White Liberal Looks at Racist Speech

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I am sitting in my favorite reading place, reading Mari Matsuda’s article, Public Response to Racist Speech: Considering the Victim’s Story. I have finally overcome my vanity and have bought a seven dollar pair of reading glasses so that I can read the footnotes without squinting, and though my stereo is broken, I am able to listen to a new compact disc of the Mozart Clarinet Concerto on my Walkman. I am in hog’s heaven.

Then the phone rings and I hobble off to answer it. I almost miss the call; I can’t see the phone because of the reading glasses and I can’t hear what’s being said because of the earphones. I’ve always had perfect health, but for a second I get a glimpse of what it must be like to be dependent on (and limited by) physical aids and prosthetic devices. A minute later I read in Matsuda: “Legal insiders cannot imagine a life disabled in a significant way by hate propaganda.”

I am what in Texas is called a “Yellow Dog Democrat”: I’d sooner vote for an old yellow dog than for a Republican. Not only am I a card-carrying member of the American Civil Liberties Union (“ACLU”), but I’m also on the chapter and state affiliate boards, and I wrote the National ACLU’s amicus brief to the United States Supreme Court in Texas v. Johnson, the first flag-burning case. I am about as close to being an absolutist about the first amendment as a rational lawyer can be, but the problem of racist speech has me troubled. And Matsuda’s article and others by

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* Professor of Law, University of Houston Law Center. A.B. 1960, Cornell University; J.D. 1963, Columbia University School of Law. I am grateful to friends and colleagues of widely different outlooks who generously read and criticized the manuscript of this essay or discussed the topic with me at length. They include David Crump, Sashe Dimitroff, David Dow, Marc Franklin, David Gregory, Steven Huber, Bill Kaplin, Mari Matsuda, Micheal Olivas, Laura Oren, Irene Rosenberg, Rhea Stevens and Patricia Tidwell. m. elisabeth bergeron, Executive Articles Editor of the St. John’s Law Review, was invaluable.

2 Id. at 2375.
articulate writers of "outsider jurisprudence" almost have me convinced. Almost.

I. THE PROBLEM

Until recently I was convinced that America had a serious race problem, but that the problem was primarily economic, and no longer the result of raw prejudice. This was not to say that there was no prejudice left, but that it was relatively discrete; lower-income whites and old, rural southerners were still fond of words like "nigger" and "wetback," and there were still places where the civil rights acts were not enforced, but the bulk of the population was at least fairly tolerant of the notion that a person deserves a fair shake regardless of color.4

But I have seen enough evidence now to reject my conclusions about the eradication of traditional prejudice. An excellent student Note recently published gave examples of the happenings in contemporary university settings:

The reports of racist incidents on college campuses recur continually in the popular press. The National Institute Against Prejudice and Violence collected reports of seventy-eight incidents of racial violence or allegations of prejudice that occurred in the spring semester of 1988 alone, and that did not purport to be a comprehensive survey. The recurrence of old-fashioned intentional racism on campuses is the most obvious form of hostility, and a sampling demonstrates the ferocity of some such incidents, which have variously involved: graffiti containing swastikas and antiblack epithets; cross-burning; the protesting of an all-white fraternity's "White History Week" party; the shouting of racial slurs; the distribution of openly hostile leaflets; racial brawls; and black student class boycotts and protests. The comprehensive list of such incidents is much longer, and that list does not include unreported incidents, which may well be the majority.5

4 Affirmative action was another matter. Many (perhaps most) whites oppose affirmative action, and while I disagree, I am unwilling to call their opposition racist. How to break the connection between poverty and race is a serious problem, but to my mind disagreement about means is not prejudice pure and simple. One of the points of this essay is that "prejudice pure and simple" is itself simplistic. For a thoughtful analysis along these lines, see Pettigrew, New Patterns of Racism: The Different Worlds of 1984 and 1964, 37 Rutgers L. Rev. 673, 682-86 (1985).

Furthermore, many violent incidents occurring outside the college setting have made headlines: for example, Vincent Chin’s death by baseball bat in Detroit\textsuperscript{6} and the Howard Beach and Bensonhurst killings in New York City.\textsuperscript{7} The problem is real. The evidence has been put forth by many writers, citing both systematic studies and journalistic accounts.\textsuperscript{8}

II. THE SOLUTIONS PROPOSED

A number of proposals have been put forth to deal with “hate speech” through some form of legal sanction. They range from criminal statutes to tort remedies to a variety of university regulations. Even the ACLU has gotten into the act. The criminal statutes may make an existing crime, such as assault and battery, more serious if motivated by racial harassment,\textsuperscript{9} or make the uttering of offensive words a crime in itself, either as a form of harassment\textsuperscript{10}


\textsuperscript{9} See, e.g., ILL. ANN. STAT. ch. 38, para. 12-7.1(a), (b) (Smith-Hurd Supp. 1990) (“[a] person commits ethnic intimidation when, by reason of . . . race, . . . he commits assault. . . . [A]ny person who commits ethnic intimidation as a participant in a mob action . . . which results in the violent infliction of injury . . . shall be guilty of a Class 3 felony”); MASS. GEN. LAWS ANN. ch. 265, § 39 (West 1990) (“Whoever commits an assault or a battery upon a person . . . for the purpose of intimidation because of . . . [the] person’s race . . . shall be punished by a fine . . . or by imprisonment . . . or both”); MINN. STAT. ANN. § 609.2231(4)(a) (West 1991) (“Whoever assault another because of the victim’s or another’s actual or perceived race . . . may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both”).

\textsuperscript{10} See, e.g., N.Y. CIV. RIGHTS LAW § 40-c (2) (Consol. Supp. 1990) (“No person shall, because of race . . . be subjected to any discrimination in his civil rights, or to any harassment . . . in the exercise thereof, by any other persons . . . or by the state. . . .”); WASH. REV. CODE § 9A.36.080(1)(a)-(b), (3) (1990) (“A person is guilty of malicious harassment if he maliciously and with the intent to intimidate or harass another person because of . . . that person’s race . . . [c]auses physical injury to another person; or [b]y words or conduct
or as criminal group libel. Tort remedies have been suggested for many years, dating back to the seminal writing of sociologist and lawyer David Riesman during World War II. Most significantly, universities all over the country have been debating and adopting conduct codes forbidding racist and other forms of "hate speech" according to various formulas.

A. The Writers

Modern scholarship on the subject usually dates from Richard Delgado's *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*. Professor Delgado showed at some length that racial insults cause injuries of the type traditionally compensated by tort law. He reviewed ways in which traditional torts such as defamation and intentional infliction of emotional distress and statutory torts involving discrimination have been used in racial insult situations. He concluded, however, that none of the existing remedies work well and proposed the establishment of an "action for racial insult." Under the proposal, a plaintiff could recover by proving that

[l]anguage was addressed to him or her by the defendant that was intended to demean through reference to race; that the plaintiff understood as intended to demean through reference to race; and that a reasonable person would recognize as a racial insult.

Professor Delgado's proposal was quite modest and relatively limited. Whether racially demeaning language would be actionable would depend on the context of its utterence.

[A]n epithet such as "You damn nigger" would almost always be

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13 See Delgado, *supra* note 5.

14 Id. at 135-49.

15 Id. at 150-65.

16 Id. at 179.
found actionable, as it is highly insulting and highly racial. However, an insult such as "You incompetent fool," directed at a black person by a white, even in a context which made it highly insulting, would not be actionable because it lacks a racial component. "Boy," directed at a young black male, might be actionable, depending on the speaker’s intent, the hearer’s understanding, and whether a reasonable person would consider it a racial insult in the particular context. "Hey, nigger," spoken affectionately between black persons and used as a greeting, would not be actionable. An insult such as "You dumb honkey," directed at a white person, could be actionable under this formulation of the cause of action, but only in the unusual situations where the plaintiff would suffer harm from such an insult.\footnote{17}

Mari Matsuda, in what has become the leading article on the topic, proposed that we consider "racist hate messages" as unprotected by the first amendment if three characteristics are present: “1. The message is of racial inferiority; 2. [t]he message is directed against a historically oppressed group; and 3. [t]he message is persecutorial, hateful, and degrading.”  

Professor Matsuda gave very little detail on the specific remedies that she would make available to victims of an unprotected racist hate message. She said only that “a range of legal interventions, including the use of tort law and criminal law principles, is appropriate to combat racist hate propaganda.”\footnote{19} She elaborated in a footnote:

\footnote{17} Id. at 179-80 (footnotes omitted). In a footnote accompanying the last sentence of the quoted passage, Delgado stated that the cause of action was designed primarily to protect members of racial minority groups traditionally victimized, but that there were some circumstances where a racial insult might cause harm when directed to members of the majority. Id. at 180 n.275. He gave the example of a white child being called a “dumb honkey” by a black teacher in a predominately black school. Id. In this respect, Delgado offered somewhat more protection to whites than does Mari Matsuda, who requires that the message be “directed against a historically oppressed group.” Matsuda, supra note 1, at 2357. Professor Matsuda agreed that some whites would fit within the concept of a “historically oppressed group,” but focused more on group status than on the vulnerability of the person insulted in the particular incident. Id. at 2361-63. Although both Professors Delgado and Matsuda argued that members of the majority have greater support and “safe havens” from racial insults, and thus need less protection, they recognize that some majority members are nonetheless vulnerable and should be protected. Id. at 2358; Delgado, supra note 5, at 180; see also Wright, Racist Speech and the First Amendment, 9 Miss. Coll. L. Rev. 1, 14 (1988) (“[i]t is, at least, hardly self-evident that anti-black and anti-white speech must rationally be regarded as symmetrical harms in nature and degree”).

\footnote{19} Matsuda, supra note 1, at 2357.

\footnote{19} Id. at 2360 (footnote omitted).
In addition to judicial modification of first amendment analysis, the forms of remedy could include creation of a new crime of racist speech, enhanced sentencing for existing crimes where racial motivation is found, administrative mechanisms for fines and injunctive relief, civil actions for damages, or a combination of the above.20

Matsuda devoted her article to a description of the impact of racist speech on the victims, an analysis of first amendment law and an argument that by taking the victim’s perspective into account and narrowly defining prohibited speech with the three criteria set out above,21 one could, consistent with the values of freedom of speech, read the first amendment to exclude racist speech from its protection.22 She also considered several “gray area” case scenarios, and indicated where she thought line-drawing appropriate.23 For example, rather than stretching present exceptions to the first amendment like “fighting words” or obscenity, and rather than trying to conceal anti-racist laws in a neutral mask, “[i]t is more honest, and less cynically manipulative of legal doctrine, to legislate openly against the worst forms of racist speech, allowing ourselves to know what we know.”24

In the past few months there has been a flood of writing on the issue.25 One of the most notable and eagerly awaited articles

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20 Id. at 2360 n.207.
21 See supra note 18 and accompanying text.
22 Matsuda, supra note 1, at 2356-61.
23 Id. at 2361-73.
24 Id. at 2374.
was Charles Lawrence's *If He Hollers Let Him Go*, an expansion of Professor Lawrence's debate with Nadine Strossen at the Biennial Conference of the ACLU. Lawrence argued that *Brown v. Board of Education* was itself a regulation of racist speech:

*Brown* held that segregated schools were unconstitutional primarily because of the message segregation conveys—the message that black children are an untouchable caste, unfit to be educated with white children. Segregation serves its purpose by conveying an idea. . . . Therefore, *Brown* may be read as regulating the content of racist speech.

Lawrence also argued that distinctions between speech and conduct are inapposite ("[r]acism is both 100% speech and 100% conduct"), and that the distinction between public and private conduct is overdrawn in the area of racism:

When a person responds to the argument that *Brown* mandates the abolition of racist speech by reciting the state action doctrine, she fails to consider that the alternative to regulating racist speech is infringement of the claims of blacks to liberty and equal protection. The best way to constitutionally protect these competing interests is to balance them directly. To invoke the state action doctrine is to circumvent our value judgment as to how these competing interests should be balanced.

In this Symposium, Mary Ellen Gale, a noted civil libertarian, has challenged what she calls "the heroic ideal of the first amendment." Professor Gale concludes:

We can expand our vision of the first amendment beyond the libertarian paradigm—to acknowledge a more complicated world. We can regulate speech to combat the harms done when speakers themselves perpetuate prejudice and repression: silencing the voices of targeted victims, undermining equality, and decreasing both individual liberty and democratic dialogue. A more complex theory of free speech, informed by social context and lived experience, can take the harms of racist speech seriously and allow us to

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27 See *infra* notes 65 and 90-91, and accompanying text.
30 Id. at 444.
31 Id. at 446-47 (footnotes omitted). Professor Lawrence's article is up to his usual high standard, but I think he is well answered by Nadine Strossen in an article printed together with his in the Duke Law Journal. See Strossen, *supra* note 25, at 541-49.
weave a remedy into our continuing constitutional story of individual rights.3

B. The Universities

The issue's major battleground has become the universities. Some of the reasons are clear. As the number of non-white students has increased, particularly ugly forms of racism have become endemic on campuses that had prided themselves on their sophistication and tolerance of difference.4 Universities traditionally adopt regulations concerning student conduct, and their administrations are at least somewhat more susceptible to pressure from minorities than the government in general.

I have been told that more than one hundred universities have adopted some degree of regulation of racist speech. I will limit myself to the regulations of three state universities, Michigan, Texas, Wisconsin,5 and one private university, Stanford, each of which take a somewhat different approach.

A federal district court struck down as unconstitutional the University of Michigan's Policy on Discrimination and Discriminatory Harassment of Students in the University Environment (the "Policy"),6 and the university has since replaced it. As this deci-

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3 Id. at 184. Given time and space constraints, I cannot discuss Professor Gale's article in any depth. I do not think that she and I are really that far apart, just as I do not think that she and Nadine Strossen are that far apart. In fact, I find Gale's conclusions about what she would restrict much milder than her rhetoric. Similarly, I frequently noticed that after making fairly outrageous (and in my lights irritating) remarks in text, Gale felt obliged to modify them in her supporting footnotes. For instance, though she states in text that: "[h]eterosexual white males . . . often exalt the heroic ideal of the first amendment while seldom, if ever, suffering its consequences," she immediately follows this with a footnote conceding that "I realize that the statement in the text is easy to undermine," and appends a list of eleven people who are either heterosexual white males who do not exalt "the heroic ideal" or are white women or people of color who do. Id. at 138 n.58 and accompanying text. I conclude that Professor Gale would like to be more radical than her considerable legal and academic ability allows her to be.

4 See supra note 5 and accompanying text.

5 Each of the three state universities is actually a system with several campuses. The Michigan and Texas regulations applied only to their main campuses, at Ann Arbor and Austin respectively. The Wisconsin regulations seem to apply to the entire university system.

