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DEFINING DISCOURSE: AN ANALYSIS OF THE PROMULGATION AND JUSTIFICATIONS OF NEW JERSEY PUBLIC UNIVERSITY SPEECH AND EXPRESSION POLICIES

by

MATTHEW ELIAS BOSQUE

A Master's Thesis Submitted to the Faculty of Montclair State University

In Partial Fulfillment of the Requirements For the Degree of

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The purpose of this research is to investigate the New Jersey Anti-Bullying Bill of Rights Act (N.J.S.A 18A:37-13 et seq.) and New Jersey's overall attempt at combating bullying in public schools in both secondary and higher education. It is found in this research that the New Jersey statute holds potentially unconstitutional provisions in the language of the statute. By examining both the First and Fourteenth Amendment, this research taps into cases like *Tinker v. Des Moines Independent Community School District*, *Davis v. Monroe County Board of Education*, and *DeJohn v. Temple University* in order to craft both a sound and constitutional speech code. It is found that recent public university speech codes tend to focus on the Fourteenth Amendment regulations while at times neglecting First Amendment regulations. Overall, this research highlights that it is possible to socially challenge new ideas both popular and unpopular yet, defend the freedom of speech on a legal level.
DEFINING DISCOURSE: AN ANALYSIS OF THE PROMULGATION AND JUSTIFICATIONS OF NEW JERSEY PUBLIC UNIVERSITY SPEECH AND EXPRESSION POLICIES

A THESIS

Submitted in partial fulfillment of the requirements
For the degree of Law and Governance

by

MATTHEW ELIAS BOSQUE

Montclair State University

Montclair, NJ

2017
<table>
<thead>
<tr>
<th>Contents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introductions ......................................................</td>
</tr>
<tr>
<td>The New Jersey-Anti Bullying Bill of Rights Act ....</td>
</tr>
<tr>
<td>The Potential Issues in Regulating Bullying ........</td>
</tr>
<tr>
<td>Federal Court Rulings ..........................................</td>
</tr>
<tr>
<td>Third Circuit Court Rulings ...............................</td>
</tr>
<tr>
<td>Sypniewski v. Warren Hills Regional Board of Education</td>
</tr>
<tr>
<td>Lim v. Board of Education of Tenafly ....................</td>
</tr>
<tr>
<td>Balancing the 1st and 14th Amendment ..................</td>
</tr>
<tr>
<td>Analyzing the New Jersey Anti-Bullying Bill of Rights Act</td>
</tr>
<tr>
<td>Analyzing Speech Codes .......................................</td>
</tr>
<tr>
<td>Bias Response Teams ............................................</td>
</tr>
<tr>
<td>Qualified Immunity .............................................</td>
</tr>
<tr>
<td>A Cultural Solution to Speech ............................</td>
</tr>
<tr>
<td>Conclusions ......................................................</td>
</tr>
<tr>
<td>Bibliography .....................................................</td>
</tr>
</tbody>
</table>
Introduction

Joseph Aziz, a Montclair State University graduate student, received a surprise on October 9, 2012. The university issued a no-contact order in regards to a couple of comments he made on YouTube featuring an event he went to himself. In the comments, Aziz described a female student at Montclair as having “legs that resembled a pair of bleached hams” while mocking the woman and her boyfriend’s weight. The no-contact order was issued by the University Coordinator of Student Conduct, Jerry Collins, and stated Aziz’s statements violated the university’s policies or community standards.

The story would have ended there if Joseph Aziz complied with the no-contact order. However, on October 10 after his meeting with Jerry Collins, Aziz posted comments on a private Facebook group concerning his treatment by the school and the woman who reported him. On November 29, Aziz received a notice from the Assistant Director for Housing Assignments, Kevin Schafer which summoned him to a Conduct Conference Meeting regarding his Facebook comment, which appeared to have been leaked by an unknown source. During the meeting, Aziz was formally charged with “Disruptive Conduct,” “Failure to Comply,” “Harassment,” “Violation of Written University Policy, Regulations and Announcements,” and “Abuse of the Conduct System.” Aziz was then suspended for the spring 2013 semester and his actions placed

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3 Ibid.
4 Ibid.
5 Ibid.
on his permanent record.6

Joseph Aziz appealed his punishment by the school through email on December 17, directed to Dr. Pennington, who is the Vice President for Student Development and Campus Life at Montclair State University.7 Dr. Pennington in her response letter stated that, while in his hearing with Mr. Schafer, he was found not responsible of “Disruptive Conduct”, “Harassment”, and “Abuse of the Conduct System”. He was however, found guilty of “Failure to Comply” and “Violations of Written University Policy, Regulations and Announcement.”8 Dr. Pennington concluded that his no-contact order and suspension of the semester was to be upheld.

Intervention for Joseph Aziz came the year after on January 4, 2013, by a non-profit organization called the Foundation for Individual Rights in Education, or better known as FIRE. FIRE is a group of lawyers and scholars that are known for litigating civil rights issues on university campuses in the United States. FIRE issued a letter to Susan Cole, the President of Montclair State University, calling for an immediate end to Aziz's no-contact order and suspension.9 FIRE, in its letter, asserted that the university's no-contact order was in fact an unconstitutional gag order, which clearly violated the First Amendment.10 Because the university admitted that Aziz was not found guilty of harassment, FIRE claimed that his punishment was solely based on the university's “Failure to Comply” decision from when he decided to make additional comments on his Facebook. As a result, FIRE also contested the university's social media prohibition

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6 Kelly Heyboer,
8 Ibid.
9 FIRE, “Fire Letter to Montclair State University President Susan A. Cole”
10 Ibid.
clause in their no-contact order considering it is unfair for Aziz to openly discuss a punishment that will have significant consequences to his life. Lastly, FIRE claimed that Aziz’s punishment was grossly disproportionate to the university policy he violated. Overall, FIRE in their legal reasoning cited *Davis v. Monroe*, which requires public schools to take action against speech or expression when it is “So severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ education experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.”

After consulting with their attorneys on January 17, 2013, and the enormous public pressure by FIRE, MSU overturned Aziz’s punishment privately, offering no press statement. On the same day, Montclair State University’s President, Susan Cole, issued a letter to Joseph Aziz; the letter absolved Aziz of both his no-contact order and his suspension admitting that it was incorrect of the university to issue a no-contact order despite being found not guilty of harassment. While Aziz was cleared on his punishment, President Cole in her letter mentions the New Jersey Anti-Bullying Bill of Rights Act as one of the motivations of the enforcement of the original law stating its purpose is to “Create a campus community in which you and every student at the University is able to pursue his or her education in a positive learning environment, free from substantial disruption and interference from others.” Overall, Aziz at the end of this legal battle was able to attend school that semester. According to his lawyers at FIRE

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14 Ibid.,
as of January 18, 2013, it remains unclear whether Montclair State University ever removed this incident off Aziz's records.15

Joseph Aziz's tale and ordeal leaves much to consider. The first reality is that, anything said online is public and can be possibly discovered by others. Another question to this tale and the most important is whether Montclair State University was correct in their overall actions. Aziz's tale despite being a small chapter in Montclair's history represents a considerable number of things: first, what his tale shows is New Jersey's frequent usage of the New Jersey Anti-Bullying Bill of Rights Act which is a legally contested statute especially within the realm of public universities. Second, Aziz's story previews why many public schools especially in New Jersey are afraid of facing litigation and as a result, they potentially over-regulate public school speech policies which may violate both the First and Fourteenth Amendment. Lastly, Aziz's story reveals the prominence of cyberbullying and whether or not it is of equal value to speech in other contexts.

In order to fully comprehend the promulgation and enactment of New Jersey policy, not only is it important to investigate New Jersey standards but, to consider federal standards and relevant U.S Supreme Court rulings. Through the research of New Jersey public university standards and policies, it will be noticed that the New Jersey Anti-Bullying Bill of Rights Act is a common defense when regulating student speech. While the Act itself is the crux of this research, the underlying ideas of the freedom of speech need to be elaborated. Before the law itself can be judged, it is crucial to carefully

trace the history and origins of not only the law itself but, the legal underpinnings through state and federal court rulings and guidelines. Additionally, the viewpoints of legal and philosophical scholars who are experienced in the subject of free speech, anti-bullying, and hate speech must also be carefully weighed.

