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Discrimination as Disruption: Addressing Hostile Environments Without Violating the Constitution

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In early March 2015, a video surfaced showing members of the Sigma Alpha Epsilon (SAE) fraternity at the University of Oklahoma chanting: "There will never be a nigger at SAE . . . you can hang him from a tree, but he'll never sign with me." Following the wide circulation of this video, the university's president expelled two students leading the chants in the video for creating a hostile racial environment on campus. Legal commentators criticized this disciplinary action, arguing that it violated the First Amendment and principles of academic freedom.[1] On the other hand, a review of Title VI law suggests that President David Boren's actions were in line with federal regulations. This has led some to argue that universities "are in a double bind."[2] They are required by civil rights statutes to redress hostile environments, but face liability under the First Amendment if they punish speech that led to a hostile environment. This essay argues that a university can defend punishment of hostile environment conduct based upon its authority to punish students for substantially disrupting the operations of the university—balancing free speech rights with the rights of students to attend school free from racial discrimination.

I. Hostile Environment Regulation Cannot Be Overly Broad

When students are punished for their verbal statements or other forms of expression, consideration must be given to First Amendment implications.[3] In-

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1. *See, e.g.*, Geoffrey R. Stone, *Racist Rants and the University of Oklahoma: Getting It Wrong,* HUFF. POST POL. (Mar. 11, 2015), http://www.huffingtonpost.com/geoffrey-r-stone/racist-rants-and-the-univ_b_6844500.html.

2. Judith Shulevitz, *In College and Hiding From Scary Ideas*, N.Y. TIMES, Mar. 21, 2015, http://www.nytimes.com/2015/03/22/opinion/sunday/judith-shulevitz-hiding-from-scary-ideas.html?emc=eta1.

3. Tinker v. Des Moines Independent Community School Dist, 393 U.S. 503 (1969).

deed, the Supreme Court has recognized principles of free speech and academic freedom as particularly valuable in the university context.[4] The concept of academic freedom serves to protect the marketplace of ideas,[5] which posits that through open debate and discussion we pursue truth and knowledge.[6] Disagreement with or opposition to an idea is not enough for a university to prohibit speech.

In the early 1990's, legal scholars debated the constitutionality of university hate speech codes designed to prevent racially and sexually offensive expressions.[7] Critics argued that justifications for the restrictions on speech are often ill defined and constitute dangerous censorship, while advocates argued that antidiscrimination laws provide the conditions for everyone to access the marketplace of ideas.[8]

First Amendment challenges to university hate speech codes largely succeeded. For example, in *Saxe v. State College Area School District*,[9] the Third Circuit considered a facial challenge to a public school district's antiharassment policy and found it to be overbroad. The plaintiff was the father of two students who believed homosexuality was wrong and felt that they could not express these beliefs under the speech code.[10] While the district court upheld the speech code as prohibiting "no more speech than was already unlawful under federal and state anti-discrimination laws," then-Third Circuit Judge Samuel Alito reversed.[11] He wrote that the school district policy "prohibits a substantial amount of speech that would not constitute actionable harassment under either federal or state law"[12] and that "it is certainly not enough that the speech is merely offensive to some listener."[13] Similarly, in *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*,[14] the Fourth Circuit rejected

4. Healy v. James, 408 U.S. 169, 180-81 (1972).

5. *Id.*

6. *See* MATTHEW W. FINKIN AND ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 35 (2009).

7. *See* Robert C. Post, *Racist Speech, Democracy, and the First Amendment,* 32 WM. & MARY L. REV. 267, 325, 327 (1991); Rodney A. Smolla, *Rethinking First Amendment Assumptions about Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 171 (1990).

8. *See, e.g.,* Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991) (claiming that speech regulation need not offend the First Amendment).

9. 240 F.3d 200 (3d Cir. 2001).

10. *Id.* at 203.

11. *Id.* at 202.

12. *Id.* at 204.

13. *Id.* at 217.

14. 993 F.2d 386 (4th Cir. 1993).

George Mason University's attempt to punish speech under a code of conduct that prohibited racially offensive speech.

When institutions have attempted to write discipline policies that regulate offensive expression generally, they have failed to withstand First Amendment challenges.[15] Ultimately, school speech codes may be a blunt tool for distinguishing between protected speech and discriminatory conduct, which is a highly context-dependent determination. The best solution may be for universities to write policies that mirror the language of hostile environment law, and enforce these policies only when there are sufficient facts to support a viable hostile environment claim.

