VOLUME 25, NO. 3 P. 126 Beverly Hills Bar Journal
SUMMER 1991 BEVERLY HILLS BAR JOURNAL

Restrictive Speech Codes on State Run College and University Campuses: Left Wing Inspired Censorship Threatens First Amendment Rights

Edward Tabash

Edward Tabash is a sole practitioner in Beverly Hills. Mr. Tabash has been active, for more than twenty years, in such personal freedoms issues as abortion rights, separation of church and state, and free speech. He is a member of the ACLU.

Personal Prologue

I would be considered more liberal than conservative by the political barometers of the past twenty five years. Yet, I was always uncomfortable with the left-right divide, with its catagories of conservatism and liberalism. I felt that these classifications fail to define entirely consistent outlooks. I always regarded the Soviet Union's historical oppression of those who sought to speak freely as revealing a severely anti liberal society, notwithstanding that the country, since 1917, has been considered to be, overall, the leading left wing nation on earth. I always thought it inconsistent when self styled liberals would attempt to whitewash the persecution of free thinkers and dissenters in the Soviet Union and in mainland China, particularly during the latter's cultural revolution of the 1960's.

The authoritarian left shares in common with the authoritarian right an intolerance of dissent and a willingness to invoke governmental power to forcibly punish or silence differing voices.

My life as a social and political activist and my concomitant legal concerns soon became primarily focused on attempted right wing inspired restrictions on personal liberty. In much of my speaking and debating on behalf of People for the American Way, a civil liberties organization founded initially to oppose the social agenda that religious conservatives hoped to impose on American society, I would publically argue against various forms of censorship, such as attempts to remove from various public school classrooms and libraries such books as J.D. Salinger's *The Catcher in the Rye* and *The Diary of Anne Frank*.[1] Then, I also became aware of a form of attempted censorship from the left, as certain feminists sought to pass laws restricting or punishing the sale or distribution of pornographic material.[2]

I always believed that principles of free speech should not vary depending on whose ox was being gored. I also believed that it was anti-intellectual to adopt a position on a social or political issue, based upon whether the position would be regarded as conservative or liberal, rather than upon an unhampered independent inquiry into the relevant merits.

Thus, notwithstanding my appreciably more liberal than conservative views, again, by late 20th Century standards, I will publically criticize actions of people on the left, which I see as fundamentally unfair and unconstitutional.

Such is the purpose of this article. I intend to show that the left wing inspired restrictive speech codes, that have proliferated over the past two or three years on state run college and university campuses, violate the First Amendment.

Ultimately, our sense of justice will only continue to evolve if we have the courage to reach for universal notions of fairness that do not necessarily favor our own ideological comrades.

The problem of racially, ethnically, sexually, or religiously prejudiced speech on college campuses creates an agonizing choice for many conscientious liberals between two cherished objectives: elimination of discrimination against historically persecuted groups on the one hand, and free speech on the other. However, the choice to favor the goal of easing the distress of victims of bigotry, at the expense of the other objective of protecting free speech, cannot be made in a vacuum. Standing over all such choices is the First Amendment, the text and Supreme Court interpretations of which necessarily constitute the final word on what is permissible in terms of government sponsored restrictions on speech.

---

[1] *Attacks on the Freedom to Learn: A 1984-1985 Report*, published by People for the American Way, Washington, D.C., at page 2.

[2] MacKinnon, Catherine, *Not a Moral Issue*, Yale L. & Policy Rev., Spring 1984, at page 321.

For purposes of this article, the terms "hate speech" and "racist speech" will be used interchangeably to refer generically to words which show bigotry against someone's race, religion, gender, ethnicity, sexual orientation, national origin, and any other catagory defining victims of historical persecution.

1. Government Versus Private Restrictions on Speech

This article deals with restrictive speech codes enforced on state run colleges and universities. It is taken for granted that the speech provisions of the First Amendment have been incorporated into the Due Process Clause of the Fourteenth Amendment and apply to all state, as well as federal, government agencies.[3]

I do not now address the separate issue of whether the speech provisions of the First Amendment apply to private colleges and universities,[4] but accept such application to state run institutions.[5]

2. One Does Not Become a Racist by Protecting Racist Speech

Arguing for the protection of racist speech does not make one a bigot. The magnanimity of the First Amendment is such that protection must be afforded to even that speech which we hate.[6]

3. Examples of Constitutionally Protected Speech that State-Run Colleges and Universities Have Punished or Attempted to Punish

At the State University of New York at Binghamton, a conservative student newspaper was sanctioned by the administration for "gay-bashing" because the paper criticized a proposal to establish a gay and lesbian studies department on campus.[7] The editors of the student newspaper at the University of Lowell in Massachusetts were punished with six months probation, thirty hours of community service, and removal from the newspaper staff, by the administration for publishing a cartoon which was meant to mock overzealous defenders of animal rights and of the death penalty. One side of the cartoon depicted an animal rights activist with the caption: "Some of my best friends are laboratory rats." The other side of the cartoon depicted a pot bellied death penalty advocate; the legend underneath said, "None of his best friends are young, black males." The editors were formally charged with creating a "hostile environment" on campus and other "civil rights" abuses.[8]

At the University of Michigan, a black dental student was brought up on disciplinary charges for violating the university's speech code because she made a comment in class that she had heard that "minority students had a difficult time in the course" and "were not treated fairly."[9] In another instance at Michigan, a student who read a limerick, alluding to the alleged homosexuality of a famous athlete, for a classroom public speaking exercise, was disciplined and forced to write a letter of apology in the school newspaper for his allegedly homophobic words.[10] Also at Michigan, a student was charged with violating the speech code because he stated in his social work research class that he believed homosexuality was a disease that could be treated.[11]

At the University of Connecticut, a sophomore put up a gag sign on the door to her dorm room describing "people who are shot on sight", including "preppies," "bimbos," and "homos." She was disciplined for violating the student speech code and ordered by the administration to move off campus and was forbidden to set foot in any university dormitory or cafeteria.[12]

4. Examples of Restrictive Speech Codes that are Clearly Vague and Overbroad from a Constitutional Perspective.

Up until it was held to be unconstitutional[13], the University of Michigan was enforcing a speech code that prohibited "victimizing...or...stigmatizing individuals or groups on the basis of race, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam era veteran status."[14]

The University of Connecticut, until challenged in court,[15] enforced a policy that prohibited "making personal slurs or epithets based on race, sex, ethnic origin, disability, religion, or sexual orientation."[16] A further regulation issued by the same university, prohibited "inappropriately directed laughter" and "conspicuous exclusion of students from conversations,"[17] and prohibited any student from saying anything that would create a "demeaning envrionment" for another student.[18]

---

[3] *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

[4] *Doe v. University of Michigan*, 721 F. Supp. 852, 867 (E.Dist Mich 1989).

[5] *Widmar v. Vincent*, 454 U.S. 263, 268-269 (1981).

[6] *Healy v. James*, 408 U.S. 169, 188 (1972).

[7] Doherty, Kathryn, "Leftist Thought Control Pervades America's University Campuses" *Los Angeles Daily Journal*, September 9, 1990.

[8] Savage, David G., "Forbidden Words on Campus", *Los Angeles Times*, February 12, 1991, page A1.

[9] *Ibid.*, page A16.

[10] *Op. Cit., Doe v. University of Michigan*, 721 F. Supp., at page 865, see note 4, supra.

[11] *Ibid.*, page 861.

[12] "Taking Offense" *Newsweek*, December 24, 1990, at page 48.

[13] *Op. Cit., Doe v. University of Michigan*, 721 F. Supp, at pages 867-869. See note 4, supra.

[14] *Ibid.*, page 853.

[15] *Wu v. University of Connecticut*, No. Civ. H-89-649 PCD (D. Conn 1989). This was the policy under which the above described student was prosecuted for hanging the gag sign on her dorm room door. See note 12, supra.

[16] *Op. Cit., Newsweek*, at page 48, see note 12, supra.

[17] *Ibid.*, page 51.

[18] op. cit., Savage, "Forbidden Words on Campus, *Los Angeles Times*, at page A1. See note 8, supra.

