

Speaking Out on Campus Speech Zones

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The news stories and press releases are similar. Students are warned, disciplined or arrested for engaging in speech-making or other expressive activity outside the campus' speech zone(s).¹ The university, the student(s), and often a free speech organization become embroiled in battle. Undoubtedly, higher education's use of campus speech zones is a current "hot topic," a subject of controversy and litigation.

Civil activist groups such as the FIRE,² the ACLU, the Rutherford Institute, and others, are dedicated to fighting government infringement of citizens' constitutional rights, including freedom of speech. These groups often provide legal advice and representation to those attacking the speech-related policies of American colleges and universities, particularly students who have been subjected to university disciplinary action or other penalties based on an institution's regulations. I suspect that cases may sometimes arise by virtue of

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¹ Sometimes referred to as free speech zones, designated speech zones, open forums, etc., these are specific locations on campus designated by a university for free expression activities. Campus speech zones are typically created by university policy or regulation. The scope of such regulations varies widely among institutions. Some require that all expressive activities such as speech-making, leafletting, demonstrations and displays take place only within the institution's geographically designated campus speech zone(s). Others require that only gatherings of a certain size or those involving sound amplification or the setting up of displays be confined to campus speech zones. Some institutions require submission of an application in order to use the campus speech zone(s). Some applications require that the applicant identify the subject matter. Others even require that a copy of whatever materials might be handed out be attached. Some institutions' regulations allow use of campus speech zones on a first come, first served basis, without use of any application. The variations are as wide as can be imagined; universities vary as to the number and locations of speech zones as well.

² FIRE is the acronym for the Foundation for Individual Rights in Education, at <http://www.thefire.org>.

test events staged with the advice of activist groups in order to bring about a confrontation.³

Once a confrontation has occurred, and especially when litigation is filed against a university defendant alleging that it has taken or intends to take unconstitutional action, the activist organization's media campaign commences. For example, during my experience as a college attorney, my institution first learned that a lawsuit had been filed against it when I received a phone call from a television reporter; he wanted to come over to my office with a mobile news crew to tape my statement of the institution's response to the charge that its literature distribution policy violated the constitutional rights of students. The advocacy organization had filed its complaint, issued a press release and begun its media activity before advising the institution that a lawsuit was being contemplated,⁴ and without serving its lawsuit on the college or providing it with a courtesy copy of the court document.

Public colleges and universities⁵ in America depend on legislatures and the public for funding in the form of state appropriations, grants, and contributions from donors. Accordingly, these colleges and universities value their good reputations and the esteem with which they are viewed. The institution's reputation, both in its perception of itself and in the eyes of the public, is important in the recruitment of students and faculty and to the institution's future success. A plaintiff's media campaign generally vilifies the defendant university, portraying it as a flagrant violator of the United States Constitution callously disregarding the rights of its students. This is strategically

³ Activist groups such as those named play an important role in safeguarding the rights of citizens against government encroachment. Although a very significant percentage of faculty and administrators are in agreement with many of the principles espoused by such groups and believe, to use the colloquial phrase, "We are all on the same side," it is, nevertheless, sometimes hard to remember this during some of the more contentious moments of a dispute.

⁴ As best as I could tell from my subsequent review of the matter, there had been little interaction between the students and campus administrators to indicate that a serious problem was brewing.

⁵ Given the direct First Amendment implications and state action, this paper focuses on the issue of campus speech zones at public institutions of higher education in the United States. In this paper I use the term "university" to refer to all public institutions of higher education in the United States.

meant to embarrass the institution and to get the attention of legislators, community leaders, the institution's administrative leadership, its board of trustees, students, faculty and the public. It is generally successful in doing so. The situation immediately becomes confrontational, polarized, adversarial and reactionary. First Amendment litigation against a college or university is automatically a high profile matter to the institution's president and board of trustees. The media campaign is a litigation tactic that, either by itself or together with the pressure brought to bear by students, faculty and the public as a result of the media campaign, is used to resolve the litigation to the plaintiff's advantage, often without going to trial. Sometimes the university's policy is withdrawn in its entirety. Other times it is revised. In my opinion, the total elimination of the policy, although expedient for resolving the pending litigation, may not be necessary. If revised, the revised policy may not be as well-reasoned or precise as could have been possible absent the deadlines, hype and other pressures of litigation.

