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Student perceptions of speech regulation at Stanford University: A survey of seniors

Marr, John William, Jr., Ph.D.
The Ohio State University, 1993

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STUDENT PERCEPTIONS OF SPEECH REGULATION
AT STANFORD UNIVERSITY:
A SURVEY OF SENIORS

DISSERTATION

Presented in Partial Fulfillment of the Requirements
for the Degree Doctor of Philosophy in the
Graduate School of The Ohio State University

By

John W. Marr, Jr., B.A., M.S.

The Ohio State University
1993

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For Tina
ACKNOWLEDGMENTS

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CHAPTER I
INTRODUCTION

Background

The recent rise in violence and harassment on American college campuses, stemming from differences in race, sex, nationality, and sexual orientation, has been well documented. A number of colleges and universities have attempted to address this issue by implementing speech codes or discriminatory harassment policies. This practice has, in turn, sparked one of the most heated and divisive policy debates in the history of modern higher education in the United States.

In its most simplistic terms, the debate over discriminatory harassment policies or "hate speech" codes has been framed as a battle between proponents of free speech and supporters of equal protection (Delgado, 1991; Grey, 1992; Jones, 1991; Lawrence, 1990). Advocates for the use of speech regulations within higher education have suggested that securing rights for all students to equal protection under the fourteenth amendment may require proscribing some forms of verbal expression in order to foster an environment that values minority participation and achievement. Opponents of speech codes have suggested that
such policies will invariably undermine free and open debate on campus, thereby threatening the very mission of higher education.

Public attention has been drawn to the issue of discriminatory harassment in higher education as a result of both the increase in incidents of harassment and violence and the publicity generated by two high-profile federal lawsuits at the University of Michigan and the University of Wisconsin. It is therefore not surprising that much of the literature in this area has been developed by legal scholars and has focused on determining the legality of such codes within the context of first and fourteenth amendment jurisprudence. A review of what has been written in this area provides compelling insights and interpretations by both supporters and opponents of discriminatory harassment policies.

Although an understanding of constitutional concerns is certainly critical to the debate in this area, much of what has been written stops short of directly addressing the central policy questions that must be answered by college and university administrators wrestling with this difficult issue. Campus leaders are, for the most part, left to conclude that, if they happen to agree with a particular scholar who believes that some speech can be regulated on campus, then they can and/or should proceed in drafting and implementing a discriminatory harassment policy.
Conversely, administrators who are persuaded that virtually all speech codes may be unconstitutional may disregard the use of such policies as a tool in combating bias-motivated harassment and violence.

The literature in this area must be broadened to include more evaluation of the experiences of those institutions that have enacted discriminatory harassment policies. Appropriate quantitative and qualitative research methods should be employed to determine both the effectiveness and advisability of speech codes in higher education. Although such empirical research may hold much value for all of higher education, such research will be particularly valuable for faculty and administrators in private colleges and universities who must make principled decisions in this area outside of the constitutional constraints imposed on public institutions.

Discriminatory harassment policies have been challenged as an infringement of free speech rights accorded by the first amendment. Some observers of higher education view the enactment of these policies as particularly ill-advised and even harmful to the academy. Such policies are seen as having a "chilling effect" on speech and expression in higher education, which many believe has a special responsibility for fostering and protecting freedom of speech and expression. Many commentaries, articles, and editorials have painted the development of speech codes as a
movement by the political left to further the ends of "politically correct" thinking on campus.

In June 1992, the United States Supreme Court ruled that a St. Paul, Minnesota city ordinance, which made it a misdemeanor to burn crosses or place Nazi swastikas on public or private property, was a violation of the first amendment. *R. A. V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538 (1992). Although it has been suggested that this ruling may sound a "death knell" for campus speech codes, the debate appears to be far from over ("Death knell," 1992). It remains to be seen, when, how, or if this ruling will be applied to higher education. Even if the ruling places some limits on the enactment of such codes at state-assisted institutions, its effect may be muted at private colleges and universities, as they are not agents of state or federal government and are not held to the same constitutional standards as public institutions.

Private educational institutions have a choice. On the one hand, they may attempt to devise policies which would withstand judicial scrutiny if adopted by a similar public institution, in other words, policies which give primacy to the first amendment. On the other hand, they may be guided by the values of the particular institution, in the relative positions of importance ascribed to them by the institution. (Battaglia, 1991, p. 345)

Stanford University, the University of Wisconsin, and the University of Michigan have each received substantial press coverage in recent years as a result of their
decisions to implement discriminatory harassment policies. Policies at both Wisconsin and Michigan have been ruled unconstitutional by federal district courts. As a private institution, however, Stanford's policy does not constitute state action and is therefore not subject to constitutional interpretation.

The Court's ruling in R. A. V. leaves private college administrators with a number of important policy questions to consider: "Should private colleges and universities hold themselves to the same constitutional standard as public institutions in addressing discriminatory harassment?" "Are speech codes an effective tool in addressing racial, ethnic, and sexual harassment on campus?" "Do speech codes have any real or perceived effects on the learning and social experiences of the students they govern?" "What types of administrative and governance procedures should be employed in studying, drafting, implementing, or evaluating a discriminatory harassment policy?" The list of practical and philosophical questions in this area is substantial, to say the least, and it is these types of questions that continue to go largely unanswered in the current literature.

Although the implementation of speech codes has fostered widespread debate on the appropriateness of such codes in higher education, most of what is known about what higher education's major constituent groups (students, faculty, and administrators) actually think about these
policies comes from stories in the popular media. In this context, one or two individuals' opinions used in a particular story appear to speak for all or most individuals within the speaker's reference group. Such opinions, in the absence of additional information, may not necessarily represent the consensus of opinion of most members of that reference group. College and university administrators considering such policies must make informed decisions based on consideration of the constitutional permissibility of adopting a code, as well as empirical research that assists them in determining the likelihood that a discriminatory harassment policy will have the desired effect if implemented.

Statement of the Problem

Much has been written on the constitutionality of speech codes, yet little empirical information exists regarding the effectiveness or desirability of such codes, as suggested by the experiences of those institutions that have used them. Additionally, there is little information on the impact of speech codes on the behaviors and perceptions of students whose conduct is regulated by such codes. This observation has been underscored by several authors, including McGowan and Tangri (1991), who noted that "underlying these more abstract issues [first amendment liberties versus equal protection] is the largely undebat ed question of how these regulations affect the students who
must abide by them" (p. 833). Another author noted that "the debate surrounding campus antiracism rules has proceeded largely in an empirical vacuum" (Delgado, 1991, p. B1). These statements provide compelling support for the relevance of an in-depth study in this area.

Evaluation of the experiences of institutions that have implemented harassment codes is an essential first step in determining the effectiveness of such codes as a tool in discouraging various forms of harassment and intimidation on campus. Such evaluation would be helpful in determining the extent to which these codes pose a threat to the integrity of the teaching/learning process. This area of research would also prove valuable to administrators and faculty in colleges considering implementing, revising, or rescinding speech codes and may also shed light on the limits of policy-making as an administrative tool in colleges and universities.

To date, Stanford University has not undertaken any evaluation of its discriminatory harassment policy, in which students have been asked to report on how the policy has affected their experiences on campus. Moreover, Stanford University’s class of 1993 is the last graduating class to have studied at Stanford prior to the university’s implementation of its discriminatory harassment code. As a group, their experiences may offer a unique and important perspective in evaluating the impact and effectiveness of
the Stanford policy. An assessment of the current perceptions of this group of students would be an important component of any comprehensive review or evaluation of Stanford's discriminatory harassment code. Such a study would have immediate practical significance for Stanford and would also make an important contribution to the literature on discriminatory harassment policies in higher education. The complete text of "Stanford's Fundamental Standard," the "Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment," and "Comments on the Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment" are included as Appendix A.
CHAPTER II
REVIEW OF LITERATURE

Discriminatory Harassment in Higher Education

By now, most observers of higher education are well acquainted with the rising trend of bias-motivated harassment and violence on America's college and university campuses. "The alarming rise in racial harassment is well documented in both legal and non-legal publications" and "the harassment has taken the form of both action and speech" (Rosenberg, 1991, p. 549). Throughout the 1980s and early 1990s, nearly 200 college and university campuses have experienced "racial unrest serious or graphic enough to be reported in the press" (Delgado, 1991, p. 343). Delgado further noted that "most observers believe the increase in racial tension on the nation's campuses is real, and not just the product of better reporting or record keeping" (p. 343).

Another author described racial conflict as "becoming commonplace on American college campuses throughout the 1980s" and further noted that "the most highly publicized racial incidents, ranging from verbal harassment to violent beatings, occurred at some of the most elite institutions in the country" (Hurtado, 1992, p. 539). Although much of the
commentary and debate in this area has focused on white-on-black violence, "the Anti-Defamation league of B’nai-B’rith has reported a drastic increase in anti-Semitic violence on campuses. Jewish student centers have been vandalized and Jewish students physically attacked at Memphis State, University of Kansas, Rutgers, and Brooklyn College" (Rosenberg, 1991, pp. 551-552). At the University of Wisconsin-Madison, a predominantly Jewish fraternity was suspended for sponsoring a "slave auction," which included parody skits of black entertainers by white students in black face-paint (Delgado, 1991, pp. 357-358).

In what has become perhaps the most widely cited article in this area, Matsuda characterized the rise of racial harassment and violence on college campuses as an "epidemic" that has included the use of "insulting nouns for racial groups, degrading caricatures, threats of violence, and literature portraying Jews and people of color as animal-like and requiring extermination" (Matsuda, 1989, pp. 2332-2333). Matsuda's article was extensively researched and provided citations from a number of books and articles in which the authors provided documentation of thousands of examples of racist incidents directed at members of racial and ethnic minorities.

In 1990, The National Institute Against Prejudice and Violence reported that, since 1986, nearly 250 colleges and universities have reported incidents of violence directed at
individuals who appear to be members of racial or ethnic minorities. This group also noted that approximately 20% of minority students will experience some form of racial or ethnic attack, and that 25% of these students will be victimized more than once (Erlich, 1990). By any measure, most observers have agreed that the incidence of racial harassment and violence is indeed on the rise, manifests in a variety of ways (both blatant and subtle), and is a concern in all types of institutions (Wiener, 1989).

All colleges and universities have institutional and/or local, state, and federal statutes that provide legal redress for incidents of physical violence and property damage irrespective of the motive of the person committing the offense. Discriminatory harassment codes are an attempt to provide college and university administrators with a legal cause of action to address incidents of hate speech.

Hate speech takes many forms. It is not limited to a face-to-face confrontation or shouts from a crowd. It may appear on T-shirts, on posters, on classroom blackboards, on student bulletin boards, in flyers and leaflets, in phone calls, in letters, or in electronic mail messages on computer screens. Hate speech may be a cartoon appearing in a student publication, a joke told on a campus radio show, an anonymous note slipped under a dormitory or meeting room door, or graffiti scribbled on walls or sidewalks. Hate speech may be conveyed through destruction or defacement of posters or displays; through symbols such as burning crosses, swastikas, KKK insignia, and Confederate flags; and even through themes for social functions, such as black-face
Harlem parties, jungle parties, or white history week parties. (Kaplin, 1992, p. 518)

A comprehensive review of the complex demographic, social, and political factors that have contributed to the rise in discriminatory harassment and violence is beyond the scope of this project. Some discussion of these issues is important, however, in understanding the development of discriminatory harassment codes in higher education. Discussions of reasons for and contributing factors to the increase in bias-motivated harassment and violence in higher education center around what many believe to be conflicting signals and priorities within the academy and society at large. This struggle is viewed as a fundamental battle for control of the university, including curriculum, faculty, and pedagogy (Mooney, 1990).

Many colleges and universities are taking the first tentative steps toward reform, in anticipation of the impact that America's changing demographics will have on their student, faculty, and staff populations. According to a 1989 Census Bureau projection

the White population may begin to decline within 40 years. After 1990, it might grow more slowly than ever before. The White population is projected to grow by 29 million (11 percent) before commencing that decline.

The Black-and-other-races population will experience a much more substantial rate of growth. The Black population might increase by 14 million persons or 50 percent by 2030, while the other
races population (primarily Asians, Pacific Islanders, and American Indians) is projected to triple by 2040, growing by 16 million. (Spencer, 1989, p. 1)

These projections carry important implications for the future delivery of academic and student services in meeting the heightened expectations of these larger "minority" groups.

At one time happy just to be admitted to the higher education party, minorities and women now rightfully want a larger role in its planning and implementation. The result has been inevitable disagreements and ultimately a basic rethinking of the role and operation of higher education. (Cortés, 1991, p. 10)

One of the ways that colleges and universities have traditionally responded to the challenge of providing opportunities for students from minority backgrounds has been through the use of affirmative action policies designed to reverse the effects of past discrimination, while advancing the goals of diversity and multiculturalism on campus. Such admission and hiring practices, however, have also helped to fuel the fires of discriminatory harassment.

In his book, Illiberal Education: The Politics of Race and Sex on Campus, D'Souza (1992) detailed the myriad ways in which minorities and other "oppressed groups" are accorded preferential treatment in higher education. These include such commonplace practices as the use of different and/or broader admission standards in considering minority and nonminority applicants and targeting certain teaching
vacancies in an effort to recruit more minorities and women scholars. D'Souza also addressed other practices in higher education, such as the proliferation of minority support groups on campus and even paying minority students to maintain a particular grade point average.

D'Souza stated that "white hostility to preferential treatment and minority separatism is a major force behind many of the ugly racial incidents that have scarred the American campus" (1991, p. 49). An important factor possibly underlying much of the current wave of intolerance is summarized by Olivas (1992a), who noted that

many Anglos, particularly Anglo men, feel extremely threatened by what they believe to be their diminished standing and opportunities in the world; many of them grew up knowing they would rule their professions and their households, and they feel that the rules have changed. (p. 481)

This situation is made more difficult in the face of information that refutes any suggestion that these measures have had any real effect on minority achievement in higher education.

The empirical and case study research suggests rather strongly that minority students are not adjusting successfully to predominantly white institutions under current conditions. Moreover, minority students find themselves at an additional disadvantage when they are forced to endure acts of racial discrimination and racism in addition to the continuing, "normal" problems of social, economic, cultural, and educational adjustment faced by all students whose backgrounds are not white.
and middle class. (Farrell and Jones, 1988, p. 213)

While many individuals once expressed support for the goals of affirmative action within higher education, many students and faculty now believe that basic affirmative action principles have been broadened and misapplied to virtually all areas of campus, including curriculum, tenure policies, and research. The call for greater diversity within higher education, largely attributed to minority and feminist scholars, has been called the "new McCarthyism" (Adler, 1990, p. 48), a new "secular orthodoxy" (Sedler, 1991, p. 1329), and the "new Fundamentalism" (Taylor, 1991, p. 34). It is most widely known as "political correctness" (Daniels, 1991; Goode, 1991; Heller, 1991; Mabry, 1990; Stimpson, 1991; Taylor, 1991).

What is "political correctness"? The available literature, as found in both scholarly journals and the popular press, has suggested that political correctness is best understood as a trilogy of thoughts, words, and actions. One author described it as a "secular orthodoxy" which "involves the implementation of values that came to the forefront in the 1960s, and include racial equality, gender equality, respect for individual differences and alternative lifestyles" (Sedler, 1991, p. 1329). Another author likened political correctness to the rise of the Christian fundamentalist movement in the late 1970s. "What unites them [proponents of political correctness]--as firmly
as the Christian fundamentalists are united in the belief that the Bible is the revealed word of God—is their conviction that Western culture and American society are thoroughly and hopelessly racist, sexist, oppressive" (Taylor, 1991, p. 34).

The political correctness controversy has been an issue in the formation of the National Association of Scholars, a conservative organization of faculty formed to promote the study of Western culture and to support faculty who wish to protest other elements of the political correctness movement, including affirmative action and ethnic diversity courses (Mooney, 1990).

In 1991, The American Association of University Professors (AAUP) issued its "Statement on the Political Correctness Controversy" in an effort to provide guidance and leadership on the issue. The result, however, was further confusion and division within the professoriate, as
many AAUP members felt that this statement had not been reviewed widely enough by association members prior to publication (Leatherman, 1991).

It has been suggested that much of the debate surrounding political correctness has been overblown and sensationalized by the media (Stimpson, 1991). Another author characterized the political correctness movement as "simply a passing reactionary fad and a classic case of whose ox was being gored" (Olivas, 1992a, p. 480). The controversy figures heavily, however, in the introduction of "The Collegiate Speech Protection Act of 1991," which was developed to hold private colleges and universities to the same constitutional standard as public institutions in the area of freedom of speech (Hyde and Fishman, 1991). Overblown or not, the controversy now threatens an important aspect of the autonomy and governance of private institutions in the United States.

Some authors have credited this current state of mistrust within the academy for creating an environment which fosters and supports bias-motivated harassment and violence. Although it may be impossible to quantify the impact of the complex demographic, social, and political issues discussed here, they must be critically considered in any attempt to better understand and address the current wave of intolerance gripping the nation's colleges and universities.
Review of Relevant First Amendment Theories and Cases

The first amendment to The Constitution of the United States lies squarely at the center of the current controversy regarding discriminatory harassment codes. The first amendment provides that

Congress shall make no law respecting an establishment of religion, or
prohibiting the free exercise thereof; or
abridging the freedom of speech, or
of the press; or the right of the people
peaceably to assemble, and to petition
the Government for a redress of
grievances. (U.S. Const. Amend. I)

In order to fully understand the nature of the speech code controversy, it is critical that one fully appreciate the dual nature of the first amendment as both a guiding principle of law as well as a national philosophical commitment to freedom of speech and expression. The underlying philosophy of freedom of expression was articulated by John Stuart Mill in On Liberty, first published in 1859. Mill reasoned that freedom to express dissenting opinion was important for three reasons: (a) to expose the error or falsity found in prevailing views and opinions when such opinions are not true, (b) to more fully appreciate the truth of prevailing opinion when such opinions are indeed true, and (c) to add to the truth of prevailing opinions with information gleaned from previously unconsidered arguments (1975).

This search for truth rationale found its way into first amendment jurisprudence in 1919 in Justice Holmes' now
famous dissent in Abrams v. United States, 250 U.S. 616 (1919). It was here that Holmes first articulated what has come to be known as the "marketplace of ideas" theory of the first amendment. Holmes wrote

but when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. Abrams, 250 U.S. at 1180.

As shall be shown later, the marketplace of ideas concept is critical in considering the constitutionality of speech restrictions in higher education.

The essence of first amendment law involves deciding when speech or expression can and cannot be regulated by the state or by a recognized agent of the state. Analysis of first amendment cases usually begins with a determination of whether the imposed regulation is specifically directed at the content of the speaker’s message or whether the state’s action is designed to regulate a content-neutral aspect of speech, such as the time, place, and manner in which the speech is delivered. Government regulation of speech because of the content of the speaker’s message has historically been subject to strict constitutional scrutiny by the Court. Virginia Pharmacy Board v. Virginia Consumer
Council, 425 U.S. 748 (1976); Cohen v. California, 403 U.S. 15 (1971). Generally speaking, "whenever the harm feared could be averted by a further exchange of ideas, governmental suppression is conclusively deemed unnecessary" (Tribe, 1988, pp. 833-834). This rule provides an understanding of how Justice Holmes' marketplace of ideas theory is operationalized in deciding first amendment cases. The marketplace concept, however, assumes a free and equal exchange of ideas among parties with an interest in a particular issue. The concept also begs the question of exactly what constitutes an "idea" in first amendment jurisprudence. For many college administrators and legal scholars, the legality of campus speech codes often turns on their understanding and interpretation of these two important issues.

Although the Constitution is understood to provide broad protection of freedom of speech, the Supreme Court has upheld content-related speech regulations for a limited range of unprotected categories of speech. These categories have traditionally included incitement to imminent lawlessness, "fighting words," defamation, obscenity, and intentional infliction of emotional distress. Categories of speech have been judged to fall outside of constitutional protection when speech has been "directed to inciting or producing imminent lawless action and is likely to incite or
produce such action," Brandenburg v. Ohio, 395 U.S. 444, 1829 (1969), or when such speech has been judged to be

no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Chaplinsky v. State of New Hampshire, 315 U.S. 568, 769 (1942).

These cases have also reinforced the notion of the marketplace of ideas as a free and open exchange of information. Speech that falls into these unprotected categories generally provides no opportunity for real dialogue and, as a result, does not fulfill this defining criteria of the marketplace of ideas theory (Tribe, 1988).

The categories approach to content-related speech regulation seeks to avoid the problem of ad hoc, case-by-case consideration of individual first amendment challenges. This approach, presumably, leaves the protection of free speech rights less vulnerable to the predispositions of individuals or the whims of changing public sentiment.

Some content-related regulation of speech can be upheld if such regulation can be shown "to serve a compelling state interest and that it is narrowly drawn to achieve that end." Widmar v. Vincent, 454 U.S. 263, 448 (1981). In Widmar, a state university failed to meet the first prong of this test in denying a student religious group's request to use campus facilities to hold a meeting. The Court was "unable to recognize the State's interest as sufficiently 'compelling'

*Widmar* underscores the difficulty of overcoming the Court's presumption of unconstitutionality of content-related speech regulations. As the Court noted in *Widmar*, "First Amendment rights are entitled to special constitutional solicitude. Our cases have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content." *Widmar*, 454 U.S. at 451. It is not surprising that few colleges have developed or defended speech codes solely on the grounds that such policies served a "compelling state interest."

Substantially less scrutiny has been accorded cases involving unprotected categories of speech, as such speech by definition has been judged to merit little, if any, constitutional protection. In such cases the Court has subjected the regulation in question to a "mere rationality" review as opposed to the strict scrutiny review accorded cases involving content-related regulations of speech or expression. The difference in the nature of court review in cases involving unprotected versus protected forms of speech has left the state with a substantially lighter burden in justifying regulation of unprotected categories of speech.

Many campus speech codes have been developed or defended as regulations of unprotected categories of speech. Many of these codes have cited *Chaplinsky* and the "fighting
words" doctrine in support of their policies. Decided in 1942, *Chaplinsky v. State of New Hampshire* involved the arrest of a Jehovah's Witness who called a city marshall a "goddamned racketeer" and a "damned Fascist." The United States Supreme Court upheld the New Hampshire Supreme Court's enforcement of a statute which barred the use of words which were thought likely to provoke an average addressee to fight. The *Chaplinsky* decision established as an unprotected category of speech words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*, 315 U.S. at 769. Citing *Cantwell v. Connecticut*, 310 U.S. 296, (1940), the *Chaplinsky* court further noted that "resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Chaplinsky*, 315 U.S. at 769.

Although this language appears to lend strong support to those institutions that have implemented speech codes that forbid face-to-face insults, this language is part of the dicta of the *Chaplinsky* decision and as such is not binding in subsequent court cases. The Court has also taken steps to limit the holding in *Chaplinsky* in a number of subsequent court cases out of concern that its *Chaplinsky* holding would lead to violations of protected first amendment rights.
In an early challenge to the Court's holding in *Chaplinsky*, the Supreme Court overturned the conviction of a man arrested for inciting a crowd under a Chicago breach-of-the-peace statute. *Terminiello v. City of Chicago*, 337 U.S. 1 (1949). The Court in *Terminiello* held that speech which deliberately seeks to provoke or otherwise stir the emotions of an audience is, at times, particularly valuable in the dissemination of ideas and therefore worthy of protection under the first amendment. This ruling, in effect, charged authorities with controlling the behaviors of individuals who would otherwise restrict the right to freedom of speech by a controversial speaker by threatening or carrying out a violent act. This is a clear limiting of the holding in *Chaplinsky*, which stated that words which "tend to incite an immediate breach of the peace" were not entitled to constitutional protection.

The Court's *Chaplinsky* ruling has been further weakened and limited by the holdings in several other cases. In 1972, the Supreme Court upheld a U.S. Court of Appeals decision to grant federal habeas corpus relief to a Vietnam war protestor arrested during a confrontation at an Army induction center. *Gooding v. Wilson*, 405 U.S. 518 (1972).

Appellee was convicted in Superior Court, Fulton County, Georgia, on two counts of using opprobrious words and abusive language in violation of Georgia Code Ann. sec 26-6303, which provides: "Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words
or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor." *Gooding*, 405 U.S. at 518-519.

The Supreme Court ruled that the Georgia statute had not been interpreted in a manner consistent with the "fighting words" interpretation of *Chaplinsky*. As a result, the Court found the Georgia statute to be unconstitutionally vague and overbroad.

Much of the Supreme Court's ruling in *Gooding* turned on its review of previous convictions under the Georgia statute as well as a literal dictionary examination of the actual words used in the construction of the Georgia statute. Although the Court did find that some previous convictions under the Georgia statute clearly did not meet the fighting words test of *Chaplinsky*, Justice Burger, in his dissent in *Gooding*, noted that

the language used by the *Chaplinsky* Court to describe words properly subject to regulation bears a striking resemblance to that of the Georgia statute, which was enacted many, many years before *Chaplinsky* was decided. *Gooding*, 405 U.S. at 529.

