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***461** HATE SPEECH: POWER IN THE MARKETPLACE

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I. INTRODUCTION: CAN WE ALL GET ALONG?

During the Los Angeles riots of 1992, Rodney King asked the profound question: "Can we all get along?" Since the Supreme Court decision in Brown v. Board of Education, [FN1] many Americans have believed that placing persons with different inherent characteristics (e.g., race, religion, gender, sexual orientation) in the same environment teaches these disparate groups to live together without hate. The idea that greater exposure to the "other" and education about the "other" leads to greater tolerance is one of the great myths of classical-liberal thought. This myth ignores the tremendous power imbalance that exists in these situations. This imbalance always works to the detriment of the "other."

Personally, I have trusted in this liberal myth for most of my adult life. However, my experiences of the last few years, particularly my experiences at the University of Cincinnati College of Law, have forced me to reexamine this belief. The growing intolerance on campuses and the struggle of administrators in dealing with this intolerance have been prominent issues over the last decade. Nothing prepared me for the homophobic environment which I encountered upon my return to school. Some examples of this intolerance included: encountering every day "Kill all fags!" written somewhere in the bathrooms; hearing the discussions among one's classmates about which restaurants to avoid because all of the waiters were "queer" and probably had AIDS; watching military recruiters on campus violate both the American Association of Law Schools and university nondiscriminatory statements and be told by the dean that as long as "it was the law" there was nothing that could be done about it; seeing posters announcing gay and lesbian events defaced; reading "dyke" written on the resume of a prospective faculty candidate--and, ultimately, hearing only silence and indifference from the administration and faculty.

***462** It is with this background that I approach the issue of hate speech and attempts by some campuses to regulate it. I realize that it is not academically correct to be so personal in writing. I firmly feel, however, that this issue of hate speech cannot be understood in the abstract, but can only be understood in all its ugliness as it strips students of dignity and terrifies them into silence. As one who has spoken out loudly and frequently, I can only speak to this issue out of the isolation and pain that the powerful ensure is the experience of those who will not be silenced.

Over the last decade there has been an increase in this hateful activity throughout America. In order to get a picture of this phenomenon, some graphic examples must be offered:

1. At the SUNY-Buffalo campus, dozens of signs were posted calling on students to murder gays and lesbians; and two first-year law students, who were perceived to be feminist, found excrement wrapped in tin foil in their mailboxes. [FN2]

2. At the University of Pennsylvania, the chairperson of the United Minorities Council received an answering-machine message which said, "We're going to lynch you, nigger shit." [FN3]

3. At the University of Iowa, a campus group distributed posters showing Bart Simpson with a loaded slingshot and a message which read "Back Off Faggot!". [FN4]

4. At Brown University, signs were posted on the doors of black students which read "Niggers go home" and "Put the kitchen help back in the kitchen." [FN5]

5. At the University of Michigan, a flier was placed in the meeting room of black students which declared that it was "open season" on blacks and referred to blacks as "saucer lips, porch monkeys, and jigaboos." In addition, the campus radio station broadcasted racist jokes and a Ku Klux Klan uniform was displayed from a dormitory window while students protested other racial incidents. [FN6]

Given the situation on many college campuses today, the only answer to Rodney King's question appears to be a resounding "no, we cannot get along." In response to incidents like those detailed above, administrators at colleges across the country have been searching for an appropriate response. [FN7] The response most often tried is some form of ***463** regulation of the offending speech. [FN8] This has proven to be very troubling to many persons. Such attempts to regulate speech run counter to our intuitive sense that people should have a right to say what they want as guaranteed by the United States Constitution. [FN9]

This Article will explore the delicate balance that school administrators have sought. First, I will examine various descriptions of hate speech and its effects, in an attempt to differentiate hate speech from the normal, objectionable speech that is simply a part of living in society. In other words, in analyzing this issue, it is important to ask whether there is a distinction between one white man saying to another white man, "you are a son of a bitch and you ought to be killed!" and a white college student saying to a black college student, "you are a no good nigger who ought to be lynched!"

Second, I will look at the limits of student free speech as developed by the United States Supreme Court through a series of cases on this issue. [FN10] In reading these cases, it is important to ask whether the Court has treated attempts at regulating speech differently in the academic context than it has in the non-academic context. Third, I will look at two cases that have addressed the issue of the regulation of hate speech: Doe v. University of Michigan [FN11] and R.A.V. v. St. Paul. [FN12] Finally, this Article will explore whether any attempts at regulating hate speech in the school context can survive the United States Supreme Court decision in the R.A.V. case.

