

1992

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Kaplin, William A. (1992) "Hate Speech on the College Campus: Freedom of Speech and Equality at the Crossroads," *Land & Water Law Review*. Vol. 27 : Iss. 1 , pp. 243 - 259.

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University of Wyoming
College of Law

LAND AND WATER LAW REVIEW

VOLUME XXVII

1992

NUMBER 1

Winston Howard Lecture

*"HATE SPEECH" ON THE COLLEGE CAMPUS: FREEDOM OF
SPEECH AND EQUALITY AT THE CROSSROADS**

*William A. Kaplin***

In recent years, the phenomenon of "hate speech"—or more broadly, "hate behavior"—has created a wrenching problem for American college campuses.

The term hate speech, as commonly understood, refers to verbal and written words, and to symbolic acts, that convey a grossly negative assessment of particular persons or groups based on their race, gender, ethnicity, religion, sexual orientation, or disability. Hate speech thus is highly derogatory and degrading, and the language is typically coarse. The purpose of the speech is more to humiliate or wound than it is to communicate ideas or information. Common vehicles for such speech include epithets, slurs, insults, taunts, and threats.

I will concentrate particularly on the First Amendment implications of the hate speech problem, comparing the free speech values that may be endangered by attempts to regulate hate speech with the equality values that may be endangered if hate speech is left unchecked. I will also concentrate on processes that universities may devise to resolve these crucial value questions. My goal is to add order

* The fifth annual Winston Howard Distinguished Lecture, University of Wyoming College of Law, April 12, 1991. For publication purposes, the author has expanded, updated, and re-edited the text and footnotes of the paper delivered on this occasion. Some portions of this lecture were adapted by the author from an article to be published as part of a symposium in *Journal of Higher Education*; see *infra* note 16. These adapted excerpts appear here with the permission of *Journal of Higher Education*.

** Professor of Law, Catholic University of America; Visiting Professor of Law, Wake Forest University, 1990-1991; Distinguished Visiting Scholar, Institute for Higher Education Law and Governance, University of Houston Law Center, Fall 1991.

and balance to the differing points of view concerning hate speech, and to bring a measure of practicality and concreteness to what has often been a rather theoretical and abstract debate. In short, my focus will be on this specific question: What may, and what should, university communities do about the hate speech problem, and how should they go about doing it?

ILLUSTRATIONS OF HATE BEHAVIOR

Let me begin with a series of illustrations of hate behavior. Each illustration portrays a real-life incident that recently occurred on some major university campus in this country.¹ As I describe these incidents, I am mindful of the dilemma posed by Professor Kent Greenawalt: "how much to risk offending by speaking the upsetting words and phrases; how much to risk failure to come to terms with the real issues by avoiding the words that shock."² To strike a balance, I have avoided some of the most profane and shocking language while nevertheless selecting a range of representative examples.

Consider then, the particular incidents that follow. Consider how they implicate free speech and equality values. Consider what universities should do to respond to such incidents or prevent their recurrence. Equally important, imagine that you are an observer at the scene of these incidents, or that you are actually the victim. What is your reaction, emotionally as well as intellectually?

1) During halftime at a football game between major football powers, the host school introduces a black woman as the new homecoming queen. When her name is announced, loud boos ring out from spectators in the stands, and a large Confederate flag is unfurled.

2) At the Jewish student union on campus, unknown persons spray paint the walls of the union with swastikas and with the phrase "Hitler is God."

3) Campus sidewalks are defaced with various slogans painted on them. Prominent among the slogans are "Step here, kill a queer" and "Stay in the closet fag."

4) A Chinese graduate student returns to his library carrel and notices graffiti scribbled there in his absence. The message reads "Die Chink, hostile Americans want your yellow hide."

5) Students blow up condoms with helium and make a balloon

1. These incidents, and many others, have been reported in the popular or professional press and have been mentioned in the law review literature on "hate speech". No attempt is made here to cite the various primary and secondary sources that have described real life hate speech incidents occurring on American campuses. See generally HOWARD ERLICH, *CAMPUS ETHNO-VIOLENCE AND THE POLICY OPTIONS* 41-72 (1990).

2. Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 *RUTGERS L. REV.* 287, 291 (1990).

bouquet. They then pin this bouquet of condoms to the dormitory room door of a female student, along with a sign that says "Jewish slut."

