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THE SUSTAINING OF EXPRESSIONAL RIGHTS

Part I: Understanding the Legal Context

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> *Restriction of free thought and free speech is the most dangerous of all subversions. It is the one un-American act that could most easily defeat us.*
>
> – Justice William O. Douglas in a speech delivered to the Authors Guild Council, New York, December 3, 1951.

> *[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe ….*
>
> – Justice Oliver Wendell Holmes, Jr., dissenting in *Abrams v. United States*, 250 U.S. 616, 630 (1919).

> *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).

A. Let's begin with a seemingly simple question. When a member of the campus community complains that a college has abridged her "freedom of expression," what right, precisely, is she invoking? Where is it written that she enjoys "freedom" of "expression"? In succeeding sections of this outline we'll consider what "expression" is and what it means to enjoy the "freedom" to express oneself, but for now let's consider a more fundamental question—where is it written that the right to freedom of expression exists at all?

The answer, briefly, may vary depending on whether the institution is public or private.

(1) *Public universities.* Free-expression guarantees generally emanate from the First Amendment to the United States Constitution. The free speech clause in the First Amendment provides:

Congress shall make no law ... abridging the freedom of speech, or of the press .... Put your eye close to the page and study this language. "*Congress* … shall make no *law*"? Is that all the First Amendment protects against?

More than a century ago the First Amendment was interpreted narrowly to prohibit only legislative enactments passed by the federal government.[1] But in a series of cases culminating in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943), the United States Supreme Court made it clear that the substantive protections in the First Amendment's free-speech clause apply to actions by *state and local governments* through the incorporation of free-speech rights into the "liberty" guarantee in the Fourteenth Amendment's Due Process Clause.[2] Today it is a settled principle of constitutional law that the First Amendment protects against *governmental* actions (federal, state and local) that abridge citizens' freedom of speech; and it is also settled that actions by officials at publicly supported state colleges and universities are governmental actions for purposes of the First Amendment. *Hosty v. Carter*, 412 F. 3d 731, 733 (7th Cir. 2005); *Brooks v. Auburn Univ.*, 412 F. 2d 1171, 1172 (5th Cir. 1969).

At a public institution, no member of the campus community

~~Congress~~ shall ~~make no law~~ ... abridging the freedom of speech, or of the press ....

levy a sanction or take any other action that has the effect of

[1] *See, e.g., State v. Worth*, 52 N.C. 488, 1860 N.C. LEXIS 89, upholding an antebellum statute enacted by the North Carolina General Assembly making it a crime to publish books or papers critical of the institution of slavery.

[2] "The term 'liberty' in the Fourteenth Amendment to the Constitution makes the First Amendment applicable to the States. Referring to that Clause in his separate opinion in *Whitney* v. *California*, 274 U.S. 357 (1927), Justice Brandeis stated that 'all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights.' … Although the text of the First Amendment provides only that '*Congress* shall make no law . . . abridging the freedom of speech…,' Justice Brandeis' view has been embedded in our law ever since." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336 n. 1 (1995) (emphasis in the original).

(2) *Private universities.* The First Amendment, like the rest of the Bill of Rights, proscribes conduct by the *government*. 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.[3]

They may, however, have certain free-speech-related rights deriving not from the First Amendment but from *policies* adopted volitionally by the institution. Witness, for example, these policy statements culled from various college and university Websites:

> Georgetown University is committed to standards promoting speech and expression that foster 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. [www.georgetown.edu/student-affairs/policies.html#SpeechandExpressionPolicy]

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> Principles of academic freedom and constitutional guarantees of free speech, however, limit [Denison] University's ability to use restrictions on speech as a means of promoting diversity and opposing harassment and discrimination. Thus, … the [University] does not restrict speech protected by state and federal constitutional law or by principles of academic freedom. [www.denison.edu/student-affairs/handbook/antiharassmentguidelines.html]

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[3] 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 …."

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> Carnegie Mellon University, a private university chartered under the corporation laws of the Commonwealth of Pennsylvania, encourages freedom of speech, assembly and exchange of ideas. As a university sincerely espousing the philosophy of academic freedom, the university urges and supports its community's desires and efforts to pursue these rights. All persons may distribute printed material, offer petitions for signature, make speeches and conduct other similar activities outside university buildings. [www.cmu.edu/esg-cat/pdf/policies.pdf]

Bottom line: the "right" to freedom of expression enjoys constitutional protection on public campuses; but on the campuses of private institutions the right may not exist at all—if it does, it is bottomed most likely on an institutional decision (probably not carefully considered) to extend constitutional protections by policy or contract.

