
January 1992

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Recommended Citation

Lackland H. Bloom, *Fighting Back: Offensive Speech and Cultural Conflict*, 46 SMU L. REV. 145 (1992)
<https://scholar.smu.edu/smulr/vol46/iss1/9>

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FIGHTING BACK: OFFENSIVE SPEECH AND CULTURAL CONFLICT

Lackland H. Bloom, Jr.*

I. INTRODUCTION

OVER the past decade, there has been a seemingly endless string of public controversies involving attempts to regulate or suppress offensive speech.¹ By offensive speech, I mean speech that is harmful primarily, or at least to a significant degree, because it is distasteful or repugnant to some communities or individual members of the audience, sometimes to the extent of causing psychic injury.² It is often impossible to fully or even partially separate the manner of speech from the idea expressed especially in this area,³ and it is usually a combination of the two which gives rise to the controversy. With respect to racial insults for instance, it is both the crudeness and hatefulness of the language in issue as well as the assertion of inferiority and exclusion which hurts and offends.

Recent conflicts over offensive speech include attempts to prohibit or regulate burning of the American flag,⁴ racial insults on campus and elsewhere,⁵

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1. In response to these developments, Southern Methodist University Law School offered a special course titled "The Regulation of Offensive Speech" funded with income from the William Hawley Atwell Chair in Constitutional Law. The course was taught by four distinguished visitors — Dean Lee Bollinger, Professor Ruth Colker, Professor Mari Matsuda and Professor Nadine Strossen — as well as four members of the school's constitutional law faculty.

2. Most First Amendment controversies do not involve offensive speech. Examples of non-offensive speech issues include seditious speech, defamation, commercial speech, campaign speech and funding, prior restraint, speech in public employment, and access to public proceedings.

3. *Texas v. Johnson*, 491 U.S. 397, 416 (1989).

4. *United States v. Eichman*, 110 S. Ct. 2404 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989); see John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Kent Greenawalt, *O'er the Land of the Free: Flag Burning as Speech*, 37 UCLA L. REV. 925 (1990); Frank Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 STAN. L. REV. 1337 (1990); Geoffrey R. Stone, *Flag Burning and the Constitution*, 75 IOWA L. REV. 111 (1989).

5. See *UWM Post Inc. v. Board of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (invalidating University of Wisconsin regulation); *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (invalidating University of Michigan regulation); see also REGULATING RACIAL HARASSMENT ON CAMPUS: A LEGAL COMPENDIUM (T. Hustoles & W. Connolly, Jr. eds. 1990); J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399 (1991); Stephen L. Carter, *Racial Harassment as Discrimination: A Cautious Endorsement of the Anti-Oppression Principle*, 1991 U. CHI. LEGAL F. 13; Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991) [hereinafter Delgado, *Campus*]; Richard Delgado, *Words that*

the burning of a cross to intimidate minorities,⁶ traditionally defined obscenity,⁷ pornography depicting the subordination of women,⁸ indecent language on the radio,⁹ indecent commercial telephone messages,¹⁰ demonstrations by

Wound: A Tort Action for Racial Insults, Epithets and Name Calling, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629 (1985); Steve France, *Hate Goes to College*, *ABA Journal*, July 1990, at 44; Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287 (1990); Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211 (1991); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Robert C. Post, *Racist Speech, Democracy and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991); Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171 (1990); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484; Symposium, *Free Speech and Religious, Racial, and Sexual Harassment*, 32 WM. & MARY L. REV. 207 (1991); James Weinstein, *A Constitutional Roadmap to the Regulation of Campus Hatespeech*, 38 WAYNE L. REV. 163 (1991); Symposium, *Campus Hate Speech and the Constitution in the Aftermath of Doe v University of Michigan*, 37 WAYNE L. REV. 1309 (1991).

6. See *R.A.V. v. City of St. Paul, Minnesota*, 60 U.S.L.W. 4667 (June 23, 1992) (invalidating ordinance which made it a crime to display a symbol which one has reason to know will arouse anger, alarm, or resentment on the basis of race, color, creed, religion, or gender); see also *United States v. Lee*, 60 U.S.L.W. 2004 (8th Cir. 1991) (sustaining a conviction under 18 U.S.C. § 241 making it a crime to intimidate a person in the exercise of a constitutional right where the defendant burned a cross on land adjacent to the apartment of a black family in order to induce them to move).

7. See, e.g., *Miller v. California*, 413 U.S. 15 (1973); see also REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY (1986); HARRY M. CLOR, *OBSCENITY AND PUBLIC MORALITY* (1969); GORDON HAWKINS AND FRANKLIN E. ZIMRING, *PORNOGRAPHY IN A FREE SOCIETY* (1988).

8. *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 324 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (invalidating a detailed ordinance which banned pornography defined as "the graphic sexually explicit subordination of women, whether in pictures or words. . ."); John Elson, *Passions Over Pornography*, *TIME*, March 30, 1992 at 52 (noting that bills have been introduced in the United States Senate and the Massachusetts legislature which would provide a civil damages remedy to individuals who could prove that they were the victims of sex crimes which were caused in part by the use of pornography); see also ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981); CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 127-213 (1987); TAKE BACK THE NIGHT: *WOMEN ON PORNOGRAPHY* (L. Lederer ed. 1980); Paul Brest & Ann Vandenberg, *Politics, Feminism and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607 (1987); Eric Hoffman, *Feminism, Pornography and the Law*, 133 U. PA. L. REV. 497 (1985); Nan D. Hunter & Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al., in American Booksellers Association v. Hudnut*, 21 U. MICH. J.L. REF. 69 (1987-89); Frederick Schauer, *Causation Theory and the Causes of Sexual Violence*, 1987 AM. B. FOUND. RES. J. 737; Nadine Strossen, *The Convergence of Feminist and Civil Liberties Principles in the Pornography Debate*, 62 N.Y.U. L. REV. 201 (1987) (reviewing *WOMEN AGAINST CENSORSHIP* (1985)); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589.

9. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991); see ARTHUR SPITZER, *SEVEN DIRTY WORDS AND SIX OTHER STORIES* (1986); Jay Gayoso, *The F.C.C.'s Regulation of Broadcast Indecency: A Broadened Approach for Removing Immorality from the Airwaves*, 43 U. MIAMI L. REV. 871 (1989); Richard Passler, *Regulation of Indecent Radio Broadcasts: George Carlin Revisited-What Does the Future Hold for the Seven "Dirty" Words*, 65 TUL. L. REV. 131 (1990).

10. *Sable Communications of California v. FCC*, 492 U.S. 115 (1989) (invalidating a Congressional ban on indecent interstate commercial telephone messages); *Dial Info. Servs. Corp. of N.Y. v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991) (sustaining statute as amended in the wake of *Sable*); *Information Providers' Coalition of the First Amendment v. FCC*, 928 F.2d 866 (3d Cir. 1991) (upholding FCC regulation of access to "dial-a-porn services"), *cert. petition filed*, 60 U.S.L.W. 3360 (Oct. 28, 1991).

Nazis or Ku Klux Klan groups,¹¹ indecent publicly funded art,¹² records containing indecent lyrics,¹³ motion pictures unsuitable for children,¹⁴ excessive violence in the media,¹⁵ sexually harassing speech in the

11. *Collin v. Smith*, 447 F. Supp. 696 (N.D. Ill.), *aff'd.*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978); *Village of Skokie v National Socialist Party*, 366 N.E.2d 347 (Ill. App. 1977), *modified*, 373 N.E.2d 21 (Ill. App. 1978); *Handley v. City of Montgomery*, 401 So. 2d 171 (Ala. Crim. App. 1981) (klan march). See ARYEH NEIER, *DEFENDING MY ENEMY* (1979) [hereinafter A. NEIER] for an account of the Skokie incidents and ensuing litigation as well as much other Nazi and Ku Klux Klan litigation involving the ACLU by the Executive Director of the ACLU who had escaped Nazi Germany as a boy. See also LEE BOLLINGER, *THE TOLERANT SOCIETY* 24-44, 53-58 67-70 & 97-100 (1985).

The Court invalidated an attempt to punish a klansman for advocating violent action in the non-immediate future in the leading case of *Brandenburg v. Ohio*, 395 U.S.444 (1969).

12. *Bella Lewitsky Dance Found. v. Frohnmayer*, 754 F. Supp. 774 (C.D. Cal. 1991) (challenging NEA grant process); *Contemporary Arts Ctr. v. Ney*, 735 F. Supp. 743 (S.D. Ohio 1990) (obscenity trial regarding publicly displayed Mapplethorpe photographs). See Robert O'Neil, *Artists, Grants and Rights: The NEA Controversy Revisited*, 9 J. HUMAN RIGHTS 85 (1991); Symposium, *Arts Funding and the First Amendment*, 14 NOVA L. REV. 317 (1990); Forum, *Arts Funding and Censorship: The Helms Amendment and Beyond*, 15 COLUM.-VLA J. LAW & ARTS 23 (1990)(featuring Professors Vincent Blasi, Richard Epstein and Kathleen Sullivan along with Beverly Wolff); Note, *Standards for Federal Funding of the Arts: Free Expression and Political Control*, 103 HARV. L. REV. 1969 (1991); see also David Cole, *Big Brother's New Weapon* — *Rust v. Sullivan*, WALL ST. J., Feb. 27, 1992, at A11 (criticizing the government's reliance on *Rust v. Sullivan* in justifying a content-based NEA grant termination); William H. Honan, *Judge Overrules Decency Statute for Arts Grants*, N.Y. TIMES, June 10, 1992, at A1 (federal district court invalidated law requiring NEA to take account of "general standards of decency" in suit brought by four performance artists); William H. Honan, *After Frohnmayer's Dismissal, Endowment's Future is Cloudy*, N.Y. TIMES, Feb. 24, 1992, 2B, at 1 (discussing forced resignation of NEA Chairman following political attacks by Patrick Buchanan on arts funding policy of the Bush Administration); William Honan, *An Uproar Over Nudes (Bush is One)*, N.Y. TIMES, Feb. 1, 1992, at A8 (dispute over matching grant proposal for a gallery displaying a satirical painting of President Bush and Dolly Parton in the nude).

