Stopping Hate Without Stifling Speech: Re-Examining the Merits of Hate Speech Codes on University Campuses

Catherine B. Johnson

Copyright ©1999 by the authors. Fordham Urban Law Journal is produced by The Berkeley Electronic Press (bepress). http://ir.lawnet.fordham.edu/ulj
Stopping Hate Without Stifling Speech: 
Re-Examining the Merits of Hate Speech 
Codes on University Campuses

Catherine B. Johnson

Abstract

This Note explores legislative attempts to help reduce incidents of hate speech on university campuses. It begins by analyzing the rise in hate speech codes at public universities and examining two U.S. Supreme Court decisions in R.A.V. v. City of St. Paul and Wisconsin v. Mitchell. The author argues that a hate speech code that implements forward-looking, long-term education objective would work towards stopping hate on campus without violating students’ First Amendment rights. This Note reaches the conclusion that a narrowly drawn hate speech code based on recognized First Amendment exceptions, implemented along with with education initiatives, could facilitate the end to hate speech without curtailing free speech on university campuses.
STOPPING HATE WITHOUT STIFLING SPEECH: RE-EXAMINING THE MERITS OF HATE SPEECH CODES ON UNIVERSITY CAMPUSES

Catherine B. Johnson*

Judge for yourself. Go to an American college campus and you will see and hear hate speech. It might be a racial or sexual insult or epithet, a threat, a demeaning joke, or degrading stereotype. It might be posted on a dormitory bulletin board or scratched into a bathroom stall or overheard in the hall. You might read it in the campus newspaper or access it through a computer terminal or have it mysteriously “spammed” onto your screen. Students, professors, staff, administrators: they use hate speech, sometimes intentionally, sometimes unwittingly, and there is no safe haven.1

INTRODUCTION

Anyone who has ever been the victim of harsh, biting, insidious speech about his or her race, religion or sexual orientation knows that, although “sticks and stones may break your bones,” names may hurt too. The sting is arguably even worse, as it permeates deep within the self and often remains there indefinitely, re-playing in the mind over and over until it becomes truth. Wounds of this kind leave a scar with which wounds from a stick or a stone could never compare.

On college campuses across the country, these verbal assaults are becoming all too frequent, taking the form of racist, sexist, harassing speech directed at certain groups in the educational community. While scholars, lawyers and administrators debate the merits of different approaches to deal with hate speech, student-victims shrink further into silence and isolation, unable to participate fully in the educational process.

* J.D. Candidate, Fordham University School of Law, 2001; B.A., English and Communications, magna cum laude, Boston College, 1998. I would like to thank Professor Abner Greene for his valuable insights and Professor Donald Fishman at Boston College who first sparked my interest in First Amendment law. Special thanks to Bob Schumacher, who encouraged and supported me in this endeavor. Finally, I also would like to thank my family, who make everything I do possible.

In response to the rising incidents of hate speech on college campuses in the late 1980s and early 1990s, some public universities attempted to enact speech codes, which the courts quickly dismissed on First Amendment grounds. However, the incidents of hate and harassment on campuses have not subsided and the resulting harm to the victims has not disappeared. There is a need to re-evaluate this situation, without viewing it as an all or nothing proposition—either free speech or equality. There is room for compromise at the center of the storm. In the face of the courts' earlier dismissals of speech codes, schools have lapsed into complete inaction. By doing so, these institutions are failing in their responsibility to provide an equal educational opportunity for their students.

This Note argues that although public universities should be lauded for their initial attempts to regulate hate through speech codes, such attempts, as drafted, were broad and overreaching. Part I analyzes the rise in hate speech codes at public universities as a response to tensions on campus and how courts ultimately struck them down as unconstitutional. This part will also examine two relevant U.S. Supreme Court decisions relating to harassing and discriminatory expressions and conduct, R.A.V. v. City of St. Paul and Wisconsin v. Mitchell. Part II presents the essential conflict between the ideals of ensuring academic diversity and equality, and the ideal of encouraging free and unfettered discourse in the academic setting. Part III asserts that current U.S. Supreme Court decisions provide a narrow framework within which universities could, and should, work to punish and deter the most egregious one-on-one instances of hate and harassment without facing serious constitutional challenges.

This Note concludes that a combination of these methods can act as a guideline for drafting a narrow hate speech code based on recognized First Amendment exceptions. Such a code, implemented along with educational initiatives, could work to stop hate without stifling free speech on university campuses.

---

2. This Note focuses on public universities because they are constitutionally bound by the First Amendment. A private university may agree to abide by these principles, but is not required to do so.
I. The Rise and Fall of Universities’ Initial Attempts to Maintain Hate Speech Codes

In the late 1980s and early 1990s, national media attention began to focus on the increase in racial, ethnic, religious, sexist and homophobic incidents on college campuses across the United States. As the social climate on campuses grew increasingly hostile, school administrators ultimately sought solutions in the form of hate speech or discriminatory harassment codes. Legal battles followed, demonstrating the judicial commitment to protecting free speech.

A. Campus Incidents Signal a Rise in Hate

Events at two schools, the University of Michigan at Ann Arbor (“Michigan”) and the University of Wisconsin (“Wisconsin”) are indicative of the rise in incidents of racial and ethnic unrest that

5. See, e.g., Howard J. Ehrlich, Ph.D., Prejudice and Ethnoviolence on Campus, 6 Higher Educ. Extension Service Rev. (visited Jan. 25, 1999) <http://www.review.org/issues/vol6no2.html>. “Ethnoviolence” is defined as “acts motivated by prejudice . . . intended to cause physical or psychological harm to persons because of their actual or perceived membership in a group.” Id. at ¶ 14. The study reports that:

   In 1987, 42 campuses had ethnoviolent incidents that drew substantial media attention. This compares to 103 colleges in 1988, and 113 in 1989 . . . . In the 1992-93 academic year, a U.S. News and World Report (April 19, 1993) survey of 550 student newspaper editors revealed that 71 percent of the colleges (85 percent for institutions with enrollments over 10,000) had at least one reported ethnoviolent incident during the school year . . . these estimates are understatements.

Id. ¶ 7.

6. See, e.g., id. at tbl. 1 (indicating illustrative incidents of ethnoviolence from 1986-1994). Some examples cited in the report include: white members of the wrestling team at the University of Minnesota at Morris drove two black teammates to a roadside location where other team members wearing Ku Klux Klan hoods were waiting by a burning cross; Pi Kappa Alpha fraternity at Texas Technological University staged an event billed as a “party in the projects,” where members at the party wore blackface, Afro wigs, and demeaning costumes; swastikas were drawn on the door of a room occupied by two Jewish freshmen at the University of California, Los Angeles; the University of Central Florida’s school newspaper, along with 24 other university newspapers, published an “advertisement” implying that there was “no convincing proof that even one individual was gassed in a German program of genocide;” groups of students at the University of Alaska, Fairbanks, appeared on campus wearing sweatshirts with the motto “Death Before Dishonor,” which was printed above a logo which read “Anti-Fag Society.” See id.; see also Charles R. Lawrence, III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431 (1990) (chronicling incidents at campuses across the country ranging from racist leaflets, to “Death Nigger” inscriptions, to bomb threats at a Jewish Student Union).

7. See discussion infra Part I.C.
began in the latter half of the 1980s and continued into the early part of the 1990s.8

1. The University of Michigan

On January 27, 1987, flyers were anonymously distributed on Michigan's Ann Arbor campus, declaring "open season" on blacks.9 On the flier, blacks were referred to as "saucer lips, porch monkeys, and jigaboos."10 Shortly thereafter, on February 4, 1987, a student disc jockey for the campus radio station allowed racist jokes to be told on-air.11 In response to these incidents, students at the University staged a demonstration to voice their opposition. The rally, however, was interrupted by the display of a Ku Klux Klan uniform dangling out of a nearby dormitory window.12

The tension continued to mount in Ann Arbor when a computer file containing racist jokes was discovered,13 as was as a second racist flier proclaiming "Niggers get off campus" and "Darkies don't belong in classrooms—they belong hanging from trees."14 Following this series of events, vandals repeatedly damaged shanties, which had been constructed in an open campus area to protest South African Apartheid.15

2. The University of Wisconsin

In May 1987, Phi Gamma Delta fraternity at Wisconsin staged a "Fiji Island" party in which a large caricature of a black Fiji islander with a bone in his nose was erected and paraded around the party by members dressed in tropical garb.16 Additionally, the next fall, this fraternity crashed a closed party held by the predominantly Jewish fraternity Zeta Beta Tau.17 A fight ensued as members of Phi Gamma Delta began making racial and ethnic slurs.18

8. The Note's focus on these schools is due in large part to the subsequent litigation of these cases. There are many more examples illustrative of the rise in campus unrest, which are not discussed here.
10. See id. at 854 ("[I]n the last three years incidents of racism and racial harassment appeared to become increasingly frequent at the University.").
11. See id.
12. See id.
13. See SHIELL, supra note 1, at 18.
15. See SHIELL, supra note 1, at 18.
17. See SHIELL, supra note 1, at 22.
18. See id.
The incidents did not end there however. In the fall of 1988, the same Zeta Beta Tau fraternity that had been victimized the year before, now held a "slave auction" fundraiser at which racial parodies of black entertainers were performed by pledges.19

**B. Schools Counter With Codes**

Following these events, students, faculty, higher education officials and civil rights activists besieged school administrators at Michigan and Wisconsin, criticizing their failure to maintain a tolerant environment for all students.20 Petitions were circulated, legal action was proposed21 and open forum meetings were called.22 Each of these actions increased the universities' need to get involved.

1. **The Michigan Solution**

The action was to come in the form of racial harassment policies, the first and most prominent one at Michigan.23 At a January 15, 1988 meeting of the Board of Regents (the "Board"), the acting president of the University proposed a policy that would enable the

---

19. See id. ("In one of the skits, pledges in blackface and 'afro' wigs lip-synched Michael Jackson songs. In another skit, a pledge impersonated Oprah Winfrey while two others taunted him sexually.").

20. See, e.g., Doe v. University of Michigan, 721 F. Supp. 852, 854 (E.D. Mich. 1989). On March 5, 1987, the Chairperson of the State House of Representatives Appropriations Subcommittee on Higher Education staged a public hearing at the Ann Arbor campus to address the problem of racism at the school. See id. In front of an audience of 600, 48 speakers expressed their criticism of the University's response to the outbreak of incidents, basically chastising the school for ignoring the plight of minority students. See id. The Chairperson ended the meeting by stating, "Michigan legislators will not tolerate racism on the campus of a state institution.... Some things have to change....Holding up funds as a club may be part of our response, but that will predicate on how the university responds." Id.

21. See id. at 854. The United Coalition Against Racism (UCAR), a campus anti-discrimination group, stated that it intended to file a class action civil rights suit against the University for failure to maintain a "non-violent atmosphere." See id.

22. See id. (noting that, in addition to the public hearing with the Subcommittee on Higher Education, the University also met with civil rights leaders in March of 1987 to discuss how they may remedy the racial problems on campus).

