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The hate speech phenomenon presents complex and potentially agonizing problems for American colleges and universities. The problem has attained high visibility in recent years as reports of hate behavior incidents on college campuses have increased. In response, many institutions have amended their student conduct codes or promulgated new regulatory policies to combat actual or potential hate speech problems. Various nonregulatory initiatives, not dependent on establishment of behavioral standards and punishment of violators, have also been implemented.[1]

For public institutions, attempts to regulate hate speech raise substantial legal issues under the First Amendment of the U.S. Constitution. For private institutions, which may not be bound by the First Amend-

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[1]Hate behavior incidents and institutional responses have been widely reported in the popular and professional press; leading examples are discussed in various of the references included at the end of this article. Most of the examples used in this article are based upon incidents reported in press accounts. For a listing of fifteen representative examples of hate speech incidents and discussion of which ones might be regulated consistent with the First Amendment [see 12, pp. 244–45]. For specific examples of institutional regulatory policies on hate speech [see 16, pp. 194–201, 230–35; 23, pp. 274–77; and 25, pp. 3–5].

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ment, attempts to regulate hate speech raise sensitive policy questions concerning the role of free expression on campus. Numerous articles (many of which are listed in the references below) have undertaken *substantive* analysis of these constitutional issues and policy questions. In contrast, this article explores a preliminary and overarching concern: the *process* by which a college or university addresses the problem of hate speech, and in particular the *process* by which the institution manages the First Amendment aspects of the problem. In other words, this article focuses on the decision-making *process* rather than on the decisions themselves; it is the journey, not the destination, that is of primary concern.

The Character and Harms of Hate Speech

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. Epithets, slurs, insults, taunts, and threats are common labels used to describe hate speech.

Hate speech takes many forms. It is not limited to a face-to-face confrontation or shouts from a crowd. It may appear on T-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 computer screens. 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, KKK insignia, and Confederate flags; and even through themes for social functions, such as black-face Harlem parties, jungle parties, or white history week parties.

Hate speech is a particular concern because of the harm it causes to the victim, the victimized group, the campus community, and ultimately to society [5, pp. 135–49; 14, pp. 458–66; 18, pp. 2335–41; 23, pp. 271–77, 317–24]. On one level, when hate speech is directed at particular individuals, it causes real hurt to those individuals. The victim may feel humiliation, shock, outrage, fear, and anxiety — both at the time the hate speech is inflicted and for long after the incident. 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. On yet another level, hate speech causes harm to the entire campus community — with the heaviest burdens still borne by the victimized groups [18, pp. 2370–73]. 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 [14, pp. 437, 456, 467–71; 19, p. 25]. Members of the victimized groups, moreover, may be unable to take full advantage of the educational opportunities available at the university [23, pp. 275–77, 317–18]. A sense of community — both for the residential community and for the community of learners — may be lost to the campus.

All these various harms of hate speech implicate deeply held values of equality and individual dignity. Whenever threats to these values move higher educational institutions to prohibit hate speech and punish its purveyors, however, free speech values become implicated as well. It is because both sets of values are at stake — and because the resulting value clashes raise complex issues concerning the mission of higher education [23, pp. 318–25] — that institutions must approach the hate speech problem with exceeding sensitivity and care.

First Amendment Aspects of Hate Speech

Hate speech employs words and symbols to convey a message. Campus hate speech regulations may serve to prohibit such messages and punish the speakers for what they have said. Institutional attempts to regulate hate speech thus raise constitutional issues under the free speech and free press clauses in the First Amendment of the U.S. Constitution. Formally, only public colleges and universities are bound by the First Amendment; private institutions, not being engaged in state action, are not so constrained [13, pp. 18–24]. In practice, however, private institutions may voluntarily commit themselves to comply with First Amendment norms. In the context of hate speech, many private institutions have undertaken to do so and thus will be as concerned with First Amendment principles as are public institutions.

Four major free speech principles serve to constrain the authority of

institutions to regulate hate speech. The combined impact of these principles is substantial, and the constraints which arise from them are severe. As suggested below, however, these principles do not eliminate all possibilities for regulating hate speech; nor do they limit the use of nonregulatory alternatives for dealing with the problem.

