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HIGHER EDUCATION, HARASSMENT, AND FIRST AMENDMENT OPPORTUNISM

Kenneth L. Marcus*

INTRODUCTION

The University of California at Irvine (Irvine) has recently emerged as an unexpected battleground in the roiling campus wars over the First Amendment and the doctrine of academic freedom. Irvine made national headlines this past fall with its decision to fire leading constitutional law scholar Erwin Chemerinsky, just one day after hiring him as the founding dean of its new law school.[1] Chemerinsky had reportedly angered Irvine's chancellor by publishing a potentially controversial op-ed in the *Los Angeles Times* on the day his appointment was announced.[2] The move was widely disparaged across the political spectrum as a violation of Chemerinsky's academic freedom.[3] Under considerable public pressure, Irvine's chancellor reversed

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[1] *See, e.g.*, Editorial, *A Bad Beginning in Irvine*, N.Y. TIMES, Sept. 14, 2007, at A20; Gillian Flaccus, *UC Campus Withdraws Deanship Offer to Legal Scholar Chemerinsky*, ASSOCIATED PRESS, Sept. 13, 2007; Sonya Geis, *Scholars Decry Law School's About-Face on New Dean*, WASH. POST, Sept. 14, 2007, at A2; Tom Tugend, *Campus Clash*, BALT. JEWISH TIMES, Sept. 21, 2007, at 47; William F. West, *Law School Dean Offer Scuttled*, HERALD-SUN (Durham, N.C.), Sept. 13, 2007, at C1.

[2] Geis, *supra* note 1. Dean Chemerinsky reported that Chancellor Michael V. Drake told him that he "knew I was liberal but didn't know how controversial I would be," and that the University of California regents would have "a bloody fight" over approval. *Id.*

[3] *See, e.g.*, Douglas W. Kmiec, *In Chemerinsky's Defense: No Matter What Your Politics, UC Irvine's Treatment of the Legal Scholar Was Wrong*, L.A. TIMES, Sept. 13, 2007, at A19; Editorial, *Respected but Rejected: Rescinding Erwin Chemerinsky's Job Offer*

his decision again, hastily re-hiring Chemerinsky.[4] What was stunning here is that Irvine failed to identify the free speech issue until it was publicly humiliated for failing to do so. Then again, the question as to when we acknowledge the First Amendment's coverage (and that of its related doctrines) has always been a mysterious one.[5]

The deeper irony here is that Irvine's leadership was hardly ignorant of the sensitivity of campus speech issues at the time of the so-called "L'Affair Chemerinsky." Indeed, at the same time that Irvine was making national headlines for its apparent hard line against academic free speech at its law school, it was aggressively taking the opposite position when it came to harassment charges brought on behalf of Jewish undergraduates.[6] Specifically, Irvine was asserting the First Amendment as a defense in an investigation conducted by the U.S. Department of Education's Office for Civil Rights (OCR) to determine whether Irvine had impermissibly allowed an environment hostile to Jewish students to develop on its campus, as well as in related proceedings before the U.S. Commission on Civil Rights.[7] In other words, Irvine was arguing before the federal government that

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as UC Irvine's Founding Law Dean Was an Act of Cowardice, L.A. TIMES, Sept. 13, 2007, at A18; Posting of Ilya Somin to The Volokh Conspiracy, http://www.volokh.com (Sept. 12, 2007, 17:22 EST).

[4] Garrett Therolf & Richard C. Paddock, *Law Dean Is Rehired as Furor Goes On*, L.A. TIMES, Sept. 18, 2007, at A1; Jon Wiener, *Chemerinsky and Irvine: What Happened?*, INSIDE HIGHER EDUC., Sept. 24, 2007, http://www.insidehighered.com/views/2007/09/24/wiener.

[5] *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1767 (2004) [hereinafter Schauer, *Boundaries*] (discussing the boundaries on the applicability of the First Amendment).

[6] U.S. COMM'N ON CIVIL RIGHTS, CAMPUS ANTI-SEMITISM: BRIEFING REPORT 66–67 (2006), *available at* http://www.usccr.gov/pubs/081506campusantibrief07.pdf [hereinafter CAMPUS ANTI-SEMITISM].

[7] *Id.* Irvine has repeatedly asserted its First Amendment argument in public defenses of its alleged non-responsiveness to anti-Semitic behavior. *See, e.g.*, Reut Cohen, *Jewish Students Discuss Vandalism with Chancellor*, CAMPUS J., Oct. 24, 2006, *available at* http://www.campusj.com/2006/10/ 24/jewish-students-discuss-vandalism-with-chancellor/ (reporting that Vice Chancellor Manuel Gomez responded to anti-Semitic vandalism by commenting that "one person's hate speech is another person's education" (quoting Chancellor Michael B. Drake's insistence that there is no distinction between protected free speech and hateful anti-Semitic speech)); Michael Miller & Heidi Schultheis, *Political Events Converge at UCI: Speeches and a Rally Wednesday Address Recent Controversy About Tolerance and Religion at School*, DAILY PILOT (Newport Beach, Ca.), May 31, 2006, *available at* http://www.dailypilot.com/ articles/2007/0531education/dpt-uci31.prt (reporting that, "[r]ather than directly comment on the allegations of anti-Semitism, the chancellor spoke at length about the 1st Amendment and especially about free speech"); H.G. Reza, *UC Irvine Chancellor Calls Harsh Speech Free Speech; Michael V. Drake Tells Concerned Jews that Muslims on Campus Have the Right to Vent*, L.A. TIMES, May 31, 2007, at B1 (reporting Chancellor Drake's insistence, in speaking to a Jewish community audience that Irvine campus events considered by some to be anti-Semitic are actually examples of constitutionally protected expression); Editorial, *UCI Falls Short on a Test of Leadership:*

academic free speech is so important as to outweigh the public importance of enforcing federal antidiscrimination laws. In light of Irvine's treatment of Dean Chemerinsky, critics have inevitably questioned whether its academic freedom posture is hypocritical (or pre-textual) in the OCR case.[8] Even if the Chemerinsky matter had not occurred, however, the university's reliance on the First Amendment would nevertheless raise difficult questions. "What becomes interesting," as Catharine MacKinnon once observed, "is when the First Amendment frame is invoked and when it is not."[9]

Nowadays, it is not surprising to hear the First Amendment invoked in virtually any campus controversy. Stanley Fish has commented that crying "First Amendment" is the modern equivalent to crying "Wolf!"[10] "In the academy," he argued, "the First Amendment . . . is invoked ritually when there are no First Amendment issues in sight"[11]—and in particular, as if to prophesy the Irvine case, in cases

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Defending Free Speech Is Responsible, But So Is Denouncing Hateful Speech, ORANGE COUNTY REG., June 1, 2007, *available at* http://www.ocregister.com/ocregister/opinion/editorials/article_1714926.ph (applauding Chancellor Drake's defense of the First Amendment but criticizing his refusal to condemn anti-Semitic hate speech).

[8] Susan Estrich, for example, argued that:

> [Chancellor] Drake has a twisted view of academic freedom, one that allows Muslim students to engage in open anti-Semitism, to hold rallies on campus attacking Zionist control of the media, equating Jewish support for Israel with Hitler's Nazis, even (according to campus Republicans) displacing previously scheduled Young Republicans meetings with rallies denouncing Israel's right to exist. But there's no room for a liberal, Jewish law professor who is routinely the object of bidding wars between top-rated law schools vying for his services.

Susan Estrich, *The Most Corrupt Man in California*, CREATORS.COM, Sept. 14, 2007, http://www.creators.com/opinion/susan-estrich/the-most-corrupt-man-in-california.html.

[9] CATHARINE A. MACKINNON, ONLY WORDS 12 (1993).

[10] Stanley Fish, *The Free-Speech Follies*, CHRON. HIGHER EDUC., June 13, 2003, *available at* http://chronicle.com/jobs/news/2003/06/2003061301c/ ("Take the case of the editors of college newspapers who will always cry First Amendment when something they've published turns out to be the cause of outrage and controversy. These days the offending piece or editorial or advertisement usually involves (what is at least perceived to be) an attack on Jews.").

[11] *Id.* Fish may be ironically accurate in his polemical characterization of higher education opportunism, but if so, he is not right in the way that he intends. If anything, he is right only to the extent that he makes "opportunistic" use of the opportunism concept in precisely the manner that he criticizes. To say that the First Amendment is invoked where there is no First Amendment argument in sight, after all, is not necessarily to identify a doctrinal error, as Fish appears to believe. After all, much modern First Amendment law originated in this manner. Unlike Fish, who has deployed the concept for polemical purposes, Schauer emphasizes not only opportunism's pejorative but also its favorable connotations. Schauer notes that the term "opportunistic" is a "word that hovers precariously between the pejorative and the complimentary." Frederick Schauer, *First Amendment Opportunism, in*

involving Jews.[12] Crying "First Amendment" in response to harassment claims, however, is not just a matter of crying "Wolf." For many years, this realm of regulatory activity was immune to First Amendment challenges altogether.[13] Today, by contrast, free speech claims are sometimes raised in the context of hate or bias incidents which do not include even incidental use of words or which use words only in support of threatening behavior.

At Irvine, according to numerous allegations, Jewish students have been ridiculed, threatened, stalked, and intimidated, and Jewish property has been vandalized.[14] Jewish students have been told to, "Go back to Russia where you

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ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 176 (Lee C. Bollinger & Geoffrey R. Stone eds., 2001) [hereinafter Schauer, *First Amendment Opportunism*]. His argument is not that opportunists misuse established doctrine; rather, it is that the boundaries within which First Amendment doctrine is conventionally applied have not themselves been doctrinally established, that they shift from time to time, and that opportunists continually apply the doctrine in novel areas where it is not well suited. *Id.* Nevertheless, Fish's argument is clearly true, even if it is not true in the way that he intends. Many in higher education who cry "First Amendment!" in the face of anti-Semitic harassment frequently are opportunists, consciously or unconsciously, pushing the boundaries of constitutional discourse into an area to which it was not previously extended—and to which it is not well suited.

[12] By way of example, Fish cited a University of Illinois at Champaign-Urbana student newspaper which printed a letter arguing that "Jews Manipulate America" and urging the President to "separate Jews from all government advisory positions" lest they "face another Holocaust." Fish, *supra* note 10. Additionally, Fish cited a Santa Rosa Junior College student article which answered in the affirmative the title question: "Is Anti-Semitism Ever the Result of Jewish Behavior?" *Id.* In both cases, Fish argued that First Amendment claims raised in response to the inevitable uproar were inapposite. *Id.* Student editors, he explained, have no First Amendment obligation to print objectionable articles and no constitutional protection from the moral outrage which their poor judgment may provoke. *Id.* Similarly, Fish argued that the Harvard education department thrice made a fool of itself when it invited, disinvited, and then reinvited controversial poet Tom Paulin to be its Morris Gray Lecturer. *Id.* As Fish relates, Paulin had denied Israel's right to exist, said that West Bank settlers "should be shot dead," and claimed that Israeli police and military forces "were the equivalent of the Nazi SS." *Id.* A department spokesman claimed that the reinvitation "was a clear affirmation that the department stood strongly by the First Amendment." *Id.* In fact, Fish argued, Paulin had no First Amendment right to the invitation, and the department had no obligations other than those that it had brought upon itself through its own poor judgment. *Id.*

[13] *See* MACKINNON, *supra* note 9, at 49–50; Robert Post, *Sexual Harassment and the First Amendment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 382, 383 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); Frederick Schauer, *The Speech-ing of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 347 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) [hereinafter Schauer, *Speech-ing*].

