UNSHACKLE THE STATEMENTS: HOW ANTI-DISCRIMINATION CODES ARE STERILIZING THE FREEDOM OF SPEECH AT PUBLIC UNIVERSITIES

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Abstract

In June of 2015, a young South African girl named Zizipho Pae ("Zizi"), who was the Acting President of the Student Representative Council ("SRC") of the University of Cape Town ("UCT") representing a student body of approximately 27,000, posted as follows on her personal Facebook page: "We are institutionalizing and normalising sin. May God have mercy on us." Even though the post did not say this explicitly, her post was intended as a response to Obergefell v. Hodges. In protest, members of the University's Queer Revolution broke into her office and, among other things, vandalized it, then took off their clothes, took pictures, and posted them on her Facebook page. They also filed a "hate speech" complaint against her with the University and reportedly also with the South African Human Rights Commission, had her expelled as member of the SRC without proper reasons or process, and almost got her scholarship revoked. The group quickly accomplished all of this despite the fact that there is a cut and dry right to the freedom of speech and expression in the South African Constitution. After requesting the University to review the SRC's decision to expel her, the Vice-Chancellor of the University reinstated Zizi as member of the SRC because her post was protected by the Constitution. However, what if Zizi had been a student at a university in the United States? Could she be removed, prosecuted, or expelled for her statement on Facebook?

Oliver Wendell Holmes once said, "The best test of truth is the power of the thought to get itself accepted in the competition of the market and that truth is the only ground upon which their wishes safely can be carried out." Freedom of speech has long been a stalwart principle that has kept the United States the most powerful nation in the world, but in recent years, anti-discrimination, harassment, and hate speech codes within public university student handbooks have severely limited students' freedom of speech and expression and have threatened that foundational freedom. This Note suggests that current case law in the United States is not strong enough or clear enough to protect students' right to freely exchange beliefs in the free marketplace of ideas because oftentimes

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university policy will either trump a student's constitutional right or unconstitutionally punish students for constitutional speech because university administrators are ignorant of the law. This Note also proposes an alternative framework and solution that allows for courts to balance both the university's authority to limit speech according to legitimate pedagogical concerns and the students' right to freely express themselves and exchange ideas as they should so see fit. Incorporating a clear framework in student handbooks and in case law that honors this balance according to the law will promote consistency, reliability, and objective analysis by reviewing disciplinary hearing boards and courts, and will ultimately ensure an appropriate balance between the freedom of speech and university interests.

INTRODUCTION

In response to a United States Supreme Court case,[1] a young South African girl named Zizi Pae posted a thought on her Facebook wall just like she did most every other day: "We are institutionalizing and normalizing sin! . . . May God have mercy on us."[2] Then, June 28, 2015 turned into a quite unordinary day for her. Zizi was the acting President of the Student Representative Council ("SRC") of a student body of almost 27,000.[3] A few hours after she posted, her office was broken into by members of the campus group Queer Revolution,[4] had her Scriptures ripped off the walls,[5] and had semi-naked pictures of the members in her office posted on her Facebook page with the caption "[We are] [b]ringing sin into the Holy SRC [office] of Zizipho Pae."[6]

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1 Michael Gryboski, *'May God Have Mercy on Us,' Says Christian Cape Town Student Forced Out of Leadership Role for Facebook Comment Opposing Gay Marriage*, CP WORLD (July 28, 2015), http://www.christianpost.com/news/may-god-have-mercy-on-us-says-christian-cape-town-student-forced-out-of-leadership-role-for-facebook-comment-opposing-gay-marriage-142005/. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2619, 2642–43 (2015), legalized same-sex marriage within all jurisdictions in the United States.

2 Zizipho Pae, FACEBOOK (June 28, 2015), https://www.facebook.com/zizipho.maduna/posts/1146044868755871.

3 *Statistics*, UNIV. OF CAPE TOWN, http://www.uct.ac.za/about/intro/statistics/ (last visited Dec. 22, 2015) (noting the total number of students enrolled as of 2014).

4 *UCT Student Leader Victimised Over Christian Viewpoint on Same-Sex Marriage*, GATEWAY NEWS (July 2, 2015), http://gatewaynews.co.za/uct-student-leader-victimised-over-christian-viewpoint/.

5 *Christian Student Threatened for Opposing Gay Marriage on Facebook*, CHRISTIAN INST. (July 16, 2015), http://www.exministries.com/christian-student-threatened-for-opposing-gay-marriage-on-facebook/.

6 Ra'eesa Pather, *UCT Queer Community Sets Its Sights on Pae*, THE DAILY VOX (July 3, 2015), http://www.thedailyvox.co.za/uct-the-queer-movement-has-been-born/; *see* Carlo Petersen, *UCT Homophobe Gets Booted Out*, IOL CAPE TIMES (July 23, 2015), http://sbeta.iol.co.za/capetimes/uct-homophobe-gets-booted-out-1889325.

The University of Cape Town Queer Revolution ("UCTQR") demanded Zizi's resignation "on account of her queer antagonistic bigotry,"[7] so the SRC immediately removed her from her presidential duties and then attempted to hold a formal hearing on the matter.[8] The hearing unfortunately dissolved into a shouting match at which members of the Lesbian, Gay, Bisexual, and Transgender Plus (LGBT+) community took their clothes off and commanded the chairman to rule in their favor,[9] so the chairman adjourned the meeting and left the room. Unabated, the remaining members quickly replaced him with a newly elected chairman, and the members voted to dismiss Zizi from the SRC without following proper due process procedures and without giving her a chance to testify on her behalf according to those same procedures.[10] The UCTQR immediately filed a complaint against her with the Human Rights Commission,[11] and a lobbying push began with the goal of seeing Zizi lose her scholarships to the university.[12] She was called an "idiot," a "homophobe," an "ignorant b****",[13] and received hundreds of hate mail messages in her Facebook inbox.[14] Then a Member of Parliament, Mr. Marius Redelinghuys, began to speak out against her and demand that she retract her statement through "a long series of mocking, insulting and other pro-homosexual messages which amount[ed] to harassment."[15]

The school administrators largely refused to get involved, citing campus group autonomy and the anti-discrimination clauses in the UCT student handbook.[16] If lawyers from Freedom of Religion South Africa (FOR SA) had not taken her case *pro bono* and stepped in to help turn the tide of public opinion back in her favor via an extensive media campaign, she might have had to drop out of school because of the intense public

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[7] *Id.*

[8] UCT SRC, FACEBOOK (June 30, 2015), https://www.facebook.com/uct.src/photos/a.905100332874551.1073741833.895318217186096/94797093525417/.

[9] Freedom of Religion S. Afr., *My Story by Zizipho Pae-Part II*, YOUTUBE (Aug. 11, 2015), https://www.youtube.com/watch?v=HTMuJJlIrTY [hereinafter FORSA].

[10] UCT SRC, *SRC Minutes from the 21st of July 2015,* FACEBOOK (July 21, 2015), https://www.facebook.com/uct.src/photos/a.962140463837204.1073741838.895318217186096/962140477170536/?type=3&theater.

[11] Carlo Petersen, *UCT Homophobe Gets Booted Out*, IOL CAPE TIMES (July 23, 2015), http://sbeta.iol.co.za/capetimes/uct-homophobe-gets-booted-out-1889325.

[12] Pather, *supra* note 6.

[13] Andre Viljoen, *Christian Leaders Speak Out Against Victimisation of "Expelled" UCT Student Leader*, GATEWAY NEWS (July 23, 2015), http://gatewaynews.co.za/christian-leaders-speak-out-against-victimisation-of-uct-student-leader/.

[14] Freedom of Religion S. Africa, *supra* note 9.

[15] Carlo Petersen, *DA MP's Comments 'Unacceptable'*, IOL CAPE TOWN (July 28, 2015, 2:23 PM), http://sbeta.iol.co.za/news/politics/da-mp-s-comments-unacceptable-1891827.

[16] Letter from Dr. Max Price, Vice-Chancellor, Univ. Cape Town, to Colleagues and Students, Univ. Cape Town (July 28, 2015) (on file with the University of Cape Town), http://www.uct.ac.za/dailynews/?id=9274.

opinion pressure that was rising against her.[17] Surprisingly, the biggest issue was not that she had made the allegedly discriminatory statement, but that she had made the statement as a student body leader.[18] In this day and age, are student leaders at public universities who hold controversial, sincerely-held religious beliefs in danger of losing their right to speak freely about those beliefs because their speech might be perceived as school-sponsored or as discriminatory?[19] Currently, student handbook discrimination and harassment codes in both nations are severely limiting students' constitutional right to the freedom of speech more and more. The problem is, school administrators are either entirely unaware of the sometime unconstitutionality of the codes or are unmoved by the rights of students. Further, if students do choose to stand up for their rights and pursue what is often the only remedy, a lawsuit, courts are without legal tests or guidance as to how to handle situations like Zizi's. Therefore, student free speech is chilled and fewer and fewer students speak about their beliefs as a result.

