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Controversial Speakers on Campus: Liberties, Limitations, and Common-Sense Guidelines

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CONTROVERSIAL SPEAKERS ON CAMPUS: LIBERTIES, LIMITATIONS, AND COMMON-SENSE GUIDELINES

KENNETH LASSON*

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I. INTRODUCTION

Veritas vos liberabit, chanted the scholastics of yesteryear. *The truth will set you free*, echo their latter-day counterparts in the academy, intoning the mantra reverentially but with increasingly more hope than confidence, more faith than conviction.

By and large, universities would like themselves to be perceived as places of culture in a chaotic world, protectors of reasoned discourse, peaceful havens where learned professors roam orderly quadrangles and ponder higher thoughts. Their slick brochures and elegant catalogues depict a community of scholars, serious and fair-minded at both work and play, all thirsting for knowledge in sylvan tranquility, all feasting on the

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fruits of unfettered intellectual curiosity, all nurtured in an atmosphere of invigorating academic freedom, in an altogether overflowing cornucopia in the ever-bustling marketplace of ideas.

The real world of the academy, of course, is not quite that wonderful - nor nearly as bad as many would suggest. The ironies become palpable, however, when those self-same institutions, which almost universally view themselves as bastions of free speech, instead stifle debate that is perceived as politically incorrect or otherwise embarrassing. Academic administrators naturally shy away from conflict and contention. They shun controversy. They abhor negative publicity of any kind, quelling it as heavy-handedly as conservative corporations whose primary concern is to ensure a profitable bottom line. Thus universities have become intuitively reluctant to sponsor ideas that clash too loudly. The research and scholarship they most enthusiastically support is that which curries favorable coverage from the media and attracts large amounts of dollars from alumni.

It is all the more anomalous that universities appear ignorant of long-established legal obligations, responsibilities, and limitations, a fact painfully apparent from the many speech and conduct codes they promulgate that have been found patently unconstitutional.[1]

Yet how *should* such institutions respond when students, professors, or outsiders foster bigotry and intolerance? Not all controversy on campus, unfortunately, is in the pursuit of Noble Truth. Must universities provide an open forum for *all* points of view, whether well-intentioned or venomous? Need they accede to demands from student groups or faculty members seeking to sponsor speakers who are purposefully contentious? Can they not draw a fair-minded line between civil-rights activists and hate-mongering bigots, between welfare reformers or publicity-seeking dissidents, between passionate anti-abortionists who condemn their opponents as "murderers" and strident anti-Semites who call Jews "blood-suckers?"[2]

Most schools have some sort of procedures in place to deal with controversial speakers, but few such policies are informed by an adequate understanding of either constitutional law or academic freedom. Moreover, the law itself is in a state of flux and conflict, struggling to relax if not resolve the tension inherent between the First Amendment's guarantee of free speech and the Fourteenth Amendment's promise of equal protection.

1. *See infra* Parts I.C., II.A.3.
2. *See infra* Part I.B.

There is thus a great need for reasoned guidelines - rules and regulations that do justice to the academic enterprise without doing violence to the moral, legal, and social principles upon which legitimate scholarship is based and from which it derives support.

This article reviews the historical context of controversial speakers on campus, examines various liberties and limitations accorded them under the Constitution, and suggests clear and effective standards for dealing with contentious speech in an academic setting.

II. CATCALLS FROM THE IVORY TOWER: AN HISTORICAL CONTEXT

A. THE ACADEMIC ENTERPRISE

Thomas Jefferson described the university as a place where "we are not afraid to follow truth, wherever it may lead, nor to tolerate error so long as reason is left free to combat it."[3] That ideal has been frequently embellished, such as in this statement from the president of Harvard University:

> Universities have a special interest in upholding free speech. Educational institutions exist to further the search for truth and understanding and to encourage the personal development of all who study and work within their walls. Because their right to speak freely and the opportunity to enjoy an open forum for debate are so closely related to these central purposes, the university has a stake in free speech that goes beyond the interest of its members. Its integrity as an institution is bound up in the maintenance of this freedom, and each denial of the right to speak diminishes the university itself in some measure.[4]

The Supreme Court has steadfastly affirmed the commitment to free speech in the American public education system. While school administrators have an important obligation to maintain order, they must nevertheless abide by First Amendment principles. "[Neither] students [nor] teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[5] This is especially true in the public university arena, where the Court has underscored the importance of safeguarding academic freedom for the "marketplace of ideas." Thus the "vigilant protection of constitutional freedoms is nowhere more vital than

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3. Alvin L. Goldman, *The University and the Liberty of its Students—A Fiduciary Theory*, 54 KY. L.J. 643, 646 (1966) (quoting THE WRITINGS OF THOMAS JEFFERSON 196 (1859)).

4. Letter from Derek Bok to the Harvard community (Sept. 21, 1984).

5. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969).

in the community of American schools," and regulations must be struck down that "cast a pall of orthodoxy over the classroom 'by violating the First Amendment.'"[6]

Such noble sentiments, however, have seldom been tested against the onslaught of hate speech increasingly being uttered on American campuses. Moreover (as the Supreme Court has likewise recognized), universities frequently appear ill-equipped to deal with controversial speech from outsiders: "The relatively placid life of the college campus of the past has not prepared either administrators or students for their respective responsibilities in maintaining an atmosphere in which divergent views can be asserted vigorously, but civilly."[7]

Often, in fact, the three groups primarily involved with deciding who speaks on campus- administrators, faculty, and students- are confused by conflicting concepts of constitutional guarantees and restrictions. Few of them fathom the nuances that differentiate the liberties of private institutions from the limitations of public ones, nor recognize that the First Amendment prohibits only the federal government from making any law "abridging the freedom of speech,"[8] nor that its subsequent application to the states bridles only state actors.[9]

B. CONTROVERSIES AND REPERCUSSIONS

1. Changing Climates on Campus

Conditions for controversy have long been part of the university experience: Natural challenges to establishment values, and inherently diverse student populations, often generate highly-charged confrontations, many of which can intensify quickly and explode in acrimony. For the most part, the clashes in the past were ideological in nature, over either political or philosophical issues involving the competing American values of individualism and communitarianism, or specific debates about military actions, religion, abortion, or communism.[10] Nevertheless, few cases

6. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

7. Healy v. James, 408 U.S. 169, 195-96 (1972) (Burger, C.J., concurring).

8. U.S. CONST., amend. I.

9. The First Amendment's bar against "abridging the freedom of speech" is "among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." Gitlow v. New York, 268 U.S. 652, 666 (1925).

10. *See* LAURENCE MARCUS, FIGHTING WORDS: THE POLITICS OF HATEFUL SPEECH (1996) 147-48. Mr. Marcus was a member of the Board of Trustees at Kean College when Khalid Muhammad appeared there.

involving controversial speakers on campus were litigated in the courts before the second half of the twentieth century.

The modern campus free-speech movement was born in 1964 at the University of California (Berkeley), where thousands of students protested a university ban against factional fund-raising. The political tides turned over the next few decades, to a point when in 1993, United Nations Ambassador Jeane Kirkpatrick was loudly heckled by a conservative group called Students Against Intervention in El Salvador.[11] Similar right-wing protests occurred in 1987 at the Harvard Law School, where a Nicaraguan resistance leader was shouted off the stage as he was about to begin a speech,[12] and in 1994 at the University of South Florida, where a violent demonstration resulted from the on-campus appearance of a Cuban exile who advocated negotiations with Fidel Castro.[13] Even purely political debate, often cited as the inviolable purpose of the First Amendment, has been placed off-limits at some educational institutions.[14]

Recently, however, the most controversial speakers- whether students, faculty, or outsiders- represent a new breed: Not only do they cross the political and ideological spectrum, but they frequently straddle the exceedingly thin line between controversial speech and hate speech. Which of their words must be protected, and which can be punished? Official responses to inflammatory utterances have often been arbitrary, capricious and unless they are challenged in court and found to be unconstitutional, chilling if not punitive. Moreover, for every speaker who prevails in litigation, there are many more who choose not to challenge their punishments.

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11. The university chancellor said he was "embarrassed that Berkeley has been advertised around the world as a place that succumbed to mob rule," "'and that campus officials were concerned that speakers who have the philosophy and opinion of the (political) right'" are rarely invited because of fear of disturbances. U.P.I. (Mar. 15, 1983).

12. *See Dr. Adolfo Calero, Contra Leader, To Speak at Harvard Law School,* PR. NEWSWIRE, (Nov. 19, 1987).

13. *See* Marlene Sokol, *Violence Mars Exile Leader's Talk,* ST. PETERSBURG TIMES, Dec. 1, 1994, at 1B.

14. *See, e.g.,* Wilson v. Chancellor, 418 F. Supp. 1358, 1361 (D. Or. 1976). In 1976, an Oregon school board issued an order prohibiting "all political speakers" from a public high school. *See also* Joan Biskupic, *For Justice Thomas, Work is Refuge; After 1 1/2 Years, Cloister of the Court Extends to Most of His Life,* WASH. POST, Apr. 19, 1993, at A1. Even justices of the Supreme Court are not immune from vociferous dissent when they speak on campus. Most notable among them recently has been Clarence Thomas, whose appearance at Mercer University in 1993 elicited loud protests. *See id.*

2. Civility and Political Correctness

The question in every case is the balance to be struck between the right to be heard and the right to be protected from offensive speech. Drawing such a line is especially difficult for civil libertarians who wish both to defend free speech and to tolerate (or encourage) diversity. They are likely to experience conflicting sentiments when faced with fact situations that test each of those often-competing goals. While seeking to ensure civil discourse, universities often endanger free speech by endorsing (and enforcing) prevailing notions of political correctness.

At Yale, for example, a student parodying the university's annual GLAD (Gay and Lesbian Awareness Days) Week hung up a poster announcing "Bad Week: Bestiality Awareness Days." The student was charged with "harassment and intimidation" and summoned to appear before the Yale College Executive Committee, consisting of students, faculty members, and deans. His hearing was conducted in secret, with no right of cross-examination. The committee sentenced him to two years' probation. Its decision was final, unappealable, and not accompanied by a written explanation.[15]

The University of Connecticut determined that a coed had violated the student behavior code by putting a sign on her dorm-room door: "Preppies, bimbos, men without chest hair, and homos shot on sight." The code prohibited "posting or advertising publicly offensive, indecent or abusive matter concerning persons . . . and making personal slurs or epithets based on race, sex, ethnic origin, disability, religion or sexual orientation." The university ordered the offending student to move off campus and stay away from the dorms and cafeterias.[16]

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15. Calling the student's treatment "absolutely dreadful" and "outrageous," the dean of Yale's Law School said:

> It would have been perfectly appropriate for faculty and administrators to say that the poster was disgraceful and that he should be ashamed of himself, but he should not have been in any way punished. I have supported gay rights from the beginning, but this was an ideological decision by the committee that violates his free speech rights.

Nat Hentoff, *Guilty Of Committing Free Speech at Yale*, WASH. POST, June 7, 1986, at A23. The decision against the student was eventually reversed and the penalty rescinded. *See* Vann Woodward, *Freedom of Speech, Not Selectively*, N.Y. TIMES, Oct. 15, 1986, at A27; *see also* Hyde and Fishman, *The Collegiate Speech Protection Act of 1991: A Response to the New Intolerance in the Academy*, 37 WAYNE L. REV. 1469, 1483 (1991) (suspension eventually rescinded).

16. The student filed suit, which resulted in the university having to alter the language in its code to prohibit only confrontational speech that is "'inherently likely to provoke an imminent violent reaction.'" Lauri A. Ebel, *University Anti-Discrimination Codes v. Free Speech*, 23 N.M.

At the University of Pennsylvania, five black females filed harassment charges after a student who was trying to study shouted out his dorm window, "[s]hut up, you water buffalo. If you're looking for a party, there's a zoo a mile from here." University officials asked the student to apologize in writing to the women for racially harassing them, and noted on his transcript that he violated the school's racial harassment policy. In addition, he was placed on residential probation and required to create and present a diversity-awareness project.[17] At Brown University, which prohibits making "someone the focus of your joke" on account of his or her race, an intoxicated student was expelled for shouting anti-black, anti-Semitic, and anti-homosexual epithets.[18]

Other sanctions are applicable to faculty members and administrators who, while exercising their rights of free speech, are forced to weather the competing winds of political correctness. At Harvard, for example, "a professor was forced to cancel a film in his course because it included a black maid."[19] At the City University of New York, a philosophy professor was chastised for publishing several articles asserting that blacks were on average "significantly less intelligent" than whites, and that intellectual deficiency, not discrimination or poverty, was responsible for the small numbers of blacks in certain intellectually demanding fields.[20] Although he said that these findings had been amply confirmed by research, he noted that they represented his personal views, were made outside of the classroom, and did not involve indoctrination of students.[21] Nevertheless protests ensued, and the university investigated. It found that the professor's conclusions had the potential to harm the process of education, that students should be protected from such harm, and that an alternative course should be offered.[22]

L. REV. at 172 (1993) (citing *How to Handle Hate on Campus*, N.Y. TIMES, Dec. 13, 1989, at A30).

17. *See* Charles Krauthammer, *Defining Deviancy Up*, THE NEW REPUBLIC, Nov. 22, 1993, at 24-25.

18. Hyde and Fishman, *supra* note 15, at 1482, 1488 (quoting Office of Student Life, Brown Univ., Racism at Brown (1990) and citing *Student at Brown is Expelled Under a Rule Barring "Hate Speech,"* N.Y. TIMES, Feb. 12, 1991, at A17). At St. John Fisher College, students were found to have violated the school code when they called the assistant director of campus ministries a "feminazi" suffering from "penis envy." *Id.* at 1483 (citing Venere, *Incident at [St. John] Fisher [College] Sets off Debate on Campus Speech*).

19. Ronald J. Rychlak, *Civil Rights, Confederate Flags, and Political Correctness: Free Speech and Race Relations on Campus*, 66 TUL. L. REV. 1411, 1426 (1992).

20. *See* Levin v. Harleston, 770 F. Supp. 895, 902 (S.D.N.Y. 1991), (*aff'd in part*, 966 F.2d 85, 87 (2d Cir. 1992)).

21. *See id.* at 908.

22. *See id.* at 906-07. In a civil action against the university, the professor prevailed. The

Other scholars who speak on campus about racial differences experience similar reactions. William Shockley, a Nobel Laureate in Physics who held controversial views on the supposed genetic inferiority of blacks, was prevented from speaking at Yale in 1974.[23] The University of Tennessee invited Charles Murray, whose 1994 book, *The Bell Curve*, contended that intelligence levels differ among ethnic groups (with blacks and Hispanics near the lowest level), to speak on campus in Chattanooga. A group of area teachers urged that his appearance be canceled. By giving Murray a forum in which to deliver his message, they said, UTC would be endorsing it.[24] More recently, there were calls for the removal of a law professor at the University of Texas who aired his view that white students are academically superior to black and Hispanic students.[25]

At the University of New Hampshire, a professor was disciplined for violating the school's sexual harassment policy after several women in his technical writing course complained about an example he used to explain the meaning of the word *simile*: "Belly dancing is like jello on a plate with a vibrator under the plate." The professor received a suspension without pay for one year and was ordered to attend counseling sessions.[26]

When a dean at Yale urged students to consider the study of Western civilization as one of the most important fields offered in the curriculum, his remarks were branded as "racist," "sexist," and "obnoxious" by various groups on campus, especially blacks and feminists, seeking to root out what they perceived as vestiges of a culture dominated by white European males.[27]

United States Court of Appeals found that his First Amendment rights had been abridged, that the university could not punish him for his beliefs, and that even the threat of discipline (through the investigating committee) had a chilling effect on his freedom of expression. *See Levin*, 966 F. 2d 85, 90.

23. Shockley created a similar stir at Princeton University in 1973. *See* Priscilla Van Tassel, *Bowen Reviews His Years At Princeton*, N.Y. TIMES, Nov. 29, 1987, at 1; Woodward, *supra* note 15, at B1.

24. Faculty organizers of the lecture held firm, stating, "[w]e're not in the business of telling people what to think. We're in the business of telling people how to think for themselves." Moreover, he pointed out, Murray's lecture would be followed by a speaker with an opposing viewpoint. Denise Neil, *Teachers Ask UTC to Drop Author's Talk*, CHATTANOOGA TIMES, Sept. 21, 1996, at B1, B8.

25. In this case the demands were thwarted by arguments citing tenure, academic freedom, and the First Amendment. *See* Nicole Cazarez, *Professor Graglia's Views Odious, Not Unspeakable*, HOUSTON CHRONICLE, Sept. 16, 1997, at A21.

26. *See* Silva v. University of New Hampshire, 888 F. Supp. 293, 299, 311 (D.N.H. 1994). The professor brought suit against the University and its officials for violating his rights under the First and Fourteenth Amendments. *See id.* at 332.