13. *Luke Records, Inc. v Navarro*, 960 F.2d 134 (11th Cir. 1992) (reversing district court finding that 2 Live Crew album "As Nasty as They Wanna Be" was obscene); Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society - From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741, 822-34 (1992); Robert Houser, *Alleged Inciteful Rock Lyrics-A Look at Legal Censorship and Inapplicability of First Amendment Standards*, 17 OHIO N.U.L. REV. 323 (1990); Cecile Berry & David Wolin, *Regulating Rock Lyrics: A New Wave of Censorship?*, 23 HARV. J. LEG. 595 (1986); Paul Scheidemantel, *It's Only Rock-and-Roll But They Don't Like It: Censoring "Indecent" Lyrics*, 21 NEW ENG. L. REV. 467 (1986). Cf. *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187 (1988) (first amendment requires dismissal of damage suit alleging that Ozzy Osborne record proximately caused suicide of teenager).

14. *Collins, Guidance or Censorship? New Debate on Rating Films*, N.Y. TIMES, April 9, 1990, sec. C, at 11. See generally E. DEGRAZIA & R. NEWMAN, *BANNED FILMS: MOVIES, CENSORS & THE FIRST AMENDMENT* (1982); Jane Friedman, *Motion Picture Rating System of 1968: A Constitutional Analysis of Self-Regulation by the Film Industry*, 73 COLUM. L. REV. (1973).

15. See *Zamora v. Columbia Broadcasting Sys.*, 480 F. Supp. 199 (S.D. Fla. 1979) (rejecting a television violence addiction claim by a teenage killer); *Bill v. Superior Court*, 187 Cal. Rptr. 625 (Cal. Ct. App. 1982) (affirming dismissal of a claim against motion picture producers by victim of violence that erupted outside of a theater showing a violent film); *Oliva v. National Broadcasting Co.*, 178 Cal. Rptr. 888, 894 (Cal. Ct. App. 1982), *cert. denied*, 458 U.S. 1108 (1982)(affirming summary judgment for defendant where assault victim sued network for broadcasting program which allegedly inspired the assault); Alan Childress, *Review Essay: Reel "Rape Speech": Violent Pornography and the Politics of Harm*, 25 LAW & SOCIETY REV. 177 (1991); Thomas Krattenmaker & L. A. Powe, *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123 (1978); James Albert, *Constitutional Regulation of Televised Violence*, 64 VA. L. REV. 1299 (1978).

workplace,¹⁶ anti-semitic computer messages,¹⁷ displays of the confederate flag at public schools,¹⁸ and advertisements in college newspapers denying that the holocaust occurred.¹⁹ There are obviously many significant differences among these issues and controversies. There are important similarities as well however. At the risk of being overly reductionist, I intend to lump these and any other similar issues as examples of attempted regulation of offensive speech and treat them largely as a group.²⁰

Much of the controversy surrounding offensive speech is attributable to the present state of cultural conflict in the United States and the western world.²¹ Presently, various groups are engaged in vigorous struggles over issues of culture, values, standards of behavior, distribution of resources, the appropriate role of government, and the relationship between the state and the individual.²² With the crumbling of consensus and the growth of conflict, there is greater opportunity to offend and to be offended. These conflicts are multifaceted political, social and cultural disputes and for the most part are simply not amenable to legal resolution. As noted above many attempts have been made to regulate or prohibit offensive speech. Most of

16. *Robinson v. Jackson Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (banning public display and private possession of pinups and pictures of nude and partially clad women in the workplace in view of extensive history of sexual harrassment of women by male employees); CATHERINE MACKINNON, *SEXUAL HARRASSMENT OF WORKING WOMEN* (1977); Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.—C.L. L. REV. 1 (1990); Strossen, *supra* note 5, at 498.

17. Michael Miller, *Prodigy Network Defends Display of Anti-Semitic Notes*, WALL ST. J., Oct. 22, 1991, at B1.

18. *Battles Still Rage over Schools' use of Confederate Flag*, DALLAS MORNING NEWS, 30, 1991 at A23.

19. Katherine Bishop, *Ads on Holocaust 'Hoax' Inspire Campus Debates*, N.Y. TIMES, Dec. 12, 1991, at A, p.12, col. 1.

20. Professor Lawrence appears to be offended that anyone, especially a non-minority, would consider racist insults merely another form of offensive speech. Lawrence, *supra* note 5, at 461. He argues that the injury from racist insults is qualitatively different from and greater than other forms of offensive speech. Perhaps so. Intuitively, racial insults strike most of us as the most offensive and most reprehensible of the many contemporary examples of offensive speech. They would seem more likely to cause serious harm with greater frequency, and more likely to result in the silencing of victims. Moreover, they would not seem to have any redeeming value. Even so, it is not obvious to me that the injury suffered by the victim of a racial insult will inevitably be significantly greater than that of a veteran confronted with a flag burning or a devout conservative Catholic confronted with "Piss Christ" or an impressionable young child confronted with 2 Live Crew. Perhaps I have not "heard the cries of the victims" as Professor Lawrence puts it. *Id.* at 459. And yet his assessments may be as distorted by cultural bias as are my own. See Post, *Racist Speech*, *supra* note 5, at 312-17 and Weinstein, *supra* note 5, at 178-79 for development of similar points also largely in response to Professors Lawrence and Matsuda.

21. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA* 337-43 (1989); DINESH D'SOUZA, *ILLIBERAL EDUCATION* (1991); E. J. DIONNE, *WHY AMERICANS HATE POLITICS* (1991); THOMAS B. EDSALL & MARY EDSALL, *CHAIN REACTION* (1991); JAMES D. HUNTER, *CULTURE WARS* (1991); ARTHUR M. SCHLESINGER, *DISUNITING OF AMERICA: REFLECTIONS ON MULTICULTURAL SOCIETY* (1991); ROGER KIMBAL, *TENURED RADICALS* (1990); ALLEN D. BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987); Robert Hughes, *The Fraying of America*, TIME, Feb. 3, 1992, at 44. Cf. MARY ANN GLENDON, *RIGHTS TALK* (1991); THOMAS SOWELL, *A CONFLICT OF VISIONS* (1987).

22. *Id.*

these attempts have either been invalidated under the First Amendment or at least present serious constitutional problems.

After briefly reviewing the legal landscape in the area of offensive speech, I will argue that the courts are quite correct in providing a high degree of protection for offensive speech in spite of the often significant competing interests. Instead of seeking legal regulation, those who take issue with the existence, manner or content of offensive speech should challenge it through counterspeech or should seek to curb it through private pressure.

I will conclude by considering some of the issues that are presented by a strategy of attacking offensive speech with counterspeech and social pressure rather than regulation.

II. THE REGULATION OF OFFENSIVE SPEECH AND THE FIRST AMENDMENT: A VERY BRIEF OVERVIEW

A. *Offensive Speech in the Courts*

The First Amendment issues raised by the regulation of offensive speech have been analyzed in great detail elsewhere.²³ I present a very brief overview of the development of the law to provide context for my argument favoring a counterspeech approach. The Supreme Court decided several cases involving attempts to punish or regulate offensive speech during the nineteen forties and fifties.²⁴ Some of these early cases provided the state with a fair amount of leeway to regulate offensive speech such as *Chaplinsky v. New Hampshire*²⁵ which recognized the fighting words doctrine, *Feiner v. New York*²⁶ which gave the police the right to stop a speaker from inciting an audience in order to prevent a hostile reaction and *Beauharnis v. Illinois*²⁷ which sustained a group libel statute against constitutional challenge. During the same period however, the Court provided significant protection for offensive speech in other cases such as *Terminello v. City of Chicago*²⁸ where it precluded the state from convicting a speaker for expression which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance. . . ."²⁹ And in *Cantwell v. Connecticut*, the Court invalidated a permit requirement under the First Amendment speech and religion clauses as applied to a person who played a phonograph record on the streets vigorously attacking various religions.³⁰ While these cases were significant, they did not confront the legality of regulating offensive speech simply because of its offensive character.

23. See *supra* notes 80-95 and accompanying text.

24. See generally Mark Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. C.R.-C.L. L. REV. 1 (1974).

25. 315 U.S. 568 (1942).

26. 340 U.S. 315 (1951).

27. 343 U.S. 250 (1952).

28. 337 U.S. 1 (1948).

29. *Id.* at 3. The speaker referred to his opponents in the crowd as "slimy scum," "snakes," and "bedbugs" however the Court invalidated the jury instructions on their face. *Id.* at 13-27 (Jackson, J., concurring).

30. 310 U.S. 296, 309-10 (1939).

From the late fifties on, the Court has decided several cases which strengthen the protection of offensive speech under the First Amendment. The Court's extension of the First Amendment to sexually oriented speech short of hard core obscenity provided some degree of protection to a significant amount of speech that is offensive to many.³¹ In the context of hostile audience reaction, the Court reaffirmed the lesson of *Terminello* that the state is obligated to protect, rather than arrest the speaker if at all possible.³²

*Cohen v. California*³³ is probably the Court's most important precedent protecting offensive speech. There, in a very influential opinion by Justice Harlan, the Court held that the First Amendment prohibited the state from punishing a person under a statute which prohibited "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person" by "offensive conduct" for wearing a jacket that said "Fuck the Draft" in the corridor of a courthouse.³⁴ Justice Harlan's opinion is noteworthy in part for the care he took in defining the issue as he explained why the doctrines of conduct versus speech, time place and manner regulation, obscenity, fighting words, hostile audience reaction and captive audience were not controlling.³⁵ The Court concluded that the precise issue presented was whether the state could "excise, as 'offensive conduct', one particular scurrilous epithet from the public discourse" out of fear of violent public reaction or to protect public morality.³⁶ In analyzing the issue, it developed several themes which provide protection for offensive speech in a wide variety of contexts. The Court again emphasized that the state is not free to assume, absent clear proof, that members of the public are likely to violently attack a person who utters offensive words, and that where practicable the state is under a duty to protect the speaker against hostile reaction.³⁷ Then, in the most crucial part of its opinion, it made four significant points regarding the nature of offensive speech and attempts to regulate it. First, it observed that the "verbal cacophony" which may occur when offensive speech is permitted is a sign of strength rather than weakness.³⁸ Second, it emphasized that it may be impossible for the state to determine which words are sufficiently offensive to be prohibited noting that "one man's vulgarity [may be] another man's lyric."³⁹ Third, the Court observed that language, especially offensive

31. *Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

32. *Gregory v. City of Chicago*, 394 U.S. 111 (1969).

