PROACTIVE AND RESPONSIVE STRATEGIES FOR MANAGING CAMPUS UNREST[1]

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I. CONTEXT

A number of articles in the *Chronicle of Higher Education* and *Inside Higher Ed* have recently brought to light some of the issues that are giving rise to unrest on college and university campuses. Issues of identity and equity have manifested themselves in protests regarding campus monuments that some members of the campus community suggest honor troublesome legacies, campus buildings named after historical figures that some view as controversial, faculty and student demographics that are argued as evidencing racial and ethnic imbalances, provocative chalkings, alleged microaggressions, and more. Some of the events that have recently made headlines are:

A. Political Chalkings

During the 2016 presidential primary season, some students have chalked "Trump," in support of Republican Presidential Candidate Donald Trump, at various places around campus. While the political chalkings are protected by the First Amendment, some students are asking the administration to take action, alleging that these chalkings constitute discriminatory harassment insofar as the students deem the chalkings to be synonymous with "attacks on Muslims, Latin Americans, African-Americans, and other minority groups."

See Sarah Brown, *"*Trump Chalkings Trigger a New Debate Over Speech and Sensitivity," *Chronicle of Higher Education* (Apr. 6, 2016)

B. Campus Building Names

Many colleges and universities have buildings on campus that are named after former slave owners or other controversial historical figures. This has prompted a series of conversations at Yale, Georgetown, Princeton, and other institutions, with vocal participants offering a wide range of opinions. Some argue that institutions

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should preserve history. Others argue that institutions should eliminate all manifestations of what many view as hurtful legacies from college campuses. Still others argue that there might be ways to preserve history while confronting the troublesome past in meaningful and lasting ways. For example, in an effort to reconcile a tainted past of having sold 272 slaves to fund institutional growth, Georgetown University has renamed two campus buildings, offered preferential admissions treatment to descendants of slaves, create a campus memorial, and launched plans to establish an Institute for the Study of Slavery.

See Sarah Brown, "Students Vent Frustrations as Yale Leaves a Slavery Champion's Name Intact," *Chronicle of Higher Education* (Apr. 29, 2106).

See also Corinne Ruff, "Many Colleges Profited From Slavery. What Can They Do About it Now?" *The Chronicle of Higher Education* (Apr. 19., 2016).

See also Madeline Will, "When Building Names Honor Racists, Universities Must Tread Carefully," *Chronicle of Higher Education* (Feb. 10, 2015).

See also Fernanda Zamudio-Suaréz, "Georgetown's Plan Spurs Hopes for a Shift in How Universities Confront Ties to Slavery," *Chronicle of Higher Education* (Sept. 2, 2016).

C. Campus Monuments Honoring Troublesome Legacies

Similar to the issues stemming from controversial building names, several colleges and universities have monuments on their campus that memorialize the legacies of controversial figures from history. Again, there is widespread debate about the extent to which historic preservation constitutes public endorsement of legacy.

See Christopher Phelps, "Removing Racist Symbols Isn't a Denial of History," *Chronicle of Higher Education*, (Jan. 8, 2016).

See also Corinne Ruff, "In Explaining Confederate Symbols, Colleges Struggle to Summarize History," *Chronicle of Higher Education* (Mar. 23, 2016).

D. Faculty and Student Demographics

Students have turned a critical eye towards the racial and ethnic demographics of tenured faculty members. In some instances, students have demanded that the University award immediate tenure to various minority faculty members whom the

students deem to be deserving of tenure. Universities in turn are not able to override their tenure policies and procedures for a number of reasons—some legal and others related to institutional mission and goals. Nonetheless, these student demands have prompted many institutions to look at their demographics, examine internal policies and procedures, and convene working groups tasked with recruiting and retaining a diverse faculty that is reflective of national racial demographics.

Student concerns about campus demographics are not limited to concerns about faculty. Student demands often include calls for increasing diversity among the student body. Some commentators speculate that *Fisher II* may catalyze another round of student protests.

See Sarah Brown and Katherine Mangan, "Faced with Extreme Demands From Defiant Protesters, What's a President to Do?" *Chronicle of Higher Education* (Jan. 23, 2016).

