

## Hate Speech

**P**osters that depict President Barack Obama in witch doctor's garb, complete with feathered headdress and a bone in his nose, are observed at protests against his administration's policies.<sup>1</sup> The National Hispanic Media Coalition requests a government inquiry into cable news reports of "an alleged connection between illegal immigration and crime" on the grounds that popular commentators on these networks may be creating "an atmosphere of hate and prejudice that 'legitimizes' violence against its targets."<sup>2</sup> Columbia University invites the president of Iran, Mahmoud Ahmadinejad, to speak, notwithstanding his calls for the destruction of Israel and assertions that the Holocaust did not occur.<sup>3</sup>

Should statements such as these be protected by the First Amendment? Are calls for regulation merely another example of "political correctness run amok?" Or do such messages cause such harm to their targets that they warrant government restrictions? These questions are at the heart of the issue of **hate speech**.

Hate speech refers to insults, slurs, or epithets directed to a group of people, based on a shared characteristic of that group. Usually the characteristics are race, gender, or religion, but they also can include ethnicity, sexual orientation, disability, or even Vietnam-era veteran's status. In Chapter 6, we will begin by discussing the problems raised by such messages and the unique issues raised by hate speech in the college and university environment. Next we will examine the reasons why the judiciary has consistently ruled that policies restricting hate speech violate the First Amendment. Finally, we will discuss three diverse perspectives on hate speech regulation and invite you to consider how this issue should best be addressed.

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<sup>1</sup>Ashley Fantz, Obama as Witch Doctor: Racist or Satirical (September 17, 2009) <<http://www.cnn.com/2009/POLITICS/09/17/obama.witchdoctor.teaparty/index.html>> .

<sup>2</sup>John Eggerton, Petition to FCC Claims that Hate Speech is "Prevalent" on Cable News Networks (January 29, 2009) <[www.broadcastingcable.com/.../162974-Hispanic\\_Group\\_Alleges\\_Hate\\_Speech\\_on\\_Cable\\_News.php](http://www.broadcastingcable.com/.../162974-Hispanic_Group_Alleges_Hate_Speech_on_Cable_News.php)> .

<sup>3</sup>Associated Press, Iranians Decry Bollinger's Speech <<http://www.msnbc.msn.com/id/20942057/page/2/>> (September 25, 2007).

## THE PROBLEM OF HATE SPEECH

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### Why Is Hate Speech Harmful?

Of course, nearly all of us have been subjected to insults or slurs. We might have been raised to accept these as a part of life. Some of us might have been advised to “grow a thicker skin” and not allow insults to unduly bother or disturb us. Conversely, some of us were probably socialized to return these insults in kind, or, if they rise to the level of fighting words provocation, perhaps to respond with violence. If insulting language is “part of the game” in contemporary discourse, why should we become uniquely concerned when the insults fall into the category of hate speech?

#### *Hate Speech and Immutable Characteristics*

One example of hate speech—the racially motivated variety—particularly supports the argument that such words are more harmful than are other insults. In racist hate speech, individuals are verbally attacked because of a shared characteristic that is *immutable*—meaning it cannot be changed. An individual has no choice, for example, in the selection of his or her race.

Critics argue that hate speech directed at immutable characteristics is harmful in several ways. It can lead to self-hatred as members of a nondominant minority are continually reminded of their alleged lack of worth,<sup>4</sup> and people thus stigmatized can exhibit low self-esteem and a diminished ability to enter into relationships—both with members of other racial groups and with members of their own.<sup>5</sup>

Victims of hate speech may also suffer physiological reactions, including difficulty breathing, nightmares, posttraumatic stress disorder, hypertension, and even suicide.<sup>6</sup> One study of African-American males reported that they are prone to higher blood pressure because they repeatedly find themselves in social positions and situations in which they are attacked, but in which they are required to suppress their feelings of hostility.<sup>7</sup> In some instances, the victims of hate speech seek escape through alcohol, drugs, or other forms of antisocial behavior.<sup>8</sup>

This is not to claim that *hate speech* is the cause of this kind of oppression: racism is. Hate speech in this context is the expression of the core cause of racism. Nevertheless, it is a medium that by many accounts carries far more impact than does an ordinary insult.

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<sup>4</sup>See, e.g., Kenneth Clark, *Dark Ghetto: Dilemmas of Social Power* (New York: Harper & Row, 1965), 64.

<sup>5</sup>Richard Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling, in *Words That Wound* (Boulder, CO: Westview, 1993), 91.

<sup>6</sup>Mari Matsuda, Public Responses to Racist Speech: Considering the Victim's Story, 87 *Michigan Law Review* (August 1989): 2320, 2332.

<sup>7</sup>Ernest Harburg et al., Socio-Ecological Stress, Suppressed Hostility, Skin Color, and Black-White Male Blood Pressure: Detroit, 35 *Psychosomatic Medicine* (July–August 1973): 276, 277–78.

<sup>8</sup>Delgado, Words That Wound, in *Words That Wound* (Boulder, CO: Westview, 1993), 91.

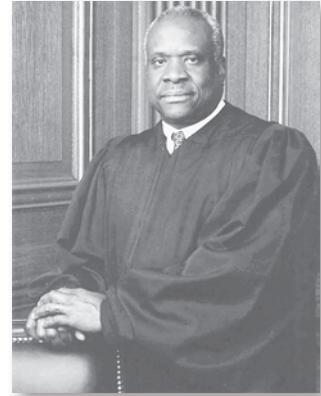
### *Hate Speech in the Context of Prejudice*

At the root of these words and expressions is their historical, political, and social context.<sup>9</sup> This is a context from which the targeted recipient finds it difficult to escape. The *R.A.V. v. City of St. Paul* decision, discussed in Chapter 5, illustrates this point well. In *R.A.V.*, the appellant had constructed a cross from broken chair legs and set fire to it inside the yard of an African-American family. Although the Court did not go to great lengths to discuss this point, the *context* of this expressive conduct and symbol should not be missed. The history of the burning cross—especially in close proximity to the homes of African-Americans—suggests a direct connection to the activity of groups like the Ku Klux Klan (KKK): lynching, arson, and racist-fueled terror.<sup>10</sup> Historically—contextually—we know these things occurred in the not-too-distant past. African-Americans, regardless of their economic status or political leanings, are aware of this past—of which the sight of the burning cross is a painful reminder. The deeper contextual meaning cannot be escaped lightly.

Eleven years after its decision in *R.A.V.* (see Chapter 5), the Supreme Court again rendered an opinion about hate speech and burning crosses (Photo 6.1). In *Virginia v. Black*,<sup>11</sup> the Court considered the constitutionality of a Virginia law that provided,

it shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place.<sup>12</sup>

The *Virginia v. Black* decision arose out of two different cross-burning incidents in 1998. In the first, Barry Black had led a KKK rally of twenty-five to thirty people on private property adjacent to a state highway in Carroll County, Virginia. During the rally, speakers made hostile remarks about people of color, and about President Clinton and Hillary Clinton. At the end of the event, a cross (twenty-five- to thirty-foot tall) was burned while *Amazing Grace* was played on a



**Photo 6.1** Justice Clarence

Thomas, appointed to the Supreme Court by President George H. W. Bush in 1990 amid great controversy, has typically sided with the conservative wing of the Court. While his concurring opinion in *R.A.V.* suggested that he is not tolerant of content-specific hate crime regulations, even Justice Thomas also experiences the internal conflict many feel over hate speech and hate crime. His vigorous dissent in *Dawson v. Delaware* argued in favor of using membership in racist hate groups to demonstrate evidence of bad character, qualifying a defendant convicted of murder for the death penalty.

Source: U.S. government.

<sup>9</sup>See, e.g., Matsuda, Public Responses to Racist Speech, 2331–35.

<sup>10</sup>For more on the history of the Klan and its use of symbolic terrorism, see Joseph S. Tuman, *Communicating Terror: The Rhetorical Dimensions of Terrorism* (Thousand Oaks, CA: SAGE Publications, 2003).

<sup>11</sup>538 U.S. 343 (2003).

<sup>12</sup>Va. Code Ann. § 18.2–423 (1996).

loud-speaker.<sup>13</sup> In the second case, defendants Elliot and O'Mara had attempted to burn a cross in the yard of the former's African-American next-door neighbor, James Jubilee. Jubilee testified that the incident made him "very nervous" because he "didn't know what would be the next phase," and because "a cross burned in your yard . . . tells you that it's just the first round."<sup>14</sup> All three defendants challenged the Virginia cross-burning law on First Amendment grounds.

