

PUTTING THEIR MONEY WHERE THEIR MOUTH IS: THE CASE FOR DENYING QUALIFIED IMMUNITY TO UNIVERSITY ADMINISTRATORS FOR VIOLATING STUDENTS' SPEECH RIGHTS

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INTRODUCTION

The First Amendment rights of students at our nation's public colleges and universities have long been afforded protection in the courts, including landmark Supreme Court decisions spanning several decades.¹ The courts have time and again recognized that the university campus "is peculiarly the 'marketplace of ideas,'"² that it plays a unique and critical role in society as a place where students enjoy robust speech rights and are free to discuss and debate a wide range of viewpoints in an endless search for truth and knowledge. Upholding the freedom of speech on campus has been viewed as essential to the ability of the American university to contribute to the betterment and progress of society.

Yet our nation's institutions of higher education, either in ignorance or defiance of the law, frequently violate the free speech rights of their students. These violations take many different forms—too often, university administrators draft unconstitutional speech codes and apply them towards protected speech, censor student newspapers, shut down campus protests and speaker events, and more. When university officials take these and similar actions, not only do they deprive students of some of their most cherished freedoms, they also contradict well established constitutional law principles. Consider, for example, that every university speech code challenged in court to a final decision on the merits has been invalidated on its face.³

This Article argues that, given the protections the judiciary has given to expressive rights at public colleges and universities, courts should deny qualified immunity to university administrators when they violate students' freedom of speech. Qualified immunity shields government officials—acting under the color of state law—from personal liability under 42 U.S.C. § 1983, a federal civil rights statute that allows individuals who have been deprived of a federal statutory or constitutional right to collect monetary damages from the responsible official.⁴ Under § 1983, public officials are entitled to qualified immunity if their

¹ See *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667 (1973); *Healy v. James*, 408 U.S. 169 (1972).

² *Healy*, 408 U.S. at 180 (internal citation omitted).

³ See *infra* Section II.A.

⁴ For a full discussion of the legal framework for § 1983 causes of action, see *infra* Section I.A.

actions do not violate “clearly established” law of which a reasonable person in the official’s position would be aware.⁵

This Article argues that the expressive rights of students at public colleges and universities are so well established in First Amendment jurisprudence that university officials depriving students of these rights cannot reasonably argue that they are entitled to qualified immunity protection.⁶ The author argues that officials should be denied qualified immunity for two types of First Amendment violations on campus: (1) the enactment of unconstitutional speech codes which by their terms encompass protected speech and (2) censorship and punishment of particular instances of protected student speech and expressive activity—referred to in this Article as “applied violations.”⁷ Both of these areas should be of grave concern to anyone who values the unfettered exchange of ideas at colleges and universities. First, speech codes misinform students of their speech rights and discourage or “chill” student expression, preventing full discussion and debate from taking place on university campuses. Second, applied violations contradict the decades of First Amendment case law, protecting the expressive rights of students in a university setting.

Piercing qualified immunity in such cases would give students the opportunity to collect monetary damages directly from university officials in their personal capacity. By allowing wronged students to pursue damages, courts would significantly alter university officials’ incentives

⁵ See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). For a full discussion of the law regarding qualified immunity, see *infra* Section I.B.

⁶ This Article takes no position with respect to violations of faculty members’ First Amendment rights at public institutions and the issue of qualified immunity in cases alleging such violations. Rather, its analysis and prescriptions are limited to the matter of qualified immunity for violations of university *students’* speech rights.

⁷ Violations of other First Amendment rights, such as the right to free exercise of religion and the right to be free of government establishment of religion, are outside the scope of this article. The author takes no position with respect to the issue of qualified immunity in cases alleging the violation of these rights. However, these rights may be at issue in some cases in which a free speech violation is also alleged; in such cases, the analysis presented in this article would remain fully applicable to the free speech claim.

Additionally, it should be noted that students’ freedom of speech necessarily includes the freedom of association, as is firmly established in First Amendment case law. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (“[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”). Therefore, this article advocates for piercing qualified immunity in cases where a student or student organization has been deprived of First Amendment associational rights.

with respect to campus speech. Faced with the prospect of paying damages out of their own pockets, administrators would logically have to reexamine their policies and practices and would be more likely to respect students' speech rights. These changes are imperative, because the current campus climate shows very little progress in spite of clear indications in the case law. For instance, a 2009 report by the Foundation for Individual Rights in Education (FIRE) found that seventy-one percent of public colleges and universities surveyed maintained "at least one policy that both clearly and substantially restricts freedom of speech."⁸ This is simply an unacceptable figure. It reveals that the case law, thus far, has failed to lead to widespread or systematic reform. Consequently, this Article expresses the hope that denial of qualified immunity will change the mentality of college administrators, and ultimately promotes greater protection for freedom of speech.

Part I of this Article sets forth the framework for § 1983 suits and discusses the legal standards which must be met by government officials seeking qualified immunity. Part II argues that given the uniform results of case law involving facial challenges to speech codes, university officials should not receive qualified immunity when they are responsible for enacting or maintaining an unconstitutional speech code. Part III argues that administrators should, other than in some exceptional circumstances, be denied qualified immunity for applied violations of students' speech rights, as the unlawfulness of these actions should be apparent to administrators in light of Supreme Court and federal circuit court precedents spanning decades. The Article concludes with some final thoughts on the import of piercing qualified immunity.

I. SECTION 1983 AND QUALIFIED IMMUNITY

A. *Availability of Section 1983 Suits*

When an individual has been deprived of a federal statutory or constitutional right by reason of a government official's conduct, he or she has recourse to a § 1983 suit. This cause of action comes from the federal Civil Rights Act of 1871, which provides, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the

⁸ FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (FIRE), *Spotlight on Speech Codes 2010: The State of Free Speech on Our Nation's Campuses* 5-7 (2009), *available at* <http://www.thefire.org/public/pdfs/9aed4643c95e93299724a350234a29d6.pdf?direct> [hereinafter FIRE, *SPOTLIGHT ON SPEECH CODES* 2010].

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deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress”⁹ Section 1983 provides a powerful weapon for those who have been harmed in the exercise of their federal statutory or constitutional rights. It allows plaintiffs to pursue injunctive and declaratory relief as well as monetary damages,¹⁰ thus allowing them to choose among potential remedies for that which best addresses their particular case.

Section 1983’s requirement of action under color of state law means that the government official must have exercised power “possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.”¹¹ The United States Supreme Court has held that if an official’s conduct satisfies the state action requirement of the Fourteenth Amendment, such conduct also constitutes action under color of state law and will support a § 1983 suit.¹² To constitute state action, “the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible,” and “the party charged with the deprivation must be a

⁹ 42 U.S.C. § 1983 (2002). The Supreme Court has held that municipal corporations can be sued directly for damages under § 1983, unlike governmental units at the state level. *See* *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978) (holding that local government units can be held liable for damages under § 1983 when execution of official government policy or custom inflicts cognizable injury). However, local government units cannot be held liable for an official’s action on a theory of respondeat superior alone, where there is no showing that the action executed official policy or custom. *Monell*, 436 U.S. at 694. Additionally, while federal government officials do not fall within the purview of § 1983, the Court held in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that federal officials can be sued for monetary damages, under an implied right of action, when they have acted to deprive an individual of a right or privilege provided by federal law. The Court has repeatedly indicated that a federal official’s qualified immunity defense when facing an implied right of action under *Bivens* should proceed under the same standards as a state or local government official’s qualified immunity defense when facing a § 1983 suit. *See, e.g.,* *Wilson v. Layne*, 526 U.S. 603 (1999); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Butz v. Economou*, 438 U.S. 478, 504 (1978) (stating that it would be “untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials”).

¹⁰ *See, e.g.,* *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (allowing plaintiff to pursue damages, injunction, and declaratory relief under § 1983); *Monell*, 436 U.S. at 690 (stating that local government units are directly liable under § 1983 for monetary, declaratory, or injunctive relief).

¹¹ *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

¹² *Lugar v. Edmonton Oil Co.*, 457 U.S. 922, 935 (1982).

person who may fairly be said to be a state actor.”¹³ Thus, a public official acts under color of state law when he undertakes the action in his official capacity or pursuant to his responsibilities under state law.¹⁴

Section 1983 suits may be brought against government officials in either their personal capacity or their official capacity. A personal capacity suit aims to impose personal liability upon a public official for actions taken under color of state law,¹⁵ whereas an official capacity suit “generally represent[s] only another way of pleading an action against an entity of which an officer is an agent.”¹⁶ The Court has stated that “[a]s long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity It is *not* a suit against the official personally, for the real party in interest is the entity.”¹⁷ Whereas a damages award against an official in his personal capacity is executed against the official’s personal assets, a plaintiff seeking damages in an official capacity suit looks to recover from the government entity itself.¹⁸ Additionally, a plaintiff in an official capacity suit must do more than demonstrate the deprivation of a federal right by a government official acting under color of state law; he or she must also demonstrate that the government entity was a “moving force” behind the deprivation and that the entity’s “policy or custom” played a part in the violation of federal law.¹⁹ Finally, an official named as a defendant in an official capacity suit cannot use qualified immunity as a defense, but rather can only avail him or herself of the sovereign immunity that the entity, as an entity, might possess.²⁰

A plaintiff seeking monetary damages under § 1983 for violation of a federal right by a state government official, such as a public college

¹³ *Id.* at 937. “[S]tate employment is generally sufficient to render the defendant a state actor.” *Id.* at 936, n.18.

¹⁴ *West*, 487 U.S. at 50.

¹⁵ *Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

¹⁶ *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978).

¹⁷ *Graham*, 473 U.S. at 166 (citing *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985)). Official-capacity suits are often necessary because unless a state has waived its Eleventh Amendment immunity or Congress has expressly overridden it, a state cannot be directly sued in its own name regardless of the relief sought. See *Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam). As the Court has observed, “implementation of state policy or custom may be reached in federal court only because official-capacity actions for prospective relief are not treated as actions against the State.” *Graham*, 473 U.S. at 167 n.14 (citing *Ex parte Young*, 209 U.S. 123 (1908)).

¹⁸ *Graham*, 473 U.S. at 166.

¹⁹ See *Polk County v. Dodson*, 454 U.S. 312, 326 (1981); *Monell*, 436 U.S. at 694.

²⁰ *Graham*, 473 U.S. at 167.

or university administrator, must pursue a personal capacity suit rather than an official capacity suit.²¹ This is due to the fact that “absent waiver by the State or valid congressional override, the Eleventh Amendment bars damages actions against a State in federal court,”²² and this bar “remains in effect when state officials are sued for damages in their official capacity.”²³ The latter point reflects the reality that a judgment against a public official in his official capacity imposes liability on the entity that he represents.²⁴ The Court has made clear that § 1983 does not constitute a valid congressional override for purposes of Eleventh Amendment immunity,²⁵ thereby making damages unavailable in a § 1983 suit against a state official in his or her official capacity. Therefore, plaintiffs seeking monetary damages for a state official’s act must pursue a personal capacity suit.

B. *The Law Governing Qualified Immunity*

When facing a § 1983 suit in his or her personal capacity, one of the defenses available to a state official is qualified immunity under the Eleventh Amendment.²⁶ Qualified immunity shields government officials performing discretionary functions from liability for civil damages “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”²⁷ As explained by the Supreme Court, the doctrine of quali-

²¹ *Id.* at 165-66.

²² *Id.* at 169 (citing *Ford Motor Co. v. Dept. of Treasury of Ind.*, 323 U.S. 459, 464 (1945)).

²³ *Id.* (citing *Cory v. White*, 457 U.S. 85, 90 (1982); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974)).

²⁴ *Brandon v. Holt*, 469 U.S. 464, 471 (1985). Unlike an action for damages, in a suit seeking injunctive or declaratory relief, a state’s immunity can be overcome by naming state officials as defendants. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). Moreover, monetary relief “ancillary” to injunctive relief is permitted by the Eleventh Amendment. *Edelman*, 415 U.S. at 667-68.

²⁵ See *Quern v. Jordan*, 440 U.S. 332 (1979); *Edelman*, 415 U.S. 651.

²⁶ *Saucier v. Katz*, 533 U.S. 194, 200 (2001).

²⁷ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity must, at the onset, be distinguished from the defense of absolute immunity, which is afforded to “officials whose special functions or constitutional status requires complete protection from suit.” *Id.* at 807. Absolute immunity extends to legislators in their legislative functions, *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491 (1975), as well as to judges in their judicial functions, *Stump v. Sparkman*, 435 U.S. 349 (1978). Absolute immunity also extends to certain officials of the executive branch, such as prosecutors and similar officials, executive officers engaged in adjudicative functions, and the President of the United States. *Harlow*, 457 U.S. at 807 (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 746 (1982); *Butz v. Economou*, 438 U.S. 478, 508-12, 513-17

fied immunity balances two important competing interests: first, the public interest in holding government officials accountable when they act irresponsibly or abuse their power, and second, the public interest in shielding officials from the distraction of trial and potential liability when they perform their duties reasonably.²⁸ The Court has recognized that “substantial costs attend the litigation of the subjective good faith of government officials,” including “distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service,” all of which can be disruptive of the ability of government to function effectively.²⁹ At the same time, the Court has made clear that “[b]y defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official’s acts.”³⁰

The Supreme Court has adopted a two-part test for qualified immunity. The first prong asks whether, taken in the light most favorable to the party asserting injury, the facts alleged demonstrate a violation of a statutory or constitutional right.³¹ The second inquiry is whether that right was “clearly established” at the time of the government official’s alleged conduct, such that it would have been clear to a reasonable person that the conduct was unlawful under the circumstances of the

(1978)). “For executive officials in general, however . . . qualified immunity represents the norm.” *Harlow*, 457 U.S. at 807.

²⁸ *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009).

²⁹ *Harlow*, 457 U.S. at 816-17. Accordingly, the Court declared that “bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery.” *Id.* at 817-18. Because qualified immunity is “an *immunity from suit* rather than a mere defense to liability,” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), the Court has “repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation.” *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam). The Court has indicated that qualified immunity should be applied

in such a way as to “permit the resolution of many insubstantial claims on summary judgment” Unless the plaintiff’s allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. . . . Even if the plaintiff’s complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.

Mitchell, 472 U.S. at 526 (internal citations omitted).

³⁰ *Harlow*, 457 U.S. at 819.

³¹ *Saucier*, 533 U.S. at 201.

case.³² Under the second prong, the right allegedly violated needs to be defined at “the appropriate level of specificity” before a court can determine whether it was clearly established.³³ Moreover, “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”³⁴ This inquiry entails consideration of both clearly established law and the factual information possessed at the time, and therefore must be “undertaken in light of the specific context of the case, not as a broad general proposition.”³⁵

The Supreme Court has cautioned that, with respect to what constitutes clearly established law, it is not necessary that “the very action in question [has] previously been held unlawful,” but rather that “in the light of pre-existing law the unlawfulness must be apparent.”³⁶ Consequently, “general statements of the law are not inherently incapable of giving fair and clear warning” and in many instances “a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the ‘the very action in question has [not] previously been held unlawful.’”³⁷ This is a

³² *Id.* The Court has explained that the two-step analysis for qualified immunity, put together, “turns on the ‘objective legal reasonableness’ of the action, assessed in light of the legal rules that were ‘clearly established’ at the time it was taken.” *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citing *Harlow*, 457 U.S. at 819). Moreover, the protection of qualified immunity does not depend on whether a government official’s error is “a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.” *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting) (citing *Butz*, 438 U.S. at 507).

³³ *Wilson v. Layne*, 526 U.S. 603, 615 (1999).

³⁴ *Anderson*, 483 U.S. at 640; *see also Saucier*, 533 U.S. at 202 (“The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”).

³⁵ *Saucier*, 533 U.S. at 201.

³⁶ *Anderson*, 483 U.S. at 640 (internal citations omitted); *see also Giebel v. Sylvester*, 244 F.3d 1182, 1189 (9th Cir. 2001)

Precedent directly on point is not necessary to demonstrate that a right is clearly established. Rather, if the unlawfulness [is] apparent in light of preexisting law, then the standard is met. In addition, *even if there is no closely analogous case law*, a right can be clearly established on the basis of common sense.

Id. (internal quotations and citations omitted) (emphasis added).

³⁷ *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997) (internal citations omitted)). *Lanier* involved a state judge’s conviction under 18 U.S.C. § 242 for violating the constitutional rights of five women by sexually assaulting them. Section 242 is the criminal analogue to § 1983, and makes it criminal to act (1) willfully and (2) under the color of state law (3) to deprive a person of rights guaranteed by the Constitution or laws of the United States. 18 U.S.C. § 242 (1993); *Lanier*, 520 U.S. at 264. Under § 242, a defendant must have “fair warning” that the act in question violates a constitutional or

crucial point and one that will carry great significance through much of this Article as the author discusses the issue of qualified immunity in First Amendment cases arising in higher education. Of course, as the Court has recognized, some violations are so obvious that a prior ruling is not required to establish the unlawfulness of the action.³⁸

Regarding the types of decisional law needed to create clearly established law, the federal circuits are currently split.³⁹ While the Supreme

statutory right “in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.” *Lanier*, 520 U.S. at 265 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). As the Court stated in *Hope*, a § 1983 case, “[o]fficers sued in a civil action for damages under 42 U.S.C. § 1983 have the same right to fair notice as do defendants charged with the criminal offense defined in 18 U.S.C. § 242.” *Hope*, 536 U.S. at 739; *see also Lanier*, 520 U.S. at 270-71

[T]he object of the “clearly established” immunity standard is not different from that of “fair warning” as it relates to law “made specific” for the purpose of validly applying Section 242. The fact that one has a civil and the other a criminal law role is of no significance; both serve the same objective, and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.

