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The Campus As A Marketplace of Ideas

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THE CAMPUS AS A MARKETPLACE OF IDEAS: THE REGULATION OF HATEMONGERING ON COLLEGE AND UNIVERSITY CAMPUSES

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THE CAMPUS AS A MARKETPLACE OF IDEAS:

THE REGULATION OF HATEMONGERING ON COLLEGE AND UNIVERSITY CAMPUSES

A GUIDE TO ANALYSIS

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(Note: The materials that appear in italicized paragraphs below are examples of hatemongering regulations that have been the subject of widely publicized judicial analysis or scholarly commentary.)

I. COURT DECISIONS

A. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992): The regulation at issue in *R.A.V.* was a city ordinance making it a criminal misdemeanor to place on public or private property --

> *a symbol [or] object ..., including, but not limited to, a burning cross or Nazi swastika, 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 ....*

In an opinion for himself and four other justices, Justice Scalia declared the ordinance facially invalid under the First Amendment on the ground that "it prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech addresses." 112 S. Ct. at 2542. In a passage of unmistakable significance to proponents of campus hatemongering codes, Justice Scalia rejected the city's argument that the ordinance served a compelling state interest by ensuring the basic human rights of members of historically persecuted groups. *Id.* at 2549-50.

B. *UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*, 774 F. Supp. 1163 (E.D. Wis. 1991). The regulation in question, known as the "UW Rule," authorized the university to take disciplinary action against any student --

> *[f]or racist or discriminatory comments, epithets, or other expressive behavior directed at an individual or on separate occasions at different*

individuals, or for physical conduct, if such comments, epithets or other expressive behavior or physical conduct intentionally:

1. *Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and*

2. *Create an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.*

... Whether the [requisite] intent ... is present shall be determined by consideration of all relevant circumstances.

The court found the UW Rule to be unconstitutionally overbroad on the ground that it "reach[es] a substantial amount of speech outside the traditional definition of fighting words." 774 F. Supp. at 1178.

C. *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989). The policy in question subjected persons (not just students) to disciplinary action for engaging in --

... [a]ny 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, employment, participation in University[-]sponsored extra-curricular activities or personal safety; or

(b) Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University[-]sponsored extra-curricular activities or personal safety.

In an unusually testy opinion, the court found that the University of Michigan policy was unconstitutionally overbroad and had repeatedly been applied to reach protected speech. The court also characterized the policy as unconstitutionally vague: "it [is] simply impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct." 721 F. Supp. at 867.

D. *Dambrot v. Central Michigan University*, Civ. A. No. 93-CV-10177-BC (E.D. Mich. Nov. 26, 1993), *reprinted in* the January 17, 1994, edition of SYNFAX WEEKLY REPORT at 176-77. Central Michigan University adopted a "discriminatory harassment" policy prohibiting --

> *intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile, or offensive educational, employment, or living environment by ... demeaning or slurring individuals through ... written literature because of their racial or ethnic affiliation; or ... symbols, epi[thets] or slogans that infer negative connotations about an individual's racial or ethnic affiliation.*

The men's varsity basketball coach, a white male, was fired after he used the word "nigger" during a closed-door team meeting. Relying on the *R.A.V.* and *University of Michigan* decisions, the coach filed suit, alleging that the speech code violated the First Amendment because it was overbroad, vague, and impermissibly content-based. In a curious ruling, the trial court agreed with the coach that the policy was unconstitutional, but held nevertheless that he was not entitled to reinstatement because the subject-matter of his remarks was not constitutionally protected under the "matter of public concern" standard from *Connick v. Myers*, 461 U.S. 138 (1983).

II. ***COMMENTARY BY PROPONENTS OF REGULATION***: Three extraordinary law review articles written from the perspective of victims of hatemongering:

A. R. Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

> [A] racial insult is only in small part an expression of self; it is primarily an attempt to injure through the use of words. ... [Racial insults] are not intended to inform or convince the listener. Racial insults invite no discourse, and no speech in response can cure the inflicted harm.
>
> Racial insults may usefully be analogized to obscenity. Although the government may regulate obscenity, it may not prohibit expression of the view that obscenity should be protected or that, for example, adultery may be proper behavior. Similarly, protecting members of racial minorities from injury through racial insults, and society itself from the accumulated harms of racism, is very different

from protecting espousal of the view that race discrimination is proper. [*Id.* at 176-77; footnotes omitted.]

