

**THE CAMPUS AS A MARKETPLACE OF IDEAS:
ARE THERE LIMITS TO FREE SPEECH?
A Guide to Analysis**

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*Give me the liberty to know, to utter, and to argue freely according
to conscience, above all liberties.*

– John Milton, *Areopagitica* (1644).

*Free speech is not to be regulated like diseased cattle and impure
butter. The audience ... that hissed yesterday may applaud today,
even for the same performance.*

– William O. Douglas, *Kingsley Books, Inc. v.
Brown*, 354 U.S. 436, 447 (1957).

*It is by the goodness of God that in our country we have those
three unspeakably precious things: freedom of speech, freedom of
conscience, and the prudence never to practice either of them.*

– Mark Twain, *Following the Equator* (1897).

PROLOGUE: AN IMPORTANT LEGAL DISTINCTION

Free-speech guarantees emanate from the First Amendment to the United States Constitution. The Free Speech Clause of the First Amendment provides:

*Congress shall make no law ... abridging the freedom of speech, or of the
press ... [emphasis added].*

The First Amendment, like the rest of the Bill of Rights, proscribes conduct by the *Federal Government*. Through the Due Process Clause of the Fourteenth Amendment, the Free Speech Clause also applies to the activities of state government agencies, including state-supported institutions of public higher education. Public universities are constitutionally prohibited from abridging the expressional rights of their students and employees. Private universities, by and large, are not subject to the same constitutional strictures. Students, faculty, and staff at private universities do not enjoy a “First Amendment” right of protection against discipline for speech-related infractions.¹

They may, however, have certain free-speech-related rights deriving from the First Amendment but from *policies* adopted by the institution – witness, for example, this provision from the 1998-99 edition of Georgetown University’s STUDENT HANDBOOK:

Georgetown University is committed to standards promoting speech and expression that fosters the maximum exchange of ideas and opinions. ... [A]ll members of the Georgetown University academic community, which comprises students, faculty and administrators, enjoy the right to freedom of speech and expression. This freedom includes the right to express points of view on the widest range of public and private concerns and to engage in the robust expression of ideas.

The lesson of this prologue: Whenever a dispute arises over the asserted right to engage in free speech, the threshold question is always: from what source, exactly, does the “right” of free speech spring?

I. PERTINENT LINES OF COURT DECISIONS.

A. “Hate Speech.” (See also Parts II and III of this outline, pages 11- 15 below.)

- (1) *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992): The regulation at issue in *R.A.V.* was a city ordinance making it a criminal misdemeanor to place on public or private property --

a symbol [or] object ..., including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable

¹ *Except in California*. See Cal. Educ. Code § 94367(a) (West, 1998): “No private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus ..., is protected from governmental restriction by the First Amendment”

grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender

In an opinion for himself and four other justices, Justice Scalia declared the ordinance facially invalid under the First Amendment on the ground that "it prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech addresses." 505 U.S. at 381. In a passage of unmistakable significance to proponents of campus speech codes, Justice Scalia rejected the city's argument that the ordinance served a compelling state interest by ensuring the basic human rights of members of historically persecuted groups. *Id.* at 395-96.

- (2) *UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*, 774 F. Supp. 1163 (E.D. Wis. 1991). The regulation in question, known as the "UW Rule," authorized the university to take disciplinary action against any student --

[f]or racist or discriminatory comments, epithets, or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets or other expressive behavior or physical conduct intentionally:

1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
2. Create an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.

... Whether the [requisite] intent ... is present shall be determined by consideration of all relevant circumstances.

The court found the UW Rule to be unconstitutionally overbroad on the ground that it "reach[es] a substantial amount of speech outside the traditional definition of fighting words." 774 F. Supp. at 1178.

- (3) *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989). The policy in question subjected persons (not just students) to disciplinary action for engaging in --

... [a]ny 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.

In an unusually testy opinion, the court found that the University of Michigan policy was unconstitutionally overbroad and had repeatedly been applied to reach protected speech. The court also characterized the policy as unconstitutionally vague: "it [is] simply impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct." 721 F. Supp. at 867.

B. Disruptive Speech by Public Employees.

- (1) *The Venerable Connick v. Myers Standard.* In *Connick v. Myers*, 461 U.S. 138 (1983), Harry Connick, the elected district attorney in New Orleans Parish, Louisiana, transferred Sheila Myers, a long-serving career assistant district attorney, to another position in the D.A.'s Office. Ms. Myers, outraged, prepared a lengthy questionnaire about office transfer policies and circulated it to fifteen other assistant D.A.'s. When Connick's deputy reported to him that Myers was fomenting a "mini-insurrection," Connick fired Myers for insubordination. In a 5-4 decision, the Supreme Court held that Myers's free-speech rights were not violated when she was fired. "Our task," held the Court, "is to seek 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" 461 U.S. at 142, *quoting Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Here, by protesting the office's transfer policies, Myers was not speaking out on a matter of public concern, but of private, limited interest; furthermore, the Court continued:

[T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

461 U.S. at 151, quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring).

Connick holds that the First Amendment protects a government employee from being disciplined on the basis of speech or expression only if (1) the discipline is imposed in retaliation for speech that addresses a matter of public concern, and (2) the employee's interest in expressing herself on this matter is not outweighed by any injury the speech could cause to the government's interest, as an employer, in promoting the efficiency of the public services it performs through its employees.

