CAMPUS SPEECH CODES: A LEGAL AND PHILOSOPHICAL VIEW

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Abstract

The goal of this paper is to determine what needs to change about campus speech codes in order for them to succeed against First Amendment challenges. Campus speech codes are a popular solution to the problem of hate speech on campuses. However, many commentators argue that these speech codes are either unethical or unconstitutional. Additionally, speech codes have historically been struck down the courts. This paper assesses the legal history of hate speech regulation, the commentary surrounding the law, and prior court cases in which speech codes were struck down in order to determine what types of hate speech are valid targets of regulation and why speech codes have been struck down in the past. Further, this paper attempts to determine what types of hate speech actually should be regulated based on ethical and practical considerations. Finally, this paper provides a set of guidelines which should help universities construct morally permissible speech codes which will succeed against First Amendment challenges.
Introduction

Free speech stands as one of our most fundamental rights, treasured in how it empowers us to participate in politics, develop our individuality, and pursue the truth. It seems particularly important to the university setting, as individual growth and truth seeking are the very purpose of higher education. Universities seek to ensure that everyone who is admitted has equal access to education and can enjoy those benefits that free speech confers. Free speech and equal opportunity, however, seem to sometimes conflict with one another with regards to hate speech. On the one hand, hate speech seems to still in fact be speech, and therefore ought to enjoy First Amendment protection. On the other-hand there are legitimate concerns that hate speech may stifle the speech of minorities. In addition hate speech causes unwarranted harm and contributes to discrimination. These concerns become more relevant in light of the recent escalation in hate-crimes on campuses. One proposed approach to the problem of hate speech on campus is to regulate it by means of speech codes, which place penalties on certain types of hate speech, but these speech codes have been repeatedly struck down by the courts for over-breadth and a lack of clarity.

Although speech codes have historically been struck down by the courts, the project of regulating some types of hate speech is still worthwhile. If hate speech inhibits equal opportunity then that seems to be a compelling reason to regulate it at least to some degree. Future codes, however, will have to be more narrow and precise. In this paper I will investigate past speech codes and determine why these codes were struck down and what would have to change in order for them to be viable.

Section one will provide a brief overview of the debate between those who support and
those who oppose regulation of campus speech and the legal history of hate speech regulation. Section two will discuss what types of hate speech are valid targets of regulation. Section three will assess speech codes that do not work, and attempt to understand what about these codes failed both constitutional and moral standards. Finally, section four will assess what types of speech should be regulated.

**Section 1: The Debate Thus Far**

Interestingly, we might trace the legal history of the debate about hate speech back to *Brown v. Board of Education of Topeka*. In this case the Supreme Court ruled that “Segregation of white and Negro children in the public schools of a State solely on the basis of race... denies to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment – even though the physical facilities and other 'tangible' factors of white and Negro schools may be equal” (*Brown v. Board of Education* 1954: 486-496). This ruling makes the practice of segregation unconstitutional because it violates the Fourteenth Amendment. It is important to note that segregation was ruled unconstitutional even if the physical facilities at the segregated schools were equal (*Brown v. Board of Education* 1954: 493). The Court was not concerned with the provisions nor the facilities at schools, but with less measurable considerations such as the social and psychological ramifications of segregation on students (*Brown v. Board of Education* 1954: 493).

Dr. Charles R. Lawrence, a prominent proponent of regulation, argues that in *Brown* the Court is concerned with the message segregation sends, and so in regulating segregation the court regulates the content of racist speech. He argues that “Segregation serves its purpose by conveying an idea. It stamps a badge of inferiority upon blacks, and this badge communicates a
message to others in the community, as well as to blacks wearing the badge, that is injurious to blacks” (Lawrence 1990: 439-440). Lawrence is arguing that segregation signals to others that the segregated minority is less valuable than the majority. This “badge of inferiority” is an idea, and segregation is the means by which it is expressed. As a mode of expression, segregation is speech. Because the regulations put forth by Brown are regulations of an idea put forth by speech, Brown amounts to a regulation of the content of racist speech. If we accept Lawrence's argument, then Brown v. Board of Education would not only be a case about equal opportunity, but also about free speech. The decision in Brown would amount to the regulation of racist ideas, and provides legal precedent for such regulations.

One possible response to Lawrence's argument is that he has failed to distinguish between speech and conduct. It is not the message segregation sends that is being regulated, but rather the act of segregation itself because that act is discriminatory. However, Lawrence argues that this response misunderstands what segregation really is. “Although the exclusion of black children from white schools... can be characterized as conduct, these particular instances of conduct are concerned primarily with communicating the idea of white supremacy. The non-speech elements are byproducts of the main message rather than the message simply a by-product of unlawful conduct” (Lawrence 1990: 441). The argument he makes does not fail to distinguish between speech and conduct, he contends, it simply argues that in the case of Brown conduct is not what is being regulated. The real purpose of segregation is to send the message that minorities are inferior; that this message is spread through conduct is merely incidental. Lawrence argues that as a result, there is no point in regulating segregation outside of its message. Therefore, in regulating segregation the Court also regulates the message of white supremacy segregation.
Lawrence's argument does not seem plausible as it stands. Segregation does not just send the message that minorities are inferior, it also preserves resources for the dominant group. This seems to be at least as strong of a reason to regulate segregation as the message it sends. Further, it can be argued that the Court was not so much concerned with the message segregation sends, but rather the unavoidable effect it has on the child's mind. The court held that “To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone” (Brown v Board of Education, 1954: 494). The court sites a psychological study to support the claim that segregation has such an effect on black students attending segregated schools. Many would argue that this is not merely a message but rather a dire consequence of ones situation, one which children should not be expected to endure. This could undermine Lawrence's argument: psychic damage to children is at least as compelling a reason to regulate segregation as the message it sends while also being compatible with First Amendment concerns. The Court would not be regulating free expression, it would be regulating the state's ability to inflict an injury on children, regardless of the message that injury might convey.

At the same time it could be argued by Lawrence that this psychological damage is exactly what motivates hate speech regulation today. A great deal of the hate speech he would regulate causes just this kind of damage; this is the reason why he and his contemporaries argue for regulation. So the Court's reasoning may still provide precedent for regulation. Both sides have strong arguments to be made, and if Lawrence is correct then there is early legal precedent
for hate speech regulation which has been ignored for some time now. One possibility is that the Court was regulating both speech and conduct in *Brown v. Board*. The regulation of speech and conduct are not mutually incompatible, and there seem to be reasons to regulate both parts of segregation. In any case the point remains controversial.

Whether one accepts Lawrence’s argument or not, the Supreme Court case *Chaplinsky v. New Hampshire* certainly does provide at least some precedent for regulation. In *Chaplinsky v. New Hampshire*, the Court established the fighting words doctrine, which bans words that “by their very utterance inflict injury or tend to incite an immediate breach of the peace” (*Chaplinsky v. New Hampshire* 1942: 315). This doctrine has inspired many scholars including Alexander Tsesis, Kent Greenawalt, and Lawrence to defend hate speech regulations by arguing that hate speech falls within the category of fighting words. Quoting Lawrence again, the defense rests upon the idea that “The experience of being called 'nigger,' 'spic,' 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” (Lawrence 1990: 452). Because hate speech inflicts such an injury, it would be possible to regulate hate speech under the fighting words doctrine. In this way *Chaplinsky* has become a cornerstone of the hate speech and speech code debates.

