1994

Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties

Nadine Strossen

New York Law School, nadine.strossen@nyls.edu

Follow this and additional works at: https://digitalcommons.nyls.edu/fac_articles_chapters

Part of the Civil Rights and Discrimination Commons, and the First Amendment Commons

Recommended Citation

https://digitalcommons.nyls.edu/fac_articles_chapters/1108

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.
Speaking of Race, Speaking of Sex

Hate Speech, Civil Rights, and Civil Liberties

Henry Louis Gates, Jr., Anthony P. Griffin, Donald E. Lively, Robert C. Post, William B. Rubenstein, and Nadine Strossen

with an introduction by Ira Glasser

NEW YORK UNIVERSITY PRESS
New York and London

Several passages in “Racial Myopia in the Age of Digital Compression” by Donald E. Lively originally appeared in an article entitled “Reformist Myopia and the Imperative of Progress: Lessons for the Post-Brown Era” (46 Vanderbilt Law Review, 865 [1993]), and are reprinted by permission of Vanderbilt Law Review.


Contents

Contributors  vii

Introduction  
Ira Glasser  1

1. War of Words: Critical Race Theory and the First Amendment  
   Henry Louis Gates, Jr.  17

2. Racial Myopia in the Age of Digital Compression  
   Donald E. Lively  59

3. Racist Speech, Democracy, and the First Amendment  
   Robert C. Post  115

4. Regulating Racist Speech on Campus: A Modest Proposal?  
   Nadine Strossen  181

5. The First Amendment and the Art of Storytelling  
   Anthony P. Griffin  257

6. Since When Is the Fourteenth Amendment Our Route to Equality?  
   Some Reflections on the Construction of the “Hate-Speech” Debate from a Lesbian/Gay Perspective  
   William B. Rubenstein  280
4. Regulating Racist Speech on Campus: A Modest Proposal?

Nadine Strossen

Freedom of speech is indivisible; unless we protect it for all, we will have it for none.

—Harry Kalven, Jr.

If there be minority groups who hail this holding [rejecting a First Amendment challenge to a group libel statute] as their victory, they might consider the possible relevancy of this ancient remark: "Another such victory and I am undone."

—Hugo Black, Jr.

The civil rights movement would have been vastly different without the shield and spear of the First Amendment. The Bill of Rights ... is of particular importance to those who have been the victims of oppression.

—Benjamin L. Hooks

It is technically impossible to write an anti-speech code that cannot be twisted against speech nobody means to bar. It has been tried and tried and tried.

—Eleanor Holmes Norton

The basic problem with all these regimes to protect various people is that the protection incapacitates.... To think that I [as a black man] will ... be told that white folks have the moral character to shrug off insults, and I do not.... That is the most insidious, the most insulting, the most racist statement of all!

—Alan Keyes

Whom will we trust to censor communications and decide which ones are "too offensive" or "too inflammatory" or too devoid of intellectual content? ... As a former president of the University of California once said: "The University is not engaged in making ideas safe for students. It is engaged in making students safe for ideas."

—Derek Bok
Restrictive codes . . . may be expedient, even grounded in conviction, but the university cannot submit the two cherished ideals of freedom and equality to the legal system and expect both to be returned intact.

—Carnegie Foundation for the Advancement of Teaching

In the political climate that surrounds [racial] issues on campus, principle often yields to expediency and clarity turns into ambiguity, and this is no less true for some of our finest scholars.

—Joseph Grano

When language wounds, the natural and immediate impulse is to take steps to shut up those who utter the wounding words. When, as here, that impulse is likely to be felt by those who are normally the first amendment’s staunchest defenders, free expression faces its greatest threat. At such times, it is important for those committed to principles of free expression to remind each other of what they have always known regarding the long term costs of short term victories bought through compromising first amendment principles.

—Civil Liberties Union of Massachusetts

As a former student activist, and as a current black militant, [I] believe[ ] that free speech is the minority’s strongest weapon . . . [P]aternalism [and] censorship offer the college student a tranquilizer as the antidote to campus and societal racism. What we need is an alarm clock . . . What we need is free speech . . . and more free speech.

—Michael Meyers

Charles Lawrence, Mari Matsuda, Richard Delgado, and other “critical race theorists” recently have made provocative contributions to the perennial debate concerning the extent to which courts and civil libertarians should continue to construe the Constitution as protecting some forms of racist expression. This recurring issue has resurfaced most recently in connection with the distressing increase of racial incidents at colleges and universities around the country. In response, many of these institutions have adopted, or are considering, regulations that curb “hate speech”—that is, speech that expresses hatred or bias toward members of racial, religious, or other groups.

Several recent judicial rulings, issued since the initial publication of the writings by Lawrence and his colleagues advocating hate speech regulations, have cast grave doubt on the constitutionality of any such
regulations. In the only three legal challenges to campus hate speech codes that have led to judicial rulings all three courts held that the codes violated the First Amendment. Moreover, although the U.S. Supreme Court has not ruled on campus hate-speech codes, in 1992 the Court unanimously struck down a city’s hate speech law, invoking rationales that appear to doom campus speech codes too. In these rulings, the courts concluded that restrictions on hate speech inevitably violate the cardinal free speech principle that speech may not be punished on the basis of its content or viewpoint, and also are inescapably vague and overbroad, thus punishing and chilling much expression that is constitutionally protected.

Notwithstanding the courts’ continuing view that hate speech must be protected, in accordance with time-honored free speech principles, it is nevertheless important to respond to the calls that Lawrence and others have made for a reexamination of those principles. It is also important to respond to the intriguing new arguments that they have made for limiting hate speech, at least in the campus context. In particular, they forcefully urge that the Constitution’s equality guarantee compels the restriction of hate speech, because such speech fosters discrimination and undermines equality.

Because civil libertarians are fully committed to securing constitutional values of equality, as well as those of free speech, it is especially imperative for us thoughtfully to consider, and respond to, the arguments made by Lawrence and other contemporary advocates of restricting hate speech. This article constitutes such a consideration and response. Although it uses Lawrence’s writings as a focal point, it also addresses the issues that have been raised by the many other recent proposals to regulate hate speech, including those advanced by Delgado and Matsuda.

Civil libertarians are committed to the eradication of racial discrimination and the promotion of free speech throughout society. We have worked especially hard to combat both discrimination and free speech restrictions in educational institutions, which should be bastions of equal opportunity and unrestricted exchange. Therefore, we find the upsurge of both campus racism and regulation of campus speech particularly disturbing, and we have undertaken efforts to counter both.

Because civil libertarians have learned that free speech is an indispensable instrument for the promotion of other rights and freedoms—including
ing racial equality—we fear that the movement to regulate campus expression will undermine equality as well as free speech. Combating racial discrimination and protecting free speech should be viewed as mutually reinforcing rather than antagonistic goals. A diminution in society’s commitment to racial equality is neither a necessary nor an appropriate price for protecting free speech. Those who frame the debate in terms of this false dichotomy simply drive artificial wedges between would-be allies in what should be a common effort to promote civil rights and civil liberties.

Lawrence urges civil libertarians to “abandon[... over stated rhetorical and legal attacks on individuals who conscientiously seek to frame a public response to racism while preserving our first amendment liberties.”\(^4\) I join in this invitation, and I extend a corresponding one: Those individuals who espouse “new perspectives” on the First Amendment in an effort to justify hate speech regulations should avoid overstated attacks on those who conscientiously seek to preserve our First Amendment liberties while responding to racism.

In important respects, Lawrence inaccurately describes and unfairly criticizes both traditional civil libertarians in general and the American Civil Liberties Union (ACLU) in particular. His argument depends on a “straw civil libertarian” who can be easily knocked down, but who does not correspond to the flesh and blood reality.\(^5\) For example, contrary to Lawrence’s assumption, traditional civil libertarians do not categorically reject every effort to regulate racist speech. The ACLU has never argued that harassing, intimidating, or assaultive conduct should be immunized simply because it is in part based on words. Accordingly, traditional civil libertarians would agree with Lawrence that some examples of racially harassing speech should be subject to regulation consistent with First Amendment principles—for example, the often-cited incident of a group of white male students pursuing a black female student across campus shouting, “I’ve never tried a nigger.”

Of course, traditional civil libertarians have urged that any restrictions on expressive activity must be drawn narrowly, and carefully applied, to avoid chilling protected speech. But, to a substantial extent, Lawrence appears to endorse a similarly cautious approach. He stresses that he supports only limited regulations and invokes as a model the relatively limited code that Stanford University adopted in 1990.\(^6\)

Insofar as Lawrence advocates relatively narrow rules that apply
traditionally accepted limitations on expressive conduct to the campus setting, his position should not be alarming (although it is certainly debatable). In portions of his article, Lawrence seems to agree with traditional civil libertarians that only a small subset of the racist rhetoric that abounds in our society should be regulated. Although we may disagree about the contours of such concepts as “captive audience,” “fighting words,” or “intentional infliction of emotional distress,” these differences should not obscure strong common goals. Surely our twin aims of civil rights and civil liberties would be advanced more effectively by fighting together against the common enemy of racism than by fighting against each other over which narrow subset of one symptom of racism—namely, verbal and symbolic expressions—should be regulated.

What is most disquieting about Lawrence’s article is not the relatively limited Stanford code he defends, but rather his simultaneous defense of additional, substantially more sweeping speech prohibitions. The rationales that Lawrence advances for the regulations that he endorses are so open-ended that, if accepted, they would appear to warrant the prohibition of all racist speech, and thereby would cut to the core of our system of free expression.

Although Lawrence’s specific proposed code appears relatively modest, his supporting rationales depend on nothing less immodest than the abrogation of the traditional distinctions between speech and conduct and between state action and private action. He equates private racist speech with governmental racist conduct. This approach offers no principled way to confine racist speech regulations to the particular contours of the Stanford code, or indeed to any particular contours at all. Lawrence apparently acknowledges that, if accepted, his theories could warrant the prohibition of all private racist speech. Moreover, although he stresses the particular evils of racism, he also says that “much of my analysis applies to violent pornography and homophobic hate speech.” Thus, Lawrence himself demonstrates that any specific, seemingly modest proposal to regulate speech may in fact represent the proverbial “thin edge of the wedge” for initiating broader regulations.

As just explained, the relatively narrow Stanford code that Lawrence endorses is incongruous with his broad theoretical rationale. The Stanford code also is at odds with Lawrence’s pragmatic rationale. The harms of racist speech that he seeks to redress largely remain untouched
by the rule. For example, Lawrence movingly recounts the pain suffered by his sister's family as a result of racist expression, as well as the anxiety he endured as a boy even from the possibility of racist expression. Yet the Stanford code clearly would not apply to any of the unspoken racist expressions that may well lurk beneath the surface of much parlance in American life. Moreover, the regulation also would not apply unless the speech was directly targeted at a specific victim. Therefore, it would not have relieved Lawrence or his family of the traumas they experienced. Furthermore, the Stanford code would not address the racist incident at Stanford that led to its adoption. Likewise, many additional campus racist incidents catalogued by Lawrence and others would be beyond the scope of the Stanford code.

Two problems arise from the disharmony between the breadth of the racist speech regulations endorsed by Lawrence and the harm that inspires them. First, this disparity underscores the rules' ineffectiveness. The regulations do not even address much of the racist speech, let alone the innumerable other manifestations of racism which—as Lawrence himself stresses—pervade our society. Second, this disharmony encourages the proponents of hate speech regulations to seek to narrow the gap between the underlying problem and their favored solution by recommending broader regulations. For example, Mari Matsuda has proposed a substantially more restrictive hate speech regulation, and Lawrence has indicated his approval of Matsuda's approach. So the wedge widens.

In this chapter I attempt to bridge some of the gaps that Lawrence believes separate advocates of equality from advocates of free speech. I show that, insofar as proponents of hate speech regulations endorse relatively narrow rules that encompass only a limited category of racist expression, these gaps are not so significant in practical effect. I also demonstrate that the First and Fourteenth Amendments are allies rather than antagonists. Most importantly, in this chapter I maintain that equality will be served most effectively by continuing to apply traditional, speech-protective precepts to racist speech, because a robust freedom of speech ultimately is necessary to combat racial discrimination. Lawrence points out that free speech values as well as equality values may be promoted by regulating certain verbal harassment and retarded by not regulating it. But we must also recognize that equality values may be promoted most effectively by not regulating certain hate speech and retarded by regulating it.
Part I of this chapter demonstrates that traditional civil libertarians agree with Lawrence's point that some speech amounts to verbal assault or harassment and may be subject to government regulation. Part 2 shows that Lawrence's conception of regulable racist speech is broader than that permitted by established constitutional doctrine and would endanger fundamental free speech values. Part 3 explores the even greater danger to free speech values posed by Lawrence's expansive rationales. Of primary importance, part 3 exposes the flaws in Lawrence's major argument—that Brown v. Board of Education and other decisions that invalidate governmental racist conduct somehow legitimize regulation of nongovernmental racist speech.

Notwithstanding my differences with Lawrence about the boundaries of regulable racist expression, it is important to place these differences in proper perspective. Even the racist speech that he would regulate constitutes only a small fraction of all racist speech. Thus, most racist expression would remain untouched under both Lawrence's approach and the approach traditionally endorsed by civil libertarians and the Supreme Court. More importantly, as is discussed in part 4, Lawrence's proposal would not effectively address the underlying problem of racism itself, of which racist speech is a symptom. Part 4 shows that suppressing racist speech could even aggravate racially discriminatory attitudes. Thus, the goals of free speech and of eradicating racism are not incompatible, as Lawrence sometimes suggests. Rather, as he also recognizes, these goals are mutually reinforcing. Although my discussion focuses on Lawrence's specific proposal, it applies as well to all other proposals to censor hate speech.

Finally, part 5 maintains that we should channel our efforts toward devising means to combat racism that are consistent with the First Amendment. This strategy ultimately will be more effective than censorship in promoting both equality and free speech. The resurgence of racist expression on American campuses has sparked a revitalized national dedication to promoting racial equality on college campuses and throughout our society and the forging of creative strategies for doing so. In order to counter racist speech, Lawrence urges us to "think creatively as lawyers." But if we are to understand and eradicate the complex root causes of racial discrimination, then we must think creatively as more than just lawyers. We must draw upon the insights and skills of educators, sociologists, and psychologists. To draft legal rules
that address only one manifestation of these deeper problems of racial inequality is at best ineffective, and at worst counterproductive.

I. SOME LIMITED FORMS OF CAMPUS HATE SPEECH MAY BE REGULABLE UNDER CURRENT CONSTITUTIONAL DOCTRINE

A. General Constitutional Principles Applicable to Regulating Campus Hate Speech

To put in proper perspective the points of disagreement between Lawrence’s analysis and traditional civil-libertarian views, the points of agreement first should be noted. Lawrence usefully rehearses the many shared understandings between advocates of traditional First Amendment doctrine, which protects much racist speech, and advocates of various hate speech regulations. Lawrence acknowledges that there are strong reasons for sheltering even racist speech, in terms of reinforcing society’s commitment to tolerance and mobilizing its opposition to intolerance. Consequently, he recognizes that to frame the debate in terms of a conflict between freedom of speech and the elimination of racism poses a false dichotomy. Accordingly, he urges civil libertarians to examine not just the substance of our position on racist speech, but also the way in which we enter the debate, to ensure that we condemn racist ideas at the same time as we defend the right to utter them.

There may be even more common ground between Lawrence and the traditional civil libertarian position than he expressly acknowledges. In presenting the civil libertarian position as absolute and uni-focused, he oversimplifies and thereby distorts it. For example, as previously noted, Lawrence sets up a “straw civil libertarian” who purportedly would afford absolute protection to all racist speech—or at least “all racist speech that stops short of physical violence.” 13 In fact, as evidenced by ACLU policies, traditional civil libertarians do not take such an extreme position. Moreover, as a matter of both policy and practice, the ACLU already condemns the ideas expressed by racist and other anti-civil libertarian speakers at the same time that it defends their right to utter them. Thus, contrary to Lawrence’s implication, such condemnation would not constitute an innovation.

Lawrence also mischaracterizes traditional civil libertarians when he
asserts that we tolerate the regulation of "garden variety" fighting words, but not racist fighting words. Some civil libertarians might agree with the Supreme Court's formerly stated view that a narrowly defined category of "fighting words" might not be constitutionally protected. Other civil libertarians maintain, consistent with the Court's apparent repudiation of its earlier view, that "fighting words" should not be excluded from First Amendment protection. All agree, however, that racist fighting words should receive the same degree of protection (or nonprotection) as other fighting words.

Consistent with Lawrence's free speech concerns, the category of racist speech he seeks to regulate under the Stanford code is relatively narrow compared to other campus hate speech rules. In important respects, this proposal overlaps with the traditional civil libertarian position.

On the end of the spectrum where speech is constitutionally protected, Lawrence agrees with courts and traditional civil libertarians that the First Amendment should protect racist speech in a Skokie-type context. The essentials of a Skokie-type setting are that the offensive speech occurs in a public place and the event is announced in advance. Hence, the offensive speech can be either avoided or countered by opposing speech. Traditional civil libertarians recognize that this speech causes psychic pain. We nonetheless agree with the decision of the U.S. Seventh Circuit Court of Appeals in Skokie that this pain is a necessary price for a system of free expression, which ultimately redounds to the benefit of racial and other minorities. Lawrence apparently shares this view.

