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## Constitutional Law — "Words That Injure: Laws That Silence:" Campus Hate Speech Codes and the Threat to American Education

Jeanne M. Craddock

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CONSTITUTIONAL LAW—“WORDS THAT INJURE;  
LAWS THAT SILENCE:”<sup>1</sup> CAMPUS HATE SPEECH  
CODES AND THE THREAT TO AMERICAN EDUCATION

JEANNE M. CRADDOCK\*

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1. EDWARD J. CLEARY, *BEYOND THE BURNING CROSS: THE FIRST AMENDMENT AND THE LANDMARK R.A.V. Case 40* (1994). Mr. Cleary litigated the *R.A.V.* case from the courts of Minnesota to the United States Supreme Court; his book recounts the events and arguments that led to the Court's opinion in 1992.

“Each generation must reaffirm the guarantee of the First Amendment with the hard cases.”<sup>2</sup>

## I. INTRODUCTION

A fundamental tenet of a free society is the right of every citizen to express himself freely. First Amendment protection of free speech forms the basis upon which Americans participate in government and achieve social change. Just solutions to social problems can be achieved most effectively through the powerful forces of speech and counter speech.

American universities educate students not only in areas of substantive import but also, and more fundamentally, by training students to think and reason independently. The image of rugged individualism that characterizes American society may have been born in part of a university education that requires students to challenge their prejudices and preconceived ideas. Innovation and new technology come from challenging existing ways of doing things. Democratic government works better when independent-thinking individuals become active in lawmaking, and the home of independent, free thought has traditionally been American academia.

Recently, however, a new threat to education has “cast a pall of orthodoxy” over university classrooms and campus life.<sup>3</sup> Hate speech codes have been enacted at numerous public and private universities. These codes strictly limit the kind of speech in which students and teachers may engage. University administrators and civil rights activists justify the strict regulation of speech by pointing to the rise in incidents of racial and sexual harassment on American campuses in the last decade. The only way that they see to end these acts of bigotry and hatred is to strictly limit the kinds of speech permitted on a campus.

The goal of hate speech code advocates is to achieve equality for traditionally subordinated groups in the marketplace of ideas, thereby improving the overall quality of life for all citizens. It is the means by which hate speech code advocates attempt to achieve this end that conflicts with the First Amendment. Free speech advocates, in opposing hate speech codes, aim to achieve a similar goal through the use of counter speech.

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2. CLEARY, *supra* note 1, at 150 (this statement was the opening line of Mr. Cleary’s argument for *R.A.V.* before the United States Supreme Court on December 4, 1991).

3. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

A number of arguments are put forth by hate speech code advocates to reconcile such codes with the First Amendment. Speech code advocates argue that the First Amendment is not absolute and that hate speech falls outside of its protection. They claim that hate speech should be classified as "fighting words" and is therefore not worthy of protection. The United States Supreme Court's decision in *R.A.V. v. City of St. Paul*,<sup>4</sup> however, forbids the selective prohibition of fighting words because such codes are both content- and viewpoint-based restrictions of speech. Contrary to the assertions of speech code advocates, hate speech codes also do not fall within the secondary effects doctrine discussed *infra*, because they are inherently content-based and therefore fail the content-neutral requirement of the doctrine. Furthermore, the codes are not narrowly tailored because less restrictive means of regulating speech exist.

Moreover, the words and structure of hate speech codes regulate a vast and indeterminable amount of both protected and unprotected speech. Students, faculty, and administrators must necessarily guess as to what speech is permitted and what is prohibited by the codes. Student political speech may fall within the sweep of the codes although political speech is highly protected by the Constitution. For these reasons, hate speech codes are overbroad, void for vagueness, and violate the First Amendment.

When constitutional arguments do not succeed, hate speech code advocates look to Title VII of the Civil Rights Act of 1964 regulating harassment in the workplace.<sup>5</sup> Advocates claim that offensive speech creates a hostile learning environment for students subjected to hate speech. But the university setting is different from the workplace. Workplace speech is generally limited to that which is necessary to get the job done, and restrictions are permitted on speech that gets in the way of the job. University education, on the other hand, requires that students confront and engage in speech that is often offensive and disagreeable. The heart of undergraduate and graduate education takes place in the context of wide open debate.

Academic freedom requires that the university not only tolerate hate speech but that it actively support each student's right to speak. Any limit on the kind of speech a student may engage in will handicap a university's ability to educate the nation's youth. It is through challenging and considering disfavored ideas that a person may develop an independent mind and the opportunity to achieve social change.

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4. 112 S. Ct. 2538 (1992).

5. 42 U.S.C. § 2000e-2 (1988); 29 C.F.R. § 1604.11 (1991).

Part II of this Comment reviews the general structure of explicit and implicit hate speech codes. Part III explores the rationales and justifications advanced in support of hate speech codes. Part IV examines the seminal case of *R.A.V. v. City of St. Paul*<sup>6</sup> in light of campus hate speech codes and discusses the justifications for such codes. The Comment then applies the doctrines of overbreadth and vagueness to hate speech codes in Part V. Part VI discusses the doctrine of academic freedom as positioned against sexual harassment policies and examines the educational necessity of free speech in American universities and colleges. Part VII concludes the Comment, finding that the only way to achieve true civil rights is through the empowering force of counter speech.

## II. THE RISE AND STRUCTURE OF HATE SPEECH CODES

In the last decade there has been an apparent rise in the number of verbal, physical and political attacks on members of minority groups in the United States.<sup>7</sup> The reason behind the rise in such attacks has been attributed to a "resurgence of arch-conservative political philosophies naturally hostile to minority groups."<sup>8</sup> Although there has been a rise in the number of reported incidents of offensive behavior, there also has been a proportionate rise in the expectation of minorities to be "protected" from any potential threat in society.<sup>9</sup> These expectations, coupled with a more vocal populace, may be a parallel reason for the rise in reported incidents of minorities experiencing offensive behavior.<sup>10</sup>

Whatever the reason behind the increased incidence of offensive behavior, American academia has sometimes responded with a heavy hand by imposing strict hate speech codes which attempt to mold and shape student and faculty words and deeds.<sup>11</sup> The general purpose of

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6. 112 S. Ct. 2538 (1992).

7. William S. Alexander, *Regulating Speech on Campus: A Plea for Tolerance*, 26 WAKE FOREST L. REV. 1349, 1350 (1991); Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990) (reciting a litany of racial incidents on American campuses); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989) (reviewing the hate speech controversy in the context of numerous hate speech incidents).

8. Jamin B. Raskin, *The Great PC Cover Up*, 14-Feb. CAL. LAW. 68 (1994) (arguing that conservatives are hiding behind the First Amendment to justify racist views).

9. This is strictly the observation of the author.

10. *Id.*

11. *UWM Post, Inc. 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."); *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989). The

hate speech codes, as explained by proponents, is to ensure equal opportunity in education by fostering a learning environment free of even the most innocuously offensive remark.<sup>12</sup> Most hate speech codes share similar qualities which attempt to address the twin goals of ensuring equal educational opportunities and protecting potential victims of hate speech from the psychic injury of offensive words.<sup>13</sup> The codes require that student and faculty dialogue reflect a heightened sensitivity to diversity and multiculturalism while curbing discourse that is less palatable to offended parties.<sup>14</sup>

A number of public and private universities have implemented hate speech codes.<sup>15</sup> Only two of these codes have been challenged in court.<sup>16</sup> In each case, a federal district court struck down the codes based on the First Amendment doctrines of vagueness and overbreadth.<sup>17</sup> American universities also have seen a rise in what may be referred to as implicit speech codes. Implicit speech codes limit and sanction speakers on an ad hoc basis depending on the kind of speech. After reviewing the structure of explicit speech codes, the next section of this Comment will briefly review the problem of implicit speech codes.

#### A. *The Structure of Explicit Hate Speech Codes*

Before understanding why hate speech codes run counter to well-settled First Amendment doctrine, it is important to understand the structure of such codes. In 1987, the University of Michigan implemented a hate speech code which reached "[e]ducational and academic centers, such as classroom buildings, libraries, research

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University of California has imposed a hate speech code limiting fighting words similar to that enacted by the University of Wisconsin. The California code prohibits words that are "likely to provoke violent reaction whether or not they actually do." Nat Hentoff, *FREE SPEECH FOR ME, BUT NOT FOR THEE*, 161-62 (1992). The New York State University Law School at Buffalo enacted a speech code that states "bigotry, prejudice and discrimination are abhorrent to [the] traditions [of law]. . . . By entering law school, each student's absolute right to liberty of speech must also become tempered in its exercise, by the responsibility to promote equality and justice." *Id.* at 155-56.

12. Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 Harv.C.R.-C.L. L. Rev. 133 (1982).

13. *Doe*, 721 F. Supp. at 854; *UWM Post*, 774 F. Supp. at 1164; see also, Matsuda, *supra* note 7; Delgado, *supra* note 12.

14. *Doe*, 721 F. Supp. 852; *UWM Post*, 774 F. Supp. 1163; Matsuda, *supra* note 7.

15. "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." *UWM Post*, 774 F. Supp. at 1165 n.1.

16. *Doe*, 721 F. Supp. 852; *UWM Post*, 774 F. Supp. 1163.

17. *Doe*, 721 F. Supp. 852; *UWM Post*, 774 F. Supp. 1163.

laboratories, recreation and study centers. . . ."<sup>18</sup> Persons were subject to discipline in these areas for "[a]ny 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>19</sup> The U.S. District Court for the Eastern District of Michigan struck down the code on overbreadth and vagueness grounds.<sup>20</sup>

Similarly, the University of Wisconsin code stated that the university "may discipline a student in non-academic matters in the following situations:<sup>21</sup>

(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 . . . .<sup>22</sup>

The Michigan and Wisconsin codes each contain a section prohibiting students from engaging in speech and behavior that create a "hostile," "intimidating," or "demeaning" learning environment for others.<sup>23</sup> Ostensibly, this part of each code tracks similar language in *Meritor Savings Bank v. Vinson*<sup>24</sup> which recognized the hostile work environment cause of action under Title VII of the Civil Rights Act of 1964.<sup>25</sup>

Both of the universities set out guidelines for students to describe the type of speech and behavior that would violate the code.<sup>26</sup> Jokes

18. *Doe*, 721 F. Supp. at 856 (discussing University of Michigan Policy on Discrimination and Discriminatory Harassment).

19. *Id.*

20. *Id.* at 852.

21. *UWM Post*, 774 F. Supp. 1163, 1165.

22. *Id.*

23. *UWM Post*, 774 F. Supp. at 1165 ("The university may discipline a student in non-academic matters in the following situations . . . [for behavior that intentionally] . . . . 2. Create(s) an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity."); *Doe*, 721 F. Supp. at 856 (A student may be disciplined for behavior that "[c]reates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in university sponsored extra-curricular activities.").

24. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986).

25. *Id.*; see 42 U.S.C. § 2000e-2 (1988); 29 C.F.R. § 1604.11 (1991).

26. *UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163, 1165 (E.D. Wisc. 1991); *Doe v. University of Michigan*, 721 F. Supp. 852, 858 (E.D. Mich. 1989).

told by one student that demean another on the basis of one of the selected categories, for example, would violate both codes.<sup>27</sup> The Wisconsin code was crafted in the wake of *Doe v. University of Michigan*,<sup>28</sup> and required that such speech and comments be directed at a particular individual with an intent to demean the individual—aspects which were apparently lacking from the Michigan code and lent to that code's unconstitutionality.<sup>29</sup> The Wisconsin guidelines further note that a student's comment during a class discussion regarding race or gender issues would not violate the code.<sup>30</sup> The Michigan code was struck for penalizing students engaged in similar classroom speech.<sup>31</sup>

As the structure of each code illustrates, the codes attempt to protect individuals within specific groups from hearing or otherwise experiencing offensive speech in the academic environment. Less explicit than written codes, implicit speech codes take the form of sanctions and reprimands penalizing selected incidents of speech.