What is the responsible, law-abiding American public university to do about the hot topic of campus speech zones? Should the university simply eliminate its use of campus speech zones before an issue arises? Should the university wait to see whether it is sued, then react? Perhaps the university should "keep its head down" and see if this is merely another short-lived higher education phenomenon. After all, current law does not necessitate the elimination of all campus speech zones.

I recommend that the issue of campus speech zones be analyzed carefully because it resounds of First Amendment free speech, one of the most cherished values of American society, and because free speech is so intimately intertwined with the purpose, role and function of the university as a special institution. It is my position that such an analysis is best done outside the high pressure and media hype that often accompanies First Amendment challenges in higher

education because the analysis is, in reality, a two-step process. First Amendment litigation, however, focuses almost solely on step two.

Obviously a public university must comply with the constitutional standards in its use of campus speech zones. Accordingly, campus speech zone regulations must be drafted carefully so that they fulfill all the constitutional requirements while simultaneously avoiding constitutional pitfalls. I believe, however, that this is but the second step of a two step process. The first step is for the specific university to answer the threshold policy question of whether or not it should employ campus speech zones, and if so, how. In order to answer that first step threshold question, I believe that a university needs to make a thorough analysis in the context of its own unique institution. This process raises a number of intriguing questions. The focus of this article is identifying the context and the important questions that arise as an institution undertakes the policy-level contextual analysis. The article begins with background information consisting of a brief description of the constitutional framework and some problems that might be encountered in drafting a constitutionally adequate campus speech zone policy. It then moves on to begin to identify the questions that ought to be considered in analyzing the step one question of whether or not a university should utilize speech zones, and if so, how. Every institution is unique and there can be no one-size-fits-all answer. Nevertheless, this article proposes that the context likely includes analysis of the underlying purpose, role and character of the university. This, in turn consists of a number of essential components, among them being the exchange of ideas and equal opportunity. The context also includes the attitudes and needs of the institution's students, day-to-day operational concerns, current high profile problems such as the post 9/11 threat of terrorist attacks, and the litigious nature of the today's university environment.

The concept of campus speech zones was developed during the 1960's so that the then prevalent campus unrest would not interfere with classes and other

university business operations.⁶ Campus speech zones developed at a time during which both First Amendment jurisprudence and higher education law were rapidly changing. As campus speech zones were becoming common, students were winning basic civil rights in their dealings with their public university, and *in loco parentis*⁷ was dead as a doctrine for describing and guiding the relationship between a university and its students.

A properly drafted campus speech zone policy supported by important governmental interests can constitute a constitutionally permissible, content-neutral regulation of the time, place and manner of protected⁸ speech, provided that the regulations⁹ are 1) “justified without reference to the content of the regulated speech,”¹⁰ 2) “narrowly tailored to serve a significant governmental interest,”¹¹ and, 3) “leave open ample alternative channels for communication of the information.”¹² The Court has clarified that the requirement of narrow tailoring is met if the “regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.”¹³ Nevertheless, “this standard does not mean that a time, place or manner regulation may burden substantially more speech than is necessary to further the government’s legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.”¹⁴ The standard for constitutional review of content-neutral regulations in

⁶Robert M. O’Neil, *Walking the Talk on Campus Speech*, TRUSTEESHIP, Mar./Apr. 2004, at 2; *see also* WILLIAM A. KAPLIN AND BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 500 (3rd ed., 1995). Kaplin and Lee state the time as the late 1960s and early 1970s.

⁷ *In loco parentis* is defined, “in the place of a parent.” BLACK’S LAW DICTIONARY 803 (8th ed. 2004).

⁸ For First Amendment purposes, speech, including expressive conduct that is deemed to constitute a form of speech, is divided into protected speech and unprotected speech. For a good, concise work on First Amendment jurisprudence, *see*, DANIEL A. FARBER, *THE FIRST AMENDMENT* (2d ed. 2003).

⁹ These elements are expressed virtually identically to Thomas J. Davis’ wording in his student Note discussed at notes 25-28 and accompanying text below.

¹⁰ *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984).

¹¹ *Id.*

¹² *Id.*

¹³ *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S.Ct. 2746, 2758, 105 L.Ed.2d 661 (1989)

¹⁴ *Id.*

public fora, including the designated public fora of a university, is intermediate scrutiny; the regulation must serve an important government interest in order to be constitutional.

