

MEMORANDUM

TO: Jack M. Weiss, Chancellor
LSU Law Center

FROM: Kenneth M. Murchison
Professor Emeritus

RE: Response to Incidents of Demeaning Speech

DATE: May 6, 2015

Last December, you telephoned to ask me if I would prepare a report in response to two incidents that involved alleged racial and homophobic slurs by students at the Law Center. Initially, you asked for an analysis of when, if ever, the First Amendment would permit the Law Center to discipline students who delivered such slurs. As we discussed the potential assignment, we agreed that the scope of the project should expand in several respects. First, the analysis would cover all demeaning speech, not just racial or homophobic slurs. Second, the report would not only address disciplinary action; it would also consider other responses the Law Center might take to render demeaning language incidents less likely to occur in the future. Third, the report would consider actions of employees as well as students. We further agreed that the report would be based on my independent research of the constitutional issues, information obtained via email and telephone calls from members of the Law Center community, and a visit to the Law Center so that individuals would have an opportunity to convey their views and concerns to me in person.

This memorandum constitutes my report on the matters you asked me to consider.¹ It consists of four parts. The first section summarizes the factual basis for the report. The second discusses the extent to which the First Amendment allows the Law Center to discipline individuals for demeaning speech. The third offers some suggestions regarding other actions the Law Center might consider taking to reduce the number of incidents involving demeaning speech. The final section summarizes my recommendations.

I. Factual Background

The project began with your email announcing it to the Law Center community. I then sent a general email to the members of the community asking them to share their views with me

¹I over two general caveats to this report.

The first is one that I know you already understand, but I offer it in case you choose to distribute this report outside the immediate Law Center community. I am not a member of the bar of the state of Louisiana, and so this report is not legal advice, which should properly come from university counsel. Instead it is policy advice for you and the faculty based on my years of experience as a professor at the Law Center and as a teacher of constitutional law.

Second, I am uncertain what impact the reintegration of the Law Center as part of LSUA&M will have on the separate disciplinary rules of the Law Center. For purposes of this report, I have assumed that the Law Center retains the authority to implement separate disciplinary rules and procedures. If that assumption is incorrect, my recommendations would be the same but I would encourage the Law Center to seek to have LSUA&M incorporate the recommendations into its standards.

by email or telephone or to share them with me in person when I visited the Law Center. I also wrote additional emails to the members of the law faculty, the constitutional law professors, the advisors to several student groups at the law center, and to the chair of the Diversity Task Force that you recently appointed. In those emails, I encouraged the recipients to share their views with me, to encourage students to do the same, and to meet with me in person when I visited the Law Center.

In response to these emails, I received a number of communications. They varied widely. Some expressed surprise at the suggestion that any problem existed. Others recounted examples of demeaning language that they or others had experienced. A third group expressed alarm at the possible creation of what they regarded as a speech code, which they believed would suppress free speech. In general, the individuals in this third group felt that any attempts to control demeaning speech would inevitably discourage protected speech by students and others.

With the assistance of the Law Library staff, I assembled a bibliography of relevant judicial opinions. I began reviewing those decisions in preparation for my visit to the Law Center.

On Tuesday, March 10, 2015, I visited the Law Center so that I could hear directly from interested persons. I met with the members of the Diversity Task Force and a group of female students and professors as well as with some individuals who had asked to meet in more private settings. I tried to schedule a separate meeting with a group of minority students, but I was unsuccessful in doing so. In the afternoon, I held an open forum at the Law Center; approximately 20-25 individuals attended that meeting, and the group had a very frank discussion.

In the written and oral comments I received during my inquiry, I found two matters particularly surprising and disconcerting. Various individuals indicated that incidents of racial and homophobic slurs were far more common than I would have expected. In addition, several students or former students suggested that some male professors engaged in conduct that made female students uncomfortable.

A number of individuals in several different contexts described racial and homophobic slurs as common at the Law Center. They explained that the slurs made them feel unwelcome and excluded from the Law Center community and discouraged them from participating in activities at the Law Center. Two of the descriptions I heard struck me with particular force. A Baton Rouge native with an LSU undergraduate degree described the Law Center atmosphere as worse than the student had previously experienced in Baton Rouge or during undergraduate studies. An upper-class student indicated at the public forum that he had personally been the object of racial slurs at the Law Center on a weekly basis.

The reports of the apparent acceptance of these slurs by nonminority students were almost as disturbing as the comments themselves. When challenged, the students responsible for the slurs dismissed them as jokes. Moreover, when other nonminority students overheard these comments, they generally remained silent or explained the comments as just the speaker's manner of communicating. In at least one case, a minority student received this explanation after complaining to a representative on the student ethics board. These exchanges convinced me that the Law Center must do more to empower its students to respond to racial and homophobic intolerance.

I received a number of comments regarding the use of language demeaning to women. Some were similar to the racial or homophobic slurs, and they should receive the same disciplinary or other responses.

Other gender-based comments differed in two significant respects. First, several women alluded to incidents in which they felt their professional accomplishments were diminished by comments that seemed to attribute the accomplishments to appearance rather than ability. Most of the women in the group meeting agreed that the problem was less an intent to demean than a failure to appreciate the demeaning impact of the comments. Second, several comments I received involved incidents that resulted from the breakup of personal relationships with other students. These incidents seemed to me to involve complicated situations for which it is much more difficult to devise specific rules to solve.

As I indicated above, one other aspect of the gender-related comments troubled me. I received both written and oral comments suggesting that the actions of some male professors made female students uncomfortable. One might reasonably regard some of these matters (*e.g.*, the way discussion of the role of consent in rape cases was handled in class) as falling within the scope of the professor's academic freedom to hold views I might regard as mistaken or to express those views in ways I might regard as insensitive. Others (such as the suggestion that a professor singled out women, especially those in dresses rather than pants, to enact class demonstrations) cannot be dismissed so easily. One thing the faculty may wish to consider is additional training in ways to avoid making students feel unnecessarily uncomfortable in class.

Obviously, I was not tasked to perform a comprehensive investigation, and my inquiries did not include an independent effort to confirm the accuracy of the specific comments made to me. Nonetheless, the common themes in these comments led me to conclude that the comments I received accurately portray the ways these incidents were perceived by the individuals who were the victims in them. My recommendations are based on that assumption.

II. Discipline and the First Amendment

Because the relevant Supreme Court precedents differ significantly with respect to students and employees, this section discusses the two groups separately. It begins by analyzing when, if ever, the Law Center might discipline students for the use of demeaning language and then considers when disciplinary action might be appropriate against employees.

A. Students

What is most noticeable with respect to university control of the speech of students is the absence of directly relevant Supreme Court precedents. Most of the decisions dealing with speech at the university level have involved groups seeking access to university facilities and resources. In them, the Court held that public universities may not engage in content discrimination with respect to access to facilities and resources that are offered to other student groups. *See Rosenberger v. Rector and Visitors*, 515 U.S. 819 (1995); *Healy v. James*, 408 U.S. 169 (1972); *cf. Widmar v. Vincent*, 454 U.S. 263 (1981) (denial of access a violation of the Free Exercise Clause for religious groups). On the other hand, the Court has also ruled that a university can refuse to grant student recognition to student groups, including those that are religiously affiliated, unless membership and leadership positions are open to all students. *Christian Legal Society Chapter of the University of California v. Martinez*, 561 U.S. 661 (2010).