### B. *Implicit Hate Speech Codes*

The hate speech codes at the University of Michigan and the University of Wisconsin explicitly proscribe specific types of verbal and physical behavior based on certain characteristics.<sup>32</sup> Generally, explicit hate speech codes are attempts to limit certain, defined types of speech. Even though explicit hate speech codes contain vague and overbroad language, such codes are a far cry from implicit codes which prescribe speech on an ad hoc basis. Those prosecuted under implicit hate speech codes are never warned that their speech may result in a potential lawsuit because such codes have no explicit substance or format. Implicit codes allow university administrators to selectively punish speech that is offensive to some on a random basis. Alternatively, administrators have regulated speech under the guise of sexual harassment policies that regulate conduct. The following discussion reviews two cases in the context of such implicit speech codes.

Most recently, the U.S. District Court for New Hampshire in *Silva v. University of New Hampshire*<sup>33</sup> struck the university's sexual harassment policy on First Amendment grounds.<sup>34</sup> The sexual harassment policy stated that:

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27. *Doe*, 721 F. Supp. at 858.

28. *Id.* at 852.

29. 774 F. Supp. at 1165.

30. *Id.*

31. *Doe*, 721 F. Supp. 852.

32. See *supra* notes 18-30 and accompanying text for a description of the codes.

33. *Silva v. University of New Hampshire*, 1994 WL 504417 (D.N.H. 1994).

34. *Id.*



[a]ll faculty, staff and students have a right to work in an environment free of discrimination, including freedom from sexual harassment. It is the policy of the University System of New Hampshire that no member of the University System community may sexually harass another. The intent of this policy is not to create a climate of fear but to foster responsible behavior in a working environment free of discrimination.<sup>35</sup>

The policy provides examples of prohibited sexual harassment to include "derogatory gender-based humor,"<sup>36</sup> "sexually degrading words to describe a person,"<sup>37</sup> and "sexually suggestive objects or pictures in the workplace."<sup>38</sup> Whether this conduct is intentional or not, it "constitutes sexual harassment and is illegal . . ."<sup>39</sup> The New Hampshire policy is similarly based on language from Title VII and case law recognizing a cause of action for a hostile work environment.

In *Sigma Chi v. George Mason University*,<sup>40</sup> the university sanctioned the Sigma Chi fraternity for holding an "ugly woman contest" beset with racial and sexual overtones.<sup>41</sup> The fraternity sued the university claiming that the sanctions violated the First Amendment.<sup>42</sup> The U.S. Court of Appeals for the Fourth Circuit affirmed the district court's grant of summary judgment in favor of the fraternity holding that the university could not accomplish its goal of an equal educational environment by regulating speech.<sup>43</sup>

This case illustrates a possibly more pervasive practice adopted by many universities to establish and implement formal hate speech codes. Rather than subjecting a university code to a high degree of constitutional scrutiny, administrators regulate offensive speech on an ad hoc basis by sanctioning or reprimanding the guilty speakers. Although formal sanctions against the speaker may result less frequently than informal sanctions, examples of such reprimands abound and have the effect of chilling the speech of faculty and students.<sup>44</sup>

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35. *Id.* at \*1.

36. *Id.* at \*2.

37. *Id.*

38. *Id.*

39. *Id.*

40. 993 F.2d 386 (4th Cir. 1993).

41. *Id.*

42. *Id.*

43. *Id.*

44. "In an economics class, black students walked out of the room because a foreign student kept using the term 'black' instead of African American. The black students and the professor objected but the foreign student persisted and so the exodus took place." Hentoff, *supra* note 11, at 154. In a separate incident, a business ethics professor was disciplined for stating that one could be fired for using the term "nigger" in the context of an ethics discussion. *Id.* at 157.

This type of ad hoc implicit hate speech code may pose an even greater danger to speech since the university offers no set of defined rules prohibiting such speech, but rather selectively enforces sanctions based on the nature of the speech, the victim, and the speaker. While the dangers of such content-based restrictions on speech are severe, speech codes are generally created and enforced with the intent of curbing, or at least curbing, the societal ills of racism and sexism.

### III. SPEECH CODES JUSTIFIED

The goals underlying speech codes are manifold: to prevent the psychic injury which results from offensive speech (otherwise known as the "victim's privilege"),<sup>45</sup> to ensure equal education opportunities for students likely to be subjected to such speech, and to limit academic and non-academic discourse to only that speech which has a positive impact on the search for truth.<sup>46</sup> The following section briefly describes the premise of these arguments in favor of hate speech codes.

#### A. *The Victim's Privilege,<sup>47</sup> or Outsider Jurisprudence<sup>48</sup>*

Outsider jurisprudence proposes that tolerance for offensive speech is the disguised oppression of minority groups who have traditionally been excluded from the marketplace of ideas.<sup>49</sup> The leading proponent of this perspective, Professor Mari Matsuda, describes offensive, and specifically racist, speech as a mechanism for the subordination of minorities which reinforces the vertical relationship between the oppressors and their victims.<sup>50</sup> Professor Matsuda would unilaterally enforce

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A law school moot court competition was prohibited from using a problem concerning lesbian child custody issues. *Id.* at 204. A constitutional law professor employing the Socratic method was disciplined for discussing the Thirteenth Amendment prohibition against slavery by referring to blacks in the class as former slaves. *Id.* at 189-90. The same professor was also reprimanded for correcting a black student's pronunciation of "the" as "de." The professor also corrected white students who said "you know" when they spoke. *Id.* at 192. Examples from Florida include a constitutional law professor during my time as a student at the Florida State University College of Law being reprimanded for permitting discussions on the constitutionality of affirmative action programs as part of class instruction. In a similar situation, black law students walked out of a constitutional law class when a law school professor used rap artists and lyrics as an example of censorship.

45. Matsuda, *supra* note 7; Alexander, *supra* note 7, at 1367.

46. Alexander, *supra* note 7.

47. *Id.* at 1367.

48. Matsuda, *supra* note 7. Outsider jurisprudence is a school of thought rejecting the traditional 'Eurocentric' descriptions of law and social phenomenon for a revisionist view of law. *Id.* "Outsider" replaces the term minority and reflects the feeling of isolation and being an outsider that minorities experience in the face of hate speech.

49. *Id.*

50. *Id.* at 2358.

hate speech codes only against the majority oppressors: whites.<sup>51</sup> That is, a white person who expresses a racial epithet toward a black person would be subject to the strictest of penalties. However, “[e]xpressions of hatred, revulsion, and anger directed against historically dominant-group members by subordinated-group members are not criminalized . . . .”<sup>52</sup> Professor Matsuda argues that although harm and hurt may be experienced by the white person, the “degree” of hurt and harm is different because a black person’s attack on a white is “not tied to the perpetuation of racist vertical relationships, [and] it is not the . . . worst example of hate propaganda.”<sup>53</sup>

A white person offended by such speech is “more likely to have access to a safe harbor of exclusive [white] interactions. Retreat and reaffirmation of personhood are more easily attained for [whites].”<sup>54</sup> Whereas, an “angry, hateful poem by a person from a historically subjugated group [is interpreted as the] victim’s struggle for self-identity in response to racism.”<sup>55</sup> Thus, the victim’s privilege is the ability to hurl even the most offensive epithet toward any member of the historically dominant race with the assurance that the speech will not be punished or countered in any way.<sup>56</sup>

### B. *Equal Education Through Unequal Speech*

Related to the notion of a victim’s privilege of speech is the ideal of equality. Proponents of this view claim that the stigmatic effect of racist speech is prohibited by the Fourteenth Amendment.<sup>57</sup> The very nature of racist speech, so the argument goes, “carries an overt denial of the Fourteenth Amendment’s promise and social agenda.”<sup>58</sup>

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51. *Id.* at 2361.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 2361-62

56. Matsuda argues that if history were to change and minority groups were to suddenly become equal with the oppressing class, there would be no need for this privilege. However, when the privileged class is the group defining how and when equality is reached and when the hurt and fear are over, there is an unqualified incentive to maintain the former oppressor’s silence for as long as possible. Furthermore, equality cannot be reached through the subordination of one group’s speech to another group’s speech. Equality can be gained through the empowerment that comes through counter speech.

57. The relevant portion of the Fourteenth Amendment provides: “No state shall make or enforce any law . . . nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1; see Alexander, *supra* note 7, at 1370; Lawrence, *supra* note 7, at 442-44 (discussing racist speech in the context of the Civil Rights Act of 1964 and Brown v. Board of Educ., 347 U.S. 483 (1954)).

58. Alexander, *supra* note 7, at 1370.

Similar to proponents of the victim's privilege, equality supporters argue that the state has a duty to not only prohibit racist speech, but also to act affirmatively as a teacher of social mores and behavior that contribute positively to the overall societal goal of equality.<sup>59</sup> Therefore, to "tolerate an equal speaking to another equal in a way that denies the dignity and truth of equality is an implicit betrayal of the whole body politic, hampering positive social evolution."<sup>60</sup> Like advocates of outsider jurisprudence, proponents of this argument believe that equality may come to minority groups only through the oppression of majority groups.

### C. *Truth, Speech, and Non-Speech*

The protection of free speech, at its zenith, seeks to discover the truth through discourse and reason. Proponents of hate speech codes argue that speech which does not contribute to the uncovering of truth is not speech at all, and is therefore not entitled to the protection of the First Amendment.<sup>61</sup> For example, racist or sexist epithets do not try to inform or convince the listener.<sup>62</sup> Such speech does not contribute to a healthy discourse and dialogue because the offended party has no opportunity for response or reflection.<sup>63</sup> Proponents claim that an individual yelling racist speech does not intend to "discover truth or initiate dialogue but to injure the victim."<sup>64</sup> Under this rationale, before speech can be protected, "thoughts must be sifted through the mind's reflective processes before gaining any constitutional legitimacy when expressed."<sup>65</sup>

These are some of the primary rationales for prohibiting certain kinds of speech. Despite the good intentions of proponents of hate speech codes, each of the foregoing arguments conflicts with well-settled First Amendment doctrine. At its core, outsider jurisprudence requires that some speech be limited for the sake of other speech. The majority's speech must necessarily be limited to ensure that the minority's message dominates in the marketplace of ideas. Speech codes designed to achieve the victim's privilege suffer because the codes are content-based restrictions on speech that select a particular viewpoint<sup>66</sup>

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59. *Id.*

60. *Id.* at 1371.

61. *Id.* at 1373; *see also* UWM Post v. Board of Regents, 774 F. Supp. 1163, 1174-75 (E.D. Wis. 1991).

62. 774 F. Supp. at 1174-75.

63. *Id.* at 1175.

64. Lawrence, *supra* note 7, at 452.

65. Alexander, *supra* note 7, at 1373.

66. R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538, 2548 (1992).

as the official government or university message on issues important in undergraduate and graduate education. That is, such codes prohibit the racist speech of a white person but allow for the racist speech of a black person. Thus, speech codes designed to achieve this goal select a preferred viewpoint and regulate based on that preference.

