"FREEDOM IS SLAVERY"*: THE THOUGHT POLICE HAVE COME TO AMERICA'S CAMPUSES

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I. INTRODUCTION

"No where is the First Amendment more imperiled than on college campuses,"[1] so proclaims *Time* Magazine in a recent article detailing

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* G. Orwell, 1984, 7 (1950).

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[1] Mehta, Tifft & Woodbury, *Bigots in the Ivory Tower*, TIME, May 7, 1990, at 106 [hereinafter *Bigots*].

incidents of racial strife at American universities.[2] In a similar article, *Newsweek* explores the tyranny of "Political Correctness" on college campuses across the country.[3] Far from being the hyperbole normally associated with the "issue of the week" in mass distribution journalism, these articles may, if anything, understate the threat posed to freedom of expression in our educational institutions.

Across the country, colleges and universities are enacting behavioral codes that prohibit or censure certain forms of expression.[4] In their most common form, these codes forbid statements or expressive behavior deemed by the institution to express prejudice or disdain towards race, religion, gender, or sexual preference.[5] Some of these codes attempt to cover all allegedly discriminatory expression, while others prohibit only statements or behavior directed towards an individual in a face-to-face encounter.[6] In either case, these behavioral codes raise disturbing implications regarding the role of the first amendment at institutions of higher education.

The conflict between these student conduct codes and the values embodied, both explicitly and implicitly, in the first amendment has led to a sharp dispute between civil rights activists and civil libertarians.[7] Civil rights activists, who favor these codes, argue that freedom of speech is meaningless without procedural and substantive equality, an idea that at least one leading activist admits is "heresy in first amendment doctrine."[8] On the other hand, civil libertarians view this new form of censorship[9] as an attempt to promote group rights at the expense of

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[2] *Id.* at 104.

[3] Adler, Starr, Chideya, Wright, Wingert & Haac, *Taking Offense*, NEWSWEEK, Dec. 24, 1990, at 48. "The goal [of political correctness] is to eliminate prejudice, not just of the petty sort that shows up on sophomore dorm walls, but the grand prejudice that has ruled American universities since their foundation: that the intellectual tradition of Western Europe occupies the central place in the history of civilization." *Id.* "Political Correctness requires that students, faculty, and administration project 'right' opinions about women, sexism, race and numerous other categories of victemology." *Politically Correct*, Wall St. J., Nov. 26, 1990, at 10A, col. 1.

[4] *See* appendix for several examples of these conduct codes.

[5] *See, e.g., id.*

[6] *See, e.g.*, appendix (the University of Wisconsin's Student Conduct Code).

[7] *See* France, *Hate Goes to College*, A.B.A. J. July 1990, at 44-45. For example, the American Civil Liberties Union (ACLU) has successfully represented the student-plaintiff against the University of Michigan in 1989 and has also sued to have the University of Wisconsin's conduct code declared unconstitutional. *Id.*

[8] *Id.* at 48 (quoting Mari Matsuda).

[9] *Id.* at 46.

those individual liberties protected by the Constitution.[10]

This article examines the constitutional difficulties of regulating the content of speech and scrutinizes student behavioral codes in light of traditional first amendment legal theory with special attention given to the application of these codes to student publications. This article then explores the arguments of a first amendment "Revisionist" and the values underlying her arguments, exposing the flawed reasoning supporting her theory.[11]

II. BACKGROUND

The eighties bore witness to a resurgence of racial tension on college campuses, much of it rooted, in one way or another, in the institutionalized *reverse discrimination* practiced by many colleges and universities in their admissions and support programs.[12] These tensions were exacerbated as schools increasingly trumpeted diversity as an end in itself, and more factions clamored to establish themselves within the hierarchy of favored interests.[13] As the conflict between these factions became more visible and the positions of the combatants more polar, the tenor of the debate became increasingly strident. Some exchanges were merely pointed barbs of the type associated with any heated debate,[14] whereas others appeared to stem from a deep-seated bigotry.[15]

Many schools reacted to the tone of the conflict by adopting student conduct codes which forbid certain forms of speech and expressive

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[10] Hentoff, *Are People of Color Entitled to Extra Freedom of Speech?*, The Village Voice, Sept. 16, 1990, at 13, col. 1. (quoting Nadine Strossen, general counsel to the ACLU).

[11] In order to avoid the problem of lack of state action, the scope of this article is limited to state run schools or schools which have voluntarily bound themselves to adhere to the Constitution. For a discussion of state action, see J. NOWACK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 12, at 421-50 (3d ed. 1986) [hereinafter CONSTITUTIONAL LAW]

[12] *See Bigots, supra* note 1, at 104. For an excellent analysis of the effects of reverse discrimination routinely practiced by colleges and universities, see D'SOUZA, ILLIBERAL EDUCATION, THE POLITICS OF RACE AND SEX ON CAMPUS, 24-58 (1991).

[13] *Cf. id.* at 105-06 (Columbia University now has enforced multicultural sensitivity training; "affirmative action" is often a source of contention as is illustrated by a Wisconsin campus newspaper cartoon featuring two white students applying blackface in hope of receiving preferential treatment.).

[14] *See, e.g., id.*

[15] *See, e.g., id.* (One Jewish student had a threatening note shoved under his door reading, "Jew-Boy getout.").

behavior.[16] Because these codes clearly attempt to regulate the content of expression, however, they raise serious first amendment implications. Inevitably, these codes were challenged by civil liberties groups, most notably the American Civil Liberties Union.[17]

In 1989, the University of Michigan's behavioral code, which prohibited "stigmatizing" or "victimizing" speech, was the first code to be challenged.[18] A graduate psychology student, specializing in "biopsychology," feared that if he proposed certain controversial theories related to biologically-based differences between races and sexes, he would be subject to sanctions under the code.[19] The student

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[16] *See supra* note 4 and accompanying text.

[17] *See supra* note 7 and accompanying text. For a discussion and further examples of censorship employed by colleges and universities, see D'Souza, *supra* note 12, at 124-56.

[18] Doe v. University of Michigan, 721 F. Supp. 852, 856 (E.D. Mich. 1989).

[19] The University of Michigan Code provided, in pertinent part:

> 1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that
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> a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
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> b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
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> c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or particular in University sponsored extracurricular activities.
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> 2. Sexual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual on the basis of sex or sexual orientation where such behavior:
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> a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
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> b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
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> c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.

Id. at 856.

maintained that the possible application of these sanctions had a chilling effect on his right to discuss these theories.[20] The District Court for the Eastern District of Michigan found those sections of the code restricting "speech activity" to be vague and overbroad[21] and, therefore, permanently enjoined their application.[22]

That same year, the University of Connecticut's student conduct code was challenged.[23] A student, Nina Wu, had hung on her door a poster which allegedly listed "homos" among those "shot on sight."[24] The University found Ms. Wu to be in violation of the school's anti-harassment code[25] and expelled her from all resident and dining halls.[26] Ms. Wu sued the university in federal court, but the matter was eventually settled by consent decree. The university reinstated Ms. Wu's room and board privileges and inserted a fighting words provision into its code.[27]

Perhaps the case currently attracting the most attention is the challenge to the University of Wisconsin's student behavioral code.[28]

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[20] *Id.* at 858.

[21] *Id.* at 864-67.

[22] *Id.* at 853-54.

[23] Soltis, *Sensitivity Training 101*, A.B.A. J., July 1990, at 47.

[24] *Id.*

[25] *Id.* At the time Ms. Wu was sanctioned, the University of Connecticut's anti-harassment Code was not limited to specific expression directed towards a specific individual or group. The Code has been subsequently modified. *Id.*

[26] *Id.*

[27] *Id. See also* appendix.

[28] The University of Wisconsin-Madison Student Disciplinary Guidelines, Procedures for non-academic misconduct provide, in pertinent part:

> The University may discipline a student in non-academic matters in the following situations.
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> . . . .
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> (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:
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> 1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
> 2. Create an intimidating, hostile or demeaning environment

What differentiates the University of Wisconsin's code from those previously challenged is that it includes a fighting words provision.[29] This case is currently before the Federal District Court of Wisconsin.[30]

These three cases are the only challenges brought against student conduct codes to date. Obviously, therefore, there is not a well developed body of jurisprudence applying the first amendment to student conduct codes. Traditional first amendment principles, however, provide a ready guide to resolving the question of whether these behavioral codes can survive first amendment scrutiny.