The University of California presently prohibits any student from making "personally abusive epithets" that are "inherently likely to promote a violent reaction," including "derogatory references" to race, ethnicity, religion, sex, and sexual orientation.[19]

5. "Fighting Words" and Offensive Speech, the Outer Limits of The First Amendment

In *Chaplinsky v. New Hampshire*, the United States Supreme Court upheld the application of a state statute to words that by their very utterance inflict injury or that incite an immediate breach of the peace.[20] Such words were characterized by the Court as "fighting words."[21] The *Chaplinsky* Court allowed states to punish "face-to-face words plainly likely to cause a breach of the peace by the addressee."[22] Ever since deciding *Chaplinsky*, the Court has retrenched from the decision, even though it has never expressly overruled it. In construing "fighting words", in later cases, the Court has apparently forgotten the first aspect of the *Chaplinsky* test (words that by their very utterance inflict injury) and has focused on the prospect of words inciting an immediate breach of the peace, even though the Court has rarely sustained a state statute punishing "fighting words" since *Chaplinsky*.

The "fighting words" concept has some serious flaws from a First Amendment standpoint. It limits a speaker's right to speak based upon some elusive concept of what would incite an average person, in the listener's situation, to respond with violence. It is what Professor Harry Kalven called a "heckler's veto."[23] It "makes a person a criminal simply because that person's neighbors have no self-control and cannot refrain from violence."[24] The Supreme Court, itself, quoted precisely this language in 1966, when it declared unconstitutional a Kentucky criminal libel statute that punished the use of words "calculated to create disturbances of the peace," in *Ashton v. Kentucky*.[25] The Court said that such language "...leaves wide open the standard of responsibility. It involves calculations as to the boiling point of a particular group, not an appraisal of the nature of the comment per se."[26] Though not expressly overruling *Chaplinsky*, the *Ashton* Court obviously disapproved of broad language defining the permissibility of speech by the nature of the reaction to it.

In *Chaplinsky*, the Court upheld the appellant's conviction for calling the City Marshall of Rochester, New Hampshire, a "God damned racketeer and a damned fascist."[27] Yet, thirty years later, in *Gooding v. Wilson*,[28] the Court overturned the conviction of a person who said to a police officer, "you son of a bitch, I'll choke you to death."[29] The Georgia statute, held unconstitutional by the *Gooding* Court, read, "Any person who shall, without provocation, use to or of another, and in his presence...opprobrious words or abusive language, tending to cause a breach of the peace...shall be guilty of a misdemeanor."[30] While paying lip service to *Chaplinsky*, the *Gooding* Court found that even with the standard dictionary definitions of "abusive" meaning harsh insulting language, and "opprobrious" meaning conveying or intending to convey disgrace, that a prohibition on "abusive" and "opprobrious" language was broader than a ban on "fighting words" and therefore unconstitutional.[31]

If the Court was unwilling to uphold a state's ban on abusive and opprobrious words, it is unlikely to uphold a state's ban, imposed through its university system, on speech that is "stigmatizing" and "victimizing" as in the case of the University of Michigan, described above.[32]

Since deciding *Chaplinsky*, the Court has insisted that "fighting words," as therein defined, are still constitutionally proscribable, even though the Court has subsequently struck down combinations of statutory language and prosecutions that could easily be deemed the equivalent of the *Chaplinsky* prosecutorial package. The Supreme Court appears to be saying that if something looks like a duck, and walks like a duck, it can still be a pigeon. In *Terminiello v. Chicago*,[33] the Court struck down as unconstitutional a municipal ordinance punishing speech that "stirs the public to anger...invites dispute...brings about a condition of unrest...creates a disturbance...or molests the inhabitants [of the city] in enjoyment of peace and quiet by arousing alarm."[34] Appellant made a speech in a filled-to-capacity auditorium, in which he vehemently denounced black people and Jews. The audience was growing hostile and there was an antagonistic "howling" crowd outside the auditorium.[35] Writing for a majority of the Court, Justice Douglas said:

> "...a function of free speech is to invite dispute. It may best serve its highest purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at preconceptions and have profound unsettling effects as it presses for acceptance of ideas...There is no room under our Constitution for a more restrictive view.[36]

---

[19] *Ibid.*, page A16.
[20] 315 U.S. 568, 571-572 (1942).
[21] *Ibid.*, page 572.
[22] *Ibid.*, page 573.
[23] Kalven, *The Negro and the First Amendment*, 140-145 (1965).
[24] Chafee, *Free Speech in the United States*, 151 (1954).
[25] 384 U.S. 195, 200 (1966).
[26] *Ibid.*
[27] *Op. Cit.*, 315 U.S., at page 569, see note 20, supra.
[28] 405 U.S. 518 (1972).
[29] *Ibid.*, page 523.
[30] 405 U.S., at page 519.
[31] *Ibid.*, pages 524-525
[32] See note 14.
[33] 337 U.S. 1 (1949).
[34] *Ibid.*, page 2.
[35] *Ibid.*, pages 2-3.
[36] *Ibid.*, page 4.

Relevant to restrictive campus speech codes, *Terminiello* dealt with unquestionably racist speech that was found to be constitutionally protected, notwithstanding the agitation of a sizable crowd to a near riot.

In *Brandenburg v. Ohio*,[37] the Supreme Court demonstrated its abandonment of that aspect of the *Chaplinsky* test allowing states to punish speech that by its very utterance inflicts injury, outside the areas of defamation and intentional infliction of emotional distress. The *Brandenburg* Court held unconstitutional Ohio's criminal syndicalism act which prohibited the teaching of violent political revolution with the intent of spreading such doctrine, or assembling with a group so advocating.[38] The state convicted the appellant for remarks made at a Ku Klux Klan rally that included such comments as "Send the Jews back to Israel...Bury the nig..rs."[39] The Court said that the state cannot forbid the advocacy of the use of force or the advocacy of violating the law except where such advocacy is directed to "inciting or producing imminent lawless actions and is likely to incite or produce such action."[40] The Court held that notwithstanding the nature of the ideas expressed, no branch of government can punish "mere advocacy" as distinguished from "incitement to imminent lawless action."[41]

The *Brandenburg* Court affirms that an idea's offensiveness without more, is not a constitutional basis for prohibiting speech. Three years after *Brandenburg*, in *Police Department of Chicago v. Mosley*,[42] the Court said, "...above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content,"[43] further saying:

> "...to permit the continued buildup of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control."[44]

The Court's prohibition of government restrictions on speech, based upon content, bears directly upon state run universities seeking to ban verbal displays of bias, bigotry, or hatred directed against any racial, gender, ethnic, religious, or sexually oriented person or persons. "It is clearly unconstitutional to enable a public official to determine which expression of views will be permitted and which will not..."[45]

In *Cohen v. California*,[46] appellant was convicted of walking through the Los Angeles County courthouse with a jacket that bore the inscription, "F... the Draft,"[47] to convey his feelings about the Vietnam war. Justice Harlan, writing for the majority, said that government cannot "excise" as "offensive":

> "...one particular scurrilous epithet from the public discourse, either upon the theory...that its use is inherently likely to cause a violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary."[48]

In language directly relevant to whether government bodies, for our inquiry, state run universities, can ban certain racial epithets because of their inherent odiousness or grievous offensiveness, the *Cohen* Court said that government cannot be trusted with such censorship power, because it would be "inherently boundless."[49] The Court went on to rhetorically ask:

> "How is one to distinguish this from any other offensive word?...For while the particular word being litigated here is perhaps more distasteful than most of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."[50]

The *Cohen* Court affirms that words, even specific epithets that cause great offense, cannot be constitutionally banned.