The South African Constitution and the South African Constitutional Court share many similarities with the Constitution of the United States and the United States Supreme Court.[20] For example, Section 15 of the Bill of Rights in the South African Constitution explains that "[e]veryone has the right to freedom of conscience, religion, thought, belief, and opinion,"[21] and Section 16(1) explains that "[e]veryone has the right to freedom of expression, which includes . . . freedom of the press and other media; . . . [and] freedom to receive or impart information or ideas."[22] However, Section 16(2) voids the previous rights if there is an "incitement of imminent violence; . . . or advocacy of hatred that is based on race,

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[17] *See Free to Believe and Free to Speak, or Not?,* FOR SA (Jul. 15, 2015), http://forsa.org.za/free-to-believe-and-free-to-speak-or-not/ [hereinafter *Free to Believe*]; *Speak Up for Free Speech,* FOR SA (July 10, 2015), http://forsa.org.za/speak-up-for-free-speech/ [hereinafter *Speak Up for Free Speech*].

[18] UCT: Queer Revolution, *Response to Zizipho Pae's Statement*, FACEBOOK (July 1, 2015), https://www.facebook.com/ziziphomustfall/posts/676960952435907 ("We would like to remind her that she remains directly accountable to the UCT electorate and our pain will not be subdued without her resignation and submission of a[n] unconditional public apology to us . . . We would like to remind Zizipho that when she swore her oath to serve students on the SRC, this oath was rooted in the SRC's constitution and not in her religious convictions . . . There is a necessary separation between one[']s office role and ones [sic] oppressive personal views, holding otherwise can be classed as a conflict of interests . . . you are an elected representative and therefore you must represent all voices, particularly those who are marginalised and oppressed and not only those [sic] who affirm your worldview.").

[19] Ward v. Polite, 667 F.3d 727, 734 (6th Cir. 2012).

[20] *Compare, e.g.*, S. AFR. CONST., 1996, ch. 2 §§ 15(1), 13 (prohibiting slavery and protecting freedom of speech) *with* U.S. Const. amends. I, XII (protecting freedom of speech and prohibiting slavery).

[21] S. AFR. CONST., 1996, ch. 2 § 15(1).

[22] *Id.* at § 16(1).

ethnicity, gender or religion, and that constitutes incitement to cause harm."[23]

The First Amendment to the United States' Constitution, by comparison, states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the [g]overnment for a redress of grievances."[24] The United States Supreme Court has set the general precedent that speech cannot be restricted unless it can be classified as a "true threat," which is determined, depending on the circuit, by one of a number of tests that will be discussed later.[25] Both nations have similar histories and reasons for placing language that protects speech in their Constitutions, but although the wordings are seemingly similar,[26] the implications of such language for public university students in their respective nations are vastly different.

In South Africa, lawyers from Freedom of Religion South Africa (FOR SA) released a statement determining that Zizi's post was explicitly protected by her constitutional right to freedom of speech because she was articulating a sincerely-held religious belief.[27] Additionally, she could not be legally reprimanded for her post because of the Constitutional Court's 1998 holding that those persons "who for reasons of religious . . . belief[s] disagree with or condemn homosexual conduct are free to hold and articulate such beliefs."[28] Resultantly, the Vice Chancellor at the University of Cape Town dismissed the Queer Revolution's complaint against Zizi and had her reinstated to the SRC on those constitutional grounds alone.[29] Unfortunately, his decision on the constitutional merits only came after serious pushback and a long media campaign from churches and religious groups all over South Africa,[30] but the

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[23] *Id.* at § 16(2).

[24] U.S. CONST. amend. I.

[25] Karen Rosenfield, *Redefining the Question: Applying A Hierarchical Structure to the Mens Rea Requirement for Section 875(c),* 29 CARDOZO L. REV. 1837, 1846 (2008).

[26] Bill Erem, *U.S. and South Africa: Historical Similarities*, L.A. TIMES (June 7, 1986), http://articles.latimes.com/1986-06-07/local/me-10034_1_south-africa-colonialism-beliefs.

[27] *UCT Response to Developments Around SRC Member's Facebook Posting*, UNIV. OF CAPE TOWN (July 28, 2015), http://www.uct.ac.za/dailynews/?id=9274 [hereinafter *UCT Response*]; *Zizipho Pae: UCT Head Condemns Intimidation, Upholds Freedom of Expression*, GATEWAY NEWS (July 28, 2015), http://gatewaynews.co.za/zizipho-pae-uct-head-condemns-intimidation-upholds-freedom-of-expression/ [hereinafter *Zizipho Pae*].

[28] Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice 1999 (1) SA 6 (CC) at 69 para. 137 (S. Afr.); *Free to Believe, supra* note 17.

[29] *See Statement by FOR SA in re: Zizipho Pae,* FREEDOM RELIGION S. AFR. (Aug. 13, 2015), http://forsa.org.za/statement-by-for-sa-in-re-zizipho-pae/ [hereinafter *Statement by FOR SA*].

[30] *See Free to Believe*, *supra* note 17.

constitutional language that supplied to rule of law is so respected on its face in South Africa, that Zizi did not have to take the University to court.[31]

In the United States, however, the Supreme Court has largely danced around exactly how the First Amendment applies to the students of public universities, continually refusing to set forth a legal test that governs speech disputes on campuses.[32] Consequently, a myth now exists on college campuses that codes written in student handbooks can and do trump students' constitutional rights and should supply the governing rules of law that university officials should use to decide the outcome of cases just like Zizi's.[33] This is troublesome because public universities are actually, contrary to myth, legally bound by the First Amendment and cannot hinder their students' constitutional right to free speech in the often times harsh and unconstitutional ways that they do.[34] The myth places student leaders like Zizi in danger of reparations, prosecution or expulsion by their universities when students exercise their constitutional right to exchange ideologies in the free marketplace of ideas.

This Note is laid out in three parts. Part I will present an overview of current anti-discrimination, harassment, and hate speech codes in public university handbooks in the United States and will then discuss the case law in the United States that surrounds students' constitutional freedoms of speech. Part II will discuss and compare the results of recent speech code cases from various lower courts to the probable results of a case like Zizi's in order to demonstrate how speech codes in student handbooks are unconstitutionally trumping students' First Amendment rights. Finally, Part III will present a test that courts should adopt as a remedy to the problem of unresolved, ambiguous law in this area and then a framework that delineates how public universities should draft codes in their handbooks in order to make harassment, anti-discrimination, and hate speech codes, if included, two-way constitutional streets.

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[31] *Statement by FOR SA*, *supra* note 29; *Speak Up for Free Speech, supra* note 17.

[32] *State of the Law: Speech Codes*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (2002) [hereinafter *State of the Law*], https://www.thefire.org/in-court/state-of-the-law-speech-codes/.

[33] Mark A. Cloutier, *Opening the Schoolhouse Gate: Why the Supreme Court Should Adopt the Standard Announced in Tatro v. Supreme Court of Minnesota to Permit the Regulation of Certain Non-Curricular Student Speech in Professional Programs*, 55 B.C. L. REV 1659, 1661–62 (2014); *see State of the Law*, *supra* note 32; *see also* Alexander Tsesis, *Burning Crosses on Campus: University Hate Speech Codes*, 43 CONN. L. REV. 617, 625 (2010).

[34] William Creeley & Samantha Harris, *Correcting Common Mistakes in Campus Speech Policies*, FOUND. FOR INDIVIDUAL RTS. IN EDUC., https://www.thefire.org/spotlight/correcting-common-mistakes-in-campus-speech-policies/ (last visited Nov. 11, 2016).

I. HOW ANTI-DISCRIMINATION, HARASSMENT, AND HATE SPEECH CODES ARE LIMITING THE FREE MARKETPLACE OF IDEAS

In 1919, Chief Justice Harlan Stone wrote:

> [I]n those countries where the political theory obtains that the ultimate end of the state is the highest good of its citizens, both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled violation of the conscience of the individual will not in fact ultimately lose it by the process.[35]

The liberty of conscience and the freedom of speech are closely intertwined and are absolutely vital freedoms that must be protected in order to sustain the rational capacity of man in the search for truth within the free marketplace of ideas.[36] The public university has long been lauded as the central hub of the free marketplace, where young minds may engage in robust debate within an environment where the production of ideas and the acquisition and exchange of knowledge is uninhibited.[37] The more points of view that are expressed, and the more ideas and information that are produced and are made universally available to all men directly correlates to society's ability to make good decisions and to continue to advance as a whole.[38] "The free marketplace . . . nurtures a true civil society capable of peaceful change."[39] However, the rise of speech, anti-harassment and anti-discrimination codes in student handbooks on public university campuses has begun to threaten the free exchange of ideas on college campuses because students have not and are not being taught how to nor do they exchange ideas with grace, dignity,

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35 Harlan F. Stone, *The Conscientious Objector*, 21 COLUM. UNIV. Q. 253, 269 (1919), https://babel.hathitrust.org/cgi/pt?id=uiug.30112111538374;view=1up;seq=641.

36 *See* United States v. Rumely, 345 U.S. 41, 56 (1953); Sergey Tokarev, *Marketplace of Ideas Theory*, (July 29, 2012), http://uscivilliberties.org/themes/4099-marketplace-of-ideas-theory.html.

37 *See* LOUIS MENAND, MARKETPLACE OF IDEAS 13–15 (2010); Hamna Ahmad, *Mason Earns Freedom of Speech Award After Changes to Student Codes,* IV FOURTH ESTATE (Sept. 14, 2015), http://gmufourthestate.com/2015/09/14/mason-earns-freedom-of-speech-award-after-changes-to-student-code/.

