White Papers

Academic Freedom vs. Civil Rights

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Academic Freedom: Where It Stands in the Courts

> *"The most serious problems of freedom of expression in our society today exist on our campuses.... The assumption seems to be that the purpose of education is to induce correct opinion rather than to search for wisdom and to liberate the mind."*[1]

Academic freedom protects the right to develop and explore ideas in an arena free from political, cultural, or organizational intimidation. Socrates recognized the need for protection from authorities and narrow-minded colleagues.[2] He knew that the object of a university is to promote learning and creativity; obtaining that goal requires an open and supportive environment.

Historically, Americans have regarded open intellectual discourse as an essential element in the preservation of the free marketplace of ideas. It is no different in the academic community. In fact, First Amendment precedents protect individual scholars and students from their own academic institutions.[3] These precedents have generally recognized the special nature of the academic community where faculty members operate as partners and colleagues to instill knowledge in students.[4] Perhaps no where else on earth are the purposes of free speech pursued with more vigor than on our campuses: we hope to embody John Stuart Mill's free marketplace of ideas so that truth can be pursued; we hope to promote Thomas Emerson's goal of providing a place where individuals can express themselves creatively; we hope to propagate Alexander Meickeljohn's notion that free speech is essential to self government.

However, academic freedom is not unlimited. The Supreme Court has consistently protected citizens of the republic from "fighting words", uninvited obscenity, and words that present a "clear and present danger."[5] Of these, the "fighting words" doctrine has been most often used to justify speech codes. The doctrine, as articulated in *Chaplinsky v. New Hampshire*,[6] made it unlawful to "address any offensive, derisive or annoying word to any person who is lawfully in any street or public place." Chaplinsky had referred to a local Marshall as a "God damned racketeer" and a "damned fascist" while the nation was at war with Germany. The Court ruled that fighting words are "those by which their very utterance inflict injury or ten to incite an immediate breach of peace."[7] Also important to the campus environment, the Court has ruled that persons are not entitled to a captive audience.[8] At some institutions, most notably Brown University, some have argued that the First Amendment protects the use of racial epithets and hate speech. In other cases, as with Professor Leonard Jeffries, Jr. at the City University of New York, some have argued that the First Amendment even protects professors who knowingly present incorrect information in their classrooms.[9]

This study will examine the tension between academic freedom and civil rights with an eye to sorting out the proper uses of the First Amendment on campuses versus the misuse of this sacred right. It will look at academic freedom from several perspectives: First, a historical review of court decisions shaping the current doctrine of academic freedom; second, an examination of the reigning case law concerning both individuals and institutions; and finally, a look at the shifting burdens of proof that have created confusion in recent cases involving academic freedom.

Historical Perspective

The freedom to disseminate information and ideas is a "special concern of the First Amendment."[10] The unique treatment by the courts of the rights of private colleges and universities was first evidenced in the *Dartmouth College* case.[11] Attorney Daniel Webster supported the need for a public policy to protect the freedom and independence of academic institutions. Webster argued that:

> *[T]he case before the court is not of ordinary importance, nor an everyday occurrence. It affects not this college only, but every college, and all the literary institutions in the country. They have flourished, hitherto, and have become in a high degree respectful and useful to the community. They all have a common principle of existence, the inviolability of their characters. It will be a dangerous, most dangerous, experiment to hold these institutions subject to the rise and fall of popular parties and the fluctuations of political parties.*[12]

The *Dartmouth College* case was important because the Supreme Court recognized that the academic institution was something special—something more than other organizations, or businesses, something that served its purpose only when free from political interference or threat of external intervention.[13] But, despite the *Dartmouth College* case, the rights of private colleges and universities evolved slowly into a clear doctrine of academic freedom. This became a constitutionally-based protection for the rights of individuals within academic institutions. These guarantees not only

protect students and professors in public institutions from the federal government, they also protect them from their state governments. In *Gitlow v. New York* (1925) the Supreme Court held that First Amendment protections could be applied to the states through the Fourteenth Amendment.[14]

The 1950's witnessed a wave of decisions that recognized the importance of freedom of expression in educational institutions. In *Slochower v. Board of Higher Education of New York City*,[15] the Court considered whether a tenured teacher in a public college could be discharged without notice or hearing because he refused to answer a legislative committee's question concerning his earlier membership in the Communist Party. In holding that Professor Slochower's constitutional rights had been violated, the Court ruled that while city authorities were permitted to scrutinize a person's fitness to hold a public position, they could not do so without affording procedural protections. Professor Slochower's refusal to answer questions "admittedly asked for a purpose wholly unrelated to his college functions"[16] and provided no permissible basis under which he could be discharged from his academic appointment.

Shortly thereafter, in *Sweezy v. New Hampshire*, [17] the Court was faced with the question of whether the Attorney General of New Hampshire could prosecute an individual for refusal to answer questions about a lecture delivered at the state university concerning the Progressive Party of the United States. The Attorney General had a clear grant of Legislative authority to compel testimony because the laws in question passed by the New Hampshire Legislature in 1951 provided for a comprehensive scheme of regulation of "subversive activities." "Subversive persons" were made ineligible for employment by the state government, including public educational institutions. The Court held that the Attorney General of New Hampshire had exceeded his authority in questioning Sweezy and, therefore his ruling had violated the Fourteenth Amendment's due process clause. In holding for the teacher, the Court weighed the state's interests against Sweezy's First Amendment right to "academic freedom" and "political expression." The Court stressed the "essentiality of freedom in the community of American universities," and warned against "imposing any strait jacket upon the intellectual leaders in our colleges and universities."[18]

If *Sweezy v. New Hampshire* was a landmark First Amendment case for the 1950's, then the Supreme Court's most significant pronouncement on academic freedom in the 1960's came in its decision in *Keyishian v. Board of Regents of the University of the State of New York*.[19] The *Keyishian* case involved faculty members whose jobs were endangered when they refused to sign loyalty certificates and sought declaratory and injunctive relief from the Supreme Court. The certificates were part of an intricate statutory and regulatory scheme aimed at preventing state employment of "subversive" persons. The Court held the New York scheme unconstitutionally vague, applying heightened scrutiny in light of the important First Amendment interest at stake:

> *Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.*[20]

The Court tied its strict standard prohibiting vagueness to the public interest in preserving academic freedom. Because the case involved individual professors suing for protection from both the state law and the state university enforcing the law, this case reaffirmed that academic freedom protects individuals even from institutions of which they are employees. Again writing for the Court, Brennan argued that "the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.... It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing conditions upon a benefit or privilege."[21]

The Court went further in 1968 in *Pickering v. Board of Education* (391 U.S. 563) when it established a balancing test for determining if public employees', including teachers', utterances were of public concern and therefore protected under the First Amendment. Marvin Pickering, a teacher in Will County, Illinois, wrote a letter critical of the school board for which he was fired when the letter was published in a local newspaper. Though Pickering lost in the lower courts, his dismissal was reversed unanimously by the Supreme Court. Justice Thurgood Marshall ruled that Pickering's letter was "public" criticism and singled out a public figure, the Superintendent for scrutiny. Furthermore, since Pickering's letter called on the public, it raised issued of public concern.

Marshall wrote:

> *The problem in any case is to arrive at a balance between the interest of the [speaker], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.... The question of whether a school system requires additional funds is a matter of legitimate public concern.... On such a question a free and open debate is vital to informed decision making by the electorate. Teachers are, as a class, members of the community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. (*Pickering*, 568, 572).*

Furthermore, Marshall ruled that since the letter was not disruptive to activities of the school, the school board had no business terminating Pickering. However, had the board been able to show that the letter disrupted the "harmony" of the school, Marshall said the Court might have ruled differently. So too if the communication had been wholly interpersonal in content. (This latter point was reinforced in *Connick v. Myers*, 461 U.S. 138 (1983) and *Waters v. Churchill*, 511 U.S. 661 (1994).)

Affirmative Action

The doctrine of academic freedom evolved further in the 1970s. In *Regents of the University of California v. Bakke*, [22] a white male, Allan Bakke, who had been denied entry to medical school sued the University of California, claiming that the school's affirmative action quotas discriminated against him on the basis of race. The Court concluded that the specific affirmative action program of the medical school violated Title VI of the Civil Rights Act of 1964. However, the Court said this about academic freedom:

Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as *a special concern of the First Amendment*. The freedom of a university to make its own judgments as to education includes the

selection of its student body.... In arguing that its universities must be accorded the right to select those students who will contribute First Amendment interest.[23] (emphasis ours).

At issue was academic freedom in the context of an institution's right to self-governance rather than the more traditional individual's personal liberties in teaching, speaking, and scholarship.

Individual v. Institution

The nature of the constitutional protection afforded academic institutions and the individuals within them remains controversial. Disputes normally center on who should be the primary beneficiary of academic freedom but have, on occasion, extended to such issues as sexual harassment and copyrights. While the Bill of Rights and the Fourteenth Amendment are applicable mainly to individuals, there nonetheless has evolved a constitutionally-based protection for academic institutions. Conflict arises when the interests of the individuals clash with the concerns of the institution as to who should be the primary beneficiary of academic freedom.

In two landmark decisions, *Sweezy v. New Hampshire* and *Keyishian v. Board of Regents*, the Court found in favor of the individual professor rather than the institution. In *Sweezy*, the Court was concerned about limitations on the university community because individual professors might be silenced. The Court explicitly linked its discussion of freedom in the university to the importance of individual, not institutional rights: "We believe that there unquestionably was an invasion of petitioner's liberties in the area of academic freedom and political expression."[24] Likewise, in *Keyishian*, the Court granted an individual professor the right to academic freedom over the state and its university. In a recent decision, *Waters v. Churchill* (1994), the Supreme Court ruled that the public employees such as nurses, teachers and police officers could not be punished or fired without some reasonable, factual basis for believing their remarks were disruptive in the workplace. However, if such a basis was discovered, then the remarks of the public employees were not protected by the First Amendment. Justice O'Connor wrote, "When someone who is paid a salary so that she will contribute to an agency's effective operation ... says things that detract from the agency's effective operation, the government employer must have some power to restrain her."[25] In short, by a 7 to 2 margin, the Court ruled that persons who affect the morale of operations at public institutions are subject to dismissal if they do not complain through proper channels and if they do not stop complaining on the job site once the issue is resolved. For example, once a tenure decision has been resolved, faculty members would be wise not to complain about it on the campus since such complaints undermine the tenure procedure and can prove divisive to the workplace.

Institutions have other rights. The *Bakke* decision cited language from Justice Frankfurter's concurrence in *Sweezy* as support for an institution's academic freedom.[26] Justice Frankfurter had listed the "four essential freedoms" of a university: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[27] While the Court re-affirmed the university's right to select a unique student body, it also ruled that the university's claim must yield to the plaintiff's Fourteenth Amendment rights and ordered the University of California to admit Bakke.[28] On March 18, 1996, the United States Court of Appeals for the Fifth Circuit in *Texas V. Hopwood* concluded on a 2-1 vote that race could not be taken into account in admissions decisions in order to achieve diversity. However, the ruling is based on the applications of four white students to a law school; thus, it mirrors that part of *Bakke* that applies to professional schools rather than using an undergraduate appeal to test the law.

Copyright

One of the most confusing areas of the law concerns copyrights. Article I of the Constitution reads, "The Congress shall have the power.... To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries...." Most professors understand the concept of "fair use" as reaffirmed in the Copyright Act of 1976. The act allows for the "fair use" of copyrighted materials for educational purposes.[29]

In determining fair use, four factors must be considered: the purpose and character of the use, the nature of the work being reproduced, the amount and substantiality of the original work reproduced, and the effect upon the potential market for the work. Because the courts have generally balanced the effect of each factor in a particular case, it is difficult to set strict standards for what does and does not constitute fair use.[30] When in doubt, permission should be obtained.

Unfortunately, the 1976 Act contained a loophole so large that several truck loads of computer programs were driven through it. A UCLA professor who bought an engineering software program copied it for his colleagues and some students. The engineering firm sued. UCLA argued that the professor was not guilty because the 1976 law exempted government agencies and UCLA was part of the state of California. The courts reluctantly went along with UCLA's argument. Until Congress closed the loophole several years ago, professors in institutions across the land were photocopying documents and duplicating disks at a dizzying pace.

The issue here is who owns the "intellectual property." Intellectual property includes:

- ideas covered by patents
- authorships copyrighted and "fixed in any medium of expression"[31]
- slogans, symbols, logos registered as trademarks
- trade secrets

The courts have ruled that professors own the copyright to their lectures through common law.[32] More difficult to understand are the rules governing the work a professor or teacher does while in the employ of a university. Collaborative efforts can wreak havoc on the copyrights and credit toward tenure of the participants.[33] Furthermore, the owner of a copyright may "assign" or "license" all or part of it to another. The 1976 law does not contain the

specific exemption for professors' writings from the work for hire rule.[34] The 1909 Act did contain such a provision. Some universities interpret this to mean that the work of professors belongs to the university.[35] Some jurists argue to the contrary that because the 1976 legislation strengthened the rights of creators, the exemption was unnecessary.[36] The Supreme Court stepped into the fray in *CCNV v. Reid* (1989) arguing that since the Congress provided no definition of "employee" in the 1976 statute, the prevailing definition had to be deduced from common law. After sifting through a list of criteria for what constitutes unsupervised work, the Court considered definitions of "Master, Servant, and Independent Contractor." When it comes to publications, Justice Marshall, who wrote the majority decision, argued that professors were independent contractors. Professors are not required to produce specific publications to receive tenure or to be promoted; they are simply required to publish scholarly work, and even that is not true in all cases. But professors should take note that the more help and supervision they receive from their universities, the more likely they are to fall into the servant category.

Finally and often most confusing is the freedom to examine "creative" works or materials, even when copyright permissions have been properly obtained. Suppose the drama department on a campus wants to stage pornographic material? Or better, suppose a teacher of a course in First Amendment regulation shows the movie *Deep Throat* which the court ruled pornographic in 1973 in *Miller v. California*?

