

1996

# Contrasts and Comparisons among Mccarthyism, 1960s Student Activism and 1990s Faculty Fundamentalism

Neil W. Hamilton

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

## Recommended Citation

Hamilton, Neil W. (1996) "Contrasts and Comparisons among Mccarthyism, 1960s Student Activism and 1990s Faculty Fundamentalism," *William Mitchell Law Review*: Vol. 22: Iss. 2, Article 3.  
Available at: <http://open.mitchellhamline.edu/wmlr/vol22/iss2/3>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact [sean.felhofer@mitchellhamline.edu](mailto:sean.felhofer@mitchellhamline.edu).

© Mitchell Hamline School of Law

## CONTRASTS AND COMPARISONS AMONG McCARTHYISM, 1960s STUDENT ACTIVISM AND 1990s FACULTY FUNDAMENTALISM†

Neil W. Hamilton††

### I. INTRODUCTION

Periods of zealotry have been frequent in higher education in the United States since the emergence of the modern university after the Civil War. Throughout the past 125 years, higher education in the United States has experienced seven waves of zealotry, occurring approximately every fifteen to twenty years. Zealotry in each wave enforced a strong ideology. These periods of zealotry have originated both from outside and from within the university to enforce a variety of strong ideologies with religious, economic, political, social or cultural roots.

At any given time, a variety of ideologies are competing for acceptance within a free society and its universities. If a particular ideology becomes dominant in the culture outside the universities, extreme proponents of the dominant ideology may attempt to impose the ideology on all forms of inquiry and expression within the university—in ideas, in speech, in action, and in association. Examples are the religious fundamentalism of administrators and faculty in the nineteenth century, the unfettered capitalism of trustees and regents at the end of the nineteenth century, the patriotism of World War I, the anticommunism prior to World War II, and McCarthyism of the late 1940s and early 1950s.<sup>1</sup>

---

† This essay is based on a speech Professor Hamilton gave at the Academic Freedom Symposium. The speech and this essay borrow from chapters two and three of Professor Hamilton's book, *ZEALOTRY AND ACADEMIC FREEDOM, A LEGAL AND HISTORICAL PERSPECTIVE*, published in 1995 by Transaction Publishers (Rutgers University, New Brunswick, New Jersey, 08903). The *William Mitchell Law Review* appreciates the willingness of Transaction Publishers to permit the use of this material.

†† Neil W. Hamilton is Trustees Professor of Regulatory Policy at William Mitchell College of Law in St. Paul, Minnesota.

1. These five waves are analyzed in detail in NEIL HAMILTON, *ZEALOTRY AND ACADEMIC FREEDOM* 9-31 (1995).

A strong ideology may also become dominant within the faculty or student body of the university itself and lead to populist intimidation from extreme proponents of the dominant ideology. They will seek to eliminate heresy. While the five periods of zealotry up to the mid-1960s were first initiated by lay persons outside the student body and faculty, the last two waves were initiated within these two groups. Student activism in the 1960s was the first wave of zealotry since the Civil War in the United States to involve a broad populist intimidation directed at academic speech initiated by students from inside the university. The fundamentalism of the radical Academic Left in the late 1980s and early 1990s has been the first period of zealotry in higher education in the United States involving a populist intimidation initiated principally by faculty.<sup>2</sup>

During any particular period, it was difficult to predict the ideological direction from which the next wave of zealotry would come. For example, who could have predicted in 1954 that within thirteen years the activism of the late 1960s would come from the New Left and would be initiated by students?

In each period, zealots have labeled disagreement as heresy, demonstrating the moral turpitude of the heretic. Zealots then have employed a variety of coercive tactics to harass and eliminate heretical academic thought and speech. Termination of employment has been only one of many ways of intimidating a scholar. Among the other threats have been harassment and vilification through public accusations of moral turpitude, social ostracism, investigations, tribunals, disruption of classes, and adverse employment decisions for candidates for appointment, and untenured and tenured faculty short of termination. Adverse employment decisions short of termination have included threats to initial appointment, promotion, research funds, salary increases, reasonable teaching loads and other professional opportunities outside the university.

Zealots have not been content to look for overt forms of heresy; they have sought also to penalize subtle traces of heresy in ideas. Any belief or association that raised doubts in their minds became evidence of heresy. Zealots also needed a supply of symbolic targets whom they could use to incite public passion and to create fear in others. As Hofstadter and Metzger

---

2. See *id.* at 31-138 (analyzing these two waves in detail).

observed almost forty years ago, "In a situation where the margin of safe divergence is obscure, the pale of orthodoxy undiscernible, the penalties of heresy unpredictable, the cautious man will blunder and the man of moderation will be martyred."<sup>3</sup>

The faculty's response to zealotry has generally been to acquiesce silently to the coercive tactics and, thus, to condone them. Faculty members generally do not publicly defend academic freedom. The results are that the coercive tactics have silenced not only the target, but also the vastly greater number of potential speakers who steer wide of possible punishment. In each period, zealots have distorted academic inquiry and speech by imposing significant restraints on the critique of accepted hypotheses and the presentation of new hypotheses.

Comparing just the patriotism of World War I with McCarthyism, Hofstadter and Metzger arrive at strikingly similar observations to those in this essay. In both of those periods, suspicion frayed the social fabric; pathological types rose to prominence; the informer's repeated accusations of moral turpitude acquired the public's sanction; the bully's defamation became socially acceptable; and the investigator was allowed to make an inquisition without the customary judicial restraint. Finally, at both times the university community and the public, called upon to judge difficult issues of individual guilt or innocence, took refuge in the assumption that where there is smoke, there must be fire, and did not inform itself whether there may not in fact be simply a smoke screen.<sup>4</sup>

Similarly edifying is a comparison of the superpatriotism underlying the waves of zealotry during World War I, prior to World War II and McCarthyism. Essentially this zealotry from outside the walls of the university and principally from the far right was the source of three separate waves of suppression within the university over forty years. Finally, during the late 1950s and 1960s, a widening consensus developed within the society that this superpatriotic zealotry was wrong, and had done great harm to the academy. Historian Arthur Schlesinger, Jr., observed in 1994 that "in the good old days, conservatives and hyperpatriots were the militant advocates of repression and

---

3. RICHARD HOFSTADTER & WALTER METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 327 (1955).

4. *Id.* at 505.

ensorship.”<sup>5</sup> This history of three waves of zealotry over forty years motivated by superpatriotism, combined with the much earlier history of the long struggle against a zealotry motivated by religious fundamentalism, has conditioned the generations of academics developing from the 1960s to the present to perceive the far right and religious fundamentalism from outside the walls as the major threats to academic freedom.

Comparisons among the last three waves of zealotry, McCarthyism, student activism of the 1960s, and the current fundamentalism of the radical Academic Left, are similarly instructive. The fundamentalist Academic Left has borrowed tactics from both McCarthyism and the student activism of the 1960s. Should another wave of zealotry occur in the next twenty years, the coercive tactics employed would probably build on those successful in the last three waves.

## II. SIMILARITIES BETWEEN MCCARTHYISM AND THE CURRENT FUNDAMENTALISM

Extreme proponents of the ideology of anticommunism during the late 1940s and early 1950s and fundamentalism from the radical Academic Left today have employed similar tactics of public accusations of moral turpitude, ostracism, investigations or the threat of investigation, tribunals, and threats to employment to suppress competent opposing ideas and positions. During McCarthyism, accusations of moral turpitude were made based upon conjecture, hearsay, gossip, and innuendo, not remotely akin to evidence. The accusation itself served as evidence. Similar manipulative persuasion has been used in the current wave. Once public accusations of moral turpitude against an academic were made during either period, the professor has been assumed guilty by a significant proportion of the academic community, and has carried the burden to prove a negative regarding his or her state of mind. These accused must demonstrate that they have no covert disloyalty or bigotry through loyalty oaths or public apologies for unconscious bigotry. For some in the academic community, the accusation alone has been accepted as fact.

There is a wide spectrum of academic opinion on the

---

5. Arthur Schlesinger, Jr., Address at City University of New York Annual Doctoral Commencement, at 3-4 (May 26, 1994) (transcript on file with author).

degree to which the use of such tactics currently is similar to the use of such tactics during McCarthyism. For example, at one end of the spectrum is graduate student John Wilson's claim that conservative foundations have funded books and articles containing the "errors, distortions, and outright lies" that have created "the myth of political correctness."<sup>6</sup> Wilson asserts that "Conservatives' attacks on political correctness have been well funded and carefully organized."<sup>7</sup> "Nearly every critic of higher education in the past decade has been supported by a conservative foundation or think tank."<sup>8</sup> Wilson offers (1) no evidence of a "carefully organized" plan among conservative foundations and scholars to create distortions and lies; (2) no evidence that "nearly every" critic of higher education has been funded by a conservative foundation; and (3) no evidence that accepting grants for research from a foundation compromises the integrity of the scholarship funded. In the writing of my book on zealotry and academic freedom, for example, I had no assistance from any conservative foundation or group. Wilson does rely on several tactics common in McCarthyism. He makes accusations of moral turpitude based on conjecture not remotely akin to scholarly evidence and argument. He also uses a guilt by association argument that a scholar accepting a grant from alleged conservative foundations compromises scholarly integrity.

A more common claim is that fears of coercive tactics are grossly exaggerated and based on the same few anecdotes endlessly recycled.<sup>9</sup> Chapter two of *Zealotry and Academic Freedom* provides a much broader and more exhaustive body of evidence on the coercive tactics of the fundamentalist academic left than has appeared in other research on this topic.<sup>10</sup> Since completion of the book manuscript in early 1995, evidence of coercion by zealots continues to accumulate. Recounting more stories of coercion adds little to the substantial evidence presented in the book, but two recent surveys provide additional insight. In April

---

6. JOHN K. WILSON, *THE MYTH OF POLITICAL CORRECTNESS* ix (1995).

7. *Id.* at 29.

8. *Id.* at 26. As evidence, Wilson points out that over a ten year period, Olin Foundation made six grants to individual scholars (Dinesh D'Souza, David Horowitz, Christine Hoff Sommers, Linda Chevez, Carol Iannone and Alan Bloim) and the Smith Richardson and Lynde and Hesse Bradley Foundation made grants to Richard Bernstein. *Id.*

9. See HAMILTON, *supra* note 1, at 132-34 & nn.247-58.

10. See HAMILTON, *supra* note 1, at 55-138.

of 1995, a survey of 600 randomly selected students at Carleton College produced a statistically significant 193 responses. Seventy-three percent of the respondents agree or strongly agree that "political correctness interferes with honest discussion of diversity; and no one strongly disagreed with that statement."<sup>11</sup> Maritz Research, a national polling firm, interviewed 749 students on a variety of fifty public and private, and small and large colleges and university campuses.<sup>12</sup> The respondents indicated whether they "consider themselves politically correct." The survey had the following findings:

**TABLE 1**

	PC STUDENTS	NON-PC STUDENTS
Do the students sometimes censor their [own] language or adjust their behavior because of political correctness? AGREE AGREE SOMEWHAT	27% 42%	6% 39%
Political correctness has been constructive on their campus. DISAGREE SOMEWHAT DISAGREE	30% 10%	40% 43%
Political correctness on campus has: GONE TOO FAR NOT FAR ENOUGH JUST RIGHT	22% 31% 46%	60% 8% 32%
(Twenty-eight percent of freshmen think political correctness has gone too far versus 37% of the seniors.)		