B. M. J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989). Professor Matsuda's vivid portrait of racism from the recipient's perspective is worth quoting at length:

> From the victim's perspective, [racist insults] inflict wounds, wounds that are neither random nor isolated. Gutter racism, parlor racism, corporate racism, and government racism work in coordination, reinforcing existing conditions of domination. Less egregious forms of racism degenerate easily into more serious forms. ...
>
> Racist hate messages are rapidly increasing and are widely distributed in this country using a variety of low and high technologies. The negative effects of hate messages are real and immediate for the victims. Victims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide. ... Victims are restricted in their personal freedom. In order to avoid receiving hate messages, victims have had to quit jobs, forgo education, leave their homes, avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor. ...
>
> As much as one may try to resist a piece of hate propaganda, the effect on one's self-esteem and sense of personal security is devastating. To be hated, despised, and alone is the ultimate fear of all human beings. However irrational racist speech may be, it hits right at the emotional place where we feel the most pain. The aloneness comes not only from the hate message itself, but also from the government response of tolerance. When hundreds of police officers are called out to protect racist marchers, when the courts refuse redress for racial insult, and when racist attacks are officially dismissed as pranks, the victim becomes a stateless person. ...
>
> The university case raises unique concerns. Universities are special places, charged with pedagogy, and duty-bound to a constituency with special vulnerabilities. Many of the new adults who come to live and study at the major universities are away from home for the first time, and at a vulnerable stage of psychological

development. Students are particularly dependent on the university for community, for intellectual development, and for self-definition. Official tolerance of racist speech in this setting is more harmful than generalized tolerance in the community-at-large. It is harmful to student perpetrators in that it is a lesson in getting-away-with-it that will have lifelong repercussions. It is harmful to targets, who perceive the university as taking sides through inaction, and who are left to their own resources in coping with the damage wrought. Finally, it is a harm to the goals of inclusion, education, development of knowledge, and ethics that universities exist and stand for. Lessons of cynicism and hate replace lessons in critical thought and inquiry.

The campus free speech issues of the Vietnam era, and those evoked by the anti-apartheid movement, pit students against university administrators, multinational corporations, the U.S. military, and established governments. In the context of that kind of power imbalance, the free speech rights of students deserve particular deference. ... Racist speech on campus occurs in a vastly different power context. Campus racism targets minority students and faculty. Minority students often come to the university at risk academically, socially, and psychologically. Minority faculty are typically untenured, overburdened, isolated, or even nonexistent, as is the case at several law schools. The marginalized position of minority faculty further marginalizes minority students. [*Id.* at 2335-38, 2370-72; footnotes omitted.]

C. C.R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L. J. 431. Professor Lawrence writes:

... I am deeply concerned about the role that many civil libertarians have played, or the roles we have failed to play, in the continuing, real-life struggle through which we define the community in which we live. I fear that by framing the debate as we have -- as one in which the liberty of free speech is in conflict with the elimination of racism -- we have advanced the cause of racial oppression and have placed the bigot on the moral high ground, fanning the rising flames of racism. Above all, I am troubled that we have not listened to the real victims, that we have shown so little empathy or understanding for their injury, and that we have abandoned those individuals whose race, gender, or sexual orientation provokes others to regard them as second class citizens. These individuals' civil liberties are most directly at stake in the debate. [1990 DUKE L. J. at 436; footnotes omitted.]

Professor Lawrence cautiously champions Stanford University's narrowly-drawn policy on "Free Expression and Discriminatory Harassment." The Stanford policy prohibits "harassment by personal vilification," defined as speech or other expression that --

> (a) *is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national or ethnic origin; and*
>
> (b) *is addressed directly to the individual or individuals whom it insults or stigmatizes; and*
>
> (c) *makes use of insulting or "fighting" words or non-verbal symbols.* [*Id.* at 450-51.]

III. ***COMMENTARY BY OPPONENTS OF REGULATION***: Two law review articles, very different from one another, illuminate the case against hate speech codes from the perspective of the mainstream civil libertarian:

A. N. Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L. J. 484 (1990). Ms. Strossen assiduously dissects the Stanford policy defended by Professor Lawrence and concludes that it is unacceptable and unworkable for several reasons: its reliance on content validation; its misinterpretation of the Supreme Court's "fighting words" doctrine; and its use of inherently vague terminology and resulting chilling effect on concededly protected speech. The ACLU's 1990 "Policy Statement on Free Speech and Bias on College Campuses" is reprinted as an appendix following her article. (1990 DUKE L. J. at 571-73.) At the risk of oversimplifying Ms. Strossen's rich analysis, its essence is captured in a short quotation at the beginning of the article:

> It is technically impossible to write an anti-speech code that cannot be twisted against speech nobody means to bar. It has been tried and tried and tried. [*Id.* at 486, *quoting* Eleanor Holmes Norton.]

