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CAN UNIVERSITIES REGULATE HATE-SPEECH AFTER *DOE V. UNIVERSITY OF MICHIGAN*?

Racism, sexism, homophobia, and anti-semitism are on the rise on university and college campuses,¹ leaving university officials to struggle with appropriate institutional responses to these acts of prejudice.² One common response has been for universities to promulgate policies prohibiting discriminatory speech—so called “hate-speech” regulations.³ Students have challenged the policies on first amendment grounds.⁴

University officials are properly concerned with the increase of discriminatory behavior and speech by students. They are responsible for ensuring equal educational opportunity, preventing interference with the educational process, protecting students from harm, both physical and psychological, and maintaining order on campus.⁵ Hate-speech restricts

1. France, *Hate Goes to College*, 76 A.B.A. J. 44 (describing incidents at the University of Michigan, the University of Wisconsin, and Stanford University); Hodulik, *Prohibiting Discriminatory Harassment by Regulating Student Speech: A Balancing of First Amendment and University Interests*, 16 J.C.U.L. 573 (1990) (describing incidents on the University of Wisconsin campuses); Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2333 n.71 (1989) (citing incidents at over 20 universities and colleges); Metz, *Bad Apples, Evil Deeds: How Law Students Deface Free Speech*, 1 STUDENT LAW, Feb. 1990, at 33; Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 176-78 (1990) (citing a report documenting racist incidents at 250 colleges and universities since 1986, a report documenting 38 incidents of anti-semitic harassment in 1988, and individual stories).

The increase in racist incidents is not limited to university campuses. Such incidents are occurring with increased frequency in the workplace and in neighborhoods. See Matsuda, *supra*, at 2327-28.

2. Metz, *supra* note 1, at 33.

3. Koepke, *The University of California Hate Speech Policy: A Good Heart in Ill-Fitting Garb*, 12 HASTINGS COMMENT L.J. 599 n.2 (1990) (stating that at least 20 colleges and universities have adopted or are considering policies regulating student speech).

Some commentators have suggested an alternative method to curb hate speech that is not strictly limited to the university context: the filing of a tort claim. See, e.g., Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123 (1990).

4. Students have challenged the University of Michigan policy, see *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989); the University of Wisconsin policy, see *UMW Post v. University of Wisconsin*, No. 90-C-328 (D. Wisc. filed March 29, 1990); the University of Connecticut policy, see *Wu v. University of Connecticut*, No. H89-649 (D. Conn. consent decree filed Jan. 25, 1990). Students also sued faculty at SUNY-Buffalo. Metz, *supra* note 1, at 37.

5. Hodulik, *supra* note 1, at 576-79. The author notes that the duty of universities to promote racial harmony arises, in part, from federal caselaw and statutes, including: *Brown v. Board of Education*, 347 U.S. 483 (1954); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1964); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1972); and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1973). Hodulik, *supra* note 1, at 576-77. See also Note, *A First Amendment Justification for Regulating Racist Speech on Campus*, 40 CASE W. RES. L. REV. 733, 770-71 (1989-90).

target groups' and individual's full access to the university environment.⁶ Such behavior disrupts the academic environment and interferes with the opportunity of other students to obtain an education.⁷ University officials have found that anti-discrimination policies are effective tools in curbing prejudice and bias.⁸

A federal district court's decision in *Doe v. University of Michigan*,⁹ and other first amendment challenges to university anti-discrimination policies, however, cast doubt on whether universities have the power to regulate hate-speech in any meaningful way. In *Doe*, the district court struck down the University's policy on discrimination and harassment as overly broad and impermissibly vague¹⁰ under the first amendment.¹¹ The court found that the policy regulated speech that fell outside the narrow categories of unprotected speech.¹²

The Supreme Court's interpretation of what speech merits absolute constitutional protection, partial protection, and no protection has evolved, leaving a somewhat confused first amendment doctrine.¹³ In *Chaplinsky v. New Hampshire*,¹⁴ the Court recognized only two levels of speech: speech that the first amendment protects absolutely, and speech

6. Matsuda, *supra* note 1, at 2372. The author believes that "official tolerance of racist speech in [the university] setting is more harmful than generalized tolerance in the community-at-large." *Id.* at 2371. Greater harm results from the power imbalance between university officials and dependent students, the lack of tenured minority faculty members resulting in the marginalization of minority students, and the fact that students are a captive audience. *Id.* at 2371-73.

