The Long Shadow of Joseph McCarthy:
Academic Freedom and Campus Hate Speech During the War on Terrorism

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The questions we have been asked to consider concern the rights and responsibilities of the University to address 1) the problem of hate speech on campus, and 2) the consequences of campus hate speech to its victims. To consider these questions we need first to know how colleges and universities deal with speech in general. And to know that, we need to know something about the state of academic freedom.

In higher education, we share a deep commitment to freedom of speech. We do that not only because the law requires it,[1] but because freedom of expression forms part of, contributes to, sustains, and reflects, the more encompassing concept of academic freedom. Academic freedom lies at the heart of the university's educational mission. It is critical to the success of higher education. At a minimum, it includes the freedom to teach, inquire, explore, experiment, theorize, reason, and conduct research, and then to disseminate the results through publication and instruction, all according to the dictates and standards of academic discipline, but largely free from nonacademic external interference. We recognize that freedom as essential to effective higher education.[2]

Academic freedom and freedom of expression are not equivalents. At times they can even be in conflict with one another. For example, freedom of expression often calls for institutional content neutrality,[3] but in a university setting full content neutrality is rarely possible, and it is often antithetical to effective education.[4] Yet without academic freedom, expression on campus loses its academic character and much of its educational force. How the university deals with freedom of expression thus depends on, and is determined by, the extent to which higher education enjoys true academic freedom.

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[1] Public universities are subject to the commands of the First Amendment to the United States Constitution. Private universities are not, and consequently they enjoy greater discretion in deciding whether or not to protect free expression.

[2] AAUP, 1940 Statement of Principles on Academic Freedom and Tenure. *See* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 Yale L.J. 251 (1989); David M. Rabban, *Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment,* 53 Law & Contemp. Probs. 227 (1990).

[3] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[4] For a simple example, tests have right answers and wrong answers. When an instructor gives one credit and the other none, s/he is engaging in content discrimination.

In 1999, I was invited to speak at this conference on similar issues. When I did, I touched only lightly on the question of academic freedom, because at that time higher education's commitment to academic freedom seemed solidly established. On the general state of academic freedom in higher education, I had these optimistic thoughts:

> The good news is that on most college campuses free inquiry and free exchange of ideas are alive and well . . . . [M]ost colleges and universities subscribe to policies endorsing privileges of academic freedom for faculty that probably exceed what the constitution would afford. The commitment to academic freedom . . . enables faculty . . . to pursue an extremely broad range of research interests, to speak out vigorously on social issues, and even to advocate highly unpopular ideas. From that base, a culture of open inquiry that extends beyond faculty to include students has developed on most college campuses. There have been periods of retrenchment necessitating judicial oversight -- for example disciplining of Communist faculty members in the 1950's-60's and attempts to regulate racist or sexist faculty speech during the 1980's-90's. But the intensity of debate over these exceptional instances should not obscure the healthy commitment to generally free and open inquiry evident on most college campuses today.[5]

In the past five years, since the events of 9/11 and the commencement of the Bush Administration's war on terrorism, I have been given occasion to reconsider that rosy assessment. Those years have witnessed an erosion of academic freedom that represents the greatest threat to intellectual autonomy since the McCarthy era. The threats to academic freedom have fallen unevenly, as they usually do. This time foreigners (especially those from the Middle East and Central Asia), Muslims, critics of American foreign policy, and those who share or sympathize with the aims (if not the methods) of our terrorist enemies have borne the lion's share of the trouble. But in some measure the chill has been felt throughout the entire academy. Conditions have not reached the point of true crisis. We are still far away from the darkest days of the McCarthy era. Yet there is cause for deep concern.

Reliving the McCarthy Era: A Basement Discovery

To put current matters in perspective, it might be helpful to look at a snapshot of the McCarthy era itself, something I recently had an unexpected opportunity to do when I discovered copies of a 1953 *Harvard Crimson*[6] and a 1953 issue of *The Nation*[7] while cleaning out some old files that once belonged to my wife's parents. The *Harvard Crimson* issue was especially

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[5] Mark C, Rahdert, The Constitution, Academic Freedom and the Essential University: Overview, National Conference on Law & Higher Education at 2-3 (1999).

