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Campus Antiracism Rules: Constitutional Narratives in Collision Legal Theory

Richard Delgado
University of Alabama - School of Law, rdelgado@law.ua.edu

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CAMPUS ANTIRACISM RULES: CONSTITUTIONAL NARRATIVES IN COLLISION

*Richard Delgado**

INTRODUCTION

Over the past few years, nearly two hundred university and college campuses have experienced racial unrest serious or graphic enough to be reported in the press.[1] Most observers believe the increase in racial tension on the nation's campuses is real, and not just the product of better reporting or record keeping.[2]

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* Charles Inglis Thomson Professor of Law, University of Colorado School of Law. J.D. 1974, U-C Berkeley School of Law (Boalt Hall). I delivered portions of this paper in talks at Harvard University and the University of Wisconsin in winter 1989-90. I am grateful to Kent Greenawalt, Michael Olivas, and Pierre Schlag for comments and suggestions. Anne Najem, Michael Kramer, Joan Leon, Marisa Walsh, and Bruce Bode, members of my fall 1989 first amendment seminar at University of Wisconsin, drafted major sections of this Article, and Lora Intrator and Robin Barnes performed heroically in editing and criticizing a sprawling manuscript. I am also indebted to Charles Holley, Markie Rath, Tim O'Shea, Elizabeth Griffin, Titus Peterson, and Frank Rodriguez for exemplary assistance in researching difficult sources and issues. This Article is the joint production of all those listed in this note.

1 Campbell, *Silencing Bigots*, Texas Observer, Jan. 26, 1990, at 14; Magner, *Blacks and Whites on Campus*, Chron. Higher Educ., Apr. 26, 1989, at 1, col. 2 ("Hundreds of institutions of all sizes have been affected," citing 175 since 1986-87 year); *see also* Leatherman, *More Anti-Semitism is Being Reported on Campuses, but Educators Disagree on How to Respond to It*, Chron. Higher Educ., Feb. 7, 1990, at 1, col. 3; *Colleges Tackle Increase in Racism on Campus*, L.A. Times, Apr. 30, 1989, Pt. I, at 36, col. 1 (National Institute Against Prejudice & Violence estimates 20-25% of all minority students victimized at least once).

2 *E.g.*, Brown, *Racism and Race Relations in the University*, 76 VA. L. REV. 295, 316 (1990) (under-reporting likely); Gibbs, *Bigots in the Ivory Tower, An Alarming Rise in Hatred Roils U.S. Campuses*, TIME, May 7, 1990, at 104; Lawrence, *The Debate Over Placing Limits on Racist Speech Must Not Ignore the Damage It Does To Its Victims*, Chron. Higher Educ., Oct. 25, 1989, at B1, col. 1 (rate increasing); Tatel, *Clear, Narrow Policies on Offensive Speech May Not Run Afoul of the First Amendment*, Chron. Higher Educ., Feb. 7, 1990, at B1 (rate increasing); *see also When Is a Joke Not a Joke? Shouts and Swastikas are Getting the Last Laugh*, NEWSWEEK, May 23, 1988, at 79 (same); Leatherman, *supra* note 1 (anti-semitism increasing); Chung, *Racial Hate Victims Talk to State Panel*, San Francisco Chron., Oct. 7, 1989, at C11, col. 4 (hate crimes, harassment against Asians increasing in California schools). *But see* Leo, *Racism on American College Campuses*, U.S. NEWS & WORLD REP., Jan. 8, 1990, at 53 (reports exaggerated, "massively unconvincing," and "over-

In response, a number of campuses have enacted student conduct rules prohibiting slurs and disparaging remarks directed against persons on account of their ethnicity, religion, or sexual orientation.[3] The University of Wisconsin rule, for example, prohibits remarks that (i) are directed to an individual; (ii) demean based on membership in a racial, religious, or sexual group; (iii) are intended to demean; and (iv) interfere with the victim's ability to take part in education or instruction.[4]

This Article deals with some of the thorny issues such rules raise. Part I discusses how we characterize the problem. As will be seen, it may be framed in two ways—as a first or fourteenth amendment problem—that are equally valid but lead to drastically different consequences. Yet, no a priori reason exists for declaring the problem "essentially" one of free speech or protection of equality.[5] Part II surveys the extent of campus racism and various universities' responses to it. Since our society has had relatively little experience with regulating group-disparaging speech, Part III reviews efforts of other Western nations in dealing with it. Part IV examines the teachings of social science on racism and its control. Part V applies case law and theories of free speech and equal protection to the problem of campus racism.

These "subnarratives" highlight the inadequacy of conventional

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blown"); Bernstein, *On Campus, How Free Should Speech Be?*, N.Y. Times, Sept. 10, 1989, at E5, col. 1 ("a handful of bigots").

For a further discussion of the harms of racist speech, see *infra* notes 247-73 and accompanying text. For a discussion of the effects on black college students of racial tension and harassment, see Fleming, *Stress and Satisfaction in College Years of Black Students*, J. NEGRO EDUC. 307 (1985). For a discussion of the resurgence of racism and antisemitism in Europe, see *Racism Revived*, THE ECONOMIST, May 19, 1990, at 14; *see also* Sherman, *Hate Crime Statutes Abound*, NAT'L L.J., May 21, 1990, at 3, col. 1 (U.S. states enacting anti-hate laws to deal with resurging racism).

[3] *See infra* notes 27-120 and accompanying text, discussing rules. Antiracism rules are not the only response a university might make to resurgent racism. Other possibilities include: (i) doing nothing; (ii) using existing codes to punish racist conduct; (iii) using teaching or moral exhortation in hopes of persuading would-be racists to moderate their behavior; (iv) instituting civil or criminal action under state law. *Id.* (discussing various approaches taken at different campuses).

[4] UNIV. WIS. STAT. § 17.06(2)(a), discussed *infra* at notes 91-120 and accompanying text. The rule reads as follows:

> UWS 17.06 OFFENSES DEFINED. The university may discipline a student in nonacademic matters in the following situations.
>
> . . . .
>
> (2)(a) For racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets, other expressive behavior or physical conduct intentionally:
>
> 1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
>
> 2. Create an intimidating, hostile or demeaning environment for education, university related work, or other university-authorized activity.
>
> (b) Whether the intent required under par. (a) is present shall be determined by consideration of all relevant circumstances.

A more restrictive rule at the University of Michigan was recently declared unconstitutional on vagueness grounds. *See infra* notes 78-90 and accompanying text.

[5] On essentialism, see generally Harris, *Race and Essentialism in American Feminist Legal Theory*, 42 STAN. L. REV. 201 (1990).

analysis in dealing with issues, like campus antiracism rules, that straddle fault lines in our system of values. Even together, Parts III, IV, and V barely begin to close the gap between liberty and equality that campus antiracism rules open. Yet our dilemma may yield to a postmodern insight discussed in Part VI: regulation of the speech by which a dominant group "constructs" a stigma-picture of a subordinate group may be carried out without offending core values of the first amendment, and may be necessary for full effectuation of the fourteenth.

I. FRAMING THE ISSUE

Persons tend to react to the problem of racial insults in one of two ways. On hearing that a university has enacted rules forbidding certain forms of speech, some will frame the issue as a first amendment problem: the rules limit speech, and the Constitution forbids official regulation of speech without a very good reason.[6] If one takes that starting point, several consequences follow. First, the burden shifts to the other side to show that the interest in protecting members of the campus community from insults and name-calling is compelling enough to overcome the presumption in favor of free speech.[7] Further, there must be no less onerous way of accomplishing that objective.[8] Moreover, some will worry whether the enforcer of the regulation will become a censor, imposing narrow-minded restraints on campus discussion.[9] Some will also be concerned about slippery slopes and line-drawing problems: if a campus restricts this type of expression, might the temptation arise to do the same with classroom speech or political satire in the campus newspaper?[10]

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[6] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech"); Gitlow v. New York, 268 U.S. 652, 666 (1925) (applying free-speech guaranty to the states); *see* Hentoff, *Voodoo Constitutional Law*, Village Voice, Aug. 29, 1989, at 20, col. 1 (campus antiracism rules "mug" the first amendment, a step toward recreating spirit of Nazism and the Third Reich). For a more moderate view, see Lawrence, *supra* note 2 (advocating a narrow first amendment "exception").

[7] *E.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964); United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). The free-speech aspect of campus antiracism rules is discussed *infra* notes 276-319 and accompanying text.

[8] In other words, there must be no way of protecting minorities that encroaches less on freedom of speech. Lewis v. City of New Orleans, 425 U.S. 130 (1974); Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973); NAACP v. Button, 371 U.S. 415, 433 (1963) (state action limiting speech must be narrowly tailored to accomplish objective).

[9] *See* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 223-25 (1941) (fear of official censorship a central concern of framers); *see also* Shunny, BROWN ALUMNI MONTHLY, Nov. 1989, at 6 (punishing racists can backfire—it just encourages them and makes them martyrs) (letter to editor); Campbell, *supra* note 1 (ACLU expresses this concern over campus antiracism rules); Will, *Academic Liberal's Brand of Censorhip*, San Francisco Chron., Nov. 7, 1989, at A22, col. 5.

[10] *E.g.*, Will, *In Praise of Censure*, TIME, July 31, 1989, at 71-72; Campbell, *supra* note 1, at 15; O'Neil, *Colleges Should Seek Educational Alternatives to Rules That Override the Historic Guarantees of Free Speech*, Chron. Higher Educ., Oct. 18, 1989, at B1, col. 1 ("the exception we make today . . . may return to haunt us"); Taylor, *"Fighting Words" Laws Should Focus on Intent, Not Control*, The Recorder, Jan. 3, 1990, at 6, col. 1.

Others, however, will frame the problem as one of protection of equality. They will ask whether an educational institution does not have the power, to protect core values emanating from the thirteenth and fourteenth amendments,[11] to enact reasonable regulations aimed at assuring equal personhood on campus.[12] If one characterizes the issue *this* way, other consequences follow. Now, the defenders of racially scathing speech are required to show that the interest in its protection is compelling enough to overcome the preference for equal personhood;[13] and we will want to be sure that this interest is advanced in the way least damaging to equality.[14] There are again concerns about the decisionmaker who will enforce the rules, but from the opposite standpoint: the enforcer of the regulation must be attuned to the nuances of insult and racial supremacy at issue, for example by incorporating multi-ethnic representation into the hearing process.[15] Finally, a different set of slopes will look slippery. If we do *not* intervene to protect equality here, what will the next outrage be?

The legal analysis, therefore, leads to opposite conclusions depending on the starting point. But there is an even deeper indeterminacy: both sides invoke different narratives to rally support.[16] Protectors of the first amendment see campus antiracism rules as parts of a much longer story: the centuries-old struggle of Western society to free itself from

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11 U.S. CONST. amends. XIII & XIV (prohibiting slavery, and requiring equal protection of the laws); *see also* U.S. CONST. amend. XV (requiring equal access to the vote).

12 This concern underlay enactment of the Wisconsin rule. *See* Statement of Regent Erroll B. Davis, Jr., Diversity Conference, UW-Madison, Nov. 17, 1989, at 2 (on file with author).

13 *See* Brown v. Board of Educ., 347 U.S. 483 (1954) (equality high value in our constitutional system); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (upholding Congress's power to enact rules protecting this value); *see also infra* notes 320-35 and accompanying text (place of equality in American legal system).

14 *E.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307-10 (1978) (Powell, J.).

15 At Madison, for example, broad participation was sought in drafting UNIV. WIS. STAT. § 17.06; its enforcement was assigned to the office of the Dean of Students, which is ethnically integrated.

16 Recent scholarship has emphasized the manner in which our understanding of reality is mediated by narratives or stories—interpretive structures that enable us to place events together and infuse them with meaning and coherence. *See* P. RICOEUR, TIME AND NARRATIVE (1984); ON NARRATIVE (W. Mitchell ed. 1980); Delgado, *Legal Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); *see also* P. BERGER & T. LUCKMAN, THE SOCIAL CONSTRUCTION OF REALITY (1967); N. GOODMAN, WAYS OF WORLDMAKING (1978). Legal stories are no exception to this rule, *see* J. WHITE, HERACLES' BOW: ESSAYS ON THE POETICS AND RHETORIC OF LAW 175 (1985) ("the narrative is the archetypal legal and rhetorical form, as it is the archetypal form of human thought in ordinary life"); Delgado, *supra*; Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987). The general term often applied to such approaches is "postmodernism." *See generally* L. HUTCHEON, A POETICS OF POSTMODERNISM: HISTORY, THEORY, FICTION (1988); Lyotard, *Answering the Question: What is Postmodernism?*, in THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE 71 (G. Bennington & B. Massumi trans. 1984); Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1213-20 (1989). For the view that stories may mediate for ill (*i.e.*, may promote discord, rather than harmony), see Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872 (1990).

superstition and enforced ignorance. The tellers of this story invoke martyrs like Socrates, Galileo, and Peter Zenger, and heroes like Locke, Hobbes, Voltaire, and Hume who fought for the right of free expression.[17] They conjure up struggles against official censorship, book burning, witch trials, and communist blacklists.[18] Compared to that richly textured, deeply stirring account, the minority-protector's interest in freeing a few (supersensitive?) individuals from momentary discomfort looks thin.[19] A textured, historical account is pitted against a particularized, slice-of-life, dignitary one.

Those on the minority-protection side invoke a different, and no less powerful, narrative. They see a nation's centuries-long struggle to free itself from racial and other forms of tyranny, including slavery, lynching, Jim Crow laws, and "separate-but-equal" schools.[20] They conjure up different milestones—Lincoln's Emancipation Proclamation, *Brown v. Board of Education*; they look to different heroes—Martin Luther King, the early Abolitionists, Rosa Parks, and Cesar Chavez, civil rights protesters who put their lives on the line for racial justice.[21] Arrayed against that richly textured historical account, the racist's interest in insulting a person of color face-to-face looks thin.

One often hears that the problem of campus antiracism rules is that of balancing free speech and equality.[22] But more is at stake. Each side wants not merely to have the balance struck in its favor; each wants to impose its own understanding of what is at stake. Minority protectors see the injury of one who has been subject to a racial assault as not a mere isolated event, but as part of an interrelated series of acts, by which persons of color are subordinated, and which will follow the victim wher-

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17 *See* Z. CHAFEE, *supra* note 9, at 497-501; Delgado & Millen, *God, Galileo and Government: Toward Constitutional Protection for Scientific Inquiry*, 53 WASH. L. REV. 349 (1978).

18 Z. CHAFEE, *supra* note 9; LIBERTY OF THE PRESS FROM ZENGER TO JEFFERSON (L. Levy ed. 1966). For an example of such a struggle, see Dennis v. United States, 341 U.S. 494 (1951).

19 *But see* Davis, *Law as Micro-Aggression*, 98 YALE L.J. 1559 (1989) (people of color are the victims of frequent "micro-aggressions," and expend much energy deciding which to confront and which to let pass).

20 For accounts of this struggle, see, *e.g.*, D. BELL, AND WE ARE NOT SAVED (1987); V. HARDING, THERE IS A RIVER (1981). It is worth observing that few black people wrote the first amendment narrative; the first amendment co-existed with slavery. By the same token, few first amendment absolutists have taken central roles in the struggle for black justice. Indeed, blacks have made their greatest gains when they acted in defiance of constitutional rules and understandings of the limits of free speech and assembly. Lawrence, When Racism Dresses in Speech's Clothing: Reconciling the First and Fourteenth Amendments (unpublished address at ACLU biennial meeting, Madison Wis. June 15, 1989, on file with author); *see infra* notes 336-53 and accompanying text (attempting to reconcile the two narratives).

21 *E.g.*, D. BELL, RACE, RACISM AND AMERICAN LAW 2-53 (Ch. 1: *American Racism and the Uses of History*) (2d ed. 1980); *see* Edelman, *Punishing Perpetrators of Racist Speech*, Legal Times, May 15, 1989, at 20 (accusing higher education leaders of hiding behind the first amendment).

22 O'Neil, *supra* note 10 (balancing, but concluding that first amendment values preponderate); Edelman, *supra* note 21 (coming to opposite conclusion).

ever she goes.[23] First amendment defenders see the wrong of silencing the racist as much more than a momentary inconvenience: protection of his right to speak is part of the never-ending vigilance necessary to preserve freedom of expression in a society that is too prone to balance it away.[24]

My view is that both stories are equally valid. Judges and university administrators have no easy, a priori way of choosing between them, of privileging one over the other. They could coin an exception to free speech, thus giving primacy to the equal protection values at stake.[25] Or, they could carve an exception to equality, saying in effect that universities may protect minority populations except where this abridges speech. Nothing in constitutional or moral theory requires one answer rather than the other. Social science, case law, and the experience of other nations provide some illumination. But ultimately, judges and university administrators must *choose*. And in making this choice, we are in uncharted terrain: we lack a pole star. To gain a sense of the scope of the problem, the next Part reviews recent events at leading universities and reactions to those events.

II. THE CURRENT CONTROVERSY

Incidents of racism and other forms of bigotry have been proliferating on the nation's campuses.[26] Some universities have done as little as

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23 *See* Davis, *supra* note 19; Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

24 *See* Hentoff, *supra* note 6, at 20.