One older, *per curiam* decision reversed the expulsion of a graduate student for an offensive, but not obscene, cartoon that was published in a student newspaper. *Papish v. Board*

of *Curators*, 410 U.S. 667 (1973). Declaring that “the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech,” the Court ordered the student readmitted because the university’s “action here cannot be justified as a nondiscriminatory application of reasonable rules governing conduct.” *Id.* at 671.

Three additional groups of Supreme Court decisions are potentially relevant to the problem of the free speech rights of university students. One set of decisions clarifies when speech is not protected by the First Amendment. The second addresses the free speech rights of students in elementary and secondary schools. The third set allows content-neutral regulations that do not amount to a prohibition of protected speech.

1. *Unprotected speech*. – Modern decisions have generally constricted exceptions to the protections of the Free Speech Clause. They have, for example, confined government’s ability to punish advocacy of unlawful conduct. Today, a government may criminalize such speech only when the speech is directed at and likely to produce imminent, unlawful action. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

In 1942, the Supreme Court famously described four types of speech whose “punishment and prevention” have “never been thought to raise any constitutional problem”: “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Although the Supreme Court did subsequently confirm the additional permissibility of criminalizing speech that threatens another, *Watts v. United States*, 394 U.S. 705 (1969) (per curiam) (threat against the President), the Supreme Court has generally narrowed the *Chaplinsky* categories in the ensuing three quarters of a century. Modern definitions have narrowly defined what can be prohibited as lewd and obscene, *see, e.g., Miller v. California*, 413 U.S. 15, 24 (1972), and created constitutional defenses that have substantially constricted the boundaries of libel and slander, *see, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Moreover, the Court no longer excludes speech that is merely “profane” or “offensive” from full constitutional protection. *See Snyder v. Phelps*, 562 U.S. ___, 131 S. Ct. 1207 (2011); *Cohen v. California*, 403 U.S. 15 (1971).

In trying to combat demeaning speech, organizations have most commonly relied only the “fighting words” exception to the First Amendment, but the current status of that exception is not entirely clear. At a minimum, the Court has limited its reach to “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.” *Cohen*, 403 U.S. at 20. One of the decisions discussed below assumed that such speech is unprotected, but held that the particular statute before the Court did not fall within the exception. The other affirms that the fighting words exception to the First Amendment still applies with respect to speech that satisfies the *Cohen* standard.

In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), a municipal ordinance prohibited placing “on public or private property, a symbol [or] object . . . which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender. . . .” Even though the Supreme Court plurality concluded that the Minnesota court had narrowly construed the ordinance to limit its reach to fighting words, it ruled the ordinance was facially unconstitutional because “it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.” *Id.* at 381.

The juvenile defendant urged the Court to reconsider and to limit the fighting words exception recognized by *Chaplinsky*, but the Court found it “unnecessary to consider that issue.”

Id. at 384. Even if the defendant’s actions could be proscribed as fighting words, the statute was unconstitutional because it only punished fighting words that focused on race, color, creed, religion, or gender. The power to proscribe speech “on the basis of *one* content element” does not, the Court concluded, include “the power to prescribe it on the basis of *other* content elements.” *Id.* at 380 (emphasis in original). Even when proscribing speech that can be banned in its entirety, “[t]he government may not regulate use [of that type of speech] based on hostility – or favoritism – towards the underlying message expressed.” *Id.* at 386.

Subsequently, the Court clarified that *R.A.V.* did not preclude a state from punishing a particular method of intimidation even if that method had been widely used to intimidate racial and religious minorities. *Virginia v. Black*, 538 U.S. 343 (2003), upheld the authority of a state to punish burning of a cross with intent to intimidate, although the Court did invalidate a provision of the statute declaring the burning of a cross in public view was *prima facie* evidence of an intent to discriminate.

According to Justice O’Connor’s majority opinion in *Black*, the statute before the Court was distinguishable from the *R.A.V.* ordinance because the statute did “not single out for opprobrium on that speech directed toward ‘one of the specified topics.’” *Id.* at 362. To the contrary, the statute simply banned “a particularly virulent form of intimidation,” much as a state might ban only pornography with the most “prurient” content. *Id.* at 363.

Black offers a recent summary of the scope of unprotected speech. It treats the speech as unprotected in three situations: where a defendant uses words that satisfy the “likely to provoke violent reaction” standard established by *Cohen*, when advocacy satisfies the “the imminent lawless action” standard of *Brandenburg*, and when the state is banning a “true threat” of violence. *Id.* at 359.

2. *Elementary and Secondary School Cases* – Except for the cases summarized at the beginning of this section, the Supreme Court has never addressed the question of when, if ever, a public university can limit speech by its students. The modern Court has, however, reviewed controls on speech in secondary schools on several occasions. In *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), the Court held that a school district could not forbid students from wearing armbands to protest the Vietnam War unless it could show that the allowing the armbands would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.” *Id.* at 509.

Subsequent decisions involving elementary and secondary schools have recognized a broad power to regulate student speech in a wide variety of contexts. The Court has permitted schools to punish offensive speech at school assemblies, *Board of Education v. Pico*, 457 U.S. (1982), and to refuse publication of controversial articles in a student newspaper, *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). Most recently, the Court approved suspension of a student for displaying a “BONG HITS 4 JESUS” at an off-campus event sponsored by the school. *Morse v. Frederick*, 551 U.S. 393 (2007). In all of these cases, the Court has emphasized the impact of the speech on the educational environment and the substantial deference due to school authorities regarding what constitutes a proper educational environment.

Although the Supreme Court has never addressed the degree to which the secondary school precedents apply to universities, decisions of the lower federal courts have considered the issue on a number of occasions. Unfortunately, the answers they provide are not entirely consistent.

Three older Fifth Circuit decisions are the only holdings binding on the law center. None of them is directly in point; moreover, they point in different directions. Relying on the

Supreme Court decision in *Healy, Bazar v. Fortune*, 476 F.2d 570, 576, *rehearing en banc* 489 F.2d 225 (5th Cir. 1973), and *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975), held that a university can only control the content of student publications in “special circumstances,” *id.* at 260; but these decisions antedate the Supreme Court’s *Hazelwood* opinion that allowed administrators to control high school newspapers. A little over a decade later, dicta in *Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986) – a case involving the dismissal of a college professor – cited the Supreme Court’s *Bethel* opinion for the proposition that “[i]ndecent language and profanity may be regulated in the schools” without distinguishing between university and secondary schools. *Id.* at 585, *citing Bethel*.

At least three other circuits have considered the scope of First Amendment rights in the context of university control of the content of student newspapers. *Hosty v. Carter*, 412 F.2d 731, 734 (7th Cir. 2005), could identify “no sharp differences between high school and college newspapers,” when it held that a university administrator who demanded that student newspaper be submitted for review prior to publication was entitled to qualified immunity. By contrast, older decisions in the Fourth and Eighth Circuits, *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973); *Stanley v. Magrath*, 7219 F.2d 279 (8th Cir. 1983), as well as more recent decisions in the Second and Sixth Circuit, *Husain v. Springer*, 494 F.3d 108 (2d Cir. 2007); *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001), have all struck down attempts to censor the content of student newspapers. The most expansive language comes in dicta from a First Circuit opinion that summarily declared the Supreme Court decision regarding high school newspapers “is not applicable to college newspapers.” *Student Government Association v. Board of Trustees*, 868 F.2d 473, 480 (1st Cir. 1989).