The sources to support this research will consist of Supreme Court cases that are further elaborated by a multitude of Third Circuit decisions. Secondary sources elaborating on many of those decisions will consist of lawyers from FIRE, independent legal scholars, New Jersey statutes, and additionally, statements from the United States Department of Education. In using these sources, it highly suspected that the New Jersey anti-bullying statute is unconstitutional as well as many of the speech codes that are applied in public schools. As a result, it is likely that the unconstitutional regulation drives public school administrators to unreasonably overregulate speech due to fear of litigation.
The New Jersey Anti-Bullying Bill of Rights Act

On September 22, 2010, Tyler Clementi, a Rutgers student, committed suicide by jumping off the George Washington Bridge in New Jersey days after fellow Rutgers students Dharun Ravi and Molly Wei had recorded him via webcam having sex with another man. His suicide became the rallying cry for many anti-bullying activists across the country including Garden State Equality, which is a public policy advocacy group that focuses on LGBT concerns. In the following weeks, New Jersey’s legislature passed and Governor Chris Christie signed into law the New Jersey Anti-Bullying Bill of Rights Act which is an extensive addendum to the state’s original anti-bullying law known as N.J.S.A. 18A:37-13. The addendum itself focuses on cyber-bullying and the addition of public universities into the original statute’s regulation. As a result of this law, New Jersey is widely recognized as a state with one of the strongest anti-bullying measures in the country.

Though public universities are treated differently under both federal and constitutional law, the New Jersey Anti-Bullying Bill of Rights Act includes public universities in the statute. While the statute was a product of the Clementi incident, the push for stronger bullying laws did not start there. The original statute, N.J.S.A. 18A:37-13 was created in 2002. Garden State Equality, an organization that was one of the

18 N.J.S.A 18A:37-13 et seq
19 State of New Jersey Department of Education, “Anti-Bullying Bill of Rights Act Questions and Answers, November 2015 ” http://www.state.nj.us/education/genfo/faq/AntiBullyingQA.pdf
21 N.J.S.A 18A:3B-68
original supporters of the 2011 amendment, asserts that New Jersey's high rates of bullying was one of the main reasons for its creation. The organization itself is known for promulgating and litigating laws on behalf of the interests of the LGBT community. The original bill contained a “Harassment, -Intimidation, and Bullying” (HIB) provision that defined HIB as: "Any gesture, any written, verbal or physical act, or any electronic communication that is reasonably perceived as being motivated either by any actual perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory handicap or by any other distinguishing characteristic, that takes place on school proper, at any school-sponsored function or on a school bus and that a) a reasonable person should know, under the circumstances, will have the effect of harming a student or damaging the student’s property, or placing a student in reasonable fear of harm to his person or damage to his property; or b) has the effect of insulting or demeaning any student or group of students in such a way as to cause substantial disruption in, or substantial interference with, the orderly operation of the school." The original 2002 bill itself introduced the requirement of having primary and secondary school districts adopting policies that handled HIB standards both inside school and in school sponsored events.

While the original 2002 bill was lauded as an effective program by anti-bullying advocates, the law itself was revealed to have a few design flaws concerning severe and
pervasive harassment, which the original law did not cover.\textsuperscript{25} Additionally, the original bill lacked provisions concerning cyber-bullying and deadlines regarding reporting the bullying itself. The language of the original bill only protected victims from bullying when it created substantial disruption in a school rather than a hostile environment which, will be explained later in this paper. The New Jersey Anti-Bullying Bill of Rights Act 2011 amendment was enacted due to both the development of social media and the Clementi case.

One of the most important additions to the bill is a new definition of HIB. The new definition adds: “Whether it be a single incident or a series of incidents”\textsuperscript{26} Unlike the 2002 version, the amendment removes the requirement of the victim of HIB to be any part of a protected class of people, which New Jersey classifies as “Race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity, expression, or a mental, physical or sensory disability.”\textsuperscript{27} What this means is, virtually any demeaning statement or expression could be considered applicable under HIB.

The 2011 amendment takes into consideration the prominence of social media and the internet and includes incidents that occur off school grounds, including online speech.\textsuperscript{28} There are two examples when it comes to online speech: first, it is any expression transmitted via a school computer. Second, it is speech from the internet that is off-campus yet, will have a direct impact to school activities. In regards to the school administration itself, the amendment creates deadlines for reporting and handling

\textsuperscript{26} N.J.S.A 18A:37-14
\textsuperscript{27} State of New Jersey Anti-Bullying Bill of Rights Act Question and Answers
\textsuperscript{28} N.J.S.A 18A:37-15.3
incidents by requiring the hiring of anti-bullying specialists.\textsuperscript{29} Lastly and most importantly in regards to this investigation, the 2011 amendment binds public universities under this law. The bill states: “Harassment, intimidation, and bullying is also a problem which occurs on the campuses of institutions of higher education in this State, and by requiring the public institutions to include in their student codes of conduct a specific prohibition against bullying, this act will be a significant step in reducing incidents of such activity.”\textsuperscript{30} What makes this bill so puzzling is that the drafters seem to have neglected the fact that there are legal distinctions between lower and higher education when it comes to First Amendment rights. Because the drafters failed to make the distinction, there may be a constitutional challenge regarding the inclusion of public universities in the bill.

While harassment itself is an established legal concept in American jurisprudence, the legal definition of harassment under HIB differs from New Jersey’s generalized definition. According to New Jersey criminal code, harassment is defined as an action that “makes, or causes to be made, a communication or communications anonymous or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm; subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or, engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.”\textsuperscript{31} Harassment laws differ due to the established legal distinction between public education and public life. Because public education requires a

\begin{footnotesize}
\textsuperscript{29} N.J.S.A 18A:37-17
\textsuperscript{30} N.J.S.A 18A:37-13.1 j
\textsuperscript{31} N.J.S.A 2C:33-4
\end{footnotesize}
semblance of order in order to properly function, students have lesser First Amendment rights than that of a private citizen. Further details will be explained in the court rulings chapter in regards to exactly what amount of rights do students have when in school.
The Potential Constitutional Issues in Regulating Bullying

While it is to be stressed that the Clementi tragedy is linked to the passing of the Anti-Bullying Bill of Rights Act, the movement to increase anti-bullying punishments was not spontaneous; Garden State Equality, asserts that many anti-bullying advocates urged for such a law prior. Overall, Clementi’s roommate, Dharun Ravi in a plea deal pleaded guilty only to attempted invasion of privacy count but in turn, the state prosecutors would dropped all other charge as of October 27, 2016. While the Clementi case was a matter of criminal invasion of privacy, the incident warrants discussion due to it being one of the sources of the New Jersey statute. Additionally, the tragedy of Tyler Clementi has led United States Congress to introduce the Tyler Clementi Higher Education Anti-Harassment Act of 2015 which so far, has failed to pass multiple times and is not currently reintroduced to Congress as of January 2017.