Id. Therefore, even though *Lanier* is not a qualified immunity decision under § 1983, the Court’s pronouncement regarding general statements of the law for purposes of “fair warning” under § 242 applies equally to analysis of the “clearly established” element of qualified immunity.

³⁸ *See, e.g., Lanier*, 520 U.S. at 271

The easiest cases don’t even arise. There has never been a Section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability because no previous case had found liability in those circumstances.

Id. (quoting *K.H. v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990)).

³⁹ The Eighth Circuit has held that “[i]n the absence of binding precedent, a court should look to *all available decisional law* including decisions of state courts, other circuits and district courts.” *Norfleet v. Ark. Dep’t. of Human Servs.*, 989 F.2d 289, 291 (8th Cir. 1993) (emphasis added). The Ninth Circuit has similarly held that in the absence of binding precedent handed down by the Supreme Court or the Ninth Circuit, “we ‘look to *whatever decisional law is available* . . . including decisions of state courts, other circuits, and district courts.’” *Boyd v. Benton County*, 374 F.3d 773, 781 (9th Cir. 2004) (internal quotations omitted) (emphasis added).

Other circuits, however, have taken more limited approaches. The Fourth, Tenth, and Eleventh Circuits do not consider district court decisions. *See, e.g., Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999) (considering only Supreme Court, forum circuit, and highest state court decisions); *Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 594 (10th Cir. 1999) (considering only decisions from Supreme Court, forum circuit, and highest state court, as well as clearly established weight of authority from other circuit courts); *Jenkins by Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n.4 (11th Cir. 1997) (considering only Supreme Court, forum circuit, and highest state court decisions). The Second and Seventh Circuits have held that district court opinions may be considered as evidence of the law but cannot clearly establish the law of the circuit. *See, e.g., Jermosen v. Smith*, 945 F.2d 547, 551

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Court has not settled the circuit split to this point,⁴⁰ it has indicated that government officials must ultimately look to “cases of controlling authority in their jurisdiction” or “a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.”⁴¹

Previously, under *Saucier v. Katz*,⁴² the Court had mandated that courts apply the two-part test in the order indicated above, requiring courts to first decide whether the facts alleged demonstrated the violation of a federal right before they could proceed to the second question.⁴³ Under *Saucier*, if a court determined that no violation had been shown, there was no need to analyze whether the right in question had

(2d Cir. 1991); *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995) (holding that district court decisions “are evidence of the state of the law. Taken together with other evidence, they might show that the law had been clearly established. But by themselves they cannot clearly establish the law . . .”). The Sixth Circuit has held that a district court must find binding precedent from the Supreme Court, the Sixth Circuit Court of Appeals, or from itself. *Ohio Civil Serv. Employees Ass’n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988). The Third Circuit has held that district court decisions do not clearly establish the law of the circuit and are not even binding on other district courts in the same district. *Doe v. Delie*, 257 F.3d 309, 321 n.10 (3d Cir. 2001) (citing *Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991)). *But see*, *Pro v. Donatucci*, 81 F.3d 1283, 1292 (3d Cir. 1996) (finding clearly established law on the basis of two Fifth Circuit Court of Appeals decisions and one district court decision within the Third Circuit).

⁴⁰ See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.32 (1982) (declining to define “the circumstances under which ‘the state of the law’ should be ‘evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court’”) (internal citations omitted); *Boyd*, 374 F.3d at 781 (“The Supreme Court has provided little guidance as to where courts should look to determine whether a particular right was clearly established at the time of the injury.”).

⁴¹ *Wilson v. Layne*, 526 U.S. 603, 617 (1999). Elsewhere, the Supreme Court has rejected the notion that only its own decisions can create “clearly established” law. In *Lanier*, the Court repudiated the Sixth Circuit’s interpretation of the Supreme Court case of *Screws v. United States*, 325 U.S. 91 (1945) as holding that only Supreme Court decisions can establish “fair warning” for purposes of a § 242 case. *Lanier*, 520 U.S. at 268. Rather, the Court clarified that *Screws* “referred in general terms to rights made specific by ‘decisions interpreting’ the Constitution . . . and no subsequent case has held that the universe of relevant interpretive decisions is confined to our opinions.” *Lanier*, 520 U.S. at 268 (internal citations omitted). Given the parallels which exist between the standards for “fair warning” under § 242 and “clearly established” law for purposes of qualified immunity, as expressly recognized by the Court, see *Hope*, 536 U.S. at 739, 741; *Lanier*, 526 U.S. at 265, the Court’s clarification of its holding in *Screws* should apply in the same way to analysis of the “clearly established” element of qualified immunity.

⁴² *Saucier v. Katz*, 533 U.S. 194 (2001).

⁴³ *Id.* at 201 (“In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence.”).

been clearly established at the time.⁴⁴ However, in its 2009 decision in *Pearson v. Callahan*, the Court overruled *Saucier* on this point, holding that the “rigid order of battle” imposed by *Saucier* should no longer be mandatory and that lower courts should instead be allowed to use their discretion to decide the order in which to proceed with the test for qualified immunity.⁴⁵ This decision appears to have come in response to significant amounts of criticism of the *Saucier* protocol both from the lower federal courts and from within the Court itself.⁴⁶

In *Callahan*, the Court reasoned that *Saucier*’s mandatory rule “sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case,” as in cases “in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.”⁴⁷ Moreover, it reasoned that “[u]nnecessary litigation of constitutional issues also wastes the parties’ resources,” defeating one of the central purposes of the qualified immunity doctrine by “forc[ing] the parties to endure additional burdens of suit . . . when the suit otherwise could be disposed of more readily.”⁴⁸ Finally, the Court asserted that

⁴⁴ *Id.* (“If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity.”). The Supreme Court had previously stated that deciding the question of alleged violation of a right before proceeding to the question of whether the law was clearly established is “the better approach to resolving cases in which the defense of qualified immunity is raised.” *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998). However, in *Saucier*, the Court for the first time made this sequence mandatory, explaining that the mandatory two-step sequence would promote “the law’s elaboration from case to case” regarding the “existence or nonexistence of a constitutional right.” *Saucier*, 533 U.S. at 201. This would create much-needed precedent in relatively undeveloped areas of the law and prevent stagnation in other areas. Conversely, “[t]he law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer’s conduct was unlawful in the circumstances of the case.” *Id.*

⁴⁵ *Pearson v. Callahan*, 129 S. Ct. 808, 817-18 (2009).

⁴⁶ The Court observed in *Callahan* that “[l]ower court judges, who have had the task of applying the *Saucier* rule on a regular basis for the past eight years, have not been reticent in their criticism of *Saucier*’s ‘rigid order of battle.’” *Callahan*, 129 S. Ct. at 817 (citing *Purtell v. Mason*, 527 F.3d 615, 622 (7th Cir. 2008); *Higazy v. Templeton*, 505 F.3d 161, 179, n.19 (2d Cir. 2007)). In addition, the Court remarked that “[m]embers of this Court have also voiced criticism of the *Saucier* rule.” *Id.* (citing *Morse v. Frederick*, 551 U.S. 393, 430-31 (2007) (Breyer, J., concurring in judgment in part and dissenting in part); *Bunting v. Mellen*, 541 U.S. 1019 (2004) (Stevens, J., joined by Ginsburg and Breyer, JJ., respecting denial of certiorari)). Thus, it concluded, “[w]here a decision has ‘been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts,’ these factors weigh in favor of reconsideration.” *Id.* at 818 (quoting *Payne v. Tennessee*, 501 U.S. 808, 829-30 (1991)).

⁴⁷ *Id.* at 818.

⁴⁸ *Id.* (internal quotations and citations omitted).

although the first prong of the *Saucier* protocol was intended to promote the development of constitutional precedent, in particular in relatively unsettled areas of the law, the cases following *Saucier* had largely failed to make a meaningful contribution to the development of precedent.⁴⁹ Thus, according to *Callahan*, the *Saucier* protocol often failed to serve its primary purpose. The Court therefore held that the *Saucier* protocol is no longer mandatory and that the order in which a court applies the two-part test for qualified immunity is now left instead to the discretion of the particular court.⁵⁰

II. QUALIFIED IMMUNITY AND SPEECH CODES

Having set the legal framework for qualified immunity in § 1983 suits, this Article turns to an analysis of the case law on campus speech codes. As this section discusses, every speech code that has been litigated to date has been struck down by a court of law—all within approximately the past two decades—thus providing university administrators with clear indication that they are in violation of the law when they draft and maintain such policies.

⁴⁹ *Id.* at 819. As the Court argued, “[f]or one thing, there are cases in which the constitutional question is so fact-bound that the decision provides little guidance for future cases.” *Id.* Another concern expressed by the Court was that “[w]hen qualified immunity is asserted at the pleading stage, the precise factual basis for the plaintiff’s claim or claims may be hard to identify.” *Id.* Additionally, “[t]here are circumstances in which the first step of the *Saucier* procedure may create a risk of bad decisionmaking,” as the lower courts “sometimes encounter cases in which the briefing of constitutional questions is woefully inadequate.” *Id.* at 820. Finally, the Court pointed out, “[a]dherence to *Saucier*’s two-step protocol departs from the general rule of constitutional avoidance and runs counter to the ‘older, wiser judicial counsel not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.’” *Id.* at 821 (quoting *Scott v. Harris*, 550 U.S. 372, 388 (2007) (Breyer, J., concurring)) (internal quotations omitted).

⁵⁰ The Court emphasized, however, “[o]ur decision does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases.” *Id.* at 821. Elsewhere, it reiterated, “[b]ecause the two-step *Saucier* procedure is often, but not always, advantageous, the judges of the district courts and the courts of appeals are in the best position to determine the order of decision-making [that] will best facilitate the fair and efficient disposition of each case.” *Id.*

A. *The Case Law on Speech Codes*

i. What is a Speech Code

Speech codes are “university regulations prohibiting expression that would be constitutionally protected in society at large,”⁵¹ or “any campus regulation that punishes, forbids, heavily regulates, or restricts a substantial amount of protected speech.”⁵² In other words, by their very terms, they infringe upon the right of university students to engage in constitutionally protected expression.⁵³ Courts have repeatedly found them to be doctrinally flawed under the First Amendment owing to their vagueness,⁵⁴ overbreadth,⁵⁵ or both.

⁵¹ FIRE, Spotlight on Speech Codes 2010, *supra* note 8, at 9.

⁵² DAVID A. FRENCH, GREG LUKIANOFF & HARVEY A. SILVERGLATE, FIRE’S GUIDE TO FREE SPEECH ON CAMPUS 130 (2005)

⁵³ As most verbal conduct is protected by the First Amendment, the narrow exceptions to the First Amendment include the categories of fighting words, obscenity, defamation, incitement to imminent lawless action, and true threats and intimidation. *See* Virginia v. Black, 538 U.S. 343, 359-60 (2003); R.A.V. v. St. Paul, 505 U.S. 377, 382-83 (1992); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Speech that does not fall under any one of these exceptions is not independently proscribable and is entitled to First Amendment protection.

Speech that is otherwise protected may be a part of unlawful conduct such as, for instance, student-on-student (or peer) sexual harassment. However, in order for that to be the case, such speech must be a part of a pattern of conduct which is “so severe, pervasive, and objectively offensive, and . . . 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.” *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999). In other words, protected speech may be legitimately swept up in a peer sexual harassment claim only when it is part of a larger pattern of extreme harassing conduct. Thus, it is incorrect to view harassment as an outright exception to the First Amendment. *See, e.g., Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204, 209 (3d Cir. 2001) (“There is no categorical ‘harassment exception’ to the First Amendment’s free speech clause . . . ‘[h]arassing’ or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections.”); *DeJohn v. Temple Univ.*, 537 F.3d 301, 316 (3d Cir. 2008) (“In *Saxe*, we noted that there is no ‘harassment exception’ to the First Amendment’s Free Speech Clause . . .”). *See also* UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis., 774 F. Supp. 1163, 1177 (E.D. Wisc. 1991) (“Since Title VII is only a statute, it cannot supersede the requirements of the First Amendment.”).

⁵⁴ A statute or regulation is unconstitutionally vague when “men of common intelligence must necessarily guess at its meaning.” *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973) (internal citations omitted). In order to avoid the vagueness problem, a statute or regulation must “give adequate warning of what activities it proscribes” and “set out ‘explicit standards’ for those who must apply it.” *Id.* The Supreme Court has held that “a more stringent vagueness test” should apply to laws that interfere with the right of free speech. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

⁵⁵ A statute or law regulating speech is unconstitutionally overbroad “if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate.” *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 864 (E.D. Mich. 1989) (citing *Broadrick*, 413

Speech codes abound at colleges and universities, and just a few examples are illustrative of the problems they present. One policy at Johns Hopkins University prohibits any and all “[r]ude, disrespectful behavior,”⁵⁶ thus covering much protected speech, moreover, in patently vague language. Similarly, Texas A&M University maintains a policy on “Student Rights and Obligations” which prohibits students from violating others’ rights to “respect for personal feelings” and “freedom from indignity of any type.”⁵⁷ San Jose State University’s policy on “Harassment and/or Assault” bans “verbal remarks,” “publicly telling offensive jokes,” and even “[p]ractical jokes and pranks,”⁵⁸ presenting fundamental vagueness and overbreadth concerns.

Still other examples are revealing. New York University’s “Anti-Harassment Policy” expressly prohibits “insulting, teasing, mocking, degrading or ridiculing” another individual, as well as “inappropriate . . . jokes.”⁵⁹ Murray State University in Kentucky lists “[t]elling sexual jokes or stories,” “[l]ooking a person up and down (elevator eyes),” and even “[d]isplaying sexual and/or derogatory comments about men/women on coffee mugs” as examples of sexual harassment.⁶⁰ Lastly, North-

U.S. at 612). The Supreme Court has mandated that “[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.” *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963). Therefore, “statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.” *Broadrick*, 413 U.S. at 611-12. “The doctrine of overbreadth, while extremely circumscribed in most applications, is generally afforded a broader application where First Amendment rights are involved.” *Roberts v. Haragan*, 346 F. Supp. 2d 853, 871-72 (N.D. Tex. 2004) (citing *Broadrick*, 413 U.S. at 612).

⁵⁶ Johns Hopkins University, Principles for Ensuring Equity, Civility and Respect for All, www.jhu.edu/news_info/policy/civility.html (last visited Feb. 26, 2009). In this section, the author has included some policy examples from private institutions purely because they are illustrative of the doctrinal problems presented by speech codes, even though private colleges and universities are not legally bound by the First Amendment. While private institutions’ speech codes are not susceptible to a constitutional challenge, the examples provided in this section are meant to illustrate the general doctrinal problems associated with university regulations on speech. In other words, the same policy, if maintained at a public college or university, would be susceptible to a constitutional challenge.

⁵⁷ Texas A&M University, Student Rights and Obligations, <http://www.tamus.edu/offices/policy/policies/pdf/13-02.pdf> (last visited Feb. 26, 2009).

⁵⁸ San Jose State University, Residence Hall & Campus Village Community Living Handbook 2007-2008, <http://housing.sjsu.edu/documents/Handbook.pdf> (last visited Aug. 2, 2009).

⁵⁹ New York University, New York University Anti-Harassment Policy and Complaint Procedures, <http://www.nyu.edu/eo/anti-harass-policy.pdf> (last visited June 8, 2009).

⁶⁰ Murray State University, Women’s Center: Sexual Harassment, <https://www.murraystate.edu/womenscenter/MSUWomensCenterSexualHarassment.htm> (last visited June 7, 2009).

eastern University bans students from using the school's information systems or facilities to "[t]ransmit or make accessible material, which in the sole judgment of the University" is "offensive" or "annoying."⁶¹ These and other existing speech codes suffer from the same First Amendment flaws found in previously challenged speech codes, and as a result continue to impinge upon student speech rights.

ii. The Decisions: From *Doe* to *Smith*

The first such case, *Doe v. University of Michigan*,⁶² was decided in 1989. In *Doe*, a graduate student challenged the University of Michigan's "Policy on Discrimination and Discriminatory Harassment," which prohibited, in pertinent part, "[a]ny behavior, verbal or physical, that *stigmatizes or victimizes* an individual on the basis of race, ethnicity, religion, sex," and other listed traits and that "[c]reates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities."⁶³ The student claimed that, under the terms of the policy, he feared that "certain controversial theories positing biologically-based differences between sexes and races might be perceived as 'sexist' and 'racist' by some students" and that therefore "his right to freely and openly discuss these theories was impermissibly chilled."⁶⁴

The federal district court found the University of Michigan policy to be both facially overbroad⁶⁵ and vague.⁶⁶ Finding the plaintiff student's fear of punishment for engaging in legitimate academic discussion in the classroom to be credible, based in part on previous instances in which the university had applied the policy against students' academic discourse, the court held that the policy was overbroad "both on its face and as applied."⁶⁷ Regarding the vagueness problem, the court reasoned that terms such as "stigmatizes" and "victimizes" were "general and elude[d] precise definition" and that the university "never articulated any principled way to distinguish sanctionable from protected

⁶¹ Northeastern University, Undergraduate Student Handbook 2008-09: Appropriate Use of Computer and Network Resources Policy, http://www.northeastern.edu/admissions/pdfs/ug handbook_0809.pdf (last visited Feb. 26, 2009).