II. The Hostile Environment Cause of Action

Title VI of the Civil Rights Act of 1964[16] prohibits discrimination based on race, color, or national origin. Title VI regulations under Section 602 interpret hostile environment harassment as a form of discrimination.[17] A hostile environment occurs when a student from a protected class experiences "severe or pervasive"[18] harassment that interferes with or limits the ability of a student to participate in or benefit from the educational program.[19]

The hostile environment framework developed in response to second-generation discrimination—new forms of covert discrimination that evolved after overt discrimination became illegal.[20] In *Meritor Savings Bank v. Vinson*,[21] the Supreme Court held that harassment that is so severe and pervasive that it "alter[s] the conditions of the victim's employment and create[s] an abusive working environment"[22] is discrimination.[23] *Meritor* relied on *Rogers v. EEOC*,[24] in which the Fifth Circuit explained that environments may become "'so heavily polluted with discrimination as to destroy completely the emotional and psy-

15. *See, e.g.*, DeJohn v. Temple University, 537 F.3d 301, 317 (3d Cir. 2008); Doe v. University of Michigan, 721 F. Supp. 852, 864-65 (E.D. Mich. 1989).

16. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006).

17. Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11449 (March 10, 1994).

18. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

19. Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1033 (9th Cir. 1998).

20. Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, in Directions in Sexual Harassment Law 1, 19-22 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003).

21. 477 U.S. 57.

22. *Id.* at 67.

23. *Id.* at 64.

24. 454 F.2d 234 (5th Cir. 1971).

chological stability of minority group workers.'"[25] In *Rogers*, a Hispanic plaintiff alleged that her employer discriminated against her by segregating patients based upon race. Despite the fact that this discrimination did not have a tangible detrimental effect on Rogers, the Fifth Circuit found that she was affected by the climate at work. The *Rogers* court wrote:

> [D]iscrimination may constitute a subtle scheme designed to create a working environment imbued with discrimination and directed ultimately at minority group employees. As patently discriminatory practices become outlawed, [] employers bent on pursuing a general policy declared illegal by Congressional mandate will undoubtedly devise more sophisticated methods to perpetuate discrimination among employees.[26]

Although the Supreme Court has never decided a hostile environment case under Title VI, lower courts have recognized a viable cause of action. In *Monteiro v. Tempe Union High School District*,[27] an African American plaintiff in the Tempe Union High School District alleged a hostile racial environment when she was subjected to racial slurs.[28] The Ninth Circuit observed:

> It does not take an educational psychologist to conclude that being referred to by one's peers by the most noxious racial epithet in the contemporary American lexicon, being shamed and humiliated on the basis of one's race, and having the school authorities ignore or reject one's complaints would adversely affect a Black child's ability to obtain the same benefit from schooling as her white counterparts.[29]

III. When Does Protected Speech Become Discriminatory Conduct?

Schools can avoid First Amendment violations by relying on the language of Title VI to distinguish when merely offensive speech becomes discriminatory conduct. Discriminatory conduct under the hostile environment cause of action must meet a threshold of severity or pervasiveness that would objectively prevent an individual from participating in educational programs. Rudeness and discourtesy is not enough, nor is "simple teasing," offhand comments, and isolated incidents that are not extremely serious.[30] Harassment does not occur

25. *Id.* at 238.

26. *Id.* at 239.

27. 158 F.3d 1022.

28. *Id*.

29. *Monteiro,* 158 F.3d at 1034.

30. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 82 (1998). *See also* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview.").

merely because words contain content or connotations that relate to protected class status. Harassment "must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive" and rise to the level of adversely affecting the student's educational benefits or opportunities, such that the victim is effectively denied equal access to these benefits and opportunities.[31] The Department of Education Office of Civil Rights's (OCR) standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's protected class, considering all the circumstances, including the alleged victim's age.[32] To create a hostile environment, racial harassment must interfere with or limit the ability of a reasonable minority student to participate in or benefit from educational services, activities, or privileges.[33]

In addition to private causes of action, OCR investigations can find that acts of harassment constitute discriminatory conduct and provide a range of remedies,[34] including climate surveys, development and dissemination of a policy prohibiting racial harassment, awareness trainings providing counseling, or taking disciplinary action against the harasser.[35] For example, in April of 2012 the University of California, San Diego and OCR entered into a consent decree. African American students had filed a complaint that alleged incidents of racial harassment interfered with their ability to access education. The incidents included public displays of nooses and a Ku Klux Klan-style hood, and the hosting of an off-campus party entitled Compton Cookout hosted by Kappa Alpha fraternity where students were invited to dress as stereotypes of African-Americans. The invitation stated:

> Ghetto chicks have a very limited vocabulary, and attempt to make up for it, by forming new words, such as "constipulated", or simply curs-

31. Letter from the Assistant Sec'y for Civ. Rts., U.S. Dep't of Educ., Off. for Civ. Rts., First Amendment: "Dear Colleague," (July 28, 2003), http://www2.ed.gov/about/offices/list/ocr/firstamend.html.

32. U.S. Dep't of Educ., Off. for Civ. Rts., Revised Sexual Harassment Guidance: Harassment of Students by Employees, Other Students, or Third Parties 5-8 (Jan. 2001), http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

33. *See* 34 C.F.R. § 100.3(b)(1)(iii) (1980).