38 *See id.*

39 David A. French, *FIRE's Guide to Religious Liberty on Campus,* FOUND. FOR INDIVIDUAL RTS. EDUC. (2002), https://www.thefire.org/pdfs/religious-liberty.pdf.

and respect and so their attempts at interchange must be heavily policed.[40] Part A of this section will detail what anti-discrimination, harassment, and hate speech codes are and why they being deployed with rapid frequency. Part B will present examples of speech codes. Part C will explain the Supreme Court's rules of decision as to what constitutes speech that is not protected by the First Amendment, such as harassment, "true threats," obscenity, the incitement of imminent lawless action, and defamation.

A. *What Are Speech Codes?*

"Congress shall make no law . . . abridging the freedom of speech . . . ."[41] Does this mean that violent and bombastic, overtly derogatory, obnoxious and dangerous, imminently harmful, and instigative speech that is part of a concerted effort to make certain groups feel uncomfortable, threatened, or isolated is covered and perpetually allowed under the First Amendment?[42] What about speech that offends another student or university official?[43]

Public university administrators have the dilemma of balancing the promotion of free speech, academic freedom, the protection of individual conscience, and the freedom of expression of their students with the need for order, peace and quiet, and protecting their students from harm, so oftentimes administrators will set out policies detailing how they will regulate the balance in their school's student handbook.[44] However, in 2015, 217 out of 440, or 49.3%, of universities surveyed by the Foundation for Individual Rights in Education ("FIRE") had policies in their handbooks that clearly restrict speech on their campuses that would have otherwise been protected by the First Amendment.[45] Further, 44.1% had at least one policy that could be interpreted as actively suppressing and/or punishing protected speech, which results in 93.4% of those schools holding policies that are likely in violation of the First Amendment.[46] To make matters worse, in the off-chance a student does take a risk and stand

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[40] *See Dignity & Respect in the Classroom*, CARDIFF U., http://learning.cf.ac.uk/wp-content/uploads/2013/05/Dignity_and_Respect_in_the_Classroom_2013.docx; *see also Equality and Diversity Policy,* CARDIFF U. (Oct. 1, 2011), http://www.cardiff.ac.uk/public-information/equality-and-diversity.

[41] U.S. CONST. amend. I.

[42] *See* Alexander Tsesis, *supra* note 33, at 624–25, 627–28.

[43] *See id.*

[44] *See* French, *supra* note 39, at 44–45, 51–52.

[45] *Spotlight on Speech Codes: The State of Free Speech on Our Nation's Campuses,* FOUND. FOR INDIVIDUAL RTS. IN EDUC.4, 6–7 (2016), [hereinafter *Spotlight on Speech Codes*] https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2013/06/27212854/SCR_Final-Single_Pages.pdf (surveying publicly available policies at 336 four-year public institutions).

[46] *Id.*

up for his constitutional rights, if violated, by suing his university in an Article III court, even though most universities receive federal money and thus should be subject to the Constitution, that student will often have to then bear costs, risk of expulsion, or denial of a diploma because case law is often not clearly settled in a way that it would provide a stable-enough rule of law for the case to go in his favor.[47] Moreover, he then may not even be able to win because of administrator-tailored defenses such as qualified immunity or the authority to create and control pedagogy.[48] This is a problem for students who attend public universities because the chilling effect that speech codes have on students' freedom of speech will last much longer than the college years, creating a society that is blind and numb to the fact that their fundamental rights are slowly being siphoned away.[49]

Any university anti-harassment, discrimination, or hate speech policy that is included in a student handbook that prohibits the freedom of speech or expression that would otherwise be protected by the First Amendment can be classified as a "speech code."[50] Although the Supreme Court largely declared traditional speech codes unconstitutional,[51] other codes have replaced them in handbooks under different names and descriptions.[52] The purpose of the codes has remained the same, which is essentially to "prevent the alienation and intimidation of targeted students."[53] However, the codes are dangerous because they vaguely prohibit offensive speech, leaving the interpretation of what the language in the code means to university officials who are likely to be influenced by

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47 *See generally* Benjamin Welch, An Examination of University Speech Codes' Constitutionality and Their Impact on High-Level Discourse (2014) (published C. of Journalism and Mass Comm.) (on file with the University of Nebraska) (discussing that college enrollment is growing at public universities and noting that lawsuits against universities for violations of the First Amendment are rare).

48 Barnes v. Zaccari, 592 F. App'x 859, 868–69 (11th Cir. 2015); Ward v. Polite, 667 F.3d 727, 732, 734 (6th Cir. 2012).

49 *See* Welch, *supra* note 47; Jonathan R. Cole, *The Chilling Effect of Fear at American's Colleges,* ATLANTIC (Jun. 9, 2016), http://www.theatlantic.com/education/archive/2016/06/the-chilling-effect-of-fear/486338/; *What are Speech Codes*?, FOUND. FOR INDIVIDUAL RTS. IN EDUC., https://www.thefire.org/spotlight/what-are-speech-codes/ (last visited Sept. 12, 2016).

50 *Id.*

51 Papish v. Univ. of Mo. Bd. of Curators, 410 U.S. 667, 669–72 (1973); Healy v. James, 408 U.S. 169, 180–81 (1972); *see* Brandenburg v. Ohio, 395 U.S. 444, 447, 449 (1969); Sweezy v. N.H., 354 U.S. 234, 251 (1957).

52 Lee E. Bird et al., *Student Conduct in the Digital Age: When Do First Amendment Protections End and Misconduct Begin?, in* MISBEHAVIOR ONLINE IN HIGHER EDUCATION 183, 196 (Emerald Group Publishing Ltd., 2012); *see* Greg Lukianoff, *Speech Codes: The Biggest Scandal on College Campuses Today*, FORBES (Dec. 19, 2012), http://www.forbes.com/sites/realspin/2012/12/19/speech-codes-the-biggest-scandal-on-college-campuses-today/.

53 Tsesis, *supra* note 33, at 621.

and interpret the speech according to political pressures.[54]

Furthermore, the codes often place bans on content-based speech, or speech that is restricted based on the government or governing body's disagreement with one group's message, which the Supreme Court has generally held must pass strict scrutiny in order for the restriction to be deemed constitutional.[55] "Expression may not be limited simply because of the content or viewpoint expressed."[56] For example, a ban on disparaging remarks or "offensive language" would be subject to strict scrutiny in any court.[57]

Content-neutral speech by contrast may be reasonably restricted to certain times, places, and manners but the restrictions must be justified without reference to the content of the regulated speech and must be narrowly tailored to serve a significant governmental interest.[58] For example, a university may institute a "free speech zone" or require students to apply in advance before they demonstrate on campus.[59] Problematically, however, instead of subjecting a student's speech to the proper level of constitutional scrutiny according to its type, the codified bans are often instituted without regard for the students' constitutional rights, current case law, and without the possibility of heavy or tangible consequences for university officials if they fail to follow constitutional due process procedure.[60] Proper application of the First Amendment within the free marketplace of ideas has produced some of the greatest works of art, literature, films, and poetry of all time[61] but speech codes are teaching the next generation that each person instead has "an absolute right to be free from offense, embarrassment, or discomfort," which is creating a weak generation that is subject to eventual government exploitation and

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[54] *See id.* at 621–24.

[55] *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 849-50 (1995); Ward v. Rock Against Racism, 491 U.S. 781, 791, 798 (1989).

[56] Bird et al., *supra* note 52, at 186.

[57] *See What are Speech Codes*?, *supra* note 49.

[58] *Ward*, 491 U.S. 781 at 791-92.

[59] *Spotlight Speech Codes 2015: Free Speech on Our Nation's Campuses,* FOUND. FOR INDIVIDUAL RTS. IN EDUC. (2016), https://www.thefire.org/spotlight-speech-codes-2015/ (citing *Infographic: Free Speech Zones on America's Campuses*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Sept. 19, 2013), https://www.thefire.org/wp-content/uploads/2014/03/Free-speech-zone-infographic-pdf).

[60] Lukianoff, *supra* note 52.

[61] Sonia Mungal, Essay, *Censorship and Book Banning Cannot be Justified*, CENGAGE LEARNING (Mar. 20, 2001) http://college.cengage.com/english/white/argument/1e/students/essays/cluster3.html (listing examples of books that were offensive and inflammatory to the culture at the time who later found them revolutionary; for example *Uncle Tom's Cabin*); *see* Banned and Challenged Books, 2006 http://www.deletecensorship.org/downloads/booklist_hpb.pdf; *The Naked Truth: A History of Art Censorship*, ART MEDIA AGENCY (Sept. 26, 2013), http://en.artmediaagency.com/73993/73993/.

continued dilution of the freedom of speech.[62] As Justice Kennedy has said, "[f]or the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses."[63]

B. What Does a Speech Code Look Like?

The Supreme Court has held that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"[64] However, the Ohio State University prohibits sexual harassment, which is defined as "[a]ny deliberate or repeated language, behavior, or visual display that causes a person fear, anxiety, shame, or embarrassment."[65] Examples include "sexual comments or inappropriate references to gender . . . and inquiries or commentaries about sexual activity, experience, or orientation."[66] Further, cultural intolerance is prohibited at Southwest Minnesota State University, and is defined as "[a]ny verbal or physical contact directed at an individual or group such as racial slurs, jokes, or other behaviors that demean or belittle a person's race, color, gender preference, national origin, culture, history or disability."[67]

The Third Circuit has held that the freedom of speech includes:

> [A] wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs . . . [which] is especially true because . . . when anti-discrimination laws are 'applied to . . . harassment claims founded solely on verbal insults, pictorial or literary matter, the statute[s] impose[ ] content-based, viewpoint-discriminatory restrictions on speech.'[68]

However, Central Michigan University, a public college subject to the legal holdings of the Sixth Circuit, prohibits bias incidents, which include

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62 *What are speech Codes?, supra* note 49.