33. 403 U.S. 15 (1971).

34. *Id.* at 16.

35. *Id.* at 18-20.

36. *Id.* at 22-23.

37. *Id.* at 22-24.

38. *Id.* at 25.

39. *Id.* at 25. See *Cunningham v. Georgia*, 59 U.S.L.W. 2535, 2536 (Ga. Feb. 22, 1991) (invalidating a law aimed at "shit happens" bumper stickers which would have prohibited displaying bumper stickers containing "profane or lewd words describing sexual acts, excretory functions, or parts of the human body"); *Baker v. Glover*, 19 (BNA) Med. L. Rptr. 1984 (M.D. Ala. 1991) (invalidating a state statute banning the public display of "obscene language descriptive of sexual or excretory activities" as applied to a bumper sticker reading "How's My Driving? Call 1-800-EAT-SHIT!").

language, is often chosen for its emotive rather than its cognitive force.⁴⁰ Finally, the Court recognized that words and ideas may often be inseparable and that the suppression of the former may result in the suppression of the latter as well.⁴¹ As long as *Cohen* is taken seriously and read honestly, significant regulation of offensive speech should remain the exception rather than the rule.⁴²

Another important offensive speech precedent is the Seventh Circuit decision in *Collin v. Smith*⁴³ invalidating an ordinance designed to prohibit a Nazi march in Skokie, a predominantly Jewish suburb of Chicago where many holocaust survivors resided. The decision to permit the march was a fairly straightforward application of the existing precedent prohibiting viewpoint discrimination and censorship by the threat of hostile audience reaction.⁴⁴ The importance of the decision lies in the fact that there was evidence that the march could cause real psychological damage to many residents of Skokie and that there was and is a solid societal consensus condemning the message of the Nazis as especially repugnant.⁴⁵ Even so, the Court of Appeals concluded that the First Amendment rights of the marchers must prevail.⁴⁶

If *Cohen* and *Collin* indicate that offensive speech is entitled to extremely broad protection, however, *FCC v. Pacifica Foundation*⁴⁷ illustrates that it is not without limitation, at least in specialized contexts. In *Pacifica*, the Court sustained an FCC administrative sanction against a broadcast licensee which permitted the broadcast of a George Carlin comedy monologue called "Filthy Words" during early afternoon.⁴⁸ A three judge plurality of the Court in an opinion written by Justice Stevens was willing to permit regulation of the language in part because of the lower social value of patently offensive speech pertaining to matters of sex and excretion.⁴⁹ Justices Powell and Blackmun were necessary for a majority, however, and only joined in that portion of Justice Steven's analysis which emphasized the unique aspects of the broadcast media including the degree to which it enters the pri-

40. *Cohen*, 403 U.S. at 26.

41. *Id.* at 26.

42. See William Cohen, *A Look Back at Cohen v California*, 34 UCLA L. REV. 1595 (1987); Daniel A. Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of Cohen v. California*, 1980 DUKE L.J. 283.

43. 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978).

44. *Id.* at 1201-06.

45. *Id.* at 1201, 1206, 1210.

46. Dean Bollinger was inspired to develop the thesis that instilling the value of tolerance, at least in the context of expression, explains our commitment to the protection of speech as offensive and harmful as the Nazis more adequately than traditional free speech rationales. *Bollinger*, *supra* note 11. This rationale also supports the relatively vigorous protection of other forms of offensive speech as well. See also DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION*, 165-227 (1986); Steven D. Smith, *Tolerance and Truth in the Theory of Free Expression*, 60 SO. CAL. L. REV. 647 (1987); Steven D. Smith, *The Restoration of Tolerance*, 78 CALIF. L. REV. 305 (1990).

47. 438 U.S. 726 (1978).

48. *Id.* at 729-30.

49. *Id.* at 745-46.

vacy of the home and is particularly accessible to children.⁵⁰ Ultimately, the Court affirmed the FCC's decision to channel offensive speech into times when children were less likely to be listening than to prohibit it entirely.⁵¹

Pacifica is a significant precedent primarily because it gave serious consideration to the competing interests affected by offensive speech including the protection of children and the avoidance of assault by offensive language in the privacy of one's home.⁵² Indeed, the Court permitted regulation of otherwise protected speech, albeit in a specialized context in order to help preserve these interests. Moreover, three members of the Court discounted the degree of protection accorded speech to some extent by its social utility.

More recently in *Bethel School District No. 403 v. Fraser*,⁵³ a majority of the Court held that a high school did not violate the First Amendment when it suspended a student for delivering a sexually suggestive campaign speech to a school assembly. As with *Pacifica*, the Court took serious account of the harm purportedly caused by the speech. For the majority, that harm consisted of insult to teenage girls and emotional damage to young and immature students in the audience.⁵⁴ Justice Brennan rejected these state interests but concurred on the ground that the school could punish the student because the speech was disruptive.⁵⁵ Like *Pacifica*, *Bethel* clearly turns on the specialized context in which the speech occurred—a public high school where the Court has consistently recognized that the state has the power to limit speech in order to preserve its educational objectives.⁵⁶ *Pacifica* and *Bethel* illustrate that on occasion, the state may limit or prohibit offensive

50. *Id.* at 756-62 (Powell, J., concurring).

51. *Id.* at 750. FCC enforcement of the policy increased significantly in the late eighties with the filing of several complaints. *See, e.g.*, Infinity Broadcasting Corp. of Pennsylvania, 2 F.C.C.R. 2703, 62 R.R. 2d 1199 (1987) (Howard Stern show). The FCC created a safe harbor for indecent speech between 12 and 6 a.m. *Id.* On reconsideration the Court of Appeals for the District of Columbia Circuit invalidated this provision as arbitrary and insufficiently based on the record. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988), *vacated as moot*, 932 F.2d 1504 (D.C. Cir. 1991). Congress then enacted a law requiring the FCC to enforce the indecency ban twenty-four hours a day. Pub. L. No. 100-459, § 608, 102 Stat. 2186, 2228 (1988). Accordingly, the FCC passed a rule completely banning the broadcast of indecent language. Enforcement of Prohibitions Against Broadcast Indecency and Obscenity in 18 U.S.C. § 1464, 4 F.C.C.R. 457 (1989). The following year, the Supreme Court struck down a similar Congressional ban on indecent interstate commercial telephone messages in *Sable Communications of California v. FCC*, 492 U.S. 115 (1989). The FCC then filed its Report on the Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, concluding that the twenty-four hour ban was constitutional in spite of *Action for Children's Television v. FCC* and *Sable Communications*. 5 F.C.C.R. 5297 (1990). The Court of Appeals then invalidated the FCC order under the First Amendment holding that the Commission must provide at least a reasonable safe harbour time period during which indecent material may be broadcast. *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991); *see Blanchard, supra* note 13, at 833-40; *see generally Passler, supra* note 9; *Gayoso, supra* note 9.

52. *Pacifica*, 438 U.S. at 747-50; *id.* at 756-62 (Powell, J., concurring).

53. 478 U.S. 675 (1986).

54. *Id.* at 683. The Court noted that many of the students in the audience were under fourteen years of age. *Id.*

55. *Id.* 687-690. Justice Marshall dissented on the ground that the school had failed to establish that the speech was in fact disruptive. *Id.* 690.

56. *Id.* at 681-86.

speech to protect against certain forms of harm, especially to children and adolescents, but even then only in narrow specialized contexts.

The limited nature of *Pacifica* was emphasized by *Sable Communications v. FCC*,⁵⁷ in which the Court invalidated, as insufficiently narrow, a federal law prohibiting the transmission of indecent interstate commercial telephone messages to adults as well as children and explicitly distinguished *Pacifica* on the ground that the telephone, unlike the radio, necessarily requires affirmative efforts by the auditor greatly decreasing the likelihood that he or she will be "taken by surprise by an indecent message".⁵⁸

The Court's recent decisions in *Texas v. Johnson*⁵⁹ and *Eichman v. United States*,⁶⁰ the flag burning cases, emphasize that when the Court perceives that prohibition of offensive speech is not view-point neutral, it will invalidate it even in the teeth of strong public support for the regulation. Like *Collin v. Smith*,⁶¹ the flag burning cases are particularly important because of the depth of the pain inflicted by the offensive speech. It must have been apparent to the Court as of *Johnson* and certainly by *Eichman* that a large segment of the American public was hurt and outraged by the public burning of the American flag, however that appeared to play no part in the Court's analysis. This suggests that despite *Pacifica*,⁶² the Court is not inclined to back away from established First Amendment protection in this area in order to accommodate very important competing social interests.

57. 492 U.S. 115 (1989).

58. *Id.* at 127-28. The Court referred to the holding in *Pacifica* as "emphatically narrow". *Id.* at 127.

