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UNPLEASANT SPEECH ON CAMPUS, EVEN HATE SPEECH, IS A FIRST AMENDMENT ISSUE

Erwin Chemerinsky*

Professor Kenneth L. Marcus's article in these pages, "Higher Education, Harassment, and First Amendment Opportunism,"¹ simply ignores the most basic principle of free speech law: the government generally cannot punish speech based on content. Professor Marcus argues that the First Amendment should not be applied to hate speech on campus, especially anti-Semitic speech, and indeed dismisses concerns over freedom of expression as "First Amendment opportunism."² But the regulation of speech on the campus of a public university, even hateful speech, is inherently a First Amendment issue.

Although I strongly believe that Professor Marcus is wrong both descriptively as to what public universities may do and normatively as to what universities should do about hate speech, I would not have taken the time to write a response had I not been the focus of his introduction and conclusion. He describes the controversy concerning my hiring as dean of the law school at the University of California, Irvine, and juxtaposes this with the University's handling of anti-Semitic speech on campus.³

I am not sure why Professor Marcus chose to focus his attention on me and the University of California, Irvine, but to a large extent he has his facts wrong. He certainly is wrong as to many of the facts involving my hiring.⁴ But much worse, he

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¹ Kenneth L. Marcus, *Higher Education, Harassment, and First Amendment Opportunism*, 16 WM. & MARY BILL RTS. J. 1025 (2008).

² He takes this phrase from an article by Frederick Schauer, *First Amendment Opportunism*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 175, 176 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002). See Marcus, *supra* note 1, at 1025, 1027 n.11.

³ See Marcus, *supra* note 1, at 1025–29, 1059. The last sentence of his article is, "On the other hand, at least Dean Chemerinsky appears to be well ensconced in the law school." *Id.* at 1059.

⁴ He says, for example, that I was fired "one day" after I was hired. *Id.* at 1025. This is not correct. The offer was extended on August 16, 2007, and was withdrawn on September 11, 2007. Marcus says that I had angered the Chancellor by "publishing a potentially controversial op-ed . . . on the day [my] appointment was announced." *Id.* The op-ed was published before I had even been offered the position by the Chancellor. It argued against a proposal by Alberto Gonzales for shortening the statute of limitations for habeas corpus petitions by those on death row. See Erwin Chemerinsky, Op-Ed., *Don't Rush to Execution*, L.A. TIMES, Aug. 16, 2007, at A17. I do not think my position was very controversial. Marcus says: "What was stunning here is that Irvine failed to identify the free speech issue until it was publicly humiliated for

is wrong in terms of what has occurred on campus at the University of California, Irvine. He repeatedly accepts the worst accusations as if they were truths and fails to describe much of what the campus administration has done to respond to hate speech and to create a hospitable environment for its students.

From the moment that it was rumored in the press that I was a serious candidate to be the founding dean of its law school, I have been drawn into the controversy concerning hate speech on the University of California, Irvine, campus. Before I accepted the offer to be dean, I carefully investigated what had happened. As a Jew, I certainly did not want to spend the rest of my career in a place that is anti-Semitic or move my family to live in a hostile environment.⁵

What I learned is that almost without exception, the events on the University of California, Irvine, campus involved speech. This included speech critical of Israel and sometimes speech that was anti-Jewish. Some very offensive things were said. Professor Marcus omits that there often were equally hostile responses from Jewish students. But virtually every incident was speech. The Office for Civil Rights of the United States Department of Education did a thorough investigation and concluded that there was no basis for finding that there was a hostile or intimidating environment for Jewish students on campus at the University of California, Irvine.⁶ Its conclusion was that "there is insufficient evidence to support the complainant's allegation that the University failed to respond promptly and effectively to complaints by Jewish students that they were harassed and subjected to a hostile environment."⁷

After the Office for Civil Rights conducted its investigation, there was a request for the campus Hillel to conduct its own investigation. It declined, apparently because it did not perceive a problem on campus warranting any further action.⁸ A group of individuals with no connection to the University believed that there was a problem, appointed themselves as a task force, and conducted their own investigation.⁹ It found

failing to do so." Marcus, *supra* note 1, at 1026. Professor Marcus terribly oversimplifies the events. I believe that Chancellor Drake's decision to withdraw the offer was based not on the op-ed, but on whether I would succeed as dean. After the offer was withdrawn, we remained in contact and spent a day together talking through some misunderstandings. Only then, was it decided to go forward with me as dean.