23. The policy drafted by the University of Michigan is certainly not the first or only one of its kind, but again is chosen as the focus because of its subsequent litigation. See UWM Post v. Board of Regents, 774 F. Supp. 1163, 1164 n.1 (E.D. Wis. 1991) ("At least fifteen colleges and universities, including nine state institutions, have adopted or are considering restrictions on discriminatory hate speech directed at members of historically disadvantaged groups," (citing Wilson, Colleges' Anti-Harassment Policies Bring Controversy Over Free Speech Issues, CHRONICLE OF HIGHER EDUC., Oct. 4, 1989, at A1)).
University "to take the position that it was willing to do something about this issue."\(^{24}\)

At the close of the meeting, the acting president appointed the Director of the University Office of Affirmative Action to draft the Michigan hate speech policy (the "Michigan Policy" or "Policy").\(^{25}\) After consulting with the Office of University Counsel and the Law School professors, fielding student, staff and faculty comments, and working through twelve drafts, the Board unanimously adopted the policy in April of 1988.\(^{26}\)

The Michigan Policy delineated three tiers of speech that set the degree of regulation according to where the conduct took place.\(^{27}\) The first tier described forms of speech that were exempt from the policy, such as school-sponsored publications.\(^{28}\) The second tier consisted of "public parts" and could only be regulated in instances of physical violence or destruction of property.\(^{29}\) The third tier included "educational and academic centers, such as classroom buildings, libraries, research laboratories, recreation and study centers" and imposed discipline for verbal or physical behavior or threats to an individual based on their "race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status," or for sexual advances.\(^{30}\)

\(^{24}\) Doe, 721 F. Supp. at 855. The president also noted that such a policy could implicate serious First Amendment concerns, but argued that

\[
\text{[J]ust as an individual cannot shout "Fire!" in a crowded theatre and then claim immunity from prosecution for causing a riot on the basis of exercising his rights of free speech, so a great many of American universities have taken the position that students at a university cannot by speaking or writing discriminatory remarks which seriously offend many individuals beyond the immediate victim, and which, therefore detract from the necessary educational climate of a campus, claim immunity from a campus disciplinary proceeding.}
\]

\[\text{Id.}\]

\(^{25}\) See id.

\(^{26}\) See id. at 856. The policy became effective May 31, 1988.

\(^{27}\) See id.

\(^{28}\) See SHIELL, supra note 1, at 19.

\(^{29}\) See id.

\(^{30}\) Doe, 721 F. Supp. at 856. The policy states,

\[
1. \text{Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that}
\]

\[
a. \text{Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or}
\]
Pursuant to the Michigan Policy, a system of hearing procedures and varying sanctions was instituted. The policy was followed the next fall by an interpretive guide ("the Guide") issued by the University's Office of Affirmative Action entitled "What Students Should Know About Discrimination and Discriminatory Harassment by Students in the University Environment," which purported to be the authoritative interpretation of the Michigan Policy.

2. The Wisconsin Solution

In response to incidents of discriminatory harassment, the University of Wisconsin's twenty-six campuses adopted a plan known as "Design for Diversity" ("the Wisconsin Plan") in May of 1988. The purpose of the Wisconsin Plan was to "increase minority representation, multi-cultural understanding and greater diversity." The Plan led to the revision of the student conduct code that would implement a university-wide rule regarding racial and discriminatory conduct. In June of 1989, the Board of Regents adopted the rule (the "UW Rule" or "Rule"), which stated that the University

- Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
- Creates an intimidating, hostile or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.

2. Sexual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual on the basis of sex or sexual orientation where such behavior:
   - Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
   - Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment participation in University sponsored extra-curricular activities or personal safety; or
   - Creates an intimidating, hostile or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.

*Id.* On August 22, 1989, the University, without notifying the court or the defendant, withdrew section 1(c) of the policy for further clarification. See *id.* at 858.

31. *See id.* at 857 (explaining the hearing process and the potential sanctions that may be imposed, including formal reprimand, community service, class attendance, restitution, loss of university housing, suspension from courses or activities, or expulsion).

32. *See id.* at 857-58. In the winter of 1989, the University withdrew the Guide because the "information in it was not accurate." *Id.*


34. *Id.*

35. *See id.* at 1165.
may discipline students for comments directed at other students that are intentionally meant to demean the individual based on his ethnicity, religion or sexual orientation, for example, and which create a hostile learning environment. 36

36. Id. at 1166. The UW Rule proscribed these situations,

2) (a) For racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets or other expressive behavior or physical conduct intentionally:

1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and

2. Create an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.

(b) Whether the intent required under par.(a) is present shall be determined by consideration of all relevant circumstances.

(c) In order to illustrate the types of conduct which this subsection is designed to cover, the following examples are set forth. These examples are not meant to illustrate the only situations or types of conduct intended to be covered.

1. A student would be in violation if:

    (a) He or she intentionally made demeaning remarks to an individual based on that person's ethnicity, such as name calling, racial slurs, or "jokes"; and

    (b) His or her purpose in uttering the remarks was to make the educational environment hostile for the person to whom the demeaning remark was addressed.

2. A student would be in violation if:

    (a) He or she intentionally placed visual or written material demeaning the race or sex of an individual in that person's university living quarters or work area; and

    (b) His or her purpose was to make the educational environment hostile for the person in whose quarters or work area the material was placed.

3. A student would be in violation if he or she seriously damaged or destroyed private property or any member of the university community or guest because of that person's race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age.

4. A student would not be in violation if, during a class discussion, he or she expressed a derogatory opinion concerning a racial or ethnic group. There is no violation, since the student's remark was addressed to the class as a whole, not to a specific individual. Moreover, on the facts as stated, there seems no evidence that the student's purpose was to create a hostile environment.

Thus, in order to be regulated under the UW Rule, a comment, epithet or other expressive behavior must:

(1) Be racist or discriminatory;

(2) Be directed at an individual;

(3) Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual addressed; and
Wisconsin also created a brochure that was made available to students and faculty explaining the UW Rule and the possible scope of its application. By the time it was challenged in court, it had been enforced against at least nine students with various sanctions including probation coupled with community service, psychological counseling and a seven-month school suspension.

C. Speech Regulations Fail Under Constitutional Challenges

It was not long before the universities' efforts to regulate hateful expression were challenged in court, pitting the idealistic goals of fostering equality in the academic environment against the First Amendment principles of free speech.

1. Doe v. University of Michigan

The Michigan Policy was challenged by a psychology graduate student who argued that his right to discuss certain biological theories positing differences between the sexes and races was impermis-

---

(4) Create an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.

Id. at 1165-66.

37. See id. at 1166-67. The brochure provided illustrations of instances in which the UW Rule would or would not apply. It provided an example that in a classroom situation in which a male student says that women are naturally better equipped to be mothers, not executives, that student would not be in violation of the policy. See id. This is because the comment was made in an academic setting and the UW Rule only sets out ways in which a student can be disciplined in non-academic situations. However, a student living in the university residence hall who continually calls a black student a "nigger" possibly could be sanctioned under the terms of the code. See id. This is true because the comment was made in a non-academic setting, was directed at a specific individual, demeans that individuals race, and potentially creates an intimidating and hostile educational environment for the victim.

38. See id. at 1167. The policy had been in effect for approximately two years at this point.

39. See id. In response to statements made by a young woman in the school newspaper about the athletic department at the University of Wisconsin at Eau Claire, plaintiff John Doe yelled epithets at the woman, including "fucking bitch" and "fucking cunt." Id. He was placed on probation for his behavior and required to perform community service at a shelter for abused women. See id.

40. See id. at 1168 (recounting an episode in which a male student at the River Falls campus yelled "you've got nice tits" to a female student in public and was later placed on probation, asked to apologize to the female and refrain from further contact with her, and required to obtain psychological counseling).

41. See id. at 1167-68 (describing the issuance of a seven month suspension to a student who called one residence hall staff member a "piece of shit nigger" and another a "South American immigrant," as well as obstructing a university official after the confrontation by misidentifying himself).

sibly chilled as a result of the policy. He argued that the Michigan Policy was unconstitutional on the grounds of vagueness and overbreadth and should be enjoined. After finding that he had standing to challenge the policy and that the expression prohibited by the code fell into a protected category of speech, the district court found the Michigan Policy to be in violation of the First Amendment. It held that "the fundamental infirmity of the Policy" was that it prohibited a "substantial amount of constitutionally protected conduct." Therefore, the Policy was fatally overbroad on its face and as applied in the previous year.

The court also stated that the terms were impermissibly vague, and to enforce the Policy would be a violation of the due process clause. The court looked at the plain meaning of the language and found that "it was simply impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct."

43. See id. at 858.
44. See id.
45. See id. at 859-60 (arguing that an individual has standing to challenge a statute's constitutionality if he can show a "realistic and credible threat of enforcement," which was evidenced here by the legislative history, the Guide and experiences shown through a year of enforcement).
46. See id. at 862-63 (presenting the limitations permissible on pure speech, such as speech constituting "fighting words," speech intended to incite imminent lawless action, speech which is "vulgar" or "obscene" and libelous speech).
47. See id. at 868. "While the court is sympathetic to the University's obligation to ensure equal educational opportunities for all of its students, such efforts must not be at the expense of free speech." Id. The court, in condemning the University for regulating speech because of its offensive message stated, "If there is any star fixed in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion . . . . Nor could simply the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people." Id. at 863.
48. Id. at 864.
49. See id.
50. See id. at 866 ("A statute is unconstitutionally vague 'when men of common intelligence must necessarily guess at its meaning'. . . . A statute must give adequate warning as to the conduct which is to be prohibited and must set out explicit standards for those who apply it.").
51. Id. at 867. Even the University's counsel found it difficult to clearly delineate protected from punishable expression: "During oral argument, the Court asked the University's counsel how he would distinguish between speech which was merely offensive, which he conceded was protected, and speech which 'stigmatizes or victimizes' . . . [c]ounsel replied 'very carefully.'" Id.
2. UWM Post v. Board of Regents

The UW Rule, though clearer and narrower in scope than the Michigan Policy and accompanied by a more sophisticated guide, was nonetheless challenged in court less than one year after its adoption. The plaintiffs, the University of Wisconsin at Milwaukee ("UWM") student newspaper, UWM Post, Inc., and an anonymous student filed suit against the Board of Regents, challenging the constitutionality of the plan.

The University presented four main arguments in support of the code: (1) it only regulated speech which fell within the unprotected "fighting words" category; (2) even if not technically within the fighting words doctrine, the balancing test used by the court in Chaplinsky rendered the speech unprotected; (3) its language paralleled Title VII law; and (4) its reach may be limited by applying a narrow construction, even if as written the rule may be unconstitutional.

The federal court rejected each of these arguments, countering point by point: (1) the fighting words doctrine had been narrowed over the years and the UW Rule did not meet the evolved criteria; (2) the balancing test did not support the University's case;
Title VII law does not apply and is therefore not a suitable parallel;\textsuperscript{61} and (4) even the limiting construction is overbroad.\textsuperscript{62} In addition, the court found the code to be unduly vague as to the intent required.\textsuperscript{63} As a result of the above findings, plaintiffs' motion for summary judgment was granted, and the court ordered that Wisconsin be permanently enjoined from enforcing the Rule.\textsuperscript{64}

The decisions in the Michigan and Wisconsin cases demonstrate the courts' deep commitment to the principles of free speech, especially in the university context.\textsuperscript{65} "These [two] cases served notice to the nation's campuses that any speech restrictions (whether in the form of an official speech code or not) that they intended to enforce had better be very carefully drafted and very carefully justified."\textsuperscript{66} Timothy Shiel, author of \textit{Campus Hate Speech on Trial}, posits that a campus speech code would have to meet narrow re-

\textsuperscript{60} See id. at 1173-77. In reference to the balancing test, in which the value of speech is weighed against the costs of its restriction, the court concluded that this approach may only be employed to determine constitutionality if the speech regulation is content-neutral, which the Wisconsin Plan was not. \textit{See id.} (citing American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985)).