25 For exposition of this view, see Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2356-80 (1989).

26 This upsurge has been paralleled by a similar increase in the society at large. *See* Van Tassel, *Colleges Fighting Growth in Prejudice*, N.Y. Times, Mar. 27, 1988, § 12NJ, at 4, col. 5 (incidents of racial prejudice increasing throughout country).

A sampling of campuses where such events have taken place includes: University of Connecticut (Asian students spat on and subject to racial slurs while riding to student dance, Hamilton, *U. Conn. Panel Is to Study Racial Abuse*, N.Y. Times, Nov. 13, 1988, § 12CN, at 1, col. 5); University of Pennsylvania (fraternity sponsored rush party featuring black strippers who performed while audience shouted epithets, *Penn Fraternities Suspended*, N.Y. Times, Mar. 5, 1988, § 1, at 7, col. 1); Brown University (racial and homophobic graffiti and flyers, Berger, *Deep Divisions Persist in New Generation at College*, N.Y. Times, May 22, 1989, at A1, col. 1); University of Mississippi (arson destroyed all-black fraternity house, *Fraternity Row Integrated at Ole Miss*, N.Y. Times, Oct. 16, 1988, § 1, at 20, col. 1); Temple University (students formed a White Student Union, Wilson, *New White Student Unions on Some Campuses are Sparking Outrage and Worry*, Chron. Higher Educ., Apr. 18, 1990, at 1, col. 2); Farleigh Dickenson University (racial brawls and fighting, Van Tassel, *supra*); Southern Connecticut (same, *Panel Seeks Penalties For Campus Racism*, N.Y. Times, June 25, 1989, § 12CN, at 10, col. 5); Rutgers University (vandalism, Van Tassel, *supra*; *see* Chron. Higher Educ., Sept. 6, 1989, at A2, col. 3); Yale (same, Hentoff, *Free Speech on the Campus*, 53 THE PROGRESSIVE 12 (May 1989)); Smith College (same, Van Tassel, *supra*); University of Michigan (slurs and caricatures, Lord, *The Greek Rites of Exclusion*, 245 NATION 10-12 (1987)); Hastings College (same, Shapiro, *Racist Caricatures Anger Students*, The Recorder, Feb. 10, 1989, § 1, at 1, col. 2); Arizona State University (same, Berger, *Deep Racial Divisions Persist in New Generation at*

possible or have focused on specific episodes or perpetrators. Others have instituted broad-based reforms, ranging from curricular changes to adoption of student conduct rules penalizing racist speech and acts. Subpart A discusses events at eight selected campuses. Subpart B summarizes some of the commentary over campus efforts to punish racist speech.

A. Major Incidents and Institutional Responses

1. The Citadel.—In October 1986, a black cadet was asleep in his room when he was awakened by five intruders chanting his name. The invaders, clad in white sheets and cone-shaped pillowcase masks, shouted obscenities and fled, leaving behind a charred cross made of newspaper.[27] Five white cadets confessed.[28] The Citadel's president condemned the action but denied it reflected the racial climate on campus.[29] Shortly thereafter, the black cadet resigned from the academy because of harassment for having reported the incident,[30] and filed an $800,000 civil rights action against the school.[31] College officials then issued a report absolving the school of responsibility and recommending only increased ethnic awareness classes for cadets.[32] One year later, a local grand jury indicted the five cadets on charges of illegally wearing masks in violation of a state anti-Klan law.[33] The Citadel promulgated no new rule governing racial insult or hazing.

2. Dartmouth College.—In February 1988, four members of *The Dartmouth Review*, a conservative weekly newspaper, confronted William S. Cole, a Black professor, at the conclusion of his music history

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College, N.Y. Times, May 22, 1989, at A1, col. 1); Wisconsin (same, *see infra* notes 91-120 and accompanying text); Hamilton College (same, Carmody, *College Erred in Suspensions, A Court Rules*, N.Y. Times, Aug. 2, 1987, § 1, at 49, col. 1); and Oberlin College (same, Edelman, *supra* note 21, at 20).

27 Clendinen, *Citadel's Cadets Feeling Effects of a Klan-Like Act*, N.Y. Times, Nov. 23, 1986, § 1, at 26, col. 1.

28 *Rights Group Files Suit in Citadel Hazing Case*, N.Y. Times, Dec. 19, 1986, at A22, col. 1.

29 *Five Citadel Cadets Confined to Campus for Hazing Black*, N.Y. Times, Nov. 1, 1986, § 1, at 14, col. 1.

30 At the time of his resignation, the black student, Kevin Nesmith stated, "I feel that I have been made the villain when the villains are at the Citadel." *Black at Citadel Leaves Over Harrassment*, N.Y. Times, Nov. 15, 1986, § 1, at 6, col. 6. Four hundred demonstrators marched through the streets of Charleston in protest of Nesmith's treatment. *Id.*

31 *Rights Group Files Suit in Citadel Hazing Case*, N.Y. Times, Dec. 19, 1986, at A22, col. 1. The complaint alleged that school officials had tolerated and perpetuated racial bigotry by failing to expel the five cadets. *Id.* On February 4, 1987, one of the five cadets filed court papers seeking damages on the grounds that Nesmith incurred no injury from the "hazing" and was therefore filing an improper suit. *White at Citadel Says Hazing was Harmless*, N.Y. Times, Feb. 5, 1987, at A22, col. 1.

32 *Inquiry at Citadel Says Record on Race is Good*, N.Y. Times, Feb. 19, 1987, at A20, col. 6.

33 N.Y. Times, Oct. 8, 1987, at A20, col. 1.

class.[34] The newspaper had recently published a highly critical review of Cole's course.[35] The confrontation turned into a shouting and pushing match between the professor and *Review* members. Black students charged that the article and classroom incident were racially motivated;[36] the *Review* insisted that they were simply fair criticism of a professor's teaching ability.[37] A university panel found three staff members guilty of disorderly conduct, harassment, and invasion of privacy for initiating and secretly recording the "vexatious exchange" with Cole.[38] The event caused a heated exchange between the *Review* and Dartmouth President James O. Freedman, who criticized the newspaper for "poisoning . . . the intellectual environment."[39] For its part, the *Review* charged Freedman with censorship and reverse discrimination.[40]

Racial tensions continued to mount.[41] In two later issues, the *Review* compared President Freedman, a Jew, with Adolph Hitler.[42] The college trustees condemned the newspaper, but declared themselves powerless to impose punishment.[43] Shortly thereafter, a superior court judge ordered Dartmouth to reinstate two of the students on the ground that a member of the disciplinary panel had been biased against them.[44] Two months later, a federal district judge dismissed the students' suit against the university.[45] Like the Citadel, Darmouth took no action to prohibit racial insult and invective.

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[34] Gold, *Racial Tension at Dartmouth As Teacher and Paper Clash*, N.Y. Times, Mar. 2, 1988, at A16, col. 5.

[35] The *Review* described Professor Cole's course on American Music in Oral Tradition as "one of Dartmouth's most academically deficient courses." Gold, *Dartmouth Punishes Four as Harassers of Professors*, N.Y. Times, Mar. 11, 1988, at A15, col.1.

[36] Casey, *At Dartmouth: The Clash of '89*, N.Y. Times, Feb. 26, 1989, § 6 (Magazine) at 28, col. 2.

[37] Gold, *Dartmouth Ends Week of Rallies in Effort to Curb Campus Racism*, N.Y. Times, Mar. 5, 1988, § 1, at 7, col. 1.

[38] Gold, *supra* note 35.

[39] Gold, *Dartmouth President Faults Right-Wing Student Journal*, N.Y. Times, Mar. 29, 1988, at A16, col. 4.

[40] *Id.*; *see also* Binder & May, *Washington Talk: Briefing: Just Like the 60's!*, N.Y. Times, July 27, 1988, at A18, col. 5. The plaintiffs charged that the penalties imposed by the school would have been less severe if the case had involved an exchange between black students and a white professor. *Id.*

[41] *Harassing Letters Upset Students at Dartmouth*, N.Y. Times, Oct. 19, 1988, at B9, col. 5. Black, gay and female Dartmouth students received unsigned letters demanding that they leave the school. *Id.* Complaints of racist and sexist graffiti and of obscene and racist phone messages increased. *Id.*

[42] The editor denied any antisemitic intent. Gold, *Satire by Dartmouth Publication Under Heavy Fire as Anti-Semitic*, N.Y. Times, Nov. 6, 1988, § 1, at 22, col. 5. In one issue, a headline played on a Nazi slogan and referred to President Freedman as "Fuhrer." *Id.* Another article, on the president's alleged anticonservative stance, made references to the Holocaust's "final solution" to the conservative problem and to conservatives being "deported in cattle cars in the night." *Id.*

[43] *Trustees Voice "Shock" on Dartmouth Review*, N.Y. Times, Nov. 7, 1988, at B11, col. 1.

[44] *Dartmouth is Ordered to Reinstate 2 Editors*, N.Y. Times, Jan. 5, 1989, at A16, col. 6.

[45] *Federal Judge Dismissed Suit by 3 Students at Dartmouth*, N.Y. Times, Mar. 23, 1989, at A17,

3. Columbia University.—In March 1987, Michael Jones, a black senior, had an altercation with Matthew Sodl, a white football player and fraternity member, at a campus discotheque.[46] Later, Jones and five black friends brawled with Sodl and a group of his friends outside the discotheque.[47] Each side claimed provocation[48] and charged the other with using racist language.[49] When the university responded slowly, several protests followed, including one in which black demonstrators and their supporters occupied the administration building.[50] The demonstration ended only after New York police arrested fifty demonstrators. Soon after, the university released a report which described the brawl as racial and charged one white male student with "verbal abuse."[51] The report noted that several black students refused to cooperate with the investigation, which prevented the university from proceeding against additional individuals,[52] an assertion many students refused to accept.[53] Their indignation increased when criminal charges were dropped,[54] a university disciplinary panel issued only warnings,[55] and a federal jury found that Columbia discriminated against the only student disciplined for the fight, because he was white.[56] At the time this Article was writ-

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col. 6; *see* Dartmouth Review v. Dartmouth College, 889 F.2d 13 (1st Cir. 1989), *aff'g* 709 F. Supp. 32 (D.N.H. 1989).

46 Jones reportedly spilled beer on Sodl; Sodl reportedly responded by rubbing Jones's head and making a sarcastic remark about his hair. *Blacks at Columbia U. File Charges in Brawl*, N.Y. Times, Mar. 24, 1987, at B5, col. 5. Jones had a run-in with Sodl and his fraternity friends two weeks before this incident. *Columbia to Investigate a Reported Racial Brawl*, N.Y. Times, Mar. 23, 1987, at B2, col. 1.

47 *Columbia to Investigate A Reported Racial Brawl*, N.Y. Times, Mar. 23, 1987, at B2, col. 1.

48 *Id.*

49 *Blacks at Columbia U. File Charges in Brawl*, N.Y. Times, Mar. 24, 1987, at B5, col. 5.

50 Morgan, *50 Arrested in Anti-Racism Protest at Columbia*, N.Y. Times, Apr. 22, 1987, at B3, col. 1. The first protest included approximately 150 demonstrators. A new group, called Concerned Black Students of Columbia (CBSC), criticized the failure of the police and university to act quickly. *Blacks at Columbia U. File Charges in Brawl*, N.Y. Times, Mar. 24, 1987, at B5 col. 5. The group and others staged a protest at police headquarters in Manhattan, where police responded by saying that it was the black complainants' own refusal to cooperate that was hampering the investigation. The complainants' attorney countered by accusing the police of acting in bad faith. *23 Seized in Protest on Columbia Clash*, N.Y. Times, Apr. 8, 1987, at B5, col. 1.

51 Carmody, *Columbia Report Cites Racial Unrest*, N.Y. Times, Apr. 23, 1987, at B2, col. 3 (reporting that an unidentified black man threw the first blow).

52 *Id.*

53 *Id.* The attorney for the CBSC viewed the report as "an attempt to blame the victims . . . for the fact that the university has not been able to do a proper investigation." *Id.* Other students described the school's disciplinary process as "a joke." *Id.*

54 Neuffer, *Columbia Begins Disciplinary Hearings on Protest*, N.Y. Times, May 27, 1987, at B3, col. 3.

55 Uhlig, *Columbia Panel Rejects Expelling Any Students in Protest on Racism*, N.Y. Times, Aug. 5, 1987, at B2, col. 1. The warnings could be expunged from the students' records after one term of violation-free conduct. *Id.*

56 *White Columbia Student is Ruled Bias Victim*, N.Y. Times, Jan. 13, 1988, at B1, col. 4. Krause had been suspended for one term but had received a stay. The jury awarded $1 in damages. *Id.*

ten, Columbia had enacted no new student rule forbidding racial behavior or insult.

4. University of California-Berkeley.—An intoxicated fraternity member shouted obscenities and racial slurs at a group of black students as they passed by his fraternity house;[57] later, a campus radio disc jockey told black students to "go back to Oakland" when they asked the station to play rap music.[58] Members of a gay and lesbian group reported that an anonymous caller had left a message on its telephone recorder declaring, "You should be taken out and gassed, like Hitler did with the Jews."[59] Berkeley responded to these and other events by instituting a campus-wide Diversity Awareness program,[60] and the statewide system enacted a policy prohibiting "those personally abusive epithets which, when directly addressed to any ordinary person, are likely to provoke a violent reaction whether or not they actually do so."[61] The rule applies to words spoken on university property, at official university functions and events. Penalties range from reprimands to dismissal.[62]

5. Stanford University.—In fall 1988, a group of black and white students at Stanford debated the racial ancestry of composer Ludwig von Beethoven.[63] The black students correctly maintained that he was a mulatto; some of the white students denied it. Later, two of the white students defaced a poster of Beethoven by scribbling on the face and adding stereotypically black facial features.[64] The incident sparked a sharp confrontation between black and white students.[65] Later, Stanford released

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57 Curtis, *College Campuses Reinforce Rules Barring Racism*, San Francisco Chron., Sept. 18, 1989, at A1, col. 1.

58 *Id.*

59 *Id.*

60 *Id.* In the program, students discuss cultures and backgrounds in an effort to break down stereotypes. *Id.*

61 Curtis, *Racial, Ethnic, Sexual Slurs Banned on UC Campuses*, San Francisco Chron., Sept. 27, 1989, at A1, col. 3. Such words include terms widely regarded as disparaging of a person's "race, ethnicity, religion, sex, sexual orientation, disability and other personal characteristics." *Id.*

62 *Id.*; *see* Shapiro, *UC's Doctrine of Silence*, The Recorder, Oct. 2, 1989, at 1, col. 2 (Laurence Tribe offered the opinion that the UC rule is constitutional on its face, but could be misapplied.).

63 Workman, *Legal Opinion in Stanford Poster Case*, San Francisco Chron., Feb. 9, 1989, at A2, col. 5.

64 Barringer, *Campus Battle Pits Freedom of Speech Against Racial Slurs*, N.Y. Times, Apr. 25, 1989, § 1, at 1, col. 1. They then placed the poster outside a black student's dormitory room. *Id.*

65 Workman, *supra* note 63, at A2, col. 6. Stanford legal counsel recommended against disciplining the perpetrators because the poster was a form of expression. *Id.* The opinion stated that the first amendment would also protect the December 1988 distribution of recruiting leaflets at Stanford Law School on behalf of the White Aryan Resistance, Shapiro, *Racist Caricatures Anger Students*, The Recorder, Feb. 10, 1989, at 1, col. 2, an action that angered many black students and intensified the debate. Workman, *supra* note 63. One student described as "bizarre" the view that freedom of speech permits some students to place others in fear through racial insults. *Id.* In addition, an electronic bulletin board in the university's mainframe computer containing racist and sexist jokes

a revised student conduct code prohibiting words intended to harm or harass, "directly addressed" to a specific person, and containing "words, pictures or symbols that are commonly understood to convey in a direct and visceral way, hatred or contempt" for a particular race or sex.[66] The Stanford law faculty were divided on whether the new measure met first amendment standards.[67]

6. University of Massachusetts.—In October 1986, the New York Mets baseball team defeated the Boston Red Sox in the final game of the World Series. At Amherst, over one thousand students who had been watching the game—some of whom were intoxicated—poured out of dormitories onto the campus shortly after midnight.[68] Skirmishes broke out.[69] When a small group of black students arrived, the violence intensified.[70] Ten students were injured, including one black who was left in a neck brace and crutches.[71] A state commission criticized the university, finding the brawl "predictable, preventable and primarily racially motivated."[72] The university punished the instigators,[73] instituted special classes and events on racial tolerance, and renewed the school's dedication to affirmative action.[74] These measures failed to prevent further racial outbreaks.[75] On March 12, over two hundred minority students

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was shut down. Workman, *Unplugging Racist Jokes Starts Furor at Stanford*, San Fransisco Chron., Feb. 1, 1989, at A4, col. 5.

