PENN STATE LAW REVIEW

Damned If You Don't . . . Damned If You Do? Creating Effective, Constitutionally Permissible University Sexual Harassment Policies

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I. INTRODUCTION

In the past two decades, the tension between the First Amendment's free speech guarantee[1] and harassment policies has been the subject of much commentary. This tension is particularly strong in the university setting.[2] On the one hand, universities are seen as beacons of free thought and the exchange of ideas. On the other hand, universities have a duty to protect their students from harassment, which could interfere with a student's right to participate fully in the learning environment. In fact, courts have indicated that a university can be legally liable for student-on-student sexual harassment under Title IX if the university knows about the harassment and fails to take any action.[3]

1. The First Amendment to the United States Constitution states, in relevant part, "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST. amend. I. The First Amendment has limits, however; the free speech clause does not protect certain categories of speech, such as defamation and obscenity. Ashcroft v. Free Speech Coal., 535 U.S. 234, 245-46 (2002).

2. *See generally* Anita Cava & Beverly Earle, *The Collision of Rights and a Search for Limits: Free Speech in the Academy and Freedom from Sexual Harassment on Campus*, 18 BERKELEY J. EMP. & LAB. L. 282 (1997) (examining the conflict between the First Amendment and university sexual harassment policies as applied to faculty); Joshua S. Press, Comment, *Teachers, Leave Those Kids Alone? On Free Speech and Shouting Fiery Epithets in a Crowded Dormitory*, 102 NW. U. L. REV. 987 (2008) (discussing the history of campus hate speech policies and suggesting that campus-wide anti-harassment policies are unconstitutional, but proposing that policies applicable only to dormitories would comply with the First Amendment).

3. *See, e.g.*, Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999) (holding that a school may be liable for damages in a private action under Title IX "where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities" and the sexual harassment is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit"); Williams v. Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282, 1294-99 (11th Cir. 2007); *see generally* Karen E. Edmonson, Comment,

Courts have also held, however, that several universities' harassment policies violated students' First Amendment freedom-of-speech rights.[4] The Supreme Court has not yet addressed this tension, and few federal courts of appeals have ruled on the issue.[5] In the recent case *DeJohn v. Temple University*,[6] the Court of Appeals for the Third Circuit struck down Temple University's sexual harassment policy, finding that the policy was overly broad and prohibited speech protected by the First Amendment.[7]

The legal fragility of university sexual harassment policies leaves administrators and university attorneys between the proverbial rock and a hard place. If they prohibit too little harmful speech, the university potentially could be liable for sex-based discrimination under Title IX.[8] If they prohibit too much speech, the relevant policy will almost certainly be challenged and invalidated under the First Amendment. In light of the Third Circuit's recent ruling in *DeJohn v. Temple University*, the middle ground between these two extremes appears to be rapidly shrinking.

This Comment discusses how the *DeJohn* case affects the viability of sexual harassment policies for public universities within the Third Circuit. Part II of this Comment discusses the relevant history of free speech doctrine in educational settings. The Comment begins, in Part II.A, with a discussion of the Supreme Court's four landmark cases dealing with public school speech restrictions. Part II.B examines Third Circuit precedents on school speech policies. Part II.C examines a case in which the Court of Appeals for the Sixth Circuit applied the overbreadth doctrine to a university's racial and ethnic harassment policy.

Part III consists of an in-depth analysis of the *DeJohn* case. Part III.A discusses the criteria set forth in the *DeJohn* opinion for determining whether a harassment policy is facially constitutional. Part III.B notes several issues that the *DeJohn* court did not address.

Davis v. Monroe County Board of Education Goes to College: Holding Post-Secondary Institutions Liable Under Title IX For Peer Sexual Harassment, 75 NOTRE DAME L. REV. 1203 (2000).

4. *See generally* Dambrot v. Cent. Mich. Univ., 55 F.3d 1177 (6th Cir. 1995); U.W.M. Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989).

5. *See infra* notes 60-68 and accompanying text.

6. 537 F.3d 301 (3d Cir. 2008).

7. *Id.* at 320. The overbreadth doctrine is an exception to traditional rules of standing in cases involving laws that restrict First Amendment rights. Broadrick v. Oklahoma, 413 U.S. 601, 610-13 (1973). "The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002).

8. *See supra* note 3 and accompanying text.

Finally, Part IV proposes a model sexual harassment policy that would likely withstand First Amendment scrutiny while still protecting an institution's interest in maintaining a harassment-free environment that is conducive to learning.

II. CASE HISTORY OF HARASSMENT POLICIES IN EDUCATIONAL SETTINGS

A. The Supreme Court's Jurisprudence on Free Speech in Public Elementary and Secondary Schools

The constitutionality of speech prohibitions in public elementary and secondary schools has often been the subject of litigation. Beginning in 1969, the Supreme Court issued a series of opinions that created standards to determine whether a school's restrictions on student speech are permissible under the First Amendment.[9] Although notable differences exist between a public elementary or secondary school environment and a higher education setting,[10] these cases provide a helpful starting point for analyzing university speech restrictions.

In *Tinker v. Des Moines Independent Community School District*,[11] the Court addressed a school district policy that prohibited students from wearing armbands to protest the Vietnam War.[12] The Supreme Court held that the policy impermissibly infringed upon students' constitutionally protected freedom of speech.[13] Following the Fifth Circuit's analysis in *Burnside v. Byars*,[14] the Court noted that student speech could not be restricted unless the prohibited speech or conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[15]

9. *See generally* Morse v. Frederick, 551 U.S. 393 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

10. Most importantly, most university students are legally adults, whereas most elementary and secondary school students are minors. School teachers and administrators could be viewed as acting in the place of a minor's parents while the minor is in school, *DeJohn*, 537 F.3d at 315, but that idea arguably would not apply to university administrators. *See* Bradshaw v. Rawlings, 612 F.2d 135, 138-40 (3d Cir. 1979). Another difference is that at the elementary and secondary school level, attendance is compulsory, but at the university level, attendance is voluntary.

11. 393 U.S. 503 (1969).

12. *Id.* at 504.

13. *Id.* at 514.

