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Racist Speech the First Amendment and Public Universities: Taking a Stand on Neutrality

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RACIST SPEECH, THE FIRST AMENDMENT, AND PUBLIC UNIVERSITIES: TAKING A STAND ON NEUTRALITY

> It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.[1]

> Malcolm X used to talk about the need for young people to learn how language works, how to dissect it, how to use it as both a shield and a sword. Above all he thought, blacks should not be fearful of language. They should not let it intimidate them but rather should fight back when words are used against them with more powerful words of their own.[2]

Following the Supreme Court's denial of certiorari in the famous "Nazis in Skokie" case,[3] American civil libertarians understandably felt that the nail had been hammered into the coffin of the movement to ban racist speech.[4] During the late 1980s, however, a public outcry arose to ban speech in a new—and nearly as alarming—context: the public university campus.[5] The problem of combatting the growing racism among college students pits the ideal of free discourse in the academic setting against the closely related ideals of academic diversity and tolerance.[6] Ultimately, the question becomes one that the Supreme Court has addressed a number of

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1 United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

2 Nat Hentoff, *Flexing Muzzles*, PLAYBOY, Dec. 1990, at 118, 120.

3 Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978) (predominantly Jewish village's attempt to prevent Nazi rally, based on the content of the expression, ruled unconstitutional).

4 *See, e.g.*, Bill Blum & Gina Lobaco, *Fighting Words at The ACLU*, CALIFORNIA LAW., Feb. 1990, at 43.

5 *See, e.g.*, Richard Bernstein, *On Campus, How Free Should Free Speech Be?*, N.Y. Times, Sept. 10, 1989, at 17, col. 1. Documentation regarding the increase in racism on campuses is easy to find in the print media. In particular, any survey of college newspapers will reveal a number of ugly, blatantly racist, and anti-Semitic incidents on several college campuses.

Many university administrations sought to combat this trend through policies prohibiting harassment (usually of minority groups) that take the form of speech. Most prominent among them were University of Michigan, University of Wisconsin, University of North Carolina and SUNY Buffalo. Chester E. Finn Jr., *The Campus: "An Island of Repression in a Sea of Freedom,"* COMMENTARY, Sept. 1989, at 17.

This Note addresses only the constitutionality of such policies on public university campuses, because, under the state action doctrine, only publicly funded institutions are bound by the first amendment. *See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2370 (1989).

6 For opposing views of the question of tolerance and diversity, *see* Finn, *supra* note 5; Martha Minow, Looking Ahead to the 1990's: Constitutional Law and American Col-

times: what is the extent and nature of the harm that speech must cause before it can be banned because of its content without violating the first amendment?[7]

In the case of racist speech at universities, any discussion of a proposal for regulation must begin by addressing the special role of free speech in the campus context, as well as the profound effect of racism on the victimized college student. A recent movement rejects the neutral standard of "fighting words" as laid out by the Supreme Court in *Chaplinsky v. New Hampshire*[8] and its progeny, and proposes a ban on racist speech in all parts of the community, with special emphasis on the university campus.[9]

This Note explores the issue of a ban on racist speech in the specific context of the university.[10] Part I describes the rise in racial harassment on campuses throughout the country, and outlines university administrators' responses to this problem. This Part also examines *Doe v. University of Michigan*,[11] in which a student petitioned a

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leges and Universities, Key-Note Address to the National Association of Colleges and Universities Attorneys Meeting (June 28, 1989) (on file with the *Cornell Law Review*).

Minow stresses the need for the university community to learn "to understand difference by recognizing diverse points of view." Minow, *supra*, at 4.

Finn argues against an emphasis on diversity if it is at the expense of a traditionally valuable education:

> But in 1989 the most prominent forms of spontaneous change on many of our high-status college and university campuses are apt instead to exacerbate the gravest problems the academy faces. Creating more complex and onerous rituals as they worship at the altar of "diversity," they concurrently provide the putative beneficiaries of their efforts so feeble an education as to suggest a cynical theology indeed.

Finn, *supra* note 5, at 23.

7 The state is extremely limited in its right to suppress "pure speech" because it disagrees with the message the speech conveys. *See* Texas v. Johnson, 109 S. Ct. 2533 (1989); Cohen v. California, 403 U.S. 15, 24, *reh'g denied*, 404 U.S. 876 (1971).

On the other hand, the state may suppress other forms of speech that fall outside the Constitution's protection. United States v. O'Brien, 391 U.S. 367, *reh'g denied*, 393 U.S. 900 (1968). "Fighting" words may be suppressed, including "the lewd and obscene, the profane, the libelous, and the insulting . . . words . . . which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Similarly, speech that is likely to incite lawless action falls outside of the first amendment's protection. Brandenburg v. Ohio, 395 U.S. 444 (1969). Racist or sexist speech that creates a hostile environment in the workplace may give rise to a civil remedy. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). Obscene speech is also not fully protected. Miller v. California, 413 U.S. 15, 22 (1973). It is unclear whether group libel (*i.e.*, words that speak falsehoods about entire groups) may give rise to a legal remedy. Beauharnais v. Illinois, 343 U.S. 250 (1952).

8 315 U.S. 568 (1942).

9 *See infra* text accompanying notes 193-223.

10 Unfortunately, it does not go without saying that white middle-class males may have something to say about racism. *See, e.g.*, Richard Delgado, *Professor Delgado Replies*, 18 HARV. C.R.-C.L. L. REV. 593, 596-97 (1983) (responding to argument that racial abuses of this type need not be vigorously combatted). The author of this Note is a white middle-class male.

11 721 F. Supp. 852 (E.D. Mich. 1989).

Federal District Court to declare unconstitutional his university's policy against verbal harassment. Part II describes a number of cases in which the Supreme Court established the first amendment's protection of free expression on university campuses. Part III outlines the rising movement to ban racist speech, and Part IV explores an application of that movement's ideas in the university context. The Note concludes that banning racist speech on public university campuses violates the first amendment and destroys the atmosphere of free expression upon which the vitality of the university depends.

I

RACISM ON CAMPUS: THE PROBLEM AND THE RESPONSE

A. The Rise in Racial Harassment on University Campuses

The alarming rise in racial harassment is well documented in both legal and non-legal publications.[12] The harassment has taken the form of both action and speech.[13] At its ugliest, this racism has been reminiscent of the brutal violence usually associated with hate groups such as the Ku Klux Klan. For example, following the 1986 World Series, a huge gang of white students chased and beat a much smaller group of African-American students at the University of Massachusetts at Amherst, for what were apparently racially motivated reasons.[14]

This violence is not confined to the hysteria of race riots. The last several years have seen an increasing number of individual acts of assault by white students against African-Americans. The violence ranges from spitting and threats at gun point to outright physical battery.[15]

Nor has the violence been confined to white against black. The Anti-Defamation league of Bńai-Brith has reported a drastic in-

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12 *See, e.g.*, Steve France, *Hate Goes To College*, A.B.A. J., July 1990, at 44; Matsuda, *supra* note 5, at 2370; David Shenk, *Young Hate*, CV, THE COLLEGE MAG., Feb. 1990, at 34; Jon Wiener, *Words That Wound: Free Speech For Campus Bigots*, THE NATION, Feb. 26, 1990, at 272; Bernstein, *supra* note 5.

13 Shenk, *supra* note 12, at 34.

14 *Id.* at 36. The riot occurred following the Boston Red Sox loss to the New York Mets. There is, at the very least, a racist stigma attached to the Red Sox organization, and it is fair to say that their following is almost exclusively white. *See, e.g.*, George Vecsey, *Robinson's Legacy Reaches a Front Office*, N.Y. Times, Feb. 25, 1990, at 4S, col. 1. Vecsey notes:

> Boston was the last major league team to field a black player, Pumpsie Green, in 1959, 12 long years after Jackie Robinson broke in with the Brooklyn Dodgers.
>
> The stands in Fenway Park are still among the whitest in the major leagues, and some of the necks are the reddest too.

Id.

15 Shenk, *supra* note 12, at 36.

crease in anti-Semitic violence on campuses.[16] Jewish student centers have been vandalized and Jewish students physically attacked at Memphis State, University of Kansas, Rutgers, and Brooklyn College.[17] The perpetrators of anti-Semitism have been both black and white.

While these incidents justifiably alarm the victims and their university communities, they raise few legal problems. Such violence, racist or not, is punishable by law. Prosecution of the offenders raises no conflicts regarding academic freedom or indeed any other constitutionally protected freedoms. The perpetrators of these acts committed crimes (or at the very least, torts) that are proscribed by state law. The prevention and punishment of such activity is not only important, but necessary to the continued healthy functioning of a university or any community.

More troublesome, in legal terms, are the incidents of racism that take the form of verbal or expressive harassment. For example, posters advertising African-American themes have been vandalized,[18] posters portraying black caricatures have appeared (including the highly publicized incident at Stanford involving a poster of Beethoven colored in with supposedly black features),[19] black professors have been shouted down,[20] and black students have been verbally threatened and insulted by white students.[21] The racism knows no bounds—it is directed towards Asians, Jews, and Latinos as well.[22]

B. The Universities' Response to the Problem

While almost all universities recognize the damage done by racist speech,[23] not all have reacted by changing campus policies.

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16 *Id.*

17 *Id.*

18 *Id.*

19 *See* Patricia Williams, *The Obliging Shell: An Informal Essay On Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2133-35 (1989). As Williams describes the Stanford incident, an African-American student and a white student had an argument about whether or not Beethoven "had black blood." (Beethoven was, in fact, mulatto.) The following night, the white student got drunk and colored in a poster of Beethoven so it would have stereotypical black features. He then posted it near the African-American student's room. *Id.* at 2133. The incident caused Stanford to reevaluate its race policy. *Id.*

20 Matsuda, *supra* note 5, at 2333.

21 Shenk, *supra* note 12, at 36.

22 *Id.* Both actual violence and verbal harassment have affected women, homosexuals, the handicapped, Vietnam veterans and other often victimized groups. While I find these incidents equally alarming, I will limit my discussion in this Note to race-oriented speech, and then, only speech directed at traditionally disadvantaged or oppressed groups. Clearly, the disadvantaged and oppressed stand to sustain the most direct harm as a result of racist speech. A justification for banning racist speech must begin where it does the most damage.

23 It is extremely difficult to distinguish truly racist speech from speech that might

Yale, for instance, declined to institute a policy prohibiting offensive speech, even though it recognized the harm that hate speech inflicts upon its victims.[24] Many other universities, however, felt the need to take swift action to protect minority students from the harm caused by racist speech.[25] For example, in enacting a code against verbal harassment at the University of Wisconsin, the regents declared that "certain types of expressive behavior directed at individuals and intended to demean and to create a hostile environment for education or other university-authorized activities would be prohibited and made subject to disciplinary sanctions."[26]

In general, the universities that chose to take action promulgated codes proscribing speech that intentionally creates an atmosphere intimidating, hostile, or derogatory to members of various ethnic groups and minority classifications.[27] Others created far more narrow gnidelines, proscribing only direct verbal assault.[28]

No statistics are available regarding the extent to which students have been punished under these policies. Nor is there evidence of how effective the policies have been in eliminating racist speech from the college experience. Indeed, the only distinct result which can be discerned from this new trend is the feeling among many students that the atmosphere of free discourse, criticism, and inquiry at universities is not what it should be.[29]

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be construed to be racist. For example, a student wbo is critical of Israel is not necessarily anti-Semitic, just as a student who is critical of the "divestment" movement is not necessarily racist. The line between racism and political criticism, among other things, is a fine one indeed.

