

# LEAVING THEM SPEECHLESS: A CRITIQUE OF SPEECH RESTRICTIONS ON CAMPUS

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When a multitude of young persons, keen, open-hearted, sympathetic, and observant, as young persons are, come together and freely mix with each other, they are sure to learn from one another . . . [T]he conversation of all is a series of lectures to each, and they gain for themselves new ideas and views, fresh matter of thought and distinct principles for judging and acting, day by day.

— John Henry, Cardinal Newman<sup>1</sup>

Although philosophers view the ideal university as a place of free expression, open debate, and critical reflection, many academic institutions have recently begun to adopt restrictive speech codes regulating the content of campus discussion. Designed to combat racist, sexist, and other offensive speech, these policies, while pursuing admirable goals, ultimately undermine the character and purpose of the academy.

The courts first confronted the constitutional validity of a university speech code in 1989 in *Doe v. University of Michigan*.<sup>2</sup> In that case, Judge Avern Cohn of the United States District Court for the Eastern District of Michigan struck down on First Amendment grounds the University of Michigan's speech code, noting that free expression is essential to the mission of the university. Still, many similar speech codes remain in force in public and private universities throughout the nation.<sup>3</sup>

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1. Newman, *The Idea of a University; Discourse VI*, reprinted in 2 FROM BEOWULF TO THOMAS HARDY 403, 412 (R. Shafer ed. 1931).

2. 721 F. Supp. 852 (E.D. Mich. 1989). See generally Case Comment, *First Amendment—Racist and Sexist Expression on Campus—Court Strikes Down University Limits on Hate Speech: Doe v. University of Michigan*, 103 HARV. L. REV. 1397 (1990); Comment, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L.J. 1351 (1990).

3. Various permutations of speech codes have been adopted at some of our nation's most prominent universities, including the University of California, the University of Connecticut, Emory University, the University of North Carolina-Chapel Hill, the Uni-

University administrators and academics advocate the use of speech codes to combat what they see as a rising tide of racial intolerance and sexual harassment on campus. They defend speech codes against First Amendment objections on two grounds. First, they contend that such codes fall within traditional exceptions to First Amendment protection. Second, they argue that the speech prohibited by such codes would be particularly harmful to historically oppressed groups, and thus, they advocate a new interpretive methodology that would allow content restrictions to be placed on speech offensive to such groups.

This Article posits that free debate and discourse are the best remedies for racism, sexism, and other forms of intolerance. Open discussion not only overcomes prejudice, but also works to empower historically oppressed groups.<sup>4</sup> In contrast, speech codes simultaneously patronize and stigmatize minority groups<sup>5</sup> and offend the underlying principles of the Constitution. Part I of this Article argues that most existing university speech codes are invalid under traditional constitutional analysis. Part II examines the controversial views of revisionist scholars, concluding that the goal of reducing ignorance and intolerance is best attained through the free market of ideas.

## I. TRADITIONAL FIRST AMENDMENT ANALYSIS

Under the First Amendment, Congress may not abridge the right to free speech.<sup>6</sup> This primary provision of the Bill of Rights, which has been held to apply to the states,<sup>7</sup> means, at the least, that content-based governmental restrictions on speech are impermissible.<sup>8</sup> In *Texas v. Johnson*,<sup>9</sup> the 1989 deci-

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versity of Pennsylvania, Stanford University, the University of Texas, Tufts University, and the University of Wisconsin. See Grey, *Discriminatory Harassment and Free Speech*, 14 HARV. J.L. & PUB. POL'Y 157 (1991); Wilson, *Colleges' Anti-Harassment Policies Bring Controversy Over Free-Speech Issues*, Chron. Higher Educ., Oct. 4, 1989, at A1, col. 2.

4. See *infra* notes 66-68 and accompanying text.

5. See *infra* note 69 and accompanying text.

6. U.S. CONST. amend. I.

7. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *Fiske v. Kansas*, 274 U.S. 380 (1927); *cf. Near v. Minnesota*, 283 U.S. 697, 707 (1931) (freedom of the press). State universities are thus subject to the First Amendment. "University administrators at public institutions are bound by the first amendment under state action doctrine. At private institutions, the principle of free speech is often evoked as a matter of ethics, regardless of whether the Constitution applies directly." Matsuda, *Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2370 (1989).

8. See, e.g., *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 561

sion finding unconstitutional a state flag-burning statute, Justice Brennan stated: "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>10</sup>

University speech codes designed to prohibit racist, sexist, and other offensive speech are inherently content-based. Administrators and academics openly admit that they object to this speech because they disagree with the very message it conveys.<sup>11</sup> Such content-based restrictions are constitutionally unacceptable. When striking down the University of Michigan's speech code, Judge Cohn emphasized the principle of content neutrality: "What the University could not do . . . was establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed."<sup>12</sup>

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(1980) (commercial speech protected); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1978); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) ("[The] government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

9. 109 S. Ct. 2533 (1989).

10. *Johnson*, 109 S. Ct. at 2544 (citations omitted).