27. Stephen Goode, *A Yale Dean Takes On The Thought Police*, WASH. TIMES, Apr. 16, 1991, at E1.

Although students, professors, and administrators who pursue their rights in court are often ultimately deemed protected by both the First Amendment and the concept of academic freedom,[28] that result cannot be expected as a matter of course. At San Bernardino Community College, a professor was accused of sexual harassment for assigning provocative essays, using profanities in class, and discussing obscene subjects, such as having consensual sex with children.[29] The board of trustees ordered him to provide a syllabus at the beginning of each class concerning his course objectives, attend a sexual harassment seminar, and undergo a formal evaluation. The professor sued, but a district court held that the classroom comments were matters of public concern, and that the professor's First Amendment interests were outweighed by the college's interest in effectively educating its students and in preventing a hostile, sexually discriminatory environment which would disrupt the educational process.[30]

Outsiders seeking a campus platform (the primary focus of this Article) present questions that are even more problematic. In 1946, members of a California branch of the American Civil Liberties Union were required to take loyalty oaths as a precondition to their use of a public high school auditorium. (Ironically the ACLU wished to hold a series of meetings on "Bill of Rights in Postwar America)."[31] Similarly, in 1962 Hunter College refused to allow the *National Review* to use its facilities for a series of conservative lectures.[32] The school declared its policy in a letter from the president: Its campus was not available to "political or other public movements or groups in presenting a distinct position or point of view opposed by substantial parts of the public."[33]

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28. *See infra* Section II.B.

29. *See* Cohen v. San Bernardino College, 883 F. Supp. 1407, 1410 (C.D. Cal. 1995).

30. *See id.* at 1411, 1421. The court also found that the discipline imposed was narrowly tailored and that the college's sexual harassment policy was not impermissibly vague or overbroad. *See id.* at 1421.

31. The requirement was tested in court and struck down: While the state is not required to open school doors to outside speakers, said the court, once it does so it cannot exclude them for unconstitutional reasons. *See* Danskin v. San Diego Unified School Dist., 171 28 P.2d 885, 887-88, 891 (Ca. 1946).

32. *See* Buckley v. Meng, 230 N.Y.S.2d 924, 927 (N.Y. App. Div. 1962).

33. *Id.* A court subsequently found that various Hunter regulations (for example, that programs must be "compatible with the aims of [the] College as a public institution of higher learning") were unconstitutionally vague and content-discriminatory. *Id.* at 929-30, 935. In 1968 restrictive speech statutes in two states were likewise held void for vagueness: a North Carolina law which prohibited speech by those who were known to be Communists or who had pleaded the Fifth Amendment with respect to subversive activities. *See* Dickson v. Sitterson, 280 F. Supp. 486, 488, 490, 498-99 (M.D.N.C. 1968). The court noted, nevertheless, that "the Communist conspiracy is dedicated to the destruction of freedom, and attempts to achieve its goals of world conquest through discord, deceit and untruths." *Id.* at 497. That same year a North Dakota

In 1969 the University of Mississippi barred several speakers, including civil-rights activist Charles Evers, from appearing at the invitation of the student Young Democratic Club in support of the Humphrey-Muskie presidential ticket.[34] That same year the president of Auburn University, a public institution in Alabama, banned the Reverend William Sloan Coffin from speaking on campus on the ground that he might advocate breaking the law.[35] In 1981, an appearance at Carlow College by Sarah Weddington, whose arguments before the Supreme Court in *Roe v. Wade* contributed to its decision striking down state laws prohibiting abortions, was canceled by the college president.[36] Similarly, a 1986 speech at Catholic University by Eleanor Smeal, then president of the National Organization of Women, was canceled because some students complained that her support for legalized abortion conflicted with Catholic doctrine.[37]

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provision that "[prohibited] trustees of a state-owned university from extending use of university to facilities to subversive organizations or their representatives" was struck down. Snyder v. Board of Trustees of the University of Illinios, 286 F. Supp. 927, 927 (N.D. Ill. 1968).

34. *See* Stacy v. Williams, 306 F. Supp. 963, 967 n.1, 972-973 (N.D. Miss. 1969). The court found that the university had not provided for a fair and adequate review of its president's decision to exclude a speaker. *See id.* at 974. Nor were students able to invite speakers themselves. *See id.* at 974, n.24. To the contrary, the university's rules banned political and religious speakers arbitrarily, and all those whose presence would "constitute a clear and present danger" on campus (an invalid prior restraint). *See id.* at 974-76, n.26, n.28, n.31. The court held that

> speaker regulations may validly provide that no request for a speaker will be honored unless made to the university by a recognized student or faculty group within a reasonable period of time prior to the proposed speaking engagement, setting forth the name of the requesting student organization, the proposed date, time and location of the meeting, the expected size of the audience and the time of the speech.

Id. at 972-73. The executive head of the institution could approve the speaker, but he had to act according to procedural due process and not with "unbridled discretion." *Id.* at 973. The court went on to supply a detailed set of regulations for use by the state's universities. *See id.* at 979-80.

35. *See* Brooks v. Auburn University, 296 F. Supp. 188, 190 (M.D. Ala. 1969), *affirmed*, 412 F.2d 1171, 1173 (5th Cir. 1969). The speaker at issue in this case was the Reverend William Sloan Coffin. The president was found to have violated the First Amendment by prohibiting the speech. The court noted that the speaker had been requested by a student organization and had been initially approved; that the president could have rejected the speaker if he reasonably thought that by doing so he would prevent violence or disorder; and that the time, place, and manner of the speech could likewise have been regulated. Here, however, the university had no rules or regulations governing speaker eligibility, and the reasons invoked by the president had never been previously used to bar a speaker. *See Brooks*, 412 F.2d 1171, 1172-73.

36. *See* U.P.I. (Oct. 20, 1981).

37. U.P.I. (Jan. 28, 1986).

3. Afro-Centrism and Anti-Semitism

Anti-Semitic and anti-Zionist speakers began to surface on college campuses in the mid-1980's. One of them was Kwame Toure (known in an earlier incarnation as the black activist Stokely Carmichael), who in 1986 appeared at the University of Maryland where, among other outrageous statements, he offered his opinion that "[t]he only good Zionist is a dead Zionist."[38] Similar incidents have increased in recent years in both number and intensity. Perhaps most notable among the speakers have been Afro-Centrists, such as Louis Farrakhan, Leonard Jeffries, Tony Martin, and, probably the most inflammatory of them all, Khalid Abdul Muhammad. In November of 1993, Muhammad appeared at Kean College, a public institution in New Jersey. There, punctuating his remarks with references to "Columbia Jew-niversity" and "Jew York City," he said:

> The so-called Jews . . . crawled out of the caves and heels of Europe . . . [and] slept in urination and . . . defecation, generation after generation for 2,000 years . . . [They] knocked [their] animals in the head with clubs . . . and suck[ed] the blood from the raw meat, and . . . still eat . . . meat raw to this very day . . . [T]he white so-called Jew slumlords in the black community are sucking our blood . . . [They] got what was coming to them in Nazi Germany. . . [They] control the White House and the media . . . [They] own the Federal Reserve System . . . Everybody always talk about what Hitler did to the Jews, but don't nobody ever asks, "What did the Jews do to Hitler?" The Jews had undermined the very fabric of society of that society. The way they do wherever they go . . .[39]

Jews weren't the only objects of Khalid Muhammad's scorn. He called the pope a "no good . . . cracker," and suggested that someone should "raise that dress up and see what's really under there."[40] He issued this rhetorical ultimatum to the whites of South Africa:

> If [they] won't get out of town by sundown, we kill everything white that ain't right in South Africa. We kill the women. We kill the children. We kill the babies. We kill the blind. We kill the crippled. We kill the faggot. We kill the lesbian. We kill them all . . . Kill the old ones too . . . Kill the crazy. Goddammit, and when you get through killing 'em all, go to the God damn graveyard and dig up the

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38. Barbara Vobejda, *U. Md Struggles With Issue of Free Speech*, WASH. POST, Mar. 2, 1986, at B4.

39. *Speech, The Secret Relationship Between Blacks and Jews*, N.J. L.J., Jan. 24, 1994, at 17; *see also* MARCUS, *supra* note 10, at xvii.

40. MARCUS, *supra* note 10, at xvii.

> grave and kill 'em. God damn, again, 'cause they didn't die hard enough.[41]

The audience, which was nearly all black, laughed and applauded.[42]

A few months later Muhammad appeared at Howard University, a publicly-funded institution in Washington, D.C. He had been invited by a student group called Unity Nation.[43] Before he spoke there was an anti-Jewish rally led by Unity Nation's leader, a law student named Malik Zulu Shabazz.[44] The speech itself, in which Muhammad declared that "America was founded on separation," and "labeled George Washington and Thomas Jefferson as criminals who owned slaves and raped black slave women," was enthusiastically received by a crowd of close to 1000.[45] Afterwards, Howard President, Franklyn Jenifer, condemned the ethnic bias displayed at the rally but defended the forum in which it was held.[46] Jenifer added that he was a deep believer in the First Amendment and academic freedom, and that he had often taken the unpopular position that speech should never be suppressed unless it directly endangers lives.

> It is far better to allow the expression of hateful views in the light of day, where they can be exposed for what they are: vile, hurtful, insensitive, and wrong. Instead of sacrificing the First Amendment rights that are so precious to us all, we should use [them] to counter and condemn such views.[47]

Muhammad was invited back to Howard, along with Jeffries and Martin, in April of 1994. In the interim, the university postponed a lecture to be given by a Jewish history professor from Yale for fear that he would

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41. MARCUS, *supra* note 10, at xvii.

42. *See id.* Muhammad had been invited to Kean by the college's student organization, which paid him a lecture fee of $2,650. *See also No Laughing Matter*, THE RECORD, Dec. 21, 1993, at C7; Jon Nordheimer, *Angry Echoes of Campus Speech*, N.Y. TIMES, Jan. 26, 1994, at B4.

43. *See* Mensah Dean, *Muhammad Speaks at Howard*, WASH. TIMES, Feb. 24, 1994, at C7.

44. In February 1994, Shabazz warmed up the audience for Khalid Muhammad: "Who is it that controls the media and Hollywood in America?" {Audience: "Jews!"} Shabazz: "Who is it that has our entertainers in a vice grip and our athletes in their vice grip?" {Audience: "Jews!"} Shabazz: "Who is it that has been spying on black leaders and spying on Martin Luther King and set up his death?" {Audience: "Jews!"}. Susan Baer and Michael Fletcher, *Howard U.: 'A Citadel of Hate'?*, ATLANTA CONSTITUTION, May 8, 1994.

45. Dean, *supra* note 43.

46. *Id.* Between the two rallies, the university by "mutual agreement" postponed a speech by a Jewish history professor from Yale, who said he was concerned about walking into a hostile environment. *See* Kimberly Goad, *UT-Dallas Taps a Controversial Administrator as its New Chief*, THE DALLAS MORNING NEWS, Sept. 18, 1994, at 1E.

47. Franklyn G. Jenifer, *Hate Speech Is Still Free Speech*, N.Y. TIMES, May 13, 1994, at A31.

be subjected to heckling and harassment because of his ethnicity. Ironically, Professor David Brion Davis, whose book, *The Problem of Slavery in Western Culture*, won a Pulitzer Prize in 1967, "was to have lectured on the Haitian Revolution of 1791, the first large-scale and successful uprising of black slaves in the New World."[48]

At Muhammad's second coming, the university's security forces prevented Jewish protesters from demonstrating. Inside, tables were lined with anti-Semitic books. As the auditorium was filling, black men were given priority seating.[49] During his speech, which was cheered by many of the 2,000 in attendance, Khalid declared, "he loves Colin Ferguson, who killed all those white folks on the Long Island train." He also said, "I am going to be like a pit bull. That is the way I am going to be against the Jews. I am going to bite the tail of the honkies."[50]

The remarks were widely reported, and caused a furor both at Howard and elsewhere, including on the floor of the United States Congress.[51] The fallout was extensive. A member of the board of trustees at Howard advocated a more restrictive code of conduct for campus clubs and the speakers they sponsor.[52] At least one corporate donor decided to stop contributing to the university, and the United Negro College Fund received a flood of angry calls and letters.[53] Needless to say, Khalid's speech also served to tarnish the image of the student body and faculty at Howard. Nor were the ironies lost on outside observers. Commenting on the different receptions given to Muhammad and Davis, the *Boston Globe* editorialized that the university's president "protected incitement to violence as academic freedom and then told Davis he could not be protected against those who were incited. Something sinister is happening at Howard."[54]

Under increasing pressure from within and without, Howard's board of trustees ultimately forced the resignation of the president.[55] But the

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48. Steven A. Holmes, *Howard University Postponed Lecture by a Jewish Historian*, N.Y. TIMES, Apr. 16, 1994, at 9; *see* Steven A. Holmes, *Struggling Through Crises at Howard University*, N.Y. TIMES, Dec. 14, 1994, at A1; Sean Piccoli, *Decision Upsets Howard Students Jewish Scholar's Lecture Postponed*, WASH. TIMES, Apr. 17, 1994, at A10.

49. *See* Piccoli, *supra* note 48.

50. Wendy Melillo and Hamil R. Harris, *Dissent Raised as Ex-Farrakhan Aide Returns to Howard U.*, THE WASH. POST, Apr. 20, 1994, at B1.

51. *See* George Rooney, *UCR Group Pressing to Thwart Muhammad*, PRESS ENTERPRISE, May 27, 1994, at B1.

52. *See* Holmes, *supra* note 48.

53. *See Hatemongering at Howard*, BALTIMORE SUN, May 24, 1994, at 12A.

54. *The Misuse of a University*, BOSTON GLOBE, Apr. 21, 1994, at 18.

55. *See* Brooke Masters, *Howard U. Condemns Bigotry*, WASH. POST, Apr. 24, 1994, at B1. The president, Franklyn G. Jenifer, insisted that his departure was unrelated to the incident. *See* Jenifer, *supra* note 47, at 42.

backlash continued. A syndicated columnist echoed the sentiment on the minds of many civil libertarians:

> Indifference to bigotry is not the same as bigotry itself, but it is too close for comfort. Indifference gives bigots running room .... Howard had an obligation to respond to the use of its campus by bigots. It did nothing of the sort, not at first, anyway, and not when it counted most. If Howard is indeed the Harvard of black colleges, then it ought to think of how it would have reacted if an anti-black rally had been held at Harvard itself, and produced nothing but a yawn. With prestige comes obligation .... Neither the First Amendment nor the principle of academic freedom means that hatred has to be met with silence. The school has learned a lesson. A pity it didn't teach it itself.[56]

There were repercussions for Khalid Muhammad as well. He was subsequently denied platforms at Emory, Howard again, and the University of Toronto.[57] In 1994, he was shot and wounded at a California rally.[58] In 1998 he fled New York after police threatened to arrest him for fomenting a riot.[59]

The central theme of Farrakhan, Jeffries, and Martin has been slightly less contentious, blaming Jews for leading the enslavement of blacks in the United States and minimalizing their place in the history of oppression. At first Farrakhan sought to dismiss the uproar surrounding Khalid Muhammad as the product of a Jewish conspiracy. "They're trying to use my brother Khalid's words against me to divide this house .... They're plotting as we speak." Then, although distancing himself from Muhammad's rhetorical excesses, he said, "I stand by the truths Khalid ... spoke."[60]

Farrakhan's Nation of Islam proclaims loudly that Jewish suffering in World War II pales in comparison to that of blacks over the centuries. His take on the Holocaust is that "Little Jews died while big Jews made money; little Jews were being turned into soap while big Jews washed themselves with it." "Anti-Semitic materials like *The Protocols of the Elders of Zion*

56. Richard Cohen, *What Happened at Howard*, WASH. POST, July 19, 1994, at A17.

57. In early 1994 the "Black Youth Congress," a student group at the University of Toronto, invited Muhammad to speak. Canada's Ministry of Immigration, responding to lobbying by the Canadian Jewish Congress, refused to issue him a visitor's permit on the grounds that he had a criminal record and that they had reason to believe he would violate Canada's hate-crime statutes. *See* Clyde Farnsworth, *Canada Bars Speech by Ex-Aide of Farrakhan*, N.Y. TIMES, May 1, 1994, at 10.

58. *See* Bill Whitaker, *CBS Morning News*, May 30, 1994.

59. *See* Tom Topousis and Adam Miller, *Safir: Throw 'Coward' Khalid in Slammer* N.Y. POST, Sept. 7, 1998, at 4.