On the other end of the spectrum, where expression may be prohibited, traditional civil libertarians agree with Lawrence that the First Amendment should not necessarily protect targeted individual harassment just because it happens to use the vehicle of speech. The ACLU maintains this nonabsolutist position with regard to both racist harassment on campus and sexual harassment in the workplace. For example, the ACLU's "Policy Statement on Free Speech and Bias on College Campuses," which its National Board of Directors adopted without dissent in 1990 (see Appendix for its full text), while opposing all regulations that "interfere with the freedom . . . to teach, learn, discuss and debate or . . . express ideas, opinions or feelings in classroom, public or private discourse," also recognizes that colleges and universities may
restrict “acts of harassment, intimidation and invasion of privacy,” because “[t]he fact that words may be used in connection with otherwise actionable conduct does not immunize such conduct from appropriate regulation.”

As the ACLU policy on campus hate speech acknowledges, terms such as “‘harassment,’ ‘intimidation,’ and ‘invasion of privacy’ are imprecise” and hence “susceptible of impermissibly overbroad application.” Nevertheless, each term “defines a type of conduct which is legally proscribed in many jurisdictions when directed at a specific individual or individuals and when intended to frighten, coerce, or unreasonably harrass or intrude upon its target.” The policy cites as an example of expressive conduct that would be appropriately sanctionable “[t]hreatening telephone calls to a minority student’s dormitory room,” but stresses that, in contrast, “[e]xpressive behavior which has no other effect than to create an unpleasant learning environment . . . would not be the proper subject of regulation.”

Because there is no clear boundary between expression that constitutes proscribable harassment and expression that constitutes protected free speech, even civil libertarians who agree that this is the appropriate line to draw still would be expected to disagree about whether particular expressive conduct fell on one side of the boundary or the other. However, the essential underlying point still stands: traditional civil libertarians share what Lawrence describes as a “moderate” perspective with regard to harassing speech on campus—that is, that such speech should be neither absolutely protected nor absolutely prohibited.19

In other situations involving racist speech, the ACLU also has recognized that otherwise punishable conduct should not be shielded simply because it relies in part on words. Some examples were provided by ACLU president Norman Dorsen: “During the Skokie episode, the ACLU refused to defend a Nazi who was prosecuted for offering a cash bounty for killing a Jew. The reward linked the speech to action in an impermissible way. Nor would we defend a Nazi (or anyone else) whose speech interfered with a Jewish religious service, or who said, ‘There’s a Jew; let’s get him.’ ”20

The foregoing ACLU positions are informed by established principles that govern the protectability of speech. Under these principles, speech may be regulated if it is an essential element of violent or unlawful conduct, if it is likely to cause an immediate injury by its very utterance,
and if it is addressed to a "captive audience" unable to avoid assaultive messages. It should be stressed that each of these criteria is ambiguous and may be difficult to apply in particular situations. Accordingly, the ACLU insists that these exceptions to free speech must be strictly construed and would probably find them to be satisfied only in rare factual circumstances. Nevertheless, ACLU policies expressly recognize that if certain speech fits within these narrow parameters, then it could be regulable.21

The captive audience concept in particular is an elusive and challenging one to apply. As Laurence Tribe has cautioned, this concept "is dangerously encompassing, and the Court has properly been reluctant to accept its implications whenever a regulation is not content-neutral."22 Noting that we are "often 'captives' outside the sanctuary of the home and subject to objectionable speech,"23 the Court has ruled that, in public places, we bear the burden of averting our attention from expression we find offensive.24 Otherwise, the Court explained, "a majority [could] silence dissidents simply as a matter of personal predilections."25 The Court has been less reluctant to apply the captive audience concept to private homes.26 However, the Court has held that even in the home, free speech values may outweigh privacy concerns, requiring individuals to receive certain unwanted communications.27

The Court's application of the captive audience doctrine illustrates the general notion that an important factor in determining the protection granted to speech is the place where it occurs. At one extreme, certain public places—such as public parks—have been deemed "public forums," where freedom of expression should be especially protected. At the other extreme, some private domains—such as residential buildings—have been deemed places where freedom of expression should be subject to restriction in order to guard the occupants' privacy and tranquility. In between these two poles, certain public areas might be held not to be public forums because the people who occupy them might be viewed as "captive." Thus, the question whether any particular racist speech should be subject to regulation is a fact-specific inquiry. We cannot define particular words as inherently off limits, but rather we must examine every word in the overall context in which it is uttered.

The foregoing principles that govern the permissibility of speech regulations in general should guide our analysis of the permissibility of particular speech regulations in the academic setting. The Supreme

Regulating Racist Speech on Campus
Court has declared that within the academic environment freedom of expression should receive heightened protection and that a "university campus ... possesses many of the characteristics of a traditional public forum." These considerations would suggest that hate speech should receive special protection within the university community. Conversely, Mari Matsuda argues that equality guarantees and other principles that might weigh in favor of prohibiting racist speech also are particularly important in the academic context.

The appropriate analysis is more complex than either set of generalizations assumes. In weighing the constitutional concerns of free speech, equality, and privacy that hate speech regulations implicate, decision makers must take into account the particular context within the university in which the speech occurs. For example, the Court's generalizations about the heightened protection due free speech in the academic world certainly are applicable to some campus areas, such as parks, malls, or other traditional gathering places. The generalizations, however, may not be applicable to other areas, such as students' dormitory rooms. These rooms constitute the students' homes. Accordingly, under established free speech and privacy tenets, students should have some rights to avoid being exposed to others' expression by seeking refuge in their rooms.

Some areas on campus present difficult problems concerning the appropriate level of speech protection because they share characteristics of both private homes and public forums. For example, one could argue that hallways, common rooms, and other common areas in dormitory buildings constitute extensions of the individual students' rooms. On the other hand, one could argue that these common areas constitute traditional gathering places and should be regarded as public forums, open to expressive activities at least by all dormitory residents if not by the broader community. The latter argument would derive general support from the Supreme Court decisions that uphold the free speech rights of demonstrators in residential neighborhoods on the theory that individual residents' rights of stopping "the flow of information into [their] household[s]" does not allow them to impede the flow of this same information to their neighbors. The Supreme Court, however, recently declined to resolve the specific issue of whether university dormitories constitute public forums for free speech purposes.

Even in the areas of the university reserved for academic activities,
such as classrooms, the calculus to determine the level of speech protection is complex. On the one hand, the classroom is the quintessential “marketplace of ideas,” which should be open to the vigorous and robust exchange even of insulting or offensive words, on the theory that such an exchange ultimately will benefit not only the academic community but also the larger community in its pursuit of knowledge and understanding.

On the other hand, advocates of campus hate speech codes contend that in the long run, the academic dialogue might be stultified rather than stimulated by the inclusion of racist speech. They maintain that such speech not only interferes with equal educational opportunities, but also deters the exercise of other freedoms, including those secured by the First Amendment. Lawrence argues that, as a consequence of hate speech, minority students are deprived of the opportunity to participate in the academic interchange, and that the exchange is impoverished by their exclusion. It must be emphasized, though, that expression subject to regulation on this rationale would have to be narrowly defined in order to protect the free flow of ideas that is vital to the academic community; thus, much expression would remain unregulated—expression that could be sufficiently upsetting to interfere with students’ educational opportunities.

Another factor that might weigh in favor of imposing some regulations on speech in class is that students arguably constitute a captive audience. This characterization is especially apt when the course is required and class attendance is mandatory. Likewise, the case for regulation becomes more compelling the more power the racist speaker wields over the audience. For example, the law should afford students special protection from racist insults directed at them by their professors.

Even if various areas of a university are not classified as public forums, and even if occupants of such areas are designated captive audiences, any speech regulations in these areas still would be invalid if they discriminated on the basis of a speaker’s viewpoint. Viewpoint-based discrimination constitutes the most egregious form of censorship and almost always violates the First Amendment. Accordingly, viewpoint discrimination is proscribed even in regulations that govern non-public forum government property and regulations that protect captive audiences.

Because most hate speech regulations are viewpoint discriminatory,
targeting only expression that conveys derogatory ideas, they could not be justified even to protect captive audiences. The Stanford policy, for example, proscribes only expression that “is intended to insult or stigmatize” on the basis of race and other prohibited categories. The variation on the Stanford code that Lawrence endorsed would have compounded this viewpoint discrimination by expressly excluding insulting speech directed at “dominant majority groups.” Moreover, although the code that Stanford adopted does not expressly reflect this particularly egregious form of viewpoint discrimination, the chair of the committee that propounded the rule indicated that it would be enforced as if it did incorporate an exception for speech that is insulting to “dominant majority groups.”

B. Particular Speech Limiting Doctrines Potentially Applicable to Campus Hate Speech

In addition to the foregoing general principles, Lawrence and other proponents of campus hate speech regulations invoke three specific doctrines in an attempt to justify such rules: the fighting words doctrine; the tort of intentional infliction of emotional distress; and the tort of group defamation. As the following discussion shows, the Supreme Court has recognized that each of these doctrines may well be inconsistent with free speech principles. Therefore these doctrines may not support any campus hate speech restrictions whatsoever. In any event, they at most would support only restrictions that are both narrowly drawn and narrowly applied.

1. Fighting Words. The fighting words doctrine is the principal model for the Stanford code, which Lawrence supports. However, this doctrine provides a constitutionally shaky foundation for many reasons: it has been substantially limited in scope and is probably no longer good law; even if the Supreme Court were to apply a narrowed version of the doctrine, such application would threaten free speech principles; and, as actually implemented, the fighting words doctrine suppresses protectible speech and entails the inherent danger of discriminatory application to speech by members of minority groups and dissidents.

In addition to the foregoing, independently sufficient bases for rejecting campus hate speech regulations modeled on the fighting words
Regulating Racist Speech on Campus

...
Court initially formulated in 1942 has since been substantially limited, essentially to the point of nonexistence, because the initial formulation contravenes fundamental free speech principles.

Although the Court originally defined constitutionally regulable fighting words in fairly broad terms in its 1942 ruling in *Chaplinsky v. New Hampshire*, subsequent decisions have narrowed the definition to such a point that the doctrine probably would not apply to any of the instances of campus racist speech that Lawrence and others seek to regulate. As originally formulated in *Chaplinsky*, the fighting words doctrine excluded from First Amendment protection “insulting or ‘fighting’ words, those which by their very utterance inflict injury or tend to incite an immediate breach of peace.”

In light of subsequent developments, it is significant to note that the first prong of *Chaplinsky’s* fighting words definition, words “which by their very utterance inflict injury,” was dictum. The Court’s actual holding was that the state statute at issue was justified by the state’s interest in preserving the public peace by prohibiting “words likely to cause an average addressee to fight.” The Court stressed that “no words were forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, [they are] addressed.” The Court also held that the statute had been applied appropriately to Mr. Chaplinsky, who had called a city marshal “a God damned racketeer” and “a damned Fascist.” It explained that these “epithets [are] likely to provoke the average person to retaliation, and thereby cause a breach of the peace.”

In 1972, in *Gooding v. Wilson*, the Court substantially narrowed *Chaplinsky’s* definition of fighting words by bringing that definition into line with *Chaplinsky’s* actual holding. In *Gooding*, as well as in every subsequent fighting words case, the Court disregarded the dictum in which the first prong of *Chaplinsky’s* definition was set forth and treated only those words that “tend to incite an immediate breach of peace” as fighting words. Consistent with this narrowed definition, the Court has invalidated regulations that hold certain words to be per se proscribable and has insisted that each challenged utterance be evaluated contextually. Thus, under the Court’s current view, even facially valid laws that restrict fighting words may be applied constitutionally only in circumstances where their utterance almost certainly will lead to immediate violence. Laurence Tribe described this doctrinal development as, in
effect, incorporating the so-called clear and present danger test into the fighting words doctrine; in other words, speech may be limited only if necessary to avert an imminent, tangible harm.

In accordance with its narrow construction of constitutionally permissible prohibitions upon “fighting words,” the Court has overturned every single fighting words conviction that it has reviewed since Chaplinsky. Moreover, in one post-Chaplinsky decision, the Court overturned an injunction that had been based on the very word that had led to the conviction in Chaplinsky itself (fascist). 47

For the foregoing reasons, Supreme Court justices and constitutional scholars persuasively maintain that Chaplinsky’s fighting words doctrine is no longer good law. 48 Even more fundamentally, constitutional scholars have convincingly argued that this doctrine should no longer be good law, for reasons that are particularly weighty in the context of racist slurs. First, as Stephen Gard concluded in a comprehensive review of both Supreme Court and lower court decisions that apply the fighting words doctrine, the asserted governmental interest in preventing a breach of the peace is not logically furthered by this doctrine. He explained:

“It is fallacious to believe that personally abusive epithets, even if addressed face-to-face to the object of the speaker’s criticism, are likely to arouse the ordinary law abiding person beyond mere anger to uncontrollable reflexive violence. Further, even if one unrealistically assumes that reflexive violence will result, it is unlikely that the fighting words doctrine can successfully deter such lawless conduct.” 49

Second, just as the alleged peace-preserving purpose does not rationally justify the fighting words doctrine in general, that rationale also fails to justify the fighting words doctrine when applied to racial slurs in particular. As Harry Kalven noted, “outbursts of violence are not the necessary consequence of such speech and, more important, such violence when it does occur is not the serious evil of the speech.” 50 Rather, as Lawrence stresses, the serious evil of racial slurs consists of the ugliness of the ideas they express and the psychic injury they cause to their addressees. Therefore, the fighting words doctrine does not address and will not prevent the injuries caused by campus racist speech.

Even if there were a real danger that racist or other fighting words would cause reflexive violence, and even if that danger would be reduced by the threat of legal sanction, the fighting words doctrine still would be
problematic in terms of free speech principles. As Zechariah Chafee observed, this doctrine “makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence.”\textsuperscript{51} In other contexts, the Court appropriately has refused to allow the addressees of speech to exercise such a “heckler’s veto.”\textsuperscript{52}

The fighting words doctrine is constitutionally flawed for the additional reasons that it suppresses much protectible speech and that the protectible speech of minority group members is particularly vulnerable. Notwithstanding the Supreme Court’s limitation of the doctrine’s scope, Gard’s survey reveals that the lower courts apply it much more broadly. Since the Supreme Court reviews only a fraction of such cases, the doctrine’s actual impact on free speech must be assessed in terms of these speech-restrictive lower court rulings. Gard concluded that, in the lower courts, the fighting words doctrine “is almost uniformly invoked in a selective and discriminatory manner by law enforcement officials to punish trivial violations of a constitutionally impermissible interest in preventing criticism of official conduct.”\textsuperscript{53} Indeed, Gard reported, “it is virtually impossible to find fighting words cases that do not involve either the expression of opinion on issues of public policy or words directed toward a government official, usually a police officer.”\textsuperscript{54} Even more disturbing is that the reported cases indicate that blacks are often prosecuted and convicted for the use of fighting words, including in situations where they are advocating civil rights.\textsuperscript{55} Thus, the record of the actual implementation of the fighting words doctrine demonstrates that—as is the case with all speech restrictions—it endangers principles of equality as well as free speech. That record substantiates the risk that such a speech restriction will be applied discriminatorily against the very minority group members whom it is intended to protect.

Lawrence himself notes that many Supreme Court decisions that overruled fighting words convictions involved a “potentially offended party [who] was in a position of relative power when compared with the speaker.”\textsuperscript{56} As Gard demonstrated, for each such conviction that was reviewed and overturned by the Supreme Court, many others were not.\textsuperscript{57} Thus, Lawrence and other proponents of university speech codes that are based on the fighting words model must believe that university officials will enforce them in a manner that differs from the general enforcement pattern of similar regulations. They must have faith that university officials, as opposed to other officials, are unusually sensitive
Regulating Racist Speech on Campus

to free speech rights in general, and to the free speech rights of minority group members and dissidents in particular.

Based on his analysis of the actual application of the fighting words doctrine, Gard adheres to no such faith in the discretion of enforcing officials. In response to another legal academic’s suggestion that the fighting words doctrine could be invoked to protect the aged and infirm from “the vilest personal verbal abuse,” Gard said that this was “a romantic vision that exists only in the imagination of a law professor.” Even assuming that university officials might be unusually attentive to free speech values when implementing the fighting words doctrine, the use of that doctrine by universities could fuel an increased use by other officials, who might well fail to implement it in a speech-sensitive fashion.

2. Intentional Infliction of Emotional Distress. A committee report that was considered by the University of Texas recommended regulating campus hate speech in accordance with the common law tort of intentional infliction of emotional distress. This doctrinal approach has a logical appeal because it focuses on the type of harm potentially caused by racist speech that universities are most concerned with alleviating—namely, emotional or psychological harm that interferes with studies. In contrast, the harm at which the fighting words doctrine aims—potential violence by the addressee against the speaker—is of less concern to most universities.

Traditional civil libertarians caution that the intentional infliction of emotional distress theory should almost never apply to verbal harassment. A major problem is that, as Gard notes, “the innate vagueness of the interest in preventing emotional injury to listeners suggests that any attempt at judicial enforcement will inevitably result in the imposition of judges’ subjective linguistic preferences on society, discrimination against ethnic and racial minorities, and ultimately the misuse of the rationale to justify the censorship of the ideological content of the speaker’s message.” Again, as was true for the fighting words doctrine, there is a particular danger that the intentional infliction of emotional distress doctrine also will be enforced to the detriment of the very minority groups whom the hate speech code advocates hope to protect.