11. Professor Charles Lawrence, a fervent advocate of speech codes that restrict racist speech, acknowledges that such codes are content-based. He argues that speech codes should go even further: "[C]ontent regulation of racist speech is not just permissible but, in certain circumstances, may be required by the Constitution." France, *Hate Goes to College*, A.B.A. J., July 1990, at 44, 48 (quoting Lawrence). Professor Mari Matsuda argues that "[w]e can attack racist speech—not because it isn't really speech, not because it falls within a hoped-for exception, but because it is wrong." Matsuda, *supra* note 7, at 2380.

12. *Doe v. University of Mich.*, 721 F. Supp. 852, 863 (E.D. Mich. 1989).

An educational institution's content-based restriction of speech was the focus in the case in *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969). The petitioners in *Tinker* were high school and junior high school students who had been suspended for wearing armbands that violated the school dress code. Specifically at issue in *Tinker* was an armband restriction that had been adopted two days before the students attempted to attend class wearing armbands. *See id.* at 504. The school officials adopted this restriction because they anticipated disturbances by students wearing armbands as a sign of protest against the Vietnam War. *See id.* at 508. The Supreme Court, however, found that such a regulation violated the students' right to free speech and characterized the case as involving "direct, primary First Amendment rights." *Id.* The Court held that the school officials could not adopt such a code simply because they disagreed with the content of the students' message:

[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. *But our Constitution says we must take this risk . . .*

*Id.* (citation omitted) (emphasis added). *See also* *Shelton v. Tucker*, 364 U.S. 479, 487

Content-based speech regulation is unconstitutional on its face unless it falls within one of the narrow categories of exceptions to First Amendment protection.<sup>13</sup> These exceptions take the form of categorical rules that differentiate between protected expression and expression that the government may regulate so long as minimal due-process requirements have been met.<sup>14</sup>

One of the categorical exceptions from First Amendment protection, often cited by speech code advocates, is for "fighting words."<sup>15</sup> The rationale behind the restrictions on fighting words can be best described as a limitation on actions rather than on words: Fighting words contain no actual content per se; rather, they are offensive because they provoke. That is, the speaker of fighting words seeks to convey a message intended and likely to incite an immediate and violent reaction. Thus, the fighting-words exception is justified on the ground of the government's interest in maintaining order and preventing

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(1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

13. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-8, at 832 (2d ed. 1988).

14. See *id.* These categories include fighting words, libelous statements, and obscene expression. See *id.* § 12-18, at 928-29.

15. Other possible categorical exceptions that might be used to shelter speech code regulations have been suggested. For example, Professor Richard Delgado has argued for such speech restrictions through a libel-law exception. See Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 *HARV. C.R.-C.L. L. REV.* 133 (1982). Libel laws have been held to constitute a categorical exception from First Amendment protection. Most prominently, in *Beauharnais v. Illinois*, 343 U.S. 250 (1952), the Supreme Court found constitutional a statute prohibiting exhibition in a public place of any publication portraying "depravity, criminality, unchastity, or lack of virtue of any class of citizens, of any race, color, creed or religion . . ." *ILL. REV. STAT.* ch. 38, para. 471 (1959) (repealed 1961). The statute also required that the publication expose the victim "[t]o contempt, derision, or obloquy, or [be] productive of breach of the peace or riots." *Id.* In *Beauharnais*, the defendant had circulated leaflets deriding blacks and calling for an uprising of one million white persons. The Court rested its decision on *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Serious doubt, however, exists as to whether *Beauharnais* is still good law. See *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978); C.E. BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 21 (1989) ("[T]he currently dominant legal view in the United States is that *Beauharnais* . . . is no longer good law.").

Professor Catharine MacKinnon advocates anti-obscenity legislation on the basis of an obscenity exception to First Amendment protection. See MacKinnon, *Pornography, Civil Rights, and Speech*, 20 *HARV. C.R.-C.L. L. REV.* 1 (1985). In *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986), however, the Seventh Circuit Court of Appeals held unconstitutional a statute, authored by MacKinnon and Professor Andrea Dworkin, that imposed civil liability on producers and purveyors of pornography and allowed victims to maintain a private action. Thus, to date, this categorical exception has failed to provide a legal shelter for speech codes that restrict free expression.

physical violence.<sup>16</sup>

The United States Supreme Court has articulated standards governing the fighting words exception. In *Chaplinsky v. New Hampshire*,<sup>17</sup> the Court unanimously upheld a statute banning “face-to-face words plainly likely to cause a breach of the peace by the addressee.”<sup>18</sup> The test outlined in *Chaplinsky* is whether or not a person of ordinary intelligence would understand the words as likely to cause the average addressee to react violently.<sup>19</sup> Such words include “the lewd and obscene, the profane, the libelous, and the insulting . . . those which by their very utterance inflict or tend to incite an immediate breach of the peace.”<sup>20</sup> In preemptory fashion, the Court noted that “[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.”<sup>21</sup> Similarly, the court in *Doe v. University of Michigan* recognized that “[u]nder certain circumstances racial and ethnic epithets, slurs, and insults might fall within [the fighting-words] description and could constitutionally be prohibited by the University.”<sup>22</sup>

The fighting-words doctrine does not, however, constitute an ironclad justification for limiting free speech. Specifically, the fighting-words doctrine can work as an undesirable restriction on speech when someone who objects to certain speech silences that speech by threatening violence. This doctrine is therefore particularly dangerous to minority groups who express unpopular views.<sup>23</sup> This is one reason that the courts have narrowly construed the fighting words doctrine, limiting its application.<sup>24</sup>

16. See Gard, *Fighting Words as Free Speech*, 58 WASH. U.L.Q. 531, 534 (1980).

17. 315 U.S. 568 (1942).

