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The Academies, "Hate Speech" and the Concept of Academic Intellectual Freedom

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THE ACADEMIES, "HATE SPEECH" AND THE CONCEPT OF ACADEMIC INTELLECTUAL FREEDOM

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I. INTRODUCTION

Intellectual freedom is the opportunity to contemplate, consider, challenge, reason, question and doubt; the opportunity to investigate, examine and dispute. It is the freedom to think and the freedom of expression.

Professor Mari Matsuda advocates a sliding scale of free speech with the rights belonging mainly to the powerless, the outsiders.[1] Nat Hentoff, on the other hand, contends that we all believe in free speech for us, but not for anyone else.[2] Holocaust survivors think anti-semitic speech should be prohibited.[3] Women's rights advocates think any speech that degrades women should be outlawed.[4] The free speech movement is out; the politically-correct movement is in.

Freedom can and does breed a variety of intolerance, an intolerance that is a potential threat to any democratic society. "The energetic presentation of ideas is the most positive way to advance democratic institutions."[5] And yet, "[i]ntolerance attacks at every point of disagreement, insisting on conformity of every outward action, including speech, and frequently attempts to control the inner world of the mind as well."[6] The logical starting point in the search for the outer limits of tolerance is when and

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1. Mari Matsuda, *Public Response to Racist Speech: Consider the Victim's Story,* 87 MICH. L. REV. 2300, 2380-81 (1989).

2. *See* NAT HENTOFF, FREE SPEECH FOR ME — BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER (1992).

3. *Berkeley: Protesters Shut Down Allegedly "Anti-Semitic" Historian for Second Time,* DECLARATION, FLORIDA'S CHRONICLE OF HIGHER EDUCATION, Apr.-May 1995, at 23. British Holocaust historian, David Irving, canceled his March 1995 speaking engagement, which was sponsored by a Muslim group, at the University of California at Berkeley when over 200 protesters pushed and shoved those who came to hear him. *Id.*

4. *See* CATHARINE MACKINNON, ONLY WORDS (1993). Catharine MacKinnon argues that censorship is a necessary means for women to achieve equality. *Id.* at 71-110. *See also* AVEDON CAROL, NUDES, PRUDES, AND ATTITUDES: PORNOGRAPHY AND CENSORSHIP (1994).

5. Molefi K. Asante, *Unraveling the Edges of Free Speech,* 75 NAT'L F. 12, 14 (1995); *see also* Mary Lefkowitz, *Exploring the Boundaries of Academic Freedom,* 75 NAT'L F. 16, 18-19 (1995); Max Beloff, *Why We Need A University Elite,* THE TIMES (London), August 19, 1995, at 14.

6. Lee C. Bollinger, *The Open Minded Soldier,* 37 LAW QUAD. 54, 56 (Summer 1994) [hereinafter Bollinger, *The Open Minded Soldier*]. *See also* LEE C. BOLLINGER, THE TOLERANT SOCIETY (1986) [hereinafter BOLLINGER, THE TOLERANT SOCIETY]; Thomas Nurnally, *Word Up Word Down,* 75 NAT'L F. 36 (1995).

> Evidentially a society will not dispense with the category of taboo language . . . . One may argue that the basis of taboo has shifted from the physical body and the sacred to the body political and conception of social justice. The same sense of outrage and defilement associated in the past with subjection to "filthy language" now appears to be associated with political incorrect speech, that is, language lacking sensitivity toward different ethnic cities, enactments, and orientations.

Id. at 37.

where values collide, that is, when one group attempts to suffocate the "truths" of the colliders. At this collision point the university is most vulnerable.

The history of censorship of speech and of persecution and punishment for ideas held, expressed or challenged has produced insightful observations about the human desire to have one's own way, to demand that others conform to it and to rid the world of those who will not or cannot conform. "Persecution for the expression of opinions seems to me perfectly logical. If you . . . want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition."[7]

Those who believe that the definition of tolerance has been pushed to the outer edge by the United States Supreme Court have chosen to draw the line in the university setting. In drawing the line, there is a final resolution of the so-called "exquisite dilemma," that is, the free trade or marketplace of ideas versus the potentially powerful impact some of those expressions have upon certain groups. The rhyming advice to children that "sticks and stones may break my bones but words will never hurt me" can be disputed since the free trade of ideas can and has produced hurtful results. During the waning years of this century, many observers would concede that there has been a profound and disturbing rise in bigotry and of expressions intended to diminish and demean on our college and university campuses.[8]

Incidents of virulent prejudice are not restricted to the more traditional race and religious groups. In addition to acts of hate and hostility against Blacks and Jews, students at many institutions of higher learning have directed their aggression toward women, homosexuals, Asians and the elderly.[9] A growing number of high school and college students, fueled perhaps by cultural ignorance and fired by media reports of affirmative action and advancements in diversity, appear to fear and hate anyone who belongs to a group different from themselves, particularly from groups seeking traditional notions of equality. This is not the product of academic ignorance. Some of this country's finest academies appear to nurture the worst manifestations of this hatred. The examples are legion and well-

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

8. *Lessons From Bigotry 101,* NEWSWEEK, Sept. 25, 1989, at 48. According to the Baltimore-based National Institute Against Prejudice and Violence, since 1986, more than 250 colleges and universities have reported racist incidents, ranging from swastikas painted on walls to violent attacks and death threats. Nancy Gibbs, *Bigots in the Ivory Tower,* TIME, May 7, 1990, at 104. Similarly, Reginald Wilson of the American Council on Education recently said, "These incidents are now happening with such alarming frequency that they have become an embarrassment for our institutions of higher learning." *Lessons From Bigotry 101, supra,* at 48.

9. Richard Vacca & H.C. Huggins, *Student Speech and the First Amendment: The Court's Operationalize the Notion of Assaultive-Speech,* 89 ED. LAW REP. 1 (1994). *See also* Steven Lewis, *Looking Down the Empty Barrel,* 75 NAT'L F. 40 (1995).

recorded elsewhere;[10] nevertheless, consider: (1) A first-year Hispanic student at Bryn Mawr College found an anonymous note calling her an ethnic slur and stating: "[I]f you and your kind can't hack the work here . . . just get out";[11] (2) The fear of AIDS led to a rampage of gay-bashing episodes at Pennsylvania State University;[12] and (3) After seventeen years of teaching, a tenured professor at Florida A & M University was dismissed by administrators after seven students accused him of remarking that "sitting around and waiting for opportunities or not taking advantage of the opportunities that are there is kind of a what some would call a n----- mentality."[13] These are examples of the types of occurrences that have become almost routine on college campuses.[14]

Such displays of racism, sexism, homophobia and anti-Semitism foreshadow the disintegration of the community of scholars and the idyllic vision many have held of college life. A survey conducted by The Carnegie Foundation for the Advancement of Teaching concluded that romantic notions of campus life serve to mask what appears to be a disturbing reality of the hate that has infiltrated university life in the United States.[15] However, Vince Herron contends that the abundant reports of animosity in universities do not, in themselves, suggest that there is more malice in the university setting than in the outside world; in fact, it is possible that universities actually have fewer occurrences of bigotry.[16]

Observers of the use of words to hurt and exclude have offered different explanations for this "hate" trend on campuses. Regardless of the explanation, one element is apparent: "self."[17] It would appear that this country is now paying an enormous price for national and state leadership that has and does glorify selfishness,[18] ignorance and insensitivity. In

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10. *See generally* Vince Herron, *Increasing the Speech: Diversity, Campus Speech Codes, and the Pursuit of Truth*, 67 S. CAL. L. REV. 407 (1994).

11. Gibbs, *supra* note 8, at 104.

12. *Id.* at 105.

13. Bill Bergstrom, *Racial Remark Leads to Firing*, ST. PETERSBURG TIMES, Nov. 12, 1993, at B1.

14. Another incident took place at San Francisco State University when a mural of Malcolm X was splattered with red paint. "The mural was criticized as anti-semitic by some Jewish students." *Amid Protests, Mural Honoring Malcolm X Is Defaced*, CHI. TRIB., May 21, 1994, at 2.

15. Gibbs, *supra* note 8, at 104.

16. Herron, *supra* note 10, at 534.

17. Gibbs, *supra* note 8, at 105. Jon Wiener, *Racial Hatred on Campus*, THE NATION, Feb. 27, 1989, at 260. Daniel Levitas, Executive Director of the Center for Democratic Renewal, stated, "We have today a whole young society that has not been called to conscience."

18. Peter Edelman, *Punishing Perpetrators of Race and Speech*, LEGAL TIMES, May 15, 1989, at 20. Consider the primary function of most elected officials (Florida, in particular) which is to cut taxes, avoid helping the less fortunate and put more persons behind bars for

addition to being influenced by cultural materialism, the current phenomenon also appears to be a byproduct of the cultural and ethnic polarization that developed in earnest during the Reagan Administration.[19] Illustrative of this polarization of perspective is one Amherst student's innocent (or, I would hope, tongue-in-cheek) question: "Who was Malcolm The Tenth?"[20] This dearth of cultural knowledge, appreciation and/or sensitivity seems to emerge on a student's first experience with diversity (*i.e.*, people of different cultures, races and values). Ill-equipped to confront the diversity of college life and questioning the free trade of ideas, a student's psychological chemistry becomes volatile.[21]

In response to the rise of hatred and harassment on campuses, many colleges and universities, once the advertised bastions of the free marketplace of ideas and intellectual academic freedom, have attempted to limit hateful speech through campus conduct codes.[22] The codes, combined with political correctness, suffocate free speech. Donald Kagan, a dean at Yale University, has said that at many colleges "there is an imposed conformity of opinions with less freedom now that there was [during the days of Joseph McCarthy]. Utilizing a technique learned from Senator Joseph McCarthy in an earlier attack on free speech, those not utilizing correct thinking are labeled bigots or racists or sexists."[23] Among the more than 200 institutions with politically-correct speech codes of conduct are: the University of Wisconsin, the University of Michigan, Stanford University and the Universities of California.[24] Yale University administrators have refused to compromise the issue of free speech and have condemned the codes.[25] The attitude of Yale is an aberration as an increasing number of schools enact their own definitions or versions of where to draw the line on free speech and when to

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longer periods of time.

19. Alexander Reid, *Colleges Grope for Solutions to Racism,* BOSTON GLOBE, Dec. 18, 1988, at 106.

20. Gibbs, *supra* note 8, at 105.

21. *Id. See also* Bollinger, *The Open Minded Soldier, supra* note 6, at 57.

22. Patrick M. Garry, *Censorship by the Free Speech Generation,* 75 NAT'L F. 29 (1995). A majority of colleges and universities now have some form of written policy on bigotry, including racial and gender intimidation. *See* PATRICK M. GARRY, AN AMERICAN PARADOX: CENSORSHIP IN A NATION OF SPEECH (1993); Barry Seigel, *Fighting Words,* L.A. TIMES, Mar. 28, 1993, § 14 (Magazine), at 14, 46.

23. *See* RICHARD BUNSTER, DICTATORSHIP OF VIRTUE (1994); Bollinger, *The Open Minded Soldier, supra* note 6, at 55.

24. Steve France, *Hate Goes to College,* 76 A.B.A. J. 44 (1990). Stanford dismantled its core curriculum of 15 required classic readings and allowed students to create their own curriculum. Bill Marvel & Barbara Kessler, *University at Center of Debate,* GAINESVILLE (FLA.) SUN, Jun. 5, 1994, at G1.

25. Nat Hentoff, *Campus Follies: From Free Speech . . .,* WASH. POST, Nov. 4, 1989, at A23.

suffocate perceived intolerant thought.[26]

These codes of conduct prohibit speech that creates a demeaning atmosphere and other undesirable effects.[27] The codes attempt to predefine the scope of permissible speech; often, they are accompanied by interpretive guides. The University of Connecticut's proclamation banned inappropriately directed laughter and conspicuous exclusion of students from conversations; the code prohibited "derogatory references" or "fighting words" that harass anyone face-to-face.[28] What is inappropriately directed laughter? What is derogatory? What are fighting words? It is good to be made aware of the power of words to hurt and exclude, but who is appointed or selected to judge? How does one define hate? There are many definitions in university conduct codes but most include: face-to-face confrontation, exclusion of certain groups and certain types of prohibited speech. Eric Neisser defined hate speech as referring to all types of communication, whether verbal, written or symbolic, that insult a racial or ethnic group, whether by suggesting that they are inferior in some respect or by indicating that they are despised or not welcome.[29] One does not have to define hate; the codes are not dealing with hate speech, per se, but with certain defined, intolerant speech. The University of California's code does not define hate but punishes speech that attacks "race, sex, sexual orientation or disability,"[30] political content notwithstanding.

Proponents of these codes claim that speech that harms is not speech at all. Hate speech, as defined by the drafters of the codes, includes speech uttered for no other reason than its harmful effects, and therefore, it deserves no constitutional protection.[31] Many commentators invalidate hate speech as speech by rationalizing that it is not a crime to hate; it is, however, illegal to hurt.[32] They ignore the lessons of history, "the suffocating and cruel tendencies of true belief . . . ."[33] Similarly, while "there is no such thing as a false idea,"[34] the codes imply that there is no idea *to* protect present in

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26. *See* Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399, 400 (1991).

27. France, *supra* note 24, at 44. *See also* Garry, *supra* note 22, at 30.

28. Gibbs, *supra* note 8, at 106.

29. Eric Neisser, *Hate Speech in the New South Africa: Constitutional Considerations for a Land Recovering from Decades of Racial Repression and Violence*, 5 SETON HALL CONST. L.J. 103 (1994).

30. Hentoff, *supra* note 25, at A23. Universities such as North Carolina, Duke and Stanford have implemented plans specifically restricting racist speech. *Lessons from Bigotry 101, supra* note 8, at 48.

31. *Take Care*, ECONOMIST, Feb. 10, 1990, at 20, 23. *But see* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992).

32. *See, e.g.*, Matsuda, *supra* note 1, at 2320, 2380-81.

33. *See* Bollinger, *The Open Minded Soldier, supra* note 6, at 57.

34. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

hate speech. Consequently, such codes are not an impermissible regulation of content because there is no content to regulate in hate speech.[35]

Opponents of conduct codes argue that codes violate the First Amendment[36] right of free speech, as well as, the duty to be true to the university's purpose to be a free-fire zone where the combatants can honorably trade in ideas.[37] When faced with the issue of speech control, some faculty members at the University of Connecticut denounced their campus code as an act of the "Thought Police" that attempted to muzzle the free exchange of ideas.[38] The code, they warned, invites misinterpretation and self-censorship.[39] Many others have spoken out against speech codes.[40] A college administrator in Colorado argued that if colleges start restricting the speech of some students in the name of social civility, the very groups that the codes are aimed at protecting easily could be the next victims of censorship.[41] Indeed, that is precisely what seems to be happening. At most universities, Louis Farrakhan would fall victim to campus codes outlawing hate speech,[42] assuming that the given hate-speech code was uniformly enforced. Moreover, those against the codes do not focus solely on the potential misapplication of the restrictions. For example, a Jewish law student at Stanford found the special protection that such codes afforded to be "demeaning."[43]

The philosophies of both the opponents and proponents of conduct codes comprise what has been called the exquisite dilemma.[44] Each side believes that it represents an unequivocal commitment to the twin goals of equality and free speech.[45] The exquisite dilemma has become the dichotomy between free speech and equal rights. Campus codes have, in reality, become attempts at political enfranchisement.

There are other methods than hate-speech codes by which this exquisite

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35. *See* VWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163 (E.D. Wisc. 1991); Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989); David Rosenberg, *Racist Speech, the First Amendment and Public Universities: Taking a Stand on Neutrality*, 76 CORNELL L. REV. 549, 551 (1991). *See also* Thomas McAllister, *Rules and Rights Colliding: Speech Codes and the First Amendment on College Campuses*, 59 TENN. L. REV. 409, 410 (1992).

36. The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

37. *See* RICHARD HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE (1963).

38. Gibbs, *supra* note 8, at 106.

39. *Id.*

40. *See* Herron, *supra* note 10, at 407.

41. Nat Hentoff, *Battling the Speech Police,* WASH. POST, Oct. 27, 1990, at A25 (quoting Gwen Thomas, candidate for president of the American Civil Liberties Union (ACLU)).

42. Wiener, *supra* note 17, at 274.

43. France, *supra* note 24, at 46 (quoting comments of Wendy Leibowitz).

44. *Id.* at 44.

45. *Id. See also* Thomas Cinti, *Freedom Is Slavery: The Thought Police Have Come to America's Campuses*, 1 CONST. L.J. 383 (1991).

dilemma can be addressed. Frequently, education — both affective and cognitive — is designated as the natural route by which to deal with hate speech.[46] One proposal is to realign curriculum to include non-Western courses, courses which offer a different perspective from the Eurocentric character of most present programs.[47] This antidote is aimed at combating lack of awareness, the cultural insularity that engenders bigotry.[48] Other alternatives include weekend retreats and curricular sensitivity training, as well as, commitments to minority hiring[49] and inculcating respect for national origin.[50] At one point, the University of Wisconsin committed itself to hiring seventy new minority faculty members in three years.[51] Smith College and Columbia University, both sites of extreme exercises of hate speech, have begun mandatory programs in ethnic and cultural sensitivity.[52] Finally, in many cases, colleges are encouraged to insure that local hate-crime laws, quite distinct from hate-speech codes, are enforced on campus.[53]

The sad fact is that universities have begun to forfeit their claim as a free trade in ideas zone. There is little to distinguish the secondary academy, where endorsed indoctrination occurs in earnest, from the university with its hate-speech code, despite the fact that, as one Amherst professor noted, "You can't legislate tolerance from above."[54] Nonetheless, many universities have taken prescriptive measures. Some are encouraging diversity, yet, at the same time they are intimidating students and faculty, and insuring "right thoughts" by threats, harassment and required sensitivity seminars. What is happening at the nation's academies is antithetical to the values that educational institutions claim to promote and instill; these last vestiges of a free trade in ideas zone are the worst for it. Furthermore, the inculcation of the free trade of ideas must begin elsewhere. Yet, the "elsewhere," elementary and secondary schools, is for the most part ignored as a value carrier in the hate speech controversy.

The purpose of this paper is first to explore the nature and level of the academy in question and its general relationship to the First Amendment. Second, the paper reviews free speech and its relationship to the concept of intellectual academic freedom. The constitutionalization of the concept of

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46. Gibbs, *supra* note 8, at 104.
47. *Id.*
48. *Id.*
49. Reid, *supra* note 19, at 106.
50. Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805 (1994).
51. Reid, *supra* note 19, at 106.
52. *Id.*
53. Editorial, *A Dip in Hate, But Not on Campus?*, CHI. TRIB., Mar. 17, 1990, at 12. *See also* Wisconsin v. Mitchell, 508 U.S. 476 (1993).
54. France, *supra* note 24, at 44.

intellectual academic freedom is a step the Supreme Court never has been prepared to take, despite its grandiose *dicta* to the contrary.[55] Nevertheless, when free speech is in peril in the very academy where it is thought to have a safe haven, the Court can, as it has in the past, choose to intercede. Finally, this paper concludes by illustrating the current hostility toward and the trivialization of the worth of free speech in academic settings. This is more damaging to a free society than the hate speech itself. Judging from university responses to student activism in the 1960s, production of hate-speech codes on a large scale is probably inevitable. The production appears to result, in part, as a consequence of the Supreme Court's view of its role as Republican Schoolmaster,[56] and thus, its ambivalence toward intervening in an academic setting in order to conduct a seminar on First Amendment jurisprudence. Unfortunately, if academics cannot respect the value of a free trade in ideas zone in a democratic society, then it might be necessary once again for the Court to protect academics from themselves.

II. SPEECH IN THE ACADEMY: ITS RECENT ROOTS

First and foremost, free speech is not, nor has it ever been, a personal privilege. It is, however, essential for scholars, students and faculty, if they are to function effectively in the educational community and are to be more than just professional orators. Academicians gathering in various institutions have a responsibility to facilitate the flow of idea-oriented dialogue. The beneficiary is society. At times it would appear that society resents academic and intellectual freedom (although when the Court speaks, it speaks of *academic* freedom, I, nevertheless, consider *intellectual* freedom to be more descriptive of the task at hand). One reason might be because the academic in this country functions not only as a scholar, but also as an active and passive political critic. Our fast-moving, complex society needs and demands examination of old and new ideas, information and values.

What then does this all mean? What are proper subjects for scholarly inquiry? How can university administrations representing society protect themselves against unpleasant condemnation? To study and evaluate only the known can be an exercise in inertia; to venture beyond the known is the worth of the scholar. Such worth cannot be generated in a vacuum. It needs to be nurtured; the scholar by nature must be involved in the risks of questioning, challenging, doubting and disputing that bring about social and/or scientific change. This involves disrupting the establishment, the status quo, and for that matter, the disenfranchised. This often results in the

55. Papish v. University of Mo., 410 U.S. 667, 670-71 (1973).

56. *See* Fletcher Baldwin, *The United States Supreme Court: A Creative Check of Institution Misdirection?*, 45 IND. L.J. 550 (1970).

victim of the disruption exercising every means at his or her disposal to prevent further action. These tactics include jailing the speaker, removing the speaker from a position of influence, controlling the speaker's words, reeducating the speaker to speak without harmful impact or simply permitting students to disrupt the speaker's presentation, class or setting. Should the university administration allow speakers to be silenced because what they say inflames the audience? The heckler's veto strangles free speech. This veto is legitimized by the extremes of left and right.

Today, concern focuses on a scholar's speech and the resulting harm to an outsider and his/her outgroup, who are now able to muster influential power. Certainly *any* action taken by an academic power-holder that would substantially impair intellectual freedom should be condemned. Yet, it would seem that where scholars aggressively inquire into social ills or societal direction, their activism, by its very definition, is a threat.

Too often the colleagues of activists do not support, and in many cases even attack, quarrelsome, disruptive brethren. Why? Professor William Van Alstyne recounts the Supreme Court of Tennessee's response in 1927 to John Thomas Scopes' appeal from a conviction resulting from teaching evolution to public school students.[57] The Court, speaking through Chief Justice Green, stated categorically that "[Scopes] had no right or privilege to serve the state except upon such terms the state prescribed. . . . In dealing with its own employees engaged upon its own work, the state is not hampered by the limitations of . . . the Fourteenth Amendment . . . ."[58] According to Chief Justice Green, the United States Constitution would be trivialized if the Court permitted Scopes to set his own agenda.[59]

Although at the time Chief Justice Green's premise appeared to be correct, constitutional lawyers now would disagree with the conclusion. However, in light of recent case law,[60] perhaps the Tennessee Supreme Court's 1927 theory is not far from the 1990s' mark. To be sure, the United States Supreme Court speaks in elegant terms when addressing the constitutional concept of incorporation and its relationship to speech.[61] But a review of the modern case law, beginning with *Sweezy v. New*

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57. William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, *in* THE CONCEPT OF ACADEMIC FREEDOM 59 (Edmund L. Pincoffs ed., 1975).

58. Scopes v. State, 289 S.W. 363, 364-65 (1927).

59. *See id.*

60. *See* Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872 (1990).

61. *See, e.g.*, Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1 (1964). *See also* Fletcher Baldwin, *Methods of Social Control of Academic Activists Within the University Setting*, 14 ST. LOUIS U. L.J. 429 (1970); Note, *Development in the Law: Academic Freedom*, 81 HARV. L. REV. 1045 (1968).

Hampshire,[62] demonstrates the Court's belief that there is no separate constitutional theory, aside from general First Amendment guarantees, that federal courts ordinarily look to in reviewing intellectual academic freedom challenges. Further, the judicial line of demarcation separating the secondary academy, where values are inculcated, from the university academy,[63] where values are challenged, has, for constitutional purposes, become blurred, if not erased.

The Court speaks of a separate constitutional theory, but acts otherwise because the concept of academic freedom as a subset of the First Amendment presents the Court and constituency with difficult and complex problems. These problems contribute to the Court's reluctance to allocate to the offended professor, teacher or student a perceived "extra right" to be constitutionally protected.[64] Thus, the Supreme Court recognizes and protects the general civil liberties of those who study and labor in the academy but make their political statements elsewhere, although not officially as a member of the academy.

The Court seems to have difficulty in understanding the boundaries of the core rationale of academic freedom. To date, the Court has failed or refused to delineate those boundaries. As Professor Van Alstyne points out, the Court has only been willing to state in *dicta* what the boundaries of academic freedom should be.[65] Justification for the concept of academic freedom is found in the unique historic nature and function of the academy and the scholars housed therein. The professional affiliations are of no concern here. Rather, the focus is upon the narrower professional pursuit that separates the academy from standard First Amendment review.[66] It is this opening that has resulted in the flood of scholarship condemning what the given author deems to be non-speech, hence subject to control and restraint.[67]

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62. 354 U.S. 234 (1957).

63. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

64. *Id. See also* Papish v. University of Mo., 410 U.S. 667 (1973). "'State colleges and universities are not enclaves immune from the sweep of the First Amendment.'. . . [T]he First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech." *Id.* at 670-71 (quoting Healy v. James, 408 U.S. 169, 180 (1972).

65. Van Alstyne, *supra* note 57, at 64-67. *See also* Richard Hiers, *Academic Freedom in Public Colleges and Universities*, 40 WAYNE L. REV. 3 (1993) (reviewing the history of the Supreme Court and academic freedom).

66. Van Alstyne, *supra* note 57, at 80.

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

III. THE ACADEMY

A. *Preface*

Many anti-speech elements seem to lose sight of the broad purpose of the academic institution. If the university is to remain vital, it must explore ideas and question concepts that may not be in accord with society at large.[68] Antagonism is inevitable. If the antagonism does not hinder academic pursuits, it can be healthy.

B. *Academic or Intellectual Freedom*

"Intellectual freedom is the 'inherent human right [n]ot to be bound in one's reason and conscience,' but rather 'to search unceasingly for what one believes to be truth.'"[69] This right does not proscribe any viewpoint or cause.[70] Indeed, intellectualism is "a style of living in which the world of thought . . . is given priority over any practical consideration"[71] even though the thought may be considered detestable. If there is a right of access to ideas, it must be shared by all. But just as the press plays a major role in the First Amendment right to receive ideas, so also, the academy is designed to serve as a fiduciary to the people's right of access and exploration.

1. *Lehrfreiheit* — Freedom to Teach

An analysis of the doctrine of academic freedom usually begins with the evolution of the concept. It seems the concept of academic freedom had its rebirth in nineteenth-century Germany. The German language embodies the idea of unrestrained academic pursuit in two expressions: *Lehrfreiheit* — freedom to teach, and *Lernfreiheit* — freedom to learn.[72] Under the aegis of the law and the concept of *Lehrfreiheit*, professors in German universities were free to discuss whatever they wanted in their classes, and also, were free to pursue scholarly research on whatever topic they pleased.[73]

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68. *See* General Robert M. O'Neil, *Academic Freedom and the Constitution*, 11 J.C. & U.L. 275 (1984).

69. Comment, *School Boards, Schoolbooks and the Freedom to Learn*, 59 YALE L.J. 928, 942 n.58 (1950) (quoting Johnsen, *Academic Freedom*, 3 REFERENCE SHELF 6, 7-8 (1925)).

70. *See id.* at 942-44.

71. Walter O. Weyrauch, *Medieval Universities, Germany and the United States: On Comparative Legal Education*, 1987 B.Y.U. L. REV. 613, 615.

72. Howard Jones, *The American Concept of Academic Freedom*, *in* ACADEMIC FREEDOM AND TENURE 225 (Louis Joughin ed., 1967). *See generally* Note, *supra* note 61.

73. Jones, *supra* note 72, at 225. *See also* Walter Metzger, *The Age of the University*, *in* THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 275, 367-412 (Richard Hofstadter & Walter Metzger eds., 1955).

However, a professor's political speech and thought were not protected outside the university setting.[74] In universities in the United States, professors perceive that they have the same freedom to teach as nineteenth-century German professors. However, in the United States, the university and/or the courts extend this freedom one step further, allowing a professor First Amendment protection with respect to political belief and thought outside of the university.[75]

2. Substantive Right or Duty — The University

The United States Supreme Court has considered the question of freedom of speech within a narrow professional pursuit and its relationship to a more global civil liberty[76] without respect to profession. Even though the Court's consideration has resulted in generalities, it is worth examining. As the Court noted in *Barenblatt v. United States*,[77] academic freedom is an essential ingredient for scholars if they are to function effectively within the academy, and if they are to be more than Paul Goodman's professional orator. Academicians who gather on university campuses have a professional responsibility to society to maintain the flow of dialogue.

The United States Supreme Court has for some thirty-plus years been committed to safeguarding academic freedom. This freedom is of transcendent value to all citizens and not merely to teachers and students concerned with the First Amendment; a concern which does not tolerate laws that cast a pall of orthodoxy over the classroom.[78] Through case language, it appears the Court is arguing for a societal right to receive the labors of the academician without governmental restraints.

3. Spirit of the First

Although academic freedom is not an express right enumerated in the First Amendment, the Supreme Court repeatedly has relied on the broad protection of constitutional guarantees to justify such expressions. In *Griswold v. Connecticut*,[79] a non-academic freedom case, the Court

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74. Jones, *supra* note 72, at 225-26.