Just such a case occurred in Florida in the 1970s. The professor's film was seized by the state and it asked permission to destroy it. But on procedural grounds and while questioning the judgement of the professor, the Supreme Court of Florida ordered (6 to 1) the state to return the film to the professor. The case was not appealed to the Supreme Court of the United States where the Constitutional issue of a professor's right to explore a Supreme Court case such as *Miller* even when students or administrators objected would have been addressed.[37]

Electronic Communications

With the evolution of cyberspace even more confusion has reigned on campuses. What if a professor using a university account distributes pornography through the Internet? Does copyright protection extend to material put out on a computer bulletin board?[38] Can a person be guilty of sexual harassment over the Internet? Is prohibiting a bulletin board or chat group from conducting conversations tantamount to violating the First Amendment's protection of freedom of assembly?

The difficulty in answering these questions arises from the unique nature of the pervasive and invasive Internet. Bulletin boards, for example, are very inexpensive to start up and have the advantage of national reach. Communication through bulletin boards is instantaneous, interactive, and can be anonymous. Bulletin boards and chat groups may seek protection behind the freedom of assembly clause of the First Amendment arguing that they are an association. The Supreme Court has regularly protected such speech.[39]

Basically, the same rules that apply to print and speech in other realms also apply in cyberspace. For example, the rules of libel and slander apply to computer bits just as surely as they do to utterances and printed defamation. But some complications arise. For example, many computer networks allow members to cross international borders. In such cases, it might be difficult to determine which country's laws apply. Many bulletin board users claim that they are akin to public parks, streets, and speakers corners. Therefore, they should be protected under the First Amendment's freedom of assembly and speech provisions.[40] In 1991, a federal judge held that CompuServe was not liable for defamatory statements posted by a user with which CompuServe had no business relationship and over which it had no control. In 1995, however, a New York state trial judged ruled that Prodigy was liable for an occurrence in a chat group which Prodigy moderated. Furthermore, public places are subject to public nuisance laws. For example, in *Wilson v. Parent* (1961), the Court found public profanity to be a public nuisance. Image what you could with certain items that regularly appear on bulletin boards or server lists. The 1984 law prohibiting the distribution of child pornography led in part to a black market in the material. The Internet has become the marketplace of choice for such material. In 1986 the law was strengthened when the government punished:

> *any person who ... knowingly makes, prints, or publishes, or causes to be made, printed or published, any notice of advertisement seeking or offering ... to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such depiction involves the use of a minor engaging in sexually explicit conduct.*[41]

The government has convicted persons for such crimes.[42] In October 1996 the Congress changed that law by passing the Child Pornography Prevention Act which eliminated the requirement that those filmed or taped actually be minors. Now the distribution any material purporting to be child pornography, regardless of the age of the participants or the use of computer graphics, is a crime.

If indecent material is transmitted over the Internet, are the local community standards developed in *Miller v. California* (1973) applied to the community where the material is uploaded, the community where it is downloaded, or is an Internet community to be established? These issues are being raised in a current case, *U.S. v. Thomas*.[43] In this case, information transmitted by a couple in California was downloaded in Tennessee, where local community standards regarding indecency are more restrictive. The Supreme Court has already ruled that sexually explicit TV channels can be blocked from broadcasting even on cable until after 10PM. The Court upheld that section of the Telecommunications Act of 1996 which requires cable companies to comply.[44]

Part of the difficulty here is the danger that the Internet could be reduced to using only communication which is inoffensive or unharmful to children. But in *Butler v. Michigan* (1957) the Supreme Court refused to force the adult population to reading only what was fit for children.[45] Whether that standard will be applied to the Internet will be decided very soon by the Supreme Court. The outcome of this case will have important implications for online users.[46] In a related case, *NEA v. Finley* (97-371), the Court ruled that "Congress has wide latitude to set spending priorities," and therefore, its decency standard for grants from the NEA was upheld.

In a recent case, *Cubby, Inc. v. Compuserve, Inc.*,[47] Cubby brought suit for libel, business disparagement, and unfair competition regarding comments posted to "Rumorville," a special interest forum available on Compuserve. The District Court granted summary judgment dismissing all claims against Compuserve under the theory that

Compuserve acted as a distributor of material, similar to a "bookstore." The actual writers of the material lacked an agency relationship with Compuserve, since they were neither Compuserve employees nor had they contracted with Compuserve directly. However, the implications for universities are far from clear. For example, would the same independent contractor relationship determined in the *Cubby* case apply to articles linked to a university home page by a student paid by the university to maintain the page? The liability borne by gateway operators, Web sites, and their users is far from established.

In fact, authorities have had difficulty prosecuting some cyberspace actions under existing laws. In *It's in the Cards, Inc. v. Faschetto*[48] in 1995, the court held that a sports bulletin board was not a "periodical publication," as required for action under Wisconsin statutes, and therefore the claim of defamation was invalid. In 1996 Section 230 of the Telecommunications Act stipulated that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.... No provider or user of an interactive computer service shall be held liable on account of:

> *Any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.*

The intent of this provision was to overturn *Stratton-Oakmont v. Prodigy*, in which a provider was held accountable for something an individual placed on the net. The new legislative provision was a major victory for computer service operators.

In a copyright case in late 1994, a U.S. District Judge dismissed charges against an MIT student who ran a Bulletin Board System on MIT computers and promoted the copying of an estimated million dollars worth of copyrighted software by users all over the world.[49] Since LaMacchia, the student, did not receive any financial gain in the process of running the Bulletin Board, he could not be tried for either copyright infringement or wire fraud.

The legal theories necessary to adjudicate electronic communications cases become even murkier when one considers the multitude of communication types. E-mail provides for private communication between two people; Usenet groups and Bulletin Boards provide for communications between thousands of people; and the World Wide Web provides links to existing files worldwide.[50] With multimedia, any of these communications can be audio, video, text, still pictures, or some combination. What standards are to be used in these cases? As the Information Superhighway develops and additional methods of communicating are introduced, additional judicial standards will be required. Even now, clarification of existing standards or the introduction of new standards is needed. Should network operators be treated as common carriers (the telephone model), publishers (the print model), broadcasters (the broadcast model), subscriptions service (the cable model), or distributors?

The publishing model is advantageous because it falls under the purview of *Miami Herald Publishing v. Tornillo* (1974), which affords the highest amount of First Amendment protection of any medium. Internet operators under this model would enjoy all the freedoms a newspaper does, though they would be responsible for libel under the Sullivan test.

The common carrier model is more complex. It must be of a "quasi-public" nature, use the same business procedures, and not operated using "individualized decisions. Common carriers, such as telephone companies, must let the user decide what is transmitted. The advantage of being a common carrier is that you are not liable for what is carried; you simply provide the equipment.

Cable television, which is often considered a common carrier utility, provides a case in point. In *National Association of Regulatory Utility Commissioners*, the court of appeals held that a cable system could be subject to common carrier regulation even on some non-video channels, if, in fact, the cable system operated those channels in a manner which otherwise met the defining characteristics of common carriage.[51] But the Supreme Court eventually ruled that such broadcast content controls as equal access, equal time, and the fairness doctrine (see below) only applied to cable channels that were initiated by the local cable provider. Furthermore, cable programming that is obscene is not protected by the First Amendment, while cable programming that is deemed indecent is protect by the First Amendment. The state of Utah, for example, has consistently lost cases in which it tried to apply the indecent standard of the *Pacifica* case to cable.[52] Thus if the Internet is an analog to cable, obscenity could be prohibited but indecency could not.

However, telephone, another common carrier, presents a different picture. Section 223(a) of the Communications Act makes it unlawful to "make any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, or indecent." It also prohibits harassing or threatening calls. Section 223(b) provides:

Whoever knowingly ... by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person under eighteen years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call; or permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.

Thus, the law left open the option of adults using so-called "Dial-a-Porn" services, but subjected them to prosecution if they solicited minors. Since Internet services are provided mainly by phone, this analog appeared to be a strong one to many in Congress when they passed the Communication Decency Act.

The broadcaster model is fraught with difficulty because broadcasters have been, unfortunately, afforded less protection than newspapers. They are subject to an indecency standard because of the *Pacifica* case. They are subject to equal time and equal access rules because of the Communication Act. And until 1987 were even monitored for editorial comments under the so-called Fairness Doctrine. Such content intensive precursors to the Internet, such as video-text and tele-text, were sometimes subjected to content controls because of their content and because of the technology that delivered them. If interactive videotext was delivered by vertical blanking in television broadcast form, some argued that it should be subject to the same controls as television programming even though much of

what was broadcast was derived from newspapers. For example, federal law prohibits broadcast stations from using "any obscene indecent, or profane language by means of radio communication."[53] It was based on this reasoning that Congress passed the Communication Decency Act which applied the federal law to the Internet using the broadcast standard.

The subscription model would treat Internet providers as cable companies. Because you subscribe to the service, you ostensibly know what you are getting. Thus, communication would be afforded a great deal of protection. However, cable companies are also common carriers and have on occasion been forced to carry local television stations and access channels against their wills.

Finally, there is the distributor model, wherein the Internet provider claims to be no more than a bookseller or news vendor. Most Supreme Court rulings have protected libraries and other providers against charges of liability because they are not responsible for the content of the items they sell.[54] Such liability would put a "chilling effect" on distributors. However, unless they are held liable, they may not properly monitor their systems, if indeed they should, for hate messages, racist language, and obscenity.

Aside from accessing the World Wide Web, online communication allows participants to enjoy e-mail. While psychically more distant that the more immediate communication available through the telephone, e-mail allows users to respond at their leisure. It is inexpensive and currently uncensored. However, e-mail is open to abuse. A message sent to one person can be endlessly forwarded. For example, a recent e-mail memo from a department chair suspending academic governance on issue of controversy among his faculty was duplicated and sent around the country in an attempt to embarrass him. E-mail can be tapped fairly easily not only by the service provider but by the ambitious hacker. It can be constructed anonymously, and thereby, be used to insult, harass, and defame with impunity. Thus, e-mail raises its own set of First Amendment issues.

To overcome these difficulties some campuses have instituted contracts between users and the university. These are generally known as "acceptable use policies." These policies concern restrictions on types of speech allowed, who may use the system, when they may use it, and security of message content. These policies can be enforced with the use of filters that pick up certain words and then either terminate communication or issue a warning. The offending message is often forwarded to authorities for review. While private online systems have the right to censor and ban a user's speech,[55] the case is murkier for universities that are publicly funded. Rules imposed in these cases must be content neutral under First Amendment precedent set particularly in "hate speech" cases wherein judges found codes to be overly broad and vague and thus open to arbitrary and capricious application. Furthermore, we should not be surprised if the courts added the Fourth Amendment right of privacy to the First Amendment right of freedom of expression when questioning campus policies with regard to e-mail.[56] The right to publish privately and anonymously was born during the revolution and sustained during the debate over the Constitution and the Bill of Rights. There can be little doubt about the original intent of the Founders on this issue. Government or by extension university use of filters and censorship standards certainly invades privacy and chills free speech. These sections of acceptable use policies will not survive Constitutional scrutiny.

Government control over Internet communications has been justified on many bases including prevention of terrorism, stopping the distribution of obscene or indecent material to children, detection of computer hackers, and the traditional position that all new media should be regulated until their impact is known. Thus, some legislator believe that a new regulatory model should be developed for electronic communications providers. Their call raises several questions: What level of responsibility will universities bear for communications initiated by their students? Will communications retain traditional academic freedom once they leave the campus?

Answers to these questions were attempted when Congress passed and the president signed the Communication Decency Act (C.D.A.). The act imposed "indecency" regulations on online communications similar to those that were imposed on broadcasters by the FCC and upheld by the Supreme Court in the *FCC v. Pacifica*. Violators were subject to a $250,000 fine and/or imprisonment of two years. But a three-judge panel of the United States Court of Appeals for the Third Circuit unanimously held that the C.D.A. of the Congress was unconstitutional. Two of the judges found the term "indecency" overbroad and vague. The other judge specifically criticized the *Pacifica* ruling suggesting that it should be discarded. Judge Sloviter concluded:

> *that the C.D.A. reaches speech subject to the full protection of the First Amendment, at least for adults.... [T]here is no effective way for many Internet content providers to limit the effective reach of the C.D.A. to adults because there is no realistic way for many providers to ascertain the age of those accessing their materials.*

Judge Buckwalter wrote in support that "the challenged provisions are so vague as to violate both the First and Fifth Amendments, and in particular Congress' reliance on *Pacifica* is misplaced." Judge Dalzell concurred:

> *The Internet is a far more speech-enhancing medium than print ... the Internet may be regarded as a never-ending world-wide conversation. As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion.*

The appeals court was sustained by a unanimous decision from the U. S. Supreme Court on June 26, 1997 in *Reno v. ACLU*, 96-510. Citing the appeals court, the Supreme Court found the language of the CDA to be overly broad and were trouble by the "vagueness" of the term "indecent." Justice John Paul Stevens wrote the decision that argued that the government's interest in keeping children away from harmful materials "does not justify an unnecessarily broad suppression of speech addressed to adults." By a seven to two margin the Court also struck down parts of the act that banned transmission of obscene or indecent material to minors. In the course of its opinion, the Court said that software provides "a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material."

One result of this decision may be the increase use of Internet screening software such as "SurfWatch," "Cyber Patrol," and "NetNanny," which screen out selected newsgroups from home computers. However, the use of these and other devices in schools and libraries, which are public and government facilities, may violate the First Amendment rights of

students and public. Filters interfere with the public right to obtain certain information. And as the Supreme Court made clear in *Tinker v. Des Moines*, students do not lose their First Amendment rights at the school house door.

