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## FREE SPEECH AND RELIGIOUS, RACIAL, AND SEXUAL HARASSMENT

### INTRODUCTION: EXERCISES IN THE REGULATION OF HATE SPEECH

RODNEY A. SMOLLA\*

The Institute of Bill of Rights Law at the College of William and Mary, Marshall-Wythe School of Law, held its annual spring symposium in April 1990 on the topic "Free Speech and Religious, Racial, and Sexual Harassment." This symposium issue of the *William and Mary Law Review* contains excellent lead articles by Toni Massaro, Robert Post, and Anthony D'Amato. The symposium featured an evening program in which the aforementioned scholars, joined by Professor Randall Kennedy of Harvard and a group of students, faculty, citizens, and community leaders, engaged in the following two role-playing exercises before a large audience.

#### CASE ONE: THE HATE SPEECH AND SEXUAL SUBJUGATION STATUTE

The Legislature of the State of Freedonia is considering the enactment of a bill dealing with both "hate speech," that is, speech impugning others on the basis of race, ethnicity, gender, sexual orientation, or religion, and speech involving "sexual subjugation," that is, speech depicting rape or other crimes of sexual violence.

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Freedonia already has a "fighting words" statute that makes it a crime to utter fighting words in face-to-face confrontations when, under the circumstances, the language used creates a clear and present danger of physical violence. Several federal courts have upheld this statute, holding that it complies with the requirements of the first amendment. The hate speech provision of the proposed bill would add the following additional section to the current fighting words law:

*Section 101: Attacks Based on Race, Ethnicity, Gender, Sexual Orientation, or Religion.* No person shall publish or utter any communication attacking, impugning, or insulting the dignity of another person, or group of persons, on the basis of race, ethnicity, gender, sexual orientation, or religion, if such communication would create a clear and present danger of inflicting severe emotional distress on a reasonable person, and is patently offensive to the ordinary reasonable person in the community.

Freedonia also has an anti-obscenity statute, which is written in language that tracks, verbatim, the applicable doctrines from prevailing United States Supreme Court opinions on obscenity. The statute thus bans speech appealing to the "prurient interest" in sex, in a "patently offensive way" applying "community contemporary standards," depicting "specifically defined" graphic sexual acts, and lacking redeeming "serious literary, artistic, political, or scientific value." This statute has also been upheld in federal court challenges. The sexual subjugation provision of the proposed bill would add the following amendment to the existing obscenity law:

*Section 202: Sexual Subjugation.* In any prosecution under this Act, the jury shall be instructed that the presence of depictions of rape, sexual assault, or other acts of sexual domination or violence, in a manner condoning or advocating such acts, shall be taken into account in determining whether the material is patently offensive to the standards of the community.

The sponsors of the bill have stated publicly that the purpose of the hate speech provision is to go beyond the existing fighting words law by criminalizing group attacks containing slurs, insults, and other forms of hate speech that the sponsors claim are both "beneath the dignity of the first amendment" and no part of the "free trade in ideas." The sponsors claim that the sexual subjugation provision "merely directs the jury to consider whether

depictions of sexual violence and exploitation contribute to the offensiveness of the material, which must still meet all other requirements of the existing obscenity law.” The sponsors argue that the section merely requires that the judge instruct the jury that such depictions be “taken into account” in determining offensiveness, but does not direct the jury with any more specificity.

The audience sat as the Legislature of the State of Freedonia.

#### CASE TWO: THE UNIVERSITY HATE SPEECH REGULATION

The Faculty Senate of Freedonia State University has before it the following proposed regulation, which has been recommended by the Faculty Committee on Racial and Sexual Harassment:

*Part I: Statement of Purpose.* Freedonia State University is a place of robust intellectual discourse. A university is also, however, a unique *community*, which may require of its members reasonable levels of rationality and civility in certain defined settings. As a condition upon entry into this special community, the University requires its faculty and students to refrain from speech attacking others *at certain places and times*.

*Part II: Open Forums.* Many parts of the University must be open forums for discourse, with no prohibitions other than a ban on speech presenting a clear and present danger of injury to people or property. Open forum areas include the open areas of the campus, such as malls, greens, squares, plazas, streets, sidewalks, meeting rooms, auditoriums, classrooms outside of class times, other spaces traditionally open to all comers (including bulletin boards in such spaces), publications—such as the campus newspaper or professional journals published by the University—and displays for all forms of creative and artistic expression—such as art galleries or stage productions.

*Part III: Restricted Zones.* Other parts of the University, rather than being open free speech forums, are directly dedicated to the University’s academic function. Restricted zones include classrooms during class times, libraries, laboratories, and recreation and research centers. In these restricted zones, members of the University community should be assured that they will not be subjected to hate speech attacks.

*Part IV: Attacks Prohibited in Restricted Zones.* No faculty member, administrator, University employee, or student shall utter or publish any speech in a restricted zone attacking,

impugning, or insulting the dignity of another person, or group of persons, on the basis of race, ethnicity, gender, sexual orientation, or religion.

Violation of the regulation can subject the offender to a range of disciplinary sanctions, including dismissal or expulsion from the University.

The audience sat as the Faculty Senate of Freedonia State University.

#### CONCLUSION

The audience participated in these exercises with vigor, generating a substantial degree of debate and argument. The audience voted in both cases. In the first case, the results were quite overwhelming. Although the debate had been reasonably balanced, the actual vote defeated all forms of hate speech legislation, even forms less draconian than the form proposed in the original problem. That vote was approximately ninety percent against any such legislation and ten percent in favor of it.

When the problem shifted to the university campus setting, the mix of libertarian and communitarian sentiments shifted slightly toward greater support for the communitarian position. Once again, however, notwithstanding a series of amendments designed to soften the impact of the regulation in hopes of garnering more support for its passage, ultimately no proposal for increased control of hate speech on campus could command more than one-third of the audience's support.

After these votes, many of the scholars, community leaders, students, and faculty expressed the view that on other campuses around the Nation, and certainly at other types of institutions, the votes might have been much closer—and indeed in many cases might have gone the other way.

Should other institutions attempt their own versions of these exercises—or facsimiles of them—we at the Institute of Bill of Rights Law would be pleased to hear your results. You can write to tell us how your audiences responded at:

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