- (2) *Waters v. Churchill*, 511 U.S. 661 (1994). Cheryl Churchill, an obstetric nurse at a public hospital in Illinois, made arrangements to meet another nurse in the hospital cafeteria. The other nurse was considering transferring to the obstetrics department. According to a version of the ensuing conversation overheard by two other nurses and relayed to administrative personnel, Churchill dumped all over the nurse supervisor and the obstetrics department in general and urged her colleague not to transfer there. When confronted by her supervisors, Churchill denied saying anything critical and denied trying to persuade the recruit not to come to obstetrics. Notwithstanding her denials, Churchill was almost immediately fired for insubordination and being a bad influence on her colleagues.

As it did in *Connick*, the Supreme Court held that the employer had not violated the free-speech rights of a terminated employee by firing her for remarks deemed insubordinate:

[T]he government's role as employer ... gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large. ... Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When

someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her.

511 U.S. at , 674-75.

- (3) *Jeffries v. Harleson*, 52 F. 3d 9 (2d Cir. 1995) – the application of *Connick* and *Waters* to the world of college and university faculty members. Leonard Jeffries, chair of the Black Studies Department at the City College of New York, traveled to Albany and made a controversial speech that included inflammatory references to Jews and sharply worded criticisms of top-level CUNY administrators. After the speech, the CUNY Board of Trustees voted to cut short Jeffries's term as chair from the normal three years to one year. Jeffries sued, claiming that the Board had acted in retaliation for the unpopular views he expressed in Albany, in violation of his free-speech rights under the First Amendment.

Although Jeffries initially won, the Supreme Court vacated the judgment in his favor and remanded the case to the Court of Appeals for reconsideration in light of its decision in *Waters*. On remand, Jeffries lost, and its reasoning is worth examining closely:

We read ... *Waters* ... to hold that the closer the employee's speech reflects on matters of public concern, the greater must be the employer's showing that the speech is likely to be disruptive before it may be punished. ... Nevertheless, even when the speech is squarely on public issues – and thus earns the greatest constitutional protection – *Waters* indicates that *the government's burden is to make a substantial showing of likely interference* and not an actual disruption.

Whittled to its core, *Waters* permits a government employer to fire an employee for speaking on a matter of public concern if: (1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech.

52 F. 3d at 13 (emphasis added). Concluded the court: because the CUNY Trustees were motivated to shorten Jeffries's chairmanship because of a "reasonable expectation" that his Albany speech would harm CUNY, their

concerns for CUNY's protection outweighed whatever First Amendment value Jeffries's Albany speech may have had.

C. The Clash between Academic Freedom in the Classroom and Emerging Doctrines of Civil Rights Law.

(For a comprehensive treatment of this issue, see Barbara A. Lee & Donna Ziegler, *In Search of an Understandable Line: The Clash of Academic Freedom with Sexual Harassment Law*, a paper presented at the 37th Annual Conference of the National Association of College and University Attorneys, June 18-21, 1997, available from NACUA for a small fee – (202) 833-8390.)

- (1) *Silva v. University of New Hampshire*, 888 F. Supp. 293 (D.N.H. 1994). Professor Silva was a tenured member of the UNH faculty. In 1992, while teaching a course in technical writing, he made a series of comparisons and allusions that female students found distasteful.² When charged with a violation of UNH's written policy prohibiting sexual harassment, Silva filed suit against the university on the ground that the policy, by dictating what he could and could not say to students in his classroom, violated his academic freedom. The court ruled in Silva's favor: "the UNH Sexual Harassment Policy as applied to Silva's classroom speech is not reasonably related to the legitimate pedagogical purpose of providing a congenial academic environment because it employs an impermissibly subjective standard that fails to take into account the nation's interest in academic freedom." 888 F. Supp. at 314.
- (2) *Cohen v. San Bernardino Valley College*, 92 F. 3d 968 (9th Cir. 1996). Cohen, a tenured faculty member in the Department of English and Film Studies, was assigned to teach a remedial English class in the spring of 1992. Cohen, intent (he said) on generating spirited class discussion, assigned provocative essays and led class discussions on controversial topics, including pornography, cannibalism, and consensual sex. When one student complained, Cohen was charged with and subsequently found guilty of violating the institution's sexual harassment policy. Cohen then sued on the same ground asserted by Professor Silva a continent away –

² For example, Silva told his students that the ability to focus on the task at hand is a key quality a good writer must possess, and continued: "I will put focus in terms of sex, so you can better understand it. Focus is like sex. You seek a target. You zero in on your subject. You move from side to side. You close in on the subject. You bracket the subject and center on it. Focus connects experience and language. You and the subject become one." 888 F. Supp. at 299.

that the college's efforts to regulate his classroom speech violated his academic freedom. The court found in his favor on the ground that the college's sexual harassment policy – very similar in content to the policies on most college campuses – was impermissibly vague: “[O]fficials of the College, on an entirely ad hoc basis, applied the Policy’s nebulous outer reaches to punish teaching methods that Cohen had used for many years. Regardless of what the intentions of the officials of the College may have been, the consequences of their actions can best be described as a legalistic ambush.” 92 F. 3d at 972.