Under the first free speech principle, regulations of the content of speech — that is, of the speaker's message, and especially of the speaker's viewpoint — 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" [24, pp. 95–96; see also 34, pp. 1173–74]. Under this principle, a content-based restriction on speech will be unconstitutional unless: (1) the restricted speech falls within one of the narrow exceptions such as those for obscenity, defamation, and fighting words [30, pp. 3–5]; or (2) the restriction "is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end" [35, p. 270].

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 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 speaking, may often be the more important element of the overall message. . . . [4, p. 26; see also 34, p. 1175].

Under the third free speech principle, speech may not be prohibited merely because persons who hear or view it are offended by the message. Only last year, the Supreme Court reaffirmed that "if 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" [31, p. 2544; see also 11, p. 795]. The Court has also indicated that this principle applies even to "virulent ethnic and religious epithets . . . and scurrilous caricatures" [33, p. 2410], and that this principle applies specifically to higher educational institutions: "[T]he mere dissemination of ideas — no matter how offensive to good taste — on a state university campus may not be shut off in the name alone of 'conventions of decency' " [21, p. 670].

Under the fourth free speech principle, government may not regulate speech activity with provisions 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" [20, p. 433; see also 6, p. 864 and 34, p. 1168].

Each of these four free speech principles applies fully to colleges and universities. The Supreme Court has asserted that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech" [21, p. 671]. And in *Healy v. James*, the Court emphasized that

> the 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, "The vigilant protection of Constitutional freedoms is nowhere more vital than in the community of American schools." [9, pp. 180–81, quoting 26, p. 487].

At the same time, however, the Supreme Court has made clear that academic communities are "special environments," and that "First Amendment rights . . . [must be] applied in light of the special characteristics of the school environment. . . ." [9, p. 180; 32, p. 506; 35, p. 268 n.5]. As the Court has further explained, "[a] university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities" [35, p. 268 n.5]. The interests that academic institutions may protect and promote and the nature of threats to these interests may thus differ from the interests which may exist for other types of institutions and in other contexts [3; 23, pp. 318–25]. Therefore, although First Amendment principles do apply with full force to the campus, their application may be affected by the unique interests of academic communities.

The Importance of Process

To take full account of the four free speech principles above, in conjunction with the many other complexities of hate speech problems, higher education institutions need a structured process for decision making on these matters. The design of the process, every bit as much as the substantive analysis of First Amendment law, is critical to the success of an institution's endeavors in the hate speech arena. Clearly, not any process will do. The following five criteria describe attributes that an insti-

tutional process should possess 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 legal and the policy aspects of the hate speech problem and must include consideration of both equality and free speech values. The process must also expose the relevant sociological, psychological, and philosophical aspects of the problem, so that the expertise of these disciplines might illuminate the underlying causes of hate behavior and its effects upon individuals, groups, and institutions. The process must also 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 all of the various constituencies represented in the student body should be included, as should faculty and administrative staff. Such dialogue should be both a starting point for, and an end product of, the process. At the start, the process should flush out and seek mutual respect for the differing points of view regarding the hate speech problem. At its end, the process should have begun to foster conditions of tolerance that allow the dialogue to continue productively into the future [19, pp. 24–25].

Criterion Number Three: The process must encompass and facilitate consideration of nonregulatory as well as regulatory options for managing the hate speech problem, giving priority to the nonregulatory options. There are two quite different approaches to dealing with hate speech on campus: the regulatory approach and the nonregulatory approach.[2] The former, unlike the latter, relies on the prohibition of certain types of speech and the imposition of involuntary sanctions on transgressors. As between the two, nonregulatory initiatives may reach or engage a wider range of students, may have a more influential impact on student attitudes and values [17, pp. 245–46; 27, pp. 934–36 and 943–44], and may better foster an institutional environment inhospitable to hate behavior. Thus, nonregulatory initiatives may have a broader and longer-range impact on the hate speech problem. Nonregulatory initiatives may also be more in harmony with higher education's mission to foster critical examination and dialogue in the search for truth [27, pp. 942–44]. Nonregulatory initiatives, moreover, do not raise substantial First Amend-

[2]Various nonregulatory options are included in Phase IV.A of the proposed process set out below. Various regulatory options are included in Phases IV.B and VII of the process.

ment issues or risk erosion of free speech values as regulatory initiatives do. For these reasons, the decision-making process should focus first on nonregulatory options, moving to regulatory options only if — and to the extent — the institution determines that nonregulatory initiatives will not suitably alleviate the hate speech problem.