These data indicate a student perception that political correct-

11. CARE, *The CARE Survey: Summary of the Findings* (Apr. 1995) (on file with author).

12. Maritz Research, College Campus Survey conducted for *Playboy Magazine* (Apr. 1995) (research results on file with author).

ness is a significant problem on campus. The data also indicate that those respondents who are sympathetic to the goals of zealots (the students who identify themselves as politically correct) tend to see a less significant problem of suppression of speech. Lazarsfeld and Thielens reported a similar phenomenon in their survey study of social scientists during McCarthyism.<sup>13</sup>

Taking also a position that minimizes any concern over coercion by the fundamentalist Academic Left, Georgetown law professor Mark Tushnet argues that while there may be efforts by liberals to enforce their views against conservatives, there is also a parallel phenomenon of "enforcement" of conservative ideology against liberals, feminists and others.<sup>14</sup> In any event, Professor Tushnet asserts that there is no similarity between McCarthyism and the current zealotry. Citing Ellen Schrecker's book, *No Ivory Tower: McCarthyism and the Universities*, he concludes that what made McCarthyism wrong was that behind Senator McCarthy's expressions lay the force of the government—or more broadly, official power. In contrast, discussions of political correctness, he argues, rarely provide examples of incidents in which, at the end of the day, official power was used to enforce political correctness.<sup>15</sup>

Tushnet's conclusion is a misreading of Schrecker's thesis and a substantial understatement of the coercive tactics em-

13. See HAMILTON, *supra* note 1, at 143.

14. Mark Tushnet, *Political Correctness, the Law, and the Legal Academy*, 4 YALE J.L. & HUMAN. 127-29 (1992). In 1985, radical right activists formed an organization called Accuracy in Academia (AIA). In order to document and oppose efforts by the radical Academic Left to use the classroom for political indoctrination, AIA asked students to report Marxist and anti-American statements by professors. The press, the AAUP, administrators, and even the secretary of education, William Bennett, condemned these tactics. AIA dropped the tactic if reporting on professors and was ignored. See JULIUS GETMAN, IN THE COMPANY OF SCHOLARS 89-90 (1992); JAMES D. HUNTER, CULTURE WARS 214-15 (1990). There have been incidents where conservative student newspapers unfairly or erroneously report accusations of moral turpitude against faculty members with whom the editors disagree. Tushnet, *supra*, at 156. John Wilson also describes incidents of "conservative correctness": feminist, gay and lesbian journals were defaced and hidden in the University of New Mexico library; the conservative president of Hillsdale College disciplined conservative faculty for criticism of the administration; President John Silber of Boston University allegedly hounds and disadvantages leftist faculty; conservative Harvard Law School faculty allegedly blocked tenure of professors advocating critical legal studies; leftist faculty have in a number of instances received hate mail; and gay and lesbian students and faculty have in a number of instances been harassed. JOHN K. WILSON, THE MYTH OF POLITICAL CORRECTNESS 29-52 (1995).

15. Tushnet, *supra* note 14, at 152.



ployed by the fundamentalist Academic Left. It is also misguided to argue that coercive tactics enforcing conservative ideology offset those enforcing fundamentalist Left ideology. Schrecker's major argument is that McCarthyism was played out in universities as a two-stage process. Government, usually by initiating an investigation, administered the first stage by identifying objectionable groups and individuals. The second stage of punishment was administered by the press, the public, the university trustees and administrators, and faculty colleagues. Schrecker points out that accusations of moral turpitude had a shattering effect on the lives and careers of the accused. They were ostracized. They could not obtain grants, promotions, or other professional opportunities. Many universities instituted separate investigations and tribunals. Ultimately, approximately ninety to one hundred professors lost their jobs.

The critical point that Schrecker emphasizes is that the press, the public, university administrators and trustees, and faculty colleagues imposed punishment on the accused by public humiliation, ostracism, additional investigations, tribunals, diminished career opportunity, and in roughly ninety to one hundred cases, termination. Schrecker comments that "being fired, it turned out, did not always produce as much anxiety as the uncertainty [created by threats, accusations, investigations, and hearings] that preceded the actual, or possible dismissal. This meant that many of the people who kept jobs may have suffered just as much emotionally as the people who lost theirs."<sup>16</sup> Writing on the topic of misperceptions concerning academic freedom, Professor Fritz Machlup concurs that there are many ways to intimidate a scholar other than termination of employment. Among these are threats to promotion, salary increases, research funds, reasonable teaching loads, and privacy. Intimidation also occurs through vilification and hostile investigations that drain money, time, and emotional and physical

---

16. ELLEN W. SCHRECKER, *NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES* 303 (1986). Professor Lionel Lewis observes that, "Perhaps the most salient characteristic of this crusade was widely publicized, indiscriminate, and largely unsubstantiated allegations of disloyalty to the country. . . . Indeed, this is what McCarthyism . . . has come to mean." LIONEL S. LEWIS, *THE COLD WAR AND ACADEMIC GOVERNANCE* 3 (1993).

energy.<sup>17</sup>

Contrary to Tushnet's conclusion, a comparison of Schrecker's analysis of the tactics and results of McCarthyism and this essay's analysis of the tactics and results of the current fundamentalism shows significant similarities. Tushnet's argument that efforts by conservatives to "enforce" their ideologies offset efforts by radical left fundamentalists is badly flawed. There is some evidence of conservative zealotry, indeed it is possible that political developments outside the walls could spawn a wave of conservative zealotry, but such coercion is equally wrong.

Taking a position close to that of Tushnet, Harvard Professor Randall Kennedy concedes that there is a subset of faculty who display an "unremitting hostility towards those who disagree with their 'line'," but that, nonetheless, the evidence "fails even to come close to suggesting the systematic and wholesale repression that has come to be associated with the unscrupulous thuggery of Senator Joseph R. McCarthy."<sup>18</sup> During the "era of real McCarthyism," Kennedy points out that congressional committees investigated allegations of moral turpitude, some universities imposed loyalty oaths, candidates for faculty positions were excluded on the basis of political associations, and untenured and even tenured professors were terminated for political reasons at some institutions. "Fortunately, nothing like that exists on campuses nowadays."<sup>19</sup>

Professor Kennedy's assertion of "systematic and wholesale repression" during McCarthyism overgeneralizes and, thus, misrepresents what happened at that time. His assertion that "nothing like that exists on campus nowadays" substantially understates the repression of the current zealotry. Data from the Lazarsfeld and Thielens study of 2,451 social scientists in 1955 point out Professor Kennedy's overgeneralization with regard to McCarthyism. The data indicate that the substantial majority of professors experienced no curtailment of their own academic freedom or that of their colleagues. Roughly one-fifth of all respondents felt that their academic freedom was directly

---

17. Fritz Machlup, *On Some Misconceptions Concerning Academic Freedom*, in *ACADEMIC FREEDOM TENURE* 177, 184-85 (Louis Joughin ed., 1969).

18. See Randall Kennedy, *The Political Correctness Scare*, 37 *LOY. L. REV.* 231, 235-36 (1991).

19. *Id.* at 236-37.

threatened. Conservative professors reported only one-half the level of concern or direct threat than did liberal professors. Since roughly seventy percent of the respondents voted Democratic in 1948 and 1952, this means that roughly twelve percent of the professors to the right of center felt threatened, compared to twenty-four percent of those to the left of center. Approximately one-tenth of all 2,451 respondents adjusted their speech and conduct to reduce their exposure. Less than two percent of all respondents felt their career had been adversely affected.<sup>20</sup> Professor Lionel Lewis' study indicates that the worst excess of McCarthyism, where a professor's appointment was threatened for allegedly radical political beliefs, was limited to fifty-eight institutions of higher education out of approximately 1900 existing over the decade of 1947-1956. Of the sixty-nine terminations that Lewis discusses, thirty-one occurred in 1949-1950 at the University of California and the remaining thirty-eight occurred over the other nine years.<sup>21</sup>

Professor Kennedy's assertion that "nothing" like McCarthyism exists on campuses nowadays simply ignores what is happening in the current zealotry. He concedes that public accusations of moral turpitude and ostracism to suppress competent academic inquiry and speech are occurring in some faculties.

At the conference, Professor Kennedy again emphasized that the fundamental difference between "the systematic and wholesale repression" of McCarthyism and the present zealotry is that official or administrative power from the top is not being used currently to suppress dissent. It would be best, Kennedy argued, for those currently donning the mantle of victims of suppression of academic speech to recognize that the opprobrium and hostility of colleagues toward dissenting ideas are simply part of academic life. Essentially, unless official sanctions from the top are evident, Kennedy argues, any danger to academic freedom is minimal. He sees no evidence of such official sanction.

Kennedy's argument that there are no official sanctions during the current zealotry cannot stand in the face of the evidence. The existence of *institutional prosecutorial structures to*

---

20. See HAMILTON, *supra* note 1, at 26-27 & nn.148-55, 143.

21. See *id.* at 27 & nn.152-57.

*carry out investigations and tribunals* for heretical speech was the essence of McCarthyism and is replicated on the campus today. Harassment and discrimination policies and speech codes combined with a prosecutorial diversity bureaucracy provide an institutional structure rich in opportunities to threaten investigation of speech and a tribunal.

A recent study gives more accurate data on these developments. In 1993-94, the Freedom Forum First Amendment Center at Vanderbilt University surveyed the 533 public colleges and universities that offer at least a bachelor's degree. Student handbooks or other materials were obtained from 384 schools.<sup>22</sup> Slightly more than sixty percent (231) of the schools surveyed prohibited harassment, which implicitly and often explicitly includes verbal harassment. Rules in this category banned all verbal abuse or verbal harassment and made no content distinctions.<sup>23</sup> If a similar proportion of the 149 schools that did not respond have similar rules, approximately 320 public colleges and universities would have rules banning verbal abuse and harassment. If the same proportion were true for the 1,269 private colleges and universities offering at least a bachelor's degree,<sup>24</sup> approximately 1,081 public and private universities would have rules forbidding verbal abuse and harassment.

Under these broad harassment and discrimination policies, complaints against pure speech will trigger an investigation. To enforce these codes and policies, the universities have created a bureaucracy to investigate and prosecute accusations against heretical speech. The combination of the speech codes and vague harassment and discrimination policies and a bureaucracy to enforce them threatens the freedom of academic inquiry and speech on major issues of the day for two reasons. First, the area of proscribed speech is not clearly defined. An accusation under

---

22. ARATI R. KORWAR, *WAR OF WORDS: SPEECH CODES AT PUBLIC COLLEGES AND UNIVERSITIES* 21 (The Freedom Forum First Amendment Center 1994).

23. *Id.* at 24-25 (almost 36 percent of the schools surveyed have rules punishing verbal abuse based on membership in a specific group). A survey of the 20 public universities with the largest student enrollment found that 10 of the universities had adopted policies that specifically address "hateful or harassing speech or conduct." Richard Page & Kay Hunnicutt, *Freedom for the Thought Fact We Hate*, 21 J.C. & U.L. 1, 4 (1994).