[14] *See* Susan B. Tuchman, *Statement Submitted to the U.S. Commission on Civil Rights Briefing on Campus Anti-Semitism*, *in* CAMPUS ANTI-SEMITISM, *supra* note 6, at 14–18; Marc Ballon, *Campus Turmoil: Jewish Students and Activists Call UC Irvine a Hotbed of Anti-Semitic Harassment*, JEWISH J., Mar. 11, 2005, *available at* http://www.jewishjournal.com/home/searchview.php?id=13779. The Irvine case is discussed in greater detail in Kenneth

came from" and called a "dirty Jew" and a "F__ing Jew."[15] In one incident, a rock was thrown at a Jewish student wearing a T-shirt with a pro-Israel message.[16] Students have been heard uttering the Arab phrase which translates as "Slaughter the Jews."[17] A Holocaust memorial was badly damaged.[18] University administration has been charged with failing to respond meaningfully to allegations, advising at least one complainant to seek psychological counseling.[19] University administrators have repeatedly insisted that the First Amendment prevents them from taking any action unless students are threatened physically.[20] Interestingly, many of the incidents have entailed the use of words, but some have not. Rock-throwing and stalking, for example, do not even involve the use of words, although they may communicate a message (e.g., "Jews are not welcome here").

These incidents highlight a puzzling phenomenon in contemporary constitutional culture. The puzzle has been the relatively recent appearance and eager acceptance, especially in higher education, of First Amendment or academic freedom arguments in areas which had long been beyond their reach. For at least the "first fifteen years of its development," the law of harassment had been well-understood to regulate a sphere of constitutionally unprotected, proscribable conduct, even when it incidentally included the use of words.[21] Yet in recent years free-speech arguments have become a favorite topic-changing device for defenders of all forms of harassment,[22] especially in post-secondary education where many are especially sensitized to issues of free speech and academic freedom. The tendency to construct harassing conduct as speech has important ramifications since the appearance of the First Amendment, with its powerful array of standards and presumptions, augurs ill for any area of regulation which is brought within its shifting boundaries. As Frederick Schauer put it, "Once the First Amendment shows up, much of the game is over."[23] And indeed, arguably, the game may now be over for harassment law, which is to say, free speech issues may have obtained too much

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L. Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 15 WM. & MARY BILL RTS. J. 837, 853–55 (2007).

[15] Zionist Organization of America (ZOA), Mem. in Supp. of Its Title VI Claims Against the University of California, Irvine 11 (Case No. 09-05-2013) (on file with William & Mary Bill of Rights Journal) [hereinafter ZOA]; Tuchman, *supra* note 14, at 17.

[16] Tuchman, *supra* note 14, at 17.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 15–16.

[20] ZOA, *supra* note 15, at 11.

[21] *See* Schauer, *Speech-ing*, *supra* note 13, at 347; *see also* MACKINNON, *supra* note 9, at 49–50; Post, *supra* note 13, at 383.

[22] Schauer, *Speech-ing*, *supra* note 13, at 355 (attributing this insight as applied to sexual harassment to Judith Resnik).

[23] Schauer, *Boundaries*, *supra* note 5, at 1767.

traction in this area to be dismissed out of hand. On the other hand, it remains at best unclear as to whether the First Amendment is even salient as to this area of law.

The appearance of the First Amendment in this area was likely hastened by overreaching on the part of civil rights advocates who, during the 1980s and 1990s, introduced campus speech codes which could not help but raise First Amendment attention.[24] For many years, this conflict played itself out in a series of arguments about campus speech codes, which were devised to protect various groups from expressions which might be considered offensive or "hateful."[25] While these codes drew some support from academic commentators,[26] the courts generally found them to violate the First Amendment and other commentators agreed.[27] Interestingly, few

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[24] See, for example, the powerful critiques provided in DAVID E. BERNSTEIN, YOU CAN'T SAY THAT!: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS 59–72 (2003); ALAN CHARLES KORS & HARVEY A. SILVERGLATE, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES (1998).

[25] *See, e.g.*, Jack M. Battaglia, *Regulation of Hate Speech by Educational Institutions: A Proposed Policy*, 31 SANTA CLARA L. REV. 345 (1991); Alan E. Brownstein, *Hate Speech and Harassment: The Constitutionality of Campus Codes That Prohibit Racial Insults*, 3 WM. & MARY BILL RTS. J. 179 (1994); Lawrence Friedman, *Regulating Hate Speech at Public Universities After* R.A.V. v. City of St. Paul, 37 HOW. L.J. 1 (1993); Richard A. Glenn & Otis H. Stephens, *Campus Hate Speech and Equal Protection: Competing Constitutional Values*, 6 WIDENER J. PUB. L. 349 (1997); Patricia B. Hodulik, *Prohibiting Discriminatory Harassment by Regulating Student Speech: A Balancing of First-Amendment and University Interests*, 16 J.C. & U.L. 573 (1990); Jens B. Koepke, *The University of California Hate Speech Policy: A Good Heart in Ill-Fitting Garb*, 12 HASTINGS COMM. & ENT. L.J. 599 (1990); Brendan P. Lynch, *Personal Injuries or Petty Complaints?: Evaluating the Case for Campus Hate Speech Codes: The Argument from Experience*, 32 SUFFOLK U. L. REV. 613 (1999); David F. McGowan & Ragesh K. Tangri, *A Libertarian Critique of University Restrictions of Offensive Speech*, 79 CAL. L. REV. 825 (1991); Thomas A. Schweitzer, *Hate Speech on Campus and the First Amendment: Can They Be Reconciled?*, 27 CONN. L. REV. 493 (1995); Robert A. Sedler, *The Unconstitutionality of Campus Bans on "Racist Speech:" The View from Without and Within*, 53 U. PITT. L. REV. 631 (1992); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484; James Weinstein, *A Constitutional Roadmap to the Regulation of Campus Hate Speech*, 38 WAYNE L. REV. 163 (1991); Nicholas Wolfson, *Free Speech Theory and Hateful Words*, 60 U. CIN. L. REV. 1 (1991); Carol L. Zeiner, *Zoned Out! Examining Campus Speech Zones*, 66 LA. L. REV. 1 (2005).

[26] *See, e.g.*, Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 345 (1991); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 436–37; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2356–58 (1989).

[27] *See, e.g.*, Dambrot v. Cent. Mich. Univ., 55 F.3d 1177 (6th Cir. 1995) (finding a university speech code unconstitutional); Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 393 (4th Cir. 1993) (applying First Amendment protections to a fraternity's "ugly woman contest" and holding a university cannot selectively limit speech); Roberts v. Haragan, 346 F. Supp. 2d 853, 867–73 (N.D. Tex. 2004) (striking down portions of a campus speech code on First Amendment grounds); UWM Post, Inc. v. Bd. of Regents

institutions have withdrawn speech or harassment codes unless threatened with the risk of litigation or faced with adverse judicial decisions, and many apparently remain on the books.[28]

At the same time, however, most universities have also promulgated anti-discrimination and harassment policies pursuant to the requirements of various federal civil rights statutes (especially Title VI of the Civil Rights Act of 1964[29] and Title IX[30] of the Education Amendments Act).[31] Unlike hate speech codes, harassment regulations (such as the federal regulations or public universities' implementing policies) are not directly aimed at speech, although the harassing conduct they regulate may include words.[32] Given the prominence of speech interests to the academic setting, however, free speech claims are now regularly raised in response to various allegations of harassment; this is nowhere more true than with respect to allegations of anti-Semitic harassment. Indeed, Justice Kennedy once remarked in dissent that federal education harassment law is "circumscribed

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of Univ. of Wis. Sys., 774 F. Supp. 1163 (E.D. Wis. 1991) (applying First Amendment doctrines of overbreadth, fighting words, and vagueness to a campus speech code); Doe v. Univ. of Mich., 721 F. Supp. 852, 861–67 (E.D. Mich. 1989) (applying the vagueness and overbreadth doctrines to a campus speech code).

For commentators who agree that campus speech codes violate the First Amendment, see, for example, Lee Ann Rabe, *Sticks and Stones: The First Amendment and Campus Speech Codes*, 37 J. MARSHALL L. REV. 205 (2003); Suzanna Sherry, *Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech*, 75 MINN. L. REV. 933, 941–44 (1991); Strossen, *supra* note 25, passim.

[28] One study found widespread post-secondary non-compliance with judicial decisions on this subject, based on higher education community dissatisfaction with the decisions. Jon B. Gould, *The Precedent That Wasn't: College Hate Speech Codes and the Two Faces of Legal Compliance*, 35 LAW & SOC'Y REV. 345, 345, 387–88 (2001).

[29] 42 U.S.C. § 2000d (2000).

[30] 20 U.S.C. §§ 1681–88 (2000).

[31] *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (Mar. 13, 1997); Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11,448 (Mar. 10, 1994).

[32] Some strong First Amendment advocates support harassment bans while opposing speech codes. *See, e.g.*, Nadine Strossen, *supra* note 25, at 490 ("The ACLU never has argued that harassing, intimidating, or assaultive conduct should be immunized simply because it is in part based on words."). Others strongly assert First Amendment claims in defense of harassing speech. *See, e.g.*, Robert W. Gall, *The University as an Industrial Plant: How a Workplace Theory of Discriminatory Harassment Creates a "Hostile Environment" for Free Speech in America's Universities*, LAW & CONTEMP. PROBS., Fall 1997, at 203 (explaining that the application of hostile environment theory in the university setting tends to stifle academic freedom); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992) (arguing that harassment laws should be carefully analyzed under the First Amendment).

by the First Amendment,"[33] and federal regulatory policy has assumed this to be so for over a decade.[34] Nevertheless, there is reason to question the validity of this assumption and the salience of free speech to the regulation of education harassment.

To the extent that harassment regulation encompasses some speech activities by state actors on the basis of content, the most difficult constitutional question may be whether First Amendment doctrine even applies to such questions or whether they lay outside of the boundaries of First Amendment coverage.[35] This Article will argue that the salience of the First Amendment to questions of academic harassment is at best unsettled; that efforts to apply First Amendment doctrine to harassment law may be seen as a form of what Frederick Schauer has described as "First Amendment opportunism;"[36] and that such efforts to extend the boundaries of the First Amendment are ultimately unresolvable on the basis of constitutional doctrine alone. Special attention is given to the recently resurgent problem of campus anti-Semitism because harassment allegations under this rubric have been subjected to frequent, intense challenge as of late.[37]

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[33] Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 667 (1999) (Kennedy, J., dissenting) ("A university's power to discipline its students for speech that may constitute sexual harassment is also circumscribed by the First Amendment.").

[34] *See* Investigative Guidance, 59 Fed. Reg. at 11,448 n.1 ("This investigative guidance is directed at conduct that constitutes race discrimination under title VI of the Civil Rights Act of 1964 and not at the content of speech. In cases in which verbal statements or other forms of expression are involved, consideration will be given to any implications of the First Amendment . . . ."); *id.* at 11,450 n.7 ("Of course, OCR cannot endorse or prescribe speech or conduct codes or other campus policies to the extent that they violate the First Amendment . . . ."); Sexual Harassment Guidance, 62 Fed. Reg. at 12,045 ("In cases of alleged harassment, the protections of the First Amendment must be considered if issues of speech or expression are involved."). Needless to say, the U.S. Department of Education's Office for Civil Rights may limit the extent to which it regulates speech activities as a matter of administrative discretion even if it is not constitutionally mandated to do so.

[35] In several of his works, Frederick Schauer usefully distinguishes between "coverage," the threshold inquiry as to whether heightened scrutiny applies, and "protection," the subsequent inquiry as to whether that scrutiny is satisfied. *See, e.g.*, Schauer, *Speech-ing*, *supra* note 13, at 361 n.6.

[36] Schauer, *First Amendment Opportunism*, *supra* note 11, at 175–76.

