

# Speech Codes and Expressive Harm

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## I Introduction

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During the 1980s and early 1990s, many American colleges and universities adopted rules prohibiting speech that denigrates individuals on the basis of race, gender, ethnicity, religion, sexual orientation, and similar categories of social identity. An apparent rash of racist and sexist incidents on campuses across the nation had led to the adoption of these “speech codes.”<sup>1</sup> For example, at the University of Michigan, someone had written on a blackboard: “A mind is a terrible thing to waste—especially on a nigger.” (Lawrence, 1993, p. 55). The bigotry exhibited in such incidents was widely condemned. Yet, the codes designed to respond to this bigotry generated considerable controversy.

Critics argued that the codes violated the principle of free speech. They did not claim that all rules regulating speech on campus would be objectionable. Rules against rallies or demonstrations in the library would be unobjectionable. The aim of such rules would simply be to allow all students to use the library facilities without disruption, and no particular political beliefs or social attitudes would be singled out for suppression. But speech codes were entirely different, as the critics saw it: the codes aimed to suppress the expression of certain beliefs and attitudes. And such an aim, the critics argued, was incompatible with any adequate understanding of free speech.

Advocates of the codes pointed to the harm caused to those targeted by “hate speech”: generalized psychic distress, feelings of anger and alienation, a sense of

physical insecurity, and the various academic and social difficulties that naturally flow from such psychological disturbances. Treating the interests of all students with equal consideration, argued the advocates, required rules punishing hate speech. Code advocates also argued that restrictions on campus hate speech could help combat bigoted attitudes and practices in society at large.

American courts have uniformly sided with the critics of campus speech codes (Shiell, 1998, pp. 73–97). In a series of cases, courts struck down a variety of codes as unconstitutional. It might seem that these legal rulings would have put the controversy to rest. But that has not happened. Discussion and debate over the legitimacy of speech codes continues.

Because the US Supreme Court has not taken up a speech code case, there is some room to argue that the legal door has not been shut entirely on the question of the constitutionality of the codes. But the continuation of the controversy does not depend on expectations about future court action. It continues because the codes raise crucial ethical and political questions in a society committed both to freedom of speech and to equality under the law. What is the best way to understand the principle of free speech? Are there special aspects of the university context that must be taken into account by that understanding? Are there special aspects of American history and society that make a difference to the speech code debate? Legal cases can help shed light on such questions, but no court ruling can decisively settle them.<sup>2</sup>

In my view, it is difficult to justify speech codes solely on the basis of the harmful causal effects of hate speech. But I think that there is another type of harm to consider, what has been called “expressive harm” (Pildes and Niemi, 1993; Anderson and Pildes, 2000). Expressive harm is not a causal consequence of hate speech. Rather, it is a harm that derives from the kind of attitude expressed in the very act of hate speech, and it is independent of the causal effects of such a speech act.

In the next section, I explain why the causally harmful results of hate speech provide an insufficient basis on which to justify speech codes. Section III then gives an account of the nature of expressive harm, focusing on how symbolic speech by public officials can do expressive harm to an individual’s right to be treated by government with equal respect and consideration. Section IV compares and contrasts private individuals with public officials when it comes to speech that does expressive harm. That section also formulates two main obstacles to justifying speech codes. In Sections V and VI, I seek to surmount those obstacles and present the case for speech codes. Section VII examines several campus speech policies, arguing for the superiority of a certain type of speech code.

## II Causal Harm

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In an influential essay, Mari Matsuda writes: “When racist propaganda appears on campus, target-group students experience debilitated access to the full university experience. This is so even when it is directed at groups rather than at individuals” (1993, p. 45). And to those speech-code skeptics inclined to dismiss the harm of hate speech as merely psychological, Charles Lawrence points out: “Psychic injury is no less an injury than being struck in the face, and it often is far more severe. Racial epithets and harassment often cause deep emotional scarring and feelings of anxiety and fear that pervade every aspect of a victim’s life” (1993, p. 74).

