SECOND THOUGHTS ON THE FIRST AMENDMENT IN HIGHER EDUCATION

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Epic constitutional dramas have a way of emerging from humble origins. Take, for example, the once long-standing practice of waving Confederate battle flags in the University of Mississippi's football stadium, which was until rather recently a routine—if not always fully accepted—tradition. As the racial diversity both of fans in the stands and players on the field markedly increased in the 1980s and '90s, the waving of the stars and bars became increasingly controversial. The Ole Miss administration and its seasoned legal department faced an acute dilemma of both policy and regulatory dimensions.

On one hand, simply banning the rebel flag from the stadium might seem the most direct and immediate option. But such an edict would almost surely be viewed as inimical to the First Amendment's guarantee of content neutrality. Alternatively, forbidding the stars and bars under a broader prohibition such as muting the waving of flags or banners with red, white and blue markings might seem to suffice; yet such action on closer analysis would preclude the display of United States flags and those of many states. There might have seemed a possible escape by simply banning from the stadium any "piece of colored cloth," with a possible dispensation for an article of clothing worn by a fan or patron at the game.[1]

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There simply had to be a more creative solution, the quest for which now attained some urgency. Ole Miss officials in the early 1990s forbade fans to bring "large banners or flags into the stadium [initially] in order to avoid [the] obstruction of spectators' view."[2] At first the specific ban embraced such objects that exceeded twelve by eighteen inches.[3] A few years later, the permissible flag or banner size was reduced to a modest twelve by fourteen inches, barely large enough to cover a piece of paper, let alone a battle flag.[4] At this point, few people on either side of the dispute seemed happy, though football rivalries persisted uneasily through several fall seasons.

Now entered a providential catalyst, the expert legal counsel of the university's General Counsel, Mary Ann Connell. In the fall of 1997, she urged the administrative cabinet to adopt a quite different approach. Umbrellas had already been banned from the stadium for some years in the interest of safety.[5] Ole Miss now decreed that "spectators will not be permitted to bring sticks or other pointed objects to University of Mississippi athletic events."[6] During the first home football game that followed the announcement of this edict, a group of dissident fans displayed a three by five feet Confederate battle flag on a stick.[7] Campus police officers immediately ordered the fans to desist.[8] At the next game (the season's finale) these persistent fans sought the athletic department's approval to display the flag in the usual manner.[9] Permission was politely but firmly refused.[10] A group of dissenting

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thank his esteemed colleague Mary Ann Connell, General Counsel at the University of Mississippi.

[1] *See* Brian Cabell, *Flag Ban Tugs on Ole Miss Traditions: Confederate Banner Impedes Athletic Recruiting*, CNN (Oct. 25, 1997, 10:44 PM), http://www.cnn.com/US/9710/25/ole.miss.

[2] Barrett v. Khayat, No. 3:97CV211-B-A, 1999 WL 33537194, at *1 (N.D. Miss. Nov. 12, 1999).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

fans then filed suit in federal district court and the issue was finally joined.[11]

The district judge understandably focused initially on the paradoxical character of the Confederate battle flag.[12] "[T]he statement made by the flag," he observed, "can range from endorsing demeaning and offensive racial philosophies to promoting school spirit. As beauty is in the eye of the beholder, so is the message of the flag often mainly in the perception of the observer."[13] The plaintiffs argued in their First Amendment complaint that the Confederate battle flag conveyed a protected symbolic message—"that [as the judge observed] as a symbol it must inherently be saying something, or communicating a message protected by the First Amendment."[14] But the court appropriately analyzed the challenged policy as a judicially inseparable or merged ban on the display of rebel battle flags and of the bringing of sticks into the stadium.[15]

While flags seemed unlikely to injure spectators, the long-standing (and apparently non-contentious) umbrella ban reflected substantial safety concerns, and the judge noted the duality of the university's flag display policy.[16] In a Solomonic conclusion upholding the ban against constitutional challenge, the federal judge concluded: "Although the bans limit the manner in which a flag may be displayed within the stadium, the court finds that this limitation upon the plaintiff's intended demonstration does not eliminate his ability to express his views elsewhere and is a reasonable time, place, and manner regulation."[17] Mercifully, there seems to have been no further litigation, much less an appeal to the Fifth Circuit.[18] Indeed, the ruling was barely noticed by the outside world, cited summarily in a scant three law review

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[11] *Id.*; *see also ABC World News This Morning*, (ABC television broadcast Nov. 6, 1997).

[12] *Barrett*, 1999 WL 33537194, at *3.

[13] *Id.*

[14] *Id.*

[15] *Id.* at *3-4.

[16] *Id.*

[17] *Id.* at *4.

[18] *See id.*

articles.[19] Only the now pervasive (some might even say intrusive) electronic database searches have given new life to an otherwise obscure precedent.

Before offering a broader perspective on free expression in the academic community, a few retrospective footnotes are appropriate. First and foremost, the Ole Miss administrative solution to an increasingly urgent challenge—reducing or eliminating the display of the Confederate battle flag in the campus stadium—proved to be both unique and ingenious. General Counsel Mary Ann Connell realized, after exploring and eliminating other options, that none of the familiar antidotes would suffice; forbidding the display of only certain pieces of colored cloth in the stadium would clearly have foundered because of its manifest viewpoint or content non-neutrality.