60. Hentoff, *supra* note 15; *see also* Baer and Fletcher, *supra* note 44.

continue to be available" wherever Farrakhan speaks.[61] Hitler, he says, "was a very great man." Judaism, he declares, "is a dirty religion."[62]

Subsequent to Khalid Muhammad's incendiary appearance at Kean College, the college president asked for legal advice on whether it could bar Farrakhan (his erstwhile mentor) from speaking there. The answer "no" came in a written opinion from the attorney general of New York: "any content-based restriction imposed by a state college on student-sponsored speakers invited by campus groups is subject to a strict scrutiny analysis and is likely to be held unconstitutional."[63]

In 1993 Jeffries "told a packed house at the Johns Hopkins University that Jews dominated the slave trade, that they continue to control the nation's power and wealth, and that the white man of any faith represents the devil."[64] Jeffries was removed from his position as chairman of the African Studies Department at CUNY, after a 1992 speech in which he argued that Jews had financed the Atlantic slave trade and spoke of a "conspiracy, planned and plotted and programmed out of Hollywood" by Jews and the Italian Mafia to denigrate blacks in films and bring about the "destruction of black people."[65] Jeffries sued. A federal court held that CUNY had violated his First Amendment rights by punishing him solely on his views.[66] This portion of the decision was affirmed by the United States Court of Appeals, but in 1996 CUNY eliminated Jeffries' department, moving its faculty into a broader ethnic studies division.[67]

In 1998 Jeffries was invited to speak at the College of Staten Island. The Jewish Defense Organization threatened "to make life miserable" for both the speaker and those who had invited him. "Free speech ends when

61. Aryeh Cohen, *Antisemitic Violence Continues to Decline*, JERUSALEM POST, Apr. 23, 1998, at 1 (italics added).

62. Kenneth Lasson, *The Tintinnabulation of Bell's Letters*, 36 WASHBURN L.J. 18, 21 1996.

63. MARCUS, *supra* note 10, at xxi; *see* James Abearn, *Professor Suggests How to Deal with Campus Hate Speeches*, ASBURY PARK PRESS, Oct. 29, 1996, at A15.

64. Kenneth Lasson, *Campuses and Common Sense*, BALTIMORE EVENING SUN, Mar. 16, 1994, at 11A (noting that Jeffries' appearance was sponsored by university funds).

65. Karen Arenson, *Divided Campus Prepares for an Address by Jeffries*, N.Y. TIMES, Apr. 1, 1998, at B3; *see* Karen Arenson, *On Campus, The Cases For and Against Jeffries*, N.Y. TIMES, Apr. 4, 1998, at B3 (providing that in his 1992 speech Jeffries had labeled blacks as "sun people" and whites as "ice people." He also said of the latter: "[Y]ou, the intellectually dead, are hereby formally notified that my intentions are not to offend anyone. It is to speak the truth as I knew it and to ensure to the best of my abilities, the survival of the White Race."). *See* Jeffries v. Harleston, 828 F. Supp. 1066, 1071, 1073 (S.D.N.Y. 1993), *aff'd in part,* 21 F.3d 1238, 1242 (2d Cir. 1994), *cert. granted and judgment vacated by* 513 U.S. 996 (1994).

66. *See Jeffries*, 828 F. Supp. 1066, 1098 (stating that "Jeffries is entitled to the constitutional protection that surrounds his speech and professional activities.").

67. *See* Jeffries v. Harleston, 21 F.3d 1238, 1250 (2d Cir. 1994).

bigotry begins," the group's national director said. "Academic freedom does not mean the right to teach or preach hate, and Jeffries is doing both." Others on campus said they thought the choice of Jeffries as a speaker was more likely to discourage than encourage the flow of ideas and were put off by what they perceived as his anti-Semitism. The speech was canceled at the last minute because of a financial dispute.[68]

By his own count Jeffries has appeared at over 300 campuses since the notorious 1992 speech. According to him, the College of Staten Island was the only school that has ever turned him away.[69] Like Jeffries, Martin frequently expounds upon what he calls "the Black Holocaust," which he describes as the "annihilation of 300 million of our people."[70] As chairman of the black studies department at Wellesley College in Massachusetts, he is a leading proponent of "Afrocentrism," whose adherents maintain that white scholars have covered up, for racist reasons, the cultural debt Europe owes to South Africa.[71] "[S]tudents are told that Greece was an Egyptian colony, Greek philosophy was based on black wisdom and famous figures of the ancient world, such as Socrates and Cleopatra, were black.[72]

When a colleague at Wellesley challenged those claims, Martin responded angrily by charging that she was at the heart of a Jewish conspiracy to discredit black scholarship, an assertion that he presented elaborately in a book entitled *The Jewish Onslaught: Dispatches from the Wellesley Battlefront.*[73]

Martin assigns his students a book published by the Nation of Islam

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68. *See* Arenson, *On Campus, supra* note 65, at B3. Jeffries showed up later on campus to have an informal chat; he was prevented from entering by security guards. *See id.*

69. *See* Arenson, *On Campus, supra* note 65, at B3. In 1992 Jeffries' appearance at the University of South Florida elicited "shock . . . dismay and . . . disgust" from the southern area director of the Anti-Defamation League. Janice Martin, *League Decries Controversial Speaker at USF*, ST. PETERSBURG TIMES, Jan. 17, 1992, at B3.

70. Hillel Juttler, *A One-Upmanship of Horrors in Holocaust Comparisons*, JERUSALEM POST, May 4, 1994, at 7.

71. Anthony Flint, *Black Academics Split on Afrocentrism*, BOSTON GLOBE, Sept. 27, 1994, at 1.

72. *See* Michael Gove, *The Woman Who Defied Political Correctness*, THE TIMES, Sept. 2, 1996, at 15.

73. *See id.* The professor who challenged Martin was Mary Lefkowitz, who questioned one of his course descriptions in a faculty meeting and critically debunked Afrocentrism as myth in THE NEW REPUBLIC, as well as in her own subsequent book, NOT OUT OF AFRICA. A self-styled "skeptical feminist," Lefkowitz draws parallels between Afrocentrists and radical feminists who rewrite history for their own ideological purposes: "They twisted the truth and blamed past inequalities on patriarchal oppression when what limited women's lives was their biology . . . What liberated women was science, not politics; what will help black students is knowledge, not attitudes." *See generally* Irene Sege, *Teaching History or Hate*, BOSTON GLOBE, Feb. 24, 1994, at 51.

entitled *The Secret Relationship Between Blacks and Jews*, which claims that Jews played a dominant role in the slave trade.[74] He also published what he called a "'broadside' against 'the privileged and powerful U.S. Jewish leadership and their unthinking Negro stooges,'" in which he views "the charge of anti-Semitism . . . as a weapon . . . that has been used by the Jewish leadership over the years to beat people over the head with."[75]

The difficulty of drawing a line between controversial and offensive views is well illustrated by Martin's arguments. The fact that they are delivered in the scholarly voice, lending them a patina of authenticity, makes them particularly pernicious. Martin's critics find his claims disturbingly reminiscent of those made in classic anti-Semitic tracts like the *Protocols of the Elders of Zion.* His own book (*The Jewish Onslaught*) "goes back and forth between fact and fiction and sees a conspiracy and finds enemies at every corner," says a sociologist at Wellesley who uses it in a course on propaganda. "He'll talk about perfectly reasonable issues, like the marginality of blacks in America, and then come back to Jews."[76]

C. INSTITUTIONAL RESPONSES TO DATE

Having to respond to various kinds of controversial speech, whether political or bigoted, discriminatory or harassing, from students or faculty or outsiders, universities have found themselves in an uncomfortable quandary. It is often difficult to draw a line between honest opinions and hate-filled vitriol, between intellectually defensible, but radical ideas and unconcealed exhortations to genocide. Universities seeking to honor both the First Amendment's guarantee of freedom of speech and the Fourteenth Amendment's promise of equal protection often find themselves faced with having to reconcile the historic tension between the two principles, in situations where there can be no clear winners.[77]

It is all the more difficult to apply principles to facts when controversial speech leaves the parties involved fragmented, but each with a constitutional argument to support its position. For example, there were those who felt that (a) Kean College properly granted an open forum to

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74. *See generally* HISTORICAL RESEARCH DEPARTMENT, THE NATION OF ISLAM, *The Secret Relationship Between Blacks and Jews* (1991). This assertion has been widely criticized as baseless by many historians including Harvard's Henry Louis Gates, who is black and whom Martin calls an Uncle Tom. *See generally* ADI REPORT ON WRITINGS OF PROFESSOR TONY MARTIN (1995); Henry Louis Gates, Jr., *Black Demagogues and Pseudo-Scholars*, N.Y. TIMES, July 20, 1992, at A19.

75. Sege, *supra* note 73 (internal quotation omitted).

76. *Id.*

77. *See* MARCUS, *supra* note 10, at 114.

Khalid Abdul Muhammad as a matter of First Amendment right, even if his views were offensive; (b) that he should have been heard as an articulate advocate of Afrocentrism, which is a legitimate historical perspective; (c) that his appearance should have been set in the format of a debate, where his words could have been immediately challenged; or (d) that he should never have been allowed to speak because his remarks were anathema to the school's educational mission.[78]

Traditional champions of free expression argue that it is impossible to draw a line between legitimate political speech, even if offensive or non-constructive, and clearly destructive hate speech. They are fully sensitive to the paradoxical position into which they are cast, rendered both conservative *and* reactionary, because they are called upon both to defend outrageous speakers and to attack their opponents for denying them their rights. At Yale in the mid-1970's, prominent speakers with unpopular views, ranging from defenders of the Vietnam War to proponents of white supremacy, were invited to address campus groups.[79] The tempestuous reactions they engendered led to an unequivocal defense of speakers' rights embodied in a statement called "Report of the Committee on Freedom of Expression at Yale."[80] At its core was a declaration that the university must do everything possible to ensure within it the fullest degree of intellectual freedom, and that "it may sometimes be necessary . . . for civility and mutual respect to be superseded by the need to guarantee free expression . . . because obstruction of such expression threatens the central function of the university."[81] "We don't invite people here because we agree with them," agreed the president of Princeton University. "The right question, well phrased, can be far more effective than preventing people from speaking."[82]

But free-speech advocates are often selective in the interests they wish to defend, and are subject to the "tyranny of group self-righteousness."[83] Nowhere is this more evident than in the proliferation of campus speech and conduct codes, which have been increasingly adopted and enforced in recent years by both private and public universities. They

78. *Id.* at 113.

79. Woodward, *supra* note 15, at A 27.

80. *Id.*

81. Hentoff, *supra* note 15, at A23; *see also* Woodward, *supra* note 15, at A27; *see generally* Stephen Goode, *A Yale Dean Takes On The Thought Police*, WASH. TIMES, Apr. 16, 1991, at E1; *see also* MARCUS, *supra* note 10, at 122.

82. Priscilla Van Tassel, *Bowen Reviews His Years At Princeton*, N.Y. TIMES, Nov. 29, 1987, at Section 11.

83. "They are on the left and right . . . . They are terrorists of the mind." Hentoff, *supra* note 15 (quoting Bartlett Giamatti, President of Yale University).

generally cover the speech and conduct of all members of a university community, including faculty. A typical code defines harassment to include, "any conduct, verbal or physical, on or off campus . . . which creates an intimidating, hostile, or offensive educational, work, or living environment" and is premised on the ideas that (a) while freedom of expression is essential in a university, so is freedom from unreasonable and disruptive offense; and (b) it is usually easier to deal with such questions if one thinks in terms of interests rather than rights.[84] The number of colleges and universities that have adopted such regulations is large and appears to be growing.[85] Their sponsors have apparently been undeterred by the fact that not a single code has yet passed constitutional muster.[86]

Public high schools are able to promulgate more restrictive procedures than universities. Thus a school district policy can require teachers to get approval of principals before they can invite guest speakers to their classrooms. In addition, parents must be notified of controversial speakers, and students may be excused from the presentations with a parent's permission. Such regulations have been set in place to combat speakers on gay and lesbian rights.[87]

Every college and university also has different administrative ways and means for dealing with controversial speakers, most of which have inherent and potential drawbacks. A sampling of representative institutions, including three small colleges and two major universities, is illustrative. At *College A*, a rural school which receives some state support for buildings and equipment, outside speakers may be brought onto campus via (a) a "Programs Board," with an annual budget of approximately $4000; (b) the College Activities Office, which spends about $1500 annually, or (c) individual academic departments. Controversial speakers must be approved by the college president, the dean of student affairs, and the student government association. Campus security personnel determine

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84. The language is derived from the code at the Massachusetts Institute of Technology. Bob Chatelle, *Democracy is Not for the Thin Skinned*, NEWSL. OF THE POL. ISSUES COMM. OF THE NAT'L WRITERS UNION, Nov. 1993. For web site on hate speech codes, *see* <http://joc.mit.edu/docs/chatelle.speech.codes.txt>.

85. One observer notes that some 700 colleges and universities have enacted hate speech codes by 1990. *See* Thomas A. Schweitzer, *Hate Speech On Campus and The First Amendment: Can They Be Reconciled?*, 27 CONN. L. REV. 493, 505 n.40 (1995) ("[A]pproximately 200 universities had enacted hate speech codes."). *Id.*

86. *See* Lauri A. Ebel, *University Anti-Discrimination Codes v. Free Speech*, 23 N.M. L. REV. 169, 179 (1993).

87. *See, e.g.*, Sonya Gray, *Some Area Schools Have Speaker Policies*, PROVIDENCE JOURNAL-BULLETIN, Feb. 23, 1994, at 1B; Elaine Williams, *Lewiston Schools Consider Policy on Guest Speakers*, LEWISTON MORNING TRIBUNE, Dec. 13, 1992, at 2C.

whether local police should be called in. The school always provides for a question-and-answer session after each speech. *Result:* Perhaps because of its very low budget for bringing in outside speakers, *College A* has not experienced a significant speech controversy in the past twenty years.[88]

College B is a private coed school with no written policy on outside speakers. They are brought in by three groups: student clubs (usually in conjunction with academic departments), an office of public events, or the student government association. The school uses a generic hiring contract, budgeting no more than three thousand dollars for each speaker. Proposals are passed on, respectively, by the director of student activities, the vice-president of the college, and the dean of students. If the issue being addressed is controversial, speakers with opposing viewpoints are sought or counter-demonstrations encouraged. *Result:* Although security arrangements would probably be a greater concern at *College B*, it too has not had a controversial speaker on campus in many years.[89]

College C is a state-run liberal-arts school, which considers itself to be open to all kinds of speakers, regardless of the nature of their speech. Funding may come from the office of student development, academic departments, the student government association (which has a lectures committee), or the department of lectures and fine arts, which any student can petition to invite a speaker. If a situation would arise where a suggested speaker's appearance was likely to cause turmoil, the director of student development would confer with the dean of student affairs, who might present the question to the college president and others. *Result: College C* has never had to use any type of security for a visiting speaker.[90]

At *University A*, a prestigious private institution, most speakers are brought to campus by student clubs or academic departments, at relatively low cost. Each fall the university sponsors a major and widely advertised month-long symposium on a topic of current interest. The symposium is organized by students, who invite from five to eight speakers to participate. Every speaker has to have a contract, either one of his/her own or the form contract supplied by the university. All speakers must ultimately be approved by the director of student activities. If the speaker is controversial, the school will decide whether it can afford the necessary security. If it cannot, the speaker doesn't come. *University A* has never

88. Recently some students painted graffiti with soap to protest a speaker. It was quietly cleaned up by housekeeping.

89. Hillary Clinton spoke on campus a year or so ago, but the first Lady brought her own security.

90. Normally such students have already gone to the Student Development Office and been rejected. Consider, however, that *College C* is in a rural area and has only about 1400 students.

canceled a speaker due to the nature of his/her speech. Its only considerations appear to be the cost of security. Controversial speakers appear at *University A* with some frequency, and student protests are not uncommon. The director of student activities meets with complaining students to discuss ramifications of their disaffection. He may consult with the dean of students. He often suggests post-program discussion groups.[91]

University B is one of the state's flagship schools, a major research facility located just outside a large city. Speakers are brought to campus by student clubs, academic departments, and a lectures committee of the student events board. The lectures committee uses student activity fees to pay speakers. Its funds are limited, so usually the topic of the proposed speech becomes more important than the speaker, especially in view of the fact that bigger-name speakers, including those with some notoriety, are more expensive. Any issues involving a controversial speaker's appearance on campus would initially be discussed within the student events board, with the director of student activities next, and finally, the vice president for student affairs.[92]

Neither of the major universities have firm policies dealing with the multifarious exigencies occasioned by controversial speakers, perhaps because all events differ according to context: the tenor of the times, nature of the forum, current tensions on campus, and the size and makeup of the student body. Some, like Howard University in the wake of its traumatic experiences with Khalid Muhammad, are struggling with how to handle similar conflicts in the future. All wish to honor the noble American tradition of free speech, but few are certain about making the difficult decisions on who should bear the cost of additional security when it is deemed necessary.