Recently, the Court upheld an Indiana law in *Barnes v. Glen Theatre, Inc.*, which prohibited nudity in public places, eschewing a challenge by dancers wanting to dance totally nude in night clubs. 111 S. Ct. 2456, (1991). Justice Rehnquist, writing for a three judge plurality, concluded that the nude dancing in issue was expressive conduct but that the state was regulating it for purposes unrelated to the suppression of expression—to enforce public morality. *Id.* at 514-15. Justice Souter concurred relying on the state's interest in suppressing the secondary effects of nude dancing such as increases in crime. *Id.* at 521-25. Justice Scalia concurred on the ground that the state was regulating conduct, not expression, and therefore the First Amendment was inapplicable. *Id.* at 515. Justice White wrote a dissent joined by three other members of the Court arguing that the law did indeed regulate the expressive aspects of nude dancing and failed to serve a compelling state interest. *Id.* at 525. The plurality's apparent conclusion that the First Amendment protects the right to dance in pasties and a G string but not totally nude seems arbitrary and foolish. Moreover, none of the justices who joined in the holding were persuasive in their attempts to explain and defend the state interests involved. But, accepting *Barnes* as controlling law, it appears limited to the somewhat unique context of the regulation of public nudity which, though granted First Amendment protection, is treated differently than other arguably indecent and offensive forms of speech (including graphic representations of nudity). To some extent at least, this reflects societal tradition, on which the Court relied heavily. *Id.* at 512-13 (Rehnquist, J.); *id.* at 517 (Scalia, J., concurring). It is hard to believe that three members of the Court would accept public morality as a legitimate justification for regulating even non-expressive aspects of non-obscene but indecent verbal or written communication outside of exceedingly specialized contexts (generally relating to children). Consequently, *Barnes* is not necessarily a particularly significant precedent with respect to most of the current offensive speech controversies. See Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 WM. & MARY L. REV. 611 (1992) for a thorough analysis of the case.

59. 491 U.S. 397 (1989).

60. 110 S. Ct. 2404 (1990).

61. 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

62. 438 U.S. 726 (1978).

The First Amendment prohibition against viewpoint discrimination was also decisive in the important case of *American Booksellers Ass'n, Inc. v. Hudnut*,⁶³ in which the Court of Appeals for the Seventh Circuit struck down an Indianapolis ordinance that banned pornography defined as "the graphic sexually explicit subordination of women, whether in pictures or in words" which include one of several specific representations of women as sexual objects or subjects of degradation.⁶⁴ Writing for the court, Judge Easterbrook was willing to assume that pornography as defined by the ordinance did foster beliefs and attitudes that contributed to the subordination of women, but still concluded that the ordinance blatantly violated freedom of speech by censoring officially disapproved depictions of women.⁶⁵ As with the Seventh Circuit's earlier decision in *Collin v. Smith*,⁶⁶ recognition that the legislation in issue may protect vulnerable people against real harm did not justify view-point based prohibition of otherwise protected speech.⁶⁷

Finally, this term in *R.A.V. v. St. Paul*,⁶⁸ a unanimous Court invalidated a city ordinance which prohibited the display of a symbol such as a burning

63. 771 F.2d 323, 324 (7th Cir. 1985), *aff'd.*, 475 U.S. 1001 (1986).

64. *Id.* at 324. The six categories were:

[T]he *Graphic Sexually* explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

- (1) Women are presented as sexual objects who enjoy pain or humiliation; or
- (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
- (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
- (4) Women are presented as being penetrated by objects or animals; or
- (5) Women are presented in scenarios of degradation, injury, debasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
- (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display."

Id. at 324 (emphasis in original). The ordinance was drafted in part by Professor Catherine MacKinnon. *Id.* at 325.

65. *Id.* at 328-31. The ordinance also applied to similar depictions of men, children and transsexuals. *Id.* at 324. That did not enhance its constitutionality however, since by prohibiting certain types of depictions of people, the ordinance still discriminated on the basis of viewpoint.

66. 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

67. In the important decision of *Butler v. Her Majesty the Queen*, the Supreme Court of Canada recently sustained a provision of the criminal code which declared that "any publication of a dominant characteristic of which is undue exploitation of sex, or of sex and any one or more of . . . crime, horror, cruelty and violence, shall be deemed to be obscene." The provision was construed to properly cover "explicit sex with violence" as well as "explicit sex that is degrading or dehumanizing . . . if it creates a substantial risk of harm." See Tamar Lewin, *Canada Court Says Pornography Harms Women and Can be Barred*, N.Y. TIMES, Feb. 28, 1992, at A1. This provision is not identical to the feminist pornography laws which have been proposed or enacted in the United States; however, it is quite similar in theory.

68. 60 U.S.L.W. 4667 (June 23, 1992). The ordinance provided that

"[w]hoever places on private or public 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."

cross or a swastika with knowledge or reason to know that it would cause "anger, alarm or resentment" on the basis of "race, color, creed, religion or gender." The case arose out of the prosecution of a minor who burned a cross on a black family's front lawn.⁶⁹ A unanimous Minnesota Supreme Court had sustained the ordinance by construing it to apply only to fighting words.⁷⁰ Although the United States Supreme Court unanimously invalidated the ordinance, it was sharply divided in its rationale. In an opinion by Justice Scalia, the majority held that the ordinance violated the First Amendment's prohibition against viewpoint discrimination in that it only punished those fighting words which cast aspersions on the basis of specified characteristics.⁷¹ Justices White and Stevens submitted concurring opinions in which they argued that the ordinance should be invalidated as overbroad but that the state should not be precluded from punishing otherwise proscribable expression which causes especially severe social and psychic injury such as cross burning or racial epithets.⁷² The majority responded that Justice Stevens' emphasis on the distinctiveness of the injury was "word play" since it is the message of racial hatred that is expressed, which renders the injuries distinct and severe.⁷³ As such, the ordinance still singles out a certain limited class of messages for punishment and is thus a clear example of viewpoint discrimination.⁷⁴ Fighting words which insult on the basis of unspecified characteristics even if in response to proscribed expression would not be punished. As the majority put it, the state may not "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules."⁷⁵

At a more theoretical level, the Court and the concurrences disagreed as to whether the state could regulate selectively within the confines of proscribable speech, such as fighting words. The majority reasoned that even there, viewpoint discrimination regulation is impermissible,⁷⁶ while the concurrences responded that the state should not be forced to address a problem that it deems less serious such as racially neutral fighting words in order to reach one that it considers more damaging such as racially based fighting

69. *Id.* at 4668.

70. *In re R.A.V.*, 464 N.W.2d 567, 510 (Minn. 1989).

71. 60 U.S.L.W. at 4671-72.

72. *Id.* at 4673 (White, J., concurring), 4678 (Stevens, J. concurring). Justice White construed the Minnesota Supreme Court ruling as prohibiting "expression that 'by its very utterance' causes 'anger alarm or resentment' and as such punishes expression which merely causes hurt feelings." *Id.* at 4673. Justice White's opinion was joined in full by Justices Blackmun and O'Connor and in part by Justice Stevens. Justice Stevens' opinion was joined in part by Justices White and Blackmun. Justices Stevens and White joined each other's overbreadth analysis but disagreed as to the proper analytical approach to hate speech regulation. Justice Blackmun submitted a short concurrence suggesting that the Court had reached out unnecessarily to write an opinion which would apply to "politically correct speech and cultural diversity." *Id.* at 4678. Justice White also argued that only the overbreadth challenge was properly presented to the Court in the petition for certiorari. *Id.* at 4673 n.1.

73. *Id.* at 4671.

74. *Id.* at 4671-72.

75. *Id.* at 4671.

76. *Id.* at 4669-71.

words.⁷⁷ The majority opinion suggested that the state could prohibit fighting words directed at "certain persons or groups" as opposed to the content of message if "the requirements of the Equal Protection Clause" were met.⁷⁸ Justice Stevens responded that there was no basis for distinguishing regulation aimed at protection of the target of the speech from regulation focussing on the nature of the harm.⁷⁹ The concurrences tend to ignore or minimize the extent to which the ordinance discriminates on the basis of viewpoint rather than subject matter although at some point to be sure, this becomes a matter of characterization.

Finally, the Court acknowledged that burning crosses to intimidate members of minority groups was a serious problem which the state was entitled to address, however it noted that the petitioner had also been charged under a racially motivated assault statute which he did not challenge and might have been charged with several other presumably constitutional offenses including arson, criminal damage to property and making terroristic threats.⁸⁰

R.A.V. unquestionably extends significant protection to offensive speech even in circumstances where it clearly inflicts significant social and psychic injury. The majority opinion reaffirms the Court's strong disapproval of viewpoint oriented regulation. This makes it especially difficult to regulate offensive speech since most such attempts focus on particularly noxious messages or ideas. Moreover, even the concurrences which argued that the state should be allowed to prohibit certain types of hate speech, confirmed that the overbreadth doctrine would still be taken seriously. Combined with the legacy of cases such as *Cohen v. California* and *Texas v. Johnson*, *R.A.V.* presents a formidable obstacle to the prohibition or regulation of offensive speech including hate speech.⁸¹

77. *Id.* at 4674 (White, J., concurring); 4680, 4683 (Stevens, Jr., concurring).

78. *Id.* at 4071. The majority argued that the federal law criminalizing threats against the life of the President was an example of a content based distinction that was consistent with the very reason why the entire class of speech was proscribable and hence not viewpoint discriminatory. *Id.* at 4670. The dissents replied that such an exception should apply to hate speech as well. *Id.* at 4676 (White, J., concurring), 4680 (Stevens, J., concurring). Arguably, the majority was suggesting that perhaps a statute which punished fighting words directed by a member of one racial group to another regardless of the message conveyed might be constitutional. Even a prohibition of fighting words directed by a member of racial majority group to a member of a racial minority group could survive the majority's First Amendment scrutiny but might succumb to the Equal Protection hurdle noted by the Court.

79. *Id.* at 4680.

80. *Id.* at 4668, 4672-73. See *United States v. Lee*, 60 U.S.L.W. 2004 (8th Cir. 1991) (cross burning constituted an attempt to intimidate a person in the exercise of a constitutional right); *2 leaders of Georgia KKK indicted in cross-burning*, DALLAS MORNING NEWS, June 27, 1992, at 3A (KKK leaders, indicted by federal Grand Jury three days before Supreme Court decision in *R.A.V.*).

81. Following *R.A.V.*, several commentators speculated that many existing attempts to regulate hate speech, especially on public university campuses were invalid. See William Celis 3d, *Universities Reconsidering Bans on Hate Speech*, N.Y. TIMES, June 24, 1992, § A, p. 11; Linda Greenhouse, *2 Visions of Free Speech*, N.Y. TIMES, June 24, 1992 at A1; Don Terry, *Decision Disappoints the Victims of Cross-Burning*, N.Y. TIMES, June 23, 1992 at A10; Paul Barrett, *Justices Reject Broad 'Hate Crime' Law as Violation of Free-Speech Guarantee*, WALL ST. J., June 23, 1992 at A24.