66 Barringer, *supra* note 64. The other protected classifications include sexual orientation, religion, and national and ethnic origin. *Id.*

67 Professor Thomas Grey, who helped draft the new code, stated that the code was constitutional because it only covered "fighting words" in face-to-face situations. *See infra* notes 276-319 and accompanying text (discussing this doctrine). Others were more doubtful. Curtis, *Attacks on Racism Can Imperil Freedom of Speech*, San Francisco Chron., Sept. 18, 1989, at A8, col. 1. Stanford is, of course, a private university and not bound by the first amendment; nevertheless, the drafters chose the first amendment as their standard.

68 Wald, *Racism Blamed for Brawl at U. of Massachusetts*, N.Y. Times, Feb. 6, 1987, at A12, col. 4.

69 *Id.*

70 *State Starting an Investigation of Clash at Massachussetts U.*, N.Y. Times, Nov. 18, 1986, at B24, col. 1.

71 *Id.*

72 Wald, *supra* note 68. The report was issued by the Massachusetts Commission Against Discrimination. The author, Frederick A. Hurst, wrote that the students perceived the Mets as a "black" team and the Red Sox as a "white" team. Accordingly, the crowd focused on the black students as surrogate targets for their anger over the "white" team's loss. *Id.*

73 *Id.* On February 2, 1987, a New Hampshire District Court sentenced one of the white students to three days in jail (suspended), one year probation, and $115 fine for shoving a black student during the fight. *U Mass Student Fined For Brawl*, N.Y. Times, Feb. 3, 1987, at A25, col. 2.

74 Gold, *Cordiality and Racial Anger Mix in Massachusetts U. Protest*, N.Y. Times, Feb. 16, 1988, at A10, col. 1.

75 On the weekend of February 6 and 7, 1987, five white students assaulted and beat two black students, who filed complaints with the campus police. Shortly thereafter, a white student informed campus police that she had been harassed by a black man. Officers allegedly selected seven black students at random for an on-site line-up. Blacks charged that the attack and line-up were racially

occupied the university's African-American Studies building.[76] The occupation ended five days later when the university agreed to many of the students' demands, including revision of the student conduct code to punish racially motivated violence.[77]

7. University of Michigan.—In January 1987, a group of black women meeting in a lounge on the Ann Arbor campus found a stack of handbills declaring "open hunting season" on all blacks.[78] A nineteen-year-old white underclassman admitted to distributing them and was disciplined,[79] a result many white students thought too severe. A short time later, a disc jockey for the campus radio station encouraged listeners to call the station and tell racist jokes on the air.[80] Other students established a computerized file which contained racist jokes, accessible through a password.[81]

After these and other incidents,[82] the Regents approved a new student conduct code covering several categories of harassment.[83] The policy, which purported to balance free speech with the university's need to deter racist conduct, set varying standards for different locations around

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motivated and demanded that those responsible be punished. *Massachusetts U. Scene of Protest*, N.Y. Times, Feb. 13, 1988, § 1, at 7, col. 1.

Although the Chancellor condemned both events and disciplined two of the perpetrators, some still considered the response inadequate. *Id.*; Gold, *Blacks Postpone a Meeting on Resolving Campus Sit-In*, N.Y. Times, Feb. 14, 1988, § 1, at 26, col. 1.

76 *Massachusetts U. Scene of Protest*, N.Y. Times, Feb. 13, 1988, § 1, at 7, col. 1. The protesters also included a number of Hispanics and American Indians. Gold, *supra* note 74.

77 Gold, *Students End Takeover at U. of Massachusetts*, N.Y. Times, Feb. 18, 1988, at A16, col. 5. Other terms of the agreement included: identifying the New Africa House as more of a cultural center for minorities and accelerating its renovation; setting a goal of 50% increase in minority student enrollment; exploring new courses on minority culture and history; studying possible expansion of cafeteria menus to include ethnic foods; and forming a student group to monitor the university's progress in all these areas. *Id.* At the time of writing, Massachusetts had not yet enacted a rule limiting racial speech.

78 Wilkerson, *Campus Race Incidents Disquiet U. of Michigan*, N.Y. Times, Mar. 9, 1987, at A12, col. 1.

79 *Student Admits Racial Act*, N.Y. Times, March 12, 1987, at A28, col. 6. The student was evicted from his dormitory and barred from university housing. *Id.*

80 The university dismissed him and shut down the station. Wilkerson, *supra* note 78.

81 Wilkerson, *Ethnic Jokes in Campus Computer Prompt Debate*, N.Y. Times, Apr. 18, 1987, § 1, at 6, col. 3. The collection contained jokes on about 300 different subjects, and was preceded by a warning that they might offend certain people. *Id.* Black students charged that some of the jokes were racist and demanded that the university take action. Others countered that the file was protected by the first amendment. After the joke file was closed, other students opened new files containing equally offensive jokes—and also essays on the evils of racial bigotry. *Id.*

82 Other incidents include a February 1988 distribution of handbills stating that blacks should be "hanging from trees" instead of attending college classes, Wilkerson, *Campus Blacks Feel Racism's Nuances*, N.Y. Times, Apr. 17, 1988, § 1, at 1, col. 3, and the continued vandalizing of the shanties constructed to protest South African apartheid. Wilkerson, *supra* note 78.

83 DISCRIMINATION AND DISCRIMINATORY HARASSMENT BY STUDENTS IN THE UNIVERSITY ENVIRONMENT, UNIVERSITY OF MICHIGAN (adopted April 14, 1988).

the campus.[84] With respect to conduct in classrooms and other academic settings, the policy prohibited any verbal or physical behavior which (1) "stigmatizes or victimizes" any individual on the basis of thirteen different cultural characteristics (including race, sex, ethnicity, and religion), and (2) threatens or interferes with the individual's university activities or "creates an intimidating, hostile or demeaning environment."[85] Sanctions ranged from formal reprimands to expulsion.[86]

A short time later, a graduate student represented by the American Civil Liberties Union (ACLU) sued Michigan on the ground that its policy violated the first amendment.[87] A United States District Court struck down the policy in August 1989, finding its provisions unconstitutionally vague.[88] The university replaced the policy with one that bars slurs directed at specific individuals[89] but exempts statements made during classroom discussion.[90]

8. University of Wisconsin at Madison.—In May 1987, members of the Madison chapter of the Phi Gamma Delta (PGD) fraternity sponsored their annual "Fiji Island" party,[91] as part of which they erected a fifteen-foot high plywood caricature of a black man with a bone through his nose[92] and paraded in black face-paint and tropical garb.[93] When black students picketed the house, the caricature was removed, only to be erected again the next day.[94] This sparked a further round of protests,[95]

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84 These standards were based on the degree of expression deemed consistent with the university's academic mission at each location (public forums, academic and educational centers, and university housing). *Id.* At public forums, such as plazas and student newspapers, the policy permits the "most wide-ranging freedom of speech." *Id.* At academic and educational centers, prohibited conduct is that which "materially impedes the educational process." *Id.* In university housing, leases control. *Id.*

85 *Id.*

86 *Id.*

87 The complaint charged that the provisions "create a chilling effect on the expression of certain ideas because of the content of those ideas." *Michigan U. is Sued Over Anti-bias Policy*, N.Y. Times, May 27, 1989, § 1, at 8, col. 3.

88 Doe v. University of Michigan, 721 F. Supp. 852, 866 (E.D. Mich. 1989).

89 Heller, *U. of Michigan Scales Back Its Rules on Discrimination and Harassment*, Chron. Higher Educ., Sept. 27, 1989, at A3, col. 1.

90 *Id.* The ACLU has called the new policy an improvement. *Id.* The university aims to issue a permanent policy in the near future. *Id.*

91 Selby & Schultz, *"Fiji" Party Frat Gets UW Suspension*, Capital Times, May 15, 1987, at 1, col. 6. Phi Gamma Deltas are known informally as "Fijis."

92 Segall, *Blacks Protest Frat Caricature*, Wis. St. J., May 4, 1987, § 1, at 1, col. 1.

93 *Id.*

94 *Id.*

95 Selby, *Frats Caricature Triggers Blacks' Call for UW Reform*, Capital Times, May 4, 1987, at 1, col. 2; Selby, *UW Sets Discussion on Racism*, Capital Times, May 5, 1987, at 23, col. 1. The fraternity president apologized, stating that the character was intended to represent a Fiji Island inhabitant, not a black person. This statement predictably angered several Fijian students. Smith, *Frat Irks Platteville Fijian*, Wis. St. J., May 5, 1987, § 1, at 1, col. 1.

which subsided only when the university suspended PGD[96] and ordered its members to undergo sensitivity training.[97]

One week after PGD was reinstated, the predominantly Jewish Zeta Beta Tau (ZBT) fraternity held a closed party. Uninvited PGD members appeared and made racial and ethnic slurs,[98] which provoked a brawl. The university immediately resuspended PGD,[99] but an independent investigator recommended reversal. The acting chancellor lifted the group's suspension and apologized.[100] One month later, the university concluded that, while the racist remarks were "reprehensible," they were not punishable under the existing student conduct code and, further, were protected by the first amendment.[101] Jewish and black student groups were outraged.[102] In February 1988, Chancellor Donna Shalala unveiled the "Madison Plan," a sweeping program aimed at improving recruitment and retention of minorities of color.[103]

In April 1988, Wisconsin Professor Harold Scheub was conducting an exam for his African Storyteller course when six men entered and disrupted the proceedings.[104] Two hours later, Professor Linda Hunter,

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96 The suspension meant that the organization lost its university recognition. The disciplinary action was viewed as a compromise between black students and the university administration, which had been considering only a written condemnation before holding the closed-door meeting with black students. Selby & Schultz, *supra* note 91. In explaining the suspension, one university official stated, "Our statements about racism would be meaningless if we were to pay no further attention to the unintended message . . . communicated by such an event." *Id.*

97 Regeth, *Sigma Alpha Epsilon Cleared, FIJI Suspended After Racism Inquiries*, (Univ. Wis.) Badger Herald, June 15, 1987, at 4, col. 1.

98 Schmeling & Pitman, *University Suspends Fraternity: Anti-Semitism Among Latest Fiji Accusations*, Capital Times, Oct. 31, 1987, at 1, col. 5.

99 *Id.*; Allegretti, *UW Indifference Cited in Racism*, Capital Times, Nov. 2, 1987, at 1, col. 5. Although PGD officers denied any racial intent and characterized the incident as just another "after-bars" fight, they nevertheless suspended five members responsible for the fracas. Schultze, *Madison Fraternity Suspends 2*, Milwaukee J., Nov. 3, 1987, at 1A, col. 2.

100 Riddle, *"Fiji" Fraternity Suspension Lifted*, Wis. St. J., Nov. 8, 1987, § 1, at 12, col. 1. University officials concluded that the suspension probably was in violation of the fraternity members' due process rights, since no determination had been made that the individuals were acting in an individual or representative capacity. *Id.*; *see also* Smith, *UW Takes Heat from Clearing Frats*, Wis. St. J., Dec. 17, 1987, § 1, at 1, col. 5.

101 Schumacher, *Two Face Discipline in Frat Incident*, Wis. Week, Jan. 13, 1988, at 3, col. 2. The school eventually would hold disciplinary hearings for one ZBT member for his role in the fight and for one PGD member who also fought and refused to participate in the investigation. Smith, *supra* note 100.

102 Smith, *Frat Fight Ruling Takes More Heat*, Wis. St. J., Dec. 19, 1987, § 4, at 1, col. 3.

103 Mow & Bernstein, *On Changing Academic Culture from the Inside: An Interview with Donna Shalala*, CHANGE, Jan./Feb. 1989, at 26; Schumacher, *The Madison Plan: Shalala Says Bold Effort Requires Deep Commitment*, Wis. Week, Feb. 10, 1988, at 1, col. 2. Shalala aimed to double the number of minority students within five years and to add over 200 new minority faculty and academic staff within three years. An Ethnic Studies course requirement, a multi-cultural center, and an outreach program to neighboring schools included among the features of the program.

104 Segall, *Disruptions at UW Seen as Racial*, Wis. St. J., Apr. 15, 1988, at 1A, col. 2. According to Scheub, the men stayed in the examination room for 10 minutes during which they hurled obscenities and left an exam book filled with pornography. *Id.*

while teaching an African languages course, was harassed by six men who set off a stink bomb in the classroom before fleeing.[105] University investigators found that the intruders, primarily members of the University of Illinois chapter of the Acacia fraternity, acted with racial motivation[106] and the complicity of the group's Madison chapter.[107] The university suspended the local chapter for one year,[108] and a number of the Illinois members pleaded no contest to criminal charges.[109]

One year after being victimized by ethnic and racial slurs, the Wisconsin chapter of ZBT sponsored a "slave auction" fundraiser at a private home.[110] The auction included several skits, including one in which pledges wore black face-paint and Afro wigs, and lip-synched Jackson Five songs; and another in which a male pledge, also in blackface and wig, impersonated Oprah Winfrey while two other males taunted the pledge sexually.[111] When a student committee concluded that the fraternity violated no campus rule and that the skits were protected speech,[112] two hundred demonstrators occupied the administration building in a "day of rage."[113] Chancellor Shalala agreed to some of the group's demands, but refused to expel the ZBT members on the ground that their

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105 *Id.*

106 *Acacia Frat Leader Disputes Racism Claim*, Wis. St. J., May 12, 1988, at 3B, col. 4. The Illinois Acacia chapter suspended 15 other members, while the chapter itself was barred by the University of Illinois for one year. *Id.*

107 Esposito, *Acacia is a Scapegoat, Fraternity Officer Says*, Milwaukee J., May 6, 1988, at 4B, col. 3.

108 *Id.* The suspension resulted in the fraternity's loss of the University of Wisconsin name, access to student facilities and mailing labels, participation in intramural sports, and membership in the Interfraternity Council. *Id.*

109 They were sentenced to probation for disorderly conduct and unauthorized presence and required to write essays about the incident or on black history and literature. Four members were also required to issue an apology letter to the University of Wisconsin, donate $50 to charity, and perform 100 hours of community service. Worthington, *U. of Wisconsin Regents Move to Rein in Racism*, Chicago Tribune, Apr. 12, 1989, at C1, col. 1.

Compare the Acacia case *with* Furumoto v. Lyman, 362 F. Supp. 1267 (N.D. Cal. 1973) (upholding discipline of students who disrupted William Shockley's classes at Stanford University; Shockley was a principal proponent of race-IQ theories which many considered racist).

110 Trebach, *Student Group Tested in ZBT Pledge Case*, Wis. Week, Oct. 26, 1988, at 1, col. 4.

111 Schmeling, *Lack of Action Against ZBTs Enrages Blacks*, Capital Times, Nov. 15, 1988, at 1, col. 1. After the skits, ZBT members entered bids for the performers' services. Smith, *"Slave Auction" Spurs Protests, UW Outrage*, Wis. St. J., Oct. 25, 1988, at 1A, col. 2.

112 Trebach, *supra* note 110. The investigating committee was composed of five students, one faculty member, one academic staff member, and a representative from the Dean of Students office. The authority to discipline student groups had been transferred to the committee from the Dean of Students. *See also* Smith, *Lawyer: Frat Action Protected by Law*, Wis. St. J., Oct. 26, 1988, at 1B, col. 1.

113 Smith, *Anti-Racism Protesters to Talk to Shalala Today*, Wis. St. J., Nov. 8, 1988, at 1B, col. 3. The Minority Coalition, a group of student minorities, demanded that a panel of administrators and minority students be formed to replace the student committee because it was ineffective in handling the "auction" incident. *Id.*

actions were constitutionally protected.[114] Once again, black students took to the streets.[115] Subsequently, the Wisconsin student association stripped the committee of authority over complaints of racism and sexism,[116] and the Interfraternity Council suspended the fraternity for five years.[117] Eventually, Chancellor Shalala tightened control over campus fraternities and sororities,[118] and promulgated a new code of student conduct punishing racial speech and behavior.[119] The Wisconsin ACLU recently filed suit to declare the university's new policy unconstitutional.[120]

9. Summary.—As previously noted, racial incidents have taken place at many campuses. A review of the more celebrated incidents indicates that in several cases—Michigan, Wisconsin, Massachusetts, Berkeley and Stanford—the incidents led to enactment of antiracism rules. In others—Dartmouth, The Citadel, and Columbia—no rules were enacted. There seems to be little correlation between the seriousness or number of incidents and the enactment of rules. Some universities have responded quickly to a small number of incidents; others have ignored serious unrest or declared themselves unable to act. Whether a campus ultimately adopts an antiracism rule or not, the mere suggestion of such rules generates controversy. The next subpart reviews that controversy, focusing particularly on arguments against rules limiting racial speech.

B. The Current Debate

In response to the rising number of racial incidents, nearly a dozen colleges and universities have adopted student conduct codes or revised old ones to cope with the new wave of unrest.[121] These rules and policies

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114 Smith, *Shalala to Appoint Greek Review Panel*, Wis. St. J., Nov. 9, 1988, at 1C, col. 1. Shalala agreed to establish a committee to study Wisconsin's long-term goal for minority retention and to reexamine the future of fraternities on the campus. *See* Stein, *Student Panel Takes No Action Against Fraternity*, Milwaukee Sentinel, Nov. 15, 1988, at 1B, col. 1.