\textsuperscript{61} See id. at 1177. The Board's argument that the UW Rule parallels Title VII law, which requires that an employer take corrective action when it discovers "pervasive illegal harassment," was rejected by the court for three reasons: (1) Title VII law addresses the employment context and not the educational; (2) Title VII law is based in agency principles and students cannot be considered agents of the school; and (3) a statute, such as Title VII, cannot supersede the First Amendment requirements. \textit{See id.}

\textsuperscript{62} See id. at 1177-78 ("This [c]ourt, nonetheless, refuses to adopt the limiting construction offered by the Board of Regents since that construction fails to solve the UW Rule's overbreadth difficulties.").

\textsuperscript{63} See id. at 1178-81. "[T]he rule is ambiguous since it fails to make clear whether the speaker must actually create a hostile educational environment or if he must merely intend to do so." \textit{Id.} at 1179.

\textsuperscript{64} See id. at 1181 (recognizing that "[t]he problems of bigotry and discrimination sought to be addressed here are real and truly corrosive of the educational environment," but that "freedom of speech is almost absolute in our land").

\textsuperscript{65} See, e.g., Doe v. University of Michigan, 721 F. Supp. 852, 863 (E.D. Mich. 1989) ("These principles acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission.").

\textsuperscript{66} SHIELL, \textit{supra} note 1, at 82.
quirements in order to be upheld in a federal court, or universities would have to hope for a reversal by a higher court.

In 1992, the U.S. Supreme Court may have thwarted those hopes when it announced its ruling on a St. Paul, Minnesota hate crimes ordinance, which punished offenders for bias-motivated crimes. The Court found the ordinance unconstitutional, sending a strong signal that content-based regulations must withstand strict scrutiny review. In addition, the Court made it clear that restrictions on speech based on disapproval with the speaker's message are at odds with the fundamental tenets of the Constitution. Though not directly about hate speech codes in the university setting, the decision in *R.A.V. v. City of St. Paul* remains a stumbling block for attempts at hate speech regulation.

3. *R.A.V. v. City of St. Paul*

In the early hours of June 21, 1990 a group of teenagers, including the petitioner, allegedly constructed a cross from broken chair legs and set it ablaze inside the fenced yard of a black family. The city charged the then juvenile petitioner, R.A.V., under the St. Paul Bias-Motivated Crime Ordinance, which provides:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

The trial court granted the petitioner's motion to dismiss on the ground that the ordinance was "substantially overbroad and imper-

---

67. See id. Shiell argues that a code must (1) not regulate protected speech on its face or punish protected speech in its application, (2) be sufficiently clear to provide a “bright line” for students to guide their conduct by, (3) be content-neutral, and (4) promote a compelling state interest that cannot be adequately furthered by other means.

Id.


69. See id. at 382.

70. See id.

71. Id.

72. See id. at 379.


74. Id.
missibly content based and therefore facially invalid under the First Amendment.”

The Minnesota Supreme Court reversed, rejecting the overbreadth claim because the phrase “arouses anger, alarm or resentment in others” limits the statute to reach only conduct constituting “fighting words,” which do not receive First Amendment protection.

The U.S. Supreme Court granted certiorari, noting that it was bound by the Minnesota Supreme Court’s interpretation of the statute to reach only conduct amounting to “fighting words.” Nevertheless, the Court unanimously reversed, holding that the “ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.”

Although all nine justices agreed that the statute was unconstitutional, they sharply disagreed in their reasoning. Justice Scalia wrote the majority opinion for the Court, with Chief Justice Rehnquist and Justices Kennedy, Souter and Thomas joining. Scalia began the opinion by outlining the constitutional principles that support his views, namely that the First Amendment generally prevents the government from proscribing speech or expressive conduct because of disapproval with its content. There are a few limited exceptions to this rule in categories such as obscenity, defamation and fighting words. However, Justice Scalia argued that even those categories are not “entirely invisible to the Constitution.” For example, the government may prohibit libel, but it may not prohibit libel critical of the government because it is im-

75. R.A.V., 505 U.S. at 380.
76. See id. at 380-81 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942), which defines “fighting words” as “conduct that itself inflicts injury or tends to incite immediate violence”). In regard to petitioner’s claim that the statute was impermissibly content based, the Court contended that it was a “narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order,” and therefore, withstood strict scrutiny review. Id. at 381.
77. See id.
78. Id. The Court explained that the rationale for prohibitions on content-based discrimination is that the function of the Government is not to drive specific ideas from the marketplace because of the views expressed therein. See id. at 387.
79. See id. at 378.
80. See id.
81. See id. at 382.
82. See id. at 383.
83. Id.
permissible content-based regulation.\textsuperscript{84} Similarly, the Court has upheld reasonable time, place and manner restrictions,\textsuperscript{85} provided they were justified without reference to the content of the speech.\textsuperscript{86}

Additionally, Scalia disagreed that fighting words are undeserving of protection in all respects.\textsuperscript{87} Instead, he argued that the ability to proscribe certain speech is based on its non-content, not its content element.\textsuperscript{88}

Fighting words are thus analogous to a noisy sound truck: Each is, as Justice Frankfurter recognized, “a mode of speech,” both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility — or favoritism — towards the underlying message expressed.\textsuperscript{89}

While Scalia contended that the prohibition against content restrictions “is not absolute,”\textsuperscript{90} he emphasized that such restrictions can only be valid if “there is no realistic possibility that official suppression of ideas is afoot.”\textsuperscript{91}

In applying these principles to the facts in \textit{R.A.V.}, Scalia found the St. Paul ordinance to be facially unconstitutional. He explained that although the Minnesota Supreme Court had interpreted it to reach only fighting words, the ordinance applied only to those fighting words based on “race, color, creed, religion, or gender.”\textsuperscript{92} Other fighting words, such as those directed at a per-

\textsuperscript{84} See id. at 384.
\textsuperscript{85} See, e.g., Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (“A State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content.”); see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976) (stating that time, place, and manner regulations have been approved when “they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information”).
\textsuperscript{86} See \textit{R.A.V.}, 505 U.S. at 386.
\textsuperscript{87} See id. at 385 (“We have not said that they constitute ‘no part of the expression of ideas,’ but only that they constitute ‘no essential part of any exposition of ideas.’” (quoting \textit{Chaplinsky}, 315 U.S. at 572) (emphasis omitted)).
\textsuperscript{88} See id. at 386 (“In other words, the exclusion of ‘fighting words’ from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a ‘nonspeech’ element of communication.”).
\textsuperscript{89} Id. (quoting Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J. concurring)).
\textsuperscript{90} Id. at 387.
\textsuperscript{91} Id. at 390.
\textsuperscript{92} Id. at 391.
son's "political affiliation, union membership, or homosexuality," were permitted, no matter how vicious or insightful.\textsuperscript{93} The "list" was therefore underinclusive, selectively excluding from First Amendment protection those specifically delineated fighting words, while seemingly providing protection for others.\textsuperscript{94} This approach, Scalia argued, went beyond content-based discrimination to actual viewpoint discrimination.\textsuperscript{95} He concluded by stating, "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules."\textsuperscript{96}

The city's argument that it had a compelling government interest in protecting against crimes motivated by bias, discrimination and intolerance was dismissed by the majority as well.\textsuperscript{97} The city did not show that its method, the bias-motivated ordinance, was the least restrictive means available to achieve its desired end.\textsuperscript{98} The Court held that, despite the legitimate interest of the city in protecting its citizens against such intolerance, less restrictive alternatives were available to address the city's interest.\textsuperscript{99} Scalia concluded by stating that the only interest served by the ordinance was to display the "special hostility" of the City Council "toward the particular biases . . . singled out."\textsuperscript{100}

Despite the force of Scalia's argument, and the 9-0 opinion of the Court, the decision in \textit{R.A.V.} is far from clear. The concurring opinions demonstrate the range of rationales and beliefs each justice holds regarding regulation of bias-motivated expression. Although all agreed that the ordinance was overbroad, each

\begin{thebibliography}{99}
\bibitem{93} Id.
\bibitem{94} See id.
\bibitem{95} See id. Justice Scalia stated:
\begin{quote}
[F]ighting words' that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable \textit{ad libitum} in the placards of those arguing \textit{in favor} of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents.
\end{quote}
Id.
\bibitem{96} Id. at 392.
\bibitem{97} See id. at 395 (explaining the city's claim that it had a compelling interest in "ensur[ing] the basic human rights of members of groups that have historically been subjected to discrimination").
\bibitem{98} See id. at 396 ("An ordinance not limited to the favored topics . . . would have precisely the same beneficial effect.").
\bibitem{99} See id. ("Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.").
\bibitem{100} Id. at 396.
\end{thebibliography}
concurring opinion took sharp turns in their interpretation of First Amendment law, thereby demonstrating the complexity of the jurisprudence in this area and the possibility for attempts at regulation.

Justice White agreed with the majority that the St. Paul ordinance was "fatally overbroad" and therefore unconstitutional.\textsuperscript{101} He strongly disagreed, however, with all other points of the decision. In a scathing criticism, he stated that the majority's reasoning was "transparently wrong" and had "cast[] aside long established First Amendment doctrine."\textsuperscript{102} White found it "inexplicable" why the Court chose this case to "rewrite First Amendment law"\textsuperscript{103} by creating its new "underinclusiveness" doctrine that would require a city to criminalize \textit{all} fighting words if it wants to criminalize \textit{some} fighting words.\textsuperscript{104}

White also argued that even if the ordinance restricted protected speech, it was narrowly tailored to serve an important government interest, and therefore withstood strict scrutiny review.\textsuperscript{105} However, the majority, in a "second break with precedent"\textsuperscript{106} held that such an ordinance "could never pass Constitutional muster if the object of that legislation could be accomplished by banning a wider category of speech."\textsuperscript{107} White contended that the majority "offers no reasoned basis" for this new interpretation,\textsuperscript{108} and that the settled "overbreadth" doctrine was all that was needed to invalidate the St. Paul ordinance.\textsuperscript{109}

\begin{enumerate}
\item Id. at 397 (White, J., concurring).
\item Id. at 398.
\item Id. at 411.
\item Id. at 401-02. White argued that not only did the majority reinvent the law, but also that its changes detracted from First Amendment jurisprudence. See \textit{id.} at 402.
\item Any contribution of this holding to First Amendment jurisprudence is surely a negative one, since it necessarily signals that expressions of violence, such as the message of intimidation and racial hatred conveyed by a burning cross on someone's lawn, are of sufficient value to outweigh the social interest in order and morality that has traditionally placed such fighting words outside the First Amendment.
\item Id.
\item \textit{Id.} at 403 (citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991)).
\item Id.
\item Id. at 404.
\item Id. at 406.
\item Id. at 413. In explaining this principle, White wrote that "[a]lthough the ordinance as construed reaches categories of speech that are constitutionally unprotected, it also criminalizes a substantial amount of expression that—however repugnant—is shielded by the First Amendment." \textit{Id.}
\end{enumerate}
In his concurring opinion, Justice Stevens criticized his colleagues in the majority as well as in the other concurring opinions.\textsuperscript{110} He rejected "the allure of absolute principles"\textsuperscript{111} and called the majority's "revision of the categorical approach . . . an adventure in a doctrinal wonderland."\textsuperscript{112}