There is little doubt that hate speech can have psychologically debilitating effects and those effects in turn can interfere with a student’s opportunities to enjoy the educational and social benefits of campus life. Black students who walk into a classroom in which the blackboard has written on it a vicious racial epithet directed against them will likely – and reasonably – respond with anger and even rage. Moreover, additional psychological injury is certainly possible: the students may come to think that

they are unwelcome and even unsafe on campus. As Matsuda notes, hate speech often uses symbols, such as a burning crosses and swastikas, which are associated with violence against minorities.

Advocates of speech codes also argue that hate speech reinforces and perpetuates bigoted attitudes and practices in society at large. Thus Lawrence writes that “racist speech...distorts the marketplace of ideas by muting or devaluing the speech of Blacks and other despised minorities” (1993, p. 78). He contends that racist speech defames Blacks as a group: it causes a reputational injury to all Blacks, not simply to the immediate targets. Delgado and Stefancic also point to the general social effects of hate speech: “the racist insult remains one of the most pervasive channels through which discriminatory attitudes are imparted” (1997, p. 4).

The harms cited by the advocates of speech codes are real and serious. Undoubtedly, the members of society have a moral obligation to combat those harms. The issue is whether university speech codes are a justifiable way to proceed.

Some critics of speech codes argue that other means of combating the harms of hate speech should be pursued. Such means include “counterspeech”, that is, speaking out against the bigoted attitudes of hate speakers. Also included are educational programs aimed at promoting equality and highlighting the harm caused by bigotry. Thomas Simon doubts that speech codes or educational programs make any significant impact on racism but suggests that universities can exert some substantial leverage in society’s fight for racial equality by “carefully examining their employment practices, investment decisions, and community service” (1994, p. 186).

Advocates of speech codes claim that the remedies suggested by Simon and others should be pursued in addition to speech codes, not in place of them. But that claim is persuasive only if speech codes are a justifiable way to regulate speech. The *prima facie* plausibility of the claim that the codes seek to suppress the expression of certain viewpoints places a substantial burden of argument on those who contend that they are justifiable. That burden is only increased by the availability of other ways of combating the causal harms of hate speech.

The arguments that we have canvassed thus far have little chance of meeting that burden because they appear to license restrictions on speech that sweep too broadly. The arguments would not only license speech codes banning the use of racial epithets and slurs. Philosophical,

literary, religious, and scientific works conveying racist, sexist, or heterosexist ideas would be subject to prohibition. As Martin Golding says in his critique of speech codes, racist and anti-Semitic beliefs that are “sanitized” and presented in the form of scholarly work is potentially more harmful than the slurs and epithets that students may hurl at one another (2000, p. 54). Such sanitized bigotry, for example, the notorious anti-Semitic tract, “Protocols of the Elders of Zion,” has the appearance of a work of scholarship and so may well have a greater psychological and reputational impact on the group it targets than the vulgar racist rant of a student.

Yet, a university is precisely where any work that purports to have objective validity should be available for critical assessment. As Golding has argued, the university is “a form of institutionalized rationality” that subjects knowledge-claims to the test of “critical examination... by competent inquirers” (2000, pp. 18, 22). The function of the university requires “communal discussion” and “the *organized* pursuit of knowledge,” and it would be seriously compromised by the prohibition of works that convey bigoted ideas and views (Golding, 2000, pp. 17–18).

Moreover, there is a body of literature that is not the fraudulent work of vicious bigots but is regarded as racist by many and would be subject to prohibition under the arguments of Lawrence and Matsuda. Consider the work on race of the psychologist J. P. Rushton, who summarizes it this way:

In new studies and reviews of the world literature, I consistently find that East Asians and their descendants average a larger brain size, greater intelligence, more sexual restraint, slower rates of maturation, and greater law abidingness and social organization than do Europeans and their descendants who average higher scores on these dimensions than do Africans and their descendants. I proposed a gene-based evolutionary origin for this pattern. (2000)

Rushton’s views have the potential to cause much more reputational damage to Blacks than an undergraduate’s drunken utterance of a racial slur. Moreover, regardless of Rushton’s intent, it is reasonable to think that his views would reinforce the bigoted attitudes of those inclined to treat Blacks as moral inferiors. And the views would obviously provoke anger among black students.