Criterion Number Four: The process must assure that the institution's initiatives for combating hate speech are adapted to the particular circumstances of its 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 — in the climate of tolerance that prevails, in the diversity of the student body, in the perceptions and attitudes commonly shared by students, in patterns of social interaction, in 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 [7, pp. 4–5].

To achieve such concreteness, the process must provide for identification of each particular type of hate speech the institution desires to regulate and 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 and 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 an institution'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 without substantial risk that a court would later find the regulation unconstitutional.

A Proposed Process for Managing the Hate Speech Problem

What specific process might meet the five criteria set out above? The following nine-phase process provides a specific example that should fit the needs of most institutions seeking to address the hate speech problem.

The proposed process is phrased in terms of steps for "the institution" to take. It does not further specify which administrators or bodies within the institution will implement or oversee the process or who will make the final decisions concerning the options and strategic choices that will arise as the process proceeds. These matters should be addressed before the process is initiated — and should be reconsidered as the process proceeds, because unforeseen options may arise that fall within the authority of administrators or bodies that have not been assigned decision-making roles within the process. Moreover, the institution's legal counsel should be involved in the process from the beginning and should be especially involved in Phases V–IX.

Phase I. Preparation

A. Researching the manifestations and effects of the hate speech problem on American campuses.
B. Studying your institution's missions and goals as they relate to the hate speech problem
C. Listening to complaints and perspectives of the campus community
D. Initiating campus dialogue on the problem and appropriate responses.

Phase II. Canvassing and Cataloging

A. Collecting facts on specific hate behavior incidents on your campus, or illustrative incidents from other campuses
B. Characterizing specific incidents (for example, racist, sexist, or homophobic incident; for example, incident perpetrated by student, by staff member, or by outsider; for example, incident involving speech or incident not involving speech).

Phase III. Understanding the Problem

A. Nature and extent of the hate behavior problem on your campus
B. The groups that are victimized and the types of harms inflicted
C. Underlying causes of the hate behavior problem
D. Free speech aspects of the hate behavior problem.

Phase IV. Identifying Options

A. Nonregulatory options
    1. Education options
        a. curriculum revisions
        b. orientation programs
        c. special presentations
    2. Training options
        a. training for student leaders
        b. training for staff (for example, hall advisers, campus security officers)
    3. Diversity options (revising admissions or hiring processes to increase campus diversity)
    4. Extracurricular programming options (sponsoring activities that bring various groups together and break down barriers; for example, community service projects)
    5. Support options (helping victims to heal and perpetrators to understand effects of actions; for example, counseling services)
    6. Counter-speech options (condemning/repudiating hate behavior incidents: institutional officials, student leaders, and campus groups as counter-speakers)
    7. Communication options (improving channels of communication between administrators and students, and among various student constituencies; for example, processes for reporting hate behavior incidents, open forums for discussion of race relations issues)
    8. Conflict-resolution options (for example, voluntary mediation for persons or groups affected by hate behavior incidents)
B. Regulatory options
    1. External regulation (for example, ethnic intimidation laws, civil rights laws, state tort law)
    2. Internal regulation (for example, student codes of conduct, nondiscrimination policies).

Phase V. Selecting Options

A. Giving priority to nonregulatory options
B. Matching options to objectives

C. Considering incremental approaches utilizing combinations of options
D. Obtaining input and feedback.

Phase VI. Pursuing Internal Regulation: Determining What to Regulate (the "catalog and shopping list" approach)

A. Studying the catalog of hate behavior incidents (II above) in light of the options selected (V above)
B. Creating a shopping list of types of incidents to be regulated.

Phase VII. Pursuing Internal Regulation: Determining How to Regulate Consistent with the First Amendment (matching shopping list items to free speech theories)

A. Regulating hate behavior that does not use words or symbols to convey a message (the "nonspeech" rationale)
B. Regulating the nonspeech aspects of a course of conduct that has both speech and nonspeech aspects (the expressive conduct rationale)
C. Regulating the time, place, or manner of hate speech (the content-neutral rationale)
D. Regulating hate speech that is obscene or defamatory or constitutes incitement or fighting words (miscellaneous rationales permitting content-based regulations of speech)
E. Regulating hate speech addressed to particular individuals in whom it creates realistic fear for personal safety or security of property (the intimidation/threat/harassment rationale)
F. Regulating hate speech in private areas which infringes upon individuals' privacy interests (the captive audience/invasion-of-privacy rationale)
G. Regulating hate speech that implements or reinforces a pattern of discriminatory conduct (the nondiscrimination rationale)
H. Regulating pervasive patterns of hate speech that prevent a particular targeted group from obtaining full benefit of an education (the equal educational opportunity rationale).

