Speech First, Equality Last

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Universities have been put in an impossible situation. They are liable under nondiscrimination laws if they allow hostile speech to interfere with someone's education, but they are increasingly said to be liable under the Free Speech Clause if they do anything to stop speech before that point. Put simply, universities are liable for acting until the moment when they are liable for not having acted.

This conundrum—what this Article calls the Double Liability Dilemma—is the result of remarkably successful litigation brought in courts across the country by a new, conservative free-speech organization called Speech First. Three courts of appeals, with a fourth perhaps soon to come, have recently enjoined universities from enforcing their harassment policies. These schools now find themselves unable to act to counteract hostile speech based on race or sex before it is too late.

To see the Double Liability Dilemma is to see that these cases simply cannot be rightly decided—and to wonder how courts or commentators might ever think otherwise. Providing the first close look at litigation that is reshaping speech and harassment regulation throughout American higher education, this Article highlights the procedural mechanisms Speech First has used to push courts into taking what critical race theorists have long referred to as the "perpetrator perspective." By contrast, this Article shows how a broader perspective, taking both sides of the dilemma into account, forces us to rethink the meaning and reach of the First Amendment on college and university campuses.

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INTRODUCTION

If universities allow racially or sexually hostile environments to arise on campus, they violate federal nondiscrimination law.[1] But if public universities work to stop hostile speech before things get that bad, they may find themselves liable under the First Amendment.

This creates a dilemma, since hostile environments don't always arise at once. Sometimes the hostility builds over time, as racially or sexually offensive comments pile on, whether from one person or many. Only in the aggregate do a speaker's words, or the words of multiple speakers, become hostile enough to affect someone's access to education. Thus the dilemma: Universities are liable under nondiscrimination laws if they *fail* to stop hostile speech before it interferes with someone's education, but they are said to be liable under the Free Speech Clause if they do anything to stop speech *before* that point. Universities, in other words, are liable for acting until the moment when they are liable for not having acted.

This cannot be the law. And yet, shockingly successful litigation brought by Speech First, a recently formed conservative campus speech organization, has made it so in several circuits: the Fifth, Sixth, and Eleventh so far, with the Fourth and Tenth Circuits potentially next. Preliminary injunctions preventing universities from enforcing their harassment policies have turned into settlement agreements, and even universities not parties to the suits have reshaped their policies with an eye to litigation, shifting the balance between protection of speech and protection from harassment on campuses across the country.

This Article asks how universities have ended up in such an untenable position, stuck on the horns of what I'll refer to as the Double Liability Dilemma: liable if they regulate or even respond to hostile speech on campus, and liable if they don't. The answer is at once straightforward, hugely consequential, and somewhat puzzling. Law and policies are being shaped with an eye on only one side of the dilemma. Advocacy organizations focused solely on speech have pushed courts into adopting what critical race theorists have long called the "perpetrator perspective."[2] As a result, recent court

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1. Title IV, Civil Rights Act of 1964, 42 U.S.C. § 2000d; Title IX, Education Amendments of 1972, 20 U.S.C. §§ 1681–1688; Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794; U.S. CONST. amend. XIV, § 1 (for public universities).

2. *See, e.g.*, Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); *see also* Katharine T. Bartlett & Jean O'Barr, *The Chilly Climate on College Campuses: An Expansion of the Hate Speech Debate*, 1990 DUKE L.J. 574 (1990) (invoking the perpetrator perspective concept in the context of campus speech).

opinions, and public discourse surrounding them, have increasingly presented the collision between speech and equality in higher education solely from the perspective of the speaker, largely ignoring the affected audience.[3] This Article is the first to trace the specific procedural mechanisms that have allowed this to happen. It does so by looking closely at the recent *Speech First* Trilogy—cases brought against the University of Texas in the Fifth Circuit, the University of Michigan in the Sixth Circuit, and the University of Central Florida in the Eleventh Circuit.[4]

The *Speech First* opinions are doctrinally troubling. But this Article shows them to be something yet worse. The opinions are flawed not just in their reasoning, but in the very *perspective* from which they reason. By taking the perpetrator perspective, viewing liability from just one side, and ignoring the equality prong of the Double Liability Dilemma, courts are putting universities in a position which is not just undesirable, but untenable.

Part I of this Article describes the Double Liability Dilemma, explaining the contradictory demands schools face when they try to prevent hostile educational environments from arising while respecting freedom of speech on campus. Part I shows how a liability floor regarding discrimination has been turned into a free speech ceiling. The lack of crawl space between the two is what puts universities in a bind. And, distressingly, many advocates, and even the Department of Education, have chosen simply to ignore the problems that arise when conflicting legal demands abut each other in this way.

Part II shows how widely and rapidly courts have come to do the same thing: ignore the Double Liability Dilemma and address campus speech controversies solely from the side of the speakers. For decades, critical race theorists have deployed the concept of the "perpetrator perspective" in diagnosing the failures of American antidiscrimination law.[5] The idea, described more fully below, is that antidiscrimination law focuses on the culpability of individual bad actors instead of the experience of groups that have long been discrimination's victims.[6] But seldom has this asymmetry been made as explicit as it has been in the *Speech First* cases. Part II of this Article traces the specific procedural mechanisms that have brought this about. A close reading of these cases highlights not just their doctrinal flaws but the resulting narrowness of their perspective. To break out of that

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3. *See infra* Subsection II.C.2.

4. Speech First, Inc. v. Fenves, 979 F.3d 319 (5th Cir. 2020); Speech First, Inc. v. Schlissel, 939 F.3d 756 (6th Cir. 2019); Speech First, Inc. v. Cartwright, 32 F.4th 1110 (11th Cir. 2022).

5. *See* Freeman, *supra* note 2; Bartlett & O'Barr, *supra* note 2.

6. *See infra* notes 197–199 and accompanying text.

speakers-only perspective—to see the contradictory demands universities now face in trying to protect speakers' *and* hearers' rights—is to see that these opinions simply *cannot* be right. Speech cannot be protected to the sweeping extent courts have recently held it to be—not if equal access to education based on race and gender is still to be protected as well.

Part III, therefore, looks at what follows from acknowledging *both* sides of the Double Liability Dilemma. If putting speech first has meant considering equality last (if at all), we might instead want to consider what universities would or should be allowed to do were they able to consider both values at once. Part III charts some of the potential ways forward.

I. THE DOUBLE LIABILITY DILEMMA

A. Seeing the Dilemma

1. Equality Law

Federal law prohibits discrimination on a variety of grounds in programs that get financial assistance from the federal government. Title VI of the 1964 Civil Rights Act bars discrimination based on race, color, and national origin;[7] the Rehabilitation Act of 1973 protects people with disabilities;[8] and Title IX of the Education Amendments of 1972 protects against discrimination "on the basis of sex" in federally funded educational programs and activities.[9] (Regulations recently proposed by the Biden administration would read "sex" in Title IX to include sexual orientation and gender identity as well as pregnancy and sex stereotypes.[10]) At public colleges and universities, the Equal Protection Clause of the Fourteenth Amendment offers

7. Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d.

8. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794(a).

9. Title IX, Education Amendments of 1972, 20 U.S.C. §§ 1681–88 ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.").

10. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

protections, not tied to federal funding, that partially overlap those enshrined in statute.[11]

Especially close attention is being paid to issues of gender discrimination in higher education at the present moment, as Title IX celebrates its fiftieth anniversary and has recently become the subject of over 700 pages of proposed rulemaking.[12] The Biden administration's rules would themselves amend a 500-page regulation promulgated under the Trump administration just three years ago.[13] Given Title IX's recent prominence, it may make sense in what follows to talk about the equality prong of the Double Liability Dilemma mainly through the lens of sex discrimination in educational programs that receive federal funding. But to be clear, claims under the various federal antidiscrimination statutes have often been treated in parallel: unsettled questions in one area often borrow answers previously established in another. For that reason, nearly everything that follows about the collision between free speech and *gender* equality law should be read to apply similarly to discrimination based on race, color, national origin, disability, or religion. Talk of gender in the pages that follow can be read more or less as a stand-in for all the categories federal antidiscrimination law protects.

Title IX dictates that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[14] The explicit penalty for non-compliance

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11. *See, e.g.*, Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 256–58 (2009) (describing, for example, how Title IX reaches more schools but does not allow for suit against individuals at those schools, as the Equal Protection Clause does at public institutions).

12. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106); *see* Dustin Jones, *Biden's Title IX Reforms Would Roll Back Trump-Era Rules, Expand Victim Protections*, NPR (June 23, 2022, 2:40 PM), https://www.npr.org/2022/06/23/1107045291/title-ix-9-biden-expand-victim-protections-discrimination [https://perma.cc/BLQ2-Q5HX].

13. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106). Lengthy as these regulations are, Mica Pollock argues that the specificity of the rules interpreting Title IX, while sometimes mocked as "legalistic micromanagement" of schools, actually makes it easier to pursue what she calls "everyday justice" for female students. MICA POLLOCK, BECAUSE OF RACE: HOW AMERICANS DEBATE HARM AND OPPORTUNITY IN OUR SCHOOLS 141–42 (2008). She contrasts this with the less extensive rulemaking surrounding Title VI, which protects against race discrimination. *Id.* In an analysis that resonates with the aggregate-harm point at the center of this Article, Pollock claims that Title IX regulations, unlike those interpreting Title VI's race protections, "break down 'sex discrimination' into many of its component parts and force some concrete analysis of the everyday acts that can add up to an inequitable experience for girls." *Id.* at 142.

14. 20 U.S.C. § 1681(a).

is withdrawal of federal funding.[15] This is no small stick, as the federal government has provided as much as $149 billion to colleges and universities in recent years.[16]

In addition, since 1979, the Supreme Court has recognized in Title IX, as in Title VI, an implied private right of action,[17] meaning that victims of sex discrimination at federally funded colleges and universities can sue their school directly for injunctive relief and damages.[18] The substantive standard that triggers legal liabilities in these private suits plays an important role in the story to come.

Soon after private suits were recognized under Title IX, the Equal Employment Opportunity Commission ("EEOC") interpreted Title VII of the Civil Rights Act, which prohibits workplace discrimination on grounds including sex, to prohibit sexual harassment, including so-called hostile environment claims.[19] In 1986, the Supreme Court endorsed these claims in *Meritor Savings Bank v. Vinson*, holding that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment,"[20] so long as the harassment is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[21] The harassment giving rise to a hostile environment can consist of non-verbal conduct, speech, or a mix of both.

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15. *Id*. § 1682.

16. Of the $149 billion the federal government provided in 2018, 65% was in student aid, 27% in grants, and 8% in contracts. *What Do Universities Do with the Billions They Receive from the Government*?, USA FACTS (Nov. 3, 2021, 2:58 PM), https://usafacts.org/articles/what-do-universities-do-with-the-billions-they-receive-from-the-government/ [https://perma.cc/B96B-XWWG]. These funds were provided to over 3,000 higher ed institutions. *See Explore the Federal Interest in Your Alma Mater*, DATA LAB, https://datalab.usaspending.gov/colleges-and-universities/ [https://perma.cc/EM9R-V5ZS].

17. Cannon v. Univ. of Chi., 441 U.S. 677, 710–16 (1979).

18. In its 2021 Term, the Supreme Court limited damages under statutes like Title VI, Title IX, and the Rehabilitation Act, passed under the Spending Clause: After *Cummings v. Premier Rehab Keller, P.L.L.C.*, emotional damages, as opposed to compensatory damages, are no longer available. 142 S. Ct. 1562, 1576 (2022).

19. Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, 45 Fed. Reg. 74676–77 (Nov. 10, 1980) (to be codified at 29 C.F.R. pt. 1604) ("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.").

20. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986).

21. *Id.* at 67 (alteration in original) (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

In a typical example of cross-statutory influence, hostile *workplace* claims under Title VII eventually became a model for hostile *educational* environment claims under Title IX—though the translation was not exact. The Supreme Court first decided in 1998 that teacher-student harassment could give rise to monetary liability against a school under Title IX.[22] Then, in *Davis v. Monroe County Board of Education* in 1999, the Court held that harassment of a student by fellow students could trigger liability for schools as well. But it replaced the "or" of the Title VII standard with an "and." As the Court summarized its holding in *Davis*:

> [F]unding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.[23]

In sum: if a university knowingly fails to stop hostile words or actions which are "severe, pervasive, and objectively offensive" enough to deprive educational opportunities to someone because of their gender, the university can be held liable in a suit by the affected students and could stand to lose their federal funding as well.

2. Free Speech Law

But legal danger looms on another side, too. Public universities are subject to the constraints of the First Amendment, which prevents state actors from abridging speech.[24] In California, the Leonard Law requires even private schools (aside from religious colleges) to treat students as if the First Amendment applied.[25] And elsewhere, many private colleges and universities voluntarily commit themselves to First Amendment constraints, including through contractual obligations such as a student handbook or code of conduct.[26]

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22. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).

23. Davis v. Monroe Cnty. Bd. of Educ.*,* 526 U.S. 629, 650 (1999) (emphasis added).

24. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

25. *See* CAL. EDUC. CODE § 94367 (2022). The Leonard Law actually says that private schools shall not discipline students for speech that would be protected outside the campus, *see id.*, thereby demolishing the few distinctions between off- and on-campus expression that even ordinary First Amendment doctrine recognizes.

26. *State of the Law: Speech Codes*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, https://www.thefire.org/research-learn/state-law-speech-codes [https://perma.cc/PW92-4L86].

The First Amendment and related free speech protections give students and others within the university community the right to express themselves without fear of official limitation or sanction. To be sure, the extent of these expressive rights varies across the importantly different spaces that university campuses contain. To simplify a complicated doctrinal story, some spaces on campus (*e.g.*, the Quad) are treated much like the parks, streets, and sidewalks of the regular world, where the greatest latitude for expression must be given no matter how inappropriate or offensive, hateful or inaccurate it might be. Other spaces on campus, most notably the classroom, are subject to different rules: professors call on students (compelling speech), force them to stay on topic (content discrimination), and judge the truth of students' exam answers (viewpoint discrimination), all without violating the Constitution. School sponsored spaces like bulletin boards and school-funded student groups come with rules of their own: content or speaker limits can be imposed if they are relevant to the funding program—*e.g.*, a bulletin board can be limited to departmental announcements or student postings—but viewpoint discrimination within those limits is not allowed.[27]

As before, the precise doctrinal details are not essential to the story here because the university harassment policies that have recently been challenged don't tend to differentiate in such a fine-grained way among spaces on campus.[28] For now then, it is possible to put aside the differences between the classroom, office, dorm, or Quad and treat the whole university as a something like a public forum, where First Amendment law is *most* suspicious of any attempts by state actors to limit, judge, favor, or punish speech.[29] Once again, for simplicity's sake in setting up the Double Liability Dilemma, not much will be lost in treating all of campus, at least for now, as "peculiarly the 'marketplace of ideas,'" where the First Amendment protects "that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'"[30]

When universities do not live up to this commitment, those whose speech has been restricted, punished, or even just chilled by *fear* of punishment can sue public universities or their employees under the First Amendment.[31]

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27. *See, e.g.*, Rosenberger v. Univ. of Va., 515 U.S. 819, 830–31 (1995).