6 See Doe v. University of Michigan, 721 F. Supp. 852, 866-67 (E.D. Mich. 1989); see also Emory Note, supra note 25, at 1357-78 (extensive discussion of both University of Michigan policy and Doe decision); Comment, First Amendment—Racist and Sexist Expression on Campus—Court Strikes Down University Limits on Hate Speech—Doe v. University of Michigan, 103 HARV. L. RSV. 1397 (1990) (further analysis of the court's opinion); infra notes 108-14 and accompanying text (in-depth discussion of Doe court's analysis).
RACIST SPEECH

sion is the only judicial opinion on this topic thus far, it warrants a
detailed examination. The Policy subjected to university discipline

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 aca-
demic 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. 37

Section 1(c) was withdrawn less than three months after the Policy
took effect (but after the federal lawsuit had been filed), on the
ground that "a need exists for further explanation and clarifica-
tion" of the provision. 38

Together with the Policy, the university issued an official "Inter-
pretive Guide" ("Guide") that contained a number of poorly
thought out illustrations of what constituted violations of the Pol-
cy. The Guide was a major reason that the court invalidated the
Policy, primarily because, together with the university's actual en-
forcement, it revealed the Policy's overbreadth and demonstrated
its potential for misapplication by well-meaning but overzealous
administrators. 39

Some parts of the Policy, dealing with physical behavior and
express threats, are not particularly controversial and do not re-
quire examination here. For our purposes, we may concentrate on
the fact that the Michigan approach focused on "verbal behav-

37 Doe, 721 F. Supp. at 856.

38 Id. at 856. The Policy had a second section dealing with "[s]exual advances, requests
for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual
on the basis of sex or sexual orientation," which had provisions paralleling sections 1(a)-(c).
Id. Section 2(c) was not withdrawn. Id.

39 See id. at 861-67. The Interpretive Guide helped give the plaintiff standing, as dis-
cussed infra notes 109-11 and accompanying text. On the standing question, the court
stated, "[I]f the plain language of the policy were all the Court had before it, it would prob-
ably conclude that Doe had failed to demonstrate a reasonable probability that the Policy
would be construed to cover his anticipated speech. ... The slate was not so clean, how-
ior” that “stigmatizes or victimizes” an individual on the basis of any of a rather long list of factors. In addition, the complainant had to show either a threat, express or implied, or an intention or reasonably foreseeable effect of interfering with the individual’s academic efforts, employment, extracurricular participation or personal safety. While the “stigmatizes or victimizes” language is vague, the additional requirement did have a narrowing effect. Section 1(c), had it not been withdrawn, would have been very troublesome, since what “[c]reates an intimidating, hostile or demeaning environment” is more difficult to define than threats and purposes. Even without section 1(c), a complainant had a case, on the text of the Policy, if she could prove that the speech “victimized or stigmatized” her on one of the forbidden grounds, and had the reasonably foreseeable effect of interfering with the complainant’s academic efforts.

The University of Wisconsin’s rules permit discipline of a student

[f]or racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets, other expressive behavior or physical conduct intentionally:

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

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

Intent is to “be determined by consideration of all relevant circumstances.” The Wisconsin Administrative Code contains, along with its rules, three illustrations of violative conduct.

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

1. A student would be in violation if:

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40 This kind of double-talk is just a rhetorical way to avoid the word “speech.”
41 Some of these factors approach the trivial (“[y]ou old, married, Vietnam-era Vet” would seem to violate the Policy three times).
42 Wis. ADMIN. CODE § UWS 17.06(2)(a) (1989).
43 Id. § UWS 17.06(2)(b).
a. He or she intentionally made demeaning remarks to an individual based on that person's ethnicity, such as name calling, racial slurs, or "jokes"; and
b. His or her purpose in uttering the remarks was to make the educational environment hostile for the person to whom the demeaning remark was addressed.

2. A student would be in violation if:
a. He or she intentionally placed visual or written material demeaning the race or sex of an individual in that person's university living quarters or work area; and
b. His or her purpose was to make the educational environment hostile for the person in whose quarters or work area the material was placed.44

A fourth and last illustration gives an example of what is not considered a violation:

A student would not be in violation if, during a class discussion, he or she expressed a derogatory opinion concerning a racial or ethnic group. There is no violation, since the student's remark was addressed to the class as a whole, not to a specific individual. Moreover, on the facts as stated, there seems no evidence that the student's purpose was to create a hostile environment.45

The University of Texas proposal46 rejects the stigmatization or victimization approach of the University of Michigan which had been declared unconstitutional before the Texas report appeared.47 Instead, it takes a double approach. Somewhat like the Wisconsin rules, it provides that physical misconduct can be treated as an aggregated offense for university disciplinary purposes if it has a discriminatory purpose.48 This is not terribly controversial.49 With

44 Id. § UWS 17.06(2)(c)(1)-(2). A third illustration makes the destruction of property with a discriminatory motive a violation. Id. § UWS 17.06(2)(c)(3).
45 Id. § UWS 17.06(2)(c)(4). Compare id. with infra notes 111-12 and accompanying text (addressing University of Michigan's Interpretive Guide which described similar conduct as sanctionable). On the Wisconsin rules, see generally Hodulik, supra note 25 (discussion by University's senior system legal counsel).
46 See Report of President's Ad Hoc Committee on Racial Harassment (Nov. 27, 1989) [hereinafter Texas Report]. The Committee was comprised of three students, three faculty members, and three administration members, and was chaired by Mark G. Yudof, Dean of the University of Texas Law School, and a prominent civil libertarian.
47 Id. at 16-17.
48 Id. at 7-8, 10-11.
49 This approach is used in the federal civil rights acts and in many local criminal statutes that already make the underlying act a crime regardless of motivation. See, e.g., Cal. Penal Code § 1170.75 (Deering 1990) (racial motivation is factor in felony sentencing).
respect to speech alone, the Texas plan focuses on the intentional infliction of emotional harm. It prohibits "racial harassment," and, building on section 46 of the Restatement (Second) of Torts, it defines "racial harassment" as "extreme or outrageous acts or communications that are intended to harass, intimidate, or humiliate a student or students on account of race, color, or national origin and that reasonably cause them to suffer severe emotional distress." The commentary on the proposal conceded that its formulation substitutes "acts or communications" where the Restatement uses "conduct," but insisted that this was "in the nature of a clarification and not a substantive revision." Violation could lead to punishment ranging from an admonition to expulsion.

Stanford University is a private institution that, under current views of state action, is not subject to the first amendment. Nonetheless, the proposal to add a racist speech "Interpretation" to Stanford's "Fundamental Standard" led to a constitutional debate involving the cream of Stanford Law School's faculty. Stanford's Fundamental Standard, written in 1896, states: "Students at Stanford are expected to show both within and without the University such respect for order, morality, personal honor and the rights of others as is demanded of good citizens. Failure to do this will be sufficient cause for removal from the University."

The "Interpretation," created by Stanford's Student Conduct Legislative Council, begins with a strong statement of commitment to the principles of free inquiry and free expression, including toleration "even of opinions which [students] find abhorrent." It

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61 Id. at 4-5.
62 Id. at 12. The full passage reads:
The primary difference is that the recommended policy refers to "acts or communications," whereas [section] 46 generically refers to "conduct." Since the tort of intentional infliction of emotional distress always has included harms brought about by "verbal conduct," the change in wording is in the nature of a clarification and not a substantive revision.

Id.

63 Id. at 6-7.
64 Paul Brest, Bill Cohen, Tom Grey, Robert Rabin, Charles Lawrence and Gerald Gunther all took part, and the opposing positions of Lawrence and Gunther were reprinted in the Stanford Lawyer. See Good Speech, Bad Speech—Should Universities Restrict Expression That Is Racist Or Otherwise Denigrating? Two Views . . ., STANFORD LAW. 4, 7 (Spring 1990) [hereinafter Good Speech, Bad Speech].
65 Stanford University, Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment 1 (June 1990) [hereinafter Stanford Interpretation].
66 Id. para. 1.
continues, that “Stanford is also committed to principles of equal opportunity and non-discrimination” because of race and other factors. Thus, “[h]arassment of students on the basis of any of these characteristics contributes to a hostile environment that makes access to education for those subjected to it less than equal. Such discriminatory harassment is therefore considered to be a violation of the Fundamental Standard.”

The two remaining paragraphs of the Interpretation contain the operative provisions:

3. This interpretation of the Fundamental Standard is intended to clarify the point at which protected free expression ends and prohibited discriminatory harassment begins. Prohibited harassment includes discriminatory intimidation by threats of violence, and also includes personal vilification of students on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.

4. Speech or other expression constitutes harassment by personal vilification if it:
   a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and
   b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and
   c) makes use of insulting or “fighting” words or non-verbal symbols.

In the context of discriminatory harassment by personal vilification, insulting or “fighting” words or non-verbal symbols are those “which by their very utterance inflict injury or tend to incite to an immediate breach of the peace,” and which are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.

Appended to the Interpretation is a very thoughtful series of comments in the form of questions and answers. It limits the application of disciplinary action to face-to-face or similar insults intentionally directed at a single person or a small group of individu-

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57 Id. at para. 2.
58 Id. at paras. 3-4 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)); see infra notes 157-68 and accompanying text (discussion of Chaplinsky’s “fighting words” doctrine). The University of Texas Ad Hoc Committee expressly disclaimed reliance on the fighting words approach. TEXAS REPORT, supra note 46, at 17-20.
Moreover, only those words and symbols that are "understood across society as a whole" as insulting or offensive to members of the groups covered in the Interpretation would be sanctioned.

The kinds of expression covered are words (listed, not exhaustively, and with apologies for the affront involved even in listing them) such as "nigger," "kike," "faggot," and "cunt"; symbols such as KKK regalia directed at African-American students, or Nazi swastikas directed at Jewish students. By contrast, a symbol like the Confederate flag, though experienced by many African-Americans as a racist endorsement of slavery and segregation, is still widely enough accepted as an appropriate symbol of regional identity and pride that it would not in our view fall within the "commonly understood" restriction. The direction of profanities or obscenities as such at members of groups subject to discrimination is also not covered by the interpretation, nor is expression of dislike, hatred, or contempt for these groups, in the absence of the gutter epithets or their pictorial equivalents.\(^\text{60}\)

The sincerity of the attempt to keep the Interpretation within narrow bounds is apparent. However, the distinction between the Confederate flag and the swastika, while tenable, points up the subjectivity involved in defining what words or symbols are "commonly understood" to be insulting to the groups covered by the Interpretation.\(^\text{61}\)

The Interpretation also makes clear that it concerns only words and symbols and not ideas, however racist or hurtful:

Making the prohibition so narrow leaves some very hurtful forms of discriminatory verbal abuse unprohibited. Substantively, this restriction is meant to ensure that no idea as such is proscribed. There is no view, however racist, sexist, homophobic, or blasphemous it may be in content, which cannot be expressed, so long as those who hold such views do not use the gutter epithets or their equivalent. Procedurally, the point of the restriction is to give clear notice of what the offense is, and to avoid politically charged contests over the meaning of debatable words and symbols in the

\(^\text{59}\) STANFORD INTERPRETATION, supra note 55, at 2-3.

\(^\text{60}\) Id. at 4.

\(^\text{61}\) The Interpretive Guide issued by the University of Michigan to flesh out its Policy reached the opposite conclusion and declared that it was harassment if "[y]ou display a confederate flag on the door of your room in the residence hall." Doe v. University of Michigan, 721 F. Supp. 852, 858 (E.D. Mich. 1989); see infra text accompanying note 113.
context of disciplinary proceedings.\footnote{Stanford Interpretation, supra note 55, at 4 (emphasis in original).}

C. The American Civil Liberties Union

The National ACLU recently adopted a policy statement deploiring racism and other biases on campus and calling for aggressive educational methods to deter them.\footnote{American Civil Liberties Union, Policy Statement on Free Speech and Bias on College Campuses (October 13, 1990) [hereinafter ACLU Policy Statement].} The preamble to the policy statement says that “some” have set up a dichotomy of either restrictions on speech or acceptance of bias as unremediable, but that “[t]he ACLU rejects both these alternatives and reaffirms its traditional and unequivocal commitment both to free speech and to equal opportunity.”\footnote{Id. at 1.} The policy itself provides in part:

1. Freedom of thought and expression are indispensable to the pursuit of knowledge and the dialogue and dispute that characterize meaningful education. All members of the academic community have the right to hold and to express views that others may find repugnant, offensive, or emotionally distressing. The ACLU opposes all campus regulations which interfere with the freedom of professors, students and administrators to teach, learn, discuss and debate or to express ideas, opinions or feelings in classroom, public or private discourse.

2. The ACLU has opposed and will continue to oppose and challenge disciplinary codes that reach beyond permissible boundaries into the realm of protected speech, even when those codes are directed at the problem of bias on campus.

3. This policy does not prohibit colleges and universities from enacting disciplinary codes aimed at restricting acts of harassment, intimidation and invasion of privacy. The fact that words may be used in connection with otherwise actionable conduct does not immunize such conduct from appropriate regulation . . . \footnote{Id. at 1-2 (footnotes omitted). The policy continued by warning against overbreadth and noting that the ACLU had opposed several codes that it deemed overbroad. It also called for universities to take affirmative steps to reduce the problem by education, communication, increases in minorities on campus, course offerings, orientation, and counseling and “such other steps as are consistent with the goal of ensuring that all students have an equal opportunity to do their best work and to participate fully in campus life.” Id. at 3.}

The ACLU policy states that the constitutionality of disciplinary codes has to be considered on an individual basis, but it does not address the hard question of whether the first amendment permits
any sanctions against speech.\textsuperscript{66}

The California affiliates of the ACLU, however, have adopted a somewhat more explicit policy about harassment on college campuses.\textsuperscript{67} The California ACLU Policy begins with a preamble reiterating the ACLU's commitment to "protecting freedom of speech to guarantee the free exchange of ideas," including abhorrent ones expressed offensively. It also sets forth a commitment to full participation in the education process on a non-discriminatory basis, and claims that harassment of minority students based upon their minority status could functionally exclude them from such full participation.

In light of the First Amendment considerations outlined above, however, any attempt to punish such harassment must be carefully drawn so as to address the severe or pervasive nature of the conduct as directly as possible, and to avoid infringement on the First Amendment protected expression of even repugnant ideas. In particular, campus policy should not bar the ability of professors to teach their philosophies or students to express their views no matter how offensive, but must instead focus on speech or expression used as a weapon to harass specific victims on the basis of their protected status.\textsuperscript{68}

The California ACLU Policy itself provides that campus administrators "are obligated to take all steps necessary within constitutional bounds to minimize and eliminate a hostile educational environment which impairs access of protected minorities to equal educational opportunities."\textsuperscript{69} The policy refers to administrators speaking out vigorously against hate speech, promoting equality, mutual accommodation, and understanding among the minority groups and the rest of the college community, by assuring diversity among faculty, staff, students and administration, and eliminating

\textsuperscript{66} The ACLU also devoted a plenary session at its biennial national meeting in June of 1989 to a debate over the issue between Professor Charles Lawrence of Stanford and Nadine Strossen, one of the ACLU's General Counsel, and now its President. See AMERICAN CIVIL LIBERTIES UNION, BIENNIAL CONFERENCE REPORT 1989, at 9-19 [hereinafter ACLU CONF. REP.]; see also Lawrence, supra note 25, at 438-39 (arguing that Constitution requires some regulation of racist speech); Strossen, supra note 25 passim (responding to Professor Lawrence's article).