Two additional cases in this area deserve mention. The first involves a two million dollar lawsuit for damages to his career by a graduate student at the University of Texas, Dallas. The student, Gregory Steshko, was kicked off e-mail by the university because he was using his account to broadcast political messages critical of Boris Yeltsin's policy toward the Ukraine and his sexual predilections. Since the University of Texas is government supported, it must answer to the charge that its restrictions on e-mail violate the First Amendment protection of content. Is an e-mail account an automatic right for graduate students? Or is it a privilege that can be revoked at any time?[57] The second case involves a University of Michigan student who exchanged e-mail with a man in Canada describing their mutual sexual interest in violence against women and girls.[58] Additionally, the student posted a story to an Internet newsgroup describing violent sexual acts. The female character in the story bore the name of one of his classmates. The district judge dismissed all charges against the student, because the communications failed to create a "true threat" as required by First Amendment jurisprudence. The district judge noted that the First Amendment requirements must be met regardless of the mode of communication.

Student Speech

Perhaps the most neglected area of campus liberty is students' First Amendment rights. While students have long and noble history when it comes to the creation of universities and protesting various issues, they return to a marginalized state regularly due to the power structure of most universities. Students formed the first universities at Paris and Bologna in the 1200; they were in charge of administration and hired and fired faculty. The first student rebellion in America probably occurred at Harvard University in 1766; it concerned contaminated butter being served in the dining halls. Inspired by William Lloyd Garrison in 1833, students at Amherst College protested slavery. The President of Amherst quashed the protests on his campus by 1835; but they continued on many other campuses throughout the country. From 1870 on student protests occurred less often with the imposition of in loco parentis by the courts; in other words, campus administrators took on the role of parents when students arrived on the campus. By the 1920s, underground student newspapers were not uncommon and they would flourish during the depression. The *Gadfly* at Harvard, the *Tempest* at the University of Michigan, and *The Critic* at Yale were typical of the times. The Intercollegiate Liberal League published *The New Student*. In 1931 dental students at the University of California at Berkeley began a protest over secret grading. In that same year, the national membership of the Intercollegiate Socialist Society reached 3,500. The National Student League was started by communists in the same year in New York City. These students traveled to Harlan County, Kentucky in support of coal mine workers. In 1934, there was a national strike against war in anticipation of World War II. However, there were also group who supported the fight against fascism, particularly during the Spanish Civil War.

In recent times, these rights have been codified in court precedent. In 1943 in *West Virginia State Board of Education V. Barnett*, Justice Robert Jackson wrote that student freedoms must be protected "if we are not to strangle the free mind at its source...."[59] Just as important, he recognized the flag salute as a "form of utterance" which is a "primitive, but effective way of communicating ideas."[60] Twenty-six years later the Court took up *Tinker v. Des Moines*, a landmark decision on the First Amendment rights of students. *Tinker* involved three high school students who were suspended from school for wearing black armbands as a symbolic protest against the Vietnam war.[61] The Supreme Court held that the suspension violated the students' rights of free expression. The Court said students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Court limited the scope of the decision, however, by stating that school officials could regulate student expression if it caused substantial disruption or material interference with school functions. This decision was further refined on January 13, 1988 when the Court handed down its decision in *Hazelwood School District v. Kuhlmeir*.[62] Justice Byron White, writing for the majority, said that educators possess censorship authority "over school sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[63] This position was consistent with the courts ruling in the *Fraser v. Bothel School District* of 1986 in which a suspension of a student for a "lewd and indecent" speech was upheld.[64] Though the student had uttered no obscene or indecent words, his use of innuendo was deemed enough of a provocation to justify expulsion. The latest area of controversy for schools is on-line publications. Some schools have refused to allow the on-line newspapers to publish the names of students for fear it exposes them to Internet predators.[65]

The right of public schools to impose dress codes and other restrictions have generally been upheld if they are content neutral. Even strip searches have been upheld by the Supreme Court.[66] A troubling case was that of Pawnee Indian children who were told to cut off their braids, which they argued were a symbol of their religious culture. The federal courts sided with the Oklahoma school district.[67] However, in a similar case, *Alabama & Coushatta Tribes of Texas v. Trustees of Big Sandy Independent School District*,[68] the district court temporarily enjoined the school district from enforcing its hair length policy against Native American students on the grounds that the students proved a substantial likelihood of First and Fourteenth Amendment infringements.[69]

A recent ruling by California's Court of Appeals is being closely watched because it involves yet another volatile campus issue, artistic integrity. In July of 1990, the court allowed an appellate ruling stand with only a single dissent. The ruling said that San Diego community college officials acted illegally in canceling a drama class production. The case arose in 1986 when a community college instructor selected the play "Split Second" for his production class. The play concerns a black New York City police officer who, in the heat of the moment, kills a white car-theft suspect who subjected the policeman to a flurry of racial epithets. At the time the play was to run, San Diego was in a state of high tension over the trial of Sagon Penn, a young black charged with the murder of a white police officer. (Penn was eventually acquitted of all charges.) Church leaders and others in the community complained about the selection of the play. Community college officials reviewed the script and noted that there were over 40 vulgar expression and slurs in the first eleven pages. The play was then canceled. The instructor and his students brought suit. In a two-to-one ruling the Court of Appeal argued that the instructor's and students' First Amendment rights had been violated. They said the instructor was within his job description rights to select the play of his choice. Furthermore, they argued there was no "clear and present danger" established for the school or the community. "Rather," the majority said, "school officials were merely concerned with avoiding the discomfort and unpleasantness that always accompany an

unpopular or unorthodox point of view."[70]

Over the years the Supreme Court has consistently ruled against school infringements on religious freedom or their attempts to support one religion over another. In 1948 in *McCollum v. Board of Education*, the ruled 8-1 that a Champaign, Illinois plan to allow students to attend sectarian religious instruction from clergy and others outside the classroom but on school grounds was unconstitutional. However, in 1952 in *Zorach v. Clauson*, that decision was clarified when the Court ruled 6-3, that students could be allowed to leave the school grounds to attend such services. In 1962 in *Engle v. Vitale*, the Court struck down the prayer composed by the Board of Regents of New York written for students at a school in Hyde Park. In 1963, the Court ruled in *Abington Township School District v. Schempp* (7-1), that states could not force students to recite the Lord's Prayers. In 1980 in *Stone v. Graham*, the Court declared a Kentucky law that required the posting of the Ten Commandments in classrooms to be unconstitutional. The Court went even further in 1985 in a very controversial ruling which struck down an Alabama law by a vote of 6-3 that required public schools to set aside a moment of silence for meditation (*Wallace v. Jaffree*). In 1987 in *Edwards v. Auillard* by a vote of 7-2 the Court invalidated a Louisianan law requiring public schools to offer "balanced treatment" between evolution and creationism.

These and other cases indicate that the Court treats public schools, state colleges and universities differently than private institutions. For example, in *Lee v. Weisman* (1992), the Court prohibited prayers given by local clergy and orchestrated by school officials at graduation ceremonies for public institutions of learning. That decision was reinforced in 1996 in *Moore v. Ingrebretsen* which effectively struck down a Mississippi law allowing students to give prayers at assemblies and over the school intercom, and again in *Santa Fe Independent School District v. Doe* (2000), where the Court ruled 6-3 to barr officials from letting students lead stadium crowds in prayer before football games. Said Justice Stevens, "The religious liberty protected by the Constitution is abridged when the state affirmatively sponsors the particular practice of prayer."[71] The only wiggle room that the Supreme Court has provided came in October of 2001 when the Court in a one line decision refused to reverse the *Brown v. Gilmore* ruling out of Virginia, which allowed for a moment of silence in public schools. Virginia legislators stressed that students were free to do as they pleased during the moment of silence. The ACLU had argued that such statutes violated the First Amendment because students feel coerced into praying during the moment of silence.

Officials in private institutions are clearly given wider latitude in regulating student activities and supporting religion since teachers and school administrators in public institutions are considered representatives of the state. However, private action may be considered public action if the state or federal government is involved in some way, such as subsidizing the institution or providing grants to its professors and students.[72] Furthermore, almost 40 states have statutes protecting freedom of expression in all venues, private as well as public. California's provision is typical: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not abridge liberty of speech or press."

If students wish to meet somewhere to pray, it is permissible at a public school, but officials and teachers may neither discourage nor encourage such activity while acting in their official capacity. This distinction reflects the basic notion that the First Amendment was written as a check on the abuse of government or state officials.

Student Press

The courts have generally held that college and university administrators have the authority to regulate student publications where their failure to do so would risk substantial disorder or violence, interruption of classes and class work, or material interference with school discipline. School officials have the burden of proving the necessity for such regulation. However, even the freest student press is treated no different from the general press in the areas of libel and obscenity. Moreover, the student press can be enjoined from advocating or inciting lawless action.

In *Dickey v. Alabama* (1967), a university president ordered an article containing speeches of "Revolutionaries" stricken from the front page of the student newspaper. In defiance of the president's order, the newspaper ran the article's headline and printed diagonally underneath it the word "censored." The newspaper's editor was suspended. The Court, however, ordered the student to be reinstated and held that the university's action was unconstitutional.

In *Antonelli v. Hammond* (1970), a university required its student newspaper to submit its copy, for pre-publication review, to a faculty advisory board chosen by the school's president. After the advisory board ruled that the student newspaper could not print an article by Eldridge Cleaver, the newspaper's editor filed suit alleging a violation of his First Amendment rights. The Federal District Court ruled for the students, holding that the university was prohibited from imposing prior restraints on a student publication.

If a state college or university has a student newspaper, its publication cannot be suspended because college officials dislike its editorial comments. In *Kois v. Wisconsin* (1972) the Supreme Court held that an underground newspaper, *Kaleidoscope*, which had published nude photographs in covering a genuine news event, could not be censored because "in the context in which [the photographs] appeared ... they were rationally related to the article that itself was clearly entitled to the protection of the Fourteenth Amendment."[73]

In *Papish v. Board of Curators of the University of Missouri* (1973), a state university expelled graduate student Papish for distributing a student newspaper containing a political cartoon that pictured a policeman raping the Statue of Liberty and the Goddess of Justice with the caption "With Liberty and Justice for All." The paper appeared while high school students were visiting the campus. A Federal Court ordered the student reinstated because the university had not demonstrated that the expression was obscene or otherwise unprotected by the First Amendment. The Supreme Court concurred with a seven member per curium opinion that read in part:

> *The newspaper ... had been sold on this state university campus for more than four years pursuant to an authorization obtained from the University Business Office. [D]isenchantment with Miss Papish's performance, understandable as it may have been, is no justification for denial of constitutional rights.*[74]

In *Joyner v. Whiting* (1973), the President of North Carolina Central University revoked the University's financial support from the official student newspaper because it had printed an editorial comment critical of the school's

admission of white students. The editor of the student newspaper said the President's action violated her First Amendment rights. The federal appeals court ruled against the school's administration, finding that there was no evidence of disruption from the publication and no student complaints. The court held: "Censorship of constitutionally protected expression cannot be imposed by suspending the editors, suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censorial oversight based on the institution's power of the purse."[75]

Freedom of the press is more limited, however, in cases where publication of a newspaper is part of the curriculum. In *Nicholson v. Board of Education* (1982), a federal Appeals Court held that students in a journalism class that publishes a school newspaper do not have a constitutional right to be free from pre-publication review. The Court said that school officials have much greater latitude in reviewing a student publication that is part of the curriculum and not an extra-curricular activity. Nicholson must be distinguished from *Trujillo v. Love* (1971). In *Trujillo*, a federal District Court ruled that the fact that community college officials had labeled a newspaper a "teaching tool," when in reality it had functioned as a forum for student expression, did not permit censorship. "Having established a particular forum for expression, officials may not place limitations upon the use of that forum which interfere with protected speech."[76]

More recently, the Court in 1995 required the University of Virginia to pay printing charges for a student newspaper which "offer[ed] a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia."[77] The Court held in the *Rosenberger* ruling that the neutrality required by the Establishment Clause supported payment of the charges since printing charges were paid for other groups. Furthermore, the Court found that in singling out this paper, which discusses from a religious viewpoint topics otherwise worthy of printing cost payment, the University violated the student's free speech rights. Justice Kennedy wrote:

> *[W]e have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.[78]*

In a related case, *Board of Regents v. Southworth* (98-1189, 2000), the Court ruled unanimously that state colleges and universities can require their students to subsidize activist groups on campus, even when these organizations or their guest speakers advance ideological notions alien to some of the students. Southworth had argued that no one should be forced to endorse ideas or contribute to political causes they oppose. Dissident students, however, are not required to endorse ideas or groups. The activity fee, said the Court, simply creates a pool of money that supports campus groups of all stripes. Thus, the system is "viewpoint neutral."

Groups On Campus

Closely linked to this problem is the right of assembly that is deeply embedded in the First Amendment. Groups often assemble on campuses and sometimes their speech is offensive. Campuses need to be particularly careful about abridging the right of assembly as a means of stopping offensive speech. As the Court said in *De Jonge v. Oregon* (1937), "Peaceable assembly for lawful discussion cannot be made a crime."[79] This decision expanded the application of the First Amendment against the states by incorporating it through the Fourteenth Amendment.