See also Beth McMurtrie, "2 New Diversity Deans Take on Ivy League Challenges," *Chronicle of Higher Education*, (Apr. 7, 2016).

See also Beth McMurtrie, "What it Will Take for Missouri to Meet Its Faculty-Diversity Goal," *Chronicle of Higher Education*, (Sept. 16, 2016).

See also Peter Schmidt, "The Supreme Court Could Fuel Campus Unrest in Ruling on Race in Admissions," *Chronicle of Higher Education* (Dec. 8, 2015).

E. Anonymous Speech on Social Media

Social media web sites such as Yik Yak provide students with a venue to anonymously post content, some of which may be highly offensive and even threatening. Colleges and universities do not administer these third-party social media sites but have been asked on some occasions to erect "geo-fences" to bar the university community from using the university's server to access certain social media sites. Geo-fencing in and of itself raises serious First Amendment concerns and in fact, is not even necessarily a feasible alternative since students are able to use personal data plans to continue to access the site. Nonetheless, it is one of the many demands that students are bringing to college and university presidents as they strive to build more inclusive communities.

See Fernanda Zamudio-Suaréz, "Students Were Mad Their College Banned Yik

Yak. So They Went on Yik Yak. The Chronicle of Higher Education," (Apr. 11, 2016).

F. Curriculum, Microaggressions, Trigger Warnings, and Academic Freedom

Students have raised concerns that they are regularly subjected to microaaggressions and that certain assigned texts necessitate trigger warnings or should not be assigned in the first place due to objectionable content. Some faculty and staff have endeavored to create "safe spaces" for students. Others have asserted a right to academic freedom and expressed vocal opposition to what they perceive to be overprotective coddling of students. This impasse has been a focus of many campus protests, and stakeholders seem to have trouble finding common ground. As writers for the *Chronicle* framed the issue, "Either safe spaces are essential sanctuaries for members of historically marginalized groups, or they reflect a troubling desire to escape the rigorous intellectual inquiry that college should be all about."

A University of Chicago welcome letter to new students illustrates how this debate is playing out. The letter stated in part, "Our commitment to academic freedom means that we do not support so-called 'trigger warnings,' we do not cancel invited speakers because their topics might prove controversial, and we do not condone the creation of intellectual 'safe spaces,' where individuals can retreat from ideas and perspectives at odds with their own." The letter, embraced by many (one person described being "ecstatic" that the administration issued the letter), also provoked a backlash from students, staff, and community members who perceived the letter to be "tone deaf" and insensitive.

See Sarah Brown and Katherine Mangan, "What 'Safe Spaces' Really Look Like on College Campuses," *Chronicle of Higher Education*, (Sept. 8, 2016).

See Beth McMurttrie, "U. of Chicago's Free-Expression Letter Exploses Fault Lines on Campus," *Chronicle of Higher Education* (Sept. 2, 2016).

See Stephanie Saul, "Campuses Cautiously Train Freshmen Against Subtle Insults," *New York Times* (Sept. 6, 2016).

See Peter Schmidt, "A Faculty's Stand on Trigger Warnings Stirs Fears Among Students," *The Chronicle of Higher Education,* (Oct. 6, 2015).

See also Peter Schmidt, "Occidental Faculty Weighs System for Reports of Microaggressions," *Chronicle of Higher Education* (Nov. 24, 2015).

See also Peter Schmdt, "Campaigns Against Microaggressions Prompt Big

Concerns About Free Speech," *Chronicle of Higher Education* (July 9, 2015).

G. Post-Election Activity

Since the 2016 elections, there has been an increase in bias-related incidents on campus. While much post-election activity falls well within the gambit of protected political speech, there has also been an uptick in reported incidents of harassment and physical violence, primarily targeted at the black, Muslim, and Jewish communities on campus. College and University administrators are working to address these bias incidents in lawful and meaningful ways without intruding on protected political speech.

Scott Jaschik, "Tensions, Protests, and Incidents," Inside Higher Ed (Nov. 14, 2016) (citing a Southern Poverty Law Center Report that tracked 211 Incidents of election-related harassment and intimidation as of November 11, 2016 at 5pm).