B. *The Campus Hate Speech Controversies*

Probably, the most publicized recent attempts to regulate offensive speech have been the efforts on several college campuses to draft and apply codes of behavior which prohibit or regulate speech that is deemed offensive to minorities, women, homosexuals and certain other groups.⁸² These codes are generally based on the premise that the speech in issue results in both severe psychological damage to members of the specified groups and seriously impedes the educational environment.⁸³

Many of the incidents that have given rise to these codes are outrageous and have quite properly been condemned.⁸⁴ The problem is a serious one. Nevertheless, the two campus speech codes which have been challenged in court, the University of Michigan Code⁸⁵ and the University of Wisconsin Code⁸⁶ have been readily invalidated under existing precedent. Proponents of speech codes have relied on a variety of First Amendment doctrines and theories including: fighting words⁸⁷, intentional infliction of emotional distress,⁸⁸

82. See *supra* note 5. See Henry J. Hyde & George M. Fishman, *The Collegiate Speech Protection Act of 1991*, 37 WAYNE L. REV. 1469, 1470 n.5 (1991) for a list of campus speech codes.

83. See Lawrence, *supra* note 5, at 452-66; Matsuada, *supra* note 5, at 2335-41; Byrne, *supra* note 25, at 412-27.

84. See Delgado, *Campus*, *supra* note 5, at 348-58; Lawrence, *supra* note 5, at 431-32; Matsuda, *supra* note 5, at 2333 n.71. See SHELBY STEELE, *THE CONTENT OF OUR CHARACTER* 129-48 (1990) for an insightful analysis of some of the factors which may be responsible for many of these racist incidents.

85. See *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989). Basically, the code prohibited behavior, including verbal behavior which "stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicapped or Vietnam-era veteran status and that . . . involves . . . [a] threat to . . . academic efforts, employment . . . extra-curricular activities or personal safety; or . . . [h]as the purpose or reasonably foreseeable effect of interfering with [such efforts or activities]." *Id.* at 856. The Court struck down the provision on grounds of overbreadth and vagueness. *Id.* at 864-67. See Robert A. Sedler, *Doe v. University of Michigan and Campus Bans on "Racist Speech": The View From Within*, 37 WAYNE L. REV. 1325 (1991) (plaintiff's attorney in *Doe* arguing that the reasoning of the case would prohibit almost all campus bans on hate speech).

86. *UWM Post v. Board of Regents of Univ. of Wisc.*, 774 F. Supp. 1163 (E.D. Wis. 1991). The Wisconsin Code prohibited speech or expressive behavior only if it is discriminatory or demeaning, directed at an individual, intended to demean on the basis of a protected characteristic and intended to create a hostile or intimidating educational environment. WIS. STAT. ADMIN. CODE T. § UWS 17.06 (2)(a) (Sept. 1989); see Patricia Hodulik, *Racist Speech on Campus*, 37 WAYNE L. REV. 1433 (1991) (discussion of experience under the Wisconsin code by the University General Counsel).

87. The much discussed Stanford Code is modeled on the "fighting words" doctrine. See STANFORD UNIVERSITY, *FUNDAMENTAL STANDARD INTERPRETATION: FREE EXPRESSION AND DISCRIMINATORY HARASSMENT* (June 1990). The Stanford Code provision is also set forth in Lawrence, *supra* note 5, at 450. The University of Wisconsin unsuccessfully attempted to rely on the fighting words doctrine in defense of its code. *UWM Post v. Board of Regents of University of Wisconsin*, 774 F. Supp. 1163, 1169-71 (E.D. Wis. 1991).

88. This approach was recommended by a task force at the University of Texas. REPORT OF THE PRESIDENT'S AD HOC COMMITTEE ON RACIAL HARASSMENT, UNIVERSITY OF TEXAS, AUSTIN (Nov. 27, 1989).

protecting true academic interchange⁸⁹ and group libel.⁹⁰ As Professor Strossen has shown in her careful analysis of the issues, each of these approaches has serious if not fatal flaws.⁹¹ Still, it is possible that at least a narrowly drawn code prohibiting a pattern of harassment pursuant to an intentional infliction of emotional distress and/or preservation of the academy theories could survive constitutional challenge.⁹² Such a provision would need to focus on intentional and clear instances of harassing speech and conduct. It would need to be carefully drafted and administered to avoid problems of overbreadth, vagueness, viewpoint discrimination and selective enforcement.⁹³ Such a code would not cover the great majority of the incidents that have given rise to the current controversies on campus⁹⁴ and it surely would not provide an adequate alternative to education, counseling and counterspeech.⁹⁵ Moreover, the proponents of any limited exception to

89. This was the theory of the Michigan code which was invalidated. *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989); see also Byrne, *supra* note 5, at 416-18 for the argument that a university should be allowed to prohibit racial insults as part of its mission to create an interchange which will advance its commitments to truth, humanism and democracy.

90. The Skokie ordinance challenged by the Nazis was modeled after the Illinois group defamation statute sustained in *Beauharnis v. Illinois*, 342 U.S. 250 (1952); see BOLLINGER, *supra* note 11, at 31 & nn. 46-47; see also Hadley Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281, 286-90 (discussing the *Beauharnis* case and reprinting the applicable portion of the Illinois statute).

91. Strossen, *supra* note 5, at 507-20. The fighting words doctrine has been significantly narrowed by the Court to cover only those insults which are likely in context to result in immediate violent reaction. *Id.* at 508-14. An intentional infliction of emotional distress approach involves a dangerous degree of subjectivity and vagueness. *Id.* at 515-16. A group defamation remedy probably does not survive *New York Times v. Sullivan*. *Id.* at 516-17.

92. See Weinstein, *supra* note 5, at 236-45 for an insightful elaboration of the persistent harassment approach. See also Massaro, *supra* note 5, at 230-65 (defending the Stanford type fighting words code and rejecting broader approaches). A fighting words provision, if narrowly drafted, could probably also survive challenge, however it would provide little real protection and hence would only be of symbolic value. See Strossen, *supra* note 5, at 492, 508, 522; Alan E. Brownstein, *Hate Speech at Public Universities: The Search for an Enforcement Model*, 37 WAYNE L. REV. 1451 (1991) (suggesting ways in which a code may be rendered constitutional and enforceable).

93. Strossen, *supra* note 5, at 523-47; see also Sedler, *supra* note 85, at 1336-48 (arguing that even narrowly drawn codes tend to be aimed at suppressing "racist ideas" and as such violate the First Amendment); *UWM Post v. Board of Regents of Univ. of Wisconsin*, 774 F. Supp. 1163, 1168-81 (E.D. Wis. 1991) (invalidating code due to overbreadth, content discrimination and vagueness). There are many reported examples of the attempted enforcement of campus speech codes against clearly protected but "politically incorrect" speech. Strossen, *supra* note 5, at 528-29; Sedler, *supra* note 5, at 1334-36. The recent Supreme Court decision in *R.A.V. v. St. Paul* reaffirms the power of the viewpoint discrimination and overbreadth doctrines in this area. *But see* Hodulik, *supra* note 86, at 1433-50 (arguing that the Wisconsin code did not create the problems that Professor Strossen has warned against).

94. See Strossen, *supra* note 5, at 492; Hodulik, *supra* note 86, at 1442 (many incidents that occurred at Wisconsin were not covered by the Code). See notes 114-116 *infra* for a discussion of a recent well-publicized incident at Stanford that was not punishable under its Code.

95. As Professor Massaro has noted, university mandated counterspeech and education can become heavy handed indoctrination at some point. See Massaro, *supra* note 5, at 264. At a state institution, this should raise First Amendment issues in the extreme case. At a private institution, similar conduct may infringe principles of academic freedom. The university community is certainly under a moral obligation to make some type of protective response. See Carter, *supra* note 5, at 13-42 (arguing that perhaps the state should be sued under an equal

the First Amendment must explain why the interests to be protected are qualitatively unique.⁹⁶ In the context of offensive speech doctrine as it has developed, the proponent of an exception must explain why the speech in question is more offensive, harmful, and subject to prohibition than that of the Nazis in Skokie, the flag burners or the cross burners in St. Paul.⁹⁷ That is not an easy task.

III. CONFLICT AND RECONCILIATION?

As a matter of existing law, offensive speech is relatively well protected under the First Amendment. And yet there is little question that various forms of offensive speech can cause very real harm that society has an interest in preventing. Racial insults, sexually demeaning speech, nazi and klan demonstrations, burning of the American flag and blasphemous art can clearly inflict severe emotional pain and in some instances lasting psychic injury.⁹⁸ Indeed, Professor Post has shown how racial insults can cause at least five different kinds of injury including basic moral harm, defamatory or subordinating harm to groups, dignitary and emotional injury to individuals, harm to the market place of ideas through silencing the victims and harm to educational environments.⁹⁹ Sexually offensive speech arguably causes emotional harm to children or at the very least interferes with their parents efforts to raise them in a particular environment.¹⁰⁰ Offensive speech that depicts the degradation of women or glorifies excessive violence may contribute to subordination, abuse, harassment, rape and other violent crime.¹⁰¹ Virtually all offensive speech can interfere with efforts by various communi-

protection theory for failure to protect minorities against serious intimidation and harassment).

96. Strossen, *supra* note 5, at 533; see Matsuda *supra* note 5, at 2357-61 (attempting to make such a case for racist speech); see also Post, *supra* note 5, at 316 (illustrating the difficulty of rationalizing a specific exception, such as racist speech, without the same argument supporting a number of other exceptions).

97. See Michelman, *supra* note 5, at 1350-51. As Professor Massaro points out, those who build a case for regulation on the reality and depth of the injury inflicted by racial insults, risk dilution of their claims if they extend the coverage of the regulation too far (i.e., to protect women, gays and the handicapped) and risk fragmentation of their political coalition if they don't. Massaro, *supra* note 4, at 244-45.