75. *Id.* at 229. *See generally* Ralph Fuchs, *Academic Freedom — Its Basic Philosophy, Function, and History*, 28 LAW & CONTEMP. PROBS. 431 (1963).

76. *See* Van Alstyne, *supra* note 57.

77. 360 U.S. 109 (1959).

78. Keyishian v. Board of Regents of the Univ. of N.Y., 385 U.S. 589, 603 (1967).

79. 381 U.S. 479 (1965). The right of privacy, a right not specifically within the scope of the First Amendment but rather a right that hovers over all the First Amendment rights, furthers the concepts of academic and intellectual freedom. The right of privacy concerns itself with fundamental rights; those rights personal to individuals and their way of life. The Supreme Court appeared to create the right in *Griswold*. *Id.* at 485. According to the Court, a Connecticut statute that prohibited and restricted the right of married couples to use

contraceptives was unconstitutional. *Id.* at 486. Justice Douglas, writing for the majority, noted that these statutes limited the married persons' right of privacy to have the freedom to choose whether they want to have children. *Id. Cf.* Roe v. Wade, 410 U.S. 113 (1973). However, the Court has extended this concept to include other matters relating to one's personal life. *See generally* Bounds v. Smith, 430 U.S. 817 (1977) (right to legal materials and access to courts); Mayer v. Chicago, 404 U.S. 189 (1971) (right to transcript in misdemeanor appeals); Boddie v. Connecticut, 401 U.S. 371 (1971) (fundamental right to privacy regarding marital decisions); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to interstate travel); Loving v. Virginia, 388 U.S. 1 (1967) (right of privacy regarding marital decisions); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to counsel in first appeal on a criminal case); NAACP v. Alabama, 357 U.S. 449 (1958) (freedom of association).

The reasoning of these cases logically includes the right to teach and the right to learn. Individuals possess an expectation of privacy to be free to discuss, to inquire and to explore various topics that are beneficial and personal to the individual. Teachers must have this right to determine, within reasonable bounds, subjects of interest to teach their students. As previously mentioned, a biased view of a topic is not sufficient, but rather there should be "uninhibited, robust and wide-open" discussion of the issues. New York Times v. Sullivan, 376 U.S. 254, 270 (1964). The right of privacy is the nucleus of the student's right to learn. Students should be provided with a breadth of information so that eventually they will be able to decide for themselves what views and what opinions they want to hold. Only with the evolvement of their ability to think can students begin to understand various ideologies. To formulate their own thoughts, students need to choose for themselves what areas they need to explore.

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are found in material things. They sought to protect Americans in their *beliefs*, their *thoughts*, their *emotions*, and their *sensations*. They conferred, as against the government, *the right to be let alone*, — the comprehension of rights and the right most valued by civilized men.

Olmstead v. United States, 277 U.S. 438, 478 (1929) (emphasis added) (Brandeis, J., dissenting). "[W]e should not overlook the fact that the spirit of America is liberty and toleration — the disposition to allow each person to live his own life in his own way, unhampered by unreasonable and arbitrary restrictions." Meyer v. Nebraska, 262 U.S. 390, 392 (1922).

> No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley: "The right to one's person may be said to be a right of complete immunity: to be let alone."

Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891) (quoting Cooley on Torts, 29).

> [T]here is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest: comprehending all that portion of a person's life and conduct which affects only himself or, if it also affects others, only with their free, voluntary, and undeceived consent and participation. When I say only himself, I mean directly and in the first instance; for whatever affects himself may affect others through himself; and the objection which may be grounded on this contingency will receive consideration in the sequel. This, then, is the appropriate region of human liberty. . . . [T]he principle requires liberty of tastes and pursuits, of framing the plan of our life to suit our own character, of doing as we like, subject to such consequences as may follow, without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our

strengthened the conclusion that there may exist a societal right to receive information by noting that "the State may not, consistently with the spirit of the First Amendment, contract a spectrum of available knowledge."[80] More specifically, the Court in *Sweezy v. New Hampshire*[81] argued for constitutional protection and cursorily noted that academic freedom is not a personal privilege but a necessity. Therefore, academic freedom demands that scholars effectively perform their functions of teaching, learning, practice and research. Without these freedoms, democracy is imperiled.

The Court has been concerned in the abstract with the subset of academic freedom.[82] If there were a constitutional rule regarding academic freedom, it would be as follows: There can be no governmental hinderance upon academic investigation, research, teaching and publication, except upon evidence of an inexcusable breach of professional ethics in the exercise of that freedom.[83] Thus, the concept of academic freedom, as it has emerged primarily in *dicta*, is at best a general constitutional principle rooted in the First and Fourteenth Amendments and tied to societal well-being. Certainly, in theory, that right was not intended to duplicate freedom of speech or press. Rather, the Supreme Court cases suggest that the Court has been crafting a separate substantive right.

4. The Academic Setting — Procedural

The difficulty is that this concept of academic freedom requires substantive judicial modification of the Court's free speech standard of review when the Court is confronted with applying the concept to specific facts. If the right and its accompanying theory could transcend the protection of free speech, the academic setting would force the Court to focus upon First Amendment claims deemed acceptable within the academy, but perhaps,

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> conduct foolish, perverse, or wrong. . . .
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> No society in which these liberties are not, on the whole, respected is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily *or* mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest.

State v. Erickson, 574 P.2d 1, 24 (Alaska 1978) (Mathews, J., concurring) (quoting JOHN STUART MILLS, ON LIBERTY (1848)).

80. *Griswold*, 381 U.S. at 482.

81. 354 U.S. 234 (1957).

82. *See* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251 (1989).

83. *See* Jones, *supra* note 72.

unacceptable in the larger community.[84] This, the Court has been reluctant to do. Yet, by the Court's own earlier admission, the unique nature and purpose of the academy may well be determinative of a claim where ordinarily a free speech or press claim would fail.[85] Even in *Miller v. California*,[86] the Court recognized a scientific and educational exception to the pornography prohibition. This is not to suggest that the right of academic freedom is absolute even in the name of enlightenment; it is not. The Court (not to mention politicians) has been very sensitive to charges of *elitism*. These charges have been brought about by misuse and misunderstanding of the concept academic freedom.

Like all constitutional freedoms, the diligent protection of academic freedom is nowhere more vital than in institutions of learning. Simply put, the context of the academic setting should provide the Court with an additional constitutional consideration. The claim of academic freedom is neither merely a free-speech claim by any one person in the academy, as in *Pickering v. Board of Education*,[87] nor a claim to free speech in an academic environment. If one has a technical right to be in an academic environment, then one has a duty to work with the mind which, in part, implies the right to speak! This right is based upon a more limited, independent right, that is, freedom from government (any governing body) restraint and punishment where the intellectual pursuit is deemed a necessary corollary to teaching and research. Practically speaking, this independent right is easy to state, but impossible to apply. More importantly, within the context of the so-called hate-speech regulations, the limitations have come from within the academy itself, where respect for the concept has, in fact, given way to expediency. This results in divorcing universities from their traditional role, leaving others (*e.g.*, think tanks) to fill the void. Furthermore, there are few outside procedural protections from the need to regulate and conform, generated from within.[88]

IV. THE LOWER EDUCATIONAL STRATUM

A. *Substantive Rights or Recognized Responsibilities?*

Another problem when attempting to define an academic freedom right is the Court's definition of "the academy." What is supposed to separate the university from the secondary academy? Is it merely a question of the age

84. *But see* Van Alstyne, *supra* note 57.
85. *See Sweezy*, 354 U.S. at 250.
86. 413 U.S. 15 (1973).
87. 391 U.S. 563, 572-73 (1968).
88. *See* Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978).

of some of the constituents? The Court seems to answer by focusing upon the concept of prescribed orthodoxy. Prescribed orthodoxy is constitutionally acceptable on the campus of the lower academy. The university is viewed as having a different role. Many universities in their rush to dam up intolerance and lingering wounds have reverted to orthodoxy. Under the guise of protecting the human rights of underrepresented classes, universities simply translate the expression of ideas into acts. Sound familiar? Recall Senator Joseph McCarthy. He, of course, was protecting us from the evils of Communism. Those who disagreed were labeled and brought into public disrepute. "In the McCarthy era, an individual was labeled a 'sympathizer' or a 'fellow traveler'; the person now is said to be 'racist' or 'sexist.'"[89]

The courts have traditionally considered secondary level education as an indoctrination period where students are "inculcated with community values."[90] The role of the lower institution is different from that of the university, which transmits knowledge as well as develops critical faculties for learning extremely creative tasks.[91] "[T]he quality of instruction at the lower levels, especially at the high school, depends to an important degree on the extent of freedom in the classroom and the intellectual integrity of the teaching force."[92] However, that integrity has been greatly compromised at the lower level academies; only the college or university nurtures a freedom-to-learn environment. Many, however, may prefer a politically-correct milieu at the higher-level academy.

B. *Lernfreiheit — Freedom to Learn*

In education there must be both the freedom to teach and the freedom to learn.[93] German students in the nineteenth century had freedom in the choice of studies. They were free "to roam from place to place, sampling academic wares."[94] Generally, the students, were responsible for their own studies. The only examination the German student took was the final one.[95] They were allowed to skip intermediate tests. Perhaps, this had as much to do with the class of the student as with the concept of intellectual freedom.[96] However, the German gymnasium or high school appears to have been as, or more, structured in its learning methodology[97] than high schools

89. *See* Bollinger, *The Open Minded Soldier, supra* note 6, at 55.
90. *See* Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982).
91. Note, *supra* note 61, at 1050.
92. *Id.*
93. *Id.* at 1049.
94. *Id.*
95. *Id.* at 1048-49.
96. Weyrauch, *supra* note 71, at 619.
97. *See generally* HOFSTADTER, *supra* note 37.

in the United States. Both restricted and compromised the freedom to think.[98]

The public school system in the United States may never have fully accepted the concept of a student's freedom to think. It has never approved of *Lernfreiheit*, at least at the secondary level.[99] Academic freedom pre-

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98. Jones, *supra* note 72, at 225-28. There are four main reasons why the educational system in the United States has failed to adopt the concept of *Lernfreiheit*. *Id.* at 225.

> The first is that in the eyes of the law the school, college, or university stands *in loco parentis* with reference to its students, especially if the students are in point of law minors. This means that the college is compelled to accept a parietal responsibility for student welfare unknown to the German system . . . .
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> The second reason arises out of the deliberate cultivation by American institutions of learning of active parental interest in the life of the college or university. [Parents] are encouraged to visit the campus and attend classes, . . . appeals are made to the domestic pocketbook for money that will make the college a home away from home. . . . [T]he interest of the institution in initiating, guiding and controlling extracurricular activities — all these move in exactly the opposite direction from institutional indifference to student welfare; and, admirable in themselves, they create innumerable regulations by the college that actually restrict student freedom . . . . [Y]ou cannot remain enrolled unless you maintain a minimum competence in a minimum number of courses; you cannot leave the institution at will; and you cannot wander from university to university, since transfer of credits from one institution to another in America demands formal approval in the shape of legal papers that are signed and sealed by a registrar or dean conveying to the receiving institution your status at the time you left the dismissing institution.
>
> A third powerful reason for American inability to accept the total concept of *Lernfreiheit* lies in the ambiguous attitude of the students themselves to the idea. Were [the American student] compelled tomorrow to live the unconditioned life of the German university student of fragrant pipe-smoking memory, he would be likely to exclaim with the poet: "Me this uncharter'd freedom tries."
>
> The fourth difference lies in the constitutions of the American university. The Continental university often gives only the Ph.D. and confines itself mainly to what in American parlance is advanced or graduate work . . . . The responsibility of the teacher toward the immaturities he faces in elementary instruction is different from his responsibility toward mature students.

Id. at 226-28.

99. *See generally Sweezy*, 354 U.S. at 234; Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala., N.D. 1970); Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969).

In *Keefe*, a teacher was discharged for using an article that contained a vulgar term for an incestuous son. *Id.* at 360-61. Although the court conceded that the obscenity standards in the adult community should not determine the standards for what students can read, the court found that the article was important for the development of the class discussion. *Id.* at 361-62. The court explained that the chilling effect of proscribing this colloquy was far more serious than the censorship of a literary work which contained an "obscene" word. *Id.* at 362.

The foundation of the court's opinion was based on the notion that teachers are free to teach material that they feel is appropriate to encourage class participation and to stimulate the individual student's own thought process. *Id.* The court referred to Justice Frankfurter's concurring opinion in Weiman v. Updegraff, 344 U.S. 183 (1952). "Such unwarranted inhibition upon the free spirit of teachers affects not only those who . . . are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which

cludes restrictions which impair the teacher's ability to stimulate the student's inquiry to investigate matters arising in the natural course of intellectual inquiry. But that concept has little impact in an environment dedicated primarily to inculcating traditional values. When government (federal, state, local or within the academy) infringes upon the teacher's right to question, let alone the student's, there is a violation of the student's right to learn.

The Supreme Court has by analogy concluded that the right to receive information is an inherent corollary of the explicit right to free speech. The right to receive ideas follows from a speaker's right to send the message. Thus, the Court has observed that "[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."[100]

In the context of the right to learn, the Court has found that the right is predicated on the student's own exercise of speech and press rights as well as on political freedom. Thus, the First Amendment would seem to be broad enough to prevent the state from contracting the spectrum of available knowledge. Such is not the case.[101] The Court has noted that students are not just passive recipients of only state-ratified communication.[102] Rather, the Supreme Court, in upholding a student's right to receive information, has stressed that "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding."[103]

Students at the lower academy are part of the community in which they learn. However, the school board, the elected body, determines the educational values that students absorb and to which they adhere. This form of censorship within the lower academy denies, or at least does not facilitate, the opportunity for the student to reach out and explore the world so as to discover new truths and adventures. Rather, the student is spoon-fed the opinions of those whose views are based on their perception of non-speech or hate-speech.

It is little wonder that similar censorship is sought at the university level. In order to avoid confrontation, closed-minded regulations, denying opposing

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all teachers ought especially to cultivate and to practice." *Id.* at 195. According to the Court, the interaction between teachers and students is a fundamental part of the development of individuals, not only in their academic setting, but also in the development of the student as a functional and useful citizen in society. *Id.* at 195-96. Justice Brennan reaffirmed that position in Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 868 (1982).

100. Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring). *See also Pico*, 457 U.S. at 853.

101. *See Pico,* 457 U.S. at 868.

102. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 511 (1969).

103. *Sweezy,* 354 U.S. at 250.

