FREE SPEECH ON CAMPUS

ERWIN CHEMERINSKY

HOWARD GILLMAN

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Preface

Controversies over freedom of speech on college campuses have existed as long as there have been college campuses. But the specific issues vary with each generation. In recent years the tension has been between the desire to protect the learning experience of all students and the desire to safeguard freedom of expression.

Students are rightly demanding, and colleges and universities are striving to provide, greater diversity and an environment conducive to learning for all students. Often, though, these efforts have led to calls by students and faculty members to restrict, punish, or disrupt speech that is seen as creating a hostile learning environment, especially for those who have traditionally suffered discrimination. Some of this anger has been focused on speech that almost anyone would consider offensive and hateful. But there have also been calls to suppress speech that is merely politically controversial or contrarian. There are demands that campuses deal with "microaggressions" and require faculty to provide "trigger warnings" before covering material that some students might find upsetting. Students have demanded—and received—formal investigations of possible violations of federal law after faculty members published scholarly articles in journals. The issues concerning speech on campus are complicated by the unprecedented ability for any person to quickly reach a large audience via social media.

As teachers and university administrators, we have a personal stake in the recent debate concerning freedom of speech on campuses. We fear that discussions over this issue, like so much else in society, are polarizing into two camps. One derides all efforts to protect students from the effects of offensive or disrespectful speech as "coddling" and "political correctness." The other side believes that free speech rights are secondary to the need to protect the learning experience of students, especially minority students.

We wrote this book because we believe that both sides are right—and wrong. They are right in that both equality of educational opportunity and freedom of speech are essential for colleges and universities. But they are wrong in thinking that one of these objectives can be pursued to the exclusion of the other. Colleges and universities must create inclusive learning environments for all students *and* protect freedom of speech. To achieve both of these goals, campuses may do many things, but they must not treat the expression of ideas as a threat to the learning environment. Freedom of expression and academic freedom are at the very core of the mission of colleges and universities, and limiting the expression of ideas would undermine the very learning environment that is central to higher education.

This book is our effort to describe, as specifically as possible, what campuses can and can't do, and should and shouldn't do, to achieve both of these goals. We recognize, of course, that the First Amendment applies only to public colleges and universities. But academic freedom—above all, the ability to express all ideas and viewpoints, no matter how offensive—is necessary at all colleges and universities. Freedom of expression therefore should be the same at all institutions of higher education. Throughout this book, we rely on First Amendment law in describing what public universities can and can't do. But we draw no distinction between public and private schools when arguing for what they *should* and *shouldn't* do.

Our focus is solely on colleges and universities. We realize that similar issues arise in high schools, junior high schools, and even elementary schools. But the Supreme Court has given these schools' administrators much more latitude to regulate student speech, and the norms of academic freedom are different, and more central, in higher education.

The issue of free speech on college campuses is as old as universities and as current as the daily

news. We have written this book because we believe that colleges must promote inclusive learning environments in a way that also preserves and respects the unfettered expression of ideas on campus. This requires a renewed appreciation of the importance of both values, an explanation of why we should not allow one value to override the other, and a clear path forward for how to advance and defend each of these fundamental features of higher education.

CHAPTER FOUR

Hate Speech

If all ideas, no matter how offensive, should be expressible on college campuses, what about epithets based on race, sex, religion or sexual orientation? What about the expression of hate more generally? Many prominent scholars have argued that hate speech conveys nothing useful to the marketplace of ideas, and by silencing its victims, it limits the exchange of ideas and undermines a university's obligation to provide all students with an environment conducive to learning.[1]

In the 1990s, persuaded by the powerful arguments for its regulation, over 350 colleges and universities adopted codes restricting hate speech. But every court to consider such a code declared it unconstitutional.[2] In this matter we side with the courts: though the advocates of restricting hate speech were motivated by the best intentions, speech cannot and should not be prohibited for expressing hate. We strongly agree with the need to create a conducive learning environment for all students, but there is simply no way to regulate hate speech without censoring ideas. That is never permissible on college campuses.

THE HARMS OF HATE SPEECH

If speech never mattered, there would be no reason to safeguard it. Freedom of speech is protected as a fundamental right precisely because speech may have powerful effects. Sometimes these effects are enormously positive; a democracy could not function without the ability to criticize government policy and openly discuss political candidates. But it is naïve and wrong to pretend that speech cannot also cause great harm. Many scholars have persuasively argued that the harm inflicted by hate speech is great enough to justify regulating it.

