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The Challenge of Free Speech on Campus

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ESSAY

The Challenge of Free Speech on Campus

ERWIN CHEMERINSKY*

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INTRODUCTION

Controversies over freedom of speech on campus are nothing new, but they are arising now with great frequency. The general principles are clear, though novel and difficult questions are constantly arising.

In early 2017, provocateur Milo Yiannopoulos was scheduled to speak at UC Berkeley. As with many campuses, the university had taken steps to ensure that the event would take place despite vigorous student protests. Other University of California campuses sent police reinforcements, a wide perimeter was established around the venue, and barricades were set up to create a safety zone between protestors and those who were attending the event.

But then Berkeley faced something that other campuses had not previously experienced: 150 black-clad rioters associated with the anarchist group “Black Bloc” – many of whom were wearing masks, helmets, body armor, and who were armed with poles, sticks, and commercial grade fire-works. They ignited fires, hurled Molotov cocktails, destroyed barricades, smashed windows, and attacked individuals. An ordinary student protest had become an unmanageable riot, which continued into the city of Berkeley, overwhelming campus

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efforts and forcing cancellation of the event.¹ President Donald Trump then tweeted that Berkeley had infringed free speech and might lose federal funds.²

The transformation of heated controversies into violent events continued in March 2017, when one person was shot after Yiannopoulos spoke at the University of Washington, despite the campus spending almost \$75,000 on extra security.³ That same month Professor Allison Stanger of Middlebury College was seriously injured when protestors, angry that Charles Murray had been invited to speak on campus, attacked her and Murray while trying to leave the campus.⁴ Sixty-seven students were later disciplined, although none were suspended or expelled.⁵

Matters became even more disturbing and tragic late August 2017, when white nationalist Richard Spencer was scheduled to speak at a “Unite the Right” rally in Charlottesville.⁶ The night before the rally several hundred torch-bearing white nationalists marched on the main quadrangle of the University of Virginia grounds, shouting “you will not replace us” and “Jew will not replace us.”⁷ When counter-protestors engaged the group, marchers threw their torches toward students and a brawl ensued.⁸ The next day groups converged, with self-styled militia members dressed in full camouflage and outfitted with semiautomatic rifles and pistols.⁹ Many white nationalists carried

1. Madison Park & Kyung Lah, *Berkeley Protests of Yiannopoulos Caused \$100,000 in Damage*, CNN (Feb. 2, 2017), <https://www.cnn.com/2017/02/01/us/milo-yiannopoulos-berkeley/index.html>.

2. Susan Svrluga & Brian Murphy, *Trump Lashes Back at Berkeley After Violent Protests Block Speech by Breitbart Writer Milo Yiannopoulos*, WASH. POST (Feb. 2, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/02/01/berkeley-cancels-speech-by-breitbart-writer-milo-amid-intense-protests/?utm_term=.04e50e71f00b.

3. Daniel Gilbert, *Milo Yiannopoulos at UW: A speech, a Shooting and \$75,000 in Police Overtime*, SEATTLE TIMES (Mar. 26, 2017), <https://www.seattletimes.com/seattle-news/crime/milo-yiannopoulos-at-uw-a-speech-a-shooting-and-75000-in-police-overtime/>.

4. Allison Stanger, *Understanding the Angry Mob at Middlebury That Gave Me a Concussion*, N.Y. TIMES (Mar. 13, 2017), <https://www.nytimes.com/2017/03/13/opinion/understanding-the-angry-mob-that-gave-me-a-concussion.html>.

5. Stephanie Saul, *Dozens of Middlebury Students Are Disciplined for Charles Murray Protest*, N.Y. TIMES (May 24, 2017), <https://www.nytimes.com/2017/05/24/us/middlebury-college-charles-murray-bell-curve.html>.

6. See Hawes Spencer & Sheryl Gay Stolberg, *White Nationalist March on University of Virginia*, N.Y. TIMES (Aug. 11, 2017), <https://www.nytimes.com/2017/08/11/us/white-nationalists-rally-charlottesville-virginia.html>.

7. Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm_term=.829170c4c067.