D. The Opposite Side of the Coin: Suppressing Expression Through Limits on Expenditures of Mandatory Student Fees.

- (1) *The Problem in a Nutshell.* At most colleges and universities, students are required to pay a mandatory “student activity fee,” the proceeds from which are allocated to student clubs to support extracurricular activities. Some of the student-club recipients engage in activities or dedicate themselves to ideals that are controversial. Some students may object to the use of their mandatory fees to support those activities, arguing that the use of their money to subsidize activities they do not believe in amounts to a violation of their First Amendment free speech or associational rights.
- (2) In a series of lawsuits brought in the 1970's and '80's, judges uniformly rejected constitutional challenges to the use of mandatory student fees for subsidization of controversial student organizations and activities. *E.g.*, *Veed v. Schwartzkopf*, 353 F. Supp. 149 (D. Neb.), *cert. denied*, 414 U.S. 1135 (1973) (allowing student fees to fund a student-run speakers program); *Arrington v. Taylor*, 380 F. Supp. 1348 (M.D.N.C. 1974) (rejecting a challenge to the use of student fees to defray the operating expenses of the student newspaper); *Good v. Associated Students of the Univ. of Washington*, 542 P. 2d 762 (Wash. 1975) (allowing use of student fees to fund a student government organization that took controversial and unpopular positions on campus and local political issues). *See generally* Note, *The Constitutionality of Student Fees for Political Student Groups in the Campus Public Forum*: Galda v. Bloustein and the Right to Associate, 15 RUTGERS L. J. 135, 153-58 (1983).
- (3) Four relatively recent cases, however, signal renewed judicial interest in the constitutional objections of students who do not want their fees used to subsidize political or ideological activities with which they disagree.

- (a) *Galda v. Rutgers, The State University of New Jersey*, 772 F. 2d 1060 (2d Cir. 1985), *cert. denied sub nom. New Jersey Public Interest Research Group v. Galda*, 475 U.S. 1065 (1986). Students at Rutgers University claimed that their First Amendment rights were violated when the university used mandatory student fees to support the campus chapter of the Ralph-Nader-inspired New Jersey Public Interest Research Group, self-described as a student-run club that “involves students in public affairs in order to broaden [their] educational experiences, and effects social and political change in the areas of concern designated by its elected student board of directors.” *Galda v. Bloustein*, 686 F. 2d 159, 165 n. 11 (3d Cir. 1982). Motivated by their strong disagreement with political positions espoused by NJPIRG on such topics as the regulation of nuclear power and equal rights for women (both of which NJPIRG supported and the plaintiffs opposed), the plaintiffs, undergraduate students at Rutgers’ Camden campus, filed suit to enjoin the university from collecting student fees from them to support NJPIRG’s activities. The Third Circuit agreed with the student plaintiffs, holding that NJPIRG’s activities were “frankly ideological” and not sufficiently related to any educational purpose to warrant the incidental abridgment of offended students’ rights of association and free speech.
- (b) *Carroll v. Blinken*, 957 F. 2d 991 (2d Cir.), *cert. denied*, 506 U.S. 906 (1992). In a case closely resembling *Galda*, students on the SUNY Albany campus challenged the dedication of a small portion of their mandatory fees to support the activities of the New York Public Interest Research Group. In a Solomon-like decision, the Second Circuit ruled that mandatory fees could be used to support NYPIRG activities *on-campus*, but could not permissibly be used for *off-campus* political and lobbying activities. The court essentially identified important educational interests inherent in the activities of NYPIRG – “the promotion of extracurricular life, the transmission of skills and civic duty, and the stimulation of energetic campus debate” (957 F. 2d at 1001) -- and ruled that those interests outweighed the incidental abridgment of free-speech and associational rights when (and only when) the club’s activities were conducted on-campus.
- (c) *Smith v. Regents of the University of California*, 844 P. 2d 500 (Cal.), *cert. denied*, 510 U.S. 863 (1993). Fees collected by the Associated Students of the University of California were used to

support hundreds of students organizations, including fourteen that (according to the plaintiffs) "pursue[d] frankly political or ideological goals" -- among them the Campus Abortion Rights Action League, the Gay and Lesbian League, and Students Against Intervention in El Salvador. The student plaintiffs also objected to ASUC's practice of taking official positions on controversial issues such as gun control and abortion. The California Supreme Court struck down the use of mandatory student fees for these purposes:

A university may, in general, support student groups through mandatory contributions because that use of funds can be germane to the university's educational mission. At some point, however, the educational benefits that a group offers become incidental to the group's primary function of advancing its own political and ideological interests. To fund such a group may still provide some educational benefits, but the incidental benefit to education will not usually justify the burden on the dissenting students' constitutional rights. Phrased in terms of the tests that courts have applied, a regulation that permits the mandatory funding of such groups is not narrowly drawn to avoid unnecessary intrusion of freedom of expression and it unnecessarily restricts constitutionally protected liberty when there is open a less drastic way of satisfying its legitimate interest. [844 P. 2d at 511.]

The relief ordered by the California Supreme Court stopped short of invalidating the whole mandatory fee program. Instead, the court ordered the Regents (1) to identify all student groups that were ineligible for funding through mandatory student fees in accordance with the balancing test spelled out in the decision, (2) to give every student the option of deducting from the mandatory student fee an amount corresponding to the proportion of the fee that would have gone to support ineligible groups, and (3) to set up an adjudicatory system for handling appeals from Regents' determinations that particular groups qualified for funding.

See generally W. Walsh, *Smith v. Regents of the University of California: The Marketplace is Closed*, 21 J. COL. & UNIV. L. 405 (1994).

(d) *Smith* Revisited: Associated Students of the University of California at Riverside v. Regents of the University of California, 1999 Westlaw 13711 (N.D. Cal. Jan. 8, 1999). In January, 1997, in response to the California Supreme Court decision in *Smith*, the Board of Regents adopted a new policy that imposed an unconditional prohibition on the use of mandatory fees to support lobbying efforts by official student organizations. This time, so to speak, the lawsuit came from the left – from the official student government at one UC campus, arguing that the ban violated *its* right to express itself through the lobbying process on matters of public importance. In a trial-court decision issued last month, the court held that the Regents' ban was not required by the decision in *Smith* and that it was consistent with the constitutional rights of all students to allow their mandatory fees to be used for lobbying by student government representatives.