As for the bill itself, while many New Jersey anti-bullying activist groups applaud the enactment of the amendment, it has been legally contentious. In 2012, the bill faced revision after the New Jersey Council on Local Mandates ruled that the unfunded mandate would be a fiscal burden. The New Jersey legislature was able to remedy the situation by adding funding to the bill. Additionally, in 2014 The Rutherford Institute, a civil liberties organization sued the Tenafly Board of Education in Lim v. Board of Education of Tenafly, challenging the Anti-Bullying act. The case concerned an elementary school student who was punished by his school’s anti-bullying specialist after

32 Garden State Equality “The Anti-Bullying Bill of Rights”
33 Nate Schweber and Lisa W. Foderaro, “Roommate in Tyler Clementi Case Pleads Guilty to Attempted Invasion of Privacy”
35 State of New Jersey Council of Local Mandates, “In Re Complaint filed by the Allamunchy Township Board of Education” http://www.state.nj.us/localmandates/pending/Allamuchy.html
36 Lim v. Board of Education of Tenafly
correctly stating that his classmate had lice on her hair. The family's lawyers contended that his rights were violated due to how overly broad the anti-bullying statute is. As of 2015, the case was settled by the agreement of the parties and no legal precedent was reached in terms of the legality of the Anti-Bullying Act.37

Federal Court Rulings

The United States Supreme Court plays an enormous role in the understanding and legal framework of both the First and Fourteenth Amendment. *Tinker v. Des Moines Independent Community School District* is widely considering the starting point concerning school speech. In 1969, the *Tinker* case involved multiple children in lower education who decided to wear black armbands to protest the Vietnam War while at its peak. The school swiftly rebuked their actions and demanded they remove the armbands. After the children refused to back down, most of them were suspended. Justice Abe Fortas, writing for the majority of the Supreme Court, found that the school district’s actions were overly proactive and silenced the children's speech out of fear of causing disruption. Justice Fortas declared that, in order for the school to justify their actions, they needed to prove that the speech or expression would cause “substantial disruption.” Justice Fortas also pointed out that the school may not have done anything if the armbands were to hypothetically support the Vietnam War instead. What that implies is that the school was viewpoint biased which, is unconstitutional when regulating speech. Anne Proffitt Dupre in her book on school speech points out that for the first time, students were able to challenge their teachers over their ideas. Though *Tinker* occurred in lower education, the *Tinker* ruling is applicable in public universities under the *Tinker* test.

Though not a scenario situated in a school environment, *Brandenburg v. Ohio*.

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occurred the same year as the *Tinker* ruling and deserves a mention, since it defines the limits of speech. While it is not applicable to lower education due to the *in loco parentis* doctrine, it is still relevant for higher education itself. The *Brandenburg* court asked whether the defendant’s speech that advocated violence against certain minorities consisted unprotected speech. While American jurisprudence has never codified the concept of hate speech, it has under *Chaplinsky v. New Hampshire* ruled that “fighting words,” or speech that results in a breach of peace as unconstitutional. The *Brandenburg* court in narrowing *Chaplinsky* ruled that in order to regulate hate the defendant’s speech, that speech must be “imminent lawless action.” In other words, the threatening speech needs to have an established time of occurrence in order to be considered a lower level of speech. Although not applied in an educational context, the *Brandenburg* test provides a powerful lens in determining whether or not one’s speech is considered unlawful speech. After combining with the *Tinker* test and other applicable Supreme Court cases, it is observed that the Supreme Court strongly rejects prior restraint. The Court requires an extremely compelling reason in order for the state to halt one’s speech. School speech also requires a similar amount of evidence in order to regulate. To summarize, the First Amendment under the scope of school speech allows speech except speech that causes substantial disruption to school functions, fighting words, and speech that could cause imminent and lawless action.

Another legal tool to analyze speech especially in public schools can be found in the “time, place, and manner” analysis. *Clark v. Community for Creative Non-Violence* concerned a charity organization wishing to hold demonstrations on the National Mall in

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41 *Chaplinsky v. New Hampshire*, 315 U.S. 568, 72 S. Ct 86 L. Ed. 1031 (1942)
Washington D.C. that involved sleeping there in order to raise awareness about the homeless population. The National Park Service rules prohibited sleeping in the park which a charity organization challenged. The Supreme Court held in favor of the National Park Service stating that the regulation did not violate the First Amendment. The Court found that, in general, speech and expression is subject to certain state restrictions including time, place, and manner. Additionally, when gauging whether these elements are applicable, it must be done so under a content neutral manner. Ward v. Rock Against Racism in (1989) further elaborates on time, place, and manner stating that government interests must be strictly content-neutral when regulating speech.

Examples of time, place, and manner in action include noise ordinances at night in cities and buffer zones near voting stations. Following the scope of both Clark and Ward, public schools in both lower and higher education must consider whether their potential regulations concerning student speech is truly content-content neutral.

While examining case law regarding the First Amendment, it may seem clear that school speech has very comfortable protections for students. The law however, becomes rather complex when the Fourteenth Amendment begins to blend with the First Amendment. The Fourteenth Amendment or, the Equal Protection Clause guarantees equal protection under the law amongst all citizens of the United States. The Court has frequently upheld that denial of speech rights can be a denial of equal protection.

In regards to the Equal Protection Clause, the United States enacted two laws that are sourced by the Fourteenth Amendment decisions: the first law is the Title VII under

the Civil Rights Act of 1964. The Civil Rights Act made it illegal to discriminate against a person on the basis of race and sex in both public and private entities.

Discrimination based on sex in the Civil Rights Act was later expanded on through *Meritor Savings Bank v. Vinson* which added sexual harassment as a form of sex discrimination to this matter. Following up, *Oncale v. Sundowner Offshore Services* included same-sex harassment. Sexual harassment in all cases needs to be pervasive or severe, and motivated based on the sex of the victim. Keep in mind that sexual harassment in terms of legal definition is an expression or in the case of the *Meritor* ruling, a *quid quo pro* solicitation. Because this speech expression is so severe that it denies one's equal protection, the speech does not violate the First Amendment but, violates the Fourteenth instead. Because the Civil Rights Act affects public schools because they are a government entity, both the First and Fourteenth Amendment meld together in shaping how schools can or cannot regulate speech.

The second provision enacted in schools has been the most impacting and most noticeably present is the Title IX of the Education Amendments of 1972 or as many others know it as, Title IX. Title IX states simply that, in an educational environment, it is forbidden to discriminate on the basis of sex in any federally funded program based in education. Title IX focuses primarily in the public education and as of late, concerns gender in *G.G. v. Gloucester County School Board*. As of March 2017, the case has been vacated by the Supreme Court due to the change of policy regarding Title IX under

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44 Public Law 88-352  
47 20 U.S.C. D 1681-1688  
48 *Gloucester County School Board v. G.G.*, 822 F.3d 709 (4d Cir. 2016)
the new Trump administration. Depending on how the court rules, it will provide a new framework that would include gender. Regardless, Title IX remains a vastly powerful tool used to keep schools in check with the threat of removing federal funding should they fail to be compliant.

As a culmination of the Fourteenth Amendment approach, *Davis v. Monroe* (1999) cemented the hostile environment theory based from *Meritor*. The case involved a young girl in elementary school facing sexual harassment by a fellow student where the school had prior notice yet, did nothing to punish or prevent further harassment. As a result of the school’s failure to act, the Court held that Title IX applied to the school’s “deliberate indifference.” The Court added that in order for Title IX damages to apply, the harassment must be “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the education opportunities or benefits provided by the school.”51 Thus, alongside the *Tinker* test, the *Davis* ruling adopted a “severe and pervasive” test.

While the *Davis* ruling does not expressly apply higher education, universities must still abide by Title IX guidelines and rules. The federal Office of Civil Rights or more commonly known as the OCR clarifies the concept of harassment. In the “Dear Colleague” letter of 2003, Assistant Secretary Gerald Reynolds firmly establishes the relationship between the First Amendment and harassment; while public universities have a duty to secure students’ right to free speech, the OCR views prohibited harassment as

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50 Davis v. Monroe,
51 Ibid.
“something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.”52 Additionally, the letter states that the harassment must also “be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program.”53 The OCR in 2011 reaffirmed its guidelines on hostile environment stating that “if a school knows or reasonably should know about a student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate that harassment, prevent its recurrence, and address its effects.”54 Title IX affects private schools as well should they take federal funding. Overall, higher education has remained committed to handling hostile environment and severe and pervasive harassment as it is required under the Davis ruling. Throughout the further rulings post-Davis, it can be observed that the courts began to side more with the Fourteenth Amendment as litigation concerning speech is examined. Because the Court will find itself siding more with Davis than Tinker, the courts find themselves divided on how speech is to be regulated, which creates a subtle conflict between the First and Fourteenth Amendment.