At the outset, a definitional question: what is hate speech? Jeremy Waldron defines it as "the use of words which are deliberately abusive and/or insulting and/or threatening and/or demeaning directed at members of vulnerable minorities, calculated to stir up hatred against them."[3] He notes with approval that laws controlling such speech

> can be found in Canada, Denmark, Germany, New Zealand, and the United Kingdom, prohibiting public statements that "incite hatred against any identifiable group where such incitements are likely to lead to a breach of the peace" (Canada); or statements "by which a group of people are degraded because of their race, colour of skin, national or ethnic background" (Denmark); or attacks on "the human dignity of others by insulting, maliciously maligning or defaming segments of the population" (Germany); or "threatening, abusive, or insulting ... words likely to excite hostility against or bring into contempt any group of persons on the ground of colour, race, or ethnic origins ..."; or the use of "threatening, abusive, or insulting words or behavior when these are intended to stir up racial hatred" (United Kingdom).[4]

Waldron and others offer several reasons why such hate speech should be regulated, especially in colleges and universities. First, it causes psychological and even physical harm to those who are subjected to it. Richard Delgado writes: "In addition to the harms of immediate emotional distress and infringement of dignity, racial insults inflict psychological harm upon the victim. Racial slurs may cause long-term emotional pain because they draw upon and intensify the effects of the stigmatization, labeling, and disrespectful treatment that the victim has previously undergone."[5] Mari Matsuda adds: "Victims of vicious hate propaganda experience psychological symptoms and emotional distress ranging

from fear in the gut to rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress syndrome, stress disorder, hypertension, psychosis, and suicide. Patricia Williams has called the blows of racist messages 'spirit murder' in recognition of the psychic destruction victims experience."[6]

Second, hate speech is an affront to the dignity of those who are subjected to it. Waldron argues that regulating hate speech is not about stopping offense, but rather protecting the dignity of each individual. He believes that in a "well-ordered society," all people not only must be protected by the law, but are entitled to live in confidence of this protection. "Each person ... should be able to go about his or her business, with the assurance that there will be no need to face hostility, violence, discrimination or exclusion by others."[7] Hate speech undermines confidence in the law's protection. "When a society is defaced with anti-Semitic signage, burning crosses and defamatory racial leaflets," Waldron says, the assurance of security "evaporates."[8] "A vigilant police force and a Justice Department may still keep people from being attacked or excluded," but the objects of hate speech are deprived of the assurance that the society regards them as people of equal dignity.[9] He says that the "aim" of hate speech "is to compromise the dignity of those at whom it is targeted, both in their own eyes and in the eyes of members of society."[10] Delgado likewise writes that "a racial insult is always a dignitary affront, a direct violation of the victim's right to be treated respectfully."[11]

Third, hate speech is a form of discrimination and should not be allowed any more than any other discrimination. Hate speech subordinates minorities. At colleges and universities, it causes its victims to feel unwelcome and interferes with their education. Charles Lawrence, in a widely cited article, explains: "Racism is both 100 percent speech and 100 percent conduct. ... All racist speech constructs the social reality that constrains the liberty of nonwhites because of their race. By limiting the life opportunities of others, this act of constructing meaning also makes racist speech conduct."[12] Catharine MacKinnon, who urged the prohibition of pornography because it subordinates women, said: "The law of equality and the law of freedom of speech are on a collision course in this country. ... The constitutional doctrine of free speech has developed without taking equality seriously."[13]

Fourth, it is argued that hate speech is an assault that the law can and should prevent and punish. Lawrence writes: "The experience of being called 'nigger,' 'spic,' 'Jap,' or 'kike' is like receiving a slap in the face. The injury is instantaneous. There is neither an opportunity for intermediary reflection on the idea conveyed nor an opportunity for responsive speech."[14] Like a physical assault, hate speech silences its victims. Lawrence goes on: "Words like 'nigger,' 'kike,' and 'faggot' produce physical symptoms that temporarily disable the victim, and perpetrators often use these words with the intention of producing this effect. ... The subordinated victims of fighting words also are silenced by their relatively powerless position in society."[15]

Most democratic nations prohibit hate speech. As one commentator noted, "the United States stands virtually alone in thinking that hate speech ought to be protected."[16] The Race Relations Act in the United Kingdom, for example, makes it a crime to publish or distribute "threatening, abusive, or insulting" written material or to use such language in a public place.[17] In Germany, *Volksverhetzung* —"incitement of popular hatred"—is an offense under Section 130 of the Strafgesetzbuch (Germany's criminal code) punishable by up to five years' imprisonment. Section 130 makes it a crime to publicly incite hatred against parts of the population, to call for violent or arbitrary measures against them, or to insult, maliciously slur, or defame them in a manner violating their human dignity.

