

## **Dear Members of the Delaware Law School Community:**

In my official role as Dean I whole-heartedly embrace and endorse the Delaware Law School's adoption of a new Strategic Plan addressing matters relating to diversity and race.

I write here not in my official role, but in my personal private capacity as a lawyer and educator who has long been engaged in these issues.

### **Condemnation of Hate Groups**

I condemn and repudiate all hate groups, including all white supremacist and neo-fascist organizations in the United States and world-wide. These include groups such as the Ku Klux Klan, and the new wave of hate-mongering organizations that comprise the phalanx of the alt-right, such as the Proud Boys. I condemn all violence and terrorism animated by bigotry. The ideology and agenda of hate groups have no place in a decent society committed to equality and human dignity. The messages of such groups are repugnant to the values of the legal profession in America, including its law schools. I am committed to fighting against the actions and words of such groups.

### **Commitment to Attacking Systemic Racism and to Pursuit of Legal Reform**

I am also committed to the pursuit of legal reform in our societal institutions to root out America's history of systemic racism. Legal reform includes direct attacks on racist policies and practices. Legal reform also includes the modification of legal doctrines that undermine accountability. Existing doctrines restricting vicarious liability and granting expansive qualified immunity are among the legal rules that impede accountability for violation of constitutional rights and federal civil rights laws.

### **Commitment to Greater Diversity in the Profession**

I am personally committed to advancing the cause of increasing the diversity of the legal profession. This is an urgent priority for lawyers and judges across the United States, including America's law schools. It is an urgent priority for the Delaware Law School.

# Hate Speech and Free Speech

My position on whether membership in hate groups should be criminalized, as it is in many nations in Europe, or whether the espousing of hateful messages should be criminalized, as it once was criminalized in some American states and also is in Europe, is more complex. Throughout my career as a lawyer and legal scholar this issue is often distilled to this question: “Should hate speech be free speech?”

Many of my law professor colleagues, law students, fellow lawyers, and jurists over the years have answered this question in opposite ways, some with a resounding “Yes!” and some with a resounding “No!” The traditional American Civil Liberties Union position, for example, is that hate speech must be protected as free speech, as an exemplar of the view that the First Amendment should be understood to protect even that speech that the vast majority of people of good will in a decent society regard as loathsome. In contrast, many voices on the opposite side believe that the speech of hate groups should be deemed outside the social compact, so intrinsically contrary to our constitutional values, and so incorrigibly corrosive and dangerous, that it deserves no constitutional protection.

I personally have never been willing to adopt either position, as an absolute.

Let me begin with my interpretation of what current American law actually is. That is to say, how do state and federal courts, beginning most importantly with the Supreme Court, actually answer this question today? Unlike those on either side of the debate who take absolute positions on the issue, in my judgment extant First Amendment law does not answer the question in a simple binary “yes” or “no” fashion. Rather, two independently-operating distinctions inform the answer. The first distinction focuses on the *setting* in which the hate speech occurs. The second focuses on the *nexus* between the content of the hate speech in specific circumstances and some other palpable harm that society has the right to regulate.

In my writings I have described the first distinction as essentially dividing speech in society between that speech occurring in the “general marketplace,” and that speech occurring in “special settings.” The general marketplace includes what First Amendment lawyers call “public forums,” including streets, sidewalks, and parks. The Internet is also a figurative “forum” of sorts, though largely owned and operated by the private companies such as Facebook (which, as explained below, is an important caveat).

In public forums such as streets, sidewalks, and parks, the existing answer is plain: membership in hate groups and the publication of hateful messages in such forums may

not be banned under current First Amendment law. That is why groups such as the Klan or the Proud Boys or the alt-right continue to be able to march and spew their hateful bile in our public spaces.

In contrast, in vast arenas of American life—in workplaces, in schools, in government facilities and programs that are not public forums—hate speech is *not* protected by the First Amendment. Employees may lose jobs or students their seats in schools for engaging in hate speech in these settings.

Viewed along this first axis, which I believe accurately describes current First Amendment law, the question of whether hate speech is or is not free speech cannot be answered without first determining the nature of the setting in which it occurs. This becomes a “boundary” dispute, in which we are examining whether the speech occurs in the general marketplace, or one of these special settings cordoned-off from that marketplace.

Seen as such a boundary dispute, where does the practice of law reside, and where do law schools reside? This question remains a work-in-progress, and one will likely find law professors, law students, lawyers, and courts on various sides of the question. My private view, for what it is worth, is that expression incident to law practice and the teaching or study of law should *not* be understood as speech in the general marketplace, but rather speech in a “special setting” in which hate speech is not tolerated. Whether the profession as a whole or law schools writ large have yet adopted this view is open to question. The newest iteration of the American Bar Association Model Rules of Professional Responsibility have certainly moved in this direction, and I fully support that movement.

The distinction between private institutions and public institutions is also salient to the boundary dispute. Private platforms such as Facebook, and private universities and law schools, are not bound by the First Amendment. Accordingly, they have greater legal latitude to banish hate speech.

Against the backdrop of what I have just said above, it is an easy matter for me to urge the complete banishment of hate speech from the Delaware Law School. I would take this position whether or not the Law School was a public institution, because I believe the legal profession and law schools should regard hate speech as intolerable. (Plainly, Delaware Law’s status as a private institution makes this position more easily defensible in pure First Amendment terms.)

Before moving on to the second axis upon which the hate speech issue pivots in modern First Amendment law, let me add one important caveat, both as to the practice of law and its teaching and study. I do not mean to imply that the legal profession or

America’s law schools should impinge on the academic or professional freedom of individuals to take controversial legal or intellectual positions on matters germane to identity. The positions of lawyers, law students, professors, or jurists on issues such as qualified immunity (to take up an example from earlier in this letter), or immigration, or abortion, or affirmative action, or the Voting Rights Act are often part of the fray, and all viewpoints on such issues should be considered appropriate for lawyers to litigate and other participants in society to debate. When I use the phrase “hate speech” here I use it as it is commonly understood—not as a position on politics or policy—but as a direct attack on an individual’s or group’s dignity based on characteristics such as the color of their skin, their national origin, their ethnicity, their religion, their gender, their sexual identity, and so on.

I turn next to the “second axis” to which I have referred. Even as to speech that occurs within public forums—speech on sidewalks or streets or parks or in cyberspace outside the superintendence of platforms such as Facebook—there are times in which hate speech crosses a line from that which the First Amendment protects and that which it does not. Again, there are dozens of Supreme Court opinions and hundreds of lower court opinions defining this second line of demarcation. As examples, when hate speech moves into the realm of true threats, or incitement to violence, or conspiracy to violate civil rights, or actionable defamation, it properly loses its First Amendment protection.

I fully respect the reality that I have colleagues in the profession and in higher education who do not agree with the nuanced answer I have offered above, which I believe does accurately and properly capture the basic structure of modern First Amendment law. Some will regard my position as not sufficiently protective of free speech. Others will regard it as too protective. Such is the nature of debate in a free society.

## Conclusion

I am proud of the Delaware Law School’s adoption of a Strategic Plan addressing issues of diversity and racism at the Law School. I endorsed the Strategic Plan in my official role as Dean. In this letter I offer my personal private endorsement, as member of the legal profession.

Sincerely,

/S/ Rod Smolla

Rod Smolla