⁶² *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 864 (E.D. Mich. 1989).

⁶³ *Id.* at 856 (emphasis added).

⁶⁴ *Id.* at 858.

⁶⁵ *Id.* at 866.

⁶⁶ *Id.* at 867.

⁶⁷ *Id.* at 864-66.

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speech,” forcing students to “guess at whether a comment about a controversial issue would later be found to be sanctionable.”⁶⁸ Because the policy could not be given a constitutionally permissible reading, the court permanently enjoined the university from enforcing it against any verbal expression.⁶⁹

Two years after *Doe*, the second speech code decision was handed down in *UWM Post, Inc. v. Board of Regents of the University of Wisconsin*.⁷⁰ In that case, a federal district court invalidated a discriminatory harassment policy prohibiting “racist or discriminatory comments, epithets or other expressive behavior” if such conduct intentionally “demean[ed] the race, sex, religion,” or other listed characteristics of an individual or “[c]reate[d] an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.”⁷¹ As was the case in *Doe*, the policy was held to be both overbroad and vague on its face.⁷² In reaching this result, the court rejected the university’s argument that the policy was aimed only at verbal conduct which met the “fighting words” exception to the First Amendment,⁷³ reasoning that the policy “regulates discriminatory speech whether or not it is likely to provoke” a violent response and “covers a substantial number of situations where no breach of the peace is likely to result,” thus extending beyond the very limited scope of the fighting words doctrine.⁷⁴

In 1992, the U.S. Supreme Court decided *R.A.V. v. St. Paul*, a case that, while not directly involving a challenge to a speech code, carries major implications for speech codes.⁷⁵ In *R.A.V.*, the Court struck down a city ordinance which prohibited placing, on public or private property, “a symbol, object, appellation . . . which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”⁷⁶ Even accepting the city’s assertion that the ordinance reached only “fighting

⁶⁸ *Id.* at 867.

⁶⁹ *Id.* at 869.

⁷⁰ *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis.*, 774 F. Supp. 1163, 1177 (E.D. Wisc. 1991).

⁷¹ *Id.* at 1165.

⁷² *Id.* at 1178, 1180.

⁷³ *Id.* at 1172.

⁷⁴ *Id.* at 1173.

⁷⁵ See *R.A.V. v. St. Paul*, 505 U.S. 377, 382-83 (1992).

⁷⁶ *Id.* at 380.

words” and therefore did not proscribe expression in violation of the First Amendment, the Court held that the ordinance impermissibly singled out expression on the basis of the subjects addressed.⁷⁷ Because the ordinance only prohibited speech involving particular personal characteristics, it unconstitutionally discriminated against speech on the basis of content.⁷⁸ *R.A.V.* importantly establishes that even within unprotected categories of speech, the First Amendment does not allow the state to ban only those viewpoints it disfavors.

Three years after *R.A.V.*, the Sixth Circuit Court of Appeals became the first federal circuit court to decide a speech code case in *Dambrot v. Central Michigan University*.⁷⁹ Once again, the challenged speech code took the form of a discriminatory harassment policy, prohibiting “any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by . . . *demeaning* or slurring individuals . . . or using symbols, [epithets] or slogans that *infer negative connotations* about the individual’s racial or ethnic affiliation.”⁸⁰ Finding this policy to be both overbroad and vague on its face,⁸¹ the Sixth Circuit stated, “[i]t is clear from the text of the policy that language or writing, intentional or unintentional, regardless of political value, can be prohibited upon the initiative of the university.”⁸² In addition, it held that, even assuming the university’s argument that the policy prohibited only fighting words to be correct, the policy “constitutes content discrimination because it necessarily requires the university to assess the racial or ethnic content of the speech.”⁸³

The same year as *Dambrot*, a California state court handed down the first speech code decision involving a private university, *Corry v. Leland Stanford Junior University*.⁸⁴ The suit was brought under California’s “Leonard Law,” which affords private university students in California the same free speech rights as students attending public

⁷⁷ *Id.* at 381.

⁷⁸ *Id.* at 391.

⁷⁹ *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

⁸⁰ *Id.* at 1182 (emphasis added).

⁸¹ *Id.* at 1183-84.

⁸² *Id.* at 1183.

⁸³ *Id.* at 1184.

⁸⁴ *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995).

institutions.⁸⁵ It challenged Stanford University's policy on harassment by "personal vilification," which barred expression "intended to insult or stigmatize an individual . . . on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin."⁸⁶ The state court rejected the university's argument that the policy merely banned the use of fighting words, on two grounds. First, it found that the policy, even if limited to the fighting words exception, banned only those fighting words based on enumerated categories such as race and gender, while permitting fighting words which did not address the enumerated topics.⁸⁷ This, it held, restricted verbal conduct "based on the content of the underlying expression" in violation of the university's obligation of content neutrality.⁸⁸ Second, it found that the policy in fact banned expression beyond the fighting words exception, making the policy facially overbroad.⁸⁹

In the years following *Doe*, *UWM Post*, *Dambrot*, and *Corry*, additional legal challenges resulted in more speech codes being invalidated. In *Booher v. Board of Regents of Northern Kentucky University*,⁹⁰ a federal district court struck down a sexual harassment policy prohibiting expression which "unreasonably affects your status and well-being by creating an intimidating, hostile, or offensive work or academic environment."⁹¹ The policy, the court held, encountered problems of vagueness as well as overbreadth.⁹²

In 2003, a federal district court's decision in *Bair v. Shippensburg University*⁹³ resulted in the defeat of a speech code with several unconstitutional provisions. Specifically, Shippensburg University's Code of

⁸⁵ CAL. EDUC. CODE § 94367 (2009)

No private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution.

Id.

⁸⁶ *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Booher v. Bd. of Regents of N. Ky. Univ.*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998).

⁹¹ *Id.* at *3.

⁹² *Id.* at *28-32.

⁹³ *Bair v. Shippensburg Univ.* 280 F. Supp. 2d 357 (M.D. Pa. 2003).

Conduct mandated that students were to speak in a manner that “does not provoke, harass, intimidate, or harm another” and prohibited “acts of intolerance.”⁹⁴ Additionally, the university’s “Racism and Cultural Diversity Statement” defined racism to include “any activity . . . that causes the subordination, intimidation and/or harassment of a person or group based upon race, color, creed, national origin, sex, disability or age,” and required students to “mirror[]” the school’s commitment to “racial tolerance, cultural diversity and social justice” in their “attitudes and behaviors.”⁹⁵ Despite the university’s proffered justification that the various provisions were “merely aspirational and precatory,” the court found otherwise and ultimately enjoined the university from enforcing them on the grounds of overbreadth.⁹⁶

The next speech code decision came the following year in *Roberts v. Haragan*.⁹⁷ At issue in that case was a speech regulation forbidding the use of “physical, verbal, written or electronically transmitted threats, *insults*, epithets, *ridicule or personal attacks*” directed at individuals based on personal characteristics or group membership, even including “ideology, political view or political affiliation.”⁹⁸ Once again the policy was struck down as overbroad, because it reached “much speech that, no matter how offensive, is not proscribed by the First Amendment.”⁹⁹

Three years later, in *College Republicans v. Reed*, a federal district court enjoined the enforcement of a San Francisco State University policy requiring students to act in accordance with the university’s “goals, principles, and policies” as well as a policy requiring students “to be civil to one another.”¹⁰⁰ In issuing the preliminary injunction, the court held that the overbreadth challenges to both speech codes were likely to prevail on the merits.¹⁰¹ In addition, the court held that another regulation banning “[c]onduct that threatens or endangers the health or safety of any person within or related to the University community, including physical abuse, threats, intimidation, harassment, or sexual misconduct” could not be read and enforced in a manner encompassing all forms of

⁹⁴ *Id.* at 362-63.

⁹⁵ *Id.* at 363.

⁹⁶ *Id.* at 372-73.

⁹⁷ *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004).

⁹⁸ *Id.* at 866-67 (emphasis added).

⁹⁹ *Id.* at 872.

¹⁰⁰ *Coll. Republicans v. Reed*, 523 F. Supp. 2d 1005, 1023-24, 1016 (N.D. Cal. 2007).

¹⁰¹ *Id.* at 1016-24.

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“intimidation” and “harassment.”¹⁰² Recognizing that those two terms, standing alone, could be applied against protected speech, the court restricted the application of this policy to only those sub-categories of intimidation and harassment that “threaten[] or endanger[] the health or safety of any person.”¹⁰³

The second speech code decision to be handed down by a federal circuit court, *DeJohn v. Temple University*,¹⁰⁴ came in 2008. At issue in *DeJohn* was a sexual harassment policy which barred “expressive, visual, or physical conduct of a sexual or gender-motivated nature, when . . . such conduct has the purpose or effect of unreasonably interfering with an individual’s work, educational performance, or status; or . . . has the purpose or effect of creating an intimidating, hostile, or offensive environment.”¹⁰⁵ The Third Circuit Court of Appeals found the policy to be facially overbroad, owing to a number of flaws. First, it noted that under the policy’s “purpose or effect” prong, “a student who sets out to interfere with another student’s work, educational performance, or status, or to create a hostile environment would be subject to sanctions regardless of whether these motives and actions had their intended effect.”¹⁰⁶ This failed the requirement that a school “show that speech will cause actual, material disruption before prohibiting it.”¹⁰⁷

Moreover, the Third Circuit reasoned that, by virtue of using terms such as “hostile,” “offensive,” and “gender-motivated,” which were not clearly self-limiting, the policy’s language was “sufficiently broad and subjective” that it “could conceivably be applied to cover any speech of a gender-motivated nature the content of which offends someone.”¹⁰⁸ The court emphasized that “[t]his could include ‘core’ political and religious speech, such as gender politics and sexual morality” and that, accordingly, the policy “provides no shelter for core protected speech.”¹⁰⁹ Based on the policy’s overbroad reach, the Third Circuit permanently enjoined the university from re-implementing or enforcing the policy.¹¹⁰

¹⁰² *Id.* at 1021.

¹⁰³ *Id.* at 1023.

¹⁰⁴ *DeJohn v. Temple Univ.*, 537 F.3d 301, 316 (3d Cir. 2008).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 317.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (internal quotations omitted).

¹⁰⁹ *Id.* at 317-18.

¹¹⁰ *Id.* at 320.

In *Lopez v. Candaele*,¹¹¹ decided in 2009, a California federal district court invalidated a sexual harassment policy at the Los Angeles Community College District which prohibited conduct having the “purpose or effect of having a negative impact upon the individual’s work or academic performance” and defined sexual harassment to include “insulting remarks,” “intrusive comments about physical appearance,” and “humor about sex.”¹¹² Like the Third Circuit in *DeJohn*, the *Lopez* court held that the policy’s focus on the purpose *and* effect of verbal conduct rendered the policy unconstitutionally overbroad.¹¹³ The court found that the policy by its terms reached a substantial amount of protected speech which is “merely offensive to some listeners” and, significantly, reasoned that although “it may be desirable to promote harmony and civility, these values cannot be enforced at the expense of protected speech under the First Amendment.”¹¹⁴ In a subsequent ruling, the court denied LACCD’s motion to reconsider its decision, upholding the injunction it had issued against enforcement of the policy.¹¹⁵

The most recent speech code decision is *Smith v. Tarrant County College District*.¹¹⁶ In *Smith*, two student plaintiffs challenged, among other provisions, their college’s policy regarding “cosponsorship,” which forbade students and faculty from holding any campus events, including expressive activity, in association with any “off-campus person organization.”¹¹⁷ The court noted that this policy prevented students “from speaking on campus on issues of any social importance” and from engaging in “the most basic forms of expressive activity. . .based on no more than the fact that the expression might depend on an off-campus organization for planning or management, is advertised as cosponsored by an off-campus organization, or otherwise substantially involves an off-campus organization.”¹¹⁸ It therefore declared that it could not “imagine how the provision could have been written more broadly” and ruled it “unconstitutional on its face.”¹¹⁹ *Smith* became the latest deci-

¹¹¹ *Lopez v. Candaele*, No. CV 09-0995-GHK (C.D. Cal. July 10, 2009).

¹¹² *Id.* at 4.

¹¹³ *Id.* at 6.

¹¹⁴ *Id.*

¹¹⁵ *Lopez v. Candaele*, No. CV 09-0995-GHK (C.D. Cal. Sept. 16, 2009).

¹¹⁶ *Smith v. Tarrant County College District*, No. 4:09-CV-658-Y (N.D. Tex. Mar. 15, 2010).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

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sion to invalidate a speech code on its face, thus joining a uniform line of cases stretching more than two decades and originating with *Doe* in 1989.

B. *University Officials Should be Denied Qualified Immunity in Speech Code Cases*

In spite of the case law, speech codes have proliferated on college campuses. In fact, the Foundation for Individual Rights in Education's most recent annual speech code report found that 266 out of 375 colleges and universities surveyed, or 71 percent, maintained "at least one policy that both clearly and substantially restricts freedom of speech."¹²⁰ Significantly, the report found that this percentage remained the same among public colleges and universities surveyed,¹²¹ despite the fact that public institutions are legally bound by the guarantees of the First Amendment. Thus, the case law has not stemmed the tide of speech codes, as officials at public universities continue to fail to respect students' free speech rights.

Given the uniform defeat of speech codes in the courts over approximately the past two decades, including two federal circuit court decisions in *Dambrot* and *DeJohn*, courts should deny qualified immunity to public university administrators being sued in their personal capacities under § 1983 for drafting and maintaining speech codes. The two-part test for qualified immunity asks, first, whether the facts alleged, taken in the light most favorable to the party asserting injury, demonstrate violation of a statutory or constitutional right¹²² and, second, whether that right was "clearly established" at the time of the government official's alleged conduct, such that it would have been clear to a reasonable person that the conduct was unlawful under the circumstances of the case.¹²³

i. Violation of a Constitutional Right

The act of depriving public university students of their freedom of expression by maintaining a doctrinally flawed speech policy is a constitutional violation for the purposes of the first prong. Whether or not a speech code has ever been enforced, its very existence will chill expres-

¹²⁰ FIRE, Spotlight on Speech Codes 2010, *supra* note 8, at 5-6.

¹²¹ *Id.* at 7.

¹²² *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

¹²³ See *supra* notes 32-33 and accompanying text.

sion on campus.¹²⁴ The Supreme Court has made clear that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”¹²⁵ It has held that “[t]he Constitution gives significant protection from overbroad laws that chill speech within the First Amendment’s vast and privileged sphere,”¹²⁶ and that consequently “constitutional violations may arise from the deterrent, or ‘chilling,’ effect of government regulations that fall short of a direct prohibition against the exercise of First Amendment rights.”¹²⁷

Moreover, that the freedom of speech guaranteed by the First Amendment is one of the most essential and sacred rights belonging to Americans makes the constitutional violation all the more blatant. The Court has eloquently expressed the “need to preserve inviolate the constitutional rights of free speech, free press and free assembly” because “[t]herein lies the security of the Republic, the very foundation of constitutional government.”¹²⁸ It has made clear that “‘precision of regulation must be the touchstone in an area so closely touching our most precious freedoms,’” in order that “[t]he danger of [the] chilling effect upon the exercise of vital First Amendment rights” be avoided.¹²⁹ Regarding the particular importance of free expression in college, the Court has stated that “[t]he Nation’s future depends upon leaders

¹²⁴ See, e.g., *Bair v. Shippensburg Univ.* 280 F. Supp. 2d 357, 372-73 (M.D. Pa. 2003) (granting plaintiff students’ request for preliminary injunction against enforcement of university speech codes and finding that plaintiffs had established the element of irreparable harm because the speech codes were “likely violative of the First Amendment” and “had a chilling effect on their speech”); *DeJohn v. Temple Univ.*, 537 F.3d 301, 313-14 (3d Cir. 2008)

[S]ince the inception of overbreadth jurisprudence, the Supreme Court has recognized its prominent role in preventing a “chilling effect” on protected expression. . . . Because overbroad harassment policies can suppress or even chill core protected speech, and are susceptible to selective application amounting to content-based or viewpoint discrimination, the overbreadth doctrine may be invoked in student free speech cases. *Id.* (internal citation omitted).