Justice Burger further noted that

the Court apparently acknowledges that the conduct of the defendant in this case is not protected by the First Amendment, and does not contend that the Georgia statute is so ambiguous that he did not have fair notice that his conduct was prohibited. *Gooding*, 405 U.S. at 530.
The net effect of GOODING was to narrow the unprotected "fighting words" category of speech so severely as to leave it virtually undefinable. It follows that that which cannot be defined easily cannot be regulated easily. This point is succinctly illustrated by Justice Blackmun in a rhetorical question offered in his dissent in GOODING: "I wonder, now that section 26-6303 is voided, just what Georgia can do if it seeks to proscribe what the Court says it still may constitutionally proscribe." GOODING, 405 U.S. at 536.

This, in effect, is the central question facing college and university administrators seeking to utilize written policies in their attempt to curb discriminatory harassment on America's college and university campuses.

Another recent blow to CHAPLINSKY and the "fighting words" doctrine was dealt in TEXAS v. JOHNSON, 109 S. Ct. 2533 (1989). In this case, defendant Johnson was convicted for burning an American flag in violation of a Texas statute that made it illegal to do so. Texas officials cited as the state's interest in enforcing this statute "preserving the flag as a symbol of national unity and preventing breaches of the peace." JOHNSON, 109 S. Ct. at 2537.

Justice Brennan wrote the five to four majority opinion which struck down the Texas statute. The facts of the case revealed no real threat of a breach of the peace either during or after the flag-burning incident, thereby nullifying the state's first interest in enforcing the
statute. With regard to the state's second interest, the Court ruled that Johnson's prosecution was directly related to the content of the message conveyed through the burning of the flag. The Court noted that despite the state's understandable interest in protecting the flag, the means by which the state of Texas chose to accomplish this was unconstitutional under the first amendment.

Johnson further weakens Chaplinsky in its rejection of the state's concern for maintaining the peace. In Justice Rehnquist's dissent he compared Johnson to Chaplinsky and noted that in both cases the messages being conveyed were

"no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed" by the public interest in avoiding a probable breach of the peace. Johnson, 109 S. Ct. at 2553 citing Chaplinsky, 315 U.S. at 769.

The dissenting Justices in Johnson argued at length that few acts are more likely to "incite an immediate breach of the peace" than burning the flag. The Court's failure to uphold this state interest in Johnson essentially strips Chaplinsky of all practical usefulness.

It should be noted that the Court has not upheld speech regulation based on the "fighting words" doctrine since the Chaplinsky decision in 1942. This record of enforcement has caused many to question the validity of the Chaplinsky decision as "good law" and renders any policy relying on the "fighting words" doctrine as tenuous at best.
The first amendment doctrines of "vagueness" and "overbreadth" also have had serious implications for the use of speech codes on college and university campuses. In fact, vagueness and overbreadth were cited as fatal flaws in the University of Michigan's speech code, which was struck down in 1989. Although these two concepts are similar, there are significant differences in their interpretation and application.

The vagueness doctrine derives from the due process clause's requirement that individuals be given "fair notice" of prohibited conduct. A speech code will be held "void on its face" if it is so vague that individuals "of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Co., 269 U.S. 385, 391 (1926). Although fair notice within the context of criminal proceedings is given after the commission of prohibited conduct, the spirit of fair notice within first amendment jurisprudence is embodied in the requirement that laws be written so as to clearly identify prohibited speech before an individual breaks the law. The doctrine has significant clout within first amendment law as it seeks to avoid the inhibition or "chilling" of speech that would result from individuals saying less than they might if the line between lawful and unlawful speech was clear and unambiguous.
Like the vagueness doctrine, the doctrine of overbreadth is "highly protective of first amendment interests" (The First Amendment Overbreadth Doctrine, 1970, p. 846). As the doctrine applies to college speech codes, a code will be ruled overbroad if it appears to proscribe constitutionally protected speech and expression in addition to its proscription of speech or expression that may be constitutionally restricted. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

To summarize, these doctrines address the degree to which individuals governed by a particular statute are likely to know what constitutionally unprotected conduct or speech is being proscribed (vagueness), and the extent to which they are likely to be punished for engaging in constitutionally protected conduct or speech that also appears to be included in the statute (overbreadth).

As briefly noted earlier, the state may also impose reasonable content-neutral restrictions on speech and expression. This type of regulation protects the state’s interest in preventing other harms not directly related to the content of the speaker’s message. *Kovacs v. Cooper*, 336 U.S. 77 (1949).

Content-neutral restrictions limit expression without regard to its content. They turn neither on their face nor as applied on the content or communicative impact of speech. Such restrictions encompass a broad spectrum of limitations on expressive activity, ranging, for example, from a prohibition
on the use of loudspeakers, to a ban on billboards, to a limitation on campaign contributions, to a prohibition on the mutilation of draft cards. (Stone, Seidman, Sunstein, and Tushnet, 1991, p. 1257)

Because many of the policies drafted by colleges and universities have addressed discriminatory harassment as an unprotected category of speech, there has been relatively little attention paid in the literature to content-neutral speech regulation as it pertains to speech regulation in higher education. Some institutions, however, have incorporated the closely related issue of the "public forum" doctrine in the drafting and/or defense of their speech codes (Doe v. University of Michigan, 721 F. Supp. 852 (E. D. Mich. 1989); Ingalls, 1989).

The public forum doctrine addresses the historical and practical significance of the state allowing individuals and groups access to places and resources to facilitate the sending and receiving of information. First amendment jurisprudence has traditionally recognized three "types" of public forums:

(1) traditional, "quintessential public forums"—"places which by long tradition or by government fiat have been devoted to assembly and debate," such as "streets and parks"; (2) "limited purpose" or state-created semi-public forums opened "for use by the public as a place for expressive activity," such as university meeting facilities or school board meetings; and, finally, (3) public property "which is not by tradition or designation for public communication" at all. Perry Education
Assuming that a given regulation is either content-neutral or addresses an unprotected category of speech, the amount of state regulation permitted varies depending on the type of public forum in question (see Figure 2). The least amount of state regulation is permitted in traditional public forums, and the greatest amount of state regulation is permitted in nonpublic forums, that is, public property that has not been designated for public communication.

Figure 2. Amount of state regulation of speech permitted across three types of public forums.
The "public forum" doctrine holds that restrictions on speech should be subject to higher scrutiny when, all other things being equal, that speech occurs in areas playing a vital role in communication—such as in those places historically associated with first amendment activities, such as streets, sidewalks, and parks—especially because of how indispensable communication in these places is to people who lack access to more elaborate (and more costly) channels. (Tribe, 1988, p. 987)

"Thus, the Court has said that speech within public forums may not ordinarily be abridged unless the regulation is content-neutral, serves a significant governmental interest, and leaves open adequate alternative channels for communication" (Tribe, 1988, p. 992).

Even speech restrictions in nonpublic forums, however, require the state to show that its interference is not a substantial restriction on freedom of speech and that there is a rational justification for the regulation (Tribe, 1988). The availability of alternative channels of communication in nonpublic forums cases, however, is usually sufficient to make most types of interference insubstantial, thereby leaving only the rational justification test to be met (Tribe, 1988). Public forum theory has important implications for the debate on campus speech codes, as some institutions have used these basic tenets to distinguish areas on campus where the greatest amount of speech restrictions would be imposed from those areas where the
least restrictions would be imposed (Doe v. University of

The aforementioned theories, doctrines, and concepts,
although important in their general use in protecting
individual freedoms and liberties, take on additional
significance when applied to educational institutions. In
Keyishian v. Board of Regents of the University of the State
of New York et al., 385 U.S. 589 (1967), the Supreme Court
stated

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.
Keyishian, 385 U.S. at 683.

Five years later in Healy v. James, 408 U.S. 169
(1972), the Court again underscored its commitment to
academic freedom within higher education by saying that "the
college classroom with its surrounding environs is
peculiarly the 'marketplace of ideas'." Healy, 408 U.S. at 169. These are just two of many potential illustrations of
the Court's acknowledgement of the important role and
function of colleges and universities in defending and
promoting freedom of speech and expression.

The record of the Court, however, also has provided
some support for limited regulation of speech activities on
campus. For example, the Court in *Widmar v. Vincent* affirmed

the continuing validity of cases . . .
that recognize a university’s right to exclude even First Amendment activities
that violate reasonable campus rules or substantially interfere with the
opportunity of other students to obtain an education. *Widmar*, 454 U.S. at 452.

Additionally, the complex nature of many state
universities endows them with a number of characteristics
and interests that suggest a variety of ways in which
freedom of speech may be constitutionally restricted (Tatel,
Michaelson, and Kohrman, 1991, p. 5). Some of these
interests include the operation of residence halls, which
gives rise to concerns about the privacy interests of dorm residents, *Rowan v. United States Post Office Department*,
397 U.S. 728 (1970), and protecting faculty, staff, and
students in campus facilities who could in certain
circumstances become a "captive audience" to unwanted speech
(1974).

Although it is clear that the Supreme Court views the
first amendment as having special significance on college
and university campuses, it is less clear how much
discretion will be accorded administrators to enact policies
that in some way restrict freedom of speech or expression.
The mixed history of first amendment jurisprudence in this
area has contributed to the confusion and uncertainty of
students, faculty, and administrators attempting to navigate these rough waters.

This review has thus far addressed significant first amendment theories and interpretations and their implications for the regulation of speech in higher education. There are, however, other legal considerations and approaches that are closely related to the issue of discriminatory harassment policies in higher education. The two most significant of these alternative approaches are tort law and the broad area of antidiscrimination law.

The area of tort law addresses private or civil wrongs or injury for which a court may award damages. The tort of "intentional infliction of emotional distress" is another possible avenue for legal redress in discriminatory harassment cases that "has been offered as a constitutionally sound vehicle for student speech codes" (Hyde and Fishman, 1991, p. 1518). Under this tort, a civil suit may be brought against anyone "who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another" (Restatement (Second) of Torts, sec 46 (1), 1965). This tort requires that the conduct in question be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (Restatement (Second) of Torts, comment d, 1965).
Although a few college speech codes have relied on the tort of "intentional infliction of emotional distress," the limits of the tort and its usefulness as a foundation for college speech codes is unclear. Despite a number of state court rulings that have found liability in cases involving racial slurs and ridicule, the Supreme Court's ruling in *Hustler Magazine v. Falwell*, 485 U.S. 48 (1988) has suggested that policies based on this tort may not pass constitutional muster. Specifically, the Court noted that "an 'outrageousness' standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience." *Hustler*, 485 U.S. at 882. Hyde and Fishman suggested that *Hustler Magazine* may signal that decisions based on intentional infliction of emotional distress "might someday be reined in" (p. 1519).

Perhaps the last area of law with significant relevance to the consideration of campus speech codes is antidiscrimination laws and regulations arising from Equal Employment Opportunity Commission guidelines, Titles VI and VII of the Civil Rights Act of 1964, and the Civil Rights Act of 1991. Administrators drafting speech codes modeled after antidiscrimination laws may position their policies to draw upon substantial legislative, judicial, and administrative history in promoting equality of opportunity.
in housing, employment, and other important societal concerns.

Some authors have commented on the possible utility of a more generalized antidiscrimination approach to addressing discriminatory harassment in higher education (Grey, 1992; Hyde and Fishman, 1991; Mikva, 1992). Such policies might be viewed as being more consistent with federal laws and administrative guidelines and less challengeable on first amendment grounds.

"Many universities have looked to the workplace [employment law] in crafting speech codes" (Hyde and Fishman, 1991, p. 1513). The University of Michigan is one such institution that partially relied on Title VII of the Civil Rights Act of 1964 in the drafting of its discriminatory harassment policy (phone interview with V. B. Nordby, December 19, 1991). In addition to its intuitive appeal, a general antidiscrimination approach appears to have recently been accorded some degree of validity in the Supreme Court’s recent ruling in R. A. V. v. City of St. Paul, Minnesota. In R. A. V., the Court seemed to suggest that ethnic intimidation statutes modeled after Title VII of the Civil Rights Act of 1964 might better withstand constitutional challenge than those relying heavily on the "fighting words" doctrine from Chaplinsky. The Court noted that

since words can in some circumstances violate laws directed not against speech
but against conduct (a law against
treason, for example, is violated by
telling the enemy the nation's defense
secrets), a particular content-based
subcategory of a proscribable class of
speech can be swept up incidentally
within the reach of a statute directed
at conduct rather than speech.
R. A. V., 112 S. Ct. at 2546.

Both the Civil Rights Acts of 1964 and 1991 place a
greater degree of emphasis on expressive conduct rather than
speech. Colleges and universities drawing a similar
distinction in the development, implementation, and
enforcement of discriminatory harassment policies may find
that such policies raise fewer constitutional concerns than
those modeled on Chaplinsky. Campus policies that focus
more sharply on student conduct, coupled with the
institution's affirmative duty to foster and maintain an
environment conducive to carrying out its teaching,
research, and service missions as articulated in Healy v.
James, may provide a constitutionally defensible means of
preserving the use of written policy in addressing
discriminatory harassment in higher education.

Mikva (1992) commented that such policies in higher
education need not be very extensive and

should avoid a description of the
offensive conduct in terms of race or
religion or the "et ceteras" [sexual
orientation, national origin, etc.].
They should describe instead the
proscribed effects that conduct must
avoid. Colleges and universities need
not tolerate property destructors
because of what they do to the
university. They do not have to
tolerate intimidators, for the same reason. This must be the thrust of campus rules and codes. People who intimidate others are excludable people, whether the intimidation is grounded in race, size, or gender. (pp. 37-38)

Although policies developed using a more generalized, antidiscrimination approach might better withstand some first amendment challenges, the approach is not foolproof in and of itself. In addition to clearing the always challenging hurdles related to vagueness and overbreadth, institutions would be required to show that the enforcement history of such policies did not violate constitutionally protected rights of speech and expression.

It should be clear that these policies are drafted and enforced in a manner intended to reach only prohibited conduct. Such policies might survive first amendment challenges, however, if restrictions on speech and expression are purely incidental to the conduct governing purposes of the policy. See, e.g., *Davis v. Monsanto Chemical Co.*, 858 F. 2d 345, (6th Cir. 1988).

Although tort law and antidiscrimination statutes carry important implications for the development and administration of college speech codes, it is clear that the first amendment represents the most serious concern in this area. The first amendment to the United States Constitution establishes a sweeping commitment to a system of free communication and expression" (Tatel, Michaelson, and Kohrman, 1991, p. 2). The Supreme Court has affirmed the
value of free and open discourse in several cases, including Terminiello v. City of Chicago, 337 U.S. 1 (1949) and Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984), wherein the Court stated that

> the First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole. Bose, 466 U.S. at 1961.

Despite the Court's often-stated reluctance to uphold state-sponsored, content-related speech restrictions, first amendment case law in both dicta and case holdings provides substantial evidence that some amount of speech regulation by public colleges and universities may be permissible in certain situations to achieve certain ends (Cohn, 1991; Strossen, 1990). This statement, however, does not address the wisdom of implementing speech codes in higher education. That is, just because the first amendment may permit the regulation of speech and expression does not mean that colleges and universities should implement such policies.

The next section of this review will address first amendment interpretations by scholars who believe colleges and universities can and perhaps should constitutionally restrict some forms of speech and expression on campus in an effort to combat the harms caused by discriminatory harassment.
The Case for Speech Regulation

Rules, policies, and guidelines have long been part of the administrative landscape in higher education. From early student conduct and faculty morality codes to today’s complex collective bargaining agreements, colleges and universities have a long history of documenting important information. Throughout the history of American higher education, student and faculty conduct have been popular targets for administrative policy-making. Given this history, it was only a matter of time until administrative fiat was brought to bear on the problem of bias-motivated harassment and violence in higher education.

Jones (1991) cited three types of responses typical of institutions that have attempted to address discriminatory harassment on campus:

(1) ignore the problem as nonexistent or as isolated incidents that require no action; or, (2) acknowledge the existence of the problem and make strong statements that such conduct will not be tolerated; or, (3) make strong statements and enact new policies or modify existing student discipline codes. (p. 1399)

Many legal scholars have gone on record as advocating some amount of speech regulation on campus as a response to the increasing incidents of discriminatory harassment (Balkin, 1990; Battaglia, 1991; Brownstein, 1991; Byrne, 1991; Delgado, 1991; Hodulik, 1991; Jones, 1991; Matsuda, 1989; Saad, 1991; SeLegue, 1991). There are significant
similarities and differences in their interpretations and approaches to the issue, and they employ a variety of first amendment theories and doctrines in presenting their respective arguments. One generally consistent theme is the amount of importance and attention paid to the rights of the traditional targets of discriminatory harassment. These authors generally view administrative policy-making as an important tool both in the direct proscription of certain kinds of speech and expression as well as the symbolic significance of articulating an official institutional position on the issue of bias-motivated harassment and violence (Grey, 1992).

Delgado (1982) opened his landmark article, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-calling," with an extensive discussion of the psychological, sociological, and political effects of racial insults. Delgado cited a number of social scientists and commentators in documenting the harmful effects of racism and discrimination. Some of the psychological harms of racism include "feelings of humiliation, isolation, and self-hatred" (p. 137). The psychological effects of racism have also been implicated as a contributing factor in the onset of mental illness and psychosomatic disease in minorities (Delgado, 1982). Perhaps most troubling is cited evidence that one of the results of racial stigmatization is the impairment of parenting skills, thereby perpetuating the
effects of racism across generations (Delgado, 1982). Taken together, all of these factors foretell the lack of significant gains on behalf of minorities in the work force.

In addition to such emotional and physical consequences, racial stigmatization may damage a victim’s pecuniary interests. The psychological injuries severely handicap the victim’s pursuit of a career. The person who is timid, withdrawn, bitter, hypertense, or psychotic will almost certainly fare poorly in employment settings. (p. 139)

Delgado noted that "most people today know that certain words are offensive and only calculated to wound" (p. 145). He viewed the marketplace of ideas solution of "more speech" as "useless because it may provoke only further abuse or because the insulter is in a position of authority over the victim" (p. 146). In examining the causes of action under which many racial insult cases have been brought, including assault and battery, intentional infliction of emotional distress, and defamation, Delgado found most of these remedies to be limited and unreliable as a redress for victims of racial harassment.

Delgado believed that what is needed is a special tort specifically designed to address the harms caused by racial insults. Delgado viewed the development of this tort as important in providing real legal alternatives for victims, and also cited social scientists who suggest that "increasing the cost of racial insults thus would certainly decrease their frequency. Laws will never prevent
violations altogether, but they will deter 'whoever is deterrable'" (p. 148).

In order to prevail in an action for a racial insult, the plaintiff should be required to prove that 'language was addressed to him or her by the defendant that was intended to demean through reference to race; that the plaintiff understood as intended to demean through reference to race; and that a reasonable person would recognize as a racial insult.' (p. 179)

Delgado acknowledged the major opposing arguments that are likely to be made in any serious consideration of his proposal, including "the difficulty of measuring and apportioning damages, the potential for fraudulent claims, and the prospect of a flood of litigation" (p. 165). Delgado countered with a quote from Prosser, who noted that "the mere fact that the claim is novel will not of itself operate as a bar to the remedy" (p. 165).

Although Delgado's remedy is grounded in tort law, he paid particular attention to anticipated objections based on the first amendment. Delgado used the four categories of first amendment values as articulated by Emerson (1963) in Toward a General Theory of the First Amendment. Emerson noted that

maintenance of a system of free expression is necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance
between stability and change in the society. (pp. 878-879)

Delgado concluded that the use of racial epithets in no way furthers the ends sought by these first amendment values and therefore saw no conflict between the first amendment and his racial insult tort.

Although Delgado's tort approach is fairly unique among most scholars in this area, he built his case in a fashion that is very similar to that of other authors who favor some degree of speech restriction on college and university campuses. SeLegue (1991) also advocated a tort approach to addressing racial harassment and violence on campus. Unlike Delgado, however, SeLegue found the tort of "intentional infliction of emotional distress" to be an adequate legal formulation for use in dealing with hate speech in higher education. SeLegue noted that "the tort doctrine of intentional infliction of emotional distress provides a constitutionally permissible model for state university codes of conduct to prohibit personally abusive, face-to-face verbal attacks" (p. 954).

SeLegue placed much of his faith in tort law in the doctrine of "susceptibility." This tort doctrine permits action to be brought for "behavior directed toward a person whom the tortfeasor knows to be particularly susceptible to a certain kind of abuse" (Restatement (Second) of Torts, comment f, 1965).
The essential justification for liability is that the tortfeasor has chosen to exploit a manifest vulnerability '[B]ecause a person's race is usually obvious, the maker of a racial insult is exploiting an apparent susceptibility rather than causing an unforeseeable injury . . .' The speaker chooses the group-based epithet precisely because it will have a particularly strong and vicious effect on the victim. (SeLegue, p. 948)

SeLegue also advocated use of the captive audience doctrine in protecting "the hearer's liberty interest in being left alone," as noted in United States v. O'Brien, 391 U.S. 367, 381 (1968). This approach, in his view, places the focus "on the hearer's liberty interest in not being harassed rather than the substantive content of the speech," thereby allowing colleges and universities and the Court to "avoid ranking or valuing speech" (p. 945). This approach presumably avoids many of the difficulties posed by traditional first amendment interpretations of protected versus unprotected speech.

Although many authors have recognized tort remedies, particularly "intentional infliction of emotional distress," as one way of providing legal redress for victims of hate speech, other advocates of hate speech policies in higher education have promoted campus-based policies which they support using a combination of first amendment theories, doctrines, and interpretations. Typical among these is the policy offered by Saad (1991).
Saad provided an excellent survey of the major concerns in the drafting and enforcement of discriminatory harassment policies. Regarding the issue of the constitutionality of such policies, Saad offered perhaps the clearest statement of the prevailing view of those who advocate the use of speech codes. Saad wrote,

to the extent a university makes it clear in its policy prohibiting racial epithets that unpopular ideas, even ideas of racial, ethnic, and sexual superiority, are not to be restricted, but rather protected, then such a policy, narrowly drafted to focus exclusively on racial epithets which interfere with another student's access to education, is constitutional. If the policy as implemented actually operates to enforce a 'secular orthodoxy' or that which is 'PC', rather than to discourage racial epithets, it should be declared unconstitutional. (p. 1352)

Saad considered some of the strongest elements of first amendment jurisprudence, including the captive audience doctrine, the balancing of state and individual interests, and the concept of "dialogue" as articulated in the marketplace of ideas theory. He concludes that a narrowly drafted policy that prohibits the use of racial epithets by one student directed at another in the classroom should not be found to violate constitutionally guaranteed rights to freedom of speech and expression. The full text of Saad's policy is as follows:

Racial epithets and slurs used by one student against another in the classroom, with the intent, or reasonably foreseeable effect of
(1) demeaning the victim and
(2) unreasonably and substantially
interfering with the victim’s ability to
obtain an education are prohibited by
this Policy. This Policy does not apply
to nor prohibit the expression of ideas,
including racist or sexist ideology or
philosophy. An exchange of ideas is
couraged, not discouraged. (p. 1362)

Saad’s approach is perhaps the most narrow of any of
the positions taken by any of the scholars reviewed in this
chapter. As such, it is clear that much offensive speech
remains protected, and many, indeed, perhaps most of the
places and interactions in which students find themselves
lie outside of the reach of this policy. Saad’s very narrow
approach, however, included most of the elements suggested
by other advocates of speech regulation in higher education,
including the tort approaches offered by Delgado and
SeLegue. Saad’s policy provides a useful starting point for
discussion of the advisability and usefulness of speech
policies.

Matsuda acknowledged taking inspiration from Delgado in
writing her widely cited 1989 article, "Public Response to
Racist Speech: Considering the Victim’s Story." Unlike
Delgado, however, Matsuda’s legal analysis focused squarely
on the first amendment in rejecting the "absolutist first
amendment position" against state regulation of racist
speech (p. 2321).

Like Delgado, Matsuda devoted considerable attention to
the plight of those who are the targets of racist speech.
Through her recounting of several examples of racially motivated incidents of harassment, she provided a vivid and compelling account of the kinds of harassment and violence that are endured every day by racial and ethnic minorities. The author, who is herself a Japanese-American, also provided examples from her personal experience of racially motivated harassment.

Matsuda’s article reinforced Delgado’s writing on the effects of racial insults and harassment, but went further to point out how responses to racially motivated incidents by majority group members served to perpetuate such incidents.

The typical reaction of non-target group members is to consider the incidents isolated pranks, the product of sick-but-harmless minds. This is in part a defensive reaction: a refusal to believe that real people, people just like us, are racists. This disassociation leads logically to the claim that there is no institutional or state responsibility to respond to the incident. It is not the kind of real and pervasive threat that requires the state’s power to quell. (p. 2327)

This notion of the relative harmlessness of racial harassment is also common throughout the legal system. It is well established that the "rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language" (Restatement (Second) of Torts, sec. 46, 1965).
Racial and ethnic minorities and other insular groups are clearly expected to endure some degree of bias-motivated harassment in society at large and in the courts as well.

Matsuda drew on social science research, declarations by international conventions on human rights, and first amendment analysis to conclude that proscription of racist hate messages can and should be criminalized by the legal system of the United States. Matsuda's victim-centered position is very straightforward and rejects complex legal formulations. "We can attack racist speech--not because it isn't really speech, not because it falls within a hoped-for neutral exception, but because it is wrong" (p. 2381).

