

Can We Still Talk Things Out?: A Case Study of Campus Hate Speech Regulations at the University of Texas

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There's a lot of ugly things in this world, son. I wish I could keep 'em all away from you. That's never possible.

- Harper Lee, *To Kill a Mockingbird*

INTRODUCTION

Intolerance is a persisting issue. The meme “Pepe the Frog” became a common racist and anti-Semitic symbol in the last year, with captions like “kill Jews, man.”¹ But this is not a purely American issue either. Local French law tried to ban “modest swimwear.”² “[F]rom July 2014 to July 2015, in the United Kingdom, there were more than 800 anti-Muslim hate crimes in London. By November 2015, when the terror attacks in Paris occurred, there were 878 reported anti-Muslim attacks in that city alone. Additionally, in Germany, the number of racially motivated attacks [was] higher than any year since the end of World War II.”³

This article focuses on hate particularly as it manifests itself as speech on American university campuses. Specifically, this article turns to recent incidents on and the response by the University of Texas at Austin. The aim in this case study is to analyze how universities may try to preserve speech while simultaneously fostering an inclusive and productive environment—surely a legitimate prerogative.⁴

In Part I of this article, I explain the recent hate speech incidents at the University of Texas and the University's response. In Part II, I assess the constitutional issues in the University's responses, and I identify a potential future difficulty that the University may have to face. Then, in Part III, I

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¹ *Pepe the Frog*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/references/hate-symbols/pepe-the-frog> (last visited on Sep. 7, 2017).

² See Engy Abdelkader, *Anti-Muslim Hatred Grows in Europe*, U. PENN. L. SCH.: GLOBAL AFFS. BLOG, <https://www.law.upenn.edu/live/news/6542-anti-muslim-hatred-grows-in-europe/news/international-blog.php#.WPTkEVPysy4> (last visited on Sep. 7, 2017).

³ *Id.*

⁴ See Richard A. Epstein, *Mob Censorship on Campus*, DEFINING IDEAS (Mar. 13, 2017), <http://www.hoover.org/research/mob-censorship-campus> (“There is an obvious tension between the efforts to secure deliberative democracy and those to provide extensive constitutional protection of caustic speech.”).

address what else can be done without stifling speech.

I. HATE SPEECH AT TEXAS AND THE UNIVERSITY'S RESPONSE

The University of Texas at Austin has sadly experienced incidents of hate speech in recent times, and the University is trying to respond. Its response and the events leading up to it may prove helpful to other universities as they grapple with hate and speech on our nation's campuses.

A. Incidents on Campus

In February 2017, students at the University of Texas at Austin woke up to find hate-filled fliers on campus.⁵ These fliers expressed anti-Muslim⁶ and anti-immigrant⁷ sentiments. Some fliers read: "Imagine a Muslim-Free America."⁸ And others read: "A Notice to All Citizens of the United States of America[:] It is your civic duty to report any and all illegal aliens to U.S. Immigration and Customs Enforcement[:] they have broken the law."⁹ Soon after the discovery of the fliers, the University attributed the hate speech to a group called American Vanguard, which is unaffiliated with the University of Texas.¹⁰ The group also publicly took credit on their website and tweeted photos of the fliers with the hashtag "#MakeAmericaWhiteAgain."¹¹ Yet it is still not confirmed if another group was instead or maybe jointly responsible.¹²

Regardless, students, faculty, and other members of the University community were understandably disturbed, angered, and hurt—many reasonably were afraid.¹³ The University strongly denounced the posters and expressed support for members of the student body who felt alienated. The university president, Greg Fenves, publicly commented: "As president of the University of Texas, [I] condemn [American Vanguard] . . . [A]ny message that's anti-Muslim, anti-immigrant, anti-Black, anti-Semitic—these types of beliefs I don't believe belong on our campus and they don't belong in

⁵ Ralph K.M. Haurwitz, *Anti-Muslim, Anti-Immigrant Fliers at UT Being Taken Down*, AUSTIN AM. STATESMAN (Feb. 13, 2017, 10:44 AM), <http://www.statesman.com/news/local/anti-muslim-anti-immigrant-fliers-being-taken-down/KCiySdbYvHBpBJW3hcWwwL/>.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Calily Bien, *Anti-Muslim, Immigration Fliers Found on UT Campus*, KXAN (Feb. 13, 2017, 9:22 PM), <http://kxan.com/2017/02/13/anti-muslim-immigration-fliers-found-on-ut-campus/>.

¹¹ *Id.*

¹² Catherine Marfin, *UT Removes Anti-Muslim Posters from Campus*, DAILY TEXAN (Feb. 13, 2017, 4:01 PM), <http://www.dailytexanonline.com/2017/02/13/ut-removes-anti-muslim-posters-from-campus>.

¹³ *See id.* (quoting the reaction of Rami Abi Habib, a student at the University of Texas, to the racist fliers).

American society.”¹⁴

After these statements, President Fenves announced a town hall meeting, which was also live streamed, to discuss hate speech and the climate on campus in the wake of these fliers.¹⁵ And in the announcement, President Fenves acknowledged the challenging situation the school and our nation has more frequently had to face—the at-times-seemingly-competing interests of free speech and civil discourse.¹⁶ All in all, President Fenves’s announcement took a more pro-free-speech position:

The nation and world have seen an increase in emotional—and too often ugly and contentious—discussions about immigration, race, religion and gender-identity. The discourse has frequently been most vigorous on university campuses, where students, faculty members and staff members of diverse backgrounds come together in the pursuit of knowledge.

The difficult discussions we are having at UT and throughout society raise important questions about free speech that are challenging to answer. Free speech is critical to the exchange of ideas that must happen at a university. We don't learn by quieting voices. We learn by listening to one another and, when we disagree, by engaging in thoughtful dialogue. Protecting free speech means protecting the rights of every perspective, even if that perspective is objectionable.

Sometimes, our collective dialogue has its limits, especially when it involves outside groups. Posters from non-UT organizations, including the ones we saw last week, are not allowed under our rules and will be taken down. They have no place on the Forty Acres. As a university community, it is up to all of us to define a culture that protects the right to free speech and supports our right to learn, teach and work in an inclusive environment.

¹⁴ Rhonda Fanning, *UT-Austin President: White Supremacist Posters Are 'Abhorrent'*, TEX. STANDARD (Feb. 16, 2017, 10:33 AM), <http://www.texasstandard.org/stories/ut-austin-president-white-supremacist-posters-are-abhorrent/#>.