The significant general problems with the intentional infliction of emotional distress theory counsel against its application in the campus
context specifically. Citing these reasons, Stanford University declined to base its hate speech regulation on this tort model. Moreover, even though the University of Texas committee report concluded that the emotional distress approach was less problematical than the fighting words approach, it cautioned: "[T]here can be no guarantee as to the constitutionality of any university rule bearing on racial harassment and sensitive matters of freedom of expression."

The position that the intentional infliction of emotional distress tort should virtually never apply to words received substantial support in the Supreme Court's 1988 decision in *Hustler Magazine v. Falwell*. Writing for a unanimous Court, Chief Justice Rehnquist reversed a jury verdict that had awarded damages to the nationally known minister, Jerry Falwell, for the intentional infliction of emotional distress. The Court held that a public figure such as Falwell may not "recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most." The Court further ruled that public figures and public officials may not recover for this tort unless they could show that the publication contained a false statement of fact that was made with "actual malice," that is, with knowledge that the statement was false or with reckless disregard as to whether or not it was false. In other words, the Court required public officials or public figures who claim intentional infliction of emotional distress to satisfy the same heavy burden of proof it imposes upon such individuals who bring defamation claims.

Although the specific *Falwell* holding focused on public-figure plaintiffs, much of the Court's language indicated that, because of First Amendment concerns, it would strictly construe the intentional infliction of emotional distress tort in general, even when pursued by nonpublic plaintiffs. For example, the Court said, to require a statement to be "outrageous" as a prerequisite for imposing liability did not sufficiently protect First Amendment values. Because the "outrageousness" of the challenged statement is a typical element of the tort (it is included in the *Restatement of Torts* definition) the Court's indication that it is constitutionally suspect has ramifications beyond the sphere of public-figure actions. The Court warned:

"Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a
particular expression. An “outrageousness” standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience. 62

For the reasons signaled by the unanimous Supreme Court in Falwell, any cause of action for intentional infliction of emotional distress that arises from words must be narrowly framed and strictly applied in order to satisfy First Amendment dictates.

3. Group Defamation. Lawrence does not elaborate on either the constitutionality or efficacy of the group defamation concept, yet he approvingly notes others’ alleged support for it. The group defamation concept, however, has been thoroughly discredited by judges and scholars. 63

First, group defamation regulations are unconstitutional in terms of both Supreme Court doctrine and free speech principles. To be sure, the Supreme Court’s only decision that expressly reviewed the issue, Beauharnais v. Illinois, 64 upheld a group libel statute against a First Amendment challenge. However, that 5-4 decision was issued more than forty years ago, in 1952, at a relatively early point in the Court’s developing free speech jurisprudence. Beauharnais is widely assumed no longer to be good law in light of the Court’s subsequent speech-protective decisions on related issues, notably its holdings that strictly limit individual defamation actions so as not to chill free speech. In particular, as Laurence Tribe has noted, the Court’s landmark ruling in New York Times v. Sullivan 65 “seemed ... to eclipse Beauharnais’ sensitivity to ... group defamation claims ... because New York Times required public officials bringing libel suits to prove that a defamatory statement was directed at the official personally, and not simply at a unit of government.”

Statements that defame groups convey opinions or ideas on matters of public concern, and therefore should be protected even if those statements also injure reputations or feelings. The Supreme Court recently reaffirmed this principle in a 1990 decision involving an individual defamation action, Milkovich v. Lorain Journal Co. 66

In addition to flouting constitutional doctrine and free speech principles, rules sanctioning group defamation are ineffective in curbing the specific class of hate speech that Lawrence advocates restraining. Even Justice Frankfurter’s opinion for the narrow Beauharnais majority repeatedly expressed doubt about the wisdom or efficacy of group libel
laws. Justice Frankfurter stressed that the Court upheld the Illinois law in question only because of judicial deference to the state legislature’s judgments on these points. Ironically, though, the Illinois legislature apparently did not consider its group libel law to be particularly wise or effective, because it repealed that law in its first revision of the state criminal code following the Supreme Court’s decision, only nine years after the decision.

The concept of defamation encompasses only false statements of fact that are made without good-faith belief in their truth. Therefore, any disparaging or insulting statement would be immune from this doctrine, unless it were factual in nature, demonstrably false in content, and made in bad faith. Members of minority groups that are disparaged by an allegedly libelous statement would hardly have their reputations or psyches enhanced by a process in which the maker of the statement sought to prove his good-faith belief in its truth, and they were required to demonstrate the absence thereof.

One additional problem with group defamation statutes as a model for rules sanctioning campus hate speech should be noted. As with the other speech-restrictive doctrines asserted to justify such rules, group defamation laws introduce the risk that rules will be enforced at the expense of the very minority groups sought to be protected. The Illinois statute upheld in Beauharnais is illustrative. According to a leading article on group libel laws, during the 1940s the Illinois statute was “a weapon for harassment of the Jehovah’s Witnesses,” who were then “a minority . . . very much more in need of protection than most.”

C. Even a Narrow Regulation Could Have a Negative Symbolic Impact on Constitutional Values

Taking into account the constraints imposed by free speech principles and doctrines potentially applicable to the regulation of campus hate speech, it might be possible—although difficult—to frame a sufficiently narrow rule to withstand a facial First Amendment challenge. However, it bears reemphasizing that, as the University of Texas committee report stressed, “[T]here can be no guarantee as to the constitutionality of any university rule bearing on racial harassment and sensitive matters of freedom of expression.”

Even assuming that a regulation could be crafted with sufficient preci-
sion to survive a facial constitutional challenge, several further problems would remain, which should give any university pause in evaluating whether to adopt such a rule. Although these inherent problems with any hate speech regulation are discussed in greater detail below, in the context of analyzing Lawrence's specific proposal, they are summarized here. First, because of the discretion entailed in enforcing any such rule, they all involve an inevitable danger of arbitrary or discriminatory enforcement. Therefore, the rule's implementation would have to be monitored to ensure that it did not exceed the bounds of the regulation's terms or threaten content-and viewpoint-neutrality principles. This danger is graphically illustrated by the experience with the only campus hate speech rules for which a full enforcement record is available (because they were subject to litigation, and hence, disclosure): those at the Universities of Michigan and Wisconsin.

Second, there is an inescapable risk that any hate speech regulation, no matter how narrowly drawn, will chill speech beyond its literal scope. Members of the university community may well err on the side of caution to avoid being charged with a violation. For example, there is evidence that the hate speech policy adopted by the University of Wisconsin in 1989 had this effect, even before it was directly enforced. A third problem inherent in any campus hate speech policy, as Lawrence concedes, is that such rules constitute a precedent that can be used to restrict other types of speech. As the Supreme Court has recognized, the long-range precedential impact of any challenged governmental action should be a factor in evaluating its lawfulness.

Further, in light of constitutional constraints, any campus hate speech policy inevitably would apply to only a tiny fraction of all racist expression, and accordingly it would have only a symbolic impact. Therefore, in deciding whether to adopt such a rule, universities must ask whether that symbolic impact is, on balance, positive or negative in terms of constitutional values. On the one hand, some advocates of hate speech regulations maintain that the regulations might play a valuable symbolic role in reaffirming our societal commitment to racial equality (although this is debatable). On the other hand, we must beware of even symbolic or perceived diminution of our impartial commitment to free speech. Even a limitation that has a direct impact upon only a discrete category of speech may have a much more pervasive indirect impact, by undermining the First Amendment's moral legitimacy. Recently, the Su-
Supreme Court ringingly reaffirmed the core principle that a neutral commitment to free speech should trump competing symbolic concerns. In *United States v. Eichman*, which invalidated the Flag Protection Act of 1989, the Court declared:

Government may create national symbols, promote them, and encourage their respectful treatment. But the Flag Protection Act goes well beyond this by criminally proscribing expressive conduct because of its likely communicative impact.

We are aware that desecration of the flag is deeply offensive to many. But the same might be said, for example, of virulent ethnic and religious epithets, vulgar repudiations of the draft, and scurrilous caricatures. “If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because it finds the idea itself offensive or disagreeable.” Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering.

2. LAWRENCE’S CONCEPTION OF REGULABLE RACIST SPEECH ENDANGERS FREE SPEECH PRINCIPLES

The preceding discussion of relevant constitutional doctrine points to several problems with the Stanford regulations, as well as other regulations adopted or considered by other universities. As previously explained, the Stanford regulations violate the cardinal principles that speech restrictions must be content- and viewpoint-neutral. Moreover, although these regulations purportedly incorporate the fighting words doctrine, they in fact go well beyond the narrow bounds that the Court has imposed on that doctrine, and they chill protected speech.

A. The Proposed Regulations Would Not Pass Constitutional Muster

1. *The Regulations Exceed the Bounds of the Fighting Words Doctrine.*

As discussed above, the fighting words doctrine is fraught with constitutional problems. As a result, it has been abrogated *sub silentio* and should be expressly invalidated (except to the very limited extent that it simply reflects the “clear and present danger” doctrine). In any event, even assuming that the doctrine is still good law, it has been severely circumscribed by Supreme Court rulings. Because those limits are necessitated by free speech principles, they must be strictly enforced.

Most recently and most pointedly, as previously discussed, in it 1992
Regulating Racist Speech on Campus

decision in R.A.V. v. City of St. Paul, the Court held that, to survive constitutional scrutiny, at the very least, fighting words regulations must be neutral in terms of the subject matter and the viewpoint of the targeted expression. For this reason alone, the First Amendment is violated by the Stanford policy, along with all other campus speech codes that prohibit only expression that conveys discriminatory ideas about race and other specified societal groupings.

Additionally, even before its R.A.V. decision, the Court had prescribed other limitations on the fighting words doctrine, which are also violated by campus speech codes of the type adopted by Stanford. Stephen Gard’s thorough study of the law in this area summarizes these pre-1992 limitations on the fighting words doctrine:

The offending language (1) must constitute a personally abusive epithet, (2) must be addressed in a face-to-face manner, (3) must be directed to a specific individual and be descriptive of that individual, and (4) must be uttered under such circumstances that the words have a direct tendency to cause an immediate violent response by the average recipient. If any of these four elements is absent, the doctrine may not justifiably be invoked as a rationale for the suppression of the expression.75

The operative language of the Stanford code provides:

Speech or other expression constitutes harassment by personal vilification if it:

a) is intended to insult or stigmatize an individual or 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.

A comparison of the Stanford code to the Supreme Court’s four pre-1992 criteria for constitutional fighting words restrictions, as summarized by Gard, reveals that the code clearly does not satisfy one of the Court’s criteria, and it may not satisfy the other three either. Most importantly, as previously explained, since its 1972 decision in Gooding v. Wilson, the Court consistently has invalidated fighting words defini-
tions that refer only to the nature of the words. Instead, it has insisted that these words must be evaluated contextually, to assess whether they are likely to cause an imminent breach of the peace under the circumstances in which they are uttered. (This requirement is set forth in Gard’s fourth criterion.) Yet the Stanford code punishes words “which are commonly understood to convey” group-based hatred. By categorically proscribing certain words, without considering their context, the Stanford code falls afoul of the First Amendment.

2. The Regulations Will Chill Protected Speech. Beyond its facial problems of violating content and viewpoint neutrality principles and fighting words limitations, the Stanford code also will dampen academic discourse. This inevitable outcome is indicated by the experience under the University of Michigan hate speech regulation.

Even though the Michigan regulation was in some respects broader than its Stanford counterpart, the latter rule also suffers from facial overbreadth and ambiguity. One of the key terms in the Stanford regulation, the term “stigmatize,” also was contained in the Michigan policy and specifically was ruled unconstitutionally vague. Accordingly, the Stanford code appears to be as constitutionally suspect as the Michigan rule, contrary to Lawrence’s assumption.

In Doe v. University of Michigan, the United States District Court for the Eastern District of Michigan held that the University of Michigan’s anti-hate speech policy violated the First Amendment because, as applied, it was overbroad and impermissibly vague. The court concluded that during the year when the policy was in effect, the University “consistently applied” it “to reach protected speech.” Moreover, because of the policy’s vagueness, the court concluded that it did not give adequate notice of which particular expressions would be prohibited and which protected. Consequently, the policy deterred members of the university community from engaging in protected expression for fear it might be sanctioned. This “chilling effect” of any hate speech regulation is particularly problematic in the academic environment, given the special importance of a free and robust exchange of ideas there.

The judge who ultimately found the Michigan rule unconstitutional did not share Lawrence’s opinion that it was “poorly drafted and obviously overbroad.” To the contrary, his opinion expressly noted that he would not have found the rule unconstitutionally overbroad merely
based on its language. Rather, he found it unconstitutional in light of the enforcement record. These findings show the relevance of the Michigan case not only to the Stanford situation, but also to all other campus hate speech regulations. Regardless of how carefully these rules are drafted, they inevitably are vague and unavoidably invest officials with substantial discretion in the enforcement process; thus, such regulations exert a chilling effect on speech beyond their literal bounds. Accordingly, even though the University of Wisconsin's hate speech policy was somewhat narrower than the University of Michigan's policy, it too was ruled to be substantially overbroad and unduly vague, thus violating the First Amendment. As Eleanor Holmes Norton has cautioned, "It is technically impossible to write an anti-speech code that cannot be twisted against speech nobody means to bar." 

In the recent wave of college crackdowns on racist and other forms of hate speech, examples abound of attempts to censor speech conveying ideas that clearly play a legitimate role in academic discourse, although some of us might find them wrongheaded or even odious. For example, the University of Michigan's anti-hate speech policy could justify attacks on author Salman Rushdie's book, The Satanic Verses, on the ground that it was offensive to Muslims.

Such incidents are not aberrational. Any anti-hate speech rule inescapably entails some vagueness, due to the inherent imprecision of key words and concepts common to all such proposed rules. For example, most regulations employ one or more of the following ambiguous terms: "demeaning," "disparaging," "hostile," "insulting," and "stigmatizing." Therefore, there is real danger that even a narrowly crafted rule will deter some expression that should be protected, especially in the university environment. In particular, such a rule probably will add to the silence on "gut issues" about racism, sexism, and other forms of bias that already impede interracial and other intergroup dialogues.

Additionally, it must be recognized that silencing certain expressions may be tantamount to silencing certain ideas. As the plaintiff in Doe v. Michigan argued:

[T]he policy . . . is an official statement that at the University of Michigan, some arguments will no longer be tolerated. Rather than encourage her maturing students to question each other's beliefs on such diverse and controversial issues as the proper role of women in society, the merits of particular religions, or the moral propriety of homosexuality, the University has decided that it must pro-
tect its students from what it considers to be “unenlightened” ideas. In so doing, the University has established a secular orthodoxy by implying, among other things, that homosexuality is morally acceptable, [and] that ... feminism [is] superior to the traditional view of women. 86

The Michigan plaintiff was victimized directly by the “pall of orthodoxy” 87 that the university’s anti-hate speech policy cast over the campus. As a graduate student specializing in behavioral psychology, he felt that the rule deterred him from classroom discussion of theories that some psychological differences among racial groups and between the sexes are related to biological differences, for fear of being charged with racial or sexual harassment.

In addition to their chilling effect on the ideas and expressions of university community members, policies that bar hate speech could also engender broader forms of censorship. As noted by William Cohen of Stanford Law School, an anti-hate speech rule such as the one adopted by his university “purports to create a personal right to be free from involuntary exposure to any form of expression that gives certain kinds of offense.” Therefore, he explains, such a rule “could become a sword to challenge assigned readings in courses, the showing of films on campus, or the message of certain speakers.” 88

B. The Proposed Regulations Would Endanger Fundamental Free Speech Principles

The various proposed campus hate speech regulations, including the Stanford code that Lawrence endorses, are not only inconsistent with current Supreme Court doctrine prescribing permissible limits on speech. Even more problematic is the fact that they jeopardize basic free speech principles. Whereas certain conduct may be regulable, speech that advocates such conduct is not, and speech may not be regulated on the basis of its content or viewpoint, even if many of us strongly disagree with—or, worse yet, are repelled by—that content or viewpoint.

1. Protection of Speech Advocating Regulable Conduct. Civil libertarians, scholars, and judges consistently have distinguished between speech advocating unlawful conduct and the unlawful conduct itself. Although this distinction has been drawn in numerous different factual settings, the fundamental underlying issues always are the same. For example,
within recent years, some pro-choice activists have urged civil libertarians and courts to make an exception to free speech principles in order to restrain the expressive conduct of anti-abortion activists. Instead, civil libertarians have persuaded courts to prohibit assaults, blockages of clinic entrances, trespasses, and other illegal conduct by anti-choice activists. Similarly, civil libertarians and courts have rejected pleas by some feminists to condone an exception to free speech guarantees for sexually explicit materials that reflect sexist attitudes. Instead, civil libertarians have renewed their efforts to persuade courts and legislatures to invalidate sexist actions. A decade ago, civil libertarians and several courts—including the Supreme Court—rejected the plea of Holocaust survivors in Skokie, Illinois, to prohibit neo-Nazis from peacefully demonstrating. Instead, civil libertarians successfully have lobbied for the enactment and enforcement of laws against anti-Semitic vandalism and other hate-inspired conduct.