7. *Id.* at 2370-73; Hodulik, *supra* note 1, at 579.

8. *College Rules to Curb Bias Draws Challenge on Constitutional Basis*, Wall St. J., Sept. 4, 1990, at B4 (citing statement by University of Wisconsin employee).

9. 721 F. Supp. 852 (E.D. Mich. 1989).

10. See *infra* note 29 and accompanying text for further discussion.

11. *Doe*, 721 F. Supp. at 866-67. For further discussion of the *Doe* case, see *infra* notes 24-41 and accompanying text.

12. *Doe*, 721 F. Supp. at 863. The court cited several Supreme Court cases carving out the narrow exceptions to protected speech. See *Bethel School Dist. No. 103 v. Fraser*, 478 U.S. 675 (1986); *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1986) (libel and slander); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (vulgar and shocking speech); *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) ("fighting words"). *Doe*, 721 F. Supp. at 863.

13. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-18 (2d ed. 1988), for a discussion of the evolution of first amendment doctrine. See also Matsuda, *supra* note 1, at 2349 (describing first amendment doctrine as "notably confused").

14. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). In *Chaplinsky*, the Supreme Court upheld the criminal conviction of a Jehovah's Witness who uttered "fighting words" to a city marshal in the midst of a disturbance caused by a crowd's hostile reaction to the appellant's proselytizing on the street. *Id.* at 573.

that the first amendment does not protect;¹⁵ only narrowly drawn categories of speech are not constitutionally protected, including “fighting words,” which “by their very utterance inflict injury or tend to incite an immediate breach of peace.”¹⁶

While the “fighting words” doctrine remains good law,¹⁷ the Court has begun to shift away from *Chaplinsky*’s simplistic methodology. Instead, the Court has moved towards an analysis that recognizes that some forms of speech merit partial protection.¹⁸ These new categories of speech include near-obscene speech,¹⁹ offensive speech,²⁰ and defamation.²¹ The “bedrock” principle of first amendment doctrine, however, has remained intact: societal objection to a particular message does not justify speech restrictions.²² Opponents of hate-speech regulations often rely on the prohibition against content-based restrictions in challenging the regulations’ constitutionality.²³

In *Doe v. University of Michigan*,²⁴ the district court held that the University of Michigan’s anti-discrimination policy violated the first amend-

15. The *Chaplinsky* approach became known as the two-level theory of first amendment doctrine. L. TRIBE, *supra* note 13, at 929. Professor Kalven receives the credit for first applying the term “two-level theory” to the Court’s analysis. See Kalven, *Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1.

16. *Chaplinsky*, 315 U.S. at 571-72. The Court cited other categories of speech that do not receive first amendment protection: “the lewd and obscene, the profane, the libelous.” *Id.* at 572. The Court noted the widespread acceptance that such utterances have little social value. *Id.*

17. See Smolla, *supra* note 1, at 198 (“fighting words” doctrine is the “one kernel of *Chaplinsky v. New Hampshire* that still survives”).

18. See L. TRIBE, *supra* note 13, at 930 (stating “the Court is beginning to construct a multi-level edifice with several intermediate categories of less-than-complete constitutional protection”).

19. See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (Court upheld under the first amendment a zoning ordinance that prohibited adult motion picture theaters from locating within a thousand feet of any residential zone, single or multiple family dwelling, church, park or school).

20. See, e.g., *F.C.C. v. Pacifica Found.*, 438 U.S. 726, *reh’g denied*, 439 U.S. 883 (1978) (Court upheld under the first amendment the Federal Communications Commission’s determination that the language of a monologue broadcast was indecent and prohibited by statute).

21. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (rule of law applied by the state court failed to provide the speech those safeguards required in a libel action brought by a public official against critics of his official conduct).

22. *Texas v. Johnson*, 491 U.S. 397 (1989) (Justice Brennan stated: “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”).

23. See Matsuda, *supra* note 1, at 2351 (author, who supports some restrictions on hate-speech, notes that the strongest argument against such regulation is that it is content-based, and, thus, forces government into the business of counseling). See also Metz, *supra* note 1, at 34-35.