"repulsive" views, are increased. This type of regulated learning discourages students from understanding a caustic opinion and results in more attacks upon the minority or disenfranchised. The world of a student can be very exciting if students are allowed to experiment with new and different phenomena.[104] Censorship of any kind tends to cap excitement by limiting exploration.[105]

The belief that change and problem solving can be accomplished peacefully if there is complete disclosure is an underpinning of democracy and self-government.[106] What emerges from the blizzard of articles on hate-speech codes is that supporters of codes do not appear to have enough faith in democratic society to accept opposing views. Unfortunately, support for restricting the lower academy's search for ideas has received a great boost by the United States Supreme Court.

C. *Two Decades of Deference: The Evolution of Academic Indoctrination*

Noble concepts describing the purpose of education and its value to the nation have, in reality, never played well in Washington. At best, there has been a sense of controlled confusion surrounding the evolution of the Court's analysis and application of a realistic First Amendment protection for the lower academy. Responding to this confusion, the Court has clarified its position by almost obliterating students' First Amendment rights in *Hazelwood School District v. Kuhlmeier*.[107] Some commentators consider *Hazelwood* the most significant free speech case involving public school students since the Court decided *Tinker v. Des Moines Independent Community School District*, twenty years ago.[108]

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104. No man can reveal to you aught but that which already lies half asleep in the dawning of your knowledge.

. . .

If he is indeed wise he does not bid you enter the house of his wisdom, but rather leads you to the threshold of your own mind.

The astronomer may speak to you of his understanding of space, but he cannot give you his understanding.

The musician may sing to you of the rhythm which is in all space, but he cannot give you the ear which arrests the rhythm nor the voice that echoes it.

And he who is versed in the science of numbers can tell of the regions of weight and measure, but he cannot conduct you thither.

For the vision of one man lends not its wings to another man.

KAHLIL GIBRAN, THE PROPHET 56-57 (1923).

105. Censorship comes in many forms. *See* HOFSTADTER, *supra* note 37.

106. JEROME FRANK, AN INTRODUCTION TO LOGOTHERAPY, MAN'S SEARCH FOR MEANING 105-06 (1959).

107. 484 U.S. 260 (1988).

108. *See* Bruce Hafen, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685.

An examination of the case law leading up to *Hazelwood* demonstrates the Court's constitutional democratization, which has evolved from protecting students' freedom of expression in *Tinker* to "denud[ing] high school students of much of the First Amendment protection that *Tinker* itself prescribed."[109] As First Amendment protection for students has diminished, the authority of local school boards and school officials has risen proportionately.[110]

The deference granted to school administrators and to local school boards in *Hazelwood* is not new. This ideology actually was given birth in *Tinker*. It is somewhat ironic that *Tinker*, the case most often cited for the concept that students do not shed their constitutional rights at the schoolhouse gate, is also the origin of the Court's restrictive holdings.

D. *The Rise and Fall of* Tinker

The Supreme Court first explicitly recognized that public school students at the secondary level enjoy First Amendment protection in *Tinker*.[111] *Tinker* concluded that the school authorities could not suppress a student's right to wear an armband as a symbolic protest against the Vietnam War.[112] Courts have cited *Tinker* for the self-evident proposition that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[113] *Tinker*, however, said little more than that constitutional rights, otherwise enjoyed outside the academy, are of equal value within the academy and that the burden is upon the government to demonstrate otherwise in any particular instance. Courts consistently have applied the *Tinker* rationale and its underlying principle to support the notion that the Constitution limits the authority of school officials over students and teachers.[114] However, the analysis does not and cannot stop there. First Amendment jurisprudence is replete with examples of restrictions on rights where a compelling state interest outweighs the individual's right to protection under the Constitution.

In *Tinker*, the Court demonstrated that pure political speech that did not interfere with the rights of others received full constitutional protection in the

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109. *See Kuhlmeier*, 484 U.S. at 290 (Brennan, J., dissenting).

110. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (holding that the school board did not act unconstitutionally by suspending a student following the student's graphic speech at a school-sponsored assembly); Virgil v. School Bd. of Columbia County, Fla., 677 F. Supp. 1547 (N.D. Fla. 1988) (holding that the school board was within its authority to ban a humanities textbook).

111. J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of* Hazelwood School District v. Kuhlmeier, 1988 DUKE L.J. 706, 707.

112. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506-07 (1969).

113. *Id.* at 506.

114. Hafen, *supra* note 108, at 689.

academy as well as on the village green.[115] However, that decision also included an often overlooked recognition of the customary deference courts accord to school officials. *Tinker* weighed the state's interest in avoiding material disruption of class work and an invasion of the rights of others against the students' right to freedom of expression of their views.[116] Thus, *Tinker* does not represent a blanket approval of a student's right to expression while at school. Rather, in considering the competing interests of the school administrators and other students, the Court created a balancing test that grants significant weight to school authorities.

In his majority opinion, Justice Fortas stated, "[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[117]

From this perspective, even in the early stages of the Court's analysis of First Amendment applications in the public school setting, the Court utilized a balancing test. Beginning with *Tinker*, the Court enunciated these two dissonant priorities which courts confronting these issues have had to reconcile. The first is the constitutional guarantees of teachers and students. The second consideration is the Court's deference to the broad authority of local school officials. Although holding that the policy prohibiting the armbands violated the students' First Amendment rights, the *Tinker* Court emphasized that it would not protect expression which was disruptive or intrusive upon the rights of others.[118] This limitation foreshadowed the Court's future decision in *Hazelwood*.

E. Pico *and the Inculcation of Local Values*

In *Board of Education, Island Trees Union Free School District No. 26 v. Pico*,[119] the Supreme Court attempted to clarify the realm of constitutional protection within the school environment.[120] *Pico* presented a challenge to a local school board's authority to remove books, including Richard Wright's *Black Boy* and Eldridge Cleaver's *Soul on Ice*.[121] The school board asserted that the books were "anti-American, anti-Christian, anti-Semitic, and just plain filthy."[122]

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115. *Id.*
116. *Tinker*, 393 U.S. at 507.
117. *Id.*
118. *Id.* at 509.
119. 457 U.S. 853 (1982) (holding that a school board cannot deny students access to ideas with which the board disagrees by removing books from the library).
120. Hafen, *supra* note 108, at 690.
121. *Id.*
122. *Pico*, 457 U.S. at 857.

In the majority opinion, Justice Brennan stressed the deference that the Courts owed to the actions of elected school boards. However, the Court stated that school boards may not remove books from library shelves simply because they dislike the ideas contained in those books and may not seek their removal to "prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion."[123] While seemingly protecting ideas in the library, the Court provided major support for restrictions. In *Pico*, the Court distinguished ideas in the library from ideas in the curriculum at large. On this point, Justice Brennan said the school board could defend their claim of absolute discretion in matters of curriculum by reliance upon their duty to inculcate community values.[124] Therefore, if any type of academic endeavor is part of the curriculum, then school boards can claim absolute discretion unless a court finds their motives to be impermissible. Thus, school boards enjoy apparent immunity so long as their motives are permissible. It is little wonder that when these same students face a hate-speech code at a university, they automatically accept it. The Supreme Court reinforced this concept of indoctrination in *Bethel School District No. 403 v. Fraser*.[125]

V. THE BEGINNING OF THE END FOR THE LOWER ACADEMY AND A SEPARATE ACADEMIC FREEDOM GUARANTEE

In *Fraser*, a high school student delivered an election campaign speech before a high school assembly. The speech contained no graphically-explicit language. However, the speech did contain sexual metaphors and double entendres, which school authorities found to be lewd. The authorities suspended Fraser and removed him from the list of candidates for commencement speaker.[126] The Supreme Court upheld the disciplinary action over the student's claim that the school board violated his freedom of expression.

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123. *Id.* at 872.

124. *Id.* at 869.

125. 478 U.S. 675 (1986). Fraser gave the following speech at a high school assembly in support of a candidate for student government office:

> I know a man who is firm — he's firm in his pants, he's firm in his shirt, his character is firm — but most ... of all, his belief in you, the students of Bethel, is firm.
>
> Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts — he drives hard, pushing and pushing until finally — he succeeds.
>
> Jeff is a man who will go to the very end — even the climax, for each and every one of you.
>
> So vote for Jeff for A.S.B. vice president — he'll never come between you and the best our high school can be.

Id. at 687 (Brennan, J., concurring).

126. *Id.* at 686 n.121.

The Court said, "The undoubted freedom to advocate unpopular and controversial issues in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[127]

The *Fraser* Court distinguished *Tinker* on the basis that the penalties in *Fraser* were unrelated to any political viewpoint, and therefore, were permissible.[128] The Court stressed that schools have an inculcative function and "the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings."[129] Furthermore, the Court included a statement on extracurricular educational activities which clearly could include *Spectrum*, the school newspaper involved in *Hazelwood*. The *Fraser* Court said, "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order."[130] This statement laid the groundwork for the Court's most restrictive decision.

VI. THE COMMUNITY VALUES STANDARD OVERWHELMS THE FIRST AMENDMENT

In *Hazelwood School District v. Kuhlmeier*,[131] the Supreme Court concluded that the First Amendment rights of public school students were not violated when their principal, without conferring with the newspaper staff, deleted an article about pregnant teenagers and an article about the impact of divorce from the school newspaper.[132] Critics have characterized *Hazelwood* as the Court using an atom bomb to swat a fly.[133] A close examination illustrates why the Court's analysis and holding were predictable. The *Hazelwood* holding was inevitable given that the ruling was based upon the Court's use of a balancing test and the ever-increasing weight given to compelling state interests in educating and training young people. *Hazelwood*, then, falls into line with the Court's previous decisions supporting the autonomy of local school boards in controlling school-related activities, with a special emphasis on curriculum control.

Prior to *Hazelwood*, almost every federal court faced with the question of student press rights started its analysis with *Tinker* and found student

127. *Id.* at 681.
128. *Id.* at 685.
129. *Id.* at 682.
130. *Id.* at 682.
131. 484 U.S. 260 (1988).
132. *Id.* at 276.
133. *See* Abrams & Goodman, *supra* note 111.

journalism entitled to extensive First Amendment protection.[134] In reaching this conclusion, many courts based their analysis on the "public forum doctrine."[135] This doctrine ensured that once the state established a "forum" for public expression, it could not censor speech or speakers, absent highly compelling circumstances.[136]

In deciding whether a school publication is a designated public forum, courts have focused on whether the publication has been opened to the general public as a place for expressive activity.[137] The Supreme Court first applied this test in *Perry Education Association v. Perry Local Educators' Association*.[138] In applying this test, the courts have reasoned that "[t]he Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if [the State] was not required to create the forum in the first place."[139]

Initially, the *Hazelwood* Court considered the traditional First Amendment analysis.[140] Justice White, writing for the majority, recognized the First Amendment protection that flowed from *Tinker* by quoting that opinion's oft-cited language: "Students in the public schools do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"[141] However, he quickly modified that statement by citing *Bethel* in support of the Court's position that students in school settings do not enjoy the same rights as adults in other settings and that the school can "disassociate itself" from vulgar or inappropriate forms of expression.[142]

Justice White proceeded with the public forum question and specifically rejected the Eighth Circuit Court of Appeal's holding that *Spectrum* was a public forum for the expression of student opinion.[143] The majority found that the school board had not intended to establish the paper as a forum for "indiscriminate use" by the public,[144] which was the standard established in *Perry*.

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134. *Id.* at 706.
135. *Id.*
136. *Id.* at 708.
137. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (upholding a content-neutral regulation restricting access to teachers' mailboxes).
138. *Id.*
139. R.W. Westling, Hazelwood School District v. Kuhlmeier: *An Administrator's Authority to Exercise Prior Restraint Over School-Sponsored Publications*, 62 TULANE L. REV. 1467, 1470 (1988) (quoting *Perry*, 460 U.S. at 45).
140. *Hazelwood*, 484 U.S. at 260.
141. *Id.* at 266 (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969)).
142. *Id.*
143. *Id.* at 268-69.
144. *Id.* at 270.

Once the Court found that the school board created *Spectrum* as a supervised learning experience for journalism students,[145] the paper became a school-sponsored activity, and therefore, was not entitled to unchecked First Amendment protection. Even though the paper was circulated beyond the class to all students and those students were encouraged to respond, the Court turned to its predictable balancing test. This action was consistent with prior rulings. The foundation for *Hazelwood* rested upon the determination that the school newspaper was part of the curriculum and not a public forum. As a part of the curriculum, the paper was not entitled to First Amendment protection generally available to public forums. Ultimately, the *Hazelwood* Court applied the *Bethel* standard, which recognized that school officials could determine what speech was appropriate in the classroom or at school assemblies.[146] Ironically, this standard had its origins in *Tinker*.

Essentially, *Hazelwood* made a distinction between the student's right to write, read and speak freely and a public institution's right not to be associated with the content of such speech. This distinction may provide a port in the storm for those seeking First Amendment protection within the schoolhouse. As one commentator asserts, "The court's opinion does not stand for the propriety of government censorship. This was not a case of the State barring a certain kind of speech, or limiting which opinions might be expressed, but of a school determining the content of something that bears its official imprimatur."[147] By distinguishing between allowing speech and sponsoring speech, and holding that different standards of First Amendment protection apply to each, the *Hazelwood* decision grants high school administrators the right to police and censor those expressions published under the school's name as part of the curriculum, thereby, granting the administrators the power to disassociate themselves from viewpoints that might be "erroneously attributed to the school."[148]

The *Hazelwood* Court rejected the *Tinker* standard, which the Court said applied solely to "personal expression that happens to occur on the school premises."[149] The Court held "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" fell outside the *Tinker* standard.[150] The school could disassociate itself "from speech that is, for example, ungrammatical, poorly written,

145. *Id.* at 268-69.
146. *Id.* at 276.
147. Dawn P. Danzelsen & Edward G. Reitler, *Recent Developments, Constitutional Law: The First Amendment and School Sponsored Activities*, 11 HARV. J.L. & PUB. POL'Y 837, 841 (1988).
148. *Hazelwood*, 484 U.S. at 271.
149. *Id.*
150. *Id.*

inadequately researched, biased or prejudiced, vulgar or profane, or *unsuitable for immature* audiences," according to the Court.[151] Applying this philosophy, the Court held that: "[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in *school-sponsored expressive activities* so long as their actions are reasonably related to *legitimate pedagogical concerns*."[152] All of these characteristics are subjective. The "unsuitability," however, is the most limiting or censoring of thought.