The argument that hate speech should be considered fighting words has met considerable resistance. Nadine Strossen, former president of the ACLU and a professor of law, points out that the fighting words doctrine “has been substantially limited in scope and may no longer be good law” (Strossen 1990: 508). This is primarily because of the case *Gooding v. Wilson*. In this case the Court struck down a Georgia statute that punished opprobrious words or abusive language,
tending to cause a breach of the peace. The Court pointed out that the words “opprobrious” and “abusive” are defined in the dictionary as meaning “conveying or intended to convey disgrace” and “harsh insulting language” respectively. The Court said that “This definition makes it a 'breach of peace' merely to speak words offensive to some who hear them, and so sweeps too broadly” (Gooding v. Wilson 1972: 525-528). Strossen argues that this ruling undermines Chaplinsky because the court “treated only those words that 'tend to incite an immediate breach of the peace' as fighting words” (Strossen 1990: 509). The court completely ignores the first portion of the fighting words definition – words “which by their very utterance inflict injury,” – suggesting a narrowed definition of fighting words. By not even acknowledging this portion of the fighting words definition, the Court implies that it considers this part of the definition irrelevant. Further, the Court has ruled in accordance with this narrowed definition ever since Gooding (Strossen 1990: 509). As a result, the Court has effectively limited fighting words to words which threaten an immediate breach of the peace by simply not acknowledging the first prong of the fighting words definition.

Three other cases have also made it difficult to regulate hate speech: Cohen v. California, Doe v. University of Michigan, and R.A.V v. City of St. Paul. In Cohen, the Supreme Court struck down a California statute under which Paul Robert Cohen was punished for wearing a jacket with the words “fuck the draft” on it (Cohen v. California 1971: 15). The Court argued that the statute could not be defended under the fighting words doctrine because speech “conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well... We cannot sanction the view that the Constitution has little or no regard for that emotive function” (Cohen v. California 1971: 26). While not having to do with fighting
words directly, *Cohen* undermines *Chaplinsky* by protecting the emotive force of speech and consequently protecting a great deal of speech which might otherwise be considered fighting words under the first prong of the *Chaplinsky* dictum. Many words which by their very utterance inflict injury convey otherwise inexpressible ideas, and such words rely upon their provocative nature to do so. As a result, it is unclear whether the injury inflicted or the otherwise inexpressible emotions are favored by the Constitution. Referring to someone as a “spic” might inflict exactly the injury that Lawrence claims it does, but it also conveys otherwise inexpressible emotions.

In *Doe v. University of Michigan* the Eastern District Court of Michigan struck down the University of Michigan speech code for over-breadth. The speech code disciplined students for “behavior that stigmatizes or victimizes an individual” based on a number of characteristics including race, sex, and ancestry (*Doe v. University of Michigan* 1989: 853). The court found from an empirical investigation that “students... who offended others by discussing ideas deemed controversial could be and were subject to discipline” and that “the Policy was enforced so broadly and indiscriminately, that plaintiff's fears of prosecution were entirely reasonable” (*Doe v. University of Michigan* 1989: 861). Robert A. Sedler served as a litigator in *Doe* and provides his insight. He points out that *Doe* struck down the Michigan speech codes because they singled out racist ideas as opposed to some type of unprotected speech (Sedler 1992: 639). As a result, the codes went too far because they punished unpopular beliefs. He further argues that the courts do not attempt to strike a balance between competing constitutional values in free speech cases: instead they simply look to see if the First Amendment has been violated and then rule in favor of the First Amendment (Sedler 1992: 647). So in order to draft speech codes which would not
be struck down it is necessary to not only avoid targeting racist ideas while somehow regulating hate speech, but to also not violate First Amendment values, even for the sake of another constitutional value such as equal opportunity.

Sedler also argues that *R.A.V* makes it outright impossible to implement speech codes. In this case the Supreme Court struck down the following ordinance of the city of St. Paul:

> Whoever places on public or private property a symbol, object, appellation, characterization 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 commits disorderly conduct and shall be guilty of a misdemeanor (*R.A.V.* 1992: 380).

Sedler argues that the reasoning behind the Court's decision is evidence that speech codes are not feasible. Quoting Scalia, Sedler points out that “the majority held that the principle of content neutrality applied to *unprotected* speech, such as 'fighting words'” (Sedler 1992: 682). Because content neutrality applies even to unprotected speech, hate speech regulation would have to be drafted in such a way as to either not discriminate between hate speech and other fighting words, or to not target hate speech on the basis of content, making speech codes quite difficult to draft.

A more recent court case, *Virginia v. Black* may indicate a shift in the Court's attitude toward hate speech regulation. In this case the Supreme Court struck down the following Virginia statute:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property
of another, a highway or other public place... Any such burning of a cross shall be
prima facie evidence of an intent to intimidate a person or group of persons


This ordinance differs from the St. Paul ordinance in that the St. Paul ordinance punished
symbols such as cross burning because such symbols are offensive, while the Virginia statute
punished cross burning because it is intimidating. The Court ruled that while “Virginia may
choose to regulate this subset of intimidating messages in light of cross burning's long and
pernicious history as a signal of impending violence... the Virginia statute's prima facie evidence
provision... is unconstitutional on its face” (Virginia v. Black 2003: 344-345). The Court said “the
provision makes it more likely that the jury will find an intent to intimidate regardless of the
particular facts of the case” (Virginia v. Black 2003: 345). While the Court held that the
regulation of true threats is entirely permissible, the prima facie provision made it likely that in
cases where cross burning was not meant to be intimidating, juries would treat it as though it
were in fact a threat, and so struck down the statute.

Alexander Tsesis, Chair of constitutional law at Chicago University, argues that “the
Court struck a delicate balance between the right of self-expression and the social dangers of true
threats” (Tsesis 2009: 661). The Court acknowledged that cross burning as a threat is particularly
serious due to its history as a violent symbol. The problem with the statute had entirely to do
with the prima facie provision. Because the Supreme Court acknowledge the power states have
to regulate threatening speech like cross burning, there might be an opportunity to regulate some
hate speech. Tsesis argues that “In circumstances where fighting words are meant to intimidate
others by reference to historically intimidating symbols, like swastikas or burning crosses, they
enter the realm of hate speech... Rather than being discursive, hate messages are meant to be threatening or damaging to targeted individuals” (Tsesis 2009: 632). In other words, a great deal of hate speech can be a true threat in exactly the same way that cross burning can be a true threat. Just as cross burning is made into a serious threat because of its history as a signal of violence, many forms of hate speech signal danger for victims as well due to the violent history of such speech. Because of this, hate speech regulations and speech codes that focus on the threatening nature of hate speech may find success.