24. U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, *DIGEST OF EDUCATION STATISTICS* 269 (1993).

the codes or policies may occur simply because an oppressed person is offended by written or spoken comment. When professors must guess what conduct threatens serious sanctions, faculty will necessarily steer far wider of the prohibited zone. Any anti-hate speech rule inescapably entails some elastic terms, due to the inherent imprecision of key words and concepts common to all such rules. For example, the rules commonly employ one or more of the following terms: "demeaning," "disparaging," "harassing," "insulting," "intimidating" and "stigmatizing."<sup>25</sup> The reach of such vague terms is anything but clear, and it is inevitable that competent academic inquiry and speech will suffer accusations and investigations under these policies.<sup>26</sup>

The second reason that these speech policies threaten freedom of academic inquiry and speech is that once an accusation of bigotry is made, the bureaucracy goes forward and the accused is also subjected to an investigation and sometimes a tribunal. Many of these university bureaucracies appear to be influenced by fundamentalist academic left ideology.<sup>27</sup> The tribunals often do not observe procedures of fundamental due process fairness. The accused may not have the right to face and question the accuser. There may be short notice of the charges and tribunal, and the investigation and tribunal proceedings are secret.<sup>28</sup> The tribunals often do not consist solely of peers. Ironically, the accused's attempts to let sunshine into the process may subject the accused to further charges of retaliation.<sup>29</sup>

---

25. Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L. J. 484, 529.

26. See *id.* at 528 n.211, 529 n.217.

27. Christopher Shea, *Eye on the Judicial Process*, CHRON. HIGHER EDUC., Feb. 9, 1994, at A37.

28. *Id.*

29. If a professor accused under a speech policy informs other faculty members that the allegations are unfair, this may lead to additional charges of retaliation and reprisal. When Mesabi Community College Professor Richard Osborne publicly objected to an all-female counseling staff, the counselors filed a sexual harassment complaint against him with the Minnesota Community College System. Osborne sent a memo to members of the faculty association about the complaint and read a summary of the complaint at the faculty association meeting. After an investigation, the college's investigator found none of the allegations constituted sexual harassment, but that telling faculty members about the complaint was an act of retaliation and reprisal. The president put a letter of reprimand in Professor Osborne's file. *Mesabi Professor Sues Over Free Speech Rights*, STAR TRIBUNE (Minneapolis), Apr. 9, 1994, at 2B. In behalf of Professor Osborne, the Minnesota ACLU and the Center for Individual Rights filed suit

Since many students and faculty wish to avoid the embarrassment and toll of an accusation of bigotry, *and* an investigation, *and* a tribunal, they will steer wide through self-censorship, and competent academic discourse will suffer.<sup>30</sup> The threat of investigation and tribunal by zealous prosecutors under vague standards creates a vast penumbra of proscribed speech on major issues of the day.

Former Yale President Benno Schmidt points out that these speech policies empower groups of faculty and students with roving commissions to punish expression they consider offensive. Indeed, at Mankato State University the idea of a roving commission was literally true; members of the Women's Studies Department deployed a group of student informants to monitor sexist, racist, or homophobic language in classroom discussion.<sup>31</sup> Schmidt points out that speech policies enforced by faculty and students unleash a vague and unpredictable engine of suppression. Vague formulas, even in the hands of disciplined judges, are a disaster for free expression. "What can we expect of such formulations in the hands of students and faculty, however well-meaning?"<sup>32</sup>

These speech codes and harassment and discrimination policies have been used to suppress heretical views. In striking down the University of Michigan's speech code, the federal court found that the university had failed to consider the impact of a formal complaint, investigation, and possible hearing on speech protected by the First Amendment. The court cited several instances where the university applied the policy forcing a student through an investigation and hearing for allegedly harassing statements made in the course of academic discussion or research. For example, in December of 1988 a graduate student in social work was charged with harassment based on sexual orientation for classroom comments that he believed homosexuality was a disease and that he intended to develop a

---

in federal court alleging that the letter of reprimand abridged Osborne's academic freedom. As part of a settlement reached in October, 1994, the college agreed to rescind the letter of reprimand, to remove it from Osborne's file, and to transfer all documents relating to the sexual harassment case to the Office of the Attorney General. *Free Speech Wins*, 198 CIVIL LIBERTIES NEWS, Dec. 1994, at 1.

30. See Strossen, *supra* note 25, at 528-29.

31. Tony Blass, *Careful What You Say*, MINN. J. L. POL., July 1991, at 15.

32. Benno Schmidt, *Universities Must Defend Free Speech*, WALL ST. J. May 6, 1991, at A16.

counseling plan for making gay clients straight. Following an investigation, the speech policy administrator found probable cause for a formal hearing. While the formal hearing panel unanimously found the student not guilty of harassment based on sexual orientation, the court saw a First Amendment problem in subjecting protected speech to an investigation and tribunal.<sup>33</sup>

The speech subject to accusation and investigation under these speech policies ranged from academic and journalistic comment to rude and offensive slurs. The universities greatly underestimated both the difficulty of administration of speech policies and the opportunity they create for investigation to suppress and chill competent speech. Administrators and faculty forgot that the most successful tactic of McCarthyism was the creation of a formal apparatus to subject academic speech to accusations of moral turpitude, investigations, and tribunals. A

---

33. *Doe v. University of Mich.*, 721 F. Supp. 852, 865-66 (E.D. Mich. 1989). Another incident cited by the Michigan court involved the first class of a second-year dentistry course regarded as one of the most difficult in the curriculum. To allay fears, the instructor divided the students up into small sections to discuss anticipated problems. One student stated that "he had heard that minorities had a difficult time in the course and that he had heard that they were not treated fairly." The minority professor teaching the class filed a complaint on the grounds that the comment was unfair. Following investigation, the student agreed to apologize. *Id.* Another federal court in Michigan, citing a pattern of alleged speech policy violations being followed by investigation and enforcement, struck down the Central Michigan University speech code for similar reasons. *Dambrot v. Central Mich. Univ.*, 839 F. Supp. 477, 482 (E.D. Mich. 1993). A court in California struck down the Stanford University speech code because of its overbreadth, and content-based restrictions. *Corry v. Leland Stanford Junior Univ.*, Case No. 740309 (Santa Clara County, Calif. Super. Ct., Feb. 27, 1995).

Before a federal court struck down the University of Wisconsin's speech code, one of the code administrators on just one Wisconsin campus had investigated ten formal complaints and found no violations of the code. Several complaints were directed at critical cartoons in the student newspaper; another complaint was for calling several students "primitive dinosaurs," and so on. Across the University of Wisconsin system, nine students drew disciplinary sanctions after investigations. For example, a student was placed on probation and ordered into sensitivity training for calling another student "Shakazulu." Shaka was the founder of the Zulu empire in the nineteenth century. The accused student insisted that the term was not intended to be offensive, but the campus director of student life decided that the term was perceived by the listening student as rude and therefore found a violation of the speech code. The same administration failed to apply the rule after a student called another a "redneck," which is defined as a disparaging name for an uneducated white farm laborer. See Barry Siegel, *Fighting Words: It Seemed Like a Noble Idea - Regulating Hateful Language*, L.A. TIMES, Mar. 28, 1993, at 14; *UWM Post, Inc. v. Board of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1167, 1179 (E.D. Wis. 1991).

good example of the problem of overbreadth of speech codes and the use of investigation to suppress dissent and enforce fundamentalist ideology occurred at the University of Pennsylvania. George Pavlik, a student columnist for the college paper, wrote articles criticizing civil rights legislation, Martin Luther King Day (because Dr. King was an alleged plagiarist), and the multicultural attack on Eurocentric culture. In March 1993, a judicial inquiry officer informed Pavlik that thirty-one charges of racial harassment had been filed against him and were under investigation. When Pavlik asked for a copy of the exact charges, the judicial inquiry officer responded, "You need to ask?" The officer offered to dismiss the charges if Pavlik were to meet with thirty-one of his accusers for a "discussion." Pavlik rejected the settlement. Eventually Pavlik's faculty adviser convinced the president and the judicial inquiry office to dismiss the charges.<sup>34</sup>

---

34. Samuel Francis, *Penned in by PC Ethnic Cleansing*, WASH. TIMES, May 4, 1993, at F1; Richard Bernstein, *Play Penn*, NEW REPUBLIC, Aug. 2, 1993, at 16-17. A second example of the use of a speech code investigation at Penn to enforce fundamentalist ideology occurred in January, 1993. Around midnight on January 13, five African-American women were loudly celebrating outside of a high-rise dormitory. Eden Jacobowitz, a freshman coming to Penn from a yeshiva, was trying to write an English paper. He yelled out his window, "shut up you water buffalo," a translation of the Hebrew word, *behameh*. This is a common insult meaning foolish or rude person, used by one Hebrew-speaking Jew to another. It has no known racial connotation. Water buffalo are domesticated oxen used in Asia.

The police investigated a complaint of racial harassment. The judicial inquiry officer reviewed the police reports, interviewed Jacobowitz four times, and concluded that Jacobowitz had intended a racial slur because his accusers interpreted water buffalo to mean large black animals that live in Africa. She decided Jacobowitz was guilty of racial harassment. He could take her decision to hearing or take her offer of a settlement. The charges would be dropped if he would write a letter of apology and present a proposal for a sensitivity training program for himself. Notice of his violation of the racial harassment policy would stay in his file. Jacobowitz refused.

The case was scheduled for hearing on April 26. After the national press focused on the story, the hearing was delayed several times. A panel of faculty and students eventually heard only Jacobowitz's motion to dismiss on May 14. It denied the motion. A full hearing was scheduled for September 9. On May 25, the five women requested that the charges be dropped. Jacobowitz lived with the accusations of moral turpitude, investigations, tribunals, and the threat of serious sanctions for four months. Professor Alan Charles Kors, who represented Jacobowitz, commented that on most campuses, many people are intimidated. University of Pennsylvania physics professor Michael Cohen, who has taught for thirty-five years at Penn, believes that, "The racial harassment policy on campus is a general form of intimidation. . . . I was around during the McCarthy era and this is much worse, there has been nothing like this." Bernstein, *supra*, at 17; Michael Hinds, *Blacks at Penn Drop a Charge of Harassment*, N.Y. TIMES, May 25, 1993, at A-10; Christopher Shea, *Resolution of Racial-Harassment Case at U. of Penn.*



These policies are also used to suppress heretical speech by professors. For example, University of New Hampshire English professor Donald Silva, a thirty-year veteran teacher, was severely disciplined for classroom speech alleged to have violated a harassment policy. When students in a spring semester, 1992, technical writing course were having trouble understanding the concept of focus in their writing, Silva explained, "Focus is like sex. You seek a target. You zero in on your subject. You move from side to side. You close in on the subject. You bracket the subject and center on it. Focus connects experience and language. You and the subject become one." A few days later Silva gave an example of a simile that he originally saw twenty years earlier in a brochure on belly dancing. "Belly dancing," he said, "is like Jello on a plate with a vibrator under the plate."