But what happens when two parts of the First Amendment come into conflict on a high school or college campus? The government may not establish a religion, according the First Amendment. Normally, the Supreme Court interprets this clause to preclude aiding or encouraging a single religious view. In *Edwards v. Aguillard* (1987), the Supreme Court ruled 7-2 that giving equal time to "creationism" constituted establishing a religion and thereby violated the First Amendment.[80] But other decisions prevent us from deducing a clear-cut rule on this issue. For example, in *Brandon v. Board of Education of the Guilderland Central School District* (1981), the Court examined a case where several students had organized a group called "Students for Voluntary Prayer," which sought permission to conduct communal prayer meetings in a classroom before the opening of school each day. These students sought no faculty involvement but their request was denied by the principal, the superintendent, and the Board. The students brought suit under the First Amendment. The lower courts did not agree with the students on the grounds that schools could determine activities, that allowing the group to form its own forum constituted encouraging religion, and supervision would be required if the group met on school property. The Supreme Court let the ruling stand. But only a week earlier, in *Widmar v. Vincent* (1981), the Court ruled that campuses could not deny campus facilities to a group of Christian students if other groups were allowed to use them; the Christian Group was given equal status with other political groups that met on the campus. Justice Powell wrote for the majority that the public forum in question was open to many groups, was already in existence, and would "confer any imprimatur of state approval" on the Christian group. In 1990, this privilege was extended to high school student groups in *Board of Education of Westside Community School v. Mergens* wherein the plurality on the Court argued that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[81] This decision was a direct outcome of the Equal Access Act which requires schools that receive federal funds to avoid discriminating against any student initiated clubs on the basis of religious or political content of their messages. Critics of the decision argue that it may open public high schools to all kinds of fringe groups, including student gangs and the Ku Klux Klan.

Again, in a 1993 case, *Lamb's Chapel v. Center Moriches Union Free School District*,[82] the Court unanimously held that once the school district had opened its facilities for after-hours use by local community groups it could not exclude a religious group's request for space to show a six part film on child-rearing just because the group planned to teach it from a Christian perspective. The reasoning in this case helped form the foundation of the Rosenberger decision previously discussed and the most recent decision by the Court on this issue, *Good News Club v. Milford Central* (99-2036, Slip. Op., June 10, 2001). In *Good News* the Court re-affirmed its position that religious groups must be permitted to hold after-school study classes in a public elementary school if other clubs were allowed such privileges. The Court said that the government cannot "discriminate" against Christian youth groups "because of [their] religious viewpoint." The 6-3 majority opinion in this case was written by Justice Thomas. In his dissent,

Justice Souter wrote that the decision appears to stand "for the remarkable proposition that any public school opened for civil meetings must be open for use a church, synagogue or mosque."

As noted, the freedom of speech poses a particular dilemma when pitted against a potential violation of the Establishment Clause, as it did in *Lamb's Chapel*. Historically, the Supreme Court has relied on what is known as the Lemon test, first articulated in *Lemon v. Kurtzman* (1971). Here, statutes in Pennsylvania and Rhode Island which provided funding to private schools, mainly Roman Catholic, for secular education were found unconstitutional. In the opinion of the Court, Chief Justice Burger wrote that to withstand scrutiny:

> *First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion[83] (internal quotes deleted).*

More recently, Establishment Clause cases have relied on two additional tests. The coercion test, as seen in *Lee v. Weisman* (1992) provided that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise."[84] Under this principle a public school in Rhode Island was prohibited from inviting clergy to give invocations and benedictions at graduation ceremonies and providing guidelines for the prayers, as previously mentioned.

In *Rosenberger*, (previously discussed), the Court relied on neutrality to dispel any concern of an Establishment Clause violation.

The neutrality of the program distinguishes the student fees from a tax levied for the support of a church or a group of churches. A tax of that sort, of course, would run contrary to the Establishment Clause concerns dating from the earliest days of the Republic.[85]

The neutrality test was also used in a 1993 school case not involving free speech issues. *Zobrest v. Catalina Foothills School District* centered on the use of a state-paid sign-language interpreter in a sectarian high school. The Court found that Arizona's Individuals with Disabilities Education Act "create[d] a neutral government program dispensing aid not to schools but to individual handicapped children.... [T]he Establishment Clause does not prevent [this service.]"[86] Under the ruling, the school district was required to provide this service for the Zobrest child, despite the fact that the child attended a parochial school.

To escape some free speech dilemmas the Court may establish policy based on a line of cases extending back to *Brandenburg v. Ohio* (1969), a unanimous decision by the Supreme Court that overturned Brandenburg's conviction for having advocated anti-black violence at a gathering of the Ku Klux Klan. Brandenburg's most inflammatory language included these passages:

> *[I]f our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revenge taken.... Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel.[87]*

The Court said political speech was protected unless it was "directed to inciting or producing imminent lawless action, and is likely to produce such action."[88] In a series of subsequent decisions, the Court has tried to clarify this decision by arguing that speech is protected by the First Amendment if it is not obscene, not libelous, or falls short of illegal action.

This series of decisions goes to the heart of hate speech laws and campus codes that seek to punish hate speech to teach people that racism is unacceptable and harmful.[89] These decisions make writing such codes a near impossibility. For example, in *Hess v. Indiana* (1973), Gregory Hess was brought to trial for encouraging anti-war demonstrators to escalate their activities. At one point, he yelled, "We'll take the fucking street later."[90] The Supreme Court overturned Hess' conviction on the grounds that his speech was protected because it was not "obscene," did not constitute "fighting words," and was unlikely to produce imminent lawless action. *Terminiello v. The City of Chicago* (1948) is one of the *stare decisis* precursors to Hess. This oft-cited decision overturned a conviction because the sitting judge had instructed the jury that all the prosecution needed to prove was that the speech in question "stirs the public to anger, invites disputes, brings about a condition of unrest, or creates a disturbance."[91] Writing for the majority, William O. Douglas argued that free speech often invites dispute:

> *It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions ... or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.[92]*

In *National Gay Task Force v. Board of Education* (1984), an Oklahoma statue requiring teachers who advocated homosexual activity to be fired was struck down on the grounds that the First Amendment does not permit someone to be punished for advocating illegal conduct at some indefinite future time. Even advocacy of non-violent protests cannot be held actionable when it results in violence.[93] The other side of this issue was addressed in *U.S. v. Kelner* (1976) where the Court of Appeals ruled that a threat that was "unequivocal, unconditional, immediate and specific as to the person threatened as to convey a gravity of purpose and imminent prospect of execution..." was not protected speech.[94] This standard is perhaps the latest and best definition of fighting words. Furthermore, in *Healy v. James* (1972) the Supreme Court ruled that speech that is "likely to materially and substantially disrupt the work and discipline of the school" is not protected by the First Amendment.[95]

The Library

The issue of School Boards removing or censoring library material is of interest to teaching, students, and parents. In 1977 in *Manarcini v. Strongsville City School District* and again in 1979 in *Salvail v. Nashua Board of Education*, the Court held that just because the material is available elsewhere does not give the boards an excuse to eliminate it from their libraries. In *Board of Education, Island Trees Free School District v. Pico* (1982), the Court's 5-4 decision

upheld the right of the school's library to retain nine books which the Board wanted removed; they included Kurt Vonnegut's *Slaughter House Five* and Langston Hughes' *Best Short Stories of Negro Writers*. Speaking for the majority, Justice Brennan wrote that "the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.... [D]iscretion may not be exercised in a narrowly partisan or political manner."[96]

Harassment

While the tides of academic freedom have swept forward in some areas, they have been threatened by new restrictions on other fronts. Recently, rules defining sexual, ethnic, and racial harassment came into conflict with an individual's right to express opinions about others. On November 10, 1980, the Federal Equal Employment Opportunity Commission established guidelines for what constitutes sexual harassment based on sec. 703 of Title VII of the Civil Rights Act of 1964.[97] Unwelcome sexual advances, requests for sexual favors and verbal or physical conduct of sexual nature constitute sexual harassment when submission to such is made either explicitly or implicitly a term or condition of an individual's employment, when submission to or rejection of such conduct by an individual is used as the basis for employment decisions, or when such conduct has the purpose or effect of unreasonably interfering with an individual's work performance.[98] The E.E.O.C. directed employers in 1992 to "take all steps necessary," including "developing appropriate sanctions," to eliminate "verbal conduct of a sexual nature [having] the purpose or effect of creating an ... offensive working environment."[99] Under this code, several categories of communication have been labeled sexually harassing. They include making or using derogatory comments or jokes, graphic verbal commentaries about an individual's body, writing suggestive or obscene notes or letters, off color remarks, and so forth. One strong rationale for such rules is that workers in a work place are often a captive audience unable to remove themselves from the site of harassment.[100] Here, questions of context (work place), intention and perception come into play. The context of a university necessarily places students, professors, staff and administrators under these guidelines.[101] In fact, the Court has recently ruled that students who are victims of sexual discrimination or harassment may be entitled to damage awards. In *Christine Franklin v. Gwinnett County Schools* (1992), the Court handed down a unanimous decision that allowed an Atlanta woman to seek damages beyond back pay and prospective relief from her high school under Title IX of the 1980 Education Act. Until this decision, schools or colleges found to have violated Title IX were threatened only with a loss of federal funds. (For California regulations and list of ways to deal with sexual harassment, see Appendix #3.) This decision was clarified in a five-to-four ruling in 1999 in *Davis v. Monroe County Board of Education*.[102] Justice O'Connor wrote the majority decision that held that if a school official is notified of harassment by one student of another and chose to do nothing about it, then the school is liable for damages. Thus, under this new ruling schools can be held liable "only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive and objectively offensive that it can be said to deprive victims of access to educational opportunities." The virtue of this decision is that it sets out a rather clear burden of proof.

In reaction to the confusion of sexual harassment, the Department of Education of the U. S. Government issued guidelines for determining if harassment had taken place:

> *In order to give rise to a complaint ... sexual harassment must be sufficiently severe, persistent, or pervasive that it adversely affects a student's education or creates a hostile or abusive educational environment.... For a one-time incident to rise to the level of harassment, it must be severe.*

One can also consult the OCR web site at: http://www2.ed.gov/about/offices/list/ocr/index.html

To establish harassment, then, a plaintiff must prove that he/she belongs to a protected group under the law, that he/she was subject to unwelcome sexual harassment, that the harassment was based upon sex, and that the harassment affected a term, condition, or privilege of employment. These rulings have led to a rash of claims of sexual harassment across the country and an often panicked reaction from school officials. In the next sections, the precedential rulings will be discussed along with some of the more interesting recent cases.

On June 23, 1998, in a five to four ruling written by Justice Sandra Day O'Connor, the Supreme Court ruled that school administrators and districts could not be named in sexual harassment suits if they did not know that sexual harassment was going on. In *Gebser v. Lago Vista Independent School District* (96-1866), O'Connor wrote, "No one questions that a student suffers extraordinary harm when subjected to sexual harassment and abuse by a teacher and the teacher's conduct is reprehensible." But if administrators are unaware of the harassment, they should not be held responsible for it. Justice O'Connor was joined by Justices Rehnquist, Scalia, Kennedy, and Thomas. While this decision may encourage the reporting of harassment, it also builds a protective shield between administrators and their faculty.

However, a few days later, the Supreme Court made clear that businesses do not enjoy the same level of protection as do school districts. In *Burlington v. Ellerth* (97-569) and *Faragher v. Boca Raton* (97-282), the Court came down on the side of employees who argued that their companies had not provided enough protection or specific instructions about sexual harassment. In these two complementary decisions, the Court made clear that it was establishing a framework for assessing job related sexual harassment. The framework contains three key elements: 1) Employers are always liable for sexual harassment by supervisors if a victim suffers "a tangible employment action, such as a discharge, demotion or undesirable reassignment." 2) Even in the absence of such actions, employers are usually liable when employees are subjected a "hostile environment," such as lewd and abusive comments from a supervisors. 3) However, in these cases, employers can avoid a large damage award if they can prove that they had "exercised reasonable care to prevent" harassment and that the victim "unreasonably failed to take advantage" of an available complaint process. The question is, where do colleges and universities fall within this new frame work?

Harassment and Hate Speech

Those seeking to restrict speech that contributes to sexual and/or racial harassment might do well to examine the case of *Doe v. University of Michigan*.[103] In 1989, a federal district court held that the University's "Policy on Discrimination and Discriminatory Harassment of Students in the University Environment" was unconstitutional because it was too vague and overbroad. The policy prohibited any behavior, verbal or physical, that stigmatized or

victimized an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or veteran status, and proscribed verbal or physical conduct that stigmatized or victimized and individual on the basis of sex or sexual orientation. The policy was brought down by a biology graduate student who insisted on his right to discuss certain controversial theories positing biologically based differences between sexes and races. The court ruled that the "University could not ... establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages ... to be conveyed."[104] The court did this while recognizing that "fighting words" and "[c]ertain kinds of libel and slander are not protected" under the First Amendment.[105] However, it should be clear from this example and the ones that follow that the Court has severely narrowed what qualifies as fighting words. In a string of decisions over the years, the Court has decided that the following words are opinions and neither fighting words nor slanderous, nor libelous: bigot, horse's ass, jerk, idiot, con artist, charlatan, Marxist, liar, Fascist, racist.[106] The most recent set back for speech codes occurred at Stanford University when in February of 1995, the California Supreme Court found the Stanford code to be "overbroad" and a clear violation of standards set down in *R.A.V. v. City of St. Paul* (1992).

This problem relates to the academic community in another way. Suppose that a professor writes a review of a colleague's book, and that in the course of the review, the professor claims that the books is an example of shoddy scholarship because the author relies on thesis X, which has been discredited by recent research. Further suppose, that in fact, the author attacks thesis X and actually supports thesis Y. Can the author sue the professor for damages on the grounds that his review was based on a blatantly inaccurate reading of the text?

The Supreme Court recently denied certiorari in such a case, *Moldea v. New York Times Company*. Dan Moldea's book on the influence of crime in the National Football League was negatively reviewed by a *Times* sportswriter. In the process of the review, the sportswriter made several factual errors which Moldea claimed deflated the sales of the book and therefore caused him to lose money. Moldea asked the *Times* to print a letter from him explaining that the errors were egregious and intentional. The *Times* refused; Moldea sued. The United States Court of Appeals first held for Moldea two to one on February 18, 1994. In part the court said "that four of the five challenged passages characterize [the book] in ways that a jury could meaningfully determine are true or false."[107] Then in one of the oddest occurrences in legal history, on May 3, 1994, the court reversed itself and decided three to none for the *New York Times*. This time the court said that the original "opinion failed to take sufficient account of the fact that the statements at issue appeared in the context of a book review, a genre in which readers expect to find spirited critiques of literary works that they understand to be the reviewer's description and assessment of texts that are capable of a number of possible rational interpretations."[108] Moldea lost his appeal to the Supreme Court.