Second, about the only plausible viewpoint-neutral or time, place, and manner regulation that met the university's needs appeared to be the ban on "sticks." Third, although the plaintiffs who eventually filed suit managed to offer a somewhat tenuous claim that the stick ban was a devious back-door way of forbidding rebel flag-waving per se, there was ample evidence of injury to skewered spectators or impaled fans in the stands to warrant even quite draconian umbrella bans that seem to have survived even torrential rains.[20] There had been, moreover, no evidence of an ulterior motive of any sort underlying the long-standing umbrella ban, or for that matter the occasional prohibition on picket signs that entailed comparable hazards.[21]

Finally, and most intriguing, the district judge managed, quite creatively, to blend two otherwise unrelated issues within his opinion. He might well simply have put aside the First Amendment challenge to the Confederate flag ban on the basis of its arguable content or viewpoint non-neutrality. But like many, a judge with the rare opportunity to take a break from pedestrian criminal cases and discourse broadly on free expression issues, he

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[19] *See, e.g.*, Shane Kotlarsky, *What's All the Noise About: Did the New York Yankees Violate Fans' First Amendment Rights by Banning Vuvuzelas in Yankee Stadium?*, 20 JEFFREY S. MOORAD SPORTS L.J. 35, 48-49 (2013).

[20] *Barrett*, 1999 WL 33537194, at *3-4.

[21] *Id.*

felt the force of a constitutional imperative coming upon him, and permissibly succumbed.

Moreover, in the final paragraph of a brief but more than adequate opinion, he noted most helpfully and perceptively the availability of alternative expressive channels.[22] He appreciated fully the uniqueness of the circumstances and the challenged ban. No spectator or fan had been barred from using a stick elsewhere on campus, and for that matter some students and other groups presumably continued to sport an occasional Confederate battle flag during a tailgate event or after-game rally.[23] In that sense, the district court ruling had a Holmesian "ticket for this day and train only" quality, though it fully accomplished its intended purpose.[24]

Building upon the University of Mississippi case, this might be an opportune occasion to reflect more broadly upon several dimensions of free speech protection that uniquely impact the college and university campus. At least four dimensions mark First Amendment freedoms as distinctive. One that most observers easily overlook is the sanctions that institutions routinely impose upon plagiarism. The publication or dissemination of someone else's intellectual labor or creation ranks as perhaps the most heinous transgression likely to incur serious sanctions within the academy.[25] If a student submits as his or her own a paper or essay that has in fact been written by someone else and claims academic credit for that spurious effort, every institution of higher learning will be eager to censure the transgressor.[26] Expulsion would constitute the expected form of reprisal, barring exceptional mitigating circumstances.[27]

What is true for dishonest students is even more clearly true of those few faithless professors who claim as their own, without

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[22] *Id.* at *4.

[23] *Id.*

[24] *See generally* Larry Copeland, *S.C. Confronts Racial Tensions Amid Signs Of Widening Divide: Among The State's Initiatives is a Code of Racial Ethics for Next Year's Elections*, PHILA. INQUIRER, Dec. 14, 1997, at A21; Kevin Sack, *Un-Naming Names: Today's Battles Topple Yesterday's Heroes*, N.Y. TIMES, Nov. 16, 1997, § 4, at 5.

[25] *See* ROBERT M. O'NEIL, FREE SPEECH IN THE COLLEGE COMMUNITY vii-viii (1997).

[26] *Id.*

[27] *Id.*

proper attribution, a colleague's intellectual product.[28] Indeed, atop the ranking of actionable transgressions within the academy is the commission of plagiarism, the commission of which invariably invites a charge leading immediately to the termination of even the most seemingly secure faculty appointment.[29] Again, absent truly mitigating circumstances, a plagiarist would be terminated from the faculty roster as promptly as due process and review by the governing board would permit.[30]

What is striking is how far such sanctions for academic dishonesty surpass or exceed comparable penalties that may be incurred beyond the campus. Federal copyright law, and comparable intellectual property safeguards in most states, imposes limited legal liability upon those who misrepresent their identity, typically for the purpose of seeking or filing for certain government benefits. But most forms of misattribution or passing off as one's own the intellectual product of a neighbor, colleague, or collaborator pass well under the regulatory radar.[31] And perhaps even more striking is the virtual unanimity of collegial condemnation for the plagiarist.[32] Moreover, the harm inflicted upon the scholarly community by one who knowingly engages in such practices amply justifies the severest of sanctions.[33]

Now comes the anomaly: Much of what the academic community routinely forbids and punishes would elsewhere be arguably protected by the First Amendment as free speech and press. None of the very few Supreme Court-recognized constitutional freedoms of expression would encompass plagiarism or misattribution of scholarly effort. Save for the very limited circumstances noted a moment ago in the regulation of intellectual property, speech and press are presumptively protected, except: incitement, child pornography, conspiracy, fraud and a few other well-established variants. And just to complete the cycle, authors at publicly supported colleges and universities are, of course, equally implicated with their independent sector