Stevens contended that the majority's "new absolutism" in prohibiting content-based regulations was troubling: "Within a particular 'proscribable' category of expression, the Court holds, a government must either proscribe all speech or no speech at all."\textsuperscript{113} He argued that content-based regulations are "inevitable" and are consistently upheld by the Court.\textsuperscript{114} Were it not overbroad, Stevens would uphold the statute, and presumably, narrowly drawn speech regulations.\textsuperscript{115}

Blackmun filed a brief concurrence to express his fear about the future: "I regret what the Court has done in this case. The majority opinion signals one of two possibilities: It will serve as precedent for future cases, or it will not. Either result is disheartening."\textsuperscript{116} Blackmun was concerned that if \textit{R.A.V.} serves as precedent, the result will be an abandonment of the categorical

\textsuperscript{110}. \textit{See id.} at 417 (Stevens J., concurring).
\textsuperscript{111}. \textit{Id.} Instead of an absolute categorical approach, Stevens presented a multifactor approach to be considered in determining the validity of a content-based regulation. \textit{See id.} at 429. First, the scope of protection depends on the "content and character" of the expression, thereby providing the most protection for political speech and the least for pornography. \textit{Id.} Second, the "context" in which the speech occurs should influence the Court's analysis—whether it was a school environment or a captive audience, for example. \textit{Id.} at 429-30. Third, the "scope of the restrictions" should be significant, considering whether it was narrow or extensive. \textit{Id.} at 431.
\textsuperscript{112}. \textit{Id.} at 418.
\textsuperscript{113}. \textit{Id.} at 419.
\textsuperscript{114}. \textit{See id.} at 420. Stevens wrote, "our decisions demonstrate that content-based distinctions, far from being presumptively invalid, are an inevitable and indispensable aspect of a coherent understanding of the First Amendment." \textit{Id.} He offered this example:

If Congress can prohibit false advertising directed at airline passengers without also prohibiting false advertising directed at bus passengers and if a city can prohibit political advertisements in its buses while allowing other advertisements, it is ironic to hold that a city cannot regulate fighting words based on "race, color, creed, religion or gender" while leaving unregulated fighting words based on "union membership . . . or homosexuality" . . . The Court today turns First Amendment law on its head . . . .
\textit{Id.} at 423.
\textsuperscript{115}. \textit{See id.} at 434. "Conduct that creates special risks or causes special harms may be prohibited by special rules . . . . There are legitimate, reasonable, and neutral justifications for such special rules." \textit{Id.} at 416.
\textsuperscript{116}. \textit{Id.} at 415 (Blackmun, J., concurring).
approach to regulating speech.\textsuperscript{117} If the case does not serve as pre-
cedent but is instead regarded as "an aberration—a case where the
Court manipulated doctrine to strike down an ordinance whose
premise it opposed,"\textsuperscript{118} then this result too is "regrettable."\textsuperscript{119}

D. Regulating Hate After R.A.V.: Wisconsin v. Mitchell\textsuperscript{120}

Blackmun's concern over the precedential weight of R.A.V. may
have been answered in the 1993 U.S. Supreme Court decision Wis-
consin v. Mitchell.\textsuperscript{121} In that case, the Court unanimously upheld a
Wisconsin statute that enhanced the defendant's sentence for ag-
grave assaulted because he intentionally selected his victim
based on the victim's race.\textsuperscript{122}

Mitchell appealed his conviction on First Amendment
grounds.\textsuperscript{124} The Wisconsin Supreme Court reversed, rejecting the
state's argument that the statute merely prohibited conduct not
speech. The court instead interpreted the statute to be a punish-

\textsuperscript{117} See id. Blackmun argued that if the Court is "forbidden to categorize" then the
result will be to "reduce protection across the board." Id. "If all expressive activity
must be accorded the same protection, that protection will be scant." Id.

\textsuperscript{118} Id.

\textsuperscript{119} Id. at 416. "I fear that the Court has been distracted from its proper mission by
the temptation to decide the issue over 'politically correct speech' and 'cultural diver-
sity,' neither of which is presented here." Id. at 415-16. While he argued that the St.
Paul ordinance was constitutionally overbroad, Blackmun concluded that he saw "no
First Amendment values that are compromised by a law that prohibits hoodlums from
driving minorities out of their homes by burning crosses on their lawns." Id. at 416.
The harm, he contended, was in "preventing the people of St. Paul" from "punishing
the race-based fighting words that so prejudice their community." Id.

\textsuperscript{120} 508 U.S. 476 (1993).

\textsuperscript{121} Id.

\textsuperscript{122} See id. at 480. The defendant, along with a group of young black men, severely
beat a white boy, rendering him unconscious and comatose for four days. The men
were allegedly inspired by a scene in the movie "Mississippi Burning" in which a
similar incident was portrayed. After viewing the movie, the defendant asked the
others, "Do you all feel hyped up to move on some white people?" and then immedi-
ately before the incident, "You all want to fuck somebody up?" Id. (citing Brief of
Petitioner at 4-5).

\textsuperscript{123} See id. Under Wisconsin law, the maximum penalty for an offense is enhanced
whenever the defendant "[i]ntentionally selects the person against whom the crime
... is committed ... because of the ... race, religion, color, disability, sexual orienta-
tion, national origin or ancestry of that person ... ." Id. (citing Wis. Stat. § 939.645(1)(b) (1999).

\textsuperscript{124} See id. at 485 ("Because the only reason for the enhancement is the defen-
dant's discriminatory motive for selecting his victim, Mitchell argues (and the Wiscon-
sin Supreme Court held) that the statute violates the First Amendment by punishing
offenders' bigoted beliefs.").
ment of the underlying bigoted thought.\textsuperscript{125} The court also found the statute unconstitutionally overbroad because conviction would require "evidence of the defendant's prior speech," which it reasoned would have a "'chilling effect' on those who feared the possibility of prosecution for offenses subject to penalty enhancement."\textsuperscript{126}

The U.S. Supreme Court granted certiorari,\textsuperscript{127} dismissing the First Amendment claims by finding that the statute punished conduct, not speech.\textsuperscript{128} The Court emphasized that "the Constitution does not erect a per se barrier to the admission of evidence concerning one's belief and associations at sentencing simply because those beliefs and associations are protected by the First Amendment."\textsuperscript{129} The Court then dismissed the overbreadth claim by stating that "this is simply too speculative a hypothesis."\textsuperscript{130}

We must conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that if he later commits an offense covered by the statute, these opinions will be offered at trial to establish that he selected his victim on account of the victim's protected status, thus qualifying him for penalty enhancement.\textsuperscript{131}

The Court therefore reversed the decision of the Wisconsin Supreme Court.\textsuperscript{132}

In its decision, the Court distinguished \textit{Mitchell} from \textit{R.A.V.}, reasoning that, while the ordinance in \textit{R.A.V.} was directed at expression, the statute in \textit{Mitchell} was aimed at conduct, which the First Amendment does not protect.\textsuperscript{133} It characterized such con-

\textsuperscript{125} See id. at 482 (arguing that the statute punished offensive thought and the reasoning behind the defendant's actions, rather than the action itself and citing R.A.V. v. St. Paul, 505 U.S. 377 (1992)).

\textsuperscript{126} Id.

\textsuperscript{127} See id. at 482-83. The Court pointed out that it granted certiorari to resolve the conflicting authority of high state courts on the constitutionality of penalty enhancement statutes that have been enacted all over the country.

\textsuperscript{128} See id. at 484 ("[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.").

\textsuperscript{129} Id. at 486 (citing Dawson v. Delaware, 503 U.S. 159 (1992)). The Court argued that the state's interest in preventing bias-motivated crimes is adequately justified by the legislature's lengthy evidence regarding the extensive harm this kind of conduct has on society, and is clearly not done so merely because of the disagreeableness of the speaker's beliefs. See id.

\textsuperscript{130} Id. at 489.

\textsuperscript{131} Id. at 488-89.

\textsuperscript{132} See id. at 490.

\textsuperscript{133} See id. at 487.
duct as "bias-inspired" and argued that the state could single it out due to its potentially grave harm to society.  

The Court may have concluded that the cases were easily distinguishable, but critics assert that the result in *Mitchell* may signal a departure from Scalia's reasoning in *R.A.V.* and an attempt to correct or amend its previous result. Therefore, an argument can still be sustained in support of narrow regulations of bias-inspired expression. "Scalia's simplistic dismissal [of bans on racially motivated fighting words] was ignored by the court in *Wisconsin v. Mitchell* . . . . Scalia's extreme attack on speech codes has been effectively overruled."  

**E. Speech Codes in Light of Caselaw**

Pursuant to federal case law and the U.S. Supreme Court's decision in *R.A.V.*, critics contend that the speech code debate at universities should be dismissed. An examination of First Amendment jurisprudence shows that the Court has permitted a man to wear a T-shirt with the words "Fuck the Draft" into a courthouse, a publisher to print violent pornography, a pro-

---

134. See *id.* at 487-88.


When the facts of *R.A.V.*—a cross burning by a white man on the lawn of a black family—are placed alongside the facts in *Mitchell*—the assault of a white victim by a group of black teenagers—the incompatibility of the Court's analysis becomes evident. Assaulting a boy because he is white is as much expression as intimidating an African American family by burning a cross on their lawn. Similarly, burning a cross to intimidate an African-American family is as much conduct as assaulting a white boy.

*Id.*


137. See generally SHIELL, *supra* note 1, at 9 (explaining the critics' contentions and arguing why this debate is far from an open and shut case).

138. See Cohen v. California, 403 U.S. 15 (1971) (holding that the message on Cohen's jacket was protected speech and those who found it offensive could avoid it simply by averting their eyes).

139. See American Bookseller's Ass'n v. Hudnut, 475 U.S. 1001 (1986) (finding that the interest of free speech outweighed the state's interest in prohibiting sex discrimination).
tester to burn the American flag, and a neo-Nazi group to march in a mostly Jewish neighborhood. The argument is that if courts will protect such expression, then it will certainly seek to ensure free and unfettered speech in the public university context.

This argument fails to take several factors into account. It also fails to carefully examine caselaw to understand just what the courts have prohibited. It is these cases that colleges and universities nationwide must reexamine when developing a potential policy on hate speech for their individual campuses. For example, R.A.V. did not hold that university speech codes were unconstitutional. The case did not even mention speech codes. "This, of course, does not mean that the Court's First Amendment analysis is not applicable to public education . . . but . . . the outcome might depend on the specific wording of the code."

The decision in R.A.V. suggests that in developing speech codes, public universities "should pay special attention to two factors: content and overbreadth." As to the content, a university code, like a city ordinance, would be void unless it added a provision that applied the "code to all students, not just to minorities or other specific groups." Although the majority in R.A.V. did not strike down the statute based on overbreadth, the concurring opinions and the federal court decisions in Doe and UWM-Post demonstrate that a campus code is not likely to survive if it punishes protected as well as unprotected speech.

Codes that "simply do not tolerate violence and intimidation directed at anyone, . . . codes built on one-on-one infractions" are

140. See Texas v. Johnson, 491 U.S. 397 (1989) (burning of the American flag is expressive conduct shielded by the First Amendment, despite the state's asserted interest in preventing breaches of the peace and preserving the symbol of the nation).
141. See Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978) (allowing members of the National Socialist Party to assemble in uniform, march, and disseminate information, after finding three village ordinances prohibiting such unconstitutional).
142. See Shiel, supra note 1, at 9. These factors include political affiliations, beliefs and reactions of the judges to the power and pressure of advocacy groups and public opinion, and the responsive nature of our legal system. See id. "Any serious student of free speech knows that what was once protected may not be in the future and what was once unprotected may well become protected at some future point."
143. See id. at 110 ("There is no constitutional barrier to narrowly written university speech codes, even if not all fighting words are punished equally.").
145. Id.
146. Id. at 663.
147. Id.
148. See id.
more likely to succeed. Also, when members of groups who have suffered disproportionate harm on campus are harassed or assaulted, then a Mitchell-based code could feasibly be employed that would take this bias into account as an aggravating factor in assessing punishment.

