Speech Protection and Protection from Speech: Forming Constitutional College Codes Regarding Hateful Expression

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**Introduction**

On February 27, 2015, a racial slur disparaging and threatening African-Americans was spray painted onto an outer wall of a dormitory building at Beloit College in Beloit, Wisconsin. This instance was the most egregious in a growing string of racist instances on the campus, and sparked outrage among the student body. Beloit College responded by condemning both this and previous actions, deeming it unacceptable and detrimental to the college community. While the college had already planned a series of discussions regarding racial identifications and biases as a result of recent notorious shootings of African-American men by law enforcement, the instances of racial hatred exhibited on their campus further demonstrated the need for such discussion and action. African-American students at Beloit College verbalized the pain and harm these instances of racial aggression had caused them, with one student noting that “It’s not just someone that doesn’t want me on campus. Someone wants me dead. It’s been four years of this. It hurts.”[[1]](#footnote-1)

This incident serves as just one example of a prevalent issue facing colleges and universities across the United States: hateful expression. Hate, in this context, is defined as active, intentional dislike, based on the recipients’ recognized or perceived identity.[[2]](#footnote-2) Expression, as defined in the First Amendment, refers to actions of speech, print, and assembly.[[3]](#footnote-3) Hateful expression can be recognized in a variety of ways; outbursts can be directed at a specific individuals or organized groups, or can be an indirect expression of hate toward a certain class of people. Hatful expression can be implied through allusion, even if difficult to recognize at times, while other forms can be quite explicit and clear to all those who witness it.[[4]](#footnote-4) Furthermore, hateful expression does not necessitate a face; some of the most troubling hateful expression is perpetrated by anonymous persons, such as the instances at Beloit College.

It is important to keep in mind, however, that simple discomfort, disdain, or dislike for something being expressed does not constitute suffering from hateful expression; to accept the most minor offenses as constituting hateful expression would push us down a slippery slope of over-protection and overly-regulated expression.[[5]](#footnote-5) Rather, hateful expression occurs when an individual or group feels particularly and specifically threatened by these enumerated means of expression. Regulations attempting to curb the existence of hateful expression must bear this in mind; otherwise, they may inadvertently regulated protected forms of expression. This caveat makes it difficult to forge the right path in creating constitutionally-sound regulations, yet this is precisely what this paper sets out to do. Although hateful expression regulations must contend with a long line of historical precedent that dictates their language, as well as the historical notion that expression should be protected as often as possible, nevertheless, the ideal campus hateful expression code can be determined and implemented through the use of narrowly-tailored, location-specific regulations on hateful expression in conjunction with hate crime language, because of the guidelines provided by historical precedent and legal discourse pertaining to hateful expression.

While the harm of hateful expression is variable, depending on the seriousness of the offense and the temperament of those who are affected by it, the very nature of hateful expression results in harm brought unto others.[[6]](#footnote-6) The harm that hateful expression inflicts upon the individual is most notable when evaluating a recipient’s self-image; those who are targeted by hateful expression are more liable to be fearful, humiliated and isolated from their surrounding community.[[7]](#footnote-7) Without some form of regulation on the types of expression permitted in a campus setting, the environment could go so far as to become hostile for students, or even discourage high school students of like backgrounds and characterizations of those who have been targeted from attending the university, harming the university’s goal of maintaining a critical mass of minority students.[[8]](#footnote-8)

In response to this gambit of issues surrounding hateful expression, college campuses have responded with the implementation of “speech codes,” with the hope of properly regulating and responding to hateful expression on their campuses. Since universities and colleges are self-governing bodies, they are justified in creating their own sets of rules and regulations to achieve their own goals, yet they must also contend with the reality that they are still dictated by state and federal law, regardless of their general autonomy.[[9]](#footnote-9) These codes, as a result of this caveat and beginning with the University of Michigan in 1989, have largely been deemed unconstitutional by federal courts. While universities try to remain mindful of the first amendment values of free speech and expression, these “speech codes” have been overwhelmingly overturned as a result of overbreadth and vagueness.[[10]](#footnote-10)

Despite this reality, universities and colleges across the country have continually tried to implement their own variations of campus “speech codes,” in hopes of finding ones that pass scrutiny. In response to this wave of legislative action by colleges, organizations such as the American Civil Liberties Union (ACLU) and the Foundation for Individual Rights in Education (FIRE) have challenged codes they find to be particularly egregious in their violation of First Amendment rights.[[11]](#footnote-11) Those that try to regulate hateful expression at deeper, concrete levels tend to be challenged and overruled; those that pass muster seem, upon evaluation, to be quite limited in their regulation and show little difference from general harassment regulations. The “perfect” code still remains elusive, and perhaps is nothing more than a hope. While perfection may not be possible, there is still room for improvement regarding campus regulations on hateful expression.

In this paper, I set out to suggest a potential path to constitutional regulations on hateful expression. I will first review the foundational literature to my argument to introduce the concepts I will be utilizing. Following this will be a review of the most important precedents dictating the formulation of campus speech codes, in order to provide a greater understanding of both the literature being utilized for this argument, as well as what constraints are placed on speech codes because of these decisions. From here, I will then evaluate some of the codes which have famously failed in the past, and evaluate the specific aspects of their language that caused their failure. I will also evaluate some of the “sound” codes, as deemed by the Foundation for Individual Rights in Education, to show the overall lack of substance directly related to hateful expression. In an attempt to bridge these gaps, I will propose my own path to forming constitutional codes regulating hateful expression. First, I will try to apply the “captive audience doctrine” and “public forum doctrine” to campus dormitories and housing in order to show how one could implement more stringent restrictions in these areas. Second, I will propose an application of the captive audience doctrine, in conjunction with the goals of Titles VI and IX, to justify more stringent restrictions on classroom expression, outside of that which is related to the course and subject being taught. Third, I will propose an adaptation of constitutional hate crime laws for the remainder of college campuses, in an attempt to circumnavigate many of the restrictions placed on creating campus speech codes, while still nearing the desired results.

**Part I: Literature Review**

1. **Defining Hate Speech, its Importance, and General Guidelines for College Campus Regulations**
2. Richard Delgado and Jean Stefancic, “Four Observations About Hate Speech,” *Wake Forest Law Review* 44 (Summer 2009).

Delgado and Stefancic’s article achieves its objective of defining hate speech and speaking to its importance as a legal issue, with emphasis on campus issues of hate speech. The authors make a point of recognizing that the debate at hand is largely being fought by progressive left-wing groups, pitting the ACLU and similar advocacy groups versus minorities, critical race theorists, and like-minded groups. This point is made to allude to potential compromise between these two sides, since they tend to agree on a plethora of other political issues. With regard to hate speech specifically, the authors provide a fairly expansive definition of the term. Hate speech is recognized as “direct or indirect; veiled or overt; single or repeated; backed by power, authority, or threat, or not.” The authors also note that it can be distinguished by characteristics, such as race, religion or sexual orientation, and that it can come in a variety of forms and expressions.

The authors go on to investigate the harms of hate speech on its various levels, in contrast to the harms that would befall a hate speaker whose expression would be limited or regulated in any manner. To the scholars’ credit, they recognize that harm does befall a hate speaker who is limited from expressing their views, but contend that the harm felt by the recipients of this hateful expression outweighs this harm, tipping the scales in the victim’s favor. Delgado and Stefancic also allude to the potential validity of time, place and manner regulations being constitutional at the conclusion of this article, but refrain from investigating this notion beyond their simple suggestion. This notion ties into how to properly implement the Captive Audience Doctrine, particularly the “place” component, which will be discussed later in this review.

1. Alexander Tsesis, “Burning Crosses on Campus: University Hate Speech Codes,” *Connecticut Law Review* 43 (December 2010).

Tsesis provides a review inspired by the holdings in the Supreme Court Case *Virginia v. Black*, which he contends changes the discussion on regulation of hate speech codes on college campuses. The author’s first important point is that discomfort, disdain, or dislike is not a valid justification for speech restrictions, regardless of morality. This is crucial to keep in mind when developing any speech codes; any violations must pass scrutiny and demonstrate legitimate violations of regulation upon expression, not something banned simply because of distaste for its moral implications. Tsesis also echoes Delgado and Stefancic’s point that any regulations must be mindful of speech rights, and ensuring there is some semblance of balance built into codes between these rights, and others rights to live unthreatened and without hate speech in their lives.

Tsesis gives a quick evaluation of the line of precedent dictating First Amendment law, summarizing their effects on regulations as needing to be mindful of First Amendment values, while trying to balance these interests with the interest of people living their lives unthreatened and unharmed. Tsesis moves on to discuss *R.A.V. v. The City of St. Paul, Minnesota*, noting that this case provides specific types of expression that are unprotected by the first amendment. The author notes that *Virginia v. Black* is so compelling because it directly prohibited an entire category of threatening expression, cross burning, without focusing on either the target of the burning or the content of the burning. The author then provides an evaluation of law and effects of law regarding hate speech in a variety of countries around the world in comparison to the United States. While the information regarding each country is interesting, perhaps the most important point made by this evaluation is that the United States is the only major democratic country not implementing stringent speech codes on hate speech, instead falling on the side of free speech more often than not. Tsesis then moves toward his recommendations for what a valid speech code should contain, including distinctions between university disciplinary measures and potential criminal charges, a negligent fault component, and required degrees of proof in finding an alleged violator guilty.

1. **The Captive Audience Doctrine and Supporting Regulation in Dormitories**
2. Melissa Weberman, “University Hate Speech Policies and the Captive Audience Doctrine,” *Ohio Northern University Law Review* 36 (2010).