As explained by the public forum doctrine, the permissibility of government restrictions on speech and the level of scrutiny to which a court will subject a restriction on free speech vary with the type of forum in which the speech takes place.¹⁵ Although the public forum doctrine is undergoing change and has been criticized as being overly formalistic and perhaps unnecessary,¹⁶ it continues to be used in recent case law concerning campus speech zones.¹⁷ Commentators, as well as recent case law, have stated that the college campus typically consists of a variety of fora.¹⁸

Even though the basic notion of the campus speech zone¹⁹ is constitutional and university policies that could survive constitutional scrutiny can be written for a variety of different types of campus speech zones, there are many ways in which a college or university's speech zone policy can run afoul of the First Amendment and thus be unconstitutional. Here are some possible examples. First, consider a campus speech zone policy that requires that students file a written application for use of the speech zone in advance, that provides that the application will not be considered properly submitted unless it states the topic to be addressed during use of the zone, that provides no standards for approval or denial by university officials (or expressly states impermissible standards), and,

¹⁵ For material describing the public forum doctrine, see FARBER, *supra* note 8, at Chap. 9; see also KAPLIN AND LEE, *supra* note 6, at 501; see also *Roberts v. Haragan*, 2004 WL 2203130 (N. Dist. Tex. 2004). I have appended the work product of my colleague, Professor Lauren Gilbert, a constitutional law scholar, to this article as Attachment A; it provides helpful guidance on types of fora and the current applicable levels of judicial scrutiny.

¹⁶ FARBER, *supra* note 8, at 189-91.

¹⁷ See *Roberts*, 2004 WL 2203130. The categories "designated public forum" and "limited public forum" both appear in case law. The Fifth Circuit, as explained in *Roberts v. Haragan*, utilizes both concepts and differentiates between the two.

¹⁸ Rodney A. Smolla, *Academic Freedom, Hate Speech and the Idea of the University*, 53 *Law & Contemp. Probs.*, 195, 218 (1990); see also *Roberts*, 2004 WL 2203130. However, it is not a foregone conclusion. See, *Galdikas v. Fagan*, 2001 WL 1223539 *3 (N.D. Ill. Oct. 12, 2001) ("GSU['s] campus may be a public forum. Even if it is a non-public forum . . .").

¹⁹ The basic notion is that of a content-neutral regulation in compliance with the standards described above.

provides for no appeal of a denial. Such a policy is likely to be found unconstitutional.²⁰ Next, consider a university policy that requires that all expression that might be characterized as “hate speech”²¹ take place only in campus speech zones; no similar policy exists for speech on other topics. This policy, too, is likely to be found unconstitutional.²² Finally, consider a university campus speech zone policy that requires that all distribution of free speech literature²³ take place only in the campus’ designated speech zone and only from behind a table provided by the university for such purposes. The university’s stated purpose for its regulation is to control litter from dropped fliers – litter that would be costly to clean-up if it were dropped all over campus, and might contribute to slip and fall accidents. If these were the only reasons for this policy, it, too, may be doomed as an unlawful violation of students’ First Amendment

²⁰ The described policy could be unconstitutional for a number of reasons. First, it would be an unconstitutional prior restraint if the stated standards for approval or denial were impermissible – *e.g.* a policy stating that permits would be given for speech that was considered “wholesome” by the relevant university administrator. *Shamloo v. Mississippi St. Bd. of Trustees*, 620 F.2d 516 (5th Cir. 1980). 2. If no standards for approval or denial were stated, it would likely be an unconstitutional prior restraint because the government official would then have unbridled discretion and might issue or deny a permit based on the official’s agreement or disagreement with the topic; furthermore, those whose applications were denied would have no means of appeal. *See Kunz v. New York*, 340 U.S 290, (1951) (concerning a city ordinance requiring permits for those who wished to conduct religious worship meetings on the street; because the ordinance was silent as to grounds for denying or revoking a permit, the court found the ordinance gave unconstitutional discretionary power to administrative official.) For a university case, *see Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575 (S.D. Tex. 2003).