Often at times, schools find themselves wedged between two forces: free speech and hostile environment laws which comprise of sexual or racial harassment. Should colleges overly regulate speech, they may find themselves in a lawsuit. Should colleges on the other hand ignore speech which then mutates into sexual or racial harassment, they may also face a lawsuit. Because of this, higher education institutions find themselves fearful of lawsuits. Title VII and Title IX have also divided itself under two different

53 Ibid.
standards: Title VII under *Faragher v. City of Boca Raton* ruled that Title VII incidents do not require prior notice.55 *Faragher* incentivizes both public and private institutions to enact internal policies that would investigate racial and sexual harassment under Title VII. Ideally, this would create a self-reporting system. On the other hand, *Franklin v. Gwinnet County Public Schools* held that Title IX incidents require actual prior notice in order to impose liability.56 Benjamin Dower notes this distinction stating that while Title VII defendants should have reasonably known about an alleged incident, Title IX defendants must have had actual notice.57 As a result of both federal statutes, public universities are encouraged to implement speech codes that give themselves an affirmative defense. Because of the myriad of laws accompanied with frequent vague language, schools may find themselves often confused on how to properly regulate and enact speech codes. What potentially complicates this further is the frequently changing administration rules provided by the federal Department of Education and the OCR.

Though the First Amendment school of thought has been frequently narrowed, the Court of Appeals has frequently upheld the free speech argument. One of the most famous cases involving a public university is *Doe v. University of Michigan*.58 The University of Michigan implemented a speech code that was so broad, a graduate student of biology feared he would not be allowed to discuss the biological differences between sexes because it might violate the speech code. The courts quickly found the speech code unreasonable and struck it down. Four years later, *IOTA XI Chapter of Sigma Chi*

Fraternity v. George Mason University faced a similar scenario were a fraternity group hosted an “Ugly Woman Contest.” Horrified at the event, the school sanctioned the fraternity due to backlash by other students. The Court of Appeals agreed that while a school had a legitimate interest in combating racism and sexism, there should have used the “least restrictive means”

The last Supreme Court ruling that is critical in analyzing the constitutionality of not just speech but constitutional rights in general is United States v. Carolene Products Co. While not a matter of speech law, Carolene Products establishes the scrutiny system in the United States in one of the footnotes of the opinion. Scrutiny is a measure of constitutionality that ranges from rational basis, intermediate scrutiny, and strict scrutiny. Strict scrutiny is the highest level of judicial review. In most matters of constitutional law, strict scrutiny is the review standard. In order for a law or action to endure scrutiny, it requires the following: first, the law must have a legitimate governmental interest. Second, the law must be as narrow as possible in order to achieve that interest. When drafting a law that may face scrutiny in court, the drafter must not only prove that the law was critical in promoting a government interest but, must also be narrow enough in language to ensure the least amount of restriction possible.

59 Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University, 993 F.2d (2d Cir. 1992)
60 United States v. Carolene Products Co., 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 2d 1234
61 Ibid.
62 Ibid.
Third Circuit Court Rulings

While the United States Supreme Court has been silent on school speech for nearly two decades, the Third Circuit Court of Appeals has been very vocal regarding these issues. The Third Circuit in 2001 decided Saxe v. State College Area School District. The State College Area School District enacted what they called an “Anti-Harassment Policy”. The code defined harassment as: “Any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of any of the characteristics described above. Such conduct includes, but is not limited to, unsolicited derogatory remarks, jokes, demeaning comments or behaviors, slurs, mimicking, name calling, graffiti, innuendo, gestures, physical contact, stalking, threatening, bullying extorting or the display or circulation of written material or pictures.” The plaintiff sued on the basis that the code was extremely overbroad in its definition of harassment, which potentially violated the First Amendment. The Third Circuit unanimously held that the policy was overbroad and that it violated the First Amendment. The Third Circuit reversed the District Court’s opinion on the basis that the District Court argued that harassment is not covered by the First Amendment. The Third Circuit disagreed stating that “There is no categorical harassment exception to the First Amendment’s free speech clause.” The court additionally stated that the anti-harassment policy regulated more than the federal and state definitions of harassment. Because the code was so overly broad, the court suggested that the harassment code seemed more like a speech code in disguise.

The Third Circuit in their ruling made it clear that an extension of the substantial

63 Saxe v. State College Area School District, 240 F.3d 200 (3d Cir. 2001)
64 Ibid.
65 Ibid.
disruption test would not be tolerated. Because the case was overbroad, the Third Circuit remarked that speech codes on campuses should either be severely restricted or be regarded as unnecessary. The court reasserts that the basic understanding and guidelines in handling speech on campus can be found in both Tinker and Davis. Ultimately, the court reminded the school district that the First Amendment is both a well-respected and acknowledged right for students in public schooling. While this case was not reviewed by the Supreme Court, it is worth noting that the unanimous opinion was delivered by Justice Alito who, at the time, was a judge on the Third Circuit.

The Third Circuit later in 2007 decided DeJohn v. Temple University. Christian DeJohn was a graduate student of Temple University in Pennsylvania who challenged his school's sexual harassment policy, which provided that "all forms of sexual harassment are prohibited, including . . . expressive, visual, or physical conduct of a sexual or gender-motivated nature, when . . . (c) such conduct has the purpose or effect of unreasonably interfering with an individual's work, educational performance, or status; or (d) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment." Because DeJohn had a background the military, he difficulty expressing his opinions on certain views like the role of women in the military. In Temple's appeal, it argued that Morse v. Frederick, a decision that allowed K-12 public schools to regulate student speech concerning advocating for illegal drug use, should be applied here. The Appeals Court rejected that opinion reasserting the clear differences between secondary and post-secondary education. Despite Temple changing their speech code during litigation, the Appeals Court found the policy unconstitutional, holding that

66 Dejohn v. Temple University 537 F.3d 301 (2008)
67 Ibid.
the speech code was overly broad despite clear guidelines from both the Tinker and Davis rulings. Judge Brooks Smith who authored the opinion stated that, “It is well recognized that the college classroom with its surrounding environs is peculiarly the marketplace of ideas, and the First Amendment guarantees wide freedom in matters of adult public discourse. Discussions by adult students in a college classroom should not be restricted.”

The DeJohn ruling reaffirms the Third Circuit's stance on the First Amendment; both schools created speech codes that were blatantly overbroad. Overall, DeJohn clarifies that the purpose of the First Amendment and its relation with the Fourteenth Amendment by stating that “Some speech that creates a hostile or offensive environment may be protected under the First Amendment.” DeJohn additionally distinguishes that sexual harassment is not a First Amendment issue as much as it is a Fourteenth Amendment's Equal Protection clause. Combing the rulings of Saxe and DeJohn, the Third Circuit clearly establishes that college students both legally and historically hold a deep connection and value to free speech. In terms of analyzing and weighing good and bad speech regulation in New Jersey statute, the DeJohn ruling is the most important case out of all of the Third Circuit's rulings.

In regards to online speech by students, the Third Circuit simultaneously decided Layshock v. Hermitage School District71 and J.S. v. Blue Mountain School District,72 which both addressed whether primary and secondary school officials can reach into a child's home and regulate their speech as if they are in a school sponsored event. Both

69 Dejohn v Temple University.
70 Ibid.
71 Layshock v. Hermitage School District, 650 F.3d 205 (3d Cir. 2010)
72 J.S. v. Blue Mountain School District, 650 F.3d 915 (3d Cir. 2010)
additionally featured the same incident where both cases involved students mocking their school principle online. The Third Circuit held in favor of the students stating that they cannot be punished for their speech simply because of its offensiveness.73

In regards to discerning the legal differences between secondary and higher education, McCauley v. University of the Virgin Islands74 directly addresses this matter. The plaintiff sued the university asserting that the university's Student Code of Conduct violated the First Amendment.75 The Third Circuit ruled partially in favor for the plaintiff stating that the university's prohibition on offensive signs and expressions that cause "emotional distress" unconstitutional.76 The Third Circuit in their ruling specifically outlined the difference between lower and higher education citing that "Public universities have significantly less leeway in regulating student speech than public elementary or high schools. Admittedly, it is difficult to explain how this principle should be applied in practice and it is unlikely that any broad categorical rules will emerge from its application. At a minimum, the teachings of Tinker, Fraser, Hazelwood, Morse, and other decisions involving speech in public elementary and high schools, cannot be taken as gospel in cases involving public universities."77 The university in their drafting of the student code erroneously created rulings similar to secondary education. What higher education lacks is in loco parentis which is the legal theory that secondary schools act in lieu of their parents. The Third Circuit has clearly established that students in higher education have well recognized rights to free speech that are critical to a college education.