Phase VIII. Internal Regulation: Other Legal Considerations

A. Avoiding overbreadth and vagueness in drafting regulations
B. Considering First Amendment issues that may arise in the imposition of particular *penalties* on particular violators.
C. Complying with *state* constitutional rights of free expression
D. Differentiating First Amendment standards for regulating *student* speech from those for regulating *employee* speech.

Phase IX. Internal Regulation: Strategic Considerations

A. Determining which general types of hate speech are to be regulated: racist? sexist? homophobic? ethnic? anti-semitic?
B. Determining which persons are to be protected: only persons from historic victim groups (for example, blacks, women, religious minorities) or all persons (whites as well as blacks, and so on.)
C. Determining the persons whose speech is to be regulated: students only? also faculty? also staff?
D. Determining whether student organizations as well as individual students will be subject to regulation
E. Determining the intention with which a speaker must have acted before his actions will violate the regulations or be subject to an enhanced penalty: an intent to harm the victim? an intent to discriminate by race, sex, and so on? or no intent requirement, so that unintentional actions will nevertheless violate the regulations?
F. Determining the types and levels of sanctions to be applied to violators: punitive (suspension, expulsion)? educational or remedial (counseling, sensitivity training, community service)?

Implementation of the Proposed Process

The nine-phase process provides a logical progression for addressing the hate speech problem on a particular campus. All institutions that choose to address this problem through this process should follow at least the first three phases. Institutions that decide to take some action concerning hate speech should proceed at least through Phase V. Institutions that decide to pursue internal regulation should complete the rest of the process.

The following commentary further explains each of the nine phases, with particular emphasis on the regulatory phases (VI–IX).

Phase I. This phase responds to criteria no. 1 and no. 2 above. The institution marshals general information and opinion relevant to the hate speech phenomenon on American campuses generally as well as on its own campus. The institution also seeks to initiate and nurture campus dialogue concerning hate speech. These steps lay the foundation for further consideration of the problem.

Phase II. This phase responds to criterion no. 4 above. The institution particularizes the hate speech phenomenon to its own campus and makes its inquiry as concrete as possible. In effect, the institution creates a "catalog" of specific incidents that have occurred on its campus and

have concerned students or administrators, supplementing it with representative examples of incidents from other campuses.

Phase III. This phase further responds to criteria no. 1 and no. 4 above. Using information and insight gained in Phases I and II, the institution develops a comprehensive understanding of the hate speech phenomenon on its campus and in general. Obviously, the institution must understand the phenomenon before it will be in a position to determine whether it has a problem requiring action, or what action might be required.

Phase IV. This phase responds to criterion no. 3 above. It is of critical importance that the institution identify and weigh nonregulatory options before focusing on regulatory options. If it does focus on regulatory options, the institution should consider not only internal regulation but also reliance on external regulation — that is, the enforcement of federal, state, and local law that may apply to some hate behavior [5, 15]. In this phase, the institution should also identify existing resources (for example, courses on race relations or multiculturalism; complaint or reporting mechanisms, disciplinary or grievance processes) that might be utilized in devising or implementing options, and existing personnel (for example, affirmative action officers, counseling center staff, student judicial affairs officers) who can assist in creating new options.

Phase V. This phase further responds to criteria nos. 2, 3, and 4 above. To proceed through this phase, the institution should, in short, "determine the objectives, examine the alternative methods of obtaining these objectives, and choose the best method for doing so" [2, p. 5]. Because it is unlikely that any one option (or method) standing alone will achieve institutional objectives regarding hate speech, the institution should consider combinations of nonregulatory options or nonregulatory options combined with external or internal regulatory options, each option making an incremental contribution to resolving the overall problem. Just as it is important to obtain input in identifying options (*see* Phase IV above), it is important to obtain input in selecting options and feedback on the tentative selections. Such input and feedback may be considered a continuation of the campus dialogue initiated in Phase I. D of the process and could be implemented through informal mechanisms such as opportunities to comment on tentative proposals, as well as more formal mechanisms such as open hearings in which witnesses testify concerning proposed options.