63 Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 836 (1995).

64 Papish v. Board of Curators of the Univ. of Mo., 410 U.S. 667, 670 (1973).

65 Ohio State University, *Sexual Harassment* (2015), https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2013/10/28031940/OSU-wellness-center-sexual-harassment-chart-14-15.pdf.

66 *Id.*

67 *Judicial Affairs: Prohibited Code of Conduct* SW. MINN. STATE UNIV. (Sept. 11, 2015), https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2015/09/11115112/SMSU-prohibited-conduct-15-16.pdf.

68 Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 206 (3d. Cir. 2001).

"words, signs, symbols, threats or actions—in electronic or real-time . . . [of] intimidation . . . harassment, and expressions of hate or hostility," because "[a]nytime anyone in the CMU community feels belittled, disrespected, threatened, or unsafe because of who they are, the entire university community is diminished."[69] Further, Kean University, also subject to the legal holdings of the Third Circuit, has prohibited any language being posted on or off-campus via an electronic communication which is "abusive, profane or sexually offensive to the average person" and has also prohibited harassing others "by sending annoying, threatening, libelous, or sexually, racially or religiously offensive messages."[70] The contradictions between the law and college speech codes are alarmingly prevalent and will continue on until either university students speak up, universities change their codes, or the Supreme Court lays down a clear rule of law as to what public universities can and cannot do with regards to student speech.[71]

C. What Type of Speech is Not Protected by the First Amendment?

Every market has a limiting principle, and in this case, the First Amendment does not protect harassment, obscenity, the incitement of imminent and lawless action, defamation, and "true threats"[72] because those areas are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[73] The Supreme Court has defined discriminatory harassment as conduct "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[74] In order to prove harassment, three elements must be met: (1) A protected class must have been targeted; (2) The speech or conduct must be

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[69] Cent. Mich. Univ., *Bias Incident Response Team* (Sept. 9, 2015), https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2002/11/19000000/CMU-bias-incidents-15-16.pdf. Central Michigan University is a public college subject to the legal holdings of the Sixth Circuit. Dambrot v. Central Mich. Univ., 55 F.3d 1177 (6th Cir. 1995).

[70] Kean Univ., *Computer Related Acceptable Use Policy* (Feb. 11, 2015), https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2002/07/Kean-acceptable-use-14-15.pdf. Kean University is subject to the legal holdings of the Third Circuit. *Third Circuit Courts*, U.S. CT. APPEALS FOR THIRD CIRCUIT, http://www.ca3.uscourts.gov/third-circuit-courts (last visted Nov. 1t, 2016).

[71] Lukianoff, *supra* note 52; *see* Welch, *supra* note 47.

[72] S. Cal Rose, *From LOL to Three Months in Jail: Examining the Validity and Constitutional Boundaries of the Arkansas Cyberbullying Act of 2011,* 65 ARK. L. REV. 1001, 1016 (2012).

[73] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[74] Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 651 (1999).

unwelcome harassing behavior that is in a verbal, written or online form; and (3) The victim-student must be deprived of equal "educational access, opportunities, rights, and/or peaceful enjoyment therefrom."[75] From that definition, Zizi's post could not be defined as harassment in any jurisdiction in the United States. Her post did not deprive anyone at UCT of equal educational access, opportunities, rights, and/or peaceful enjoyment therefrom because it was made on her personal Facebook page while she was off campus. If a person did not want to continue to see her posts, they could simply "unfriend" her.

However, as will be discussed, her post could quite possibly be considered harassment by some of the holdings of the lower circuits in cases substantially similar to hers even though the Supreme Court has said otherwise. Discriminatory harassment, discriminatory speech, or hate speech is not speech that someone does not like or that merely ruffles someone's feathers as being simply rude or offensive; the speech must go beyond mere offense into the realm of actual, provable harm.[76] "All ideas having even the slightest redeeming social importance, [*e.g.*] unorthodox ideas, controversial ideas, even ideas *hateful to the prevailing climate of opinion*[,] have the full protection of the guaranties" of freedom of speech.[77] Contrary to popular belief among administrators, using racial slurs and other extreme and derogatory language is constitutionally protected at a public university.[78]

Obscenity was defined in *Roth v. United States* and then later in *Miller v. California* as a thing, if considered as a whole by an average person, that goes substantially beyond customary limits of candor in description or representation of a shameful or morbid interest in nudity, sex, or excretion after applying contemporary community standards and is lewd, lascivious, filthy, or indecent.[79] In order to censor speech as obscenity, the government or governing body (for example, the university administrator) must prove: (1) under contemporary community standards, the average person would deem the speech as a whole as appealing to a prurient interest; (2) whether the speech describes or shows sexual conduct defined by state law in a manifestly offensive way; and (3)

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[75] *See also* Brett A. Sokolow et al., *The Intersection of Free Speech and Harassment Rules*, 38 HUM. RTS. MAG. 4 (2011), http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol38_2011/fall2011/the_intersection_of_free_speech_and_harassment_rules.html.

[76] Rodney A. Smolla, *Academic Freedom, Hate Speech, and the Idea of a University*, 53 L. CONTEMP. PROBS. 196, 202–03 (1990).

[77] Roth v. United States, 354 U.S. 476, 484 (1957) (emphasis added).

[78] *See* Sokolow et al. *supra* note 75.

[79] Miller v. California, 413 U.S. 15, 20–21, 31 (1973).

whether the speech as a whole has no serious political, scientific, literary, or artistic value.[80]

The incitement of imminent or lawless action, or fighting words, is determined not by what the recipient of the words interpreted them as but by whether a reasonable, common man in that person's position would have interpreted them as an incitement to fight.[81] Defamatory speech generally consists of actual malice where the person reporting the information knew it was false or published it with reckless disregard of whether it was false or not.[82]

Although the above definitions are fairly set-in-stone, the circuits are still split as to what the definition and legal framework of the various types of speech that are not covered under the First Amendment. For example, the "true threat" language was first established by *Watts v. United States* after a young man was arrested for violating a statute that made it a criminal offense to knowingly or willingly threaten the life of the President of the United States.[83] He was 18 years old at the time and made the remark that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L. B. J."[84] The Supreme Court overturned his conviction because the government did not prove, or distinguish from hyperbole, a true threat within the context of his statement and because "debate on public issues should be uninhibited, robust, and wide-open, and . . . may . . . include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[85] The Court held in *Virginia v. Black*, a cross-burning case, that the First Amendment protects symbolic and expressive conduct as well as speech but does not protect fighting words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace."[86] A "[t]rue threat" was defined in *Black* as "statements where the speaker means to communicate a serious expression of an intent to commit an act of . . . violence to a particular individual . . . with the intent of placing the victim in fear of bodily harm or death."[87] States may constitutionally choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm in light of the history of the form of intimidation.[88]

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[80] *Id.* at 23–24.

[81] Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

[82] New York Times v. Sullivan, 376 U.S. 254, 281 (1964).

[83] Watts v. United States, 394 U.S. 705, 706 (1969).

[84] *Id.*

[85] *Id.* at 706–08.

[86] Virginia v. Black, 538 U.S. 343, 343, 359 (2003).

[87] *Id.* at 359–60.

[88] *See id.* at 363.

Alarmingly, the Court recently considered changing the definition of a "true threat" in *Elonis v. United States* when the lower court raised the issue of whether a true threat may *subjectively* intend to bring about fear of bodily harm or death or whether a reasonable person uttering the words in the context would foresee that his words would be interpreted as a threat.[89] Before *Elonis*, a majority of lower courts adopted an objective test that generally revolved around the reasonable person standard.[90] If speech made online or elsewhere is deemed a "true threat," the speaker may be criminally prosecuted under statutes such as Section 875(c) which states, "[w]hoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both."[91]

In *Elonis*, the defendant, after his wife left him, posted self-styled rap lyrics under a pseudonym on Facebook, used language that contained "graphically violent language and imagery" about his wife, his co-workers, a kindergarten class, and state and federal law enforcement.[92] He claimed that his lyrics were fictitious and that he had the right under the First Amendment to post statements like "[e]nough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined [a]nd hell hath no fury like a crazy man in a Kindergarten class [t]he only question is . . . which one?"[93] At trial the jury was instructed to convict if they found that a reasonable person would foresee that his statements would be interpreted as a threat. The jury convicted Elonis and he was given three years and eight months in prison.[94] The Third Circuit affirmed his conviction after determining, progressively, that a "true threat" could result from mere negligence without proof of a true intent to intimidate or threaten.[95]

The Supreme Court has long been wary of establishing a mere negligence standard because a speaker's criminal conviction would then turn on the subjective determination of how the recipient of the speech interpreted the speaker's language; thus, the lower courts continue to battle between whether an objective or subjective standard applies

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[89] Elonis v. United States, 135 S. Ct. 2001, 2004, 2007–08 (2015).