24 Nat Hentoff, *Campus Follies: From Free Speech . . .*, Wash. Post, Nov. 4, 1989, at 18, col. 1. Hentoff describes a recently formed committee that reaffirmed the conclusions of a 1975 report on free expression at Yale. He quotes Yale's president, Benno Schmidt:

> "we cannot censor or suppress speech in a university. . . . On some other campuses in this country, values of civility and community bave been offered by some as paramount values of the University, even to the point of superseding freedom of expression.
>
> Such a view is wrong in principle and if extended, is disastrous to freedom of thought."

Id.

25 Shenk, *supra* note 12, at 36. The list is a lengthy one. Most prominent among public universities that promulgated codes of forbidden speech are University of Michigan, University of Wisconsin, University of North Carolina, SUNY Buffalo, University of California, and University of Massachusetts at Amherst. *Id.*; Finn, *supra* note 5, at 17; Rosemary C. Harold, *Dilemmas*, STUDENT LAW., Feb. 1990, at 8.

26 Finn, *supra* note 5, at 17.

27 There is wide variation in the specific descriptions of the people meant to be protected. Certainly racial and ethnic minorities are covered in almost all codes, but some include homosexuals, the handicapped, stutterers, and even Vietnam veterans. *See infra* text accompanying notes 40-41.

28 *See* Hentoff, *supra* note 24.

29 *See, e.g.*, James Taranto, *The Right To Be Racist*, CV, THE COLLEGE MAG., Feb. 1990, at 38 (author describes his suspension from the student newspaper at California

C. The Case of *Doe v. University of Michigan*[30]

The winter of 1987 saw an alarming sequence of events at the University of Michigan that led the University administration to adopt a code regulating student speech.[31] The first cause for concern came when unknown persons distributed fliers that declared "open season" on blacks, and used extremely vile language to refer to African-Americans.[32] A week later, in an apparently unconnected event, racist jokes were heard on the college radio station.[33] To make matters worse, at a rally protesting these incidents, a Ku Klux Klan uniform was displayed from a dormitory window.[34]

The administrators of the University quickly took action against the further escalation of this kind of behavior. The University President first issued a statement expressing outrage at the events and reaffirming the University's dedication to maintaining a racially, ethnically, and culturally diverse campus.[35] By the following winter, the University had taken steps to desigu a policy prescribing disciplinary action against students found guilty of racial harassment.[36] The proposed policy went through twelve drafts and was scrutinized by students, faculty, and the Board of Regents of the University. It went into effect on May 31, 1988.[37] The policy's framers certainly knew of the "serious civil liberties questions"[38] implicated by the policy, yet they were determined to make a strong showing that the University opposed racism in any form.[39]

The rule that put the policy into effect originally applied specifically to areas of study,[40] and proscribed as punishable the following:

State University at Northridge after he wrote an article critical of the University's disciplinary action against a fellow student who ran an offensive newspaper cartoon).

30 721 F. Supp. 852 (E.D. Mich. 1989).

31 *Id.* at 853.

32 *Id.* at 854.

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.* at 855.

37 *Id.* at 856.

38 *Id.* at 855.

39 *Id.* Justifications for such policies have been fairly uniform. Kenneth Shaw, President of the University of Wisconsin, declared that his school's policy "send[s] a message to minority students that the board and its administrators do care." Finn, *supra* note 5, at 17. The Massachusetts regents similarly said that"[t]here must be a unity and cohesion in the diversity which we seek to achieve, thereby creating an atmosphere of pluralism." *Id.* An official at Emory (not a state university) was more forthcoming: "I don't believe freedom of speech on campus was designed to allow people to demean others on campus." *Id.*

40 That is to say, "[e]ducational and academic centers, such as classroom buildings, libraries, research laboratories, recreation and study centers." *Doe*, 721 F. Supp. at 856.

> 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.[41]

Shortly after the rule went into effect, part 1(c) was withdrawn on the ground that it was unclear and required further explanation.[42]

The Office of the General Counsel of the University reserved the right to rule that certain conduct that violated the policy was nonetheless protected by the first amendment, and was immune from punishment.[43] The University thus acknowledged the tension between its goal of eliminating racism and its obligations as a state agent to uphold constitutional liberties.[44]

The policy outlined procedures for filing a complaint against an alleged harasser.[45] The accuser could either file a formal complaint or seek informal counseling from the University support system. The policy explicitly stated that the University preferred informal solutions whenever possible.[46] If informal action proved impossible, formal procedures, including a written complaint and an independent investigation, were mandated. A number of sanctions could be imposed in the most severe cases, ranging from formal reprimand to expulsion.[47]

Shortly after promulgation of the policy, the University Office of Affirmative Action issued a guide that purported to be an authori-

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41 *Id.* The second part of the rule read much the same way except that it addressed conduct involving sexual harassment. *Id.*

42 *Id.* The analogous provision regarding sexual harassment was allowed to remain, perhaps because so much legislation regarding sexual harassment had already passed constitutional muster. *See, e.g.*, Mary Gray, *Academic Freedom and Nondiscrimination: Enemies or Allies?*, 66 TEX. L. REV. 1591 (1988).

43 *Doe*, 721 F. Supp. at 856-57.

44 This disclaimer in no way saved the policy, because the policy itself still had a substantial chilling effect on student speech.

45 *Doe*, 721 F. Supp. at 857.

46 *Id.*

47 *Id.* The constitutionality of the procedural aspects of such a policy is a separate issue and is beyond the purview of this Note.

tative interpretation of the policy.[48] It provided examples of sanctionable conduct, including many examples of blatant racial harassment, but also some of the following:

> A male student makes remarks in class like "Women just aren't as good in this field as men," thus creating a hostile learning atmosphere for female classmates.
>
> Two men demand that their roommate in the residence hall move out and be tested for AIDS.[49]

The guide also had a section entitled "You are a harasser when . . . ".[50]

> You exclude someone from a study group because that person is of a different race, sex or ethnic origin than you are.[51]
> You tell jokes about gay men and lesbians.
> Your student organization sponsors entertainment that includes a comedian who slurs Hispanics.[52]
> You display a confederate flag on the door of your room in the residence hall.[53]
> You laugh at a joke about someone in your class who stutters.[54]

Shortly after its publication, the Office of Affirmative Action withdrew the guide.[55] The University, however, did not publicly announce the withdrawal,[56] and presumably many students had already interpreted the new policy through explanations provided in

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48 *Id.* at 857-58. The guide was entitled "What Students Should Know about Discrimination and Discriminatory Harassment by Students in the University Environment." *Id.* at 857.

49 *Id.* at 858. I include only those examples which strike me as far beyond what the policy meant to cover.

50 *Id.*

51 One can easily imagine a situation in which this could arise with no racist implications at all. Especially in a class studying race related issues, certain students may feel more comfortable studying with students of their own background.

52 This strikes me as extremely dangerous, even as a suggestion. Matsuda, for example, speaks approvingly of Spike Lee's depiction of racial bigotry in the film *Do the Right Thing*. Matsuda, *supra* note 5, at 2369. To proscribe racial remarks in an artistic context could very well stifle creativity where it is most needed. Additionally, it is very difficult to draw the line between racially based humor and actual slurs. This is an example of the kind of overbreadth and vagueness that alarms civil libertarians.

53 Both Georgia and Mississippi have the confederate flag as part of the state flag. BENJAMIN F. SHEARER & BARBARA S. SHEARER, STATE NAMES, SEALS, FLAGS, AND SYMBOLS 69, 75 (1987). The symbols of many rock and roll bands also make use of the confederate flag. Is that harassment? How about use of the confederate flag in a satirical context? How about use of the confederate flag as a way of saying you wish the South had won the war? All of these—though of varying degrees of offensiveness—are protected by the first amendment. *See, e.g.*, Stromberg v. California, 283 U.S. 359 (1931).

54 *Doe*, 721 F. Supp. at 858 (footnotes added). Could the last provision mean that showing the comedy film *A Fish Called Wanda* is prohibited at the University of Michigan? Or could only people who laugh at it be punished? Or would it be permissible because the victim of the joke is not a student at Michigan?

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

56 *Id.*

the guide. They may have already modified their conduct or speech or both in order not to break the rules of the policy as they understood them. The guide, however inaccurate, outlined a possible interpretation of the policy. Even without it, the students themselves might have arrived at the same conclusions.

The inevitable legal conflict arose when Doe, a biopsychology[57] graduate student, requested that the policy be declared unconstitutional. Doe believed it might hinder his right to pose theories regarding biologically based differences between the sexes and races.[58] He said that some students or faculty members might regard his theories as sexist or racist, and that he might thus be charged with a violation of the policy if he were to discuss them.[59]

Doe brought the case before the United States District Court for the Eastern District of Michigan. He moved for an injunction against the policy on the grounds that it was unconstitutionally vague and overbroad, and that it chilled speech and conduct protected by the first amendment.[60]

The court understood the tension reflected in the case between state interests and the first amendment.[61] Affirming the state's right to regulate speech in the form of obscenity, sexual abuse, libel, and fighting words, the court invoked fundamental first amendment law:[62] "The First Amendment presents no obstacle to the establishment of internal University sanctions as to any of these categories of conduct."[63] Additionally, the court said that the University "may subject all speech and conduct to reasonable and nondiscriminatory time, place, and manner restrictions which are narrowly tailored and which leave open ample alternative means of communication."[64] The court left the University free to regulate protected speech in the same manner as any other state actor, provided the regulation narrowly fits the state interest. Following Supreme Court precedent,[65] the Michigan court drew the line at the pure suppression of ideas:

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57 Doe described the field as "the interdisciplinary study of the biological bases of individual differences in personality traits and mental abilities." *Id.*

58 *Id.* There is a long-standing debate in academia regarding the ethical and constitutional implications of this kind of research. *See, e.g.*, Richard Delgado, *Can Science Be Inopportune? Constitutional Validity of Governmental Restrictions On Race-IQ Research*, 31 UCLA L. REV. 128 (1983).

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

60 *Id.*

61 The court said: "It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict. The difficult and sometimes painful task of our political and legal institutions is to mediate the appropriate balance between these two competing values." *Id.* at 853.

62 For a brief outline of first amendment doctrine, see *supra* note 7.

63 Doe, 721 F. Supp. at 862.

64 *Id.* at 863.

65 *See, e.g.*, Texas v. Johnson, 109 S. Ct. 2533 (1989); Cohen v. California, 403 U.S.

the University could not establish an anti-discrimination policy that effectively prohibited unpopular or offensive speech.[66]

The court recognized that the principles of free speech "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."[67] The court did not suggest that racial harmony was not a valid goal of the University. However, the first amendment left no room for suppression of speech to achieve that goal.[68]

The court did affirm the University's right to regnlate speech as to time, place, and manner.[69] The "fundamental infirmity of the [p]olicy" lay with the outright prohibition, rather than regulation, of speech.[70] Because of this, the policy was facially overbroad.

The court also found the rules unconstitutionally vagne,[71] relying on the standard described in *Broadrick v. Oklahoma*:[72] "[a] statute is unconstitutionally vagne when 'men of common intelligence must necessarily gness at its meaning.' "[73] This standard, the court argned, applied with particular force because the policy suppressed a constitutional right.[74] Because it was very difficult, even impossible, for a student to distingnish between protected and unprotected activity, the rules of the policy failed the test for vagueness.[75]

The court summarized its reasoning by quoting Thomas Cooley, former Justice of the Michigan Supreme Court and Professor of Law at the University of Michigan Law School:

> Even if speech "exceed[s] all the proper bounds of moderation, the consolation must be that the evil likely to spring from the violent discussion will probably be less, and its correction by public sentiment more speedy, than if the terrors of the law were brought to bear to prevent the discussion."[76]

15, *reh'g denied*, 404 U.S. 876 (1971); United States v. O'Brien, 391 U.S. 367, *reh'g denied*, 393 U.S. 900 (1968); *infra* text accompanying notes 89-128.

66 *Doe*, 721 F. Supp. at 863.