[6] *The Harvard Crimson, Fifth Annual Crimson Report on Academic Freedom* (June 10, 1953) (hereinafter *Crimson*).

[7] *The Nation* (May 9, 1953) (hereinafter *Nation*).

revealing. It was a special issue, fifth in a series of annual special issues devoted to the state of academic freedom in the United States. The lead article concerned the dangers for professors in refusing to cooperate if subpoenaed to testify about their political affiliations or their knowledge of others' activities.[8] Other articles detailed firings of professors at Rutgers, Ohio State, the University of Kansas, New York University and elsewhere;[9] personal verbal attacks on individual professors by members of the Colorado legislature;[10] the ouster of a dean at Queens' College who had defended the rights of suspected student groups to have access to university facilities, thereby earning the enmity of influential veterans' groups;[11] and actions taken against various student groups suspected of leftist policies or ties.[12] Another series of articles detailed banning of films thought to run contrary to American foreign policy, banning of speakers because of their views, and one case of retaliation against a conservative student for his attempts to expose the communist sympathies of his professors.[13]

The paper also chronicled some resistance to the pressures on academia, notably by the ACLU, the National Council of Churches, professors' organizations such as the AAUP, and a few brave individuals, such as Harvard Law School Dean Erwin Griswold.[14] But it also recorded a series of state court decisions upholding loyalty oaths, state laws equating membership in lists of "subversive organizations" with "unfitness to teach," and other measures.[15] Notably absent were strong defenses of academic freedom by university presidents or boards of trustees, let

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[8] "Education and the Fifth Amendment," *Crimson*, at M-1. The staff of the *Crimson* reported "collect[ing] material concerning 37 cases of infringement of academic freedom" over a six month period. They identified cases involving "27 colleges in 20 states." *Id.* at M-1.

[9] "Rutgers First to Dismiss for Fifth Amendment Use," *Crimson* at M-2; "Darling Fired at Ohio State on 3 Counts," *Crimson* at M-2; "Instructor Fired in Kansas for Red Amnesty Appeal, *Crimson* at M-3; "Burgum Fired at N.Y.U. for Not Speaking," *Crimson* at M-8.

[10] "Colorado Senate Feuds Defame Three Teachers," *Crimson* at M-3.

[11] "Dean Ousted at Queens College by Veterans' Groups," *Crimson* at M-3.

[12] "Young Republicans Try to Drive [Labor Youth League] off Wisconsin Campus," *Crimson* at M-3; "Students Hit Lecture Rules as Speaker Bannings Fall Off," *Crimson* at M-9.

[13] "Legion Labels Academic Purges 'Americansim,'" *Crimson* at M-4; "Tennessee Drops Two Films Made Thirty Years Ago," *Crimson* at M-4; "U. Of Chicago Student Blasts Reds; College Officials Deny Him Degree," *Crimson* at M-3.

[14] "Civil Liberties Union Most Effective Group in Action," *Crimson* at M-5; "Churches Assail Committee Methods," *Crimson* at M-7; "AAU's Statement Upholds Colleges," *Crimson* at M-7; "Rockefeller Foundation Sets Academic Freedom Position," *Crimson* at M-5; "The Counter-Offensive – an Educational Problem," *Crimson* at M-5.

[15]"High Courts Sanction Teacher Loyalty Oaths," *Crimson* at M-10.

alone leading figures in government.[16] Indeed, a student editorial chastised university administrators for their nearly complete failure to rise to the defense of academic freedom.[17] Perhaps most sobering of all was a selection in the lead article from a letter to the *Crimson* by famous Harvard constitutional scholars Arthur Sutherland and Zechariah Chaffee, Jr., holding out little hope of constitutional or other legal protection for professors who lost their jobs because of their refusals to cooperate with federal and state investigative committees.[18]