(4) *A Concluding Observation.* The trend toward greater judicial regulation of student clubs poses a significant challenge to public college and university administrators. A state university cannot support every student group that applies for money. The pot is too small. Until now, judges have given universities great latitude in deciding how to apportion their limited funds. The decisions in *Galda*, *Carroll*, and *Smith* suggest that the era of judicial deference may be drawing to a close, and that courts may be more aggressive in intervening to order support for groups that assert a constitutional right to air their views.

II. **COMMENTARY BY PROPONENTS OF SPEECH REGULATION.** Three extraordinary law review articles present the perspective of victims of oppressive speech.

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

[A] racial insult is only in small part an expression of self; it is primarily an attempt to injure through the use of words. ... [Racial insults] are not intended to inform or convince the listener. Racial insults invite no discourse, and no speech in response can cure the inflicted harm.

Racial insults may usefully be analogized to obscenity. Although the government may regulate obscenity, it may not prohibit expression of the view that obscenity should be protected or that, for example, adultery may be proper behavior. Similarly, protecting members of racial

minorities from injury through racial insults, and society itself from the accumulated harms of racism, is very different from protecting espousal of the view that race discrimination is proper. [*Id.* at 176-77; footnotes omitted.]

- B. M. J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989). Professor Matsuda's vivid portrait of racism from the recipient's perspective is worth quoting at length:

From the victim's perspective, [racist insults] inflict wounds, wounds that are neither random nor isolated. Gutter racism, parlor racism, corporate racism, and government racism work in coordination, reinforcing existing conditions of domination. Less egregious forms of racism degenerate easily into more serious forms. ...

Racist hate messages are rapidly increasing and are widely distributed in this country using a variety of low and high technologies. The negative effects of hate messages are real and immediate for the victims. Victims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide. ... Victims are restricted in their personal freedom. In order to avoid receiving hate messages, victims have had to quit jobs, forgo education, leave their homes, avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor. ...

As much as one may try to resist a piece of hate propaganda, the effect on one's self-esteem and sense of personal security is devastating. To be hated, despised, and alone is the ultimate fear of all human beings. However irrational racist speech may be, it hits right at the emotional place where we feel the most pain. The aloneness comes not only from the hate message itself, but also from the government response of tolerance. When hundreds of police officers are called out to protect racist marchers, when the courts refuse redress for racial insult, and when racist attacks are officially dismissed as pranks, the victim becomes a stateless person. ...

The university case raises unique concerns. Universities are special places, charged with pedagogy, and duty-bound to a constituency with special vulnerabilities. Many of the new adults who come to live and study at the major universities are away from home for the first time, and

at a vulnerable stage of psychological development. Students are particularly dependent on the university for community, for intellectual development, and for self-definition. Official tolerance of racist speech in this setting is more harmful than generalized tolerance in the community-at-large. It is harmful to student perpetrators in that it is a lesson in getting-away-with-it that will have lifelong repercussions. It is harmful to targets, who perceive the university as taking sides through inaction, and who are left to their own resources in coping with the damage wrought. Finally, it is a harm to the goals of inclusion, education, development of knowledge, and ethics that universities exist and stand for. Lessons of cynicism and hate replace lessons in critical thought and inquiry.

The campus free speech issues of the Vietnam era, and those evoked by the anti-apartheid movement, pit students against university administrators, multinational corporations, the U.S. military, and established governments. In the context of that kind of power imbalance, the free speech rights of students deserve particular deference. ... Racist speech on campus occurs in a vastly different power context. Campus racism targets minority students and faculty. Minority students often come to the university at risk academically, socially, and psychologically. Minority faculty are typically untenured, overburdened, isolated, or even nonexistent, as is the case at several law schools. The marginalized position of minority faculty further marginalizes minority students. [*Id.* at 2335-38, 2370-72; footnotes omitted.]

- C. C.R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L. J. 431. Professor Lawrence writes:

... I am deeply concerned about the role that many civil libertarians have played, or the roles we have failed to play, in the continuing, real-life struggle through which we define the community in which we live. I fear that by framing the debate as we have -- as one in which the liberty of free speech is in conflict with the elimination of racism -- we have advanced the cause of racial oppression and have placed the bigot on the moral high ground, fanning the rising flames of racism. Above all, I am troubled that we have not listened to the real victims, that we have shown so little empathy or understanding for their injury, and that we have abandoned those individuals whose race, gender, or sexual orientation provokes others to regard them as second class citizens. These individuals' civil liberties are most directly at stake in the debate. [1990 DUKE L. J. at 436; footnotes omitted.]

Professor Lawrence cautiously champions Stanford University's narrowly-drawn policy on "Free Expression and Discriminatory Harassment." The Stanford policy prohibits "harassment by personal vilification," defined as speech or other expression that --

- (a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national or ethnic origin; and
- (b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and
- (c) makes use of insulting or "fighting" words or non-verbal symbols. [*Id.* at 450-51.]