II. THE CONTEXT AND CONSEQUENCE OF HATE SPEECH.

Commentators who have written on the issue of hate speech have struggled to define it. [FN13] One writer defines hate speech in the racial context in the following manner:

> I define a racial insult as a verbal or symbolic expression by a member of one ethnic group that describes another ethnic group or an individual member of another group in terms conventionally derogatory, that offends members of the target group, and that a ***464** reasonable and unbiased observer, who understands the meaning of the words and the context of their use, would conclude was purposefully or recklessly abusive. Excluded from this definition are expressions that convey rational but offensive propositions that can be disputed by argument and evidence. An insult, so conceived, refers to a manner of speech that seeks to demean rather than to criticize, and to appeal to irrational fears and prejudices rather than to show respect for others and informed judgment. [FN14]

What appears to be missing from this definition is the power relationship from which hate speech emerges. Hate speech generally results from long held hatred on the part of dominant social groups based on conceptions of characteristics of subordinate social groups. [FN15] It is in this power relationship that hate speech flourishes and wounds those who do not have the power to respond or for whom the cost of response is much too high. For example, at the University of Cincinnati College of Law, the cost of a gay- or lesbian-student response to abusive speech is for other students to alert prospective employers of their "queerness," such that their employment possibilities are greatly diminished. It is an unusual student who is willing to put his or her career on the line by contributing to the "marketplace of ideas," by speaking on this issue. This may seem to be an extreme example, but I would argue it is extreme only to those who are members of the dominant subgroup. As one author writes:

> Definitions of hate speech are clouded by conventional preconceptions held by dominant social groups. "The typical reaction of non-target group members is to consider the incidents isolated pranks, the product of sick-but- harmless minds.... It is not the kind of real and pervasive threat that requires the state's power to quell." [FN16]

A. Rejecting Neutrality: Power and Hate

> [E]verywhere the crosses are burning, sharp-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 are not shooting at you.) [FN17]

***465** Perhaps the most profound writing on this point has come from Mari Matsuda. Her work focuses not on the constitutional limits on hate speech, but rather on the effect of hate speech on its victims. [FN18] She argues that hate speech should be regulated because of its immense harm to victims and because "racial supremacy is one of the ideas we have collectively and internationally considered and rejected." [FN19] Matsuda's arguments are focused primarily on racial-minority groups, but I would argue that they have resonance for other subjugated groups.

By focusing on the effect hate speech has on its victims, Matsuda does not allow such speech to be trivialized or to be seen as merely the byproduct of living in the modern world. [FN20] Underlying Matsuda's work is the belief that words have power to wound (a concept already accepted in tort law) just as surely as a physical assault. [FN21] As Matsuda writes:

> The negative effects of hate messages are real and immediate for the victims. Victims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis and suicide. Professor Patricia Williams has called the blow of racist messages "spirit murder" in recognition of the psychic destruction victims experience.
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> Victims are restricted in their personal freedom. In order to avoid receiving hate messages, victims have had to quit jobs, forgo education, leave their homes, avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor....
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> As much as one may try to resist a piece of hate propaganda, the effect on one's self-esteem and sense of personal security is devastating. To be hated, despised, and alone is the ultimate fear of all human beings. However irrational racist speech may be, it hits right at the emotional place where we feel the most pain. The aloneness comes not only from the hate message itself, but from the government response of tolerance. [FN22]

Matsuda clearly rejects traditional First Amendment jurisprudence that has attempted to deal piecemeal with which categories of speech are deserving of protection under the Constitution and which are not. [FN23] She explicitly rejects the presumption that all restrictions on speech ***466** should be content-neutral. Instead, she argues that the damage done to persons by hate speech is so egregious and the value of such speech so minimal that it is never deserving of protection. [FN24] She acknowledges that she is treading on dangerous ground in making this

proposal, because it is difficult to determine which speech is so far beyond the boundaries of acceptability that it is undeserving of protection. [FN25] As she argues, "[r]acist speech is best treated as a sui generis category, presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated outside the realm of protected discourse." [FN26]

In short, Matsuda argues that the world has categorically rejected the ideas underlying hate speech, and thus, has already given up neutrality on the content of such speech. [FN27] While I agree that the myth of neutrality in speech cases should be reconsidered in the area of hate speech, I am not sure that her premise concerning the universal rejection of such ideas is correct. I would argue that the neutrality should be rejected and such speech should be regulated simply because such speech is violent and the government has the authority and the duty to regulate violence.

Matsuda goes on to argue that, while not an easy task, courts could apply a non-neutral standard to hate speech in a manner which would preserve the protective scope of the First Amendment. [FN28] In fact, she argues that the regulation of hate would, in fact, enhance the quality of speech, in that it would set subjugated groups free from the silence imposed by hatred. [FN29] This standard would define unprotected hate speech by the following characteristics:

1. The message is of racial inferiority, in that such speech "proclaims racial inferiority and denies the personhood of target group members." [FN30]

2. The message is directed against a historically oppressed group, in that such speech is a mechanism of structural subordination reinforcing historical power relationships. [FN31]

3. The message is persecutorial, hateful, and degrading. [FN32]

Matsuda premises these standards on what I believe to be the questionable assumption that racist speech is universally condemned. As she writes:

