WHITHER PC AFTER R.A.V.?

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Surely one of the most widely publicized developments on college and university campuses in recent years has been the debate about whether, and how, to curb outbreaks of racism and other, similar forms of group hostility. Many campuses have been convulsed by incidents of racism, sexism, homophobia, and religious and ethnic hostility. Members of victimized groups have pressed for strong institutional responses. Faculty and administration have also reacted sharply to these incidents, partly out of concern for the plight of the victims, partly out of conviction that such overt inter-group hostility is anathema to the aims of academic enlightenment and interferes directly with learning. As a consequence, many institutions of higher education have amended their codes of student conduct specifically to prohibit both acts of group hostility and the forms of expression ("hate speech") that so often accompany them.

The efforts of university administrations to address problems of group hostility and hate speech, however, have sparked intense resistance, particularly from advocates of conservative political ideology. They contend that codes of student conduct are being used by liberal-dominated academies to enforce what they have dubbed "political correctness" (or "PC" for short) on students enrolled in the institution. Rather than protect free debate and academic enlightenment, these critics charge, colleges and universities are trying to stifle it, in
favor of an imposed liberal orthodoxy on issues such as race or
gender relations, or sexual orientation.

The debate has also sharply divided the community of legal
academicians. Many, citing the goals of equality enshrined in
the Fourteenth Amendment, argue that punishment of racist,
sexist, and other forms of group-hostile behavior, including
punishment of the hate speech that attends them, is a natural
outgrowth of the civil rights movement and a necessary component
of this nation's progress toward true racial, sexual, ethnic, and
religious equality.¹ Perhaps a greater number, while supporting
efforts to prohibit and punish hateful conduct, balk at the
proscription of hate speech, because they believe it to be
protected by the First Amendment.² Within the legal academy,
this battle between what Professor Delgado has aptly described as
conflicting "narratives" of constitutional liberty (the "free
speech" narrative and the "equality" narrative)³ has yet to
reach any consensus. Each side is convinced that it is right;
each finds flaws in the arguments of the other.

Last Term, the United States Supreme Court radically altered


³ Delgado, supra note 1, at 345-348.
the terms of this debate by deciding *R.A.V.* v. *St. Paul*. The case involved an attempt by authorities of the City of St. Paul, Minnesota, to prosecute individuals who erected a burning cross on an African-American family's lawn, under a St. Paul statute that prohibited erection of a symbol "which one knows or has reason to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender ...." The Justices agreed unanimously that the prosecution violated the First Amendment. A majority of five justices, however, went further and announced some fundamental changes in the structure of First Amendment jurisprudence that have profound implications for the political correctness debate and for the handling of group hatred in higher education.

In an opinion by Justice Scalia, the majority accepted the state court's conclusion that the statute punished only "fighting words" -- a category of speech that the Court had for sixty years treated as beyond the First Amendment's protection. But in *R.A.V.*, the Court held that even within this category of "totally proscribable" speech, the First Amendment still required viewpoint neutrality. The state, in other words, is precluded

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5 The Court created the fighting words doctrine in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The Court defined fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." The Court concluded "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."
from singling out some fighting words for special punishment because of the state's opposition to the message those particular fighting words convey. In the opinion of the majority, the critical vice of the St. Paul statute was that it engaged in such viewpoint discrimination, for example by punishing only those fighting words which conveyed particular beliefs about race relations.

The Court, however, did not erect an absolute barrier against content-based punishment of fighting words. Instead, it suggested four situations in which content discrimination might be permissible. These are: 1) situations where the reason for proscribing the content-based subcategory is a special case of the reason for proscribing the entire category (the Court gave as an example a law prohibiting threats against the life of the President); 2) situations where the subcategory involves "secondary effects" unrelated to the message of the speech; 3) situations where the proscription is primarily aimed at conduct rather than speech; and 4) cases where the nature of the content discrimination does not raise the "realistic possibility that official suppression of ideas is afoot." Where the content-based proscription of fighting words fails to fall within one of these exceptional situations, the discrimination is permissible only if it meets the standards of intensive scrutiny -- described by the Court as situations where the content discrimination is

7 Id. at 2545-2547.
"reasonably necessary" to accomplish a "compelling interest."\textsuperscript{8} Much of the majority opinion in \textit{R.A.V.} was devoted to demonstrating why the St. Paul statute failed to fit into one of the exceptional situations listed above, and why its means were not "reasonably necessary\textsuperscript{9} to accomplish the presumably compelling interest of ending race discrimination.