**Valid Targets of Regulation**

Andrew Altman, a philosophy professor at Georgia State University, highlights three broad categories that encompass the deeper concerns that motivate the First Amendment:

First is the idea that speech can promote individual development and contribute to the public political dialogue, even when it is wrong, misguided, or otherwise deficient. Second is the Madisonian reason that the authorities cannot be trusted with formulating and enforcing rules that silence certain views: they will be too tempted to abuse such rules in order to promote their own advantage or their own sectarian viewpoint. Third is the idea that any departures from viewpoint-neutrality might serve as precedents that could be seized upon by would-be censors with antiliberal agendas to further their broad efforts to silence speech and expression (Altman 1993: 312-313)

According to Altman, the First Amendment is motivated by individual development and political dialogue, distrust toward the authorities, and prevention of censorship. Hate speech that does not contribute to any of these values should be considered a valid target for regulation because we
have no reason to protect it. In light of these values, only a few types of hate speech are valid targets for regulation. Four types of hate speech in particular seem worth regulating: epithets, hate speech that creates a hostile environment, threats, and “low value” hate speech delivered to a captive audience. It goes without saying that an effective speech code will be difficult to draft, and it may even be impossible. But the only question being investigated in this section is what types of hate speech are valid targets for regulation.

Epithets which are used as derogatory terms are one valid target of regulation. This includes terms such as “nigger”, “wetback”, and “chink” that are commonly understood as members of a racist vocabulary used primarily to refer to minority groups. Altman claims that these epithets are “the primary verbal instruments for treating people as moral subordinates... because the conventional rules of language make the epithet ‘faggot’ a term whose principal purpose is precisely to treat homosexuals as having inferior moral standing” (Altman 1993: 311). The history and common use of these epithets causes listeners to recognize the term as subordinating its target. Terms such as “faggot” were created with this purpose in mind and are used in this way today. This subordination is distinct from a mere insult. Rather, “Treating persons as moral subordinates means treating them in a way that takes their interests to be intrinsically less important, and their lives inherently less valuable, than the interests and lives of those who belong to some reference group” (Altman 1993: 310). The wrongs of this subordination “are among the principal wrongs that have prevented – and continue to prevent – Western liberal democracies from living up to their ideals and principles” (Altman 1993: 312). Among those principles which have not been lived up to because of subordination are the principles that guide the First Amendment. Subordinating epithets do not promote individual
growth or contribute to public dialogue. Instead, by treating others as inherently inferior these epithets make it more difficult to interact with and take seriously the ideas of others, reducing the opportunity for growth and discussion. And both authorities and would-be censors have used subordinating language in the past to make it seem permissible to restrict the liberties of minorities, including (but not limited to) their freedom of expression. Given how starkly the wrong performed by epithets contrasts with First Amendment values, epithets are valid targets of regulation.

It is important to note that while epithets can be used to subordinate, they can be used in other ways as well. Comedians often use epithets to get a laugh out of a crowd, and casual use of epithets between close friends can be a display of camaraderie. Altman notes that “sometimes victimized groups seize on the slurs that historically have subordinated them... For example, homosexuals have done this with the term 'queer’” (Altman 1993: 311). Epithets can even be used in scientific research, especially in the fields of psychology and sociology. Each of these uses of epithets are entirely consistent with First Amendment values. So regulations of epithets must be sufficiently narrow so as to only capture those epithets which subordinate. This means that regulation of epithets must at least be restricted to those actually intended to treat others as inferior based on race, sex or creed. Speech codes which regulate epithets in this way will be entirely consistent with First Amendment values (Altman 1993: 314).

Hate speech that creates a hostile environment is also a valid target for regulation. A hostile environment is best defined within workplace harassment law. Kent Greenawalt, a professor at Columbia Law School, gives the basic standards for workplace harassment:

(1) the employee belongs to a protected group; (2) she was subject to unwelcome
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harassment; (3) the harassment was based on sex (or other relevant category); (4) it affected a condition of employment; (5) the employer knew or should have known of the harassment and failed to take prompt remedial action; and (6) the employee acted reasonably under the circumstances (Greenawalt 1995: 76)

Such speech seems worthy of regulation for several reasons. First, “Universities have an interest in assuring decent conditions of learning for all students... [and] Governments have a special interest in seeing that educational conditions are not unfairly skewed in favor of some groups at the expense of others” (Greenawalt 1995: 95). The claim that Universities have a responsibility to provide a quality educational environment is uncontroversial. It seems difficult to imagine how students subject to speech that by its definition affects their ability to work can possibly enjoy the best quality of education possible. Second, it seems as though hostile environments directly inhibit the concerns which motivate the First Amendment. Education is an essential tool for exposing individuals to a wide array of ideas; this exposure gives students valuable experience with which they develop themselves. A hostile environment prevents them from engaging with these ideas to the fullest extent, and as a result restricts the degree to which they grow. Finally, sexual discrimination by schools has already been restricted under Title IX of the Educational Amendments Act of 1972 (1990), and sexual harassment can constitute discrimination under Title IX (Gebser v. Lago Vista Independent School District 1998: 283).

There is no good reason why these protections should not be extended to harassment on the basis of race or ethnicity as well.

Threatening hate speech is another valid target of regulation. A threat in this case does not mean the mere promise of bodily harm. The majority of threats are either delivered in jest or are
simply unlikely to be acted upon. Instead, I refer to a true threat. True threats were first acknowledged in the Supreme Court case Watts v. United States. Watts was brought to trial for remarking that if made to carry a rifle “the first man I want to get in my sights is L.B.J.”, a statement several listeners found rather amusing (Watts v. United States 1969: 705). While threats against the president are a felony, the Court held that “Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners” the statement amounted to little more than “a kind of very crude offensive method of stating a political opposition to the President” (Watts v. United States 1969: 708). This ruling establishes that there is a difference between threats and “true threats”, and only these “true threats” are actionable.

One problem is that the legal definition of a “true threat” is unclear. In Virginia v. Black the Court defines true threats as “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence... The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders” (Virginia v. Black 2003: 344). Paul T. Crane, a Professor of Law at the University of Chicago, suggests that the Supreme Court’s definition “spawned as many questions as answers. One critical question the Court’s ambiguous language failed to answer is what intent, if any, the government must prove a speaker had in order for his communication to qualify as a ’true threat’” (Crane 2006: 1226). This ambiguity makes applying the doctrine of true threats tricky. However, we can certainly imagine what a true threat might look like. The Court in Virginia v. Black acknowledges that cross burning can constitute a true threat due to the history of violence associated with the symbol. I argue that threats made on the basis of race or ethnicity are strong candidates for being true
threats for exactly the reasons discussed in *Virginia v. Black* and by Tsesis. The language of hate speech already has a history of violence. The promise of violence that employs hate speech invokes that history, making a much more powerful threat than normal. As a result, victims of these threats have good reason to fear for their well-being because history suggests that threats made on the basis of race are often acted upon.

