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NATIONAL INSTITUTE AGAINST PREJUDICE & VIOLENCE

WHEN FREE SPEECH BECOMES HARASSMENT

Developing Effective Campus Policies

by David S. Tatel

MARCH 1990 **SPECIAL REPORT**

The following is the text of remarks delivered by attorney David S. Tatel at the October 10-11, 1989, conference entitled, "The President's Role in Creating a Healthy Campus Racial and Ethnic Climate." The conference was co-sponsored by the National Institute Against Prejudice and Violence, the United States Department of Justice Community Relations Service, the American Association of State Colleges and Universities, and the University of Maryland Baltimore County. Mr. Tatel, former director of the Department of Health, Education and Welfare's Office for Civil Rights, is a partner in the Washington, D.C. law firm of Hogan & Hartson and head of the firm's education group.

When Joan Weiss asked me to speak here today, I planned to describe the extent to which the First Amendment to the Constitution imposes limits on the ability of a public college or university to deal with racially offensive and demeaning speech. The more I thought about the issues, however, the more it seemed to me that approach would not be particularly helpful. Although I have my own views on that important subject, the truth is that the precise scope of the First Amendment and its applicability to offensive and demeaning speech on campus is unsettled. There are as many views on the subject as there are people who have addressed it. In the end, we may not know the answer until the Supreme Court addresses this difficult issue.

For these reasons, I thought it would be more helpful to suggest how colleges and universities can approach this difficult and growing problem of racial harassment on campus in a way that avoids a First Amendment controversy altogether, or at least minimizes one if it occurs. Whether a university's view of the First Amendment is broad or narrow, a strategy designed to minimize conflict with it makes sense for several reasons. For one thing, academic freedom is itself protected by the First Amendment; the university ought to be the last institution in society that imposes limits on it. This is particularly true when those limits are imposed in the name of equal educational opportunity, since the civil rights movement has itself been conducted under the protective umbrella of the First Amendment.

Finally, clashes with the First Amendment are quite likely to result in litigation which will be both divisive and, particularly if the institution loses, expensive.

Before summarizing my suggestions for avoiding a conflict with the First Amendment, I want to make three points. First, the First Amendment applies only to public institutions. Some private institutions, however, are subject to similar principles of freedom of expression either because state law contains such guarantees or because they have incorporated such guarantees in their catalogs and publications.

Second, although I will be referring to racial harassment throughout this talk, my comments are equally applicable to harassment based on sex, ethnicity, sexual orientation or disability.

Finally, and most important, my suggestions that the First Amendment imposes limits on the power of public universities to punish offensive and demeaning speech should not be interpreted as an indication that I do not believe that the problem is serious. To the contrary, my own view is that racial harassment is a growing problem on our campuses that is causing grave and serious harm to minority students. It is a problem that demands the immediate attention of college presidents and boards of trustees. At the same time, it must be approached with a clear understanding of the First Amendment, for as Justice Black has said: "I do not believe that it can be too often repeated that the freedoms...guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish."

I. Assess the Need for a Policy

My first suggestion is that before dashing off a racial harassment policy, a university should ask itself whether it really needs one. The reason for asking this question is that federal law — and in many parts of the country, state law — punish racially–motivated interfer-

ence with constitutional and statutory rights, including the right to attend public universities or private universities that receive federal funds. These laws carry both criminal and civil sanctions. Several states have laws that prohibit any form of racial harassment, and in other states, victims of racial harassment can recover damages for emotional injury.

These statutes are, of course, quite narrow. They prohibit only the most egregious forms of racial harassment and intimidation. But depending upon the particular circumstances on campus, a university might find that it can satisfy its needs by relying on existing criminal and civil law. For this reason, before a university drafts a racial harassment policy, it should examine the key federal laws carefully and determine whether relevant state law provides additional criminal and civil sanctions. If it does not, it may want to consider whether seeking state legislation would solve the problem on its campus.

The advantages of this course of action are two-fold. First, it will keep the university out of the business of regulating speech and thus avoid any conflict between university policy and the First Amendment altogether. Second, I cannot think of a more effective way to signal to the university community that racial harassment is unacceptable than by treating it as a criminal offense.

There are, of course, disadvantages to this approach. Criminal and civil law may not be sufficiently broad to cover the types of behavior that are occurring on campus. Also, some believe that universities ought to regulate themselves, and bringing law enforcement officers on campus is inconsistent with that autonomy.

I do not know whether the advantages of this course of action outweigh the disadvantages on any particular campus. That is a question each university will have to decide for itself. My only point is that this is a decision a university ought to make before it writes its own racial harassment policy that could precipitate a serious conflict with the First Amendment.

II. Ensure That the Policy Is Both Narrow and Clear

Universities that believe they need a racial harassment policy should make sure their policy is both narrow and clear. Let me first address the question of narrowness.

Before a university begins to write a racial harassment policy, it needs to understand certain basic First Amendment principles. The most important is that the First Amendment prohibits public entities from punishing speech, except for certain very narrowly limited classes of speech such as obscenity, libel, slander, and what are known as "fighting words" — those that are directed at an individual and are likely to cause the average person to retaliate and precipitate a breach of the peace. Courts have allowed public entities to regulate the "time, place and manner" of speech, provided the limitations are narrow and content neutral.