Matsuda advocated a very narrow ban on racist speech that she admitted would leave a broad range of offensive speech protected by the first amendment. Matsuda drew much of the conviction in her position from Article 4 of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination. Article 4 required in part that participating states [nations]

shall declare as an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof. (Cited in Matsuda, p. 2341)
Matsuda cited the charter of the United Nations, the Universal Declaration of Human Rights, and the American Declaration of the Rights and Duties of Man as international examples of the fundamental "wrongness" of tolerating expressions of racial hate and intolerance. Additionally, she cited existing laws in the United Kingdom, Canada, Australia, and New Zealand as evidence of the "growing international movement toward outlawing racist hate propaganda" (p. 2347). Thus, according to Matsuda, the "United States [is] alone among the major common-law jurisdictions in its complete tolerance of such speech" (p. 2348).

Matsuda argued that the almost universal condemnation of racism suggests that racist speech is perhaps best treated as a sui generis category, presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse. (p. 2357)

This approach, in Matsuda's view, is more protective of current first amendment liberties than most other approaches to speech regulation.

The alternative to recognizing racist speech as qualitatively different because of its content is to continue to stretch existing first amendment exceptions, such as the "fighting words" doctrine and the "content/conduct" distinction. This stretching ultimately weakens the first amendment fabric,
creating neutral holes that remove protection for many forms of speech. Setting aside the worst forms of racist speech for special treatment is a non-neutral, value-laden approach that will better preserve speech. (p. 2357)

It should be reiterated that Matsuda’s approach calls for a ban on only a narrow range of what could be considered racist speech. Therefore, "a belief in intellectual differences between the races, for instance, is not subject to sanctions unless it is coupled with an element of hatred or persecution" (p. 2348). This position is very similar to that of Saad, whose policy also provided protection for controversial and potentially offensive academic discourse.

Delgado’s and Matsuda’s articles addressed bias-motivated harassment on a broad, societal scale as opposed to a strict focus on discriminatory harassment in higher education. These articles, however, have both been widely read and cited by observers of the speech code controversy in higher education. Judge Cohn even amended his decision in Doe v. University of Michigan in order to acknowledge Matsuda’s article, which was published just after he rendered his decision in Doe. These articles offer two of the most decisive and far-reaching approaches to regulation of racist speech.

In another article, perhaps as widely cited as Delgado’s and Matsuda’s, Stanford law professor Charles Lawrence openly wrestled with the notion of campus speech restrictions. He freely acknowledged his discomfort in
urging regulation of the one tool that was available to blacks "when neither the power of the vote nor that of the gun [were] are available" (p. 435). Like other authors in this area, Lawrence viewed the campus speech controversy as a "conflict between the constitutional values of free speech and equality" (p. 434). Unlike other authors, however, Lawrence made "no pretense of dispassion or objectivity" in reaching his conclusion that speech codes should remain among the choices available to college administrators in dealing with discriminatory harassment and violence on campus (p. 434).

Lawrence's approach and tone are similar to Matsuda's in that he too drew upon vivid personal experiences combined with legal analysis and interpretation in supporting his position. Lawrence's ringside seat to the incidents leading to the development of Stanford University's Free Expression and Discriminatory Harassment policy also provided the added dimensions of context and firsthand experience lacking in the writing of most other scholars in this area.

Lawrence relied on several theories of first amendment law to support his conclusion that the Constitution does permit narrow regulation of racist speech on campus. Among the theories reviewed by Lawrence are the "fighting words" doctrine, the captive audience doctrine, the state action doctrine, and the marketplace of ideas theory. Lawrence also spent considerable effort reviewing Brown v. Board of
Education, 347 U.S. 483 (1954), which he interpreted to be a case essentially about the regulation of racist speech.

Lawrence was critical of "the distinction that many civil libertarians draw between direct, face-to-face insults, which they think deserve first amendment protection, and all other "fighting words," which they concede are unprotected by the first amendment" (p. 437). Lawrence argued that the distinction between these two types of speech is essentially a false one and that the "fighting words" doctrine permits regulation of abusive, face-to-face insults in the same way as it permits regulation of classic "fighting words." Lawrence, however, offered no discussion on the tenuous status of the "fighting words" doctrine as good law, given its history of disuse since the Chaplinsky decision.

Lawrence also found justification for campus speech codes in the captive audience doctrine. In Lawrence's view, Stanford's policy, "and indeed regulations with considerably broader reach, can be justified as necessary to protect a captive audience from offensive or injurious speech" (p. 456). He offered compelling arguments to support what he believed to be an institution's responsibility to provide a safe, nonintimidating environment in which learning can take place for all students.

Most legal scholars and administrators would probably agree with Lawrence that college and university
administrators have an affirmative duty to protect students from harassment in dormitories, lounges, and other commonly used student facilities. Lawrence, however, went on to suggest that this responsibility "provides a compelling justification for regulations that ensure them safe passage in all common areas" (pp. 456-457). Providing the "safe passage" suggested by Lawrence would require some regulation of speech in areas of campus that have been defined as public forums. This suggestion by Lawrence underscores a major concern of Lawrence's critics, and most notably, of Strossen.

Although Lawrence's stated position is supportive of narrowly drawn regulations designed to address "racist speech that results in direct, immediate, and substantial injury" to the target listener, his writing strongly implies that he supports regulations that are substantially broader than the limited restrictions suggested by his official position. This is a central issue in Strossen's critique of Lawrence's article, which is discussed later in this chapter.

Lawrence's discussion of the shortcomings of the marketplace of ideas theory echoes many of the same concerns expressed by others regarding the appropriateness of its use as the controlling metaphor in first amendment jurisprudence. Lawrence took his condemnation of marketplace theory further than most authors in his
assertion that with regard to racism, the marketplace is so infected with the disease of racism that the marketplace has been rendered incapable of evaluating the speech of nonwhites on an equal footing with the speech of whites. Lawrence noted that

our belief in the inferiority of nonwhites trumps good ideas that contend with it in the market, often without our even knowing it. In addition, racism makes the words and ideas of blacks and other minorities less saleable, regardless of their intrinsic value, in the marketplace of ideas. (p. 465)

Lawrence likened this failure of the marketplace of ideas unto Ely's concept of "process defect" in the area of equal protection.

Professor Ely coined the term "process defect" in the context of developing a theory to identify instances in which legislative action should be subjected to heightened scrutiny under the equal protection clause. Ely argues that the courts should interfere with the normal majoritarian political process when the defect of prejudice bars groups subject to widespread vilification from participation in the political process and causes governmental decisionmakers to misapprehend the costs and benefits of their actions. (pp. 469-470)

Lawrence also offered an interpretation of Brown v. Board of Education, which he believed supported his view that public and private institutions have an affirmative duty to discontinue "societal practices that treat people as members of an inferior or dependent caste, as unworthy to participate in the larger community" (p. 439). Lawrence
contended that the Court's ruling in Brown essentially amounted to a regulation of speech "because of the message segregation conveys--the message that black children are an untouchable caste, unfit to be educated with white children" (p. 439). To the extent that the Brown decision disallowed the practice of segregation in schools because of the message conveyed by segregation, the Court's ruling can be viewed as disallowing racist communication. "As a regulation of racist speech, the decision is an exception to the usual rule that regulation of speech content is presumed unconstitutional" (p. 440).

Lawrence went on to tie his interpretation of Brown to his concern about the role of state action doctrine in perpetuating racism. Lawrence argued that the objective of eliminating racism is not served by first amendment jurisprudence, which allows private citizens to engage in many of the types of discriminatory acts from which it prohibits government. Lawrence noted that

the deference usually given to the first amendment values in this balance is justified using the argument that racist speech is unpopular speech, that, like the speech of civil rights activists, pacifists, and religious and political dissenters, it is in need of special protection from majoritarian censorship. But for over three hundred years, racist speech has been the liturgy of America's leading established religion, the religion of racism. Racist speech remains a vital and regrettably popular characteristic of the American vernacular. (p. 447)
In Lawrence's view, the public/private distinction merely serves to privatize the institution of racism and allow the courts and government to hide behind the first amendment in justifying their inaction. This view is shared by Grey (1992), who noted that employment law cases involving hostile environment discrimination cases "provide some of the best examples of civil rights analysis that blur the 'speech-action' as well as the 'public-private' distinction" (p. 509).

In a manner somewhat similar to Matsuda's, Byrne (1991) also made a significant break from traditional first amendment jurisprudence in suggesting that state-assisted colleges and universities should not be considered state actors in the same way as are state legislatures or police departments. In Byrne's view,

the university has a fundamentally different relationship to the speech of its members than does the state to the speech of its citizens. On campus, general rights of free speech should be qualified by the intellectual values of academic discourse. I conclude that the protection of these academic values, which themselves enjoy constitutional protection, permits state universities lawfully to bar racially abusive speech, even if the state legislature could not constitutionally prohibit such speech throughout society at large. (p. 400)

Byrne agreed with Matsuda, however, that universities should not be permitted to regulate even highly offensive ideas if such ideas are offered within the context of academic discourse.
Byrne's position on speech regulation in higher education is perhaps the most aggressive of any author writing in this area. Although he recognizes that the use of such codes represents an uneasy selection from the available evils, Byrne nevertheless believed that "a school should welcome the opportunity to persuade a court that it has misconceived the nature of the university as being neutral about the quality of the speech of its students" (p. 443).

Balkin's (1990) article pursued what he terms a "legal realist" approach to first amendment jurisprudence. He began by acknowledging the unspoken value judgments inherent in every legal theory in every area of law. He noted that current first amendment interpretations related to racist speech represent a balancing of the interests of speakers to say what they feel versus the right of the targets of such speech to be free of oppression. Balkin concluded that "to the degree that the state protects the free speech rights of racists, the state affirms that the rights of minorities to be free from certain forms of racial oppression do not count" (p. 7).

Although Balkin acknowledged the social forces that brought about the "Holmes-Brandeis vision of first amendment law," he believed that current first amendment orthodoxy impedes progressive social change. Balkin viewed first amendment law as a changing, ever-developing jurisprudential
theory that has not evolved as it should to meet contemporary free speech challenges. Balkin favored "a reinterpretation of the captive audience doctrine to permit regulation of face-to-face racial and sexual harassment in the workplace" (p. 13).

The captive audience doctrine has not held a central place in the theories of many other scholars writing in this area. Nonetheless, other authors have acknowledged the potential applicability of the captive audience doctrine in campus speech regulation (SeLegue, 1991; Tatel, Michaelson, and Kohrman, 1991).

Although Balkin did not write specifically within the context of higher education, he did offer an example in which he applied this broader interpretation of the captive audience doctrine to a racial and sexual harassment situation on campus. Balkin noted that "it is likely that very soon defense counsel will connect the first amendment attacks on campus regulation of racist speech with analogous situations in the workplace" (p. 48). This observation has indeed come to pass as evidenced by the attention being paid to the areas of employment law and the Civil Rights Acts of 1964 and 1991 discussed earlier in this chapter.

Although Battaglia (1991) admitted that "there is much appeal to Professor Matsuda's position," he offered a much more limited approach to addressing discriminatory
harassment on campus. His position is consistent with Saad (1991), Byrne (1991), and other writers who believed that hate speech, which has the purpose and likely effect of intimidating students from full participation in educational processes, can be proscribed consistent with the first amendment, and, indeed, should be proscribed in educational settings. (Battaglia, p. 347)

Like Saad, Battaglia offered what he believed to be a sample policy that could withstand a first amendment challenge. Battaglia articulated six elements of a good hate speech policy. These included (a) targeting the policy directly at the harmful or undesirable effect, (b) directing the policy at the prevention of unlawful or otherwise undesirable conduct, (c) directing the policy at the prevention of emotional and/or reputational injury, (d) establishing a strong relationship between the proscribed speech and undesirable effects, (e) implementing safeguards to minimize overbreadth in enforcement, and (f) establishing a range of educational as opposed to just punitive sanctions.

Battaglia’s analysis included the important element of intent on behalf of the speaker, which was addressed only in passing by Delgado (1982), Matsuda (1989), and Balkin (1990). Battaglia’s position has important implications for the enforcement of speech policies, as he addressed some observable characteristics of speech that, in his view,
influence the degree to which the speech is constitutionally protected.

Hate speech almost always has some communicative value, and, therefore, is entitled to some level of first amendment protection. However, as the expressive content becomes more emotive and less cognitive, or when the purpose is to hurt and humiliate rather than to communicate facts or values, the importance of the speech for first amendment purposes is substantially diminished. Moreover, when the content of speech is regulated because it interferes with some legitimate interest other than whatever emotional disturbance it may cause, as in the law of defamation or sexual harassment in the workplace, the less rigorous balancing approach is appropriate. (p. 365)

Battaglia advanced the case for campus speech regulation through his focus on policy enforcement, as evidenced by consideration of the intent of the speaker and his call for a range of educational sanctions. These are significant considerations to be added to the positions of the authors previously discussed. Additionally, Battaglia lent some support to Balkin’s notion of the relevancy of Title VII in the debate on campus speech codes.

Battaglia and Saad have each taken a substantial risk in offering policies that they assert would withstand constitutional scrutiny. The full text of Battaglia’s sample policy is included as Appendix B. Battaglia’s policy adheres to his criteria for good speech codes in its articulation of the type of speech and conduct that is
proscribed, as well as its protection of speech that may be offensive to some, but is nevertheless constitutionally protected.

Jones (1991) agreed with Delgado (1982) that Emerson's four first amendment values are not served by the protection of hate speech. Jones found authority and responsibility for colleges and universities to develop speech codes by borrowing the "hostile environment" standard found in EEOC guidelines. Jones contended that higher education officials have the same duty to protect targeted students as employers do to protect employees from racial and sexual harassment (p. 1418). Jones, like Balkin, saw a relevant analogy between workplace harassment and discriminatory harassment on campus.

Brownstein (1991) shared several of Battaglia's concerns about the use of speech codes on campus, including problems related to vagueness and overbreadth. Both authors also shared a belief in the value of educational as opposed to punitive sanctions for those who violate harassment policies. Brownstein, however, took his concern for policy enforcement issues further than Battaglia by offering a fairly well-developed model for use in enforcing speech codes.

Brownstein’s brief commentary built on previous works by the author and others to reach the conclusion that "there are various situations in which hate speech may be
restricted without violating the first amendment" (p. 1452). Even so, readers were asked to assume arguendo that hate speech can be limited to some degree within a higher education context.

Brownstein took an in-depth look at the problems in the administration and enforcement of speech codes with a focus on the problems of vagueness and overbreadth. He noted that, even when speech restrictions are accepted in theory,

specific regulations are criticized on the grounds that they are vague and overbroad. Instead of precisely delineating the expression that may be appropriately and constitutionally limited, particular regulations may chill protected speech and provide too much unfettered discretion to an administrative staff. (p. 1451)

Brownstein's specific focus on the vagueness and overbreadth doctrines is particularly relevant in light of the centrality of these concerns to the outcome of Doe v. University of Michigan.

Brownstein blamed many of the current first amendment legal formulations for the widespread confusion in deciding on the constitutionality of campus speech codes.

It is relatively easy to recite the test for obscenity in Miller v. California, but no one seriously believes this formula provides a dealer in sexually explicit materials with a clear idea of how much of his inventory is constitutionally protected. The Brandenburg principle for identifying an actionable clear and present danger is similarly uncertain in its scope and application. (p. 1455)
In Brownstein's view, none of the traditional first amendment theories or doctrines, such as public forum analysis or "fighting words," offer real assistance in the debate on campus speech codes because they likewise suffer from being vague and overbroad.

Brownstein's approach recognized the critical link between policies as they are written and the way in which these policies are enforced. Brownstein concluded that perhaps a university's hate speech policy should encompass more expression than can be constitutionally prohibited. In doing so, however, it must create a remedial framework that is not focused, at least initially, on the punishment of those who exceed the policy's boundaries. (p. 1461)

Although Brownstein's view may be unacceptable to many, his approach addressed a critical aspect of the use of speech codes. Even narrowly drawn policies are likely to be vague and overbroad unless they go so far as to list specific words and expressions that are impermissible under the policy. A number of authors, including Brownstein, agreed that such an approach is unworkable and virtually meaningless, as offenders can easily avoid sanctions by merely avoiding words and expressions on the list. Such an approach does little to discourage the forms of racial harassment and violence the policy is designed to address.

Brownstein's enforcement model changed the nature of the relationship of the institution to its students, particularly those who violate the speech code. Brownstein
believed that punitive disciplinary responses should not be taken by the institution against first-time violators. Instead, administrators should use initial violations as an opportunity to teach students why their actions were inappropriate under the code and to educate them on the harms caused by what they said or did. In this model, the institution serves more as a mediator, facilitating communication between two parties in dispute, and less as a judicial body deciding guilt and innocence. Brownstein believed that

this type of initial, nondisciplinary response is unlikely to invoke a successful constitutional challenge. No one will be forced under threat of sanction to participate in mediation or even to meet with university officers. The first amendment does not prevent the university from telling a student who is willing to listen, "Don’t you realize how hurtful and offensive that kind of comment is?" or from notifying the university community that certain expressive behavior is deplorable. (p. 1462)

Brownstein added, "unfortunately, this response may not be adequate to prevent future hurtful actions by others or even by the same individual" (p. 1462).

Brownstein’s enforcement model would impose disciplinary sanctions on offenders beginning with their second offense. Hearings for second offenders would be held and sanctions imposed by a committee so as not to invest too much censorship authority in one person. Although "this approach does allow egregious examples of hate speech to
occur without sanction in the first instance" (p. 1462), the model appears to establish a framework within which students, faculty, and administrators can talk about hate speech, its effect on its targets, and its effect on the campus in general. Additionally, this approach "presumes that not every instance of insensitive and hurtful expression involves speech invidiously motivated by an incorrigible bigot" (p. 1462).

Brownstein saw this "second offense" approach as more protective of first amendment rights than average policies. He argued that his proposed model forces both sides to examine closely the actual speech in question in determining whether it is protected expression or not. This approach keeps the institution from indiscriminately sanctioning all first offenders, and the entire campus has an opportunity to understand fully the boundary between protected and unprotected speech through the experience gained in enforcing the speech policy.

Brownstein’s model raised a number of significant concerns, including (a) how broad or narrow an institution’s actual speech policy should be that accompanies the use of this enforcement model; (b) the time, effort, and expense of tracking incidents and offenders; and (c) whether such an approach really produces less of a chilling effect on speech than other enforcement models. Certainly, the biggest concern with Brownstein’s approach is the wisdom of
permitting colleges to implement discriminatory harassment policies that are vague and overbroad on their face.

These problems notwithstanding, Brownstein's focus on the enforcement of speech codes is an important contribution to the debate on such policies. Elements of Brownstein's model are part of the enforcement model used at the University of California at Davis and were also part of how the University of Michigan attempted to enforce its policy prior to the court decision in *Doe*. It may be that the University of Michigan's enforcement procedures did not represent a comprehensive educational enforcement model of the nature of Brownstein's model. It is more likely, however, that Brownstein's model simply does not provide sufficient safeguards for constitutionally protected speech. Taken together, the pros and cons of Brownstein's model suggest that the best speech codes will be strongly protective of first amendment rights in both how they are written and how they are enforced.

Hodulik, in her 1990 article, "Racist Speech on Campus," asked two critical questions that underscore the need for the present study:

(1) Is it possible to draft and implement a constitutional regulation?
(2) Even if enactment of a constitutional regulation is possible legally, is it sound policy for a university to attempt this kind of restriction of student speech? (p. 1433)
Hodulik concluded that there is "a consensus among most commentators that some limited form of regulation is legally sustainable" (p. 1433).

Hodulik wrote her article from her perspective as senior system legal counsel for the University of Wisconsin. Hodulik traced the development of discriminatory harassment codes, which she noted "grew logically and directly out of existing laws and policies mandating non-discrimination and equality of educational opportunity" (p. 1435). She saw discriminatory harassment codes as "an additional tool in furthering equal access and affirmative action recruitment goals" (p. 1436). She further noted that the policy "would serve as an expression of the university’s commitment to principles of tolerance and diversity, and that it was necessary to prevent and redress the harm caused by racist and discriminatory harassment" (p. 1437).

Hodulik recounted the events that led to the development of the policy at the University of Wisconsin. These included the posting of a large cardboard caricature of a black man on the lawn of a fraternity to announce an upcoming party, and another fraternity party that featured a "Harlem room" in which watermelon punch and fried chicken was served. A third fraternity was involved in a fight that stemmed from the use of racial epithets.

The resulting policy at Wisconsin was narrow in scope and relied largely on the "fighting words" doctrine outlined
in Chaplinsky. The policy also drew guidance from the "hostile environment" standard provided in EEOC guidelines. Wisconsin’s policy prohibited speech and expressive behavior that was found to be

(1) discriminatory and demeaning;
(2) directed at an individual;
(3) intended to demean--on the basis of a protected characteristic--the person to whom it is directed; and (4) intended to create an intimidating or hostile educational environment. The rule further clarifies, through the use of examples, that it does not apply in the context of group settings such as classroom discussions, but only in instances of individually directed discriminatory remarks intended to demean and to create a hostile environment. (p. 1439)

Hodulik noted that Wisconsin’s policy represented a conservative approach to addressing hate speech on campus. She stated that Wisconsin’s policy is

narrower than comparable workplace policies, narrower than the rule struck down in Doe, narrower than what some of the advocates of regulation would wish, and too narrow to address some of the conduct that prompted their adoption in the first place. (p. 1439)

In addressing the question of whether even a narrowly drafted code represents sound policy, Hodulik reviewed the limited number of cases that were brought under Wisconsin’s policy. She concluded that use of the policy at Wisconsin had been "sound and viable" (p. 1449).

Wisconsin’s policy created a cause of action for students harmed by face-to-face epithets in a manner that
had not been previously covered by the student conduct code. Hodulik also stated that "the enforcement of the rule has not stifled lively debate within the academic community, [and] has not been used to repress minorities or other protected groups" (p. 1448).

Hodulik was, however, frank in her discussion of the limits of a policy approach to discriminatory harassment. Perhaps the most significant of the problems she noted was a raising of expectations of many advocates of the policy, who believed that a wider range of expression was covered by the policy. This situation proved disappointing to some who viewed the adoption of a speech regulation as a major step toward eliminating racism within the university. Hodulik noted that Wisconsin's policy was never intended to be the institution's sole response in addressing bias-motivated harassment.

Several aspects of Wisconsin's experience warrant specific mention. In the 18 months of enforcement addressed by Hodulik's article, 32 complaints were filed. Thirteen of these were dismissed, as the behavior or statement in question was found not to violate the rule; two additional cases were dismissed following a hearing; and discipline was imposed in ten cases (Hodulik, p. 1441). "The disciplinary sanctions imposed included one written apology, one warning letter, seven disciplinary probations and one suspension" (p. 1441). Additionally, each case that resulted in
probation or suspension also involved additional violations of the student conduct code, such as an assault, threat, or disorderly conduct. "In no case was discipline imposed in connection with a classroom discussion or expression of opinion" (p. 1441).

As previously noted, the narrowness of the policy provided protection for a wide range of offensive speech and expression. Indeed, Hodulik noted that the fraternity incidents involving the Harlem room and the black caricature on the lawn would have been beyond the scope of the policy. The policy did provide redress, however, for individual students who were the direct targets of racial and sexual epithets. Moreover, Hodulik noted the following:

At Wisconsin, none of the incidents leading to disciplinary action under the hate speech rule occurred in classrooms or other forums for debate; all took place in social or dormitory settings. In none of the cases did the use of abusive epithets lead to further opportunity for speech. In several, the result was an angry and potentially violent confrontation, while in others the victim was silent. (p. 1447)

This is an important observation, particularly in light of Saad's suggested policy, which expressly forbade the use of racial epithets in classrooms only. It appears that any policy drawn so narrowly as to exclude social settings in which bias-motivated harassment is most likely to occur is likely to yield little or no benefit to the institution. Taken together, these observations underscore Hodulik's
contention that "the practical experiences with the Wisconsin rule indicate that the risk of a 'chilling effect' on speech from a narrowly applicable rule is minimal or nonexistent" (Hodulik, p. 1442). Although other scholars covered in this review have provided compelling reasons to believe that hate speech may be constitutionally restricted on campus, Hodulik's evaluation of Wisconsin's history in administering a speech code has provided the first real discussion of the advisability of such codes based on real evidence and experience.

Wisconsin's policy included a number of the elements felt to be important by many of the authors discussed in this review. Nevertheless, Wisconsin's speech code was ruled unconstitutional by a federal district court judge later in the same year that Hodulik's article (1991) was published. UWM Post v. Board of Regents of U. of Wis., 774 F. Supp. 1163. Judge Warren stated that "the rule goes beyond the present scope of the fighting words doctrine and is likely to allow the rule to apply to many situations where a breach of the peace is unlikely to occur" (Collison, 1991, p. A37). This opinion is similar to concerns expressed by Judge Cohn in voiding the University of Michigan's policy in 1989. Doe, 1989.

In June 1992, the United States Supreme Court ruled that a St. Paul, Minnesota city ordinance that made it a
misdemeanor to burn crosses or place swastikas on public or private property was a violation of the first amendment. *R. A. V. v. City of St. Paul, Minnesota, 112 S. Ct. 2538* (1992). This ruling may have far-reaching implications for ethnic intimidation statutes across the country and may signal serious problems for campus speech codes (Jaschik, 1992). Although it remains to be seen how or when this ruling will be applied to higher education, some institutions, such as the University of Michigan, have chosen to abandon the use of any kind of speech code as a result of this ruling.

