

Misconduct

Taken from Louisiana State University's Code of Student Conduct: Non-Academic Misconduct 2009-2010,

> Students may be charged with misconduct for any of the following:
>
> - Extreme, outrageous, or persistent acts, or communication that is unwanted and what a reasonable person would conclude would harass, harm, or distress another thereby causing substantial and material disruption. This would include, but is not limited to, acts carried out by a third party at the bequest of the individual, whereby, among other things, the alleged perpetrator has hampered the ability of the alleged victim to learn and participate in the academic environment.

University of Oregon's Student Conduct Code: Definitions 2010-2011 states,

> Sexual Misconduct' means: ... Sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that interferes with work or academic performance because it has created an intimidating, hostile, or degrading environment and would have such an effect on a reasonable person of the alleged complainant's status when the conduct is unwelcome and sufficiently severe or pervasive that it deprives that person of benefits of the University's educational environment.

Of the Pac 10 and SEC schools, four are included in the "freedom of conscience" division. Under this division, no institution received a green light, three received a yellow light (Louisiana State University, University of Southern California, and Vanderbilt University), and one received a red light (University of South Carolina). Therefore, the speech codes written for this division were all found to hinder free speech in some way.

V. DISCUSSION

Many believe that it is the job of the university to promote knowledge and truth while nurturing the development and well being of its students. This can be seen by the codes presented previously in addition to the fact that all of the Pac 10 and SEC schools, with the exception of Auburn University, Louisiana State University, University of Arizona, and University of Washington, possess advertised commitments to free expression.

One major issue, however, is that with speech codes, universities are trying to regulate civility, which is impossible. History has shown that regulating beliefs does not get rid of the beliefs. Instead regulation pushes them underground, potentially increasing the danger of both actions and consequences. According to an article in USA Today, "The case [Shippensburg University] illustrates how colleges' efforts to promote campus harmony can violate constitutional rights to free expression by squelching all but the most bland and conformist comments. While some views may be offensive, the best way to confront them is by encouraging

open dialogue, not giving veto power to those most easily offended."[28] However, not all agree. "Hate speech is rarely an invitation to a conversation," says another article in USA Today. "College counselors report that campuses where highly publicized incidents of hate speech have taken place show a decline in minority enrollment as students of color instead choose to attend schools where the environment is healthier."[29]

Though a significant portion of the ratings is centered on harassment, this was not the intention of the paper. However, the clear majority of the speech codes receiving green lights are based on harassment. It is anticipated that this is a result of the foundation that has been established in the workplace regarding regulations of harassment. It would be interesting to explore additional workplace codes for parallels in hate speech divisions identified by FIRE and the extent to which these may be found as less restrictive on free speech.

Taken together, a speech code should encourage speech, even speech that some may find offensive, while protecting students from a hostile educational environment. The key may be to educate students on challenging what they see and hear through research and discussion. As Voltaire said in 1767, "Anyone who has the power to make you believe absurdities has the power to make you commit injustices." Based on the research and case precedents, universities can see that codes with a clearly defined regulation that is narrow in scope is more likely to hold up in court. The question is how narrow and well-defined must the code be to be deemed constitutional. To this point, no complete speech codes from universities have been found to be constitutional and workable.

Employing the green light codes of the previously examined university regulations, it could be possible to piecemeal a potentially constitutional and sustainable speech code.

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[28] N.A. (March 3, 2004). Campus rules overreach. *USA Today*, NEWS, 12A.
[29] Delgado, Richard. (March 3, 2004). Hate cannot be tolerated. *USA Today*, News, 12A.

However, because no green light was given to SEC and Pac 10 schools for some divisions, further research must be done to identify universities that have been given green lights for these divisions for a more inclusive code. Moreover, a speech code that is deemed constitutional and sustainable may not be enough to reach the goal of regulating civility, as many universities appear to be attempting. According to Shiell, "any policy, no matter how sophisticated, no matter how well-grounded in history or law or philosophy or politics, will leave something to be desired."[30]

[30] Timothy C. Shiell, *Campus Hate Speech on Trial*, Second Edition, Revised (University Press of Kansas, 2009), 2.