67 *Id.*; *see infra* text accompanying notes 89-128.

68 "While the Court is sympathetic to the University's obligation to ensure equal educational opportunities for all of its students, such efforts must not be at the expense of free speech." *Doe*, 721 F. Supp. at 868.

69 *See infra* text accompanying note 64.

70 *Doe*, 721 F. Supp. at 864.

71 *Id.* at 866-67.

72 413 U.S. 601 (1973).

73 *Doe*, 721 F. Supp. at 866 (quoting *Broadrick*, 413 U.S. at 607).

74 *Id.* (*citing* Smith v. Goguen, 415 U.S. 566 (1974)).

75 *Id.* at 867. The court argued that "[l]ooking at the plain language of the Policy, it was simply impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct." *Id.*

76 *Id.* at 869 (citing THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 429 (Da Capo ed. 1972) (1st ed. 1868)).

Thus, *Doe* acknowledged first amendment protection of speech in the context of the university. However, the court did not leave it at that.

In an addendum to the opinion, Judge Cohn expressed his regret at not having read an article by Professor Mari J. Matsuda: *Public Response to Racist Speech: Considering the Victim's Story*.[77] In regretting the court's oversight of this article, Judge Cohn stated: "An earlier awareness of Professor Matsuda's paper certainly would have sharpened the Court's view of the issues."[78]

Matsuda's article synthesizes a growing movement that over the last ten years has advocated various restrictions on hate speech.[79] Matsuda takes the position that the government's supposedly neutral view toward speech effectively disenfranchises the traditionally oppressed classes of American society.[80] She proposes criminalization of the most hateful forms of racist speech as well as private remedies for other types of racist expression.[81]

Matsuda believes that universities are the kind of places where offensive speech ought to be regulated,[82] even though the Supreme Court has consistently held that the protection of such speech is "nowhere more vital" than in the academic community.[83] In approaching Matsuda's proposals, it is necessary to first understand the neutrality-based constitutional framework she so adamantly opposes. The following Part of this Note outlines the development of the Supreme Court's constitutional analysis emphasizing freedom of expression as a necessary element in the effective functioning of a university.

II

THE SUPREME COURT'S PROTECTION OF SPEECH AT PUBLIC UNIVERSITIES

The racist speech issue at public universities focuses on the ideal of full freedom of discourse in the academic setting. Without it, universities would cease to be havens of openness, scholarship, inquiry, and learning.[84] Recognizing this, in the last three decades

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77 Matsuda, *supra* note 5. *See infra* text accompanying notes 129-222.

78 *Doe*, 721 F. Supp. at 869.

79 *See infra* text accompanying notes 129-70.

80 Matsuda, *supra* note 5, at 2338.

81 *Id.* at 2321.

82 *Id.* at 2370-73.

83 *See infra* text accompanying notes 89-128.

84 Volume 66, number 7 (June 1988), of the *Texas Law Review* is devoted to a symposium on academic freedom. For a discussion of the history of academic freedom in Europe and America, see Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265 (1988). Metzger, a historian, describes the non-constitutional roots of academic freedom in America. Among those influencing

the Supreme Court has continually reaffirmed freedom of speech as essential to the atmosphere of the university.[85] Until the late 1950s, however, university administrators had nearly absolute power to regulate and suppress student conduct and speech, even where such suppression implicated constitutional rights.[86] Beginning in 1957, the Supreme Court heard a number of cases addressing this conflict, and in its rulings vastly expanded the scope of freedom of expression of students and teachers in public universities, elementary schools, and high schools.[87] While some of the cases do not directly address the question of offensive speech, taken together, they show judicial insistence that a broad definition of free expression should reign on public university campuses. At present, as a result of these cases, students at universities enjoy freedom of expression to the same extent as people outside the academy.[88]

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the present "martyrology of academic freedom" are Socrates, Abelard, the "heretical first president of Harvard College," and perhaps most vitally, nineteenth century German universities. *Id.* at 1265-71.

85 *See infra* text accompanying notes 89-128. For a brief summary of academic freedom and the constitution, see John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481, 1481-84 (1988).

86 *See, e.g.*, Lewis Bogaty, *Beyond* Tinker *and* Healy*: Applying the First Amendment to Student Activities*, 78 COLUM. L. REV. 1700 (1978). The article describes the classic view, which regarded higher education as a privilege that "allowed university administrators almost unlimited discretion in regulating the conduct of their students." *Id.* at 1700. The article cites Hamilton v. Regents of University of California, 293 U.S. 245 (1934), in which the Court upheld a state law requiring University of California students to study military science even though they adhered to a pacifist religion. The Court found that no freedom of religion was implicated, because the students were free to study elsewhere. Bogarty, *supra*, at 1700.

87 Differences in the state's authority to regulate student conduct and speech at elementary or secondary schools and on university campuses spring from two fundamental distinctions. First, schools play a much greater role in the socialization and indoctrination of students as good citizens than do universities. Schools invariably face a tension between neutrality in the curriculum and the desire to teach certain values shared by the community. Whether or not all students and their parents agree, certain non-neutral values are taught, to varying degrees, in public schools. *See, e.g.*, Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15. Of course many values, such as religion, cannot be force-fed to public school students. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (striking down school requirement of pledge of allegience to the American flag).

Second, the simple fact that school pupils are younger and more immature than college students creates a variety of social as well as legal differences in the nature of the educational setting. The rules required for discipline are logically more stringent in a school than in a college. *See infra* text accompanying notes 101-13. The rules regarding obscenity may be stricter in high schools than at universities without implicating first amendment rights in any way. *Compare* Bethel School Dist. v. Fraser, 478 U.S. 675 (1986) (upholding school discipline of high school student for speech with sexual innuendo) *with* Papish v. Board of Curators, 410 U.S. 667, *reh'g denied*, 411 U.S. 960 (1973) (striking down university expulsion of student for publishing graphic headline).

88 *See infra* text accompanying notes 89-128.

A. Freedom of Opinion for University Professors

1. Sweezy v. New Hampshire

Much of the progress toward recognition of students' rights to free speech was made in cases regarding the rights of professors. In *Sweezy v. New Hampshire*,[89] which preceded the upheaval of the sixties by a few years, the Court affirmed a professor's right to hold and voice politically unpopular opinions. The case involved a professor's refusal to answer questions addressed to him by the state Attorney General concerning the content of his lectures as well as his personal political beliefs and associations.[90] In investigating Professor Sweezy, New Hampshire attempted to root out "subversive activities" at the state university.[91] From this narrow invasion of academic freedom, the Court construed a far wider breadth of freedoms:

> The essentiality of freedom in the community of American universities is almost self-evident. . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[92]

Even then, the Warren Court understood that a college education meant more than skittles and beer. The Court emphasized that the university should be a place where students and professors can pursue ideas free from the watchful eye of a paternalistic administrator.[93] The suppression of unfounded, ridiculous, or even racist beliefs destroys the atmosphere of inquiry and creative thought that defines the university.[94] Furthermore, legitimate ideas often offend

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89 354 U.S. 234, *reh'g denied*, 355 U.S. 852 (1957).

90 *Id.* at 239-42.

91 *Id.* at 236-37. Sweezy was asked, among other things, whether his wife had ever been a member of a certain political party, whether he had ever attended a meeting of that party, and whether or not he believed in communism. *Id.* at 243.

92 *Id.* at 250.

93 Monitoring professors in order to weed out those with "subversive" opinions not only closes off valid areas of intellectual pursuit, such as studies in Marxism or homosexuality, but it also stifles the atmosphere by forcing scholars to be constantly on guard to determine which kinds of ideas are unacceptable. Since political fashions come and go, it can never be clear which ideas may be proscribed at any given time.

94 The movement to ban racist speech argues that suppressing racist ideas alone would do nothing to stifle the atmosphere of a university. *See infra* text accompanying notes 193-223. But the *Sweezy* Court concluded that the mere presence of suspicion and

members of the college community.[95] The ability to tolerate that which offends is not the least significant lesson one might learn at college.

In *Sweezy*, the Court stressed the freedom to be unorthodox:

> History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.[96]

The Court, then, affirmed not only the right, but the necessity, of allowing free speech and free inquiry in the university context.[97]

2. Keyishian v. Board of Regents

Ten years later in *Keyishian v. Board of Regents*,[98] the Court echoed this affirmation. Several faculty member at the State Univer-

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distrust hinders the process of scholarship. A great many ideas which have proved useful to citizens of democratic society were at one time or another deemed racist. Among the thinkers who have weathered this accusation are Shakespeare, Dickens, Darwin, Moses, Nietzsche, and Malcolm X. While few would want racist ideas to grow within our public universities, one can hardly argue that it is in the interest of scholarship that academics hesitate before pursuing an idea because they fear accusations of racism.

95 It is easy to think of examples. One would be surprised if members of one religion found nothing ridiculous, if not offensive, in the dogma of another religion. Homosexuality is abhorred and condemned by a number of religions. Similarly, opinions of various nationalist movements are well represented on campuses and could easily be construed to be offensive to members of politically rival national or ethnic groups.

96 *Sweezy*, 354 U.S. at 251.

97 Matsuda and others make the argument that since racism is universally condemned, it is more than merely unorthodox. *See infra* text accompanying notes 182-84. *Sweezy* rejects the image of university administrators or state legislators determining which strange ideas are unacceptable. *Sweezy*, 354 U.S. at 250. It is doubtful, and certainly undesirable, that racist ideas will ever be regarded as anything other than a scourge on society. But even regarding race, once objectionable ideas come and go. "Prevailing mores," *id.* at 251, change like the weather. While once the rallying cry was that all people are the same, now different groups relish their differences. The recent movements that led to the creation of Women's Studies and Black Studies exemplify this development. Indeed, it now might be construed as racist for a white person to tell an African-American that "you are the same as me." Because issues of race permeate almost all social and political matters, regulations regarding the racial content of speech may potentially influence the discussion of almost any issue. And since it is so difficult to know what kinds of ideas might be construed as racist, it is not far-fetched to suggest that the proscription of racist speech would stifle at least some worthwhile discourse. Additionally, while the Court probably did not have racists in mind among the "unorthodox," I doubt the Justices would have been happy with rules dictating specifically what could and could not be said.

This reluctance to allow the government to dictate right and wrong clashes with the movement represented by Professor Matsuda which supports the government's right to legislate non-neutral rules in order to achieve true equality. *See infra* text accompanying notes 136-45.

98 385 U.S. 589 (1967).

sity of New York refused to sign a certificate denying any affiliation with the Communist Party. This lead to notification of their impending dismissal.[99] As in *Sweezy*, the Court insisted that the goals and functioning of the university depend on first amendment protection. The Court was particularly fearful of allowing the government to dictate what kind of political atmosphere must prevail in academia. The classroom atmosphere, they said, depended upon freedom of opinion as well as freedom of speech:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. 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. . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."[100]

Sweezy and *Keyishian* laid the foundation for the attitude that has prevailed until now: universities achieve their goals best when no ideas—political or otherwise—receive official condemnation or suppression. The cases allow for the presence and tolerance of dissent, even when it goes against the deeply held convictions of most members of the university community. They emphasize the exchange of ideas: the refutation of one assertion by the superiority of another, the creation of new truths, the reestablishment of old ones. The facts of these cases, however, did not directly conceru the rights of the *students* to speak freely.

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99 *Id.* at 592.

100 *Id.* at 603 (*quoting* United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). The question will be raised below: how sanitized do we want college life to be? Certainly we would prefer never to encounter racial harassment, but never to encounter racist beliefs? To cleanse the college classroom of any kind of racist assertion would deprive students of the opportunity to refute it, to attack it, and to defeat it at its source.