What then are the constitutional interpretations and theories that have thus far proven insurmountable in defending speech codes against first amendment challenges? The next section of this chapter will consider the position of opponents to the use of speech codes on campus in addressing discriminatory harassment. Although opponents of speech codes generally use a much narrower range of constitutional theories and doctrines to support their positions, the forces of history and court precedents have combined to make cases involving state-sponsored regulation of speech perhaps the most closely scrutinized area in all of constitutional law.

The Case Against Speech Regulation

A previous section of this chapter addressed relevant first amendment theories and cases to establish an
understanding of the broad protection accorded freedom of speech and expression under the first amendment. Indeed, the Court's presumption of unconstitutionality of state-sponsored, content-related speech regulations provides much of the defense needed by opponents of speech regulation in higher education.

This favored position with respect to the Court and the first amendment results in an entirely different approach in the arguments for and against speech codes. Opponents of speech regulation in higher education have been credited with shaping the speech code controversy as primarily a first amendment issue as opposed to an equal protection issue (Hodulik, 1991, p. 1436). Supporters of speech codes struggle to broaden, reinterpret, or discard current first amendment doctrines, while opponents work to keep the Court focused on current first amendment understandings in an effort to maintain and strengthen these time-honored rulings and doctrines.

The debate on the use of speech codes in higher education is fraught with both philosophical and technical concerns. In his foreword to the 1991 Symposium issue of The Wayne Law Review, Browne questioned "whether we can achieve an increase in tolerance through suppression of noxious views. Put another way, is it realistically possible to impose an ‘enforced sensitivity’ to others?" (p. 1311). Browne believed that "even if the goals of
racist speech policies were achievable, the price, in the form of lost first amendment liberties, is simply too high" (p. 1311). Like other opponents of speech codes, Browne foresaw almost insurmountable problems in developing and enforcing a first amendment jurisprudence that effectively and consistently sanctions prohibited speech without restricting protected expression.

As the first case presenting a first amendment challenge to a university speech code, *Doe v. University of Michigan* provides a useful starting point for considering arguments against speech codes in higher education. Virginia Nordby, associate vice president for student services at the University of Michigan, traced the development of Michigan's discriminatory harassment code back to 1987 when several incidents, including distribution of a flier declaring "open season" on blacks and the broadcasting of racist jokes by a student disc jockey on a campus radio station, led the administration to consider implementing a discriminatory harassment code (phone interview with V. B. Nordby, December 19, 1991). It should be noted that the university's response was partially motivated by an implied threat from a Michigan legislator that the university's state appropriation might be held up in order to encourage a response to these incidents by the university. *Doe*, 1989. The university implemented its policy on discriminatory harassment in the Fall of 1988.
Doe, a graduate student at the university, brought suit challenging the policy as unconstitutionally restricting his freedom of speech. Doe's work in biopsychology involved the study of theories that explored the possibility that biological traits contributed to differences between males and females and individuals of different races. As these views were likely to be considered racist or sexist by some, Doe asserted that the policy impermissibly chilled his right to openly discuss these theories. "He requested that the Policy be declared unconstitutional and enjoined on the grounds of vagueness and overbreadth." Doe, 721 F. Supp. at 858.

In questioning Doe's standing to bring the suit, the university responded by stating that the policy had "never been applied to sanction classroom discussion of legitimate ideas and that Doe did not demonstrate a credible threat of enforcement as to himself." Doe, 721 F. Supp. at 858. To this the Court replied that "were the Court to look only at the plain language of the Policy, it might have to agree with the University that Doe could not have realistically alleged a genuine and credible threat of enforcement." Doe, 721 F. Supp. at 859.

The Court, however, considered all available information on the interpretation and enforcement of the policy including the policy itself, the interpretive guide that was published along with the policy, the available
legislative history on the development of the policy, "and experiences gleaned from a year of enforcement." Doe, 721 F. Supp. at 859. The Court's examination of these records led to its conclusion that "the record clearly shows that there existed a realistic and credible threat that Doe could be sanctioned were he to discuss certain biopsychological theories." Doe, 721 F. Supp. at 860.

In reviewing the record of enforcement for several complaints that had been filed under the policy, the Court noted that there were several incidents in which protected speech, some which occurred within the context of classroom discussion, led to sanctions by university administrators under the terms of the policy. As a result, the Court determined that "the university could not seriously argue that the policy was never interpreted to reach protected conduct. It is clear that the policy was overbroad both on its face and as applied." Doe, 721 F. Supp. at 866. Additionally, the Court determined that "the terms of the Policy were so vague that its enforcement would violate the due process clause." Doe, 721 F. Supp. at 867.

Thus, the University of Michigan became the first American university to have a speech code voided by a federal court. Although the ruling in this case centered around the issues of vagueness and overbreadth, the Court devoted considerable attention to recounting the history of first amendment jurisprudence leading to the Court's
position that "while the Court is sympathetic to the University’s obligation to ensure equal educational opportunities for all of its students, such efforts must not be at the expense of free speech." Doe, 721 F. Supp. at 868. Doe clearly established the Court’s resolve to permit very little, if any, state-sponsored regulation of speech, particularly within public colleges and universities.

Judge Cohn indicated some respect for the "fighting words" doctrine articulated in Chaplinsky, but was noncommittal in addressing the degree to which "fighting words" provides a solid basis upon which an institution might base a speech policy. In addressing this issue, Judge Cohn noted that

under certain circumstances [italics added] racial and ethnic epithets, slurs, and insults might [italics added] fall within this description and could constitutionally be prohibited by the University. In addition, such speech may [italics added] also be sufficient to state a claim for common law intentional infliction of emotional distress. Doe, 721 F. Supp. at 862.

This statement provides little assistance to other institutions that have relied on the "fighting words" doctrine to support and justify similar discriminatory harassment codes.

What then are the implications of Doe for other institutions wrestling with the issue of speech codes? Sedler (1991), who served as plaintiff’s counsel in Doe, viewed Doe as a ‘‘landmark’’ decision having considerable
impact on the constitutional permissibility of campus bans on 'racist speech’" (p. 1328). Sedler noted that "the Doe decision was not about poorly drafted campus bans on 'racist speech’" (p. 1328). In Sedler's view, the university's prohibition of "racist speech" essentially amounts to a ban of "racist ideas." In Sedler's view, none of the concerns expressed by the university—providing equal educational opportunity, maintaining a positive campus environment, deterring violence and harassment—are sufficient to sustain the policy. In Sedler's words,

The reasons why the University of Michigan's policy violated the first amendment indicate that virtually every ban of "racist speech" on campus imposed by a public university will also be held unconstitutional. Campus bans on "racist speech," no matter how narrowly-framed and no matter how justified, are directed primarily against the expression of "racist ideas." Under the "law of the first amendment," a public university cannot constitutionally prohibit the expression of "racist ideas" on campus. (p. 1328)

Sedler's view appears to be extreme in light of the fact that other opponents of speech regulations acknowledged that some narrowly drafted speech policies may be constitutionally defensible (Sherry, 1991; Siegel, 1990). Indeed, Judge Cohn (1991), writing in the same edition of The Wayne Law Review as Sedler and Browne, stated that

I did not say in my bench opinion, or in my follow-up written decision, that discriminatory speech does not harm its victims or that society has no interest in regulating such speech, or that such
Although Sedler's comments could be viewed as an attempt to reinforce his belief in Doe as a "landmark" decision in first amendment law, he is correct that Doe provides the current legal benchmark for other institutions considering written policy as part of their response to incidents of bias-motivated harassment on campus.

In her widely cited article, "Regulating Racist Speech on Campus: A Modest Proposal?," Strossen (1990) outlined her objections to campus speech regulations, taking specific issue with the position taken by Lawrence, discussed earlier in this review. As a general counsel to the ACLU, Strossen sought an approach that minimized perceived conflicts between the goals of the first and fourteenth amendments. Strossen feared "that the movement to regulate campus expression will undermine equality, as well as free speech," and that "those who frame the debate in terms of this false dichotomy simply drive artificial wedges between would-be allies in what should be a common effort to promote civil rights and civil liberties" (p. 490).

Strossen took perhaps as much interest in what Lawrence did not say as in what he did. Strossen characterized Lawrence's position as being "the proverbial 'thin edge of the wedge' for initiating broader regulations" (p. 493).

What is disquieting about Professor Lawrence's article is not the relatively limited Stanford code he defends, but
rather his simultaneous defense of additional, substantially more sweeping, speech prohibitions. The rationales that Professor Lawrence advances for the regulations he endorses are so open-ended that, if accepted, they would appear to warrant the prohibition of all racist speech, and thereby would cut to the core of our system of free expression. (pp. 492-493)

Strossen identified two problems with the use of speech regulations in higher education, the first being that most regulations are so narrow as to render them ineffective in curbing most of the types of harassment that gave rise to the policy in the first place. This, in turn, leads to a second problem in which supporters of such policies seek to broaden them in an effort to encompass more of the types of speech and expression not covered by the policy. It is this process that establishes Strossen's "thin edge," which will forever threaten the civil liberties of the students, faculty, and staff who are subject to speech regulations.

Strossen discussed several philosophical and legal arguments that have been advanced by proponents of speech regulations. In considering the symbolic usefulness of speech codes, Strossen cautioned that "universities must ask whether that symbolic impact is, on balance, positive or negative in terms of constitutional values" (p. 523). Strossen went on to cite United States v. Eichman, in which the Court invalidated the "Flag Protection Act of 1989." In this recent ruling, the Court clearly established the nation's interest in freedom of speech and expression as
being superior to symbolic concerns. There is little reason to believe that the Supreme Court would find a college’s interest in symbolically reaffirming its commitment to racial equality through the enactment of speech regulations as more compelling than the government’s interest in fostering patriotism by attempting to outlaw flag burning.

In considering the fighting words doctrine as support for speech regulations, Strossen cited Gard’s analysis (1980) of the four elements of the doctrine:

The offending language (1) must constitute a personally abusive epithet, (2) must be addressed in a face-to-face manner, (3) must be directed to a specific individual and be descriptive of that individual, and (4) must be uttered under such circumstances that the words have a direct tendency to cause an immediate violent response by the average recipient. If any of these four elements is absent, the doctrine may not justifiably be invoked as a rationale for the suppression of the expression. (p. 525)

By Strossen’s analysis, Stanford’s policy, and many others, clearly miss on one and quite possibly all four of these criteria. Strossen noted that Stanford’s policy’s most serious defect is that it does not allow for the contextual evaluation of speech in a manner consistent with the Court’s ruling in Gooding v. Wilson, 405 U.S. 518 (1972), which required that speech be evaluated on a case-by-case basis “to assess whether they are likely to cause an imminent breach of the peace under the circumstances in which they are uttered.” Gooding, 405 U.S. at 526.
Stanford’s policy makes no mention of this type of situational evaluation and, in Strossen’s view, violates the first amendment’s guarantee of freedom of speech and expression. The full text of Stanford’s policy is provided in Appendix A.

Strossen explicitly rejected the use of the "intentional infliction of emotional distress" tort as suggested by some supporters of speech codes. Although Strossen acknowledged the "logical appeal" of the use of this tort, she believed its use is particularly ill-advised within the context of higher education. She noted that "traditional civil libertarians caution that the intentional infliction of emotional distress should almost never apply to verbal harassment" (p. 108). The key problem lies in what one scholar called the "boundless subjectivity" of the tort, which

subjects people to punishment because they violate "changing sensitivities" of [a] particular community at [a] particular time, perpetuates stereotyping, invites "radically unpredictable" judicial decisionmaking, and incorrectly assumes that all members of racial or other groups have monolithic responses to challenged stimuli. (Strossen, note 154, p. 516)

Strossen noted that because of these concerns, Stanford officials decided not to base the university’s discriminatory harassment code on the tort of intentional infliction of emotional distress. The university, however, "adopted a rule that is modeled on the Chaplinsky dictum
that also sought to protect against emotional distress" (Strossen, note 157, p. 517). In Strossen’s view, this integration of these two constitutionally suspect doctrines is an additional weakness of the Stanford policy.

Strossen also rejected Lawrence’s passive support for the use of group defamation statutes as a rationale on which to base campus speech codes, noting that "group defamation regulations are unconstitutional in terms of both Supreme Court doctrine and free speech principles" (p. 519). Although the Supreme Court did uphold the group libel statute at issue in Beauharnais v. Illinois, 343 U.S. 250 (1952), Strossen agreed with other scholars that

"Beauharnais is widely assumed no longer to be good law in light of the Court’s subsequent speech-protective decisions on related issues, notably its holdings that strictly limit individual defamation actions so as not to chill free speech. (p. 519)

Strossen went on to argue, as have others, that speech codes are not an effective tool in countering racism and that such rules may even aggravate the problem. Strossen also cited specific examples from an extensive international history of the use of these types of statutes and regulations against members of the groups the statutes were developed to protect. With regard to speech regulations in American higher education, Strossen stated that "during the approximately one year that the University of Michigan rule
was in effect, there were more than twenty cases of whites charging blacks with racist speech" (p. 558).

Although Strossen made it clear that she does not support the use of speech codes in the battle against discriminatory harassment in higher education, she concluded her essay by stating that "if universities adopt narrowly framed rules that regulate racist expression, then these rules should constitute one element of a broader program that includes the more positive, direct strategies outlined above" (p. 565). These strategies include open condemnation of racist acts by faculty and administrators, education and training in communication and cultural diversity, and other opportunities to promote intergroup understanding.

Rosenberg (1991) shared a conviction similar to Sedler’s, that "the exchange of ideas—even wrong ones—allows students—even racists—to discover the truth rather than having the government tell it to them" (p. 583). Rosenberg believed in the university as the "marketplace of ideas" and believed that educational institutions offer minority students a unique opportunity to "stand their ground" and refute the implications conveyed in racial epithets (p. 584).

Much of Rosenberg’s argument against speech codes rested on his conclusion that the views of Delgado and others "do not overcome the Supreme Court’s emphasis on free speech in the academic community, where the ideals of
pursuit of the truth and self-fulfillment are most vital" (Rosenberg, 1991, p. 587).

Rosenberg saw particular problems for the enforcement of speech codes in the area of vagueness, as did the Doe court. Although Rosenberg believed that Matsuda's criteria for proscribing speech is somewhat better than the formulation drafted by the University of Michigan, he nevertheless believed that the Doe Court would similarly rule against a policy drafted using Matsuda's criteria. Rosenberg largely discounted Matsuda's call for designating hate speech as a category unto itself and attacked Matsuda's position for not fitting into any of the acknowledged unprotected categories of speech. Thus, Rosenberg relied on the "marketplace of ideas" theory, the vagueness doctrine, and the Court's current interpretation of "unprotected categories" of speech in concluding that all but the narrowest of speech codes are probably unconstitutional.

Like Rosenberg, Heins (1983) also took issue with Delgado but for different reasons. Heins believed that Delgado's position, as articulated in "Words That Wound" (1982), is a gross oversimplification of important issues involving complex questions of first amendment jurisprudence balanced against individual rights and larger societal concerns. She argued that Delgado's position "is fundamentally hostile to the first amendment" and that
Delgado even "misstates the applicable constitutional law" (Heins, 1983, p. 585).

Much of Heins' objection to Professor Delgado's racial epithets tort centered around the practical problems of enforcement. Heins noted that in his discussion of his proposed tort,

Delgado suggests that an epithet such as "You damn nigger" would "almost always" be actionable, while "boy" might be actionable, "depending on the speaker's intent, the hearer's understanding, and whether a reasonable person would consider it a racial insult in the particular context." (Delgado as quoted in Heins, 1983, p. 585)

Heins added that "these attempted distinctions ought to be enough to suggest the practical problems inherent in Delgado's plan" (p. 585). Like Browne and others, Heins saw little chance that courts will easily and consistently be able to discern actionable speech and expression from that which is protected by the first amendment.

Most of Heins' position, however, is grounded in her respect for the Supreme Court's traditional presumption of the unconstitutionality of content-based speech regulations. Her line of criticism of Delgado's plan essentially measured Delgado's new proposal against the rules of existing first amendment law and found Delgado's plan lacking.

Heins concluded her article with an opinion that "the list of 'exceptions' to the first amendment should not be enlarged, but refined and narrowed" (p. 592). This
statement stands in direct opposition to the position of Matsuda and other proponents of speech codes, who support their arguments largely by calling for new ways of interpreting the first amendment in an attempt to establish offensive speech more firmly as lying outside of the bounds of first amendment protection.

McGowan and Tangri (1991) provided an in-depth, evenhanded review of marketplace theory in reaching their conclusion regarding what the Constitution will and will not permit in the area of speech regulation in higher education. Although McGowan and Tangri challenged both the theory's usefulness and appropriateness as the first amendment's controlling metaphor, they nevertheless concluded that it may well be the best choice of the available evils. They noted that

marketplace theory therefore rests ultimately upon the relative risks of oppression involved. As between the risk that individuals will choose the "wrong" truth and the risk that government will do so, marketplace theory prefers the former. This preference reflects the government's effective monopoly on the use of "legitimate" force to enforce its view of the truth. If an individual mistakenly believes falsity to be true, she suffers for her mistake. If a government makes the same error, millions of people may suffer. (p. 838)

This argument helps to reinforce the strong philosophical foundation that has long supported traditional first
amendment jurisprudence with marketplace theory as its cornerstone.

The tone and organization of McGowan and Tangri’s article seek to tie their assessment of what the Constitution will and will not permit with the realities of policy-making on college and university campuses. Although many opponents of speech codes have settled on the position that the Constitution forbids practically all forms of speech regulation, McGowan and Tangri clearly addressed both the legality and advisability of implementing such policies.

McGowan and Tangri provided a more moderate view than most opponents of speech regulation. They believed that it is therefore acceptable under the first amendment to regulate such speech on the basis of preserving the ability of potential listeners rationally to deliberate about the merits of ideas presented to them. Such a narrow regulation, however, differs greatly from more sweeping offense-based restrictions already adopted at various universities. (p. 860)

McGowan and Tangri rejected several arguments offered by proponents of speech codes. The authors recalled Byrne’s argument that colleges and universities should not be viewed as state actors in the same manner as city police divisions and should be allowed to regulate speech in a manner consistent with their educational missions. McGowan and Tangri challenged Byrne’s position by noting that there is no reason to believe that college administrators can be trusted any more than government officials to regulate
speech and expression. They further noted that "the Michigan regulation should give us long pause before we place uncritical reliance upon university administrators to be relatively more benign despots than are politicians" (McGowan and Tangri, 1991, p. 900).

These authors also rejected Matsuda’s contention that the college campus is a special environment in which care must be taken to safeguard the interests of vulnerable students. Consistent with other opponents of speech codes, McGowan and Tangri (1991) suggested that "preserving a vigorous and widely varied university marketplace" toward fostering an atmosphere of tolerance is preferable to regulating offensive speech (p. 904).

McGowan and Tangri’s research divided speech codes into three categories: (a) "regulations designed and tailored to prevent speech that will provoke a violent response," (b) "regulations designed and tailored to prevent private speech that severely offends listeners," and (c) "regulations designed to protect members of a protected class from stigma" (p. 917). By their analysis, speech restrictions falling into the first category are permissible under the "fighting words" exception articulated in Chaplinsky. Speech codes falling into the second category are permissible because such speech "implicates constitutional values at a very low level" (p. 917). Speech restrictions coming under the third category, however, "are
unconstitutional because the offense they seek to regulate arises from the ideas a speaker expresses, ideas that may not be deemed false without violating the skeptical premises of marketplace theory" (p. 917). McGowan and Tangri viewed this popular usage of speech codes—to protect racial and ethnic minorities and other identifiable subgroups from stigma—as being both unwise and unconstitutional.

As briefly noted earlier, Siegel (1990) acknowledged that the Court’s decision in *Doe* appears to leave the door open for upholding speech codes that are more narrowly drafted and enforced than Michigan’s policy. Although it is clear that Siegel does not favor campus speech restrictions, he nevertheless presented a balanced analysis of the problems and interests at stake in this controversy.

Siegel avoided the depth of interpretation and analysis used by Sedler and Rosenberg in reaching his conclusion that the "good intentions [of speech codes] do not make up for their glaring defects" (Siegel, 1990, p. 1399). Siegel relied largely on the traditional first amendment interpretations articulated by the Court in *Doe* in supporting his conclusion. Part IV of Siegel’s article, however, addressed the implications of *Doe* for private colleges and universities and provided an illuminating discussion of the tenuous distinction between the two.

Siegel noted that a number of private institutions, including Emory, Tufts, Dartmouth, and Stanford, have
implemented speech codes in response to incidents similar to those at the University of Michigan. A number of these policies are quite similar to Michigan's policy and presumably suffer from many of the same flaws. Siegel addressed the double standard that exists between these two types of institutions in noting that

if a federal district court had jurisdiction to hear a case attacking the Emory policy, it might very well conclude that the vague and overbroad language discussing the creation of a "hostile" or "intimidating" environment violates the first amendment. Since Emory is a privately-operated university, however, no state action ordinarily arises from its actions. In the absence of state action, the fourteenth amendment has no application to the policies or conduct of a private university. As a result, plaintiffs in this situation have no basis to assert a violation of first amendment rights. (p. 1381)

Siegel is troubled by this situation, in which proponents of speech codes at some private institutions "seemingly gloat over their immunity from the first amendment" (p. 1382). Siegel noted, however, that even students at private colleges have three arguments that they may use to bring a first amendment challenge. These include (a) the attribution of state action to a private institution, (b) the principles of consistency as shown by institutions whose speech codes do respect the first amendment, and (c) state constitutions that respect free speech rights. These arguments, however, are legal
formulations by which potential plaintiffs could attempt to bring a suit if they felt their rights had been violated. None of these avenues serve to safeguard freedom of speech and expression rights proactively, as does the first amendment as applied to state actors.

Siegel's most compelling line of inquiry, however, may well be his discussion of the largely indistinguishable line between public and private institutions. He noted that

ostensibly, public and private universities share many similarities. They are virtually indistinguishable in physical facilities, administrative structure, tenure process, curricula, student composition, extra-curricular organizations, sports programs, and a host of other areas. In addition to the internal features that make them alike, public and private universities can receive identical treatment in their relationships with the state. (p. 1389)

The range of ways in which private institutions are treated identically to state-supported institutions is so vast as to make the distinction virtually meaningless. Siegel believed that all colleges and universities should be "bastions of free discourse," and as such, he believed that private colleges and universities should be subject to the same first amendment standards as public institutions.

Even though a private university is organized and administered independently of the state, the government nevertheless may "intrude greatly" into [a private university's] autonomy to promote significant governmental interests. If the state may so interfere, then a private university should not wield its remaining autonomy
by trampling on a value so essential as free speech. (pp. 1389-1390)

This argument of Siegel’s is essentially the mirror opposite of the argument advanced earlier in this review by Byrne (1991). Byrne suggested that "the university has a fundamentally different relationship to the speech of its members than does the state to the speech of its citizens" (p. 400). Siegel essentially wanted private colleges to conduct themselves as if they were public institutions, while Byrne believed that public institutions should be able to regulate speech and expressive conduct more like private colleges. Although both authors offered compelling arguments to support their respective views, Siegel’s position has recently been given added significance through the introduction of "The Collegiate Speech Protection Act of 1991." United States Representative Henry Hyde introduced "The Collegiate Speech Protection Act of 1991" to provide "students at private colleges and universities those rights of free speech already possessed by their peers at public institutions" (Hyde and Fishman, 1991, p. 1469).

Hyde and Fishman, also writing in the same edition of The Wayne Law Review as Cohn and Sedler, spent considerably less time than other authors reviewing the rise in bias-motivated harassment and violence on campus. They focused instead on examples of what they believe to be the insurrection of "politically correct" values in higher education. Although these authors noted that their
commentary "is not the proper forum to debate the merits of Afrocentrism, multiculturalism, or deconstructionism," they nevertheless believed that "a regime of political correctness is now in place at many of our finest universities" (Hyde and Fishman, 1991, p. 1472).

Like many other opponents of speech codes, Hyde and Fishman took an absolutist view of the first amendment as allowing virtually no restrictions on freedom of speech and expression. They are particularly committed to the concept of the university as the marketplace of ideas. Although they acknowledged the arguments that suggest that hate speech largely discourages a true exchange of ideas, they countered these arguments by stating that "if the marketplace functions anywhere, it functions at a university that is devoted to rational discourse and that provides students and faculty alike with plentiful forums to disseminate their views" (p. 1486).

In their examination of "speech beyond the pale," Hyde and Fishman reached very different conclusions than supporters of speech regulation regarding the impact and significance of truly hateful speech and expression. Although they acknowledged "undeniably devastating" effects of such speech, they went on to categorize such speech as stemming "from horribly sophomoric pranks and jokes" and perhaps being "nothing more than mean-spirited" (pp. 1487-1488). They acknowledged the difficulty in properly
delineating between speech that perhaps should be regulated as opposed to constitutionally protected speech, but suggested that

> even if a defensible line could be drawn and consistently enforced, it is still advantageous to know to what extent racism pervades society. Racist speech can be used as a "social thermometer" that allows us to "register the presence of disease within the body politic." (p. 1489)

The full text of Hyde's and Fishman's bill is included as Appendix C. The salient clause of this proposed legislation, however, is as follows:

> A postsecondary educational institution that is a program or activity shall not make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication protected from governmental restriction by the first article of amendment to the Constitution of the United States. (p. 1493)

The bill would provide for civil penalties, including injunctive and declaratory relief and attorney's fees and litigation costs. Although the bill is primarily targeted at private colleges, public institutions would be subject to its provisions as well (Hyde and Fishman, 1991).

