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Campus Speech Codes: The Threat to Liberal Education, 27 J. Marshall L. Rev. 709 (1994)

Stephen Fleischer

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CAMPUS SPEECH CODES: THE THREAT TO LIBERAL EDUCATION

STEPHEN FLEISCHER*

INTRODUCTION	709
I. FIRST AMENDMENT DOCTRINE APPLICABLE TO SPEECH	
CODES.....	712
A. <i>The Fighting Words Doctrine: Chaplinsky v. New Hampshire</i>	712
B. <i>Time, Place, and Manner Restriction</i>	717
C. <i>Clear and Present Danger: Brandenburg v. Ohio</i> ..	718
D. <i>Group Defamation: Beauharnais v. Illinois</i>	719
E. <i>Intentional Infliction of Emotional Distress</i>	724
II. OUTSIDER JURISPRUDENCE: MATSUDA AND LAWRENCE	728
A. <i>Matsuda: The Victim's Story</i>	728
1. <i>Matsuda's Proposal: Sui Generis Category</i>	732
B. <i>Lawrence: Equality</i>	735
1. <i>Lawrence's Proposal: Fighting Words</i>	737
III. CAMPUS SPEECH CODES: THE THREAT TO LIBERAL	
EDUCATION	738
CONCLUSION.....	747

The purpose of Newspeak was not only to provide a medium of expression for the world-view . . . but to make all other modes of thought impossible. It was intended that when Newspeak had been adopted once and for all . . . a heretical thought - that is, a thought diverging from the principles of Ingsoc - should be literally unthinkable. . . . This was done partly by the invention of new words, but chiefly by eliminating undesirable words. . . .

-GEORGE ORWELL, NINETEEN EIGHTY FOUR

INTRODUCTION

In response to racial tensions on campus,¹ many universities

* J.D. 1993, University of Iowa. The author would like to thank Professor William Buss for his thoughtful comments on the first and second drafts. This article is dedicated to Charles H. and C. Elaine Fleischer.

1. Although they cite no empirical studies, commentators consider the extent and character of racial incidents to be of "epidemic" proportions. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH L. REV. 2320, 2332-33, nn. 38, 71 (1989) ("college campuses have seen an epidemic of racist incidents in the 1980s"); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 434 (American campuses have seen "a resurgence of racial violence"); Robert A. Sedler, *The Unconstitutionality of Campus Bans on "Racist Speech: The View*

have enacted regulations restricting racist speech. "Racist speech" refers primarily to speech that denigrates persons on the basis of their race or ethnic origin.² Proponents of speech codes argue that racist speech by its very nature causes discrete and serious harm to minorities.³ They claim that such speech inevitably "create[s] an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity."⁴

These advocates, many of whom are First Amendment scholars, recognize that speech codes interfere with freedom of expression.⁵ They contend that narrowly drafted codes will not only minimize any chilling effect on speech, but will also facilitate debate and discussion in the academic context. In their opinion, racist speech constitutes a mechanism of oppression that silences the voices of minorities. Racist speech sends the painful message, apparently believed by the speaker, that persons of color are inferior to whites.⁶ Advocates contend that speech codes will ensure that the academic environment is characterized by civility and mutual respect.⁷ So great is the harm and, so ubiquitous is the nature of racist speech that the value of free expression must be balanced against the equality value of the Fourteenth Amendment.⁸ To ensure equality of educational opportunity for "victim groups," universities must prohibit the expression of racist sentiments.

A small number⁹ of scholars resists the call for censorship. They argue that campus bans on racist speech will inhibit the exchange of controversial ideas and undermine the university's commitment to unfettered inquiry. These scholars believe that speech

From Without and Within, 53 U. PITT. L. REV. 631 (1992) ("a disturbing number of overtly racist incidents"). For a consideration of the empirical evidence on campus racial incidents, see DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS 124, 134 (1991).

2. Sedler, *supra* note 1, at 631.

3. See, e.g., Matsuda, *supra* note 1, at 2326-41 (telling the victim's story of the effects of racist speech).

4. This language is taken from the University of Wisconsin Administrative Code § UWS 17.06(2) (hereinafter "UW Rule") and is similar to that found in regulations at other universities, such as the University of Michigan. Both the Wisconsin and Michigan codes were recently invalidated. *UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

5. Aware of the First Amendment's role in liberating the oppressed, Matsuda is "uncomfortable in making [these] suggestions [to regulate speech] if others fall too easily in agreement." Matsuda, *supra* note 1, at 2357. Noting that traditional First Amendment doctrine reinforces society's commitment to tolerance, Lawrence cautions against "set[ting] aside [such doctrine too] hastily." Lawrence, *supra* note 1, at 435-36.

6. "[R]acial inferiority is planted in our minds as an idea that may hold some truth." Matsuda, *supra* note 1, at 2339.

7. Lawrence, *supra* note 1, at 438.

8. See generally, Lawrence, *supra* note 1, at 438.

9. Sedler, *supra* note 1, at 632 (claiming this view is "a distinctly minority one").

codes will not remedy the underlying causes of racial problems but may actually exacerbate latent tensions between students.¹⁰

The civil libertarians who resist the call for censorship are not convinced by the speech code proponents' concern for narrow drafting. They argue that to mitigate the unique injury suffered by victims of hate speech, any regulation would have to sweep broadly and include not only vicious epithets, but derogatory ideas and opinions as well.¹¹ Such broad regulations could greatly inhibit the expression of controversial ideas. Indeed, "racist speech" is a generic term that includes speech that demeans others on the basis of gender, sexual orientation, physical ability and attractiveness, religion, marital status, and even, in some cases, Vietnam-era veteran status.¹² Some commentators fear that hate speech regulation could be used to impose a new orthodoxy¹³ on campus, the goal of which is to render illegitimate ideas that are disfavored by liberal academics.¹⁴ Thus, the great danger is that regulation of hate speech will not only chill freedom of intellectual inquiry and impede discussion of controversial ideas, but that it will actually render certain ideas "beyond the pale."¹⁵ Such a result would threaten

10. The most persuasive critic of speech codes is Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L.J. 484 (arguing that freedom of speech is the most effective weapon against discrimination). For the perspective of the litigating lawyer, see Sedler, *supra* note 1, at 631.

11. For example, a classroom discussion in which a white student, with the tacit approval of the instructor, cited affirmative action programs as proof that blacks are intellectually inferior could create more of a "hostile learning environment" for minorities than an isolated vituperative exchange on campus.

12. University of Michigan Policy on Discrimination and Discriminatory Harassment of Students in the University Environment (hereinafter "Policy"). Under the University of Connecticut's policy harassment includes "misdirected laughter" and "conspicuous exclusion from conversation." D'SOUZA, *supra* note 1, at 9.

13. The author uses the term "orthodoxy" interchangeably in this paper with the term "political correctness." In the charged atmosphere of the American academy, the term "politically correct" engenders either derisive laughter, angry retorts, or a vigorous nodding of heads. The author merely requests that the reader remain open to the ideas presented in this paper.

14. These beliefs include the notion that homosexuality is just another lifestyle, that the tenets of feminism are superior to the traditional view of women, that heterosexuality tends to dominate and suppress women, and that Western culture is characterized by oppression of non-whites and females. See generally, D'SOUZA, *supra* note 1; NAT HENTOFF, FREE SPEECH FOR ME-BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER (1992); JONATHAN RAUCH, KINDLY INQUISITORS: THE NEW ATTACKS ON FREE THOUGHT 19, 143 (1993); Sedler, *supra* note 1, at 638; Michiko Kakutani, *The Word Police are Listening for 'Incorrect' Language*, N.Y. TIMES, Feb. 1, 1993, at B1; John Leo, *Found on the Shelves at Isms' R Us*, WASH. POST, June 9, 1992 at F1.

15. The enforcement record of several campus speech codes suggests that these concerns are not unwarranted. See *Doe v. University of Mich.*, 721 F. Supp. 852, 859 (E.D. Mich. 1989) (stating that, based on the University's enforcement of its speech code, "there existed a realistic and credible threat" that the expression of certain race-based biopsychological theories might invite sanc-

American universities in the 1990s no less than efforts to establish a political orthodoxy threatened the academic setting in the 1950s and 1960s.¹⁶

The regulation of hate speech through speech codes poses a serious threat to freedom of speech and intellectual inquiry. Section I argues that speech codes are inconsistent with traditional First Amendment doctrine. Section II analyzes in detail the arguments of Charles H. Lawrence and Mari Matsuda, two of the most influential speech code proponents. Section III demonstrates that hate speech regulations, which reflect the movement to impose a new secular orthodoxy on campus, represent a grave threat to liberal education.

I. FIRST AMENDMENT DOCTRINE APPLICABLE TO SPEECH CODES

Freedom of speech is not absolute. In order to justify the regulation of hate speech, a university could turn to the following speech-limiting doctrines: (1) Fighting Words; (2) Time, Place, and Manner Restriction; (3) Clear and Present Danger; (4) Group Defamation; and (5) Intentional Infliction of Emotional Distress. This section argues that only the most narrowly drawn hate speech regulation could be upheld under any of these doctrines. Such a regulation, however, would not effectively prevent the harm caused by racist speech.

A. *The Fighting Words Doctrine: Chaplinsky v. New Hampshire*

If you are going to call a man a bastard, be prepared to prove it on his teeth.

-R. Kipling

[Free speech] may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.

- Terminiello v. Chicago¹⁷

The fighting words doctrine was first articulated over 40 years

tion); *UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163, 1167-68 (E.D. Wis. 1991); Sedler, *supra* note 1, at 639 (arguing that the Michigan policy was "administered to implement a new secular orthodoxy on the university campus"). For further discussion, see *infra* text accompanying notes 202-10.

16. Several Supreme Court cases dealt with universities' attempts to establish "conventions of decency" and to compel professors to sign loyalty oaths during the 1960s and 1970s. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation"); *Papish v. Board of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973) ("[T]he mere dissemination of ideas - no matter how offensive to good taste - on a state university campus may not be shut off in the name alone of 'conventions of decency.'").

17. 337 U.S. 1, 4 (1949).

ago in *Chaplinsky v. New Hampshire*.¹⁸ The *Chaplinsky* Court defined fighting words as "those which by their very utterance (1) inflict injury or (2) tend to incite an immediate breach of the peace."¹⁹ In upholding the conviction of Chaplinsky, a Jehovah's witness who had called a police officer a "damned Fascist" and a "God damned racketeer," the Supreme Court appeared to be establishing a two-part definition. However, the Court applied only the second half of the definition because that is how the State Supreme Court had interpreted the statute.²⁰ The state was concerned, not with emotional injury, but with a potential breach of the peace.²¹

Proponents of speech codes claim that hate speech regulation could be upheld under the fighting words doctrine.²² Reliance on this controversial, forty-year old doctrine is misplaced for several reasons. First, the *Chaplinsky* court was concerned not with the emotional impact of epithets, but with a potential breach of the peace. Second, subsequent decisions have narrowed significantly the fighting words doctrine. Third, many commentators and some courts consider that the doctrine is no longer consistent with First Amendment principles. Fourth, any hate speech regulation upheld under the fighting words doctrine would not alleviate the alleged harm caused by racist speech. Indeed, the doctrine could easily be used against unpopular speech by minorities.

Since *Chaplinsky*, the Supreme Court has narrowed and clarified the fighting words doctrine to such an extent that it would not apply to most hate speech regulation. The Court has emphasized that the definition is limited to the second half.²³ In order to meet this definition, the words must "naturally tend to provoke violent

18. *Id.*

19. Such words are "no essential part of any exposition of ideas, and are of slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 572.

20. The New Hampshire Supreme Court interpreted a state statute that made it unlawful to "address any offensive, derisive or annoying word to any other person [in public] . . . or call him by any offensive or derisive name." *Id.* at 569. To ban words that "men of common intelligence would understand would be words likely to cause an average addressee to fight." *Id.* at 573. The New Hampshire court noted that "no words [are] forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." *Id.*

21. Fighting words are "face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker." *Id.*

22. Lawrence, *supra* note 1, at 450-52 (describing Stanford University's speech code as one which would, because of the "fighting words" doctrine, permissibly prohibit certain instances of speech). The fighting words doctrine is the principal model for the Stanford University code.