[90] Adrienne Scheffey, Note, *Defining Intent in 165 Characters or Less: A Call for Clarity in the Intent Standard of True Threats After Virginia v. Black*, 69 U. MIAMI L. REV. 861, 875 (2015).

[91] 18 U.S.C. § 875(c) (2012).

[92] Elonis, 135 S. Ct. 2004–05, 2007 (2015) ("Pull my knife, flick my wrist, and slit her throat[;] Leave her bleedin' from her jugular in the arms of her partner . . . ."). *Id.* at 2007.

[93] *Id.* at 2005–07.

[94] *Id.* at 2007.

[95] *Id.* at 2007, 2013.

because of the lack of clear language from the Court one way or the other.[96] However, in *Elonis*, instead of defining once and for all whether either a *mens rea* intent to threaten or whether simple recklessness is required to prove a violation of the federal threat statute, the Supreme Court in *Elonis* simply overturned the defendant's conviction because simple negligence wasn't enough; a defendant's state of mind of intent to threaten must be established.[97] Therefore, as of now the courts are still split as to whether the "test should be applied from the perspective of a reasonable speaker . . . or reasonable recipient" and where the line should be drawn as to how a court should determine whether a defendant intended to make a threat or not.[98]

Elonis matters because it is the first time since *Virginia v. Black* that the Court came close to defining what a "true threat" is,[99] and although the Court could have further limited free speech through a ruling that would have had a chilling effect on it, the Court instead "made it harder to prosecute people for threats made on" social media sites like Facebook, albeit through vague language.[100] The Court likely may take another case in the near future that will define the line once and for all, which could further either secure or sequester freedom of speech, but as of now, the Court is leaving the circuits to their own devices.[101]

Again, after a reasonable, objective evaluation of the definitions above, it is unlikely that any court would find that Zizi's online statement was lacking First Amendment protection. Her statement was not so severe or objectively offensive that it would be offensive on its face to a reasonable person. She did not directly target any one person or people group. She did not deny anyone an educational opportunity, and it did not go so far beyond the candor of the community standards to invoke prosecution. Therefore, public colleges and universities cannot, under the current

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96 Scheffey, *supra* note 90, at 875–76; David L. Hudson Jr., *True Threats*, FIRST AMENDMENT CTR. (May 12, 2008), http://www.firstamendmentcenter.org/true-threats [hereinafter Hudson, *True Threats*].

97 *Elonis*, 135 S. Ct. at 2012–13.

98 Hudson, *True Threats*, *supra* note 96; Eugene Volokh, *The Supreme Court Doesn't Decide When Speech Becomes a Constitutionally Unprotected "True Threat"*, WASH. POST (June 1, 2015), https://www.washingtonpost.com/news/volokhconspiracy/wp/2015/06/01/the-supreme-court-doesnt-decide-when-speech-becomes-a-constitutionallyunprotected-true-threat/.

99 Clay Calvert & Matthew D. Bunker, *Fissures, Fractures & Doctrinal Drifts: Paying the Price in First Amendment Jurisprudence for a Half Decade of Avoidance, Minimalism & Partisanship*, 24 WM. & MARY BILL RTS. J. 943, 943–44 (2016).

100 Adam Liptak, *Supreme Court Overturns Conviction in Online Threats Case, Citing Intent*, N.Y. TIMES, (June 1, 2015), http://www.nytimes.com/2015/06/02/us/supreme-court-rules-in-anthony-elonis-online-threats-case.html.

101 *See Elonis*, 135 S. Ct. at 2012.

definitions, punish one of its students for making a similar statement on social media or in any other forum.

II. Open for Business: Applying Current Lower Court Decisions to Zizi's Case

The above standards are the only ones that should be limiting the freedom of speech in the United States, but as the FIRE study showed, many public universities are going farther than the outer limits set by the Court and are limiting their students' speech out of the need for order, ignorance of the legal standards, lack of accountability or questionably constitutional Department of Education regulations.[102] The following sections will introduce case studies of where students' freedom of speech was restricted beyond the limits presented above or preserved in different forums on public college campuses and the holdings will then be compared to Zizi's case to see whether Zizi, could have been convicted in any lower court in the United States for what she posted on Facebook on the twenty-eighth of June.

A. Could Zizi's Statement be Limited Because it Could be Considered Curricular or School-Sponsored Speech?

"[T]he central issue of the American free speech tradition is the 'fundamental tension between the principle that seditious libel cannot be proscribed by law and the common sense of stopping free speech at the boundary of incitement to crime.'"[103] First Amendment protections on free speech do decline according to how close a student's expression comes to being defined or perceived as school-sponsored speech or speech that is curriculum-oriented.[104] Therefore, the court must necessarily ask, "Whose speech is it?"[105] A university is permitted to restrict speech that is not consistent "with its basic educational mission" as long as the restrictions are "reasonably related to legitimate pedagogical concerns."[106] However, the restrictions must be "neutral and generally applicable" to all students

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[102] Greg Kukianoff, *Feds to Students: You Can't Say That—The Justice and Education Departments Issue a Dangerous New Speech Code for Colleges*, THE WALL St. J. (last updated May 16, 2013), http://www.wsj.com/articles/SB10001424127887323582904578485041304763554; *Spotlight on Speech Codes, 49* note 45.

[103] James M. Boland, *Is Free Speech Compatible with Human Dignity, Equality, and Democratic Government: America, a Free Speech Island in a Sea of Censorship*?, 6 DREXEL L. REV. 1, 44 (2013) (quoting HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 120 (Jamie Kalven ed., 1988)).

[104] *See* Ward v. Polite, 667 F.3d 727, 734 (6th Cir. 2012).

[105] *Id.*

[106] *Id.* at 733–34; *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) ("[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.").

in the school to be constitutional.[107] This tension is often the cause of action for many student versus university lawsuits because the Supreme Court has not drawn a clear line yet as to how to navigate between the discretion and authority given to schools to select and implement its curriculum (the first line of jurisprudence) and the right of students to attend an institution that is not an "expression-free enclave," that allows them to freely exchange ideas (the second line of free speech jurisprudence).[108]

The first line, school authority, was invoked to justify *Christian Legal Society v. Martinez* where the Court upheld an "all-comers" nondiscrimination policy that required all registered student organizations, including ones with sincerely-held religious beliefs, to accept all interested students and allow them to seek leadership positions regardless of whether their conduct or beliefs were consistent with the organization's ideals.[109] However, because the First Amendment prohibits suppressing content-based speech, or speech that is banned specifically because of its message, the second line of free speech jurisprudence allows students to speak and convey controversial messages through their clothing on public university campuses.[110] Student groups whose message may go against the university's purpose are allowed to exist and receive funding, and more.[111] Students are guaranteed freedom from viewpoint discrimination that would compel them "to utter what is not in [their] mind and . . . what [they] might find deeply offensive."[112]

Also, in order for a student's speech to be suppressed because of pedagogical concerns, it must be deemed to cause "substantial disruption of or material interference with school activities."[113] Although the Court has not clearly defined what a legitimate pedagogical concern or substantial disruption is,[114] the Court is moving toward a legal standard of sameness; as long as the university implements and enforces a nondiscrimination policy equally across the entire student body and collection of student groups, the policy will be enforceable because it is the university's prerogative to decide and enforce such things even if the

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[107] *Ward*, 484 U.S. at 738.

[108] *Id.* at 732–33.

[109] Christian Legal Soc'y v. Martinez, 561 U.S. 661, 668–69, 678, 694, 698 (2010).

[110] *See* Tinker v. Des Moines Indep. Cty. Sch. Dist., 393 U.S. 503, 505–06 (1969).

[111] *See* Rosenburger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 839–44 (1995).

[112] *Ward*, 667 F.3d at 733 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943)).

[113] *Tinker*, 393 U.S. at 514.

[114] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

policy has a negative and "incidental effect on some speakers or messages but not others."[115]

In 2012, the Sixth Circuit fleshed out these standards when it heard the case of a graduate student who had been expelled for asking to refer a gay client to another counselor during the final stages of her graduate counseling program.[116] Although the student had a 3.91 GPA, she was expelled for refusing to affirm a gay client's values during a counseling session because counseling and affirming a gay man about relationship issues went against her religious beliefs.[117] A university policy prohibited students from discriminating against others based on sexual orientation, so although the student quietly asked for the client to be re-assigned, she was subjected to a formal disciplinary review as asking to refer the client "created an 'ethical dilemma,'" and then the student was expelled for violating two provisions of the American Counseling Association's ("ACA") counseling code of ethics.[118] The student claimed that she "had no problem counseling gay and lesbian clients, so long as the university did not require her to affirm their sexual orientation," and she in fact requested to refer her client to another counselor "to *avoid* imposing her values on" her gay client.[119] She never showed anything but respect for his homosexual distinction and the client himself never found out about her request to refer him to someone else.[120] She claimed that "tolerance [was] a two-way street," and that the ACA's code explicitly stated that if a counselor determined that he or she would be unable to be of professional assistance to any client that he or she may refer the client.[121]

The District Court granted summary judgment to the university but the Sixth Circuit reversed the grant of summary judgment because a reasonable jury could find that the student was expelled because of the school's hostility toward her speech and faith and that the ACA code contained no such ban.[122] The Sixth Circuit's decision to reverse and remand was predicated upon both the fact that the school did not have a

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115 *Martinez*, 561 U.S. at 695–96.