III. CONTENT BASED REGULATION OF SPEECH

"Congress shall make no law . . . abridging the freedom of speech."[31] This apparently "unequivocal command" lead Justice Black to conclude that "the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field."[32] Despite the rather absolute language of the first amendment, there are, and have always been, certain restrictions placed upon speech. These restrictions can be broken down into two broad categories: 1) the regulation of the time, place, or manner of speech;[33] and 2) the regulation of the content of speech. Time, place

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> for education, university related work, or other university-authorized activity . . . .

University of Wisconsin-Madison, Student Disciplinary Guidelines, Procedures for non-academic misconduct, Chapter 17, § 17.06 (1990). For the full text of the Code, see appendix.

[29] *Id.* § 17.06(2)(a).

[30] UMW Post, Inc. v. Board of Regents of the University of Wisconsin System, No. 90-C-328 (E.D. Wis. filed March 29, 1990).

[31] U.S. CONST. amend. I.

[32] Konigsberg v. State Bar of California, 366 U.S. 36, 61 (1961) (Black, J., dissenting).

[33] Time, place and manner restrictions include: requiring parade permits, Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding the right of a municipality to require a parade permit for a group of sixty-eight Jehovah's Witnesses walking single file in groups of five or six, carrying placards and distributing leaflets), prohibiting excess noise, Grayned v. Rockford, 408 U.S. 104 (1972) (upholding an ordinance forbidding noisy disturbances near schools while school was in session), and limiting the location of leafletting, Heffron v. International Soc'y for Krishna Consc., 452 U.S. 640 (1981) (upholding a state fair rule requiring all leafletting to be carried out from a dually licensed booth on the fairgrounds).

In order to be a valid time, place, or manner restriction a statute, regulation, or ordinance must meet the following criteria:

and manner restrictions, however, are not relevant to the analysis of the constitutionality of student conduct codes. These student conduct codes restrict content. Their entire purpose is to prohibit certain kinds of speech, not to control the time, place, or manner of all speech.

Content-based regulation of speech receives the Court's strictest scrutiny.[34] In recent years, such regulations have not passed this rigorous review unless they have fallen into one of several narrowly defined exceptions.[35] These exceptions are libel,[36]

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1) The law must allow a substantial alternative opportunity for speech. *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1335-36 (1970) (Other avenues of communication should be available to allow the speaker to reach the same audience with substantially the same degree of effectiveness.).

2) The law must be neutral on its face and in its application as to both the speaker and the content. *Cf.* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-23, at 977-80 (2d ed. 1988) ("[E]ven a wholly neutral government regulation or policy, aimed entirely at harms unconnected with the *content* of any communication, may be invalid if it leaves too little breathing space for communicative activity, or leaves people with too little access to channels or communications, whether as would-be speakers or as would-be listeners." *Id.* at 978 (emphasis in original)).

3) The law must narrowly serve an important state interest. United States v. O'Brien, 391 U.S. 367, 377 (1968) (holding a federal law which prohibited the destruction or mutilation of Selective Service registration certificates did not violate the first amendment because it was within the government's power to enact the regulation; it furthered an important government interest in assuring the continuing availability of certificates issued; this interest was not related to the suppression of free expression and was no more restrictive than necessary to further that interest).

4) The law must allow speech in public forums. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1976) (holding that the first amendment prohibits a municipal board from denying a theatrical promoter access to a city-leased theater based on the content of a musical).

For further explanation and analysis of what constitutes reasonable time, place and manner restrictions, see CONSTITUTIONAL LAW, *supra* note 11, § 16.47, at 970-84.

[34] Perry Ed. Assn. v. Perry Local Educator's Assn., 460 U.S. 37, 45 (1983).

[35] TRIBE, *supra* note 33, § 12-8, at 832.

[36] *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985). In *Dun & Bradstreet*, a construction contractor brought a defamation action against a credit reporting agency for false information it reported on the contractor's credit report. *Id.* at 751-52. On the grounds that no showing of "actual malice" was made, the agency appealed the judgment of the trial court, which awarded the plaintiff presumed and punitive damages. *Id.* at 752. The Supreme Court held that the first amendment is not violated when, in a defamation case not involving matters of public concern, presumed and punitive damages are allowed without a showing of actual malice. *Id.* at 749. *See also* Note, Dun & Bradstreet, Inc. v. Greenmoss Builders: *"Matters of Private Concern" Give Libel Defendants Lowered First Amendment Protection*, 35 CATH. U.L. REV. 883 (1986).

obscenity,[37] incitement to riot,[38] fighting words[39] and commercial speech that is misleading.[40] The proponent of a content-based regulation, however, bears an onerous burden when he attempts to avail himself of one of these exceptions. For example, a public official may only recover for libel if he proves that the allegedly libelous statement was issued with actual malice.[41] Moreover, a publication cannot be found to be obscene unless it is demonstrated that (a) the dominant theme of the material taken as a whole appeals to a prurient interest; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[42] Additionally, the government may

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[37] *See, e.g.*, Miller v. California, 413 U.S. 15 (1973). Miller was convicted pursuant to a California obscenity statute which prohibited mailing brochures advertising adult material. *Id.* at 16. Upholding the conviction, the Supreme Court reaffirmed that obscene material is not protected by the first amendment and articulated new standards for determining what constitutes obscenity. *Id.* at 23-24. *See also* Note, *Obscenity And The Reasonable Person: Will He "Know It When He Sees It?,"* 30 B.C.L. REV. 823 (1989).

[38] *See, e.g.*, Feiner v. New York, 340 U.S. 315 (1951). While making a speech on a city street in New York, Feiner made derogatory comments about the American legion, President Trumanand and several other political officials. *Id.* at 317. Furthermore, Feiner urged that blacks rise up in arms and fight for equal rights. *Id.* The Supreme Court upheld the conviction, stating that "when a speaker passes the bounds of argument or persuasion and undertakes incitement to riot . . . ." he is not protected by the first amendment. *Id.* at 321.

[39] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). In *Chaplinsky*, the appellant was convicted for violating a municipal ordinance prohibiting the use of words which would offend, annoy, deride or prevent the hearer from pursuing his business or occupation. *Id.* at 569. Specifically, the appellant used the words, "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." *Id.* The *Chaplinsky* Court found these utterances "epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Id.* at 574.

[40] *See generally* CONSTITUTIONAL LAW, *supra* note 11, §§ 16.30-31, at 907-24. The first amendment issues involved in the regulating of commercial speech are not relevant to this article and therefore will not be explored in any depth.

[41] New York Times Co. v. Sullivan, 376 U.S. 255, 283 (1964). In *Sullivan*, the New York Times appealed a state court judgment awarding compensatory damages to an elected official for libelous statements printed in its newspaper. *Id.* at 256. The Supreme Court reversed, holding that actual malice must be proven in order to award damages to a public official for libelous statements involving his official conduct. *Id.* at 279-80. *See also* Matheson, *Procedure in Public Person Defamation Cases: The Impact of the First Amendment,* 66 TEX. L. REV. 215 (1987).

[42] Miller v. California, 413 U.S. 15, 24 (1973).

prohibit the advocacy of violence or unlawful acts only when such advocacy intends to incite or produce imminent lawless action or violence, and is likely to incite or produce such action.[43] Finally, government may prohibit fighting words only when uttered face-to-face in a manner likely to incite an immediate breach of the peace, and may preclude only those words that individuals of common intelligence would understand to cause an average addressee to fight.[44]

Save for these narrowly drawn exceptions, the government may not regulate the content of speech.[45] Thus, the only way for student conduct codes to withstand constitutional attack is to limit their restrictions to that speech encompassed within either the traditional libel or fighting words exceptions.[46] As discussed below, however, while these "limited" behavioral codes may be constitutionally applied to a narrow class of student conduct, the application of these codes to student publications is problematic at best.[47]

A. LIBEL

Libel is a concept bestowed upon the United States through several hundred years of English common law and has involved the Supreme Court "in a continuing effort to determine the respective domains of freedom of communication and the protection of reputation."[48] While libel is an established exception to the prohibition against content based

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[43] Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969). In *Brandenburg*, a Klu Klux Klan leader was convicted under an Ohio statute which prohibited "advocating the duty, necessity, or propriety of crime, sabotage, violence" to affect political or industrial reform, or assembling with any persons who advocate these actions. *Id.* at 444-45. The Supreme Court reversed the conviction, indicating that a statute which "punish mere advocacy" will fail under the first amendment. *Id.* at 449. *See also* Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159 (1982).