24. 721 F. Supp. 852 (E.D. Mich. 1989).

ment.²⁵ In response to an increasing number of on-campus racial incidents,²⁶ the University adopted a policy regulating the discriminatory harassment of students.²⁷ The policy prohibited, under the penalty of sanctions, “[a]ny 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 . . .”²⁸ To merit punishment, the student’s behavior had to involve a threat²⁹ or have the purpose or “reasonable foreseeable effect”³⁰ of interfering with another student’s education, employment, extra-curricular activities, or personal safety.³¹

The district court deemed the policy overbroad, both on its face and as applied.³² The court first distinguished pure speech from mere con-

25. *Id.* at 866-67.

26. *Id.* at 854. The incidents included a flier calling for “open season” on African-Americans, referring to these citizens as “saucer lips, porch monkeys, and jigaboos;” a campus radio station broadcast of racist jokes; and a display of a Ku Klux Klan robe in a dormitory window. *Id.*

For a description of the history of the policy, see *Doe*, 721 F. Supp. at 854-56.

27. *Id.* at 856. The policy applied to “[e]ducational and academic centers, such as classroom buildings, libraries, research laboratories, recreation and study centers . . .” *Id.* (quoting from the policy).

28. *Id.* To resolve complaints, the policy provided informal mediation and resolution mechanisms, and a formal hearing process whenever the parties could not reach a negotiated settlement. *Id.* at 857.

29. *Id.* The policy defined a punishable threat as one that “[i]nvolves an express or implied threat to an individual’s academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety.” *Id.*

30. *Id.* The policy prohibited behavior that “[h]as the purpose or reasonable foreseeable effect of interfering with an individual’s academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety.” *Id.*

31. *Id.* The policy included a provision prohibiting:

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

a. Involves an express or implied threat to an individual’s academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety;

b. Has the purpose or reasonable foreseeable effect of interfering with an individual’s academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety;

c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.

Id. The penalties for violating the policy ranged from a formal reprimand to expulsion. *Id.* at 857. Penalties also included community service, class attendance, restitution, eviction from University housing, suspension from specific courses and activities, and suspension from school. *Id.*

32. *Id.* at 866. The University maintained that it had never applied the policy to protected speech. *Id.* at 861. The University of Michigan antidiscrimination policy included a provision addressing free speech protection, which stated: “The Office of the General Counsel will rule on any

duct.³³ The court then noted that the first amendment did not prohibit state regulation of the most extreme forms of discriminatory conduct,³⁴ which the University was free to proscribe.³⁵

In contrast, the court stated that the first amendment placed strict limitations on the University's power to regulate "pure-speech."³⁶ According to the court, the first amendment prohibited the University from regulating speech based upon content,³⁷ unless it fell within limited categories of unprotected speech.³⁸

Comparing the scope of the University's policy with the categories of unprotected speech, the court concluded that the policy was overbroad, sweeping "within its ambit a substantial amount of protected speech along with that which it may legitimately regulate."³⁹ Additionally, the court held that the policy was impermissibly vague.⁴⁰ The court believed that the terms "stigmatize," "victimize," "threat," and "interfere with" eluded precise definition.⁴¹

Students have challenged the anti-discrimination policies of other uni-

claim that conduct which is the subject of a formal hearing is constitutionally protected by the first amendment." *Id.* at 856-857.

33. *Id.* at 861. The court noted that it is sometimes difficult to draw a precise line between conduct and speech. *Id.* The Supreme Court has acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence v. Washington*, 418 U.S. 405, 409 (1974). For a discussion of the difficulties involved in distinguishing speech and conduct for first amendment purposes, see L. TRIBE, *supra* note 13, § 12-7.

34. *Doe*, 721 F. Supp. at 861. The court listed discrimination in the allocation of employment and government benefits, discrimination in education, conspiracies to deprive persons of their constitutional rights, abduction, sexual harassment, rape, assault and battery, and vandalism as extreme forms of discriminatory conduct. *Id.* at 861-62. The court added, however, that a variety of criminal law and the threat of civil suits sanction such forms of discrimination. *Id.* at 861.

35. *Id.*

36. *Id.*

37. *Id.* at 863. See *supra* note 22 and accompanying text for a discussion of the importance of the content-based prohibition in first amendment analysis.

38. *Id.* The court listed fighting words, obscenity, some vulgar and shocking speech, types of libel and slander as unprotected speech. *Id.* See *supra* note 12. The court acknowledged that, under certain circumstances, racial epithets, slurs, and insults might fall within the "fighting words" category, and be subject to university regulation. *Id.* at 862.