In addition, racist threats are valid targets of regulation much more often than epithets because there are far fewer cases where a threat will be consistent with First Amendment values. It is difficult to imagine how a threat would be used to convey a scientific or philosophical idea. Threats do not enhance individual growth or political discourse, and true threats often times are the vehicles of censorship, so they obviously do not prevent censorship. It seems as though threats are almost always inconsistent with First Amendment values, and so are usually valid targets for regulation.

Importantly, even racist threats can be made in jest. Good friends may issue these threats towards one another as a joke. While bizarre, no one would suggest that this behavior should be regulated so long as both parties received the gesture in good humor. Restrictions on racist threats would have to take into account the context just as much as any other regulation. But a great deal of racist threats seem in fact to be true threats that invoke the violent history of racism, and so are valid targets for regulation.

Finally, “low value” hate speech delivered to a captive audience should be regulated. Greenawalt suggests that low value speech should be regarded as speech which serves primarily to demean or humiliate (Greenawalt 1995: 86). This is not the same as the subordination perpetrated by most epithets. Rather than regarding another as morally inferior, low value speech
merely insults the target. While “pick my cotton nigger” calls to mind a history of slavery, the expression “you probably couldn't read this because you're black” insinuates intellectual inferiority. While deeply humiliating and racially charged, this speech need not suggest anything about the targets moral value. Statements about intellectual prowess are often made without any suggestion that this bears on the value of ones life or liberties.

This low value speech has never been regarded as a valid target for regulation in a typical setting. Merely being crude and hurtful does not interfere with any First Amendment values. Serious intellectual discussion often becomes heated: this is natural and no one would think that it presents a genuine problem for First Amendment values. Even racially charged insults can be issued while engaging in fruitful discussion. Low value speech only becomes a problem when listeners are a captive audience.

Captive audience doctrine and the idea of a captive audience itself have not been well defined in either commentary nor in the law. Professor Patrick M. Garry, a visiting law professor at several different universities, says this about the doctrine: “The captive audience doctrine strives to relieve recipients from being held captive to unwanted speech. It rests on the belief that in certain circumstances people should no have to be exposed to offensive speech” (Garry 2006: 1). This concept has only been applied a few times, however, and almost all of these have only provided protections in the privacy of ones own home.\(^1\) The most noteworthy case in which the Supreme Court acknowledged the doctrine outside of the household was during the court case \textit{Lehman v. City of Shaker Heights}. In this case the Supreme Court upheld a Shaker Heights ordinance that restricted political advertisements played on the speakers of streetcars. The Court held that “the right of the commuters to be free from forced intrusions on their privacy precludes

the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience” (*Lehman v. City of Shaker Heights* 1974: 307). It seems as though listeners in at least two kinds of places are captive audiences according to the Court: those in their own homes and those on public transport. Listeners in both these places are incapable of reasonably excusing themselves from the speech. Individuals making use of public transportation likely have no other means of transportation and so cannot excuse themselves from the speech, and it would be unreasonable to expect individuals to insulate themselves from the speech of others in the privacy of their own home. In light of these considerations, a plausible definition for a captive audience would be “listeners who cannot be reasonably expected to excuse themselves from the speech of others”.

Most instances in which individuals are “captives” do not call for regulation, but sometimes being a captive audience poses a threat to individual liberties. Low value hate speech delivered to a captive audience, in the context of a university setting, is a valid target for regulation because “the university's responsibility for ensuring these students received an equal educational opportunity provides a compelling justification for regulations that ensure them safe passage in all common areas” (*Lawrence* 1990: 456-457). Students should not be required to endure low value hate speech in order to attend their classes because hate speech has the capacity to seriously inhibit their ability to study. Just as hostile environments make it difficult for minorities to enjoy their education to the fullest, being forced to endure low value hate speech in places they have no choice but to be present in discourages participation in academia. By discouraging students in this way, low value hate speech delivered to a captive audience inhibits their ability to engage in the public discourse and grow from their education, contravening First
Amendment values.

Students have a duty to endure hate speech that communicates philosophical, scientific, or artistic ideas in order to allow their fellow students to enjoy the full benefits of the First Amendment, even if listeners are a captive audience. To regulate these more substantial types of hate speech would be to restrict the public dialogue, contravening important First Amendment values. Because of this, these substantive types of hate speech are not valid targets for regulation, even to protect captive audiences. However, low value hate speech does not actually enhance public discourse: it is merely an unfortunate consequence of debate. Because hate speech delivered to a captive audience makes it difficult to fully enjoy an education, and low value hate speech does not enhance First Amendment values, low value hate speech seems regulable in this particular instance.

Captive audience regulations are perhaps the most difficult to apply. While a student on the university mall could be called a captive audience, it would seem unreasonable to punish students for engaging in low value speech in that place. For instance, punishing a student for presenting a racist caricature of a black person on the mall might contradict the desire to prevent censorship. Additionally, it is debatable whether or not students on the mall can reasonably be expected to avert their attention. In most cases the matter will be vague. However there are at least a few instances in which students definitely qualify as captives. Private domains have already been deemed places “where freedom of expression should be subject to restriction in order to guard the occupants’ privacy and tranquility” (Strossen 1990: 502). Minimally this includes living spaces: low value hate speech performed in dorms, fraternity houses and sorority houses amounts to an invasion of privacy. And at least in some cases, listeners using public
transportation are captives. In order to avoid over-breadth regulations based on captive audience doctrine should focus on these cases.

A further consideration when applying captive audience regulation is the matter of public forums. Much of a campus would be considered some type of public forum, where most forms of speech are permissible however unpopular they may be (Smolla 1990: 218). Universities are places of free expression, and students are more than capable of ignoring speakers in places such as parks or streets. However there are many public spaces where indiscriminate speech has never been seen as permissible, called nonpublic forums (Smolla 1990: 218). Some examples of possible nonpublic forums on a university include a food court, recreational center, and art gallery. These spaces are all recognized as serving a particular purpose, and speech has been restricted in these places.

In these nonpublic forums, the regulation of hate speech in order to preserve their function is permissible. One place that ought to be considered a nonpublic forum is the classroom. Regulating classroom speech is dangerous and not to be taken lightly: it is in the classroom that the majority of a students development and learning takes place, and is designed to be a place for free and open discussion. But it is the preservation of open discussion and learning that should lead to the regulation of some classroom hate speech. Regulation of low value classroom hate speech would no doubt have a chilling effect, but racist speech also chills the speech of minorities, and regulating hate speech in the classroom will “make way for more speech than it chills” (Lawrence 1990: 456). Even then, however, many types of hate speech still ought to be permitted in the classroom. Again, much hate speech is valuable for its substantive content, this speech cannot be regulated even to encourage minorities to speak. Only low value
hate speech should be regulated in classrooms in order to preserve the academic rights of as many students as possible. Harassing hate speech should also be regulated in the classroom, as it is at least as disruptive as low-value hate speech and lacks the substance which might excuse some other hate speech. Epithets, however, are too often used to convey substantive ideas, and in order to avoid over-breadth should not be regulated under the captive audience doctrine.

Captive audience regulations on hate speech would need to be handled differently for each university. Many campuses have many types of spaces, such as various facilities and landmarks, that other campuses do not. These would need to be assessed on a case by case basis to establish which constitute legitimate nonpublic forums. While this may be difficult, the project would still be worthwhile in order to preserve the greatest portion of speech possible.