> How can one argue for censorship of racist hate messages without encouraging a revival of McCarthyism? There is an important ***467** difference that comes from human experience, our only source of collective knowledge. We know, from our collective historical knowledge, that slavery was wrong. We know the unspeakable horror of the holocaust was wrong. We know white minority rule is wrong. This knowledge is reflected in the universal acceptance of the wrongness of the doctrine of racial supremacy. [FN33]

I submit that it is not clear that there is a universal consensus that the doctrine of racial supremacy is wrong, any more than there is a universal consensus that subordination on the basis of gender or sexual orientation is wrong. It is because there is not a universal consensus on these issues that we have passed laws regulating discrimination based on these categories, including laws that regulate some speech in the area of sexual harassment. [FN34]

While courts have yet to adopt the non-neutral analysis proposed by Matsuda, there does appear to be a greater interest in a victim-centered analysis of hate speech. In a recent lecture at Yale Law School, United States Supreme Court Justice John Paul Stevens cited the work of Matsuda, saying "we should at least consider the possibility that racial-, gender- and religious-based invectives can cause distinct and especially grievous injury, particularly when used by members of a powerful group against an individual already disadvantaged by hostile environment." [FN35] It remains to be seen whether this analysis will triumph in the courts, particularly in cases involving a college and university setting, where the need to maintain order may perhaps be greater.

B. Hate Speech As "Fighting Words"

More traditional attempts at regulating hate speech categorized such speech as "fighting words," a type of speech recognized by the Supreme Court as outside the protection of the First Amendment. [FN36] The fighting-words doctrine orginated in Chaplinsky v. New Hampshire, in which the Court said:

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the ***468** lewd and obscene, the profane, the libelous, and the insulting or "fighting" words--those which by there very utterance inflict injury or tend to an immediate breach of the peace. It has been well observed that such utterances 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. [FN37]

From this description, it would appear that hate speech falls within the "fighting words" exception to First Amendment protection as described in Chaplinsky. Over time, however, the Court has significantly narrowed the meaning of "fighting words." [FN38] For the exception to apply, the language at issue must have "little or no social value" and the prohibition involved must be based upon a realistic concern about the breach of the peace. [FN39] Also, any regulation of fighting words cannot be based upon official hostility to the speech involved. [FN40]

What has been difficult in casting hate speech within the purview of the "fighting words" exception has been the requirement that the speech threaten an immediate breach of the peace. [FN41] Obviously, when one reviews the examples with which this note began, one finds examples of hate speech which would tend to bring about an immediate breach of the peace. Yet, many other examples exist which have greater attenuation to violence. What of the words written on the door where the writer is long gone when the words are discovered? What about words broadcast over the radio where there is not the immediate threat of violence? These are situations which are difficult to analyze under the "fighting words" exception. [FN42] As one commentator describes this effort:

> The approach taken by advocates of regulation, therefore, has been to emphasize a harm resulting directly from the scurrilous expression that is analogous to a breach of the peace, such as the listener's severe emotional distress or feeling of loss of social equality. In the context of the university, the harm has been portrayed as the creation of a hostile environment that denies the student target equal educational opportunity. This argument has moral weight and legal plausibility, at least when the insult is directed at a specific victim who suffers demonstrable harm. But for published, broadcast, or diffuse insults, the harms suffered do not call for government intervention as insistently as do words ***469** sparking physical violence. Government cannot sit by while its citizens fight each other; government can sit by while parties attempt to explain the nature of the emotional or social injury they have suffered from hearing offensive comments. [FN43]

In spite of these problems, "fighting words" analysis has been the most acceptable basis for regulating hate speech in the university context. [FN44]

III. STUDENTS' RIGHTS TO FREE SPEECH

To understand the limits which are placed on attempts to regulate hate speech in the college or university setting, one must first examine the content that the Supreme Court has given to the free-speech rights of students.

A. Tinker v. Des Moines Independent Community School District

The starting point for any analysis of the free-speech rights of students in public institutions is the Tinker case, in which the Supreme Court reversed the

suspension of three high-school students. [FN45] The students were suspended by school authorities for coming to school wearing black armbands in protest of the war in Vietnam. [FN46] The Court granted that school officials had the right to prohibit some forms of outrageous speech. The students, however, did not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." [FN47] The Court indicated that the speech at issue (the wearing of the armbands) was not sufficiently disruptive of school activities to justify a regulation of that speech. The Court stated that "the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred." [FN48]

The Court indicated that speech could not be banned merely because there was some fear of disruption on the part of school authorities. [FN49] Apprehension of some disruption is simply not enough to justify interference with the free-speech right of the students. [FN50] The Court explained:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. ***470** Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk.... [FN51]

The language of the Court's opinion indicates that school authorities can only regulate speech that "makes the educational process almost impossible." [FN52] The validity of any regulation of speech then turns on the question: "What are the educational goals of the school, and does the speech materially disrupt those goals?" Thus, the analysis is specifically tailored to the unique situation of the educational setting involved in the regulation. [FN53] As the Court described these limits on school authorities' power to regulate speech:

> In order for the state in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would: "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. [FN54]

