



Regulating Racist Speech on Campus

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- 1 I have spent the better part of my life as a dissenter. As a high school student, I was threatened with suspension for my refusal to participate in a civil-defense drill, and I have been a conspicuous consumer of my First Amendment liberties ever since. There are very strong reasons for protecting even racist speech. Perhaps the most important of these is that such protection reinforces our society's commitment to tolerance as a value, and that by protecting bad speech from government regulation, we will be forced to combat it as a community.
- 2 But I also have a deeply felt apprehension about the resurgence of racial violence and the corresponding rise in the incidence of verbal and symbolic assault and harassment to which blacks and other traditionally subjugated and excluded groups are subjected. I am troubled by the way the debate has been framed in response to the recent surge of racist incidents on college and university campuses and in response to some universities' attempts to regulate harassing speech. The problem has been framed as one in which the liberty of free speech is in conflict with the elimination of racism. I believe this has placed the bigot on the moral high ground and fanned the rising flames of racism.
- 3 Above all, I am troubled that we have not listened to the real victims, that we have shown so little understanding of their injury, and that we have abandoned those whose race, gender, or sexual preference continues to make them second-class citizens. It seems to me a very sad irony that the first instinct of civil libertarians has been to challenge even the smallest, most narrowly framed efforts by universities to provide black and other minority students with the protection the Constitution guarantees them.
- 4 The landmark case of *Brown v. Board of Education* is not a case that we normally think of as a case about speech. But *Brown* can be broadly read as articulating the principle of equal citizenship. *Brown* held that segregated schools were inherently unequal because of the *message* that segregation conveyed—that black children were an untouchable caste, unfit to go to school with white children. If we understand the necessity of eliminating the system of signs and symbols that signal the inferiority of blacks, then we should hesitate before proclaiming that all racist speech that stops short of physical violence must be defended.
- 5 University officials who have formulated policies to respond to incidents of racial harassment have been characterized in the press as “thought police,” but such policies generally do nothing more than impose sanctions against intentional face-to-face insults. When racist speech takes the form of face-to-face insults, catcalls, or other assaultive speech aimed at an individual or small group of persons, it falls directly within the “fighting words” exception to First Amendment protection. The Supreme Court has held that words which “by their very utterance inflict injury or tend to incite an immediate breach of the peace” are not protected by the First Amendment.
- 6 If the purpose of the First Amendment is to foster the greatest amount of speech, racial insults disserve that purpose. Assaultive racist speech functions as a

preemptive strike. The invective is experienced as a blow, not as a proffered idea, and once the blow is struck, it is unlikely that a dialogue will follow. Racial insults are particularly undeserving of First Amendment protection, because the perpetrator's intention is not to discover truth or initiate dialogue but to injure the victim. In most situations, members of minority groups realize that they are likely to lose if they respond to epithets by fighting and are forced to remain silent and submissive.

7 Courts have held that offensive speech may not be regulated in public forums, such as streets, where the listener may avoid the speech by moving on, but the regulation of otherwise protected speech has been permitted when the speech invades the privacy of the unwilling listener's home or when the unwilling listener cannot avoid the speech. Racist posters, fliers, and graffiti in dormitories, bathrooms, and other common living spaces would seem to clearly fall within the reasoning of these cases. Minority students should not be required to remain in their rooms in order to avoid racial assault. Minimally, they should find a safe haven in their dorms and in all other common rooms that are a part of their daily routine.

8 I would also argue that the university's responsibility for insuring that these students receive an equal educational opportunity provides a compelling justification for regulations that insure them safe passage in all common areas. A minority student should not have to risk becoming the target of racially assaulting speech every time he or she chooses to walk across campus. Regulating vilifying speech that cannot be anticipated or avoided would not preclude announced speeches and rallies—situations that would give minority-group members and their allies the chance to organize counter-demonstrations or avoid the speech altogether.