Perhaps the flag burning cases are the crown jewel of the Supreme Court's odyssey, thus far, in permitting ever more offensive manifestations of opinion to find First Amendment protection. In *Texas v. Johnson*,[51] the Court upheld a decision of the Texas Court of Criminal Appeals reversing a trial court conviction of a person for burning an American flag.[52] Flag burning goes beyond mere speech. It is a physical act beyond the spoken or written word that is undertaken to emphasize the speaker's point of view through dramatic action. Even though the *Johnson* Court acknowledged that government bodies are generally more free to regulate expressive conduct that goes beyond mere speaking or writing,[53] the burning of an American flag was deemed protected First Amendment activity.[54]

---

[37] 395 U.S. 444 (1969).
[38] *Ibid.*, pages 448-449.
[39] *Ibid.*, at page 446, footnote 1.
[40] *Ibid.*, page 447.
[41] *Ibid.*, page 449.
[42] 408 U.S. 92 (1972).
[43] *Ibid.*, page 95.
[44] *Ibid.*, page 96.
[45] *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).
[46] 403 U.S. 15 (1971).
[47] *Ibid.*, page 16.
[48] *Ibid.*, pages 22-23.
[49] *Ibid.*, page 25.
[50] *Ibid.*
[51] 105 L. Ed. 2d. 342 (1989).
[52] 755 S.W. 2d. 92, 97 (1988).
[53] *Op. Cit.*, 105 L.Ed. 2d., at pages 354-355.
[54] *Ibid.*, page 364.

The Court said that the act of burning one's own American flag does not destroy the property of another person and does not thereby do any damage other than to severely offend those who love the flag and see it as the core symbol of our national existence.[55]

> "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive and disagreeable."[56]

One year later, in *U.S. v Eichman*,[57] the Court held unconstitutional a Congressional statute protecting the flag from desecration by an asserted content neutral ban on damaging the physical integrity of the flag. The Court saw through this smoke screen and would not permit Congress to shield a privately owned American flag from contemptuous treatment.[58]

In language directly applicable to state run university attempts to prohibit hate speech, the *Eichman* Court said:

> "We are aware that desecration of the flag is deeply offensive to many. But the same might be said, for example, of virulent ethnic or religious epithets."[59]

By this language the Supreme Court is saying that racist speech is as protected as flag burning. Flag burning is deeply offensive to many. So is racist speech. They both must be endured as essential to a society that permits free expression.

6. Does the Severe Offense Suffered by Members of Historically Persecuted Groups by Hearing Racist Speech Justify Reading an Exception for Such Speech into the First Amendment?

The foregoing has demonstrated that abusive, opprobrious, and deeply offensive words, spoken by one person to another, has First Amendment protection.

Therefore, those who try to argue that constitutional protection can be removed from certain types of racist speech, without doing violence to basic First Amendment principles, have been unpersuasive. One of these is Professor Charles R. Lawrence III, a law professor at Stanford University. In his *If He Hollers Let Him Go: Regulating Racist Speech on Campus*,[60] Professor Lawrence argues that speech which insults or stigmatizes a person or small groups of people based upon the listeners' membership in a historically persecuted group, should not be afforded First Amendment protection.[61] Already he is at odds with the Supreme Court, as shown by the language quoted above from *U.S. v Eichman*,[62] in which the Court held that virulent racial and ethnic epithets are constitutionally protected forms of expression.

Professor Lawrence insists that, by being black, he has a perspective on the damage caused by racist speech which white people cannot generally understand.[63] He argues that a crucial factor compelling the banning of racist speech is that the chief proponents of such prohibitions come from those members of historically persecuted groups who have been the victims of hate speech.[64] Professor Lawrence reveals too much with this argument. The greatest danger of censorship has always been that those who are offended by what is being said will be the ones to prohibit it's expression. It is the proverbial case of the fox being chosen to guard the chickens. Of course, in the end, there will be no chickens. If we permit those offended by speech to be the ones to regulate it, that speech will not survive. Professor Lawrence wants the victims of racist speech to implement its prohibition.[65]

Professor Mari J. Matsuda, an associate professor of law at the University of Hawaii, in her *Public Response to Racist Speech: Considering the Victim's Story*,[66] also argues that the permissible scope of speech should be curtailed in order to make our jurisprudence more responsive to members of "outsider,"[67], that is, historically persecuted, groups. Professor Matsuda maintains that neutral First Amendment principles serve to entrench existing power[68] and thus are not adequate to address the needs of members of traditionally excluded groups in their quest to transcend the consequences of historical discrimination. As with Professor Lawrence's views, such an argument is simply inconsistent with current First Amendment law that prohibits government agencies from content based speech prohibitions.[69]

7. No Arm of Government May Enact Speech Regulations that are Vague and Overly Broad

Any government enactment regulating speech is unconstitutionally vague if people "of common intelligence must guess at its meaning,"[70] that is, if the regulation does not readily permit someone to know in advance of saying something whether the comment will be punishable. A government regulation is also unconstitutionally over-

---

[55] *Ibid.*, page 359.
[56] *Ibid.*, page 360.
[57] 110 L.Ed. 2d. 287 (1990).
[58] *Ibid.*, page 295.
[59] *Ibid.*, page 296.
[60] Duke Law Journal 431 (1990), hereinafter, "Lawrence."
[61] *Ibid.*, pages 450-451.
[62] *Op. Cit.*, 110 L.Ed. 2d, at page 296, see note 59, supra.
[63] *Op. Cit.*, Lawrence, pages 434-435.
[64] *Ibid.*, page 461.
[65] *Ibid.*, page 459.
[66] 87 Mich. Law Rev. 2320 (1989), hereinafter "Matsuda."
[67] *Ibid.*, pages 2322-2323.
[68] *Ibid.*, page 2325.
[69] *Op. Cit.*, *Police Department of Chicago v. Mosley*, 408 U.S., at page 99, see note 42, supra.
[70] *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973).

broad, even if the speech or conduct currently under prosecution is not protected by the First Amendment, if the regulation is written so as to sweep into its range of prohibition, speech or conduct that is constitutionally protected,[71] like fishing nets meant for tuna that also ensnare dolphins. Since racist speech is so protected, the violation of the First Amendment by these speech codes is apparent even before we reach the issue of overbreadth.

The state university speech codes that were quoted, above, are both vague and overbroad. In *Doe v. University of Michigan*,[72] a federal district court held the restrictive speech code of the University of Michigan[73] unconstitutional. The court held that the words "stigmatize" and "victimize" are too general and lack "precise meaning."[74] Students of "common understanding were forced to guess whether a comment about a controversial issue would later be found to be sanctionable under the policy."[75] The court held that the university could not prohibit speech because the administration disagreed with the ideas or messages sought to be conveyed, or because what was being said was gravely offensive to large numbers of people.[76]

Stanford University, a private institution, is not necessarily subject to the same First Amendment considerations that apply to state run universities.[77] Professor Lawrence cites Stanford's speech code, though, to argue that similar and even greater restrictions, imposed by state run institutions, should be deemed constitutional.[78] The Stanford code prohibits "...speech or other expression that constitutes harassment by personal vilification if it insults or stigmatizes" someone on the basis of sex, race, color, handicap, religion, sexual orientation, national or ethnic origin. The code also prohibits verbally expressing direct and visceral hatred or contempt based on these catagories.[79] In fact, Professor Lawrence would go beyond the Stanford policy and urge all colleges and universities to prohibit racist speech that is not even expressed to a person in a face-to-face encounter, but is spoken just in the presence of members of a "denigrated" group.[80]

Such a speech code as Stanford's, if adopted by a state run institution, would clearly be unconstitutionally vague and overbroad. It would also violate the First Amendment's mandate that government regulations dealing with speech be content neutral.

Professor Matsuda wants racist speech outlawed if all three of her catagories are met: 1) The message is of racial inferiority; 2) The message is directed against a historically oppressed group; and 3) The message is persecutorial, hateful, and degrading.[81] An immediate example of the unconstitutional vagueness and overbreadth of these criteria is provided by Professor Matsuda, herself. She says that an off beat social scientist, who sincerely believes in the inferiority of some races, should be permitted to speak, unless the ideas expressed carry a message of hatred or persecution.[82]

Whether pseudo scientific assertions of the inferiority of certain historically oppressed groups can be defined as persecutorial, hateful, and degrading is precisely the kind of judgment call that cannot be made by someone sincerely trying to guage the legal permissibility of such speech. Would Professor Matsuda, under her own criteria, allow such speech to go unpunished, if, as a consequence of the speaker's determination of racial inferiority, that speaker recommends a lesser panoply of societal rights for members of the allegedly inferior races? What if the speaker were to sincerely propose that members of the inferior races should be barred from becoming physicians? What if the speaker, motivated by a sincere concern for the intelligence level of future generations, says that members of inferior races should be involuntarily sterilized?