34. Huntsville City School District, OCR Case No. 04-13-1325, http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04131325-b.pdf (including as remedies a notice of nondiscrimination, climate survey, grievance procedures, training, and a district statement regarding harassment).

35. *See* Policies and Procedures, *Racial Harassment Guidance*, University of California Berkeley Campus (January 2005), http://ophd.berkeley.edu/policies-procedures/hostile-environment. *See, e.g.,* Resolution Agreement Faulkner State Community College OCR Docket Number 04-14-2054, http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04142054-b.pdf (including as remedies a formal statement by the president of the university, a climate survey, grievance procedures, and staff training).

> ing persistently, or using other types of vulgarities, and making noises, such as "hmmg!", or smacking their lips, and making other angry noises, grunts, and faces.[36]

The Consent Decree provided for an Office for the Prevention of Harassment and Discrimination, a taskforce to determine how best to recruit and keep faculty from underrepresented groups, made "a knowledge of diversity, equity, and inclusion" a requirement for all undergraduates, allocated "permanent funding" for staff positions in ethnic studies minors, agreed to hire a Director of Development for Diversity Initiatives whose main job is to raise money "to promote diversity-related activities on campus," dedicated space on campus for the affinity groups, and set aside funding to recruit and retain minority students.

Conclusion: Discrimination Disrupts the Educational Function of the School

Universities that act to address a hostile environment can defend their actions against First Amendment challenges based upon the interest of students in attending a safe and orderly school where "the work and discipline of the school" is not "materially and substantially disrupted."[37] The Supreme Court has long recognized that "First Amendment rights must be analyzed 'in light of the special characteristics of the school environment.'"[38] "A university's mission is education" and the Supreme Court has never "denied a university's authority to impose reasonable regulations compatible with that mission," even when the restricted speech would be protected in other settings.[39]

Supreme Court cases addressing academic freedom permit schools to restrict speech that would offend "reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."[40] While the Court recognized the right of students to express their political beliefs through protest in *Tinker v. Des Moines Independent Community School District*, the Court simultaneously affirmed that schools can prohibit speech "which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities."[41] In *Healy v. James*,[42] the Court affirmed that universities may require reasonable regulations

36. University of California, OCR Case. No. 09-11-6901 (Apr. 13, 2012) http://2kpcwh2r7phz1nq4jj237m22.wpengine.netdna-cdn.com/wp-content/uploads/2012/05/Resolution-Agreement.pdf.

37. *Tinker*, 393 U.S. at 513.

38. *Widmar*, 454 U.S. at 267.

39. *Id.* at 268 n. 5.

40. *Healy*, 408 U.S. at 189.

41. *Tinker*, 393 U.S. at 514.

42. 408 U.S. 169 (1972).

for the "interest of the entire academic community."[43] Free expression and debate in the university are protected to the extent "consonant with the maintenance of order."[44] While the justification for pedagogical oversight is less compelling in the university setting than in elementary and high schools, university officials still have deference to "prescribe and control conduct in the schools."[45]

Of course, an "'undifferentiated fear or apprehension of disturbance'"[46] without any particularized reason as to why the school anticipates substantial disruption would not be sufficient to restrict speech under Title VI. The Tenth Circuit's decision in *West v. Derby Unified School District* No. 260[47] illustrates this point. In this case a middle school student was suspended for drawing a Confederate flag in math class. The Court upheld the suspension under *Tinker*'s substantial disruption standard, finding that the school had demonstrated a concrete threat of substantial disruption: "The district experienced a series of racial incidents [including 'hostile confrontations' and at least one fight] in 1995, some of which were related to the Confederate flag."[48] The Tenth Circuit held that the "history of racial tension in the district made administrators' concerns . . . reasonable."[49]

But even when facts do not suggest a disruption in the sense of an uproar, evidence of a hostile environment is proof of the disruption of a university's mission in the most fundamental sense of *Tinker*. When harassment based on race rises to a level of severity and pervasiveness that qualifies for Title VI protection, minority students have, by definition, been prevented from accessing educational programing. In such cases, schools are justified in intervening under the First Amendment's recognition of pedagogical interests.

Simply because hostile environment disruptions happen quietly when a student is too distracted to learn, or in ways that most intensely affect minority students who are few in number, or in ways that become invisible because the students who are affected withdraw from the hostile environment, this does not mean that the interference does not occur. In fact, this kind of disruption is precisely what hostile environment discrimination law is concerned with: a disruption in the education of minority students that leads these students to feel unwelcome and quietly disappear. Hostile environment conduct "intrudes upon . . . the rights of other students"[50] to learn—a legitimate justification for regulation of speech under *Tinker*.

43. *Id.* at 193.

44. *Id.* at 171.

45. *Tinker,* 393 U.S. at 507.

46. *Saxe*, 240 F.3d at 217 (quoting *Tinker*, 393 U.S. at 508).

47. 206 F.3d 1358 (10th Cir. 2000).

48. *Id.* at 1366.

49. *Id.*

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