Legitimate pedagogical concerns! The Court has constructed a filter, a powerful control tool to be utilized by officials. Consequently, some commentators now feel that the actions of school officials do not implicate free speech concerns at all so long as they are taken with a "valid educational purpose."[153] Determining a valid educational purpose, however, may be problematic. Justice White, in his statement directed at the principal's actions in deleting the two pages of administration-perceived "objectionable text" from *Spectrum*, found that the principal had acted reasonably.[154] In making this finding, the Court provided an example of one set of facts that passed the "valid educational purpose test." Commentators have concluded that the broadest way to read this example is that "when an educator acts in good faith to evaluate a situation in terms which focus on quality of work or on the propriety of materials for dissemination to students in the school environment," the action will be seen as a valid educational purpose.[155] Divorce and pregnancy are deemed inappropriate considerations for high school reading, study and discussion. Without preparation, practice or training for comparing, contrasting and evaluating ideas, how can students be teachable at the university?

VII. ARE THE CONTROLS AT THE LOWER ACADEMY SUBJECT TO BEING TRANSPLANTED?

Let us be clear, the fact is that academic protection is achieved, if at all, through First Amendment analysis. There is no constitutionally-approved academic freedom sub-set. First Amendment protection within the academy is no different than it is elsewhere. First, the *Tinker* standard stated that absent a showing of "material and substantial interference with schoolwork or discipline," schools could not restrain the First Amendment rights of their students.[156] Then, *Hazelwood* expressly limited this right to non-school

151. *Id* (emphasis added).
152. *Id.* at 273 (emphasis added).
153. Hafen, *supra* note 108, at 693.
154. *Hazelwood*, 484 U.S. at 274-75.
155. Hafen, *supra* note 108, at 694.
156. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506-07 (1969).

sponsored activities. Given *Hazelwood*'s new standard in the public school setting, clearly the educator's actions need merely be "reasonably related to legitimate pedagogical concerns."[157]

The Supreme Court, however, explicitly reserved the question of whether a college student's search for knowledge would be subject to the wide-ranging powers granted high school administrators in *Hazelwood*.[158] Thus, it is possible that lower courts will use this undecided question to prevent university administrators from using *Hazelwood* as a green light for censorship in higher education.[159] Does location determine the light? Or do age or a magic ritual with paper? Can the key to unlocking these questions ever be a footnote?

VIII. THE STRUGGLE FOR THE MIND

A. *The Preferred Position Perspective*

Philosophers and leaders have enshrined the inviolable right of free speech. Voltaire passionately phrased his belief in free speech. "I disapprove of what you say, but I will defend to the death your right to say it."[160] Justice Oliver Wendell Holmes insisted that the principle of free thought meant "not free for those who agree with us, but freedom for the thought that we hate."[161] Justice Hugo Black explained the implications of not enforcing the First Amendment to the fullness of its constitutional extent. "I do not believe that it can be too often repeated that the freedoms . . . guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish."[162]

Finally, within the context of college conduct codes, Justice William Brennan, a staunch advocate of the First Amendment, stated that colleges should abolish all conduct codes.[163] Justice Brennan is correct.[164] At a recent symposium on the issue of the legitimacy of university regulations against hate speech,[165] the overwhelming majority of participants rejected conduct codes as a technique to regulate civility on campus.[166] A more frontal attack is occurring as some students begin looking to the courts for

157. *Hazelwood,* 484 U.S. at 273.
158. *Id.* at 273 n.7.
159. Abrams & Goodman, *supra* note 111, at 728.
160. STEPHEN G. TALLENTYRE, THE FRIENDS OF VOLTAIRE 199 (1907).
161. United States v. Schwimmer, 279 U.S. 644, 654-55 (1924) (Holmes, J., dissenting).
162. Communist Party v. SACB, 367 U.S. 1, 137 (1961) (Black, J., dissenting).
163. Hentoff, *supra* note 41, at A24.
164. *But see* Herron, *supra* note 10, at 407.
165. Paul R. Verkuil, *Free to Speak, but Willing to Listen and Learn,* N.Y. TIMES, Apr. 25, 1990, at A28.
166. *Id.*

relief, having found little on campus.[167] Students argue that campus codes violate their free speech rights guaranteed by the First Amendment.

For example, the University of Connecticut expelled a student for posting a hand-lettered sign on the door of her dorm room.[168] The sign listed various categories of people unwelcome in the student's room.[169] Among the enumerated groups were "homos."[170] The university expelled the student on the basis of a regulation banning, *inter alia*, slurs regarding sexual orientation.[171] Under the pressure of the student's First Amendment claim, the university reinstated her.[172] Besides settling with the student, the university revised its code to encompass only the most incendiary speech.[173] The prohibited speech then included only those words likely to provoke an immediate violent reaction in the context of a direct personal confrontation.[174]

One of the early cases that went to trial involved the campus code of the University of Michigan.[175] In *Doe v. University of Michigan*, a biopsychology graduate student challenged the university's campus code.[176] Doe complained that the code inhibited him from, and would discipline him for, expressing his views in his academic specialty.[177] Biopsychology is the study of the biological differences in personality and mental abilities among

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167. The ACLU sued to have the University of Wisconsin code declared unconstitutional. France, *supra* note 24, at 44.

168. Editorial, *How to Handle Hate on Campus,* N.Y. TIMES, Dec. 13, 1989, at A30.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. Doe v. University of Mich., 721 F. Supp. 852, 853 (E.D. Mich. 1989).

176. *Id.* at 858. The key part of the University of Michigan's Policy on Discrimination and Discriminatory Harassment of Students in the University Environment states that in "educational and academic centers" persons are subject to discipline for:

> 1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that
>
> > a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
> >
> > b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety.

Id. at 856.

The University of Michigan Policy on Discrimination and Discriminatory Harassment was passed unanimously on April 14, 1988 and became effective on May 31, 1988. *Id.*

177. *Id.* at 858.

the sexes and races.[178] Doe charged that the university's policy had a chilling effect on the open discourse of this controversial theory.[179]

Examining the plaintiff's claim that the policy was unconstitutional, the court held that the policy was overbroad and vague.[180] Addressing both aspects of unconstitutionality, the court first described all of the types of speech that are not entitled to the fullest protection of the First Amendment.[181] The court included obscenity, libel and fighting words among the types of speech that may be regulated.[182] Furthermore, the court stated that although it could not regulate pure speech that falls outside these exceptions, the university could constitutionally impose time, place or manner restrictions upon campus speech.[183] However, the court qualified that statement by noting that the university could not prohibit certain speech simply because it disagreed with the ideas or messages that the speaker sought to convey.[184]

The court also addressed the overbreadth claim.[185] The court, in part, focused upon *Papish v. University of Missouri*.[186] "[T]he mere dissemination of ideas — no matter how offensive to good taste — on a state university campus may not be shut off in the name alone of common decency."[187] Based upon this reasoning, the court determined that "the state may not prohibit broad classes of speech, some of which may indeed be legitimately regulable, if in so doing a substantial amount of constitutionally protected [conduct] is also prohibited."[188] This was the fundamental infirmity of the Policy. The court found that the University of Michigan Code could not withstand constitutional scrutiny.[189]

After finding the policy unconstitutional for reasons of overbreadth, the court focused upon the heart of its attack: vagueness.[190] Applying the vagueness test, the court found that the words "stigmatize" and "victimize" were unconstitutionally vague because people of ordinary intelligence must

178. *Id.*
179. *Id.* at 858.
180. *Id.* at 866-67.
181. *Id.* at 862-63.
182. *Id.* at 862.
183. *Id.* at 863. *See also* United States v. O'Brien, 391 U.S. 367 (1968).
184. *Doe*, 721 F. Supp. at 863 (citing Texas v. Johnson, 491 U.S. 397 (1989)).
185. *Id.* at 864.
186. 410 U.S. 667 (1973).
187. *Doe*, 721 F. Supp. at 864 (quoting *Papish*, 410 U.S. at 670).
188. *Id.*
189. *Id.*
190. *Id.* at 867. The court stated that "looking at the plain language of the Policy, it was simply impossible to discern any limitation on its scope or any conceptual distinction between unprotected and protected conduct." *Id.*

necessarily guess at their meaning.[191] Simply put, vagueness "'inhibit[s] freedoms affirmatively protected by the constitution.'"[192] Vague rules are the stuff of the police state. The court found that the university's policy created a real and substantial chilling effect.[193]

The Supreme Court had an opportunity to test the conclusions of the *Doe* court in a non-academic speech case, *R.A.V. v. City of St. Paul, Minnesota*.[194] In *R.A.V.* the Court did what many universities had not been willing to do, recognized a free trade in ideas zone, even though in this instance the idea was the reprehensible act of burning a cross.[195] The Court rejected the invitation posited by the city to create a new low-value category for hate speech.[196] In doing so, the Court refused to lower the tolerance point for protected speech.[197] The ordinance at issue in *R.A.V.*, as construed by the Minnesota Supreme Court, forbade fighting words based on characteristics that have come to define hate speech: "race, color, creed, religion, or gender."[198]

The St. Paul ordinance was designed to convey a message of understanding by the government of the indignities that minorities are forced to endure because of, among other actions, hate speech.[199] If couched in general words that prohibit fighting words, this message of understanding would be lost. The state argued that government must address bias-motivated speech in order to ensure dialogue, reconciliation and peace.[200]

Besides conveying a message of support to minorities, the state concluded that the statute is not prohibiting speech uttered in the spirit of the marketplace;[201] in short, that the traditional marketplace rationale for the First Amendment is not served where hate speech is unregulated.

The *R.A.V.* Court rejected the invitation to create a new low-value cate-

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191. *Id.* at 866 (citing Broderick v. Oklahoma, 413 U.S. 601, 607 (1973)). The court stated that "both of these terms are general and elude precise definition," and that "the terms of the Policy were so vague that their enforcement would violate the due process clause." *Id.* at 867.

192. *Id.* (quoting Smith v. Goguen, 415 U.S. 566, 573 (1974)).

193. *Id.* (citing the test in Young v. American Mini-Theatres, 427 U.S. 50 (1976)).

194. 505 U.S. 377 (1992).

195. *Id.* at 396.

196. *Id.* at 381. *See* Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124 (1992).

197. *R.A.V.*, 505 U.S. at 381.

198. *Id.* at 380; *cf.*, Amar, *supra* note 196.

199. ST. PAUL, MINN., LEG. CODE § 292.02 (1990). Consider, for example, Wisconsin v. Mitchell, 508 U.S. 476 (1993), wherein speech becomes unprotected action when the crime itself resulted from the victim's race, religion, gender or the like. This is an entirely different matter. *See also* ANTI-DEFAMATION LEAGUE, 1994 HATE CRIME LAWS, A COMPREHENSIVE GUIDE (1994).

200. *R.A.V.*, 505 U.S. at 394-95.

201. *See id.* at 393.

gory for hate speech.[202] In fact, the Court increased the scrutiny given to regulations of previously denominated categories of low value, reasoning that those categories are not "entirely invisible" to the First Amendment.[203] Regulation within low-value categories must be done for reasons related to why the category exists, not for any non-prescribable message incident to them. In reaching this conclusion, the Court found unconstitutional not just the statute at issue in *R.A.V.*[204]

R.A.V.'s increased scrutiny of regulations of low-value speech is in conformity with the absolutists. One First Amendment absolutist calls for a view of the First Amendment that considers the "pathological perspective."[205] This theory stands for the proposition that the overriding objective at all times must be to equip the First Amendment to do the maximum service.[206] If thus equipped, the First Amendment will sustain those historical periods when intolerance of unpopular ideas is prevalent.[207] Therefore, the First Amendment must be targeted and prepared for the most threatening scenarios.[208]

This analysis of the First Amendment is suggested from the very nature of the Amendment. Unlike other Amendments, the First Amendment is quite clear in its language; it maintains a preservative function.[209] It is, after all, a preferred guarantee. Justifications for the infringement of other constitutionally protected rights and liberties are usually inadequate to justify restrictions on freedom of speech or press.[210]

The importance of the First Amendment lies with its purpose of perpetuating the republican form of government.[211] In a democratically pluralistic society, the First Amendment is first among equals. Freedom of speech is the paradigmatic liberty through which citizens participate in democracy.[212]

Free speech is therefore essential to the basic structure and relationship of the political community.[213] Consequently, a [state] campus conduct code

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202. *Id.* at 382-83.
203. *Id.* at 383.
204. *Id.* at 386.
205. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985). The author defines "pathology" as a shift in fundamental attitudes and perceptions among groups whose judgments have an important influence on the general level and vigor of debate and inquiry. *Id.* at 451.
206. *Id.* at 449.
207. *Id.*
208. *Id.* at 450.
209. *Id.*
210. David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 455 (1987).
211. *Id.* at 448-49.
212. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approach to the First Amendment*, 1990 DUKE L.J. 375, 392.
213. *Id.*

that interferes with the First Amendment necessarily threatens the fragile democratic balance.

B. *Critique of the Preferred Position Perspective*

There are difficulties with the preferred position perspective. Indeed, some of the premises upon which the preferred position rests are tenuous.

The absolutist's position does not appear to consider the universal condemnation of prejudice, which is a violation of human rights and basic dignity. The United Nations Universal Declaration of Human Rights includes not only entitlement to equal protection against discrimination, but also states that "any incitement [fighting words] to such discrimination" is a violation of the Declaration.[214] In *Beauharnais v. Illinois* the United States Supreme Court at one point recognized a similar prohibition on public acts that discriminate against a group.[215]

Make no mistake, the essence of hate speech is that one group believes it is superior to another based upon immutable characteristics.[216] Consequently, those that espouse this view believe that they can demean, abuse, and subordinate "selected victim groups."[217] The quest to limit the rights of those perceived to be in the "selected victim groups" manifests itself in verbal attacks and abuse, which often result in mental and physical violence.[218]

This multi-faceted violence has caused some to reconsider the preferred position of the First Amendment, arguing that this "historical connection of all the tools of racism is a record against which to consider a legal response to racist [and other hate] speech."[219] Thus, the magnitude of the negative and unknown effects of hate speech demands a reexamination of equal protection interests not to mention other constitutional rights and liberties equally as compelling in remedying hate speech.[220]

In addition to policy concerns which measure the fundamental value of constitutional interests, some argue that a preferred position for the First

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214. *Universal Declaration of Human Rights,* G.A. Res. 217, U.N. Doc. A/8II (1948). The full text of the relevant portion of the Declaration states: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." *Id.* Of course, the declaration is speaking to the fighting-words doctrine which is also recognized by most absolutists. *Id.*

215. 343 U.S. 250 (1952).

216. Matsuda, *supra* note 1, at 2332.

217. *Id.*

218. *Id.*

219. *Id.* at 2335.

220. For example, the Thirteenth Amendment to the United States Constitution forbids "badges of slavery" for both public and private parties. U.S. CONST. amend. XIII, § 2.