The Court's use of the phrase "authoritative selection" reflects many Americans' insistence that the government not dictate what is right or wrong, true or false—no matter how obvious the distinction seems to be. The issue of whether or not to allow suppression of books asserting that the holocaust actually did not occur provides a useful example of this. *See* Gerald Tishler, *Freedom of Speech and Holocaust Denial*, 8 CARDOZO L. REV. 559 (1987). In this debate transcript, Alan Dershowitz stated the civil libertarian position quite succinctly:

> Martin Luther King was right. The Nazis who marched in Skokie were wrong. [But] [t]he government can't make judgments of right or wrong, it cannot distinguish between Martin Luther King walking through Cicero [with a white woman] and a Nazi group walking through Skokie. And I submit that those judgments are impossible.

Id. at 588.

B. *Tinker*: The Recognition of Students' Rights to Free Speech

The Court's current attitude toward university students' freedom of speech took root in its rulings regarding the constitutional rights of public school students. The state can more strictly regulate the behavior of minors than it can the actions of other citizens.[101] Freedoms granted to high-school students, ought, then, to apply to college students as well.

Tinker v. Des Moines Independent Community School District[102] stands as the seminal case affirming the free expression rights of public school students. There, three high school students were suspended from school for wearing black armbands in protest against the Vietnam War.[103] The Supreme Court reversed the suspension, insisting that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[104]

While acknowledging that school authorities retained the right to prohibit certain outrageous forms of speech, the Court held that the protest in question was not sufficiently disruptive to warrant suppression of the students' rights: "[T]he record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred."[105] The Court carefully outlined the limits of the school officials' rights to suppress student expression:

> In order for the state in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,"

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101 *See supra* note 87 and accompanying text. At the same time, universities do have disciplinary needs that in some cases may require greater restrictions than are needed in high schools. Matsuda argues for controls on racist speech based on the uniquely sensitive nature of the college student who is "away from home for the first time, and at a vulnerable stage of psychological development." Matsuda, *supra* note 5, at 2370. Conceivably, high school students require less protection from emotional harm because they can rely on their home environment for support.

102 393 U.S. 503 (1969).

103 *Id.* at 504.

104 *Id.* at 506. This phrase became the foundation for most of the subsequent affirmations of students' rights to free speech. *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 863, 865 (1982). The academic setting came to be viewed as deserving the full protection of the first amendment. Administrators could no longer simply plead the special circumstance of the educational context in depriving students of free speech rights.

105 *Tinker*, 393 U.S. at 514.

the prohibition cannot be sustained.[106]

This language suggests that the Court would allow the proscription only of expressive activities that make the educational process almost impossible, not through the content of their message, but through their means.[107] For instance, officials could surely ban loud music from campus because it would make learning in the classroom impossible.[108] *Tinker*, then, allows school authorities some breadth in instituting time, place, and manner regulations on disruptive speech,[109] but not on merely unpopnlar expression.[110]

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106 *Id.* at 509 (citation omitted).

107 The notion that *Tinker* proscribes only physical disruption has been borue out by a number of federal court interpretations. *See* Casenote, *Protecting a School's Interest in Value Inculcation to the Detriment of Students' Free Expression Rights:* Bethel School District v. Fraser, 28 B.C.L. REV. 595 (1987) (authored by Royal C. Gardner III). Gardner asserts that the courts bave defined *Tinker*'s substantial disruption standard as "physical disturbance wbich constitutes a material threat to the orderly administration of a school or the discipline of its students." *Id.* at 605. In Pliscou v. Holtville Unified School Dist., 411 F. Supp. 842 (S.D. Cal. 1976) the court ruled that scbool officials could not interfere with students publishing an unofficial newspaper, as long as it threatened no material disruption of the classroom. *See* Gardner, *supra*, at 605 n.126. On the other hand, several federal courts have banned student expression because of its physical effect on school. Speake v. Grantham, 317 F. Supp. 1253 (S.D. Miss. 1970), *aff'd*, 440 F.2d 1351 (5th Cir. 1971), held that students who distributed leaflets falsely claiming that classes were cancelled were not protected by the first amendment. Similarly, sitdown strikes that physically disrupted use of school facilities were deemed to be unprotected. *E.g.*, Farrell v. Joel, 437 F.2d 160 (2d Cir. 1971); Adibi-Sadeh v. Bee County College, 454 F. Supp. 552 (S.D. Tex. 1978).

108 It is doubtful that the Court wonld construe racist remarks as materially and substantially interfering with the operation of the school. This is not to suggest that no racist speech can be banned. The Court would surely allow banning racist speech that incites riots, or indeed any speech that goes beyond the standard of "fighting words" laid out in *Chaplinsky*. As long as no physical disruption takes place, the speech is protected. Certainly, speech of a racist nature is more likely to cause a pbysical disruption than other forms of offensive speech. But in the high school context, until the speech results in some physical manifestation of its disruptive effect, it is protected by the first amendment. The same should be true of universities. The difference in the standard of "disruption" springs from the differing nature and goals of schools and universities.

109 There must be more than merely a *fear* of disruption. The Court recognizes that the exchange of ideas in a social setting will inevitably cause arguments and occasionally even disruptions. Apprehension is not a sufficient ground for suppression of speech:

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

Tinker, 393 U.S. at 508 (citation omitted).

Because of the inherently greater maturity of college students, it makes sense to say that the kind of language that will cause a disturbance in a university is probably harsher and more offensive than the kind of words that regularly cause fights in high schools. An application of *Tinker* in the university setting, then, must be made "in light of the special characteristics" of the university environment. *Id.* at 506.

110 The underlying question in each case regarding school speech is: What are the

In *Tinker*, the Court applied the first amendment "in light of the special characteristics of the school environment."[111] It follows then, that when applying the *Tinker* standard to universities, the Court must look at the peculiar nature of the campus community to decide what constitutes conduct or speech that "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation"[112] of the university.[113]

C. *Tinker* Goes to College

1. Healy v. James

Tinker was reinforced and applied to the university community in *Healy v. James*.[114] In *Healy*, authorities at Central Connecticut State College denied official recognition to a student group affiliated with Students for a Democratic Society. The college argned that the organization's philosophy was "antithetical to the school's policies."[115] Using the reasoning in *Tinker*, the Court agreed that

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educational goals of the school, and does the speech materially disrupt those goals? Relatively recently, the Court recognized the public school's role as an inculcator of civic values. *See* Bethel School Dist. v. Fraser, 478 U.S. 675 (1986). In *Fraser*, the Court upheld disciplinary action taken against a student for giving a mildly obscene campaign speech at a student assembly. The Court distinguished this speech from the expression in *Tinker* on the ground that the obscene speech disrupted the school's educational goals and intruded on the rights of other students. *Id.* at 680. One of the Court's argnments suggested that public schools seek to teach students to behave in a socially acceptable way, and that the student's speech hindered this goal. *Id.* at 681.

This decision need not be viewed as a move away from *Tinker*. Rather, it simply shows that the Court allows for the notion that public schools have a legitimate educational goal in preventing real disruption as a result of obscene expression among their students.

Similarly, in Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988), the Court upheld a school's rigbt to exercise editorial control over a student newspaper. The Court allowed suppression of an article in the student newspaper that revealed actual facts about the personal and sexual lives of students in the school and their parents. The Court held that such editorial control was related to "legitimate pedagogical concerns." *Id.* at 273.

This suppression arises from the Court's willingness to say that public schools have a legitimate interest in preventing the misuse of a student newspaper. This in no way negates the *Tinker* standard of material disruption, which remains.

111 *Tinker*, 393 U.S. at 506.

112 *Id.* at 509.

113 Certainly much of what constitutes disruption at a school applies equally to a university. Any acts that physically prevent students from learning in the classroom can clearly be proscribed. *See, e.g.*, Furumoto v. Lyman, 362 F. Supp. 1267 (N.D. Cal. 1973) (disrupting a university class to debate the professor's alleged racist views falls outside first amendment protection).

On the other hand, universities no longer play the role of value inculcator. The Court's rhetoric suggests that unlike schools, universities exist not to indoctrinate, but to allow students to make up their own minds regarding systems of values. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967).

114 408 U.S. 169 (1972).

115 *Id.* at 175; *see id.* at 175-76 n.5.

universities have the authority to control student conduct toward the goal of providing an environment conducive to education. But the Court insisted that this goal does not leave room for creating rules that would not stand outside the academy. To the contrary, first amendment freedoms are even more important on campus than in the outside world:

> Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[116]

The Court thus rejected the argument that the need for order[117] in a university justifies limits beyond reasonable time, place, and manner restrictions on free expression. The language here could just as easily apply to racist speech as to dissent. Since racist speech that does not fall to the level of "fighting words" cannot be banned in the community, it cannot be banned on campus.

As in *Tinker*, the Court drew the line at disruption: "Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."[118] In defining what that might entail, the Court distinguishes advocacy from action:

> The critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action which is not. Petitioners may, if they so choose, preach the propriety of amending or even doing away with any or all campus regulations. They may not, however, undertake to flout these rules.[119]

This formulation clearly allows a variety of speech that contra-

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116 *Id.* at 180 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

117 Certainly one of the evils that universities seek to prevent in suppressing racist speech is disorder. Racist speech may, for example, cause shouting matches or fights between groups on campus.

118 *Healy*, 408 U.S. at 189.

119 *Id.* at 192. This distinction can easily be applied in the case of racist speech. One may preach racism, speak racism, but one may not actually do racism. Calling someone a nasty name is a manifestation of racism, just as calling for a sit-in is advocacy of action without actually being action. However, the teaching assistant who lowers a student's grade out of hatred for the student's race is doing racism, and deserves punishment. At most universities, a few teaching assistants may hold deeply rooted racist beliefs. As long as those attitudes in no way affect the assistants' ability to teach students fairly and professionally, they must be allowed to work despite those beliefs. The same applies to communists, anarchists, atheists, fascists, etc. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967).

dicts nearly universally held values and opinions. The Court protects students' rights to advocate ideas that call for the absolute transformation of the university itself. As long as such expression remains pure speech, it is and must be protected.[120]

2. Papish v. Board of Curators

A year after *Healy*, the Supreme Court again relied on *Tinker* in deciding *Papish v. Board of Curators*.[121] In *Papish*, a University of Missouri student had been suspended for distributing a newspaper that used the word "motherfucker" in a headline.[122] The Court of Appeals that heard the case said "that on a university campus 'freedom of expression' could properly be 'subordinated to other interests such as, for example, the conventions of decency in the use and display of language and pictures.' "[123] However, at the time the Supreme Court heard the case, *Healy* had been handed down. The Court said that *Healy* "makes it clear 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.' "[124]

The *Papish* Court affirmed the university's right to "enforce reasonable regulations as to time, place, and manner of speech and its dissemination."[125] Here, however, the student "was expelled because of the disapproved content of the newspaper rather than the time, place, or manner of its distribution."[126]

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120 The issue boils down to whether or not calling someone a nasty name is an act or a statement. In United States v. O'Brien, 391 U.S. 367 (1968), the Court outlined the distinction in upholding the arrest of a man for burning his draft card. The Court reasoned that something more than pure expression was taking place, and that the government interest in preventing it justified the suppression of the concurrent symbolic speech.

Admittedly, hard cases will arise when offensive speech borders on "fighting words." Such a case arose in Gooding v. Wilson, 405 U.S. 518 (1972). There, in the course of his arrest, a man said to the police, "White son of a bitch, I'll kill you. . . . You son of a bitch I'll choke you to death." *Id.* at 521 n.1. The Court overturned his conviction of breaking a Georgia statute that proscribed use of "opprobrious words or abusive language, tending to cause a breach of the peace." *Id.* at 518.

121 410 U.S. 667, *reh'g denied*, 411 U.S. 960 (1973).

122 *Id.* at 668.

123 *Id.* at 669 (quoting Papish v. Board of Curators, 331 F. Supp. 1321 (W.D. Mo. 1971)).