The Nation issue was a little less riveting, but it did include a fascinating piece on how the McCarthy committee was using oversight for the contents of State Department libraries and other tenuous federal connections as pretexts for investigating the activities of journalists and authors, and how publications and authors who had been willing to criticize McCarthy received the brunt of the attention.[19] The issue also detailed foreign commentary criticizing the timidity of the American press.[20] It included an article by a respected lawyer proposing a First Amendment privilege, on lines comparable to the Fifth Amendment privilege against self-incrimination, and arguing that individuals subpoenaed for questioning should have a right to challenge the committee's statutory and constitutional authority to do so.[21] In its article on journalists, *The Nation* asked some searching questions that could just as easily have been directed to higher education (substitute "higher education" for "the press","universities" for "dailies", and "academic freedom" for "a free press" in the quotation below and you will see what I mean):

> [W]ill the press as a whole recognize in time the clear danger to its freedom that is implicit in McCarthy's campaign to silence its critics? ... Will the great dailies capitulate, or will they decide that now is the time to bring to an end an ignoble witch hunt which in a time of crisis and great danger has divided the nation and held it up to ridicule abroad, and now threatens to undermine three basic institutions of a democratic society – the churches, the schools, and the press? If the big dailies hesitate at the outset, if, as the universities seem inclined to do, they open the gates to the barbarians, they will not only have destroyed the spirit and purpose of a free press; they will have invited their own destruction.[22]

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[16] *See* "College Presidents Discuss Liberties," *Crimson* at M-11.

[17] "Universities and the Public Trust: An Editorial," *Crimson* at M-12.

[18] "Education and the Fifth Amendment," *Crimson* at M-1

[19] "The Press Meets McCarthy," *Nation* at 387.

[20] *Id.* At 388.

[21] Philip Wittenberg, "How to Say No to the Demagogues," *Nation* at 390-392.

[22] "The Press Meets McCarthy, *Nation*, at 388.

In 1953, at the height of McCarthyism, these were brave – and risky – words.

The McCarthy era is a well-known story in the annals of threats to American freedom, one I have often told to my students. I was an infant (albeit a university brat) when it happened, and it has always seemed far away, part of an America I never directly experienced. But reading about it in contemporary newspaper and periodical format gives the story a new immediacy.

In my classes on constitutional law, we have typically studied the McCarthy period as a prelude for study of the First Amendment cases that emerged from it. For over 20 years, from the mid- 1950s to the 1970s, the Supreme Court issued an array of decisions responding in whole or in part to the threats to free expression the McCarthy era posed. They form much of the bulwark of modern First Amendment law. They include cases establishing the unconstitutionality of loyalty oaths,[23] striking down statutes requiring disclosure of organizational affiliations,[24] prohibiting "unconstitutional conditions" on political affiliation,[25] limiting criminal punishment for peaceful advocacy of unlawful activity,[26] recognizing a First Amendment dimension to academic freedom,[27] extending First Amendment rights to public employees,[28] and extending due process rights to teachers and others dismissed from public employment.[29] Indeed, much of the First Amendment doctrine developed by the Warren and Burger Courts (all of whose Justices experienced the McCarthy era first-hand) reflects a judicial response to the excesses of McCarthyism. A conviction that McCarthy and his contemporaries stepped over the constitutional line lies behind a good deal of modern First Amendment law.

For most of my career, I taught the McCarthy materials as a completed and, from the free speech perspective, fairly triumphant story. To be sure, free speech was threatened. But ultimately reason prevailed over demagoguery. Excesses of zeal were trimmed. Abuses of power were corrected. The courts stood up for our basic rights. The legislatures backed down. And through the courts, constitutional safeguards were put in place to ensure that it wouldn't happen again. That's the story I assumed when I discussed free speech in the university with this group eight years ago.

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[23] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

[24] Shelton v. Tucker, 364 U.S. 479 (1960).

[25] Speiser v. Randall, 357 U.S. 513 (1958).

[26] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[27] Sweezy v. New Hampshire, 354 U.S. 234 (1957); Healy v. James, 408 U. S.169 (1972)

[28] Pickering v. Board of Education, 391 U.S. 563 (1968).