Weberman’s article is primarily of significance for her investigation of the captive audience doctrine and its application to certain areas of college campuses. Weberman first points out that the Supreme Court has previously recognized the university’s right to exclude first amendment activities that interfere with one’s ability to receive an education, an important aspect when dealing with hateful expression on campuses and in classrooms. The author also gives a quick evaluation of Supreme Court cases that overturned certain campus speech codes, notably those at the University of Michigan and University of Wisconsin. These codes failed for being overly broad, creating chilling effects on speech, and using vague terms. Weberman also lists Central Michigan, George Mason, Shippensburg and Stanford as having had policies struck down as unconstitutional. Weberman notes that a code should not and cannot be classified as invalid if there is one conceivable impermissible application; there are limitless scenarios which could be presented, and should be taken case-by-case. Rather, codes cannot use sweeping language that would automatically violate a gambit of protected speech.

Weberman introduces the idea of the “captive audience doctrine” being applicable to campuses in three main areas. This relates back to the previous notion that time, place, and manner regulations can be implemented; by using the captive audience doctrine, it would be defended by implementing through the time, place and manner mantra, particularly place. If unwanted speech is intrusive to a point that listeners cannot reasonably avoid hearing or witnessing it, they are considered “captive” and the speech is now able to be regulated. Weberman argues that policies using this idea must be narrow and target only areas that are unavoidable: dormitories, walkways to and from dormitories and class, and the classroom. Weberman goes on to justify her rationale for applying the captive audience doctrine to these locations, as well as how to facilitate violations in these areas when they occur. While this does not afford regulation to the entire campus, Weberman argues that a system like this can more comfortably navigate the deterrents to the regulation of expression.

1. Joshua S. Press, “Teachers, Leave Those Kids Alone? On Free Speech and Shouting Fiery Epithets in a Crowded Dormitory,” *Northwestern University Law Review* 102 (2008).

Press’ article primarily gives further credence to speech regulations within the dormitory setting, which when combined with Weberman’s article, gives even greater strength to an argument for regulating expression in dormitories. Press begins by providing background information suited to give greater support to the validity and importance of hateful expressions harms. He notes that hate speech, particularly in the dormitory setting, could become hostile for students, and may harm the university’s goal of achieving a racially diverse critical mass within their student body. Press debunks the notion that using fighting words as rationale for restrictions is sound, noting that the Supreme Court has not upheld a conviction under fighting words since *Chaplinsky*, which is where it was introduced. Most ordinances being argued under this doctrine are overruled due to being vague or overbroad. Using this doctrine would be difficult on its face; singling out certain categories would make it content-based discrimination, which fails, while being too expansive in defining aspects would be struck down for overbreadth.

Press asserts that restrictions can pass muster, however, in the dormitory setting, echoing part of Weberman’s argument. If regulations are narrowly tailored and viewed as permissible because of the distress caused, the balance between speaker and listener might swing to the listener. Press spends much of the remainder of the article establishing dormitories as nonpublic forums, thus not being granted the same level of protection as public forums and making them more open for regulation. He cites *Frisby v. Schultz* as demonstrating a legitimate state interest in protecting unwilling listeners in their homes, and that speech can be prohibited when the captive audience cannot avoid speech. His claims are further backed by *Chapman v. Thomas*, a 4th circuit case which classified dormitories as nonpublic forums. Using the public forum doctrine, speech can be restricted in nonpublic forums, provided that the restrictions are not suppressing expression because of opposition from school officials. This also fits into the *R.A.V.* framework, and is a useful alternative to the fighting words doctrine.

1. **Hate Crime Legislation**
2. Hans C. Wahl, “The Right to be Offended: The Greatest of All Unenumerated Rights,” *Florida Coastal Law Review* 13 (Spring 2012).

Wahl begins his article by looking at the implications of the decision in *R.A.V. vs. The City of St. Paul, Minnesota.* He states that there were some in the field of constitutional law who interpreted this decision as saying that it is particularly unacceptable to evaluate and attack one’s speech or motivation while also evaluating any criminal conduct which may have occurred. This loophole, some reasoned, meant that it was acceptable to evaluate one’s speech and motivations *after* criminal conduct has been determined to be legitimate. This leads Press to the case of *Wisconsin v. Mitchell*, which determined whether or not enhancing existing criminal penalties was constitutional because the perpetrator’s motivation came from discriminatory hate. The court unanimously upheld the provision, contending that the First Amendment does not prohibit the use of speech as evidence to determine motive or intent for a crime, and that there is no reasonable chilling of protected speech occurring under such action. While hate speech laws are largely unconstitutional, hate crime laws are not.

Wahl argues, however, that there is no distinct difference between these types of law since determinations for motivation are based on a perpetrator’s prior speech and thoughts, placing focus on the content of speech still. Press contends, furthermore, that violent conduct motivated by hate is already illegal, and that there are no additional benefits to society through hate crime legislation. There are also issues of subjectivity with regard to evaluating one’s motivations, making its use inherently problematic. Such legalities create a slippery-slope toward governmental regulation of speech to a point that free speech no longer exists. To best deal with issues of hate, in Wahl’s view, is to allow those with bigoted views to express themselves, and then utilize one’s own freedom of speech, coupled with people’s right to be offended, to effectively respond to and educate these people. If left unchecked, Wahl fears that hate crime legislation will have detrimental effects upon individual liberty and freedom.

 Before analyzing the implications of this and other literature, it is important to first understand the most important precedents dictating the regulation of speech and expression on college campuses.

**Part II: Dictating Precedents**

1. **Doe v. University of Michigan**

The first notable federal challenge to University speech codes came in 1989 via the University of Michigan. After a string of seemingly racially motivated incidents over a three year span, the University of Michigan held meetings to draft a policy regulating campus actions and speech.[[12]](#footnote-12) The policy implemented three levels of regulation, dictated by the location of the issue: public areas of the campus, campus publications, and university buildings such as dormitories and academic centers. While speech in public areas of campus was largely “tolerated,” and University publications were deemed unsanctionable, University buildings were governed by a specific set of regulations. Violations in these sanctioned areas were recognized as stigmatizing persons via threat, and creating a hostile educational environment, based on “race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status.”[[13]](#footnote-13) The University also provided an example guide, in an attempt to highlight situations that would be deemed as violations of their regulatory system in order to clearly inform students of their expected behavior.[[14]](#footnote-14)

The ruling district court, while exploring the background related to the enforced code, recognized that the policy was drafted with the intent that offensive expression would merit regulation. Based on the example guide provided by the university, however, Doe’s desired expression would have been impermissibly regulated in this instance, as well as the existence of other impermissible regulations since the code’s adoption.[[15]](#footnote-15) Before addressing the issues of overbreadth and vagueness directly, the court makes a point of recognizing speech that, theoretically, could be sanctionable under a policy of this nature: “it can be safely said that most extreme and blatant forms of discriminatory conduct are not protected by the First Amendment, and indeed are punishable…discrimination in employment, education…are prohibited by the constitution.”[[16]](#footnote-16) The policy at hand, however, impermissibly prohibited large classes of speech without properly distinguishing between that speech which is constitutionally protected and that which is regulable.[[17]](#footnote-17) The University also failed to differentiate speech in a classroom discussion context which, while potentially offensive, would likely have legitimate protection, and speech wholly unrelated to the class which would be sanctionable.[[18]](#footnote-18) Both of these aspects represented the policy to be overbroad, and when coupled with the lack of discernable limitations, distinctions, or a definable scope, vague as well.

1. **UWM Post v. Board of Regents of the University of Wisconsin System**

On the heels of the decision in *Doe v. The University of Michigan* came *UWM Post v. The Board of Regents of the University of Wisconsin School System* in 1991, dealing with Wisconsin’s own speech code passed around the same time as Michigan’s. In response to their own string of racial incidents within the school system, the University of Wisconsin Board of Regents implemented their own non-discriminatory conduct policy, to be adopted at all of their governed institutions. The policy allowed the universities to discipline students directing hateful expressions at students which intentionally “demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age” of persons to purposefully create a hostile educational environment.[[19]](#footnote-19) Wisconsin, like Michigan, provided examples of violations in hopes of illuminating the type of conduct considered sanctionable for its students, as well as a pamphlet that gave examples of situations that both were and were not regulable.[[20]](#footnote-20)

Many of the same qualms with the Michigan policy appear in the Wisconsin opinion as well. While the court opinion concedes that a statute should not be considered invalid via overbreadth on its face because there is a single conceivable situation where the policy may be impermissible, it did find that the rule as written goes beyond the parameters laid out by the fighting words doctrine, the justification employed by the UW system, and regulates speech based upon its content, making it overly broad.[[21]](#footnote-21) Much of the speech being regulated would not incite violent reaction, making the university’s interest non-compelling, and causing it to fail the balancing test.[[22]](#footnote-22) The opinion also nixes any parallels between university regulations and Title VII requirements.[[23]](#footnote-23) The UW policy, furthermore, was deemed vague because of its under-explained terminology and failure to clarify whether violations must actually create a hostile work environment, or simply attempt to create one.[[24]](#footnote-24)

1. **R.A.V. v. City of St. Paul, Minnesota**

While not a case directly dealing with colleges and universities, *R.A.V. v. City of St. Paul, Minnesota* serves as a benchmark regarding constitutional regulation of hateful expression. This case investigates St. Paul’s Bias-Motivated Crime Ordinance, which dictated that people could be charged with a disorderly conduct misdemeanor if they place any type of symbol on property they know to cause anger for persons based on “race, color, creed, religion or gender.”[[25]](#footnote-25) While R.A.V. claimed that the ordinance was unconstitutional due to its lack of content-neutrality and its use of viewpoint-discrimination, the city of St. Paul contended that the particular language used aligned the code with the fighting words doctrine developed in *Chaplinsky*, thus granting it legitimacy.[[26]](#footnote-26) Before investigating the case at hand, the court first provides examples of legitimate regulations of expression, and concedes that “even the prohibition against content discrimination that we assert the First Amendment requires is not absolute.”[[27]](#footnote-27) These enumerated means of regulation will be evaluated at greater length later in this work.