Scott Jaschik, "The Incidents Since Election Day," Inside Higher Ed (Nov. 11, 2016) (list of reported bias incidents on campus since election day).

H. Petitions and Protests in Support of Undocumented Immigrant Students

Since the 2016 elections, students have circulated petitions and organized protests in support of undocumented students, asking senior leadership to declare campuses as "sanctuary campuses" or other variations of protected spaces for these students. While the legal and policy implications of sanctuary status are well beyond the scope of this outline, the subject matter is among the latest in the wave of student demands.

Shannon Najmabadi , "How Colleges are Responding to Demands that They Become 'Sanctuary Campuses," Chronicle of Higher Education (Dec. 2, 2016).

I. Other Issues

Other issues stem from student concerns about university policies, campus resources, institutional responses from the leadership, and training.

See American Council on Education Center for Policy Research & Strategy, "Summary of Student Demands," (Dec. 14, 2015).

As these issues surface, context is important. Erwin Chemerinsky astutely notes in an April 3, 2016 *Chronicle* article that "[t]his is the first generation of students to be educated, from a young age, not to bully." These anti-bullying campaigns have inculcated in a generation of students "a persistent instinct to protect others against the hateful discrimination of intolerant speech," a message that resonates much more strongly with this generation who knows of the McCarthy Era and Vietnam war only as "abstractions." Erwin Chemerinsky& Howard Gillman, "What Students Think About Free Speech," *Chronicle of Higher Education* (Apr. 3, 2016).

II. LAW

Several of the issues outlined above implicate the First Amendment, Title VI and VII. As college and university administrators dialogue and negotiate with students about ways to make the campus more inclusive, they must be familiar with these laws. On a general level, campus counsel must be fluent in First Amendment principles, including recognized exceptions to the First Amendment and the overbreadth and vagueness doctrines. Private universities that are not subject the First Amendment should be acquainted with their internal policies and procedures, which in most instances afford First Amendment-like protections to students and faculty and thus bind the institution contractually to adhere to those protections. Public and private universities that receive federal funds are subject to the protections afforded by Titles VI and VII of the Civil Rights Act and thus must tailor policies, procedures, and practices accordingly. Below is an overview of how these laws might interface with the various issues emerging through channels of campus unrest:

A. First Amendment

1. **Public Institutions** --"Congress shall make no law … abridging the freedom of speech…."

B. Exceptions to First Amendment Protections

1. **True Threats**

   a. Intimidation where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. *See Virginia v. Black*, 538 U.S. 343 (2003).

   b. A statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person. *See Planned Parenthood v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002).

2. **Inciting or Producing an Imminent Lawless Action**

   a. Where the speaker intends to incite, uses words likely to produce such action, and openly encourages such incitement. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969).

3. **Fighting Words**

a. Where the very utterance of words inflicts injury or tends to incite an immediate breach of the peace. *See Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

4. **Obscenity**

a. Where a description or depiction of sexual conduct, taken as a whole by the average person, applying contemporary community standards, portrays sex in a patently offensive way, appeals to the prurient interest of individuals, and lacks serious literary, artistic, political, or scientific value. *See Miller v. California*, 413 U.S. 15 (1973).

5. **Libel and Defamation**

a. Oral or written falsehoods, which are not merely a statement of the speaker's opinion, that are communicated to a third party, or parties, and would harm another's reputation. *See New York Times v. Sullivan*, 376 U.S. 254 (1964); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

6. **Time/Place/Manner Restrictions**

a. Institutions may be able to regulate speech by imposing reasonable time, place, and manner restrictions. The degree to which these restrictions must be content neutral or viewpoint neutral vary depending on the forum, although as a general matter, public universities will not be able to (and should not want to, given the collective mission to promote "robust exchanges" in the "marketplace of ideas") regulate the content of the speech that is the subject of this outline. For a more in-depth discussion of time, place, and manner restrictions, see Robert C. Clothier and Alexander ("Sandy") R. Bilus, "The First Amendment Rights of Students, Protesters, Gadflies, and Assorted Miscreants: What Can a Public Institution Do and Where?," (NACUA Annual Conference 2015).

