

THE SUSTAINING OF EXPRESSIONAL RIGHTS

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Responding to the Challenge

“Never in the history of higher education have our colleges and universities faced such appalling responsibilities....Historically, the role of higher education has been comparatively simple and easily defined. Our colleges and universities were supposed to preserve, disseminate, and advance knowledge. Today our colleges still have these three tasks to perform, but in addition they find themselves confronted now with a new and awesome list of other responsibilities....Freedom of thought and expression imply criticism and criticism is seldom popular; it is especially unpopular in times of national peril. However, independent and critical thinking is probably needed more in a time of crisis than at any other time.”

Jazzes H. Halsey, President, University of Bridgeport, at the
Opening Convocation, September 25, 1951

“We gather at a time of enormous stress for colleges and universities across the country. It is a time of contentious debate on campuses – among students, among faculty, and within administrations. Some of these debates concern matters of national or global importance. Many are joined – even incited – by outside forces, from political pressure groups to the mainstream media to increasingly strident voices on the Web....What is called for in times like these is a renewed understanding of what our principles are in theory and what they mean in practice. As always, we must also understand what purposes they serve, so we know what’s ultimately at stake.”

Lee C. Bollinger, President, Columbia University, in remarks for the
Benjamin N. Cardozo Lecture, March 23, 2005

Today, as in the early fifties, speech at U.S. colleges and universities is under scrutiny. Critics view the speech of students, faculty, staff and administrators as an indicator of a flaw in higher education. Because so many views and ideas -- some mainstream, some unusual, some pedestrian, some unique or offensive – are expressed on our campuses, those who are angered by views different from their own find colleges and universities an easy target for their frustrations.

As President Bollinger points out, we must not only understand our principles in theory, we must understand what they mean in practice. It is easy to stand before you today or at convocation or in a classroom and speak elegantly and self-righteously about the importance of speech and expressional rights. It is much more difficult to translate that into a plan of action after meeting with the Board of Trustees who are questioning a faculty member's statements in support of eco-terrorism or on a telephone call from a parent whose child has been the target of hate speech. If we don't understand the purposes our principles serve and we haven't considered how that should affect our responses to provocative and troubling speech, we increase the likelihood that our responses will heighten the crisis and undermine our principles.

In 1949, the Regents of the University of California adopted the well-known loyalty oath requiring all employees of the University to swear that they supported the constitutions of the political subdivisions in which the University was located, they were not members of the Communist party, and they did not believe in, were not members of and did not support any organization that believed in the overthrow of the U.S. Government.¹ In the statement issued with the oath, the Regents noted that from its establishment the University of California was dedicated to the search for truth. "The primary obligation of the regents ... has been to stand steadfastly for that freedom of the human mind and spirit which has enabled the assemblage of distinguished scholars constituting the faculty to continue to pursue these objectives."² While the Regents at the University of California and other colleges and universities were expressing their own fears of communism, they presumably were also responding to the pressure they felt from Congressional and state hearings aimed not only at identifying Communist faculty but also designed to demonstrate the need for laws requiring schools and universities to fire Communist employees. This was especially true at public colleges and universities.³

¹ "Regents will discuss loyalty oath today," Arnt Froshaug, *Daily Californian*, Issue No. 1, June 24, 1949, front page, and "Wrong yardstick," *Daily Californian*, Issue No. 2, July 1, 1949, p. 8. Available from the Online Archive of California; <http://ark.cdlib.org/ark:13030/hb1w100414>

² "Wrong yardstick," *id.*

³ Schrecker, Ellen, "Political Tests for Professors: Academic Freedom during the McCarthy Years," presented during "The University Loyalty Oath, a 50th anniversary retrospective. October 7, 1999. Available at http://sunsite.berkeley.edu/uchistory/archives_exhibits/loyaltyoath/symposium/schrecker.html

Today, the challenges to expressive speech on campus come from many places. Legislatures and Congress still wield a powerful sword at public colleges and universities and to a lesser extent at private colleges and universities as well. Corporations and donors can exert greater influence than ever before as they provide an increasing share through gifts, sponsored research or other revenue of the financial resources colleges and universities need for their operating budgets and endowments. The media, both mainstream and web-based, now have the ability to influence public opinion and create a huge outpouring of public sentiments. Finally, our students and their parents have strong opinions about what occurs and feel an increasing entitlement as consumers of higher education to influence our responses and ensure they or their children are not exposed to speech that makes them uncomfortable or “unsafe.”