The Collegiate Speech Protection Act has been renounced by two major coalitions of colleges and universities, the American Council on Education (ACE) and The National Association of Independent Colleges and Universities (NAICU). Both organizations viewed the bill as hampering legitimate efforts to address bias-motivated harassment and
violence. ACE further objected to the bill’s suggestion that restricting freedom of speech is actually the objective of speech codes rather than discouraging harassment (Hyde and Fishman, 1991).

Hyde and Fishman offered no new arguments against the use of speech codes. Their review covered essentially the same ground as has been addressed by other opponents of speech codes. They strongly supported the concept of the university as the marketplace of ideas and believed that speech codes inevitably lead to a "chilling" of open academic discourse. Like Strossen (1990) and others, Hyde and Fishman (1991) also believed that "any restraint on free speech holds special dangers for the marginalized individual" (p. 1490). These authors viewed the enactment of speech codes as an important act in which those who are oppressed in effect give to their oppressors power over the most important tool available for use in the battle against discrimination and harassment—the power of free speech.

Although Hyde and Fishman broke no new ground in their opposition to speech codes, the Collegiate Speech Protection Act is potentially a very formidable weapon in the battle over free speech and equal opportunity in higher education. The introduction of this bill clearly raises the stakes in this important debate and perhaps foretells the lengths to which each side is willing to go to establish their respective positions in campus practice and in the courts.
The Situation at Stanford

As has been previously noted, incidents of discriminatory harassment and violence have occurred at all types of colleges and universities across the country. Two events known to the Stanford community as the "Otero Vigil" and the "Ujamaa Incident" fueled most of the study and discussion leading to the University's 1989 "Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment" policy.

On May 23, 1988, the Stanford Daily published an article regarding the eviction of a freshman student, Mark Nilan, from "Otero House," a predominantly white undergraduate student residence.

Specifically, Mr. Nilan had verbally attacked the Resident Fellow and a Resident Assistant, had vandalized the dorm, and had repeatedly insulted fellow residents. A central theme in the student's behavior was the apparent belief that he should not be expected to live in a residence that had a gay staff member. Mr. Nilan had been cautioned repeatedly that this conduct was out of line and that if it persisted, his residence privilege would be revoked. (Cole, 1990, p. 2)

Several members of the Phi Delta Theta fraternity decided to protest this administrative action by holding a silent vigil outside of Otero House. Shortly before midnight on May 24, seven members of the fraternity, wearing masks and carrying candles, went to Otero where they "formed a semi-circle in front of the entrance to the lounge where a
lengthy house meeting on the subject of Mr. Nilan's eviction had just ended" (Cole, p. 3).

Many Otero residents witnessed the vigil which eventually created quite a disturbance. "Many residents reacted with shock and fear. At least one resident reported seeing men in sheets bearing lighted candles. The image of the Ku Klux Klan was perceived by most if not all of the residents, and many became extremely agitated" (Cole, p. 3).

The police were summoned, as well as a past president of the University's Black Student Union (BSU). The protesters declined to identify themselves to the police officers who questioned them, but assured the officers that their intentions were to hold a nonviolent protest. The crowd increased to approximately 50 to 60 students, including many members of the BSU.

Upon learning that the protesters were staging a silent vigil, one of the onlookers provided one of the protesters with paper on which the protester wrote the purpose of the demonstration. Although many in the crowd sought to engage the protesters in a discussion of their actions, the seven remained silent for the duration of the protest, which lasted about 45 minutes.

Although there was no report of physical violence in connection with the vigil,

the effect of the event on Otero residents was extreme stress. The vigil and its consequences caused some residents to feel that their home had
been violated and their security breached. During the night in question, many residents found themselves fearful and confused. Many also felt that there was no one in control of the situation, which seemed volatile. (Cole, p. 4)

The Otero vigil stimulated much debate and discussion on campus. Considerable attention was devoted to what many perceived to be blatant racial overtones in the manner in which the protest was conducted, as well as the students' rights under the first amendment to conduct the vigil in precisely the way they choose.

Ultimately, the Judicial Affairs Officer declined to prosecute the students under the Fundamental Standard, observing that the vigil participants probably did not have a monopoly on the ignorance that they displayed and that educational responses seemed more appropriate than judicial ones. (Cole, p. 6)

The day the decision in the Otero Vigil case was announced, another controversial situation, the Ujamaa Incident, was also reported in the Stanford papers. This incident, which has been widely reported in the popular press, involved the defacing of a poster of Beethoven as a result of a discussion among several students regarding the composer's ethnic heritage.

The situation began within the context of a "wide ranging conversation" in the main corridor of Ujamaa, Stanford's black ethnic theme house (Cole, p. 6). While as many as ten students participated in the discussion, three students "figure[d] prominently in the subsequent events"
Two of the students were white, male freshmen, the third was a black, male sophomore.

As the conversation turned to black contributions to music, QC Robbins, the black sophomore, noted that "all music listened to today in America has African origins" (Cole, p. 7). When challenged to consider classical music, and specifically Beethoven, QC responded that he had read that Beethoven was black, of mixed African and European heritage.

In the evening of the next day, Fred and Alex, the two white freshmen students involved in the previous day's discussion, had been out drinking when they noticed a "Stanford Symphony recruiting poster featuring a picture of Beethoven" (Cole, p. 7). The students removed the poster, returned to Ujamaa, went to Alex's room, where he had some crayons, and colored in the poster to make it 'look like a stereotype of a black person.' Fred told us that he colored the face brown; both Fred and Alex drew lines 'emphasizing' the lips, and coloring in 'black, frizzy hair.' (Cole, p. 7)

Around midnight, Fred taped the poster to a chalkboard outside of QC's room. Later the next day, upon examining the poster, QC "immediately linked it to the Beethoven conversation" although the identity of the students behind the defacing of the poster would remain unknown for two weeks (Cole, p. 8).

The defacing of another poster in Ujamaa two weeks after the Beethoven poster led to the identification of Fred
and Alex as the perpetrators in the Beethoven incident. The person responsible for defacing the second poster with a racial epithet was never identified.

Cole's account of subsequent meetings and actions surrounding the Beethoven poster incident detailed the pain and anger experienced by many black students at Stanford over these and other examples of racial insensitivity at the University. Investigation into the incident and consultation with legal counsel "presented strong arguments against University discipline in response to either of those events" [the Otero Vigil and the Ujamaa Incident] (Cole, p. 15).

To the disappointment of some and the surprise of none, an announcement was forthcoming that the two freshmen who defaced the Beethoven poster would not be prosecuted under the Fundamental Standard of student conduct. The Judicial Officer and the Dean of Student Affairs appealed to a policy-making body, the Student Conduct Legislative Council (SCLC), to clarify the requirements of the Fundamental Standard where they appear to conflict with the University's commitment to free expression. Thus, after some robust criticism of the administration's unwillingness to invoke the Fundamental Standard, campus attention and energy moved from the judicial arena to a legislative one. (Cole, p. 15)

The resulting legislative effort was widely discussed and debated across campus in virtually all available forums. The first policy drafted by the SCLC was quickly denounced as being "too imprecise and broad in scope" (Cole, p. 15).
The SCLC submitted for campus response a second proposed Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment. It was widely recognized to be an improvement over the first attempt, due in large part to the conceptual and drafting help of a member of the Law School faculty. (Cole, p. 15)

The most recent challenge to Stanford's policy came in the Winter Quarter of 1992, when Keith Rabois, a first-year law student, was observed walking through the student lounge of Otero House shouting abusive comments. His offensive remarks addressed the sexual orientation of Otero House's Resident Fellow and were directed toward the Resident Fellow's living quarters. The individual about whom the remarks were made was not home at the time of the incident.

The Judicial Affairs Officer ruled that Rabois' conduct was not actionable under the discriminatory harassment interpretation of the fundamental standard because the remarks were not addressed to the Resident Fellow in a face-to-face confrontation (phone interview with S. Cole, April 21, 1993). The strong condemnation of Rabois behavior from many members of the Stanford community, however, is thought to be a factor in Rabois' decision to continue his law studies at Harvard University.

The Rabois incident was thought by some to be an important test of Stanford's harassment policy. While his conduct clearly violated Stanford's norm of civil conduct, at no time was the harassment policy used to sanction his
behavior. Cole noted that the Stanford community at large clearly understood why the policy was not invoked in the Rabois incident, and many chose to exercise their right to express their opinions about his conduct in the student newspaper and in other forums on campus (phone interview with S. Cole, April 21, 1993).

Despite the Rabois incident, however, there remains considerable disagreement at Stanford regarding the "Free Expression and Discriminatory Harassment" policy. It remains for some an important statement of Stanford's commitment to providing equal educational opportunity, while for others it serves as a formal reminder of lost first amendment rights at one of America's most prestigious universities.

The present study results provide a partial assessment of how selected members of Stanford's 1993 senior class view the policy that has been the subject of much political, social, and academic debate throughout much of their undergraduate experience at Stanford. The results of this may provide Stanford administrators with important information regarding the social and educational effects of the policy--information that can be used to enhance the strengths of the Stanford community, while addressing the bigotry and intolerance prevalent across all of higher education.
CHAPTER III
METHODOLOGY

Research Setting

Permission to conduct the study at Stanford University was obtained through the university’s Office of Judicial Affairs. Human subjects review and approval was obtained through the Office of Research Risks at The Ohio State University.

Stanford University is a medium size (just over 13,000 students) private university located in Stanford, California, approximately 25 miles southeast of San Francisco. Stanford offers the bachelor of arts and bachelor of science degrees in a variety of traditional undergraduate disciplines. Additionally, the University offers graduate and professional programs in fine arts, business administration, education, law, and medicine, among others. Approximately 6,500 of Stanford’s students are enrolled in graduate or professional programs.

Subjects

This study provides a partial assessment of the effect of Stanford’s "Free Expression and Discriminatory
Harassment" policy on the behaviors and perceptions of members of the University's 1993 undergraduate senior class.

A survey was mailed to each student at Stanford who met the following criteria:

1. were enrolled during the Winter Quarter of the 1992-93 academic year;
2. began their undergraduate matriculation during the Autumn Quarter of the 1989-90 academic year;
3. had not attended any other postsecondary institution of higher learning prior to beginning at Stanford;
4. had completed 144 or more academic units.

Descriptively, the population represents seniors--students meeting Stanford's criteria of having earned 144 or more academic units--who began their undergraduate matriculation at Stanford during the academic year before Stanford's discriminatory harassment policy went into effect, and who were enrolled during the Winter Quarter of the 1992-93 academic year.

Criterion No. 3 was added to control for possible extraneous variance in the responses of students who might have begun their undergraduate education at an institution other than Stanford. It is for this reason that the population defined for this study excludes transfer students.

The study's selection criteria resulted in a population of 1,269 possible subjects. The 1,269 students who comprise
The population for this survey make up 75% of Stanford’s total 1993 undergraduate senior class (N = 1,700).

**Instrumentation**

The "Free Expression and Discriminatory Harassment Survey" (see Appendix D) was designed to assess the effect of Stanford University’s 1989 "Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment" policy in several areas of the undergraduate experiences of students selected for this study. The survey is a 32-item questionnaire that consists of "true/false" response statements (n = 5), five-point "Likert-type" statements (n = 18), and open-answer response items (n = 4).

Survey items were designed to reflect areas of concern identified in the literature on speech codes in higher education. A number of authors have expressed concern about the effect and/or usefulness of such policies on several areas of campus life, including classroom instruction and discussion, housing, and extracurricular activities (Bartlett, 1990; Battaglia, 1991; Hodulik, 1991; Tatel, Michaelson, and Kohrman, 1991). Survey items address student experiences in these three areas.

A draft of the survey was provided to the Judicial Affairs Officer at Stanford, who reviewed it for wording and content. Several items were added or changed at the suggestion of the Judicial Affairs Officer. A draft of the survey was also reviewed by several members of Stanford’s
Student Conduct Legislative Council. These steps were taken to address and strengthen the content validity of the survey.

The survey was pretested on a group of Stanford students several weeks before it was mailed to the subject group. This pretest suggested no significant revisions to the wording, number, or sequence of survey items. The survey was estimated to take approximately 15 to 20 minutes for most students to complete.

Study Procedures

The survey was mailed during the Winter Quarter of the 1992-93 academic year. Each survey was numbered to permit tracking of nonrespondents in order to conduct two follow-up mailings.

On February 17, 1993, the survey was mailed to each of the 1,269 seniors identified by the selection criteria. The survey packet included (a) a cover letter describing the purpose of the survey and the date by which the survey was to be returned, (b) the eight-page survey (four pages printed on both sides), (c) a No. 10 return envelope with a 29¢ first-class commemorative stamp, and (d) a postcard with a 19¢ first-class stamp (see Appendix D). The postcard was included to give students the opportunity to indicate their willingness to participate in a possible in-person or telephone interview, and/or their desire to receive a copy
of the survey results. The postcard was to be returned by mail, separate from the completed survey.

Mailing labels for the 1,269 selected seniors were provided by the Registrar’s Office at Stanford University. Each survey package was mailed unfolded in a 9" x 12" white envelope bearing the return address of The Ohio State University, College of Education, Department of Educational Policy and Leadership and displaying the official logo of the university printed in red ink. This envelope had the word "Important" stamped on the outside of the envelope under the return address.

Two follow-up mailings were conducted to encourage a high response rate. On March 8, 1993, 888 reminder postcards were mailed to those students who had not returned surveys as of that date. The survey was mailed a second time to nonrespondents on April 4, 1993. This mailing was sent to 822 students who had not returned their surveys.

Research Questions

The research questions addressed in this study are as follows:

1. Do respondents indicate that the discriminatory harassment policy has had an effect on their classroom experiences?

2. Do respondents indicate that the discriminatory harassment policy has had an effect on their housing experiences?

3. Do respondents indicate that the discriminatory harassment policy has had an
effect on their experiences in extracurricular activities?

4. Are there significant differences in levels of support for the policy among racial/ethnic and gender subgroups of respondents?

Data Analysis

Descriptive statistics were used to describe respondents along the variables of gender and racial/ethnic background. Respondent and population demographics are provided in Chapter 4 and are presented in Tables 1 and 2. Additional descriptive statistics were used to report respondent characteristics on several key variables captured by the survey.

Student subgroups of interest were identified by combining the gender and racial/ethnic variables, yielding a total of four groups. These groups consisted of white males, white females, "other" males, and "other" females. The "other" designation was the result of a statistical collapsing of data from several racial/ethnic categories, including African American, Native American, Asian, Hawaiian, Hispanic/Latino, and Mexican American/Chicano. These groups were combined due to their limited representation in the population defined for this study. Titles used in defining racial/ethnic characteristics were taken directly from the Stanford University undergraduate application for admission.
Differences in the responses of these groups were compared using the multiple discriminant function analysis technique. Discriminant analysis is used to predict group or categorical membership in studies using nominal criterion variables (Huck, Cormier, and Bounds, 1974). Discriminant analysis results were computed using the microcomputer version of the Statistical Package for the Social Sciences (SPSS/PC+, 1992).

Open-ended responses were analyzed using the content analysis procedure described by Patton (1990). "Content analysis is the process of identifying, coding, and categorizing the primary patterns in the data" (p. 381).

Student responses for each open-ended survey item were studied, labeled with regard to the content of the response, and grouped with similar responses. Major categories/themes of responses and the frequency of student responses within each category were identified for each open-ended item. Wherever possible, selected verbatim student responses were used to illustrate the category and to provide the reader with a feel for representative responses in most categories. Qualitative responses were used to further describe survey respondents on several key variables. Open-ended responses were also used to more fully interpret the results of statistical analysis used in the study.

As suggested by Patton, two reviewers were used in the coding of open-ended responses. Discussions between
reviewers assisted in the development and consolidation of response categories. The use of a second reviewer also provided what Patton referred to as "analytical triangulation," thereby enhancing the credibility (validity) of the data reported for open-ended questions.
CHAPTER IV
FINDINGS

Population and Respondent Characteristics

This study seeks to assess student support for Stanford University's "Free Expression and Discriminatory Harassment" policy and the effect, if any, the policy has had on respondents' classroom, residential, and extracurricular experiences. This study also seeks to determine if support for the policy differs among racial/ethnic and gender subgroups within the student population defined for this study.

The population selected for this study was comprised of 46% females and 54% males. The racial/ethnic composition of the population was 61% white and 39% from a variety of minority racial/ethnic backgrounds.

Of the students who returned completed surveys, 53% were female, 47% were male, 63% were white, and 37% reported having a minority racial/ethnic background. The four subgroups of students compared in the discriminant analysis were identified using the gender and racial/ethnic variables. These groups consisted of white males, white females, "other" males, and "other" females. The two
"other" categories resulted from the combining of all students of minority racial/ethnic backgrounds.

The variable "age" was not used in defining subgroups because of the limited range of ages reported by respondents (20-23 years), with 95% of respondents having reported their age as 21 or 22 years. Information provided by Stanford confirms that respondent ages are consistent with the distribution of ages found in the larger population.

Population racial/ethnic and gender characteristics as provided by Stanford University are summarized in Table 1. Table 2 provides the same summary data for survey respondents.
Table 1
Population Gender and Racial/Ethnic Characteristics

<table>
<thead>
<tr>
<th>Gender</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female</td>
<td>594</td>
<td>46.3</td>
</tr>
<tr>
<td>Male</td>
<td>690</td>
<td>53.7</td>
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</table>

<table>
<thead>
<tr>
<th>Racial/Ethnic</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American</td>
<td>79</td>
<td>6.2</td>
</tr>
<tr>
<td>Amer. Indian/Native Amer.</td>
<td>8</td>
<td>0.6</td>
</tr>
<tr>
<td>Asian Amer./Pacific Isl.</td>
<td>256</td>
<td>19.9</td>
</tr>
<tr>
<td>Hispanic/Latino</td>
<td>9</td>
<td>0.7</td>
</tr>
<tr>
<td>Mexican Amer./Chicano</td>
<td>94</td>
<td>7.3</td>
</tr>
<tr>
<td>White</td>
<td>789</td>
<td>61.5</td>
</tr>
<tr>
<td>Other</td>
<td>49</td>
<td>3.8</td>
</tr>
</tbody>
</table>
### Table 2
Respondent Gender and Racial/Ethnic Characteristics

<table>
<thead>
<tr>
<th>Gender</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female</td>
<td>289</td>
<td>52.9</td>
</tr>
<tr>
<td>Male</td>
<td>257</td>
<td>47.1</td>
</tr>
<tr>
<td>Missing</td>
<td>5</td>
<td>Missing</td>
</tr>
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</table>

<table>
<thead>
<tr>
<th>Racial/Ethnic</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American</td>
<td>27</td>
<td>4.9</td>
</tr>
<tr>
<td>Amer. Indian/Native Amer.</td>
<td>4</td>
<td>0.7</td>
</tr>
<tr>
<td>Asian Amer./Pacific Isl.</td>
<td>111</td>
<td>20.3</td>
</tr>
<tr>
<td>Hispanic/Latino</td>
<td>7</td>
<td>1.3</td>
</tr>
<tr>
<td>Mexican Amer./Chicano</td>
<td>32</td>
<td>5.8</td>
</tr>
<tr>
<td>White</td>
<td>345</td>
<td>63.0</td>
</tr>
<tr>
<td>Other</td>
<td>22</td>
<td>4.0</td>
</tr>
<tr>
<td>Missing</td>
<td>3</td>
<td>Missing</td>
</tr>
</tbody>
</table>
Major Findings

A total of 555 surveys were returned, out of a total of 1,269 mailed, for a return rate of 44%. Study results, however, are reported using "valid" totals and percentages. Although this increases the accuracy of reported statistics, the total return for any single item will not equal 555 due to missing data on some items.

Survey Items 12, 13, 15, 16, 18, 19, 20, and 22 address important aspects of academic, extracurricular, and residential life at Stanford. These items address areas in which Stanford's Discriminatory Harassment Policy might be thought to have an effect. Subjects were asked to indicate whether they "strongly disagreed," "somewhat disagreed," were "undecided" about, "somewhat agreed," or "strongly agreed" with each of these eight items. The complete wording of each of these key survey items is as follows:

Item 12  Due to the existence of Stanford's "Free Expression and Discriminatory Harassment" policy, I have not raised subjects or questions in class that might have been viewed as sensitive or controversial.

Item 13  My in-class education at Stanford has been affected by the existence of Stanford's "Free Expression and Discriminatory Harassment" policy.

Item 15  Due to the existence of Stanford's "Free Expression and Discriminatory Harassment" policy, I have not raised subjects or questions while in on- or off-campus housing that might have been viewed as sensitive or controversial.

Item 16  My residence life at Stanford has been affected by the existence of Stanford's "Free
Expression and Discriminatory Harassment policy.

Item 18 Due to the existence of Stanford’s "Free Expression and Discriminatory Harassment" policy, I have not raised subjects or questions that might have been viewed as sensitive or controversial while involved in extracurricular activities.

Item 19 My involvement in extracurricular activities at Stanford has been affected by the existence of Stanford’s "Free Expression and Discriminatory Harassment" policy.

Item 20 I support Stanford’s "Free Expression and Discriminatory Harassment" policy.

Item 22 I believe that Stanford’s "Free Expression and Discriminatory Harassment" policy is an important statement of the University’s commitment to providing educational opportunities for all of its students.

Table 3 provides response frequencies and percentages for all survey respondents for each of the key survey items noted above.
Table 3
Key Survey Items by Total Respondents

<table>
<thead>
<tr>
<th>Survey Items</th>
<th>12</th>
<th>13</th>
<th>15</th>
<th>16</th>
</tr>
</thead>
<tbody>
<tr>
<td>Response Categories</td>
<td>f (%)</td>
<td>f (%)</td>
<td>f (%)</td>
<td>f (%)</td>
</tr>
<tr>
<td>Strongly Disagree</td>
<td>254(54)</td>
<td>196(41)</td>
<td>237(50)</td>
<td>128(27)</td>
</tr>
<tr>
<td>Somewhat Disagree</td>
<td>114(24)</td>
<td>118(25)</td>
<td>131(28)</td>
<td>118(25)</td>
</tr>
<tr>
<td>Undecided</td>
<td>32(7)</td>
<td>80(17)</td>
<td>37(8)</td>
<td>101(21)</td>
</tr>
<tr>
<td>Somewhat Agree</td>
<td>61(13)</td>
<td>68(14)</td>
<td>55(12)</td>
<td>102(21)</td>
</tr>
<tr>
<td>Strongly Agree</td>
<td>11(2)</td>
<td>13(3)</td>
<td>16(3)</td>
<td>27(6)</td>
</tr>
<tr>
<td>Survey Items</td>
<td>18</td>
<td>19</td>
<td>20</td>
<td>22</td>
</tr>
<tr>
<td>Response Categories</td>
<td>f (%)</td>
<td>f (%)</td>
<td>f (%)</td>
<td>f (%)</td>
</tr>
<tr>
<td>Strongly Disagree</td>
<td>266(57)</td>
<td>238(51)</td>
<td>55(12)</td>
<td>60(13)</td>
</tr>
<tr>
<td>Somewhat Disagree</td>
<td>115(25)</td>
<td>113(24)</td>
<td>62(13)</td>
<td>75(16)</td>
</tr>
<tr>
<td>Undecided</td>
<td>57(12)</td>
<td>81(17)</td>
<td>120(25)</td>
<td>88(19)</td>
</tr>
<tr>
<td>Somewhat Agree</td>
<td>28(6)</td>
<td>26(5)</td>
<td>182(38)</td>
<td>186(39)</td>
</tr>
<tr>
<td>Strongly Agree</td>
<td>4(1)</td>
<td>12(3)</td>
<td>56(12)</td>
<td>66(14)</td>
</tr>
</tbody>
</table>
Aggregated survey results indicate a fairly strong degree of support for the policy among study participants. Counting all valid survey responses \( (n = 475) \), 50% of respondents "strongly agreed" or "somewhat agreed" with survey Item 20, "I support Stanford's 'Free Expression and Discriminatory Harassment' policy." This compares to 25% of respondents who indicated that they "strongly disagree" or "somewhat disagree" with Item 20, and 25% of respondents who were undecided as to their support for the policy. Additionally, a majority of respondents indicate that the policy has had a minimal effect on their classroom, residential, and extracurricular experiences (Survey Items 13, 16, and 19).

In addressing Research Question No. 1, 66% \( (n = 475) \) "strongly disagreed" or "somewhat disagreed" that their classroom experiences had been affected by the policy, 17% indicated that they were undecided, and 17% indicated that they "strongly agreed" or "somewhat agreed" that their in-class education had been affected by the policy. In considering Research Question No. 2, on the issue of residence life, 52% of all respondents \( (n = 476) \) "strongly disagreed" or "somewhat disagreed" that their residence life had been affected by the policy, 21% indicated that they were "undecided," and 27% indicated that they "strongly agreed" or "somewhat agreed" that their residence life had been affected by the policy.
In considering extracurricular activities, Research Question No. 3, 75% of all respondents \((n = 470)\) "strongly disagreed" or "somewhat disagreed" that the policy has affected their participation in campus activities, 17% were "undecided," and 8% "strongly agreed" or "somewhat agreed" that the policy has had an effect on their extracurricular activities. Other key survey items, including Items 12, 15, and 18, suggest that most respondents do not believe that Stanford's discriminatory harassment policy has had the negative impact on academic and social discourse predicted by opponents of speech codes as noted in the literature.