B. B. Neuborne, *Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech*, 27 HARV. C.R.-C.L. L. REV. 371 (1992). In an otherwise abstract and lofty treatment of the political theory underlying First Amendment jurisprudence, Professor Neuborne detours for what seems like a premeditated attack on the Matsuda-Lawrence approach:

The critical question about hate speech on campus, as with hate speech on the streets, is whether behavior, including speech, demonstrably prevents the student from enjoying the principal benefit of participation in the educational enterprise -- learning. Threats and intimidation from whatever source clearly do so. Sustained verbal harassment directed at the target may well do so, whether or not it involves messages of hate, depending upon its duration, intensity, and context. Bruised emotions caused by ugly ideas and epithets, even hateful ones, do not.

As with hate speech in the streets, the alleged harm -- in this case, interference with the learning process --

> [I must pause to remark how very different Professor's Neuborne's clinical, dispassionate, and abbreviated characterization of the harm caused by hate speech is from the emotion-laden characterization of Professors Matsuda and Lawrence!]

-- must be proven, not merely alleged or assumed, and the causal nexus between the speech and the harm must be demonstrated. Generalized assertions of an inability to study without a demonstrable, tangible adverse effect on academic performance would be insufficient. ...

The principal vice of the first generation of campus speech codes was the facile and wholly unsupported assumption that the beneficiaries of the codes were so fragile that speech which hurt their feelings would automatically prevent them from learning.

Viewing outsiders as weaklings who require special coddling is, of course, an age-old form of infantilization that reinforces subordinate status. [27 HARV. C.R.-C.L. L. REV. at 399-400; footnotes omitted.]

IV. OTHER USEFUL ARTICLES

A. R.G. Hartman, *Hateful Expression and First Amendment Values: Toward a Theory of Constitutional Constraint on Hate Speech at Colleges and Universities after* R.A.V. v. St. Paul, 19 J. COLL. & UNIV. L. 343 (1993). One of the first articles recognizing that *R.A.V.* would reinforce judicial

skepticism about campus speech codes -- an analysis that precisely presaged the trial court's decision in *Dambrot* a few months ago.

B. F. Michelman, *Universities, Racist Speech and Democracy in America: An Essay for the ACLU*, 27 HARV. C.R.-C.L. L. REV. 339 (1992). An interesting treatment of the constitutional and practical implications of the controversial "Hyde Bill" championed by Congressman Henry Hyde in 1991. The name of the legislation said it all -- the "Collegiate Speech Protection Act of 1991." It would have created a novel federal cause of action against private universities for abridging communication in a manner that, had such communication occurred at a public university, would violate the First Amendment. On March 12, 1991, the ACLU issued a press release endorsing the Hyde Bill. As Professor Michelman notes, the bill attracted broad, bipartisan support from quarters not frequently allied with one another. Congressman Barney Frank joined Congressman Hyde in cosponsoring it.

C. J.P. Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L. J. 399 (1991). This provocative article advances an entirely different theory, captured in this passage at the beginning:

> Several thoughtful scholars have examined generally whether the government can penalize citizens for racist slurs under the first amendment, but to the limited extent that they have discussed university disciplinary codes they have assumed that the state university is merely a government instrumentality subject to the same constitutional limitations as, for example, the legislature or the police. In contrast, I argue that the university has a fundamentally different relationship to the speech of its members than does the state to the speech of its citizens. On campus, general rights of free speech should be qualified by the intellectual values of academic discourse. I conclude that the protection of these academic values, which themselves enjoy constitutional protection, permits state universities lawfully to bar racially abusive speech, even if the state legislature could not constitutionally prohibit such speech throughout society at large. [79 GEO. L. J. at 399-400; footnote omitted.]

V. DRAFTING A SPEECH CODE: PRACTICAL GUIDELINES AND QUESTIONS

A. The verdict is in: the Supreme Court's decision in *R.A.V.* greatly complicates the task of drafting a defensible campus speech code. Any effort to insulate a code from First Amendment scrutiny by invoking the "fighting words"

doctrine runs headlong into Justice Scalia's caustic conclusion that a regulation prohibiting *some* fighting words but not *all* fighting words -- as a hate speech code does by definition -- is constitutionally suspect. There is no question that the first "prong" of the Stanford policy (see page 6 of this outline) -- prohibiting speech that is "intended to insult or stigmatize an individual or a small number of individuals *on the basis of their sex, race, color, handicap, religion, sexual orientation, or national or ethnic origin*" -- would cause constitutional difficulties under the reasoning in *R.A.V.* Indeed, any policy that proscribes categories of speech "on the basis of" or "because of" a delineated factor -- as *every policy* quoted in this outline does -- would fail under *R.A.V.* Justice Scalia's reasoning leads to a drafting suggestion unavoidably freighted with irony: The safest hate speech code may be one that makes no mention of the very groups for whose benefit such policies are primarily drafted. Take, for example, the Stanford policy, which prohibits speech --

> intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national or ethnic origin ....