⁵ My wife, Catherine Fisk, was a chaired professor at Duke Law School and was offered a chaired position at the University of California, Irvine. (She accepted.) We planned to purchase and did buy a house in a neighborhood of faculty housing right on campus.

⁶ Letter from Charles R. Love, Program Manager, Office for Civil Rights, U.S. Dep't of Educ., to Michael V. Drake, Chancellor, Univ. of Cal., Irvine (Nov. 30, 2007) [hereinafter Department of Education Letter], available at <http://www.normanfinkelstein.com/pdf/uci/OCR%20Report%20120507-Z05145157-0001.pdf>.

⁷ Peter Schmidt, *U. of California at Irvine Is Cleared in Civil-Rights Office's Investigation of Anti-Semitism Allegations*, CHRON. HIGHER EDUC., Dec. 13, 2007, <http://chronicle.com/daily/2007/12/966n.htm> (quoting Department of Education Letter, *supra* note 6, at 10–11).

⁸ See TASK FORCE ON ANTI-SEMITISM AT THE UNIV. OF CAL., IRVINE, REPORT 2 (2008) [hereinafter TASK FORCE REPORT].

⁹ See *id.*

that there was a problem.¹⁰ But again, virtually every incident in this report involved speech on campus.¹¹ In response to this report, the student leaders of every major Jewish organization on campus issued an open letter declaring that they did not perceive anti-Semitism on campus and that they found the University of California, Irvine, a “safe and secure” place for Jewish students.¹² Professor Marcus does not mention this.¹³

Nor does Professor Marcus mention the many efforts by the University’s administration and officials to make Jewish students feel safe and welcome. He also does not describe the many efforts to create a dialogue and working relationship between the Jewish and Muslim students. One example of this is the Olive Tree Initiative, a group of, among others, Jewish and Muslim students from the campus who traveled to the Middle East together and have done a series of programs on campus about their experiences.¹⁴

I have now been affiliated, as dean-designate or dean of the law school, with the University of California, Irvine, for almost fourteen months. I have not seen the slightest indication of anti-Semitism from the campus administration. I have seen nothing that would lead me, or anyone, to find a hostile environment for Jews. Quite the contrary, I believe that Chancellor Michael Drake is deeply concerned about this issue and wants to do everything he can, consistent with the Constitution, to ensure that the University is protective of Jewish students and, of course, all students. I have spoken with rabbis in the area and officials of organizations like the Jewish Federation. They are uniformly highly praising of Chancellor Drake and how he has handled the issue.

There have been incidents in which student groups have invited speakers who have said hurtful and sometimes hateful things.¹⁵ But Professor Marcus equates a few incidents—and in the past two years there have been only a few—with harassment and a hostile environment. Moreover, he never explains how, consistent with the Constitution, the University could possibly keep these speakers from expressing their views on the campus of a public university.

Professor Marcus’s article uses the University of California, Irvine (and me), to illustrate his broader point about the First Amendment on campuses.¹⁶ I want to

¹⁰ *Id.* at 26.

¹¹ *See id.* at 9–19.

¹² Press Release, Anteaters for Israel, Hillel: Jewish Student Union, Alpha Epsilon Pi, Epsilon Phi, UCI Jewish Student Leaders Strongly Support Chancellor Drake: Jewish Student Life Thrives on Campus, Despite Misinformation from Outside Organizations (Mar. 25, 2008), available at <http://anteatersforisrael.org/2008/03/25/uci-jewish-student-leaders-strongly-support-chancellor-drake/>.

¹³ *See* Marcus, *supra* note 1.