\textsuperscript{67} There are three ACLU affiliates in California, the ACLU of Northern California, Southern California, and San Diego. Each has adopted the same policy, with minor conforming changes. I have quoted from the Southern California version.

\textsuperscript{68} ACLU of California, Policy Concerning Harassment on College Campuses (1990) [hereinafter California ACLU Policy] (copy on file with the St. John's Law Review).

\textsuperscript{69} Id.
discrimination on campus. Thus far, the California Policy does not differ much from the National Policy. However, the California Policy, without explicitly advocating the enforcement of restrictions on speech, implicitly approves narrow limitations:

Campus administrators may not, however, enact campus codes of conduct prohibiting discriminatory harassment of students, faculty, administrators and staff on the basis of speech or expression unless at a minimum all of the following conditions are met:

1. The code of conduct reaches only speech or expression that:
   a) is specifically intended to and does harass an individual or specific individuals on the basis of their race, sex, religion, sexual orientation, national alienage; or ethnic origin, and
   b) is addressed directly to the individual or individuals whom it harasses; and
   c) creates a hostile and intimidating environment which the speaker knows or reasonably should know will seriously and directly impede the educational opportunities of the individual or individuals to whom it is directly addressed . . . .

Professor Mary Ellen Gale of Whittier College School of Law, a participant in this Symposium, was a principal drafter of the California ACLU Policy. In a letter to the New York Times she defended it, noting that, as of the date of her letter, it was narrower than any university's "speech code." "Offensive speech—in classroom debates, public discourse or private conversation—is something students must endure or challenge with speech of their own; harassment that threatens personal safety and educational opportunity is not." 71

Thus, a number of approaches attempt to remedy this admittedly serious problem. However, there is no agreement on how a particular policy squares with the first amendment.

70 Id. at para. 1. Paragraph 2 of the California Policy calls for due process in enforcement of any code of conduct and promulgation of illustrations showing when the policy does and does not apply.

71 N.Y. Times, July 28, 1990, at 20, col. 5. Professor Gale's letter was dated July 5, though it was not published by the Times for another three weeks. Although the Stanford Interpretation, supra note 55, is dated June, 1990, it was not available until somewhat later, and it is not clear whether Professor Gale was including the Stanford approach in her statement. The Stanford Interpretation seems very close to paragraphs 1(a) and 1(b) of the California ACLU Policy, but it uses a "fighting words" standard where the ACLU requires in paragraph 1(c) that the forbidden speech "create a hostile and intimidating environment."
III. THE OBVIOUS CRITICISMS

I appreciate the severity of the problem of racist and other hurtful speech. I also accept the good faith of those who have proposed restrictions on it. The administration at the University of Michigan was sympathetic to the first amendment; Mark Yudof, the Dean of the University of Texas Law School, who chaired his university's regulation-writing committee, has a long record of active support of constitutional rights; and Mary Ellen Gale, author of the California ACLU Policy, is a member of the National Board of the ACLU and a leader of the ACLU of Southern California. Charles Lawrence, Mari Matsuda, and Patricia Williams, whose ideas I will discuss, all have a sincere and strong belief in the freedoms of speech and press. The institutions and writers who have supported restrictions on racist speech, for the most part, have done so with reluctance, convinced that the great intrusion of racism causes unspeakable pain to its victims and destroys our aspirations towards a society based on equality. To them, this combination requires us to act.

Pastor Martin Niemöller saw, too late, that he had been morally required to speak out against the Nazis, and while the analogy is not perfect, we do well to remember his words:

In Germany, they came for the Communists, and I didn't speak up because I wasn't a Communist. Then they came for the Jews, and I didn't speak up because I wasn't a Jew. Then they came for the trade unionists, and I didn't speak up because I wasn't a trade unionist. Then they came for the Catholics and I didn't speak up because I was a Protestant. Then they came for me . . . , and by that time no one was left to speak up.\(^\text{72}\)

Even accepting the individual and collective anguish caused by racist speech, and accepting the effect of racist speech in undoing our imperfect steps toward equality,\(^\text{73}\) there are several obvious criticisms that we cannot ignore, and that we dare not minimize.

\(^{72}\) Peter's Quotations 22-23 (L. J. Peter ed. 1977). Niemöller was referring to his failure to speak, as a private citizen against acts of government, while we are dealing here with the failure of government to act against speech by private citizens. I think, though, that the spirit of Niemöller's statement summarizes one serious justification for intervention against racist speech.

\(^{73}\) Particularly in the university setting, many other types of "hate speech" have been proscribed besides racist speech. I will not ignore all of these other categories, but I will concentrate on racist speech, because it puts forth most graphically the collision between the ideals of free speech and equality.
A. The Two Slippery Slopes

Slippery slopes, while difficult to limit, are always present in law.74 The slippery slope argument is heard every time social change is called for, whether the call is to limit maximum hours worked by bakers, as occurred in 190571 or to set aside construction contracts for minority businesses in 1989.76 But where the first amendment is concerned, the slippery slope argument has great force. Most of us understand that speech undeserving of protection usually comes from an unpopular and unsympathetic source; in fact, many times the person or institution asserting the first amendment right is downright slimy. Yet we have seen, even in America, that little exceptions grow larger. As Justice Brennan once wrote, “the censor’s business is to censor.”77

For instance, the foundation case on prior restraint involved an anti-semitic scandal sheet,78 but the Nixon administration relied on dictum in the case79 when it tried to enjoin the New York Times and the Washington Post from publishing the Pentagon Papers during the Vietnam War.80 The Supreme Court held, in 1951,
that leaders of the American Communist Party were different from ordinary political speakers because they sought to undermine our constitutional democracy by force; thus, they could be sent to prison.\footnote{Dennis v. United States, 341 U.S. 494, 509 (1951).} This not only received popular support, but was advocated by many broad first amendment constructionalists.\footnote{See, e.g., S. Hook, HERESY, YES—CONSPIRACY, No. 94-119 (1953) (discussion of Smith Act, which makes it illegal to advocate or conspire to overthrow government by force). For a contemporaneous criticism of Hook as being too tolerant, see W. Berns, FREEDOM, VIRTUE & THE FIRST AMENDMENT 209-17 (1957).} It wasn’t long, however, before small-time bureaucrats used this argument to fire a subway conductor who would not answer questions about his membership in a “subversive group”\footnote{See Lerner v. Casey, 357 U.S. 468, 471, 478-79 (1958).} and to deny bar admission to an applicant who refused to say whether he belonged to the Communist Party.\footnote{See Konigsberg v. State Bar of California, 366 U.S. 36, 38 (1961). Justice Harlan’s opinions in both Konigsberg, see id. at 41-42, and Lerner, 357 U.S. at 478-79, were based on the right of a public employer or licensor to candor, but underlying the opinions was the assumption that the American Communist Party was different in kind from other political organizations, a fact thought to justify the inquiry in the first place.} These actions were upheld by the Supreme Court. The Earl Warren Supreme Court! With a Supreme Court that is less sensitive to freedom of speech issues, we must be even more wary of regulating any restriction on speech. In the case of racist speech, I see not one, but at least two slippery slopes.

1. The First Slippery Slope: Why Only Racism?

A common justification for restriction is that racism is simply different from other forms of hateful speech. Mari Matsuda has argued that:

Racist speech is best treated as a \textit{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.\footnote{Matsuda, supra note 1, at 2357.}

She cited David Kretzmer who wrote:

My claim that speech is unique rests on two factors. The first is the catastrophic historical experience with racism, an experience which reached its most hideous manifestations in modern times. The second is the universal formal condemnation of racism. Ra-
RACIST SPEECH

racism is not a political philosophy adopted by some and rejected by others; it is a phenomenon castigated by peoples of divergent political and general philosophies. It has become the one ideology outlawed by international law.\textsuperscript{88}

Richard Delgado, whose article, \textit{Words That Wound},\textsuperscript{87} is an important precursor of the current debate, never quite asserted a uniqueness argument, but devoted the first half of his article to the special, and catastrophic, nature of racism.\textsuperscript{88} Professor Delgado stated his thesis even more explicitly in a recent essay:

Few acts of clear-cut racism come into the field of vision of most white people; when they do, they cause a deep impression. Minorities, by contrast, live in a world dominated by race. We experience racial treatment every day of our lives. We are bathed in it. A high percentage of our social interaction is tinged by it. And, when we meet with others of color, we trade stories of racial treatment and how our friends are dealing with it. Race is a recurring reality of our lives.\textsuperscript{89}

And Charles Lawrence, author of an influential study of unconscious racism in America,\textsuperscript{90} told the Biennial Conference of the ACLU that the marketplace of ideas was tainted by race:

The idea of an American marketplace of ideas was founded with the idea of racial inferiority of non-whites as cheap commodities. . . . Ever since, racism has remained, arguably, the market's most active item of trade. It's not just the prevalence and strength of the idea of racism that makes the unregulated marketplace of ideas an untenable place for those who seek full personhood for all . . . . The problem . . . is that the irrational and often uncon-
scious idea of racial inferiority of non-whites is a disease which infects and disables the operation of the market. Racism makes the words of blacks and other minorities less saleable.\textsuperscript{91}

I accept the factual predicates asserted by these writers. Our history and the testimony of the daily victims of racism make a powerful case. The problem remains, however, that I have heard and read similar arguments, made just as passionately, by others who have called some other form of communication so odious and harmful that its suppression was also justified—even within a strongly protective view of free speech. Consider the arguments of veterans' groups over flag-burning:

The American people revere and respect the flag. There are no comparable laws or reservoirs of public feeling for other national symbols . . . as there is for the Stars and Stripes. Consequently, the flag can be considered sui generis. . . . By desecrating the flag, by burning it in a public place, as well as by shouting "Fuck you, America," the demonstrators were in effect cursing passersby and destroying an object that most Americans hold dear and revere, a symbol that in fact represents them individually and collectively. A veteran who fought in combat to preserve the flag, a person whose father or husband gave his life for that flag in service to the country, or any patriotic citizen who loves his country and cherishes the freedoms the flag stands for, would likely intervene to protect the flag against destruction. To most people, an assault on the flag constitutes an assault on them as well. The fact that the crowd was restrained in this case does not deprive Texas of authority to prohibit conduct likely to undermine that restraint.\textsuperscript{92}

\textsuperscript{91} ACLU Conf. Rep., supra note 66, at 12. For a much expanded version of the talk under the title If He Hollers, Let Him Go, see Lawrence, supra note 25.

\textsuperscript{92} Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae of the Washington Legal Foundation, Veterans of Foreign Wars of the U.S., National Flag Foundation, Amvets, Air Force Association, and the Allied Educational Foundation in Support of Petitioner, at 11, 15, Texas v. Johnson, 109 S. Ct. 2533 (1989). Similar arguments can be found in the Brief for Petitioner at 10 ("it is fundamental that the flag of the United States is a unique, important symbol of nationhood and unity") and in Justice Stevens’ dissent in Johnson:

The question is unique. In my judgment rules that apply to a host of other symbols, such as state flags, armbands, or various privately promoted emblems of political or commercial identity, are not necessarily controlling. Even if flag burning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable.

\textit{Johnson}, 109 S. Ct. at 2556 (Stevens, J., dissenting).

For a perceptive view of this "totemic" attitude toward the flag, see McBride, "Is Noth-
Consider also Andrea Dworkin’s argument against pornography:

Now, we have been told that we have an argument here about speech, not about women being hurt. And yet the emblem of that argument is a woman bound and gagged and we are supposed to believe that is speech. Who is that speech for? We have women being tortured and we are told that is somebody's speech. Whose speech is it? It's the speech of a pimp, it is not the speech of a woman . . . . Pornography is a civil rights issue for women because pornography sexualizes inequality, because it turns women into subhuman creatures . . . . We need civil rights legislation because only those to whom it has happened know what has happened. They are the people who are the experts. They have the knowledge. They know what has happened, how it's happened; only they can really articulate, from beginning to end, the reality of pornography as a human rights injury . . . . We need civil rights legislation because, as social policy, it says to a population of people that they have human worth . . . . that this society recognizes that they have human worth. It is significant that while Mari Matsuda has built a great deal of her argument for restrictions on racist speech on the narrowness of her definition and on the uniqueness of the problem of racism, she also cited Dworkin and the feminist anti-pornography legislation in supporting her belief that violent pornography and anti-gay and anti-lesbian hate speech also "require public restriction." Americans were appalled when the Ayatollah Khomeini put a death sentence on Salman Rushdie for blaspheming the Prophet Mohammed in The Satanic Verses. Of course, that couldn't happen here—not literally. But Martin Scorsese's film, The Last


94 See Matsuda, supra note 1, at 2360. Treating racist speech as sui generis and universally condemned on the basis of its content and the harmful effect of its content is precisely the censorship that civil libertarians fear. I would argue, however, that explicit content-based rejection of narrowly defined racist speech is more protective of civil liberties than the competing-interests tests or the likely-to-incite-violence tests that can spill over to censor forms of political speech.

11 Id. (footnote omitted).

95 Id. at 2332. Professor Matsuda made this remark as an aside, stating that pornography raised different issues and required separate analysis beyond the scope of her article, but her remark shows how "unique" exceptions can grow, spawning other "unique" exceptions.
Temptation of Christ, similarly outraged Christians because it depicted Christ as imagining himself married to Mary Magdeline. The movie's opponents called for its suppression on the ground that even a serious literary work should not be protected by the first amendment when it tarnishes the most basic beliefs of innocent people.