¹²⁵ *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

¹²⁶ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002); see also *Brown*, 456 U.S. at 61 (1982) (striking down state law regulating speech of candidates for public office, because the “chilling effect” of the law was “incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns”); *Broadrick v. Oklahoma*, 413 U.S. 601, 630 (1973) (Brennan, J., dissenting) (stating that “overbreadth review is a necessary means of preventing a ‘chilling effect’ on protected expression”); *Hill v. Colorado*, 530 U.S. 703, 773 (Kennedy, J., dissenting) (stating that a state statute’s “substantial imprecision’s will chill speech, so the statute violates the First Amendment”).

¹²⁷ *Laird v. Tatum*, 408 U.S. 1, 11 (1972).

¹²⁸ *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

¹²⁹ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603-04 (1967) (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963)).

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trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"¹³⁰ With these pronouncements in mind, it is patent that the drafting and implementation of speech codes curtailing a wide swath of protected speech is a constitutional violation.

ii. Clearly Established Law

With respect to the second element of the qualified immunity test, the law regarding speech codes is by now clearly established. The case law, from *Doe* in 1989 to *Smith* in 2010, is remarkable for its consistent results, as the courts have on each occasion rejected the implementation of a doctrinally flawed speech code and acted to uphold campus speech rights.¹³¹ The Third Circuit's 2008 decision in *DeJohn* is perhaps the most important among the recent cases. As a federal circuit court opinion which spoke forcefully of students' speech rights, *DeJohn* should send an unequivocal message, once and for all, to university administrators that they risk personal liability by maintaining speech codes. In other words, *DeJohn* should set the final nail in the coffin for the argument that the judiciary has not provided a clear indication of the legal tenability of university speech codes.

It is true that there have been a finite number of speech code decisions to date and that not every single type of speech code imaginable has been litigated.¹³² However, as discussed in the previous section,¹³³

¹³⁰ *Id.* at 603 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

¹³¹ See, e.g., *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008) (invalidating overbroad sexual harassment policy). For a full discussion of the case law, see *supra* Section II.A.ii.

¹³² No speech code decision to date has arisen from a facial challenge to a university computer usage or information technology policy, yet these types of policies frequently abridge protected expression. State University of New York–Brockport, for example, maintains an Internet use policy stating that "[a]ll uses of Internet/e-mail that harass, annoy or otherwise inconvenience others are not acceptable," including "offensive language or graphics (whether or not the receiver objects, since others may come in contact with it)." State University of New York–Brockport, Internet/E-Mail Rules and Regulations, http://www.brockport.edu/policies/docs/computing_policies.pdf (last visited May 13, 2010) (emphasis added). Similarly, Lone Star College System in Texas prohibits "[u]sing abusive, indecent, profane, or vulgar language . . . via electronic communication . . ." Lone Star College System, Student Responsibilities: Student Code of Conduct: Non-Academic Misconduct, <http://www.lonestar.edu/student-responsibilities.htm> (last visited May 13, 2010). Though a legal challenge to either of these policies, or similar ones at other institutions, would present a court with a type of speech code that has not been litigated previously, it would be clear from the face of the policies that they restrict speech entitled to constitutional protection.

¹³³ See *supra* Section I.

in order for a government official's conduct to constitute violation of clearly established law, it is not necessary that the precise action have been held unlawful by a prior decision. Rather, the law regarding qualified immunity requires that "in the light of pre-existing law the unlawfulness must be apparent."¹³⁴ The Supreme Court has held that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the 'the very action in question has [not] previously been held unlawful.'"¹³⁵ Elsewhere, the Court has stated that "officials can still be on notice that their conduct violates established law *even in novel factual circumstances* Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, *they are not necessary to such a finding*."¹³⁶

Under these principles, the fact that courts have overturned speech codes on all eleven occasions that they have been litigated to a final decision—and, conversely, have not upheld them on a single occasion¹³⁷—should convey to any reasonable university administrator that speech codes are legally untenable at public colleges and universities. The courts have made clear that a university speech regulation, which is facially vague or overbroad, or both, will be struck down on constitutional grounds.¹³⁸ It is an outrage—and a violation of clearly established law—for colleges and universities to continue to maintain overbroad or vague speech policies, as the unlawfulness of such practice should be apparent on its face.¹³⁹ Administrators should be aware that

¹³⁴ Anderson v. Creighton, 483 U.S. 635, 640 (1987) (internal citations omitted).

¹³⁵ Hope v. Pelzer, 536 U.S. 730, 741 (2002) (quoting United States v. Lanier, 520 U.S. 259, 271 (1997)) (internal citations omitted).

¹³⁶ *Id.* at 741 (emphasis added); see also Papineau v. Parmley, 465 F.3d 46, 56 (2d Cir. 2006) ("[T]he Supreme Court has declined to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, and has, instead, chosen a standard that excludes such immunity if in the light of pre-existing law the unlawfulness [is] apparent." (internal citations omitted)).

¹³⁷ See *supra* Section II.A.ii for a discussion of case law on speech codes.

¹³⁸ See, e.g., Dambrot v. Cent. Mich. Univ., 55 F.3d 1177 (6th Cir. 1995) (striking down discriminatory harassment policy due to overbreadth and vagueness).

¹³⁹ In addition to the Supreme Court and lower courts' guidance on the doctrines of overbreadth and vagueness, FIRE's previously discussed definitions of speech codes should provide administrators with a basic level of guidance for regulating student expression and conduct. Speech codes are "university regulations prohibiting expression that would be constitutionally protected in society at large," or "any campus regulation that punishes, forbids, heavily regulates, or restricts a substantial amount of protected speech." See FIRE, SPOTLIGHT ON SPEECH CODES 2010, *supra* note 8. Administrators should be expected to understand, after two decades

student speech at public institutions is generally entitled to the full protection of the Constitution and therefore should not be proscribed by university policy, except in those narrow instances where it would meet one of the prohibited categories under the First Amendment.¹⁴⁰ Freedom of speech should be the norm, not the exception, on college campuses.

Proponents of maintaining qualified immunity for university officials in speech code challenges will perhaps argue that it is difficult to know or anticipate whether a particular policy is vague or overbroad. However, the Supreme Court, in First Amendment jurisprudence spanning several decades, has provided sufficient guidance regarding the standards for vagueness and overbreadth, as have lower federal courts.¹⁴¹ The Court has stated that a statute or regulation is unconstitutionally vague when “men of common intelligence must necessarily guess at its meaning,” and that in order to avoid the vagueness problem, a statute or regulation must “give adequate warning of what activities it proscribes” and “set out ‘explicit standards’ for those who must apply it.”¹⁴² Similarly, the Court has indicated that a statute or law is void for overbreadth when it “offends the constitutional principle that ‘a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms,’”¹⁴³ or, more simply, “reaches a substantial amount of constitutionally protected conduct.”¹⁴⁴

Federal courts have made clear the reach of overbreadth and vagueness specifically in the context of speech codes. In *Booher*, for instance, the court held a sexual harassment policy to be unconstitutionally vague because it “fail[ed] to give adequate notice regarding precisely what conduct is prohibited” and “delegate[d] enforcement responsibility with inadequate guidance.”¹⁴⁵ It also held the same policy to be overbroad for “fail[ing] to draw the necessary boundary between the subjectively mea-

of case law counseling against the practice of maintaining such policies, that any policy which falls under these definitions is unlikely to withstand a constitutional challenge.

¹⁴⁰ See *supra* note 53.

¹⁴¹ See *supra* notes 54-55 and accompanying text.

¹⁴² *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

¹⁴³ *Cameron v. Johnson*, 390 U.S. 611, 616-17 (1968) (internal citation omitted).

¹⁴⁴ *Houston v. Hill*, 482 U.S. 451, 458 (1987) (internal citations omitted).

¹⁴⁵ *Booher v. Bd. of Regents of N. Ky. Univ.*, 1998 U.S. Dist. LEXIS 11404, *31-32 (E.D. Ky. July 21, 1998).

sured offensive conduct and objectively measured harassing conduct,” creating “the impression that speech of a sexual nature that is merely offensive would constitute sexual harassment.”¹⁴⁶ Similarly, *Doe* states that a statute or law regulating speech is unconstitutionally overbroad “if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate.”¹⁴⁷

The pronouncements of the Supreme Court and lower courts make it unreasonable for administrators—whose primary work duties require a proper understanding of students’ rights and whose training and education provide such knowledge—to argue that they should not be expected to know which types of policies run afoul of the doctrines of overbreadth or vagueness. Rather, these doctrines have been sufficiently defined and illustrated in the case law, and in particular, the Supreme Court’s guidance cannot simply be ignored by university administrators.

Moreover, certain forms of speech codes have been invalidated on multiple occasions, making the law especially clear with respect to these types of policies. First and foremost, these include harassment policies encompassing speech beyond the proper standard for student-on-student (or peer) harassment,¹⁴⁸ as the misapplication of harassment law has historically been one of the major factors in the prevalence of speech codes.¹⁴⁹ Additionally, these include policies prohibiting “demeaning”

¹⁴⁶ *Id.* at *28, *30.

¹⁴⁷ *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 864 (E.D. Mich. 1989).

¹⁴⁸ The controlling standard for peer harassment, as established by the Supreme Court in *Davis v. Monroe County Board of Education*, requires conduct that is “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.” *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999). For a full discussion of the *Davis* decision and its implications for student speech rights, see *infra* Section III.B.

¹⁴⁹ In fact, nearly every decision to date in which a speech code was invalidated involved, at least in part, a challenge to a harassment policy. See generally *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (sexual harassment policy); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (discriminatory harassment policy); *Lopez v. Candaele*, No. CV 09-0995-GHK (C.D. Cal. July 10, 2009) (sexual harassment policy); *Coll. Republicans v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (policy on harassment and intimidation); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (sexual harassment policy); *Bair v. Shippensburg Univ.* 280 F. Supp. 2d 357 (M.D. Pa. 2003) (policy on harassment); *Booher*, 1998 U.S. Dist. LEXIS 11404 (sexual harassment policy); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wisc. 1991) (discriminatory harassment policy); *Doe*, 721 F. Supp. 852 (discriminatory harassment policy); *Corry v. Leland Stanford Jr. Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (policy on harassment by “personal vilification”).

or “stigmatizing” speech,¹⁵⁰ policies mandating that all student speech be “civil” or “tolerant,”¹⁵¹ and policies requiring students to adopt university-approved viewpoints or beliefs.¹⁵² When a university implements a speech code falling under any of these categories, the violation of clearly established law is all the more apparent. It is disingenuous at best, and plainly ignorant at worst, for a public university which has a policy mirroring one of these codes to claim that it was unaware of the unlawfulness of its policy. Therefore, a court deciding a constitutional challenge to such a policy should be even more inclined to pierce qualified immunity.

Significantly, in addition to the judiciary, both the legislative and executive branches of the federal government have in recent years affirmed the importance of upholding the freedom of speech on college campuses. By lending their respective voices to the issue, they have joined the courts in making the preeminence of free speech rights even clearer and thus making the rejection of qualified immunity in speech code cases all the more warranted.

Congress has twice in the past twelve years issued “sense of Congress” resolutions calling for increased protection of students’ speech rights, as part of its reauthorizations of the Higher Education Act.¹⁵³ The first such “sense of Congress” resolution came in the 1998 amendments to the Act and stated that no college or university student “should, on the basis of participation in protected speech or protected association, be excluded from participation in, be denied the benefits of, or be subjected to discrimination or official sanction” at any institution

¹⁵⁰ See *Dambrot*, 55 F.3d at 1177 (“demeaning or slurring individuals”); *UWM Post, Inc.*, 774 F. Supp. at 1177 (comments that “demean” another on the basis of listed traits); *Doe*, 721 F. Supp. at 864 (speech that “stigmatizes or victimizes” an individual on the basis of listed characteristics); *Corry*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (speech “intended to insult or stigmatize an individual” on the basis of listed traits).

¹⁵¹ See *Coll. Republicans*, 523 F. Supp. 2d at 1005 (policy requiring students “to be civil to one another”); *Roberts*, 346 F. Supp. 2d 853, 871-72 (“insults,” “ridicule,” and “personal attacks” on the basis of listed characteristics); *Bair*, 280 F. Supp. 2d at 362-63 (“acts of intolerance”).

¹⁵² See *Coll. Republicans*, 523 F. Supp. 2d at 1006-07 (requiring students to act in accordance with the university’s “goals, principles, and policies”); *Bair*, 280 F. Supp. 2d at 362-63 (requiring students to “mirror[]” the university’s commitment to “racial tolerance, cultural diversity and social justice” in their “attitudes and behaviors”).

¹⁵³ Higher Education Act of 1965, Pub. L. No. 89-329, 122 Stat. 3083; see 20 U.S.C. § 1001.

receiving funding under the Act.¹⁵⁴ In the second “sense of Congress” resolution, which came in the 2008 amendments to the Act, Congress reiterated that “an institution of higher education should facilitate the free and open exchange of ideas” and that “students should not be intimidated, harassed, discouraged from speaking out, or discriminated against.”¹⁵⁵ The “sense of Congress” provisions are legally non-binding.¹⁵⁶ However, the fact that Congress spoke twice within ten years in favor of campus speech rights adds to the authority of the speech code case law and further signals to university administrators that they must tread carefully when enacting policies regulating student speech.

Within the executive branch, the Department of Education’s Office for Civil Rights (OCR) sent a strongly worded “Dear colleague” memorandum in 2003 to federally funded colleges and universities to clarify the scope and meaning of federal harassment regulations.¹⁵⁷ In the letter, OCR made clear that its harassment regulations “are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution” and therefore “do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment.”¹⁵⁸ This nullifies perhaps the most common rationale used by university administrators to justify their speech codes: compliance with harassment law.¹⁵⁹ OCR also emphasized in the letter that “the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile envi-

¹⁵⁴ 1998 Amendments to the Higher Education Act of 1965, Pub. L. 105-244, 112 Stat. 1591; see 20 U.S.C. § 1011a(a)(1) (2008).

¹⁵⁵ 2008 Amendments to the Higher Education Act of 1965, Pub. L. 110-315, 122 Stat. 3090; see 20 U.S.C. § 1011a(a)(2) (2008).

¹⁵⁶ CHRISTOPHER M. DAVIS, CRS REPORT FOR CONGRESS, “SENSE OF” RESOLUTIONS AND PROVISIONS (Apr. 20, 2007), available at <http://www.rules.house.gov/archives/98-825.pdf>.

A “sense of” resolution is not legally binding because it is not presented to the President for his signature. Even if a “sense of” provision is incorporated into a bill that becomes law, such provisions merely express the opinion of Congress or the relevant chamber. They have no formal effect on public policy and are not considered law. *Id.*; see also Brian J. Steffen, *A First Amendment Focus: Freedom of the Private-University Student Press: A Constitutional Proposal*, 36 J. MARSHALL L. REV. 139, 170 (2002) (stating that 1998 “sense of Congress” resolution “represents only recommendations to college officials with no formal penalties for violating its spirit or letter”).

¹⁵⁷ See Letter from Gerald A. Reynolds, Assistant Sec’y, U.S. Dep’t of Educ., Office for Civil Rights, to Federally Funded Colleges and Universities, Dep’t of Educ. (July 28, 2003), available at <http://www2.ed.gov/about/offices/list/ocr/firstamend.html>.

¹⁵⁸ *Id.*

¹⁵⁹ See *supra* note 149 (discussing that nearly every speech code decision to date has arisen, at least in part, from a challenge to a university harassment policy).

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ronment” on a university campus and that allegations of harassment must be “evaluated from the perspective of a reasonable person in the alleged victim’s position.”¹⁶⁰ This point is an important one in that it responds to a frequent problem in the way colleges and universities seek to address and prevent harassment—the tendency to target expression which a few sensitive individuals may find offensive or disagreeable.¹⁶¹ By issuing policy guidance in favor of free expression, OCR has made its position clear regarding any tension between harassment law and students’ free speech rights. This should send a strong message to university administrators about the legitimacy of their speech codes, since the abuse of overbroad harassment rationales has been a leading factor in the prevalence of speech codes. Combined with the two statements from Congress, the OCR memorandum provides additional authority to the speech code decisions and should leave even less doubt about the state of the law.

Finally, speech codes have been the subject of much criticism both in legal scholarship¹⁶² and in popular literature and publications,¹⁶³ as

¹⁶⁰ Letter from Gerald A. Reynolds to Federally Funded Colleges and Universities, *supra* note 157.

¹⁶¹ For instance, Kansas State University defines sexual harassment to include “generalized sexist statements and behavior that convey insulting or degrading attitudes about women,” including “insulting remarks” and “obscene jokes or humor about sex or women in general.” Kansas State University, Types of Sexual Harassment Covered by the Policy, http://www.k-state.edu/dh/sex_harass/types.html (last visited May 11, 2010). Northern Illinois University’s policy on harassment bans the “[i]ntentional and wrongful use of words, gestures and actions” to “annoy” or “alarm” another person. Northern Illinois University, Violations of The Student Code of Conduct: Harassment, http://www.niu.edu/judicial/Code_of_Conduct.pdf (last visited May 11, 2010). The University of Iowa defines sexual harassment as something that “occurs when somebody says or does something sexually related that you don’t want them to say or do, regardless of who it is.” The University of Iowa, What is Sexual Harassment?, <http://www.sexualharassment.uiowa.edu/index.php> (last visited May 11, 2010). Finally, Murray State University’s sexual harassment policy prohibits “[c]alling a person a doll, babe, or honey,” “[m]aking sexual innuendoes,” and “[t]urning discussions to sexual topics.” Murray State University, Stop Sexual Harassment, http://www.murraystate.edu/HeaderMenu/Administration/StudentAffairs/departments/womensCenter/Sexual_Harassment.aspx (last visited May 11, 2010).