Just because certain kinds of speech are valid targets for regulation does not mean we can realistically expect to see speech codes hold up in court. Even carefully drafted codes have in the past been struck down for being vague and over broad. In order to see any of these types of hate speech actually regulated, it is important to understand why so many speech codes have failed in the past and correct those mistakes.

**Speech Codes That Have Failed In the Past**

*University of Michigan*

University of Michigan featured one of the most notorious speech codes and *Doe* has been an important part of the speech codes debate, so a great deal ought to be learned from assessing this code and understanding what exactly failed about it. The code disciplined students for any of the following within university facilities:

1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on
the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that

a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored 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.

2. Sexual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual on the basis of sex or sexual orientation where such behavior:

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.
The code focused mostly on types of speech that have already been shown to be valid targets for regulation. It largely targeted threats and harassment. The only targeted speech that might be invalid is speech which creates a “demeaning environment”, which would constitute low value speech. Without the captive audience stipulation, such speech is not a valid target for regulation. However the court was not concerned with matters of captive audiences, but rather deemed the code unconstitutional on its face.

What about the code caused it to be facially unconstitutional? Strossen writes of the University of Michigan codes

In Doe v. University of Michigan, the United States District Court for the Eastern District of Michigan held that the University of Michigan's anti-hate speech policy violated the first amendment because... it was overbroad and impermissibly vague. The court concluded that during the year when the policy was in effect, the University 'consistently applied' it 'to reach protected speech... Consequently, the policy deterred members of the university community from engaging in protected expression for fear it might be sanctioned (527).

Strossen extracts two main reasons for the courts ruling on the University of Michigan codes: it was “over-broad” and “vague”. The court comes to the conclusion that the codes have these problems by looking at the interpretive guide the University of Michigan released to help apply the code, the actual language of the codes themselves, and through empirical evidence suggesting that these problems manifest in the form of serious First Amendment violations.

The over-breadth of the Michigan speech codes, according to the court, is in large part
due to the interpretive guide on the campus speech codes which indicated that several types of speech which might thought to be merely offensive were punishable, including “A male student makes remarks in class like 'Women just aren't as good in this field as men’” and “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” (*Doe v. University of Michigan* 1989: 858). Because this guide was purported to be authoritative the codes were taken as over-broad themselves because the guide singled out these forms of protected speech. With regards to vagueness, the court held that “the terms 'stigmatize' and 'victimize' are not self defining”, and further took issue with a clause stating that the victimization had to constitute a threat to academic activities: the court was unclear what constituted such a threat (*Doe v. University of Michigan* 1989: 859). The vagueness of these codes comes down to the words they were written in and the clarity with which they expressed what speech was to punished. One possible worry then is that speech codes which target a very narrow spectrum of hate speech, such as exclusively epithets, might still be struck down if those codes were not very clear on what particular use of epithets would warrant sanction.

The court was also deeply concerned with the application of the codes to reach protected speech and feared that it chilled speech because of three particular reported incidents in which the court felt the codes reached protected speech (*Doe v. University of Michigan* 1989: 865). The first involved a graduate student who claimed homosexuality was a disease and had been counseling several “patients”. He was brought to a formal hearing, and while not sanctioned the court believed that the university would not have pardoned the student had he been acquitted. The second involved a student reading a homophobic limerick in class during a scheduled
public-speaking exercise. While never brought to hearing, the student was persuaded to write a formal letter of apology and attend an educational class for the incident. The third report was filed by a professor who reported a student who claimed “he had heard that minorities had a difficult time in the course and that he had heard that they were not treated fairly” (*Doe v. University of Michigan* 1989: 866). The student was also forced to write a formal apology. The court held that because the intent of the speaker and the protected nature of the speech was never taken into account, each of these incidents were evidence of over-breadth.

The First Amendment violations perpetrated by the University of Michigan are not merely legal. The student in the first report seems entirely permissible in his conduct: however unpopular the students beliefs, they were held in an academic fashion and expressed with the intent to contribute to an academic environment. Whatever we may feel about any actions taken based on these beliefs, there is nothing morally reprehensible about the speech alone. The third incident seems innocent as well: more gossip than hate speech and certainly not directed at the group so much as at the class. Any speech codes which could bring these two students to trial seem to be seriously flawed.

The second incident however is more difficult. The student was presenting the limerick during a public speaking exercise: the rest of the class no doubt was forced to give their attention to the speaker. They are students who presumably have to attend this class – a captive audience – and cannot exercise the right to excuse themselves from the speech. What differentiates this incident from the first is that this incident was an academic exercise and as such the student is being given a platform from which the other students may not excuse themselves, and the student was abusing the platform he was given. Further, the students speech was certainly low value.
While limericks are intended to be humorous, the audience clearly did not receive it as such. As a result, the limerick becomes less humorous and more humiliating, and as a result becomes a valid target for regulation in light of the captive audience doctrine. The University of Michigan code may have in fact been right to sanction this student.

While the second student's speech was likely a valid target for regulation, the speech of the other two students was certainly not. The Michigan speech code seems to have gotten something right in that it was permissibly applied at least once, but this does not excuse the First Amendment violations of the other two instances. Permissible speech cannot be regulated merely to restrict some unwanted speech, this is the very essence of what it means to be over-broad. In order to avoid this over-breadth the wording of a code must be clear and precise. If a code is unclear, it will be ruled unconstitutional on its face and struck down. The job does not end once a code has been drafted, there must be clear and careful guidance regarding a code. Otherwise the code will likely be dismantled. The interpretive guide was clearly impermissible in many ways, and because it was an authoritative source of interpretation it jeopardized the Michigan code as a whole. Interpretation of codes must reflect the careful wording and clarity with which the codes were drafted. And beyond mere interpretation, the actual application of the codes must also be careful. Only three reports of the codes reaching protected speech were cited in the case, one of which is controversial, and yet the codes were struck down. The drafting, interpretation, and application of speech codes must all be clear and narrow, or else the codes risk over-breadth and being struck down.

*Standford University*

In the court case *Corry v. Stanford*, a group of students at Stanford University filed a
lawsuit against the university alleging that Stanford's speech code violated First Amendment protections. The following is the Stanford Code at the time of the lawsuit:

Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment

1. Stanford is committed to the principles of free inquiry and free expression. Students have the right to hold and vigorously defend and promote their opinions, thus entering them into the life of the University, there to flourish or wither according to their merits. Respect for this right requires that students tolerate even expression of opinions which they find abhorrent. Intimidation of students by other students in their exercise of this right, by violence or threat of violence, is therefore considered to be a violation of the Fundamental Standard.

2. Stanford is also committed to principles of equal opportunity and non-discrimination. Each student has the right to equal access to a Stanford education, without discrimination on the basis of sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin. Harassment of students on the basis of any of these characteristics contributes to a hostile environment that makes access to education for those subjected to it less than equal. Such discriminatory harassment is therefore considered to be a violation of the Fundamental Standard.