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91. The university does not typically look for public assistance with security, although its special events office, which sometimes brings in heads of states, almost always uses local police to help. One of the most controversial recent speakers was Leonard Jeffries, a black supremacist who is widely known for his anti-Semitic remarks. The Director of Student Activities organized post-program events. There were some peaceful protests during the speech.

92. The most recent controversial speaker at *University B* was Johnny Cochran, the lead defense attorney in the O.J. Simpson murder trial. Cochran's contract required that he be provided with a certain amount of security, which was supplied by a private security agency hired by the Director of Student Activities.

III. LIBERTIES AND LIMITATIONS: THE CONSTITUTION ON CAMPUS

A. PRINCIPLES OF FREE SPEECH

"[T]he best test of truth," said Justice Oliver Wendell Holmes, "is the power of the thought to get itself accepted in the competition of the market."[93] This axiom can be proven only where freedom of expression, which may be the central characteristic of a democratic society based on popular self-governance, is unfettered. Such a liberty also serves to promote flexibility in the growth and development of a democracy by allowing for reasoned dialogue, and to maintain a healthy balance between stability and change.[94] The university should both encourage that dialogue and seek that balance.

The traditional view of the First Amendment's guarantee of free speech as virtually absolute, allowing few and narrow exceptions, reflects the Founding Fathers' dedication to an open and vigorous exchange of ideas. The theory is that those thoughts that are abhorrent to a free society, goes the argument, will fester if suppressed but wither when aired. Moreover, who is to decide which ideas are offensive? "'Freedom of speech is so precious and delicate a liberty that it must be preserved at great cost: Thus the depth of conviction in Voltaire's oft-quoted declaration, 'I disapprove of what you say but I will defend to the death your right to say it.'"[95]

But the First Amendment is *not* absolute. Indeed, the carefully carved exceptions to the rule of free speech (among them obscenity, defamation, and fighting words), and the recognition that speech can be constitutionally regulated by time, place, and manner restrictions, are all based on the understanding that the First Amendment was never intended to protect all utterances. Merely because it may be difficult to draw a line between acceptable and nonacceptable expression, or to allocate responsibility for deciding what speech to restrict, does not justify an absolutist approach.

In recent years there has been growing support for yet another exception: the control of group defamation.[96] Although an effort in this

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93. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

94. *See* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-79 (1963).

95. Kenneth Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11, 12 (1985).

96. *See* Scelfo v. Rutgers Univ. 282 A.2d 445, 448 (N.J. 1971) ("The court in reaching its decision enunciated certain rules regarding group defamation").

direction has been made on college and university campuses by way of speech and conduct codes, most of them have been too broadly drawn to pass constitutional muster.[97] Nevertheless, some goals of such codes, civil discourse, reasoned debate, and the exclusion of unbridled hate speech (that which is uttered without possibility of immediate challenge), are entirely defensible if not fundamental to the academic enterprise.

To what extent can a university constitutionally limit speech?

1. Forum Analysis

The rights and responsibilities of a public university toward outside speakers must be analyzed according to the institution's status as a forum, because the degree of protection for the speaker depends upon whether the forum is (a) *traditionally public*, (b) *public pursuant to governmental designation*, or (c) *nonpublic*. Traditional public forums, which generally include "streets and parks," require that the speaker be accorded full First Amendment rights.[98] On the campus of a public university, surrounding streets and sidewalks or open quadrangle areas may be considered traditional forums.[99] Free speech is also guaranteed in non-traditional public forums (sometimes called "limited public forums"), that is, places made public by specific governmental designation. They have been characterized as either "property that the State has opened for expressive activity by all or part of the public" or a place or channel of communication for use by the public at large for assembly and speech for use by certain speakers or for the discussion of certain subjects.[100]

Speech in non-public forums, on the other hand, may be limited, if the disqualification or cancellation is viewpoint-neutral and otherwise reasonable in light of the purpose of the property.[101] Largely in light of the Supreme Court's recent holding in *Arkansas Educational Television Comm'n v Forbes*,[102] a public university's auditorium is likely to qualify as a non-public forum. The state has not created a designated public forum, said the Court, when it has done little more "than reserve eligibility for

97. *See* Kenneth Lasson, *Political Correctness Askew: Excesses in the Pursuit of Minds and Manners*, 63 TENN. LAW REV. 689, 727 (1996).

98. *See* International Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680-81 (1992).

99. *See* David F. McGowan and Ragesh K. Tangri, *A Libertarian Critique of University Restrictions of Offensive Speech*, 79 CAL. L. REV. 825, 914 (1991).

100. Arkansas Educ. Television Comm'n v Forbes, 523 U.S. 666, 677 (1998) (quoting *International Society*, 505 U.S. 672, 678).

101. *See id.* at 677-78 (internal citation omitted).

102. 523 U.S. 666 (1998).

access to the forum to a particular class of speakers, whose members must then, as individuals, *obtain permission* to use it."[103]

However, the case of *Forbes*, a 6-3 decision which involved a public television station's exclusion of a state congressional candidate from a televised debate, made it clear that even a non-traditional public forum should be made "'generally available' to a class of speakers."[104] The debate in *Forbes* was held to have been in a nonpublic forum because it "did not have an open-microphone format."[105] The logistics of holding an electoral debate required the station to choose from a limited list of speakers and to allow them all to speak on one occasion.[106] The Court noted that stations faced with the prospect of having to accommodate every candidate, regardless of viability, might eliminate debates altogether.[107] Forbes' exclusion was because of his lack of voter support and not his viewpoint. Moreover, his rejection was otherwise reasonable, that is, not intended as a manipulation of the political process, and thus constitutional.[108]

Forbes should not be interpreted, therefore, as giving public universities the right to cancel controversial speakers at will. Unlike public television stations, public universities often choose speakers from catalogues provided by speakers' bureaus, with hundreds of speakers to choose from, and need accommodate no more than one at a time. Moreover, it could well be argued that public universities have a *greater* responsibility to provide diverse viewpoints than does a public television station.[109]

Indeed, such was the view of the dissenters in *Forbes*, who pointed out that the station had no "narrow, objective and definite standards" upon which to base its decision.[110] They agreed with the Court of Appeals' conclusion, that the station's appraisal of "political viability" was "so subjective, so arguable, so susceptible of variation in individual opinion, as to provide no secure basis for the exercise of governmental power consistent with the First Amendment."[111] This failure to articulate an

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103. *Id.* at 679. (emphasis added) (internal citation omitted).
104. *Id.* at 678 (internal citation omitted).
105. *Id.* at 680.
106. *See id.* at 681.
107. *See id.*
108. *See* Perry Educ. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 47-48 (1983) (holding that there was no evidence that the school district's internal mail system was not a designated public forum, though selected speakers were able to gain access to it).
109. *See* discussion below on academic freedom, including the students' right to know.
110. *Forbes*, 523 U.S. at 693.
111. *Id.* at 686 (Stevens, J., joined by Souter J., and Ginsburg J., dissenting) (quoting Forbes

objective standard might be scrutinized more closely if the state actor were a public university. Even if a university's auditorium qualifies as a non-public forum, the utterances of a guest speaker cannot be limited unless they (a) fall into a category of unprotected speech (that is, they can be viewed as fighting words, obscene, or defamatory, or they create a clear and present danger); (b) are limited by reasonable time, place and manner restrictions; or (c) cause a substantial interference with the school's educational mission.

At least for students, a public university campus possesses many of the characteristics of a public forum. Denial of student access to forums for exchanging ideas would limit participation in the intellectual give-and-take of campus debate. Public students thus enjoy the rights of free speech and association on campus, and any restriction of those rights is subject to strict scrutiny as a prior restraint.

The First Amendment rights of students were clearly articulated by the Supreme Court in *Tinker v. Des Moines Indep. Community Sch. Dist.*,[112] in which the Supreme Court held that black armbands worn by high school pupils in protest of the war in Vietnam constituted a peaceful expression of political opinion protected by the First Amendment.[113] Student speech can be limited, said the Court, only where it has been determined that it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[114]

The Supreme Court has also established that students have a constitutional "right to receive ideas;"[115] to associate freely;[116] and "to

v. Arkansas Educ. Telecomm. Network Found., 93 F.3d 497, 505 (8th Cir. 1996)).

112. 393 U.S. 503 (1969).

113. *See id.* at 514.

114. *Id.* at 513 (internal citation omitted); *see also* Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966) (public high school regulation prohibiting students from wearing buttons displaying political messages, absent any disruption of student activities, was unconstitutional); *see generally* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); *see also* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding unconstitutional a school board resolution which required all teachers and pupils to participate in the flag salute); Hammond v. South Carolina State College, 272 F. Supp. 947, 950 (D.C.S.C. 1967) (college rule prohibiting parades, celebrations and demonstrations without prior approval of college authorities was a prior restraint on students' speech and assembly rights which violated First Amendment).

115. Board. of Educ. v. Pico, 457 U.S. 853, 867 (1982); *see generally* Minarcini v. Strongsville City School Dist., 541 F.2d 577, 584 (6th Cir. 1976) (decided six years earlier but using *Pico's* reasoning).

116. *See* Healy v. James, 408 U.S. 169, 183 (1972), in which the Court held that a state college's refusal to recognize Students for a Democratic Society, a radical organization which sometimes resorted to violence, violated the members' associational and speech rights. Neither the school's disapproval of the group's philosophy, its failure to affirmatively deny the possibility that they might resort to violence, mere threat of disorder, could support state abridgment of the

inquire, to study, and to evaluate."[117] School boards may not remove books from school library shelves in an attempt to insure political, religious or other orthodoxy.[118] "[S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate . . . [S]chool officials cannot suppress 'expressions of feeling with which they do not wish to contend."[119] They must "always remain free to inquire, to study and to evaluate, to gain new maturity and understanding."[120]

The Supreme Court has also addressed the issue of whether a public university may permissibly deny access to its facilities by a student religious group. One particular university, which previously allowed a religious group to conduct meetings on campus for several years, changed its policy when informing students that religious gatherings violated a regulation that prohibited the use of school "buildings or grounds for purposes of religious worship or religious teaching."[121] The Court held that the new regulation violated the First Amendment because it prohibited the content of religious speech without demonstrating a compelling governmental interest to do so. The university had created a limited open forum for the use of student groups, and therefore bore "a heavy burden of justify[ing]"[122] the exclusion of particular groups.[123]

The Court went out of its way, however, to distinguish university settings from traditional public forums like streets and parks. Decisions regarding how best to allocate scarce resources and to fulfill the underlying educational mission are entitled to deference. A university should not be required, for example, to provide equal campus access to students and non-

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rights at issue. *Id.* at 183.

117. *Keyishian*, 385 U.S. 589, 603.

118. *See Pico*, 457 U.S. 853, 880. Justice Blackmun, concurring, said that requiring a school board to justify its removal of a book with more than its mere dislike is a narrow principle, since "[s]chool officials must be able to choose one book over another . . . when the first book is deemed more relevant to the curriculum, or better written, or when one of a host of other politically neutral reasons is present." *Id.* In his dissent, Chief Justice Burger, joined by Justices Powell, Rehnquist and O'Connor, noted that the court had never previously recognized a student's right to receive knowledge from school library books. *See id.* at 888. He noted that the plurality's decision placed an unprecedented responsibility on the government to affirmatively provide the ideas in question at a particular place. *See id.* In his dissent, Justice Powell noted that the right in question was unprecedented and would allow students to regularly overrule decisions made by school boards. *See id.* at 893, 897 (attaching an appendix to his opinion in which he quotes numerous passages from the banned books which would be considered "obscene" or "vulgar").

119. *Id.* at 868 (internal citation omitted).

120. *Keyishian*, 385 U.S. at 603 (internal citation omitted).

121. Widmar v. Vincent, 454 U.S. 263, 265 (1981).

122. *Id.* at 268.

123. *See id.* at 277.

students. More recently, however, the Court struck down a state university regulation that denied funding to a student religious group to pay the printing costs of its publications, holding that the rule amounted to an unconstitutional viewpoint discrimination.[124] Other forms of protected expression on college campuses, such as the construction of symbolic shanty towns, have been recognized in the lower courts.[125] Likewise, denial of funding to gay student groups has been held to violate the First Amendment.[126]

The constitutional standards are also higher for universities than for high schools. This rule has been established in a long line of cases which have noted that elementary and secondary schools, unlike universities, are designed for the "selective conveyance of ideas" and not places for "free-wheeling inquiry."[127] Nevertheless, a number of lower courts have dealt

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124. *See* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995) (distinguishing between "content discrimination, which may be permissible if it preserves the purposes of [a] limited forum, and . . . viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations."). *Id.*
A federal court in Virginia addressed the issue of whether a state university, pursuant to a regulation barring organizations that have "special interests in religious, political, and social activities," could deny recognition of a student chapter of the American Civil Liberties Union. *See* American Civil Liberties Union of Va., Inc. v. Radford College, 315 F. Supp. 893, 894-95 n.1 (W.D. Va. 1970). Non-recognition of a group did not absolutely preclude the group's use of university facilities, but recognition guaranteed such use. The court held that the university was compelled to grant the same recognition to the ACLU group that it had previously given other political student organizations. *See id.* at 896-97. This case illustrates the importance of university regulations (and/or litigation) that clearly enunciate educational goals and objectives to be achieved or impaired by restricting on-campus speech.

125. Shanty towns have been recognized as protected forms of speech on college campuses, subject to reasonable TPM restrictions. *See* Students Against Apartheid Coalition v. O'Neil, 660 F. Supp. 333, 337, 340 (W.D. Va. 1987) (citing University of Utah Student Against Apartheid v. Peterson, 649 F. Supp. 1200, 1211 (D. Utah 1986), which held that erection of shanties was First Amendment protected symbolic speech, but that the university requirement that they be removed at night in the interests of campus safety was a reasonable time, place and manner restriction; and holding that UVA's lawn use regulations precluding shanty construction, a form of symbolic speech protected by the First Amendment, did not meet the *O'Brien* standard).

126. *See* Gay and Lesbian Students Ass'n v. Gohn, 850 F.2d 361, 368 (8th Cir. 1988) (noting that "the [Gay and Lesbian Students Association] does not advocate sodomy, and, even if it did, its speech about an illegal activity would still be protected by the First Amendment. People may extol the virtues of arson or even cannibalism. They simply may not commit the acts.") *Id.* Consider, however, that the quoted passage may overstate the law: Extolling the virtues of arson may cause a material disruption, or create a clear and present danger that a listener will follow the speaker's advice.

127. *Pico*, 457 U.S. at 915; (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting); *see* Cary v. Board of Education of the Adams-Arapahoe Sch. Dist. 28-J, 598 F.2d 535, 539-540 (10th Cir. 1979) (noting that most of the Supreme Court cases on academic freedom involve institutions of higher learning, distinguishing the Court's opinions on secondary schools); Mailloux v. Kiley, 323 F. Supp. 1387, 1392 (D. Mass. 1971) (noting that speech rights of secondary school teachers are probably less than those of university professors, that secondary

with secondary-school regulations requiring review of all non-school publications prior to their distribution on campus, most of which have been struck down as unconstitutional prior restraints.[128] But a student's right to free expression is far from absolute. An otherwise protected speech which interferes with the inculcation of "fundamental values," even if it is not physically disruptive, may nevertheless be prohibited.[129] Similarly, the state may limit the exposure of minors to speech which is indecent but not necessarily obscene.[130]

Likewise, a state university may deny recognition to a socialist student organization upon finding the group advocated the overthrow of established institutions by violent methods.[131] A Florida court upheld a university's denial of recognition, stating the university presented ample evidence that recognition would threaten the school's educational goals and "constituted an imminently present threat" to order on campus.[132] The court further stressed that the administration's findings were neither vague nor indirect, but were based on documented evidence that the national socialist organization seeking university recognition advocated violent disruption as a way to achieve its goals.[133]

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school acts *in loco parentis*, and that secondary teachers are usually less educated and often less mature than professors); *but see* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 521-22 (1969) (Black, J., dissenting) (implying that there is no distinction between the rights of college students and students below the college level in state-run schools, and that the state has broad power to limit the rights of both; and citing Waugh v. Board of Trustees of the Univ. of Mississippi, 237 U.S. 589, 596-97 (1915) in which the Court held constitutional a state law barring students from peaceably assembling in Greek letter fraternities.); *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 285-288 (1988) (Brennan, J., joined by Marshall, J., and Blackmun, J., dissenting) (implying that the First Amendment rights of high school students are virtually the same as those of college students or even adults).