¹⁵ *Town Hall on Campus Climate*, UT CALENDAR, http://calendar.utexas.edu/event/town_hall_on_campus_climate#.WOunXFPysy6 (last visited on Sep. 8, 2017).

¹⁶ *Message from President Fenves on Campus Climate and Town Hall*, UNIV. OF TEX. AT AUSTIN OFFICE OF THE PRESIDENT, <https://president.utexas.edu/messages/president-fenves-campus-climate-town-hall> (last visited on Sep. 8, 2017).

The best response to offensive speech is enlightened dialogue. So, we will hold a town hall meeting at 2 p.m. on Wednesday in the ballroom at the Student Activity Center to discuss the climate at UT and the issues impacting our community. . . .

We cannot ignore hate. We cannot ignore our differences. But we can speak to one another. We can listen to one another. We can improve.¹⁷

Fenves's message to the university community was surely earnest. It was also rousing. University administrators today more and more often face a Catch-22 of protecting speech versus maintaining a sufficient level of inclusivity to promote academic productivity.

This is no cake walk. At Yale, "hundreds of students encircled Jonathan Holloway, the first black dean of Yale College, outside of the main library and demanded to know why he had not communicated with the college community about allegations . . . that a university fraternity chapter had turned away black women from a party" ¹⁸ One article in the Atlantic chronicles other recent such difficulties pretty succinctly:

At Duke, student activists demanded disciplinary sanctions for students who attend "culturally insensitive" parties, mandatory implicit-bias training for all professors, and loss of the possibility of tenure if a faculty member engages in speech "if there are discriminatory attitudes behind the speech" ¹⁹ At Emory, student activists [called for] student evaluations [to] include a field to report a faculty member's micro aggressions . . . and that the social network Yik Yak be [banned from campus].²⁰ [Students] at Wesleyan pushed to [defund their campus newspaper] because [of] an op-ed that criticized Black Lives Matter.²¹

¹⁷ *Id.*

¹⁸ Isaac Stanley-Becker, *Yale's President Tells Minority Students: 'We Failed You'*, WASH. POST (Nov. 6, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/11/06/yales-president-tells-black-students-we-failed-you/?utm_term=.7c5580a454a4.

¹⁹ Conor Friedersdorf, *The Glaring Evidence that Free Speech is Threatened on Campus*, ATLANTIC (Mar. 4, 2016), <https://www.theatlantic.com/politics/archive/2016/03/the-glaring-evidence-that-free-speech-is-threatened-on-campus/471825> (quoting *Demands of Black Voices*, (Nov. 20, 2015), <http://static1.squarespace.com/static/541e2ec8e4b042b085c464d9/t/56515dfae4b033f56d2481bc/1448173050985/dukedemands.pdf>).

²⁰ *Id.* The list of demands can be viewed at Black Students at Emory, *List of Demands*, (Nov. 11, 2015), https://docs.google.com/document/d/1KM__SDc4-QaQKXyl_DYUIDKRjN0DgLN0xVln986LunI/edit?pli=1

²¹ *Id.* (citing Conor Friedersdorf, *Will Black Lives Matter Be a Movement that Persuades?*,

Dartmouth University students demanded the expulsion of fraternities that throw [racist or racially insensitive] parties . . . [and called for] a student newspaper to change its name.²²

And at Claremont McKenna College, students and demonstrators blocked a speaker they found controversial, who was opposed to the Black Lives Matter movement, from speaking on campus.²³ Putting aside the diverse and unique reasons for each of the reactions of those groups of students, most of those events are distinct from the ones that occurred at Texas (if correct, the Yale and Dartmouth incidents seem to be in the same ballpark). The incidents on the Texas campus were overt and bold acts of hate. But it was speech alone, whereas many other campus incidents had at least some element of non-speech conduct. Still, the dilemma remains at Texas. A solution seemed unclear to the administration—at first, Fenves only banned all non-UT fliers from campus.²⁴ But students at Texas remained understandably and justifiably angry.

Much of this anger seems to stem from the fact that actions of intolerance have continued on the Texas campus in recent years. In 2013, an unknown person water ballooned a group of African-American students with balloons the students believe were filled with bleach.²⁵ In 2015, a Muslim student was spat on.²⁶ And the flier incident is sadly not the most recent in a series of incidents of intolerance. About two weeks after the flier incident, vandals smashed the window of the Hillel at the University of Texas, a Jewish student center.²⁷ Then in early April, someone (or a group of people—although the university believes it was a single student) posted anti-

ATLANTIC (Sept. 24, 2015), <https://www.theatlantic.com/politics/archive/2015/09/will-black-lives-matter-be-a-movement-that-persuades/407017/>).

²² *Id.* (citing *The Plan for Dartmouth's Freedom Budget: Items for Transformative Justice at Dartmouth*, http://static1.squarespace.com/static/541e2ec8e4b042b085c464d9/t/56515381e4b08f0af88df6cb/1448170369580/Dartmouth_Freedom_Budget_Plan.pdf).

²³ Howard Blume, *Protestors Disrupt Talk by Pro-Police Author, Sparking Free-Speech Debate at Claremont McKenna College*, L.A. TIMES (Apr. 9, 2017, 10:20 AM), <http://www.latimes.com/local/lanow/la-me-ln-macdonald-claremont-speech-disrupted-20170408-story.html>.

²⁴ *Message from President Fenves*, *supra* note 20.

²⁵ Calily Bien & Robert Maxwell, *UT Town Hall on Campus Climate Reveals Student Anger*, KXAN (Feb. 22 2017, 1:29 PM), <http://kxan.com/2017/02/22/ut-hosts-town-hall-on-campus-climate> (This incident notably involves physical conduct, which admittedly is distinct from speech).

²⁶ Bien & Maxwell, *supra* note 25. (While spitting on someone is an assault in the state of Texas and not a matter of speech, the incident is nonetheless inextricably associated with hate speech. Hence much of the difficulty in dealing with campus speech issues. All too frequently hateful speech is followed by hateful physical acts).

²⁷ Catherine Marfin, *UTPD, APD Investigating Vandalism at Texas Hillel*, DAILY TEXAN (Feb. 28, 2017, 12:28 AM), <http://www.dailytexanonline.com/2017/02/28/utpd-apd-investigating-vandalism-at-texas-hillel>.

Chinese and anti-Chinese-American fliers across campus.²⁸ To be sure, these incidents are readily distinguishable. But they form part of an overall problem of campus intolerance, within which is the vexing hate-speech issue.