B. The heart of the matter: what does "freedom" of "expression" protect?

(1) Look again at the text of the free speech clause in the First Amendment:

> *Congress shall make no law ... abridging the freedom of speech, or of the press....*

The First Amendment does not use the word "expression." It prohibits government from abridging the freedom of "speech." Yet we all understand at an intuitive level that the First Amendment is both *narrower* and *broader* than its literal wording—

- *Narrower* in that there are some forms of speech—pure, unadulterated, straight-from-the-lips speech—that the government *can* censor, for example (in the famous phrase

of a venerable Supreme Court decision) "shouting fire in a theatre and causing a panic." *Schenck v. United States*, 249 U.S. 47, 52 (1919).[4]

- *Broader* in that its protections extend beyond mere words (mere "speech") to certain forms of expressive conduct—carrying placards in a peaceful protest (*United States v. Grace*, 461 U.S. 171 (1983)), defacing the American flag (*Texas v. Johnson*, 491 U.S. 397 (1989)), sewing an obscene expression of political dissent onto the back of a jacket (*Cohen v. California*, 403 U.S. 15 (1971)).

"Freedom of speech" in the constitutional sense of the phrase, then, doesn't apply to *all* speech and doesn't apply *just* to speech. For college and university officials charged with making decisions—sometimes split-second decisions—about the limits of free expression on campus, that degree of vagueness is unsettling. Can we be more precise? Can we apply guidelines, tests and rules delimiting the boundaries of protected expression?

(2) A useful starting point is Professor Thomas Emerson's famous and often quoted definition of free expression:

> A system of freedom of expression, operating in a modern democratic society, is a complex mechanism. At its core is a group of rights assured to individual members of the society. This set of rights, which makes up our present-day concept of free expression, includes the right to form and hold beliefs and opinions on any subject, and to communicate ideas, opinions, and information through any medium—in speech, writing, music, art, or in other ways. To some extent it involves the right to remain silent. From the obverse side it includes the

[4] In an elegant law review article written almost a quarter-century ago, Professor William Van Alstyne offered other examples of pure speech that government unquestionably has the right to censor or abridge: "[an offer] to pay $5,000 for the murder of the offeror's spouse; a Congressman's bribe solicitation; an interstate manufacturer's deliberately false and misleading commercial advertisements; a witness committing perjury in the course of a trial; or … a simple, soft statement made to the president that he will be shot if he fails to veto a particular bill or fails to grant a certain pardon." *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107, 114 (1982).

> right to hear the views of others and to listen to their version of the facts. It encompasses the right to inquire and, to a degree, the right of access to information. As a necessary corollary, it embraces the right to assemble and to form associations, that is, to combine with others in joint expression.
>
> Any system of freedom of expression must also embody principles through which exercise of these rights by one person or group may be reconciled with equal opportunity for other persons or groups to enjoy them. At the same time, the rights of all in freedom of expression must be reconciled with other individual and social interests. It is this process of reconciliation that has given rise to most of the controversial issues in the past and continues to be the major focus of attention today. [Thomas I Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 3 (1970).[5]]

In Professor Emerson's view, expression is linked to the concept of *communication*. Communication entails three essential elements: a communicator (a speaker or an actor), a recipient (a listener), and something of substance to communicate ("ideas, opinions, [or] information"). Expression relates most intimately to communication—hence merits the highest and most unequivocal level of constitutional protection—when it conveys the speaker's (or actor's) "beliefs" or "opinions."

(3) Three conclusions follow.