¹⁶² See, e.g., Adam A. Milani, *Harassing Speech in the Public Schools: The Validity of Schools’ Regulation of Fighting Words and the Consequences if They Do Not*, 28 AKRON L. REV. 187, 198 (1995) (“Given the Supreme Court’s statements on the regulation of speech in a university setting, however, it is not surprising that the few decisions which have been handed down have universally held that [speech] codes violate students’ First Amendment freedoms.”); James R. Bussian, *Anatomy of the Campus Speech Code: An Examination of Prevailing Regulations*, 36 S. TEX. L. REV. 153, 188 (1995) (arguing that “when the speech codes are analyzed in light of well-established constitutional precedent, the majority of them pose profound constitutional

commentators have long argued that they are legally indefensible on public college campuses. These varied voices add to the unequivocal message sent by the courts, by Congress, and by OCR, making the clarity of the law even more comprehensive. Piercing qualified immunity therefore makes logical sense in view of the combined strength of the voices that have rallied against the existence of speech codes on campus.¹⁶⁴

problems,” but that “[c]ourt decisions are not deterring public universities, for they continue to push the fringes of First Amendment law”); Joseph W. Bellacosa, *The Regulation of Hate Speech by Academe vs. the Idea of a University: A Classic Oxymoron?*, 67 ST. JOHN’S L. REV. 1, 8 (1993) (arguing that “[a]part from the concerns over constitutionality, equally serious concerns flare up regarding the wisdom of [speech] codes,” since “[t]hese regulatory adventures in an academic atmosphere loom disproportionately to the threatened harms” and since they “seem contradictory to the *raison d’être* of institutions of higher learning”); *Id.* at 9 (arguing that “[f]ew people could responsibly deny” that speech codes “can be used as vehicles to foster special interests and ideological or political agendas,” making them “potentially susceptible to great abuse and mischief” and “contrary to the rich and great traditions of higher education—open discourse, lofty or even lowly debate, and classical rhetoric”); Thomas L. McAllister, *Rules and Rights Colliding: Speech Codes and the First Amendment on College Campuses*, 59 TENN. L. REV. 409, 409 (1992)

The university’s role in American society as a bastion of inquiry and thought, open to all ideas no matter how contentious or repugnant to accepted norms and established principles, is being questioned. The implementation of speech codes threatens academic freedom and, at public colleges and universities, gives rise to serious First Amendment issues.

Id.; Vince Herron, *Increasing the Speech: Diversity, Campus Speech Codes, and the Pursuit of Truth*, 67 S. CAL. L. REV. 407, 418 (1994) (arguing that even accepting that “university speech codes are created with good intentions, they simply are not the right tool for the job” and are “bound to fail not only those who look to them for protection, but also those who look at the codes as an answer to a very real and very serious problem”).

¹⁶³ See, e.g., ALAN CHARLES KORS & HARVEY A. SILVERGLATE, *THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA’S CAMPUSES* (1998); ROBERT O’NEIL, *FREE SPEECH IN THE COLLEGE COMMUNITY* (1997); JON B. GOULD, *SPEAK NO EVIL: THE TRIUMPH OF HATE SPEECH REGULATION* (2005); Dorothy Rabinowitz, *American Politics Aren’t ‘Post-Racial’*, WALL ST. J., July 7, 2008, at A13; Alan Charles Kors, *On the Sadness of Higher Education*, WALL ST. J., May 27, 2008 (online edition), <http://online.wsj.com/article/SB121184146283621055.html>; Michael Moynihan, *Flunking Free Speech: The Persistent Threat to Liberty on College Campuses*, REASON ONLINE, Dec. 24, 2007, <http://reason.com/archives/2007/12/24/flunking-free-speech>; WorldnetDaily, <http://www.wnd.com/index.php?fa=PAGE.view&pageId=83761> (Dec. 15, 2008, 22:21 EST); Ray Nothstine, *Speech Codes Limit Campus Freedom*, ACTON INST. COMMENTARY, Dec. 3, 2008, http://www.acton.org/commentary/491_speech_codes.php; David E. Bernstein, *Campus Speech Code Warning*, WASH. TIMES, Aug. 18, 2003, at A12; Harvey A. Silverglate & Greg Lukianoff, *Speech Codes: Alive and Well at Colleges*, THE CHRON. OF HIGHER EDUC., Aug. 1, 2003, at 7, available at http://www.thefire.org/public/pdfs/3978_2349.pdf.

¹⁶⁴ One final matter bearing mention is a complication that could arise when students attempt to identify the administrator responsible for implementing a particular speech code. The named official may argue that the college or university as a whole, or an office or department within the institution, is responsible for the enactment of the speech code in question. Since a

III. QUALIFIED IMMUNITY AND APPLIED VIOLATIONS

The second category of violations of clearly established law regarding students' speech rights is the censorship and punishment of specific instances of protected speech and expressive activity.¹⁶⁵ These violations take many different forms, both in terms of the policies enforced and the modes of expression being restricted. The end result in each case, though, is that the right of students on public college campuses to engage in constitutionally protected speech is violated.

Because applied violations take many different forms and revolve around almost limitless factual scenarios, the author does not argue in this section that a court should deny qualified immunity in every instance of an applied violation. It would be nearly impossible—and ultimately beyond the scope of this article—to catalogue and analyze every imaginable applied violation of students' speech rights. Rather, the author's argument is that in the *vast majority* of such cases, courts should find that the university's action contradicts clearly established law.

Unlike speech codes, which are on their face unconstitutional at public institutions due to their over breadth or vagueness and have been

§ 1983 plaintiff is required to demonstrate that a specific official or number of officials has caused the constitutional deprivation, this defense may in some instances appear to be an effective one. However, a plaintiff-student will almost always be able to identify the head of the responsible department or office. The student can thereby assign liability on the basis of position title and institutional practice, in other words by determining the party ultimately responsible for approving and implementing the office's policies. Alternatively, the student can name the college or university president as the defendant, under the theory that the president is ultimately the individual responsible for the university's implementing and maintaining its policies, including any speech codes. Under either approach, it seems unlikely that a court would reject § 1983 liability, provided the policy in question represents a constitutional violation.

¹⁶⁵ For instance, in 2009, administrators at Community College of Allegheny County in Pennsylvania responded to a student's efforts to start a gun-rights advocacy student organization by banning informational pamphlets she sought to distribute on campus, ordering all copies of the pamphlets to be destroyed, and threatening punishment for such "academic misconduct" in the future. Press Release, Foundation for Individual Rights in Education (FIRE), First Amendment Rights Trampled by Pittsburgh College after Student Advocates for Concealed Carry of Firearms on Campus (May 27, 2009), *available at* <http://www.thefire.org/article/10645.html> (last visited May 12, 2010). In another applied violation case, Michigan State University found a student government leader guilty of violating its "spam" policy and placed a formal warning in her disciplinary file after she e-mailed a group of faculty asking them to weigh in on a proposed change to university policy. Press Release, Foundation for Individual Rights in Education (FIRE), Michigan State University Student Faces Suspension for "Spam" after E-Mailing Professors (December 4, 2008), *available at* <http://www.thefire.org/article/9994.html>. Despite the fact that the student's e-mail was timely, concerned a campus issue, and targeted a carefully selected group of faculty recipients, the university used the spamming rationale to attempt to silence her and even threatened her with suspension.

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the dormitory could lose weight by using the stairs rather than the elevators.¹⁶⁸ Despite the obvious humorous intent of the flyers, the university found the student guilty of violating policies on harassment, affirmative action, and disorderly conduct and, in addition to removing him from his dormitory, subjected him to disciplinary probation and mandatory meetings with a counselor.¹⁶⁹

Indiana University – Purdue University Indianapolis found a student-employee guilty of racial harassment merely for reading a scholarly book during his work breaks, on the basis that another employee found the subject matter of the book as well as images on its front cover to be offensive.¹⁷⁰ The university failed to consider the purely innocuous nature of the student-employee's actions and instead justified its decision by stating that he had “demonstrated disdain and insensitivity” toward his co-workers by openly reading a book with an “inflammatory and offensive topic.”¹⁷¹

DePaul University shut down a student group's “affirmative action bake sale,” a peaceful form of campus protest, in 2006 because the event allegedly violated the school's discriminatory harassment policy.¹⁷² Making this a clear example of administrative censorship of a disfavored viewpoint, DePaul administrators initially told the student group that the event was being shut down because it was taking place at an inappropriate location, even though they allowed another student group to

¹⁶⁸ Press Release, Foundation for Individual Rights in Education (FIRE), University of New Hampshire Evicts Student for Posting Flier (Oct. 28, 2004), *available at* <http://www.thefire.org/index.php/article/5005.html>.

¹⁶⁹ *Id.*

¹⁷⁰ Rabinowitz, *supra* note 163. The book, titled *Notre Dame vs. the Klan: How the Fighting Irish Defeated the Ku Klux Klan*, is a historical account which chronicles a street fight in 1924 between University of Notre Dame students and members of the Ku Klux Klan in South Bend, as well as the Klan's subsequent decline in influence in the state of Indiana. The book's front cover contains images of robed Klansmen and burning crosses.

¹⁷¹ Letter from Lillian Charleston, Affirmative Action Officer, Indiana Univ.–Purdue Univ. Indianapolis, to Keith John Sampson (Nov. 25, 2007), *available at* <http://www.thefire.org/public/pdfs/4b26b68ef98eb6b6de987138657f0467.pdf>.

¹⁷² Press Release, Foundation for Individual Rights in Education (FIRE), DePaul University Calls Affirmative Action Protest “Harassment” (Jan. 30, 2006), *available at* <http://www.thefire.org/index.php/article/6754.html>. The basic idea behind this event, a form of protest which has been used at several colleges nationwide, is to charge less money to certain minority groups than to white students for the same baked goods. In doing so, the student group hoped to satirize the use of affirmative action in university admissions and to spark student debate about the issue.

set up a protest table at the same location a week later, and then subsequently justified their decision under the harassment policy.¹⁷³

In another student protest case, Valdosta State University in Georgia expelled a student in 2007 for peacefully protesting the university's decision to construct additional parking garages on campus based on his environmental concerns.¹⁷⁴ The student created an online collage of pictures satirizing the university president and criticizing the university's plan, and as a result received a notice of administrative withdrawal labeling him a "clear and present danger" to the campus.¹⁷⁵ Moreover, the student was told that he would only be readmitted to the university if he submitted certifications of his mental health and on-going therapy.¹⁷⁶

Lastly, the University of North Carolina-Chapel Hill, on two separate occasions over a two-year period, refused to allow religious student organizations to limit membership to those who shared in the groups' religious beliefs, thereby infringing upon the groups' freedom of expressive association.¹⁷⁷ On both occasions, the university argued that excluding students who did not share in the groups' beliefs violated the school's nondiscrimination policies,¹⁷⁸ despite the fact that the forced inclusion of such students would have fundamentally altered the groups'

¹⁷³ *Id.* Even worse, the school responded to the student group's initial queries about the harassment charges by stating that it had not yet determined its reasons for intervening in the bake sale. *Id.* Essentially, the administration only came up with a justification for shutting down the protest after the fact.

¹⁷⁴ Press Release, Foundation for Individual Rights in Education (FIRE), Valdosta State University Expels Student for Peacefully Protesting New Parking Garages (Oct. 24, 2007), *available at* <http://www.thefire.org/index.php/article/8531.html>.

¹⁷⁵ *Id.* The collage included pictures of the university president, a parking deck, a bulldozer excavating trees, a flattened globe marked by a tire tread, automobile exhaust, and other images, and also featured a variety of slogans such as "No Blood for Oil," "More Smog," and "Bus system that might have been." *Id.* Preceding the creation of this collage, the student had placed flyers around campus drawing attention to the university's proposed plans and had written e-mails to the university president, student and faculty governing bodies, and the Board of Regents stating his concerns about the parking structures. *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Press Release, Foundation for Individual Rights in Education (FIRE), InterVarsity Multi-Ethnic Christian Fellowship Banned at Rutgers University; InterVarsity Christian Fellowship Threatened with Similar Punishment at UNC, (Dec. 30, 2002), *available at* <http://www.thefire.org/index.php/article/54.html>; Press Release, Foundation for Individual Rights in Education (FIRE), University of North Carolina at Chapel Hill Denies Recognition to Another Christian Group (Aug. 1, 2004), *available at* <http://www.thefire.org/index.php/article/4971.html>.

¹⁷⁸ *Id.*

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religious nature by preventing them from associating around shared beliefs and limiting their ability to disseminate a consistent message.

These and numerous other incidents from recent years show that colleges and universities continue to violate their students' basic speech rights. This is unacceptable given the Supreme Court's consistent protection of college students' freedom of expression, as discussed in the next section.

B. *Supreme Court Jurisprudence on Students' Expressive Rights at Public Universities*

In case law spanning decades,¹⁷⁹ the Supreme Court has upheld the speech rights of students at public colleges and universities and made clear that these rights are entitled to the full protection of the First Amendment. The Court's jurisprudence on students' expressive rights should inform administrators that the vast majority of student speech and expressive conduct may not constitutionally be censored or punished and that restrictions on student speech are only permissible in narrow, exceptional cases. Therefore, these cases sufficiently convey the general constitutional principles governing student speech rights to clearly establish law for purposes of qualified immunity.¹⁸⁰

The first of these decisions is *Healy v. James*,¹⁸¹ which arose from a public college president's decision to deny official recognition to a student group based on concerns over potential disruption and violence. As a result of being denied official recognition, the group, a local chapter of Students for a Democratic Society (SDS), was deprived of the opportunity to place announcements regarding meetings and other activities in the student newspaper, barred from using campus bulletin boards, and denied the use of campus facilities to hold meetings.¹⁸²

In invalidating the college's decision, the Supreme Court acknowledged that a university has "a legitimate interest in preventing disruption on the campus," but stated that "a 'heavy burden' rests on the college to demonstrate the appropriateness" of action taken to prevent

¹⁷⁹ See *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667 (1973); *Healy v. James*, 408 U.S. 169 (1972).

¹⁸⁰ See *supra* notes 36-38 and accompanying text.

¹⁸¹ *Healy v. James*, 408 U.S. 169 (1972).

¹⁸² *Id.* at 170, 176.

actual disruption.¹⁸³ The Court drew a crucial distinction between “mere advocacy” of disruption, which fell under protected expressive activity, and “advocacy ‘directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action,’” which was not entitled to constitutional protection.¹⁸⁴ Regarding the former, the Court pronounced, “[t]he mere disagreement of the President with the group’s philosophy affords no reason to deny it recognition. As repugnant as these views may have been . . . the mere expression of them would not justify the denial of First Amendment rights The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.”¹⁸⁵

Healy’s impact extends well beyond the decision rendered in the case, as the Court’s majority opinion spoke unequivocally and powerfully about college students’ expressive rights. The Court emphasized at the outset that the outcome of the case merely required “the application of well-established First Amendment principles” and was “governed by existing precedent.”¹⁸⁶ Adding that “state colleges and universities are not enclaves immune from the sweep of the First Amendment,”¹⁸⁷ the Court affirmed, “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹⁸⁸ Rather, it found that

the precedents of this Court *leave no room for the view* that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large The college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas,’ and *we break no new constitutional ground* in reaffirming this Nation’s dedication to safeguarding academic freedom.¹⁸⁹

¹⁸³ *Id.*; *see also id.* at 181 (“There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges [their] associational right.”).

¹⁸⁴ *Id.* at 188 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

¹⁸⁵ *Id.* at 187-88.

¹⁸⁶ *Id.* at 170.

¹⁸⁷ *Id.* at 180.

¹⁸⁸ *Id.* (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

¹⁸⁹ *Id.* at 180-81 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)) (emphasis added).

One year later, the Court handed down *Papish v. Board of Curators of the University of Missouri*,¹⁹⁰ in which it found that a university violated a student's First Amendment rights by expelling her for distributing on campus a newspaper containing an "indecent" political cartoon and article.¹⁹¹ The Court held that neither the cartoon nor the article "can be labeled as constitutionally obscene or otherwise unprotected."¹⁹² It also rejected the argument that the university's decision was "an exercise of its legitimate authority to enforce reasonable regulations as to the time, place, and manner of speech and its dissemination," reasoning that the facts "show clearly that petitioner was expelled because of the disapproved *content* of the newspaper rather than the time, place, or manner of its distribution."¹⁹³ As such, the Court ruled that the "University's action here cannot be justified as a nondiscriminatory application of reasonable rules governing conduct" and invalidated the school's decision to expel the student.¹⁹⁴

Similarly to *Healy*, *Papish* speaks strongly about the importance of protecting students' rights to speak freely on college and university campuses. The Court pronounced, "[w]e think *Healy* makes it clear 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.'"¹⁹⁵ Additionally, having found that the university's decision to punish the student had been based on the content of the newspaper, the Court stated that, "the First Amendment *leaves no room* for the operation of a dual standard in the academic community with respect to the content of speech."¹⁹⁶ With such unequivocal language, both *Papish* and *Healy* stand as landmark decisions in the Court's First Amendment jurisprudence and have particular importance in pro-

¹⁹⁰ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667 (1973).