Outside the student newspaper context, the decisions of the circuits are also split. The Eleventh and Tenth Circuits have allowed the greatest restrictions on student speech, while the Sixth and Third Circuits have both struck down some university attempts to regulate student speech.

An early Eleventh Circuit decision concerned regulations governing student elections at the University of Alabama. Although the court agreed that these restrictions would violate the First Amendment if applied to regular elections, it relied on the Supreme Court’s secondary school cases in upholding the regulations of student elections. Because the university viewed “its student government association, including the election campaigns, as a ‘learning laboratory,’” it could place “reasonable restrictions on this learning experience.” *Alabama Student Party v. Student Government Association*, 867 F.2d 1344, 1346 (11th Cir. 1991); *cf.* *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) (applying framework of Supreme Court *Hazelwood* decision to professor’s speech in class).

More recently, the Eleventh Circuit cited the Supreme Court’s *Hazelwood* case in rejecting a First Amendment challenge to a university’s requirement that a graduate student in counselling to undertake a remediation plan to address “deficiencies in her ‘her ability to be a multiculturally competent counselor, particularly with regard to working with gay, lesbian, bisexual, transgender, and queer/questioning (GLBTQ) populations.’” *Keeton v. Anderson-Wiley*, 664 F.3d 865, 867 (11th Cir. 2011). After deciding that the remediation plan was viewpoint neutral, the court turned to the question of whether the burden placed on the student’s “First Amendment rights was reasonable, keeping in mind ‘the special characteristics of the school environment.’” *Id.* at 875, *quoting Widmar*. It concluded the burden was reasonable because the university had “a legitimate pedagogical concern in teaching its students to comply with” the Code of Ethics of the American Counseling Association. *Id.* at 876.

The Tenth Circuit also applied a deferential review standard in two cases. In 1994, it applied the secondary school precedents to allow a university to prevent a student group from showing a controversial film. *Cummins v. Campbell*, 44 F.3d 847 (10th Cir. 1994). A decade later, the same court used a somewhat more nuanced analysis in upholding the university's power to require an acting student to use expletives the student believed were offensive. *Axon-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004). Because the speech in question was "school-sponsored" speech, the Supreme Court's secondary school decisions allowed university "officials to place restrictions on the speech" so long as their actions are "reasonably related to legitimate pedagogical concerns." *Id.* at 1290.

In contrast to the decisions described in the preceding paragraphs, the Third and Sixth Circuits have applied a more robust protection for the First Amendment in reviewing university regulations. These decisions are particularly important because several of them involve harassing speech that is somewhat closer to the types of speech that the Law Center would like to discourage.

The Third Circuit has given the most thorough explanation of the rationale for recognizing "a difference between the extent that a school may regulate student speech in a public university setting as opposed to that of a public elementary or high school." *McCauley v. University of the Virgin Islands*, 618 F.3d 232, 242 (3d Cir. 2010), quoting *DeJohn v. Temple University*, 537 F.3d 301, 315 (3d Cir. 2008). The *McCauley* court gave four reasons for conclusion. First, the pedagogical goals of the institutions differ: "While both seek to impart knowledge," universities encourage "inquiring and challenging *a priori* assumptions, whereas" elementary and high schools prioritize "the inculcation of societal values." 618 F.3d at 243. Second, "'public elementary and high school administrators,' unlike their counterparts at public universities, 'have the unique responsibility to act *in loco parentis*.'" *Id.*, quoting *DeJohn*, 537 F.3d at 315. Third, "public elementary and high schools must be empowered to address the 'special needs of school discipline' unique to those environs." *McCauley*, 618 F.3d at 245, quoting *DeJohn*, 537 F.3d at 315-16. Fourth, "public elementary and high school administrators 'must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics.'" By contrast, "[c]onsiderations of maturity are not nearly as important for university students, most of whom are already over the age of 18 and entrusted with a panoply of rights and responsibilities as legal adults." *Id.* at 246, quoting *Hazelwood*, 484 U.S. at 272.

McCauley involved a First Amendment objection to the student code of conduct at the University of the Virgin Islands. The district court had enjoined as overbroad a provision that prohibited the commission of "any act . . . which tends to injure or actually injures, frightens, demeans, degrades or disgraces any person," 618 F.3d at 242; and the Sixth Circuit considered facial challenges to three additional provisions that banned the display of "any unauthorized or obscene, offensive, or obstructive sign" at athletic fields and the field house, the cafeteria, or the center for the arts; conduct which causes emotional distress; and verbal assault, lewd, indecent or obscene conduct or expression on university owned or controlled property or at university sponsored or supervised functions. *Id.* at 248, 250, 252. Applying overbreadth doctrine "informed by the 'critical importance' free speech has in our public universities, *id.* at 242, the court found the first two provisions overbroad and facially unconstitutional. The use of the word "offensive" in the first provision was so "broad and subjective" that it could apply to any speech that offended anyone, *id.* at 248-49; similarly, the wording of the second provision was also unacceptable because it was "entirely subjective and provide[d] no shelter for core protected

speech.” *Id.* at 250. By contrast, the third was constitutional because “a reasonable limiting construction would interpret it as only applicable to speech that is obscene under the relevant Supreme Court decisions.” *Id.* at 253.

As several of the quotations in the preceding paragraph suggest, *McCauley* followed the earlier Third Circuit decision in *DeJohn*. *DeJohn* involved a facial challenge to Temple University’s sexual harassment policy, which provided:

All forms of sexual harassment . . . , including . . . expressive, visual, or physical conduct of a sexual or gender-motivated nature, when . . . (c) such conduct has the purposed or effect of unreasonably interfering with an individual’s work, educational performance, or status; or (d) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment.

The court began its analysis by finding that overbreadth review was implicated “on public university campuses through this country, where free speech is of critical importance because it is the lifeblood of academic freedom.” *Id.* at 314. Reaffirming that the Free Speech Clause contains no “harassment exception,” *id.* at 316, the Court identified two deficiencies in the Temple policy: “its focus on the motives of the speaker” and its use of “hostile,” “offensive,” and “gender-based,” words that are “sufficiently broad and subjective that they ‘could conceivably be applied to cover any speech’ of a ‘gender-motivated’ nature the content of which offends someone.” *Id.* at 317, quoting *Saxe v. State College Area School District*, 240 F.3d 200, 210, (3d Cir. 2001). Nor was it possible to subject the policy “to a reasonable limiting construction.” *Id.* at 318. Although the Court conceded the university had “a compelling interest in preventing harassment,” it ultimately concluded that “a harassment policy may suppress core protected speech” unless the policy “is qualified with a standard akin to a severe or pervasive requirement.” Similarly, the Court acknowledged that “speech amounting to ‘fighting words’ would not be protected,” but ruled that the Temple policy covered “much more speech” than would be allowed even under a more lenient test that allowed the prohibition of speech that resulted in a “substantial disruption” of the educational process. *Id.* at 320.