(a) ***The reason for communicating is important to the analysis.*** The closer the speaker stays to the communication of ideas, opinions, or information, the more the speaker enjoys constitutional protection—and the harder it is for the institution to sanction the

[5] Over the last three decades Professor Emerson's treatise has profoundly influenced Supreme Court jurisprudence on free speech. *E.g.*, *United States v. American Library Ass'n*, 539 U.S. 194, 210 (2003); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n. 12 (1978); *Grayned v. City of Rockford*, 408 U.S. 104, 116 n. 32 (1972).

speaker because of what he or she has said. If the reason for speaking is something other than the communication of ideas, opinions or information—to blow off steam, to be mean, to titillate, to sell products—then the claim to constitutional protection is less compelling. First Amendment law offers many examples of utterances that don't rise to the level of constitutionally protected speech because they're not made for the demonstrable purpose of communicating ideas, opinions or information:

- *Fighting words*. I do not have a constitutionally protected right to taunt, bully, insult, provoke, or pick fights through the use of inflammatory words. *Sill v. Pennsylvania State University*, 318 F. Supp. 608 (M.D. Pa. 1970).[6]
- *Obscenity*. I have no right to utter words or show images that come within state-law definitions of obscenity. *Loving v. Boren*, 956 F. Supp. 953 (W. D. Okla. 1997).[7]
- *Defamation*. I don't have a constitutional privilege to slander another member of the university community; I can be disciplined or punished based solely on the content of my words if those words are false and cause injury to reputation. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303 (Mo. 1993).[8]
- *Insubordination*. I can't go public with criticisms of my supervisor if by doing so I create discord in the workplace. *Jeffries v. Harleson*, 52 F. 3d 9 (2d Cir. 1995).[9]

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[6] But courts construe the fighting words exception very narrowly. Taunts or insults are deemed fighting words only when they "have a *direct* tendency to cause *acts of violence* by the person to whom, *individually*, the remark is addressed"—the words in italics constituting potent limitations on the breadth of the doctrine. *Gooding v. Wilson*, 405 U.S. 518, 524 (1972).

[7] But the judicially fashioned definition of obscenity is narrow and hard to satisfy, and very few forms of campus expression have ever been deemed obscene in a decided court case.

[8] But many obstacles must be surmounted before a defamation plaintiff can prevail. See generally Robert C. Clothier, *A Little Libel, a Lot of Trouble: Defamation and Related Issues in Higher Education*, a paper prepared for the Annual Conference of the National Association of College and University Attorneys, June 16-19, 2004, available to NACUA members at www.nacua.org, a password-protected Website.

[9] I sense, based on an examination of decided cases over the last decade, that colleges and universities prevail more frequently here than in other First Amendment settings. Nevertheless, case law imposes a substantial burden on an employer who seeks to discipline an employee on the basis of assertedly disruptive speech in the workplace. *See, e.g., Baca v. Sklar*, 398 F. 3d 1210 (10th Cir. 2005).

- *Commercial speech*. A college can prohibit me from soliciting customers for my business. *American Future Systems, Inc. v. Pennsylvania State University*, 752 F. 2d 854 (3d Cir. 1984).[10]

If, on the other hand, the speaker is motivated by a desire to communicate ideas, opinions or information, then the First Amendment is particularly solicitous, even if the ideas are repellant, the opinions jarring, the information unwelcome, or the words bruising and harsh. A good example is *Silva v. University of New Hampshire*, 888 F. Supp. 293 (D. N.H. 1994), a case involving the pedagogical tactics of a tenured communications professor at the University of New Hampshire. In 1992, while teaching a course in technical writing, Professor Silva made a series of comparisons and allusions that female students found distasteful.[11] When charged with a violation of UNH's written policy prohibiting sexual harassment, he 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 First Amendment free-speech rights. The court ruled in Professor 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.

[10] But many forms of commercial speech are, in fact, protected by the First Amendment, and colleges have not always succeeded in enforcing anti-solicitation rules. *E.g., Bd. of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469 (1989).

[11] 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.

(b) ***How and where the speaker communicates is important to the analysis.***

- Under the "time-place-manner" doctrine, the college may not necessarily be entitled to censor my words but it indubitably has the right to tell me *where*, *when* and *how* I may speak. I don't have the constitutional right to drown out other voices by shouting or electronically amplify my message. *Kovacs v. Cooper*, 336 U.S. 77 (1949). I can't insist on speaking anywhere I want on campus. If I disrupt a class, I can be disciplined for it. *Bayless v. Martine*, 430 F. 2d 873 (5th Cir. 1970).
- The forum is critical.
  (i) *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. *Healy v. James*, 408 U.S. 169, 180 (1972) ("[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas'"). 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*, discussed above.
  (ii) *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.