In making its decisions, the appeals court relied heavily on the Supreme Court's 1990 ruling in *Milkovich v. Lorain Journal Co*. In that case, involving an editorial sports column that accused a coach of perjury, the Court tried to reassess the prior rulings which had separated assertions of opinion from assertions of fact, arguing that opinion was protected by the First Amendment but that false statements of fact were actionable. In *Milkovich* the Court tried to close the loophole through which one person could slander or libel another by simply preceding the offending language with the words "in my opinion." The Court said that "loose, figurative, or hyperbolic" statements are not actionable in defamation cases, not because they are opinion, but because the Court had ruled in other cases that parody and imaginative commentary was protected speech.[109] Therefore, if what is said or written is clearly not intended as parody or fiction, and if it asserts a statement of fact which can be proven false, then it is actionable under defamation rules. Said the Court, "the breathing space which freedoms of expression require in order to survive is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and fact."[110] Given this ruling, one can understand the confusion of the Court of Appeals.

Before leaving this matter, let me return to the hypothetical example from the academic community. If the professor writing the review based his opinion of "shoddy scholarship" on facts that could be shown to be false, he may be liable for the damages the author suffers due to his review. For example, suppose the author was denied tenure based on the professor's review of his book. If the opinions in the review are based on provably false fact, the author may have a case against the professor particularly when you consider the genre for scholarly reviews are not as imaginative or figurative as editorials or newspapers' book reviews.

Defamation cases aside, the rationale behind restricting the use of the "fighting words" standard has been clearly laid out by Franklyn Haiman in *Speech Acts and the First Amendment* (1993). Initially, the standard was born from a school of thought that asserts that certain phrases are in fact "performative utterances." Philosophers such as Ludwig Wittgenstein, J. L. Austin, and John Searle argue that words are often deeds. For example, when the president of a university confers degrees, he/she not only speaks words, he/she makes graduation official. So why isn't it equally clear that when one person insults another, that person is also performing an act that can be punished in the way assault is? The answer lies in the analysis of the original example. Just think, if the president of the university had a snit and decided not to confer degrees, do you really believe those present would be deprived of their degrees? Of course not. Any more than if I tell a colleague to go to hell, he actually will. Thus, the Courts have continually restricted the fighting words standard as swear and other words have increased in common usage. As Haiman points out in 1972 the Supreme Court narrowed fighting words to be only those that "tend to incite an immediate breach of the peace."[111] Even in the case of malicious language, one must show that the "stimulus had been followed by palpable injury, such as a heart attack or a physiological nervous breakdown" to collect damages.[112] Let's examine some contemporary cases on campuses.

In 1988 the University of Connecticut at Storrs expelled a junior named Nin Wu from the dormitories for taping a poster to her door that listed types of persons who should be "shot on sight." The list included "bimbos," "preppies," "racists," and "homos." The federal district court in Hartford reinstated Wu arguing her First Amendment rights had been violated.

In 1991 another federal district court stopped George Mason University in Virginia from imposing any discipline on a fraternity for engaging in expressive conduct that perpetuated racial and sexual stereotypes.[113] In this instance fraternity members dressed up as "ugly women" using blackface, pillows, and other articles of apparel that suggested racial stereotypes. The court said, "The First Amendment does not recognize exceptions or ideas or matters some may deem trivial, vulgar or profane .... [A] state university may not hinder the exercise of First Amendment rights simply

because it feels that exposure to a given group's ideas may be somehow harmful to certain students."[114] Similar rulings occurred in the cases of Zeta Beta Tau fraternity at California State University at Northridge and Phi Kappa Sigma at the University of California at Riverside.

Furthermore, the Court has ruled that verbal attacks on groups are not actionable because that would "render meaningless the right guaranteed by the First Amendment to explore issues of public import." [115] Kent Greenawalt writes, "When a law is directed at group epithets and slurs, words are made illegal because they place people in certain categories and are critical of members of those categories. This is clearly content discrimination."[116]

These decisions often invoke the very narrow standard imposed by the Supreme Court in *Papish v. University of Missouri* (1973), wherein the Court ordered the reinstatement of a student who had been expelled for handing out an underground newspaper with the headline "Motherfucker Acquitted." The Court argued that "the mere dissemination of ideas—no matter how offensive to good taste, on a state university campus may not be shut off in the name alone of conventions of decency."[117] More difficult yet, based on other cases, it is clear that speech codes must not only meet "the most exacting scrutiny," but the university must prove that the codes will result in a change of atmosphere and belief. That is, they must advance the cause the university believes is in the government's interest.[118] This position was no doubt reinforced by *R.A.V. v. City of St. Paul* [1992], in which the Supreme Court struck down a city ordinance that made it a misdemeanor to place "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..."[119] Justice Scalia in the majority decision wrote that the ordinance was unconstitutional because:

> *Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered.... Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas.*

While this decision was somewhat modified by *Mitchell v. Wisconsin* in 1993, it still makes it almost impossible for a campus to write speech codes. In *Mitchell*, the Court upheld a Wisconsin statute that allowed for the enhancement of a penalty for aggravated battery on the grounds that Mitchell's selection of a victim was based on race. Todd Mitchell had been arrested for beating a white youth; upon conviction, he was sentenced to an additional two years because the crime was racially motivated and therefore fell under the Wisconsin law which allowed for extended sentencing if the victim had been targeted on the basis of "race, religion, color, disability, sexual orientation, national origin, [and/or] ancestry." The state supreme court reversed the sentencing; however, a unanimous U.S. Supreme Court reinstated the sentence and argued that judges have been given latitude in sentencing including taking into account racial bias.[120] Furthermore, in writing the decision, Chief Justice Rehnquist argued that the statute had no "chilling effect" on free speech and was therefore not overly broad. The synthesis position here seems to be that pure expression may not be prohibited even if racially offensive, but if a crime is committed and it can be shown that the perpetrator was racially motivated, the penalty for the crime can be increased.

Another proposal to deal with hate speech on campus has been proposed by Ann Gill, a proponent of Haiman's "more speech is better than less speech" doctrine. Responding to *Cannock v. Myers* (1983) which prohibits universities from limiting the expression of its employees on "political, social or other concerns to the community,"[121] Gill would encourage campuses to provide for contrasting views to those who utter hate speech.[122] She builds her case carefully by arguing that "In the absence of coercion, the Constitution does not prohibit the university from expressing its own opinion or sponsoring particular points of view."[123] The first problem with this view is the prepositional phrase "in the absence of coercion." When would it not be coercible for a university to state its own position on an issue? How much would the untenured professor risk in opposing the university line? In fact, what Gill is proposing by her own admission is a "Campus Fairness Doctrine,"[124] which no doubt would bring with it the horrors of the doctrine that was imposed on broadcasters up to August of 1987. The fairness doctrine, which stated that important issues had to be aired and that contrasting views on those issues also had to be aired, seemed mild enough. But in practice it had a chilling effect on the discussion of issues in news programs, advertisements, and other broadcast forums for fear of investigation by the Federal Communications Commission and possible litigation. The overbroad and content oriented fairness doctrine raised such questions as: Who decides what an important issue is? (A small group in the community? A representative minority? A majority of citizens? A single concerned citizen?) How do important issues get prioritized? (Do we take up traffic signals before school funding?) Who decides who is afforded the right to present contrasting views? How many potential contrasting views are there? Given the academy's penchant for splitting hairs, one could imagine a proliferation of views that could well take several days of programming on the minutest of issues. It is not difficult to see how arduous administrating such a program would be.

However, harassers need to be aware that the courts are getting better at finding ways to isolate and punish them on campuses. As the law now stands, in order to establish a First Amendment right of protection for his or her speech, a professor, administrator, or student must demonstrate that 1) he or she was disciplined for speech that was directed toward an issue of public concern, and 2) that his or her interest in speaking outweighed the College's or government's interest in regulating speech.[125] The inquiry into whether a plaintiff's interest in speaking outweighs the College's interest is a factual determination conducted under the *Pickering* balancing test (1968). The Supreme Court has protected academic speech more than any other, as we have seen. For example in *Terminiello v. Chicago* (1949), the Court said that "Any word spoken in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take that risk."[126] Furthermore in *Burnside v. Byars* (1966), the Fifth Circuit of the Court of Appeals ruled, "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that it's action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[127] When subjecting speech to these tests, the Supreme Court has ruled that "content, form, and context of a given statement, as revealed in the whole record" must be used.[128] Using this test, the Sixth Circuit of the Court of Appeals ruled that a professors use of profane language not germane to his subject matter was not protected by the First Amendment and that he could be suspended.[129] Using an analogue to sexual harassment, the Court ruled that student had a right to hostile-free learning environment. [For more on this case and

these issues see the White Paper *Where We Are On Hate Speech*.]

Burden of Proof

The nature of constitutional protection afforded academic institutions and the individuals within them remains a controversial issue. The judicial response has been an elaborate scheme that attempts to weigh the relative claims of the institution and the individual when conflict arises. There are three basic conflicts: 1) retaliatory dismissal or denial of tenure; 2) charges of hiring discrimination; and 3) disclosure of confidential university files during discovery.

In the first type, professors claim that they have been denied tenure or dismissed in retaliation for expressing unpopular or dissenting views. The leading case delineating burdens of proof in cases of retaliation is *Mt. Healthy City School District Board of Education v. Doyle* (1977).[130] *Mt. Healthy* involved a public school teacher whose contract was not renewed after he: 1) engaged in an argument in which another teacher slapped him; 2) used "obscene gestures" toward two female students when they disobeyed him; 3) had an argument with cafeteria workers; 4) called students involved in a disciplinary complaint "sons of bitches;" and 5) called a local radio station with information regarding a proposed teacher dress code to which he objected.[131]

The district court held in favor of the teacher on the grounds that he had demonstrated by a preponderance of the evidence that retaliation for his telephone call to the radio station, a protected First Amendment activity, was a substantial factor in the decision not to renew his contract.[132] The decision was appealed to the Supreme Court where Justice Rehnquist, writing for the majority, chastised the district court.[133] The Supreme Court's primary concern was that, under the lower court's approach, disciplinary actions might be prevented due to the fact that the teacher happened to engage in a protected activity while committing the offending action. For example, if the Mt. Healthy school board would have fired Doyle for using obscene gestures or fighting with teachers and students, then the fact that Doyle had also engaged in a protected activity—calling a radio station—might act to shield him from dismissal. The Court held that after teachers prove that an impermissible motive is a "substantial" factor in the school's decision, school administrators should be given an opportunity to demonstrate that they would have made the decision even in absence of participation in a protected activity such as free speech. Thus, the Supreme Court gave the school an opportunity to prove that an impermissible reason was not a cause of the decision to dismiss or fail to renew. Upon remand, the Sixth Circuit upheld the Mt. Healthy standard and denied the teacher's claim.

Secondly, in racial and gender discrimination cases, conflict arises between universities and professors who contest particular employment decisions as discriminatory. Attempts by feminists to expand such obscenity rulings as *Miller v. California* to sexual harassment have so far failed. In *American Booksellers Assoc. v. Hudnut* (1985) and *Hudnut v. American Booksellers Assoc.* (1986), the Court ruled that "more speech, not enforced silence" is the key to combating offensive slurs. As Haiman has written:

> *To invoke the concept of sexual harassment against communicative behavior that is not personally directed in a persistent pattern at particular individuals in a captive audience situation is to stretch the legal terminology far beyond its intended parameters. It opens the door to the suppression of a vast array of speech that may be as benighted, insensitive, emotionally distressing, and reinforcing of socially undesirable attitudes as communication denigrating to racial, religious, and ethnic groups but that ... should not be legally prescribed. As for the [Cathleen] MacKinon view that pornography is an act of sexual subordination that should be subject to legal penalties just as any other act of sex discrimination, the answer is ... [s]peech is not the same as action, and if it were, we would have to scrap the First Amendment.*[134]

How then does one deal with sexual harassment? We can start with *Meritor Savings v. Vinson*[135] (1986) wherein the Supreme Court unanimously ruled that illegal sex discrimination is "not limited to economic or tangible discrimination."[136] It also covers sexual harassment that creates a "hostile environment." In this case the plaintiff claimed that she submitted to sexual intercourse for fear of losing her job. She also claimed to have been fondled in front of other employees and followed into the women's restroom. The case was fairly clear cut. Two years later in *Broderick v. Ruder*, the Court ruled that an employer creates a hostile work environment by affording preferential treatment to female employees who submit to sexual advances.[137] Since those decisions the courts have tried to resolve the tension that exists between protection of freedom of expression and protection from sexual, ethnic, or racial harassment in a recent series of decisions. A federal appeals judge in Cincinnati ruled that women who work in male-dominated environments have to tolerate "rough-hewn and vulgar language." A federal appeals judge in San Francisco ruled that crude remarks about sex can amount to illegal gender discrimination.

Teresa Harris v. Forklift Systems (92-1168) bubbled up to the Supreme Court allowing it to clarify lower court rulings. The history of the case is instructive. Both sides stipulated that Harris' employer Charles Hardy made many statements to her that had sexual overtones; they included, "Let's go to the Holiday Inn to negotiate your raise.... You're a dumb-ass woman. What do you know.... We need a man [in your job]."[138] Hardy thought it humorous to ask women to fetch coins from his pants pockets. When Harris complained and threatened to resign, Hardy promised to reform what he called his joking ways. He also noted that on occasion Harris had stayed after work to have beers with other employees in a setting where sexual references were frequent. A few weeks later when Harris brought in a new contract, Hardy said to her, "What did you do, promise him [sex] on Saturday night?"[139] Harris quit and filed a sexual harassment suit. In the first trial, the judge was critical of Hardy but dismissed Harris' claim because Hardy's harassment was not "so severe as to ... seriously affect [her] psychological well-being."[140] A panel of three judges for the Cincinnati appeals court upheld the dismissal without comment. Harris then appealed to the Supreme Court which heard the case in October of 1993. In questioning of attorneys Justices Ginzburg and Scalia clashed over who had what burden of proof. Ginzburg implied that those seeking redress for sexual harassment should have no greater burden of proof than those bringing suit under the Civil Rights Act of 1991, which increased damages for job discrimination. Scalia's questioning indicated that making someone uncomfortable on the job was not enough to warrant restricting someone's First Amendment rights.