98. See, e.g., Collin v. Smith, 578 F.2d 1197, 1205-06 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); R.A.V. v. City of St. Paul, 60 U.S.L.W. 4667, 4678, 4683 n.9 (June 23, 1992) (Stevens, J. concurring); BOLLINGER, *supra* note 11, at 65-70; Lawrence, *supra* note 5, at 458-66; Matsuda, *supra* 5, at 2236-41; Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127 (1987).

99. Post, *supra* note 5, at 272-77.

100. See FCC v. Pacifica, 438 U.S. 726, 747-49 (1978) & 757-61 (Powell, J., concurring); Attorney General's Comm'n on Pornography 343-345 (1986); HAWKINS & ZIMRING, *supra* note 7, at 185-87; Charles Alexander, *A Parent's View of Pop Sex and Violence*, TIME, May 7, 1990, at 100.

101. See CATHERINE A. MACKINNON, FEMINISM UNMODIFIED (1987); CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981). The question of whether or to what extent pornography contributes to sexual violence is complicated and controversial. See Schauer, *supra* note 8, at 737. See also RICHARD A. POSNER, SEX AND REASON 366-74 (1992); Childress, *supra* note 15, at 179 (noting that it is very hard to prove harm from pornography).

ties to define themselves.¹⁰² At the same time however, it may contribute to the ability of both the offended and offending communities to understand and affirm their own values.¹⁰³

Can these interests be accommodated or must one necessarily prevail over the other? Direct legal accommodation of the competing interests through specific exceptions to First Amendment doctrine or through ad hoc or definitional balancing tends to be a victory for the competing societal interests and a defeat for freedom of speech. A compelling case can be made that to be effective, the protection of free speech must be largely unyielding.¹⁰⁴ For instance, Professor Blasi has argued that very stringent protection is essential in order to resist the pressure to dilute freedom of expression during recurring pathological periods.¹⁰⁵ Arguably, the present era of cultural conflict and political correctness is just such a period. Although "slippery slope" arguments can be reflexive and dogmatic, this would appear to be an area in which the danger of losing one's footing and sliding down the slope is very real indeed. At the present time there are so many different types of offensive speech claims pressed on society and the courts by aggrieved groups and individuals, that it will be legally and politically difficult to resist the granting of exceptions for all once relief is accorded to some. Our commitment to free expression is tested and tested again in hard cases in which speech causes real harm.¹⁰⁶ An attempt to balance the competing interests or to carve out one or more first amendment exceptions to the regulation of offensive speech would constitute a significant step backward from the speech-protective legacy of *Cohen v. California*, *Texas v. Johnson*, and *R.A.V. v. City of St. Paul*.

It might seem that the conflict in issue involves something of a zero-sum game in which one side loses if the other side wins. As such, if offensive speech is highly protected, competing social interests are sacrificed. That is one way of viewing the conflict, but not the only way, and I would argue, not the best way. Much, though certainly not all of the offensive speech in controversy today occurs in the context of our ongoing cultural conflict. "Politically incorrect" opinions and charges including vigorous criticism of affirmative action programs and multiculturalism, for instance, may be considered racist and offensive to many in the academic community but quite

102. See Post, *supra* note 5, at 286-87.

103. See BOLLINGER, *supra* note 11, at 157-88:

For speech that attacks and challenges community values the act of toleration serves to both define and reaffirm those values; the act of tolerance implies a contrary belief and demonstrates a confidence and security in the correctness of the community norm. Through toleration, in short, we create the community, define the values of that community, and affirm a commitment to confidence in those values.

Id.

104. See THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 9-20 (1970).

105. See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

106. See BOLLINGER, *supra* note 11, at 13-42; NEIER, *supra* note 11, at 124, 148.

appropriate to a large segment of the country.¹⁰⁷ Rap lyrics which seem to celebrate violence and the abuse of women may be an acceptable and largely rhetorical art form to many black urban males but highly offensive to feminists and white suburbanites.¹⁰⁸ Serrano's "Piss Christ" may outrage many Christians but be considered an important cultural statement in segments of the art world.¹⁰⁹ Flag burning may appear an unpardonable affront to most Americans, while some may consider it a desperate cry of anguish regarding the status quo.¹¹⁰ While, hopefully, few believe that racial insults or Nazi demonstrations are appropriate behavior, many believe that even speech that is highly offensive and harmful should be permitted in the United States, if for no other reason than fear and distrust of government censorship.

If the Constitution, including the First Amendment, is to continue to serve as a unifying symbol to our nation, it must stand above conflicts of culture and values and provide and protect the arena in which they may be resolved through social, cultural, and political struggle.¹¹¹ Just as the First Amendment prohibits the state from banning speech that is offensive to certain individuals and communities, so it empowers those very persons and their allies to fight back through speech and associational activity, in order to define or reshape public or communal values and standards of behavior.¹¹²

What can a concerned American do when faced with deeply offensive speech, be it racial insult, pornography, flag burning, blasphemous art, or indecent language on the radio? He or she can engage in a wide variety of activity that clearly is protected by the First Amendment itself, including speaking out, demonstrating, circulating and signing petitions, writing letters to editors, calling radio talk shows, organizing and attending public forums and teach-ins, distributing pamphlets, applying peer group pressure,

107. See Hyde & Fishman, *supra* note 82, at 1472-73, for a catalogue of some of the excesses of political correctness on campus.

108. See Jon Pareles, *On Rap, Symbolism and Fear*, N.Y. TIMES, Feb. 2, 1992, § 2, at 1; Seth Mydans, *For Nonviolent Legacy, A Violent Rap Message*, N.Y. TIMES, Jan. 11, 1992, at A, (rap music video by Public Enemy depicting assassination of politicians from Arizona, a state that has failed to recognize the Martin Luther King Holiday); Tom Mathews, *Fine Art or Foul*, NEWSWEEK, July 2, 1990, at 46; Richard Corliss, *X Rated*, TIME, May 7, 1990, at 92.

109. Mathews, *supra* note 108, at 49.

110. See Michelman, *supra* note 4, at 1362-63.

111. In rejecting strong hate speech regulation based on aggressive substantive equality theory, Professor Massaro observes that "to impose *speech* limitations based on a culturally contested theory seems especially wrong." Massaro, *supra* note 5, at 243 (emphasis in original).

112. I believe that Dean Bollinger would view this approach as exemplifying at least some of the characteristics of the fortress model of free expression of which he is quite critical. BOLLINGER, *supra* note 11, at 46. He is worried that it creates a "warfare mentality" and "tends to postulate a social universe in which the citizenry is alienated from the government, as well as internally from each other, and to induce a posture that can be unfortunately disingenuous and manipulative". *Id.* at 102, 104. Although it may seem cynical, I believe this to be a relatively accurate perception of our present social universe. I do not believe that our operative model of free expression created this state, although it probably contributes to it. I see a wide open approach to expression in the hate speech area as a fair, process-oriented method of coping with existing cultural conflict. To deny the existence and power of cultural conflict in our world would be utopian.

educating children, exercising parental control, and boycotting merchants who sell offensive products. Assuming that most state regulation of offensive speech probably is unconstitutional, and assuming that the majority of concerned citizens do not favor unconstitutional legislation, concerned and offended citizens nevertheless can demand responses from their elected representatives as one effective means of pressuring private groups such as record companies, television networks or the Motion Picture Association to take preemptive action.

Private counterspeech and associational action are not easy. They require sustained effort by ordinary citizens, rather than by professional politicians.¹¹³ They can be successful, although there is no guarantee that they will be. For all of the talk, and some of the action, about speech codes and various regulations, private and associational actions are the primary means by which the problems of offensive speech are addressed.¹¹⁴ Skokie, is an excellent example. After, the A.C.L.U. established that the Nazis had a constitutional right to march in Skokie, the Nazis canceled the march, presumably because they would have been humiliated by an overwhelmingly larger and louder counter-demonstration.¹¹⁵ The student and faculty response to a recent incident at Stanford University, in which a well known conservative student shouted "Faggot, I hope you die of AIDS" outside of the room of a gay resident advisor, illustrates the power of counterspeech and peer pressure.¹¹⁶ Although the campus disciplinary authorities held that the student's conduct was protected under Stanford University's speech code, students and faculty coalesced in a rather thunderous denunciation of the student's behavior through public petitions and editorials.¹¹⁷ From a distance, it would seem that the reaction may have gone too far, at least to the

113. Dean Bollinger argues that response through the lawmaking process is easier, more powerful, and more satisfying to the offended community than mere private counterspeech. BOLLINGER, *supra* note 11, at 72. This probably is true. But it also is true that, to a certain extent because of these factors, legislative response cuts far more deeply into the values underlying freedom of expression.

114. Dean Bollinger notes that we all feel a strong urge to respond to offensive speech simply because silence may be taken as approval. *Id.* at 64, 71-72.

115. NEIER, *supra* note 11, at 8.

116. Ken Myers, *An Incident at Stanford Sparks More Dialogue on "PC" Speech*, NAT'L L.J., March 9, 1992, at 4. See Weinstein, *supra* note 5, at 233 n. 202 for an account of a somewhat similar incident at Arizona State University.

117. *Id.* Recently, at the SMU Law School, a letter signed by a non-existent organization attacking minority students and the school's affirmative action program was inserted into the communications folders of minority students and posted around the law school. The Dean, Faculty, and Student Bar Association each published letters condemning the *anonymous* letter and reaffirming their support for the minority students. An all school public meeting was called to allow students to engage in a dialogue about diversity at the law school. See Rochelle Riley, *Race Woes Confronted at SMU*, DALLAS MORNING NEWS, April 15, 1992, at 1. An extraordinarily offensive and tasteless parody of a law review article by the late and violently murdered Professor Mary Jo Frug was distributed by certain members of the Harvard Law Review at a Law Review banquet. This resulted in great public outcry at the school condemning both the parody and the administration of the law school itself for allegedly fostering a hostile atmosphere for women and minorities. Fox Butterfield, *Parody Puts Harvard Law Faculty in Sexism Battle*, N.Y. TIMES, April 27, 1992 at A8. For the argument that the private response by the faculty & students to the parody was excessive and intolerant see Stuart Taylor, Jr., *The Rule of Nonsense at Harvard Law*, LEGAL TIMES, June 1, 1992, at 25.

extent that the student was hissed in class and received threatening phone calls.¹¹⁸ Counterspeech, like offensive speech itself, can be exercised excessively and irresponsibly. Even so, it is far preferable to official censorship and, as the Stanford incident suggests, an extremely effective method by which the community can express its outrage, deter future incidents, and define or reaffirm its own values.