128. *See* Bright v. Los Angeles Unified Sch. Dist., 556 P.2d 1090, 1100 (Cal. 1976); *see generally In re* Jordan, 500 P.2d 873 (Cal. 1972); Morris v. Williams, 433 P.2d 697 (Cal. 1967) (en banc).

129. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (holding that a high school student's suspension, caused by his use of graphic sexual metaphor in a nominating speech made before the school body did not violate his First Amendment rights).

130. *Pico*, 457 U.S. at 870 (in which all members of the Court recognized that the school board had authority to remove books that were vulgar); *see also* Thomas v. Board of Educ., Granville Central Sch. Dist., 607 F2d 1043, 1057 (2d Cir. 1979) (stating that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket"); Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726, 749 (1978) (stating "[a]lthough Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant.) *Id.*; Ginsberg v. New York, 390 U.S. 629, 633 (1968) (upholding a New York statute which banned the sale of sexuality oriented material to minors).

131. *See* Merkey v. Board of Regents, 344 F. Supp. 1296, 1307 (N.D. Fla. 1972).

132. *See id.* at 1306.

133. *See id.* at 1302.

Students' expressive rights have been similarly limited in school newspaper cases. The Supreme court has stated that a principal's refusal to allow two articles to be published in a high school paper did not violate the First Amendment because the paper was a nonpublic forum, which "might be reasonably perceived to bear the imprimatur of the school"[134] and therefore subjected to a standard "reasonably related to legitimate pedagogical concerns."[135]

Faculty members have similar limitations. For example, a professor who sued the University of Massachusetts for ordering his controversial art display to be removed from the student union building was not allowed to claim First Amendment protection. The exhibit included detailed nude paintings with controversial titles, including paintings of nude adolescents. A federal appeals court rejected the plaintiff's claim that his art constituted political or social speech: Plaintiff's constitutional interest was held to be minimal in that "freedom of speech must recognize, at least within limits, freedom not to listen."[136]

Outsiders seeking a forum on campus operate under similar rules.

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134. Hazlewood School District v. Kuhlmeier, 484 U.S. 260, 271 (1988).

135. *Id.* at 273. Note that this is similar to the standard applied in cases involving the First Amendment rights of prisoners, where the current test is whether the speech is "reasonably related to legitimate *penological* concerns." Turner v. Safely, 482 U.S. 78, 89 (1986); Thornburgh v. Abbott, 490 U.S. 401, 409 (1989). In *Hazelwood,* Justice Brennan, joined by Justices Marshall and Blackmun, wrote a noteworthy dissent, in which he argued that *Tinker's* "material disruption" standard was appropriate in this case, and that the principal's actions failed that standard. Student expression, said Brennan, is bound to conflict with the state's pedagogical functions, but that "mere incompatibility with the school's pedagogical message" was not constitutionally sufficient justification for the suppression of student speech. Brennan further noted that the Court has never intimated a distinction between personal and school-sponsored speech. *See Hazlewood,* 484 U.S. at 280-82 (citing Papish v. University of Missouri Board of Curators, 410 U.S. 667, 671 n.1 (1973) (per curiam) (holding unconstitutional a University's expulsion of a student for lewd expression in an off-campus newspaper she sold on-campus pursuant to university authorization)); *see also Healy,* 408 U.S. at 195-196. However, both *Papish* and *Healy* involved speech on college campuses.

The distinction between non-school-sponsored student speech and that which may bear the school's "imprimatur" was used to uphold a high-school principal's decision to abandon the school's "Johnny Reb" mascot in *Crosby v. Holsinger,* 852 F.2d 801, 802 (4th Cir. 1988) (holding that a principal was justified in eliminating a "Johnny Reb" mascot, after receiving complaints that black students and parents found it offensive); *see* Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988) (striking down a school regulation requiring submission and approval of non-school sponsored publications before they could be distributed on campus in).

136. Close v. Lederle, 424 F.2d 988, 989-91 (1970); 400 U.S. 903 (1970) *cert. denied. Close* may be distinguished from other free-speech cases in that the people viewing the artwork probably did not come to the forum for that purpose, and therefore would not have wanted to view it if given the choice. Further, the rights of involuntary viewers to be protected from this "offensive" material superseded a faculty member's right to express himself on campus, even though he had been invited to do so by an official.

Thus, extracurricular organizations, such as the ACLU, have been granted standing to assert the right of its student members to form a chapter on a college campus. "[W]hile it might be constitutional for a state university to deny use of its facilities to all outside speakers, it is clearly unconstitutional to allow some outside speakers to use facilities but to deny their use to speakers who are controversial or considered undesirable by the college administration, board of trustees, or state legislature."[137] Just as students and faculty at public universities do not enjoy an absolute right to free expression, regardless of the consequences of certain speech, university officials do not have absolute power to arbitrarily censor on-campus speech by outside speakers.[138]

Although it is not likely that a public university would adopt a policy of disallowing all outside speakers from speaking on campus, if such a policy is deemed best for the institution's educational goals, it can constitutionally do so. On the other hand, public universities cannot allow some outside speakers and disallow others without a narrowly drawn justification, as such a practice is deemed an unconstitutional prior restraint on the right of students and faculty to hear certain speakers. Such prior restraints on speech are presumed unconstitutional unless the restraint is "narrowly drafted so as to suppress only that speech which presents a 'clear and present danger' of resulting in serious substantive evil which a university has the right to prevent."[139]

An unconstitutional prior restraint was found when a university barred the guest of a recognized student group to speak on campus because he might advocate breaking the law and because he was a convicted felon.[140] The university had no official outside speaker regulations in effect at the time, and the president based his decision on merely a "philosophical concept." The court ruled that the principal's decision was "blatant political censorship," and that his guidelines constituted unconstitutional prior restraints on speech.[141] Similarly, a college administrator's attempt to

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137. American Civil Liberties Union of Virginia, Inc, v. Radford College, 315 F. Supp. 893, 896 (W.D. Va. 1970).

138. *See* Stacy v. Williams, 306 F. Supp. 963, 970 (N.D. Miss. 1969) (invalidating unconstitutionally vague outside speaker regulations applicable to all universities in the State of Mississippi).

139. *Id.* at 971 (internal citation omitted). The "clear and present danger test," first enunciated by the Supreme Court in *Whitney v. California*, 274 U.S. 357, 376 (1927), is satisfied only where a proper authority finds that "immediate serious violence (or other substantive evil) was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated." *Id.*

140. *See* Brooks v. Auburn University, 296 F. Supp. 188, 191 (M.D. Ala. 1969).

141. *Id.* at 188, 191, 196. The court also held that Auburn could not allocate funds to pay

sanction a student/faculty organization for inviting controversial speakers to campus was struck down. The court held the president's conclusion that the speakers' militant views "would be apt to exacerbate the tensions between the College and the community [and to] provoke discussions between students" was insufficient to quell the speech at issue.[142] Fear of campus disturbances is not enough to overcome the right to freedom of expression, since many types of discussions among students can cause disruptions.[143]

In determining whether a university is to be considered public or private, courts are also called upon to decide whether its actions are fairly attributable to the state.[144] Because private universities are generally not considered state actors, they are held to a lower standard of constitutional scrutiny and a lesser obligation to ensure a student's First Amendment rights.[145] The Supreme Court first recognized this proposition in *Rendell-Baker v. Kohn*,[146] in which a teacher at a private school for socially-maladjusted high school students had been discharged after supporting a student petition for greater participation in decision-making. Five other teachers who complained about their colleague's dismissal were likewise discharged. All six filed claims alleging violations of their rights under the First, Fifth, and Fourteenth Amendments. The court held that even though the school received public funds and performed a public function, its

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some speakers, then withhold payment for other speakers without constitutional justification. *See id.* at 198. *See also* Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1519 (10th Cir. 1992) (intimating that the defendant university which refused to allow "The Last Temptation of Christ" to be screened on campus was likely to lose on the merits). For an exhaustive analysis of outside publication cases, see Burch v. Barker, 861 F.2d 1149, 1152-59 (1987).

142. Pickings v. Bruce, 430 F.2d 595, 600 (8th Cir. 1970).

143. *See id.*

144. *See* Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 306 (1989).

> [T]he [state action] doctrine holds that although someone may have suffered harmful treatment of a kind that one might ordinarily describe as a deprivation of liberty or a denial of equal protection of the laws, that occurrence excites no constitutional concern unless the proximate active perpetrators of the harm include persons exercising the special authority or power of the government of a state.

Id.

145. *See* Evan G. S. Siegel, Comments, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L.J. 1351, 1382-1387 (1990).

146. 457 U.S. 830 (1982); *see generally* Blum v. Yaretsky, 457 U.S. 991 (1982) (determining that a private nursing home was not a state actor despite being heavily funded and regulated by the state); Lugar v. Edmondson Oil. Co., 457 U.S. 922, 937 (1982) (recognizing that the party charged with a constitutional deprivation must be fairly characterized as a state actor.)

discharge of the teacher was not the result of any state regulation and must therefore be honored. The private school's relationship with the state was likened to that of a private contractor and its client: There is no "symbiotic relationship" between the two.[147]

In order for constitutional rights to be asserted against a private university, a showing must be made that "state action" is involved.[148] The mere fact that a private university's mission may be to educate members of the public does not by itself fulfill this function. Absent state action, a university may regulate speech as it sees fit because constitutional rights can only be infringed by the government.[149] Generally, state action is found where three conditions occur: (1) the state and the private entity maintain an interdependent relationship; (2) the state requires, encourages, or is otherwise significantly involved in nominally private conduct; and (3) the private entity exercises a traditional state function. Governmental regulation of a private college, or even substantial contribution of financial support, does not alone constitute state action.

Unfortunately, courts have been neither clear nor uniform in the distinctions they draw between private and public universities. For example, the Supreme Court of New Jersey found that although Princeton University is a private institution, it could still be obligated to protect free speech. Princeton had sought to evict someone from its campus for distributing political literature without a permit. The court held that the state constitution, which expressly forbade government from abridging the right of speech and assembly, should be applied to private universities

147. Some commentators have suggested that the Supreme Court modified its holding in *Rendell-Baker* with its subsequent ruling in *Bob Jones University v. United States,* 461 U.S. 574 (1983), which suggests that "private colleges, like private persons, are always free to advocate or endorse heinous doctrines, even if they are contrary to contemporary morality or constitutional law." William Shaun Alexander, *Regulating Speech on Campus: A Plea for Tolerance,* 26 WAKE FOREST L. REV. 1349, 1362 (1991). But *Bob Jones* says no such thing, holding simply that the Establishment Clause has not been violated when tax benefits granted to a religious university are withheld because the institution failed to observe the "fundamental public policy" of non-discrimination as required by federal statute (even if its actions were taken pursuant to religious belief). While this holding might appear to characterize the school's discriminatory practices as government related, the words "state action" are never mentioned in the case. Moreover, *Bob Jones* is otherwise too distinguishable to be treated as a modification of *Rendell-Baker*: There was no speech issue raised; the school's actions were clearly covered by a federal statute, as interpreted by an IRS Revenue Ruling in spite of the institution's private status; and the Court, if it had found for the university, would have been undermining its oft-articulated position that equal treatment of all races is fundamental public policy. *See generally Bob Jones* 461 U.S. 574 (1983).

148. *See* Counts v. Voorhees College, 312 F. Supp. 598, 607-08 (D.S.C. 1970).

149. *See* Gay and Lesbian Students Ass'n v. Gohn, 656 F. Supp. 1045, 1051 (W.D. Ark. 1987).

through the state's police power. It thus found that Princeton's permit regulation was unconstitutional, in that it was not based on any specific standards at the university for limiting expression.[150] Further, the court noted that because the mission of both private and public universities is the same- education- a wide disparity in expressive freedoms between the two types of colleges "would seem anomalous and undesirable." Thus, it concluded, "the differences between public and private educational institutions may, in many situations, be negligible."[151]

The activities of private universities may likewise be considered state action if the federal or state government is heavily involved in subsidizing or running the institution. For example, when a group of employees maintained that Temple University, an otherwise private university, had violated their civil rights by wrongfully terminating them, the District Court found state action on the part of the university because of its intimate relationship with governmental entities. Although a university does not become a state actor merely because it has a charter from the state, Temple University was incorporated by statute into the Pennsylvania education system, there were state-appointed members on Temple's board of trustees, and the university received significant state subsidies.[152]

An argument can also be made that a private institution may become a state actor if it performs some public function or opens the campus to the public. By inviting the public to attend concerts, lectures, films and sporting events, the private university creates a public forum, where First Amendment freedoms are protected. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional

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150. *See* State v. Schmid, 423 A.2d 615, 632-33 (N.J. 1980). The *Schmid* case contains a thorough analysis of other cases pertaining to constitutional freedoms and private property in general.

151. The Court stated that although Princeton

> is involved in a continuous relationship with the State . . . [it] is a state-accredited educational institution; it participates in and receives . . . the advantages of certain State programs . . . Its property and buildings on the central campus with the exception of its ice skating and hockey facility and its campus parking lots, are tax-exempt. [It] also receives state-budgeted funds . . . [It] is, indisputably, predominantly private, unregulated and autonomous in its character and functioning as an institution of higher education.

Id. at 621.

152. *See* Isaacs v. Board of Trustees of Temple Univ., 385 F. Supp. 473, 478 (E.D. Pa. 1974).

rights of those who use it."[153]

In 1991 Congress attempted to enable private university students to obtain injunctive relief if the school "[made] or [enforced] any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication protected [by the First Amendment]."[154] The Collegiate Speech Protection Act, which was endorsed by the American Civil Liberties Union, would have allowed students at private educational institutions receiving federal funds to challenge campus conduct codes on First Amendment grounds. The bill did not pass.[155]

Public schools, in contrast, are viewed with considerably more stringent constitutional scrutiny.[156] They must abide by three general principles of free speech. First, speech cannot be banned because of its content.[157] Second, even the expression of odious ideas must be protected.[158] And third, the academic setting presupposes a heightened commitment to First Amendment principles.[159] Thus on a state university campus, the mere dissemination of ideas, no matter how offensive to good

153. Marsh v. Alabama, 326 U.S. 501, 506 (1946).

154. *See* William Kimsey, *Fighting Restrictive Codes on Campus*, WASH. TIMES, Apr. 13, 1992, at E4.

155. *See* Hyde and Fishman, *supra* note 15, at 1493. The legislation would have provided the following:

> (a) A postsecondary educational institution that is a program or activity shall not make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication protected from governmental restriction by the first article of amendment to the Constitution of the United States; (b) Whoever is a student at an educational institution engaged in a violation of subsection (a) may, in a civil action, obtain appropriate injunctive and declaratory relief ... (c) This section does not apply to an educational institution that is controlled by a religious organization, to the extent that the application of this section would not be consistent with the religious tenets of such organization.

Id. at 1493-94. In 1992 the California legislature amended the state's education code to guarantee students the same First Amendment rights on campus that they have elsewhere. CAL. EDUC. CODE § 94367 (West 1992). The law applies to public and private colleges and universities, with a narrow exception for schools operated by religious denominations. Students can sue for infringement of their free speech rights. Civil recovery is limited to court costs and attorney's fees. This section has been upheld in various cases involving California State University, Northridge, Occidental College, and Stanford University.

156. *See infra* Section II.C.

157. *See* Police Dept' of the City of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

158. *See* Texas v. Johnson, 491 U.S. 397, 414 (1989); Cohen v. California, 403 U.S. 15, 24-25 (1971); Street v. New York, 394 U.S. 576, 593 (1969); *see also* Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 547-48 (1980).

159. *See* Shelton v. Tucker, 364 U.S. 479, 487 (1960).

taste, "may not be shut off in the name alone of 'conventions of decency.'"[160] The university is generally in a better position if it has an established policy against unprotected categories of speech, rather than having to attack them on an *ad hoc* basis.

2. Unprotected Utterances

To issue a prior restraint, that is, to cancel a speech before it is delivered, a public university must show that a breach of the peace is virtually certain to occur by virtue of the speaker's advocacy of violence.[161] Past instances of violence associated with a particular speaker may also justify a cancellation. Generally, however, a public university would have to wait until the inflammatory words have been uttered and have been determined to create a clear and present danger or a substantial threat that violence will ensue.[162]

Regulation of expression that incites imminent lawless action is permissible. The Supreme Court has drawn the distinction between "mere advocacy," for which the government cannot punish, and inciting a group to violence, which it can constitutionally limit.[163] But the Court has strictly interpreted this standard, requiring a careful consideration of the facts and circumstances surrounding such expression. Thus, universities must narrowly tailor policies to ensure that regulation prohibits only imminent, unlawful incitement to action, the definition and application of which can be difficult.[164]

Even if a university has a constitutionally sound prohibition against "fighting words" (an improbable proposition), it would not be able to prevent a speaker from uttering insults at his audience. The Supreme Court has held that "fighting words," which "by their very utterance inflict injury or tend to incite an immediate breach of the peace," are not communication but instruments of assault, and therefore are not entitled to First Amendment protection.[165] Such words do not promote "any exposition of ideas, and are of such slight social value as a step to truth that any benefit

160. Papish v. Board of Curators of the Univ. of Mo., 410 U.S. 667, 670 (1973) (refusing to suppress offensive words is a "central test" of commitment to free speech).