23. *Gooding v. Wilson*, 405 U.S. 518 (1972) (overturning Georgia court's decision for failing to limit interpretation of state statute to second half of fighting words definition).

resentment"²⁴ and the fighting words must be "directed to the person of the hearer."²⁵ In rejecting the common law definition of "breach of peace," the Court has established a "stringent" definition of "breach of peace."²⁶ Fighting words must not merely breach decorum, but must also tend to bring the addressee to fisticuffs.²⁷ Thus, hate speech regulation, such as those at the University of Wisconsin, University of Michigan, and Stanford University, which prohibit words that "create a hostile environment" would not be upheld under the fighting words doctrine. Indeed, in striking down a narrowly-drafted speech code, the District Court of Wisconsin held that "it would be improper . . . to expand the Supreme Court's definition of fighting words to include speech which does and does not tend to incite violent reaction."²⁸

Not only has the fighting words doctrine been severely limited, but there is some indication that it may no longer be good law. Since *Chaplinsky*, the Supreme Court has overturned every conviction based on the fighting words doctrine.²⁹ Gerald Gunther stated that, "one must wonder about the strength of an exception which, while theoretically recognized, has ever since 1942 not been found to be apt in practice."³⁰ Professor Gard claims that the fighting words doctrine is a "quaint remnant of earlier morality that has no place in a democratic society dedicated to the principle of freedom of expression."³¹

Under certain, limited conditions, racial or ethnic slurs might fall within the fighting words doctrine. However, to be upheld under the fighting words doctrine, a regulation would have to be so narrowly drawn that it would not target the harm allegedly caused by racist speech. The harm that speech code advocates want to avoid is not the violent outburst; rather, it is the perniciousness and ugliness of the ideas expressed that speech code advocates seek to

24. *Id.* at 524 (holding that the terms "abusive" and "opprobrious" have greater reach than "fighting words").

25. *Cohen v. California*, 403 U.S. 15, 20 (1971) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940)).

26. *UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991) (striking down a University of Wisconsin hate speech regulation).

27. *Gooding*, 405 U.S. at 526-27. See *Texas v. Johnson*, 491 U.S. 397 (1989) (discussing the "fighting words" doctrine).

28. *UWM Post, Inc.*, 774 F. Supp. at 1175.

29. GERALD GUNTHER, *CONSTITUTIONAL LAW* 1073 (12th ed. 1991). Moreover, the Court has overturned an injunction based on the very word employed in *Chaplinsky*. *Cafeteria Employees Local 302 v. Angelos*, 320 U.S. 293, 295 (1943) (stating that the use of the word "fascist" is "part of the conventional give-and-take in our economic and political controversies.").

30. *STANFORD UNIV. CAMPUS REP.*, May 3, 1989, at 18.

31. Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 536 (1980); Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749, 1754 (1985) ("Chaplinsky may well reflect concerns peculiar to the decade when it was decided, rather than enduring first amendment principles.").

avoid. The Court, however, recognizes the importance of protecting offensive and unpopular speech.³² Even the most vituperative use of a vile racial epithet entails the expression of an idea, i.e., that the addressee is inferior and unwanted on campus.³³

The logic of the fighting words doctrine is inapplicable in the racial context. The doctrine aims to prevent a violent response on the part of the addressee, not emotional injury. Campus speech code proponents, however, contend that racist speech incapacitates minorities, causing them either to flee or to remain silent.³⁴ The fighting words doctrine would not apply in such instances. Moreover, given the fact that the Supreme Court has emphasized that the words must have a "direct tendency to cause acts of violence by the person to whom *individually* the remark is addressed,"³⁵ the fighting words doctrine would not apply to situations, which speech code proponents claim are equally painful, where a student overheard derogatory comments based on race.³⁶

Speech code proponents contend that only hate speech directed at historically oppressed groups should be regulated.³⁷ However, a recent Supreme Court decision suggests that the fighting words doctrine cannot be limited to words or symbols that arouse anger on the basis of race, color, or national origin. In *R.A.V. v. City of St. Paul*, the majority of the Court³⁸ struck down an ordinance that

32. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds it offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

33. In striking down the University of Wisconsin's narrowly drafted speech code, the District Court noted that "racist speech" was intended to inform the listeners of the speaker's "racist or discriminatory views." *UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163, 1175 (E.D. Wis. 1991).

34. Lawrence, *supra* note 1, at 457-64 ("[M]inorities remain silent and submissive"). H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 14-15 (1965) ("Outbursts of violence are not the necessary consequence of such speech . . . and not the serious evil of such speech.").

35. *Gooding v. Wilson*, 405 U.S. 518, 523-24 (1972) (emphasis added).

36. Matsuda, *supra* note 1, at 2372.

37. Matsuda, *supra* note 1, at 2361.

38. Although the decision was unanimous, there were several concurring opinions. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2560-61 (1992). The concurring opinion of Justice White, joined by Justices Blackmun, O'Connor and Stevens, disagreed with the majority's reasoning, but they did reaffirm the very limited nature of the fighting words doctrine. Because the Minnesota Supreme Court's narrowing construction of St. Paul's ordinance defined fighting words to encompass speech that causes anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender, Justice White found it insufficient to avoid unconstitutional overbreadth. As Justice White noted, "[t]he mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *Id.* at 2559. However, in accepting the Minnesota Supreme Court's construction, Justice Scalia seems to suggest, contrary to precedent, that the fighting words doctrine includes both parts of the definition: words that either inflict injury or tend to incite violence. *Id.* at 2549.

banned the display of a symbol which one knows or has reason to know arouses anger, alarm, resentment in others on the basis of race, color, creed, religion, or gender.³⁹ The majority held that the ordinance violated the principle of content neutrality.⁴⁰ Justice Scalia noted that "[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects"⁴¹ and that "[s]electivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas."⁴² One commentator contends that the "Court's holding makes *authoritative* the thesis . . . that under the law of the First Amendment, virtually any campus ban on racist speech imposed by a public university will be found to be unconstitutional."⁴³

Given the inherent danger of abuse of this doctrine, it seems strange that minority spokesmen would advocate reliance on it. Professor Gard notes that "the problem of discriminatory enforcement is particularly acute in the fighting words context. [A real danger] is that the law will be selectively invoked against minority groups . . . or speakers" who espouse views unpopular with those in power.⁴⁴ Indeed, the history of this doctrine indicates that blacks are often prosecuted and convicted at the state level under the fighting words doctrine.⁴⁵ The doctrine has been applied broadly by the lower courts to include speech critical of government and law enforcement policies.⁴⁶ It should be remembered that *Chaplinsky* involved the arrest of a Jehovah's Witness who was publicly rebuking the local government. Thus, to rely on the fighting words doctrine, speech code proponents must have confidence that the discretion of enforcement personnel will be employed equitably.⁴⁷

39. The defendants were convicted under the ordinance after burning a cross inside the fenced yard of a black family. *Id.* at 2541.

40. *Id.* at 2547.

41. *Id.*

42. *Id.* at 2549.

43. Sedler, *supra* note 1, at 681.

44. Gard, *supra* note 31, at 566.

45. Strossen, *supra* note 10, at n.139 (describing examples of such prosecution).

46. In the lower courts, the doctrine of fighting words "is almost uniformly invoked in a selective and discriminatory manner by law enforcement officials to punish trivial violations of a constitutionally impermissible interest in preventing criticism of official conduct." Gard, *supra* note 31, at 564.

47. "We must realize that judges, being human, will not only make mistakes but will sometimes succumb to the pressures exerted by the government to allow restraints [on speech] that ought not to be allowed." L. BOLLINGER, *THE TOLERANT SOCIETY* 78 (1986).

B. Time, Place, and Manner Restriction

(We are often 'captives' outside the sanctuary of the home and subject to objectionable speech. . . .

-Rowan v. United States Post Office Department⁴⁸

Speech may be regulated by reasonable time, place, and manner restrictions.⁴⁹ To be upheld under this doctrine, the regulation must be: (1) content neutral; (2) narrowly tailored to serve a significant government interest; and, (3) leave open alternative channels of communication.⁵⁰ This doctrine permits regulation, but not prohibition of speech.

Some commentators advocate the regulation of hate speech in order to protect the captive audience.⁵¹ Such a regulation would involve the doctrine of a reasonable time, place, or manner restriction. Only the most narrowly tailored speech code limited to the student's dormitory room would be upheld under this doctrine. Such a regulation would not be effective at preventing the harm caused by racist speech.

Under this doctrine, the Court has recognized that an unwilling listener has an interest in avoiding intrusive speech. Although the regulation of otherwise protected speech has been upheld when the unwilling listener cannot avoid the speech,⁵² the most "reasonable" regulation applies to speech that invades the privacy of the unwilling listener's home. In upholding a prohibition of "focused picketing" directed against a person in front of that person's home, the Court noted that "[a]lthough in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different . . . [i]ndividuals are not required to welcome unwanted speech into their homes."⁵³ Thus, a university regulation that permitted a student to exclude unwanted speech from his dormitory room, or perhaps even from the dormitory as a whole, would probably be constitutional.⁵⁴ However, such a restriction would have to be content neutral. It would exclude all unwanted speech, racist or

48. 397 U.S. 728 (1970).

49. This article will not address the issues relating to speech codes at private universities and colleges.

50. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

51. *Lawrence*, *supra* note 1, at 437. However, other commentators contend that the captive audience concept is "an elusive and challenging one to apply." *Strossen*, *supra* note 10, at 501. *Lawrence Tribe* notes that this concept is "dangerously encompassing, and that the Court has been reluctant to accept its implications whenever a regulation is not content-neutral." *LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW* §§ 12-19, at 949-50 (2d ed. 1988).

52. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (holding that the FCC can restrict the broadcasting of "offensive language" over the radio in the middle of the day).

53. *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

54. *Sedler*, *supra* note 1, at 667.

otherwise. Moreover, the racist message could not be suppressed since alternative channels of communication would have to remain available.

Charles Lawrence contends that reasonable time, place, manner restrictions should apply throughout the campus.⁵⁵ Such an assertion misapplies the doctrine, misconstrues the nature of the university, and ignores the rather onerous burden the Court places on an individual to avoid unwanted speech outside of the sanctuary of the home.⁵⁶ The campus is not a home and students, including minorities, are not a captive audience on the university campus. The university cannot assert an interest in protecting the privacy of the home once the student leaves his room. At that point, the doctrine of reasonable time, place, and manner restriction is no longer applicable. Any selective targeting of racial epithets would violate the principle of content-neutrality. Moreover, outside of their rooms, students would have an obligation to avoid unwanted speech.⁵⁷ Obviously, the Court, applying traditional First Amendment doctrine, has more confidence than Lawrence in the ability of minority students to defend themselves verbally against offensive ideas and expressions.⁵⁸

C. *Clear and Present Danger*: *Brandenburg v. Ohio*

(T)he fitting remedy for evil counsels is good ones.

-Whitney v. California⁵⁹

(Brandeis, J., concurring)

Brandenburg represents the culmination of the Court's attempt to limit dangerous expression without chilling unpopular speech.⁶⁰ The Court held that the state could only outlaw speech

55. "Minority students should not have to remain in their rooms to avoid racial assault." Lawrence, *supra* note 1, at 456-57.

56. "[I]n many locations, we expect individuals simply to avoid speech they do not want to hear . . ." *Frisby*, 487 U.S. at 484 (citing *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975) and *Cohen v. California*, 403 U.S. 15 (1971)).

57. "The ability of government . . . to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen*, 402 U.S. at 21 (emphasis added).

58. Lawrence, *supra* note 1, at 456. See *Frisby*, 487 U.S. at 474 (upholding prohibition of "focused picketing" directed against a person in front of the person's home); *Kovacs v. Cooper* 336 U.S. 77, 86 (1949) (finding that a city ordinance outlawing use of soundtrucks on city streets did not abridge the right to free speech); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736 (1970) (upholding federal law that enabled unwilling recipient of sexually explicit material to prevent material from coming into the home).

59. 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

60. See *Dennis v. United States*, 341 U.S. 494 (1951) (upholding conviction of violation of Smith Act); *Frohwerk v. United States*, 249 U.S. 204 (1919) (ap-

advocating the use of force or illegal action "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁶¹ Subsequent cases revealed that both the "incitement"⁶² and the "imminent"⁶³ tests would be rigorously applied. The utterance must be an incitement and not just unpopular political speech.⁶⁴

Speech code proponents claim that hate speech is ubiquitous and that it incites racial violence.⁶⁵ Hate speech restrictions might therefore fall under the *Brandenburg v. Ohio* test.⁶⁶ However, not only is this doctrine inapplicable to most campus situations, but it would not alleviate the harm caused by racist expressions.

A valid speech code under *Brandenburg* would have to be narrowly drafted. It could only target hate speech directly advocating imminent violent action against minorities. Moreover, such speech would have to be considered likely to produce violent action. Although racially charged college campuses have witnessed some violent outbursts, the vast majority of incidents do not involve incitement, but rather racial slurs, epithets, derogatory comments, offensive jokes, and graffiti.⁶⁷ Indeed, speech code proponents cite the debilitating *emotional* effect of hate messages as the most serious problem. Unfortunately, *Brandenburg* would not offer any protection to the psyche of minority students.