As we listened to our students describe their experiences with hate speech, we understood why they wanted to restrict it. The effects described by Delgado, Lawrence, Matsuda, Waldron, and others are real. Hate speech genuinely threatens an inclusive learning environment, and colleges and universities are right in wishing to protect this environment.

THE FIRST AMENDMENT AND THE EXPRESSION OF HATE

Throughout American history, powerful arguments have been advanced for restricting speech that is considered harmful, and we have learned the advantages of extending free speech protections even in

the face of legitimate concerns about harm. How do general free speech principles and the current state of First Amendment law apply to hate speech?

Although the Supreme Court has never ruled on whether colleges or universities may prohibit the expression of hate, the Court's decisions have touched on issues of hateful expression in four areas: group libel, fighting words, laws prohibiting cross burning, and statutes imposing greater penalties for hate-motivated crimes. Taken together, these decisions make it very difficult for public colleges or universities to constitutionally prohibit hateful expression. Of course, that does not address whether this *should* be the law and whether private colleges and universities, which are not bound by the First Amendment, should follow the same approach. Before we get to that question, however, consider what the Supreme Court has said about hateful expression.

Group Libel

More than a half century ago, the Supreme Court held that group libel is not protected by the First Amendment. In *Beauharnais v. Illinois* (1952), the Court upheld a state law that prohibited any publication portraying "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed, or religion [which exposes such citizens] to contempt, derision, or obloquy or which is productive of breach of the peace or riots."[18] Justice Felix Frankfurter's opinion affirmed the conviction of individuals who had urged the Mayor and City Council of Chicago to protect white neighborhoods from "encroachment, harassment, and invasion ... by the Negro" and who called for "one million self respecting white people in Chicago to unite."[19]

Just as a state can punish defamation against an individual, wrote Frankfurter, so may it "punish the same utterance directed at a defined group."[20] Noting the strife caused by expressions of hate based on race and religion, he concluded that the government did not need to show that these expressions posed a "clear and present danger" because "libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.'"[21]

Beauharnais is the strongest authority for the government to regulate racist speech, and it has never been overruled. Yet it is very questionable whether it is still good law.[22] It was decided at a time when the Court considered any type of defamatory speech to be outside the protection of the First Amendment—a premise the Court expressly rejected a decade later in *New York Times v. Sullivan,* when the justices ruled in favor of civil rights advocates who were being sued for defamation by Southern segregationists.[23] The speech at issue in *Beauharnais,* however vile, was political speech, and it is highly doubtful that the Court today would allow punishment of individuals for expressing opinions about racial groups or calling for government actions.[24] In fact, a later decision, *R.A.V. v. City of St. Paul,* in 1992, strongly indicates that expression of hate is not entirely outside First Amendment protection.[25] As discussed below, there the Court declared unconstitutional a law prohibiting burning a cross or painting a swastika in a manner likely to cause "anger, alarm, or resentment." Moreover, the Illinois statute upheld in *Beauharnais* almost certainly would be declared unconstitutional today on grounds of vagueness and overbreadth.

A reflection of the abandonment of *Beauharnais* is found in the protection of Nazis' right to stage a march in the predominantly Jewish suburb of Skokie, Illinois. In 1977, the leaders of the Nationalist Socialist Party of America announced that they planned to hold a peaceful demonstration in Skokie, a town with many survivors of Nazi concentration camps. A trial court issued an injunction preventing the marchers from wearing Nazi uniforms, displaying swastikas, or expressing hatred toward Jewish people. The court relied in part on testimony concerning a large counter-demonstration and the fear of a violent confrontation between the two groups. Although the state appellate courts upheld this injunction, the

United States Supreme Court summarily reversed the state courts.[26] The Illinois Court of Appeals then modified the injunction so that it prohibited only display of the swastika. The Illinois Supreme Court vacated the entire injunction as violating the First Amendment.[27]

Meanwhile, Skokie adopted several ordinances meant to prevent the Nazis from speaking there. These laws required applicants for parade permits to purchase a substantial amount of insurance, prohibited dissemination of material that "promotes and incites hatred" based on race or religion, and outlawed wearing military-style uniforms in demonstrations. The United States Court of Appeals for the Seventh Circuit declared these ordinances unconstitutional and expressly said that it no longer regarded *Beauharnais* as good law.[28] After winning in the courts, the Nazi party canceled its rally in Skokie and held a small protest march in Chicago.