161. Advocacy alone cannot be prohibited. *See Brooks*, 412 F.2d at 1173 (internal citation omitted).

162. *See* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969); *see also Healy*, 408 U.S. at 192.

163. *See Brandenburg*, 395 U.S. at 449 (1969).

164. *See Johnson*, 491 U.S. at 407.

165. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). *Chaplinsky* involved a defendant who was arrested after calling the city marshall a "[g]od damned racketeer" and a "damned [f]ascist." *Id.* at 569.

that may be derived from them is clearly outweighed by the social interest in order and morality."[166] But the Court has narrowly construed this doctrine.[167]

In *Beauharnais v. Illinois*, the Supreme Court held that the First Amendment does not protect statements which defame specific groups.[168] Though the Court subsequently limited the group-libel exception when it decided that public officials had to prove actual malice in order to recover for libel, stating that First Amendment freedoms required such restrictions and underscoring the notion that political speech is to be protected under the First Amendment,[169] it has never explicitly overruled *Beauharnais*. Group-libel should thus remain a viable action.[170] Thus it is open to question whether broad university regulations that penalize group libel (for example, a prohibition on the distribution of racist or anti-Semitic publications) would be held unconstitutional as protected political speech.

It is likewise well established that when the interest in prohibiting the expression outweighs the need for the speaker to disseminate his message, it may be limited by fairly applied time, place, and manner restrictions, provided that there is an alternative forum available and the regulation is content-neutral.[171] For example, if a controversial speaker was inadvertently scheduled to appear during a university's final examination period, in derogation of an established policy prohibiting such appearances at that time, cancellation of the speech would in all likelihood be

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166. *Id.* at 572; *see* Thomas F. Shea, *Don't Bother to Smile When You Call Me That"—Fighting Words and the First Amendment,* 63 KY. L.J. 1, 22 (1975). The fighting-words doctrine, which requires that there be a "one-on-one, face-to-face" confrontation is arguably obsolete, since the Supreme Court hasn't upheld any laws prohibiting fighting words since *Chaplinsky*. *See, e.g.*, Gooding, Warden v. Wilson, 405 U.S. 518, 537 (1971) (Blackmun, J., dissenting) (stating that "the Court . . . is merely paying lip service to Chaplinsky.").

167. *See Punishing Racist Speech*, 1 SYNTHESIS: L. AND POL'Y IN HIGHER EDUC. 3 (1989). In some post-*Chaplinsky* cases, the Court has refused to classify the challenged speech as fighting words. *See, e.g.*, Street v. New York, 394 U.S. 576, 592 (1969) and Bachellar v. Maryland, 397 U.S. 564, 567 (1970). In other cases where the doctrine was arguably applicable, the Court has reversed lower court decisions based on overbreadth of laws rather than for failure to meet the "fighting words" standard. *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1 (1949) and Gooding v. Wilson, 405 U.S. 518 (1971).

168. *See* Beauharnais v. Illinois, 343 U.S. 250, 251, 266-67 (1952).

169. *See generally* New York Times v. Sullivan, 376 U.S. 254 (1964); R.A.V. v. St. Paul, 505 U.S. 377 (1992).

170. *See* Kenneth Lasson, *Group Libel Versus Free Speech: When Big Brother* Should *Butt In*, 23 DUQ. L. REV. 77, 110 (1984).

171. *See* Brooks v. Auburn Univ., 412 F.2d. 1171, 1173 (5th Cir. 1969); *see generally* University of Utah Students Against Apartheid v. Peterson, 649 F. Supp. 1200 (D. Utah 1986); Stacy v. Williams, 306 F. Supp. 963, 974 (N.D. Miss. 1969). (stating that the court "[sees] no objection to the university's requirement that preference be given to an academic event over an invitation to a guest speaker sought to be scheduled at the same time."). *Id.*

constitutional.[172] While speech itself cannot advocate violence, neither may it be silenced by those in the audience. The prohibition against a "heckler's veto," acceding to an audience's demand that the speaker be halted, is based on the generally-accepted presumption against attributing the creation of a "clear and present danger" to the speaker.[173]

But this principle appears to conflict with the "substantial interference doctrine;" perhaps the most concrete criterion upon which controversial speech on campus may be constitutionally regulated. This standard, first promulgated by the Fifth Circuit in *Brooks v. Auburn University*,[174] suggests that even if no clear and present danger could be demonstrated, a university might be able to cancel a speaker who is likely to create a "material disruption."[175] Such a disruption may occur when a controversial speaker is shouted down, regardless of who (speaker or heckler) is silenced or ousted.[176]

3. Speech Codes

As noted earlier many universities, both public and private, have responded to the increasing amount of campus incivility by formulating speech and conduct codes.[177] A typical code defines harassment to include any conduct, verbal or physical, on or off campus, which creates an intimidating, hostile, or offensive educational, work, or living environment, and is premised on the ideas that (a) while freedom of expression is essential in a university, so is freedom from unreasonable and disruptive offense; and (b) it is usually easier to deal with such questions if one thinks

172. The school would probably have to show that students did actually use the auditorium for studying, and it would probably have to arrange for him to speak at another site on campus, or reschedule his appearance at a later time.

173. Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

174. 412 F.2d 1171 (1969).

175. *Id.* at 1173; *see* Phillips v. Anderson County Sch. Dist. Five, 987 F. Supp. 488, 492-93 (D.S.C. 1997) (holding that, based on "material disruption" standard, a middle school was justified in prohibiting student from wearing jacket made to look like a Confederate battle flag, in view of past disruptive incidents resulting from students wearing garments which depicted the Confederate flag); Wilson v. Chancellor, 418 F. Supp. 1358 (D. Or. 1976) (holding that school board's absolute prohibition of political speakers at a local high school was unreasonable where "no disruptions had occurred in [the teacher's] classes, or at any other school gatherings where political subjects were discussed" and "none were expected in the future.") *Id.* at 1364; *but see Healy*, 408 U.S. 169, 185, 190-91 (mere threat of disorder insufficient to justify university's refusal to enfranchise its SDS chapter).

176. Under First Amendment jurisprudence, it would likely be required to silence the hecklers and allow the speaker to continue, provided that his speech is otherwise protected.

177. One observer notes some 700 colleges and universities had enacted hate speech codes by 1995. *See* Schweitzer, *supra* note 85, at 508 n.48.

in terms of interests rather than rights.[178]

The movement to enforce civility on campus has been called the most successful effort in American history to restrict offensive speech.[179] Perhaps that is why universities promulgating such codes have been undeterred by the fact that not one of them has been found constitutional. Among the most notable university codes to be overturned to date have been those at three major universities: Michigan, Wisconsin and Stanford.[180]

The University of Michigan's policy was the first to go before the courts. The test case arose out of a series of racist incidents on campus in the winter of 1987, beginning with the distribution of racist pamphlets declaring "open season" on African-Americans, referring to them as "saucer lips, porch monkeys, and jigaboos." A week later some racist jokes were broadcast on the campus radio station. When students demonstrated against these incidents, a student displayed a Ku Klux Klan uniform from a dormitory window. The administration quickly took action in the form of a statement from the president of the university expressing outrage at the events, and reaffirming the University of Michigan's dedication to maintaining a racially, ethnically, and culturally diverse campus. The state legislature held a public hearing on racism. At the same time, students formed a "United Coalition Against Racism" and threatened to file a class-action suit against the university for failing to maintain a nonracist environment on campus.[181]

By the following spring, the University of Michigan's regents had adopted a student code of conduct. Its *Policy on Discrimination and Discriminatory Harassment*[182] prohibited any behavior (verbal or physical) that stigmatizes or victimizes an individual for physical, racial, or social characteristics beyond his control. Such behavior would include any "express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or .... [c]reat[ing] an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities."[183]

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178. *See, e.g.*, Stephen Fleischer, *Campus Speech Codes: The Threat to Liberal Education*, 27 J. MARSH. L.R. 709, 738-48 (1994) (discussing affects of collegiate speech codes).

179. *See* Lasson, *supra* note 97, at 733.

180. *See id.* at 727.

181. *See* John Doe v. University of Michigan, 721 F. Supp. 852, 854 (E.D. Mich. 1989).

182. *Id.*

183. *Id.* at 856. A black female law student called another student "white trash" and was charged with violating the University of Michigan harassment rule. She ultimately agreed to

Interestingly, the Michigan code divided the university into three speech zones: public areas, where only physical acts would be restricted; residence halls, where speech and conduct were governed by language in the room leases; and educational facilities (including libraries), where the university sought to regulate speech that discriminated "on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status."[184]

The university policy was challenged by a graduate student in biopsychology, who argued that it infringed on his freedom to teach; specifically, that it would hamper his discussion of the biological roots of individual differences in personality traits and mental abilities. He believed that some of the theories, because they espoused genetic and biological factors as major contributors to individual differences presented, could be perceived as sexist or racist under the code.[185]

In 1989, a federal judge struck down the Michigan policy as an unconstitutional restriction on free speech, finding it to be vague and overbroad because "the terms stigmatize and victimize are not self-defining" and "can only be understood with reference to some exogenous value system."[186] The court also took issue with the university in that its code sought to prohibit "certain speech because it disagreed with the ideas or messages sought to be conveyed... [It]was essentially making up the rules as it went along."[187] In short, the university could not proscribe speech "simply because it was found to be offensive, even gravely so, by large numbers of people."[188] The court commented further on the tension brought to bear in speech codes between free speech and equal protection, and making clear its feeling that the First Amendment took precedence over the Fourteenth.[189]

Two years later, Wisconsin's speech code was likewise declared unconstitutionally vague and overbroad. The policy covered "racist or discriminatory comments, epithets or other expressive behavior directed at an individual," where those comments "demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals, "and" [c]reate an intimidating, hostile or

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write a formal letter of apology to settle the charge. American Civil Liberties Union Briefing Paper Number 16 (1996) <http://www.aclu.org/library/pbp16.html>.

184. *John Doe*, 721 F. Supp. 852, 856 (E.D. Mich. 1989); *See* MARCUS, *supra* note 10, at 124.

185. *See John Doe* at 858.

186. *Id.* at 859.

187. *Id.* at 868.

188. *Id.* at 863.

189. *See id.* at 868.

demeaning environment for education, or other university-authorized activity.[190] The Wisconsin code was much clearer and more narrowly drafted than that of the University of Michigan. First, it applied only to direct attacks on an individual. Second, it included illustrative examples, such as calling someone an offensive name, placing demeaning material in someone's living quarters, and destroying property. Third, the university issued to students and faculty an explanatory pamphlet, including detailed classroom and non-classroom examples, applying the policy to the facts of each example, and concluding with whether the expression would be subject to the university's code.[191]

The Wisconsin code was applied in a number of specific incidents involving fraternities. A student who called another student "Shakazulu" was placed on probation, ordered to consult with an alcohol abuse counselor, and required to plan a project to help sensitize himself to the issue of diversity. A student was also placed on probation for impersonating an immigration official and demanding to see the immigration documents of a Turkish-American student. A student was placed on probation and required to get treatment for alcohol abuse for telling an Asian-American student that "[i]t's people like you that's the reason this country is screwed up."[192] A student was placed on probation and required to perform community service for yelling at a woman and calling her a "fucking bitch."[193] Another student was suspended for calling a residence hall staffer a "South American immigrant."[194] While it had been more carefully drafted than the Michigan policy, the Wisconsin code was nevertheless found unconstitutional[195] The university, which was one of the first to ban racial and sexual slurs on campus, first attempted to redraw its code more narrowly, but later dropped in entirely in 1992.[196]

Perhaps the most surprising code to fail was Stanford's, a set of rules which carefully sought to avoid any chilling effect on the debate of sensitive topics by forbidding only fighting words linked to sex and race. In 1988, after two white students defaced a poster at a black theme house with racial caricatures, Stanford had enacted a hate speech regulation which

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190. UWM Post, Inc. v. Board of Regents of University of Wis. System, 774 F. Supp. 1163, 1165 (E.D. Wis. 1991).
191. *See id.* at 1165-66.
192. *Id.* at 1167.
193. *Id.*
194. *Id.*
195. *See id.* at 1177.
196. *See id.*

banned insults based on sex or race.[197] In 1994, ten students filed suit, claiming that Stanford's rule (entitled "Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment") violated the California Educational Code, the California Constitution, and the U.S. Constitution, arguing that it was a "content-based, view point discriminatory, prior restraint on speech." A lower state court agreed, on the grounds that the code inhibited free speech: "Stanford cannot proscribe speech that merely hurts the feelings of those who hear it."[198] The ruling was the first time a speech code at a private university had been held invalid.[199]

B. NOTIONS OF ACADEMIC FREEDOM

1. Precepts

The concept of academic freedom, a First Amendment subtext through which scholars generally invoke an enhanced notion of free-speech rights,[200] can trace its history as far back as Plato's *Apology*, in which Socrates defended his right to discuss controversial topics with others, regardless of whether those in power may have found them unacceptable.[201] Yet even Socrates felt constrained by certain moral and religious principles, which were subsequently reflected in the curriculum of the great early

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197. *See* Bill Workman, *Ban on Hate Speech Struck Down/Judge Rules Stanford Code is too Broad, San Francisco Chronicle, Chronicle Peninsula Bureau* (Mar. 2, 1995) *<http://joc.mit.edu/docs/stanford.ban.struck.down.htm>*.

198. Ben Wildavsky, *First Amendment vs. Anti-Hate Efforts: Rethinking Campus Speech Codes*, San Francisco Chronicle, Mar. 4, 1995, at A1. Stanford's code had been crafted by Thomas Grey, a law professor highly sensitive to First Amendment principles. *See id.*

199. *See id.* For a detailed summary of the speech code test cases at Michigan, Wisconsin, and Stanford, *see* MARCUS, *supra* note 10, at 122-129. George Mason University's code is also discussed therein.

200. This article primarily addresses the speech rights of outsiders who appear by invitation at public colleges and universities. Some such speakers may simultaneously be employed as professors on other campuses. However it is not generally held that a professor's academic freedom at his home campus is carried with him whenever he appears elsewhere. For a more thorough treatment of this issue, *see* ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, 35-36 (L. Joughin ed., 1969) (recognizing professors' rights to full freedom in research, in classroom teaching, and to speak or write outside the classroom free from censorship or discipline by their employing institution); *see also* Mark G. Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831 (1987); Steven R. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293 (1976); and *Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045 (1968).

201. *See* Irwin Polishook, *Academic Freedom and Academic Contexts*, 15 PACE L. REV. 141, 142 (1994).

universities.[202] For example, any dissent from the Articles of the Church of England was prohibited at Oxford and Cambridge.[203] Similar limitations on academic freedom continued into the late nineteenth century, when professors at American colleges and universities were dismissed for such offenses as "advocated free trade and greenbacks," participating in a Populist convention, speaking out against monopolies, favoring free silver, opposing imperialism, and delivering a pro-labor speech.[204]

A concerted effort to change the state of affairs came with the creation of the American Association of University Professors in 1915. "Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher ... or the institution as a whole. The common good depends upon the free search for truth and its free exposition." So begins the AAUP's first *Statement of Principles on Academic Freedom and Tenure.*[205] Academic freedom is deemed essential to these purposes, and applies to teaching, research, and learning. Tenure is a means to both freedom of teaching and research and to "a sufficient degree of economic security to make the profession attractive to men and women of ability."[206]

Specifically, academic freedom means that the teacher is entitled to full freedom in research and in the publication of its results, subject to the adequate performance of his other academic duties, as well as to freedom in the classroom in discussing his subject. *"But [he] should be careful not to introduce into [his] teaching controversial matter which has no relation to [his] subject."*[207] "Limitations of academic freedom because of religious or

202. *See id.*

203. *See id.*

204. *Id.* at 143.

205. WALTER METZGER, ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY, 146 (1955); *see* also Polishook, *supra* note 2021, at 142. A declaration on academic freedom was first endorsed by the AAUP at its Second Annual meeting in 1916. In 1940, representatives of the Association of American Colleges and the American Association of University professors agreed upon a "Statement of Principles on Academic Freedom and Tenure," and upon three attached "Interpretations." The 1940 Statement, and its Interpretations, were endorsed by the two associations in 1941. In subsequent years endorsement has been officially voted by numerous other organizations. The 1990 edition of AAUP's *Red Book* lists 143 endorsers, including many professional disciplinary associations, as well as the Association of American Law Schools, the American Council of Learned Societies, and the American Association of Higher Education.

