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# UNIVERSITY HATE SPEECH CODES: A NECESSARY METHOD IN THE PROCESS OF ERADICATING THE UNIVERSAL WRONG OF RACISM

## INTRODUCTION

This Note was inspired by a series of hate motivated incidents that occurred at various colleges and universities over recent years.<sup>1</sup> The painful impact of these incidents on the academic

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1. The number of hate incidents is quite disturbing in light of both their frequent occurrence, and the fact that they occur at some of the nation's most prestigious educational institutions. *See, e.g.*, Judith Barra Austin, *Panel Tackles Conflict Between Harassment Laws, First Amendment*, GANNETT NEWS SERV., Sept. 10, 1992 (stating that a student at Clemson University arrived at what she believed to be her apartment for the semester only to be told by her roommate that they could not room together because she was black); Sarah Bowen, *Can Racist Slurs be Banned on Campus?*, USA TODAY, Oct. 15, 1992, at 11A (stating that at the University of Texas "individuals in a fraternity painted a car with obscenities targeted at blacks" and that at the University of Wisconsin, the Ku Klux Klan made on-campus attempts to recruit); Alexander Cockburn, *Dangerous Diversions; Hate Speech and Political Correctness Beat the Devil*, THE NATION, May 27, 1991, Vol. 252, No. 20, at 690 (stating that at Brown University, a student walked through campus shouting an array of epithets that included: "Fucking nigger," "What are you a faggot?" and "Fucking Jew"); Ellen Goodman, *Free Speech v. Equality*, THE BOSTON GLOBE, Mar. 17, 1991, at A27 (stating that at Harvard, confederate flags are displayed, despite wide spread recognition of their symbolic reference to an era of slavery and institutional racism); Charles Leroux, *Hate Speech Enters Computer Age*, CHI. TRIB., Oct. 27, 1991, at C4 (stating that at the University of Wisconsin, a student sent a message through the computer system to an Iranian faculty member stating "Death to all Arabs! Die Islamic Scumbags"); Ken Myers, *An Incident at Stanford Sparks More Dialogue on 'PC' Speech*, NAT'L L.J., Mar. 9, 1992, at 4 (stating that at Stanford University, a first year law student walked through a dormitory and uttered a series of homophobic remarks including "Faggot! Hope you die of AIDS! Can't wait 'til you die, faggot"); Katherine Shaver, *Congress Examines the Appropriateness of Universities' Hate Speech Codes*, STATE NEWS SERV., Sept. 10, 1992 (reporting that on Halloween, students dressed up as members of the Ku Klux Klan and called a black student a "nigger," and that at the University of South Florida, in the Fall of 1991, anti-Semitic graffiti defaced various buildings throughout the campus); *Stanford, UC Unruffled By Hate*

communities, coupled with the realization that these incidents extended across the country, compelled the writers to discuss the issue of hate speech on the college campus.

It has been nearly four decades since the United States Supreme Court declared discrimination on the basis of race unconstitutional and opened the gates of equal opportunity to people of color.<sup>2</sup> However, college campuses are presently embroiled in an epidemic of hate acts directed at students of various ethnic, religious and racial backgrounds.<sup>3</sup> In an effort to provide an equal educational opportunity to all students, many colleges and universities have adopted speech and conduct codes to alleviate the profound harm of such discriminatory acts.<sup>4</sup>

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*Speech Ruling*, S.F. CHRON., June 29, 1992, at A15 (reporting that at Stanford University, two white males defaced a Beethoven poster with racial caricatures, and then posted it on the door of a black student's room).

Our law school was also affected by this hate-motivated phenomenon. In May of 1991, a Touro student circulated a flier listing the name of almost every student in the class of 1993, along with their undergraduate grades and LSAT scores. The names of minority students appeared in boldface, and a racist message was attached which suggested that minority students were given preferential treatment in the admissions process. Additionally, in October of 1991, a racially motivated cartoon was displayed in a men's restroom portraying disparate treatment in the admissions interview process.

2. See *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). *Brown* held that "segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive[s] the children of the minority group equal educational opportunities." *Id.*

3. See *supra* note 1 and accompanying text.

4. See Steven R. Glaser, *Sticks and Stones May Break My Bones, But Words Can Never Hurt Me: Regulating Speech on University Campuses*, 76 MARQ. L. REV. 265 (1992). Glaser found that given the staggering number of racial attacks on college campuses, "[m]inority groups urged college officials to adopt regulations punishing derogatory and discriminatory language." *Id.* at 266. College officials were "expected to acknowledge and attempt to remedy the harmful effects of intolerance while remaining an institution of higher learning committed to freedom of expression." *Id.* However, many school officials were pressured into enacting hate speech codes. *Id.* (citing *Breaking the Codes*, NEW REPUBLIC, July 8, 1991, at 7, 8); Linda P. Campbell, *College Debate: Free Speech vs. Freedom of Bigotry*, CHI. TRIB., Mar. 18, 1991, at 1; see also Thomas H. Moore, *R.A.V. v. City of St. Paul: A Curious Way to Protect Free Speech*, 71 N.C. L. REV. 1252 (1993). Moore lists several

These codes are often paradigmmed after the “fighting words” doctrine.<sup>5</sup> However, in light of the diminishing scope of the doctrine,<sup>6</sup> and the nature of these hate expressions,<sup>7</sup> it is quite

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universities that adopted hate speech codes including “the University of California, Emory University, the University of Michigan, the University of North Carolina at Chapel Hill, and the University of Wisconsin.” *Id.* at 1255 n.9. For example, Stanford University adopted a speech code to prevent discriminatory harassment based on “hatred or contempt for students, faculty, or university employees on ‘the basis of their sex, race, color, handicap, religion, sexual orientation, or national or ethnic origin.’” *Id.*; Ronald J. Rychiak, *Civil Rights, Confederate Flags, and Political Correctness: Free Speech and Race Relations on Campus*, 66 TUL. L. REV. 1411, 1424 (1992) (noting that speech codes “protect students from acts of violence and harassment”).

5. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). In *Chaplinsky*, the Supreme Court defined the “fighting words” doctrine:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

*Id.*; see also, *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992). The Court concluded that although expressions reached by the St. Paul Ordinance were proscribed under the “fighting words” doctrine, the ordinance was still unconstitutional since it “prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech address[ed].” *Id.* at 2542; *Lewis v. City of New Orleans*, 415 U.S. 130, 143 (1974); *Sambo’s Restaurants, Inc. v. Ann Arbor*, 663 F.2d 686, 694 (6th Cir. 1981) (noting that the Supreme Court has held that “suppression of speech which in no way tends to incite an immediate breach of the peace cannot be justified under *Chaplinsky’s* ‘fighting words’ doctrine” (citing *Gooding v. Wilson*, 405 U.S. 518, 524-27 (1977))); *UWM Post, Inc. v. Board of Regents of Univ. of Wis. Sys.*, 744 F. Supp. 1163 (E.D. Wis. 1991). The court stated that the University speech code, which prohibited students from directing discriminatory epithets at particular individuals with intent to demean them and create hostile educational environments, went beyond the scope of the “fighting words” doctrine. *Id.*; *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (holding that the University speech code was unconstitutionally overbroad since the effect of the code was “to prohibit speech because it disagreed with ideas or messages sought to be conveyed”).