124 *Id.* at 670. Certainly part of the harm that policies such as the University of Michigan's seek to prevent is the offensiveness of the racist's opinions. Unless more harm than "offens[e] to good taste" is done, *Papish* prohibits suppression of even racist speech. *Id.*

125 *Id.*

126 *Id.*

SUMMARY

Taken together, these cases represent solid precedent for the Supreme Court's attitude regarding the role of the first amendment at the university. They affirm that students in public institutions of learning retain their free speech rights despite official university opposition[127] or the distaste and condemnation of other students. Similarly, they recognize the key role that the free exchange of ideas—even patently offensive ones—has in the achievement of the university's goals. These cases not only show that students deserve free speech rights, but further that free speech is absolutely essential to the functioning of the university. Speech may be suppressed only when it materially and substantially interferes with the operation of the university.[128]

III

THE MOVEMENT TO BAN RACIST SPEECH

The court in *Doe* admitted that it had failed to take into account the growing movement—of which Professor Matsuda is a part—to legislate against racist hate speech.[129] In general, the movement's proponents argne that legal action can and should be taken to com-

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127 An example of a federal court allowing racist student speech in the face of official opposition arose in Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973). The president of a predominantly black state university suspended funding to the college newspaper after it published articles advocating segregation. *Id.* at 459. One such article, in discussing the influx of whites into the school read:

> There is a rapidly growing white population on our campus. . . . Black students on this campus have never made it clear to those people that we are indeed separate from them, in many ways, and wish to remain so. And until we assume the role of a strong, proud people we will continue to be co-opted. Until we chose [sic] to make this clear, by any means necessary, the same thing will continue to happen.

Id. at 458. The Court of Appeals reversed the District Court's decision allowing withdrawal of the paper's funding. In reversing, the court noted that "[t]he record contains no proof that the editorial policy of the paper incited harassment, violence, or interference with white students and faculty." *Id.* at 461. The suppression of the paper was content based: "if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment." *Id.* at 460.

128 It is not surprising that the District Court held as it did in Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989). *See supra* text accompanying notes 60-76. As a result of the university's policy, students became wary of pursuing unfashionable and unorthodox ideas. Their freedom of speech was chilled in a way it never would have been outside the university. The opinion describes a case in which a Jewish student brought a complaint, later dismissed, against another student for suggesting in class that "Jews cynically used the Holocaust to justify Israel's policies toward the Palestinians." *Doe*, 721 F. Supp. at 866 n.14. While clearly political speech, this statement also has the potential to offend deeply. However, the administration made no convincing case that such speech interfered with the functioning of the university. The notion that a student might even worry about being called into the Dean's office for such a statement is surely the kind of thing the Court demands should be avoided.

129 *Doe*, 721 F. Supp. at 866 n.14.

bat the problem of racist speech[130] both because that speech itself is harmful, and because it is part of the greater problem of racism in society.[131] They insist that since traditional neutral laws have done little to combat the oppression of "outsiders," non-neutral, content-based laws must be used to eradicate the problem.[132] The movement's proponents focus on the harm caused to the victim of racist speech, rather than on the free speech interests of the speaker.[133] They also believe that banning racist speech will do little harm to

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130 *See infra* text accompanying notes 144-92. For a discussion of the related topic of racial defamation, group libel, and the first amendment, see Kenneth Lasson, *Group Libel Versus Free Speech: When Big Brother Should Butt In*, 23 DUQ. L. REV. 77 (1984); Kenneth Lasson, *Racial Defamation As Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11 (1985).

131 *See, e.g.*, David Kretzmer, *Free Speech and Racism*, 8 CARDOZO L. REV. 445, 453 (1987) ("There are strong connections among racism, racial prejudice, and racial discrimination. These are not one-way connections. Prevalence of racism or racial prejudice is likely to encourage racial discrimination. Conversely, allowing racial discrimination is likely to encourage the spread of racism and racial prejudice.").

132 Matsuda prefers to use the word "outsider" rather than "minority" because of the latter's empbasis on numbers rather than on power. This makes good sense, in that it far more accurately describes the people to whom it refers. African-Americans, and certainly women, are not the numerical minority in many areas, but they are certainly outsiders to the power structure. Matsuda, *supra* note 5, at 2323.

Matsuda describes the reasoning that has led "outsiders" to reject neutrality:

> The need to attack the effects of racism and patriarchy in order to attack the deep, hidden, tangled roots characterizes outsider thinking about law. Outsiders thus search for what Anne Scales has called the rachet—legal tools that have progressive effect, defying the habit of neutral principles to entrench existing power. They have derived rachet-like measures to eliminate effects of oppression, including affirmative action, reparations, desegregation, and the criminalization of racist and misogymist propaganda. Such measures are best implemented through formal rules, formal procedures and formal concepts of rights, for informality and oppression are frequent fellow-travelers.

Id. at 2325 (footnote omitted). Williams voices a slightly more radical rejection of neutral laws:

> Blacks and women are the objects of a constitutional omission which has been incorporated into a theory of neutrality. It is thus that omission is really a form of expression, as oxymoronic as that sounds: racial omission is a literal part of original intent; it is the fixed, reiterated prophecy of the Founding Fathers.

Williams, *supra* note 19, at 2142-43.

133 *See infra* text accompanying notes 146-54. This is not to say that racism does not harm society as a whole. Professor Richard Delgado describes the harm to all of society when some are victimized through racism:

> Racism and racial stigmatization harm not only the victim and the perpetrator of individual racist acts but also society as a whole. Racism is a breach of the ideal of egalitarianism, that "all men are created equal" and each person is an equal moral agent, an ideal that is the cornerstone of the American moral and legal system. A society in which some members regularly are subjected to degradation because of their race hardly exemplifies this ideal.

Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 140-41 (1982).

the traditional interests that free speech protects.[134] Finally, they believe that such a ban would not do irreparable harm to the standards of freedom which are traditionally viewed as embodied by the first amendment.[135]

A. Outsider Jurisprudence and the Rejection of Neutrality

Matsuda approaches the problem of racism by using what she terms "outsider jurisprudence."[136] Outsider jurisprudence focuses on the failure of traditional—neutral—jurisprudence to achieve true equality for oppressed groups.[137] Matsuda believes that equality in fact must be given priority over full equality before the law. For those without equality, freedoms such as freedom of speech are "meaningless."[138] She believes that state tolerance of racist speech—and its insistence on protecting even Nazis' rights to speak—effectively disenfranchises its victims from the state itself:

> When hundreds of police officers are called out to protect racist marchers, when the courts refuse redress for racial insult, and when racist attacks are officially dismissed as pranks, the victim becomes a stateless person. Target-group members can either identify with a community that promotes racist speech, or they can admit that the community does not include them.[139]

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134 *See infra* text accompanying notes 135-70.

135 *See infra* text accompanying notes 171-92.

136 Matsuda, *supra* note 5, at 2323.

137 *Id.* at 2325.

138 Mari J. Matsuda, *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 BUFFALO L. REV. 337 (1989). In that discussion, Matsuda said:

> I think the first amendment and the concept of free speech is an important one, but if I were to give primacy to any one right, and if I were to create a hierarchy, I would put equality first, because the right of speech is meaningless to people who do not have equality. I mean substantive as well as procedural equality. . . . Until we are able to bring our brothers and sisters to some level of equality where they can participate equally in the political process, rights like free speech are going to remain relatively meaningless to them.

Id. at 360.

139 Matsuda, *supra* note 5, at 2338 (footnote omitted). This statement is unfair to advocates of free speech. Civil libertarians are not suggesting that the government dismiss racist attacks as pranks, under any circumstances. Certainly, everyone agrees that racist attacks involving criminal conduct deserve the full force of the law. And even when such acts are unactionable because they are protected by the first amendment, the government should treat them seriously as ugly manifestations of racism. But it should not ban them.

More important is the notion that protection of racists constitutes government exclusion of the groups against which the racism is directed. The government would provide the same protection, if needed, to any purely expressive protests made in opposition to the racists. The point of neutral application of constitutional rights is that the government protects the racist in order to assure all citizens that they will always receive similar protection.

According to Matsuda, neutrality on the part of the government ostracizes traditionally oppressed groups.

Professor Richard Delgado similarly feels that the government's refusal to act in the face of racist expression is a message that it does not believe in the ideal of egalitarianism: "The failure of the legal system to redress the harms of racism, and of racial insults, conveys to all the lesson that egalitarianism is not a fundamental principle; the law, through inaction, implicitly teaches that respect for individuals is of little importance."[140]

Professor Martha Minow also subordinates the ideal of freedom through neutral application of the law to the more vital one of true equality. She stresses the need to legally recognize different perspectives regarding different kinds of people in order to treat them truly equally:

> The goal of equality, then, will remain elusive so long as we attribute differences to others and then pretend that differences are discovered, not socially created. Equality will remain elusive so long as we neglect perspectives other than our own that could cballenge the labels . . . we assign.
>
> Consider this in the context of legal equality. Courts have interpreted constitutional and statutory equality provisions to insist [to] the government, employers, and schools [that] people must be treated the same, that is, if they ARE the same. But if they are not the same, if they are "really different," then the demands of equal treatment do not apply. It is unfair to treat people differently if they really are the same; but it is also unfair to treat people the same if they are different.[141]

For these scholars, America's neutrality-based attempt at achieving equality for all its citizens has failed. Disgnsted with this failure, they have proposed legislation to account for such systematic inequalities. Delgado argnes for an independent tort remedy for damages caused by racist speech.[142] Matsuda calls for "movement of the societal response to racist speech from the private to the public realm."[143] Taking Delgado one step further, she proposes "formal criminal and administrative sanction" as an "appropriate response to racist speech."[144] Her proposal[145] suggests that the

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140 Delgado, *supra* note 133, at 141. This too, confuses the government's failure to combat racism with its refusal to forbid racist speech. Certainly government inaction regarding racism in general suggests a lack of concern. And no doubt that bas been the case since the birth of the republic. But the government's refusal to stop racist speech is based fundamentally on an ideal of egalitarianism. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972).

141 Minow, *supra* note 6, at 7.

142 Delgado, *supra* note 133, at 179.

143 Matsuda, *supra* note 5, at 2321 (footnote omitted).

144 *Id.* (footnote omitted).

government take action to stop the harm done by racist speech, rather than continue to turn a blind eye out of deference to the first amendment.

B. A Focus on the Victim

According to Matsuda, the government's blindness to the perspective of outsiders ignores the actual harm to individuals caused by racist speech.[146] Such speech particularly and profoundly harms those who have traditionally been its victims.[147] Matsuda argues that in addition to harming individuals, racist speech perpetuates the oppression of "outsiders"; it limits their personal freedom, and creates an atmosphere hostile to their growth as people and as groups:

> Victims are restricted in their personal freedom. In order to avoid receiving hate messages, victims have had to quit jobs, forgo education,[148] leave their homes, avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor . . . . One subconscious response is to reject one's own identity as a victim group member.[149]

Matsuda is not alone in her assertion that "[f]rom the victim's perspective racist hate messages cause real damage."[150] Delgado argues that racial insults can be the cause of the outsider's inability to progress socially:

> Social scientists who have studied the effects of racism have found that speech that communicates low regard for an individual because of race "tends to create in the victim those very traits of 'inferiority' that it ascribes to him." Moreover, "even in the absence of more objective forms of discrimination—poor schools, menial jobs, and substandard housing—traditional stereotypes about the low ability and apathy of Negroes and other minorities can operate as 'self-fulfilling prophecies.'" These stereotypes, portraying members of a minority group as stupid, lazy, dirty, or

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145 *See infra* text accompanying notes 174-76.

146 Matsuda, *supra* note 5, at 2322-23.

147 Advocates of a legal response to racist speech also regret the harm done to society in general. *See infra* text accompanying notes 156-70.