Similarly, those supporting speech codes for equality's sake would protect only that speech which promotes the equality of oppressed groups. For example, the sexist speech of a man to a woman may be curbed by the Fourteenth Amendment requirement of equal protection. A woman's sexist speech to a man, however, would go unchecked because such speech cannot oppress the historically dominant male. In fact, the argument goes, under the Fourteenth Amendment the state must act affirmatively to ensure equality through the regulation of the man's speech.<sup>67</sup>

Speech codes designed to achieve these goals are content and viewpoint selective. Each selects a preferred view and limits speech that is counter to that view. Well-settled First Amendment doctrine holds that these codes are "presumptively invalid"<sup>68</sup> because the very purpose of the First Amendment is to protect speech that we disfavor the most.<sup>69</sup> Although the need for equality in all segments of society is of great importance, the need to enhance an individual's education through the introduction of new, and sometimes offensive, ideas is at least equally important. The fallacy of the speech code arguments is the assertion that equality and an end to oppression will be achieved through unilateral speech regulation.<sup>70</sup> Instead, the answer to the scurrilous problems of bigotry and hatred must be more speech and better speech. The force of speech and counter speech in the push for social change cannot be underestimated, and the university is the primary place in which students learn the value and power of speech.

Leaders in the speech code movement have attempted to limit the scope of codes to prescribe "fighting words" only; fighting words are those words that provoke an immediate injury and violent reaction.<sup>71</sup> Professor Matsuda and others who consider hate speech as non-speech believe that the "psychic injury" that results from hate speech

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67. Alexander, *supra* note 7, at 1370. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

68. 112 S. Ct. at 2542.

69. *Texas v. Johnson*, 491 U.S. 397 (1989); *Cohen v. California*, 403 U.S. 15 (1971).

70. *Beauharnais v. Illinois*, 343 U.S. 250, 275 (1952) (Black, J., dissenting) ("If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark: 'Another such victory and I am undone.'").

71. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

meets the definition of fighting words and is therefore not entitled to First Amendment protection.

The constitutional problem with this interpretation is two-fold. First, speech codes prescribe only certain fighting words (*e.g.*, racist speech) while other fighting words are acceptable (*e.g.*, aspersions against an individual's mother). As the next section will illustrate, this type of selectivity flies in the face of the First Amendment. Beyond the constitutional problem is a concern regarding the message sent to university students learning under a speech code. Instead of learning how to think and reason independently, students are taught that the act of questioning should be punished because questions regarding the validity of minority arguments fall within the scope of hate speech codes. A university education then becomes indoctrination rather than development of the mind to challenge what is and to discover what ought to be. A second, and related, problem with speech codes limited to fighting words is that they are facially overbroad. While fighting words are not protected, offensive speech is highly protected and, at least in the case of offensive political speech, is one of the reasons for the existence of the First Amendment.<sup>72</sup> Hate speech codes regulate both protected and unprotected speech. Lastly, proponents of speech codes argue that the special, captive setting of the university requires that speech be limited for individuals to learn in an environment free of fear and hateful speech.

When the foregoing arguments fail as a valid constitutional rationale for speech codes, hate speech code proponents look to Title VII for protection. Title VII of the Civil Rights Act of 1964 recognizes a cause of action for employees against employers for the creation of what they consider to be a hostile work environment.<sup>73</sup>

The university, however, differs significantly from the workplace because the primary role of an undergraduate or graduate education is to challenge an individual's beliefs and thought processes through the introduction of new, and sometimes offensive, ideas. Where workplace speech might be limited to that which is necessary to get the job done, university speech between and among students and teachers must be, out of necessity, wide open to all forms of debate—offensive and polite. Only through the open discussion of ideas and beliefs may education take place. The doctrine of academic freedom ensures that

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72. *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

73. *Meritor Savings Bank v. Vinson*, 477 U.S. 57; 42 U.S.C. § 2000e-2 (1988); 29 C.F.R. § 1604.11 (1991).

university speech is free of unconstitutional speech limits which hinder the achievement of legitimate pedagogical concerns.

The rest of this Comment explores the constitutional bases for rejecting hate speech codes on university campuses. Although much has been written on the issue of hate speech codes in the university context,<sup>74</sup> few if any commentators have attempted to tackle this issue in light of the U.S. Supreme Court's majority opinion in *R.A.V. v. City of St. Paul*.<sup>75</sup> Additionally, the amorphous doctrine of academic freedom has proven difficult to understand and apply in hate speech cases. The next section analyzes content-based restrictions of speech in light of the *R.A.V.* majority decision, and continues by examining the decision's potential effect on future hate speech codes. This Comment also develops more fully the academic freedom doctrine to conclude that hate speech codes and education are incompatible means of attaining social goals; for it is only through speech and counter speech that individuals may attain equality in society.

#### IV. CONTENT-BASED RESTRICTIONS ON SPEECH

The First Amendment prevents a state from prohibiting speech simply because of its message.<sup>76</sup> The above arguments indicate that the purpose of hate speech codes on university campuses is to shield certain students and classes of students from speech that they might find offensive. Yet, the U. S. Supreme Court has never tolerated this type of purpose.<sup>77</sup> In fact, if speech is offensive to some, "that consequence is a reason for according it constitutional protection."<sup>78</sup>

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74. Alexander, *supra* note 7; Lackland H. Bloom, Jr., *Fighting Back: Offensive Speech and Cultural Conflict*, 46 SMU L. REV. 145 (1992); Delgado, *supra* note 12; Lawrence, *supra* note 7; Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673 (1993); Matsuda, *supra* note 7; Carolyn M. Mitchell, *The Political Correctness Doctrine: Redefining Speech on College Campuses*, 13 WHITTIER L. REV. 805 (1992); James A. Weinstein, *A Constitutional Roadmap to the Regulation of Campus Hate Speech*, 38 WAYNE L. REV. 163 (1991).

75. 112 S. Ct. 2538 (1992); see Frederick M. Lawrence, *supra* note 74 (providing a cursory review of the *R.A.V.* decision); Bloom, *supra* note 70 (brief discussion of *R.A.V.* in a review of general First Amendment doctrine).

76. 112 S. Ct. at 2542.

77. See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (noting that freedom of speech encompasses the freedom to express ideas which are "defiant or contemptuous"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." (emphasis added)); *FCC v. Pacifica Foundation*, 438 U.S. 726, 745-46 (1978) ("[I]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.').

78. *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 548 n.8 (1980) (Stevens, J., concurring), *rev'd sub nom.* *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980).

### A. R.A.V. v. City of St. Paul<sup>79</sup>

In 1990, R.A.V., a minor, and other teenagers, assembled and ignited a crudely made cross in the yard of a black family.<sup>80</sup> R.A.V. was charged under the St. Paul Bias-Motivated Crime Ordinance.<sup>81</sup> The relevant portion of the ordinance provided:

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.<sup>82</sup>

The trial court dismissed the case because it found that the statute was facially overbroad and constituted a content-based restriction in violation of the First Amendment.<sup>83</sup> The Supreme Court of Minnesota reversed the trial court's decision.<sup>84</sup> The court determined that the statute did not suffer from overbreadth because prior Minnesota cases limited the ordinance's reach to restricting only "fighting words" which do not receive constitutional protection under *Chaplinsky v. New Hampshire*.<sup>85</sup> The Supreme Court of Minnesota determined that the statute "was not impermissibly content-based [because] . . . 'the ordinance [was] a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order.'"<sup>86</sup> The U.S. Supreme Court reversed.<sup>87</sup>

The majority opinion in *R.A.V.*, written by Justice Scalia,<sup>88</sup> dismissed R.A.V.'s overbreadth argument and turned directly to the content-based argument.<sup>89</sup> The majority accepted the Minnesota court's interpretation of the ordinance to limit its reach to fighting words but nevertheless concluded that the ordinance was unconstitutional be-

79. 112 S. Ct. 2538 (1992). See *CLEARY*, *supra* note 1.

80. 112 S. Ct. at 2541.

81. St. Paul, Minn., Legis. Code § 292.02 (1990).

82. 112 S. Ct. at 2541 (quoting St. Paul Bias-Motivated Crime Ordinance).

83. *Id.*

84. *Id.*

85. *Id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

86. *Id.* at 2541-42 (quoting *In re R.A.V.*, 464 N.W.2d 507, 511 (Minn. 1991), *rev'd*, *R.A.V. v. City of St. Paul, Minn.*, 112 S. Ct. 2538 (1992)).

87. *Id.* at 2550.

88. *Id.* at 2541 (Scalia, J., was joined by Rehnquist, C.J., and Kennedy, Souter, and Thomas, JJ. White, J., concurred in the judgment joined by Blackmun and O'Connor, JJ.).

89. *Id.* at 2542.



cause "it prohibit[ed] otherwise permissible speech solely on the basis of the subjects the speech addresses."<sup>90</sup>

At the outset, the Court stated that the First Amendment prohibits the state from proscribing speech or expressive conduct because it disagrees with the thoughts and ideas expressed.<sup>91</sup> For this reason, content-based restrictions on speech are "presumptively invalid."<sup>92</sup> The First Amendment, however, is not absolute and the Court has recognized the valid proscription of speech in areas that 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."<sup>93</sup> This limited categorical approach in the proscription of speech extends to fighting words,<sup>94</sup> defamation,<sup>95</sup> and obscenity.<sup>96</sup>

Throughout First Amendment jurisprudence, the Court has suggested that speech in these categories is not constitutionally protected because of its low social value.<sup>97</sup> However, these categories should not be viewed as "entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content."<sup>98</sup> By way of illustration, the government may prohibit libel in general, but may not prohibit only libel that is critical of the government.<sup>99</sup> Therefore, although fighting words are generally thought to be of de minimis value in the expression of ideas, fighting words still retain some value in the exposition of ideas—just not an essential value.<sup>100</sup>

The Court has long recognized that some speech may be prohibited on one basis (*e.g.*, defamation) "but not on . . . another (*e.g.*, opposition to the city government). . . ."<sup>101</sup>

[N]on-verbal expressive activity [may] be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.<sup>102</sup>

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90. *Id.*

91. *Id.*

92. *Id.*

93. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

94. *Id.* at 573.

95. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

96. *Miller v. California*, 413 U.S. 15 (1973).

97. *Roth v. United States*, 354 U.S. 476, 483-84 (1957); *Chaplinsky*, 315 U.S. at 571-72.

98. *R.A.V. v. City of St. Paul, Minn.*, 112 S. Ct. 2538 (1992).

99. *Id.*

100. *Id.* at 2544.

101. *Id.*

102. *Id.* (citing *Texas v. Johnson*, 491 U.S. 397, 406-07 (1989)).

The First Amendment also allows for the regulation of the time, place and manner of speech as long as the regulation is "justified without reference to the content of the regulated speech."<sup>103</sup> The state may also regulate one element of speech (e.g., obscenity) but not "on the basis of *other* content elements" (e.g., opposition to the state).<sup>104</sup>

To make the point, Justice Scalia separates fighting words into "speech" and "non-speech" elements; the former protected, the latter, unprotected.<sup>105</sup> The unprotected, non-speech, aspect of fighting words may be analogized to a noisy sound truck.<sup>106</sup> The sound truck and the fighting words are both *modes* of speech,<sup>107</sup> in that each can be used to convey an idea, but, alone, neither has a claim to First Amendment protection.<sup>108</sup> However, in the case of the sound truck and the fighting words: "[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message expressed."<sup>109</sup> Thus, the state's ability to proscribe such speech may not be used as a vehicle for content discrimination; rather, the state may simply proscribe the *entire* category of fighting words without reference to the *kind* of fighting words proscribed.<sup>110</sup>

The *R.A.V.* majority next addresses the issue of certain special exceptions to the general rule against laws which proscribe speech on the basis of content.<sup>111</sup> The primary evil associated with content discrimination is that it necessarily allows the government to exclude certain viewpoints from the marketplace of ideas.<sup>112</sup> But, in the case of obscenity, defamation and fighting words, when content discrimination is based on "the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists."<sup>113</sup>

103. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

104. *R.A.V. v. City of St. Paul, Minn.*, 112 S. Ct. 2538, 2544 (1992) (emphasis added).

