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NOTES

A FIRST AMENDMENT JUSTIFICATION FOR REGULATING RACIST SPEECH ON CAMPUS*

This Note outlines a first amendment justification for regulating racist speech at state universities. The analysis shows that while discussions of racial issues further the underlying philosophies of the first amendment, racist epithets thwart the philosophical objectives that free expression was designed to protect. The discussion provides a guide for how such regulations could be validated within the first amendment tradition despite the presumptions against group libel statutes and content-based restrictions. The special interests of the university community and the psychological well-being of minority students argue for more leniency in evaluating the regulation of racist speech on campus than would be permissible in the community at large. This Note proposes a model university code for regulating racist epithets. While the model code prohibits racist epithets, it assures protection for discussion of racial issues that promotes first amendment values.

everywhere the crosses are burning,
snap-shooting goose-steppers around every corner,
there are snipers in the schools . . .
(I know you don't believe this.
You think this is nothing
but faddish exaggeration. But they

* I would like to thank Professors Jonathan Entin and William Marshall and Dean Melvyn Durchslag for their comments and encouragement. I would also like to thank Anne Morgan and Melissa Sternlicht for their editorial contributions.
are not shooting at you.)

Lorna Dee Cervantes

IN 1987 AT the University of Michigan, a group of black women were in a meeting when a fellow student shoved a leaflet under the door. The leaflet read, "blacks 'don't belong in classrooms, they belong hanging from trees.' " In response to this and similar incidents, the University of Michigan enacted an anti-discrimination policy in the fall of 1988. The Michigan policy punished speech that victimizes students on the basis of race, sex, ethnicity, religion or sexual preference, interferes with academic efforts or "[c]reates an intimidating, hostile or demeaning environment for educational pursuits."
Racism on campus has become a nationwide problem.\(^7\) A survey of three hundred students from twenty universities reveals

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

b. Has the purpose or reasonably foreseeable effect of interfering with an individual’s academic efforts, employment, participation in University sponsored extracurricular activities or personal safety; or

c. Creates an intimidating, hostile or demeaning environment for educational pursuits, employment or participation in University sponsored extracurricular activities.

Id. § B, at no. 1.

While many different groups are victimized, the analysis in this Note will focus on stigmatization based on race because most campus incidents of such victimization are aimed at blacks. Berger, *Deep Racial Divisions Persist in New Generation at College*, N.Y. Times, May 22, 1989, § A, at 15, col. 1.

7. The following examples represent the types of racial incidents occurring on college campuses across the country:

(1) “At Arizona State University, 500 white students seething over an assault on a white student by three black students shouted anti-black slurs.” Berger, *supra* note 6, § A, at 1, col. 1.

(2) In the fall of 1988, the Zeta Beta Tau fraternity at the University of Wisconsin’s Madison campus “held a mock slave auction at which some pledges performed skits in blackface.” Worthington, *University of Wisconsin Regents Move to Rein in Racism*, The Chicago Tribune, Apr. 12, 1989, § C, at 1. Zeta Beta Tau (ZBT), a primarily Jewish fraternity, was itself a target of racism when Fiji (another fraternity) members crashed a ZBT party, beat three people and taunted them with anti-semitic slurs. Weiner, *supra* note 3, at 260. In 1986 the Kappa Sigma fraternity had a party featuring a “‘Harlem Room,’ with white students in blackface, watermelon punch, graffiti on the walls and garbage on the floor.” *Id.*

(3) “[O]n the first day of class at the University of Maryland in College Park, a black female student complained to the administration that her white male professor told her she had two strikes against her if she wanted to be an engineer — her sex and her race.” Innerst, *Colleges Torn by Racial Violence*, The Wash. Times, October 26, 1989, § A, at 1. Other incidents at the University of Maryland include, “the shunning of a Korean student by her classmates, a swastika painted on the wall outside a center for Jewish students, a Ku Klux Klan request for time on campus radio, and fliers distributed for an organizational meeting of a White Student Union.” *Id.*

(4) At Louisiana State University, a fight broke out when black students entered a “black face” party thrown by a white fraternity. *Id.*

(5) At San Francisco City College, “[t]wo posters outside the Black Student Union [were] defaced with swastikas and racial slurs.” *Id.*

(6) At New York University, “[a] laundry ticket was tacked to the bulletin board of an Asian student group. A poster of the Rev. Jesse Jackson was ripped from the door of a dormitory room occupied by a Hispanic woman. When she put it back up, someone set it on fire.” Lee, *Law Students at N.Y.U. Rally Against Race Bias*, N.Y. Times, March 3, 1989, § B, at 2, col. 5.

(7) At Loyola Marymount University, a black freshman “said she had been stopped at least three times since September by security guards and asked what she was doing on campus.” Goodman, *Students Charge Bias Abounds at Loyola and Say It's Tolerated at Top*, L.A. Times, Oct. 15, 1989, § J, at 1, col. 5.
that race relations are "by far the most frequently mentioned concern" of university students.\textsuperscript{8} At Michigan State University, "two thirds of the 136 students who were asked whether they had seen an incident on campus 'that [they] thought was racist or showed an intolerance for minorities,' said yes.\textsuperscript{9}

While racial harassment increases, the percentage of blacks enrolled in universities is decreasing.\textsuperscript{10} To counteract these trends several universities have enacted anti-discrimination policies which provide stiff penalties for those who engage in racist expression.\textsuperscript{11}


10. See, e.g., Rezendes, Campus Minorities: Confronting Racism With Mature Methods, The Wash. Post, Apr. 19, 1988, § A, at 3, col. 1 (Between 1983 and 1988, the "black college enrollment . . . increased numerically, but dropped from 9.6 percent of the student population to about 8.8 percent.").

11. Besides the University of Michigan's anti-discrimination policy, see supra notes 4-6 and accompanying text, at the University of Massachusetts, students successfully demanded that "tougher prohibitions against racial harassment" be added to the student conduct code. Rezendes, supra note 10, § A, at 3, col. 1. In June of 1989, the University of Massachusetts enacted a prohibition against "'racism, anti-Semitism, ethnic, cultural, and religious intolerance' on their 27 campuses." Finn, The Campus: "An Island of Repression In a Sea of Freedom", COMMENTARY, Sept. 1989, at 17.

The State University of New York School of Law in Buffalo "issued a statement from the faculty warning that sanctions will be imposed for 'racist, sexist, homophobic and anti-Lesbian, agest, and ethnically derogatory statements' that indicate the student lacks 'sufficient moral character to be admitted to the practice of law.'" Matsuda, supra note 1, at 2370 n.248 (citing Faculty Statement Regarding Intellectual Freedom, Tolerance, and Prohibited Harassment, State University of New York at Buffalo School of Law (Oct. 3, 1987)).

During the summer of 1989, the University of Wisconsin revised the student code so that "'certain types of expressive behavior directed at individuals and intended to demean and to create a hostile environment for education or other university-authorized activities would be prohibited and made subject to disciplinary sanctions.'" Finn, supra, at 17. The Wisconsin policy "provides a range of penalties, including expulsion for a student found guilty of using words that demean another student, a campus visitor or an employee on the basis of race, religion, national origin, sex disability or sexual orientation. It also would address such group behavior as racially demeaning fraternity skits." Worthington, supra note 7, § C, at 1, col. 2. The regents voted to remove the phrase "epithets shall be presumed to have been uttered with the required intent" so that the burden of proof would be on the accuser. Id. § C, at 2, col. 1.

The University of North Carolina at Chapel Hill has also tightened anti-discrimination restrictions by adopting an anti-discrimination policy similar to those adopted by the University of Michigan and the University of Wisconsin. See Finn, supra, at 17.

Among the private colleges that have recently enacted anti-discrimination policies are Emory, Smith and Stanford. See Mitgang, When Right Goes Wrong; Faced with Racial Tension, Colleges Debate How Free Student Speech Should Be, L.A. Times, June 11, 1989, § 1, at 2, col. 1; see Berger, supra note 6, § A, at 1, col. 1.
Some legal scholars argue that university anti-discrimination policies violate first amendment rights. Both conservatives and civil libertarians warn that these policies are so broad that they will punish speech deserving first amendment protection. Further, stifling all racist speech on campus may increase racial tension since only open discussions allow people to express their views and exchange ideas about racist attitudes. These arguments led a federal district court to permanently enjoin the University of Michigan from enforcing its policy against verbal behavior or conduct. In the wake of the Michigan decision, this Note will explore the possibilities of designing a university policy that punishes racial epithets but preserves the right to openly discuss racial issues.

The discussion will focus on whether university anti-discrimination policies represent a valid exercise of university authority or thwart the first amendment guarantee of free expression. Central to this question is the tension between the constitutional necessity of protecting unpopular speech and the desire to control the damage that racist expression inflicts on the university community. Although racial tensions pervade private as well as public universities, private institutions have far more regulatory freedom; therefore this Note will focus on public universities.

The constitutional validity of targeting racist epithets will ultimately depend on how the courts classify the university policies in terms of first amendment jurisprudence. This Note will consider three analytical perspectives through which courts may view regulations of racist speech on college campuses. First, a content-based analysis will be discussed to determine whether first amendment protection of racist speech advances the underlying philosophies of free expression. Second, prevention of group defamation will be considered as a possible justification for the university policies. Third, the analysis will address how the special environment of the university alters the application of first amendment

12. See, e.g., Finn supra note 11, at 19 (noting the chilling effect that may result from certain university solutions).


14. See Matsuda, supra note 1, at 2370 (public institutions are bound by the first amendment under the state action doctrine while private institutions are not).

15. See infra notes 19-73 and accompanying text.

16. See infra notes 74-162 and accompanying text.
principles.\textsuperscript{17} Finally, this Note proposes a Model University Anti-Racism Policy which is tailored to regulate the most invidious racist epithets while assuring that the right to discuss racial issues is granted full first amendment protection.\textsuperscript{18}

I. CONTENT-BASED RESTRICTIONS OF RACIST SPEECH

Some theorists suggest that racist speech is so antithetical to the constitutional values of modern America that it should not be afforded first amendment protection.\textsuperscript{19} Proponents of this view often turn to a content-based analysis\textsuperscript{20} in order to carve racist remarks out of the realm of speech that is given full first amendment protection. By placing racist speech low in the hierarchy of protected speech, states would be permitted to exercise regulatory power over racist epithets, and state universities would be free to maintain their anti-discrimination policies.