115 Schmeling, *supra* note 111.

116 Nowlen, *WSA Seeks Disciplinary Changes*, Wis. Week, Nov. 30, 1988, at 1, col. 5.

117 Miller, *Fraternities Come Down Hard on ZBT*, Wis. St. J., Nov. 22, 1988, at 1, col. 2.

118 *Campus Life: Wisconsin; Racist Acts Inspire a Call for Control over Fraternities*, N.Y. Times, May 21, 1989, § 1, at 52, col. 5. Shalala's proposal marked the end of a 20-year "hands-off" policy regarding Wisconsin fraternities. *Id.*

119 UNIV. WIS. STAT. § 17.06(2)(a), *supra* note 4. The rule is binding on the entire University of Wisconsin system.

120 U.W.M. Post, Inc. v. Regents, University of Wisconsin, No. 90-C-328 (pending in the E.D. Wis.). *See* Jones, *UW Racism Rule to Begin Friday Despite Criticism*, Milwaukee J., Sept. 20, 1989, at 1B, col. 1.

121 Wilson, *Colleges' Anti-Harassment Policies Bring Controversy Over Free-Speech Issues*, Chron. Higher Educ., Oct. 4, 1989, at A1, col. 2. Institutions that have already adopted policies include Emory University, the Universities of Texas, Wisconsin, California, Connecticut, Michigan, North Carolina at Chapel Hill and Pennsylvania, Brown University, Pennsylvania State University, Trinity College, Mt. Holyoke, and Tufts University. Institutions currently considering anti-harassment policies include Stanford, Eastern Michigan, Colorado, and Arizona State. In early October of 1989, Tufts's administrators rescinded its policy, which had identified specific areas of campus where

have drawn fire from commentators ranging from political conservatives to first amendment absolutists.

1. The University as "Bastion of Freedom."—A frequent argument against campus antiracism rules is that they run counter to the ideal of the university as a bastion of free thought. Describing the campus as "the locus of the freest expression to be found anywhere," where the unpopular truth may be "pursued—and imparted with impunity," Professor Chester Finn decries any effort to limit that freedom.[122] Many contend that anti-harassment policies, even those aimed only at face-to-face insults, might chill academic exchange or teaching.[123] Further, they argue that "chill" of expression operates only in one direction: Professor Alan Charles Kors charges that at most campuses a white male can be insulted and disparaged with relative impunity.[124] Minority protectors often respond by transferring the debate outside the realm of speech. Martha Minow, for example, focuses on the way racist insults stigmatize the victim, and draws a line between speech and harassment.[125] Dartmouth President James O. Freedman responded to criticism of his attack on the *Dartmouth Review* by describing the conflict not as a mat-

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"demeaning" speech was restricted, believing that the policy would probably fail a court challenge. Ingalls, *Tufts Rescinds Controversial Policy Limiting Free Speech in Certain Areas*, Chron. Higher Educ., Oct. 11, 1989, at A3, col. 1.

Most rules are patterned after the "fighting words" exception of Chaplinsky v. New Hamsphire, 315 U.S. 568 (1946), or in terms of the tort of severe emotional distress. Mt. Holyoke, a private college, has adopted a standard prohibiting—"unwelcome slurs, jokes, graphic written materials as well as all other verbal or physical actions related to an individual's personal background or attributes," MT. HOLYOKE COLLEGE STATEMENT ON HUMAN RIGHTS (Oct. 1989) (on file with the author)—that appears to track no recognized exception to the first amendment.

Most policies contain detailed procedures for resolving complaints as well as substantive standards. Many university schemes emphasize informal resolution. If this approach fails or the grievant chooses not to pursue informal procedures, the university may institute formal proceedings. Most university rules provide for punishment, such as a reprimand, community service, or suspension, if there exists "clear and convincing evidence," *see, e.g.*, University of Michigan policy, or if there exists a "reasonable basis for believing" that a violation has occurred. *See, e.g.*, Mt. Holyoke College policy. Most policies provide the accused with the right to appeal an adverse decision. *See, e.g.*, University of Wisconsin policy.

122 Finn, *The Campus: "An Island of Repression In a Sea of Freedom,"* COMMENTARY 17, 18 (1989). Finn, professor of education and public policy at Vanderbilt University, states that academic freedom is the only difference that separates our universities from those in totalitarian countries. *Id.*; *see also* Hentoff, *supra* note 26 ("If students are to be 'protected' from bad ideas, how are they to learn to identify and cope with them?"); Washburn, *Liberalism Versus Free Speech*, 40 NAT'L REV. 39, 41 (1988) (free inquiry is the bedrock upon which a liberal education is built).

123 Finn, *supra* note 122, at 18-19 (referring to historian Stephan Thernstrom, who was criticized by students for reading aloud from a white plantation owner's journals without providing the slaves' point of view).

124 Kors, *It's Speech, Not Sex, the Dean Bans Now*, Wall St. J., Oct. 12, 1989, at § 1, at 16, col. 3. Kors is a professor of history at the University of Pennsylvania.

125 Minow, Looking Ahead to the 1990's: Constitutional Law and American Colleges and Universities, Keynote Address to the National Association of Colleges and Universities Attorneys Meeting (June 28, 1989).

ter of "expression," but as one of protecting academic diversity.[126]

2. In Loco Parentis.—Opponents of campus antiracism rules also charge that the rules represent a throwback to the days when colleges and universities functioned *in loco parentis*.[127] Professor Finn points out that although campuses have refused to regulate student sexuality and alcohol and drug consumption, they are nevertheless anxious to prohibit offensive speech.[128] Professor Minow, on the other hand, points out that "neutrality does not mean no state regulation. The state is not neutral when it permits some private groups to wield power over others."[129]

3. Protecting the Vulnerable.—In his long-running battle with the *Dartmouth Review*, President Freedman emphasized that an academic institution has a responsibility toward the potential victim of racial harassment and insult.[130] Conservatives reject this idea,[131] arguing that speech cannot be bad merely because it permits individuals to say bad things.[132] Contrary views are an inherent part of an intellectual community; persons who are "hurt by strong expressions of disagreement belong not in a university, but in a Trappist monastery."[133] Other writers, however, reply that the injury of a racist insult is not just an individual one, but a collective injury that the community may, and should, address.[134]

4. The Politics of Tolerance.—Many writers who question campus antiracism rules maintain that the new restrictions are motivated more by politics than the need to protect racial minorities. Robert M. O'Neil views the question as whether "special interests" should override free speech protections.[135] Others see the new policies as thinly veiled efforts to privilege a liberal agenda,[136] pointing out that higher education's tolerance for scathing speech seems to vary with the ideology of the

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126 Gold, *supra* note 39.

127 Finn, *supra* note 122, at 18. The *in loco parentis* doctrine held that colleges and universities operated as surrogate parents, responsible for the health and moral well-being of students. *E.g.*, M. OLIVAS, THE LAW AND HIGHER EDUCATION 599-615 (1989).

128 *Id.*; *see also* Kors, *supra* note 124.

129 Minow, *supra* note 125 (raising possibility that this view may lead to an overactive state).

130 Washburn, *supra* note 122, at 39. Freedman added that "because freedom of expression has the capacity to wound the feelings of members of the community, colleagues also have the responsibility to provide support for those who have been wounded." *Id.*

131 Washburn, for example, writes that if we want free expression to yield to the sensitivities of the individual, the entire nature of the university must change. *Id.* at 40.

132 Seligman, *The Speech Suppression Movement*, 119 FORTUNE 195, 196 (June 19, 1989).

133 Washburn, *supra* note 122, at 39.

134 *See* Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682 (1988).

135 O'Neil, *supra* note 10. O'Neil served as president and professor of law at University of Virginia.

136 *See* Kors, *supra* note 124; *see also* Bernstein, *supra* note 2 (Thomas Short, professor of philosophy at Kenyon College, considers current campaign part of self-serving effort to depict minorities as oppressed and victimized).

speaker.[137] George Will, for example, questions whether rules banning items offensive to the right—"unpatriotic, irreligious or sexually explicit expressions"—would be graciously accepted by leftist endorsers of antiracism rules.[138] Thomas Sowell labels antiracism rules desperate attempts by liberals to cover up the failures of affirmative action.[139] Minority protectors respond that protecting people of color from disparaging treatment is a matter not of politics but human decency, and is deeply rooted in our tradition of constitutional equality.[140]

5. A Better Way?—Some opponents of antiracism rules urge that "[m]ore speech, not less, is the proper cure for offensive speech."[141] Jon Weiner, for example, calls on universities to speak out forcefully and frequently on why racist speech is objectionable.[142] Others urge that universities focus on underlying racist attitudes, rather than on their outward manifestations,[143] or address racism through teaching and example.[144] The soundness of these and related arguments is detailed later in this Article.

III. International Perspectives

This Part examines the experience of other nations in regulating racially offensive speech. The United States has relatively little experience in doing so; most of the regulations have been recent, highly controversial, and centered on college campuses. The debate surrounding campus antiracism rules swirls around a number of issues that have empirical components—questions that might be answered yes or no. Can free speech continue to exist in a society that prohibits one of its forms? Will one type of regulation lead to another, or conversely, will enforcement inevitably be turned against minorities? Are laws limiting racist speech

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137 Finn, *supra* note 122, at 21; Washburn, *supra* note 122, at 40-41 (listing occasions where unpopular speakers have been silenced by campus protesters who have gone unpunished).

138 Will, *supra* note 10, at 71-72; *see also* Will, *supra* note 9. Will uses the Christian crucifix as an example. He concludes that members of the left will bestir themselves when the Ku Klux Klan burn this symbol, while the right reacts when pop singer Madonna uses it in her provocative musical performances. *Id.*

139 Sowell, *Campuses Attempting to Mask Truth By Closing Mouths*, Rocky Mt. News, Apr. 16, 1990, at B22, col. 1.

140 *See, e.g.*, Matsuda, *supra* note 25; Lawrence, *supra* note 2.

141 Barringer, *supra* note 64; *see also* Will, *supra* note 10, at 72 (purpose of our system of constitutional liberty is not to immunize ideas from criticism, but rather to expose them to it).

142 Wiener, *Racial Hatred on Campus*, The Nation, Feb. 27, 1989, at 260, 262. Mr. Wiener is a professor of history at UC Irvine.

143 Finn challenges academic institutions to focus on providing high quality education to minority students to increase their matriculation rate, rather than waste resources on preventing "naughty" conduct. Finn, *supra* note 122, at 22; *see also* Barringer, *supra* note 64 (Ira Glasser, executive director of the ACLU, believes that speech-repressing rules avoid dealing with the underlying problem of racial prejudice).

144 *See* O'Neil, *supra* note 22.

effective compared with other approaches to controlling racism? The debate about campus rules has proceeded largely in an empirical vacuum. Although one must always be cautious in drawing conclusions from the experiences of other cultures, those experiences may nevertheless suggest answers to these questions.

A. International Conventions and Declarations

Many countries have condemned discrimination and racial violence. This condemnation has taken a number of forms, including international treaties and conventions, many enacted in response to the atrocities inflicted upon Jews and other minorities during World War II.[145] For example, the Universal Declaration of Human Rights provides that persons are entitled to protection from discrimination *and* its incitement.[146] The European Convention for the Protection of Human Rights and Fundamental Freedoms[147] and the American Declaration of the Rights and Duties of Man[148] provide similar protections.[149] The Convention on the Prevention and Punishment of the Crime of Genocide[150] requires states to prohibit "direct and public incitement" to commit that crime.[151] The International Covenant on Civil and Political Rights,[152] which affirms freedom of expression, nevertheless states that "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hos-

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145 Jones, *Article 4 of the International Convention of the Elimination of All Forms of Racial Discrimination and the First Amendment*, 23 HOW. L.J. 429, 436 (1980); *see also* Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445 (1987); Matsuda, *supra* note 25.

According to the leading international authorities, the principle of racial nondiscrimination is securely enshrined in the body of international law. *See* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 598-601 (4th ed. 1990) (principle of protecting minorities from discrimination now securely established in international law); *see also* J. INGLES, POSITIVE MEASURES DESIGNED TO ERADICATE ALL INCITEMENT TO, OR ACTS OF RACIAL DISCRIMINATION: IMPLEMENTATION OF ARTICLE 4 OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1986); Kretzmer, *supra*, at 447; Jones, *supra*, at 436. International agreements emphasize the prevention of racial and ethnic discrimination more than any other single category of human rights. McDougal, Lasswell & Chen, *The Protection of Respect and Human Rights: Freedom of Choice and World Public Order*, 24 AM. U.L. REV. 919, 1075 (1975) ("There is a clear trend towards including constitutional provisions which not only guarantee equality before the law, but which specifically provide against racial discrimination."); *see also* Greenburg, *Race, Sex, and Religious Discrimination in International Law*, in T. MERON, HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 307, 309 (1984).

146 G.A. Res. 217, U.N. Doc. A/810, at 71 (1948).

147 Convention For the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Fundamental Freedoms].

148 American Convention on Human Rights, OEA/ser. K/ XVI/1.1, doc. 65 rev. 3 (1970), *reprinted in* 9 INT'L LEGAL MATERIALS 99 (1970) [hereinafter American Convention].

149 Fundamental Freedoms, *supra* note 147, art. 14, at 232; American Convention, *supra* note 148, art. 1.1, at 101.

150 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 280.

151 *Id.* at 280 (art. 3(c)).

152 G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966).

tility or violence shall be prohibited by law."[153]

The most important and specific piece of antiracism legislation, however, is the International Convention on the Elimination of All Forms of Racial Discrimination.[154] Signed by 104 states,[155] the Convention provides that:

> The concern of the United Nations with the promotion and protection of human rights and fundamental freedoms is an expression of the ever-increasing interest of the international community in ensuring that these rights and freedoms shall be enjoyed by all human beings everywhere. . . . [R]acial discrimination has been and is considered to be one of the most odious of human rights violations.[156]

The Convention's central provision is article 4, which requires member countries to criminalize dissemination of hate propaganda and all organizations that incite racial discrimination.[157] The General Assembly adopted this article only after heated debate,[158] yet most signatory nations have followed its mandate in enacting national legislation.[159]

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153 *Id.* at 55 (art. 20, § 2).

154 International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter International Convention]. The International Convention was signed but not ratified by the United States on September 28, 1966. *Id.* at 303.

155 N. LERNER, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 155-56 (2d ed. 1980).

156 Dore, *United Nations Measures to Combat Racial Discrimination: Progress and Problems in Retrospect*, 10 DENVER J. INT'L L. POL'Y 299, 299-300 (1981).

157 States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form . . . :

(a) Shall declare an offense punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin . . . .

(b) Shall declare illegal and prohibit organizations . . . which promote and incite racial discrimination . . . .

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

International Convention, *supra* note 154, at art. 4.

158 J. INGLES, *supra* note 145, at 1. Although the United States is a member of several international organizations which have promulgated legislation denouncing racism, it has not ratified the International Convention. The United States supported the Convention with this reservation:

> The Constitution of the United States contains provisions for the protection of individual rights such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America.

International Convention, *supra* note 154.

159 Kretzmer, *supra* note 145, at 500. A small minority of states formulated declarations and reservations regarding article 4, and some have not carried out their obligation under that article to adopt the required legislation. Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT. L. 283, 316 (1985). However, a large number of states have made efforts to implement all or part of their obligations under the Convention. N. LERNER, *supra* note 155, at 166.

B. Case Studies

1. Great Britain.—Legal treatment of racial hatred in Great Britain began in 1732 with *R. v. Osborn.*[160] Osborn accused "several Jews" of murdering a woman and her child because the father was a Christian.[161] When some readers attacked and injured a group of Jews,[162] the public prosecutor charged Osborn with seditious libel. The court, however, stated that the foundation of this case was incitement to commit breach of the peace.[163] Although Osborn was convicted,[164] later cases narrowed *Osborn* in various ways.[165] Parliament responded by criminalizing hate speech in the Public Order Act of 1936.[166] With the rise of neo-Nazism, however, the statute proved inadequate.[167] The Race Relations Act of 1965[168] was the culmination of several earlier attempts to broaden and conform British law to international trends.[169] The Act created a new offense for persons who:

> with intent to stir up hatred against any section of the public . . . distinguished by colour, race or ethnic or national origins— . . . publish[ ] or distribute[ ] written matter which is threatening, abusive or insulting; or . . . use[ ] in any public place or at any public meeting words which are threatening, abusive or insulting, being matter or words likely to stir up hatred. . . .[170]

The Act was a compromise. Civil libertarians successfully insisted that provisions be incorporated to prevent the measure from becoming an unreasonable infringement on speech.[171] Included were provisos that: (1) prosecutions could only be carried out with the consent of the Attorney General;[172] (2) the statute would apply only to distribution of materi-

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160 R. v. Osborn, 25 Eng. Rep. 584 (K.B. 1732).

161 *Id.* at 585.

162 *Id.*

163 *Id.* At common law, criminal sanctions had long existed against those who incited others to bigotry if their actions were likely to disturb the peace. A. LESTER & G. BINDMAN, RACE AND LAW IN GREAT BRITAIN 344 (1972).

164 *R. v. Osborn*, 25 Eng. Rep. at 585.