In the wake of \textit{R.A.V.}, the question naturally arises how campus codes prohibiting hate speech will fare under the Court's new analysis. The decision has already prompted some universities either to abandon their efforts to punish hate speech, or to undertake thoroughgoing revisions in an effort to satisfy the restrictions placed by \textit{R.A.V.}\textsuperscript{10} My comments will be devoted primarily to offering some guidance for the latter effort.

At the outset, it should be noted that \textit{R.A.V.} in particular, and the First Amendment in general, apply only to state actors. Private colleges and universities, as yet, are unaffected, and therefore such private institutions may deal with hate speech with considerably greater latitude. (I say "as yet" because legislation was introduced in the last Congress which would prohibit recipients of federal funds -- including virtually all

\textsuperscript{8} \textit{Id.} at 2549-2550.

\textsuperscript{9} \textit{Id.} at 2550.

colleges and universities -- from punishing hate speech.\textsuperscript{11} If Congress enacted such a statute both private and public universities colleges and universities would be effectively prevented from restraining hate speech.) In addition, all institutions should have broader capacity to deal with hate speech by their employees -- faculty and staff -- since such speech is attributable to the state itself and may constitute constitutionally prohibited racial, sexual, or religious discrimination. There are still First Amendment limitations on what universities may do, but with respect to faculty and staff, since they are state actors, the countervailing policies of the equal protection clause necessarily qualify the scope of free speech.\textsuperscript{12}

Even beyond these considerations, there still may be some room for hate speech restrictions within the academy. Indeed, a reasonably careful look at \textit{R.A.V.} suggests at least five ways in which such restrictions might be upheld.

First, it is abundantly clear from \textit{R.A.V.} that restrictions on conduct are unaffected. People who \textit{act} toward others in hostile or discriminatory ways may be punished for doing so. Indeed, the Court in \textit{R.A.V.} took pains to identify a number of criminal statutes applicable in St. Paul by which the actions of

\begin{itemize}
\item \textsuperscript{12} For discussion see Weinstein, \textit{supra} note 2, at 191-195.
\end{itemize}
the R.A.V. defendants could have been punished.\textsuperscript{13} This is an important distinction, because many of the most serious incidents of group hostility on college campuses in recent years have involved conduct as well as speech. Thus, people who deface others' property with swastikas or racist expressions may be punished for defacing property. People who threaten the safety of minority students on campus may be punished for assault. People who engage in racially motivated violence may be punished for their violent acts. People or organizations that discriminate on the basis of race may be punished for doing so. And so forth. To some, these proscriptions may not seem adequate, because they strike at the outgrowth of the problem rather than its root. But it is important to understand that R.A.V. leaves the government's power to punish hateful conduct intact; thus, it does not leave authorities powerless to deal with racism or other forms of group hostility.

Second, it may be possible for universities to use the Supreme Court's idea of the "limited forum" to prohibit hate speech in some places within the university. The Court has held that government need not allow all speech everywhere on government property. Outside such "traditional forums" as parks or streets, the government has substantial latitude to identify where speech may occur, and where it is inconsistent with other government functions the government may prohibit speech. The

\textsuperscript{13} R.A.V., 112 S.Ct. at 2541, n. 1 (might have violated statutes punishing terroristic threats, arson, and criminal damage to property).
Court has even permitted some limited forms of content discrimination under its forum doctrine. A university is a place of many forums, some open, some very limited. Using the forum doctrine, it might be possible for colleges and universities to prohibit hate speech in some places on campus (e.g., a classroom, a library, a laboratory, a gymnasium, perhaps even a cafeteria or a dormitory) on grounds that the speech is inconsistent with the limited nature of the forum the university has, in that particular place, created.\(^\text{14}\)

Third, it is at least arguable that some campus rules might survive on the ground that they exist to prevent a "secondary effect" of hate speech. In the academy, it is important to maintain an environment that is conducive to learning. Individuals who feel threatened or who, because of assertions of inferiority, lack the self-confidence necessary to engage in intellectual exploration, arguably are unable to participate fully in the learning process. University officials, however, must be careful not to rely too heavily on this rationale. The Court made clear in R.A.V. that the "secondary effect" must be truly separate from official antipathy to the message.\(^\text{15}\) Hate speech resting on the claim of protecting the learning


\(^{15}\) R.A.V., 112 S.Ct. at 2549 (quoting Boos v. Barry, 485 U.S. 312 (1988) for proposition that "[t]he emotive impact of speech on its audience is not a 'secondary effect'.")
environment may well founder on this limitation of the secondary effect doctrine. Indeed, if the university singles out for prevention only the feelings of inferiority resulting from hate speech, its efforts to protect the learning environment will seem underinclusive, raising suspicion of a hidden viewpoint agenda.