Yet, Rushton’s work may not be legitimately banned from libraries, classrooms, and other campus forums by a speech code. The institutional rationality of the university

demands that the work be available for the critical analysis of scholarly experts and for the study of interested students.

The university’s role as a testing ground for claims to knowledge makes it difficult for advocates of speech codes to meet their burden of justification solely by pointing to the harmful causal consequences of hate speech. But this does not necessarily doom all efforts to justify the codes. There is another form of harm associated with hate speech – expressive harm. A justification that takes account of both causal and expressive harm has better prospects for success. Let us turn to some examples to illustrate the existence and nature of expressive harm.

### III Expressive Harm: Public Actors

In the recent past, there was considerable controversy sparked by southern states that flew the Confederate flag over their capitols. On July 1, 2000, South Carolina became the last state to remove the flag from its site over the seat of the state government. Blacks and many others take the flag to be a symbol of slavery and racism, and they construed the display of the flag to be an expression of racist attitudes. Some southern Whites rejected that interpretation and argued that the flag was a legitimate expression of reverence for the valor of their ancestors who suffered and died during the Civil War. But in the wake of protests, state legislators voted to take the flag down.

What was the harm of flying the flag over state capitols? In *NAACP v. Hunt* (1990), a federal appeals court rejected the claim that Alabama was violating the Equal Protection Clause of the Fourteenth Amendment by flying the confederate flag over its capitol. The court reasoned that the only harm done by the flying of the flag was the emotional distress of the plaintiffs and that such harm did not amount to a violation of the constitutional principle of equality.

However, the court’s reasoning was flawed by its failure to see that there is another form of harm done by the flying of the flag, which did violate the equality principle. The flying of the flag did expressive harm to Blacks: Aside from its causal consequences, the act of flying the flag was the expression of a racist attitude hostile, or at least grossly indifferent, to the interests of Blacks (Forman, 1991, p. 508). The official expression of such an attitude constituted a violation of the right to be treated by government with equal respect and consideration.

There are undoubtedly well-meaning individuals who take pride in the display of the Confederate flag. But they fail to realize that the nation is not sufficiently removed from its history of racial oppression for the flag to be a benign cultural symbol. The debilitating effects of past racism still severely hamper the life chances of Blacks, and current racism aggravates the wounds left by this history (Bobo, 1997). The meaning of the flag is still freighted with the history and legacy of racial oppression.

In such a context, flying the flag over the seat of government is, at best, an expression of a callous indifference toward the state's racial minorities and counts as an expressive harm to them. As Anderson and Pildes explain it, "a person suffers expressive harm when she is treated according to principles that express negative or inappropriate attitudes toward her" (2000, p. 1528). And Alabama was treating its black citizens in exactly that way.

Another example of expressive harm is found in Amar's hypothetical variation of the Hunt case: suppose that Alabama adopted as its official motto the slogan "The White Supremacy State" (1998, p. 254). It would be strained to argue that non-White plaintiffs seeking a ruling that the state had violated the Equal Protection Clause would need to prove that the adoption of the motto had causal effects harmful to racial equality. Indeed, under certain scenarios, the motto might produce political backlash promoting equality. The fact is that the very adoption of the motto, apart from its causal consequences, is a harm to racial minorities. It is an expressive harm.