28. *See infra* Part Error! Reference source not found..

29. David L. Hudson Jr., *Public Forum Doctrine*, THE FIRST AMEND. ENCYC. (Jan. 8, 2020), https://www.mtsu.edu/first-amendment/article/824/public-forum-doctrine [https://perma.cc/EKL8-VAK6].

30. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (alteration in original) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

31. In this case a suit would be brought under 42 U.S.C. § 1983. Belinda Bean, *Right of Action Under Title IX of Educational Amendments Act of 1972 (20 U.S.C.A. §§ 1681 et seq.)*

Different levels of protection apply to different members of the university community. Staff members have the least protection, as they are subject to First Amendment rules that apply to government employees in general: public employees lose protection when speaking in the course of their jobs, if they are speaking on something that is not a matter of public concern, or if the disruption caused by their speech outweighs its value.[32] In some circuits, academic freedom gives professors somewhat greater protection than other employees receive, at least in the context of their teaching and research.[33] But once again we can put these differences aside and, for present purposes, focus on students, assuming once again that in most contexts, general First Amendment rules—meaning the greatest level of protections—apply to them. Limits on student speech generally cannot differentiate on the basis of content or viewpoint, and they can't be vague or overbroad.[34] In the contexts we will be concerned with here, schools cannot limit or punish student speech because it is hateful, harmful, or offensive—at least so long as it does not constitute a true threat, incitement to violence, or, importantly, harassment.[35]

3. The Collision

At the intersection of free speech law and equality law is the problem of speech-based harassment. The idea that harassing speech should be given lesser or no First Amendment protection is longstanding, but also somewhat controversial, at least intermittently so.

As Frederick Schauer memorably observed, "throughout the 1980s, sexual harassment and freedom of speech were treated like psoriasis and the Fifth Amendment, each of independent importance but not in any apparent way related to each other."[36] About three decades ago, things changed, and the question of whether hostile environment claims were compatible with the First Amendment became one of the hottest topics in the business. From

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Against School or School District for Sexual Harassment of Student by Student's Peer, 141 A.L.R. Fed. 407 (1998).

32. *See* Garcetti v. Ceballos, 547 U.S. 410, 418–20 (2006); Connick v. Myers, 461 U.S. 138, 146–47 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 571–72 (1968).

33. *See* Demers v. Austin, 746 F.3d 402, 412 (9th Cir. 2014); *see also* Brian Soucek, *Diversity Statements*, 55 U.C. DAVIS L. REV. 1989, 2023–27 (2022).

34. *See generally* Vikram David Amar & Alan E. Brownstein, *A Close-up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*, 101 MINN. L. REV. 1943 (2017) (providing a comprehensive overview of the doctrines affecting student and faculty speech).

35. *See id.* at 1944, 1976.

36. Frederick Schauer, *The Speech-ing of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 352 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003).

scholarship[37] to courts[38] and back again,[39] the question was debated, decided, and debated further by seemingly everyone except the U.S. Supreme Court.

In 1993, the Court unanimously decided in *Harris v. Forklift Systems* that sexual harassment claims under Title VII do not require a showing of serious psychological injury.[40] In doing so, the Court said not a word about any potential limits on hostile environment claims under the First Amendment—despite the fact that both parties, the ACLU, and others had all briefed that very question.[41] Referring to the case at the time as the "First Amendment dog that didn't bark," Professor Richard Fallon wrote that after *Harris*, "it is virtually inconceivable that the Supreme Court might hold that the First Amendment forbids the imposition of Title VII liability for a broad category of sexually harassing speech."[42]

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37. *See, e.g.*, J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375 (1990); Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.–C.L. L. REV. 1 (1990); Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171 (1990); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 289 (1991); Thomas C. Grey, *Discriminatory Harassment and Free Speech*, 14 HARV. J.L. & PUB. POL'Y 157 (1991).

38. *See* Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (M.D. Fla. 1991); *see also* Judith Resnik, *Changing the Topic*, 8 L. & LITERATURE 339, 341 (2014) (identifying the First Amendment defense in *Robinson* as a turning point after years in which "Title VII law had accrued with relatively little discussion of the fact that (of course) Title VII affects speech"); United States v. X-Citement Video, Inc., 982 F.2d 1285, 1296 n.7 (9th Cir. 1992) (Kozinski, J., dissenting) (providing several early-1990s cases that discuss speech restrictions and workplace harassment).

39. *See, e.g.*, Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment: Avoiding a Collision*, 37 VILL. L. REV. 757 (1992); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1, 2 (1994) (discussing the problem of sexually harassing speech in the broader context of First Amendment doctrine and theory); Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563 (1995); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992) [hereinafter Volokh, *Freedom of Speech and Workplace Harassment*]; Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461 (1995); Kingsley R. Browne, *Workplace Censorship: A Response to Professor Sangree*, 47 RUTGERS L. REV. 579 (1995); Suzanne Sangree, *A Reply to Professors Volokh and Browne*, 47 RUTGERS L. REV. 595 (1995); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687 (1997); Eugene Volokh, *What Speech Does 'Hostile Work Environment' Harassment Law Restrict?*, 85 GEO. L.J. 627, 629 (1997).

40. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

41. Fallon, Jr., *supra* note 39, at 1, 9–10, 44–45.

42. *Id.* at 10, 56.

The takeaway: hardly anyone disputes that speech satisfying the *Meritor* hostile environment test—harassing speech that is "sufficiently severe or pervasive to . . . create an abusive working environment"[43]—is protected under the First Amendment. Similarly, even the most die-hard campus speech advocates accept restrictions on speech that is "so severe, pervasive, *and* objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school"—the test established in *Davis v. Monroe* for establishing a school's liability for peer-to-peer sexual harassment.[44]

For example, in recent Department of Education hearings on Title IX, Cherise Trump, the Executive Director of Speech First—the organization responsible for the litigation detailed in Part II—argued that the *Davis* standard not only "struck the proper balance between allowing universities to properly regulate sexual harassment under the Title IX and complying with the First Amendment," but that the *Davis* standard is constitutionally required.[45] Any further limits on hostile speech would, she said, "be inconsistent with the First Amendment" and would violate the free speech and academic freedom rights of students and faculty.[46] Similarly, the Foundation for Individual Rights and Expression ("FIRE"), a leading campus speech advocacy group, accepts that "peer harassment is not protected speech"—but *only if* it is defined according to the *Davis* standard.[47] FIRE recently identified 753 university speech codes that regulate speech that doesn't rise to the *Davis* standard and so, according to FIRE, are all unconstitutional.[48] For leading campus speech organizations, then, *Davis* provides the line where constitutionally protected speech suddenly turns to unprotected harassment.

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43. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

44. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999) (emphasis added).

45. *Public Hearing on Title IX*, U.S. DEP'T. OF EDUC. OFF. OF C. R., 898–900 (June 7, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-publichearing-complete.pdf [https://perma.cc/8G75-UXDN] ("The *Davis* standard provides consistency for judicial administrative enforcement and gives schools flexibility and discretion. More importantly, the First Amendment requires it.").

46. *Id.* at 899–901.

47. Mary Griffin, *Hundreds of Overbroad Harassment Policies Severely Endanger Protected Speech*, FIRE (Feb. 21, 2018), https://www.thefire.org/hundreds-of-overbroad-harassment-policies-severely-endanger-protected-speech/ [https://perma.cc/UNA2-CQQS]; *see also Model Code of Student Conduct*, FIRE (Sept. 15, 2020), https://www.thefire.org/sites/default/files/2020/05/28103900/model-code-of-student-conduct.pdf [https://perma.cc/57Z2-3BWR].

48. Griffin, *supra* note 47.

This brings us, at last, to the Double Liability Dilemma. All agree that universities face legal liability if they don't try to stop known sexual harassment—even purely verbal harassment—that is severe, pervasive, and objectively offensive enough to deny someone's educational opportunity.[49] But according to many free speech advocates—and, increasingly, courts—speech that does not rise to the severe, pervasive, and objectively offensive level is constitutionally protected;[50] universities violate the Free Speech Clause if they do anything to stop it. Universities are liable if they allow speech to cross the *Davis* threshold and liable too if they act before that happens.

An initial objection to this framing might be: This is just how thresholds work in law. Legal liabilities arise when a certain test is met. Just as lots of provocative or violent things can be said and remain protected until the moment they reach the level of incitement,[51] so too here: universities must respect students' right to say inflammatory, offensive, or biased things until a hostile environment arises, at which point they have a duty to step in.

This analogy doesn't fully work, however. In the case of incitement, the government doesn't have to wait until the incited violence actually occurs before stepping in. The *Brandenberg* standard allows speech restrictions once lawless action is likely and imminent.[52] Universities, meanwhile, are being told to stand by until the *Davis* standard for a hostile educational environment is actually met. By then, though, students' educational opportunities will, by definition, already have been affected.

Moreover, it is easy to imagine a racially or sexually or otherwise hostile environment arising out of the *collective* acts (including speech acts) of many different people. Perhaps no one individually says anything severe, pervasive, and objectively offensive enough to meet the *Davis* standard on their own. But aggregated, the expression makes a campus environment unbearably hostile. What is a university to do in that case? No individual can be deterred from speaking without risking a First Amendment suit; but by failing to stop

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49. *Davis*, 526 U.S. at 650.

50. *Limits to Free Speech*, FIRE, https://www.thefire.org/research-learn/limits-free-speech [https://perma.cc/7ZL8-X4TU] ("To be considered unlawful student-on-student (or peer) harassment, behavior must be unwelcome; discriminatory on the basis of a protected status, like gender or race; directed at an individual; and 'so severe, pervasive, and objectively offensive' that the victim is 'effectively denied equal access to an institution's resources and opportunities.' . . . [I]solated pure speech or expression is unlikely to constitute harassment on its own.").

51. Brandenberg v. Ohio, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

52. *Id.*

the collective effects of those individuals' speech, universities risk violating federal nondiscrimination law. This is the Double Liability Dilemma in its most intractable form.

The notion that hostile environments might arise through cumulative offenses—perhaps even relatively minor ones, and from different speakers—is hardly a discovery of this Article.[53] If anything, this Article is focused more on explaining how courts or commentators could come to miss or ignore this problem.

That they should do so is especially surprising given that the problem of cumulative discrimination, and its First Amendment implications, was central to the free speech/harassment controversies of the 1990s. It was prominent, for example, within one of the mostly highly publicized incidents of the time: the rise and fall of Stanford University's "speech code."[54]

At Stanford, a racist incident on campus—a blackface caricature of Beethoven placed outside a black student's dorm room after an argument about the composer's ancestry—prompted protests but no disciplinary measures.[55] Stanford's code of conduct, what it calls the "Fundamental Standard," had been interpreted to prohibit only speech that could be criminalized or subjected to tort liability.[56] In response to the controversy, a new policy or "interpretation" of the Fundamental Standard was written by Stanford law professor Thomas Grey and approved in 1990.[57] No student was ever charged under the policy,[58] yet a group of students brought a facial challenge to it on free speech grounds. A Superior Court judge in California found the policy unconstitutional in 1995,[59] and Stanford decided not to appeal.[60]

Stanford's 1990 policy explicitly prohibited one type of speech—what it termed "personal vilification" on the basis of protected grounds—even when the speech in question did not itself count as severe enough to create a hostile environment in violation of Title IX.[61] Professor Grey made clear why this

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53. *See, e.g.*, Thomas C. Grey, *How To Write a Speech Code Without Really Trying: Reflections on the Stanford Experience*, 29 U.C. DAVIS L. REV. 891, 908, 950 (1996).

54. *Id.* at 891.

55. *Id.* at 892–93.

56. *Id.* at 893.

57. *Id.* at 894.

58. *Id.* at 897 n.22.

59. *Id.* at 896; Order on Preliminary Injunction at 19, Corry v. Stanford, No. 740309 (Santa Clara Cnty. Super. Ct. Feb. 27, 1995) [hereinafter Corry v. Stanford Order on Preliminary Injunction].

60. Grey, *supra* note 53, at 896.

61. The relevant policy text said that:

was necessary: allowing such speech would "leave those who face a widespread form of prejudice *unprotected against the harassing effect of cumulated abusive insults from many different individuals*."[62] In Grey's example, "twenty separate students could each" direct a racial or sexual epithet against another student "and nothing could be done to stop any of them. . . . [T]he University," Grey concluded, "would be in breach of federal law and in default of its moral obligations to its students if it let this happen."[63]

The Stanford policy was motivated by the problem of "cumulated abusive insults from many different individuals"—the dynamic that drives the Double Liability Dilemma. In fact, Professor Grey even pointed to the problem of cumulative insult as the reason why discriminatory harassment on the basis of protected identity categories demands different treatment than ordinary, non-identity-based insults:

> Persons with these characteristics thus tend to suffer the special injury of cumulative discrimination: they are subjected to repetitive stigma, insult, and indignity on the basis of a fundamental personal trait. In addition, for most of these groups, a long history closely associates extreme verbal abuse with intimidation by physical violence, so that vilification is experienced as assaultive in the strict

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> Speech or other expression constitutes harassment by personal vilification if it:
>
> a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and
>
> b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and
>
> c) makes use of insulting or "fighting" words or non-verbal symbols.
>
> In the context of discriminatory harassment, insulting or "fighting" words or non-verbal symbols are those "which by their very utterance inflict injury or tend to incite to an immediate breach of the peace," and which are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.

Id. at 948.

62. *Id.* at 908.

63. *Id.* The FAQ that accompanied Stanford's policy also made this point: "[T]he injury of discriminatory denial of educational access through maintenance of a hostile environment can arise from single acts of discrimination on the part of many different individuals. To deal with a form of abuse that is repetitive to its victims, and hence constitutes the continuing injury of harassment to them, it is necessary to prohibit the individual actions that, when added up, amount to institutional discrimination." *Id.* at 950.

> sense. It is the cumulative and socially pervasive discrimination, often linked to violence, that distinguishes the intolerable injury of wounded identity caused by discriminatory harassment from the tolerable, and relatively randomly distributed, hurt of bruised feelings that results from single incidents of ordinary personally motivated name-calling . . . .[64]

Especially notable for the argument to come is the sustained focus here on the way speech of certain kinds "is experienced."[65] But neither this focus nor the larger problem of cumulative discrimination made it into the decision in *Corry v. Stanford*, which struck down Stanford's policy under the First Amendment.[66] Stanford's experiment ended without any answer to how it or other universities should address the problem that prompted the policy in the first place.