Of course, the University of Texas is not alone. Many other universities experience and struggle to deal with prejudice and discrimination. In short, hatred and intolerance remain a problem in society, and that problem often manifests itself on university campuses. Maybe this is lucky. Universities are the great institutions we rely on to better our youth; to educate our youth not merely by teaching them, but also by teaching them to open their minds. So maybe our universities are in fact best suited to take positive action. The University of Texas has taken one step out onto that tight-rope of balancing speech and social tolerance, which provides a good case study of how universities might attempt to quell hate speech and mend some social ails.

B. The New University Policies

In response to the fliers incident, the University of Texas implemented and enforced two policies. One was the prohibition on non-UT-organization fliers.²⁹ The other was the new policy called the Hate and Bias Incident Policy.³⁰ The latter policy is comprised of 11 sections,³¹ but for all effective purposes, it has four major components. Let's review them and the issues they raise in the order they were written.³²

1. Policy Statement

The policy statement consists largely of a condemnation, a commitment, and a clarification of student rights. The condemnation takes aim at intolerance: "The University of Texas at Austin ('University') unequivocally condemns and prohibits: acts of intolerance, hate, bias, and prejudice when manifested in threatened or actual violent conduct against a person; harassment; and incitement to imminent violations of law."³³ This position seems entirely alright. It contains a key qualification for intolerance

²⁸ Kayla Meyertons & Catherine Marfin, *Racist Posters Target Chinese Community in Campus Buildings*, DAILY TEXAN (Apr. 4, 2017, 12:06 AM), <http://www.dailytexanonline.com/2017/04/04/racist-posters-target-chinese-community-in-campus-buildings>.

²⁹ See Haurwitz, *supra* note 5.

³⁰ *Hate and Bias Incidents*, UNIV. OF TEX. AT AUSTIN UNIV. POLICY OFFICE (Mar. 8, 2017), <https://policies.utexas.edu/policies/hate-and-bias-incidents>.

³¹ *Id.*

³² Please note that the purpose of Part I.B is not to engage in constitutional analysis. Instead, it is merely to try to arrive at the most likely definitions and interpretations of the policy. Any normative conclusions are made irrespective of potential constitutionality, which is addressed in later parts of this article.

³³ *Hate and Bias Incidents*, *supra* note 30.

and hate—“when [they are] manifested in threatened or actual *violent conduct* . . . ; *harassment*; and *incitement* to imminent violations of law.”³⁴ This fits squarely within established First Amendment caselaw.³⁵ So, note, nothing here is a ban on hate speech, per se.

Texas then commits itself to create an “environment free from acts of intolerance, hate, bias, or prejudice based on an individual’s race, color, religion, national origin, gender, gender identity or gender expression, age, disability, citizenship, veteran status, sexual orientation, ideology, political views, or political affiliation.”³⁶ Notably, this is not really a policy; more a statement of purpose and intent.

Then, the University clarifies that it supports the right to free speech. Accordingly, “members of the University community have the right to hold, vigorously defend, and express their ideas and opinions, and for such ideas and opinions to flourish or wither according to their merits.”³⁷ Admirably put. And consider it—even offensive and hateful ideas would seem to fit within this realm of university-protected speech.

2. *Reasons for Policy*

The reason section is short and sweet. Texas recognizes the need to “protect controversial ideas and opinions and differing viewpoints.”³⁸ This again would seem to indicate that even vile speech is protected; but only so long as the speech does not rise to the level of “threatened or actual violent conduct against a person, harassment, or incitement to imminent violations of law.”³⁹ Reasonable. Of course, this begs the question: *what* rises to threatened violent conduct, harassment, or incitement?⁴⁰ In other words, where do those fliers fit in? How do we categorize them under this policy? The definitions section sheds *some* light on this, but not definitively.

3. *Definitions*

The Texas policy proscribes three types of conduct: violent conduct, harassment, and incitement. Violent conduct and harassment are defined under the policy, but incitement is not. Within violent conduct, both actual

³⁴ *Id.* (emphasis added).

³⁵ See EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS* 3, 165, 189 (6th ed. 2016) (explaining incitement, speech integral to unlawful conduct, and infliction of emotional distress).

³⁶ *Hate and Bias Incidents*, *supra* note 30.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Actual violent conduct seems straight-forward enough. If the speech is accompanied by violence, then it is not protected, and of course, nor is the violence.

and threatened are prohibited. The former, actual, is described as “an act that causes bodily injury to or harmful, aggressive, or unwelcome physical contact with another.”⁴¹ So, this all comes down to a physical component. It would seem that physical attacks as well as the spitting and water balloon incidents⁴² mentioned before would all fall within this definition. But hateful words that make someone feel unwelcome without rising to more (perhaps harassment or incitement) would not be captured by the policy. Threatened violent conduct is likewise narrowly defined—“an act that threatens another with imminent bodily injury or harmful, aggressive or unwelcome physical contact.”⁴³

Harassment and verbal harassment are defined much more in-depth and, ironically, are more ambiguous in meaning. Harassment is defined as:

*verbal or physical conduct that is directed at an individual or group because of race, color, religion, national origin, gender, gender identity or gender expression, age, disability, citizenship, veteran status, sexual orientation, ideology, political views, or political affiliation when such conduct is sufficiently severe, pervasive, or persistent so as to interfere with an individual or group's academic or work performance, or to create a hostile work or academic environment.*⁴⁴

This definition prompts two questions. First, does “verbal” mean only oral speech? Or does it instead entail textual speech, too—school paper articles, internet posts, and more? Most likely, it includes both.⁴⁵ Second, what level of interference is necessary under the policy to qualify as harassment? Granted, the “interference” requirement is cabined in a clause containing the “sufficiently severe” language. But some ambiguity remains: yes, the verbal conduct must be sufficiently severe, pervasive, or persistent. Thus, the school will have to make a fact inquiry—how often did the conduct recur, where and were the circumstances, and the like. Yet tied to this is the idea that the conduct was so severe (or pervasive or persistent) *such that* it interfered with student performance or environment. The policy does not

⁴¹ *Hate and Bias Incidents*, *supra* note 30.

⁴² See Bien & Maxwell, *supra* note 25 and accompanying text.

⁴³ *Hate and Bias Incidents*, *supra* note 30.

⁴⁴ *Id.* (emphasis added).