Phase VI. This phase further responds to criterion no. 4 above and provides a partial response to criterion no. 5. Phase VI builds upon the work done under Phase II. Phase II used the metaphor of the "catalog";

this phase uses the metaphor of the "shopping list" that is drawn from the catalog. This shopping list of types of hate speech incidents that the institution wishes to regulate provides a concrete, realistic focus for the institution's consideration of internal regulatory options in Phase VII.

Phase VII. This phase further responds to criterion no. 5 above. Institutions proceeding through this phase must pay particular attention to the four free speech principles set out above. What is called for, in effect, is a matching process. The institution attempts to match each item on its shopping list (from Phase VI) to some acceptable First Amendment rationale for regulation, keeping in mind that "regulatory failure sometimes means a failure to correctly match the tool to the problem at hand" [2, p. 191]. This regimen of matching will likely result in a combination of internal regulatory approaches, each one geared to a particular segment of the hate behavior the institution wishes to confront.

Under such an incremental approach, it is unlikely that all the items on the institution's shopping list could be regulated consistent with the First Amendment. Some items could be regulated only at the price of substantial intrusion upon free speech values and substantial risk of later judicial invalidation. The institution may consider such a price to be too high and may therefore remove the risky items from its list.

To guide the matching process, Phase VII sets forth eight approaches to regulating "hate behavior segments" consistent with the First Amendment. It is clear that the approaches in VII. A, B, C, and D could be constitutionally implemented with carefully crafted regulations.[3] Strong arguments can also be made to support the approaches in VII. E and F, but due to the relative paucity of precedent directly on point, their constitutionality is not quite as clear as for approaches A–D. The approaches in VII. G and H are the most speculative of the eight approaches, but solid arguments and some precedent can be marshalled in their support. The following discussion briefly examines each of the eight proposed regulatory approaches.

A. The institution may regulate hate behavior that does not use words or symbols to convey a message and therefore does not involve

[3]There is continuing controversy, however, over the validity and scope of the "fighting words" rationale in VII.D [14, pp. 449–57]; [29, pp. 508–14]; [17, pp. 252–63]; [8, pp. 294–98; 16, pp. 222–25]. The defamation rationale in VII.D would also become controversial if extended to "group defamation" (that is, statements defaming racial or other groups rather than individuals as such). Many commentators and courts have concluded that group defamation laws would likely be unconstitutional [8, pp. 303–6; 29, pp. 517–20; 16, pp. 225–26], and the defamation rationale contemplated by VII.D is accordingly limited to defamation of individuals.

protected speech. Examples of such behavior, that have occurred in recent years on college campuses, include throwing eggs, public urination, spreading human excrement, burning buildings, kicking, shoving, beatings, spitting, stone throwing, trashing of rooms, and blocking of pathways and entryways. Such actions clearly are not protected by the First Amendment. All such activities can therefore be reached under carefully drafted regulations concerning physical attacks, destruction or defacement of property, and other prohibited acts such as indecent exposure or arson.

B. When hate speech is combined with nonspeech actions in the same course of behavior, the institution may regulate the nonspeech aspects of the behavior without violating the First Amendment. For example, a campus building may be spray-painted with swastikas or hate slogans; graffiti may be painted on campus sidewalks; epithets may be carved or burned into a dorm room door. All these behaviors convey messages; all therefore involve speech. The behavior also has a nonspeech aspect, however; it constitutes a destruction of property. While an institution cannot prohibit particular messages, it can prohibit destructive acts. Such acts may therefore be covered under neutral regulations governing such nonspeech matters as destruction and defacement of property.[4]

C. Even though the institution usually may not regulate the *content* of speech (free speech principle no. 1), it may regulate the *time, place, or manner* of speech. For instance, an institution may regulate noise levels in or near the library during library hours, or near classrooms while classes are in session, or on dormitory quadrangles during hours when residents are likely sleeping; or an institution may prohibit the construction of symbolic displays or structures in certain areas of the campus. Such regulations will usually be constitutional if they are applied alike to all speech rather than selectively applied only to hate speech. Thus, for example, if an