105. *Id.* at 2545.

106. *Id.*

107. *Id.* (citing *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring)).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* The majority recites several examples in which the government may proscribe an entire category of speech, such as obscenity, threats to the President, and commercial speech in industries at risk of fraud. But the government may not criminalize only subcategories of this kind of speech, such as obscenity with political messages, threats to the President based on the policy on aid to inner cities, etc. *Id.* at 2546.

Another exception to the general rule against content-based statutes is the secondary effects doctrine.<sup>114</sup> This doctrine, set forth by the Supreme Court in *City of Renton v. Playtime Theaters*,<sup>115</sup> allows the government to carve out a subcategory of a proscribable class of speech when such subcategory is associated with "secondary effects" or harmful consequences directly attributable to the speech.<sup>116</sup> As long as regulation of the secondary effect is "justified without reference to the content of the . . . speech" the state may prohibit the subcategory of speech to address a secondary effect.<sup>117</sup> Under this doctrine, then, a state could allow live obscene performances, but could prohibit those performances involving minors.<sup>118</sup>

In a related context, speech and words may often violate laws directed not at speech but at conduct.<sup>119</sup> For example, words are used to violate the law against treason.<sup>120</sup> The proscription of treason is permissible since there is no reference to the words spoken.<sup>121</sup> Therefore, a specific "content-based subcategory of . . . speech [may] be swept up incidentally within the reach of a statute directed at conduct, rather than speech."<sup>122</sup> In the case of fighting words, sexually derogatory fighting words may violate Title VII's general prohibition against harassment in employment practices.<sup>123</sup> Title VII explicitly proscribes the use of "verbal or physical conduct of a sexual nature" in creating a hostile work environment, and thus only *incidentally* proscribes a subcategory of proscribable speech.<sup>124</sup> It is important to note that these exceptions do not depend on the government's agreement with what a speaker may say.<sup>125</sup> The *R.A.V.* majority states that such selectivity may be validated even when a neutral regulatory position is lacking.<sup>126</sup> The cardinal requirement, however, is that "the nature of the content discrimination is such that there is no realistic possibility that [the] suppression of ideas is afoot."<sup>127</sup> The Supreme Court is pri-

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114. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986).

115. *Id.*

116. *R.A.V.*, 112 S. Ct. at 2546 (citing *Playtime Theaters*, 475 U.S. at 48).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. 29 C.F.R. § 1604.11(a) (1994); *see also Meritor Savings v. Vinson*, 477 U.S. 57, 65 (1986).

125. *R.A.V.*, 112 S. Ct. at 2547.

126. *Id.* The majority does not provide any example of such a regulation, however.

127. *Id.*

marily concerned with prohibiting the government from using content-based regulations for the suppression of certain viewpoints.<sup>128</sup>

Applying this rationale to the St. Paul ordinance, the majority determined that despite the limiting construction of the ordinance to proscribe fighting words only, the ordinance restricted certain fighting words that arouse "anger, alarm or resentment . . . on the basis of race, color, creed, religion or gender . . . ." <sup>129</sup> In effect, the statute allowed the city to place special restrictions on those who expressed ideas on disfavored subjects.<sup>130</sup> Under the First Amendment, however, the city did not have the "authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules."<sup>131</sup>

The state has an interest, and an obligation, to confront bias-motivated messages and notions of racial supremacy.<sup>132</sup> However, the state may not accomplish this objective by selectively limiting speech.<sup>133</sup> Indeed, even when the object of such content-based restrictions is to eliminate certain emotional and psychological "injuries" that result from messages of group-hatred, the ordinance still fails on First Amendment grounds.<sup>134</sup> The only type of injury attributable to fighting words that may permissibly be proscribed through the First Amendment is that which is equivalent to a personal and immediate threat.<sup>135</sup> Any attempt to distinguish between the injury inflicted by fighting words "that communicate messages of racial, gender, or religious intolerance" and other kinds of "psychological" injuries is

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128. The Court provided as an example of viewpoint discrimination prohibited by the First Amendment a case in which a person "could hold up a sign saying . . . 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.'" *Id.* at 2548. While there may be exceptions to the general rule against content-based statutes, it is fair to say that there are no exceptions for statutes that select one viewpoint over another.

129. *Id.* at 2547 (emphasis added).

130. *Id.*

131. *Id.* at 2548. Marquis of Queensbury Rules are a code of rules governing boxing matches, named after the Eighth Marquis of Queensbury, Sir John Sholto Douglas, who supervised the code's formulation by English athlete John G. Chambers in 1867. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1384 (1986).

132. *R.A.V. v. City of St. Paul, Minn.*, 112 S. Ct. 2538 (1992).

133. *Id.* St. Paul argued that content-specific limitations are necessary to communicate to the minority that the majority does not hold these views. The Court responded by stating that the point of the First Amendment is that the majority's preferences must be expressed by some means "other than silencing speech on the basis of its content." *Id.*

134. *Id.* at 2548. See also *Boos v. Barry*, 485 U.S. 312, 321 (1988) (stating that psychological damage to a person is not the kind of secondary effect permissible to justify the proscription of speech since such an 'injury' is a primary effect).

135. *R.A.V.*, 112 S. Ct. at 2548-49. There must be an immediate perception of physical threat resulting from such fighting words.

nothing more than "word play."<sup>136</sup> The symbols and words singled out by the St. Paul ordinance evoke "anger, alarm or resentment" that is "caused by a distinctive idea, conveyed by a distinctive message."<sup>137</sup>

The St. Paul ordinance did not just single out a particular *mode* of expression (e.g., all threatening words), it attempted to single out only expressions that the city deemed to "communicate messages of racial, gender or religious intolerance."<sup>138</sup> This kind of selectivity allowed the city "to handicap the expression of particular ideas."<sup>139</sup> For this reason alone, the statute was "presumptively invalid."<sup>140</sup> The city argued that the statute did not target freedom of expression, but rather, it protected against the victimization of vulnerable citizens.<sup>141</sup> By the city's determination, the primary effect of the statute was to protect the citizens.<sup>142</sup> The majority, however found that the St. Paul ordinance did not fit the "secondary effects" exception described in *City of Renton v. Playtime Theaters, Inc.*<sup>143</sup> because the "emotive impact of speech on its audience is not a 'secondary effect.'"<sup>144</sup>

Arguing in favor of the ordinance, St. Paul asserted that even if the regulation limited hostile expression, it was justified because it was narrowly tailored to serve a compelling state interest.<sup>145</sup> "Specifically, . . . the ordinance help[ed] to ensure the basic human rights of members of groups that have historically been subjected to discrimination. . . ." <sup>146</sup> The Court, however, found that the ordinance was not narrowly tailored to serve the state interest.<sup>147</sup> While the city's stated interest was compelling, it could employ the weapon of content-specificity only when no other regulatory alternative existed.<sup>148</sup> To pass constitutional muster, an ordinance must limit fighting words *in general*, not some fighting words *in particular*.<sup>149</sup> Because the content-neutral alternative of limiting *all* fighting words existed, St. Paul's or-

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136. *Id.*

137. *Id.* at 2548.

138. *Id.* at 2549.

139. *Id.*

140. *Id.* In addition, the city's comments and concessions as to the purpose of this selectivity requires that the ordinance be found invalid. *Id.*

141. *Id.*

142. *Id.*

143. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986).

144. *R.A.V. v. City of St. Paul, Minn.*, 112 S. Ct. 2538, 2549 (1992) (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 2549-50.

149. *Id.* at 2548-50.

dinance unduly limited free speech.<sup>150</sup> The only interest served by the selective St. Paul ordinance was "that of displaying the city council's special hostility towards the particular biases thus singled out."<sup>151</sup>

### *B. Applying R.A.V.'s Analysis to University Hate Speech Codes*<sup>152</sup>

Like the St. Paul ordinance in *R.A.V.*, campus hate speech codes unnecessarily and impermissibly proscribe speech based on content.<sup>153</sup> Campus hate speech codes single out certain kinds of speech and viewpoints for regulation while affording full protection to other speech. "[This] is precisely what the First Amendment forbids."<sup>154</sup> The following section analyzes the justifications for campus hate speech codes in the context of *R.A.V.*'s majority opinion.

#### *1. Fighting Words as Non-Speech*

While fighting words have commonly been referred to as "non-speech" elements of discourse,<sup>155</sup> proponents of hate speech codes would rid academic discourse of all speech that does not contribute positively to the search for truth.<sup>156</sup> The primary mechanism used in speech codes to limit hate speech is to expressly prohibit only certain kinds of words that offend specific classes of individuals.<sup>157</sup> Even if these codes target only "fighting words,"<sup>158</sup> speech codes utilizing this mechanism fail under *R.A.V.*'s majority analysis of the fighting words doctrine.

Before *R.A.V.*, the vitality of the fighting words doctrine was in question.<sup>159</sup> The *R.A.V.* majority, however, not only breathed new life into this permissible proscription of speech, but also further clarified

150. *Id.*

151. *Id.* at 2550.

152. CLEARY, *supra* note 1, at 69 (stating that when he was researching the *R.A.V.* petition for certiorari, his "focus . . . changed from traditional First Amendment case law to the debate over the repressive climate of a political-acceptability standard prevalent on [American] campus[es]").

153. *Id.*

154. *R.A.V. v. City of St. Paul, Minn.*, 112 S. Ct. 2538, 2550 (1992).

155. Alexander, *supra* note 7, at 1372. Proponents of hate speech codes sometimes classify hate speech as "non-speech" because hate speech does not serve the underlying purposes of the First Amendment of pursuing truth and promoting self-worth through the exercise of each individual's capacities. Because hate speech is designed to cause a reaction and not a two-sided conversation, it cannot be a valued part of the First Amendment. *Id.* Thus, hate speech cannot be speech since only "valued" speech should be protected under the First Amendment. *Id.*

156. *Id.*

157. *Id.* at 1373.

158. *UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163, 1168 (E.D. Wis. 1991).

159. See GERALD GUNTHER, *CONSTITUTIONAL LAW* 1073-74 12th ed. (1991); Stephen W. Gard, *Fighting Words as Free Speech*, 58 Wash. U. L.Q. 531 (1980).

its limits. In *Chaplinsky v. New Hampshire*,<sup>160</sup> fighting words were described as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."<sup>161</sup> In *Gooding v. Wilson*,<sup>162</sup> the Court expressly declined to include within the definition of fighting words those words which convey disgrace and are insulting to listeners.<sup>163</sup> The Court stated that such a definition would make it a violation of law to "speak words offensive to some who hear them, and so sweeps too broadly."<sup>164</sup> The hate speech codes outlined in Part II of the Comment all limit speech that "demeans," "insults," "stigmatizes," or "victimizes" certain classes of individuals.<sup>165</sup> The *R.A.V.* majority expressly rejected the St. Paul ordinance *because* it selectively proscribed such words.<sup>166</sup>

The hate speech codes in Michigan and Wisconsin do not target injuries resulting from physical force, but rather attempt to protect against the emotional injury of offensive speech.<sup>167</sup> This injury, proponents of speech codes argue, makes such words "fighting" words.<sup>168</sup> The codes, however, expressly proscribe *only* those fighting words which injure certain individuals on the basis of certain characteristics. Fighting words which "do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—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 that speaker's opponents."<sup>169</sup> Professor Matsuda's argument in favor of a "victim's" speech privilege, then, runs counter to the majority opinion in *R.A.V.*<sup>170</sup> It is precisely because

160. 315 U.S. 568 (1942).