8. See Spencer, *supra* note 6.

9. Heim, *supra* note 7.

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large shields and long wooden clubs.¹⁰ They charged through a line of counter-protestors, swinging sticks, punching, and spraying chemicals.¹¹ Not long after police ordered the groups to disperse, a member of the white nationalist group drove a car into a crowd killing Heather Heyer.¹²

Soon thereafter, Spencer was able to speak at the University of Florida, but only after extensive campus security efforts and a declaration of a state of emergency by the governor.¹³ He also spoke at both Auburn and Michigan State after federal judges prevented each university from denying him access; at MSU one-hundred officers in riot gear broke up fights and made arrests.¹⁴ Spencer initially sued The Ohio State University for refusing him access, but dropped the lawsuit when the campus sought evidence exploring whether Spencer was coordinating with others who were planning violence at the event.¹⁵ The university claimed that, at previous events, Spencer and other event organizers “only feigned cooperation with local officials on safety matters while drawing up secret military-style plans to disobey law enforcement or campus directives if their event was limited in ways they deemed unacceptable.”¹⁶

In the summer of 2017, conservative student groups announced that they were going to stage a “Free Speech Week” at UC Berkeley to include provocative speakers such as Ben Shapiro, Milo Yiannopoulos, Steve Bannon, Ann Coulter and others. Shapiro came and gave an address in a large campus auditorium and Yiannopoulos appeared for fifteen minutes on campus. The rest of free speech week was canceled at the last minute by the student organizers. Nonethe-

10. *Id.*

11. *Id.*

12. *Id.*

13. Matt Pearce & Les Neuhaus, *White Nationalist Richard Spencer to Noisy Florida Protestors: You Didn't Shut Me Down*, L.A. TIMES (Oct. 19, 2017, 1:55 PM), <http://www.latimes.com/nation/la-na-florida-spencer-speech-20171019-story.html>.

14. See David Jesse & RJ Wolcott, *Fistfights, Arrests at Michigan State University Before Richard Spencer Takes Stage*, DETROIT FREE PRESS (last updated Mar. 5, 2018, 9:20 PM), <https://www.freep.com/story/news/local/michigan/2018/03/05/richard-spencer-michigan-state-university/395079002/>; Travis M. Andrews, *Federal Judge Stops Auburn From Canceling White Nationalist Richard Spencer Speech*, WASH. POST (Apr. 19, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/04/19/federal-judge-stops-auburn-from-canceling-white-nationalists-speech-violence-erupts/?utm_term=.e05e6dc2ec0b.

15. *Richard Spencer to Drop Ohio State Lawsuit*, CINCINNATI (Mar. 6, 2018), <https://www.cincinnati.com/story/news/2018/03/06/richard-spencer-drop-ohio-state-lawsuit/401291002/>.

16. *Id.*; Lori Falce, *Ohio State Responds to Spencer Suit, Cites Safety as Reason for Denial*, CTR. TIMES DAILY (Jan. 7, 2017), <https://www.cincinnati.com/story/news/2018/03/06/richard-spencer-drop-ohio-state-lawsuit/401291002/>.

less, Berkeley spent over \$3.9 million for security for the anticipated events.¹⁷

The core of freedom of speech is that *all* ideas and views can be expressed. The Supreme Court repeatedly has made clear that the government never can prevent, punish or deny benefits for speech based on its viewpoint, even if the speech is deeply offensive. As many have observed, we don't need freedom of speech to protect the messages we like; we would let those happen anyway.

Current college students are often ambivalent, or even hostile, to the idea of free speech on campus. I worry that the commitment to free speech among students and faculty is waning. In my seminars the last two years, I was surprised by how much the students wanted campuses to stop offensive speech and trusted campus officials to have the power to do so. A 2015 survey by the Pew Research Institute said that four in ten college students believe that the government should be able to prevent people from publicly making statements that are offensive to minority groups.¹⁸ The most recent studies demonstrate that students continue to wrestle with how best to value free speech and inclusivity, with more than half of students valuing diversity and inclusivity above free speech, more than half supporting bans on hate speech, and almost a third supporting restrictions on offensive speech.¹⁹

In September 2017, University of California, Berkeley Chancellor Carol Christ convened a forum on campus on free speech that included several faculty speakers – including me – that was attended by a large audience. Several faculty and students, to resounding applause, declared that Chancellor Christ should refuse to allow hateful speakers like Milo Yiannopoulos and Ann Coulter on campus. Towards the end of the discussion I said:

Be clear that if Chancellor Christ were to exclude speakers based on their viewpoint, she would get sued and lose. The speakers would

17. Frances Dinkelspiel, *UC Berkeley Spent Close to \$4M on Security In Just One Month In 2017*, BERKELEYSIDE (Feb. 6, 2018), <http://www.berkeleyside.com/2018/02/06/uc-berkeley-spent-close-4m-security-just-one-month-2017>.