18. *Chaplinsky*, 315 U.S. at 573.

19. See *id.* at 572.

20. *Id.*

21. *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1937)).

22. *Doe v. University of Mich.*, 721 F. Supp. 852, 862 (E.D. Mich. 1989). The court, however, ruled that the University of Michigan’s speech code did not confine itself to regulating such circumstances. See *id.* at 863 (“If the Policy had the effect of only regulating in these areas, it is unlikely that any constitutional problem would have arisen.”).

23. See Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 512.

24. Professor Tribe notes that, in effect, the Court has incorporated the clear-and-present-danger test into the fighting-words doctrine. According to Professor Tribe, the courts are interpreting *Chaplinsky* as it was intended to be interpreted—as an opinion based on the ground that the government was not to be foreclosed by the First Amend-

Under current case law, universities seeking to restrict fighting words would need to include four elements in their speech codes before the fighting-words exception from First Amendment protection would be applicable. First, offending utterances must constitute extremely provocative personal insults.<sup>25</sup> Second, the words must have a direct tendency to incite an immediate, violent response by the average recipient.<sup>26</sup> Third, the words must be uttered face-to-face to the addressee.<sup>27</sup> Fourth, each offending utterance must be directed at an individual, not a group.<sup>28</sup> Following these guidelines, public universities could constitutionally enact codes that restrict fighting words. Yet such codes would likely encompass more than the remarks that they currently proscribe. For example, in *Chaplinsky* the fighting words held to be unprotected were "damned Fascist" and "damned racketeer."<sup>29</sup> Any attempt to regulate exclusively speech aimed at particular groups would render a code unconstitutional because the focus would be on content rather than on public order.

Even assuming that universities may constitutionally regulate

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ment from prohibiting words likely to cause a public brawl. See *L. TRIBE*, *supra* note 13, § 12-18, at 929 n.9.

25. See, e.g., *Norwell v. City of Cincinnati*, 414 U.S. 14 (1973) (refusing to uphold the conviction of one "verbally and negatively" protesting his arrest, finding no fighting words); *Cohen v. California*, 403 U.S. 15 (1971) (refusing to uphold conviction of person wearing a jacket bearing the message "F— the draft"); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

26. See, e.g., *Lewis v. City of New Orleans*, 415 U.S. 130 (1974) (refusing to uphold conviction of defendant who said "you g—d— motherf—ing police"); *Gooding v. Wilson*, 405 U.S. 518 (1972) (refusing to uphold defendant's conviction for addressing a policeman by saying "you son of a b— I'll choke you to death"); *Cohen v. California*, 403 U.S. 15, 20 (1971) (stating that fighting words are "those personally abusive epithets which, when addressed to the ordinary citizen, are as a matter of common knowledge, inherently likely to provoke reaction"); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

27. See, e.g., *Hess v. Indiana*, 414 U.S. 105 (1973) (statement made during antiwar protest that "We'll take the f—ing street later" was constitutionally protected because the words were not aimed at anyone in particular); *Lewis v. City of New Orleans*, 408 U.S. 913, 913 (1972) (Powell, J., concurring) (If the words in question "had been addressed by one citizen to another, face to face and in a hostile manner . . . they would be 'fighting words.'"); *Gooding v. Wilson*, 405 U.S. 518, 524 (1972) (stating that speech restrictions must be limited to words that have a direct tendency to cause acts of violence by the person to whom the remark is addressed); *Cohen v. California*, 403 U.S. 15, 20 (1971) ("No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult."); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

28. See, e.g., *Gooding v. Wilson*, 405 U.S. 518, 524 (1972); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942). See also *supra* note 15 (questioning continued validity of *Beauharnais*).

29. *Chaplinsky*, 315 U.S. at 569.

a narrow category of speech, university speech codes face two additional hurdles. First is the doctrine of overbreadth. An overbroad statute is one that, although designed to restrict only unprotected speech, includes within its ambit speech protected by the First Amendment.<sup>30</sup> Most university codes are likely to fail this test. The quintessential example of an overbroad university speech code was presented in *Doe v. University of Michigan*. The University of Michigan code subjected students to discipline for “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.”<sup>31</sup>

The overbroad speech code of the University of Michigan resulted in multiple infringements on free speech. For instance, a student in the School of Social Work openly stated in an academic discussion that he believed homosexuality to be a disease and that he hoped to develop a program for persuading gay clients to become heterosexual.<sup>32</sup> After other students filed a complaint, the Interim Policy Administrator at the University of Michigan concluded that the evidence warranted an official hearing on charges of “sex and sexual orientation harassment.”<sup>33</sup> The panel that heard the student’s case found him “guilty” of sexual harassment, but refused to convict him, citing First Amendment protections. The scruples of the administrators apparently prevented the suppression of unpopular views. But as the court noted in its review:

[T]he fact remains that the Policy Administrator—the authoritative voice of the University on these matters—saw no First Amendment problem in forcing the student to a hearing to answer for allegedly harassing statements made in the

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30. See *Broadrick v. Oklahoma*, 413 U.S. 601, 612-13 (1973):

In [some] cases, it has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes.