That formulation would not work if subjected to scrutiny under the First Amendment, since it reflects a content-based judgment that some categories of stigmatizing insult are more worthy of regulation than others; but it might if deprived of its meaty last half: "... intended to insult or stigmatize an individual or a small number of individuals" -- period!

B. Several first-generation codes adopted an approach that seemed like a good idea at the time: modelling their policies after the Equal Employment Opportunity Commission's regulatory definition of atmospheric sexual harassment. The University of Wisconsin rule, for example, prohibited racist or discriminatory comments that "[c]reate an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity" -- a precise paraphrase of the EEOC guideline. That approach was squarely repudiated by trial courts in the University of Wisconsin, University of Michigan, and Central Michigan University cases, and is clearly not a wise starting point for the formulation of policy today.

C. The receptiveness of courts to "vagueness" arguments poses another almost insoluble obstacle to the drafting of a constitutionally acceptable campus speech code. Every reported case accepts the plaintiff's characterization that the verbs and adjectives used in the code -- "stigmatizes," "demeans," "offensive," "negative" -- form unacceptably vague boundaries between regulable and protected speech.

The determined draftsperson must take advantage of the legal distinction between "speech" and "action" and the law's predisposition to allow a greater degree of latitude when it is the latter being regulated. The University of Wisconsin policy, for example, used vocabulary that virtually gave up the ghost in advance -- "*comments*," "*expressive* behavior." By fostering the impression that the policy regulated pure speech, the first generation of campus codes made an easy target. The second generation will probably use "action" vocabulary -- "hostile *conduct*," "incite immediate *violence*" (the exact formulation from the Supreme Court's half-century-old "fighting words" case, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)), etc.

D. The speech codes invalidated by the courts over the last few years have all shared one attribute in common. They were *generalized* codes that established a uniform standard regardless of *who* engaged in racist activities or *where* those activities took place. Would a *differentiated* policy fare better if challenged on constitutional grounds?

(1) ***Differentiation based on geography***: Taking a cue from Nadine Strossen, does the concern for the sanctity of free speech assume different dimensions in different parts of the campus?

> [T]he heightened protection due free speech in the academic world certainly [is] applicable to some campus areas, such as parks, malls, or other traditional gathering places. The generalizations, however, may not be applicable to other areas, such as students' dormitory rooms. These rooms constitute the students' homes. Accordingly, under established free speech tenets, students should have the right to avoid being exposed to others' expression by seeking refuge in their rooms. [Strossen, *supra*, 1990 DUKE L. J. at 503.]

Would the Central Michigan policy have survived a constitutional challenge if it had been limited to interchanges between students within the confines of university residence halls?

(2) ***Differentiation based on the identities of actor and intended victim***: Are the remarks of a student entitled to greater constitutional protection if delivered to a faculty member than if delivered to another student? Would there be a distinction, for constitutional purposes, between an insensitive remark made by one student to another student during a casual conversation and the same remark made by the editor of the student newspaper in a published column? Notice that in the first instance the perpetrator knows the identity of the victim and

presumably (or demonstrably) *intends* the remark to cause offense to that particular victim. In the second instance, the remark is broadcast with no individualized victim in mind. Is that distinction legally or constitutionally significant?

E. A drafting idea: The sad fact about racially hateful speech or conduct is that an extraordinarily high proportion of incidents on college campuses involve inebriated students. The student conduct codes at most universities allow the imposition of disciplinary sanctions for disorderly conduct or violations of the campus drug and alcohol policy. I would wager that on most campuses, astute administrators could successfully prosecute the overwhelming majority of racial hatemongering incidents by handling them as disorderly-conduct or alcohol cases. I would also wager -- although the proposition is legally more questionable -- that it would be constitutionally defensible to treat alcohol-induced racism as an aggravating factor in meting out punishment under a campus alcohol policy (*e.g.*, temperance class for public drunkenness, but suspension for a racial epithet hurled in public).

F. Conclusion: The first generation of campus hate speech codes were ambitious in scope. Their failure to survive constitutional challenges should not deter university policymakers from pursuing the laudable objectives that motivated us to legislate in this area in the first place. By trimming our drafting sails to incorporate the lessons of the first round of court cases -- no vague verbs, an emphasis on "action" terminology instead of "speech" terminology, attention to the physical setting in which conduct is regulated, no attempt to regulate "atmospheric" racism *à la* the EEOC guidelines -- we can satisfy constitutional concerns while at the same time (a) reaching the lion's share of the most egregious forms of racist hatemongering on campus, and (b) sending the intended message to perpetrator and victim alike: this is a repugnant form of expression that the university community does not tolerate and will never abide.