The Sixth Circuit has been similarly hostile to broad bans on harassing language. A 1995 decision held that Central Michigan University’s discriminatory harassment policy was unconstitutional under the First Amendment because it was overbroad. The policy prohibited:

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

In the Sixth Circuit’s view, the policy language was “sweeping and seemingly drafted to include as much and as many types of conduct as possible.” As a result, the appellate court concluded that “[o]n its face, the policy reaches ‘a substantial amount of constitutionally protected conduct.’” *Id.* at 1182. Finally, the court rejected the argument that the policy could be saved by limiting it to “fighting words.” Even if that construction were adopted, the policy would still be unconstitutional under *R.A.V.* as “content discrimination because it necessarily requires the university to assess the racial or ethnic content of the speech.” *Id.* at 1184.

The opinions discussed in the preceding paragraphs do not mean that all university controls on speech are unconstitutional. Even in the Third and Sixth Circuits, courts have upheld some university actions limiting student speech.

A district court in the Third Circuit upheld the suspension of a student against a First Amendment challenge. The court ruled that the university could reasonably construe a student's emails to a professor as "true threats" that were unprotected under the First Amendment. *Osei v. Temple University*, 2011 WL 4549609 (E.D. Pa. 2011).

Two decisions of the Sixth Circuit itself have recognized that universities have some power to restrict speech on campus. In *Gilles v. Davis*, 427 F.3d 197 (3d Cir. 2005), that court rejected a First Amendment challenge to the arrest of a campus evangelist for disorderly conduct. The arrest was proper, the Court ruled, because the evangelist's invective against a woman who claimed to be a lesbian Christian amounted to "fighting words" under *Chapinsky*. More recently, *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), upheld the authority of university to set standards that required student to counsel homosexual students during a counseling practicum, but remanded the case for a factual determination of whether the student's expulsion was based on neutral enforcement of a legitimate school curriculum.

Two district courts in the Sixth Circuit have also ruled in favor of university regulations that were challenged on First Amendment grounds. The second of these decisions is very recent; the court issued it after my visit to the Law Center in March.

Corlett v. Oakland University Board of Trustees, 958 F. Supp. 2d 795 (E.D. Mich. 2013), upheld a university decision to suspend a student for referring to his professor as "stacked" and including a fetishized description in a writing assignment. The court concluded that the "[p]laintiff's expressions of lust for [the teacher] and descriptions of her physical appearance" were not protected by the First Amendment and that it should not "interfere and assess the appropriateness of the school's punishment where First Amendment expression is not involved." *Id.* at 809. Finally, the Court rejected the overbreadth challenge to the university's disciplinary policy because "the terms 'intimidate,' 'harass,' 'threaten,' and 'assault' each have 'long-established legal definitions' and the plaintiff had failed to allege any facts to suggest" the university regulation "has been interpreted to reach constitutionally protected conduct." *Id.* at 811.

The most recent decision rejected a challenge to Ohio University's sexual misconduct policy. The policy defined sexual harassment by hostile environment as conduct that "has the purpose or effect of unreasonably interfering with a person's work or academic performance or creating an intimidating, hostile or offensive environment for working, learning, or living on campus." *Marshall v. Ohio University*, 2015 WL 1179955 (S.D. Ohio Mar. 13, 2015). It went on to declare that "the determination of whether an environment is 'hostile' is often contextual and must be based on the circumstances" and then listed seven circumstances that might affect the determination:

- The frequency of the conduct;
- The nature and severity of the conduct;
- Relationship between alleged harasser and subject of the alleged harassment;
- Location and context in which the alleged conduct occurs;
- Whether the conduct was physically threatening;
- Whether the conduct was humiliating; [and]
- Whether the conduct arose in the context of other discriminatory conduct.

Id. at 2-3 (slip copy). The court rejected a student's overbreadth challenge to the policy, distinguishing *Dambrot* and *DeJohn*. Ohio University had, the court found, "narrowly tailored" its policy so that it only proscribed conduct that, "when viewed both subjectively and objectively, (1) is unwelcome, (2) is of a sexual nature, (3) is severe or pervasive, and (4) has the

purpose or effect of unreasonably interfering with the complainant’s work or studies or otherwise creating a hostile environment.” Moreover, the court noted, the language of policy tracked the regulatory definition of sexual harassment and the language used by the Supreme Court in its harassment cases.” *Id.* at 7 (emphasis in original).

3. *Conduct, Secondary Effects, and Time, Place, and Manner Restrictions* – As summarized above, the Supreme Court has narrowly defined the categories of unprotected speech that can be regulated or punished. It has allowed greater authority to control illegal conduct even if that conduct involves speech. Several of these decisions seem relevant to the ability of the Law Center to protect its law students. As explained below, they reasonably support an additional set of disciplinary responses that might apply to some demeaning speech incidents.

The Supreme Court has upheld statutory prohibition of harassment that creates a hostile racial or sexual environment even if speech is part of the harassing conduct. *See e.g. Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). The conduct must be extreme to constitute a hostile environment. The language the Court used in an elementary schools context requires that the harassment must be so “severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” *Davis*, 526 U.S. at 631.

The Court has also suggested, albeit in dicta, that it might allow regulations of the “secondary effects” that is offensive but fails to fit within the fighting words exception. *See R.A.V.*, 505 U.S. 394. In the university context, the most likely secondary impact that might affect demeaning speech is the possible impact on the educational process. Even before *Brown v. Board of Education*, 347 U.S. 483 (1954), the Supreme Court recognized that equal protection requires more than the right to attend classes; it mandates full participation in the educational process. *See Sweatt v. Painter*, 339 U.S. 629 (1950). As indicated in the introductory section of this report, several students indicated to me that demeaning language incidents had the effect of discouraging their participation in activities at the Law Center other than classes.

Another decision that is relevant to the demeaning speech issue allows the government to enhance criminal punishment because the defendant selected the victim of the crime on the basis of “race, religion, color, disability, sexual orientation, [or] national origin or ancestry.” *Mitchell v. Wisconsin*, 508 U.S. 476 (1993). The Supreme Court unanimously found the punishment enhancement statute constitutional because the statute was not based on “mere disagreement with the offender’s beliefs or biases.” Instead, the government thought that “bias-inspired conduct” will “inflict greater individual and societal harm.” Nor was the statute overbroad. To find the statute overbroad would require a conclusion that a citizen would suppress “unpopular bigoted opinions for fear that if he later commits an offense covered by the statute, these opinion will be offered at trial to establish that he selected his victim on account of the victim’s protected status.” That hypothesis was “simply too speculative . . . to support . . . [an] overbreadth claim.” *Id.* at 488-89.

4. *Application of existing precedents* – As the foregoing paragraphs demonstrate, no directly controlling precedents articulate bright line rules regarding exactly what types of restrictions the Law Center might impose on student speech. Nonetheless, a review of the relevant precedents suggests some reasonable conclusions.

Perhaps the appropriate way to begin is to describe what is impermissible. First, the decisions indicate that disciplinary action under the existing Code of Student Professional

Responsibility for a demeaning epithet based on race, religion, sexual orientation, or gender would be invalid under the First Amendment. The courts would likely regard the existing “misconduct” standard as both too vague and overbroad to apply to a speech-based offense. Second, a sense of the faculty resolution that the standard applies to certain forms of demeaning epithets would be insufficient for two reasons. It would not eliminate the overbreadth problem, and it would violate the *R.A.V.* prohibition against content-based limitations on restrictions of speech. Third, if the student code were amended to prohibit certain forms of demeaning epithets, the revised provision would still conflict with *R.A.V.* Fourth, if the prohibition were broadened to cover all demeaning epithets at the Law Center and the university, it would still be overbroad.