D. Group Defamation: *Beauharnais v. Illinois*

If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark: 'Another such victory and I am undone.'

-*Beauharnais v. Illinois*⁶⁸
(Black, J., dissenting)

plying the clear and present danger test in a modified manner); *Abrams v. United States*, 250 U.S. 616 (1919) (upholding conviction under Espionage Act); *Debs v. United States*, 249 U.S. 211 (1919) (upholding conviction under Espionage Act); *Schenck v. United States*, 249 U.S. 47 (1919).

61. *Brandenburg*, 395 U.S. at 446.

62. *Bond v. Floyd*, 385 U.S. 116, 132 (1966) (finding anti-war and anti-draft statements of Georgia state representative did not constitute advocacy of unlawful draft resistance, but merely a general, abstract declaration of opposition to the Vietnam War).

63. *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (holding that student anti-war protester's statement that they would "take the fucking street later" was not incitement).

64. *Watts v. United States*, 394 U.S. 705, 708 (1969) (holding that black man's claim that "if they ever make me carry a rifle, the first man I want to get in my sights is L.B.J." is hyperbolic political speech, not a true threat).

65. Matsuda, *supra* note 1, at 2335-41.

66. *Brandenburg*, 395 U.S. 444 (1969).

67. Matsuda, *supra* note 1, at 2332-33.

68. 343 U.S. 250, 275 (1952) (Black, J., dissenting).

Some commentators contend that university regulation of racist speech could be upheld under the theory of group defamation as articulated in *Beauharnais v. Illinois*.⁶⁹ The *Beauharnais* Court upheld an Illinois group criminal libel law that prohibited any publication that "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race . . ." ⁷⁰ *Beauharnais*, president of the White Circle League, was convicted for distributing leaflets that depicted blacks in a derogatory manner and appeared to advocate violence against them.⁷¹

However, commentators' reliance on *Beauharnais* is misplaced for several reasons. First, unless the college setting is characterized by extreme racial violence, the rationale underlying *Beauharnais* is inapplicable. Second, subsequent speech-protective cases suggest that *Beauharnais* is no longer good law. Third, ordinances prohibiting group libel are inconsistent with First Amendment principles. Fourth, a group defamation law could actually facilitate the propagation of racist material.

The rationale underlying the *Beauharnais* decision is inapplicable in the average college setting. The *Beauharnais* Court was concerned that the prohibited utterances would incite racial violence.⁷² At the time of the decision, race relations in Chicago were characterized by strife and violence.⁷³ There is some indication that racist attacks on blacks followed the dissemination of hateful propaganda.⁷⁴ While the atmosphere on American college campuses is racially charged, one cannot compare it to Illinois' history of racial strife "and its frequent obligato of extreme racial and religious propaganda."⁷⁵ The vast majority of racial incidents on campus involve slurs, epithets, offensive jokes, and derogatory language, not violence.⁷⁶ Since *Beauharnais*, courts have been reluctant to uphold group defamation laws in the absence of fears of violence. In striking down a Skokie ordinance based on the *Beauharnais* law, the Seventh Circuit rejected the Village's contention that "*Beauharnais* implicitly sanctions prohibiting the use of First Amendment rights to invoke racial . . . hatred *even without refer-*

69. *Beauharnais*, 343 U.S. at 258. See Lawrence, *supra* note 1, at 464 (noting group defamation concept).

70. *Beauharnais*, 343 U.S. at 251.

71. *Id.* at 252. The defendant distributed leaflets demanding that Chicago officials stop the encroachment of the Negro. *Id.* The leaflet stated that the white people would be corrupted by the raping and drug use of the Negro. *Id.* at 258.

72. *Id.* at 258-59.

73. *Id.* at 259. "Illinois has been the scene of exacerbated tension between races, often flaring into violence and destruction." *Id.*

74. *Id.* "[W]ilful purveyors of falsehood concerning racial . . . groups promote strife . . ." *Id.*

75. *Beauharnais*, 343 U.S. at 261.

76. Matsuda, *supra* note 1, at 2333 n.71.

ence to fears of violence."⁷⁷

Subsequent speech-protective decisions suggest that *Beauharnais* may no longer be good law. Libel was once considered unprotected speech.⁷⁸ The *Beauharnais* Court accorded great deference to both the Illinois' legislature's assessment of the potential for violence⁷⁹ and its power to define libel.⁸⁰ However, in *New York Times Co. v. Sullivan*,⁸¹ the Court held that libelous speech should be afforded some protection. The Court established the stringent requirement of "knowing falsity or reckless disregard for the truth" in a defamation action brought by a public official.⁸² The Court, recognizing the importance of "uninhibited, robust" discussion of public issues, was concerned that broad definitions of libel by states would chill freedom of speech.⁸³ This ruling undercuts the rationale on which *Beauharnais* is based. Thus, the Seventh Circuit, in striking down an Illinois group libel statute based upon the *Beauharnais* ordinance, shared the doubts of the Eighth Circuit⁸⁴ "that *Beauharnais* remains good law at all after the constitutional libel cases."⁸⁵

Proponents of hate speech regulation may contend that *New York Times* does not apply to the case of group libel. They could argue that the Court was merely concerned that broad definitions of libel by states would chill discussion of public issues and inhibit criticism of government officials.⁸⁶ However, not only has the

77. *Collin v. Smith*, 578 F.2d 1197, 1205 (7th Cir.), cert. denied, 439 U.S. 916 (1978). Skokie modeled its ordinance on the *Beauharnais* group libel statute. *Id.* at 1204.

78. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) ("[T]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include . . . the libelous.").

79. *Beauharnais*, 343 U.S. at 259. "Illinois [could conclude, from the State's own experience,] that wilful purveyors of falsehood concerning racial and religious groups promote strife." *Id.* "[W]e would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial . . . groups . . ." *Id.* at 261.

80. *Id.* at 258. "[I]f an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group . . ." *Id.*

81. 376 U.S. 254 (1964).

82. *Id.* at 279-80 ("prohibit[ing] a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not").

83. *Id.* at 279.

84. *Tollett v. United States*, 485 F.2d 1087, 1094 n.14 (8th Cir. 1973).

85. *Collin v. Smith*, 578 F.2d 1197, 1205 (7th Cir. 1978). See TRIBE, *supra* note 51, at 926-27 (questioning the validity of *Beauharnais* after the defamation case).

86. See *New York Times*, 376 U.S. at 270 (finding that "[d]ebate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

Court extended the stringent "actual malice" requirement to cases involving public figures, but in cases involving defamatory statements about a private figure, the state cannot establish a standard of fault below negligence.⁸⁷

Group defamation statutes are inconsistent with First Amendment principles. Statements that defame groups convey opinions or ideas on matters of public concern.⁸⁸ The offensiveness of such expression is constitutionally irrelevant. Indeed, "[i]f there is a bed-rock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds [it] offensive or disagreeable."⁸⁹ It should not be forgotten that *Beauharnais* was attempting to influence public policy by disseminating his offensive views in the form of a petition to city officials. Moreover, any group defamation law, even if narrowly drafted, could still chill speech. The Seventh Circuit, in striking down a group libel law similar to the *Beauharnais* ordinance as overbroad,⁹⁰ noted that the law "could conceivably be applied to criminalize dissemination of *The Merchant of Venice* or a vigorous discussion of the merits of reverse racial discrimination in Skokie."⁹¹

By chilling speech, group libel laws could mitigate the harm caused by racist expression: minorities would not be exposed to offensive notions of inferiority. Speech code enthusiasts could point to such regulations as evidence that societal response to racism has moved to the public realm.⁹² However, the very existence of such paternalistic laws might have the perverse effect of engendering feelings of inferiority. Shelby Steele notes that, unless confronted openly, the notion of inherent racial inferiority haunts blacks. "The families of [black] students will have pounded into them the fact that blacks are not inferior. And probably more than anything, it is this pounding that finally leaves a mark. If I am not inferior, why

87. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

88. Lawrence, *supra* note 1, at 463 n.119. Lawrence recognizes that "the racial epithet is the expression of a widely held belief. It is invoked as a statement of political belief." *Id.*

89. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

90. *Collin v. Smith*, 578 F.2d 1197, 1204 (7th Cir. 1978). In order to receive a permit, any proposed assembly in Skokie could not "portray criminality, depravity or lack of virtue in, or incite violence, hatred, abuse or hostility toward a . . . group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation." *Id.* at 1199.

91. *Id.* at 1207. See Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629, 662 (1985) (noting that "[t]he statute would provide grounds for punishing such works as *Huckleberry Finn* and *Merchant of Venice* . . . *Mein Kampf* could also be affected by the law [of *Collin*], even if published or used to teach the evil of Nazism.").

92. Matsuda, *supra* note 1, at 2321.

the need to say so?"⁹³

The enforcement of group libel ordinances would facilitate the propagation of racist ideas. Defamation encompasses false statements of fact made without a good faith belief in their truth. Minority psyches would not be assuaged by a trial process in which the defendant could "introduce into evidence every piece of hate-literature" available in order to prove his good faith belief in the truth of the defamatory statements.⁹⁴ Indeed, Lawrence's suggestion of an "actual malice" requirement as an element of the crime would only exacerbate this problem.⁹⁵ The trial would provide the defendant with a public forum and media coverage to air his derogatory opinions.⁹⁶ If convicted, an appeal will provide expanded air time for the defendant's views.⁹⁷ An acquittal could be interpreted by minorities as state endorsement of the offensive views.

Given the inherent risk that group libel statutes could be enforced against minorities and unpopular groups, it seems ironic that victim group spokesmen would advocate their use.⁹⁸ Indeed, it should not be forgotten that the *Beauharnais* statute was used in the 1940s to harass Jehovah's Witnesses, a highly unpopular minority group.⁹⁹ As Justice Black noted in his dissent, "the same kind of state law that makes *Beauharnais* a criminal for advocating segregation . . . can be utilized to send people to jail . . . for advocating equality and nonsegregation."¹⁰⁰ The existence of group libel ordinances does not guarantee that they will not be used against those groups in most need of protection.

As argued above, hate speech regulation would be upheld under *Beauharnais* only in the most extreme situation. One would have to imagine a campus with a history of racial strife and violence. There would have to be evidence that the prohibited utterances tend to cause violence. However, an ordinance prohibiting group libel would not be expected to ameliorate such a dire situation. Indeed, the *Beauharnais* Court, while not questioning the

93. SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* 134 (1990).

94. Joseph Tanenhaus, *Group Libel*, 35 *CORNELL L.Q.* 261, 299 (1950).

95. Lawrence, *supra* note 1, at 463 n.119.

96. See Comment, *Race Defamation and the First Amendment*, 34 *FORDHAM L. REV.* 653, 675 (1966) (suggesting that minority groups will not be protected because a trial would aid hate groups in disseminating their propaganda).

97. *Id.* at 662.

98. See Peter Linzer, *White Liberal Looks at Racist Speech*, 65 *ST. JOHN'S L. REV.* 187, 226 (1991) (arguing that group libel may be used against some groups intended to be protected: "[A] resurrection of *Beauharnais* will give prosecutors a weapon against those who speak intemperately about religions, or against any group that offends people [and] these prosecutors may favor some groups that most writers do not intend to protect.>").

99. Tanenhaus, *supra* note 94, at 279-80.

100. *Beauharnais*, 343 U.S. at 274.

wisdom of the law, certainly questioned its effectiveness: "It may be argued, and weightily, that this legislation will not help matters."¹⁰¹

E. Intentional Infliction of Emotional Distress

Against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be.

-Calvert Magruder¹⁰²

Racist speech hurts.¹⁰³ Accordingly, some universities are justifying hate speech regulation based on the common law tort of intentional infliction of emotional distress.¹⁰⁴ This approach focuses on the injury caused by racist speech: the emotional or psychological harm that interferes with studies. However, reliance on this common law tort is misplaced for several reasons. First, recent Supreme Court decisions suggest that this tort should never apply to words. Second, the highly subjective nature of the inquiry could lead to abuse of this doctrine, especially against minorities. Third, in order to avoid the possibility of abuse, a regulation would have to be so narrowly drafted that it might be unenforceable.

In *Hustler Magazine v. Falwell*, the Court precluded recovery in a state emotional distress action for an ad parody which could not reasonably have been interpreted as factual.¹⁰⁵ The Court applied the *New York Times* standard¹⁰⁶ to ensure that public debate

101. *Id.* at 250.

102. *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936).

103. See Lawrence, *supra* note 1, at 458-66 ("Face to face racial insults . . . are like receiving a slap in the face"); Matsuda, *supra* note 1, at 2326-31 (discussing the harm resulting from racism); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 135-49 (1982) (same).