[4]Under this regulatory approach, it may be necessary to distinguish between the validity of the regulation itself and the validity of the *penalties* imposed pursuant to the regulation. So long as all violators are subject to the same penalties, whether or not there were speech aspects to their behavior, the imposition of penalties does not create additional first amendment problems. But if behavior with speech aspects is penalized more harshly than non-speech behavior because of the institution's special concern for hate speech, additional problems may arise. Suppose, for example, that an institution applies a destruction of property regulation to student A, who covers a classroom wall with nondescript blotches of paint; and to student B, who paints a swastika on a classroom wall. If the institution penalizes student B more harshly because he had engaged in hate speech, the difference in treatment could be attributable to the *content* of B's speech. The penalty itself then, apart from the regulation, would raise issues under free speech principles one and three above and could be unconstitutional.

institution prohibits shouting (or use of a bullhorn) on the dormitory quadrangle between 1:00 and 6:00 a.m., the regulation may be used to punish a student for shouting racial epithets so long as it would also apply to, say, a student shouting out the final scores of night games in the American League.

D. The institution may regulate the *content* of speech which falls within one of several exceptions to the free speech principle prohibiting regulation of content (no. 1 above). Approach D pools together the established exceptions that are potentially relevant to the hate speech problem [30, pp. 3–5]. Thus, for example, if hate speech is delivered by the speaker in such a way as to constitute incitement, the institution may punish that speech under a regulation conforming to U.S. Supreme Court definitions of incitement [28, pp. 188–90, 192–93]. Parallel reasoning would apply to obscene speech, defamatory speech, and "fighting words." Each such exception is narrow, however, and taken together they would cover only a very small portion of hate speech incidents that arise. The most adaptable of these exceptions, and the one most frequently discussed with reference to hate speech, is the fighting words exception [17, pp. 252–63]. But because a fighting words regulation would cover so few incidents of hate speech, its importance would be mostly symbolic [28, pp. 198–99].

E. The institution probably may regulate hate speech that constitutes intimidation, threats, or harassment addressed to particular individuals and creating in such individuals a realistic fear for their physical safety or the security of their property. Such a regulation might also possibly be extended to speech creating a realistic fear for the physical safety of the individual's family, living group, or friends. Speech activities with such effects are analogous to assaults and related actions that typically are punishable under both criminal law and tort law [15]. An intimidation/threat/harassment regulation could apply not only to certain face-to-face confrontations but also to such matters as notes containing threats of physical harm and harassing phone calls to a student's dorm room. It could also apply to a situation where white male students trail a black female student across campus at night, taunting her with sexual comments suggesting the possibility of rape; or to a situation where white students dressed in KKK garb burst into a black student's room at night, burn a paper cross, and make racially derogatory comments. Such activities, even though they are carried out in part through speech, may be narrowly regulated because the danger of physical harm to person or property, and the

accompanying psychic injury to the person so threatened, will override whatever speech interest may be at stake [29, pp. 571–72 (appendix, pt. 3)].[5]

F. The institution probably may regulate hate speech that occurs in private areas of the campus and thereby infringes upon privacy interests of persons who are legitimately in these private places. The area most likely to qualify as private for purposes of such a regulation is the college dormitory, especially its private living areas. Library carrels and similar study areas would also likely qualify. Under current First Amendment doctrine, such private areas are not considered to be "public forums" open to public dialogue; and the persons occupying such private places may be considered "captive audiences" who cannot guard their privacy by avoiding the hate speech [29, pp. 501–4]. Thus a hate speech regulation limited to such circumstances may be constitutional even though a similar regulation applicable to public areas of campus would not be. If a white student places a racially derogatory poster in a dorm room corridor of a black theme dorm, for example; or if students tape a bouquet of condoms and a sign proclaiming "Jewish slut" to the door of a female student's dorm room, the institution should be able to reach such activity under a narrowly drawn regulation protecting privacy interests.