See also *Houston v. Hill*, 482 U.S. 451, 458-60 (1987) (municipal ordinance prohibiting the interruption of police executing their duties is overbroad); *NAACP v. Button*, 371 U.S. 415, 433 (1963) (Virginia statute defining and punishing malpractice by attorneys unduly inhibits free expression).

31. *Doe v. University of Mich.*, 721 F. Supp. 852, 856 (E.D. Mich. 1989) (quoting University of Michigan code).

32. See *id.* at 865.

33. *Id.*

course of academic discussion and research. Moreover, there is no indication that had the hearing panel convicted rather than acquitted the student, the University would have interceded to protect the interests of academic freedom and freedom of speech.<sup>34</sup>

Another incident at the University of Michigan involved a statement made in an orientation session of a dentistry class. The class was widely regarded as one of the most difficult in the dentistry curriculum. During a small group discussion, a student noted that "he had heard that minorities had a difficult time in the course and that he had heard that they were not treated fairly."<sup>35</sup> The student attributed this information to his roommate, a black former dentistry student. A minority professor teaching the class filed a complaint, contending that the statement was unfair and hurt her chances for tenure. As a result of this complaint, the student was "counseled" on the University's racial harassment policy and agreed to write a letter apologizing for the comment.<sup>36</sup>

These two incidents indicate that the University of Michigan's code was overbroad because, contrary to the basic principles of the First Amendment, the code constrained speech on the basis of its content. Furthermore, both incidents occurred in the context of academic discussion and produced no imminent threat of physical violence, as required by the fighting-words doctrine.<sup>37</sup> Thus, even if universities may restrain speech within the narrow fighting-words exception, the University of Michigan's code went far beyond the scope of this exception.

A second obstacle that university speech codes face is vagueness. Statutes that seek to regulate speech are "void for vagueness" if they fail to give public notice as to what constitutes criminal or sanctionable conduct.<sup>38</sup> The vagueness doctrine is particularly important in the context of free speech, because a vague statute may well "chill" constitutionally protected speech. To avert the concerns posed by the vagueness doctrine, a restriction on speech must give adequate warning of the conduct that is prohibited; it must precisely define the unpro-

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34. *Id.*

35. *Id.* at 866.

36. *See id.*

37. *See supra* notes 25-29 and accompanying text.

38. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 16.9, at 846 (3d ed. 1986).

tected speech.<sup>39</sup> Yet this is no easy task. For example, vagueness will continue to plague all speech codes that fail to adequately define such terms as "racist."<sup>40</sup>

Existing university speech codes have not been drafted with sufficient care to avoid the vagueness problem. In *Doe*, Judge Cohn found that the words "stigmatize" and "victimize" "elude precise definition."<sup>41</sup> The language in the University of Michigan code, he said, put students in a position to have to guess what it meant in order to avoid sanctions by the University.<sup>42</sup>

The University of Michigan code is by no means the only campus speech regulation with vagueness problems. For example, the Stanford University speech code, while purporting to limit itself to "fighting words," restricts statements intended to "stigmatize" or "convey . . . contempt for human beings on [the] basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin."<sup>43</sup> As with the provisions of the University of Michigan's code, the terms "stigmatize" and "convey . . . contempt for" lack a precise definition and are exceptionally ambiguous. The University of Connecticut's speech code punishes students for "derogatory names, inappropriately directed laughter, inconsiderate jokes and conspicuous exclusion [of other students] from conversation."<sup>44</sup> It is difficult to imagine a more vague and ambiguous regulation of speech. The State University of New York at Buffalo Law

39. See *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973).

40. See Wright, *Racist Speech and the First Amendment*, 9 MISS. C.L. REV. 1, 23 (1988) ("[A] reasonably workable definition of racist speech that commands the agreement of even the targets of such speech may be practically unattainable, given that not only the behavioral patterns associated with racism, but also the nature or definition of racism may change historically.").

41. *Doe*, 721 F. Supp. at 867. Cf. *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 324-31 (7th Cir. 1985) (Indianapolis ordinance "defining 'pornography' as a practice that discriminates against women" struck down as violative of First Amendment because the ordinance "left out of its definition any reference to literary, artistic, political, or scientific value"), *aff'd mem.*, 475 U.S. 1001 (1986).

42. See *Doe*, 721 F. Supp. at 867.

43. Stanford Univ., *Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment 1* (June 1990) (available in office of *Harvard Journal of Law & Public Policy*). For a discussion of the Stanford code, see Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 451. See also Grey, *supra* note 3, at 160.

44. Wiener, *Words that Wound: Free Speech for Campus Bigots?*, NATION, Feb. 26, 1990, at 272, 273 (citing the University of Connecticut speech code). A student disciplined under the University of Connecticut code attacked the regulation as unconstitutional. A court-approved settlement of the suit substantially restricted the scope of the code. See Emerson, *Only Correct*, THE NEW REPUBLIC, Feb. 18, 1991, at 18.