Several women students complained about these classroom comments. The university's Sexual Harassment and Rape Prevention Program conducted an investigation. The director of Silva's school created shadow sections so that any of Silva's students who wished to do so could transfer out, and later formally reprimanded Silva, finding that his sexual remarks had "created an intimidating, hostile, and offensive academic environment." The director's proposed punishment was that Silva make a public apology, attend weekly counseling with a psychotherapist, and reimburse the university \$2,000 to cover the cost of setting up an alternative section of his course to accommodate students who could no longer study with him. Silva

---

*Leaves Everyone Dissatisfied*, CHRON. HIGHER EDUC., June 2, 1993, at A24-25; Nancy Roman, *Penn's Delay of Trial for "Stur" Called Political, But Not Correct*, WASH. TIMES, Apr. 27, 1993, at A-1; Robert Leiter, *'Water Buffalo' a Racial Stur? Penn. and Student Disagree*, ETHNIC NEWSWATCH, April 30, 1993, at 24; Laurence Stans, *Speech Impediments*, ROLLING STONE, Aug. 5, 1993, at 45-49.

The university's board of inquiry to look into the procedural aspects of the case concluded that the judicial procedure failed the five women who had requested that the charges be withdrawn. The causes of the denied justice were efforts by outside organizations such as the American Civil Liberties Union and the press and the adverse publicity the case generated. The harassment code contained flaws which could not withstand the stress of intense publicity. *Editorial, The Penn File: An Update*, WALL ST. J., Apr. 4, 1994, at A14.

In another case in April of 1994, a Kent State University senior displayed a sign at the student center urging homosexuals to "think straight." After several students complained to the administration, the senior took the sign down because he did not want to face a possible disciplinary hearing for what the student conduct code calls, "behavior deemed detrimental to the university community." Debra Dennis, *Student Alleges KSU Code Stifles Free Speech*, CLEV. PAIN DEALER, May 4, 1994, at 1B.

rejected this offer of settlement because even if his remarks did not reflect good judgment, they had not created an "offensive learning environment" and should have been protected by academic freedom.

Silva appeared at a formal hearing in early 1993, before a panel of two students, two faculty, and a staff person, all chosen and trained by the university. The panel found Silva's comments and his behavior to be offensive, intimidating, and contributing to a hostile academic environment. A few weeks later, an appeals panel, consisting of three faculty and two students selected and trained by the university, also found that Silva had created a hostile and intimidating environment. The administration adopted the recommendation of the appeals panel that Silva be suspended without pay for one year and that as a condition of returning to work, he undergo therapy at his own expense with a counselor selected by the university.<sup>35</sup>

In October 1993 Silva brought a lawsuit against the university claiming violation of his First Amendment rights. In September 1994, the federal court found that Silva's classroom statements "advanced his valid educational objective" and "were made in a professionally appropriate manner as part of a college class lecture." The judge further found that the application of the university's sexual harassment policy to Silva's classroom statements violated the First Amendment. The judge ordered the university to reinstate Silva pending a determination on the merits of his constitutional claims.<sup>36</sup> An AAUP investigating committee found that the University of New Hampshire had effectively placed Silva on indefinite suspension since he could not return until a university-selected counselor certified that Silva was "ready to return to the classroom." The committee found that this was tantamount to a dismissal. The committee further determined that the university had engaged in "numerous serious departures from standards of academic due process" in Silva's case. In December 1994, the university settled the lawsuit by reinstating Silva, agreeing to pay him \$170,000 in legal fees and \$60,000 in back pay, and removing all references to

---

35. Richard Bernstein, *Guilty If Charged*, N.Y. REV. OF BOOKS, Jan. 13, 1994, at 11-14; Courtney Leatherman, *U. of New Hampshire Wrestles With Issue of Sexual Harassment in Wake of Professor's Suspension*, CHRON. HIGHER EDUC., Jan. 12, 1994, at A18.

36. *Silva v. University of New Hampshire*, 888 F. Supp. 293, 331-32 (D.N.H. 1994).

allegations of sexual harassment from his file.<sup>37</sup>

An individual case like Silva's has an enormous impact on colleagues. The AAUP found that, "Many of the faculty members who met with the investigating committee voiced acute concern about conditions for academic freedom at the University of New Hampshire." Their concern is based in large measure upon the course of action followed in Professor Silva's case. These faculty members saw the administration as enforcing the university's sexual harassment policy without taking principles of academic freedom into adequate account. The investigating committee shares this view.<sup>38</sup>

In 1994 the American Association of University Professors (AAUP) heard from about three professors per week who believed they had been unfairly accused of sex harassment.<sup>39</sup>

37. American Association of University Professors, *Academic Freedom and Tenure: University of New Hampshire*, ACADEME, Nov.-Dec. 1994, at 78-80 (stating the findings of Committee A on Academic Freedom and Tenure).

38. *Id.* at 79.

39. Courtney Leatherman, *Fighting Back*, CHRON. HIGHER EDUC., Mar. 16, 1994, at A17, A18. The media have picked up some of these cases. For example, a male student in Professor Lawrence Jorgensen's class in the American political system at Los Angeles Valley College asked about the availability of extra credit. Jorgensen replied that, "No, I can't accept credit cards because I don't have a machine, I won't accept checks because of the economy, and I don't accept sexual favors because of AIDS. So you will all have to do the assigned work." A female student brought harassment charges. Professor Farrel Broslewsky, "designated representative" for Professor Jorgensen, wrote to the sexual harassment compliance officer that "[f]irst your office encourages the filing of malicious complaints of sexual harassment so that your office can open secret files on the accused instructor. You deny the instructor the opportunity to confront the accuser, you refuse access to the files, you obstruct efforts of the falsely accused instructor to be exonerated." Alexander Cockburn, *Beat the Devil*, THE NATION, Apr. 11, 1994 at 475, 476. At Wayne State University, a member of the Tlingit Indian tribe filed a complaint against a white professor who she said had used derogatory terms like "squaw" in a course on American Indians. Campus officials investigated the charge and said last summer [1993] that they had found no evidence of racism on the professor's part. At Iowa State, four students filed grievances complaining that a white teacher of African American history courses behaved curtly, cut off classroom discussion, and faced the "white" side of the classroom too much. The history department conducted an investigation which cleared the professor. Denise Magner, *When Whites Teach Black Studies*, CHRON. HIGHER EDUC., Dec. 1, 1993, at A19, A20. Responding to an argument that sexuality was socially learned, sociology professor Stephen Sanderson at Indiana University of Pennsylvania commented that while he was making no judgment on homosexuality, it was "a kind of biological abnormality." The student filed a complaint and an investigation followed. Sanderson believes that it is chilling to investigate complaints for stating views in the classroom. Leatherman, *supra* at A17, A18; see *Liberal Harassment*, DEMOCRATIC CULTURE, Spring, 1994, at 27-28 for two similar stories. At the University of Wisconsin, Milwaukee, two women graduate students filed sexual

Ann Franke, counsel for the AAUP, observes that universities have seen a sharp increase in the number of sexual harassment charges that focus on the content of classroom lectures or reading material. Sexual issues are becoming more difficult to discuss in the classroom, she believes. "The dividing line between what is sexual harassment and legitimate academic discourse is not well-established right now . . . and the concern is that a kind of self-censorship takes place and gets in the way of legitimate subjects of academic inquiry."<sup>40</sup> If these standards are allowed to stand, she warns, "Lectures will need to be so bland so that no one has a negative reaction to them."<sup>41</sup> The AAUP condemns sexual harassment, adds AAUP Associate General Secretary Jordan Kurland, but, "[o]ver the past two years, sexual harassment has been singled out as a very special sort of offense that requires a different kind of due process. We've always been opposed to that." On some campuses, the

---

harassment complaints against feminist theory Professor Jane Gallop in late 1992. They claimed that while Gallop pretended to be a feminist, in reality, she did not take these women seriously as students. After a lengthy investigation, the university's Office of Affirmative Action found no harassment but chastised Professor Gallop for something of which there had been no complaint: a too intense, too personal, too volatile *pedagogical* relationship with one student. Jane Gallop, *Feminism and Harassment Policy*, ACADEME, Sept.-Oct. 1994, at 16-18. A number of similar stories appear in Paul Trout, *Second Thoughts on Sexual Harassment*, MONTANA PROFESSOR, Spring, 1994, at 9-11.

In response to student demands that only a Native American should teach Native American Studies at Chico State University, History Professor Joseph Conlin wrote a letter to the editor of the local newspaper arguing that such demands were unrealistic because few Native Americans had Ph.D.'s in history and those that did took jobs at prestigious universities with higher salaries. "By the time you get to the level of Chico State University—speaking generally again—little more is required of Affirmative Action faculty than that they show evidence of a majority of vital life signs." In March, 1993, the American Indian Club filed complaints under the university's racial harassment policy. In May, the university's investigator found that Professor Conlin's written behavior was responsible for "creating a demeaning learning and working environment" in violation of the harassment policy and advised the president of possible sanctions, including suspension without pay, demotion, or dismissal. Five months later, the president wrote that while he deplored Conlin's disruptive, insensitive, inaccurate, and hurtful comments, he would not take disciplinary action in light of Conlin's First Amendment rights. A few weeks later, Chico State scrapped its racial harassment policy because of its unconstitutionality. Joseph Conlin, *How the Rudest Man in Chico Fought the Law — And Won*, SACRAMENTO BEE, Jan. 16, 1994, at F1; Richard Ek, *College Drops Harassment Ban*, S.F. CHRON., Dec. 4, 1993, at A18.

40. Dirk Johnson, "Word Cops" Monitor a Classroom, STAR TRIB. (Minneapolis), May 13, 1994, at 4A.

41. Brian Jackson, *Bible Scholar Sues to Fight Taint of Sexual Harassment*, CHICAGO SUN TIMES, Mar. 25, 1994, at News 5.

officials investigating these complaints act as “judge, jury and coach.”<sup>42</sup> In 1995, the AAUP adopted suggested policy and procedures for handling harassment complaints that delete all “hostile” climate or environment language and emphasize that hearing bodies should be composed of faculty peers.<sup>43</sup>

The institutionalized apparatus of prosecutors not only investigates complaints and empanels tribunals, but may also monitor classroom speech. For example, in fall semester, 1993, the Office of Equal Opportunity and Affirmative Action and the Women’s Center at the University of Minnesota created a program of Classroom Climate Advisors. If a student feels uncomfortable about a race or gender classroom- or course-related issue, the student can request the appointment of a classroom climate advisor who will help both to develop a strategy to deal with the problem and to implement it. The advisor will also accompany the student to see the instructor. If this is unsuccessful, the student can file a formal complaint.<sup>44</sup>

The threat of investigation and tribunal is chilling. The creation of an institutionalized apparatus of zealous prosecutors within the university itself to monitor speech, conduct investigations of speech under vague standards, and support tribunals sends an unmistakable and threatening message to faculty and students: Steer clear of the possibility of offending any oppressed person or group, or risk accusation, investigation, and tribunal.