Finally, consider the "War on Drugs." It has a laudable purpose, at least with respect to children, yet it has already led to intrusions on the guarantees against unreasonable searches and seizures and self-incrimination, particularly when pregnant women are involved.99 In at least one case, a new mother was convicted of delivery of an illegal substance to a minor, based on the transfer of her drug tainted blood occurring between the moment of her child's birth and the cutting of its umbilical cord.97

In Skinner v. Railway Labor Executives Association,98 the United States Supreme Court, in a divided opinion, upheld the required testing of railroad personnel who had been involved in a train accident. Because most people would prefer not to ride on a train being operated by an engineer who is either drunk or stoned, the decision was not widely contested. On the same day, however, the Court relied on Skinner to uphold a broad testing policy for many employees of the Customs Service in National Treasury Employees Union v. Von Raab.99 Justice Antonin Scalia, who had joined in Skinner, now vigorously dissented, suggesting that at least for him, this was too far down the slippery slope:100

I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making

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99 See Paltrow, When Becoming Pregnant is a Crime, ix CRIM. JUST. ETHICS 1, 41-47 (Winter/Spring 1990) reprinted in, 20 ACTIVISTS' QUARTERLY 1, 6-7 (Houston Chapter, ACLU, Summer 1990).
100 Id. at 680-81 (Scalia, J., dissenting).
Today, in Skinner, we allow a less intrusive bodily search of railroad employees involved in train accidents. I joined the Court's opinion there because the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm, rendered the search a reasonable means of protecting society. I decline to join the Court's opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely.

Id. (Scalia, J., dissenting).
a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.\textsuperscript{101}

The real problem is that everybody has “so worthy a cause.”\textsuperscript{102}

2. The Second Slippery Slope: What Speech Is Racist?

I find it noteworthy that in the catalogue of on-campus racist incidents quoted earlier,\textsuperscript{103} the cataloguers included as a racist incident a fraternity party celebrating “White History Week.” Assuming, as is likely, that the party was a malevolent parody of Black History Month, should this kind of bad taste be subject to official sanction?\textsuperscript{104} Even if we accept the idea that racist speech should be curbed officially, how do we define what racist speech is actionable?

A major problem with any restriction on speech is that it will tend to be overbroad. As has often been noted, “the First Amendment needs breathing space,”\textsuperscript{105} and laws using “means which sweep unnecessarily broadly and thereby invade the area of protected freedoms”\textsuperscript{106} are appropriately struck down.\textsuperscript{107} In Doe v. University of Michigan,\textsuperscript{108} it was overbreadth, not the basic idea of punishing racist speech, that led Judge Avern Cohn to strike down the University’s regulations. The plaintiff, a graduate student in

\textsuperscript{101} Id. at 687 (Scalia, J., dissenting).
\textsuperscript{102} Id. It is worth remembering that the University of Michigan’s Policy on Discrimination and Discriminatory Harassment forbade not only “[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin [and] ancestry.” It also protected “age, marital status, handicap or Vietnam-era veteran status.” See Doe v. University of Michigan, 721 F. Supp. 852, 856 (E.D. Mich. 1989).
\textsuperscript{103} See supra note 5 and accompanying text.
\textsuperscript{104} Apparently, it wasn’t even considered possible that the fraternity boys might have been seriously showing pride in the accomplishments of Caucasians or that this pride would not be racist if sincere.
\textsuperscript{105} Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973).
\textsuperscript{107} While the Court tried to curtail the overbreadth doctrine in Broadrick, 413 U.S. at 615, by requiring that the overbreadth be “substantial,” it has continued to strike laws down as overbroad. See, e.g., Secretary of State v. J.H. Munson Co., 467 U.S. 947, 970, (1984) (Maryland statute that prohibited charitable organization from paying expenses in excess of 25% of amount raised in any fundraising activity struck down as overbroad); Schad v. Mt. Ephraim, 452 U.S. 61, 74 (1981) (zoning ordinance banning live entertainment struck down as overboard); see also Board of Trustees of State Univ. of N.Y. v. Fox, 109 S. Ct. 3028, 3038 (1989) (remanding for consideration of overbreadth issue).
psychology, had said that he wanted to discuss theories of "biopsychology" that posited biologically-based differences between races and sexes, which he feared might be deemed racist or sexist under the regulations. The court found that the claim that the Michigan Policy would chill speech gave him standing, and that the presence of an official "Interpretive Guide" to the regulations gave credence to his fears.\textsuperscript{109}

The Guide, which was withdrawn by the university during the pendency of the case, gave as an example of "sanctionable conduct" the following illustration: "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."\textsuperscript{110} Since this was just what the plaintiff wanted to discuss in class, the court found that "there existed a realistic and credible threat that Doe could be sanctioned were he to discuss certain biopsychological theories."\textsuperscript{111}

Other examples in the Guide included inviting everyone on the floor of a residence hall to a party except one person because the party-givers think she might be a lesbian, and two men demanding that their roommate in the residence hall move out and be tested for AIDS.\textsuperscript{112} In another section of the Guide, the reader was warned that "You are a harasser when":

\begin{quote}
You exclude someone from a study group because that person is of a different race, sex, or ethnic origin than you are.
You tell jokes about gay men and lesbians.
Your student organization sponsors entertainment that includes a comedian who slurs Hispanics.
You display a confederate flag on the door of your room in the residence hall.
You laugh at a joke about someone in your class who stutters.
You make obscene telephone calls or send racist notes or computer messages.
You comment in a derogatory way about a particular person or group's physical appearance or sexual orientation, or their cultural origins, or religious beliefs.\textsuperscript{113}
\end{quote}

\textsuperscript{109} Id. at 858-61.
\textsuperscript{110} Id. at 860.
\textsuperscript{111} Id. at 859-60. Given the university's treatment of three actual incidents involving classroom speech, Doe's fears seem to have been justified. See id. at 865-66.
\textsuperscript{112} Id. at 858.
\textsuperscript{113} Id.
It is clear that the Interpretive Guide was a particularly inept piece of work, put together by some well-meaning person who had no idea what the first amendment was about. The University withdrew the Guide a few months after it was issued because "the information in it was not accurate." This was too late to save the regulations in Doe, but for our purposes the issue is not whether Judge Cohn properly relied on the Guide. The point is that the guide was issued in the first place. It was, after all, not a "Dear Abby" column, but a set of rules that could lead to expulsion if violated. Some of the illustrations perhaps could be the basis of official action, but most should not. Whatever we may think of people who laugh at racist jokes or who comment derogatorily on people's physical appearance, surely we cannot convert all verbal bad manners into hanging offenses.

The disapproval of ideas deemed "harassing" is even more disquieting than the attempt to enforce the Guide-writer's personal standard of decorum. Many ideas are hare-brained, many are hurtful and dangerous, and many others may or may not be worthwhile. At times, an idea that causes no stir coming from one source may sound offensive coming from another. For instance, sociology incorporates a concept called the "victim system," which holds that an exploitative history in combination with discrimination and prejudice often leads a group's members to act in self-destructive ways. The concept is obviously relevant to minorities of color, particularly blacks. When asserted by a white speaker, it could be taken as patronizing, just as its denial by a white speaker

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114 Id.

A victim system is a circular feedback process that . . . threatens self-esteem and reinforces problematic responses in communities, families, and individuals. The feedback works as follows: Barriers to opportunity and education limit the chance for achievement, employment, and attainment of skills. This limitation can, in turn, lead to poverty or stress in relationships . . . . Strains in family roles cause problems in individual growth and development and limit the opportunity of families to meet their own needs or to organize to improve their communities. Communities limited in resources (jobs, education, housing, etc.) are unable to support families properly, and the community all too often becomes itself an active disorganizing influence, a breeder of crime and other pathology, and a cause of even more powerlessness . . . .

Id.

116 Id. "Throughout history victimizing has exerted a pervasive effect upon Afro-American families." Id.
could be taken as "anti-black." But if we do not allow this concept to be aired and attacked, for acceptance, rejection or, most likely, modification and adaptation, we stifle thought and serve neither minorities nor the university nor, indeed, the nation as a whole.

This, of course, is what John Stuart Mill taught us nearly 150 years ago. It is no less true today when minorities complain about theories they do not like than it was when the Spanish Inquisition harassed Galileo over Copernican astronomy. Even a response such as "It's 128 years since Lincoln freed the slaves and it's time for blacks to pull up their own socks" states ideas that may be a part of a discussion on race, deserving of first amendment protection. Individual preference or distaste for a particular idea, in and of itself, is no ground for suppressing an idea.

Insults involve different problems. Calling someone a "fat Jew" when he is both overweight and Jewish involves neither vulgar words nor untruths. In this second case we may agree that the remarks are both in bad taste and intended to hurt; nonetheless, when we base our prohibition on the presumed state of mind of the speaker and the assumed reaction of the person spoken about, we dangerously complicate and expand the restriction.

Even when we move away from the borderline cases and focus on the words we all consider offensive (i.e., "nigger," "kike," "spic," and "wop") we run into problems. A significant complication is that slang words fall in and out of style, changing meaning and connotation in lightning fashion. These rapid changes make it extremely difficult to declare some words poisonous.

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117 For an attack on victim mentality by a black journalist, see S. Crouch, Aunt Medea, in Notes of a Hanging Judge 202-03 (1990); S. Steele, The Content of Our Character: A New Vision of Race in America passim (1990).

118 John Zipperer, then an editor of the Badger Herald, the University of Wisconsin's student newspaper, charged that the University's ban on speech that "created a hostile environment" because of race and other factors will likely cause instructors to avoid controversial subjects. However, he gave no examples of this happening. See Zipperer, Tongue-Tied: Restricting Speech on Campus, Newsl ink 7 (Jan. 1990) (syndicated in Collegiate Times column by the Collegiate Network).


120 Termi nelli v. Chicago, 337 U.S. 1, 4 (1949). "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."Id.

121 I once asked my Dad to stop using "colored" and start saying "black." My mother pointed out that when they were growing up, "colored" was considered the polite term, and that it was a little harder for my parents to keep up with changing mores than it was for me.
In this century alone, we have seen the preferred term go from “black”\textsuperscript{122} to “colored”\textsuperscript{123} to “negro”\textsuperscript{124} to “Negro”\textsuperscript{125} to “Afro-American”\textsuperscript{126} to “black”\textsuperscript{127} to “Black”\textsuperscript{128} back to “black”\textsuperscript{129} and now to “African-American” and “person of color.”\textsuperscript{130} We remember, also, that Richard Pryor put out several record albums with the word “nigger” in the title. While he has publicly abandoned

Justice Thurgood Marshall, whose activism and self-respect need no testimonial from me, continued to use “Negro” long after most blacks viewed it as an insult.

\textsuperscript{122} See W.E.B. Du Bois, \textit{The Souls of Black Folk}, in THREE NEGRO CLASSICS (1973 ed.). Dr. Du Bois most often used the term “Negro,” but he appears to have used “black” interchangeably with “Negro,” as in this discussion of the “free Negroes of the North” before the Civil War:

Thus, Forten and Purvis of Philadelphia, Shad of Wilmington, Du Bois of New Haven, Barbadoes of Boston, and others, strove singly and together as men, they said, not as slaves; as “people of color,” not as “Negroes.” The trend of the times, however, refused them recognition save in individual and exceptional cases, considered them as one with all the despised blacks . . . .

\textit{Id.} at 48.

\textsuperscript{123} As is still used in name of the National Association for the Advancement of Colored People, founded in 1909.

\textsuperscript{124} In his 1973 introduction to \textit{The Souls of Black Folk}, supra note 122, Herbert Apotheker reprinted excerpts of reviews of the book when it was published in 1903. From what I can gather from them, the terms “black,” “Negro” and “colored” were all in polite usage at the turn of the century. Those unsympathetic to blacks consistently did not capitalize “Negro,” but there was no consistency on capitalization among those who clearly were sympathetic.

\textsuperscript{125} See supra note 124. The capitalization of “Negro” was a major issue of dignity for blacks during the first third or so of this century.

\textsuperscript{126} See, e.g., Pinderhughes, supra note 115, at 108:

[W]e will use the term Afro-American rather than Black for several reasons: It refers to an identity that is cultural as well as racial. Other ethnic groups are rightly identified by culture or nationality rather than by race. “White” or “Black” is not a culture, as Irish American and Italian American are. In addition, the term more clearly differentiates descendants of American slaves from descendants of Africans in other parts of the world, such as the Caribbean and South America.

\textit{Id.}

\textsuperscript{127} As in “Don’t call me a Negro, I’m black,” a common remark in the early seventies.

\textsuperscript{128} The term was capitalized in the Ninth Edition of G. Gunther, \textit{Constitutional Law} 691 (9th ed. 1975).

\textsuperscript{129} Gunther went back to a lower case “b” in the Tenth Edition in 1980. As he is very sensitive to language and usage, I can only believe that he felt that the capitalization of “black” had not taken hold. G. Gunther, \textit{Constitutional Law} at 706 (10th ed. 1980).

\textsuperscript{120} I do not mean this litany as ridicule. The campaign for use of the term “Negro” and for its capitalization was an important dignitary development, and the substitution of “black” for “Negro” seems to have put a stake through the heart of the concept of the cowardly and superstitious stock figure that is so common in movies of the thirties. “Negro Power” and “Negro is beautiful” simply do not have the force of “Black Power” and “Black is beautiful.” Why, I leave to semanticists and social psychologists. Nonetheless, usage does not always keep up with theory and social activism.
the word, the term is often used by blacks about other blacks, and I have heard whites say that they use the term to refer not to all blacks but to lower-income blacks, much as whites and blacks refer to “rednecks.” Thus, can we put a complete ban even on the use of the term “nigger”?\(^1\)

The problem with reading any words out of the English language, or at least out of the first amendment was explained by Justice John Marshall Harlan, in *Cohen v. California*,\(^2\) one of the greatest of the first amendment opinions.\(^3\) *Cohen* involved a young man who, at the height of the Vietnam War, walked around a corridor of a courthouse in Los Angeles wearing a jacket with “Fuck the Draft” written on it. He was convicted of disturbing the peace and sentenced to thirty days in jail. The Supreme Court reversed his conviction, in part because “the principle contended for by the State seems inherently boundless”:

How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is

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\(^1\) There is a San Francisco band called the Beat Nigs. However, according to an insert to their debut album of the same name, as quoted in *The New Trouser Press Record Guide* 39 (3d ed. 1989), “nig” is “a positive acronym . . . [which] has taken on a universal meaning in describing all oppressed people who have actively taken a stand against those who perpetuate ethnic notions and discriminate on the basis of them.” *Id.*

One is reminded of John Lennon’s song “Woman Is the Nigger of the World,” which he certainly meant as support of feminism and oppressed people. Other examples of sympathetic use of “nigger” by a non-black can be found in two of Lawrence Joseph’s greatest poems, *Sand Nigger*, in L. *JOSEPH, CURRICULUM VITAE* 27 (1988), and *I Think About Thigpen Again*, in L. *JOSEPH, SHOUTING AT NO ONE* 11 (1983). Mari Matsuda considered, as one of her “hard cases,” Mark Twain’s use of “racist dialogue to portray a racist land.” She fully recognized that Mark Twain was anti-racist, but stated that:

The problem for some African-American parents is that their young children may suffer harm from further exposure to racist language, particularly in a white majority setting. . . . The failure of school integration and the under-representation of African Americans in positions of authority in the schools increases the danger that Mark Twain’s realism, in some schools, will cause the kind of harm Twain himself would have abhorred. We need safe harbors before we begin rocking boats. Matsuda, *supra* note 1, at 2369. Professor Matsuda has told me that she would not ban Mark Twain, but would ask teachers to think about context when they use his works (letter on file with author).