14. 363 F.2d 744, 749 (5th Cir. 1966).

15. *Tinker*, 393 U.S. at 509 (quoting *Burnside*, 363 F.2d at 749).

The Court revisited the issue of a public school's ability to prohibit student speech in *Bethel School District No. 403 v. Fraser*.[16] Bethel High School, guided by the *Tinker* standard, had adopted a policy stating that "[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."[17] School officials applied the policy to discipline a student who gave a sexually explicit speech at an assembly where students nominated their classmates for student government positions.[18]

Reversing the decision of the Ninth Circuit Court of Appeals,[19] the Supreme Court held that the actions of the school administrators did not infringe on the student's constitutional rights.[20] Important to the Court's determination was the fact that, unlike in *Tinker*, the student speech at issue in *Fraser* was not related to a political viewpoint.[21] The Court in *Fraser* ruled that public schools could constitutionally prohibit lewd or indecent speech.[22]

Two years after deciding the *Fraser* case, the Court again addressed a First Amendment challenge to a student speech restriction in *Hazelwood School District v. Kuhlmeier*.[23] In *Kuhlmeier*, a high school principal deleted two pages from the school newspaper because he was concerned about both the content of the articles and the privacy interests of the people discussed in the articles.[24]

The Court distinguished this case from *Tinker* by holding that although schools cannot *prohibit* protected speech, a school is not necessarily required to *promote* student speech by allowing students to use the school's name and resources.[25] Schools may control student speech in school-sponsored publications and broadcasts as long as the censorship is "reasonably related to legitimate pedagogical concerns."[26]

16. 478 U.S. 675 (1986).
17. *Id.* at 678.
18. *Id.*
19. *Id.* at 687.
20. *Id.* at 685.
21. *Bethel School District No. 403*, 478 U.S. at 685.
22. *Id.*
23. 484 U.S. 260 (1988).
24. *Id.* at 263-64. The two articles in question concerned teen pregnancy and divorce. *Id.* Although the parties' names were changed, the individuals were still identifiable by the details included in the article. *Id.* at 263, 274.
25. *Id.* at 272-73.
26. *Id.* at 274. The Court stated that it did not decide whether the same standard applied at the post-secondary level. *Id.* at 273, n. 7. The Court later refined the *Kuhlmeier* standard and applied it to universities in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995). In *Rosenberger*, the Court ruled that a public university could not deny funding to a student-run publication on the basis of the viewpoints expressed therein when it was clear that the publication was independent of

The Supreme Court most recently reviewed a school speech restriction in *Morse v. Frederick*.[27] In *Frederick*, several students unfurled a banner displaying the words "BONG HiTS 4 JESUS" while at a school-sponsored event.[28] A school policy prohibited students from advocating the use of illegal substances.[29] Applying the policy, the principal told the students to take down the banner.[30] When one student refused, the principal suspended him from school.[31]

Relying largely on the *Fraser* opinion,[32] the Court held that the principal had not violated the student's First Amendment rights.[33] The Court found that the principal's actions were justified by the school's legitimate interest in preventing student drug use and quelling peer pressure.[34] The Court stated its holding in *Frederick* narrowly, permitting restrictions on student "speech that can reasonably be regarded as encouraging illegal drug use."[35]

The Supreme Court's school speech opinions indicate that while elementary and secondary school students certainly have First Amendment rights, those rights are limited. Students cannot invoke the First Amendment as a means to interfere with the rights of others[36] or with the educational mission of a school. Arguably, these same principles should apply to university students as well.

B. Third Circuit Case Law on School Speech Policies

Prior to its recent decision in *DeJohn v. Temple University*,[37] the Court of Appeals for the Third Circuit had also issued two important opinions regarding school harassment policies. The first important Third Circuit precedent is *Saxe v. State College Area School District*;[38] the second is *Sypniewski v. Warren Hills Regional Board of Education*.[39] The Third Circuit relied on these cases, along with the four Supreme

the university and the views expressed were the views of private speakers. *See id.* at 834-37.

27. 551 U.S. 393 (2007).
28. *Id.* at 397.
29. *Id.* at 398. The policy stated: "The Board specifically prohibits any assembly to public expression that . . . advocates the use of substances that are illegal to minors. . . ." *Id.* (omissions in original).
30. *Id.*
31. *Id.*
32. *See Morse v. Frederick*, 551 U.S. at 404-05, 409.
33. *Id.* at 397.
34. *Id.* at 407-08.
35. *Id.* at 397.
36. *See infra* note 99 and accompanying text.
37. 537 F.3d 301 (3d Cir. 2008).
38. 240 F.3d 200 (3d Cir. 2001).
39. 307 F.3d 243 (3d Cir. 2002).

Court school speech cases, in its analysis of Temple University's sexual harassment policy in *DeJohn*.[40]

In *Saxe*, the court determined that the State College Area School District's ("SCASD") harassment policy was unconstitutional because it was overly broad and prohibited speech that did not fit within the *Tinker*, *Fraser*, or *Kuhlmeier* standards.[41] The *Saxe* court quickly struck down a portion of the policy which defined harassment as "verbal . . . conduct which offends . . . an individual . . . because of [inter alia, 'religion . . . or other personal characteristics']."[42] Citing *Tinker*, the court noted that a school cannot prohibit speech merely because the speech is uncomfortable or offensive.[43]

The court then determined that, in the narrowest possible reading, the policy defined harassing speech as speech meeting the following elements: "(1) verbal . . . conduct (2) that is based on one's actual or perceived personal characteristics and (3) that has the purpose or effect of either (3a) substantially interfering with a student's educational performance or (3b) creating an intimidating[,] hostile, or offensive environment."[44]

The court found that even this narrow reading of the policy prohibited speech that was not lewd, not school-sponsored, and did not create a substantial risk of disruption.[45]

The court was particularly concerned that the policy prohibited speech that had "the purpose . . . of . . . substantially interfering with a student's educational performance" and did not require a showing of an *actual* substantial interference.[46]

The court also took issue with the "intimidating, hostile or offensive environment" element, finding that it too prohibited protected speech.[47] The court seemed to suggest two ways in which SCASD could possibly bring this final element of the policy into compliance with the First Amendment. First, SCASD could limit the scope of the policy to prohibit only speech that would result in liability to the school under federal discrimination laws, as interpreted by the Supreme Court in *Franklin v. Gwinnett County Public Schools*[48] and *Davis v. Monroe*

40. *See, e.g.*, *DeJohn*, 537 F.3d at 315, 317.
41. *Saxe*, 240 F.3d at 216-17.
42. *Id.* at 215.
43. *Id.*
44. *Id.* at 216.
45. *Id.*
46. *Saxe*, 240 F.3d at 216-17.
47. *Id.* at 217.
48. 503 U.S. 60, 76 (1992) (holding that money damages are an appropriate remedy in a Title IX suit against a school for sex-based discrimination).