165 For example, *King v. Caunt*, (unreported) held that the prosecution must prove *intent to* incite. B. COX, CIVIL LIBERTIES IN BRITAIN 231 (1975).

166 Public Order Act, 1936, 1 Edw. 8 & 1 Geo. 6, ch. 6, § 5; *see* McCrudden, *British Anti-Discrimination Law: An Introduction*, 2 DICK. INT'L L. ANN. 65 (1983).

167 McCrudden, *supra* note 166, at 66.

168 Race Relations Act, 1965, ch. 73, § 6(1) (amended in 1976 and 1986) [hereinafter 1965 Act].

169 McCrudden, *supra* note 166, at 66-67; *see also* Shemonsky, *The Exclusion of Religion From Great Britain's Race Relations Act: "Sikh" and Ye Shall Find a Violation of Human Rights Obligations*, 14 CAL. W. INT'L L.J. 87 (1984).

170 1965 Act, *supra* note 168.

171 Speech of the Home Secretary, Sir F. Soskie, 711 PARL. DEB., H.C. (5th ser.) 926, 933-37 (1965).

172 1965 Act, *supra* note 168.

This removes the matter from the hands of the local police and rules out private prosecutions. The Attorney General is likely to be more sensitive to the potential threat to freedom of speech

als or words spoken in public;[173] (3) only "threatening, abusive or insulting" speech would be covered;[174] (4) intent must be shown;[175] and (5) the racial group victimized must be one residing within Great Britain.[176]

Under the revised statute, few prosecutions occurred.[177] *R. v. Hancock*[178] indicated additional lacunae in the act. In *Hancock*, a white supremacist group distributed pamphlets proclaiming that nonwhites were genetically inferior and should be returned to their countries of origin.[179] The wording was pseudoscientific and avoided language of threat or incitement, and the defendant was acquitted.[180] Britain responded by abolishing the element of intent from the Act,[181] so that prosecution could be based on the objective likelihood of a speech-act's stirring up hatred.[182] The Act was once again modified in 1986.[183] The new Act permits a

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stemming from the law's liberal application than local police, who are likely to be more concerned with public peace considerations.

Kretzmer, *supra* note 145, at 502; *see also* McCrudden, *supra* note 166, at 67.

173 1965 Act, *supra* note 168.

174 *Id.* "On one hand, the terms used are relatively broad, thus leaving the statute open to vagueness and overbreadth arguments. On the other hand, this restriction would seem to imply that only cruder forms of racist expression are prohibited. More sophisticated forms of expression are protected." Kretzmer, *supra* note 145, at 501.

175 1965 Act, *supra* note 168.

176 *Id.*

177 Lasson, *Racism in Great Britain: Drawing the Line on Free Speech*, 7 B.C. 3RD WORLD L.J. 161, 170 (1987).

178 R. v. Hancock (unreported); *see* Lasson, *supra* note 177, at 169. For further discussion of the case, see Longaker, *The Race Relations Act of 1965*, 11 RACE 125, 130-42 (1969).

179 R. v. Hancock (unreported); *see* Lasson, *supra* note 177, at 169.

180 *Id.*

181 Race Relations Act, 1976, ch. 74, § 70 [hereinafter 1976 Act]. There may have been a more insidious reason for the promulgation of this Act, *i.e.*, to prevent Asian workers from striking and to contain the second generation of black youths. "At present, [the blacks'] . . . frustration does not amount to a cohesive political force. Meanwhile, actions . . . (can) be taken within the present framework without provoking upheaval and conflict." Thus, the Act can also be seen not as an instrument of progress, but more as a way to maintain status quo—to nip the black power movement in the bud. I MACDONALD, RACE RELATIONS—THE NEW LAW 7 (1977).

182 1976 Act, *supra* note 181.

183 Public Order Act, 1986, ch. 64, §§ 17-18. Sections of the 1986 Act pertinent to racial hatred are:

§ 17 Meaning of "racial hatred":
In this part "racial hatred" means hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins. § 18 Use of words or behaviour or display of written material:
(1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if—
(a) he intends thereby to stir up racial hatred, or
(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.
(2) An offence under this section may be committed in public or a private place, except that no offence is committed where the words or behaviour are used, or the written materials is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.
(3) A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.

constable to arrest without a warrant "anyone he reasonably suspects is committing an offense under this section."[184] Moreover, unlike earlier versions, the statute prohibits private as well as public behavior.[185] The Attorney General, however, must still consent to prosecutions.[186] Although many are still unsatisfied with the law, few advocate doing away with it altogether.[187] In the meantime, British courts interpret the Act narrowly to minimize conflict with free speech.[188]

Professor David Kretzmer suggests three ways to interpret the British experience: (1) The British statute goes as far as possible in curbing free speech—a more effective one would unacceptably impair liberty; (2) The statute is imperfect, but serves to limit cruder forms of hateful speech and has some symbolic and educative value; (3) The law in its current version is inadequate, but having shown that speech may be limited without dire consequences, it may be expanded cautiously as social conditions dictate.[189] In any event, the principal remaining question centers on whether to remove some of the law's restrictions at the risk of encroaching even further on free speech.[190]

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(4) In proceedings for an offence under this section it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling.

(5) A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting.

(6) This section does not apply to words or behaviour used, or written material displayed, solely for the purpose of being included in a programme broadcast or included in a cable programme service.

Id.

184 *Id.* at § 18(3).

185 *Id.* at § 18(2); *see also* Wolffe, *Values in Conflict: Incitement to Racial Hatred and the Public Order Act 1986*, 1987 PUB. L. 85, 87.

186 Public Order Act, *supra* note 183. This provision is regarded as the greatest protection to freedom of speech, since the Attorney General generally will be more sensitive to free speech issues than the police. Yet critics have charged that this requirement impairs the law's effectiveness by making enforcement cumbersome. Kretzmer, *supra* note 145, at 502; Lasson, *supra* note 177, at 171-72.

187 Bindman, *The Law and Racial Discrimination: Third Thoughts*, 3 BRIT. J. LAW & SOC'Y. 110 (1976) (repeal would be seen as condoning racism and would be politically unwise); Matsuda, *supra* note 25, at 234 (remaining controversy centers around proposals to lift some of the restrictions designed to protect freedom of speech). *But see* Lasson, *supra* note 177, at 171:

> Englishmen have a strong attachment to freedom of speech. The freedom was won . . . not just to enable people to say pleasant, fraternal and acceptable things . . . but to say distasteful, unacceptable, provocative, antagonist things. Any criminal statute which is framed to circumscribe that freedom is likely to be given a bumpy ride, however desirable or even necessary the purpose may be.

Id. (quoting London Times, Jan. 9, 1978, at 3, col. 2).

188 Shemonsky, *supra* note 169, at 88.

189 Kretzmer, *supra* note 145, at 503-04.

190 *Id.* at 506.

2. Canada.—Like Great Britain, Canada has developed a panoply of measures to protect minorities against racism.[191] These include the Constitutional Charter of Rights,[192] the Canadian Bill of Rights,[193] certain provisions of the Canadian Criminal Code,[194] and ten provincial human rights codes.[195]

Under the Canadian Charter of Rights (Canadian Charter) and the United States Constitution, free expression cases are treated in much the same way.[196] The Canadian Charter guarantees fundamental freedoms of religion, expression, and association.[197] These liberties are "subject . . . to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[198] To determine the constitutionality of laws limiting speech, a two-step test is used.[199] The first step is to determine whether an individual right falls under the Charter. The second is to analyze whether the restriction is justified by an "interest of sufficient importance to warrant overriding a constitutional right"[200] and whether the "means chosen to attain these objectives [are] appropriate or proportional to the ends."[201]

Canada's national criminal code prohibited hate speech as early as June 1970.[202] A 1965 Report of the Special Committee on Hate Propa-

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191 Britain's measures are statutory and decisional, *see supra* notes 160-88 and accompanying text. Canada's include these, plus certain constitutional provisions. *See infra* notes 192-221 and accompanying text.

192 CAN. CONST. pt. 1, §§ 1-34 (1982) [hereinafter Charter].

193 *Id.*

194 Canadian Criminal Code, R.S.C. ch. C-46, §§ 319.1, 319.2, 319.3(a)-(d) (1985) (*amended by* R.S.C. ch. C-42, § 319.2 (1988)).

195 *See* Hunter, *When Human Rights Become Wrongs*, 23 U.W. ONT. L. REV. 197 (1985).

196 Sedler, *The Constitutional Protection of Freedom of Religion, Expression, and Association in Canada and the United States: A Comparative Analysis*, 20 CASE W. RES. J. INT'L L. 577, 593 (1988) (What emerges from a comparison of the cases that have arisen thus far, however, is a much higher degree of similarity than of difference).

197 Charter, § 2.

198 Charter, § 1; *see* Regel, *Hate Propaganda: A Reason to Limit Freedom of Speech*, 49 SASKATCH. L. REV. 303, 305 (1984).

199 Sedler, *supra* note 196, at 579-80.

200 *Id.* at 579-81 (quoting Regina v. Edward Brooks and Art, Ltd., 2 S.C.R. 713 (1986)).

201 *Id.* (quoting Regina v. Edward Brooks and Art, Ltd., 2 S.C.R. 713 (1986)). Legislation (1) must be "carefully designed or rationally connected to the objective," (2) must "impair the right as little as possible," and (3) "must not so severely entrench an individual or groups rights that the legislative objective, although important, is nevertheless outweighed by the abridgment of rights. There is a very narrow scope involved here, it is limited to communications with the intention of promoting hatred." *Id.* (quoting Regina v. Edward Brooks and Art, Ltd., 2 S.C.R. 713 (1986)). Under this framework, the Supreme Court in Canada has upheld provisions of the Criminal Code which prohibit the "spreading of false news likely to cause mischief to the public interest in social and racial tolerance." Regina v. Zundel (unreported) (Ont. Dist. Ct. 1985), *reprinted in* LAW REFORM COMMISSION OF CANADA, HATE PROPOGANDA 13 (Working Paper No. 50, 1986) [hereinafter LAW REFORM].

202 An Act to Amend the Criminal Code, R.S.C. ch. 11 (1970 1st Supp.) (*amending* R.S.C. ch.

ganda[203] provided the impetus for Canada's current legislation.[204] Parliament commissioned the Report in an attempt to understand the origin and activity of various hate organizations in the country.[205] Out of the Report's recommendations[206] and the desire to harmonize Canada's legislation with international standards, Canada enacted House of Commons Bill C-3[207] which recognizes four types of hate speech as crimes: advocating genocide,[208] public incitement of hatred,[209] willful promotion of hatred,[210] and spreading false news.[211] The first was the least controversial; it merely carries out Canada's responsibilities to legislate the provisions of the United Nations Convention on Genocide.[212] The second, public incitement of hatred,[213] drew fire; one of the criticisms is that the reaction of the audience dictates whether or not an offense has occurred.[214] The third and fourth provisions, wilful promotion of hatred other than in a private conversation and spreading false news, have been rarely applied.[215]

Each of the offenses is subject to a number of defenses—all designed to protect free expression[216]—which together with the requirement of the

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C-34. (1970)). Efforts had been underway since 1953 to pass a law regarding hate propaganda. *See* LAW REFORM, *supra* note 201, at 7.

203 HOUSE OF COMMONS, REPORT OF THE SPECIAL COMMITTEE ON HATE PROPAGANDA IN CANADA (1986) [hereinafter Cohen Report].

204 Matsuda, *James McCormick Mitchell Lecture, Language as Violence v. Freedom of Expression & Canadian and American Perspectives on Group Defamation*, 37 BUFFALO L. REV. 337, 343 (Spr. 1988/89).

205 *Id.* The report concluded that hate propaganda was a serious enough problem in Canada to warrant legislation and that legislation could restrict free speech, but that this freedom "does not [include] the right to vilify." It also found that race-hate speech serves no valid public purpose, but represents a "clear and present danger to the function of a democratic society." Cohen Report, *supra* note 203, at 14, 24-25.

206 *See* Cohen Report, *supra* note 203, at 773.

207 An Act to Amend the Criminal Code, *supra* note 202.

208 Canadian Criminal Code § 281.1(3). All references to the Canadian Criminal Code are to R.S.C. ch. C-34 (1970), as amended.

209 *Id.* at § 281.2(1) (current version at R.S.C. ch. C-46, § 319.1 (1985)).

210 *Id.* at § 281.2(2) (current version at R.S.C. ch. C-46, § 319.2 (1985)).

211 *Id.* at § 177 (current version at R.S.C. ch. C-46, § 181 (1985)).

212 Cohen Report, *supra* note 203, at 773.

213 Canadian Criminal Code § 281.2(1) (current version at R.S.C. ch. C-46, § 319.1 (1985)). The statute reads:

> Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, is guilty of
>
> (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
>
> (b) an offense punishable on summary conviction.

214 Cohen Report, *supra* note 203, at 773.

215 *See* Canadian Criminal Code § 281.2(2) (current version at R.S.C. ch. C-46, § 319.2 (1985)).

216 LAW REFORM, *supra* note 201, at 9. These include truth, good faith, and fair comment on a public subject. Canadian Criminal Code § 281.2(2) (current version at R.S.C. ch. C-46, § 319(3) (1985)).

Attorney General's consent to prosecute[217] are designed to limit the likelihood of abuse. Although a few civil libertarians continue to express concern, criticism generally has been muted.[218] One commentator has observed that when hate laws were first proposed, the Canadian Civil Liberties Association raised the spectre of the slippery slope;[219] yet, they have been applied sparingly, and little discernible weakening of commitment to free speech has occurred.[220] As in Great Britain, the remaining debate concerns how broad or narrow the rules should be, details of their effectuation, and defenses to charges brought under them.[221]

3. Other Countries.—As has been seen, anti-hate speech legislation generally takes one of three forms: laws against group libel, breach of the peace, and incitement to racial hatred.[222] States which have enacted incitement statutes have, for the most part, based their criminal codes on article 4 of the Convention.[223] These states include The Netherlands,[224] France,[225] and Austria.[226]

The German penal code outlaws the spreading of hatred, promotion of genocide,[227] inciting of hatred against minority groups in a manner tending to breach the peace,[228] organization of unconstitutional political parties (neo-Nazi),[229] and dissemination of propaganda[230] and use of the emblems of these parties.[231] It also prohibits writings that "incite to racial hatred or which depict cruel and otherwise inhumane acts of violence against persons in such a manner as to glorify or deny the wrongfulness of such acts of violence."[232] Further, it is a punishable offense to deny the Holocaust's existence.[233]

Italy, which at the time of article 4's enactment expressed concern

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217 Canadian Criminal Code § 319(6).

218 Matsuda, *supra* note 204, at 339 (citing R. v. Buzzanga and Durocher, 25 O.R.(2d) 705, 101 D.L.R. 3rd 488 (CA) (1979)).

219 *Id.* at 370-71.

220 *Id.* Most Canadians appear to support the law and even call for it to be made more effective. *Id.*

221 Canadian Bar Association, Special Committee on Racial and Religious Hatred, HATRED AND THE LAW (1984).

222 For a detailed analysis, see Kretzmer, *supra* note 145, at 494-507.

223 *See supra* notes 157-59 and accompanying text; Kretzmer, *supra* note 145, at 494-507.

224 Commentators have praised the Netherlands Code for the way it effectuates the country's obligations under the U.N. Convention. N. LERNER, *supra* note 155, at 187.

225 *Id.* at 158.

226 J. INGLES, *supra* note 145, at 21.

227 THE PENAL CODE OF THE FEDERAL REPUBLIC OF GERMANY § 220(a) (J. Darby Trans. 1987).

228 *Id.* § 130.

229 *Id.* § 84.

230 *Id.* § 86.

231 *Id.* § 86a.

232 *Id.* § 131.

233 LAW REFORM, *supra* note 201, at 22.

that the article might jeopardize the right of free expression, nevertheless enacted one of the strongest laws implementing it.[234] The first sentence under the law was imposed on October 28, 1980, after eleven Italian youths carried wooden crosses and shouted "Jews to the ovens" and "Hitler taught us it's no crime to kill Jews" during a basketball game between Israel and Italy. The judge imposed a sentence of three years and four months.[235]

The Scandinavian countries have long protected individual liberty. Yet, Sweden's constitution[236] permits punishment of hate speech[237] and acts of persecution against national or ethnic-origin groups.[238] Norway recently amended its penal code in the wake of antisemitic violence. The statute provides:

> Anyone who threatens, insults, or exposes any person or groups of persons to hatred, persecution or contempt on account of their religion, race, colour, or national or ethnic origin by means of a public utterance or by other means of communication brought before, or in any other way disseminated among the general public, shall be punished by fines or imprison-

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234 Kretzmer, *supra* note 145, at 499. The law reads:

> Article 3
> Save where the Act constitutes a more serious offence, for the purposes of implementation of the provisions of Article 4 of the Convention, a penalty of imprisonment for a period from one to four years shall be imposed on:
> (a) Any person who, in any way whatsoever, disseminates ideas based on racial superiority or racial hatred;
> (b) Any person who, in any way whatsoever, instigates discrimination or inspires the commission of or commits, acts of violence or incitement to violence against persons because they belong to a national, ethnic or racial group.