Fourth, it is clear from R.A.V. that governmental institutions, including colleges and universities, may prohibit all fighting words, regardless of subject matter, and they may punish hate-speech fighting words along with other kinds under such a general proscription. Indeed, the R.A.V. court found that the St. Paul statute failed strict means-ends scrutiny precisely because such a general fighting words statute would have sufficed to reach the defendants' activity. 16 Here, however, the opinions of the concurring justices in R.A.V. warrant some caution. The statute in R.A.V. defined hate speech in terms of the tendency of the speech to arouse "anger" or "resentment" in the audience. While the majority accepted the Minnesota Supreme Court's conclusion that this statute applied only to fighting words, the concurring justices would have held the statute overbroad. 17 In other decisions, the Court has taken a dim view of statutes that similarly proscribed speech on the basis of audience reactions. After all, the robust, wide-open debate that the First Amendment is intended to foster often includes caustic

16 Id. at 2549-2550.

17 R.A.V., 112 S. Ct. at 2558-2560 (White, J. concurring in the judgment) (joined on this issue by Justices Blackmun, O'Connor and Stevens).
comments and radical ideas that others may well find threatening or upsetting. Thus, the court has traditionally been wary of restraints framed in terms of emotive audience response.

Finally, there remains the possibility that within general restraints on hateful conduct actions motivated by group bias or hostility may be subjected to greater punishment. Many states have adopted statutes that impose greater penalties when conduct that is otherwise punishable is motivated by racial or other forms of group prejudice. Thus, for example, if defacing others’ property normally leads to one year of imprisonment, doing so with a racist motivation doubles the punishment to two years’ incarceration. The Court has a case before it this Term, Wisconsin v. Mitchell, which involves the constitutionality of such a statute. Although the issue remains unresolved, the Court suggested in dicta in a case last Term, Dawson v. Delaware, that such a penalty enhancement scheme might be constitutional as long as the enhancing characteristic bore a rational relationship to the state’s interest in proscribing the conduct in the first place.

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19 485 N.W. 2d 907 (Wis. 1992). The statute in question in Mitchell provides that a sentence for aggravated battery could be increased from two years to seven if the victim was chosen because of race.

These various possibilities suggest that R.A.V. leaves colleges and universities some room to maneuver on the problem of combatting group hatred. But I think R.A.V. was intended to, and does, send a broader message that college and university administrators, in particular, would do well to heed. The message is that the liberties of the First Amendment do not have an ideological cast. If we say that the First Amendment protects those who would threaten democracy by advocating anarchy, if it protects those who would threaten private property by advocating communism, if it protects those who would threaten national security by advocating pacifism, it must also protect those who would threaten equality by advocating racism, or sexism, or religious orthodoxy, or homophobia. And if it allows the anarchist, or the communist, or the pacifist to advocate by caustic commentary and offensive, anger-arousing language, it should do the same for the racist and sexist as well. If we vaunt the values of free debate on one issue, only to sacrifice them when values of particular importance to us come under fire, we unleash a principle we cannot contain. We invite others to do the same when their pet values are threatened, and ultimately the First Amendment unravels. The speech a majority of us hates will be suppressed, and our society will become vulnerable to the tyranny of orthodox ideas.

There is, in the recent history of hate speech regulation on campus, plenty of evidence that the First Amendment’s inherent content neutrality has been, at least occasionally, selectively
forgotten. One does not have to be a political conservative to have felt the chilling winds of "PC" blowing across college campuses. In our rush to deal with problems about which we care deeply, we have lost sight of some essential principles of our free speech tradition. We have forgotten that speech is not the same as conduct, and that we may not punish speech in lieu of conduct, however attractive that option may sometimes seem. We have also too often forgotten that the constitutional antidote to dangerous, even hurtful speech is more speech, speech of a different and opposite character, that seeks to win in the marketplace of ideas by persuasion rather than fiat.

There is much in the "more speech" category that colleges and universities can do about expression of group hostility. Orientation sessions can address the issue. Public forums can be organized. Classes on race and gender issues can be offered, perhaps even required. Hateful expression can be identified, reported, and its authors ostracized. Victims can be given counselling. The college can provide mediation. Faculty and staff can be sensitized and trained to respond to hateful speech. Those in the academy who support equality can be mobilized to speak out in its favor, and to challenge the prejudice they find in others.

These may not be the easiest or most efficient methods of dealing with group hatred. But the First Amendment does not stand for either ease or efficiency. More importantly, these methods address not merely the expression of hatred, but the
attitudes which give rise to it. Punishing hateful speech at best merely sends those attitudes underground. At worst, it gives the advocates of racism and other forms of bigotry access to undeserved moral high ground by allowing them to masquerade as defenders of free expression.