104. The University of Texas' speech code is based on this doctrine. See Report of President's Ad Hoc Committee on Racial Harassment, UNIVERSITY OF TEXAS AT AUSTIN 17 (Nov. 27, 1989) (defining prohibited "racial harassment" as "extreme or outrageous acts or communications that are intended to harass, intimidate, or humiliate a student on account of race, color, or national origin and that reasonably cause them to suffer severe emotional distress." The rule applies "only where the distress inflicted is so severe that no reasonable person could be expected to endure it."). See also Delgado, *supra* note 103, at 151-57 (discussing the application of intentional infliction of emotional distress with regard to hate speech).

105. 485 U.S. 46, 57 (1988). The parody, featured in *Hustler Magazine*, was of a Campari Liqueur ad entitled "Jerry Falwell Talks About His First Time." *Id.* at 48. The parody suggested that Jerry Falwell's first sexual encounter was with his mother in an outhouse. The ad contained a disclaimer in small print, "Ad parody-not to be taken seriously." *Id.*

106. "Public figures and public officials . . . [must show] that the publication contains a false statement of fact which was made with 'actual malice,' i.e., with

will not suffer for lack of imaginative expression or of rhetorical hyperbole.¹⁰⁷ The Court noted that "even when a speaker or writer is motivated by hatred or ill-will, his expression [is] protected by the First Amendment. . . ."¹⁰⁸ The Court suggested that even if it can be shown that the defendant intended to inflict emotional distress, recovery will not be allowed unless the *New York Times* standard is met.¹⁰⁹

Speech code proponents could argue that the *Hustler* Court was concerned about the possible chilling effect on speech critical of public officials and public policy. However, the Court indicated that, even with regard to non-public plaintiffs, it would strictly construe the tort of intentional infliction of emotional distress.¹¹⁰ The Court noted with concern the inherent subjectivity of the "outrageousness" standard, even in the realm of "social discourse."¹¹¹ The Court emphasized that the emotional reaction of the audience is an insufficient justification for not protecting speech.¹¹² Moreover, in a recent case the Court stated in dictum that *Hustler* provides "protection for statements that cannot 'reasonably be interpreted as stating actual facts' about an *individual*."¹¹³

Many commentators note that the inherent subjectivity of the tort of intentional infliction of emotional distress could result in this doctrine being applied at the expense of victim group members. Professor Gard believes that "this innate vagueness . . . will inevitably result in the imposition of judges' selective linguistic preferences on society, discrimination against ethnic and racial minorities, and ultimately the misuse of the rationale to justify the censorship of the ideological content of the speaker's message."¹¹⁴

knowledge that the statement was false or with reckless disregard as to whether or not it was true." *Id.* at 48.

107. *Id.* at 57 (stating that "[T]he sort of robust political debate encouraged by the First Amendment is bound to produce speech critical of public officials or public figures Such criticism [will at times be] 'vehement, caustic, and sometimes unpleasantly sharp" *Id.* at 51.

108. *Id.* at 53.

109. *Id.* at 56. "[S]uch a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Id.* at 56.

110. 485 U.S. at 53. "Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude" *Id.*

111. *Id.* at 55. Acknowledging the subjective nature of the "outrageous" standard, the Court stated that "[o]utrageous in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Id.*

112. *Id.* "An 'outrageousness' standard thus runs afoul of our longstanding refusal to allow damages to be awarded because speech in question may have an adverse emotional impact on the audience." *Id.* at 55.

113. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (emphasis added) (quoting *Falwell*, 485 U.S. at 50).

114. Gard, *supra* note 31, at 578. As Haiman points out in FRANKLIN S. HAIMAN, *SPEECH AND THE LAW IN A FREE SOCIETY* 152-53 (1981), the "outra-

Indeed, for this very reason, Stanford University declined to base its hate speech regulation on this tort model.¹¹⁵ Moreover, the University of Texas, which based its code on this doctrine, noted that "[t]here can be no guarantee as to the constitutionality of any university rule bearing on racial harassment and sensitive matters of freedom of expression."¹¹⁶

In order to minimize potential abuse of the tort of intentional infliction of emotional distress, the University of Texas narrowly drafted its ordinance. Not only is the application of the regulation limited to race, color or national origin, but it requires both an intention to harass and the causation of severe emotional distress.¹¹⁷ One commentator believes that these stringent requirements may render the policy unenforceable.¹¹⁸ As drafted, the Texas ordinance would not prevent minority exposure to non-hostile, but equally damaging, messages of racial inferiority. Moreover, the Texas code is stricter than Section 46 of the Restatement (Second) of Torts.¹¹⁹

A review of the cases under Section 46 of Restatement (Second) of Torts reveals the difficulty in obtaining relief for offensive speech and suggests that this model may not be appropriate for the university setting. Section 46 imposes liability for damages on a defendant who "by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another"¹²⁰

geousness" standard invites great subjectivity. "[T]here is a particular danger that this speech restrictive doctrine will also be enforced to the detriment of the very minority groups whom it is designed to protect." Strossen, *supra* note 10, at 515.

115. "Most members of the group had difficulty with the subjectivity involved in making judgments on the basis of the emotional pain suffered by the targets of [hate speech]. . . . The prevailing view seemed to be that emotional pain, by itself, cannot be measured with the precision and objectivity required of any rule restricting speech." STANFORD UNIVERSITY, FUNDAMENTAL STANDARD INTERPRETATION: FREE EXPRESSION AND DISCRIMINATORY HARASSMENT (June 1990).

116. Strossen, *supra* note 10, at 516.

117. See Strossen, *supra* note 10, at 516 (discussing the definition of "racial harassment under the ordinance). Limiting the regulation based on race, color, or national origin might not be upheld under *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2550 (1992) (majority holding that ordinance that banned the display of a symbol which one knows or has reason to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender violates the principle of content neutrality).

118. See Linzer, *supra* note 98, at 233 (discussing the requirements of the Texas policy).

119. The application of Section 46 is not limited to harassment based on race, ethnicity, or religion. Rather, anyone who has sustained severe emotional distress under the proscribed circumstances may file a complaint based on the principle enunciated in Section 46.

120. RESTATEMENT (SECOND) OF TORTS § 46 (1965). In order to prevent the courts from "running wild on this thing," the drafters noted that "extreme and outrageous conduct" should be narrowly construed. "[It] does not extend to mere insults, indignities, threats, annoyances, petty oppression There is

Although isolated utterances of racial epithets are actionable, the courts are most willing to grant relief when plaintiff is either a customer¹²¹ or an employee.¹²² Moreover, the vast majority of successful cases have involved allegations of "speech plus conduct," rather than pure speech.¹²³ Although proving the requisite intent is not unduly burdensome, the courts strictly construe the requirements of extreme and outrageous conduct and severe emotional distress.¹²⁴ Successfully convincing the trier of fact that the distress was of the requisite "severity" often turns on the extent of physical manifestations of the impact of the speech.¹²⁵ Thus, to be effective the tort of intentional infliction of emotional distress seems to require that the targeted individual bear his or her psychic scars in public.

Section 6-103 of the Model Communicative Torts Act (Model Act) is even more restrictive.¹²⁶ Concerned about the chilling effect on protected speech, the drafters of the Section limited its application to race, sex, ethnicity or religion and required "a pattern of communication evincing a continuity of purpose." Unlike the common-law tort of intentional infliction of emotional distress, Section 6-103 would not apply to isolated utterances of racial epithets. Sec-

no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion. . . ." RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

121. See *Wiggs v. Courshon*, 355 F. Supp. 206, 208 (S.D. Fla. 1973) (ruling against white waitress who informed black customer in presence of customer's five year old daughter that, "you can't talk to me like that, you black-son-of-a-bitch. I will kill you." The waitress yelled repeatedly that "they are nothing but a bunch of niggers."). *Id.*

122. See *Bailey v. Binyon*, 583 F. Supp. 923 (W.D. Ill. 1984) (upholding a judgment against an employer who repeatedly called a black employee "nigger," and told him he "was not a human being, [but] a nigger.").

123. Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123, 127 (1990).

124. *Id.* at 151-52.

125. One commentator contends that if a "tough" or "strong" person is the victim of discriminatory speech, that person may well find it difficult to prove the fact of emotional distress. *Id.* at 158. Compare *Gray v. Serruto Builders, Inc.* 110 N.J. Super. 297 (1970) (court dismissed action in which black minister denied housing that was subsequently offered to white couple. The court considered the plaintiff to be a "man not likely to be bowled over by a single setback") with *Alcorn v. Anbro Eng'g, Inc.*, 468 P.2d 216 (Cal. 1970) (upholding judgment in favor of black truck driver repeatedly called "nigger" by his boss and threatened with dismissal. The employee became "sick and ill for several weeks thereafter, was unable to work, and sustained shock, nausea and insomnia.").

126. The Model Act recognizes a tort action whenever a person "intentionally engages in a . . . pattern of communication evincing a continuity of purpose . . . that is addressed to an individual, that is specifically intended to . . . harass or intimidate the individual (on the basis of) race, sex, ethnic origin, or religion, and that directly causes serious emotional distress." Model Communicative Torts Act § 6-103 (1989).

tion 6-103 would be even less effective at protecting minorities from the harm of racist speech.

II. OUTSIDER JURISPRUDENCE: MATSUDA AND LAWRENCE

[T]he experience of racism . . . makes the group's consciousness the victim's consciousness. . . .

-Mari Matsuda

Calling a white a 'honky' is not the same as calling a black a 'nigger'.

-Professor Robert Rabin¹²⁷

The above discussion demonstrates that hate speech regulations would not fare well under traditional Constitutional doctrine. This section will consider the perspectives of Mari Matsuda and Charles H. Lawrence, two leading advocates of "outsider jurisprudence." These scholars suggest that "carefully drafted"¹²⁸ regulations that target the "worst forms"¹²⁹ of hate speech could and should be upheld. This section, however, will demonstrate that reliance on their arguments is misplaced. First, these advocates misconstrue First Amendment doctrine. Second, contrary to their assertions, the advocates of outsider jurisprudence intend to prohibit offensive ideas and opinions, as well as racial epithets. Such a result is not only inconsistent with the advocates' claims, but also with freedom of speech. Finally, university regulations codifying the position of these advocates represent a threat to liberal education.

A. Matsuda: The Victim's Story¹³⁰

Advocates of "outsider jurisprudence"¹³¹ contend that any First Amendment tension caused by the emergence of speech codes can be resolved by "considering stories from the bottom."¹³² "Armed with stories from human lives," Mari Matsuda and Charles H. Law-

127. Chairman of Stanford Conduct Legislative Council.

128. Lawrence, *supra* note 1, at 438; Matsuda, *supra* note 1, at 2357.

129. Matsuda, *supra* note 1, at 2357.

130. This section deals primarily, but not exclusively, with the assertions of Matsuda. For organizational and stylistic purposes, this section incorporates those aspects of Lawrence's argument that are similar to Matsuda's. For a consideration of Lawrence's proposal to deal with hate speech, see *infra* notes 184-208 and accompanying text.

131. Matsuda prefers "outsider" to "minority," since the latter term "belies the numerical significance of the constituencies typically excluded from jurisprudential discourse." She claims that the outsider's jurisprudence is "growing and thriving" alongside mainstream jurisprudence. Matsuda, *supra* note 1, at 2323.

132. Matsuda, *supra* note 1, at 2322. Lawrence, *supra* note 1, at 436 ("[W]e have not listened to the real victims").

rence, both of whom are members of victim groups,¹³³ intend to take the reader where the law allegedly never ventures: the "places where women, children, people of color, and poor people live."¹³⁴ Only by listening to the "sorrow songs" of "jurisprudence of color" can the reader "defy the habit of neutral principles [used] to entrench existing power."¹³⁵

Under this approach, anecdotal information rises to the level of Constitutional doctrine since "stories are a means of obtaining the knowledge to create a just legal structure."¹³⁶ Ad hominem analysis is not a logical fallacy because the "identity of the person doing the analysis often seems to make the difference . . . in responding [appropriately] to racist speech."¹³⁷ The victim's story provides particular solutions to the problems of racist messages. "Law is essentially political" and the focus of outsider jurisprudence is appropriately on "effects."¹³⁸ Thus, it is ironic that these advocates conclude that outsiders should place their confidence in the use of "formal legal rules" to achieve substantive justice.¹³⁹ There is no explanation as to how or why these legal rules will be immunized from their untrustworthy political nature.

In making the case for *campus* speech codes, Matsuda and Lawrence describe a *society* dominated by racism and made up of competing groups.¹⁴⁰ Perception, they claim, is a function of group

133. "I write this Article from within the cauldron of this controversy." Lawrence, *supra* note 1, at 434. See Matsuda, *supra* note 1, at 2320.