At what point would Professor Matsuda, under her own criteria, consider such speech to be constitutionally protected? At what point would she want the speaker silenced?

Professor Lawrence approves of Professor Matsuda's approach to the government's banning of racist speech.[83] He also appears to call for only banning a very narrow aspect of racist speech, such as face-to-face epithets,[84] and, yet, at the same time, as pointed out above, he would also ban racist speech spoken in the mere presence of the "denigrated" group.[85] While paying lip service to prohibiting only a narrow catagory of racist speech, Professor Lawrence betrays sympathy for banning all racist speech, saying that, "...all racist speech constructs the social reality that constrains the liberty of non-whites because of their race."[86]

The First Amendment revisionism advocated by Professors Lawrence and Matsuda further illustrates the danger of letting the offended censor the offender. Professor Lawrence openly declares, "Most blacks—unlike white civil libertarians—do not have faith in free speech as the most important vehicle for liberation."[87]

The phrase "harassment" appears in many of these college and university restrictive speech codes.[88] Without

---

[71] *NAACP v. Button*, 371 U.S. 415, 432 (1963).
[72] *Op. Cit.*, 721 F. Supp 852, see note 4, supra.
[73] see note 14, supra.
[74] *Ibid.*, page 867.
[75] *Ibid.*
[76] *Ibid.*, page 863.
[77] *Ibid.*, page 867.
[78] *Op. Cit.*, Lawrence, pages 450-451.
[79] *Ibid.*
[80] *Ibid.*, page 463, footnote 119.
[81] *Op. Cit.*, Matsuda, page 2357.
[82] *Ibid.*, pages 2364-2365.
[83] *Op. Cit.*, Lawrence, page 481, footnote 169.
[84] *Ibid.*, pages 436-437.
[85] *Ibid.*, page 463, footnote 119, see footnote 80, supra.
[86] *Ibid.*, page 444.
[87] *Ibid.*, page 466.
[88] Stanford speech code, see note 79, supra.

further definition, the term "harassment" is vague and overbroad. One court has held that "harassment," by itself, does "not admit of a limiting instruction. It can mean anything."[89]

8. Should the First Amendment Yield to the Fourteenth Amendment in the Case of Racist Speech because of Some Legitimate Conflict between the Free Speech Clause of the First and the Equal Protection Clause of the Fourteenth?

Professor Lawrence believes that consititutional protection for racist speech wrongfully sacrifices the promise of equality contained in the Equal Protection Clause of the Fourteenth Amendment to the Free Speech Clause of the First Amendment.[90] Professor Matsuda agrees.[91]

The Due Process and Equal Protection Clauses of the Fourteenth Amendment have been interpreted to prohibit any branch of government from undertaking discriminatory actions. In *Police Department of City of Chicago v. Mosley*,[92] the Supreme Court held that, in terms of ideas, the government may not "grant the use of a forum to those whose ideas it finds acceptable, but deny use to those wishing to express less favored or more controversial views."[93] The *Mosley* Court relied upon the Fourteenth Amendment to bar the states from violating First Amendment rights, saying that government bodies must recognize "an equality of status in the field of ideas."[94] Thus, the Supreme Court invokes the Fourteenth Amendment to stop state governments from silencing speech because of its content. This contradicts the assertions of Professors Lawrence[95] and Matsuda,[96] who argue that The Fourteenth Amendment may actually require the government to silence racist speech in order to assist historically persecuted groups in their quest for equality.

The Fourteenth Amendment has been interpreted to prohibit a considerable amount of private discriminatory actions. In *Runyon v. McCrary*,[97] the Supreme Court prohibited commercially operated, private, non sectarian schools that advertised to the general public[98], from refusing to accept otherwise qualified black students. The Court said that while parents have the right to send their children to private schools that promote a belief in the desirability of racial segregation, there is no corresponding right for schools to actually practice the exclusion of racial minorities.[99] The Court said, though, that such schools may inculcate whatever values they want to teach.[100]

Runyon clearly demonstrates that while discriminatory *behavior* may be proscribed, racist *speech* may not be similarly prohibited. Contrary to the assertions of Professors Lawrence and Matsuda, the Fourteenth Amendment cannot be used to ban a bigot's speech, though it can be used to stop actual acts of discrimination.

9. Should the Commonly Understood Distinction between Conduct and Speech be Abandoned in Order to Treat Racist Speech as No Different Than Actual Discriminatory Conduct?

Professor Lawrence obviously recognizes the distinctions that current law makes between racist *speech* and discriminatory *conduct*. In order to get around this distinction, he offers a novel theory that, in terms of racist speech, the distinction between words and actions should be essentially eliminated. He argues that the proper role of the Equal Protection Clause of the Fourteenth Amendment in banning racist speech becomes evident, if we regard racist speech and discriminatory conduct as inseparable.[101] He says that there is a complete overlap between the idea and practice of racism.[102] Professor Lawrence argues that the landmark public school desegregation case of *Brown v. Board of Education*,[103] was not just a prohibition against actual racial segregation by public schools, but was also a prohibition against the accompanying "message" of inferiority and that *Brown* therefore requires the curtailment of racist speech.[104]

In her excellent response to Professor Lawrence, Nadine Strossen, Professor of Law at New York Law School, and national President of the ACLU, in her *Regulating Racist Speech on Campus: A Modest Proposal?*,[105] points out that the defendant board of education in *Brown* was not simply saying that blacks are inferior. Rather, the board was treating blacks as inferior through "pervasive systems of conduct" by maintaining segregated public schools.[106] Professor Strossen says that while a by-product of the challenged conduct was a message, that message was only incidental to actually segregating black from white children in the public schools.[107] Professor Strossen points out that verbally expressing that blacks are unfit to attend school with whites is materially distinguishable from le-

---

[89] *Dorman v. Satti*, 862 F.2d. 432, 436 (2d. Cir. 1988). This case dealt with a Connecticut statute that was designed to protect hunters by prohibiting harassment of any person who was in the process of "lawful taking of wildlife." 862 F.2d., at page 433.

[90] *Op. Cit.*, Lawrence, pages 437, 445, and 475.

[91] *Op. Cit.*, Matsuda, page 2376.

[92] *Op. Cit.*, 408 U.S. 95, see note 42, supra.

[93] *Ibid.*, page 96.

[94] *Ibid.*

[95] *Op. Cit.*, Lawrence, page 449.

[96] *Op. Cit.*, Matsuda, pages 2376-2377.

[97] 427 U.S. 160 (1976)

[98] *Ibid.*, page 168.

[99] *Ibid.*, page 176.

[100] *Ibid.*, page 177.

[101] *Op. Cit.*, Lawrence, page 442.

[102] *Ibid.*, page 444, footnote 58.

[103] 347 U.S. 483 (1954)

[104] *Op. Cit.*, Lawrence, pages 439-440.

[105] Duke Law Journal (1990) 484, hereinafter "Strossen."

[106] *Ibid.*, page 542.

[107] *Ibid.*

gally prohibiting black children from going to school with white children.[108]

Professor Lawrence, again, argues that all racist speech constructs the social reality that constrains the liberty of non-whites.[109] He further says that racist speech becomes conduct by limiting the life opportunities of others.[110] Professor Strossen points out that given the Supreme Court's distinction between words and actions, one could turn the argument against Professor Lawrence and say that if some speech is tantamount to conduct and therefore not constitutionally protected, some conduct is tantamount to speech and therefore is protected by the First Amendment, as in the instances of flag burning and picketing.[111] Indeed, we can say to Professor Lawrence that since he wants speech to be indistinguishable from conduct and conduct to be indistinguishable from speech, under current law, any close case will have to be resolved in favor of speech as opposed to conduct thus protecting the act sought to be punished, as in the flag burning cases.[112] Accordingly, there must be more, not less, protection for speech.

Finally, of course, it simply violates common sense to say that expressing an idea is no different than doing a physical act that actually interferes with another person's freedom.

10. Should the Distinction between Government Action and Private Action be Eliminated for Purposes of Punishing Racist Speech by Private Individuals?