In recent years, the Supreme Court has carved out an additional exception to the First Amendment that gives elementary and secondary schools broad discretion to regulate student expressive activities that are curriculum-related. This exception, however, does not apply to colleges and universities which the Supreme Court has repeatedly held are not "immune from the sweep of the First Amendment."

The Supreme Court's latest First Amendment decision — the 1989 flag burning case — is worth reading because, although it was controversial, Justice Brennan's majority opinion was quite traditional in its application of First Amendment doctrine and illustrates the importance of ensuring that racial harassment policies are as narrow as possible. The Court ruled that expressive conduct — burning an American flag — is entitled to the same First Amendment protection as is accorded to ordinary speech, and that it cannot be punished merely because the state disagrees with the views that are expressed. The decision is particularly worth reading because, in a comment directly related to the subject of this conference, Justice Brennan said that society cannot prohibit the expression of an idea or punish it merely because society finds the idea to be offensive or disagreeable. The First Amendment, he said, does not "guarantee that other concepts virtually sacred to our Nation as a whole — such as the principle that discrimination on the basis of race is odious and destructive — will go unquestioned in the marketplace of ideas."

Notwithstanding the Supreme Court's very narrow and very consistent interpretation of the First Amendment, the increased level of racial harassment on campus has led some colleges and universities to argue for more authority to regulate offensive speech. The primary argument is that the university community is different from society as a whole, that it is an academic, collegial institution, and that its primary responsibility is to protect the integrity of the academic process. Because of this, it is argued, universities can punish offensive and demeaning speech that interferes with the integrity of the academic process even though that speech might be protected by the First Amendment outside the university community.

A second argument for giving universities greater authority to regulate speech is that universities have a legitimate interest in promoting racial diversity on campus and a responsibility to maintain a harmonious community and protect minority students from discrimination on the basis of race. That responsibility, it is argued, also gives the institution authority to punish racist speech that might otherwise be protected by the First Amendment.

A third argument is that racially harassing speech is so damaging to minority students that, like obscenity, it can be prohibited outright. This argument would apply on or off campus.

Many well–intentioned people believe that these arguments have merit. Indeed, some universities have used these arguments to justify policies that penalize speech that interferes with "the learning environment." Others strongly disagree with these arguments and believe that the courts will not accept them as a basis for creating an additional exception to the First Amendment. As I said at the outset, I do not intend to try to resolve this debate. The important point is that the courts have not yet accepted any of these arguments. This means that a university that relies on them as a basis for its racial harassment policy is venturing into unchartered waters and running the risk that its policy will be challenged in court. Depending on the particular circumstances on campus, a university may be prepared to run that risk, but before it does, it at least ought to examine whether a narrow approach might satisfy its needs.

I already mentioned using existing federal and state law. If those do not satisfy a university's needs, the institution should consider the possibility of basing a racial harassment policy on the well–accepted "fighting words" exception to the First Amendment. This exception would allow a university to punish offensive or demeaning speech that is likely to cause retaliation or breach of the peace.

If that approach is too narrow, a university should consider the possibility of prohibiting offensive or demeaning speech that is aimed at an individual and that is intended to cause direct, immediate, and serious injury, *i.e.,* one–on–one racial epithets. Although the courts have generally ruled that even racial epithets are protected by the First Amendment, at least to the extent that they do not amount to "fighting words," my own view is that a narrowly drafted policy that prohibits one-on-one racial epithets might well survive constitutional scrutiny in the context of the college campus. Racial epithets advance none of the purposes of the First Amendment, they cause serious injury, and they can disrupt the learning environment. The courts might accept such a narrowly drafted racial harassment policy as a rational compromise of a difficult problem, particularly if the university follows the other suggestions that I am going to make in just a moment.

I want to emphasize that I am not saying that a racial harassment policy that penalizes only one–on–one racial epithets *will* survive constitutional challenge. I am saying only that it has a good chance of doing so, and that it certainly has a better chance than the broader regulations that many universities now are adopting. The point of all of this, of course, is that the narrower a university's policy, the closer the policy sticks to punishing only one-on-one racial epithets, the less likely the university will be sued and the more likely it will win if it is.

In addition to drawing a racial harassment policy narrowly, a university also should be sure that the policy is as clear as possible. The reason for this is that regardless of how narrow the university intends its policy to be, if the language is not clear and if it could be interpreted to punish protected as well as unprotected speech, the courts will likely invalidate it.

For this reason, the language of the policy should be crystal clear. All written and oral interpretations and explanations of the policy should be equally clear. And finally, a university should make sure that the policy is applied consistently and only to unprotected activities. The overall message a university should send to a reviewing court is that the campus clearly understands the policy and that it can be applied only to speech that is not protected by the First Amendment.