18. Jacob Poushter, *40% of Millennials OK with limiting speech offensive to minorities*, PEW RES. CTR. (Nov. 20, 2015), <http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/>.

19. Niraj Chokshi, *What College Students Really Think About Free Speech*, N.Y. TIMES (Mar. 12, 2018), <https://www.nytimes.com/2018/03/12/us/college-students-free-speech.html>; *Free Expression on Campus: What College Students Think About First Amendment Issues*, KNIGHT FOUND. (Mar. 11, 2018), <https://www.knightfoundation.org/reports/free-expression-on-campus-what-college-students-think-about-first-amendment-issues>.

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get an injunction and be allowed to speak. They would recover attorneys' fees and maybe money damages. They would be portrayed as victims. And since they would get to speak anyway, nothing would be gained.

No one applauded.

As I look at what is happening on the Berkeley campus and across the country, I realize that the context is new, but the underlying law and principles are well established. Disputes over free speech on campus have long occurred, but there are ways in which this is different. Usually in the past, it was students who wanted to speak and campus administrators who tried to stop the demonstrations. Now it often is about outside speakers and outside disruptors, like antifa. The campus is just the place for their battle. This was true at UC Berkeley at the end of January when antifa's violence forced the cancellation of Yiannopoulos' planned speech and it was true at the University of Virginia when white supremacist groups marched on campus. Also, as is occurring on the Berkeley campus, it is now often students and faculty calling for preventing the speakers, while campus officials are steadfastly protecting freedom of expression.

While teaching an undergraduate class at the University of California, Irvine Chancellor Howard Gillman and I realized that the students' desire to restrict hurtful speech came from laudable instincts. This is the first generation of college students to be taught from a young age that bullying is wrong and they have internalized this message. Many spoke powerfully of instances where they or the friends had suffered from hurtful speech and bullying. They want to make campuses inclusive for all and they know that hate speech causes great harm, especially among those who have been traditionally underrepresented in higher education.

I worry, too, that students do not realize how much speech has been essential for the advancement of rights and equality. There would not have been a Nineteenth Amendment, which gave women the right to vote, without the women's suffrage movement and its widespread demonstrations. The civil rights protests of the 1960s – lunch counter sit-ins, the march on Selma, demonstrations on campuses – were essential to bringing about the end to segregation. Those events, though, are ancient history for my students. I worry that today's college students equate freedom of speech more with the vitriol of Yik-Yak than the anti-Viet Nam War protests that I participated in when I was in college. I was surprised by how little our students knew

about the history of free speech, including of times like McCarthyism, when faculty and students suffered greatly from the lack of protection for expression and academic freedom.

In this essay, I want to address a specific question: why must campuses tolerate hate speech?²⁰ There is no doubt that hate speech causes great harms. Many prominent scholars have argued that hate speech conveys nothing useful to the marketplace of ideas and, in fact, by silencing its victims, limits the exchange of ideas and undermines a university's obligation to provide an environment conducive to the learning of all students.²¹ They have powerfully described the great harms that hate speech inflict on those who have traditionally been excluded and underrepresented on campuses.

By the early 1990s over 350 colleges and universities adopted hate speech codes. A number of these were challenged in court. But everyone to be considered was declared unconstitutional.²²

One of the most prominent examples involved the University of Michigan. The University of Michigan was motivated to devise a hate speech code after some truly horrendous events on campus.²³ In 1987, flyers were distributed that declared "open season" on blacks. Blacks were referred to as "saucer lips, porch monkeys, and jigaboos." A student disc jockey allowed racist jokes to be broadcast on the campus radio station. Student demonstrations were interrupted by the display of a KKK uniform out of a nearby dorm window. Another flyer proclaimed, "Niggers get off campus" and "Darkies don't belong in classrooms – they belong hanging from trees." The university had to respond to such horrific expression.

The challenge was how to translate the natural desire to eliminate such egregious examples into a policy that was consistent with the First Amendment. This proved extremely difficult.

20. My views on this topic are described in much more detail in ERWIN CHERMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* (2017).

21. See, e.g., Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445 (1987); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C. R.-C. L. REV. 133 (1982) (all favoring restrictions on hate speech).