County Board of Education.[49] Second, SCASD could modify the "hostile environment" prong to "require a threshold showing of severity or pervasiveness."[50] Because the SCASD policy in question contained neither of these limitations, the court held that the policy was unconstitutionally overbroad.[51]

One year later, the Third Circuit reviewed another school harassment policy in *Sypniewski*.[52] This time, the court upheld all but one provision of the school district's harassment policy.[53] The court held that a prohibition of speech that "creates ill will" was overly broad because it encompassed speech that merely offended the listener.[54] In upholding the remainder of the policy, including prohibitions of speech that is "racially divisive" or "creates . . . hatred," the court focused on the school district's history of disruptive racial incidents.[55] The district had adopted the policy in response to serious racial tensions and related disruptive acts in the school district.[56] However, the court noted that in a different district without such a background, the same policy might be unconstitutionally overbroad.[57] The court's analysis rested on *Tinker*'s "substantial disruption" standard: because racially motivated speech previously caused substantial disruptions in the district, the Board could reasonably believe that similar speech would cause substantial disruptions in the future.[58]

Saxe and *Sypniewski* revealed that the Third Circuit saw little space between the prohibitions of Title IX and the requirements of the First Amendment. *Saxe* in particular implied that the minimum standard for liability under Title IX and the maximum constitutionally permissible level of student speech restriction might be one and the same.[59] Even so, *Sypniewski* showed that the court was willing to look to the individual circumstances necessitating a harassment policy for a particular school.

49. 526 U.S. 629, 633 (1999) (holding that a school may be liable for damages in a private action "where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities" and the harassment is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit"). *See Saxe*, 240 F.3d at 217.

50. *See id.* at 217.

51. *Id.*

52. *See generally* Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243 (3d Cir. 2002).

53. *Id.* at 265.

54. *Id.* at 264-65.

55. *Id.* at 262, 265-66.

56. *Id.* at 247-49.

57. *Sypniewski*, 307 F.3d at 265.

58. *Id.* at 262.

59. *See supra* text accompanying notes 48-49. *DeJohn* seems to further this conclusion. *See infra* text accompanying notes 90-91.

C. Harassment Policies in the University Setting: The Sixth Circuit's Approach

Several federal district courts have wrangled with the question of how the rules surrounding elementary and secondary school speech restrictions should be applied in a university setting.[60] Prior to *DeJohn*, however, the Sixth Circuit Court of Appeals was the only federal appellate court to examine the constitutionality of a university harassment policy.

In *Dambrot v. Central Michigan University*,[61] the U.S. Court of Appeals for the Sixth Circuit held that Central Michigan University's racial and ethnic harassment policy was overbroad and facially unconstitutional.[62] The policy prohibited racial and ethnic harassment, which it defined as:

> any intentional, unintentional, physical, verbal or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by . . . (c) demeaning or slurring individuals through . . . written literature because of their racial or ethnic affiliation; or (d) using symbols, [epithets] or slogans that infer negative connotations about the individual's racial or ethnic affiliation.[63]

The court held that this definition prohibited "a substantial amount of constitutionally-protected speech."[64] The policy contained a limiting provision that stated, "[t]he University will not extend its application of discriminatory harassment so far as to interfere impermissibly with individuals[']rights to free speech."[65] The court concluded that this provision was not enough to save the policy because it was still possible for the University to violate students' freedom of speech unintentionally under the policy.[66] The court also found that the policy could not be sustained as a prohibition of "fighting words"[67] because it only

60. *See generally* UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989).

61. 55 F.3d 1177 (6th Cir. 1995).

62. *Id.* at 1182.

63. *Id.*

64. *Id.* (quoting Leonardson v. City of East Lansing, 896 F.2d 190, 195 (6th Cir. 1990)).

65. *Id.* at 1183.

66. *Dambrot*, 55 F.3d at 1183.

67. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (stating that certain classes of speech, including "fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace," are not protected by the First Amendment).

prohibited "fighting words" related to race or ethnicity, which constituted content discrimination.[68]

The Sixth Circuit did not address the Supreme Court's school speech jurisprudence at all when it analyzed Central Michigan University's policy.[69] Rather, the *Dambrot* court invalidated CMU's harassment policy based primarily on overbreadth doctrine.[70] The *Dambrot* court treated universities more like municipalities than like public schools. This approach is different from the analysis that the Third Circuit later utilized in *DeJohn*.[71] The *Dambrot* court did not discuss a university's interest in preventing harassment or students' right to participate in educational activities; rather, the court focused entirely on employees' and students' freedom of speech.[72] This approach fails to recognize the unique status of universities and the many competing rights and interests that converge in a higher education setting.[73]

III. ANALYZING *DEJOHN V. TEMPLE UNIVERSITY*

DeJohn v. Temple University[74] provided the Third Circuit an opportunity to address, for the first time, the intersection of university harassment policies and freedom of speech. The plaintiff in the case, a former Temple University graduate student, claimed that Temple's sexual harassment policy was overly broad and facially unconstitutional.[75] The Third Circuit Court of Appeals agreed.[76]

The court did not, however, imply that a university could *never* formulate a constitutional harassment policy.[77] While the court found

68. *Dambrot*, 55 F.3d at 1184-85 (citing R.A.V. v. St. Paul, 505 U.S. 377 (1992)). The *Dambrot* court said that CMU's policy prohibited only those fighting words related to an "individual's racial or ethnic affiliation," which "necessarily require[d] the university to assess the racial or ethnic content of the speech." *Id.* at 1184.