In a manner that was strikingly different from the earlier case, the majority opinion (written by Justice Sandra Day O'Connor) went to great lengths to address the social and political context of burning crosses in American history.



### **VIRGINIA v. BLACK, 538 U.S. 343 (2003)**

Justice O'Connor announced the judgment of the Court.

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#### **II**

Cross burning originated in the 14th century as a means for Scottish tribes to signal each other. . . . Sir Walter Scott used cross burnings for dramatic effect in *The Lady of the Lake*, where the burning cross signified both a summons and a call to arms. . . . Cross burning in this country, however, long ago became unmoored from its Scottish ancestry. Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan.

The first Ku Klux Klan began in Pulaski, Tennessee, in the spring of 1866. Although the Ku Klux Klan started as a social club, it soon changed into something far different. The Klan fought Reconstruction and the corresponding drive to allow freed blacks to participate in the political process. Soon the Klan imposed "a veritable reign of terror" throughout the South. . . . The Klan employed tactics such as whipping, threatening to burn people at the stake, and murder. . . . The Klan's victims included blacks, southern whites who disagreed with the Klan, and "carpetbagger" northern whites.

The activities of the Ku Klux Klan prompted legislative action at the national level. In 1871, "President Grant sent a message to Congress indicating that the Klan's reign of terror in the Southern States had rendered life and property insecure." . . . In response, Congress passed what is now known as the Ku Klux Klan Act. See "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes," 17 Stat. 13 (now codified at 42 U.S.C. Sections 1983, 1985, and 1986). President Grant used these new powers to suppress the Klan in South Carolina, the effect of which severely curtailed the Klan in other States as well. By the end of Reconstruction in 1877, the first Klan no longer existed.

The genesis of the second Klan began in 1905, with the publication of Thomas Dixon's *The Clansmen: An Historical Romance of the Ku Klux Klan*. Dixon's book was a sympathetic portrait of the first Klan, depicting the Klan as a group of heroes "saving" the South from blacks and the "horrors" of Reconstruction. Although the first Klan never actually practiced cross burning, Dixon's book depicted the Klan burning crosses to celebrate the execution of former slaves. . . . Cross burning thereby became associated with the first Ku Klux Klan. When D. W. Griffith turned Dixon's book into

<sup>13</sup>538 U.S. 348–49.

<sup>14</sup>*Ibid.*, 350.

the movie *The Birth of a Nation* in 1915, the association between cross burning and the Klan became indelible. In addition to the cross burnings in the movie, a poster advertising the film displayed a hooded Klansman riding a hooded horse, with his left hand holding the reins of the horse and his right hand holding a burning cross above his head. . . . Soon thereafter, in November 1915, the second Klan began.

From the inception of the second Klan, cross burnings have been used to communicate both threats of violence and messages of shared ideology. The first initiation ceremony occurred on Stone Mountain near Atlanta, Georgia. While a 40-foot cross burned on the mountain, the Klan members took their oaths of loyalty. . . . This cross burning was the second recorded instance in the United States. The first known cross burning in the country had occurred a little over one month before the Klan initiation, when a Georgia mob celebrated the lynching of Leo Frank by burning a "gigantic cross" on Stone Mountain that was "visible throughout" Atlanta. . . . The new Klan's ideology did not differ much from that of the first Klan. As one Klan publication emphasized, "We avow the distinction between [the] races, . . . and we shall ever be true to the faithful maintenance of White Supremacy and will strenuously oppose any compromise thereof in any and all things." . . . Violence was also an elemental part of this new Klan. . . . Often, the Klan used cross burnings as a tool of intimidation and a threat of impending violence. For example, in 1939 and 1940, the Klan burned crosses in front of synagogues and churches. . . . After one cross burning at a synagogue, a Klan member noted that if the cross burning did not "shut the Jews up, we'll cut a few throats and see what happens." . . . In Miami in 1941, the Klan burned four crosses in front of a proposed housing project, declaring, "We are here to keep niggers out of your town. . . . When the law fails you, call on us." . . . And in Alabama in 1942, in "a whirlwind climax to weeks of flogging and terror," the Klan burned crosses in front of a union hall and in front of a union leader's home on the eve of a labor election. These cross burnings embodied threats to people whom the Klan deemed antithetical to its goals. And these threats had special force given the long history of Klan violence.

The Klan continued to use cross burnings to intimidate after World War II. In one incident, an African-American "school teacher who recently moved his family into a block formerly occupied only by whites asked the protection of city police . . . after the burning of a cross in his front yard." . . . And after a cross burning in Suffolk, Virginia during the late 1940's, the Virginia Governor stated that he would "not allow any of our people of any race to be subjected to terrorism or intimidation in any form by the Klan or any other organization." . . . These incidents of cross burning, among others, helped prompt Virginia to enact its first version of the cross-burning statute in 1950.

The decision of this Court in *Brown v. Board of Education* . . . along with the civil rights movement of the 1950's and 1960's, sparked another outbreak of Klan violence. These acts of violence included bombings, beatings, shootings, stabbings, and mutilations. . . . Members of the Klan burned crosses on the lawns of those associated with the civil rights movement, assaulted the Freedom Riders, bombed churches, and murdered blacks as well as whites whom the Klan viewed as sympathetic toward the civil rights movement.

Throughout the history of the Klan, cross burnings have also remained potent symbols of shared group identity and ideology. The burning cross became a symbol of the Klan itself and a central feature

of Klan gatherings. According to the Klan constitution (called the kloran), the "fiery cross" was the "emblem of that sincere, unselfish devotedness of all klansmen to the sacred purpose and principles we have espoused." . . . And the Klan has often published its newsletters and magazines under the name *The Fiery Cross*. . . . At Klan gatherings across the country, cross burning became the climax of the rally or the initiation. Posters advertising an upcoming Klan rally often featured a Klan member holding a cross. . . . Typically, a cross burning would start with a prayer by the "Klavern" minister, followed by the singing of *Onward Christian Soldiers*. The Klan would then light the cross on fire, as the members raised their left arm toward the burning cross and sang *The Old Rugged Cross*. Throughout the Klan's history, the Klan continued to use the burning cross in their ritual ceremonies.

For its own members, the cross was a sign of celebration and ceremony. During a joint Nazi-Klan rally in 1940, the proceeding concluded with the wedding of two Klan members who "were married in full Klan regalia beneath a blazing cross." In response to anti-masking bills introduced in state legislatures after World War II, the Klan burned crosses in protest. On March 26, 1960, the Klan engaged in rallies and cross burnings throughout the South in an attempt to recruit 10 million members. Later in 1960, the Klan became an issue in the third debate between Richard Nixon and John Kennedy, with both candidates renouncing the Klan. After this debate, the Klan reiterated its support for Nixon by burning crosses. And cross burnings featured prominently in Klan rallies when the Klan attempted to move toward more nonviolent tactics to stop integration. . . . In short, a burning cross has remained a symbol of Klan ideology and of Klan unity.

To this day, regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a "symbol of hate." . . . And while cross burning sometimes carries no intimidating message, at other times the intimidating message is the *only* message conveyed. For example, when a cross burning is directed at a particular person not affiliated with the Klan, the burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm. Moreover, the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical. The person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan's wishes unless the victim is willing to risk the wrath of the Klan. Indeed, as the cases of respondents Elliott and O'Mara indicate, individuals without Klan affiliation who wish to threaten or menace another person sometimes use cross burning because of this association between a burning cross and violence.

In sum, while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful.

### III

#### A.

The First Amendment, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." The hallmark of the protection of free speech is to allow "free trade in ideas"—even ideas that the overwhelming majority of people might find distasteful or discomforting. . . .

The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution. . . . The First Amendment permits "restrictions upon the content of speech in a few limited areas, which 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.'" . . .

Thus, for example, a State may punish those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace" . . . And the First Amendment also permits a State to ban a "true threat." . . .

"True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." Intimidation in the constitutionally proscribable sense of the word is a type of true threat, 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. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. As noted . . . the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.

#### **B.**

The Supreme Court of Virginia ruled that in light of *R.A.V.* . . . , even if it is constitutional to ban cross burning in a content-neutral manner, the Virginia cross-burning statute is unconstitutional because it discriminates on the basis of content and viewpoint. . . . The Supreme Court of Virginia relied upon *R.A.V.* . . . , to conclude that once a statute discriminates on the basis of this type of content, the law is unconstitutional. We disagree.