[29] Board of Regents v. Roth, 408 U.S. 564 (1972).

Neo-Mini-McCarthyism: An Outgrowth of the War on Terror

Since the events of 9/11, developments both governmental and cultural in our society have prompted me to wonder whether the McCarthyism story is either so complete or so triumphant. Events have not reached anything like the fever pitch of the early 1950s (I devoutly hope they never will), but they have succeeded in exposing both the potential for a resurgence of McCarthy-like assaults on higher education, and the vulnerability of the higher education community to such dangers. They have also provoked, at least in my own mind, a reassessment of the security of the constitutional guarantees on which our claims to academic freedom, in an ultimate confrontation, might depend. Before examining the problem of campus hate speech, I need to explain why I feel less secure about academic freedom than I did eight years ago, and to ruminate about what we in higher education can and should be doing about it.

The past five years have witnessed a sort of mini-McCarthy period. The *bete noir* of today, of course, is not international communism as it was then, but rather international terrorism, particularly those forms of terrorism associated with the Islamic extremism of our sworn enemies, al Qaeda and the Taliban. On the federal level, moreover, the prime mover has not been Congress but the Executive, often with a congressional legislative rubber stamp in its back pocket. The methods haven't been quite the same, either. There have been no McCarthy-style public investigations, at least not at the federal level. Professors and students have not been subjected to legislative subpoenas, required to sign loyalty oaths, interrogated by investigative commissions about their past affiliations, or pressured to make public disclosures against one another. There has been nothing quite so overt as the blacklists of authors and entertainers that happened in the 1950s. Yet there have been other methods that are in their own way as or more effective at invading the academic integrity of higher education.

The first whiff of the neo-mini-McCarthyism came shortly after 9/11, when the entire nation succumbed (for a time) to a new attitude of suspicion that was captured in the lighted road signs that popped up around major metropolitan areas saying "Report Suspicious Activity." I noticed the change right away in my students, who in class discussions showed a much greater inclination to defend constitutional theories that would support governmental invasion of individual liberty in the pursuit of national security. Most disconcerting to me was support for secret domestic surveillance, investigative detention of so-called "material witnesses," and various forms of repressive treatment for foreigners suspected of unsavory associations. This new attitude found legal expression in the Patriot Act, which authorized new governmental surveillance methods, detention of individuals under suspicion of terrorist aims or sympathies, and actions against organizations (and their supporters) believed to have terrorist ties.[30] On college and university campuses it brought new measures for investigating and monitoring foreign students and scholars. And it led to a few high-profile cases involving faculty and

[30] For an early criticism of the Patriot Act, see David Cole, *Enemy Aliens*, 54 Stan. L. Rev.953 (2002).

students charged with terrorist ties or sympathies. Although some of the cases had merit, most did not, and innocent individuals' careers and reputations were harmed in the process.

Although not precisely representative, the story of Ward Churchill says a lot (and most of it bad) about the present state of academic freedom. A Native American culture scholar-activist and professor at the University of Colorado, Churchill wrote an essay after 9/11 in which he made assertions about the culpability of the 9/11 victims, expressed in a fashion that could be interpreted as sympathizing or identifying with the perpetrators. A couple of years later, when he was scheduled to speak at Hamilton College, a grass-roots campaign against him used Churchill's post-9/11 remarks to generate public pressure on the administration at Hamilton to rescind the invitation. That episode would have been troubling enough, but it turned out to be only the beginning. After the Hamilton affair was over, those who had criticized Churchill redirected their efforts toward his home institution, the University of Colorado at Boulder, and to the Colorado legislature, whom they pressured to conduct an investigation. The result was a full-blown inquiry at the University of Colorado questioning Churchill's academic qualifications and fitness to teach. The final report recommended his dismissal, although it did state that his post-9/11 essay was protected speech. One could almost write the Churchill story up as a news article, stick it into the 1953 *Harvard Crimson*, and except for the dates and the references to current events it would hardly stand out.[31]