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[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*

colleagues when it comes to potential liability for academic dishonesty. While none of us would venture to question the basic premises on which the unique treatment of plagiarism rests, let us be clear that life on campus can be very different from the rest of the community. What is most striking is how routinely most members of the scholarly community accept this anomaly without probing its rationale.[34]

A second campus-based exception also gets short shrift and similarly merits closer scrutiny. Many institutions of higher learning have established rigorous honor systems, often student regulated, which punish "lying, cheating and stealing" on or near the campus (or in certain university-related activities off campus).[35] Not surprisingly, it is independent or private institutions that most commonly adopt and enforce such codes of conduct.[36] But the public sector is also heavily committed to enforcing "honor" within its student bodies.[37] The national service academies and state publicly supported colleges like Virginia Military Institute number among the early proponents of such codes.[38] And even among civilian campuses like the University of Virginia, the College of William and Mary, and a host of others, the student commitment to integrity (and the policing of honor systems) rank very high among vital institutional values.[39]

Now comes the rub. While few of us would doubt that even the most public of campuses may punish "stealing" and even "cheating," the same may not so easily be said of "lying." Speaking an untruth, without more, is not usually viewed as an actionable offense.[40] A political speaker or advocate for a cause, for example, is permitted very broad latitude even in the most public settings before he or she incurs legal liability for libel or slander; when the speaker is also a public official or a public figure, of course, the potential risk further diminishes. Yet when students on a public or private campus engage in "lying" especially to the detriment of

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[34] *Id.*
[35] *Id.* at viii-ix.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*

a fellow student or a student organization, that is a quite different matter.[41]

Such a response is not purely hypothetical. Indeed, occasionally a student affairs administrator in the public sector wisely declines to impose (or urges student honor code committees to impose) a penalty for "lying," without more, for fear of abridging free speech guarantees. Independent institutions are, of course, wholly immune from such risks since (in almost all cases) they are beyond reach of the First Amendment in that limited enclave.[42] Thus the unique situation posed by a public campus honor code and its ban on "lying" clearly and sharply distinguishes speech on campus from the general run of expression in the larger community.[43]

A third anomalous exception may seem even more curious. Those professors and instructors who assign works to be read and studied in the original language make exceptional efforts to prevent students from reading a translation.[44] While of course there is no actionable means by which foreign language and literature teachers may enforce any such constraint, evidence of a bad translation, for example, occasionally shows up on a student's exam and is properly sanctioned.[45] And in an honor system institution, a fellow student may properly report a cheater observed reading a known translation and thus bypassing the original assigned work. A private college or university could, in theory, even impose penalties on students known to have relied on a "trot," but in practice such a draconian approach seems highly unlikely.[46]

Now, finally we encounter a fourth and quite different exception, which brings us back to Ole Miss and the Confederate battle flag. The controversy became most intense—indeed uniquely intense—in the football stadium. Apparently alumni and others had regularly gathered in parking lots and on fraternity or

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[41] *See id.*

[42] *See generally id.* at 218-39. Independent institutions are beyond reach of the First Amendment, save in the unusual case where, for example, a private campus has deputized its police officers and thus created "state action."

[43] *Id.* at viii-ix.

[44] *Id.* at viii.

[45] *Id.*

[46] *Id.*

sorority lawns for pre-game events. Occasional displays of the stars and bars were surely not unknown on such occasions. But tensions between supporters and opponents of rebel flag displays had become increasingly voluble in the 1980s as demography, both of the fans and the players, gradually changed.[47] Reports suggested that the athletic department, and especially the coaching staff, had encountered growing difficulty in recruiting African-American players and staff precisely because of the propensity of some fans to display and wave the Confederate flag as a symbol.[48] Finally, the University adopted and publicized the steps we have noted earlier, with the Solomonic outcome that may not have satisfied everyone, despite its ingenuity and creativity.[49]

In fact, setting aside the football stadium as a unique venue, the regulation of student (and even community) expression turns out to be vastly complex at a large public university like Ole Miss. A vast range of "time, place, and manner" regulations govern the campus. At one end of the scale, remote parking lots may offer the least likely justification for regulation, leading some institutions unwisely, but understandably, to designate them as "free speech zones," thus implying that speech may not be tolerated elsewhere.

At the other end of the scale, there is the actual classroom, physical or virtual. Despite the increasing emphasis on remote learning, internet-hosted, and broadcast courses, many students and professors continue to interact in four-walled traditional classrooms where formal exchanges persist. And where such traditional learning does occur between student and teacher, regulating interaction may pose challenges for both parties. If a contentious—or even merely curious—student interrupts, seeking to ask a question, the response should depend entirely on the instructor's policy; many lecturers welcome such interjections at the podium, and in fact become uncomfortable if time passes without such interaction, while others wish simply to expound without interruption and invite questions at the conclusion of or after class.