#### IV Expressive Harm: Private Actors

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In the Confederate flag and state motto cases, public officials were the ones whose actions did expressive harm. Their status as officials made the harms ascribable to the state and so – the circuit court's ruling notwithstanding – a constitutional violation. But the expressive harm they did was independent of their official status. State officials can typically exert much more causal power in the world than private citizens. And what they express through their acts might well have much more widespread causal effects than the expressive activities of a private individual. Those causal effects may result in harms that most private individuals simply do not have the causal capacity to produce, for example, widespread loss of employment opportunities. But the private individual is capable of doing expressive harm. Just as a state official can express callous indifference or hostility to racial minorities, so

can a private citizen. And expression of such an attitude can amount to a harm in both sorts of cases.

On the other hand, there is a big difference between the expressive harm to racial equality committed by a state official and the same sort of harm done by a private individual. When the expressive harm is done by the communicative act of a private individual, it is protected by free speech principles. It is unjustifiable for the law to allow state officials to fly the Confederate Flag above their capitols, but the law should protect private individuals who wish to display the flag outside their homes or on their car antennas. Such private actions can express indifference or hostility to racial equality, but it should be not subject to legal sanction.

Private hate speakers thus have a free-speech shield that protects them from liability for the expressive harm they may do, just as that same shield usually protects them from liability for the harmful causal effects of their speech. So it may seem that we have not really advanced the argument for speech codes. Moreover, one can claim that the argument has been made even more difficult by the difference between official and private speech.

When a university punishes a student for a speech code violation, it seems to be committing an expressive harm against him. Aside from any bad causal effects the punishment may have on the student, it is an expression of the emphatic moral condemnation of his social attitudes. And critics of restrictions on hate speech might contend that such condemnation by government violates the rights of hate speakers to equal consideration. Everyone should be permitted to express their views, without discrimination on the basis of what those views are (Dworkin, 1995, pp. 200–1). Accordingly, we appear to have two strong reasons against speech codes. The campus hate speaker may do expressive harm, but that form of harm is no less protected by free speech principles than the causal harm he may do. And the university's punitive response to the hate speaker is a form of official moral condemnation that expressively harms the speaker. The challenge of justifying speech codes depends upon a cogent response to these two reasons. The next two sections seek to develop such a response.

#### V Moral Contempt

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The expressive harm of hate speech plays two related roles in the justification of speech codes. First, it helps explain why certain forms of hate speech should be

regarded as “low value” speech in the university context. Second, it serves to distinguish those forms of hate speech that ought to be subject to official restriction from those that ought to be protected against such restriction. Let us begin with a look at how the meaning and use of racial epithets can be understood in terms of the idea of expressive harm.

Racial epithets and similar terms of abuse are communicative tools for expressing an extreme form of moral contempt.<sup>3</sup> Such contempt involves the attitude that the person targeted by the epithet belongs to a group whose members have a lower moral status than those in the group to which the speaker belongs. For those who think in such terms, it is appropriate to express such contempt when members of the morally subordinate groups seek to be treated as equals. The expression of extreme contempt is thought to be fitting because those who are moral inferiors are trying to act as equals: they are impostors who need to be treated as such. Racial epithets and similar terms of abuse are words whose use is to treat someone in a morally degrading way by expressing a certain form of moral contempt toward them. Racist or sexist speech in the form of scientific or philosophical discourse might also convey contempt, but that is not the principal purpose of those forms of discourse. Rather, the vocabulary of such discourse is for formulating and expressing ideas that claim to have objective validity. Any such validity-claim is subject to critical scrutiny and challenge by anyone who can raise such a challenge, even by those persons whom the claim might assert to be moral inferiors to the speaker. “Scientific racism” might explicitly assert that a certain racial group is inherently less intelligent or more prone to crime than other racial groups, but in making such claims it implicitly invites anyone to produce arguments and evidence to refute them.

It is true that the use of epithets can be part of assertions that claim objective validity. Anti-Semites can say “Kikes are all thieves.” But hate speech couched in scientific or philosophical discourse does not employ such epithets because the discourse is meant to convey objective claims unadorned by the subjective feelings of the speaker. In contrast, the point of epithets is precisely to express the feelings of the speaker.