B. Healy v. James

The Supreme Court addressed issues similar to those raised in Tinker in the university setting in Healy. [FN55] University officials at Central Connecticut State College had denied recognition to a student group affiliated with the Students for a Democratic Society (SDS). [FN56] The University argued that the philosophy of this organization was antithetical to the University's, and that it could regulate the groups actions in order to preserve order on the campus and to meet educational goals. [FN57] The Court agreed that universities have the authority to regulate student conduct in order to ensure a conducive educational environment. [FN58] Such regulations, however, continue to be limited by the constitutional***471** protection for speech and association. [FN59] The Court commented:

> Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protection should apply with less force on college campuses than in the community at large. Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." [FN60]

Like Tinker, the Court in Healy focused on disruption as the test for when a university can legitimately regulate student conduct. [FN61] The Court's analysis is as follows:

> The critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy "directed to inciting or producing imminent lawless action and ... likely to incite or produce such action."

[citations omitted] 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." [citations omitted] Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education. [FN62]

Thus for hate speech to be prohibited under the Tinker/Healy analysis, it must be more than merely offensive. To be regulated, such speech must materially disrupt the university-educational process or goals. [FN63]

IV. REGULATION OF HATE SPEECH AND THE RESPONSE OF THE COURTS

A. Doe v. University of Michigan

In response to a series of hate-speech incidents that occurred on campus, administrators at the University of Michigan determined that some response was necessary. [FN64] Initially, the President of the University ***472** issued a statement denouncing the behavior and reaffirming the commitment of the University to be a place of tolerance. [FN65] Over the next year, faculty and administrators developed a policy outlining disciplinary action for students found guilty of harassment. [FN66] The policy went through twelve drafts and became effective May 31, 1988. [FN67]

The policy applied to "[e]ducational and academic centers, such as classroom buildings, libraries, research laboratories and study centers." [FN68] The policy was designed to punish:

> 1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status and that
>
> 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 reasonable foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
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> c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities. [FN69]

In acknowledging the tension between its effort to eliminate or regulate hate speech and the free-speech guarantee of the First Amendment, the Office of the General Counsel of the University was given the power to declare that certain conduct that perhaps violated the policy was nonetheless protected speech. [FN70] The policy outlined the various punishments which might result from its violations. [FN71]

Shortly after enstating the policy, the university issued a guidebook that both supplemented and explained the policy, [FN72] and provided behavioral guidelines. [FN73] It included the following examples:

> A male student remarks in class: "Women just aren't as good in this field as men," thus creating a hostile learning atmosphere for female classmates. ***473** Two men demand that their roommate in the residence hall move out and be tested for AIDS.
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> You are a harasser when:
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> You exclude someone from a study group because that person is of a different race, sex or ethnic origin than you are.
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> You tell jokes about gay men and lesbians.
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> Your student organization sponsors entertainment that includes a comedian who slurs Hispanics.

You display a confederate flag on the door of your room in the residence hall. You laugh at a joke about someone in your class who stutters. [FN74]

Not long after its publication, this guidebook was withdrawn. [FN75] The university did not, however, publicly announce the withdrawal of the guide or express any disapproval of its broad sweep. [FN76]

This policy was challenged by Doe, a biopsychology graduate student. Doe argued that the policy would curtail his ability to posit theories concerning biologically-based differences in the sexes and the races. [FN77] He argued that he could conceivably be charged for racist or sexist speech under this policy should he put forth such theories. [FN78] This case was brought in the United States District Court for the Eastern District of Michigan, with Doe challenging the policy as so vague and overbroad that it chilled protected speech. [FN79]

The court immediately recognized the tension which existed in this case between the university's interest in creating a diverse and tolerant educational environment and the right of the individual to free and unfettered speech. [FN80] As the court said, "It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict. The difficult and sometimes painful task of our political and legal institutions is to mediate the appropriate balance between these two competing values." [FN81] The court made it clear that the university could regulate fighting words.

While the University's power to regulate so-called pure speech is far more limited, certain categories can be generally described as ***474** unprotected by the First Amendment. It is clear that so-called "fighting words" are not entitled to First Amendment protection. These would include "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words'-- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Under certain circumstances racial and ethnic epithets, slurs, and insults might fall within this description and could constitutionally be prohibited by the University. [FN82]

Also, the University could, according to the court, regulate speech and conduct by using "reasonable and discriminatory time, place, and manner restrictions which are narrowly tailored and which leave open ample alternative means of communication." [FN83]

The court also concluded that the university could not regulate speech because it disapproved of the "ideas or messages" which it contained. [FN84] While the court struck down the regulations as vague and overbroad, the content-based distinction drove the court's analysis. This remained true even if the speech would offend large numbers of persons. [FN85] This reasoning fails to recognize that it is not the content of the speech that is the focus of the need for regulation. Rather, it is the impact such speech has on the person to whom it is directed. The court failed to make the connection that "fighting words" are not protected by the First Amendment solely because their content may incite persons to a breach of the peace or may inflict injury. Instead, the court relied upon the myth of the marketplace of ideas to support its reasoning that such regulations are impermissible, saying that the principles of free speech "acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission." [FN86]