If Stanford was trying to solve the Double Liability Dilemma by *expanding* its regulation of speech, Professor Eugene Volokh, at around the same time, was thinking through interventions on the other side, citing the problem of cumulative harassment to justify a *narrowing* of harassment law. Writing in the context of workplace speech, Volokh argued in 1992 that employers "cannot restrict speech that creates a hostile work environment without suppressing other speech as well."[67] In his words:

> [T]he only practical way for an employer to avoid liability based on the sum of all offensive statements is by instituting a policy that will bar each individual statement. An employer cannot say to each employee: 'It is all right for you to make offensive statements, but only so long as the total effect of all your statements and the other employees' statements does not create a hostile environment.'[68]

The lesson Professor Volokh drew from this was that harassment law needed to be redefined. His solution: speech should be prohibited only when the speaker knows it to be offensive, directs it at another employee because of their identity, and thereby creates a hostile work environment.[69]

For present purposes, what's relevant is not the substance of Professor Volokh's proposal—although that will come back in Part III—but to note that the First Amendment problems surrounding cumulative discrimination were

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64. *Id.*

65. *Cf. infra* Section I.B and Part II (discussing the pervasiveness of the perpetrator perspective in more recent campus speech controversies).

66. Corry v. Stanford Order on Preliminary Injunction, *supra* note 59.

67. Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 39, at 1812.

68. *Id.*

69. *Id.* at 1846.

being addressed three decades ago, from prominent figures on (roughly) both sides of the debate. The Double Liability Dilemma was driving leading policy proposals in early 1990s. But neither Stanford's solution nor Volokh's has endured. Still unresolved, the Double Liability Dilemma is now mostly just ignored.

There is one exception in contemporary legal scholarship. In a recent article, Professor Todd Pettys asks whether the First Amendment ever allows schools to intervene to stop student expression that is not, or not yet, severe, pervasive, and objectively offensive enough to trigger Title IX liability.[70] Pettys even goes on to ask what would happen if a second student's hostile speech, when combined with that of the first, pushed things over the edge.[71] "Does each student speaker's constitutional susceptibility to discipline change by virtue of the other's speech?," Pettys wonders.[72]

Pettys argues that schools cannot discipline students for speech that falls below the *Davis* standard. But importantly, he thinks schools can "condemn the statement as antithetical to campus values" or advise the student "about the harms that continued expressions of that sort might inflict."[73] When multiple speakers are involved, Pettys thinks their individual contributions to a collectively hostile environment should be subject to discipline only if students knew that they were likely to create such an environment.[74] One way students might come to know this is through the advising that Pettys would allow universities to engage in even before students' speech reaches the *Davis* threshold. If a student's hostile speech continues after they become aware that their expression is helping create a hostile environment for others, Pettys thinks schools may be justified in sanctioning them even though the student's individual speech isn't responsible for the hostile environment on its own.[75]

Thoughtful and important as Professor Pettys' analysis is, he wrote it before an ever-growing number of courts began to find unconstitutional the very types of student advising that his article advocates.[76] In the wake of the *Speech First* Trilogy described in Part II, policies like these—and perhaps even certain forms of university counterspeech—now appear

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70. Todd E. Pettys, *Hostile Learning Environments, the First Amendment and Public Higher Education*, 54 CONN. L. REV. 1, 37–38 (2022).

71. *Id.* at 38–39.

72. *Id.* at 39.

73. *Id.* at 40.

74. *Id.* at 53–54.

75. *Id.* at 54–55.

76. *See infra* Part II.

unconstitutional in the Fifth, Sixth, and Eleventh circuits.[77] The cases reach this result, however, only by ignoring the Double Liability Dilemma and the problem of cumulative harassment that is at its heart.

B. Ignoring the Dilemma

In the regulatory whiplash of the last few years, both the Trump and Biden Departments of Education have gestured toward the Double Liability Dilemma without doing anything to resolve it. Free speech advocacy organizations, meanwhile, have focused on just one of the Dilemma's conflicting liabilities, demanding First Amendment protection for any speech that falls short of the *Davis* threshold. Increasingly, courts have begun following their lead, forcing universities to do so as well.

In May 2020, the Trump administration published regulations interpreting Title IX. The accompanying commentary noted that colleges and universities differ from workplaces in their dedication to the "free and robust exchange of ideas."[78] As a result, it claimed, the balance between freedom of speech and the protection from sexual harassment should tip more strongly in favor of the former than the latter in the context of higher education.[79] Instead of Title VII's "severe *or* pervasive" test for workplace harassment, the *Davis* standard defining sexual harassment in terms of "unwelcome conduct that is 'severe, pervasive, and objectively offensive'" was said to "ensur[e] that conduct addressed as a Title IX civil rights issue represents serious conduct unprotected by the First Amendment or principles of free speech and academic freedom."[80] According to the Trump administration, any broader test for harassment under Title IX would risk chilling protected speech.[81]

That said, the 2020 regulations also noted that misconduct that does not meet the *Davis* standard "may be actionable under another part of a recipient's code of conduct (e.g., anti-bullying)."[82] The *Davis* standard, in other words, was said to describe the point at which universities *must* intervene, not when they may. But if the Free Speech Clause and *Davis* liability share a common border, how could universities intervene to stop

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77. Speech First, Inc. v. Cartwright, 32 F.4th 1110 (11th Cir. 2022); Speech First, Inc. v. Fenves, 979 F.3d 319 (5th Cir. 2020); Speech First, Inc. v. Schlissel, 939 F.3d 756 (6th Cir. 2019).

78. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30037 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

79. *Id.* at 30037, 30163–64.

80. *Id.* at 30152.

81. *Id.* at 30140–42.

82. *Id.* at 30154.

speech falling short of the *Davis* line without violating the First Amendment? The 2020 regulations don't answer that question. The 2020 regulations simply ignored the Double Liability Dilemma.

The Biden administration's proposed 2022 regulations (re)interpreting Title IX would broaden the definition of sexually hostile environments beyond the *Davis* standard,[83] replacing *Davis*'s "and" with Title VII's "or." But they follow the Trump regulations in envisioning university interventions against harassment that go even further beyond what Title IX itself requires. The newly proposed rules state that "even when conduct does not meet the definition of sexual harassment under [the Title IX regulations], nothing precludes a recipient from addressing the conduct under the recipient's code of conduct or other non-Title IX process."[84] Thus, even as it broadened the Title IX harassment definition beyond the *Davis* standard for private liability, the Biden administration also acknowledged that universities may (as opposed to must) act to stop harmful speech before it qualifies as harassment under the newly expanded definition.

How, then, does the Biden administration ignore the Double Liability Dilemma? Not, as the Trump administration did, by closing its eyes to the fact that hostile environments can arise from an accumulation of offenses. Imagining a student repeatedly called "girly" by peers "over a period of weeks," the commentary to the proposed Biden regulations makes clear that even though "infrequent or inconsistent incidents may not be sufficiently serious to create a hostile environment, that same treatment repeated by different students in each class throughout the day may do so."[85] The proposed 2022 regulations even provide a multi-factor test for determining whether a hostile environment has arisen, and two of its factors take cumulative discrimination into account.[86] One is the "type, frequency, and duration" factor, which is said to be more easily satisfied if, for example, "taunts [against a student seen as violating sex stereotypes] are made by a

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83. Notice of Proposed Rulemaking: Title IX of the Educational Amendments of 1972, 87 Fed. Reg. 41390 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106). The 2022 regulations define sexual harassment to cover "unwelcome sex-based conduct that is sufficiently severe *or* pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively, it denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (i.e., the conduct creates a hostile environment)." *Id.* at 41410.

84. *Id.* at 41411.

85. *Id.* at 41418.

86. *Id.* at 41417–18.

number of students."[87] Another explicitly asks whether there has been "other sex-based harassment" at the school in question.[88]

The Biden administration recognizes the problem of cumulative discrimination: the way protected speech can, over time or when aggregated with that of others, create a legally intolerable educational environment. What it ignores is the First Amendment problem schools face when trying to stop hostile speech from accumulating. Noting somewhat airily that it is not changing the Trump regulations' free speech provision, § 106.6(d), which somewhat needlessly makes clear that nothing in Title IX requires schools to take steps that would violate the First Amendment, the proposed Biden regulation goes on to say that even if schools may not be able to stop students from voicing derogatory opinion about one sex, it can "take steps to ensure that competing views are heard."[89] What those steps might be and how they might avoid charges of viewpoint discrimination is left undescribed.

The Biden administration's newly proposed regulations largely ignore the liabilities universities face on the free speech side of the Double Liability Dilemma. Meanwhile, the free speech advocates who are now fighting against the proposed policy ignore the other side: the liability that universities rightly incur when they allow a sexually (or racially or otherwise) hostile environment to arise out of accumulated hostilities.

Take, for example, the model code of student conduct offered by the Foundation for Individual Rights and Expression. FIRE's definition of discriminatory harassment would require not only that the *Davis* severe, pervasive, and objectively offensive standard be met, but also that speech, to be proscribed, must be targeted at an individual—Professor Volokh's approach from the 1990s.[90] FIRE warns schools that "[s]traying from [its] definitions may result in successful litigation against the college"[91] and claims that 753 university policies currently violate the constitution by allowing the investigation and punishment of speech that doesn't cross the *Davis* threshold.[92]

Even as FIRE bases its annual "college free speech rankings" in part on whether universities adhere to the *Davis* standard in their speech and

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87. *Id.* at 41417.

88. *Id.* at 41418.

89. *Id.* at 94.

90. MODEL CODE OF STUDENT CONDUCT, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION 11–12, https://www.thefire.org/research-learn/model-code-student-conduct [https://perma.cc/G6E2-PR89]; *cf.* Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 39, at 1797–98.

91. *Id.* at 11–12, 15.

92. *See* Griffin, *supra* note 47 and accompanying text.

harassment codes,[93] FIRE has not, to my knowledge, ever explained how universities are to prevent hostile educational environments from arising out of the accumulated speech of multiple speakers if it is impermissible for them to respond in any way to any individual's hostile speech until it individually reaches *Davis* levels.

It may be understandable that an advocacy organization dedicated solely to free speech issues might ignore the burdens its free speech absolutism might place on other values, such as equality or inclusion. As one of FIRE's spokespeople recently explained, FIRE differs from organizations like the ACLU because it does not feel the need to "deal with the tensions that may or may not exist with free speech and other values"; "there's no other values that we have to defend, which makes our work a little bit easier and more focused," he added.[94] If you ignore the nondiscrimination half of the Double Liability Dilemma, it surely is "a little bit easier" to demand ever more stringent speech protections, whatever their (ignored) cost.

More surprising—and troubling—is the fact that courts are increasingly demanding this level of protection for speech as well. In May 2022, a federal district court issued a preliminary injunction preventing the University of Houston from enforcing its harassment policy.[95] The reasoning was pithy:

> Speech First [the plaintiff] will likely succeed on the merits because the original policy does not comport with the standard adopted by the Supreme Court [citing *Davis*]. As summer approaches, enjoinment of the policy will not cause irreparable harm with fewer students on campus.
>
> The University says that it will be injured if recourse is unavailable for harassment against students or faculty. As important as this is, students also need defenses against arbitrary professors.[96]

The court's analysis—quoted here in its entirety—is remarkable in a number of ways. For one, the test for preliminary injunctions asks whether

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93. *See 2023 College Free Speech Rankings Methodology*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, https://rankings.thefire.org/rank/methodology [https://perma.cc/93KH-DH57]; *see also Spotlight on Speech Codes 2023*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, https://www.thefire.org/research-learn/spotlight-speech-codes-2023 [https://perma.cc/MM56-D6H8] (explaining that schools must adhere to the *Davis* standard to adequately protect free speech).

94. Matt Taibbi, *Move Over ACLU, FIRE is the New Champion of Free Speech*, RACKET NEWS (June 6, 2022), https://taibbi.substack.com/p/move-over-aclu-fire-is-the-new-champion [https://perma.cc/W4SP-UBTC] (quoting Nico Perrino from FIRE).

95. Preliminary Injunction at 5, Speech First, Inc. v. Khator, No. 4:22-cv-00582 (S.D. Tex. May 19, 2022).

96. *Id.*

irreparable harm will result if the injunction is *not* issued, not if issuing the injunction will itself cause irreparable harm.[97] Second, the balancing of harms here is opaque at best, with a university that cannot protect students and faculty from harassment pitted against students who "need defenses against arbitrary professors"—whatever that might mean, given the unlikelihood that professors are tasked with enforcing Houston's harassment policy. Finally, and most relevantly here, the district court simply assumes without argument that a harassment policy violates the First Amendment if it limits speech that fails to cross the *Davis* threshold. A liability floor under Title IX has been turned into a free speech ceiling.

The court's injunction may have been temporary, but it was enough to push the University of Houston to settle in under a month, paying the plaintiff, Speech First, $30,000 in attorney's fees.[98] How is it that a federal district court could enjoin university from enforcing its harassment policy, assuming that *Davis* provides the boundary line between speech and harassment, without ever seeing the Double Liability Dilemma that universities face as a result? How could it so easily dismiss the worries of a university unable to prevent harassment on campus, thereby exposing itself to Title IX liability?

The answer is that the district court was simply following the lead of its court of appeals, as the Southern District of Texas lies within one of three circuits that have themselves struck down university harassment policies on free speech grounds within the past few years, each in cases brought by Speech First. The following Part explains the procedural mechanisms that have made that organization so successful in getting courts to ignore the Double Liability Dilemma—and, as a result, in shifting the balance between speech and equality on campuses across the country.

II. THE *SPEECH FIRST* TRILOGY

Speech First describes itself as "a nationwide membership organization of students, alumni, and others that . . . seeks to protect the rights of students and others at colleges and universities, through litigation and other lawful means."[99] Funded less by its five dollar lifetime membership dues than by contributions from an undisclosed variety of right-wing donors, the organization launched its litigation efforts within months of its founding in

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97. *Id.* (citing Moore v. Brown, 868 F.3d 398, 402–03 (5th Cir. 2017)).