6. See *R.A.V.*, 112 S. Ct. at 2538. The Supreme Court, in effect, diminished the scope of the “fighting words” doctrine by invalidating a city ordinance which forbade speech “that insult[ed], or provoke[d] violence, ‘on

likely that existing speech codes, if challenged, may be held unconstitutional by the United States Supreme Court.<sup>8</sup>

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the basis of race, color or creed, religion, or gender.’” *Id.* at 2547. The Court stated that “[d]isplays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics.” *Id.* Thus, “fighting words” cannot be restricted where there are “special prohibitions on those speakers who express views on disfavored subjects.” *Id.*; see also *UWM Post, Inc.*, 774 F. Supp. at 1170 The court explained that the “fighting words” doctrine has a narrow scope to include only words “which tend to incite an immediate breach of the peace” and applies where “fighting words” are “directed at the person of the hearer . . . .” *Id.*

7. Hate motivated expressions on the nation’s university campuses are often not face-to-face, but rather directed at a group of students, generally of similar ethnic backgrounds, ethnic composition or sexual orientation. See, e.g., Bowen, *supra* note 1, at 11A (showing incidents where there is little physical confrontation in hate crimes such as an incident at the University of Texas including individuals in a fraternity painting a car with racial epithets targeted blacks); Anthony Flint, *Swastika Often a Tool of Shock, Not Hate; Experts Say Youths May Use It In Ignorance*, BOSTON GLOBE, JAN. 31, 1994, at 13 (explaining that some students from Boston College found a swastika formed by bundles of newspapers); Judith Gaines, *City Study Finds 58 Percent of Hate Crimes Done For Thrill*, BOSTON GLOBE, May 28, 1993, at 21 (stating that fifty-eight percent of hate crimes are done anonymously and for the “thrill of it” and aimed at particular groups); Jack Levin, *Hatemongers Among Us*, ST. PETERSBURG TIMES, July 31, 1993, at 10 (“[M]ost [hate crimes] are committed by otherwise ordinary citizens—students in the dorm, the guy at the next desk at work or the neighbor down the block.”); Stephanie Mansfield, *Gays on Campus; Homosexual College Students; University of Kansas*, REDBOOK, Vol. 181, No. 1, May, 1993, at 124 (describing various attacks on homosexuals on college campuses such as one which offers free baseball bats for gay bashing).

8. See *University of Wisconsin Repeals Ban on ‘Hate Speech,’* NY TIMES, Sept. 14, 1992, at A10. The University of Wisconsin imposed a hate-speech code, one of the first of its kind, in 1989. *Id.* In 1991, this code was declared unconstitutionally overbroad by the Federal District Court for the Eastern District of Wisconsin. *UWM Post, Inc. v. Board of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991). The speech code provided disciplinary sanctions for the following expressions:

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:

Universities, however, as institutions of higher learning, are vested with the duty to effectively implement the mandates of *Brown v. Board of Education*.<sup>9</sup> Today, the recurrence of heinous acts of hate on our nation's college campuses, reminiscent of pre-*Brown* times, threaten the *Brown* promise of equal access to education for all.<sup>10</sup> Salvation of this principle rests upon the

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1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
  2. Create an intimidating, hostile or demeaning environment for education, university related work, or other university -- authored activity . . . .

*Id.* at 1165. The code cited some examples of expressions that would place a student in violation of the code. Among the cited examples include a student "intentionally ma[king] demeaning remarks to an individual based on that person's ethnicity, such as name calling, racial slurs, or 'jokes.'" *Id.* at 1166. Subsequently, the University modified the code to include only direct confrontations. See *University of Wisconsin Repeals Ban on 'Hate Speech,' supra* at A10. In light of the *R.A.V.* decision, the University repealed the modified code in September of 1992. *Id.*

9. See generally 347 U.S. 483 (1954) (stating that "[s]chool authorities have the primary responsibility for elucidating, assessing, and solving [racial discrimination in schools]; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles"); see also *Keyes v. School Dist. No. 1*, 413 U.S. 189, 222 (1973) (holding that school districts "have an affirmative duty . . . to eliminate segregation in the schools" (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971))).

10. See Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431. Lawrence broadened the meaning of *Brown* and articulated a principle upon which all anti-discrimination laws rest, mainly "the principle of equal citizenship." *Id.* at 438. He argued that *Brown* can be read as regulating the content of racist speech since "[s]egregation serves its purposes by conveying an idea." *Id.* Thus, the message sent to the public is that blacks are inferior, which ultimately injures all black individuals. *Id.* Therefore, "[a]s a regulation of racist speech, the decision is an exception to the usual rule that regulation of speech content is presumed unconstitutional." *Id.* Since the goal of segregation is to promote "white supremacy," then "*Brown* and its progeny require that the systematic group defamation of segregation be disestablished." *Id.* at 441. Lawrence also concluded that "white supremacists' conduct or speech is forbidden by the equal protection clause" and mandated by *Brown*. *Id.* at 442. Lawrence noted that where the university fails to protect victims from acts of

recognition that speech codes are a necessary means of ensuring the vitality of the *Brown* legacy.

This Note will attempt to articulate a compelling justification for the adoption of hate speech regulations on all state university campuses. Part I will examine the recent Supreme Court decision of *R.A.V. v. City of St. Paul*,<sup>11</sup> and analyze its impact on the “fighting words” doctrine and on existing university hate speech codes. Part II will articulate an independent ground for the adoption of hate speech codes on college campuses based on the Supreme Court’s decision in *Brown v. Board of Education*.<sup>12</sup>

## I. R.A.V. v. CITY OF ST. PAUL

In the early hours of June 21, 1990, R.A.V. and several other teenagers burned a cross made of broken chair legs inside the fenced yard of a black family.<sup>13</sup> The petitioner was convicted under the St. Paul Minnesota Bias-Motivated Crime Ordinance.<sup>14</sup>

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hate and to protect “their right to pursue their education free from this kind of degradation and humiliation, then . . . there are constitutional values at stake.” *Id.* at 448.

11. 112 S. Ct. 2538 (1992).

12. 347 U.S. 483 (1954). In *Brown*, the Supreme Court found that in the field of public education “[s]eparate educational facilities are inherently unequal.” *Id.* at 495. The Supreme Court based its holding on findings that separating minority students solely because of their race “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” *Id.* at 494; *see also infra* notes 95-130 and accompanying text.

13. *R.A.V.*, 112 S. Ct. at 2541.

14. *Id.* at 2540. The defendant’s conduct could have been punished under several state criminal statutes such as those prohibiting arson, terrorist threats, or criminal damage to property. *Id.* at 2541. Instead, the teenagers were charged with violating two other laws. *Id.* One punished racially motivated assaults and was not challenged. *Id.* The other was St. Paul’s Bias-Motivated Crime Ordinance. *Id.* The ordinance in question provides:

Whoever places on public or private property a symbol, object, appellation, characterization 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.

ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990).

The state supreme court upheld the statute as falling within the “fighting words” doctrine.<sup>15</sup> The Supreme Court of the United States overruled the state supreme court by unanimously holding the statute unconstitutional.<sup>16</sup> However, the Justices sharply disagreed in their reasoning.<sup>17</sup>

The majority began its analysis by reiterating the well-established constitutional principle that the First Amendment prohibits the government from restricting speech based on disapproval of its content.<sup>18</sup> The majority posited an exception to this general principle, consisting of certain categories of expression such as obscenity, defamation, and “fighting words.”<sup>19</sup> However, the majority stated that even these

15. The procedural posture was as follows: The trial court dismissed the charge on the ground that the ordinance was substantially overbroad and impermissibly content-based; the state supreme court reversed, holding that the ordinance could reasonably be interpreted to prohibit only “fighting words” which fall outside the protection of the First Amendment. *In re Welfare of R.A.V.*, 464 N.W.2d 507, 510-11 (Minn. 1991).

16. *R.A.V.*, 112 S. Ct. at 2550-51.

17. Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy, Souter, and Thomas delivered the majority opinion. They posited that the ordinance was facially unconstitutional because it prohibited speech based upon its content. *Id.* at 2542. Justice White, joined by Justices O’Connor, Blackmun, and Stevens who joined in part, filed a concurring opinion arguing that the ordinance was unconstitutional because it was “fatally over-broad” and that the majority’s reasoning was “transparently wrong.” *Id.* at 2550-51 (White, J., concurring). Justice Stevens filed a separate concurring opinion in which he argued that both the majority opinion and Justice White’s concurring opinion were wrong in their categorical approach. *Id.* at 2561 (Stevens, J., concurring). Justice Blackmun filed a brief separate concurrence to emphasize the harmful impact of the majority’s opinion on the categorical exceptions. *Id.* at 2560 (Blackmun, J., concurring).