The Skokie controversy reflects many basic First Amendment principles. The courts ruled that expression of hate is protected speech, and the government may not outlaw symbols of hate such as swastikas. Moreover, the government cannot suppress a speaker because of an anticipated audience reaction. Skokie was not allowed to prevent the Nazis from marching even though their demonstration would deeply offend and upset Holocaust survivors and might even provoke a violent response. The Skokie litigation and other developments in First Amendment law since *Beauharnais* make it very difficult to argue that campuses can prohibit hate speech as a form of group libel.

Fighting Words

Another approach that government might take to banning hate speech is by considering it a form of fighting words. Many colleges and universities have based their hate speech codes around the fighting words exception to the First Amendment. Professor Lawrence used this argument to claim that colleges and universities can prohibit hate speech.[29]

In the 1942 case *Chaplinsky v. New Hampshire,* the Supreme Court expressly held that "fighting words" are unprotected by the First Amendment.[30] Chaplinsky, a Jehovah's Witness, was distributing literature for his religion on a street corner on a Saturday afternoon and gave a speech denouncing other religions as a "racket." He said at one point to a listener, "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."[31]

The Supreme Court upheld Chaplinsky's conviction for this speech, saying that "allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and *the insulting or fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace*."[32] The Court said that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution."[33]

Chaplinsky appears to recognize two situations where speech constitutes fighting words: when the speech is likely to cause a violent response against the speaker, and when it is an insult likely to inflict immediate emotional harm. Each aspect raises questions. As to the danger that the listener will be provoked to fight, the issue is whether the appropriate response is to punish the speaker or punish the person who actually resorts to violence. A physical reaction against a speaker should not be a basis for silencing the speaker; otherwise, it is too easy for people to silence the speech they don't like by threatening a reaction against it.

As to the infliction of emotional injury, the question—which is key in the discussion of hate speech—is whether any speech should be punished because it is upsetting or deeply offensive to an

audience.[34] Expression of ideas—for example, that a racial or ethnic group is inferior—also can inflict immediate emotional harm. Depending on the audience, speech expressing all types of ideas can inflict emotional distress. In the early 1960s, there is no doubt that civil rights protests deeply upset those who believed in segregation. Donald Trump's promise if elected to deport those not lawfully in the United States upset those who have to live in fear of deportation. Allowing speech to be censored or punished because it causes an immediate emotional reaction gives the government an unlimited power to restrict expression.

The Supreme Court has never overturned *Chaplinsky;* fighting words remain unprotected by the First Amendment. But in the more than seventy years since that decision, the Court has never again upheld a fighting words conviction. It has used three techniques in overturning these convictions.

First, in *Cohen v. California* (1971), the Court narrowed the scope of the fighting words doctrine by ruling that it applies only to speech directed at another person that is likely to produce a violent response.[35] Cohen was convicted of disturbing the peace for wearing in a courthouse a jacket with the words "Fuck the Draft." The state argued, in part, that the inscription on the jacket constituted fighting words because it might provoke violence from people who were angered by the message. In an opinion by Justice John Harlan, the Court rejected this reasoning: "While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not directed to the person of the hearer. No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult."[36]

The Court also applied this requirement in *Texas v. Johnson* (1989), where it held that flag burning, though deeply offensive to many, was a form of speech protected by the First Amendment.[37] One argument made by the government was that flag burning was likely to provoke a violent response from those who saw it and thus was a form of fighting words. Justice William Brennan's majority opinion rejected this contention for the reason given in *Cohen:* "No reasonable onlooker would have regarded [the] generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs."[38]

Second, the Court has often found laws prohibiting fighting words to be unconstitutionally vague or overbroad. *Gooding v. Wilson* (1972) involved an individual who was convicted for saying to a police officer at an antiwar demonstration, "White son of a bitch, I'll kill you," and "You son of a bitch, I'll choke you to death."[39] He was convicted under a Georgia law that forbade any person to "use to or of another, and in his presence opprobrious words or abusive language, tending to cause a breach of the peace."[40] The Court found that the statute's definition of fighting words would impermissibly allow for the prosecution of clearly protected speech. Three other cases decided that same year—*Rosenfeld v. New Jersey,*[41] *Lewis v. City of New Orleans,*[42] and *Brown v. Oklahoma*[43]—also involved the angry use of profanity in a manner likely to provoke an audience. In each case, the Court overturned the conviction.

Third, the Court has declared it impermissible to pass laws prohibiting some fighting words but not others. This was the result in *R.A.V. v. City of St. Paul* (1992), one of the Court's most important cases about hate speech.[44] A St. Paul ordinance prohibited placing "on public or private property symbols, objects, characterizations, or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[45] The Minnesota Supreme Court gave the ordinance a narrow construction so that it applied only to fighting words or incitement not protected by the First Amendment.