3. This interpretation of the Fundamental Standard is intended to clarify the point at which protected free expression ends and prohibited discriminatory harassment begins. Prohibited harassment includes discriminatory intimidation by threats of violence, and also includes personal vilification of students on the basis of their
sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.

4. Speech or other expression constitutes harassment by personal vilification if it:
a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and
b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and

c) makes use of insulting or "fighting" words or non-verbal symbols.

In the context of discriminatory harassment by personal vilification, insulting or "fighting" words or non-verbal symbols are those "which by their very utterance inflict injury or tend to incite to an immediate breach of the peace," and which are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin. (Lawrence, 450-451)

The court struck down the speech code, saying “Defendants' Speech Code cannot withstand the analysis and the holding in R.A.V., supra. The speech Code prohibits speech based on the content of the underlying expression and is not directed at conduct” (Corry v. Stanford 1995: 19). The court held that words “commonly understood to convey' hatred and contempt on the basis of race, religion, etc. [clearly]... focuses upon the content of the words” (Corry v. Stanford 1995: 8). Because R.A.V. applies content neutrality to unprotected speech, this type of regulation violates the First Amendment.
CAMPUS SPEECH CODES

Corry v. Stanford is an interesting case in that it deals with a private university. Normally only public universities are subject to the First Amendment: private universities are allowed to restrict as much speech they like because they are privately owned (assuming the school receives no public funding). The California Leonard Law, however, had made it so that First Amendment protections applied in all private universities. Because of this, the Leonard Law allowed the students to go after the Stanford code. Because the Stanford code was subject to the same constitutional limitations as public universities, we can still learn quite a bit about speech codes by analyzing why the Santa Clara Superior Court decided to strike down this code.

The Stanford code was struck down on two primary points. The first was that the court did not find the code to be sufficiently restricted to unprotected speech. The University argued that the code effectively only proscribed epithets, and that epithets fall within the category of fighting words, given the first prong of Chaplinsky (Corry v Stanford 1995: 4). The court held, however, that in Gooding the Supreme Court restricted the fighting words doctrine to words that threaten an immediate breach of the peace (Corry v Stanford 1995: 6), and as a result epithets not meant to incite an immediate breach of the peace did not fall within the category of fighting words. The second reason was that even if the court did accept the fighting words argument, the code would be unconstitutional given the ruling of R.A.V (Corry v Stanford 1995: 9). R.A.V. applies content neutrality to even unprotected speech, and because the code specifically targets the content of speech in many instances (such as by regulating only discriminatory harassment) the code was in violation of the First Amendment. The combination of these two lines of reasoning make the code unconstitutional.

The case is an example of Sedler's concerns in action. Even if the courts primary line of
reasoning failed for some reason, *R.A.V* still makes the code unconstitutional for the reasons given earlier. It seems as though in order to draft a code that is constitutional it would have to also be ineffective, doing little to target hate speech above any other kind of fighting words. The courts primary line of reasoning is worrying as well: the fighting words doctrine seems to not be very effective at justifying the regulation of much hate speech, given the ruling of *Gooding* and subsequent cases. In particular, this is worrisome for universities hoping to regulate the use of epithets. *Corry* makes it apparent that epithets cannot be regulated based on the fighting words doctrine. Epithets simply do not need to threaten an immediate breech of the peace, and so do not qualify as fighting words.

The *R.A.V.* problem may be less serious than it appears after *Virginia v. Black*. The Court has already acknowledged that seriously threatening speech can be regulated for the well-being of members of a community. As was discussed earlier, hate speech seems to be a likely candidate for a true threat much of the time. Epithets make hate speech even more likely to be threats because they are more commonly recognized as drawing on a history of violence. If the Stanford defense (and the code itself) had reasoned from this perspective, perhaps the Santa Clara Superior Court might have ruled differently. This approach still requires the code to be clear and precise enough in the wording to restrict prohibition to just threatening epithets.

*University of Wisconsin*

The last of the failed speech codes discussed in this paper is the University of Wisconsin speech code struck down in *U.W.M. Post v. Board of Regents*. In this case John Doe and several other students at the University of Wisconsin worked with the U.W.M. Post to sue the University of Wisconsin Board of Regents and have the University speech code struck down on the grounds
that it was over-broad and so unconstitutional on its face (**U.W.M. Post v. Board of Regents** 1991: 1164). The Board of Regents attempted to defend the code on the grounds that the targeted speech was unprotected under the fighting words doctrine. The Eastern District Wisconsin Court ultimately struck down the speech code, stating “the only restriction the fighting words doctrine can abide is that based on the fear of violent reaction” (**U.W.M. Post v. Board of Regents** 1991: 1181). Because the code restricted many types of speech that did not threaten an immediate breach of the peace, the court held that the code went well beyond the scope of fighting words doctrine. As a result, the code was over-broad and thus unconstitutional.

The University of Wisconsin speech code, which in keeping with the language of the court will here-after be referred to as the UW rule, read as follows:

The university may discipline a student in non-academic matters in the following situations.

(2) (a) 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.(b) Whether the intent required under par. (a) is present shall be determined by consideration of all relevant circumstances. (**U.W.M. Post v. Board of Regents** 1991: 1165)
The UW rule is similar in many ways to the Michigan code. Both target hostile environments, demeaning speech, and intimidating speech. Like the Michigan code, the UW rule restricts an invalid target for regulation by limiting demeaning speech without the captive audience stipulation. In this way neither code seems permissible.

The Wisconsin District court treated the fighting words doctrine just as Strossen argues the courts have after Gooding, disregarding the first prong of the Chaplinsky definition. The Wisconsin court interpreted the law as having narrowed the fighting words doctrine in three ways: “First, the Court has limited the fighting words definition so that it now only includes its second half. Second, the Court has stated that in order for words to meet the second half of the definition they must 'naturally tend to provoke violent resentment.' Finally, the Court has held that fighting words must be directed at the person of the hearer” (U.W.M. Post v. Board of regents 1991: 1170). The court did not rule the UW rule over-broad because it targeted speech consistent with First Amendment values, but rather because the speech targeted did not fall under fighting words. However, almost all of the speech targeted by the UW rule is a valid target for regulation. This means that the fighting words doctrine is incapable of serving as a grounds for regulating the kinds of speech that can validly be regulated. The important lesson to take away from U.W.M. Post is that fighting words are an insufficient precedent on which to base hate speech regulations. Schools that seek to defend their codes on the grounds of fighting words doctrine are unlikely to find success in court.

**Speech that Should be Regulated**

With the law surrounding speech regulation examined, I will now turn to a discussion of what ought to be regulated. Epithets, true threats, harassment, and low value hate speech
delivered to a captive audience all seem to be valid targets. However, this does not mean that these types of hate speech should be regulated, and if they should be regulated it does not mean they should always be regulated. This section will discuss the best arguments proscribing regulation, the best arguments favoring regulation, and between these determine what sort of speech should be regulated.