Another variation on the same theme is the threat of investigation by professional organizations. For example, the American Historical Association has adopted a Statement on Standards of Professional Conduct that defines sexual harassment to include “all behavior that prevents or impairs an individual’s full enjoyment of educational or workplace rights, benefits, environment or opportunities, such as generalized sexist remarks or behavior.”<sup>45</sup> The Executive Director is authorized to investigate complaints by requesting the accused to respond

---

42. Leatherman, *supra* note 39, at 18.

43. American Association of University Professors, *Report of Committee A, 1994-95, ACADEME*, Sept.-Oct. 1995, at 51.

44. Memorandum to faculty from Patricia Mullen, Director of the Office of Equal Opportunity and Affirmative Action and Betty Kroll, Director of the Minnesota Women’s Center (Aug. 30, 1993) (on file with author).

45. AMERICAN HISTORICAL ASSOCIATION, STATEMENT ON STANDARDS OF PROFESSIONAL CONDUCT 5 (1993).

in writing within ninety days. The written record is then reviewed by members of the Professional Division, which may make findings and recommend public disclosure of the individual case.<sup>46</sup>

In his 1994 book, *Hate Speech: The History of an American Controversy*, University of Nebraska Professor Samuel Walker provides the first comprehensive account of the history of hate speech controversies and the punishment of offensive speech in the United States. He finds that, "the proliferation of restrictive campus speech codes was wholly unprecedented: never had there been such strong support for punishing offensive speech."<sup>47</sup> With support of a well organized set of campus advocates, the campus speech code movement has been the most successful effort in American history to restrict offensive speech.<sup>48</sup> The Education Department's March 1994 guidance on racial harassment for its civil rights investigators further facilitates the investigation of speech under vague standards by a prosecutorial bureaucracy. The guidance "defines 'racial harassment' to include creation of a 'racially hostile environment' through any 'verbal statements' that are 'sufficiently severe' that [they] would have adversely affected the enjoyment of some aspect of the [institution's] educational program by a reasonable person, of the same age and race as the victim."<sup>49</sup>

One of the investigators in the 1955 Lazarsfeld and Thielens study of the impact of McCarthyism on social scientists concurs that the evidence contradicts Professor Kennedy's assertions about the differences between McCarthyism and the current fundamentalism. In the 1950s, Harvard Professor David Reisman participated in follow-up interviews to test the validity of the Lazarsfeld and Thielens survey. Reisman concluded that the earlier study had gotten it straight. Reisman observes now that current perceptions of McCarthyism are overstated.

46. *Id.* at 9-11.

47. SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY* 127 (1994).

48. *Id.* at 133.

49. Stuart Taylor, Jr., *A Clintonite Threat to Free Speech*, *LEGAL TIMES*, May 9, 1994, at 27. The broad definition of harassment in the guidance together with the department's investigatory power are chilling. In fiscal 1993, the department issued 35 rulings in cases alleging racial harassment at colleges. It found violations in six. Scott Jaschik, *U.S. Issues Policy on Racial Harassment*, *CHRON. HIGHER EDUC.*, Mar. 23, 1994, at A22.

“McCarthyism is now seen as much more widespread than was really the case.”<sup>50</sup> “The most intense intramural concerns aroused by McCarthyism were mainly experienced at the most eminent institutions, the more ‘liberal’ liberal-arts colleges and universities.”<sup>51</sup> Reisman is “deeply concerned about the climate of higher education [now]. The issue that most concerns me is the freedom of conversation in the residential colleges and university centers, and how inhibited that is, out of fear of saying something sexist, racist, homophobic, or whatever. That, I think, has a profoundly chilling effect. Certain topics just can’t be explored.”<sup>52</sup>

Professor Kennedy’s assertion that “nothing” like McCarthyism exists on campuses nowadays also assumes a political landscape today comparable to that existing during McCarthyism. During McCarthyism, the ideological zealotry came from the far right, and the most likely targets were to the left of center. As noted earlier, seventy percent of the social scientists in the Lazarsfeld and Thielens study were voting to the left of center in the presidential elections in 1948 and 1952. During the current zealotry from the fundamentalist academic left, the most likely targets are to the right of center. However, many faculties in the humanities and social sciences today are dominated by the left. There are virtually no faculty to the right of center on some of these faculties.<sup>53</sup> Under these circumstances it is highly misleading to compare absolute numbers of faculty or proportions of total faculty who report either concern about academic freedom, actual threat to their own academic freedom, or actual adverse career effects. Given the political demographics of the professorate in some fields and the direction from which the current ideological zealotry comes, the number of professors who report being threatened should be substantially lower now than occurred during McCarthyism. The relevant data base would be a survey of the impact of the current zealotry on professors in the humanities and social sciences who

---

50. David Reisman, *The State of American Higher Education: A Conversation with David Reisman (interview with Wilfred McClay)*, ACAD. QUESTIONS, Winter, 1994-95, at 29.

51. *Id.* at 16.

52. *Id.* at 29.

53. The data available indicate that the left so totally dominates departments of humanities and social sciences at elite and research universities that moderate and conservative faculty have almost no presence. See HAMILTON *supra* note 1, at 99-102.

are publicly dissenting from some tenet at the current orthodoxy or whose views tend to be to the right of center.

Professor Kennedy's key point of confusion is the assumption that the zealot's tactics of harassment and intimidation must be identical to McCarthyism to suppress academic speech. McCarthyism was but one combination of coercive tactics. Table 2 outlines a spectrum of coercive tactics. Zealots currently employ a wide spectrum of coercion, including disruption of speeches, classes, and administrative functions, and investigation and tribunal. Suspensions have been used. For the most vulnerable group, students and untenured faculty, these tactics suppress much dissenting speech. Even for tenured faculty, many will be silenced. Only the most courageous, those who can be silenced only by actual termination, will speak publicly in dissent.



**TABLE 2****Relative Coerciveness of Various Tactics of Harassment and Intimidation Used to Suppress Dissent During Waves of Zealotry**

	10-point scale of coercion
Private accusations labeling disagreement as an act of moral turpitude justifying punishment	1
Public accusation of moral turpitude injuring reputation and career opportunity	2
Public humiliation and struggle meetings *	3
Use of media to create symbolic target around whom to incite community passion and anger	4
Unreasonable working conditions a. Collegial ostracism and hostility** b. Threats to reasonable committee and teaching assignments, salary increases, research funds, opportunities for prestigious public service, and appointments at other institutions	5-6
Threats to initial appointment and promotion	7
Disruption of speeches, classes, and administrative functions; Investigations and tribunals	8
Suspensions of faculty	9
Termination of tenured faculty	10

\* Struggle meetings are group intimidation where zealots can surround the target and make misrepresentations and accusations both to generate passion and anger against the target and to isolate the target.

\*\* Jordan Kurland, associate general secretary of the AAUP, noted at this conference that personal incivility and bitterness among colleagues in some instances had become unbearable during recent years. This was a substantial breakdown in conditions of employment.

It is clearly not necessary for zealots in any wave of suppression to use termination of tenured faculty to have substantial impact in silencing dissenting speech. Combinations of other tactics like disruption of classes and investigations and tribunals may have even a greater impact.

At the other end of the spectrum of views comparing the relative degree of repression during McCarthyism with current fundamentalism are Professors David Bryden and Eugene Genovese and former Yale Dean Donald Kagan. University of Minnesota Professor David Bryden writes that academics today are nearly all left of center, because of their "pervasive fear of being labeled racist, sexist, or homophobic. University debate today is far more stifled than it was in the 1950s by McCarthyism." A far broader array of topics are controversial and could lead to penalties.<sup>54</sup> University of Georgia Professor Eugene Genovese agrees. "As one who saw his professors fired during the McCarthy era . . . I fear that our conservative colleagues are today facing a new McCarthyism in some ways more effective and vicious than the old."<sup>55</sup> Former Yale Dean Donald Kagan sees a similar degree of coercion. "There is an imposed conformity of opinion. It takes real courage to oppose the orthodoxies. To tell you the truth, I was a student during the days of Joseph McCarthy, and there is less freedom now than there was then."<sup>56</sup>

These analyses at both ends of the spectrum suffer from overbreadth for several reasons. It is difficult to compare a populist intimidation initiated by faculty or students inside the university with an intimidation initiated from outside the faculty or student body. Both have different strengths and weaknesses in effectuating the goal of suppressing dissent. A zealotry effectuated by the trustees, regents, and administrators can more directly threaten employment. However, the faculty also has substantial power defining opportunity for employment, the conditions of employment for tenured and untenured professors,

---

54. David P. Bryden, *It Ain't What They Teach, It's the Way They Teach It*, PUB. INTEREST, Spring 1991, at 38, 46.

55. Eugene D. Genovese, *Heresy, Yes-Sensitivity, No*, NEW REPUBLIC, Apr. 15, 1991, at 30.

56. Dinesh D'Souza, *In the Name of Academic Freedom, Colleges Should Back Professors Against Students' Demands for "Correct" Views*, CHRON. HIGHER EDUC., Apr. 24, 1991, at B1, B3.

staff, and the learning environment and rewards and penalties for students. Public humiliation, ostracism and harassment through investigations and tribunals are powerful weapons of intimidation in the hands of peers.

It is more useful in assessing the impact of zealotry on universities to distinguish among the groups in the academic community: students, applicants for faculty appointment, the untenured professors, tenured professors, staff, and the administration. The more vulnerable the group, the lower the threshold where coercive tactics significantly stifle that group's academic inquiry and speech.

From this perspective, students, candidates for faculty employment, untenured professors, and staff are extremely vulnerable to accusations of moral turpitude, public humiliation, ostracism, and investigation. In many faculties the coercive tactics of zealots in the current fundamentalism have exceeded the threshold necessary to significantly suppress speech for these vulnerable groups. Whether the current coercion is as onerous as McCarthyism for these vulnerable groups does not seem very relevant. The results are substantially the same.

For deans and university presidents, the comparison between McCarthyism and the current fundamentalism is more problematic because few, if any, deans and presidents were accused during McCarthyism. In contrast the ideological construct of the fundamentalist Academic Left identifies deans and university presidents as the embodiment of the oppression endemic in society and the university. They are regularly a principal target of public accusations of bigotry, public humiliation, and adverse media attention. These accusations do threaten an administrator's opportunities for career advancement and mobility. Whether such accusations threaten current job security depends upon how much damage is inflicted on public perception and goodwill of the university, and the governing board's confidence that the administrator can continue to raise funds successfully. Deans and university presidents are probably subject to greater coercion in the current wave of zealotry than during McCarthyism.

Tenured professors are the only group for whom the current fundamentalism does not pose the same degree of threat to employment as McCarthyism did. There is an institutionalized prosecutorial structure that is carrying out investigations and

tribunals for heretical speech, but tenured professors are not losing their jobs. The critical point is that the willingness of tenured professors to risk punishment in order to speak covers a spectrum. At one end is that subset of tenured professors dissenting from fundamentalist ideology who will speak freely as long as they do not suffer permanent loss of employment. These are few. At the other end of the spectrum is the subset of tenured professors whose speech is deterred by any threat of punishment.

Even for tenured professors, public accusations of bigotry, public humiliation, and ostracism impose both very substantial psychological costs and substantial damage to the possibility of grants, further academic advancement, mobility in the profession, and public service opportunities. For many tenured professors, these costs are sufficient to stifle competent dissent.