¹⁴ *See* Olive Tree Initiative, <http://www.socsci.uci.edu/~cpb/OLIVE%20TREE%20INITIATIVE.html> (last visited Feb. 27, 2009).

¹⁵ *See* TASK FORCE REPORT, *supra* note 8, at 17–18.

¹⁶ *See* Marcus, *supra* note 1, at 1027, 1029, 1032.

make two points about Professor Marcus's discussion of speech on campus. First, his article is flawed because of his failure to define any of the key terms and concepts that he employs. Second, and more important, his article fails to recognize that restrictions of speech on campus, even hate speech, inherently implicate the First Amendment. It is not "First Amendment opportunism" to see government restrictions on speech, even hate speech, as a constitutional issue.

The hard question in this area is when does speech cross the line and become harassment. There is the right to say hateful things on the campus of a public university, but there is not a right to threaten someone or create a hostile environment. In some instances, this may require difficult line drawing. But Professor Marcus offers no basis for analyzing how this line should be drawn and instead prescribes an approach that would allow punishing a great deal of speech that is unquestionably protected by the First Amendment. Put another way, any administrator in a public university who tried to follow Professor Marcus's approach would certainly be successfully sued for violating the First Amendment.

I. PROFESSOR MARCUS'S LACK OF CLARITY

Professor Marcus's concern is with anti-Semitic harassment on campus. His thesis is that the use of the Constitution to analyze restrictions is just "First Amendment opportunism."¹⁷ His paper, thus, focuses on three concepts: anti-Semitism, harassment, and First Amendment opportunism.¹⁸ But none are defined with any precision.

To begin with, the use of the phrase "anti-Semitic" is a bit confusing since all who are involved in this controversy are "Semitic." Professor Marcus's concern is really with anti-Jewish speech. The difficulty is whether criticism of Israel or anti-Israel speech is anti-Jewish speech. Professor Marcus declares: "[A]nti-Zionism targets a central aspect of Jewish identity."¹⁹ He quotes Ruth Wisse that "Judaism without Zionism would not be Judaism."²⁰ Professor Marcus forgets here that many Orthodox rabbis and groups initially opposed the creation of Israel on the ground that it was for God to return the Jewish people to their biblical homeland.²¹ More importantly, I am troubled with conflating views about a nation with hate towards a religion. There is a great danger with confusing speech critical of Israel with being anti-Israel or anti-Jewish. I am Jewish and strongly supportive of the existence of Israel as a Jewish state, but I am particularly troubled when criticism of Israel is taken as being anti-Zionist, which is then equated with anti-Semitism. These are quite distinct and yet Professor Marcus never draws any distinctions among them.

¹⁷ *Id.* at 1032.

¹⁸ *Id.*

¹⁹ *Id.* at 1044.

²⁰ *Id.*

²¹ This is powerfully conveyed in the magnificent novel by CHAIM POTOK, *THE CHOSEN* (1967).

Second, and more importantly, Professor Marcus never defines “harassment.”²² He and I certainly agree that threats and harassment are not protected by the First Amendment. But when speech crosses the line and becomes harassment is an extremely difficult issue. Professor Marcus uncritically assumes that hateful speech is inherently harassment.²³ He repeatedly speaks of “harassing behavior” and uses as his example the expression of anti-Semitism or other hateful messages.²⁴ But here Professor Marcus is letting the label “harassment” do the analytical work. He starts with the premise that harassment is likely not protected by the First Amendment,²⁵ labels anti-Semitic speech as harassment,²⁶ and then concludes that anti-Semitic speech is likely not protected.²⁷ But certainly not all hateful speech is harassment.