134. Matsuda, *supra* note 1, at 2322.

135. Lawrence claims that "to engage in a debate about the first amendment and racist speech without a full understanding of the nature and extent of the harm of racist speech risks making the first amendment an instrument of domination rather than a vehicle of liberation." Lawrence, *supra* note 1, at 459.

136. Matsuda, *supra* note 1, at 2325 n.32.

137. Masuda, *supra* note 1, at 2326.

138. Matsuda, *supra* note 1, at 2324-25.

139. Matsuda, *supra* note 1, at 2325. This suggestion is ironic since the legal system is dominated by white males. Moreover, given the fact that the legal system has been used to suppress blacks, it is ironic that these commentators advocate more government power over speech. Consider the perspective of another victim group member reflecting upon the Nazi march in Skokie, Illinois:

Because we Jews are uniquely vulnerable, I believe we can win only brief respite from persecution in a society in which encounters are settled by power. As a Jew, therefore . . . I want restraints placed on power . . . I want restraints which prohibit those in power from interfering with my right to speak

ARYEH NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM 5 (1979).

140. Lawrence, *supra* note 1, at 435. While Matsuda and Lawrence both recite several well-known examples of campus racial incidents, they fail to delve into the context or tone of such events. They do not explain the cause of these problems; rather, they imply that it is innate white racism. For a detailed discussion of campus racial incidents, see generally JOHN H. BUNZEL, RACE RELATIONS ON CAMPUS: STANFORD STUDENTS SPEAK 25-35 (1992); D'SOUZA, *supra* note 1 (providing a detailed discussion and explanation of many racial incidents that have occurred since 1980); THOMAS SOWELL, INSIDE AMERICAN EDUCATION:

membership; although people of "non-color" witness and hear of racial incidents, their membership in the dominant group prevents them from perceiving the "true" nature of such situations.¹⁴¹ While non-target group members consider such events to be distasteful, isolated incidents, minorities, by virtue of their membership in the victim group, correctly view them as part of an escalating and dangerous whole.¹⁴² The fact that racial incidents go unreported by the mainstream press¹⁴³ contributes to the perception by people who are not victims that such incidents are random, isolated, and inconsequential.¹⁴⁴ Denizens of "victim communities," however, informed by virtue of membership, as well as a flourishing outsider press, correctly "link together several thousand real life stories into one tale of caution."¹⁴⁵ Thus, minorities understandably advocate swift state action, while dominant group members suggest that the "private realm" is the appropriate means to deal with these "isolated" pranks.¹⁴⁶

According to Matsuda and Lawrence, hate speech is merely one very powerful implement of racism which permeates American society. Racist speech goes beyond vile epithets targeted at particular individuals. It includes "disparaging" remarks, "sanitized" racist comments, such as "righteous indignation" against diversity and affirmative action, and any other form of overt or covert behavior which creates an "intimidating or hostile environment."¹⁴⁷ From the victim's perspective, each of these types of comments does the same harm and damage: reinforcing the ubiquitous, albeit erroneous, message of inherent racial inferiority.¹⁴⁸ Racist speech, which

THE DECLINE, THE DECEPTION, THE DOGMAS 155-73 (analyzing the reporting of racist incidents and consideration of causes of racial tensions on campus).

141. See Lawrence *supra* note 1, at 483 n.140 (discussing Lawrence's contention that whites' and non-whites' different perceptions of racism are due to their respective races and cultures). Matsuda employs the following terms interchangeably: "dominant group," "non-target group," "people of non-color," "whites." As noted above, although she uses the term "minority," Matsuda prefers the word "outsider." She also refers to "victims groups," "historically underrepresented groups," "fellow travelers," "victim communities." Matsuda, *supra* note 1, at 2321, 2323, 2325, 2339.

142. See Matsuda, *supra* note 1, at 2327 n.37 (claiming that hate messages are rarely isolated especially on university campuses). As Lawrence notes "black folks know that no racial incident is isolated in America." Lawrence, *supra* note 1, at 461. Neither Lawrence nor Matsuda cite empirical evidence or studies to support these assertions. In fact, the incidents they report as justifying hate speech regulations appear to be isolated.

143. See Matsuda, *supra* note 1, at 2331.

144. Matsuda, *supra* note 1, at 2331.

145. Matsuda, *supra* note 1, at 2331.

146. Matsuda, *supra* note 1, at 2327.

147. For a discussion of forms of racism among the elite of society, people who are less likely to resort to physical or otherwise obvious racist acts, see Matsuda, *supra* note 1, at 2334.

148. Citing no empirical evidence, Matsuda claims that "the spoken message of hatred and inferiority is conveyed on the street, in schoolyards, in popular

causes discrete and serious harm to minorities, interferes with the learning process. Not only does the visceral shock and the preemptive impact of hate speech silence minorities, but the ubiquity and force of the message of inferiority devalues their opinions.¹⁴⁹ Moreover, the lack of individual targeting does not minimize the damage.¹⁵⁰

So powerful is hate speech and so strong is group identity, that all members of the target group allegedly react in a similar fashion. Moreover, there is no resisting the painful impact of hate speech.¹⁵¹ The physiological symptoms and emotional distress range from "fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide."¹⁵² Any attempt to resist the alleged message of inferiority is futile.¹⁵³ The message contributes to a feeling of isolation, which is reinforced by the lack of government response.¹⁵⁴ The dominant group member reaction? Somehow Matsuda's status as a victim does not prevent her from generalizing the effect of racist speech on whites. According to Matsuda, whites experience a sense of distant guilt, and relief that they are not targeted.¹⁵⁵ Ignoring the vast increase in the number of interracial marriages since 1970,¹⁵⁶ Matsuda claims that this generalized reaction is "one reason why social relations across racial lines are so rare in America."¹⁵⁷

culture and in the propaganda of hate widely distributed in this country." Matsuda, *supra* note 1, at 2332. Moreover, Matsuda asserts that racist hate messages are rapidly increasing and are widely distributed in this country using a variety of law and high technologies." Matsuda, *supra* note 1, at 2336.

149. Racist speech thus "constructs" reality.

150. As Matsuda notes, "[a minority] student cannot [over]hear a racial slur on the way to a lecture, and then concentrate on the lecture as though nothing has happened." Matsuda, *supra* note 1, at 2372 n.256.

151. For a discussion of the far-reaching impact of hate messages and other forms of racism, see Matsuda, *supra* note 1, at 2337.

152. Matsuda, *supra* note 1, at 2336. Matsuda cites studies to show the painful effects of hate speech on individual victims. Racist speech does hurt. However, as was demonstrated above, the offensiveness of speech does not warrant its suppression under First Amendment doctrine. Moreover, as will be demonstrated below, there are more effective means of dealing with hate speech.

153. See Matsuda, *supra* note 1, at 2337-38 (discussing the devastating impact of being the victim of racism, and carrying the feeling of being hated by society).

154. For a discussion which considers the government's role in racism in society, see Matsuda, *supra* note 1, at 2338. Matsuda claims that the government often tolerates hate messages in various forms.

155. Matsuda, *supra* note 1, at 2338-39.

156. The number of interracial marriages in the past twenty years has increased four-fold. Lynell George, *Cross Colors: Interracial Dating is Not New, But How Couples Get Together Has Changed*, L.A. TIMES, Dec. 9, 1990, at 14.

157. Matsuda, *supra* note 1, at 2339.

1. Matsuda's Proposal: *Sui Generis* Category

Although Matsuda criticizes traditional constitutional doctrine for protecting racist speech at the expense of minorities, she recognizes that speech codes, which place the state in the position of censor, could chill valuable speech.¹⁵⁸ She is uncomfortable in advocating regulation "if others fall too easily into agreement."¹⁵⁹ Therefore, to avoid weakening the First Amendment by attempting to fit the square peg of racist speech into the round hole of traditional doctrine, Matsuda advocates the creation of a narrowly defined, *sui generis* category.¹⁶⁰ So untenable is the idea of inherent racial superiority and so great is the harm caused by hate speech, that expression that promotes such dangerous and universally condemned beliefs¹⁶¹ can be cast "outside the realm of protected discourse."¹⁶² A "narrow definition of actionable racist speech" will not only prevent chilling valuable speech, but it will also "set aside" the "worst forms" of racist speech for special treatment.¹⁶³ Three characteristics serve to identify actionable racist speech:

- (1) The message is one of racial inferiority;
- (2) The message is directed against a historically oppressed group;
- (3) The message is persecutorial, hateful and degrading.¹⁶⁴

From doctrinal and policy perspectives, Matsuda's recommendation raises several problems. Her assertion that racist ideas are universally condemned is undermined by the occurrence of racist incidents in the United States and abroad. Indeed, one commentator contends that Matsuda and others advocate hate speech regulation precisely because of its prevalence.¹⁶⁵ The fact that hate

158. See Matsuda, *supra* note 1, at 2357 (stating that "the image of book burning should unnerve us and remind us to argue long and hard before selecting a class of speech to exclude from the public domain.").

159. Matsuda, *supra* note 1, at 2357. Actually, Matsuda notes the great benefit derived from freedom of speech and the values that the First Amendment promotes. Matsuda, *supra* note 1, at 2353.

160. Matsuda, *supra* note 1, at 2357.

161. Matsuda claims the universal condemnation of racism justifies treating racist speech as categorically different. She cites the International Convention on the Elimination of All Forms of Racial Discrimination, which requires ratifying states to "criminalize racial hate messages." The United States has signed, but not ratified this convention. Matsuda also notes with approval that the United Kingdom, Canada, New Zealand, and Australia outlaw hate speech. Matsuda, *supra* note 1, at 2341-48. Other commentators reveal that both the Canadian and the United Kingdom laws have been used to suppress speech by the very minorities these laws were intended to protect. For a discussion of situations where national regulations have worked contrary to minority interest, see Strossen, *supra* note 10, at 556; NEIER, *supra* note 139, at 155.

162. Matsuda, *supra* note 1, at 2357.

163. Matsuda, *supra* note 1, at 2357.

164. Matsuda, *supra* note 1, at 2357.

165. Robert C. Post, *Racist Speech, Democracy, And The First Amendment*, 32 WM. & MARY L. REV. 267, 301-02 (1991).

speech is prohibited by UN conventions and outlawed in other countries does not mean that such treatment is consistent with First Amendment doctrine or American free speech values. The United States is unique in its defense of dangerous speech, racist or otherwise.¹⁶⁶ For example, while Germany forbids the display of the swastika, American courts have consistently defended an individual's right to burn the flag or to disseminate Nazi propaganda.¹⁶⁷

Treating hate speech as "qualitatively different" would signify a diminution of the impartial commitment to free speech in the United States.¹⁶⁸ Once racist speech is banned based on the emotional injury suffered by those targeted, other groups would argue that offensive speech targeted at them should be placed in a *sui generis* category.¹⁶⁹ Speech code proponents would argue that the harm caused by hate speech is uniquely serious.¹⁷⁰ They could contend that such categorization would do minor, if any, damage to First Amendment fabric. However, not only is the offensiveness of speech irrelevant to Constitutional analysis,¹⁷¹ but the "First

166. "[T]he United States is apparently alone in the world community in sheltering racist speech. . . [b]ut . . . history demonstrates that if freedom of speech is weakened for one person, group, or message, then it is no longer there for others." Strossen, *supra* note 10, at 536.

167. See *Texas v. Johnson*, 491 U.S. 397 (1989); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

168. "He that would make his own liberty secure, must guard even his enemy from oppression, for if he violates this duty, he establishes a precedent that will reach himself." Thomas Paine, *quoted in* AMERICAN CIVIL LIBERTIES UNION, WHY THE ACLU DEFENDS FREE SPEECH FOR RACISTS AND TOTALITARIANS 2 (1990).

169. See Strossen, *supra* note 10, at 522-23 n.190.

"What would this proposed act of constitutional revision do to the moral legitimacy of the stance our Constitution has taken . . . in defense of expression that offends many Americans as deeply as flag burning offends the great majority of us? . . . What enduring Constitutional principle will remain unimpaired that will legitimately surmount these claims?"

Id. (statement by Professor Walter Dellinger concerning the proposed amendment to the Constitution that would prohibit flag burning).

170. Two Supreme Court Justices appear to accept the notion that hate speech causes unique harm. In a concurring opinion in *R.A.V. v. City of St. Paul*, Justice Stevens noted that: "[t]hreatening someone because of her race . . . may cause particularly severe trauma. . . [S]uch threats may be punished more severely than threats against someone based on, say, his support of a particular athletic team." *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2561 (1992). Justice Blackmun chastised the majority for failing to realize that "racial threats and verbal assaults are of greater harm than other fighting words." *Id.*

171. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 414. See Sedler, *supra* note 1, at 664 ("It is also completely irrelevant, from a constitutional standpoint, that the expression of racist ideas may cause serious and discrete harm to victim groups. . . . [T]he fact that expression causes psychic or emotional harm to persons cannot be an *independent justification* for restricting it"). Justice White recently noted that "[t]he mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *R.A.V.*, 112 S. Ct. at 2559 (concurring opinion).