\(^2\) 403 U.S. 15 (1971).

\(^3\) As Gerald Gunther reminded us in his criticism of Stanford University’s limitations on racist speech. See Gunther, *No*, in *Good Speech, Bad Speech, supra* note 54, at 41.
perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.\textsuperscript{134}

Justice Harlan then gave an even more compelling reason:

[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressable emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message . . . . Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.\textsuperscript{135}

That last sentence should give us pause. We want to ban the word "nigger" because we would like a nation without the concept, but to ban words and thoughts to achieve even the highest social end is not consistent with our notion of freedom of speech.\textsuperscript{136} Also,

\textsuperscript{134} Cohen, 403 U.S. at 25.

\textsuperscript{135} Id. at 26.

\textsuperscript{136} "Racial insults convey ideas of racial supremacy and inferiority. Objectionable and discredited as these ideas may be, they are ideas nonetheless." Strossen, supra note 25, at 549. We may recall in this context, George Orwell's appendix to 1984 (1949), in which he discussed The Principles of Newspeak. By progressively distorting and eliminating Oldspeak words, the Oceania authorities had made it impossible to state the Declaration of Independence, except as the Newspeak word "crimethink." G. ORWELL, 1984 256 (Signet ed. 1981); see also G. ORWELL, Politics and the English Language, in SHOOTING AN ELEPHANT AND OTHER ESSAYS passim (1950).

A related issue is that of so-called "politically correct" speech, the notion that various words should be avoided because of their negative connotations to and about those outside the mainstream. It is easy enough to both attack the "PC" concept, see Taking Offense, Newsweek, Dec. 24, 1990, at 48 (cover story on "Thought Police"), and to satirize it as college newspaper cartoonist Jeff Shesol did when his character Politically Correct Man said that nine-year "girls" should be call "pre-women." See id. at 53. But there is a lot of truth to the argument that words that most of us think of as harmless can add to stereotyping ("girls", "Orientals", "deaf and dumb", "black-hearted villain") or cause pain to those described. See notes 121 and 130, supra; see also the debate over the Dictionary of Cautionary Words and Phrases in the New York Times Book Review. Compare Goodman, Decreasing Our Word Power: The New Newspeak, N.Y. Times (Book Review) Jan. 27, 1991, at 1,
we should remember Justice Harlan's point regarding about the emotive power of speech. A group that believes that universities should be all-white is protected by the first amendment. Too many people have been banned in the past because their beliefs were considered anathema, whether it be the socialists who were denied their seats in the New York Legislature in the 1920's because they did not believe in capitalism, or Julian Bond, who was denied his seat in the Georgia Legislature in the 1960's because of his support of draft resisters. Thus, if the supporters of an all-white university put out a pamphlet in moderate tones, they surely cannot be suppressed. But if they feel that they can make their point better with banners that say "No Niggers At State U," our checkered history of dealing with unpopular opinion should caution us not to suppress them even if we dislike either what they are saying or how they say it.

But isn't this too precious? We all know that "nigger" is offensive. Why is this not enough to bring the word outside the protection of the first amendment? Well, to many people, the word "fuck" is just as offensive. In fact, according to The Brethren, Chief Justice Burger tried to prevent counsel from using the word in the oral argument of Cohen v. California and was beside himself with the thought that Justice Harlan might use the word in open court when reading his decision from the bench. Similarly, many of the writers of color refuse to dignify racial epithets and

with id., The Multicultural Dictionary, N.Y. Times (Book Review), Mar. 3, 1991, at 30 (letters to the Editor). My objection is to those in power mandating or forbidding certain words, not to private action to avoid them. See infra notes 48-57 and accompanying text.

137 L. Chamberlain, Loyalty and Legislative Action 48-50 (1951)
140 See B. Woodward & S. Armstrong, supra note 139, at 133.

"John, you're not going to use 'that word' in delivering the opinion, are you?" Burger asked.

Harlan had been deeply amused at Burger's concern. He had no intention of uttering the word aloud in open court, but he side-stepped the question. He enjoyed "twitting" the Chief, as he called it.

"It would be the end of the Court if you use it, John," the Chief asserted.

The Chief sat in rigid and pained stoicism waiting for the offending word. . . . Finally, [Harlan] finished without ever using it.

Id.
instead put dashes in the place of vowels. As Mari Matsuda put it: “This Article does not spell out racial slurs in a personal effort to avoid harm to others, and to prevent desensitization to harmful words.”141 On the next page, she quoted someone who referred to “you fucking J-ps.”142 It is understandable that Professor Matsuda finds racial insults more distasteful than variants on the word “fuck”; so do I. But many people, most likely including Warren Burger, would have written out the quotation as “you f-cking Japs.” And in Los Angeles, before the Cohen v. California decision was issued, using “fucking” in public would have gotten you thirty days in jail, not using “Japs.” Is it good enough just to reverse the rules of what words are forbidden?143

B. The Worst Risk: Giving Aid and Comfort to the Enemy

As real as the slippery slope problems are, the biggest danger is that a racist speech exception to the first amendment will provide an opening for those hostile to freedom of speech generally. While there are few people who stand against freedom of speech, there are plenty who prefer decorum and orthodoxy to what they at least see as rudeness, incivility, immorality and disarray. Many of these people, I fear, will enter into a mariage de convenance with those who are against racist speech and will point to a racist speech exception as a precedent when they seek a further exemption.144

This unfortunate result has already occurred with the feminist

141 Matsuda, supra note 1, at 2329 n.49.
142 Id. at 2330 n.55.
143 I have been told the true story of a Japanese-American man who was mystified and hurt when some people started telling “JAP-jokes” in his presence. It was explained to him afterwards that these referred to Jewish American Princesses, and that most of the people telling the jokes that day were Jewish. Whether this made him any happier was not recorded.
144 Not all conservatives fit this description. The Federalist Society’s newsletter, called with uncharacteristic humor “The Federalist Paper,” carried a description of a debate over racist speech at Stanford in which Tom Grey, who is white, supported some restrictions while Alan Keyes, who is black, opposed them. It was clear from the account that the approved position of the Federalists was to oppose restrictions on racist speech:

Keyes challenged the idea of providing people with special protection... because such categorization is a bad idea, not only because it is an insult to believe such people cannot protect and defend themselves, but also because such protection won’t leave people prepared for the real world anyway. “Freedom is the ability to defend yourself,” he emphasized. He drew a standing ovation and left his mark at Stanford.

attack on pornography. I earlier quoted Andrea Dworkin's arguments against first amendment protection for pornography.\textsuperscript{146} I have no doubt regarding the good faith of both Dworkin and Catherine MacKinnon, her colleague in the feminist attack on pornography,\textsuperscript{146} but their biggest converts have been Ed Meese's Pornography Commission,\textsuperscript{147} as well as Warren Burger, William Rehnquist, and Sandra Day O'Connor.\textsuperscript{148}

I see the same kinds of alliances developing if a racist speech exception to the first amendment is created. Our Senators and Representatives somehow had the courage to vote against the proposed constitutional amendment to ban flag-burning; I don't see how they would be able to tell a man who lost a leg in Vietnam that flag-burning is protected but calling a North Vietnamese a "Gook" is not.

A related problem is that those who enforce the law can do a lot of picking and choosing about how they execute it. The more exceptions we create to the first amendment, the more we enable selective enforcement.\textsuperscript{149} Julian Bond had a valid point in his complaint to the Federal Communications Commission ("FCC") following FCC v. Pacifica Foundation (the Seven Dirty Words Case).\textsuperscript{150} In Gerald Gunther's words:

It is no wonder that Julian Bond is outraged about the FCC's doing nothing to stop an announcer on a radio station in the

\textsuperscript{146} See supra note 93 and accompanying text.
\textsuperscript{146} They jointly wrote a prototype ordinance that was vetoed by the Mayor of Minneapolis, but passed in modified form in Indianapolis. See G. GUNTHER, CONSTITUTIONAL LAW 1097 n.1 (11th ed. 1986). The Indianapolis ordinance was held unconstitutional in American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316, 1317 (S.D. Ind. 1984), aff'd, 771 F.2d 323 (7th Cir. 1985), aff'd mem., 475 U.S. 1001 (1986).
\textsuperscript{147} See 2 ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY FINAL REPORT 1258-61 (Dep't Just. 1986). In Fred Schauer's words, "[t]he Commission, of which the editor of this Supplement was a member, issued its Report on July 9, 1986, amid widespread comment, most of it negative." G. GUNTHER, supra note 146, at 375 (1990 Supp.).
\textsuperscript{148} In Hudnut, 598 F. Supp. at 1316, the feminist anti-pornography ordinance was declared unconstitutional by District Judge Sarah Evans Barker, a Carter appointee. Id. at 1337. Judge Barker's decision was unanimously affirmed by the Seventh Circuit in an opinion by Judge Frank Easterbrook, a Reagan appointee. See American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 334 (7th Cir. 1985). The Seventh Circuit's judgment was affirmed summarily by the Supreme Court without opinion, but with then-Chief Justice Burger, then-Associate Justice Rehnquist and Justice O'Connor stating that they "would note probable jurisdiction and set the case for oral argument." American Booksellers Ass'n v. Hudnut, 475 U.S. 1001, 1001 (1986).
\textsuperscript{149} As between our epithet-tossing disabled veteran and a flag-burner, guess whom the police will arrest.
\textsuperscript{150} 438 U.S. 726, 730 (1978).
South who frequently uses the word “nigger.” Bond argued that if the FCC can stop people who use four-letter words that are offensive, they surely ought to stop someone who uses a word that is offensive to half the audience in the South.\footnote{G. Gunther, \textit{supra} note 146, at 1122 n.5. Professor Gunther continued: It is not that I think that Julian Bond ought to have prevailed in his complaint. What Bond’s complaint illustrates to me is that once you open the door to punishing a station broadcasting George Carlin’s “filthy words,” the next step may be that you will permit Skokie to ban the swastika . . . and will support Bond’s claim to ban derogatory racial expletives. Id.}

Gunther was concerned as to whether \textit{Pacifica} would open the door to more censorship.\footnote{\textit{See id.}} My worry concerns whether legitimate claims of hypocrisy, like those made by Bond, will merely give the FCC an excuse to permit more censorship of language on radio and television. It appears that the FCC seeks to put further restrictions on speech, mostly sexual expression.\footnote{\textit{See 52 Fed. Rec. 16,386 (1987); 3 FCC Rec. 930 (1987); Hirrel, \textit{Will Dirty Words Disappear from TV?}, Tex. Law, Oct. 8, 1990, at 26, col. 1 (describing FCC’s intention to impose 24-hour ban on indecent but not obscene language). A challenge to the ban was presented to the District of Columbia Circuit, in Action for Children’s Television v. FCC, 852 F.2d 1332, 1334 (D.C. Cir. 1988) (upholding FCC definition of “indecent broadcast material,” but striking down as unreasonable time restriction its limitation of such material to hours between 12:00-6:00 a.m.).} I could easily see it embracing restrictions on racist speech to buttress its restrictions on “indecent” speech.

One thing that strikes me about the articles justifying restrictions on racist speech is that their writers often cite awful opinions—opinions that they normally would oppose—as justifications for the new exception. I have heard complaints that the plaintiff in \textit{Doe v. University of Michigan} lacked standing to complain about the anti-harassment rules, but a rigid view of standing was the Burger Court’s most effective means of preventing people from even raising their constitutional rights.\footnote{See, e.g., Valley Forge Christian College v. Americans United, 454 U.S. 464, 462 (1982) (taxpayer had no standing to challenge establishment clause); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 42-46 (1976) (failure to establish case or controversy in suit alleging revenue ruling encouraged hospitals to deny services to indigents); Warth v. Seldin, 422 U.S. 490, 518 (1975) (lacked standing to challenge zoning ordinance). Arguably, the message of these cases is that if government hurts all citizens equally, no one may complain to the courts.} I have heard it argued that private universities need not worry about the refinements of the first amendment since the state action doctrine immunizes them from the Constitution; but again, a rigid concept of state ac-
tion has been a very effective way to keep technically non-govern-
mental centers of power free of constitutional responsibilities. To have standing and state action used to support restrictions on racist speech directed at poor people and minorities may seem the turnabout that is fair play, but to me it helps cement doctrines that effectively have prevented those very people from obtaining constitutional relief from the courts.

Substantively, the supporters of restrictions on racist speech tend to rely on cases that have found speech unprotected, a strategy that is in my mind extremely short-sighted. A case often-cited is Chaplinsky v. New Hampshire.

Chaplinsky involved a Jehovah’s Witness who was distributing literature in a small town in New Hampshire, and who offended the crowd by denouncing all religion as a “racket.” The crowd got restless and a policeman escorted Chaplinsky away. Chaplinsky then argued with the City Marshall and called him a “God-damned racketeer” and “a damned Fascist.” Chaplinsky was convicted under a state law that forbade anyone to “address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any


In Warth, 422 U.S. at 490, and Simon, 426 U.S. at 32, the standing rules worked to the detriment of poor people and minorities, the very people that the racist speech exception to the first amendment is designed to benefit. Flagg Bros., 436 U.S. at 167 (Marshall, J., dissenting), and Metropolitan Edison, 419 U.S. at 373-74 (Marshall, J., dissenting), both involved assertions of constitutional rights that would have benefitted indigents and minorities if state action had been found. Writers who support some form of restriction on racist speech have, in other contexts, recognized the significance of these procedural matters to substantive rights of minorities. Richard Delgado wrote:

Aided by computerized analysis, attorneys have been vigorously pressing actions on behalf of disadvantaged groups. Initially some of these claims were successful, but recently successes have become rarer and rarer. Instead, what we have seen is doctrinal retrenchment; as the factual predicate for inequality claims advanced, legal doctrine retreated. . . Changes were made in standing to sue, and limitations were placed on state action and on the type of relief allowed. . . Thus, our response to Blacks’ “You promised” has been, in effect, “No, we didn’t.” Delgado, On Taking Back Our Civil Rights Promises: When Equality Doesn’t Compute, 1989 Wis. L. Rev. 579, 583-84 (footnotes omitted). And Patricia Williams criticized Stanford’s narrow view of who was injured by a racist incident (essentially a matter of standing). See Williams, supra note 5, at 2132-37.

315 U.S. 568 (1942).
offensive or derisive name." The New Hampshire court had interpreted the statute to cover words that "men of common intelligence would understand would be words likely to cause an average addressee to fight." The United States Supreme Court unanimously affirmed the conviction in an opinion by Justice Frank Murphy, which included the following well-known and oft-quoted paragraph:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . . ."