[37] *See* GARY A. TOBIN ET AL., THE UNCIVIL UNIVERSITY 44–53 (2005) (noting the misuse of First Amendment arguments in academic settings); Marcus, *supra* note 14, at 888; Ruth Contreras et al., *Position Paper on Anti-Semitism in Academia*, SCHOLARS FOR PEACE IN THE MIDDLE EAST, Mar. 20, 2003, http://www.spme.net/cgi-bin/ articles.cgi?ID=32. The contemporary debate about campus anti-Semitism is different in several respects from other forms of harassment, which make it a most difficult case for civil rights advocates. First, much contemporary or "new" anti-Semitism includes (or mimics) the tropes of political discourse. To the extent that hostile environments are created in part by putatively political discourse, the spoken elements of the harassment are more closely connected to core First Amendment concerns than is the case with more familiar hate speech. Second, some commentators argue that much alleged anti-Semitism is not in fact anti-Semitic. *See, e.g.*,

I. FIRST AMENDMENT OPPORTUNISM

A. The Nature of First Amendment Opportunism

In one classic article, Frederick Schauer famously identified the phenomenon of "First Amendment opportunism" as the use of First Amendment argumentation as a second-best justificatory device when the primary justification for a questioned course of conduct is legally unavailable.[38] In other words, it is the opportunistic use of free speech doctrines by people and organizations who find that they lack other rhetorically or doctrinally effective means of achieving their goals.[39] In a useful metaphor, Professor Schauer likens First Amendment opportunism to the use of a pipe wrench to drive a nail into a board when one does not have a hammer.[40] It is a second-best device pressed into service for tasks to which it is poorly designed.[41] Parties resort to the First Amendment in this way, and with considerable frequency, when "society has not given them the doctrinally or rhetorically effective argumentative tools they need to advance their goals."[42] By way of example, Schauer points to First Amendment arguments regarding false or aggressive advertising, nude dancing, and gays in the military (think "Don't Ask, Don't Tell").[43] In each case, the First Amendment becomes the "pipe wrench" of legal and political argument in American culture, playing the role of "argumentative showstopper" that sacred text or abstract principles serve in others.[44] In this way, Schauer argues, "political, social, cultural, ideological, economic, and moral claims . . . that appear to have no special philosophical or historical affinity with the First Amendment, find themselves transmogrified into First Amendment arguments."[45]

Michael Neumann, *What Is Anti-Semitism?*, *in* THE POLITICS OF ANTI-SEMITISM 1–12 (Alexander Cockburn & Jeffrey St. Clair eds., 2003). They may argue, for instance, that some alleged anti-Semitic incidents consist merely of legitimate criticism of the State of Israel, Israeli policies, or the policies of the United States or other countries toward Israel. *See id.* Third, others who do not deny this form of anti-Semitism nevertheless "banalize" or minimize it, especially in those areas where people have become inured and desensitized to anti-Semitic incidents as they have increased in volume and severity. *See* PIERRE-ANDRE TAGUIEFF, RISING FROM THE MUCK: THE NEW ANTI-SEMITISM IN EUROPE 3 (Patrick Camiller trans., 2004) ("[M]any different attitudes and manifestations of Judeophobia had become banalized, as if they fitted so well into the ideological scenery that they were no longer perceptible.").

[38] Schauer, *First Amendment Opportunism*, *supra* note 11, at 175–97.

[39] *Id.* at 175.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at 177–87.

[44] *Id.* at 176.

[45] *Id.* at 191.

The phenomenon is notable because there may be no neutral principles to determine what conduct is First Amendment speech and what conduct is not.[46] Some speech is not covered under the First Amendment and some non-speech conduct is covered.[47] Examples of speech not covered under the First Amendment include contractual terms, warranties, wills, product labels, securities representations, and certain competitive price information.[48] Conversely, examples of non-speech that is covered under the First Amendment include dancing, mime, music, parades, armband protests, and flag-waving.[49] The issue here is not whether the conduct is protected under the First Amendment but whether it is even covered. In other words, some forms of speech and conduct have historically been considered outside the ambit of First Amendment concern. Schauer has therefore identified as a principle feature of First Amendment jurisprudence that the initial inquiry of whether the Amendment's rules, standards, tests, and factors apply is quite distinct from the later inquiry of whether the conduct at issue is what one might in ordinary parlance describe as "speech."[50] First Amendment opportunism consists of efforts to apply First Amendment principles outside of the context in which they have historically been applied in the service of goals that otherwise lack stronger justificatory support.[51]

B. Harassment and First Amendment Opportunism

The most difficult example of First Amendment opportunism—and the only one to which Schauer has devoted an entire article—is the way in which opponents of harassment sanctions have transformed harassment into a free-speech issue.[52] Given the enormous volume of commentary on this issue over the last two decades, it is surprising to realize that harassing speech has only relatively recently been seen as First Amendment speech.[53] During the early years of the development of harassment

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[46] *See* Schauer, *Boundaries*, *supra* note 5, at 1803 (discussing how First Amendment coverage principles are speculative).

[47] Schauer, *Speech-ing*, *supra* note 13, at 349. Schauer demonstrates that non-covered speech is not limited, for example, to performative speech and that even some forms of advocacy speech are also not covered. *Id.* at 349–50.

[48] *Id.* at 349–50.

[49] *Id.* Indeed, the list is rather long. *See, e.g.*, United States v. Eichman, 496 U.S. 310 (1990) (holding that the Flag Protection Act of 1989 was unconstitutional); Texas v. Johnson, 491 U.S. 397 (1989) (finding the burning of an American flag during a political protest to be protected by the First Amendment); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984) (finding that a regulation prohibiting demonstrators from sleeping in a park did not violate the First Amendment); United States v. O'Brien, 391 U.S. 367 (1968) (upholding a ban on the burning of draft cards).

[50] Schauer, *Boundaries*, *supra* note 5, at 1765–68; Schauer, *Speech-ing*, *supra* note 13, at 350.

[51] *See* Schauer, *First Amendment Opportunism*, *supra* note 11, at 175–76.

[52] Schauer, *Speech-ing*, *supra* note 13, passim.

[53] The courts have on various occasions, if not consistently, protected the right of hateful

law, the use of words in the act of harassment, with few exceptions, no more implicated the First Amendment than did the use of words in "virtually every act of unlawful price-fixing, unlawful gambling, or unlawful securities fraud."[54] Only a decade ago, the literature on this topic was charged with a "palpable absence" of engagement with First Amendment values.[55] This is a significant change in that sexual harassment law was not subject to constitutional review during the earlier formative years of its development.[56] In other words, it was not very long ago that the entire debate over First Amendment protection in this area was not even a part of First Amendment discourse.[57] Shifting the terms of debate from harassment to the First Amendment has been an effective strategy for those who recognize that the First Amendment has significant rhetorical cachet and may trump other social values.[58] In other words, it has been an effective form of First Amendment opportunism.

Nevertheless, it remains unclear whether the Supreme Court would extend the boundaries of the First Amendment in this manner. Despite the frequency with which commentators now discuss the conflict between sexual harassment law and the First Amendment, the Supreme Court has not yet addressed the issue, and it has seldom been resolved even by the lower courts. Some commentators have argued that the Supreme Court does not consider sexual harassment to be within the coverage of the First Amendment, noting that the Court did not address the issue when it was squarely raised before it.[59] Specifically, in *Harris v. Forklift Systems, Inc.*, the Court silently passed over First Amendment defenses to a hostile environment sexual harassment case in which much of the offending conduct was verbal.[60] Professor Schauer has argued that the Court's silent avoidance of the First Amendment argument may be

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groups to express their views publicly. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 380, 393–96 (1992) (finding a First Amendment violation when a city ordinance banned certain types of "reprehensible" conduct); Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978) (permitting a neo-Nazi march through a Jewish neighborhood in Skokie, Illinois). *But see* Virginia v. Black, 538 U.S. 343, 363 (2003) (permitting a Virginia statute banning cross burnings).

[54] Schauer, *Speech-ing*, *supra* note 13, at 347.

[55] *See* Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 278 (1991).

[56] Post, *supra* note 13, at 383; Schauer, *Speech-ing*, *supra* note 13, at 347.

[57] For influential arguments on a hate-speech exception to free speech, see Lawrence, *supra* note 26, at 461; Matsuda, *supra* note 26, at 2356–58. This exception would be analogous to the fighting words doctrine, which permits government regulation of messages that have "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[58] Schauer, *Speech-ing*, *supra* note 13, at 355 (attributing this insight to Judith Resnik).

[59] Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1, 1–2.

[60] 510 U.S. 17, 19, 21–23 (1993) (describing verbal conflict and refraining from addressing any possible First Amendment arguments in the Court's holding).

seen as a decisive rejection of the relevance—which is to say the coverage—of First Amendment claims in this context, precisely because those issues were not even addressed.[61]

Of course, even if sexual harassment claims in the workplace are not covered under the First Amendment (and a full discussion of this claim is beyond the scope of this Article), one might still argue that harassment claims are covered in higher education. Depending on the rationale for finding harassment is not covered in the workplace, it is at least arguable that the privileged status of free speech in academia requires a greater range of coverage in that area.[62] This might, for instance, be the conclusion which one reaches through an institutional approach to First Amendment coverage.[63] Certainly, higher education is frequently thought to be a forum in which First Amendment concerns have a heightened importance,[64] because the "classroom is peculiarly the 'marketplace of ideas.'"[65] The Supreme Court has long since held "that state colleges and universities are not enclaves immune from the sweep of the First Amendment."[66]

On the other hand, even under an institutional analysis, the argument could go the other way. For instance, one could argue that students' interest in equal educational opportunities, not only in the public schools, but also in higher education, is of such central constitutional import as to trump the institution's speech values.[67] A third

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[61] Schauer, *Speech-ing*, *supra* note 13, at 356.

[62] Indeed, hostile environment claims more frequently provoke First Amendment arguments at schools, colleges, and universities than elsewhere. *Id.* at 354.

[63] Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 919–26 (2006) [hereinafter Schauer, *Academic Freedom*]; Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1274–75 (2005). An earlier formulation of this general argument can be found in J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 256 (1989). For a critique of the institutionalist approach toward "carving up" the First Amendment, see Dale Carpenter, Response, *The Value of Institutions and the Values of Free Speech*, 89 MINN. L. REV. 1407 (2005). Interestingly, Schauer has concluded:

> [T]he right of academic freedom, as a component of the First Amendment, may well be the right of a university—whether public or private—to make its own academic decisions, even if those decisions might, when made by a public college or university, constitute otherwise constitutionally problematic content-based or even viewpoint-based decisions.

Schauer, *Academic Freedom*, *supra* at 923–24.

[64] Schauer, *Speech-ing*, *supra* note 13, at 354.

[65] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

[66] Healy v. James, 408 U.S. 169, 180 (1972).

[67] On the constitutional importance of equal educational opportunity, see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (upholding the power of Congress to enact legislation advancing this value); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (establishing the high importance of equal educational opportunity under our Constitution). Moreover, Mari Matsuda

position, recognizing that college campuses have attributes of both public fora and private homes, would be to provide heightened protections only in public campus spaces like lecture halls and not in residential areas.[68] This micro-institutional approach may be unworkable in practice to the extent that it requires a case-by-case consideration of a multiplicity of environments.

The institutional approach has its drawbacks, many of which are rooted in basic rule-of-law concerns. Carving up First Amendment coverage by institution requires the courts to make complicated, policy-laden, high-stakes, institution-by-institution determinations. In the meantime, legal uncertainty may foment excessive litigation and, worse, chill the exercise of legitimate, protected speech. Furthermore, it raises the prospect that the courts will privilege certain speakers based on institutional biases (including biases toward institutions with which judges have had personal associations). Even if their institutional determinations are free of bias, they may have the actual or perceived effect of providing unequal protection of laws (as when university professors appear to receive greater constitutional protections than those permitted to lesser mortals: *quod licet jovi non licet bovi*).[69]

II. CAMPUS ANTI-SEMITISM AS FIRST AMENDMENT OPPORTUNISM

The literature on campus anti-Semitism, and of the "new" anti-Semitism generally, is conspicuous for the prominence with which freedom of speech claims are raised, not only in the United States,[70] but also in countries which have weaker speech protections and stronger hate speech laws.[71] Some campus hate incidents do not pose even remotely plausible First Amendment concerns;[72] rather, they involve vandalism,[73] rock-throwing,[74] stalking,[75] death threats,[76] arson,[77] and physical

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argued that college students are at a particularly "vulnerable stage of psychological development" and especially subject to the harm of hateful speech. Matsuda, *supra* note 26, at 2370.

[68] Strossen, *supra* note 25, at 503–04.

[69] "[W]hat is permitted to Jove (or Jupiter, the king of the gods) is not permitted to cows." Danny J. Boggs, *Challenges to the Rule of Law: Or, Quod Licet Jovi Non Licet Bovi*, 2006–2007 CATO SUP. CT. REV. 7.

[70] *See* TOBIN ET AL., *supra* note 37, at 44–53; Marcus, *supra* note 14, at 888; Contreras, *supra* note 37.