⁴⁵ See *id.*; cf. *Verbal*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/verbal> (not that the dictionary definition of verbal entails both alternatives raised here: “of, relating to, or consisting of words” and “spoken rather than written.”).

address how *that* is defined. Hence the uncertainty.⁴⁶ Still, Texas does include a limiting principle: “The harassment this policy prohibits does not exhaust the category of speech that is unnecessary and inappropriate to vigorous debate [C]ommunity norms . . . cannot be enforced by disciplinary rules.”⁴⁷

Verbal harassment is also defined—although its relation to and interplay with plain harassment is unclear. The Texas policy defines verbal harassment as “hostile or offensive speech, oral, written, or symbolic” that (1) isn’t necessary for expressive purposes; (2) “is sufficiently severe, pervasive, or persistent to create an objectively hostile environment that interferes with” a victim’s ability to engage in the academic community; and (3) is aimed at one or more specific individuals.⁴⁸ This definition would seem not to capture one-off nasty and racist name-calling. For example, if someone were to level anti-Semitic insults at me personally as I walked past, that would be vile. But is it severe enough to “interfere[] with or diminish[] . . . [my] ability to participate in . . . the services, activities, or privileges provided by the University?”⁴⁹ Well, that likely depends. If this stranger accosted me just once, it’s questionable whether or not it diminishes my ability to be a University student. If it becomes an every-day sort of thing, then that’s another matter. From a policy standpoint, this seems reasonable. We want these discussions and investigations to be intensely fact specific; unique to each incident.

The verbal harassment definition also comes with two limiting principles built in. First, the policy explicitly states that “[t]o make an argument for or against the substance of any political, religious, philosophical, ideological, or academic idea is not verbal harassment, even if some listeners are offended by the argument or idea.”⁵⁰ This would protect a lot of potentially hateful speech—anti-gay sentiments, anti-immigration sentiments, racism at least to the extent it’s part of the white supremacy ideology,⁵¹ and more. Second, the policy acknowledges that similar policies have at times been held unconstitutional, and thus, the policy directs that it “be interpreted as narrowly as necessary to preserve its constitutionality.”⁵²

⁴⁶ This is not to say that the University will define interference in a nefarious or stifling-of-speech manner. Nor is this to say that the University necessarily erred in defining harassment as it did.

⁴⁷ *Hate and Bias Incidents*, *supra* note 30.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See generally ‘*We’re Not Going Away*’: *Alt-Right Leader on Voice in Trump Administration*, NPR (Nov. 17, 2016), <http://www.npr.org/2016/11/17/502476139/were-not-going-away-alt-right-leader-on-voice-in-trump-administration> (featuring an interview of Richard Spencer, a prominent white nationalist, explaining his ideology of white supremacy and nationalism).

⁵² *Hate and Bias Incidents*, *supra* note 30.

Finally, the policy never defines incitement. But most likely, it's safe to assume the University seeks to use the same definition it has in the law generally: "Advocacy of the use of force or of law violation"⁵³ when "directed at inciting"⁵⁴ "imminent lawless action"⁵⁵ and that "is likely to incite."⁵⁶

4. Responsibilities and Procedures

The primary mechanism for enforcing this policy is through a reporting system—students or faculty who believe they have been harassed are directed to report violations of the policy.⁵⁷ Based on what counts as harassment—e.g., if pervasive hateful speech that makes someone feel uncomfortable qualifies—there might be an unintended reporting bias. Some offensive speech might be reported more than other types. Regardless, once a report is made, the University "will respond and investigate the allegation in a fair, impartial, and prompt manner."⁵⁸ Investigation seems to be the right call here. Yet why not go to the police in such instances? This article will compare the university definition of harassment to state and national definitions of harassment. If the definitions are different, maybe that is concerning. And if it is the same, then why not just give it to the police? It might be because the University can be more lenient and allow students who violate the policy a second chance without hurting their public records.

The policy then lists four bulleted rules. First, "[n]o person will make, distribute, or display on the campus any statement that constitutes verbal harassment of any other person."⁵⁹ Second, "[n]o person will make, distribute, or display on the campus any statements" that are incitements to violate the law.⁶⁰ Third, a discriminatory purpose will serve as an aggravating factor for disciplinary purposes. And fourth, the University may take disciplinary action in response to violations of the policy.⁶¹

The policy then elaborates on the reporting processes, the campus flier incident, and the measures⁶² the University can and will, when appropriate, take.

⁵³ VOLOKH, *supra* note 35, at 3.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *See id.* (quoting *Brandenburg v. Ohio*, 395 U.S. 444 (1969)) (internal quotation marks omitted).

⁵⁷ *Hate and Bias Incidents*, *supra* note 30.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* Against University students, this includes "immediate interim disciplinary action" such as "suspending the right of the student to be present on the campus (including to live in campus residence halls) and to attend classes."

II. CONSTITUTIONALITY OF THE UNIVERSITY POLICY

Most of the University of Texas's policies seems permissible. The non-UT-organization ban on campus fliers seems well within Texas's rights, provided the University enforces it consistently against all individuals and groups. The Hate and Bias Incident Policy seems for the most part to be constitutional.

A. *The Non-UT-Organization Ban*

When Texas banned posters and fliers by non-UT students and organizations,⁶³ it was almost certainly acting legitimately. A state-run college, like the University of Texas, likely has power over at least some on-campus speech due to the state's role as a property owner.⁶⁴ In the case of Texas, this would depend on how the campus is defined:⁶⁵ a traditional public forum, a designated public forum, a limited public forum, a nonpublic forum, a quality-based funding program, or a nonforum.

The traditional public forum is "government property traditionally available for public expression" like parks.⁶⁶ The designated public forum is a piece of government property that was opened explicitly to serve as a forum for the public at large.⁶⁷ Between the traditional and designated public forums, "[s]peech restrictions . . . 'are subject to the same strict scrutiny . . .'"⁶⁸ The limited public forum is, appropriately, one "limited to use by certain groups,"⁶⁹ and the nonpublic forum is "all other government-owned property that's generally open to a *defined* group of people, but not for the purpose of promoting private speech . . ."⁷⁰ Yet, again, "despite the separate labeling, limited public fora and nonpublic fora are treated similarly."⁷¹ Quality-based funding programs "allocates scarce resources on the basis of some judgment of 'quality,' e.g., the artistic excellence in *NEA v. Finley* . . . rather than 'indiscriminately' to an entire class of speakers . . .

⁶³ *Message from President Fenves*, *supra* note 16.