Professor Strossen further points out that in *Brown v. Board of Education*, a *public* agency, as opposed to a *private* party, was prohibited from discriminatory conduct.[113]

We have seen the Supreme Court stop government from discriminating against ideas expressed in a public forum.[114] Professor Lawrence argues, though, from cases that prohibit private discriminatory conduct, that just as government can and should ban private acts of racial discrimination, government can, and should actually be required, to ban the racist speech of private individuals.[115] Professor Matsuda argues that a government that does not punish the hate speech of private individuals is implicated in the perpetuation of racism.[116]

As pointed out, above, the case of *Runyon v. McCrary*,[117] along with other cases, permits government to prohibit discriminatory treatment of racial minorities by private parties in a considerable number of instances, but does not permit government to prohibit those private parties from verbalizing racist ideas.[118] Indeed, as shown above, much of the argument for banning racist speech is linked to the flawed contention that the commonly understood distinction between racist *speech* and discriminatory *conduct* should be discarded.

Professor Strossen draws an analogy between the law dealing with separation of church and state and the issue of whether the state must punish racist speech by private parties. She points out that just as government bodies are required not to support racism, they are required not to support any religious doctrine under the Establishment Clause of the First Amendment;[119] and, just as government bodies cannot tell the individual to believe in any theology, the government cannot tell the individual what to say about historically persecuted groups.[120] In *Board of Education of the Westside Community Schools v. Mergens*,[121] the Supreme Court, in deciding that public schools may permit voluntarily attended religious groups to meet on school grounds during noninstructional time, without the active participation of school officials, said through Justice O'Connor:

> "...there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[122]

The *Mergens* Court simply recognized the long established distinction between what government cannot advocate and what a private party is free to advocate. Indeed, the Establishment Clause of the First Amendment prohibits government from showing any preference to any religious belief. The Free Exercise Clause permits any private party to express preferences for any religious belief or no belief. This right is also guaranteed to private parties by the Free Speech Clause, the same clause that permits a person to express racist ideas.[123]

Government cannot "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[124] Therefore, the Fourteenth Amendment actually compels government bodies to *refrain* from silencing private hate speech, rather than requiring state agencies to punish such speech. Government agencies do not support

---

[108] *Ibid.*

[109] *Op. Cit.*, Lawrence, page 444, see note 86, supra.

[110] *Ibid.*

[111] *Op. Cit.*, Strossen, page 543.

[112] *Op. Cit.*, *Texas v. Johnson*, see note 51, supra; *U.S. v. Eichman*, see note 57, supra.

[113] *Op. Cit.*, Strossen, pages 541-542.

[114] *Op. Cit.*, *Police Department of City Chicago v. Mosley*, 408 U.S., at page 96.

[115] *Op. Cit.*, Lawrence, page 449.

[116] *Op. Cit.*, Matsuda, pages 2378-2379.

[117] *Op. Cit.*, 427 U.S. 160, see note 97, supra.

[118] *Ibid.*, page 176.

[119] *Op. Cit.*, Strossen, page 545.

[120] *Ibid.*

[121] 110 L.Ed. 2d. 191 (1990).

[122] *Ibid.*, pages 215-216.

[123] *Op. Cit.*, *Runyon v. McCrary*, 427 U.S., at page 176, see note 100, supra; *Op. Cit.*, *U.S. v. Eichman*, 110 L.Ed.2d., at page 296.

[124] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

all privately expressed messages that they fail to forcibly silence. As Justice O'Connor said in *Mergens*, "The proposition that [government bodies] do not endorse what they fail to censor is not complicated."[125]

In a story reported in *National Review*[126], a male University of Washington student was barred by campus police from entering a classroom in which he was enrolled in an introduction to women's studies course, because he asked his professor after one class for some proof of the assertion that lesbians make the best parents. As reported, it is this male student who is the victim of unconstitutional state action, because his professor, as an agent of a state run university, was punishing him for exercising his First Amendment right to speak and to inquire.

Professor Matsuda argues that because of the psychological vulnerability of university students, who may be away from home for the first time, and because of their dependence on the university for community and for intellectual development, tolerance for racist speech on campus causes more damage than it would in the community-at-large.[127] In addition to the constitutional problems with Professor Matsuda's proposals, we must bear in mind that a university's mission is to prepare students for life in the real world. To unrealistically insulate students from having to hear offensive comments, by turning the campus into an artificial island, totally divorced from societal realities, is to do those students a grave disservice by rendering them unprepared to cope with the day to day world, upon graduation.

Moreover, if fear of disciplinary prosecution silences those students who do harbor bigoted ideas about certain races, about women, about gays and lesbians, or about any historically persectued group, they will never subject their ideas to the free and open discussions that could lead them to re-examine their prejudices. Of course, under the First Amendment, one should not have to promise to ultimately change one's biases as a prerequisite to being able to express one's views without fear of punishment. However, if students are to have the opportunity to experience the conversational interaction that could result in a change of attitudes, they can only do so in a campus environment that does not gag them with repressive speech regulations.[128]

If the state has any obligation on its college and university campuses, it is not to shield would-be offended persons from having their sacred cows challenged, it is to protect the right of free inquiry. If anything, college campuses must permit the *maximum*, not the *minimum*, allowable expression. The Supreme Court has said:

> "...the precedents of this Court leave no room for the view that, because of the need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, the vigilant protection of Constitutional freedoms is nowhere more vital than in the community of American schools. The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'"[129]

11. Does the Concept of Affirmative Action, which Permits Government Bodies to Intentionally Choose Members of Historically Persecuted Groups over Members of Dominant Groups, for the Receipt of Certain Benefits, Also Permit Government Agencies to Vary the Legally Permissible Scope of Speech, Depending upon One's Group Membership?

While favoring the banning of hate speech directed at members of historically persecuted groups,Professor Lawrence would not punish hate speech directed against members of "dominant majority groups."[130] Professor Strossen points out that during an oral defense of his position, Professor Lawrence said that he would prohibit a white woman from disparaging a black or gay man, but not a white heterosexual man.[131] Professor Strossen further points out that Professor Lawrence did not explain if his outcome would be different if the female speaker were lesbian.[132]

Professor Matsuda also argues that any speech restrictions should not be universal but should depend on the group membership of the speaker (dominant or minority) and the subjects of the speech. She would allow the anti-Arab speech of a white Zionist, speaking out of survival fears stemming from the Jewish experience of persecution, who did not resort to white supremacy rhetoric. However, if the same speaker betrayed any belief in generic white supremacy, thereby choosing to ally with a historically dominant group, Professor Matsuda would prohibit the speech.[133]

Government agencies, under current constitutional law, are permitted to show certain preferences to members of historically persecuted groups. This is affirmative action. In *Metro Broadcasting, Inc. v. FCC*,[134] the Supreme Court upheld the constitutionality of a Congressional requirement giving minority groups preferences in competition for new broadcast licenses and for existing licenses sold in distress sales.[135] The Court held that not only is such action justified to rectify past discrimination but is also justified to achieve the future benefit of ethnically diverse points of view being broadcast.[136]

---

[125] *Op. Cit.*, 110 L.Ed. 2d., at page 216.
[126] March 18, 1991, page 31.
[127] *Op. Cit.*, Matsuda, pages 2370-2371.
[128] Rohde, Stephen F., "Any Limitations are Bound to Violate the First Amendment" *Los Angeles Daily Journal*, July 19, 1990, page 6.
[129] *Op. Cit.*, *Healy v. James*, 408 U.S., at page 180, see note 6, supra.
[130] *Op. Cit.*, Lawrence, page 450, footnote 82.
[131] *Op. Cit.*, Strossen, page 559, footnote 387.
[132] *Ibid.*
[133] *Op. Cit.*, Matsuda, page 2364.
[134] 111 L.Ed. 2d. 445 (1990).
[135] *Ibid.*, page 445.
[136] *Ibid.*, page 463.

The Court also said that just as attaining a diverse student body at colleges and universities is a constitutionally permissible goal, upon which a race-conscious admissions program may be predicated, so does having the addition of minority voices to the airwaves serve important First Amendment values.[137]

There was nothing, though, in the Court's opinion suggesting that government could censor the content of non-minority programming, until such time as sufficient minority licenses had been distributed. When the Supreme Court permitted race-conscious criteria for achieving a diverse student body on state run college and university campuses, in *University of California Regents v. Bakke*,[138] there was no mention of any concomitant right of the university or of racial minorities to silence the speech of non-minority students on campus.

