

Campus Hate  
Speech: Developing  
Lawful Policies to  
Protect Students and  
Encourage Dialogue



A word of warning.....



Why are you here?  
Have you had experience  
with campus hate speech  
acts or hate speech codes?

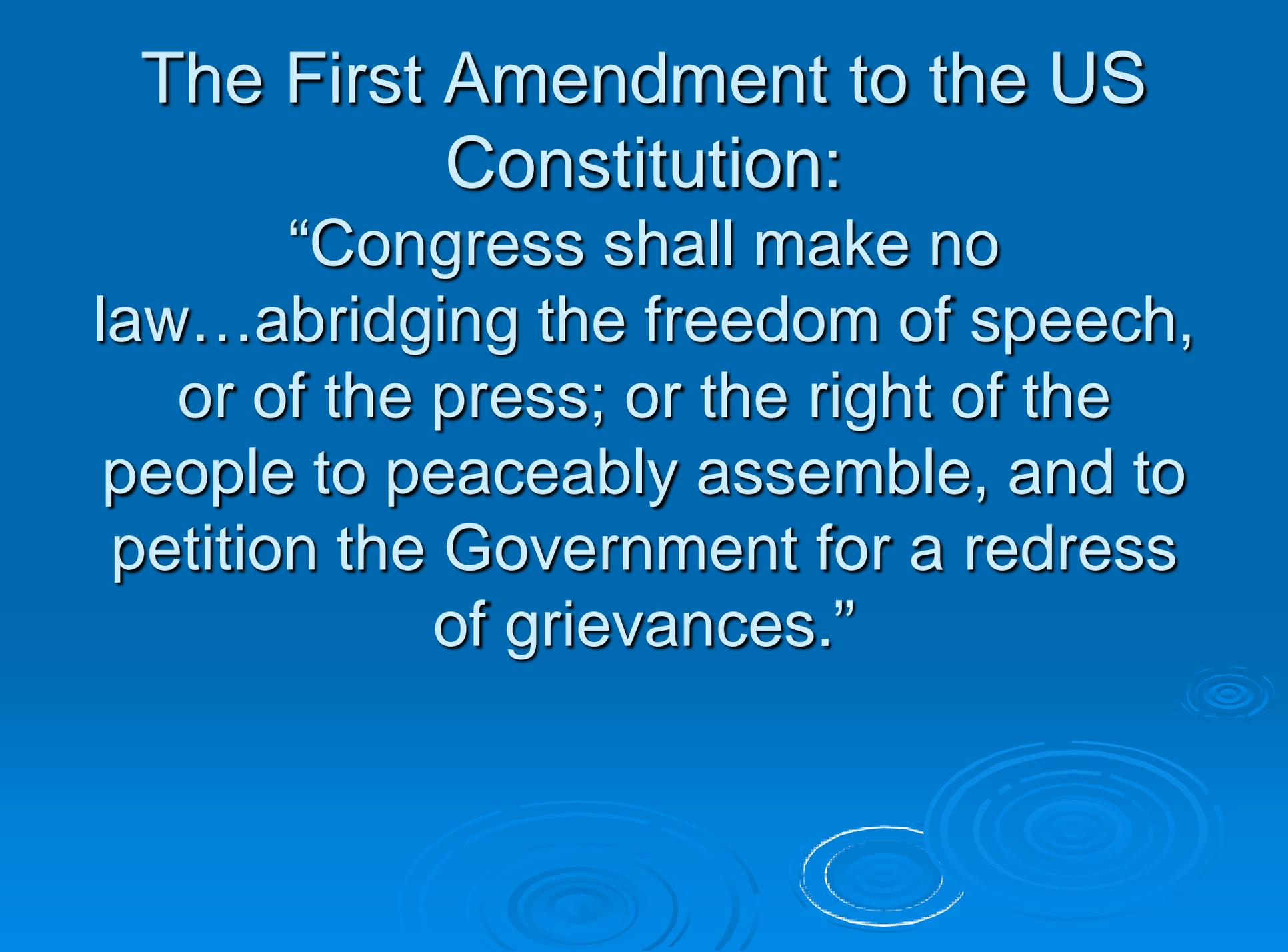


# What are the sources of speech liberties?

- Federal Constitution (Sets the floor)
- State Constitutions (CA Constitution/Puneyard)
- Federal Statutes (Whistle-blower)
- State Statutes (Leonard Law)
- A divine source? Is this a universal principle/human right?