In November of 1993, the Court ruled 9-0 that Harris did not need to prove that she suffered psychological harm; her burden was to prove that the harassment was frequent, severe, humiliating, and an unreasonable interference with her

work performance. The decision written by Justice Sandra Day O'Connor was meant to clarify a 1991 amendment to job bias laws which allowed employees to sue for up to $300,000 in damages for job discrimination including sexual harassment. In taking the "middle path," O'Connor asked whether a "reasonable person" would have viewed Harris' workplace as a "hostile or abusive work environment." [141] O'Connor ruled out off-hand remarks and "mere offensive utterances ... or jokes" as grounds for damages.[142]

The Equal Employment Advisory Council, which represents 270 corporations, welcomed the decision. It recommend that businesses establish policies forbidding harassment and that they set up grievance procedures based on the Court ruling. These would allow workers to complain without penalty and nip instances of harassment in the bud. California's Fair Employment and Housing Commission ruled that in light of the decision college students who claim sexual harassment by teachers can file complaints for damages with the state. (See Appendix #3) The Commission believes the Harris decision reinforces California's Unruh Act, which forbids discrimination by businesses based on sex, race and other categories.[143]

A ruling by the courts has extended the Harris ruling. This case began in 1993 when 17 Latino employees of Avis Rent a Car claimed that a hostile work environment had been created by the repeated use of racial epithets. A California judge found in favor of the employees awarding them $135,000. When Avis took no action the employees' supervisor, John Lawrence, the Judge, Carlos Brea, ruled that there was substantial likelihood that Lawrence would continue to harass the employees. Therefore, the judge ordered: Defendant John Lawrence shall cease and desist from using derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of Avis Rent a Car Systems Inc., and shall further refrain from any uninvited touching of said employees." Avis appealed this ruling to the California Supreme Court, which upheld it in a 4-3 decision *Avis v. Aguilar*. The majority claimed that "Continual use of racial epithets poisons the atmosphere of the workplace." That decision was appealed to the U. S. Supreme Court which refused to grant certiorari in an 8-1 decision. In his eight page dissent, Judge Clarence Thomas wrote, "The unprecedented injunction entered by the courts below ... very likely suppresses fully protected speech."

Related to Harris but more germane to campuses was the recent ruling in *Patricia H. v. Berkeley Unified School District* (1993), which alleged that a hostile learning environment was created by the presence of a teacher who had sexually molested two students. The Court re-asserted the "reasonable victim" standard in its interpretation of Title IX.[144] However, a subcommittee of the American Association of University Professors (AAUP) has argued that the "hostile environment" standard which is appropriate in a normal workplace should not be applied to college classroom because it has a "chilling effect" on learning and teaching. The EEOC, which created the criteria for establishing than a "hostile environment" exists, specifically applied it to a "working" environment, not a "learning" environment. The problem is that in a work environment offensive or intimidating comments are unnecessary, but in a learning environment almost any new idea and many traditional ones are likely to offend or intimidate some student in the class. In the case of *Professor Donald Silva vs. the University of New Hampshire*, as U. S. Court reinstated Silva arguing that 1) clear fair notice must be given what constitutes sexual harassment and that standard must not be "impermissibly subjective", 2) student are for the purposes of the law "sophisticated adults," 3) Silva's remarks advanced his educational objective, 4) "it is a fundamental tenet of First Amendment jurisprudence that the preservation of academic freedom is a matter of public concern," 5) the procedures for removal must conform to the due process clause. The University agreed to pay Silva $60,000 in back pay and $170,000 in legal fees.

One of the most interesting cases occurred when San Bernardino Valley College disciplined a professor on the grounds that he had created a hostile environment in his classroom. Professor Dean Cohen was a tenured professor who taught courses in remedial English. He often assigned materials that discussed obscenity, cannibalism, and consensual sex. He often read such materials to the class including articles from Playboy and Hustler. A female student was assigned a paper on defining pornography. When she asked for an alternate assignment, Cohen denied her request. She stopped attending class and received an F for the course. She then filed a sexual harassment grievance. The College found that Cohen had violated its recently adopted policy on sexual harassment[145] and ordered him to attend a sexual harassment seminar, undergo a formal evaluation, and modify his teaching technique. Cohen filed suit seeking injunctive relief. The district court dismissed the College, the board, and the grievance committee and denied Cohen's request for relief against the individual officials, ruling they were immune from his damages claims. Cohen appealed the rulings regarding the individual officials. The U.S. Court of Appeals for the Ninth Circuit posted its decision on August 21, 1996 concluding that the College's policy was unconstitutionally vague, but agreed with the lower court that various individual officials were entitled to "qualified immunity from civil liability." The Supreme Court refused to hear the appeal from the College, so the ruling is in effect.

Professors seeking redress for racial or gender discrimination typically sue under Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination "because of an individual's race, color, religion, sex, or national origin."[146] Congress explicitly extended Title VII protection to employees of educational institutions in 1972.[147] The Court outlined the burden of proof for claims of discrimination under Title VII in *McDonnell Douglas Corporation v. Green*.[148] The case involved a black civil rights activist who sought to be reinstated after having been fired from his position as a mechanic. The Court established the following rules:

1. the plaintiff must establish a *prima facie* case by showing:
    a. that he or she belonged to the protected group,
    b. that he or she applied or was qualified for the position the employer sought to fill,
    c. that he or she was refused the job, and
    d. that the employer has continued hiring efforts;
2. the defendant must then produce a valid, nondiscriminatory reason for the employment decision;
3. finally, the plaintiff has the opportunity to demonstrate that the employer's reasons are *post hoc*.

Confusion as to the extent of the burden placed upon the employer by this scheme led to a series of clarifications by the Supreme Court, culminating in its decision in *Texas Department of Community Affairs v. Burdine* (1981).[149]

That case established that the defendant bears the burden of producing only "admissible evidence that would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus."[150] In 1993, in *St. Mary's Honor Center v. Hicks*, the Court ruled that the plaintiff has the burden of proof when it comes to a claim of wrongful dismissal. Writing for the majority, Justice Scalia said the final decision rests with the jury: "It is not enough to disbelieve the employer; the [jury] must believe the plaintiff's explanation of intentional discrimination."[151]

Thirdly, a number of courts have addressed the question of individual versus institutional rights to review materials.[152] In these cases, professors who were denied tenure sought access to review materials in order to obtain evidence necessary to prove their claims of racial or gender discrimination. In response, the universities claimed institutional "academic freedom" protected the confidentiality of the files. Many of the evidentiary cases involve retention, promotion, and tenure committee members who seek to keep secret the details of their participation in the decision-making process. They wish to avoid retaliation and to protect free decision-making within the committee's deliberative process. The circuit courts have split on this issue, with the Third and Fifth Circuits rejecting such a privilege and the Second and Seventh Circuits allowing it.

However, on January 9, 1990 in *University of Pennsylvania v. EEOC*, 88-493, the Supreme Court unanimously ruled that a university, when charged with race or sex discrimination, must turn over confidential internal documents to government investigators. Associate Professor Rosalie Tung filed a charge with the EEOC when she was denied tenure. The EEOC subpoenaed her tenure file and the files of five male faculty members who allegedly received more favorable treatment than Tung. Writing for the Court, Justice Blackmun said that universities do not enjoy a "special privilege" that makes them exempt in such investigations.[153] The ramifications of the decision on the confidential tenure and promotion decision-making processes are unclear at the state and local level. It is clear, however, that the First Amendment provides no special privilege to refuse disclosure of faculty review materials to facilitate an EEOC investigation.

In another case, *In re Dinnan*, the university based its privilege argument upon protection of a professor's individual rights. Professor Dinnan refused to disclose how he had voted regarding the tenure of a candidate who later sued on a claim of employment discrimination.[154] The Court found in favor of the university's claim of privilege predicated upon its role as a defender of the individual rights of professors; consequently, the conflict between individual and institution blurred. Similarly, a recent decision involved Father Curran, a priest who was dismissed from teaching theology at the Catholic University of America for teaching doctrines inconsistent with the Catholic Church. The District of Columbia Superior Court found in favor of the University's right to determine who would teach Catholic theology at its own University.[155] Such a decision would not be possible at a public institution of higher learning.

Conclusion

Clearly, the constitutional right to academic freedom remains problematic.[156] Recent cases illustrate that academic freedom is marked by controversy and inconsistency when compared to civil rights.[157] However, to date individual teachers have received preference over institutions in most cases, particularly where their research and classrooms are involved. Universities, especially private ones, have retained the right to construct their own student bodies through unique admissions procedures. But they are now open to more investigation than ever when it comes to discrimination suits. Freedom of expression for students has been extended to the high school level when speech is non-disruptive and purely political. Student presses are protected when they are not part of the normal curriculum and have become traditional campus forums for free expression of opinion. More important, the courts have generally reinforced societal guarantees of freedom of expression and due process of law in academic settings. When these guarantees conflict, the courts must balance the interest of one party against the other. Furthermore, issues of bias and sexual harassment have raised the possibility of further restrictions on freedom of expression and confidentiality.

When Socrates worried about his opinions being curtailed by the government and his colleagues, he provided a strong rationale for protection of a teacher's right to explore ideas in a free environment. The Athenian court eventually convicted Socrates of corrupting the city's youth. His talk of elitism was deemed seditious in the new Athenian democracy. Even today, the teacher's words must be responsible especially in a litigious society where libel, slander, obscenity, and pornography are not protected by the First Amendment. And freedom of speech is no longer a defense if one creates a hostile environment for one's fellow workers. Furthermore, teachers need to be aware that his or her words in formerly confidential committee meetings may become part of the public record. While the Fourteenth Amendment has been used to justify incorporating the First Amendment against the states, the Fourteenth's call for "due process" may also weaken the First Amendment protection afforded to universities and their faculty on campuses across the country. The Ivory tower is less remote than ever before.

Endnotes Follow Appendices

Appendix #1

Credo for Responsible Communication in a Free Society
Speech Association of America

Recognizing the essential place of enlightened communication in a democratic society, members of the Speech Association of America endorse the following statement of principles:

1. We accept the responsibility of teaching by precept and example, in community as well as classroom; of developing in our students a respect for precision and accuracy in communication and for reasoning based upon valid evidence and a judicious discrimination among values.
2. We urge teachers to encourage students to accept the role of articulate and well-informed citizens.
3. We respect the rights of others when expressing contrary beliefs, and we are dedicated to a frank exchange of

opinion, limited only by legal restrictions as interpreted by our courts.

4. We condemn intimidation which attempts to restrict the processes of free expression, whether by powerful minorities or ruthless majorities.
5. We dedicate ourselves fully to these principles, confident in the belief that reason will prevail in a free market place of ideas.

Adopted, August 20, 1963

1. Resolved: That this Association expresses its determined support for the constitutional right of peaceful protest, whether verbal or nonverbal, whether carefully reasoned or heatedly emotional, as long as it does not interfere with the free speech rights of others who may disagree;
2. That we criticize as misguided those who believe that the justice of their cause confers license physically and coercively to interfere with the speech and activities of others of a different persuasion.

Adopted, December 28, 1967

Appendix #2

Rights and Freedoms of Students
American Association of University Professors, et al.
Preamble

Academic institutions exist for the transmission of knowledge, the pursuit of truth, the development of students, and the general well-being of society. Free inquiry and free expression are indispensable to the attainment of these goals. As members of the academic community, students should be encouraged to develop the capacity for critical judgment and to engage in a sustained and independent search for truth. Institutional procedures for achieving these purposes may vary from campus to campus, but the minimal standards of academic freedom of students outlined below are essential to any community of scholars.

Freedom to teach and freedom to learn are inseparable facets of academic freedom. The freedom to learn depends upon appropriate opportunities and conditions in the classroom, on the campus, and in the larger community. Students should exercise their freedom with responsibility.

The responsibility to secure and to respect general conditions conducive to the freedom to learn is shared by all members of the academic community. Each college and university has a duty to develop policies and procedures which provide and safeguard this freedom. Such policies and procedures should be developed at each institution within the framework of general standards and with the broadest possible participation of the members of the academic community. The purpose of this statement is to enumerate the essential provisions for student freedom to learn....

II. In the Classroom

The professor in the classroom and in conference should encourage free discussion, inquiry, and expression. Student performance should be evaluated solely on an academic basis, not on opinions or conduct in matters unrelated to academic standards.

A. Protection of freedom of expression

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.

B. Protection against improper academic evaluation

Students should have protection through orderly procedures against prejudiced or capricious academic evaluation. At the same time, they are responsible for maintaining standards of academic performance established for each course in which they are enrolled.

C. Protection against improper disclosure

Information about student views, beliefs, and political associations which professors acquire in the course of their work as instructors, advisors, and counselors should be considered confidential. Protection against improper disclosure is a serious professional obligation. Judgements of ability and character may be provided under appropriate circumstances, normally with the knowledge or consent of the student.

IV. Student Affairs

In student affairs, certain standards must be maintained if the freedom of students is to be preserved.

A. Freedom of association

Students bring to the campus a variety of interests previously acquired and develop many new interests as members of the academic community. They should be free to organize and join associations to promote their common interests.

1. The membership, policies, and actions of a student organization usually will be determined by vote of only those persons who hold bona fide membership in the college or university community.