The *Metro Broadcasting* Court said that a key reason why such government preferences are constitutional is that they do not contravene a "legitimate firmly rooted expectation"[139] of non-minorities, that is, a vested right. Yet, if someone would argue that non-minorities could not speak freely over their existing privately owned broadcast stations, then the deprivation of free speech would obviously contravene a "legitimate firmly rooted expectation." The Court also suggested that since there are a limited number of broadcast frequencies on the electromagnetic spectrum, no one has a basic First Amendment right to a license to begin with and Congress has a freer hand in being selective in the distribution of broadcast licenses in society.[140]

However, once one has a license, there is strong First Amendment protection against government censorship of the speech that is broadcast. In *Anti Defamation League of B'nai Brith v. FCC*,[141] the federal court of appeals for the District of Columbia refused to block renewal of a broadcast license by a station that aired anti-Semitic commentary. The court said that in order for race and religion to be freely discussed, there cannot be government defined bans on the uttererance of "falsehood," or an "appeal to prejudice."[142]

The Supreme Court permits government to single out members of historically persecuted groups, for greater representation on university campuses and for greater access to the airwaves. Government may not, however, use its police power to assist minorities in suppressing the speech rights of non-minorities.

If a government plan to give minority group members special consideration in purchasing housing were upheld as constitutional, government agencies could still not take away a home already owned by a non-minority person and give it to a member of a historically persecuted group. To do so would be to contravene a "legitimate firmly rooted expectation."[143] For any government agency to punish a non-minority person for speech which a minority person found offensive would also contravene that non-minority person's legitimate firmly rooted expectation in the universality of the First Amendment.

12. Does the Nonsensical, Nonintellectually Answerable Nature of Racist Speech Provide it with Lesser Constitutional Protection?

Professor Lawrence argues that racist speech, particularly, derogatory epithets, expresses no ideas, just hate. He says that for an utterance to constitute speech it must appeal to the mind in order for the listener to make an evaluation. Epithets of bigotry, to Professor Lawrence, are not speech.[144]

Professor Matsuda suggested, in a panel discussion in which we were both invited to discuss the issue of campus speech restrictions,[145] that racist speech could be distinguished from other speech in that particularly racial epithets contribute nothing cognitive to a discussion.

It is interesting how those on the left, who would ban speech they find offensive, use identical reasoning to those on the right who would do precisely the same thing to speech they want prohibited. Professors Lawrence and Matsuda argue that racist speech is less worthy of constitutional protection because it deals in emotionally charged utterances designed only to hurt others, rather than dealing in ideas. This is the same kind of reasoning used by Chief Justice William Rehnquist, dissenting in the flag burning cases. He said "flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely indulged in not to express any particular idea, but to antagonize others."[146] Compare this with Professor Lawrence's assertion: "Racial insults are undeserving of first amendment protection because the perpetrator's intention is not to discover truth or initiate dialogue but to injure the victim."[147]

Professor Lawrence, Professor Matsuda, and Chief Justice Rehnquist need to be reminded that the First Amendment makes no distinction between speech designed for intellectual analysis and speech designed for purely emotional appeal.

As Justice Harlan said in the majority opinion in *Cohen v. California*:

> "We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual

---

[137] *Ibid.*, page 465.

[138] 438 U.S. 265, 311-313 (1978).

[139] *Op. Cit.*, 111 L.Ed. 2d., at page 483

[140] *Ibid.*

[141] 403 F.2d. 169 (D.C. 1968), cert denied 394 U.S. 930 (1969).

[142] *Ibid.*, page 172.

[143] *Op. Cit., Metro Broadcasting, Inc. v. FCC*, 111 L.Ed. 2d, at page 483, see note 140, supra.

[144] *Op. Cit.*, Lawrence, page 452, footnote 87.

[145] Symposium at California State University at Northridge, October 3, 1990.

[146] *Op. Cit., Texas v. Johnson*, 105 L.Ed. 2d., at page 371, see note 51, supra.

[147] *Op. Cit.*, Lawrence, page 452.

> speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated."[148]

To ban racial epithets from the allowable words that a member of society may choose is, ultimately, to ban the ideas those epithets represent. Justice Harlan, again, in *Cohen*:

> "...we cannot indulge the facile assumption that one can forbid particular words without also running the risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.[149]

13. Do Restrictive Speech Codes that Prohibit "Victimizing" or "Stigmatizing" Someone on the Basis of Their Religion Inadvertantly Resurrect Discredited Blasphemy Laws?

Among the derogatory comments that many college and university speech codes prohibit are those that address someone based upon the listener's religion.[150]

The Establishment Clause of the First Amendment prohibits any branch of government from favoring any religious belief over any other belief.[151] No person can be punished for entertaining or professing any religious belief or disbelief.[152] A person is free to express disdain for any religious belief system. Accordingly, laws prohibiting speech that demeans or stigmatizes someone because of their religion are not only void for vagueness and overbreadth (Section 7, above), but also violate the right of free speech which includes the right to speak freely about religious doctrines.

In *Burstyn v. Wilson*,[153] the Supreme Court held unconstitutional a New York statute that made it unlawful to treat any religion with "contempt, mockery, scorn, and ridicule."[154] The *Burstyn* Court said:

> "...the state has no legitimate interest in protecting any or all religions from views that are distasteful to them...It is not the business of government in our country to suppress real or imagined attacks upon a particular religious doctrine..."[155]

In England, where there is no constitutional protection of free speech corresponding to our First Amendment, ancient blasphemy laws, chillingly alien to the above United States Supreme Court language, are still being enforced to protect Christianity, exclusively, from verbal disdain. In England, it is still criminally punishable to speak:

> "blasphemy against the Almighty, by denying His being, or providence; or by contumelious reproaches of our Saviour Christ. Whither also may be referred all profane scoffing at the Holy Scripture, or exposing it to contempt and ridicule."[156]

In 1977, the editor of the *Gay News* was prosecuted under the above quoted law for publishing a poem about imaginary sexual acts with Jesus' body after the crucifixion. The conviction and one year suspended sentence were upheld by the House of Lords.[157]

Professor Matsuda approves of Canada's laws against hate speech.[158] Those same laws were invoked by the Canadian government to halt, at one point, the importation of Salman Rushdie's *The Satanic Verses*,[159] out of concern that the book's skepticism about Islamic doctrine violated the ban on racist speech.[160]

There is, perhaps, no greater freedom of speech than the right to question religious orthodoxy. Yet, under these vague and overbroad university restrictive speech codes, and the even more sweeping speech prohibitions advocated by Professors Lawrence and Matsuda, there is real danger that one's right to challenge religious dogma could be subject to state imposed penalties. If a pro choice student were to tell a devout Roman Catholic student that the latter's religion is based upon a fraudulent claim to divine infallibility and is really nothing more than an institution of male celibates out to destroy the sexual fulfillment of the rest of the world, could the speaker be disciplined? Would a Christian student, who criticized Islam (still a minority faith in this country) be subject to discipline?

Given the language of these restrictive speech codes, and the preferential treatment for members of historically persecuted groups, advocated by Professors Lawrence and Matsuda, it is likely that a white fundamentalist Christian student could be prosecuted for telling a gay or lesbian student that homosexuality was a sin punishable by eternal damnation. Yet, under current constitutional law, a white evangelical student has a First Amendment right to express such views about gays and lesbians, regardless of how abhorrent those views may be to enlightened people.

---

[148] *Op. Cit.*, 403 U.S., at page 26, see note 46, supra.

[149] *Ibid.*

[150] See Section 4, supra., and notes 14, 16, and 19, supra.

[151] *Allegheny County v. Pittsburg ACLU*, 106 L.Ed 2d. 472, 492, 493 (1989).

[152] *Ibid.*, page 493.

[153] 343 U.S. 495 (1952)

[154] *Ibid.*, page 504.

[155] *Ibid.*, page 505.

[156] Blackstone, William, *Commentaries on the Laws of England: of Public Wrongs*, Beacon Press, 1962, at page 55.

[157] *You and Your Rights*, The Reader's Digest Association Limited, London, 1980, at page 54.

[158] *Op. Cit.*, Matsuda, page 2347.

[159] Viking Press (1988).