[44] Chaplinsky v. New Hampshire, 315 U.S. 568, 572-74 (1942). *See also supra* note 40.

[45] *Cf.* TRIBE, *supra* note 35, § 12-8, at 832.

[46] For example, the University of Connecticut entered into a consent decree by which they modified its code to include a fighting words provision. *See* Soltis, *supra* note 23, at 47. *See also* appendix.

[47] The obscenity exception will not be addressed because the behavioral codes in question do not attempt to prohibit this kind of expression, the obscenity exception is not relevant to this analysis. The Rutgers' student conduct code does note that obscenity is constitutionally unprotected, but the code outlaws "insult, defamation, or harassment" not obscenity itself. *See* appendix.

[48] M. FRANKLIN & R. RABIN, TORT LAW AND ALTERNATIVES 816 (1987).

regulation of free speech, the past quarter century has witnessed the Supreme Court actively defining its constitutional boundaries.[49]

The most well known constitutional issue encountered in libel law is malice. In order to prove libel, a public official must demonstrate an allegedly libelous statement was issued with actual malice.[50] Actual malice requires that the statement be made "with knowledge that it was false or with reckless disregard of whether it was false or not."[51] The Supreme Court has recognized that without such a "defense for erroneous statements honestly made," publishers would resort to self-censorship, thus dampening the "vigor" and "variety" of public debate.[52] This limitation makes it virtually impossible to prosecute any publication, let alone a student-run publication, under the theory of libel for statements made about a public figure.[53]

It is easier to prove libel where defamatory statements are published concerning a private individual. A university could constitutionally prosecute a student publication for libeling a private individual upon a showing of mere negligence.[54] It is unclear, however, exactly what sanctions could be levied against such a publication. A "private defamation plaintiff" may only be awarded the actual damages caused by the defamatory remarks.[55] Presumed damages and punitive damages are not compensation for injury, and may be wielded by a jury to

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[49] *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964).

[50] *Id.* at 283. Specifically, the *Sullivan* Court held:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279-80.

[51] *Id.*

[52] *Id.* at 278-79.

[53] The requirement of actual malice was extended to "all public figures" in Curtis Publishing Co. v. Butts, 388 U.S. 130, 162 (1967).

[54] Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). The *Gertz* Court was mindful of the inherent differences between a public figure or public official and a private individual. *Id.* at 342-43. Specifically, the Court recognized the difficulty a private individual would face in attempting to demonstrate intentional or reckless defamation. *Id.* Accordingly, the *Gertz* majority advocated that a less restrictive standard be adopted by the states, but precluded recovery based on a strict liability theory. *Id.* at 347.

[55] *Id.*

suppress unpopular ideas; therefore, such damages are constitutionally suspect.[56] Applying this reasoning to student-run publications, it is probably constitutional for a university to force the publishers of a publication found to have libeled a private individual to compensate the individual for harm suffered. It is unlikely, however, that the university could expel the publishers or ban the publication. Such actions could lead to the suppression of unpopular ideas that Justice Powell found to be constitutionally impermissible in *Gertz v. Robert Welch, Inc.*[57]

In addition to the burden of proving actual malice or negligence, schools attempting to regulate speech under a theory of defamation face major obstacles rooted in the traditions of libel law. First, libelous statements must be assertions of fact, not opinion.[58] Much of the speech that schools wish to suppress is not factual in nature, but falls more within the rubric of name-calling. This type of speech is not an assertion of fact, and, therefore, it cannot arguably constitute libel.[59] Second, to be libelous, a statement must refer to a particular individual, and be so understood.[60] Although the Supreme Court recognized the concept of group libel in *Beauharnais v. Illinois,*[61] the soundness of its

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[56] *Id.*

[57] *Id.*

[58] Cianci v. New Times Publishing, Inc., 639 F.2d 54, 64 (2d Cir. 1980). *See also* Hutchner v. Castillo-Puche, 551 F. 2d 910, 913 (2d Cir. 1976), *cert. denied*, 434 U.S. 834 (1977) ("A writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expression of it may be."). *See generally* Chen, *Once More into the Breach: Fact Versus Opinion Revisited After* Milkovich v. Lorain Journal Co., 1 SETON HALL CONST. L.J. 331 (1991).

[59] PROSSER & KEETON, THE LAW OF TORTS 113 n.10 (5th ed. Supp. 1988) (citing Greenbelt Cooperative Pub. Ass'n v. Bresler, 398 U.S. 6 (1970)) ("[S]tatements taken to be mere name-calling, metaphor, or rhetorical hyperbole rather than fact, are also protected and cannot form the basis for a libel action.").

[60] PROSSER & KEETON, *supra* note 59, § 111 at 783. The plaintiff has the burden of proving that the publication refers to him when the reference is not clear. *Id.* In general, defamatory publications regarding a group will not support an action. *Id.* at 784. *But see* Neiman-Marcus v. Lait, 13 F.R.D. 311 (S.D.N.Y. 1952) (defamatory statement referring to only 25 members of the Neiman-Marcus sales staff).

[61] 343 U.S. 250 (1952). In *Beauharnais*, the petitioner was convicted under a municipal ordinance for distributing lithographs which depicted negroes in depraved, criminal and unchaste acts. *Id.* at 251-52. The petitioner argued both that the municipal ordinance infringed upon the first amendment freedom of speech and therefore violated his due process rights, and was too broad to support conviction for a crime. *Id.* at 252-53. Reviewing petitioner's assertions, the Court recognized that an individual's rights were often inextricably bound to the rights of a group to which he belonged, either racial or religious, and that employment, educational opportunities, and even his dignity may

reasoning is questionable in light of subsequent Supreme Court holdings, rendering it unlikely that the Court would decide in the same manner today.[62] Finally, in all cases of libel, truth is an absolute defense.[63] If a statement is factually true, it cannot, by definition, be libelous.[64] The law presumes that a defamatory statement is false, and the defendant has the burden of proving its veracity.[65] For example, if a student publication were to satirize a minority student program on the grounds that the students in the program had lower grades on average than students not in the program, and the university attempted to prosecute the publication under a student conduct code modeled after traditional libel law, an absolute defense would be the truth of the statement.

B. FIGHTING WORDS AND INCITEMENT TO UNLAWFUL ACTS

Another method schools have employed to avoid constitutional challenge is to add a fighting words provision to their student conduct codes.[66] Both the fighting words and incitement to unlawful acts doctrines, however, require the plaintiff to show a likelihood of an imminent breach of the peace of the type normally associated with "face-

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be effected by the reputation of that group. *Id.* at 262-63.

[62] In *Beauharnais* the majority appeared to apply a rational review of the group libel statute in question. *Id.* at 262. The Supreme Court has subsequently held, however, that the first amendment deserves strict scrutiny. Widmar v. Vincent, 454 U.S. 263, 276 (1981). In *Widmar*, a student religious group, established at the University of Missouri, regularly held its meetings on the campus, with the University's permission, for a period of four years. *Id.* at 265. Subsequently, the group was advised that it could no longer meet at the University pursuant to a University regulation prohibiting the use of University buildings or facilities for religious activities. *Id.* The student group challenged this exclusion as an infringement on their first amendment rights, but the Court asserted that "the most exacting scrutiny" must be employed in cases where the state undertakes to regulate speech based on content. *Id.* at 276.

[63] *See* PROSSER & KEETON, *supra* note 59, § 116, at 840-42.