Research Question No. 4, regarding differences in response patterns among the four student subgroups of interest in this study was addressed using the multiple discriminant function analysis technique. The results of the analysis indicate that Group 1, white males, did respond distinctly different from Groups 2, 3, and 4, white females, "other" males, and "other" females, on key survey items. The weak statistical relationship between the groups and the major discriminant function, however, suggests that the difference between Group 1 and Groups 2, 3, and 4 may be of little practical significance. Survey respondents across all four groups may still be more similar than they are different, even taking gender and racial/ethnic characteristics into account.
Subgroup Responses to Key Survey Items

Table 4 provides response frequencies and percentages for each of the racial/ethnic and gender subgroups considered in this study on each of the key survey items previously noted.
## Table 4
### Key Survey Items by Gender and Racial/Ethnic Group

<table>
<thead>
<tr>
<th></th>
<th>12</th>
<th>13</th>
<th>15</th>
<th>16</th>
<th>18</th>
<th>19</th>
<th>20</th>
<th>22</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>WHITE MALES</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Strongly Disagree</td>
<td>74(51)</td>
<td>59(40)</td>
<td>64(44)</td>
<td>42(29)</td>
<td>81(57)</td>
<td>73(51)</td>
<td>34(23)</td>
<td>35(24)</td>
</tr>
<tr>
<td>Somewhat Disagree</td>
<td>35(24)</td>
<td>37(25)</td>
<td>30(25)</td>
<td>3.2(22)</td>
<td>30(21)</td>
<td>32(22)</td>
<td>27(19)</td>
<td>30(21)</td>
</tr>
<tr>
<td>Undecided</td>
<td>10(7)</td>
<td>21(14)</td>
<td>12(8)</td>
<td>28(19)</td>
<td>18(13)</td>
<td>23(16)</td>
<td>36(26)</td>
<td>30(21)</td>
</tr>
<tr>
<td>Somewhat Agree</td>
<td>22(15)</td>
<td>25(17)</td>
<td>24(16)</td>
<td>3.3(23)</td>
<td>11(8)</td>
<td>11(8)</td>
<td>41(28)</td>
<td>45(31)</td>
</tr>
<tr>
<td>Strongly Agree</td>
<td>4(3)</td>
<td>4(3)</td>
<td>10(7)</td>
<td>11(8)</td>
<td>3(2)</td>
<td>4(3)</td>
<td>8(6)</td>
<td>6(4)</td>
</tr>
<tr>
<td><strong>WHITE FEMALES</strong></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Strongly Disagree</td>
<td>85(54)</td>
<td>64(41)</td>
<td>81(51)</td>
<td>43(27)</td>
<td>85(55)</td>
<td>81(52)</td>
<td>11(7)</td>
<td>14(9)</td>
</tr>
<tr>
<td>Somewhat Disagree</td>
<td>37(24)</td>
<td>42(27)</td>
<td>44(28)</td>
<td>4.0(25)</td>
<td>43(28)</td>
<td>42(27)</td>
<td>18(12)</td>
<td>22(14)</td>
</tr>
<tr>
<td>Undecided</td>
<td>7(5)</td>
<td>25(16)</td>
<td>11(7)</td>
<td>3.4(22)</td>
<td>20(13)</td>
<td>24(15)</td>
<td>42(27)</td>
<td>25(16)</td>
</tr>
<tr>
<td>Somewhat Agree</td>
<td>23(15)</td>
<td>21(13)</td>
<td>20(13)</td>
<td>35(22)</td>
<td>7(6)</td>
<td>7(6)</td>
<td>60(38)</td>
<td>68(43)</td>
</tr>
<tr>
<td>Strongly Agree</td>
<td>5(3)</td>
<td>5(3)</td>
<td>2(1)</td>
<td>6(4)</td>
<td>0(0)</td>
<td>2(1)</td>
<td>26(17)</td>
<td>28(18)</td>
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<tr>
<td><strong>OTHER MALES</strong></td>
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<td></td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Strongly Disagree</td>
<td>40(53)</td>
<td>35(46)</td>
<td>42(55)</td>
<td>18(24)</td>
<td>46(61)</td>
<td>41(55)</td>
<td>6(8)</td>
<td>7(9)</td>
</tr>
<tr>
<td>Somewhat Disagree</td>
<td>21(28)</td>
<td>12(16)</td>
<td>22(29)</td>
<td>20(26)</td>
<td>17(22)</td>
<td>15(20)</td>
<td>10(13)</td>
<td>10(13)</td>
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<tr>
<td>Undecided</td>
<td>4(5)</td>
<td>19(25)</td>
<td>4(5)</td>
<td>2.2(29)</td>
<td>9(12)</td>
<td>12(16)</td>
<td>12(16)</td>
<td>13(17)</td>
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<td>Somewhat Agree</td>
<td>10(13)</td>
<td>7(9)</td>
<td>6(8)</td>
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<td>4(5)</td>
<td>4(5)</td>
<td>36(47)</td>
<td>33(43)</td>
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<tr>
<td>Strongly Agree</td>
<td>1(1)</td>
<td>3(4)</td>
<td>2(3)</td>
<td>3(4)</td>
<td>0(0)</td>
<td>4(5)</td>
<td>12(16)</td>
<td>13(17)</td>
</tr>
<tr>
<td><strong>OTHER FEMALES</strong></td>
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<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Strongly Disagree</td>
<td>54(59)</td>
<td>37(40)</td>
<td>49(53)</td>
<td>25(27)</td>
<td>52(56)</td>
<td>41(44)</td>
<td>4(4)</td>
<td>3(3)</td>
</tr>
<tr>
<td>Somewhat Disagree</td>
<td>20(22)</td>
<td>29(28)</td>
<td>29(31)</td>
<td>25(27)</td>
<td>25(27)</td>
<td>23(25)</td>
<td>5(5)</td>
<td>12(13)</td>
</tr>
<tr>
<td>Undecided</td>
<td>10(11)</td>
<td>15(16)</td>
<td>9(10)</td>
<td>17(18)</td>
<td>9(10)</td>
<td>22(24)</td>
<td>30(32)</td>
<td>20(22)</td>
</tr>
<tr>
<td>Somewhat Agree</td>
<td>6(7)</td>
<td>14(15)</td>
<td>4(4)</td>
<td>19(20)</td>
<td>6(7)</td>
<td>5(5)</td>
<td>44(47)</td>
<td>39(42)</td>
</tr>
<tr>
<td>Strongly Agree</td>
<td>1(1)</td>
<td>1(1)</td>
<td>2(2)</td>
<td>7(8)</td>
<td>1(1)</td>
<td>2(2)</td>
<td>10(11)</td>
<td>18(20)</td>
</tr>
</tbody>
</table>
As Table 4 shows, a substantial number of respondents in each subgroup indicated that they "strongly agreed" or "somewhat agreed" with Item 20 (Group 1, n = 41, 34%; Group 2, n = 86, 55%; Group 3, n = 48, 63%; Group 4, n = 54, 58%). This compares with 42% in Group 1, 19% in Group 2, 21% in Group 3, and 9% in Group 4 who indicated that they "strongly disagreed" or "somewhat disagreed" with Item 20. As Table 4 indicates, Group 1, white males, is the only group that disagreed with the policy more than it agreed with the policy.

Survey Item 12 asked respondents to indicate if the policy tended to dissuade them from raising sensitive issues in classes. A majority in each of the four groups indicated that they "strongly disagreed" or "somewhat disagreed" that the policy had such an effect on their tendency to broach sensitive issues in class (Group 1, n = 109, 75%; Group 2, n = 122, 78%; Group 3, n = 61, 81%; Group 4, n = 74, 81%). Significantly smaller percentages of students in each group indicated that they either "strongly agreed" or "somewhat agreed" that Stanford's policy has made them less likely to raise sensitive or controversial issues in classes (Group 1, n = 26, 18%; Group 2, n = 28, 18%; Group 3, n = 11, 14%; Group 4, n = 7, 8%).

Responses on each of the key items provided in Table 4 indicate that most respondents in each group support the policy or reported that the policy has had little effect on
their classroom, extracurricular, and residential experiences at Stanford. The data provided in Table 4, however, provides no information on how the responses by members of Group 1 compare to the responses by members of Group 4, or how Group 2 compares with Group 3.

Discriminant function analysis results provide important information on possible differences in the responses of student subgroups considered in this study. The technique will address the degree to which percentage differences on key survey items presented in Table 4 represent the normal range of expected variation between groups, or if Table 4 is actually documenting distinct differences in response patterns between groups that are perhaps influenced by gender and racial/ethnic characteristics.

**Discriminant Function Analysis Results**

Of the 555 total surveys returned, 96 were unable to be used in the discriminant analysis procedure due to missing data on one or more key variables used in the analysis. Discriminant analysis results are reported for 459 total cases. The same survey items noted in Table 4 were used to examine group differences in the discriminant analysis. Table 5 provides data on the number of cases within each group. The "Priors" column provides the proportion that each group comprises of the total cases used in the analysis.
Canonical Discriminant Functions

The analysis reveals three canonical discriminant functions with eigenvalues ranging from .0038 to .1403. Eigenvalues and canonical correlation coefficients are provided in Table 6. Eigenvalues provide an index of the strength of each of the discriminant functions "thus, the function with the largest eigenvalue is the most powerful discriminator, while the function with the smallest eigenvalue is the weakest" (Klecka, 1980, p. 34).

Table 6 indicates that Discriminant Function 1 is the strongest discriminator between groups of the three functions remaining in the analysis. This function appears to represent philosophical support for the discriminatory harassment policy and accounts for 88% of the variance between the four groups. Function 2 and Function 3 together account for the remaining 12% of the variance. These two functions appear to be of limited utility in discriminating between groups after the effect of Function 1 has been accounted for.

The canonical correlation coefficient for each of the three discriminant functions also provides important information regarding the usefulness of these three functions in accurately discriminating between the four groups. "This coefficient is a measure of association which summarizes the degree of relatedness between the groups and the discriminant function" (Klecka, p. 36).
Although Function 1 is clearly the strongest of the three discriminant functions, its canonical correlation coefficient is relatively low ($r = .35$). This suggests that there is little association between the groups and the first discriminant function. Canonical correlations for the second and third discriminant functions are even lower.

These findings suggest that the discriminant functions derived in this study are of limited utility in distinguishing between the four subgroups of students under consideration in this study. Care should be taken not to place too much significance in the apparent differences between these groups when considering policy or programming issues related to the discriminatory harassment policy.
Table 5
Number of Cases by Group

<table>
<thead>
<tr>
<th>Group</th>
<th>Number of Cases</th>
<th>Priors</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Unweighted</td>
<td>Weighted</td>
</tr>
<tr>
<td>1 White Males</td>
<td>141</td>
<td>141.0</td>
</tr>
<tr>
<td>2 White Females</td>
<td>152</td>
<td>152.0</td>
</tr>
<tr>
<td>3 Other Males</td>
<td>75</td>
<td>75.0</td>
</tr>
<tr>
<td>4 Other Females</td>
<td>91</td>
<td>91.0</td>
</tr>
<tr>
<td>TOTAL</td>
<td>459</td>
<td>459.0</td>
</tr>
</tbody>
</table>

Table 6
Canonical Discriminant Functions

<table>
<thead>
<tr>
<th>Function</th>
<th>Eigenvalue</th>
<th>Percent of Variance</th>
<th>Cumulative Percent</th>
<th>Canonical Correlation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1*</td>
<td>.1403</td>
<td>88.22</td>
<td>88.22</td>
<td>.35</td>
</tr>
<tr>
<td>2*</td>
<td>.0149</td>
<td>9.37</td>
<td>97.59</td>
<td>.12</td>
</tr>
<tr>
<td>3*</td>
<td>.0038</td>
<td>2.41</td>
<td>100.00</td>
<td>.06</td>
</tr>
</tbody>
</table>

* marks the three canonical discriminant functions remaining in the analysis.
Unstandardized and Standardized Canonical Discriminant Function Coefficients

Canonical discriminant function coefficients help in determining the contributions of each key variable in determining each discriminant function. Unstandardized function coefficients provide "the absolute contribution of a variable in determining the discriminant score," while standardized coefficients assist in determining the relative weight of a variable in comparison to other variables used in the analysis (Klecka, p. 29). Unstandardized and standardized discriminant function coefficients are provided in Tables 7 and 8.
Table 7
Unstandardized Canonical Discriminant Function Coefficients

<table>
<thead>
<tr>
<th>Item</th>
<th>Function 1</th>
<th>Function 2</th>
<th>Function 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>12</td>
<td>.2170757</td>
<td>.9369983</td>
<td>-.3221602</td>
</tr>
<tr>
<td>13</td>
<td>.5825660E-01</td>
<td>-.2277563</td>
<td>.2304229</td>
</tr>
<tr>
<td>15</td>
<td>-.4895257</td>
<td>.1144143</td>
<td>.4584724</td>
</tr>
<tr>
<td>16</td>
<td>.8917805E-01</td>
<td>.1755824</td>
<td>.8654821E-01</td>
</tr>
<tr>
<td>18</td>
<td>.1545630</td>
<td>-.7048767</td>
<td>.7236605</td>
</tr>
<tr>
<td>19</td>
<td>-.8277137E-01</td>
<td>-.4866330</td>
<td>-.7128196</td>
</tr>
<tr>
<td>20</td>
<td>.3955198</td>
<td>.5036602</td>
<td>-.3615912</td>
</tr>
<tr>
<td>22</td>
<td>.4501352</td>
<td>-.3467141</td>
<td>.5711548</td>
</tr>
<tr>
<td>(constant)</td>
<td>-2.706509</td>
<td>-.3324086</td>
<td>-1.136258</td>
</tr>
</tbody>
</table>

Table 8
Standardized Canonical Discriminant Function Coefficients

<table>
<thead>
<tr>
<th>Item</th>
<th>Function 1</th>
<th>Function 2</th>
<th>Function 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>12</td>
<td>.24836</td>
<td>1.07206</td>
<td>-.36860</td>
</tr>
<tr>
<td>13</td>
<td>.06859</td>
<td>-.26814</td>
<td>.27128</td>
</tr>
<tr>
<td>15</td>
<td>-.55895</td>
<td>.13064</td>
<td>.52349</td>
</tr>
<tr>
<td>16</td>
<td>.11203</td>
<td>.22183</td>
<td>-.10872</td>
</tr>
<tr>
<td>18</td>
<td>.14763</td>
<td>-.67328</td>
<td>.69122</td>
</tr>
<tr>
<td>19</td>
<td>-.08774</td>
<td>-.51583</td>
<td>-.75559</td>
</tr>
<tr>
<td>20</td>
<td>.44156</td>
<td>.56229</td>
<td>-.40368</td>
</tr>
<tr>
<td>22</td>
<td>.52924</td>
<td>-.40764</td>
<td>.67152</td>
</tr>
</tbody>
</table>
Table 8 indicates that of the eight key variables used in the discriminant analysis, Items 15, 20, and 22 make the greatest contribution to the first discriminant function. On Function 2, four of the eight variables (Items 12, 18, 19, and 20) have relatively large standardized coefficients. Items 19, 18, 22, and 15 are the most significant variables in the third function.

Classification Results

The three discriminant functions derived in this study could be used to predict the group membership of a survey respondent of unknown group affiliation. These same three discriminant functions could also be used to "predict" the group membership of the actual cases from which the functions were derived. The resulting classification matrix provides yet another check of the usefulness of the discriminant functions. "The proportion of cases correctly classified indicates the accuracy of the procedure and indirectly confirms the degree of group separation" (Klecka, p. 49). Table 9 provides predicted classification results for the actual cases used in this study.
Table 9
Classification Results

<table>
<thead>
<tr>
<th>Actual Group</th>
<th>No. of Cases</th>
<th>Predicted Group Membership</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Group 1</td>
<td>141</td>
<td>83</td>
</tr>
<tr>
<td></td>
<td></td>
<td>58.9%</td>
</tr>
<tr>
<td>Group 2</td>
<td>152</td>
<td>45</td>
</tr>
<tr>
<td></td>
<td></td>
<td>29.6%</td>
</tr>
<tr>
<td>Group 3</td>
<td>75</td>
<td>18</td>
</tr>
<tr>
<td></td>
<td></td>
<td>24.0%</td>
</tr>
<tr>
<td>Group 4</td>
<td>91</td>
<td>25</td>
</tr>
<tr>
<td></td>
<td></td>
<td>27.5%</td>
</tr>
<tr>
<td>Ungrouped cases</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>66.7%</td>
</tr>
</tbody>
</table>

Percent of "grouped" cases correctly classified: 42.48%
Table 9 illustrates the major study finding that Group 1, white males, did respond distinctly different from each of the remaining three groups on key survey variables. The data also indicate that Groups 3 and 4, "other" males and "other" females, tended to respond in a manner most similar to Group 2, white females.

Some cases that actually belong in Group 1, white males, were predicted to belong in Groups 2 and 4, white females and "other" females. A substantial number of cases (n = 45, 30%) actually belonging in Group 2, white females, were predicted to belong in Group 1, white males. Four other cases in Group 2, white females, were predicted to belong in Group 4, "other" females.

The model predicted no cases as belonging in Group 3, "other" males, including cases that actually belonged in Group 3. Group 3 cases, "other" males, appear to most resemble Group 2, white females, with some Group 3 cases appearing to resemble Group 1, white males. Group 4, "other" females, shows a predicted profile very similar to that of Group 3, "other" males, with few cases correctly predicted to fall into Group 4 and the highest number of cases predicted to fall into Group 2, white females.

The classification results suggest strong similarities between the responses of minority males and females, Groups 3 and 4, and the responses of white females in Group 2. This finding suggests commonalities in the
perceptions of white female, minority male, and minority female students, possibly shaped by their membership in groups that have historically suffered bias-motivated discrimination and harassment.

In a hypothetical example in which strong and accurate discriminant functions were applied to this data, predicted percentages in the bolded diagonal cells of the classification matrix would approach 100% for each group. This would indicate that the functions were correctly "predicting" membership in the actual groups in which the cases belong.

Data for the present study, however, indicate that actual cases were correctly classified only 42% of the time. Statistical probability would predict that for four groups, cases would be correctly classified 25% of the time by chance alone. Thus the discriminant functions do not contribute significantly to the correct classification of cases beyond what would be expected by chance. The classification matrix again confirms the limited practical utility of the discriminant functions derived in this study.

Content Analysis of Open Response Items

Open response items provide a more detailed understanding of student opinion regarding Stanford's discriminatory harassment policy. Content analysis of open response items is used to sort and classify written responses into a smaller number of categories. The
frequency of responses within each major category, as well as the detail and insight provided by representative responses, can provide Stanford administrators with empirical reference points from which to consider student concerns about the policy, its administration, or other related issues. Students were given an opportunity to elaborate on their Likert responses in Survey Items 13, 16, and 19. Item 32, the last item in the survey, provided respondents with an opportunity to address any aspect of the policy they wished.

**Item 13 Open Responses**

Students who answered "strongly agree" or "somewhat agree" to the Likert-scaled section of Item 13 were asked to elaborate on their response. A total of 92 written responses was received.

More than half \( n = 53, 58\% \) of the written responses to this item suggested that the Stanford policy negatively affects classroom interaction. A number of students specifically used the phrase, "stifles debate," in this context, suggesting that, in their view, the policy induces at least some Stanford students (not necessarily including themselves) to refrain entirely from discussion of sensitive issues both in and outside of classrooms.

Some specific quotes from student responses illustrate this category of opinion:
I think the policy has rendered some people mute, in that they withhold statements out of fear that they will offend someone.

I think many interesting topics are avoided because people don't want to deal with the consequences of being involved in a "sensitive discussion."

People like myself often just stay out of discussions to avoid the tyranny of the minority.

There is no dialogue at Stanford, only a spectrum from correct thought to naive thought.

The provision exists to expel students for saying "the wrong thing." I have strong convictions, but it's better to keep my mouth shut for 4 years and get a degree than speak my mind and be booted from Stanford.

[The policy] hurts education at Stanford.

A smaller group of students (n = 18, 20%) indicated that the policy has had a positive effect on their classroom experiences. They cited a raising of the general level of consciousness and sensitivity on campus, stimulation of discussion and debate, and the addition of new courses (and the enhancement of existing ones) that emphasize multicultural diversity.

Some illustrative quotes are as follows:

I believe my Stanford education mostly raised my level of awareness/sensitivity/concern on racial, gender, and other discriminatory issues.

I feel this policy forces students to move past name calling and focus on the underlying reasons for prejudice.
The topics discussed include a variety of ethnic and cultural experiences. There is greater emphasis on multiple cultures.

My experience in class has taught me not to jump to conclusions about other people—they haven’t been a forum for discussing or exchanging "fighting words."

The policy has helped to reduce the chances that a hostile environment be created on campus that would certainly have a negative effect on my ability to focus on studies.

I haven’t been forced to deal with racist/sexist beliefs that some professors may hold.

Slurs, insults, and the like don’t belong in an intellectual discussion.

A number of students questioned the impact of the policy versus that of social pressure (i.e., political correctness, or "PC"). For Item 13, 13 students (14%) raised this specific question, suggesting that effects on their education at Stanford—whether positive or negative—may be more readily attributed to social expectations or "PC" than to the existence of a university policy.

Examples of this kind of response follow:

Too many students use "PC" codes as an excuse not to listen to others—hear them out. By institutionalizing them, we’ve taken away personal responsibility. People don’t talk—or, rather, they don’t communicate.

I took a course in Language and Race in the U.S. I felt that we were strongly rewarded for taking positions in line with supporting linguistic minorities, and I felt that I could not speak
against it due to the atmosphere in the room [even] though nothing I would have said could have been prosecuted under the policy.

A few other low-response categories include the following: (a) the policy gives an unfair advantage to members of minority groups who can say whatever they want, (b) the policy has not improved the social consciousness or instructional agendas of some Stanford professors, and (c) the policy has had no effect on academics at all. As one student summarized this last category: "Academics have simply been unaffected by the policy."

Item 16 Open Responses

Item 16 asked students who responded "strongly agree" or "somewhat agree" on the Likert-scaled section of the question to elaborate on their response. Specifically, they were asked how residence life at Stanford has been affected by the university policy. A total of 118 written responses was received.

Student opinion is split almost evenly on whether the policy encourages or discourages discussion on human rights, multicultural diversity, free speech, and other related topics in residence halls and other student domiciles. Nearly a third of the respondents (n = 37, 31%) suggested that the policy encourages discussion in the dorms and generally support the policy. A similar number (n = 36,
31%) stated that the policy discourages open debate and dialogue in student residences.

The following comments illustrate students' belief that the policy encourages open discussion in student residences:

I think life on campus has been affected in an ultimately positive way because much dialogue has resulted in reaction to the policy.

It [has] created interesting discussions about rights--the right to free speech, the right to be free from harassment--and how these can conflict.

Individuals [have] the opportunity and ability to reevaluate our actions and expressions in terms of not only ourselves and our feelings, but also in terms of what others might feel in response.

I believe it leads to a better existence in dormitory life. . . . As a woman and a minority, I really appreciate the sensitivity and awareness to issues important to me.

[The policy encouraged discussion that] helped me get to know others' lifeways/customs/daily problems.

It facilitates tolerance and peace in the residences.

Conversely, the following quotes illustrate students' opinions that the university policy and the "politically correct" climate at Stanford discourage open discussion in student residences:

The general climate at Stanford, which is formed in part by this policy, discourages frank discussion of people’s opinions.
[There is] the feeling by many that the "thought police" are watching. The new policy just adds to the feeling that only certain views are accepted at this campus, whether hateful or not.

Students here are made to feel like criminals for suggesting a racial connection to anything!

One finds oneself regulating one's intercourse with others, part in deference to others and part to remain enrolled at Stanford... Are we not taught to question?

I think the policy is more an outgrowth of a herd mentality which encourages closed-mindedness and discourages open discourse.

Although nobody really understands exactly what the policy states (i.e., nobody has taken the time to read it—including myself), the sporadic coverage of this issue in both The Stanford Daily and The Stanford Review... has created an atmosphere of disgust for all types of "fighting words" or even slightly negative comments about other races, sexes, etc. This sentiment has certainly prevented me from voicing several personal opinions... in casual discussions in the dormitory.

A number of students (n = 18, 15%) offered the opinion that Stanford's Residential Education overemphasizes the policy and promotes a politically correct agenda. The following comments depict this perspective:

Res. Ed. exerts a strong PC bias through which dorm atmosphere is shaped. Rarely are two sides of an issue presented, if an issue is openly discussed at all.

Many people have been forced to assume multiple personalities due to the policy and the broader "sensitivity" teachings [in Residential Education]. Among friends, they
are more open to say what they think. . . . Among others, they wear the P.C. straitjacket, carefully guarding everything said.