Content-based restrictions are designed to "limit communication because of the message conveyed."\textsuperscript{21} The Court has identified certain inherently harmful categories of expression which are set outside the constitutionally protected realm and classified as non-speech. Examples of such content-based exceptions are "'fighting' words,"\textsuperscript{22} "incitement to riot,"\textsuperscript{23} and obscenity.\textsuperscript{24} Some jurists ad-

\textsuperscript{17} See infra notes 163-215 and accompanying text.
\textsuperscript{18} See infra notes 216-19 and accompanying text.
\textsuperscript{19} See Lasson, \textit{Group Libel Versus Free Speech: When Big Brother Should Butt In}, 23 DUQ. L. REV. 77, 96 (1984) (pointing out that obscenity laws support the assertion that speech can be restricted on the basis of content); see also Arkes, \textit{Civility and the Restriction of Speech: Rediscovering the Defamation of Groups}, 1974 SUP. CT. REV. 281, 281 (supporting limited group libel laws).
\textsuperscript{20} Content-based analysis involves an inquiry first into whether the expression furthers underlying first amendment rationales and second into balancing the reasons for and against protection. See Stone, \textit{Content Regulation and the First Amendment}, 25 WM. & MARY L. REV. 189, 194-95 (1983) [hereinafter Stone, \textit{Content Regulation}]. An alternative form of analysis preferred by Professor Schauer is categorization. Categorization serves the same purpose of defining certain categories of speech out of the general realm of protection. The difference between the two analytical frameworks is that categorization allows for less judicial discretion than content-based analysis by establishing rules for the treatment of subcategories. Schauer, \textit{Categories and the First Amendment: A Play in Three Acts}, 34 VAND. L. REV. 265, 300 (1981) [hereinafter Schauer, \textit{Categories}] (pointing out that with categorization the judge merely has to "place the case in the proper category in order to determine the result"]').
\textsuperscript{21} Stone, \textit{Content Regulation}, supra note 20, at 190.
\textsuperscript{22} Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (defining "fighting" words as expressions "which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

Stanford University's anti-discrimination policy is based on the fighting words distinc-
vocate such an exception for speech that defames a group defined by a common national origin.25

In a content-based analysis, the court assesses the value of an expression by focusing "on the extent to which the speech furthers the historical, political, and philosophical purposes that underlie the first amendment."26 If the expression is deemed to be of such low value that it merits only limited constitutional protection, the court will place this genre of speech among the other categories that are unprotected.27 Then the court would define what circumstances merit restriction.28 To determine the validity of a content-based restriction for racial expression, the freedom to engage in racist speech will be examined for whether it furthers the search for truth,29 self-government,30 and self-actualization31 philosophies underlying the first amendment.

A. The Search for Truth

One justification for giving wide deference to free expression...
is that open public discussion advances the search for truth. At first glance, protection of racist expression appears directly to thwart this underlying first amendment rationale. Because equality is a centerpiece of the American conception of a participatory democracy, speech that promotes inequality based on race does not contribute to an understanding of our society any more than the argument that the world is flat. Dean Lee Bollinger, who ultimately concludes that racist speech should be tolerated, concedes that tolerating such expression is antithetical to the search for truth. Dean Bollinger explains that "[t]he more we believe in the immorality or error of the ideas being expressed . . . the more attenuated is the truth-seeking advantage claimed as the justification for the free speech principle. The 'value' to us in these terms ranges from remote to none." Consequently, the search for truth rationale is seldom if ever argued in cases involving racist expression.

Although the Supreme Court has never denied first amendment protection to irrational speech, only rational debate can be justified by a truth-seeking philosophy. Racist speech may be

32. Professor Tribe explains that:
[T]he ideal of equality expresses aspirations so basic as to demand major attention on its own terms. Indeed, the notion that equal justice under law may serve as indirect guardian of virtually all constitutional values is evidenced by more than a maxim carved in marble on the United States Supreme Court. That notion, expressed with growing frequency and even stridency throughout this century, wars with the idea that equality is liberty's great enemy and can be purchased only at an unacceptable price to freedom.

33. See L. Bollinger, The Tolerant Society: Free Speech and Extremist Speech in America 54 (1986). Dean Bollinger's theory is that the act of tolerating racist speech has symbolic value in itself, and that this tolerance will bring greater good to society than restricting extremist speech. Bollinger sees tolerance as a "matter of self-protective political strategy, a response to a perceived reality of ever-threatening intolerance and prejudice." Id. at 99. Bollinger concludes that "we must not fail to see the genuine nobility of a society that can count among its strengths a consciousness of its own weaknesses." Id. at 248.

In contrast, Professor Mari Matsuda rejects Dean Bollinger's tolerance theory by asserting that "[t]olerance of hate speech is not tolerance borne by the community at large. Rather, it is a psychic tax imposed on those least able to pay." Matsuda, supra note 1, at 2323.

34. L. Bollinger, supra note 33, at 54.

35. Id.

36. In Gertz v. Robert Welch, Inc., the Court explained:
Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor
considered irrational because such criticism assumes that "undesirable voluntary behavior" is a function of an immutable characteristic. The faulty logic in this correlation is that while the voluntary behavior is the true object of the criticism, no voluntary action on the part of the victim can eliminate the negative association that prejudice conjures up from the victim's inherited qualities. If rational discourse is a necessary means of understanding and refining society, irrational speech cannot be defended as a way to approach this understanding. Because racist speech promotes irrational stereotyping, it adds nothing to public discourse that directly advances the search for truth. Accordingly, protecting racist speech violates the fundamental truth-seeking philosophy of the first amendment since, as Justice Brandeis wrote, it "is the function of speech to free men from the bondage of irrational fears."

However, even if racist expression rings categorically false and irrational, there remain reasons why such speech may further the pursuit of truth. For centuries, it has been argued that confronting the choice between truth and falsity makes people know and appreciate true ideas. John Milton wrote that "books are as meats and viands are — some of good, some of evil substance," and "bad meats will scarce breed good nourishment in the healthiest concoction; but herein the difference is of bad books, that they to a discreet and judicious reader serve in many respects to discover, to confute, to forewarn, and to illustrate." John Stuart Mill argued that through censorship society loses "what is almost as great a benefit [as truth], the clearer perception and livelier impression of truth, produced by its collision with error." Per-

the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

38. Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring). "Brandeis recognized the importance of self-control and that it brings benefits not just to those who have been spared as victims but also to those who have been spared the costs of acting badly towards them." L. Bollinger, supra note 33, at 141.
haps the most famous articulation of this philosophy is the marketplace metaphor coined by Justice Holmes in *Abrams v. United States.41* Justice Holmes wrote that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."

It is important to note the adversarial quality of this model. The mere existence of falsity does not illuminate truth. The only way a false idea can advance the search for truth is through its juxtaposition to a truthful complement. To the extent that a false idea invites refutation, the idea is valuable for it encourages a higher understanding of the truth. Viewed in this perspective, the presence of racist speech appears important as a catalyst for debate on the issue. For only the articulation of racist ideas leads to strong arguments against the merits of racist ideology.43

The adversarial model of the search for truth rationale provides a sound analytical framework for judging when racist speech is beneficial enough to merit first amendment protection. Many university anti-discrimination policies are vague. For example, Michigan's policy targets racist threats. While the leaflet and radio incidents44 clearly fall into the category of racist threats, it is possible that a psychology dissertation on success as a function of race or a criticism of affirmative action policies would also be punishable as civilized masks for pure racial aggression. The adversarial quality of the search for truth model provides a useful structure for defining the difference between these two sets of examples. The academic discussion and the informal criticism of affirmative action are ideas that invite responses, and therefore, further the search for truth. Conversely, the leaflet and radio jokes can be distinguished because they do not invite a response.

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41. 250 U.S. 616 (1919) (The Court upheld the convictions of five Russians for violation of the Espionage Act indicating that a publication intended to incite contempt and resistance against the United States government during the time of war is not protected by the first amendment.)

42. *Id.* at 630 (Holmes, J., dissenting).

43. However, truth may never be as seductive as good propaganda. *See* Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 469-70 (1987). Professor Kretzmer argues that since racist ideas are often highly attractive to the public, these views handicap the search for truth in the short run. Kretzmer points out that racist ideas are often invoked by governments and publicly accepted during times of social or economic upheaval. *Id.* To Kretzmer, the historical repetition of this tactic undermines the validity of the marketplace metaphor, although false ideas may eventually be rejected over a period of time. *Id.*

44. *See supra* notes 2-3 and text accompanying note 2.
This first set of examples stands isolated as racial epithets — phrases intended to fix an association between a group and a disparaging idea without inviting a response. When such incidents occur, criticism emerges in the media and among members of the community. These responses, however, are inadequate because the reaction is limited to sympathetic circles and is not a communication between the original speakers, who may have been anonymous, and their target. The Supreme Court of the United States has recognized that this type of imbalance thwarts the search for truth.  

At this point, a distinction can be drawn between racial ideas and racist epithets. A racial idea invites debate and advances the search for truth. Racist epithets, however, are more properly classified as isolated insults. In so far as a racial idea advances this underlying first amendment rationale, the idea merits protection. However, protection of racist epithets undermines the purposes of the truth-seeking goal underlying the first amendment.

B. The Self-Government Rationale

Professor Alexander Meiklejohn illustrated the importance of the self-government rationale to the American experience through an image of the town meeting. Professor Meiklejohn explains that this principle of free speech is "not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage." The rationale of universal participation is premised on the notion that "[t]o be afraid of ideas, any idea, is to be unfit for self-government."

Questioning the legitimacy of protecting racist speech illuminates an inherent conflict in Meiklejohn's rationale. His philosophy of equal participation would not be furthered by speech that

45. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding an FCC order to allow a party equal radio air time to rebut a personal attack by the station). In Red Lion, the Court used the marketplace metaphor to show how the truth-seeking ethic suffers when radio stations broadcast disparaging remarks from one side of an issue without giving the opposition an opportunity to respond. Id. at 390.

46. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 22-27 (1948) [hereinafter A. MEIKLEJOHN, FREE SPEECH] (examining the effect of the First Amendment on the procedure of the traditional American town meeting).

47. Id. at 26-27.

encourages racially-biased exclusion or by speech that excludes the unorthodox speaker. This conflict turns the issue into a balancing question of whether suppressing the first amendment rights of one individual is justified when this person advocates harm to or exclusion of other members of the community. Since Meiklejohn's model is based on "a voluntary compact among political equals," excluding some members of the community would result in an inequality of citizens which would be inconsistent with the model. Similarly, Professor Karst asserts that, "[i]nsofar as a guarantee of free speech rests on a theory of self-government, then, the principle of equal liberty of expression is inherent in that guarantee." However, by promoting alienation, racist epithets move the community in a direction that is inconsistent with the self-government justification for free expression in a participatory democracy.

49. A. MEIKLEJOHN, FREE SPEECH, supra note 46, at 11 (discussing the idea that a duty to obey a law arises only if a person has equally shared in making it).

50. Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 25 (1975). Professor Karst criticizes Professor Meiklejohn's application of the model to the parliamentary setting. Specifically, he criticizes the assertion that equality of ideas does not necessitate all voices being heard, as long as each idea has a representative voice. Professor Meiklejohn explains:

The First Amendment . . . is not the guardian of unregulated talkativeness. It does not require that, on every occasion, every citizen shall take part in public debate. Nor can it even give assurance that everyone shall have opportunity to do so. If, for example, at a town meeting, twenty like-minded citizens have become a "party," and if one of them has read to the meeting an argument which they have all approved, it would be ludicrously out of order for each of the others to insist on reading it again. No competent moderator would tolerate that wasting of the time available for free discussion. What is essential is not that everyone shall speak, but that everything worth saying shall be said.