161. *Id.* at 572; *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) (Holding that as long as advocacy does not "incite lawless actions [it] must be regarded as protected speech"); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940)

When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious. Equally obvious is that [the] state may not unduly suppress free communication of views . . . under the guise of conserving desirable conditions.

*Cantwell*, 310 U.S. at 308.

162. 405 U.S. 518 (1972).

163. *Id.* at 525.

164. *Id.* at 527 (citation omitted).

165. *See supra* notes 18-31 and accompanying text.

166. *R.A.V. v. City of St. Paul, Minn.*, 112 S. Ct. 2538 (1992).

167. *See, e.g., UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163, 1175 (E.D. Wis. 1991); Delgado, *supra* note 12, at 133-49.

168. Lawrence, *supra* note 7, at 449-57.

169. *R.A.V.*, 112 S. Ct. at 2548.

170. *See supra* notes 45-56 and accompanying text for Professor Matsuda's argument.

hate speech codes are content and viewpoint selective, that each is a facial violation of the First Amendment.

## 2. *Secondary Effects*

Similarly, the secondary effects doctrine promulgated in *City of Renton v. Playtime Theaters, Inc.*,<sup>171</sup> is often used as a justification for campus hate speech codes and other content-based proscriptions of speech. As described in section IV.A above, the doctrine allows government to carve out a subcategory of proscribable speech when the speech is associated with harmful consequences to a particular group.<sup>172</sup> Proponents argue that the codes do not target expressive behavior directly; rather, such codes target the conduct and injuries that come from hate speech.<sup>173</sup> Proponents claim that speech codes are justified under the secondary effects doctrine because society experiences severe harm when individuals scream epithets at one another.<sup>174</sup> Although immediate violence may result, the greatest harm is to the psyche of the subordinated class and its individual members.<sup>175</sup> University hate speech codes are aimed at protecting members of minority classes from the "psychic" wounds which result from such demeaning words.<sup>176</sup> This "secondary harm" of offensive speech justifies the codes under the *Renton* doctrine.

On its face, this doctrine allows for the regulation of speech as long as the regulation cures some secondary harm.<sup>177</sup> The regulation, however, must not regulate speech based on its content.<sup>178</sup> In *Renton*, the Court held that a city could regulate the location of obscene movie theaters to avoid the secondary harm of crime.<sup>179</sup> In *Boos v. Barry*,<sup>180</sup> the Court clarified this doctrine by stating that a city's attempt to prevent the "psychological damage" of individuals exposed to certain kinds of speech was not the type of secondary effect contemplated in *Renton*.<sup>181</sup> The Court stated that regulation aimed at preventing psychological damage "targets the direct impact of a . . . category of

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171. 475 U.S. 41 (1986).

172. *R.A.V.*, 112 S. Ct. at 2546 (citing *Playtime Theaters*, 475 U.S. at 48).

173. See *supra* notes 7, 12.

174. Delgado, *supra* note 12.

175. *Id.*

176. *Id.*; Lawrence, *supra* note 7.

177. *City of Renton v. Playtime Theaters*, 475 U.S. 41, 48-49 (1986).

178. *Id.*

179. *Id.*

180. 485 U.S. 312 (1988).

181. *Id.* at 321.



speech . . . .”<sup>182</sup> The very injury sought to be prevented is the *direct* impact of speech upon the listener.

Campus hate speech codes aimed at protecting students from psychological injury do not meet the content-neutral requirement of the secondary effects doctrine, because each is aimed at curbing the emotive impact of speech upon its listener. Even when a definitive and recognized harm may injure a specific group, the First Amendment prohibits viewpoint-based speech proscriptions.<sup>183</sup> To combat the potential harm of hate speech, the best course of action is not to stifle speech but to add more speech to the marketplace.<sup>184</sup> Counterspeech is the most powerful instrument available for gaining equality and curbing the secondary effects of offensive speech.<sup>185</sup> Only by pointing out the weaknesses and the moral wrongness of an oppressor’s speech can an oppressed group realize the strength of advocating a morally just outcome. The use of counter speech is consistent with the Constitution and the foundation of a free society. It is only through speech and counter speech that a democratic society functions and just laws are enacted.

### 3. *Speech, Women, and Viewpoint Discrimination*

In an analogous case, *American Booksellers Association, Inc. v. Hudnut*,<sup>186</sup> the Court of Appeals for the Seventh Circuit struck an Indianapolis ordinance because it was content and viewpoint restrictive. While *Hudnut* predated *Renton* and the secondary effects doctrine by several months, proponents of the Indianapolis ordinance at issue in *Hudnut* made arguments similar to the secondary effects doctrine. In *Hudnut*, American Booksellers Association, Inc. challenged an ordinance defining and prohibiting pornography which discriminates against women.<sup>187</sup> Specifically, the ordinance prohibited the “graphic sexually explicit subordination of women, whether in pictures or in words” displaying women in various scenarios and stereotyped roles.<sup>188</sup> Indianapolis prohibited such depictions of women in *any* kind of work, be it of “literary, artistic, political, or scientific value.”<sup>189</sup>

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182. *Id.*

183. For example, in *R.A.V.* black Minnesota citizens were subjected to a crudely constructed burning cross. 112 S. Ct. 2538 (1992). Despite the harm experienced by those individuals, the *R.A.V.* Court determined that the City of St. Paul ordinance prohibiting such acts violated the First Amendment. *Id.*

184. *Texas v. Johnson*, 491 U.S. 397, 419 (1989).

185. *Id.*

186. 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986).

187. *Id.*

188. *Id.* at 324 (citation omitted).

189. *Id.* at 325.

Arguing in favor of the ordinance, civil rights groups and feminists claimed that it would play an important role in "reducing the tendency of men to view women as sexual objects, a tendency that leads to both unacceptable attitudes and discrimination in the workplace and violence away from it."<sup>190</sup> Because pornography influenced attitudes, the ordinance was "a way to alter the socialization of men and women rather than . . . vindicate community standards of offensiveness."<sup>191</sup> As one prominent supporter of the ordinance put it: "[I]f a woman is subjected, why should it matter that the work has other value?"<sup>192</sup> In effect, supporters were arguing for a secondary effects exception similar to pleas made by proponents of campus hate speech codes.

The Seventh Circuit found that the statute was unconstitutional,<sup>193</sup> and the U.S. Supreme Court affirmed the decision without comment.<sup>194</sup> The Seventh Circuit found the ordinance's definition of pornography violative of the First Amendment because it established "an 'approved' view of women . . . . Those who espouse the approved view may use sexual images; those who do not, may not."<sup>195</sup> Even in recognizing the dangers inherent in pornography, the court observed that pornography perpetuates a belief system that, whether right or wrong, is protected speech under the First Amendment.<sup>196</sup> The social forces of racism, anti-Semitism, and violence all shape an individual's socialization and perceptions.<sup>197</sup> Hateful speech must be protected by the First Amendment, otherwise the government would be "in control of all of the institutions of culture, the great censor and director of which thoughts are good for us."<sup>198</sup>

Proponents of the ordinance argued that pornography as speech is unanswerable and is not speech at all because it does not contribute to the search for truth.<sup>199</sup> In response, the court found that the dominance of truth is not a "necessary condition of freedom of speech."<sup>200</sup> Limiting speech on the basis that otherwise the truth will not prevail "implies the power to declare the truth."<sup>201</sup>

190. *Id.*

191. *Id.*

192. *Id.* (quoting Catherine A. MacKinnon, *Pornography, Civil Rights and Speech*, 20 Harv. C.R.-C.L. L. Rev. 1, 21 (1985)).

193. *Id.*

194. 475 U.S. 1001 (1986).

195. 771 F.2d at 327.

196. *Id.* at 328.

197. *Id.*

198. *Id.* at 329.

199. *Id.* at 330.

200. *Id.*

201. *Id.*

The Indianapolis ordinance restricted not only the content of speech (e.g., prohibiting all pornography of women in general), but further prohibited particular views on the roles of women (e.g., women in subordinate positions).<sup>202</sup> Only pornography depicting women as "objects" or in "subordinate" roles was prohibited.<sup>203</sup> Depictions of women in domineering roles or roles of power, however, would be permitted.<sup>204</sup> The Seventh Circuit found that such selective restriction of speech was viewpoint discrimination and amounted to nothing more than "thought control."<sup>205</sup>

Likewise, proponents of campus hate speech codes have envisioned a favored view of society free of bigotry, sexism and hate. By using universities as a vehicle for the indoctrination of predetermined social mores, hate speech code advocates hope to "enlighten" those in the dark on such issues. Speech code proponents seek to determine the "truth" to be sought through discourse, thereby achieving social hegemony by restricting the search for truth to only approved viewpoints. As Judge Easterbrook stated: "If the government may declare the truth, why wait for the failure of speech?"<sup>206</sup> The purpose of the First Amendment is to *prevent* the oppression of Americans and the spread of "dogma that may enslave others."<sup>207</sup> For this reason, hate speech codes are in conflict with the First Amendment.

#### 4. *Narrowly Tailored*

When the First Amendment conflicts with the Equal Protection Clause, statutes implicating both must "be narrowly tailored to their legitimate objectives."<sup>208</sup> The First Amendment requires that government be specific and precise in its regulation when attempting to achieve the goals of the Equal Protection Clause.<sup>209</sup> Accordingly, the government may not "vindicate its interest in preventing disruption by the wholesale exclusion of [speech] on all but [a few] preferred subject[s]."<sup>210</sup>

By its nature, a hate speech code regulates only speech that conveys messages of "hate." The problem with such specific regulation is that the Equal Protection Clause requires precisely the *equal* protection of

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202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 328.

206. *Id.* at 331.

207. *Id.* at 328.

208. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 101 (1972) (citation omitted).

209. *Id.*

210. *Id.*

all individuals and the messages they convey. The goal of outsider jurisprudence advocates, and others supporting hate speech codes, is the *unequal* protection of speech.<sup>211</sup> Fundamental to the functioning of a free society and the education of youth is the First Amendment belief that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we *hate*."<sup>212</sup> Speech codes must be narrowly tailored to meet a compelling government interest. Otherwise, such codes run the risk of sweeping too broadly and chilling protected speech. The next Part analyzes campus hate speech codes under the First Amendment doctrines of "overbreadth" and "vagueness."

## V. OVERBREADTH AND VAGUENESS

Although few courts have applied the *R.A.V.* analysis to campus hate speech codes, the principles set forth in Justice White's concurring opinion has provided the strongest basis to date for striking such codes. Justice White's concurrence in *R.A.V.* emphasized that the St. Paul ordinance swept too broadly in attempting to regulate unprotected speech.<sup>213</sup> The following section examines the overbreadth doctrine in the context of the St. Paul ordinance and campus hate speech codes.

### A. *Facial Overbreadth: Fertile Ground for Statute Striking*

The overbreadth doctrine allows a person being prosecuted for expressive conduct to bring a facial challenge to a statute that reaches protected conduct "even when that person's activities are not protected by the First Amendment."<sup>214</sup> Fundamental to the overbreadth doctrine is the belief that all "harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . ."<sup>215</sup> It is important to note, however, that using the overbreadth doctrine is "strong medicine," appropriate only when the overbreadth is both real and substantial "judged in relation to the statute's plainly legitimate

211. Matsuda, *supra* note 7.

212. *U.S. v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting) (emphasis added), *rev'd*, 328 U.S. 61 (1946).