Investigation, the threat of investigation, and tribunals impose greater penalties and will stifle a further subset of tenured professors. There will remain a subset of tenured professors dissenting from fundamentalist ideology who cannot be intimidated except by more coercive measures directly terminating employment. Extended internal and external investigations and possible sanctions under discrimination and harassment speech policies can achieve reprimands, suspensions or terminations but fewer of the heavier penalties are occurring. A professor can also be forced out if defense costs for external investigations are not indemnified by the university.<sup>57</sup>

These tactics have been successful in forcing out several tenured professors who could not withstand sustained vilification and investigation. A tenured professor under assault by investigations is unlikely to survive without an administration at least willing to indemnify defense costs. Some tenured professors have been sanctioned for academic speech allegedly violating discrimination or harassment speech policies. Sanctions have included suspension, probation, public reprimand, sensitivity

---

57. For example, in the author's situation described in the Preface to *ZEALOTRY AND ACADEMIC FREEDOM*, *supra* note 1, resignation from a tenured position would have been necessary if over \$100,000 in legal defense fees for five external investigations had not been indemnified. Even with indemnification for defense costs for the five external investigations, defense of the five meritless internal investigations cost several thousand dollars in legal and expert fees, and all ten investigations took over 4,500 hours of the author's time and total energies for five and one-half years.

training and therapy, and public apology. Schrecker has observed that many professors who kept their jobs during McCarthyism may have suffered just as much emotionally as those who lost theirs. This is true also in the current wave of zealotry.

Overall, the use of public accusations of moral turpitude, public humiliation, and ostracism is probably more widespread in this period of zealotry than in McCarthyism. The array of prohibited topics is wider and the zealots are themselves members of the academic community who can monitor daily activity of others. It is also important to remember that during McCarthyism the ideological zealotry came from the far right, and the most likely faculty targets were to the left of center, but as discussed earlier, a substantial majority of social science professors were voting left of center. The most likely faculty targets of the current zealotry will be to the right of center; however, many faculties in the social sciences and humanities have virtually no professors who are to the right of center. The isolation felt by those targeted in the current zealotry compounds the threat. The use of investigations and the threat of investigation may be less widespread in this period than during McCarthyism, but investigations of competent academic inquiry and speech are occurring in some faculties. Data reporting how frequently complaints against speech and investigations of speech and tribunals occur on all campuses are not available. In any event, total body count will not be as important as a determination of the degree of threat to faculty members who are either publicly dissenting from some tenet of the current orthodoxy or who are to the right of center. It is clear that many hundreds of colleges and universities have speech codes, and the federal court cases striking down speech codes at the Universities of Michigan and Wisconsin indicate that investigations under speech codes occur with some frequency. In addition, many universities have adopted harassment and discrimination policies under which complaints against pure speech will trigger an investigation. Such investigations have been documented on a number of campuses. It is reasonable to assume that all students and faculty on these campuses are well aware of both the institutionalized apparatus for investigation of speech and instances where heretical speech has been investigated. They are also aware that the area of proscribed speech is not clearly

defined. It may be defined entirely by the perception of the oppressed listener. Judgment about initiating an investigation lies in the hands of a bureaucracy often heavily influenced by fundamentalist ideology. This threat of investigation under vague standards by zealous prosecutors creates a vast penumbra of proscribed speech on major issues of the day.

This is the key point. The use of repeated unsupported accusations of moral turpitude, together with an institutionalized apparatus for investigations and tribunals to create the "big lie," were the most successful coercive strategies of McCarthyism, not the termination of employment. The zealots believed that the secretive nature of communist activities and conspiracies meant that communist subversive intentions would rarely be evident in overt speech or conduct, but rather must be inferred from patterns of association. In addition, accusation based on suspicion alone seemed justified in fighting secretive subversive intention and activity. An institutionalized apparatus of investigation and tribunal was also necessary to ferret out these secretive patterns of associations, intentions, and activities. Hofstadter and Metzger observed in 1955 that this apparatus of investigation "makes, or threatens to make, investigation—by trustees, by state legislative committees, by filiopietistic groups—a built-in characteristic of academic life, an organ of administration, interminable because it is non-specific, incalculable in effect because it rarely relates to professional behavior."<sup>58</sup>

This strategy of repeated unsupported accusations of moral turpitude with an institutionalized apparatus for investigations and tribunals is replicated in the current fundamentalism from the radical Academic Left. The mission of the fundamentalist here is to expose the hidden structures of oppression in the culture. It is a small and natural step for the fundamentalist to expose those with hidden motives of oppression and bigotry and the hidden conspiracies supporting the structures of oppression. Accusation based on feelings alone is justified in fighting the hidden oppressors. An institutionalized structure of zealous prosecutors is necessary to root out hidden motives of bigotry and conspiracy. Under vague standards, the prosecutors can investigate speech, conduct, and associations from which hidden motives and conspiracies of bigotry and oppression can be

---

58. HOFSTADTER & METZGER, *supra* note 3, at 505-06.

inferred. Thus, investigation is once again a built-in characteristic of academic life, inflicting incalculable harm because it rarely relates to professional competence.

Accusation, humiliation, and ostracism alone are sufficient threats to significantly suppress dissenting speech of the most vulnerable groups, students, candidates for employment, the untenured, staff, and some deans and presidents. They are also sufficient to suppress dissenting ideas of many tenured professors; if the threat of investigation and tribunal is apparent, a larger group of tenured professors will be silenced. The worst excess of McCarthyism, a formal suspension or termination proceeding, occurs when a tenured professor's academic speech is subject to prosecution under harassment and discrimination speech policies. The most severe penalty imposed has been an indefinite suspension that the AAUP found was tantamount to a dismissal. Thus, among tenured professors whose ideas dissent from those of fundamentalist colleagues, the subset who will speak publicly is the group who can be suppressed only by a significant probability of actual employment termination. Even this subgroup's energy and capability for dissent will be vitiated by sustained tactics of vilification and investigation.

There are three other similarities between McCarthyism and the current fundamentalism. First, although the point is implicit in the preceding discussion, it bears emphasis that zealots in both McCarthyism and the current fundamentalism do not stop with targets who are clearly communists or bigots. The strategy is to go far beyond that limited circle and attack others for political advantage. Second, Lionel Lewis found that when the university specified formal charges during McCarthyism, the university rarely referred to political beliefs, relying instead on pretextual accusations of incompetence, dishonesty, or insubordination.<sup>59</sup> In the present zealotry, pretextual charges of discrimination and harassment serve the same purpose.

The last similarity between McCarthyism and the current fundamentalism is denial by the zealots that any suppression of academic inquiry and speech is occurring. Recall that during McCarthyism at no point did the vast majority of trustees, administration, or faculty who punished suspected communists admit that they were repressing dissent. On the contrary, they

---

59. LIONEL S. LEWIS, *COLD WAR ON CAMPUS* 97-100, 109 (1988).

claimed that they were defending free speech and academic freedom. The same phenomenon is occurring today.

### III. SIMILARITIES BETWEEN STUDENT ACTIVISM OF THE 1960S AND THE CURRENT FUNDAMENTALISM

The student activism of the 1960s and the current fundamentalism of the radical Academic Left are the first widespread periods of zealotry involving a populist intimidation of academic speech initiated and sustained from within the faculty or student body themselves. Up to thirty years ago, institutions and faculties were able to rely principally on individual commitments to professional standards and individual self-discipline, guided and supported by academic traditions and collegial interaction, as the principal mechanisms inhibiting professional misconduct. However, as the 1973 joint Association of American Colleges and AAUP Commission on Academic Tenure found:

The vast and rapid growth of the profession in recent years has surely weakened the force of professional tradition. And the reflection on campuses of broader social turmoil has presented acute problems of professional conduct, for which broad general professional standards and traditional reliance upon individual self-discipline have been inadequate. . . . [M]ost ominously, assaults upon academic freedom from within the institution by or with the toleration of members of faculties themselves have gone unpunished.<sup>60</sup>

This 1973 finding is again accurate twenty years later.

Student activism of the 1960s and the current fundamentalism share an ideological kinship. The ideology of the New Left in the 1960s and the ideology of the fundamentalist Academic Left in the late 1980s and early 1990s embrace the common theme that the current cultural, economic, political, and social structures in the United States have been created and are operated by a power elite to oppress the powerless. The structures are illegitimate and corrupt. This hidden hierarchy of power and privilege must be reversed, and the oppressed enfranchised. The university itself is controlled by a power elite to oppress the powerless. Standards of academic quality are themselves a mask for oppression.

---

60. COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, *FACULTY TENURE* 42-43 (1973).



Because the university itself is oppressive and corrupt, ideological zealots within the faculty and student body are free of attachments of institutional loyalty and community pride that, in other institutions like corporations or professional firms, normally moderate self-inflicted public disrepute.<sup>61</sup> In this ideological construct, creating disrespect for the university is a positive step in exposing its hidden corruption and illegitimacy.

Seeing the world metaphorically as consisting of oppressors and the oppressed, ideological zealots in these two waves are convinced, even while engaging in false charges of moral turpitude and disruption, that they are the innocent and oppressed victims of an organized but hidden social assault. They hold to a belief in the singular worth and exclusivity of the suffering of the adherents of the ideology. They assume a moral stance of blamelessness.

During both the 1960s student activism and the current fundamentalism, zealots employ tactics of confrontation and disruption to degrade and silence dissenting ideas. The tactics of confrontation include the use of ridicule, rudeness, inflammatory false accusations, and other forms of abusive language to degrade and silence others. These tactics are most effective against the most vulnerable groups, students, staff, and untenured professors. Harvard President Bok notes that “[i]n the past twenty-five years, we have all grown used to attacks on almost everything and everyone with any power, influence or visibility. . . . While much of this criticism is undoubtedly deserved, the temptations for exaggeration and excess are very strong.”<sup>62</sup>

Community organizing techniques have been successful tactics in both periods. Focusing on a specific symbolic target around whom to incite and mobilize anger and passion and the media is a formidable threat. A small, well-organized group of zealots within the university can sometimes bring the university to its knees.

---

61. The willingness of ideological zealots to disparage their own institution and to bring it into public disrespect is extremely difficult for outsiders like alumni and trustees to comprehend. The attachments of institutional loyalty and community pride by which they live do not apply in a university setting for a particular ideological subset of professors and students.

62. Derek Bok, *What's Wrong With Our Universities?*, 14 HARV. J.L. & PUB. POL'Y 305, 308-09 (1991).

Zealots in both periods have disrupted or have threatened to disrupt speeches and classes to prevent unpopular dissenting views from being heard. Forced occupations of administrative buildings have been used to intimidate administrative decision making.

Clearly, incidents of disruption of speeches and classes and forced occupations during the current fundamentalism are more isolated, involve many fewer students, and are not so destructive as occurred during the student activism of the 1960s. However, many presidents and deans today remember the effectiveness of disruption in the 1960s in generating adverse media attention, damaging the university, and bringing down administrations. The threat of disruption today is sufficient to intimidate those administrators who are fearful of adverse media attention.