# The First Amendment to the US Constitution:

“Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.”



# Some threshold questions:

- What is state action?
- How do you know if there state action?
- Free speech on private school campuses in CA (state statutory protections: The “Leonard Law”). Also some free speech rights on private property.

# What is Hate Speech?

- Like pornography, do you just “know it when you see it”?
- Matsuda’s Definition:
  - The message one of racial inferiority
  - The message is directed against a historically oppressed group
  - The message is persecutorial, hateful, and degrading
  - Is this limitation to race defensible? Does it raise content/viewpoint problems? Historical arguments that race is a special category? Should we delete the first restriction?

# *The University of Michigan Case*

## The Story:

- In the late 1980s the University of Michigan witnessed a disturbing rise of hate speech including a flier declaring “open season” on black people and described this group as “porch monkeys” among other things.
- A campus radio station allowed racist jokes to be broadcast.
- At a demonstration to protest these events, a KKK uniform was displayed in a dormitory window.

# Michigan's Response: A hate speech code:

- “Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status” *AND* that:
  - A. “Involves an express or implied threat to an individual’s academic efforts...” *OR*
  - B. “Has the purpose...or effect of interfering with an individual’s academic efforts...” *OR*
  - C “Creates an intimidating, hostile or demeaning environment for educational pursuits...”

# Examples of prohibited conduct in Michigan's "interpretive guide":

- A male student remarks in a class that "women just aren't as good in this field as men"
- You exclude someone from a study group because of race, sex, or ethnic origin
- You tell jokes about gay men or lesbians
- You display a confederate flag on the door of your room
- Racist graffiti written on a study carrel

# What was *Michigan's* response to the following incidents? How would you respond?

- In the course of an academic discussion in a graduate-level social work class, a student explains that he believes that homosexuality is a disease and he describes a plan for “curing” his future gay clients.
- A dentistry student expressed concerns in class that the professor would be unfair to minorities.
- A student in a public-speaking class recites a homophobic limerick.

# The Michigan Response:

- Students required to write apology letters
- Required to undergo formal hearings
- Required to attend educational sessions
- Issue of quality of work in the first scenario not addressed

# The Case: *Doe v. Michigan*

- Doe, a psychobiology student, brought suit because he feared that his constitutionally protected right to expression might be punished under the policy if he openly discussed his opinions about biologically based race and gender differences.
- During the course of the litigation, The University of Michigan recalled its “interpretive guide” because it contained inaccuracies.

What did the Federal  
District Court for Eastern  
Michigan Decide?



# The court struck down the codes on grounds of vagueness and overbreadth

- A law is unconstitutionally vague when men or women of common intelligence cannot tell what conduct is prohibited and what is not. What evidence is there that Michigan's code was vague?
- A law is unconstitutionally overbroad if the law sweeps protected as well as unprotected speech into its orbit.

# Evidence that code was unconstitutionally vague:

- The University of Michigan recalled its “interpretive guide” because it contained inaccuracies. Even university officials couldn’t tell what was properly prohibited. Opens the door to arbitrary enforcement.
- When asked how he could distinguish between merely offensive speech and speech that “stigmatizes”, university counsel replied “very carefully”. There is no principled way to distinguish. Speech that “stigmatizes” or “victimizes” still protected.

# Evidence that the code was overbroad:

- The University consistently interpreted the code to punish protected speech even though the code could also be applied to unprotected speech.
- Eg: The code could be used to punish unprotected speech such as a serious threat to kill someone because of their race.

Why are courts so concerned about restrictions on speech that are overbroad or vague? Are you concerned?

- When laws are vague there are due process and arbitrary enforcement concerns.
- When laws are overbroad there are “chilling effect” concerns. Critical speech central to democracy. The first amendment needs “breathing room.”

# The *University of Wisconsin Case:* *The Code:*

- UW may discipline a student in non-academic matters when a student makes a comment or epithet that:
  - Is “racist or discriminatory”
  - Is “directed at an individual”
  - Demeans “the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual and
  - Creates “an intimidating, hostile, or demeaning environment for education...”

What lessons did Wisconsin learn from Michigan? How did Wisconsin narrow its code?