Initially, several points should be made. Murphy was a public man of great courage and heart, but with little legal craftsmanship, and while stars of the Court like Harlan Fiske Stone, Hugo Black, Felix Frankfurter, William O. Douglas and Robert Jackson joined in his opinion, no one seemed to have given its broad dicta much thought. Chaplinsky is a product of a time when the Court was only beginning to develop a jurisprudence of freedom of speech, and almost every one of its supposed exceptions has been limited or abandoned by the modern Court. In addition, the specific holding concerning "fighting words" has never since been applied by the Court to uphold a conviction, though the Court has

\[159\] Id.
\[160\] Id. at 573.
\[161\] Id. at 571-72 (quoting Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940)) (footnotes omitted).
\[162\] When he was Governor of Michigan, Murphy refused to call out the National Guard to eject the sit-down strikers in the Flint General Motors plant, an action that led to the unionization of the automobile industry but ended his elective career. While on the Supreme Court, he dissented in the Japanese Evacuation Case, Korematsu v. United States, 323 U.S. 214, 233-42 (1944) (Murphy, J., dissenting). His dissent has been vindicated by history, and his reputation can rest on it justifiably.
\[163\] A well-known law professor who knew Murphy from his days in the Justice Department informally described him as "all heart and no brains."
continued to cite it on this point.164

The dangers of silencing a speaker to avoid confrontation with his audience was shown not long after Chaplinsky in Feiner v. New York.165 There, the Court upheld the conviction of a college student for disorderly conduct when he refused a police officer's order to stop addressing a crowd. At least one member of the crowd had threatened violence when Feiner made derogatory remarks about President Truman, the Mayor of Syracuse, and the American Legion. While it is true that Chief Justice Vinson spoke of incitement to riot rather than "fighting words," as both the concurrence of Justice Felix Frankfurter166 and the dissenting opinion of Justice Hugo Black167 make apparent, the only danger of violence, if any, came from the crowd, stirred up against Feiner by his own, highly political and unpopular, words. Feiner, nonetheless, went to jail.

Chaplinsky also held that the first amendment does not protect words "which by their very utterance inflict injury" and that "are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."168 To be sure, this dictum could support restrictions on racist speech, but it would also support the prosecutions of homosexual art such as Robert Mapplethorpe's, as well as art and music deemed anti-religious or otherwise offensive.169 With Congress interfering with the National Endowment

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164 G. Gunther, supra note 146, at 1048. Although the Court has repudiated the notion of broad exceptions from First Amendment concerns for most of the types of speech listed by Justice Murphy in Chaplinsky, the specific holding of Chaplinsky with regard to the non-protected nature of 'fighting words' continues to be cited by the modern Court, albeit in diluted form.

165 Id.

More recently, however, Gunther emphasized the fact that the Court has never upheld a "fighting words" conviction since Chaplinsky. See Gunther, No, in Good Speech, Bad Speech, supra note 54, at 41. The University of Texas Ad Hoc Committee on Racial Harassment refused to rely on Chaplinsky for the same reason. See Texas Report, supra note 46, at 19. Other universities such as Stanford have relied heavily on Chaplinsky. For examples of the non-application of Chaplinsky, see Rosenfeld v. New Jersey, 408 U.S. 901, 901 (1972); Lewis v. New Orleans, 408 U.S. 913, 913 (1972); 415 U.S. 130, 132-33 (1974); Brown v. Oklahoma, 408 U.S. 914, 914 (1972); Gooding v. Wilson, 408 U.S. 518, 528 (1972); Cohen v. California, 403 U.S. 15, 26 (1971).


167 Id. at 289 (Frankfurter, J., concurring).

168 Id. at 321 (Black, J., dissenting).

for the Arts’ funding of allegedly “offensive” art and prosecutors seeking convictions against art museums, rap groups and record sellers, now is not the time to provide censors with more weapons.

Finally, we should consider Beauharnais v. Illinois,¹⁷⁰ which upheld an Illinois group criminal libel law. Like Chaplinsky, Beauharnais placed libel outside the area of constitutionally protected speech.¹⁷¹ Since then, New York Times v. Sullivan¹⁷² has limited libel significantly and made clear that it is protected speech, though not necessarily immune from sanction. In the dispute over the Nazi march in Skokie, Illinois, the Seventh Circuit suggested that Beauharnais was, in fact, dead although never overruled expressly.¹⁷³ The Supreme Court denied a stay from the Seventh Circuit order, and later denied certiorari.¹⁷⁴ Both Court orders were per curiam over dissents by Justice Blackmun who called for consideration of the lower court decision in light of Beauharnais. The majority ignored Blackmun’s argument. It is very dangerous to read too much into certiorari and stay denials, but it certainly seems that the majority in 1978 considered Beauharnais a dead letter.¹⁷⁵

However, the fact that there was doubt about Beauharnais in 1978 does not mean that it is dead in the 1990’s.¹⁷⁶ Beauharnais

Live Crew recording “As Nasty as They Wanna Be” declared obscene. There is a local band in Houston named Jesus Penis, and among the names of groups reviewed in The New Trouser Press Record Guide (3d ed. 1989) which would give great pain and anger to the religious are Blind Idiot God, the Blessed Virgins, the Jesus and Mary Chain, Teenage Jesus and the Jerks, and the Sisters of Mercy (an all-male band). Other names that would seriously offend or hurt identifiable groups or individuals are Butthole Surfers, the Crucifucks, the Dicks, the Fartz, Scraping Foetus Off the Wall, Pearl Harbour and the Explosions, Little Bo Bitch (another all-male group, whose name was changed to Lonely Boys when they came to America), the Sic F*cks, Siouxsie and the Banshees (whose debut consisted of a “lengthy free-form rendition of ‘The Lord’s Prayer,’ stopping only when they became bored,” id. at 522), the (very popular) Dead Kennedys, and everybody’s favorite, Sandy Duncan’s Eye. An offensiveness standard, even a limited one, would give prosecutors, who tend not to like punk-new wave-heavy metal-rap bands to begin with, a great chance to make trouble. I am indebted to Mr. Blake Brunkenhoefer of the Class of 1992 at the University of Houston Law Center for assistance with this footnote (and for the loan of his copy of The New Trouser Press Record Guide, which I recommend highly).

¹⁷⁰ 343 U.S. 250 (1952).
¹⁷¹ Id. at 266.
¹⁷⁶ Marc Franklin, a leading writer on both torts and communications law, has in-
itself involved an anti-black pamphlet, and it is certainly possible
that the post-Reagan majority on the Supreme Court could decide
that group libel is still "outside" the first amendment in a case
involving racial speech. In the long run, however, a resurrection of
Beauharnais will give prosecutors a weapon against those who
speak intermittently about religions, or against other groups that
offend people. I expect that these prosecutors may favor some
groups that most writers do not intend to protect.177 Even if a
prosecutor does protect "discrete and insular minorities," he may
protect them at the expense of other minorities, like rap groups
that are sexist, homophobic or, perhaps, anti-Semitic.

One of the most perceptive comments about this facet of the
issue is an article by Chris Nealon, which appeared in a local
Houston gay publication.178 The article pointed to conservative at-
tacks on homosexuals, but then focussed in on the homophobic
lyrics of rap music and other forms of popular art:

What about right-wing artistic expression, the production of cul-
ture designed to degrade us, even assault us? The examples are
easy enough to come up with, given the long history of
homophobic stand-up comedy—Andrew Dice Clay is only the
most recent example—and the proliferation of virulently anti-gay
rap music, from Big Daddy Kane ("The Big Daddy law is anti-
faqgot") to Public Enemy. "Hate speech" as it is now called, has
become the obscenity in the war over artistic expression. And it
has put many lesbian and gay activists in the uncomfortable posi-
tion of advocating the removal of some cultural figures, Clay and
Andy Rooney among them, from the public eye, while simultane-

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177 An analogy illustrates the danger. The tort of intentional infliction of emotional
harm is a standard, if somewhat vague, tort going back at least to the nineteenth century.
See W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON TORTS § 12 (5th
ed. 1984) [hereinafter PROSSER]. It is the basis of the racial harassment regulations adopted
at the University of Texas. See Texas Report, supra note 46, at 11-15. But it was this very
tort that Jerry Falwell tried to use to avoid the first amendment restrictions on libel when
he sued Larry Flynt and Hustler Magazine over a scurrilous, but obviously political parody.
Falwell was awarded $200,000 in compensatory and punitive damages. See Falwell v. Flynt,
797 F.2d 1270, 1273 (4th Cir. 1987). The Supreme Court threw the judgment out, but left
Further discussion of this approach appears in Part V of this Article, infra and text accom-
ppanying notes 209-15.

178 Nealon, The Attack on Gay Sexuality, Montrose Activity Center Newsl., Sept. 1990,
at 4.
ously battling to keep gay-positive art alive.\textsuperscript{179}

Nealon suggested, as have other writers, that there is a difference between shutting down “hate speech” and opposing attempts to ban art as obscene.

It is one thing to keep open the possibility of expression that some people may find offensive, and quite another to try to block speech that does immediate and widespread damage to an already disenfranchised community.

Or is it? The issues get even murkier when an art form like rap is used as a tool for gay-bashing. Black rappers, who produce almost all rap music, are themselves part of a violently disempowered community; and rap music plays an important role in carving out a contemporary cultural identity for young black men.\textsuperscript{180}

Nealon then pointed to what I think is one of the greatest dangers that those who would suppress hate-speech may create:

So for lesbians and gay men who are angry about homophobia in rap, for instance, it’s hard to decide what to do. The obvious danger in starting a fight against speech of any kind, no matter how reprehensible, is that we will help create a monster; that our specific attempts to eliminate homophobic speech will be sucked up into a larger, right-wing drive to limit any expression that deals with homosexuality.\textsuperscript{181}

I would expand that warning even further. Attempts to control people’s language and ideas are not one-way ratchets. No matter how much we try to bound the forbidden area and immunize other speech, each time we silence somebody we give a new weapon to others—police, prosecutors, senators, and college presidents—who are likely to use that weapon against someone whose speech we believe should be protected. We will not know what speech will be restricted until it is too late; that we protest, “No, we didn’t mean that kind of speech,” will get no heed. Pastor Niemöller’s remarks will come back to haunt us in a very different way.\textsuperscript{182}

\textsuperscript{179} Id.

\textsuperscript{180} Id. The paragraph continued by discussing the testimony of Henry Louis Gates, Jr., the literary theorist, that 2 Live Crew’s outrageously sexist rap lyrics were actually mocking negative stereotypes of black sexuality by the use of exaggeration. The paragraph concluded “[i]n short, Gates was saying that context makes a difference, that what is offensive to one community may be life-giving for another.” \textit{Id}.

\textsuperscript{181} Id.

\textsuperscript{182} See \textit{supra} text accompanying note 72.
Despite these essential criticisms, I keep coming back to what I see as the quintessential picture—the young man from the black ghetto who has listened to his family and teachers and worked hard at school at the cost of being thought a nerd, who has avoided the obstacles of drugs, crime and dropping out, who has gotten into a good university and who arrives on campus to see a sign that says “Nigger go home.” It is easy for us to say that he has to develop a tough hide, that we have “a profound national commitment” to public debate that is “uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks . . . .” However, it is cold comfort to that young man, or to the American-born child of Vietnamese boat people who has won a scholarship to Stanford, the black woman who has driven up I-94 from Detroit to Ann Arbor, the Chicana who has left the colonias of the Rio Grande Valley to go to University of Texas at Austin, or the Native American who is entering the University of Wisconsin. It was pretty scary for most of us when we first got to college, even if we looked like everybody else. But students from minority groups often start out feeling like outsiders; if we allow fraternities to hang pictures of Little Black Sambo with diagonal lines through them or to put up signs saying “no nega babies,” or to use any of the million variants adapted to hurt whatever race, culture, sexual orientation, or other category that someone does not like, how are these young people to respond? A sizeable number of black students are leaving the big state and private universities to attend historically black colleges. They are doing so primarily to avoid hostile environments, voting with their feet. Is it the minority’s responsibility to bear the pain so that the majority may speak freely? If that is our only answer to racist speech, what will remain of our commitment to equal opportunity in education?

Building on an important article by Alan Freeman, Profes-

183 New York Times, 376 U.S. at 270. It should be noted that the Times Court was speaking of debate “on public issues” and attacks “on government and public officials.” Id.
184 See Matsuda, supra note 1, at 2320 n.2.
185 See id. at 2333 n.71.
186 See id. at 2371 n.251.
sor Mari Matsuda brought home to many of us the importance of remembering the terrible impact of racist speech on those toward whom it is aimed.\textsuperscript{188} Her approach does, though, have risks: speech is often hurtful and the victim’s perspective often calls for suppression, regardless of whether we are talking about flag-burning, defamation, pornography or profanity. The victim’s perspective is a very slippery slope,\textsuperscript{189} and we must not forget this. But I am coming to think that we also cannot forget the victim’s story.

Patricia Williams has written about “spirit-murder.”\textsuperscript{190} I think this is what happens to those who are incessantly subjected to insults and essentially are not thought of as people. I have never been called a hateful name to my face, and if I were, I suppose that I would either laugh it off or recover quickly. But we recognize that to many people, particularly people of color, insults, whether direct and intentional or oblique and unintentional, are part of daily life.\textsuperscript{191}

The attempt to split bias from violence has been this society’s most enduring and fatal rationalization. Prejudice does hurt, however, just as the absence of prejudice can nourish and shelter. Discrimination can repel and vilify, ostracize and alienate. White people who do not believe this should try telling everyone they meet that one of their ancestors was black.\textsuperscript{192}

Charles Lawrence has argued that \textit{Brown v. Board of Education}\textsuperscript{193} was really about equal citizenship and the absence of caste in America, and that racial insults block equal access to education,
thus undermining all that was accomplished in Brown.\textsuperscript{194} He has also described the effect of anti-black, anti-Semitic graffiti at a Quaker school on his sister, who is the principal, and on his nephews, who attend it.\textsuperscript{195} Both Professor Lawrence and Judge Damon Keith have shown, impressively, Little Black Sambo's demeaning effect on black children, and that such a hurt lasts into adulthood.\textsuperscript{196} Kimberlé Williams Crenshaw has written that black law students are likely to have different perspectives on law because they "are likely to have encountered more racist treatment and attitudes than white students."\textsuperscript{197} And Richard Delgado says that whenever minority members get together, they end up discussing the slights that they still receive, because "[r]ace is a recurring reality of our lives."\textsuperscript{198}

Recognizing the immense impact that racist speech has on its victims is not a justification for reading the first amendment out of the Constitution, and we cannot set up the kind of moral thought police that the University of Michigan Interpretive Guide envisioned. Nonetheless, something must be done. The question is what?