All nine Justices on the United States Supreme Court voted to declare the ordinance unconstitutional and overturn the conviction of a man who burned a cross on a black family's lawn. Justice Scalia noted that "the exclusion of fighting words from First Amendment protection means that they are regarded as essentially a 'nonspeech' element of communication," like "a noisy sound truck." But as with a sound truck, he added, "The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed."[46] The problem with the St. Paul ordinance was that it drew

content-based distinctions among expressions of hate: it prohibited hate speech based on race, religion, or gender, but not based on political affiliation or sexual orientation. Justice Scalia pointed out: "Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered."[47]

The Court has created a Catch-22 when it comes to the regulation of so-called fighting words: a law punishing fighting words in general will be struck down as too broad and vague (that is, it covers too much), but a narrower law, focusing just on certain kinds of fighting words, will be struck down as an illegitimate content-based distinction (that is, it covers too little). While the fighting words exception technically still exists within First Amendment law,[48] this Catch-22, combined with the fact that the justices have never upheld a fighting words conviction in all the years since *Chaplinsky,* makes it virtually impossible for public colleges and universities to regulate hate speech on these grounds.

Cross Burning

In *Virginia v. Black* (2003), the Court held that governments may prohibit cross burning when it is intended to intimidate, but this intent must be proven in the particular case; in other words, the mere act of burning a cross is not inherently unprotected speech.[49] A Virginia law prohibited cross burning "with an intent to intimidate a person or group of persons." The law also described an act of cross burning as "prima facie evidence of an intent to intimidate a person or group of persons." In evaluating the law, the Court simultaneously considered two separate cases: one involving Klan members who were convicted of burning a cross at a rally on an isolated farm, and the other involving two men who were convicted of burning a cross on the lawn of a home recently purchased by an African American family.

The Court's holding had three parts. First, the government cannot prohibit all cross burning. Justice Sandra Day O'Connor, writing for the majority in an 8–1 decision, explained that burning a cross is symbolic expression, and the government cannot ban symbols just because they are powerful and offensive. Second, cross burning as a means of communicating a serious intent to commit an act of unlawful violence to a particular individual or group of individuals—what is known in the law as a "true threat"—is not protected by the First Amendment.[50] Third, there must be proof in the individual case that the speech was a true threat. The Court concluded that the Klan members could not be punished for burning a cross on an isolated farm because the absence of onlookers meant that the action could not reasonably be seen as a true threat. But the Court made clear that the men who had burned a cross on an African American family's lawn could be convicted because this act obviously was a true threat.

By concluding that cross burning generally is protected speech, the Court prevents public colleges and universities from treating expression of hate as inherently punishable. But by allowing punishment of such speech in the context of a true threat, the Court does provide opportunities for campuses to deal with certain kinds of hateful acts.

Penalty Enhancements for Hate-Motivated Crimes

The final area where the Court has considered hate speech is in the context of laws that provide enhanced penalties for hate-motivated crimes. In *Wisconsin v. Mitchell* (1993), the Court upheld a state law that imposed greater punishments if it could be proved that a victim was chosen because of his or her race.[51] The Supreme Court emphasized that these penalty enhancements are directed at conduct, not at speech, and that they are justified because "bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest. The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases."[52] This logic is similar to that in employment discrimination cases, where the prohibition is focused on bad

conduct but speech acts may be part of the proof that bad conduct took place. In that sense, these cases do not provide a legal basis for regulating hate speech.

THE EXPERIENCE WITH HATE SPEECH CODES

This history allows us to understand the legal fate of previous efforts to pass hate speech codes. By the early 1990s, over 350 colleges and universities adopted hate speech codes. A number of these were challenged in court, and all to be challenged were declared unconstitutional.[53]

One of the most prominent examples involved the University of Michigan, which was motivated to devise a hate speech code after some truly horrendous events on campus.[54] In 1987, flyers were distributed that declared "open season" on blacks. Blacks were referred to as "saucer lips," "porch monkeys," and "jigaboos." A student disc jockey allowed racist jokes to be broadcast on the campus radio station, and student demonstrations were interrupted by the display of a KKK uniform from a nearby dorm window. Another flyer proclaimed, "Niggers get off campus" and "Darkies don't belong in classrooms—they belong hanging from trees." The university had to respond to such horrific expression.