What then can be done? Reasonably construed, the existing precedents permit the Law Center to limit the most egregious incidents of demeaning speech.

The Law Center can certainly prohibit the types of speech that the Supreme Court has indicated fall outside the protections of the First Amendment: advocacy of illegal action, obscene speech, threats and intimidation, and fighting words. These prohibitions would not be insignificant. Some of the demeaning speech incidents reported to me would probably have qualified as fighting words; one or two might have reasonably been regarded as intimidation. To define these violations, I would employ the language of the relevant Supreme Court opinions to avoid any inadvertent broadening that might render the prohibitions unconstitutional.

The Law Center can also ban illegal harassment, including harassment accomplished by speech. Here, my recommendation would be to define the prohibited conduct in the student code as illegal harassment. I have not reviewed the existing harassment policies of LSUA&M to confirm that their language is not overbroad under the recent precedents of the Third and Sixth Circuits. You might want to recommend that the LSUA&M Chancellor ask university counsel to review the wording of the policies.

In addition to adding these new prohibitions to the Code of Student Professional Conduct, the Law Center should also add a statement to the punishment section of the code. I recommend that the statement say that more severe punishments are warranted for any violation where the victim was selected on the basis of race, ethnicity, religion, gender, sexual orientation, gender, or *disability*.² As noted in the discussion of the Supreme Court opinions, the Court has expressly sanctioned this form of penalty enhancement for criminal law; no sound reason distinguishes other types of government penalties.

The foregoing suggestions fit easily within the Supreme Court precedents, but they reach only the most egregious conduct. One can, however, offer several additional possibilities that fit reasonably within the existing doctrinal framework, although one cannot point to any specific decision affirming their use.

One possibility is to create time, place, and manner provisions. The least controversial would be to make violations of classroom behavior policies a violation of the code. Even the most expansive opinions of the Third and Sixth Circuits recognize that a university has broad discretion over the classroom. The faculty can choose to establish basic rules applicable to all classes or individual professors can announce rules prohibiting demeaning epithets in class. If the faculty chooses the individual professor option, I would strongly encourage faculty members to add a ban on demeaning epithets to their syllabi. In my judgment, the ban should not be limited to racial, religious, homophobic, or gender-based epithets to avoid the argument that the ban is an impermissible content-based discrimination.

²Italicized word is my addition to the suggestions that some members of the faculty have made to me.

Although the Law Center's power to establish minimal standards of conduct (including prohibitions on inappropriate speech) is not unlimited, I believe it extends beyond the classroom. In the past, the Law Center has established various limitations for special events; in the case of Supreme Court visitors, United States Marshalls have been present to enforce those limitations.

I recommend that the Law Center add the following prohibition to the Code of Student Professional Responsibility: "Directing demeaning epithets at another student or member of the Law Center community while on the Law Center campus or at an event sponsored by the Law Center or a Law Center organization." To avoid the claim that the restriction is content-based, I have omitted any language that would confine to the prohibition to particular types of demeaning epithets. The penalty statement suggested above, however, would make those epithets more serious violations.

This recommendation is undoubtedly the most controversial I am offering. It rests on a fairly aggressive reading of the precedents I have described, but I am convinced that reading is justified by the reports I received regarding the frequency of racial, homophobic, and other slurs and the impact those slurs have on students. I believe the aggressive interpretation is justified by several interrelated rationales. First, the reports I received justify the conclusion that incidents involving demeaning epithets are discouraging some students from participating fully in the life of the Law Center. One can argue this impact is relevant in two ways: as a "secondary effect" of offensive speech that may not rise to the level of fighting words or as conduct that "substantially disrupts" the educational process to the extent that the Supreme Court's secondary school precedents apply in the university context. Second, by limiting the ban to the Law Center and Law Center activities, one can more easily regard the regulation as a time, place, and manner provision. One concern that courts have expressed with broad prohibitions of speech at a university is that the ubiquity of the university in the lives of students leaves insufficient opportunity for speech. To avoid that argument, my proposal only applies on the Law Center campus or at events sponsored by the Law Center or Law Center organizations. Since the lives of law students revolve less exclusively around the Law Center, this limitation would recognize a substantial role of private life outside Law Center control, while ensuring that all students will be welcomed at the Law Center and at Law Center events. Because the prohibition only applies to demeaning epithets directed at specific persons or groups of persons, it would – for example – allow students opposed to this recommendation to organize a demonstration on the Law Center campus protesting it.

The breadth of this recommendation requires an important note regarding punishment of infractions. I do not mean for anything in my report to suggest that every violation of the additions to the code I have proposed (or, indeed, any violations of the code) should lead to harsh punishment like suspension or expulsion. Depending on the violation, lesser sanctions (perhaps even private reprimands) might be appropriate in many cases. One expects the Law Center administration to adopt a penalty proportionate to the violation and the violator's past conduct, and the current procedures at the Law Center seem adequate to ensure that result.

I have one final suggestion the faculty might want to consider as an alternative or addition to the ban on demeaning epithets proposed above. The University of New Mexico prohibits the bullying of students. It defines bullying as "repeated mistreatment of an individual or individuals by verbal abuse, threatening, intimidating, humiliating conduct or sabotage that creates or promotes an adverse and counterproductive environment, so as to interfere with or undermine legitimate . . . learning" and emphasizes that bullying "is not about occasional differences of opinion, conflicts and problems." This approach would at least give the Law

Center a mechanism for responding to repeated acts of demeaning epithets without trying to generally ban all demeaning epithets at the Law Center. I would personally prefer another title than bullying, but I have not thought of one. If the faculty does take this approach, I would limit the ban to actions on the Law Center campus and at events sponsored by the Law Center or Law Center organizations.

B. Employees

Over the last half century, the Supreme Court has addressed the First Amendment rights of governmental employees on a number of occasions. These decisions have not eliminated all uncertainties regarding employee rights. They do, however, provide substantially more guidance regarding when disciplinary action is appropriate than do student speech cases that are discussed in the preceding section.

Modern doctrine begins with the Court's decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968). *Pickering* involved a public school teacher who was fired after writing a letter to the local newspaper criticizing the way the board of education and superintendent had handled past proposals to raise new revenues for the schools. The Court's analysis began by rejecting the suggestion "that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work." Notwithstanding this recognition of the free speech rights of public employees, the Court conceded "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possess in connection with regulation of the speech of the citizenry in general." Thus, "[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568.

Applying this balancing test to *Pickering*'s letter, the Court concluded that the board of education had violated his free speech rights. Its analysis emphasized that the statements in the letter were "in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher." Thus, publication of the letter presented "no question of maintaining either discipline by immediate superiors or harmony among coworkers." In this situation, the Court "unequivocally" rejected the suggestion that the board could justify its action with respect to "comments on matters of public concern that are substantially correct." Even though the letter did contain some minor assertions that the Court agreed were "false," the board failed to show "that the publication of the letter damaged the professional reputation of the Board and the superintendent" or that it would "foment controversy and conflict among the Board, teachers, administrators, and the residents of the district." *Id.* at 569-70. Even "[m]ore importantly, the question whether a school system requires additional funds is a matter of legitimate public concern." Because teachers are "the members of the public most likely to have informed and definite opinions as to how funds allotted to the operation of the school should be spent," they must "be able to speak out freely on such questions without fear of retaliatory dismissal." *Id.* at 571-72.