2. Affiliation with an extramural organization should not of itself disqualify a student organization form institutional recognition.
3. If campus advisers are required, each organization should be free to choose its own adviser, and institutional recognition should not be withheld or withdrawn solely because of the inability of a student organization to secure an adviser. Campus advisers may advise organizations in the exercise of responsibility, but they should not have the authority to control the policy of such organizations.
4. Student organizations may be required to submit a statement of purpose, criteria for membership, rules of procedures, and a current list of officers. They should not be required to submit a membership list as a condition of institutional recognition.
5. 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.

B. Freedom of inquiry and expression

1. 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 operation of the institution. At the same time, it should be made clear to the academic and the larger community that in their public expressions or demonstrations students or student organizations speak only for themselves.
2. 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 insure 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 the institution.

C. Student participation in institutional government

As constituents of the academic community, students should be free, individually and collectively, to express their views on issues of institutional policy and on matters of general interest to the student body. The student body have clearly defined means to participate in the formulation and application of institutional policy affecting academic and student affairs. The role of the student government and both its general and specific responsibilities should be made explicit, and the actions of the student government within the areas of its jurisdiction should be reviewed only through orderly and prescribed procedures....

V. Off-Campus Freedom of Students

A. Exercise of rights of citizenship

College and university students are both citizens and members of the academic community. As citizens, students should employ the same freedom of speech, peaceful assembly, and right of petition that other citizens enjoy and, as members of the academic community, they are subject to the obligations which accrue to them by virtue of this membership. Faculty members and administrative officials should insure that institutional powers are not employed to inhibit such intellectual and personal development of students as is often promoted by their exercise of the rights of citizenship both on and off campus.

B. Institutional authority and civil penalties

Activities of students may upon occasion result in violation of law. In such cases, institutional officials should be prepared to apprize students of sources of legal counsel and may offer other assistance. Students who violate the law may incur penalties prescribed by civil authorities, but institutional authority should never be used merely to duplicate the function of general laws. Only where the institution's interests as an academic community are distinct and clearly involved should the special authority of the institution be asserted. The student who incidentally violates institutional regulations in the course of his off-campus activity, such as those relating to class attendance, should be subject to no greater penalty than would normally be imposed. Institutional action should be independent of community pressure.

Appendix #3

California Code Section 12940:

"It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:....

h. For an employer ... or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age, to harass an employee or applicant. Harassment of an employee or applicant by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible benefits shall not be necessary in order to establish harassment.

i. For an employer ... to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."

Department of Fair Employment and Housing Regulations:

1. Harassment includes but is not limited to:
    A. Verbal harassment, for example, epithets, derogatory comments or slurs on a basis enumerated in the Act;
    B. Physical harassment, for example, assault, impeding or blocking movement, or any physical interference with normal work or movement, when directed at an individual on a basis enumerated in the Act;
    C. Visual forms of harassment, for example, derogatory posters, cartoons, or drawings on a basis enumerated in the Act;
    D. Sexual favors, for example, unwanted sexual advances which condition an employment benefit upon an exchange of sexual favors...;
    E. In applying this subsection, the rights of free speech and association shall be accommodated consistently with the intent of the subsection.
2. Proof of such knowledge may be direct or circumstantial.

Education Code Section 212.6

b. Each educational institution in the State of California shall have written policy on sexual harassment.

e. A copy of the ... institution's written policy on sexual harassment ... shall be provided as part of any orientation program conducted for new students at the beginning of each quarter, semester, or summer session ...

f. A copy of the ... institution's written policy on sexual harassment ... shall be provided for each faculty member, all members of the administrative staff, and all members of the support staff at the beginning of the first quarter or semester of the school year, or at the time that there is a new employee hired.

Guidelines for Dealing with Sexual Harassment

A close reading of regulations and court decisions regarding sexual harassment lead to the following suggestions:

1. Campuses must provide an office and a phone number where complaints can be filed.
2. Campuses must provide and publish a clear channel for filing complaints. Avoid multiple channels for grievances and multiple grievance procedures.
3. The campus policy must cover student-student, student-faculty, faculty-administrator, and student-administrator complaints.
4. Sexual harassment claims should be handled independently from committees which usually handle grade appeals, faculty affairs, or other disciplinary matters.
5. All parties need to keep careful records; the university needs to keep an on-going file to demonstrate its good faith in these matters.
6. Even though parties may agree initially to an informal resolution of problems and formal record should be kept since these agreements often come unglued.
7. The sanction meted out by the university must demonstrate that it is serious about prevent such incidents from re-occurring.
8. Sanctions must be consistent, neither arbitrary nor capricious.
9. With regard to confidentiality, the Office of Civil Rights has stated, "Victims of harassment have many good reasons for being reluctant to reveal their identities, and institutions have a duty to honor a request for anonymity." Under Title IX, the university is obligated to investigate a report even though the complain does not want to be identified. Often the mere questioning of a suspected offender will lead to a reduction in harassment and will also serve to show that the university operated in good faith.
10. Procedures for dealing with cases need to be uniform. An interviewing protocol should be established so that each alleged victim and each alleged suspect is treated fairly and consistently. Some campuses use a hearing panel which meets at the behest of and reports to a campus officer such as the associate vice president for academic affairs, the affirmative action officer, or the provost.
11. Complainants must be protected from extra-legal retaliation; however, if the complaint is found to be groundless, complainants may suffer sanctions themselves.
12. Parties involved must be notified of decisions and/or sanctions in a timely and uniform matter.
13. The university is obligated to inform its population of what it considers a hostile and discriminatory environment to be. The input of the campus community in the formulation of this description is encouraged. What may seem a hostile environment to students, may seem normal teaching procedures to a professor. Art, film, physical education and First Amendment classes are particularly vulnerable to being improperly restricted unless this description is carefully worked out.

Endnotes

[1]. Benno C. Schmidt, Jr., "The University and Freedom," speech to 92nd Street Y (New York: March, 1991), p. 1, 3.

[2]. *Gorgias*, at 522.

[3]. The most recent example of this protection is a law passed in the state of California (SB 1115) which prohibits colleges and universities from punishing students for filing lawsuits charging universities or colleges with unjustly abridging the students right to freedom of speech. The law went into effect on January 1, 1993.

[4]. See Robert Ladenson, "Is Academic Freedom Necessary?", *Law and Philosophy*, 5 (1986), pp. 59-87; Josiah Royce, "The Freedom of Teaching," *The Overland Monthly* n.s. 2 (1883), pp. 235-40; John Dewey, "Academic Freedom," *Educational Review* (January, 1902), p. 3; David Mathews, "A Symposium on Freedom and Ideology: The Debate about Political Correctness," *Civic Arts Review* (Winter, 1992), p. 4; Sidney Hook, "Communists, McCarthy and American Universities," *Minerva* (Autumn, 1987), p. 344.

[5]. We should be very clear on the point that the Court is reluctant to infringe upon free speech even in these cases. In *Cohen v. California*, for example, the Court held that the expression "Fuck the Draft" did not constitute fighting words even when worn on the back of jacket in a public courthouse. A whole string of Supreme Court decisions indicates that lower courts need to apply the "clear and present danger" standard with care. See *Taylor v. Mississippi, Cantwell v. Connecticut, Herndon v. Lowery, Thornhill v. Alabama*.

[6]. 315 U.S. 568 (1942).

[7]. at p. 572. See also, *Beauharnais v. Illinois* 343 U.S. 250 (1952) which convicted a man of group libel. Though thought to be a dying opinion of the Court, it was recently revived in a Wisconsin case.

[8]. See *Cox v. Louisiana* (1965).

[9]. Jeffries, who as chair of City College's African-American department, gave a speech on July 20, 1991 which was widely interpreted as anti-Semitic, racist, and anti-gay. He singled out Arthur Schlesinger, Albert Shanker, and Diane Ravich, whom he called a "sophisticated Texas Jew." After some pressure from Governor Mario Cuomo, Jeffries was stripped of his departmental chairmanship. He brought suit and the case wended its way to the Supreme Court. Harvard University's Alan Dershowitz contextualized the issue when he wrote: "Women and blacks are entirely free to attack white men (even "dead white men," as they do in describing the current curriculum) in the most offensive of terms. Radical feminists can accuse all men of being rapists, and radical African-Americans can accuse all whites of being racists, without fear of discipline or rebuke. But even an unintentionally offensive parody of women or blacks provides the occasion for demanding the resignation of deans, the disciplining of students and an atmosphere reminiscent of McCarthyism." in "Harvard Witch Hunt Burns the Incorrect at the Stake," *Los Angeles Times*, Washington edition (April 22, 1992), p. A11. In this case, however, the Supreme Court ruled on November 14, 1994 that since Jeffries was a public employee he could be disciplined for his remarks. *Harleston v. Jeffries*, 94-112. Lower courts have been ordered to rehear the case based on whether Jeffries comments damaged moral or disrupted the workplace.

[10]. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978); see also *Whitehill v. Elkins*, 389 U.S. 54, 59-60 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Grisold* U.S. 360, 368-369 (1964); *Shelton v. Tucker*, 364 U.S. 470, 487 (1960); *Barenblatt v. United States*, 369 U.S. 109, 112 (1959); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Wieman v. Updegraff*, 344 U.S. 183, 195-198 (1952); *Adler v. Board of Educ.*, 342 U.S. 485, 497, 508 (1952) (Black, dissenting; Douglas, dissenting); see infra notes 122-58 and accompanying text.

[11]. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819).

[12]. Ibid., at 598.

[13]. For an analysis tracing the roots of this case, see Campbell, 70 *Kentucky Law Journal* 643, especially at 704-705 (1981-1982). "Simply stated, the Dartmouth College Doctrine was that the federal contracts clause protected private religious, quasi-religious, and secular corporations from arbitrary state legislative attack. The Court thus partially established for the first time the constitutional principle of associational freedom and integrity in the context of the religiously and politically diverse and highly competitive early 19th Century American Society."

[14]. 268 U.S. 652.

[15]. 350 U.S. 551 (1956).

[16]. Ibid., at 558.

[17]. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

[18]. Ibid., at 261-262.

[19]. *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967).

[20]. Ibid., at 603.

[21]. Ibid., at 605-606.

[22]. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

[23]. Ibid., 312-313.

[24]. *Sweezy v. Hew Hampshire*, at 251.

[25]. 128 L.Ed. 2d 699. This decision was reinforced in November of 1994 in *Harleston v. Jeffries*, 94-112. (See page 1 above for circumstances of case.)

[26]. Ibid., 234, 263.

[27]. Ibid., at 263.

[28]. *Bakke*, 314-316.

[29]. Section 107 of the law as amended says: "the fair use of copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered include:

> 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> 2) the nature of the copyrighted work;
>
> 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> 4) the effect of the use upon the potential market for or value of the copyrighted work.

[30]. For a discussion of fair use and the academy, see "Fair use of Copyrighted Works." 1995. The Trustees of California State University.

[31]. An author may copyright his or her own work or register the work with the U.S. Copyright Office. Information may be obtained at http://www.copyright.gov

[32]. See *Williams v. Weisser*, 273 Cal. App. 2d 726 (1969).

[33]. In *Weissman v. Freeman*, 684 F. Supp. 1248 (S.D.N.Y. 1988), the courts ruled that collaborative work can result in joint ownership.

[34]. See, for example, *University of Colorado Foundation v. American Cyanamid*, 880 F. Supp. 1387 (D. Colo. 1995). The university owns the copyright to the article written by its professors because it was work done within the scope of their employment.

[35]. See for example *Weinstein v. University of Illinois* (1987), Seventh Circuit Court of Appeals.

[36]. See, for example, *Hayes v. Sony Corp. of America* (1988) which was argued in the Seventh Circuit Court of Appeals. Judge Posner wrote:

> *Although college and university teachers do academic writing as a part of their employment responsibilities and use some of their employers paper, copier, secretarial staff, and (often) computer facilities in that writing, the universal assumption and practice was that (in the absence of an explicit agreement as to who had the right to copyright) the right to copyright such writing belonged to the teacher rather than to the college or university. A college or university does not supervise its faculty in the preparation of academic books and articles, and is poorly equipped to exploit their writings. (847 F.2d. 416).*

[37]. See *Roberts v. Florida*, 373 So. 2d 672 FLA.(1979).

[38]. For an excellent analysis of these and related questions see Stephen A. Smith, "Communication and the Constitution in Cyberspace," *Communication Education*, 43 (1994), 87-101.

[39]. See, for example, *NAACP v. Alabama*, 357 U.S. 449 (1958), see particularly 460-61 where the Court says, "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas in an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."

[40]. See *Hague v. Committee for Industrial Organization*, 1939; Marsh v. Alabama, 1946.

[41]. Child Sexual Abuse and Pornography Act of 1986, Public Law No. 99-628, 100 Stat. 3510 (1986).

[42]. See for example *United States v. Kimbrough*, which surfaced in the Fifth Circuit in 1995 and the Supreme Court denied cert. in 1996. See also *New York v. Ferber* (1982) which upheld a conviction for the distribution of child pornography, which was defined as obscene under the Miller test.

[43]. No. 94-20019 (ND Tenn Dec. 2, 1994).

[44]. See *Playboy Entertainment v. United States*, 96-1034.

[45]. 352 U.S. 380.

[46]. "First Amendment and the Media" pp. 254-255.

[47]. 776 F. Supp. 135, 139 (SDNY 1991).

[48]. Wisconsin Court of Appeals, 1995.

[49]. *U.S. v. LaMacchia* No. 94-10092 (D Mass 1994).

[50]. For an excellent discussion of the Internet and issues surrounding it see "First Amendment and the Media: Regulating Interactive Communications on the Information Superhighway," *Fordham Intell. Prop., Media & Ent. Law Journal* [vol 5:235 1995] pp.235-277.

[51]. 533 F.2d 601, 608 (D.C. Cir. 1976).

[52]. See *Jones v. Wilkinson*, 800 F. 2d 989 (10th cir. 1986, summarily affirmed by the Supreme Court.