98. Joint Stipulation of Dismissal at 5, Speech First, Inc. v. Khator, No. 4:22-cv-00582 (S.D. Tex. June 6, 2022).

99. Complaint at ¶ 8, Speech First, Inc. v. Schlissel, No. 2:18-cv-11451-LVP-EAS (E.D. Mich. May 8, 2018).

early 2018.[100] In May of that year, Speech First filed suit against the University of Michigan, taking on both its anti-harassment policy and its "Bias Response Team," a group established to respond to reports of identity-based harms on campus.[101] Largely identical suits soon followed against the University of Texas in December 2018; the University of Illinois in May 2019; Iowa State in January 2020; the University of Central Florida in February 2021; Virginia Tech in April 2021; the University of Houston in February 2022; and Oklahoma State University in January 2023.[102]

Thus, within five years of its founding, Speech First had brought lawsuits within the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits. In each, it quickly filed—and in most cases, lost[103]—motions for preliminary injunctions, allowing it to make it as quickly as possible to, by now, six courts of appeals. Speech First's success rate has been impressive: three wins (in the Fifth, Sixth, and Eleventh Circuits), one loss (in the Seventh) that resulted in

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100. *See* P. E. MOSKOWITZ, THE CASE AGAINST FREE SPEECH 139 (2019); Daniel Moattar, *The Dark Money Behind Campus Speech Wars*, NATION (July 9, 2018), https://www.thenation.com/article/archive/dark-money-behind-campus-speech-wars/ [https://perma.cc/589B-C9HV]; *Speech First*, SOURCEWATCH, https://www.sourcewatch.org/index.php/Speech_First [https://perma.cc/GF7H-8963].

101. Speech First, Inc. v. Schlissel, 939 F.3d 756, 762 (6th Cir. 2019). These "teams" are common on American campuses. Approximately 230 colleges and universities have created similar Bias Response Teams ("BRTs"). Joseph W. Yockey, *Bias Response on Campus*, 48 J.L. & EDUC. 1, 5 (2019); *see id.* at 5–15 (providing an overview of BRTs' general structures and procedures and discussing how several institutions have implemented these teams); *see also* Ryan Miller et al., *A Balancing Act: Whose Interests Do Bias Response Teams Serve?*, 42 REV. HIGHER EDUC. 313, 317–19 (2018) (describing the key functions and history of Bias Response Teams).

102. *Court Battles*, SPEECH FIRST, https://speechfirst.org/court-battles/ [https://perma.cc/LX27-MR3J].

103. Speech First's motions were denied in every case except those against Iowa State, which settled two months after the suit was filed; against Virginia Tech, whose computer use policy was enjoined while all other challenged policies were kept in place; and against the University of Houston, where the district court followed precedent set in the University of Texas case and granted a preliminary injunction, after which the parties quickly settled. *See* Tyler J. Davis, *Free-Speech Nonprofit Drops Lawsuit vs. Iowa State After School Adjusts Chalking, Email Policy*, DES MOINES REG. (Mar. 13, 2020), https://www.desmoinesregister.com/story/news/crime-and-courts/2020/03/13/free-speech-lawsuit-against-iowa-state-dropped-university-adjusts-policies/5042712002/ [https://perma.cc/9AJ4-WLLM]; Maggi Marshall, *Virginia Tech Ordered To Stop Enforcing Policy that Could Violate Free Speech*, WSET (Sept. 27, 2021), https://wset.com/news/local/federal-judge-orders-virginia-tech-to-stop-enforcing-policy-that-could-violate-free-speech-first-amendment-college-campus [https://perma.cc/9NW2-TBXV]; Kate McGee, *Settlement with Conservative Free Speech Group Forces University of Houston To Keep Amended Anti-Harassment Policy*, TEX. TRIB. (June 10, 2022, 2:00 PM), https://www.texastribune.org/2022/06/10/university-houston-speech-first-settlement/ [https://perma.cc/33CG-PDYT]. Its preliminary injunction request against Oklahoma State is currently pending. *See Court Battles*, SPEECH FIRST, https://speechfirst.org/court-battles/ [https://perma.cc/LX27-MR3J].

a settlement nonetheless, cases still pending in the Fourth and Tenth Circuits, and a quick settlement by Iowa State which kept the Eighth Circuit case from reaching a decision either way.

This Part dives deeply into what I call the *Speech First* Trilogy—or Tetralogy, if you include the Seventh Circuit case which came out the other way, creating the beginnings of a circuit split. The four cases share facts largely in common, involve similar claims, and were decided in largely the same procedural posture. In three circuits, they have also produced the same result: universities have been forced to disband their bias response teams and abandon or rewrite their harassment policies. Even in the Seventh Circuit, where Speech First lost, the University of Illinois settled nonetheless, giving up one of its speech policies and clarifying others so as to avoid Supreme Court review.[104] As losses pile up, universities elsewhere are watching and re-evaluating their own responses to hostile speech on campus.[105]

A. The Policies

The three cases of the *Speech First* Trilogy, along with their estranged sibling in the Seventh Circuit, all share two targets in common: university antidiscrimination policies and the teams established to deal with reported violations.

To start with the latter: whether called a Bias Response Team, as at Michigan, the Campus Climate Response Team (Texas), the Bias Assessment and Response Team (Illinois), or, more colorfully, the Just Knights Response Team (Central Florida, playing on the school's nickname), official university groups tasked with responding to reports of bias, discrimination, and other offensive incidents have proliferated in recent years at universities across the

104. Notice of Dismissal, Speech First, Inc. v. Killeen, No. 3:19-cv-3142 (C.D. Ill. 2021).

105. *See* Liliana M. Garces et al., *Repressive Legalism: How Postsecondary Administrators' Responses to On-Campus Hate Speech Undermine a Focus on Inclusion*, 58 AM. EDUC. RES. J. 1032 (2021).

country.[106] A 2017 report found 231 such teams nationwide.[107] In 2022, Speech First claimed to have found 456 of them.[108]

The specific teams Speech First challenged in court were typical.[109] Each was created to support students who reported bias incidents, often online or by phone; the teams published anonymized versions of the complaints received; they educated the community about issues of bias; and when appropriate, they referred cases to campus police, counselors, or student affairs administrators—although, importantly, the response teams themselves lacked any disciplinary power of their own.[110] Michigan's team, like Illinois', was allowed to contact people alleged to be responsible for the incident, but it could not force them to meet.[111] And at all the schools besides Michigan, reports could be—and often were—submitted anonymously, so no further contact on the side of the complainant was possible. Crucially, the bias response teams at all four schools encouraged reports of incidents going well beyond speech and conduct that is either illegal or proscribed by the school's code of conduct.[112] So the *Speech First* cases were at once challenging schools' definitions of what could be disciplined as harassment *and* the presence of teams charged with responding in more informal, non-disciplinary ways to a broader set of speech and behavior.

For example, at Michigan, the university policies challenged in *Speech First v. Schlissel* prohibited students from "harassing or bullying" one

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106. *See* Yockey, *supra* note 101, at 5.

107. EAB, CAMPUS BIAS RESPONSE: A BRIEFING FOR SENIOR CAMPUS LEADERSHIP 4 (2017), https://attachment.eab.com/wp-content/uploads/2017/10/D9AC8B9F569D4AFCA226A4D4D61C2BB8.pdf [https://perma.cc/LWY7-ZS34]; FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, BIAS RESPONSE TEAM REPORT 2017 10 (2017), https://www.thefire.org/sites/default/files/2022/09/Bias%20Response%20Team%20Report%202017.pdf [https://perma.cc/U83N-PEW8].

108. SPEECH FIRST, FREE SPEECH IN THE CROSSHAIRS: BIAS REPORTING ON COLLEGE CAMPUSES 3 (2022), http://speechfirst.org/wp-content/uploads/2022/07/SF-2022-Bias-Response-team-and-Reporting-System-Report.pdf [https://perma.cc/475H-2F9G].

109. *See* Yockey, *supra* note 101, at 5–11 (describing common powers that Bias Response Teams wield, along with descriptions of specific teams' work at the University of Michigan, the University of Chicago, UC Davis, and the University of Wisconsin, Madison).

110. Speech First, Inc. v. Schlissel, 939 F.3d 756, 762 (6th Cir. 2019); Speech First, Inc. v. Fenves, 979 F.3d 319, 325 (5th. Cir. 2020); *see also* Miller et al., *supra* note 101, at 326–29 (discussing how other institutions combine educational approaches and formal disciplinary and investigative procedures when responding to reports of bias).

111. *Schlissel*, 939 F.3d at 762; Speech First, Inc. v. Killeen, 968 F.3d 628, 633 (7th Cir. 2020).

112. This is not unique among Bias Response Teams. Other universities' Bias Response Teams also address similarly broad ranges of bias incidents. *See, e.g.*, Yockey, *supra* note 101, at 6 (giving an example of the University of Wisconsin's definition of reportable incidents of bias).

another.[113] Before the lawsuit was filed, an official university website included the Merriam-Webster dictionary definitions of both terms, suggesting that unwelcome speech that persistently annoys someone or creates an unpleasant situation for them could result in sanction.[114] (Michigan removed the dictionary definitions from its website after it was sued, but Speech First successfully argued that voluntary cessation did not moot their claims.)[115] Meanwhile the school's Bias Response Team defined bias incidents more broadly still, to include any conduct that "discriminates, stereotypes, excludes, harasses or harms" others based on their identity.[116] Bias incidents qualified for reporting and response, but not sanction, unless they rose to the level of harassment or bullying.[117] The Sixth Circuit reversed the district court to find standing on both claims.[118]

In *Speech First v. Fenves*, Speech First challenged policies on speech, technology, and conduct in residence halls at the University of Texas.[119] Texas's "Institutional Rules," the broadest of these policies, protected community members' freedom of expression "subject only to rules necessary to preserve the equal rights of others and the other functions of the University."[120] It went on to define verbal harassment as "hostile or offensive speech" that both "personally describes or is personally directed to" specific individuals and "is sufficiently severe, pervasive, or persistent to create an objectively hostile environment that . . . diminishes the victim's ability to participate in or benefit from" University activities.[121] Adding a First Amendment carve-out, the rules excluded from the harassment definition any speech "necessary to the expression of any . . . argument for or against the substance of any political, religious, philosophical, ideological, or academic idea . . . even if some listeners are offended by the argument or idea."[122] Separate from the harassment rule, Texas's Hate and Bias Incidents Policy defined a broader category of "campus climate incidents" which its Response Team was created to address.[123] These could include parties with racist themes, derogatory graffiti regarding sexual orientation, or classroom

113. 939 F.3d 756, 761 (6th Cir. 2019).
114. *Id.* at 762.
115. *Id.* at 767.
116. *Id.* at 762.
117. *Id.*
118. *Id*. at 761.
119. 979 F.3d 319 (5th Cir. 2020).
120. *Id.* at 323.
121. *Id.*
122. *Id.*
123. *Id.* at 325.

environments deemed hostile or offensive.[124] Relying in part on the Sixth Circuit's opinion in *Schlissel*, the Fifth Circuit similarly reversed the district court and found standing for Speech First to proceed with its claims.[125]

At the University of Illinois, Speech First challenged a non-disciplinary no-contact policy, under which students would be forbidden from communicating, provoking, or intimidating each other,[126] a prior approval policy for non-campus election postings which the University repealed soon after the lawsuit was filed,[127] and Illinois's bias-response protocol, which addressed "actions or expressions that are motivated, at least in part, by prejudice against or hostility toward a person (or group)" because of their identity.[128] The Seventh Circuit denied Speech First's preliminary injunction request, holding that the group's members lacked standing on the first and third of these claims and that the second had become moot.[129]

Finally, in *Speech First v. Cartwright*, its case against Central Florida, Speech First challenged a policy that prohibited harassment and also prohibited students from condoning, encouraging, or failing to intervene to stop it.[130] The policy defined harassment to include "verbal acts, name-calling, graphic or written statements (via the use of cell phones or the Internet), or other conduct" that is "so severe or pervasive that it unreasonably interferes with, limits, deprives, or alters the terms or conditions of education . . . , when viewed from both a subjective and objective perspective."[131] The policy then listed a set of factors that might make an environment more or less objectively hostile, asking, for example, how personally directed the conduct was, whether it "implicates concerns related to academic freedom or protected speech," and what its effects proved to be.[132] In addition to the harassment policy, Speech First also challenged UCF's Just Knights team, which was formed to respond to a broader set of incidents.[133] These might not rise to the level of a policy violation but may still "contribute to creating an unsafe, negative, unwelcoming environment for the victim," whether

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124. *Id.*

125. *Id.* at 337.

126. Speech First, Inc. v. Killeen, 968 F.3d 628, 635 (7th Cir. 2020).

127. *Id.* at 636. The policy prohibited students from posting and distributing leaflets, handbills, and other materials about candidates for non-campus elections without "prior approval."

128. *Id.* at 632–33.

129. *Id.* at 631.

130. Speech First v. Cartwright, 32 F.4th 1110, 1114–18 (11th Cir. 2022).

131. *Id.* at 1114–15.

132. *Id.* at 1115.

133. *Id.* at 1116.

intentionally or not.[134] The Eleventh Circuit found standing on both claims, enjoined the harassment policy and returned the case to the district court to decide whether to enjoin the Just Knights program as well.[135]

Speech First's suit against Virginia Tech has a largely indistinguishable set of facts from those just described.[136] And in a divided decision issued just before this Article went to press, the Fourth Circuit rejected the reasoning of the *Speech First* Trilogy, deepening the circuit split on these issues.[137]

B. The Procedural Posture

In addition to their similar facts, claims, and outcomes, the shared procedural posture in these cases is especially notable. In fact, as the following Section describes, the somewhat wonky procedural details in these cases is what explains the unusually one-sided perspective courts keep taking in deciding them. Procedure is driving the outcomes of these cases by determining whose stories get told there.

The procedural commonalities in the Speech First cases begin with who's bringing them. As a membership organization dedicated to campus speech issues, Speech First claims associational standing derived from that of its members.[138] What this means is that the people whose speech is allegedly endangered are not parties to the case. Instead they appear as anonymized references ("Student A," "Student B," etc.) in Speech First's complaints and affidavits.[139] In the Michigan case, for example, Student A was described in

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134. *Id.*

135. *Id.* at 1129.

136. Speech First, Inc. v. Sands, No. 21-2061 (4th Cir. argued Oct. 25, 2022).

137. Speech First, Inc. v. Sands, 69 F.4th 184 (4th Cir. 2023). In *Sands*, the Fourth Circuit held 2-1 that Speech First lacked standing to pursue its First Amendment claim against the Bias Policy at Virginia Tech. Siding with the Seventh Circuit rather than the Fifth, Sixth, and Eleventh, the opinion by Judge Motz found that Speech First had failed to show any credible threat of injury to its members. A "fiery" dissent, *id.* at 194 n.9, by Judge Wilkinson, describing Virginia Tech's campus as a "surveillance state," *id.* at 204 (Wilkinson, J., dissenting), may well attract the Supreme Court's attention, as will the circuit split one this issue that has now grown more entrenched. Thus, while the Fourth Circuit's new decision does not change anything in this Article's analysis, it surely might raise its stakes.