Amendment rests upon a faulty or false assumption. That assumption is the American jurisprudential myth of the marketplace of ideas.[221] This concept, idealizing the merits of competing ideas and robust debate, is rooted in the utilitarian movement of English philosophers such as John Stuart Mill.[222] Justice Holmes is credited with introducing the concept of a free marketplace of ideas in his dissent in *Abrams v. United States*[223] when he stated that "the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."[224] The marketplace model assumes that people will eschew false assertions.[225] Accepting this assumption as true, the most meritorious aspect of the marketplace model is that it avoids the danger of officially-sanctioned truth.[226] This unrealistic assumption about human nature tends to diminish the effectiveness of the marketplace theory. The success of the marketplace theory requires a citizenry "capable of making determinations that are both sophisticated and intricately rational."[227] Societal trends have not vindicated the marketplace model's faith in the rationality of the human mind.[228] Citizens appear to act without reason or full understanding.

Without the requisite guarantee of a rational populace, an ominous danger exists. If people are unequipped to distinguish truth from falsity, then there is the dangerous potential for the dissemination of completely false information under the sanctity of the First Amendment.[229] If this is the case, does it not reflect upon the educational process?[230] Are students provided with the opportunities to learn, think and reflect, as well as, dispute and question ideas? The failure is not in the marketplace of ideas theory, but in many school systems where there is an unwillingness to teach people the basic tools of thinking. This results in both government and its citizens being blinded by the information highway and being poorly prepared when confronted with opportunities to think. Could it be that the computer will be

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221. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1.

222. *Id.* at 3.

223. 250 U.S. 616 (1919) (Holmes, J., dissenting). Justice Holmes' dissent hinged on his belief that the defendants' call for a socialist revolution presented no clear and present danger. Therefore, the best way to refute the defendants was through public debate. *See also* Ingber, *supra* note 221, at 3.

224. *Abrams*, 250 U.S. at 630. From Justice Holmes' perspective, a properly functioning marketplace of ideas ultimately assures the proper evolution of society, wherever that evolution might lead. Ingber, *supra* note 221, at 3.

225. Ingber, *supra* note 221, at 3.

226. *Id.* at 7. As discussed hereinafter, the marketplace model permits the converse danger of the dissemination of false doctrine. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 7-8.

230. *Id.*

the ultimate downfall of the First Amendment?

C. *The Revisionist Perspective*

While the First Amendment's preferred position advocates argue for the right to exercise free speech, even hate speech, there is a considerable body of legal scholarship, the revisionists, that favors censorship of what they define as hate speech.[231] These academicians add intellectual support to the emotional outrage that hate speech provokes.[232] The First Amendment revisionists, in order to justify the regulation of speech, do not claim that campus codes are not content regulations. Nor do they contend that the traditional categories of low-value speech, to which the First Amendment affords less protection, require expansion.[233] "This stretching [of the First Amendment exceptions] ultimately weakens the First Amendment fabric, creating neutral holes that remove protection for many forms of speech. Setting aside the worst forms of racist speech for special treatment is a non-neutral, value-laden approach that will better preserve free speech."[234]

Instead, the revisionists charge that the Court's practice of permitting content-based restrictions on speech that falls into one of a few recognized exceptions ignores legitimate countervailing interests.[235] Rather than attempting to focus upon new exceptions to the First Amendment, the revisionists attack the fundamental nature of the First Amendment.[236]

While others insist upon a value-neutral constitutional interpretation, the revisionists advocate a so-called realistic approach.[237] The revisionists maintain that traditional First Amendment analysis is not value-neutral at all.[238] Rather, because the First Amendment was constructed by, is applied by and is interpreted by property-holding white males, there is necessarily a value system operating throughout First Amendment jurisprudence.[239] Based upon the historical context in which the First Amendment has developed, that value system reflects the exclusive dimension of the men in power

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231. *See, e.g.*, Matsuda, *supra* note 1, at 2321-22.

232. Irving R. Kaufman, *Nibble at Freedom, and Risk Losing It All; First Amendment: Tools Dragged Out to Stifle Hateful Speech Would Disturb Bedrock Principles of Free Expression*, L.A. TIMES, July 31, 1990, at B7.

233. Matsuda, *supra* note 1, at 2357.

234. *Id.*

235. Martha Minow, *Recent Case: First Amendment — Racist and Sexist Expression on Campus — Court Strikes Down University Limits on Hate Speech* — Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989), 103 HARV. L. REV. 1397 (1990).

236. Matsuda, *supra* note 1, at 2321.

237. *Id.*

238. Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 175 (1982).

239. Matsuda, *supra* note 1, at 2322. This does not bode well for the King James or any other version of the Bible!

at the time.[240] The argument would seem to be that free speech values do not exist within a political vacuum.[241] In order to create a more equitable foundation and to function more effectively for the interests of a larger constituency, the First Amendment must be examined from a multi-faceted perspective.[242] First Amendment reconsideration in light of more heterogeneous concerns is important because, "freedom of expression as defined by women and minority groups looks different than freedom of expression defined by others."[243] In fashioning a new method of First Amendment analysis, the revisionists argue that because of prejudice inherent within traditional First Amendment analysis, women and minorities deserve special treatment.[244]

The revisionist's value-laden approach is particularly appealing in the campus setting. As the President of Emory University noted, "We misconstrue the nature of the university when we operate as if it were value-neutral. Educators are by definition professors of value."[245] Furthermore, the university is a forum for passing on to the next generation not only information but also the habits and manners of society.[246] It seems from this argument that the university is no different than the secondary or elementary school or society at large since its purpose is to promote not only free expression but also an environment conductive to learning and mutual engagement.[247] And when censorship is necessary, it is employed. When someone or some group is the target of hate speech, they are effectively silenced, frightened and incapable of participating fully in campus life.[248] By censoring some speech and preventing intimidation, the revisionists hope to facilitate the exchange of more diverse ideas except, of course, those they consider to be the wrong ones.[249]

The revisionist's attack upon the fundamental nature of the First Amend-

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240. *Id.*

241. France, *supra* note 24, at 44.

242. Matsuda, *supra* note 1, at 2322. Matsuda's theory embraces the perspective of those she terms as "outsiders." Matsuda uses the term "outsider" instead of "minority" because the latter belies the numerical significance of the constituencies typically excluded from jurisprudential discourse. *Id.* at 2322 n.15.

243. France, *supra* note 24, at 44 (comments of Kathleen Mahoney, a Canadian law professor). Similarly, Stanford law professor Charles Lawrence notes that in considering the First Amendment and hate speech, people must listen to the victims. Jon Wiener, *Free Speech for Campus Bigots,* THE NATION, Feb. 26, 1990, at 273.

244. *See* Matsuda, *supra* note 1, at 2380-81.

245. James T. Laney, *Why Tolerate Campus Bigots?*, N.Y. TIMES, Apr. 6, 1990, at A35.

246. *Id.*

247. *Id.*

248. *See generally* Richard H. Hiers, *Academic Freedom in Public Colleges and Universities: O Say Does That Star-Spangled First Amendment Banner Yet Wave?*, 40 WAYNE L. REV. 1 (1993).

249. Kaufman, *supra* note 232, at B7.

ment stems, in part, from inherent flaws in general First Amendment philosophy, notably, the conception of the marketplace of ideas.[250] The ideal that each person possesses the opportunity to expound his/her views has failed.[251] Racism, sexism and other variations of prejudice have proved intransigent in the private sector.[252] Country club and rotary networks have created a society where a limited few have true access to the private marketplace of ideas. The difficulty here is that the revisionists want to censor private ideas, intolerant though they might be. The revisionists cannot identify any official policy protecting racism or discrimination; the "problem has become primarily a problem of attitude, of mind, not of official policy."[253]

When First Amendment absolutists invoke the marketplace model, the traditional emphasis on the individuality of constitutional rights succumbs to the superior goal of group benefit.[254] The aggregate benefit that this society receives from the promotion of free speech, as well as free press, justifies the marketplace model.[255] The marketplace theory[256] values not the benefit of free speech to the individual, but the benefit of free speech to society.[257]

The marketplace model focuses on society and not the speaker who relegates free speech to an instrumental function.[258] Free speech is valued for its ability to facilitate the progress of society, rather than any innate value in and of itself.[259] When free speech is viewed as such, limited government regulation becomes more palatable, the purpose usually being to maximize societal benefits.[260] Thus, the absolutist's marketplace theory actually justifies the revisionist theory that some government regulation of free speech is necessary. At some point, the First Amendment will break under the rejection of tolerance of hated ideas. If society is to benefit from the eradication of hate speech, it must be accomplished through education not censorship or indoctrination.

One of the first voices heralding the abolition of tolerance of hate speech was heard in the early 1980s when the term "words that wound" was coined.[261] In considering a legal remedy for words that wound, hate speech

250. *See* Minow, *supra* note 235.
251. *See* Hiers, *supra* note 248.
252. *Id.*
253. Bollinger, *The Open Minded Soldier, supra* note 6, at 58.
254. Ingber, *supra* note 221, at 4.
255. *Id.*
256. *See generally* BOLLINGER, THE TOLERANT SOCIETY, *supra* note 6.
257. *Id.*
258. *Id.*
259. *Id.*
260. *See* United States v. O'Brien, 391 U.S. 367 (1968).
261. *See generally* Delgado, *supra* note 238.

began to be analogized to the intolerant act of producing obscenity.[262] The Supreme Court's reasoning for why states are constitutionally permitted to regulate obscenity became instructive when seeking similar reasoning in calling for the regulation of hate speech.[263]

In *Paris Adult Theatre I v. Slanton*,[264] the Supreme Court articulated several reasons why states can subject obscenity to regulation. First, the Court stated that there is "at least . . . an arguable correlation between obscenity and crime."[265] The parallel seemed to be that hate speech is in contravention with the goals of antidiscrimination laws and the spirit of the Thirteenth Amendment.[266] Second, *Paris* concluded that states can regulate obscenity because the nation and the states have a right to maintain a decent society.[267] By analogy, the revisionists argue that the regulation of hate speech is within the government's interest in maintaining a "decent society."[268] By that logic, any intolerant act can be forbidden by government in the name of a "decent society."

While these reasons constitute the legal justification for regulating hate speech, other revisionists have stressed equitable and policy considerations.[269] The revisionists believe that content-based and viewpoint-based limits upon speech actually promote equality in the exercise of free speech.[270] The revisionists assert that "free speech is meaningless to people who do not have equality."[271] In this context, equality is a necessary precondition to the exercise of free speech.[272] Therefore, sanctions against hate speech may actually promote a more equitable exercise of free speech, especially among some of the victims of hate speech.[273] By eliminating the chilling effect that hate speech has upon minority commentary, the revisionists believe they are actually promoting free speech.[274]

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262. *Id.* at 177.
263. *Id.*
264. 413 U.S. 49 (1973).
265. *Id.* at 58.
266. Delgado, *supra* note 238, at 178.
267. *Paris Adult Theatre*, 413 U.S. at 59-60 (quoting Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, J., dissenting)).
268. Delgado, *supra* note 238, at 178.
269. *See generally* Matsuda, *supra* note 1.
270. France, *supra* note 24, at 44.
271. *Id.* (comments of Mari Matsuda).
272. *Id.* (comments of Charles Lawrence).
273. Kaufman, *supra* note 232, at B7.
274. *Id. See* Ray Washington, *UF's Sexual Harassment Workshops Expand,* GAINESVILLE SUN, April 19, 1995, at B1. Starting in the fall of 1995, graduate teaching assistants at the University of Florida will be expected to attend sexual harassment workshops and mini conferences. *Id.* Jacquelyn Hart, Assistant Vice President for Affirmative Action, stated, "The more people who go through these sessions, we believe, the more likely our campus will be free from sexually harassing behavior." *Id.*

The revisionist's policy considerations start with the basic contention that law formation is largely the product of value judgments.[275] Therefore, adherence to doctrinal absolutism implies that the law, perhaps unintentionally, supports hate speech.[276] Juxtaposed with this implication is the fact that in the United States, society expresses its moral judgments through the law.[277] The First Amendment not only justifies the absence of laws against hate speech, but also serves to excuse the lack of a systemic response to this shameful social phenomena.[278] As one commentator has suggested, "by donning blinders that block our equality interests from judicial consideration courts . . . risk perpetuating discrimination."[279] Thus, because "any definition of rights necessarily defined the rights of others," this, in essence, has protected the rights of others to be free from oppression.[280]

The revisionists charge that since the First Amendment does not consider the interests of all those involved, it becomes a tool of domination, not liberation.[281] Under this scheme, society's outsiders bear the burden of the supposed greater good that free speech promotes.[282] Failure to examine competing equality interests[283] especially is anomalous in First Amendment jurisprudence, a realm of constitutional law premised on the marketplace notion that sound conclusions are the product of thorough exploration of all cogent points.[284]

In the final analysis, the revisionist's perspective is rooted not only in natural justice, but also in government control of acceptable private political expression. The moral arguments that the revisionists construct to justify the regulation of hate speech are most compelling. They favor regulating hate speech as defined by the government, "not because it isn't really speech, not because it falls within a hoped-for neutral exception, but because it is wrong."[285] As one commentator has written, "failing to notice another's

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275. Matsuda, *supra* note 1, at 2379.
276. *Id.*
277. *Id.*
278. *Id.*
279. Minow, *supra* note 235, at 1399.
280. Balkin, *supra* note 212, at 381. Balkin compares the free market arguments that conservatives adopted and perverted in the *Lochner* era with the potential perversion that First Amendment absolutism presents. This perversion is revealed as Klansmen and cigarette advertisers join staunch First Amendment advocates as defenders of the faith. Balkin calls this phenomenon "ideological drift." *Id.* at 393, 423.
281. Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 459.
282. *Id.* at 472.
283. *Id.* This result demonstrates the perversion that Balkin's "ideological drift" produces. *See generally* Balkin, *supra* note 212.
284. Minow, *supra* note 235, at 1399.
285. Matsuda, *supra* note 1, at 2380.

pain is an act with significance."[286]

The argument continues that in addition to the psychological trauma that government indifference inflicts,[287] analytically dismissing the claims of hate speech victims as outside doctrinal protection sends a dual message.[288] The victims receive a message of marginalization, which compounds their initial injury.[289] Simultaneously, denying victims redress signals approval to the perpetrators, perhaps prompting further acts of bigotry.[290]

D. *Critique of the Revisionist Perspective*

While the revisionists accuse the absolutists of "romanticizing" the First Amendment,[291] the revisionist position not only romanticizes the moral imperative, but also, more dangerously, leaves the judgment to the authoritative decision maker. The revisionist's doctrine emphasizes governmental restructuring of the First Amendment to accommodate an acknowledged evil.[292] As other evils are acknowledged, they too will be dealt with in a similar manner, and the flexibility of the First Amendment will accommodate all who fear the marketplace of ideas. The fact is, what the revisionists propose is the promotion of a hate speech-free society by abrogating the exercise of all other conflicting, constitutionally-mandated rights.[293]

To say that society can solve its problems by suppressing the beliefs or opinions of private citizens is inconsistent.[294] The resulting freedom will be for me, but not for thee. The revisionists have forgotten that the First Amendment serves to protect the minority against majoritarian impulses to suppress the airing of unpopular views. Censoring speech that the majority of citizens abhor is antithetical to this free society.

