Campus Antisemitic Speech and the First Amendment

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INTRODUCTION

The recent increased rate of antisemitic incidents at U.S. universities has created a quandary for college and university administrators who seek to prevent behavior tending to disrupt education without running afoul of the First Amendment. A recent United States Supreme Court decision that upheld a state cross burning statute, *Virginia v. Black*, may provide guidance for regulating antisemitism in public university spaces. This case reconfirms that speech is not an absolute right. Like defamation, antisemitic verbal attacks can result in dignitary harms. And like “fighting words” or “true threats,” intimidating antisemitism increases the likelihood that hate crimes will be perpetrated on campus. Accordingly, intimidating antisemitism is so incompatible with education that to prohibit its dissemination on campus would not disrupt the university’s mission of intellectual advancement.

Opponents of university hate speech regulations often rely on the Supreme Court reasoning in *R.A.V. v. St. Paul*, a case in which the majority found a municipal ordinance prohibiting cross burning to be unconstitutional. Following the Supreme Court’s rationale, free speech libertarians and several lower federal courts asserted that university administrators lack the authority to regulate the communication of group hatred. Eleven years after deciding *R.A.V.*, the Court upheld a more rigorously drafted cross burning statute than the one it struck down in *R.A.V.* The later decision, *Virginia v. Black*, defined the scope of legitimate limitations on hate speech in general, and its conclusions are applicable to the regulation of antisemitic speech on university cam-

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3 This paper proposes a more narrowly constructed hate speech code than the ones found unconstitutional in lower court decisions. Those district and circuit court cases were issued long before *Virginia v. Black*, which is the Supreme Court decision I primarily rely on to develop a campus anti-incitement policy. See UMW Post, Inc. v. Bd. of Regents of the Univ. of Wis., 774 F. Supp. 1163, 1178-79 (E.D. Wis. 1991). Because these decisions were not binding precedents, many colleges outside the courts’ jurisdictions retained various hate speech codes. JON B. GOULD, SPEAK NO EVIL: THE TRIUMPH OF HATE SPEECH REGULATION 159 (2005).
puses. In this paper, I argue that institutions of higher education can punish persons using university property to spread intimidating and defamatory antisemitism.

I. ANTISEMITISM ON AMERICAN CAMPUSES

Jewish students at several U.S. universities have recently been the targets of a growing number of antisemitic incidents. Antisemitic slurs are based on historic stereotypes that are derisive to Jews. Virulent antisemitism also aims to create a hostile environment for Jewish students and anyone, irrespective of religion, who is associated with Jewish causes, like Zionism. An Anti-Defamation League audit found that there were 94 antisemitic incidents on U.S. campuses in 2007, representing about 6 percent of total anti-Jewish harassment and vandalism that year. A consistent university policy against hate speech would demonstrate the gravity of these verbal attacks and could deter future antisemitic conduct. In formulating such a policy, it must be borne in mind that public university regulations can only withstand judicial scrutiny if they are based on judicial precedents concerning free speech.

The following is a short list of recent events: Jewish students at the University of California-Irvine report that antagonism has increased to the point that they must circumvent some parts of campus to avoid conflict, are reluctant to engage in activities sponsored by Jewish organizations, and have trouble focusing on their studies. In one of the most extreme examples of new antisemitism, Imam Mohammad al-Asi and Amir Abdel Malik Ali delivered speeches at a week-long event at the UC-Irvine that integrated traditional stereotypes with modern events claiming Jews are in control of U.S. media and responsible for the terror on September 11, 2001. In one speech Al-Asi asserted, “We have a psychosis in the Jewish community that is unable to co-exist equally and brotherly with other human beings.” In 2010, the Muslim Student Union at UC-Irvine, which the University subsequently banned from campus, sponsored a speaker who “compared Jews to Nazis” and “expressed support for Hamas, Hizbullah and Islamic Jihad.” At the University of California at Berkeley, swastikas were scrawled on a Jewish student organization’s pamphlet. In addition, Holocaust denier David Irving and Ku Klux Klan supporter Tomislav Sunic appeared at a group event on the University of Oregon campus.

Universities and policymakers around the country have drafted a variety of responses to the uses of hate speech on their campuses. The University of Nevada, Las Vegas is evaluating whether to institute a campus hate crime policy that would prohibit

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5 Susan B. Tuchman, Editorial, Jewish Students of America, Know Your Legal Rights, JERUSALEM POST (Israel), Dec. 11, 2005.  
7 Sonia Scherr, Anti-Semitism Goes to School, INTELLIGENCE REPORT, Issue 131 (Fall 2008).  
8 See Tuchman, supra, note 5.  
9 Scherr, supra note 7.  
11 Hate Speech Roils UC Berkeley Campus, N.Y. JEWISH WEEK, Sept. 26, 2008, at 50.  
12 Jack Moran, Hate-Filled Graffiti Spurs Vigil, Concerns, REGISTER-GUARD (Eugene, OR), June 24, 2008, at A.