⁶⁴ VOLOKH, *supra* note 35. Please note that the following analysis follows Professor Volokh's framework that can be found in his casebook. *Id.* at 610–12. Much of the case citations that follow are derived from the Volokh casebook, and I owe the Professor my thanks for his well-written and easy-to-approach book. My hope in this article is, in part, to complete and put forth issue analysis pertinent to the Texas incident through the preexisting framework—not to proffer a new or re-delineate a preexisting framework.

⁶⁵ *Id.*

⁶⁶ *Id.* at 611.

⁶⁷ *Id.*

⁶⁸ *Id.* (quoting *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010)).

⁶⁹ *Id.* at 611. (quoting *Martinez*, 561 U.S. at 661) (internal quotation marks omitted).

⁷⁰ VOLOKH, *supra* note 35, at 611 (emphasis added).

⁷¹ *Id.*

.⁷² Finally, there is the nonforum—rather, something “the government uses to speak” like “a government-owned television channel.”⁷³

Let’s eliminate the obvious. Texas isn’t a nonforum. If state-funded universities were used purely for government speech, then universities wouldn’t enroll students. Nor is the campus of the University of Texas a quality-based funding program. For admission purposes, it surely would be. But the issue in the flier policy is not “who gets money,” but rather, “who is allowed to be on and use the campus in approved ways.” Finally, the campus is certainly not a designated public forum. The express purpose of the campus is to facilitate the education of its students and the research of its faculty. This leaves three options.⁷⁴

Least likely of our remaining options seems the traditional public forum. Some public universities permit on-campus non-student protestors. But the determinative issue is whether a public university is viewed traditionally as a public forum. And I think most campuses are not public speech zones traditionally open to society at large in the same way that Central Park in Manhattan is.

So the question is whether the Texas campus is a designated or limited public forum. Ultimately, the distinction doesn’t matter too much since the legal analysis is the same.⁷⁵ First, the speech regulation must be reasonable.⁷⁶ Second, the speech regulation must be viewpoint-neutral.⁷⁷ To be reasonable, the regulation must serve the government’s “legitimate interest” in using the property “for the use to which it is lawfully dedicated.”⁷⁸ While “the government need not show conclusive proof that the speech would interfere with the government’s activities,”⁷⁹ here the University of Texas shouldn’t have too many problems with that. The purpose of a university is to educate its students and drive cutting-edge research. Clearly, the students and faculty were perturbed to the point that the academic environment was interfered with.⁸⁰

Viewpoint-neutrality is easily seen by contrast with its opposite: viewpoint-based.⁸¹ Here, “the question is whether the law inherently restricts

⁷² *Id.* at 612.

⁷³ *Id.*

⁷⁴ See? . . . (hopefully-soon-to-be) lawyers can do math! California Bar preparation advice is kindly welcomed.

⁷⁵ VOLOKH, *supra* note 35, at 611.

⁷⁶ *Id.*

⁷⁷ *Id.* at 612.

⁷⁸ *Id.* at 611 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 50 (1983)).

⁷⁹ *Id.* (quoting *Perry Educ. Ass’n*, 460 U.S. at 50).

⁸⁰ See *supra* Part I.A.

⁸¹ See VOLOKH, *supra* note 35, at 612–13.

some viewpoints while leaving others unrestricted.”⁸² Examples⁸³ of viewpoint-based restrictions include bans on antiwar speech⁸⁴ and religious speech.⁸⁵ Considering the ban without the context of its enforcement, it seems clearly to be content-neutral (and thus viewpoint-neutral)⁸⁶ since the ban discriminates against all UT-outsiders regardless of their views. Under this ban, the American Vanguard is just as prohibited from posting fliers on campus as is the ACLU or His Holiness the Dalai Lama.⁸⁷

B. The Hate-and-Bias-Incidents Policy

Overall, this policy is likely to withstand court review. The violent conduct provisions are well within the University’s prerogatives. The harassment provision seems to be permissible, but the verbal harassment provision stands on shakier grounds. Finally, the incitement provision again seems well within the University’s rights.

1. Violent Conduct: Actual or Threatened

There seems to be no problem with a university banning actual violent conduct, as Texas does in its Hate and Bias policy.⁸⁸ For one thing, this isn’t even a suppression of speech. As previously noted, the policy defines actual violent conduct as “an *act that causes bodily injury* to or harmful, aggressive, or unwelcome physical contact with another.”⁸⁹ This actually looks like an assault statute. It mirrors the language of the State of Texas’s own assault law pretty closely, which creates an offense for “intentionally, knowingly, or recklessly caus[ing] bodily injury to another”⁹⁰ Even if a court somehow interpreted this portion of the policy as a restriction on speech (perhaps actual violent conduct coupled with speech—*e.g.*, “I’m gonna beat the snot out of you”), it would be a permissible one. Likely, it could be fit into the fighting-words exception from First Amendment protection.⁹¹ Just like threatened violent conduct.

⁸² *Id.* at 613.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Rosenberg v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

⁸⁶ VOLOKH, *supra* note 35, at 613.

⁸⁷ But there is a risk of unequal enforcement. The University should be vigilant in applying this ban equally. As highly as this author regards the Dalai Lama, the flier policy should apply equally to Tenzin Gyatso. Otherwise there would be a very plausible attack on the University for viewpoint-based discrimination in enforcement.

⁸⁸ *Hate and Bias Incidents*, *supra* note 30.

⁸⁹ *Id.* (emphasis added).

⁹⁰ Tex. Pen. Code § 22.01(a)(1)(2017).

⁹¹ VOLOKH, *supra* note 35, at 185.

Like actual violent conduct, the threatened violent conduct policy is defined in a way that mirrors the State of Texas's assault law. Compare for yourself. The Bias and Hate Incident Policy: "[A]n act that threatens another with imminent bodily injury or harmful, aggressive or unwelcome physical contact."⁹² The State of Texas's assault law: "intentionally or knowingly threaten[ing] another with . . . bodily injury . . ."⁹³ So for one thing, it would be pretty strange for courts to permit the State to criminalize assault, but prohibit universities from sanctioning students for the same offense. And for another, even if the courts chose to view this solely from a speech lens, the restriction on speech would slip easily into the fighting-words category of exceptions. Under that exception,⁹⁴ fighting words are unprotected speech. And fighting words are defined as speech that: "tend[s] to incite an immediate breach of the peace,"⁹⁵ is a "personally abusive epithet[] which, when addressed to the ordinary citizen, . . . [is] inherently likely to provoke a violent reaction,"⁹⁶ and is "a direct personal insult."⁹⁷ Conduct that fits into the policy definition of threatened violent conduct would thus fit into the fighting words exception.