Once the guidelines for regulation, both the standard requirements and the enumerated exceptions, are applied, however, the St. Paul law is determined to be unconstitutional. The first reason for this failure is that the laws lack of content-neutrality and predication on viewpoint discrimination by employing particular prohibitions on types of expression that are seen unfavorably, as opposed to a regulation on all types of fighting words.[[28]](#footnote-28) The ordinance could theoretically have placed restrictions on particular modes of expression, such as all fighting words delivered in a threatening manner, but to regulate certain types of fighting words while also ignoring the mode of delivery fails to pass constitutional muster.[[29]](#footnote-29) Although the court agrees that the particular instance being regulated was abhorrent, it found that there are more proper means of preventing this behavior without infringing on the First Amendment.[[30]](#footnote-30)

1. **Virginia v. Black Et. Al.**

The final major dictating precedent, *Virginia v. Black,* seems to build on *R.A.V.* and open the door ever so slightly for greater regulation on hateful expression. The concern here was a Virginia statue that made any intent of intimidation through the burning of a cross on someone’s property a felony, and dictated that any burning of a cross will serve as evidence of intent to intimidate.[[31]](#footnote-31) While Virginia contended that the law was constitutional and served a compelling state interest, Black and the other respondents contended that simply burning a cross is not sufficient proof that there was an intent to intimidate, and that the banning of cross burning specifically is content-discriminatory.[[32]](#footnote-32) Upon review, the Supreme Court found in favor of Black and the respondents, invalidating the Virginia law, but in an important plurality decision.

In their decision, the court first reviewed the history of cross burning in the United States, concluding that such an act is a “symbol of hate.”[[33]](#footnote-33) The court, however, settled that burning a cross does not inherently communicate intimidation, yet it recognized the impact that such an act of hate can have. The court then noted that the protections of the First Amendment are not absolute, leading them to evaluate the previous decision of the Virginia State Supreme Court. In this analysis, The Supreme Court rejects the Virginia court’s reliance upon *R.A.V.* to determine the Virginia statue was content-discriminatory because they did not prohibit every form of content-based discrimination. Instead, as stated in the analysis of *R.A.V.*, certain types of content can feasibly be banned in accordance with the constitution; because the Virginia statute aims to regulate such a dangerous type of intimidation, and it was not specific regarding who the intimidation was aimed toward, this type of regulation is valid.[[34]](#footnote-34) The law fails regardless, however, as a result of its provision which takes any cross-burning as intent to intimidate; there are cases where burning a cross is not intended to intimidate and, furthermore, there is no way to prove intent to intimidate beyond a reasonable doubt simply by the action occurring.[[35]](#footnote-35) Due to this extra provision, the Virginia statute was overruled.

1. **Implications of Precedents**

After reviewing four of the most important precedents dictating regulation of hateful expression, it is important to enumerate what the fallout of these rulings has been, both in what restrictions are placed on creating codes, as well as the concessions and allowances for regulations stated in these precedents. The courts recognize, most importantly, that there are conceivable regulations on speech and expression that would not violate the first amendment, most notably demonstrated in *R.A.V.’s* opinion. The court states that there is no potential for viewpoint discrimination when the rationale for this supposed discrimination is wholly related to why the speech is able to be regulated.[[36]](#footnote-36) The First Amendment, under this view, permits content regulation when the rationale for regulation is compelling as a result of the content being regulated, in conjunction with all other surrounding facts. If content is regulated, regardless of mode of delivery and the recipient of the content, and provided that the content being regulated is particularly virulent, regulations can pass constitutional scrutiny. *Virginia* provides a prudent example of proper content regulation; while the law failed because of the intent clause, outside of this blemish, the content-based nature of the statute was deemed constitutional as a result of the danger the regulated expression posed. If regulations treat potential violations on a case-by-case basis regarding their intent to harm or intimidate, they can justifiably regulate types of content.

These justifiable regulations, however, should be careful to toe the lines set by *Michigan* and *UWM* *Post*. Although these are not Supreme Court decisions, thus not mandating them as national precedent, their failure to be granted certiorari by the Supreme Court lends them legal legitimacy, and should be treated as if they are full precedents to avoid legal conflict. Taking this view, if attempts to regulate hateful expression are too expansive in what they try to regulate, they will still fail to pass scrutiny. There must be clear lines drawn between speech which is protected and unregulable under these codes, and that which is regulable. *Michigan*’s opinion even contends that most forms of discriminatory expression are not protected by the First Amendment, yet if the regulations are not clear in their efforts and inadvertently regulate protected forms of expression, this concession becomes moot. In addition, codes must have clearly defined limits built into their language, as well as the clear scope of the regulations, to ensure that these regulations do not accidently repress protected forms of expression.

Overbreadth and vagueness are the two main hurdles hateful expression regulations must contend with; one misstep will inevitably derail the entirety of regulations being implemented. In addition, because this is an educational setting, college hateful expression regulations must also be mindful of regulations pertaining to the classroom, to ensure speech which is defensibly related to the course being taught is not chilled by overbreadth. The threshold of proper regulation, however, does not require perfection; the *UWM* opinion recognizes that it is near impossible to conceive of every possible challenge to a regulation. This lessens the burden of code-makers substantially because they neither have to claim nor achieve perfection in their efforts, so long as they are mindful to not over-regulate. To get a better sense of exactly what these over-regulations look like, it is useful to provide some of the language from the failed Michigan and Wisconsin codes and evaluate their failing elements, and contrast these failures with codes that have been deemed “acceptable.”

**Part III: Code Evaluation**

1. **Failed Codes**
2. *University of Michigan*

“**Any behavior, verbal or physical, that stigmatizes or victimizes an individual** on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that

a**. Involves an express or implied threat to an individual's** academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extracurricular activities.

2. Sexual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual on the basis of sex or sexual orientation where such behavior:

a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.”[[37]](#footnote-37)

(It is important to note that section 1c was redacted from the policy before the issue was brought to court; section 2c which mirrors its language in application to sexual misconduct, however, remained in the policy.) There are two significant critiques to be offered when looking at this code, based on the court opinion regarding the policy. The first issue to address is this code’s overbreadth, particularly in regulating speech within the classroom that should ultimately be protected. On its face, the policy is subject to various lines of precedent, which all contend that content restrictions over broad classes of speech are impermissible, while time, place and manner regulations may be permissible.[[38]](#footnote-38) The Michigan policy lends no concern to the location or medium of the expression, instead placing blanket restrictions on “any behavior” that violates their enumerated regulations. In its application, three incidents governed by this code are cited in determining its scope, all within the classroom. In the investigations which followed, the intent of the speaker was largely irrelevant to whether or not any punishment would follow, and the application of the policy never gave an accused violator the recognition that their alleged violation may in fact be in haste because the expression could be protected.[[39]](#footnote-39)

To compensate for these failures, codes should avoid any kind of blanket restrictions, and instead tailor regulations to specific areas of campus, in conjunction with any other surrounding elements related to situations being pursued under the regulations. Codes should also implement a “negligent fault component,” to better distinguish expression that is protected and has some semblance of social or educational value, in hopes to alleviate the classroom incident.[[40]](#footnote-40) In keeping with the previous notion of tailoring codes to particular areas, however, there should be particular regulations for classrooms, which keep these past failures in mind and tailor the code to properly regulate expression in the classroom which is wholly unrelated to the course.

The issue of vagueness comes to the forefront when looking more directly at the language used in the Michigan policy. Use of words such as stigmatize or victimize are too general on their face and, furthermore, do not inherently constitute regulable expression.[[41]](#footnote-41) If the effect of the expression is to be a “threat” to the listener’s involvement with the University, the nature of this threat must be clearly defined since not all threats to one’s involvement are inherently unprotected.[[42]](#footnote-42) In short, the policy never clearly articulates how to discern regulable expression from protected expression, forcing students to largely guess whether or not certain expressions would be in violation. The issue of vagueness, unfortunately, is not one that has a specific “quick fix.” Rather, in order to account for the issue of vagueness, policies must be formed in much more rigid ways, using particular language that separates and defines protected and unprotected expression in order to ensure that most issues can be placed on either side of these lines.

1. *University of Wisconsin*

“UWS 17.06 Offenses defined. The university may discipline a student in non-academic matters in the following situations…

(2)(a) **For racist or discriminatory comments, epithets** **or other expressive behavior** directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets or other expressive behavior or physical conduct **intentionally**:

1. **Demean** the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and

2. **Create an intimidating, hostile or demeaning environment** for education, university-related work, or other university-authorized activity.

(b) Whether the intent required under par. (a) is present shall be determined by consideration of all relevant circumstances.

(c) In order to illustrate the types of conduct which this subsection is designed to cover, the following examples are set forth. These examples are not meant to illustrate the only situations or types of conduct intended to be covered.

1. A student would be in violation if:

a. He or she intentionally made demeaning remarks to an individual based on that person's ethnicity, such as name calling, racial slurs, or "jokes"; and

**b. His or her purpose in uttering the remarks was to make the educational environment hostile for the person to whom the demeaning remark was addressed.**

2. A student would be in violation if:

a. He or she intentionally placed visual or written material demeaning the race or sex of an individual in that person's university living quarters or work area; and

**b. His or her purpose was to make the educational environment hostile for the person in whose quarters or work area the material was placed.**

3. A student would be in violation if he or she seriously damaged or destroyed private property of any member of the university community or guest because of that person's race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age.