7. **Discriminatory Harassment**

a. Under Title VI and Title VII, a state actor can regulate (and must address to obtain the *Ellerth-Farragher* defense) unwelcomed

speech that creates a "severe or pervasive" and hostile work environment or that otherwise denies a student the benefits of or subjects a student to discrimination in a federally-funded education program. This is a statutory exception to the First Amendment and not an exception carved from the common law, as those listed above. When a state actor punishes an individual solely for speech that it deems to have created a hostile environment, the First Amendment is implicated, and institutions should be mindful of these implications as they address Title VI and VII complaints. *See* Zimmer, Sullivan & White, *Cases and Materials on Employment Discrimination,* 415-17, 7th ed. (Wolters Kluwer 2008).

8. **Disruption**

   a. Expression that substantially infringes on campus rules, interrupts classes, or otherwise interferes with the ability of others to obtain an education. *Tinker v. Des Moines Independent Community School*

   b. Test: Whether there is evidence showing a "substantial disruption or material interference with school activities", or "invasion of the rights of others"

   c. Factors

      i. Reaction of students/teachers, students or teachers taking time off, out of control classrooms, classes cancelled, speed of administrative response, disciplinary action taken
      ii. Need not be actual disruption, though "undifferentiated fear" of disruption insufficient -- "well-founded expectation of disruption"
      iii. That the speech offends or upsets others is not enough
      iv. Caution: Secondary School Case

a. Overbreadth and Vagueness Doctrines

The overbreadth and vagueness doctrines demand that policies and laws are clearly drafted so as to convey to the public what behavior is permissible and what behavior is not, *and* to convey this message in a manner that does not unnecessarily regulate constitutionally-protected speech.

1. **Overbreadth Doctrine**

The government has enacted a law or policy that proscribes some constitutionally-protected speech.

a. ***Doe v. Univ. of Michigan*, 721 F. Supp. 852 (E. D. Mich. 1989).** This case invalidated the University of Michigan's Policy on Discrimination and Discriminatory Harassment of Students in the University Environment ("Policy"). The University adopted the Policy as an effort to "curb what the University's governing Board of Regents (Regents) viewed as a rising tide of racial intolerance and harassment on campus." *Id.* at 854. The Policy was adopted in the wake of criticism regarding the University's response to a series of racially-motivated incidents, accusations that the university was "generally ignoring the problems of minority students," and an impending class action lawsuit that accused the university of failing to maintain and create a "non-racist, non-violent atmosphere' on campus." *Id.* Applying the overbreadth doctrine, the court found the Policy to be constitutionally impermissible insofar as it "swe[pt] within its ambit a substantial amount of protected speech along with that which it may legitimately regulate." 67. The court admonished, "[w]hile the Court is sympathetic to the University's obligation to ensure equal educational opportunities for all its students, such efforts must not be at the expense of free speech." *Id.* at 868.

b. ***UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*, 774 F. Supp. 1163 (E. D. Wisc. 1991).** As part of a newly adopted "Design for Diversity," the University of Wisconsin enacted a Policy and Guidelines on Racist and Discriminatory Conduct to respond to "concerns over an increase in incidents of discriminatory harassment." *Id.* at 1164. In part, the Policy proscribed speech that "[d]emean[ed] the race, sex, religion, color, creed, disability, sexual orientation , national origin, ancestry or age of [an] individual or individuals" or "[c]reat[ed] an intimidating, hostile, or demeaning environment for education, university-related work, or other university-authorized activity." *Id.* at 1165. The court found the Policy to be overbroad. *Id.* at 1178, 1181. It rejected the Defendant's argument that the proscribed speech fell within the "fighting words" exception because the policy did not require that "the regulated speech, by its very utterance, tend to incite violent reaction." *Id.* at 1172. The court rejected the Defendant's argument that the *Chaplinsky* balancing test harmonized the Policy with First Amendment requirements because the Policy regulated speech based upon its content, and thus *Chaplinsky* did not apply. *Id.* at 1174. The court rejected the university's other defenses as well.