Blogs, e-mail, faxes and other immediate types of communication reduce, put pressure on or sometimes eliminate our opportunity to consider our responses before taking action. Christopher Simpson, president of Simpson Communications and a former senior administrator at University of Indiana, University of Oregon and University of South Carolina at Columbia, notes that while experiencing crisis is not new to higher education, the frequency of the crises has increased due to greater national partisanship and the advent of technology, especially blogs.⁴ He describes how the day after the university took a controversial action, three key websites listed the e-mail, home and office address plus the cell phone numbers for him, the president and the athletic director. He received 3500 e-mails in the first 24 hours. When an administrator is besieged like that it is easy to lose track of the importance of protecting expression or even what that protection requires.

The Legal Framework

Public colleges and universities are legally restricted in their ability to regulate speech. Although private colleges are, for the most part⁵, free of those legal restrictions, many have similar limitations because of self-adopted codes of expression or protections of speech rights.

⁴ “Campus Flaps in the Age of Internet,” *Chronicle of Higher Education*, Colloquy Live that occurred April 28, 2005. Available at <http://chronicle.com/colloquy/2005/04/flaps>

⁵ State laws may impose limits on private colleges and universities, e.g. Cal. Educ. Code §04367, found at <http://caselaw.lp.findlaw.com/cacodes/edc/94367.html>

At the same time, colleges and universities are required to take action in response to harassment claims. Federal law, enforced by the Office for Civil Rights, makes clear colleges and universities may be found to have violated various non-discrimination statutes (Title VI, Title IX, the Americans with Disabilities Act) if they have created or are responsible for a hostile environment which means harassing conduct of a physical, written, oral or otherwise expressive nature severe or pervasive enough to interfere with or limit participation in or benefit from a college or university's educational program or activities.

A. The Balancing Test -- Important Factors

Colleges and universities must balance their responsibility to uphold the laws that protect speech with their responsibility to maintain their efficient operations including preventing a hostile environment. Certain factors must be considered in balancing a college or university's ability to restrict or punish speech or other expressive activity. For example, who is the speaker, where is the speech occurring and what is the nature or purpose of the speech (as distinguished from the content of the speech)? Balancing is made more difficult because interest groups and constituents often consider their own goals or needs to greatly outweigh the needs or goals of other groups or individuals.

Restrictions on speech largely fall into two categories, content or viewpoint neutral restrictions and restrictions based on the viewpoint or content the speaker is expressing. Content or viewpoint neutral restrictions are often referred to as "time, place, and manner restrictions" to reflect the type of limitations they contain. Public colleges and universities have broad authority to regulate speech when the regulations are content neutral, that is, not based on the content of the speech.

However, when the basis for restriction is the provocative nature or content of the speech, a university like any governmental entity is limited in its ability to regulate speech or punish the speaker. As the Supreme Court stated in *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2542 (1992),

“The First Amendment generally prevents government from proscribing speech... or even expressive conduct... because of the ideas expressed. Content-based regulations are presumptively invalid. [*Citations omitted.*]”⁶

Even where the government can impose some limits on speech, those limits must be applied equally to all speech and not further regulated by content. For example, defamation lawsuits allow courts to award damages for speech that harms another’s reputation, but allowing more severe sanctions when the speech criticized Congress would not be permissible. The First Amendment does allow limited regulation of obscenity and of fighting words, but, again, the limits on obscenity or fighting words must apply without consideration of the viewpoint they express.