4. A student would not be in violation if, during a class discussion, he or she expressed a derogatory opinion concerning a racial or ethnic group. There is no violation, since the student's remark was addressed to the class as a whole, not to a specific individual. Moreover, on the facts as stated, there seems no evidence that the student's purpose was to create a hostile environment.”[[43]](#footnote-43)

 Many of the issues with the Michigan policy are once again at conflict in the Wisconsin code, those being instances of overbreadth or vagueness in the policy’s operative application. Part of the problem with this policy is not readily apparent because it derives from the justification used by Wisconsin in defense of the policy: the fighting words doctrine. The fighting words doctrine, established in *Chaplinsky v. New Hampshire,* requires that regulation only be placed upon classes of speech considered obscene, profane, libelous or insulating; regulation is placed on words that “by their very utterance inflict injury or tend to incite an immediate breach of the peace.”[[44]](#footnote-44) The regulations at play in this policy do not necessarily result in any immediate breaches of peace, nor do they inherently inspire any sort of violent reaction. If the code does not take into consideration the responses of victims or any consequences of the actions, an attempt to use the fighting words doctrine is a fruitless endeavor, as a compelling interest for the university is not discernible.

 A second major issue with the Wisconsin policy is the lack of clarification regarding the creation of an “intimidating, hostile or demeaning environment.”[[45]](#footnote-45) First, this terminology needs to be better explained and more universally understandable. Terms in a policy should not need their own explanation, rather they should *be* the explanation. Second, and a problem uniquely related to the Wisconsin policy, is the difference between the *intent* to create such an environment and the actual creation of that environment. For students to be in violation of the policy, it is not clear whether they must simply want to create some sort of hostile environment, or if they must actually succeed in carrying out this intention. This issue is exacerbated by emphasized sections of 1b and 2b of the Wisconsin code, in contrast with the emphasized text in (2)(a) and 2(b). While sections (2)(a) and 2(b), taken together, require the intentional creation of a hostile environment, sections 1b and 2b, through their providing of examples of infractions, state that a student would be in violation if they acted with the purpose of creating a hostile environment. Friction exists between these two ideas; one states that a student must intentionally create a hostile environment, while the actual examples of infractions necessitate only an intent to create such an environment. This invalidates the provided examples, and makes the qualifications for being found guilty unclear to any reader of the policy, at face value.

 The Wisconsin policy, like the Michigan policy before it, failed to constitutionally regulate hateful expression, and was therefore stricken down. If these are failed codes, employing language that one would initially think is attempting to be quite clear and can clearly be noted as well-intentioned in trying to defend victimized students, the question then is what language can and has passed the judgment of free-speech defenders. To answer this, one must look to existing university regulations that get at the issues being dealt with in these failed, direct codes.

1. **“Sound” Codes**

Before providing and discussing some of the “sound” campus policies, it is necessary to justify how these codes were chosen. The following codes were found through the Foundation for Individual Rights in Education (henceforth referred to as FIRE). The FIRE organization sets out to “defend and sustain individual rights at America’s colleges and universities,” including issues of free speech, equality and religious liberty.[[46]](#footnote-46) Through their website, FIRE defends the rights of university students when their First Amendment rights to free speech and expression are unlawfully violated by their respective universities. FIRE reads policies at hundreds of United States colleges and universities each year, giving each code a ranking, and if deemed necessary, advocating and facilitating legal action against particularly egregious codes. According to their database guide, there are three rankings a code can fall under: Red, which notes a policy that clearly and strongly restricts freedom of speech by infringing on protected means of expression; yellow, which notes a policy that is comparatively more limited in its restriction, but as a result of its language, could easily be used to curtail protected means of expression; and green, which notes a policy that does not seriously infringe upon free speech and is sound in nature.[[47]](#footnote-47) Based on these classifications, the following two codes were chosen due to their classification under the green heading by FIRE. While these codes have not yet been challenged in court and confirmed as constitutional, their recognition as acceptable by a prominent legal activist group lends them credibility as examples of “sound” policies in the eyes of the law.

1. *Arizona State University*

“HARASSMENT

It is a violation of University policy for any University employee or student to subject any person to harassment on University property or at a University ­sponsored activity.

Actions Constitute Harassment: If they **substantially interfere** with another's educational or employment opportunities, peaceful enjoyment of residence, physical security, and they are taken with **a general intent** to engage in the actions and with the knowledge that **the actions are likely to substantially interfere with a protected interest** identified in the subsection above. Such intent and knowledge may be inferred from all the circumstances.

Freedom of Speech and Academic Freedom: **Neither this nor any other university policy is violated by actions that amount to expression protected by the state or federal constitutions or by related principles of academic freedom**. This limitation is further described in the "ASU First Amendment Guidelines," the current version of which supplements this policy. (Available in the Office of the General Counsel)

Relationship to CCI: If harassment **is** discriminatory, it falls within the education, information gathering, and referral functions of the CCI. Harassment is discriminatory if taken with the purpose or effect of differentiating on the basis of another person's race, sex, gender identity, color, national origin, religion, age, sexual orientation, disability, other protected veteran status, special disabled veteran status, or Vietnam ­era veteran status.”[[48]](#footnote-48)

 The first thing that stands out about the Arizona State code is its seeming lack of depth in explaining its regulatory intention and reach. The first relevant section of this code comes in the “Actions Constitute Harassment” subsection; if an action interferes with someone else’s peace and security, and the actor has the general intent to, or knowledge that the action will, interfere with the targets peace and security, that person can then be considered to be engaging in harassment. This code does not, therefore, explicitly address hateful expression or even hate speech, just the broad classification of harassment. The enumerated classifications of discrimination in the final subsection are not directly tied to the “Actions Constitute Harassment” subsection; these classifications are tied to The Arizona State University Committee for Campus Inclusion, an advisory board which may recommend consequences for instances of discriminatory harassment, but have no authority to take any action themselves.[[49]](#footnote-49) This allows the code to avoid any issues of content-bias, disallowed by the holdings of *R.A.V*.[[50]](#footnote-50) While this lack of depth may be able to skirt legal boundaries and pass inspection, more specific regulatory action can be justified, and bland policies like this will do little to quell the outcries of students for their universities to actually care about acts of hateful expression on their campuses and properly respond to their existence.

 The Arizona State policy does universally succeed, however, with the inclusion of its third subsection, “Freedom of Speech and Academic Freedom.” Although one may consider this statement a given aspect of any policy, it is of paramount importance to directly recognize supreme laws governing expression. By noting that actions, speech, and expression afforded protection by both state and federal constitutions and law cannot be in violation of this regulation, the policy demonstrates mindfulness of the existence and merits of free speech. Balance between the interests of protecting victims of hateful expression and the constitutional right to freedom of expression is crucial to developing an agreeable policy, and small additions such as this go a long way in both recognizing and maintaining this balance, while also protecting the policy from failure, as this implies any accusation must first be determined to be unprotected. This will be unique to every university, since they may predicate their policies upon their own unique, developed rationales, but each rationale will have to be balanced against the right to free expression, more certainly guaranteeing that provisions will not over-regulate expression.

1. *George Mason University*

“III. STATEMENT ON FREEDOM OF EXPRESSION George Mason University believes that through active participation in an intellectually and culturally diverse learning community, students will be better prepared to deal with the issues they will face in a rapidly changing and diverse society. In the presentation of ideas, **the University encourages a balanced approach and respect for contrary points of view**. Being open to the ideas and opinions of other members of the community will lead to discussion that is characterized by courtesy, mutual respect, and charity. Congruent with these ideas is the principle that **all members of the George Mason University community enjoy the right to freedom of speech and expression**. The right to free speech and **expression does not include unlawful activity or activity which endangers or threatens to endanger** the safety or well-being of any member of the community. Further, **it does not include** any activity which **materially interferes with the education or well-being** of other students or the mission of the institution. 3 It is expected that members of the community will actively participate in programs and activities of the University and will support efforts to foster the identified values of the community. **All members of the community are expected to abide by local, state, federal, and international laws.**

VIII. ACTS OF MISCONDUCT Acts of misconduct include, but are not specifically limited to, the following:

7. Infliction of or threat of physical harm to any person(s), including self (when disruptive or detrimental to the community), or their property;

9. **All hostile, threatening, or intimidating behavior that by its very nature would be interpreted by a reasonable person to threaten or endanger the health, safety or well-being of another**. Examples of such behavior may include, but are not limited to: a) An act(s) that alarms or seriously disrupts another person’s ability to participate in any aspect of University life is prohibited; or b) Communicating verbally either directly or indirectly through another party, by telephone, regular or electronic mail, voice mail or any verbal, mechanical, electronic or written communication in a manner that would likely restrict or deny an individual’s access to educational resources, university activities, and university-related opportunities;

10. **Any form of harassment based on perceived or actual identities**;

23. Bias related incidents include but are not limited to any violation of the Code of Student Conduct motivated by a consideration of race, sex (including gender identity), color, religion, ancestry, national origin, age, disability, veteran status, or sexual orientation may subject the student to the imposition of a sanction more severe than would be imposed in the absence of such motivation.”[[51]](#footnote-51)

 The excerpted sections are the most pertinent to the topic of speech and expression regulation. While the George Mason code does not reference protected speech as explicitly as the Arizona State code, it does recognize that students must follow all supreme laws, which would include classes of protected expression under the First Amendment. George Mason’s code, furthermore, advocates for a balanced approach to matters of conflict regarding ideas and opinions, and asserts that all students have a right to freedom of speech and expression. Although not the same approach as Arizona State, these statements tend to achieve the same effect; asserting that there is a protected right to speech and expression, and the call for balance in these matters alludes to the fact that all accusations will first need to be recognized as unprotected by governing law. The code also goes far enough to recognize matters that do not fall under free speech and expression, although not in the clearest of terms, which was the court’s first issue with this code.