School's code states that by "joining this legal community each student's absolute right to liberty of speech must also become tempered."<sup>45</sup> The law school's policy warns students that "racist, sexist, homophobic, anti-lesbian, ageist and ethnically derogatory statements" will evoke "swift, open condemnation by faculty."<sup>46</sup> Two law students complained that the language of this policy was so vague that they were afraid that speech not intended to be racist but interpreted as such could result in sanctions.<sup>47</sup>

In summary, the university speech codes presently in place fail the test of constitutionality because they do not confine themselves to regulating fighting words and because they are overbroad and vague.<sup>48</sup> Unless universities write narrower codes or abandon the project altogether, they will continue to be unable to withstand attack under existing constitutional law standards.<sup>49</sup>

## II. RESPONSES TO THE REVISIONISTS

Traditional First Amendment analysis yields strong arguments against campus speech codes at state universities. The proponents of these codes, however, rely on more than just the existing precedents and principles. In support of restrictions on racist speech, some revisionist scholars reject conventional First Amendment analysis as "absolutist" and instead call for a

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45. *Colleges' Harassment Codes Stir Free-Speech Debate Suits*, Wash. Times, Nov. 28, 1990, at A5, col. 1 (quoting State University of New York at Buffalo Law School policy).

46. *Id.* (quoting State University of New York at Buffalo Law School policy).

47. *See id.*

48. Gerald Gunther, Stanford law professor and author of a leading casebook on constitutional law, believes that "no matter how narrow or broad [speech codes] may be, anti-harassment policies are 'wrong as a matter of policy as well as doubtful as a matter of law.'" *Id.* (quoting Professor Gunther). He stated that he is worried about "the intimidating effect of these rules on a student who might feel vehemently opposed to affirmative action, but doesn't speak up because he feels he will be charged with racism . . . . This is thought control and interference in free debate of the worst variety." *Id.* (quoting Professor Gunther).

49. Subsequent to the court's holding in *Doe*, the University of Michigan redrafted its speech code in an attempt to bring it into conformity with constitutional constraints. The "interim policy on discriminatory conduct" presently states:

Physical acts or threats or verbal slurs, invectives or epithets referring to an individual's race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age or handicap made with the purpose of injuring the person to whom the words or actions are directed and that are not made as part of a discussion or exchange of an idea, ideology or philosophy are prohibited.

Office of the President, Univ. of Mich., Interim Policy on Discriminatory Conduct (Sept. 1990) (available in office of *Harvard Journal of Law & Public Policy*).

new approach that takes into account the "victim's story."<sup>50</sup>

Arguing that racist speech alienates minority students and encourages racial violence, these scholars propose explicitly content-based restrictions on racist speech.<sup>51</sup> They seek to quash offending utterances with speech codes, criminal penalties, and tort actions for group libel.<sup>52</sup>

The revisionists contend that racist speech silences and marginalizes minorities, effectively depriving these groups of free speech as well as the right to an education and personal development. Taking an anecdotal approach, they recount recent racial incidents on campus and elsewhere and discuss the emotional costs these incidents impose on the victims.<sup>53</sup> These revisionist scholars argue that allowing racist speech on campus constitutes a "psychic tax imposed on those least able to pay."<sup>54</sup>

Revisionist scholars accuse First Amendment "romantics" of extreme insensitivity at best and actual discriminatory intent at worst. Thus, Professor Richard Delgado, responding to an attack by an American Civil Liberties Union (ACLU) attorney on his proposal for a tort action for racial insults, notes that the ACLU "is composed mostly of white, male, middle-class lawyers who care a great deal about free speech,"<sup>55</sup> but less about exploited women and holocaust survivors. Professor Delgado

50. Matsuda, *supra* note 7, at 2321-22. See also Lawrence, *supra* note 43, at 456; Delgado, *supra* note 15, at 181.

51. See *supra* note 11.

52. See Matsuda, *supra* note 7, at 2357-58 (urging criminal penalties for statements that carry a "message of racial inferiority" that is "persecutorial, hateful and degrading" to a historically oppressed group); Lawrence, *supra* note 43, at 457 (arguing for campus speech regulations that would "prohibit face-to-face vilification"); Delgado, *supra* note 15, at 133 (arguing for a tort action for group libel).

53. See Lawrence, *supra* note 43, at 482-83 (discussing a personal experience of racism); Matsuda, *supra* note 7, at 2326-31 (recounting a litany of racist incidents). See also Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989) (discussing the trend toward anecdotal "storytelling" in legal scholarship). While this trend toward legal storytelling is innovative and refreshing, it shares the limitations of all anecdotal evidence. From the articles listing racist incidents on campus, it is difficult to determine the exact magnitude of the problem, because statistics or other objective measures are not presented.

54. Matsuda, *supra* note 7, at 2371 (noting that "[m]inority students often come to the university at risk academically, socially, and psychologically"). She adds:

The application of absolutist free speech principles to hate speech, then is a choice to burden one group with a disproportionate share of the cost of speech promotion. The principle of equality is violated by such allocation.