The court failed to recognize how the prevalence of hate speech threatened the educational mission of the university, by creating an environment within which many persons were unable to learn. The myth of the marketplace of ideas used by the court to support its view that the constitutional interest in free speech is greater than the constitutional interest in a non-discriminatory environment ignores the powerful silencing impact of hate speech on those at which it is aimed. The court itself appeared ambivalent about this issue, as indicated by the rather bizarre addendum attached by Judge Cohn to his opinion. In this addendum, Judge Cohn indicates that he regrets not encountering the work of Mari Matsuda prior to filing the opinion in this case. [FN87] He ***475** indicates that "[a]n earlier awareness of Professor Matsuda's paper certainly would have sharpened the Court's view of the issues."

[FN88]

B. R.A.V. v. St. Paul

While Doe represents the only case where a university hate-speech policy has been tested in the courts, the United States Supreme Court recently decided a case that may have significant impact on future attempts to regulate hate speech. [FN89] The City of St. Paul Minnesota adopted an ordinance which provides:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor. [FN90]

This statute was challenged in R.A.V. as being an impermissible regulation on speech in violation of the First Amendment. [FN91]

On June 21, 1990, the defendant, R.A.V., and several other teenagers assembled a cross made by taping together two broken chair legs. [FN92] They allegedly burned the cross in the yard of a black family who lived across the street from the house where R.A.V. was staying. [FN93] R.A.V. was prosecuted under the above Bias-Motivated Crime Ordinance. [FN94]

At trial, R.A.V. challenged the ordinance as substantially overbroad and impermissibly content-based. [FN95] While the trial court granted the motion to dismiss the charge on this basis, the Minnesota Supreme Court reversed. [FN96] The state supreme court narrowly construed this statute as only reaching speech which would be considered "fighting words" and thus could be regulated. [FN97] The court also rejected the argument that the ordinance was impermissibly content-based, finding that "the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias motivated threats to public safety and order." [FN98]

***476** On appeal, the United States Supreme Court reversed the Minnesota Supreme Court and held that this ordinance was facially unconstitutional "in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." [FN99] The Court accepted that the ordinance only reached speech characterized as "fighting words." [FN100] However, in the opinion for the majority, Justice Scalia, while accepting that:

> [f]rom 1791 to the present ... our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which 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, [FN101]

argued that this restriction impermissibly sought to prohibit speech based on its content. As Justice Scalia wrote about the "fighting words" doctrine:

> We have sometimes said that these categories of expression are "not within the area of constitutionally protected speech," or that the "protection of the First Amendment does not extend" to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity "as not being speech at all." What they mean is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)--not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. [citations omitted] [FN102]

Justice Scalia's analysis is confusing because it is the very content of "fighting words" which leads to an imminent breach of the peace or injury, thus making them proscribable. [FN103] Justice Scalia appears to be saying that while "fighting words" generically can be prohibited, particular groups of "fighting words" cannot be proscribed on the basis of their content. [FN104] As he writes,

It is not true that "fighting words" have at most a "de minimis" expressive content or that their content is in all respects "worthless ***477** and undeserving of constitutional protection," sometimes they are quite expressive indeed. We have not said that they constitute "no part of the expression of ideas," but only that they constitute "no essential part of any exposition of ideas." [FN105]

It is extremely difficult to discern any significant difference between something which may be an "expression of ideas," but is not, at the same time, "an essential part of the exposition of ideas." This understanding of the "fighting words" doctrine seems to run counter to much of its interpretation since Chaplinsky.

Essentially, the majority opinion rests on the notion that while "fighting words" generally can be proscribed on the basis of their content, the government may not single out one particular subclass of "fighting words" for regulation on the basis of the offensive nature of that subclass of "fighting words." [FN106] As Justice Scalia writes:

In other words, the exclusion of "fighting words" from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the word are, despite their verbal character, essentially a "nonspeech" element of communication. Fighting words are thus analogous to a noisy sound truck: Each is, as Justice Frankfurter recognized, a "mode of speech;" both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility--or favoritism--towards the underlying message expressed. [FN107]

Thus, the Court found this ordinance unconstitutional, because it proscribes only those "fighting words" based on "race, color, creed, religion or gender" and favors other categories of "fighting words." [FN108] As Justice Scalia points out, " 'fighting words' that do not themselves invoke race, color, creed, religion, or gender--aspersions upon a person's mother, for example-- would be usable," while those "fighting words" that invoke the designated categories are proscribed. [FN109]

Interestingly, Justice Scalia leaves open the possibility that a subclass of proscribable speech may be proscribed because of the particular "secondary effects" of the speech, so that the regulation is "justified without reference to the content of the speech." [FN110] If, as Matsuda argues, ***478** hate speech has the secondary effect of inflicting real harm upon those to whom it is directed, then it is possible that such speech might be proscribed to prevent the injury. Thus, such a proscription does not aim at the content of the speech, but rather at the secondary effect--the injury. Of course, this would mean that the Court must accept that--hate speech has an injurious effect similar to the injury a victim receives from physical assault. This would require greater sensitivity on the part of the Court to the very real power differential in some communicative moments. It would also require abandoning the marketplace metaphor.