II. CONFLICTING IDEALS ON THE IMPLEMENTATION OF HATE SPEECH CODES

This is not an easy legal or moral puzzle, but it is precisely in these places where we feel conflicting tugs at heart and mind that we have the most work to do and the most knowledge to gain.

The conflict regarding the regulation of hate speech often pits the ideals of liberty against those of equality: the call for free and unfettered speech as afforded by the First Amendment against the demands for equal opportunity and access as protected by the Fourteenth Amendment.

The "civil-rights-versus-civil-liberties" approach is one way of framing the issue surrounding the hate speech debate, but some are wary of a seemingly categorical approach to such a complex controversy. Justice Stevens argues that the two are inextricably intertwined. Expansion in First Amendment doctrine "came about as a result of the Court's decision that the word 'liberty' as used in the Fourteenth Amendment includes the freedoms protected by the First Amendment."

Under this theory, traditional First Amendment analysis must inevitably be evaluated from a Due Pro-
cess perspective, “specifically the need to evaluate the legitimacy and adequacy of a state’s interests in abridging speech.”

As these theories suggest, the conflict may be better analyzed by avoiding such labels—“speech versus equality.” Instead, there should be an examination of the particular arguments offered by those who favor speech codes as a necessary and permissible means of addressing a real societal harm against the arguments of those who denounce them as a counter-productive, impermissible violation of the First Amendment.

A. Proponents of Hate Speech Regulations: Furthering First Amendment Realism

1. The Irreparable Harm of Hate Speech

The ubiquity and incessancy of harmful racial depiction are thus the source of its virulence. Like water dripping on sandstone, it is a pervasive harm which only the most hardy can resist. Yet the prevailing first amendment paradigm predisposes us to treat racist speech as an individual harm, as though we only had to evaluate the effect of a single drop of water. This approach . . . systematically misperceives the experience of racism for both victim and perpetrator.

Mari Matsuda, a professor at the School of Law and at the Center for Asian American Studies at UCLA, was one of the first to look at the hate speech issue from the point of view that it actually harms its victims. She is often accredited for bringing an “outsider jurisprudence” to the forefront of this debate. Matsuda explains that victims of hate speech suffer irreparable harm, both psychologically and physically. Victims of racist speech internalize the feelings of inferior self-worth and self-hatred. This in turn affects their relationships with others, their job performance, educational endeavors, and ultimately their ability to effectively com-

156. Id. at 1301.
158. See Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim’s Story, 87 Mich. L. Rev. 2320 (1989). The article explains that outsider jurisprudence is both “historical and revisionist, attempting to know history from the bottom,” employing non-traditional sources such as, journals, poems, oral histories, and shared stories and experiences. Id. at 2324.
159. Id. at 2336 (“Victims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide.”). Professor Matsuda cites numerous psychological and psycholinguistic studies for her propositions. See id.
municate. The harm of hate speech, as proponents of codes contend, is real.

a. Assaultive Speech Lands a Blistering Blow

Those in favor of hate speech regulations argue that the harm of such speech is the equivalent of a punch — an actual assault on one’s sense of person, essentially having the same effect as physical violence. Like violence, words may land a sharp and insidious blow to those at whom they are hurled: “The experience of being called a ‘nigger,’ ‘spic,’ ‘Jap,’ or ‘kike’ is like receiving a slap in the face.” Regulating such speech is a “pragmatic response to the urgent needs of students of color and other victims of hate speech who are daily silenced, intimidated, and subjected to severe psychological and physical trauma by racist assailants who employ words and symbols as part of an arsenal of weapons of oppression and subordination.”

As if repeated blows to one’s psychological well-being by language of this sort is not enough, the victim is then further injured by the “government response of tolerance.” The blows of the racists, the homophobes or the sexists is then compounded by a final shot from the government or the university that stands idly by and accepts the intolerant messages.

Those involved in the outsider jurisprudence movement contend that a message of hate “inflict[s] wounds” that do not just injure the intended victim but rather “hit the gut of [all] those in the target group.” This message—you are different, you are inferior, you do not belong, you will never amount to anything—is then

160. See id. at 2337.

161. See MARI J. MATSUDA ET AL., WORDS THAT WOUND 7 (1993); see also Lawrence, supra note 6, at 462 (“Psychic injury is no less an injury than being struck in the face, and it often is far more severe.”).

162. Lawrence, supra note 6, at 452.

163. MATSUDA ET AL., supra note 161, at 7.

164. Matsuda, supra note 158, at 2338.

165. See id.

166. Id. at 2335.

167. Id. at 2332; see also MATSUDA ET AL., supra note 161, at 8 (“This was injury to a group. To privatize it ignored the greatest part of the injury.”).
"conveyed on the street, in school yards, in popular culture, and in the propaganda of hate widely distributed in this country."  

b. Tolerance of Hate Speech Perpetuates a Social Reality of Subordination

Those who call for regulation of hate speech further contend that in allowing such messages to be conveyed and spread, the government is arguably constructing and even perpetuating a damaging social reality about the affected groups "so that members of that group are always one down."  

All members are harmed, because "at some level, no matter how much both victims and well-meaning dominant-group members resist it, racial inferiority is planted in our minds as an idea that may hold some truth."  

This dominant social reality harms victims of hate speech in two ways: (1) externally, in society's perception of such groups; and (2) internally, in the victim's own perception of himself. The former is known as the "those people" effect—when one repeatedly hears that "those people are lazy, dirty, sexualized, money-grubbing, dishonest, inscrutable... [w]e reject the idea, but the next time we sit next to one of 'those people' the dirt message, the sex message, is triggered."  

By "[p]ermitting one social group to speak disrespectfully of another habituates and encourages speakers to continue speaking that way in the future," thereby making laws regulating such speech imperative to ensure that such groups may no longer find themselves "one down."  

As this way of speaking becomes "normalized" by society, it then becomes "inscribed in hundreds of plots, narratives, and scripts; it becomes part of culture, what everyone knows."  

Not only do such messages cause external or reputational harm to the group as perceived by society, such ideas often become an internal reality for victims. Repeated messages of this sort eventu-

---

168. See Matsuda, supra note 158, at 2232.
170. Matsuda, supra note 158, at 2339.
171. Id. at 2339-40.
173. Delgado, supra note 169, at 172; see also CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 179 (1995) ("[C]ontent-based or even viewpoint-based restrictions might plausibly been seen as a corrective . . . .").
174. Delgado & Yun, supra note 172, at 1296-97.
ally cause victims to believe that perhaps they do not deserve to be treated as everyone else.175 “Through an unfortunate psychological mechanism, incessant bombardment by images of [this] sort . . . inscribe those negative images on the souls and minds of minority persons. Minorities internalize the stories they read, see and hear every day.”176

The effect of such internalization silences victims, ingraining them with the notion that their voice is not valuable or credible in society’s discourse.177 “Who would listen to, who would credit, a speaker or writer one associates with watermelon-eating, buffoonery, menial work, intellectual inadequacy, laziness, lasciviousness, and demanding resources beyond his or her adequate share?”178 The result of such silencing is that victims of hate speech have no effective voice in the marketplace of ideas,179 leaving them little opportunity to counter-attack the assaultive speech.180

c. Hate Speech Denies Equal Educational Opportunity

[O]ur educational institutions [are] idealized as a refuge for the calm, impartial, and unimpeded pursuit of knowledge and truth. Here we hope to escape the bigotry, cruelty and injustice outside. But universities and colleges are no longer, if they ever were, tranquil havens in a prejudiced world. Instead, for people of color, women, gays and lesbians, religious minorities, and members of other arbitrarily disadvantaged groups, institutions of higher education have become, increasingly, places of physical and psychological danger.181

Advocates and opponents of hate speech regulation both agree that the university holds a special place in our society. It is instilled with a unique mission to pursue knowledge and truth through un-

175. See Matsuda, supra note 158, at 2340.
177. See id.
178. Id.
179. For a discussion of the marketplace of ideas philosophy see infra note 209 and accompanying text.
180. See id. at 1287 (“The expense of speech also precludes the stigmatized from participating effectively in the marketplace of ideas.”). For a more extensive discussion of the failure of the “more speech” argument in the area of hate speech, see infra Part II.A.2.a.
fettered discourse. At the same time, the university must promote the ideals of equality and tolerance as well as ensure that all students have the same access to pursue their educational goals. Those in favor of regulation argue that when messages of hate are expressed and then tolerated at a university the victims are essentially denied an equal opportunity to learn.

Speech code advocates contend that what makes the university a special place is that it brings people of various backgrounds, religions, economic statuses and ethnicities into a self-contained community and seeks to give each one of them the same opportunity to achieve and succeed. Students depend on this sense of community and equality for intellectual development.

The tolerance of racist, sexist or homophobic speech at a university destroys “the goals of inclusion, education, development of knowledge, and ethics that universities exist and stand for.” Advocates assert that a university cannot educate its students on the ideals of tolerance, equality and acceptance of difference when its inaction sends a message that such ideals are not significant enough to be vigilantly protected by the administration.

Without the protection of the university system, victims are left with a means of self-regulation, which places an undue burden on “vulnerable members of our society, such as isolated, young black undergraduates attending dominantly white campuses.” Hate speech is therefore “harmful to targets” in this setting, because they “perceive the university as taking sides through inaction” and leaving students “to their own resources in coping with the damage wrought.” Such a burden takes attention, focus and energy away from their academic pursuits.

Speech code proponents argue that the content-based aspect of speech codes raises no significant issue, because “controlling

---

182. See generally Evan G.S. Siegel, Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities, 39 Emory L.J. 1351 (1990) (outlining the hate speech code debate in the university setting).
183. See generally id.
184. See generally Matsuda, supra note 158, at 2370-71.
185. See id. at 2370 (“Universities are special places, charged with pedagogy, and duty-bound to a constituency with special vulnerabilities.”).
186. See id. at 2370-71.
187. Id.
188. See Shiel, supra note 1, at 48 (“A university can live up to this promise by enacting a hate speech code, for even if a code is rarely enforced, its symbolic message is that minorities are welcome and their interests will be protected.”).
189. Delgado & Stefancic, supra note 176, at 1286.
190. Matsuda, supra note 158, at 2371.
RE-EXAMINING HATE SPEECH

speech is . . . a defining characteristic of the university." Support for this argument is evidenced by subject matter restrictions in curriculum, viewpoint discrimination in admissions, faculty tenure decisions, grading, and the recognized need to ensure civility in academic discourse that would not be necessary on a street corner.