In *R.A.V.*, we held that a local ordinance that banned certain symbolic conduct, including cross burning, when done with the knowledge that such conduct would "'arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender'" was unconstitutional. . . . We held that the ordinance did not pass constitutional muster because it discriminated on the basis of content by targeting only those individuals who "provoke violence" on a basis specified in the law. . . . We did not hold in *R.A.V.* that the First Amendment prohibits *all* forms of content-based discrimination within a proscribable area of speech. Rather, we specifically stated that some types of content discrimination did not violate the First Amendment:

"When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class." . . .

Similarly, Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R.A.V.*, the Virginia statute does not

single out for opprobrium only that speech directed toward "one of the specified disfavored topics." It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's "political affiliation, union membership, or homosexuality." Moreover, as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities. . . .

The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R.A.V.* and is proscribable under the First Amendment.

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Unlike the *R.A.V.* decision, which simply noted that burning a cross in a neighbor's yard was "reprehensible,"<sup>15</sup> the Supreme Court's opinion in *Virginia v. Black* delivered an extended acknowledgment of the context of prejudice and bigotry in which cross burnings are often conducted. The Court recounted the KKK's long history of burning crosses as a means to intimidate its victims and threaten them with imminent violence and concluded that the First Amendment allowed a state to criminalize cross burning *when it was conducted with the intent to intimidate*.<sup>16</sup>

It is also worth noting that this decision, like its predecessor in *R.A.V.*, entertained a rationale for the state law in question by looking to a categorical exception. In *R.A.V.*, that rationale involved treating the hate speech law (a bias-motivated crime ordinance) as fighting words. In *Virginia v. Black*, the law was treated as justified for preventing a true threat.

In neither case, however, did the Supreme Court use these cases as opportunities to declare that hate speech itself could be a new categorical exception. As we shall see below, this has left the lower federal courts to debate how to confront hate speech.

### ***Additional Sources of Hate Speech***

The KKK is hardly the only source of hateful messages. In another example, members of the National Socialist Party of America—contemporary representatives of the old Nazi Party from Hitler's Germany—wished to march through Skokie, Illinois—home to many Jewish

<sup>15</sup>505 U.S. 396.

<sup>16</sup>The Court overturned the convictions in this case, however, on the grounds that the Virginia law was not limited to cross burnings conducted with intent to intimidate. 538 U.S. 363–67.

Americans.<sup>17</sup> The presence of Nazi swastikas and uniforms, even *without* oral or written messages denying or justifying the Holocaust, would still have a specific historic, political, and social context for Jews. As with the burning cross, that context is not easily dismissed.

Hate speech can occur anywhere in American society—from city streets to suburban yards to offices.<sup>18</sup> Most settings have specific rules for behavior that facilitate certain interests—civility, harmony, efficiency, the ability to do one’s job. What happens, then, if the forum for hate speech is a school?

In a college or university, higher learning theoretically occurs when students are exposed to as many different ideas as possible. Can this purpose of higher education coexist in an environment where hate speech is present? Equally so, does it suffer if restrictions against hate speech are imposed?

## The Challenges of Hate Speech on Campus

### *A Home for the Marketplace of Ideas*

Schools in our society enjoy a special kind of protection where the First Amendment is concerned. As Justice Brennan, writing for the majority in *Keyishian v. Board of Regents*,<sup>19</sup> observed,

Our nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of Constitutional freedoms is nowhere more vital than in the community of American schools. . . . The classroom is particularly the “marketplace of ideas.”<sup>20</sup>

Academic freedom, in Justice Brennan’s words, is significant for both students and teachers in our school system—especially in colleges and universities, where students mature and develop the skills to reason, advocate, and learn. Although these settings are designed to be arenas for enlightened thought, they can also reflect the real attitudes and prejudices of the societies they serve, and consequently exhibit the kind of intolerance and hatred present in the general community.

<sup>17</sup>See, e.g., *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) *cert. denied*, 439 U.S. 916 (1978). While the Court of Appeals here affirmed a district court decision declaring Skokie’s ordinances (which had blocked the Nazi demonstration) unconstitutional, it did admit that many observers would find the demonstration “seriously disturb[ing], emotionally and mentally” (578 F.2d, 1206).

<sup>18</sup>See, e.g., *Contreras v. Crown Zellerbach Inc.*, 565 P.2d 1173 (1977) (en banc). Here, a Latino employee was subjected to a campaign of verbal racial abuse by coworkers.

<sup>19</sup>385 U.S. 589 (1966).

<sup>20</sup>*Ibid.*, 603.

### ***An Increase in Reports of Hate Speech***

Evidence of incidents of hate speech on campus became increasingly apparent in the late 1980s and early 1990s. For example, the University of Wisconsin system was the site of numerous examples of racist and discriminatory language and conduct. In one instance, a fraternity held a party that featured a “Harlem room,” where fried chicken and watermelon punch were served. The students there all wore blackface as a joke. Yet another fraternity used a large cardboard caricature depicting a black man to announce a party with the theme of “Fiji Island.” At a different fraternity, racist name-calling led to a fight. Other Wisconsin incidents included a mock slave auction, and abusive epithets written on mirrors and on the walls of private living quarters.<sup>21</sup>

Hateful rhetoric was evident at other campuses around the country. Spouting the rhetoric of white supremacy, KKK members spoke at a rally at Kansas University,<sup>22</sup> allegedly distributed white supremacist flyers at Northwest Missouri State University, and distributed material pertaining to the “Invisible Empire” (another way to refer to the KKK) at Stockton State College in New Jersey.<sup>23</sup> Aryan Resistance literature was distributed at Stanford University in California.<sup>24</sup>

These incidents were not limited to students. At Dartmouth College, a student referred to an African-American professor as a “cross between a welfare queen and a bathroom attendant,”<sup>25</sup> while at Purdue a university counselor found the words “Death, Nigger” scratched into her door.<sup>26</sup>

Evidence of the extent of hate speech on campuses began to mount. In 1991, Colorado law professor Richard Delgado wrote that nearly two hundred campuses had experienced racial unrest serious or graphic enough to be reported to the press.<sup>27</sup> A study by the National Institute Against Prejudice and Violence found that, in the course of one academic year, 20 percent of all minority students would suffer physical or verbal abuse motivated by prejudice.<sup>28</sup> The Southern Poverty Law Center’s *Klanwatch* report documented more than 270 occurrences of hate crimes during 1992 in schools and colleges—a figure likely to be low because victims and schools frequently do not report such incidents.<sup>29</sup> Howard Erlich, research director for the National Institute Against Prejudice and Violence, noted that “every single indicator we have suggests that ethnviolence incidents are at least steady, if not increasing.”<sup>30</sup>

<sup>21</sup>Patricia Hodulick, Prohibiting Discriminatory Harassment by Regulating Student Speech: A Balancing Test of First Amendment and University Interests, 16 *Journal of College and University Law* (1990): 573, 574.

<sup>22</sup>*Klanwatch Intelligence Report # 42* (February 1988).

<sup>23</sup>*Ibid.*

<sup>24</sup>*Ibid.*

<sup>25</sup>Charles Lawrence III, If He Hollers let Him Go: Regulating Racist Speech on Campus, 1990 *Duke Law Journal* (1990): 431, 432.

<sup>26</sup>*Ibid.*

<sup>27</sup>Richard Delgado, Campus Antiracism Rules: Constitutional Narratives in Collision, 85 *Northwestern Law Review* (Winter 1991): 343.

<sup>28</sup>Ellen Lange, Racist Speech on Campus, 64 *Southern California Law Review* 105, 129 (November 1990).

<sup>29</sup>John O’Neil, A New Generation Confronts Racism, 50 *Educational Leadership* (May 1993): 60, 61.

<sup>30</sup>*Ibid.*



**Photo 6.2** The University of Michigan's speech code was found unconstitutionally vague and overbroad in *Doe v. University of Michigan*. Although a strong case can be made against hate speech on ethical grounds, the legal case has been problematic. Colleges and universities have struggled with efforts to define hate speech with precision and link their regulation to a category of expression that is unprotected by the First Amendment.

Source: ©iStockphoto.com/uschools.

On campus, the result of such expression may be a “disruption of an equal learning environment”<sup>31</sup> as African-American students are forced to hear that “they belong hanging from trees”<sup>32</sup> and Asian students are subjected to taunts such as “Die, Chink,” or “Hostile Americans want your yellow hide.”<sup>33</sup> Women on campus have been called “fat housewives”<sup>34</sup> and “fucking cunts.”<sup>35</sup> Such demeaning expression can damage students’

<sup>31</sup>First Amendment—Racist and Sexist Expression on Campus, 103 *Harvard Law Review* (April 1990): 1397, 1399.

<sup>32</sup>Campus Blacks Feel Racism’s Nuances, *New York Times*, A1, April 17, 1988.