[71] For a discussion of this issue in the Canadian context, see Dr. Stefan Braun, *Second-Class Citizens: Jews, Freedom of Speech, and Intolerance on Canadian University Campuses*, WASH. & LEE J. CIVIL RTS. & SOC. JUST., Spring 2006, at 1, 27.

[72] *See* Marcus, *supra* note 14, at 890–91.

[73] *Id.* at 854, 890 n.320.

[74] Tuchman, *supra* note 14, at 17.

[75] See *supra* note 14 and accompanying text.

[76] *See* Marcus, *supra* note 14, at 850–51, 853–54; Tuchman, *supra* note 14, at 17; Dr. Laurie Zoloth, *Fear and Loathing at San Francisco State*, *in* THOSE WHO FORGET THE PAST: THE QUESTION OF ANTI-SEMITISM (Ron Rosenbaum ed., 2004).

[77] Tuchman, *supra* note 14, at 13–14; *see also* Kim Vo, *Ceremonial Shelter Burns, Ends*

intimidation.[78] Other incidents, however, involve harassing incidents and the use of words.[79] Whether the First Amendment is appropriately raised in these cases is now a topic of considerable controversy. To understand how this is so, and to understand the competing narratives at stake, requires some understanding of the development of contemporary campus anti-Semitism.

A. The Resurgence of Campus Anti-Semitism

During recent years, American college campuses have seen numerous alarming examples[80] of the striking resurgence of anti-Semitic activity which is taking place worldwide.[81] There appear to be six sources for this resurgence: traditional European, Christian Jew-hatred; aggressive anti-Israelism that crosses the line into anti-Semitism; traditional Muslim anti-Semitism; anti-Americanism and anti-globalism that spill over into anti-Zionism and anti-Semitism; black anti-Semitism; and

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Jewish Sukkot Festival, SAN JOSE MERCURY NEWS, Oct. 5, 2007. In 2007, a Jewish ceremonial structure was torched at San Jose State University, although police have not yet determined the cause. *Id.* Another similar structure was defaced at the University of California at Davis that same week. Richard Proctor, *Jewish Religious Booth Vandalized*, THE CALIFORNIA AGGIE, Oct. 5, 2007, *available at* http://www.californiaaggie.com/home/index.cfm?eent=display Article&ustory_id=918d&dcc-b3c2-4e38-8806-717595d2a4f2.

[78] For a detailed description of one such episode, see Zoloth, *supra* note 76, at 258–61.

[79] The words are often quite choice. For example, University of California at Irvine audiences have been informed that "there are good Jews and bad Jews" and have been taught the "Jewish cracker theory," according to which "Jews are plagued with arrogance that comes from a combination of white supremacy and the notion that Jews are the chosen people." Tuchman, *supra* note 14, at 15.

[80] *See* CAMPUS ANTI-SEMITISM, *supra* note 6; TOBIN ET AL., *supra* note 37; Kenneth L. Marcus, *The Resurgence of Anti-Semitism on American College Campuses*, 26 CURRENT PSYCHOL. 206 (2007); Marcus, *supra* note 14, at 840–44.

[81] Many organizations have concluded that anti-Semitic activity has increased. *See, e.g.*, PHYLLIS CHESLER, THE NEW ANTI-SEMITISM: THE CURRENT CRISIS AND WHAT WE MUST DO ABOUT IT (2003); ABRAHAM FOXMAN, NEVER AGAIN? THE THREAT OF THE NEW ANTI-SEMITISM (2003); GABRIEL SCHOENFELD, THE RETURN OF ANTI-SEMITISM (2004); Braun, *supra* note 71; ALL-PARTY PARLIAMENTARY GROUP AGAINST ANTISEMITISM, REPORT OF THE ALL-PARTY PARLIAMENTARY INQUIRY INTO ANTISEMITISM (2006), *available at* http:// thepcaa.org/Report.pdf; EUROPEAN JEWISH CONGRESS, ANTI-SEMITIC INCIDENTS AND DISCOURSE IN EUROPE DURING THE ISRAEL-HEZBOLLAH WAR (2006); MICHAEL MCCLINTOCK & JUDITH SUNDERLAND, HUMAN RIGHTS FIRST, ANTISEMITISM IN EUROPE: CHALLENGING OFFICIAL INDIFFERENCE (2004), *available at* http://www.humanrightsfirst .org/discrimination/antisemitism/antisemitism_report_22_april_2004.pdf. To put the new anti-Semitism debate into perspective, compare Leon Wieseltier, *Against Ethnic Panic: Hitler Is Dead*, *in* THOSE WHO FORGET THE PAST, *supra* note 76, at 178–88 (arguing that the fervor over perceived anti-Semitic actions is largely based on unfounded hysteria), with Ruth R. Wisse, *On Ignoring Anti-Semitism*, *in* THOSE WHO FORGET THE PAST, *supra* note 76, at 189–207 (arguing that the threat against the Jewish people and Israel is real and imminent).

fundamentalist intolerance.[82] Generally speaking, the most significant recent episodes of American campus anti-Semitism have been associated with anti-Israelism or anti-Zionism.[83] In addition to the University of California at Irvine, a few other campuses have become particularly notorious for alleged incidents of anti-Semitism over the last few years.[84]

San Francisco State: During one notorious 2002 rally, a large number of pro-Palestinian students surrounded approximately fifty Jewish students, screaming "Get out or we will kill you," and "Hitler did not finish the job."[85] When one Jewish professor began to sing peace songs, the crowd yelled, "Go back to Russia, Jew."[86] At about the same time, students distributed a flyer advertising a pro-Palestinian rally which featured a picture of a dead baby with the words, "Canned Palestinian Children Meat—Slaughtered According to Jewish Rites Under American License."[87] More recently, a Jewish supporter of Israel alleged that he was, in separate incidents, spat on and assaulted.[88]

Columbia University: Columbia faculty, especially in the Middle East and Asian Languages and Cultures program, have been accused of intimidating and silencing Jewish pro-Israel students.[89] In one example, a professor allegedly privately told a pro-Israel Jewish student, "You have no voice in this debate."[90] When she insisted that she be allowed to express her opinion he disagreed, approaching very close to her and saying, "See, you have green eyes . . . You're not a Semite. . . . I'm a Semite. I have brown eyes. You have no claim to the land of Israel."[91]

These incidents are quite distinct from legitimate criticizing of Israeli politics.[92] To the extent that there might be any question, the distinguishing features of anti-Semitic anti-Zionism are rapidly becoming conventional: employment of "classic anti-Semitic stereotypes," use of double standards, "drawing comparisons between Israel and Nazi Germany," and "holding Jews collectively responsible for Israeli

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[82] The first four forms of global anti-Semitism are identified in U.S. DEP'T OF STATE, REPORT ON GLOBAL ANTI-SEMITISM (2004), *available at* http://www.state.gov/g/drl/rls/40258.htm. The latter two forms of indigenous anti-Semitism are identified in Marcus, *supra* note 14, at 844.

[83] Marcus, *supra* note 14, at 844.

[84] For a more detailed discussion of incidents on these campuses, see *id.* at 850–56.

[85] Zoloth, *supra* note 76, at 260.

[86] *Id.* at 261.

[87] Sarah Stern, *Campus Anti-Semitism*, *in* CAMPUS ANTI-SEMITISM, *supra* note 6, at 22.

[88] This was reported to the author during an interview conducted at San Francisco State University, Nov. 15, 2007.

[89] The Anti-Defamation League, *Public Comments*, *in* CAMPUS ANTI-SEMITISM, *supra* note 6, at 58–60; Stern, *supra* note 87, at 24–25. The Columbia situation is discussed extensively throughout TOBIN ET AL., *supra* note 37, at 158–60.

[90] Stern, *supra* note 87, at 24–25.

[91] *Id.*

[92] *Findings and Recommendations*, *in* CAMPUS ANTI-SEMITISM, *supra* note 6, at 72.

actions" regardless of actual complicity.[93] For example, American college students and faculty have recently used the medieval phrase "blood libel" to describe Israeli military practices,[94] ascribed traditional Jewish cultural stereotypes to contemporary Israeli society,[95] and attributed demonic characteristics to Israeli leaders and Zionists as those characteristics have historically been related to Jews.[96]

This spillover of anti-Israelism into anti-Semitism has historical resonance in that it represents the second significant mutation that anti-Semitism experienced in the space of a century.[97] Some of this activity, globally and domestically, takes the form of basic hate and bias activity. Much recent anti-Semitism, however, is post-racialist or even anti-racist in appearance.[98] While early nineteenth-century anti-Semitism was predominantly religious in animus and mid-twentieth-century anti-Semitism predominantly racial, twenty-first-century anti-Semitism is predominantly political in character and often purports to address the Jewish state.[99]

The nineteenth-century shift from religious to racialist anti-Semitism, attributed largely to German journalist Wilhelm Marr and his colleagues, was essentially a deliberate effort to justify continued adherence to anti-Jewish attitudes in the face

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[93] The increasingly conventional use of these criteria is discussed in Marcus, *supra* note 14, at 846–48, 851. For a few approaches to this issue which tend to converge upon the criteria identified above, see, for example, Bernard Lewis, *The New Anti-Semitism: First Religion, Then Race, Then What?*, 75 AM. SCHOLAR 25, 26–27 (2006); Natan Sharansky, *Seeing Anti-Semitism in 3D*, JERUSALEM POST, Feb. 24, 2004, *available at* http://www.ncsj.org/AuxPages/022304JPost_Shar.shtml; Letters between Robert Wistrich, Dir., Vidal Sassoon Int'l Ctr. for the Study of Anti-Semitism, Hebrew Univ. of Jerusalem, and Brian Klug, Senior Research Fellow, Oxford Univ. (2005), *available at* http://sicsa.huji.ac.il/klug.html; European Monitoring Centre on Racism and Xenophobia, Working Definition of Antisemitism (Mar. 16, 2005), http://eumc.europa.eu/eumc/material/pub/AS/AS-WorkingDefinition-draft.pdf. Despite the apparent recent convergence of identified criteria, these analyses are by no means uncontroversial and are rejected by commentators who disagree, in varying degrees, with these analysts' conclusions regarding the relationship between anti-Semitism and anti-Zionism. *See, e.g.*, NORMAN G. FINKELSTEIN, BEYOND CHUTZPAH: ON THE MISUSE OF ANTI-SEMITISM AND THE ABUSE OF HISTORY (2005) (denying the existence of a new anti-Semitism); THE POLITICS OF ANTI-SEMITISM, *supra* note 37, at vii–viii (highlighting the plight of the Palestinian people that is often lost in the debate over Israel); Brian Klug, *The Myth of the New Anti-Semitism: Reflections on Anti-Semitism, Anti-Zionism and the Importance of Making Distinctions*, THE NATION, Feb. 2, 2004, at 23 (arguing that when anti-Semitism is seen everywhere, it loses its true significance).

[94] Marcus, *supra* note 14, at 851 (describing the use at San Francisco State University of the so-called "blood libel," a centuries-old defamation which ascribes a particular form of cannibalism to persons of the Jewish faith).

[95] *Id.* at 852–53 (relating allegations at Columbia University).

[96] *Id.* at 854 (relating allegations at the University of California at Irvine).

[97] *See* ROBERT S. WISTRICH, ANTISEMITISM: THE LONGEST HATRED xxiv (1991).

[98] *See* WALTER LAQUEUR, THE CHANGING FACE OF ANTI-SEMITISM: FROM ANCIENT TIMES TO THE PRESENT DAY 147 (2006).