2. Carefully Drafted Hate Speech Codes are in Accord with First Amendment Jurisprudence

a. Hate Speech as Fighting Words

The "fighting words" doctrine was first articulated by the U.S. Supreme Court in Chaplinsky v. New Hampshire. The Court held that such words—those that "inflict injury or tend to incite an immediate breach of the peace"—are unprotected by the First Amendment. Fighting words, Justice Murphy wrote, "are no essential part of any exposition of ideas, and are of such 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." The doctrine, as first set out in Chaplinsky, has been weakened by later caselaw. Fighting words that merely insult or injure are no longer unprotected by the First Amendment. The second prong, words that "tend to cause an immediate breach of the peace," is

---

191. SUNSTEIN, supra note 173, at 199.
192. See id. at 199-200. Sunstein suggests various ways in which a university engages in content and viewpoint-based regulations, but cautions that "[t]hese examples do not by any means compel the conclusion that any and all censorship is acceptable in an academic setting." Id. at 201.
193. 315 U.S. 568 (1942). In Chaplinsky, appellant was convicted of violating a New Hampshire law "prohibiting the addressing of any derisive or annoying word to any other person who is lawfully in any street or other public place, or calling him by any offensive or derisive name." Id. at 568.
194. Id. at 572. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include . . . 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Id. at 571-72.
195. Id.
196. See, e.g., Gooding v. Wilson 405 U.S. 518, 524-25 (1972) (holding a Georgia statute prohibiting abusive language to be unconstitutionally vague and overbroad on its face); Terminello v. City of Chicago, 337 U.S. 1, 4-5 (1949) (reversing the conviction of petitioner whose speech allegedly stirred people to anger and invited public dispute); City of Houston v. Hill 482 U.S. 451, 462 (1987) (finding a city ordinance which made it illegal to abuse or disturb a police officer overbroad, as it did not limit its reach to the fighting words exception).
now the emphasis of the doctrine. 197 Accordingly, under the present doctrine, speech must be: (1) an extremely provocative personal insult; (2) addressed to an individual; (3) in a face-to-face encounter; (4) tending to cause an immediate violent reaction; and (5) tending to cause a breach of peace by an average hearer. 198

Such a narrowing of the fighting words doctrine impacts strongly on a university’s ability to regulate hate speech under this theory. 199

In spite of this narrowing, speech code proponents argue that hate speech in the form of face-to-face insults can appropriately be regulated as fighting words. 200 Charles R. Lawrence III, Professor of Law at Georgetown University and frequent author on topics such as hate speech, racism and discrimination, asserts that it is permissible to hold such speech as undeserving of protection for two reasons: first, the impact of such speech is immediate and therefore presents no time for reflection or response; second, the purpose of the First Amendment is to encourage more speech and the silencing effect of racist invectives work counter to this principle. 201 Sanctioning such speech does not enable truth to reach the marketplace, because the speaker’s intention is to silence and injure the victim. 202

The argument that hate speech can be viewed as a form of “verbal aggression” or as fighting words is grounded in the premise that “speech of this sort, which seeks to abuse or dominate others on a

197. Chaplinsky, 315 U.S. at 572.
199. See id. ("[U]niversity speech codes that prohibit students from using abusive language that merely 'annoys' other students will be held unconstitutional.").
200. See Lawrence, supra note 6, at 451 ("When racist speech takes the form of face-to-face insults, catcalls, or other assaultive speech aimed at an individual or small group of persons, then it falls within the ‘fighting words’ exception to first amendment protection."). But see Matsuda, supra note 158, at 2357 (arguing that stretching "existing first amendment exceptions, such as the ‘fighting words’ doctrine . . . weakens the first amendment fabric"). Hate speech

is best treated as a sui generis category, presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse.

Id.

201. See Lawrence, supra note 6, at 452.
202. See id. ("Assaultive racist speech functions as a preemptive strike. The racial invective is experienced as a blow, not a proffered idea, and once the blow is struck, it is unlikely that dialogue will follow.").
visceral level, often leads to violence." Therefore, hate speech may be constitutionally regulated under the fighting words doctrine because it does not merely annoy or insult, rather it is likely to invoke a violent reaction. Because of the violent "blow" struck by such speech, the victim has no time to reflect on the idea expressed and rationally or reasonably respond to it.

The second argument made by Lawrence is a direct response to opponents who argue that more speech, not less, is the best cure for hate speech's harm. Just as the attack of hate speech engenders violence, over time such messages suppress and silence the victims so that they cannot effectively respond to their assailants. "When one is personally attacked with words that denote one's subhuman status and untouchability, there is little (if anything) that can be said to redress either the emotional or reputational injury."

Such an effect inhibits truth and diverse ideas from circulating in the marketplace, and this runs contrary to the principles espoused by the First Amendment. Without a voice in such a system, victims of hate speech therefore cannot effectively talk back, because even if they did, no one would listen. The reality of most situa-
tions is that talking back may actually place the victim in more danger.\textsuperscript{211}

\textit{b. The Ban on Content-Based Regulations and Viewpoint Discrimination: Not So Absolute}

Those who argue that hate speech codes can be enacted within the parameters of constitutional law face significant hurdles under traditional First Amendment jurisprudence. Justice Marshall wrote, "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."\textsuperscript{212} More recently, in \textit{R.A.V.}, Scalia stated that "content-based regulations are presumptively invalid."\textsuperscript{213}

However, even Justice Stevens has argued "[t]hat the Court routinely departs from the purported rule against content regulation" and that Marshall's oft-quoted passage is more properly described as a "goal or an ideal" than a "proposition of law."\textsuperscript{214} In his concurrence in \textit{R.A.V.}, Stevens offered this example:

Threatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot, and threatening a high public official may cause substantial social disruption; such threats may be punished more severely than threats against someone based on, say, his support of a particular athletic team. There are legitimate, reasonable, and neutral justifications for such special rules.\textsuperscript{215}

The Court arguably makes much of its distinctions and decisions based on content.\textsuperscript{216}

In the past, the Court has held that a city law permitting commercial advertising, but not political advertising, on city buses is

\textsuperscript{211} See id. at 885.

The idea that talking back is safe for the victim or potentially educative for the racist simply does not correspond with reality. It ignores the power dimension to racist remarks, forces minorities to run very real risks, and treats a hateful attempt to force the victim outside the human community as an invitation for discussion.

\textit{Id.}

\textsuperscript{212} Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).


\textsuperscript{214} Stevens, \textit{supra} note 155, at 1304; \textit{see also} Gale, \textit{supra} note 181, at 144-45 ("The \textit{[F]irst [A]mendment, as construed (and constructed) by the Court, permits the government to ban or restrict a wide variety of expression because of its content or its viewpoint . . . no one seriously argues that the \textit{[F]irst [A]mendment means that anyone anywhere can say absolutely anything.").

\textsuperscript{215} \textit{R.A.V.}, 505 U.S. at 416 (Stevens, J., concurring).

\textsuperscript{216} See \textit{id.} at 421.
constitutional;\textsuperscript{217} that the Government may regulate airline advertising, but not bus advertising;\textsuperscript{218} that the Court may limit cigarette advertising, but not cigar;\textsuperscript{219} and that restrictions on the broadcasting of indecent words on the radio may be constitutionally permissible.\textsuperscript{220} "All of these cases involved the selective regulation of speech based on content—precisely the sort of regulation the Court invalidates [in R.A.V.]."\textsuperscript{221}

It is frequently stated that the government also is not free to regulate speech based on the speaker’s viewpoint.\textsuperscript{222} Justice Scalia emphasized this principle in \textit{R.A.V.}, where he used the following example to demonstrate the viewpoint discriminatory effect of the St. Paul ordinance: “One could hold up a sign, for example, that all ‘anti-Catholic bigots’ are misbegotten; but not that all papists are, for that would insult and provoke violence ‘on the basis of religion.’"\textsuperscript{223} Scalia concluded that such an effect gave one side a clear advantage over another depending on what views they were espousing.\textsuperscript{224}

A ban on viewpoint discrimination, however, is not as absolute as critics contend. In fact, laws in the past have been upheld though they discriminate on the basis of viewpoint.\textsuperscript{225} For example, in the areas of commercial speech, the government forbids advertising in favor of cigarette smoking even though it does not forbid advertising against cigarette smoking.\textsuperscript{226} The same is true regarding alcohol advertising.\textsuperscript{227} Also, in the area of securities law and the regulating of proxy statements, favorable comments about a company may be banned while unfavorable ones are allowed or even encouraged.\textsuperscript{228}

A regulation on hate speech could conceivably overcome the presumption of invalidity based on viewpoint if “(a) there is at most a small risk of illegitimate motivation, (b) low value or unprotected speech is at issue, (c) the skewing effect on the system of

\textsuperscript{220} See FCC v. Pacifica Found., 438 U.S. 726 (1978) (plurality opinion).
\textsuperscript{221} \textit{R.A.V.}, 505 U.S. at 422.
\textsuperscript{222} See, \textit{e.g.}, \textit{id.} at 391.
\textsuperscript{223} \textit{Id.} at 391-92.
\textsuperscript{224} \textit{Id.} at 392.
\textsuperscript{226} See \textit{id.} at 28.
\textsuperscript{227} See \textit{id.}
\textsuperscript{228} See \textit{id.}
free expression is minimal, and (d) the government is able to make a powerful showing of harm.” In drafting a campus code, a university could arguably prove that hate speech is of low value and that its harm is great. Although a university’s motivation may be less suspect than the city council’s in R.A.V., the effect on free expression is still a hurdle a university would have to overcome.

Given the ambiguity of First Amendment jurisprudence, proponents of hate speech restrictions ask “why can we not mark off boundaries between prohibited racist and sexist harassment and permissible, though racist or sexist, self-expression or intellectual inquiry?” Matsuda succinctly stated, “If the harm of racist hate messages is significant, and the truth value marginal, the doctrinal space for regulation of such speech is a possibility.” This possibility, however, faces much criticism from First Amendment absolutists.

B. Critics of Hate Speech Codes: Protecting First Amendment Formalism

Critics of hate speech codes argue that previously drafted regulations, such as the Michigan Policy and the UW Rule, are problematic for three reasons. First, such attempts are impermissibly vague in that they do not indicate clearly the limitations placed on students. Second, they are underinclusive; forbidding speech about certain topics but not others essentially amounts to favoring one view over another. Third, such regulations are fatally overbroad in that they often sweep protected as well as unprotected speech within their reach. These restrictions on expression run counter to the bedrock principle of the First Amendment, namely that more speech, not less, is the way to ensure that truth reaches the marketplace of ideas. Nowhere is this idea more cherished, critics argue, than in the university setting.

1. Vagueness

A statute is considered unconstitutional due to vagueness when “men of common intelligence must necessarily guess at its mean-

229. Id. at 29-30.
230. Gale, supra note 181, at 145.
231. Matsuda, supra note 158, at 2341.
232. See infra Part II.B.1.
233. See infra Part II.B.2.
234. See infra Part II.B.3.
235. See infra Part II.B.4.
236. See infra Part II.B.5.
ing."237 One cannot be expected to be punished for conduct that is not clearly prohibited in plain language so that there can be no mistaking its meaning.238 The speech codes at both Michigan and Wisconsin were struck down based on vagueness, and opponents of speech codes embrace the court decisions.