138. *E.g.*, Speech First, Inc. v. Killeen, 968 F.3d 628, 638 (7th Cir. 2020). For an explanation of this standard, see *Hunt v. Washington*, 432 U.S. 333, 343 (1977) ("An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.").

139. *E.g.*, Complaint at 27, 31, 34, Speech First, Inc. v. Schlissel, 333 F. Supp. 3d 700 (E.D. Mich. 2018) (No. 4:18-CV-11451).

Speech First's complaint as a rising sophomore with strong and unpopular views on "gun rights, illegal immigration, and abortion."[140] He "wants to speak passionately and repeatedly about these matters" but fears that doing so "may be considered 'harassment' or 'bullying'" under Michigan's code of conduct, or could be reported to Michigan's bias response team, "thereby subjecting Student A to investigations and potential sanctions such as 'restorative justice,' 'individual education,' or referral for formal discipline."[141] Different sets of anonymized students—but all with similar alleged beliefs and fears—appear in each of Speech First's complaints and declarations submitted in support of motions for preliminary injunctions.[142]

The second procedural commonality of note: the *Speech First* Trilogy (and the Seventh Circuit outlier) all involved facial rather than as-applied challenges to university policies and response team initiatives.[143] In other words, *none* of the suits offered examples of *any* actual enforcement of the policies at issue. The policies' definitions were instead said to be vague and overbroad as written.[144] Student speech had allegedly been chilled not by any actual disciplinary actions taken by the defendant universities but simply because of unclarity about what exactly the challenged policies cover.[145]

Third, the absence of any alleged disciplinary actions, or even investigations, led in each case to disputes over standing, a requisite for federal courts to hear a case.[146] (Again, since Speech First's associational standing derives from that of its student members; any defects in the latter would lead to the case's dismissal.)[147] Standing requires a concrete and particularized, actual or imminent injury, not one that is "conjectural or

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140. *Id.* at 27.

141. *Id.* at 29–30.

142. *Id.* at 27; Complaint at 17–18, 20, Speech First, Inc. v. Killeen, 968 F.3d 628 (7th Cir. 2020) (No. 3:19-CV-03142); Complaint at 22–24, Speech First, Inc. v. Fenves, 384 F. Supp. 3d 732 (W.D. Tex. 2018) (No. 1:18-CV-01078); Complaint at 23, 27, 31, Speech First, Inc. v. Cartwright, 2021 WL 3399829 (M.D. Fla. 2021) (No. 6:21-CV-00313). Identical wording repeatedly appears in the filings submitted to the Middle District of Florida in *Cartwright*: "Because he has strong views on these issues, Student A wants to speak passionately and repeatedly about these matters." Complaint at 25, Speech First, Inc. v. Cartwright, 2021 WL 3399829 (M.D. Fla. 2021) (No. 6:21-CV-00313).

143. Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1125–28 (11th Cir. 2022); *Killeen*, 968 F.3d at 639; Speech First v. Schlissel 939 F.3d 756, 766 (6th Cir. 2019); Speech First v. Fenves, 979 F.3d 319, 330, 335 (5th Cir. 2020).

144. *E.g.*, *Cartwright*, 32 F.4th at 1125.

145. *E.g.*, *Fenves*, 979 F.3d at 330.

146. *Cartwright*, 32 F.4th at 1119; *Killeen*, 968 F.3d at 632; *Schlissel*, 939 F.3d at 763–64; *Fenves*, 979 F.3d at 329–30.

147. *Supra* note 138 and accompanying text.

hypothetical."[148] The standing analysis in each of the Speech First cases thus asked whether the various Students A, B, and C wanted to speak in ways that are at least arguably prohibited under the relevant policies, giving rise to a substantial threat—or fear—of enforcement.[149] *None* of the district courts found standing, at least in regard to Speech First's claims against the bias response teams. Speech First's appeal of these decisions forced the appellate courts to adopt the position of the unnamed conservative students mentioned in the complaint in order to determine, in essence, how reasonable that student's "cancel culture" fears might be.[150]

At the same time, a fourth procedural twist shared by three of the cases[151] forced the courts to decide, more or less, whether the universities the students claimed to fear could themselves be trusted.[152] This became necessary because Illinois, Michigan, and Texas each changed at least some of their policies after Speech First filed suit.[153] Courts thus had to decide whether the changes mooted Speech First's claims, or whether changes made could be unmade just as easily once the suits were dismissed.[154] Affidavits and briefs from university officials disclaiming any intention to reenact the policies in question persuaded only the Seventh Circuit; the Fifth and Sixth Circuits remained unconvinced, both because of the timing of the changes and the universities' refusal to admit that the policies they abandoned were unconstitutional.[155]

Finally, in the circuit courts, all of this was decided on appeals of preliminary injunction motions that the district courts had denied.[156] This last procedural commonality importantly affects what the courts of appeals actually decided in these cases. For one thing, the standard they were applying, given that a preliminary rather than permanent injunction was at

148. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

149. *Cartwright*, 32 F.4th at 1115; *Schlissel*, 939 F.3d at 763–66; *Killeen*, 968 F.3d at 639; *Fenves*, 979 F.3d at 330.

150. *Cartwright*, 32 F.4th at 1120 (noting that, in assessing whether a First Amendment plaintiff (i.e., Students A, B, and C) has standing, the "fundamental question" is "whether the challenged policy 'objectively chills' protected expression").

151. *Schlissel*, 939 F.3d at 767–70; *Killeen*, 968 F.3d at 645–47; *Fenves*, 979 F.3d at 327–31.

152. *Schlissel*, 939 F.3d at 767–70; *Killeen*, 968 F.3d at 653–55; *Fenves*, 979 F.3d at 327–31.

153. *Schlissel*, 939 F.3d at 762; *Killeen*, 968 F.3d at 645–47; *Fenves*, 979 F.3d at 327–31.

154. *Schlissel*, 939 F.3d at 767; *Killeen*, 968 F.3d at 645–47; *Fenves*, 979 F.3d at 327–31.

155. *Fenves*, 979 F.3d at 321; *Schlissel*, 939 F.3d at 771; *Killeen*, 968 F.3d at 648.

156. Speech First, Inc. v. Cartwright, 32 F.4th at 1113 (11th Cir. 2022); *Killeen*, 968 F.3d at 632; *Schlissel* 939 F.3d at 763; *Fenves*, 979 F.3d at 327. In *Fenves*, the district court had not only denied the motion for a preliminary injunction but also dismissed the case, given its finding that Speech First lacked standing. *Fenves*, 979 F.3d at 327.

issue, asks only about a *likelihood* of success on the merits—not an actual determination of the merits themselves.[157] Questions that were already speculative—Are students likely to be disciplined for their speech under the policies?—thus became even more so as courts asked whether it was *likely* that later evidence would show a likelihood of discipline. In several instances, the courts of appeals did not even do that much. In the Michigan and Texas cases, the Sixth and Fifth Circuits reversed the courts below on mootness and standing but sent the case back for the district courts to determine the likelihood of success on the merits.[158] The Eleventh Circuit, in the case against UCF, did find Speech First's challenge to the school's harassment policy was likely to succeed and so enjoined the policy, but it left it to the district court to do the same, or not, in regard to the bias response program.[159]

The procedural minutiae here might seem like the exhausting fact pattern of a Civil Procedure exam. But some of the details—like the fact that only a preliminary injunction was at issue in any of the appeals—sharply limit the precedential power of what the courts actually held.

You wouldn't know that though from looking at Speech First's press releases.[160] Its litigation website claims that it has "successfully won lawsuits against the University of Central Florida, the University of Houston, the University of Michigan, the University of Texas, the University of Illinois, and Iowa State University."[161] Of course, as already noted, Speech First actually *lost* in the Seventh Circuit,[162] so there its "win" refers to the settlement with Illinois which kept the case from being considered by the Supreme Court.[163] In the other cases, wins refer to preliminary injunction motions followed by settlements.[164]

That said, the difference between winning the chance to continue litigating and winning full stop does not amount to much if the schools you are fighting

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157. *E.g.*, *Cartwright*, 32 F.4th at 1124 ("We consider four factors when determining the propriety of preliminary injunctive relief: (1) substantial likelihood of success on the merits, (2) irreparable harm, (3) the balance of equities, and (4) the public interest. Likelihood of success on the merits 'is generally the most important of the four factors.'").

158. *Schlissel*, 939 F.3d at 770; *Fenves*, 979 F.3d at 338.

159. *Cartwright*, 32 F.4th at 1128–29.

160. *See Protect Free Speech*, SPEECH FIRST, https://speechfirst.org/court-battles/ [https://perma.cc/SWB6-GFSW].

161. *Id.*

162. Speech First, Inc. v. Killeen, 968 F.3d 628, 647 (7th Cir. 2020) (holding that Speech First lacked standing to seek a preliminary injunction against the University of Illinois's BART, BIP, and NCD policies).

163. *University of Illinois - Status: Settled*, SPEECH FIRST, https://speechfirst.org/case/university-of-illinois/ [https://perma.cc/J7SM-KBJS].

164. *Protect Free Speech*, *supra* note 160.

don't have the will to continue litigating. Michigan, Texas, Illinois, and UCF all settled with Speech First once their cases returned to the district court, and Iowa State and the University of Houston settled before their cases ever left the trial court.[165] These decisions may have seemed smart individually, as the settlements often just enshrined in contract what the schools had told courts they were already doing.[166] But the fact that none of these cases has gotten to discovery or trial is crucially important. Speech First has obtained opinions in its favor in three federal circuits without *ever* having to navigate the procedural stages where evidence—including evidence about what actually happens on university campuses—would have the chance to emerge. A growing legal consensus about the state of free speech on universities campuses and the constitutionality of their equality efforts is based on no evidence other than the subjective fears expressed in anonymized affidavits about disciplinary investigations that have not yet occurred.

The focus here has been on procedural commonalities among *Speech First* cases. But before moving on to discuss how those procedural facts influenced the perspective courts have taken, or ignored, in deciding these cases, one last procedural point unique to the Michigan case is important to flag. In *Schlissel*, the earliest case in the *Speech First* Trilogy, Speech First received some unusual help. Just a month after this newly formed "membership organization" filed its very first lawsuit, the United States Department of Justice ("DOJ") took note and filed a "statement of interest"[167] supporting Speech First's preliminary injunction request.[168] Lawyers from DOJ's Civil Rights Division told the court that "free speech has come under attack on campuses across the country" and expressed the view that the University of Michigan's harassment policy and bias response initiative were both

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165. *Id.*

166. To give one example, Speech First describes its settlement in the Michigan case (a "landmark victory for free expression") as accomplishing two things: Michigan agreed to keep in place the changes it had already made to its harassment policy, and it replaced its Bias Response Team with a Campus Climate Support program that "does not punish students." *Speech First v. U of M; Settlement Agreement*, SPEECH FIRST (Oct. 28, 2019), https://speechfirst.org/court-battles/speech-first-v-u-of-m-settlement-agreement/ [https://perma.cc/S3PS-8ZXT]. But even Speech First had admitted before the Sixth Circuit that the old Bias Response Teams "lack[ed] any formal disciplinary power and that bias incidents [were] not directly punishable." Speech First v. Schlissel, 939 F.3d 756, 765 (6th Cir. 2019). Further, Michigan's Vice President for Student Affairs had already testified that the amended policy would govern disciplinary proceedings. *See id.* at 769. Thus, Speech First's "landmark victory" really only enshrines in contract the practices already in place at Michigan.

167. *See* 28 U.S.C. § 517.

168. Statement of Interest in Support of Plaintiff's Motion for Preliminary Injunction by United States at 8–9, Speech First, Inc. v. Schlissel, 333 F. Supp. 3d 700 (E.D. Mich. 2018) (No. 4:18-CV-11451).

unconstitutionally vague and overbroad.[169] A statement released at the time said that "[t]his Justice Department, under the leadership of Attorney General Jeff Sessions, is committed to promoting and defending Americans' first freedom at public universities."[170] And so from nearly the start of its litigation efforts, Speech First's right-wing stance on campus speech was officially endorsed as that of the United States as well.

C. The Problems

The problems with the three opinions of the *Speech First* Trilogy are at once doctrinal and, for lack of a better word, perspectival. In fact, the defects in the opinions' legal reasoning are best explained by the limited perspective courts were pushed toward through the shared procedural moves described in the last Section.[171] The facial challenges, the questions about whether anonymous conservative students had fears justifiable enough to establish standing, the mootness analysis which turned on universities' perceived trustworthiness, the preliminary nature of the claims—all of these factors pushed courts to adopt an unusually literalized version of what critical race theorists have long described as the "perpetrator perspective" within antidiscrimination law.[172]

In the *Speech First* Trilogy, the Fifth, Sixth, and Eleventh Circuits looked at the speech-equality collision on university campuses exclusively from the speech side—which is to say, from the side of the anonymous students wanting to voice provocative conservative views.[173] The courts were pushed to do so by the claims' facial nature, which abstracts from any actual disciplinary proceedings, and by the preliminary stance in which they were heard, before discovery had revealed evidence of actual campus dynamics rather than imagined ones. Furthermore, in imagining these campus dynamics—in evaluating the reasonableness of students' fear of speaking (for standing purposes) and their distrust of university assurances (for mootness purposes)—the courts have quite literally taken the perpetrator perspective by adopting widespread conservative views, or talking points, about the status of free speech on today's university campuses.

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169. *Id.*

170. *Justice Department Files Statement of Interest in Michigan Free Speech Case*, U.S. DEP'T OF JUST. (June 11, 2018), https://www.justice.gov/opa/pr/justice-department-files-statement-interest-michigan-free-speech-case [https://perma.cc/7TNH-HV8J].

171. *See supra* Section II.B.

172. *See, e.g.*, Freeman, *supra* note 2.

173. Speech First, Inc. v. Cartwright, 32 F.4th 1110 (11th Cir. 2022); Speech First, Inc. v. Schlissel, 939 F.3d 756 (6th Cir. 2019); Speech First, Inc. v. Fenves, 979 F.3d 319 (5th Cir. 2020).

This Section looks at the doctrinal shortcomings in the *Speech First* Trilogy not just to highlight mistakes in the courts' reasoning, but more importantly, to show the narrowness of their perspective, from which only half of the Double Liability Dilemma can be seen.