Act No. 654, Oct. 13, 1975, *reprinted in* Annex and the initial report of Italy (CERD /C/R.95/ add. 1).

235 *Around the World; 11 Youths Sentenced in Italy for Anti-Semitic Acts*, N.Y. Times, Oct. 29, 1980, at A5, col. 1.

236 Instrument of Government, *reprinted in* Vol. XVI Constitutions of the Countries of the World (1985) [hereinafter Instrument of Government].

237 Swed. Penal Code ch. 16, § 8 (1972).

238 Instrument of Government, *supra* note 236, at ch. 2, art. 13. The Penal Code provides that:

> If a person publicly or otherwise in a statement or other communication which is spread among the public threatens or expresses contempt for an ethnic group or other such group with allusion to race, skin color, national or ethnic origin or religious creed, he shall be sentenced for *agitation against ethnic group* to imprisonment for at most two years, or, if the crime is petty, to pay a fine.

Swed. Penal Code ch. 16, § 8 (1986) (emphasis in original).

Though this statute has been in place for more than 20 years, Sweden is generally considered a free and tolerant society. Lasson, *Group Libel Versus Free Speech: When Big Brother Should Butt In*, 23 DUQ. L. REV. 77, 89 (1984). One might argue, however, that conflict between speech and equality values is minimized in Sweden by the infrequency with which prosecutions occur. *See Broadcaster Sentenced for Racism*, Wis. St. J., Nov. 15, 1989, at 9A, col. 6 (prosecutions infrequent).

ment up to two years.[239]

Australia has adopted the Racial Discrimination Act of 1975,[240] which makes it "unlawful for a person to publish or display . . . an advertisement or notice that indicates . . . an intention to do an act that is unlawful by reason of a provision of this Part."[241] New Zealand's Race Relations Act of 1971, amended in 1977,[242] makes incitement to racial disharmony a criminal offense.[243]

4. Summary.—As previously noted, one must extrapolate cautiously from the experiences of other societies. Moreover, what holds true of a nation may not hold true for a university, whose peculiar interests may make anti-hate speech legislation either more or less defensible. Still, it would be a mistake to ignore the experience of Canada, a nation whose constitutional approach to regulation of speech resembles our own; or that of Great Britain, with whom we share a long common-law tradition. With these provisos, some cautious generalizations are possible. The acceptance and effectiveness of laws against hate speech depend on a constellation of social and historical conditions. In Scandinavia, the laws have remained untested and unchallenged. In Britain and Canada, antiracism laws met with initial resistance, which has largely subsided.[244] In these and other countries which have implemented anti-hate legislation, there appears to have been little of a snowball effect towards censorship.[245] Thus, it is evidently possible to regulate the more vicious forms of race-hate speech, while remaining committed to free expression.[246]

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239 In interpreting this statute, the Norwegian Supreme Court balances section 135(a) with the right of freedom of speech. *Id.* Speech is protected but not absolute; the criminal law can sanction its exercise when it becomes abusive. *Reprinted in* initial report (CERD/C/R,25/Add.3) *amending* ch. 16 of the Penal Code. Finland ratified the Convention on July 14, 1970 and inserted article 6 into its penal code. It states:

> a) anyone disseminating to the public statements and other information in which a section of the population is threatened, slandered or insulted on account of being of a certain race, colour, national or ethnic origin or confession of faith shall be sentenced for discrimination against that section of the people to imprisonment for two years at most or to pay a fine.

Id. at art. 6(a).

240 Racial Discrimination Act of 1975, *reprinted in* Acts of the Parliament of the Commonwealth 349 (1975).

241 *Id.* at 355.

242 New Zealand Race Relations Act of 1971, no. 150, *reprinted in* 4 N.Z. Stats. 3590 (1971). The 1977 amendments made wording changes and increased the fines. The amendments did not affect the substance of the law. 4 N.Z. Stats. at 3590 (1977).

243 This includes the publication or distribution of written or spoken material likely to incite hostility or ill will against any group. *Id.*

244 In most, the debate is now focused not so much on whether these laws interfere with free expression, as whether they are effective and broad enough. Matsuda, *supra* note 25, at 2341-48.

245 Kretzmer, *supra* note 145, at 474 n.117.

246 Minow, *supra* note 125; *see also* L. BOLLINGER, THE TOLERANT SOCIETY 38 (1985) ("United States stands virtually alone in the degree to which it has decided legally to tolerate racist rhetoric"); Bernstein, *supra* note 2 (observing that "[s]ome countries regarded as free and democratic—France and Canada among them—have strong laws against uttering racist or religious invective").

IV. Social Science and Racism

The debate surrounding campus antiracism rules has not only proceeded in an empirical vacuum, ignoring the experience of other countries; it has also proceeded in a theoretical one, blind to the insights of social scientists who have studied race and racism. Critics of antiracism rules, for example, often assert: (i) that rules forbidding racist remarks will simply cause racism to go underground or surface in a more virulent form;[247] (ii) that racist speech serves as a pressure valve, allowing prejudiced individuals to blow off steam harmlessly;[248] (iii) that punishing racist speech is ineffective because it does not deal with the "root" causes of racism;[249] and (iv) that the harm of a racial insult is de minimis.[250] For their part, defenders of anti-hate rules maintain that racial speech causes serious harm to the psyche and educational prospects of its victims, with little if any documentation of these effects. Social science research sheds light on these and other assertions central to the debate about antiracism rules. This Part first reviews theories of the nature and origin of racial prejudice. It then examines social science writing on how racist behavior may best be controlled.

A. Nature and Origin of Prejudice

Social scientists have put forward a number of overlapping theories—psychodynamic, socioeconomic, and social-psychological—that explain how persons come to harbor prejudiced attitudes toward members of outgroups. There is no dominant theory; indeed, more than one approach may be essential to understand the complex phenomenon of racism.

Psychodynamic theories find the source of racism in personality traits of particular individuals.[251] For example, Adorno and his coauthors write that the most severe forms of racism are associated with a group of traits labelled the "authoritarian personality."[252] Authoritarian personalities are rigid, conventional, and have difficulty accepting impulses they consider deviant—fear, weakness, sex, and aggression. Because they reject these impulses in themselves, they are prone to displace

247 N. Strossen, Remarks at ACLU Biennial Conference Plenary session, Racism on the Rise (June 15, 1989), at 8 (on file with author).

248 Delgado, *supra* note 23, at 178-79 (discussing this view).

249 N. Strossen, *supra* note 247, at 3, 7, 9; *see also* O'Neil, *supra* note 10 (educational options, unlike student conduct rules, will get at the root causes of the problem of campus racism).

250 N. Strossen, *supra* note 247, at 4-8 (misallocation of resources to combat racist speech).

251 These theories came into focus particularly after World War II as the world strove to understand the horror of the Holocaust. *See, e.g.*, B. Bettelheim & M. Janowitz, Dynamics of Prejudice (1950); E. Hartley, Problems in Prejudice (1948); Lawrence, *The Id, The Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1986).

252 T. Adorno, E. Frenkel-Brunswick, D. Levinson & R. Sanford, The Authoritarian Personality (1969).

them onto others, particularly members of disempowered groups.[253]

Other social scientists believe that understanding racism requires going beyond personal pathology to broader currents in society.[254] Many hold that two principal sources of racism and prejudice toward outgroups are economic dislocation and competition with the dominant group.[255] The anxiety produced by rapid social change requires a scapegoat—but that group must then be assigned traits of inferiority, in order to preserve the myth that America is fair and just.[256] Scapegoating also channels aggression and strengthens group loyalty against outsiders who are perceived as at fault for societal ills.[257]

Finally, the social-psychological approach[258] holds that racial antipathies are not innate but are learned,[259] often as an aspect of group membership.[260] Humans have a natural propensity to generalize. Ethnic categories serve this purpose, as well as satisfy the basic human need for group identity.[261] Loyalties to the in-group are accompanied by dislike of outgroups. The dislike increases the distance between the individual and the outgroup, so that the attitude becomes self-reinforcing.[262]

The combined effect of all these forces—personal dynamics,

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253 G. ALLPORT, THE NATURE OF PREJUDICE 400-03, 482 (25th Anniversary ed. 1979) (authoritarians often received rigid discipline by parents when young and were given conditional affection based on clearly defined roles of parental dominance and child submission; thus they learn to repress any feelings objectionable to parents and to project them onto others); Harding, Prosbansky, Kutner & Chein, *Prejudice and Ethnic Relations*, in 5 HANDBOOK OF SOCIAL PSYCHOLOGY 1, 33-35 (G. Lindzey & E. Aronson eds. 1968).

254 J. KOVEL, WHITE RACISM—A PSYCHOHISTORY 231 (1984); Handlin, *Prejudice and Capitalist Exploitation*, in 6 COMMENTARY 79 (1948); *see also* G. ALLPORT, *supra* note 253, at 208-11, 224-25.

255 *E.g.*, BETTELHEIM & JANOWITZ, *supra* note 251 (ethnic prejudice increases in times of economic depression); Handlin, *supra* note 254; J. KOVEL, *supra* note 254, at 231; Delgado, *The Imperial Scholar*, 132 U. PA. L. REV. 561, 570-71 (1984).

256 G. ALLPORT, *supra* note 253, at 224; I. KATZ, STIGMA—A SOCIAL PSYCHOLOGICAL ANALYSIS 121 (1981).

257 G. ALLPORT, *supra* note 253, at 234-38; I. KATZ, *supra* note 256, at 221; C. KLUCKHOLM, NAVAHO WITCHCRAFT (1944). *Compare* these scapegoating theorists *with* those of the closely related "internal colonialism" school, *e.g.*, O. COX, CASTE, CLASS AND RACE: A STUDY IN SOCIAL DYNAMICS (1948); Cho, *Theories of Racial Inequality: From Assimilation to Internal Colonialism, reprinted in* RACE, CLASS, CULTURE IN AMERICA: CRITICAL PERSPECTIVES OF THIRD WORLD AMERICA 245 (L. Shinagawa ed. 1983) *and* those who advocate the "frustration-aggression" approach to understanding prejudice. *E.g.*, D. BETHLEHEM, A SOCIAL PSYCHOLOGY OF RACE 100-01 (1985); G. SIMPSON & J. YINGER, RACIAL AND CULTURAL MINORITIES: AN ANALYSIS OF PREJUDICE AND DISCRIMINATION 68 (4th ed. 1972).

258 *See, e.g.*, G. ALLPORT, *supra* note 253, at 206; G. SIMPSON & J. YINGER, *supra* note 257, at 139; *see also* M. GOODMAN, RACE AWARENESS IN YOUNG CHILDREN 250-51 (1964).

259 K. CLARK, PREJUDICE AND YOUR CHILD 17 (2d ed. 1963); *see also* M. GOODMAN, *supra* note 258.

260 *E.g.*, G. ALLPORT, *supra* note 253, at 20, 21-35, 37.

261 *Id.* at 20, 37; Taifel, *Cognitive Aspects of Prejudice*, 25 J. SOC. ISSUES 79-97 (1969).

262 G. ALLPORT, *supra* note 253, at 29, 39-41, 78; M. SHERIF & C. SHERIF, GROUPS IN HARMONY AND TENSION 218 (1966).

scapegoating, economic dislocations, and ingroup-outgroup categories—is powerful: studies indicate that a majority of Americans harbor some prejudice toward groups other than their own.[263] Yet, not all act on these attitudes; at times, we hold our prejudice in check. The next subpart explores the conditions under which the racial impulse is restrained and what society may do to promote restraint.

B. Controlling Racism

Unlike with racism's etiology, there is relative agreement on the part of social scientists on how to control its expression. Much prejudice is situational—individuals express it because the environment encourages or tolerates it.[264] The attitude may be relatively constant, but most of us express it selectively—at times we hold it in check, at other times we feel freer to express it in action.[265] The main inhibiter of prejudice is the certainty that it will be remarked and punished. This "confrontation theory"[266] for controlling racism holds that most individuals are ambivalent in matters of race. We realize that the national values—those enshrined in the "American Creed"—call for fair and respectful treatment of all. But the fair-mindedness of our public norms is not always matched by our private behavior.[267] During moments of intimacy we feel much freer to tell or laugh at an ethnic joke, to make a racist or sexist remark.[268]

Rules, formalities, and other environmental reminders put us on notice that the occasion requires the higher formal values of our culture. The existence of rules forbidding certain types of racist acts causes us not to be inclined to carry them out. Moreover, threat of public notice and disapproval operates as a reinforcer—the potential racist refrains from acting, out of fear of notice and sanction. The confrontation theory is probably today the majority view among social scientists on how to control racism. Most who subscribe to this approach hold that laws and rules play a vital role in controlling racism. According to Allport, they "create a public conscience and a standard for expected behavior that check *overt* signs of prejudice."[269] Nor is the change merely cosmetic. In time, rules are internalized, and the impulse to engage in racist behavior weakens.[270]

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263 G. ALLPORT, *supra* note 253, at 79-80.

264 *Id.* at 337-38; P. VAN DEN BERGHE, RACE AND RACISM 20-21 (2d ed. 1978).

265 *See* I. KATZ, *supra* note 256, at 23-24; J. KOVEL, *supra* note 254, at 54-55.

266 On the confrontation theory, see generally I. KATZ, *supra* note 256, at 16, 109; Westie, *The American Dilemma: An Empirical Test*, 30 AM. SOC. REV. 527, 529 (1965).

267 G. MYRDAL, AN AMERICAN DILEMMA (1962).

268 *Id.*; *see also* Allport, *Prejudice: Is it Societal or Personal?*, in RACIAL ATTITUDES IN AMERICA: ANALYSES AND FINDINGS OF SOCIAL PSYCHOLOGY 165, 166 (J. Brigham & T. Weissbach eds. 1971).

269 G. ALLPORT, *supra* note 253, at 470-71 (emphasis in original).

270 *Id.*; Westie, *supra* note 267, at 529, 533; *see also* Katz & Gurin, *Race Relations and the Social Sciences: Overview and Further Discussion*, in RACE AND THE SOCIAL SCIENCES 342, 373 (I. Katz &

The current understanding of racial prejudice thus lends some support to campus antiracism rules. The mere existence of such rules will often cause members of the campus community to behave in a more egalitarian way, particularly when others may be watching. Even in private settings, some people will refrain from acting because the law has set an example. Those whose prejudice is associated with authoritarianism will do so because the rules represent society's legitimate voice.

Further, social science casts doubt on both the "hydraulic" theory of racism, according to which controlling racism in one arena will simply cause it to crop up somewhere else,[271] and the theory that racist remarks are relatively harmless. A large body of literature shows that incessant racial categorization and treatment seriously impair the prospects and development of persons of minority race,[272] deepen rigidity and set the stage for even more serious transgressions on the part of persons so disposed.[273]

V. CONSTITUTIONAL PARADIGMS

As mentioned earlier, campus antiracism rules can be analyzed from two directions. One perspective puts speech at the center, and demands that proponents of antiracism rules justify the abridgment of that liberty.[274] Another perspective puts equal dignity at the center, and regards the speech-act as a violation.[275] Proponents of the latter view argue that the university has the power (perhaps the duty) to protect vulnerable

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P. Gurin eds. 1969). A competitor theory, the "social contact" theory, formed the basis of institutional desegregation in the 1960s and 1970s, but has been largely supplanted by the confrontation theory. For a discussion of the social contact approach, see, *e.g.*, Amir, *Contact Hypothesis in Ethnic Relations*, 71 PSYCHOLOGY BULL. 319 (1969). For a discussion of the steps of attitude transformation, see H. KELMAN, COMPLIANCE IDENTIFICATION AND INTERNALIZATION: THREE PROCESSES OF ATTITUDE CHANGE 51-68 (1958) (change will occur if the individuals responsible for creating and enforcing the rule have high respect and trust, and are seen as acting fairly).

271 *See* sources cited in *supra* notes 269-70 (impulse withers if not acted on); Berkowitz, *The Case for Bottling Up Rage*, PSYCHOLOGY TODAY, July 1973, at 26.

272 *See* Delgado, *supra* note 23, at 136-49 (harms of racism and racist speech include: impairment of the ideal of equal respect; injury to the victim's feelings, self-worth, physical and mental well-being, and pecuniary prospects; and, especially in the case of children, damage to identity and self-regard); Brown, *supra* note 2, at 323-25 (same); *see also* G. ALLPORT, *supra* note 253, at 142-61 (passivity, self-hate, militancy, extreme alerting, aggression against one group, enhanced striving, clowning, cloistering, and strengthening of in-group ties); M. GOODMAN, *supra* note 258 (detailing special vulnerability of children to racial abuse and categorization); Lawrence, *supra* note 20, at 15 n.29 (harms include dehumanization) & 23 n.46 (psychic injury, displaced aggression, suicide, fear, self-hate, clowning, and self-defeating behavior); Matsuda, *supra* note 25, at 2335-41 (harmful effects of racist messages on victim, most of which are internalized and delayed, are not of an immediate, reactive nature); Goleman, *Anger Over Racism is Seen as a Cause of Blacks' High Blood Pressure*, N.Y. Times, Apr. 24, 1990, at C3, col. 1.