V. REFLECTIONS ON REGULATING HATE SPEECH IN THE UNIVERSITY AFTER R.A.V.

The question which must be asked concerning attempts to regulate hate speech in the educational context after R.A.V. is whether or not the context is sufficiently unique to warrant a different analysis. The Court has long recognized that while students do not shed their constitutional rights at the classroom door, the interests involved in the educational process may allow some regulation of expression that might not be permissible in a non-university context. [FN111] While this is particularly true in the elementary and secondary school settings, some commentators argue that the university should be less able to restrict speech because its very purpose is to serve as the "marketplace of ideas." [FN112]

To say this is to say nothing. The university is a unique marketplace of ideas because its purpose is to create an environment within which discourse can take place. To simply say that all speech must be tolerated because all speech somehow contributes to the marketplace is to ignore the fact that some speech, by its very nature, leads to a destruction of the marketplace. As J. Peter Byrne has written:

The university's relationship to the speech of its members is fundamentally different from the state's. The university has a corporate reverence for speech as the embodiment of, and stimulus to, thinking and knowledge. Implicit in the university's core function is the regulation of expression to enhance its quality. Membership in the academic community is restricted to those who possess the talent and training to teach or learn at a high level. The academic speech of the teachers and the students is subject to disciplinary norms deemed to facilitate criticism and discourse; those who do not meet the standards of speech set by the university are subject to penalties--students through grades and faculty through the denial of promotion or tenure.... Thus, the fact that ***479** universities function through speech and the criticism of ideas does not mean that speech ought to be under less restriction there than in society as a whole; on the contrary, both scholarship and learning necessarily involve the discipline of speech to improve it. [FN113]

Thus, the university already approaches speech from a non-neutral position because speech is judged according to whether or not it contributes to the academic endeavor of the university--the pursuit of the truth. All speech is not treated equally in this pursuit!

It is important to remember that the Supreme Court indicated in both Tinker and Healy that the line between permissible and impermissible regulation of student speech is predicated on whether or not the speech disrupts the educational process. [FN114] In Healy, the Court stated that the important distinction was between advocacy and action. [FN115] Advocacy of particular ideas is protected, while conduct/action which is prohibited is not protected. [FN116] It can be argued, using Matsuda's victim-centered analysis, that most true hate-speech is not advocacy at all, but assault. There is no doubt that the university can prohibit a straight man, driven by homophobia, from punching a gay man in the face. This is prohibited because it is assault, regardless of the motivation. However, according to current First Amendment jurisprudence, if the same straight man taunts the gay man, calling him "Faggot!", the university has no power to prohibit the speech, even if the effect of the verbal assault on the victim is worse than the punch.

The myth of the marketplace holds out the belief that the man who is called "faggot" or the black woman who is called a "nigger" can respond to such speech with more speech, thus contributing to the level of discourse. This idea fails to take seriously the effect of such speech on the victim, as well as the significant power held by the dominant group over the subordinate group. Current Supreme Court jurisprudence concerning the free speech rights of students, as exemplified by Tinker and Healy, emphasizes the myth of the marketplace of ideas. [FN117] However, Tinker and Healy were both examples of pure political speech. In both cases the student speech which the school attempted to regulate was clearly advocacy of a particular political idea. [FN118] The same cannot be said for most examples of pure hate speech. The Supreme Court, in its attempt to maintain constitutional neutrality, has created a doctrine of student speech that sweeps in all manner of ***480** speech. The current doctrine is, therefore, inadequate in that it refuses to recognize that there is speech which by its very nature and intent does injury to students and makes the educational process impossible. As Byrne has written,

> Racial slurs more profoundly burden the striving toward educational attainments than do noise or inane sales patter. Minority scholars have been eloquent in expressing the disabling effects racial insults work on minority students and faculty. These harms are exacerbated by the social position of minorities at most American universities where until recently they studied only in small numbers. Racial insults obviously burden the ability of targets to pursue their studies; infuriated and embarrassed, their emotions may push them toward self-protection or retaliation. The university should have an obligation to protect its students from such disabling harassment. [FN119]

A more reasoned doctrine would recognize this and allow the university to prohibit speech that fosters a hostile educational environment for minority students. [FN120] Such an approach is similar to that already used against employers in Title VII cases. [FN121] Under Title VII, an employee has an action against the employer where the employer fails to take corrective action in response to racial or sexual harassment that leads to the creation of a hostile work environment. [FN122] Such an

approach recognizes that hate speech does significant harm to the victim, attacking their sense of personhood and disrupting their educational process.