<sup>33</sup>Racist and Sexist Expression on Campus—Court Strikes Down University Limits on Hate Speech, 103 *Harvard Law Review* (April 1990): 1397, 1400.

<sup>34</sup>Project on the Status and Education of Women, *The Classroom Climate: A Chilly One for Women?* (Washington D.C: Association of American Colleges 1982), 5. This document can be accessed at < [http://www.hws.edu/offices/provost/pdf/classroom\\_climate.pdf](http://www.hws.edu/offices/provost/pdf/classroom_climate.pdf) > .

<sup>35</sup>See Complaint Number 2, University of Wisconsin-Eau Claire, as cited in *UWM v. Board of Regents*, 774 F. Supp. 1163, 1167 (E.D. Wisc, 1991).

self-image and self-confidence as well as alienating them from their school.<sup>36</sup> In an academic environment, hate speech undoubtedly hinders learning and participation both inside and outside the classroom.

### ***A Response by Colleges and Universities***

Fueled by increased public awareness and scrutiny, college and university administrators began responding to hate speech (Photo 6.2). By 1992, more than one hundred colleges had adopted speech codes.<sup>37</sup>

For example, the University of Michigan sought to regulate hate speech by adopting the following language as part of its Policy on Discrimination and Discriminatory Conduct, to the effect that persons would be subject to discipline for

1. 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, employment, participation in University sponsored extracurricular 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 extracurricular activities or personal safety; or
  - (c) Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extracurricular activities.<sup>38</sup>

Sanctions for violating the Michigan policy could include a formal reprimand, community service, sensitivity classes, payment of restitution, removal from university housing, suspension from courses and activities, suspension, and expulsion. The latter two remedies could be imposed only for violent or dangerous acts, repeated offenses, or a willful failure to comply with lesser sanctions. If a complaint was filed and supported by sufficient evidence, a hearing would be held before a panel consisting of four students and a tenured faculty member. The university president could set aside or reduce any sanction the panel imposed.<sup>39</sup>

Although most concerned groups acknowledged Michigan's attempt to redress the problems with hate speech, not all were comfortable with the language of the policy. In *Doe v. University of Michigan*, an anonymous graduate student in psychology and biopsychology

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<sup>36</sup>See, e.g., Richard Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling, 17 *Harvard Civil Rights-Civil Liberties Law Review* (Spring 1982): 133.

<sup>37</sup>Louis Freedberg, Stanford, U.C. Unruffled by Hate Speech Ruling, *San Francisco Chronicle*, A15, June 29, 1992.

<sup>38</sup>*Doe v. University of Michigan*, 721 F. Supp. 852, 856 (E.D. Mich, 1989). Section LC was withdrawn before this policy was ultimately adjudicated in federal court.

<sup>39</sup>*Ibid.*, 857.

(simply titled John Doe) brought suit against the university, alleging that the policy might have a chilling effect on his right to discuss potentially controversial theories of biology in class. This was to be the first of several legal challenges to speech codes, discussed in the next section of this chapter.

## DO SPEECH CODES VIOLATE THE FIRST AMENDMENT?

### The University of Michigan Policy: No First Amendment Exception for Offensive Speech

Doe's challenge to the Michigan code was heard in a federal district court. The court's opinion, written by Judge Cohn, concluded that the code was unconstitutionally vague and overbroad. After reviewing the facts of the case, Judge Cohn drew the line between speech and behavior that the university could regulate, and expression that was protected from university sanction by the First Amendment. He then explained how the Michigan policy reached protected expression, and hence was unconstitutional. As you read the *Doe* opinion, decide whether the speech that the University of Michigan sought to regulate should be protected by the First Amendment.



#### ***DOE v. UNIVERSITY OF MICHIGAN*, 721 F. Supp 852 (E.D. Mich. 1989)**

Cohn, District Judge.

##### **I. Introduction**

It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict. The difficult and sometimes painful task of our political and legal institutions is to mediate the appropriate balance between these two competing values. Recently, the University of Michigan at Ann Arbor (the University) . . . adopted a Policy on Discrimination and Discriminatory Harassment of Students in the University Environment (the Policy) in an attempt to curb what the University's governing Board of Regents (Regents) viewed as a rising tide of racial intolerance and harassment on campus. . . .

##### **II. Facts Generally**

According to the University, in the last three years incidents of racism and racial harassment appeared to become increasingly frequent at the University. For example, on January 27, 1987, unknown persons distributed a flier declaring "open season" on blacks, which it referred to as "saucer lips, porch monkeys, and jigaboos." On February 4, 1987, a student disc jockey at an on-campus radio station allowed racist jokes to be broadcast. At a demonstration protesting these incidents, a Ku Klux Klan uniform was displayed from a dormitory window. . . .

On March 5, 1987, the Chairperson of the State House of Representatives Appropriations Subcommittee on Higher Education held a public hearing on the problem of racism at the University

in Ann Arbor. Forty-eight speakers addressed the subcommittee and an audience of about 600. The speakers were uniformly critical of the University's response to racial incidents and accused it of generally ignoring the problems of minority students. At the close of the hearing, the Chairperson was quoted as stating:

"Michigan legislators will not tolerate racism on the campus of a state institution. . . . [The subcommittee] will make our decision [on appropriations for the University] during their budget discussions of the next few weeks. . . . Holding up funds as a club may be part of our response, but that will predicate on how the university responds."

Following the hearing, the United Coalition Against Racism (UCAR), a campus anti-discrimination group, announced that it intended to file a class action civil rights suit against the University "for not maintaining or creating a non-racist, non-violent atmosphere" on campus. . . .

At the January 15, 1988 meeting of the Regents, the Acting President informed the Board that he had been working on a proposed policy on student discipline dealing with racial harassment. . . . He stated that he was taking this action in response to widespread complaints that the University could not or would not enforce its existing regulations concerning racial harassment.

Following the January meeting, the Acting President appointed the Director of the University Office of Affirmative Action (Director) to draft a policy. The proposed policy went through twelve drafts. . . . At the April 14, 1988 Regents meeting, the Policy was unanimously adopted. . . .

### **III. The University of Michigan Policy on Discrimination and Discriminatory Harassment**

[At this point, the court printed the Michigan policy verbatim. Relevant portions of the code have already been discussed previously in this chapter. The court went on to describe a guide to the policy that the university had distributed.]

Shortly after the promulgation of the policy in the fall of 1988, the University Office of Affirmative Action issued an interpretive guide (Guide) entitled *What Students Should Know about Discrimination and Discriminatory Harassment by Students in the University Environment*. The Guide purported to be an authoritative interpretation of the Policy and provided examples of sanctionable conduct. These included:

A flyer containing racist threats distributed in a residence hall.

Racist graffiti written on the door of an Asian student's study carrel.

A male student makes remarks in class like "Women just aren't as good in this field as men," thus creating a hostile learning atmosphere for female classmates.

Students in a residence hall have a floor party and invite everyone on their floor except one person because they think she might be a lesbian.

A black student is confronted and racially insulted by two white students in a cafeteria.

Male students leave pornographic pictures and jokes on the desk of a female graduate student.

Two men demand that their roommate in the residence hall move out and be tested for AIDS. . . .

According to the University, the Guide was withdrawn at an unknown date in the winter of 1989, because "the information in it was not accurate." The withdrawal had not been announced publicly as of the date this case was filed.

#### IV. Standing

Doe is a psychology graduate student. His specialty is in the field of biopsychology, which he describes as the interdisciplinary study of the biological bases of individual differences in personality traits and mental abilities. Doe said that certain controversial theories positing biologically based differences between sexes and races might be perceived as “sexist” and “racist” by some students, and he feared that discussion of such theories might be sanctionable under the Policy. He asserted that his right to freely and openly discuss these theories was impermissibly chilled, and he requested that the Policy be declared unconstitutional and enjoined on the grounds of vagueness and overbreadth. . . .

#### V. Vagueness and Overbreadth . . .

##### A. Scope of Permissible Regulation

Before inquiring whether the policy is impermissibly vague and overbroad, it would be helpful to first distinguish between verbal conduct and verbal acts that are generally protected by the First Amendment and those that are not. It is the latter class of behavior that the University may legitimately regulate.

Although the line is sometimes difficult to draw with precision, the Court must distinguish at the outset between the First Amendment protection of so-called “pure speech” and mere conduct. As to the latter, it can be safely said that most extreme and blatant forms of discriminatory conduct are not protected by the First Amendment, and indeed are punishable by a variety of state and federal criminal laws and subject to civil actions. . . .