Crossover to the Culture Wars

The Ward Churchill affair also demonstrates a link between the international war on terrorism and the domestic so-called culture wars. The ringleaders in the Churchill matter were socially conservative columnists, commentators, and bloggers with powerful access through media and internet avenues of communication to the nation's vaunted conservative base. With a relatively few deftly placed commentaries, they were able with tremendous speed to generate a strong whirlwind of public reaction producing both immediate and sustained pressure on government and university officials to punish Churchill for his views. It was an impressive show of political action, and it fed on years of distrust of higher education among the nation's social conservatives. The calls for action against Churchill came from a sizable segment of our society that has been schooled to regard higher education as an elite bastion of left-wing liberalism that is essentially and irretrievably out of touch with basic American values.

The culture wars have also spawned a different sort of threat to academic freedom which also has McCarthy roots – the so-called "Academic Bill of Rights" (ABOR). ABOR is the project of author-activist David Horowitz. It is an attempt to get legislatures (state or federal) to enact into positive law a set of legal commands that purport to guarantee academic freedom for teachers and students in higher education. In actuality, ABOR would wrest control over academic freedom away from the universities themselves, vesting it in legislatures, courts, and administrative agencies instead. It is based on the premise that in liberal-dominated higher

[31] See, e.g., "U. of Colorado Begins Process to Fire Ward Churchill," *The Chronicle of Higher Education* (July 7, 2006).

education, professors are being hired, tenured and promoted for their political and ideological views rather than their academic qualifications. These professors, the ABOR advocates assert, force their ideological biases on their students, so that students who possess politically and socially conservative views are being punished academically for holding them. ABOR's aim is to give the students a legal means for challenging their professors' liberal political excesses, and to give legislatures and/or departments of education a platform for investigating ideological bias in higher education.

Although ABOR has not yet been adopted as law by Congress or by any state, it has provoked legislative investigations,[32] including one in my home state of Pennsylvania, as well as pressure on university boards of trustees. In Pennsylvania, a legislative committee went to various publicly supported universities (including Temple University, where I work), to conduct hearings on the state of academic freedom, the alleged liberal political bias of the faculty, and the alleged mistreatment of politically and socially conservative students. I am happy to say that the Pennsylvania committee's final report found no substantial evidence of classroom political bias, and it did not recommend legislative action. It did ask colleges and universities in the state to reaffirm their own commitments to academic freedom and to clarify for students the procedures to be followed in cases of faculty bias. At Temple we have done that by adopting as a Board of Trustees policy a declaration that parallels the AAUP's 1940 Statement on Academic Freedom (the Statement was already included in the Faculty Handbook and was incorporated into the main faculty union's collective bargaining agreement), standardizing and simplifying grievance procedures enabling students to register complaints about instruction, establishing a website detailing the university's policies and procedures, and ensuring that all students are regularly advised of them. At the moment, this seems to be the end of ABOR at Temple. For a time, however, it looked like the university's systems of shared self-governance and institutional autonomy with regard to academic freedom were in real danger of a legislative override. The episode served as a reminder of the extent to which university autonomy and faculty participation in university governance are essential ingredients to true academic freedom. It also served as a sobering reminder how easy it would be for a legislature to take the protections of academic freedom away.

Indeed, a handful of relatively recent Supreme Court decisions, including two from the Court's most recent term, create a potential inroads to academic freedom under the First Amendment that underline higher education's vulnerability. Two decisions from the Rehnquist Court, *Rust v. Sullivan*[33] and *National Endowment for the Arts v. Finley*,[34] established the

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[32] Jennifer Jacobson, "Opponents of 'Academic Bill of Rights' Form a Coalition to Fight It More Effectively," *id.* (March 16, 2006). AAUP, Government Relations: "Academic Bill of Rights" Campaign: State Legislation Proposing an "Academic Bill of Rights," available http://www.aaup.org/AAUP/GR/ABOR/aborstateleg.htm (last updated May 2006).

[33] 500 U.S. 173 (1991).