6) Five white students dressed in Ku Klux Klan garb crash through the door of a black student's dorm room. They set up and burn a paper cross, harass the black student, and then flee.

7) Two black women students returning to their dormitory room discover that the insignia KKK has been carved into the door of their room.

8) Members of a campus fraternity hold a fund raiser which they call a slave auction. Fraternity pledges show up in blackfaces and Afro wigs, and perform parodies of prominent black entertainers.

9) A white fraternity votes to accept a black member. One night shortly thereafter, fraternity members discover a cross burning on the front lawn of their fraternity house.

10) When returning at night from a drinking party with fraternity brothers, a student passes by a dormitory and loudly shouts obscenities and racist comments that prominently include the word "nigger." When a dorm resident asks him to quiet down, the student shouts back: "What are you a faggot?" "What are you a Jew?"

11) Several white students trail a black woman student across campus at night. They taunt her and make sexually suggestive comments, prominently including the comment "I've never tried a nigger before."

12) A group of Japanese students is accosted on campus and taunted. The taunters also throw eggs at the Japanese students and urinate in front of them.

13) Several hate mailings are sent to a Native-American student who is serving as student council president. One of the mailings includes this message: "You are a redskinned bitch and Custer should have finished off your entire degenerate race."

14) In a Hebrew house which keeps a kosher kitchen, Jewish students discover that the kitchen has been strewn with litter and smeared with human excrement; they also discover anti-Semitic slurs and a note which reads, in part, "Didn't Hitler teach you nothing?"

15) Several white students argue heatedly with a black student over whether the composer Beethoven had any black ancestors. Later that night, the white students mark up a Beethoven poster to turn his likeness into a cartoon caricature of a black face. They then place the poster outside the black student's room in a campus dormitory that emphasizes the theme of black culture.

These are not isolated examples. Various commentators have noted the expanding scope of the current wave of campus hate behav-

ior. In terms of racial incidents alone, the National Institute Against Prejudice and Violence estimates that at least 300 campuses have had one or more such incidents reported in the past three years. The Institute also estimates that up to 80 percent of students who are victims of a racial incident do not report it so that the actual number of incidents is probably far larger than the reported number.³

As these examples suggest, hate speech is not limited to a face-to-face confrontation or shouts from a crowd. Hate speech takes many forms. It may appear on tee shirts, on posters, on classroom blackboards, on student bulletin boards, in flyers and leaflets, in phone calls, in letters, or in electronic mail messages on a computer screen. Hate speech may be a cartoon appearing in a student publication, a joke told on a campus radio show, an anonymous note slipped under a dormitory or meeting room door, or graffiti scribbled on walls or sidewalks. Hate speech may be conveyed through destruction or defacement of posters or displays; through symbols such as burning crosses, swastikas, Ku Klux Klan insignia, and Confederate flags; and even through themes for social functions, such as blackface Harlem parties, jungle parties, or white history week parties.

THE HARMS OF HATE SPEECH

Why is hate speech such a wrenching problem, deserving of our sustained and sensitive attention? There are many reasons, some more obvious than others. Of special concern are the harms that hate speech causes to the victim, the victimized group, the campus community, and ultimately to society.⁴ It may be difficult for us to fully appreciate these harms, for as Professor Charles Lawrence has reminded us:

Not everyone has known the experience of being victimized by racist, misogynist, or homophobic speech, and we do not share equally the burden of the societal harm it inflicts. Often we are too quick to say we have heard the victims' cries when we have not; we are too eager to assure ourselves we have experienced the same injury . . . [when we have not].⁵

3. See, e.g., Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM & MARY L. REV. 267, 268 (1991); Darryl Brown, Note, *Racism And Race Relations In The University*, 76 VA. L. REV. 295, 315-17 (1990); Peter Bryne, *Racial Insults And Free Speech Within The University*, 79 GEO. L.J. 399, 401-02 (1991); compare Judith Hanna, *Racial Tension On University Campuses*, 3 SYNTHESIS: LAW AND POLICY IN HIGHER EDUCATION, No. 2, 166-67 (1991).

4. See, e.g., Post, *supra* note 3, at 271-77; Charles Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 458-66 (1990); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2335-41 (1989); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 135-49 (1982).