148 This is perhaps the most compelling argument for suppressing racism on college campuses.

149 Matsuda, *supra* note 5, at 2337 (footnote omitted & footnote added).

150 *Id.* at 2340 (footnote omitted). Matsuda graphically describes the emotional damage that racist speech inflicts:

> As much as one may try to resist a piece of hate propaganda, the effect on one's self-esteem and sense of personal security is devastating. To be hated, despised, and alone is the ultimate fear of all human beings. However irrational racist speech may be, it hits right at the emotional place where we feel the most pain.

Id. at 2337-38 (footnote omitted).

> untrustworthy, are often communicated either explicitly or implicitly through racial insults.[151]

Racist speech alone may perpetuate aspects of racism in our country.

These scholars have also stressed the emotional damage of racist speech. Professor Kretzmer outlines some of the psychological harms caused by racial stigmatization: "self-hatred, humiliation, isolation, impairment of the capacity to form close interracial relationships, and adverse effects on relationships within a given group."[152]

Racist insults damage the psyche and dignity of the victim through the manipulation of historical inequalities. The governmental emphasis on neutrality does nothing to change these inequalities. Professor Kretzmer believes that an assessment of the harm caused by racist speech must take into account the unique perspective of the victim as a member of an oppressed group: "The effect of racist speech on personal dignity is largely a function of the harms caused by racism itself in a given society and the experience of people in that society with the various manifestations of racism."[153] Professor Delgado similarly focuses on the historical basis for the power that racist insults wield:

> Immediate mental or emotional distress is the most obvious direct harm caused by a racial insult. Without question, mere words, whether racial or otherwise, can cause mental, emotional, or even physical harm to their target, especially if delivered in front of others or by a person in a position of authority. Racial insults, relying as they do . .]. on the history of slavery and race discrimination in this country, have an even greater potential for harm than other insults.[154]

By examining racist speech from the victim's perspective, Matsuda, Delgado, and Kretzmer effectively demonstrate that this racism profoundly damages the lives of its individual victims, and actually perpetuates the disadvantages which it exploits in the first place. These authors make a compelling case for the need to elimi-

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151 Delgado, *supra* note 133, at 146 (footnotes omitted) (quoting MARTIN DEUTSCH, IRWIN KATZ & ARTHUR R. JENSEN, SOCIAL CLASS, RACE AND PSYCHOLOGICAL DEVELOPMENT 175 (1968)). This seems to be the most convincing argument that racist speech carries with it some kind of actual effect that might justify its suppression. Delgado effectively argues that aside from the aspects of racism that take physical form, verbal racism itself perpetuates the oppression of its victims. This does indeed come very close to the kind of actual harmful effect that the Court has held justifies suppression of speech.

152 Kretzmer, *supra* note 131, at 466 (referencing Delgado, *supra* note 133, at 136-38).

153 *Id.* at 465.

154 Delgado, *supra* note 133, at 143 (footnotes omitted).

nate racist speech. Their proposals about how to do this run head-first into the ideals of free expression embodied in the first amendment.

C. The Effect of Suppression of Racist Speech on the First Amendment and Freedom of Expression

Advocates for the suppression of racist speech offer assurances that such action would do little harm to the democratic values that freedom of expression is meant to protect. Proponents of a ban on racist speech argue that, rather than harm those values, such a ban would reinforce them by promoting equality and tolerance for all citizens.

1. *Will Suppression of Racist Speech Damage the Values Protected By Freedom of Expression?*

Both Delgado and Kretzmer systematically argue that none of the traditional interests protected by freedom of speech is endangered by legal suppression of racist insults. Their approaches offer very similar arguments and will be presented together here. Both refer to the four values of freedom of expression as propounded by Professor Thomas I. Emerson in his article *Toward a General Theory of the First Amendment*.[155]

Both Delgado and Kretzmer dismiss the notion that suppression of racist speech would somehow inhibit the ideal of self-fulfillment or self-realization as described by Professor Emerson. Delgado suggests that racist speech actually stifles the ability of people to pursue self-fulfillment. A racist speaker, he argues, can hardly be described as engaging in "self-fulfillment" when spewing out racist insults:

> The values of individual self-fulfillment to be furthered through free expression are based on the rights of individuals to develop their full potentials as members of the human community. But bigotry, and thus the attendant expression of racism, stifles, rather than furthers, the moral and social growth of the individual who harbors it. In addition, a racial insult is only in small part an expression of self: it is primarily an attempt to injure through the use of words. No one would argue that the value of self-fulfillment is not limited by consideration of the effects of one's means of expression on other members of society.[156]

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155 Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963). Emerson lists four values protected by freedom of expression: 1) Self-fulfillment; 2) The ascertainment of truth; 3) Participation in decision-making on the political level; 4) Achievement of social stability. *Id.* at 878-79.

156 Delgado, *supra* note 133, at 175-76 (footnotes omitted). It can be argued that racist expression often plays a role in a person's self-expression. In her reply to Del-

Kretzmer follows a slightly different tack, arguing that although the government has an interest in people's personal freedoms, not all forms of self-fulfillment are allowed, especially when they hurt other people:

> It is abundantly clear, however, that the mere fact that a particular act is a form of expression which enables a person to achieve self-fulfillment in no way implies that the person has a privilege to do the act when it harms someone else. Acts may legitimately be regulated, and possibly prohibited, not only when they actually harm others, but even when they merely endanger them.[157]

Thus, speech that does real harm—or merely endangers — may be suppressed even though it remains a form of self-fulfillment for its speaker.[158]

Delgado and Kretzmer also address the role of free speech in the ascertainment of truth. Both John Stuart Mill[159] and Professor Emerson[160] argue that freedom of expression is essential to soci-

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gado's article, Marjorie Heins suggests examples in which blatantly racist speech is related to individual self-fulfillment:

> [E]ven within Emerson's framework, gutter language, including racially-charged gutter language, is not wholly unrelated to "individual self-fulfillment," .... Certainly, name-calling lets off steam. Hate-filled or degrading epithets can be a powerful part of artistic or dramatic expression. During the heyday of black and chicano power, terms like "honkey," "Mister Charlie," "gringo," or "gabacho" were filled with personal as well as political and social meaning ....

Marjorie Heins, *Banning Words: A Comment On "Words That Wound,"* 18 HARV. C.R.-C.L. L. REV. 585, 590-91 (1983).

While Delgado stresses that the tort would primarily apply to "protect members of racial minority groups traditionally victimized," he says that it could also apply on behalf of members of the majority in certain situations. Delgado, *supra* note 133, at 180 n.275. In any case, Heins is correct in pointing out the fact that racist terms often appear in artistic contexts, as well as in legitimate political and social ones.

157 Kretzmer, *supra* note 131, at 482. Kretzmer gives a few examples: driving fast cars, hunting tigers, raping women, and beating up members of minority groups. *Id.*

158 This argument becomes extremely problematic when applied to a university because so much of what takes place in an educational setting—especially in the arts—is experimental self-expression.

William Wordsworth defined poetry—and by implication, all art—as "the spontaneous overflow of powerful feelings." *See* WILLIAM WORDSWORTH, *Preface to Lyrical Ballads*, in THE SELECTED POETRY AND PROSE OF WILLIAM WORDSWORTH 423 (Geoffrey Hartman ed. 1977). It is not outrageous to suggest that spontaneous expression may sound racist—or even be racist—and still qualify as art; nor is it outrageous to suggest that a budding collegiate writer might be intimidated by an atmosphere that punishes utterances that might be construed as racist.

Poems that use racist words have often drawn calls for censorship. Such an incident occurred when the African-American writer Julius Lester allowed an African-American teenager to read her poems on his New York radio show. The poems expressed the girl's jealousy of Jews, and were widely condemned as anti-Semitic. *See* JULIUS LESTER, LOVESONG (1989). Of course, even if they were anti-Semitic, no law should allow the poems to be suppressed.

159 *See* JOHN STUART MILL, ON LIBERTY (Elizabeth Rapaport ed. 1978) (1st ed. 1859).

160 *See* Emerson, *supra* note 155, at 881.

ety's quest for the truth. Kretzmer acknowledges this goal, but believes a balancing test is in order. For Kretzmer, the value of the fight against racism outweighs the value of racist speech in the pursuit of truth.[161] Delgado does not believe that racist insults play any role in the exchange of ideas which Mill and Emerson describe as leading to the truth: "[T]he characteristic most significant in determining the value of racial insults is that they are not intended to inform or convince the listener. Racial insults invite no discourse, and no speech in response can cure the inflicted harm."[162]

Emerson believes that free speech functions to allow all members of a democracy to participate in checking the government and its actions.[163] Delgado points out that allowing racial insults merely contributes further to the powerlessness of the already disadvantaged.[164] This, argues Delgado, detracts from democracy's goal of equality and inclusion. Kretzmer, too, sees no conflict between suppression of racist speech and the ideal of democracy:

> Among the values of a democratic regime is "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family." Racist speech is not merely speech which advocates abrogation of this recognition: it is speech which in itself is an affront to the inherent dignity of man. It is not clear why speech must be allowed in a democracy when it clashes with this basic value.[165]

He argues, in opposition to the *Skokie* decision, that no democratic government has the obligation to allow Nazis "to persuade others that Jews must be exterminated."[166]

Finally, both Delgado and Kretzmer reject application of Emerson's theory of the role of freedom of expression in social stability in allowing racist speech. Emerson's theory essentially says that free speech allows argument to take the place of force in determining the outcome of social and political conflicts.[167] Delgado counters that "racism, in part through racial slurs, furthers all the evils caused by the suppression of speech."[168] He argues that the goal of allowing full participation in decisionmaking is hindered by allowing racist speech: "Racism dulls the moral and social senses of its perpetra-

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161 Kretzmer, *supra* note 131, at 469.

162 Delgado, *supra* note 133, at 177.

163 Emerson, *supra* note 155, at 883.

164 Delgado, *supra* note 133, at 178. Of course, many activities allowed in our society detract from the goals of democracy. Would the government suppress the speech of a man who calls for a voting boycott?

165 Kretzmer, *supra* note 131, at 477 (footnote omitted).

166 *Id.* at 480.

167 Emerson, *supra* note 155, at 884-85.

168 Delgado, *supra* note 133, at 179.

tors, while disabling its victims from fully participating in society and leaving unprejudiced members of society demoralized."[169] Kretzmer also doubts "whether a relativist, balancing approach to freedom of speech makes a society any less stable or adaptable than a society which adopts a more demanding standard."[170]

Delgado and Kretzmer argue that the suppression of racist speech would do little damage to the values that the first amendment was created to protect. According to these scholars, little harm would be done to democratic values or to individual freedoms as a result of narrowly drawn legislation against forms of racist speech. Indeed, they argue that such a law would reaffirm many of the values embodied in the ideal of democracy.

2. *The First Amendment and the Suppression of Racist Speech*

Proponents of legislation against racist speech insist that their movement applies only to a narrow area of expression. Because this speech is so detrimental on so many levels, they argue that its suppression need not pose a threat to the positive existing freedoms protected by the first amendment. Matsuda believes that creating a new category of unprotected speech rather than stretching the doctrine of "fighting words" as well as the "content/conduct distinction" is the most delicate way of suppressing racist speech without also suppressing speech that merits first amendment protection: "Setting aside the worst forms of racist speech for special treatment is a non-neutral, value-laden approach that will better preserve free speech."[171]

In creating her category of unprotected racist speech, Matsuda focuses on the victim and on the historical and cultural forces that have led to racial inequality:

> Racist speech is best treated as a *sui generis* category, presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse.[172]

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169 *Id.*

170 Kretzmer, *supra* note 131, at 487. In the very short term, Kretzmer's argument seems compelling. As he and Delgado have shown, *see supra* text accompanying notes 152-54, racist speech damages its victims in a number of important ways. Its elimination would certainly take away the immediate psychological damage.