In the four and a half decades since *Pickering*, the Supreme Court has occasionally decided cases in favor of public employees. *See, e.g., Lane v. Franks*, ___ U.S. ___, 134 S. Ct. 2369 (2014); *Rankin v. McPherson*, 483 U.S. 378 (1987); *Gevhan v. Western Line Consolidated*

District, 439 U.S. 410 (1979). Nonetheless, the general thrust of the decisions has been to limit the scope of First Amendment rights enjoyed by public employees. *See, e.g., City of San Diego v. Roe*, 543 U.S. 77 (2004); *Waters v. Churchill*, 511 U.S. 561 (1994); *Mt. Healy City School District v. Doyle*, 429 U.S. 274 (1977). The paragraphs that follow discuss the two decisions that have defined the contours of current doctrine.

Connick v. Myers, 461 U.S. 138 (1983), involved the dismissal of an assistant district attorney in New Orleans. Unhappy with a decision transferring her to another section of criminal court, Myers prepared a questionnaire soliciting the views of other assistants regarding “office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt obligated to work in political campaigns.” *Id.* at 141. Shortly thereafter, she was dismissed. The district attorney told her “that she was being terminated because of her refusal to accept the transfer” and “that her distribution of the questionnaire was considered an act of insubordination.” *Id.* at 142.

A divided Supreme Court refused to order Myers reinstated. Writing for the majority, Justice White emphasized that *Pickering* was premised on the finding that the teacher’s letter addressed a matter of public concern. Thus, “if Myers’ questionnaire cannot be fairly characterized as constituting speech on a matter of public concern,” the Court did not need “to scrutinize the reasons for her discharge.” *Id.* at 146. To decide that critical issue of whether the speech involved a matter of public concern required an examination of “the content, form, and context of a given statement, as revealed by the whole record.” *Id.* at 148. Examining Myers’ speech in that way, the majority concluded the only item in the Myers questionnaire that “touch[ed] on a matter of public concern” was the question that asked “if assistant district attorneys had ever felt pressured to work in political campaigns on behalf of office supported candidates.” *Id.* at 149.

Just determining that Myers’ speech involved a matter of public concern did not, Justice White found, establish whether her dismissal was impermissible. The Court still had to decide if the District Attorney was justified in discharging Myers under the balancing test established by *Pickering*. That test requires, the Court emphasized, “full consideration of the government’s interest in the effective and efficient fulfillment of its responsibilities to the public.” *Id.* at 150. Justice White acknowledged that the District Attorney “had made no demonstration . . . that the questionnaire impeded Myers’ ability to perform her responsibilities,” but also noted “that ‘it is important to the efficient and successful operation of the District Attorney’s office for Assistants to maintain close working relationships with their superiors.’” He then observed that both the District Attorney and his first assistant believed the “questionnaire was an act of insubordination which interfered with working relationships” and concluded “a wide deference” to that judgment was “appropriate.” Of course, Justice White cautioned, “a stronger showing may be necessary if the employee’s speech more substantially involved matters of public concern.” *Id.* at 151-52.

Two other factors also favored the employer in *Myers*: “the manner, time, and place in which the questionnaire was distributed” and the “context in which the dispute arose.” With regard to the first of these factors the exercise of the “rights to speech at the office” supported “the District Attorney’s fears that the functioning of his office was endangered.” With regard to the second, the questionnaire followed on the heels of the notice that Myers was being transferred. This connection between the dispute and application of a challenged policy to the speaker gave “additional weight . . . to the supervisor’s view that the employee had[d] threatened the authority of the employer to run the office.” *Id.* at 152-53.

In 2006, the Court added an even more significant limit to the protections afforded by *Pickering*. *Garcetti v. Ceballos*, 547 U.S. 410 (2006), held that the First Amendment does not insulate the speech of a public employee from discipline when the employee speaks pursuant to his or her official duties.

Garcetti also involved an assistant district attorney, Richard Ceballos. The assistant wrote a memorandum to his superiors criticizing inaccuracies in an affidavit used to obtain a search warrant and recommended dismissal of the case. When prosecution proceeded despite the assistant's recommendation, defense counsel called Ceballos to testify on a motion to traverse the warrant. At the hearing, Ceballos "recounted his observations about the affidavit, but the trial court rejected the challenge to the warrant." Subsequently, Ceballos claimed, his employer took "a series of retaliatory employment actions," including "reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion." *Id.* at 414-15.

The Supreme Court rejected Ceballos' claim because he failed to show that his First Amendment rights had been violated. It regarded "[t]he controlling factor" in the case to be that the assistant's "expressions were made pursuant to his duty as a calendar deputy." *Id.* at 421. In the Court's view, "when public employees make statements pursuant to their official duties," they "are not speaking as citizens for First Amendment purposes." Thus, "the Constitution does not insulate their communications from employer discipline." *Id.* at 421.

The Supreme Court narrowed *Garcetti* slightly last year. *Lane v. Franks*, ____ U.S. ____, 134 S. Ct. 2369 (2014), held that a public employee's truthful testimony in a federal criminal trial was speech on a matter of public concern even if the employee learned some of the subject matter of his testimony in the course of his employment. The Court also ruled that discharging Lane under the balancing test established by *Pickering* was impermissible. In this case, "the employer's side of the *Pickering* scale was almost empty." The state offered "no evidence, for example, that Lane's testimony . . . was false or erroneous or that Lane unnecessarily disclosed any sensitive, confidential, or privileged evidence while testifying." *Id.* at 2381.

Applying these precedents to most Law Center employees is relatively straightforward. If employees utter racial, ethnic, homophobic, or other slurs as part of their official duties, the First Amendment provides them no protection. If they utter such slurs in speech that is not part of their official duties, the two-part test of *Pickering* and *Connick* would apply. First, one would have to determine if the speech involved a matter of public concern. In most cases involving demeaning speech, the answer to that question would be no, and the employee would have no First Amendment protection. If the speech did involve a matter of public concern, one would still have to balance the employee's free speech right against the Law Center's "interest in effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150.

The one ambiguity that remains is how *Garcetti* applies to faculty members. The Supreme Court suggested that "expression related to academic scholarship or classroom instruction" might "implicate additional constitutional interests," 547 U.S. at 425, but it did not further delineate those interests. To the extent that the Court develops any expanded protections for faculty in the future, it is likely to tie them closely to articulated pedagogical goals or research interests. Language used outside the classroom or research settings is unlikely to qualify for protection, and demeaning epithets direct at individuals are seldom likely to qualify for First Amendment protection even in those settings.

Even before *Garcetti*, several decisions in the courts of appeals upheld dismissal of university employees. When the Sixth Circuit invalidated the Central Michigan University discriminatory harassment policy as overbroad, it nonetheless upheld the dismissal of the university basketball coach who had directed racial slurs at players. Moreover, the Fifth Circuit ruled that *Pickering* permitted discipline of a college faculty member for the use of profanity in the classroom.