Controlling expression on the grounds that it promotes hate is a dangerous method for achieving societal goals. The danger exists in the uncertainties of the proposition. The revisionists posit that the victim's perspective is the standard for judging what expression is damaging.[295] The very subjectivity of this standard invites abuse. Moreover, this subjectivity entails a degree of ambiguity that jeopardizes due process.

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286. France, *supra* note 24, at 44.
287. Minow, *supra* note 235, at 1399.
288. *Id.* at 1400.
289. *Id.*
290. *Id.*
291. France, *supra* note 24, at 48 (comments of Mari Matsuda).
292. *See generally* France, *supra* note 24; Matsuda, *supra* note 1.
293. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).
294. *Id.*
295. Matsuda, *supra* note 1, at 2368.

The revisionist's theory includes other aspects that are objectionable from both a constitutional and social policy perspective. First, some revisionists claim that hateful verbal attacks upon dominant group members are permissible.[296] The revisionists rationalize this position by claiming that "retreat and reaffirmation of personhood are more easily attained for historically non-subjugated group members."[297] However, this position cuts against the philosophical foundation upon which the revisionists theory rests. While the revisionists sanctify diverse values and the deleterious effects of hate speech, apparently, they apply these principles selectively.

Another objectionable aspect of revisionists theory is found in the attempts to promote cultural diversity. The revisionists quarrel with the presence of books which contain what they perceive as hate speech.[298] This objection even extends to works where such hate speech is used to illustrate the ugly reality of a prejudicial society.[299] For example, revisionists criticize the use of literature, such as Mark Twain's, which employs hate speech to expose the ignorance of a racist society.[300]

While schools in the United States are admittedly deficient in non-Western course materials, the elimination of Eurocentric materials is a dangerous precedent. Censorship goes beyond just the regulation of speech to encroach upon the areas of artistic integrity and individual interpretation. The potential danger that someone may suffer from the artistic use of hate speech cannot justify interference with the right of an individual to express ideas and opinions free from restraints.

The revisionists recognize some of the flaws in their theories. They have, therefore, constructed various explanations to harmonize some of the glaring inconsistencies that undercut the credibility of their theories. For example, application of pure revisionist thought would deem Zionism as racist.[301] Therefore, speech that advocated Zionism would be subject to regulation. To avoid this consequence, the revisionists argue that racial hostility within the Zionist context is the product of historical persecution.[302] Analysis of Zionist hate speech must be examined in a particular context.[303] Thus:

> If a Zionist's expression of anger includes a statement of generic white supremacy and persecution, the speaker chooses to ally with

296. *Id.* at 2357.
297. *Id.* at 2361.
298. *Id.* at 2369.
299. *Id.*
300. *Id.*
301. *Id.* at 2363.
302. *Id.*
303. *Id.*

> a larger, historically dominant group, and the victim's privilege should not apply. On the other hand, angry, survivalist expression, arising out of the Jewish experience of persecution and without resort to the rhetoric of generic white supremacy, is protected under the contextualized approach.[304]

The "victim's privilege"[305] is the revisionist's convenient way of justifying the hard case. However, this rationale fails to consider hate speech by those in a victim's group; they theoretically also enjoy the "victim's privilege." This inconsistency reveals the strained logic in the revisionist attempt to reconcile the incongruous results that their doctrine produces.

IX. AN EGALITARIAN PARADIGM FOR HATE SPEECH

"To be weighed in the balance are, on the one hand, the extent to which communicative activity is in fact inhibited; and, on the other hand, the values, interests, or rights served by enforcing the inhibition."[306]

At the outset, it is important to note that the constitutional solutions apply only to state universities. Under the doctrine of state action,[307] private universities do not fall within the ambit of the following regulations. The basis of a constitutionally permissible campus conduct code starts with the Supreme Court's assertion that, "[T]he First . . . Amendment ha[s] never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses."[308]

Constitutional consideration of hate speech rests upon the proposition that not every action carries a message. Hate speech shares many characteristics with what the Supreme Court has deemed low-value speech.[309] Hate speech is somewhat like libel because it is untrue.[310] Unfortunately, that is a value judgment that might differ between speaker and recipient. Hate speech qualifies under the fighting words doctrine because it tends to provoke an aggressive reaction in the victim.[311] Once again, a value judgment is

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304. Cohen v. California, 403 U.S. 15, 25-26 (1971) (quoting Winters v. New York, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting)).

305. *Id.*

306. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 979 (2d ed. 1988).

307. Parker v. Brown, 317 U.S. 341 (1943).

308. *Cohen*, 403 U.S. at 19.

309. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (libel); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words); Miller v. California, 413 U.S. 15 (1973) (obscenity). In Roth v. United States, 354 U.S. 484, 479 (1957), the Court observed that obscenity was "utterly without redeeming social importance."

310. *See, e.g., Greenmoss Builders*, 472 U.S. at 763 (where a false credit report constituted libel).

311. *See Chaplinsky*, 315 U.S. at 571-72.

utilized if hate speech, as with obscenity, is said to possess no artistic, literary, scientific or social value.[312] Furthermore, the degree of tolerance is important in an understanding of impermissible speech.

In cases of libel, fighting words and obscenity, the Supreme Court has permitted content-based regulation because these forms of speech demand less, if any, First Amendment protection;[313] hence, the First Amendment is

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312. *Miller*, 413 U.S. at 24.

313. There is no question that libelous statements directed at individuals are outside First Amendment protection. Hate speech codes, however, punish statements against classes of people, such as Blacks, Jews or Orientals. The constitutionality of the codes thus depends on whether laws punishing group libel are permissible. The constitutionality of group libel laws is uncertain. Most courts require injury to an individual before a libel claim can be made. However, the Supreme Court did uphold the constitutionality of a group libel statute in Beauharnais v. Illinois, 343 U.S. 250 (1952).

Beauharnais arose when the petitioner was convicted under an Illinois statute banning speech which, *inter alia*, "exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots." *Id.* at 251 (quoting ILL. REV. STAT. § 224a (1949)). *Beauharnais* authorized the distribution of leaflets which urged segregation of whites from blacks. *Id.* at 252. Specifically, the leaflets said, "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, SURELY WILL." *Id.* at 276.

The Court upheld Beauharnais' conviction. *Id.* at 266. Justice Frankfurter, writing for the majority, said the statute was not unconstitutional simply because it punished group libel. *Id.* at 263.

> But if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State.

Id. at 258.

The Court rejected the idea that the statute should be subject to First Amendment scrutiny because it regulated the content of speech. *Id.* at 266. Since libel fell outside the protection of the Constitution, Justice Frankfurter reasoned there was no need to apply the "clear and present danger" test. *Id.*

Justice Frankfurter did not focus on whether the statements banned by the Illinois statute should be considered libelous in the first place. He said that as long as Illinois had defined libel in a way related to the "peace and well-being" of the State, it was an unreviewable legislative judgment. *Id.* at 258.

Twelve years after *Beauharnais*, the Supreme Court handed down the landmark libel decision of New York Times v. Sullivan, 376 U.S. 254 (1964). *New York Times* arose when a public official (Sullivan) in Montgomery, Alabama, sued the *Times* over an advertisement that appeared in its pages. *Id.* at 256. The advertisement accused Sullivan of racist, oppressive police practices against Blacks while Sullivan served as the Montgomery police commissioner. *Id.* at 256-58.

The Court framed the issue as whether the Alabama law of libel sufficiently safeguarded First Amendment and free press rights. *Id.* at 265. Writing for the majority, Justice Brennan concluded it did not. *Id.* at 292.

In *Beauharnais*, the Court had decided that the way a state defined libel was subject to rationality review. *Beauharnais*, 343 U.S. at 266. But in *New York Times*, Justice Brennan rejected the idea that a state could avoid a First Amendment inquiry by merely defining categories of speech as libelous. *New York Times*, 376 U.S. at 292.

not tolerant of platform protection for what is deemed hate speech. In the case of hate speech, there exist not only compelling reasons to regulate, but also even more compelling reasons to ignore regulation. While true hate speech is virtually lacking in content, one question is: Who censors the ideas and who protects the utterances?

The regulation of hate speech void of content must be distinguished from the regulation of other forms of prejudicial expression. Hate speech is complex, involving racism, sexism, homophobia, etc. It encompasses theories of superiority such as the white man's burden,[314] Herbert Spencer's Social Darwinism[315] and the Michigan plaintiff's theories of biop-

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> In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law. . . . [L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards which satisfy the First Amendment.

Id. at 269 (citing N.A.A.C.P. v. Button, 371 U.S. 415, 429 (1963)).

In essence, Justice Brennan said state libel laws would no longer be subject to the rationality review of *Beauharnais*. A First Amendment analysis would be applied instead. *New York Times* placed much more stringent restrictions on states' abilities to define libel law than *Beauharnais*. The statute from *Beauharnais* could not survive under the higher standard of analysis.

It can, however, be argued that the higher standard of review announced in *New York Times* does not necessarily make the *Beauharnais* statute unconstitutional. The categories of speech prohibited in the two cases were arguably different.

The statute at issue in *New York Times* had the potential to stifle criticism of public officials and their conduct. Some might say that the Alabama statute in *New York Times* failed strict scrutiny because it infringed on highly valued First Amendment discourse. By contrast, the *Beauharnais* statute might withstand review because that statute banned only hateful epithets which do not further the First Amendment's high purpose. I believe history suggests that *New York Times* settled the matter; the *Beauharnais* statute probably could not withstand constitutional analysis today.

As for obscenity, hate speech and obscenity do have some similarities. Both arguably are low-value speech, and both can be dehumanizing. For that reason, it might be suggested that hate speech law, like obscenity, be made a First Amendment exception.

However, there are also some important differences. Obscenity can be called low-value speech because it rarely contains serious political messages. Hate speech, on the other hand, is often tangled with political messages. The argument that hate speech effectively eliminates the possibility of reply speech is too broad to be considered seriously. The Supreme Court does not use it as a rationale for speech regulation.

Some might say that hate-speech law operates like obscenity law, but that suggestion has little appeal given the confused state of obscenity. The Court never had to create an obscenity exception. It existed in state and common law. Hate speech law, by contrast, would require the Court to undertake the daunting task of creating a new First Amendment exception.

314. "Take up the White Man's burden/send forth the best ye breed . . . ." OXFORD DICTIONARY OF QUOTATIONS 401:11 (4th ed. 1992).

315. HERBERT SPENCER, PRINCIPLES OF BIOLOGY (1865). "It cannot but happen . . . that those will survive whose functions happen to be most nearly in equilibrium with the modified aggregate of external forces . . . ." *Id.* at 64.

sychology.[316] Whether we like it or not, these theories convey ideas, which no matter how distasteful, enjoy First Amendment protection.[317] The difference between these repulsive theories and hate speech is the difference between the statements "You're inferior because . . . " and "You don't have a right to exist."[318] Clearly, the former sentence conveys an idea, while the latter does not.

I believe Professor Tribe's narrowly-drawn law that would punish the use of hate speech when it involves the intentional infliction of psychic trauma would pass constitutional muster.[319] Professor Tribe argues that "the First Amendment need not sanctify the deliberate infliction of . . . words that cause hurt just by their being uttered and heard."[320] Thus, fighting words used with the specific intent to inflict pain rather than to convey an idea would not and do not under existing case law enjoy the full protection of the First Amendment.[321]

The problem with regulating hate speech is one of overbreadth and intolerance of speech the government finds hurtful. That was the case in the University of Michigan's code.[322] The statute was overbroad because it swept within its parameters constitutionally-protected speech.[323] Perhaps the determination of concepts such as "overbreadth" when it involves a career, should be left to the appropriate governmental decision-maker as it finally was in *Doe*. This would include courts but not universities.

Fashioning a conduct code against hate speech that does not violate the overbreadth and toleration doctrine[324] involves extremely complex reconciliation, respecting the difference between the twin principles of regulating conduct and regulating the exposition of ideas. Many universities have demonstrated unwillingness to adopt such an unpopular position. Understand that hate speech does not constitute the overt, state-sponsored misconduct prohibited under federal legislation, for example, the Civil Rights Act of 1964.[325] Hate speech is usually the act of students, sometimes staff and their family; such action is not condoned by the state. But that does not mean that it should be prohibited. The First Amendment does not necessarily

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316. Doe v. University of Mich., 721 F. Supp. 852, 858 (E.D. Mich. 1989). See further discussion in *supra* note 176.

317. *See, e.g.*, Shaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980). "[C]ommunication of information, the dissemination and propagation of views and ideas . . . are within the protection of First Amendment." *Id.* at 632.

318. Laney, *supra* note 245, at A35.

319. Stuart Taylor, Jr., *Fending Off "Fighting Words,"* LEGAL TIMES, Jan. 1, 1990, at 19.

320. *Id.*

321. *Id.*

322. Doe v. University of Mich., 721 F. Supp. 852, 853 (E.D. Mich. 1989).

323. *Id.* at 868.

324. *See* New York State Club Ass'n v. City, 487 U.S. 1, 11 (1978).

325. Civil Rights Act of 1964, 42 U.S.C. § 2000 et. seq. (1984).

prohibit this type of conduct.[326] Hate speech, as usually defined, falls between two extremes: limited levels of conduct no longer tolerated as speech and constitutionally-permissible expression of ideas.[327] Regulating hate speech will continue to fail because campus conduct codes tend to alter the level of tolerance to the chilling point of nonexistence, hence censorship. Universities cannot or will not narrowly tailor their codes to respect competing constitutional principles. If they do, their codes become redundant. Therefore, in order to take a stand some universities have refused to recognize that they are in the *words and ideas* business. *Words and ideas* must first turn into action and that action must be aimed at fighting or physical injury before the First Amendment will tolerate regulation.

The University of Michigan case may provide some help in formulating a code that respects these competing constitutional interests. The court in *Doe* stated that to be overbroad a statute must sweep into its ambit a "*substantial amount* of constitutionally protected conduct."[328] The United States Supreme Court also has noted that the quantum necessary for a statute to be overbroad is substantial:

> [T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. . . . [T]here must be a *realistic danger* that the statute itself will *significantly compromise* recognized First Amendment protection of parties not before the Court for it to be facially challenged on overbreadth grounds.[329]

Thus, even though there is a delicate balance between permissible speech and prohibited conduct, codes regulating prohibited speech-action conduct need to be well-tailored.[330] Speech cannot be suppressed.