The more progressive principle of rectification or reparation—the obligation to repair effects of historical wrongs—is even more grossly violated.

*Id.* at 2376.

55. Delgado, *Professor Delgado Replies*, 18 HARV. C.R.-C.L. L. REV. 593, 596 (1983).

has taken this analysis a step further, arguing that white administrators secretly approve of racial insults and attacks. At "powerful white-dominated institutions," the administrators "benefit, and on a subconscious level they know they benefit, from a certain amount of low-grade racism in the environment."<sup>56</sup>

While revisionist proposals are likely to provide obvious advantages, they are not the most efficient means of combatting offensive speech. Public discussion and discourse serve better in opposing racism, sexism, and other forms of intolerance than rigid restrictions on speech. The traditional "marketplace of ideas" should discourage the purveyors of ignorance and falsehood. As Justice Holmes wrote:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by *free trade in ideas*—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.<sup>57</sup>

According to Dean Lee Bollinger, this statement by Justice Holmes "stands as one of the central organizing pronouncements for our contemporary vision of free speech."<sup>58</sup>

Open exchange and discussion play a particularly vital role in the truth-seeking mission of colleges and universities. By forc-

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56. Lawrence, *supra* note 43, at 475 (quoting address by Richard Delgado to State Historical Society, Madison, Wisconsin, April 24, 1989). "If an occasional bigot or redneck calls one of us a nigger or a spick one night late as we're on our way home from the library, that is all to the good." *Id.* (quoting same).

57. *Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting) (emphasis added). *Abrams* involved the prosecution of five Russian aliens for the distribution, in August 1918, of leaflets denouncing President Wilson for the United States intervention in Russia following the Russian Revolution. The leaflets urged munitions and other workers to protest the intervention with a general strike. The defendants were prosecuted under the Espionage Act, "a World War I piece of legislative handiwork that proscribed a variety of activities the Congress had deemed potentially harmful to the war effort." L. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 16 (1986).

58. L. BOLLINGER, *supra* note 57, at 18. An earlier statement of the "marketplace" thesis was made by John Milton in 1644 in an argument for the repeal of the British licensing system. Milton wrote:

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?

*Id.* at 58-59 (quoting J. MILTON, *AREOPAGITICA* 58 (R. Jebb ed. 1918)).

ing students to confront and address differing views, free campus debate ultimately advances the goals of toleration and understanding. As the Supreme Court stated in *Keyishian v. Board of Regents of the University of New York*:<sup>59</sup> “The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’ ”<sup>60</sup>

The revisionist scholars reject claims by civil libertarians that free debate and discussion will ultimately provide a remedy for intolerant speech. According to Professor Lawrence, racism renders the marketplace of ideas “dysfunctional” by limiting access and discouraging participation by minorities. “The American marketplace of ideas was founded with the idea of the racial inferiority of non-whites as one of its chief commodities, and ever since the market opened, racism had remained its most active item in trade.”<sup>61</sup>

Ironically, the very success that the revisionists have achieved helps to establish the validity of the much-maligned marketplace of ideas. Today, scholars representing the perspectives of various minority groups wield substantial power on college campuses. Most obviously, their efforts have led to the adoption of the many current speech codes.<sup>62</sup> The numerous sensitivity workshops and diversity requirements adopted by prestigious universities also underscore the influence of these scholars.<sup>63</sup>

It seems hypocritical for revisionist scholars to persist in referring to themselves as members of “outgroups” when their views carry such weight in the academic community.<sup>64</sup> As Rob-

59. 385 U.S. 589 (1967).

60. *Keyishian*, 385 U.S. at 603 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

61. Lawrence, *supra* note 43, at 468.

62. See *supra* note 3.

63. For example, Duke University requires freshmen to attend a diversity seminar that introduces students to “Duke’s vision” of “multiculturalism.” See Siegel, *The Cult of Multiculturalism*, THE NEW REPUBLIC, Feb. 18, 1991, at 34. Yale Law School instituted “race-sensitivity training workshops” in response to the distribution of a racist letter. See Rosen, *Hate Mail*, THE NEW REPUBLIC, Feb. 18, 1991, at 19. Columbia University has adopted mandatory “multicultural sensitivity-training” workshops for all freshmen. See Gibbs, *Bigots in the Ivory Tower*, TIME, May 7, 1990, at 104, 105.

64. Professor Delgado defines an “outgroup” as “any group whose consciousness is other than that of the dominant one.” Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 n.8 (1989).

ert Sedler, a professor at Wayne State University who argued the case against the University of Michigan speech code, stated, "[t]he 60's New Left radicals have taken over lots of university establishments. They can be just as fascistic as anyone."<sup>65</sup>

Furthermore, racist incidents on campus have not forced minority students into isolation and inaction; instead, they have produced a powerful student reaction.<sup>66</sup> And although Professor Matsuda insists that "the mainstream press often ignores [stories of racial harassment],"<sup>67</sup> in fact, activists and academics have proven adept in drawing the popular media's attention to the problem of campus racism.<sup>68</sup> This sort of private agitation and activism is precisely what is prescribed by the traditional "marketplace of ideas" approach.