G. The institution may be able to regulate hate speech that serves to implement or reinforce a practice of discrimination by a campus organization or informal campus group. If a campus fraternity places a sign in front of its house reading "No Blacks Allowed," for instance, this speech may be an act of discrimination, making it less likely that black students would seek to become members of that fraternity. When such speech is an integral element of a pattern of discriminatory conduct, the institution should be able to cover the 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

[5]This regulatory approach could also raise the problem of "differential penalties," discussed with respect to a prior regulatory approach in note 4 above. Suppose, for example, that an institutional regulation generally prohibited intimidation, but the institution penalized intimidation involving hate speech more harshly than intimidation accomplished by other means. The question would be whether this harsher penalty was based on the content or offensiveness of the speaker's message and, if so, whether the First Amendment would countenance such a differentiation. A similar problem could arise where an institution had a regulation that punished intimidation accomplished through hate speech or behavior but had no regulations covering other types of intimidation accomplished through other means.

within the campus community is a compelling interest that justifies the limited intrusion into the discriminators' speech interests.

H. The institution may be able to regulate hate speech which is part of a pattern of hate behavior whose effects on the targeted group are so pervasive that group members are unable to benefit fully from campus educational opportunities. This rationale draws heavily upon the First Amendment view of the university as a "special environment." Under this rationale, pervasive patterns of hate speech, left unchecked, would undermine equal educational opportunity for the targeted group [23, pp. 275–77, 317–18], and the institution would then have a compelling interest in intervening to reestablish conditions of equality [17, pp. 250–51]. The U.S. Supreme Court has held that colleges and universities need not tolerate First Amendment activities that "substantially interfere with the opportunity of other students to obtain an education" [9, p. 189; 35, p. 277]. The Court has also held that eradication of race discrimination in higher education is a compelling interest that may override First Amendment claims [1, p. 2035; see also 35, p. 270]. The reasoning of such cases would arguably support narrow equal educational opportunity regulations that punish hate speech and other hate behavior in order to protect the targeted group from further harm. Such regulations could be invoked against student organizations or individual students only when a continuing pattern of hate speech has created educational harms sufficient to substantiate the institution's compelling interest in reestablishing conditions of equality. Were such a regulation challenged in court, the institution would have the burden of demonstrating that there is a pervasive pattern of hate speech on campus that has created a denial of equal educational opportunity to an identifiable racial or other minority group.

Phase VIII. This phase further responds to criterion no. 5 above. Even if the institution devises a regulatory initiative that falls squarely within one or more of the approaches in Phase VII, other constitutional problems may still need to be addressed. The institution's system of penalties for hate speech violations may raise additional First Amendment concerns if hate speech is penalized more harshly than other activity violating the same institutional regulation.[6] The state constitution may protect some aspects of free expression to a greater degree than does the

[6]This is the "differential penalties" problem discussed in notes 4 and 5 above. The problem could arise under regulatory approaches B, C, E, and F in Phase VII, and perhaps under G.

federal Constitution, thus creating stricter constraints on the institution [13, pp. 10, 25–27; 30, p. 6]. Or, if the institution seeks to apply its regulations not only to students but also to faculty or other employees, additional First Amendment considerations may come into play.[7] And most importantly, the federal constitutional doctrines of overbreadth and vagueness (free speech principle no. 4, above) will subject the institution to stringent standards concerning the narrowness and clarity of its regulatory language.

The strictures that the overbreadth and vagueness doctrines place upon the drafting of hate speech regulations are well illustrated by the case of *Doe v. University of Michigan* [6]. The plaintiff, a graduate student, challenged the university's hate speech policy. The policy's central provision was aimed at "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." The policy prohibited such behavior if it "involves an express or implied threat" to, or "has the purpose or reasonably foreseeable effect of interfering" with, or "creates an intimidating, hostile, or demeaning environment" for individual pursuits in academics, employment, or extracurricular activities. This prohibition applied to behavior in "educational and academic centers, such as classroom buildings, libraries, research laboratories, and recreation and study centers." Focusing on the wording of the policy and the way in which the university had interpreted and applied the policy's language, the court held the policy to be unconstitutionally overboard on its face because its wording swept up and sought to punish substantial amounts of constitutionally protected speech. In addition, the court held the policy to be unconstitutionally vague on its face. This fatal flaw arose primarily from the words "stigmatize" and "victimize" and the clauses concerning a "threat" to or an "interfering" with an individual's academic pursuits — language which was so vague that students would not be able to discern what speech would be protected and what would be prohibited.