[64] *Id.*

[65] *Id.* § 116, at 841 (citing Bingham v. Gaynor, 203 N.Y. 27, 96 N.E. 84 (1911); Atwater v. Morning News Co., 67 Conn. 504, 34 A. 865 (1896)).

[66] *See supra* note 27 and accompanying text. In Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), "fighting words" were deemed to be those that "men of common intelligence would understand to be words likely to cause an average addressee to fight," such as "threatening, profane or obscene revilings," and words "plainly tending to excite the addressee to a breach of the peace." *Id.* at 573.

to-face" communication.[67] Because student publications do not involve face-to-face communication, such codes are inapplicable to student publications.

The fighting words doctrine emerged in *Chaplinsky v. New Hampshire*.[68] The *Chaplinsky* Court upheld a conviction under a New Hampshire statute that prohibited addressing "any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place."[69] The Court reasoned that the statute was constitutional because it was narrowly drawn to prohibit only "face-to-face words likely to cause a breach of the peace."[70] Since most student publications by their very nature involve written or recorded words, the element of face-to-face confrontation, as required by *Chaplinsky*, is not present. It is difficult to imagine any student publication that would meet the face-to-face requirement of *Chaplinsky*.

In subsequent decisions, moreover, the Court has made it clear that a fighting words provision is valid only if it prohibits "direct personal insults," as opposed to insults directed to a broad audience.[71] Offensive language in a student publication would, therefore, have to be directed toward a particular individual to be constitutionally prosecuted under a fighting words prohibition.

Even if the face-to-face and direct personal insult requirements did not exist, it is not at all certain whether a fighting words prohibition could pass constitutional muster today. The Supreme Court has greatly limited the applicability of the fighting words doctrine by utilizing the standards of vagueness and overbreadth.[72] Employing these doctrines, the Court has overturned convictions for language that appears to be

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[67] *See* Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (A state may not prohibit language which advocates the use of force unless the advocacy is intended to incite or produce imminent lawless action and will likely incite or produce such lawless action.). *Chaplinsky*, 315 U.S. at 573 (upholding a state statute which was narrowly drafted to prohibit the use of such speech in a public place as would likely cause a breach in the peace).

[68] 315 U.S. 568 (1942).

[69] *Id.* at 568. *See also supra* note 40.

[70] *Chaplinsky*, 315 U.S. at 573.

[71] Cohen v. California, 403 U.S. 15, 20 (1971) (The state cannot, consistent with the first and fourteenth amendments, criminalize the public use of the word "fuck" when the word was not directed at a particular individual.).

[72] CONSTITUTIONAL LAW, *supra* note 11, § 16.40, at 946.

considerably more offensive than that uttered in *Chaplinsky*.[73] In doing so, the Court has held that words that denigrate are not, by themselves, enough to constitute fighting words.[74]

In short, neither libel law nor the fighting words doctrine provide a practical method of regulating student expression, particularly student publications. The constitutionally mandated requirement of proving actual malice, combined with the common law elements of defamation, imposes a nearly insurmountable obstacle to prosecuting student expression under a theory of libel law. The fighting words doctrine and the closely related concept of incitement to unlawful acts are limited to face to face encounters in which the expression is likely to result in an immediate breach of the peace. Moreover, the fighting words doctrine has been even further limited by the Court's application of the concepts of vagueness and overbreadth.

IV. SUPPORTERS OF STUDENT CONDUCT REGULATIONS

Proponents of student conduct regulations fall into two broad classes: those who attempt to justify the regulations under some traditional exception to the prohibition against content based regulation of speech, and those who question traditional first amendment jurisprudence.[75]

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[73] *Id.* § 16.40, at 946-47. For example, the Supreme Court overturned a conviction on the grounds that the ordinance in question was overbroad. Lewis v. City of New Orleans, 415 U.S. 130, 134 (1974). In *Lewis*, a woman addressed a police officer, "you god damn m.f. police." *Id.* at 131.

[74] *Lewis*, 415 U.S. at 133. In *Lewis*, the Supreme Court reversed and remanded a conviction under a New Orleans ordinance which made it a criminal offense to curse, revile or use obscene or opprobrious words to a police officer in the performance of his duties. *Id.* at 132. Justice Powell, concurring separately, noted that "the words may well have conveyed anger and frustration without provoking a violent reaction from the officer." *Id.* at 135 (Powell, J., concurring.)

This issue was similarly examined by the Court in Gooding v. Wilson, 405 U.S. 518, 527-28 (1972), which invalidated a Georgia statute prohibiting the use of "opprobrious words or abusive language, tending to cause a breach of the peace . . . ." *Id.* at 519. The *Gooding* Court held that this statute far exceeded the scope of the "fighting words" contemplated by *Chaplinsky*. *Id.* at 524. *See also* Ashton v. Kentucky, 384 U.S. 195 (1966); Cox v. Louisiana, 379 U.S. 536 (1965). If face to face curses cannot be upheld as fighting words, one has to wonder just what are "fighting words."

[75] I have termed the former group first amendment "traditionalists" and the latter, first amendment "revisionists."

A. THE FIRST AMENDMENT "TRADITIONALISTS"

First amendment "traditionalists" claim that college and university student conduct codes fall within the traditionally recognized exceptions to the content-based regulation of speech, thereby avoiding strict constitutional scrutiny. One commentator who is representative of those whom I have termed first amendment traditionalists is Professor Kent Greenawalt. During his recent lecture at Rutgers Law School-Newark, Professor Greenawalt outlined his theories on suppressing the freedom of expression.[76] While Professor Greenawalt did not expressly address the issue of student conduct codes, he did present what he believes are justifications for suppressing "abusive speech": first, speech that is injurious to the addressee;[77] second, speech that is generally offensive.[78]

Professor Greenawalt began his analysis by reviewing the fighting words doctrine and the corresponding concept of "danger of imminent violence."[79] His analysis of the doctrine comports well with the reasoning of *Chaplinsky* and subsequent Supreme Court holdings.[80]

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[76] Professor Greenawalt's lecture, later published as Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287 (1990), was delivered as the Edward J. Bloustein Lecture.

[77] *Id.* at 298-300.

[78] *Id.* at 300-02.

[79] *Id.* at 294-98. Professor Greenawalt focuses his discussion of when free speech may properly be restricted on three factors, to wit, "the speaker's aims and understandings, the probability of violence, and the breadth of circumstances against which that probability is assessed." *Id.* at 296. In considering these factors, Professor Greenawalt suggested:

> Inquiry should not concentrate on the perceived capacity of a particular victim to respond physically. The test should be whether remarks of that sort in that context would cause many listeners to respond forcibly. Neither statutory nor constitutional standards should require that a particular addressee be, or appear, likely to react violently.

Id. at 297-98.

[80] Professor Greenawalt's analysis of *Chaplinsky* properly focuses on the potential for violent response. *Id.* at 294. Moreover, he provides an interesting analysis of how likely the potential for violence must be and a description of the "average addressee." *Id.* at 297-98. Professor Greenawalt suggests the following hypothetical:

> Imagine that in an area where few blacks live, a twenty-five year old white man of average size and strength waits for a bus with a single black person, and the white directs a torrent of insults and racial epithets at his black companion.

Professor Greenawalt, however, strayed far afield when he proposed other constitutional grounds sufficient to suppress free speech. Specifically, Professor Greenawalt contended that speech, injurious to an addressee, may be constitutionally prohibited.[81] He purported to find support for this position in *Chaplinsky*, which he reads as allowing the suppression of words that injure.[82] Apparently, Professor Greenawalt believes that injury to the addressee provides a basis for constitutionally suppressing speech, separate and distinct from preserving the peace.[83] Additionally, Professor Greenawalt interpreted the "imminent harm" standard as requiring the particular addressee, as opposed to the "average addressee," to be spurred to violence.[84]

In this analysis Professor Greenawalt misconstrued *Chaplinsky* on two points. First, in reading *Chaplinsky* to allow suppression of injurious speech, Professor Greenawalt raised *obiter dicta* to the level of holding and ignored subsequent Supreme Court decisions, all of which focus on the state's interest in preventing a breach of the peace and not on the injury caused to the addressee.[85] Focusing upon the intent to suppress

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> Does it matter if the black listener is 1) a strong twenty-three year old man, 2) a seventy-year-old man on crutches, 3) a very small woman of fifty, or 4) a child of nine? Only in the first instance is violence likely. Can the same remark be punishable if directed at the one person able to respond and constitutionally protected if directed at people not able to match the speaker physically?