 George Mason’s code states that freedom of speech and expression does not protect any person who “endangers or threatens to endanger” community members, nor expression that conflicts with students education or well-being. By not providing examples, this code does not back itself into a corner where it over-protects, but without more stringent explanation, there is little clarity as to what is considered to meet this level of judgment. Beyond this problem, under heading “Acts of Misconduct,” the enumerations of misconduct related to expression are quite weak. Section 9, while potentially strong in its invocation of a rational-basis model of interpreting behavior or expression that would violate the code, gives overly-general examples of such violations. Section 10, in succession, gives no definition to “identities,” nor does it clarify proper definitions of identities anywhere else in the policy guidelines. This weakness could, coupled with a rational-basis approach to determining violations, inadvertently leave some group protections to the fate of subjectivity; although no direct evidence shows this *will* happen, it is not unimaginable for more historically recognized and stigmatized identities such as race to be afforded more stringent protection than those of more recently acceptable terms of identity, such as non-binary gender identifications. Although George Mason avoids locking itself into any over-regulatory policies, its lack of expansion leaves much to be desired.

 These are just two examples of “sound” regulations being used at colleges today. If these codes have passed the scrutiny of FIRE, meaning they are unlikely to come into conflict with any existing law, many may argue that this is a topic with no further need of discussion. If policies cannot be perfect, regardless of their approach, then some may be content to model regulations on policies such as these and move on to new issues. To ignore any further actions and improvements, however, would be doing a disservice to the intention of such policies in the first place. While it is true that policies should aim for the least restrictive means possible, if a compelling interest can be shown for more restrictive means while still maintaining a sense of balance between the right to be afforded protection from hateful expression and the right to freely express oneself, then that level of restriction should be considered the least restrictive means possible. This level of restriction would become the least restrictive mean necessary to properly regulate and balance this issue. Settling for bland policies that lack significant depth or agency regarding particular protections falls below the bar that should be set for regulating issues of hateful expression. Harm to actors who have their expression momentarily restricted until they are able to do so in a safe haven pales in comparison to the harm experienced by victims of hateful expression, and the pursuit for regulation should not acquiesce to these existing, unsatisfactory levels.[[52]](#footnote-52)

This does not mean that the balance should severely switch to the other side; beyond the obvious constitutional and precedential restrictions on doing so, there is significant value to having open discussion and communication in educational environments, particularly upon controversial topics such as the ones revolving hateful expression; an inadvertent chilling of open discussion would not only be illegal, but immoral as well.[[53]](#footnote-53) Campus officials, therefore, must aim for means of regulation that help to protect the interests of potential victims of hateful expression, while still maintaining free expression rights and a fostering of open dialogue on their campuses in general. Given this desired level of regulatory balance, there is a potential compromise path that may approach an effective system while still maintaining constitutionality, dependent upon specific, stringent regulations for certain places on campus that qualify, those being university dormitory housing and classrooms, and the utilization of hate crime legislation language to govern the rest of the campus.

**Part IV: Regulating Dormitories through the Public Forum Doctrine and Captive Audience Doctrine**

 The first campus locations that qualify for more stringent regulatory measures are campus-provided housing and dormitories. This location is supported through two legal principles, those being the public forum doctrine and the captive audience doctrine. On their own, each doctrine could justify the implementation of more particular regulations in the dormitory setting; when combined, the argument for regulation in dormitories is solidified even further. Before rationalizing why these specific principles are applicable, it is necessary to first understand their legislative history as well as their legal functions and purposes.

1. **The Public Forum Doctrine**

The public forum doctrine began its development in 1939, in the case of *Hague v. Committee for Industrial Organization*, which determined both that citizens have a right to express their opinions on public property, and that this is not an absolute right, affording public areas the potential for regulation if it is in the interest of the general populace.[[54]](#footnote-54) This regulation, however, must not overstep its bounds or curtail the right to free expression under the First Amendment.[[55]](#footnote-55) Moving forward from this decision, the Supreme Court began developing where the line between permissible and impermissible regulation of public forums lay. The court decreed that selective exclusions and regulations based on the content of expression was an impermissible regulation, and that it is largely open spaces, such as parks and sidewalks, that fall under the classification of a public forum.[[56]](#footnote-56) The most important development in applying the public forum doctrine to college dormitories, however, came in 1983 in *Perry Education Association v. Perry Local Educators’ Association*. The court in this case developed three classifications for forums: traditional public forums, designated public forums, and non-public forums.[[57]](#footnote-57) While particularly compelling justification is necessary to curtail expression in both public forum distinctions, non-public forums were afforded an implicit right to regulate expression based on both the subject of the expression and the identity of the actor.[[58]](#footnote-58)

This distinction opens up the possibility of regulation in a variety of new ways; if public property is not a traditionally held bastion of free expression, nor is it designated as a forum in which limitless expression is permitted, it is classified as a nonpublic forum and given legitimate means to regulate expression.[[59]](#footnote-59) The public forum doctrine has continued to expand as a legal concept, growing to be recognized as a vital standard within the application of the First Amendment.[[60]](#footnote-60) The added provision of nonpublic forums being able to regulate expression based on subject matter and speaker identity is a substantial win for proponents of regulating hateful expression. This power, although tempered by the clarification that regulations must be reasonably related to a legitimate purpose and must remain viewpoint neutral, is a tremendous ally for people who seek to justify a location they wish to more strictly regulate as a nonpublic forum.[[61]](#footnote-61)

1. **The Captive Audience Doctrine**

The captive audience doctrine was first developed in the Supreme Court Case *Cohen v. California* in 1971. Cohen was charged with disturbing the peace for wearing a jacket with the phrase “Fuck the Draft” written on the back.[[62]](#footnote-62) The Supreme Court reversed his conviction, based on the fact that a conviction was not justifiable through the use of the fighting words doctrine because his expression did not equate to any kind of expression unprotected by the First Amendment.[[63]](#footnote-63) The important element in this instance, however, is the court’s rationale for why, despite exposure of the expression to unwilling recipients, it was not violative of any constitutional laws. The Court recognizes that the government may take action to ensure that the private residence is protected from any sort of unwelcomed expression or ideas, and that those being subjected in private residences are “captive” to this expression.[[64]](#footnote-64) While Cohen’s expression did not translate to recipients being held captive in any sense, the court recognizes that there is indeed a “special plight of the captive auditor” that can and should be protected by the government.[[65]](#footnote-65) If some unwilling recipients or viewers are exposed to this harmful content, but they are in public and can readily avoid it, then they do not qualify as a captive audience; if these unwilling recipients are in their own private residence, or have no feasible or easily facilitated means of avoiding this expression, however, then they would qualify as a captive audience.[[66]](#footnote-66)

This ruling creates some leeway for proponents of regulating objectionable or hateful expression, that is, if the regulations can be shown to protect a truly captive audience. This can be difficult to do since the courts have provided a plethora of means through which unwilling listeners are able to avoid undesired expression.[[67]](#footnote-67) There are two main components to determining captive audience status: can the audience avoid the message, and should they have to avoid the message?[[68]](#footnote-68) It is this test that tends to give way to rulings supporting free expression rather than protection from expression. The most reliable and easily utilized determinant in deciding whether or not the captive audience doctrine is applicable is location. When dealing with issues on public property, it is difficult to come up with a plausible defense because the space belongs to neither the hateful speaker nor the unwilling listener of hateful expression.[[69]](#footnote-69) Certain political advertising has been deemed unconstitutional via the captive audience doctrine, through the case of *Lehman v. City of Shaker Heights*.[[70]](#footnote-70) Although there are other instances in which the courts have fallen on the side of restriction, identifying public expression that truly holds an audience captive to its content is a dubious endeavor; the Supreme Court and other lower federal courts attempt to rationalize ways an audience can avoid these unwanted messages when in public, continuing the historical trend of supporting free expression.

When looking at issues in one’s own home, however, the scales tip in favor of the unwilling listener; considered to be a place deserving of solitude and privacy, a listener is protected from undesired expression within and just outside of their home.[[71]](#footnote-71) The interests of an unwilling listener will supersede the interests of a suppressed hate-speaker when the issue occurs inside of the listener’s residence.[[72]](#footnote-72) This comes as a result of the second prong of the captive audience test: should the audience have to avoid the expression. When a person would have to vacate their own residence to avoid unwanted expression, this leads to an intolerable burden and invades one’s privacy. While there may be arguments among legal scholars regarding the full extent and applicability of the captive audience doctrine, it is almost universally agreed that the home qualifies for such protections, making its application in this realm the most assured use.[[73]](#footnote-73)

1. **Why These Doctrines Work**

When looking at colleges, there are easily discernible facets which point to college dormitories falling into the category of nonpublic forums. While the majority of college campuses are open to the public to peruse and explore, college dormitories are not one of these publicly accessible areas, instead acting as secure locations that only student residents may access.[[74]](#footnote-74) The added fact that dormitories already come under particular regulations from the college, such as accessibility privileges and quiet hours, make them far removed from a public forum reserved for free expression and places them in the wheelhouse of nonpublic forums, affording them particular regulations.[[75]](#footnote-75) This view is further bolstered by the case of *Chapman v. Thomas*, albeit only an appellate court case; the court determined that the public property under consideration, that being college dormitories, falls under the nonpublic forum classification.[[76]](#footnote-76) As long as the regulations put in place serve a reasonable purpose and do not “suppress expression merely because the public officials oppose the speaker’s view,” regulations can be applied to college dormitories.[[77]](#footnote-77) Much like the cases of *Michigan* and *UWM Post*, while this ruling does not act as Supreme Court precedent, it is reasonable to apply its holding as dictating rule unless otherwise overruled by the Supreme Court. Taken in this context, college dormitories fall under the general view of nonpublic forums. This opens the door for some semblance of regulation upon expression.