69. This might be explained in part by the fact that CMU's policy had been applied to discipline a coach rather than a student. *See id.* at 1180-81.

70. *See id.* at 1182-84 (citing, inter alia, Members of City Council v. Taxpayers for Vincent, 466 U.S. 780, 801 (1984); Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973)).

71. *See infra* notes 80-82 and accompanying text.

72. *See generally Dambrot*, 55 F.3d at 1182-85.

73. *See* discussion *infra* Parts III-V.

74. 537 F.3d 301 (3d Cir. 2008).

75. *Id.* at 305.

76. *Id*. at 320.

77. In fact, the Third Circuit had said in *Saxe*, "[w]e do not suggest, of course, that no application of anti-harassment law to expressive conduct can survive First Amendment scrutiny. Certainly, preventing discrimination in the workplace—and in the schools—is not only a legitimate, but a compelling, government interest." Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 209 (3d Cir. 2001). *But see* Press, *supra* note 2, at 989-90 ("[C]ourts have almost universally rejected campus speech policies. . . ."). While technically true, this statement is misleading when one considers how few courts (particularly appellate courts) have actually considered such policies.

fault in several specific words and phrases within Temple's policy, the court left some provisions untouched.[78] Moreover, the court suggested that universities may still prohibit categories of speech that traditionally have not been protected by the First Amendment.[79] Part III.A of this Comment distills from the *DeJohn* opinion the criteria for creating a constitutional university sexual harassment policy. Additionally, the potential consequences of each criterion are discussed. Part III.B notes several questions that the *DeJohn* court did not address and considers the implications of those issues for universities striving to draft effective yet constitutional sexual harassment policies.

A. Guidance from the Third Circuit: Criteria for Creating a Constitutional University Sexual Harassment Policy

The *DeJohn* court could have invalidated Temple University's sexual harassment policy upon finding that just one provision was overly broad. Instead, the court chose to explain how several of the policy's provisions prohibited protected speech.[80] Although the additional discussion was perhaps unnecessary to the outcome of the case, the court's analysis provides helpful guidance for universities wishing to avoid litigation over their own sexual harassment policies.

The *DeJohn* court built its analysis on the Supreme Court and Third Circuit precedents regarding speech restrictions in elementary and secondary schools.[81] One should initially note the court's warning that when imposing restrictions on student speech, colleges and universities have less constitutional leeway than elementary and secondary schools.[82] However, despite repeatedly referencing this higher standard, the court never set forth any test different from the judicially established tests for elementary and secondary school settings. Rather, the court's analysis of Temple's policy focused mostly on *Tinker*'s substantial disruption test.[83]

1. The Speaker's Motives

First, the court stated that a university harassment policy could not focus on the speaker's motives.[84] The relevant portion of Temple's policy prohibited "expressive, visual or physical conduct of a sexual or gender-motivated nature . . . [that] has the purpose or effect of

78. *See infra* text accompanying notes 109-114.
79. *See DeJohn*, 537 F.3d at 316, 320.
80. *See* discussion *infra* Parts III.A.1-6.
81. *See, e.g.*, *DeJohn*, 557 F.3d at 317-18.
82. *Id.* at 318.
83. *See, e.g.*, *id.* at 317 n.17.
84. *Id.* at 317.

unreasonably interfering with an individual's work, educational performance, or status; or has the purpose or effect of creating an intimidating, hostile, or offensive environment."[85] The court concluded that speech intended by the speaker to create an unreasonable interference or a hostile environment does not necessarily create such a disruption.[86] Therefore, the "purpose or effect" language of Temple's policy prohibited speech that did not satisfy *Tinker*'s substantial disruption requirement.[87]

The elimination of language describing a speaker's motive likely will not lessen the effectiveness of a sexual harassment policy. A university's goal in creating a sexual harassment policy is to protect an individual's ability to learn and function comfortably and effectively in the educational environment. Words that are spoken or written with a malicious purpose do not interfere with this goal if they do not actually disrupt the targeted individual's ability to participate fully in the educational process. Therefore, this first limitation does not diminish the value of sexual harassment policies.

2. Gender-Motivated Speech

Second, the court objected to the policy's prohibition of "gender-motivated" speech, particularly when accompanied by the words "hostile" and "offensive."[88] The court noted that this provision was broad enough to prohibit "'core' political and religious speech, such as gender politics and sexual morality," which is protected by the First Amendment.[89] The court suggested that a policy could prohibit "gender-motivated" speech that creates a "hostile or offensive environment" only if the policy required "a showing of severity or pervasiveness."[90] To withstand First Amendment scrutiny, a policy prohibiting "gender-motivated" speech must require "that the conduct [is so severe or pervasive that it] *objectively and subjectively* creates a hostile environment or substantially interferes with an individual's work."[91]

These limitations will likely require a number of public universities to substantially narrow the scope of their sexual harassment policies. It is difficult to conceive of an effective sexual harassment policy that does not include some reference to gender- or sex-motivated speech. However, the court gave universities a choice to bring their policies into

85. *Id.* at 316.
86. *DeJohn*, 557 F.3d at 317.
87. *Id.* at 319.
88. *Id.* at 317-18.
89. *Id.* at 317.
90. *Id.* at 317-18.
91. *DeJohn*, 557 F.3d at 318.

compliance with the First Amendment: either eliminate any reference to gender- or sex-motivated speech or add a severity or pervasiveness requirement.[92] The latter would almost certainly be the more desirable option.

Policies that require a showing of severity or pervasiveness will inevitably allow some harmful verbal conduct to go unpunished. A student who endures gender-motivated speech that "subjectively creates a hostile environment" will have no recourse under such a policy unless the student can also prove that the speech is so severe and pervasive that it also *objectively* creates a hostile environment.[93] There may be situations in which the speaker and the listener both clearly understand that the speech is creating a hostile environment and interfering with the listener's educational experience. However, an outsider, who does not understand the relationship between the two parties or the particular vulnerability of the listener, may not comprehend the devastating effect of the speech. In such a situation, the victim could only prove the existence of a subjectively hostile environment. The victim thus would have no recourse under a policy that only prohibits speech that creates *both* an objectively and subjectively hostile environment.