It is first necessary to consider the best arguments for regulation. If any of the arguments broadly proscribing regulation succeed, then none of the regulations are permissible. Richard Delgado, a civil rights professor at Alabama School of Law, and David H. Yun, an accomplished lawyer and co-author for many legal articles, attempt to resist the major arguments against regulation. They discuss many of these, but the ones that will be discussed in this paper are the “two wrongs” argument, the “deflection” argument, and the “talk back” argument.

Perhaps the strongest argument against regulation is the “two-wrongs” argument. This is the stance that hate speech may be wrong but prohibition is not the way to deal with it... The moderate left opposes hate speech restrictions because although it detests racism it loves free speech even more. Neoconservatives oppose regulation because it is government... that would be doing the regulating, and especially because in the area of speech, governing to them is synonymous with censorship (Delgado and Yun 1994b: 1821).

These are the sentiments echoed by the Supreme Court in many of their rulings. For instance in *Virginia v. Black* the supreme court acts in accordance with the “moderate left” version of the argument: acknowledging that threats are worth regulating but giving priority to the principles of
The argument comes in two forms: free speech is more valuable than hate speech is detestable, and hate speech regulation amounts to allowing the government to censor. The response to the argument must also come in two forms. The first is this: hate speech is detestable exactly because it works against free speech, so if free speech is valuable hate speech should be regulated. Quoting Delgado and Yun, “hate speech silences the victim and drives him away” (Delgado and Yun 1994b: 1822). Hate speech is often hurtful, and usually hate speakers are not attempting to open any kind of dialogue. Because of this hate speech will often prevent not only dialogue, but the speech of the victim, and so it seems as though the individual who loves free speech should want to regulate at least some hate speech. This does not mean that all hate speech should be regulated. We can imagine many situations in which the regulation of hate speech would not secure a greater amount of speech, such as hate speech delivered to a group of racists. However, in many situations such regulations would secure more speech, such as hate speech delivered by a small but vocal and hostile group of racists in the presence of an even greater number of minorities. In this circumstance it is perfectly understandable for the minorities to feel so intimidated that they do not speak up. In these situations the argument at hand seems to recommend some restrictions on hate speech.

The second response comes from Delgado and Yun themselves. They argue that “with hate speech regulation, few of the concerns that underlie our aversion to censorship are present. Hate-speakers are not criticizing government, but someone weaker than themselves. In prohibiting it, universities are not attempting to insulate themselves from criticism” (Delgado and Yun 1994b: 1821-1822). Regulations that target hate speech in particular should not worry
those with “neo-conservative” concerns because the regulation of hate speech does nothing to protect governing bodies from criticism. Hate speech is directed at minorities, and they are the chief beneficiaries of such regulations. Further, it is unlikely that hate speech restrictions will provide precedent for further unwanted regulations so long as the regulations only restrict valid targets, and the regulations are narrowly drafted.

Neither version of the “two wrongs” argument will proscribe regulation in every scenario. Further it seems as though all four valid targets are the kinds of hate speech that even those wary of regulation would want to restrict. Very few will be prepared to defend harassment or true threats in general, much less as a type of hate speech. Epithets – being primarily a vehicle for the subordinating wrong – are certainly less valuable than most speech, and it is hard to imagine how they could be used to criticize government, so the “two wrongs” commentator should not worry about regulations of these either. And hate speech delivered to a captive audience raises even deeper concerns regarding individual liberties: the right to not be a captive audience is certainly more concerning than the right to speak. After all, captivity is the sort of restriction on personal liberty that the exercise of free speech usually works against. So the “two wrongs” argument does not seem to suggest any limitation on the valid targets of regulation.

Delgado and Yun describe the “deflection” argument as the opinion “that mobilizing against hate speech is a waste of precious time and resources” (Delgado and Yun 1994b: 1812). Proponents of this argument hold that hate speech regulation does not actually accomplish very much in combating genuine racist sentiments, and so long as these sentiments persist hate speech will as well. Instead of combating hate speech directly, activists should focus on finding ways to combat actual racist beliefs. This will combat racism at the core. Citing their own prior research,
Delgado and Yun respond to this argument by suggesting that “a society that speaks and thinks of minorities derisively is fostering an environment in which... discrimination will occur frequently” (Delgado and Yun 1994b: 1813). Frequent hate speech helps to foster an environment that allows for more serious forms of discrimination. The use of speech codes suppresses this hate speech, consequently sending a message that the university is in fact not an environment friendly to racist ideas, thus making it more difficult to sustain racist sentiments. While this is not necessarily a good reason to regulate hate speech, it does work against the idea that hate speech regulation is futile. Hate speech regulation genuinely has the capacity to reduce the amount of hate speech specifically because it discourages racist sentiments.

Lastly is the “talk back” argument. The argument “draws force from the First Amendment principle of ‘more speech,’ according to which additional dialogue is always a preferred response to speech that some find troubling” (Delgado and Yun 1994a: 883). Supporters of this argument suggest utilizing counter speech in order to combat hate speech. By turning hate speech into an opportunity for dialogue, talking back can potentially educate the speaker and combat genuine racist sentiments simultaneously. This way the greatest amount of free speech is preserved while also combating racist sentiments. Because free speech and combating racist sentiments are pressing concerns, this solution is very appealing. However, talking back is not always a viable strategy. Delgado and Yun point out “The idea that talking back is safe for the victim or potentially educative for the racist simply does not correspond with reality” (Delgado and Yun 1994a: 885). Often times hate speech is intimidating, and minorities may be putting themselves at risk by speaking against aggressors. Delgado and Yun suggest that this invalidates the argument entirely: I disagree with them on this point. While hate speech certainly can be
intimidating, it does not have to be. Just because the hate speech is hurtful or humiliating does not mean it has to be intimidating. Often times counter speech will be perfectly viable. One area where their argument is certainly correct, however, is in the case of threats, which by their very nature suggest an elevated risk. No one would suggest challenging an individual issuing a blatant threat. So at least true threats bypass the “talk back” argument.

But what of the other valid targets? Counter speech will sometimes be effective for each of them. In many cases there is nothing preventing a captive audience from opening a dialogue with the speaker. The subordinating wrong epithets perform is egregious, but epithets themselves are not very difficult to deal with nor are they especially intimidating: simply requesting that an individual not use an epithet may be enough to stop them. And harassment may be altogether prevented if victims simply open a dialogue with harassers before the speech escalates to that point. However if a speaker is unwilling to engage in a dialogue, then counter speech will not be effective. The argument relies upon individuals discussing and educating one another. This is a cooperative endeavor: if either party is unwilling then it cannot be achieved. As a result, these solutions will not always resolve conflicts that arise from hate speech (indeed they will rarely work). But it is impossible to know how willing someone is to engage in dialogue if they are not asked, and the cost for attempting to enact counter speech is relatively low in the cases of the particular types of hate speech at hand. Therefore I recommend the following stipulation: speech codes should require students to at least attempt counter speech before reporting other students in the case of these three types of hate speech. Requiring students to pursue at least some counter speech encourages dialogue and allows for a greater degree of free speech, while still leaving open the option of university intervention if necessary.
One possible concern is that this requirement would make regulations significantly more difficult to enforce. Offending students could simply claim that victims did not attempt counter speech before reporting, and in this way avoid charges. However a similar problem exists in all forms of speech regulation: it is often difficult to prove that any given instance of regulated speech legitimately occurred. In spite of this, speech regulations, when warranted, are pursued because the managerial difficulties are well worth the improvements these regulations bring to a community. Few would argue that because it is difficult to prove someone actually issued a threat we should not regulate true threats. Similarly, certain managerial burdens must be taken to ensure that the greatest amount of free speech possible is preserved, because freedom of speech is also valuable.