While the University’s power to regulate so-called pure speech is far more limited, . . . certain categories can be generally described as unprotected by the First Amendment. It is clear that so-called “fighting words” are not entitled to First Amendment protection. . . . Under certain circumstances racial and ethnic epithets, slurs, and insults might fall within this description and could constitutionally be prohibited by the University. In addition, such speech may also be sufficient to state a claim for common law intentional infliction of emotional distress . . . . Finally, the University may subject all speech and conduct to reasonable and nondiscriminatory time, place and manner restrictions which are narrowly tailored and which leave open ample alternative means of communication. . . . If the Policy had the effect of only regulating in these areas, it is unlikely that any constitutional problem would have arisen.

What the University could not do, however, was establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed. . . . As the Supreme Court stated in *West Virginia State Board of Education v. Barnette*:

“If there is any star fixed in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

Nor could the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people. . . . As the Supreme Court noted in *Street v. New York*:

“It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers. . . .”

These principles acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission. . . . With these general rules in mind, the Court can now consider whether the Policy sweeps within its scope speech which is otherwise protected by the First Amendment.

### **B. Overbreadth**

. . . A law regulating speech will be deemed overbroad if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate. . . . [T]he state may not prohibit broad classes of speech, some of which may indeed be legitimately regulable, if in so doing a substantial amount of constitutionally protected conduct is also prohibited. This was the fundamental infirmity of the Policy.

The University repeatedly argued that the Policy did not apply to speech that is protected by the First Amendment. It urged the Court to disregard the Guide as "inaccurate" and look instead to "the manner in which the Policy has been interpreted and applied by those charged with its enforcement." However, as applied by the University over the past year, the Policy was consistently applied to reach protected speech. . . .

On December 7, 1988, a complaint was filed against a graduate student in the School of Social Work alleging that he harassed students based on sexual orientation and sex. The basis for the sexual orientation charge was apparently that in a research class, the student openly stated his belief that homosexuality was a disease and that he intended to develop a counseling plan for changing gay clients to straight. . . .

Although the student was not sanctioned over the allegations of sexual orientation harassment, the fact remains that the Policy Administrator—the authoritative voice of the University on these matters—saw no First Amendment problem in forcing the student to a hearing to answer for allegedly harassing statements made in the course of academic discussion and research. . . .

A second case, which was formally resolved, also demonstrated that the University did not exempt statements made in the course of classroom academic discussions from the sanctions of the policy. On September 28, 1988, a complaint was filed against a student in an entrepreneurship class in the School of Business Administration for reading an allegedly homophobic limerick during a scheduled class public-speaking exercise which ridiculed a well known athlete for his presumed sexual orientation. The Policy Administrator was able to persuade the perpetrator to attend an educational "gay rap" session, write a letter of apology to the *Michigan Daily*, and apologize to his class and the matter was dropped. No discussion of the possibility that the limerick was protected speech appears in the file or in the Administrator's notes.

A third incident involved a comment made in the orientation session of a preclinical dentistry class. The class was widely regarded as one of the most difficult for second year dentistry students. To allay fears and concerns at the outset, the class was broken up into small sections to informally discuss anticipated problems. During the ensuing discussion, a student stated that "he had heard that minorities had a difficult time in the course and that he had heard that they were not treated fairly." A minority professor teaching the class filed a complaint on the grounds that the comment

was unfair and hurt her chances for tenure. Following the filing of the complaint, the student was "counseled" about the existence of the policy and agreed to write a letter apologizing for making the comment without adequately verifying the allegation, which he said he had heard from his roommate, a black former dentistry student.

The manner in which these three complaints were handled demonstrated that the University considered serious comments made in the context of classroom discussion to be sanctionable under the Policy. . . . The University could not seriously argue that the policy was never interpreted to reach protected conduct. It is clear that the policy was overbroad both on its face and as applied.

### **C. Vagueness**

Doe also urges that the policy be struck down on the grounds that it is impermissibly vague. A statute is unconstitutionally vague when "men of common intelligence must necessarily guess at its meaning. . . ." A statute must give adequate warning of the conduct which is to be prohibited and must set out explicit standards for those who apply it. . . .

Looking at the plain language of the Policy, it was simply impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct. . . . The operative words in the cause section required that language must "stigmatize" or "victimize" an individual. However, both of these terms are general and elude precise definition. . . .

The first of the "effects clauses" stated that in order to be sanctionable, the stigmatizing and victimizing statements had to "involve an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extracurricular activities or personal safety." It is not clear what kind of conduct would constitute a "threat" to an individual's academic efforts. . . .

Moving to the second "effect clause," a stigmatizing or victimizing comment is sanctionable if it has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, etc. Again, the question is what conduct will be held to "interfere" with an individual's academic efforts. The language of the policy alone gives no inherent guidance. The one interpretive resource the University provided was withdrawn as "inaccurate," an implicit admission that even the University itself was unsure of the precise scope and meaning of the Policy.

During the oral argument, the Court asked the University's counsel how he would distinguish between speech which was merely offensive, which he conceded was protected, and speech which "stigmatizes or victimizes" on the basis of an invidious factor. Counsel replied "very carefully." The response, while refreshingly candid, illustrated the plain fact that the University never articulated any principled way to distinguish sanctionable from protected speech. Students of common understanding were necessarily forced to guess at whether a comment about a controversial issue would later be found to be sanctionable under the Policy. The terms of the Policy were so vague that its enforcement would violate the due process clause. . . .

### **VI. Conclusion**

[A 1975 Yale University] report concluded that "freedom of expression is a paramount value, more important than civility or rationality" (*New York Times*, Sept. 22, 1986, at B4). Writing about [a case of hate speech on the Yale campus], Professor Woodward observed:

"It simply seems unnatural to make a fuss about the rights of a speaker who offends the moral or political convictions passionately held by a majority. The far more natural impulse is to stop the nonsense, shut it up, punish it—anything but defend it. But to give rein to that inclination would be to make the majority the arbiters of truth for all. Furthermore, it would put the universities into the business of censorship" (*New York Times*, Oct. 15, 1986, at A27).

While the Court is sympathetic to the University's obligation to ensure equal educational opportunities for all of its students, such efforts must not be at the expense of free speech. Unfortunately, this was precisely what the University did . . . .



After reading this case, do you feel the issue is as simple as Judge Cohn suggests? At one level, Cohn's opinion plainly uses vagueness and overbroad analysis to reject the Michigan policy. By arguing that the policy could punish pure speech that, however offensive, is protected by the First Amendment, Cohn reasoned that the Michigan rules were unconstitutionally overbroad. And by asserting that average students (even "reasonable students") would find it impossible to discern any difference between protected and unprotected conduct, he was claiming that the policy was also vague.

Although Cohn's opinion had no binding effect outside his own district, it was nevertheless influential in other courts through the federal system. Any university administrator or counsel probing the opinion for guidance might likely conclude that a campus speech code needed to be narrowly tailored and clear (thereby evading overbreadth and vagueness) to pass constitutional muster.

Such a cursory reading of this case, however, would potentially miss a more significant aspect of legal analysis by Judge Cohn—because in this case he also discussed the doctrine we have referred to as *categorization* to reject the Michigan policy. In describing the various categorical exceptions to the First Amendment, he concluded that the policy did not limit its definition of hate speech to words that fit any of these categories (e.g., fighting words or obscenity). He very clearly inferred that if the code had done so, "it is very unlikely that any constitutional problem would have arisen."<sup>40</sup>

The message was clear: Draft a response to hate speech that is grounded in a categorical exception, and the Court will likely permit the restriction. Other universities attempted to argue that their speech codes were constitutional, because the expression they forbade fell within these exceptions to the First Amendment.

### **The University of Wisconsin Policy: Not Saved by the Categorical Exceptions Theory**

The University of Wisconsin thought that its hate speech policy was limited to categorical exceptions to the First Amendment. Wisconsin's rule allowed the university to discipline students

<sup>40</sup>721 F. Supp. 863.

2. (a) For racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at several individuals, or for physical conduct, if such comments, epithets or 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.<sup>41</sup>

The Wisconsin rule was challenged in federal court on First Amendment grounds in the case of *UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*,<sup>42</sup> presided over by federal district court Judge Warren. University administrators argued that by limiting their rule to racist or discriminatory comments, epithets, or other expressive behavior, they had sufficiently narrowed the class of proscribed speech to that with “minimum social value” and that which was “likely to cause violent response.”<sup>43</sup> In other words, the university believed that its rule only applied to speech that the *Chaplinsky*<sup>44</sup> doctrine left unprotected.