[99] WISTRICH, *supra* note 97, at xxi–xxiii.

of changing social attitudes towards religion and religious discrimination.[100] Significantly, the religious-racialist mutation served an evolutionary function: the anti-Semitism virus evolved to adapt to changing environmental conditions. The racialist-political mutation, in which racialist anti-Semitism evolved into political anti-Semitism, represented a similar example of adaptive behavior in the twentieth century: Jew-hatred adapted to a post-Holocaust environment in which explicit race-hatred was socially unacceptable unless repackaged to appear political in nature.[101] In many cases, age-old anti-Semitic stereotypes and defamations are recast in contemporary political terms, castigating Israel and Zionism in terms historically used to denigrate Jews and Judaism.[102] In this formulation, Israel—mordantly characterized as "the 'Jew' of the nations"[103]—is made the repository of age-old stereotypes and defamations classically equated with Jews: as "a pariah;" as "supernaturally powerful and crafty;" as conspiratorial; and as a malignant force responsible for the world's evils.[104]

This political turn in anti-Semitism has had another consequence however. Where political speech has social and legal protection, such as on the American college campus, politically inflected hate and bias incidents are more difficult to police without implicating constitutional protections and academic freedom concerns.[105] Indeed, virtually any form of abuse may be considered protected—and its opposition deemed censorious—when the context is an academic campus and the

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[100] LAQUEUR, *supra* note 98, at 21–22; WISTRICH, *supra* note 97, at xv.

[101] Lewis, *supra* note 93, at 25–29; Kenneth L. Marcus, *The Second Mutation: Israel and Political Anti-Semitism*, *in*FOCUS, Spring 2008, at 2, *available at* http://www.jewishpolicycenter.org/infocus/.

[102] *Findings and Recommendations*, *in* CAMPUS ANTI-SEMITISM, *supra* note 6, at 72 (finding that "[a]nti-Semitic bigotry" in higher education "is no less morally deplorable when camouflaged as anti-Israelism or anti-Zionism"); Marcus, *supra* note 14, at 844–46.

[103] SCHOENFELD, *supra* note 81, at 147.

[104] *Id.* Since the end of World War II, explicit racialist anti-Semitism has been unfashionable in most Western countries. Lewis, *supra* note 93, at 29. For this reason, animosity towards Jews and Judaism in the postwar period has been expressed primarily in political rather than racial terms. *Id.* This development likely occurred first in the Soviet Union, where Jews were frequently persecuted as "Zionists" by Stalin and his successors. LAQUEUR, *supra* note 98, at 180. As Walter Laqueur has explained, this use of the term "Zionism" was purely euphemistic or pretextual, since virtually all true Russian Zionists had emigrated to Palestine by the end of the war. *Id.* This mutation in the rhetoric of anti-Semitism mirrors the parallel transition in nineteenth-century Germany, where racialist anti-Semitism developed as a self-conscious alternative to the purely religious Judaeophobic antipathies which were already considered backward. Marcus, *supra* note 101. For a discussion of this earlier transition, see WISTRICH, *supra* note 97, at xv.

[105] For a discussion of the balance between freedom of speech and respect for a campus community, see J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399 (1991).

perpetrator is careful to adopt the tropes of political discourse.[106] This has been an enormous challenge for civil rights enforcement in this area.

B. The Harassment Narrative: The Harm in Campus Anti-Semitism

As with other cases of racial antagonism, these incidents may be characterized as basic harassment, implicating core equal protection concerns.[107] As Richard Delgado has written, those who frame questions of ethno-racial insult in Equal Protection Clause terms "will ask whether an educational institution does not have the power, to protect core values emanating from the Thirteenth and Fourteenth Amendments, to enact reasonable regulations aimed at assuring equal personhood on campus."[108] In this case, it must be remembered, the regulations in question are not speech codes but harassment policies.[109] That is to say, their aim is not to restrict any form of speech per se, as is the case with speech codes; rather, it is to eliminate those forms of discrimination that deny students an equal educational opportunity based on prohibited classifications, regardless of whether the discriminatory conduct includes the use of words. As such, they are mandated by long-standing federal regulations promulgated under Title VI of the Civil Rights Act of 1964[110]—a statutory provision which, notwithstanding its Spending Clause justification, was passed in order to effectuate the Fourteenth Amendment and arguably also the Thirteenth.[111]

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[106] *Id.*

[107] CAMPUS ANTI-SEMITISM, *supra* note 6, at 3 (discussing statutory-based concerns); Marcus, *supra* note 14, at 868–74 (discussing Fourteenth Amendment concerns and statutory concerns).

[108] Delgado, *supra* note 26, at 346 (footnote omitted).

[109] Title VI of the Civil Rights Act of 1964 prohibits discrimination in federally assisted programs, including public and private universities, on the basis of race, color, or national origin. 42 U.S.C. § 2000(d) (2000). The Supreme Court established two decades ago, in the context of sexual harassment, that unwanted talk, teasing, or touching may violate federal law. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (determining that a bank employee may sue because of unwanted sexual advances, even if she did not lose her job). In *Franklin v. Gwinnett County Public Schools*, the Supreme Court held that sexual harassment against students in educational settings constituted sex discrimination. 503 U.S. 60 (1992). Having established a private right of action for sexual harassment under Title IX in *Franklin*, the Court in *Gebser v. Lago Vista Independent School District* prescribed the circumstances under which a school district may be held liable for teacher-on-student sexual harassment. 524 U.S. 274, 284–85 (1998). A year after *Gebser*, the Supreme Court held in *Davis v. Monroe County Board of Education* that student-on-student harassment may also violate Title IX. 526 U.S. 629, 633 (1999). In *Davis*, however, the Court limited the liability of school districts to instances in which they act with deliberate indifference to the harassment and where the harassment is "so severe, pervasive, and objectively offensive," that it "undermines and detracts from the victims' educational experience" to the point at which "victim-students are effectively denied equal access to an institution's resources and opportunities." *Id.* at 651.

[110] 42 U.S.C. § 2000(d).

[111] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 286 (1978).

Certain consequences follow from the characterization of this issue in terms of harassment, as Professor Delgado has observed. First, the defenders of this harassment must now show that the interest in the protection of their actions or speech is sufficiently compelling to overcome the antidiscrimination principle and that, if so, it is advanced in the least discriminatory manner.[112] In other words, must institutions be permitted to cultivate environments so hostile as to deny students equal educational opportunity? Is there not a way to allow legitimate campus discourse without eliminating equal access? Second, advocates may insist that the enforcement be sensitive to the nuances of harassment and equal opportunity at issue.[113] In this case, for example, enforcement officials would need to understand the nature of the new anti-Semitism and the way in which it impacts American college students who are targeted. Third, a certain set of slippery slopes will come into view.[114] If verbal harassment is permitted, then why not non-verbal harassment which conveys expressive content? If campuses are permitted to develop environments that are hostile to Jews, then why not to women and other minorities? If harassment is constitutionally protected, then why not other forms of discrimination which also communicate messages about racial (or other) superiority, whether their means are verbal or non-verbal?

From the perspective of antidiscrimination law, the question here is not whether anti-Zionism is anti-Semitism, has become anti-Semitism, crosses over into anti-Semitism, or is a veil for anti-Semitism.[115] Rather, the question is whether specific incidents create a sufficiently hostile environment for Jewish students to deny them equal educational opportunities.[116] Parsing the matter in this way shows how high the bar is, and it also focuses us on what the stakes are. Moreover, it forces us to address, in the context of contemporary anti-Semitism, the question that feminists were forced to address a generation ago with respect to sexual harassment: What is the harm in this form of harassment?[117] How, palpably, does anti-Zionism deprive individual American students of educational opportunities when exposure to contrary views is such a vital element of the educational process?[118]

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[112] Delgado, *supra* note 26, at 346.

[113] *Id.* at 346.

[114] Delgado, *supra* note 26, at 346.

[115] For a discussion of these related theories, see Marcus, *supra* note 14, at 845–46.

[116] It should also go without saying that the anti-Zionism with which we are dealing here, and which is found on many contemporary college campuses, is distinct from the various historical Jewish arguments against Zionism, such as the messianic arguments associated with some sects of Hasidic Jewry. For a brief description of such arguments, see Ari L. Goldman, *Hasidic Enclave: A Step Back to Older Values*, N.Y. TIMES, July 7, 1986, at B1.

[117] For a demonstration of why it is important to understand the harm entailed by various forms of harassment, see Katharine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 693 (1997).

[118] The question is not an easy one even for those expert in the field. Indeed, one leading commentator recently published an analysis of the effects of anti-Zionism on Jews which does not even mention its impact on diasporic Jews. RUTH R. WISSE, JEWS AND POWER 142–54 (2007).

Leon Wieseltier has called anti-Zionism "the most dangerous anti-Semitism of them all."[119] He reasons that "every instance of anti-Semitism is a criticism of the Jewish state, a fundamental criticism, since it denies the legitimacy of the ideal of a normal life for Jews."[120] Similarly, Ruth Wisse has argued that Judaism without Zionism would not be Judaism, "just as a non-Jewish Israel would not be Israel."[121] In other words, anti-Zionism targets a central aspect of Jewish identity. In this sense, an anti-Zionist who claims not to be anti-Semitic may be compared to an anti-papist who claims not to be anti-Catholic; the claim, if not logically incoherent, will unavoidably raise suspicion. Moreover, anti-Zionism typically also employs classically anti-Semitic stereotypes and defamations in service of anti-Israeli criticism.[122] Pierre-Andre Taguieff has identified the essence of anti-Semitic anti-Zionism with unusual precision:

> By presenting "Zionism" as the incarnation of absolute evil, an anti-Jewish vision of the world reconstituted itself in the second half of the twentieth century. Like the old "anti-Semitism," in the strong sense of the term, it is characterized by an absolute hatred of Jews as representatives of a single, intrinsically negative entity or exemplars of an evil force—that is, a total hatred in which Jews are "considered in themselves as endowed with a malign essence." Two ideas are regularly combined: the Jews are everywhere ("nomadism"), and everywhere they support one another (perhaps forming a worldwide group of conspirators). The charge that Jews have a will to dominate, or are involved in a "plot to conquer the world," is recycled in this fantasy, as is the long-stereotypical rumble of accusation: "The Jews are guilty," which for more than half a century has been repeatedly translated into "the Zionists are guilty," "Zionism is guilty," or "Israel is guilty."[123]

Again in Wisse's terms, "contemporary anti-Zionism has absorbed all the stereotypes and foundational texts of fascist and Soviet anti-Semitism and applied them to the Middle East."[124] Contemporary anti-Zionism, then, is an attack on a central

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[119] Leon Wieseltier, *Old Demons, New Debates*, *in* OLD DEMONS, NEW DEBATES: ANTI-SEMITISM IN THE WEST 2 (David I. Kertzer ed., 2005).

[120] *Id.*

[121] Hillel Halkin, *Zionism and Anti-Semitism*, *in* OLD DEMONS, NEW DEBATES, *supra* note 119, at 40.

[122] TAGUIEFF, *supra* note 37, at 4.

[123] *Id.* (citations omitted).

[124] Wisse, *supra* note 81, at 192.

tenet of Judaism which is rooted in traditional anti-Semitism. To distinguish Jew-hatred from hateful anti-Zionism is to misunderstand both concepts. Neither exists without the other.

This is manifest in practice on those campuses where intensely hateful anti-Zionism has adversely impacted Jewish students in very specific ways. On some university campuses, Jewish students have been so harassed by anti-Zionist and other anti-Semitic harassment that they have avoided wearing clothing or jewelry that would identify them as Jewish; have deliberately refrained from speaking out about Israel or Zionism for fear of retaliation; have avoided campus areas where anti-Zionist or anti-Semitic activity is expected; and, in extreme cases, have transferred out of problematic campuses, fleeing anti-Zionism and anti-Semitism in search of educational opportunities where they need not fear such harassment.[125]

The contention here is not that anti-Zionist speech is harassment per se, but that it may be used in a manner that contributes to the creation of a hostile environment. In a sense, any word or deed can contribute to a hostile environment if it contributes to denying particular students an equal educational opportunity. Certain forms of anti-Zionism are simply more likely to have a harassing effect on Jewish students, just as some forms of pornography may contribute to the development of an environment which is hostile towards women.[126] In both cases, the softer forms of each mode of expression are unquestionably protected by the Constitution;[127] nevertheless, each genre includes examples which devalue their subject in a manner which renders them more likely to have a harassing effect when used in a particular manner. In other words, some anti-Zionism has characteristics which will foreseeably have this affect on reasonable university students: they are anti-Semitic in the sense that they exhibit the characteristics which conventionally distinguish anti-Semitism from legitimate criticism of Israel, and they are used as an assault upon Jewish students individually and as a whole.