The contrast explains why hate speech couched in the discourse of science, philosophy, theology, or other scholarly vocabularies should be protected. The claims that such speech makes are subject to the scrutiny, challenge, and refutation of those operating within the institutional

rationality of the university. As Golding has stressed, that rationality requires protection even for speech that claims or suggests some groups of humans are inherently inferior to others.

In contrast, speech using racist epithets and similarly abusive terms is “low value” speech in the university context because it contributes virtually nothing to the operation of the institutional rationality of the university at the same time that it is used to degrade members of the university community. The exercise of that rationality involves the critical assessment of claims to objective validity. It is difficult to see what role is played in that process by the use of epithets to express contempt for and degrade persons who are members of the university community on the basis of their race, gender, and other categories of social identity.

My argument might be rejected on the basis of the reasoning in the case of *Cohen v. California*. Writing for the Court, Justice Harlan said that the words on the jacket Cohen wore into a courthouse, “Fuck the Draft,” conveyed a message in which the emotional and cognitive elements were inseparable. Protecting Cohen’s message against the Vietnam War draft meant protecting the expletive in terms of which the message was expressed. And the Court held that the message must be protected as the expression of Cohen’s political viewpoint.

It may be argued that Harlan’s reasoning applies to the use of racist or sexist epithets. Such epithets convey a message in which emotional and cognitive elements are mixed and the message must be protected as the expression of certain viewpoint. However, there is an important difference between campus hate-speech cases and Cohen’s case: The campus cases – but not Cohen’s – are closely analogous to cases of verbal racial harassment in the workplace. And restrictions on such harassment at work are unobjectionable.

Cohen was not acting in an employment context but rather as a member of the general public, expressing his views in a building open to the public. And he caused no disturbance in courthouse operations. But imagine that he were an employee at a business with black employees and that he wore a jacket in the workplace saying “Fuck niggers.” Such expression could be justifiably prohibited on grounds of equal employment opportunity.

Campus speech cases are more like such an employment case than they are like the actual Cohen case. Students are not employees. But they do have a defined role within the university, and they should not be materially disadvantaged in their role on account of their race,

gender, or sexual orientation. The use of racial epithets and similar terms of abuse in the campus context is reasonably thought to interfere with equal educational opportunity, just as the use of such terms can interfere with equal employment opportunity in the workplace.

It is also true that the principle of equal educational opportunity must be construed in a way that is responsive to the special role of the university in critically examining all ideas claiming objective validity. Hate speech in the mode of scientific or philosophical discourse can cause psychological distress sufficient to interfere with a student's ability to enjoy the opportunities of campus life. But in that case, it is the ideas expressed that are the grounds for the distress. And, unlike other institutions, the role of the university in critically assessing ideas requires that distress caused by the assertion of ideas be excluded as a reason for adopting a speech policy. However, that role does not require the university to ignore the causal effects of racist epithets on the student.

Sadurski has claimed that "insensitivity to many psychic harms is the price of a broadened scope for individual autonomy" (1999, p. 224). It is also true that a certain degree of such insensitivity is the price of a university's commitment to the free expression and critical testing of ideas claiming objective validity. But the causal harm of racial epithets is not the result of putting forth propositions that claim objective validity. Rather, the causal harm is the product of the extreme moral contempt that the epithets express. Thus, a university speech policy that takes account of the causal harms of such epithets is not subject to the same objection as a policy that takes account of the causal harm of statements that claim objective validity.

## VI Official Condemnation

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Let us now turn to the matter of whether a speech code treats hate speakers with less than equal consideration. After all, such a code makes them liable to punitive measures for the expression of their social and political attitudes, and "the significance of punishment is moral condemnation" (Kahan, 1996, p. 598). There is no circumventing the fact that a speech policy that employs punishment to express such condemnation seeks to suppress speech for the viewpoint it expresses. And in so doing, the policy violates the equal expressive rights of those who hold the disfavored viewpoints.