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[47] *See* Brian Cabell, *Flag Ban Tugs on Ole Miss Traditions: Confederate Banner Impedes Athletic Recruiting*, CNN (Oct. 25, 1997, 10:44 PM), http://www.cnn.com/US/9710/25/ole.miss.

[48] *Id.*

[49] *See supra* notes 2-24 and accompanying text.

There are a host of other protocols that academic institutions regularly observe. Obviously, for example, students and others studying in the campus library or other mandatorily quiet areas are forbidden from speaking above a whisper, using audible cell phones or pads, using sound from laptops or internet stations, etc. A comparable degree of enforced silence may also be warranted in science laboratories, and of course during tests and examinations. During exam periods, those who regulate the environs of classroom buildings may also find ways of ensuring quiet while other students are actually taking tests and exams. Thus, somewhere between the classroom and library reading room on one end of the spectrum and the stadium parking lot on the other end, regulation of "time, place and manner" reflects a bewildering array of options. Suffice it to say that the university campus provides a singular laboratory for First Amendment experts and observers.

A RETROSPECTIVE VIEW OF U.S. LAW ON HATEFUL AND OFFENSIVE SPEECH[50]

The Confederate battle flag saga in Mississippi may have been novel in certain respects, but it represents the often tortured, and usually ambiguous, application of uniquely American free speech principles. Nations as close and otherwise congenial as Canada take a profoundly variant view of hateful or deeply offensive expression.[51] When it comes to otherwise democratic Western European countries like France and Germany, the differences can be even more striking.[52] Yet the U.S. policy with regard to epithets, slurs, and symbolic displays of such views has not always been so benign—nor have courts been nearly so insistent upon the sort of content or viewpoint neutrality that was

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[50] Information in this Part was originally printed in *Law and Contemporary Problems* and the *Albany Law Review*. *See* Robert M. O'Neil, *Rights in Conflict: The First Amendment's Third Century*, LAW & CONTEMP. PROBS., Spring 2002, at 7, 17-22 [hereinafter O'Neil, *Rights in Conflict*]; Robert M. O'Neil, *Hate Speech, Fighting Words, and Beyond—Why American Law is Unique*, 76 ALB. L. REV. 467, 470-78 (2013) [hereinafter O'Neil, *Hate Speech, Fighting Words, and Beyond*].

[51] *See generally* Kathleen Mahoney, *Hate Speech, Equality, and the State of Canadian Law*, 44 WAKE FOREST L. REV. 321 (2009).

[52] *See* O'Neil, *Hate Speech, Fighting Words, and Beyond*, *supra* note 50, at 497-98.

mandated by the district judge in Mississippi. Thus a brief retrospective may be helpful in setting the stage.

It all began in 1941 with a seemingly trivial case, *Chaplinsky v. New Hampshire*.[53] An itinerant Jehovah's Witness preacher named Chaplinsky was arrested on a quiet Sunday morning in a small New Hampshire town.[54] The arresting officer charged that Chaplinsky had called him, to his face, "a damned Fascist" and a "God damned racketeer."[55] In the absence of any witnesses, the recorder's court found against the itinerant speaker.[56] Chaplinsky was duly convicted of violating a state law that made it a crime to "address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name."[57]

The New Hampshire Supreme Court affirmed the conviction, finding that the statute was appropriately limited to "face-to-face words plainly likely to cause a breach [through] . . . 'classic[] fighting words.'"[58] A unanimous U.S. Supreme Court affirmed, in a brief opinion including several Justices who had as recently as the late 1930s strongly supported freedom of expression.[59] Justice Murphy wrote for the Court, and Justices Black and Douglas joined without comment in a summary opinion that clearly permitted states to punish the use of mere words, albeit under extenuating circumstances.[60] The key to the Court's ruling was the Court's view that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[61]

So dismissive a view of expression that was both unquestionably offensive and provocative now seems not only archaic but illogical. That view was even more striking given the

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[53] 315 U.S. 568 (1942).

[54] *Id.* at 569-70.

[55] *Id.* at 569 (internal quotation marks omitted).

[56] *Id.*

[57] *Id.*; State v. Chaplinsky, 18 A.2d 754, 757 (N.H. 1941).

[58] Chaplinsky v. New Hampshire, 315 U.S. at 573; State v. Chaplinsky, 18 A.2d at 762.

[59] Chaplinsky v. New Hampshire, 315 U.S. at 574.

[60] *Id.* at 569, 574.

[61] *Id.* at 572.

deeply religious context of Chaplinsky's utterances. But a unanimous Court—including its erstwhile free speech champions—was easily persuaded that such words forfeited any constitutional claim when they were spoken face-to-face in a manner that was "likely to cause a breach of the peace" whether or not any disorder actually ensued, which in the instant case it clearly did not.[62] The New Hampshire law was simply deemed "a statute punishing verbal acts" which, through minimal interpretation, had been specifically "limited to define and punish specific conduct lying within the domain of state power."[63] Such an exegesis left the charged words devoid of any possible First Amendment protection, even in the eyes of the high Court's otherwise most speech-protective members.[64]

Commentators have over the years noted that the ruling contained two elements: First, there was an implicit assumption that utterance of epithets under such conditions inherently inflicts psychic injury on a person who is their immediate target or object—though a query is warranted in the case of a uniformed police officer. Second, when such verbal hostility creates or threatens an imminent breach of the peace, government may intervene even though mere words are involved, no violence ensues, and the epithets could not possibly have been viewed as an actionable threat. Justice Murphy's cryptic opinion provided minimal guidance for those—police and judges—who would, in later years, do their best to reconcile the inherent ambiguity between the "damaging words" and "breach of the peace" premises that the judgment so awkwardly blended.