A. MEIKLEJOHN, FREE SPEECH, supra note 46, at 25. Professor Karst criticizes this passage for undermining the principle of equality inherent in the model:

Meiklejohn's rather strained example does not even typify the expression in town meetings, let alone the sort of freewheeling expression characteristic of debate in the public forum. But Meiklejohn is wrong in a more fundamental way. The state lacks "moderators" who can be trusted to know when "everything worth saying" has been said, and the legislature lacks the capacity to write laws that will tell a moderator when to make such a ruling. And even the repetition of speech conveys the distinctive message that an opinion is widely shared. The impression of a mounting consensus is of great importance in an "other-directed" society where opinion polls are self-fulfilling prophecies. A vital public forum requires a principle of equal liberty of expression that is broad, protecting speakers as well as ideas.

Id. at 40 (footnote omitted).

51. For a discussion of the nature and gravity of the psychological harm inflicted through racial incidents, see infra notes 202-13 and accompanying text.
In a university setting, the issue becomes whether the first amendment guarantee of free expression outweighs the university's authority to deter and reprimand a student who seeks to extinguish the participatory rights of other students. Here again, different forms of racist speech divide according to whether they invite a response. Racist speech that encourages a response does not infringe on the participatory rights of other community members and therefore, according to the self-government rationale, should be left unregulated. Racist epithets, however, fall on the other side of this line, not only because of their exclusive form, but because they are specifically and solely intended to alienate minorities.

An event from the Fall of 1988 illustrates this exclusionary effect. On the Berkeley campus of the University of California, black students requested that the school radio station play a recording of rap music. Over the air, the student disc jockey responded by telling the black students to "[g]o back to Oakland." When reports of this sort of incident reverberate throughout the campus, the epithet sends a message to all black students that if they attempt to have a voice in a campus organization, they will be treated with hostility.

While first amendment rights are considered among those meriting the greatest judicial protection, freedom of expression cannot be treated as though it exists in a vacuum. The value in protecting the racist speaker can only be assessed when it is held up against its potential for limiting the constitutional rights of others. In view of the self-government rationale, the balance in-

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54. See Kunz v. New York, 340 U.S. 290, 302 (1951) (Jackson, J., dissenting) ("We should weigh the value of insulting speech against its potentiality for harm."). But see First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) where the Court declared, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." Id. at 790-91 (citing Buckley v. Valeo, 424 U.S. 1, 48-49 (1976)). For a criticism of this dicta, see Fiss, Free Speech and Social Structure, 71 IOWA L. REV. 1405 (1986). Professor Fiss asserts that:

The received Tradition takes no account of the fact that to serve the ultimate purpose of the first amendment we may sometimes find it necessary to "restrict
dicates that curbing the racist speaker tampers less with our notion of ordered liberty than permitting substantial sectors of the community to be alienated from public discourse. For when some voices are allowed such deference that they effectively silence other voices, political equality disappears, the marketplace is no longer free, and both the self-government and search for truth rationales are undermined.

C. The Self-Actualization Rationale

Proponents of the self-actualization rationale view freedom of speech as a right of individual expression. In a democratic order, freedom of speech functions as a necessary catalyst to self-determination. This theory of self-realization breaks down into the twin rights of controlling personal destiny through decision-making and developing intellectual powers and abilities. The first right is a broader version of the self-government rationale, for it focuses on an individual's right to give and receive information that is necessary to making important life decisions. Professor Redish describes the second as the right to develop personal human faculties through art, literature, dance or whatever other method one chooses.

This extension of the theory has troubled writers such as Judge (then Professor) Bork who claim that the self-actualization rationale is theoretically flawed since the doctrine fails to distin-
guish speech from other self-serving conduct.\textsuperscript{59} According to Judge Bork,

\begin{quote}
[a]n individual may develop his faculties or derive pleasure from trading on the stock market, following his profession as a river port pilot, working as a barmaid, engaging in sexual activity, playing tennis, rigging prices or in any of thousands of endeavors. \ldots These functions or benefits of speech are \ldots indistinguishable from the functions or benefits of all other human activity.\textsuperscript{60}
\end{quote}

One response to Judge Bork can be found in the writings of Thomas Emerson, who wrote that the self-actualization "theory rests upon a fundamental distinction between \ldots 'expression' and 'action'" and that "society must withhold its right of suppression until the stage of action is reached."\textsuperscript{61} More importantly, speech is expressly differentiated from other expressive conduct by the existence of the first amendment which serves as a constitutional mandate to protect this freedom.\textsuperscript{62} No similar provision exists which would apply to a more general liberty for all expressive action.

Proponents of the self-actualization theory believe that people with unpopular views have as much of a right to expressive self-fulfillment as mainstream thinkers. However, those believing that racist remarks deserve some first amendment protection based on the self-actualization principle do not necessarily oppose the kind of balancing that takes into account the damaging effects of such speech. As Professor Redish explains, "the self-realization value does not preclude balancing the interest of free speech against competing social values. Under a balancing concept, we could ac-

\textsuperscript{59} See, e.g., Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 25 (1971) (noting that the self-actualization theory standing alone would require the constitutional privileging of many types of behavior in addition to speech).

\textsuperscript{60} Id. at 25.

\textsuperscript{61} T. Emerson, General Theory, \textit{supra} note 55, at 6-7.

\textsuperscript{62} Professor Schauer asserts that it is freedom of speech and press, and not freedom of liberty in general, that is specifically set forth in the text for special protection. Even if the justification would, to be fully consistent, have to be applied to a far wider range of cases, only part of this range is picked out by the constitutional text for special attention. The reason we do not apply the self-development arguments to their full reach is that we lack the constitutional mandate for so doing. Because we have that mandate in the case of speech, we can proceed to apply that justification in speech cases. The relevant distinction under this argument — what makes speech special — is the very fact that the constitutional text says it is. Schauer, \textit{Must Speech Be Special?}, 78 Nw. U.L. Rev. 1284, 1297-98 (1983).
cept . . . the equal value of different types of speech, yet still decide that the different areas of expression may be treated differently because of external considerations.  

To analyze racist expression through this self-actualization theory, one must decide whether racist epithets are pure insults or self-fulfilling expressions that advance the twin rights of self-determination and self-development. Those who consider racist speech to be insulting acts believe that "a racial insult is only in small part an expression of self: it is primarily an attempt to injure through the use of words." This view assumes that though all speech has some self-actualization value, some forms of speech should be regulated for they are articulated more to inflict harm than to express a belief. Professor Tribe asserts that "[t]he first amendment need not sanctify the deliberate infliction of pain simply because the vehicle used is verbal or symbolic rather than physical. And legislatures may create remedies for the damage done with words so long as these remedies display sufficient sensitivity to freedom of expression as well."

Seen in this light, the line between an insult and a politically abhorrent idea appears brighter. Concrete examples of this distinction can be seen in the difference between Picasso's graphic criticism of women and a pornographic publication or between an academic discussion of racial differences and the Michigan leaflet. Courts draw these kinds of lines regularly. Those who classify racist speech as insulting acts can argue within this analytical framework that the self-fulfilling value of speech is not an absolute and must be limited to the degree that such speech causes tangible harm to others.

63. M. Redish, supra note 56, at 81.
65. L. Tribe, supra note 32, at 856.
66. See, e.g., Dennis v. United States, 341 U.S. 494, 501-02 (1951) (drawing a line between an academic discussion of law violation and advocacy of law violation). Similarly, Professor Lasson asserts that differentiating between "racial defamation and political comment is not nearly as difficult" as drawing this line in the obscenity context. Lasson, Racial Defamation as Free Speech: Abusing the First Amendment, 17 Colum. Hum. Rts. L. Rev. 11, 48 (1985) [hereinafter Lasson, Racial Defamation].
67. See Delgado, supra note 64, at 156 (arguing that the self-fulfillment rationale must be overshadowed when excessive acts cause harm to others).
D. Applying Content-Based Restrictions to Racist Speech

Although the traditional first amendment rationales provide cogent reasons why racist speech should not be protected, regulation of racist speech would be a content-based restriction which by definition carries a heavy presumption of invalidity. Commentators have noted that the Court has become "especially wary" of content-based restrictions, and the Court has insisted that "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." University anti-discrimination policies will be considered valid only if the speech they sanction is deemed to be of low value. "[F]or except when low value speech is at issue, the Court has invalidated almost every content-based restriction that it has considered in the past quarter-century."

The presumption against content-based restrictions follows from the idea that they promote inequality. Professor Karst asserts that equality "lies at the heart of the first amendment's protections against government regulation of the content of speech." When one side of an issue is silenced, the other sides clearly have a competitive advantage. "When government restricts only certain ideas, viewpoints, or items of information, people wishing to express the restricted messages receive 'unequal' treatment." The Court clearly disapproves of discriminatory treatment of speech, because

under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views . . . . There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard.

While the logic of these arguments works toward the protection of most extremist speech in order to preserve first amendment

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68. See, e.g., Stone, Restriction of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions. 46 U. CHI. L. REV. 81, 82 (1978) (noting that the court has upheld content-based restrictions only in "extraordinary circumstances").
69. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (citations omitted).
70. Stone, Content Regulation, supra note 20, at 196 (footnote omitted).
72. Stone, Content Regulation, supra note 20, at 202.
73. Mosley, 408 U.S. at 96 (footnote omitted) (quoting A. MEIKLEJOHN, POLITICAL FREEDOM, supra note 48, at 27).
equality, the exclusionary quality of racist speech changes the analytical considerations. Since the racist speech itself serves to silence other voices, it is only through suppressing this speech that true equality is achieved. Although convincing first amendment arguments can be found for protecting racist speech, the balance of the arguments shows that non-protection will more appropriately further the traditional philosophies underlying free expression. Therefore, classifying racist speech within the low value realm that may be regulated remains a legitimate alternative.

II. EFFORTS TO RESTRICT RACIST SPEECH REOPEN THE QUESTION OF WHERE THE COURT STANDS ON GROUP LIBEL STATUTES

When universities seek to promote racial tolerance through anti-discrimination policies that punish racist speech, the administrators are asking the courts to permit a content-based restriction analogous to a group libel statute. These laws that prohibit racial abuse are designed to promote order by minimizing racial tensions. In justifying the regulation of speech that inspires hatred for a racial, ethnic, or religious group, universities inevitably will confront whether group libel statutes are still a sound basis for state regulation.

The only time the Supreme Court reviewed the constitutional validity of a group libel statute was in the 1952 decision of Beauharnais v. Illinois. The Beauharnais Court, by a five to four vote, affirmed the conviction of a white supremacist under a law prohibiting publications that defamed groups on the basis of race or religion. In effect, the majority decision upheld the validity of

74. T. Emerson, The System of Freedom of Expression 391-92 (1970) [hereinafter T. Emerson, SYSTEM OF FREEDOM]. Thomas Emerson explains that:
Group libel laws are designed to promote internal order by eliminating or reducing friction among racial, religious, national or similar groups. In general they seek to prohibit, through criminal or civil process, communications that are abusive, offensive, or derogatory with respect to a group, or that tend to arouse public contempt, prejudice, or hatred toward the group.

