



THE GEORGE
WASHINGTON
UNIVERSITY
WASHINGTON DC

JOHN F. BANZHAF III, B.S.E.E., J.D., Sc.D.
Professor of Public Interest Law
Dr. William Cahan Distinguished Professor
Founder, Action on Smoking and Health (ASH)
Fellow, World Technology Network (WTN)
Creator: Banzhaf Index of Voting Power
<http://banzhaf.net> @profbanzhaf

DC Office:
(202) 994 – 7229
VA Office:
(703) 527 – 8418
FAX:
(202) 697-5000
John@Banzhaf.net

DATE: Tuesday, March 24, 2015

TO: Lorraine Voles, GWU Vice President for External Relations

CC: Beth Nolan, Esq., GWU Sr VP and General Counsel
CC: Fitzroy A. Smith, GWU Asst VP Risk Mgmt & Insurance
CC: Charles K. Barber, Esq., GWU Deputy General Counsel

FROM: John F. Banzhaf III, Esq., GWU Professor of Law

RE: **Possible Legal Liability For Two Statements**

I am writing to most respectfully suggest that you might wish to clarify (if not correct) two statements which the University recently issued, not only because they appear to be factually incorrect, but also because they may expose the University and its president to legal liability. These statements are to the effect that:

1. The object just posted at the University by a Jewish student was a Nazi swastika
2. Posting the object might amount to a "hate crime."

NOT A NAZI SWASTIKA

It is my understanding that the object posted by the Jewish student, and said in a formal statement published by the University to be a Nazi swastika - described by the President "as the symbol of the Nazi Party" and "associat[ed] with genocide" - is in fact NOT a Nazi swastika, but rather a long-recognized Indian religious symbol signifying peace and other desirable attributes. It is my understanding that the symbol posted by the student is different from the Nazi swastika in both orientation and color.

Although the University's statement does mention that the student acquired the symbol in India - so that it is clear that the University is aware of its origins and proper meaning - the statement continues to describe the object as a swastika - something which it may resemble, but which it is not.

It is as if a student posted the traditional 6-pointed Jewish star, but his college publicly accused him of posting a pentagram (which to some resembles the Jewish star) and used words in its statement like "hateful," "sacrilegious," and "anti-religious" which arguably do apply to a pentagram.

Another appropriate analogy would be if a student used the word "niggardly" in a posting, and his college in a statement accused him of using "an N-word" [the term "N-word" has been used to refer not only to "n*gger," but also to n*gga," "niggar," and other variations] in the following language [based upon GWU's actual statement]:

"Since its adoption nearly a century ago as a derogatory terms for African Americans, N-words have acquired an intrinsically racist meaning, and therefore the act of posting it in a university residence hall is utterly unacceptable. Our entire community should be aware of the N-word's association with lynchings perpetrated against African Americans and should be concerned about the extremely harmful effects that displaying this symbol has on individuals and on the climate of our entire university community." [TAKEN FROM GWU'S STATEMENT, Footnote¹ below]

Even if the description of the object as a swastika was not factually incorrect - and I respectfully suggest that it IS factually incorrect because of differences in color, orientation, etc. - a failure to disclose that it also represents virtues in a major religion, and that the student apparently saw it as such when he acquired it in India, may create legal liability based upon a theory of misrepresentation by failure to disclose material facts under the circumstances.

As you may recall, my students and I put together a law suit against McDonald's - one which was widely ridiculed and regarded as frivolous - based upon a statement it made about its french fries which was truthful but which omitted key information. It cost McDonald's over 12 million dollars.

In summary, I would most respectfully suggest that, to avoid additional exposure for liability for defamation, false light invasion of privacy, intentional interference with existing contractual advantage, and possibly other torts, and to mitigate any damages from such actions, the University issue an "update" or "clarification" to the effect that the symbol was not in fact a swastika - especially as that symbol is known to most students only as a symbol of Nazism. Rather it is an Indian religious symbol which has no negative connotations, and while it does resemble a traditional Nazi swastika, it differs from it in orientation, color, etc.