Residential Education at Stanford tries to indoctrinate students through programming on "Multiculturalism." In my experience, their notion of multiculturalism is quite limited (includes only Asians, Afro-Americans, Chicano-Latinos, and Native Americans) and makes other minority groups feel excluded.

Res. Ed. is a stifling experience of goodness and fascism.

A similar number of students \( n = 16, 14\% \) believed the university policy helps minority students, in a number of ways. The following comments illustrate how students perceived these benefits:

[The policy] creates a climate in which the minorities and less powerful are encouraged to speak out more.

I think any sort of "official statement" about the inappropriateness of discriminatory harassment discourages such harassment. As a woman and an open homosexual, I think this fact has helped me to feel safer from harassment on the campus in general.

I feel the discrimination which I . . . received on a daily basis in secondary school was strongly curtailed [at Stanford] by the policy. It allowed me to actually focus on my studies and learning rather than combating daily prejudice. I feel this policy forces students to move past name calling and focus on the underlying reasons for prejudice.

I was sexually harassed in my dorm. My knowledge of the existence of the policy allowed me to approach school
authorities about the incident. Without it I might not have known my rights (or that I had any).

The policy allowed me to address a problem of harassment by phone which resulted in the student's suspension from Stanford for two quarters.

I feel more comfortable knowing that I am protected or at least have some legal recourse to fight against discrimination or threats based on my race or gender.

Some respondents ($n = 9, 8\%$) thought that the university policy breeds resentment among residents that results in negative backlash, including labeling and bitterness. The following comments offer examples:

I do not feel as if [the policy] . . . protects me. Students and faculty members feel free to vilify white, male, Christian heterosexuals. As a straight WASP, I am pegged as an "oppressor," and I am expected to atone for the "sins" of my forefathers. I would like to defend my ancestors based upon cultural relativism, but I'd be alienated for doing so.

By living in a fraternity, I feel I have been unfairly labeled by the university as a probable violator of its . . . policy. We in the fraternity are therefore pressured into guarding our words and actions more than other members of housing.

Particularly in my freshman dorm, certain anti-white sentiments went unchallenged by my peers and R.A.'s; I had never heard talk like this before and it made me uncomfortable that no one seemed surprised or upset by it.

[The policy] does perpetuate the constant minority whining.
A few other low-response categories include the following: (a) the policy is ineffective, (b) the policy is not needed for students living off-campus, and (c) nobody understands and/or has actually read the policy.

**Item 19 Open Responses**

Students who answered "strongly agree" or "somewhat agree" to the Likert-scaled section of Question 19 were asked to elaborate on their responses. A total of 44 written responses was received.

This relatively small number of total responses generated 13 different response categories. The largest number of respondents (n = 7, 16%) noted that the policy has been the subject of debate or discussion during an extracurricular activity in which they participated. Some representative responses include:

- I have been part of discussions about the policy that have taken up a significant portion of the extracurricular event that I was attending.

- I was an editor at the student newspaper. The topic got coverage, so we discussed it.

- I have talked about the policy at length and debated its merits in student government.

Two categories each received the next highest number of respondents (n = 6, 14%). Students were evenly divided in the category that suggested that the policy encouraged their involvement in extracurricular activities and the category
that suggested that social pressures may have had a greater
effect on their extracurricular activities than did the
policy. The following quotes are representative of comments
made by students who indicated that the policy encouraged
their involvement in extracurricular activities:

Actually, my attendance at dorm-based
and campus-wide programs has probably
been positively affected by such a
policy, because I am interested in
hearing various opinions on related
issues and there have been plenty of
opportunities to listen to lecturers and
presentations during my years here.

I feel that I have been introduced to
many different cultural practices as a
result of the policy. From this
introduction I have moved into
participation in activities at the
various community centers I have been
introduced to.

Among students who suggested that social pressure at
Stanford may have had a greater effect on their
extracurricular activities than did the policy, the
following is a representative response:

I would argue that non PC activities and
extracurriculars are repressed on campus
by the administration’s political agenda
[through] explicit strong support of
some student groups, while doing nothing
for others and implicitly discouraging
their activities and range of
organization through slanted residential
education programs, etc. I feel that I
was definitely influenced away from
joining or supporting some groups such
as Stanford College Republicans, etc.,
as an undergraduate.

Some respondents (n = 5, 11%) indicated that the policy
has had no effect on their extracurricular activities. An
additional five students indicated that the policy caused some degree of self-censorship in extracurricular activities.

A few other low-response categories include the following: (a) the policy has contributed to increased sensitivity in considering members of minority groups, (b) the policy has enhanced the level of comfort while participating in extracurricular activities, and (c) the policy has contributed to the avoidance of extracurricular activities with ethnic themes. One student noted that "activities that would cause me to censor my feelings in order to avoid violation of [the] standard are usually not worth me going to anyway."

**Item 32 Open Responses**

The open responses portion of Items 13, 16, and 19 specifically referenced classroom, housing, and extracurricular experiences, respectively. In responding to Item 32, students were free to comment on or to address any aspect of their experience with Stanford’s discriminatory harassment policy. Item 32 elicited the highest number of written responses among all of the open response items, with 317 comments having been recorded. These comments were grouped into 30 categories.

The largest number of comments (n = 38, 12%) was recorded in the category that suggested that the policy has
had no effect on discourse at Stanford. Some representative comments from this category include:

I think the vast majority of students are unaffected by it.

I disagree in principle with the fundamental standard interpretation, but I do not believe it affects discourse to any great extent.

The policy is just not a big deal on or off campus. The Daily milked it for all the controversy it stirred up, but most people don't know much about it and don't care.

I have never been aware of anyone here with whom I am acquainted feeling any restraint on their expression of opinions of any kind because of some paper locked up in somebody's file cabinet. It may make a political statement about the school's "attitude," but it has little or no bearing on what students actually do and say.

The next largest number of responses (n = 36, 11%) was received in the category that indicated that respondents believe that there is little awareness or knowledge of the policy among Stanford students. Defining comments in this category include:

I am not fully aware of the statements within the policy, though I am aware of the policy's existence.

I am only aware that it [the policy] exists and have never been in a discussion with any one that seemed to know much about it either. Seems to me I should be, as every student should be, more familiar with it! (I'm going to read it now!)
The next category of responses to Item 32 \((n = 28, 9\%)\) indicated that the policy has had little effect compared to the "politically correct" social climate at Stanford.

Typical of these responses are:

Yes, I do know people who moderate their speech at Stanford, but it's more due to peer pressure than any official policy.

More stifling to free discourse by far are peer "PC" pressures, exerted subtly and informally. Any deviation from the dominant "PC" mindset among students can make you feel like an outcast pretty fast . . .

I don't think that it [the policy] stifles conversation in dorms or activities. To the extent that students are careful or guarded in what they say, it is because of sensitivity to the feelings of others and fear of being thought "backward." Fear of judicial consequences does not enter their minds.

Stanford students are often ultra-sensitive, and fairly few students would ever act in a way that would require discipline under the policy. Besides, they would be vilified in the Daily anyway, which might be worse.

The "Free Expression and Discriminatory Harassment" policy in particular is too narrow to have noticeable impact on people's speech habits. What intimidates students from expressing unpopular views both in and out of the classroom is an overwhelming "left" political tone that is promoted by professors, residence education, and many students.

In theory and practice, the scope of the Grey Amendment plays an insignificant secondary role in controlling behavior and speech. Campus politics, Dan Kennedy's tenure, faculty political agendas, and student pre-professionalism
combine to limit speech freedoms. The Grey Amendment just formalizes this.

Students who responded in the next most frequent category \((n = 26, 8\%)\) suggested that the *policy stifles* speech. The following responses provide an understanding of this response category:

Living at Stanford gives one the feeling that Big Brother is always watching. I don't consider myself a racist. I went to public high school in NYC where I was one of three Christians and faced an 85% non-white class. Even this background and trust in my own instincts doesn't save me from being afraid of one day making a seemingly innocent; but apparently evil blunder on Stanford’s campus.

It sucks! There is no discourse here. Everyone (whites and minorities) is afraid to discuss such issues frankly. Everybody at Stanford is offended all the time so you can't speak because someone gets pissed off and makes it an issue, often without any regard for the intent of the speech or the message (often misperceived because students are so quick to get mad that they don’t listen). The Fundamental Standard chills free speech and prevents the intellectual exchange.

Regardless of whatever rhetorical arguments the university uses to defend the policy, its immediate impact is to restrict freedom of expression. Nothing could be more antithetical to the purpose of a university.

Some respondents \((n = 23, 7\%)\) viewed the policy as an infringement on their *first amendment rights*. One respondent noted:
the written policy is unnecessary and a dangerous intrusion into the sanctity of free speech.

A number of students (n = 20, 6%) viewed Stanford's concern for the issue of discriminatory harassment as positive and are, therefore, supportive of the policy. Two students wrote:

The fact that Stanford is concerned enough to have such a policy makes me very pleased with the school.

No matter where you are, you can't escape discriminatory remarks. However, the Fundamental Standard says something very positive about Stanford—our standards are higher than those of the real world. Change can start here.

Another group of students (n = 15, 5%) thought the policy is fine in itself, given its current purposes and design. Their comments have more to do with a variety of related issues and concerns, such as potential for abuse in the enforcement of the policy under a future university administration, a need for more campus-wide discussion of underlying issues that led to the policy, and making sure that the policy does not stifle academic and social discourse on campus. Two comments in this category include:

The statement itself may be fine, but the way groups use/abuse their "protection" is outrageous. Separatism, ethnocentrism, and alienation are the products of the statement's implied purposes of "preservation" and "security" and "promotion" of discriminated-against groups.

I believe Stanford has the right, as well as the responsibility, to ensure
both the tolerance of differences and the discussion of ideas. Since this policy most resembles that of the U.S. legislation and judicial rulings, it has a well grounded foundation on which to base its validity and application. At the same time, it [the university] should use its academic environment and intellectual community to promote more discussion about the policy—more discussion about the policy will relieve myths and tension, as well as encourage the flow of all ideas in general.

Another 15 responses (5%) were received in a category in which students indicated that the policy has contributed to what they feel is a safer, more comfortable social and academic environment on campus. A representative comment includes:

I support the policy because it is one factor in creating a safe, secure environment for everyone at Stanford and for providing equal educational opportunity for all people. I do not believe that this policy stifles academic discourse in any way because discriminatory attacks are not intellectual or academic in nature, but only outbursts of ignorance.

Survey Item 32 generated many low-response categories. These remaining categories include: (a) respondents who believe that free and open discourse is the only way to address discriminatory harassment; (b) those who indicated that educational and social programming are better alternatives to address discriminatory harassment than formal policy; (c) students who believe that the policy is unfortunate, but necessary; (d) respondents who view the policy as a superficial and ineffective response; (e) those
who believe that the policy is vague and confusing; (f) respondents who believe that the policy is too narrow to have much effect; (g) students who believe the policy fosters hostility and resentment; (h) students who believe that the policy is unfair in its protection only of a small group of racial minorities; and (i) several respondents who believe that the policy is not necessary due to previously existing campus policies.

Summary of Open Responses

The results of the content analysis of open responses are generally supportive of the quantitative data derived from the categorical survey items. Responses in the major categories for Items 13, 16, 19, and 32 provide information on ways in which the policy is seen as benefiting the Stanford community, ways in which the policy is seen as harming the university, and the degree to which respondents perceive the policy to have any effect at all.

Qualitative responses provide an important descriptive dimension to the analysis of student opinion both for and against the policy. Following are the major themes and issues arising from the content analysis of open-ended responses.

The policy is viewed as having the following benefits among supporters:

1. the policy has contributed to broader discussion of and sensitivity to the issue of discriminatory harassment;
2. the policy has contributed to making the Stanford campus safer and more comfortable for racial/ethnic minority students.

The policy is viewed as having the following negative consequences among nonsupporters:

1. the policy contributes to some degree of self-censorship both in and out of classes among some number of students;

2. the policy is thought by some to be a tool to further the ends of "politically correct" thinking on campus.

Other significant observations provided in open responses include:

1. many students believe the policy has had no effect--positive or negative--on campus speech and expression;

2. many students appear to have little knowledge or concern about the policy.

The issue most often raised by respondents, however, is the social climate at Stanford which many see as promoting a leftist, "politically correct" social and academic agenda. Stanford's "Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment" policy clearly takes a backseat to residential education programs, classes and programs on multiculturalism and diversity, and other ways in which public opinion at Stanford works to shape the actions and perceptions of individual students. Most students who participated in this study appear to view the policy as a product of this environment and not the cause of it.
CHAPTER V
DISCUSSION AND RECOMMENDATIONS

Discussion

The primary purposes of this study are to assess and describe the opinions of a selected group of Stanford University seniors with respect to the university's "Free Expression and Discriminatory Harassment" policy. This study employed both quantitative and qualitative research techniques in an effort to not only determine what the prevailing student opinions are regarding the policy, but also to describe these viewpoints in detail and context.

Study results indicate that there is substantial support for the policy among the students who participated in the survey. Discriminant analysis results, however, suggest that this support may not be uniform across all groups of students at Stanford. These results indicate that white male students, while largely supportive of the policy, may not be as supportive of the policy as white female students or the aggregate groups of male and female minority students who responded to the survey.

The relative statistical weakness of the discriminant functions derived in this study, however, cautions against placing too much practical significance in the apparent
differences between these groups of students. It seems reasonable to suggest that the net effect of a number of factors including Stanford's selective admission practices, campus culture, and freshman-to-senior attrition may combine to render study participants, and perhaps all Stanford seniors, more similar than different in their opinions regarding the discriminatory harassment policy.

Content analysis of open responses point out important areas of concern among respondents who believe that the policy has not positively contributed to their experiences at Stanford. These concerns address some degree of "chilling" or self-censorship of speech in classroom, extracurricular, and residential settings. Some respondents also expressed concern about the degree to which the policy contributes to, or is the result of what some students consider to be an oppressive, "politically correct" social atmosphere that serves to confine academic and social discourse to safe, administration-approved subjects.

Many respondents, however, indicated that the policy has positively contributed to their undergraduate experience at Stanford. These students pointed out that they have benefited from the broadening of their cultural experiences. Several students pointed out that one can be genuinely concerned about race and gender issues without striving to be politically correct.
Perhaps as interesting as any finding regarding student support for or against the policy is the finding that many students have very little awareness, knowledge, or concern about the policy. This observation is illustrated by the written responses of several students who noted that the policy has no direct impact on the day-to-day existence of the average Stanford student. This observation is supported by survey statistics that document that 74 respondents (13%) indicated that they were unaware that Stanford even has a discriminatory harassment policy.

The study findings raise interesting and difficult questions when examined against the backdrop of the literature discussed in Chapter 2. The significant level of student support for the policy stands in contrast to the opinions of authors who argue that discriminatory harassment policies inevitably threaten freedom of speech and expression and the integrity of the teaching/learning process (Browne, 1991; Hyde and Fishman, 1991).

Although some respondents reported that they believe that the policy has contributed to some degree of self-censorship among students, many others reported positive benefits as a result of the policy. Factor into this the many students who indicated that they were largely unaware of the policy and those who indicated that the policy has had no effect on discourse whatsoever at Stanford, and the study offers compelling evidence that the application of
this particular policy at this particular university does not significantly jeopardize the "marketplace of ideas" at Stanford.

The degree to which most survey respondents drew a distinction between the effect of the policy and the influence of the social climate at Stanford provides Stanford administrators and other observers with a difficult dilemma. A number of authors have pointed out the range of alternatives which they perceive to be available to college and university administrators in addressing incidents of discriminatory harassment and violence on campus. This range of alternatives typically include reaffirming the institution's commitment to affirmative action, courses and programming on cultural diversity, and public condemnation of bias-motivated incidents (Sedler, 1991; Strossen, 1990).

Data provided by survey participants, however, strongly suggest that the issue of political correctness at Stanford is more a function of Stanford's use of these nonpolicy means of promoting diversity than it is the result of the discriminatory harassment policy. Every incoming student who is required to attend a course or program on cultural diversity will form an opinion regarding the worthwhileness of the experience. Generally speaking, however, only those students who in some way feel threatened or otherwise affected by a discriminatory harassment code will take issue with such a policy.
Stanford's experience suggests that speech codes can be developed and enforced in a manner consistent with the first amendment. This observation is supported by student responses to survey Item 23, in which 75% of all respondents indicated that they "strongly agreed" or "somewhat agreed" "that it is possible to develop a policy which discourages discriminatory harassment without stifling academic discourse."

Limitations

Despite the care taken in the design and execution of this study, the results are subject to a number of limitations, most of which are common to virtually all survey research projects. In the present study these limitations involve a number of issues, including total response rate, instrumentation validity, selection of key variables for discriminant analysis, and the influence of social desirability in completing survey items.

Given that "there is no agreed upon standard for a minimum acceptable response rate" (Fowler, 1988, p. 48), confidence in the representativeness of survey respondents relative to the research population must be judged in light of the unique features of this project. The total response rate of 44% represents a substantial proportion of the total population defined in this study, and a comparison of demographic characteristics in Tables 1 and 2 suggests that
survey respondents are roughly equivalent to the larger population.

The returned surveys provided a variety of responses both in support of and against the policy, but a substantial number of respondents suggested that the policy has little to no effect on campus. To the degree that "people who have a particular interest in the subject matter . . . are more likely to return mail questionnaires than those who are less interested" (Fowler, 1988, p. 49), nonrespondents may be providing additional information regarding the relative unimportance of the policy to many students at Stanford.

Care was taken in the design of the survey to strengthen the reliability and validity of the instrument. These steps included a review of the literature in gaining an understanding of areas to address in the survey, a review of the survey by officials at Stanford, and a pretest of the survey by Stanford students to strengthen readability and clarity of survey items. The pretest also provided evidence that survey items were being consistently and accurately interpreted by all survey respondents. These precautions, however, can only offer evidence that the survey is probably a valid and reliable measure of student opinion regarding the discriminatory harassment policy.

Key survey items used in the discriminant analysis were selected on the basis of item content and correlation with other key variables. This combination of survey items,
however, proved to be of limited value in accurately predicting the group membership of actual cases. It is possible that a different combination of current survey items or other items not included in the current survey might better discriminate between respondent subgroups.

The possibility of socially desirable response patterns is of particular concern in survey research dealing with sensitive or controversial issues. In the present study it is particularly ironic to acknowledge the possibility that some survey respondents may have completed a confidential survey on a topic with strong political correctness overtones in a politically correct manner.

The reporting of actual student responses to open response items provides some balance to this possible study limitation. Many respondents were quite candid in expressing what they believed to be both the pros and cons of the policy as well as the current social climate at Stanford. In the final analysis, however, the findings of this study are probably affected by social desirability concerns to a degree no greater and no less than the findings of most survey research projects.

Finally, it must be noted that the findings of this project are provided as a description of prevailing student opinion among the students participating in this study, with limited generalizability to the population defined for this project. Officials at Stanford University and other
institutions must judge for themselves the potential usefulness of this data beyond the narrowly defined population in question.

Recommendations

The findings of this study suggest a number of recommendations that might assist Stanford University administrators in the continued administration of their discriminatory harassment policy. These include:

1. using this data within the context of a comprehensive policy evaluation, including assessment of other campus groups, e.g., graduate and professional students, faculty and staff, and administrators;

2. within the context of this comprehensive evaluation, review other possible indices of policy effectiveness, such as the rate of bias-motivated incident reports before and after the implementation of the policy;

3. closely monitor and evaluate student services and residential education efforts toward finding the best "mix" of cultural diversity programming;

4. maintain current policy enforcement philosophy, giving the widest possible latitude to students in their exercise of constitutionally guaranteed first amendment rights;

5. be careful to maintain and build upon the strengths of the Stanford community in considering any future action involving the discriminatory harassment policy.

Summary

As should be clear from the review of the literature provided in Chapter 2, the area of speech regulation in higher education is not one to be entered into lightly. The
complex web of laws, legal theories and doctrines, and judicial rulings having direct bearing on freedom of speech and expression in higher education are probably best managed by avoiding them altogether. Institutions that have not yet developed speech codes would be well advised to avoid the temptation to do so until clearer direction on the development and enforcement of such codes is provided by the courts. This guidance, however, may be a while in coming, given that the courts "have provided precious little help [thus far] to the administrators who must figure out what to do with the racists and other intolerants that creep into the campus communities" (Mikva, 1992, p. 37).

Particular policies and practices are not equally well suited to every organization. The exact same discriminatory harassment code may have very different effects in two different institutions. Again, institutions should avoid the temptation even to borrow speech codes in effect at other institutions, even codes that are valid on their face, as constitutionality is ultimately determined both by code content and the code’s enforcement history.

Evidence suggests that thus far, Stanford University has been successful in administering its discriminatory harassment code in a manner consistent with the first amendment. It also appears that in the opinion of most study respondents, neither academic nor social discourse has suffered appreciably as a result of the policy. Stanford’s
experience with its discriminatory harassment code is a unique product of factors related to Stanford's students, faculty, administrators, and campus climate. It nevertheless serves to illustrate that such policies can be fairly administered in the fight against bias-motivated harassment and violence on college and university campuses.

A recent higher education newsletter suggested that some colleges and universities rushed into the implementation of speech codes "without careful reflection about the potential consequences" (Synfax Weekly Report, 1993, p. 2). Although this may be true, one can just as easily characterize the development of the Collegiate Speech Protection Act of 1991 as a similarly ill-conceived response to the implementation of speech codes at some colleges and universities.

College and university administrators will need access to a wide variety of administrative tools in managing the many challenges facing their institutions. Although many of these tools should be employed only after careful study and consideration and used with great care and restraint, the discretion and authority to use them should not be precluded by federal legislation.

All available signs suggest that college and university administrators, faculty, and students must prepare themselves to hear and endure more examples of bias-motivated speech and conduct. Most of these messages will
be conveyed in a manner so as to escape sanction under most campus speech policies and general student conduct codes. The courts and state and federal lawmakers must understand that real people will be hurt by many of these incidents. To the extent that the courts and state and federal legislators fail to offer support and assistance to higher education officials in addressing this important issue, they perpetuate the concern of many that even today, all are not equally invited to shop in the higher education marketplace.
APPENDIX A

DOCUMENTATION ON STANFORD UNIVERSITY'S
FUNDAMENTAL STANDARD INTERPRETATION:
FREE EXPRESSION AND DISCRIMINATORY
HARASSMENT POLICY
THE FUNDAMENTAL STANDARD

The Fundamental Standard has set the standard of conduct for students at Stanford since 1896. It states:

Students at Stanford are expected to show both within and without the University such respect for order, morality, personal honor and the rights of others as is demanded of good citizens. Failure to do this will be sufficient cause for removal from the University.

Over the years, the Fundamental Standard has been applied to a great variety of situations. Actions which have been found to be in violation of it include:

Physical assault;
Property damage; attempts to damage University property, such as rock-throwing;
Theft, including theft of University property such as street signs, furniture, and library books;
Forgery, such as signing an instructor's signature to a grade change card;
Sexual harassment;
Charging computer time or long distance telephone calls to unauthorized accounts;
Presenting invalid or false meal cards or IDs to obtain meals to which the student is not entitled;
Misrepresentations in seeking financial aid, student
housing, discount computer purchases, or other University benefits;
Misuse of University equipment or funds;
Complete or partial destruction of library books;
Driving drunk on campus in a way that presents a threat to the life or property of others; and
Leaving threatening and obscene messages on the telephone answering system of another student.

There is no "ordinary" penalty which applies to violations of the Fundamental Standard. Infractions have led to penalties ranging from censure to expulsion. In each case, the gravity of the offense and a student's prior conduct are considered; however, the more serious the offense, the less it matters that a student has otherwise not done wrong.

**FUNDAMENTAL STANDARD INTERPRETATION:**
**FREE EXPRESSION AND DISCRIMINATORY HARASSMENT**

The Interpretation that follows became effective in June 1990 after 18 months of discussion and debate. It is a response to some incidents in recent years on campus that revealed doubt and disagreement about what the Fundamental Standard means for students in the sensitive area where the right of free expression can conflict with the right to be free of invidious discrimination. This interpretation of the Fundamental Standard is offered by the Student Conduct
Legislative Council to provide students and administrators with guidance in this area.

1. Stanford is committed to the principles of free inquiry and free expression. Students have the right to hold and vigorously defend and promote their opinions, thus entering them into the life of the University, there to flourish or wither according to their merits. Respect for this right requires that students tolerate even expression of opinions which they find abhorrent. Intimidation of students by other students in their exercise of this right, by violence or threat of violence, is therefore considered to be a violation of the Fundamental Standard.

2. Stanford is also committed to principles of equal opportunity and nondiscrimination. Each student has the right of equal access to a Stanford education, without discrimination on the basis of sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin. Harassment of students on the basis of any of these characteristics contributes to a hostile environment that makes access to education for those subjected to it less than equal. Such discriminatory harassment is therefore considered to be a violation of the Fundamental Standard.

3. This interpretation of the Fundamental Standard is intended to clarify the point at which protected free
expression ends and prohibited discriminatory harassment begins. Prohibited harassment includes discriminatory intimidation by threats of violence, and also includes personal vilification of students on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.

4. Speech or other expression constitutes harassment by personal vilification if it:

a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and

b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and

c) makes use of insulting or "fighting" words or non-verbal symbols.