In contrast, university speech codes tend to patronize and marginalize minority groups. Alan Keyes, a black who served as an official in the Reagan administration, denounces such codes as "paternalistic forms of well-intentioned racism that cripple[] blacks," and indicates that "he would feel cheated by an education that insulated him from contact with white racist views."<sup>69</sup> Codes prohibiting racist and sexist speech are demeaning because they isolate certain groups at the expense of others. This arouses resentment and hinders communication. Ultimately, the communication effected through privately-organized pressure and protest advances the goals of improved opportunity

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65. France, *supra* note 11, at 49 (quoting Professor Sedler). See also Adler, *Taking Offense*, NEWSWEEK, Dec. 24, 1990, at 48 ("politically correct" movement on campus is "the program of a generation of campus radicals who grew up in the '60s and are now achieving positions of academic influence").

66. The United Coalition Against Racism (UCAR), a student organization at the University of Michigan, is probably one of the most well-organized and visible student groups on the campus. Following several racist incidents on the Michigan campus in 1987, UCAR threatened to file a class action suit against the university "for not maintaining or creating a non-racist, non-violent atmosphere" on campus. Following this threat, the university adopted its "anti-racial harassment policy." *Doe v. University of Mich.*, 721 F. Supp. 852, 854 (E.D. Mich. 1989).

67. Matsuda, *supra* note 7, at 2331.

68. The following are a sample of some recent popular articles describing racist incidents on campus: France, *supra* note 11; Gibbs, *supra* note 63, at 104 (noting that "many campuses seem to distill the free-floating bigotries of American society into a lethal brew"); Wiener, *supra* note 44 (discussing the competing view on campus speech codes); White, *The New Racist*, MS. MAG., Oct. 1987, at 68 (discussing racist incidents at the University of Michigan, the University of Massachusetts-Amherst, the University of Wisconsin, and others); and Lord, *Frats and Sororities: The Greek Rites of Exclusion*, NATION, July 4, 1987, at 1012 (describing a variety of racist incidents on campus, including the "jungle party" of the Sigma Alpha Mu fraternity at the University of Michigan).

69. France, *supra* note 11, at 49 (quoting Keyes). See also Keyes, *Freedom Through Moral Education*, 14 HARV. J.L. & PUB. POL'Y 165 (1991).

for and sensitivity toward minorities more successfully than do codes restricting speech.

The marketplace approach also avoids some of the potential pitfalls of official regulation of speech content. Official speech code restrictions, unlike private action, may stifle a broad range of politically unpopular speech on campus.<sup>70</sup> The danger lies in the balancing analysis advocated by speech code proponents. These advocates urge universities and courts to weigh the injury to victims of racist speech against the value of the First Amendment rights involved.<sup>71</sup> Many commentators have expressed the concern, however, that such a "balancing approach" may ultimately justify restrictions on a broad array of speech rights.<sup>72</sup>

The advocates of speech restriction respond that their proposals are modest and narrow in scope, focusing only on the most extreme racist statements. Professor Lawrence writes that "narrowly drafted regulations of racist speech . . . can be defended within the confines of existing First Amendment doctrine."<sup>73</sup> Likewise, Professor Matsuda proposes a "narrow definition of actionable racist speech."<sup>74</sup> While these reassurances are undoubtedly sincere, they should be examined critically. The same scholars who advocate speech restrictions are also often involved in expanding contemporary definitions of racism. Professor Lawrence writes that in America "[r]acism is ubiquitous. We are all racists."<sup>75</sup> Professor Matsuda implies that opposition to affirmative action and other diversity policies is really just a form of covert racism.<sup>76</sup> This suggests that the

70. See *infra* notes 78-86 and accompanying text.

71. See, e.g., Matsuda, *supra* note 7, at 2376 (stating that "[t]he failure to hear the victim's story results in an inability to give weight to competing values of constitutional dimension"); Lawrence, *supra* note 43, at 457 (urging "reconsideration of the balance that must be struck between our concerns for racial equality and freedom of expression").

72. See, e.g., L. TRIBE, *supra* note 13, § 12-2, at 794 (arguing that balancing is a "slippery slope," providing no clear standard for distinguishing various types of restrictions); M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.02, at 2-11 to 2-12 (1984) (discussing the dangers of "ad hoc balancing").

73. Lawrence, *supra* note 43, at 457.

74. Matsuda, *supra* note 7, at 2357.

75. Lawrence, *supra* note 43, at 468. See also Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (applying Freudian and Cognitive psychology in developing a theory of unconscious racism).

76. See Matsuda, *supra* note 7, at 2332-34. She writes:

Lower- and middle-class white men might use violence against people of color, while upper-class whites might resort to private clubs or righteous indignation against "diversity" and "reverse discrimination." Institutions—gov-

validity of affirmative action programs and plans to "diversify" the college curriculum are not issues about which reasonable people can disagree. Given this eagerness to find hidden agendas and unconscious racism, one might reasonably be suspicious of assurances that speech codes will remain narrow in scope.

To the extent these scholars succeed in expanding the definition and scope of "racist" behavior, more academic activities may be at risk. The balancing analysis of First Amendment revisionists makes it difficult to establish a point at which vague First Amendment rights begin to outweigh the more concrete pain and injury of the victims of racist, sexist, and other insulting comments. The result of such analysis would likely support more inclusive codes of regulation.