Amendment was designed to avoid [totalitarian] ends by avoiding [such] beginnings."¹⁷² In conducting the "highly contextualized" analysis to determine whether speech is "actionable," a court would have to rely on the "victim's voice." Not only does such an approach seem unprincipled, but it does not lend itself to an application that is predictable or consistent.

Given her assertion that any expression of inherent racial inferiority causes equally severe harm to minorities, Matsuda's recommendation to define actionable hate speech narrowly is ironic and not altogether convincing.¹⁷³ Indeed, once she applies her definition of actionable hate speech to "hard cases," it is clear that her goal is to render offensive ideas, as well as painful epithets, illegitimate. Consider the following:

1. Expressions of hatred, revulsion, and anger towards dominant-group members by subordinated group members are not actionable. Although Matsuda recognizes that the harm and hurt is "there," she contends that it is of a "different degree."¹⁷⁴ Not only will dominant group members have greater access to "safe harbors," but since the attack is not linked to "racist vertical relationships," it is less pernicious.¹⁷⁵ Moreover, such utterances are merely part of the "victim's struggle for self-identity."¹⁷⁶
2. The display of the swastika, klan robes, or the confederate flag convey the message of racist persecution and should be banned.¹⁷⁷
3. Under certain circumstances, the ideas of the "dead-wrong" social scientist would be denied a public forum. If the theory of inferiority is not free of any message of hatred or persecution, then it should be outlawed under Matsuda's "narrow definition."¹⁷⁸
4. "Cold-blooded versions" of anti-Semitic literature, especially those propagating the "Holocaust Myth," should be met not with more credible historical accounts, but with outright censorship.¹⁷⁹ Displays of offensive collections, such as Nazi propaganda, should be subject to "state intervention" where the

172. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

173. Matsuda, *supra* note 1, at 2357.

174. Matsuda, *supra* note 1, at 2361.

175. Matsuda, *supra* note 1, at 2361.

176. Matsuda, *supra* note 1, at 2362.

177. Matsuda, *supra* note 1, at 2365.

178. Matsuda, *supra* note 1, at 2464-65. Apparently, the only dangerous "dead-wrong" social scientists are those offering "pseudo-scientific, Eurocentric" theories. Matsuda does not address the case of Leonard Jeffries, chairman of Afro-American studies at New York University. Jeffries contends that whites are inherently inferior to blacks since they lack melanin in their skin. Jeffries refers to whites as "ice people."

179. Matsuda, *supra* note 1, at 2366-67.

displays cause “gratuitous harm” to viewers.¹⁸⁰ In order to distinguish historical displays from more dangerous collections, one must rely on the “victim’s story.”¹⁸¹ Only by considering the “victim-group members’” perspective can one determine whether there is “real harm to real people.”¹⁸²

5. While the rapid fire sequence of racial epithets in Spike Lee’s film *Do the Right Thing* offers an “incisive anti-racist critique of racist speech,” Mark Twain’s *The Adventures of Huckleberry Finn* causes harm to minority children by “further expos[ing]” them to racist speech.¹⁸³

The preceding consideration of Matsuda’s “narrow” definition should give pause to anyone who has confidence that relying on the voice of victims will create a more just legal order in which freedom of speech and unfettered intellectual inquiry will flourish.

B. Lawrence: Equality

Lawrence also beseeches the reader to “listen to the victims.”¹⁸⁴ He suggests that “carefully drafted” regulations can be upheld “without significant departures from existing First Amendment doctrine.”¹⁸⁵ Lawrence contends that racist speech denies minorities equal protection and claims that *Brown v. Board of Education*¹⁸⁶ supports the regulation of private racist speech.¹⁸⁷ Lawrence argues that hate speech, which is similar to a physical blow, can be treated as the “functional equivalent” of fighting words. For several reasons, reliance on Lawrence’s justifications for restricting racist speech is not recommended. First, Lawrence misconstrues both *Brown* and the fighting words doctrine. Second,

180. Citing no empirical studies other than a Time-Life advertisement for books on the Third Reich, Matsuda claims that there is a “growing passion for collecting racist memorabilia.” Matsuda, *supra* note 1, at 2368.

181. Matsuda, *supra* note 1, at 2368.

182. Matsuda, *supra* note 1, at 2368.

183. Matsuda, *supra* note 1, at 2369. In Mark Twain’s account of the journey of Jim, an escaped slave, and Huck Finn, a white boy, down the Mississippi River in the late 19th century the word “nigger” is repeated over 160 times. The story is generally considered to be a damning critique of slavery and racism in America. Indeed, the only honorable character is Jim, the slave. While the book was originally banned as offensive to whites, many school systems have now removed the book from the curriculum and library shelves for fear of offending black students. For a more detailed, and at times amusing, account of the movement to ban *THE ADVENTURES OF HUCKLEBERRY FINN*, see HENTOFF, *supra* note 14 at 18-41.

184. Lawrence, *supra* note 1, at 459. Lawrence, who is black, provides some examples of racist speech. Lawrence, *supra* note 1, at 460 (white high school students painted vicious racial epithets on large soccer kickboard easily visible from black family’s home). However, his doctrinal approach would not support the regulation of the very incidents that he describes.

185. Lawrence, *supra* note 1, at 438.

186. 347 U.S. 483 (1954).

187. Lawrence, *supra* note 1, at 438.

the non-intellectual nature of racial epithets does not justify its prohibition. Third, Lawrence's rationales could be used to regulate protected speech.¹⁸⁸

Lawrence argues that *Brown v. Board of Education* justifies the regulation of private racist speech. The *Brown* Court held that segregated schools, which are "inherently unequal," violate the equal protection clause of the Fourteenth Amendment.¹⁸⁹ However, Lawrence contends that the Court held segregated schools unconstitutional because of the message segregation conveys: racial inferiority of black students.¹⁹⁰ Lawrence's analysis conflates the important speech/conduct distinction and ignores the state action requirement of the Fourteenth Amendment.

Separate educational facilities did not merely send a message of inferiority. Rather, they *treated* blacks as inferior by separating them from whites. *Brown* outlawed state-mandated discriminatory conduct, not speech. Any message was incidental to the challenged conduct.¹⁹¹ To hold otherwise would conflate the distinction between speech and conduct.¹⁹² Moreover, even if *Brown* were construed to involve speech, it would apply only to *governments* and not to private speech.

The Equal Protection Clause of the Fourteenth Amendment, by its very terms, limits the power of state government.¹⁹³ It would not apply to the activities or speech of a private individual, no matter how offensive. However, Lawrence, who considers the state action requirement to be a "mystifying property of constitutional ideology,"¹⁹⁴ contends that the ubiquitous nature of racism combined with the state's refusal to punish private racist speech denies blacks equal protection.¹⁹⁵ This characterization collapses the public/private distinction, a result which some commentators contend

188. One commentator notes that "Lawrence apparently acknowledges that . . . his theories could warrant the prohibition of all private racist speech. [A]ny specific seemingly modest proposal to regulate speech may in fact represent the proverbial 'thin edge of the wedge' for initiating broader regulations." Strossen, *supra* note 10, at 492.

189. The Fourteenth Amendment provides that "[No] State [shall] deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV (emphasis added).

190. Lawrence, *supra* note 1, at 439-40.

191. Lawrence contends that "segregation's primary goal is to convey the message of white supremacy." Lawrence, *supra* note 1, at 441.

192. Strossen, *supra* note 10, 542.

193. The equality guarantee implicit in the due process clause of the Fifth Amendment binds only the federal government. U.S. CONST. amend. V.

194. Lawrence, *supra* note 1, at 444.

195. Lawrence, *supra* note 1, at 442. Matsuda also argues that the government's failure to punish private racist speech can be viewed as state action since it sends the message that the state supports such speech. Matsuda, *supra* note 1, at 2378-79.

would have "disastrous consequences."¹⁹⁶

Lawrence's argument that the First Amendment's right to freedom of expression should be balanced against the Fourteenth Amendment's right to equal protection misconstrues the constitutional conflict and would justify sweeping restrictions on offensive speech. The articulation by an individual of the message of inherent racial inferiority does not involve a clash between two constitutional rights. Rather, the conflict is between the speaker's constitutional *right* to free expression and the *ideal* or *norm* of equality that the speaker is challenging.¹⁹⁷ "[I]f racist speech can be prohibited because it is contrary to the ideal of equality, then surely Communist propaganda . . . could be forbidden because it is contrary to the ideal of democracy as embodied in our Constitution."¹⁹⁸ Such a result would be inconsistent with the free speech principles embodied in the First Amendment and would constitute a dangerous precedent.

1. Lawrence's Proposal: Fighting Words Equivalent

Lawrence contends that face-to-face racial epithets constitute the "functional equivalent" of fighting words. According to this argument, racial epithets do not deserve First Amendment protection for two reasons. First, they do not convey ideas, but are similar to physical blows.¹⁹⁹ Second, acting as a preemptive blow,²⁰⁰ racist speech silences minorities and causes an imperfection in the marketplace of ideas. Lawrence's argument overlooks the Court's defense of non-intellectual speech that appeals to the emotions. In *Terminiello v. Chicago*,²⁰¹ the Court noted that free speech may "best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger."²⁰² In *Cohen v. California*,²⁰³ the Court stated that the "emotive function [of speech] may . . . often be the more important element of the overall message sought to be communicated."²⁰⁴ Indeed, Lawrence fails to note that even the most vituperative slur conveys a message: that the addressee is inferior and unwanted.

The fact that racist speech causes an imperfection in the marketplace of ideas by devaluing and silencing minority voices does

196. James Weinstein, *A Constitutional Roadmap to the Regulation of Campus Hate Speech*, 38 WAYNE L. REV. 163, 168 n.19 (1991).

197. *Id.* at 167.

198. *Id.* at 169.

199. "The experience of being called a "nigger" . . . is like receiving a slap in the face." Lawrence, *supra* note 1, at 452.

200. Lawrence, *supra* note 1, at 453.

201. *Terminiello v. Chicago*, 337 U.S. 1 (1949).

202. *Id.* at 4.

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

204. *Id.* at 26.

not justify its restriction. An imperfection in the marketplace of ideas does not justify government intervention. Some speech may silence others. This merely demonstrates the power of speech, which does not deprive others of the important negative liberty to speak.²⁰⁵ Sacrificing freedom for one party "is not an increase in what is being sacrificed, namely freedom, however great the moral need or compensation for it."²⁰⁶ Society may choose to pursue other goals, such as equality. However, society may not seek to attain these goals by suppressing speech. Rather, it must rely on other methods, such as counter-expression or regulation of conduct.

Although Lawrence appears to advocate narrowly drafted regulations, it is apparent that he intends to outlaw offensive ideas and opinions as well. Such a result is necessary because the harm caused by hate speech consists of the message of inferiority. Although he supports a fighting words model, Lawrence contends that this doctrine should be expanded to include "racist verbal assaults . . . intentionally spoken in the presence of members of the denigrated group."²⁰⁷ He endorses group defamation statutes²⁰⁸ and notes with approval Matsuda's proposal to create a *sui generis* category.²⁰⁹ Moreover, he advocates the application of a non-neutral captive audience doctrine to the campus as a whole.²¹⁰ The disharmony between the narrow regulations and the alleged harm of hate speech inevitably encourages proponents of speech codes, including Lawrence and Matsuda, to recommend broader, more restrictive laws. Such a result undermines free speech and is inconsistent with the values embodied in the First Amendment.

III. SPEECH CODES: THE THREAT TO LIBERAL EDUCATION

[Academic freedom] is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

-Keyishian v. Board of Regents²¹¹

205. The First Amendment establishes the negative liberty of freedom of speech. It places restrictions on the power of government to regulation speech. Ronald Dworkin, *Liberty and Pornography*, N. Y. REVIEW OF BOOKS, Aug. 15, 1991, at 12.

206. *Id.* at 15. "To deny free speech in order to engineer social change in the name of accomplishing a greater good for one sector of our society erodes the freedoms of all and, as such, threatens tyranny and injustice for those subjected to the rule of such laws." American Booksellers Ass'n, Inc. v. Hudnut, 598 F. Supp. 1316, 1337 (S.D. Ind. 1984).

207. Lawrence, *supra* note 1, at 451 n.85.

208. Lawrence, *supra* note 1, at 464.

209. Lawrence, *supra* note 1, at 481 n.169.

210. *See supra* notes 54-57 and accompanying text.