A pervasive weakness in Lawrence’s analysis is his elision of the distinction between racist speech, on the one hand, and racist conduct, on the other. It is certainly true that racist speech, like other speech, may have some causal connection to conduct. As Justice Holmes observed, “[e]very idea is an incitement” to action. However, as Justice Holmes also noted, to protect speech that advocates conduct you oppose does not “indicate that you think the speech impotent, ... or that you do not care wholeheartedly for the result.” Rather, this protection is based on the critical distinction between speech that has a direct and immediate link to unlawful conduct and all other speech, which has less direct and immediate links. In Holmes’s immortal words:

[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, “Congress shall make no law . . . abridging the freedom of speech.”

Justice Holmes’s stirring phrases were penned in dissenting opinions. However, the Court enshrined his view as the law of the land in 1969, in Brandenburg v. Ohio. In a unanimous opinion overturning the conviction of a Ku Klux Klansman for an anti-black and anti-Semitic speech, the Court said that the First Amendment does “not permit a
210 Nadine Strossen

state to forbid... advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” 94

2. Proscription on Content-Based Speech Regulations.

a. The indivisibility of free speech. It is important to place the current debate about campus racist speech in the context of efforts to censor other forms of hate speech. Such a broadened perspective suggests that consistent principles should be applied each time the issue resurfaces in any guise. Every person may find one particular type of speech especially odious, and one message may most sorely test his or her dedication to free speech values. But for each person who would exclude racist speech from the general proscription against content- or viewpoint-based speech regulations, recent experience shows that there is another who would make such an exception only for anti-choice speech, another who would make it only for sexist speech, another who would make it only for anti-Semitic speech, another who would make it only for flag desecration, another who would make it only for speech at odds with traditional religious or moral values, and so on.

The recognition that there is no principled basis for curbing speech that expresses some particular ideas is reflected in the time-honored prohibition on any content- or viewpoint-based regulations. As stated by Laurence Tribe, “If the Constitution forces government to allow people to march, speak, and write in favor of peace, brotherhood, and justice, then it must also require government to allow them to advocate hatred, racism, and even genocide.” 95

The position stated by Tribe is not just the traditional civil libertarian view, but it also is the law of the land. The courts consistently have agreed with civil libertarian claims that the First Amendment protects the right to engage in racist and other forms of hate speech. Why is this so, and should it be so? Lawrence rightly urges us to take a fresh look at this issue, no matter how well settled it is as a matter of law. I have taken that invitation seriously and reflected long and hard upon his thought-provoking analysis and the questions it presents. Having done so, however, I conclude that the courts and traditional civil libertarians are correct in steadfastly rejecting laws that create additional new exceptions to free speech protections for racist expression.

One longstanding rationale for the view that speech must be pro-
Regulating Racist Speech on Campus

tected, regardless of its content or views, is the belief that we need a free
marketplace of ideas, open even to the most odious and offensive ideas
and expressions, because truth ultimately will triumph in an unrestricted
marketplace.\textsuperscript{96} The marketplace metaphor is subject to some criticism,
as Lawrence notes. Nevertheless, the marketplace of ideas does some-
times work to improve society: this has been particularly true with
regard to the promotion of racial equality. Moreover, there are other,
independently sufficient rationales for the content- and viewpoint-neu-
tral protection even of hate speech. Another important, more recently
articulated rationale is that freedom of expression promotes individual
autonomy and dignity.\textsuperscript{97} Lawrence himself endorses an additional the-
ory for the protection of racist speech, a view that has been advanced by
Lee Bollinger: free speech reinforces our society’s commitment to toler-
ance and to combating racist ideas.\textsuperscript{98}

Although the foregoing theories may be acceptable in general, one
might ask why they do not permit exceptions for racist speech. Racism
in America is unique in important respects. For most of our country’s
history, racism was enshrined legally through slavery or de jure discrimi-
nation. The post-Civil War constitutional amendments guaranteed racial
equality. More recently, all branches and levels of the government have
sought to implement these constitutional guarantees by outlawing any
vestiges of state-sponsored, as well as many forms of private, racial
discrimination. Given our nation’s special obligation to eradicate the
“badges and incidents” of the formerly government-sanctioned institu-
tions of racism, is it not appropriate to make broader exceptions than
usual to free speech doctrines for racist speech? As Rodney Smolla has
noted, “Racist speech is arguably different in kind from other offensive
speech, because the elimination of racism is \textit{itself} enshrined in our Con-
stitution as a public value of the highest order.”\textsuperscript{99}

The American commitment to eradicate racial discrimination is rein-
forced by a parallel international commitment, as expressed in such
documents as the United Nations Charter, the Universal Declaration of
Human Rights, and the International Convention on the Elimination of
All Forms of Racial Discrimination. Moreover, the United States is
apparently alone in the world community in sheltering racist speech.
Both under international agreements and under the domestic law of
many other countries, racist speech is outlawed.

In light of the universal condemnation of racial discrimination and
the worldwide regulation of racist speech, it certainly is tempting to consider excepting racist speech from First Amendment protection. Episodes of racist speech, such as those cited by Lawrence and others, make a full commitment to free speech at times seem painful and difficult. Civil libertarians certainly find such speech abhorrent, given our dedication to eradicating racial discrimination and other forms of bigotry. But experience has confirmed the truth of the indivisibility principle articulated above: history demonstrates that if the freedom of speech is weakened for one person, group, or message, then it is no longer there for others. The free speech victories that civil libertarians have won in the context of defending the right to express racist and other anti-civil libertarian messages have been used to protect speech proclaiming anti-racist and pro-civil libertarian messages. For example, in 1949, the ACLU defended the right of Father Terminiello, a suspended Catholic priest, to give a racist speech in Chicago. The Supreme Court agreed with that position in a decision that became a landmark in free speech history. Time and again during the 1960s and 1970s, the ACLU and other civil rights groups were able to defend free speech rights for civil rights demonstrators by relying on the Terminiello decision.

b. The slippery slope dangers of banning racist speech. To attempt to craft free speech exceptions only for racist speech would create a significant risk of a slide down the proverbial “slippery slope.” To be sure, lawyers and judges are capable of—indeed, especially trained in—drawing distinctions between similar situations. Therefore, I agree with Lawrence and other critics of the absolutist position that slippery slope dangers should not be exaggerated. It is probably hyperbole to contend that if we ever stepped off the mountaintop where all speech is protected regardless of its content, we would inevitably end up in the abyss where the government controls all our words. On the other hand, critics of absolutism should not minimize the real danger: we would have an extremely difficult time limiting our descent to a single downward step by attempting to prohibit only racist expression on campus. It would be very hard to craft applicable rules and supporting rationales that would meaningfully distinguish this type of speech from others.

First, hard questions would be presented about the groups that should be protected. Should we regulate speech aimed only at racial and ethnic groups, as the University of Texas considered? Or should we also bar
Regulating Racist Speech on Campus

insults of religious groups, women, gay men and lesbians, individuals with disabilities, Vietnam War veterans, and so on, as do the rules adopted by Stanford and the University of Michigan?

Second, it would be highly challenging to define proscribable harassing speech without encompassing important expression that should be protected. Censorial consequences would likely result from all proposed or adopted university policies, including the Stanford code, which sanction speech intended to “insult or stigmatize” on the basis of race or other prohibited grounds. For example, certain feminists suggest that all heterosexual sex is tantamount to rape because heterosexual men are aggressors who operate in a cultural climate of pervasive sexism and violence against women. Aren’t these feminists insulting or stigmatizing heterosexual men on the basis of their sex and sexual orientation? And how about a Holocaust survivor who blames all (“Aryan”) Germans for their collaboration during World War II? Doesn’t this insult or stigmatize on the basis of national and ethnic origin? And surely we can think of numerous other examples that would have to give us pause.

The difficulty of formulating limited, clear definitions of prohibited hate speech, which do not encompass valuable contributions to societal discourse, is underscored by the seemingly intractable ambiguities in various campus rules. Even proponents of campus hate speech regulations recognize their inevitable ambiguities and necessarily contextualized applications, with the result that the individuals who enforce them must have substantial discretion to draw distinctions based upon the particular facts and circumstances involved in any given case. Richard Delgado, an early advocate of rules proscribing hate speech, acknowledged that the offensiveness of even such a traditionally insulting epithet as “nigger” would depend on the context in which it was uttered, since it could be a term of affection when exchanged between friends. The imprecise nature of racist speech regulations is underscored further by the fact that even their proponents are unsure or disagree as to their applicability in particular situations.

Once we acknowledge the substantial discretion that anti-hate speech rules will vest in those who enforce them, then we are ceding to the government the power to pick and choose whose words to protect and whose to punish. Such discretionary governmental power is fundamentally antithetical to the free speech guarantee. As soon as the government
is allowed to punish any speech based upon its content, free expression exists only for those with power.

c. The content- and viewpoint-neutrality principles reflect sensitivity to hate speech's hurtful power. Contrary to Lawrence's apparent assumption, the conclusion that free speech protections must remain indivisible, even for racist speech, has nothing to do with insensitivity to the feelings of minority group members who are vilified by hate speech and suffer acutely from it. Traditional civil libertarians recognize the power of words to inflict psychic and even physiological harm. For example, precisely because the ACLU both acknowledges the power of speech and defends the exercise of that power even by those who express anti-civil libertarian ideas, the ACLU expressly dissociates itself from such ideas and makes it a priority to combat them through counterspeech and action. Nor are traditional civil libertarians unconcerned with the rights of hate speech victims, as Lawrence implies. To the contrary, civil libertarians champion the rights of all individuals to live in a society untainted by racism and other forms of bias; since its founding in 1920, the ACLU has directed considerable resources and efforts toward securing these rights.

I was appalled by Lawrence's account of the vicious racist vilification to which his sister's family recently was subjected. This account powerfully demonstrates that the old nursery rhyme is wrong: maybe words are different from sticks and stones insofar as they cannot literally break our bones, but words can and do hurt—brutally.

Two prominent defenders of content-neutral protection for hate speech have described painful personal experiences as victims of such speech. I refer to Stanford law professor Gerald Gunther, who was a leading opponent of the proposed Stanford code that Lawrence advocates, and Aryeh Neier, who as executive director of the ACLU during the Skokie episode vigorously championed the free speech rights of racists and anti-Semites. Far from opposing censorship despite the suffering they personally experienced as a result of hate speech, Gunther and Neier oppose censorship precisely because of these personal experiences. The justification for not outlawing "words that wound" is not based on a failure to recognize the injurious potential of words. The refusal to ban words is due precisely to our understanding both of how very powerful they are and of the critical role they play in our democratic society.
3. LAWRENCE'S RATIONALES FOR REGULATING RACIST SPEECH WOULD JUSTIFY SWEEPING PROHIBITIONS, CONTRARY TO FREE SPEECH PRINCIPLES

Although Lawrence actually advocates regulating only a relatively narrow category of racist speech, his rationales could be asserted to justify broader rules. Indeed, he himself appears to recognize that, if accepted, his approach could lead to outlawing all racist speech, as well as other forms of hate speech. Since many universities and individuals have advocated broader-ranging regulations—and since Lawrence also endorses restrictions that have a "considerably broader reach" than the Stanford code— it is important to consider the problems with Lawrence's more expansive rationales. His general theories about racist speech entail substantial departures from traditional civil libertarian and constitutional law positions.

A. Brown and Other Cases Invalidating Governmental Racist Conduct Do Not Justify Regulating Nongovernmental Racist Speech

Lawrence intriguingly posits that Brown v. Board of Education, Bob Jones University v. United States, and other civil rights cases justify regulation of private racist speech. The problem with drawing an analogy between all of these cases and the subject at hand is that the cases involved either government speech, as opposed to speech by private individuals, or conduct, as opposed to speech. Indeed, Brown itself is distinguishable on both grounds.

1. The Speech/Conduct Distinction. First, the governmental defendant in Brown—the Topeka, Kansas, Board of Education—was not simply saying that blacks are inferior. Rather, it was treating them as inferior through pervasive patterns of conduct, by maintaining systems and structures of segregated public schools. To be sure, a by-product of the challenged conduct was a message, but that message was only incidental. Saying that black children are unfit to attend school with whites is materially distinguishable from legally prohibiting them from doing so, despite the fact that the legal prohibition may convey the former message.

Lawrence's point proves too much. If incidental messages could trans-
form conduct into speech, then the distinction between speech and conduct would disappear completely, because all conduct conveys a message. To take an extreme example, a racially motivated lynching expresses the murderer’s hatred or contempt for his victim. But the clearly unlawful act is not protected from punishment by virtue of the incidental message it conveys. And the converse also is true. Just because the government may in effect suppress particular hate messages that are the by-product of unlawful conduct that it directly prohibits, it does not follow that the government may directly suppress all hate messages. Those messages not tightly linked to conduct that is independently unlawful must still be protected.

The Supreme Court has recognized these critical distinctions by subjecting to more demanding First Amendment scrutiny governmental measures that directly target the expressive element of expressive conduct. When a governmental measure seeks to regulate the communicative aspect of expressive conduct, the measure is presumptively unconstitutional. In contrast, when a governmental measure seeks to regulate the noncommunicative aspect of expressive conduct, the measure is presumptively constitutional. For example, in United States v. O’Brien, the Court upheld a statute that criminalized the destruction of draft cards, because it concluded that the government’s interest was limited to the nonexpressive aspect of this conduct. Conversely, in two later decisions, the Court struck down laws criminalizing the burning of the American flag, because it concluded that these laws aimed at the expressive aspect of the forbidden conduct.

Brown v. Board of Education does not constitute a precedent for regulating racist hate speech precisely because of these critical distinctions. The Brown Court’s invalidation of laws mandating racially segregated schools was not aimed at the expressive aspect of those laws. In stark contrast, anti-hate speech rules are aimed squarely at the communicative aspect of any expressive conduct.

2. The Private Action/State Action Distinction. Even if Brown had involved only a governmental message of racism, without any attendant conduct, that case still would be distinguishable in a crucial way from a private individual’s conveyance of the same message. Under the post-Civil War constitutional amendments, the government is committed to eradicating all badges and incidents of slavery, including racial discrimi-
nation. Consistent with the paramount importance of this obligation, the Supreme Court has held that the equal protection clause bars the government from lending textbooks to racially discriminatory private schools,\textsuperscript{115} even though the Court had held previously that the establishment clause does not bar the government from lending textbooks to private religious schools.\textsuperscript{116} In this respect, the government's constitutional duty to dissociate itself from racism is even greater than its constitutional duty to dissociate itself from religion. The government's supreme obligation to counter racism clearly is incompatible with racist speech promulgated by the government itself. Private individuals, though, have no comparable duty.

Mari Matsuda has argued that the government's failure to punish private hate speech could be viewed as state action insofar as this failure conveys a message that the state tolerates such speech. Because the Court construes the First Amendment's establishment clause as prohibiting government action that conveys a message of state support for religion,\textsuperscript{117} establishment clause cases constitute instructive precedents for evaluating Matsuda's argument. In the analogous establishment clause context, the Court repeatedly has held that the government's neutral tolerance and protection of private religious expression, along with all other expression, does not convey a message that the government endorses religion. In its 1990 decision in \textit{Board of Education of Westside Community Schools v. Mergens},\textsuperscript{118} the Court expressly reaffirmed the crucial distinction between government and private speech, in the establishment clause context, in terms fully applicable to the racist speech controversy. The Court declared, "[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."\textsuperscript{119} Paraphrasing this language and applying it to the hate speech context, one could say, "There is a crucial difference between government speech endorsing racism, which the Equal Protection Clause forbids, and private speech endorsing racism, which the Free Speech Clause protects."

In light of the government's special duty to dissociate itself from racism, one might try to distinguish private religious speech from private racist speech—much as the Court distinguished textbook loans to racially discriminatory private religious schools from the same kind of loans to private religious schools. However, the direct, tangible, explicit
government support of racially discriminatory schools through textbook lending programs is critically different from the indirect, intangible, implicit government support allegedly lent to racist conduct by the government’s failure to outlaw private racist speech.

Lawrence makes a telling point when he says that our government never has repudiated the group libels it perpetrated for years against blacks and that it is insufficient for the government simply to cease uttering those libels. Accordingly, one strategy for promoting racial equality, which is consistent with free speech, is to urge the government to proclaim anti-racist messages. The ACLU policy on campus hate speech (which is set out in the appendix to this chapter) expressly endorses this strategy.

Lawrence also makes the persuasive point that there is no absolute distinction between state and private action in the racist sphere, insofar as private acts of discrimination (as well as government acts) also are unlawful. This point, however, raises the other distinction discussed above—the distinction between words and conduct. Civil libertarians vigorously support the civil rights laws that make private discriminatory acts illegal, but that is a far cry from making private *speech* illegal. The *Bob Jones* case, upon which Lawrence seeks to rely, illustrates this critical distinction. What was objectionable there was the government conduct that supported and endorsed the private racist conduct—namely, the government’s financial contributions, through the tax system, to racially discriminatory private educational institutions. Moreover, even if a private university could be prohibited from *undertaking* discriminatory actions—in the case of Bob Jones University, barring interracial marriage and dating—it still could not be prohibited from *advocating* such actions. The ACLU amicus brief in the *Bob Jones* case made precisely these points in countering the university’s claim that withdrawing its tax benefits would violate its First Amendment rights. The ACLU argued, and the Court agreed, that the university was still free to urge its students not to engage in interracial marriage or dating, and that this was as far as its First Amendment rights extended. Prohibited racist acts are no different from other prohibited acts. The government may punish the acts, but it may not punish words that advocate or endorse them.