5. Lawrence, *supra* note 4, at 459.

On one level, when hate speech is directed at particular individuals, it causes real hurt to those individuals. The victim may suffer humiliation, shock, outrage, fear, and anxiety. These may be psychic rather than physical injuries, and the result may be emotional rather than physical scarring, but the wounds are every bit as real.

On another level, hate speech inflicts pain on the broader class of persons who belong to the group which the hate speech denigrates. If blacks are targeted by a particular hate speech incident, for instance, all blacks on campus who become aware of the incident may be hurt—not just the person who was subjected to the speech or those who personally witnessed it. A case in point is the introductory example about the defacement of the Beethoven poster after an argument over whether the composer had black ancestors. Blacks throughout the university, students as well as faculty members, reacted to that incident. One black faculty member described her pain as follows:

[The most deeply offending aspect of the Beethoven defacement concerns] the ability of black and brown and red and yellow people to name their rightful contributions to the universe of music or any other field. It is the right to claim that we are, after all, part of Western Civilization. It is the right to claim our existence The failure of [the university] to acknowledge this level of the harm in the [Beethoven] incident allows students to deface me. In the margins of their notebooks, or unconsciously perhaps, they deface me; to them, I “look like a stereotype of a black [person],” . . . not an academic; they see my brown face and they draw lines “emphasizing . . . the lips, and coloring in the black frizzy hair” In the margins of their notebooks, I am obliterated.⁶

On yet another level, hate speech causes harm to the entire campus community, with the heaviest burdens still being borne by the victimized groups. The feelings of vulnerability, insecurity, and alienation that repeated incidents of hate speech engender in the victimized groups may undermine the conditions necessary to constructive dialogue on campus. Members of the victimized groups, moreover, may be unable to take full advantage of the educational opportunities available at the university. A sense of community, both for the residential community and for the community of learners, may be lost to the campus.

All these effects of hate speech share a common theme. They all implicate deeply held values of equality and individual dignity. The threat to these values, standing alone, is more than enough to arouse

6. Martha Minow, *On Neutrality, Equality & Tolerance: New Norms for a Decade Of Distinction*, CHANGE, Jan.-Feb. 1990, at 19-20, quoting Patricia Williams, *The Obliging Shell: An Informal Essay On Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2135-37 (1989).

our concern about hate speech. Whenever such concern moves us to consider regulating hate speech in order to protect equality values, however, free speech values become implicated as well. It is because both sets of values are at stake that we must approach the hate speech problem, and legal analysis of the issues, with exceeding sensitivity and care.

APPLICABLE FREE SPEECH PRINCIPLES

By most counts, about 200 colleges and universities in the United States have amended their campus conduct codes or adopted new codes in order to set standards of permissible speech. A wide variety of standards and provisions have been suggested or implemented for this purpose. Since hate speech employs words and symbols to convey a message, and since campus code provisions may prohibit and punish particular types of messages, constitutional issues arise under the free speech and free press clauses of the First Amendment. Formally, only public colleges and universities are bound by the First Amendment's provisions. Private institutions, not being engaged in state action, are not so constrained. In practice, however, private institutions may voluntarily commit themselves to comply with First Amendment norms; and, in the context of hate speech, many private institutions have undertaken to do so.

Four major free speech principles serve to constrain the authority of universities to regulate hate speech. Under the first principle, regulations of the content of speech (that is, regulations of the speaker's message) are highly suspect. As the U.S. Supreme Court has frequently stated, "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content There is an 'equality of status in the field of ideas', and government must afford all points of view an equal opportunity to be heard."⁷

Under the second free speech principle, the emotional content as well as the cognitive content of speech is protected from government regulation. In *Cohen v. California*, the U.S. Supreme Court explained that:

[m]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically

7. *Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972) (quoting ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1948)).

speaking, may often be the more important element of the overall message⁸

Under the third free speech principle, speech may not be prohibited merely because persons who hear or view it are offended by the message. In 1990 the Supreme Court reaffirmed that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”⁹

Under the fourth free speech principle, government may not subject speech activity to regulations whose language is either overbroad or vague and would thereby create a chilling effect on the exercise of free speech rights. As the Supreme Court has stated, “Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”¹⁰

Each of these four free speech principles fully applies to universities. As the Supreme Court emphasized in *Healy v. James*:

[T]he precedents of this Court leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”¹¹

At the same time, however, the U.S. Supreme Court has made clear that academic communities are “special environments,” and that “First Amendment rights must be analyzed ‘in light of the special characteristics of the school environment.’”¹² The university’s interests, the values that the university may promote, and the nature of threats to these interests and values may therefore differ from that which exists in other contexts. Thus, although First Amendment principles apply with full force, different considerations may enter into their application to the campus.