116 *Ward*, 667 F.3d at 730.

117 *Id.* at 730–32.

118 *Id.* (stating that the student allegedly violated Rule A.4.b by imposing values that were inconsistent with counseling goals and Rule C. 5 by engaging in discrimination based on sexual orientation, both of which were incorporated into her counseling program's student handbook).

119 *Id.* at 731, 735.

120 *Id.* at 735.

121 *Id.*

122 *Id.* at 730.

no-referral policy and a religious speech discrimination claim.[123] The university had attempted to act after-the-fact, could not point to any articulated policy in its course materials, and it was shown that the university in other instances had permitted a practicum referral to another counselor.[124] As to the First Amendment claim, the court found "a reasonable jury could also find evidence of religious-speech discrimination" when the record showed that the school had all but admitted to acting in a discriminatory way against the student when a professor said that the student was "selectively using her religious beliefs . . . to rationalize her discrimination against one group of people."[125] Further, the student was pressed with questions such as:

> whether she would "see [her] brand of Christianity as superior to" that of a Christian client who viewed her faith differently . . . whether she believed that "anyone [is] more righteous than another before God" and . . . "doesn't that mean that you're all on the same boat and shouldn't [gays and lesbians] be accorded the same respect and honor that God would give them?"[126]

However, "[a] university cannot compel a student to alter or violate her belief systems . . . [because of] a phantom policy" nor ask them to pay such a "price to obtain a degree."[127]

Finally, although the school claimed that "the ACA code of ethics set forth neutral and generally applicable policies" that the university had incorporated into their anti-discrimination policy, the university had not implemented them in a neutral and generally applicable way.[128] Evidence was shown that secular exemptions to the phantom no-referrals policy had been made, but that the school had denied religious exemptions.[129] Individual exemptions are "the antithesis of a neutral and generally applicable policy . . . [because] [a] double standard is not a neutral" one.[130] The school could only apply its anti-discrimination code if it itself did not discriminate.[131]

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[123] *Id.* at 730, 734–35 (holding that "religious speech is still speech" that is protected by the First Amendment (citing Settle v. Dickson Cty. Sch. Bd., 53 F.3d 152, 155 (6th Cir. 1995))). Teachers can limit speech providing that it is done "in the classroom in the name of learning and not as a pretext for punishing [a] student for her … religion." *Ward*, 667 F.3d at 734 (quoting *Settle*, 53 F.3d at 155).

[124] *Ward*, 667 F.3d at 736–37.

[125] *Id.* at 737.

[126] *Id.* at 737–38.

[127] *Id.* at 738.

[128] *See id.* at 738–39.

[129] *Id.* at 739.

[130] *Id.* at 740.

[131] *See id.* at 738, 740–42.

Following the university's arguments in *Ward*, could Zizi's statement be considered "reasonably related to legitimate pedagogical concerns?"[132] Courts generally apply the *Hazelwood* test to determine the answer to that question, a test originally written to apply to high school speech cases only, but in recent years has also been applied to university speech cases.[133] Speech that could be reasonably interpreted and perceived as bearing the imprimatur of the school includes "school-sponsored publications, theatrical productions," and others that are supervised by a faculty member and are designed to impart particular knowledge or skills to student participants or audiences.[134] If speech can be interpreted as school-sponsored, the school is free to limit it if it would "substantially interfere" with the school's message, "impinge upon the rights of other students [or] . . . [is] ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[135] Additionally, a school may limit speech that could be perceived as school-sponsored if it would "associate the school with any position other than neutrality on matters of political controversy."[136]

When has speech by a student body leader been interpreted as school-sponsored? In 1969 in California, a state in the Ninth Circuit, two students, both student body officers, created a newspaper on their own that heavily criticized the administration.[137] After distributing the papers outside of the schoolhouse gate for thirty minutes one morning, the two students were suspended from school and removed from their student body offices because of their use of vulgarity and profanity in the publication.[138] The District Court upheld the suspension because the students' conduct was related to school activity and the school could demonstrate that instead of suspending the boys because the school wanted to avoid the "discomfort and unpleasantness" that accompanied their unpopular viewpoint, the school showed that their publication substantially interfered with the requirements of appropriate discipline

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[132] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272–73 (1988) (creating the *Hazelwood* test that determined that schools may only limit student speech in school sponsored activities when the decision to censor speech is reasonably related to legitimate pedagogical concerns; differentiating from school sponsored activities from the freedom of speech covered by the *Tinker* test that prohibited censorship of speech unless the expression in question created a material and substantial disruption of school activities or an invasion of the rights of others).

[133] *Ward*, 667 F.3d at 733–34.

[134] *Id.* at 271.

[135] *Id.* at 271.

[136] *Id.* at 272.

[137] Baker v. Downey City Bd. of Educ., 307 F. Supp. 517, 519, 525, 526 (C.D. Cal. 1969).

[138] *Id.* at 519.

in the operation of the school.[139] The court also found that the school's decision was a reasonable exercise of the power and discretion of the school authorities because the students had violated their oaths of office which provided that the students must do their

> best to fulfill the requirements of the office to which [they] . . . [had] been elected [and must] uphold and support the rules and regulations of the student body and the school . . . set an example in scholarship and leadership which [would] . . . be a pattern [of] . . . conduct among the students and do everything within [their] . . . power to uphold the highest standards of the school.[140]

Their speech was censored, first, because the boys had knowledge and intent that the publication would have a presence on-campus and, second, because they were student body officers who had taken an oath of loyalty, essentially, to the school.[141] However, according to this holding, Zizi's post could not be constitutionally disciplined for her post because it was not related to school activity, did not interfere with the operation of the school, she did not violate any oath of her office, and had no knowledge that her post would have a presence on-campus because she made it on her personal Facebook page.

In 2012, the District Court for the Northern District of Georgia upheld the First Amendment retaliation claim of a student body president in *Lack v. Kersey* who: had been removed because he defied his principal in a Facebook message to another person, publicly supported the LBGT community in lobbying to change "Prom King and Queen" to "Prom Court," and lobbied for other policy changes openly in front of the freshman class and in defiance of the administration.[142] The president's speech was found to be "protected by the First Amendment as it was non-violent and did not cause a material or substantial disruption in the school," did not infringe on pedagogical concerns, and the school's decision unconstitutionally chilled the speech of other ordinary students.[143] Although the president was not reinstated or granted a temporary restraining order because he had violated other provisions of his contract

[139] *Id.* at 517–19, 521 (citation omitted), 525–26.

[140] *Id.* at 519, 527–28, 519 n. 1.

[141] JOSEPH O. OLUWOLE & PRESTON C. GREEN III, CENSORSHIP AND STUDENT COMMUNICATION IN ONLINE AND OFFLINE SETTINGS 195–96 (2016).

[142] Lack v. Kersey, No. 1:12-CV-930-RWS, 2012 U.S. Dist. LEXIS 44657, at *2 (N.D. Ga. Mar. 30, 2012).

[143] *Id.* at *6, *8–9 (holding that a reasonable student would be scared into not talking about anything controversial because if a student body president was punished and removed for like conduct, they would incur possibly even worse consequences for articulating their beliefs).

as president that were not constitutionally protected,[144] this case shows that Zizi probably could not be removed from her post by the school even if the school thought that her post was controversial or offensive. Like the president's speech in *Lack*, Zizi's statement did not arguably cause a material or substantial disruption in the school, nor did it infringe on any legitimate pedagogical concerns. Therefore, a student body president may hold and speak openly about their controversial, sincerely-held beliefs on their own time even if they are contrary to what their school openly promulgates as policy.

B. Could Zizi be Punished for Her Statement Because it Could be Considered Offensive, Threatening or Discriminatory?

After Trayvon Martin's death in 2012, public opinion across the nation called for equality and sameness across every spectrum like never before.[145] For example, students at Clemson University began to advocate for a "public commitment" from the administration to criminally prosecute defamatory speech made on social media, for "a safe space for students from underrepresented groups," for the "names of offensively named buildings . . . changed," for "incentivized diversity training for administrators and faculty," and for diversity to be included as a core Clemson value via a CU1000 course.[146] After one-hundred ten faculty signed the list of grievances, three professors wrote an open letter to Clemson students explaining that, in a wave of political pressure, many faculty had signed the list of grievances without considering that some, if not most, of the demands were unconstitutional and would strip students of their rights.[147] After the letter was distributed, many faculty members were embarrassed that they did not take enough time to read the list of grievances to realize that some of them would limit students' constitutional rights, but instead signed off on the list because it was a

[144] *Id.* at *9–12 (finding that because Plaintiff did not attend the Homecoming Decoration day, wear spirit-week attire, or sell Homecoming tickets according to his contract and be accordingly dismissed as student body president.).