211. 385 U.S. 589, 603 (1967).

To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust.

-Sweezy v. New Hampshire²¹²

The previous sections of this paper strongly suggest that hate speech regulations cannot be upheld under traditional First Amendment doctrine. This section will argue that campus speech codes will undermine the liberal educational system and erode a commitment to the values animating the First Amendment.

In making their case for campus speech codes, Matsuda and Lawrence misconceive the purpose of the university and offer a demeaning portrayal of minority students. The purpose of the university is not to protect a "constituency with special vulnerabilities" from offensive ideas and beliefs.²¹³ Nor does the university's mission entail the establishment of a community of diverse groups.²¹⁴ Rather, the purpose of the university is to encourage debate, facilitate unfettered intellectual inquiry, and force students as *individuals* to justify their opinions with solid, thoughtful arguments.²¹⁵ Campus speech codes, which classify students based on group membership, send the dangerous message that censorship, not debate, is the best means of dealing with offensive ideas. Moreover, the existence of speech codes also suggests that certain groups are unable to verbally defend themselves in the arena of debate.²¹⁶ Actually, confronting demeaning ideas with counter speech would do more to empower minorities than the existence of paternalistic regulations.²¹⁷

212. 354 U.S. 234, 250 (1957).

213. Matsuda, *supra* note 1, at 2370.

214. "[Minority] students are dependent on the university for community . . . and for self-definition." Matsuda, *supra* note 1, at 2370-71.

215. Benno Schmidt, President of Yale, claims that "[a] university is a place where people have to have the right to speak the unspeakable and think the unthinkable and challenge the unchallengeable." HENTOFF, *supra* note 14, at 152. [U]niversities are [not] finishing schools: their mission . . . is not to convert errant minds or to teach good manners. Their mission is to advance knowledge by teaching and practicing public criticism." RAUCH, *supra* note 14, at 132.

216. Not all minority students feel the need for the false protection of speech codes. During a debate on hate speech at Harvard Law School, one black student stated that he was confident of his ability to respond to racist comments. To suggest that black students had to be "protected" was, in his opinion, "condescending" and "insulting" to black people. HENTOFF, *supra* note 14, at 160.

217. Consider the incident that occurred at Arizona State. While walking in the hallway of their dormitory, four black women encountered a poster on the door of one of the residents. The poster depicted blacks in a negative fashion. Rather than hiding behind Arizona State's speech code, these women confronted the resident and demanded that he justify his views. He could not. Instead, he offered an apology and removed the poster. The women organized a dorm meeting to discuss the matter. Although all of those present agreed that the poster was offensive, they also realized that students are permitted to express their views, no matter how offensive, on their doors. The next evening the

Freedom of expression facilitates the university's mission: to advance knowledge and encourage a search for the truth.²¹⁸ The search for the truth is a continuous process, based on the premise that the most rational and soundest judgement is that achieved by considering all sides of the debate. Thus, freedom of expression is essential. No argument is immune to challenge. Suppression of expression impedes the deliberative process and distorts the final judgement. The only justification for censorship is that the censor is infallible in its judgment of the truth. Campus speech codes, which outlaw the expression of offensive ideas, will not only impede discussion and the search for the truth, but will also send the dangerous message to young Americans that those in positions of authority can be trusted to unilaterally determine what is true. The regulation of hate speech in the academic setting may erode the commitment of a generation of Americans to a liberal system of free expression. As the Supreme Court noted not long ago, "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection."²¹⁹

Speech code proponents claim that rules requiring "civility and respect in academic discourse" are necessary to encourage the fullest exchange of debate.²²⁰ However, campus speech codes could chill speech by inhibiting the discussion of controversial ideas and opinions.²²¹ As noted above, in order to mitigate the harm of racist speech, speech codes must prohibit the dissemination of the offensive idea of racial inferiority. Students will be reluctant to question such policies as affirmative action and ethnic theme houses.²²²

residents of the dorm met to watch a film about Thurgood Marshall and *Brown v. Board of Education*. The women also organized a university-wide meeting at which race relations were discussed. Not only was this an empowering experience, but the women felt others were encouraged to "recognize that each of them is unique rather than a collection of stereotypical physical and emotional characteristics." *Id.* at 93-95.

218. According to Benno Schmidt, "[t]he university has a fundamental mission which is to search for the truth." HENTOFF, *supra* note 14, at 152.

219. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

220. Lawrence, *supra* note 1, at 438.

221. Benno Schmidt, President of Yale University, notes that "these speech codes are a terrible mistake . . . Students think that they are codes about building communities based on correct thoughts, and that's antithetical . . . to the idea of a university." HENTOFF, *supra* note 14, at 152. "[Speech codes] will 'add to the silence' on 'gut issues' about racism, sexism, and other forms of bias that already impede interracial . . . dialogues." Strossen, *supra* note 10, at 529.

222. "I have no doubt . . . that the possibility of discipline for uttering racist statements would deter many students from this critique of affirmative action." Weinstein, *supra* note 196, at 215. "It is a shame that the pros and cons of [affirmative action] cannot really be discussed here. There is censorship going on Who's going to submit an article attacking affirmative action to the

Moreover, "racist or hate speech" is a generic term that includes speech that demeans others on the basis of gender, sexual orientation, physical ability and attractiveness, religion, marital status, and even, in some cases, Vietnam-era veteran status. Students could consider that such codes impose a new orthodoxy that discourages questions challenging tenets of feminism, sources of homosexuality, and the idea that there are biological differences among racial groups that contribute to cognitive ability.²²³ Whether or not students' fears are valid, the important point is what they *perceive*.²²⁴

Experience demonstrates that speech codes have been used to punish unorthodox views. Under the University of Michigan policy, a male student who remarked that "women just are not as good in this field as men" created a hostile learning environment in violation of the speech code.²²⁵ A black graduate student seeking his degree in social work was brought before the enforcement panel because he "repeatedly said that homosexuality is an illness that needs to be cured," and that he had "developed a model to change gay men and lesbians to a heterosexual orientation."²²⁶ Although a divided panel held that he did not violate the policy, they did determine that his statements "should be reviewed by the appropriate social work professionals in considering [the student's] suitability

student newspaper? You are sure to be called a racist." D'Souza, *supra* note 1, at 129 (quoting conversation with University of Michigan sophomore David Makled).

223. "[T]oday we see the universities trying to implement a new secular orthodoxy, one component of which is the imposition of restrictions on racist speech." Sedler, *supra* note 1, at 638. "The methods and fervor of the self-appointed language police can lead to a rigid orthodoxy . . ." Kakutani, *supra* note 14, at B1. There is a "generally hostile classroom reception regarding any student right of center. This 'can be arguably viewed as symptomatic of a prevailing spirit of academic and social intolerance of . . . any idea which is not 'politically correct.'" HENTOFF, *supra* note 14, at 153 (quoting Berry Endick, student at New York University Law School).

224. Nat Hentoff, *P.C. Law Schools*, WASH. POST, Dec. 10, 1992, at A12 (quoting study that shows that students hesitate to offer dissenting views in class for "fear that professors would decrease their grade"). "The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." NAACP v. Button, 371 U.S. 415, 433 (1963).

225. This example comes from the Interpretive Guide which accompanied the University of Michigan's Policy on Discrimination and Discriminatory Harassment of Students in the University Environment (hereinafter Policy). Lawrence mistakenly claims that this speech code was "poorly drafted." In striking down the Policy, the Michigan District expressly noted that it would not have done so based solely on the language. *Doe v. Michigan*, 721 F. Supp. 852, 859 (E.D. Mich. 1989). Rather, it was unconstitutional due to the enforcement record. *Id.* at 860. Several Constitutional law experts at the University of Michigan helped draft the code. *Id.* at 855. The policy went through twelve drafts. *Id.*

226. Sedler, *supra* note 1, at 641 (citing Plaintiff's Exhibit Submitted In Support of Motion for Preliminary Injunction, *Doe* (No. 89-CV-71683-DT)).

as a professional social worker.²²⁷ In an unrelated incident, a business student was required to write a letter of apology in the school newspaper and attend a Gay Rap session after telling a joke about homosexuals.²²⁸ A white student violated the policy when he remarked that he "had heard that minorities have a difficult time in a [preclinical dentistry] weed-out class and that [they] were not treated fairly." The student had learned of these rumors from his roommate, who was black.²²⁹ Finally, in striking down Michigan's policy, the District Court agreed that a biopsychology student would have violated the code had he sought to discuss controversial theories concerning the "biological bases of individual differences in personality traits and mental abilities."²³⁰

Enforcement of hate speech regulations often entails the use of various forms of "mind control." Students must write humiliating letters of apology, undergo "sensitivity training," and enter into "behavior contracts." For example, a student at the University of Wisconsin who called a woman a "fucking bitch" was required to perform twenty hours of community service at a shelter for abused women.²³¹ A student who called a black student a "Shakazulu" during an argument was required to view a video on racism and write an essay on the video describing how it "sensitized [him] to the issues of diversity."²³² While such policies may create a superficial conformity, it is doubtful that they disabuse students of their offensive ideas. Legitimate questions, along with discriminatory attitudes and ideas, are driven underground to fester. Such a result seems antithetical to the notion of the university as a place to "speak the unspeakable and think the unthinkable and challenge the unchallengeable."²³³

Contrary to the assertions of Lawrence and Matsuda, hate speech is not a white monopoly. Black students have had complaints filed against them for anti-gay and racist remarks.²³⁴ One black student was compelled to write a humiliating letter of apology after referring to his white counterpart as "white trash."²³⁵ As one commentator noted, "it was everybody complaining about every-

227. Sedler, *supra* note 1, at 642 (quoting Plaintiff's Exhibit Submitted in Support of Motion for Preliminary Injunction, *Doe* (No. 89-CV-71683-DT)) (alteration in original).

228. Sedler, *supra* note 1, at 642.

229. Sedler, *supra* note 1, at 642 n.44 (citing *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989)).

230. *Doe v. Michigan*, 721 F. Supp. 852, 858 (E.D. Mich. 1989).

231. *UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163, 1167 (E.D. Wis. 1991).

232. *Id.* (alteration in original).

233. Benno Schmidt, President of Yale University. HENTOFF, *supra* note 14, at 152.

234. Sedler, *supra* note 1, at 645.

235. *Doe v. Michigan*, 721 F. Supp. 852, 856 (E.D. Mich. 1989).

body else about everything."²³⁶ Rather than creating an atmosphere of civility, campus speech codes facilitate acrimonious accusations and finger-pointing.²³⁷

In making their case for campus speech codes, Matsuda and Lawrence do not offer an explanation for the racial incidents at American universities other than "innate" white racism. However, many commentators who have studied the context and tone of racial incidents on campus consider the cause of such problems lies, not in the "innate" racism of whites,²³⁸ but in the politics of difference that is vigorously practiced by American universities.²³⁹ Under the guise of promoting "diversity," university administrators have established ethnic theme houses, black student unions, and African-American studies programs. Universities have even endeavored to hire minority faculty, even though there were no openings.²⁴⁰ However, not only do some of these programs highlight

236. Sedler, *supra* note 1, at 645.

237. "The buzzword is sensitivity, and the intimidation is intense." Ian Macneil, Robert Braucher Visiting Professor of Law, Harvard University. D'SOUZA, *supra* note 1, at 197.

238. Speech code proponents argue that racism is something of a "cultural constant" with whites that can only be relinquished through rigorous sensitivity training. D'SOUZA, *supra* note 1, at 126 (citing a study by the National Institute Against Prejudice and Violence). Ironically, the vast majority of incidents on campus have occurred at Northern universities. D'SOUZA, *supra* note 1, at 126. Out of one hundred and five racial incidents classified by region, only seven took place in the South. Thomas Sowell, *The New Racism on Campus*, FORTUNE, Feb. 13, 1989, at 115. As Thomas Sowell notes, "these events have occurred overwhelmingly in the Northeast, not exactly Reagan country." *Id.* The state with the most incidents is Massachusetts. A student at the University of Michigan was surprised at the problems taking place at his university. Isabel Wilkerson, *Campus Race Incident Disquiets University of Michigan*, N.Y. TIMES, Mar. 9, 1987, at A12 (stating "I think of these things happening in the South, not in Ann Arbor [Michigan]."). *Id.*

239. Steele considers the politics of difference to be a "volatile politics in which each group justifies itself, its sense of worth and its pursuit of power, through difference alone." STEELE, *supra* note 93, at 132. See also D'SOUZA, *supra* note 1, at 49 ("[W]hite hostility to preferential treatment and minority separatism is a major force behind many of the ugly racial incidents that have scarred the American campus"); BUNZEL, *supra* note 140, at 4, 139; SOWELL, *supra* note 140, at 134 (stating that "[M]uch of the intervening time [since the implementation of affirmative action programs] has seen a steady building of tensions toward the ugly episodes of recent years, which have now been christened, 'the new racism'"); ARTHUR M. SCHLESINGER, THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY 102-04 (1991); *Race on Campus*, U.S. NEWS & WORLD REP., Apr. 19, 1993 at 52 ("Clearly, the double standard is a major cause of discontent among whites.").