²¹ Kaplan and Lee describe, “Hate speech” is an imprecise catch-all term that generally includes verbal and written words and symbolic acts that convey a grossly negative assessment of particular persons or groups based on their race, gender, ethnicity, religion, sexual orientation, or disability. Hate speech thus is highly derogatory and degrading, and the language is typically coarse. The purpose of the speech is more to humiliate or wound than it is to communicate ideas or information. Common vehicles for such speech include epithets, slurs, insults, taunts and threats. Because the viewpoints underlying hate speech may be considered ‘politically incorrect,’ the debate over hate speech codes has sometimes become intertwined with the political correctness phenomenon on American campuses.” KAPLIN, *supra* note 6, at 509.

²² There are a number of reasons that this content-based policy could be held unconstitutional. It is unconstitutionally overbroad in that it proscribes protected speech in addition to unprotected speech (*i.e.* hate speech that does not rise to the level of fighting words or a true threat is protected, even though, to many, hate speech is “a rape of human dignity.” Smolla, *supra* note 18, at 224. The described policy is also unconstitutionally vague if the policy’s definition of hate speech is such that a person would have to guess whether particular language would be proscribed or not. *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989); *see also UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*, 774 F. Supp. 1163 (E.D. Wisc. 1991).

²³ As distinguished from commercial advertising which has rules of its own.

rights.²⁴ Admittedly, these examples are relatively uncomplicated. There is no limit to the complex fact patterns presenting multiple constitutional impediments that could be imagined.

Writing a campus speech zone policy that will both withstand constitutional scrutiny and be workable for the practical needs of a particular university is challenging, but can be successfully accomplished through the combined efforts of university counsel and student life administrators.

From my perspective, a more interesting question is whether or not a particular university should employ campus speech zones. This question is at the intersection of law and policy – First Amendment and higher education law, and higher education policy.

The only article with which I am familiar on the topic of campus speech zones is a well-written law student note that looks at the question solely from the perspective of First Amendment free speech law utilizing public forum analysis.²⁵ Its author, Thomas Davis, states that, “the uniqueness of each university precludes a definitive answer”²⁶ Mr. Davis takes the position that campus speech zones, “are a terrible idea.”²⁷ He would prefer, “reasonable time, place and manner restrictions on disruptive activities, while allowing peaceful, non-disruptive students the right [to engaging in free expression activities without place limitations].”²⁸ Certainly, this is one solution to the campus speech

²⁴ Control of litter, even control of litter likely to contribute to accidents, may not constitute a sufficiently important government interest to justify the regulation for constitutional purposes. This might seem frustrating to higher education administrators trying to accomplish as much as possible with inadequate state funding. From the perspective of making the most prudent use of limited funds, it would seem more prudent to spend the money on items directly impacting classroom instruction such as hiring another adjunct professor so that another section of a required course could be offered to students; or, it might seem to be a better use of funds if they were spent on making the university’s facilities more accessible to handicapped students. It is likely, however, that First Amendment scholars and trial counsel for the plaintiff would argue to the contrary.

²⁵ Thomas J. Davis, *Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum Doctrine*, 79 IND. L.J. 267 (2004).

²⁶ *Id.* at 269. I agree with this limited portion of Mr. Davis’ conclusion, namely, that, “the uniqueness of each institution precludes a definitive answer. . . .”

²⁷ *Id.* at 297.

²⁸ *Id.* at 270.

zone question, and initially I found attractive an approach that allowed free speech activities anywhere on campus, with the exception of classrooms during class meetings and certain other nonpublic fora; problems could be addressed by after-the-fact disciplinary measures on disruption rather than via the before-the-fact limitation of speech zones. However, Thomas Davis' article, as well as my initial reinterpretation of it, looks at the question from only a limited perspective and fails to look at the question of campus speech zones in its entirety. Given the importance of what is at stake, I believe that it should be fully analyzed.

It is my position that, in reality, the analysis consists of a two step process. The first step consists of policy level questions, the first of which is whether or not a specific university should use campus speech zones in its unique situation. If that question is answered in the affirmative, the university should consider from its policy perspective what particular variation campus speech zone(s) would best meet the university's important objectives. Only after these step one questions are answered does the institution move on to step two, making sure that the constitutional requirements are fully met in its particular formulation of campus speech zone(s). At this step the speech zones as initially envisioned must be adjusted as necessary to comply with both constitutional standards and university needs.