8. *Cohen v. California*, 403 U.S. 15, 26 (1971).

9. *United States v. Eichman*, 110 S. Ct. 2404, 2410 (1990) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)); see also *Cohen v. California*, 403 U.S. 15 (1971); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

10. *NAACP v. Button*, 371 U.S. 415, 433 (1963); see also *Smith v. Goguen*, 415 U.S. 566 (1974) (vagueness); *Houston v. Hill*, 482 U.S. 451 (1987) (overbreadth).

11. *Healy v. James*, 408 U.S. 169, 180 (1972) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)); see also *Papish v. Board of Curators of Univ. of Missouri*, 410 U.S. 667 (1973).

12. *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981) (quoting *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969)); *Healy v. James*, 408 U.S. at 180.

THE DECISIONMAKING PROCESS: FIVE CRITERIA

To take full account of these four free speech principles, in conjunction with the many other complexities of the hate speech problem, universities should have a structured process for decisionmaking on these matters. The design of the process is just as critical to the success of a university's endeavors as is its substantive analysis of the First Amendment issues. Clearly, not any process will do. I have devised five criteria that a university process must meet if it is to facilitate effective management of the hate speech problem.

Criterion Number One: The process must foster a comprehensive approach to, and comprehensive perspective on, the hate speech problem on American campuses. To meet this criterion, the process must encompass both the equality and the free speech aspects of the problem. Similarly, it must encompass both the legal and the policy aspects of the problem. The process must also expose the relevant sociological, psychological, and philosophical aspects of the hate speech problem, enabling this expertise to illuminate the underlying causes of hate behavior and its effects upon individuals, groups, and institutions. In addition, the process must facilitate collection of information on the extent and manifestations of the hate speech problem on American campuses.

Criterion Number Two: The process must both encourage and rely upon dialogue within the campus community. The full range of campus interests and perspectives should be reflected in this dialogue. Thus the various constituencies represented in the student body should be included, as well as faculty and administrative staff. Such dialogue should be both the starting point and the end product of the process.

At its start, the process should begin to flush out and seek mutual respect for the differing points of view regarding the hate speech problem. As Professor Martha Minow has stated:

We can't really learn about the partiality of our own perspectives without talking with other people about their perspectives, which help us rethink our own. . . .

[D]o we have confidence that we know the meanings of [hate behavior] incidents from the perspectives of people we do not know well . . . ?

In short, can we learn to look at perspectives other than our own, and then still others, continually unsettling our assumptions that we know what others think?¹³

At its end, the process should have begun to foster conditions of

13. Minow, *supra* note 6, at 20.

tolerance that allow the dialogue to continue productively into the future. Tolerance, according to Professor Minow:

means doing more than inviting outsiders to be included—it means listening to their views about what it would take for them to feel included. In colleges and universities, this means dialogue—dialogue about equality, neutrality and tolerance, about discipline and freedom, about injury and harassment. It means considering the preconditions for participation—the preconditions for assuring that every member of the community feels like a member of the community.¹⁴

Criterion Number Three: The process must encompass and facilitate consideration of non-regulatory as well as regulatory options for managing the hate speech problem, giving priority to the non-regulatory options. Non-regulatory options could include at least the following: (1) education options, such as curriculum revisions, orientation programs, or extra-curricular activities focusing on matters such as race relations, gender relations, and multi-culturalism; (2) training options, such as sensitivity training for student leaders or for staff members such as residence hall advisors and campus security officers; (3) counter-speech options, such as the strategic use of statements by university officials and student leaders that repudiate and condemn hate speech incidents occurring on campus; (4) communication options, such as a formalized process for reporting hate behavior incidents; and (5) conflict-resolution options, such as a complaint process with voluntary mediation and counseling for persons involved in alleged hate behavior incidents. In contrast, regulatory options would include all proposals relying on the prohibition of certain types of speech and imposition of involuntary sanctions on transgressors.