Nevertheless, many victims of harmful sex-based speech will likely be able to show that the harassing speech both subjectively and objectively creates a hostile environment. While the court's imposition of a severity and pervasiveness requirement will leave victims of harmful gender-motivated speech unprotected in some circumstances, the requirement does not undermine sexual harassment policies altogether.

3. Speech that Unreasonably Interferes with an Individual's Work

Perhaps the *DeJohn* court's biggest assault on harassment policies was its announcement that policies probably cannot constitutionally prohibit speech or conduct that "unreasonably interfere[s] with an individual's work."[94] The court concluded that even though

92. Again, there is no guarantee that the inclusion of a severity or pervasiveness requirement would be enough to save a policy that proscribes gender-motivated speech. *See supra* note 91.

93. *See DeJohn*, 537 F.3d at 317-18.

94. *DeJohn*, 537 F.3d at 319. Interestingly, in its discussion, the court quoted only the first part of this clause. The full clause prohibited "expressive, visual or physical conduct of a sexual or gender-motivate nature when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's *work, educational performance, or status*." *Id.* at 316 (emphasis added). The court's omission suggests that the court would uphold a prohibition on speech that interferes with an individual's educational performance or status. The court did cite to its statement in *Saxe* that a policy "which prohibits speech that would 'substantially interfer[e] with a student's educational

"unreasonably" might encompass both an objective and a subjective requirement, "it still does not necessarily follow that speech which effects an unreasonable interference with an individual's work justifies restricting another's First Amendment freedoms."[95] Initially, this statement appears to conflict with the underlying premise of the Supreme Court's ruling in *Davis*[96] and the purpose of Title IX.[97] However, the court's later statements seem to indicate that, once again, a severity or pervasiveness requirement would be sufficient to cure the problem.[98]

Yet it is difficult to reconcile the court's language with one of the oft-referenced limitations of the *Tinker* opinion: speech that interferes with the rights of others is not protected under the First Amendment.[99] As the Supreme Court made clear in *Davis*, students have a right under Title IX to be free from sexual harassment under any education program receiving federal funds.[100] It would seem, then, that "gender-motivated" speech that "unreasonably interfere[s] with an individual's work"[101] should not be entitled to First Amendment protection. Although "a person's work" is an ambiguous phrase,[102] "a person's work" is surely encompassed by Title IX's broad scope, which covers any federally

performance' may satisfy the *Tinker* standard. . . ." *Id.* at 320 n.22 (quoting Saxe v. State Coll. Area Sch. Dist, 240 F.3d 200, 217 (3d Cir. 2001)).

95. *Id.* at 319.

96. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650-51 (1999) ("[Title IX] makes clear that . . . students must not be denied access to educational benefits and opportunities on the basis of gender."). *See supra* note 49.

97. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2000). *See infra* notes 100-103 and accompanying text. The statement also squarely conflicts with the EEOC's Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2008), which provide that "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

98. *DeJohn*, 537 F.3d at 320.

99. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508, 513 (1969) ("There is here no evidence whatever of . . . collision with the rights of other students to be secure and to be let alone. . . . [T]his case does not concern speech or action that intrudes upon . . . the rights of other students. . . . But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—disrupts classwork or involves substantial disorder *or invasion of the rights of others* is, of course, not immunized by the constitutional guarantee of freedom of speech." (emphasis added)).

100. *See* 20 U.S.C. § 1681(a) (2000); *see generally Davis*, 526 U.S. 629.

101. *See DeJohn*, 537 F.3d at 316.

102. *See id.* at 319. "Work" could refer to the work of an employee, a student's work-study position, or even a student's coursework or research.

funded "education program or activity."[103] The *DeJohn* court's failure to address this conflict leaves the issue ripe for argument in a future case.[104]

4. Speech that Creates a Hostile or Offensive Environment

Additionally, the court objected to the phrase "hostile or offensive environment."[105] The court reasoned that such a broad phrase "could encompass any speech that might simply be offensive to a listener,"[106] but provided little further explanation for striking down this phrase. The court did acknowledge elsewhere in the opinion that, according to the Supreme Court, a student can sue a school for "hostile environment" harassment under Title IX.[107] Presumably, then, the Third Circuit would permit a prohibition of speech that creates a "hostile environment" but not a prohibition of speech that creates a "hostile *or offensive* environment."

While the court did not attempt to define either hostile or offensive, one can infer from the Supreme Court's employment law jurisprudence that "hostile environment" is a higher standard than "offensive environment."[108] Therefore, a policy that prohibits only "hostile

103. 20 U.S.C. § 1681(a) (2000). "Program or activity" is defined as "all the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education." 20 U.S.C. § 1687 (2000).

104. Of course, a court could find that Title IX itself unconstitutionally restricts free speech. The conflict might not simply be between a statute and the First Amendment, however. Even without Title IX, public schools and universities would be prohibited from discriminating against students on the basis of sex by the Equal Protection Clause of the Fourteenth Amendment and subject to liability for discrimination under Section 1983. *See* U.S. CONST. amend. XIV, § 1; 42 U.S.C. § 1983 (2000); Nabozny v. Podlesny, 92 F.3d 446, 453-58 (7th Cir. 1996) (citing Reed v. Reed, 404 U.S. 71, 76 (1971); Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982)). Furthermore, students have a "right[] . . . to be secure and to be let alone," Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969), and hostile environment sexual harassment may interfere with that fundamental right. *See* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006).

105. *DeJohn*, 537 F.3d at 320. The full clause prohibited speech that had the "purpose or effect of creating an *intimidating*, hostile, or offensive environment." *Id.* at 316 (emphasis added). The court's omission of the word "intimidating" from its discussion of the phrase suggests that universities can constitutionally prohibit speech that creates an intimidating environment. Intimidating speech likely falls into the category of verbal acts, which may not be entitled to First Amendment protection. *See generally* John F. Wirenius, *Actions as Words, Words as Actions: Sexual Harassment Law, The First Amendment and Verbal Acts*, 28 WHITTIER L. REV. 905 (2007) (noting that the Supreme Court has long considered verbal acts to be outside the scope of the First Amendment and proposing that verbal acts doctrine could resolve the tension between the First Amendment and workplace sexual harassment law).