[7]The U.S. Supreme Court has developed a special area of law governing the free speech rights of public employees, and lower courts have frequently applied this law to faculty and staff members of higher educational institutions [13, pp. 184–86]. For cases concerning faculty expression alleged to be demeaning or offensive, *see Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986), *Omlor v. Cleveland State University*, 45 Ohio St.3d 187, 543 N.E.2d 1238 (1989), and *Piarowski v. Illinois Community College District*, 759 F.2d 625 (7th Cir. 1985). The institution's regulatory actions were upheld in all three cases. *But see Levin v. Harleston*, 770 F. Supp. 895 (S.D.N.Y. 1991), a faculty hate speech case in which the faculty member prevailed on free speech and due process grounds.

Similarly, in *UWM Post, Inc. v. Board of Regents of the University of Wisconsin System* [34], the court utilized both overbreadth and vagueness analysis to invalidate a campus hate speech regulation. The regulation applied to "racist or discriminatory comments, epithets, or other expressive behavior directed at an individual" and prohibited any such speech which "intentionally" (1) "demean(s)" the race, sex, or other specified characteristics of the individual, and (2) "create(s) an intimidating, hostile, or demeaning environment for education. . . ." The court held this language to be overbroad because it encompassed many types of speech that would not fall within any existing exceptions to the principle that government may not regulate the content of speech. Regarding vagueness, the court rejected the plaintiffs' argument that the phrase "discriminatory comments, epithets, or other expressive behavior" and the word "demean" were vague. But the court nevertheless held the regulation unconstitutionally vague because another of its provisions, juxtaposed against the language quoted above, created confusion as to whether the prohibited speech must actually demean the individual and create a hostile educational environment or whether the speaker must only *intend* those results and they need not actually occur.

Phase IX. This phase further responds to criteria no. 1 and no. 4 above. In addition to the legal considerations that are central to Phases VII and VIII, there are also various strategic considerations that the institution must address in drafting hate behavior regulations. Phase IX identifies the most important of these strategic considerations. There are policy implications to each of the strategic choices set out in this phase, and some of these choices may also have legal implications relating to the approaches and considerations in Phases VII and VIII. The choice regarding groups to be protected (IX.B) has engendered the most controversy thus far [17, pp. 241–44; 18, pp. 2357, 2361–63; 27, pp. 937–38; 29, pp. 506–7, 558–59]. But other choices are similarly difficult [17, pp. 244–45 (choice IX.A), pp. 245–46 (choice IX.E)]. Regarding intent requirements (choice IX.E), for instance, it is difficult to distinguish words intended to hurt a person from words intended to convey information — including information about the speaker's emotional state. A speaker may also have "mixed motives," intending in part to hurt but also in part to convey information [8, p. 298]. Or the speaker's intent may be impenetrable; it is not realistically possible to discern with any assurance what the intent was. Moreover, attempts to assess a speaker's intent may become tainted by subtle biases of those making the assessment; "there is a powerful tendency to attribute bad motives to those with whom we fundamentally disagree" [23, p. 324 n.253]. Although civil and criminal courts may be capable of grappling with such difficulties, they may be

beyond the capacities of typical student or student-faculty disciplinary boards. Courts draw upon the expertise of judges and attorneys and are guided by the structure of formal rules of evidence, formal procedural rules, and a body of judicial precedent. Institutional disciplinary boards generally do not have such expertise or such structure to assist them in making the fine-grained distinctions that intent requirements may entail.

Conclusion

As a general proposition, it is important for colleges and universities to focus on the *processes* they use to make and implement policy decisions. With a problem as sensitive and complex as the hate speech problem, process questions become a critical consideration, and a carefully structured process for decision making becomes a critical necessity. To guide institutions in these circumstances, this article has provided a proposed process in nine phases, along with suggestions for its implementation. This article also provides five criteria that may be used to formulate or to evaluate other processes an institution may wish to consider. Third, the article identifies the four key principles of First Amendment law that circumscribe the institution's discretion to deal with hate speech and suggests regulatory options that may be implemented consistent with these four principles. Careful attention to process, along the lines suggested in this article, may increase the campus community's receptivity to institutional decisions and initiatives concerning hate speech, may help defuse intergroup and interpersonal tensions on campus, and may enhance the quality and clarity of whatever policy and legal decisions the institution makes.

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