The other cases upon which Lawrence premises his argument also do not authorize the regulation of private racist speech. For example, he
draws a false analogy between private racist speech and a local government’s financing of allegedly “private” segregated (all-white) schools, after the government had closed down public schools in defiance of desegregation orders. Lawrence misreads these cases, which invalidated tangible government support for segregated schools, as standing for the proposition “that the defamatory message of segregation would not be insulated from constitutional proscription simply because the speaker was a non-government entity.” For example, in *Griffin v. Prince Edward County School Board*, the Supreme Court held that the governmental financing of segregated schools constituted prohibited state action. In contrast, had individual school district residents urged their government to undertake such action, or expressed their support for such action to black residents, that would have constituted protected private speech.

**B. The Nonintellectual Content of Some Racist Speech Does Not Justify Its Prohibition**

In addition to his principal argument that private racist speech may be regulated because it is indistinguishable from governmental racist conduct, Lawrence offers a second purported justification for restricting racist speech. He contends that “[a] defining attribute of speech is that it appeals first to the mind of the hearer who can evaluate its truth or persuasiveness,” and that because certain racist speech lacks this attribute, it should not be viewed as speech. This position is inconsistent with fundamental free speech values.

Lawrence’s argument overlooks the teachings of such landmark Supreme Court decisions as *Terminiello v. Chicago* and *Cohen v. California*, which recognize that protectible speech often appeals to the emotions as well as the mind. As early as 1948, the Court recognized that First Amendment protection is not restricted to the “exposition of ideas.” As Justice Douglas declared in a celebrated passage in *Terminiello*:

> [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. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance
of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.128

Justice Harlan129 echoed this theme in Cohen when he explained that protectible expression

conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible 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 sought to be communicated.130

Together, Terminiello and Cohen recognize that speech often expresses the speaker's emotions and appeals to the audience's emotions. This generalization applies not only to the ugly words of racist vituperation, but also to the beautiful words of poetry. Indeed, much indisputably valuable language, as well as expressive conduct, has the intention and effect of appealing not directly or not only to the mind. Such language also seeks to and does engage the audience's emotions. If emotion-provoking discourse were denied protected status, then much political speech—which is usually viewed as being at the apex of First Amendment protection—would fall outside the protected realm. The Court in Terminiello and Cohen rejected the restricted First Amendment paradigm of "a sedate assembly of speakers who calmly discussed the issues of the day and became ultimately persuaded by the logic of one of the competing positions."131

Lawrence reveals his narrower view when he asks, "[A]re racial insults ideas? Do they encourage wide-open debate?"132 In light of the Terminiello-Cohen line of cases, Lawrence wrongly implies that a negative response to these questions should remove racial insults from the domain of protected speech. Lawrence also incorrectly implies that the response to these questions should be negative. Racial insults convey ideas of racial supremacy and inferiority. Objectionable and discredited as these ideas may be, they are ideas nonetheless.
4. PROHIBITING RACIST SPEECH WOULD NOT EFFECTIVELY COUNTER, AND COULD EVEN AGGRAVATE, THE UNDERLYING PROBLEM OF RACISM

A. Civil Libertarians Should Continue to Make Combating Racism a Priority

Despite Lawrence's proffered justifications for regulating a broader spectrum of racist speech, he in fact advocates regulating only a quite limited category of such speech. Thus, even Lawrence's views of regulable speech, although broader than those of the Supreme Court or traditional civil libertarians, would allow most racist speech on campus.

I do not think it is worth spending a great deal of time debating the fine points of specific rules or their particular applications to achieve what necessarily will be only marginal differences in the amount of racist insults that can be sanctioned. The larger problems of racist attitudes and conduct—of which all these words are symptoms—would remain. Those who share the dual goals of promoting racial equality and protecting free speech must concentrate on countering racial discrimination, rather than on defining the particular narrow subset of racist slurs that constitutionally might be regulable.

I welcome Lawrence's encouragement to civil libertarians to "engage actively in speech and action that resists and counters the racist ideas the first amendment protects." But Lawrence need not urge traditional civil libertarians to "put[ ] at least as much effort and as many resources into fighting for the victims of racism as we put into protecting the rights of racists." The ACLU, for example, always has put far more effort and resources into assisting the victims of racism than into defending the rights of racists.

Although ACLU cases involving the Ku Klux Klan and other racist speakers often generate a disproportionate amount of publicity, they constitute only a tiny fraction (approximately one-tenth of one percent) of the ACLU's caseload. In the recent past, the ACLU has handled about six cases a year advocating the free speech rights of white supremacists, out of a total of more than six thousand cases, and these white supremacist cases rarely consume significant resources. Moreover, the resources the ACLU does expend to protect hatemongers' First Amendment rights are well invested. They ultimately preserve not only civil liberties, but
also our democratic system, for the benefit of all. Aryeh Neier persuasively drew this conclusion, for example, with respect to the ACLU's defense of the American Nazi party's right to demonstrate in Skokie:

[When it was all over no one had been persuaded to join [the Nazis]. They had disseminated their message and it had been rejected.

Why did the Nazi message fall on such deaf ears? Revolutionaries and advocates of destruction attract followers readily when the society they wish to overturn loses legitimacy. Understanding this process, revolutionaries try to provoke the government into using repressive measures. They rejoice, as the American Nazis did, when their rights are denied to them; they count on repression to win them sympathizers.

In confronting the Nazis, however, American democracy did not lose, but preserved its legitimacy.

The judges who devoted so much attention to the Nazis, the police departments that paid so much overtime, and the American Civil Liberties Union, which lost a half-million dollars in membership income as a consequence of its defense, used their time and money well. They defeated the Nazis by preserving the legitimacy of American democracy. 135

In contrast with its small, albeit important, investment in protecting the free speech rights of racists, the ACLU has throughout its history devoted substantial resources to the struggle against racism. The ACLU backed the civil rights movement in its early years, working with lawyers from the National Association for the Advancement of Colored People to plan the attack on segregation. In 1931, the ACLU published Black Justice, a comprehensive report on legalized racism. The ACLU also played an important role in the infamous Scottsboro cases, in which seven young black men were convicted of raping two white women after sham trials before an all-white jury; an ACLU attorney argued and won the first of these cases to reach the Supreme Court.

During World War II, the ACLU sponsored a challenge to the segregated draft and organized the Committee Against Racial Discrimination. In the 1950s, the ACLU successfully challenged state laws that made it a crime for a white woman to bear a child she had conceived with a black father. In the 1960s, the ACLU provided funds and lawyers to defend civil rights activists, and since then it has lobbied extensively for civil rights legislation.

The ACLU's Voting Rights Project has helped to empower black voters throughout the southern United States, facilitating the election of
hundreds of black officials. The ACLU also maintains several other special “Projects” whose constituents or clients are (alas) predominantly black—for example, the Capital Punishment Project, the Children’s Rights Project, and the National Prison Project. Since the late 1980s, the ACLU’s national legal department has focused on civil liberties issues related to race and poverty, and has won pathbreaking victories in cases involving racial discrimination in education and housing. In addition, state and local-level branches of the ACLU consistently allocate substantial resources to civil rights cases.

As indicated by both policy and action, the ACLU is committed to eradicating racial discrimination on campus as an essential step toward its larger goal of eliminating racial discrimination from society at large. For example, ACLU leaders have corresponded and met with university officials to recommend measures that they could implement to combat campus racism, consistent with both equality and free speech values. In the same vein, ACLU officials have worked for the implementation of educational programs designed to counter racist attitudes among college students, as well as younger students. Additionally, ACLU representatives have participated in universities’ deliberations about whether to adopt anti-hate speech rules, and if so, how to frame them. Representatives of the ACLU have also organized investigations of racist incidents at specific campuses, for purposes of advising university officials about how to respond to and prevent such problems. Furthermore, ACLU officials have organized and participated in protests of racist incidents, both on campus and more generally.

In light of these efforts, Lawrence’s suggestion that “the call for fighting racist attitudes and practices rather than speech [is] ‘just a lot of cheap talk’” is a cheap shot. In particular, it is noteworthy that the ACLU affiliates that have brought lawsuits challenging campus hate speech regulations also have undertaken specific efforts to counter campus and societal racism. Moreover, the charge of “cheap talk” more appropriately might be leveled at those who focus their attention on hate speech regulations. Such regulations may appear to provide a relatively inexpensive “quick fix,” but racist speech is only one symptom of the pervasive problem of racism, and this underlying problem will not be solved by banning one of its symptoms.
B. Punishing Racist Speech Would Not Effectively Counter Racism

Parts 2 and 3 of this chapter emphasized the principled reasons, arising from First Amendment theory, for concluding that racist speech should receive the same protection as other offensive speech. This conclusion is also supported by pragmatic or strategic considerations concerning the efficacious pursuit of equality goals. Not only would rules censoring racist speech fail to reduce racial bias, but they might well even undermine that goal.

First, there is no persuasive psychological evidence that punishment for name-calling changes deeply held attitudes. To the contrary, historical experience and psychological studies show that censored speech becomes more appealing and persuasive to many listeners merely by virtue of the censorship.

Nor is there any empirical evidence, from the countries that do out-law racist speech, that censorship is an effective means to counter racism. For example, Great Britain began to prohibit racist defamation in 1965. Almost three decades later, this law has had no discernible adverse impact on the National Front and other neo-Nazi groups active in Britain. As discussed above, it is impossible to draw narrow regulations that precisely specify the particular words and contexts that should lead to sanctions. Fact-bound determinations are required. For this reason, authorities have great discretion in determining precisely which speakers and which words to punish. Consequently, even vicious racist epithets have gone unpunished under British law. Moreover, even if actual or threatened enforcement of the law has deterred some overt racist insults, that enforcement has had no effect on more subtle, but nevertheless clear signals of racism. Some observers believe that racism is even more pervasive in Britain than in the United States.

C. Banning Racist Speech Could Aggravate Racism

For several reasons, banning the symptom of racist speech may compound the underlying problem of racism. Lawrence sets up a false dichotomy when he urges us to balance equality goals against free speech goals. Just as he observes that free speech concerns should be weighed on the pro-regulation as well as the anti-regulation side of the balance,
he should recognize that equality concerns weigh on the anti-regulation as well as the pro-regulation side.

The first reason that laws censoring racist speech may undermine the goal of combating racism flows from the discretion such laws inevitably vest in the prosecutors, judges, and other individuals who implement them. One ironic, even tragic, result of this discretion is that members of minority groups themselves—the very people whom the law is intended to protect—are likely targets of punishment. For example, among the first individuals prosecuted under the British Race Relations Act of 1965, which criminalized the incitement of racial hatred, were black-power leaders. Their overtly racist messages undoubtedly expressed legitimate anger at real discrimination, yet the statute drew no such fine lines, nor could any similar statute possibly do so. Rather than curbing speech offensive to minorities, this British law instead has been regularly used to curb the speech of blacks, trade unionists, and anti-nuclear activists. In perhaps the ultimate irony, this statute, which was intended to restrain the neo-Nazi National Front, instead has barred expression by the Anti-Nazi League.

The British experience is not unique. History teaches us that anti-hate speech laws regularly have been used to oppress racial and other minorities. For example, none of the anti-Semites who were responsible for arousing France against Captain Alfred Dreyfus were ever prosecuted for group libel. But Emile Zola was prosecuted for libeling the French clergy and military in his famous “J’accuse,” and he had to flee to England to escape punishment. Additionally, closer to home, the very doctrines that Lawrence invokes to justify regulating campus hate speech—for example, the fighting words doctrine, upon which he chiefly relies—have always been particularly threatening to the speech of racial and political minorities.

That the foregoing examples simply illustrate a longstanding global pattern was documented in a 1992 book published by Article XIX, the London-based International Centre Against Censorship (which takes its name from the provision in the Universal Declaration of Human Rights that guarantees free speech), and the Human Rights Centre at the University of Essex in Great Britain. Drawing upon contemporary analyses of the experience in fourteen different countries, with various laws punishing racist and other hate speech, the book shows that such laws
consistently have been used to suppress expression by members of racial and other minority groups. Article XIX's legal director described this pattern:

The flagrant abuse of laws which restrict hate speech by the authorities ... provides the most troubling indictment of such laws. Thus, the laws in Sri Lanka and South Africa have been used almost exclusively against the oppressed and politically weakest communities. ... Selective or lax enforcement by the authorities, including in the UK, Israel, and the former Soviet Union, allows governments to compromise the right of dissent and inevitably leads to disaffection and feelings of alienation among minority groups.¹⁴¹

The general lesson that anti-hate speech laws will be used to punish members of groups that are relatively politically powerless and targets of discrimination has also proven true in the specific context of campus hate speech regulations. In 1974, in a move aimed at the National Front, the British National Union of Students (NUS) adopted a resolution that representatives of "openly racist and fascist organizations" were to be prevented from speaking on college campuses "by whatever means necessary (including disruption of the meeting)." A substantial motivation for the rule had been to stem an increase in campus anti-Semitism. Ironically, however, following the United Nations' cue, some British students deemed Zionism a form of racism beyond the bounds of permitted discussion. Accordingly, in 1975 British students invoked the NUS resolution to disrupt speeches by Israelis and Zionists, including the Israeli ambassador to England. The intended target of the NUS resolution, the National Front, applauded this result. However, the NUS itself became disenchanted by this and other unintended consequences of its resolution and repealed it in 1977.

The British experience under its campus anti-hate speech rule parallels the experience in the United States under the first such rule that led to a judicial decision. During the year-and-a-half that the University of Michigan rule was in effect, there were more than twenty cases of whites charging blacks with racist speech. More importantly, the only two instances in which the rule was invoked to sanction racist speech (as opposed to sexist and other forms of hate speech) involved the punishment of speech by or on behalf of black students.¹⁴² Additionally, the only student who was subjected to a full-fledged disciplinary hearing under the Michigan rule was a black student accused of homophobic and sexist expression. In seeking clemency from the sanctions imposed
following this hearing, the student asserted that he had been singled out because of his race and his political views. Others who were punished for hate speech under the Michigan rule included several Jewish students accused of engaging in anti-Semitic expression\textsuperscript{143} and an Asian-American student accused of making an anti-black comment.\textsuperscript{144} Likewise, the student who brought a lawsuit (which was ultimately settled when the university agreed to abandon its policy in favor of a narrow one) challenging the University of Connecticut’s hate speech policy, under which she had been penalized for an allegedly homophobic remark, was Asian American. She claimed that, among the other students who had engaged in similar expression, she had been singled out for punishment because of her ethnic background.

Lawrence himself recognizes that rules regulating racist speech might backfire and be invoked disproportionately against blacks and other traditionally oppressed groups. Indeed, he charges that other university rules already are used to silence anti-racist, but not racist, speakers.\textsuperscript{145} Lawrence proposes to avoid this danger by excluding from the rule’s protection “persons who were vilified on the basis of their membership in dominant majority groups.”\textsuperscript{146} Even putting aside the fatal First Amendment flaws in such a radical departure from content- and viewpoint-neutrality principles, the proposed exception would create far more problems of equality and enforceability than it would solve.\textsuperscript{147}

A second reason why censorship of racist speech actually may subvert rather than promote the goal of eradicating racism is that such censorship measures often have the effect of glorifying racist speakers. Efforts at suppression result in racist speakers’ receiving attention and publicity that they otherwise would not have garnered. As previously noted, psychological studies reveal that whenever the government attempts to censor speech, the censored speech—for that very reason—becomes more appealing to many people. Still worse, when pitted against the government, racist speakers may appear as martyrs or even heroes.

Advocates of hate speech regulations do not seem to realize that their own attempts to suppress speech increase public interest in the ideas they are trying to stamp out. Thus, Lawrence wrongly suggests that the ACLU’s defense of hatemongers’ free speech rights “makes heroes out of bigots”; in actuality, experience demonstrates that it is the attempt to suppress racist speech that has this effect, not the attempt to protect such speech.\textsuperscript{148}
There is a third reason why laws that proscribe racist speech could well undermine goals of reducing bigotry. As Lawrence recognizes, given the overriding importance of free speech in our society, any speech regulation must be narrowly drafted. Therefore, it can affect only the most blatant, crudest forms of racism. The more subtle, and hence potentially more invidious, racist expressions will survive. Virtually all would agree that no law could possibly eliminate all racist speech, let alone racism itself. If the marketplace of ideas cannot be trusted to winnow out the hateful, then there is no reason to believe that censorship will do so. The most it could possibly achieve would be to drive some racist thought and expression underground, where it would be more difficult to respond to such speech and the underlying attitudes it expresses. The British experience confirms this prediction.