As between regulatory and non-regulatory initiatives, the non-regulatory initiatives may have a broader and longer range impact on hate speech. Regulatory initiatives, if not combined with substantial non-regulatory initiatives, may be ineffective or counter-productive. Regulatory initiatives, moreover, necessarily raise substantial First Amendment issues and risk erosion of free speech values. For these reasons, the decision making process should focus first on non-regulatory options, moving to regulatory options only if the university determines that non-regulatory initiatives alone will not suitably alleviate the hate speech problem.

Criterion Number Four: The process must assure that university initiatives for combatting hate speech are adapted to the particular circumstances of that particular campus. There is no all-purpose solution for hate speech that can fit all campuses. Campuses differ from one another in many relevant respects. There are differences in the climate of tolerance that prevails, the diversity of the student body,

14. *Id.* at 25.

the perceptions and attitudes commonly shared by students, the patterns of social interaction, and the institutional structure and mission. Campuses also differ in terms of their actual experiences with the hate speech problem. The number of reported incidents varies substantially from campus to campus, as do the types of incidents, their effect on the campus environment, and the pattern of institutional responses. The process should assure that these differences and variables are taken into account, so that the problems are addressed in terms most meaningful to that campus and the solutions are crafted to its particular reality and experience.

Criterion Number Five: The process must focus on First Amendment issues in an exceedingly methodical and concrete way calculated to shed maximum light on legal obstacles to regulation as well as available latitude for regulatory initiatives. It would be a mistake to approach the complex First Amendment issues of hate speech in the abstract. As the legal philosopher, John Chipman Gray, warned over 60 years ago:

The danger in dealing with abstract conceptions, whether in the Law or in any other department of human knowledge, is that of losing foothold on the actual earth. The best guard against this is the concrete instance, the example . . . I shall, therefore, try to test the soundness of any theories I may advance, by applying them to sets of facts and seeing how they work in practice.¹⁵

To achieve such concreteness, the process must provide for the identification of particular types of hate speech the university desires to regulate and the determination of whether some particular First Amendment theory would support regulation of each such type of hate speech. This process of matching the concrete example to the specific theory must be methodical because different types of regulations will require different types of analysis under the First Amendment. There is no omnibus regulatory approach that can serve all of a university's regulatory interests regarding hate speech. Nor is there any grand First Amendment theory that can justify regulation of all the types of hate speech an institution might wish to reach. In each instance, therefore, the question will be whether some particular type of regulation, covering some particular type of hate speech, can be drafted and enforced without substantially intruding upon free speech values and risking a later court ruling that the regulation is unconstitutional.

OPTIONS FOR REGULATING HATE SPEECH

Suppose that a university, employing a process that meets these

15. JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 4-5 (2d ed. 1927).

five criteria,¹⁶ determines to regulate hate speech to the full extent permitted by the First Amendment. Suppose further that this university has developed an extensive list of specific hate behaviors that it wishes to regulate, and is exploring regulatory options for covering each example on its list. What are the types of regulatory options that this university may employ in this phase of the process? I will first discuss options that should not be employed because of legal or strategic obstacles to their use, and then move on to options that may be employed if the university proceeds with great care.

First, the university may not simply ban particular words from the campus on the assumption that such words are used as epithets or slurs. To select words from the introductory examples, the university may not simply ban use of the words "nigger", "fag", "Chink", or "slut". The meaning and effect of a word depends upon the context in which it is used. Thus a particular word may or may not be used to denigrate.¹⁷ The tone of voice, accompanying body language, relationship between the parties, and setting in which the word is used all influence the understanding of the communication. The use of a word in a class discussion or dorm bull session, for example, may differ vastly from the use of the same word in a face-to-face confrontation or an anonymous note. In addition to these evaluative difficulties, banning particular words from campus would raise clear constitutional problems under the four free speech principles. As the U.S. Supreme Court emphasized in *Cohen v. California*,

[I]t is . . . often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual . . . [W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.¹⁸

Second, for similar reasons, the university may not simply ban word usages that are generically defined and deemed to be hurtful. For example, the university may not simply ban "racial epithets," "ethnic slurs," or "sexist insults;" nor may it simply ban "vilification," "invective," or "bigotry." Even if context is taken into account in applying such generic and unadorned terms, the terms themselves are not self-defining. There is no uniform understanding of what language usages they would cover. There is no confining principle that would strictly limit their application. Therefore, a regulation employing such terms to describe prohibited speech would surely violate the fourth

16. For a specific example of a nine-phase process that would meet these five criteria, see William Kaplin, *A Proposed Process for Managing the First Amendment Aspects of Hate Speech on Campus*, 63 J. OF HIGHER EDUC. (1992) (forthcoming).