73 Ibid.
74 McCauley v. University of the Virgin Islands 618 F.3d (3d Cir. 2010)
75 Ibid.
76 Ibid.
77 Ibid.
While neither Layshock nor Blue Mountain was concerned with speech in higher education, they did make an impact regarding online speech of college students. The Third Circuit recognized that in general, the speech of students that take place online must directly impact the school or its functioning. In other words, a public university can regulate a speech that takes place online if that speech factually would lead or cause substantial disruption as prescribed by the Tinker test. Because of the Saxe and DeJohn rulings, colleges in the Third Circuit are highly discouraged from creating broad speech codes and in fact, should consider more emphasis on free speech rights.
Sypniewski v. Warren Hills Regional Board of Education

While the Third Circuit has frequently struck down speech codes and anti-harassment policies, *Sypniewski v. Warren Hills Regional Board of Education*\(^78\) establishes where an anti-harassment policy is permitted. *Sypniewski* involved a public school that adopted an anti-harassment policy that specifically focused on racial harassment. The school in *Sypniewski* had a history of frequent racial harassment between students which required the school to take action. The school adopted a policy regulating “Wearing or possession of any written material that is either racially divisive or creates racial ill will or creates racial hatred and that is such that the school has a specific and well-founded fear that it will substantially disrupt or interfere with the work of the school or the rights of other students.”\(^79\) The Court upheld the policy with the exception of the term “ill will”. The Court removed the term because of how vague and broad the definition could potentially be. On the basis of upholding the overall school policy, the court required two elements for a constitutional speech code: first, the policy must be backed by evidence that there was substantial disruption as a result of a hostile environment. Second, the policy must be narrow in its language. *Sypniewski*’s test appears highly influenced by the strict scrutiny review; the school must not only prove it had a legitimate interest but must also prove that its regulation is narrow enough. The school was able to successfully prove that there were frequent incidents of racism on campus which originally created the need of enacting the policy. *Sypniewski*’s policy focused strictly on racism. The policy in itself was not broad and only restated the requirement of a school to take action whenever such incidents occur.

\(^78\) *Sypniewski v. Warren Hills Regional Board of Education*, 307 F. 3d 243 (3d Cir. 2002)

\(^79\) Ibid.
While this incident occurred in an elementary school and under *in loco parentis*, this ruling does not discount the fact that both public and private universities are required by law to mitigate incidents of racism and sexism under the Civil Rights Act and Title IX. Both “Dear Colleague” letters affirm this fact. While the *Sypniewski* case focuses solely on lower education, the case is critical in weighing the legality of speech regulations in public schools because while all the other Third Circuit cases provide examples of where speech codes were struck down, *Sypniewski* provides an example where a speech code was sustained. Because *Sypniewski* is content based speech regulation, the case will have limited influence over public universities. Regardless, *Sypniewski* provides useful guidance when drafting speech law including anti-bullying.
Lim v. Board of Education of Tenafly

While the Lim case ended in a dismissal and later a settlement, it is worth reviewing the Rutherford Institute claims against the New Jersey anti-bullying statute. L.L, who is a minor in elementary school, was punished by his teacher and later, the “Anti-bullying Specialist” in his school for truthfully stating that his classmate had lice in her hair. The plaintiff on behalf of L.L sued on three counts: first, the plaintiff claimed the school had deprived him of his First Amendment rights. Second, the plaintiff claimed the school deprived L.L of his Fourteenth Amendment rights. Third, the plaintiff claimed the school violated Article 1 Section 6 of the New Jersey Constitution’s free speech clause.\(^{80}\)

The Plaintiff in Lim primarily used the Saxe ruling to argue that the New Jersey Anti-Bullying Bill of Rights Act was facially overbroad. Saxe according to the plaintiff struck down Saxe’s speech code because it contained broad language. In response to the plaintiff’s claims, the New Jersey Commissioner of Education and the defendant argued that Sypniewski permitted the “Harassment, Intimidation, and Bullying” policy.\(^{81}\) While Sypniewski upheld a speech code, the plaintiff argued that the defendant’s reliance on Sypniewski is incorrect; Sypniewski was upheld because of how narrow the school policy was. The language of the policy specifically concerned tackling racism which was well documented and acknowledged by the court. The plaintiff followed Sypniewski’s reasoning by pointing out that the school district in Saxe failed to provide evidence for the justification in implementing the new policy. The HIB provision covers almost


everything by adding what the plaintiff calls, "A broad catchall category of any other distinguishing characteristic."82

The plaintiff's second point asserts that HIB covers off-campus speech. N.J.S.A 18A:37-14 in covering off school grounds creates a facially overbroad regulation. The plaintiff points to both Layshock and Blue Mountain in citing that schools can only regulate off-campus speech when it substantially disrupts school order. In the case of HIB, the statute covers a wide net of categories. Because the ability to regulate is lessened even more off-campus, the plaintiff argues that provision is also unconstitutional.

The last point the plaintiff provides is that even if HIB is constitutional, it was incorrectly applied to L.L. L.L's speech was neither substantially disruptive nor did it jeopardize the equal protection of another student. By claiming a fellow classmate had lice, L.L made a factual statement which the plaintiff argues is worthy of protection. The plaintiff suspected that the bullying specialist stretched the purpose of the law and thus, wrongfully applied the definition of HIB to L.L.

Despite the plaintiff pointing out that the HIB policy is overbroad on its face, the motion to dismiss was sustained by the Administrative Law Judge and the Commissioner of Education.83 The Commissioner admitted that in the case of L.L, the HIB policy is a stretch. However, the Commissioner reveals that the school districts are still struggling to find a balance between a reasonable standard and the provision of the HIB statute.84 Because of the difficulty in finding balance, the Commissioner concludes that the actions of the school administrators cannot be seen as unreasonable. While the right to appeal

82 Id', 13-14
84 Ibid.
was granted, the two parties eventually settled, leaving the answer to whether or not the Anti-Bullying Bill of Rights Act is unconstitutional as inconclusive.
Balancing the 1st and 14th Amendment

The First and Fourteenth Amendment have both experienced a tremendous evolution in just half a century. Because of the development of free speech and the public urgency in combating racism and sexism, both Amendments are reaching a convergence point in public universities. The difficulty in understanding this convergence is partially accredited to the fact that the Supreme Court has yet to directly address this. As a result, public universities are legally required to respect students’ right to free speech under Tinker while simultaneously mitigating incidents of racism and sexism as required under Davis, Title VII, and Title IX. The harsh reality many schools have come to realize is that, it is extremely difficult to balance both interests.

Benjamin Dower notes the delicate balance by pointing out that universities would undoubtedly face a lawsuit should they neglect First Amendment rights as sourced by the Tinker and Brandenburg rulings and tests. On the other hand, should a university be too careless in their speech policies and thus become negligent in handling sexual harassment and racism, they may also face a lawsuit under the Fourteenth Amendment. While the Substantial Disruption test is sourced by the First Amendment and the Tinker test, the equal protection and hostile environment test is rooted in Fourteenth. Public universities however, have molded the laws more based on the hostile environment philosophy more than the free speech approach recently for two reasons: First, the hostile environment theory as evidenced by the Davis, Meritor, and Franklin has been more frequently upheld in the Supreme Court. Second, the punishment for violating Title IX and Title VII is much more severe than violating the First Amendment.

85 Benjamin Dower, “The Scylla of Sexual Harassment and the Charybdis of Free Speech: How Public Universities Can Craft Policies to Avoid Liability”
The “Dear Colleague” letter in 2011 threatened the loss of federal funding if universities were found negligent in preventing sexual assault and harassment on campuses.\(^\text{86}\) As a result of numerous public schools having their speech codes focus on preventing harassment, Dower notes that universities began regulating based on speaker's intent which goes against the \textit{Tinker} test.\(^\text{87}\) Rather than gauging speech through the substantial disruption view, many universities punish students for the intent of their speech. Cases like \textit{Doe, Iota Chi, Saxe}, and \textit{DeJohn} reveal that First and Fourteenth Amendment conflicts are frequently filed in court.