Id. at 297.

[81] *Id.* at 298-300. To illustrate speech injurious to an addressee, Professor Greenawalt suggests an Hispanic woman standing alone, being tormented by four men who insult her gender and ethnic background and call her a "whore." *Id.* at 298. Professor Greenawalt asserts that speech such as this, intended "to hurt and humiliate, not to assert facts or values" should be constitutionally restricted. *Id.*

[82] *Id.* Specifically, Professor Greenawalt referred to *Chaplinsky's* holding which states that words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

[83] Professor Greenawalt asserts that the fighting words doctrine removes from constitutional protection, words that injure *or* incite a breach of the peace. *Id.*

[84] *Id.* at 299.

[85] The *Chaplinsky* Court's holding focuses on the concept of "fighting words" and whether certain words would cause a man of common intelligence to fight. *Chaplinsky*, 315 U.S. at 573. *See also supra* note 70 and accompanying text. Indeed, the passage referred to by Professor Greenawalt is the Court's only reference to words "which by their very utterance inflict injury." *Chaplinsky*, 315 U.S. at 572.

For example, the Court held that the words "Fuck the Draft" displayed on Cohen's jacket were not fighting words because the expression was not directed to anyone,

injurious speech, Professor Greenawalt quoted language from *Chaplinsky* stating that there is no constitutional protection for words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace,"[86] leaving the reader with the impression that the *Chaplinsky* Court's holding was premised upon two separate lines of reasoning. By portraying a skewed picture of *Chaplinsky*, Professor Greenawalt obfuscated its holding. He conveniently neglected to inform the reader that the statute before the Supreme Court had been expressly limited by the New Hampshire Supreme Court to forbidding only those words that "have a *direct tendency to cause acts of violence* by the persons to whom, individually, the remark is addressed."[87] Therefore, under *Chaplinsky*, a court should not consider the injury to the addressee in determining whether a statement constitutes fighting words; rather, the only factor to be considered by a court is whether the speech is likely to cause an imminent breach of the public peace by the violent reaction of the addressee.

Second Professor's Greenawalt erred in construing *Chaplinsky* to require that the speech provoke the *particular* addressee to violence. This analysis ignores the language of *Chaplinsky* which states:

> The word "offensive" is not to be defined in terms of what a *particular* addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are "fighting words" when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight.[88]

The focus of *Chaplinsky* then is on classes of words which may be suppressed, not because of the proclivity of a particular addressee to react violently to any given phrase, but because of the likelihood of an average individual to react violently.

Professor Greenawalt continued his analysis, suggesting that general

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implying that this decreased the likelihood of violent response. Cohen v. California, 403 U.S. 15, 20 (1971). *Cf.* Feiner v. New York, 340 U.S. 315 (1951).

[86] Greenawalt, *supra* note 76, at 295 (quoting *Chaplinsky*, 315 U.S. at 572).

[87] Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (citing State v. McConnell, 70 N.H. 294, 47 A. 267 (1900); State v. Brown, 68 N.H. 200, 38 A. 731 (1895) (emphasis added)).

[88] *Chaplinsky*, 315 U.S. at 573 (citing State v. McConnell, 70 N.H. 294, 47 A. 267 (1900); State v. Brown, 68 N.H. 200, 38 A. 731 (1895) (emphasis added)).

"offensiveness" may serve as a basis for suppressing speech.[89] While recognizing that the "Constitution does not permit prohibition based on the offensiveness of language alone,"[90] Professor Greenawalt purported to find support for his position in two Supreme Court decisions,[91] *Bethel School Dist. v. Fraser*[92] and *FCC v. Pacifica Foundation.*[93]

In *Pacifica Foundation*, the Court held that the FCC could restrict the use of offensive language to time periods when it was unlikely that children would be listening.[94] The Court premised its holding on two lines of reasoning: the intrusive nature of radio, which allowed it to enter into the homes of individuals who did not seek out the language,[95] and the state's interest in helping parents to prevent their children from listening to indecent language.[96] Although the holding of *Pacifica Foundation* appears to afford less protection to offensive speech, it is important to note that the Court did not suppress the offensive language. The *Pacifica Foundation* Court merely regulated the time during which it could be aired.[97] Furthermore, contrary to Professor Greenawalt's implications, the notion that offensive speech deserves less first

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[89] *See* Greenawalt, *supra* note 76, at 300.

[90] *Id.* at 301 (citing Cohen v. California, 403 U.S. 15 (1971)). For a discussion of *Cohen*, see *supra* note 71 and accompanying text.

[91] Greenawalt, *supra* note 76, at 301.

[92] 478 U.S. 675 (1986).

[93] 438 U.S. 726 (1978).

[94] *Id.* at 750.

[95] *Id.* at 748-49. Specifically, the Court stated:

> Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.

Id.

[96] *Id.* at 749-50. In addition, the Court noted that broadcasts were accessible to children yet unable to read. *Id.* at 749. Therefore, while a written transcript of the "Filthy Words" broadcast might have been incomprehensible to young children, the broadcast could have been well within their grasp. *Id.* Based, in part, upon this factor, the Court upheld the regulation of otherwise protected speech. *Id.* (citing Ginsberg v. New York, 390 U.S. 629, 639-40 (1968)).

[97] *Id.* at 750.

amendment protection was not accepted by a majority of the Court.[98]

Similarly, in *Fraser*, the Court upheld the suspension of a student for using vulgar, but not obscene, language during a speech at a high school assembly.[99] The student in question made a speech nominating a fellow student for a student government position. During the entire speech, he referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.[100] The Court held that while the first amendment protected an adult making a political point in an offensive manner, the same latitude was not extended to children in public school.[101] The Court's holding was also premised upon the state's interest in shielding a juvenile captive audience from offensive expression.[102]

Even if it is possible to abstract from these cases *some* notion of a lesser degree of first amendment protection for offensive speech, any

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[98] Indeed, the majority clearly stated, "[a]lthough these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the first amendment. Some uses of even the most offensive words are *unquestionably protected*." *Id.* at 746 (emphasis added). In this case, the majority's restriction is clearly intended to protect minors from offensive language. Justice Powell, whom Justice Blackmun joined, concurred in the holding, but did not agree that offensive speech deserved less protection. *Id.* at 761-62 (Powell, J., concurring). Justices Brennan, Stewart, Marshall and White dissented. *Id.* at 777.

[99] Bethel School District v. Fraser, 478 U.S. 675 (1986). The speech given by the respondent was as follows:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.
>
> Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.
>
> Jeff is a man who will go to the every end—even the climax, for each and every one of you.
>
> So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.

Id. at 687 (Brennan, J., concurring).

[100] *Id.* at 677-78.

[101] *Id.* at 682.

[102] *Id.* at 685. The *Fraser* Court referred to previous holdings which similarly extended enhanced protected to children. *See generally id.* at 682-85 (citing FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (upholding the restriction of offensive broadcasts during daytime hours when minors would be more accessible to the broadcast); Ginsberg v. New York, 390 U.S. 629 (1968) (banning the sale of sexually explicit material to minors, even though the same material was entitled to first amendment protection with regard to adults)).

infringement of such speech would have to be narrowly drawn. Neither *Pacifica Foundation* nor *Fraser* permitted total suppression of speech. Rather, in each case, the Court merely regulated the speech in such a manner so as to lessen the chance that juvenile audiences would be exposed to it. Therefore, these cases could not serve as a basis for regulating student expression on a college campuses where contact with juveniles is virtually non-existent.[103]

In summary, the first amendment "traditionalists," as exemplified by Professor Greenawalt, fail to adequately explain how student conduct codes can be harmonized with accepted first amendment jurisprudence. The fighting words doctrine is the only defensible exception discussed by Professor Greenawalt which can possibly justify the content based regulation of speech.[104] As previously discussed, however, the scope of this sole exception has been severely limited during recent years, both by the restriction of what constitutes fighting words[105] and by the use of the vagueness and overbreadth doctrines.[106] Thus, in light of this analysis, it appears extremely unlikely that the fighting words doctrine could be constitutionally applied to any form of expression, let alone student publications.