III. **COMMENTARY BY OPPONENTS OF REGULATION.** Two law review articles, very different from one another, illuminate the case against speech restrictions from the perspective of the mainstream civil libertarian:

- A. Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L. J. 484 (1990). Ms. Strossen assiduously dissects the Stanford policy defended by Professor Lawrence and concludes that it is unacceptable and unworkable for several reasons: its reliance on content validation; its misinterpretation of the Supreme Court's "fighting words" doctrine; and its use of inherently vague terminology and resulting chilling effect on concededly protected speech. The ACLU's 1990 "Policy Statement on Free Speech and Bias on College Campuses" is reprinted as an appendix following her article. (1990 DUKE L. J. at 571-73.) At the risk of oversimplifying Ms. Strossen's rich analysis, its essence is captured in a short quotation at the beginning of the article:

It is technically impossible to write an anti-speech code that cannot be twisted against speech nobody means to bar. It has been tried and tried and tried. [*Id.* at 486, *quoting* Eleanor Holmes Norton.]

- B. Burt Neuborne, *Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech*, 27 HARV. C.R.-C.L. L. REV. 371 (1992). In an otherwise abstract and lofty treatment of the political theory underlying First Amendment jurisprudence, Professor Neuborne detours for what seems like a premeditated attack on the Matsuda-Lawrence approach:

The critical question about hate speech on campus, as with hate speech on the streets, is whether behavior, including speech, demonstrably prevents the student from enjoying the principal benefit of participation in the educational enterprise -- learning. Threats and intimidation from whatever source clearly do so. Sustained verbal harassment directed at the target may well do so, whether or not it involves messages of hate, depending upon its duration, intensity, and context. Bruised emotions caused by ugly ideas and epithets, even hateful ones, do not.

As with hate speech in the streets, the alleged harm -- in this case, interference with the learning process --

[I must pause to remark how very different Professor's Neuborne's clinical, dispassionate, and abbreviated characterization of the harm caused by hate speech is from the emotion-laden characterization of Professors Matsuda and Lawrence!]

-- must be proven, not merely alleged or assumed, and the causal nexus between the speech and the harm must be demonstrated. Generalized assertions of an inability to study without a demonstrable, tangible adverse effect on academic performance would be insufficient. ...

The principal vice of the first generation of campus speech codes was the facile and wholly unsupported assumption that the beneficiaries of the codes were so fragile that speech which hurt their feelings would automatically prevent them from learning.

Viewing outsiders as weaklings who require special coddling is, of course, an age-old form of infantilization that reinforces subordinate status. [27 HARV. C.R.-C.L. L. REV. at 399-400; footnotes omitted.]

IV. COPING WITH OFFENSIVE SPEECH.

A. First principle: We may be able to regulate *conduct* without raising free-speech concerns. Examples:

- (1) *Alcohol codes.* The sad fact about incidents of offensive speech on college campuses is that an extraordinarily high proportion of them involve inebriated students. In a notorious 1990 case, a Brown University undergraduate was disciplined and eventually expelled for sitting in the courtyard of his dormitory and hurling anti-black, anti-Semitic, and anti-gay

epithets at passing students. He was disciplined, *not* under the university's policy against hate speech, but under one that prohibited alcohol abuse (he was severely drunk at the time of the incident). The student conduct codes at most universities allow disciplinary sanctions for disorderly conduct or violations of the campus drug and alcohol policy. On most campuses, astute administrators could prosecute the overwhelming majority of racial hatemongering incidents by handling them as disorderly-conduct or alcohol cases. I would also wager -- although the proposition is legally more questionable -- that it would be constitutionally defensible to treat alcohol-induced racism as an aggravating factor in meting out punishment under a campus alcohol policy (*e.g.*, temperance class for public drunkenness, but suspension for a racial epithet hurled in public).

- (2) *Prohibitions against theft or vandalism.* In April, 1993, a group calling itself "Concerned Black and Latino Students" stole 14,000 copies of the daily student newspaper from distribution boxes on the University of Pennsylvania campus. The student group accused the newspaper of "blatant and covert racism" in its coverage of campus events. Similar incidents were reported on the campuses of North Carolina State University, the College of the Holy Cross, and Dartmouth College that year. Later in 1993, the *Chronicle of Higher Education* carried a story bearing the headline "Racial Incidents Spark Anger and Anxiety at Oberlin." The article reported that someone had painted anti-Asian graffiti on the walls of a campus memorial dedicated to Christian missionaries killed in China's Boxer Rebellion. These are examples of conduct undertaken in the name of freedom of expression. It is my contention that conduct otherwise punishable as theft or vandalism does not warrant protection simply because the perpetrators are ideologically motivated or want to convey a political or social message.

B. *Not all speech is the same.* In a community dedicated to learning and the dissemination of ideas, some words are more significant than others, and the institution's justification for engaging in regulation of speech is accordingly less compelling or more compelling.

C. The first variable: *Forum*. In what forum is the speaker speaking?

- (1) *The classroom.* As a legal principle -- and, I dare say, as a matter of common sense -- we are most sensitive to free-speech concerns when the speech in question takes place in a classroom. We allow teachers and students an almost unfettered right of free expression in the classroom. We tolerate abrasive speech (within limits) because (a) we are sensitive to

the academic freedom of faculty members to determine for themselves what should be taught and how it should be taught, and (b) we believe that from the hurly-burly of uninhibited classroom discussion students refine their analytic skills and develop a broader appreciation for the learning process. See, e.g., *Silva v. University of New Hampshire*, and *Cohen v. San Bernardino Valley College*, discussed on pages 7-8 of this outline.