Recent incidents on college campuses reveal the dangers inherent in using broad definitions of racism or other offenses to regulate speech. The following examples, though anecdotal, provide an appropriate counter-point to the "victims' stories" of Professors Matsuda and Lawrence.<sup>77</sup>

One story from Dartmouth College is particularly illustrative.<sup>78</sup> A lecturer in French and Italian required her class to write an essay on the infamous *Dartmouth Review*. One student, apparently failing to condemn the publication, received a "D" on his essay on the ground that it was racist. The student appealed the grade, and an ad hoc committee composed of French department professors concluded that there was no racism in the piece. The professor responded that "[she couldn't] in good conscience reward with an 'A' someone who is writing racist remarks, no matter how well it is said."<sup>79</sup> She was unable or unwilling, however, to specify in what respect the essay was racist. The department refused to reverse its conclusion and the professor resigned. In this incident, the procedural safeguards fortunately prevented a student from being subject to political grading. Still, the harassing and biased behavior of the

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ernment bodies, schools, corporations—also perpetuate racism through a variety of overt and covert means.

*Id.* at 2334 (footnotes omitted). See also Kinder, *The Continuing American Dilemma: White Resistance to Racial Change 40 Years After Myrdal*, J. Soc. ISSUES, 1986, No. 2, at 151, 152 (arguing that opposition to affirmative action and busing is often part of a new "symbolic racism").

77. See *supra* note 50 and accompanying text.

78. See *Good News at Dartmouth; Sarah Sully Resigns*, NAT'L REV., Sept. 15, 1989, at 18.

79. *Id.* at 18.

French professor in question will undoubtedly make students think twice before voicing unpopular views on campus.

A recent incident at Duke University also reveals the increasing intolerance on college campuses.<sup>80</sup> In September 1990, several faculty members joined the National Association of Scholars, an organization committed to preserving the classical Western curriculum. In response, Stanley Fish, Chairman of the English Department and professor of law at Duke,<sup>81</sup> charged the organization with racism, sexism, and homophobia.<sup>82</sup> He also urged that the university administration exclude association members from major campus committees on curriculum and tenure. Thus, instead of relying on debate and discussion, Fish attempted to enforce his views through coercive sanctions. Fortunately, the Duke administration rebuffed his demands.<sup>83</sup>

A litany of other incidents have appeared in the press. At Brown University, an art professor cancelled a showing of *The Birth of a Nation*, D.W. Griffith's classic film on the Ku Klux Klan, because of objections by the local NAACP.<sup>84</sup> Student publications at the University of Virginia and Vassar College have fought recognition and funding battles with student governments over politically charged issues.<sup>85</sup> During a recent Yale-Dartmouth football game in Hanover, New Hampshire, several students raised a banner advocating the restoration of the traditional Dartmouth Indian symbol. A college proctor, deeming the banner offensive, ordered the police to seize it.<sup>86</sup>

These incidents hardly prove that there is an epidemic of speech oppression on college campuses. Combined with the rise of speech codes, however, the incidents evince a possible trend toward content-based speech restrictions at America's universities. The incidents give substance and life to the threat posed to free expression by such a trend.

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80. See *Scholars' Group Accused of Bias, Divides Faculty*, N.Y. Times, Oct. 21, 1990, at 45, col. 3.

81. One collection of essays by Professor Fish that has been especially influential in the "politically correct" movement is S. FISH, *IS THERE A TEXT IN THIS CLASS?* (1980). For a discussion of Fish's role in the "politically correct" movement, see Prescott, *Learning to Love the PC Canon*, NEWSWEEK, Dec. 24, 1990, at 50.

82. See *Scholars' Group Accused of Bias, Divides Faculty*, *supra* note 80.

83. See *id.*

84. See Gibbs, *supra* note 63, at 106.

85. See *Papers Proliferate; The Right Presses Case on Campus*, L.A. Times, May 1, 1989, at 1, col. 1.

86. See *Good News at Dartmouth; Sarah Sully Resigns*, *supra* note 78, at 19.

## III. CONCLUSION

For thousands of years, poets and scholars have directed the young to "seek for truth in the groves of Academe."<sup>87</sup> Today, however, this search for truth is imperiled as well-respected scholars and prestigious universities commit themselves to restrictions on free debate and discussion. While these restrictions are doubtless well-intentioned, they constitute a dangerous example of state-sanctioned controls on free expression.

This new regime of speech restrictions rejects the traditional goal of truth-seeking at the university and substitutes a questionable policy of social engineering. History presents many sobering examples of the dangers of accepting restrictions on liberty in the name of utopian visions. As Edmund Burke wrote in his analysis of the French Revolution, "[i]n the groves of *their* academy, at the end of every vista, you see nothing but the gallows."<sup>88</sup>

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87. Horace, *Epistolarum libri II*, ii, 45, reprinted in *THE COMPLETE WORKS OF HORACE* 260 (J. Yonge ed. 1867) ("Atque inter silvas Academi quaerere verum," translated, "And seek for truth in the groves of Academe").

88. E. BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 88 (T. Mahoney ed. 1955) (1790) (emphasis in original).