22. See, e.g., *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1185 (6th Cir. 1995); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1173-74, 1181 (E.D. Wis. 1991) (holding Wisconsin's hate speech code unconstitutional); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 867 (E.D. Mich. 1989).

23. These facts are found in *Doe*, 721 F. Supp. at 854.

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The policy adopted by the University of Michigan in 1988 prohibited:

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.²⁴

Shortly after the promulgation of the policy in the fall of 1988, the University Office of Affirmative Action issued an interpretive guide (Guide) entitled *What Students Should Know about Discrimination and Discriminatory Harassment by Students in the University Environment*. It gave many examples of what was prohibited, including:

- (A) A flyer containing racist threats distributed in a residence hall.
- (B) Racist graffiti written on the door of an Asian student's study carrel.
- (C) A male student makes remarks in class like "[w]omen just aren't as good in this field as men," thus creating a hostile learning atmosphere for female classmates.
- (D) 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.
- (E) A black student is confronted and racially insulted by two white students in a cafeteria.
- (F) Male students leave pornographic pictures and jokes on the desk of a female graduate student.
- (G) Two men demand that their roommate in the residence hall move out and be tested for AIDS.²⁵

24. *Id.* at 856.

25. *Id.* at 858.

As Professor Kent Greenawalt observed, “the University of Michigan code . . . was broad in its scope and seemed to reach into the realm of obnoxious ideas civilly expressed.”²⁶

Soon after its adoption, this code was used not against the kinds of purely hateful slurs that inspired its passage, but against people who were expressing opinions that others objected to. Complaints were filed against a student for stating that Jewish people used the Holocaust to justify Israel’s policies toward the Palestinians. Another student found himself facing punishment for saying that he had heard that minorities had a difficult time in a particular course. A graduate student in Social Work was subjected to formal disciplinary procedures for asserting that homosexuality was a disease.²⁷ As the court noted, “[o]n at least three separate occasions, students were disciplined or threatened with discipline for comments made in a classroom setting.”²⁸

The individual who eventually challenged the policy in federal court was a graduate student who claimed the campus hate speech code put him at risk of punishment for studying certain controversial theories in his field of biopsychology, including the study of individual and group differences in personality traits and cognitive abilities.²⁹

A federal judge struck down the policy on the grounds that the standards for punishment – “stigmatizing” or “demeaning” speech, for example – were so broad and vague that it was “simply impossible to discern any limitation” on the policy’s scope and reach.³⁰ A person saying anything controversial or critical could be at risk for punishment. The court explained: “[t]he operative words in the cause section required that language must “stigmatize” or “victimize” an individual. However, both of these terms are general and elude precise definition. Moreover, it is clear that the fact that a statement may victimize or stigmatize an individual does not, in and of itself, strip it of protection under the accepted First Amendment tests.”³¹

This ruling was not an isolated outcome. Between 1989 and 1995, other courts examined university speech codes, and in every case the codes were deemed unconstitutional. A federal district court struck

26. KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* 75 (1995).

27. *See id.* at 76; *Doe*, 721 F. Supp. at 861.

28. *Doe*, 721 F. Supp. at 861.

29. *Id.* at 858.

30. *See id.* at 867.

31. *Id.* at 867.

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down the University of Wisconsin's hate speech code.³² The code provided that the university may discipline a student in non-academic matters in the following situations.

For racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets or other expressive behavior or physical conduct intentionally:

1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
2. Create an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.³³

The federal district court found that the regulation was unconstitutionally overbroad and vague, mostly because a great deal of speech that people might consider "demeaning" was clearly protected by the First Amendment.³⁴

When in 1991 George Mason University imposed sanctions on a fraternity after it conducted an "ugly woman contest" with racist and sexist overtones, the United States Court of Appeals struck down the sanctions, explaining that the First Amendment protected even offensive and juvenile forms of expression. The court declared:

We agree wholeheartedly that it is the University officials' responsibility, even their obligation, to achieve the goals they have set. On the other hand, a public university has many constitutionally permissible means to protect female and minority students. We must emphasize, as have other courts, that "the manner of [its action] cannot consist of selective limitations upon speech."³⁵

The invalidation of hate speech codes was not limited to those adopted by public universities where the First Amendment applies. In May 1990, the Stanford Student Conduct Legislative Council adopted a student conduct code drafted by law professor and constitutional scholar Thomas Grey. The code prohibited "discriminatory harassment," including "personal vilification of students on the basis of their sex, race, color, handicap, religion, sexual orientation or national and

32. *UWM Post, Inc.*, 774 F. Supp. at 1163.