However, the difficulty with such a suppression would be its far greater long term effects on the government's ability to suppress constitutional rights, as well as the chilling effect it would have on all forms of free speech.

171 Matsuda, *supra* note 5, at 2357. Matsuda never deals with the question of what will happen after this approach is allowed. Will the scope of the prohibition broaden?

172 *Id.* (footnote omitted).

She describes this as a recognition of racist speech as "qualitatively different because of its content."[173]

Matsuda believes that her definition of actionable racist speech is narrow enough to avoid implicating first amendment rights. Such speech is identified by its message, which must 1) be "of racial inferiority"; 2) be "directed against a historically oppressed group"; and 3) be "persecutorial, hateful, and degrading."[174] Further, Matsuda believes these criteria eliminate the danger of squelching that speech which should be protected under the first amendment.[175] She recognizes, however, that even under this narrow construction, a number of "hard cases" may arise.[176]

The three elements taken together, Matsuda argues, provide a prerequisite to prosecution that "prevents opening of the dreaded floodgates of censorship."[177] The first element—an assertion of racial inferiority—is the "primary identifier of racist speech . . . [that] racist speech proclaims racial inferiority and denies the personhood of target group members."[178] The second element identifies the use of racist speech as an assertion of "power and subordination."[179] Finally, the third element, Matsuda says, "is related to the 'fighting words' idea," in that racial speech is "persecutorial, hateful, and degrading."[180] This paradigm, she argues, narrows the field of speech that can be proscribed, so that there is little harm to the first amendment's protection of freedom of speech.[181]

Ultimately, Matsuda relies on arguments that avoid the first

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173 *Id.*

174 *Id.*

175 Matsuda explains that her criteria do not amount to the kind of overbroad statutes designed to combat racism which have been used in the past. *Id.* at 2360 n.206. She points to statutes such as the one questioned in New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1928) in which a state attempting to combat the Ku Klux Klan required all organizations to register and submit membership lists to the state.

176 Two of these "hard cases" are "the special case of the university," and "the case of the dead wrong social scientist." These cases are analyzed later in this Note in the section discussing Matsuda's ideas as they relate to the academic community. *See infra* text accompanying notes 193-222.

177 Matsuda, *supra* note 5, at 2358.

178 *Id.*

179 *Id.*

180 *Id.*

181 Matsuda provides a few examples of the kind of speech that cannot be proscribed. "[A]rguing that particular groups are genetically superior in a context free of hatefulness and without the endorsement of persecution is permissible. Satire and stereotyping that avoids persecutorial langnage remains protected. Hateful verbal attacks upon dominant-group members by victims is impossible." *Id.* She entirely avoids the issue of unconstitutional vagueness. How is the citizen to know when a context is hate-free? How biting must satire be before it becomes persecutorial? What is a dominant group? Are there different levels of dominant groups within the subset of "outsiders"? This problem of vagueness becomes particularly acute in the university context.

amendment question and instead point to the world community's overwhelming conclusion that racism is evil:

> What is argued here, then, is that we accept certain principles as the shared historical legacy of the world community. Racial supremacy is one of the ideas we have collectively and internationally considered and rejected. As an idea connected to continuing racism and degradation of minority groups, it causes real harm to its victims. We are not safe when these violent words are among us.[182]

Matsuda concludes that an absolutist analysis of constitutional rights denies the role that law plays in the social sphere. Since the Supreme Court's present first amendment interpretation allows racism, the government legitimizes it: "The chilling sight of avowed racists in threatening regalia marching through our neighborhoods with full police protection is a statement of state authorization."[183] Her analysis asks that we abandon notions of neutrality, and allow the government to suppress speech based on its content: "We can attack racist speech—not because it isn't really speech, not because it falls within a hoped-for neutral exception, but because it is wrong."[184]

Delgado is more effective in his response to criticisms that a tort for racial insults would cheapen the first amendment. He argues that the government interest in eliminating racism justifies such a tort, in the same way that the government interest in order and decency justifies suppression of fighting words and certain forms of obscenity that a speaker inflicts upon a "captive or unwilling audience."[185]

Delgado suggests that, like the fighting words banned in *Chaplinsky*,[186] "[r]acial insults, and even some of the words which might be used in a racial insult inflict injury by their very utterance."[187] Accordingly, courts could use the existing *Chaplinsky* standard[188] to ban racist speech.

Furthermore, Delgado argues that racial insults can be viewed

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182 *Id.* at 2360. This seems to be an entirely non-constitutional argument. It is very dangerous to advocate the suspension of constitutional liberties on the basis of the danger such liberties pose to citizens—especially when arguing on behalf of "outsiders."

There can be little question that suspension of the fourth amendment would make the lives of many people—especially outsiders—a good deal safer and more secure. But I doubt that Matsuda would approve of even the slightest erosion of fourth amendment liberties in order to protect urban dwellers from crime.

183 *Id.* at 2378.

184 *Id.* at 2380.

185 Delgado, *supra* note 133, at 174.

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

187 Delgado, *supra* note 133, at 173-74.

188 *Chaplinsky*, 315 U.S. at 572. *See supra* note 7.

as obscenity directed at a captive audience.[189] He distinguishes racial insults from obscene statements such as the inscription "fuck the draft" in *Cohen v. California*.[190] There, the Court pointed out that viewers could avoid the offensive speech by averting their eyes.[191] The same cannot be said for racial insults: "One cannot avert one's ears from an insult. More importantly, a racial insult is directed at a particular victim; it is analogous to the statement 'Fuck you,' not the statement 'Fuck the Draft.' "[192]

The movement to ban racist speech presents an important alternative perspective for analysis of the harm such speech perpetrates. Approaching the question from the victim's perspective reveals the powerful effect that racist words can have on their victims. The movement's proponents also argue that suppression of racist speech would do little harm to the ideals of free expression and the rights embodied in the first amendment. It is not clear, however, that implementation of these proposals on a university campus would have only the benign effect that they suggest.

IV

THE "HARD CASE" OF UNIVERSITIES: WHAT IF THE *DOE* COURT HAD READ MATSUDA?

Under current Supreme Court precedent, proponents of a ban on racist speech at public universities would have to prove that the presence of racist speech might reasonably lead to "material[ ] and substantial[ ] interfere[nce] with"[193] university activities or "substantially interfere with the opportunity of other students to obtain an education."[194] In its decisions regarding the freedom of expression at universities, the Supreme Court made two points clear. First, refusal to suppress speech because of the offensiveness of its content does not interfere with the university's smooth operation, and second, allowing such speech is a vital element of the academic atmosphere.[195] That atmosphere, according to the Court, fosters "scholarship"[196] in the traditional sense, as well as the "exchange of ideas"[197] and "debate."[198] Matsuda fails to make a compelling case

189 *Id.* at 174.
190 Cohen v. California, 403 U.S. 15, *reh'g denied*, 404 U.S. 876 (1971).
191 *Id.* at 20.
192 Delgado, *supra* note 133, at 175.
193 Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 509 (1969) (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
194 Healey v. James, 408 U.S. 169, 189 (1972).
195 *See supra* text accompanying notes 84-128.
196 Sweezy v. New Hampshire, 354 U.S. 234, 250, *reh'g denied*, 355 U.S. 852 (1957).
197 Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).
198 *Healy*, 408 U.S. at 181.

that a ban on racist speech would not do substantial harm to the atmosphere so vital to the goals of a university. She also fails to show how the presence of racist speech sufficiently disrupts or interferes with the operation of the university to justify suppression of first amendment rights. Judging by the Supreme Court's standards, the *Doe* decision would not have changed even if Matsuda's arguments had been advanced.

A. Debate and the Exchange of Ideas

Like the Supreme Court, Matsuda recognizes that the first amendment has special meaning in the context of the university, because it is a place of personal growth, learuing, discourse, and the exchange of ideas.[199] But unlike the Court, Matsuda believes that these special concerns justify a narrower,[200] rather than a wider, scope of freedoms:

> Universities are special places, charged with pedagogy, and duty-bound to a constituency with special vulnerabilities. Many of the new adults who come to live and study at the major universities are away from home for the first time, and at a vulnerable stage of psychological development. Students are particularly dependent on the university for community, for intellectual development, and for self-definition. Official tolerance of racist speech in this setting is more harmful than generalized tolerance in the community-at-large.[201]

She thus sets the scene for a discussion of racist speech in universities by focusing on the victim rather than on the general context of academia.

Viewing campus speech from this perspective, Matsuda takes a drastically different view from the Supreme Court regarding the priority and nature of free discourse in the university setting:

> [Racist speech] is harmful to student perpetrators in that it is a lesson in getting-away-with-it-all that will have lifelong repercus-

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199 *See supra* text accompanying notes 84-128.

Matsuda recognizes that the free speech rights of students have led to important demonstrations of social and political awareness, and that those rights need to be safeguarded: "The campus free speech issues of the Vietnam era, and those evoked by the anti-apartheid movement, pit students against university administrators, multinational corporations, the U.S. military, and established governments. In the context of that kind of power imbalance, the free speech rights of students deserve particular deference." Matsuda, *supra* note 5, at 2371 (footnote omitted). Matsuda's willinguess to allow speech based on its place in the distribution of power is frightening. Surely the voice of those speaking on behalf of established institutions deserves equal protection.

200 It is surprising that Matsuda discusses universities in her section entitled "Hard Cases" because her reasoning suggests that the suppression of racist speech is more easily justified at a university than in other contexts.

201 Matsuda, *supra* note 5, at 2370-71 (footnote omitted).

> sions. It is harmful to targets, who perceive the university as taking sides through inaction, and who are left to their own resources in coping with the damage wrought.[202]

Matsuda's analysis, however, fails to account for the unique nature of the university.

First, she claims that allowing racist speech teaches students that such behavior is acceptable in the general community.[203] This view undervalues the importance of the university as a place which brings students from different backgrounds together in an atmosphere that might lead them to question the preconceptions with which they arrived. In fact, allowing free speech in universities can teach students to reconsider their racist views before heading into the real world. The university setting offers the victims of racist speech the chance to respond freely without fear of substantial backlash from people with more power. In the workplace, a victim of racist speech may have greater fears about responding to the racism of his boss, or even of a co-worker. He may lose his job for responding. The university provides more pathways and chances for a student to express exactly how that racism has made him feel, and to attempt to persuade other students of his position. The politics of the workplace may prevent him from doing that. In contrast, the campus setting may be the only place where a racist will hear the viewpoint of the minority.[204] It is far better to allow the racist to identify himself and to let the diverse community of the university confront his racism, than to silence his view so that he leaves the university with the same bigoted opinions as when he entered.

Matsuda totally rejects the Court's affirmation of the university as the "marketplace of ideas," in which the exchange of ideas—even wrong ones—allows students—even racists—to discover the truth rather than having the government tell it to them.[205]

Matsuda asserts that the victim of racist speech will perceive that the university sides with the racist by allowing him to speak and by leaving the student to cope with the damage.[206] Matsuda should acknowledge that universities in fact do many things that suggest they care about the welfare of the victim of racist speech.[207] But

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202 *Id.* at 2371 (footnote omitted).

203 *Id.*

204 *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 250 ("Teachers and students must always remain free to . . . gain new maturity and understanding."), *reh'g denied*, 355 U.S. 852 (1957).

Certainly a university offers the opportunity for those with racist views to change them through exposure to other views, cultures, and attitudes. A policy against racist speech could well discourage a racist student from even discussing his preconceptions.