39. *Doe*, 721 F. Supp. at 864. The court stated that a permissible scope of application does not insulate a statute from constitutional scrutiny. *Id.*

40. *Id.* at 867.

41. See *supra* notes 30-31 for the policy. For a critical view of the *Doe* decision, see generally Recent Cases, *First Amendment—Racist and Sexist Expression on Campus—Court Strikes Down University Limits on Hate Speech—Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989), 103 HARV. L. REV. 1397 (1990). For the view that Supreme Court precedents support the *Doe* decision, see Smolla, *supra* note 1, at 208.

versities as unconstitutional restrictions of speech.⁴² In October of 1990, a group of students at the University of Wisconsin filed suit against the University, challenging its anti-hate speech policy on first amendment grounds.⁴³ Wisconsin's policy prohibited "racist or discriminatory comments, epithets or other expressive behavior" and physical conduct that intentionally demeaned the race or sex of the individual or created an intimidating or hostile educational environment.⁴⁴ Relying heavily on the *Doe* decision, the students argued that the policy was similarly overbroad and impermissibly vague.⁴⁵ The case is still pending.

The University of Connecticut adopted an anti-discrimination policy in 1989, which prohibited students from "making personal slurs or epithets based upon race, sex, ethnic origin, disability, religion or sexual orientation."⁴⁶ The university amended its policy after a student filed suit in federal court, challenging the policy on first amendment grounds.⁴⁷ The amended policy is now limited to "the face to face use of 'fighting words' by students to harass any person(s) on university property or on other property to which the Student Conduct Code applies."⁴⁸

After *Doe*, only a narrowly drawn policy will survive first amendment

42. See *supra* note 4.

43. *UMW Post v. University of Wisconsin*, No. 90-C-328 (D. Wisc. filed March 29, 1990). The University of Wisconsin code is "one of the toughest" university anti-hate speech codes. See *France*, *supra* note 1, at 44.

44. Complaint at Exhibit A, *UMW Post v. University of Wisconsin*, No. 90-C-328 (D. Wisc. filed March 29, 1990). For a discussion of the history of the policy, see Hodulik, *supra* note 1, at 574-75. Penalties provided by the policy include written reprimand, probation, suspension, and expulsion. Brief for Plaintiff at 8 n.2., *UMW Post v. University of Wisconsin*, No. 90-C-328 (D. Wisc. filed March 29, 1990). One incident giving rise to the policy involved a fraternity party featuring a "Harlem Room" with students in black-face and cardboard caricatures of black men. *Id.* at 574.

45. Brief for Plaintiff at 11-14, 17, 20, 25, 32, 43-44, *UMW Post v. University of Wisconsin*, No. 90-C-328 (D. Wisc. filed March 29, 1990). For the view that the Wisconsin policy survives constitutional scrutiny, see generally Hodulik, *supra* note 1.

46. Hodulik, *supra* note 1, at 36-37.

47. *Wu v. University of Connecticut*, No. H89-649 (D. Conn. filed Jan. 25, 1990). To amend the policy, the parties entered into a court-approved consent decree. Proposed Consent Decree, *Wu v. University of Connecticut*, No. H89-649 (D. Conn. filed Jan. 25, 1990).

48. *Id.* The policy defines "fighting words" as:

those personally abusive epithets which, when directly addressed to any ordinary person are, in the context used and as a matter of common knowledge, inherently likely to provoke an immediate violent reaction, whether or not they actually do so. Such words include, but are not limited to, those terms widely recognized to be derogatory references to race, ethnicity, religion, sex, sexual orientation, disability, and other personal characteristics.

Id.

scrutiny.⁴⁹ Courts following *Doe* will invalidate university anti-discrimination policies that are not limited to the narrow exceptions carved out of the prohibition against content-based regulation. Thus, the *Doe* decision leaves university officials very little room in which to maneuver. University officials properly may restrict discriminatory conduct,⁵⁰ but very few racial and sexual harassment incidents involve pure conduct.⁵¹ To further restrict student behavior requires courts to "continue to stretch existing first amendment exceptions."⁵²

An anti-discrimination policy limited to "fighting words," similar to the University of Connecticut's amended rule,⁵³ most likely will survive constitutional scrutiny under *Doe*.⁵⁴ This exception "edge[s] close to the category of racist speech,"⁵⁵ but generally fails to reach most of the discriminatory speech on university campuses.⁵⁶ Courts have interpreted the "fighting words" exception narrowly to reach only speech that presents a "clear and present danger" of violent reaction.⁵⁷ The frequency of racist and sexist comments, however, cuts against viewing hate-speech as posing such an imminent danger.⁵⁸ Furthermore, because

49. The *Doe* court noted the strong first amendment prohibition against content-based restrictions. *Doe v. University of Michigan*, 721 F. Supp. 852, 962-63 (E.D. Mich. 1989).