206. American Association of Univ. Professors, 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments <http://www.aaup.org/1940stat.htm>.

207. *See id.* at Academic Freedom (b)2 (emphasis supplied). As an AAUP editor's note points out, some courses of study require consideration of matter on which the teacher is not in all aspects expert; thus the teacher of English composition or literature may have to deal with writings about race relations, sexual mores, or social philosophy. A teacher handling mixed responsibilities of this type ordinarily indicates the limits of his expert judgment, and should not

other aims of the institution should be clearly stated in writing at the time of the appointment."[208]

The college or university teacher is regarded as "a citizen, a member of a learned profession, and an officer of an educational institution." When speaking or writing, the teacher should thus be free from institutional censorship or discipline. But his special position in the community imposes special obligations. As a person of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not a spokesman for the institution.[209]

Like the First Amendment, however, academic freedom is not absolute. This was recognized at length by the first Declaration of Principles in 1915, which provided that there are no rights without corresponding duties.[210] The claim to freedom of teaching is made in the interest of the integrity and progress of scientific inquiry. The liberty of the scholar to set forth his conclusions is conditioned upon their being the fruits of "competent, patient and sincere inquiry," which are set forth with "dignity, courtesy, and temperateness of language."[211] While the university teacher need not withhold his own opinions in controversial matters, he should be a person of "fair and judicial mind," and offer "without suppression or innuendo, the divergent opinions of other investigators."[212] A professor should cause his students "to become familiar with the best public expressions of the great historic types of doctrine upon the questions at issue."[213] Above all, he should remember that his business is not to give students "ready-made conclusions, but to train them to think for themselves, and to provide them access to those materials which they need if they are to think intelligently."[214] In short, there is a balance to strike

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be subject to particular scrutiny because he may deal with controversial issues.

208. Problems sometimes arise through the failure of an institution to be explicit about its particular limitations at the time of appointing a teacher, or the failure of a teacher to observe limitations which he has accepted short of waiver of his fundamental academic obligations. *Id.*

209. *See* ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *supra* note 200, at 36. An issue has also arisen regarding the right to silence or, conversely, the obligation of disclosure.

210. *See General Report of the Committee of Academic Freedom and Academic Tenure* (1915), *reprinted in* 53 LAW & CONTEMP. PROBLEMS 393 at 393, app. A401 (1990).

211. *Id.* at 401.

212. *Id.*

213. *Id.*

214. *Id.*

between the right of the individual to free speech and the right of others to be protected from it. Violations of such academic responsibilities by professors who do not state the truth as they see it, develop and improve their scholarly competence, exercise critical self-discipline and judgment in using and transmitting knowledge, and act as intellectual guides and counselors may be looked upon as abuses of academic freedom rather than its exercise.

Academic freedom also forbids use of the classroom for political advocacy or indoctrination, for defamation, or in efforts to incite violence. A professor can be constrained from discussing material irrelevant to his assigned subject matter; from using abusive or profane language; from discriminating against students or colleagues on the basis of their race, religion, gender, or viewpoints; and from violating current standards of decency and civility.[215] The more difficult cases of academic freedom involve incendiary speakers whose agenda are arguably motivated by bigotry and have little educational value.

But under the standards articulated above, one would struggle to invoke academic freedom as a defense to the rantings of Khalid Muhammad. Nor, for that matter, would they seem to justify questionable academic programs. For example, the conference on "Revolting Behavior" sponsored in 1997 by the State University of New York at New Paltz, which featured the sale of sex toys and instruction on sado-masochism and masturbation, might arguably be outside the protection of AAUP guidelines.[216]

2. Jurisprudence

As noted earlier, the leading case regarding academic freedom is *Keyishian v. Board of Regents*,[217] in which the Supreme Court declared:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of

215. *See, e.g.*, CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 7 (1993).

216. The conference also featured a presentation by a "performance artist" who dressed as a Hasidic Jew, was beaten with a whip, made to crawl on his hands and knees, during which he was subjected to an act of (simulated) sodomy. "[A]cademic freedom . . . will not long last if it is spat upon in this fashion. The academy is supposed to be a refuge from ignorance and bigotry. [SUNY] has used a public trust to promote deviancy and Jew-hatred." *Anti-Semitism at New Paltz*, N.Y. POST, Feb. 10, 1998, at 26.

217. 385 U.S. 589 (1967).

> constitutional freedoms is nowhere more vital than in the community of American schools . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."[218]

The Court later embellished upon its holding in *Keyishian*: "To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[219]

However, while the Court has discussed the idea of academic freedom in cases involving states' attempts to prohibit or punish teachers for engaging in radical political speech, it has never fully articulated how the concept protects teachers, nor what standard of scrutiny applies. For example, in striking down a loyalty oath required of state employees as violative of due process, Justice Frankfurter said that teachers "must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma."[220] The implication is that teachers have a duty to freely inquire as part of their job, and that their speech rights may therefore have higher status under the Constitution. The Court also invoked the right of academic freedom in overturning a university professor's contempt conviction for failing to respond to the state attorney general's inquiries as to his political associations and the nature of his lectures to students.[221]

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218. *Id.* at 603 (internal citation omitted). After discussing academic freedom, Justice Brennan makes it clear that the basis of the Court's rejection of the statute in question was vagueness, and not academic freedom. *See id.* at 603-04.

219. In *Keyishian*, the court further observed,

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth . . . . No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust."

Id. at 603 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)); *see also* Silva v. Univ. of N.H., 888 F. Supp. 293, 312-315, 327 (D. N.H.1994) (quoting *Keyishian*, 385 U.S. 589, 603-04.

220. Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., joined by Douglas, J., concurring).

221. *See id.* at 191, 196.

Such inquiries violated the professors' rights of political expression and academic freedom.[222]

In 1960 the Court held unconstitutional a state law which required public school teachers, as a condition of employment, to file affidavits disclosing all organizations to which they had belonged in the past five years.[223] The statute was found to be overly broad and unnecessarily intruding on teachers' associational freedoms.[224] Academic freedom was also discussed at length in *Epperson v. Arkansas*,[225] where a unanimous Supreme Court struck down an Arkansas statute which made the teaching of evolution in public schools a criminal offense.[226] Although the Court based its decision on the Establishment Clause, it noted that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The court further noted that it would "not hesitate to condemn . . . 'arbitrary' restrictions upon the freedom of teachers to teach and students to learn."[227]

On the other hand, the Court has upheld the constitutionality of a federal statute granting the Attorney General discretion to deny admission to an alien who advocated communism, despite the academic-freedom protests asserted by American university professors who wished to meet and speak with him. In discussing the right to receive information and ideas, the Court relied on a variety of non-academic freedom cases.[228] In

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222. *See Sweezy*, 354 U.S. at 250. Concurring, Justices Frankfurter and Harlan discussed the political and academic issues at length, and at one point equated academic and political speech (in both "thought and action are presumptively immune from inquisition by political authority"), and at another, quoting liberally from an address by T.H. Huxley at the opening of Johns Hopkins University. *Id.* at 255-267 (Frankfurter, J., joined by Harlan, J., concurring).

223. *See Shelton*, 364 U.S. at 485-86, 490.

224. *See id.* at 490. Justice Frankfurter wrote a separate dissent, in which he said that the state's interest in guaranteeing teacher fitness was compelling and not violative of academic freedom, absent any evidence that the information was used to disqualify teachers on the basis of their membership in certain organizations. *See id.* at 495-96.

225. 393 U.S. 97 (1968).

226. *See Epperson*, 393 U.S. at 98-99, 102-09.

227. *See id.* at 105 (quoting *Shelton*, 364 U.S. at 487). Justices Black and Stewart concurred, finding the statute to be unconstitutionally vague and unclear as to whether teachers were prohibited from teaching evolution or from merely mentioning the subject. *Id.* at 110, 115 (Black, J., concurring) (Stewart, J., concurring).

228. *See* Red Lion Broadcasting Co., Inc., v. FCC, 395 U.S. 367, 370-71, 390-91, 400-01 (1969) (upholding FCC's fairness doctrine granting access rights to those holding differing views from the broadcast media); Stanley v. Georgia, 394 U.S. 557, 568 (1969) (right to possess and use pornographic material in one's home); Lamont v. Postmaster General, 381 U.S. 301, 302 n.1, 305 (1965) (striking down statute permitting government to refuse to deliver communist propaganda from abroad unless addressee requested its delivery in writing); Thomas v. Collins, 323 U.S. 516, 519, 534 (1945) (right of labor organizer to speak and of workers to hear him, regardless of whether organizer was registered to solicit with the state); Martin v. City of Struthers. 319 U.S.

holding that a Louisiana statute requiring the teaching of creationism alongside evolution violated the Establishment Clause, the Court interpreted the statute's stated secular purpose, "academic freedom," as merely a pretext to advance a Christian view of science.[229] However, few cases describe academic freedom as a right to teach or advance one's ideas.[230] Most of them identify a "right of inquiry" similar to that found outside the classroom, which is otherwise protected by associational (before associational rights were recognized) and due process rights.[231]

Two somewhat conflicting sentiments, including the state's right to run the school system versus the Court's duty to enforce the Constitution,[232] illustrate the difficulty a clearly articulated right to academic freedom

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141-42, 149 (1943) (right to disseminate religious literature door-to-door).

229. Edwards v. Aguillard, 482 U.S. 578, 586, 589, 594 (1987). "The Act does not grant teachers a flexibility that they did not already possess to supplant the present science curriculum with the presentation of theories, besides evolution, about the origin of life." *Id.* at 587.

> If the [legislature's] purpose was solely to "maximize the comprehensiveness and effectiveness of science instruction, it would have encouraged the teaching of all scientific theories about the origins of humankind. But under the Act's requirements, teachers who were once free to teach any and all facets of this subject are now unable to do so.

Id. at 588-89. Justice Scalia disagreed with the majority's definition of academic freedom. In the context of the Louisiana law, he did not analogize it to instructor's freedom ("the freedom of teachers to teach what they will") but to the student's right to know ("student's freedom from indoctrination"). *Id.* at 627, 631-32. The majority, however, noted that the "students' freedom from indoctrination" language was later deleted from the statute, and that the expert relied on by the Act's sponsors at legislative hearings interpreted the phrase "academic freedom" to mean "the freedom to teach science." *Id.* at 589 n.9.

230. *See* University of California v. Bakke, 438 U.S. 265, 312, 318-19 (1978) (affirming university's freedom to make its own decisions); *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (identifying four types of institutional academic freedom: "to determine . . . on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study") *Id.*; *but see* Barenblatt v. United States, 360 U.S. 109, 112 (1959) (academic freedom does not apply to non-academic activities). Legal scholars have also disagreed about whether academic freedom is recognized as constitutional right. *See Compare*, *Developments in the Law: Academic Freedom,* 81 HARV. L. R. 1045, 1065 (1968) (questioning existence of academic freedom as a constitutional right); *Civil Rights—Academic Freedom, Secrecy and Subjectivity as Obstacles to Proving a Title VII Sex Discrimination Suit in Academia,* 60 N.C. L. REV. 438, 446 (1982) (suggesting that academic freedom has attained the status of a constitutional right); *see also Epperson,* 393 U.S. 97, 104-05; *Edwards,* 482 U.S. 578, 599 (Powell J., concurring).

231. *See, e.g.,* Norstrand v. Balmer, 335 P.2d 10 (Wis. 1959).

232. *See Epperson,* 393 U.S. at 104. "Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where [it is] essential to safeguard the fundamental values of freedom of speech and inquiry and of belief." *Id.* "And more important, it would not place this Court in the unenviable position of violating the principle of leaving the States absolutely free to choose their own curriculums for their own schools so long as their action does not palpably conflict with a clear constitutional command." *Id.* at 112.

inside the classroom would raise. On one hand, meaningful education depends on free inquiry by instructors and students; on the other, the state's broad discretion as to how to run its schools and inculcate civic values (especially in lower schools) requires consistency and orthodoxy. A strongly worded declaration of academic freedom inside the classroom could allow teachers to invoke the Constitution to override decisions by superiors.

Some lower courts have articulated a concept of academic freedom. For example, once contracted to appear at a public university, a speaker might assert a right to academic freedom to prevent a subsequent denial of the right to speak due to the controversial nature of his speech.[233] Others have held that academic freedom does not outweigh a school board's authority to prescribe curriculum, and/or that certain types of teacher speech were less worthy of protection than others.[234]

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233. *See* Wilson v. Chancellor, 418 F. Supp. 1358, 1362 (D. Or. 1976); *see also* Keefe v. Geanakos, 418 F.2d. 359, 361-63 (1st Cir. 1969) (teacher suspended for distributing an issue of *Atlantic Monthly* magazine to students which contained offensive language, after being warned not to by a school committee, would probably succeed on his academic freedom claim on remand); Sterzing v. Fort Bend Indep. Sch. Dist., 376 F. Supp. 657, 658-59, 662 (S.D. Tex 1972) (teacher's dismissal for using a book on race relations not in authorized curriculum violated his First Amendment right to choose his own teaching methods, provided they served a "demonstrated educational purpose"); Mailloux v. Kiley, 323 F. Supp. 1387, 1388, 1392-93 (D. Mass.) (teacher's dismissal for writing of the word "Fuck" on the blackboard for purposes of a lesson violated his rights of expression and academic freedom, based on the standard that teachers who use methods not proven to have the support of the preponderant opinion of the profession may not be discharged, unless the state can show that the teacher was put on actual notice as to the consequences), *aff'd per curiam,* 448 F.2d 1242, 1243 (1st Cir. 1971) (noting that the regulation at issue was unconstitutionally vague); Parducci v. Rutland, 316 F. Supp. 352, 356 (M.D. Ala. 1970) (teacher's dismissal for assigning Kurt Vonnegut's, *Welcome to the Monkey House*, violated her right to academic freedom). In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court held that a state ban on the teaching of foreign languages in public and private schools violated substantive due process, including the right of teachers to teach, the right of students to acquire useful knowledge, and the right of the students' parents to have the teacher instruct their children German. *See id.* at 396-97, 399-400, 403.

234. *See* Martin v. Parrish, 805 F.2d 583, 584, 586 (5th Cir. 1986) (college teacher's use of profanity not protected by the First Amendment); Cary v. Board of Education, 598 F.2d 535, 539, 542, 544 (10th Cir. 1979) (recognizing right of academic freedom, but holding that teachers could not teach the books banned by the Board so long as, on remand, it was found that the books were not banned on the basis of the Board's "personal predilections"); Goldwasser v. Brown, 417 F.2d 1169, 1171, 1177 (D.C. Cir. 1969) (dismissal of instructor Air Force Language School due to his expression of anti-war sentiments and tales of discrimination he had suffered as a Jew did not violate his First Amendment rights); Burns v. Rovaldi, 477 F. Supp. 270, 272, 277-78 (D. Conn. 1979) (Board. of Education's interest in preventing "sectarian or partisan instruction" outweighed teacher's First Amendment interest in allowing his students to read pen-pal letters from his fiancée which advocated Communism); Mercer v. Board of Education, 379 F. Supp. 580, 582, 586-87 (E.D. Mich. 1974) (public school teacher was bound to obey state's prohibition against the teaching of birth control to students, since he had no constitutional right to teach information

Some commentators have proposed that academic freedom be accepted as part of the common law,[235] be construed as an implied contractual term,[236] or codified into statute.[237] Courts have yet to adopt any of these suggestions to date.

3. Challenges

Although the almost universal acceptance of academic freedom sometimes prompts professors and laymen alike to consider the subject somewhat moot,[238] the concept has come under increasing attack in recent years, particularly by radical feminists.[239] The claim is that academic freedom serves to mask "bourgeois values" or "ethnocentric assumptions."[240] To the extent that this idea has gained currency, the whole notion of academic freedom is in jeopardy.

C. SHADES OF REALITY

Thus it can be seen that, under both the First Amendment and the doctrine of academic freedom, campus speakers clearly possess both rights

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"beyond the scope of the established curriculum"), *aff'd mem.* 419 U.S. 1081 (1974).

235. *See, e.g.*, Robert F. Ladenson, *Is Academic Freedom Necessary?*, 5 LAW & PHIL. 59, 66 (1986) (exploring the ways in which Academic Freedom can be integrated into the law as a "specially protected class").

236. *See, e.g.*, Martin H. Malin & Robert Ladenson, *University Faculty Members' Right to Dissent: Toward a Unified Theory of Contactual and Constitutional Protection*, 16 U.C. DAVIS L. REV. 933, at 959-73 (1983).

237. *See, e.g.*, Robert M. O'Neill, *Academic Freedom and the Constitution*, 11 J.C. & U.L. 275, 290 (1984).