Id.

75. 343 U.S. 250 (1952).

76. Id. at 267. The Illinois statute authorized criminal penalties for any public exhibition of a publication which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which . . . exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy . . ." Id. at 251 (quoting Ill. Rev. Stat. ch. 38, ¶ 471 (1949) (repealed 1961)). This Illinois statute is typical of other group libel statutes that were promulgated after World War II. The statute was later
group libel statutes. In doing so, the Court recognized that states have the authority to minimize the harmful results of speech that defames a specific group.\textsuperscript{77} The Court noted that in light of Illinois' history of racial discord, the legislature had a legitimate interest in maintaining "the peace and well-being of the State."\textsuperscript{78} Justice Black dissented, claiming group libel is merely a "sugar-coating"\textsuperscript{79} on blatant censorship. Justice Black was convinced that the decision was a direct assault on the first amendment and nothing more than a pyrrhic victory for minorities.\textsuperscript{80} He concluded his dissent by cautioning those encouraged by the Court's decision to heed the warning of the "ancient remark: 'Another such victory and I am undone.'"\textsuperscript{81}

Despite the inconclusive appearance of the five-to-four split, the \textit{Beauharnais} decision established a presumption that group libel statutes are valid. Eight of the nine Justices expressly assented that if narrowly written and appropriately applied, state legislation may regulate speech that defames a group.\textsuperscript{82} Justice Black's passionate dissent on this point\textsuperscript{83} does not undermine the general principle, established by the opinion, that certain forms of libel are of such low value that regulation should be permitted.\textsuperscript{84} The theoretical basis of his dissent is that the first amendment applies to the states as originally written in absolute terms, and therefore,
no legislature has the power to diminish a citizen's exercise of free expression. As first amendment jurisprudence has evolved, the Court has continually maintained that there are areas of expression of such low value — such as obscenity — that can properly become objects of state regulation. Beauharnais stands for the principle that group libel belongs in the realm of low-value speech where state regulation is justified.


Although Beauharnais has never been overruled, many commentators and courts believe that the concept of group libel is an "anachronism." As first amendment jurisprudence has evolved, several of the underlying premises of the Beauharnais opinion have been substantially altered. For example, to justify the wide deference given to the Illinois legislature, the Court asserted that no form of libel is in the realm of constitutionally protected speech. The Court further assumed that if libel directed at an individual was actionable, then a libelous utterance directed at a defined group also should be actionable. These blanket assumptions, that all libelous expression falls in the category of non-pro-

85. Id. at 270 (Black, J., dissenting). In a famous interview with Edmond Cahn, Justice Black said, "I have no doubt . . . that there should be no libel or defamation law . . . just absolutely none . . . ." Cahn, Justice Hugo Black and the First Amendment "Absolutes": A Public Interview, 37 N.Y.U. L. Rev. 549, 557 (1962).

86. See G. Stone, L. Seidman, C. Sunstein & M. Tushnet, Constitutional Law 925 (1986) (noting that the Supreme Court has allowed appropriate restraints on freedom of speech).

87. See, e.g., Roth v. United States, 354 U.S. 476, 485 (1957) (holding " obscenity is not within the area of constitutionally protected speech").


89. Beauharnais v. Illinois, 343 U.S. 250, 258 (1952). See T. Emerson, System of Freedom, supra note 74, at 396 (noting that Beauharnais "read the whole area of libel law out of the First Amendment . . . .").

90. Beauharnais, 343 U.S. at 258.
tected speech, were rejected by the Supreme Court in New York Times Co. v. Sullivan.91

The Court in New York Times broke significant new ground in establishing that the protection against a regime of seditious libel is "the central meaning of the First Amendment."92 The common law crime of seditious libel referred to "words or writings that do not amount to treason but are nonetheless critical of government officials or their policies."93 The New York Times Court reasoned that if criticism of the government is to be free and open, some degree of protection must be available for criticism targeted at public officials, even if such statements are defamatory and false.94 This protection implicitly identified political speech as central to the first amendment.95 As a result of New York Times, public officials are permitted to collect damages for libelous criticism but only when it is made with actual malice.96

This new protection for some libelous speech directly undermines the assumption in Beauharnais that all libelous speech falls beyond the pale of first amendment protection. The identification of political speech as a central first amendment concern also may influence the way Beauharnais is viewed today. When Beauharnais was decided, Justice Black argued that the first amendment should preclude punishment for extremist speech that is presented through a political petition.97 Now that the Court will permit first amendment protection of some libelous speech and has focused on political speech as a central value to be protected, Justice Black's argument against this application of a group libel statute may have more impact.

The question of whether racist expression is political speech once again raises the issue of how form alters the first amendment

92. See id. at 273; see also L. Bollinger, supra note 33 (arguing that New York Times made seditious libel unconstitutional); Kalven, The New York Times Case: A Note on 'the Central Meaning of the First Amendment', 1964 Sup. Ct. Rev. 191, 209 (central meaning of the first amendment "is that seditious libel cannot be made the subject of government sanction").
93. L. Tribe, supra note 32, § 12-12, at 861 (footnote omitted).
94. See New York Times, 376 U.S. at 271 (the inevitable erroneous statement must be protected if free debate about public officials is to survive).
95. Id. at 266.
96. Id. at 279-80. Actual malice is defined by the Court as a statement made with "knowledge that it was false or with reckless disregard of whether it was false or not." Id. at 280.
analysis. As discussed earlier, modes of expression that invite responses are categorically different from epithets.98 The Beauharnais majority did not address the issue of whether the leaflet was designed primarily as a political petition or as a written assault.99 Beauharnais' leaflet urged the Chicago city government "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro . . . . If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, SURELY WILL."100 Although Justice Black believed that presenting this inflammatory message in the form of a political petition brought the leaflet within the free zone of the first amendment, the rest of the Court may have responded differently.

Subsequent Supreme Court holdings though, have demonstrated ongoing judicial approval of the Beauharnais holding. In Garrison v. Louisiana,101 the Court approved of the judicial application of the Illinois group libel statute because it was "designed to reach speech, such as group vilification, 'especially likely to lead to public disorders.' "102 Almost two decades later in New York v. Ferber103 the Court reaffirmed the treatment of Beauharnais' leaflet as low-value speech by citing Beauharnais to illustrate the legitimacy of content-based regulation when "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake."104

While libelous statements that approach political speech may be outside the low-value sphere, libelous remarks targeting private individuals who are not public figures are still within the sphere of permissible state regulation.105 Unlike public figures, private indi-

98. See supra notes 44-45 and accompanying text.
99. Addressing the basic nature of the expression is the necessary point of analytical departure. The coupon contained in Beauharnais' leaflet, which offered membership in the White Circle League, could have led the Court to classify the leaflet as a commercial solicitation. See Arkes, supra note 19, at 304. Certainly the opinion would have been stronger had it addressed the commercial and political aspects of the leaflet before declaring that the primary nature of the publication was political.
102. id. at 70 (quoting Model Penal Code § 250.7 (Tent. Draft No. 13, 1961)).
104. Id. at 763-64.
105. See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 345-46 (1974) ("[s]tates should retain substantial latitude in their efforts to enforce a legal remedy for defamatory
individuals have limited access to "channels of effective communication" with the general public. Therefore, they have a greater need for legal redress to countervail verbal assaults to their reputation. Furthermore, private individuals are in greater need of state protection because, unlike public figures, they have not assumed the risk of involvement in public affairs and controversies. This distinction between public and political libel as opposed to private libel may affect judicial treatment of group libel statutes. The validity of a group libel statute may well depend on the circumstances surrounding the specific statutory application. Courts will be more likely to sustain a group libel statute in a situation involving community members who defame fellow members without political motive, as in the University scenario, rather than a situation involving a political petition, as in Beauharnais.

Some commentators argue that applying the heightened New York Times standard to group libel actions extends the New York Times holding far beyond the scope intended by the Court. The New York Times assertion that libel can no longer claim "talismanic immunity" from first amendment considerations did not bring all libelous speech within the realm of free expression. This assertion simply ensured "that a state could not remove speech from judicial scrutiny merely by putting a label on it." The expansion of first amendment protection to libel aimed at public figures or concerning public issues may have expanded first amendment protection to include group libel among these other protected categories of libelous speech. The public issues ex-

falsehood injurious to the reputation of a private individual.

106. Id. at 344.
107. Id. at 344-45.
108. Id.
109. See, e.g., Lasson, Racial Defamation, supra note 66, at 35 (arguing that New York Times is "expressly limited to actions brought by public officials against critics of their official conduct").
111. Lasson, Racial Defamation, supra note 66, at 35 (footnote omitted).
112. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 351-52 (1974). In Gertz, a reputable attorney representing the family of a police murder victim brought a libel action against defendant magazine for publishing defamatory remarks about him and his association with his client. The Court held that the attorney lacked the general fame and notoriety to be a public figure under the New York Times test, so the defendant's speech was not protected by the first amendment. Id.
113. See Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 763 (1985) (a credit agency's false report on a construction company's credit was not protected by the first amendment because it was not a "matter[] of public concern.").
ception raises the question of whether all racist speech should be afforded first amendment protection by virtue of the fact that racial tension is a matter of great public concern. In deciding whether libelous speech falls within the public issues exception, the Court examines the expression's "content, form and context." For example, in Dun & Bradstreet, Inc. v. Greenmoss Builders, the Court concluded that the remarks in a disputed credit report were not a matter of public concern because they were made "solely in the individual interest of the speaker . . . [and were] wholly false and clearly damaging to the victim's business reputation." Applying this dicta to racist epithets furthers the assertion that they should be considered low-value speech because they are expressed purely with an individual intent to injure. Conversely, racist ideas expressed in forms that invite response are not solely advanced in the speaker's interest at the victim's expense, but contribute to open public discourse. Racist ideas therefore may be legitimately classified as matters of public concern according to the Dun & Bradstreet dicta.

Since the problem this Note addresses concerns college students belonging to a racial minority, the public figures exception does not aid the analysis except as an example of the Court's willingness to expand first amendment protection of libelous speech beyond the standard articulated in New York Times. Because the Beauharnais decision placed group libel in the low-value speech realm, in order to recognize first amendment protection of group libel, the Court will need to decide that the harm from speech which is libelous to a group is more like the damage resulting from public libel than private libel.