c. ***Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*,**

993 F. 2d 386 (4th Cir. 1993). In this case, the court upheld a lower court decision that invalidated George Mason's sanction of the Iota XI Chapter of Sigma Chi for conducting an "ugly woman contest" with crude racist and sexist overtones. *Id.* at 387. In reaching this holding, the court reasoned that the University had improperly sanctioned the Fraternity for a performance that "ran counter to the views the University sought to communicate to its students and the community." *Id.* at 393. It continued, "[t]he mischief was the University's punishment of those who scoffed at its goals of racial integration and gender neutrality, while permitting, even encouraging, conduct that would further the viewpoint expressed in the University's goals and probably embraced by a majority of society as well." *Id.* The court acknowledged the University's obligation to pursue alternative means of achieving its goal of maintaining a non-discriminatory educational environment, although the court was clear that such means could not include impermissible restrictions on speech.

d. ***Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003).** Granting in part a preliminary injunction enjoining the university from enforcing a policy that prohibited: speech that was "inflammatory or harmful towards others"; speech that could be construed as "acts of intolerance;" speech that "provoke[s], harass[es], intimidate[s], or harm[s] another;" and speech that constitute "acts of intolerance that would demonstrate malicious intentions towards others." *Id.* at 362. The court held that these provisions were overbroad. *Id.* at 373-74. It upheld various aspirational statements in the policy. *See id.* at 371. In invalidating the University's restrictions on speech, the court noted, "[The Policy] is inconsistent with our nation's tradition of safeguarding 'free and unfettered interplay of competing views' in the academic arena. Communications which provoke a response, especially in a university setting, have historically been deemed an objective to be sought after rather than a detriment to be avoided." *Id.* at 370-71.

e. ***DeJohn v. Temple University*, 537 F.3d 301 (3rd Cir. 2008).** Plaintiff DeJohn, a graduate student at Temple University, challenged the constitutionality of the University's Sexual Harassment Policy under the overbreadth doctrine, arguing that the Policy's prohibition of "gender-motivated" speech that "has the purpose or effect of unreasonably interfering with an individual's . . . educational performance; or . . . has the purpose or effect of creating an intimidating, hostile or offensive environment," inhibited him from expressing opinions in class about women in combat. *Id.* at 305. The court affirmed the lower court's opinion, concluding that the University's Policy was overbroad. *Id.* at 320

f. ***R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).** This U.S. Supreme Court case invalidated a city ordinance that made it a criminal misdemeanor to burn a cross or display a Nazi swastika "which one reasonably knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender." *Id.* at 381. Though invalidating the ordinance, the Court recognized that " [i]t is the responsibility, even the obligation, of diverse communities to confront such notions [of bias motivated hatred] in whatever form they appear, but the manner of that conformation cannot consist of selective limitations upon speech." *Id.* at 392 (internal quotations omitted).

2. **Vagueness Doctrine**

The vagueness doctrine requires that individuals be put "on notice" of what behavior is permitted and what behavior is proscribed so that they are able to tailor their actions accordingly.

a. ***Doe v. Univ. of Michigan supra*:** In addition to finding the University's Policy on Discrimination and Discriminatory Harassment of Students in the University Environment ("Policy") to be overbroad, the court also concluded that the Policy was constitutionally vague insofar of as it prohibited "stigmatiz[ation]" and "victimize[ation]," and these terms lacked a precise definition and failed to give sufficient warning of prohibited conduct. *Id.* at 866-67.

b. ***Bair v. Shippensburg supra :*** The court held that the policy was unconstitutionally vague insofar as it prohibited speech that was "inflammatory or harmful towards others"; speech that could be construed as "acts of intolerance;" speech that "provoke[s], harass[es], intimidate[s], or harm[s] another;" and speech that constitute "acts of intolerance that would demonstrate malicious intentions towards others.". *Id.* at 362, 373-74.

c. ***College Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005 N.D. Cal. 2007).** Granting in part a preliminary injunction that invalidated provisions in the San Francisco State University Code of Conduct that required students "to be civil to one another and to others in the campus community" and disciplined students engaging in behavior that is "inconsistent with SF State goals, principles, and policies." *Id.* at 1010-11, 1025.