[145] Stephanie Lawrence, The Effect of Colorblind Racial Ideology on Discussion of Racial Events: An Examination of Responses to the News Coverage of the Trayvon Martin Shooting (2014) (Scholarworks at University of Massachusetts-Amherst), http://scholarworks.umass.edu/masters_theses_2/93/ (citing Victoria C. Plaut et al., *Is Multiculturalism or Color Blindness Better for Minorities?*, 20 ASS'N FOR PSYCHOL. SCI. 444, 444 (2009)).

[146] *Grievances*, SEE THE STRIPES, http://seestripescu.org/?page_id=70 (last visited Dec. 20, 2016).

[147] Alex Morey, *Faculty Focus: How Three Professors banded Together to Beat Back a Free Speech Threat at Clemson*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Dec. 28, 2015), https://www.thefire.org/faculty-focus-how-three-professors-banded-together-to-beat-back-a-free-speech-threat-at-clemson/.

popular move to do so at the time.[148] Three faculty members retracted their support for the students' list of grievances because of this and many never came to fruition.[149] The professors' open letter read "[a]ll students everywhere have a right to think, learn, and speak in an environment free of faculty or administrative threats, intimidation, harassment, coercion, and indoctrination . . . [i]n the name of genuine tolerance and diversity, let there be no thought crimes or thought police at Clemson University."[150]

The faculty's eager and too quick response and then embarrassing retraction of support highlights what is unfortunately a common occurrence on university campuses today.[151] University administrators often react to a situation according to lofty ideals such as equality for all, judge not, black lives matter, or "its discrimination" before stopping and considering that the students whose speech they are reacting to may be legally allowed to say or do what they are doing according to the Constitution even though their speech or actions may be unpopular on that particular day.[152]

To further underscore this point, in *Barnes v. Zaccari*, a student sued the university president at Valdosta State for expelling him after he posted a collage on his personal Facebook page, sent out letters, and posted flyers that lobbied against the university president's new campus parking garage.[153] The collage did not contain any threatening language, but was coincidentally, and unfortunately posted, a few days earlier, a gunman killed thirty-two people at Virginia Tech University.[154] The president, alarmed by the Virginia Tech tragedy, justified Barnes' expulsion by saying his collage was "threatening," that Barnes represented a "clear and present" safety risk on campus and that Mr. Zaccari, the president, had simply taken immediate action against the emergency that Barnes had created.[155] A note was slipped under Barnes' dorm room that read

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[148] *Id.*

[149] *See generally id.* (faculty members were embarrassed for signing the petition without examining the impact of the list of grievances on students' First Amendment rights).

[150] C. Bradley Thompson, *An Open Letter to Clemson Students*, CAPITALISM MAGAZINE (Feb. 2, 2015), http://capitalismmagazine.com/2015/02/open-letter-clemson-students/.

[151] *See* C. Bradley Thompson, *Some Clemson Faculty Call for Censorship*, MINDING THE CAMPUS (Feb. 17, 2015), http://www.mindingthecampus.org/2015/02/some-clemson-faculty-call-for-censorship/.

[152] *See id.*; Gary Wihl, *Politics, Academic Freedom and the General Counsel's Office*, LIBERAL EDUCATION SPRING 2006, http://files.eric.ed.gov/fulltext/EJ744024.pdf.

[153] Barnes v. Zaccari, 669 F.3d 1295, 1298–99, 1301 (11th Cir. 2012).

[154] Complaint at 2, 10–12, Barnes v. Zaccari, 669 F.3d 1295 (11th Cir. 2012) (No. 1:08-cv-00077-CAP).

[155] *Barnes*, 669 F.3d at 1298, 1301, 1306.

> [a]s a result of recent activities directed towards me by you, included but not limited to the attached threatening document [Barnes's Facebook collage], you are considered to present a clear and present danger to this campus. Therefore, pursuant to Board of Regents' policy 1902, you are hereby notified that you have been administratively withdrawn from [VSU] effective [today].[156]

The Board gave him forty-eight hours to vacate the residence hall.[157] However, the 11th Circuit affirmed the District Court's denial of summary judgment after a finding that the president could not invoke a qualified immunity defense; Barnes' expulsion was later reversed.[158] The court found that the president had violated Barnes' due process rights,[159] and nearly eight years later, the case was finally settled for $900,000 in favor of Barnes.[160] This case only underscores the constitutionality, legality, and blanket freedom of a student like Zizi to post just about anything regarding their own personal sincerely-held beliefs on their Facebook page regardless of who is upset or offended by it.

By contrast, in *Wynar v. Douglas County School District* the Ninth Circuit recently upheld the expulsion of a student because of his MySpace posts about guns and threats to shoot specific people "within days of the anniversary of the Virginia Tech massacre."[161] The court cited *Tinker* and found that his online posts "presented a real risk of significant disruption

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[156] *Barnes*, 669 F.3d at 1301. The Valdosta State Student Handbook states that "[a]ny student, faculty member, administrator, or employee, acting individually or in concert with others, who clearly obstructs or disrupts, or attempts to obstruct or disrupt any teaching, research, administrative, disciplinary, or public service activity . . . shall be subject to disciplinary procedures, possibly resulting in dismissal . . . ." *Board of Regents Policy Manual Section 1902*, *in* VALDOSTA STATE UNIVERSITY STUDENT HANDBOOK 2015, http://www.valdosta.edu/colleges/education/social-work/documents/msw-student-handbook-2014-2015.pdf.

[157] Complaint, *supra* note 154, at 21, ¶ 60.

[158] *Barnes*, 669 F.3d at 1309. On January 16, 2008, the Board of Regents of the University System of Georgia reversed Barnes' expulsion. *Victory for Free Speech at Valdosta State University*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Jan. 17, 2008), https://www.thefire.org/victory-for-free-speech-at-valdosta-state-university-2/.

[159] *Barnes*, 669 F.3d at 1309.

[160] *See Eight Years After Student's Unjust Expulsion from Valdosta State U., $900K Settlement Ends 'Barnes v. Zaccari'*, FIRE (July 23, 2015), https://www.thefire.org/eight-years-after-students-unjust-expulsion-from-valdosta-state-u-900k-settlement-ends-barnes-v-zaccari/.

[161] Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1065–66 (9th Cir. 2013) (upholding a student's expulsion because of online statements like "that stupid kid from vetch. he didnt do shit and got a record. i bet i could get 50+ people / and not one bullet would be wasted").

to school activities and interfered with the rights of other students."[162] The court held that his post constituted an "identifiable threat of violence" and that the school could respond to off-campus speech if it meets the requirements of the *Tinker* test and interfered with the rights of other students.[163]

The *Tinker* test, similar to the *Hazelwood* test, governs when public schools may legally limit or punish students' speech that cannot be found to be school-sponsored.[164] In *Tinker*, the Court found that school officials had the authority to act to prevent the occurrence of substantial disturbances or material interferences with school activities before they happen and regardless if they ever happen as long as the disturbance (student speech or expression related) interferes with the rights of others.[165] If a university administrator wanted to prosecute or punish Zizi for her statement, the *Tinker* test would most likely be the one to hold the most water constitutionally, for the Court has, again, yet to clearly define what "interferes with the rights of others" means.[166]

However, overall, although many university administrators may think that statements like Zizi's can be constitutionally prosecuted because of the current political climate or the language in their student handbooks, many do not realize that the law in most circuits is still very much in favor of free speech, even though most of the times it is unclear at best.[167]

III. Finding a Marketplace Middle Ground: A Generally-Applicable Solution

The *Hazelwood* standard from 1988, created to govern high school students' speech, remains the most-utilized standard for deciding how and

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[162] *Id.* at 1065, 1067. In *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, the court found that student expression of wearing black arm bands in protest of the Vietnam War could not be censored because the wearing of them did not "materially and substantially interfere[] with the requirements of appropriate discipline in the operation of the school." 393 U.S. 503–05 (1969) (quoting Burnside v. Byars, 363 F.2d 744 (1966)).

[163] *Wynar*, 728 F.3d at 1069. The court held that under *Tinker*, student speech can be censored if it materially and substantially interfered with school activities. *Id.* at 1070.

[164] *Id.* at 1067.

[165] *Tinker*, 393 U.S. at 509, 510, 514.

[166] *Wynar*, 728 F.3d at 1072; *see* David L. Hudson Jr., *Federal Appeals Court Issues Significant Ruling on Student Online Speech*, First Amendment Ctr. (Dec. 3, 2013), http://www.firstamendmentcenter.org/federal-appeals-court-issues-significant-ruling-on-student-online-speech [hereinafter Hudson, *Federal Appeals Court Issues*].

[167] *Wynar*, 728 F.3d at 1068; Hudson, *Federal Appeals Court Issues*, *supra* note 166.

when public schools may regulate or restrict student expression.[168] However, the line between where educators are permitted to limit student speech because it would cause a substantial disruption and where educators go too far in invoking curriculum "as a pretext for punishing . . . [a] student for [his or her] religion"[169] or finding that a student's speech interfered with the rights of others is still unclear.[170] Therefore, what can university administrators, courts, and students do to find an appropriate balance between university governance and student rights amidst a foggy rule of law? The Sixth Circuit offers a starting place for how to resolve this problem in *Ward v. Polite*:

> If the [code] appears to be neutral and generally applicable on its face, but in practice is riddled with exemptions or worse is a veiled cover for targeting a belief or a faith-based practice, the [code] satisfies the First Amendment only if it "advance[s] [the] interests of the highest order and [is] narrowly tailored in pursuit of those interests."[171]

The court in *Ward* articulated the tension between the two camps well and avoided generalities such as "discrimination" in setting forth its test,[172] so the Court should follow its example and set forth an objective, specific test.