1. Doctrinal Shortcomings

Each of the *Speech First* cases involves two claims—one challenging schools' harassment policies and one seeking to enjoin their bias response teams—and the opinions err on both fronts.[174]

Take, first, the appellate courts' reading of the harassment policies at issue. The Eleventh Circuit's is illustrative. Here is its summary of the overbreadth problems:

> [T]he policy (1) prohibits a wide range of "verbal, physical, electronic, and other" expression concerning any of (depending on how you count) some 25 or so characteristics; (2) states that prohibited speech "may take many forms, including verbal acts, name-calling, graphic or written statements' and even 'other conduct that may be humiliating"; [and] (3) employs a gestaltish "totality of known circumstances" approach to determine whether particular speech, for instance, "unreasonably . . . alters" another student's educational experience.175

Phrased like that, you might think that the University of Central Florida had been prohibiting students from drawing pictures that involve any of twenty-five different identities. But it did no such thing. The policy prohibited expression, in a variety of forms, "that is so severe or pervasive that it unreasonably interferes with, limits, deprives, or alters the terms or conditions of education" on the basis of one of the twenty-five identity traits.[176] And because the race- or gender- or other-identity-based interference had to be not just subjectively but also objectively unreasonable, the school provided a list of contextual factors that would make it so. It is hard to imagine how an objective test could work otherwise.

In its next paragraph, the Eleventh Circuit lists as "obvious examples" of views that "could qualify for prohibition" under the policy the view that "abortion is immoral" or "affirmative action is unfair."[177] These would be

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174. *Cartwright*, 32 F.4th at 1115; *Schlissel*, 939 F.3d at 763–66; Speech First, Inc. v. Killeen, 968 F.3d 628, 639 (7th Cir. 2020); *Fenves*, 979 F.3d at 330.

175. *Cartwright*, 32 F.4th at 1125.

176. *Id.* at 1114–15.

177. *Id.* at 1125.

restricted, the court claims, because "the policy targets 'verbal, physical, electronic or other conduct' based on 'race,' . . . [or] 'sex.'"[178] Yet as a description of the policy, that is just factually wrong—as we have just seen. The policy does not target speech based on race or sex. It targets the unreasonable interference with education based on race or sex, including instances where the interference occurs through words. Without more—*much* more—merely arguing that abortion is immoral would be explicitly protected under the very list of factors that the court decried as unhelpfully (perhaps even unconstitutionally) "gestaltish."[179]

The opinion gets worse from there. Claiming that the "policy's imprecision exacerbates its chilling effect," the Eleventh Circuit offered "just one example[:] what does it mean for one student's speech to 'unreasonably alter' another student's educational experience? Both terms—'unreasonably' and 'alter'—are pretty amorphous."[180] This claim—that the term "unreasonably" is vague enough to make a university's speech policy facially unconstitutional—is especially rich, coming as it does in an opinion that asks whether the court below "applie[d] the law in an *unreasonable* . . . manner"[181] when it held that "Speech First's members could not *reasonably* believe that they would be punished."[182] The court of appeals, by contrast, held that UCF's harassment policy "would cause a *reasonable* student to fear expressing potentially unpopular beliefs,"[183] since "[n]o *reasonable* college student wants to run the risk of being accused of 'offensive,' 'hostile,' 'negative,' or 'harmful' conduct—let alone 'hate or bias.'"[184] All of this, again, in an opinion that faults UCF for using the "pretty amorphous" word "unreasonably" in its harassment policy.

Lest this seem like cherry-picking from one opinion, examples of similarly poor reasoning from the Fifth and Sixth Circuits' opinions are provided in the footnotes.[185]

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178. *Id.*

179. UCF's totality of the circumstances test asks, among other things, "[w]hether the conduct implicates concerns related to academic freedom or protected speech," as views on abortion or affirmative action unquestionably would. *Id.* at 1115.

180. *Id.* at 1121 (alterations omitted).

181. *Id.* at 1118 n.2 (emphasis added).

182. *Id.* at 1118 (emphasis added).

183. *Id.* at 1121 (emphasis added).

184. *Id.* at 1124 (emphasis added).

185. In the Michigan case, faced with the inconvenient fact that no student had ever "faced discipline for having an 'intellectual debate'"—the very thing Speech First's members claimed to be chilled from having—the Sixth Circuit replied that "[t]he lack of discipline against students could just as well indicate that speech has already been chilled," thereby setting an unanswerable test for standing that universities can apparently never defeat. Speech First, Inc. v. Schlissel, 939

Speech First's second category of claims—its challenge to bias response teams—also led to errors on the courts' part. Here the main problem was finding a basis for standing, which required the courts to explain how teams without any disciplinary powers might still stifle student speech.[186]

In the Michigan case, the Sixth Circuit offered two explanations. First, although the bias team lacked its own power to sanction students for their speech, it did have the power to refer cases to other student affairs officials or to the police for further investigation.[187] While "the referral itself does not punish a student," the ensuing "investigative process" *was* said to be "chilling even if it does not result in a finding of responsibility or criminality."[188] But

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F.3d 756, 766 (6th Cir. 2019); *cf. id.* at 774 (White, J., dissenting) (describing university officials' testimony, not mentioned in the majority opinion, swearing that no students have been or would be disciplined for speaking in the way Students A, B, and C desired). By not requiring evidence that the university had ever used the harassment policy to discipline students for their speech, the Sixth Circuit actually made it easier to bring facial challenges rather than as-applied ones—a deeply counterintuitive result. *See id.* at 766 (distinguishing the case from *Morrison v. Bd. of Educ.*, 521 F.3d 602 (6th Cir. 2008), where a student's as-applied challenge was dismissed because a high school had not applied its speech policies to that student). *But see Schlissel*, 939 F.3d at 775 (White, J., dissenting) (demolishing the majority's reading of *Morrison*). Why would any plaintiff challenge their own discipline when they could more easily just get rid of the whole disciplinary policy itself?

As for the case against the University of Texas, the Fifth Circuit too set up tests, both for standing and for vagueness, that were impossible for the university to win. The lack of any evidence that students had been disciplined for any of the kinds of things Speech First's members allegedly wanted to say—and sworn assurances from university leaders that students would *not* be disciplined for such speech—was deemed irrelevant, since the mere existence of a vague policy by itself "causes self-censorship." Speech First, Inc. v. Fenves, 979 F.3d 319, 337 (5th Cir. 2020). As for why it's vague: apparently because the university defined its terms in too much detail. In the Fifth Circuit's words: "'The Institutional Rules' definition of verbal harassment consumes nearly a full page of small type. This alone might raise questions about vagueness . . . ." *Id.* At the same time, the court complained that "[t]erms like 'harassment,' 'intimidation,' 'rude,' 'incivility,' and 'bias' beg for clarification," *id.* at 332—apparently having forgotten the full page of small type intended to provide such clarification. Take the term "verbal harassment," for example: Texas's policy defined it as personally directed speech that is "sufficiently severe, pervasive, or persistent to create an objectively hostile environment that interferes with or diminishes the victim's ability to participate in or benefit from the services, activities, or privileges provided by the University"—and it exempted speech that is necessary for expressing some "political, religious, philosophical, ideological, or academic idea." *Id.* at 323. It is unclear what here "beg[s] for clarification." *See id.* at 332. The Fifth Circuit's suggestion that Texas should have instead just said that students will be disciplined for speech that is outside the First Amendment or that violates Title IX, *see id.* at 337, is perplexing, in part because the policy language is so much clearer and more specific than First Amendment doctrine, and also because the Title IX standard so closely mirrors Texas's actual policy language.

186. *Cf.* Morrison v. Bd. of Educ., 521 F.3d 602, 608 (6th Cir. 2008) (holding that standing requires more than "governmental investigative and date-gathering activity").

187. *Schlissel*, 939 F.3d at 763.

188. *Id.* at 765 (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 68 (1963)).

if a student's conduct violates the school's code of conduct or the law, a bias response team's referral is hardly needed; the team's referral power is no different—and no more chilling—than that of any community member at Michigan or anyone else who can report a crime.

Second, the Sixth Circuit found an "objective chill" in the response team's power to invite students accused of bias to a voluntary meeting.[189] Here the chill requires students to believe that voluntary meetings really aren't voluntary at all. And though the court admitted that there is nothing in the record that would support this belief, the court itself imagined "far-reaching consequences" of bias team encounters: "[A]n individual could be forgiven for thinking that inquiries from and dealings with the Bias Response Team could have dramatic effects such as currying disfavor with a professor, or impacting future job prospects."[190] All of this is pure speculation; how a professor, much less a future employer, would learn of an email between a student and Michigan's Bias Response Team is left completely unexplained.

The Fifth Circuit explicitly followed the Sixth Circuit's standing analysis, adding that Texas's bias response team intimidates students not just through its referral power, but also by the language it uses ("describ[ing] its work, judgmentally, in terms of 'targets' and 'initiators' of incidents"[191]), and even by "facilitating conversation between those who were targeted by and those who initiated a complaint."[192] As Part III will discuss further, if universities cannot choose how to characterize offensive speech on campus or facilitate even voluntary discussions among students, it is hard to see what they possibly *can* do to prevent a hostile environment from arising before it is too late.

The Eleventh Circuit, meanwhile, held that bias teams intimidate students because "[n]o reasonable college student wants to run the risk of being accused of 'offensive,' 'hostile,' 'negative,' or 'harmful' conduct—let alone 'hate or bias.' Nor would the average college student want to run the risk that the University will 'track[]' her, 'monitor[]' her, or mount a 'comprehensive response[]' against her."[193] Surely they wouldn't. But none of these quotes are accurate. As the Eleventh Circuit's opinion itself reveals elsewhere, UCF's bias response teams tell students (when they send emails in response to reports) that the university is "committed to tracking *patterns of bias*"—

189. *Id.*
190. *Id.*
191. Speech First, Inc. v. Fenves, 979 F.3d 319, 338 (5th Cir. 2020).
192. *Id.*
193. Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1124 (11th Cir. 2022).

not to tracking students themselves.[194] Similarly, it is *incidents*, not students, that the teams "monitor," and the teams are there to "ensure comprehensive responses" to students who have *experienced bias*—not to mount a comprehensive response against the *speaker*.[195]

The last point is especially worth emphasizing: the Eleventh Circuit's *Speech First* opinion actually misquoted a university bias response team's statement of purpose in order to shift the quote's focus from those who experience hostility to those who inflict it. The Just Knights Response Team's stated goal was to comprehensively respond to victims of bias and hostile speech; the court of appeals misquoted the statement to make student *speakers* appear as the focus of the quote—and the true victims of the school's policies. Seldom has critical race theory's concept of the "perpetrator perspective" in American antidiscrimination law been made quite so literal.

2. Perspectival Shortcomings

When Professor Alan Freeman developed the concept of the "perpetrator perspective" in a 1978 article, he was diagnosing an approach to the problem of discrimination which sees it as a series of bad actions by atomistic individuals whose violations are judged, or excused as unintentional, "outside of and apart from" actual social and historical contexts.[196] Contrasted to this was the "victim perspective," concerned less with individual fault than with the "conditions of actual social existence" that a person experiences as "a member of a perpetual underclass."[197] American antidiscrimination law, Professor Freeman argued, is "hopelessly embedded in the perpetrator perspective."[198]

As originally developed, the perpetrator perspective was not particularly concerned with speech, but later scholars have made the connection, including to campus speech debates. Professors Katharine Bartlett and Jean O'Barr have invoked the concept[199] in describing how university speech and

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194. *Id.* at 1116 (emphasis added).

195. *Id.* at 1117.

196. Freeman, *supra* note 2, at 1049–55.

197. *Id.* at 1049; *see also id.* at 1053 ("The perpetrator perspective sees racial discrimination not as conditions, but as actions, or series of actions, inflicted on the victim by the perpetrator. The focus is more on what particular perpetrators have done or are doing to some victims than it is on the overall life situation of the victim class.").

198. *Id.* at 1053.

199. *See* Bartlett & O'Barr, *supra* note 2, at 582–83 nn.33–34 (citing Darryl Brown, *Racism and Race Relations in the University*, 76 VA. L. REV. 295, 309 (1990)).

harassment policies tend to overlook "the kind of racist, sexist or heterosexist behaviors that are subtle, unknowing, and without a single clear perpetrator or intended victim."[200] From the perpetrator's perspective, individual slights and offenses are seen as trivial and the question on campus "shifts from 'How do we eradicate racist, sexist, and heterosexist behaviors?' to 'Why do some people have to be so sensitive?'"[201]

Bartlett and O'Barr's writing resonates with contemporaneous work by critical race theorist Mari Matsuda. Without referring to the perpetrator perspective explicitly, Professor Matsuda's influential work on hate speech sought to "respect and value" "the victim's story of the effects of racist hate messages" *alongside* "the first amendment's story of free speech."[202] "Informed members of . . . victim communities," Matsuda wrote, "link together several thousand real life stories into one tale of caution."[203] Without sustained attention to these stories, she argued, it becomes all too easy for outsiders—and the law—to dismiss any incidents that do become known as "random and isolated."[204] The result: the law fails to account for the disproportionate costs free speech protections impose on some groups rather than others.[205]

Though more than three decades old now, critical race theorists' emphasis on the perpetrator perspective in American antidiscrimination law—and its correlate, the refusal to give due attention to the stories and perspective of victims of discrimination—applies disturbingly well to the *Speech First* cases of the past few years.

In fact, the dismal legal reasoning within the *Speech First* Trilogy is made possible by the narrow perspective taken in each of those opinions. The holdings in those cases only make sense, if at all, if the perspective of victims—those who experience accumulated gendered or racial hostility on campus—gets ignored along with the potential liability universities face should such hostility arise. To see the Double Liability Dilemma requires a dual perspective. To recognize universities' duties both to speakers and their audiences, to free expression and inclusion, is to approach the problem of campus speech from two sides. Taking only the perpetrator (speaker) perspective is what allows courts to ignore the Dilemma. And the shared

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200. *Id.* at 582.

201. *Id.*

202. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2321 (1989).

203. *Id.* at 2331.

204. *Id.*

205. *Id.* at 2376 ("The application of absolutist free speech principles to hate speech . . . is a choice to burden one group with a disproportionate share of the costs of speech promotion.").

procedural posture of the *Speech First* cases is what has allowed, or even pushed, courts to take such a myopic perspective.

Recall the fact that each of these cases came to the court of appeals on a denied motion for a preliminary injunction to block university speech policies on their face, not as actually applied to any of the anonymous student members of the organization bringing the cases.[206] The posture of the case forced courts to predict—or better yet, to imagine what unnamed conservative students might predict—universities would do if the students voiced their views on socially fraught topics. The question presented, after all, was about what a student in that position might reasonably fear, and how that fear might chill their speech.