\(^{86}\) Dear Colleague 2011

\(^{87}\) Benjamin Dower, 3
Analyzing the New Jersey Anti-Bullying Bill of Rights Act

Now that there is an understanding of both Supreme Court and Third Circuit rulings, the New Jersey Anti-Bullying Bill of Rights Act can be properly reviewed. As previously stated, the definition of “Harassment Intimidation and Bullying” is “any gesture, any written, verbal or physical act, or any electronic communication that is reasonably perceived as being motivated either by any actual perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory handicap or by any other distinguishing characteristic, that takes place on school proper, at any school-sponsored function or on a school bus and that a) a reasonable person should know, under the circumstances, will have the effect of harming a student or damaging the student’s property, or placing a student in reasonable fear of harm to his person or damage to his property; or b) has the effect of insulting or demeaning any student or group of students in such a way as to cause substantial disruption in, or substantial interference with, the orderly operation of the school”. While that is the New Jersey definition of harassment in public schools, Davis defines harassment as “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the education opportunities or benefits provided by the school.”

After reviewing both the New Jersey anti-bullying statute and the Davis test, there are three noticeable errors with the: first, New Jersey has failed to differentiate between lower education and higher education. In Keyishian v. Board of Regents, Justice Brennan noted that classrooms are a “marketplace of ideas”88 The Third Circuit in DeJohn recognized this same view declaring that the “First Amendment guarantees wide freedom

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88 Keyishian v. Board of Regents, 358 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967)
in matters of adult public discourse” Because New Jersey statute 18A:3B-68 adopts the
18A:37-14 definition of HIB identically, this creates a problem because as shown, the
Supreme Court and Third Circuit has firmly established a distinction between speech
rights between grade school and higher education.

In regards to the *Lim* case, it is very likely that the case was dismissed on the fact
that it took place in secondary education. Because it did not take place in a university, the
HIB regulation is backed by *in loco parentis* which gives administrators a wider breadth
to regulate speech. This reasoning follows *Morse v. Frederick* considering the high
school in the case was successfully able to regulate a student’s speech based on its
content. If *Lim* hypothetically occurred in a higher education setting, it would had been
very likely that the dismissal would have been denied, considering the stark difference
between lower and higher education as well as the amount of scrutiny involved.

The second issue with the HIB definition is that its ambiguity violates the First
and Fourteenth Amendment. The anti-bullying law covers more characteristics than what
both *Tinker* and *Davis* permit. For example, HIB covers speech that is “insulting or
demeaning” Insulting or demeaning speech to a group of students goes beyond either
substantial disruption or even hostile environment. The exact language of that provision
of HIB appears evident that it attempted to go beyond what the First and Fourteenth
Amendment allows. Recall that both the *Saxe* and *Temple* rulings struck down speech
codes that were considered overbroad in defining what is considered harassment. Because
the Third Circuit has already discouraged the usage of overbroad language in their rulings,
New Jersey's HIB definition is brought into question on what exactly does the state mean
by “insulting or demeaning” statements.
Because the lack of distinction between lower and higher education in the HIB statute, the second provision of HIB exacerbates its ambiguity. Under the current definition of the second provision, the New Jersey statute could very well punish controversial expressions both politically and religiously. Because of the *Tinker* ruling, schools are designed to regulate speech that is found to disrupt and threaten the school's order. HIB on the other hand, is designed to regulate speech should a student feel emotionally hurt or offended enough. Recall that the *Tinker* case originated from a student protest of the Vietnam War. The debate surrounding the Vietnam War was notably incendiary; Anne Dupre has noted that as a result of the children wearing armbands, there were hurt feelings and others making fun of the children.89 While the Court has expressed little to no interest regarding hurt feelings in the college settings, the New Jersey act has HIB's language. In modern colleges, debate topics like LGBT rights, immigration, and the American elections are frequent on campus. Many of these topics can leave students feeling offended or hurt by some of their other fellow classmate's opinions. If offended enough by a certain opinion, even if religious, the HIB policy could render a student's opinion subject to regulation despite rulings ranging from *Tinker* to *McCaulley*. The *Tinker* ruling fully acknowledges that certain discourse can leave people feeling offended or emotional hurt after certain expressions. The HIB policy ensures that should any student feel insulted or demeaned, New Jersey would find that expression unprotected under the New Jersey act.

In 2012, Derek Bambauer has argued why the New Jersey anti-bullying statute

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was unconstitutional. In the symposium, he references *The Simpsons* when one of the characters in the show insults the French calling them “cheese eating surrender monkeys” He argues that insult highlights a major flaw in the HIB policy stating that if somebody genuinely found that insult offensive, then the New Jersey statute could punish the speaker for that statement under HIB. Bambauer’s example presents how extreme the application of the law can extend. Both the *Tinker* and *McCabe* are highly critical of regulating speech simply because it creates emotional distress. Greg Lukianoff, who is the President of the Foundation for Individual Rights in Education, notes this issue stating that, “Of course, without an objective, reasonable person standard, the most hypersensitive and easily offended students will be able to decide what speech is and is not insulting, demeaning, or emotionally harmful.” Both Bambauer and Lukianoff are concerned with the HIB policy on the basis of the First Amendment; Bambauer notes for example that if a Christian holds disdain or criticism towards the LGBT community, they may be subject for discipline despite it being their genuine opinion. Overall, because of how broad the language of HIB is, it is extremely unlikely that the statute would survive a strict scrutiny review despite New Jersey proving that bullying is indeed a problem.

What is even more concerning about the New Jersey law is that the drafters of HIB seem oblivious to the fact that colleges both privately and publicly are already required to prevent and or punish harassment. Even without the New Jersey anti-bullying

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90 Yakowitz, Creeley, Bambaur, “Bullying and the Social Media Generation: The Effects of the New Jersey Anti-Bullying Statute on School Administration, Students, and Teachers” (Symposium, Seton Hall University, 2012)
91 Ibid.
law, the U.S Office for Civil Rights under the Department of Education already made it clear in both “Dear Colleague” letters that negligence in preventing racial and sexual harassment under Title VII and Title IX will be punished. Both letters make clear that those who remain negligent in preventing harassment under the Davis standard jeopardize their school’s funding. Because of this noticeable threat, the New Jersey statute can either seem redundant or covering more definitions than they are legally allowed to.

The third issue with the New Jersey statute is the ability to regulate off-campus speech for. The legal reach of the statute goes as far as “Off school grounds” when concerning HIB incidents.94 In accordance with the Layshock and Blue Mountain rulings, school officials cannot regulate speech to the same extent they can in classes and on campus. Off-campus speech through digital communication can only be punished if the speech directly leads to substantial disruption on campus.

In defense of the anti-bullying bill, critics argue that Sypniewski justifies the statute. Because the Third Circuit traced the school’s history of frequent racism, the court found it reasonable to uphold considering a school’s duty to combat racism is prescribed in both the Fourteenth Amendment and the Civil Rights Act. Because of the existence of a noticeable hostile environment to minorities in the school system, the court aside from the term “Ill will” found no issue with the school’s policy.95 There is however, a critical difference between the justification of Sypniewski and the language of the Anti-Bullying Bill of Rights Act; the difference between the two is noted in Lim v. Board of Education of Tenafly where the plaintiff asserts that the language of the statute is overly broad and

95 Sypniewski v. Warren Hills Regional Board of Education
lacks any clear justification or anticipation of substantial disruption. The plaintiff in Lim noted that in order for an anti-harassment policy to endure scrutiny, there are two elements it requires: first, the plaintiff stated that “The court placed a lot of emphasis on the documentation history of a disruption at the school, which provided the district with adequate justification for crafting a policy that narrowly targets the identified problems.” The school was in Sypniewski was able to successfully defend their justification through evidence of disruption as a direct result of racism. Second, the school strictly focused itself with racism and did not cover more than what the issue was in front of them.