114. Id. at 761 (citing Connick v. Myers, 461 U.S. 138, 147-48 (1983)).
116. Id. at 762 (citations omitted).
117. Since 1699, courts have drawn a clear distinction between individual and group libel, and they have failed to recognize a cause of action arising from disparaging words directed at a group. Note, supra note 88, at 310. Although there is some authority that utterances classified as group libel were crimes at common law, recovery of damages normally was permitted only in cases of individual libel. Beauharnais, 343 U.S. at 258; See Arkes, supra note 19, at 291 (arguing that it would be "absurd" to allow an individual to recover personal damages for a disparaging comment directed generally at an entire group). The theory behind the distinction "is that the gravamen of such an action must be individual harm, and that as the target group increases in size, the harmful effect of the statement on any individual member must be diluted, until at some point the harm falls below the threshold of legal recognition." Note, supra note 88, at 310. Judicial adherence to the common law has resulted in a customary denial that tangible harm results from group defamation. But cf. Riesman, Democracy and Defamation: Control of Group Libel,
Whether or not group libel results in the same type of injury to reputation as individual libel is a question worth examining. If it can be shown that group and individual libel result in the same type of harm, the argument for regulating group libel becomes stronger because individual libel is low-value speech that states may regulate. The *Beauharnais* Court believed that both types of libel could be equally damaging: "[T]he Illinois legislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits."118 Throughout history, group defamation has been used repeatedly as an instrument of political suppression.119 "The well-known patterns of attacks on 'democrats',

42 COLUM. L. REV. 727 (1942) (criticizing judicial treatment of the increasing attacks on groups and nationalities); Arkes, *supra* note 19, at 281 (discussing the inadequacy of treatment of group libel).

118. *Beauharnais*, 343 U.S. at 263.

119. After World War II, several western European nations enacted group libel statutes to guard against a recurrence of the extreme abuses that grew out of simple group defamation and racism. *See* Lasson, *Racial Defamation, supra* note 66, at 50-53.

The aftermath of World War II revealed the catastrophic propositions of Nazi racism. As a result, several international declarations were drafted in order to prevent similar repercussions of racial hatred:

[A]rticle 7 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 10, 1948 states: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

Even more explicit is the International Covenant on Civil and Political Rights adopted by the General Assembly in 1966. While article 19 of the Covenant guarantees the right to freedom of expression, article 20 provides: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

Precedence of antiracism over freedom of expression is carried even further by the International Convention on the Elimination of All Forms of Racial Discrimination, adopted in December, 1965. In article 4 of this Convention, which has been ratified and acceded to by more than 100 states, the States Parties "condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form."


The United States voted for adoption of the International Covenant on Civil and Political Rights and signed the Convention on the Elimination of All forms of Racial Discrimination but these conventions have not been ratified . . . . [The State Department] recommended that the United States should attach reservations to its ratification of these treaties.

*Id.* at 450 (footnotes omitted).
'reds', 'socialists', 'Jews', 'liberals', 'Catholics', ran little risk of a prosecution for libel, since vague groups of this sort, it was held, could not be defamed."

Had the common law set a precedent for recognition of the harm that resulted in group libel, some legal remedy may have been available to those victimized by extreme abuses of group defamation.

The enactment of group libel laws represents a political choice to guard against repetition of past abuses. The Beauharnais Court recognized the legitimacy of this motive by observing that

Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that willful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community.

Allowing racist epithets to remain a form of group libel that states may regulate creates a situation in which the expanded New York Times standard prevails as practical security for open public discourse of racial ideas, while Beauharnais still stands, not for its anachronistic generalizations, but for the principle that racist epithets do cause harm to their victims and diminish the quality of public discourse.

B. The Brandenburg Clear and Present Danger Standard Undermines Beauharnais

By 1969, the Supreme Court implicitly negated the holding in Beauharnais that group libel is beyond the realm of first amendment protection. In Brandenburg v. Ohio, the Court significantly expanded first amendment protection of extremist speech by extending this protection to threats of racist revenge at

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120. Riesman, supra note 117, at 729 (footnote omitted). For example, Riesman writes that:

In the Rise of the Nazis to power in Germany, defamation was a major weapon. It took various forms . . . . [M]en were hounded to the point of initiating prosecutions for libel against their detractors, who had the advantage of influence with the reactionary courts, and who utilized the courtroom as a platform for their propaganda without fear of being sentenced for contempt.

Id. at 728-29 (footnotes omitted).

121. Beauharnais, 343 U.S. at 258-59.

122. Beauharnais is discussed supra notes 75-88 and accompanying text.

a Ku Klux Klan rally. The *Brandenburg* decision assures that speech defaming a racial, ethnic or religious group will be protected if it stops short of meeting the heightened clear and present danger standard. The government may prosecute only when such speech is directed to incite or is likely to result in imminent and serious danger. Although *Brandenburg* does not directly address the validity of group libel statutes, it implicitly undermines their legitimacy by extending first amendment protection to the object they regulate. *Brandenburg* substantially narrows the window of group libel that may be regulated. While, it cannot be assumed that group libel statutes can never be justifiably applied, by assigning some constitutional protection to this speech, *Brandenburg* requires a greater showing of harm than that required by the *Beauharnais* rational basis standard.

If the *Brandenburg* clear and present danger standard alone were used to assess the validity of the Michigan policy, it is nearly certain that the university would be unable to sustain the rule to control situations for which it was designed. The requisite degree of harm would not be present. Under the *Brandenburg* test, only the imminence of violence or serious injury to the state would be sufficient justification to punish racist speech. In the Michigan leaflet incident, the women who read the insults against their heritage were not threatened with imminent physical violence. The injury they experienced was purely psychological. The primary purpose of the Michigan policy was not to curb physical violence, but rather to protect the university community from racial violence.

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124. *Id.* at 444-45. The Court reversed the conviction of Brandenburg, a Ku Klux Klan leader, who had been convicted under an Ohio statute for “advocat[ing] . . . the duty, necessity, or, propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform” and for “voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.” *Id.*

125. *Id.* at 447.

126. *Id.* at 447 n.2 (citing Dennis v. United States, 341 U.S. 494 (1951) and Yates v. United States, 354 U.S. 298 (1957) as decisions that “fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

127. The rational basis standard employed in *Beauharnais* allows the legislature to assume harm without proof. *See* Beauharnais v. Illinois, 343 U.S. 250, 262 (1952). The *Brandenburg* clear and present danger standard requires that the harm or potential for harm be empirically demonstrated. *See* *Brandenburg*, 395 U.S. at 448-49.

128. *See supra* note 2 and accompanying text.
discord and the personal psychological distress that results from racial insults.129

In Cohen v. California,130 the Supreme Court implicitly rejected the argument that psychological abuse is the practical equivalent of a physical assault by holding that offending sensibilities is simply not enough to justify suppression of speech.131 Cohen was convicted for wearing a jacket decorated with the words “Fuck the Draft” into a Los Angeles Courthouse.132 The Court held that this expression was a legitimate exercise of first amendment rights and reversed the conviction.133 In reaching its decision, the Court expressly considered whether Cohen’s message was directed at insulting any particular audience. The Court explained:

No individual actually or likely to be present could reasonably have regarded the words on [Cohen’s] jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State’s police power to prevent a speaker from intentionally provoking a given group to hostile reaction.134

This “captive audience”135 argument would have been more convincing if, for example, Cohen’s jacket had read, “Fuck the Jews” because this epithet singles out a defined group for ridicule136 and does not carry with it the political overtones of targeting government policy.

Since Cohen, the Court has held that, in certain situations, offending sensibilities is enough to justify restricting speech.137

129. MICHIGAN POLICY, supra note 4, preamble.
131. Id. at 23-26. Some medical experts contend that psychological attacks are more devastating than physical injuries. Dr. Howard Ehrlich, Director of the National Institute Against Prejudice and Violence, explains that “[a] broken bone can heal in a few months, but psychological injuries are more intense and longer lasting.” Wilkerson, supra note 2, § 1, at 34, col. 1.
132. 403 U.S. at 16.
133. Id. at 26.
134. Id. at 20 (citations omitted).
135. Id. at 21.
136. See Arkes, supra note 18, at 315 (asserting that the statement in Cohen attacks an impersonal institution rather than singling out particular persons for ridicule).
137. See FCC v. Pacifica Found., 438 U.S. 726 (1978). This case involved a comedy routine broadcast over the radio in which George Carlin’s monologue satirized the Puritan view of language of the broadcast media by reading off the words that could not be said on public airwaves. Id. at 729. The Court classified the routine, not as obscene, but as indecent since it was broadcast during daytime hours when children may have been easily exposed to it. Id. at 738-41. Although the Court conceded that the monologue should be protected in other contexts, protecting the sensibilities of the broadcast audience was con-
The Court will sometimes permit regulation based on psychological harm even though the incident falls far short of creating any sort of clear and present danger of imminent violence. This trend indicates that psychological harm on campus may be recognized as creating enough damage to justify university anti-racism policies.

C. The Clear and Present Danger Test Cannot Appropriately Address the Problem

It is not certain that the Court would apply the *Brandenburg* standard in assessing a challenge to the validity of the group defamation rules. The range of expressive acts is so wide that it is impossible to find a single test that is universally appropriate. Professor Kalven has written that the clear and present danger considered enough to regulate this type of expression over the radio. *Id.* at 748-50. *See also* New York v. Ferber, 458 U.S. 747, 774 (1982) (holding that a New York statute prohibiting persons from knowingly promoting a sexual performance by a child under the age of 16 by distributing material which depicts such a performance did not violate the first amendment); Young v. American Mini-Theatres, 427 U.S. 50, 63 (1963) (holding that ordinances providing that an "adult theater" could not be located within 1,000 feet of any two other "regulated uses" or within 500 feet of a residential area were not invalid under the first amendment); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1974) (holding that obscene films were not speech entitled to first amendment protection, and states have a legitimate interest in regulating exhibition of obscene material in public places). Professor Schauer asserts that "[a]fter Young and Pacifica, . . . it certainly appears that offensive speech is a subcategory in which restrictions will be permitted." *Schauer, Categories*, supra note 20, at 292-93.

138. Yet in Collin v. Smith, 578 F.2d 1197, 1206-07 (7th Cir. 1978), cert. denied, 439 U.S. 915 (1978), the Seventh Circuit rejected the argument that a Nazi march through Skokie, a predominantly Jewish community outside Chicago, would create an unacceptable level of psychological harm. The apologetic tone of the opinion suggests the court's discomfort in applying the clear and present danger test to this problem. *See L. BOLLINGER*, supra note 33, at 28-29, 71, 88, 134, 232 (addressing the significance of the judges' personal dissatisfaction with the outcome of the case). For a discussion of the failed constitutional arguments presented in this case and suggestions of how it may have come out differently, see Lasson, *Racial Defamation*, supra note 66, at 15-20. *But see A. NEIER*, DEFFENDING MY ENEMY 54-68 (1979) for a defense of the Collin decision.

139. *Schauer, Codifying the First Amendment: New York v. Ferber*, 1982 SUP. CT. REV. 285, 287 [hereinafter, Schauer, *Codifying*] ("[T]he diversity of communicative activity and governmental concerns is so wide as to make it implausible to apply the same tests or analytical tools to the entire range of First Amendment problems."). Professor Schauer considers one of the most important trends in recent first amendment jurisprudence to be the recognition that since not all speech merits the same degree of protection, some expression should be "subject to control under standards less stringent than clear and present danger in any form." *Id.* at 306. He adds that "the First Amendment is becoming increasingly intricate, which has prompted one scholar to observe pejoratively that First Amendment doctrine is beginning to resemble the Internal Revenue Code." *Id.* at 309 (footnote omitted).
test is an inappropriate response to the problem of group libel.