The challenge was how to translate the natural desire to eliminate such egregious behavior into a policy that was consistent with the First Amendment. This proved extremely difficult. The policy adopted by the university in 1988 prohibited:

> 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 extra-curricular activities or personal safety; or
> b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
> c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.[55]

Shortly after this policy went into effect, in the fall of 1988, the University Office of Affirmative Action issued an interpretive guide entitled *What Students Should Know about Discrimination and Discriminatory Harassment by Students in the University Environment*. The examples of what was prohibited 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.[56]

Commenting on the breadth of this code, Kent Greenawalt observed that it "seemed to reach into the realm of obnoxious ideas civilly expressed."[57]

In practice, the code was used not against the kinds of purely hateful slurs that inspired its passage, but against people who expressed opinions that others objected to. Complaints were filed against a student who stated that Jewish people used the Holocaust to justify Israel's policies toward the Palestinians. Another student found himself facing punishment for saying that he had heard that minorities had a difficult time in a particular course. A graduate student in social work was subjected to

formal disciplinary procedures for asserting that homosexuality was a disease.[58] As the court noted, "On at least three separate occasions, students were disciplined or threatened with discipline for comments made in a classroom setting."[59] Eventually, a graduate student challenged the policy in federal court by claiming that the hate speech code put him at risk of punishment for studying certain controversial theories in his field of psychobiology, including the study of individual and group differences in personality traits and cognitive abilities.

A federal judge struck down the policy on the grounds that the University of Michigan's definition of what was prohibited speech was so broad and vague that it was "simply impossible to discern any limitation" on the policy's reach.[60] Any controversial or critical comment could put someone at risk for punishment. To qualify as prohibited under the code, the judge wrote, language must "'stigmatize' or 'victimize' an individual. However, both of these terms are general and elude precise definition. Moreover, it is clear that the fact that a statement may victimize or stigmatize an individual does not, in and of itself, strip it of protection under the accepted First Amendment tests."[61]

This was not an isolated outcome. Between 1989 and 1995, every court that examined a university speech code found the code unconstitutional. The hate speech code passed by the University of Wisconsin, for instance,[62] provided that the university could discipline a student in nonacademic matters in the following situations:

> For racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets or other expressive behavior or physical conduct intentionally:
> 1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
> 2. Create an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.[63]

The federal district court found this regulation unconstitutionally overbroad and vague, mostly because a great deal of speech that people might consider "demeaning" was clearly protected by the First Amendment.

When George Mason University suspended a fraternity in 1991 after it conducted an "ugly woman contest" with racist and sexist overtones, the United States Court of Appeals struck down the sanctions, explaining that the First Amendment protected even offensive and juvenile expression. The court declared: "We agree wholeheartedly that it is the University officials' responsibility, even their obligation, to achieve the goals they have set. On the other hand, a public university has many constitutionally permissible means to protect female and minority students. We must emphasize, as have other courts, that 'the manner of [its action] cannot consist of selective limitations upon speech.'"[64]

The invalidation of hate speech codes was not limited to public universities. In May 1990, the Stanford Student Conduct Legislative Council adopted a student conduct code, drafted by law professor and constitutional scholar Thomas Grey, that prohibited "discriminatory harassment," including "personal vilification of students on the basis of their sex, race, color, handicap, religion, sexual orientation or national and ethnic origin."[65] Personal vilification was defined as intentional, personally directed "fighting words or non-verbal symbols ... commonly understood to convey direct and visceral hatred or contempt for human beings" on the basis of their membership in those groups.[66]

In February 1995, a California Superior Court judge invalidated the Stanford code as violating a California statute, the Leonard Law, which provides that "no private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech ... that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment."[67] The Leonard Law thus says that private schools cannot punish speech that would be deemed protected in a public institution. The court declared: "Defendants' Speech Code does violate Plaintiffs' 1st

Amendment rights since the Speech Code proscribes more than just 'fighting words' as defined in *Chaplinsky*, and the later lines of case law. To this extent, therefore, Defendants' Speech Code is overbroad. In addition, however, the Speech Code also targets the content of certain speech [and] ... is an impermissible content-based regulation."[68]

The motivations behind the desire to punish hateful speech are laudable. So far, however, the legal and definitional challenges of translating these motivations into workable codes have proven impossible to overcome. After watching so many universities lose in court, some, such as the University of Pennsylvania, withdrew their hate speech codes; others, such as Yale, said they would not be enforced.[69]

SHOULD HATE SPEECH ON CAMPUSES BE PROHIBITED?

We believe, with legal scholars Delgado, Lawrence, Matsuda, and Waldron, that hate speech causes great harm and that colleges and universities must act to protect students from harm. Their advocacy was instrumental in causing many schools to adopt policies prohibiting such expression. But the courts have ruled that the First Amendment clearly prohibits public colleges and universities from using hate speech codes to achieve this goal.