The federal district court rejected the university’s analysis. Citing *Gooding v. Wilson*,<sup>45</sup> Judge Warren noted that fighting words include “only words which tend to incite an immediate breach of the peace.”<sup>46</sup> The Wisconsin code prohibited all language directed at an individual when the words created a hostile educational environment by demeaning individuals on the basis of characteristics such as race or sex. The university had attempted to argue that such speech always constituted fighting words:

[I]t is understandable to expect a violent response to discriminatory harassment, because such harassment demeans an immutable characteristic which is central to the person’s identity. . . . [T]he victim will feel compelled to respond, not just for his own dignity, but for the dignity of his brothers and sisters of color, national origin or creed.<sup>47</sup>

The district court rejected the university’s analysis, and concluded instead that “it is unlikely that all or nearly all . . . expressive behavior which creates an intimidating, hostile, or demeaning environment tends to provoke a violent response.”<sup>48</sup> Because the Wisconsin policy applied in part to speech that was not likely to provoke a breach of the peace, it did not meet the fighting words exception.

<sup>41</sup>Wisc. Admin. Code, § UWS 17.06(2).

<sup>42</sup>774 F. Supp. 1163 (E.D. Wis, 1991).

<sup>43</sup>*Ibid.*, 1169.

<sup>44</sup>315 U.S. 568 (1942). The categories of speech that were held to be unprotected in *Chaplinsky* are discussed in Chapter 5.

<sup>45</sup>405 U.S. 518 (1972). The *Gooding* case is discussed in Chapter 5.

<sup>46</sup>774 F. Supp. 1171.

<sup>47</sup>*Ibid.*, 1173.

<sup>48</sup>*Ibid.*

The federal court also declined the university's invitation to classify hate speech as a new category of unprotected speech, above and beyond the categories identified in *Chaplinsky*. Judge Warren reasoned that *Chaplinsky* did not ask lower courts to create additional categorical exception. Furthermore, the court was not persuaded that hate speech, like fighting words, lacked social utility. The opinion recognized that students who used hateful terms probably were attempting "to inform their listeners of their racist or discriminatory views."<sup>49</sup> However, this did not strip them of First Amendment protection. Under *Cohen*,<sup>50</sup> the emotive function of speech is protected, and hate speech expresses students' feelings about persons of a different race, gender, or religion.

Furthermore, even if a majority of persons would agree that racist views are wrong, the First Amendment does not require that the correct viewpoints will win out in the marketplace of ideas.<sup>51</sup> The *UWM Post* decision echoed the opinion of the U.S. district court in *Doe*. In the university context, an uninhibited marketplace of ideas was to be maintained, even when it led to speech that was highly offensive to some or all of its listeners. Speech codes could only promote communitarian values, such as civility on campus and respect for other members of the university community, if the restrictions were limited to speech that met a categorical exception to the First Amendment. Within two months of the *UWM Post* decision, a federal district court in Virginia taught George Mason University a similar lesson.

### **George Mason University: Offensiveness Not Valid Grounds for Controlling Expression**

The principle that freedom of speech demands tolerance of ideas, no matter how repugnant they are to many people, was put to the test in the case of *Iota Xi Chapter of Sigma Chi v. George Mason University*.<sup>52</sup> The expression in question took place on the campus of George Mason University, a state institution, during a week-long social event called Derby Days. One Derby Days activity, held in the cafeteria of the student union, was called "Dress a Sig." In this contest, fraternity brothers dressed as caricatures of "ugly women." At the 1991 event, "one participant dressed in black face, used pillows to represent breasts and buttocks and wore a black wig with curlers."<sup>53</sup> Several student leaders, offended by the racial and sexual stereotypes perpetuated by the contest, demanded that Sigma Chi be sanctioned. The dean of student services barred the fraternity from holding social and sports activities for a two-year probationary period, and the fraternity took their case to federal court, claiming the university had violated their First Amendment rights.

The federal district court agreed, and enjoined the university from imposing any discipline on Sigma Chi as a result of the "Dress a Sig" contest. The court held that "a state

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<sup>49</sup>Ibid., 1175.

<sup>50</sup>403 U.S. 13 (1971). The Cohen case is discussed in Chapter 5.

<sup>51</sup>774 F. Supp. 1175.

<sup>52</sup>773 F. Supp. 792 (E.D. Va, 1991).

<sup>53</sup>Ibid., 793.

university may not suppress expression because it finds that expression offensive,”<sup>54</sup> since there are no First Amendment exceptions for bigoted or racist views.

The district court agreed that the university had a right to pursue its educational mission, and that goals such as enhancing the education of women and minorities and promoting a diverse student body were part of that mission. However, the university offered no specific proof of any harm to those goals. Conversely, the court ruled that the fraternity’s action was “consistent with GMU’s educational mission in conveying ideas and promoting the free flow and expression of those ideas.”<sup>55</sup> The U.S. district court in Virginia was consistent with its counterparts in Michigan and Iowa, in that it reaffirmed that offensiveness cannot be a justification for suppressing speech on campus. However, the *Sigma Chi v. George Mason* opinion, written by district court Judge Hilton, raised other issues as well. First, the court noted that the university had offered no proof of any harm to goals such as promoting diversity and improving the learning environment of women and minorities. Would the outcome of the case have been different if the university could prove that students had sought medical treatment or dropped out of the university because the contest had been so traumatizing? The court left that question open, but later in this chapter we will discuss the argument that speech that causes such effects should be regulated.

A second line of analysis developed by the court was the contention that freedom of speech does not merely benefit the individual communicators. In addition, the court opined, the educational mission of a university is promoted when there is a free flow of ideas. In other words, freedom of speech has a communitarian as well as an individual dimension. The university may do its best job of educating in an environment where no idea is too offensive to be expressed. George Mason University obviously thought that preserving diversity was more important to its educational mission than protecting all speech on campus, no matter how offensive. The dichotomy between promoting diversity and preventing censorship of expression forces any university to make a value judgment when it considers a speech code. The federal court in *Sigma Chi* was convinced that the Constitution had already made this value judgment (against regulation of speech) for the university. Would you want your university to react as George Mason’s administration did, or do you agree with the federal district court?

## Summary of the Federal Court Decisions on Speech Codes

In a short period of time (1989–1992), three different federal district courts upheld challenges to university regulation of hate speech on First Amendment grounds; a municipal restriction of hate speech was also found unconstitutional in *R.A.V.* (discussed in Chapter 5). Although *R.A.V.* did not consider a university speech code, the Supreme Court’s reasoning in that case was highly consistent with that of the lower courts in *Doe*, *UWM Post*, and *Sigma Chi*. The courts did not allow hate speech to be regulated when the justification for restriction is that such speech is highly offensive.

Notwithstanding the Michigan, Wisconsin, and George Mason cases, a number of colleges and universities have continued to maintain speech codes. A study of one hundred

<sup>54</sup>Ibid., 795.

<sup>55</sup>Ibid., 794.

randomly selected four-year colleges and universities found that, after these decisions, about one-fourth of these schools had retained an existing policy or adopted a new one that was likely to be unconstitutional.<sup>56</sup> And when these speech codes have been challenged, the federal judiciary continues to rule that these regulations violate the First Amendment, often on the same vagueness and overbreadth grounds that were applied in *Doe v. University of Michigan*.<sup>57</sup> In the absence of a Supreme Court decision that settles the First Amendment issues nationwide, challenges to speech codes are only proceeding one school at a time.

Could a carefully worded speech code be consistent with the First Amendment? The courts that have considered the issue have left open the possibility that carefully written speech codes may be found constitutional. *R.A.V.* reaffirmed the validity of the categorical approach to the First Amendment, and *Doe* and *UWM Post* specifically noted that a university could restrict speech that fits a categorical exception. If a university restricts a category highlighted in *Chaplinsky*, such as fighting words or libel, and the restriction meets *R.A.V.*'s edict not to discriminate on the basis of content,<sup>58</sup> a speech code would have a greater chance of being found constitutional by a federal court. This is not to say that universities necessarily should adopt speech codes, but it is important to understand the possibility that some speech codes may pass judicial muster in the future.

Do you agree with the reasoning of the federal courts that have found speech codes unconstitutional? Would you support some form of speech code for your university or community? These are important decisions for all members of a democratic society to consider. The next section will offer differing viewpoints on these issues.