*R.A.V. v. City of St. Paul*⁷ invalidated a city ordinance that prohibited burning crosses or Nazi swastika if doing so was likely to arouse anger, alarm or resentment in others on the basis of race. The Supreme Court considered if the burning of a cross or swastika should fall be considered as “fighting words” and, as such, subject to regulation because of content. The Supreme Court concluded the City could regulate burning, but it could not regulate or impose more serious sanctions based on the content of the message conveyed by the burning. Similarly, it is permissible to apply a ban on outdoor burning to flag burning but an ordinance prohibiting flag burning would violate the First Amendment.

In contrast, the Supreme Court upheld a Wisconsin statute that enhanced the sentence for criminal assault when the victim was selected because of race. (See, *Wisconsin v. Mitchell*, 113 S.Ct. 2194) The court distinguished *Mitchell* from *R.A.V.* because the City of St. Paul was punishing individuals for their expressive conduct (burning a cross or swastika) as opposed to the State of Wisconsin that was increasing the penalty for an already criminal act, because the motive of the assailant in selecting the victim was race.

B. Provocative Speech by Students

Frequently, colleges or universities try to control provocative or offensive speech by prohibiting speech that is hurtful, disrespectful, racist, sexist, homophobic or inflammatory.

⁶ 112 S.Ct. 2538, 2542 (1992)

⁷ *Id.*

Courts are wary of student conduct codes that prohibit hate speech or other expressive behavior. Even prior to *R.A.V.* challenges to codes at the University of Michigan and at the University of Wisconsin prohibiting speech or behavior that stigmatize, victimize or demean others were considered overly broad and overly vague, creating the likelihood students would violate them when engaged in protected speech.⁸ Students' speech rights are broad. Even when students say things that are hurtful or inflammatory to other students or employees, courts are reluctant to allow colleges and universities to restrict or punish speech.

The University of Michigan case arose out of a situation familiar to many campuses. The University was aware of increasingly frequent incidents of racial harassment on campus. In response the University president issued a statement deploring the behavior and restating the University's commitment to diversity. The state legislature held a hearing on the situation, at which the University was criticized by speakers and characterized as unresponsive. The University was threatened with a lawsuit and with reduction in its state support. After considerable turmoil, the University adopted a policy that, in part, prohibited behavior that stigmatized or victimized another individual on a number of prohibited bases. Students charged with violating the policy were offered a hearing before sanctions were imposed. A graduate teaching assistant challenged the policy, alleging he could be sanctioned for discussing with his class theories of racial and sexual differences. In considering the policy, the Court noted students had been disciplined or threatened with discipline for comments made in class.⁹ The Court noted a number of types of conduct, including speech, that could be regulated: discrimination in employment, education and award of benefits; physical assault for purposes of ethnic intimidation; property damage for purposes of intimidation; deprivation of civil rights; and sexual abuse and harassment. The court acknowledged, "[u]nder certain circumstances racial and ethnic epithets, slurs, and insults might [be 'fighting words'] and could be constitutionally prohibited by the University" or could give rise to other crimes or civil causes of action. The court also acknowledged that in certain circumstances speech that is vulgar, offensive or shocking might not be protected. But the court continued "[w]hat the University could not do, ... was

⁸ *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989) and *UWM Post, Inc. v. Board of Regents of University of Wisconsin System*, 774 F. Supp. 1163 (E.D. Wis. 1991).

⁹ A student who expressed his view that homosexuality was a disease was referred for a hearing based on a comment in a social work research class. *Doe* at 861.

establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed.”¹⁰

The University of Wisconsin-Madison also experienced an increase in racial harassment in the late 1980's at a time its Board was implementing a plan to diversify the student population and work to improve multi-cultural understanding. One event involved using a caricature of a black Fiji Islander and another involved a “slave auction” where fraternity pledges performed skits in black face. The Board took certain actions, including amendments to the system-wide student conduct code, as well as giving direction to each of the system campuses. The Board rule allowed students to be discipline for “racist or discriminatory comments, epithets or other expressive behavior directed at an individual...” if the comments demeaned the individual based on a number of prohibited factors and created “an intimidating, hostile or demeaning environment.”¹¹ A number of students were disciplined pursuant to the code for their comments. The Wisconsin Board of Regents argued that the comments constituted “fighting words” and, as such, were not protected by the First Amendment.