First, a threat of "imminent" bodily harm seems "likely to cause on average addressee to fight."⁹⁸ But even if the reader took issue with that assertion, a threat of imminent harm should still fit into the first prong of the fighting words exception. Admittedly, in the light of such a threat, some might have a different response—flight⁹⁹ instead of fight.¹⁰⁰ Yet even flight is likely to "cause a breach of the peace"¹⁰¹—the underlying concern of the fighting words exception. Besides, if a threat of imminent harm doesn't qualify for the first prong, it's unlikely anything that ever actually happens would. There would be no purpose of creating an exception for a nonexistent exigency.

Second, the same fight-or-flight analysis under the first prong should also apply to the second prong (likelihood of provoking a violent reaction). And in *Cohen v. California*, the Court indicated that it was not necessary

⁹² *Hate and Bias Incidents*, *supra* note 30.

⁹³ Tex. Pen. Code § 22.01(a)(2)(2017).

⁹⁴ VOLOKH, *supra* note 35, at 185.

⁹⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

⁹⁶ *Cohen v. California*, 403 U.S. 15, 20 (1971).

⁹⁷ *Cohen*, 403 U.S. at 20.

⁹⁸ *Chaplinsky*, 315 U.S. at 573.

⁹⁹ *E.g.*, THE GRAND BUDAPEST HOTEL (Indian Paintbrush 2014) (depicting M. Gustave turning tail and running when confronted by armed police).

¹⁰⁰ *E.g.*, THE LIFE AQUATIC WITH STEVE ZISSOU (Touchstone Pictures 2004) (depicting Steve Zissou sucker-punching his son Ned "Kingsley" Zissou in the face after Ned declared to Steve "I'm going to fight you").

¹⁰¹ *See Chaplinsky*, 315 U.S. at 572.

that the person being threatened be the one likely to respond violently.¹⁰² Instead, if bystanders are incensed to violence from the incident, the Court indicated this would suffice.¹⁰³ The recent incident of a high schooler who stepped in to defend a visually impaired student from being bullied is one example of the idea.¹⁰⁴

Third, the University policy also satisfies the direct personal insult requirement: by defining the threat as against an individual; and by creating a reporting system whereby individuals who believe someone has offended them in violation of the law, report their own personal harm.¹⁰⁵

2. Harassment

To compare the harassment portions of the University's policy to federal precedent, it's useful to first determine how the harassment and verbal harassment definitions differ (if in meaningful ways at all). To compare the definitions, it's useful to break down the definitions¹⁰⁶ into their elements in a bulleted list. (Please note the following definitions are partial quotations and partial paraphrases from the University policy.¹⁰⁷)

A. Harassment (H)¹⁰⁸

1. verbal or physical conduct
2. directed at an individual or group
3. because of race, color, religion, national origin, gender, gender identity or gender expression, age, disability, citizenship, veteran status, sexual orientation, ideology, political views, or political affiliation
4. sufficiently severe, pervasive, or persistent so as to
 - a. interfere with an individual or group's academic or work performance,
 - b. or to create a hostile work or academic environment.

B. Verbal Harassment (VH)¹⁰⁹

1. hostile or offensive speech, oral, written, or symbolic
2. unnecessary for expressive purposes

¹⁰² See *Cohen*, 403 U.S. at 23 (“We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen.”).

¹⁰³ *Id.*

¹⁰⁴ Jessica Chasmar, *Hero Teen Knocks Out Bully Who Was Beating Blind Classmate*, WASH. TIMES (Sept. 25, 2015), <http://www.washingtontimes.com/news/2015/sep/25/bully-who-hit-blind-classmate-arrested-after-knock/>.

¹⁰⁵ See *Hate and Bias Incidents*, *supra* note 30.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

3. sufficiently severe, pervasive, or persistent to create an objectively hostile environment that interferes with” a victim’s ability to engage in the academic community
4. aimed at one or more specific individuals.

So now let’s play a matching game sort of like one you might find on the kids’ menu at a diner. Directed at a person or group: H#2 matches with VH#4. Sufficiently severe to interfere: H#4 more or less matches with VH#3. Speech: H#1 loosely matches with VH#1. But we do have differences. The harassment portion of the policy creates as an element discriminatory intent (H#3), whereas the verbal harassment definition lacks this. Instead, the verbal harassment portion of the policy opts for an element of being unnecessary for expressive purposes (VH#2). These two elements are quite different. They don’t seem to be proxies for each other. As a result, the harassment policy tracks pretty well with the general First Amendment requirements for a harassment law, while the verbal harassment policy tracks less well.

In general, “private and public universities . . . [may only] restrict conduct or speech”¹¹⁰ that comports with the following harassment definition—speech that’s:

1. “severe or pervasive” enough
2. to create a “hostile, abusive, or offensive work [or academic] environment”
3. based on race, religion, sex, national origin, age, disability, or in some situations veteran status,
4. for the plaintiff and
5. a reasonable person.¹¹¹

Comparing this definition to the ones in the Texas policy, the two harassment policies match up almost exactly (except for the “reasonable person” component). Yet the verbal harassment definition in the Texas policy is perhaps uncomfortably afield. In the general rule, there’s no consideration of whether the speech is necessary for expressive purposes. And come to think of it, there probably isn’t much speech that is truly necessary for expressive purposes—most things can be expressed in alternative ways. Though even if a hypothetical reviewing court were to find both of the Texas definitions to completely match the general rule, there might be trouble.

Prof. Eugene Volokh points¹¹² to three circuit court cases striking down campus speech codes: *McCauley v. University of Virgin Islands*,¹¹³ *Dambrot*

¹¹⁰ VOLOKH, *supra* note 35, at 335.

¹¹¹ *Id.* at 333.

¹¹² *Id.* at 335.