# Example of student conduct that was punished under this code

- A student yelled f\*\*\*\*ing c\*\*t and f\*\*\*\*ing b\*\*\*h for ten minutes at a woman because of an article she wrote about the athletic department in a school newspaper.
- A student tells an Asian-American student “It’s people like you—that’s the reason this country is screwed up” and “you don’t belong here.”

How did the Federal District  
Court for Eastern Wisconsin  
rule?



WI's code did not survive judicial scrutiny, in part, because:

- The code was  
Overbroad
- Wisconsin's code was  
*not* content-neutral

1. What is content neutrality?
2. Why do courts care about this?
3. Can you guess why the Wisconsin code failed the test for content-neutrality?



# Content-Neutrality:

- A limitation on speech is content-neutral if the restriction “restricts communication without regard to the message conveyed”
- Why wasn't the Wisconsin code “content neutral?”

# The WI code is not content-neutral because it:

- Regulates speech based on content. Student are free to hurl epithets or comments to other students so long as the content of what they are saying is not about race, sex, religion, etc...
- Does this weaken the case for Matsuda's definition?

# Examples of content-neutral restrictions on speech

- Laws prohibiting noisy speeches near a hospital
- Laws banning the erection of billboards in a residential neighborhood
- Laws requiring the disclosure of the names of leaflet distributors
- Counter argument: might the medium be the message?

# The *Dambrot* Case

- The Facts: Dambrot, the basketball coach for Central Michigan University used the “N” word to motivate his basketball team and was punished under a speech code that forbade:
- “using symbols, epitaphs (sic) or slogans that infer (sic) negative connotations about an individual’s racial or ethnic affiliation”

Why is this code fail the test for  
viewpoint neutrality?



# A restriction on speech is not viewpoint neutral if:

- The restrictions allow the speaker to express a viewpoint on one side of a debate, but not the other.
- The code at issue in this case would allow a speaker to express his or her opinion about positive or neutral racial qualities, and as long as not “negative” in the eyes of University enforcers, this speech would be acceptable.

Why are courts so concerned about content and viewpoint based restrictions? Are you concerned?



# Why content/viewpoint restrictions raise special concerns

- There is a fear that the government could use these types of restrictions to suppress unpopular ideas, criticism and dissent.
- “Above all else, the First Amendment means that government has no power to restrict expression because of its message...or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought”...there is a profound commitment to debate that is “uninhibited and robust”
- Autonomy, truth-seeking, and democracy reasons

Are content or viewpoint based  
restrictions ever allowed?



# Very rarely...And only if:

- The restriction serves a compelling governmental interest that is narrowly tailored to serve that interest. Eg: A restriction on revealing the exact location of troops in wartime.

But doesn't the government have a  
“compelling interest” in protecting  
minorities on campus and ensuring  
equal access to education?



Yes.



So why aren't speech codes  
“narrowly” tailored enough to serve  
the compelling governmental  
interest of providing access to  
education for all?



Because there are other methods of advancing this interest that do no damage to the 1<sup>st</sup> Amendment

- Statements of community values (combating speech with speech)
- Multicultural education, mixed dorms, student affairs activities (again, more speech, not less)
- Constitutional restrictions on speech

What are some legal ways to restrict hate speech on campus?



# Some legal ways to restrict speech hate speech:

- Fighting words??—Keep objective focus
- Group libel??—Focus on the *individual*
- Reasonable time, place and manner restrictions unrelated to content or viewpoint. Focus on educational access/maximizing speech for all
- Obscenity (very strict standard)
- Assault—Keep objective focus
- Behavior vs. “pure speech”
- Enhanced punishments for bias-motivated crimes
- Title VII and IX of the Civil Rights Act(64 and 90)

# The seminal fighting words case: *Chaplinsky (1942)*

- The facts: Chaplinsky, a Jehovah's witness confronted a man in the street and said, "You are a God damned racketeer and "a damned Fascist and the whole government of Rochester are Fascists."
- Chaplinsky is convicted under a statute that restricts derisive speech in public places and appeals to the Supreme Court.

# The outcome of Chaplinsky:

- The court ruled that the state had the authority to restrict Chaplinsky's speech because he had used a form of speech—fighting words—that enjoys little protection.
- Fighting words, by their very utterance inflict injury and tend to incite an immediate breach of the peace...and are of such slight social value as a step to truth... that any benefit derived from them is outweighed by the need for order.