106. *DeJohn*, 537 F.3d at 320.

107. *Id.* at 316 n.14.

108. In the context of Title VII of the Civil Rights Act of 1964, the Supreme Court has held that a "hostile or abusive work environment" does create an actionable claim for

environment" harassment would perhaps proscribe less speech than a policy that prohibits "hostile or offensive environment" harassment. This substitution of phrases would narrow many university sexual harassment policies somewhat, but it would not significantly interfere with the goal of ensuring that students are not subjected to a hostile living and learning environment.

5. Unwelcome Sexual Advances or Requests for Sexual Favors

One provision of Temple's sexual harassment policy that the *DeJohn* court did not discuss was a clause prohibiting "an unwelcome sexual advance or request for sexual favors."[109] The court quoted this clause as part of "the relevant portion" of the policy but made no mention of the clause in its analysis.[110] Presumably, then, a university can still constitutionally prohibit a student from making unwelcome sexual advances and requests for sexual favors.[111]

6. Fighting Words

Finally, the *DeJohn* court summarily stated that "[c]ertainly speech amounting to fighting words[112] would not be protected. . . ."[113] Despite the court's optimism, commentators have noted that today, the fighting

discrimination. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986). However, the Court has also said that "'mere utterance of an . . . epithet which engenders offensive feelings in an employee' does not sufficiently affect the conditions of employment to implicate Title VII." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (quoting Meritor Sav. Bank, 477 U.S. at 67). Title VII prohibits workplace discrimination "with respect to [an employee's] compensation, terms, conditions, or privileges of employment" and makes it unlawful for an employer to "adversely affect [an employee's] status as an employee" because of the employee's sex. 42 U.S.C. § 2000e-2(a) (2000). Perhaps the *DeJohn* court implicitly relied on the Supreme Court's Title VII usage of the terms "hostile" and "offensive." A number of courts have explicitly relied on Title VII precedents in analyzing Title IX. *See infra* notes 128-130 and accompanying text.

109. *DeJohn*, 537 F.3d at 316.

110. *See id.*

111. The court likely did not address this clause because it considered such actions to be clearly conduct rather than speech. The court said in *Saxe* that "non-expressive, physically harassing conduct is entirely outside the ambit of the free speech clause." Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 206 (3d Cir. 2001). For a discussion of the verbal acts doctrine and how it may apply to workplace harassment policies, *see generally* Wirenius, *supra* note 105.

112. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (stating that certain classes of speech, including "fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace," are not protected by the First Amendment).

113. *DeJohn*, 537 F.3d at 320 (citing *Chaplinsky*, 315 U.S. 568).

words doctrine is at best very narrow.[114] Therefore, the fighting words doctrine will provide little assistance to universities attempting to prevent and address sexual harassment.

B. Open Questions: What DeJohn *Did Not Address*

While the *DeJohn* court provided some helpful guidance for universities seeking to create constitutional harassment policies, the court failed to address several important issues that affect the creation and application of such policies. First, the *DeJohn* court did not discuss whether the First Amendment applies differently to words spoken in various physical and verbal contexts. Part III.B.1 argues that university sexual harassment policies should treat harmful sex-based speech differently according to the physical and verbal context in which the speaker conveys the words. Second, the *DeJohn* court only discussed the First Amendment standards for restrictions of student speech. Part III.B.2 explains that different federal laws and constitutional standards govern a university's treatment of its several major constituencies. Because the court did not attempt to reconcile students' First Amendment rights with a university's other obligations under Federal Law, *DeJohn* exacerbated an existing double standard for the treatment of students and employees in academia. Third, the *DeJohn* court assumed without discussion that Temple University is a state actor and is therefore bound by the First Amendment. Part III.B.3 briefly discusses the First Amendment's state actor requirement and concludes that private colleges and universities are not legally required to comply with *DeJohn.* However, private universities should consider modifying their sexual harassment policies to ensure free expression.

1. The Importance of Context

The sexual harassment policy at issue in *DeJohn* did not expressly mention the context in which words are spoken;[115] accordingly, the court did not address the importance of context to restrictions on harassing

114. *See* Burton Caine, *The Trouble with "Fighting Words":* Chaplinsky v. New Hampshire *is a Threat to First Amendment Values and Should Be Overruled,* 88 MARQ. L. REV. 441, 536 (2004) ("[T]he United States Supreme Court has never upheld a conviction for fighting words in the sixty-two years since Chaplinsky[] and has protected speech vastly more offensive than the mild protest in Chaplinsky. . . ."); *see also id.* at 553 ("Out of thirty-nine federal cases [decided between April 1996 and September 2001 concerning the fighting words doctrine], not one person was criminally convicted of a speech-related offense."); Press, *supra* note 2, at 1007-08 ("In many of the instances involving fighting words, modern courts simply strike down the ordinances as unconstitutionally vague or overbroad.").

115. *See DeJohn*, 537 F.3d at 316.

speech. However, distinguishing varying contexts could play a crucial role in reconciling the First Amendment, Title IX, and sexual harassment policies. Noting that colleges are "marketplace[s] of ideas,"[116] the *DeJohn* court declared that "[d]iscussion by adult students in a college classroom should not be restricted."[117] Yet colleges are not merely places where classes are held; for many students, a college campus is a school, workplace, recreation facility, and home all in one. The protections of the First Amendment should be strongest in the classroom, in the context of intellectual debate.[118] The First Amendment should not, however, protect harassing statements that are made in a student's on-campus home.[119] One commentator argues that dormitories should be treated as nonpublic fora, where even content-based restrictions on student speech are permissible.[120] While the *DeJohn* opinion seemingly requires very narrowly tailored campus-wide sexual harassment policies, universities can likely impose stricter policies in residence halls and other nonpublic spaces.