¹¹³ *McCauley v. Univ. of V.I.*, 618 F.3d 232 (3d Cir. 2010).

v. Central Michigan University,¹¹⁴ and *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*.¹¹⁵ Let's take a deeper dive, going in reverse chronological order. In *McCauley* (the Third Circuit case), the university charged a student with harassing someone who had accused the student's friend of rape.¹¹⁶ At that university, there were two somewhat comparable policies at play—Paragraph E and Paragraph H (the latter only to some extent). Paragraph E prohibited:

Committing, conspiring to commit, or causing to be committed any act which causes or is likely to cause serious physical or mental harm or which tends to injure or actually injures, frightens, demeans, degrades or disgraces any person. This includes but is not limited to violation of the University policies on hazing, sexual harassment or sexual assault.¹¹⁷

And Paragraph H prohibited “conduct which causes emotional distress, including ‘conduct TTT which compels the victim to seek assistance in dealing with the distress.’”¹¹⁸

Both of these laws were struck down as unconstitutional. The district court struck down Paragraph E as facially overbroad and unconstitutional under the First Amendment, and the appellate court upheld this ruling.¹¹⁹ The circuit court struck down Paragraph H, on the other hand, because it was “entirely subjective and provide[d] no shelter for core protected speech.”¹²⁰ But note how these provisions are distinct from Texas's harassment policy. Neither policy even arguably tracks the general rule for harassment law and the First Amendment. So in all likelihood, this Third Circuit case isn't particularly damning or troublesome for the Texas policy. At least, there's a very strong argument that the Third Circuit case is very distinguishable from a hypothetical court review of the Texas policy.

In *Dambrot* (the Sixth Circuit case), the university's men's-basketball coach used the N-word in the locker room (the coach asserts he did so in a “positive manner”), and news of it spread across the campus like wild fire.¹²¹ The coach was fired¹²² under the school harassment policy, which prohibits:

¹¹⁴ *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

¹¹⁵ *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993).

¹¹⁶ *McCauley*, 618 F.3d at 236.

¹¹⁷ *Id.* at 237.

¹¹⁸ *Id.* at 238–39.

¹¹⁹ *Id.* at 253.

¹²⁰ *Id.* at 250.

¹²¹ *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1180–81 (6th Cir. 1995).

¹²² *Id.*

[A]ny intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile, or offensive educational environment by . . . demeaning or slurring individuals through . . . written literature because of their racial or ethnic affiliation; or . . . using symbols, [epithets] or slogans that infer negative connotations about the individual's race or ethnic affiliation.¹²³

The court found the policy invalid under the First Amendment as overbroad and vague.¹²⁴ But note that this policy is quite distinct both from the Texas harassment policy and the general rule. Here, there's no requirement that the speech be *directed* at an individual; rather that it "subjects an individual." True, there is language along the "hostile or offensive environment" lines. Yet there's no requirement that conduct be severe or pervasive enough. Thus again, this case seems fairly distinguishable from the Texas policy.

Finally, in the *Sigma Chi Fraternity* case (the Fourth Circuit case), one fraternity brother impersonated an African-American woman by painting himself black and cross-dressing in an offensively stereotyping manner.¹²⁵ News of the event understandably caused an uproar on campus, and the university responded by placing social-event sanctions on the fraternity.¹²⁶ But the court struck down this action as a form of viewpoint discrimination. Notably there was no formal policy that was applied. So there wasn't even a framework to go off of. Because the Texas policy is closely tailored to the general rule in a formal framework, this fraternity case also likely isn't problematic for the Texas policy.

All in all, the Texas harassment policy seems close enough to the general rule to be safe. True, the reasonableness element is missing. But the policy instructs courts to interpret this however possible to make constitutional. So the reasonableness element should likely be read in. That said, there's still some risk since, as Prof. Volokh notes, the Supreme Court has not addressed this issue.¹²⁷ And nor has the Fifth Circuit (where the Texas policy would be reviewed). Furthermore, the verbal harassment policy is missing more of the necessary elements to the general rule for the First Amendment and harassment law. So it particularly seems more vulnerable to a First Amendment challenge. Its hope, too, lies in the policy instruction to read as narrowly as possible to remain constitutional.

¹²³ *Id.* at 1182.

¹²⁴ *Id.* at 1185.

¹²⁵ *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388 (4th Cir. 1993).

¹²⁶ *Id.*

¹²⁷ VOLOKH, *supra* note 35, at 335.

3. Incitement

Finally, the incitement provision of the Texas policy is assuredly permissible. This assumes that the University of Texas enforces that provision in accordance with the definition under current law.¹²⁸ If (or sadly perhaps when) the University ever faces an alleged case of incitement, the key distinction between abstract advocacy and actual incitement must be drawn. As the Supreme Court has put it: “[T]he mere abstract teaching of . . . the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.”¹²⁹ So note, for example, that a white nationalist advocating in theory that white citizenry eventually forcibly deport immigrants or individuals of non-European ancestry¹³⁰—while reprehensible—would not count as incitement.

4. The Trickier Issue: Campus Hate Groups

What happens if a group of students at a university try to form an official student club centered on an ideology of hate? Perhaps a white nationalism organization. The university could try to deny the group status. But this might not work out so well if challenged in the courts. In *Healy v. James*, the Supreme Court faced a case in which Central Connecticut State College had refused to recognize a student organization called “Students for a Democratic Society.”¹³¹ The group, now defunct, is primarily remembered for its anti-Vietnam War activism.¹³² While the Court reversed and remanded the case for further fact-finding and consideration,¹³³ the Court did hold that “[t]here can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges [the First Amendment].”¹³⁴ In effect, this means that the discrimination needs to be viewpoint neutral.

In *Widmar v. Vincent*, the University of Missouri at Kansas City denied student-organization status to a previously recognized group called “Cornerstone.”¹³⁵ The Supreme Court affirmed the circuit court’s striking

¹²⁸ See *supra* text accompanying notes 57–60.

¹²⁹ *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (quoting *Noto v. United States*, 354 U.S. 298 (1957)); see also *VOLOKH*, SUPRA NOTE 35, at 5–7 (including excerpts of *Brandenburg* quoting *Yates v. United States*, 354 U.S. 298 (1961)).

¹³⁰ See *infra* text accompanying notes 136–38.

¹³¹ *Healy v. James*, 408 U.S. 169, 170–71 (1972).

¹³² *Students for a Democratic Society (SDS)*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Students-for-a-Democratic-Society> (last visited Sept. 7, 2017).

¹³³ *Healy*, 408 U.S. at 194.

¹³⁴ *Id.* at 181.

¹³⁵ *Widmar v. Vincent*, 454 U.S. 264, 267 (1981).

down of the denial.¹³⁶ “In order to justify discriminatory exclusion from a public forum based on the religious content of a group’s intended speech,” the Court reasoned, “the [u]niversity must therefore satisfy the standard of review appropriate to content-based exclusions.”¹³⁷ In other words, the university must show a compelling state interest with narrowly tailored means. This is exceedingly difficult to do, as the reader might imagine. So this poses a real problem for Texas if the University ever attempted to ban certain hate-based organizations on the grounds of their beliefs alone. That would certainly be a no-no. But there are caveats to this rule.