18. *Id.* at 2542; *see, e.g.*, *United States v. Eichman*, 496 U.S. 310, 318 (1990) (“If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); *Texas v. Johnson*, 491 U.S. 397 (1989) (stating that government may not prohibit speech solely because it disfavors its content).

19. *R.A.V.*, 112 S. Ct. at 2542-43; *see, e.g.*, Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2351 (1989). The reason for the adoption of these limited categories is generally related to the substantial harm caused by the speech as compared to



categories are not “entirely invisible to the Constitution.”<sup>20</sup> The majority disagreed with the notion that [fighting words] “constitute ‘no part of the expression of ideas.’”<sup>21</sup> Rather, the majority likened “fighting words” to “a noisy sound truck,”<sup>22</sup> in that they are both “mode[s] of speech,”<sup>23</sup> and may convey an idea but neither, standing alone, is protected by the First Amendment.<sup>24</sup> “As with the sound truck, however, so also with ‘fighting words’: The government may not regulate use based on hostility - or favoritism - towards the underlying message expressed.”<sup>25</sup>

Applying this content restriction standard to the St. Paul ordinance,<sup>26</sup> the majority concluded that it was “facially

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the low societal value of the regulated speech. *Id.*; see also Richard Delgado, *Legal Theory, Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. UNIV. L. REV. 343, 377 (1991). Professor Delgado suggests that over the last century the Court has carved out several exceptions to protected speech. Some examples of such exceptions include: *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (speech used to form a criminal conspiracy); *Roth v. United States*, 354 U.S. 476 (1957) (speech that is obscene); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (speech that defames or libels a group); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (speech that amounts to “fighting words”); *Schenk v. United States*, 249 U.S. 47 (1919) (falsely shouting fire in a crowded theater). *Id.*

20. *R.A.V.*, 112 S. Ct. at 2543. Although these categories of speech, may “be regulated *because of their constitutionally proscribable content*,” the Constitution prohibits regulation that is based on the specific content of such speech. For example, the government may regulate libelous or obscene material, but may not prohibit only those libelous or obscene material which criticize the government. *Id.*

21. *Id.* at 2544.

22. *Id.* at 2545.

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

24. *Id.* The First Amendment provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

25. *R.A.V.*, 112 S. Ct. at 2545.

26. See *supra* note 14 for text of the ordinance.

unconstitutional.”<sup>27</sup> Other “fighting words” were not included in the ordinance.<sup>28</sup> The majority asserted that “[t]hose who wish to use ‘fighting words’ in connection with other ideas - to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality - are not covered.”<sup>29</sup> Further, the Court stated, “‘fighting words’ that do not themselves invoke race, color, creed, religion, or gender . . . would seemingly be usable . . . [on the sides] of those arguing *in favor* of racial, color, etc. tolerance and equality, but could not be used by that speaker’s opponents.”<sup>30</sup>

The majority stated with clarity that the First Amendment prohibited St. Paul from imposing restrictions on certain “fighting words” simply because the expressed views are disfavored.<sup>31</sup> St. Paul, the majority noted, “ha[d] no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.”<sup>32</sup>

Next, the majority addressed St. Paul’s contention that even if the ordinance did restrict protected expression, it should survive strict scrutiny analysis because the ordinance served a compelling

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27. *R.A.V.*, 113 S. Ct. at 2547. Despite the fact that the ordinance, as construed by the Minnesota Supreme Court, reached only “fighting words,” the Supreme Court held that the ordinance included only those “fighting words” that were based on “race, color, creed, religion or gender.” *Id.*

28. *Id.* The Court stated that “[d]isplays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics.” *Id.*

29. *Id.*; see also *Simon & Schuster Inc. v. Members of N. Y. State Crime Victims Bd.*, 112 S. Ct. 501 (1991) (holding that the concept of protected speech includes verbal or written speech which has been propounded by a criminal concerning his crime and that laws providing financial disincentives for criminals to speak about their crimes run afoul of the First Amendment unless they are sufficiently narrowly tailored to serve a compelling government interest).

30. *R.A.V.*, 112 S. Ct. 2547-48.

31. *Id.* at 2547.

32. *Id.* at 2548. The Marquis of Queensbury Rules were a boxing code of fair play developed in the nineteenth century by the eighth Marquis of Queensbury to govern boxing matches. Simply stated, it is “a code of fair play presumed to apply in any fight.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 1384 (1981).

government interest.<sup>33</sup> While the majority conceded that the asserted interests were compelling, it concluded that the content of the discrimination was not reasonably necessary to achieve this interest.<sup>34</sup> The majority explained that the only interest served by the ordinance was the city officials' interest in demonstrating their political bias toward certain groups.<sup>35</sup> The opinion concluded by suggesting that "St. Paul ha[d] sufficient [content-neutral] means at its disposal to prevent such behavior without adding the First Amendment to the fire."<sup>36</sup>

In response, Justice White, in his concurrence, charged the majority with departing from precedent in two instances. First, the majority abandoned the principle of *stare decisis* in the area of "fighting words" and "adopt[ed] an untried theory."<sup>37</sup> Second, he felt "the Court refuse[d] to sustain the ordinance even though it would survive under the strict scrutiny applicable to other protected expressions."<sup>38</sup>

Justice White reasoned that *stare decisis* should dictate the Court's path in analysis and asserted that the majority had abandoned the overbreadth tradition<sup>39</sup> by enunciating an

33. *R.A.V.*, 112 S. Ct. at 2549. The asserted compelling state interest was to protect "the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish." *Id.*

34. *Id.* at 2549-50.

35. *Id.* at 2550. The Court stated that this "is precisely what the First Amendment forbids." *Id.*

36. *Id.* The majority stated that "[a]n ordinance not limited to the favored topics . . . would have precisely the same beneficial effect" and would prevent bias behavior. *Id.*

37. *Id.* at 2551 (White, J., concurring). Justice White, with whom Justices Blackmun, O'Connor and Stevens concurred, asserted that the majority failed to follow precedents which the Supreme Court had established regarding the analysis of "unprotected speech." *Id.* (White, J., concurring). Justice White contended that *R.A.V.* could have been decided by invalidating the ordinance in accordance with cases such as *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). *Id.* at 2551-52 (White, J., concurring).

38. *Id.* at 2554 (White, J., concurring).

39. The concurring opinion stated that "[t]his case could easily be decided within the contours of established First Amendment law by holding, as petitioner argue[d], that the St. Paul ordinance [wa]s fatally overbroad because

“underinclusiveness” evaluation.<sup>40</sup> That is, the Court’s First Amendment jurisprudence had previously determined that there were certain categories of expression that did not deserve First Amendment protection.<sup>41</sup> The “fighting words” doctrine, Justice White posited, was one of those limited categories.<sup>42</sup> The

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it criminalize[d] not only unprotected expression but expression protected by the First Amendment.” *Id.* at 2550 (White, J., concurring). Generally, the rationale for the application of the overbreadth doctrine is that statutes that regulate speech might deter or chill persons from engaging in speech or activity that is protected under the First Amendment. *Id.* at 2553 (White, J., concurring).

40. *Id.* at 2553 (White, J., concurring). Justice White stated that “the Court’s new ‘underbreadth’ creation serves no desirable function. Instead it permits, indeed invites, the continuation of expressive conduct that in this case is evil and worthless in First Amendment terms . . . .” *Id.* (White, J., concurring) (citations omitted).

41. *Id.* at 2551 (White, J., concurring). In the areas of privacy and defamation, the Court has declared that expressing intimate and private facts about a private individual is subject to civil damages, as is the spread of untruths damaging to both public and private figures. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (stating that a credit agency’s false report regarding a construction company’s credit is not protected speech); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (holding that states may enforce a legal remedy for false statements injurious to a private individual’s reputation); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that public officials may seek damages from a media defendant for libel upon a showing of actual malice); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (stating that libelous statements aimed at groups, like those aimed at individuals, do not deserve First Amendment protection). Similarly, in the area of obscenity, the Court, over two decades ago, declared obscenity as not deserving protection because the Court considered obscenity to be utterly without redeeming social importance. *Roth v. United States*, 354 U.S. 476 (1957).