It is too simplistic for the problem at hand. It requires the pointing to some specific evil engendered by the speech, such as a breach of peace; but although group libel may on occasion be productive of a breach of peace, this approach to it focuses on the wrong evil. Group libels would be exactly as odious, antisocial, and dangerous even though they were never to be a breach of peace. Further, if we attempt to substitute the evil of racial hatred and tension and prejudice in order to get an immediate evil, we may be talking sensibly about systematic group libel but this logical turn deprives the test of any bite . . . . More important, it has never been clear that clear and present danger was offered as the criterion for all forms of speech problems so that we could say any speech which does not present a clear and present danger of overt conduct is constitutionally untouchable.140

Since the clear and present danger test was designed for cases involving advocacy of law violation that promote harmful physical acts such as obstructing the draft,141 the test is often assumed to be inappropriate for first amendment issues involving primarily psychological harm, such as that caused by obscenity.142

Inciting violence is not the only way that extremist speech

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140. H. Kalven, The Negro and the First Amendment 44 (1965). Professor Schauer agrees that problems involving defamation "do not fit neatly into a 'clear and present danger' type standard of review." Schauer, Categories, supra note 20, at 292. For more general criticisms on applying the clear and present danger test in this context, see Arkes, supra note 19, at 323 (asserting that this test teaches us "that, before citizens can expect the law to protect them or to vindicate their interests, they must prepare themselves to use violence outside the law").

141. In Schenck v. United States, 249 U.S. 47 (1919), involving a conviction for draft obstruction, the Court articulated the first version of the clear and present danger test: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Id. at 52. In Debs v. United States, 249 U.S. 211, 215 (1919), the Court cites Schenck in convicting the defendant for conspiracy to obstruct military recruiting. Also, in Whitney v. California, 274 U.S. 357, 371 (1927), the clear and present danger test was applied to convict the defendant for belonging to a group which advocated the overthrow of the government.

142. See Schauer, Codifying, supra note 139, at 305, in which the author states, "[n]ot every enormous state interest can fit neatly into Brandenburg's incitement-immediacy-inevitability formula, and other versions of the general clear and present danger formula may remain viable for special or novel circumstances." In support of this proposition, Professor Schauer cites United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979), mandamus denied sub nom., Morland v. Sprecher, 443 U.S. 709 (1979), dismissed, 610 F.2d 810 (7th Cir. 1979), and Van Alstyne, A Graphic Review of the Free Speech Clause, 70 Calif. L. Rev. 107 (1982). Schauer, Codifying, supra note 139, at 305 n.109.
can injure a community. Dean Lee Bollinger has written about the divisive effects of extremist speech on community cohesion. He points out that speech "can destroy the collective bonds that normally hold society together . . . . [In Collin] one of the risks of the Nazi march was the disruption of the peaceful coexistence that had tentatively been maintained in the community between Jews, Christians, and blacks." Dean Bollinger criticizes the current doctrinal structure for failing to account for these other harms.

Similarly, applying the clear and present danger test in the university setting would not solve the problem because the test overlooks the critical psychological tension between free expression and ethnic integrity. In reaction to the divisive effects of racist speech, many universities have weighed the competing interests and determined that minimizing racial discord is more important than maintaining absolute first amendment rights on campus. James Freedman, the President of Dartmouth College said that curbing racism in a student publication is not a question of freedom of expression when the "newspaper recklessly sets out to create a climate of intolerance and intimidation that destroys our mutual sense of community and inhibits the reasoned examination of the widest possible range of ideas."

Compounding the effects that racism has on community cohesion are the psychological effects that take their toll on the individual members of minority groups. As a result of the increase in racist incidents on college campuses, "black students say they feel

143. L. BOLLINGER, supra note 33, at 179.
144. Id. at 191 (discussing Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), cert. denied, 439 U.S. 915 (1978) where the Nazi organization was given the right to march in Skokie, Illinois, a small, predominately Jewish community).
145. See id. at 191-93 (criticizing the non-recognition of legitimate societal harm in the current doctrinal structure, and suggesting that the definition of "danger" in the clear and present danger test be broad and flexible enough to encompass a wide variety of social harm from speech).
146. This is evidenced by the rise in establishment of university anti-discrimination policies. See supra notes 11 & 22.
147. Gold, Dartmouth President Faults Right-Wing Student Journal, N.Y. Times, Mar. 29, 1988, § A, at 16, col. 4. Although Dartmouth is a private institution, the sentiments of Dartmouth’s President, James Freedman, are relevant in view of the notorious racial tensions at Dartmouth. In 1988, Dartmouth suspended several students for harassing a black music Professor. Casey, At Dartmouth the Clash of ’89, N.Y. Times, Feb. 26, 1989, § 6, at 28, col. 1. On January 3, 1989, a New Hampshire judge ordered that two of the suspended students be readmitted. Id.
increasingly like outsiders, isolated and unwelcome.”

Black students tend to have a far less positive experience at white universities than their white peers. Dr. Howard Ehrlich, a psychologist and Director of the National Institute Against Prejudice and Violence, finds that withdrawal is the predominant reaction to a racist environment. Along with this diminished involvement in campus life comes a profound sense of low self-esteem. A recent survey of black students at sixteen white colleges reported “only 12 percent of black students, as against a majority of whites, said they felt they were an important part of campus life.”

Another problem with applying the clear and present danger test in this context is that it targets only the trigger of violence instead of all the events that may have contributed to heightened racial tension. While racist speech may not always lead to immediate danger, every epithet, especially when well publicized, heightens racial tensions and contributes to a climate which often degenerates into violence. Prominent psychological and sociological theorists stress that racist expression is “a precondition for acts of racial violence.”

148. Wilkerson, supra note 2 § 1, at 34, col. 1.
149. Graham, Baker, and Wapner, Prior Interracial Experience and Black Student Transition Into Predominantly White Colleges, 42 J. PERSONALITY & SOC. PSYCHOLOGY 1146, 1147 (1985). The authors observe that:

Almost all of the studies . . . report that black students in white colleges, by comparison with white students in the same colleges or black students in predominantly black colleges, experience more difficulty in the various aspects of adjustment, perform less well academically, are generally less satisfied with college, perceive the university climate more negatively, and have higher drop-out rates.

Id.

150. Wilkerson, supra note 2, § 1, at 34, col. 1.
151. Id. One Michigan student described his reaction to racist events in remarkably personal terms: “White students say, ‘Michigan is great; it’s awesome.’. . . . But I just want to get my education and get out of here. This is their place, not mine.” Id. § 1, at 1, col. 2.
152. See Arkes, supra note 19, at 283. Professor Arkes observes:

It may be hard to make a precise connection in any case between the suffering of a harm and any particular publication that might have helped to sustain (or create) a climate of prejudice from which injuries may arise. In the nature of things, the lines of causation here cannot be drawn with exactness between particular events, and many of the harms that result from the defamation of groups may not crop up until years after the fact.

Id. For several recent examples of racial violence on campus, see notes 2 and 7 and accompanying text.
153. Kretzmer, supra note 43, at 463. Professor Kretzmer cites the social psychologists Gordon W. Allport and Neil J. Smelsmer for their empirical studies showing that people engage in racist acts more easily when they have participated in milder levels of
The clear and present danger test is also problematic when applied to racist speech because physical violence on behalf of a victim is unlikely in a situation where a minority is the target. Speech falling within the “fighting words” category, that may be regulated, will be different in a situation where the parties are on unequal ground and the victim is likely to turn the other cheek. Racist speech is so common that it is not seen as fighting words but rather as part of the ordinary conflict people are expected to tolerate. Ironically, if minorities were to react violently, the racist speaker could be punished through either the “fighting words” exception or the clear and present danger test. However, the response to dehumanizing racist language is often withdrawal rather than a fight. Targets choose to avoid racist encounters whenever possible, internalizing the harm rather than escalating the conflict. Refusing a fight and admirable self-restraint then denotes the racist words as non-actionable. In this way, self-defensive withdrawal erects a constitutional wall that isolates minorities from state protection.

The clear and present danger test will never be a satisfactory response to complex psychological problems unless we give the “imminency” and “danger” elements a more flexible and sensitive reading. As originally conceived, the Court could take account of such harm because the clear and present danger test was intended to incorporate the idea that “the character of every act depends upon the circumstances in which it is done.” However, as refined in Brandenburg, the test has become too rigid a formulation to respond to issues involving primarily psychological damage.

Until Beauharnais is either reinforced or overruled, the legal validity of statutes aimed at curtailing group libel will remain a

prejudice conduct such as racist speech. Id. at 462-65.
154. See Matsuda, supra note 1, at 2337.
155. See id.
156. See id. (“In order to avoid receiving hate messages, victims have had to . . . modify their behavior and demeanor.”).
157. See id. (“The recipient of hate messages struggles with inner turmoil.”).
158. See L. Bollinger, supra note 33, at 193 (“[T]he ‘clear and present danger’ standard . . . seems a perfectly appropriate formulation, provided we give the term danger the wide and sensitive compass it ought to have.”).
159. Schenck v. United States, 249 U.S. 47, 52 (1919) (the defendants were convicted of conspiring to cause insubordination in the military by printing and circulating a document encouraging recruits to resist the draft).
fertile source of dispute. The fact that the Court has repeatedly refused to overrule Beauharnais illustrates the Court's reticence to apply the Brandenburg clear and present danger test to all types of expression. Although many commentators have suggested that the New York Times decision or the heightened clear and present danger standard marked the end of Beauharnais, the Court continues to mention Beauharnais approvingly. Assuming that the Court concurs that the Brandenburg test is poorly tailored to cases involving psychological harm and that group libel in the university context is more analogous to private than public libel, the basic principle of Beauharnais that racist epithets are low-value speech remains as a legitimate foundation for examining an appropriate judicial response for state action against the problem of racist speech.

III. THE UNIVERSITY ENVIRONMENT AFFECTS FIRST AMENDMENT ANALYSIS

The validity of the university anti-racism policies may ultimately turn on how the special environment of the university...
alters the application of first amendment principles. This contextual analysis may be decisive regardless of whether or not the regulation of racist epithets is deemed to be a legitimate content-based regulation. Even if racist epithets are found generally to be worthy of first amendment protection, courts may find that extending this protection is inappropriate when racist speech jeopardizes the compelling goals of an academic institution. In shifting to a context-based analysis, we must ask whether there is something unique about the university setting that makes the interests of the state compelling enough to curtail students' first amendment rights.

The Court has recognized that because universities have traditionally been treated similarly to public forums the broadest first amendment protections should apply to university students. For if any open and accessible marketplace of ideas still exists, it is the American university. According to this argument, permitting universities to maintain their anti-racism codes would close the forum to some students.

Preserving free debate on campus is also a strong motivating factor in favor of anti-racism policies. Universities will benefit from policies that are specifically tailored to maintain openness by treated equally.

Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

In the third tier, often called the non-public forum, regulations must be viewpoint neutral and reasonable. In this tier, the government may, in addition to reasonable time, place, and manner restrictions, "reserve the forum for its intended purposes . . . as long as the regulation on speech is reasonable and [is] not an effort to suppress expression merely because public officials oppose the speaker's view." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (citation omitted).