The step one questions cannot be fully or properly analyzed unless they are carefully considered in context. What is the context within which the question of campus speech zones arises? I believe that it begins with the underlying purpose, role and character of the university, but also incorporates the more mundane, but pressing, day-to-day operational questions faced by today's college and university officials. The context must include the needs, attitudes and expectations of today's students. I believe that it is especially important that the context include current high profile problems confronting public higher education that might bear on the question of university speech zones. It would also be helpful if there were a model or analytic framework

within which the question could be examined. As yet there is no comprehensive model to replace *in loco parentis*.

I am working on an extensive article that examines the question in the context I have just described. As part of the process I'm exploring some interesting questions and thoughts presented by the contextual analysis.

What is the essential role and character of the university?²⁹ Shouldn't the decision to establish, continue, modify or discontinue use of campus speech zones be consonant with such underlying purpose(s)? The work of Jaroslav Pelikan, in "The Idea of the University - A Reexamination,"³⁰ has been particularly influential in my thinking. Aside from enhancing learning through scholarship, disseminating knowledge through teaching and publishing, and gathering and preserving knowledge through its museums and collections, the university is a complex institution with a number of roles that combine to form the essence of the university,

For example, the university has a role in promoting international understanding. Would the presence of campus speech zones promote or hinder that role? In examining the question, one must consider the presence of international students and scholars, and the best means of accomplishing a meaningful exchange of ideas. One ought also to consider the impact of the current war on terrorism on the ability of foreign students and scholars to enter the United States to study, learn and teach. What about the university's role in the postwar healing of international tensions?

Doesn't the basic and applied research performed at the university have a role in addressing problems such as hunger and disease? How do campus speech zones relate to this role? What about those who wish to express their views in support or opposition to that research? Is there a substantial risk of violence? Would campus speech zones exacerbate or ameliorate the risks?

²⁹ college, community college or other institution of higher learning

³⁰ JAROSLAV PELIKAN, THE IDEA OF THE UNIVERSITY - A REEXAMINATION (1992).

The Supreme Court has referred to the university as the “marketplace of ideas.”³¹ Jaroslav Pelikan’s book expounds upon that theme. The exchange of ideas is the lifeblood of the university. Facilitating that exchange is an essential role of the university. If so, this factor is critical to a particular institution’s decision-making with respect to campus speech zones. How should that exchange take place? Is it a loud cacophony with lots of speaking but little listening? Is it dialectical - a measured, well-reasoned process of critical thinking and the evaluation of different ideas and theories? Can it be both? Obviously, there must be room for both, but the latter is of overriding importance. Do campus speech zones help by giving voice to either the former or the latter? Do they facilitate one, both or neither? Is the use of campus speech zones merely a subterfuge for cracking down on the free speech of students or anyone else who might want to express controversial ideas? A variety of commentators say there is a need for universities to teach critical thinking and to promote lifelong learning.³² Do speech zones enhance the ability of the university to provide such an educational experience? Would restrictions targeting disruptive activities without creating campus speech zones be just as effective and less of an intrusion on free speech? Is the objective merely to control disorder or is it to facilitate the dialectic? Based on Pelikan’s work, the objective would be to ensure a meaningful, thoughtful dialectic. Which, if either - of targeting disruption without speech zones, or creating speech zones - would better facilitate the dialectic?

What is the role of the university with respect to change? Pelikan points out that the university’s faculty studies social change and that future social activists are often inspired to reflection and eventual action through their experience at the university. He also stresses, however, that the role of the

³¹ *Healy v. James*, 408 U.S. 169, 180 (1972) (quoting *Keyishian v. Bd. of Regents of Univ. of New York*, 385 U.S. 589, 603 (1967)).

³² *E.g.*, ARTHUR LEVINE AND JEANETTE S. CURETON, *WHEN HOPE AND FEAR COLLIDE: A PORTRAIT OF TODAY’S COLLEGE STUDENT*, ch. 8 (1998).

university is dialectical and a university should not transform itself, or allow itself to be transformed, into a tool for any of the polarities of ideology.

Pelikan also stresses that the concept of equality of opportunity lies at the heart of the university. He notes that the university is especially a “ground of promise in the future”³³ for those within the societies served by the university who have been victims of discrimination and repression. Higher education is a means for them to achieve access to the benefits enjoyed by the majority. Can campus speech zones have any impact on the character and ability of the university to fulfill its role as such a ground of promise for the future?