17. Greenawalt, *supra* note 2, at 291.

18. *Cohen v. California*, 403 U.S. 15 at 25-26.

free speech principle, providing that regulations must be sufficiently narrow and clear to avoid the twin evils of overbreadth and vagueness.

Third, the university may not simply ban words that are intended to humiliate or hurt. It is unlikely that principled distinctions could be made between the types and levels of humiliation and hurt that would be prohibited and those that would not. As Professor Greenawalt has noted, "Much harsh language is a natural part of heated personal exchanges and strong disagreements about ideas. Since few of us are able and inclined to modulate our discourse to the magnitude of a subject, the law must tolerate many words that hurt."¹⁹ Similarly, it is unlikely that the university could distinguish words intended to humiliate and hurt from those that merely offend a person's sensibilities. The latter type of words are clearly protected under the third free speech principle, which prohibits government from regulating speech merely because of its offensiveness. Even if such distinctions concerning humiliation and hurt could be made, other obstacles arise in attempting to ascertain the intent of the person who spoke the hurtful words.²⁰ A speaker may have "mixed motives," intending in part to hurt and in part to convey information—including information about the speaker's emotional state. Or the speaker's intent may simply be impenetrable, so that university decision makers cannot ascertain the intent after the fact. For all these reasons, a regulation prohibiting speech intended to humiliate or hurt would be beyond the university's capacity to administer, and would also violate the First Amendment.

Fourth, the university may not combat hate speech simply by banning false assertions regarding particular persons or their racial, ethnic, religious, or gender groups. At first blush, such a regulation would appear to present fewer problems under the four free speech principles. The requirement that the speech be false would appear to confine a university's discretion, and the law presumably would not protect speech content which is false. But a test of falsity may be so limited in its application, or so difficult to administer, that it cannot provide the basis for meaningful regulation of hate speech. Only speech asserting or implying facts that are subject to verification can be tested for falsity. Often speech does not have such a factual base. Instead, it merely asserts an opinion or expresses an emotion. Additionally, speech that does purport to assert facts may be so vague, or the underlying factual data may be so uncertain, that the statement cannot be judged to be either true or false. Consider the introductory example of the student on the dormitory quadrangle who yelled: "What are you, a fag?" "What are you, a Jew?" It is not likely that these statements are fact-based or, if they are, could be subjected to any kind of verification. It is also unlikely that any particular meaning

19. Greenawalt, *supra* note 2, at 298.

20. See Toni M. Massaro, *Equality And Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 245-46 (1990); Greenawalt, *supra* note 2, at 298; Post, *supra* note 3, at 324 nn. 253-55 and accompanying text.

intended by the speaker or conveyed by these labels could be identified.

If the university cannot regulate hate speech in any of these four ways, then how may it regulate? As previously indicated, no single regulatory approach exists that is consistent with the four free speech principles and can cover the myriad of situations a university may wish to confront. The university should therefore pursue a combination of regulatory approaches, each one geared to a particular segment of the hate behaviors it wishes to confront. Under such an incremental approach, some types of hate speech will simply remain unregulated because they cannot constitutionally be addressed.

I shall give six examples of hate behavior "segments" that a university could probably regulate consistent with the First Amendment.²¹ Any regulation covering such segments, of course, must include definitions and qualifying language to narrow and focus its scope.²²

First, and easiest, the university may regulate hate behavior that does not use words or symbols to convey a message, and therefore does not involve protected speech. The introductory examples include actions such as throwing eggs, public urination, and spreading human excrement. Such actions clearly are not protected by the First Amendment. Other obvious examples include kicking, shoving, beatings, spitting, stone throwing, trashing of rooms, and blocking of pathways and entryways. All such activities can be reached under carefully drafted regulations concerning physical attacks, destruction or defacement of property, and other prohibited acts such as indecent exposure.