42. *R.A.V.*, 112 S. Ct. at 2551-52 (White, J., concurring). The “fighting words” doctrine was first articulated in the case of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). *Chaplinsky* was distributing his religious message by way of literature before a crowd of unsympathetic listeners. *Id.* at 569-70. While being escorted towards the police station, *Chaplinsky* accused the city marshal of being a “God damned racketeer” and, that the city government was comprised of “Fascists or agents of Fascists.” *Id.* at 569. He was convicted under a New Hampshire statute narrowed by the New Hampshire Supreme Court. *Id.* at 569. The United States Supreme Court, in a unanimous decision, upheld the New Hampshire statute as construed by the

rationale for this categorical exclusion is that “their expressive content is worthless or of *de minimis* value to society.”<sup>43</sup> Thus, in evaluating each category and its scope, the Court has consistently engaged in a content based evaluation.<sup>44</sup> Yet, as Justice White noted, the majority dismissed the clearly established principle that certain categories of expression did not deserve First Amendment protection because their content was worthless, and instead suggested that the “earlier Courts did not mean” what they said.<sup>45</sup> Justice White argued that the majority was suggesting that “[s]hould the government want to criminalize certain fighting words, the Court now requires it to criminalize all fighting words.”<sup>46</sup>

According to Justice White:

Fighting words are not a means of exchanging views, rallying supporters, or registering a protest; they are directed against individuals to provoke violence or to inflict injury. Therefore, a ban on all fighting words or on a subset of the fighting words category would restrict only the social evil of hate speech, without creating the danger of driving viewpoints from the marketplace.<sup>47</sup>

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state court. *Id.* at 573-74. The Court reasoned that Chaplinsky’s epithet lacked communicative value, since an “[a]rgument is unnecessary to demonstrate that the appellations . . . are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.” *Id.* at 574. In dicta, Justice Murphy, for the first time, enunciated the standard for evaluating “fighting words.” Simply stated, the test was whether men of average intelligence would be incited to react violently to words and expressions directed at an individual or a small group which by their very utterance inflict injury or tend to incite immediate violence. *Chaplinsky*, 315 U.S. at 573.

43. *R.A.V.*, 112 S. Ct. at 2552 (White, J., concurring) (citations omitted).

44. *Id.* (White, J., concurring).

45. *Id.* (White, J., concurring).

46. *Id.* at 2553 (White, J., concurring). But see the majority opinion, in which Justice Scalia described the concurrence assertions as “the concurrences’ own invention.” *Id.* at 2545. The Court stated, “the First Amendment imposes not an ‘underinclusiveness’ limitation but a ‘content discrimination’ limitation upon a State’s prohibition of proscribable speech.” *Id.* at 2545.

47. *Id.* at 2553 (White, J., concurring) (citations omitted). The debut of the marketplace metaphor in American jurisprudence came from the dissenting opinion of Justice Holmes where he argued that “the ultimate good desired is

The majority described this emphasis on the injury caused by such speech as “word-play.”<sup>48</sup> Additionally, the majority stated that

What ma[de] the anger, fear, sense of dishonor, etc. produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc. produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message.<sup>49</sup>

The majority expressly approved the idea of confronting speech or behavior that threaten “‘diverse communities’ . . . but the manner of that confrontation [could] not consist of selective limitations upon speech.”<sup>50</sup> It explained:

[T]he reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable and socially unnecessary *mode* of expressing *whatever* idea the speaker wishes to convey. St. Paul has not singled out an especially offensive mode of expression - it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner.<sup>51</sup>

Justice White termed the impact of the majority’s analysis of the “fighting words” doctrine on First Amendment jurisprudence as “negative.”<sup>52</sup> According to Justice White, this holding “necessarily signals that expressions of violence, such as the

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better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [the people’s] wishes safely can be carried out.” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

48. *R.A.V.*, 112 S. Ct. at 2548. While, Justice Scalia’s response was specifically directed at Justice Stevens’ concurring opinion, the concept of injury to the listeners was also articulated by the concurring opinions of White, Blackmun, and Stevens. *Id.* at 2550-71.

49. *Id.* at 2548.

50. *Id.* (quoting *In re Welfare of R.A.V.*, 464 N.W.2d 507, 508 (Minn. 1991)).

51. *Id.* at 2548-49 (emphasis in original).

52. *Id.* at 2553 (White, J., concurring).

message of intimidation and racial hatred . . . are of sufficient value to outweigh the social interest in order and morality that ha[d] traditionally placed such fighting words outside the First Amendment.”<sup>53</sup>

It is quite significant, however, that while Justice White’s concurring opinion vehemently disagreed with the majority’s analysis, it agreed with the outcome on the separate ground that the St. Paul ordinance was unconstitutionally overbroad.<sup>54</sup> He reasoned that “[a]lthough the ordinance reache[d] conduct that [was] unprotected, it also ma[de] criminal expressive conduct that cause[d] only hurt feelings, offense, or resentment, and [wa]s protected by the First Amendment.”<sup>55</sup> Consequently, the overbreadth doctrine dictates a prohibition on statutes that are so vague or overbroad that they either include protected speech in

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53. *Id.* (White, J., concurring).

54. *Id.* at 2558 (White, J., concurring). In general, following *Chaplinsky*, the theories employed by the Court when striking down statutes designed to prohibit or regulate “fighting words,” have been the vagueness and overbreadth doctrines. *See, e.g.*, *United States v. Eichman*, 110 S. Ct. 2404, 2410 (1990) (striking down Flag Burning Act as violative of the First Amendment); *Gooding v. Wilson*, 405 U.S. 518, 524 (1972) (striking a Georgia statute on its face because it was not limited to words “hav[ing] a direct tendency to cause acts of violence by the person to whom, individually, the remark[s] [are] addressed”); *Terminiello v. Chicago*, 337 U.S. 1, 5 (1949) (overturning a municipal ordinance prohibiting breaches of the peace as overbroad).

55. *R.A.V.*, 112 S. Ct. at 2560 (White, J., concurring). Generally, the rationale for the application of both doctrines is that statutes that regulate speech might deter or chill persons from engaging in speech or activity that is protected under the First Amendment. Thus, in order for the governmental regulation to be tolerated it must be drawn with “narrow specificity.” *NAACP v. Button*, 371 U.S. 415 (1963). In *NAACP*, Justice Brennan explained:

[T]he instant decree may be invalid if it prohibits privileged exercises of First Amendment rights *whether or not* the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute’s inhibitory effect upon such rights, this Court has not hesitated to take in to account possible applications of the statute in other factual contexts besides that at bar.

*Id.* at 432 (emphasis added).

the prohibition or leave an individual without clear guidance as to the boundary between prohibited and protected speech.<sup>56</sup>

In applying the overbreadth doctrine to the St. Paul ordinance, Justice White concluded that the ordinance reached not only physical harm but also “expressive conduct that caused only hurt feelings, offense, or resentment . . . .”<sup>57</sup> Psychological harm, he noted, was beyond the well defined boundaries of the “fighting words” doctrine.<sup>58</sup> Thus, the St. Paul ordinance was “fatally overbroad” and therefore unconstitutional.<sup>59</sup>

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56. *See, e.g., Gooding*, 405 U.S. at 518. The Court, in an opinion authored by Justice Brennan, struck down a Georgia statute which provided that “any person who shall . . . cause a breach of the peace . . . shall be guilty of a misdemeanor” as unconstitutionally vague and overbroad. *Id.* at 528. What is significant about this case is the dissenting opinion by Justice Blackmun, in which he accuses the Court of “merely paying lip service to *Chaplinsky*.” *Id.* at 537 (Blackmun, J., dissenting). Justice Blackmun’s dissent indeed raised a profound question. He asked, “I wonder, now that [the Georgia statute] is void, just what Georgia can do if it seeks to proscribe what the Court says it still may constitutionally proscribe.” *Id.* at 536 (Blackmun, J., dissenting). This fundamental question was directed at the Court’s apparent lack of guidance and clarity on the exact boundaries of the “fighting words” doctrine. Justice Blackmun suggested that after *Gooding*, the *Chaplinsky* test is moot as there are no statutes that could satisfy the overbreadth and vagueness scrutiny. *See id.* at 536-37 (Blackmun, J., dissenting).