The U.S. Supreme Court limits the “fighting words” exception to words “which by their very utterance... tend to incite an immediate breach of the peace.”¹² For words to “incite an immediate breach of the peace,” they must be directed to the person who hears them and be likely to result in immediate violence or physical response. Words that may be insulting, hurtful or inflammatory do not fall within the exception unless they will likely incite a violent reaction. Further, while fighting words may be regulated or prohibited, the prohibition or regulation may not be based on content.

Cases since *R.A.V.* continue to limit regulation of speech by public colleges and universities. For example, in *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*¹³, a fraternity challenged a disciplinary sanction George Mason University imposed against a fraternity that held a “ugly woman contest” in which fraternity members portrayed African-Americans in racist and sexist way that the University found created a hostile learning

¹⁰ *Doe* at 863.

¹¹ Wisc. Admin. Code § UWS 17.06(2) cited in *The UWM Post, Inc.* at 1165-1166.

¹² *Chaplinsky v. New Hampshire*, 62 S.Ct. 766, 769, cited in *The UWM Post, Inc.* at 1169.

¹³ 993 F.2d 386, (4th Cir. 1993).

environment for women and African-Americans that was incompatible with the university's mission. Although the court agreed fraternity members' behavior was "sophomoric" and "crude", it pointed out that expressive activities, so long as they are not obscene, are generally protected by the First Amendment as speech.¹⁴ The university argued the skit did not convey a message so it should not have been protected. However, the court concluded that entertainment is inherently expressive and entitled to protection. The court noted that the university's objection to the entertainment was its message, which the University and others perceived as discriminatory. While the court agreed the university had an obligation to maintain "an educational environment free of discrimination and racism, and in providing gender-neutral education,"¹⁵ the court made clear the university must find constitutionally permissible means to do so.

In a more recent case, students challenged certain provisions of Shippensburg University's relating to speech that was "inflammatory or harmful toward others."¹⁶ The court reviewed statements in the University Catalog, including the Code of Conduct, the University Student Handbook, including the guidelines for chartering and funding student organizations, as well as a letter from the university president regarding rallies and demonstrations. The court distinguished between certain provisions that it found to be merely aspirational and those under which sanctions could be imposed against students or student groups. The aspirational language, such as "[t]he University will strive to protect these freedoms [necessary for the pursuit of truth and knowledge] if they are not harmful toward others,"¹⁷ merely expressed the University's desire. Restrictive language, such as a prohibition on communication that might "provoke, harass, intimidate or harm another,"¹⁸ actually limited students' speech. The court rejected the notion that evidence the university rarely cited students for violations demonstrated that the statement was aspirational.

To college and university administrators, it may seem as if their inability to discipline students who engage in speech and other expressive conduct that other students consider to create a racially or sexually hostile environment creates an impossible situation. In an

¹⁴ *George Mason* at 389-390.

¹⁵ *Id.* at 393.

¹⁶ *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.Dist. Penn. 2003).

¹⁷ *Id.* at 361.

¹⁸ *Id.* at 370.

attempt to respond to this dilemma, the U.S. Dept of Education, Office for Civil Rights (OCR) issued a "Dear Colleague" letter July 2003.¹⁹ In its letter OCR states, "Some colleges and universities have interpreted OCR's prohibition of harassment as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR's standard, the conduct must also be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program.... In summary, OCR interprets its regulations consistent with the requirements of the First Amendment."

While providing college and university administrators some comfort that they need not adopt or enforce codes that go beyond what is Constitutionally permissible, investigative guidance OCR issued in March 2004,²⁰ includes statements of responsibility that seem broader. The guidance describes the approach OCR will use to investigate incidents of racial harassment. It makes clear that once an educational institution is aware of a racially hostile environment, it has a legal duty to take reasonable steps to eliminate, including imposition of disciplinary measures, "reasonably calculated to prevent recurrence."