CONCLUSION

As I watched the recent election returns and witnessed gay and lesbian persons have their rights stripped in Colorado and come close to being declared abnormal by the voters of Oregon, I felt the great fear that emerges when majoritarian power is turned on subordinated minorities. This same phenomenon occurs everyday on campuses across America, even in the face of increased education. We tolerate such behavior on campus, but will not tolerate it in our workplaces. I fail to see the analytical difference between the hostile environment created when a man sexually harasses a coworker by calling her a "bitch" and the hostile educational environment created when a law student harasses another student calling her a "dyke." We recognized long ago that the answer to such speech in the workplace was not more speech, because of the power imbalance implicit in the relationship. This same ***481** power imbalance is at work for minority groups in the university setting and their silencing should not be tolerated. As Mr. Justice Jackson wrote in 1950 in dissent in Kunz v. New York:

> These terse epithets come down to our generation weighted with hatreds accumulated through centuries of bloodshed. They are recognized words of art in the profession of defamation. They are not the kind of insult that men [and women] bandy and laugh off when the spirits are high and the flagons are low. They are not in that class of epithets whose literal sting will be drawn if the speaker smiles when he uses them. THEY ARE ALWAYS, AND IN EVERY CONTEXT, INSULTS WHICH DO NOT SPRING FROM REASON AND CAN BE ANSWERED BY NONE. THEIR HISTORICAL ASSOCIATIONS WITH VIOLENCE ARE WELL UNDERSTOOD, BOTH BY THOSE WHO HURL AND THOSE WHO ARE STRUCK BY THESE MISSILES. Jews, many of whose families perished in extermination furnaces of Dachau and Auschwitz, are more than tolerant if they pass off lightly the suggestion that unbelievers in Christ should all have been burned. Of course, people might pass this speaker by as a mental case, and so they might file out of a theatre in good order at the cry of "fire." But in both cases there is genuine likelihood that someone will get hurt. [FN123]

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[FN1]. 347 U.S. 483, 74 S.Ct. 686 (1954) (Brown I); 349 U.S. 294, 75 S.Ct. 753 (1955) (Brown II).

[FN2]. Robin M. Hulshizer, Comment, Securing Freedom From Harassment Without Reducing Freedom Of Speech: Doe v. University of Michigan, 76 IOWA L.REV. 384, 385 n. 4 (1991).

[FN3]. Id.

[FN4]. Id.

[FN5]. Id.

[FN6]. Id. at 384, n. 7.

[FN7]. See J. Peter Byrne, Racial Insults and Free Speech Within the University, 79 GEO.L.J. 399 (1991); David Rosenberg, Note, Racist Speech, The First Amendment, and

Public Universities: Taking a Stand on Neutrality, 76 CORNELL L.REV. 549 (1991); Nicholas Wolfson, Free Speech Theory and Hateful Words, 60 U.CIN.L.REV. 1 (1991); Kim M. Watterson, Note, The Power of Words: The Power of Advocacy Challenging the Power of Hate Speech, 52 U.PITT.L.REV. 955 (1991).

[FN8]. See Byrne, supra note 7, at 399-415; Rosenberg, supra note 7, at 551- 59; Hulshizer, supra note 2, at 383-87.

[FN9]. Id.

[FN10]. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733 (1969); Healy v. James, 408 U.S. 169, 92 S.Ct. 2338 (1972); Papish v. Board of Curators of the University of Missouri, 410 U.S. 667 93 S.Ct. 1197 (1973).

[FN11]. 721 F.Supp. 852 (E.D.Mich.1989).

[FN12]. --- U.S. ---- 112 S.Ct. 2538 (1992).

[FN13]. See Richard Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 HARV.C.R.-C.L.L.REV. 133 (1982); Mari J. Matsuda, Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story, 87 MICH.L.REV. 2320 (1989); Byrne, supra note 7, at 399-415.

[FN14]. Byrne, supra note 7, at 400.

[FN15]. Matsuda, supra note 13, at 2323-41.

[FN16]. Watterson, supra note 7, at 965 (quoting Matsuda, supra note 13 at 2327).

[FN17]. Matsuda, supra note 13, at 2335 (quoting Lorna Dee Cervantes, Poem for the Young White Man Who Asked Me How I, an Intelligent Well-Read Person Could Believe in the War Between the Races, in M. SANCHEZ, CONTEMPORARY CHICANO POETRY 90 (1986)).

[FN18]. Id. at 2335-41.

[FN19]. Id. at 2360.

[FN20]. Id. at 2323-26.

[FN21]. Id. at 2336-38.

[FN22]. Id.

[FN23]. Id. at 2356-61.

[FN24]. Id. at 2357.

[FN25]. Id. at 2358-61.

[FN26]. Id. at 2357.

[FN27]. Id.

[FN28]. Id. at 2356-61.

[FN29]. Id. at 2357.

[FN30]. Id. at 2357-58.

[FN31]. Id.

[FN32]. Id.

[FN33]. Id. at 2359.

[FN34]. See 42 U.S.C. 2000e-2 (1988) (Title VII), where verbal harassment of women or racial minorities in a work environment can result in violations of the ban on employment discrimination.