There is a strong, cogent rationale for imposing narrowly tailored regulations on expression in college dormitories, given the potential harm that can befall students who are subjected to hateful expression within their own living space.[[78]](#footnote-78) This is a particularly strong rationale when the various levels of harms via hateful expression are taken into consideration; in the dormitory setting, the majority of hateful expression is likely to occur face-to-face, which often results in the greatest harm to victims.[[79]](#footnote-79) The college, furthermore, has a vested interest in ensuring its students feel safe and are free of the harms of hateful expression; the allowance of hateful expression may lead students to leave the university, reducing their student body and also harming the universities goal of maintaining a diverse student body.[[80]](#footnote-80) Colleges have a legitimate rationale, based on these notions, that supports their ability to impose expression regulations in dormitories. These regulations, however, are tempered by the caveat that regulations cannot suppress a certain viewpoint, making it difficult ground to tread without overstepping the boundaries of the public forum doctrine. Given the nature of this particular nonpublic forum, however, the application of the captive audience doctrine affords greater freedom to colleges in applying particular restrictions, in order to protect the interests of student privacy and freedom from harm via hateful expression in their own homes.

The college dormitory serves as the home of many students, who are all learning to adjust to a new environment and function alongside each other in a new living environment, whether they like everyone they are surrounded by or not. In such a setting, some level of conflict is bound to arise between residents of the dormitory. In many instances, these conflicts are purely interpersonal, and not something deserving of campus intervention. When these conflicts, or when negative feelings that arise in residents, are grounded in matters of hateful expression, however, the captive audience doctrine is introduced to the equation. Weberman argues that students deserve protection within their own residence because it is their “home” while attending college and cannot reasonably be avoided; regulations would apply to hallways, common areas, bathrooms, while leaving students’ rooms unregulated since individuals have a right to allow or disallow expression in their own homes.[[81]](#footnote-81)

When using the two pronged test for the captive audience doctrine, this becomes quite clear. The second prong of the test is what matters in this setting; auditors should not have to flee or abandon their residence in order to avoid harmful and hateful expression.[[82]](#footnote-82) It is technically feasible for students to avoid these messages by leaving their dormitory whenever this harmful expression faces them, yet this does not mean that any victim should have to take these extreme measures. Rather, students should not have to fear victimization inside of their own home, and college campuses have an obligation and the constitutional support to impose stringent regulations within the dormitory setting in order to protect the interests of all those living there from incurring harm from hateful expression. This is a narrowly drawn regulation, aimed at protecting a truly unavoidable area for students, and should be carefully drawn so as to not overly restrict expression in any other areas of campus.[[83]](#footnote-83) If universities ground their regulatory policy regarding dormitories in the captive audience doctrine alone, they are within their constitutional right and will better be able to protect their students from hateful expression on a regular basis. When coupled with the public forum doctrine, however, this rationale is only further strengthened.

1. **Counterarguments**

In the case of *Widmar v. Vincent* in 1981, the Supreme Court recognized that, although different from traditional public forums like streets or parks, universities have many qualities inherently connected to public forums.[[84]](#footnote-84) Some may argue that this would deem colleges as a wholly public forum, invalidating arguments in support of dormitories as nonpublic forums. This contention was not made as a direct part of the ruling, however, nor did it explicitly mark college campuses as public forums, as it was found in a footnote of the decision.[[85]](#footnote-85) If we assume this holding does apply, however, the issue then becomes the employed language; “campus” does not inherently mean the entirety of the college’s property and buildings. One could argue that the rest of college campuses act as public forums, while college dormitories are afforded their own status, given the previously provided rationale for labeling them as such.

The second knock against the public forum rationale, however, has greater merit, since the public forum doctrine is meant to apply to government or publicly owned property.[[86]](#footnote-86) While this would maintain the employment of the public forum doctrine for public colleges and universities, its application to private institutions may be more difficult to justify. Private colleges are just that: private. They are privately owned, operated, and regulated. This does not mean, however, that private colleges receive no benefits from a federal standpoint because they still benefit from federal grants and student tuition monies that come through federal loans.[[87]](#footnote-87) If private colleges are still beholden to policies such as Title IX based on their interaction with the federal government, one could argue that this coverage extends to other legal mandates and ideas, such as the public forum doctrine. If an argument for the use of the public forum doctrine at private colleges is invalidated by this notion, however, they still have the captive audience doctrine to lean on in support of dormitory regulations.

There are some on the side of free expression who would attempt to twist the captive audience doctrine on its head in order to protect free expression, rather than allow for justifiable regulations to protect students from hateful expression. From this point of view, the campus is purveying expression which cannot be avoided by students, including potential hate speakers. The unwanted expression being placed on the potential hate speaker is the regulation restricting their ability to express their views, thus making *them* the captive audience and victimizing them.[[88]](#footnote-88) The rationale is that students are largely beholden to the university in their day-to-day lives; they live in university housing, go to class, may use university transportation and eat university provided food during determined hours, placing the power of the relationship overwhelmingly in the hands of the university.[[89]](#footnote-89) The student has little choice to avoid the campus setting, making restrictions on their free expression an undue burden that should be challenged. This is a grossly misinterpreted application of the captive audience doctrine. The captive audience doctrine is intended to protect people from truly intrusive, harmful expression that they cannot avoid. An individual being told he or she cannot express themselves to the fullest conceivable extent because the university wants to limit potentially harmful and hateful expression is far less of a burden than being unwillingly exposed to expression that victimizes and harms an individual on a regular basis. Using the captive audience doctrine in this manner does not protect potential hate speakers; it enables them to freely spew hateful views when there are constitutional means that allow for its regulation.

A second counterargument regarding the captive audience doctrine in this setting arises, which admittedly has greater merit than the previous challenge; since the dormitory is the speaker’s home, people therefore have a constitutional right to freely express themselves because it is within their own zone of privacy.[[90]](#footnote-90) It is undeniable that individuals have the freedom to express themselves within their own residence however they would like, and cannot be told to curb this expression. A college dormitory is not, however, solely one’s home; rather, the college dormitory is the communal home of many students. Although there is an interest in allowing speakers to freely express themselves in their residence, when weighing the restricted expression of one against the protection of many, the many outweigh the one.[[91]](#footnote-91) The university should try to strive for balance in its regulations regarding expression because there is a legitimate interest in allowing free expression of controversial and even offensive content.[[92]](#footnote-92) When the content becomes truly hateful and harmful, and is in an unavoidable environment, however, the balance must shift to the potential victims of hateful expression as this proposed regulatory path does.

**Part V: Regulating Classrooms through the Captive Audience Doctrine**

Constitutionally regulating the classroom poses a slightly greater challenge than regulating dormitories, yet it is a compelling and important area on campuses that qualifies for its own set of regulations. This area of campus is also justifiable under the captive audience doctrine, and is further supported by the provisions of Title VI of the Civil Rights Act of 1964 and Title IX of the United States Education Amendments of 1972.

1. **Why The Doctrine Works**

When looking at the college classroom to determine whether or not the captive audience doctrine lends any assistance in implementing regulations on restricting expression, the two-pronged test is once again applied. The classroom is afforded regulable status under the captive audience doctrine as a result of the second prong, much like dormitories, regarding whether the audience should have to avoid the expression. The primary objective of a university student is to live up to this title: student. To be a student, however, it is necessary to attend class, meaning there is no justifiable means of avoiding hateful expression in the classroom because all students are required to attend class.[[93]](#footnote-93) While students may technically be able to walk out of a classroom full of hateful expression of their own accord, this does not translate to them being able to avoid the expression, nor should students have to avoid the expression they are being exposed to. Students, rather, are captive to their environment, and would be unwilling listeners to any hateful expression occurring in the classroom.

This interest is further supported by the provisions of both Title VI and Title IX. Title VI states that no one can be excluded or discriminated against as a result of their race, color, or origin, and that institutions which receive federal funding may be reduced or cut off if they fail to uphold this standard.[[94]](#footnote-94) Title IX states that no one can be excluded or discriminated against in an educational setting on the basis of sexual identity, and that universities may have any funding cut or curtailed if they fail to uphold these standards.[[95]](#footnote-95) For both public and private colleges, these regulatory standards apply; although private colleges may not directly receive federal aid, they are still bound to these regulations because of the federal financial aid programs their students use, which they are the benefactors of in the form of funding and tuition. A failure to uphold these standards, therefore, is violative of the agreement put forth in these titles. Taken with the rationale of the captive audience doctrine, colleges have both justification and obligation to ensure that discriminatory hateful expression is not present in their classrooms.