57. *R.A.V.*, 112 S. Ct. at 2560 (White, J., concurring).

58. *Id.*; *see also* *Cohen v. California*, 403 U.S. 15 (1971). Cohen was arrested for wearing a jacket in a courthouse that bore the message, “Fuck the Draft.” *Id.* at 16-17. The Supreme Court, in an opinion authored by Justice Harlan, implicitly rejected [the argument] that psychological abuse is the practical equivalent of a physical assault by holding that offending sensibilities is simply not enough to justify suppression of speech. *Id.* at 26. The Court explained:

No individual actually or likely to be present could reasonably have regarded the words on [Cohen’s] jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State’s police power to prevent a speaker from intentionally provoking a given group to hostile reaction.

*Id.* at 20. Justice Harlan, responding to the print on Cohen’s jacket, inquired, “[h]ow is one to distinguish this from any other offensive word?” *Id.* at 25. Leaving the matter to one’s subjective taste, he suggested that “one man’s vulgarity is another’s lyric.” *Id.* This apparent break from the *Chaplinsky* assumption that there are certain categories of speech that are undeserving of



He also suggested that “[i]n a second break with precedent,” the majority found that even if the ordinance “survive[d] under the strict scrutiny applicable to other protected expression,” it would not pass constitutional muster.<sup>60</sup> Justice White found that if the ordinance only prohibited expression not protected by the First Amendment, it would be held constitutional.<sup>61</sup> He also maintained that the majority seemed to hold that “a narrowly drawn, content-based ordinance could never pass constitutional muster if the object of that legislation could be accomplished by banning a wider category of speech.”<sup>62</sup>

While Justice Stevens, the author of a separate concurring opinion, agreed with Justice White that the ordinance at issue was unconstitutionally overbroad, he rejected “the allure of absolute principles [that] skewed the analysis of both the majority and concurring opinions.”<sup>63</sup> Justice Stevens termed the majority’s analysis a “revision [of the] categorical approach,”<sup>64</sup> which to

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First Amendment protection, significantly undermined *Chaplinsky*. See Deborah R. Schwartz, Note, *A First Amendment Justification for Regulating Racist Speech on Campus*, 40 CASE W. RES. L. REV. 733, 760 (1989/90).

59. *R.A.V.*, 112 S. Ct. at 2560 (White, J., concurring).

60. *Id.* at 2554.

61. *Id.*

62. *Id.*

63. *Id.* at 2561 (Stevens, J., concurring). Justice Stevens argued that the Court has never limited itself either to the “fighting words” doctrine or to the principle that content-based regulations are presumptively invalid, but rather “repeated both of these maxims” in past opinions. *Id.* (Stevens, J., concurring). He disagreed with the Court’s adherence with absolutism to the principle that content-based regulations of expression are presumptively invalid which led it to hold that regulation of “fighting words” by subject matter was prohibited by the First Amendment. *Id.* at 2562 (Stevens, J., concurring).

64. *Id.* at 2562 (Stevens, J., concurring). This categorical approach, Justice Stevens stated, was enunciated in *Chaplinsky*:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

him was “something of an adventure in a doctrinal wonderland.”<sup>65</sup> Justice Stevens, however, was “more troubled [by the majority’s] near-absolute ban on content-based regulations of expressions . . . .”<sup>66</sup>

According to Justice Stevens, the majority had abandoned the “rough hierarchy” created by the Court’s First Amendment jurisprudence.<sup>67</sup> That is, by holding that “fighting words” may not be “regulated based on subject matter,” Justice Stevens claimed that the majority “[gave] fighting words *greater* protection than [wa]s afforded commercial speech.”<sup>68</sup>

In the midst of this confusing and highly charged battle over the boundaries of the “fighting words” doctrine, Justice Blackmun’s concurring opinion made the most sense. Justice Blackmun suggested that perhaps this decision “will be regarded as an aberration - a case where the Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults are of greater harm than other fighting words.”<sup>69</sup>

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*Id.* at 2561 (Stevens, J., concurring) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)). These categories of expression are not constitutionally protected speech. *Id.* (Stevens, J., concurring).

65. *Id.* at 2562 (Stevens, J., concurring). Justice Stevens criticized Justice Scalia’s concept of “obscene anti-government speech” as “fantastical.” The concept, he noted, “is a contradiction in terms: If expression is antigovernment, it does not ‘lac[k] serious . . . political . . . value’ and cannot be obscene.” *Id.* (Stevens, J., concurring).

66. *Id.* (Stevens, J., concurring). Content-based restrictions of speech, he noted, are “an inevitable and indispensable aspect of a coherent understanding of the First Amendment.” *Id.* at 2563 (Stevens, J., concurring). Justice Stevens also noted that the determination as to whether speech is deserving of First Amendment protection or not, requires an examination of its content. *Id.* (Stevens, J., concurring).

67. *Id.* at 2564 (Stevens, J., concurring). “Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all.” *Id.* (Stevens, J., concurring).

68. *Id.* (Stevens, J., concurring).

69. *Id.* at 2560-61 (Blackmun, J., concurring).

*The Impact of R.A.V. on University Speech Codes*

Whether *R.A.V.* has the profound impact of parachuting the “fighting words” doctrine into a confused state, as Justice White posited,<sup>70</sup> or if it is merely “an aberration,” as Justice Blackmun proposed,<sup>71</sup> the question remains as to the impact of this decision on the existing university hate speech codes. It would appear that the decision has created an additional restriction on the “fighting words” doctrine. The *R.A.V.* decision appears to suggest that for speech codes to survive, they must withstand both a content and an overbreadth scrutiny. The implication may be that the constitutionality of speech codes may depend on the particular wording of the codes.

The pre-*R.A.V.* approach limited the outer boundaries of “fighting words” to encompass only words which were capable of causing physical violence and which were used in face-to-face confrontations.<sup>72</sup> The traditional analysis would evaluate this test under the overbreadth doctrine.<sup>73</sup> This approach treated content-based regulation of speech within the categorical exceptions as immune from constitutional scrutiny.<sup>74</sup> Thus, as Justice White noted, a code that restricted expressions that amount to face-to-face confrontations and create a threat of imminent physical

70. *Id.* at 2560 (White, J., concurring).

71. *Id.* (Blackmun, J., concurring).

72. See *Gooding v. Wilson*, 405 U.S. 518, 524 (1971) (striking down a Georgia statute since it was not limited “to words that ‘have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed’” (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942))); *Cohen v. California*, 403 U.S. 15, 20-22 (1971) (reversing Cohen’s conviction under a California statute for wearing a jacket with the inscription “Fuck the Draft” because the words did not constitute “fighting words” but were merely offensive and distasteful to the public).

73. The Georgia statute in *Gooding* was struck down on vagueness and overbreadth grounds. *Gooding*, 405 U.S. at 528. The purpose of the doctrine is to prevent the states from prohibiting constitutionally protected speech when attempting to proscribe unprotected speech. *Broadrick v. Oklahoma*, 413 U.S. 601, 612-13 (1973).