This is a good juncture at which to turn to some of the current high profile issues facing higher education, starting with hate speech. Hate speech has been recognized as a problem by many in higher education.³⁴ Would the use of campus speech zones for all or some gatherings exacerbate the problem of hate speech? Or, could campus speech zones provide a measure of relief? Is there any way that campus speech zones could be employed that would meet the courts’ current standards for constitutionality with respect to hate speech?

How does the war on terrorism impact a university’s decisions with respect to campus speech zones, if at all? Does the use of speech zones provide a convenient target for terrorist attacks? Could the use of campus speech zones facilitate better security measures? What about the design and placement of speech zones? Could the design and location of the facilities enhance student safety? How can possible conflicts between designing for safety and placing speech zones in locations where speakers can reach the intended audience be resolved? How does the matter of hate speech impact that mix of competing problems, if at all?

Moving to other specific questions, what is the impact of the war on terrorism and the PATRIOT Act on the use of campus security cameras in the

³³ Title of Pelikan’s Chapter 14.

³⁴ Michael A. Olivas, *The Political Economy of Immigration, Intellectual Property and Racial Harassment*, 63 J. OF HIGHER ED. 570 (1992); Smolla, *supra* note 18.

vicinity of campus speech zones? Does the presence of cameras create an unnerving possibility of chilling free expression? Do the answers to these questions sway the answer with respect to the establishment, continuance, modification or discontinuance of campus speech zones? Next, would use of some of the measures taken by law enforcement with respect to demonstrations and free speech at the Presidential Nominating Conventions and other key events be good or bad if implemented for university speech zones? Would they be good or bad with respect to the role, purpose and character of the university?

Another current high profile issue confronting the university is the problem of the prevailing litigious climate. Lawsuits against universities are commonplace. If individuals and activist groups are targeting universities' campus speech zones for legal challenges, wouldn't it be more cost effective to simply eliminate campus speech zones and avoid the litigation altogether?³⁵ If an institution has carefully examined the issue of campus speech zones and determined that they facilitate the educational experience of students, is the possibility of litigation nonetheless determinative?

Do the needs and attitudes of students impact institutions' decisions with respect to campus speech zones? A number of commentators and institutions have reported that student bodies at the end of the 20th century and beginning of the 21st century differ from those of several decades ago.³⁶ A significant proportion of the student body consists of non-traditional students who are older and who may have jobs, families and attend college part time. The percentage of non-traditional students varies among institutions with community colleges typically having a larger percentage of non-traditional students. In general, whether they are of traditional age or not more students must work while attending college, live off-campus and attend college part time. Levine and

³⁵ Litigation is costly in terms of money, time, distraction and stress, not to mention the intangible cost of damage to the university's reputation caused by the plaintiff's likely media campaign tactics.

³⁶ *E.g.* LEVINE & CURETON, *supra* note 32; ROBERT D. BICKEL AND PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY* (1999).

Cureton as well as Bickel and Lake report that college students' attitudes toward their institutions are consumer-oriented. At the close of the 20th century students wanted higher education that would enable them to get and keep jobs and attain their personal goals. Levine and Cureton note that students are uncomfortable with, and concerned about, race relations at their institutions.³⁷ What does the university offer to these consumer-oriented students and does the presence or absence of campus speech zones make any difference? Levine and Cureton also report that students at the close of the 20th century believe that they must confront and solve many of the pressing problems facing society. They believe that their generation is up to the challenge. Are these student goals consistent with the role and purpose of the university? If so, do campus speech zones help or hinder an educational experience that can empower students to tackle these challenges?

How do the pressures of day-to-day operations impact the decision-making with respect to campus speech zones? Limited funding for public institutions of higher education is certainly a pressing reality. Depending on one's area of responsibility at the university, day-to-day activities may mean trying to stretch inadequate state financial appropriations, coping with unfunded mandates, lobbying, recruiting students, dealing with personnel issues, handling routine contracts, providing for the design and maintenance of facilities, keeping up with the fast-changing world of technology and the ever-present onslaught of hackers and viruses, teaching, publishing, advising students and providing a curriculum that befits a specific university's mission and meets students' needs and desires. Of course, these are but a few of the hundreds of basic operational concerns addressed by colleges and universities daily. In these times of short funding, most institutions are trying to get by with fewer employees handling the same or a greater volume of work. Is careful consideration of campus speech zones so time consuming that it is an issue that must be put to one side?