In drafting regulations for the classroom, however, the university must be sure to include one crucial element in its policy: a negligent fault component. This component protects those using potentially offensive expressions for art, education, or something else with compelling social value.[[96]](#footnote-96) This harkens back to a need for balance, and to ensure that a code does not inadvertently regulate protected expression. For example, in a biology course, a student may use inflammatory language that is disparaging and harmful toward a certain racial identity, yet this may concurrently be related to the topic of the class however abhorrent some may find it. While their language may have been offensive, the content of their message had an educational purpose, thus granting it protection. If the same remarks were made in a calculus class, however, their relativity to the course being taught disappears, more likely making them hateful expression, which would be regulable. This also serves as a compelling remedy to some of the issues regarding the failed university codes; one of the major sticking points in *Michigan* was the lack of distinction regarding expression in the classroom. A negligent fault component regarding classroom expression would address this problem by protecting the university in its investigative and punishment process; any accusations of hateful expression occurring in the classroom would first be evaluated under the negligent fault component to determine if it was related to the course in any way, and if it is deemed to be irrelevant, further investigation can occur.

1. **Counterarguments**

In applying the captive audience doctrine, or any defensible means of regulation on classroom expression, dissenters would argue that this is counterintuitive to the essential purpose of the classroom, which is fostering a marketplace of ideas to better facilitate student learning.[[97]](#footnote-97) Colleges should be active in ensuring that this environment of sharing ideas is protected and properly facilitated.[[98]](#footnote-98) Taking this view, sanctions would violate the first amendment rights of the student, particularly because in this instance, regulated expression would likely contain some semblance of content or viewpoint bias.[[99]](#footnote-99) If classroom expression goes wholly unregulated, however, the threat of damage to the open marketplace of ideas still exists; victimized students may feel uneasy expressing their own views, still resulting in a suppression of ideas and harm to the learning environment.[[100]](#footnote-100) Presenting another case where harm is present on both sides, the harms of hateful expression polluting the marketplace of ideas are more severe than the harms of regulation suppressing the marketplace of ideas.[[101]](#footnote-101)

These suggested regulations, furthermore, actively work to maintain a proper balance within the marketplace of ideas, through its employment of a negligent fault component. This component attempts to ensure that any expression which is debatably related to the purpose of the course or topic being discussed is viewed as protected expression in order to avoid impermissibly regulating expression with social value.[[102]](#footnote-102) The negligent fault component works to ensure that only expression which is discerned to be wholly unrelated to the course or topic at hand can potentially be considered a violation of the college’s regulatory system. Given this component, in conjunction with the balance of regulation falling in favor of potential victims, justifying the need for regulation, the proposed method is the least restrictive means of regulating expression in the classroom.

1. **Why the Captive Audience Doctrine does not apply to the rest of College Campuses**

Some scholars may call for the application of the captive audience doctrine in other campus locations, and rationalize how a student is a captive auditor in these given areas, such as campus transportation and walkways.[[103]](#footnote-103) While these arguments may have a justifiable rationale for applying the captive audience doctrine, these areas also have much stronger counterarguments. Students are not beholden to only taking one path to and from campus buildings, even if an alternate path may take longer or be less ideal. Outside of the dormitory and the classroom, there are few, if any, locations on college campuses that students must be in and would have no easily facilitated way of avoiding or exiting if faced with hateful expression.

Those in favor of more stringent regulations on hateful expression may not be in favor of this view, but it is in the interest of protecting the aforementioned regulatory systems in dormitories and classrooms that other uses of the captive audience doctrine should be avoided. Just as was seen in the failed cases of *Michigan* and *UWM Post*, one faulty component of a regulatory system can be the downfall of the entire regulation. In the interest of maintaining the most stringent regulations where they currently lie, it is best to not push the limits of constitutional defensibility and justification. To use the captive audience doctrine in other areas of campus is pushing the limits of the doctrine, and threatens to overstep its jurisdiction, spelling failure for the system as a whole. Universities should instead find alternate means of combating hateful expression on the remaining areas of their campuses.

**Part VI: Why Have Past Regulations on Public Campus Areas Failed?**

After employing the previous arguments for regulatory systems in campus dormitories and college classrooms, questions remain regarding how to properly regulate the remainder of the college campus. Recalling the issues related to the decisions in both *Michigan* and *UWM Post*, the most damaging element in each case was the overbreadth found in each regulatory system which led to protected speech being impermissibly regulated.[[104]](#footnote-104) In addition, the guidelines as put forth by the decisions in *R.A.V.* and *Virginia* only allow for particularly narrowly tailored means of regulation, which cannot be predicated on the content of the expression being dealt with.[[105]](#footnote-105) The proposed regulatory systems in this paper thus far have kept this fact in mind, and have attempted to create location-specific, narrowly tailored regulations in order to avoid any issues of overbreadth or content-bias. If stringent regulations are applied to the remaining areas of college campuses, however, the likelihood of overbreadth or content-bias increases tremendously, given their lack of justification under legal doctrines which permit stringent regulatory measures.

It is for this reason that this paper will not advocate for any further codes regulating hateful expression in other areas of college campuses. If further regulatory measures are unlikely to succeed, their inclusion could potentially threaten the justifiable measures applied to college dormitories and classrooms. In the interest of maintaining these measures, an extension of aforementioned supporting doctrines, or attempts to justify regulation on public campus areas through other legal doctrines, are not advisable. There is an opening for an alternate, indirect method of curbing the presence of hateful expression on college campuses that, while likely less stringent than those on the side of regulation may wish to see, would violate neither First Amendment rights nor constitutional precedent on regulating hateful expression on college campuses: hate crime language.

**Part VII: Hate Crime Laws: Analogous to Hate Speech Codes and a Fitting Substitute for Public Campus Areas**

1. **History and Function of Hate Crime Law**

Hate crimes are deemed to occur when victims are selected because they are identified as members of a certain group or class of people the actor hates or has a negative bias towards.[[106]](#footnote-106) The development of hate crime law began with the implementation of the Civil Rights Act of 1968. This Act, also commonly titled the Fair Housing Act, gave the federal government the power to punish criminal activity motivated by racial, religious or ethnic bias within particular federally protected actions, such as applying for jobs and housing or participating in government-sponsored programs.[[107]](#footnote-107) While the use of hate crime law in this instance is fairly limited regarding what activities the government can and cannot impose penalties upon, the law served as a catalyst for attention to bias-motivated criminal acts.[[108]](#footnote-108) The need for greater application of hate crime law, however, would not be meaningfully recognized until the Hate Crime Statistics Act in 1990, which implored the Attorney General (who, in turn, delegated responsibility to the Federal Bureau of Investigations) to gather information regarding the occurrence and prevalence of hate crimes in the United States.[[109]](#footnote-109) The results of this investigation showed that an overwhelming amount of participating law enforcement agencies did not report hate crimes within their jurisdiction, even though more than one third of these agencies did in fact have hate crimes occur.[[110]](#footnote-110) This lack of recognition demonstrated the failure of agencies to properly recognize and respond to criminal actions motivated by hate based on particular identities and personal classifications.

 States would begin to enact their own versions of hate crime legislation, with the first challenge to such legislation in the Supreme Court being heard in the 1993 case *Wisconsin v. Mitchel*l. In this case, Mitchell was charged with aggravated battery, and had his penalty enhanced because he chose his victim by racial identity.[[111]](#footnote-111) The court wrote in its opinion that the Wisconsin statute “singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm.”[[112]](#footnote-112) In doing so, the state has not infringed upon the First Amendment because the amendment does not disallow the use of past speech and expression to determine an actor’s motive, and in turn, increase criminal penalties because of the biased nature of the crime.[[113]](#footnote-113) The Court thus recognized that states have a compelling interest to increase the penalties for criminal actions, after determining the crime to have occurred and the alleged party to be guilty, if their motivation for committing the crime was through bias toward someone’s recognized or perceived identity. Forty-five states implemented their own versions of hate crime laws as a result of the ruling in this case.[[114]](#footnote-114) This ruling was pivotal; while the semblance of hate crime laws had federally existed through the Civil Rights Act of 1968, it was this instance that cemented their legality within the states and judicially validated their legitimacy as sound legal doctrine. This power was expanded for the federal government in 2009 through the Shepard-Byrd Act, which stripped away the specific investigable classes as outlined in the Civil Rights Act of 1968 and allowed the Department of Justice to investigate and penalize persons who commit crimes based in identity bias.[[115]](#footnote-115)

1. **Applying Hate Crime Language to Campus Regulations**

Hate crime legislation, as a result of the aforementioned legislative history surrounding it, has constitutional and precedential legitimacy, both at the federal and state level. What is important with regard to applying this legislation to college campuses, however, is how hate crime laws operate in practice, in comparison to codes limiting hate speech or hateful expression. The traditional hate speech code focuses on regulating specific expression based on specific content or viewpoints toward specific identities, which inevitably results in the decree that said regulation is unduly content-based or view-point biased.[[116]](#footnote-116) Hate crime law, however, adds additional penalties onto existing sanctions if the motivation for the unlawful act is via specific content or view-points, those which hold bias toward specific identities.[[117]](#footnote-117) This operational difference is the key distinguishing factor between the two ideas: speech codes focus purely on the content and motivation of an act, and consider it throughout its investigation, while hate crime laws only consider such content and motivation after a criminal act has been determined to occur, and seeks to enhance the given penalties to highlight the special damage that hate crimes cause.

This key difference between the two doctrines works well to solve the problem many colleges face in trying to regulate hateful expression on their campuses. The use of hate crime language would not explicitly disallow particular types of expression or specific content from being expressed, but would rather be an addendum to the investigative policy of campus violations as a whole. These actions require physical action to occur in a way that violates existing campus policies before any issues regarding bias or motivation are taken into consideration.[[118]](#footnote-118) If hate crime legislation is recognized as legal at the state level, and it is functionally analogous to hate speech laws, then the application of hate crime legislation to the remainder of campuses can achieve the same goals without the same legality issues. While general expression and demonstrations on campuses may not be easily or, quite frankly, constitutionally regulated, any actions which are perceived as violating other rules, particularly under harassment codes unrelated to specifically regulating hateful expression, could then be treated under hate crime regulation if they are found to be motivated by such ideas. For example, an individual who vandalizes the outside of a campus building would be violating campus regulations and subject to punishment. If this vandalism was rooted in racial hatred (through the use of racial epithets or inflammatory imagery such as a noose), however, the hate crime addendum would be applied and more stringent penalties could be assigned to the criminal actor.