74. See *Chaplinsky*, 315 U.S. at 571-72.

violence would be held constitutional.<sup>75</sup> On the other hand, codes that prohibited expression which caused hurt feelings, annoyance or emotional distress would be considered fatally overbroad.<sup>76</sup>

Many universities with pre-*R.A.V.* hate speech regulations<sup>77</sup> claimed that their speech and conduct codes were within the boundaries of “fighting words,” curtailed to encompass unprotected speech.<sup>78</sup> However, when challenged, the codes were struck down on the grounds that they were fatally overbroad.<sup>79</sup> In addition to threats of physical violence, the codes

75. See *R.A.V.*, 112 S. Ct. at 2551-52 (White, J., concurring).

76. See *id.* at 2559-60.

77. See, e.g., Fred M. Hechinger, *About Education*, N.Y. TIMES, June 6, 1990, at B7. In the last decade several state and private institutions have adopted speech codes in response to the epidemic of racial incidents on their campuses. *Id.* Among such institutions are the University of Texas, the University of Albany, the University of California, the University of Wisconsin, the University of Michigan, the University of Pennsylvania, the University of Oklahoma, the University of Connecticut, Brown University and Stanford University. *Id.*; see also *Doe v. University of Mich.*, 721 F. Supp 852, 866 (E.D. Mich. 1989) (holding the university speech code unconstitutionally overbroad). The code provided in part that a student would be subject to discipline for:

1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that
  - a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
  - b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
  - c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.

*Id.* at 856.

78. See *UWM Post, Inc. v. Board of Regents of the Univ. of Wis.*, 774 F. Supp. 1163, 1169 (E.D. Wis. 1991); *University of Mich.*, 721 F. Supp. at 864.

79. See, e.g., *UWM Post*, 774 F. Supp. at 1177 (holding a speech code unconstitutionally overbroad and unduly vague); *University of Mich.*, 721 F.

covered emotional injury, which is not within the contour of permissible restrictions of the “fighting words” doctrine.<sup>80</sup>

*R.A.V.* alters the Court’s traditional approach by stating that even within the categorical approach, content-based restrictions are impermissible.<sup>81</sup> This new content restriction analysis appears to mandate that if the government wishes to impose restrictions upon “fighting words,” it must include all “fighting words.”<sup>82</sup> After *R.A.V.*, if the state wishes to prohibit only a sub-category of “fighting words,” it must demonstrate that it is not inspired by the motive to suppress an expression of ideas. Thus, campus codes that restrict epithets based on race, religion, gender and sexual orientation would be subject to the same treatment as the St. Paul ordinance. Such constructions would be held unconstitutional because they appear to proscribe speech based on favoritism and viewpoint.<sup>83</sup>

Justice White expressed grave doubts about the wisdom of this doctrine. He noted:

It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil, (citation omitted) but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection.<sup>84</sup>

Notwithstanding the disagreement among the majority and concurring opinions, one determinative factor has remained unchanged. By tradition, the Court has determined that the “fighting words” doctrine does not encompass words which by their very utterance inflict psychological or emotional injury.<sup>85</sup>

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Supp. at 867 (finding a speech and conduct code to be unconstitutionally overbroad both on its face and as applied).

80. See *UWM Post*, 774 F. Supp. at 1173; *University of Mich.*, 721 F. Supp. at 867.

81. *R.A.V.*, 112 S. Ct. at 2545.

82. See *id.* at 2553 (White, J., concurring).

83. *Id.* at 2543-45.

84. *Id.* at 2553 (White, J., concurring) (citations omitted).

85. See *Cohen v. California*, 403 U.S. 15 (1971) (rejecting the assertion that psychological harm is equivalent to physical harm); see also *Brown v.*

Yet, to reiterate, hate motivated expressions on the nation's university campuses are often not face-to-face, but rather directed at a group of students, generally of similar ethnic composition.<sup>86</sup> Furthermore, the acts often occur in an anonymous fashion, not allowing the victim the opportunity to confront the speaker contemporaneously.<sup>87</sup> The victims rarely react through physical confrontation,<sup>88</sup> rather, they experience profound psychological pain and despair.<sup>89</sup>

Thus, while it is possible for a university to formulate a speech code that would prohibit all "fighting words" including only face-to-face confrontations that lead to physical violence, this limited formulation simply does not encompass the profound emotional and psychological damage that such acts cause. Under such formulation, the codes, if held constitutional, would only protect the victims in circumstances where there is a face-to-face confrontation with a resulting violent outburst.<sup>90</sup>

In light of the diminishing impact of the "fighting words" doctrine as a meaningful avenue for regulating hate speech on the college campus, the question arises as to whether it is possible to formulate speech codes that would pass constitutional scrutiny under the categorical exceptions.<sup>91</sup> Accordingly, a separate

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Oklahoma, 408 U.S. 914 (1972); *Lewis v. New Orleans*, 408 U.S. 913 (1972); *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972). In this 1972 trilogy, the majority vacated and remanded three convictions for use of offensive language. Chief Justice Burger's dissent may best describe the discontent with the *Cohen* principle: "When we undermine the general belief that the law will give protection against fighting words and profane and abusive language such as the utterances involved in these cases, we take steps to return to the law of the jungle." *Rosenfeld*, 408 U.S. at 902.

86. *See supra* note 7.

87. *See supra* note 7.

88. *See Lawrence, supra* note 10, at 452 (being faced with racial insults may cause minorities to be silent or to run instead of fighting); *see also Matsuda, supra* note 19, at 2355-56.

89. *See Matsuda, supra* note 19, at 2335-41.

90. *See generally Cohen*, 403 U.S. at 21.

91. *See Matsuda, supra* note 19, at 2356. Professor Matsuda argues that racist speech presents "an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside

categorical exception under which hate acts may be regulated has been suggested.<sup>92</sup> This category has been defined through three identifying characteristics: “1. The message is of racial inferiority; 2. The message is directed against a historically oppressed group; and 3. The message is persecutorial, hateful, and degrading.”<sup>93</sup>

This test addresses a rather narrow category of hate speech, leaving clearly protected the wide range of racially motivated speech that could properly be uttered in the classroom, or by students, concerning the issues of racial superiority, affirmative action and the like. Thus, the excludable speech would be the deeply harmful, degrading and hateful expressions that contain no social value and cause grave harm to the listeners.<sup>94</sup>

## II. THE *BROWN* VISION

While the aforementioned test is compelling, this Note suggests an additional justification for upholding campus speech codes as constitutional. The Court’s historical decision in *Brown v. Board of Education*,<sup>95</sup> provides a fundamental basis upon which hate speech codes at university campuses may be upheld without disturbing the ideals of free speech.

The long term vision of *Brown* was to systematically eradicate the universal wrong of racism.<sup>96</sup> The *Brown* decision recognized

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the realm of protected discourse.” *Id.* at 2357. Furthermore, Professor Matsuda asserts that it is quite possible to present a compelling argument for a narrow range of “racist hate messages [and still] remain true to the First Amendment” values. *Id.* at 2356.

92. *Id.* at 2357.

93. *Id.*

94. *Id.* at 2358; *see also* Delgado, *supra* note 19, at 379. “[S]ocial science writers hold that making racist remarks impairs, rather than promotes, the growth of the person who makes them, by encouraging rigid, dichotomous thinking and impeding moral development.” *Id.*

95. 347 U.S. 483 (1954).

96. *See id.* at 493. “Today [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these

that equal access to education is a necessary means for eliminating racism.<sup>97</sup> Today, the recurring acts of hate on our nation's college campuses, reminiscent of the pre-*Brown* era, threaten the *Brown* promise of equal access to education for all.<sup>98</sup>

*Brown*, in many respects, is the most important civil rights case of the twentieth century. Prior to *Brown*, “[a]ll public schools were segregated; public accommodations were segregated; only a minute percentage of registered voters was black; and black public office holders were virtually nonexistent. Black families had less than one half the median income of white families, and illiteracy rates were appallingly high.”<sup>99</sup>

The immediate goal of *Brown* was to acknowledge that segregated schools were “inherently unequal.”<sup>100</sup> The greater significance of the decision, however, was a recognition by the Supreme Court that racism is a universal wrong embedded in the

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days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.” *Id.* at 493.

97. *See id.* at 494. The Court held that “[t]o separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” *Id.* The goals of equal access have permeated society, and are by no means limited to the realm of education. *See, e.g.,* *Gayle v. Browder*, 352 U.S. 903 (1956) (desegregation applied to intrastate transportation); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (desegregation of golf courses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (desegregation in parks and swimming pools).