The Doe court wrote, "Looking at the plain language of the Policy, it was simply impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct."239 Words in the code, such as "stigmatize" or "victimize" did not have any "precise definition," nor was it clear what constituted a "‘threat’ to an individual’s academic efforts."240 As a result, "students of common understanding were necessarily forced to guess at whether a comment about a controversial issue would later be found to be sanctionable under the [Michigan] Policy," thereby making enforcement of the Policy a violation of due process.241

2. Underinclusiveness Leads to Viewpoint Discrimination

Based on the doctrine of underbreadth, laws that are too narrowly tailored may meet constitutional challenges.242 The original concern for underinclusion stemmed from an equal protection idea, but it has gained prominence in the area of First Amendment law, particularly under Scalia’s opinion in R.A.V.243 A law is considered underinclusive "when [it] targets some conduct or actors for adverse treatment, yet leaves untouched conduct or actors that are indistinguishable in terms of the law’s purpose."244 Opponents of hate speech regulations argue that this underinclusion is a fatal flaw in the concept of codes.245

238. See id.
239. Id. at 867.
240. Id.; see also UMv Post v. Board of Regents, 774 F. Supp. 1163, 1180 (E.D. Wis. 1991) ("[T]he UW Rule is unduly vague because it is ambiguous as to whether the regulated speech must actually demean the listener and create an intimidating, hostile or demeaning environment for education or whether the speaker must merely intend to demean the listener and create such an environment.").
243. See id.
244. Id.
The underbreadth doctrine was employed by the majority to strike down the St. Paul hate speech ordinance in *R.A.V.*, because the statute proscribed only those fighting words addressing race, color, creed, religion and gender.246 "Those who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered."247

The Court argued that the City was not permitted to pick and choose which fighting words were permissible and which were not.248 The effect of such underinclusiveness essentially amounted to viewpoint discrimination.249 In effect, expressions of racism or sexism, for example, would be prohibited across the board, but fighting words that do not concern one of the proscribed topics "would seemingly be usable ad libitum in the placards of those arguing in favor of racial, color, etc. tolerance and equality, but could not be used by those speakers' opponents."250 Alan Charles Kors, a historian at the University of Pennsylvania, has criticized speech codes for much the same reason, and has noted, "You may say anything you wish at most American universities about whites, males, heterosexuals, Catholics, Jews as Israelis, or Jews as white Americans, members of the Unification church, evangelical Protestants, and, offend them as you will ... You may not offend militant blacks, politicized Hispanics, radical feminists, or activist gays."251 Critics are wary of such ad hoc determinations of which groups deserve protection and which do not.

3. **Overbreadth: Codes Cover More than Mere Fighting Words**

Another argument offered by critics of hate speech codes is that the proposals are consistently overbroad and therefore unconstitutional. "[T]he state may not prohibit broad classes of speech, some of which may indeed be legitimately regulable, if in so doing a substantial amount of constitutionally protected conduct is also prohibited."252 In regulating First Amendment activities, it is essential

---

246. Id.
247. Id.
248. See id.
249. See id.
250. Id. But see supra Part I.C.3. in which the concurring justices argue against the underbreadth doctrine as applied by the majority.
251. SHIELL, supra note 1, at 62 (quoting Alan Charles Kors, *Harassment Policies in the University, Society* 28, no. 4 (1991)).
that the statutes be narrowly tailored to address a compelling harm.\textsuperscript{253}

According to the Court, overbreadth analysis is "strong medicine" and may be used to strike down a statute "only when the overbreadth of the statute is not only 'real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'\textsuperscript{254} However, in \textit{Doe, UWM Post} and \textit{R.A.V.}, the courts found that the hate speech regulations were not capable of a narrower interpretation and were facially overbroad. All the concurring justices in \textit{R.A.V.} agreed upon this one point of contention.\textsuperscript{255} Justice White, for example, wrote that "[a]lthough the ordinance as construed reaches categories of speech that are constitutionally unprotected, it also criminalizes a substantial amount of expression that—however repugnant—is shielded by the First Amendment . . . . \text{[T]he ordinance is therefore fatally overbroad and invalid on its face.}\textsuperscript{256}

The overbreadth doctrine is a powerful argument to be considered in drafting hate speech codes. If the language of the code is not carefully and narrowly framed, protected speech is inevitably going to be punished, as the ordinance in \textit{R.A.V.} did with language like arouses "anger, alarm or resentment."\textsuperscript{257} The Court argued that the "mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected."\textsuperscript{258} \textit{R.A.V.} demonstrates that each word must be chosen carefully, so as not to sweep too broadly into constitutionally protected areas.

4. \textit{More Speech, Not Less, is the Best Way to Combat Hate}

One of the primary arguments made by opponents of hate speech regulation is that the U.S. Constitution does not provide for curtailment of speech simply because some people find it "bad" or "hurtful."\textsuperscript{259} Laurence Tribe, author of a hornbook on Constitu-
tional law, writes, "If the Constitution forces government to allow people to march, speak, and write in favor of peace, brotherhood and justice, then it must also require government to allow them to advocate hatred, racism, and even genocide."260

This argument is supported by the notion that it is difficult, even dangerous, to attempt to define exactly which speech causes harm261 or to determine how speech will affect each individual.262 Therefore, by advocating more speech, instead of labeling certain speech impermissible, our Constitution ensures a neutral marketplace of ideas. Truth can only be reached by discourse.263 "Because we cannot be certain as to what concepts advance or demean human autonomy, we permit vigorous debate," thereby promoting "the pursuit of truth."264

Free expression has historically been the greatest ally of the disadvantaged, discriminated and downtrodden.265 Speech has allowed doors to open for such groups, which is why critics of codes are wary of closing them through such restrictions.266 As Benjamin L. Hooks, former Executive Director of the National Association for the Advancement of Colored People, wrote, "The civil rights movement would have been vastly different without the shield and spear of the First Amendment. The Bill of Rights . . . is of particu-
lar importance to those who have been the victims of oppression."\textsuperscript{267}

Nadine Strossen, president of the American Civil Liberties Union ("ACLU"), argues that it is censorship that has historically silenced minorities and free speech that has liberated them: "Censorship traditionally has been the tool of people who seek to subordinate minorities, not those who seek to liberate them."\textsuperscript{268} The guarantees of the First Amendment have furthered the civil rights movement and the women's movement, thereby demonstrating the "symbiotic interrelationship between free speech and equality."\textsuperscript{269}

5. The Academic Environment Should Educate, Not Silence

Critics of hate speech codes argue that the university is also a special place in that nowhere else is freedom of thought and opinion as cherished.\textsuperscript{270} With that in mind, they contend that speech codes hinder rather than help the educational mission by providing an artificial environment where notions of "good" and "bad" ideas are dictated by the administration and not through communication among students.\textsuperscript{271} The result is a chill on free speech, shackling unfettered discourse in an environment long cherished for promoting such lofty goals.\textsuperscript{272}

Critics further maintain that the carefully scrutinized "good intentions" of speech code advocates fail to provide a remedy for the intolerance felt by a minority college student.\textsuperscript{273} Such regulations have the opposite effect by furthering notions of victimization, in-

\textsuperscript{267} Id. at 181 (quoting Benjamin L. Hooks).
\textsuperscript{268} Id. at 232.
\textsuperscript{269} Id. at 233.
\textsuperscript{270} See, e.g., David Rosenberg, Note, Racist Speech, The First Amendment, and Public Universities: Taking a Stand on Neutrality, 76 Cornell L. Rev. 549, 564 (1991) (arguing that universities must be allowed wide latitude in promoting open and robust debate in order to ensure the free exchange of ideas).
\textsuperscript{271} See Siegel, supra note 182, at 1399-00 ("Students do not fully benefit from their college years unless classes and classmates expose their assumptions and challenge their preconceptions... A university primarily concerned with providing an environment guaranteed to be agreeable for everyone at all times offers its students comfort, but at the expense of true education.").
\textsuperscript{272} See Shiel, supra note 1, at 64 ("This happens, even if the code does not restrict constitutionally protected speech, because students and faculty are afraid of being accused of hate speech and limit their comments to politically safe truisms or simply don't comment at all on important social issues.").
\textsuperscript{273} See generally Siegel, supra note 182 (demonstrating that the costs of hate speech codes weigh heavier than the benefits to a student).
feriority and weakness by singling out specific groups for special protection. 274

Implicit in such measures is the notion that minorities must depend on the State for assistance rather than empowering themselves to take action. 275 “Many minorities . . . view such codes as condescending in their portrayal of minorities as helpless victims of words.” 276 The codes create special sensitivity towards certain groups and will likely increase an incoming student’s “sense of rejection” before he even sets foot on campus. 277

Both proponents and critics of hate speech codes offer persuasive arguments in favor of their positions, but rather than foster change, this battle perpetuates the universities’ inaction. There is some common ground from which a solution can be found by looking to established U.S. Supreme Court cases in related matters. 278

III. FIGHTING HATE ON DIFFERENT FRONTS: NARROWING THE PATH TO A COMMON END

New times demand new measures and new men;
The world advances, and in time outgrows
The laws which in our father’s day were best;
And doubtless, after us, some purer scheme
Will be shaped out by wiser men than we,
Made wiser by the steady growth of truth. 279

In examining the debate surrounding hate speech regulations, it appears that the two sides stand on opposite precipices. On one side, hate speech harms and must be restricted, especially on college campuses. On the other, free speech is fundamental and cannot be compromised, especially on college campuses. Although this rift appears to be insurmountable, in reality the two sides are not so far apart.

274. See id. at 1400 (“By creating classes of people who require special respect, the existing policies foster an inegalitarian disciplinary system at an institution that operates essentially as a meritocracy.”).

275. See Shiell, supra note 1, at 69.

276. Id.; see also Gates et al., supra note 265, at 181 (quoting Alan Keyes, who stated “The basic problem with all these regimes to protect various people is that the protection incapacitates . . . . To think that I [as a black man] will . . . be told that white folks have the moral character to shrug off insults, and I do not . . . . That is the most insidious, the most insulting, the most racist statement of all!”).


278. See infra Part III.A.1-2.

There is, as with most conflicts, a middle ground where the rift may be mended if a delicate balance can be reached. Ultimately, both sides would concede that an educational environment should provide an opportunity for its students to learn, to exchange ideas and to grow as individuals. A narrow path towards ensuring this common end is both possible and permissible by taking certain aspects of each side into account and reaching a suitable compromise.

A. Discriminatory Harassment Directed at Specific Individuals Creates a Hostile Environment on College Campuses and is Antithetical to the University Mission

Absent the absolutists, most civil libertarians will concede that some narrowly drafted hate speech codes are possible, even arguably necessary, on college campuses.280 Nadine Strossen, a self-described “free speech purist,” recognized that restrictions on speech may be permissible when faced with a “countervailing goal of compelling importance, such as preventing violence.”281 The policy of the ACLU provides for this necessity by “not prohibit[ing] colleges and universities from enacting disciplinary codes aimed at restricting acts of harassment, intimidation and invasion of privacy. The fact that words may be used in connection with otherwise actionable conduct does not immunize such conduct from appropriate regulation.”282

In the search for solutions to the hate debate the question is arguably not whether hate speech can be regulated on campus, but when and under what circumstances.283 This Note argues that it can be regulated in situations where the speech rises to the level of discriminatory harassment, the assaultive speech is intentionally directed at an individual in a one-on-one encounter, and effectively denies that individual an equal opportunity to learn. There is, as critics of codes contest, great danger in regulating speech on campus, which is why this proposal is narrow and seeks to restrict speech as little as possible while still attempting to ensure all students their inherent rights of “equal voice, equal liberty, and equal education.”284

281. Id.
282. Id. (quoting ACLU Policy Guide, Policy 72(a) (1993)).
283. See id. at 152-53 (“In truth, the only argument between free speech absolutists and others is not over whether speech can be regulated, but only over when it can be regulated.”).
284. Gale, supra note 181, at 173.
1. An Educational Environment Free of Discrimination: A Title VII Workplace Model on Campus

Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” The U.S. Supreme Court addressed the scope of this “abusive work environment” action in *Harris v. Forklift Systems, Inc.*, in which a woman sued her former employer for his sexist and insulting remarks on the job.