In the context of discriminatory harassment by personal vilification, insulting or "fighting" words or non-verbal symbols are those "which by their very utterance inflict injury or tend to incite to an immediate breach of the peace," and which are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.
COMMENTS ON THE
FUNDAMENTAL STANDARD INTERPRETATION:
FREE EXPRESSION AND DISCRIMINATORY HARASSMENT

The following text was written by Professor Thomas Grey of the Stanford Law School. It serves to answer many questions about the purpose and scope of the new interpretation and is provided to the community by the 1990 Student Conduct Legislative Council.

The Fundamental Standard interpretation (see page 5) first restates, in Sections 1 and 2, existing University policy on free expression and equal opportunity respectively. Stanford has affirmed the principle of free expression in its Policy on Campus Disruption, committing itself to support "the rights of all members of the University community to express their views or to protest against actions and opinions with which they disagree." The University has likewise affirmed the principle of non-discrimination, pledging itself in the Statement of Nondiscriminatory Policy not to "discriminate against students on the basis of sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin in the administration of its educational policies." In Section 3, the interpretation recognizes that the free expression and equal opportunity principles conflict in the area of discriminatory harassment, and draws the line for disciplinary purposes at "personal vilification" that
discriminates on one of the bases prohibited by the University's non-discrimination policy.

1. Why prohibit "discriminatory harassment," rather than just plain harassment?

Some harassing conduct would no doubt violate the Fundamental Standard whether or not it was based on one of the recognized categories of invidious discrimination—for example, if a student, motivated by jealousy or personal dislike, harassed another with repeated middle-of-the-night phone calls. Pure face-to-face verbal abuse, if repeated, might also in some circumstances fit within the same category, even if not discriminatory. The question has thus been raised why we should then define discriminatory harassment as a separate violation of the Fundamental Standard.

The answer is suggested by reflection on the reason why the particular kinds of discrimination mentioned in the University's Statement on Nondiscriminatory Policy are singled out for special prohibition. Obviously it is University policy not to discriminate against any student in the administration of its educational policies on any arbitrary or unjust basis. Why then enumerate "sex, race, color, handicap, religion, sexual orientation, and national and ethnic origin" as specially prohibited bases for discrimination? The reason is that, in this society at
this time, these characteristics tend to make
individuals the target of socially pervasive invidious
discrimination. These characteristics thus tend to
serve as the basis for cumulative discrimination:
repetitive stigma, insult, and indignity on the basis
of a fundamental personal trait. In addition, for most
of the groups suffering such discrimination, a long
history closely associates extreme verbal abuse with
intimidation by physical violence, so that vilification
is experienced as assaultive in the strict sense. It
is the cumulative and socially pervasive
discrimination, often linked to violence, that
distinguishes the intolerable injury of wounded
identity caused by discriminatory harassment from the
tolerable, and relatively randomly distributed, hurt or
bruised feelings that result from single incidents of
ordinary personally motivated name-calling, a form of
hurt that we do not believe the Fundamental Standard
protects against.

2. Does not "harassment" by definition require repeated
acts by the individual charged?

No. Just as a single sexually coercive proposal
can constitute prohibited sexual harassment, so can a
single instance of vilification constitute prohibited
discriminatory harassment. The reason for this is,
again, the socially pervasive character of the
prohibited forms of discrimination. Students with the characteristics in question have the right to pursue their Stanford education in an environment that is not more hostile to them than to others. But the injury of discriminatory denial of educational access through maintenance of a hostile environment can arise from single acts of discrimination on the part of many different individuals. To deal with a form of abuse that is repetitive to its victims, and hence constitutes the continuing injury of harassment to them, it is necessary to prohibit the individual actions that, when added up, amount to institutional discrimination.

3. Why is intent to insult or stigmatize required?

Student members of groups subject to pervasive discrimination may be injured by unintended insulting or stigmatizing remarks as well as by those made with the requisite intent. In addition, the intent requirement makes enforcement of the prohibition of discriminatory harassment more difficult, particularly since proof beyond a reasonable doubt is required to establish charges of Fundamental Standard violations.

Nevertheless, we believe that the disciplinary process should only be invoked against intentionally insulting or stigmatizing utterances. The kind of expression defined in Section 4(c) does not constitute
"insulting or 'fighting' words" unless used with intent to insult. For example, a student who heard members of minority groups using the standard insulting terms for their own group in a joking way among themselves might—trying to be funny—insensitively use those terms in the same way. Such a person should be told that this is not funny, but should not be subject to disciplinary proceedings. It should also not be a disciplinary offense for a speaker to quote or mention in discussion the gutter epithets of discrimination; it is using these epithets so as to endorse their insulting connotations that causes serious injury.

4. Why is only vilification of "a small number of individuals" prohibited, and how many are too many?

The principle of free expression creates a strong presumption against prohibition of speech based upon its content. Narrow exceptions to this presumption are traditionally recognized, among other categories, for speech that is defamatory, assaultive, and (a closely related category) for speech that constitutes "insulting or 'fighting' words." The interpretation adopts the concept of "personal vilification" to help spell out what constitutes the prohibited use of fighting words in the discrimination context. Personal vilification is a narrow category of intentionally insulting or stigmatizing discriminatory statements
about individuals (4a), directed to those individuals (4b), and expressed in viscerally offensive form (4c).

The requirement of individual address in Section 4(b) excludes "group defamation"--offensive statements concerning social groups directed to the campus or the public at large. The purpose of this limitation is to give extra breathing space for vigorous public debate on campus, protecting even extreme and hurtful utterances in the public context against the potential chilling effect of the threat of disciplinary proceedings.

The expression "small number" of individuals in 4(a) is meant to make clear that prohibited personal vilification does not include "group defamation" as that term has been understood in constitutional law and in campus debate. The clearest case for application of the prohibition of personal vilification is the face-to-face vilification of one individual by another. But more than one person can be insulted face to face, and vilification by telephone is not (for our purposes) essentially different from vilification that is literally face to face.

For reasons such as these, the exact contours of the concept of insult to "a small number of individuals" cannot be defined with mechanical precision. One limiting restriction is that the
requirements of 4(a) and 4(b) go together, so that a "small number" of persons must be no more than can be and are "addressed directly" by the person conveying the vilifying message.

To take an important example, we believe that a racist or homophobic poster placed in the common area of a student residence might be found to constitute personal vilification of the African-American or gay students in that residence. Any such finding would, however, be context-specific, turning on the numbers involved, as well as on the evidence of the perpetrator's own knowledge and intentions.

5. What is the legal basis for the concept of "insulting or 'fighting' words," and what is the concept's relation to the actual threat of violence on the one hand, and to the actual infliction of emotional distress on the other?

In its unanimous decision in Chaplinsky v. New Hampshire (1942), the Supreme Court spoke of "certain well-defined and narrowly limited classes of speech" which are outside the protection of the First Amendment because their utterance is "no essential part of any exposition of ideas" and of such "slight social value as a step to truth" that they can be prohibited on the basis of "the social interest in order and morality." Along with libel and obscenity, this category was said
to include "insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

In subsequent opinions, the Court has consistently reaffirmed the basic Chaplinsky doctrine. At the same time, the Court has clarified the concept of "insulting or 'fighting' words" in two important ways. First, where the state attempts to punish speech for provoking violence, the threat of violence must be serious and imminent (Gooding v. Wilson, 1972). Second, the "insulting or fighting words" exception does not allow prohibition of utterances offensive to the public at large, but must be confined to insults or affronts addressed directly to individuals, or thrust upon a captive audience (Cohen v. California, 1971).

The Supreme Court's phrase "insulting or 'fighting' words" is often shortened to simply "fighting words," an expression which, while roughly capturing the sort of personally abusive language we mean to prohibit, may also have certain misleading connotations. First, the expression may imply that violence is considered an acceptable response to discriminatory vilification; but we prohibit these utterances so that disciplinary proceedings may substitute for, not supplement, violent response. Second, exclusive focus on the actual likelihood of
violence might suggest that opponents of controversial speech can transform it into forbidden "fighting words" by plausibly threatening violent response to it—the so-called "heckler's veto." The speech, if it is to be subject to restraint, must also be grossly insulting by the more objective standard of commonly shared social standards. Finally, the "fighting words" terminology might be thought to imply that extreme forms of personal abuse become protected speech simply because the victims are, for example, such disciplined practitioners of non-violence, or so physically helpless, or so cowed and demoralized, that they do not, in context, pose an actual and imminent threat of violent retaliation. Such a limitation might be appropriate under a breach of the peace statute, whose sole purpose is to prevent violence, but does not make sense in an anti-discrimination provision such as this one.

Another and largely overlapping category of verbal abuse to which legal sanctions may be applied is defined by the tort law concept of "intentional infliction of emotional distress." Much of the conduct that we define as discriminatory harassment might well give rise to a civil suit for damages under the "emotional distress" rubric. But that rubric has drawbacks as the legal basis for a discriminatory
harassment regulation. It is less well established in free speech law than is the fighting words concept. Further, taken as it is from tort law, it focuses primarily on the victim's reaction to abuse; the question is whether he or she suffers "severe emotional distress." We think it better in defining a disciplinary offense to focus on the prohibited conduct; we prefer not to require the victims of personal vilification to display their psychic scars in order to establish that an offense has been committed.

6. What is included and excluded by the provision requiring "symbols . . . commonly understood to convey direct and visceral hatred or contempt?"

These terms in Section 4(c) provide the most significant narrowing element in the definition of the offense of discriminatory personal vilification. They limit the offense to cases involving use of the gutter epithets and symbols of bigotry: those words, pictures, etc., that are commonly understood as assaultive insults whenever they are seriously directed against members of groups subject to pervasive discrimination. The requirement that symbols must be "commonly understood" to insult or stigmatize, and so injure "by their very utterance," narrows the discretion of enforcement authorities; it means that particular words or symbols thought to be insulting or
offensive by a social group or by some of its members must also be so understood across society as a whole before they meet the proposed definition.

The kinds of expression covered are words (listed, not exhaustively, and with apologies for the affront involved even in listing them) such as "nigger," "kike," "faggot," and "cunt;" symbols such as KKK regalia directed at African-American students, or Nazi swastikas directed at Jewish students. By contrast, a symbol like the Confederate flag, though experienced by many African-Americans as a racist endorsement of slavery and segregation, is still widely enough accepted as an appropriate symbol of regional identity and pride that it would not in our view fall within the "commonly understood" restriction. The direction of profanities or obscenities as such at members of groups subject to discrimination is also not covered by the interpretation, nor is expression of dislike, hatred, or contempt for these groups, in the absence of the gutter epithets or their pictorial equivalents.

Making the prohibition so narrow leaves some very hurtful forms of discriminatory verbal abuse unprotected. Substantively, this restriction is meant to ensure that no idea as such is proscribed. There is no view, however racist, sexist, homophobic, or blasphemous it may be in content, which cannot be
expressed, so long as those who hold such views do not use the gutter epithets or their equivalent. Procedurally, the point of the restriction is to give clear notice of what the offense is, and to avoid politically charged contests over the meaning of debatable words and symbols in the context of disciplinary proceedings.

7. Does not the narrow definition of vilification imply approval of all "protected expression" that falls outside the definition?

Free expression could not survive if institutions were held implicitly to endorse every kind of speech that they did not prohibit. The Stanford community can and should vigorously denounce many forms of expression that are protected against disciplinary sanction. For example, while interference with free expression by force or intimidation violates the Fundamental Standard, less overt forms of silencing diverse expression, such as too hasty charges of racism, sexism, and the like, do not. Yet the latter form of silencing is hurtful to individuals and bad for education; as such, it is to be discouraged, though by means other than the disciplinary process.

Similarly, while personal vilification violates the Fundamental Standard, even extreme expression of hatred and contempt for protected groups does not, so
long as it does not contain prohibited insulting or fighting words, or is not addressed to individual members of the groups insulted. Yet such extreme expressions of hatred and contempt cause real harm. Members of the University community have every right to denounce them. At the same time, however, respect for the right of free expression—so critical to a university community—requires that students tolerate opinions which they find abhorrent. As stated in Section 1, intimidation aimed at suppressing the exercise of this right through violence, or the threat of violence, constitutes a violation of the Fundamental Standard.

In general, the disciplinary requirements that form the content of the Fundamental Standard are not meant to be a comprehensive account of good citizenship within the Stanford community. They are meant only to set a floor of minimum requirements of respect for the rights of others, requirements that can be reasonably and fairly enforced through a disciplinary process. The Stanford community should expect much more of itself by way of tolerance, diversity, free inquiry and the pursuit of equal educational opportunity than can possibly be guaranteed by any set of disciplinary rules.
APPENDIX B

BATTAGLIA'S PROPOSED HATE SPEECH POLICY
BATTAGLIA’S PROPOSED HATE SPEECH POLICY

A. Statement of Policy

A student who intentionally or recklessly uses hate speech, under such circumstances that another student is likely to suffer serious emotional distress or be intimidated from full participation in any university activity or program, shall be disciplined. A student shall not be disciplined under this Policy for any conduct which s/he demonstrates has serious literary, artistic, political or scientific value.

B. Definition/Principles of Interpretation and Application

1. "Hate speech" is any word, gesture, graphic representation, or symbol which reflects hatred, contempt, or stigmatization by reason of race, ethnicity, national origin, gender, religion, handicap or sexual orientation.

2. The following are presumed to constitute "hate speech": ["nigger," "kike," "cunt," "faggot," "wop," "spic," "gook," K.K.K. regalia]. However, a student shall be permitted to demonstrate that, under the particular facts and circumstances, characterization as hate speech is inappropriate.

3. A student acts intentionally when s/he desires a particular effect to occur or knows that the effect is
certain, or substantially certain, to occur. A student acts recklessly when s/he deliberately disregards a high degree of probability that a particular effect will occur.

4. Hate speech which is comprised of, includes, or is part of a threat of physical harm to person or property, or a specific discriminatory act, shall be presumed to be used intentionally or recklessly. However, a student shall be permitted to demonstrate that, under the particular facts and circumstances, the requisite state of mind was not present.

5. Hate speech which has a strong tendency to result in physical harm to person or property, or in a specific discriminatory act, shall be presumed to be likely to cause serious emotional distress or intimidation. However, a student shall be permitted to demonstrate that, under the particular facts and circumstances, a requisite effect was not likely to occur.

6. In determining whether hate speech is likely to cause serious emotional distress or intimidation, the applicable standard shall be the likely effect on a student of ordinary sensibilities who shares the class-defining characteristic.
7. This Policy applies on all university property, and during all university activities and programs whether or not conducted on university property.

8. In determining whether any element of an offense under the Policy is established, the following additional factors are particularly relevant:
   a. Whether or not the student's conduct is directed to a specific individual, a small number of specific individuals, or a large number of specific individuals.
   b. Whether or not the student's conduct is part of a pattern of vilification, harassment, intimidation, or discrimination.
   c. Whether or not the student's conduct occurs during classroom instruction, or in a dormitory, library, laboratory or other research center.

9. In determining whether conduct has serious literary, artistic, political or scientific value, the applicable standard shall be the reasonable member of the university community.
APPENDIX C

COLLEGIATE SPEECH PROTECTION ACT OF 1991
A BILL

To amend Title VI of the Civil Rights Act of 1964 to protect the free speech rights of college students.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Collegiate Speech Protection Act of 1991."

SEC. 2. TITLE VI AMENDMENT.

Title VI of the Civil Rights Act of 1964 is amended by adding at the end the following:

SEC. 607. (a) A postsecondary educational institution that is a program or activity shall not make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication protected from governmental restriction by the first article of amendment to the Constitution of the United States.

(b) Whoever is a student at an educational institution engaged in a violation of subsection (a) may, in a civil action, obtain appropriate injunctive and declaratory relief. The court shall award reasonable attorneys' fees and other litigation costs to a prevailing plaintiff in a civil action under this section.
(c) This section does not apply to an educational institution that is controlled by a religious organization, to the extent that the application of this section would not be consistent with the religious tenets of such organization.
February 17, 1993

Dear Stanford University Senior:

Please take a few minutes to complete the enclosed survey. The survey has been designed to assess your knowledge and opinions regarding Stanford University's "Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment" policy. This study will be used to fulfill requirements for my doctoral degree in educational administration at The Ohio State University. The survey will take approximately 15 to 20 minutes to complete.

While much has been written regarding discriminatory harassment policies in higher education, there is very little research which documents the perceptions of students enrolled at colleges that have implemented such policies. Your responses will provide important input to Stanford faculty, staff, and administrators, as well as administrators in other institutions who are considering new or reviewing existing discriminatory harassment policies.

Although several offices and groups at Stanford (e.g., the Dean of Students Office, the Student Conduct Legislative Council, the Judicial Affairs Office) are interested in the results of this survey and have assisted in its distribution, this study has been funded and conducted totally independent of any office at Stanford. The number which appears in the upper right-hand corner of page 1 of the survey will be used to assure that a sufficient number of completed surveys are returned for purposes of statistical analysis. No member of the Stanford community will ever see your completed survey. Your survey will be returned to Columbus, Ohio in the enclosed postage-paid envelope, and all responses will remain absolutely confidential. I will, however, provide a summary of the survey results to interested offices and groups at Stanford.

If you are willing to be interviewed by phone or in person regarding this study, please complete that portion of the enclosed postcard and return it separately from your survey. Additionally, if you wish to receive a copy of the results of this study, please complete that portion of the enclosed postcard and return it separately from your survey. A report will be available during Spring Quarter of 1993.

Please complete and return the survey by March 5. A postage-paid return envelope is enclosed for your use. Your prompt return of this brief survey will provide a critical yet currently missing piece of information in the ongoing study of discriminatory harassment policies in higher education. Thank you for your assistance.

Sincerely,

[Signature]

John W. Marr, Jr.
Doctoral Candidate
The Ohio State University
Free Expression and Discriminatory Harassment Survey

Please answer all questions without referring to Stanford University's Student Conduct Policies. Please indicate your response by placing a "✓" in the blank beside your answer or by filling in the blank. Please print your responses. Thank you for your time in completing this survey. Your assistance is truly appreciated.

1. You are: ( ) Male ( ) Female

2. Your ethnic origin is:

( ) American Indian/Alaskan Native
( ) Asian/Pacific Islander
( ) Black/African American
( ) Ethnic Hawaiian
( ) Mexican American/Chicano
( ) Other Hispanic/Latino
( ) White
( ) Other, please indicate: _______________________________________________________

3. Your age is: ___________ Years

4. Please indicate your major: ______________________________________________________

5. In what quarter and year did you begin your studies at Stanford?

_____________________________ Quarter _______________________________ Year

6. Are you aware that Stanford University has a Free Expression and Discriminatory Harassment Policy?

( ) Yes ( ) No ( ) Don't know/Not sure

If you answered "No" to this question, you have completed the survey. Please return the entire survey in the enclosed postage-paid envelope. Thank you for your assistance.
7. Have you read Stanford University's "Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment"?

( ) Yes   ( ) No   ( ) Don't know/Not sure

8. Please indicate whether you believe that the following two statements regarding discriminatory harassment are included in Stanford University's "Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment":

A. "Prohibited harassment includes discriminatory intimidation by threats of violence, and also includes personal vilification of students on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin."

( ) Yes, the above statement is included.

( ) No, the above statement is not included.

( ) I am not sure whether the above statement is included.

B. "Speech or other expression constitutes harassment by personal vilification if it a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and c) makes use of insulting or 'fighting' words or non-verbal symbols."

( ) Yes, the above statement is included.

( ) No, the above statement is not included.

( ) I am not sure whether the above statement is included.

Questions Regarding the "Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment" in Classes

9. Faculty members have initiated in-class discussion of Stanford's "Free Expression and Discriminatory Harassment" policy in classes that I have attended.

( ) True   ( ) False
10. I have taken part in classroom discussions about Stanford's "Free Expression and Discriminatory Harassment" policy.

( ) True ( ) False

11. Other students have discussed Stanford's "Free Expression and Discriminatory Harassment" policy in classes which I have attended.

( ) True ( ) False

12. Due to the existence of Stanford's "Free Expression and Discriminatory Harassment" policy, I have not raised subjects or questions in class that might have been viewed as sensitive or controversial.

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13. My in-class education at Stanford has been affected by the existence of Stanford's "Free Expression and Discriminatory Harassment" policy.

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If you answered "Somewhat Agree" or "Strongly Agree" to Question #13, please indicate below how your education at Stanford has been affected by the "Free Expression and Discriminatory Harassment" policy.

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Questions Regarding the "Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment" in On- and Off-Campus Housing

14. I have taken part in discussions regarding Stanford's "Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment" while in either on- or off-campus housing.

( ) True ( ) False

15. Due to the existence of Stanford's "Free Expression and Discriminatory Harassment" policy, I have not raised subjects or questions while in on- or off-campus housing that might have been viewed as sensitive or controversial.

Strongly Disagree Somewhat Disagree Undecided Somewhat Agree Strongly Agree

( ) ( ) ( ) ( ) ( )

16. My residence life at Stanford has been affected by the existence of Stanford's "Free Expression and Discriminatory Harassment" policy.

Strongly Disagree Somewhat Disagree Undecided Somewhat Agree Strongly Agree

( ) ( ) ( ) ( ) ( )

If you answered "Somewhat Agree" or "Strongly Agree" to Question #16, please indicate below how your residence life at Stanford has been affected by the "Free Expression and Discriminatory Harassment" policy.

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Questions Regarding the "Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment" in Extracurricular Activities

17. I have taken part in discussions regarding Stanford's "Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment" while involved in extracurricular activities.

( ) True          ( ) False

18. Due to the existence of Stanford's "Free Expression and Discriminatory Harassment" policy, I have not raised subjects or questions that might have been viewed as sensitive or controversial while involved in extracurricular activities.

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19. My involvement in extracurricular activities at Stanford has been affected by the existence of Stanford's "Free Expression and Discriminatory Harassment" policy.

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If you answered "Somewhat Agree" or "Strongly Agree" to Question #19, please indicate below how your extracurricular activities have been affected by the "Free Expression and Discriminatory Harassment" policy.

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General Questions Regarding Stanford's "Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment" Policy

20. I support Stanford's "Free Expression and Discriminatory Harassment" policy.

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21. I know of other Stanford students who support Stanford's "Free Expression and Discriminatory Harassment" policy.

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22. I believe that Stanford's "Free Expression and Discriminatory Harassment" policy is an important statement of the University's commitment to providing educational opportunities for all of its students.

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23. I believe that it is possible to develop a policy which discourages discriminatory harassment without stifling academic discourse.

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24. Stanford's "Free Expression and Discriminatory Harassment" policy is too narrow to be of much use in discouraging discriminatory harassment.

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25. I support different means of addressing discriminatory harassment as an alternative to written policy.

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26. I know of other Stanford students who support different means of addressing discriminatory harassment as an alternative to written policy.

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27. In addition to the "Free Expression and Discriminatory Harassment" policy, Stanford University has provided adequate social and/or educational programs to address discriminatory harassment.

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28. I considered leaving Stanford because of the "Free Expression and Discriminatory Harassment" policy.

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29. I know of other Stanford students who considered leaving Stanford because of the "Free Expression and Discriminatory Harassment" policy.

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30. Stanford's "Free Expression and Discriminatory Harassment" policy was a factor in my encouraging potential students to attend Stanford University.

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31. Stanford's "Free Expression and Discriminatory Harassment" policy was a factor in my discouraging potential students from attending Stanford University.

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32. Please include any additional comments you may have regarding Stanford's "Free Expression and Discriminatory Harassment" policy, including any reasons you may have for supporting or not supporting the policy.

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Thank you very much for your assistance. Please return the entire survey in the enclosed postage-paid envelope.
Dear Stanford Senior,

I hope that you will take a few minutes from your busy schedule to complete and return the "Free Expression and Discriminatory Harassment Survey" you recently received from The Ohio State University. Your responses will be important as Stanford administrators consider future use of the discriminatory harassment interpretation of "The Fundamental Standard." Thank you for your consideration, and please pardon this note if you have already returned your survey.

I wish you all the best in completing your studies at Stanford.

John Marr
Doctoral Candidate
The Ohio State University
April 4, 1993

Dear Stanford Senior:

I am writing to provide you a final opportunity to have your perceptions included in the first major student study of discriminatory harassment policies. Returning your survey will ensure that study results truly reflect the broad range of student opinion among Stanford seniors. Your participation is very important as Stanford administrators consider the future of this Fundamental Standard Interpretation. Your participation will also help many others in the larger academic community who are considering new or reconsidering existing discriminatory harassment policies. Please take a few minutes to complete the enclosed survey and return it in the postage-paid envelope provided.

Your completed survey must be received by me no later than April 15 to be included in the study results. Thank you for your consideration. I wish you all the best in completing your undergraduate studies and in your future career.

Please disregard this note if you have already returned the survey.

John W. Marr, Jr.
Doctoral Candidate
The Ohio State University
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Davis v. Monsanto Chemical Company, 858 F. 2d 345, (6th cir. 1988)


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Healy v. James, 408 U.S. 169 (1972)


Keyishian v. Board of Regents of the University of the State of New York, et al., 385 U.S. 589 (1967)


Kovacs v. Cooper, 336 U.S. 77 (1949)


Restatement (Second) of Torts, sec 46, 1965.


*Terminiello v. City of Chicago*, 337 U.S. 1 (1949)


*Thornhill v. Alabama*, 310 U.S. 88 (1940)


*United States Constitution, Amendment I.*