This approach circumnavigates much of the resistance and challenges that typical campus codes regulating expression face. Given that states are afforded the right to apply their own versions of hate crime legislation, it is not a stretch to allow colleges to mimic the language of these laws in their own regulatory systems.[[119]](#footnote-119) The use of hate crime language may not fully satisfy those on the far end of the spectrum in favor of stringent regulation; hate crime statues are only largely applicable to actions which can be deemed to have occurred and with a guilty party, and hate crime statutes that try to deal with simply threatening expression cannot use content as a differentiating factor.[[120]](#footnote-120) This could potentially result in actions which some may deem victimizing going unpunished, with no feasible means to remedy this moral wrongdoing, because they do not fall under the jurisdiction of the hate crime clause of the colleges regulatory system.

This system, however, is advantageous through its strong legal precedence and support. Since laws of these nature have already been given approval by the Supreme Court, the likelihood that they would be successfully challenged and overturned as a violation of student’s right to free expression is significantly reduced. The invocation of hate crime language will, in essence, act as an indirect measure of regulating hateful expression.[[121]](#footnote-121) Both approaches would inevitably end up punishing the same actions in all likelihood as well, given that actions which are only offensive or obscene are granted constitutional protection.[[122]](#footnote-122) College codes attempting to regulate hateful expression have no more power to halt offensive expression than hate crime legislation.[[123]](#footnote-123) Both approaches will only be able to impose penalties onto actions which truly exemplify an act of direct, targeted hateful expression, yet expression regulation is controversial and difficult to properly articulate while hate crime legislation has legal support. By using hate crime language in regulatory policies, colleges can still regulate the presence of hateful expression on their campuses, once they investigate and determine a violation of their already established codes to have occurred, through added penalties condemning bias-motivated acts of hate.

1. **Counterarguments**

Some would argue that the use of hate crime laws is a facetious endeavor; there are already criminal statutes in place that criminalize violent behavior and other various criminal acts, and implementing additional penalties after the fact does nothing to curb hateful expression.[[124]](#footnote-124) If the given laws do nothing to prevent the action from occurring, and instead simply impose more stringent penalties after the fact, there is no strong justification for their existence. This is a particularly narrow view of the benefits of hate crime legislation. It already goes without saying that criminal statutes exist which penalize the crimes hate crime legislation would apply to. This does not inherently mean hate crimes laws do nothing to curb their occurrence or have no added benefit to society; knowing that the ensuing penalties for criminal acts based in identity-bias are more severe both provides extra caution to a potential actor from committing such an act, as well as shows these attacked groups that their victimization is recognized, validated, and an important issue that deserves special attention.[[125]](#footnote-125)

Another issue that can be taken with hate crime legislation is precisely why it is so beneficial to college campuses: its parallels hate speech or hateful expression codes. Some argue that because these two ideas are functionally analogous, the holding in *Wisconsin v. Mitchell* is in conflict with the decision in *R.A.V. v. The City of St. Paul, Minnesota*.[[126]](#footnote-126) Whether dealing with hateful expression regulation or hate crime laws, the content of past speech and expression is still considered under these codes, constituting an undue infringement of First Amendment rights to free expression.[[127]](#footnote-127) This conflict, however, is remedied by the decision in *Virginia v. Black*, telling those who implement hate crime law that statues dealing with threats cannot use the content of the threat as its distinguishing feature.[[128]](#footnote-128) This argument, however, is invalidated by the simple fact that hate crime legislation has been validated by the Supreme Court, regardless of these semantic issues pertaining to when an actor’s speech and expression are considered; unless and until this holding is overturned, there is no reason to shy away from its implementation. Those on the side of greater free expression may not be pleased with the legality and use of hate crime laws in parallel manners to regulations on hateful expression, but just as they advocate, the simple fact that one holds disdain or is upset by something does not make that action illegal.

**Conclusion**

 Forming constitutionally sound regulations on hateful expression is a difficult process, given the particular structure and language that these regulations must employ to ensure that they do not become overly broad or regulate in a manner which is impermissibly vague. While Supreme Court precedent largely helps in the understanding of what is not workable, it gives very little direct guidance regarding how to create workable regulatory systems. Codes which do not overstep the boundaries put in place by the constitution and ensuing Supreme Court precedents do not act in a stringent enough manner to satisfy many on the side of protection from hateful expression. This reality calls for a new approach to regulating hateful expression on college campuses, particularly focused on justifiable locations receiving more stringent regulations, while treating the majority of the college campus in a different manor. Through the utilization of the public forum doctrine and captive audience doctrine, colleges can impose more stringent regulatory manners upon their dormitory housing. The captive audience doctrine also supports the implementation of more stringent regulatory manners within the college classroom, with the caveat that a negligent fault component be included, to ensure that expression contributing to the course at hand, in any manner, is not unduly regulated. The remainder of the college campus, meanwhile, cannot justifiably receive the privileges of more stringent regulatory manners; instead, the remainder of the college campus should be governed through the language of hate crime legislation. The use of hate crime legislation will allow for colleges to largely achieve the same ends that a hateful expression regulation would, allowing the college to impose stricter penalties on determined violations of other regulatory codes, without overstepping the bounds of either the constitution or Supreme Court precedent.

 Reforms to college regulatory systems, however, cannot combat the ills of hateful expression alone. These proposed measures have a limited amount of expression which can be legally and properly regulated and will undoubtedly result in hurtful forms of expression still appearing on the college campus. Attempts to invoke counter-speech, the use of positive forms of expression to combat this harmful expression, are largely unsuccessful and cannot be relied upon to deal with these issues, either.[[129]](#footnote-129) Counter-speech does nothing to reduce the harms of hateful expression and in some cases may intensify the levels of harassment originally employed.[[130]](#footnote-130) The utilization of positive speech and imagery in early education with regard to identities, in hopes of reducing the prevalence of hateful expression later, is a noble and important idea, but to try and use this approach to combat existing hateful expression is a fruitless endeavor.

 The lack of clarity regarding the regulation of hateful expression is exacerbating the gap between each sides of the hateful expression debate and it must inevitably be addressed in a definitive manner by the Supreme Court. Between the tensions of *R.A.V. v. St. Paul*, *Virginia v. Black*, and *Wisconsin v. Mitchell* alone, either side of the debate can theoretically justify their approach, albeit with each facing legitimate counterarguments from the opposition. This fact, coupled with the outrage over incidents at college campuses across the United States, such as at Beloit College, will eventually force the Supreme Court to take a clear, definitive stance on the legitimacy of this issue, as well as the proper means of regulating and controlling these issues. Until that decision comes, however, colleges are largely left in the dark, hoping that the regulatory system they choose to employ passes the scrutiny of organizations such as FIRE, as well as constitutional muster. Colleges that predicate their systems upon these outlined justifications and through these suggested measures, however, stand a better chance than most at succeeding.

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107. The Civil Rights Act of 1968, Public Law 90-284, 82 Stat. 73 (April 11, 1968). [↑](#footnote-ref-107)
108. Meli, “Hate Crime and Punishment,” 935. [↑](#footnote-ref-108)
109. Matthew Trout, “Federalizing Hate: Constitutional And Practical Limitation to the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009,” *American Criminal Law Review* 52 (Winter 2015): 137. [↑](#footnote-ref-109)
110. Meli, “Hate Crime and Punishment,” 936. [↑](#footnote-ref-110)
111. Wisconsin v. Mitchell 508 U.S. 476, 479 (1993). [↑](#footnote-ref-111)
112. Ibid, 488-489. [↑](#footnote-ref-112)
113. Ibid, 490. [↑](#footnote-ref-113)
114. Wahl, “The Right to be Offended,” 393. [↑](#footnote-ref-114)
115. Meredith Boram, “The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act: A Criminal Law Perspective,” *University of Baltimore Law Review* 45 (Spring 2016): 345. [↑](#footnote-ref-115)
116. Wahl, “The Right to be Offended,” 394. [↑](#footnote-ref-116)
117. *Ibid.* [↑](#footnote-ref-117)
118. *Ibid.,* 395. [↑](#footnote-ref-118)
119. Meli, “Hate Crime and Punishment,” 934. [↑](#footnote-ref-119)
120. Trout, “Federalizing Hate,” 146. [↑](#footnote-ref-120)
121. Wahl, “The Right to be Offended,” 396. [↑](#footnote-ref-121)
122. Doe v. University of Michigan, 866. [↑](#footnote-ref-122)
123. Weberman “The Captive Audience Doctrine,” 579. [↑](#footnote-ref-123)
124. Wahl, “The Right to be Offended,” 397. [↑](#footnote-ref-124)
125. Boram, “Hate Crimes Prevention Act,” 368. [↑](#footnote-ref-125)
126. Trout, “Federalizing Hate,” 146. [↑](#footnote-ref-126)
127. Wahl, “The Right to be Offended,” 396. [↑](#footnote-ref-127)
128. Trout, “Federalizing Hate,” 146. [↑](#footnote-ref-128)
129. Tsesis, “Burning Crosses on Campus,” 663. [↑](#footnote-ref-129)
130. *Ibid.* [↑](#footnote-ref-130)