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

206 Matsuda, *supra* note 5, at 2371.

207 Almost all universities have affirmative action programs in admissions and spe-

even on a campus wholly insensitive to the needs of minorities, a victimized student will be allowed full opportunity to voice his anger and disgust with the perpetrator. Outside the university he may not have that opportunity. In this sense, the university is a kind of training ground for the real world. To teach the victimized student that racist views do not exist and do not need to be reckoned with is unrealistic.[208]

Matsuda argues that minority students are, to a certain extent, a captive audience, with few places of retreat when racism appears on campus.[209] Again, this iguores the fact that the university setting offers outsiders a unique opportunity to stand their ground because all avenues of attack are open to them. The atmosphere offers them the chance to refute and to protest with no fear of official reprisal. A university cannot force outsiders to respond, but the fact that it offers them every chance to do so is a more powerful statement of devotion to true equality than a policy that suppresses the racist's speech.[210] To proscribe any kind of speech based on its content is the first step towards destroying that atmosphere of freedom that allows and encourages the victim to respond.

B. Inclusion, Education, Development of Knowledge, and Ethics

Matsuda also argues that allowing racist speech harms a number of other fundamental university goals: "Finally, it is a harm to the goals of inclusion, education, development of knowledge, and ethics that universities exist and stand for. Lessons of cynicism and

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cial academic development programs targeted at minority students. Similarly, over the last several years, universities have recognized the value of the study of third world cultures in a variety of fields. Many campuses sponsor theme houses, which focus on minority cultures. It can hardly be said, then, that universities ignore the problems of minorities. Finn, *supra* note 5, at 20. At the same time, as Matsuda points out, minorities are woefully underrepresented among professional academics. Matsuda, *supra* note 5, at 2371 n.253. And there is little doubt that institutionalized racism does exist in universities. The deplorable exploitation of African-American athletes is a prominent example.

208 At the risk of sounding insensitive, I would like to point to an example Matsuda provides earlier in the article: "As one student reported after watching harassment of an African-American professor at Dartmouth, 'That moment let me know that there are people in this world who hate you just because of your color. Not dislike you, or choose not to be friends with you, but hate you.' " Matsuda, *supra* note 5, at 2338 n.89 (citations omitted). Now presumably, the twentieth century has proven this notion to all of us. But I wonder if the student would have been better off believing that the harassers were his friends. Acknowledging the existence of race-hate seems to me a better policy than letting it lurk under the surface.

209 *Id.* at 2372.

210 Delgado, in his article on Race-IQ research, stresses that racist ideas do the most harm when the victim has no opportunity to respond. In the university setting, the victim has this opportunity. Delgado, *supra* note 58, at 196-97.

hate replace lessons in critical thought and inquiry."[211]

Certainly, the presence of one-sided racist speech harms the goal of inclusion. But the underlying philosophy that compels the university to allow racist speech is one whose primary values are tolerance and inclusion. While the immediate message the outsider student receives is one of hate, the overall message is one in which he shonld take comfort: that he too has the opportunity to think and to say whatever he wants with absolutely no fear of official condemnation. The university's value of inclusion is truly all-encompassing. Matsuda's proposal, although it means to protect racism's victims, is actually one of exclusion.

Contrary to Matsuda's assertion, allowing racist speech does not ultimately hinder the development of ethics. Even if we argue that racist speech has no discernible content, we cannot deny that it exists and that it will not disappear in the near future.[212] When the Supreme Court in *Sweezy* argued that free speech must reigu at universities in order to allow students to "gain new maturity and understanding,"[213] it had difficult questions of ethics in mind. To ignore the ethical problem of the existence of racism by suppressing its expression hides from the real problem.

Matsuda is worried that "cynicism and hate" will "replace lessons in critical thought and inquiry."[214] It is not clear that the existence of the former should necessarily mean the disappearance of the latter. Anyone with a brief acquaintance with the history of racism in America ought to be very cynical about the possibility of change. Cynicism, however, sometimes gives rise to critical thought and inquiry. While the whole community certainly would have been better off had it never occurred, the incident at Stanford involving the defaced Beethoven poster certainly resulted in a great deal of discourse regarding the nature of racism.[215] More importantly, however, as the Supreme Court suggested,[216] it is an unhealthy environment indeed in which students hesitate to discuss even very

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211 Matsuda, *supra* note 5, at 2371. To the extent that the presence of racism on campus discourages outsiders from attending public universities, her case is strong. She notes that some young African-Americans insist on attending predominantly African-American colleges in order to avoid racist attacks. *Id.* It is unclear, however, that a primary element accounting for the underrepresentation of African-Americans on campus is their fear of encountering racist speech.

212 The existence of racism raises a great many vital questions regarding living in a pluralistic society: What do you say to a racist?; Do racists have any rights at all?; How much force should be used in reforming racists?

213 Sweezy v. New Hampshire, 354 U.S. 234, 250, *reh'g denied*, 355 U.S. 852 (1957).

214 Matsuda, *supra* note 5, at 2371.

215 *See* Williams, *supra* note 19, at 2133-35.

216 *See, e.g., Sweezy*, 354 U.S. at 250 ("Scholarship cannot flourish in an atmosphere of suspicion and distrust.").

controversial subjects for fear of offending other students and thus incurring the wrath of the university administration. This is precisely the kind of devotion to orthodoxy,[217] or insistence on allegedly "good taste,"[218] from which the Supreme Court insists universities should be free.

Matsuda only briefly addresses the question of how her proposal might affect academic research.[219] Although she trusts the marketplace of ideas to prove racist theories wrong, it is not at all clear that implementation of her suggestions would not do severe damage to academic pursuits. Even under her narrowly drawn proposal, college students and professors may fear discussing controversial issues about race in the classroom[220] or even through research and publication.[221] The Supreme Court feared this chilling effect when

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217 *Id.* at 251.

218 Papish v. Board of Curators, 410 U.S. 667, 670, *reh'g denied*, 411 U.S. 960 (1973).

219 Matsuda, *supra* note 5, at 2364. She briefly discusses the "hard case" of the "Dead-wrong social scientist." *Id.* She trusts the filtering processes in academia to distinguish pseudo-scientific theories of race from genuine science: "Assuming the dead-wrong social-science theory of inferiority is free of any message of hatred and persecution, the ordinary, private solution is sufficient: attack such theories with open public debate, and with denial of a forum if the work is unsound in its documentation." *Id.* at 2365.

220 That this has already begun to happen is well-documented. Finn points out that "students have begun to monitor their professors and to take action if what is said in class irks or offends them." Finn, *supra* note 5, at 18. He recounts the following incident:

> Not long ago, the historian Stephan Thernstrom was accused by a student vigilante of such classroom errors as "read[ing] aloud white plantation owners' journals 'without also giving the slaves' point of view.'" Episodes of this kind, says Thernstrom, serve to discourage him and other scholars from even teaching courses on topics that bear on race and ethnicity.

Id. at 19 (citations omitted).

221 This issue has been addressed in regard to sexual harassment. *See, e.g.*, Gray, *supra* note 42. There she argues that judicial enforcement of anti-sexual harassment provisions might stifle academic freedom:

> Civil libertarians have always grappled with the prohlem of the advocacy of unpopular views. Defenders of academic freedom face such a problem when it comes to dealing with those accused of sexual harassment in the form of denigrating or offensive speech. What if a professor out of firm conviction or an attempt to stimulate discussion, asserts that women are incapable of becoming scientists? . . . What if the offensive behavior has no serious justification—like showing slides of nude women in anatomy class presentation? Might not female colleagues and students (or, indeed, male colleagues and students) complain that these incidents hinder their ability to work?

Id. at 1612. She goes on to argue against suppression of speech based on its content:

> Academic freedom must include the right to hold and express views offensive to many. Whether the expression of such views renders one unfit as a teacher is an inquiry that may be left to the faculty member's peers or, if the dismissal of a faculty member leads to litigation, to the courts. If, however, the question is whether courts should suppress comments that merely tend to make for a hostile workplace, the courts' role in regu-

it described the dangers of a "pall of orthodoxy."[222]

Nor do Delgado's and Kretzmer's arguments support Matsuda's position. They make a convincing case that suppression of racist speech would do only limited damage to the ideal of the pursuit of truth in the community, but they do not overcome the Supreme Court's empbasis on free speech in the academic community, where the ideals of pursuit of the truth[223] and self-fulfillment are most vital. Students and teachers must be free, as the Court says, to pursue all avenues of thought, even when they appear to be—or are—wrong.

CONCLUSION

Sometimes college students engage in speech intending that it lead to racial violence. These acts, it can safely be said, constitute fighting words, and deserve punisbment by the full force of the law. However, Matsuda fails to prove that tbis standard is not also sufficient in the context of a university. Indeed, there is compelling judicial support for the notion that a university should, at the very least, be a place where freedom of speech is commensurate to the standard observed outside of academia. To go beyond the accepted standard unnecessarily chills the atmosphere of freedom that the Supreme Court has deemed essential to the goals of the university.

Even if one accepts that the Supreme Court's attitude toward free speech at universities is inadequate, it is not clear that Matsuda is able to delineate a policy suppressing racist speech that would not significantly harm the values of free speech. In particular, the problem of vagueness, which plagued the University of Michigan's policy, causes great harm to the values of free expression.

As outlined above, Matsuda has formulated a fairly straight-forward calculus to judge the type of speech the university may ban. The speech must 1) be of racial inferiority; 2) be directed against a

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lating discrimination in employment and education should not extend to the regulation of the content of speech.

Id. at 1613 (footnotes omitted).

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

223 Gray makes a convincing case against the suppression of pornography, and argues that any attempts to protect women at universities through suppression of speech are better left untried, in the interests of academic freedom:

> Although it is difficult to defend pornography with any enthusiasm, those seeking to suppress what they define as harmful to women should remember that society suppressed birth control manuals as late as the 1950's. First amendment and academic freedom protection presents a "slippery slope," and absolutism is a preferable stance. Any attempt to limit the availability of written material or the speech of faculty and students, whether through sexual harassment complaints or through statutes . . . constitutes a threat to academic freedom.

Gray, *supra* note 42, at 1614-15.

historically oppressed group; and 3) be persecutorial, hateful, and degrading. Her formulation leaves so many gaps that even had the University of Michigan adopted the standard, the *Doe* court would have rejected it.[224] It forces students and professors alike to wonder about what can and cannot be said. To impose such a restriction on the academic community almost certainly chills its members' willingness to explore their own attitudes towards questions of race. It would also constrain discourse between the races for fear of offending one another.

Ultimately, Matsuda does not fully resolve these problems. The *Doe* court would have found the same problems in her formula—though to a lesser extent—that they found in the University of Michigan's ineptly formulated policy. Matsuda does not provide a new standard that adequately supersedes the Supreme Court's refusal to allow suppression of speech "simply because it [is] found to be offensive, even gravely so, by large numbers of people."[225] She has merely shown the extent of the harm done by racist speech, without actually showing how it somehow fits, or should fit, into an unprotected category of speech. This, to paraphrase the *Doe* court, is the fundamental infirmity of her proposition.

While the presence of racist speech on college campuses is deplorable, it cannot and should not be stopped through prohibiting rules. The university represents a unique forum that fosters the exchange of ideas, even patently offensive ones. To sanitize the atmosphere of the university in order to protect the sensibilities of the traditional victims of oppression would ultimately do little to eradicate the scourge of racism in this country, but would do a great deal to inhibit the discourse around which university learning revolves. The Supreme Court has recognized the state's right to redress real harm inflicted through violence and through fighting words. Universities can and must suppress violence and oppression on campus, but they should do nothing to stop the exchange of ideas—even offensive ones—lest they destroy the atmosphere essential to their purpose.

David Rosenberg

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224 The *Doe* court would have had to ask itself a series of difficult questions such as: Does the prohibition include artistic expression? Shall we remove Mein Kampf from the library? What is an historically oppressed group? How political must speech be before it is protected?

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