[34] 524 U.S. 569 (1998).

substantial power of government to regulate speech by attaching content-based conditions to the receipt of government grants. In the former, the government forbade family planning agencies that received federal funding from counseling in favor of abortions. In the latter, it implemented "decency" requirements for recipients of federal arts funding. In both instances, the Court upheld the requirements as permissible means of carrying out government spending policies, despite their regulation of the content of speech. Given the extent to which nearly all colleges and universities depend on government aid, these cases open a significant avenue of potential limitation on academic freedom.

Their potential impact was reinforced and extended by last term's decision in *Rumsfeld v. FAIR*,[35] where the Court upheld a federal law requiring university law schools to grant access to military recruiters whose hiring policies conflicted with the institutions' policies opposing discrimination based on sexual orientation. *Rumsfeld* is particularly noteworthy because the Court treated higher education's First Amendment argument as insubstantial. The Court concluded that hiring activity was conduct, not speech, and that Congress could have commanded military recruiter access directly, even without any government spending. The decision invites the segmentation of higher education into separate "conduct" and "speech" components, enabling extensive regulation of the former by external forces.

Perhaps even more troubling is the Court's decision in *Garcetti v. Ceballos*,[36] which essentially held that there are no First Amendment rights of any kind for government employee speech that occurs in the course of employment. In a footnote, the Court left open the question whether its rationale would apply to higher education, but we must not forget that most of the speech academic freedom is meant to protect occurs in the course of employment, not beyond it. There is thus considerable tension between the *Garcetti* rationale and the academic freedom decisions of the 1950s and 1960s. The current Court, many of whose members did *not* experience the McCarthy period first-hand, may not appreciate the need for protecting faculty speech in the course of employment, even though that is the essence of academic freedom. If they extend *Garcetti* to higher education, the link between academic freedom and First Amendment protection will simply cease to exist.

Dealing with Hate Speech

Temple's ABOR episode, with its focus on the relationship among university, faculty, and student, circles me back to the questions with which this essay began – how to deal with hate speech and its consequences on campus. How one deals with hate speech depends on the nature and depth of institutional commitment to academic freedom. In a university *without* a deep commitment to academic freedom, dealing with hate speech is easy. Whatever the institution chooses to treat as hate speech (typically some combination of speech containing *ideas* that we hate (hated speech), speech by *individuals* whose values and beliefs we hate (hated speakers),

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[35] 126 S.Ct. 1297 (2006)

[36] 126 S. Ct. 1951 (2006).

and speech that promotes *outcomes* we reject (hated consequences)) can simply be banned, and the speakers can be punished. That is what McCarthyism was all about. McCarthy hated communism, he hated communists, and he hated what he viewed as communism's threat to American democracy. So he had no qualms punishing what he viewed as pro-communist speech or association. But in a university *with* a deep commitment to free speech and academic freedom, dealing with hate speech presents a much more difficult and delicate challenge, because we have to safeguard the freedoms of the speaker and balance those against our desire to protect against the victims of the speech.

How do we strike the balance? In a community committed to true academic freedom, there is no easy answer. Nevertheless, I think there are some important steps that can help get us at least part way toward a better understanding.

First, we have to make sure that true academic freedom is alive and well. This requires a full university commitment that is shared by administrators and Boards of Trustees, and that vigorously resists attempts to subject expression within the university to external control. This means resisting the push for legislative or executive interference, and it means resisting pressure from the general public. It means continually making the case for the importance of academic freedom to the educational enterprise. It means standing up for the rights of faculty and students whose ideas we think are dreadful. It also requires effective and transparent procedures within the university for securing and protecting the academic freedom of both faculty and students, with procedures that vest the ultimate responsibility for maintaining academic freedom in the faculty itself.