Appeasement of zealots through concessions has not been a very successful strategy for either 1960s student activism or the current fundamentalism. In both the 1960s and currently, the zealot's purpose is to force the university into confrontation and oppressive action to demonstrate the reality of oppression in the university. Thus, concessions are used to demonstrate an admission of guilt and to give rise to new demands that force the confrontation.

Faculty response to zealotry also has a similar underlying explanatory variable in both the 1960s and the present. During the student activism of the 1960s, Professors Ladd and Lipset discovered that the general ideological predisposition that faculty brought to political issues was a major determinant to the way they responded to the coercive tactics of the student radicals. They found both that there was a close association between left-of-center posture in politics and relatively high support for the student protests and that the politics of American academics was disproportionately to the left of center. They concluded further that the skew to the left was much more pronounced at the elite universities and that the degree of variation in political attitude by field was quite extraordinary. In some fields, like psychology, sociology, anthropology, political science, history, and philosophy, two-thirds or more of the professorate characterized themselves as "liberal" or "left," while the average for all fields

was forty-six percent.<sup>63</sup> The politics of the professorate currently is still disproportionately to the left of center, particularly in the elite universities and in some fields in the humanities and social sciences. There again seems to be an ideological solidarity that inhibits faculty members with left-of-center political views from defending the academic freedom of targets of the current zealotry from the fundamentalist Academic Left. Writing in 1969, Harvard professor Nathan Glazer observed that he never dreamed that a radical critique of American society could develop such enormous power that it became simply the new convention, and that a public defense of the liberal intellectual system against the radicals became in effect a conservative position held by a few.<sup>64</sup> This is again true in the 1990s.

Faculty response to the zealotry of the late 1960s and currently also shares another similar explanatory variable. After three waves of zealotry motivated by superpatriotism over a forty-year period, the professorate and the general public finally came to see that this zealotry from the far right and outside the walls was wrong. The generations of scholars maturing since 1960 have been conditioned to believe that the major threat to academic freedom is both from outside the walls and from the far right. During the 1960s and currently, this conditioning leads to blindness among many faculty concerning threats to academic freedom from both the radical Left and inside the walls. If the pattern of these waves of zealotry from the radical Left is similar to that of the earlier three waves of zealotry from the superpatriots, there will be no wide consensus that coercion from the radical Left is equally wrong for another ten to fifteen years.

#### IV. SIMILARITIES AMONG MCCARTHYISM, STUDENT ACTIVISM OF THE 1960S, AND THE CURRENT FUNDAMENTALISM

Proponents of any strong ideology may embrace zealotry to suppress freedom of academic thought and speech. However, the likelihood that an ideology will be combined with zealotry is highest when encouragement or permission for the coercion of others' speech is inherent in the ideology. For example,

---

63. EVERETT C. LADD, JR. & SEYMOUR M. LIPSET, *THE DIVIDED ACADEMY: PROFESSORS AND POLITICS* 368-69 (1975).

64. NATHAN GLAZER, *REMEMBERING THE ANSWERS* 280-81, 288-89, 293-94 (1970).

capitalism as an ideology does not explicitly endorse coercion of others' speech. In contrast the ideologies of McCarthyism, the student activism of the 1960s, and the fundamentalist Academic Left do support or condone correction or extirpation of heresy in others. The ideologies of the last three waves of zealotry are most similar to religious fundamentalism in terms of ideological encouragement or permission to eliminate heresy.

Zealots in the three most recent periods of zealotry also have employed similar advocacy tactics of manipulative persuasion. Accusations against individuals and institutions have been based on conjecture, gossip, hearsay, the twisting of any ambiguity, half-truth by omission, exaggeration, and misrepresentation. Innuendo is played out in forums like the media where there is no chance of due process in terms of adequate notice of the charges, a chance to tell the other side, and neutral peer decision makers observing procedures that take pains with the facts and the rules applicable to the facts. Zealots in all three periods have searched for symbolic events and individuals against whom to incite passion and to mobilize the community.

In each of the three periods, a change came over the rules of academic discourse in the university. Advocacy tactics of manipulative persuasion displaced common academic standards of thoroughness and accuracy in the gathering of relevant evidence, careful and impartial consideration of the weight of the evidence, analytical reasoning, and balance and fairness in argument and controversy. The ideologies of both student activism of the 1960s and the fundamentalist academic left give ideological legitimacy to this displacement in arguing that the common standards of academic discourse are only instruments of oppression by an elite. Only the student activists of the 1960s openly acknowledged substituting advocacy tactics for the usual rules of academic discourse. They also made no bones about their willingness to use disruption and violence. During both McCarthyism and the current fundamentalism, zealots generally have denied the use of these tactics and have presented themselves to the public clothed with the credibility of scholars.

The current zealotry poses a unique long-term threat to academic freedom by undermining the premises upon which the liberal intellectual system and academic freedom rest. In all earlier periods, zealots ignored the rights of academic freedom, using coercive tactics to suppress heretical thought and speech,

but they did not assault the principle of academic freedom itself. The last two waves of zealotry, but particularly the current wave of zealotry from the fundamentalist Academic Left, are the first both to ignore rights of academic freedom and to deny the legitimacy of the premises upon which professional academic freedom rests. Fundamentalist ideology seeks to give intellectual legitimacy to the politicization of the university. To the degree the ideology gains acceptance, academics will be left without a principled defense when university employers or other groups choose to exercise political and economic power to interfere with academics' professional autonomy.<sup>65</sup> Professional autonomy will exist under these circumstances only as long as the professorate exercises more political or economic power than employers or other groups. Understanding this threat from the fundamentalist academic left requires a brief review of both the fundamental premises of professional academic freedom and the ideology of the extremists in postmodern schools.

Professional academic freedom, as articulated in the 1915 and 1940 AAUP statements, is rooted in a liberal intellectual tradition that presupposes a progressive concept of knowledge. Human understanding at any one point is imperfect, but defects can be exposed by testing hypotheses against reality. The process of hypothesis-experimentation-new hypothesis improves knowledge. It is the possibility of falsifying every knowledge claim that is the mechanism of knowledge. Within the university, this progressive conception of knowledge is realized through

---

65. Of course the waves of zealotry explored in this essay indicate that the aspiration of professional academic freedom has frequently been far greater than the reality. The doctrine has not stopped the suppression of competent academic thought. However, the test of a principle and its supporting institutional structure should not be the existence of failed expectation, but the degree of failed expectation relative to other institutional structures. Even with its failures, professional academic freedom and its supporting institutional structure have given more protection to freedom of academic inquiry and speech in the United States than the protection available in other countries like those of the former Soviet Union, where pure political and economic power have determined the right to speak. The existence of professional academic freedom at least provides a principled moral argument to minimize lay interference in academic speech. Georgetown Law Professor Peter Byrne cautions "that university life often fails to resemble these ideals has not destroyed their power to shape expectations and moderate behavior. So long as people perceive them to express a core of truth and an enduring potential, we shall have academic freedom in its traditional form; should they be abandoned as shams, higher education will change rapidly in directions we cannot predict." J. Peter Byrne, *Academic Freedom and Political Neutrality in Law Schools*, 43 J. LEGAL EDUC. 315, 318 (1993).

a discourse subject to unique disciplinary constraints of certification, professional competence and ethical conduct. An academic's professional audience understands and evaluates her speech within a tradition of knowledge, methodology and criteria. There is a common set of standards used to evaluate the academic work of faculty and students. A scholar and teacher must meet the following duties of professional competence in her academic work: (1) to gather evidence relevant to the issue at hand through thorough and painstaking inquiry, (2) to record evidence accurately, (3) to give careful and impartial consideration to the weight of the evidence, (4) to reason analytically from the evidence to the proposition, (5) to seek internal consistency, (6) to exercise courage when the evidence contradicts what the scholar and teacher had hoped to achieve, (7) to set forth justly without suppression or innuendo the divergent evidence and propositions of other investigators, (8) to present evidence and analysis clearly and persuasively, (9) to be rigorously honest in acknowledging academic debt and (10) to improve the account of some area of knowledge.

Earlier in this century, the principal danger to this progressive conception of knowledge was lay interference by governing boards. This interference imposed constraints on the offering of new hypotheses or the criticizing of accepted ones. Lay interference also occurred when lay judgments were substituted for professional judgments regarding professional qualifications and professional competence.

The 1915 and 1940 statements articulate the employment conditions necessary to secure the benefits of this progressive conception of knowledge. Essentially, university employers have agreed to grant exceptional vocational freedom to professors to inquire, to teach, and to publish without lay interference on the condition that professors meet certain correlative duties as individuals and as a collegial body. Professional academic freedom grants rights to professors to be free from lay interference in research, teaching, and intramural and extramural utterance. It also imposes on individual professors correlative duties of professional competence and ethical conduct. The faculty as a collegial body has correlative duties to enforce the individual duties and to defend academic freedom.

In contrast, the central belief of extreme proponents in the postmodern schools is that accurate representation of the way

the world is, impartiality, and approximation of objective knowledge are myths. Each picture of reality is the product of social or personal factors. The progressive concept of knowledge based on the idea of movement toward objective knowledge or value is impossible. The social, political, and economic arrangements of society are therefore not the product of any paradigm of systematic thought that is better than any other, but simply the result of differences in power among social classes and status groups.

Since movement toward objective knowledge is impossible, and only viewpoints or perceptions exist, no academic's account of phenomenon can, in any objective sense, be more true than that of any other person. No distinctions can be made based on competence. Rationality, objectivity, accuracy and standards of intellectual quality and merit are slogans or masks of oppression designed to convince the oppressed that subordination is justice.

Extreme proponents in the diversity movement agree that these traditional standards of professional competence have no better justification or intrinsic value than constructs held by oppressed persons from status groups. In the alternative, extreme proponents in the diversity movement may argue that social equality is a higher goal than the progressive conception of knowledge and the rights and duties of professional academic freedom. Extreme proponents from both of these ideologies agree that higher education must be politicized to give voice and power to the ideas of oppressed persons and groups.<sup>66</sup>

The argument that perfectly unbiased observation is impossible and that all evaluation has significant reference to an academic's own values is well taken and valuable. Presumably

---

66. For example, after the University of New Hampshire's chapter of the AAUP stated that the criteria for harassment were too broad and would chill speech, an associate professor of women's studies at UNH circulated a letter stating:

The (professor's association), 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 right 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.

Suzanne Fields, *Crying 'Harassment' Like Little Boy Who Cried 'Wolf' Obscures the Real Thing*, SUN-SENTINEL (Fort Lauderdale), Jan. 27, 1994, at 19A.

this argument still acknowledges that there is benefit in striving to meet the common standards used to evaluate academic work. The important question is to what degree the aspirational goals are achieved.

The extreme position of the fundamentalist Academic Left is to deny the possibility of accurate gathering and use of evidence, impartial consideration of the weight of the evidence, analytical reasoning from the evidence to the proposition, and a progressive concept of knowledge.<sup>67</sup> These concepts are simply hegemonic fraud, concealing the power and oppression of the dominant Eurocentric culture and people. Academic inquiry and discourse thus are not about the ideas that people express, but about the people who express the ideas.<sup>68</sup>

This position is fatal to professional academic freedom. Our tradition of professional academic freedom is premised upon a progressive concept of knowledge. If there is no knowledge, and no way to distinguish fact from perception or reason from rhetoric, then professional academic freedom has no principled defense.