Second, when hate speech is combined with non-speech actions in the same course of behavior, the university may regulate the non-speech aspects of the behavior without violating the First Amendment. In the introductory examples, a Jewish student union was spray-painted with swastikas and slogans, graffiti were painted on sidewalks, and a hate insignia was carved into a dorm room door. All these behaviors conveyed messages and therefore involved speech. But

21. In addition to these six examples of regulable "segments," the university could also regulate hate speech which is obscene or defamatory, or constitutes incitement or fighting words according to current U.S. Supreme Court definitions. See *Matter of Welfare of R.A.V.*, 464 N.W. 2d 507 (Minn. 1991), *cert. granted*, 111 S.Ct. 2795 (1991) (cross burning as fighting words or incitement); see generally DAVID TATEL, MARTIN MICHAELSON, AND DANIEL KOHRMAN, *HOW THE FIRST AMENDMENT APPLIES TO OFFENSIVE EXPRESSION ON THE CAMPUSES OF PUBLIC COLLEGES AND UNIVERSITIES* (1990). The university could also regulate the time, place, or manner, as opposed to the content, of hate speech. See, e.g., *Clark v. Community for Creative Non-violence*, 468 U.S. 288 (1984). Such regulations would fall into established exceptions to, or be outside the scope of, the first three of the four free speech principles in the text above. Any such regulation, however, would have to be sufficiently narrow and specific to avoid violation of the fourth free speech principle.

22. See *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989); see generally cases cited *supra* note 10.

each behavior also had a non-speech aspect — destruction of property. While the university cannot prohibit particular messages, it can prohibit destructive acts. Such acts may therefore be covered under neutral regulations governing such non-speech matters as destruction and defacement of property.

Third, the university could probably regulate hate speech that is intimidating, threatening, or harassing, if such speech is addressed to particular individuals and fosters in them a realistic fear for their physical safety or the security of their property.²³ Threats that create realistic fears for the safety of a person's family, living group, or friends might also be regulated. Speech activities with such effects are analogous to assaults which typically are punishable under both criminal and tort law. The introductory examples involving the white students in KKK garb who crashed into the black student's room, the male students who followed the female student across campus at night making sexual threats, and the taunters who accosted the group of Japanese students could fall into this category. Such activities, even though carried out in part through speech, can be narrowly regulated because the danger of bodily harm or property damage, along with the psychic injury to the person threatened, overrides whatever speech interest may be at stake.

Fourth, the university could probably regulate hate speech that occurs in private areas of the campus and thereby infringes upon privacy interests of listeners legitimately in these areas. The place most likely to qualify as private for purposes of such a regulation is the college dormitory, especially the rooms or suites in which students live. The introductory examples involving the defaced Beethoven poster in the black theme dorm and the condoms and "Jewish slut" sign on the dorm room door may fall within the rationale. The scribbling of graffiti in the Chinese student's library carrel might also be included. For First Amendment purposes, such private areas are not considered to be "public forums" open to public dialogue. Furthermore, the persons occupying such private places may be considered "captive audiences" that cannot guard their privacy by avoiding the hate speech.²⁴ For these two reasons, the likelihood is increased that hate speech regulations limited to such private places would be constitutional.

Fifth, the university could probably regulate hate speech that serves to implement or reinforce a policy of racial or other discrimination. If a campus fraternity places a sign in front of its house reading

23. Compare *Georgia v. Miller*, 398 S.E.2d 547 (1990). Statutes and regulations that punish intimidation, threats, or harassment often include an intent requirement. To make out a violation, it must be shown that the speaker had intended to intimidate, threaten, or harass his victim. Such intent requirements may pose additional complexities (see *supra* note 20 and accompanying text), especially when administered by students or staff at a university (see Kaplin, *supra* note 16).

24. See, e.g., *Frisby v. Schultz*, 487 U.S. 474 (1988).

"No blacks allowed here," for example, such speech may be an act of discrimination, making it unlikely that black students would seek to become members of that fraternity. When speech is an integral element of a pattern of discriminatory conduct, universities should be able to cover such speech under a regulation prohibiting discrimination on the basis of identifiable group characteristics such as race, sex, or ethnicity. In effect, the goal of eradicating such discrimination on campus becomes a compelling interest that justifies the limited intrusion into the discriminator's speech interests.