33. *Id.* at 1166.

34. *Id.* at 1172-73.

35. *IOTA XI Ch. of Sigma Chi Fraternity v. Geo. Mason Univ.*, 993 F.2d 386, 393 (4th Cir. 1993).

ethnic origin.”³⁶ Personal vilification was defined as intentional, personally directed “fighting words or non-verbal symbols” that “are commonly understood to convey direct and visceral hatred or contempt for human beings” on the basis of their membership in those groups.³⁷

In February 1995, a California Superior Court judge invalidated the Stanford code as violating a California statute, the Leonard Law, which provides that:

[N]o private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech . . . that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment.³⁸

The court declared:

Defendants’ Speech Code does violate Plaintiffs’ [First] Amendment rights since the Speech Code proscribes more than just “fighting words” as defined in *Chaplinsky*, and the later lines of case law.

To this extent, therefore, Defendants’ Speech Code is overbroad.

In addition, however, the Speech Code also targets the content of certain speech [and] . . . is an impermissible content-based regulation.³⁹

The motivations behind the desire to punish hateful speech are laudable. However, to date, the legal and definitional challenges that arise when these motivations are translated into workable codes have proven impossible to overcome. After watching so many universities lose in court, some, such as the University of Pennsylvania, withdrew their hate speech codes; others, such as Yale, said that they would not be enforced.⁴⁰

I do not doubt that hate speech causes great harms, as persuasively expressed by scholars such as Professors Delgado, Lawrence, Matsuda, and Waldron. I believe that colleges and universities must act to protect students from harm, especially students of color, women, those of minority religions, and gays and lesbians. But the First

36. *Corry v. Leland Stan. Junior Univ.*, No. 704309 (Santa Clara Cnty., Feb. 27, 1995).

37. ERWIN CHEMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 47 (2017).

38. *Id.* See also CAL. EDUC. CODE, § 94367(a); *Stanford University Speech Code Violates First Amendment*, 16 No. 12 ENT. L. REP. 21 (1995).

39. ERWIN CHEMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 47–48 (2017). See also *Stanford University Speech Code Violates First Amendment*, 16 No. 12 ENT. L. REP. 21 (1995).

40. See TIMOTHY C. SHIELL, *CAMPUS HATE SPEECH ON TRIAL* 4 (2d ed. 2009).

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Amendment clearly prohibits public colleges and universities from pursuing this goal by passing hate speech codes.

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

I think not. First, decades and decades of efforts – by state governments, local municipalities, and campuses – have demonstrated that all such codes are impermissibly vague and overbroad and thus risk punishment based on political viewpoint or worldview. Any rule that seeks to punish people for their speech – whether in a public or a private university – must be specific about what is prohibited and what is allowed. Otherwise, too many people will be afraid to say anything controversial for fear that they will be singled out for arbitrary (or ideologically-based) punishment based on unclear standards. But there are no examples of codes that are sufficiently specific and that apply only to unprotected speech. The Michigan code, described above, prohibited “any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed”⁴¹ Likewise, the Stanford hate speech code provided that “[s]peech or other expression constitutes harassment by vilification if it: (a) is intended to insult or stigmatize an individual or individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.”⁴² The University of Wisconsin code prohibited speech that was “demeaning” based on “race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals.” Professor Jeremy Waldron’s definition of hate speech, quoted above is that hate speech is “[t]he use of words which are deliberately abusive and/or insulting and/or threatening and/or demeaning directed at members of vulnerable minorities, calculated to stir up hatred against them.”⁴³

41. *Doe v. University of Michigan*, 721 F. Supp. 852, 856 (E. D. Mich. 1989).

42. Lawrence, *supra* note 21, at 450. The Stanford Code, too, was invalidated when challenged. See *Stanford University Speech Code Violates First Amendment*, 16 No. 12 ENT. L. REP. 21 (1995).