V. WHAT'S RIGHT AND WRONG WITH THE PROPOSED PLANS

The University of Michigan's plan\textsuperscript{199} is a textbook example of what should not be done. It is not even necessary to belabor the Interpretive Guide\textsuperscript{200} to see the overbreadth of the Michigan Policy itself. The Policy penalized "[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race" or any of eleven other factors, if it "[i]nvolve[d] an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extracurricular activities or personal

\textsuperscript{194} See Good Speech, Bad Speech, supra note 54, at 6.
\textsuperscript{195} ACLU CONF. REP., supra note 66, at 11-12.
\textsuperscript{196} See Sambo's Restaurants v. City of Ann Arbor, 663 F.2d 686, 696, 702 n.8 (6th Cir. 1981) (Keith, J., dissenting); Lawrence, supra note 90, at 317-18. But see Sambo's v. City Council, 466 F. Supp. 177, 181 (N.D. Ohio 1979) (holding that Sambo's had right to attempt business venture). Lawrence's two-page prologue is too long to reprint here, but everyone ought to read it. It summons the emotional impact of racist words better than any single thing I've read.
\textsuperscript{197} Crenshaw, Foreword: Toward a Race-Conscious Pedagogy in Legal Education, 11 NAT'L BLACK L.J. 1, 2 n.4 (1989).
\textsuperscript{198} See Delgado, supra note 89, at 408; supra note 89 and accompanying text.
\textsuperscript{199} See supra notes 36-41 and 108-14 and accompanying text.
\textsuperscript{200} See supra notes 108-14 and accompanying text.
safety; or [had] the purpose or reasonably foreseeable effect of interfering with" any of these categories of the individual's efforts. 201 "Stigmatizes," "victimizes," "implied threat" and "reasonably foreseeable effect of interfering" are all vague words and phrases which are easily manipulated. The University applied the Policy to matters well beyond insults and threats. The Policy exempted public areas of the campus and publications such as the University newspaper, 202 but the University charged students for remarks made in classrooms, such as the belief that homosexuality is a disease that can be cured or that the speaker "had heard that minorities had a difficult time in the course and that he had heard that they were not treated fairly." 203 Despite the attempts to limit the Michigan Policy, even at its narrowest it permitted free-wheeling disciplining of students for "bad" ideas and thoughts. Even without the Interpretive Guide, it should have been struck down.

The other plans that we have examined are much more carefully designed, and are much more sensitive to the needs of freedom of speech. The University of Wisconsin's rules, for example, expressly exempt generalized statements, even if derogatory and racist. 204 The Wisconsin attempt is well-crafted and narrow, but it still leaves open to interpretation the meaning of "intentionally to demean" or "intentionally create an intimidating, hostile or demeaning environment." An illustration speaks of "demeaning remarks to an individual based on that person's ethnicity, such as name calling, racial slurs, or 'jokes'." 205 Thus, a Polish joke would be restricted, but only if it were intended to create a hostile environment. Intent thus becomes a major factor, and it is to be "determined by consideration of all relevant circumstances." 206 The Wisconsin approach is close to acceptable, but it still leaves room for after-the-fact inferences that could penalize a speaker for

201 Doe, 721 F. Supp. at 856; see supra text accompanying note 37. Again, we may pass by the third limiting factor, which the university withdrew, namely, creating a hostile environment. To my mind this was so subjective as to be intrinsically overbroad as well as vague.

202 Doe, 721 F. Supp. at 856.

203 Id. at 865-66.

204 See Wis. Admin. Code § UWS 17.06(2)(c)(4) (1989); supra text accompanying note 45.

205 See Wis. Admin. Code § UWS 17.06(2)(c)(1) (1989); see supra note 44 and accompanying text.

206 Wis. Admin. Code § UWS 17.06(2)(b) (1989); see supra text accompanying note 43.
The University of Texas prohibits "racial harassment." Its attempts to use the tort of intentional infliction of emotional harm is the product of a thoughtful approach. It has four elements: "extreme or outrageous acts or communications"; intention to harass, intimidate or humiliate; a connection with race, color or national origin; and a causation requirement of severe emotional distress. I see, however, two weaknesses. First, although the policy is said to apply to remarks addressed at a group of listeners and not to "abstract statements not addressed at particular listeners," by its terms it is not so limited. Second, and much more important, it suffers from the tort's usual difficulty of drawing a line that does not make actionable ordinary insults that are part of day-to-day life.

The leading cases traditionally applied the tort to cruel practical jokes, like the famous one in Wilkinson v. Downton. Though the Texas Report has argued that its addition of "communications" to the Restatement Second of Torts' "extreme or outrageous conduct" formula is not a substantive change, the case law and commentary on the tort of intentional infliction of emotional harm is unclear. The fifth edition of Prosser, written in 1984, quoted Calvert Magruder's famous 1936 statement that "against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughness of the mental hide is a better protection than the law could ever be." However, the 1988 supplement to Prosser added these words: "but this is a poor reason for denying recovery for any genuine, serious mental injury."

In 1982, Richard Delgado found the traditional tort inadequate because of its failure to recognize the special viciousness of racial insults:

What courts have thus far failed to recognize is that racial insults are in no way comparable to statements such as, "You are a God

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207 Apparently, the ACLU opposed the Wisconsin rules as overbroad. See ACLU Policy Statement, supra note 63, at 1 n.2.
208 TEXAS REPORT, supra note 46, at 4; see supra text accompanying note 51.
209 TEXAS REPORT, supra note 46, at 20.
210 2 Q.B. 57 (1897). See generally PROSSER, supra note 177, at 54-63.
211 See supra note 52.
212 PROSSER, supra note 177, at 56 (quoting Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 HARV. L. REV. 1033, 1035 (1936)).
213 PROSSER, supra note 177, at 17 (Supp. 1989).
damned woman and a God damned liar,” which the Restatement gives as an example of a “mere insult.” Racial insults are different qualitatively because they conjure up the entire history of racial discrimination in this country. . . . [T]hus far courts generally have not recognized the gravity of racial insults within the rubric of the tort of intentional infliction of emotional distress. Only an independent tort for racial insults can fully take into account the unique, powerfully evocative nature of racial insults and the insidious harms they inflict.214

The Texas policy tries to use this approach in the university context, limiting its application to “race, color or national origin,” which is considerably narrower than the other regulations discussed. Perhaps it is narrow enough not to lend itself to overbroad application; it may, though, prove to be largely unenforceable since it requires both an intention to harass and the causation of severe emotional distress. On the other hand, if these factors are taken for granted, the Texas rules will penalize anyone who insults another on racial or national origin grounds, and the careful work that went into the Texas Report will be mere window dressing.

The Stanford Interpretation of its Fundamental Standard said that it was “intended to clarify the point at which protected free expression ends and prohibited discriminatory harassment begins.”215 On the one hand, the Stanford Interpretation is carefully narrow in its attempt to limit its sway to personal rather than generalized insults,216 and in its requirement of intent to insult or stigmatize, said to require proof beyond a reasonable doubt.217 On the other hand, it has a fairly long list of prohibited categories: sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin. It does not include age, marital status or Vietnam-era veteran status, like the Michigan Policy, but it is much broader

214 Delgado, supra note 5, at 157 (footnotes omitted). Those who would apply Delgado’s approach to sexist insults, see Matsuda, supra note 1, at 2331-32, would surely dispute the Second Restatement’s casual dismissal of the “God damned woman” remark as well. See Restatement (Second) of Torts § 46 (1965).

215 See Stanford Interpretation, supra note 55, at 1, reprinted supra text accompanying note 58.

216 See Stanford Interpretation, supra note 55, at 3. In one of its comments, the Interpretation says that its writers “believe that a racist or homophobic poster placed in the common area of a student residence might be found to constitute personal vilification of the African-American or gay students in that residence,” but that such a finding would be content specific, based on the numbers involved and the perpetrators’ actual knowledge and intentions. Id.

217 Id. at 2.
than the Texas rules. The specific list of categories is taken from Stanford's anti-discrimination policy, and the comments to the Interpretation justify using this list rather than general harassment:

[I]n this society at this time, these characteristics tend to make individuals the target of socially pervasive invidious discrimination. These characteristics thus tend to serve as the basis for cumulative discrimination: repetitive stigma, insult and indignity on the basis of a fundamental personal trait... It is the cumulative and socially pervasive discrimination, often linked to violence, that distinguishes the intolerable injury of wounded identity caused by discriminatory harassment from the tolerable, and relatively randomly distributed, hurt of bruised feelings that results from single incidents of ordinary personally motivated name-calling, a form of hurt that we do not believe the Fundamental Standard protects against.\textsuperscript{218}

With the possible exception of handicap, I suppose that the categories all fit that description, but I'm sure that others can make similar arguments for still more categories and the list certainly goes beyond the basic category of race emphasized as unique by Matsuda and Delgado.

The bigger question is the inclusion of the "fighting words" concept in the Stanford Interpretation.\textsuperscript{219} Like Kent Greenawalt in his Edward J. Bloustein Lecture,\textsuperscript{220} the Stanford committee seems to use fighting words less as a legal concept than as a metaphor. In \textit{Chaplinsky v. New Hampshire},\textsuperscript{221} the realistic potential for violence was the major justification for allowing the state to charge the speaker with breach of the peace. The reasoning seemed to be that by arresting the speaker, a brawl which he spawned could be avoided. Yet both Greenawalt and the Stanford writers agree that there is something wrong with a test—"likely to provoke the average person to retaliation, and thereby cause a breach of the peace"\textsuperscript{222}—that depends on the average listener's self-discipline, temper, or cowardice. Thus, both use sort of a reasonable temper-loser standard. It doesn't matter if the listener actually would fight. Greenawalt suggests (for no apparent reason) that a study

\textsuperscript{218} Id.
\textsuperscript{219} See supra text accompanying notes 157-67 (discussion of "fighting words").
\textsuperscript{221} 315 U.S. 568 (1942).
\textsuperscript{222} \textit{Chaplinsky}, 315 U.S. at 574.
showing that twenty percent of the "average actual addressee[s]" would fight should be enough to justify restriction of the speech.\textsuperscript{223} The Stanford Interpretation goes even further and says that the phrase "fighting words," "while roughly capturing the sort of personally abusive language we mean to prohibit, may also have certain misleading connotations," (such as legitimating violence in the form of a heckler’s veto or not protecting the weak or self-disciplined),\textsuperscript{224} and thus should not be used too literally.\textsuperscript{225} At the same time, the interpretation is not comfortable with an intentional infliction of emotional distress standard because "it is less well established in free speech law than is the fighting words concept."\textsuperscript{226} Ironically, the Texas Report, which uses the intentional infliction standard, contains a similar discussion that dismisses the "fighting words" standard as inappropriate to a modern first amendment analysis.\textsuperscript{227}

The California ACLU proposal uses a standard of specific intent to harass and actual harassment on the basis of a fairly long but relatively discrete list of traits.\textsuperscript{228} Even this standard, which is quite narrow, depends on the meaning of "harass," "intent to harass" and the speaker’s reasonable knowledge that the "hostile and intimidating environment" that his words created "will seriously and directly impede the educational opportunities" of the listener. I think I know what these words mean, but I worry what meaning fact-finders (such as university bureaucrats or student-faculty panels that can become politicized) will employ; I feel that they may not be as cautious as I would be in finding a violation.

This, to my mind, is a real problem. Each of the four narrow regulations that I have discussed, Wisconsin, Texas, Stanford and the California ACLU proposals works fairly well, but can be manipulated to suppress speech in ways that go beyond what its authors intended. No matter how narrowly we define potentially offensive words, we have to come up with some standard. We can say that racist speech is bad, \textit{per se}, but "racist" quickly becomes

\begin{footnotes}
\footnote{223} Greenawalt, \textit{supra} note 220, at 297 & n.27.
\footnote{224} \textit{Stanford Interpretation}, \textit{supra} note 55, at 3.
\footnote{225} Id. “Such a limitation might be appropriate under a breach of the peace statute, whose sole purpose is to prevent violence, but does not make sense in an anti-discrimination provision such as this one.” Id.
\footnote{226} Id. at 4.
\footnote{227} See \textit{Texas Report}, \textit{supra} note 46, at 18-20.
\footnote{228} See California ACLU Policy, \textit{supra} note 68. “[R]ace, sex, religion, sexual orientation, national alienage, or ethnic origin.” \textit{See supra} text accompanying note 70.
\end{footnotes}
“racist/sexist/ethnic/anti-gay/anti-disabled” if not more. We can speak of “outrageous acts or communications” like the Texas Report, or “fighting words” like the Stanford Interpretation, or the “creation of a hostile environment” like the California ACLU, but each approach has drawbacks. If these concepts are kept in line, all may be well. But the biggest problem is that restrictions on speech often aren’t kept in line.

VI. **Okay, White Liberal, So What’s Your Solution?**

Once again, the Clarinet Concerto is playing (though this time I am seated at the word processor). Now it’s up to me. It’s easy to say what’s wrong with everyone else’s proposals. Can I do any better?

I don’t know. Maybe the problem is insoluble. Maybe our only choice is either to make a small rent in the first amendment and hope that it doesn’t get bigger or leave the cure to the “more speech” approach that will not actually stop the pain or the hate. But I don’t think that we have to give up quite so easily. I think that there are a few things that government can do, occasionally through the criminal laws or possibly the tort system; schools, colleges and universities have somewhat more flexibility, particularly when they are also the “landlord” of a dormitory.

The best remedy, however, is organized private opposition to hate speech of many kinds. Nothing in our right to freedom of speech requires that speech be immune from criticism or boycott. The real problem today is that good people are no longer speaking up against racism and other forms of hurtful speech. Bouyed, I think, by ten years of Reaganism, our children have been raised to be rather casual about racist remarks. Unlike most of us, our children have grown up on the front lines, in schools that are integrated, whether by busing or affirmative action or just the dropping of barriers. Often, this has been good, giving them a chance to know people who are different from them. But it has also produced considerable problems, especially when racial integration is coupled with economic and class integration. Many white children who use “nigger” have been called “honkey” or “whitey” when they were outnumbered. Some of them have been beaten up or robbed of their lunch money by non-whites. The reverse has been even more true: minority children undoubtedly have suffered worse abuse, both verbal and physical. We can say that both whites and
minorities should be understanding, but it's not that easy. Not for them.

Regardless of the social complications, the state has serious obligations to minorities. There is no reason why the criminal laws should not be used when racial taunts carry with them an implicit threat of physical harm ("I've never had a Nigger" to a black woman surrounded by a group of white men; "Jews can't fight"; "Spics don't belong in this neighborhood"). A jury after the fact may infer a threat that really was not there or, conversely, may fail to convict though the threat was real. I think that if juries are more fully integrated, the collective common sense—the main reason for having juries—will prevail and a pretty healthy middle ground will be found. In addition, the existence of the law will permit police to act and thwart potentially serious racial trouble. Also, the possibility of being arrested, even if not convicted, may deter white racists. There is a saying in the Houston ghettos that "you can beat the rap, but you can't beat the ride." Maybe that ought to apply to whites as well. Notwithstanding the dangers of this approach, the requirement of an implicit threat is a sufficient restraint, and there is no constitutional problem with criminalizing speech that is literally assaultive.