After three quarters of a century, first year law students would undoubtedly assume that *Chaplinsky* stands nothing as more majestic than ancient history, long entitled to a decent burial. Paradoxically, however, such a merciful interment has never occurred. Indeed, the ruling remains a recognized exception to First Amendment freedoms, along with "threats," "incitement," and a few other desiderata. As recently as the seminal "hate speech" ruling in 1992 the high Court's majority simply assumed *Chaplinsky*'s continuing vitality, stressing only in passing that

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[62] *Id.* at 573-74.
[63] *Id.*
[64] *Id.*

those fighting words that were used to convey a particular viewpoint could not be *selectively* disfavored on the basis of the subject matter.[65] In his majority opinion, Justice Scalia expressly declined an invitation to "modify the scope of the *Chaplinsky* formulation"—a step he deemed wholly unnecessary to the majority's inarticulate disposition of the case.[66]

Thus, despite its nearly complete disregard at all levels of the judicial system, rumors of *Chaplinsky*'s demise appear to have been greatly exaggerated. Lower courts may have continued to be wary of citing this judgment, but have continued to dance awkwardly around it while distinguishing it in nearly indistinguishable cases of verbal assault and affront, while leaving this anomalous precedent inviolable.

Before departing *Chaplinsky*, two broader cautions may be in order. Just to make matters even more confusing, the World War II Court's severely constrained view of free expression stands in stark contrast to a brace of speech-protective rulings in the late 1930s. In *De Jonge v. Oregon*[67] and *Herndon v. Lowry*[68] a majority of the rapidly shifting Court went even beyond the Holmes/Brandeis formulations of a decade or so earlier.[69] Not only did *Chaplinsky* appear to provide a de novo constitutional premise; incredibly, none of the prior protective rulings even deserved mention.[70] The second caveat is even more striking. Near the close of Justice Murphy's strangely apologetic opinion appeared this seemingly gratuitous warning: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words. . . ."[71]

Those categories, Justice Murphy affirmed, were "no essential part of any exposition of ideas."[72] Of all the oversights

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[65] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992).
[66] *Id.*
[67] 299 U.S. 353 (1937).
[68] 301 U.S. 242 (1937).
[69] *See De Jonge*, 299 U.S. 353; *Herndon*, 301 U.S. 242.
[70] *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
[71] *Id.* at 571-72.
[72] *Id.* at 572.

and anomalies, perhaps the most blatant were the inattention of Justices Black and Douglas (let alone Murphy) to the casual condemnation of "the libelous" along with every other disfavored category of speech.[73]

Let us now fast forward to a wholly different set of issues during the Vietnam War. When draft resistance advocate Paul Cohen displayed in the Los Angeles courthouse a jacket bearing the unambiguous message "Fuck the Draft" he was promptly arrested and charged with violating a California breach of the peace statute.[74] The state courts routinely affirmed the conviction.[75] But to the surprise of most observers, the U.S. Supreme Court agreed to review this seemingly trivial (or juvenile) message and reversed the conviction.[76] Justice Harlan's opinion—remarkable as much for its content as its authorship—told more about what the case did not involve than what it did cover.[77] The majority made clear that there had been no evidence of actual or even feared disruption in the courthouse.[78] Indeed, when Cohen was politely asked to remove his jacket by a bailiff upon actually entering a courtroom, he did so promptly, folding and thus obscuring the garment's offending message.[79]

There was also no possible issue of incitement in Cohen's words, nor did California officials so characterize the epithet.[80] Despite the unwelcome nature of the message, the adjacent spectators could hardly have been described as a "captive" audience as long as they were completely free to avoid the impact of Cohen's jacket by averting their eyes and going elsewhere in the building.[81] Any concern about possible prejudice to a pending judicial proceeding also failed to gain attention simply because the draft resistance prosecutions (of which many were in fact pending at that time) were, of course, all tried in federal rather than state courts.

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[73] *Id.* at 571-74; *see also* O'Neil, *Rights in Conflict*, *supra* note 50, at 16-19.
[74] Cohen v. California, 403 U.S. 15, 16 (1971).
[75] *Id.* at 17.
[76] *Id.* at 17, 26.
[77] *See id.* at 18-22.
[78] *Id.* at 18, 20.
[79] *Id.* at 19 n.3.
[80] *Id.* at 16-18.
[81] *Id.* at 21-22.