213. *R.A.V. v. City of St. Paul, Minn.*, 112 S. Ct. 2538, 2558 (1992) (White, J., concurring).

214. *R.A.V.*, 112 S. Ct. at 2558; *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

215. *Broadrick*, 413 U.S. at 612.

sweep."<sup>216</sup> But such application is nonetheless necessary to preserve our most precious liberties when they are threatened by a hostile majority.

The *R.A.V.* concurrence considered the St. Paul ordinance based on the limiting construction of the Minnesota Supreme Court,<sup>217</sup> which purported to restrict the ordinance's reach to only those categories of speech not protected by the First Amendment.<sup>218</sup> However, the concurring Justices determined that the ordinance "also criminalizes a substantial amount of expression that—however repugnant—is shielded by the First Amendment."<sup>219</sup>

A fatal flaw of the St. Paul ordinance lies in the Minnesota Supreme Court's interpretation of fighting words.<sup>220</sup> The Minnesota court used the *Chaplinsky* definition of fighting words—"those which by their very utterance inflict injury . . . ."<sup>221</sup> The court's interpretation of "injury," however, included "those displays that one knows or should know will create anger, alarm or resentment based on racial, ethnic, gender or religious bias."<sup>222</sup> That is, Minnesota construed the ordinance to prohibit words that by their very utterance, cause "anger, alarm or resentment."<sup>223</sup> The First Amendment, however, may not be evaded so easily.<sup>224</sup>

The fighting words cases make it clear that a listener's generalized reaction to offensive words is not enough to "strip expression of its constitutional protection. The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected."<sup>225</sup> Rather, the First Amendment explicitly protects "everyday" speech, even "insulting" speech, despite its emotive impact on listeners.<sup>226</sup> In fact, the fundamental underpinnings of the First Amendment require that the most offensive speech be protected—even when that speech is rooted in hatred. "[U]tterances honestly believed contribute to the free exchange of ideas and the ascertainment of truth."<sup>227</sup>

216. *Id.* at 615.

217. *R.A.V.*, 112 S. Ct. at 2559.

218. *Id.* (The Minnesota Supreme Court limited the ordinance to fighting words. *In re Welfare of R.A.V.*, 464 N.W.2d 507, 511 (Minn. 1991), *rev'd*, 112 S. Ct. 2538 (1992)).

219. *Id.*

220. *Id.*

221. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

222. *R.A.V.*, 112 S. Ct. at 2559 (quoting *In re Welfare of R.A.V.*, 464 N.W. 2d at 510).

223. *Id.*

224. *Id.* at 2548.

225. *Id.*

226. See *Texas v. Johnson*, 491 U.S. 397, 418 (1989); *Cohen v. California*, 403 U.S. 15, 24 (1971); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

227. *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964). See also *U.S. v. Eichman*, 496 U.S. 310

In general, hate speech codes attempt to "cleanse public debate to the point where it is grammatically palatable to the most squeamish among us."<sup>228</sup> By stifling the marketplace of ideas, proponents of hate speech codes attempt to create a fictional "equality" in which the oppressed minority becomes the ruling majority. The new majority's equality, however, comes from the heavy hand of regulation instead of through the pervasive and empowering force of counter speech.<sup>229</sup> Our society is protected from such an Orwellian future because of "our absolute right to propagate opinions that the government finds wrong or even hateful."<sup>230</sup>

As two recent decisions demonstrate, the overbreadth doctrine provides the most fertile ground for courts on which to strike university hate speech codes.

### B. *Doe v. University of Michigan*<sup>231</sup>

As the seminal case in the campus hate speech code controversy, *Doe* represents the first student challenge to a speech code in federal court. *Doe* was a graduate student at the University of Michigan studying biopsychology—an interdisciplinary study of the biological basis for personality traits and mental abilities.<sup>232</sup> *Doe's* research involved the examination of certain controversial theories which suggested biological differences between races and sexes.<sup>233</sup> Because such theories might be labeled "sexist" or "racist," *Doe* refrained from openly discussing these theories out of fear of sanctions under the university speech code.<sup>234</sup> Claiming that his right to openly discuss such theories was impermissibly chilled, *Doe* sought to have the speech code declared unconstitutional on overbreadth and vagueness grounds.<sup>235</sup>

The Michigan hate speech code, described in Part II *supra* of this Comment, was enacted by university administrators in response to a rise in incidents of racial harassment and the threat of civil rights

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(1990); *Texas v. Johnson*, 491 U.S. 397 (1989); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Cohen v. California*, 403 U.S. 15; *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Terminiello*, 337 U.S. 1.

228. *Cohen*, 403 U.S. at 25.

229. *Collin v. Smith*, 578 F.2d 1197, 1201 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

230. *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

231. 721 F. Supp. 852 (E.D. Mich. 1989).

232. 721 F. Supp. at 858.

233. *Id.*

234. *Id.*

235. *Id.*

suits.<sup>236</sup> Even after recognizing the serious threat posed to the First Amendment, the acting president justified the speech code, stating that "speaking or writing discriminatory remarks which seriously offend many individuals . . . detract[s] from the necessary educational climate of a campus. . . ."<sup>237</sup>

The Michigan speech code applied differently depending upon the context.<sup>238</sup> In public areas, a higher degree of tolerance for speech was available and sanctions were imposed only in cases of violence.<sup>239</sup> Student living areas were also apparently covered by the code.<sup>240</sup> The most troublesome aspect of the code, however, was its reach into "[e]ducational and academic centers, such as classroom buildings, libraries, research laboratories, recreation and study centers."<sup>241</sup> It is in this context that the federal district court found the code to sweep within its ambit speech protected by the First Amendment.<sup>242</sup>

Relying on the doctrinal framework of overbreadth, the district court found that these First Amendment 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."<sup>243</sup> Even in the special circumstances of the university, the district court cited several examples illustrating that the code was consistently applied to reach protected speech.<sup>244</sup> First, a graduate student in social work was charged with harassment based on sexual orientation and sex because he stated his belief, *in the classroom*, that "homosexuality was a disease and that he intended to develop a counseling plan for changing gay clients to straight."<sup>245</sup> Second, a business student was charged with harassment based on sexual orientation because he read a "homophobic" limerick during a public-speaking exercise which ridiculed a well-known athlete for his sexual orientation.<sup>246</sup> Third, the professor of a preclinical dentistry class filed a complaint against a student who stated that he heard "that minorities had a difficult time in the course and that . . . they were not

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236. *Id.* The university also feared the loss of federal funding.

237. *Id.* at 855.

238. *Id.*

239. *Id.* at 856.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 863 (citing *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957)).

244. *Id.*

245. *Id.* at 865.

246. *Id.*

treated fairly."<sup>247</sup> The statement was apparently made in the context of a small group formed specifically to discuss anticipated problems in the class.<sup>248</sup> In a fourth incident, charges were filed, and later dismissed, against a student who offended another student in a class on the Holocaust by suggesting that Jews used the Holocaust to justify Israel's policies toward Palestine.<sup>249</sup>

In each of these instances, the district court determined that the student's speech fell within the boundaries of the First Amendment.<sup>250</sup> Yet in each case, university officials held the subtle threat of sanctions over each student—a manner of enforcement deemed to be the equivalent of "a full blown prosecution."<sup>251</sup> For these reasons, the code was overbroad both on its face and as applied.<sup>252</sup>

The *Doe* court also found the code to be void for vagueness because students of ordinary "intelligence must necessarily guess at its meaning."<sup>253</sup> To comply with the First Amendment, a statute must provide adequate warning as to what conduct is permitted and prohibited.<sup>254</sup> Statutes must also provide guidelines for application to avoid arbitrary intrusions on civil liberties.<sup>255</sup> These requirements "apply with particular force where the challenged statute acts to inhibit freedoms affirmatively protected by the constitution."<sup>256</sup>

The Michigan speech code was void for vagueness because it was impossible for a student to "discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct."<sup>257</sup> Particularly troublesome to the court were words such as "victimize" and "stigmatize"—words that necessarily require a subjective interpretation of cause and effect.<sup>258</sup> The university failed to provide students with a mechanism for distinguishing between protected and unprotected conduct, leaving students to guess about the effect of each comment made.<sup>259</sup> Even counsel for the university acknowledged that the only way a student could make such a determina-

247. *Id.*

248. *Id.*

249. *Id.* at 865 n.14.

250. 721 F. Supp. 852.

251. *Id.* at 866.

252. *Id.*

253. *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973)).

254. *Id.*

255. *Id.*

256. *Id.* (citation omitted).

257. *Id.* at 867.

258. *Id.* "These words can only be understood with reference to some exogenous value system." *Id.* at 859.

259. *Id.* at 867.



tion would be "very carefully."<sup>260</sup> Such vague enforcement terms violate the Due Process Clause of the Fourteenth Amendment.<sup>261</sup> Therefore, the Michigan code was unconstitutional.

### C. UWM Post v. Board of Regents of the University of Wisconsin<sup>262</sup>

Two years after *Doe*, the Eastern District of Wisconsin struck a similar university speech code not only on overbreadth and vagueness grounds, but also because the code's definition of fighting words violated the First Amendment.<sup>263</sup> The University of Wisconsin code was enacted to discourage discrimination and harassment and encourage diversity on the University's twenty-six campuses.<sup>264</sup> The code was designed with the assistance of law professors who assured the university that the code would withstand First Amendment scrutiny, because its application required that a speaker intend to create a hostile educational environment for the individuals addressed.<sup>265</sup>

When the code was in effect, nine students were sanctioned: one for calling another student "shakazulu."<sup>266</sup> Another student violated the code by shouting loud epithets at a woman for ten minutes.<sup>267</sup> Still another student was disciplined for yelling at an Asian-American student, "It's people like you—that's the reason this country is screwed up."<sup>268</sup> A student was sanctioned for harassing a Turkish-American student by impersonating an immigration official and requesting immigration documents.<sup>269</sup> One student called a residence hall staff member a "piece of shit nigger," and another a "South American immigrant."<sup>270</sup> A student was sanctioned for placing a message stating "Death to all Arabs!! Die Islamic scumbags!!" on a computer screen sent to an Iranian faculty member.<sup>271</sup> Other students were disciplined for calling a fellow student a "fat ass nigger" and yelling to a female student in public "you've got nice tits."<sup>272</sup>

260. *Id.*

261. *Id.*

262. 774 F. Supp. 1163 (E.D. Wis. 1991).

263. *Id.*

264. *Id.* at 1164.

265. *Id.* at 1165. Part II of this Comment outlines the provisions of the Wisconsin speech code.

266. *Id.* at 1167.

267. *Id.* The student repeatedly shouted "fucking bitch" and "fucking cunt" at the woman in response to statements she made about the university's athletic department. *Id.*

268. *Id.* The student also told the Asian-American student "you don't belong here" and "Whites are always getting screwed by minorities and some day the Whites will take over." *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at 1168.

272. *Id.*

A group of students sued the university claiming that the code was overbroad and void for vagueness.<sup>273</sup> While the Eastern District Court of Wisconsin struck the code on these grounds, the court went on to respond to the university's argument that the code only proscribed fighting words within the permissible bounds of the First Amendment.<sup>274</sup> The court's analysis of fighting words in this context is significant because it serves as a logical precursor to the Supreme Court's decision in *R.A.V.* one year later.