Former University of Chicago professor Edward Shils sums up the consequences of this assault on academic freedom.

If there are no criteria of validity or truthfulness, because no statement can ever be truer than any other statements, then it is useless to attempt to assess the validity of the achievements of scholars and scientists. It is useless to attempt to assess the scientific or scholarly achievements of candidates for appointment or to decide which students have done well or poorly in their dissertations and examinations. What is there for academic freedom to protect except the security of tenure and the prerogative of frivolity.<sup>69</sup>

A few postmodern scholars are straightforward in acknowledging both that their ideology is fatal to professional academic freedom, and that large segments of the professorate do not believe in the theory of knowledge underlying the system which they operate. In her 1988 book, *Reconstruction*, University of

---

67. GERTRUDE HIMMELFARB, ON LOOKING INTO THE ABYSS: UNTIMELY THOUGHTS ON CULTURE AND SOCIETY 158-59 (1994).

68. Stephen L. Carter, *Academic Tenure and "White Male" Standards: Some Lessons from the Patent Law*, 100 YALE L.J. 2065, 2067 (1991).

69. Edward Shils, *Do We Still Need Academic Freedom?*, AM. SCHOLAR, Spring 1993, at 187, 205.



Georgia Professor Betty Jean Craige concludes that when postmodern scholars “abandon a belief in objectivity, we must redefine the principle of ‘academic freedom’, for the public and for ourselves, in terms of contextual value. The discipline—and the academic world generally—cannot use the notion of academic independence from politics to support academic-evaluation-by-academics after it has shown society’s intellectual activity to be inseparable from its political activity.”<sup>70</sup> Professor Craige’s equating academic freedom with independence from politics confuses the meaning of academic freedom. Scholarly work that meets the correlative duties of competence may in fact greatly influence politics. The critical point Craige makes is that when postmodern scholars abandon objectivity and claims of knowledge, they abandon also the rationale upon which academic freedom rests. They then have no principled defense against government or employer interference in scholarship, teaching and intramural and extramural utterance.

English professor Louis Menand is more direct in a 1993 article published in *Academe*, the AAUP’s magazine. He first describes the progressive conception of knowledge on which professional academic freedom rests for justification.

[The progressive conception of knowledge] is the model of science: knowledge develops by the accumulation of research findings, brick piled onto brick, monograph onto monograph, until the arch of knowledge about a field stands clearly defined against the background of mere undisciplined information. All these professional requirements [academic credentials, scholarship and peer review] were established to encourage the production of more bricks, to squeeze more toothpaste from the tube of truth.

In any event, it is fair to say that almost no one in my field, and certainly almost no one in my generation, any longer believes in the theory of knowledge production from which the institutional structure of the modern university derives. The conventional wisdom among English professors and graduate students is that “knowledge” is subjective, relative, contingent, culturally determined, political—in no sense brick like except in its potential to do harm.

In this state of intellectual affairs, it becomes very difficult to argue that professors need the protections

---

70. BETTY JEAN CRAIGE, RECONNECTION 123 (1988).

associated with the concept of academic freedom, since so many professors now assert that their work is not about reaching the truth about a field, but about intervening politically in a conversation—a “discourse”—that is always and already political anyway. . . . If you are a professor who believes that “truth” is simply a name for what a particular group of people finds it advantageous to regard as given or universal, if you consider “knowledge” to be an instrument of political control, if you think that universities are sites for social indoctrination, you can hardly have much use for a concept grounded in the idea that intellectual inquiry is a neutral and disinterested activity.<sup>71</sup>

Menand forthrightly acknowledges that the challenge of postmodern ideology to the ground on which both the university and professional academic freedom stand is fundamentally different than earlier scholarly disputes. In those disputes, all disputants agreed that they were trying to get to superior knowledge about their subject, they disagreed on who knew the way. In the contemporary quarrel, the fundamentalist academic left is burrowing away at the ground on which the rest of academia is trying to stand.<sup>72</sup>

If the fundamentalist Academic Left succeeds in its project and successfully undermines and dismantles professional academic freedom, the consequences will be severe. In the face of zealotry from outside or inside the walls, professional autonomy will then be a function purely of the political power of the professorate. Even though currently the professorate does have power in the university, the ebb and flow of history teaches that power will from time to time shift to other constituencies.

University employers in particular would have no principled reason to grant professors vocational freedom from lay interference if the account of any subject is simply a subjective preference based on the social status and politics of the speaker. There would be no reason that academic employers should not assert their own subjective political preferences to the degree permitted to other employers.

As corporations, foundations, governments, courts, other groups, and the public at large come to understand the

---

71. Louis Menand, *The Future of Academic Freedom*, ACADEME, May-June 1993, at 11, 15-16.

72. *Id.* at 16.

politicization of teaching and research within the university, they will see no principled reason to grant universities or professors academic independence. The threat of fundamentalist groups based on ethnicity and religion to academic independence bears special mention. In earlier centuries, religious fundamentalists often posed the greatest threat of authoritarian oppression. The most powerful force of authoritarian oppression of heretics and dissenters this century has been ethnicity, most often from the right. In service of the goal of empowering the oppressed, the fundamentalist Academic Left encourages claims of power based on ethnicity. Forces of ethnicity, without any check from academic freedom, pose a substantial threat of intellectual authoritarianism.

Academics' public credibility, which rests on the public perception that academics strive to meet traditional standards of professional competence in their teaching, scholarship, and public service, will also be lost. For centuries, scholars and teachers have worked to persuade society that knowledge will grow, and the public good will be served, by granting academic independence to individual professors and to universities. Society's willingness to give support to academic freedom is one of the remarkable achievements of humankind.

An ideology held by a significant subset of the faculty itself that both assaults the premises on which professional academic freedom rests and encourages the politicization of the university is a serious threat. It will drain the reservoirs of confidence, trust, and tolerance on which academic independence for the university and its scholars and teachers depend. It will also cause the society to be more vulnerable to the epidemics of mass irrationality and paranoia that recur through history. Ironically, the fundamentalists are probable long-run victims of their ideology and strategy. The concept of an apolitical university, even if a myth, serves most to protect radical academics on the left from threat of pressure and coercion from the conservative forces in society. At the height of 1960s student activism, Professor Noam Chomsky cautioned that:

One legacy of classical liberalism that we must fight to uphold, in the universities and without, is the commitment to a free marketplace of ideas. . . . Once the principle is established that coercion is legitimate [in the university], it is rather clear against whom it will be used. And the principle of legitimacy of coercion would destroy the university as a

serious institution; it would destroy its value to a free society. This must be recognized even in the light of the undeniable fact that the freedom falls far short of the ideal.<sup>73</sup>

It is difficult to compare the relative coerciveness of the tactics employed in these last three waves of zealotry. The use of particular tactics was more severe and more widespread during the earlier two periods; for example, the use of investigations and threats to employment during McCarthyism and the use of disruption of speeches, classes, and administrative functions during the 1960s. However, the current fundamentalism combines the tactics successful in both earlier periods.

Faculty zealots responsible for the current fundamentalism are also far more entrenched in academia than the politicians of the 1950s or the students of the 1960s. The fundamentalists' tenacity in using this spectrum of tactics against dissenting inquiry or speech over an extended number of years may yet prove the most effective of all three periods in eliminating heresy.

The results of coercive tactics have been roughly the same in all three waves of zealotry. The universities were not overrun with zealots in any of these periods. The majority of professors and campuses were not directly affected. However, each wave the zealotry had a major impact on targets at some campuses and within some faculties. Even if the most serious coercion has been concentrated in some universities or faculties, knowledge of the coercion is widespread, and the more vulnerable and cautious members of the broader academic community will steer clear of the possibility of harm.

The usual faculty response in each of these three periods of zealotry has been not to counter the zealotry vigorously. Typically, few faculty give public support to the accused, or to the university. The ideological predisposition that faculty brought to political issues has been a major determinant of the way they have responded to the coercive tactics of zealots in all three waves. In general, faculty tend not to support academic freedom for dissenting ideas for which they have no sympathy. Administrators generally have been far more concerned with

---

73. Noam Chomsky, *The Function of the University in a Time of Crisis*, in *THE GREAT ISSUES TODAY* 59 (Robert M. Hutchins and Mortimer J. Adler, eds. 1969); see also, SEYMOUR M. LIPSET, *REBELLION IN THE UNIVERSITY* 210 (1976) (the myth of the apolitical university serves to protect unpopular minorities, that is, radicals).

public relations than with freedom of academic inquiry and speech. Zealots thus discovered in each period that extreme tactics can be undertaken to assault the accused and the university without censure by the faculty. This public behavior of silent acquiescence and silent submission has been the ballast of ideological zealotry in all three waves. It repeatedly condones and rewards the tactics of zealotry.

## V. SUMMARY OF THE SIMILARITIES IN THE SEVEN WAVES

The major purpose of this essay is to review the historical record regarding freedom of academic inquiry and speech in American higher education since the emergence of the modern university 125 years ago. This review leads to the following findings:

1. Periods of zealotry in service of a variety of strong ideologies have been frequent in higher education, occurring approximately every fifteen to twenty years.

2. Waves of zealotry originated both from without and from within the faculty and the student body.

3. During any particular period, it was difficult to predict the ideological direction from which the next wave would come.

4. In each wave, zealots labeled disagreement as heresy, demonstrating the moral turpitude of the heretic, and justifying a variety of coercive tactics to harass and to eliminate heretical academic thought and speech. A favored tactic has been to subject alleged heretics to investigation and tribunal. These have been especially effective against vulnerable groups like students, candidates for appointment, and untenured faculty. In a number of these periods of zealotry, attacks on the academic freedom of competent dissent were disguised as pretextual accusations of other misconduct.

5. Once unleashed, zealotry did not stop with targets who were clearly heretics like communists or bigots; it attacked others for political advantage.

6. The usual faculty response of silent acquiescence in the face of coercive tactics has been the ballast of the ideological zealotry in each wave.

7. There were instances in each period where faculty or administration or both publicly defended academic

freedom.

8. The major result in each wave was not just the silencing of the targets but also the silencing of a vastly greater number of potential speakers who would steer wide of possible punishment.

If these findings are correct, then both graduate students and established professors reading this essay must give thought to the possibility of experiencing one or two waves of zealotry before the end of their academic careers. At this point, it is difficult to predict the ideological direction from which these future waves may come.

In light of these findings, self-interest dictates that every academic think through and act upon her or his responsibility to protect freedom of academic inquiry and speech. Reciprocal duties among faculty to speak publicly to protect competent dissenting academic inquiry and speech must be the principal line of defense against zealotry. The critical group is those faculty whose views are most advantaged by the suppression of the views of colleagues with whom they disagree. Those faculty members have the highest duty to step forward to defend publicly the right of dissent.

The professorate must undertake measures to strengthen our tradition of academic freedom. My essay on buttressing academic freedom proposes a number of steps to prepare a stronger defense of our tradition of academic freedom.