[160] *Time*, February 27, 1989, at page 30.

14. Should the Concept of Criminally Punishable Group Defamation be Reactivated for Purposes of Outlawing Racist Speech?

Professor Lawrence favors using criminally punishable group defamation laws as a means for the state to prosecute racist speech.[161] Professor Strossen correctly points out that punishing group defamation is inconsistent with current First Amendment law.[162] Group defamation is unavoidably a theory, a conceptualization about a race of people, an idea. "Under the First Amendment there is no such thing as a false idea."[163]

The only Supreme Court case to ever uphold a criminal conviction under a state's group defamation statute was *Beauharnais v. Illinois*,[164] in which a five to four Court upheld the constitutionality of a statute that prohibited any depiction of "criminality, depravity, unchastity, or lack of virtue" in targeted groups.[165] The Court also based its decision on the perceived tendency of the prohibited utterances to cause violence and disorder.[166] Thus, *Beauharnais* can be seen as an aberrational revisiting of *Chaplinsky*,[167] and the general issue of fighting words, a doctrine which, as shown in this article, has been substantially limited by the Court, itself.[168]

The case of members of the American Nazi Party wishing to march in heavily Jewish populated Skokie, Illinois demonstrates how the notion of criminal sanctions for group defamation has been discarded. In *Collin v. Smith*,[169] a federal appeals court declared unconstitutional a municipal ordinance that made it unlawful for anyone to "portray criminality, depravity or lack of virtue in, or incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, social, ethnic, national or regional affiliation," and that banned "the dissemination of any materials within the village of Skokie which promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so."[170]

The Nazis wanted to march wearing militrary uniforms displaying swastikas. The court found that the swastikas would be extremely mentally and emotionally disturbing not only to the Jewish population of Skokie, in general, but to the significant numbers of holocaust survivors, who would thereby suffer exceedingly painful memories.[171] Yet the court would not permit the town to prevent the march, swastikas and all, from taking place, saying that if free speech rights are to protect all points of view, those principles must include protection for even those views that society "quite justifiably rejects and despises."[172]

A swastika unquestionably sends a message of what Professor Lawrence calls "subhuman status,"[173] further conveying to Jews what Professor Matsuda has characterized as the core evil of hate speech, isolating the target as outside the human family, as being "alone."[174]

I am the American born son of an Auschwitz survivor. My bedtime stories as a child consisted of my hearing about Dr. Mengele directing my grandfather and my uncle to the gas chamber and my mother to the work barracks, upon the family's arrival at Auschwitz. Yet, the call for me regarding Skokie was an easy one. The Constitution protects the expression of *all* ideas, even those that argue that my mother should have died in Auschwitz and I should have never been born. The Constitution protects the freedom to hate me because of the immutable happenstance of the ethnicity into which I was born. Accordingly, the Constitution also protects the freedom to verbally and symbolically express that hatred, so long as there is no imminent threat to my physical well being, my property, and no actual physical impediment to my right to live, work, and love in our society.

It is the very protection offered to the articulation of even Nazi sentiments that "distinguishes life in this country from life under the Third Reich."[175]

The prospect of group defamation relevant to the campus is not one of any private right of action brought in civil court by the aggrieved against the speaker, but rather it is the question of state police action to punish the speaker. *Ashton v. Kentucky*,[176] becomes germane, then, affirming that criminal defamation statutes are conceptually inconsistent with constitutional free speech principles.[177] Given the degree to which the Supreme Court has found, subsequent to *Beauharnais*, constitutional protection for much speech that previously was relegated to state defamation laws, beginning with *New York Times v. Sullivan*,[178] and given the degree to which offensive speech, even to the extent of hate speech against blacks and Jews, has been found, subsequent to *Beauharnais*, to be constitutionally protected,[179] *Beauharnais* is probably even more moribund than *Chaplinsky*.

The *Collin v. Smith* court, in rejecting the claim that the proposed Nazi march in Skokie, with swastikas, would be proscribable group defamation, dismissed any continuing application of *Beauharnais* as having been decided "years

---

[161] *Op. Cit.*, Lawrence, page 464, footnote 124.
[162] *Op. Cit.*, Strossen, page 518.
[163] *Gertz v. Welch*, 418 U.S. 323, 339 (1974).
[164] 343 U.S. 250 (1952).
[165] *Ibid.*, page 251.
[166] *Ibid.*, page 254.
[167] *Op. Cit.* 315 U.S. 568, see note 20, supra.
[168] See notes 25, 26, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, and 59, supra, and accompanying text in Section 5.
[169] 578 F.2d. 1197 (7th Cir. 1978).
[170] *Ibid.*, page 1199.
[171] *Ibid.*, pages 1200, and 1205.
[172] *Ibid.*, page 1210.
[173] *Op. Cit.*, Lawrence, page 453.
[174] *Op. Cit.*, Matsuda, page 2338.
[175] *Op. Cit.*, *Collin v. Smith*, 578 F.2d., at page 1201.
[176] *Op. Cit.* 384 U.S. 195 (1966), see note 25, supra.
[177] *Ibid.*, page 198.
[178] 376 U.S. 254 (1964).
[179] *Op. Cit.*, *Brandenburg v. Ohio*, 395 U.S. 444, see note 37, supra.

before the Supreme Court, itself, rewrote the rules."[180] In concurring in *Anti Defamation League of B'nai Brith v. FCC*,[181] the case in which the federal appeals court for the District of Columbia refused to overturn the renewal of a broadcast license to a station that aired anti-Semitic commentary, Judge J. Skelly Wright said that *Beauharnais* was no longer useful precedent.

15. Should the Concept of Protecting Captive Audiences be Invoked to Generally Prohibit Racist Speech on Campus?

The Supreme Court has upheld some limitations on the intrusion of unwanted communications into the sanctity of the would-be listener's private domain. The Court has assumed that unwilling listeners are "captive audiences" in places such as their homes, where they cannot avoid the intrusion. In *Kovacs v. Cooper*,[182] the Court upheld a Trenton, New Jersey ordinance that prohibited sound trucks from emitting "loud and raucous" noises that in fact disturbed people in their homes.[183] The *Kovacs* Court was not concerned about the *content* of the messages blared, but only with the decibel level of any message conveyed by very loud amplification.[184] In *Lehman v. City of Shaker Heights*,[185] the Court upheld a municipality's ban on *all* political advertising on city buses.[186] In his concurring opinion, Justice Douglas said that people riding the bus to and from work have no choice but to be there and government may legitimately provide them with some tranquility by shielding them from political propaganda.[187] The majority opinion pointed out that the city was justified in avoiding the issues of possible favoritism and bias that could arise if political advertisements were allowed and some factions felt they were getting more choice space then others.[188]

Had political advertising been permitted, the Court would not have allowed space to be sold to only candidates of one political party. "Because state action exists, however, the policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious, or invidious."[189] Accordingly, since state action exists when public universities attempt to choose which kind of speech can be barred from campus, there can be no arbitrary and capricious exclusion of one kind of speech. Moreover, unlike a public rapid transit system, which "is no more a meeting place for discussion than is a highway,"[190] "the college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'"[191] Since the business of state run colleges and universities is ideas, the "Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."[192]

Thus, Professor Lawrence's contention that students who must attend classes in order to obtain their education, are "captive audiences" entitled to insulation from racist speech,[193] falters in light of the Supreme Court's heightened concern for the greatest freedom for the expression of ideas in college classrooms.

If the student's actual dormitory living quarters are the equivalent of a private dwelling,[194] then, there may possibly be some validity to the argument that students have the right to be shielded from offensive communications when in the confines of their dorm rooms. Of course, the right of privacy in one's dwelling goes beyond the issue of avoiding distasteful speech. Students wishing to study quietly in their dorimitories have the right not to have trombones played in their ears, regardless of the tunes played by the trombone player. Yet, whatever restrictions would apply to dorm rooms would be unique to a student's special interests of privacy corresponding to a private dwelling. Such a right could not be extended, under current constitutional law, to more public areas, thus refuting Professor Matsuda's argument that the captive audience concept should bar racist propaganda from appearing anywhere on campus.[195] As Professor Strossen points out, common areas of campuses, even common areas of dormitory buildings, are traditional gathering places for students to discuss issues.[196] Thus, even any unique and limited privacy right, peculiar to a dormitory room's equivalence to a private dwelling, would have to yield to any common practice of general discussion among college roommates.If a Christian student were sharing a dorm room with a gay student and they were both discussing the nature of God and the universe in a late night "bull" session, the gay student should not be able to call upon the "captive audience" doctrine to justify university punishment of the Christian student if, in the middle of the discussion, the latter said to the gay student, "by the way, homosexuality is a mortal sin."