¹⁹¹ *Id.* at 667. The political cartoon in question (which had previously been printed in another newspaper) depicted policemen raping the Statue of Liberty and the Goddess of Justice, above the caption, "With Liberty and Justice for All." *Id.* The article, entitled "Motherfucker Acquitted," covered the assault trial and subsequent acquittal of a New York City youth who was a member of an organization called "Up Against the Wall, Motherfucker." *Id.* at 667-68.

¹⁹² *Id.* at 670.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 671.

¹⁹⁵ *Id.* at 670.

¹⁹⁶ *Id.* at 671 (emphasis added).

viding the guiding principles for freedom of speech in public colleges and universities.¹⁹⁷

In *Widmar v. Vincent*, the Court held that a public university's act of denying a religious student organization the use of campus facilities for meetings violated the group's right to free exercise of religion and freedom of speech and association.¹⁹⁸ Having made campus facilities generally available to registered student organizations and thereby having created a public forum,¹⁹⁹ the university nevertheless sought to exclude the group on the basis of the religious content of its views. Recognizing that the student group's "desire to use a generally open forum to engage in religious worship and discussion" related to "forms of speech and association protected by the First Amendment," the Court stated that the university could justify its actions only by demonstrating that the restriction was "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end."²⁰⁰ This it was unable to do.

In *Widmar*, the Court once again affirmed the sacrosanct status of college and university students' speech rights, stating that "respondents' First Amendment rights are entitled to special constitutional solici-

¹⁹⁷ It is important to note that the *Papish* and *Healy* opinions borrowed from Supreme Court precedent regarding the First Amendment rights of faculty members in higher education, as well as the First Amendment rights of students at lower levels of public education. See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (upholding state university faculty members' challenge to state law requiring adherence to loyalty oath as a condition of public employment); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (holding that the state attorney general's investigation and questioning of a professor's past expressions and associations created an unconstitutional government interference with his right to lecture and associate with others); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969) (overturning school district's decision to suspend high school students for wearing armbands in protest of war under the rationale of preventing potential disturbance of school discipline, because such expression was entitled to First Amendment protection absent substantial disruption of or material interference with school activities); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (upholding elementary school students' objection, on freedom of conscience grounds, to mandatory participation in the act of saluting the American flag and reciting the Pledge of Allegiance in public schools). In these earlier decisions, the Supreme Court established that students in public institutions do not lose their constitutionally guaranteed freedom of speech by virtue of enrolling in school, and that faculty members at public colleges and universities are entitled to the protections of the First Amendment and academic freedom in order to carry out their academic duties. These cases complement the Court's decisions specific to college and university students to underscore the need to protect and uphold freedom of speech in education generally and, of particular importance, in higher education.

¹⁹⁸ *Widmar v. Vincent*, 454 U.S. 263, 269 (1981).

¹⁹⁹ *Id.* at 264-65, 267.

²⁰⁰ *Id.* at 270.

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tude.”²⁰¹ It added, “[w]ith respect to persons entitled to be there, our cases *leave no doubt* that the First Amendment rights of speech and association extend to the campuses of state universities.”²⁰² Furthermore, the Court indicated that student expression raises different issues in the college setting than in secondary education, positing that “[u]niversity students are, of course, young adults. They are less impressionable than younger students”²⁰³ *Widmar* thus supports the idea that the speech rights of college and university students must be afforded robust protection and not be equated with the speech rights of high school students, and that university regulation of student speech must be limited accordingly.

More recently, a pair of Supreme Court decisions regarding student activity fees at colleges and universities reaffirmed the importance of upholding First Amendment rights on campus. The first of these cases, *Rosenberger v. Rector & Visitors of the University of Virginia*,²⁰⁴ was decided in 1995. The case arose from a student organization’s challenge to the university’s denial of funding for the printing costs of its publication.²⁰⁵ The university based its decision on the fact that the publication was religious in nature or, in the university’s own words, “primarily promotes or manifests a particular belief in or about a deity or an ultimate reality.”²⁰⁶ Finding that the university had created a limited public forum in which it funded a wide array of student groups and their expressive activities, the Court held that the university could only exclude

²⁰¹ *Id.* at 276.

²⁰² *Id.* at 268-69 (internal citation omitted) (emphasis added).

²⁰³ *Id.* at 274 n.14. The Court’s statement came in a footnote opining that university students are capable of understanding that “an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices” and that “the University’s policy is one of neutrality toward religion.” *Id.* Nonetheless, the Court’s statement provided an early indication in the case law that student speech in the college setting, and regulation of such speech, entails a different analysis than student speech in secondary education.

²⁰⁴ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

²⁰⁵ *Id.* at 822-23. The student organization, as a Contracted Independent Organization (CIO), was eligible to apply for funds from the Student Activities Fund (SAF), which existed to “support a broad range of extracurricular student activities that ‘are related to the educational purpose of the University.’” *Id.* at 823-24 (internal citation omitted). University policy recognized eleven categories of student groups that could seek payment to third-party contractors, including one for “student news, information, opinion, entertainment, or academic communications media groups.” *Id.* at 824 (internal quotations and citation omitted). However, university policy stipulated that certain CIO activities would not be eligible for reimbursement by SAF, including religious activities, political lobbying and electioneering, and activities that would jeopardize the university’s tax-exempt status. *Id.* at 824-25.

²⁰⁶ *Id.* at 825.

speech where its distinction was “reasonable in light of the purpose served by the forum” and viewpoint-neutral.²⁰⁷ In this case, the university had denied the student group funding precisely because of its religious disposition, thus violating its free speech rights.²⁰⁸

In the Court’s other student fees decision, *Board of Regents v. Southworth*, a group of students at a public university challenged a mandatory student fee program which was used to fund a variety of student organizations, arguing that they should not be forced to fund expressive activity with which they disagreed.²⁰⁹ The Court upheld the program, again applying the standard of viewpoint neutrality.²¹⁰ It recognized that, rather than facilitating its own speech, the university “exact[ed] the fee at issue for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students.”²¹¹ Relying on its public forum analysis in previous case law as well as the *Rosenberger* decision, the Court concluded that “the principal standard of protection for objecting students . . . is the requirement that of viewpoint neutral-

²⁰⁷ *Id.* at 829 (internal quotations omitted). Crucially, in reaching its decision, the Court drew a distinction between the government’s ability to regulate the speech of private speakers it has funded and the government’s ability to regulate its own speech. It quoted *Widmar* for the principle that

when the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.

Id. at 833. “It does not follow, however . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.” *Id.* at 834.

²⁰⁸ *Id.* at 837. Additionally, the Court rejected the university’s argument that its decision to deny funding to the student group was compelled by the Establishment Clause. The Court stated, “[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion,” and “the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.” *Id.* at 839. In this case, there was

no suggestion that the University created [the SAF] to advance religion or adopted some ingenious device with the purpose of aiding a religious cause. The object of the SAF is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life.

Id. at 840.

²⁰⁹ *Bd. of Regents v. Southworth*, 529 U.S. 217, 221 (2000).

²¹⁰ *Id.* at 230.

²¹¹ *Id.* at 229.

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ity in the allocation of funding support.”²¹² Finding that the university’s program met the requirement of viewpoint neutrality in the instant matter, the Court denied the students’ challenge.²¹³

Both the *Rosenberger* and *Southworth* decisions recognized the vital importance of students’ speech rights at public universities. In *Rosenberger*, the Court stated that for a 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.”²¹⁴ It added that the “danger . . . to speech from the chilling of individual thought and expression” which results from the government’s viewpoint discrimination is “especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.”²¹⁵ Students’ expressive rights are important because “[t]he quality and creative power of student intellectual life . . . remains a vital measure of a school’s influence and attainment,”²¹⁶ and thus its ability to serve as a true marketplace of ideas. Similarly, in *Southworth*, the Court recognized that a university “may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall.”²¹⁷ If so, it is entitled to operate a viewpoint-neutral mandatory fee program “to sustain an open dialogue to these ends.”²¹⁸

Finally, the Court’s 1999 decision in *Davis v. Monroe County Board of Education*, though not a First Amendment case arising in the university setting, is significant because of the protection the Court af-

²¹² *Id.* at 233.

²¹³ *Id.* at 234. However, the Court invalidated a separate referendum aspect of the university’s program, whereby a majority vote of the student body could be used to fund or defund a particular student organization. *Id.* at 235. The Court reasoned, “[t]o the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires.” *Id.* This logically flowed from the fact that “[t]he whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum . . . does not depend upon majoritarian consent.” *Id.* Thus, the Court remanded for further proceedings with respect to the referendum system.

²¹⁴ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995).

²¹⁵ *Id.* at 835.

²¹⁶ *Id.* at 836.

²¹⁷ *Bd. of Regents*, 529 U.S. at 233.

²¹⁸ *Id.*

forded therein to student speech rights.²¹⁹ *Davis* involved a fifth-grade student's suit against her school district under Title IX,²²⁰ claiming that it unlawfully subjected her to gender-based discrimination by failing to prevent sexual harassment by a classmate. In holding that monetary damages are available under Title IX against an institution for its "deliberate indifference" to known acts of student-on-student (or peer) sexual harassment,²²¹ the Court established a high standard for actionable peer harassment. It held that for conduct to rise to the level of actionable peer harassment, it must be "so severe, pervasive, and objectively offensive, and . . . so undermine[] and detract[] from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."²²²

The Court explicitly recognized in *Davis* that its standard created a high threshold for peer harassment. Paralleling the facts of the case before it, which involved a prolonged pattern of extreme conduct,²²³ the Court emphasized that peer harassment, in order to be actionable under Title IX, must involve truly harassing conduct rather than pure speech.²²⁴ The Court stated that "[d]amages are not available for simple acts of teasing and name-calling . . . even where these comments target

²¹⁹ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

²²⁰ Education Amendments of 1972, Title IX, Pub. L. 92-318, § 901, 86 Stat. 235, 373 (1972) (codified at 20 U.S.C. § 1681(a)).

²²¹ *Davis*, 526 U.S. at 633.

²²² *Id.* at 651.

²²³ The plaintiff in *Davis* was subjected to "repeated acts of sexual harassment . . . over a 5-month period," including "numerous acts of objectively offensive touching." *Id.* at 653. In fact, the conduct was so severe that the harassing student ultimately was charged with, and pleaded guilty to, criminal sexual battery. *Id.* at 634.

²²⁴ Stating that "[t]he most obvious example of student-on-student sexual harassment capable of triggering a damages claim would . . . involve the overt, physical deprivation of access to school resources," the Court used the example of "a case in which male students physically threaten their female peers every day, successfully preventing the female students from using a particular school resource—an athletic field or a computer lab, for instance." *Id.* at 650-51. With respect to the requirement of a pattern of conduct, the Court stated that allegedly harassing behavior must be

serious enough to have the systemic effect of denying the victim equal access to an educational program or activity. Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment.

Id. at 652-53.

differences in gender.”²²⁵ *Davis* counsels that peer harassment law, properly understood, should not be interpreted and applied to restrict protected speech, except where it is part of a larger pattern of harassing conduct.²²⁶ Therefore, *Davis* represents a significant step forward for student speech rights at all levels of education and certainly at the college and university level, where the misapplication of harassment law, both in policy and in practice, has long been one of major factors in the deprivation of students’ expressive rights.

C. *University Officials Should be Denied Qualified Immunity for Most Applied Violations*

In the cases discussed in the previous section,²²⁷ the Supreme Court strongly defended the free speech rights of students at public colleges and universities. The federal circuit courts, in case law spanning decades, have largely followed the Court’s jurisprudence. The First,²²⁸

²²⁵ *Id.* at 652. It added:

It is not enough to show . . . that a student has been “teased,” or “called . . . offensive names.” Comparisons to an “overweight child who skips gym class because the other children tease her about her size,” the student “who refuses to wear glasses to avoid the taunts of ‘four-eyes,’” and “the child who refuses to go to school because the school bully calls him a ‘scardy-cat’ at recess” are inapposite and misleading.

Id. (internal citations omitted).

²²⁶ See also *Davis*, 526 U.S. at 651 (discussing lack of an outright harassment exception to the First Amendment).

²²⁷ See *supra* notes 181-218 and accompanying text.

²²⁸ See *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652 (1st Cir. 1974). In *Bonner*, a student organization at a public university challenged the decision of the university president to prohibit its social functions on the grounds that the group’s promotion of a homosexual lifestyle conflicted with the prevailing morality of the community. The First Circuit pronounced that the Supreme Court’s decisions in *Healy* and *Papish* “indicate in no uncertain terms that the First Amendment applies with full vigor on the campuses of state universities,” and that *Healy* in particular was “controlling” of the matter before it. *Id.* at 658. Characterizing the student group as a “political action committee,” the court stated that the group’s efforts to organize the homosexual minority, ‘educate’ the public as to its plight, and obtain for it better treatment from individuals and from the government thus represent but another example of the associational activity unequivocally singled out for protection in the very ‘core’ of association cases decided by the Supreme Court.

Id. at 660. Moreover, the court deemed it “immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters” (internal citations omitted). In addition to holding that the student group’s associational freedom had been violated, the First Circuit held that its “more traditional First Amendment rights” had been abridged as well, as there was no doubt that “expression, assembly and petition constitute significant aspects of the [group’s] conduct in holding social functions.” *Id.* at 660-61 (internal quotations omitted). Rather than constituting a permissible “time, place and manner” restriction, the university’s infringement upon the group’s activities “was based in large measure, if not exclu-

Second,²²⁹ Fourth,²³⁰ Fifth,²³¹ Sixth,²³² Seventh,²³³ and Eighth²³⁴ Cir-

sively, on the content of [its] expression.” *Id.* Thus, the court granted an injunction against the university’s ban on the student group’s social functions. *Id.* at 663.

²²⁹ See *Husain v. Springer*, 494 F.3d 108 (2nd Cir. 2007). For a discussion of the *Husain* decision, including the Second Circuit’s analysis of the defendant official’s qualified immunity claim, see *infra* Section III.D.

²³⁰ See *Iota Xi v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993). In *Iota Xi*, the Fourth Circuit granted injunctive relief to a fraternity in its § 1983 claim and overturned sanctions imposed by its university in response to the fraternity’s “ugly woman” contest. The university had deemed the live entertainment to be racist and sexist, thereby “creat[ing] a hostile learning environment for women and blacks, incompatible with the University’s mission.” *Id.* at 388. The court held that the university’s sanctions constituted impermissible viewpoint discrimination under *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992), stating, “[t]he mischief was the University’s punishment of those who scoffed at its goals of racial integration and gender neutrality, while permitting, even encouraging, conduct that would further the viewpoint expressed in the University’s goals and probably embraced by a majority of society as well.” *Id.* at 393. The court added that, with respect to the university’s interest in providing an educational environment free of discrimination, the university had

available numerous alternatives to imposing punishment on students based on the viewpoints they express. . . . We must emphasize, as have other courts, that “the manner of [its action] cannot consist of selective limitations upon speech.” The University should have accomplished its goals in some fashion other than silencing speech on the basis of its viewpoint.

Id. at 393 (internal citations omitted); see also *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973) (holding that public university president violated student newspaper’s First Amendment rights by withdrawing financial support in response to newspaper’s editorial policy advocating racial segregation, where no showing was made that the editorial policy posed the danger of physical violence or disruption at the university or incited immediate lawless action).

²³¹ See *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975). For a discussion of the *Schiff* decision, including the Fifth Circuit’s analysis of the defendant official’s qualified immunity claim, see *infra* Section III.D.