X. FORMULATING A CONSTITUTIONAL CAMPUS CONDUCT CODE

If public statements are any indication of dissatisfaction, students appear to have felt more chilled by the speech codes than have faculty or administrators. In April 1994, student leaders from some thirty-eight colleges and universities across the nation met at Harvard University to discuss issues related to free speech. They ratified what has since become known as The

326. *Id.*
327. Verkuil, *supra* note 165, at A28.
328. Doe v. University of Mich., 721 F. Supp. 852, 864 (E.D. Mich. 1989) (emphasis added).
329. City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 800-01 (1984).
330. *See id.*

Cambridge Resolution.[331] It states:

> We believe that speech codes and broadly drawn codes of conduct, no matter how benevolent in purpose, are inimical to the life of the university, and that no matter how plausible their rationale, have the ultimate effect of repressing views that do not fit the prevailing campus orthodoxy, and that students should have the freedom to think, write, and speak the truth as they see it, without fear of intimidation, coercion, or the threat of punishment.[332]

In the spring of 1995, the University of Florida Student Senate passed The Cambridge Resolution, as did all the other institutions except for the University of Texas.[333] In The Cambridge Resolution, Benno Schmidt stated that "the university has a fundamental mission which is to search for the truth" and that it should be a place where people have "the right to speak the unspeakable and think the unthinkable and challenge the unchallengeable."[334]

Although the ability of speech to inflict emotional harm is not, in itself, enough to justify abridgment,[335] the psychic trauma that is at the root of the fighting words doctrine[336] forms a constitutional basis for a moral imperative. As the Supreme Court stated in *Chaplinsky v. New Hampshire*:[337]

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that *any benefit*

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331. *See generally UF Student Senate Says No to PC Ideology — Ratifies Resolution,* DECLARATION, FLORIDA'S CHRONICLE OF HIGHER EDUCATION, Apr.-May 1995, at 3 [hereinafter DECLARATION].

332. *The Cambridge Resolution,* DECLARATION, FLORIDA'S CHRONICLE OF HIGHER EDUCATION, Apr.-May 1995, at 4.

333. DECLARATION, *supra* note 331, at 3.

334. *The Cambridge Resolution, supra* note 332, at 4.

335. *See* Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

336. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

337. *Id.*

> *that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."*[338]

Thus, the Supreme Court has considered cases of hate speech and determined that such hate speech falls within the fighting words exception to the First Amendment.[339] Therefore, under the fighting words doctrine, as espoused by the Court in *Chaplinsky*, hate speech enjoys little or no First Amendment protection.[340] *Chaplinsky* requires that the fighting words be "*likely* to provoke the average person to retaliation, and thereby cause a breach of the peace."[341] However, the state cannot prohibit offensive expression on the assumption that such expression will incite a riot or cause the audience to breach the peace.[342] Thus, the Court has built in a safety mechanism in the form of an exacting probability of danger to trigger the fighting words exception.

There is a problem with the doctrine of fighting words in the context of hate speech codes. The Supreme Court requires that in order for fighting words to be unprotected, they must contain an explicit link to a breach of the peace through a retaliatory response.[343] The current state of the doctrine requires an aggressive reaction to the insulting communication.[344] However, in many contexts, the fighting words doctrine impedes achievement of a remedy where hate speech has the exact opposite effect. Not that the victim will retaliate, but that the victim will *not* retaliate.[345] The implicit assumption in the current fighting words doctrine is that aggressors and victims have equal power and bargaining positions.[346] This is usually not true; it is not a level playing field. Some persons of various cultural and

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338. *Id.* at 571-72 (quoting Cantwell v. Connecticut, 310 U.S. 296, 309 (1940)) (emphasis added).

339. *Id.* The defendant in *Chaplinsky* had called the complainant a "God damned racketeer" and a "damned Fascist." *Id.* at 569.

340. *Id.* at 571.

341. *Id.* at 574 (emphasis added).

342. Texas v. Johnson, 491 U.S. 397, 407-08 (1989). This case dealt with the constitutionality of a state law banning the desecration of the United States flag. The majority held that flag burning was a form of political speech, and therefore, was protected by the First Amendment. *Id.* at 404-06.

343. *See Chaplinsky*, 315 U.S. at 570-71.

344. *See id.*

345. Balkin, *supra* note 212, at 421. Balkin gives the example of a young black woman taunted by a group of white men who were yelling racial and sexist slurs. The woman does not physically assault her aggressors. Instead, she runs away, attempting to escape their abuse. Nonetheless, she is harmed. *Id.*

346. Lawrence, *supra* note 281, at 453-54.

sexual backgrounds may not be physically provoked by an epithet.[347] While some may feel like fighting and react in a physical manner to hate speech, others may retreat from intimidation,[348] since a violent response might only provoke the aggressor more.[349] However, the passivity of the victim's reaction does not mean that the speech is any less demeaning.[350] Thus, the problem with utilizing the fighting words doctrine to combat hate speech is in determining what set of values should be substituted for the current values, which are infected with preexisting social constructs.[351]

The aggressive quality of the victim's reaction to hate speech should not determine whether such speech is protected.[352] Despite the flight rather than fight reaction, the preemptive effect of the invective is the same.[353] This concept requires slight, if any, modification of *Chaplinsky*. *Chaplinsky* specified that speech, which because of its very existence inflicts injury, is speech unprotected under the First Amendment fighting words doctrine.[354]

This standard is designed to prevent "inexpressible emotions" from falling "under the protection of free speech as fully as do Keats' poems or Donne's sermons."[355] The true notion of fighting words, as articulated by Justice Murphy, is aimed at harmful speech-action that does not contain any social or political message. The revised standard is directed toward speech that plays no role "indispensable to the discovery and spread of political truth."[356] Although, "[i]t is possible to find some kernel of expression in almost every activity,"[357] the Supreme Court noted that "such a kernel is not sufficient to bring the activity within the protection of the First Amendment."[358]

Unfortunately, codes that define fighting words as they relate to hate speech ignore the possibility of valid expression within their content. Furthermore, codes impute some bias and do not have room for differing perspectives.

It cannot be stressed enough that to qualify under the fighting words

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347. *See* Matsuda, *supra* note 1.
348. *See id.*
349. Lawrence, *supra* note 281, at 452.
350. *Id.*
351. *See id.*
352. *Id.* at 452.
353. *Id.*
354. *See Chaplinsky*, 315 U.S. at 571-72.
355. Cohen v. California, 403 U.S. 15, 25-26 (1971) (quoting Winters v. New York, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting)).
356. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis & Holmes, JJ., concurring).
357. City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989).
358. *Id.*

doctrine, hate speech must be "intended" as a personal attack.[359] The doctrine requires a personal attack that provokes a reaction from the victim.[360] Thus, more generalized hate speech directed at a distinct group would not fall within the category.

It is true that, in *Beauharnais v. Illinois*,[361] the United States Supreme Court recognized the viability of the group defamation doctrine when it held: "[I]f an utterance directed at an individual may be the subject of criminal sanctions, we cannot deny to a state power to punish the same utterance directed at a defined group."[362] The *Beauharnais* Court affirmed Illinois' power to punish the defendants for distributing racist flyers.[363] In affirming the defendants' guilt, the Court held that group libel was a legitimate theory under which the state could prosecute persons for racist expression.[364]

Since the holding in *Beauharnais*, the Supreme Court has found that under certain circumstances, libel laws do indeed implicate the First Amendment.[365] Although the Supreme Court has never overruled *Beauharnais*, it has in fact done little with it. The fact is that after *R.A.V.*, the rebirth of *Beauharnais* is problematic.

No matter where *Chaplinsky*, *Brandenburg*, *Johnson* and *R.A.V.* end up, there is one observation worth noting: the university is not the appropriate policing agency to aid and abet in the narrowing of tolerance of free speech. The university is the appropriate agency to aid and abet in the enlarging of discourse with respect to limits of free speech.

What these cases suggest is that in a society governed by the rule of law it is not possible to eradicate easily that which is contemptible. In the case of hate speech, the speaker maintains certain rights under the Constitution, as *R.A.V.* recognized. No one would deny that in defending the speaker's right to express speech freely, the rights of the victim should also be taken into account.

Under the Fourteenth Amendment, people possess the right of equal protection.[366] This right demands that all similarly situated human beings be treated by government in a similar manner unless compelling reasons exist for an alternation in treatment. In fashioning a constitutionally functional

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359. *See Chaplinsky*, 315 U.S. at 572-73.

360. *Id.* Under the expanded notion of fighting words, the reaction need not be violent.

361. 343 U.S. 250 (1952). The Court upheld a state law making "group libel" a punishable offense. *Id.* The defendant had distributed racists flyers and had been convicted under the statute. *Id.* at 252.

362. *Id.* at 258.

363. *Id.*

364. *Id.*

365. See New York Times v. Sullivan, 376 U.S. 254 (1964); Gertz v. Robert Welch, 418 U.S. 323 (1974).

366. U.S. CONST. amend. XIV.

hate-speech policy, First and Fourteenth Amendment interests must be weighed and balanced. Free speech is never an absolute right; equal protection under the law is as legitimate as any of the other factors that temper the right to free speech. However, the venerable First Amendment is essential to the proper functioning and preservation of a democratic, republican society, and must above all else, be protected.

Despite the tension between these two paramount rights, the university is not the appropriate academy to inculcate societal values through force and censorship. It is little wonder that courts are reluctant to intervene at the university level. In recent years, as exemplified by hate-speech codes, the universities have become the high schools and grade schools of the land, assuming the task of inculcating regional values. That is precisely why the Court backed away from *Tinker*. It did not want to be a school board. As long as the universities focus upon their primary task of seeking knowledge and expanding tolerance, the courts will continue to protect their enterprise. Persons in the university deserve an environment conducive to the enrichment of all. Can censorship codes accomplish that goal? Too often universities capitulate by ignoring the importance of intellectual speech. The protection of the disenfranchised does not require the prior restraint of speech. The free exchange of ideas is the hallmark of intellectual and academic freedom. Courts are aware of this concept; sadly, many universities appear not to be. Bigotry has no place in the whole of our society. But, dismantling traditional intellectual freedom, which is important to accomplish universities' goals, and replacing it with a structured, lower-school environment does a disservice to all. Limiting lectures and discussions to politically-correct language and concepts, as determined by administrations, legislatures or even courts, is intellectually dangerously disabling. Censorship will never cure the disease of bigotry, sexism and homophobia, it will only nurture it.[367] "In a democracy, the answer to 'bad' speech is better speech, not no speech."[368]

XI. CONCLUSION

Hate speech is abhorrent. It creates a hostile environment. Colleges and universities, cities and states have attempted to curtail this offensive speech and the actions that often follow with lengthy codes to protect nearly everyone. Although race and religion appear to be the primary foci, and

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367. STEPHEN V. BENET, THEY BURNED THE BOOKS (1942). "[W]hen I give the command, you will rise and bring your textbooks to my desk. All this nonsense of freedom and tolerance — that is finished. We shall give you new textbooks. The old ones will be burned in the schoolyard. Are there any questions?" *Id.* at 12-13. *See* Comment, *supra* note 69, at 928 n.1.

368. *To the Editor: Marcia Pally and Joan Kennedy,* N.Y. TIMES, July 24, 1994, § 4, at 14.

sexual harassment is an issue in the workplace and on campus, the codes also have focused on disability, sexual orientation, ancestry, age, Vietnam-era veteran status and marital status.

Codes and ordinances against hate speech have often been the result of angry complaints by the victims and loud echoes by always-campaigning legislators. Lawyers and law professors have worked with committees to establish codes that will be acceptable to the state and federal courts, codes that do not violate the First Amendment. There have been codes of conduct and alternative sentencing guidelines. Students have been reprimanded, and faculty and administrators admonished.

Why the overbroad, vague codes? Why the burdens on speech? Perhaps, the colleges and universities continue to exude an atmosphere of unequal power — of parent and child, or employer and employee. The discerning student and faculty member is realistic and recognizes the sovereignty of the institution, its ability to punish the former through grades and recommendations and the latter through appointments and merit pay. Perhaps the authors of the codes perform a dual chameleon like function or even a Jekyll and Hyde role by answering the needs of the victims and the politically-correct administration yet believing that rules do not change behavior, and hence, only serve as alarms, guidelines or pacifiers. These rules can then be used to scapegoat the courts that overturn them.

Arguments have been made that the commitment to freedom of speech is destroying our society rather than preserving our freedom. Some might argue that in an age of concentrated control of the mass media, there are too few stalls in the market for the marketplace theory still to be viable. Perhaps the balance of power is so distorted that there is little or no real sense of the damage hate speech can and does inflict. The awareness may only be heightened when budgets or tax status are threatened.

Black students in any recognizable numbers have been on "white" campuses for less than a half century and in law schools for some twenty years. Women have a similar occupation record. College faculties continue to be representative of the good old boys. The inculcative interest cuts both ways; it may require some deterrence of intolerant expression, and it may require enforced tolerance of the intolerant.

Historically, we have purported to support free speech. This support, however, is tenuous when it concerns free speech at home. In 1977, some fifty American Nazis with swastikas and storm troop uniforms wanted to demonstrate in Skokie, Illinois where there was a large Jewish population and "as many as several thousand" of the citizens were Holocaust survivors.[369] The city quickly passed ordinances and secured injunctions to prevent the

369. Collin v. Smith, 578 F.2d 1197, 1199 (1978).

demonstrations.[370] The angry townspeople and their national and international supporters claimed that the Nazi form of expression was deliberately calculated to ignite violence.[371] The fact is, the First Amendment has not been limited to ideas and symbols that further freedom, dignity, nonviolence and just causes.[372]

Banning speech could undermine the goal of combatting prejudice. An antihate speech policy could stultify candid intergroup dialogue on racism and other forms of bias. Education, free discussion and the airing of misunderstandings and failures of sensitivity are more likely to promote positive intergroup relations than are legal battles. The rules barring hate speech will continue to generate newspaper stories and some litigation. Other forms of controversy will exacerbate intergroup tensions. The censorship approach is diversionary. It makes it easier for communities to avoid coming to grips with less convenient and more expensive, but ultimately, more meaningful approaches for combatting discrimination. The university community plays a different role; it cannot be treated like the workplace. It has a legitimate interest in facilitating the development of tolerance and respect for dissenting views. *R.A.V.* clearly signals the Court's intent to protect speech, though not speech action.[373] It establishes precedent for university hate-speech codes. There are sufficient means at the institutions' disposal to prevent reprehensible speech without adding the First Amendment to the fire.

370. *Id.*
371. *Id.* at 1203.
372. *Id.* at 1210.
373. *See* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992).