The positive effect of racist speech—in terms of making society aware of and mobilizing its opposition to the evils of racism—are illustrated by the wave of campus racist incidents now under discussion. Ugly and abominable as these expressions are, they undoubtedly have had the beneficial result of raising public consciousness about the underlying societal problem of racism. If these expressions had been chilled by virtue of university sanctions, then it is doubtful that there would be such widespread discussion on campuses, let alone more generally, about the real problem of racism. Consequently, society would be less mobilized to attack this problem. Past experience confirms that the public airing of racist and other forms of hate speech catalyzes communal efforts to redress the bigotry that underlies such expression and to stave off any discriminatory conduct that might follow from it.149

Banning racist speech could well undermine the goal of combating racism for additional reasons. Some black scholars and activists maintain that an anti-racist speech policy may perpetuate a paternalistic view of minority groups, suggesting that they are incapable of defending themselves against biased expressions. Additionally, hate speech restrictions stultify the candid intergroup dialogue that is an essential precondition for reducing discrimination. Education, free discussion, and the airing of misunderstandings and failures of sensitivity are more likely to promote positive intergroup relations than are legal battles. The rules barring hate speech will continue to generate litigation and other forms of controversy that will exacerbate intergroup tensions. Moreover, hate speech rules could well fuel resentment against the minority group mem-
bers who are likely to be perceived as the proponents or intended beneficiaries of such rules. Finally, the censorship approach is diversionary. It makes it easier for communities to avoid coming to grips with less convenient and more expensive, but ultimately more meaningful, approaches for combating discrimination.

5. MEANS CONSISTENT WITH THE FIRST AMENDMENT CAN PROMOTE RACIAL EQUALITY MORE EFFECTIVELY THAN CAN CENSORSHIP

The Supreme Court recently reaffirmed the time-honored principle that the appropriate response to speech conveying ideas that we reject or find offensive is not to censor such speech, but rather to exercise our own speech rights. In *Texas v. Johnson*, the Court urged this counterspeech strategy upon the many Americans who are deeply offended by the burning of their country’s flag: “The way to preserve the flag’s special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong.” In addition to persuasion, the types of private expressive conduct that could be invoked in response to racist speech include censure and boycotts.

In the context of countering racism on campus, the strategy of increasing speech—rather than decreasing it—not only would be consistent with First Amendment principles, but also would be more effective in advancing equality goals. All government agencies and officers, including state university officials, should condemn slavery, de jure segregation, and other racist institutions and policies that the government formerly supported. State university and other government officials also should affirmatively endorse equality principles. Furthermore, these government representatives should condemn racist ideas expressed by private speakers. In the same vein, private individuals and groups should exercise their First Amendment rights by speaking out against racism. Traditional civil libertarians have exercised their own speech rights in this fashion and also have defended the First Amendment freedoms of others who have done so.

In addition to the preceding measures, which could be implemented on a society-wide basis, other measures would be especially suited to the academic setting. (The ACLU policy on campus hate speech urges universities to take various suggested steps to counter racism and other
forms of discrimination, consistent with free speech and equality values. See Appendix.) First, universities should encourage members of their communities voluntarily to restrain the form (but not the substance) of their expression in light of the feelings and concerns of various minority groups. Universities could facilitate voluntary self-restraint by providing training in communications, information about diverse cultural perspectives, and other education designed to promote intergroup understanding. Members of both minority and majority groups should be encouraged to be mutually respectful. Individuals who violate these norms of civility should not be subject to any disciplinary or mandatory action, but instead should be offered education, information, and advice on a voluntary basis. Of course, universities must vigilantly ensure that even voluntary limits on the manner of academic discourse do not chill its content.

In addition to the foregoing measures, universities also should create forums in which controversial race-related issues and ideas could be discussed in a candid but constructive way. Further, universities could encourage students to receive education in the history of racism and the civil rights movement in the United States and be exposed to the culture and traditions of racial and ethnic groups other than their own. Consistent with free speech tenets, these courses must allow all faculty and students to express their own views and must not degenerate into “reeducation camps.”

The proposed measures for eliminating racism on campus are consistent not only with American constitutional norms of free speech and equality, but also with internationally recognized human rights. For example, the Universal Declaration of Human Rights provides, in Article 26(2), that individuals have a right to receive, and states have an obligation to provide, education which “promote[s] understanding, tolerance and friendship among all nations, racial or religious groups.”

Many universities appear to be responding constructively to the recent upsurge in campus hate speech incidents by adopting some of the measures suggested here. This development demonstrates the positive impact of racist speech, in terms of galvanizing community efforts to counter the underlying attitudes it expresses.

It is particularly important to devise anti-racism strategies consistent with the First Amendment because racial and other minority groups ultimately have far more to lose than to gain through a weakened free
speech guarantee. History has demonstrated that minorities have been among the chief beneficiaries of a vigorous free speech safeguard. In his 1994 book, *Hate Speech: The History of an American Controversy*, Samuel Walker shows that, throughout the twentieth century, the equality rights of African Americans and other minority groups were dependent on a robust free speech concept. He further shows that, realizing the importance of protecting even speech viewed as hateful or dangerous—because their own speech certainly was so viewed in many Southern and other communities—the major civil rights organizations consistently opposed efforts to restrict hate speech. As Walker concluded, "the 'lessons' of the civil rights movement were that the interests of racial minorities and powerless groups were best protected through the broadest, most content-neutral protection of speech." 154

Lawrence offers two rebuttals to the proposition that blacks are (on balance) benefited rather than hurt by a strong free speech guarantee. First, he notes that "[t]he first amendment coexisted with slavery." 155 It is undeniable that, until the Union won the Civil War, not only the First Amendment, but also all of the Constitution's provisions guaranteeing liberty, coexisted with the total negation of liberty through the institution of slavery. It is also true, however, that the free speech guarantees of the federal Constitution and some state constitutions allowed abolitionists to advocate the end of slavery. Moreover, it must be recalled that until the 1930s, the First Amendment provided no protection whatsoever against speech or press restrictions enacted by state or local governments. Further, although the First Amendment from its adoption provided theoretical protection against actions by the national government, in practice it was not enforced judicially until the latter half of the twentieth century. Not until 1965 did the Supreme Court initially exercise its power to invalidate unconstitutional congressional statutes, which it had recognized 162 years earlier, in the First Amendment context.156 Thus, under the Espionage Act of 1918 and similar state statutes, numerous individuals were punished for expressing unpopular political opinions. During World War I and its aftermath, the First Amendment did not prevent these laws from contributing to "the gravest period of political repression in American history." 157

In short, although slavery coexisted with the theoretical guarantees enunciated in the First Amendment, slavery did not coexist with the judicially enforceable version of those guarantees that emerged only
after World War I. We never can know how much more quickly and peacefully the anti-slavery forces might have prevailed if free speech and press, as well as other rights, had been judicially protected against violations by all levels of government earlier in our history. That robust freedoms of speech and press ultimately might have threatened slavery is suggested by southern states’ passage of laws limiting these freedoms in an effort to undermine the abolitionist cause.

The second basis for Lawrence’s lack of “faith in free speech as the most important vehicle for liberation” is the notion that “equality [is] a precondition to free speech.” Lawrence maintains that racism devalues the ideas of non-whites and of anti-racism in the marketplace of ideas. Like the economic market, the ideological market sometimes works to improve society, but not always. Odious ideas, such as the idea of black inferiority, will not necessarily be driven from the marketplace. Therefore, the marketplace rationale alone might not justify free speech for racist thoughts. But that rationale does not stand alone.

The civil libertarian and judicial defense of racist speech also is based on the knowledge that censors have stifled the voices of oppressed persons and groups far more often than those of their oppressors. Censorship traditionally has been the tool of people who seek to subordinate minorities, not those who seek to liberate them. As Harry Kalven has shown, the civil rights movement of the 1960s depended on free speech principles. These principles allowed protestors to carry their messages to audiences who found such messages highly offensive and threatening to their most deeply cherished views of themselves and their way of life. Equating civil rights activists with Communists, subversives, and criminals, government officials mounted inquisitions against the NAACP, seeking compulsory disclosure of its membership lists and endangering the members’ jobs and lives. Only strong principles of free speech and association could—and did—protect the drive for desegregation. Martin Luther King, Jr., wrote his historic letter from a Birmingham jail, but the Birmingham parade ordinance that King and other demonstrators had violated eventually was declared an unconstitutional invasion of their free speech rights. Moreover, the Civil Rights Act of 1964, which these demonstrators championed, did become law.

The more disruptive forms of protest, which Lawrence credits with having been more effective—such as marches, sit-ins, and kneel-ins—
were especially dependent on generous judicial constructions of the free speech guarantee. Notably, many of these protective interpretations initially had been formulated in cases brought on behalf of anti-civil rights demonstrators. Similarly, the insulting and often racist language that more militant black activists hurled at police officers and other government officials also was protected under the same principles and precedents.

The foregoing history does not prove conclusively that free speech is an essential precondition for equality, as some respected political philosophers have argued. But it does belie Lawrence's theory that equality is an essential precondition for free speech. Moreover, this history demonstrates the symbiotic interrelationship between free speech and equality, which parallels the relationship between civil liberties and civil rights more generally. Both sets of aims must be pursued simultaneously because the pursuit of each aids the realization of the other. The mutual interdependence of equality and liberty was forcefully described by Kenneth Karst:

[T]he constitutional values of equality and liberty are fundamentally linked by the notion that equal access to certain institutions and services is a prime component of any meaningful liberty. This link is reflected in the language of egalitarian movements. The civil rights movement of the 1960s, for example, marched under the banner of “Freedom” even though its chief objective was equal access—to the vote, to education, to housing, even to lunch counters. “Liberation” is today a theme of more than rhetorical significance in egalitarian causes such as the women's movement.

CONCLUSION

Some traditional civil libertarians may agree with Lawrence that a university rule banning a narrowly defined class of assaultive, harassing racist expression might comport with First Amendment principles and make a symbolic contribution to the racial equality mandated by the Fourteenth Amendment. However, Lawrence and other members of the academic community who advocate such steps must recognize that educators have a special responsibility to avoid the danger posed by focusing on symbols that obscure the real underlying issues.

The recent exploitation of the American flag as a symbol of patriotism, to distort the true nature of that concept, serves as a sobering
reminder of this risk. Joseph S. Murphy, chancellor of The City University of New York, recently offered lessons for educators from the flag-related controversies. His cautionary words apply even more powerfully to the campus hate speech controversy, since the general responsibility of academics to call for an honest and direct discourse about compelling societal problems is especially great within our own communities:

As educators, we should be somewhat concerned [about the manipulation of such symbols as the flag for partisan political purposes]. At our best, we convey ideas in their full complexity, with ample appreciation of the ambiguity that attaches to most important concepts. We use symbols, but we do so to illuminate, not to obscure. . . . The real question is how we use our position in the university and in society to steer national discourse away from an obsessive fixation on the trivial representation of ideas, and toward a proper focus on the underlying conflicts that define our era. 167

An exaggerated concern with racist speech creates a risk of elevating symbols over substance in two problematic respects. First, it may well divert our attention from the causes of racism to its symptoms. Second, a focus on the hateful message conveyed by particular speech could likely distort our view of fundamental neutral principles applicable to our system of free expression generally. We should not let the racist veneer in which expression is cloaked obscure our recognition of how important free expression is and of how effectively it has advanced racial equality.

Appendix
ACLU Policy Statement: Free Speech and Bias on College Campuses
(adopted by the ACLU National Board of Directors, without dissent, on October 13, 1990)

PREAMBLE
The significant increase in reported incidents of racism and other forms of bias at colleges and universities is a matter of profound concern to the ACLU. Some have proposed that racism, sexism, homophobia and other such biases on campus must be addressed in whole or in part by restrictions on speech. The alternative to such restrictions, it is said, is to permit such bias to go unremedied and to subject the targets of such bias
to a loss of equal educational opportunity. The ACLU rejects both these alternatives and reaffirms its traditional and unequivocal commitment both to free speech and to equal opportunity.

**POLICY**

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. Although “harassment,” “intimidation,” and “invasion of privacy” are imprecise terms susceptible of impermissibly overbroad application, each term defines a type of conduct which is legally proscribed in many jurisdictions when directed at a specific individual or individuals and when intended to frighten, coerce, or unreasonably harry or intrude upon its target. Threatening telephone calls to a minority student’s dormitory room, for example, would be proscribable conduct under the terms of this policy. Expressive behavior which has no other effect than to create an unpleasant learning environment, however, would not be the proper subject of regulation. The fact that words may be used in connection with otherwise actionable conduct does not immunize such conduct from appropriate regulation. For example, intimidating phone calls, threats of attack, extortion and blackmail are unprotected forms of conduct which include an element of verbal or written expression. As always, however, great care must be taken to avoid applying such provisions [that proscribe harassment and similar conduct] overbroadly to protected expression. The ACLU will continue to review such college codes and their application in specific situations.
on a case-by-case basis. . . . In determining whether a university disciplinary code impermissibly restricts protected speech, there must be a searching analysis both of the language of the code and the manner in which it is applied. Many factors, which are heavily fact-oriented, must be considered, including time, place, pattern of conduct and, where relevant, the existence of an authority relationship between speaker and target.

4. All students have the right to participate fully in the educational process on a nondiscriminatory basis. Colleges and universities have an affirmative obligation to combat racism, sexism, homophobia, and other forms of bias, and a responsibility to provide equal opportunities through education. To address these responsibilities and obligations, the ACLU advocates the following actions by colleges and universities:

(a) to utilize every opportunity to communicate through its administrators, faculty, and students its commitment to the elimination of all forms of bigotry on campus;
(b) to develop comprehensive plans aimed at reducing prejudice, responding promptly to incidents of bigotry and discriminatory harassment, and protecting students from any such further incidents;
(c) to pursue vigorously efforts to attract enough minorities, women and members of other historically disadvantaged groups as students, faculty members and administrators to alleviate isolation and to ensure real integration and diversity in academic life;
(d) to offer and consider whether to require all students to take courses in the history and meaning of prejudice, including racism, sexism, and other forms of invidious discrimination (see ACLU Policy #60, which states: "In the classroom, a teacher should promote an atmosphere of free inquiry. This should include discussion of controversial issues without the assumption that they are settled in advance or that there is only one 'right' answer in matters of dispute. Such discussion should include presentation of divergent opinions and doctrines, past and present, on a given subject.");
(e) to establish new-student orientation programs and continuing counseling programs that enable students of different races, sexes, religions, and sexual orientations to learn to live with each other outside the classroom;
to review and, where appropriate, revise course offerings as well as extracurricular programs in order to recognize the contributions of those whose art, music, literature and learning have been insufficiently reflected in the curriculum of many American colleges and universities; 

g) to address the question of de facto segregation in dormitories and other university facilities; and

(h) to take 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.

Notes

The title of this chapter is drawn from Jonathan Swift's essay "A Modest Proposal for preventing the Children of poor People from being a Burden to their Parents or the Country, and for Making them Beneficial to the Public" (Dublin 1729), in Jonathan Swift, 492 (A. Ross and D. Woolley, eds., 1984). This chapter not only responds to the specific points made in Lawrence, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," 1990 Duke L.J. 431, reprinted in Mari Matsuda et al., Words that Wound, 1993 (hereafter Lawrence), but also addresses the general issues raised by the many other recent proposals to regulate racist and other forms of hate speech on campus. Strossen's and Lawrence's pieces are expanded versions of oral presentations they made at the Biennial Conference of the American Civil Liberties Union in Madison, Wisconsin, on June 16, 1989.

I thank Charles Baron, Jean Bond, Ava Chamberlain, Elsa Cole, Donald Downs, Eunice Edgar, Stephen France, Mary Ellen Gale, Ira Glasser, David Goldberger, Thomas Grey, Gerald Gunther, Nat Hentoff, Mary Heston, Martin Margulies, Mari Matsuda, Michael Meyers, Gretchen Miller, Colleen O'Connor, Taggarty Patrick, John Powell, John Roberts, Alan M. Schwartz, Judge Harvey Schwartz, Robert Sedler, Norman Siegel, Peter Siegel, William Van Alstyne, and Jane Whicher for information and insights they shared regarding the subject of this chapter. For comments on earlier versions of the chapter, I thank Ralph Brown, Edward Chen, Norman Dorsen, Bernie Dushman, Stanley Engelstein, Eric Goldstein, Martin Goldstein, Franklyn Haiman, Morton Halperin, Alon Harel, Leanne Katz, Martin Margulies, Maimon Schwarzschild, and Samuel Walker. For their research assistance, special thanks go to Jennifer Colyer, Thomas Hilbink, and Marie Newman, who provided the most help. For additional research assistance, I thank Marie Costello, Jayni Edelstein, William Mills, Ramyar Moghadassi, Tony Ross, and Julia Swanson.
There is no single "civil libertarian" or ACLU position on many of the issues discussed in this article. For example, both Lawrence and Strossen are avowed civil libertarians and ACLU supporters, although they disagree on certain civil liberties issues.

On October 13, 1990, the ACLU's National Board of Directors adopted a policy opposing campus disciplinary codes against hate speech. For the text of this policy, which was adopted without dissent, see the Appendix.

In addition to the national organization, the ACLU includes fifty-one statewide or regional "affiliates," all of which may adopt their own policies. Although an affiliate's policies must be "in accordance" with those of the national organization, this requirement is designed "to obtain general unity, rather than absolute uniformity." See Policy Guide of the American Civil Liberties Union, at Policy No. 501 (rev. ed. 1990) (hereafter ACLU Policy Guide). Accordingly, some ACLU affiliates may adopt policies concerning the regulation of campus hate speech that are to some extent divergent from each other, and from the national ACLU policy.