43. JEREMY WALDRON, *THE HARM IN HATE SPEECH* 8–9 (2012).

The sweep of such codes is intentionally broad, but that means that they inevitably prohibit the expression of ideas that might be seen as “stigmatizing” or “demeaning” or “insulting.” These concepts are not only inherently vague; they are also inherently politically charged. Much of what we debate as a society – and much of what is debated on college campuses – relates to whether certain forms of expression should be considered demeaning or insulting, and disagreements often run deep. Many strong anti-racism and anti-sexism advocates make powerful arguments for why seemingly innocuous speech acts, and many forms of cultural expression, should be considered exclusionary and demeaning. In fact, some embrace the view that cultural reproduction of racism and patriarchy is ubiquitous because it is built into the very foundation of our social order. Some opponents of these positions claim the critics are too quick to find oppression, or that they are humorless, or that their concerns are sometimes legitimate but overstated. Others argue that what the critics consider demeaning (e.g., sexualized depictions of women or certain examples of cultural appropriation) should actually be viewed as empowering. The arguments are endless.

Given this, any hate speech code can, in theory, either lead to the punishment of extraordinary numbers of people (who may not suspect they are demeaning anyone) or can result in a refusal to punish many speech acts that could be considered stigmatizing. The upshot is that people will inevitably be punished for their political views, with results being arbitrary and often surprising. Given the definitional problems, how could it be otherwise? What should a campus do when gay and lesbian students complain that they are demeaned by a Christian student’s expression of a belief in heterosexual conceptions of marriage – deny that it is demeaning or punish the student? Justice Clarence Thomas believes that affirmative action programs stigmatize minorities on the basis of race and “stamp minorities with a badge of inferiority.”⁴⁴ Could a student’s advocacy of affirmative action be taken as violating such prohibitions? What of Laura Kipnis’ argument that overly-protective approaches to sex on campus actually stigmatize women?⁴⁵ Or the claim that much anti-racism rhetoric demeans

44. *Grutter v. Bollinger*, 509 U.S. 306, 373 (2003) (Thomas, J., dissenting).

45. Christine Smallwood, *Laura Kipnis’s Battle Against Vulnerability: The Northwestern University Professor Strengthens Her Polemic Against Campus Sexual Culture*, *NEW YORKER* (Apr. 2, 2017), <https://www.newyorker.com/culture/persons-of-interest/laura-kipniss-battle-against-vulnerability>.

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whites?⁴⁶ Unfortunately, these challenges are inherent to the entire enterprise and cannot be solved with better definitions.

This brings me to my second argument against such codes: they are often used to punish the speech of minorities and others who were not the intended targets of such efforts. Vague and overbroad laws inherently risk discriminatory enforcement and that is exactly what has happened with hate speech codes. As Professor Nadine Strossen observes: “[o]ne ironic, even tragic, result of this discretion is that members of minority groups themselves – the very people whom the law is intended to protect – are likely targets of punishment. For example, among the first individuals prosecuted under the British Race Relations Act of 1965 were black power leaders.”⁴⁷ Although the English law was adopted in part as a response to a rise in anti-Semitic instances on campus, it was used against those who advocated on behalf of Israel on the ground that Zionism should be regarded as a form of racism under the United Nations resolution.⁴⁸

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

During the years in which Michigan’s speech code was enforced, more than twenty blacks were charged – by whites – with racist speech. [N]ot a single instance of white racist speech was punished A full disciplinary hearing was conducted only in the case of a black social work student who was charged with saying, in a class discussion of research projects, that he believed that homosexuality was an illness, and that he was developing a social work approach to move homosexuals toward heterosexuality.⁴⁹

As we look at experience around the world there are many examples of unexpected and politically-charged applications of hate speech codes. In 2006, individuals in Sweden were convicted for distributing leaflets to high school students saying homosexuality was a “deviant sexual proclivity,” had “a morally destructive effect on the substance of society” and was responsible for the development of H.I.V. and

46. Vann R. Newkirk II, *The Myth of Reverse Racism*, ATLANTIC (Aug. 5, 2017), <https://www.theatlantic.com/education/archive/2017/08/myth-of-reverse-racism/535689/>.

47. Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L.J. 484, 556 (1990) (discussing how judicial and prosecutorial discretion can undermine the goal of combating racism when implementing laws that censor racist speech).

48. *Bollinger*, 509 U.S. at 557.