In addition to distinguishing various physical contexts, sexual harassment policies should attempt to distinguish among verbal contexts as well. The *DeJohn* court was concerned that Temple University's harassment policy could prohibit "'core' political and religious speech, such as gender politics and sexual morality."[121] The Supreme Court readily distinguished the pure political expression in *Tinker* from the nonpolitical, nonreligious, lewd speech in *Fraser*.[122] In public elementary and secondary schools, the former could not be restricted,[123]

116. *Id*. at 315 (quoting Healy v. James, 408 U.S. 169, 180 (1972)).

117. *Id*. at 315.

118. *But see* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512-13 (1969) ("[T]he principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. . . . When [a student] is in the cafeteria, or on the playing field, or on the campus during authorized hours, he may express his opinions . . . if he does so without 'materially and substantially interfer[ing] with the . . . operation of the school' and without colliding with the rights of others." (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

119. In Frisby v. Schultz, 487 U.S. 474, 488 (1988), the Court held that a content-neutral municipal ban on picketing outside of a residence did not unconstitutionally restrict citizens' freedom of speech. The Court concluded that the government had a substantial interest in protecting the sanctity of a person's home. *Id.* at 484 (citing Carey v. Brown, 447 U.S. 455, 471 (1980)). The Court went on to say that "[t]here simply is no right to force speech into the home of an unwilling listener." *Id.* at 485.

120. *See* Press, *supra* note 2, at 1021-28. For more about public forum analysis, *see International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677-80 (1992) (explaining, inter alia, that when government property is not a traditional public forum and has not been opened to the public for the purpose of free expression, any restriction of speech on that property must only be a reasonable restriction).

121. *DeJohn*, 537 F.3d at 317.

122. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

123. *See generally Tinker*, 393 U.S. 503.

but the latter could be prohibited.[124] Therefore, universities may be able to avoid overbreadth challenges by explicitly exempting speech about political and religious views from their policies' definitions of sexual harassment.[125]

2. A Double Standard: Students Versus Employees

Colleges and universities are unique in that members of their communities often fill many roles. For instance, a student can also be an employee and a tenant. The *DeJohn* court did not acknowledge these overlapping roles. In fact, the court did not differentiate at all among students, employees, and faculty members.

Fashioning a sexual harassment policy that will apply to all sectors of the campus community is a challenging task. First, discrimination against employees is primarily governed by Title VII,[126] while discrimination against students is governed by Title IX.[127] While these laws are similar in some respects, they are not the same.[128] Many courts have employed Title VII precedents to analyze Title IX issues,[129] but other courts have rejected this approach.[130] The *DeJohn* court added to the double standard by objecting to Temple's prohibition of "hostile or offensive environment" harassment,[131] a phrase that the Equal Employment Opportunity Commission ("EEOC") uses in its definition of sexual harassment for purposes of Title VII.[132]

124. *See generally Fraser*, 478 U.S. 675.

125. *But see supra* text accompanying notes 65-66.

126. *See generally* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2000).

127. *See generally* Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2000).

128. Both acts prohibit sex-based discrimination, but the specific words used in the two acts are not identical. *Compare* 42 U.S.C. § 2000e-2(a) (2000) *with* 20 U.S.C. § 1681(a) (2000). The Supreme Court has indicated that Title VII was intended to compensate victims of employment discrimination, while Title IX was designed to prevent discrimination. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998).

129. *See*, *e.g.*, Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007); Nelson v. Christian Bros. Univ., 226 F. App'x 448 (6th Cir. 2007).

130. *See* Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736 (9th Cir. 2000) (citing *Gebser*, 524 U.S. at284-86).

131. *See supra* text accompanying notes 105-108.

132. "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2008).

Second, a public university can exercise greater control over its employees' speech than over speech by students.[133] The Supreme Court has said that a public employee's speech is only entitled to First Amendment protection if the employee "spoke as a citizen on a matter of public concern."[134] Even then, a public employer may impose "speech restrictions that are necessary for [the] employer[] to operate efficiently and effectively."[135]

The employee-student distinction becomes even more complicated when considering the unique status of professors. The Supreme Court has indicated the possibility that "expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."[136]

Because of the varied standards for both harassment liability and First Amendment protection, public universities may need to create separate harassment policies for different sectors of their communities. Creating, explaining, and enforcing multiple sexual harassment policies will impose an additional burden on universities that previously relied on one policy for the entire campus community.

3. The State Actor Requirement: Public Versus Private Universities

Finally, it is worth noting that the First Amendment, applied to the states through the Fourteenth Amendment, prohibits only *state actors* from abridging the freedom of speech.[137] Therefore, the constraints of *DeJohn* and the *Tinker* line of cases do not apply to private colleges and universities.[138] However, private colleges and universities may invite criticism if they choose not to revise their sexual harassment policies to

133. *See generally* Garcetti v. Ceballos, 547 U.S. 410 (2006).

134. *Id.* at 418 (citing Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, 391 U.S. 563, 568 (1968); Connick v. Myers, 461 U.S. 138, 147 (1983)).

135. *Id.* at 419.

136. *Id.* at 425.

137. *See* U.S. CONST. amend. I; U.S. CONST. amend. XIV, § 1; Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

138. Private colleges and universities are not state actors based on the Supreme Court's analysis of similar entities. *See generally* Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (holding that Plaintiff's claim under 42 U.S.C. § 1983 for violation of her First Amendment rights could not stand because Defendant private high school was not a state actor despite the fact that it depended on public funds, was regulated by the State, and performed a public function); *see also* Blackburn v. Fisk Univ., 443 F.2d 121, 122-24 (6th Cir. 1971). The *DeJohn* court did not address the public/private distinction, likely because Temple University regularly refers to itself as a public university and thus did not question its status as a state actor. *See* Temple University, About Temple, http://www.temple.edu/about/index.htm (2008).

comply with First Amendment case law.[139] Private colleges will have to decide, based on their social climates and histories of harassment, how broad or narrow their sexual harassment policies should be. In the interest of promoting academic freedom, free expression, and discourse, private colleges may be wise to make their policies no broader than necessary to ensure a healthy learning environment.