273 Delgado, *supra* note 23, at 140 (harms to the perpetrator); G. ALLPORT, *supra* note 253, at 170-86, 371-84, 407-08; G. SIMPSON & J. YINGER, *supra* note 257, at 238.

274 *See supra* notes 6-10 and accompanying text.

275 *See supra* notes 11-15 and accompanying text.

populations from racial abuse, and demand that the advocates of free speech show why the interest in hurling invective should nevertheless prevail. Typically, they cite some of the harms associated with racist speech detailed in the preceding section. This Part analyzes both views: subpart A evaluates the free-speech claim, subpart B the equality arguments.

A. A First Amendment View

The first amendment appears to stand as a formidable barrier to campus rules prohibiting group-disparaging speech. Designed to assure that debate on public issues is "uninhibited, robust, and wide open,"[276] the first amendment protects speech which we hate as much as that which we hold dear.[277] Yet, racial insults implicate powerful social interests in equality and equal personhood.[278] When uttered on university campuses, racial insults bring into play additional concerns. Few would question that the university has strong, legitimate interests in (i) teaching students and teachers to treat each other respectfully; (ii) protecting minority-group students from harassment; and (iii) protecting diversity, which could be impaired if students of color become demoralized and leave the university, or if parents of minority race decide to send their children elsewhere.[279]

The United States Supreme Court has only on one occasion weighed free speech against the equal-protection values endangered by race-hate speech. In *Beauharnais v. Illinois*,[280] the defendant was convicted under a statute prohibiting dissemination of materials promoting racial or religious hatred. Justice Frankfurter, citing the "fighting words" doctrine of *Chaplinsky v. New Hampshire*, ruled that libelous statements aimed at groups, like those aimed at individuals, fall outside first amendment protection.[281] Later decisions, notably *New York Times v. Sullivan*,[282] have

276 New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

277 Abrams v. United States, 250 U.S. 616, 630 (1919).

278 Delgado, *supra* note 23, at 140-45; *see also* Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1609 (1986) ("The judges deal in pain and death"); Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 389 (1989) (implying that the first amendment narrative may be "violent," in the sense that Robert Cover uses that term).

279 *See* Tatel, *supra* note 2; Statement by Regent Erroll B. Davis, Jr., *supra* note 12 (mentioning each of these concerns); *see also* Evenson, *On Outlawing Hate Speech*, GUILD NOTES, Nov./Dec. 1989, at 9 (campus hate speech interferes with learning); Shaw, *Racism Policy Will Meet Tests*, Wis. St. J., July 10, 1989, at 18A, col. 1 (university has interest in teaching tolerance, and in encouraging students of color to remain); *Campus Racism, Michigan Plans to Combat Bias*, Wis. St. J., Dec. 12, 1989, at 3A, col. 4 (University of Michigan president cites need to respond to racial unrest because of United State's increasing ethnic diversity and necessity of inculcating norms of tolerance).

280 343 U.S. 250 (1952).

281 *Id.* at 257-58.

282 376 U.S. 254 (1964) (libel of public figures requires showing of actual malice); *see also* Garrison v. Louisiana, 379 U.S. 64 (1964) (overturning libel judgment won by public official by analogizing case to seditious libel).

increased protection for libelous speech, with the result that some commentators and courts have questioned whether *Beauharnais* today would be decided differently.[283] Yet, *Beauharnais* has never been overruled, and in the meantime many courts have afforded redress in tort for racially or sexually insulting language, with few finding any constitutional problem with doing so.[284]

Moreover, over the past century the courts have carved out or tolerated dozens of "exceptions" to free speech. These exceptions include: speech used to form a criminal conspiracy[285] or an ordinary contract;[286] speech that disseminates an official secret;[287] speech that defames or libels someone;[288] speech that is obscene;[289] speech that creates a hostile workplace;[290] speech that violates a trademark or plagiarizes another's words;[291] speech that creates an immediately harmful impact or is tantamount to shouting fire in a crowded theatre;[292] "patently offensive" speech directed at captive audiences or broadcast on the airwaves;[293] speech that constitutes "fighting words";[294] speech that disrespects a judge, teacher, military officer, or other authority figure;[295] speech used to defraud a consumer;[296] words used to fix prices;[297] words ("stick 'em up—hand over the money") used to communicate a criminal threat;[298] and untruthful or irrelevant speech given under oath or during a trial.[299]

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283 *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 861 n.2 (1988) (citing Smith v. Collin, 439 U.S. 916, 919 (1978) (Blackmun, J., dissenting from denial of certiorari)).

284 These cases are collected and discussed in Delgado, *supra* note 23.

285 *See* Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

286 Contract law penalizes, by attaching various penalties and consequences to them, words of offer and acceptance (such as, "You've got a deal").

287 Snepp v. United States, 444 U.S. 507 (1988) (per curiam); United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979); *see also* L. BOLLINGER, THE TOLERANT SOCIETY 176 (1986) (disclosure of secrets in wartime setting not protected speech).

288 Beauharnais v. Illinois, 343 U.S. 250 (1952); *see* Hutchinson v. Proxmire, 443 U.S. 111 (1979); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

289 Roth v. United States, 354 U.S. 476 (1957); *see* Miller v. California, 413 U.S. 15 (1973).

290 Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399 (1988); Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971).

291 Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

292 Schenk v. United States, 249 U.S. 47, 52 (1919).

293 Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); FCC v. Pacifica Found., 438 U.S. 726 (1978).

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

295 Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918); *see* Bethel School Dist. v. Fraser, 106 S. Ct. 3159 (1988). For federal protection of *inanimate* objects and symbols, see 18 U.S.C. § 707 (4-H club symbol); 18 U.S.C. § 711 (Smokey the Bear); 18 U.S.C. § 711a (Woodsey the owl); 36 U.S.C. §§ 170 *et seq.* (U.S. flag).

296 On fraud, see R. PERKINS & R. BOYCE, CRIMINAL LAW 304-08, 1048 (3d ed. 1982).

297 On punishment of price-fixing, see L. SULLIVAN, ANTITRUST 29-30, 132-34 (1977).

298 On the various crimes of threat, see R. PERKINS & R. BOYCE *supra* note 296, at 177-82, 448-52, 1113-15.

299 *See, e.g.*, MCCORMICK ON EVIDENCE 544-48 (E. Cleary ed. 1984). The Court uses a number

Much speech, then, is unprotected.[300] The issues are whether the social interest in reining in racially offensive speech is as great as that which gives rise to these "exceptional" categories, and whether the use of racially offensive language has speech value.[301] Because no recent Supreme Court decision directly addresses these issues, one might look to the underlying policies of our system of free expression to understand how the Supreme Court may rule if an appropriate case comes before it.[302]

Our system of free expression serves a number of societal and indi-

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of analytical routes to arrive at the conclusion that certain types of speech should be considered exceptions to first amendment protection. Some correspond to Justice Holmes's "clear and present danger" test, according to which "words . . . used in such circumstances and . . . of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U.S. 47, 52 (1919); Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting); *see also* Dennis v. United States, 341 U.S. 494 (1951) (modifying test to take account of gravity of evil and degree of probability).

At other times, the Supreme Court has applied a two-tier approach, according to which "well-defined and narrowly limited classes of speech" are held to fall outside first amendment protection. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1948). Examples of such exceptions are obscenity, defamation, and child pornography. In either case, the Court weighs the societal interest sought to be protected against the value of the speech within our system of free expression. *See id.* at 572 ("the ideas . . . are of such slight social value . . . that any benefit . . . is clearly outweighed by the social interest in order and morality."). Exceptions are not lightly created—even emotional speech, conveying little informational content, is protected. *See* Cohen v. California, 403 U.S. 15 (1971) (swear words printed on jacket protected as form of expression); *see also* Gooding v. Wilson, 405 U.S. 518 (1972) (conviction of antiwar protester who shouted, "White son of a bitch, I'll kill you," to police officer at Army induction station under breach of peace statute reversed as overbroad).

In general, the Court has rejected efforts to restrict speech that are based on "sensibility" harms. *See* Rosenfeld v. New York, 408 U.S. 901 (1972) (speaker repeatedly said "motherfucking" in speech before school board meeting). Yet, recent commentary and the approach suggested in this subpart urge that the injury of racially disparaging speech goes beyond sensibility harms. *See infra* notes 313-18 and accompanying text; Note, *supra* note 134. Recently, the Court used *Chaplinsky*'s "speech of slight social value" standard to coin a new exception for child pornography. New York v. Ferber, 458 U.S. 747 (1982). For an analysis of the Court's current approach to uncovered speech and further discussion of *Ferber*, see Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 SUP. CT. REV. 285, 303.

For a concise discussion of many of the "exceptions" and excluded "categories" of speech, see J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 865-67, 879, 905, 909, 911, 915, 923, 943-52, 960-73, 973-88, 998-1000, 1009-27 (2d ed. 1983). For a discussion of various models for understanding the Court's approach to the scope of first amendment protection, see Baker, *Scope of First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978).

300 L. TRIBE, *supra* note 283, at 932 ("an edifice of less than complete protection").

301 The exceptional categories in most cases mark an area where the socially and economically powerful need an exception. Few exceptions benefit the weak and powerless. Is insistence on applying absolutism to the problem of racist speech itself class-based and racist? *Cf.* N. ROSENBERG, PROTECTING THE BEST MEN (1986) (arguing that law of defamation was intended to protect powerful white males).

302 K. GREENAWALT, SPEECH, CRIME AND THE USES OF LANGUAGE 295 & n.33 (1989) (Supreme Court could broaden permissible bases for prohibition; precise issue of racist speech has not been settled).

vidual goals.[303] Included are the personal fulfillment of the speaker; ascertainment of the truth; participation in democratic decisionmaking; and achieving a balance between social stability and change. Applying these policies to the controversy surrounding campus antiracism rules yields no clear result. Uttering racial slurs may afford the racially troubled speaker some immediate relief, but hardly seems essential to self-fulfillment in any ideal sense. Indeed, social science writers hold that making racist remarks impairs, rather than promotes, the growth of the person who makes them, by encouraging rigid, dichotomous thinking and impeding moral development.[304] Moreover, such remarks serve little dialogic purpose; they do not seek to connect the speaker and addressee in a community of shared ideals.[305] They divide, rather than unite.

Additionally, slurs contribute little to the discovery of truth. Classroom discussion of racial matters and even the speech of a bigot aimed at proving the superiority of the white race might move us closer to the truth.[306] But one-on-one insults do not. They neither state nor attack a proposition; they are like a slap in the face.[307] By the same token, racial insults do little to help reach broad social consensuses. Indeed, by demoralizing their victim they may actually reduce speech, dialogue, and participation in political life.[308] "More speech" is rarely a solution. Epithets often strike suddenly, immobilizing their victim and rendering her speechless.[309] Often they are delivered in cowardly, anonymous fashion—for example, in the form of a defaced poster or leaflet slipped under a student's door,[310] or hurled by a group against a single victim, rendering response foolhardy.[311] Nor do they help strike a healthy balance between stability and social change. Racial epithets could be argued to

303 Commentators have categorized these goals differently. The following are those proposed in T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 3-6 (1970), and Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877, 878-86 (1963). For other treatments, *see* Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245; Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

304 *E.g.*, G. ALLPORT, *supra* note 253, at 170-86, 371-84, 407-08.

305 Delgado, *supra* note 23, at 140-43; Lawrence, *supra* note 20, at 5; *see Chaplinsky*, 315 U.S. at 572 (words that "by their very utterance inflict injury" are punishable).

306 Most university statutes and guidelines appear to exclude this type of speech.

307 *See* Delgado, *supra* note 23, at 136, 143-45, 147-48; *see also* K. GREENAWALT, *supra* note 302, at 289-99.

308 Delgado, *supra* note 23, at 144-46.

309 *See* L. TRIBE, *supra* note 283, at 837; Lawrence, *supra* note 20, at 14, Wesson, Sex, Lies and Videotape: The Pornographer As Censor (forthcoming 1990).

310 *See, e.g.*, *supra* notes 63-65 and accompanying text.

311 *See, e.g.*, *supra* notes 57-59 and accompanying text. Moreover, the places of perpetrator and victim are not parallel. "Talking back" to a white who has insulted, say, a person of color, is not easily feasible, since nothing has the same emotional currency as a racial epithet like, "Go home, Nigger, you don't belong on this campus." What word has the impact of Nigger—you *white*?

relieve racial tension harmlessly and thus contribute to racial stability, but this strained argument has been called into question by social science.[312]

Yet racial epithets *are* speech, and as such we ought to protect them unless there is a very good reason for not doing so. A recent book by Kent Greenawalt suggests a framework for assessing laws against insults.[313] Drawing on first amendment principles and case law, Greenawalt writes that the setting, the speaker's intention, the forum's interest, and the relationship between the speaker and the victim must be considered.[314] Moreover, abusive words (like kike, nigger, wop, and faggot) are punishable if spoken with intent, cause a harm subject to formulation in clear legal language, and form a message essentially devoid of ideas.[315] Greenawalt offers as an example of words that could be criminally punishable, "You Spick whore" uttered by four men to a woman of color at a bus stop, intended to humiliate her.[316] He notes that such words can have long-term damaging effects on the victim[317] and have little if any cognitive content; that which the words have may be expressed in other ways.[318]

Under Greenawalt's test, narrowly drawn university guidelines penalizing racial slurs might withstand scrutiny. The university forum has a strong interest in establishing a nonracist atmosphere. Moreover, most university rules are aimed at face-to-face remarks that are intentionally abusive. Most exclude classroom speech, speeches to a crowd, and satire published in a campus newspaper. Under Greenawalt's nonabsolutist approach, such rules might well be held constitutional.[319]

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312 *See supra* notes 248, 303-05 and accompanying text.

313 K. GREENAWALT, *supra* note 302; *see also* Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287 (1990) (putting forth similar argument, drawn from his book).

314 Greenawalt, *supra* note 313, at 289.

315 *Id.* at 291-93, 295-301.

316 *Id.* at 299.

317 *Id.*

318 *Id.*

319 Universities might decline to enact such rules even if it were constitutional to do so. *See* Address by Delgado, State Historical Society, Madison, Wis., Apr. 24, 1989, *cited in* Lawrence, *supra* note 20, at 29:

> I believe that racist speech benefits powerful white-dominated institutions. The highly educated, refined persons who operate the University of Wisconsin, other universities, and major corporations, would never, ever themselves utter a racial slur. That is the last thing they would do.
>
> Yet, they benefit, and on a subconscious level they know they benefit, from a certain amount of low-grade racism in the environment. If an occasional bigot or redneck calls one of us a nigger or spick one night late as we're on our way home from the library, that is all to the good. Please understand that I am not talking about the very heavy stuff—violence, beatings, bones in the nose. That brings out the TV cameras and the press and gives the university a black eye. I mean the daily, low-grade largely invisible stuff, the hassling, cruel remarks, and other things that would be covered by rules. This kind of behavior keeps nonwhite people on edge, a little off balance. We get these occasional reminders that we are different, and not really wanted. It prevents us from digging in too strongly, starting to think we could really belong

B. An Equal Protection View

The first amendment perspective yields no clear-cut result. Society has a strong interest in seeing that expression is as unfettered as possible, yet the kind of expression under consideration has no great social worth and can cause serious harm. Unfortunately, looking at the problem of racist speech from the perspective of the equality-protecting amendments yields no clearer result.

Equality and equal respect are highly valued principles in our system of jurisprudence. Three constitutional provisions[320] and a myriad of federal and state statutes are aimed at protecting the rights of racial, religious, and sexual minorities to be free from discrimination in housing, education, jobs, and many other areas of life.[321] Moreover, universities have considerable power to enact regulations protecting minority interests.[322] Yet the equality principle is not without limits. State agencies may not redress breaches by means that too broadly encroach on the

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here. It makes us a little introspective, a little unsure of ourselves; at the right low-grade level it prevents us from organizing on behalf of more important things. It assures that those of us of real spirit, real pride, just plain leave—all of which is quite a substantial benefit for the institution.

(citing S. BROWNMILLER, AGAINST OUR WILL (1979) (rape is the crime of all men against all women; even men who would not consider assaulting a woman nevertheless benefit from *in terrorem* effect fear of rape inspires in women)).

320 U.S. CONST. amends. XIII-XV.

321 *See, e.g.*, D. BELL, *supra* note 21 (discussing such statutes and their history). Most campus antiracism rules invoke these principles in their preambles or legislative histories. *E.g.*, Campbell, *supra* note 1 (University of Texas rule); Statement by Regent Erroll B. Davis, Jr., *supra* note 12 (University of Wisconsin rule).