C. Provocative Speech by Employees

Faculty and staff at public colleges and universities have certain protected speech rights because they are employed by a public entity. However, those rights are not as broad as rights enjoyed by students; colleges and universities may, in certain instances, impose sanctions against faculty and staff because of the content of their speech. For faculty, issues of speech, especially provocative speech, are intertwined with issues of academic freedom. Principles of academic freedom apply to faculty speech at private, as well as public, institutions.²¹

¹⁹ *First Amendment: Dear Colleague*, <http://www.ed.gov/print/about/offices/list/ocr/firtamend.html>

²⁰ *Federal Register*, Vol. 59, No. 47, Thursday, March 10, 1994, or <http://www.ed.gov/print/about/offices/list/ocr/docs/race394.html>

²¹ William Kaplin and Barbara Lee, *The Law of Higher Education*, Jossey-Bass, San Francisco, 1995 and Supp. 2000, and Larry White, *Culture Wars and Freedom of Expression on Campus*, presented at the Annual Conference of the National Association of College and University Attorneys, June 26-29, 2005, are two excellent resources in considering speech restrictions in light of academic freedom.

Three U.S. Supreme Court cases form the basis of the law that effects the regulation of all public employees' speech: *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); and *Waters v. Churchill*, 511 U.S. 661 (1994). These cases provide an analysis to be used in determining the limits public colleges and universities can impose on employees' provocative or objectionable speech.

In *Pickering*, the Supreme Court acknowledged the need to balance the interests of government in operating efficiently with a public employee's interest in speech. In *Connick*, the Court distinguished between matters of public concern and other matters that reflect the employee's personal interest even if they regard matters related to the operation of a public entity. Only matters of public concern are subject to the *Pickering* balancing test. Matters that are of personal or private interest do not receive the same level of protection. Further, a public employer has the need, as an employer, to be able to regulate the speech of its employees on personal or private matters.

In *Dambrot v. Central Michigan University*,²² a basketball coach was terminated for using the word "nigger" while talking to players in the locker room during or immediately after a basketball game. Although the African-American students on the team were not offended by its use, a former member of the team and other students objected. The university's affirmative action officer concluded the coach's behavior violated the university's discriminatory harassment policy. The university decided the coach could no longer lead the program effectively and informed the coach his contract would not be renewed. Despite finding the discriminatory harassment policy prohibited "a substantial amount of constitutionally protected speech,"²³ the court upheld the university's decision to terminate the coach. The court noted the coach's speech was not on a matter of public concern. The court emphasized, "[c]ontroversial parts of speech advancing only private interests do not necessarily invoke First Amendment protection."²⁴ The coach's only purpose was to motivate his players. The court also concluded the university's decision to terminate the coach did not intrude on the coach's right to academic freedom. The court noted that

²² 55 F.3d 1177 (6th Cir. 1995).

²³ *Dambrot* at 1182.

²⁴ *Id.*

matters of public concern are essentially the same as matters that raise issues of academic freedom; both are grounded importance of unfettered public expression of ideas. Rather than the public expression of ideas, the coach's statement was more akin to an instructor's choice of a teaching method, which is not protected expression.

The Sixth Circuit Court of Appeals, which decided *Dambrot*, more recently decided another case, *Bonnell v. Lorenzo*,²⁵ dealing with a faculty member's provocative classroom speech as well as the same faculty member's publication of a student's sexual harassment complaint with his response. Students at Macomb Community College had filed complaints over the faculty member's repeated use of sexually explicit language and personal comments in his English classes. After the first complaint, the faculty member was warned that continued use of such language and comments when not appropriate to the subject matter could be considered sexual harassment and could result in disciplinary action. The next academic year, when another complaint was filed, the faculty member distributed copies of the complaint to the faculty along with a response to the complaint. The college suspended the faculty member. The college subsequently instructed the faculty member to refrain from discussing or disseminating the complaint further, citing its concerns that his actions sent the message to students they would be ridiculed or ostracized if they filed complaints. The faculty member responded by providing the complaint and his response to local media. The court considered both the underlying speech (the faculty member's words and comments in class) and the speech expressed through the dissemination of the student's complaint and the faculty member's response. The court quickly concluded that the classroom language and comments, like the coach's speech in *Dambrot*, were not on a matter of public concern.²⁶ The court pointed out that the faculty member might have a constitutional right to use such language, he did not have a constitutional right to do so in a classroom "where they are not germane to the subject matter, in contravention of the College's sexual harassment policy."²⁷ In contrast, the court concluded the faculty member's distribution of the complaint and his response were regarding matters of public concern, balancing the First Amendment with protection against sexual harassment, and applied the *Pickering* balancing test to determine if the faculty member's interest in