The appearance of "political correctness", a socially prescribed orthodoxy of opinion on a variety of issues, including race, gender and sexual preference, on many college campuses and elsewhere is to some extent, a legitimate, if often excessive, response to speech and ideas that certain communities find offensive.¹¹⁹ To some extent, political correctness may be an outraged response to the increase in the number of racist and other discriminatory incidents which have occurred on American college campuses in recent years.¹²⁰ However, it also may reflect the anxieties of many academics and students who feel threatened and distressed by their recognition that the population at large rather decisively rejects the leftist, anti-western, oppression centered ideology that is so often fashionable in the academy.¹²¹ Carried to extremes as it frequently has been, political correctness may breed a certain polarization and resentment which actually encourages intemperate and racist responses.¹²² I disagree with the world-view, politics, philosophy, to a large extent the values and certainly the intolerance of the "politically correct". But as long as they attempt to impose their orthodoxy through speech and peer pressure as they ordinarily do, rather than through regulatory codes and official coercion,¹²³ I cannot help but conclude that they are fighting the culture war vigorously and legitimately as it should be fought. As such, I salute their commitment, but hope that they fail.

Battles over record and motion picture labeling also exemplify the power of counterspeech and associational effort. Many people believe that the language on records, especially rap and heavy metal, and the gratuitous sex and violence in motion pictures is harmful to the adolescent audience that is all but inevitably exposed to it.¹²⁴ The issues are obviously similar to those

118. Jeff Gottlieb, *Campus anti-gay incident unites law school in anger*, SAN JOSE MERCURY NEWS, Feb. 11, 1992, at 1B.

119. See Massaro, *supra* note 5, at 260, for the argument that counterspeech, though not necessarily of the political correctness variety, stands a better chance of rebutting hate speech on college campuses than anywhere else.

120. See *supra* note 82.

121. BORK, *supra* note 21, at 337-43; D'SOUZA, *supra* note 21, at 124-56; see also Sedler, *supra* note 85, at 1329-30.

122. See generally D'SOUZA, *supra* note 21, at 125-36.

123. See Steven C. Bahls, *Political Correctness and the American Law School*, 69 WASH. U. L.Q. 1041 (1991) (a significant percentage of law students believe that many law professors tend to be intolerant of the expression of opposing political views in class); see also Levin v. Harleston, 60 U.S.L.W. 2791 (2d Cir. June 23, 1992) (state college violated First Amendment rights of professor who had made controversial statements concerning race and IQ by setting up "shadow sections" into which his students could transfer and by setting up a faculty committee to investigate his writings); Arlynn Lieber Presser, *The Politically Correct Law School: Where It's Right to be Left*, A.B.A. J., Sept. 1991, at 52.

124. See *supra* note 98 and accompanying text.

addressed in *FCC v. Pacifica Foundation*.¹²⁵ Proponents of some labeling with regard to records and an improved guidance system with respect to motion pictures lobbied Congress, state legislatures and municipalities for regulation.¹²⁶ Any legislation which might have resulted almost certainly would have been invalidated and many of the proponents of such legislation must have known that to be the case. The effort helped to prompt the respective industries to adopt or revise self-policing procedures however.¹²⁷ Whether the resulting products are satisfactory may be debated. Still, it is an example of how private pressure with respect to offensive speech can initiate a private accommodation. The protest movement which resulted in the 7-11 stores' decision to discontinue the sale of Playboy and Penthouse is a more problematic example of a successful attempt to limit the availability of offensive materials since it apparently involved pressure from staff members of the Attorney General's Commission on Pornography as well as from private citizen groups.¹²⁸

As, political correctness, and perhaps all of these examples illustrate, private counterspeech and pressure can be excessive and intolerant.¹²⁹ It can result in self-censorship—indeed, that is often, though not always the point. That obviously raises the question of whether privately induced self-censorship is any less of a problem than legally coerced censorship? Reflection should suggest however that state imposed censorship is significantly more dangerous than whatever chill may be induced by pressure from private groups.¹³⁰ The coercive power of the law itself renders official censorship qualitatively more severe. Private communities and interest groups can hardly call upon fines, imprisonment, other sanctions, injunctions, the investigatory and prosecutorial power of the state, and the moral authority of the

125. See *supra* notes 47-52 and accompanying text.

126. See Berry & Wolin, *supra* note 13, at 596 (describing the successful lobbying by a variety of groups including the PTA and Reverend Jesse Jackson's PUSH); Blanchard, *supra* note 13, at 822-33; Lewis Grossman, *Self-Censorship by Media Industries*, 15 COLUM. VLA J. L. & ARTS 443 (1992) (discussing lobbying campaigns to induce self-censorship by the motion picture, comic book, television, and record industries); Jon Pareles, *Companies to Label Explicit Records*, N.Y. TIMES, March 29, 1990, at B1; Burges, *Arizona: 'No ID, no LP'*, DALLAS MORNING NEWS, Mar. 25, 1990, at A43; Howard, *Unbecoming Attractions, FW Parents Vow to Continue Seeking law to Keep Youth from Films rated R, NC-17*, DALLAS MORNING NEWS, Feb. 2, 1992, at 33A.

127. *Id.* Recently, some police organizations threatened to boycott Time Warner and its subsidiaries to protest a rap record by Ice-T titled *Cop Killer* which celebrates the killing of police officers. Todd Copilevitz & Manuel Mendoza, *Police Plan Protests Over Rap Song*, DALLAS MORNING NEWS, June 10, 1992, at A 25; John Leland, *Rap and Race*, NEWSWEEK, June 29, 1992 at 47; see also Annetta Miller, *Do Boycotts Work?*, NEWSWEEK, July 6, 1992, at 58. Ultimately, Ice-T dropped the song from the album but attributed the decision to personal threats rather than pressure from the boycott. Sheila Rule, *'Cop Killer' To Be Cut From Ice-T Album*, N.Y. TIMES, July 29, 1992, at B1..

128. See Hawkins & Zimring, *supra* note 7, at 203-204; Corliss, *supra* note 108, at 98.

129. Dean Bollinger's tolerance rationale for freedom of expression is concerned with private suppression through intolerance as well as state censorship. BOLLINGER, *supra* note 11, at 80. For the reasons stated in the text at *infra* notes 138-140, I consider this problem significantly less threatening.

130. See BOLLINGER, *supra* note 11, at 13; see also Massaro, *supra* note 5, at 245-48 for the argument that our legal culture still largely accepts the private/public distinction in the speech context.

law itself to enforce their wills. Rarely, if ever, could private community pressure achieve the pervasive and lasting impact on speech that one would expect from the force of law. Quite apart from the absence of official sanctions, it is unlikely in a society as diverse as ours that one particular community would be able to impose a single minded approach on an issue which by definition would be controversial. Nor will the limits of the permissible be as frozen into place by private pressure, which should fluctuate with changes in society, as it might by positively enacted law.

It is well recognized that one function of the First Amendment is to provide a check on government power.¹³¹ Such a check is necessary in view of the importance of maintaining free access to information about official conduct and because of the threat that government censors will inevitably be biased in favor of censorship or against unpopular speakers or opinions.¹³² These concerns are not as compelling with respect to private pressure groups since they will not have the pervasive power of government. Plus there should be similarly situated competing groups to challenge their contentions. Attempts to encourage self censorship through private pressure do present a somewhat unique threat to free expression, however, in that unlike state regulation, clear standards and strict procedural due process are not required.¹³³

Though most theories of free expression assume to a large extent that more speech is good and that officially compelled censorship is bad, it is certainly not obvious that private pressure to induce self-censorship is necessarily bad for society. Racial insults or epithets provide a case in point. Those who argue that the First Amendment precludes the state from prohibiting racial insults do not contend that such speech is desirable and should be encouraged or even tolerated privately—quite the contrary. There is probably all but unanimous opinion that private citizens and communities such as university students and faculties should attempt to totally discourage racial insults through education, counseling, argument, righteous indignation and other means of influencing community standards as recently happened with respect to the sexual orientation epithets at Stanford University.¹³⁴ This would seem to be a legitimate use of the power of speech although it can become improperly heavy-handed if coercively imposed by the university itself.¹³⁵ Indeed, considering that racial, gender based and sexual preference based insults may be intended to and will often have the effect of “silencing” the victims,¹³⁶ and considering that by definition, the victims will often be

131. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

132. *Id.* at 538-44.

133. See Scheidemantal, *supra* note 13, at 502-07.

134. See notes 116-118 *supra* and accompanying text.

135. See Massaro, *supra* note 5, at 264.

136. See Lawrence, *supra* note 5, at 458-66; Matsuda, *supra* note 5 at 2376. For a compelling argument that prohibiting racist insults will not solve the problem of silencing, which is probably more attributable to systemic racism in any event, but will distort the marketplace of free expression, see Post, *supra* note 5, at 302-11.

members of minority groups,¹³⁷ the larger community must assume the responsibility of speaking out vigorously against such attacks. Those who believe that there is a place for racial or other such epithets on campus or elsewhere will remain legally free to engage in them if they are willing to accept the stinging rebuke of their fellow students or citizens.