For example, in *Christian Legal Society Chapter v. Martinez*, a chapter of the Christian Legal Society argued that its First Amendment free-speech and freedom-of-association rights ran counter to the Hastings Law School policy obliging student groups to accept all students as members.¹³⁸ But the Court found the school policy to be a “reasonable, viewpoint-neutral condition on access to the [student-organization forum].”¹³⁹ So if the University of Texas (or any university) were to adopt a viewpoint-neutral policy of student-organization nondiscrimination, they would be able to prevent groups that actively discriminate in their membership from forming on campus. And if the University sought to prevent the formation of university-recognized groups that sought to or in fact did disturb classes and students (especially in violent manners), this too would likely be permissible. Yet when it comes to the content of their beliefs, student groups espousing hate speech could not be denied recognition. That’s probably a good thing, though—at the very least in order to protect controversial speech on campus. Who’s to say what will or won’t be the trend of controversial student thought in years to come. It’s better to err on the side of permitting too much speech than too little.

III. WHAT ELSE CAN BE DONE?

So the University of Texas has taken an apparently legitimate yet small step forward. But is this enough? Many will say no. And what about the reality of potentially hate-based student groups? The truth is that these flyers are reprehensible. We as a university community don’t want hate speech. But we don’t get to that point by shutting down nonharassing yet offensive speech. For one thing, it doesn’t actually change hearts. Instead it drives dissent underground where it’s harder to address. For another, we weaken ourselves. As Prof. Richard Epstein has said, debate is very important in society and especially for academics. If you never have the opportunity to

¹³⁶ *Id.*

¹³⁷ *Id.* at 270.

¹³⁸ *Christian Legal Soc’y Chapter v. Martinez*, 561 U.S. 661 (2010).

¹³⁹ *Id.* at 662.

face someone smarter than yourself with opposing viewpoint, you never have the chance to test your ideas against someone else. This is critical because if you're beaten in argument, it forces you to reassess and reevaluate your position, which ultimately makes your views stronger and more coherent. On the other side of things, you do your debate partner the same benefit in beating his or her argument. If we ban speech we find hateful, then we start to limit what can be said in a way that will stifle many arguments or make some people afraid of articulating themselves in case they are misunderstood.

So debate is critical. But hate speech and hatred is still undesirable. So what do we do? We get there by bettering our community and by changing hearts. It's difficult. But not impossible. Take for example Derek Black, the son of the founder of the white supremacist website Stormfront.¹⁴⁰ By the time Derek went off to college, he had become a leader within the white supremacy community—he even had his own radio show.¹⁴¹ When his college classmates found out (he had been very private about his views), he faced a lot of ostracism. Except from one student:

“Matthew Stevenson had started hosting weekly Shabbat dinners at his campus apartment shortly after enrolling in New College in 2010. He was the only Orthodox Jew at a school with little Jewish infrastructure, so he began cooking for a small group of students at his apartment each Friday night. Matthew always drank from a kiddush cup and said the traditional prayers, but most of his guests were Christian, atheist, black or Hispanic — anyone open-minded enough to listen to a few blessings in Hebrew. Now, in the fall of 2011, Matthew invited Derek to join them. . . .

Matthew decided his best chance to affect Derek's thinking was not to ignore him or confront him, but simply to include him. “Maybe he'd never spent time with a Jewish person before,” Matthew remembered thinking. . . .

Derek arrived with a bottle of wine. Nobody mentioned white nationalism or the forum, out of respect for Matthew. Derek was quiet and polite, and he came back the next week and then the next, until after a few months, nobody felt all that threatened, and the Shabbat group grew back to its original size. . . .

Some members of the Shabbat group gradually began to ask

¹⁴⁰ Eli Saslow, *The White Flight of Derek Black*, WASH. POST (Oct. 15, 2016), https://www.washingtonpost.com/national/the-white-flight-of-derek-black/2016/10/15/ed5f906a-8f3b-11e6-a6a3-d50061aa9fae_story.html?utm_term=.f8b98b967add.

¹⁴¹ *Id.*

Derek about his views, and he occasionally clarified them in conversations and emails throughout 2011 and 2012. He said he was pro-choice on abortion. He said he was against the death penalty. He said he didn't believe in violence or the KKK or Nazism or even white supremacy, which he insisted was different from white nationalism. He wrote in an email that his only concern was that "massive immigration and forced integration" was going to result in a white genocide. He said he believed in the rights of all races but thought each was better off in its own homeland, living separately. . . .

He decided early in his final year at New College to finally respond on the forum. He wanted his friends on campus to feel comfortable, even if he still believed some of their homelands were elsewhere. He sat at a coffee shop and began writing his post, softening his ideology with each successive draft. He no longer thought the endpoint of white nationalism was forced deportation for nonwhites, but gradual self-deportation, in which nonwhites would leave on their own. He didn't believe in self-deportation right *now*, at least not for his friends, but just eventually, in concept.¹⁴²

Eventually, Derek renounced white supremacy. (The rest of the Washington Post article is quite good and inspirational—readers who are curious should read the rest.) The point isn't that Derek eventually came to be an "enlightened, bleeding-heart liberal who favors immigration amnesty." That's irrelevant. The point is that Derek learned to love and make friends with people who are immensely (or perhaps after all not *that*) different from himself.

I highlight this anecdote as an example of how we can handle hate—by trying to win hearts and reveal to each other our underlying humanity. Students and faculty at the University can and ought to do the same thing. It doesn't need to be as dramatic as the story of Derek Black. But one thing the University (and maybe the student government) can do is launch a campus initiative on spreading tolerance. Whether that's a positive rally or march, or an ad campaign, or maybe even a concert and art exhibition to raise money. Furthermore, organizations that have been more inward-looking should reach out to other organizations whose members often have divergent views. In other words, a mixer. Get going a no-politics-talk bowling night between the Jewish and Palestinian student groups (at least at first). Finally,

¹⁴² *Id.*

we must rely on for and demand from our universities that they do what they're made to do—teach. Maybe this can be wrapped into an ad campaign. Perhaps it can be an outreach program for nonstudents. I don't think these suggestions are necessarily the answers to our problems—they're certainly not a panacea. But my hope in this piece is not only to have assessed the constitutionality of a small step forward, but also to get us off on the right foot as we ask what else we can do.