- (2) *The student press.* Newspapers and magazines are viewed as traditional media for the expression of thoughts and ideas. We instinctively recognize that print media are entitled to leeway in disseminating unpopular views. In the early 1990s, several colleges and universities were roiled by emotional disputes over the appearance in campus newspapers of paid advertisements placed by a California group, the Committee for Open Debate on the Holocaust. The advertisements contended that the extermination of Jews by Nazi Germany during World War II never took place. When the editors of the student newspaper at Cornell University decided to run the advertisement, 400 students and faculty members protested outside the university's student union building. At Duke University, passions were so inflamed when the student newspaper ran the advertisement that the History Department used its own funds to take out a full-page advertisement of its own both to refute the historical contentions in the original ad and to castigate the student editors for running it.
- (3) *Public lectures.* In 1993 and 1994, Khalid Abdul Muhammad, a representative of Louis Farrakhan's Nation of Islam, made a series of speeches on college campuses in New York, New Jersey, Maryland, and other eastern states. (At Georgetown, a student organization invited Mr. Muhammad to appear on campus, and he did without incident in the spring of 1993.) Many, particularly members of campus Jewish communities, found his remarks inflammatory and offensive, and even the Reverend Mr. Farrakhan condemned the substance of Mr. Muhammad's remarks as "repugnant, malicious, mean-spirited, and spoken in mockery of individuals and people, which is against the spirit of Islam." Mr. Muhammad's appearances were sometimes preceded by hostile, even violent confrontations between Jewish and African-American student groups. Most institutions, however, reacted to invitations to Mr. Muhammad not by banning his appearance, but by supplementing it with colloquia, panel discussions, and the showing of Steve Spielberg's film *Schindler's List*.

- (4) *Dormitories*. Are free-expressions concerns as exalted when exchanges occur, not in classrooms, editorial pages, or lecture halls, but in the privacy of a dormitory room? At least one noted civil libertarian says no:

[T]he heightened protection due free speech in the academic world certainly [is] applicable to some campus areas, such as parks, malls, or other traditional gathering places. The generalizations, however, may not be applicable to other areas, such as students' dormitory rooms. These rooms constitute the students' homes. Accordingly, under established free speech tenets, students should have the right to avoid being exposed to others' expression by seeking refuge in their rooms. [Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L. J. 484, 503 (1990).]

- D. The second variable: *Communicative Intent*. Is the speaker endeavoring to communicate an idea? Or is the speaker trying to intimidate or humiliate? Interestingly, most campus speech codes include intent as an element of the offense. *E.g.*, the speech code at Stanford University prohibits speech --

intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national or ethnic origin ... [emphasis added].

A separate but related issue: Is there a distinction between the intent to malign a specific, identifiable individual on the one hand, and a group or class of people on the other? In which of the following cases is the institution's justification for regulating stronger?

- Speaker says to a Jewish student, "I hate [offensive term]. Get out of here. You and your kind are not wanted here."
- Same speaker posts a flier on campus bulletin boards. The flier says, "The Jewish people are a plague. They should not be allowed to enroll at our institution."

The Stanford policy quoted above would allow the imposition of discipline in the first case but not in the second. Stanford's policy includes hate speech only when it is directed against "an individual or a small number of individuals," a formulation deliberately meant to exclude generalized "group libel" of the kind illustrated in the bulletin-board-flier case.

- E. The third variable: *Captive Status*. We are intuitively more tolerant of speech when we have the option not to listen. A vulgar theatrical performance may offend, but we can always leave. On the other hand, if we are *forced* to listen, we have the right to insist on greater attention to civility. A highly publicized example of *involuntary* listening occurred at the University of Pennsylvania in 1993, when a student who claimed he was irritated by noise coming from the sidewalk outside his dormitory window leaned out and shouted, "Shut up, you water buffalo." The students, five undergraduate African-American females, interpreted the remark as a racial epithet and filed a complaint under Penn's racial harassment policy. Their complaint became a local and national *cause célèbre* when the Philadelphia chapter of the American Civil Liberties Union weighed in on the side of the male student and accused Penn of imposing an unconscionably broad ban on expressive speech. At the end of the semester the female students withdrew their complaint and blasted Penn's student disciplinary system as "corrupt." A few months later, Penn quietly repealed its racial harassment policy.

EPILOGUE: THE GEORGETOWN APPROACH.

- A. The three elements of Georgetown's approach to expression and free-speech issues are:
- The *Guidelines on Speech and Expression*, drafted by James Walsh, S.J., Professor of Theology, in 1989;
 - The *Speech and Expression Policy*, a set of procedural and substantive standards for adjudicating disputes over expressional rights; and
 - The Committee on Speech and Expression, a body consisting of four faculty members and four undergraduate students who advise the Dean of Students on matters that arise under the *Guidelines* and the *Policy*.

The *Guidelines* and the *Policy* are reproduced at the end of this outline.

- B. The *Guidelines* contain useful statements of principle that define not only the *rights* members of the Georgetown community possess with respect to the communication of ideas through speech and expression, but also the *duties* that flow from the responsible exercise of those rights.
- C. The *Policy* establishes reasonable time-place-manner restrictions on the scheduling of events and lectures, the posting of handbills and fliers, and other expressional activities. Among its features:

- It subjects students to disciplinary action for “expression that is indecent or is grossly obscene or grossly offensive on matters such as race, ethnicity, religion, gender, or sexual preference”
- It provides for protests at events “as long as any speaker’s right to free speech and the audience’s right to see and hear a speaker are not violated.”
- It establishes limits on the posting of fliers and the circulation of pamphlets. “Only members of the Georgetown community” may engage in these activities on campus.
- It formally recognizes one central courtyard in the middle of the campus as an area in which individuals and groups may gather during daylight hours “for the purpose of exchanging ideas.”