[53]. 18 U.S.C. Sec. 1464 (1976).

[54]. See *Smith v. California*, 1959.

[55]. The issue of privacy on these system is addressed in the Electronic Communication Privacy Act of 1986.

[56]. See, for example, *NAACP v. Alabama*, 1958, on the privacy issue. See also *McIntyre v. Ohio Elections Commission*, 1995.

[57]. See also D. L. Wilson, "Suit Over Network Access," *Chronicle of Higher Education* (November 24, 1993), pp. A16-17.

[58]. *U.S. v. Baker*, No. 95-80106 (E.D. Mich June 21, 1995).

[59]. 319 U.S. 637.

[60]. Ibid., at 662. This decision reversed *Minersville School District v. Gobitis*, 310 U.S. 586 (1940) in which Justice Felix Frankfurter wrote a majority decision that claimed that national unity was a rationale for expelling a Jehovah's witness for refusing to salute the flag.

[61]. Justice Black, an absolutist on First Amendment issues, was also a literalist. He voted against Tinker on the grounds that the First Amendment was not meant cover symbolic speech. A year before the *Tinker* decision, Justice Warren had articulated a compromise position in *U. S. v. O'Brien* (1968): "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever a person engaged in conduct intends thereby to express an idea.... This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech elements can justify incidental limitations on the first amendment." (20 L.Ed. 2d 679-680).

[62]. See Paul Seigel, "Tinkering with Stare Decisis in the Hazelwood Case," *Free Speech Yearbook* (1989), p. 97; Hafen, "*Hazelwood School District v. Kuhlmeier* and the Role of First Amendment Institutions," *Duke Law Journal* (1988), pp. 685-705.

[63]. 484 U.S. 271.

[64]. See also the recent Sixth Circuit decision in *Kincaid v. Gibson*, U.S. App. Lexis 21385 (1999).

[65]. Some schools are relying on the Federal Education Records Privacy Act of 1974 which prevents schools from releasing confidential information about students without their permission.

[66]. Strip searches of two 8 year-old girls in an elementary school, for example, was held not to violate the constitution's ban on "unreasonable searches." In 1997 the Supreme Court allowed a U.S. Court of Appeals decision (8-3, Atlanta Circuit) to stand in McKenzie v. Herring, 97-381. In this case a teacher, Susannah Herring, strip searched two of her second grade pupils because $7 was missing from the classroom. The courts ruled that the teacher was immune from liability because she did not clearly violate the constitutional rights of the pupils.

[67]. See *Rider v. Board of Education of Independent School District*, 414 U.S. 1097 (1973).

[68]. 817 F.Supp. 1319.

[69]. On June 25, 1997, in a decision that surprised some scholars, the Supreme Court struck down the Religious Freedom Act of 1993, which would have allowed Native Americans to use such substances as peyote if they were a traditional and legitimate part of their ceremonies. The Court ruled 6-3 that the act was an infringement on states' rights. See *City of Boerne v. Florida* (95-2074).

[70]. *Di Bona v. Matthews* 220 Cal.App.3d 1343 (Cal. App. 4 Dist. 1990).

[71]. Slip. Op. 99-62.

[72]. See *Isaacs v. Board of Trustees of Temple University* 385 F. Supp. 473.

[73]. 408 U.S. 231.

[74]. 410 U.S. at 667-668.

[75]. 477 F.2d 460.

[76]. 322 F.Supp. 1266.

[77]. *Rosenberger v. Rector & Visitors of University of Virginia* 115 S.Ct. 2515 (1995).

[78]. Ibid., at 2517.

[79]. 299 U.S. 365.

[80]. In May of 1995, the Supreme Court let stand a lower court decision requiring a Michigan high school to remove a portrait of Jesus that had hung in the hallway for 30 years (*Bloomingdale Public School v. Washesic*, 94-1383). This ruling was consistent with a 1980 ruling that required the removal of the Ten Commandments from a wall in a public school.

[81]. 496 U.S. 250.

[82]. 508 U.S. 384. The Court used the precedent set in *Cornelius v. NAACP Legal Defense and Ed. Fund*, 473 U.S. 788 (1985).

[83]. 403 U.S. 612-613.

[84]. 120 L.Ed. 2d 480-481.

[85]. 115 S.Ct. 2522 (1995).

[86]. 125 L.Ed. 2d 14.

[87]. 395 U.S. 446-47 (1969).

[88]. 395 U.S. 447.

[89]. See, for example, Richard Delgado, "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling," *Harvard Civil Rights-Civil Liberties Law Review*, 17 (1982): 133-181.

[90]. At 303; see also *Hernandez v. Loury*, 1937.

[91]. 337 U.S. 3.

[92]. Ibid., at 4.

[93]. *NAACP v. Clairborne Hardware Company*, 458 U.S. 886 (1982).

[94]. 534 F.2d 1027.

[95]. 408 U.S. 189.

[96]. R457 U.S. 864.

[97]. Charges of sexual harassment may be filed at any field office of the U.S. Equal Employment Opportunity Commission.

[98]. See also California Code Section 12940 (a), (h) and (I). The most controversial sections of the California Code prohibit "leering, ... slurs, and jokes, ... suggestive or obscene letters, notes, or invitations, ... impeding or blocking movements."

[99]. 29 C.F.R. Section 1604.11. In California this language has been incorporated into the Fair Employment and Housing Act, specifically Government Code Sections 12940 (a), (h), and (I). The most troublesome part of this code concerns "Visual conduct" which forbids "leering, making sexual gestures, displaying of sexually suggestive objects or pictures, cartoons or posters." Do I hang the poster of the Renoir nude in an office I am sharing with another?

[100]. For an opposing view on this point see, Eugene Volokh, "Freedom of Speech and Workplace Harassment," *UCLA Law Review* (1992), 1880-16.

[101]. See National Association of College and University Attorneys, *Regulating Racial Harassment on Campus: A Legal Compendium* (Washington, D.C.: NACUA, 1990); American Association of University Professors, "Preliminary Report on Freedom of Expression and Campus Harassment Codes," *Academe* (May-June, 1991), pp. 23-26. See also, William Van Alstyne, "The University in the Manner of Tiananmen Square," *Hastings Constitutional Law Quarterly*, 21 (1993), pp.1-14.

[102]. 97-843.

[103]. See John Hulshizer, "Securing Freedom from Harassment without Reducing Freedom of Speech: Doe v. University of Michigan," *Iowa Law Review* (January, 1991), pp. 392-98. See also Richard Delgado, "Campus Anti-Racism Rules: Constitutional Narratives in Collusion," *Northwestern University Law Review* (Winter, 1991), pp. 375-378; J. Peter Byrne, "Racial Insults and Free Speech Within the University," *Georgetown Law Journal* (February, 1991), pp. 425-30; Rodney A. Smolla, "Academic Freedom, Hate Speech, and the Idea of a University," *Law and Contemporary Problems* (Summer, 1990), pp. 211-16.

[104]. 721 F.Supp. 863 (E.D. Mich. 1989).

[105]. The federal court cited *Chaplinsky v. New Hampshire* (1942) and *Beauharnais v. Illinois* (1952). In Chaplinsky, the Supreme Court said:

> *There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. (315 U.S. 571-572.)*

More recent cases can be read to have narrowed the application of Chaplinsky. Summarizing the results of *Gooding v. Wilson* (1972), *Brown v. Oklahoma* (1972), and *Eaton v. City of Tulsa* (1974), Archibald Cox wrote:

> *Later cases place more reliance upon the doctrine of overbreadth or the duty of a policeman to suffer verbal abuse, but upon one ground or another they reverse convictions for such utterances as 'white son of a bitch, I'll kill you' and 'm----r f----r fascist pig cops' or calling a prosecution witness 'chickenshit'....*

See *Freedom of Expression* (1981), p. 51. In 1994 the Supreme Court of California recently struck down Stanford University's speech code on similar grounds to the Michigan case.

[106]. See *Sall v. Barber*, 782 F. 2d 1216 (1989); *Buckley v. Littell*, 539 F. 2d 882 (1976), cert. denied, 429 U.S. 1062 (1977); *Blouin v. Anton*, 431 A. 2d 439 (1981); *Ferguson v. Dayton Newspapers*, 7 Med. L. Rptr. 2502 (1981); *Stevens v. Tillman*, 855 F. 2d 394 (1988); *Kirk v. CBS*, 14 Med. L. Rptr. 1263 (1987); *Ollman v. Evans*, 750 F. 2d 970 (1984). It is possible that the decision regarding "racist" may be overturned on appeal, but the cost of legal action for the offended party will still be enormous.

[107]. *Modela v. New York Times Co*. 15 F.3d 1146 (D> Cir. 1994).

[108]. *Modela v. New York Times Co*. 22 F.3d 311 (D.C. Cir. 1994).

[109]. 497 U.S. 1. See, for example, *Hustler Magazine v. Falwell* (1988) or *Greenbelt Cooperative Publishing Association Inc. v. Bresler* (1970).

[110]. Ibid., at 19.

[111]. *Speech Acts and the First Amendment* (Carbondale: Southern Illinois University Press, 1993), p. 22.

[112]. Haiman, p. 30

[113]. *Iota XI Chapter of Sigma Chi Fraternity v. George Mason University* 733 F.Supp. 792 (E.D. Va. 1991).

[114]. Ibid., at 793. See also *UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*.

[115]. See *Khalid Absullan Tario Al Monsour Faissal Fahd Al Talal v. Fanin*, 506 F. Supp. 187 (1980).

[116]. In "Insults and Epithets: Are They Protected Speech?" *Rutgers Law Review*, 42 (1990), 304.

[117]. 410 U.S. 670.

[118]. See *Boos v. Barry*; *Police Department of Chicago v. Mosley*; *Linmark Associates v. Township of Willingboro*; *First National Bank of Boston v. Bellotti*; *Central Hudson Gas Company v. Public Utility Commission*.

[119]. See Justice Scalia's opinion, pp. 1-2 of slip opinion no. 90-7675. I should note that the majority in this case was supported by two very different rationales. The moderates supported overturning the law on the grounds that it reached beyond "fighting words." The conservatives, led by Scalia, objected to the law because it banned only particular categories of fighting words to the exclusion of others.

[120]. See *Dawson v. Delaware* and *Barclay v. Florida*.

[121]. 461 U.S. 146.

[122]. See "Revising Campus Speech Codes," *Free Speech Yearbook*, 31 (1993), pp. 124-137.

[123]. Ibid., at 128.

[124]. Ibid., at 130.

[125]. See *Connick v. Myers*, 461 U.S. 138, 147-50 (1983); *Pickering v. Bd. Of Educ.*, 391 U.S. 563, 568 (1968).

[126]. 337 U.S. 1, 69 (1949).

[127]. 363 F. 2d 744, 749 (1966).

[128]. *Connick v. Myers*, at 147-48.

[129]. *Bonnell v. Lorenzo*, Electronic Citation: 2001 FED App. 0057P (6th Cir.)

[130]. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

[131]. Ibid., at 281-282.

[132]. Ibid., at 284.

[133]. Ibid., at 287.

[134]. Haiman, pp. 56-57.

[135]. See particularly 477 U.S. 57, 60, 106 S. Ct. 2399, 2402.

[136]. 477 U.S. 64.

[137]. Previous cases include *Katz v. Dole* (1983), and *Henson v. City of Dundee* (1982)

[138]. 126 L.Ed. 2d 300.

[139]. Ibid., at 300.

[140]. Ibid., at 301.

[141]. Ibid., at 302.

[142]. In other cases based on Title VII courts have ordered certain conduct curtailed. See for example *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991).

[143]. The ruling involved the case of a University of California at Berkeley graduate student, Amy L. Forga. In a 4 to 3 ruling, the Commission claimed that though Ms. Forga had the right to sue, the "pattern of unwelcome sexual conduct" was not serious enough to be illegal harassment.

[144]. See also *Cumpian v. Banco Santander Puerto Rico* (1990) and *Jordan v. Clark* (1988).

[145]. The policy read as follows:

> *Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal, written, or physical conduct of a sexual nature. It includes, but is not limited to, circumstances in which: 1. Submission to such conduct is made explicitly or implicitly a term or condition of a student's academic standing or status. 2. Such conduct has the purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating,*

hostile, or offensive learning environment. 3. Submission to or rejection of such conduct is used as the basis for academic success or failure.

[146]. 42 U.S.C. & 2000e-2a (1982).

[147]. Equal Employment Opportunity Act, Pub. L. No. 92-261, & 8, 86 Stat. 103.

[148]. 411 U.S. 792 (1973).

[149]. 450 U.S. 248 (1981).

[150]. Ibid., p. 257.

[151]. 125 L.Ed. 2d 424.

[152]. *EEOC v. Franklin and Marshall College*, 775 F.2d. 110 3rd Cir. (1985). (Rejecting evidentiary privilege for universities), cert. denied, 476 U.S. 1163 (1986).

[153]. 493 U.S. 182.

[154]. 661 F.2d 426 (5th Cir. 1981).

[155]. In this decision Judge Weisberg emphasized that the Catholic Church has a "unique relationship to the Holy See" as a pontifical university chartered by Pope Leo XII in 1889. Weisberg continued by stating, "On some issues—and this case certainly presents one of them—the conflict between the universities commitment to academic freedom and its unwavering fealty to the holy See is direct and unavoidable. On such issues, the University may choose for itself on which side of the conflict it wants to come down." (*Curran v. The Catholic University of America* No. 1562-87 (D.C. Super. Ct. Feb. 28, 1989)).

[156]. For an excellent account of the problems associated with academic freedom, see; J.J. Partain, "Recent Developments" *Vanderbilt Law Review*, 40 (1987). Also, see Mertz, E. "Comment" *Northwestern University Law Review*, 82 (1988).

[157]. Currently, California State University of Northridge is involved in a case wherein the faculty may have exerted editorial control over college newspaper that resulted in legal action by the student.

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