To reflect the fact that civil libertarians may differ about some specific issues discussed in this chapter, the term "traditional civil libertarian" is used only to describe the general view that much hate speech is entitled to First Amendment protection. All other, more specific, views expressed in this article reflect the author's opinions.
nation” of racist speech (see id. at 477). They “typically . . . elect[ ] to stand by” while universities draft constitutionally vulnerable hate speech regulations (see id. at 477). They “wait [to] attack [such] poorly drafted and obviously overbroad regulations” (id. at 478 n.162).

The foregoing stereotypes are presented through unsupported assertions and are belied by the facts recited throughout this chapter. Lawrence also makes incorrect and misleading statements specifically about the ACLU and its members, which are also countered throughout this chapter. See id. at 473, 478 & nn.163–64.

Lawrence qualifies his depiction of the “traditional” civil libertarian or ACLU member in one important respect: he repeatedly suggests that civil libertarians and ACLU members who are members of minority groups (or perhaps women) differ from others in their positions on free speech and equal protection issues. See id. at 466 (distinguishing “[m]ost blacks” from “many white civil libertarians”); see also id. at 458–59, 461 & n.113, 473–74, 477–78 & nn.163–64.

Such racial (and gender) stereotyping is both factually inaccurate and antithetical to equality principles. The inaccuracy is illustrated by the fact that the ACLU’s policy concerning free speech and equality on campus (see Appendix) was adopted unanimously, without dissent from any of the many National Board members who are African American, members of other minority groups, or female.

6. See Lawrence, at 450 & n.82, 481, citing Stanford University, “Fundamental Stanford Interpretation: Free Expression and Discriminatory Harassment” (June 1990). At various points in his article, Lawrence endorses regulations of broader scope. However, he stresses his proposed variation of the Stanford code, which would apply to “all common areas” and would “not . . . protect[ ] persons . . . vilified on the basis of their membership in dominant majority groups.” Lawrence at 450 n.82. Therefore, throughout the remainder of this chapter, references to the regulation endorsed by Professor Lawrence refer to this formulation, unless expressly indicated otherwise.

7. See Lawrence at 438–49.
8. See id. at 449.
9. Id. at 436 n.27.
10. Thomas Grey, who drafted the Stanford code, said “his rule probably wouldn’t apply to one of the most publicized racial incidents at Stanford, when a white student left on a black student’s door a poster of Beethoven drawn as a black caricature.” Gottlieb, “Banning Bigoted Speech: Stanford Weighs Rules,” San Jose Mercury-News, Jan. 7, 1990, at 3, col. 1. The broader variation of the Stanford code that Lawrence endorsed (see Lawrence at 450 n.82) apparently would have applied to this Stanford incident (see id. at 456 n.101), but not to the incident endured by his sister or to his boyhood ordeal.
11. Lawrence at 480.

12. I owe this formulation to Ira Glasser, executive director of the ACLU (and a non-lawyer).

13. Id. at 449. See also id. at 438, 457, 461, 473-74, 476-77.

14. See T. Emerson, The System of Free Expression, 337-38 (1970) ("[F]ighting words' can be considered the equivalent of knocking a chip off the shoulder—the traditional symbolic act that puts the parties in the role of physical combatants."); L. Tribe, American Constitutional Law, § 12-10, at 852-53 (2d ed., 1988) ("It is not difficult to recognize the genuine dilemma that law enforcement officers may confront when violence is incipient; although free speech would be suppressed, silencing the speaker is certainly preferable to a blood bath").

15. See, e.g., F. Haiman, Speech and Law in a Free Society (1981). Haiman states:

[It is my contention that in all of the circumstances in which antagonistic crowds or individuals respond or threaten to respond violently to communicators, the audience should be held responsible for its behavior, and not the speaker. . . . Violent reaction, by definition, is born in the psyche of the respondent. The idea to attack the communicator is not implanted or urged by the speaker, as might an idea to commit illegal acts be initiated and advocated by one who incites a supportive audience. . . . [I]f hostile audiences are not held responsible for their own behavior . . . they will soon learn that they have the power to exercise a "heckler's veto" over the speech of their antagonists.

Id. at 258; see also id. at 20-23, 132-35, 253-54, 256-58.

16. For example, the Stanford code applies only to intentionally insulting words "addressed directly" to an individual or small number of individuals. In contrast, the University of Michigan rule, which was held to violate the First Amendment, did not require either that the penalized words be intentionally insulting or that they be addressed to specific individuals. Moreover, the Michigan rule originally proscribed speech that “[c]reates an intimidating, hostile, or demeaning environment.” The same overbroad, vague language was contained in the University of Wisconsin rule, which was also held unconstitutional.

17. The reference is to an American neo-Nazi group’s efforts, in 1977-78, to gain permission to demonstrate peacefully in Skokie, Illinois, a community with a large Jewish population, including many Holocaust survivors. For the judicial opinions rejecting arguments that Skokie residents should be protected from such personally odious expressions, see Collin v. Smith, 578 F.2d 1197, 1205-7 (7th Cir.), cert. denied, 439 U.S. 916 (1978); Village of Skokie v. National Socialist Party, 69 Ill. 2d 605, 612-18, 373 N.E. 2d 21, 23-25 (1978). For an excellent account of both the specific Skokie controversy and the general issues it raised, see A. Neier, Defending My Enemy: American Nazis, the Skokie Case, and the Risks of Freedom (1979).

18. I use the term “minorities” to encompass groups differentiated by various
characteristics, including race, ethnicity, religion, sexual orientation, and physical disability. I recognize, however, that the term “minorities” may "impl[y] a certain delegitimacy in a majoritarian system" and in fact describes groups that in the aggregate are a majority. Williams, “Alchemical Notes: Reconstructing Ideals from Deconstructed Rights,” 22 Harv. C.R.-C.L.L. Rev. 401, 404 n.4 (1987).


21. Regarding speech that is an essential element of unlawful conduct, the ACLU Policy Guide, at Policy No. 16, states that “[T]here is . . . [a] need for the regulation of selling practices to minimize fraud, deception, and misinterpretation. . . . If the sale or transaction is one that can be validly regulated or prohibited, then communications that are an integral part of such a sale or transaction can be regulated.”

Regarding speech that can cause an immediate injury by its very utterance, see ACLU Policy Guide, at Policy No. 6 (accepting limitations on expression that creates “clear and present danger” of immediate unlawful action); id. at Policy No. 37 (recognizing that, under strictly limited circumstances, certain lawsuits may be brought for libel and invasion of privacy through speech without violating First Amendment).

Regarding captive audiences, the ACLU Policy Guide, at Policy No. 43, states:

[T]he First Amendment is not inconsistent with reasonable regulations designed to restrict sensory intrusions so intense as to be assultive. Reasonable regulations are those that apply only to time, place and manner without regard to content. . . . What constitutes a “reasonable” regulation will necessarily vary depending upon such factors as (1) the size of the . . . area involved, (2) the duration [or] frequency with which an individual is in the area . . . , or (3) the extent to which alternatives exist so that the individual can reasonably be called upon to avoid the area. . . . Assultive sensory intrusions are those that are objectionable to the average person because of an excessive degree of intensity, e.g., volume or brightness, and which cannot be avoided.

In larger public spaces . . . all communication is permitted unless it interferes with the primary purpose of the space. . . .

In open public areas . . . people are able to move away from communication which they consider offensive. So long as there is ample public space[ ] where communication is unrestricted, the government may creat [sic] and maintain reason­ably limited sanctuaries in public places where people can go for quiet contemplation.

Human beings have a significant ability mentally to reject many assaultive stimuli. The process known as "selective perception" enables us to generally choose what we wish to assimilate from the multitude of sensory bombardments surrounding us. We also have a strong tendency to screen out or distort messages that are inconsistent with our current beliefs.

Given these tendencies... one might argue that the possibilities of unwelcome messages penetrating the psychological armor of unwilling audiences are so small that we ought to be worrying more about how to help unpopular communicators get through to reluctant listeners than how to give further protection from speech to those who already know too well how to isolate themselves from alien ideas.

31. See Board of Trustees v. Fox, 492 U.S. 469 (1989). The district court in the same case had characterized these dormitories as "limited public forums." Fox v. Board of Trustees, 649 F.Supp. 1393, 1401 (N.D.N.Y. 1986).
33. See Schmidt, "Freedom of Thought: A Principle in Peril?," Yale Alumni Mag., Oct. 1989, at 66 ("On some other campuses in this country, values of civility and community have been offered by some as paramount values of the university, even to the point of superseding freedom of expression. Such a view is wrong in principle, and, if extended, disastrous to freedom of thought").
34. Joseph Grano stated:

One of the harms posited in the University of Michigan case was that some students found the speech at issue so upsetting that they had difficulty concentrating on their studies. The same harm could be posited, of course, in many other circumstances. During the Vietnam War, for example, the frequent and often caustic antiwar protests, which sometimes even expressed support for those whom the United States was fighting, may have extremely upset students who had served in the battle, who had lost family members or friends in the war, or who simply believed that an unwavering loyalty was owed to their country. Similarly, many students, especially on segregated
Regulating Racist Speech on Campus

2.43
campuses in the South, may have been deeply disturbed by the civil rights protests gripping the nation and many universities during the Sixties.


The ACLU's policy endorsing restrictions on a limited category of verbal sexual harassment on campus is confined to situations that involve "the abuse of power."


38. Lawrence at 450 n.82.


During a debate in the Faculty Senate, Professor Michael Bratman offered a hypothetical: in angry exchange with a white student, a black student calls him a "honky SOB." I assume, said Bratman, that language would be prohibited.

"No," said Professor [Robert] Rabin [a law professor who chairs the Student Conduct Legislative Council, which propounded the code]. The proposed speech standard takes the position, Rabin explained, that the white majority as a whole is not in as much need of protection from discriminatory harassing speech as are those who have suffered discrimination.

"Calling a white a 'honky,'" Rabin said, "is not the same as calling a black a 'nigger.'"

40. The University of Michigan based its rule on yet another approach, which focused on stigmatization and victimization of students, interference with academic efforts, and the creation of an intimidating or hostile educational environment. In Doe v. University of Mich., 721 F.Supp. 852 (E.D. Mich. 1989), this rule was held to violate the First Amendment.

41. 120 L. Ed. 2d 305 (1992).

42. Id. at 323.

43. 315 U.S. 568 (1942).

44. 405 U.S. 518, 523 (1972) (where appellant had said to police officers, "White son of a bitch, I'll kill you," "You son of a bitch, I'll choke you to death," and "You son of a bitch, if you ever put your hands on me again, I'll cut you all in pieces," Court reversed conviction under law that it found overbroad in light of Chaplinsky).


47. Compare Cafeteria Employees Local 302 v. Angelos, 320 U.S. 293, 295 (1943) (use of word "fascist" is "part of the conventional give-and-take in our economic and political controversies" and hence protected under federal labor law) with Chaplinsky, 315 U.S. at 573–74 (conviction affirmed on ground that words "God damned racketeer" and "damned Fascist," when addressed to police officer, were likely to provoke violent response).

48. See, e.g., Gard, "Fighting Words as Free Speech," 58 Wash. U. L.Q. 531, 536 (1980) (hereafter Gard) (post-Chaplinsky Supreme Court decisions have rendered fighting words doctrine "nothing more than a quaint remnant of an earlier morality that has no place in a democratic society dedicated to the principle of free expression"); Shea, "Don't Bother to Smile When You Call Me That"—Fighting Words and the First Amendment," 63 Ky. L.J. 1, 1–2 (1975) ("majority of the U.S. Supreme Court has gradually concluded that fighting words, no matter how narrowly defined, are a protected form of speech").

49. See Gard at 580.


51. Z. Chafee, Free Speech in the United States, 151–52 (1941), at 151.


53. Gard at 580.

54. Id. at 548. Accord id. at 568. Compare Lawrence, at 437 n.29 ("[T]here is no evidence that the continued usage of [the fighting words doctrine] has led down the slippery slope to rampant censorship").

55. See, e.g., Lewis v. City of New Orleans, 415 U.S. 130 (1974) (state court upheld conviction on basis of fighting words doctrine in situation in which police officer said to young suspect’s mother, "[g]et your black ass in the goddamned car," and she responded, "you god damn mother fucking police—I am going to [the Superintendent of Police] about this"); Street v. New York, 394 U.S. 576 (1969) (black man who protested against shooting of civil rights leader James Meredith by burning the American flag and saying, "If they let that happen to Meredith we don’t need an American flag," was convicted under statute that criminalized words casting contempt on United States flag; Supreme Court rejected contention that conviction could be justified on fighting words rationale, id. at 592); Edwards v. South Carolina, 372 U.S. 229, 236 (1963) (state court upheld convictions of civil rights demonstrators for holding placards stating "I am proud to be a Negro" and "Down with Segregation"; Supreme Court rejected contention that convictions could be justified on fighting words doctrine); Waller v. City of St. Petersburg, 245 So. 2d 685 (Fla. Dist. Ct. App. 1971), rev’d, City
of St. Petersburg v. Waller, 261 So. 2d 151 (Fla. 1972) (black man was convicted after shouting “pig” at passing police car, and state supreme court upheld conviction based on fighting words doctrine).

56. Lawrence at 453 n.92.
57. See Gard at 22.
58. Gard at 564.
59. Lawrence recognizes the potential danger that any speech-restricting precedent “would pose for the speech of all dissenters,” and that such a danger “might . . . include general societal tolerance for the suppression of speech.” Lawrence at 458 & n.106.
60. Gard at 578 (emphasis added).
64. 343 U.S. 250 (1952).
67. The Illinois statute provided, in pertinent part: “It shall be unlawful . . . to . . . publish . . . in any public place . . . any . . . publication [which] . . . exposes citizens of any race, color, creed or religion to contempt, derision or obloquy.” Ill. Rev. Stat., chap. 38, para. 471 (1949). Although the Supreme Court held this law constitutional in 1952, the Illinois legislature repealed it in 1961.
69. See Amsterdam, “Perspectives on the Fourth Amendment,” 58 Minn. L. Rev. 349, 435 (1974) (“The dangers of abuse of a particular power are, certainly, a pertinent consideration in determining whether the power should be allowed in the first instance”).
70. See L. Tribe, § 12–10, at 856 (although the Constitution probably permits legislation punishing words that cause hurt by their mere utterance, such legislation “would be constitutionally problematic—the potential for content-specific regulation is always great”).
72. Walter Dellinger tellingly made this point about another proposed exception to the First Amendment of an ostensibly limited nature—for physical desecration of the U.S. flag:
What would this proposed act of constitutional revision do to the moral legitimacy of the stance our Constitution has taken (and will continue to take) in defense of expression that offends many Americans as deeply as flag burning offends the great majority of us? Once we have quickly passed the Twenty-seventh amendment to protect the sensibilities of those who revere the flag, what do we say to those who are particularly offended by, but must continue to tolerate, the burning of crosses by hooded members of the Ku Klux Klan, a brazen reminder of the era of lynching and terror? And what do we say to those who find themselves silenced and marginalized by sexualized (but not constitutionally “obscene”) portrayals of women? What enduring Constitutional principle will remain unimpaired that will legitimately surmount these claims?

“Hearings on Measures to Protect the Physical Integrity of the American Flag, Before the Senate Committee on the Judiciary,” 101st Cong., 1st sess. 553 (1989) (statement of Walter Dellinger).


74. As a private institution, Stanford University is not directly bound by First Amendment standards. However, many private academic institutions make policy choices to adhere to standards that are consistent with their notions of academic freedom.

75. Gard at 563–64.

76. The Stanford code also may fail to satisfy the Court’s strict parameters for the fighting words doctrine in other respects. First, it does not expressly require that the prohibited speech “must constitute a personally abusive epithet,” the first criterion set forth in Gard’s list. Based on his analysis of cases that address the fighting words doctrine, Gard concluded that “the utterance must constitute an extremely provocative personal insult” in order to comport with free speech principles. Gard, at 536.

Although the Stanford code may comply with the Court’s second and third requirements, by prescribing that the prohibited speech must be “addressed directly to the individual or individuals whom it insults or stigmatizes,” both of these elements have been construed so strictly that they may not be satisfied by this provision. Some judicial rulings indicate that the second requirement, the face-to-face element, “is not satisfied by mere technical physical presence, but contemplates an extremely close physical proximity.” Gard, at 559. The third requirement has been interpreted to mean that “the offensive words must be descriptive of the particular person and addressed to that person.” Gard, at 561 (emphasis added). The Stanford code does not require that the prohibited words describe the individual to whom they are addressed. Instead, under the Stanford code, the words may convey hatred for broad groups of people.

77. That regulation provided that, in certain “[e]ducational and academic centers,” individuals were subject to discipline for:

Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that . . .
[i]nvolves an express or implied threat to . . . or 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. . . .

Doe v. University of Mich., 721 F.Supp. 852, 856 (E.D. Mich. 1989). As originally adopted and implemented, the regulation also sanctioned speech that "[c]reates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities." Id. After the regulation was legally challenged, however, the university announced that it was withdrawing that section on the ground that "a need exists for further explanation and clarification" of it. Id.