238. *See* Polishook, *supra* note 201, at 146 (describing the proliferation of the notion of Academic Freedom since the 1960's).

239. In a Letter circulated to campus organizations at the University of New Hampshire by an associate professor of women's studies, *quoted in* Richard Bernstein, *Guilty If Charged*, N.Y.. REVIEW OF BOOKS, Jan. 13, 1994, at 14, the following critique was made:

> The AAUP, indeed, academia itself, has traditionally been dominated by white heterosexual men and the First Amendment and Academic Freedom (I'll call them FAF) have traditionally protected the rights of white heterosexual men. Most of us are silenced by existing social conditions before we get the power to speak out in any way where FAF might protect us. So forgive us if we don't get all teary-eyed about FAF. Perhaps to you it's as sacrosanct as the flag or the national anthem; to us strict construction of the First Amendment is just another yoke around our necks. *Id.*

See also STANLEY E. FISH, THERE IS NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO, 201-02 (1993).

240. Gary Pavela, *Deconstructing Academic Freedom*, 22 J.C. & U.L. 359, 362 (1995) (book review).

and obligations. But legal principles and academic ideals sometimes mask the realities. Just as constitutional and academic guarantees are not absolute, their application is often a double-edged sword. As we have seen, the same places where such a liberty was vociferously advocated in the 'Sixties were the very sites of its repression in the 'Nineties. The same people who stridently object to "Eurocentric white male-dominated" orthodoxies show themselves to be rigid about their own multicultural and deconstructionist agendas.[241] Many modern proponents of academic freedom appear to invoke it only on behalf of those who buy into a radical perspective. Their critique of traditional merit systems may have distinct anti-Semitic repercussions as well. Their assault on truth and memory renders established norms of reason and logic virtually useless.

The multiculturalist momentum (some might call it an onslaught) also makes it difficult to deal with bigotry masquerading as academic discourse and to respond to the inevitable and underlying question, what rights and responsibilities can be supported by the law? The rulings vary from case to case. A statewide regulation in West Virginia prohibited the sale of items or solicitation of funds on a public college campus, as well as distribution of literature by outside organizations.[242] The court found that the regulation at issue was a reasonable "manner" restriction that did not unduly restrict the plaintiffs' right to free expression.[243] The court further stated that the college campus was "generally open for public debate," but that restricting fund-raising by outside groups was a valid means of furthering educational goals by protecting students from the diversion of often-unwanted solicitation.[244] More recently, the same court held that a preacher had no First Amendment right to object to a state regulation invoked by the Virginia Polytechnic Institute, which required outside speakers to obtain an official university sponsor in order to use school facilities.[245]

Perhaps the most important practical concern of universities faced with the question of whether to provide a forum for a controversial speaker is that of security. Can the cost of additional safety forces justify restricting or canceling appearances by outsiders? Several lower courts

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241. For a thorough critique of multiculturalism and its adherents, *see generally* DANIEL A. FARBER AND SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997).

242. *See* Glover v. Cole, 762 F.2d 1198-99 (4th Cir. 1985).

243. *See id.* at 1201, 1203.

244. *See id.* at 1203.

245. *See* Gilles v. Torgersen, 71 F.3d 497, 498-501 (4th Cir. 1995). The appellate Court held that, while the case presented "interesting" constitutional questions that may need to be resolved, the case was not justiciable because the preacher did not assert an inability to obtain sponsorship. *See id.* at 500-01.

have answered that question in the affirmative. For example, Clemson University's denial of a request for a "Vietnam Moratorium Day Observance," to which students from colleges across seven states would be invited, was upheld when university officials claimed they feared a violent disruption, given that one had occurred during a similar observance held a few weeks earlier.[246] However, a policy that attempts to deny general university funding for controversial speakers, or that requires the host student organization to pay for additional security, is probably invalid. Such a rule would likely be held as unconstitutionally quelling controversial speech, while allowing "safe" speech by allocating general funding to pay for such speech.[247] Some institutions have sought to discourage groups from inviting hate speakers to campus by making the groups themselves responsible for the costs of additional security or damage-insurance policies. This practice would likely be ruled unconstitutional if not applied to all host groups. For similar reasons, a university "should not permit a speaker's own security staff to dictate security arrangements."[248]

IV. REASON IN THE MARKETPLACE OF IDEAS: COMMON-SENSE GUIDELINES

In dealing with the new breed of controversial speakers on campus, there is an obvious need for strong and determined leadership to underscore the true goals of universities: education, as opposed to indoctrination; fostering dialogue, as opposed to festering discord; emphasizing commonality as an even higher value than diversity.[249] Each case might be handled differently, depending upon the circumstances; but in general, the

246. *See generally* Clemson Univ. Vietnam Moratorium Comm. v. Clemson Univ., 306 F. Supp. 129 (D.S.C. 1969). Clemson would have had to bolster its own security force by approximately 125 state marshalls to guard against violence. *See id.* at 131. Even though the university had previously allowed public attendance when outside speakers were invited onto campus, the court found that it had no duty to extend constitutional rights to anyone other than its own students and faculty. The administration had told plaintiffs that they could host a Vietnam Moratorium Day meeting for Clemson students exclusively, inviting outside speakers of the students' choosing, which the court found to be sufficient accordance of the students' right to free expression. *See id.* at 131-32. In finding that Clemson had no duty to import outside police officers in order to control the conduct of non-Clemson students on campus, the court noted that several other universities had recently brought in outside security forces for potentially disruptive events, and that their "very presence . . . [was] an incitement to violence by the students." *Id.* at 133.

247. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 828-29 (1995).

248. MARCUS, *supra* note 10, at 160.

249. *See id*; *see also* Burt Neuborne, *Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech*, 27 HARV. C.R.-C.L. L. REV. 371, 398-99 (1992).

university should seek to assure civility and a reasonable opportunity to debate or rebut the speaker's views. In addition, the institution should anticipate and be able to respond quickly and decisively to unexpected hate speech.

At the same time, however, university regulations that may result in an inhibition of free expression on campus (especially by students and faculty) must be drafted in a manner that clearly states the educational purposes furthered by such a policy; that is to say, the goal must be to limit speech that "materially disrupt[s] the educational process."[250] Once a university adopts a policy of inviting outside speakers onto its campus, any regulations must be narrowly tailored to achieve only the governmental interest of preventing violence on campus.[251] While universities retain the right to determine their own academic goals, the only constitutionally permissible restriction on free speech to attain those goals appears to be a complete ban on all outside speakers. University officials cannot pick and choose which views they wish students to hear. An administration's unsupported apprehension of a campus disturbance, or its fear of offending student groups or the community at large, are inadequate bases for refusing to allow recognized student groups to invite controversial outside speakers on campus. Moreover, the few cases that have upheld administrators' regulatory actions on security bases seemed to require actual past violence resulting from the outside speaker at issue.[252]

When drafting speech regulations, universities should beware that certain phrases have been judicially struck down as unconstitutionally vague or overbroad. For example, a regulation that prohibits "advocacy" of unlawful action by an outside speaker will likely be deemed invalid, unless the speaker is calling for immediate unlawful action. The mere "presence" of a controversial person on campus as an incitement is likely an insufficient basis for a college to bar that person's speech; the issues are what the speaker says and does, not his presence. "In such circumstances . . . attendant law enforcement officers must quell the mob, not the speaker."[253] Another problematic regulation is the type which prohibits religious services on campus. While such a ban is constitutionally permitted (if not required), only religious services can be

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250. *Healy*, 408 U.S. at 184, 187-89 (internal citation omitted).

251. *See* Thomas v. Collins, 323 U.S. 516, 530 (1945); Cohen v. San Bernardino College, 883 F. Supp. 1407, 1409-10 (1995).

252. Likewise, if the speaker's past conduct is an issue, the timing of past violent episodes is relevant; if violence occurred on a college campus many years ago, that fact standing alone may be insufficient to ban the speaker. *See Stacy*, 306 F. Supp. at 976.

253. *Id.* at 977.

banned, not discussion of religious topics.[254]

In reviewing a university's speech policies, a court is also likely to look for a standard of reasonableness. For example, where a regulation requires a speaker's topic to be "relevant" or "competent" as it relates to educational goals, the rule should specify which individual or office is to judge what topics are relevant and what criteria will be used. Similarly, a type of regulation that prohibits speakers who "speak in a libelous, scurrilous or defamatory manner or in violation of public laws which prohibit incitement to riot" would likely require specificity regarding who will decide such matters and by what standards.[255] While the courts have held that a university's reasonable time, place, and manner restrictions on speech are constitutionally permitted, a general regulation that allows officials to bar a speaker where the invitation or its timing are not "in the best interests of the University" will likely be struck down as unconstitutionally vague.[256]

Universities which seek to prohibit on-campus speech that disparages or is offensive to racial and ethnic minorities may appear to further the educational goal of maintaining order on campus, as well as restraining "low-value" speech which possesses the sole purpose of degrading people. However, no such code has yet to pass constitutional muster.[257]

A model anti-harassment regulation has been suggested for use by universities seeking to protect and attract minority students. It prohibits expression that is directed at religious, racial, or historically oppressed groups, is derogatory to the point of directly or impliedly denying the humanity of the group, or is expressed in an exclusionary manner which threatens the academic or social participation of the group. This type of policy must be carefully drafted because it is content-based.[258]

The American Communication Association's *Model Campus Speech Code* suggests four areas that state and private institutions should address. The first focuses on the primary responsibility of the university community to protect the right of free expression. The second obligates the university to provide and publicize a public common area where the academic community and non affiliated persons can peacefully dissent and

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254. *Id.* at 975.

255. *See* Smith v. Univ. of Tennessee, 300 F. Supp. 777, 779, 782-83 (E.D. Tenn. 1969).

256. *Id.* at 783.

257. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution." Cantwell v. Connecticut, 310 U.S. 296, 309-310 (1940); *but see generally* Deborah R. Schwartz, *A First Amendment Justification for Regulating Racist Speech on Campus*, 40 CASE W. RES. L. REV. 733 (1990).

258. *See* Schwartz, *supra* note 257, at 777-78.

demonstrate. The third section protects any speaker who faculty or students have invited to express his or her viewpoints. Under this section, the university should commit itself to maintaining an atmosphere where open, vigorous debate can occur, and provide funding to student organizations who invite speakers on a content-neutral basis. The right to dissent, in its many forms, is permitted so long as the audience does not substantially interfere with the speaker's ability to communicate. Finally, the Model Code suggests sanctions for those who violate the free speech rights of others, including expulsion, arrest, warning, written reprimand, sensitivity training, suspension, or a note of the violation placed on a transcript or personnel file.[259]

In general, universities must draft speech policies carefully, considering the type of environment regulated, its resulting standard of judicial review, and whether the regulated speech affects student/faculty rights or those of the general public. Where the university, especially a public college, has opened a forum to outside speakers, it is likely that a decision to exclude controversial speakers will be held unconstitutional unless clear and substantial evidence suggests the likelihood of serious disturbances on campus. Just as students and faculty at a public institution cannot be denied an exchange of ideas and opinions, initiated either by themselves or outsiders, neither are university administrators powerless to maintain order in pursuing their educational mission.

University officials faced with the prospect of a controversial speaker on campus should make it clear that neither violence, destruction of property, nor hecklers' vetoes permitted. On the other hand, counter-demonstrations to hate speech will likewise be protected, as will protests on other controversial issues. Moreover, in appropriate circumstances such demonstrations may be joined by administrators and other campus leaders. Civil discourse should always be encouraged, with the university taking the moral high ground.[260] In addition, virtually any college or university, whether public or private, should adhere to guidelines suggested by a careful and reasoned review of established case law and commentary:

- *Develop and publish the procedures that must be followed in order for an outside speaker to be brought onto campus.* Contact everyone in the chain of administrative command

259. *ACA Model Campus Speech Code, available in,* <http://cavern.uark.edu/comminfo/www/campus.speech.html>.

260. The president of the university or college should know about controversial speakers and advise those who invited them to consider the repercussions and perhaps urge them to withdraw the invitation. He or she might consider reaching out as well to alienated groups and joining a protest demonstration. *See* MARCUS, *supra* note 10, at 160.

(including the president or chancellor) each time a speaker's appearance is at issue. Do not vary from these procedures: An exception made in one speaker's favor may be cited later by another who's been denied a similar platform to support a claim that the discriminatory application of the procedures violated the Equal Protection Clause.

- *Make the bases for canceling a speaker clear and thorough, and apply them consistently. A speaker can be constitutionally barred or canceled if (a) there is a likelihood of clear and present danger on the basis of past appearances that resulted in disruptions (or if students who oppose the speaker present a realistic threat of imminent violence),*[261] *and/or (b) the sponsoring institution is unable to meet security requirements.*[262] Even though this choice might have the effect of a heckler's veto, the university should assert its responsibility to avoid a material disruption of the educational process.[263] Arguments can also be made that the public university is less capable than the state itself in managing violent confrontations resulting from public speech; that, acting to a limited degree in loco parentis, it has a greater responsibility to protect against violent responses by their students than does the state to curb those of its citizens; and that it should have the capacity to punish those who create disruptions on campus (by either canceling the speaker's engagement and/or expelling the students who threatened the trouble).

- *Do not cancel a speaker based merely on the content of the*

261. This rule may be applied even if the speaker played not part in the disturbance. Although there may be no clear and present danger if the speaker is attacked by hecklers, the likelihood of such a scenario may still qualify under existing jurisprudence as the type of potential disruption which satisfies the Constitution in a public-university setting. *See* Holmes, *supra* note 48, at A1, B10 (noting that Howard turned down a request by Muhammad to speak at Howard a third time after he was wounded at a rally in California); *see also* Melton v. Young, 465 F.2d 1332, 1333-35 (6th Cir. 1972) (student's jacket modeled on rebel flag was banned as a "provocative symbol" about one year after the school had to discontinue using the Confederate flag as their school flag because this had incited various disturbances that culminated in the imposition of a city-wide curfew).

262. This standard would have less of an effect on speakers who can supply their own security, although the choice of security should be left to the college or university. A school might decline to use a speaker's own security force if it fears that by doing so it would compromise its own standards. *See* Melillo & Harris, *supra* note 50, at B1 (reporting that when the Howard auditorium started filling up, the Nation of Islam security force gave priority seating to black men).

263. *See* Pam Belluck, *Appearance by Farrakhan Aide Roils a CUNY Campus,* N.Y. TIMES, Nov. 7, 1995, at B3. The reporter discusses the decision of CUNY's President to let Muhammad speak, though he had tried to cancel his speech, for fear that students who supported him would be injured in a clash with police. Certainly this is not a heckler's veto situation (it is in fact the opposite), but if the possibility of violence to students inspired a President to cancel a speaker, some courts might overlook the heckler's veto.

speech or the speaker's reputation or character.[264]

- *Refrain from using "legalese."*[265]
- *In the absence of exceptional circumstances, grant only one or two administrators the power to cancel a speaker's appearance.*[266]
- Do not allow a controversial speaker unilaterally to dictate security arrangements.

V. CONCLUSION

Most courts adhere to a public policy that the university should be preserved as a "marketplace of ideas," while at the same time maintaining the right of administrators to make decisions they deem in the best interest of their institution's educational mission. The tension inherent in those competing values is reflected by what happens when controversial speech occurs on campus. Much of the case law is a vestige of campus unrest in the late '60's and early '70's, when the courts sought strongly to protect what they perceived as the constitutional right of students to hear all types of views on any subject. That principle has been sorely tested with the rise of politically-correct and radical agendas, promoted by academic deconstructionists and outspoken social reformers. One result has been the promulgation of speech and conduct codes - all of which when challenged in court, have to date been found unconstitutional.

Those speech and conduct codes which have yet to be challenged continue to be applied arbitrarily. New rules and regulations, and the inevitable litigation they spawn, are likely to be seen in the future - unless universities adopt policies and procedures that allow them to keep controversial speech on campus within realistic and constitutional limits, while encouraging vigorous, constructive, and responsible commerce in the marketplace of ideas.

The guidelines offered above should be useful for that purpose, while at the same time keeping proponents of hate, such as Khalid Muhammad, constitutionally at bay.

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264. *See, e.g.*, Dickson v. Sitterson, 280 F. Supp. 486, 497 (M.D. N.C. 1968); Snyder v. Board of Trustees, 286 F. Supp. 927, 933-934 (N.D. Ill. 1968).

265. Do not, for example, ban all speakers who would create a "clear or present danger" or "material disruption" on campus. Such language will likely be held void for vagueness. *See Stacy*, 306 F. Supp. at 976-977.

266. Even then, the power should be exercised only where there are clearly constitutional grounds to do so and the administration is invoked to give the appearance of finality. *See, e.g.*, *Brooks*, 412 F.2d at 1173 (internal citation omitted); *Stacy*, 306 F. Supp. at 971.