Such a clarification would not necessarily prevent the University from maintaining that it was inappropriate for the student to post this symbol, since it could be seen/misinterpreted as a Nazi symbol which "has acquired an intrinsically anti-Semitic meaning, and therefore the act of posting it in a university residence hall is utterly unacceptable." It would also seem to be consistent with your own philosophy as reported in the most recent issue of *The Hatchet*:

"If a mistake is made or something is said that is wrong, [you have] to correct that," Voles said at a December interview focused on GW's media strategy. "The hardest thing is in a crisis situation, people get really nervous and start talking about things as if they're facts. That's when you have to take a step back."

NOT A HATE CRIME

In stating, twice, that the University is "referring the matter to the MPD for review by its Hate Crimes Unit," a reasonable reading, especially for many non-sophisticated students, is that based upon the

¹ Since its adoption nearly a century ago as the symbol of the Nazi Party, the swastika has acquired an intrinsically anti-Semitic meaning, and therefore the act of posting it in a university residence hall is utterly unacceptable. Our entire community should be aware of the swastika's association with genocide perpetrated against the Jewish people and should be concerned about the extremely harmful effects that displaying this symbol has on individuals and on the climate of our entire university community.

known facts, the student's action is a "hate crime," or at the very least a major university after conferring with its legal counsel believes that it constitutes a hate crime.

But as my colleague, GWU Law Professor Jonathan Turley, has carefully explained to the many readers of his blog *Res ipsa loquitur*, there legally can be no "hate crime," even if the symbol posted were in fact a true Nazi swastika, and if the student posted it with an improper motive, because there is no crime. A hate crime, he notes, is simply an ordinary crime like assault or arson which is performed out of a hatred based upon factors like race. But as Prf. Turley points out, it can hardly be a crime for a member of a fraternity to post a symbol on that fraternity's own bulletin board.

Even under GWU's totally unofficial definition of a hate crime - any criminal offense, including "intimidation, vandalism, larceny, simple assault or other bodily injury," that was "motivated by the offender's bias" - there is no underlying crime such as vandalism or assault which could make it a "hate crime.'

This, of course, may be very different from situations in which a swastika is sprayed on university property, where the crime of vandalism may provide the underlying crime to make it a "hate crime." Prof Turley also raises additional related questions which probably should be carefully considered.

"However, the immediate treatment of the posting of such an incident as a hate crime leads to the question over what now constitutes a hate crime. There is also the question of what happens to students who have images that are deemed offensive in their dorm rooms or as part of public statements. If a student includes a swastika or KKK image as part of an exercise of free speech, would they be expelled? There are a host of images that are viewed as offensive by students for cultural or religious or racial reasons. It is not clear what images would be deemed as hateful and grounds for discipline. For example, would students be allowed to create their own racist or intolerant club if it did not receive university funding or take any actions (beyond speech) directed toward other students?"

Suggesting that someone has committed a crime constitutes (unless it is true) the tort of libel per se for which the victim can collect damages even in the absence of proof of any specific loss. However, accusing a Jewish student of committing a crime (and both Prof. Turley and I believe that there is no underlying crime) based upon the hatred of the religion of his family, many of his friends, most of the members of his largely-Jewish fraternity, etc. would be seen by almost everyone as very significant harm, and therefore warranting large damages.

The harm is further exacerbated by the fact that, in addition to summarily being told that he cannot attend his classes because he allegedly poses a threat of some kind to other students, he is barred from participating in the upcoming on-campus celebrations and activities which make up Passover.

In summary, I would most respectfully suggest that, to avoid additional exposure for liability for defamation, false light invasion of privacy, intentional interference with existing contractual advantage, and possibly other torts, and to mitigate any damages from such actions, the University issue an "update" or "clarification" to the effect that its use of the words "hate crime" was not meant in a literal and legal way, but rather as a more general expression of concern or outrage. While the University has no information at this time to indicate that this student could literally be convicted of a "hate crime," this does not affect how strongly it is concerned, nor what further steps it may take on its own.