C. The First Amendment Narrative

Nevertheless, other commentators see harassing behavior as protected expression when a hostile environment is created at least in part through the use of insulting words or other expressive activities.[128] Given the high value traditionally associated

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[125] Marcus, *supra* note 14, at 854–55; Tuchman, *supra* note 14, at 15; ZOA, *supra* note 15, at 4.

[126] *See, e.g.*, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1522 (M.D. Fla. 1991) (holding that posting of photos of nude women in workplace was part of conduct supporting a finding of hostile work environment).

[127] *See, e.g.*, Jacobellis v. Ohio, 378 U.S. 184 (1964) (holding that defendant's conviction for possessing and exhibiting an obscene film violated the First Amendment).

[128] *See, e.g.*, Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273, 328 n.369 (2001).

with free inquiry and expression in academic settings, some civil libertarians advocate wide latitude for campus speech.[129] Granted, many civil libertarians acknowledge that harassment, at least in the case of person-to-person harassment, is an excepted category of behavior, since the spoken element is merely incidental to what is essentially a form of unlawful conduct.[130] Nevertheless, those who defend harassing activities—whether as First Amendment purists or as persons of less pure motivation—typically argue that the public expressive portion of harassing activity is protected from content-based regulation. While this approach may provide harassment defenders with useful legal and rhetorical devices, they are not entirely well suited to the task. Moreover, the attempt to address only person-to-person but not general public hostile environment harassment ironically leaves the most dangerous forms of harassment unaddressed.

By shifting the debate from the hateful conduct to the question of free speech, those who frame campus racial hate as a First Amendment problem enjoy certain favorable consequences. Here again, Richard Delgado has aptly described the consequences of this shift in perspective, as he notes, "the burden shifts to the [antidiscrimination] side to show that the interest in protecting members of the campus community from" harassment and denial of equal opportunity is sufficiently compelling to "overcome the presumption" that free speech enjoys.[131] This burden is made harder by what one might call the "jiu-jitsu argument": the observation that antidiscrimination law, like hate speech restrictions, may be used to harm precisely the groups they were intended to protect.[132] For example, a 1974 resolution adopted by the British National Union of Students to prevent "openly racist and fascist organizations" from speaking on college campuses was invoked against Israelis, including Israel's ambassador to the United Kingdom, after the U.N. adopted its notorious proclamation on Zionism as racism.[133] Similarly, in her path-breaking article on hate speech, Mari Matsuda notoriously characterizes Zionism as a "hard case," asserting that only some forms of Zionist speech should be protected.[134]

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[129] *See, e.g., id.*

[130] *See, e.g.*, Post, *supra* note 55, at 301–02.

[131] Delgado, *supra* note 26, at 345. Indeed, many equal opportunity advocates will be too quick to acknowledge the presumption even when it is not salient.

[132] Henry Louis Gates, Jr., *War of Words: Critical Race Theory and the First Amendment*, *in* HENRY LOUIS GATES, JR. ET AL., SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES 43–45 (1994).

[133] *Id.* at 44. Numerous other examples could be recounted. "During the year in which [the University of] Michigan's speech code was enforced, more than twenty blacks were charged—by whites—with racist speech," while "not a single instance of white racist speech" was punished. *Id.*

[134] Matsuda, *supra* note 26, at 2364. For example, she argues that Zionists who participate in white supremacy should not be protected. *Id.* The problem with Matsuda's example is not reciprocity. Certainly minority students (including Jews) who harass others should be held to the same standards which protect their own equal opportunity. Rather, the problem with her example is the suggestion that Zionism is related in some fashion to white supremacy.

Moreover, Matsuda suggests that *Palestinians* should decide which Zionist speech is protected and which is not.[135] In the end, however, the jiu-jitsu argument proves too much, insofar as it provides a reason to oppose any legal tool worth having. The fact that civil rights laws can be misused is an argument for better enforcement and oversight, not an argument for abolition.

Second, once the First Amendment's doctrinal structure is adopted, "there must be no less onerous way of accomplishing [the equal opportunity] objective."[136] For example, it may be asked, could reasonable Jewish (or other minority) students avoid the prospect of harassment or racial insult simply by avoiding courses, conversations, or campus lectures in which they are likely to be offended? On one campus, a senior administrator told me that Jewish students who are offended by anti-Semitic lectures given on one part of campus could simply avoid that part of the university. The administrator did not have an answer, however, when I asked which portions of the university were equally available to all students regardless of religion and whether there were certain portions that he would advise members of other minority groups to avoid.

It is true that the Supreme Court has held that we bear the burden of averting our attention from expressions that we find offensive in public places.[137] On the other hand, college students, especially at residential, as opposed to commuter, institutions, may be something of a "captive audience" for harassing behavior. Generally speaking, the Court has been more protective of people's "captive audience" rights in their own homes than in public places.[138] College campuses are both public places *and* student homes—and, at various times and in various places, they bear precisely the attributes that have led courts both to apply the First Amendment strictly and to abstain from doing so.

There is an irony in the heightened concern typically given to the protection of speeches at public events. On the one hand, even strong civil rights advocates have sometimes shied away from criticizing *Skokie*-type hateful public expressions.[139] Their reason is that public discourse is both more central to the concerns of the First Amendment and also less likely to yield significant individualized harms. At the same time, some civil libertarians concede that there is "no clear boundary between

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[135] *See id.*

[136] Delgado, *supra* note 26, at 345.

[137] *See, e.g.*, Cohen v. California, 403 U.S. 15, 21 (1971) (overturning a conviction for wearing a jacket with explicit language).

[138] *See, e.g.*, Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 737 (1970) (upholding addressee's statutory right to have name removed from mailing list for erotic materials).

[139] *See* Lawrence, *supra* note 26, at 457 & n.103. For the judicial opinions rejecting arguments that the Jewish population of Skokie, Illinois, should be protected from an American neo-Nazi group's demonstration, see *Collin v. Smith*, 578 F.2d 1197, 1205–07 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); *Village of Skokie v. Nat'l Socialist Party of Am.*, 373 N.E.2d 21, 23–26 (Ill. 1978).

speech that 'demonstrably hinders'" educational opportunities and speech that merely "'creates an unpleasant learning' environment."[140] If we are concerned about hostile environments, though, we should be especially concerned about harassing speech by public speakers at well-attended public events. Surely such events contribute more to a campus environment than do person-to-person encounters. Indeed, if one's goal were to create a hostile environment, one would want to focus on such events. It is a great deal harder to change the environment of a large institution through one-on-one retail encounters; in practical terms, environmental changes are most efficiently conducted wholesale through large public events. Indeed, the very term "hostile *environment*" encapsulates the insight that equal opportunity is effectively denied by broad environmental conditions and not only through direct person-to-person encounters.

Third, some will worry whether enforcement will amount to a slippery slope to censorship, imposing intolerable restraints on campus discourse.[141] This has been the claim on many campuses at which anti-Semitic incidents have recently been alleged.[142] In the University of California at Irvine case, for example, the administration argues that the civil rights complainants are asking "that UC Irvine silence just one side of the [campus Middle East] dialogue: the Muslim side."[143] Similarly, an "Ad Hoc Committee to Defend the University" has circulated a petition, signed by over 500 university professors and others, denouncing efforts to defame scholars and pressure administrators.[144] The petitioners argue that defenders of Israel are threatening free speech, academic freedom, the norms of academic life, and "the core mission of institutions of higher education in a democratic society."[145] Indeed, the petitioners warn that these efforts pose a "serious threat to institutions of higher education in the United States."[146] The methods which the ad hoc committee specifically decries include "unfounded" allegations of anti-Semitism, efforts to broaden the definition of anti-Semitism, and certain lawsuits presumably brought

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[140] Strossen, *supra* note 25, at 499.

[141] Delgado, *supra* note 26, at 345. As one commentator bluntly asserted, "Partisans of Israel often make false accusations of anti-Semitism to silence Israel's critics." Scott Handleman, *Trivializing Jew-Hatred*, *in* THE POLITICS OF ANTI-SEMITISM, *supra* note 37, at 13, 13.

[142] *See* Contreras, *supra* note 37 (stating that many university officials believe anti-Semitism is "protected as academic freedom").

[143] CAMPUS ANTI-SEMITISM, *supra* note 6, at 65 (quoting UC Irvine counsel Diane Geocaris).

[144] Ad Hoc Committee to Defend the University, Petition, http://defend.university.googlepages.com/home (last visited Apr. 8, 2008). Interestingly, the petition does not argue that well-founded allegations of campus anti-Semitism threatened the freedom of speech, only "unfounded insinuations and allegations." *Id.* It is not clear how the petitioners would expect university administrators or civil rights officials to distinguish between well-founded and unfounded allegations, other than by investigating them.

[145] *Id.*

[146] *Id.*

under civil rights laws.[147] In other words, the petitioners are broadly targeting a wide range of efforts intended to protect Jewish university students from anti-Semitic harassment. This sort of charge appears to have rhetorical traction with many people and is sometimes combined with stereotypical assertions about Jewish conspiratorial power and Jewish control over the media.[148] Indeed, Stephen Walt and John Mearsheimer recently called anti-Semitism allegations the "Great Silencer."[149]

Unavoidably, antidiscrimination law will have the effect of silencing some discriminators, just as tort law silences some defrauders and conspiracy law silences some conspirators. This will be true as long as lawbreakers use words to further their malfeasance. The serious First Amendment question here is not whether any speech is silenced, but whether legitimate, protected speech is chilled in a manner that unacceptably hampers speech.[150]

In fact, it may be argued that the *failure* to enforce antidiscrimination law may have a more chilling effect on campus free expression than the exercise of this power. Specifically, some commentators have observed that anti-Semitic incidents have had the affect of silencing some Jewish students and faculty on college campuses who were intimidated from expressing their viewpoint publicly.[151] In reference to this problem, Natan Sharansky has dubbed American Jewish college students the "new Jews of silence," a phrase resonant with the experience of Russian Jews in the old Soviet Union.[152] Henry Louis Gates, Jr. has suggested that "perhaps the most powerful arguments of all for the regulation of hate speech come from those who maintain that such regulation will really enhance the diversity and range of public discourse."[153] The gist of this argument, as applied either to hate speech or harassment, is that these activities tend to have a silencing effect on the minorities at whom they are targeted. Indeed, the danger now is not only that students and some faculty will be silenced by the harassment itself; it is also that they will be silenced by other faculty members who denounce efforts to eliminate anti-Semitism as a threat to academic freedom and "the core mission of institutions of higher

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[147] *Id.*

[148] BERNARD HARRISON, ISRAEL, ANTI-SEMITISM AND FREE SPEECH 32 (2007).

[149] JOHN J. MEARSHEIMER & STEPHEN M. WALT, THE ISRAEL LOBBY AND U.S. FOREIGN POLICY 191–96 (2007). In light of the particular place which Professors Walt and Mearsheimer occupy in this debate, the objectivity of their perspective may itself be subject to question. Interestingly, this Great Silencer has not stilled Walt and Mearsheimer's presses, nor hampered their international tour, nor quashed their audience before the United Kingdom's House of Lords, nor prevented the reportedly healthy advances on sales of their book. *See, e.g.*, The Annotico Report, Oct. 3, 2007, http://www.annoticoreport.com/2007/10/israel-lobby-to-be-translated-into.html.

[150] For a demonstration that, "[t]he charge of attempting to silence 'all critics of Israel' by smearing them as anti-Semites is absurd," see HARRISON, *supra* note 148, at 35–37.

[151] *See, e.g.*, TOBIN ET AL., *supra* note 37, at 107.

[152] Stern, *supra* note 87, at 22.

[153] Gates, *supra* note 132, at 43–45.

education in a democratic society."[154] As I have traveled to college campuses to describe the U.S. Commission on Civil Rights' public education campaign on campus anti-Semitism, students and faculty have expressed precisely this concern to me. That is, they are reluctant to speak out against hate and bias incidents for fear that they will be accused of trying to silence debate or suppress academic freedom.