Any viewpoint-biased speech restriction should be troubling to those who value strong protections for freedom of speech. But it is important to place the speech code debate in its broader social and historical context in order to understand how a limited departure from viewpoint neutrality can be justifiable.

Consider again the Confederate flag dispute. Blacks and many others reasonably took the flag as symbolic of the state's indifference, or even antagonism, to racial equality. Removal of the flag was reasonably construed as an expressive affirmation of that value. The removal was hardly viewpoint-neutral and could not have been in the situation. But the expressive affirmation of racial equality was justifiable, and even mandatory, under the circumstances.

The flag was reasonably construed as standing for a set of values associated with the Confederacy, including white supremacy. In theory, the flag can stand for such virtues as courage and honor without the taint of the white supremacist regime those virtues in fact served. But in contemporary American society the display of the flag cannot be purified of such a taint. There is no way for a state to display the flag over its capitol without it being reasonably interpreted as callous indifference to interests of its black citizens.

Many advocates of speech codes appear to see the code controversy in similar terms: adopting a speech code is a way of symbolically affirming the value of racial equality but not adopting one amounts to the expressive repudiation of that value (Shiffrin, 1999, pp. 78–80). But the analogy is not quite right. The failure to have a code is not analogous to displaying a symbol whose meaning is still inextricably intertwined with racism. For that reason, it is wrong to think that it is morally, even if not legally, mandatory for any university to have a speech code. But having such a code still may be a justifiable option.

A speech code is an expressive affirmation of racial equality. So are other aspects of university life, such as the observance of the Martin Luther King holiday. Hate speakers may object to the holiday as a departure from viewpoint neutrality and a denigration of their right to equality. They don't get to have an official holiday for their favorite opponent of the civil rights movement. But the nation's commitment to racial equality means that hate speakers and advocates of racial equality simply are not treated in an absolutely evenhanded way, nor should they be. The history of racial injustice is so egregious, and its lingering effects still so troublesome, that some

tilt away from strict expressive neutrality and in the direction of racial equality is entirely justifiable. The question is the degree and nature of the tilt.

Critics of speech codes may concede that symbolically affirming racial equality and condemning bigotry through official holidays is fine but then argue that it is an entirely different matter when it comes to using punitive measures for strictly symbolic purposes. But speech codes can be reasonably understood as more than a strictly symbolic gesture. Their condemnation of bigotry sends a strong educational message to the university community and arguably deters forms of verbal degradation that interfere with a student's opportunity to enjoy benefits of campus life.

It may be true that speech codes are not indispensable for providing equal educational opportunity: counter-speech that condemns instances of campus bigotry and other alternatives might work. But it is not unreasonable for a school to judge that a speech code would be of sufficient value to warrant its adoption. The question is how to formulate a code that serves equal opportunity while respecting the centrality of free expression to the role of the university.

## VII Speech Codes

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Some advocates of speech codes defend bans on hate speech that sweep more broadly than the use of epithets (Matsuda, 1993, pp. 44–5; Lawrence, 1993, p. 70). Such broad codes would prohibit hate speech formulated in scientific, philosophical, or theological terms. It should be clear that my analysis rejects codes of that kind as inconsistent with the central place that free speech must play in the life of the university. A speech code must be narrowly drawn in order to be justifiable (Cohen, 1996, pp. 212–14; Weinstein, 1999, pp. 52, 127).

A typical version of a narrow code prohibits hate speech only when (a) it uses racial epithets or analogously abusive terms based on sex, sexual orientation, and similar categories of social identity, (b) the speaker intends to degrade persons through his use of such terms, and (c) the terms are addressed directly to a specific person or small group of persons.