Of course, constitutional protections are not the primary legal protections for Law Center employees. Civil Service laws protect most of them, and faculty members are protected by tenure rules and university policies protecting academic freedom.

The Louisiana Constitutions established the civil service protections for state employees. *See* La. Const. art. X, § 1(A). It only allows permanent employees that are part of the classified service to be disciplined for “cause,” *id.* § 8(A), and allows them to appeal disciplinary actions to the Civil Service Commission. *Id.* §§ 8(A), 12(A). Although university counsel should be consulted before any disciplinary action is instituted, demeaning epithets directed at specific individuals should constitute cause, at least when uttered in the performance of any employee’s duties or at the Law Center. To educate the Law Center staff and to provide notice as to what conduct is permissible, you may want to have the Law Center human relations personnel prepare a notice reminding all employees of their responsibility to treat other members of the Law Center community and the public with respect.

Law Center and University policies regarding academic freedom guarantee all faculty members broad discretion to pursue their teaching objectives and research goals. Additional rules provide procedural protections, including an opportunity for remediation, for faculty members who hold appointments with indefinite tenure. In my judgment, the substantive protections available to faculty members do not include the right to direct demeaning epithets at other individuals in the classroom. As with other employees, you should consult with university counsel before proceeding against any particular individual. I also think educational statements would be helpful in providing notice and discouraging incidents that might require a disciplinary response. I recommend that the faculty adopt a statement affirming the duty of all faculty members to treat students and other members of the Law Center community with respect and specifically declaring that demeaning epithets at individuals or groups of individuals are unprofessional conduct for faculty as well as students.

The preceding paragraphs prompt me to repeat a caution that I stated with respect to student speech. Not all incidents of demeaning speech are equally severe. Only the most egregious or repeated examples would justify severe punishment like suspension or dismissal. Lesser incidents would properly give rise to lesser sanctions.

III. Other Ways to Respond to Incidents of Demeaning Speech

Of course, the ultimate goal of responding to incidents of demeaning speech is not to punish individuals, but to make such incidents less likely to occur at the Law Center. The paragraphs that follow identify ways other than discipline in which the Law Center might respond to incidents of demeaning speech. These suggestions apply to both students and employees. I do not intend the suggestions to be definitive. Almost everyone is likely to disagree with one or more of them. Moreover, I am confident that you and other members of the faculty will identify additional alternatives that did not occur to me.

A. Government speech

One thing the Law Center can do is to express its opposition to the type of demeaning language incidents that have occurred at the Law Center. I am aware that, in the past, you have forcefully and publicly indicated that racial slurs and other demeaning epithets have no place at the Law Center. For at least two reasons, I think additional statements are needed now and will be needed in the future. First, students and other members of the Law Center community are aware of the inquiry that I have undertaken. If the Law Center is silent at the end of the inquiry, students may assume that you and the faculty have concluded that no problems exist. Second, the public life of statements seems surprisingly short. As an example, several students at the public forum I held said they were unaware of your previous email statement regarding racial slurs even though they had heard of the incident that gave rise to it.

I believe that at least two types of statements are appropriate. First, both the Law Center faculty and the administration should make general public statements indicating that the use of demeaning epithets toward fellow students or other members of the Law Center community is inconsistent with the professionalism expected of students at the LSU Law Center. Second, if future incidents involving demeaning language arise, the administration should reaffirm the Law Center's commitment to these high standards of professionalism.

I regard it as important that both the faculty and administration reaffirm that the use of demeaning language is inconsistent with the professionalism standards of the Law Center. My recommendation would be that the faculty should adopt a statement of policy and that you should personally endorse the statement as it is distributed.

The faculty must, of course, decide the exact content of the policy statement. I do, however, have the following suggestions.

Vice-chancellor Diamond sent me his proposal that the faculty adopt a resolution declaring: "It is unprofessional for a student either on the Law Center or University campus or at a Law Center or university event, in addressing a person or persons, to use epithets that demean on the basis of race, ethnicity, national origin, religion, gender, or sexual orientation." For the reasons I explained in the previous section, I think that *R.A.V.* precludes this approach to defining a disciplinary offense. Although limiting the reach of the declaration to demeaning epithets directed at specific types of victims might be permissible in a policy statement, I personally would favor a slightly different approach. I would expand the definition of unprofessional conduct to include any demeaning epithet and would add this second sentence to the policy: "The unprofessionalism is especially egregious when the demeaning epithet is based on race, ethnicity, national origin, religion, gender, sexual orientation, or *disability*."³

My basic concern with limiting the category of unprofessional conduct to demeaning epithets aimed at a limited group of protected categories is the negative implication of the statement. Stating that certain types of demeaning epithets are unprofessional conduct implies that other demeaning epithets do not amount to unprofessional conduct. Stating that all demeaning epithets amount to unprofessional conduct and that the lack of professionalism is more egregious when directed at specific protected groups only implies that other demeaning epithets are less serious instances of unprofessional conduct. I am more comfortable with the latter implication.

Another way the Law Center faculty and administration might make a useful general statement would be to update and to strengthen the institutional statement on diversity and

³The italicized word is an added category.

inclusion. In the meeting with the Diversity Taskforce during my visit to Baton Rouge, I was given a copy of a study of the statements adopted by various institutions. My understanding is that the taskforce may recommend an improved statement for the Law Center. Adoption of such a statement would provide a general reinforcement of the particular demeaning language statement suggested above.

Having the administration endorse the particular statement the faculty chooses to adopt is relatively straightforward, but the question of how the administration should respond to if incidents arise in the future is a bit trickier. On the one hand, some might construe silence as acceptance of the demeaning speech. On the other, you are responsible as Chancellor for making the final decision if the incident results in a disciplinary action; and you must both remain impartial and maintain the appearance of impartiality.

I recommend that you respond if future incidents occur by reaffirming the Law Center's values while avoiding any judgment of the particular incident. Obviously, you will have to make the final decision in any particular situation, but perhaps a statement like this one would suffice: "As many members of the Law Center community are aware, an incident involving [racial, homophobic, gender as appropriate] slurs directed against a Law Center student has been reported. Because I am responsible for making the final decision if this matter should result in any form of disciplinary action, I will not be involved in the investigation of the charge; and I will not be making any comments regarding the facts of the particular incident. Nonetheless, I do think it is important for me to reiterate my personal commitment to inclusion and respect for human dignity and to reemphasize that those values are core values of the Law Center. I fully support the faculty declaration that the use of demeaning epithets at the Law Center or at Law Center is unprofessional conduct and that the professionalism is particularly egregious when it is based on [race, sexual orientation, gender as appropriate], and I will do all in power to eliminate such unprofessional conduct in the Law Center community."

If members of the Law Center community are subjected to demeaning epithets or other forms of demeaning language, you can denounce the offending conduct even more forcefully. Because you will not be an impartial arbiter for the incident, you can be a strong advocate for the victim of the demeaning language.

B. Education

Education is crucial to making the Law Center community more tolerant. It begins with prominently displaying (in print and on the Law Center website) any policies the Law Center adopts regarding professionalism and diversity.