The thirteenth and fourteenth amendments, together with their legislative effectuations, particularly 42 U.S.C. §§ 1981-82, secure the rights of liberty, personal security and property of the former slaves and their descendants. *See* J. TEN BROEK, EQUAL UNDER THE LAW (1965); Reed, *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom From Discrimination*, 84 YALE L.J. 1441, 1445-48 (1975). Education is a liberty falling within federal protection, *see* Lau v. Nichols, 414 U.S. 563 (1974), and rules against racial insult can be seen as aimed at eliminating "badges and incidents of slavery." *See* Runyon v. McCrary, 427 U.S. 160 (1976) (federal antidiscrimination provisions reach private action; are permissible efforts to abolish aftereffects of slavery); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

Federal law, then, probably gives universities the power (perhaps the obligation) to regulate racial slurs. Often, they will have this power under state law as well. *See, e.g.*, WIS. CONST. art. I, § 11 (protecting right of people to be secure in their persons); State *ex. rel* Jones v. Gerhardstein, 135 Wis. 2d 161, 400 N.W.2d 1, 6 (Wis. App. 1986) (art. I, § 11 gives rise to right of privacy that includes "individual's *right to be free from unwanted and unwarranted personal contact*") (emphasis added); *see also* Commonwealth v. Local Union 542, 347 F. Supp. 268, 299 (E.D. Pa. 1972) ("racist acts are as related to the incidents of slavery as each roar of the ocean is related to each incoming wave"; state action to eliminate discrimination permissible and supported by a compelling state interest). For discussion of the limits of universities' power to effectuate equality, see *infra* notes 322-29 and accompanying text.

322 *See, e.g.*, Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969) (upholding suspensions of disruptive students if such action is taken pursuant to reasonable and narrowly drawn rules); Henkel v. Phillips, 82 Wis. 2d 27, 33-34, 260 N.W.2d 653 (1977); M. OLIVAS, HIGHER EDUCATION LAW (1989).

rights of whites, or on other constitutional principles. Rigorous rules of intent, causation, standing, and limiting relief circumscribe what may be done.[323] New causes of action are not lightly recognized; for example, the legal system has resisted efforts by feminists to have pornography deemed a civil rights offense against women.[324]

Moreover, courts have held or implied that a university's power to effectuate campus policies, presumably including equality, is also limited. Cases stemming from efforts to regulate the wearing of armbands,[325] what students may publish in the school newspaper,[326] or their freedom to gather in open areas for worship or speech[327] have shown that individual liberty will sometimes subordinate an institution's interest in achieving its educational objectives—students do not abandon all their constitutional rights at the schoolhouse door.[328] According to the author of a leading treatise on higher education law, rules bridling racist speech will be found constitutional if there is a local history of racial disruption; if the rules are narrowly tailored to punish only face-to-face insults and avoid encroaching on classroom and other protected speech; if they are consistently and even-handedly applied; and if due process protections such as the right to representation and a fair hearing are present.[329] The author's guidelines seem plausible, but have yet to be tested. One set of rules was promulgated, then withdrawn;[330] another was declared overbroad and subsequently redrafted.[331] In several jurisdictions, the ACLU has announced that it is monitoring developments and may file suit.[332]

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323 *See* Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923, 936 (1988) (summarizing these and other constraints).

324 *See* American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); C. MACKINNON, FEMINISM UNMODIFIED 175-95 (1987); MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL. J. 321 (1984); Wesson, *supra* note 305.

325 Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

326 *See* Hazelwood v. Kuhlmeier, 484 U.S. 260, 272 (1988) (Court weighed school officials' interest in protecting those that could be harmed by article in school newspaper against paper's first amendment right to publish what it wishes; upheld power to censor when "expression . . . will substantially interfere with the work of the school or impinge upon the rights of other students").

327 Widmar v. Vincent, 454 U.S. 263, 270 n.4 (1981).

328 *Tinker*, 393 U.S. at 506; *see* Goss v. Lopez, 419 U.S. 565 (1974).

329 Interview with Michael Olivas, professor of law, U. Houston, Madison, WI (Feb. 4, 1990). Universities must also avoid applying regulations only in racially charged and highly polarized situations. *Id.* Olivas is Director, Institute of Higher Education Law & Governance, and author of a leading casebook on higher education law. *See* M. OLIVAS, *supra* note 322.

330 *See* Wilson, *supra* note 121 (Tufts University enacted, then rescinded rule); *see also Tufts Restores Free Speech After T-Shirt Confrontation*, San Francisco Chron., Dec. 9, 1989, at B6, col. 1.

331 *See supra* notes 78-90 and accompanying text (events at University of Michigan).

332 *Id.* (events at University of Wisconsin); Cain, *Policy Would Suspend Those Using Racial Slurs*, Colorado Daily, Jan. 30, 1990, at 1, col. 3. An ACLU spokesman said a Colorado rule being drafted is sound "as long as . . . clearly defined. . . . the government has to do some protecting"); Blum & Lobaco, *Fighting Words at the ACLU*, CAL. LAW., Feb. 1990, at 43 (ACLU has taken 20 cases challenging student conduct codes); Shapiro, *UC's Doctrine of Silence*, The Recorder, Oct. 2, 1989, at 1, col. 2 (Northern California ACLU monitoring events at Berkeley, may sue).

In the meantime, analogous authority continues to develop. In *Bob Jones University v. United States*,[333] the Supreme Court held that universities may not discriminate in the name of religion. In *University of Pennsylvania v. EEOC*,[334] the Supreme Court held that a university's desire to protect confidential tenure files did not insulate the university from review in connection with discrimination investigations. Both cases imply that the antidiscrimination imperative will at times prevail over other strong interests, such as freedom of religion or academic freedom—and possibly speech.[335]

VI. Reconciling the First and Fourteenth Amendments: Stigma-Pictures and the Social Construction of Reality

A. Class Subordination and the Problem of Concerted Speech

As the analysis to this point has shown, neither the constitutional narrative of the first, nor of the thirteenth and fourteenth, amendments clearly prevails in connection with campus antiracism rules. Judges must choose. The dilemma is embedded in the nature of our system of law and politics: we want and fear both equality and liberty.[336] This Part offers a solution to the problem of campus antiracism rules based on a postmodern insight: the speech by which society "constructs" a stigma picture of minorities may be regulated consistently with the first amendment.[337] Indeed, regulation may be necessary for full effectuation of the values of equal personhood we hold equally dear.

The first step is recognizing that racism is, in almost all its aspects, a class harm—the essence of which is subordination of one people by another. The mechanism of this subordination is a complex, interlocking series of acts, some physical, some symbolic. Although the physical acts (like lynchings and cross burnings) are often the most striking, the sym-

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333 Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (government's "overriding interest in eradicating racial discrimination in education" outweighs institution's free exercise claim to a tax exemption); *see* Laycock, *Tax Exemption for Religiously Discriminatory Schools*, 60 Tex. L. Rev. 759 (1987).

334 University of Pennsylvania v. EEOC, 110 S. Ct. 577 (1990) (action brought on behalf of an Asian woman denied tenure, in part, because her writings focused on Asian issues).

335 *See also* Marzette v. McPhee, 294 F. Supp. 562, 563, 569 (E.D. Wis. 1968) (students invaded university president's office and made "insulting, degrading and humiliating" remarks; court held such conduct subject to sanction).

336 *See* Delgado, *Critical Legal Studies and the Realities of Race: Does the Fundamental Contradiction Have a Corollary?*, 23 Harv. C.R.-C.L. L. Rev. 407 (1988).

337 *See supra* note 16 (modern legal theory beginning to accept idea that narratives and stories mediate and create reality; defining "postmodernism"). For the view that most knowledge is essentially contestable, see T. Kuhn, The Structure of Scientific Revolutions (1970); M. Polanyi, Personal Knowledge (1964). For the view that much legal knowledge *should* be contested (but rarely is), see K. Bumiller, The Civil Rights Society: The Social Construction of Victims (1988); Delgado, *supra* note 16; Minow, *supra* note 16.

bolic acts are the most insidious. By communicating and "constructing" a shared cultural image of the victim group as inferior,[338] we enable ourselves to feel comfortable about the disparity in power and resources between ourselves and the stigmatized group.[339] Most civil rights law, of necessity, contributes to this stigmatization: the group is so vulnerable that it requires social help.[340] The shared picture also demobilizes the victims of discrimination, particularly the young. Indeed, social scientists have seen evidence of self-hatred and rejection of their own identity in children of color as early as age three.[341]

The ubiquity and incessancy of harmful racial depiction are thus the source of its virulence.[342] Like water dripping on sandstone, it is a pervasive harm which only the most hardy can resist. Yet the prevailing first amendment paradigm predisposes us to treat racist speech as an individual harm, as though we only had to evaluate the effect of a single drop of water. This approach—corresponding to liberal, individualistic theories of self and society—systematically misperceives the experience of racism for both victim and perpetrator. This mistake is natural, and corresponds to one aspect of our natures—our individualistic selves. In this capacity, we want and need liberty. But we also exist in a social capacity; we need others to fulfill ourselves as beings. In this group aspect, we require inclusion, equality, and equal respect.[343] Constitutional narratives of equal protection and prohibition of slavery—narratives that encourage us to form and embrace collectivity and equal citizenship for all—reflect this second aspect of our existence.

When the tacit consent of a group begins to coordinate the exercise of individual rights so as seriously to jeopardize participation by a smaller group, the "rights" nature of the first group's actions acquires a different character and dimension.[344] The exercise of an individual right

338 *See* Brown, *supra* note 2 (language constructs harmful pictures of persons of color); Ingersoll, *Race and Ethnic Relations Among High School Youths: Perspectives from Psychology*, INT'L J. GROUP TENSIONS 26 (1988) (language establishes rules and expectation by which child or adolescent makes sense of world; language of prejudice establishes a "rationality" for it); *see also* J. GOULD, THE MISMEASURE OF MAN (1981) (pseudo-science contributed to notion of inferiority of nonwhite races).

339 *See generally* I. KATZ, *supra* note 256 (stigma the product of multiple encounters); Delgado, *supra* note 16; Lawrence, *supra* note 20, at 22 (no racist act or slur is isolated).

340 K. BUMILLER, *supra* note 337, is the best expression of this view; *see also* D. BELL, *supra* note 21, at 2-51 (American race-remedies law itself advances racism).

341 *E.g.*, M. GOODMAN, *supra* note 258, at 55-56.

342 *See supra* notes 22-23, 251-72 and accompanying text (racial treatment systematic and increasing); *see also* Minow, *supra* note 16 (on power to label others); Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1274-89 (1985) (on language of social roles).

343 A. MACINTYRE, AFTER VIRTUE (1982); M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1985).

344 In general, we need the first amendment to protect minorities from tyranny by the majority. But with racist insults and epithets, the majority uses speech to construct a stigma-picture of the

now poses a group harm and must be weighed against this qualitatively different type of threat.[345]

First amendment scholar Kent Greenawalt's recent book[346] has made a cautious move in this direction. Although generally a defense of free speech in its individual aspect, his book also notes that speech is a primary means by which we construct reality.[347] Thus, a wealthy and well-regarded citizen who is victimized by a vicious defamation is able to recover in tort. His social "picture," in which he has a property interest, has been damaged, and will require laborious reconstruction. It would require only slight extension of Greenawalt's observation to provide protection from racial slurs and hate-speech.[348] Indeed, the rich man has the dominant "story" on his side; repairing the defamation's damage will be relatively easy.

Racist speech, by contrast, is not so readily repaired—it separates the victim from the storytellers who alone have credibility. Not only does racist speech, by placing all the credibility with the dominant group, strengthen the dominant story, it also works to disempower minority groups by crippling the effectiveness of *their* speech in rebuttal.[349] This situation makes free speech a powerful asset to the dominant group, but a much less helpful one to subordinate groups—a result at odds, certainly,

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minority. Arguably, the cautions that ordinarily operate in favor of protecting speech do not apply here.

Of course, it may be pointed out that some of the framers and theoreticians of the Constitution and first amendment favored slavery and the oppression of colored peoples. *See* T. HOBBES, LEVIATHAN, pt. II, ch. 221 (Of the Liberty of Subjects); D. BOUMGOLD, HOBBES' POLITICAL THEORY 93-97 (1988); J. LOCKE, TWO TREATISES OF GOVERNMENT, 2d Treatise, §§ 17, 24, 85; R. GANT, JOHN LOCKE'S LIBERALISM 67 (1987). Yet later in our history we committed ourselves—through the thirteenth, fourteenth and fifteenth amendments—to an antisubordination principle. *See supra* notes 6-25 and accompanying text. Generally, empowered persons will favor competition and the marketplace of ideas, while those lacking a strong voice will view the universalizing, quasi-objective values of the marketplace of ideas with mistrust and will prefer the more contextualized perspectives afforded by equal protection analysis. *See* Delgado, *supra* note 16. Our dilemma is that we wish to promote *both* values at the same time. One cannot, however, "balance" incommensurables; creation of a new category of speech-act for behavior by which a more powerful group creates a stigma-picture of a weaker one seems the only solution.

345 *See* Denvir & Powell, Caliban's Complaint: Racist Speech and the First Amendment (unpublished, on file with author) (Brandeis's more affirmative view of first amendment as protecting dialogic function of citizen participation yields support for antiracism rules and statutes).

346 *See* K. GREENAWALT, *supra* note 302.

347 *Id.* at 217-20, 299-302; *see also* P. BERGER & T. LUCKMAN, *supra* note 16; M. POLANYI, *supra* note 337.

348 This extension would not be the first time the struggle for black justice has yielded doctrinal benefits for all. *See* H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT (1965) (pointing out that reforms born of the cauldron of civil rights often end up benefiting all society, not just blacks). *See also* Miranda v. Arizona, 384 U.S. 436 (1966).

349 Recent developments in "norm theory" bear this out. We experience empathy for persons who suffer misfortune only if we believe that their misfortune is outside the norm *for them*. If our experience teaches us that blacks are ordinarily poor or stigmatized, we will experience little empathy for one who is. *See* Miller & Kahneman, *Norm Theory*, 93 PSYCH. REV. 136, 136-53 (1986).

with marketplace theories of the first amendment. Unless society is able to deal with this incongruity, the thirteenth and fourteenth amendments and our complex system of civil rights statutes will be of little avail. At best, they will be able to obtain redress for episodic, blatant acts of individual prejudice and bigotry. This redress will do little to address the source of the problem: the speech that creates the stigma-picture that makes the acts hurtful in the first place, and that renders almost any other form of aid—social or legal—useless.

B. Operationalizing the Insight

Could judges and legislators effectuate this Article's suggestion that speech which constructs a stigma-picture of a subordinate group stands on a different footing from sporadic speech aimed at persons who are not disempowered? It might be argued that *all* speech constructs the world to some extent, and that every speech act could prove offensive to someone. Traditionalists find modern art troublesome, Republicans detest left-wing speech, and some men hate speech that constructs a sex-neutral world. Yet race—like gender and a few other characteristics—is different; our entire history and culture bespeak this difference.[350] Thus, judges easily could differentiate speech which subordinates blacks, for example, from that which disparages factory owners. Will they choose to do so? There is cause for doubt: low-grade racism benefits the status quo.[351] Moreover, our system's winners have a stake in liberal, marketplace interpretations of law and politics—the seeming neutrality and meritocratic nature of such interpretations reassure the decisionmakers that their social position is deserved.[352]

Still, resurgent racism on our nation's campuses is rapidly becoming a national embarrassment. Almost daily, we are faced with headlines featuring some of the ugliest forms of ethnic conflict and the spectre of virtually all-white universities. The need to avoid these consequences may have the beneficial effect of causing courts to reflect on, and tailor, constitutional doctrine. As Harry Kalven pointed out twenty five years ago, it would not be the first time that insights born of the cauldron of racial justice yielded reforms that ultimately redounded to the benefit of all society.[353]

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350 Race and sex are more deeply inscribed, culturally and individually, than almost anything else. One could forget momentarily that one is a law student or labor lawyer. Try to imagine, however, what it would be like to forget that one is a female or a black.

351 *See supra* note 319; D. BELL, *supra* note 21 (putting forth economic determinist theory of civil rights and racial justice).

352 D. BELL, *supra* note 21; Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 100-03 (1989).

353 H. KALVEN, *supra* note 348.

VII. CONCLUSION

This Article began by pointing out a little-noticed indeterminacy in the way campus antiracism rules are analyzed. Such rules may be seen either as posing a first amendment problem or falling within the ambit of the equality-protecting amendments. The survey of the experience of other nations in regulating hate speech and the writings of social scientists on race and racism do not dispel this indeterminacy. Each view is plausible; each corresponds to a deeply held narrative; each proceeds from one's life experiences; each is backed by constitutional case law and principle. Each lays claim to the higher education imperative that our campuses reflect a marketplace of ideas.[354]

The gap between the two approaches can be addressed by means of a post-modern insight: racist speech is different because it is the means by which society constructs a stigma-picture of disfavored groups. It is tacitly coordinated by its speakers in a broad design, each act of which seems harmless, but which, in combination with others, crushes the spirits of its victims while creating culture at odds with our national values. Only by taking account of this group dimension can we capture the full power of racially scathing speech—and make good on our promises of equal citizenship to those who have so long been denied its reality.

354 *Compare* Gunther, *No*, STANFORD LAWYER, Spring 1990, at 7 (free speech requires that we tolerate even repulsive messages) *with* Wiener, *supra* note 142 (affirmative intervention necessary to protect campus diversity); *see also* Gibbs, *supra* note 2, at 105 (black students dropping out or enrolling at all-black colleges); Wilkerson, *Racial Harassment Altering Blacks' Choices on Colleges*, N.Y. Times, May 9, 1990, at 1, col. 5 (same).