Allowing a facial rather than as-applied challenge, and considering the claims at the preliminary injunction stage prior to discovery or evidence about any actual disciplinary actions, together meant that courts had to rely on their own intuitions about how universities were likely to treat conservative speech on campus. And the opinions of the *Speech First* Trilogy leave little doubt about the sources shaping those intuitions.

In the Michigan case, as noted before, the Department of Justice had appeared to state the United States' view that "free speech has come under attack on campuses across the country."[207]

In the Texas case, the court went beyond the record to cite Princeton professor and free speech advocate Keith Whittington and Second Circuit Judge Jose Cabranes on how anonymous reporting threatens freedom of expression on campus;[208] two sources—including an infamous open letter to *Harper's Magazine*—meant to show "our current national condition" in which "institutional leaders . . . are delivering hasty and disproportionate punishment" for controversial speech;[209] and writings from noted conservative scholars John Finnis, Robert George, and Harvey Mansfield, offered for no clear purpose at all.[210]

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206. *See id.*

207. United States' Statement of Interest in Support of Plaintiff's Motion for Preliminary Injunction at 8–9, Speech First, Inc. v. Schlissel, 333 F. Supp. 3d 700 (E.D. Mich. 2018) (No. 2:18-CV-11451), https://www.justice.gov/opa/press-release/file/1070601/download [https://perma.cc/W7KH-V7YZ].

208. Speech First, Inc. v. Fenves, 979 F.3d 319, 338 (2020) (citing Keith Whittington, *Free Speech and the Diverse University*, 87 FORDHAM L. REV. 2453, 2466 (2019); Jose Cabranes, *For Freedom of Expression, For Due Process and For Yale: The Emerging Threat to Academic Freedom at a Great University*, 35 YALE L. & POL'Y REV. 345, 360–61 (2017)).

209. *Fenves*, 979 F.3d at 339 (quoting Elliot Ackerman et al., *A Letter on Justice and Open Debate*, HARPER'S MAG. (July 7, 2020), https://harpers.org/a-letter-on-justice-and-open-debate/ [https://perma.cc/5567-WUB3]).

210. *Fenves*, 979 F.3d at 339 n.18.

Finally, in the Central Florida case, Judge Marcus concurred separately just to warn of "the grave peril posed by a policy that effectively polices adherence to intellectual dogma."[211] He went on: "History provides us with ample warning of those times and places when colleges and universities have stopped pursuing truth," before endorsing the well-known University of Chicago Statement on Freedom of Expression and concluding: "[a] university that turns itself into an asylum from controversy has ceased to be a university; it has just become an asylum."[212]

This is the effect of the procedural commonalities described earlier. By bringing these cases facially rather than applied, by anonymizing the students whose "injuries" were said to establish standing, and by getting to courts of appeals before an evidentiary record was established, Speech First ensured that the Fifth, Sixth, and Eleventh Circuits made their decisions based not on events that actually happened at any of the defendant universities, but on intuitions shaped by well-publicized narratives, carefully crafted by free speech advocates, about rising liberal intolerance on today's college campuses.[213]

So thoroughly, in fact, do the courts of appeals take the perpetrator perspective in the *Speech First* Trilogy that they discount the only evidence

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211. Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1129 (11th Cir. 2022) (Marcus, J., concurring).

212. *Id.* at 1129–30. The Chicago Statement is so beloved by university free speech advocates that one organization, the Foundation for Individual Rights and Expression, has staff dedicated to evangelizing on its behalf. *See FIRE Case Files*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, https://www.thefire.org/cases/fire-launches-campaign-in-support-of-university-of-chicago-free-speech-statement/ [https://perma.cc/HSF9-YZCJ]. For concerns about the Chicago Statement, see Brian Soucek, *Academic Freedom and Departmental Speech*, 108 ACADEME 24, 24, 26 (2022) and SIGAL R. BEN-PORATH, FREE SPEECH ON CAMPUS 41–42 (2017).

213. *See* Graham Piro, *Penn Law Dean Asks for 'Major Sanction' Against Professor Amy Wax, Creating Tenure Threat for all Penn Faculty*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (July 13, 2022), https://www.thefire.org/penn-law-dean-asks-for-major-sanction-against-professor-amy-wax-creating-tenure-threat-for-all-penn-faculty/ [https://perma.cc/BPY4-L5HP] ("The dean's report marks the latest step in a monthslong process of sanctioning Wax for her speech as a faculty member at Penn—speech that, while offensive to many, remains protected by Penn's promises of academic freedom."); *Free Speech at American Universities Is Under Threat*, ECONOMIST (Oct. 12, 2017), https://www.economist.com/united-states/2017/10/12/free-speech-at-american-universities-is-under-threat [https://perma.cc/Z5VE-BJSU]; Yasha Mounk, *The Real Chill on Campus*, ATL. (June 16, 2022), https://www.theatlantic.com/ideas/archive/2022/06/campus-free-speech-self-censorship/661282/ [https://perma.cc/J82H-ABAL]; Emma Camp, *I Came to College Eager To Debate. I Found Self-Censorship Instead*, N.Y. TIMES (Mar. 7, 2022), https://www.nytimes.com/2022/03/07/opinion/campus-speech-cancel-culture.html [https://perma.cc/ZZ64-CMVJ]. *But see* ELIZABETH NIEHAUS, SELF-CENSORSHIP OR JUST BEING NICE: UNDERSTANDING COLLEGE STUDENTS' DECISIONS ABOUT CLASSROOM SPEECH (2021).

that *does* make it into the record: the assurances of university officials that the speech described in Speech First's complaints and declarations would not run afoul of the universities' anti-harassment codes. Even the officials' sworn statements that they did not intend to reinstate policies they amended after the lawsuits were filed were seen as too unreliable to moot Speech First's claims. From the perpetrator perspective, this makes sense. Would a conservative student immersed in commentary about cancel culture and woke thought policing on college campuses be likely to see administrators as a threat? Of course!

What that perspective hides, however—and what the *Speech First* Trilogy, one footnote aside,[214] utterly ignores—is the reason why universities crafted harassment policies and formed bias response teams in the first place. Focusing solely on stray comments by individual (albeit unnamed) *speakers*, the courts never consider how a multitude of such speakers might together create environments hostile enough to deny educational opportunities to *listeners* based on their race, gender, religion, or disability. Amidst all the concern about preserving "the college classroom with its surrounding environs [as] peculiarly the 'marketplace of ideas,'"[215] the *Speech First* courts completely fail to ask whether some are getting driven out of the marketplace, or what is reasonable for universities to do about it.

In sum, the three opinions that make up the *Speech First* Trilogy in the Fifth, Sixth, and Eleventh Circuits are not just doctrinally flawed or unsatisfying in their reasoning. To say that broader culture-war narratives shaped the perspective the courts took in these cases is not (just) to complain that the courts were insufficiently even-handed. The claim, ultimately, is something much stronger. By taking solely the speaker's perspective, courts have blinded themselves to the dilemma their decisions have forced upon universities who are legally obliged to protect *both* free expression and equal inclusion. Taking only the perpetrator perspective, the *Speech First* courts failed to see that their decisions have placed universities in a legally *contradictory* position—and, therefore, must necessarily be wrong.

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214. In fairness, the Eleventh Circuit's *Cartwright* opinion is actually the one member of the Trilogy that does *anything* to acknowledge—albeit in a footnote—the two-sidedness of the problem universities face. *Cartwright*, 32 F.4th at 1124 n.4. "Speech First's members claim to have been intimidated and marginalized" by UCF's bias response team, the court notes, but then observes that the response team was created "to address situations in which students felt intimidated or marginalized" due to hostile speech by other students; "kind of like . . . snowflakes all around," the court quips, before deciding that intimidation by fellow students pales in importance compared to intimidation by university officials. *Id.*

215. *Id.* at 1129 (quoting Healy v. James, 408 U.S. 169, 180 (1972)).

The final Part asks what would need to change in order to allow universities to escape this dilemma.

III. ESCAPING THE DILEMMA

The Double Liability Dilemma remains a dilemma only if two contradictory things are held true at once: 1) universities are required by antidiscrimination law to try to prevent hostile educational environments from arising from conduct that might include, or even consist solely of, racially or sexually harassing speech; and 2) before the hostile environment threshold is reached, universities are prohibited by free speech law from taking steps to stop or counteract such speech.

Theoretically, the dilemma can be resolved from either direction. For example, courts or Congress could decide that universities should *not* be liable for race or sex discrimination that consists solely of verbal expression. Speech alone can never support a hostile environment claim, they might say. Despite the decades of antidiscrimination doctrine this would upend, the Fifth Circuit floated exactly this suggestion in its *Speech First* case.[216] Citing *Davis*, the case that established the severe, pervasive, and objectively offensive standard for hostile environment liability,[217] the Fifth Circuit commented ominously, in a footnote: "Whether *Davis* may constitutionally support purely verbal harassment claims, much less speech-related proscriptions outside Title IX protected categories has not been decided by the Supreme Court or this court and seems self-evidently dubious."[218]

Finding the proposition self-evident, the Fifth Circuit did not bother to argue why it is true, or how it is consistent with, say, prohibitions on "Whites Only" signs and other purely verbal yet clearly illegal barriers to access in public accommodations, housing, and employment.[219] To the contrary, what actually "seems self-evidently dubious" is the idea that speech which is so hostile that it denies people access to education on account of their race or gender should be protected as public discourse under the First Amendment. At the very least, a world where racist and sexist exclusion must be permitted

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216. Speech First, Inc. v. Fenves, 979 F.3d 319, 337 n.16 (5th Cir. 2020).

217. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999).

218. *Fenves*, 979 F.3d at 337 n.16.

219. *Cf.* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.").

at public schools as long as it is done through spoken or written words rather than other conduct seems self-evidently undesirable from a moral standpoint.

Without allowing speech-based harassment entirely, another way to escape the Double Liability Dilemma would be to immunize universities from liability on the equality side in cases whenever the First Amendment was responsible for preventing universities from intervening.[220] Support here comes from *Davis* itself, where the Supreme Court noted that "it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims."[221]

It may seem that any contradiction between the Free Speech Clause and antidiscrimination statues like Title VI and Title IX must be resolved in favor of speech; a statute has to give way to the constitution, after all. But at least at public universities, the nondiscrimination side of the Dilemma has a constitutional dimension as well: the Equal Protection Clause. Since the Constitution protects students and employees at public schools from sex- and race-based harassment,[222] free speech cannot be the university's sole concern. Expression and equality dictates each have to be defined with an eye to the other.

Constitutional balancing is additionally required insofar as the First Amendment interests of students may collide with those of the universities themselves. Insofar as the *Speech First* cases suggest that universities cannot speak out against hostile speech, or even label it as biased,[223] without unconstitutionally chilling the expression of their students, these cases run headlong into the age-old mantra that the proper remedy to dangerous or hateful speech is "more speech."[224] The *Speech First* cases themselves threaten to chill *universities'* constitutionally protected counterspeech—their

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220. *Cf.* Farmers Educ. & Coop. Union of Am. v. WDAY, Inc., 360 U.S. 535 (1959) (holding that a television/radio station could not be held liable for defamatory statements federal law required it to broadcast and prohibited it from censoring). Thanks to Dan Rauch for pointing me to this case.

221. *Davis*, 526 U.S. at 649.

222. *See, e.g.*, Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009) (holding that Title IX liability for peer-on-peer sexual harassment does not preclude suit under the Equal Protection Clause); Feminist Majority Found. v. Hurley, 911 F.3d 674, 701–02 (4th Cir. 2018) (holding and citing cases from five other circuits holding that "a school official can be liable under the Equal Protection Clause for his deliberate indifference to student-on-student sexual harassment"); DiStiso v. Cook, 691 F.3d 226, 241 (2d Cir. 2012) (holding similarly for racial harassment claims).

223. *See supra* notes 192–194 and accompanying text.

224. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

right to express institutional values such as equity and inclusion, to condemn speech and actions that threaten it, and to inculcate qualities like civility or professionalism. Free speech concerns, in other words, crop up on both sides of these cases.

The speech rights of students simply cannot be defined without consideration of the other constitutional interests at play. Balancing is needed. Preventing schools from acting, and delaying liability, until some point *after* the *Davis* threshold has been reached would be one way to dissolve the Double Liability Dilemma. But consider the balance that would entail. For one thing, if "preventing schools from acting" includes preventing schools from speaking out against hateful speech, institutional speech rights would have been left off the scales. Moreover, waiting until after the *Davis* line is crossed, by definition, means that harassment would already have occurred that is "so severe, pervasive, and objectively offensive that it effectively bar[red] the victim's access to an educational opportunity or benefit."[225] Hostile environments could be dealt with only once that had already arisen. And if they arose through the cumulative speech of multiple speakers, it is not clear that disciplinary responses to individual speakers would be possible even then.

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Finding this result untenable, both constitutionally and normatively, this Article thus will turn in its remaining pages to the other, more promising prong of the Dilemma.

If we assume that universities must act *before* hostile environments arise on campus—that schools must try to *prevent* the denial of educational benefits based on race or sex—what follows about First Amendment constraints on how universities can respond to racially or sexually hostile speech?

As we have seen, the limits imposed through the preliminary injunctions and settlements in the *Speech First* cases are unbelievably sweeping. As Part II showed, the Fifth, Sixth, and Eleventh Circuits have all struck down common harassment policy language—including terms like "unreasonably"—as unconstitutionally vague. The same courts have held that student speech might reasonably (!) be chilled by an emailed invitation to a voluntary meeting with bias response team members who have no disciplinary powers. Finally, in finding constitutional injury in the very fact

225. *Davis*, 526 U.S. at 633.

that colleges label some speech to be offensive, negative, or harmful,[226] the courts have called into question universities' ability even to engage in their own speech in response to hateful or biased expression on campus.[227] So sweeping are these restrictions that the only measures that would seem to survive them are purely supportive ones provided to those on the receiving end of racially or sexually hostile speech. Schools can presumably still provide counseling or accommodations (class and housing transfers, etc.) to victims, even if they cannot take steps to respond to *speakers* until their speech rises to the *Davis* standard. (Unclear is whether schools can refer to their victim support efforts as "bias responses" or if even that itself is stigmatizing enough to potentially chill speakers' hostile expression.)

The sweeping limits imposed in the *Speech First* Trilogy are what give rise to the Double Liability Dilemma, for they leave universities with no tools to stop—and few tools even to mitigate the effects of—hostile speech before it reaches the *Davis* standard. But of course at that point, schools become liable for not having acted. So, once again, the question is what must change in this emerging caselaw to allow universities to avoid the Dilemma?