Several commentators have argued that anti-discrimination policies can withstand constitutional attack only if courts depart from traditional first amendment analysis. Moreover, these same scholars believe such departures are necessary to prevent first amendment concerns from undermining or sacrificing equal protection. See generally, Matsuda, *supra* note 1; Smolla, *supra* note 1.

50. See *supra* notes 33-35 and accompanying text.

51. See *supra* note 33 for a discussion of the Supreme Court's test for distinguishing conduct from speech.

52. Matsuda, *supra* note 1, at 2357. The author states that extending the existing categories of unprotected or partially protected speech will weaken first amendment doctrine; she therefore advocates treating racist speech as *sui generis*. *Id.*

Note that discriminatory harassment by students does not fall neatly into the defamation exception because such harassment does not necessarily lower the victims' reputations in the community. Smolla, *supra* note 1, at 210.

53. See *supra* note 48 and accompanying text.

54. See *supra* note 38 and accompanying text. See also Smolla, *supra* note 1, at 199.

55. Matsuda, *supra* note 1, at 2355. Proponents of racist and sexist speech prohibitions often rely upon the "fighting words" doctrine, at least in part, to justify restrictions on hate-speech. See Metz, *supra* note 1, at 35.

56. Matsuda, *supra* note 1, at 2355. See also Smolla, *supra* note 1, at 199. A least one commentator believes that something broader than the "fighting words" policy will survive constitutional scrutiny. *Id.* at 210-11. The author admits, however, that universities will have difficulty drafting a policy that will survive constitutional scrutiny. *Id.* at 211.

57. L. TRIBE, *supra* note 12, at 929; Brief for Plaintiff at 22, *UMW Post v. University of Wisconsin*, No. 90-C-328 (D. Wisc. filed March 29, 1990) (stating that since *Chaplinsky*, the Supreme Court has not upheld a single conviction for the use of fighting words).

58. Matsuda, *supra* note 1, at 2355.

most victims internalize the messages rather than lash out against the perpetrators, it is difficult to categorize hate-speech as "fighting words."⁵⁹

The *Doe* decision and other court challenges may force university officials to devise and implement other means to curb ethnic, racial, sexual, and homosexual harassment. Stripped of the power to regulate hate-speech in any meaningful way, universities must focus on eliminating the root causes of discrimination.⁶⁰ A number of options are available. Several universities now require students to enroll in classes that explore racial issues.⁶¹ Orientation sessions highlighting racial and cultural diversity sensitize students to the various forms of discrimination and set a tone of tolerance in the academic environment.⁶² Additionally, increased efforts to recruit women and minority faculty members and students are potent weapons against discriminatory speech.⁶³ In the absence of these or similar remedial measures, targeted groups and individuals, as well as nonperpetrating students, will be forced to tolerate racist and sexist speech.

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59. *Id.*

60. Opponents of hate-speech regulation believe that the most effective way of creating a harmonious school environment is to provide support services and programs, not by limiting speech. *Metz, supra* note 1, at 36. Proponents of hate-speech regulation would argue that services and programs are not enough to combat racism. *See Matsuda, supra* note 1.

61. Brief for Plaintiff at 39, *UMW Post v. University of Wisconsin*, NO. 90-C-328 (D. Wisc. filed March 29, 1990).

62. *Id.* (citing UW-Madison as an example).

63. Students across the country boycotted classes in 1989 in an effort to force law schools to hire more minority faculty. A Boalt Hall student organization, The Coalition for a Diversified Faculty, spearheaded the movement. *See Metz, supra* note 1, at 38. Furthermore, the University of Wisconsin at Madison adopted a diversification plan that includes a hiring goal of seventy minority faculty members by 1991 and calls for doubling the number of minority students by 1990. Brief for Plaintiff at 39, *UMW Post v. University of Wisconsin*, No. 90-C-328 (D. Wisc. filed March 29, 1990).