B. THE FIRST AMENDMENT "REVISIONISTS"

First amendment "revisionists" recognize that using student conduct codes to censure speech based upon its content does not comport with the first amendment as it has traditionally been interpreted. Perhaps the

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[103] Greenawalt, *supra* note 76, at 305. Professor Greenawalt's provided an additional justification for suppressing free speech based upon the "long-term harm" caused by such speech. *Id.* at 302. Discussing long-term harm, Professor Greenawalt emphasized that the use of insults and epithets tend to "reinforce feelings of prejudice and inferiority and contribute to social patterns of domination." *Id.* Professor Greenawalt further posited that, when dealing with long-term harms, the particular audience which is targeted is not of primary significance. *Id.* (citing L. Bollinger, THE TOLERANT SOCIETY 38-39 (1986); E. BARENDT, FREEDOM OF SPEECH 163-65 (1985); Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281, 283-84; Note, *A Communitarian Defense of Group Libel Laws,* 101 HARV. L. REV. 682, 689-94 (1988)). He argues that insults and epithets reinforce feelings of prejudice and inferiority. *Id.* Nonetheless, after an analysis of this often proffered justification, Professor Greenawalt correctly concluded that suppression of speech on this basis would be unconstitutional.

[104] *See supra* notes 79-80 and accompanying text.

[105] *See supra* notes 73-74 and accompanying text.

[106] *See supra* note 72 and accompanying text.

most well known of the revisionist genre is Professor Mari Matsuda.[107] Professor Matsuda candidly admits that the regulation of "hate speech" is a "limitation on the basis of content" and, as such, is "heresy" in first amendment law.[108] She advocates, in contrast to the traditional content neutral principle, a "non-neutral value-laden approach" to regulating speech.[109] While her ideas find no support in the first amendment, they have, at the very least, the virtue of intellectual honesty.

Professor Matsuda eschews the application of neutral principles.[110] Her thesis, quite simply, is that criminal and administrative sanctions

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[107] Associate Professor of Law, University of Hawaii, the William S. Richardson School of Law.

[108] Matsuda, *The James McCormick Mitchell Lecture, Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 Buff. L. Rev. 337, 361 (1988/89).

[109] Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2357 (1989). In her article, Professor Matsuda cites to the following victims experiences, referring to them as "true 'just kidding' stories":

> An African-American worker found himself repeatedly subjected to racist speech when he came to work. A noose was hanging one day in his work area. "KKK" references were directed at him, as well as other unfortunately typical racist slurs and death threats. His employer discouraged him from calling the police, attributing the incidents to "horseplay."
>
> In San Francisco, a swastika was placed near the desks of Asian-American and African-American inspectors in the newly integrated fire department. The official explanation for the presence of the swastika at the fire department was that it was presented several years earlier as a "joke" gift to the battalion chief, and that it was unclear why or how it ended up at the work stations of the minority employees.
>
> In Jackson, Mississippi, African-American employees of Frito-Lay found their cars sprayed with "KKK" inscriptions, and were the targets of racist notes and threats. Local African Americans and Jews were concerned, but officials said the problem was attributed to children.
>
> An African-American FBI agent was subject to a campaign of racist taunts by white co-workers. A picture of an ape was pasted over his child's photograph, and racial slurs were used. Such incidents were called "healthy" by his supervisor.

Id. at 2327-29.

[110] *Id.* at 2325.

should be applied to "racist" speech.[111] She defines what constitutes "racist" speech by looking to the "victim's story,"[112] and would not sanction racist expressions of "hate, revulsion and anger" directed against "historically dominant-group members" by "subordinated-group members."[113] Professor Matsuda, however, fails to define what criteria one must meet to be a "subordinated-group member," nor does she indicate who shall decide who is a "subordinated" as opposed to a "dominant" group member.

In Professor Matsuda's most complete work on the subject, however, she errs when she attempts to harmonize her theories with "traditional" first amendment jurisprudence.[114] Not only does this attempt fail, it highlights the incompatibility of the her theory with first amendment principles. In order to successfully argue that her views are compatible with the first amendment, Professor Matsuda must demonstrate that the speech she considers suppressible is qualitatively different from the speech she considers non-suppressible.[115] In attempting to make this argument, Professor Matsuda immediately falls down the proverbial "slippery slope," for it is simply impossible to carve out for special treatment one idea from the universe of ideas.

Professor Matsuda attempts to distinguish the speech she wishes to suppress from other speech on the basis of what, for lack of a better term, I will call "world opinion."[116] She suggests that racist speech is uniformly rejected, and that this rejection may be viewed as an indication of moral truth.[117] Professor Matsuda, however, offers no support for

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[111] *Id.* at 2321.

[112] *Id.* at 2326.

[113] *Id.* at 2361. For example, under her theory, a black could not be convicted or sanctioned for making racist remarks to a white because she contends that racists remarks to a white hurt less than racist remarks to a black. *Id.*

[114] *Id.* at 2356. Specifically, Professor Matsuda suggests that "[i]n order to respect first amendment values, a narrow definition of actionable racist speech is required." *Id.* She argues that if such restricted categories are not formulated, the courts will be left to "stretch existing first amendment exceptions," such as "fighting words," and the "content/conduct" distinction, beyond practicality. *Id.*

[115] *Id.* at 2357.

[116] Professor Matsuda suggests that "universal" rejection of an idea is a bright-line test for determining whether an idea is false. *Id.* at 2359.

[117] *Id.* at 2359 n.203.

this proposition which is the philosophical cornerstone of her argument,[118] and her thesis is subject to several levels of criticism.

First, the premise of Professor Matsuda's argument, namely that racist speech is universally rejected, may be disputed on two grounds: one, that racist speech is not uniformly rejected, and two, that there is no uniform definition as to what constitutes racist speech. While Professor Matsuda may be correct that a majority of the people in the world would reject racist speech, such sentiments are hardly universal. The mere fact that there are groups she wishes to censure for using racist speech indicates that such speech is not universally renounced. Regrettably, the ethnic and racial violence springing up across the world bears mute testimony that identification with, and the belief in the superiority of, one's own racial and ethnic group are still strong motivating forces for many individuals.[119]

Moreover, what is considered racist speech in one country is not necessarily considered racist speech in another. When Professor Matsuda asserts that all countries reject racist speech,[120] she engages in an ancient bit of sophistry. For example, all societies forbid murder, but that is only because murder is defined as an unlawful killing. Different societies may have very different definitions of what murder is. Likewise, assuming Professor Matsuda is correct that all people reject racist speech, it does not follow that there is any consensus on what constitutes racist speech. Rather, it merely means that individuals reject speech their society defines to be "bad."

Second, even if one concedes the premise of Professor Matsuda's

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[118] Rather, Professor Matsuda outlines the proposition briefly in a few lines and in a short footnote, as if it were axiomatic, stating:

> How can one argue for censorship of racist hate messages without encouraging a revival of McCarthyism? There is an important difference that comes from human experience, our only source of collective knowledge. We know, from our collective historical knowledge, that slavery was wrong. We known white minority rule in South Africa is wrong. This knowledge is reflected in the *universal acceptance of the wrongness of the doctrine of racial supremacy.* There is no nation left on this planet that submits as its national self-expression the view that Hitler was right.

Id. at 2359 (emphasis added).

[119] *See generally An Outbreak of Bigotry*, TIME, May 28, 1990 at 35.

[120] Matsuda, *supra* note 109, at 2359. Professor Matsuda further commented that the protection of racist organizations was "uniquely American," and set forth as illustrative the police protection extended to the Klu Klux Klan for it's anti-negro marches. *Id.* at 2341-48.

argument, it does not necessarily follow that universal acceptance or rejection of an idea constitutes truth. At one time the world was universally believed to be flat. Conversely, the idea that the world was round was universally rejected. Would Professor Matsuda have us today fear falling off the edge of the earth?