To institutions struggling with the task of drafting useful policies on speech and expression, I commend Georgetown’s approach. We have had much success with it (knock on wood.).

Speech & Expression Policy

Preamble

In January 1989, the following guidelines on speech and expression for the Main Campus of Georgetown University were implemented. They were developed by the Committee on Speech and Expression and presented to the University community after widespread consultation with faculty, students and administrators. The Committee on Speech and Expression, composed of four faculty members and four undergraduate students, is a standing committee that advises the Dean of Students on matters relating to speech and expression. The Dean of Students is responsible for administering these guidelines. The policy guiding speech and expression is intended to ensure the "untrunneled expression of ideas and information." Reverend James Walsh, S.J., wrote the following statement to provide an appropriate context for understanding the policy:

The following policy on free speech and expression derives from a certain understanding of what a university is and of what Georgetown University is. I will attempt to articulate that understanding.

1. **The nature of a university.** A university is many things but central to its being is discourse, discussion, debate: the untranneled expression of ideas and information. This discourse is carried on communally: we all speak and we all listen. Ideally, discourse is open and candid and also—ideally—is characterized by courtesy, mutual reverence and even charity.

2. **The university teaches by being what it is.** What the university takes seriously as an institution imparts (to its students especially but not exclusively) important lessons. The fundamental lesson it imparts—just by being what it is—has to do with the nature of the intellectual life. Rigor of thought and care in research; the willingness to address any question whatever; the habit of self-critical awareness of one's own biases and presupposition; reverence for fellow members of the university community and openness to their ideas, which is reductively a concern for the truth itself—the list could be prolonged. These habits of mind and attitude have a powerfully shaping influence on all members of the academic community. A university that sends contrary "signals" to any of its members (as, obviously, by tolerating plagiarism, violence, intellectual shoddiness, or any sort of special pleading in the interest of ideology or vested interest) betrays its mission.

3. **"Free speech" is central to the life of the university.** The category "free speech" suggests another realm of life and argument, that of American constitutional law. Indeed, members of a university community exercise "dual citizenship": we are

academics and we are Americans. The rights and obligations that flow from our participation in each of the two orders—academic and constitutional—are not reducible to those of either one, nor superseded by one or the other, but neither are they in conflict. At the same time, the body of legal principles elaborated from the First Amendment is usefully applied to particular problems. For example, “free speech” in the constitutional sense may be limited by—and only by—reasonable and non discriminatory considerations of “time, place and manner.” These legal categories are most helpful in resolving the problem of how to reconcile the absolute openness of expression proper to a university with other considerations: numbers of people, multiplicity of activities, scheduling, space available and so on. The long and short of the matter is that “time, place and manner” are the only norms allowable in governing the expression of ideas and sharing of information that is the very life of the university.

4. More is better. Discourse is central to the life of the university: To forbid or limit discourse contradicts everything the university stands for. This conviction proceeds from several assumptions. Besides those sketched above, there is the assumption that the exchange of ideas will lead to clarity, mutual understanding, the tempering of harsh and extreme positions, the softening of hardened positions and ultimately the attainment of truth. Some ideas, simply by being expressed, sink without a trace; others cry out for the intervention of reflection, contrary evidence, probing questions. None of that happens when one cuts off discourse. John Henry Newman’s formulation applies here: “flagrant evils cure themselves by being flagrant.” The remedy for silly or extreme or offensive ideas is not less free speech but more.

5. The tradition of Georgetown University demands that we live up to these ideals. In this whole question, matters of history and of convictions central to the Catholic and Jesuit tradition come into play. The historical precedent of the medieval Catholic university, with its lively practice of the “disputation,” and its role in the formulation, clarification and development of doctrine; the Catholic teaching that between faith and reason there can be no fundamental conflict; the Catholic teaching about the autonomy of reason; certain Jesuit principles, about putting the most favorable construction on your neighbor’s argument and especially about reverence for conscience; the vision of our founder, John Carroll, of a “general and equal toleration, . . . giving a free circulation to fair argument,” and of an Academy that would be the “first in character & merit in America”—these and many other fundamentals of the tradition in which Georgetown stands prohibit any limitation upon discourse. Georgetown’s identification with the Catholic and Jesuit tradition, far from limiting or compromising the ideal of free discourse, requires that we live up to that ideal.

6. Violation of these principles, by whatever parties, must have consequences. This is a corollary of the principles themselves and necessary to vindicate the nature of the University itself. The offenses envisioned in the following policy amount to cutting off discourse. Making it impossible for others to speak or be heard or seen, or in any way obstructing the free exchange of ideas, is an attack on the core principles the University lives by and may not be tolerated.

Rev. James Walsh, S.J.
Department of Theology

Speech and Expression Policy

I. GENERAL POLICY

Georgetown University is committed to standards promoting speech and expression that foster the maximum exchange of ideas and opinions. This statement of policy outlines principles that ensure these standards.

First, all members of the Georgetown University academic community, which comprises students, faculty and administrators, enjoy the right to freedom of speech and expression. This freedom includes the right to express points of view on the widest range of public and private concerns and to engage in the robust expression of ideas. The University encourages a balanced approach in all communications and the inclusion of contrary points of view. As is true with the society at large, however, this freedom is subject to reasonable restrictions of time, place and manner, as described herein, although such restrictions shall be applied without discrimination toward the content of the view being expressed or the speaker.