That left for closer scrutiny California's surviving claim that Cohen had uttered "fighting words" and might be charged under a muted but still viable *Chaplinsky* ruling.[82] That option invited a basis for distinguishing (or even applying) the World War II judgment. Yet Justice Harlan now offered a sharply different view: "While the four-letter word displayed by Cohen . . . is not uncommonly employed in a personally provocative fashion," observed the Court, "in this instance it was clearly not 'directed to the person of the hearer'" and thus could not legally be deemed a "fighting word."[83] The significance of Justice Harlan's premise thus far surpassed simply its clear rejection or repudiation of the conventional theories of potential culpability.

Beyond what was necessary simply to sustain Cohen's conviction, the majority went on essentially to make almost a virtue of the defendant's novel choice of language, noting that "one man's vulgarity is another's lyric."[84] If government could ban the public utterance of particular words as a way to punish the expression of unpopular views, those in power "might [warned Justice Harlan] soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."[85] Thus, cautioned the majority, there was a grave risk, in banning particular words, of "running a substantial risk of suppressing ideas in the process."[86]

Herein lies the core paradox of *Cohen*, and its uneasy coexistence as an arbiter of civility in public discourse. Curiously, what the *Cohen* Court never needed to determine was how far this judgment reflected the political context of Cohen's utterance and the "unpopular view" whose expression was enhanced by the selective use of an especially evocative four-letter word. A few variants may suggest how quickly we enter the realm of uncertainty or ambiguity. Suppose, for example, Mr. Cohen left the building but soon returned with tape over the words "the draft" in order to highlight that single offending verb. While charging him with a breach of the peace might still be problematic

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[82] *Id.* at 20.
[83] *Id.*
[84] *Id.* at 25.
[85] *Id.* at 26.
[86] *Id.*

on the original facts, the gathering of a restive courthouse audience angered by such an isolated epithet might alter the situation dramatically.

Any criminal charge based on the display of an isolated vulgar and taboo verb would seem to require some assessment of the anti-war context of the actual *Cohen* case. While there was ample warrant in Justice Harlan's opinion for a non-contextual view – "one man's vulgarity is another's lyric"[87]—there were also implications in that opinion that its reach should be confined to protecting public incivility through the use of a vulgar epithet in order to, as the Court put it, "express[] . . . unpopular views."[88] The actual language on the back of Cohen's jacket would seemingly support such an inference under either theory; the single unadorned and non-contextual display of the isolated word would, however, be far more problematic. Or if Mr. Cohen removed the jacket and walked about the corridor pointing to the three-word message, attracting the attention of random passers-by without any physical contact or even interference would a breach-of-the peace charge fare differently in the Supreme Court? Again, the inherent ambiguity in Justice Harlan's opinion based on the actual facts of the case creates unavoidable doubt and uncertainty.

Finally, there remains for closer analysis a plausible claim that the very act of publicly flaunting a taboo or vulgar word in order to shock or offend listeners creates—without more—a protected message. Justice Brennan once observed, in rebuking his colleagues for allowing the FCC to ban broadcasts of George Carlin's "seven dirty words," that there was ample justification for "confirming Carlin's prescience as a social commentator" since he had evoked public anger and government sanctions over satire which the author himself deemed "harmless and essentially silly."[89] Perhaps such a premise gives the putative "in your face" *Cohen* display more attention than deserves. One should, nonetheless, recall that George Carlin's own use on the air of the "seven dirty words" in the FCC-banned broadcast was (unlike

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[87] *Id.* at 25.

[88] *Id.* at 26.

[89] FCC v. Pacifica Found., 438 U.S. 726, 777 (1978) (Brennan, J., dissenting).

Cohen's jacket) non-contextual in ways to which Justice Brennan was keenly attune.[90]

A brief update to the current context is now in order. First Amendment jurisprudence has, of course, been accelerated even well beyond the Vietnam War cases, including *Cohen* and several cases specifically protecting public advocacy unless "directed to inciting or producing imminent lawless action and is likely to incite or produce such action"[91] and unless such expression is "directed to any person or group of persons."[92] Most recently, several opinions by Chief Justice Roberts have strengthened the basic free speech and press safeguards in vital respects, including bans on animal-cruelty videos[93] and on hateful displays of, most notably, public homophobia in the course of protesting military funerals.[94] Paradoxically, however, the Roberts Court has continued to pay at least lip service to the *Chaplinsky* exceptions, noting in passing that the First Amendment has "permitted restrictions upon the content of speech in a few limited areas . . . including obscenity . . . defamation . . . fraud . . . incitement . . . and speech integral to criminal conduct."[95]

HATEFUL SPEECH AND ADVOCACY IN HIGHER EDUCATION[96]

As the Mississippi Confederate battle flag case reminds us, the regulation of expression on college and university campuses poses singular challenges in regard to matters of race, gender, sexual orientation, and a host of other sensitive areas of academic life. But before pursuing that topic directly, we welcome a brief primer on the evolution of "hate speech" prior to its pursuit on the college and university campus. The history precedent to the "speech code" era is well worth exploring in its own right, not least because the quest for regulation through speech codes has

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[90] *See generally id.* at 762-77.