The pitfall of Professor Matsuda's argument is illuminated when her theory is brought to its logical conclusion. According to this theory of truth, any idea currently "universally" rejected could never be found to be true, since any discussion of the rejected idea could be suppressed. Furthermore, since universality of opinion connotes truth, it follows that any idea currently universally accepted as true could never be subsequently discovered to be false. If taken seriously, such a theory of knowledge inevitably leads to stagnation and orthodoxy of thought.

Third, even if Professor Matsuda is correct that racist speech is universally rejected, and, therefore, false, there is a respected line of philosophical thought which holds that stifling even a false idea "would be an evil still."[121] While it is not possible to attempt to do justice to the argument here, briefly put, it reasons that if false ideas are not allowed to be rigorously and openly examined, then truth is memorized dogmatically rather than discovered for what it is.[122]

Finally, the greatest weakness in Professor Matsuda's argument lies in its inability to distinguish racist speech from other unpopular forms of protected speech. Professor Matsuda herself unwittingly provides the

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[121] J. MILLS, ON LIBERTY 77 (1982 ed.).

[122] *Id.* at 96-97. This theory suggests:

> There is a class of persons (happily not quite so numerous as formerly) who think it enough that if a person assents undoubtingly to what they think true, though he has no knowledge what ever of the grounds of the opinion, and could not make a tenable defence of it against the most superficial objections. Such persons, if they can once get their creed taught from authority, naturally think that no good, and some harm, comes of its being allowed to be questioned. Where their influence prevails, they make it nearly impossible for the received opinion to be rejected wisely and considerately though it may still be rejected rashly and ignorantly; for to shut out discussion entirely is seldom possible, and when it once gets in, beliefs not grounded on conviction are apt to give way before the slightest semblance of an argument. Waiving, however, this possibility—assuming that the true opinion abides in the mind, but abides as a prejudice, a belief independent of, and proof against, argument—this is not the way in which truth ought to be held by a rational being. This is not knowing the truth. Truth, thus held, is but one superstition the more, accidentally clinging to the words which enunciate a truth.
>
> *Id.*

perfect example, attempting to demonstrate that her theory would not lead to the suppression of Marxist-Leninist speech because it is not universally rejected, and it is clearly political.[123]

Since the time that Professor Matsuda wrote her article, however, the world has witnessed the near complete repudiation of Marxist-Leninist ideology.[124] Under Professor Matsuda's theory of truth this "universal" rejection proves that the speech is false. Furthermore, she cannot even differentiate Marxist-Leninist speech from racist speech on the grounds that the former is political and the latter is not, because as she herself has pointed out some individuals believe "[e]verything is political."[125] Therefore, under her theory there is no distinction between Marxist-Leninist speech and racist speech. Will she now concede that Marx-Leninist speech may be suppressed? Somehow, one feels the answer would be no.

Professor Matsuda's attempt to reconcile her theory with the first amendment fails both in its practical application and in its epistimological underpinnings. Thus, her theory is revealed to be exactly as she originally stated it: an attempt to impose her values on others by making the values of which she approves inviolate. Hers may be noble values, but they are hers nonetheless, and she offers no principled, coherent or objective method to ensure that other less noble values will not be similarly imposed.

V. THE CASE FOR LIBERTY

Professor Matsuda is at her best when she frees herself from the constraints of the Constitution, *stare decisis* and legal analysis, and confines herself to identifying competing value systems. In contrasting the values preeminent in the first amendment with those underlying her theory, I believe that she may have isolated the fundamental issue underlying the debate over student behavioral codes.

The preeminent value embodied in the first amendment is that of

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[123] Matsuda, *supra* note 109, at 2359-60. Professor Matsuda categorizes Marxist thought as "part of the ongoing efforts of human beings to understand their world and improve life in it." *Id.* at 2360.

[124] The radical changes that have occurred recently in the Soviet Union and Eastern Europe are well documented. The events that took place in Tianimen Square lend additional support to this view, although technically, China is Maoist not Marxist.

[125] Matsuda, *When the Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 Womens Rights L. Rep. 7, 8 (1989).

Liberty.[126] Professor Matsuda, however, candidly states that she places equality first among the hierarchy of values.[127] The genesis of the debate between first amendment revisionists and civil libertarians then, lies in the tension between Liberty and equality.

There is no principled, purely logical, manner in which to prove that Liberty should and must take precedence over all other values, including equality, in our Constitutional system.

To be sure one could argue that while equality is certainly a constitutional value, the first amendment revisionist's version of equality is extra-constitutional in nature. When a first amendment revisionist speaks of equality, he is speaking of substantive equality,[128] i.e., equality of outcomes. The equality enshrined in the Constitution is an equality of opportunity, it requires the government to apply its laws to its citizens equally.[129] Because Liberty is a value clearly fostered by the Constitution and the first amendment revisionist's version of equality is not, one could argue that Liberty must trump the first amendment revisionist's equality.

Such an argument, however, is unsatisfying for two reasons. First, simply noting that the first amendment revisionists' equality is not protected by the Constitution does not address their argument that it should be valued more highly than Liberty. Second, I wish to argue that Liberty should take precedence over all other values, even the equality of opportunity protected by our Constitution.

Again, this proposition cannot be proved with mathematical precision. I could harken back to the arguments of the founding fathers which trumpeted Liberty as the supreme value.[130] This is rhetoric, however, not proof. I could make sociological arguments, but, I am sure

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[126] At the author's request, the word "Liberty" has been capitalized throughout this article.

[127] Matsuda, *supra* note 108, at 360.

[128] France, *supra* note 7, at 48.

[129] "No *State* shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1 (emphasis added). The fifth amendment's due process clause has also been interpreted to contain elements of equal protection. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954). *See also* Corrigan v. Buckley, 271 U.S. 323, 330 (1926) (Neither the fourteenth nor the fifth amendment prohibit "private individuals from entering into contracts 'with racially restrictive covenants' respecting the control or disposition of their property.")

[130] Perhaps the most unequivocal statement of this position was made by Patrick Henry when he said, "I know not what course others may take, but as for me, give me liberty or give me death." Patrick Henry, speech at the Virginia Convention at Saint John's Episcopal Church, Richmond, Virginia.

that for each such argument I proffered a countervailing rationale could be created.

I can only aver that Liberty is the value that I hold most dear. To be sure, Liberty and free speech can lead to division and rancor. This was recognized by Justice Douglas, who in writing for the majority in *Terminiello v. Chicago*[131] stated:

> [A] function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. . . . [T]he alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.[132]

However, even though Liberty and its concomitant value, freedom of expression, may be divisive, they are precious ideals for which many have spilt their blood. People do not accept a loss of their Liberty without a struggle, nor should they.

To impose substantive equality, as these student conduct codes attempt to do, requires a deprivation of Liberty. For this reason these codes, and their proponents, will and should be fought. Tyrants, like fools, should not be suffered gladly. We should remember the admonition of Justice Louis Brandeis, "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[133]

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[131] 337 U.S. 1 (1949), *reh'g denied*, 337 U.S. 934 (1949).

[132] *Id.* at 4.

[133] Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

APPENDIX

A. University of Connecticut Student Conduct Code:

The University of Connecticut reaffirms that it does not condone harassment directed toward any person or group within its community - students, employees or visitors. Every member of the University ought to refrain from actions that intimidate, humiliate or demean persons or groups or that undermine their security or self-esteem.

Harassment consists of abusive behavior directed toward an individual or group because of race, ethnicity, ancestry, national origin, religion, gender, sexual orientation, age, physical or mental disabilities. The University a) strictly prohibits making submission to harassment either explicitly or implicitly a term or condition of an individual's employment, employment appraisal, or evaluation of academic performance; and b) forbids harassment that has the effect of interfering with an individual's performance or creating an intimidating, hostile or offensive environment.

The University deplores behavior that denigrates others because of their race, ethnicity, ancestry, national origin, religion, gender, sexual orientation, age, physical or mental disabilities. All members of the University community are responsible for the maintenance of a social environment in which people are free to work and learn without fear of discrimination and abuse. The failure of managers at any level to remedy harassment violates this policy as seriously as that of the original discriminatory act.