Sixth, a university might be able to regulate certain types of hate speech that are part of a pattern whose effects on the targeted group are so pervasive that group members are unable to benefit fully from campus educational opportunities. Under this rationale, pervasive patterns of hate speech, left unchecked, may create a denial of equal educational opportunity. This denial provides the university with a compelling interest in intervening to re-establish conditions of equality. In *Healy v. James*, the U.S. Supreme Court declared that universities need not tolerate First Amendment activities that "substantially interfere with the opportunity of other students to obtain an education."²⁵ In other cases, the Court has held that government has a compelling interest in combatting denials of educational opportunity caused by race discrimination, and that compelling interests may overcome First Amendment rights.²⁶ To invoke the reasoning of such cases, the university apparently must demonstrate that a continuing pattern of hate speech exists on campus, that the "hate speech" targets an identifiable racial or other minority student group, and that this student group therefore cannot pursue its educational opportunities on equal terms with other students. Such circumstances would be similar to the "hostile environment" concept that has become prominent in the field of employment discrimination.²⁷ In effect, the university must demonstrate that continuing acts of hate speech have created a "hostile environment" on campus that serves to discriminate against an identifiable student group in its pursuit of an equal education. If such conditions existed, the university might temporarily implement narrow regulations that protect equal educational opportunity by prohibiting hate speech which perpetuates these conditions. Such regulations could provide sanctions against student organiza-

25. *Healy v. James*, 408 U.S. at 189; see *Widmar v. Vincent*, 454 U.S. at 277.

26. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981).

27. See, e.g., *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991). Caution is appropriate in relying on the "hostile environment" employment discrimination cases to govern student hate speech problems. The authority relationships between employer and employee may differ from those between institution and student. The close, sustained working relationships that may prevail in the employment context may not always parallel the situation of students in academia. Moreover, First Amendment law concerning the free speech rights of employees does not always parallel First Amendment law concerning free speech rights of students. See, e.g., *Connick v. Myers*, 461 U.S. 138 (1983).

tions as well as against individual students.²⁸

CONFRONTING THE CHALLENGES

Clearly, the hate speech problem presents a formidable challenge to universities, to the members of academic communities, and to society as a whole. To confront this challenge, many important choices must be made. But no choice need be made between the values of equality and the values of free speech. Equality and free speech are at the crossroads, but they need not part ways, and we need not leave either behind or weight either down with excess baggage. The choice, rather, is between various combinations of actions that a university might pursue in the name of both equality and free speech. The selection of appropriate combinations of non-regulatory and regulatory initiatives will require exceedingly careful attention to process concerns, as well as to free speech principles.

Beyond these challenges of law and process, there is yet a greater challenge for us all. The problem of hate speech provides a mirror in which we can see ourselves better. Through our reactions to this problem, we can more clearly see who we are and what we stand for as individuals and collectively as academic communities. We can learn much on a personal level about racism, sexism, anti-Semitism, and homophobia in our society. We can confront our own values; test our own attitudes; review our own behaviors; and gauge our own capacities for tolerance. Can we really understand the depth and significance of the hate speech problem, not from our own egocentric and conditioned perspectives but from the perspectives of those who are potential victims? Can we develop the empathy and awareness that will allow us to respond to this problem with sensitivity to persons who may have a skin color different from ours, or may come from a different culture, or may have a sexual orientation that is not ours? Can we

28. At the time of this lecture, the courts had decided only one campus hate speech case involving students: *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989). Since then opinions have been issued in two other such cases: *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*, 1991 WL 195325 (E.D. Va. 1991); and *UWM Post, Inc., v. Board of Regents of University of Wisconsin System*, 1991 WL 206819 (E.D. Wis. 1991). Both courts rely on First Amendment free speech principles to invalidate actions a university had taken to regulate hate speech. The *Iota Xi* opinion relies particularly on the first and third free speech principles; see *supra* text accompanying notes 7 and 9. The *UWM Post* opinion relies on all four of the free speech principles discussed above, with particular emphasis on the fourth principle concerning overbreadth and vagueness; see *supra* text accompanying note 10. Neither opinion casts doubt on the first five regulatory approaches or segments developed in this article since the regulatory activities at issue were outside the bounds of these five suggested approaches. The *UWM Post* case, however, does consider (and invalidate) a more expansive version of regulatory approach number six; see *supra* text accompanying notes 25-27; it is possible that some of the broader reasoning from this case could cast doubt even on a narrow version of this approach. At the least, this case does make clear that great caution must be utilized even with narrow regulations of the type suggested in regulatory approach number six. See *supra* note 27 for brief discussion of the need for caution.

develop personal commitments to both equality and to freedom of expression? Above all, it is these challenges that I leave you with today.