(iii) *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. 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*.

(iv) *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.
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> Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L. J. 484, 503 (1990).

(c) ***Tradeoffs and balancing are unavoidable***. This is the powerful point in Professor Emerson's second paragraph. When speakers express themselves, someone is usually listening and may not appreciate the substance of the communication. *Striking the appropriate balance between the expressional right of the speaker and other legitimate rights possessed by the listener—that's where the rubber meets the road in campus freedom-of-expression disputes*.

What factors should the college take into account in striking the balance?

- *The very, very substantial weight an institution of higher education is required to assign to free expression*. The Supreme Court has characterized free speech as a constitutional right entitled to special protection: "Freedom of press, freedom of speech, freedom of religion are in a preferred position." *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943). Without belaboring the point, suffice it to say that, when a college purports to justify restrictions on free speech by reference to countervailing institutional interests, those interests must be nothing short of compelling to trump the extraordinary significance we attach to free speech in this country.
- *Captive status.* We are intuitively more tolerant of speech when we have the option not to listen. "The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the

objectionable speech." *Frisby v. Schultz*, 487 U.S. 474, 487 (1988). A vulgar theatrical performance may offend, but we can always leave. On the other hand, if we are *forced* to listen, we arguably have the right to insist on higher standards of civility and solicitude.[12]

- *The speaker's intent to cause harm*. There is a fine line between words designed to cause discomfort and "words that wound,"[13] but it is a line nevertheless—and a potentially significant one in terms of constitutional analysis. I would argue that speech has no communicative content if its purpose (true to Professor Emerson's formulation) is not to express ideas, opinions or information but to cause embarrassment, humiliation or pain.

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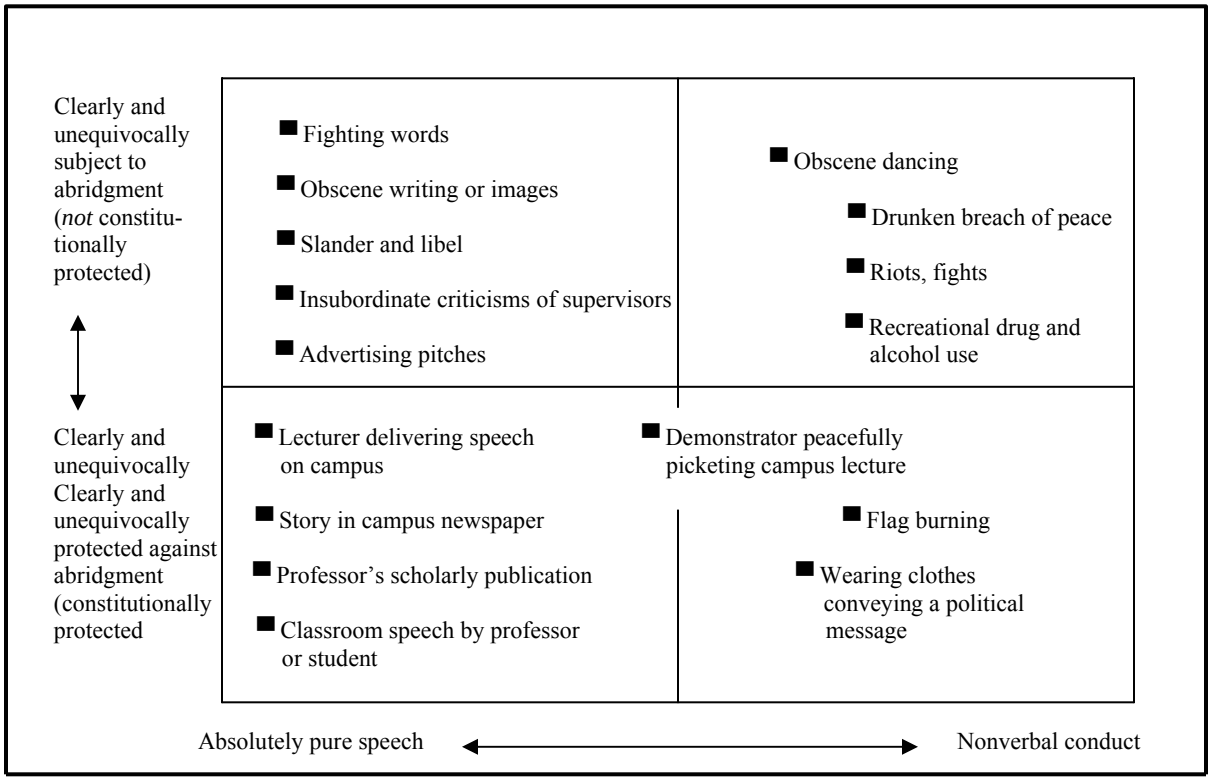
[12] In *Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986), college administrators brought disciplinary charges against an economics professor for repeatedly using obscenities when he taught undergraduate classes. The professor claimed abridgment of his free speech rights. His suit was rejected: "It is true that vulgarity in Central Park may be tolerated and protected by the First Amendment because its unwilling viewer or listener has the right to turn away. However, we hold that the students in Martin's classroom … paid to be taught and not vilified in indecent terms. … Martin's language is unprotected … because, taken in context, it constituted a deliberate, superfluous attack on a 'captive audience' with no academic purpose or justification." 805 F. 2d at 586 (citations omitted).