98. *See generally* Walter R. Allen, *The Color of Success: African-American College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities*, 62 HARV. EDUC. REV. 26, 27-28 (1992). Three-fourths of currently enrolled black college students attend predominantly white institutions. *Id.* The students generally emphasize feelings of alienation, sensed hostility, racial discrimination and lack of integration. *Id.* In addition, studies of African-American students suggest that many have negative, anomic experiences in white institutions and they suffer from lower achievement and higher attrition than white students. *Id.*

99. FRANK T. READ & LUCY S. MCGOUGH, *LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH* xi (1978).

100. *Brown*, 347 U.S. at 495 (stating that separate educational facilities are inherently unequal).



nation's educational institutions.<sup>101</sup> Further, the Court recognized that it is appropriate for the Supreme Court of the United States to take affirmative steps toward rectifying the institutional racism that created segregation based on race.<sup>102</sup> Accordingly, the *Brown* Court stated:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>103</sup>

Thus, while the Court stopped short of declaring education a fundamental right, it expressly asserted that “such an opportunity where the state has undertaken to provide it, is a right which must be available to all on equal terms.”<sup>104</sup>

The *Brown* Court, however, left undefined the exact contour of the principle of equal access to education.<sup>105</sup> Perhaps, the *Brown*

101. *See id.* at 494. The Court noted that separating school children based on race “generates a feeling of inferiority as to their status in the community . . . .” Furthermore, the Court recognized that “segregation of white and colored children in public schools has a detrimental effect upon the colored children.” *Id.* (quoting *Sweatt v. Painter*, 339 U.S. 629 (1950)).

102. *Brown*, 347 U.S. at 494.

103. *Id.* at 493.

104. *Id.*

105. *See generally Brown*, 347 U.S. 483. The Supreme Court, in *Brown*, merely addressed the question of whether segregating educational institutions violates the Equal Protection Clause of the U.S. Constitution. *Id.* at 493. However, the Supreme Court, post-*Brown*, did focus on the contours of equal education in ruling on several cases relating to the enforcement of desegregation. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). The Court held that federal courts cannot order school boards to adjust the racial composition of any of its schools, no matter how great the racial imbalance between schools, unless there has been a finding that there

holding was limited to increasing minority enrollment in previously all white schools. Alternatively, *Brown* may have mandated non-discriminatory admissions as the first step of the journey toward eliminating racial discrimination.<sup>106</sup> Is it conceivable that *Brown* mandated the creation of an atmosphere of diversity, participation, and fulfillment of career aspirations beyond the mere ability to enroll in the institutions of learning?<sup>107</sup>

Initially, the *Brown* mandate of equal access to education focused on creating a shift in the enrollment process at all

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was officially-maintained (*de jure*) segregation. *Id.* at 19-20. *See also* Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979) (establishing that where intentionally segregated educational systems operated in 1954, a prima facie case exists that current segregation is due in part to this prior segregation); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (establishing that where intentionally segregated educational systems operated in 1954 a prima facie case exists that current segregation is due in part to this prior segregation).

106. *See generally* BARBARA ASTONE & ELSA NUÑEZ-WORMACK, PURSUING DIVERSITY: RECRUITING COLLEGE MINORITY STUDENTS, ASHERIC HIGHER EDUCATION REPORT 7, 3 (1990). The authors stated:

Bringing more minority students to college campuses is clearly one important step [in ensuring academic equity], and therefore recruitment is an essential part of any successful institutional plan for increasing minorities' participation. It is only the beginning, however. Ensuring academic success and graduating are the necessary complements to achieving equity in education.

*Id.*

107. *See generally* ELIZABETH A. ABRAMOWITZ, EQUAL EDUCATIONAL OPPORTUNITY FOR BLACKS IN U.S. HIGHER EDUCATION, AN ASSESSMENT 19 (1976). Abramowitz noted that:

Equal educational opportunity embodies three concepts - access, distribution, and persistence. . . .

Access means that Black students have the opportunity to enroll in undergraduate, graduate, or professional schools. Distribution refers to choice, the opportunity for Black students to enter different types of institutions and fields of study. And persistence refers to the opportunity to remain in college and complete their training in a timely fashion. In order to have equal educational opportunity, a Black student must not just have the opportunity to enroll in college, but a choice of institutions and programs, and a chance to complete the training once begun.

*Id.*

educational institutions.<sup>108</sup> This judicially mandated process opened the otherwise closed gates to students of color in the nation's educational institutions.<sup>109</sup>

Nearly four decades after *Brown*, it is reasonably safe to conclude that institutions of higher education have made substantial progress in their admission policies for students of color.<sup>110</sup> However, the rate of participation and graduation among students of color is alarmingly low as compared to white students.<sup>111</sup> Two possible reasons explaining the gap between

108. See generally JOHN E. FLEMING ET AL., *THE CASE FOR AFFIRMATIVE ACTION FOR BLACKS IN HIGHER EDUCATION* 39 (1978). "During the 1960s, under pressure from civil rights groups and activist students, many institutions of higher education that had traditionally excluded minorities established special recruitment and admissions policies. More than eight hundred undergraduate institutions provided some form of special help for minority and disadvantaged students. . . ." *Id.*

109. See generally PHILIP G. ALTBACH & KOFI LOMOTÉY, *THE RACIAL CRISIS IN AMERICAN HIGHER EDUCATION* 111-13 (1991). The authors noted that the purpose of *Brown* and more recent cases is to desegregate so that "blacks and other minorities [can] contest for expanded opportunity in education at all levels." *Id.* at 111. The authors also noted that post-*Brown* decisions helped to produce "critical clarification of the responsibilities of colleges and universities to provide full and fair access." *Id.* The authors further recognized that cases preceding *Brown* "provide an even richer and more telling discussion of the educational policy dilemma that has and continues to encompass greater access to higher education." *Id.* at 112.

110. See generally AMERICAN COUNCIL ON EDUCATION, *MINORITIES ON CAMPUS, A HANDBOOK FOR ENHANCING DIVERSITY* 1 (1989) (finding that in 1960 there were 150,000 black students enrolled in higher education and that by 1975 that number increased to one million even though "[b]lack enrollments have remained stagnant since 1975").

111. *Id.* at 2-3. The study stated:

Between 1967 and 1975, the percentage of black high school graduates 24 years old or younger who were enrolled in or had completed one or more years of college rose from 35 percent to 48 percent; over the same period, the corresponding rate for whites grew much more slowly from 51 percent to 53 percent. However, between 1975 and 1985, while the college participation rate for white youths continued to climb to 55 percent, the rate for blacks dropped to 44 percent.

*Id.* "Among 1980 high school seniors who enrolled in college, 21 percent of the white students, compared with 10 percent of the black students and 7

participation rates of white students and minority students are the inferiority of the primary and secondary schools that minority students attend<sup>112</sup> and the piecemeal approaches that have been taken to increase minority participation.<sup>113</sup>

In addition, studies have focused on the impact of the campus environment on student participation by comparing the participation of black students in all black colleges with the participation of black students in predominantly white universities.<sup>114</sup> For instance, a quantitative study on this issue was conducted, where it was concluded that:

On predominantly White campuses, Black students emphasize feelings of alienation, sensed hostility, racial discrimination, and lack of integration. On historically Black campuses, Black students emphasize feelings of engagement, connection, acceptance, and extensive support and encouragement. Consistent with accumulated evidence on human development, these students, like most human beings, develop best in environments where they feel valued, protected, accepted, and socially connected. The supportive environments of historically Black colleges communicate to Black students that it is safe to take the risks associated with intellectual growth and development.<sup>115</sup>

It was further found that “little doubt exists over the negative impact of hostile racial and social relationships on Black student achievement.”<sup>116</sup> Additionally, “[w]hen Black students are made

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percent of the Hispanic students, earned a bachelor’s degree or higher degree by spring 1986.” *Id.* at 3.