# Is the “fighting words” doctrine dead?

- The court has not upheld a single conviction based on the “fighting words” doctrine since it issued the doctrine over 65 years ago, even in extreme cases. Eg: “black motherf\*\*\*ing pig” not fighting words

# If there is any life left in the fighting words doctrine, they must:

- Must be directed to an individual (Mary Smith), not a category of people (Asian people)
- Must be highly likely to incite imminent violence, not just a danger of a breach of decorum.
- Are there any examples of this today? Are fighting words just an example of quaint, gun-slinging morality in more brutal times? Doctrines are sensitive to cultural/historical shifts.

# The seminal group libel case: *Beauharnais v. Illinois (1952)*

- The president of the “White Circle League” circulated a leaflet throughout Chicago that reads, if “being mongrelized by the negro will not unite us, then the aggressions, rapes, robberies, knives, guns and marijuana of the negro surely will...”
- Beauharnais is convicted under a statute that prohibits portrayal of a race or class of people as depraved or criminal.

# The Outcome:

- The conviction stands, because:
  - Of needs for harmony in a multicultural society
  - Deference to legislative judgments
  - If an utterance directed towards an individual can be the subject of criminal sanctions, then the utterance directed towards the group can also be the subject of criminal sanctions

# Is the group libel doctrine dead?

- Since the *New York Times v. Sullivan* and a host of other cases, libel requires a false statement of *fact* directed towards an individual made with actual malice.
- Imagine the absurdity and horror of a jury trying to pass judgment of the “facts” in the leaflet. The solemnity of the process would lend undue legitimacy to the leaflet

# Reasonable time, place, or manner restrictions unrelated to content or viewpoint:

- “Parades, marches, and other demonstrations may not obstruct the flow of traffic into or out of buildings”
- “The sound from parades, marches or other demonstrations may not X decibels over X amount of time”
- “Parades, marches and demonstrations may not be held inside classrooms”
- Notion of the public forum (“where” matters)
- Danger in using this to secretly censor...?

# Assault

- Words that create a *reasonable* apprehension of *imminent bodily* harm. Eg: a credible threat to kill an individual person, not “I would like to see this whole race of people die...”

# Enhanced punishment for hate-motivated crimes

- Does implicate the first amendment because being punished more for the expressive component of the act but, permissible because of:
  - Unique harms hate crimes bring to the individual
  - More societal unrest and harm because of greater likelihood of retaliation.

# Obscenity:

- Appealing to the prurient interest
- Patently offensive according to community standards
- Completely devoid of artistic, literary, scientific, artistic, etc...value.
- Eg: hard-core pornography, completely decontextualized
- Could pornography be described as “hate speech?”

# Behavior vs. “Pure Speech”

- Although expressive conduct is not as highly protected as “pure speech”, it still receives a strict level of protection. Eg:
  - Flag burning is protected expressive conduct
  - Nude dancing is protected expressive conduct
  - Wearing black armbands to protest the Vietnam war

# Title VII (employment) of the Civil Rights Act

- Quid pro quo harassment in employment
- Pervasive and severe test
- Captive audience in employment (applicable to campus?)
- Stronger legal pedigree/public support than fighting words.
- What if student also an employee?
- Argument rejected in the WI case
- Work about producing work, not ideas. Campus environment is special. Doesn't this depend on the work.

Forget what the law is! What  
should it be? Let's play  
dictator....



Please take a few minutes to read USC's speech code and statement of community values. Are they constitutionally sound? How so? Why was Stanford's code struck down (unpublished state superior court) and USC's might withstand attack?

# Stanford's Code punishes speech that:

- Is intended to insult or stigmatize an individual...on the basis of sex, race, color, handicap, religion... and
- Makes use of... “fighting words”. “Fighting words” are those which by their very utterance inflict injury or tend to incite an immediate breach of the peace”
- Why did the court strike this down?

# Some arguments in defense of the *right* to engage in hate speech

- Hate speech regulations condemn offensive ideas, but they do not condemn all offensive ideas. Eg: The burning of a flag to insult a group of widows and orphans mourning soldiers killed in battle, “F\*\*k the draft”, pornography.
- “This discrimination makes clear that those who promulgate these regulations assign to themselves the authority to determine which ideas are offensive.” Gives the government power that belongs to the individual. Gov. power can be abused.