This is the law. But should it be? After all, many countries punish speech that disparages or incites hatred against a person or group on the basis of race, religion, sex, ethnicity, or sexual orientation. Even if public colleges and universities are limited by First Amendment restrictions, there might still be good reasons why private colleges and universities should adopt such codes.

We think not. There are strong reasons why campuses should resist calls to censor and punish people who express ideas considered offensive, hateful, or demeaning.

First, decades and decades of efforts—by state governments, local municipalities, and campuses—have demonstrated that all such codes are impermissibly vague and overbroad. They all risk punishing people based on political viewpoint or worldview. Any rule that seeks to punish people for their speech must state specifically what is prohibited and what is allowed. Otherwise, too many people will be afraid to say anything controversial for fear that they will be singled out for arbitrary punishment based on unclear standards. There are no examples of codes that both are sufficiently specific and that apply only to unprotected speech. The Michigan code, for instance, prohibited "any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed." The Stanford code provided that "Speech or other expression constitutes harassment by vilification if it: a) is intended to insult or stigmatize an individual or individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin."[70] The University of Wisconsin code prohibited speech that was "demeaning" based on "race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals." Jeremy Waldron defined hate speech as "the use of words which are deliberately abusive and/or insulting and/or threatening and/or demeaning directed at members of vulnerable minorities, calculated to stir up hatred against them."[71]

These codes have an intentionally broad sweep, but precisely for that reason, they inevitably prohibit the expression of ideas that might be seen as "stigmatizing," "demeaning," or "insulting." In addition to being inherently vague, these concepts are also inherently politically charged. Much of what we debate as a society—including on college campuses—relates to whether certain forms of expression should be considered demeaning or insulting, and these disagreements often run deep. Many anti-racism and anti-sexism advocates make powerful arguments for why seemingly innocuous speech acts, and many forms of cultural expression, should be considered exclusionary and demeaning. Some even embrace the view that cultural reproduction of racism and patriarchy is built into the very foundation of our social order. Opponents of these positions sometimes claim the critics are too quick to find oppression, that they are humorless, or that their concerns, while sometimes legitimate, are overstated. Others argue that what the critics consider demeaning (such as sexualized depictions of women or certain examples of cultural appropriation) are actually empowering. The arguments are endless.

Given this level of disagreement, any hate speech code can, in theory, either lead to the punishment of very many people (who may not think they are demeaning anyone) or result in a refusal to punish many arguably stigmatizing speech acts. The upshot is that people will inevitably be punished for their political views, with arbitrary and often surprising results. Given the definitional problems, how could it be otherwise? Suppose gay and lesbian students complain that they are demeaned by a Christian student's expressed belief that traditional heterosexual marriage is the only true marriage. Should the university deny that this belief is demeaning, or punish the student? What if the Christian student then complains that the gay students' complaint demeans and stigmatizes her religious beliefs? The door is open to an endless succession of claims and counterclaims. Justice Clarence Thomas believes that affirmative action programs stigmatize minorities on the basis of race and "stamp minorities with a badge of inferiority."[72] Could a student's advocacy of affirmative action be taken as stigmatizing minorities as inferior? What of Laura Kipnis's argument that overly protective approaches to sex on campus stigmatize women? Or the claim that some anti-racism rhetoric demeans whites and is calculated to stir up hatred against them? These challenges are inherent to the entire enterprise. They cannot be solved with better definitions.

This brings us to our second argument against such codes: they are often used to punish the speech of people who were not their intended targets. Vague and overbroad laws inherently risk discriminatory enforcement, and that is exactly what has happened with hate speech codes. As Nadine Strossen observes: "One ironic, even tragic, result of this discretion is that members of minority groups themselves—the very people whom the law is intended to protect—are likely targets of punishment. For example, among the first individuals prosecuted under the British Race Relations Act of 1965 were black power leaders."[73] Although the English law was adopted in response to a rise in anti-Semitic incidents on campus, it was used against those who advocated on behalf of Israel, by people who argued that according to United Nations General Assembly resolution no. 3379, Zionism was a form of racism.[74]

That has also been the experience with hate speech codes in the United States. As Henry Louis Gates Jr. notes:

> During the years in which Michigan's speech code was enforced, more than twenty blacks were charged—by whites—with racist speech. Not a single instance of white racist speech was punished. ... A full disciplinary hearing was conducted only in the case of a black social work student who was charged with saying, in a class discussion of research projects, that he believed that homosexuality was an illness, and that he was developing a social work approach to move homosexuals toward heterosexuality.[75]