One option, encountered earlier,[228] is Professor Volokh's proposal that only personally directed speech should be regulable in workplaces[229] and at schools,[230] and only once the target of the speech has said the speech is unwanted.[231] Another option is that of Professor Pettys,[232] who would omit Volokh's directed speech requirement—since, he argues, even overheard slurs and other hostile expression can become offensive enough to affect someone's educational opportunities[233]—but who would add a requirement that, in order to be subject to discipline, students must know that their speech combined with others' is likely to create a hostile environment.[234]

Notably, at least one of the policies Speech First has successfully challenged actually did contain a targeted speech limitation similar to

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226. *See Cartwright*, 32 F.4th at 1124 ("No reasonable college student wants to run the risk of being accused of 'offensive,' 'hostile,' 'negative,' or 'harmful' conduct—let alone 'hate or bias.'").

227. *See supra* Part Error! Reference source not found..

228. *See* Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 39; *see also* text accompanying notes 67–69.

229. Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 39.

230. Letter from Eugene Volokh & Gary T. Schwartz, Professor of L., UCLA Sch. of L., to U.S. Comm'n on C.R. (May 13, 2011) (on file with author) (addressing harassment regulations at the K-12 levels in his letter).

231. *Id.*

232. *See* Pettys, *supra* note 70, at 53–54; *see also* text accompanying notes 70–75.

233. Pettys, *supra* note 70, at 51.

234. *Id.* at 53.

Volokh's. In *Fenves*, the University of Texas's harassment policy extended only to "'hostile or offensive speech' . . . that . . . personally describes or is personally directed to one or more specific individuals."[235] But that was not enough to save the policy at the Fifth Circuit.[236]

Unlike the *Speech First* courts, Professors Volokh and Pettys both would allow schools to regulate at least some student speech that falls below the *Davis* standard because it is not, *on its own*, severe, pervasive, and objectively offensive enough to deny someone access to education.[237] Notably, both are compelled to do so because, unlike the *Speech First* courts, both scholars see beyond the perpetrator perspective. Like Professor Matsuda before them,[238] Professors Volokh and Pettys each justify their respective proposals by arguing that the tests they propose strike the proper *balance* between free speech protections and protection from the harms of racist and sexist speech.[239] As balancers, they necessarily put listeners' interests on one side of the scale, thereby taking the victims' perspective into account in a way that the *Speech First* courts have simply failed to do.

There is another important way in which Professor Volokh's and Pettys' proposals converge with each other—and diverge from the *Speech First* Trilogy. Both argue that schools should be allowed to take a wide range of steps *other than* discipline to discourage hostile speech or counteract its effects. It is a mark of how radical the *Speech First* opinions are that they would not allow even these kinds of responses.

According to Volokh, "[s]chools can and often should condemn rude and harmful speech, even if the speech is constitutionally protected."[240] Talking specifically about K-12 schools, Volokh argues that there are many possible avenues for such condemnation: public statements by administrators and respected teachers, statements coordinated with influential student groups,

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235. Speech First, Inc. v. Fenves, 979 F.3d 319, 323 (5th Cir. 2020).

236. *Id.* at 334 ("It is likely that the University's policies arguably proscribe speech of the sort that Speech First's members intend to make.").

237. *See* Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 39, at 1812; Pettys, *supra* note 70, at 53.

238. *See* Matsuda, *supra* note 202; *see also* text accompanying *supra* notes 202–206.

239. *See* Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 39, at 1843–44 ("Harassment law may restrict speech, but it does so to achieve a very important goal—an equal work environment for employees regardless of their race, sex, religion, or national origin. . . . [T]his interest that harassment law serves must be frankly and fairly balanced against the value of the free speech that harassment law suppresses."); Pettys, *supra* note 70, at 51 ("[W]e need a middle path—one that neither excessively chills harmless speech nor frees speakers to entirely disregard the access-denying harm their words might inflict.").

240. Volokh & Schwartz, *supra* note 230, at 6.

and individual meetings with students and their parents.[241] Students need to learn that some statements are not only unkind but, if repeated later on in life, can cost them jobs or even destroy their careers.[242]

Pettys, meanwhile, makes school outreach to students about offensive but constitutionally protected speech constitutive of what counts as protected speech going forward.[243] Because Pettys would allow universities to discipline students only once they know that their speech, when combined with that of others, is likely to create a hostile environment, university interventions that give students this knowledge can set the stage for future discipline.[244] "The more that a speaker learns about the likely impact of his or her contemplated speech, the greater his or her exposure to constitutionally permissible discipline," Pettys writes.[245] On this account, then, institutional speech and direct outreach to student speakers—the very thing bias response teams were created to do—are not just allowable, they are sometimes required to create the conditions under which schools can later employ stronger measures to stop cumulative hostility before it becomes actionable under Title VI and Title IX.

The *Speech First* cases, by contrast, prohibit universities from engaging in exactly this kind of outreach. Measures as innocuous as emails from administrators inviting students to *voluntary* meetings to discuss the effects of their speech have been viewed as unconstitutionally chilling. Worse, as noted already,[246] insofar as courts have found injury in the terms universities use to describe certain speech as biased or hostile or harmful, the *Speech First* courts call into question the extent to which university leaders can even engage in expression of their own. If it is constitutionally problematic even to name a group a "bias response team," the official condemnation that Professor Volokh recommends is on dubious ground in the circuits where Speech First has won. It is hard to overstate how radically restrictions like these would hamstring colleges and universities in their efforts to promote equal inclusion on campus.

Ultimately, it isn't necessary to endorse Professor Volokh's or Pettys' or anyone else's specific test for what speech should be proscribable or punishable in order to make the most important point: that *some* standard

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241. *Id.*

242. *Id.*

243. *See* Pettys, *supra* note 70, at 54 ("If . . . speakers are not initially aware of the impact their speech is probably having, they can be advised about that impact, thereby setting the stage for more aggressive institutional intervention if the harassment continues.").

244. *Id.* at 53.

245. *Id.* at 54.

246. *See supra* text accompanying note 226.

lower than the *Davis* test is necessary if universities are to escape the Double Liability Dilemma; *some* responses to offensive but protected speech must count as non-disciplinary, and thus permissible. If every effort to change the tone of speech on campus is seen as unconstitutionally chilling, schools will be powerless to stop the hostile environments that they are legally required to prevent. The fact is, schools *do* want to chill speech that is headed toward the hostile environment threshold. And a significant strand of nondiscrimination law is premised on the idea that they must do so.

The courts that have sided with Speech First have done so by ignoring the antiharassment prong of the Double Liability Dilemma—and the perspective of anyone other than speakers. But courts aren't alone in doing this. All too often, discussion about prominent campus speech controversies tends to the same thing. Before bringing this Article to a close, it might be helpful to look briefly at one of these controversies, just to see the dynamic in action. For the sake of familiarity, a recent law school example should suffice to make the point.

Controversy exploded at Yale Law School in 2021 when an email went out to students inviting them to a "Trap House" themed party, co-hosted by the Native American Law Students Association and the school's chapter of the Federalist Society.[247] Given the racial connotations of the party's theme,

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247. For background and a sampling of the commentary on the controversy, see Eda Aker, *Email from Yale Law Student Sparks National Discussion on Racism and Free Speech*, YALE DAILY NEWS (Oct. 19, 2021, 1:51 AM), https://yaledailynews.com/blog/2021/10/19/email-from-yale-law-student-sparks-national-discussion-on-racism-and-free-speech/ [https://perma.cc/2LGV-96FH]; Monica Bell (@monicacbell), TWITTER (Oct. 15, 2021, 2:25 PM), https://twitter.com/monicacbell/status/1449124183124938753 [https://perma.cc/SKM9-MSSD]; Ruth Marcus, Opinion, *At Yale Law School, a Party Invitation Ignites a Firestorm*, WASH. POST (Oct. 14, 2021, 7:04 PM), https://www.washingtonpost.com/opinions/2021/10/14/yale-law-school-party-invitation-trap-house/ [https://perma.cc/UY7Y-3E6H]; Liz Wolfe, *Don't Use the Term 'Trap House' in Your Party Invite at Yale Law School*, REASON (Oct. 13, 2021, 4:10 PM), https://reason.com/2021/10/13/dont-use-the-term-trap-house-in-your-party-invite-at-yale-law-school/ [https://perma.cc/A2FA-DBLP]; Debra Cassens Weiss, *Yale Law School Sought 2L's Apology for 'Trap House' Constitution Day Invitation, Citing 'Triggering Associations'*, ABA J. (Oct. 18, 2021, 9:16 AM), https://www.abajournal.com/news/article/yale-law-school-sought-2ls-apology-for-trap-house-constitution-day-invitation-citing-triggering-associations [https://perma.cc/HFV5-6U5P]; Joe Patrice, *Yale Law School Trap House Incident Not a Free Speech Thing No Matter How Hard Folks Try*, ABOVE THE L. (Nov. 12, 2021, 3:45 PM), https://abovethelaw.com/2021/11/yale-law-school-trap-house-incident-not-a-free-speech-thing-no-matter-how-hard-folks-try/ [https://perma.cc/G2NU-VA5F]; Aaron Terr, *How Yale Law School Pressured a Student To Apologize for a Constitution Day 'Trap House' Invitation*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Oct. 14, 2021), https://www.thefire.org/how-yale-law-school-pressured-a-law-student-to-apologize-for-a-constitution-day-trap-house-invitation/ [https://perma.cc/AL6N-LZ3C]; Mark Joseph Stern, *Yale Law School's Free Speech Blunder Bolsters the Federalist Society's Victim Mentality*, SLATE (Oct. 13, 2021, 6:40 PM),

students complained both on student listservs and to the administration.[248] Two student affairs administrators called in the student who had sent the email; they discussed how his invitation had been received, urged him to apologize (even drafting language he could use), and warned him of how the controversy might affect his professional reputation going forward.[249] When a recording of the meeting went public,[250] the controversy made national headlines.[251] Senator Tom Cotton referred to the school's actions as "insanity" and called for a tax on its endowment;[252] FIRE proclaimed that "free speech is in jeopardy yet again at Yale University;"[253] Ruth Marcus wrote in the *Washington Post* that "Maoist reeducation camps have nothing on Yale Law School."[254]

Critics seemed to delight in pointing out that the Yale Law students who complained that the email was discriminatory must not understand the legal test for harassment, which this one email clearly didn't meet. ("[A]s future lawyers, they will do themselves no favors by bringing frivolous claims," Professor Andrew Koppelman wrote at the time.[255]) But here the problem of cumulative discrimination rears its head once again. When a hostile education environment arises gradually out of a succession of incidents, are students really expected to withhold their complaints until it is too late? And are school administrators also required to keep out of it until students' educational opportunities have been effectively denied?

If the answer is yes, the Double Liability Dilemma is back. But if the answer is no, if administrators don't have to hold back entirely, then perhaps the objection is just that Yale's administrators went too far or applied too much pressure in response to the email controversy. In that case, the question

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https://slate.com/news-and-politics/2021/10/yale-law-school-federalist-society-trap-house.html [https://perma.cc/3MPK-A249].

248. *See* Aker, *supra* note 247.

249. *Id.*

250. Aaron Sibarium, *Listen to Yale Law School Administrators Tell a Student His Affiliation with the Federalist Society Is 'Triggering' for Classmates*, WASH. FREE BEACON (Oct. 13, 2021, 4:59 AM), https://freebeacon.com/campus/listen-to-yale-law-school-administrators-tell-a-student-his-affiliation-with-the-federalist-society-is-triggering-for-classmates/ [https://perma.cc/6MGH-LC9R].

251. *See supra* note 247.

252. Tom Cotton (@TomCottonAR), TWITTER (Oct. 13, 2021, 8:08 AM), https://twitter.com/TomCottonAR/status/1448304658615787531 [https://perma.cc/RHU6-X3YZ].

253. Terr, *supra* note 247.

254. Marcus, *supra* note 247.

255. Andrew Koppelman, *Yale Law's Bullying, Coercive Diversity Leaders*, CHRON. HIGHER EDUC. (Oct. 18, 2021), https://www.chronicle.com/article/yale-laws-bullying-coercive-diversity-leaders [https://perma.cc/RKF4-LBQ3].

becomes where to draw the line. What counts as discipline, or improper pressure, when schools try to deter offensive but protected speech, elevate academic discourse, or better prepare students for the profession they are poised to enter?

In discussions of this and similar incidents, the protected nature of the individual speech act is sometimes treated as the only relevant fact. But it's hardly uncommon—or inappropriate—for professors and administrators to try to shape or deter or professionalize student expression, however protected it may be. Students whose speech is unprofessional or hostile or boorish are likely to face reputational consequences, and it may be a teacher's or administrator's responsibility, especially at a professional school, to help them see that. Students surely can't be disciplined simply for acting like a jerk, but surely also a good teacher will help them see how being a jerk might affect their professional futures. And when the stakes are not just a speaker's own professional success, but the educational opportunities of his or her classmates—as is the case when offensive speech is contributing to a racially or sexually hostile educational environment—educators have an even greater duty to intervene.

The problem is that *any* intervention, when viewed solely from the speaker's standpoint (as in the *Speech First* cases), is bound to seem like an abridgement of speech. The whole point of the intervention, after all, is to *change* students' expression—to make it less hostile or more professional. When professors pull a student aside to discuss how they are engaging their peers in class—no less than when bias response teams ask to meet with students accused of bias—the intent is that those voluntary interactions will change the way students express themselves. Voluntary as these discussions may technically be, the point is to persuade, and the power dynamics involved make persuasion sometimes hard to distinguish from coercion. But the mere fact that student might choose to speak differently because a faculty or staff member at their school has tried to educate (as opposed to punish) them about their speech's effects—this cannot itself be treated as the kind of chilling effect the First Amendment protects against. Not if education is to occur, and not if it is to be kept open on equal terms to all.

IV. CONCLUSION

It cannot be the law that universities are both legally required to act, and legally liable for acting, to prevent racially or sexually hostile educational environments from arising on their campuses. And yet opinions in three circuits, with more perhaps to come, have put universities in that

contradictory position. As a logical matter, because these opinions lead to contradiction, they must necessarily be premised on a mistake.

This Article has shown how courts deciding Speech First's challenges to harassment policies across the country have ignored the dilemma they have been imposing on universities. Courts have been blinded to one of the dilemma's prongs: by taking what critical race theorists would call the "perpetrator perspective" on campus speech debates, courts have focused on speakers while losing sight of the rights of their (often unwilling) audiences. The *Speech First* cases show with unusual clarity how procedural moves can push courts into adopting such a blinkered perspective.

The *Speech First* Trilogy cannot be the last word—not if universities are to escape the dilemma and fulfill their moral, pedagogical, and legal commitments to advancing *both* free speech *and* equal inclusion. To understand, as this Article has sought to do, how campus speech debates have reached this untenable point is, hopefully, to understand also some of the possible ways beyond it.