49. HENRY LOUIS GATES ET AL., *SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES* 45 (1994).

AIDS.⁵⁰ In 2009, a member of the Belgian Parliament was convicted of distributing leaflets with the slogans: “Stand up against the Islamification of Belgium,” “Stop the sham integration policy” and “Send non-European job-seekers home.”⁵¹ The European Court of Human Rights affirmed these convictions, rejecting defenses based on freedom of speech.⁵² In Poland, a Catholic magazine was fined \$11,000 for inciting “contempt, hostility and malice” by comparing a woman’s abortion to the medical experiments at Auschwitz.⁵³ In 2008, film star Brigitte Bardot was convicted by French authorities for placing online a letter to Nicolas Sarkozy in which she complained about the Islamic practice of ritual animal slaughter. It was her fifth conviction for hate speech.⁵⁴ In 2011, Scottish football fan Stephen Birrell was sentenced to eight months in prison for insulting Celtic fans, Catholics and the Pope on a Facebook page. During sentencing, the sheriff, Bill Totten, told Birrell that his views would not be tolerated by “the right-thinking people of Glasgow and Scotland.”⁵⁵

Protecting free speech is necessary because the alternative – granting government expanded powers to punish speakers they don’t like – creates even more harm in society. Even if one is successful at punishing exactly the hateful speaker one hoped to punish the entire process risks making martyrs and rallying support for those sanctioned. Moreover, as Professor Strossen notes, these bans can stultify “the candid intergroup dialogue concerning racism and other forms of bias that constitutes an essential precondition for reducing discrimination” and “generate litigation and other forms of controversy that will exacerbate intergroup tensions.”⁵⁶

Finally, and most importantly, while advocates for speech codes claim that hate speech plays no part in the legitimate expression of ideas, we believe it is inevitable that the act of censoring words will lead to the censoring of ideas. It is tempting to say that campuses at

50. *Vejdeland & Others v. Sweden*, App. No. 1813/07, Eur. Ct. H.R., Judgment, ¶ 15 (Feb. 9, 2012), [http://hudoc.echr.coe.int/eng#{"itemid":\["001-109046"\]}](http://hudoc.echr.coe.int/eng#{).

51. *Féret v. Belgium*, App. No. 15615/07, Eur. Ct. H.R., Judgment, ¶ 41 (July 16, 2009), [http://hudoc.echr.coe.int/eng#{"itemid":\["001-93626"\]}](http://hudoc.echr.coe.int/eng#{).

52. *Vejdeland*, *supra* note 50, at ¶ 60; *Féret*, *supra* note 51, at ¶ 82.

53. See Vanessa Gera, *Polish Court Fines Catholic Magazine for Comparing Woman Who Sought Abortion to Nazis*, CANADIAN PRESS (Sept. 23, 2009).

54. See *Bardot Fined Over Racial Hatred*, BBC NEWS: ENTERT (June 3, 2008), <http://news.bbc.co.uk/2/hi/entertainment/7434193.stm>.

55. See *Internet Bigot Stephen Birrell Jailed For Eight Months*, BBC NEWS (Oct. 17, 2011), <http://www.bbc.com/news/uk-scotland-glasgow-west-15333744>.

56. Strossen, *supra* note 47, at 561.

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the very least should be able to prohibit epithets; words like “nigger” and “faggot” cause great harm. But it is not difficult to imagine contexts – in scholarly analysis, popular culture, or casual conversation – where the use of any such word would be considered appropriate. As Justice Harlan eloquently explained: “[w]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”⁵⁷ Ultimately, hate speech codes inescapably ban the expression of unpopular ideas and views, and that is never acceptable on college campuses.

CONCLUSION

American society is more polarized than it has been any time since Reconstruction. These deep divisions inevitably play themselves out on college campuses. But ultimately the solution is not to trust campus officials to suppress speech. It is imperative that colleges and universities create inclusive learning environments for all students. This, though, cannot come by suppressing speech. The law is clear that a public university may not exclude a speaker based on his or her views, nor may students or faculty be punished for the views that they express.

Although there is a right of speakers to express hateful messages on campus, that does not mean that campus officials should silently tolerate such speech. It is important that campus officials denounce hate when it occurs and explain why it is inconsistent with the type of community we desire. After a recent incident of hate speech in my law school, I immediately sent a message to all students, faculty, and staff strongly condemning the expression of hate and expressing how it was inconsistent with the community we are and aspire to be.

Having seen the enormous time and money invested by the Berkeley campus to deal with the appearances of Ben Shapiro and Milo Yiannopoulos, I cannot help but wish this went on someplace else. But I know that Berkeley, especially because of its history with the free speech movement of the 1960s, is a unique place for expression. This is why it is so important that the campus did all that it can

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

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to ensure freedom of speech. It is also why this campus has the chance to be a model for other schools in upholding the principle that all ideas and views can be expressed at colleges and universities.