³⁷ E.g. LEVINE & CURETON, *supra*, note 32, ch. 4.

Given the importance of the question of campus speech zones and its close relationship to the essence and purpose of the university, I suggest that the question as to whether the use of campus speech zones should be established, continued, modified or discontinued at any particular institution deserves very careful consideration. There are no simple answers, and because every institution is unique³⁸, there is no one-size-fits-all solution.³⁹

It would be helpful if there were an analytic model that could guide the analysis. As previously stated, and as maintained by Professors Bickel and Lake in their book, *Rights and Responsibilities of the Modern University*,⁴⁰ no truly satisfactory or lasting comprehensive model has been developed to fill the void left by the demise of *in loco parentis*. *Rights and Responsibilities of the Modern University* deals with tort issues in higher education, specifically, student safety and campus security that may result in bodily injury. In that book, Professors Bickel and Lake suggested and developed the model of the facilitator university to analyze those tort law issues. It is a subject matter somewhat removed from the constitutional and higher education law and policy issues presented by campus speech zones. Nevertheless, I would like to examine whether an adaptation of the facilitator university model might be helpful in analyzing issues relating to campus speech zones.

First, it is necessary to briefly describe the facilitator university as envisioned by Professors Bickel and Lake in their work.⁴¹ According to Professors Bickel and Lake, education is the primary focus of the facilitator university with respect to students. It sees all operations as either facilitating or hindering education. Those that hinder it ought to be changed to eliminate the hindrance. The facilitator university sees itself as providing more than multiple unrelated services to disconnected, solitary consumers. It sees itself as providing

³⁸ Smolla, *supra* note 18; KAPLIN & LEE, *supra* note 6; BICKEL & LAKE, *supra* note 36.

³⁹ Davis, *supra* note 25.

⁴⁰ BICKEL AND LAKE, *supra* note 36.

⁴¹ This abbreviated sketch of the facilitator university provides but a glimpse of the model more fully developed and presented in their book.

a bundle of services with the bundle varying according to the needs and goals of the specific student. However, no matter the composition of the bundle of services, these services are uniquely tailored to the context of university life and seek to reconnect the university with its students and its students with each other to create a community of learners with an appropriate balance among student responsibility, university responsibility and shared responsibility. The facilitator university is a guide that provides as much support, information, interaction and control as is reasonably necessary and appropriate in the situation.⁴² Furthermore, the facilitator university model recognizes the unique nature of each college and university and that each institution changes over time as its student body and programs change, and its mission and community evolve. Unlike the parental model of *in loco parentis*, the facilitator university is creative and practical and respects the inherent wisdom of students. It does not choose for students, but allows them to make choices for themselves. It prefers centrist and balanced approaches rather than extreme reactions.

If this model were adapted to address free speech issues, would it be helpful in analyzing campus speech zones? What is the analysis of campus speech zones under the facilitator university model? Does it result in a higher quality analysis for each unique institution? Does analysis under the facilitator university model reach the same conclusions? Could campus speech zones, for some institutions, and under some circumstances, help students make well-reasoned choices for themselves, thus facilitating the type of educational experience that Pelikan describes? Is the adaptation of the facilitator university that I am examining consonant with the essence, role and character of a university as expressed by Pelikan and others? Could this adaptation of the facilitator university model guide an institution in its efforts to reconnect the

⁴² Again, the focus is tort-related student safety and campus security. RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY was published prior to 9/11, so student safety and campus security relate mainly to unreasonable risks in student life activities, premises safety, and the presence of persons with violent tendencies on campus, without the overlay of the post-9/11 war on terrorism. ROBERT C. BICKEL AND PETER F. LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY (1999).

university with its students and to reconnect its comparatively isolated students with each other and the faculty and administration to create a community of learners in which there could be meaningful dialectic? Would campus speech zones help the dialectic? If so, then perhaps, for these institutions, the campus speech zone should be established, or continued and modified, to best reach such goals in that specific university's unique circumstances.

In closing, I would like to point out once again that the task is best undertaken outside the hype and pressures of litigation. The analysis of these questions will, like most successful undertakings in higher education, require collaboration and cooperation among many members of the university community. In this instance it will require especially close collaboration between administrators and counsel. To me it is a fascinating inquiry, and I would appreciate any feedback or insights that you might wish to provide.

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