In accordance with the reasoning behind Sypniewski and the complaint in Lim, the New Jersey Anti-Bullying Bill of Rights Act must pass two elements that are similar to a strict scrutiny review: first, the statute must require evidence of historical disruption like in Sypniewski. Second, the statute itself must be narrow and lack vagueness according to Saxe and DeJohn. Putting the two elements into application, it seems clear that the anti-bullying statute holds ground in terms of proven disruption; N.J.S.A § 18A:37-13.1 cites multiple studies and research on bullying. Garden State Equality additionally proves that bullying especially in the realm of LGBT issues is also prominent. Where the New Jersey statute clearly fails is the ability to narrow their objective. Anti-bullying as evidenced by the definitions provided in the statute is an extremely broad term. If the anti-bullying statute was approached by the Third Circuit, it is very likely that it would not survive scrutiny. The statute is not narrow enough and is not specific on any issues but instead, provides a large blanket covering multiple fields and issues at once.

97 Id. 27
Overall, there are two approaches the courts can take in finding the New Jersey statute unconstitutional: first, it appears clear that the language is overbroad in its definitions, going beyond what *Tinker* and *Davis* permit. *Saxe, DeJohn,* and *Sypniewski* support this assertion through dismissing speech codes that are either too broad or focus on speaker's intent. While New Jersey has successfully proven that bullying is indeed a serious problem in their state, they have failed to make narrow definitions and objectives in their regulation of speech under *Sypniewski.*

Second, the statute fails to distinguish the role of speech between lower and higher education. If the courts were to analyze the statute under this route, it would be possible for them to declare N.J.S.A 18A:3B-68 unconstitutional. The legal scrutiny will be much higher and while there are some problems with HIB under secondary education, there remains an immediate issue with binding the law together with higher education.
Analyzing Speech Codes

In 2017, FIRE published their yearly “Spotlight on Speech Codes” report which regularly reports the status of speech codes and meticulously documents both private and public schools on whether their speech codes are unconstitutional.99 FIRE uses a “red light”, “yellow light”, and “green light” system in determining whether a speech code is constitutional, where green means they find it constitutional, yellow is potentially unconstitutional and red is clearly unconstitutional. While a massive amount of colleges a decade ago held a red light, FIRE reports that as of 2017, 39.6% out of 449 reported colleges both public and private hold a red light.100 According to FIRE, New Jersey currently has four public universities that contain speech codes that are red, four universities that are yellow, and zero universities that are completely green.101 After understanding the influence of New Jersey’s anti-bullying statute, it is very possible that there appears a correlation between New Jersey’s statute and the crafting of a public university’s speech code in New Jersey.

While it is evidenced that crafting a legally sound speech code can be very difficult, it is not impossible. Benjamin Dower offers a list detailing what should and should not be on a speech code: first, Dower urges school administrators to track the legislative and judicial language as closely as possible. Second, schools should be focused on the result of the speech rather than intent. Last, the code should include a hostile environment clause as required by Davis.102 Dower on the other hand, provides a list of things a school should not doing when creating a speech code; he discourages the

100 Ibid.
101 Ibid.
102 Dower 29-30
usage of sweeping statements, speech codes that focus on speaker's intent, and also using the word "offensive" considering how broadly that can be defined.\textsuperscript{103} Overall, schools should not be discouraged in attempting to defend free speech. Particularly in the Third Circuit, the courts in \textit{Saxe} and \textit{DeJohn} limit liability to universities that encourage the freedom of speech in their speech codes considering how intrinsic it is to collegiate experience.

\begin{footnotesize}
103 Id. 30
\end{footnotesize}
Bias Response Team

While speech codes have thrived between the 1990s to the late 2000’s, they have waned as a result of frequent ligation and consistent rulings against overbroad school policies. In an attempt to curb sexual harassment, racism, and bullying, universities implemented a new reporting system called “Bias Response Team”; a response team dedicated investigating speech incidents on campus. The bias response taskforce system operates by receiving reports by students about potentially offensive speech; after receiving the report, the taskforce investigates the circumstances of the incident. After the investigation, a school will then choose what manner of discipline is appropriate. Discipline can vary from hearings or discussions which reprimand the student's speech. If necessary, the incident gets reported to law enforcement for further action.¹⁰⁴

FIRE in 2017 the first ever national report that has documented its origins and how it relates to speech codes.¹⁰⁵ Bias teams around the country have created a term known as “bias incident”; Rutgers University defines bias incident as, “an act – either verbal, written, physical, or psychological that threatens or harms a person or group on the basis of actual or perceived race, religion, color, sex, age, sexual orientation, gender identity or expression, national origin, ancestry, disability, marital status, civil union status, domestic partnership status, atypical heredity or cellular blood trait, military service or veteran status.”¹⁰⁶ Montclair State University defines a bias incident as “conduct, speech, or expression that is motivated by bias or prejudice that doesn't involve

¹⁰⁵ Ibid.
¹⁰⁶ Rutgers Student Affairs, “Purpose of Reporting Bias Acts” Rutgers University, http://studentaffairs.rutgers.edu/services-and-support/bias/
a criminal act. The College of New Jersey defines bias incidents as “any prejudice, hateful, or other bias natured encounter.” After reviewing each school's policy and definition on bias, it becomes noticeable that each school's definition of bias is widely varied.

While the idea of a bias response team seem like a positive step away from speech codes, there appears to be a few noticeable issues upon examination: first, FIRE reports that a sizable amount of campuses refuse to identify who exactly is part of the bias team. FIRE's investigation managed to surmise that most teams consists mostly of law enforcement officers however, they are also known to contain faculty members, media relation administrations, and even students. Second, FIRE reports that while their information about bias response teams were discovered as a result of public record requests, some schools refused to comply ranging from hiding records to charging money to be able to view those record. Universities who choose not to reveal the details additionally claim that it is not within the public's interest to know how a bias response team operates. Information can be difficult to come by depending which campus is looked at and how they handle bias incidents.

Overall, the lack of transparency appears to be one of the bias response team's greatest weaknesses. Considering members of bias teams consists of public relations and school administrators, universities potentially hold an incentive to handle speech

109 Bias Response Team Report 2017, 4
110 Id, 8
111 Id, 5
112 Ibid.
incidents more discretely. Speech code incidents on campuses often became publicized ranging from local to national attention. Because of frequent media spotlight, universities often retract their punishments and apologize for their actions. With this in consideration, it is worth asking whether ethically, a school administrator or a public relations agent would be impartial in ruling and judging incidents. Because of these concerns, transparency is perhaps the most important solution to making a bias response team work.

As of this writing, there appears to be no suits filed challenging the concept of a bias response team. After all, a bias response team takes each incident case by case. Even though the definitions of bias vary by each school, being found guilty of bias does not necessarily mean any legal violation. For the sake of efficiency, the response team should be sure to label what is and is not protected speech. Because of the lack of transparency, it can be difficult in gauging how many reports are received by university teams. It is very likely that they will receive potentially frivolous reports for two reasons: first, many definitions as noted by Rutgers’ definition of bias are staggeringly broad. Second, many of the bias response teams’ members are either not properly trained or informed on First and Fourteenth Amendment laws of speech regulation.113 Because of these two factors, it is likely that universities are receiving more complaints than they should thus, taking away much needed time to investigate legitimate cases of unlawful speech. Because cases like Davis and Franklin impose liability for negligence, university administrators risk liability if their actions take too long. The New Jersey anti-bullying statute additionally gives strict time limits for schools to take action. In order to ensure that time is being managed and meaningful cases are being addressed, it would be wise for universities to list actionable offenses on the complaint forms online. By using similar guidance in

113 Id. 23
drafting speech codes according to Benjamin Dower, universities will find themselves safe from legal liability while also saving time handling bias incidents.
Qualified Immunity

Because it has become clear how well recognized and established the First Amendment is in American jurisprudence, it is worth discussing the doctrine of qualified immunity as a remedy in order to balance between the First and Fourteenth Amendment. Qualified immunity means that state actors can be potentially protected from liability. *Bivens v. Six Unknown Named Agents* elaborated on this concept stating that government agents can potentially lose their protection should they have gravely violated a U.S citizen's rights. The Supreme Court in *Harlow v. Fitzgerald* further establishes that government officials are granted immunity when they violate something that is not clearly established in U.S law.