Addressing these arguments, it seems as though certain kinds of hate speech can be regulated. However, this does not mean that these types of speech ought to be regulated. A final assessment of our moral obligations with regards to regulation of the valid targets of hate speech restrictions is in order to discover what hate speech should be regulated.

In the context of the university, morality seems to demand that true threats be regulated. True threats contravene the purpose of the university at every turn. The threat of bodily harm is not only a source of anxiety likely to disrupt student's studies, but also disruptive toward all forms of discourse. Violence is antithetical to speech: where one's safety is concerned discussion becomes secondary to survival. For these reasons it seems obvious that true threats in themselves ought to be regulated. Few would argue this point. However I argue that a regulation on all true threats would suffice. After all, racially charged threats will usually fall under the category of true threats anyway, so there is no need to single them out. True threats incapacitate their victims,
and cause unwarranted distress capable of reducing the ability to live a happy life. Any speech likely to have these affects on a reasonable individual constitutes a true threat, the Court says as much in *Virginia v. Black*. A cross burned on the property of a minority, issued as a threat, is certainly likely to have just the same paralyzing affect. Because a racially charged threat is functionally identical to a true threat, the regulation of all true threats will be enough to regulate racially charged true threats.

Additionally, threatening hate speech should survive the content neutrality stipulations because in *Black* the Supreme Court already acknowledged the states right to ban speech likely to intimidate in spite of violating content neutrality. Tsesis points out “A narrow reading of *Black* would require campus hate speech codes to be as open-ended as the Virginia statue. A broader reading of *Black*, however, is that the underlying problem of the Minnesota ordinance was that it prohibited words that merely aroused an emotive response rather than intimidated persons” (Tsesis 2009: 643). The broad reading of *Black* suggests that regulations on threatening hate speech will survive court because such speech is likely to intimidate, even when not a true threat. As a result, regulations targeted at threatening hate speech should survive court.

At first glance it seems as though there might be very good reason to regulate epithets on campuses. The subordinating wrong has no place in a university: to treat another as a moral inferior does nothing to pursue truth, enhance the social dialogue, foster individuality, provide a functioning learning space or in any other way contribute to the universities goals. However, epithets do not outright contravene the goals of the university either. Altman points out that the subordinating wrong contributes to environments that allow for more heinous acts such as genocide and slavery. Because preventing these acts is important, epithets are at least a valid
target for regulation. However epithets do not directly contribute to these acts. Epithets are merely the vehicle for subordination, not the means by which genocide or slavery are committed. Subordination only makes it easier to commit these acts. It is not obvious that society has an obligation to regulate speech based on its secondary effects. If society has no such obligation, how could universities?

For these reasons, I suggest that epithets are not a type of hate speech that should be regulated but rather only one that can be regulated. There is no need to contrive an imperative to regulate: the speech seems a valid target and perhaps some universities will believe that something about their situation warrants regulation on epithets. Because the regulation of epithets ultimately does not accomplish much outside of generally combating hate speech, it is not necessary to do so either. And because additional regulations are likely to make speech codes vague or ambiguous, in most circumstances it would be advisable to let epithets alone.

On the other hand, every instance of harassment seems to be one which ought to be regulated. Harassment by its very nature disrupts the work of others. As Greenawalt points out, “the conditions of campus life and the reasons for speech codes bear some relation to the notions behind workplace harassment law” (Greenawalt 1995: 95). Students are trying to accomplish a kind of work when they study. Studying requires the kind of focus and attention that work does and is disrupted in a similar way by harassment. Because student's studies are deeply important to the university, speech codes which target harassment seem necessary in the same way they are necessary for the workplace. And just as the history of violence hate speech carries makes racially charged threats more threatening, it makes racial harassment more harassing as well. Students targeted by racial harassment are more likely to become agitated, anxious, or in other
ways disrupted because the harassment carries the additional influence of a history of violence.

Much like threatening hate speech, however, harassing hate speech requires no additional regulation. Harassment that uses hate speech is not unique from other types of harassment. All that is required to qualify as harassment is that the speech disrupts: whether the speech is disruptive with the aid of hate speech or apart from it makes no difference. So generally regulating harassment should also capture harassment that uses hate speech. For this reason, it seems as though no further regulations are required for harassing hate speech. Speech codes which generally regulate harassment will suffice.

Finally is the most difficult matter: regulation of low value hate speech delivered to a captive audience. On the one hand, this variety of hate speech seems most directly tied to matters of equal opportunity. Students are susceptible to captivity given the frequency with which they attend classes and other events they cannot be reasonably expected to excuse themselves. The potential for captivity is likely to dissuade students from partaking in these events to the fullest if it means being subject to speech which is potentially deeply distressing. Additionally, in the case of hate speech minorities are uniquely vulnerable to these concerns, and as a result have more to fear from captivity. Permitting low value hate speech to captive audiences is tantamount to allowing a hostile environment uniquely designed for minorities. Because of this, it seems as though universities ought to regulate this type of hate speech.

However this type of hate speech is also particularly difficult to regulate. Open forums and non-public forums will vary between campuses. Drafting regulations that capture only low value hate speech may prove difficult, given the subtlety of the distinction between low value and substantive hate speech. And it is unclear whether or not captive audience regulations will
escape content neutrality. Part of the issue is that the captive audience doctrine has received so little attention that it is difficult to say what will and will not succeed with it. But this is also exactly why universities ought to pursue these regulations anyway. It is not clear whether or not the courts will rule in favor of content neutrality or captive audience doctrine. Further, it is not clear that content neutrality applies in the case of captive audiences at all. The Supreme Court allowed Shaker Heights to single out advertisements in *Lehman*, so perhaps captives are excused whatever the content of the speech. Further legal precedent will need to be established before the feasibility objection can be raised against regulations on hate speech delivered to a captive audience, and given the moral obligation to protect captives regulations ought to be pursued in the meantime.

**Conclusion**

Few recommended regulations have emerged from this paper. Low value hate speech delivered to a captive audience seems to be the only type of hate speech that is both a valid target and in need of targeted regulations. Additionally, captives should have to attempt some counter speech before regulations are acted upon. Even with these narrow regulations the guidance speech codes receive will have to be careful and precise, otherwise codes will still fail in courts. In spite of how narrow these regulations are, I believe they are still worthwhile. Regulations of the recommended type will prevent a great deal of the most troubling hate speech which causes serious problems for students. And the narrowness helps the regulations to survive First Amendment challenges. Given the law and demands of morality these guidelines should help produce effective, valid speech codes.
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