In *Cohen v. California*,[197] the Court would not allow

---

[180] *Op. Cit.*, 578 F. 2d., at page 1205.
[181] *Op. Cit.*, 403 F. 2d. page 174, see note 141, supra.
[182] 336 U.S. 77 (1949).
[183] *Ibid.*, page 87.
[184] *Ibid.*, pages 81-82.
[185] 418 U.S. 298 (1974).
[186] *Ibid.*, page 299.
[187] *Ibid.*, page 306.
[188] *Ibid.*, page 304.
[189] *Ibid.*, page 303.
[190] *Ibid.*, Justice Douglas concurring, at page 306.
[191] *Op. Cit.*, *Healy v. James*, 408 U.S., at page 180, see note 129 and note 6, supra.
[192] *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 210-211 (1975).
[193] *Op. Cit.*, Lawrence, pages 456-457.
[194] *Rowan v. United States Post Office*, 397 U.S. 728, 736-737 (1970), in which the Court upheld a postal regulation permitting unwilling addressees to require addressors to remove their names from the relevant mailing list.
[195] *Op. Cit.*, Matsuda, page 2372.
[196] *Op. Cit.*, Strossen, page 503.
[197] *Op. Cit.*, 403 U.S., at page 21-22, see note 46, supra.

the state to prohibit the display of an offensive word in a public building merely because unwilling observers of the message would be briefly exposed to the highly offensive epithet before being able to "avert their eyes." The *Cohen* Court revealed a strict intent to narrow the captive audience doctrine as a basis for outlawing offensive or controversial speech, saying that for government to:

> "shut off discourse to protect others from hearing it...is dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."[198]

The *Cohen* Court further said that any broader scope of government authority could be arbitrarily used to silence dissident opinion.[199]

Professors Lawrence[200] and Matsuda[201] argue that First Amendment law should be revised to permit members of historically persecuted groups to silence speakers that offend them. The *Cohen* Court rejected the state's effort to ban certain speech, based upon who the listeners might be. In addressing the state's claim that the epithet at issue in *Cohen* should not receive protection for public display in areas where women and children would be exposed to it, the Court said that such distinctions:

> "cannot legitimately be justified in this Court as designed or intended to make fine distinctions between differently situated recipients."[202]

As shown above, to the extent that the Supreme Court has upheld speech restrictions, on behalf of captive audiences, such restrictions have been permitted only in instances of intrusion into private space. There is no case allowing restrictions on content specific speech in public forums where general discussion is permitted. Professor Strossen points out that the Court has held that a state run university campus is a public forum, for purposes of content neutral protection of speech.[203]

As the Court said in *Erznoznick v. City of Jacksonville*,[204] holding unconstitutional a municipal ordinance that prohibited the showing of nudity on drive in theater screens, visible to the general public:

> "The plain, if at times, disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenius forms of expression, 'we are inescapably captive audiences for many purposes.' Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer...the burden normally falls upon the viewer to 'avoid further bombardment of his sensibilities by averting his eyes.'"[205]

16. Can State Run Colleges and Universities Take Affirmative Steps to Combat Racism on Campus, Short of Banning or Punishing Racist Speech?

As we have seen, government may take special affirmative steps on behalf of members of historically persecuted groups to rectify the consequences of past discrimination and to insure a greater mix and diversity of viewpoints in the marketplace of ideas. Accordingly, as Professor Strossen points out, state college and university officials, as agents of government, can speak out against racist ideas expressed by private speakers,[206] so long as they do not infringe on the rights of those whose speech they are criticizing.[207]

The flag burning cases are instructive, as are the affirmative action cases, in how government may promote a point of view without suppressing those who would argue against that view. In *Texas v. Johnson*,[208] the Court said:

> "To say that the government has an interest in encouraging proper treatment of the flag, however, is not to say that it may criminally punish a person for burning a flag as a means of political protest."[209]

In *U.S. v Eichman*,[210] the Court prohibited government suppression of physical flag desecration, even though government has a "legitimate interest in the flag as an incident of sovereignty."[211]

Universities may counsel against racism and even offer courses and seminars designed to combat bigotry, so long as no student is coerced into a renunciation of a viewpoint, in what Professor Strossen likens to the infamous "reeducation camps,"[212] of totalitarian countries, be they of the right or the left.

Government authorities may speak out against racism,

---

198 *Ibid.*, page 21.

199 *Ibid.*

200 See note 130, supra.

201 See note 133, supra.

202 *Op. Cit.*, 403 U.S., at page 22, footnote 4.

203 *Op. Cit.*, Strossen, page 503, citing in footnote 89 thereof *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 803 (1985) and *Widmar v. Vincent*, 454 U.S. 263, 267 n. 5 (1981), the latter case cited for the proposition that by permitting student meetings, a public university created an open forum for student groups.

204 *Op. Cit.*, 422 U.S., at page 206, see note 192, supra.

205 *Ibid.*, pages 210-211.

206 *Op. Cit.*, Strossen, page 562.

207 *Ibid.*, page 563.

208 *Op. Cit.*, 105 L.Ed. 2d. 342, see note 51, supra.

209 *Ibid.*, page 363.

210 *Op. Cit.*, 110 U.S. 287, see note 57, supra.

211 *Ibid.*, page 295, footnote 6.

212 *Op. Cit.*, Strossen, page 564.

but may not punish the articulation of racist ideas by private individuals.

Conclusion

I submit that under well established First Amendment principles, content based restrictive speech codes enacted by state run colleges and universitites are unconstitutional.

Many defenders of free speech recognize that racist speech is constitutionally protected. However, there are some who do so only grudgingly, out of a certain grim fatalism regarding the clear import of the First Amendment, even expressing their wish that protection for free speech were not so universal. I am willing to go out on a limb and say that while I am sympathetic with those who are offended by hate speech, I am not sympathetic with those who want government to formally punish it.

I would be unwilling to change the broad scope of First Amendment protection. The greatness of existing law, in my view, is precisely because it is non partisan. It does not play favorites. It requires content neutrality in the exercise of the police power of the state.

No facet of the human condition should be beyond criticism, question, ridicule, and doubt. There are no concepts so sacred that government should censor written, oral, or symbolic attacks on them, attacks that are not destructive of another's property.

As Justice Brennan said in the majority opinion in *Texas v. Johnson*:[213]

> "The First Amendment does not guarantee that ...concepts virtually sacred to our nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas."

As much as I abhor racism and bias against women and gays and lesbians, I believe the benighted neanderthals, who express such bigotry, have every right to do so. As I said earlier, as the son of an Auschwitz surviving mother, I fully defend the rights of some WASP wimp to wear a swastika. I fully defend the right of a believing Christian to tell me that my support for legal abortion will land me in God's eternal disfavor. I, of course, also fully defend my right to tell fundamentalists that, in my view, their religious beliefs are nonsensical superstition.

As a white Jewish liberal, I say to other white liberals that notwithstanding our appropriate concern for members of historically persecuted groups, we must not fall into the trap of believing that we must cave in to everything they demand, without an independent examination of the merits of each situation. We must have the courage to face down the reverse racism that tries to paint us as racist, ourselves, if we, for instance, don't agree with every policy proposed by a black person. I, for one, feel absolutely on solid ground in heralding myself to someone like Professor Lawrence as a person totally committed to equality for all people, acutely aware of the pain and horror of African American history, and of the need for redress, even though I say to him that I oppose his efforts to legally silence those who hate him and who hate me.

Beyond partisan ideology, we must remain a nation of universal First Amendment patriots.

Just as caring parents, who love all their children equally, will tenderly prevent one such child from harming another, so should the First Amendment continue to exercise its benevolent imperium in blocking the attempt of any American to silence another.

---

[213] *Op. Cit.*, 105 L.E.2d, at page 362, see note 51, supra.