²⁵ 241 F.3d 800 (6th Cir. 2001).

²⁶ *Id.* at 818 – 821, also citing *Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986).1

²⁷ *Id.* at 820.

commenting on matters of public concern was outweighed by the college's interest in promoting efficiency in the public services it provides. The court concludes that despite the importance of the faculty member's rights of academic freedom and freedom expression they do not overcome a student's right to a hostile-free learning environment. Otherwise, faculty members would be able to shield themselves from complaints of harassment.²⁸

The court's conclusion is consistent with the Supreme Court's opinion in *R.A.V.*²⁹ The Supreme Court there briefly acknowledged the need to place some restrictions on speech when the speech had the effect of discriminating on a prohibited basis in violation of Title VII. Colleges and universities must have the ability to deal with harassing behavior. OCR's Racial Incidents and Harassment Against Students and Educational Institutions; Investigative Guidance provides, "If the alleged harasser is an agent or employee of a recipient, acting within the scope of his or her official duties..., then the individual will be considered to be acting in an agency capacity and the recipient will be deemed to have constructive notice of the harassment."³⁰

Matters of public concern have as broad a reach as the issues that faculty members, either through their discipline or own interest, are likely to comment upon publicly. Because it is a balancing test, as the topic of the speech becomes of greater public concern, the college or university must show harm to its efficient provision of its services to be able to restrict the speech of its employees or to take negative personnel action against them as a result of the public comments. For example, in *Jeffries v. Harleston*,³¹ the Second Circuit Court of Appeals considered the reduction of a department chair's term, after the U.S. Supreme Court vacated an earlier decision and remanded the case in light of *Waters v. Churchill*.³² A department chair made derogatory comments, particularly about Jews in discussing the history of black oppression. The court found that the chair's speech was solely on matters of public concern, but the action by City University of New York did not violate his speech rights because it was reasonable to conclude his comments would harm the University. The court noted that

²⁸ *Id.* at 821-825. See, also, Arthur L. Coleman & Jonathan R. Alger, *beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses*, 23 J.C. & U.L. 91 (1996).

²⁹ *R.A.V.* at 2546.

³⁰ *Supra* p. 3.

³¹ 52 F.3d 9 (2nd Cir. 1995).

³² *Supra*.

removing the faculty member from his position as department chair did not silence him or limit his public contact because he was still a tenured faculty member.

The Response

College and university administrators' responses to provocative speech may be reviewed by the courts and almost certainly will be reviewed by the court of public opinion. Frequently the demands of each conflict. Demands from the public and the university community are often aimed largely at achieving their own goals even when they are couched in terms of "what will be best for the university." Developing a response requires both a practical plan and a theoretical understanding of how to implement it.

Even the best plan will be ineffective without leadership. We often view leadership as the power to give orders and to be in charge, to seize power. When a crisis arises as a result of provocative speech, college and university leaders need much more than that. In fact, the impulse to act quickly and show strength may be exactly the wrong response.

Those who study leadership note other traits often demonstrated by true leaders. Thomas E. Cronin and Michael A. Genovese note in "The Paradoxes of the American Presidency," that all leaders face countervailing pressures that pull them in many directions.³³ Consider the university president who opens the student newspaper one Monday morning to find a photograph of a transgendered student leader with a graphic caption. Within minutes the student's mother calls asking how the University intends to protect her child. While expressing outrage at the photograph, the President tries to learn if the photograph has prompted other behavior targeting the student. The student's mother says "Isn't that enough? My child is afraid to go out. If anything happens, I will hold the university and you, personally, responsible." Before the morning is over the President has phone calls and e-mail messages from alumni, donors, FIRE, the Student Press Law Center, the Lesbian, Gay, Bisexual, Transgender, Queer Alliance and three legislators, either demanding the University take action or the University take no action against the student newspaper and its editors and writers.