# Continued...

- The cost in restricting hate speech is too great. Precedents establishing governmental authority to restrict hate speech because it is offensive to most could backfire and be used to censor those who speak out in favor of equality and social justice or criticize the gov.
- Eg: Disallowing a gay rights group on campus because it is offensive to the community (*Gay Alliance of Students v. Matthews*); Abuses against alleged communists (*Gitlow*)

# Continued...

- The safety valve theory. If destructive ideas can be talked about, perhaps this diverts destructive actions. Germany had strict hate speech codes protecting Jewish people before the Holocaust (didn't work).
- The response to hate speech should be counter speech, not censorship
- US haven for artistic and political freedom—is hate speech a cost for this?
- Values of autonomy, truth, tolerance, self-fulfillment, democratic participation
- Use extra-legal social sanctions

# Some arguments in favor of restricting hate speech

- Hate speech rises to the level of violence in its effects because it can cause “nightmares, PTSD, hypertension, psychosis and suicide.”
- Hate speech diminishes speech in the aggregate because it silences victimized groups—doesn’t enhance “marketplace of ideas”, participation, truth or identity development
- Hate speech constitutes “group libel”

Given that hate speech might be a reality on your campus, what can you do about it? Is there a way to maximize any value it might have?



# Continued...

- Hate speech clashes with another constitutional value: the right to equal protection enshrined in the 14<sup>th</sup> amendment. We fought a civil war to win this amendment. *Brown*, in particular established the right to equal access to education. Campus hate speech prevents equal access to education.
- Cross-cultural examples of healthy democracies with hate speech codes
- Room for civil disobedience?

# Pedagogical Opportunities: Learning Outcomes

## I. Learning Outcomes

- I. Disequilibrium as inducement to cognitive growth (Gurin).
- II. Realization that racism is not “in the past” (Delton)
- III. Public Pedagogy/Democratic Action (Furin)—Superintendent from rural PA described having public conversations and activism that “would not have taken place otherwise”. \$20,000 raised for a foundation

# Coalition Building

## I. Coalition Building

- I. Conflict as an opportunity for community creation, creativity, and coalition building
  - I. Community Creation/coalition building: Could rally student groups that don't normally communicate (LGBT, BSU, APALSA) around a common cause, pointing out shared interests (Green)
  - II. Creativity: Experience in how to "talk back" to bigotry. Angel wings at funerals.

# Identity Development

- I. Bennett's four stages:
    - I. Pre-exposure (pre-college for some)
    - II. Conflict; "a shattering experience"  
(Bennett) "rending and separation"  
(Hyppolite)
    - III. Retreat (perhaps hatred for dominant group)
    - IV. Social Justice Phase
- 

# The University Response: Building Educational Resilience

- I. Hate speech poses an educational “risk” (dropout, suicide, coalition destruction, stunted identity development, ignorance) for its victims (O’Connor; Williams)
- II. Combating educational risk requires educational *resilience* (O’Connor)
- III. Relationship building is key to educational resilience (O’Connor; Dembo)

# The University Response: Creating Conditions for Relationship Building

- I. Informal interactional diversity in university housing (Gurin). Are segregated dorm floors amenable to this?
  - II. Small, discussion based classes.
  - III. Cultural styles in teaching, learning and the recognition of achievement.  
(Bennett)
- 

# Edit/Add on:

- Survey of state statutes and constitutions to see if any extra constitutional or statutory “leonard like” protections
- Cornell riot story: maybe sometime things have to get worse before they get better/a little bit of chaos is a good thing.
- Do survey of how supposedly neutral codes/TPM, actually applied. Eg: in audience public school punished a guy for saying “fag”. 1<sup>st</sup> amm violation
- Explore civil disobedience theme: when should you do it versus case for obeying laws you disagree with
- Qualitative an quantitative data on effects of hate speech
- More practical advice on what can be done to build resilience
- Edit out the “overbroad piece”: too confusing, and can just extract one principle from each case
- High-minded quotes: “the bedrock principle” “if there is any fixed star...no official, high or petty...”
- Put slide 54 down a couple of slides. Edit for typos.