A university should subject its student handbook to its own form of strict scrutiny and do its research on the correct legal standards, and ensure that by an objective evaluation by members of both camps (ones supporting freedom of speech and others supporting increased administrative control) that each policy is clearly laid out with clear definitions and examples that are narrowly tailored to address specific instances of how a student can be harmed by another and how they can then be punished by the administration. Terms such as "emotional harm," "discrimination" and "degrading conduct" should be defined with extreme

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[168] *See* Ward v. Polite, 667 F.3d 727, 733–34 (6th Cir. 2012) (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–71 (1988)) (noting that student speech can only be restricted in public schools if the censorship was reasonably related to legitimate pedagogical concerns).

[169] Settle v. Dickson Cty. Sch. Bd., 53 F.3d 152, 155 (6th Cir. 1995).

[170] *See Wynar*, 728 F.3d at 1072; Hudson, *Federal Appeals Court Issues*, *supra* note 166.

[171] *Ward*, 667 F.3d at 738.

[172] *See id.*

accuracy, and specific instances and examples of conduct that "interferes with the rights of others," for example, should be laid out.[173]

Universities should also include savings clauses such as "[s]peech protected by the First Amendment shall not be punished under this policy,"[174] and include specific examples of the threshold of severity that must be established for a student to be punished under the code. Further, administrators should make sure that their student handbook codes were not copied from EEOC guidelines that are not applicable in college settings and make sure to educate every faculty member, administrator and student on the policies, clearly defining mandatory versus aspirational standards so that each person will know their rights and their limitations from the outset in order to prevent a chilling effect on student speech.[175] Additionally, universities should include authentic and effective instructions on how to communicate, argue, and disagree peacefully, with instructors modeling proper behavior in their diversity training sessions.[176]

Universities may also model FIRE-approved universities such as George Mason who have changed their student handbook policies to be in accordance with students' constitutional rights.[177] Cardiff University in the United Kingdom recently published a highly acclaimed diversity policy after rewriting their student handbook codes to address the tension between dignity, expression, and protecting students from harm that university administrators should read thoroughly, understand, and apply.[178] Even though the tension may not be an easy thing to work through, there are resources out there for courts and universities to use

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[173] For example, RESTATEMENT (THIRD) OF TORTS § 45 (2012) defining emotional harm to mean "impairment or injury to a person's emotional tranquility; Creeley & Harris, *supra* note 34, at 12–13 (2009) explain that "no one can be certain what a university means by 'emotional harm'"; *Discrimination and Discriminatory Harassment Policies*, OR. ST. UNIV., http://eoa.oregonstate.edu/discrimination-and-harassment-policies (last visited Oct. 15, 2016), defining discrimination as "any act that either in form or operation, and whether intended or unintended, unreasonably differentiates among persons on the basis of a protected status."

[174] Creeley & Harris, *supra* note 34, at 12–13.

[175] *Id.* at 12.

[176] Joanne C. Jones & Sandra Scott, *Cyberbullying in the University Classroom: A Multiplicity of Issues*, *in* 5 MISBEHAVIOR ONLINE IN HIGHER EDUCATION 157, 171 (Laura A. Wankel & Charles Wankel eds., 2012).

[177] *George Mason University Earns FIRE's Highest Rating for Free Speech*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Apr. 21, 2015), https://www.thefire.org/george-mason-university-earns-fires-highest-rating-for-free-speech/.

[178] *See generally Dignity at Work and Study*, CARDIFF UNIV. (2011), http://www.cardiff.ac.uk/govrn/cocom/equalityanddiversity/dignityatwork/ (university policy "committed to supporting, developing and promoting equality and diversity in all of its practices and activities and aims to establish an inclusive culture free from discrimination and based upon the values of dignity, courtesy and respect").

as models to help them solve the balance problem. Universities need to create objective, clearly articulated standards by which to navigate the delicate balance of administrator authority and student freedom of speech.

Public universities may also learn from the standard recently set by the Department of Education for religious private colleges.[179] In 1972, Congress added a provision to Title IX that if an educational institution is "controlled by a religious organization," it does not have to comply with Title IX if the act "would not be consistent with the religious tenets of such organization."[180] While public universities cannot obtain "'right-to-discriminate' waivers"[181] like private universities can, public universities should study the public policy behind the waivers in order to craft generally applicable policies in their student handbooks. Most private colleges receive federal aid money but are constitutionally and legally allowed to "discriminate" based on the institutions' mission and the fundamental, bedrock rights to the freedom of religion, and the freedom of speech that this nation was built upon.[182]

Non-profit organizations and courts could encourage universities to reform their policies by creating example handbooks that specifically spell out what the freedom of speech entails for students along with directions as to how to bring a lawsuit against their university for violating their constitutional rights. For example, in *Keeton v. Anderson-Wiley*, the court clearly lays out what a student or plaintiff must do in order to establish a First Amendment retaliation claim against a defendant, so an example handbook should include easy-to-read and understandable frameworks to empower students with knowledge as to how to stand up for their constitutional rights.[183] Finally, the standard set forth in *Tatro v. University of Minnesota* where the court found that "a university does not violate the free speech rights of a student enrolled in a professional program when the university imposes sanctions for Facebook posts that . . . are narrowly tailored and directly related to established professional conduct standards"[184] is an excellent example of a narrowly-tailored,

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[179] Andy Birkey, *Dozens of Christian Schools Win Title IX Waivers to Ban LGBT Students*, THE COLUMN (Dec. 1, 2015), http://thecolu.mn/21270/dozens-christian-schools-win-title-ix-waivers-ban-lgbt-students.

[180] Education Amendments of 1972, Pub. L. No. 92-318, sec. 901(a)(3), 86 Stat. 235, 373 (1972); Birkey, *supra* note 179.

[181] Birkey, *supra* note 179.

[182] *See id.*

[183] Keeton v. Anderson-Wiley, 664 F.3d 865, 878 (11th Cir. 2011) (quoting Bennett v. Hendrix, 423 F.3d 1247, 1250 (11th Cir. 2005).

[184] Tatro v. Univ. of Minn., 816 N.W.2d 509, 520–21 (Minn. 2012); Mark A. Cloutier, *Opening the Schoolhouse Gate: Why the Supreme Court Should Adopt the Standard Announced in Tatro v. University of Minnesota to Permit the Regulation of Certain Non-Curricular Student Speech in Professional Programs*, 55 B.C.L. Rev. 1659, 1681–82 (2014).).

appropriate test that articulates how to navigate the tension in the clearest way yet.

CONCLUSION

"If you believe as I do that ideas have consequences, what happens on American college campuses will eventually percolate its way down and through the culture as a whole. And if we lose free speech on college campuses, we will eventually lose free speech in the country."[185] Until the Supreme Court resolves the circuit confusion and debate over this issue once and for all, the only way that public university students will retain their freedom of speech and expression will be if courage is mustered and utilized by university officials, students, nonprofits, churches, and laypeople, not the court.[186] Until then, the myth that student handbook codes trump students' constitutional rights to the freedom of speech, religion, and expression will only grow stronger. In South Africa, churches, law firms, media specialists, politicians, students, and university officials all collaborated together in a unified effort to defend Zizipho Pae's constitutional right to the freedom of speech at the University of Cape Town, and in Clemson, South Carolina, three university professors collaborated in a unified effort and were courageous enough to speak up for the constitutional rights of the student body and saw great and lasting change as a result. Therefore, instead of punishing students for expressing their viewpoints in peaceful ways via impersonal and vague speech codes in university handbooks, universities, professors, students, and the community should instead work toward creating dynamic environments at public universities where a variety of controversial viewpoints can be exchanged.

"A double standard is not a neutral standard"[187] in the free marketplace of ideas, but it will take courageous men and women taking a stand to defend constitutional rights for it to remain so. The inclusion of anti-harassment, anti-discrimination, and hate speech codes in university handbooks is important to protect vulnerable students and to ensure order and peace on public campuses. However, the rights and freedoms of every student to speak out about their beliefs and to share ideas is just as equally important; in fact, the freedom of speech is a strong pillar that remains immovably steadfast even in the mist of public uproar or the current politically correct opinion of the day. That freedom is, indeed, the cornerstone that makes the United States of America the greatest nation in the world. University administrators need to step up and take the time

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[185] Morey, *supra* note 147.

[186] See *id.*, for an example of university officials that objected to student organization's demands to criminally prosecute protected speech.

[187] Ward v. Polite, 667 F.3d 727, 740 (6th Cir. 2012).

to create constitutional student handbooks that include codes as two-way constitutional streets.[188] They are, in fact, bound by the First Amendment and are charged to uphold it. Our nation's great and noble history demands nothing less. The myth must be put to rest.

188 Ahmad, *supra* note 37.