V. ACADEMIC FREEDOM

Especially with respect to microaggressions and trigger warnings, faculty sometimes raise

concerns about the extent to which real or perceived regulation of classroom content or curricular choices impede their academic freedom. Although academic freedom belongs to the institution and not the individual faculty member, *Urofsky v. Gilmore,* 216 F.3d 401, 415 (4th Cir. 1999), this issue is nonetheless receiving more attention in the media, in part because of a recent Report issued by American Association of University Professors on trigger warnings.

a. **Title VI**

i. **The Statute**

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d *et. seq.*

1. ***Bryant v. Independent School District No. I-38 of Gavin County*,** 334 F.3d 928 (10th Cir. 2003). Decision from the 10th Circuit Court of Appeals reversing the district court's award of summary judgment to the Defendant on Plaintiffs' Title VI hostile environment claim. The Plaintiffs alleged that the principal took no action to address their complaints of a racially hostile environment. *Id.* at 932. Plaintiffs regularly encountered racial slurs, racially-biased graffiti inscribed into school furniture, racially-biased notes placed in students' lockers, confederate flag t- shirts, KKK symbols, and nooses placed on persons and vehicles. *Id.* They reported this to the principal, who took no action to address their concerns. *Id.* The Court held that "when administrators who have a duty to provide a non-discriminatory educational environment for their charges are made aware of egregious forms of intentional discrimination and make the intentional choice to sit by and do nothing, they can be held liable under [Title VI]." *Id.* at 933.

ii. **Microaggression, Chalkings, and Yik Yak Postings:** It is at least arguable that microaggressions, chalkings, or Yik Yak postings (to a lesser degree

because of the lack of university control) might be so severe or pervasive to create a hostile environment under Title VI. University administrators will need to balance the principles derived from *Bryant* against the First Amendment Protections outlined in Part II.A of this outline to analyze student reports of microaggressions and other forms of alleged discriminatory harassment.

iii. **Campus Monuments and Buildings Names:** Does the very presence of campus monuments/buildings that honor troublesome legacies create a hostile environment? Probably not. But remember *Bryant*. There, the students did not report a single instance of mistreatment but rather a collection of pervasive mistreatment over time. It is at least worth thinking about the extent to which student concerns about building names and monuments, when considered as one among many issues, may raise a Title VI concern.

b. **Title VII**

i. **The Statute**

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment into any way which adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000 e-2.

ii. Hostile Environment Claims

Title VII claims of harassment (whether harassment based on race, color, religion, sex, or national origin) are analyzed under the framework set forth in *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742 (1998).

1. Elements

In short, the Plaintiff must prove that (1) he/she belongs to a protected class; (2) that he/she was subjected to unwelcomed harassment; (3) that the harassment complained of was based on plaintiff's protected status; (4) that the harassment was sufficiently severe or pervasive to alter the terms or conditions of plaintiff's employment and create a discriminatorily abusive or hostile working environment; and (5) that the defendant is responsible for the harassment under a theory of either direct or vicarious liability. *Weatherly et. al. v. Alabama State University*, (M.D. Ala. Dec. 8,

2011).

2. Affirmative Defense

Thereafter, the Defendant may offer evidence that (1) it exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities it provided, or otherwise to avoid harm. *Id.*

3. ***Frett v. Howard University*** (D.D.C. Feb. 5, 2016): Memorandum and Opinion from the U.S. District Court for the District of Columbia granting summary judgment to the Defendant. Plaintiffalleged that she was subjected to a discriminatory, hostile, and harassing environment when her boss allegedly criticized her, used a racial slur, micromanaged her decisions, and under-compensated her, and engaged in other purported misbehavior. She further alleged that she was subjected to retaliation after she filed an EEO complaint. The Court concluded that the isolated offenses on the record, even if true, did not amount to behavior that was so severe or pervasive that it created a hostile work environment. Regarding retaliation, the Court held that "no reasonable fact finder could infer from the record that Plaintiff's EEO complaint was the reason for any adverse employment action," since her placement on paid administrative leave during the pendency of the EEO investigation was consistent with Howard University's policies and her termination was pursuant to a Reduction in Force plan. Finally, the Court concluded that Plaintiff's unsubstantiated observations of race and gender discrimination were not enough to defeat summary judgment.

iii. Application

University employees (including student employees) who allege that they are being subjected to pervasive microaggressions or other discriminatory

harassment in the work environment may have actionable claims under Title VII if the university knows about behavior that rises to the level of legal harassment and declines to take steps to remedy the behavior. *See* ***Cuddeback v. Florida Bd. of Ed.***, 381 F.3d 1230 (11th Cir. 2004) (discussing Title VII's application to student employees).

c. Hiring a Diverse Faculty (Title VII Cont.)