[91] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[92] Hess v. Indiana, 414 U.S. 105, 108 (1973).

[93] *See* United States v. Stevens, 559 U.S. 460 (2010).

[94] *See* Snyder v. Phelps, 131 S. Ct. 1207 (2011).

[95] *Stevens*, 559 U.S. at 468 (internal quotation marks omitted).

[96] Information in this part was originally printed in *Law and Contemporary Problems* and the *Albany Law Review*. *See* O'Neil, *Rights in Conflict*, *supra* note 50, at 23-29; O'Neil, *Hate Speech, Fighting Words, and Beyond*, *supra* note 50, at 478-90.

prompted continuing ambivalence both by administrators and students—though, as we shall see, not by courts.[97]

Long before the advent of concerns in higher education about race and gender, a few states took notice of the value of regulating discriminatory conduct, which might include speech as well as action. Exactly a century ago New York's legislature imposed what seems to have been the first governmental curb on ethnically offensive language.[98] The earliest antecedent of what eventually became group libel laws—and of course eventually evolved as campus speech codes—specifically forbade hotels from discriminatory advertising—that is, from publicly announcing a refusal to accommodate overnight guests on the basis of race, color, or religion.[99] That action of course preceded Federal Public Accommodations Laws by a half century and, not surprisingly, involved no attention to First Amendment or free speech concerns.[100] Curiously, such vocal opposition as did accompany the statute came from those who feared that hotels and inns might be unable, under the New York law, to refuse rooms to persons infected with tuberculosis.[101]

It was not long before other legislatures began to follow suit in seeking to regulate discriminatory speech.[102] By the mid-1920s at least seven other states had adopted similar anti-bias laws, some of which targeted hostile words as well as acts or conduct.[103] Concern for the legal protection of ethnic and other minorities was further heightened in the post-World War I era by the emergence of anti-Semitic publications, notably Henry Ford's scurrilous *Dearborn Independent* and its featuring of the infamous *Protocols of the Elders of Zion*.[104] Specific efforts were undertaken by a number of cities to restrict or ban publication and distribution of Mr. Ford's newspaper.[105] For the first time, free speech press

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[97] *See generally* O'NEIL, *supra* note 25, at 1-26.

[98] *See* Evan P. Schultz, *Group Rights, American Jews, and the Failure of Group Libel Laws, 1913-1952*, 66 BROOK. L. REV. 71, 90-91 (2000).

[99] *Id.*

[100] *See id.* at 91 n.111 (providing the final version of the relevant portion of the statute).

[101] *See id.* at 91.

[102] *Id.* at 99.

[103] *Id.*

[104] *Id.* at 100-01.

[105] *Id.* at 104-05.

concerns arose with regard to statutes and ordinances that went beyond regulation of political advocacy or incitement, and focused instead on race, gender, and religion.[106]

These early efforts encountered mixed success. The Michigan legislature specifically declined to adopt such a measure largely because of a challenge mounted by the fledgling American Civil Liberties Union, founded just a few years earlier.[107] Meanwhile, however, a Cleveland ordinance was successfully challenged in federal court, producing what was undoubtedly the first judgment striking down government sanctions on racist or ethnically offensive expression.[108] The American Jewish Committee, by contrast, viewed the Ohio controversy with marked ambivalence and kept its distance from the *Dearborn Independent*, declining to take sides.[109] The president of the Anti-Defamation League of B'nai B'rith lamented in the mid-1930s that, although the First Amendment "was never intended as a protection against group libel any more than [as an obstacle] against individual libel," it nonetheless posed "an insurmountable obstacle in bringing before the bar of justice one of the lowest type of malefactors."[110] At just about the time of this comment, the U.S. Supreme Court had in *Near v. Minnesota*[111] struck down as an invalid act of prior restraint, Minnesota's attempt to enjoin future publication of scandalous or defamatory matter, albeit without specific reference to the content of the publication.[112]

In the interim, events in Europe leading to World War II would intensify the concerns that had engendered the earlier laws. The most direct response to the international impact of Nazi propaganda was an epic two-part article published in the Columbia Law Review by a young lawyer named David Riesman[113]—long before he switched from law to sociology and

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[106] *Id.* at 105.

[107] *Id.*

[108] *See* Dearborn Publ'g Co. v. Fitzgerald, 271 F. 479, 482-86 (N.D. Ohio 1921); *see also* Schultz, *supra* note 98, at 105-06.

[109] *See* Schultz, *supra* note 98, at 101 n.166.

[110] *Id.* at 111 (quoting B'NAI B'RITH MANUAL 201 (Samuel S. Cohen ed., 1926)).

[111] 283 U.S. 697 (1931).

[112] *Id.* at 701-03, 722-23.