³³ Oxford University Press - USA, New York, N.Y., 1998, p 27.

Cronin and Genovese quote Charles de Gaulle explaining that successful leaders “must know when to dissemble, when to be frank.” They “must pose as a servant of the public in order to become its master.”³⁴ Rather than suggesting leaders should be duplicitous or false in their responses, Cronin and Genovese go on to point out this requires leaders to be excellent listeners, to hear what others are saying to take in the information or as Cronin and Genovese say to “squint with their ears.”³⁵ The ability to hear what others are saying may also provide an opportunity for a prompt rather than an immediate response.

I think we should take a moment more to consider leadership. You may now be thinking “if my president would only....” That’s too easy. Leadership in response to provocative speech is not solely the duty of the president. In fact, the president’s role must be carefully determined. It is easy to consider leadership as the responsibility of others, rather considering our own duty to assume leadership.

James Burns, in *Leadership*, talks of leadership that shapes, alters and elevates motives and values through teaching, or as Burns titles it “transforming leadership.”³⁶ This is not the leadership of making orders or “being in charge.” Burns points out that transforming leadership is pervasive and common. It occurs daily in homes and schools everywhere. It is not oratory, manipulation or brute coercion. It is acts that are taken consciously to achieve change. It includes conscious decisions and conscious actions designed to change values and judgments.³⁷ That means each of us has the opportunity, even the responsibility, to be leaders in the face of provocative speech. Burns speaks of the importance of purposeful leadership. We must understand the principles so we can understand the purposes they serve.

How is this translated into practice? Simpson emphasizes the need for a Crisis Communications Plan that is written, tested and implemented.³⁸ He also underscores the importance of understanding the financial and reputational impact of potential crises. The plan needs to be developed not only as a plan to guide us through the crises, but as a document

³⁴ *Id.* at 11.

³⁵ *Id.*

³⁶ Harper and Row Publishers, New York, NY. 1978, p. 426-427.

³⁷ *Id.*

³⁸ *Supra.*

that helps each of us, not just the president, to demonstrate purposeful leadership, leadership designed to further our collective not personal goals, during times of crisis.

Our leadership responsibility involves more than responding to the crises inevitable in an environment that encourages individuals to exercise their expressional rights, even when the exercise is provocative. It is the daily acts of teaching and acting that provide transforming leadership by teaching the community, whether the university community or the community at large, the value of protecting expressional rights. Through our actions and our statements we have the ability to develop respect for ideas different than ours, ideas and expressions of those ideas that challenge us. Burns writes, “Traditional conceptions of leadership tend to be so dominated by images of presidents and prime ministers speaking to the masses from on high that we may forget that the vast preponderance of personal influence is exerted quietly and subtly in everyday relationships.”³⁹

Bollinger points out the irony of academy freedom and freedom of speech is, when they are at issue, we often focus our attention on whether the speech is protected rather than why the ideas are wrong or at flawed. He sees it as a natural tendency to debate the narrower and seemingly safer question rather than the idea itself.⁴⁰ I would suggest it instead demonstrates our failure to teach the underlying importance of expressional rights when speech is not at issue that requires us to focus our attention in times of crisis to protecting expressional rights.

I agree with Bollinger, “We do not need a new set of principles, tailored to the times. We need only to reaffirm the principles that have guided us for the past hundred years, that have seen our profession through times of great challenge, and led us toward ever-expanding horizons of human insight and the building of democratic societies.”⁴¹ To that I would add that we must develop plans and responses that are tailored to the realities of today and that incorporate the principles that we espouse freely and hold dearly. Most important, we must ensure our daily behavior is consistent with those principles.

³⁹ *Id.* at 442.

⁴⁰ *Supra.*

⁴¹ *Id.*