112. *Id.* at 1. Since “[b]lack and hispanic students are more likely to be poor [and] [h]eavily concentrated in inner city public schools, they frequently receive an education inferior to that of more affluent and white students.” *Id.* Some steps have been taken to improve primary and secondary schools by “expand[ing] the pool of prepared students. . . .” *Id.*

113. *Id.* at 2. “Isolated programs to attract and retain minority students, faculty, and staff” is one approach. *Id.* However, “[c]omprehensive, institution-wide policies and programs” are central to increasing minority participation. *Id.*

114. Allen, *supra* note 98, at 39-40.

115. *Id.*

116. *Id.* at 41.

to feel unwelcome, incompetent, ostracized, demeaned, and assaulted, their academic confidence and performance understandably suffer.”<sup>117</sup>

Similarly, the American Council on Education addressed the dramatic rise in racial hostilities on campuses across the nation and advised that “[campus] climate is so central to all other efforts to improve minority participation, [that] it is both the point of departure and the culmination of all other efforts.”<sup>118</sup> The Council concluded that “[s]tudents and other members of the campus community who feel unwelcome or alienated from the mainstream of campus life are unlikely to remain. If they do remain, they are unlikely to be successful.”<sup>119</sup>

In short, it is reasonably safe to conclude that *Brown’s* vision of educational opportunity and access for all has not been achieved. While for students of color many barriers to success exist in the broader context of the society,<sup>120</sup> universities must

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117. *Id.*

118. AMERICAN COUNCIL ON EDUCATION, MINORITIES ON CAMPUS, A HANDBOOK FOR ENHANCING DIVERSITY 113 (1989).

119. *Id.*

120. *See, e.g.,* Allen, *supra* note 98, at 41-42. Professor Allen suggests that:

African-American students’ relative lack of access to and success in U.S. higher education is not shrouded in mystery. It is the result of the same historical, political, economic, social, cultural, and psychological patterns that have perpetuated Black subjugation and oppression since Blacks arrived on these shores in 1619. U.S. society has been - and in many respects continues to be - organized to thwart, restrict, and undercut Black progress and achievement. (citation omitted) Thus it should come as no surprise when African Americans are ‘discovered’ to suffer from disadvantages in higher education; these disadvantages merely reflect and parallel Black disadvantages in the wider society - in ‘choice’ of neighborhoods, in rates of sickness and death, in quality of primary school education, in possession of wealth, in rates of criminal victimization and incarceration - in nearly every aspect of American life.

*Id.*

confront the challenge posed by *Brown* of achieving the goal of equal access to education.<sup>121</sup>

While the Supreme Court has not directly defined the boundaries of appropriate university missions, it has spoken in broad terms about the university's authority to exclude expressions which substantially interfere with students' ability to participate in the educational process.<sup>122</sup> Undeniably, a hostile and uncivil educational environment denies the unprotected victims equal access to education.<sup>123</sup> Creating and maintaining a

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121. See generally ASTONE & NUÑEZ-WORMACK, *supra* note 106, at xv. Their report is partially compiled with funding from the Office of Educational Research and Improvements, U.S. Department of Education. The authors stated summarily in their forward:

Over the past few years, the ASHE-ERIC Higher Education Report series has published several reports dealing with the issues of diversity . . . . From these reports, several general conclusions are easily drawn: The concern over diversity is increasing. The issue of diversity not only concerns the strength of our society's social fabric, but also is becoming increasingly central to our economic well being. Higher education institutions can and should play a major role in educating a diverse citizenry that will produce leaders capable of developing solutions for the issues of diversity in our society.

*Id.* Additionally, a college degree provides increased employment opportunity as well as enhanced social standing. *Id.* at 1-4.

122. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 276-77 (1981) (stating that a public university possesses authority to impose reasonable regulations compatible with its educational mission upon the use of its campus and to exclude expressions which substantially interfere with the opportunities of other students to obtain an education); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12 (1978) (stating that attainment of a diverse student body "is a constitutionally permissible goal for an institution of higher education"). *But see Papish v. Board of Curators*, 410 U.S. 667, 670 (1973) (stating that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency'").

123. See generally Lawrence, *supra* note 10, at 450. A portion of the Stanford University Fundamental Standard Interpretation states that:

Each student has the right to equal access to a Stanford Education, without discrimination on the basis of sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin. Harassment of students on the basis of any of these characteristics contributes to a

civil and safe environment for students of color ought to be one of the reasonable missions of every university.<sup>124</sup>

When confronted with hate-motivated assaults on students of color, the university must act fast. For instance, it has been noted that:

[The university] has strong, legitimate interests in (i) teaching students and teachers to treat each other respectfully; (ii) protecting minority-group students from harassment; and (iii) protecting diversity, which could be impaired if students of color become demoralized and leave the university, or if parents of minority race decide to send their children elsewhere.<sup>125</sup>

Similarly, it has been suggested that the university is a special environment, “a distinct social entity, whose commitment to enhancing the quality of speech justifies setting minimum standards for the manner of speech among its members.”<sup>126</sup>

hostile environment that makes access to education for those subjected to it less than equal.

*Id.* (quoting Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment, adopted by Stanford University June 1990).

124. See generally Robin M. Hulshizer, Comment, *Securing Freedom from Harassment Without Reducing Freedom of Speech: Doe v. University of Michigan*, 76 IOWA L. REV. 383, 396 (1991) (stating that “one of the most compelling arguments for university adoption of student-conduct policies is that group violence actually jeopardizes the academic environment”); Thomas L. McAllister, Comment, *Rules and Rights Colliding: Speech Codes and the First Amendment on College Campuses*, 59 TENN. L. REV. 409, 419 (1992) (stating that “part of the university’s mission [is] to teach students to ‘express themselves in acceptable, civil terms’” (quoting Chief Justice Burger’s dissent in *Papish v. Board of Curators*, 410 U.S. 667 (1973))).

125. See Delgado, *supra* note 19, at 376; see also Schwartz, *supra* note 58, at 768; Sean M. SeLegue, Comment, *Campus Anti-Slur Regulations: Speakers, Victims, and the First Amendment*, 79 CAL. L. REV. 919, 944 (1991) (analogizing the university environment to the captive audience doctrine and proposing a civility zone under which students are protected from assaulting speech).

126. J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399, 416 (1991). Professor Byrne articulates compelling interests for the regulation of speech on the university campus:

The university has three moral commitments that shape its activities: these are to the values of truth, humanism, and democracy. Consideration of the educational mission of the modern university under

Membership in the university community is reserved for those who are capable of engaging in an atmosphere conducive to a high quality of instruction and scholarship.<sup>127</sup> In this special community, both teachers and students are “subject to disciplinary norms deemed to facilitate criticism and discourse; those who do not meet the standards of speech set by the university are subject to penalties -- students through grades and faculty through the denial of promotion or tenure.”<sup>128</sup>

In sum, speech codes specifically formulated to address the substantial harm caused by hate expressions are indeed among the necessary steps universities must take to ensure that students of color are given the same educational opportunity as the rest of the student population.<sup>129</sup> Such narrowly designed codes of conduct are a necessary means of ensuring the vitality of the *Brown* mandate, equal access to education for all.

## CONCLUSION

Our society needs to look back in time and assess the damage that racial strife has caused America, and reflect on the solutions that were finally found. *Brown v. Board of Education*,<sup>130</sup> was a landmark case not only because it provided elementary school students with equal educational opportunities, but additionally because it recognized that racism is an intolerable wrong in our society.

The Supreme Court’s decision in *Brown* was an effective affirmative step toward eliminating the universal ill of racism from this nation. However, the Court must take further steps to insure that the current tide of racial hatred does not destroy the

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the headings of these three commitments can help clarify the grounds upon which the Constitution can countenance distinct treatment of the university.

*Id.* at 418-19.

127. *Id.* at 416-17.

128. *Id.* at 417.

129. See Matsuda, *supra* note 19 and accompanying text. The Matsuda test is an appropriate example of the narrow type of expression the universities may properly regulate.

130. 347 U.S. 483 (1954).



progress of the last four decades. In the spirit of *Brown*, the Supreme Court must once again act to preserve the diversity of American society, and end the damage that is caused by these acts of hate.

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