In criticizing narrow speech codes, some legal theorists have suggested that general rules against verbal harassment would be preferable to codes formulated in terms of race, gender, and so on (Golding, 2000, p. 60). Such general rules would not select out particular categories of

verbal harassment, but would rather prohibit any verbal abuse that materially interfered with a (reasonable) student's ability to learn and enjoy the other benefits of campus life and that was intended to cause such interference. General harassment rules certainly have much to be said for them as an alternative to narrow speech codes. A student's opportunities to take advantage of the benefits of the university should not be materially interfered with by any form of verbal harassment. And if the speech policy of a university were restricted to racial epithets and the like, then students who were harassed for other reasons, for example, their political affiliation, could rightly complain that the university was not adequately protecting their interest in equal educational opportunity. Accordingly, it is reasonable to think that general rules against all forms of verbal harassment would be preferable to a speech code limited to categories such as race and gender. Nonetheless, it is possible to give due recognition to the special expressive and causal harm of racial epithets within a set of general rules prohibiting any verbal harassment that interferes with a student's equal educational opportunity.

The capacity of racial epithets to express extreme moral contempt gives them an unusual power to interfere with a student's efforts to take advantage of her educational opportunities. General rules against verbal harassment can be interpreted and applied in a way that takes account of that fact. For instance, the use of anti-Semitic epithets could be judged a violation of the rules even in the case of just a single incident, while other forms of abusive speech, for example, those targeting a person's political affiliation, would need to involve repeated episodes before they would rise to the level of a violation. Or the use of a racist epithet might be judged a violation when it is reasonably foreseeable that an individual in the targeted group would be exposed to the abusive term, even if the epithet were not specifically directed at her.<sup>4</sup> For other forms of verbal harassment, directly addressing the targeted individual might be required.

The basic standard for a violation would be the same in all cases of verbal harassment: Did the abusive speech materially interfere with a student's opportunity to take advantage of the benefits of campus life?<sup>5</sup> But in the interpretation and application of that standard, the distinctive expressive power of racist epithets and similar terms of abuse would be taken into account.<sup>6</sup>

A campus speech policy that took account of that special expressive power could do a better job of protecting equal opportunity than general rules against verbal harassment that failed to be responsive to expressive harm

of hate speech. And the policy could also do a better job than speech codes limited to the prohibition of verbal abuse based on race, gender, sexual orientation, and similar categories of social identity. Taking account of the expressive power of racial epithets and analogous terms

of abuse involves some departure from the principle that restrictions on speech should be viewpoint-neutral. But the departure is relatively minor and the value served – equal educational opportunity in our institutions of higher education – is an important one.

## Notes

- 1 In this essay, I use the term “speech code” to refer to rules that punish individuals for speech that degrades or demeans others on the basis of race or the other listed features.
- 2 Under US constitutional law, there is an important distinction between state and private universities: The former, but not the latter, are subject to the free speech clause of the Constitution. For this essay, I will assume that most, if not all, private institutions of higher education place a high value on free speech and desire to respect free-speech principles.
- 3 My analysis of epithets is meant to capture a standard use of such terms. There are other uses.
- 4 Consider the case from the University of Michigan, cited in section I.
- 5 There should also be requirements that the speech intentionally interfere with the student’s opportunities and that the response of the affected student be reasonable.
- 6 Delgado and Stefancic (1997) propose general rules against verbal harassment combined with provisions for extra punishment in cases where the harassment is based on race, gender, and the like. They point out that their proposal appears to be consistent with the Supreme Court ruling in *Wisconsin v. Mitchell* (1993), which permitted a state to enhance criminal penalties for crimes committed from racially discriminatory motives. It is unclear, though, whether the Court would extend that ruling to cases where the underlying “crime” is a speech offense. My proposal is not that extra punishment be given for hate speech, but rather that the expressive harm of such speech be factored into the question of whether an incident rises to the level of an offense. The two proposals are not incompatible, although I think that, aside from truly egregious cases, a university’s punitive response to hate speech episodes should be relatively mild and mainly symbolic.

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