Applying public forum analysis to the university environment would significantly complicate the analysis for it would involve breaking the university down into its different environmental components. Under public forum analysis, the various areas and institutions of the university — such as campus media, classrooms and dormitories — would each have to be assessed individually.

164. See, e.g., Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981) (noting that "the campus of a public university, at least for its students, possesses many of the characteristics of a public forum"). Some conservatives take this argument further, and assert that efforts to curb racist speech amount to "ideological indoctrination." Finn, supra note 11, at 19 (arguing that universities' efforts to curb racist speech will restrict open discussion that is the hallmark of the American university).

165. See Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (noting that the "classroom is peculiarly the 'marketplace of ideas'").
discouraging only exclusionary speech. For in addition to alienating minority students from the community, speech that promotes racial tensions breeds divisiveness and disorder that disrupts the educational process.

The Court has held that in certain special environments, speech that normally warrants first amendment protection may be regulated when it interferes with the special goals of the institution. For example, the unique purposes of certain institutions such as military bases, prisons, and schools, justify restricting these environments for first amendment purposes to a degree that is unwarranted on public streets and in parks. Therefore, the same speech that is protected in some forums can be regulated in other forums. Thus racist speech that is disruptive enough to thwart educational purposes should be regulated at public universities, but remain protected in traditional public forums. In Tinker v. Des Moines School District, the Court gave public schools the authority to punish expression if the school demonstrates that the verbal conduct "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." For such a prohibition to be valid, the school must show that the regulation is based on "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."

The Tinker standard, which was specifically addressed to the high school setting, was extended to state universities in Healy v.

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166. See supra note 11 (discussing these policies).
167. See infra notes 188-90 and accompanying text.
170. See Perry Educ. Ass'n. v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (holding that agreement giving teachers' union preferential access to an interschool mail system is constitutional).
171. In Gregory v. Chicago, 394 U.S. 111 (1969), Justice Black conceded that government may protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people either for homes, wherein they can escape the hurly-burly of the outside business and political world, or for public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals. Id. at 118 (Black, J., concurring).
174. Id. at 509
James. In Healy, the Court ruled that colleges can regulate speech that poses "a substantial threat of material disruption" to the educational process. Furthermore,

a public university, at least for its students, possesses many of the characteristics of a public forum. . . . [However, a] university differs in significant respects from public forums such as streets, parks, or even municipal theaters. A university's mission is education, and [it may] impose reasonable regulations compatible with that mission upon the use of its campus and facilities.

This holding is consistent with the characteristic deference the Court gives to university faculty decisions. The Court justifies this relaxed standard of review by asserting that a liberal approach keeps the activities of an educational institution consistent with its intended purposes.

For a court to sustain an anti-racism policy under the current standard of review, the university must show that racist epithets materially disrupt the educational environment. To accomplish this, universities should assert that regulating racist speech is justified by compelling educational interests such as maintaining order, attracting a diverse student body, avoiding the perpetuation of racist stigma, and minimizing psychological harm both to individuals and the community. The merits of each of these interests will be discussed separately.

175. 408 U.S. 169 (1972).
176. Id. at 189. The Court noted that merely unpopular views could not be regulated: "The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent." Id. at 187-88. But the Court also noted that if the speech is directed toward action, as opposed to discussion, regulation of the speech would be permissible. Id. "In the context of the 'special characteristics of the school environment,' the power of the government to prohibit 'lawless action' is not limited to acts of a criminal nature. Also prohibitable are actions which 'materially and substantially disrupt the work and discipline of the school.'" Id. at 189 (footnote omitted) (citation omitted).

178. See, e.g., Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214, 225 (1985) (stating that "[w]hen judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment"). The Ewing Court concluded that this "narrow avenue for judicial review" precluded it from overturning a university decision in the absence of "a substantial departure from accepted academic norms." Id. at 227.

179. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (reasonable time, place, and manner restriction allowing teachers' union preferential access to interschool mail system is consistent with its intended purpose).
A. The Interest of Maintaining Order on Campus

Racial tensions across the United States have bred dissension on campus, often resulting in violence against black students. At the University of Massachusetts in Amherst, for example, violence erupted just after the New York Mets defeated the Boston Red Sox in the 1986 World Series. A reporter observed, "hundreds of students, many of them drunk, poured out of the dorms. White Red Sox fans began shoving Mets fans who were black; soon a white mob of 3,000 was chasing and beating anyone who was black."\(^{180}\) One student "recalls thinking, 'My God, my life is being threatened here — and it's because I'm black.'"\(^{181}\) At the University of Mississippi, an arsonist's fire gutted a house belonging to the first black fraternity to locate on fraternity row.\(^{182}\) During a student election at the University of California-Los Angeles in the Spring of 1988, months of racial tensions violently erupted into a brawl that involved more than 200 students.\(^{183}\) In 1988 at the University of Massachusetts, a white female student and two black male students who attended a party together were attacked by six white students.\(^{184}\) These incidents reflect the urgent need to diffuse racism on campus. Because each epithet increases racial tension, which increases the likelihood of violence, universities have a compelling interest in restricting racist speech to maintain order on campus.

The argument that racist speech should be regulated to maintain order on campus will ultimately encounter the clear and present danger test set forth in Brandenburg v. Ohio.\(^{185}\) The inevitable stumbling block is that a claim of potential violence triggers the Brandenburg test which requires showing of harm or potential

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181. Id. (quoting a black student named Joseph Andrade).
183. "Voting booths were upended, ballot boxes grabbed and blows exchanged at UCLA . . . as more than 200 students disrupted an undergraduate presidential election in a protest that campus leaders said was the outgrowth of months of racial tension." *Racial Tension Erupts in Melee at UCLA*, L.A. Times, May 27, 1988, at 1, col. 1. The demonstrators were angry because their candidate, a Latino, was disqualified for not having enough college credits or sufficient grades. *Id.*
imminent or serious danger. Once Brandenburg is invoked, the focus shifts from psychological to physical harm. Under the Brandenburg test, universities could act to diffuse racism only when tensions become so uncontrollable that physical violence appears to be the only solution.

The Brandenburg approach is unsatisfactory because it ignores the reality of how racial tensions evolve and eventually take hold of a community. It is the accumulation of racist sentiment, as opposed to an isolated incident, that creates the hostile environment. Professor Matsuda notes that racist incidents on university campuses are "rarely isolated" occurrences, and that "[l]ess egregious forms of racism degenerate easily into more serious forms." To illustrate the connection between racist words and racist deeds, Professor Matsuda points out that the killing of a California high school student, Thong Hy Huynh, "after months of anti-Asian racial slurs" was no accident. To steer courts away from the analytical domain of Brandenburg, universities may argue that restricting racist speech is a compelling interest because it may minimize racial tensions before they escalate violently.

B. The Need to Attract and Keep a Diverse Student Body

The interest in regulating racist speech is especially compelling to universities because a divisive racist climate undermines the central function of the institution — education. A university maintains an open marketplace of ideas in part to the degree that it brings in students from various backgrounds. University administrators use anti-discrimination policies to create a welcoming and supportive atmosphere for minority students that will encourage their participation in the university community. By bringing together students with diverse backgrounds, the spectrum of ideas widens and the educational process flourishes.

The Supreme Court has established that universities have a compelling interest in maintaining a diverse student body. In Regents of the University of California v. Bakke, the Court as-

186. See supra note 126 and accompanying text.
188. Matsuda, supra note 1, at 2327 n.37.
189. Id. at 2335.
190. Id. (footnote omitted).
sserted that "attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education." Universities hope that passage of anti-racism policies will help reverse falling minority enrollment. The University of Wisconsin passed an anti-discrimination policy in part because minorities were turning down full scholarships because of racial tensions on campus. With minority enrollment in institutions of higher education declining despite increasingly vigorous recruitment, the interest in attracting and keeping minorities on campus becomes more significant. The Court has found that encouraging diversity of the student population is a compelling interest even if such action results in deprivation to individuals among the majority. In *Bakke*, the Court ruled that a university may admit a minority student over an equally qualified white student in

192. *Id.* at 311-12.
194. Robert Meacham, an administrator at the University of Cincinnati believes that the "means by which we deal with racism will determine whether or not we will have minority students in higher education." *Conference to Combat Campus Racism*, Proprietary to the United Press Int'l, Sept. 18, 1989 (quoting Robert Meacham of the University of Cincinnati). Despite the fact that recruiting minorities has become a top priority in higher education, minority enrollment does not reflect these efforts.

Although a growing percentage of black students are finishing high school, black attendance in college is dropping. In 1985 only 26 percent of black high school graduates went on to college, down from 34 percent in 1976 . . . . While minority college enrollment expanded slightly between 1980 and 1986, the gain was mostly because of increased numbers of Asians and Hispanics, not blacks. These bleak statistics persist despite several decades of intense effort to attract and retain minority students . . . . By the year 2020, 35 percent of the American population will be minority, with blacks and Hispanics making up the largest portion. For society's sake as well as for their own survival, colleges cannot afford to have more than a third of the nation view them as inaccessible or inhospitable.


In *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), we upheld a New York reapportionment plan that was deliberately drawn on the basis of race to enhance the electoral power of Negroes and Puerto Ricans; the plan had the effect of diluting the electoral strength of the Hasidic Jewish community. We were willing in *UJO* to sanction the remedial use of a racial classification even though it disadvantaged otherwise "innocent" individuals. In . . . Califano v. Webster, 430 U.S. 313 (1977), the Court upheld a provision in the Social Security laws that discriminated against men because its purpose was "the permissible one of redressing our society's longstanding disparate treatment of women."

*Id.* (Marshall, J., concurring in part and dissenting in part) (citations omitted).
the interest of maintaining a diverse class. In seeking to legitimate university anti-racism policies, the same end of diversity of the student population is sought as in Bakke.

Although the university interests in Bakke and in maintaining the anti-racism policies are identical, the cases can be distinguished by the harm generated. In Bakke, the Court held that "innocent individuals" of the majority who took no part in past societal discrimination may be legitimately denied admission. The Court should be more willing to curb student rights in the Michigan leaflet and similar incidents because the speaker is seeking to perpetuate past discrimination and thereby plays an active role in promoting the harm that the university is attempting to eradicate.

A narrowly defined anti-racism policy would only deter racist speech aimed at excluding others. Therefore, the policies would not be ones of exclusion, but ones of reciprocal inclusion. When the harm generated by such policies is viewed in this broader context, it is clear that a much greater harm — the exclusion of innocent individuals from the university community — may be justifiably avoided in the interest of maintaining diversity of the student population at public universities. Since the University’s interest in diversity is compelling enough to exclude qualified members, restricting the small range of exclusionary speech so that minority students have equal participatory rights is equally, if not more, compelling.