Words that are nothing but insults, without an implicit threat of violence, should not be governed by the criminal law. Although the words may cause pain, the inherent boundlessness that I described as the first and second slippery slopes stops me from criminalizing mere insults. We should not use the criminal laws to cleanse public discourse, whether of "fuck" or of "nigger." I greatly fear that the laws, however well intentioned, will end up being used against the wrong people. I also have doubts about Richard Delgado's tort approach, at least when it is to be applied to isolated instances of insults. In the case of more systematic verbal attacks, Delgado and Matsuda have made out a case for a new tort or for an extension of the existing tort of intentional infliction of emotional harm. Systematic incivility, especially when people regu-

\[229\] See e.g., Batson v. Kentucky, 476 U.S. 79, 95 (1986) (holding that pattern of peremptory challenges to black jurors in criminal cases may establish prima facie case of discrimination by prosecutor in violation of equal protection clause).

\[230\] In hindsight, it seems clear that the police should have intervened to aid the blacks in the Howard Beach incident when they were first called about "black troublemakers." See Williams, supra note 7.

\[231\] See supra notes 74-143 and accompanying text.
larly have contact with one another, may justify tort relief, even if the speaker does not really intend to cause emotional harm. But this probably should apply as much to someone who regularly calls another person a "fat slob" as to the speaker who limits his insults to the accepted (though always expanding, it seems) categories of disadvantaged statuses.

Most of the action has taken place in the university setting, and it is there that most governmental and quasi-governmental action should occur. In addition, school authorities at the lower levels will have as much or more justification for intervention against racist speech than those in higher education. Recent Supreme Court decisions, however, have cut back on the student rights that Tinker v. Des Moines School District upheld during the Vietnam era. A racist angle would be a great excuse for the Rehnquist Court to make further cutbacks. Nonetheless, university restrictions can be justified, both in terms of equal educational opportunity, an argument emphasized by Charles Lawrence and in terms of the collegiality that is so much the essence of college and university life.

Clearly, the university may protect its students from violence and threats of violence, just as the government may do so by crimi-

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222 By this I mean to include private colleges and universities that are not literally state actors under current federal constitutional law, but which function much like a government. See State v. Schmid, 84 N.J. 535, 547-49, 423 A.2d 615, 621-22 (1980).

223 But see infra note 237 (university limitations on speech justified under doctrine of "communitarianism"). On occasion, a residential university may be able to make a better argument for action than a commuter high school, based on the communitarian ideas. See infra note 237.


226 See Lawrence, Yes, in Good Speech, Bad Speech, supra note 54, at 8.

227 See Note, A Communitarian Defense of Group Libel Laws, 101 HARV. L. REV. 682 (1988). This student piece makes an excellent case, based on "communitarianism" or "civic republicanism," that can be applied to justify some limitations on speech by universities, where a community that admits of disagreement and diversity of opinion is essential to the enterprise. Id. However, it does not convince me that group libel laws should be upheld.

The communitarian approach and the traditional educational role of the university combine to give it lots of room to require courses and other colloquia that foster greater understanding and knowledge of other cultures. This was a major part of the National ACLU's Policy Statement. See ACLU Policy Statement, supra note 63, at 4.
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nal laws. Thus, at the least, a university may make racist speech with an implied threat a sanctionable violation. I see a stronger case for punishing the plain insult—for requiring some degree of civility—in the university setting than in the criminal law, primarily because we are dealing with younger people who are required to live and go to school near one another on a continuing basis. We often speak of the university community, and notions of communitarianism are more prominent on campus than in the streets of a city or suburb. Nonetheless, all my criticisms in the preceding section of this paper apply to my approach as well. It is very hard, perhaps impossible, to define just what kinds of unkind or uncivil speech should be restricted, and it is essential that we let speech go unrestricted unless we are convinced that we can keep even the most justifiable restrictions within bounds.

Ideas especially must be protected, in and out of the classroom, no matter how wrong or hurtful they are. Whether it is a lecturer arguing genetic differences among the races; a course in which affirmative action is criticized; a revisionist view of history (favorable or unfavorable to minorities); or a student spouting off in the Union about why the university should be all white, the first amendment must protect that speaker. As Mari Matsuda has correctly pointed out, the university does not have to give a platform to every point of view, flat-Earth, creationist, or white supremacist. But that is a far cry from enabling a university to suppress those ideas if someone already has a podium or if the university has a public forum, whether a “Hyde Park Corner” on the campus or a campus publication open to all. Thus, no matter how racist a speaker’s ideas may be, even to “neutral” observers, the university has no business trying to suppress them, directly or indirectly.

238 Many writers have drawn a parallel with proceedings under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988), that find discrimination when an employee is subject to racist or sexist verbal abuse on the job. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986). While Meritor did not reach the first amendment issue, the workplace seems very different from the university. The employer has almost total control over employees’ speech on the job and it is his failure to exercise that control over racist or sexist speech by employees that violates Title VII. The university clearly does not have the control over students’ speech that an employer has over his workers’ speech. I thank Bruce Griffiths of the Houston ACLU for pointing out this distinction to me.

239 Matsuda, supra note 1, at 2362-63.

240 But see id. at 2358 (hateful verbal attacks upon dominant group leaders by victims permissible as part of marketplace of ideas).
But the university has more power, to my mind, when residential housing is involved. As the landlord of a semi-captive audience of students who must live together, the university can, and should, enforce rules of civility. Thus, the much-publicized expulsion of Douglas Hann from Brown University\textsuperscript{241} seems to me, on the reported facts, to be justifiable. As I understand it, the student, celebrating his twenty-first birthday, got drunk, made a lot of noise outside a dormitory late at night, and yelled anti-Semitic and anti-homosexual epithets at a dorm resident. The dormitory student told Hann to keep quiet, and later filed a complaint with the disciplinary council.\textsuperscript{242}

Just as it may enforce noise limits or have rules about dress in the corridors of coed dorms,\textsuperscript{243} the university should be able to forbid racist signs or posters on doors and bulletin boards or in windows. Restrictions on what a student may do in his room when it is not visible or audible outside pose a different problem. Assuming no unwilling roommates, a student's room should be treated more like his castle\textsuperscript{244} than other parts of the dormitory.

A major source of campus racism seems to be fraternities, and the university should have the same power to prevent various forms of racist speech within the fraternity as within the remainder of the campus. Often, the fraternity will be on campus, and its building may even be owned by the university. If so, it may be treated much like a dormitory, even though its residents are together voluntarily. Even if the fraternity is off-campus, as long as the fraternity recognized by the university and has some formal presence in the university community, the university should con-


\textsuperscript{243} Cf. Board of Trustees of State Univ. of New York v. Fox, 109 S. Ct. 3028, 3038 (1989) (upholding restrictions on Tupperware parties in dormitories on commercial speech grounds).

\textsuperscript{244} See, e.g., Stanley v. Georgia, 394 U.S. 557, 568 (1969) (under first amendment, mere private possession of obscene materials cannot be crime).
trol it. Many universities have imposed non-discrimination rules on fraternities, most impose drinking, hazing, and pledging rules, and at least in the past, most limited the times when women were allowed in the fraternity house. In fact, the university has the power to ban fraternities entirely. Given the impact that fraternities have on the social structure of many campuses, I think that they properly can be held to a level of civility that would forbid racist signs, slave auction parties, and the like.

The most important thing that schools and universities can do is intervene before the trouble starts. They are in the business of education, and educating whites about the majority of our heavily non-white world is certainly consistent with that mission, whether this is done by requiring courses in non-western cultures or through discussions among different groups. I think that these discussions (to use the jargon of the sixties, "rap sessions") should cover grievances of the "insiders" as well as those "outsiders". If there is a predisposed end position, they will become political self-correction sessions like those used by the Chinese Red Guard during the Cultural Revolution, and the white males forced to go to them will tune out. If, however, the talks are well-moderated but allowed to get acrimonious, if people are allowed to say politically incorrect things both insiders and outsiders may learn about each other, and in the long run, that may lead to fewer incidents of both racist speech and racist conduct.

It will take great ability to keep meetings like these from getting out of hand, but I think that talented and well-trained group leaders will be able to make them work. I'm sure that this has already been tried at some schools. If we can learn from existing successes and failures how to make these rap sessions effective, and if schools intervene before as well as after incidents occur, we may yet prove that Justice Brandeis was right when said that the cure for bad speech is more speech not suppression.

That is about the limit of what I would allow. But that is

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246 See supra note 237.
247 Like "why can't the blacks get ahead? My grandparents came over without any money and . . . ." Or "I was the only white kid on the bus and the niggers called me 'white boy' every day." Or the usual criticisms of Asians and Jews for succeeding academically.
248 See Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring ("the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies").
not the end of the story of racist and other hateful speech. The problem is real, on and off campus. That the Constitution forbids government and its surrogates from doing much does not prevent you and me, private citizens, from acting. Nothing in the first amendment makes all speech equal in quality; rather, it simply prevents government from making the judgments. Freedom of speech, in fact, means very little if there is no criticism of what is spoken and written. When the government or a university allows racist speech to be uttered, it is not approving it or adopting it; it is merely tolerating it; but when private citizens keep silent, they do imply their approval, much like Pastor Niemöller did with the Nazis.250

What can citizens do? To begin with, the good people, the ones who deplore racist and other hate speech, can speak out against it and work at trying to bridge the gaps. Faculty and students who oppose racist speech on campus can organize counter-demonstrations. Kenneth Lasson, who has written in favor of group libel laws,251 has written that “many campuses, though largely integrated, are simmering with racial tension.”252 However, in the same article, he noted:

paper's racism, and I have already expressed my doubts about the FCC trying to cleanse radio or television of racist speech. See supra text accompanying notes 150-53. Nonetheless, if the university is the licensee of a station run by students or actually owns the student newspaper, there is a greater argument for its limitation of racist speech, since it owns and is therefore responsible for the organ in which the racist speech appears. However, the risk that this beginning of censorship will open the door to further censorship is reason enough to keep the university out of it. Also, it is far from clear whether the university has the power to censor a student newspaper. Compare Papish v. Board of Curators of Univ. of Mo., 410 U.S. 667, 670-71 (1973) (university newspaper articles cannot be “shut-off” due to disapproved content) with Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (educators do not offend first amendment by exercising editorial control over school-sponsored expressive activities); see also Joyner v. Whiting, 477 F.2d 456, 462 (4th Cir. 1973) (holding that president of historically black state university violated first amendment when he cut off funds to student newspaper because of its editorial position that too many white students were attending university).

250 Matsuda is wrong when she writes that a “doctrinal pillar supporting racist speech is the refusal to recognize that tolerance and protection of hate group activities by the government is a form of state action.” Matsuda, supra note 1, at 2378. As the Stanford Interpretation states: “Free expression could not survive if institutions were held implicitly to endorse every kind of speech that they did not prohibit.” Stanford Interpretation, supra note 55, at 4.

251 See supra text accompanying note 72.


[T]here may be truth to the notion that more speech, not less, is the proper curative . . . . Consider these positive effects of the integration engendered by Brown I: . . . At Syracuse University, students designated one week for celebrating racial and cultural diversity. Groups on various other campuses have come together in peaceful demonstrations of protest against activities viewed as anti-Semitic, anti-white, or anti-American. At the University of Maryland, students formed a Coalition for Understanding and Tolerance to deal with matters of intolerance on college campuses in the Baltimore-Washington area.253

In addition, those opposing the bad speech can make more aggressive counter-attacks. When I first started teaching, in the mid-seventies, the most effective restraint on sexist speech in the classroom was hissing by the women students. In a similar manner, female college students today can refuse to go out with fraternity boys who run racist parties or hang racist and frequently sexist signs from their house. We can all boycott sponsors of drive time radio shows that feature racist jokes. Chris Nealon has called for “guerilla art”—sexually explicit posters, street theatre and other forms of confrontation—as a counter-attack on homophobia:

The advantage of guerilla art is not only that it bypasses the abstractions and the hype surrounding censorship, but also that it is not confined to museums and galleries. Guerilla art is about confrontation, which makes it a useful tool in combatting hate speech as well as censorship. A group of female artists at one New England college recently took over a display case in the student center, wearing bras and undies made out of pornography and sexually explicit advertising. Conservative male students responded to the display with outraged accusations that public space was no place for smut—implying that their bedrooms were the right place.

This kind of direct action is valuable to gay and lesbian communities because it is a positive response to our enemies—it’s a way of taking the offensive. Instead of scrambling to preserve what little mainstream endorsement there is for lesbian and gay art, instead of censoring hateful art, these actions produce more art. They keep lesbian and gay voices alive in the public sphere by putting them in unexpected places, by startling people. Guerilla art cannot reach the same huge audiences the TV, music and magazines can; it would seem easier to try to get Andy Rooney off the air than to compete with his message. But direct action

253 Id. at 147 (footnotes omitted).
groups like ACT UP have taught us that small, carefully targeted protests, in unusual settings like administrative offices or churches, have the powerful effect of keeping lesbians and gay men on the offensive. They are a shock to the polite heterosexual system, and the healthiest response so far to the war on our sexuality.254

James O. Freedman, President of Dartmouth College, recently wrote, “[f]or the past ten years The Dartmouth Review—an off-campus newspaper unassociated with Dartmouth College—has attracted national attention with its brazen attacks on blacks, women, homosexuals, Native Americans and Jews.”255 Though he detailed some really obnoxious examples of adulation of the Nazis and full-out, unabashed racism, President Freedman did not try to find some way of suppressing the student editors of the paper. Instead, he called attention to the people who supported it with their money and with post-graduation jobs. As he put it, “My quarrel is not so much with the handful of undergraduates who write for The Review as it is with those outsiders—including Patrick Buchanan, William F. Buckley Jr., George Gilder and William Rusher—who continue to support it.”256 He reported that the John M. Olin Foundation, headed by former Secretary of the Treasury William E. Simon, had contributed $295,000 to the Review over the past ten years. In all, conservative patrons had contributed more than $800,000 to it in the past three years alone. “Those are heady sums from respectable adults who ought to know better.”257

The more we call out the names of the respectable people who are supporting racist speech, the more we boycott them and the racist speakers, and the more we speak out against racist speech, the more we will stop racist speech. And we, the people, should do it with as little as possible of the heavy hand of government. Boycotts can be abused, as we all know, but they are a legitimate answer to bad speech, and a much better and less dangerous answer than opening the door to censorship by government. That is a liberal’s answer, and I’ll stand by it.

254 Nealon, supra note 178, at 5.
256 Id.
257 Id.