Lawrence contends that it is unfair to judge the Stanford code in light of the experience under the Michigan rule, arguing that the latter was "clearly overbroad," and asserting that "it is difficult to believe that anyone at the University of Michigan Law School was consulted in drafting" it. Lawrence, at 477 n.161 & 478 n.162.

It is ironic that, in this particular context, Lawrence seeks to focus the debate solely on the Stanford code. As previously observed, throughout his article he repeatedly defends alternative hate speech regulations that are not only broader than Stanford's but also broader than Michigan's. Moreover, his proffered rationales would justify sweeping prohibitions. Therefore, perhaps Lawrence should not be so quick to protest that the Michigan code was "obviously overbroad." Lawrence, at 478 n.162.

In any event, the University of Michigan did consult with law school faculty members, including Lee Bollinger and Theodore St. Antoine, as well as university counsel and other lawyers. The university also received comments from numerous other individuals and groups, including the ACLU, in its drafting process. See Letter from Henry W. Saad (counsel to university in Doe litigation) to Honorable Avern Cohn, at 2 (Aug. 17, 1989). Therefore, Lawrence's unsubstantiated assertion that the ACLU and "[t]raditional civil liberties lawyers typically have elected to stand by" while universities draft clearly unconstitutional rules (Lawrence at 477) is directly belied by the Michigan experience.

79. See Doe, 721 F.Supp. 865. The court cited the following examples of protected speech that had been subjected to the policy: a statement by a graduate student in the School of Social Work, in a research class, expressing his belief that homosexuality was a disease and that he intended to develop a counseling plan for changing gay clients to straight (id.); the reading of an allegedly homophobic limerick, which ridiculed a well-known athlete for his presumed sexual orientation, by a student in the School of Business Administration during a class public-speaking exercise (id.); and a statement by a student during an orientation session of a preclinical den-
tstry class, widely regarded as especially difficult, that he had heard that minorities had a hard time in the course and that they were not treated fairly (id. at 865–66).

80. Lawrence at 478 n.162.


83. Other examples of legitimate academic discourse condemned as “hate speech” include the following: a group of students complained that a faculty member had created a hostile atmosphere by quoting racist comments originally made at the turn of the century, even though the professor said that was not his intention (see Statement of the Washtenaw County Branch, American Civil Liberties Union on the University of Michigan Policy, “Discrimination and Discriminatory Harassment by Students in the University Environment” 4, May 25, 1989); another group of students contended that the former students’ complaint about the professor had itself created a hostile atmosphere (see id. at 5); a law student suggested that judicial decisions reflecting adverse stereotypes about blacks should not be studied in law school courses (see Shaw, “Caveat Emptor,” N.Y.L. Sch. Rep., Apr. 1989, at 3); a Jewish professor was penalized for suggesting to his black students that they should celebrate the anniversary of their ancestors’ liberation from slavery under the Thirteenth Amendment, just as Jews celebrate their ancestors’ liberation from slavery during Passover (see Hentoff, “Campus Court-Martial,” Washington Post, Dec. 15, 1988, at A25, col. 2; students complained about a professor’s statement that black students are not sufficiently critical of human rights violations by black African governments (see McKinley, “Minority Students Walk Out Over a Teacher’s Remarks,” New York Times, Oct. 4, 1989, at B3, col. 5).

84. Regarding the chilling effect of a University of Connecticut anti-hate speech rule, which the ACLU successfully challenged, see Brief of Amicus Curiae in Support of Plaintiff’s Motion for Preliminary Injunction, at 9–10 and n.10, Wu v. University of Conn., No. Civ. H-89–649 PCD (D. Conn. Jan. 25, 1990) (submitted by ACLU). In its brief, the ACLU stated:

[A] student could plausibly fear prosecution for voicing an opinion that members of the Unification Church ... are “cultists”; that Zionists are “imperialists” or that Palestinians are “terrorists”; that evangelical ministers are “hustlers” and their followers are “dupes”; or that homosexuals are “sick.” ... [A] homosexual rights activist could perhaps be prosecuted for declaring that Catholics are “bigots” if they follow their Church’s teaching that homosexuality is a sin. ... Similarly, a black activist student leader might reasonably hesitate to characterize other black students, who are deemed insufficiently supportive of black causes, as “Uncle Toms.”

85. As Justice Harlan observed in Cohen v. California, 403 U.S. 15, 26 (1971), “We cannot indulge in the facile assumption that one can forbid a particular

word without also running the substantial risk of suppressing ideas in the process.”


87. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). See also West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion”).


89. See Lawrence at 438–44.


92. Id. at 630–31.


94. Id. at 447.

95. L. Tribe, § 12-8, at 838 n.17.

96. In a widely quoted dissent, Justice Holmes championed this rationale for free speech as “the theory of our Constitution”:

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


97. See Cohen, 403 U.S. at 24 (“[N]o other approach [than protecting free speech] would comport with the premise of individual dignity and choice upon which our political system rests”).


An epithet such as "You damn nigger" would almost always be found actionable, as it is highly insulting and highly racial. ... "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 ... but only in the unusual situations where the plaintiff would suffer harm from such an insult.

Id. See also UWM Post, Inc. v. Board of Regents of the University of Wisconsin System, 774 F.Supp. 1163, 1180 (E.D. Wis. 1991):

The University of Wisconsin—Whitewater found that a white student had not violated the UW Rule where he called a black student "nigger" as part of a verbal exchange which led to a physical confrontation.... The University explained that there was no violation because: “[The white student] was raised in a racially mixed neighborhood in Chicago. It was common for both blacks and whites in this environment to refer to blacks who were not respected, liked or appreciated as 'nigger.' As [the white student] stated, 'it's like calling someone an ass or names like that.' [The black student] agreed and stated that this kind of language/name calling exists in his neighborhood as well. [He] also stated that he did not think [the] intent [of the white student] was to demean him personally or racially.”

For example, during a discussion about the University of Wisconsin hate speech policy, even its advocates disagreed as to whether it would (or should) apply to the following hypothetical situation: A white student sits down next to a black student and says, "I want you to know that I'm a racist and hate the idea of blacks being here at the University," but does not use any racist epithet. Telephone interview with Eunice Edgar, executive director of ACLU of Wisconsin (Nov. 14, 1989).

It should be stressed, though, that this expression would not be encompassed by either the Stanford code or Professor Lawrence's variation on it.


[L]est it be said that I unduly slight the pain imposed by expressions of racial or religious hatred let me add that I have suffered that pain. I empathize with others who have, and I rest my deep belief in the principles of the First Amendment in part on my own experiences.

I received my elementary education in a public school in a very small town in Nazi Germany. I was subjected to vehement anti-Semitic remarks, from my teacher, my classmates and others. “Judensau” (Jew pig) was far from the harshest.

See A. Neier at 2–3 (recounting his childhood as a Jew in Hitler's Germany, his narrow escape from the Nazi death camps, and the extermina-
tion of almost all his relatives, beyond his immediate family, during World War II).

106. Gunther stated:

My own experiences have certainly not led me to be insensitive to the myriad pains offensive speech can and often does impose. But the lesson I have drawn from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes difficult path of denouncing the bigots’ hateful ideas with all my power yet at the same time challenging any community’s attempt to suppress hateful ideas by force of law.

Gunther letter.

107. Aryeh Neier, reflecting on his role in the Skokie incident, recalled:

The most frequently repeated line of all in the many letters about Skokie that I received was: “How can you, a Jew, defend freedom for Nazis?” . . . The response I made . . . most often began with a question: “How can I, a Jew, refuse to defend freedom, even for Nazis?” . . . Because we Jews are uniquely vulnerable, I believe we can win only brief respite from persecution in a society in which encounters are settled by power. As a Jew, therefore . . . I want restraints placed on power . . . I want restraints which prohibit those in power from interfering with my right to speak, my right to publish, or my right to gather with others who also feel threatened. . . . To defend myself, I must restrain power with freedom, even if the temporary beneficiaries are the enemies of freedom.

A. Neier at 4–5.

108. Lawrence at 456.


111. See Lawrence at 438–49.


114. One can imagine situations in which racially segregated schools would not convey the message of white supremacy, which Lawrence views as the central meaning of school segregation. See Lawrence at 441, 462–64. Yet, under Brown, such schools surely would still violate the equal protection clause. For example, a black student who had been raised in a different culture marked by black supremacy, and then moved to the U.S. and attended a racially segregated school, might well interpret school segregation as conveying the message of white inferiority. Would Brown not demand that this student should nonetheless attend a desegregated school? As another example, a community might come to view racial diversity much the way it now regards religious diversity, so that the choice to attend a racially segregated school would be viewed as conveying no more stigmatizing a message than the choice to attend a religiously segregated school. Would Brown not insist, nevertheless, that no public schools could
be racially segregated, even if the option of attending them was completely voluntary? See Green v. County School Bd., 391 U.S. 430 (1968) (rejected “freedom-of-choice” plan for desegregation).


119. Id. at 250 (emphasis added).


121. Lawrence at 448.


123. Equally unpersuasive is Lawrence’s attempted reliance on cases upholding prohibitions upon race- or gender-designated advertisements for employees, home sales, and rentals (see Lawrence at 449 & n.81, 464 n.123). As the Supreme Court ruled, in Pittsburgh Press Co. v. Human Relations Comm’n, 413 U.S. 376, 391 (1973), such advertisements constituted integral elements of the prohibited discriminatory conduct—e.g., refusing to hire women. Id. at 388-89. Therefore, these advertisements fit within the general category of speech that may be regulated on the ground that it constitutes an essential element of an unlawful act.

124. Lawrence at 452 n.87.

125. 337 U.S. 1 (1949).


129. It is noteworthy that these two ringing endorsements of constitutional protection for offensive, provocative speech were written by justices at opposite ends of the Court’s ideological spectrum. The agreement on this issue between Justice Douglas, a noted liberal, and Justice Harlan, a respected conservative, indicates that their views represent a solidly entrenched consensus about free speech tenets.

130. Cohen, 403 U.S. at 26 (emphasis added).


132. Lawrence at 463 n.119.

133. Lawrence at 480.


135. A. Neier at 170–71.

136. Lawrence at 480 n.166.

137. The three affiliates that have challenged university hate speech rules are located in Connecticut, Michigan, and Wisconsin. All three are engaged in ongoing efforts to counter race discrimination, of which I will describe a few examples. In a pathbreaking case under the Connecticut Constitution,
the Connecticut ACLU (along with the NAACP Legal Defense Fund) is
challenging the de facto maintenance of two separate and unequal public
school systems in the Hartford area: one for low-income, minority students
in Hartford and one for more affluent, white students in Hartford's sub-
urbs. The Connecticut affiliate also successfully challenged racial discrimi-
nation in the hiring and promotion of minorities within the state police
department, and has taken various initiatives to counter police brutality
against minority citizens. The Michigan ACLU, along with the NAACP, is
challenging the 1992 legislative reapportionment scheme for the Michigan
House and Senate as unconstitutionally diluting minority votes. The Wis-
consin ACLU is co-counsel in a challenge to the practice of “red-lining”
homeowners insurance in the Milwaukee area (to exclude coverage for
areas with large minority populations), which resulted in the first appellate
court ruling that this practice violates the current Federal Fair Housing
Act. The Wisconsin affiliate also has fought against various discriminatory
measures aimed at Chippewa Indians and Hmong immigrants.

138. See Lasson, “Racism in Great Britain: Drawing the Line on Free Speech,”
7 B.C. Third World L.J. 161, 166, 171-73 (1987) (Democratic National
Party chairman Kingsley Read was tried under Race Rela-
tions Act in 1978
for referring in a public speech to “niggers, wogs, and coons,” and for
commenting on an Asian who had been killed in a race riot, “One down,
a million to go.” The judge instructed the jury that Read’s words were not
in themselves unlawful, and the jury acquitted Read).


140. See Stein, “History against Free Speech: The New German Law against the
argues that although there was an article in the German Criminal Code in
1871 that punished offenses against personal honor, “[T]he German Su-
preme Court . . . consistently refused to apply this article to insults against
Jews as a group—although it gave the benefit of its protection to such
groups as ‘Germans living in Prussian provinces, large landowners, all
Christian clerics, German officers, and Prussian troops who fought in
Belgium and Northern France.’” Id. at 286 (footnotes omitted).

141. Sandra Coliver, “Hate Speech Laws: Do They Work?” in Striking a Bal-
ance: Hate Speech, Freedom of Expression and Non-Discrimination, 373-
74 (Sandra Coliver, ed., 1992); see also Kevin Boyle, “Overview of a
Dilemma: Censorship Versus Racism,” in Striking a Balance, 3 (“The
South African laws against racial hatred were used systematically against
the victims of its racist policies. In Eastern Europe and the former Soviet
Union laws against defamation and insult were vehicles for the persecution
of critics who were often also victims of state- tolerated or sponsored
anti-Semitism”).

142. See Plaintiff’s Exhibit Submitted in Support of Motion for Preliminary
Injunction at 1, Doe v. University of Mich., 721 F.Supp. 852 (E.D. Mich. 1989) (No. 89-CV-71683-DT) (black student used term “white trash” in conversation with white student); id. at 5 (at beginning of preclinical dentistry course, recognized as difficult, faculty member led small group discussion, designed to “identify concerns of students”; dental student said that he had heard, from his minority roommate, that minorities have a difficult time in the course and were not treated fairly; the faculty member, who was black, complained that the student was accusing her of racism).

143. These students wrote graffiti, including a swastika, on a classroom blackboard, and said they intended it as a practical joke.

144. His allegedly offensive remark was the question why black people feel discriminated against; after being charged, he explained that he was attempting to complain that black students in his dormitory tended to socialize together, with the result that he felt socially isolated.

145. See Lawrence at 466 (noting “cruel irony” in Stanford’s refusal to punish white students for hanging racist poster in a dormitory, while punishing black students who engaged in peaceful sit-in to protest that refusal).

146. Id. at 450 n.82.

147. Just one such problem is how “dominant majority groups” would be defined. Would they be defined in the context of the particular academic community—for example, at Howard Law School, blacks would probably fit this definition, and at Cardozo Law School, Jews would—or in the context of the larger society?

148. For example, when the American Nazi party finally was allowed to march in Illinois in 1978, following the government’s and Anti-Defamation League’s attempts to prevent this demonstration, two thousand onlookers watched the twenty Nazis demonstrate.

149. See S. Walker, at 59–62 (the ACLU’s content-neutral defense of free speech for the Ku Klux Klan—which in the 1920s dominated many state legislatures, played a major role at the 1924 Democratic National Convention, and staged a massive march on Washington, D.C.—led to a decline in the Klan’s influence by exposing its vicious plans to public view). See also Neier, at 34: “The Nazis deter the expression of anti-Semitism in forms that might be more palatable to the American public and, therefore, more threatening to the Jews. Other anti-Semites must impose restraints on themselves for fear of being bracketed with the almost universally hated Nazis. A strong Nazi movement would be a great danger to Jews in the United States; a weak Nazi movement with no potential for growth has its uses.”


151. Id. at 419.

152. In response to a letter demeaning women that a student club had circulated, Derek Bok, president of Harvard University, argued that this letter should not be suppressed. He then issued the following public criticism of the letter:
The wording of the letter was so extreme and derogatory to women that I wanted to communicate my disapproval publicly, if only to make sure that no one could gain the false impression that the Harvard administration harbored any sympathy or complacency toward the tone and substance of the letter. Such action does not infringe on free speech. Indeed, statements of disagreement are part and parcel of the open debate that freedom of speech is meant to encourage; the right to condemn a point of view is as protected as the right to express it. Of course, I recognize that even verbal disapproval by persons in positions of authority may have inhibiting effects on students. Nevertheless, this possibility is not sufficient to outweigh the need for officials to speak out on matters of significance to the community—provided, of course, that they take no action to penalize the speech of others.


153. See, e.g., Neier at 170 (Illinois ACLU, which had represented neo-Nazi group seeking to demonstrate, also assisted anti-Nazi groups in securing their First Amendment rights to counter-demonstrate).


155. Lawrence at 466.

156. See Lamont v. Postmaster General, 381 U.S. 301 (1965).

157. Neier at 110.

158. Lawrence at 466.

159. Id. at 467.

160. This paragraph and the following paragraph are drawn in large part from Gale and Strossen, “The Real ACLU,” 2 Yale J.L. & Feminism 161, 174–76 (1990).

161. See H. Kalven, at 4.


165. See Brown v. Oklahoma, 408 U.S. 914 (1972) (during political meeting in university chapel, appellant, a Black Panther, had referred to specific policemen as “mother-fucking fascist pig cops”; Supreme Court summarily vacated conviction under law which it found unconstitutionally overbroad); Gooding v. Wilson, 405 U.S. 518, 523 (1972) (where appellant, a black demonstrator, had made several threatening statements to police officers, including “White son of a bitch, I’ll kill you,” Court reversed conviction under law that it found unconstitutionally overbroad); see also Lewis v. New Orleans, 415 U.S. 130 (1974) (where police officer said to young suspect’s mother, “Get your black ass in the goddamned car,” and suspect’s mother responded, “You god damn mother fucking police—I am going to [the Superintendent of Police] about this,” lower courts upheld
mother’s conviction on fighting words doctrine, but the Supreme Court reversed).