In the course of a powerful opposition to hate speech codes, Robert Post has identified three distinct arguments to support this concept of silencing: "victim groups are silenced because their perspectives are systematically excluded from the dominant discourse; victim groups are silenced because the pervasive stigma of racism systematically undermines and devalues their speech; and victim groups are silenced because the visceral 'fear, rage, [and] shock' of racist speech systematically preempts response."[155] Post's typology is useful insofar as it distinguishes between three distinct modes of silencing: systematic exclusion, stigmatization, and intimidation. Each of these methods may be used, consciously or unconsciously, to stifle minority expression. The problem with Post's analysis is that it addresses only the mildest version of each form of silencing, thereby failing to fully comprehend the extent of the interest in protecting minority expression, particularly in matters sufficiently serious to implicate the laws of harassment.

The first form of silencing—the systematic exclusion of minority perspectives from the dominant discourse—when present, may be a strong argument for how minority voices have been silenced. Post acknowledges that this argument may be factually true, but he is able to avoid its ramifications by addressing minority exclusion at a highly abstract level.[156] For Post, the exclusion of minority perspectives may be a theoretical claim about the way in which certain racialized or gendered understandings are built into our language. Post refers, for instance, to built-in biases in discourse which appears, facially, to be "neutral and objective."[157] Understandably enough, Post argues that the function of dialogue is to question such apparently polite (mis)understandings, challenging the tacit assumptions in public discourse.[158] The exclusion of minority perspectives can, however, be more blunt and literal, as when a senior professor directly warns a Jewish, female student: "You have no voice in this debate."[159] There is

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[154] Ad Hoc Committee to Defend the University, *supra* note 144.

[155] Post, *supra* note 55, at 306 (citations omitted).

[156] *Id.* at 306–07.

[157] *Id.* at 306 (citing Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1370–81 (1988)).

[158] Post, *supra* note 55, at 306–07.

[159] TOBIN ET AL., *supra* note 37, at 107. This example is drawn from recent allegations at Columbia University. *Id.* The Foundation for Individual Rights in Education (FIRE) has suggested that pro-Israeli or conservative scholars may find Columbia University to be "inhospitable to their point of view," due in part to the dominance of anti-Zionist perspectives at Columbia's MEALAC Department. Letter from David French, President FIRE to Lee C. Bollinger, President, Columbia University (Jan. 10, 2005) at 6, *available at* http://www.thefire.org/pdfs/5100_3550.pdf. Commenting on the situation at Columbia, FIRE

nothing even facially "neutral and objective" about this silencing, which may have a more direct chilling effect.

The second form of silencing, in Post's analysis, occurs when "victim groups are silenced because the pervasive stigma of racism systematically undermines and devalues their speech."[160] Post acknowledges the factual premise of this argument but responds that the problem can be resolved through better speech and more effective political engagement.[161] Again, Post's argument is more persuasive when the undermining and devaluing are gentle and polite than when stigmatization is aggressive and blunt—as in the case, for example, of repeated calls to "slaughter the Jews"[162]—which, regardless of intent, has a potentially chilling effect which is unlikely to be ameliorated by the best of contrary argument.

In the third form of silencing, the visceral "fear, rage, [and] shock" of racist speech "systematically preempt[s] response."[163] This method, about which Post expresses some skepticism, characterizes public discourse as coercive in the sense that it documents the deep personal injury of racist speech.[164] As this argument goes, "this injury may in particular circumstances be so shocking as to literally preempt responsive speech."[165] Indeed, this may be one reason for the selection of certain hate tropes, such as the repeated use of Nazi references in anti-Jewish and anti-Israeli speech. Post argues that, under these conditions, it is likely that members of dominant and victim groups will develop conflicting judgments about whether bigotry shocks significant numbers of the minority target group population into silence.[166] Moreover, Post argues that "[t]he visceral shock of uncivil speech can sometimes actually serve constructive purposes, as when it causes individuals to question the community standards . . . and . . . to acknowledge the claims of others from radically different cultural backgrounds."[167] This is surely not true of

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admonishes that "it would violate every reasonable notion of student academic freedom to give professors the ability to open classroom discussion for all comments except those critical of the professor's point of view." *Id.* at 2."Just as students do not have the right to 'expect their views will be unchallenged,' neither do professors have the right to indoctrinate their students without permitting a murmur of classroom dissent." *Id.* FIRE acknowledges Columbia's right to maintain an anti-Zionist position within the Department if this advances Columbia's mission. *Id.* at 5. However, FIRE urges Columbia to provide full disclosure to students and donors if anti-Zionism is in fact central to the university's mission. *Id.* Alternatively, if anti-Zionism is not central to Columbia's mission, FIRE urges Columbia to provide for a more diverse expression of viewpoints on its campus. *Id.*

[160] Post, *supra* note 55, at 306.

[161] *Id.* at 307.

[162] *See, e.g.*, Tuchman, *supra* note 14, at 17.

[163] Post, *supra* note 55, at 306 (quoting Lawrence, *supra* note 26, at 452).

[164] *Id.* at 311.

[165] *Id.* at 308.

[166] Post, *supra* note 55, at 308.

[167] *Id.* at 304.

harassing speech which, to be actionable, must be so severe, persistent, and objectively offensive as to prevent the target students from equally participating in educational opportunities.[168] No one who hears persistent cries of "Hitler didn't finish the job" or "let it snow with Jewish ash" will be inspired to question community standards or to acknowledge the claims of the different backgrounds which motivate the speakers.[169]

Finally, some will point to a different set of slippery slopes: "[I]f a campus restricts this type of expression, might the temptation arise to do the same with classroom speech . . ."?[170] The answer here, of course, is yes. Students are no less vulnerable to harassment in the classroom than elsewhere, and the importance of academic freedom to the university does not provide faculty with carte blanche to engage in any form of harassment as long as they do so within their own classrooms. Nevertheless, it must be acknowledged that any conduct regulation broad enough to encompass some amount of speech runs the risk of abuse. This is also true, however, with respect to other areas, such as antitrust and securities regulation, which lie outside the coverage of the First Amendment.[171]

D. Campus Anti-Semitism as First Amendment Opportunism

To characterize campus anti-Semitism as First Amendment opportunism is to frame the issue in terms of an equal protection narrative. The gist of the former characterization—and of the "opportunism" concept—is that the two narratives do not provide equally suitable tools for the task.[172] One of them is a hammer and the other a pipe wrench, although both are whacking at the same nail.[173] On balance, it appears that the First Amendment narrative is the pipe wrench here in the sense that it is ill-equipped to address either person-to-person or general public hostile environment harassment. It should be remembered, however, that to characterize an argument as opportunistic is not to refute it, at least when "opportunism" is used in Schauer's descriptive, non-pejorative sense.[174] Opportunism is the manner in which non-covered activities may ultimately become covered. Whether the subject of anti-Semitic harassment is likely to gain constitutional salience is a separate question which will be discussed later. For present purposes, the important point is merely that campus harassment—including even campus anti-Semitism—is a zone of First Amendment opportunism.

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[168] *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999).

[169] *See, e.g.*, Zoloth, *supra* note 76, at 260.

[170] Delgado, *supra* note 26, at 345 (citations omitted).

[171] *See infra* notes 197–98 and accompanying text.

[172] *See* Schauer, *First Amendment Opportunism*, *supra* note 11, at 175–76.

[173] *Id.*

[174] *Id.* at 176.

In what sense is the First Amendment narrative a pipe wrench when it comes to anti-Semitic campus harassment? First, as Professor Schauer has demonstrated more generally in the case of sexual harassment, the First Amendment frame was not customarily applied to the harassment picture until relatively recently.[175] Second, the pertinent area of state action (i.e., federal antidiscrimination law) does not principally relate to speech, although its violation may be accomplished through words. Third, the harm at issue (denial of equal educational opportunities) is not primarily a function of speech. In these respects, efforts to apply the First Amendment narrative to campus harassment may be considered opportunistic.

To describe a constitutional or rhetorical strategy as "opportunistic" is not to assume that all who employ it are conscious of its opportunistic strategy. Indeed, once a First Amendment strategy has been successfully utilized for a particular purpose, it is unlikely that those who use it for that purpose in the future will be aware of the irregularity in its usage. In other words, once the pipe wrench is successfully used as a hammer, people will eventually forget that it was not forged for that purpose, and the awkwardness of its use may be forgotten. However, if this approach to harassment regulation is opportunistic, the question arises as to whether the courts should accept the invitation to bring harassment regulation into the boundaries of the First Amendment. This is a significant matter, since hostile environment law, like securities and antitrust law, can be viewed as a form of content-based speech regulation. If the courts should find that the First Amendment is salient to this area of law, then one could of course argue as to whether particular state actions are exempted under, say, the "fighting words"[176] or "imminent danger" doctrines.[177] But to place harassment within the First Amendment narrative would be to situate civil rights on a terrain decidedly to its disadvantage.

III. THE SALIENCE PROBLEM FOR CAMPUS HARASSMENT

For those who would defend campus hate speech, or any other opportunistically defended misconduct, on First Amendment grounds, the most difficult hurdle may be the threshold inquiry as to whether the subject is covered under the First Amendment. The inquiry here is not the heavily debated question as to whether First Amendment doctrine, if applied, would preclude regulation of the activities in question. Rather, it is the prior inquiry as to whether First Amendment inquiry is even salient to the question. This threshold inquiry is hampered by the lack of

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[175] *See supra* notes 53–59 and accompanying text.

[176] Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (holding that the use of "fighting words" is not protected by the First Amendment).

[177] Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that a state cannot regulate speech which advocates violence unless its advocacy is directed to inciting or producing lawless action).

standards. Frederick Schauer has argued that constitutional doctrine, which explains what is protected under the First Amendment, does not determine the threshold question of constitutional coverage.[178] Ultimately, the boundaries of the First Amendment are determined by political, economic, social, and cultural forces more so than by doctrinal theories.[179]

Schauer has argued that the Supreme Court has silently disposed of First Amendment arguments which it considers to be non-germane, rather than provide a reasoned explanation or doctrinal support for their denial.[180] This silence may be the most devastating form of dismissal, but it could certainly be construed in other ways. Arguably, this fade-to-black is the jurisprudential equivalent of the last ten seconds of *The Sopranos*' series finale:[181] a pregnant gesture, endlessly debatable, but inherently ambiguous.

Some possible gate-keeping standards, which Kent Greenawalt and Frederick Schauer have culled from criminal law cases, include (i) whether the speech in question is public or face-to-face, (ii) whether it is intended to provoke social change rather than private gain, (iii) whether it relates to general issues rather than particular transactions, and (iv) whether it is normative rather than informational.[182] From this one could induce that matters covered by the First Amendment tend to be general, public, and socially motivated or directed. By contrast, those that are private, face-to-face, and transactional tend not to be covered. By and large then, the First Amendment tends to cover communications in the public sphere much more so than the private sphere under this assessment.

Campus hate and bias incidents have fallen on both sides of this division. For example, much political anti-Semitism has taken the form of venomous public anti-Israeli speeches and lectures, which expressly advocate changes in American and Israeli policy, relating to general matters of Middle Eastern politics, with intent to communicate a perspective on social justice. Applying the Greenawalt-Schauer factors, such speech would most likely be covered; moreover, once covered it would undoubtedly be protected. By contrast, some campus anti-Semitism has taken instead the form of ugly face-to-face confrontations with individual Jewish students

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[178] Schauer, *Boundaries*, *supra* note 5, at 1766.

[179] *Id.* at 1766–68.

[180] *Id.* at 1796–97.

[181] *See* HBO, The Sopranos Episode Guide, Season 6, Episode 86, http://www.hbo.com/sopranos/episode/index.shtml (last visited Feb. 8, 2008) (describing the ending of the final episode).

[182] Schauer, *Boundaries*, *supra* note 5, at 1801, (citing KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE (1989)). As Schauer demonstrates, however, no doctrinal criteria adequately describe the boundaries of the First Amendment. *Id.* at 1803. Some decisions can only be described by non-doctrinal criteria: sympathetic litigants, the existence of a well-established regulatory scheme, and connections to issues already covered under the First Amendment. *Id.* at 1803–07.

or destruction of Jewish property, with no likelihood of affecting broader social change other than by persecuting particular students based on the students' ethnic, national, or religious traits with roughly the normative content of a swinging noose or burning cross.[183] The extent to which these incidents are covered by the First Amendment is, at best, questionable.[184] Ironically, however, the conduct covered under this dichotomy is in some ways less significant to the development of hostile environment harassment than the conduct that would not be covered.