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## THINKING CRITICALLY ABOUT HATE SPEECH REGULATION

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We present three issues for you to consider in this section. First is the question of the reasoning in the judicial opinions holding that speech codes are unconstitutional. In the previous section of this chapter, you studied the reasoning of the federal courts, which have consistently agreed that hate speech restrictions violate the First Amendment. The reasoning of the courts (and civil libertarians who oppose speech codes) has been criticized by commentators. In the interest of taking a balanced approach to this issue, we will review their positions. Second, we will address the desirability of basing speech codes on the fighting words doctrine. Even if speech codes are desirable, should these rules be predicated on the assumption (made by the University of Wisconsin in *UWM Post*) that hate speech constitutes fighting words? We will conclude this section by discussing the marketplace of ideas. Would a marketplace approach to hateful speech be superior to a prohibition of such discourse?

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<sup>56</sup>Jon B. Gould, The Precedent That Wasn't: College Hate Speech Codes and the Two Faces of Legal Compliance, 35 *Law & Society Review* (2001): 345, 360.

<sup>57</sup>Julie Seaman, Hate Speech and Identity Politics: A Situationalist Proposal, 36 *Florida State University Law Review* (Fall 2008): 99, 100, n. 7.

<sup>58</sup>Speech codes that only applied to racist fighting words or to anti-Catholic libel would be examples of restrictions that discriminate on the basis of content.

## Hate Speech Not Compatible With First Amendment Doctrine

Claims that speech codes violate the First Amendment have been criticized by scholars who support restrictions on hate speech. Some of the major contentions they develop are summarized here. After reading these viewpoints and contrasting them with the reasoning of the federal courts (see the previous section), do you agree that codes restricting hate speech should be held to violate the First Amendment?

### ***Bad Ideas Do Exist and Can Be Regulated.***

The argument that “there is no such thing as a false idea”<sup>59</sup> is a central premise in the case against government regulation of hate speech. Under this view, the worth of ideas is determined in the marketplace of ideas, rather than by government officials with the power to prohibit expression of “bad” ideas.

Defenders of speech codes argue that certain ideas, such as assertions that one race or sex is genetically inferior to another, are undeniably bad ones. How can we determine that certain ideas are bad, though? A consensus of the world’s diverse cultures is one standard that has been advocated. For example, Professor Richard Delgado notes that 104 states have signed the *International Convention on the Elimination of All Forms of Racial Discrimination*. Article 4 of this Convention states that the signatories “condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin.”<sup>60</sup> University of California at Los Angeles Law professor Mari Matsuda contends that human experience teaches us that certain ideas are wrong. Presumably, we would all agree that slavery, the Holocaust, and apartheid are evil.<sup>61</sup> On issues such as these, advocates of codes contend, opposing viewpoints do not need a hearing in the marketplace of ideas.

### ***The First Amendment Should Not Trump the Fourteenth Amendment.***

The Fourteenth Amendment to the U.S. Constitution includes the guarantee that “no state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” Proponents of speech codes argue that there is no valid reason to assume that the First Amendment should always prevail when it conflicts with the Fourteenth.<sup>62</sup> Instead, the First Amendment interests of the perpetrator of hate speech should be balanced against the equal protection interests of the target of that speech. For example, verbal harassment (and the fear of verbal harassment) on a college campus can have a devastating effect on the victim’s academic performance.<sup>63</sup> Why should the victim’s right to equal educational opportunity be subordinated to a racist’s free speech right?

<sup>59</sup>*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

<sup>60</sup>Delgado, *Campus Antiracism Rules*, 363. The United States signed, but did not ratify, the Convention on September 28, 1966. *Ibid.*, n. 154.

<sup>61</sup>Matsuda, *Public Responses to Racist Speech*, 2359.

<sup>62</sup>See, e.g., Catharine A. Mackinnon, *Only Words* (Cambridge: Harvard University Press, 1993), 71.

<sup>63</sup>Charles Lawrence III, *If He Hollers, Let Him Go: Regulating Racist Speech On Campus*, in *Words That Wound* (Boulder, CO: Westview, 1993), 75–76.

Hate speech might perpetuate inequality in society, as well as in the university setting. Racist speech may sustain racist attitudes,<sup>64</sup> whereas prohibition of racist speech might weaken the impulse to engage in racist behavior.<sup>65</sup> Hateful speech can create an environment in which society is less likely to worry about the human needs of those who are targeted. In the words of feminist scholar Catharine MacKinnon, “there is a relation . . . between the use of the epithet ‘nigger’ and the fact that a disproportionate number of children who go to bed hungry every night in this country are African-American.”<sup>66</sup>

### ***Hate Speech Is Not a Mere Insult.***

In each hate speech case that has been discussed in this chapter, the court has held that speech cannot be banned on the grounds that it is offensive. Advocates of regulation counter that hate speech is not the equivalent of an everyday insult. The physical and psychological harms of hate speech, which are hardly limited to hurt feelings, were noted earlier in this chapter. Hate speech functions as a verbal “slap in the face,” telling another person that he or she is not a human being and often producing physical symptoms.<sup>67</sup> Ethnic slurs occur in the context of a society plagued by racism, and can “cause long term emotional pain” by “intensifying the effects of the stigmatization, labeling, and disrespectful treatment that the victim has previously undergone.”<sup>68</sup> It is argued that members of the dominant culture cannot fully understand the impact of hate speech because they have no analogous experience from which to empathize.<sup>69</sup> To members of the target groups, though, the injury experienced is all too painful and real.

### ***Hate Speech Silences Others’ Voices.***

In Chapter 1, we noted that one justification for restricting speech is the argument that some speech operates to inhibit others from expressing their right to freedom of speech. Defenders of speech codes have argued that hate speech is particularly likely to have this effect. Hate speech occurs in the context of a society where the efforts of women, minorities, and homosexuals to exercise their rights have caused them to be fired, publicly humiliated, and even lynched. Stanford Law professor Charles Lawrence argued that, to the target of hate speech, the use of insulting epithets is effectively a threat. Members of the target group are silenced because they recognize a connection between hateful speech and subsequent violent acts.<sup>70</sup>

In summary, one reaction to judicial decisions that speech codes are unconstitutional is a criticism of the premises underlying these opinions. Critics have decried the marketplace assumption that there is no such thing as a bad idea and the claim that hate speech causes

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<sup>64</sup>Matsuda, Public Responses to Racist Speech, 2339.

<sup>65</sup>Delgado, Campus Antiracism Rules, 374.

<sup>66</sup>MacKinnon, *Only Words*, 74.

<sup>67</sup>Lawrence, If He Hollers, Let Him Go, 68.

<sup>68</sup>Delgado, Words That Wound, in *Words That Wound* (Boulder, CO: Westview, 1993), 60.

<sup>69</sup>Lawrence, If He Hollers, Let Him Go, 72.

<sup>70</sup>*Ibid.*, 79.

no greater harm than the hurt feelings produced by everyday insults all of us encounter. These critics also argue that the Fourteenth Amendment interest in equality can outweigh society's interest in protecting racist, sexist, and homophobic expression, and that any gains in freedom of speech to those who use hate speech are outweighed by the chilling effect of hate speech on its victims. Rather than attacking the premises of hate speech cases and advocating their reversal, an alternative for opponents of hate speech would be to develop policies that are consistent with the case law on speech codes.

## Developing Speech Codes That Are Consistent With First Amendment Doctrine

### *A Speech Code Prohibiting Fighting Words?*

Although the courts reviewing speech codes have suggested that a policy directed only at fighting words would be a constitutional means to regulate hate speech, this approach raises some problems.

First is that within the legal and academic community there is widespread disagreement as to what ultimate force the doctrine of fighting words carries. As evidenced in our chapter on fighting words and the reference to the *R.A.V.* case, every fighting words conviction heard by the U.S. Supreme Court since it narrowed the rule (disregarding the original *Chaplinsky* language of words “which by their very utterance inflict injury” and replacing it with a requirement that words must “tend to incite an immediate breach of the peace”) has been overturned. This is the paradox mentioned in Chapter 5 Court wants this categorical exception—but almost never enforces it. Should the prevention of hate speech be based on a doctrine with this track record?

Second and equally critical is that we cannot always say that the normal response to fighting words *today* is a violent response. The fighting words doctrine assumes a level playing field—one in which the target of the speech feels free, unfettered, and courageous enough to react with violence. The reality of a society tainted by bigotry, however, is that we do *not* always operate on such a field; more often than not, the grounds are *uneven*. Even within a utopia such as a college or university, minorities are likely to be overwhelmed by the sheer numerical superiority of the dominant culture, and merely succumb to the speech and move along.

We can only imagine what passed through the minds of two African-American students at Arizona State University who were threatened with blatantly racist, hateful invective, who were later surrounded by some two thousand individuals, and who were beaten by another fifteen or so. Regardless of the courage or character of these students, would it be reasonable to assume that they would have stayed for the beating if they had not been trapped by the crowd? More to the point, even assuming a smaller crowd size, would other minority students or other targets of hate speech reasonably be expected to stay and fight in this situation?