The district court initially explained the limited definition given to fighting words by the Supreme Court.<sup>275</sup> This definition included words that: (1) inflict injury by their very utterance; (2) "naturally tend to provoke violent resentment";<sup>276</sup> and (3) are "directed at the person of the hearer."<sup>277</sup> Words that cause any reaction less than an immediate breach of the peace cannot be punished as fighting words under the First Amendment.<sup>278</sup>

Applying this definition of fighting words to the Wisconsin speech code, the court broke the code down to four elements. For the code to apply, the speech must: (1) be "racist or discriminatory"; (2) be "directed at an individual"; (3) be demeaning to the "race, sex, religion, etc."; and (4) "create an intimidating, hostile or demeaning [educational] environment."<sup>279</sup> The court seemed to focus on the reason "fighting" words are characterized as such. If speech induces an immediate violent reaction, it is proscribable under the First Amendment. A reaction short of violence, however, does not justify this kind of content-based proscription. Therefore, because the Wisconsin code does not require that the speech, by its very utterance, tend to incite violent reaction, it goes beyond the narrow scope of the fighting words definition and is unconstitutional.<sup>280</sup>

The first element, requiring that speech be racist or discriminatory, targets speech based on its *content* and not on the *reaction* it is likely to invoke.<sup>281</sup> While the second element appears at first glance to meet First Amendment requirements, it does not require that the prohibited speech *always* incite violent reaction, and may therefore apply in a

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273. *Id.*

274. *Id.* at 1169.

275. *Id.* at 1170 (citing *Gooding v. Wilson*, 405 U.S. 518 (1972)).

276. *Id.*

277. *Id.*

278. *Id.* at 1171 (citing *Collin v. Smith*, 578 F.2d 1197, 1203 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978)).

279. *Id.* at 1172.

280. *Id.*

281. *Id.*

variety of instances—violent or not.<sup>282</sup> Third, speech may demean a person on the basis of race, gender, religion, etc., without inciting a riot.<sup>283</sup> Finally, although a hostile educational environment may be disturbing, “it does not necessarily tend to incite violent reaction.”<sup>284</sup> Based on this analysis, the district court found the speech code overbroad and therefore in violation of the First Amendment.<sup>285</sup>

Significantly, the district court rejected the university’s argument that a balancing approach should be employed to regulate speech that has only slight social value and harmful effects.<sup>286</sup> A balancing approach is appropriate only where the regulation is content neutral.<sup>287</sup> The Wisconsin speech code regulates speech not only based on its content, but also on its viewpoint. Speech which does not ridicule a person’s race, sex, religion, etc., is permitted, while speech that ridicules on these bases is prohibited. “This is thought control.”<sup>288</sup> The district court’s analysis closely resembles *R.A.V.*’s majority holding by focusing on the scope of fighting words and the inherently broad nature of a definition which prohibits any word tending to evoke *any* kind of reaction.

In examining the doctrinal underpinnings of free speech and campus hate speech codes, one may question whether these broad principles should apply differently in the special situation of American universities. Because undergraduate and graduate education forces students to challenge existing thoughts and ideas, there is a tremendous opportunity for students and teachers alike to educate one another through the free and open exchange of ideas. It is through speech that an individual attains the education and reasoning skills necessary to achieve equality. For it is that by understanding what is, and the arguments of those one disagrees with, that an individual may determine what ought to be. Free speech and reason are the empowering devices every individual must possess to create social change and achieve equality.

When arguments for hate speech codes fail on constitutional grounds, advocates look to Title VII of the Civil Rights Act of 1964 for support.<sup>289</sup> The Title VII argument claims that the free and open

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* at 1173.

286. *Id.*

287. *Id.* at 1174 (citing *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986)).

288. *Hudnut*, 771 F.2d at 328.

289. 42 U.S.C. § 2000e-2 (1988); 29 C.F.R. § 1604.11 (1991).

debate of ideas creates a hostile learning environment for students of oppressed groups in violation of federal law. The regulation of speech in the workplace, however, differs significantly from the regulation of speech in the university setting. The doctrine of academic freedom will not allow speech codes, either explicit or implicit, to jeopardize the mission and role of education in American society.

## VI. ACADEMIC FREEDOM

Just beyond the realm of First Amendment law lies the doctrine of academic freedom. In a series of cases, the Supreme Court defined the contours of this doctrine, ensuring that content-based, overbroad and vague limits on speech serve as a floor, rather than a ceiling, on the breadth of a student's First Amendment freedoms. The following examines this doctrine in light of campus hate speech codes and a recent order by the U.S. District Court for New Hampshire.<sup>290</sup>

The United States Supreme Court has long recognized "the essentiality of freedom in the community of American universities [as] almost self-evident."<sup>291</sup> The university plays a vital role in educating and training this country's youth,<sup>292</sup> and "[t]he vigilant protection of [our] constitutional freedoms is nowhere more vital than in the community of American schools."<sup>293</sup> Free and open discussion of ideas is essential to American education because "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust."<sup>294</sup> The Court has repeatedly held that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us . . . . That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."<sup>295</sup> More than any other forum, "[t]he classroom is peculiarly the 'marketplace of ideas.'"<sup>296</sup>

Students and teachers do not leave their constitutional freedoms "at the schoolhouse gate."<sup>297</sup> The notion of academic freedom rests on a

290. *Silva v. University of New Hampshire*, 1994 WL 504417 (D.N.H. 1994).

291. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). See generally *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (invalidating a statute requiring recitation of the Pledge of Allegiance in schools).

292. *Sweezy*, 354 U.S. at 250 ("[A]ny straight jacket" imposed on educators "would imperil the future of our Nation.")

293. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); see also *Wieman v. Updegraff*, 344 U.S. 183, 165 (1952) (Frankfurter, J., concurring) ("unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice.").

294. *Sweezy*, 354 U.S. at 250.

295. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

296. *Id.*

297. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969).

foundation of national strength made up of the kind of "hazardous freedom," openness, and "independence and vigor of Americans who grow up and live in this . . . society."<sup>298</sup> Even when a school fears an act of expression will cause a disturbance, that fear is not enough to overcome fundamental freedoms.<sup>299</sup> For this reason, state schools "may not be enclaves of totalitarianism."<sup>300</sup>

Even in the face of these broad goals, academic freedom recognizes the need for order in the "special characteristics of the school environment."<sup>301</sup> In this regard, schools have "comprehensive authority . . . consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."<sup>302</sup> In *Hazelwood School District v. Kuhlmeier*,<sup>303</sup> the Court recognized a school's ability to limit speech related to a "valid educational purpose."<sup>304</sup> In *Kuhlmeier*, a high school was allowed to censor a student newspaper of selected articles since the paper was considered part of the curriculum for a journalism class.<sup>305</sup> When speech is part of "legitimate academic decisionmaking," the school may limit student and teacher speech.<sup>306</sup> However, when schools attempt to regulate private student speech unrelated to an educational purpose, the First Amendment is "directly and sharply implicated"<sup>307</sup> and will require "judicial intervention to protect students' constitutional rights."<sup>308</sup>

#### A. *Whether Classroom Speech Is Protected*

A school may censor student speech only when the censorship has a valid educational purpose such as maintaining order in school.<sup>309</sup>

298. *Id.* at 508-09.

299. *Id.* at 508

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 disturbance. But our Constitution says we must take this risk . . . .

*Id.*

300. *Id.* at 511. "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Id.* Otherwise, the freedom "would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots." *Id.* at 513.

301. *Id.* at 506.

302. *Id.* at 507.

303. 484 U.S. 260 (1988).

304. *Id.* at 273.

305. *Id.* at 260-61.

306. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 183 (1990).

307. *Kuhlmeier*, 484 U.S. at 273 (internal quotation marks omitted).

308. *Id.*

309. *Id.*

The need for order and censorship, however, will not match the force First Amendment protections should command on college campuses.<sup>310</sup> In fact, a university may not shut off the dissemination of ideas—"no matter how offensive to good taste"—in the name of "conventions of decency" alone.<sup>311</sup> The Supreme Court has expressly overruled the use of school authority to regulate speech when students are sanctioned based on the content of the message.<sup>312</sup> "[T]he First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech . . . ."<sup>313</sup> Campus hate speech codes target private student speech which cannot be censored under the First Amendment absent a clear educational motive.

In *Silva v. University of New Hampshire*,<sup>314</sup> the U.S. District Court for New Hampshire clarified the standard applied in cases challenging the First Amendment on academic freedom grounds. In *Silva*, a professor was charged with violation of the university's sexual harassment policy for using sexually suggestive speech in a technical writing class as an instrument of instruction.<sup>315</sup> Specifically, Professor Silva recited two analogies that he had used in previous semesters, before 1992, to convey certain ideas about technical writing.<sup>316</sup> First, the professor described the "focus" necessary for good technical writing in terms of sex: "Focus is like sex. You seek a target. You zero in on your subject. You move from side to side. You close in on the subject. You bracket the subject and center on it. Focus connects experience and language. You and the subject become one."<sup>317</sup> In a second technical writing class, Professor Silva employed "Little Egypt's definition of belly dancing" to provide an example of a good definition that employs general classifications, such as belly dancing, with a concrete

310. *Healy v. James*, 408 U.S. 169, 180 (1972).

311. *Papish v. Board of Curators*, 410 U.S. 667, 670 (1973) (internal quotation marks omitted). *See also* *University of Pennsylvania v. EEOC*, 493 U.S. 182, 197 (1990) (affirming the academic freedom doctrine when the state places content-based restrictions on student and teacher speech). *But see* *Knight v. Alabama*, 14 F.3d 1534 (11th Cir. 1994) (suggesting that the academic freedom doctrine does not apply with full force in certain university contexts).

312. *Papish*, 410 U.S. at 670.

313. *Id.* at 671. *But see* *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972) (discussing the limited circumstances in which a professor's speech may be legitimately curtailed), *cert. denied*, 411 U.S. 972 (1973).

314. 1994 WL 504417 (D.N.H. 1994).

315. *Id.* The University of New Hampshire sexual harassment policy is outlined in Part II of this Comment.

316. *Id.* at \*2-3. Silva later stated that he "used both examples in . . . classes on numerous prior occasions without incident, [and] the Little Egypt simile since the early 1970's. [He] considered both illustrations to have legitimate pedagogical goals." *Id.*

317. *Id.* at \*3.

metaphor, "like jello shimmying on a plate" with a vibrator under it, so that students of belly dancing better understand the necessary movements of the dance.<sup>318</sup> Professor Silva described this metaphor as a legitimate pedagogical instrument because it "is classic in its use of concrete differentia and simple metaphor, i.e. the trembling jello equates to the essential movements necessary to the dance. It is unlike the dance but also its very essence."<sup>319</sup>

The U.S. District Court for New Hampshire upheld Professor Silva's First Amendment claim on academic freedom grounds.<sup>320</sup> The court applied the test set forth in *Mount Healthy City School District Board of Education v. Doyle*<sup>321</sup> to prove a violation of the First Amendment. Under the *Mount Healthy* analysis, the plaintiff must show (1) the classroom speech was constitutionally protected and (2) the speech was a motivating factor in the decision to discipline him.<sup>322</sup> The defendant then "must show that it would have acted in the same manner even in the absence of the protected classroom speech."<sup>323</sup> The university disciplined Professor Silva because of his classroom comments.<sup>324</sup> The second element of this test is met and, therefore, the only question that remains is whether Professor Silva's speech is protected.