Before turning to my third suggestion, I want to emphasize that although the First Amendment may limit a university's power to punish certain kinds of speech, it in no way limits the university's ability to condemn racial harassment in the strongest possible terms. Nothing in the First Amendment prohibits the university from harnessing all of its educational and communicative resources in the battle against racial harassment.

III. Identify the Types of Speech to be Penalized

My next suggestion derives from the English teacher's old adage that one cannot write clearly about a subject that one does not clearly understand. This principle applies equally to the drafting of racial harassment policies: before a university writes a policy, it is important for it to focus on precisely what it wants to prohibit.

Some universities have approached the problem the other way around: they begin by writing the policy before they completely understand the types of speech they want to prohibit. As a consequence, the language is usually overbroad and vague, and there is little consensus on campus as to its meaning.

A better approach is to focus first on the types of speech a university wants to penalize. Once it reaches agreement on this, it will be relatively easy to write a policy that punishes only the speech it wants to discourage. Not only is this likely to result in a policy that is narrow and clear, but it will demonstrate to a reviewing court that the university approached the issue carefully and with sensitivity to the limits of the First Amendment.

IV. Involve the Entire Campus Community

Do not write the policy in the administration building. Instead, let the policy evolve from a process that includes all elements of the university community.

For example, an institution should consider establishing a committee consisting of faculty, administrators, staff and students, and directing it to hold two sets of

hearings. The first should be a fact-finding hearing. All interested organizations and individuals should be invited to testify on the extent of racial harassment on campus. Include testimony from constitutional scholars on the limits of the First Amendment.

The committee should make findings on the basis of these hearings and summarize them in a public report. The report should include the committee's findings regarding racial harassment on campus, its recommendations regarding the need for a racial harassment policy, and a proposed racial harassment policy if the committee feels that one is necessary.

After the campus has had time to discuss and debate the report, the committee should hold a second hearing where all interested individuals and organizations are invited to testify about the report and its recommendations. Following the second set of hearings, the committee should issue a final report to the President and Board of Trustees.

There are several very important reasons for proceeding this way. First, it will discipline the process by focusing on the behavior the university wants to prohibit rather than on the language of the policy. This will contribute to the development of a narrow and clear policy that will make it more defensible. The process will also enhance the policy's defensibility because it will demonstrate to a reviewing court that the policy was not imposed on the university community by a small group of administrators, but rather evolved from a process that included all elements of the academic community.

Second, the process will serve an important educational function. It will give everyone on campus a better understanding of the scope and nature of racial harassment and of the damage that it can inflict. Third, it will give the campus a better understanding of the limits of the First Amendment.

Finally, the process will give all concerned a greater degree of confidence in the policies and in their related procedures, thus reducing the chances that they will be challenged in court, and increasing the likelihood that victims of harassment will actually use them. Some observers of racial disorders on campus have reported that they occurred, at least in part, because students did not utilize existing university procedures because they were not involved in their development and therefore lacked confidence in them.

V. Keep the Policy in Perspective

My final suggestion is that a university's response to the problem of racial harassment must be broader and more comprehensive than written policies penalizing racist speech. A racial harassment policy, if one is needed at all, should be only part of a comprehensive response to the problem. Colleges and universities throughout the country have developed a variety of programs designed to prevent racial harassment from occurring and to deal with it when it does. These programs include counseling, mediation, improved communication, education, and strengthened efforts to hire minority faculty and administrators.

There are, of course, strong policy reasons for developing comprehensive programs of this kind. There are also compelling legal reasons for doing so. Like the procedures I suggested earlier, including racial harassment policies as only part of a comprehensive program will help to discipline the process by ensuring that the policies are narrowly drawn to deal with only the most egregious types of harassment. This approach will also make the policies more defensible by demonstrating to a reviewing court that the university is trying to deal with the underlying causes of the problem rather than simply penalizing speech.

One final point: while it is important to ensure that the university's response to the problem of racial harassment is comprehensive and includes both educational programs and racial harassment policies, it is equally important to ensure that the university does not use its educational programs as sanctions against those who have participated in activities protected by the First Amendment. Some universities seem to believe that First Amendment problems can be avoided if students who engage in racial harassment, instead of being punished, are required to attend educational programs or to apologize to their victims. This belief is wrong if a reviewing court subsequently determines that the speech in question was protected by the First Amendment. If it was, the university cannot impose any sanction, even one as mild as education or counseling.

VI. No Easy Answers

I hope these suggestions are helpful, although I am the first to acknowledge that it is much easier for me to stand here in Washington advising you on how to avoid a conflict with the First Amendment than it is for you to return to campus and actually accomplish it.

That reminds me of an old story about Will Rogers. During World War II, Rogers appeared before a congressional committee and testified that he knew how to end the war in the North Atlantic. The way to end that war, he said, was to bring the Atlantic Ocean to a boil which would in turn force the German U-boats to surface where they could be destroyed by American warships. The chairman of the committee told Mr. Rogers that he thought that was quite an intriguing idea, but asked him how he intended to bring the Atlantic Ocean to a boil. "I haven't thought about that," said Mr. Rogers, "but I am sure there are experts in the War Department who will know how to do it."

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