Recent student demands have asked that colleges and universities increase racial and ethnic diversity among faculty and staff. These demands again implicate Title VII and the concomitant provisions regarding the laws governing raced-based considerations in employment.

1. **Steelworkers v. Weber, 443 U.S. 193 (1979).** In *Weber,* the United Steelworkers of America entered into a collective bargaining agreement that included an affirmative action plan that reserved for black employees 50% of the slots in an in-house training program. *Id.* at 197. The purpose of the voluntary program was to eliminate racial imbalances in the program. *Id.* Prior to implementation of the plan, only 1.83% of the company's skilled craft workers were black, compared to 39% of the eligible workforce being black. *Id.* at 193. The Court examined the verynarrow issue of whether Title VII prohibited private employers from voluntarily implementing affirmative action programs in order to remedy "conspicuous racial imbalance in traditionally segregated job categories." *Id.* at 200, 209. The Court concluded that such programs were permissible under Title VII. *Id.* at 209.

2. **Johnson v. Transportation Agency, Santa Clara County, CA 480 U.S. 616 (1987).** In an effort to remedy gender imbalance in various job categories, the Transportation Agency of Santa Clara County California voluntarily implemented an affirmative action program, in which sex was considered as a factor when evaluating qualified candidates for various jobs. *Id.* at 622. In this case, qualified female and male applicants applied for a promotion as a "road dispatcher." *Id.* at 623. The hiring agent undertook a holistic review of all qualified candidates, which included consideration of "affirmative action matters," and ultimately awarded the promotion to the female candidate. *Id.* at 625. One of the male candidates sued, alleging that the Transportation Agency's Affirmative Action program impermissibly discriminated against him based on sex in violation of Title VII of the Civil Rights Act. *Id.* at 619. Relying on *Weber,* the U.S. Supreme Court upheld the Agency's Affirmative Action program, holding that the affirmative action plan (1) was designed to eliminate gender imbalance in traditionally segregated job

categories and (2) was narrowly tailored insofar as it was designed as a "moderate, flexible, case-by-case approach" to eliminating vestiges of gender imbalance in the workplace. *Id.* at 637, 39.

3. ***U.S. v. Bd. of Trustees of Illinois State Univ.,* 944 F. Supp. 714 (1996).** Illinois State University adopted a voluntary affirmative action program called the Learner Program. *Id.* at 717. The purpose of this program was to counteract a Veterans Preference that, according to ISU, disproportionately impacted the number of women and racial minorities in the workforce. *Id.* Prior to the implementation of the program, applicants took a civil service exam to qualify for civil service positions at ISU. Veterans were awarded bonus points for their veteran status, and because the test was relatively easy, applicants often received perfect scores, and veteran applicants took over the top hiring slots with their point bonus. The vast majority of veterans in Central Illinois were white men, and as such, the vast majority of applicants appointed to civil service positions at ISU were white men. ISU implemented the affirmative action program to counterbalance this effect. Citing *Massachusetts v. Feeney,* 442 U.S. 256 (1979), the Court held that the affirmative action program designed to counteract the veterans' preference was inconsistent with Title VII because a program that favors veteran applicants only discriminates based on veteran status and does not discriminate based on gender. *Id.* at 720. The Court also found that ISU overemployed African American and Hispanic civil servants relative to the demographics of the civilian labor force, and thus racial and ethnic imbalance was not a valid reason for implementing an affirmative action program. *Id.* at 721.