[FN35]. Marcia Chambers, Sua Sponte, Nat'l L.J., Nov. 16, 1992, at 13, 14 (quoting Justice John Paul Stevens' lecture on the First Amendment at Yale Law School.).

[FN36]. Byrne, supra note 7, at 406-07.

[FN37]. 315 U.S. 568, 571-72; 62 S.Ct. 766, 769 (1942).

[FN38]. Byrne, supra note 7, at 406.

[FN39]. Id.

[FN40]. Id.

[FN41]. Id. at 406-07.

[FN42]. Id.

[FN43]. Id. at 407.

[FN44]. Id.

[FN45]. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

[FN46]. Id. at 504, 89 S.Ct. 733, at 735.

[FN47]. Id. at 506, 89 S.Ct. at 736.

[FN48]. Id. at 514, 89 S.Ct. at 740.

[FN49]. Id. at 508, 89 S.Ct. at 737.

[FN50]. Id.

[FN51]. Id.

[FN52]. Rosenberg, supra note 7, at 565.

[FN53]. Id. at 566.

[FN54]. Tinker, 393 U.S. at 509, 89 S.Ct. at 738.

[FN55]. Healy v. James, 408 U.S. 169, 92 S.Ct. 2338 (1972).

[FN56]. Id. at 175, 92 S.Ct. at 2242.

[FN57]. Id. at 175, 92 S.Ct. at 2243.

[FN58]. Id. at 180, 92 S.Ct. at 2345. See also Rosenberg, supra note 7, at 567.

[FN59]. Healy, 408 U.S. at 180, 92 S.Ct. at 2346.

[FN60]. Id. (quoting Shelton v. Tucker, 364 U.S. 479, 487, 81 S.Ct. 247, 251 (1960)).

[FN61]. Id. at 188-89, 92 S.Ct. at 2349.

[FN62]. Id. at 188, 189, 92 S.Ct. at ???.

[FN63]. See also Papish v. Board of Curators, 410 U.S. 667, 670 93 S.Ct. 1197, 1199 (1973) (Supreme Court, citing Healy, indicated that it is "clear that the mere dissemination of ideas--no matter how offensive to good taste--on a state university campus may not be shut off in the name alone of 'conventions of decency.' ").

[FN64]. Doe v. University of Michigan, 721 F.Supp. 852, 852 (E.D.Mich.1989).

[FN65]. Id.

[FN66]. Id. at 855-56.

[FN67]. Id. at 855-56.

[FN68]. Id. at 856.

[FN69]. Id.

[FN70]. Id. at 856-57.

[FN71]. Id. at 857.

[FN72]. Id. at 857-58.

[FN73]. Id.

[FN74]. Id. at 858.

[FN75]. Id.

[FN76]. Id.

[FN77]. Id.

[FN78]. Id.

[FN79]. Id.

[FN80]. Id. at 861-64.

[FN81]. Id. at 853.

[FN82]. Id. at 862 [citations omitted].

[FN83]. Id. at 863.

[FN84]. Id.

[FN85]. Id.

[FN86]. Id.

[FN87]. Id. at 869.

[FN88]. Id.

[FN89]. R.A.V. v. St. Paul, 112 S.Ct. 2538 (1992).

[FN90]. Id. at 2541.

[FN91]. Id.

[FN92]. Id.

[FN93]. Id.

[FN94]. Id.

[FN95]. Id.

[FN96]. Id.

[FN97]. Id.

[FN98]. Id. at 2541-42.

[FN99]. Id. at 2542.

[FN100]. Id.

[FN101]. Id. at 2542-43.

[FN102]. Id. at 2543.

[FN103]. See Watterson, supra note 7, at 964-69.

[FN104]. R.A.V., 112 S.Ct. at 2543-46.

[FN105]. Id. at 2543-44.

[FN106]. Id. at 2545.

[FN107]. Id.

[FN108]. Id. at 2547.

[FN109]. Id. at 2547-48 (emphasis in original).

[FN110]. Id. at 2546. Yet, Justice Scalia rejects Justice Stevens' point in dissent that what the St. Paul Ordinance was aimed at was not speech at all, but such secondary effects (i.e. injuries resulting from the speech). Id. at 2548.

[FN111]. See supra text accompanying notes 45-63.

[FN112]. See Byrne, supra note 7, at 415.

[FN113]. Id. at 416-17.

[FN114]. See supra text accompanying notes 45-63.

[FN115]. See supra text accompanying notes 55-63.

[FN116]. Rosenberg, supra note 7, at 567.

[FN117]. See Watterson, supra note 7, at 973-76.

[FN118]. See supra text accompanying notes 45-63. See also Byrne, supra note 7, at 430-36.

[FN119]. Byrne, supra note 7, at 420.

[FN120]. Id.

[FN121]. Id.

[FN122]. Id.

[FN123]. Kunz v. New York, 340 U.S. 290, 299, 71 S.Ct. 312, 317 (1951).

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