²³² See *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001). In *Kincaid*, the Sixth Circuit ruled that a public university violated a group of students’ free speech rights by confiscating and failing to distribute a yearbook due to objections over the appearance of its cover as well as its content. The university’s decision to confiscate and withhold the yearbook from the campus community was based on, among other things, the colors used in the cover, the yearbook’s overarching “destination unknown” theme, and the inclusion of current events ostensibly unrelated to campus life. *Id.* at 345. The Sixth Circuit first determined that the university had created a limited public forum through its policy and practice toward the yearbook and that, accordingly, it could “impose only reasonable time, place, and manner regulations, and content-based regulations that are narrowly drawn to effectuate a compelling state interest.” *Id.* at 354. The university’s actions in this case failed these requirements because “wholesale confiscation of printed materials which the state feels reflect poorly on its institutions is as broadly sweeping a regulation as the state might muster” and, moreover, because they left open “no alternative grounds for similar expressive activity.” *Id.* Additionally, the Sixth Circuit rejected the university’s argument that it was merely regulating the “style and form” of the year book rather than its content, stating that “[c]onfiscation ranks with forced government speech as amongst the purest forms of content alteration. There is little if any difference between hiding from public view the words and pictures students use to portray their college experience, and forcing students to

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cuits have all, for example, upheld students' speech rights in cases arising from applied violations. While the respective decisions of the circuit courts represent a mere sampling of the case law on university students' expressive rights, they lend additional weight to the lessons of the Supreme Court cases.²³⁵ That is, they should make it even clearer to uni-

publish a state-sponsored script." *Id.* at 355. Finding that the university did not present a compelling reason to justify its content-based exclusion, the court held that the university had violated the students' First Amendment rights. *Id.*

²³³ See *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006). In *Walker*, a religious student organization at a public university's law school challenged the school's decision to revoke the group's official status on the grounds that its membership policies violated the school's nondiscrimination policies because they required voting members and officers to subscribe to a statement of faith disavowing all sexual activity outside of a traditional marriage, including homosexual conduct. In finding the revocation of official status to be a violation of the group's freedom of expressive association, the Seventh Circuit stated that "[w]hen the government forces a group to accept for membership someone the group does not welcome and the presence of the unwelcome person 'affects in a significant way the group's ability to advocate' its viewpoint, the government has infringed on the group's freedom of expressive association." *Id.* at 861 (quoting *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000)). The court reasoned that "CLS's beliefs about sexual morality are among its defining values; forcing it to accept as members those who engage in or approve of homosexual conduct would cause the group as it currently identifies itself to cease to exist." *Id.* at 863. The court further held that the school's asserted interest in "eliminating discriminatory conduct and providing equal access to opportunities" did not meet the compelling state interest standard, as "the Supreme Court has made it clear that antidiscrimination regulations may not be applied to expressive conduct with the purpose of either suppressing or promoting a particular viewpoint." *Id.* Stating that the case before it was "legally indistinguishable" from *Healy*, the Seventh Circuit ultimately held that the student organization was entitled to a preliminary injunction against the revocation of its official status. *Id.* at 864, 867.

²³⁴ See *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983). In *Magrath*, the editors of a student newspaper at a public university challenged the university's board of regents' decision to alter the funding system for the paper, which the students alleged came in response to the content of a controversial issue. The issue contained articles, advertisements, and cartoons satirizing, among other things, established religion, public figures, and social, political, and ethnic groups. *Id.* at 280. The Eighth Circuit began its analysis of the students' First Amendment claim by declaring that "[a] public university may not constitutionally take adverse action against a student newspaper, such as withdrawing or reducing the paper's funding, because it disapproves of the content of the paper." *Id.* at 282. It held that the students demonstrated that the decision to alter funding "was substantially motivated by the content of the newspaper," *id.*, based in part on statements by university regents to the effect that "students should not be forced to support a paper which was sacrilegious and vulgar." *Id.* at 284. The newspaper was therefore "entitled to an injunction restoring the former system of funding." *Id.* at 280.

²³⁵ As is the case with respect to the issue of speech codes, legal commentators have largely echoed the Supreme Court and federal circuit courts by condemning the routine applied violations of university students' free speech rights. See, e.g., Bellacosa, *supra* note 162, at 4 (arguing that "[a]s an almost universal proposition, colleges and universities, serving as state actors or agents, cannot regulate speech based on its content" and that the vast majority of speech is protected, unless it "falls into some very exceptional and highly qualified categories, such as

versity officials that they must take great care to avoid violating students' speech rights.

The decisions of the Supreme Court and the federal circuits are sufficient to defeat qualified immunity in the vast majority of cases challenging applied violations. University officials should, as part of their basic training and education, be expected to be familiar with the holdings of Supreme Court cases pertaining to their work responsibilities and functions. They also should be aware of federal circuit court decisions following those important precedents, whether taking place within their own circuit or a sister circuit. Even where their circuit has not clearly established the unlawfulness of a particular First Amendment deprivation, the decisions of the sister circuits, taken in conjunction with the Supreme Court's holdings, will typically be sufficient to create "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful."²³⁶

While the case law is not exhaustive and has not addressed every potential applied violation as a specific proposition, it provides administrators with the general constitutional rules governing university students' expressive rights to defeat qualified immunity. As the Supreme Court has made clear, the doctrine of qualified immunity does not turn on whether "the very action in question has previously been held unlawful," but rather requires that "in the light of pre-existing law the unlawfulness must be apparent."²³⁷ In the Court's words, "general statements of the law are not inherently incapable of giving fair and clear warning," and in many instances "a general constitutional rule already identified in

fighting words, obscenity, or defamation"); Bussian, *supra* note 162, at 158-59 ("[T]he Constitution applies to public university campuses with the same force that it applies to public streets and parks."); Milani, *supra* note 162, at 197 (stating that *Healy* placed a "heavy burden . . . on the college to demonstrate the appropriateness of [its] action" and required that "the group must actually disrupt the work and discipline of the school or interfere with the rights of others before the speech could be quashed") (internal quotations omitted); McAllister, *supra* note 162, at 411 ("As a general proposition, the protections of the First Amendment extend to the public university setting as they do to any other setting in society . . . most speech and expression do fall within the scope of its protection."); *id.* at 417 (arguing, "[i]t would certainly be anomalous to deny students' First Amendment protections in an arena in which the exchange of ideas and quest for truth demands truly free speech," and that "in preparing for the 'real world' it is important for students to learn to cope with speech that they disagree with or find distasteful"). A survey of the legal scholarship on college students' First Amendment rights and the ways in which public institutions violate those rights thus reiterates the lessons to be learned from the case law.

²³⁶ *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

²³⁷ *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

the decisional law may apply with obvious clarity to the specific conduct in question, even though the ‘the very action in question has [not] previously been held unlawful.’”²³⁸

Under these principles, the Supreme Court’s strong defense of students’ expressive rights at public colleges and universities in case law spanning decades, put together with the holdings of circuit courts in cases challenging applied violations, provides university officials with sufficient notice for purposes of qualified immunity. The case law should convey to administrators that the vast majority of student speech and expressive conduct is entitled to constitutional protection, and that restrictions on student speech are only permissible in narrow, exceptional cases.

Moreover, as previously discussed,²³⁹ these principles have been affirmed by both Congress and the Office for Civil Rights (OCR), making them even clearer and, consequently, more difficult to ignore. In two separate “sense of Congress” resolutions within the past twelve years, Congress has expressed that our nation’s institutions of higher education are places where the free exchange of ideas is to be promoted.²⁴⁰ Likewise, OCR has responded to the abuse of overbroad harassment rationales in speech codes by making clear that colleges and universities seeking to comply with federal harassment regulations should not infringe upon protected student speech.²⁴¹ In other words, the legislative and executive branches of our federal government have joined the judiciary in calling for colleges and universities to uphold students’ expressive rights.

These declarations lend additional weight to the Supreme Court’s jurisprudence and the federal circuit court decisions, making universities’ infringements upon students’ free speech rights all the more unreasonable and, ultimately, indefensible. Given the different sources of authority on this matter, courts adjudicating student suits challenging applied violations should deny qualified immunity to administrators in all but the most exceptional cases.

²³⁸ *United States v. Lanier*, 520 U.S. 259, 271 (1997) (quoting *Anderson*, 483 U.S. at 640).

²³⁹ See *supra* Section II.B.ii.

²⁴⁰ See *supra* notes 153-56 and accompanying text.

²⁴¹ See *supra* notes 157-61 and accompanying text.

D. *Case Law on Qualified Immunity and Applied Violations*

This final section discusses some cases in which courts have denied qualified immunity to university officials for applied violations of students' speech rights. These cases illustrate courts' agreement that when administrators at public colleges and universities violate clearly established law regarding students' First Amendment rights, they should not receive immunity from suit in their personal capacity. Though the case law has not dealt extensively with the issue of qualified immunity for applied violations, the few available decisions are instructive.

One such case is the Second Circuit's 2007 decision in *Husain v. Springer*.²⁴² In *Husain*, the editors of a student newspaper at a public university brought a § 1983 challenge—seeking both injunctive relief and monetary damages—against the university president's decision to nullify a student government election because of the newspaper's endorsement of certain candidates. At the onset of its analysis, the Second Circuit noted,

[c]ourts have long recognized that student media outlets at public universities, and the student journalists who produce those outlets, are entitled to strong First Amendment protection. These rights stem from courts' recognition that . . . student media outlets generally operate as 'limited public fora,' within which schools may not disfavor speech on the basis of viewpoint.²⁴³

The Second Circuit

agree[d] that, at a minimum, when a public university establishes a student media outlet and requires no initial restrictions on content, it may not censor, retaliate, or otherwise chill that outlet's speech, or the speech of the student journalists who produce it, on the basis of content or viewpoints expressed through that outlet.²⁴⁴

The court found that in this case the university had by policy created a limited public forum in which, subject to the existence of a compelling state interest, it could only place restrictions based on the identity of speakers who participated.²⁴⁵ By nullifying the student government

²⁴² *Husain v. Springer*, 494 F.3d 108 (2nd Cir. 2007).

²⁴³ *Id.* at 121.

²⁴⁴ *Id.* at 124.

²⁴⁵ *Id.* at 125.

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election, the university president had run afoul of this limitation because “[w]hen a state university official takes retaliatory action against a newspaper for publishing certain content in an effort to force the newspaper to refrain from publishing that or similar content in the future, the official’s action creates a chilling effect which gives rise to a First Amendment injury.”²⁴⁶ Therefore, the court held that the student editors’ First Amendment rights had been violated.²⁴⁷

The Second Circuit then turned to the qualified immunity issue. In overturning the district court’s grant of summary judgment to the university president on qualified immunity grounds, the Second Circuit first determined that, at the time of the president’s decision to nullify the student government election, it was clear that such action violated the student journalists’ First Amendment rights.²⁴⁸ The court held that a reasonable official in the president’s position would have been aware that the newspaper constituted a public forum “limited only with respect to the speakers who could participate and not with regard to the subject matters on which the newspaper could discuss” and that, accordingly, the First Amendment prohibited viewpoint discrimination within such a forum.²⁴⁹

Critically, in formulating its analysis, the Second Circuit determined that even though no court had specifically held that the nullification of a student election on the basis of a student newspaper’s expressed views violated the First Amendment by chilling speech, the unlawfulness

²⁴⁶ *Id.* at 128 (citing *Stanley v. Magrath*, 719 F.2d 279, 283 (8th Cir. 1983)). On this point, the court reasoned that although the university’s actions “did not entail impoundment” of the newspaper issue in question, “the denial of funding, or the express prohibition of election coverage,” it nonetheless “violated the plaintiffs’ First Amendment rights as a result of the chill on student speech that it created.” *Id.* (citing circuit precedent for the proposition that “[i]t is well-established that First Amendment rights may be violated by the chilling effect of government action that falls short of a direct prohibition against speech”) (internal citation omitted)).

²⁴⁷ *Id.* at 131.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 131-32. The Second Circuit ultimately held that the qualified immunity issue could not be resolved at the summary judgment stage because it was unclear whether it was “objectively reasonable” for the university president to believe that her actions were lawful at the time, as a factual dispute existed regarding whether or not she had relied upon the university’s content-neutral rules for student elections in making her decision. *Id.* at 133. Concluding that it could not determine, at the summary judgment stage, the extent to which the president relied on student election rules, and that it could not “say that even if she did so rely, a reasonable jury would be compelled to find such reliance objectively reasonable,” the Second Circuit held that the district court erred by granting summary judgment to the university president on the grounds of qualified immunity. *Id.* at 134.

of the university president's actions in this case was "apparent in the light of pre-existing law," with the "contours of the right . . . sufficiently clear that a reasonable official would understand that what he is doing violates that right."²⁵⁰ The Second Circuit recognized—as the author has argued in this Article—that in the absence of on-point legal precedent, general principles from case law can establish the law for purposes of qualified immunity.²⁵¹ The importance of such a holding is readily apparent, and student plaintiffs in many future First Amendment suits will have a better chance of piercing qualified immunity if they are able to convince the court to apply the same reasoning.

A federal district court in the Second Circuit followed *Husain*'s rejection of qualified immunity in a similar case decided in 2008. In *Sigal v. Moses*, three students at a public college brought a § 1983 action against the college president for overturning a student government election, in which the three students had been elected to office, due to the fact that a student newspaper initiated by one of the student candidates ran a special election edition allegedly promoting the candidacy of the plaintiff students and others in their party in an unfair manner.²⁵² The court began its analysis by observing that the previous year, "the Second Circuit decided a case almost identical on its facts with the present one."²⁵³ Following the *Husain* decision, the district court found a violation of plaintiffs' First Amendment rights.²⁵⁴ It held that the newspaper had a right to advocate for the election of certain candidates, a right that "could not be restricted because of the fact that student activity fees were used to support the newspaper."²⁵⁵ It rejected the college presi-

²⁵⁰ *Id.* at 132 (internal quotations and citations omitted).

²⁵¹ See *supra* Sections II.B.ii and III.C.

²⁵² *Sigal v. Moses*, 2008 U.S. Dist. LEXIS 95039 (S.D.N.Y. Nov. 21, 2008). The newspaper, which was funded by student activity fees, ran an election edition consisting of four pages, one of which included "candidate statements" from the three plaintiff students as well as other candidates from their party, the "New Millennium." *Id.* at *11-12. These statements were in larger print and more prominently featured than similar statements provided by independent candidates. *Id.* at *12. After three students complained that the election issue unfairly favored and promoted the New Millennium candidates, the college president determined that the New Millennium's candidate statements were "'centrally placed in a manner which receives immediate eye attention, and makes it the equivalent of a piece of campaign literature,'" and that "'the editorial and other material' in the paper also favored the New Millennium slate." *Id.* at *13-14. The college president therefore nullified the election and decreed that there would be a new election the following semester. *Id.* at *9.

²⁵³ *Id.* at *16-17.

²⁵⁴ *Id.* at *19.

²⁵⁵ *Id.*

dent's argument that the newspaper's election issue "became 'the equivalent of a piece of campaign literature,'" opining that the contents of the issue "did not rob the paper of its character as a newspaper" entitled to First Amendment protection.²⁵⁶

Turning to the college president's qualified immunity defense, the *Sigal* court took note of the Second Circuit's determination in *Husain* that the law was clearly established regarding the First Amendment violation in that case "despite the fact that no case had at that time been decided dealing literally with the nullification of a student government election based upon the content of a student newspaper."²⁵⁷ It observed that the Second Circuit "held that the clear meaning of other decided cases was sufficient to cover what was done by the college president in this case."²⁵⁸

In its qualified immunity analysis, the *Sigal* court held itself "bound by the holding in *Husain* to the effect that the law was plainly apparent at the time of the events in question."²⁵⁹ It then turned to the question of whether it was nevertheless objectively reasonable for the college president to believe that her actions were lawful. Significantly, even though the court determined that the college president had acted in good faith and believed that her actions were necessary to ensure a valid and fair election process and were in the best interests of the institution, it stated that the issue of qualified immunity "must be directed more closely to the specific constitutional rights involved—that is rights under the First Amendment—and these rights cannot be interfered with unless such interference is justified by a compelling government interest."²⁶⁰ The court held that it was not objectively reasonable for the president to believe that nullifying the election was a lawful implementation of the college's content-neutral election rules, because the record demonstrated that she did not give sufficient consideration to the First Amendment principles at stake.²⁶¹ The court therefore denied qualified

²⁵⁶ *Id.* at *19-20.

²⁵⁷ *Id.* at *18.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at *20.

²⁶⁰ *Id.* at *21 (citing *Husain v. Springer*, 494 F.3d 108, 125 (2nd Cir. 2007)).

²⁶¹ *Id.* at *21-22. The court reasoned that the college president arrived at a finding of a violation of the college's election rules after she determined that the newspaper had lost its character as a newspaper and had become the equivalent of a piece of campaign literature, and that "[t]his consideration surely had First Amendment implications." *Id.* at *21. Therefore, "a reasonable consideration of the First Amendment implications was necessary in order for" her actions to be found objectively reasonable. *Id.* at *21-22.

immunity to the president and awarded compensatory damages to the students.²⁶²

Schiff v. Williams represents another federal circuit court's decision on the issue of qualified immunity.²⁶³ In *Schiff*, three student editors of a university newspaper brought a § 1983 challenge to the university president's decision to dismiss them from their positions and publish the newspaper using administrative personnel, seeking back pay, compensatory damages, and attorneys' fees.²⁶⁴ The university president argued that his decision was based on the newspaper's substandard "editorial responsibility and competence," which "reflect[ed] discredit and embarrassment upon the university."²⁶⁵

In *Schiff*, the Fifth Circuit held that the president's rationale was insufficient because "the right of free speech embodied in the publication of a college student newspaper cannot be controlled except under special circumstances."²⁶⁶ The university had to demonstrate that its actions were "necessarily related to the maintenance of order and discipline within the educational process."²⁶⁷ In this case, the problems identified by the school—the newspaper's "poor grammar, spelling and language expression," which "could embarrass, and perhaps bring some element of disrepute to the school"—were "clearly not the sort which could lead to significant disruption on the university campus or within its educational processes."²⁶⁸ Therefore, the Fifth Circuit held that the students' First Amendment rights had been violated.