C. The Interest in Avoiding the Perpetuation of Racist Stigma

Since 1879, stigma has been recognized as a constitutionally significant harm. In Strauder v. West Virginia, the Court held that American citizens have an absolute right to be exempt from state "legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy." Since then, judicial concern about stigma en-

196. Id. at 311-15.
197. Id. at 307.
198. See Strauder v. West Virginia, 100 U.S. 303 (1879). See generally Marshall, Discrimination and the Right of Association, 81 Nw. U.L. Rev. 78, 94 (1986) ("Stigma was first recognized as a constitutionally significant injury when a state itself created or perpetuated negative stereotypes.").
199. 100 U.S. 303, 308 (1879). The Strauder Court reasoned that singling people out based on race "is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing
couraged through state action has broadened to include stigma perpetuated by ordinary citizens.\textsuperscript{200} Judicial dedication to avoiding stigma is based on the belief that divisions based on immutable characteristics "are contrary to our deep belief that 'legal burdens should bear some relationship to individual responsibility or wrongdoing.'"\textsuperscript{201} One of the most deleterious effects of permitting racial epithets to go unpunished is that they perpetuate racial stereotyping. In view of this effect on the university environment, universities have a compelling interest in eradicating racial stigmas by way of anti-racism policies.

D. Minimizing the Psychological Harm that Affects Individuals and Campus Unity

As a final defense of university anti-racism policies, the university may argue that racial epithets result in substantial harm that significantly affects community cohesion and individual adjustment to college life.\textsuperscript{202} Although the judiciary has traditionally treated racist threats under the category of group libel as a diffuse and indiscernible harm, substantial psychological, sociological and political effects result from racial insults.\textsuperscript{203} Racist epithets aimed at groups may have an even more deleterious effect than individual insults since they paint negative stereotypes with a "broader brush."\textsuperscript{204}

The harms resulting from racial threats may be considerably amplified in a university environment. The minority groups targeted by these insults tend to be so poorly represented that the

\textsuperscript{200} See Marshall, supra note 198, at 94 ("[T]he concern was that officially sanctioning discrimination imbues it with a legitimacy that perpetuates similar treatment in purely private conduct.").

\textsuperscript{201} Regents of the Univ. of California v. Bakke, 438 U.S. 265, 360-61 (citations omitted) (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

\textsuperscript{202} See supra notes 147-54 and accompanying text.

\textsuperscript{203} See Delgado, supra note 64, at 135-39 (pointing to the psychological harms caused by racial stigmatization to support an independent tort action for racial insults).

\textsuperscript{204} Arkes, supra note 19, at 292. Professor Arkes cites authorities confirming the widespread presence of racial and religious stereotypes. Id. He then points out:

When blacks were commonly turned away from hotels and other public accommodations — the black middle class and professional people as well as the poor and uneducated — one may seriously wonder whether the clerks behind the counters were responding to these people as individuals or whether they were responding largely to a category into which these people had been thrust, and in which they had been stigmatized as a group.

\textsuperscript{Id.}
harm falls on the shoulders of a small number of individuals. Therefore, alienation resulting from racial insults on college campuses can be closely analogized to the harm resulting from individual libel, which is an accepted basis for state regulation. Furthermore, victims of racism often suffer "physiological symptoms and emotional distress ranging from [deep] fear, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide." Professor Matsuda calls specific attention to a California Attorney General's report finding that racist epithets "cause deep emotional scarring and bring feelings of intimidation and fear that pervade every aspect of a victim's life." The reaction of minority students to racist incidents supports this conclusion. When a black Denison University student was awakened in the middle of the night by racist epithets yelled through his dormitory room wall, he said, "I felt I had been mentally, spiritually and emotionally raped. Everything about my personhood had been mauled." College students often enter college psychologically vulnerable because they are away from home for the first time. This vulnerability is reflected in the fact that minority students feel victimized when any member of their cultural group becomes a target of racism: A black student at the University of Texas at Austin, says, "Overt racial incidents can have a real psychological effect, even if they don't happen to you."

When the university fails to act to diminish the harm caused by racial incidents, the damage becomes more acute. At the Madison campus of the University of Wisconsin, a student spokesman for the Minority Coalition, said, "By hiding behind the issue of free speech, the administration is making this campus safe for racism." Professor Matsuda agrees that "[o]fficial tolerance of racist speech in [the university] setting is more harmful than generalized tolerance in the community-at-large. It is harmful to stu-
dent perpetrators in that it is a lesson in getting-away-with-it that will have lifelong repercussions.”

It is harmful to targets, who perceive the university as supporting racism through inaction, and who are left to their own resources in coping with the damage wrought.

Recognizing that official university tolerance looks like passive complicity with racism, university administrators promote anti-racism policies as actions reflecting university support for minorities and criticism of racially motivated verbal attacks. For example, the President of the University of Wisconsin, Kenneth Shaw, promotes the university’s regulation of racial speech because its policy “can particularly send a message to minority students that the board and its administrators do care.”

The passage of university anti-racism policies reflects a special sensitivity to the needs of minorities in much the same way as heightened judicial review of laws discriminating against minorities. Given that the Supreme Court has determined that private individuals are more vulnerable to harm from defamatory speech than are public figures, it would be logical for a court to find that members of a minority group are more vulnerable to the deleterious effects of exclusionary speech than members of the majority. An illustration of this concept can be seen through the comparison of two hypothetical political leaflets. “A” distributes a leaflet saying that men are inferior to women, and therefore should not have the right to vote. “B” distributes a leaflet saying that blacks are inferior to whites, and therefore should not have the right to vote. The group targeted by B will incur more harm than the group targeted by A, simply as a reflection of recent history. While men have traditionally enjoyed suffrage throughout this country’s history, blacks have been subject to governmental measures that prevented them from voting. Therefore, blacks are more likely to believe B’s expression threatens their participatory

211. Matsuda, supra note 1, at 2371.
212. See id. at 2336.
213. Finn, supra note 11, at 17 (quoting Kenneth Shaw, President of the University of Wisconsin).
214. In footnote four of United States v. Carolene Products, 304 U.S. 144 (1938) for example, Justice Stone wrote that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.” Id. at 152-53 n.4 (1938).
215. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 244 (1974) (holding that states may punish defamation directed at private individuals); supra notes 106-10 and accompanying text.
voice, and the state may realistically conclude that the threat from B's leaflet will exceed that from A's leaflet. Consequently, in the interest of minimizing racial tensions, a state or a university may deem it necessary to protect minorities against extremist speech.

IV. A MODEL UNIVERSITY ANTI-DISCRIMINATION POLICY

In analyzing the philosophies underlying the first amendment and its modern legal doctrine, persuasive arguments have emerged in favor of university regulation of racist speech. For an anti-discrimination policy to be judicially accepted, it must be sufficiently narrow to avoid infringing on speech that merits first amendment protection. The Michigan policy prohibiting "racial threats" was deemed facially invalid for being overly broad. This overbreadth problem does not arise in the model policy presented below, which punishes racist epithets, but allows racial ideas to be expressed in a form that invites a response. The model policy does not undermine any of the underlying first amendment rationales because only racism expressed for the purposes of insult and exclusion is punishable.

This Model University Anti-Racism Policy prohibits any written or spoken expression which is:

1. Targeted at a religious, racial or historically oppressed group; and
2. Derogatory to the point where the expression directly or impliedly denies the humanity of the group; and
3. Expressed in an exclusionary manner which threatens the academic or social participation of the targeted group.

The introductory clause identifies the type of behavior regulated by this policy. This policy regulates written or spoken words, caricatures, and symbols, but not physical violence because regulating physical harm to people or property does not involve first amendment concerns.

The first prong enumerates the various groups that may fall victim to discriminatory speech. Although most hateful speech victimizes racial minorities, this model policy is broad enough to punish epithets that isolate people based on gender, sexual persuasion, religion, or national origin.

216. See supra notes 4-6 and accompanying text.
The second prong ensures that only derogatory remarks will be regulated. While most exclusionary speech falls within this category, general stereotyping would not. For example, the statement that blacks are better athletes than whites would not be regulated because, although the expression conveys a racial attitude, it is not derogatory. In contrast, the Berkeley incident, in which the white disc jockey told the black student to “‘[g]o back to Oakland,’ ” would be regulated. Even though the actual words appear innocuous, the speaker's obvious intent is to express the idea that since the student is black, his participation is not welcome at the campus radio station.

Under the third prong, the first amendment guarantee of free expression is preserved because racial ideas may be expressed in a forum that promotes discussion. This prong preserves the opportunity for students to challenge assumptions about racism because the dialogue is open to all. Classroom or informal discussion about genetic differences or the validity of affirmative action policies are protected, as long as the discussion does not deny the participatory rights of those targeted by the speech. It is this prong that isolates and protects expressions that advance the policies underlying the first amendment.

The judge that struck down the Michigan anti-discrimination policy noted that the policy infringed on constitutionally protected speech when it was used to punish a student who "openly stated in a class discussion his belief that homosexuality was a disease and that he intended to develop a counseling plan for changing gay clients to straight." Under the model policy, this type of speech would not be punishable because there is no intent to exclude the targeted group from the community. More importantly, the statement was made in a setting where the targeted individuals, or others troubled by the ideas expressed, could respond in a way which would aid the speaker and class members in understanding homophobic stereotypes. While this speech is protected by the model policy, the speech in the Michigan leaflet would be punishable since it was presented in a way that evaded response, and was clearly intended to exclude minority students from campus life.

218. See supra note 53 and accompanying text.
CONCLUSION

While content-based restrictions on speech carry a heavy burden of presumptive invalidity before the Court, a university has compelling arguments for restricting racist epithets. These arguments will only be successful if the Court is convinced that the clear and present danger standard, in its present form, should not apply to speech causing purely psychological harm. If this standard is inapplicable, a university can show that racist epithets should be subject to regulation because the harm from them is closely analogous to the harm generated by private libel.

A university’s best argument is that in view of falling minority enrollment, schools must act to attract and keep minorities on campus. Racist epithets breed racial tensions, thwart goals of student diversity, perpetuate stigma, alienate individuals, and segregate the community. Each racist incident substantially contributes to an environment where minorities feel excluded, and therefore, cannot perform as academic or social equals. As minorities withdraw from the mainstream student body, the entire community suffers from the loss of their unique participatory potential.

Since the participatory rights of some students are severely jeopardized by racist epithets, the Court should permit this narrow area of first amendment expression to be regulated on campus. University anti-racism policies are far less prejudicial than other regulations, such as admission standards which effectively exclude qualified students from schools. Anti-racism policies simply ensure that all members of the university community have a voice on campus. Minority students press for passage of these policies for their symbolic value, because to them, administrative apathy looks like vicarious aggression. University anti-racism policies send the university community a message that there are times when tolerance goes too far and becomes silence in the face of injustice.

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220. See L. BOLLINGER, supra note 33, at 233.
221. Id. at 11, 217, 233. In his introduction, Dean Bollinger writes:
   I [do not] want the reader to assume that the view taken here is premised on the notion that tolerance is always a virtue and intolerance a vice. There are times when tolerance constitutes moral weakness and is itself properly to be condemned, just as there are times when responding “intolerantly” is a sign of admirable moral strength. . . .

Id. at 11.