4. ***Petit v. City of Chicago,* 352 F.3d 1111 (2004).** In Petit, the Chicago Police Department administered an exam that formed the basis for promotions to sergeant. *Id.* at 1112. To eliminate bias among graders in the subjective portions of the test, the Police Department standardized[1] grades based on race. *Id.* at 1116-17. The result was that the weighted scores of some African American and Latino police officers who were promoted to sergeant were slightly below the un-weighted scores of white police officers who did not receive the promotion. *Id.* at 1117. A class of white police officers sued the Police Department alleging that the grading protocol for the promotional exam violated their rights under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 1112. The 7th Circuit Disagreed, finding the Chicago Police Department demonstrated a compelling interest in a diverse population at the rank of sergeant and further that the standardization procedure was narrowly tailored insofar as it was limited in time and designed to minimize

harm to members of any racial group.[2] *Id.* at 1115, 1117-18.

5. Note too that in the above analyses, a plaintiff may be able to craft a § 1983 claim alleging an Equal Protection violation. While this outline does not get into the nuances of that analysis, campus counsel should consider this possibility when evaluating claims.

vi. **Strategies for Addressing Campus Unrest in a Lawful and Meaningful Way**

There is not yet a set of universally-accepted "best practices" for responding to campus unrest. Colleges and universities are still in a trial-and-error period, with some navigating the turmoil more successfully than others. The following strategies are derived from a review of all articles from the *Chronicle of Higher Education*, *Inside Higher Ed*, and other publications over a 6-month period that that spoke positively about an institutional response to campus unrest.

a. **Invite Dialogue**

1. Engage students as partners in working towards a more welcoming and inclusive environment. Listen to the students. Seek to understand. "Let the students speak, and let them know that you hear them. Listen—really listen—to their concerns, fears and the hopes that reach to the core of their being." Douglas A. Hicks and Suzy M. Nelson, **"Are You Ready to Work with Campus Protesters?"** *University Business* (March 2016).

2. *See also* Sarah Brown and Katherine Mangan, "Faced with Extreme Demands From Defiant Protesters, What's a President to Do?" *Chronicle of Higher Education* (Jan. 23, 2016).

b. **Know Your Role**

1. "As an administrator, understand that you are an actor in the process. Instead of reacting only to what students do or say, proactively work with them to propose short-term and long-term solutions. Tap your own sources of professional and personal support." Hicks & Nelson *supra.*

2. "Remember that you are the public face of the university. Be prepared for the demonstrators, other students and the public to make assumptions and false claims about you. Be open and empathetic. Avoid becoming defensive." Hicks & Nelson *supra.*

c. **Know Yourself**

[2] "Standardization is a recognized statistical method for removing differences between the scores of two or more groups of test-takers." *Id.* at 1117.

If there exists any tension between your public persona as a university administrator, and private inclinations to act in solidarity with the protestors (or any other values clash), talk with mentors and others to figure out how to navigate this tension.

D. Clarify the Agenda

1. "Clarify, with as much precision as possible, the students' agenda." Hicks & Nelson *supra.*

2. "[L]earn who is speaking on behalf of the students, and request that a small, consistent group be appointed to engage with you." Hicks & Nelson *supra.* This will allow you to clarify and understand the issues.

E. Convene Small Group Meetings

Once you understand the slate of issues, you may want to convene working groups of students, faculty, and staff to research, report on, and address each issue in a thoughtful and substantive way. *See* Corinne Ruff, "One University's Response to Student Demands on Race: Radical Transparency," *Chronicle of Higher Education* (Apr. 21, 2016).

F. Involve High-Level Senior Leadership

1. Throughout the entire process, involve high-level senior leadership in a public way.

2. Public messages should be delivered by a high-level senior administrator.

G. Educate

1. Some student demands may not be viable. Don't forget that at the core, institutions of higher education serve an educational mission. This is a great opportunity to explain shared governance, academic freedom, and First Amendment protections in the context of higher education. *See, e.g.* University of Missouri Chancellor's Diversity Initiative, "Creating a Better Mizzou Project: Learning the Facts as We Work Towards a More Inclusive Campus," (offering community seminars on shared governance, the First Amendment, and system leadership).

2. Also as educators, we can help students find their voices and help them channel them productively to bring about change or improvement.

H. Follow Up

This movement calls for a culture shift that must be monitored over time. Follow

up regularly with the protest leadership in the weeks, months, and years after the initial unrest.