I put this case in a footnote rather than in the main text because its holding is difficult to reconcile with the holding to the contrary in the *Silva* case (discussed on pages 6-7 of this outline). In general—and at the risk of egregious overgeneralization—it would be extremely difficult for an institution to argue that it has the right to regulate or set limits on a professor's classroom speech. Nowhere is expression more indisputably related to the communication of ideas, opinions and information.

[13] I have borrowed the phrase in quotation marks from Richard 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 penetrating law review article that sought to make the case for hate-speech codes on college and university campuses. From that article:

> [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. [*Id.* at 176-77.]



C. Two Concluding Thoughts:

(1) For purposes of determining the rights and obligations of the parties to a free-speech dispute on campus, a lawyer would analyze the following questions:

(a) From whence (if anywhere) does the speaker derive a legally protected right to freedom of expression?

- The answer is easy if the institution is public—from the free speech clause in the First Amendment (as incorporated into the "liberty" guarantee contained in the Fourteenth Amendment's due process clause).
- If the institution is private? *Maybe* institutional policies that commit officials to the observance of free-speech rights. *Maybe* a state statute or state constitutional

provision. *Maybe* inchoate contract rights derived from institutional custom and practice. *Maybe* no such legally enforceable right exists at all.

(b) At the threshold, is it "speech"?

- Is it words? Expressive conduct? A combination? Neither?
- If it takes the form of words or expressive conduct, is it nevertheless disqualified from legal protection because it lacks a communicative rationale? Can it be characterized as fighting words? Obscenity? Defamation? Etc. (Probably not.)

(c) If it is arguably protected communicative expression, is the college nevertheless entitled to regulate it?

- Can its time, place or manner be controlled?
- Are there countervailing institutional or individual interests that weigh in favor of regulation? (Probably not.)

(2) That's how a lawyer would do the analysis. ***But legal analysis isn't the end of the story! Not by a long shot!***

(a) Free-speech disputes are politically and emotionally explosive. Don't overlook that inescapable reality. Being legally right is one thing; winning the war of public opinion is something else.

(b) There are well organized advocacy groups espousing unfettered free-speech rights on America's campuses. From the Website of one such group:

The mission of FIRE[14] is to defend and sustain individual rights at America's increasingly repressive and partisan colleges and universities. These rights include freedom of speech, legal equality, due process, religious liberty, and sanctity of conscience—the essential qualities of individual liberty and dignity. FIRE's core mission is to protect the unprotected and to educate the public and communities of concerned Americans about the threats to these rights on our campuses and about the means to preserve them. …

America's colleges and universities are, in theory, indispensable institutions in the development of critical minds and the furthering of individual rights, honest inquiry, and the core values of liberty, legal equality, and dignity. Instead, they often are the enemies of those qualities and pursuits, denying students and faculty their voices, their fundamental rights, and even their individual humanity. … Illiberal university policies and practices must be exposed to public criticism and scrutiny so that the public is made aware of the violations of basic rights that occur every day on college campuses. [www.thefire.org/index.php/article/4851.html]

14 "FIRE" stands for the Foundation for Individual Rights in Education.