I believe that Professor Marcus’s key sentence here is his statement: “If we are concerned about hostile environments, though, we should be especially concerned about harassing speech by public speakers at well-attended public events.”²⁸ Notice that Professor Marcus simply assumes that anti-Semitic or racist speech is “harassing speech.” Professor Marcus thus labels speech at a public event as a form of harassment simply based on its content. This then allows the powerful label of “harassment” to be used for any speech that Professor Marcus finds unpalatable. But the expression of hate in a speech in a public place is not sufficient to constitute harassment. Harassment generally must be directed at a person (or people); it must be more than merely expressing an idea, even a hateful idea.²⁹

Third, it is not clear what Professor Marcus means by “First Amendment opportunism.”³⁰ Professor Marcus uses this phrase to try to keep university actions regulating hate speech from being subjected to constitutional scrutiny. He attempts to dismiss constitutional concerns as “First Amendment opportunism.” He says that “the First Amendment narrative is the pipe wrench here in the sense that it is ill-equipped to address either person-to-person or general public hostile environment harassment.”³¹ He refers to “opportunistically defended misconduct.”³²

But again Professor Marcus is letting a label, “opportunism,” substitute for analysis. Whenever the government is regulating or punishing expression—the spoken

²² See Marcus, *supra* note 1.

²³ *Id.* at 1042 (“[C]ases of racial antagonism . . . may be characterized as basic harassment.”).

²⁴ *Id.* at 1043, 1045.

²⁵ *Id.* at 1032.

²⁶ *Id.* at 1045.

²⁷ *Id.* at 1052 (concluding that anti-Semitic harassment is a “non-covered activit[y]” under the First Amendment, but stating that it may become a covered activity if characterized as First Amendment opportunism).

²⁸ *Id.* at 1048.

²⁹ BLACK’S LAW DICTIONARY 733 (8th ed. 2004).

³⁰ Marcus, *supra* note 1, at 1033.

³¹ *Id.* at 1052.

³² *Id.* at 1053.

word, the written word, conduct that communicates a message—there is inherently a First Amendment issue.³³ There is nothing inappropriate or “opportunistic” about thinking of it in those terms. Professor Marcus speaks of “public hostile environment harassment.”³⁴ This again equates public expression of hate as harassment. But public expression is speech and I cannot think of a single Supreme Court case that has ever deemed public expression to be harassment. In fact, to speak of “opportunistically defended misconduct” assumes that there is “misconduct” and begs the question of whether hateful speech can be deemed a form of misconduct.

My central point is that Professor Marcus begs all of the important questions. When does speech cross the line and become harassment? What types of conduct are deemed anti-Semitic harassment? What is the appropriate role of the First Amendment and when are constitutional concerns just “opportunism”? None of this is addressed in his paper.

II. PROFESSOR MARCUS’S FAILURE TO APPLY FIRST AMENDMENT PRINCIPLES

It is never clear in Professor Marcus’s article when he is engaging in analysis under current First Amendment law and when he is arguing for what he believes First Amendment analysis should be. Under current First Amendment law, the most basic principle is that the government generally cannot restrict speech based on content unless strict scrutiny is met. The Supreme Court has declared: “[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”³⁵ The Supreme Court has thus explained that “[c]ontent-based regulations are presumptively invalid.”³⁶ The Court has stated that “the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals.”³⁷

A public university simply cannot prohibit the expression of hate, including anti-Semitism, without running afoul of this principle. Punishing speech because of its hateful message is inherently a content-based restriction on speech and would violate the First Amendment. In other words, speakers generally have the right to go on to any public university campus and proclaim the most vile racist or homophobic or anti-Semitic ideas. Any attempt to silence or punish them based on the content of their message would infringe upon the First Amendment.

³³ See, e.g., *Schlagler v. Phillips*, 166 F.3d 439, 442 (2d Cir. 1999) (noting the Supreme Court’s recognition that “regulation of expression inevitably involves some inhibition of First Amendment freedoms”).

³⁴ Marcus, *supra* note 1, at 1052.

³⁵ *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

³⁶ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

³⁷ *Turner Broad. Sys., Inc. v. Fed. Comm’n Comm’n*, 512 U.S. 622, 641 (1994).