240. In 1989, Smith College pledged to quadruple minority representation on the faculty to 20 percent. D'SOUZA, *supra* note 1, at 16. At the University of Wisconsin-Madison, *The Madison Plan*, initiated by the chancellor and now official policy, commits the university to hiring seventy minority faculty in three years. Under the *Michigan Mandate*, seventy-six minority faculty have been hired through affirmative action programs over the past two years. *Id.* The University of Iowa hired seven black professors although none of them filled specific openings in departments. Carolyn Mooney, *Affirmative Action Goals, Coupled with Tiny Number of Minority Ph.D.s, Set Off Faculty Recruiting*

differences, but they appear to extend entitlements based solely on color.²⁴¹ For example, although black students make up only six percent of the student body at the University of Pennsylvania, the University funds a separate black yearbook, "Positively Black."²⁴² Furthermore, most, if not all, universities and college programs have "affirmative action" programs.²⁴³ Black and Hispanic students with B averages are honored at the University of North Carolina at Chapel Hill at the university-sponsored annual "3.0 Minority Recognition Ceremonies."²⁴⁴ Penn State pays black students for improving their grades. Improving from a C to a C+ brings \$550 and anything more brings \$1,000.²⁴⁵ It would be difficult to argue that such paternalistic programs promote self-confidence. As Steele notes, "What better way to drive home the nail of inferiority?"²⁴⁶

The politics of difference²⁴⁷ transforms race into the currency of power on campus. Students are encouraged to view each other as mere representatives of diverse and competing groups. Highlighting one's difference, especially one's racial difference, inspires others to do the same.²⁴⁸ Elevating difference, however, under-

Frenzy, CHRON. of HIGHER EDUC., Aug. 2, 1989, at A1. See also SOWELL, *supra* note 140, at 148-155.

241. Steele notes that "race is, by any standard, an unprincipled source of power." STEELE, *supra* note 93, at 140. Donald Eastman, vice president for development and university relations at the University of Georgia, notes that "[t]here is no justifiable moral defense for ethnic or racial segregation . . . by blacks or whites . . ." Donald Eastman, *The New Segregation*, WALL ST. J., May 5, 1993, at A22.

242. D'SOUZA, *supra* note 1, at 48.

243. Many students believe that blacks are admitted under such programs with lower paper credentials than other students. STEELE, *supra* note 93, at 134. Unfortunately, the existence of these programs has not improved graduation rates of blacks students. *Id.* Only 18 percent of black students admitted on affirmative action programs at Berkeley graduate. D'SOUZA, *supra* note 1, at 39. However, blacks admitted under the regular program graduate at a 45 percent rate. *Id.* Stephen L. Carter, Professor of Law at Yale, refers to affirmative action as "racial justice [on the] cheap." STEPHEN CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 72 (1991). Shelby Steele believes affirmative action programs reinforce "the myth of [racial] inferiority." For an excellent discussion of the double standards applied to admissions at elite American universities, see SOWELL, *supra* note 140, at 133-73.

244. D'SOUZA, *supra* note 1, at 48.

245. D'SOUZA, *supra* note 1, at 4.

246. STEELE, *supra* note 93, at 90.

247. There may be a subtle, but sinister rationale behind the willingness of university administrators to accede to the demands of minorities. Consider this comment by Kenneth B. Clark, the distinguished black social psychologist: "The white liberal . . . who concedes black separatism so hastily and benevolently must look to his own reasons, not the least of them perhaps an exquisite relief." SCHLESINGER, *supra* note 239, at 114.

248. "[I]nstitutionalized separatism only crystallizes racial differences and magnifies racial tensions . . . Most ominous about the separatist impulses is the meanness generated when one group is set against another." SCHLESINGER, *supra* note 239, at 104, 110.

mines any sense of community by making each group foreign and inaccessible to others.²⁴⁹ The politics of difference, promoted under the guise of "diversity," sanctions power based on race, a heretofore illegitimate source of power.²⁵⁰ Thus, racial tensions are inevitable. As Steele notes, "When I make my *difference* into power, other groups must seize upon their difference to contain my power and maintain their position relative to me."²⁵¹ If being black is a source of power, students may reasonably conclude that being white is also sanctioned as a source of power.

Most, if not all, white students are taught that segregation is wrong and that entitlements based on race are illegitimate.²⁵² Thus, many view university policies based on skin color as inequitable.²⁵³ Moreover, there is evidence that a double standard is applied to racist incidents on campus: While administrations react with vigor to the protests of minority students,²⁵⁴ attacks on white or Jewish students go unreported or result in minor reprimands.²⁵⁵ Moreover, it is interesting to note that, as early as 1969, several civil rights figures predicted that policies that promote difference based on race and double standards would have a detrimental affect on campus race relations.²⁵⁶

In the charged atmosphere of a campus, speech codes, which treat the symptoms and not the causes of the racist disease, will exacerbate racial tensions in several ways. First, hate speech regulations will discourage debate on controversial topics, such as affirmative action. Some will view speech codes as rendering certain ideas "beyond the pale." Dissenting views will be forced underground, only to eventually explode in an ugly or perhaps violent manner. Second, to the extent that speech codes are enforced only against members of the dominant group, speech codes will be viewed as biased and unfair entitlements based on race. Such paternalistic regulations will not disabuse white students of any notions of black racial inferiority. Third, even if speech codes are uniformly administered, they will reinforce notions of difference and contribute to an atmosphere characterized by mutual recrimi-

249. A popular T-shirt motto is "It's a black thing-you just don't understand." Eastman, *supra* note 222, at A22.

250. SCHLESINGER, *supra* note 239, at 141.

251. SCHLESINGER, *supra* note 239, at 140.

252. "Whites are now less willing to endure unfairness to themselves in order to grant special entitlements to blacks. . . ." STEELE, *supra* note 93, at 122.

253. STEELE, *supra* note 93, at 122.

254. D'SOUZA, *supra* note 1, at 136-40. SOWELL, *supra* note 140, at 155-69 (discussing tactics used by college administrations to combat "hate speech").

255. D'SOUZA, *supra* note 1, at 134-35.

256. See SOWELL, *supra* note 140, at 135 (discussing Professor Clyde Summers' 1969 analysis of the probable impact that preferential admission policies at law schools would have on black and white students and race relations in general).

nation. Thus, without investigating the causes of racial incidents on campus, speech code enthusiasts, such as Matsuda and Lawrence, suggest an approach that will not only fail to solve the problem, but will also undermine the American commitment to freedom of speech.

In a more general sense, support for campus speech codes can be viewed as a part of the current emphasis on ethnicity and group identity. The contemporary cult of ethnicity that is so popular at American universities embraces ethnicity as the defining experience for most Americans. Ethnic enthusiasts claim that ethnic ties are permanent and that the maintenance of group identity is more important than the development of individual identity. Ethnic spokesmen argue that "division into ethnic communities establishes the basic structure of American society and the basic meaning of American history."²⁵⁷ These advocates argue that the university, through "multicultural studies" and ethnic theme houses, is the place to reaffirm these group ties.

Speech code proponents agree that the United States is dominated by competing groups²⁵⁸ and that the purpose of the university is to promote group identity.²⁵⁹ Indeed, they contend that speech codes will facilitate the maintenance of group ties.²⁶⁰ However, not only is this conception inconsistent with American tradition²⁶¹ and antithetical to the nature and purpose of the university, but it may also contribute to the loosening of the brittle bonds of national identity that hold this country together.

Contrary to the assertions of the contemporary spokesmen of ethnicity and group identity, the United States has since its inception been a multicultural nation. The solution to the inherent fragility of a multiethnic society²⁶² has been the creation of a new

257. SCHLESINGER, *supra* note 239, at 16. "The ethnic ideology inculcates the illusion that membership in one or another ethnic group is the basic American experience." SCHLESINGER, *supra* note 239, at 112.

258. *See supra* note 140 and accompanying text. So hegemonic is group identity, that the "group's consciousness [is] the victim's consciousness." Matsuda, *supra* note 1, at 2373.

259. Matsuda, *supra* note 1, at 2362.

260. By enforcing civility on campus, speech codes will ensure that students are no longer "punished" for group identification. Matsuda, *supra* note 1, at 2370-73.

261. Schlesinger states that the "ethnic interpretation of American history . . . reverses the historic theory of America as one people — the theory that has thus far managed to keep American society whole." SCHLESINGER, *supra* note 239, at 16.

262. Schlesinger notes the significance of the success of the American experiment: "History is littered with the wreck of states that tried to combine diverse ethnic or linguistic or religious groups within a single sovereignty. Today's headlines tell of imminent crisis or impending dissolution of one or another multiethnic polity . . ." SCHLESINGER, *supra* note 239, at 129.

national identity²⁶³ premised on a willingness to shed the foreign skin and embrace a new civic culture.²⁶⁴ As such, America is a transformative nation. The holy trilogy of the American ethic — study hard, work hard, get ahead — has been and remains an important force for assimilation.²⁶⁵ Moreover, the American Creed envisages a nation of *individuals* pursuing *individual* achievement, not a nation composed of separate ethnic communities.²⁶⁶ The Constitution enshrines individual, not group rights. Ethnic identity and the ties to the “old country” are to be promoted in the home, not the universities. The purpose of schools and universities in the American system is not to maintain inviolable cultures, but to instill a sense of common purpose in the students, while encouraging individual self-realization and achievement. Indeed, one commentator notes that “public schools have been the great instrument of assimilation and the great means of forming an American identity.”²⁶⁷ To enable universities to become balkanized into fractious groups could undermine a commitment to the American experiment by deemphasizing the individual and democratic values on which the Republic is based. Campus speech codes exacerbate this problem by encouraging students to view each other, not as individuals, but as mere representatives of monolithic, competing groups.

CONCLUSION

Campus speech codes cannot be upheld under traditional Constitutional doctrine and are inconsistent with First Amendment principles. Speech codes will not end campus racism. Rather, they will only exacerbate tensions and contribute to a polarization of the

263. “He is an American, leaving behind him all his ancient prejudices . . . The American is a new man, who acts upon new principles . . . Here *individuals* of all nations are melted into a new race of men.” HECTOR ST. JOHN DE CREVECOEUR, *LETTERS FROM AN AMERICAN FARMER* (1782) (emphasis added).

264. “[T]he mechanism for translating diversity into unity has been the American Creed, the civic culture — the very assimilating, unifying culture that is today challenged, and not seldom rejected, by the ideologues of ethnicity.” SCHLESINGER, *supra* note 233, at 131.

265. There is some troubling evidence that black students dismiss this ethic as “being white.” However, some black Americans embrace the idea of the United States as a transformative nation. See Tim W. Ferguson, *Getting Down to Business After the Verdict*, *WALL ST. J.*, April 13, 1993, at A15.

266. Matsuda suggests that individual achievement (by minorities) is meaningless because “when the group is subordinated, even the lucky counterexample feels the downward tug.” Matsuda, *supra* note 1, at 2362. However, some academics contend that the emphasis on group identity may be detrimental to the success of black Americans. CARTER, *supra* note 242, at 238-39, 102-23 (noting that the emphasis on group solidarity often silences dissenting views within the group); STEELE, *supra* note 93, at 159-63 (noting that “[w]e are still spilling scarce energy into the pursuit of collective esteem at the expense of individual development. . . . [O]pportunities for development can finally be exploited only by individuals”).

267. SCHLESINGER, *supra* note 239, at 112.

campus. Contrary to the assertion of hate speech proponents, speech codes will not enforce "civility." Rather, they will discourage academic discourse on controversial topics and inhibit intellectual inquiry. They will be interpreted as part of the pall of orthodoxy that has settled over the American academy. Offensive ideas and discriminatory beliefs will be forced underground, where they will fester and eventually explode in an uglier and, perhaps violent, form.

Most important, hate speech regulation will not disabuse whites or blacks of nagging doubts about racial inferiority. Indeed, viewed as paternalistic ordinances, they may only reaffirm such dangerous and erroneous notions. Minority students should not be forced to hide behind regulations. Rather, they should be encouraged to meet derogatory expressions with forceful, thoughtful arguments. Such action will do much to imbue them with a sense of empowerment. As Dr. Martin Luther King said, "The only way to beat the man ahead of you is to run faster."