Third, the fighting words doctrine assumes very much a gender-biased perspective. Many would argue that women in our society have not been socialized to respond to insults by using violence, yet the assumption underlying this doctrine is that the recipient of this speech will react in just this way. Notwithstanding the earlier point about uneven playing

fields, even if minority men did feel comfortable with a violent response, can we necessarily say the same of minority women?

For these reasons, it may not make much sense to base rules for hate speech on a categorical exception like fighting words. Are there other theories that may be more applicable in hate speech cases? Perhaps the answer lies in a second categorical exception, suggested by Judge Cohn in the *Doe* case.

### ***A Speech Code Prohibiting Intentional Infliction of Emotional Distress?***

Victims of messages that are calculated to cause severe emotional damage have been able to sue in civil court, relying on the tort law of intentional infliction of emotional distress. This tort assumes a situation in which the speaker intends to harm the recipient of the message by causing a stressful reaction. The *Second Restatement of the Law of Torts* indicates when there is civil liability for intentional infliction of emotional distress: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."<sup>71</sup>

Virtually all states now recognize this tort as defined by the *Second Restatement*. Prohibition of this conduct, rather than fighting words, could form the basis of a university speech code. According to the *Second Restatement*, extreme and outrageous conduct occurs when "the recitation of the facts to an average member of the community would arouse his [or her] resentment against the actor, and lead him [or her] to exclaim 'Outrageous!'"<sup>72</sup> The decision of whether particular conduct rises to the level of outrage is made by the trier of fact on a case-by-case basis, usually taking into account changing social conditions and the plaintiff's own susceptibility.<sup>73</sup>

Hate speech can constitute extreme and outrageous conduct. Although at one time courts referred to racist language as "merely" offensive rather than outrageous,<sup>74</sup> judicial decisions have begun to maintain that hate speech is not necessarily a "mere insult." For example, in *Bailey v. Binyon*, an employer called Mr. Bailey a "nigger," followed him into the kitchen, and repeated the insult. After Bailey asked to be treated like a human being, Binyon replied, "You're not a human being, you're a nigger." The court noted that it would not characterize Binyon's remarks as "mere insults."<sup>75</sup> In response to derogatory remarks made to a Mexican-American employee by coworkers, the Supreme Court of Washington noted, "Racial epithets which were once part of common usage may not now be looked upon as 'mere insulting language.' Changing sensitivity in society alters the acceptability of former terms."<sup>76</sup> A university disciplinary regulation against the intentional infliction of

<sup>71</sup>Restatement (Second) of the Law of Torts § 46, 71 (American Law Institute, 1965).

<sup>72</sup>*Ibid.*, 73.

<sup>73</sup>See, e.g., *Alcorn v. Ambro Engineering Inc.*, 2 Ca1.3d 493 (1970).

<sup>74</sup>Shawna Yen, Redressing the Victim of Racist Speech After *R.A.V. v. City of St. Paul*, 26 *Columbia Journal of Law and Social Problems* (Summer 1993): 589, 596–97.

<sup>75</sup>*Bailey v. Binyon*, 583 F. Supp. 923, 934 (N.D. Ill, 1984).

<sup>76</sup>*Contreras v. Crown Zellerbach Corporation*, 565 P. 2d 1173, 1177 (Wash, 1977).

emotional distress might reduce problems inherent in speech codes based on fighting words. One advantage is that intentional infliction of emotional distress combats the actual harm caused by hate speech. By targeting outrageous conduct resulting in severe distress, the regulation applies when the harm to the victim is the greatest. When fighting words are prohibited, words that cause little long-term damage to the victim can be forbidden on the grounds that a fight may ensue, whereas very hateful messages are tolerated if they are not uttered in a context where the victim is likely to fight back. Moreover, intentional infliction of emotional distress is only applicable when distress does result. A lesson of the *UWM Post* decision is that university regulations will be deemed overbroad if they apply to situations where the harm (e.g., violence) may not occur. Finally, the language of the *Restatement's* definition is **content neutral**. The perpetrator is liable when the effect of the message on its victim is sufficiently severe. There is no prohibition of messages on any particular subject; hence, it would be less suspect in the eyes of a reviewing court.

Although a speech code based on the language of the intentional infliction of emotional distress tort would avoid some of the problems inherent in the fighting words approach, the code would not resolve all the difficulties inherent in the regulation of hate speech.

First, this standard, like codes based on fighting words, presumes a level playing field as a starting place. To feel comfortable about responding to hate speech by using a lawsuit to recover damages, one would first have to feel comfortable and confident with the legal system. Given the historical treatment of women and minorities in our legal system, can we honestly say this inspires such confidence?

Second, and problematic for the First Amendment, is yet another potential vagueness problem. Under the *Restatement* definition, a hate speaker might be liable if his or her words constitute outrageous conduct. The *Doe* court found terms such as “victimize” and “stigmatize” vague. How is a speaker any more likely to know that his or her words rise to the level of “outrageous” than that his or her speech stigmatized or victimized another person?

Finally, there are difficulties with proof of harm in cases involving emotional distress. What would serve as evidence of stress? If a victim told university administrators that he or she had suffered severe distress, should that be a sufficient basis for punishing speech? If so, any offensive speech could be punished. And how would university disciplinary authorities be expected to filter out the other aspects of general bigotry in society to know that a sufficient proportion of a victim’s stress was caused by the perpetrator’s hate speech?

The questions raised by speech codes, whether they are based on fighting words or emotional distress, have led to suggestions that universities look for answers to the problems of discrimination that do not rely on suppressing speech.

## A Marketplace of Ideas Remedy for Hate Speech

In *Sigma Chi v. George Mason University*, Judge Hilton noted that promoting and not limiting the free flow of ideas was consistent with the university’s mission.<sup>77</sup> This approach is consistent with Justice Brandeis’s call for more speech as a response to speech we abhor.<sup>78</sup> When a person tells a joke that sounds racist or sexist or homophobic, students and faculty

<sup>77</sup>773 F. Supp. 794.

<sup>78</sup>*Whitney v. California*, discussed in Chapter 3 of this text.

could indicate their distaste for such jokes, even if members of the target group are not present. In classroom discussions, professors and students can challenge assumptions that are based on stereotypes about a class of persons. Rather than shouting down a speaker who is being politically incorrect, participants can challenge that speaker to provide evidence supporting his or her views.

Is the marketplace of ideas the best remedy for hate speech? Or are the harms to the individual victims and the university community too great to allow such words to go unpunished? In formulating an answer, rely on your first-hand experience on campus and elsewhere, as well as on what you have read. Although students and faculty may be powerless to change the course of the law of libel or obscenity, the members of the university community will ultimately decide the fate of hate speech on campus.

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## CONCLUSION

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As suggested by the sequence of cases such as *R.A.V. v. City of St. Paul* and *Virginia v. Black*, there is linkage between fighting words and what may be termed hate speech. Some fighting words may also be hate speech, but the latter has its own particular set of harmful effects that include not only the threat and reality of physical violence, but also the psychological and emotional scarring that comes from words and behavior that marginalizes and dehumanizes people. Without question, hate speech—abusive insults, epithets, and expressive conduct targeted at individuals on the basis of immutable characteristics like race, gender, or religion—creates a serious problem for our society. Hate speech can stigmatize, leading to serious psychological and even physical damage. Because it is contextually based, it can promote ugly stereotypes and the sorts of images that perpetuate such practices as racism or homophobia.

This has proved to be a particularly difficult problem for schools—especially at the college and university level—where students are expected to participate in a free and open exchange of ideas. Campus administrators have tried various remedies aimed at ridding the academy of hate speech—but not all remedies validate the contextually based suffering of victims or accomplish this goal without also encroaching on speech protected by the First Amendment. Although courts and legal theorists continue to develop theories and models for proscribing this kind of speech, no single contemporary effort completely escapes practical—or constitutional—problems.

Future efforts at regulating hate speech in schools will likely make use of categorical exceptions to the First Amendment (e.g., fighting words) but could also include more novel exceptions such as intentional infliction of emotional distress. Whether these will actually diminish hate speech is at best unclear.

An alternative response to hate speech is reliance on the marketplace of ideas. Regardless of whether a speech code is in place at a university, students and faculty can respond to any incidents of racism and prejudice with more speech. If members of the university community use their voices to advocate tolerance and diversity, rather than relying on their power to silence opposing views, they might gain far greater results than any speech code could hope to achieve.