Hate speech codes around the world have often been applied in politically charged ways. In 2006, individuals in Sweden were convicted for distributing leaflets to high school students saying homosexuality was a "deviant sexual proclivity," had "a morally destructive effect on the substance of society," and was responsible for the development of HIV and AIDS.[76] In 2009, a member of the Belgian Parliament was convicted of distributing leaflets with the slogans "Stand up against the Islamification of Belgium," "Stop the sham integration policy," and "Send non-European job seekers home."[77] The European Court of Human Rights affirmed these convictions, rejecting defenses based on freedom of speech.[78] In Poland, a Catholic magazine was fined $11,000 for inciting "contempt, hostility and malice" by comparing a woman's abortion to the medical experiments at Auschwitz.[79] In 2008, film star Brigitte Bardot was convicted by French authorities for placing online a letter to president Nicolas Sarkozy in which she complained about the Islamic practice of ritual animal slaughter. It was her fifth conviction for hate speech.[80] In 2011, Scottish football fan Stephen Birrell was sentenced to eight months in prison for insulting Celtic F.C. fans, Catholics, and the pope on a Facebook page. During sentencing, the sheriff, Bill Totten, told Birrell that his views would not be tolerated by "the right-thinking people of Glasgow and Scotland."[81] In Kenya, hate speech laws are used only against those who speak out against the ruling party's Jubilee Alliance, including a movement leader who

contested the 2013 election results, a student activist who criticized the president on Twitter, and a blogger who said the president was "adolescent."[82]

We come back to a central point: protecting hate speech is necessary because the alternative—granting governments the power to punish speakers they don't like—creates even more harm. The argument in favor of hate speech laws is essentially an argument for granting people in authority the power to censor or punish individuals who insult, stigmatize, or demean others, and it is inevitable that such vague and broad authority will be abused or used in ways that were not contemplated by censorship advocates.

Even if one could punish exactly the hateful speakers one hopes to punish, the entire process risks making martyrs and rallying support for those sanctioned. For example, the Dutch government's hate speech prosecutions of far-right politician Geertz Wilders led to more attention to his anti-Muslim sentiments and his criticisms of Moroccan immigrants. It allowed him to motivate the increasing ranks of his supporters by claiming that "If speaking about this is punishable, then the Netherlands is no longer a free country but a dictatorship." (One of his tweets reads, "Prosecuted for what millions think.") [83] Moreover, as Strossen notes, these bans can stultify "the candid intergroup dialogue concerning racism and other forms of bias that constitutes an essential precondition for reducing discrimination" and can "generate litigation and other forms of controversy that will exacerbate intergroup tensions."[84]

There is also no evidence that the presence or absence of hate speech laws results in more tolerant attitudes toward vulnerable groups or in less discrimination. In the United States, even without hate speech laws, we have moved from only 4 percent of Americans approving of interracial marriage in 1958 to 86 percent approval in 2011, with about 15 percent of all new marriages in 2015 between persons of different races. According to FBI statistics, the total number of U.S. hate crime incidents decreased from 8,759 in 1996 to 6,628 in 2010 and to 5,928 in 2015. Even without punishing anti-gay sentiment, acceptance of same-sex marriage has dramatically increased between 2001 (when 57 percent of people opposed it) to 2016 (when 55 percent favored it), mostly because of the greater presence of gay and lesbian voices and experiences in American culture and politics. By contrast, in Europe, the Anti-Defamation League's survey of anti-Semitism reports higher levels in all European countries surveyed, despite their having hate speech laws, than in the United States. A report from the EU Fundamental Rights Agency reports an increase in hate crimes between 2000 and 2009 in eleven out of fourteen surveyed EU nations. As one commentator puts it in his review of Waldron's discussion of hate speech, "Waldron demands that defenders of current First Amendment protections answer the question of whether the targets of abuse 'can [lead their lives], can their children be brought up, can their hopes be maintained and their worst fears dispelled, in a social environment polluted by [hate speech]?' The answer seems to be an emphatic 'yes.'"[85]

Finally, although advocates for speech codes claim that hate speech plays no part in the legitimate expression of ideas, we believe that censorship of words leads inevitably to the censorship of ideas. It is tempting to say that campuses should at the very least be able to prohibit epithets; words like "nigger" and "faggot" cause great harm. But it is not difficult to imagine contexts—in scholarly analysis, popular culture, or casual conversation—where the use of any given word would be considered appropriate. As Justice Harlan eloquently explained: "We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."[86] Hate speech codes inescapably ban the expression of unpopular ideas and views, which never is tolerable in colleges and universities.

But even if colleges and universities can't and shouldn't try to ban hate speech, they still must act to create a conducive learning environment for all students. The question becomes: what can they do?