It must be acknowledged that social and cultural struggle will not necessarily produce the optimum amount of free expression at any given time. Peer pressure can readily breed unthinking orthodoxy but that is a matter which over time will be challenged and hopefully corrected in the marketplace of expression itself. Political correctness has its truths and it has its excesses. Those excesses are regularly ridiculed in the press and on campus and eventually, they will probably be whittled away. Moreover, there is no reason to believe that either legal regulation (however carefully crafted) or uncritical tolerance of all that is spoken or written would strike a better balance. The first carries all of the threats and difficulties of government censorship while the second makes no attempt to accommodate the competing societal interests at all.

The excesses of private pressure will be restrained to a very significant extent by the dynamics of the process. To be successful at influencing standards of speech and conduct, a significant number of the members of a private community must be willing to devote a fairly sustained amount of time and effort to the issue. Most people are unwilling or unable to make such a commitment unless the issue is quite unique and important to them. There are, of course, professional interest groups such as the American Civil Liberties Union, which take positions on speech issues as a matter of course, however, the public can easily grow skeptical and cynical about organizations that are perceived to protest, complain and warn too frequently.¹³⁸ As the aftermaths of the Bork and Thomas nominations tend to suggest, most people, including those who enjoy participating in major cultural conflicts, can do battle for only so long before they need a period of repose. Consequently, although cultural conflicts over offensive speech can be expected to continue in this divided and divisive society, they will be intermittent and the truly pitched battles will only be sustained over relatively significant issues (if only from a symbolic standpoint). This further limits the extent to which private pressure can have a pervasive chilling effect.

Finally, one must ask whether a strategy of encouraging or participating in cultural conflict through expressive activity is wise and desirable for a person committed to First Amendment values. The most familiar models of freedom of expression such as the self government theory and the marketplace of ideas often seem to be quite tempered and rational in their orientation. Moreover, most of us would ideally like to envision ourselves as

137. See Lawrence, *supra* note 5, at 466-72; Matsuda, *supra* note 5, at 2376.

138. It can be costly for an organization to vigorously pursue an intuitively unpopular public campaign. See NEIER, *supra* note 11, at 69-104 for a detailed account of the increases and decreases in ACLU membership due to its support of unpopular causes, especially the American Nazi march in Skokie. See generally SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES (1990).

tolerant, fair-minded people who are prepared to listen to opposing viewpoints and if we disagree, express that disagreement in a reasoned, civil, respectful but persuasive manner designed to convince a worthy but openminded opponent of the errors of his or her position. Such a model fails to adequately describe the raucous, overreaching, rhetorical and oftentimes disingenuous and intolerant style of argument which is likely to prevail in the highly charged context of cultural conflict. In the heat of battle, speakers will often attempt to persuade through emotionalism and misrepresentation rather than through careful analysis and illumination. Senator Kennedy's early attack on the nomination of Judge Bork is one well known successful example of such demagoguery.¹³⁹ President Bush's use of the pledge of allegiance issue in the 1988 presidential campaign is another.¹⁴⁰ This is the rhetoric of the campaign trail, of the fierce political struggle, and of the angry dissenter. It is a form of speech that the Supreme Court had in mind in *Terminello v. Chicago* when it wrote that "a function of free speech under our system of government is to invite dispute [and] [i]t may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger"¹⁴¹ or what it had in mind in *New York Times v. Sullivan* when it wrote that "debate on public issues should be uninhibited, robust and wide open."¹⁴² And it is the kind of speech that the Court had in mind in *Cohen v. California* when it proclaimed that this "verbal cacophany is . . . not a sign of weakness but of strength."¹⁴³ It is a form of rhetoric that the Court has protected regularly.¹⁴⁴

In vigorous dissents from the Ninth Circuit's refusal to grant an en banc hearing in the recent case of *McCalden v. California Library Association*, Judges Kozinski and Reinhardt argued persuasively that the majority had misunderstood the degree to which protected counterspeech can permissibly be threatening and indeed dangerous.¹⁴⁵ There, the panel reversed the dismissal of several state law causes of action such as interference with contractual relationships in a lawsuit brought by self-styled "Holocaust revisionists" who were denied the opportunity to set up an exhibit at the California Library Association convention after several Jewish groups threatened to engage in potentially disruptive demonstrations.¹⁴⁶ The dissents correctly recognized that the alleged threats of unprotected disruption were plead with insufficient specificity in a free speech case and that such threats themselves are not necessarily unprotected in the context of raucous political

139. ETHAN BRONNER, *THE BATTLE FOR JUSTICE*, 98-99 (1989).

140. See *Waving the Bloody Shirt*, *NEWSWEEK*, Nov. 21, 1988, at 116-17.

141. 337 U.S. 1, 4 (1949).

142. 376 U.S. 255, 270 (1963).

143. 403 U.S. 15, 25 (1971).

144. See, e.g., *Letter Carriers v. Austin*, 418 U.S. 264, 268 (1974) ("a scab is a traitor to his God, his country, his family and his class"); *Gooding v. Wilson*, 405 U.S. 518, 520 n.1 (1972) ("White son of a bitch", "I'll kill you"); *Street v. New York*, 394 U.S. 576, 479 (1969) ("If they let that happen to Meredith we don't need an American flag").

145. No. 88-5727, 1992 U.S. App. LEXIS 750, at *34 and *51 (9th Cir. Jan. 24, 1992).

146. *Id.* at * 3.

counter-demonstration.¹⁴⁷

Emotionally charged overstatement, angry denunciation, and shrill and threatening protest are not the only rhetorical weapons for doing cultural battle. This form of debate annoys a great many people and grows tiresome even with those who enjoy it to some extent. Often, in the heat of conflict over emotionally charged issues, reason and moderation will be the wisest and the most promising approach. My point is simply that both as a political weapon and as a method of free expression, a bit of flat out demagoguery, is not necessarily something to be suppressed or even embarrassed by.

Quite apart from the self interested strategy of the speaker to avoid losing more support than he or she gains, the limits of protected expression apply to cultural conflict as elsewhere. Speakers and protestors must remain within the law. However emotionally intense the issues, there is no license to trespass, obstruct movement of the public or access to public facilities or businesses or to engage in acts of violence or destruction.¹⁴⁸ In the context of abortion clinic protests for instance, peaceful protest on public property outside of a clinic should generally be permissible,¹⁴⁹ however blockage of access should not be tolerated.¹⁵⁰ The threat of disruption obviously convinced the majority in the *McCalden* case that defendants' plans were not protected by the First Amendment.¹⁵¹ Had the plaintiffs been able to allege with greater specificity that the defendants themselves intended to engage in violence and property damage if the Holocaust revisionists were permitted to set up their exhibit, it is unlikely that there would have been a basis for the strong dissents that were submitted.

The practice of heckling can only be addressed in context. To some extent, vocal disapproval, including at key points within the delivery of a speech for instance, should be protected as an effective means of counter-speech. A well placed interjection, not necessarily polite, can, on occasion,

147. *Id.* at * 37-50 (Kozinski, J., dissenting); *id.* at * 51-70 (Reinhardt, J., dissenting).

148. *Right to Life Advocates, Inc. v. Aaron Women's Clinic*, 737 S.W.2d 564 (Tex. App.—Houston [14th Dist.] 1987), *cert. denied*, 488 U.S. 824 (1988) (affirming injunction against trespassing at abortion clinic); *National Org. for Women v. Operation Rescue*, 914 F.2d 582, 585 (4th Cir. 1990), *cert. granted*, 111 S. Ct. 1070 (1991) (affirming injunction prohibiting blocking access to abortion clinic); *Northeast Women's Ctr. v. McMonagle*, 939 F.2d 47, 62 (3d Cir. 1991) (injunction limiting access to abortion clinic found reasonable); *New York State National Org. for Women v. Terry*, 886 F.2d 1339, 1363-64 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990) (affirming permanent injunction prohibiting blocking access to abortion clinic).

149. *National Org. for Women v. Operation Rescue*, 914 F.2d 583, 586 (4th Cir. 1990), *cert. granted* 112 L. E. 2d 1176 (Feb. 25, 1991) (refusing to broaden injunction to cover intimidation, harassment or disturbance of patients); *Portland Feminist Women's Health Ctr. v. Advocates for Life*, 849 F.2d 861 (9th Cir. 1988) (modifying injunction to permit shouting, yelling and chanting that does not substantially interfere with abortion clinic); *Mahoney v. District of Columbia*, 58 U.S.L.W. 2454 (D.C.D.C. 1990) (invalidating ordinance prohibiting picketing within one hundred yards of an abortion clinic). *Cf. Frisby v. Schultz*, 487 U.S. 474 (1989); *United States v. Grace*, 461 U.S. 171 (1983).

150. *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 261 (1989) (upholding application of civil R.I.C.O. to harassing abortion clinic clients, trespassing and destruction of property); *State v. O'Brien*, 784 S.W.2d 187 (Mo. App. 1989) (no necessity defense to trespassing at abortion clinic).

151. *McCalden*, 1992 U.S. 750 at *20-23.

do more to undermine the impact of an argument than unlimited rebuttal. Thus, as long as heckling does not completely disrupt the speaker or preclude the presentation, it should probably be protected in public facilities. When it does interfere too significantly with the speaker's ability to be heard, it can probably be prohibited as reasonable time, place and manner regulation.¹⁵²

Combatting offensive speech in the rough and tumble of the marketplace isn't for everyone. A person's decision whether to fight offensive speech with counterspeech will depend on many factors including the depth of commitment to the issues at stake, comfort with public debate, assessment of the potential impact of such strategy and the amount of spare time available. It may not be the easiest or the most effective way of countering offensive speech and attempting to preserve community standards. Legal regulation, if constitutional (generally a doubtful if) might have greater impact and be less trouble for the ordinary citizen. But fighting back through counterspeech is a better way to proceed because it has the potential to preserve the First Amendment freedom for all persons and communities in spite of their severe disagreements and provides a means by which these individuals and groups may accommodate their disagreements however roughly, by exercising free expression rather than by regulating it.

152. See *Frisby v. Schultz*, 487 U.S. 474 (1988) (prohibition of picketing in front of a residence was valid as reasonable time, place, and manner regulation); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (ban on camping in D.C. parks applied to demonstrations dramatizing the plight of the homeless was reasonable time, place, and manner regulation).