Even if the Greenawalt-Schauer factors were applied, moreover, the division of hate and incidents into covered and non-covered categories is not as neat as it may appear. First, these factors hardly describe the contours of First Amendment coverage in a fully satisfactory manner. Schauer has argued that judicial coverage determinations cannot be understood on the basis of doctrinal considerations alone and that other factors must be appreciated, such as the presence of sympathetic litigants, the connection to another activity covered under the First Amendment, or the presence of a well-entrenched regulatory system.[185] Harassment, including educational harassment, certainly satisfies the description of an activity subjected to a well-established regulatory regime.

Second, the Greenawalt-Schauer factors more or less amount to a restatement of the public/private dichotomy,[186] which has been so widely criticized both by feminist and non-feminist political and legal theorists.[187] While characterizations of this dichotomy vary, feminist critics often distinguish between a "public sphere" which is regulated by law and a "private sphere" which is not.[188] Under one view, the "private sphere," often associated with the family, is relatively unregulated by government in a manner that parallels a laissez-faire approach to the economy.[189]

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[183] *See, e.g.*, *supra* notes 14–20 and accompanying text.

[184] *Compare* Virginia v. Black, 538 U.S. 343 (2003) (striking down a statute taking the act of cross burning as prima facie evidence of intent to intimidate, but affirming the state's ability to criminalize cross-burning), *with* R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992) (invalidating an ordinance prohibiting display of symbols known to "arouse anger, alarm or resentment in others").

[185] Schauer, *Boundaries*, *supra* note 5, at 1803–07.

[186] Others have observed the nexus between First Amendment law and the public/private distinction. Indeed, one commentator has gone so far as to assert that "we have erected the public-private dichotomy as the distinction around which all else in speech law revolves." Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1103, 1192 (1993).

[187] For a discussion of these critiques by a commentator sensitive to the manner in which privacy concerns may be important to women, see Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992); *see also* Tracy E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 CHI.-KENT L. REV. 847 (2000) (reconsidering the feminist critique of the public/private dichotomy).

[188] *See, e.g.*, KATHERINE O'DONOVAN, SEXUAL DIVISIONS IN LAW 3 (1985).

[189] *See* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1502 (1983).

Feminist scholars have generally rejected a sharp dichotomy between "public" and "private" as well as the view that the state should not regulate the "private sphere."[190] Frances Olsen has argued, for example, that it is impossible for the state to leave the family "free" through "neutral" nonintervention, since the state creates the ground rules for social interaction within that sphere.[191]

In some ways, the Greenawalt-Schauer factors reflect the converse of the dichotomy that feminist critics describe. In the First Amendment context, it is in the "private sphere" that courts are more likely to allow speech regulation, while speech in the "public sphere" is in theory unregulated. The First Amendment deregulation of the public sphere is not inconsistent with the general understanding of the public/private dichotomy. As Olsen points out, there are some public sphere institutions—principally involving economic markets—for which laissez-faire approaches were traditionally favored.[192] The "marketplace-of-ideas" metaphor reflects the sense in which similar anti-regulatory impulses have traditionally been advocated in different aspects of the public sphere.[193]

What appears anomalous, however, is that the putative private sphere limitations on First Amendment coverage suggest a greater constitutional tolerance of private sphere regulation than public, notwithstanding the greater common law tolerance for public sphere regulation in other areas. In this sense, we can inquire whether the reverse of Olsen's critique applies here. The question becomes whether state actors in higher education can ever be said to leave the public campus speech environment free through "neutral" nonintervention when state institutions frame the terms of discourse so pervasively in higher education: establishing programs, hiring faculty, funding lectures, chartering student organizations, etc. When a state university permits the creation of a hostile environment for certain students, can it really hide from harassment claims behind the First Amendment when the university actively controlled each of the elements which ultimately created the environment?

Third, the opportunistic character of at least some campus hate and bias incidents prevents their facile characterization. In other words, it is the nature of these gambits to present the private as public to invite constitutional coverage where the First Amendment might otherwise not extend. For example, the opportunist presents sexual abuse as public art by emphasizing the expressive character of pornographic activities, rather than, for example, the personal character of the acts that are portrayed. In the same way, the opportunist presents hate and bias incidents as public by employing the paraphernalia of political discourse. This is most apparent on those campuses where blatant, face-to-face intimidation and harassment

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[190] Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557, 570–71 (2006).

[191] Olsen, *supra* note 189, at 1509 n.53.

[192] *Id.* at 1502.

[193] *Id.* at 1502–04.

are ignored, while disputants endlessly debate the First Amendment ramifications of hateful public speech. In each of these ways, opportunists manufacture the basis for First Amendment coverage by repackaging essentially private conduct in a manner that has the trappings of public discourse. The ease with which this tactic is employed only reflects the frailty of the public/private distinction.

In short, we lack clear standards of First Amendment coverage, and the best ones that we can glean are not entirely adequate to the task. It may be that other criteria, whether as supplement or as alternative to the Greenawalt-Schauer factors, may be in order. For all the shortcomings of the speech-conduct dichotomy, it seems intuitive that some consideration must be given to the extent to which expressive activity predominates in the regulated behavior; the extent to which government action has the intent or effect of regulating the expressive character of the behavior; and the extent to which the non-expressive content may be regulated without implicating expression. Also relevant is the extent to which the conduct in question falls within the ambit of competing constitutional concerns such as the constitutional interest in equal protection.

Meanwhile, in the absence of acceptable standards, questions of salience must be determined on a case-by-case basis. For example, is the First Amendment salient to antidiscrimination law generally, to higher education harassment policy in particular, and to the question of campus anti-Semitism? Notwithstanding the difficulties inherent in the speech/conduct dichotomy, the Supreme Court has suggested that some hateful expressions may be regulated on the basis of content if the law that does so is based on conduct—as antidiscrimination law, unlike hate codes, may be said to be.[194] Ultimately, antidiscrimination law pulls in harassing campus speech only as an incidental constituent of behavior addressed under a well-established regulatory scheme.

What would it mean to say that it is not? Surely it does not mean that antidiscrimination efforts will never run afoul of the First Amendment. Indeed, *Bivens* liability has attached when government officials deliberately test the boundaries of First Amendment protection by investigating to determine whether purely political speech is motivated by discriminatory animus.[195] Similarly, officials may run afoul of constitutional protections if they seek to regulate campus speech with overly vague speech guidelines.[196] This is also true, however, of securities or antitrust officials.[197] To say that a regulatory regime lies outside of the boundaries of the First Amendment is not to give officials carte blanche to regulate all forms of

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[194] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992).

[195] *See, e.g.*, White v. Lee, 227 F.3d 1214 (9th Cir. 2000).

[196] *See* BERNSTEIN, *supra* note 24, at 67–69.

[197] *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); *see also* United Mine Workers v. Pennington, 381 U.S. 657 (1965). Both cases suggested the First Amendment protects lobbying the government to change federal antitrust laws.

speech within its ambit. For example, while antitrust law generally resides outside the boundaries of the First Amendment, it does fall within that amendment's coverage at the margins, under the *Noerr-Pennington* doctrine.[198] To say that harassment law is, as a general rule, no more covered by the First Amendment than the law of securities, antitrust, or fraud is only to conclude that the incidental regulation of speech in the course of a broader conduct-based regulatory scheme does not, without more, satisfy the preliminary coverage inquiry.

CONCLUSION

Much of the rhetoric, and some of the legal argument, surrounding campus harassment—and especially campus anti-Semitism—consists of First Amendment opportunism. That is to say, it consists of agenda-driven efforts, varying in degree of success, to change the topic from harassment to free speech in a context in which the First Amendment is at least arguably inapplicable. These efforts are fraught with social, legal, and political significance, as they mark a struggle to shift the boundaries of constitutional discourse in a way that could increase some protections while decreasing others.

The danger in this form of opportunism is generally two-fold. On one hand, opportunistic use of the First Amendment can lead to distortion or dilution of the protections afforded under that constitutional provision. This is a reflection of the observation that "[t]he First Amendment has always derived much of its strength from its narrowness";[199] in other words, it is able to provide strong protections to those areas within its coverage precisely because its boundaries are relatively modestly circumscribed. On the other hand, this form of opportunism infringes rather aggressively on a core interest of contemporary constitutional and civil rights law: protecting equal educational opportunities from hostile environment harassment.

In the case of campus anti-Semitism, we have seen that the First Amendment narrative does not fully capture the range of issues which the problem generates. In Professor Schauer's metaphor, this narrative is a pipe wrench, rather than a hammer, swinging at a nail.[200] Worse, the argument has a questionable pedigree, in that it is resonant with stereotypes of Jewish conspiratorial power, and it has been used in a manner that can itself suppress efforts to promote equal educational opportunity. The opportunistic use of First Amendment doctrine and rhetoric cannot be fully addressed within the scope of existing doctrine, and its success or failure will ultimately turn more on political or sociological factors than on jurisprudential considerations. For these reasons, the danger of misusing the First Amendment in this context is not only that it can distort First Amendment doctrine, weaken speech

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[198] *See* cases cited *supra* note 197.

[199] Schauer, *Speech-ing*, *supra* note 13, at 360.

[200] Schauer, *First Amendment Opportunism*, *supra* note 11, at 175.

protections by overextending them, and threaten equal educational opportunity. It is also that our constitutional discourse is degraded by defenses of hate and bias incidents which are both questionable in their moral genealogy and dangerous in their impact on educational equality.

By way of a postscript, there are two noteworthy developments that occurred as this Article was going to press. First, on November 30, 2007, the U.S. Department of Education's Office for Civil Rights dismissed the anti-Semitism case against Irvine.[201] OCR found that each of the allegations against Irvine were untimely filed, insufficiently supported factually, or that Irvine's response was sufficiently prompt and effective.[202] While OCR's investigation has been criticized by other public officials, Irvine interpreted the disposition as vindication of its position on harassment as freedom of speech.[203] Second, in February 2008, the independent Task Force on Anti-Semitism at the University of California, Irvine, formed by the Hillel Foundation of Orange County,[204] issued its final report two months after OCR's closure letter was made public.[205] The Task Force concluded that the "acts of anti-Semitism are real and well documented" and that "Jewish students have been harassed."[206] Recommending that Irvine take various action to rectify the climate of anti-Semitism which the Task Force had found, the Task Force urged that "students with a strong Jewish identity should consider enrolling elsewhere until tangible changes are made."[207] On the other hand, at least Dean Chemerinsky appears to be well ensconced in the law school.

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[201] Closure letter from Charles R. Love, Program Manager, U.S. Dep't of Educ., Office for Civil Rights, Region IX, to Susan Tuchman, Director, Center for Law and Justice, Zionist Organization of America (Nov. 30, 2007) (regarding OCR Case No. 09-05-2013).

[202] *Id.* at 2–13.

[203] *See* Marla Fisher, *Civil Rights Investigation Clears UCI of Anti-Semitism Charges: Agency Says Lack of Evidence in Allegations by Jewish Students*, ORANGE COUNTY REG., Dec. 11, 2007, *available at* http://www.ocregister.com/news/students-jewish-campus-1939795-officials-report.

[204] *See generally* Michael Miller, *Group to Probe Anti-Semitism*, DAILY PILOT (Newport Beach, Ca.), Feb. 15, 2007, *available at* http://www.dailypilot.com/articles/2007/02/19/education/dpt-uci16.txt.

[205] TASK FORCE ON ANTI-SEMITISM AT THE UNIVERSITY OF CALIFORNIA, IRVINE, REPORT, *available at* http://www.redcounty.com/rccampuswatch/Orange%20County%20Task%20Force%20Report%20on%20anti-Semitism%20at%20UCI.pdf [hereinafter TASK FORCE REPORT].

[206] *Id.* at 26; *see also* Brad A. Greenberg, *Report Says UCI Is a Hostile Place for Jewish Students*, JEWISH J. LOS ANGELES, Feb. 22, 2008, *available at* http://www.jewishjournal.com/home/preview.php?id+18953.

[207] TASK FORCE REPORT, *supra* note 211, at 27.