The first inquiry in this regard is whether the teacher was put on notice of what conduct and speech is prohibited.<sup>325</sup> Without notice, a teacher may not know to avoid the conduct and speech prohibited to save his position.<sup>326</sup> In *Keyishian v. Board of Regents*,<sup>327</sup> the Supreme Court required that schools give clear direction to teachers as to what speech and conduct is prohibited.<sup>328</sup> Without narrow and specific regulations, a teacher must guess as to what speech and conduct might "lose him his position, [and he] will 'steer far wider of the unlawful zone . . .'"<sup>329</sup> Thus, without adequate notice of prohibited speech, classroom instruction and discourse would be chilled out of fear of

318. *Id.* (Silva specifically stated to his class, "Belly dancing is like jello on a plate with a vibrator under the plate.")

319. *Id.*

320. *Id.* at \*21.

321. 429 U.S. 274 (1977).

322. 1994 WL 504417 at \*19.

323. *Id.*

324. *Id.* at \*23 ("but for Silva's classroom statements he would not have been subject to UNH discipline").

325. *Id.* at \*19 (citing *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993)); see also *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967).

326. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

327. 385 U.S. 589 (1967).

328. 1994 WL 504417 at \*19 (citing *Keyishian*, 385 U.S. at 604).

329. *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526, *reh'g denied*, 358 U.S. 860 (1958)).

sanctions. Chilled classroom speech sacrifices the quality of an education that trains students to think independently for the sake of students who have been indoctrinated with a "politically correct" mindset.<sup>330</sup> The relevant question to be addressed is whether in light of the "existing regulations, policies, discussions, and other forms of communication between school administration and teachers, was it reasonable for the school to expect . . . the teacher to know that [his] conduct was prohibited?"<sup>331</sup>

The *Silva* court determined that the communication in question was not "of a sexual nature" under the University sexual harassment policy; rather, the six complainants mistakenly understood the message as sexual.<sup>332</sup> It is the complainants' misunderstanding of the message which created an offensive academic environment.<sup>333</sup> For this reason, the university's discipline of Professor Silva violated the notice requirement of *Keyishian*.<sup>334</sup>

The second inquiry in determining whether the professor's speech is protected requires "that the government regulation be reasonably related to legitimate pedagogical concerns."<sup>335</sup> In *Mailloux v. Kiley*,<sup>336</sup> the First Circuit Court of Appeals clarified the test for determining the validity of a government regulation affecting a teacher's classroom speech.<sup>337</sup>

[F]ree speech does not grant teachers a license to say or write in class whatever they may feel like, and . . . the propriety of regulations or sanctions must depend on such circumstances as the age and sophistication of the students, the closeness of the relation between

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330. Politically correct speech is a general limitation on any kind of speech that excludes a class or individual based on particular characteristics. One commentator explained politically correct speech as any speech that "implies that those who are not heterosexual, caucasian, and male with 'Eurocentric' thought patterns are somehow 'less' than those who possess these attributes." Alexander, *supra* note 7, at 1372. Where classroom speech is restricted to politically correct speech, no one benefits. Teachers and students wishing to express ideas are stifled by the threat of sanctions and therefore sacrifice educational goals, while students who might be offended are never given an opportunity to develop reasoning skills because there is no idea or speech to counter.

331. 1994 WL 504417 at \*19.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.* at \*20 (citing *Ward v. Hickey*, 996 F.2d 448, 452-53 (1st Cir. 1993)); see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) ("educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns"); *Mailloux v. Kiley*, 448 F.2d 1242 (1st Cir. 1971)).

336. *Mailloux v. Kiley*, 448 F.2d 1242 (1st Cir. 1971).

337. *Id.*



the specific technique used and some concededly valid educational objective, and the context and manner of presentation.<sup>338</sup>

The court held that the university's sexual harassment policy, as applied to classroom speech, "seeks to address the legitimate pedagogical concern of providing a congenial academic environment."<sup>339</sup>

Applying the *Mailloux* test to the situation in *Silva*, the complaining students were all adult college students and were presumed to possess the sophistication of adults.<sup>340</sup> Professor Silva's teaching objective in conveying basic writing principles to his class was advanced by his classroom statements.<sup>341</sup> Finally, because the statements were made in the context of his college class lecture, the third requirement regarding the manner of presentation was satisfied.<sup>342</sup> An analysis of this inquiry in light of First Amendment interests in academic freedom, prompted the *Silva* court to determine that the university's sexual harassment policy was "not reasonably related to the legitimate pedagogical purpose of providing a congenial academic environment because it employ[ed] an impermissibly subjective standard that fails to take into account the nation's interest in academic freedom."<sup>343</sup> For this reason, application of this policy to Professor Silva violated the First Amendment.<sup>344</sup>

#### B. *Is the Protection of Some Worth the Education of Others?*

The University of New Hampshire's use of a sexual harassment policy similar to Title VII to regulate speech runs counter to the primary mission of a university to educate students through open discourse and debate. The university setting is fundamentally different from the workplace, and the purpose of Title VII is inconsistent with the mission of a university. In the workplace, employee speech is generally limited to that speech which is necessary to complete a job or task. Though some employees engage in social speech with co-workers, most speech in the workplace tends to be that which is necessary to meet the goals of the business.

The university setting, on the other hand, is different because the goal and mission of education is different. Whereas the goal of workplace speech is business profit, the bottom line in education is the de-

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338. *Id.* at 1243.

339. *Id.*

340. 1994 WL 504417 (D.N.H. 1994).

341. *Id.*

342. *Id.*

343. *Id.* at \*21.

344. *Id.*

velopment of reasoning, analysis and independent thinking. A university may fulfill its mission by developing these skills, challenging preconceived notions and the existing set of social and political mores. Students learn substantive material through the discussion and analysis of their own prejudices and ideas.

Free speech is fundamental to the functioning of a free society. The First Amendment protection of free speech forms the basis upon which Americans participate in government and achieve social change. Words, thoughts, prayers and votes are mechanisms by which a free society creates laws and protects its citizens. There is less opportunity for tyranny by the majority in a society that allows for the open debate of ideas by all its citizens. Just solutions to social problems can be achieved through speech and counter speech.<sup>345</sup>

The majority opinion in *R.A.V.* strikes at the heart of a free society. Without the preservation of First Amendment rights in cases that offend us the most, there is no need for a First Amendment because speech in cases that do not offend us is not in need of protection. Democracy is built upon the voice and will of the people. The primary responsibility of American citizenship is to make one's voice heard through voting and participation in the government.

Higher education is the one place in America where one's primary purpose is not only to make one's voice heard, but also to question one's ideas and the ideas of others. The university's fundamental mission is "to search for truth and a university is a place where people have to have the right to speak the unspeakable and think the unthinkable and challenge the unchallengeable."<sup>346</sup> Students entering universities should be prepared to confront ideas that they do not like. In the case of law schools, the study of law requires that every student learn and be able to articulate all sides of an argument—even those views they disagree with. Legal education requires that students confront arguments and ideas that they do not like. At the heart of *R.A.V.* is the notion that a university cannot selectively ban certain ideas from the educational environment because the ideas may harm individuals who, by the act of enrolling in a university, ask for the development of their minds through debate and discourse.

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345. The counter speech of activists such as Malcolm X, Martin Luther King, William E. B. Du Bois and Frederick Douglass achieved social change for the plight of minorities despite an institutional imbalance of resources. Hentoff, *supra* note 11, at 183. The counter speech of private citizens is the most productive means of addressing offensive speech. Otherwise, in the words of Theodore Roosevelt "the one absolutely certain way of bringing this nation to ruin, of preventing all possibility of its continuing to be a nation at all . . . would be to permit it to become a tangle of squabbling nationalities." CLEARY, *supra* note 1, at 71 (citing Arthur M. Schlesinger, Jr. quoting Theodore Roosevelt).

346. Hentoff, *supra* note 11, at 152 (quoting Benno Schmidt, President of Yale University).

Students who enter an undergraduate or graduate education program bring with them their fears, doubts, misconceptions, and strongly held beliefs. "If they spend four years cooped up under repressive regulations, they might well dutifully obey the rules, offend no one, and leave with all their prejudices, fears, doubts, and misconceptions firmly intact."<sup>347</sup> Campus hate speech codes teach individuals to think of government and authority with Orwellian fear.<sup>348</sup> The education of people requires the free disclosure and challenge of basic social and political values. Speech codes prevent the full development of an individual's mind by limiting the ideas that may be publicly considered and analyzed.

The implementation of speech codes on university campuses sends this message to bigots:

We can't cope with your disgusting speech. Your words are too powerful for us administrators and faculty. We don't know how to educate against it. So, in this place of higher learning and free inquiry, we're going to shut you up. We are too weak in resources, skills, creativity and courage to do anything else.<sup>349</sup>

The intuitive fallacy of campus speech codes is that they "weaken those they ostensibly protect by not enabling them to protect themselves."<sup>350</sup> One must wonder how giving offensive power to some can possibly improve the lot of the oppressed.<sup>351</sup> Speech codes do not hurt bigots; rather, those most hurt by "the pall of orthodoxy on campus are students who are liberals but of an independent mind—and moderates."<sup>352</sup> Ironically, universities have attempted to improve speech through speech codes. However, the only way to improve speech "is to abolish all speech codes. Not 'improve.' Abolish."<sup>353</sup>

The lofty goals of speech code advocates are not inconsistent with the First Amendment. Rather, it is the means by which this group attempts to achieve the ends of social equality that conflict with individual liberties. Speech-code advocates are not without recourse because

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347. *Id.* at 169.

348. Students are afraid to speak out on the views they hold. At the University of California at Berkeley, home of the Free Speech Movement, a student looked nervously over her shoulder and asked that her name not be used, noting "[t]here are things you wouldn't want to talk about around certain people." Hentoff, *supra* note 11, at 153 (citing Louis Freedberg, *A Campus Fear of Speaking Freely*, SAN FRANCISCO CHRON., Oct. 30, 1991, at A1).

349. *Id.* at 177.

350. *Id.* at 196.

351. *Id.* at 177.

352. *Id.* at 152-53.

353. *Id.* at 196.

the First Amendment provides a strong shield against the sword of offensive speech: counter speech. Through the active, engaging, and often relentless debate on issues of social and political concern, holders of minority opinions learn the strengths of their own arguments and the weaknesses of their opponents'. With this knowledge, these groups are better able to strike at the heart of a bigoted argument with all of the fervor and force necessary to combat hateful ideas. Instead of sacrificing the most fundamental of our civil liberties for the sake of the Fourteenth Amendment, we must use the liberty as a force for social change.<sup>354</sup>

## VII. CONCLUSION

The controversy over hate speech codes boils down to a conflict between the advocates of civil rights and the advocates of civil liberties.<sup>355</sup> The goal of both groups is to improve the functioning of a free society by ensuring that every citizen is equipped with the same opportunities for growth and achievement, and is given the opportunity to live a life free from the fear of fellow citizens. Each group aims to increase citizen participation in government, professional and social life. To achieve this end, each group takes a separate and conflicting route. The paths of each, however, can run in harmony when the First Amendment is used both as a shield and as a sword. It is only when the citizens of a free society use the force of words, thoughts, and votes, that true social change occurs. Civil rights have, thus far, been recognized because of this country's dedication to an individual's civil liberties. Deviation from this commitment may result in a society composed of individuals lacking the skill or educational background to challenge governmental authority and improve the functioning of a free society.

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354. As an example, Malcolm X proved to be "an extraordinarily resilient, resourceful, probing master of language." He did not achieve this skill, however, by being protected from racist speech. Hentoff, *supra* note 11, at 167.

355. *Id.* at 150.