9 The most commonly advanced argument against the regulation of racist speech proceeds something like this: we recognize that minority groups suffer pain and injury as the result of racist speech, but we must allow this hate mongering for the benefit of society as a whole. Freedom of speech is the lifeblood of our democratic system. It is especially important for minorities, because often it is their only vehicle for rallying support for the redress of their grievances. It will be impossible to formulate a prohibition so precise that it will prevent the racist speech you want to suppress without catching in the same net all kinds of speech that it would be unconscionable for a democratic society to suppress.

10 Whenever we make such arguments, we are striking a balance on the one hand between our concern for the continued free flow of ideas and the democratic process dependent on that flow and, on the other, our desire to further the cause of equality. There can be no meaningful discussion of how we should reconcile our commitment to equality and our commitment to free speech, until it is acknowledged that there is real harm inflicted by racist speech and that this harm is far from trivial.

11 To engage in a debate about the First Amendment and racist speech without a full understanding of the nature and extent of that harm is to risk making the First Amendment an instrument of domination rather than a vehicle of liberation. We have not known the experience of victimization by racist, misogynist, and homophobic speech, nor do we equally share the burden of the societal harm it inflicts. We are often quick to say that we have heard the cry of the victims, when we have not.

12 The *Brown* case is again instructive, because it speaks directly to the psychic injury inflicted by racist speech by noting that the symbolic message of segregation

affected "the hearts and minds" of Negro children "in a way unlikely ever to be undone." Racial epithets and harassment often cause deep emotional scarring and feelings of anxiety and fear that pervade every aspect of a victim's life.

13 *Brown* also recognized that black children did not have an equal opportunity to learn and participate in the school community if they bore the additional burden of being subjected to the humiliation and psychic assault contained in the message of segregation. University students bear an analogous burden, when they are forced to live and work in an environment where at any moment they may be subjected to denigrating verbal harassment and assault. The same injury was addressed by the Supreme Court, when it held that sexual harassment that creates a hostile or abusive work environment violates the ban on sex discrimination in employment of Title VII of the Civil Rights Act of 1964.

14 Carefully drafted university regulations would bar the use of words as assault weapons and leave unregulated even the most heinous of ideas, when those ideas are presented at times and places and in manners that provide an opportunity for reasoned rebuttal or escape from immediate injury. The history of the development of the right to free speech has been one of carefully evaluating the importance of free expression and its effects on other important societal interests. We have drawn the line between protected and unprotected speech before without dire results. (Courts have, for example, exempted from the protection of the First Amendment obscene speech and speech that disseminates official secrets, that defames or libels another person, or that is used to form a conspiracy or monopoly.)

15 Blacks and other people of color are skeptical about the argument that even the most injurious speech must remain unregulated because, in an unregulated marketplace of ideas, the best ones will rise to the top and gain acceptance. Our experience tells us quite the opposite. We have seen too many good liberal politicians shy away from the issues that might brand them as being too closely allied with us.

16 Whenever we decide that racist speech must be tolerated because of the importance of maintaining societal tolerance for all unpopular speech, we are asking blacks and other subordinated groups to bear the burden for the good of all. We must be careful that the ease with which we strike the balance against the regulation of racist speech is in no way influenced by the fact that the cost will be borne by others. We must be certain that those who will pay that price are fairly represented in our deliberations and that they are heard.

17 At the core of the argument that we should resist all government regulation of speech is the ideal that the best cure for bad speech is good, that ideas that affirm equality and the worth of all individuals will ultimately prevail. This is an empty ideal, unless those of us who would fight racism are vigilant and unequivocal in that fight. We must look for ways to offer assistance and support to students whose speech and political participation are chilled in a climate of racial harassment.

18 Civil rights lawyers might consider suing on behalf of blacks whose right to an equal education is denied by a university's failure to insure a nondiscriminatory educational climate or conditions of employment. We must embark upon the development of a First Amendment jurisprudence grounded in the reality of our history and our contemporary experience. We must think hard about how best to launch legal attacks against the most indefensible forms of hate speech. Good lawyers can create exceptions and narrow interpretations that limit the harm of hate speech without opening the floodgates of censorship.

19 Everyone concerned with these issues must find ways to engage actively in actions that resist and counter the racist ideas that we would have the First Amendment protect. If we fail in this, the victims of hate speech must rightly assume that we are on the oppressors' side.

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