Sexual harassment is defined as any unsolicited and unwanted sexual advance, or any other conduct of a sexual nature whereby a) submission to these actions is made either explicitly or implicitly a term or condition of an individual's employment, employment appraisal, or evaluation of academic performance; or b) these actions have the effect of interfering with an individual's performance or create an intimidating, hostile, or offensive environment.

Examples of sexual harassment in the work place may include all activities that attempt to extort sexual favors, inappropriate touching, suggestive comments, and public display of pornographic or suggestive calendars, posters, or signs. All forms of sexual harassment and discrimination are considered serious offenses by the University. Such behavior is particularly offensive when power relationships are involved.

The University strongly discourages romantic and sexual relationships between faculty and student, or between supervisor and employee even when such relationships appear, or are believed to be, consensual. The lines of power and authority that exist between the parties may

undermine freedom of choice.

Graduate students serving as teaching assistants are well advised to exercise special care in their relationships with students whom they instruct and evaluate as a power differential clearly exists although teaching assistants do not hold faculty appointments.

Any person who believes that she or he is being harassed or otherwise subjected to discrimination because of race, ethnicity, ancestry, national origin, religion, gender, sexual orientation, age, physical, or mental disabilities, or other similar characteristics is encouraged to consult the Office for Affirmative Action Programs (OAAP). The office is located in Hall Building, 2nd Floor, Box U-175, 362 Fairfield Rd., Storrs, CT 06269-2175. The telephone number is 486-2943.

Complaints against students are governed by the provisions of the Student Conduct Code rather than this policy. Any such complaints should be directed to the Office of the Dean of Student, Box U-62, Wilbur Cross Building, Room 221; telephone 486-3426.

Any person who believes he or she is a victim of, or witness to, a crime motivated by bigotry or bias should report it to The University of Connecticut Police Department at 486-4800, located at 1501 Storrs Road, Box U-70, Storrs, CT 06369.

Deans, directors and department heads receiving complaints must alert OAAP as to the nature of the incident, and may refer the inquirer to the OAAP, or seek information on the inquirer's behalf to resolve the complaint. (The anonymity of complainant and accused may be maintained during the reporting and consultation.)

Other sources of information include the Women's Center, the Office of the Dean of Students, the Simons Afro-American Cultural Center, the International Center and the Puerto Rican/Latin American Center.

Each office and person involved in advising complainants on sources of assistance must avoid comments that might dissuade victims from pursuing their rights or constitute threats of reprisal. Such behavior in itself is discriminatory and is a violation of this policy.

John T. Casteen, III, President

February 10, 1990

B. University of Wisconsin Student Conduct Code:

UWS 17.06 Offenses defined. The university may discipline a student in non-academic matters in the following situations.

(1) For intentional conduct which constitutes a serious danger to the personal safety of other members of the university community or guests.

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

(a) A student would be in violation if he or she attacked or otherwise physically abused, threatened to physically injure, or physically intimidated a member of the university community or a guest because of that person's race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age.

(b) A student would be in violation if he/she attacked or threw rocks or other dangerous objects at law enforcement personnel whose services had been retained or called for to protect members of the university community or university property, or if he/she incited others to do so when he/she knew or reasonably should have known that such conduct would result.

(c) A student would be in violation if he/she sold or delivered a controlled substance as defined by the Wisconsin Uniform Controlled Substance Act (ch. 161, Stats.) or if he/she possessed a controlled substance with intent to sell or deliver. For the purposes of this section "delivery" shall be defined as a delivery prohibited by ch. 161, Stats.

(d) A student would be in violation if he/she removed, tampered with, or otherwise rendered useless university equipment or property intended for use in preserving or protecting the safety of members of the university community such as fire exit signs, extinguishers, alarms, or hoses, first aid equipment, or emergency telephones, or if he/she obstructed or caused to be inoperable fire escape routes such as stairwells or elevators.

(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.

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

1. A student would be in violation if:

a. He or she intentionally made demeaning remarks to an individual based on that person's ethnicity, such as name calling, racial slurs, or "jokes"; and

b. His or her purpose in uttering the remarks was to make the educational environment hostile for the person to whom the demeaning remark was addressed.

2. A student would be in violation if:

a. He or she intentionally placed visual or written material demeaning the race or sex of an individual in that person's university living quarters or work area; and

b. His or her purpose was to make the educational environment hostile for the person in whose quarters or work area the material was placed.

3. A student would be in violation if he or she seriously damaged or destroyed private property of any member of the university community or guest because of that person's race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age.

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

C. Rutgers University, Student Conduct Code:

Intolerance and bigotry are antithetical to the values of the University, and unacceptable within our community. Discrimination against or the insult, defamation, or harassment of students on the basis of race, religion, color, sex, age, sexual orientation, national origin, ancestry, disability, marital status or veteran status violates acceptable standards of conduct within the University.

Insult, defamation, or harassment directed against any student(s) by any member(s) of our community interferes with the mission of the University. Each member of our community is expected to be sufficiently tolerant of others so that all students are free to pursue their goals in an open environment, able to participate in the free exchange of ideas, and able to share equally in the benefits of our educational opportunities. Beyond that, each member of the community is encouraged to do all that she/he can to ensure that the University is fair, humane, and responsible to all its students.

A community establishes standards in order to be able to fulfill its mission. The policy against insult, defamation, and harassment seeks to guarantee certain minimum standards. Free speech and the open discussion of ideas are to be encouraged. However, a distinction is to be made between speech acts and those which restrict the rights and opportunities of others through violence, intimidation, or the creation of an hostile environment. That distinction is made when the acts in question:

(a) constitute constitutionally unprotected assault, harassment, threats, intimidation, incitement, obscenity, defamation or discrimination; or

(b) directly create a substantial and immediate interference with the educational processes of the University; or

(c) consist of unwelcome sexual advances, requests for sexual concessions or other verbal or physical conduct of a sexual nature where submission to such conduct is made, explicitly or implicitly, a condition of an individual's education; or submission to or rejection of such conduct is used as the basis for decisions affecting an individual's academic status; or such conduct has the purpose or effect of unreasonably interfering with an individual's learning or creating an intimidating, hostile or offensive learning environment; or

(d) are accomplished by means of unlawful defacement of University property.

A variety of actions and words fall under insult, defamation, and harassment ranging from physical assaults to threats, from vandalism to belittling comments, from inappropriate racial epithets to differential treatment of individuals based upon factors irrelevant to what is being considered. In determining whether actions or words rise to the level of insult, defamation, or harassment whether sanctionable or not, students should consider both their intent and effect.

Students who believe themselves to be victims of insult, defamation and harassment should report such incidents to the Dean or Dean of Students of their college.

In addition, President Bloustein has asked each Provost of the University to designate a member of his staff to whom complaints may be directed. In Camden, Provist Gordon has named Ms. Mary Lee Hassall, Associate Dean of Students, (609) 757-6043. For Newark, Provost Samuels has appointed Mr. James Ramsey, Associate Provost, (201) 648-5541. For New Brunswick, Provost Leath has designated Dr. John Creeden, Assistant Provost, (201) 932-7688.

The President has named the following individuals within the University administration to handle complaints by students of insult, harassment, and defamation:

Mr. David Burns, Assistant Vice President for Student Life Policy and Services, 301 Van Nest Hall, New Brunswick, NJ (201) 932-7255. (For all complaints)

Ms. Lee Gidding, Director of Affirmative Action, 39 Union Street, New Brunswick, NJ (201) 932-7152. (For complaints specifically directed against faculty or staff)

These individuals will serve as resources to the community in resolving, or in referring complaints as appropriate.

Insult, defamation and harassment cover a wide variety of actions, many of which are dealt with, in other terms, by substantive and procedural provisions in, for instance, the University Sexual Harassment Policy and Procedure or the University Student Disciplinary Hearing Procedure, under which such acts are to be considered heinous.

Some complaints can be resolved using informal methods, while others will require the implementation of formal procedures. All complaints will be treated confidentially, and complainants are encouraged to report incidents even if they do not wish to pursue the matter beyond the reporting stage.