1. The right of free speech and expression does not include unlawful activity or activity that endangers or imminently threatens to endanger the safety of any member of the community or of any of the community's physical facilities, or any activity that disrupts or obstructs the functions of the University or imminently threatens such disruption or obstruction.
2. Moreover, expression that is indecent or is grossly obscene or grossly offensive on matters such as race, ethnicity, religion, gender, or sexual preference is inappropriate

in a university community and the University will act as it deems appropriate to educate students violating this principle.

Obviously and in all events, the use of the University forum shall not imply acceptance or endorsement by the University of the views expressed.

II. GUIDELINES

The following guidelines implement the foregoing propositions:

1. Events: An individual member or group of members of the academic community may invite any person to address the community. For purposes of this document, an event is any public meeting organized by such an individual or group primarily for the dissemination or exchange of ideas. "Public meeting" shall not be construed to include formal academic convocations, regularly scheduled classes, or regular business meetings of University organizations.

The individual or group hosting such an event must reserve the place where it will occur as outlined in the Appendix in accordance with registration requirements. However, the area adjacent to the ICC ("Red Square") shall be available, without prior arrangement, for individuals and groups during daylight hours for the purpose of exchanging ideas. Because of the proximity of this area to classrooms, sound amplification in conjunction with any presentation in Red Square is prohibited, as is disruption of classes in any other way.

2. Costs: An individual hosting an event is responsible for all costs (including security if such is deemed necessary by the University administration) associated with the event; no University subsidy will be available unless by prior arrangement. A group hosting an event is also responsible for all costs associated with the event, but a University financial subsidy may be available through the Office of Student Programs to pay a certain proportion of security costs for group-sponsored events. A group is defined as: (a) a continuing student organization, (b) an academic department or any continuing faculty or administrative organization, (c) an ad hoc group established by a petition of twelve signatures of members of the academic community. Petition forms are available in the Office of Student Programs.

3. Access to Events: Any event that receives financial support or other benefits of any kind from the University must be open to members of the academic community. If seating is expected to be limited, an equitable means of ticket distribution must be approved by the appropriate campus office. Such events ordinarily shall allow for a period of questions from the audience.

4. **Protest of Events:** An individual or group wishing to protest at an event may do so as long as any speaker's right to free speech and the audience's right to see and to hear a speaker are not violated.

5. **Literature:** Literature includes posters, handbills and pamphlets. Only members of the Georgetown University academic community may hang posters or distribute handbills and pamphlets. No student organization other than one granted access to University benefits may use Georgetown in its name, or for any other reason except to identify the location of an event.

a. Posters: All posters placed on campus must be in compliance with the following guidelines:

1. All material to be posted on campus may be placed only on unenclosed public bulletin boards or kiosks.

2. Due to the special nature of some locations, specific requirements are posted at those locations.

3. If posting in inappropriate locations results in damage to property, restitution will be required of the responsible party.

b. Handbills and Pamphlets: Handbills and pamphlets may be distributed at any location on campus except classrooms or offices in use. When handbill distribution is associated with a particular event, whether indoor or outdoor, the location of indoor handbill distribution may be restricted on occasion to preserve safety and security at events and convocations, but distribution in these cases may not be wholly prevented or unnecessarily restricted.

6. The Dean of Students has the responsibility for administering these guidelines. Only in extreme cases of violation of these guidelines can the Dean prohibit speech and expression before it occurs. In administering these guidelines, the Dean shall be advised by a Committee on Speech and Expression, composed of students, faculty and administrators. The Dean and the Committee may consider and implement revisions and improvements to these guidelines in a manner consistent with the ideals articulated at the beginning of this document.

7. **Disciplinary Procedures:** Violations of the policy and/or guidelines by students will be handled through the disciplinary system administered through the Office of Student Conduct. If an administrative action is taken in cases involving the restriction of one's speech and expression, an appeal as of right may be taken to a Hearing

Board. That action may be modified or reversed by the Hearing Board for the same reasons as are allowed in the disciplinary system, as well as on grounds that the administrator acted in an unreasonable and arbitrary manner or contrary to this policy governing speech and expression and thus unnecessarily restricted speech and expression on campus.

Nothing herein shall be construed to confer rights on any person not a part of the academic community as defined herein.

Appendix, Speech & Expression Policy

The University will make every effort to accommodate groups who wish to schedule an event. Those groups who invite someone to speak on the Main Campus should reserve a space in advance of the event with the appropriate office, in accordance with that office's regulations. Below are listed the spaces available for public events and the offices that administer them.

POLICIES

Place.....	Office to Contact	Phone
Classrooms	Registrar's Office.....	687-4020
Copley Formal Lounge	Student Activity Facilities	687-4081
Copley Lawn.....	Student Activity Facilities	687-4081
Gaston Hall.....	Student Activity Facilities	687-4081
GU Conference Center.....	Conference Center	687-3242
(Ballrooms, Salons)		
Healy Lawn.....	Student Activity Facilities	687-4081
ICC Galleria and	Student Activity Facilities	687-4081
Auditorium		
Lauinger Terrace	Student Activity Facilities	687-4081
Leavey Center	Student Activity Facilities	687-3726
Commons		
Leavey Conference	Student Activity Facilities	687-3726
Rooms		
Leavey Esplanade	Student Activity Facilities	687-3726
Leavey Program Room	Student Activity Facilities	687-3726
Sellinger Lounge.....	Student Activity Facilities	687-3726
Village C Lounge	Student Activity Facilities	687-4081
White-Gravenor	Student Activity Facilities	687-4081
Esplanade		