The U.S. District Court for the Middle District of Tennessee found for the defendant, asserting that the conduct did not “seriously affect the plaintiff’s well-being” or cause her to “suffer injury.” The U.S. Supreme Court reversed, arguing that the standard under Title VII is not one requiring psychological injury; it is enough that the conduct is severe and pervasive enough to create an objectively hostile environment. The theory is that, even if no psychological injury is documented, a discriminatorily abusive work environment “can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.”

287. See id. at 19. During Harris’ employment at Forklift, her supervisor told her on several occasions, in the presence of other employees, “You’re a woman, what do you know” and that she was “a dumb ass woman.” Id. He made sexual innuendos about discussing her compensation, stating that the two of them should “go to the Holiday Inn to negotiate [Harris’] raise.” Id. Hardy asked female employees to get coins from his front pocket and had Harris and other women pick objects up off the floor in front of him that he intentionally threw there. See id.
288. Id. at 20 (citing Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986)). The Court of Appeals for the Sixth Circuit affirmed the decision of the district court. See id.
289. Id. at 22 (“So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.”). The court points out that this “is not a mathematically precise test” and can “only be determined by looking at all the circumstances.” Id. at 22-23. Such factors to be taken into account include the frequency and severity of the conduct, and whether it threatens, humiliates, or “unreasonably interferes with an employee’s work performance.” Id. at 23.
290. See id. at 21-22 (“[E]ven without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII’s broad rule of workplace equality.”).
Title VII and IX of the Civil Rights Act embody the Fourteenth Amendment's guarantee of equality\textsuperscript{291} and seek to prevent discrimination in the workplace and in education by forbidding the denial of a person's equal opportunity to participate and achieve. Some hate speech on college campuses rises to the level of verbal harassment, intimidation and discrimination, which deprives the victims of an equal educational opportunity. Therefore, strong justification exists for hostile environment based speech codes in the university setting.\textsuperscript{292}

The workplace and the university setting are sufficiently similar to warrant the application of the workplace model in the university environment. Any differences between the two are "in degree more than [in] kind."\textsuperscript{293} The essential purpose behind each institution, the workplace or the university, is to ensure an environment that is conducive to equal productivity, equal thought, and equal opportunity to achieve. The two have many similar characteristics:

The classroom, the lab, the dorm, the dining hall, and the like are all places in which students must live and work and perform successfully if they are not to be denied tangible future benefits, in just the same way that the workplace is a place in which employees must live and work and perform successfully if they are not to be denied tangible future benefits.\textsuperscript{294}

The two environments are analogous in several other respects. First, in both an employment setting and on a college campus the employee and the student generally interact with the same people on a regular basis, whether it be in meetings, classes, or social events.\textsuperscript{295} Second, in both of these contexts the participants share individual goals—success, promotion, academic achievement—and community goals—productivity, recognition, winning.\textsuperscript{296} Third, both employees and students have limited avenues of retreat in the face of harassing speech, and are therefore a captive audience.\textsuperscript{297}

\begin{itemize}
\item \textsuperscript{291} 42 U.S.C.A. § 2000e-2 (1999); 20 U.S.C.A. § 1681 (1999) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.").
\item \textsuperscript{292} See generally S\textsuperscript{h}ie\textsuperscript{l}l, supra note 1, at 99 (outlining the argument in favor of applying a Title VII approach in the university setting); see also Gale, supra note 181, at 174.
\item \textsuperscript{293} Ellen E. Lange, Note, \textit{Racist Speech on Campus: A Title VII Solution to a First Amendment Problem}, 64 S. CAL. L. REV. 105, 125 (1990).
\item \textsuperscript{294} S\textsuperscript{h}ie\textsuperscript{l}l, supra note 1, at 107.
\item \textsuperscript{295} See Lange supra note 293, at 125-26.
\item \textsuperscript{296} See id. at 126.
\item \textsuperscript{297} See id.
\end{itemize}
Finally, the "risk of overintrusiveness [in these contexts] is limited by the nature of the setting" because "both the workplace and the campus are discrete, definable 'experiences.'"\(^{298}\) With such definite boundaries, rules may be tailored to specifically address the potential tensions that arise. Because of these similarities, "[t]he protective rights accorded individuals in the workplace—protection from harassment and discrimination—ought to be accorded to students as they pursue their education."\(^{299}\)

In drafting such a code, the goal would be to prohibit severe, intentional, face-to-face verbal assaults that would disrupt a reasonable person's ability to function effectively in the campus setting.\(^{300}\) This aspect of the code would be race-neutral and drafted in accordance with the recognized First Amendment exception of workplace harassment.\(^{301}\) Challenges regarding content-based restrictions on speech as well as viewpoint discrimination hurdles should therefore be avoided because a race-neutral code does not single out certain speech about certain groups. The speaker must intend to cause harm, and the interference with the victim's educational rights must be objectively identifiable to a reasonable person.\(^{302}\)

In further narrowing this provision, a university should employ sanctions that are the "least restrictive means available to discourage prejudiced harassment."\(^{303}\) In addition, the incident should be "highly likely to produce serious psychological harm and a hostile or intimidating educational environment."\(^{304}\) Students should be informed as to exactly what could constitute a violation of the code so as to avoid vagueness challenges, and in suspect cases, "a presumption in favor of free speech should prevail."\(^{305}\)

---

298. Id. at 127.
299. Id.
300. See Delgado & Yun, supra note 210, at 886-87. The standard is not subjective and, therefore, does not take into account a student's particular hyper-sensitivities. The harm and disruption must be objectively discernable to a reasonable person similarly situated.
301. See id. at 886-87.
302. See Gale, supra note 181, at 182-83. Under the language of Harris, examples of interference would include that which affects a student's performance, retention at the university, or advancement and achievement. Harris, 510 U.S. at 21-22.
303. Id. at 183.
304. Id.
305. Id. To avoid vagueness challenges, a speech code should be accompanied by a set of explicit guidelines and seminars/workshops for entering students. See Lange, supra note 293, at 132. Also, the Equal Employment Opportunity Commission Guidelines have been held to be sufficiently detailed to provide adequate notice to
To avoid overbreadth challenges, constitutionally protected speech must not be swept within the code's parameters. Therefore, under such a policy, certain situations may not be actionable, such as “campus debates, speeches or demonstrations, classroom discussions, or conversations among students, unless the circumstances clearly show that speaker intentionally singled out particular individuals for discriminatory harassment.” These limitations, when taken together, remedy the substantial flaws in the Michigan Policy and the UW Rule at Wisconsin.

For example, under this type of narrow, limited code, a student who states in class that the arts are more suited for the women's side of the brain and mathematics for the man's would not face punishment. In addition, students who are members of a Neo-Nazi group cannot be forbidden from holding a protest on campus and brandishing flags with swastikas on them.

If, on the other hand, a student who arranged for a controversial Nation of Islam speaker to appear during Black History month and was then the subject of four death threats by another individual on campus, then that individual should be subjected to sanctions. Also, in a case where a black quarterback is continually jeered and threatened in person, and by phone and mail, the individual(s) responsible would possibly face punishment. In both of these incidents the behavior is a severe, intentional, one-on-one threatening verbal assault that is highly likely to produce serious psychological harm and an intimidating educational environment to a reasonable student.

2. Race as an Aggravating Factor in Punishing Hate: A Mitchell Component

A second provision to a campus code should incorporate a penalty enhancement approach, that would increase the punishment for any campus offense where bias was found to be a motivating factor. This approach is constitutionally permissible under
Mitchell and "would not single out particular types of expression, but rather particular types of motivation at the punishment stage."310

Under this provision, any campus offense, such as vandalism, invasion of privacy, assault or theft could be punished more severely if bias was found to be a motivating factor. The U.S. Supreme Court has held that it is constitutionally permissible to consider such aggravating factors as racial hatred in making sentencing determinations.311 In Dawson v. Delaware, the Court held "that the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment."312 Although Dawson does not involve a penalty enhancement provision, its rationale applies nonetheless. Moreover, motive is permissibly taken into account under federal and state anti-discrimination laws, and where evidence of discrimination is found, one cannot claim protection under the First Amendment's shield.313

A code, therefore, should be drafted based on a race-neutral Title VII hostile environment model with a penalty enhancement component at the sentencing stage for those infractions said to be bias-motivated. Such a code would be constitutionally permissible and would not place the Title VII statute above the demands of the First Amendment. This solution is supported by the compelling interest in protecting the university community from the serious harm bias-inspired conduct inflicts.314

310. Delgado & Yun, supra note 210, at 887.

311. See Barclay v. Florida, 463 U.S. 939, 949 (1983) ("The United States Constitution does not prohibit a trial judge from taking into account the elements of racial hatred in this murder . . . Barclay's desire to start a race war [is] relevant to several statutory aggravating factors.").


313. See Wisconsin v. Mitchell, 508 U.S. 476, 487-88 (1993); see also Norwood v. D.L. Harrison, 413 U.S. 455, 470 (1973) ("Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.").

314. See Mitchell, 508 U.S. at 487. The State's amicus brief argued that "bias motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest." Id. at 488.
B. University Environment as a Place to Educate: The Invaluable Role of Educational Endeavors in Ensuring a Tolerant Campus Environment

In analyzing ways to deal with the problem of hate speech on university campuses, one must not forget that the context is an educational environment, the mission of which is to educate young adults. In implementing any policy on hate speech, a college must include an educational component that aims to teach students about intolerance, racism, sexism, homophobia and religious differences in a serious and meaningful way. A narrowly drafted speech code would work to deter the most egregious and assaultive speech directed at individual students, but in order to ensure long-term change, educational programs must be put in place as well.

Critics of codes argue for more speech, maintaining that open dialogue and exchange of ideas is the intent of the First Amendment in this country. In theory this principle is true, and if everyone had an equal voice and equal opportunity to be heard, then speech codes of any sort would not be needed. Unfortunately, this situation rarely exists. This inequality does not mean, however, that more speech or open dialogue on the matter is not also an essential component in furthering this cause. Serious discussion of these issues should be fostered at a university through “counterculture courses, in the traditional rhetorical and academic mode, to examine and critically challenge hate-filled or bating or inciting speech” or notions about certain groups.\(^\text{315}\)

Non-academic avenues should be encouraged as well, such as creating opportunities for demonstration projects and discourse as well as mediation and counseling provisions for all students.\(^\text{316}\) Minority student organizations should also be strongly supported in addition to multi-cultural events and forums and workshops for discussion of controversial subjects.\(^\text{317}\) It is critical that students be provided with an opportunity to talk to each other and understand their differences, not mock them. Perhaps by fostering differences among the study body, speech codes in any form will become less and less necessary.


\(^{316}\) See id. at 12.

\(^{317}\) See id.
CONCLUSION

When students are unable to pursue their academic goals because of assaultive, discriminatory speech, the university has failed in its mission to provide an environment where every student has an equal opportunity to succeed. Implementing a narrowly drafted race-neutral code provision based on a hostile environment model, in addition to a penalty enhancement component for bias-inspired violations, is permissible, constitutional, and necessary to ensure that the university’s mission is carried out.

Such a code, along with forward-looking, long-term educational objectives, would work towards stopping hate on campus without stifling the speech of individual students. A public university can no longer be permitted to hide behind the shield of the First Amendment when students are being denied an equal educational opportunity.