Second, we need to be clear that true academic freedom is not equivalent to license. Self-regulation through shared governance is not the same as no regulation at all. Although academic expression should not be *externally* restrained, by legislatures and courts or bloggers and commentators, it should be *internally* restrained, by the norms of discourse within a relevant academic discipline. Those norms are *not* content-neutral. They typically identify favored and disfavored modes of reasoning, set obligations for documentation and testing, include prohibitions against plagiarism and other ethical responsibilities, impose duties to disclose contrary data, and the like. They also frequently involve avoidance of hyperbole or exaggeration, and they probably include some duty of civility, particularly in addressing the contrary ideas of others. Faculty and students who claim the protections of academic freedom have an obligation to be *academic* in their protected discourse – that is, to observe the norms of their discipline in the ways that their ideas and opinions are presented. Faculty have an obligation to model these disciplinary norms in their own work, and they have a responsibility to enforce them at appropriate junctures (e.g., in the classroom) in the work of their students.

Third, colleges and universities, particularly those in the public sphere, need more openly to acknowledge points of tension between academic freedom and freedom of expression. As an academic I am restrained in my expression in ways that as a citizen participating in political or

social debate I am not.[37] When I speak as a citizen my speech may be protected by the First Amendment, but may not be protected by the principles of academic discourse. Conversely, there may be places where my speech as an academic is or should be protected, even though that speech would not be protected by the First Amendment. Because academic freedom and free expression are not coextensive, it is important to be clear about how and why one is speaking – to carefully distinguish citizen speech from academic speech. The lines will not always be clear, but the difficulty of drawing them supplies no excuse for refusing to do so.

Fourth, it is important to recognize that, within the university, the appropriate domains of academic and citizen speech are different, occur in different places and at different times, and are subject to different rules. What I can say with First Amendment protection at a political rally near the campus bell tower is different from what I can say with academic freedom protection in class, or at an academic symposium. The purposes of speech are different, the venues are different, the purposes and sources of protection are different, and as a consequence the rules are different.

Here lies, I think, the key to responding to hate speech on campus. In many important respects, the protections of academic freedom and freedom of expression run parallel to one another, and where they do they leave little room for regulating hate speech. Neither source of freedom supports suppression of speech (or punishment of speakers) because we oppose or hate the content of the speech itself – the ideas that are expressed. Neither source of freedom supports suppression because of the hated identity of the speaker, or because the speaker associates with some hated cause. Neither supports suppression because the speech supports or leads to hated ideological consequences. In these circumstances both require that the speech be heard and that the speakers' right to expression be respected. The only appropriate response under either regime is counter-speech that challenges the ideas, exposes the hated associations, or demonstrates the error of the consequences.

But with respect to the mode and manner of communication there is an important difference between free expression and academic freedom. In the interest of "robust and wide-open debate," principles of free expression tolerate speech that is caustic, vindictive, ad hominem, hurtful, defamatory, exaggerated, undocumented, even sometimes false. Principles of academic freedom generally do not. They generally require civil discourse that remains focused on ideas, not personalities, and that is expressed in terms of academic reason. They discount as inimical to truth speech that is exaggerated, undocumented, or false. As a consequence, where speech in the academy lays claim to participate in academic discourse, it is appropriate for the academy to enforce academic norms of civility and reason, precision and accuracy, and to restrain speech that transgresses them. However, outside the confines of academic discourse, a public university is constrained to tolerate forms and manners of expression that appropriately would be forbidden in an academic discussion.

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[37] Although I am using the term "citizen" here, it is important to recognize that First Amendment guarantees extend to noncitizens as well.

Even where hurtful speech must be tolerated, there is a great deal the university can do to ameliorate its effects. Like the government, it can use the *Rumsfeld* line between speech and conduct, regulating student and faculty conduct that is harmful to others.[38] It can use content-neutral regulations to minimize the impact of hate speech on potential victims. It can also provide positive measures that respond to hate speech, either with counter-speech or with active forms of assistance for its potential victims. Most importantly, the university can insist that academic discourse remain true to academic norms, including the norms of civility that apply in academic settings. The best defense of academic freedom is to exercise it with academic integrity.

[38] For example, experience teaches that some of the most hurtful student-on-student hate speech occurs in connection with consumption of alcohol. The university may not be able to punish the speech, but it may well be able to punish violation of university policies on alcohol consumption, which is undoubtedly conduct and not speech.