On the qualified immunity issue, the Fifth Circuit stated that the university president "'must be held to a standard of conduct based not only on permissible intentions, *but also on knowledge of the basic unquestioned constitutional rights of his charges.*"²⁶⁹ In this case, the court affirmed the district court's ruling that the university president was not entitled to qualified immunity, despite the lower court's finding that his action "was not motivated by malice . . . perhaps he thought he had a right to do what he did; he probably did think so."²⁷⁰ As the Fifth

²⁶² *Id.* at *22-23.

²⁶³ *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975).

²⁶⁴ *Id.* at 259-260.

²⁶⁵ *Id.* at 259.

²⁶⁶ *Id.* at 260.

²⁶⁷ *Id.* at 261.

²⁶⁸ *Id.*

²⁶⁹ *Id.* (internal citation omitted).

²⁷⁰ *Id.*

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Circuit stated, the university president “cannot avoid responsibility for his abridgement of First Amendment rights because his motives were to serve the best interest of the school.”²⁷¹ The *Schiff* decision is important because it underscores that qualified immunity requires an objective analysis and does not hinge upon the subjective intentions of a state official. As the Fifth Circuit emphasized, “[i]t is the existence of a reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords basis for qualified immunity.”²⁷²

More recently, a federal district court denied qualified immunity at the motion to dismiss stage in a § 1983 lawsuit arising from a student protest case at Valdosta State University in Georgia, discussed in the first part of this section.²⁷³ The student, Hayden Barnes, was expelled from Valdosta State in 2007 for peacefully protesting the university’s plan to construct new parking garages on campus, via an online collage.²⁷⁴ Despite the fact that the collage consisted entirely of protected expression satirizing the university president and criticizing the university’s decision to construct the garages, Barnes was labeled a “clear and present danger” by the university.²⁷⁵ Following his expulsion, Barnes sued the university, the president, and various administrators under a number of causes of action, including a § 1983 action against the individual defendants in their personal capacities for retaliating against him for the lawful exercise of his First Amendment rights.²⁷⁶

In ruling on the individual defendants’ qualified immunity defense, the federal district court first determined that the First Amendment protected Barnes’ expression.²⁷⁷ The court rejected the defendants’ argument that the collage constituted fighting words and found “no indication that the language had the potential to cause any sort of substantial disruption on the VSU campus or in the classroom.”²⁷⁸

Next, turning to the element of clearly established law, the court considered whether a reasonable public university administrator would

²⁷¹ *Id.*

²⁷² *Id.* (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 247–48 (1974)).

²⁷³ See *supra* Section III.A.

²⁷⁴ See *supra* notes 174–76 and accompanying text.

²⁷⁵ *Id.*

²⁷⁶ *Barnes v. Zaccari*, No. 1: 08-CV-0077-CAP (N.D. Ga. Nov. 19, 2008).

²⁷⁷ *Id.*

²⁷⁸ *Id.* (citing *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

know that “expelling a student from school for advocating against planned construction” would violate the student’s right to free speech.²⁷⁹ Just like other courts, it affirmed the principle that “general statements of the law are not inherently incapable of giving fair and clear warning, and . . . a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful.”²⁸⁰ Applying this principle to the case at hand, the court cited to circuit precedent holding as “‘settled law’ that the government may not retaliate against citizens for the exercise of First Amendment rights.”²⁸¹ The court held that, based on such precedent, the individual defendants were “on notice and had fair warning” that retaliating against Barnes for speaking out against the proposed construction projects would violate his freedom of speech.²⁸² Therefore, it rejected qualified immunity on this claim and allowed Barnes’ action for damages to move forward.²⁸³

A federal district court pierced qualified immunity in the 2007 case of *Commissioned II Love, Savannah State University Chapter v. Yarbrough*.²⁸⁴ *Yarbrough* arose from the suspension and ultimate expulsion of a faith-based student organization from a public university’s campus due to the religious practices of its members, which prompted the organization and two of its student officers to bring a § 1983 suit seeking an injunction to prevent the university from denying the group student organization status, as well as nominal damages.²⁸⁵

²⁷⁹ *Id.*

²⁸⁰ *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)) (internal quotations and citation omitted).

²⁸¹ *Id.* (quoting *Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir. 2005)) (internal quotation and citation omitted).

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Commissioned II Love, Savannah State Univ. Chapter v. Yarbrough*, 621 F. Supp. 2d 1312 (S.D. Ga. 2007).

²⁸⁵ *Yarbrough*, 621 F. Supp. 2d at 1316-18. The university objected to the student group’s ritual of washing new members’ feet during its off-campus retreat each semester. *Id.* at 1317. Though the student group stated that this ritual was part of its sincerely held Christian beliefs, *id.*, the university suspended the group from campus, prohibiting it from “(1) conducting any activities; (2) congregating; (3) wearing its paraphernalia; (4) soliciting membership; or (5) participating in ‘meetings, step shows, or other ‘underground activities’ on campus or off campus” *Id.* at 1317 n.5. Subsequently, members and non-members of the student group were instructed to cancel an off-campus weekend trip to a Christian music event due to the group’s suspension; the students refused to do so, contending that the trip was an off-campus event

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At the motion to dismiss stage, the district court rejected the university officials' argument that the student group's "expulsion from campus only restricts them from assembling on campus as a student organization," and that they had "not shown that they would be prevented from assembling on campus as an outside organization."²⁸⁶ It stated that "denial of official recognition of a student group can establish a claim for restriction of associational rights," and that "the Supreme Court has stated that a student group's ability to exist outside the campus community does not significantly ameliorate the harm caused by the denial of official campus recognition."²⁸⁷ The court therefore denied the university officials' motion to dismiss the students' freedom of association claim.²⁸⁸ With regard to the issue of qualified immunity, the court determined that the students had sufficiently alleged both that the officials "violated a constitutional right and that the right was clearly established at the time of violation."²⁸⁹ Accordingly, at this early stage of litigation, the court denied the officials' qualified immunity defense.²⁹⁰

The preceding case law demonstrates that courts have pierced qualified immunity under various circumstances in which students at public universities have challenged applied violations of their First Amendment rights.²⁹¹ Courts should, following these cases as well as the First

unaffiliated with the group. *Id.* at 1318. The student group was therefore "immediately and permanently expelled" from the university for violating the terms of its suspension. *Id.*

²⁸⁶ *Id.* at 1321.

²⁸⁷ *Id.* (citing *Healy v. James*, 408 U.S. 169, 183, 189 (1972)).

²⁸⁸ *Id.* The court also denied the officials' motion to dismiss the students' freedom of intimate association claim, reasoning that the student group had a restrictive admissions process and selective membership, required the completion of a semester-long purification process, allowed only members to attend meetings and retreats, and generally kept its inner workings "insulated from the public." *Id.* at 1323-24.

²⁸⁹ *Id.* at 1326.

²⁹⁰ *Id.*

²⁹¹ While outside the scope of this Article, it is also worth noting that courts have denied qualified immunity to university officials for applied violations of the free speech rights of faculty members, and even of non-student third parties. With respect to challenges brought by faculty members, see, for example, *Burnham v. Ianni*, 119 F.3d 668, 681 (8th Cir. 1997) (denying qualified immunity to university chancellor for taking down two professors' photos as part of a department exhibit); *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 597 (2d Cir. 1990) (holding that university officials were not entitled to qualified immunity for denying a professor tenure and promotion on the basis of his in-class speech); *Booher v. Bd. of Regents of N. Ky. Univ.*, 1998 U.S. Dist. LEXIS 11404, at *47 (E.D. Ky. July 21, 1998) (denying qualified immunity to university officials for faculty censure of professor for speaking out on a matter of public concern); *Hall v. Kutztown Univ.*, 1998 U.S. Dist. LEXIS 138, at *85-86 (E.D. Pa. Jan. 12, 1998) (holding that university official was not protected by qualified immunity, where professor was denied tenure-track employment after expressing opposition to multicultural educa-

Amendment principles discussed in this Article, pierce qualified immunity in the vast majority of cases challenging such violations. Only in rare circumstances should a court find that the law is not clearly established in this area.

CONCLUSION

This Article asserts that because the law governing students' speech rights at public colleges and universities is clearly established, university officials should not be granted qualified immunity, except in rare cases, for applied violations of students' free speech rights. The Article also posits that because speech codes at public institutions have been clearly shown to be unconstitutional, administrators are not entitled to qualified immunity for drafting and maintaining speech codes.

Denial of qualified immunity in either type of case should not come as a surprise to a university official who has followed the development of the law, particularly over the past two decades. University administrators, whose work duties and very reason for existence on campus require a proper understanding of student rights, must afford students' free speech rights the level of respect and protection to which they are entitled. This should logically follow from administrators' basic training and experience, as well as from the case law and policy updates

tion and the practices of certain cultures during a faculty meeting); *Silva v. Univ. of N.H.*, 888 F. Supp. 293, 327 (D.N.H. 1994) (holding that university officials were not entitled to qualified immunity for applying school's sexual harassment policy against professor's in-class speech and suspending him for one year); *Levin v. Harleson*, 770 F. Supp. 895, 918 (S.D.N.Y. 1991), *aff'd in part* 966 F.2d 85 (2d Cir. 1992) (holding that qualified immunity was not available to university administrators who retaliated against a professor's writings outside the curriculum by creating a committee to investigate his views and establishing "shadow sections" of his course).

With respect to challenges brought by third parties, see, for example, *Putnam v. Keller*, 332 F.3d 541, 560 (8th Cir. 2003) (denying qualified immunity to public college administrators for banning former college music instructor from campus after he had been removed from his position, where the campus ban infringed upon the former instructor's right, as a member of the general public, to access the campus for activities protected by the First Amendment); *Giebel v. Sylvester*, 244 F.3d 1182, 1189 (9th Cir. 2001) (holding that a public university professor and department chair was not entitled to qualified immunity at the summary judgment stage for removing a former colleague's handbills from university bulletin boards, where the former professor, no longer affiliated with the university, sought to publicize his appearance at a conference to be held on the university campus); *Davis v. Stratton*, 575 F. Supp. 2d 410, 1317 (N.D.N.Y. 2008) (holding that a public college administrator was not entitled to qualified immunity at the summary judgment stage for having a non-student preacher removed from campus by police and arrested for criminal trespassing, where the preacher was engaged in preaching, leafleting, and videotaping and was told by the administrator that he was on private property and was not authorized to be on campus because he had not followed proper procedures).

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they typically receive from such organizations as the National Association of College and University Attorneys (NACUA),²⁹² the Association for Student Conduct Administration (ASCA),²⁹³ and others. The combination of prior and ongoing education should be sufficient to keep administrators well-informed on issues that are central to their job functions and responsibilities. It is patently unreasonable for university officials in positions of authority to plead ignorance when, first, their official duties require given knowledge and understanding of the law²⁹⁴ and, second, they have reasonable access to the relevant information.²⁹⁵

Nevertheless, public colleges and universities continue to ignore and violate their students' First Amendment right to free speech, making student responses, including litigation, necessary. Crucially, § 1983 provides a vehicle for individuals to vindicate federal constitutional and statutory rights such as the right to freedom of speech, and an important aspect of § 1983 litigation is the ability to hold government officials liable in their personal capacity for monetary damages. Suits brought against officials in their personal capacity serve the public interest in "hold[ing] public officials accountable when they exercise power irresponsibly"²⁹⁶ and in "deterrence of unlawful conduct and . . . compensation of victims."²⁹⁷ In this way, individuals are able to use the courts

²⁹² The National Association of College and University Attorneys (NACUA) regularly updates its members on pertinent case law in the university setting, including First Amendment decisions. See National Association of College and University Attorneys, Legal Reference Service Documents, <http://www.nacua.org/lrs/documents.asp> (last visited May 10, 2010) (discussing recent decisions of higher education law). NACUA also publishes *The Journal of College and University Law* jointly with the University of Notre Dame School of Law, thereby providing its members with additional legal guidance and information. See National Association of College and University Attorneys, *The Journal of College and University Law*, <http://www.nacua.org/publications/JCUL.asp> (last visited May 10, 2010).

²⁹³ The Association for Student Conduct Administration (ASCA) provides its members with a "Law & Policy Report" through weekly e-mails, to update them on the latest case law and legislative developments, as well as legal analysis. See Association for Student Conduct Administration, Law & Policy Report, <http://www.theasca.org/en/cms/?38> (last visited May 10, 2010). Its annual conference also provides an overview of developments in higher education law during the past year. See Association for Student Conduct Administration, 2010 ASCA Annual Conference, http://www.theasca.org/Conf_2010/ (last visited May 10, 2010). This includes a case law overview. See WILLIAM M. FISCHER, W. SCOTT LEWIS & SAUNDRA K. SCHUSTER, ASSOCIATION FOR STUDENT CONDUCT ADMINISTRATION, YEAR IN REVIEW: LEGAL ISSUES UPDATES 2009 CASES, (February 2010) <http://www.theasca.org/attachments/wysiwyg/1/2009CaseLawYearReview.pdf>.

²⁹⁴ See *supra* Sections II-III.

²⁹⁵ See *supra* Sections II-III.

²⁹⁶ *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009).

²⁹⁷ *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

as a check on the abuse of authority by government officials and thereby advance compliance with the law.

As discussed, speech codes have persisted and indeed proliferated at colleges and universities despite two decades of cases uniformly invalidating them.²⁹⁸ The most telling statistic, taken from FIRE's 2009 speech code report,²⁹⁹ is that 71 percent of institutions surveyed maintained "at least one policy that both clearly and substantially restricts freedom of speech," with the percentage remaining the same among public colleges and universities surveyed.³⁰⁰ Thus, administrators either lack an understanding of the lessons to be drawn from the case law or are acting in defiance of the law, or perhaps in some cases both. Whatever the case may be, they are simply not "getting it."

Students should therefore utilize personal capacity suits under § 1983 in order to vindicate their speech rights by holding university administrators individually accountable for drafting and maintaining speech codes. This requires courts to pierce qualified immunity. Once courts begin to award damages to students who have been harmed by the existence of speech codes, administrators will suddenly face a different set of incentives. Faced with the real prospect of paying monetary damages out of their own pockets, administrators will be forced to reconsider their institution's stated policies toward student speech. They will have to address the constitutional infirmities presented by these policies. On many if not most campuses, this will likely result in eradication of speech codes and rewriting of speech regulations to comport with the guarantees of the First Amendment, creating a major victory for students' free speech rights.

Likewise, piercing qualified immunity in cases of applied violations will change the calculus for administrators and force them to confront the First Amendment problems in their practices. Despite decades of case law from the Supreme Court and federal circuit courts affirming the sanctity of freedom of speech at public colleges and universities,³⁰¹ these institutions continue to violate their students' speech rights. The examples provided of applied violations from recent years³⁰² demonstrate that such violations take many different forms and revolve around

²⁹⁸ See *supra* Section II.B.

²⁹⁹ FIRE, SPOTLIGHT ON SPEECH CODES 2010, *supra* note 8.

³⁰⁰ *Id.* at 5-7.

³⁰¹ See *supra* Sections III.B-C.

³⁰² See *supra* Section III.A.

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varying fact patterns, but that the end result is the same: student expression is censored or punished despite its clear entitlement to constitutional protection and, often, its tame and innocuous nature. Again, far too many administrators are not “getting” the message from the case law, either because they fail to understand the rights belonging to students on public campuses or because they willfully ignore those rights, or in some cases both.

Therefore, students should pursue personal capacity suits under § 1983 for applied violations of their free speech rights. If courts pierce qualified immunity in such cases, they will provide students with the ability to use § 1983 as a check against the abuse of authority by public university officials. As the author has shown, courts have already rejected qualified immunity in a number of cases arising from applied violations.³⁰³ If more courts do the same in future cases, the result on many campuses will likely be that administrators, facing a powerful disincentive with respect to violations of student speech rights, will more closely examine the impact of their actions on those rights. Knowing that they will face personal liability for monetary damages if their actions are found to violate clearly established law, officials at public colleges and universities will be less likely to restrict the exercise of speech and expressive activity protected by the First Amendment. This too will represent a major victory for students’ free speech rights at public colleges and universities.

Ultimately, litigation under § 1983 is one of many weapons to be used in the fight against campus censorship and punishment of student speech.³⁰⁴ Freedom of speech is one of the most sacrosanct rights possessed by Americans and certainly at public colleges and universities, where the freedom of students to interact, debate, and exchange views is crucial to the university’s ability to fulfill its mission as a true “marketplace of ideas.” This Article posits that § 1983 litigation against public university officials in their personal capacity is a crucial vehicle for vindicating students’ speech rights and that, in order to allow these suits to proceed, courts should pierce qualified immunity. By doing so, the ju-

³⁰³ See *supra* Section III.D.

³⁰⁴ For instance, the Foundation for Individual Rights in Education (FIRE) uses public advocacy against speech codes and applied violations to bring media and public attention toward campus abuses and instances of censorship. See Foundation for Individual Rights in Education (2009) <http://www.thefire.org>. By bringing these abuses to light, FIRE forces universities to choose between attempting to defend their policies and practices in the court of public opinion, which they are often unable to do, and rescinding them altogether.

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diciary can act as a check against university administrators' abuse of authority. It is the author's hope that this will have the long-term effect of upholding and protecting students' speech rights on public university campuses, a result that would greatly benefit students, their institutions, and ultimately society as a whole.