Professor Marcus ignores that efforts to regulate hate speech on campus have been consistently declared unconstitutional.³⁸ Courts have repeatedly found that attempts to formulate rules (such as speech codes) to regulate hate speech are unconstitutionally vague and overbroad.³⁹ Moreover, efforts to punish hate speech, without harassment or threats, are impermissible content-based regulations.⁴⁰

This, of course, does not mean that every place on the campus is equally open to speech. Public open spaces traditionally used for speech are different than classrooms while classes are being conducted. Professor Marcus fails to mention that many of the instances at University of Campus, Irvine, occurred when speakers were invited by student groups to give talks on campus. If university officials were to rescind these invitations or to regulate who could appear based on the content of the message, there would be a clear violation of the First Amendment.

Thus, as a descriptive matter, the First Amendment protects the utterance of anti-Jewish and anti-Israel, and more generally racist, messages on public university campuses. A university may impose time, place, and manner restrictions, and may punish threats or harassment of specific individuals.⁴¹ But Professor Marcus is simply wrong in saying that it is just "First Amendment opportunism" to analyze restrictions on hate speech under the First Amendment. Current law requires this.⁴²

Perhaps Professor Marcus is making a normative argument as to what the First Amendment should mean. He cites to scholars such as Richard Delgado who would provide far less protection for hate speech than exists under current law.⁴³ But if this

³⁸ See, e.g., *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1181 (E.D. Wis. 1991) (holding that university rule imposing punishment on students who took part in hate speech was unconstitutional); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 773 F. Supp. 792 (E.D. Va. 1991) (holding that discipline of fraternity by university for racial and sexual stereotypes at a social event was a violation of students' First Amendment rights), *aff'd*, 993 F.2d 386 (4th Cir. 1993); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 853 (E.D. Mich. 1989) (holding that university policy against "stigmatizing or victimizing" individuals based on race, ethnicity, religion, etc., included within its scope speech protected by the First Amendment).

³⁹ See, e.g., *UWM Post, Inc.*, 774 F. Supp. at 1180.

⁴⁰ *R.A.V.*, 505 U.S. at 382 ("Content-based regulations are presumptively invalid."). See generally Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 202 (1994) (discussing the Supreme Court's determination that "content-based restrictions on speech cannot be tolerated").

⁴¹ See, e.g., *Camp Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1280 (11th Cir. 2006) (discussing these limitations within the context of the First Amendment's prohibition on prior restraint of speech).

⁴² *R.A.V.*, 505 U.S. at 391 ("The First Amendment does not permit . . . special prohibitions on those speakers who express views on disfavored subjects."); see also *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) ("When laws against harassment attempt to regulate oral or written expression . . . we cannot turn a blind eye to the First Amendment.").

⁴³ See Marcus, *supra* note 1, at 1030 n.26, 1042–48. For Delgado's central assertions, see

is his focus, he is being terribly unfair to the Administrators of the University of California, Irvine. He never acknowledges that their tolerance of hate speech is required by the First Amendment or that his criticism is based on an approach that no court ever has adopted.

Of course, to say that the First Amendment requires that public colleges and universities tolerate hate speech does not mean that they are powerless to act. College and university administrators have the responsibility to act to make sure that every student is made to feel safe and welcome. Likewise, they should be sure that there is the opportunity for more speech and hopefully for constructive dialogues on controversial issues. Long ago, Justice Brandeis explained that the "fitting remedy for evil counsels is good ones" and "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."⁴⁴

CONCLUSION

I do not minimize the problem of anti-Jewish speech and incidents on college campuses. Professor Marcus does an excellent job of detailing the forms these take and the rise in them across the country. I share his sense that there is a serious problem that must be dealt with.

But I take strong exception to his inaccurate use of me and the University of California, Irvine, as his examples and to his dismissing free speech as issues of no more than "First Amendment opportunism." There are very difficult issues to be addressed, such as what constitutes harassment and when and how universities may and should act to deal with harassment. But unfortunately Professor Marcus's approach does not help in dealing with these crucial questions.

Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991).

⁴⁴ *Whitney v. California*, 274 U.S. 357, 375, 377 (1927) (Brandeis, J., concurring).