At a minimum, education regarding these policies should become a prominent feature of orientation for first-year law students. Obviously, you can cover the topics with students as you welcome them, but I think it would also be a good idea to invite experienced practitioners to speak to the students about the importance of professionalism and civility in the practice of law. I suggest including practitioners rather than members of the faculty in this educational effort for two reasons. I think entering law students will be more attentive if the message is delivered by individuals occupying professional positions to which most them aspire. In addition, I think practitioners can speak more authoritatively about the possible consequences students may face as practitioners. *See, e.g.* ABA Journal Weekly Newsletter (April 17, 2015) (news story regarding six-month suspension for an attorney whose "indefensibly outrageous" remarks included gender-based slurs against opposing counsel).

I also recommend that the Law Center consider sponsoring occasional forums on professionalism during the school year. I think these forums could be particularly effective in exploring topics where the consensus about what constitutes acceptable conduct may be less universal. One way to involve students might be to expand the responsibility of the student ethics board to include a leadership role in performing this educational function.

Another idea presented during my visit to the Law Center appears to me to have considerable merit. Some students reported that members of their first-year section had held meetings that included frank dialogue on race and that these dialogues helped to bridge some racial antagonisms. Because students in first-year sections spend so much time together, they often forge the type of strong relationships that may permit frank and honest dialogue with respect to difficult subjects. I suggest that the Law Center seek ways to foster such dialogue sessions in first-year sections.

In all of these educational efforts, the Law Center should try to broaden the focus beyond the particular students who are making the slurs or other demeaning comments. As I indicated earlier, one of the most disappointing things I heard during my visit was the unwillingness of other students to protest when their classmates were subjected to demeaning slurs. The Law Center should emphasize to all students that professionalism requires more than silence; it mandates that an individual have the courage to oppose publicly those who flout Law Center values.

C. Conferral of benefits

The constitutional restraints discussed in the previous section limit the government's ability to punish for exercising their free speech rights. They do not limit the ability of a public university to reward students for exemplary performance. As a result, the Law Center may apply professionalism standards that are more stringent when rewarding students than uses when disciplining students.

The most obvious application involves considering professionalism when deciding whether to recommend students for employment or graduate study. Certainly, individual faculty members can consider professionalism in deciding whether to recommend students. In addition, the faculty might want to consider a resolution urging colleagues to do so.

Some student benefits already contain an explicit or implicit professionalism component. The Law Center Chancellor must decide to recommend whether students have the requisite character and fitness for admission to the bar; surely, past unprofessional conduct bears on that character and fitness requirement. Likewise, according to the information posted on the Law Center website, the purpose of the Order of the Coif is to stimulate scholarly work of the highest order and to promote a high standard of professional conduct. Those criteria seem to permit the Law Center faculty to review candidates to ensure that they satisfy both eligibility requirements.

I also recommend that a professionalism component be explicitly incorporated into other Law Center recognitions. When students are selected for important functions like the Moot Court Board or Student Bar Association offices, I believe their professional conduct as well as their oral advocacy skills should be expressly considered. That example is just one illustration of how the concept of recognizing professionalism could be given affirmative recognition. I am confident you and members of the faculty can identify others.

D. Journalism guidelines for the *Civilian*

During my inquiry, several individuals complained about the *Civilian* publishing offensive speech. Most of these examples were demeaning to women, particularly female professors. Although none of the examples I saw satisfied the strict constitutional standard for obscenity, the references were certainly offensive; and I doubt they would have been deemed acceptable journalism in any publication other than a sexual tabloid. I suggest that the Law Center establish a set of good journalism practices for future editions of the *Civilian*. I suspect one could find a good model of such practices by checking with the Department of Journalism, and applying any reasonable standards should prevent similar articles in the future.

E. Particular concerns with respect to incidents of gender discrimination

In some cases, the incidents of demeaning speech directed at women fall within the general parameters discussed throughout this report. Sexual slurs can have the same negative impacts on women at the Law Center as racial or homophobic slurs have on the individuals to whom those epithets are directed. Thus, the Law Center should subject the incidents to the same disciplinary rules recommended in the previous section and should include them in the nondisciplinary responses described in this section.

In at least two respects, however, gender-related responses may call for a more nuanced response. For one thing, members of the Law Center community need to be educated about the need to avoid denigrating the accomplishments of women by suggesting they result from appearance rather than ability. For another, the Law Center needs to recognize the relationship issues that can often complicate gender incidents.

As explained above, several women (both students and faculty) reported that they have had their professional achievements diminished by comments that appeared to attribute the accomplishments to appearance rather than professional ability. Here, the problem appears to involve a clash of perceptions rather than an intent to demean. Perhaps the Law Center should consider panels to sensitize male students, faculty, and staff to the need to treat women as professional equals and to suggest ways one might achieve this goal.

Similarly, the Law Center may also wish to consider some presentations focused more specifically at the faculty. In particular, the incidents reported to me that information regarding how to ensure both the appearance and reality of equal classroom treatment for male and female students may be desirable.

Finally, several gender-based incidents reported to me confirmed that these incidents are often associated with the breakdown of relationships between students. Although I understand that these problems make reporting and handling these situations more complicated, I lack the expertise offer concrete suggestions here beyond the thought that the Law Center might try to facilitate the provision of counselling and other services to students in these circumstances. I do believe that it is a topic that is appropriate for consideration by faculty members or others with more expertise in this area.

F. Clear path for complaints

Much to my surprise, several students indicated to me that they were uncertain exactly how and where complaints should be lodged at the Law Center. The reintegration of the Law Center into LSUA&M has the potential to increase that confusion. Students may be uncertain when they should make their complaints to the Law Center administration and when, if ever, they should make them to individuals that serve the remainder of the Baton Rouge campus. After clarifying the complaint mechanisms, the Law Center should publicize them and post them prominently on the Law Center website.

IV. Summary of Recommendations

A. Discipline

For the reasons described in detailed above, I recommend that the Law Center amend the Code of Student Professional Responsibility in several respects. First, the code should prohibit those forms of speech that the Supreme Court has indicated are not protected by the First Amendment. Second, illegal harassment should be a violation of the code. Third, the code should include a statement that a violation of the code is more serious when the victim was selected on the basis of race, ethnicity, religion, gender, sexual orientation, gender, or disability. Fourth, the code should prohibit violations of classroom behavior rules. Fifth, the code should ban demeaning epithets on the Law Center campus or at Law Center events. As an alternative or addition to the last recommendation, the faculty should consider a prohibition against bullying.

With respect to employees, no specific code exists. To make certain that employees understand the inappropriateness of demeaning epithets, I recommend clarifying statements be published. For faculty members, endorsement of the prohibition against demeaning epithets by the faculty is desirable.

B. Other responses

The report also recommends a number of nondisciplinary actions the Law Center might take to lessen incidents of demeaning language in the future. First, it recommends that the Law Center administration and the faculty reaffirm their commitments to diversity and inclusion now and that you reaffirm your commitment if specific incidents arise in the future. Second, the report offers specific suggestions for educational efforts to make students and others aware of the potential consequences of demeaning speech to victims, the Law Center, and those who use such language. Third, it proposes consideration of professionalism in recommending students to employers and the bar and in selecting students for leadership and recognition at the Law Center. Fourth, it suggests that journalism guidelines be established for the *Civilian*. Fifth, it advocates a more nuanced response to gender-based incidents because of the special characteristics those incidents can present. Sixth, it urges clarification of the appropriate path for reporting violations now that the Law Center has been reintegrated into LSUA&M.