Azhar Majeed argues that because First Amendment rights are so well recognized in U.S. law, courts should be able to deny qualified immunity to school administrators that violate a student’s freedom of speech. Majeed argues that because of the notable legal risk in drafting speech codes, school administrators should be much more careful in the language. The Supreme Court makes clear in *Elrod v. Burns*, a First Amendment case that, “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitute irreparable injury." Historically, cases like *New York Times v. United States* have shown how crucial time can be when publishing news to the public.

Because of these two cases, Majeed asserts that the First Amendment holds a unique

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connection with qualified immunity.\textsuperscript{119}

In order for there to be a cause of action in denying a state official qualified immunity, \textit{Saucier v. Katz} offers a two pronged test: first, the court asks whether the party involved violated a statutory or constitutional right.\textsuperscript{120} Second, that right must have been clearly established in law. While this test was not overturned, \textit{Pearson v. Callahan} ruled that the \textit{Katz} test is optional in its usage.\textsuperscript{121}

Majeed connects the concept of qualified immunity with the \textit{DeJohn ruling}; because \textit{Harlow} denies qualified immunity when violating well recognized rights, the \textit{DeJohn} ruling suggests school administrators risk personal liability when they violate students' speech rights. \textsuperscript{122} The \textit{Burns} case follows this reasoning in the Supreme Court by reiterating that the protection of First Amendment rights is critical.

Because it can be concluded that public schools act out of fear of the Fourteenth Amendment, one possible solution is to then increase the penalties for violating the First Amendment. As noted by FIRE's speech code report, the number of colleges and universities that have unconstitutional speech codes are staggering. Yet at the same time, FIRE has illustrated that it is possible for speech codes to exist that are both constitutional and respectful of First and Fourteenth Amendment rights. Because of the amount of Supreme Court cases and Third Circuit cases providing guidance on drafting speech codes, many of the excuses provided by schools remain unfounded. With qualified immunity at risk, public administrators would ideally be forced to reconsider their speech code policies. Since it would be both unreasonable and unconstitutional to

\begin{itemize}
\item \textsuperscript{119} Majeed, 24
\item \textsuperscript{120} \textit{Saucier v. Katz}, 533 U.S. 194, 121 S. Ct. 2151, 150 L.Ed. 2d 272 (2001)
\item \textsuperscript{121} \textit{Pearson v. Callahan}, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)
\item \textsuperscript{122} Majeed, 25
\end{itemize}
limit Fourteenth Amendment protections, it would then seem reasonable to increase the penalties in violating the First Amendment. If a school speech code drafter is afraid of both amendments equally, they would ensure their speech code is legally sound.
A Cultural Solution

When drafting the opinion to the *Tinker* case, Justice Fortas held a deep distrust in school officials; he felt that school officials would regulate speech over the fear of disorder rather than after the fact. Despite understanding that factor, he also understood that his view held certain flaws; allowing students the right to speech could potentially be hazardous. Yet, in his ruling of *Tinker*, he called this factor as hazardous freedom, claiming “our Constitution says that we must take this risk.”\textsuperscript{123} After reflecting upon the words of Justice Fortas, it has become clear that his analysis is the most ideal solution. School administrators in many of the cases that have been discussed acted potentially in an arbitrary manner. In many of the cases that have been discussed, speech codes have been designed to act proactively rather than reacting from the result of the expression. It has been proven countless times in court that acting proactively against speech and drafting broad speech codes is unconstitutional.

Many proponents who fight against racism, sexism, and bullying enter under the presupposition that the law is the only solution to their issues. To assume so would be incorrect; cases like *Tinker* have affirmed that contentious speech is best to be resolved between individuals rather than the state. State actors are only granted the ability to intervene when there is substantial disruption, imminent lawless action, or speech that denies a race or sex their equal protection under the law. Justice Brandeis in *Whitney v. California* famously claimed that “if there be a time to expose through discussion the falsehood and fallacies, to the avert the evil by process of education, the remedy to be applied is more speech, not enforced silence.”\textsuperscript{124} What both Justice Brandeis and Justice

\textsuperscript{123} *Tinker v. Des Moines Independent Community School District.*
\textsuperscript{124} *Whitney v. California*, 274 U.S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927)
Fortas illustrate is that it is up to the individual or the community to engage in speech both good and bad. Culture is influenced by social pressure and ideas; when a bad or untruthful idea is expressed, it is up for the society to combat it through open and free debate.

Governments and universities do however have an interest and ability to influence norms and mores; that influence however, can be enforced. In times of political or racial strife, a university often leaves notices and emails to students gently reminding them of the need for unity. Those influences enacted by schools are both legally and culturally sound as one of the many goals of schools is for the student to leave as an active and informed citizen. While those goals are noble, those actions cannot be enforced. If a student chooses to express their disagreement with that ideal, they are within their First Amendment rights to do so. When it comes to tackling racism and sexism, positive culture and active and engaging discourse is as valid as an answer as law. It is not mutually exclusive for somebody to say that they are an activist for many of those ideal yet, staunchly defend the freedom of speech.
Conclusions

There is no doubt that the New Jersey Anti-Bullying Bill of Rights Act as well as many of the speech codes drafted on college campuses was a product of good intentions. However, good intentions do not necessarily make it constitutional. Cases ranging from *Abrams v. United States* to *Tinker* have demonstrated compelling reasons for both U.S students and citizens to mistrust the government's ability to regulate speech.\(^{125}\)

Aside from concerns of censorship, it can be concluded that the New Jersey statute violates both the First and Fourteenth Amendment. Under the lens of the Supreme Court, the statute's definition does not fit under *Tinker*’s substantial disruption test nor does it comply with *Davis*’ requirement of the expressing being so severe, pervasive, and objectively offensive. Complementing the Supreme Court analysis, the Third Circuit court under Justice Alito struck down a broad speech code in *Saxe*. Additionally, the *DeJohn* court and the *Sypniewski* court clearly defines where a speech code is and is not permissible, providing more than enough guidance when regulating speech on campus as an administrator. Even if the statute was constitutional in the eyes of public lower education, it is facially unconstitutional under the lens of higher education. The Supreme Court has commented multiple times distinguishing the free speech rights between lower and higher education. *McCausley* in the Third Circuit additionally makes this distinction.

While speech codes have faced much litigation in the past decade, colleges are slowly revising their codes to ensure that they closely following the language of *Tinker* and Davis. As of now, many colleges still act out fear of the Fourteenth Amendment which often neglects student's First Amendment rights. Solutions like threatening qualified immunity against administrators may potentially force schools to more careful

\(^{125}\) Abrams v. United States. 250 U.S. 616. 40 S. Ct. 17. 63 L. Ed. 1173 (1919)
constructing their speech codes lest they risk losing their qualified immunity. Another potential solution would be to encourage the federal Office of Civil Rights to draft a new letter reasserting the importance of free speech in public universities. Under the Third Circuit, there appears to be no reasons for schools to be afraid of litigation when both Saxe and DeJohn limit liability when universities properly enact First Amendment regulations.

While bias response teams seem dubious, there also appears to be no immediate legal ramifications towards the idea itself. If schools are to insist on using that system, the best advice for now would to be as transparent as possible when it comes to informing students how exactly the system and investigations work. Additionally, schools should provide clearly established examples of protected and unprotected speech in order to make the system more efficient.

It is important for public universities to take heed of Justice Fortas' words; there is a natural hazard in permitting free speech in schools. People may find themselves hurt or frustrated by others' speech. However, it is critical for American society to let that discourse take place. Universities for over a century have become the lifeblood of many American ideals and values. In order for there to be progression, all ideas must be considered in the arena of discourse; even the ideas that many loathe. College universities are the engines that drive such rich discourse and the reality is that Justice Brandeis was right; the answer is more speech, not less.
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