IV. A POSSIBLE POST-*DEJOHN* UNIVERSITY SEXUAL HARASSMENT POLICY

A. Introduction

The following policy is primarily designed to address harassing speech by students in the wake of *DeJohn*. While it prohibits harassment by employees as well, this policy might not be sufficient to comply with the requirements of Title VII.[140] Universities wishing to exercise greater control over harassing speech by employees will need to create a separate policy that applies only to employees.[141] This sample policy uses the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex as a starting point.[142] Although the EEOC is charged with enforcing Title VII rather than Title IX, the policy at issue in *DeJohn* closely mirrored the EEOC Guidelines, and many other universities have also used the Guidelines to construct their policies.[143] In addition, some language in the sample policy has been borrowed from the definition of sexual harassment used by the Department of Education, Office for Civil Rights.[144]

B. Sample Sexual Harassment Policy

All members of the campus community are prohibited from engaging in sexual harassment. Sexual harassment includes both quid pro quo and hostile environment harassment.

139. Indeed, the *DeJohn* case prompted a fervent new campaign by the Foundation for Individual Rights in Education ("FIRE") against all campus speech codes. *See generally* Press Release, FIRE, After Free Speech Victory in Federal Court, FIRE Sends Warning to Public Universities Violating the First Amendment (September 30, 2008), http://www.thefire.org/index.php/article/9744.html.

140. *See supra* notes 126-132 and accompanying text.

141. *See supra* notes 133-136 and accompanying text.

142. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2008).

143. *See* Earle & Cava, *supra* note 2, at 306.

144. U.S. Department of Education, Office for Civil Rights, Frequently Asked Questions about Sexual Harassment, http://www.ed.gov/about/offices/list/ocr/qa-sexharass.html (2008).

Quid pro quo sexual harassment occurs when a person makes "[u]nwelcome sexual advances, requests for sexual favors, [or] other verbal or physical conduct of a sexual nature"[145] and:

(1) "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment";[146]

(2) "submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual";[147]

(3) such conduct "causes a student to believe that he or she must submit to unwelcome sexual conduct in order to participate in a school program or activity";[148] or

(4) the person is "an employee [and] causes a student to believe that the employee will make an educational decision based on whether or not the student submits to unwelcome sexual conduct."[149]

Hostile environment sexual harassment occurs when a person makes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature"[150] or "on the basis of [the listener's] sex"[151] and such conduct is so severe, persistent, or pervasive[152] that it substantially "interfer[es] with an individual's [educational or] work performance or [objectively and subjectively][153] creat[es] an intimidating, hostile,"[154] or "abusive"[155] environment.

An expression of one's religious, "literary, artistic, political, or scientific"[156] views regarding sex or gender, including topics such as sexual morality or gender roles, does not, on its own, constitute sexual harassment and is not prohibited by this policy.[157]

145. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2008).
146. *Id.*
147. *Id.*
148. U.S. Department of Education, Office for Civil Rights, Frequently Asked Questions about Sexual Harassment, http://www.ed.gov/about/offices/list/ocr/qa-sexharass.html (2008).
149. *Id.*
150. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2008).
151. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2000).
152. *See supra* notes 50, 90, and accompanying text.
153. *See supra* text accompanying note 91.
154. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2008).
155. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986). *See supra* note 108.
156. Miller v. California, 413 U.S. 15, 34 (1973).
157. *See supra* text accompanying notes 121-125.

C. Additional Tools to Prevent and Address Harmful Speech on University Campuses

The preceding Sample Policy attempts to address all of the *DeJohn* court's concerns. It is a narrowly drawn policy, and some universities may worry that it will not be adequate to prevent and penalize sexual harassment. Universities should consider adopting other complementary policies that can supplement the scope of the above sexual harassment policy.

For instance, a policy prohibiting a student from engaging in unwelcome, offensive speech or conduct in another student's on-campus residence can protect the sanctity of each student's on-campus home.[158] In addition, universities may be able to constitutionally prohibit speech which is likely to substantially disrupt the operation and educational mission of the university.[159] Universities may also be able to prohibit lewd or indecent speech,[160] particularly if such speech serves no legitimate religious, political, artistic, scientific, or literary purpose.[161] By combining a narrowly tailored sexual harassment policy with additional policies that restrict particular kinds of verbal conduct in particular situations, universities can likely maintain a relatively civil living, learning, and working environment while staying within the boundaries of the First Amendment.

V. CONCLUSION

Although *DeJohn v. Temple University* is binding precedent only for public universities in the Third Circuit, its effects will surely be felt nationwide. Together with *Dambrot v. Central Michigan University*, the *DeJohn* decision opened the door for students at other public universities to challenge their schools' sexual harassment policies as overbroad and unconstitutional. The conflict between students' First Amendment rights and university harassment policies will likely continue to gain attention due to the efforts of free speech advocacy groups.

While the *DeJohn* opinion may initially seem to signal the demise of university harassment policies as applied to students, a careful reading reveals that effective, constitutionally-permissible policies are still possible. Although many public universities must now modify their sexual harassment policies to comply with *DeJohn*, universities should not eliminate their policies altogether. Carefully drafted sexual

158. *See supra* notes 119-120 and accompanying text.
159. *See supra* text accompanying notes 15, 55-58.
160. *See supra* text accompanying notes 17-22.
161. *See* Miller v. California, 413 U.S. 15, 34, 36-37 (1973).

harassment policies play an important role in establishing and maintaining equilibrium among freedom of speech, equal protection, freedom from sex-based discrimination, and the right to be left alone. To fulfill their educational missions, universities must continue to search for ways to balance the sometimes competing rights of their students.

Ideally, universities are places where ideas are developed, positions are challenged, and intellectual fires are sparked. If the best kind of learning and exchange is to occur, students must be free to convey their thoughts openly. Sexual harassment prevents students from being fully able to sit at the table and participate in the discussion. A truly free exchange of ideas cannot occur coextensively with debilitating sexual harassment. Resolving this paradox in a way that protects the rights of all students will be a great but necessary challenge to universities—and to courts.