[113] David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727 (1942).

authored such memorable books as *The Lonely Crowd*.[114] Riesman, then a law professor at the University of Buffalo, issued a forceful call for the more vigorous enforcement of state group libel laws, which he viewed as the most promising antidote to Nazi propaganda.[115] Though he could hardly have overlooked the inherent tension that such laws would create for free speech and press, he insisted that in perilous times even *Bill of Rights* guarantees (and especially those protecting free speech and press) must yield to national exigency: "[I]t is no longer tenable," he urged, "to continue a negative policy of protection *from* the state . . . [which] plays directly into the hands of the groups whom supporters of democracy need most to fear."[116]

Just as Senator Joseph McCarthy was mobilizing virulent anti-Communist sentiment on one side, Riesman had rallied state lawmakers to an opposite cause. In the 1940s and early '50s a number of states did in fact heed his plea by enacting laws that specifically targeted racist, anti-religious, and otherwise ethnically demeaning publications.[117] The challenge would almost inevitably reach the Supreme Court, as it did in 1951.[118] The specific focus was an Illinois statute that imposed penalties on anyone who published or exhibited material that "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion . . . to contempt, derision, or obloquy or which is productive of breach of the peace or riots."[119]

The officers of the White Circle League were specifically charged with organizing the distribution of a provocative leaflet that urged Chicago's city government to "'halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro" and called upon "'[o]ne million self[-]respecting white people in Chicago to unite.'"[120] The leaflet also warned of ominous prospects—the

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[114] *See generally* DAVID RIESMAN, THE LONELY CROWD (1950).

[115] Riesman, *supra* note 113, at 775-80.

[116] *Id.* at 780.

[117] *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 251-52 (1952); People v. Beauharnais, 97 N.E.2d 343, 344-45 (Ill. 1951).

[118] *See Beauharnais*, 343 U.S. 250 (argued in 1951).

[119] *Id.* at 251 (internal quotation marks omitted).

[120] *Id.* at 252.

"rapes, robberies, knives, guns and marijuana of the [N]egro"—should such pleas not be promptly heeded by the white community.[121]

The Illinois courts sustained the convictions and rejected both First Amendment and Due Process claims.[122] The statute, observed the lower court, provided a defense only for "publi[cation] with good motives and for justifiable ends," but that sufficed in extenuation.[123] The state court also rejected the defendants' plea that a "clear and present danger" must exist before such a sanction could be imposed on expression.[124] The *Dennis v. United States* anti-Communist conspiracy case was, of course, pending at precisely the same time, albeit focused on federal rather than state law matters.[125]

A sharply divided U.S. Supreme Court in *Beauharnais v. Illinois* clearly recognized the paradox. The majority found persuasive, however, an analogy to individual civil redress for defamation derived from *Chaplinsky*, and also took explicit judicial notice of recent and mounting racial tensions in Chicago.[126] "[W]e would deny experience," wrote Justice Frankfurter for the majority, "to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented."[127]

The dissenters were predictably dismayed by such a ruling. Justice Black, who would in later years disparage *Beauharnais* as the Court's single worst free speech decision, insisted that the majority "acts on the bland assumption that the First Amendment is wholly irrelevant."[128] Even Justice Stanley Reed, seldom counted among champions of free expression, dissented here (albeit more on due process than speech and press grounds).[129]

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[121] *Id.*
[122] *Id.* at 251-52.
[123] *Id.* at 254.
[124] *Id.* at 253.
[125] *See* Dennis v. United States, 341 U.S. 494 (1951).
[126] *Beauharnais*, 343 U.S. at 253-64.
[127] *Id.* at 261.
[128] *Id.* at 268 (Black, J., dissenting).
[129] *Id.* at 277-84 (Reed, J., dissenting).

Justice Robert Jackson, usually found on the other side after his recent experience prosecuting Nazi war criminals at Nuremberg, also dissented from what seemed an unsupportable and, for that matter, unrebuttable inference of danger from a misguided and innocuous racist tract.[130]

Clearly the *Beauharnais* ruling has not fared well over time; today it would be cited positively only at an advocate's peril. Yet despite decades of ample opportunity to give the case a decent burial, the Court has never disparaged it, much less even hinting at its possible demise. Indeed, as recently as two decades ago the Justices cited the case as illustrative of categories of expression that have been denied First Amendment protection.[131] Time and again the central premise of *Beauharnais* seems to have survived in a different and even more ominous form. Quite simply, for nearly three quarters of a century this dubious judgment remains a major obstacle to efforts to undermine, set aside, or circumvent sanctions on speech that is racist, sexist, homophobic, or otherwise offensive. Unless the "group libel" laws of the '50s and '60s were somehow entitled to a constitutional pass from the high Court on grounds that would set apart all other forms of "hate speech" regulation, this paradox persists as one of the most puzzling in First Amendment.

Finally, before turning to the intriguing case of campus speech codes, where several strands of higher education law eventually blend, we should note one other almost comic variant. While *Beauharnais* remained in splendid isolation as frail precedent for *criminal* group libel laws, a half dozen or so states (especially New York) added a puzzling brace of *civil sanctions* on those speakers in the Empire State who uttered hostile slurs and epithets and otherwise uncivil language.

Illustratively, a Long Island restaurateur was forced to apologize to a waitress whom he had publicly insulted as a "Jewish broad[]" because she allegedly sought special treatment at the lunch counter.[132] And a non-Jewish neighbor sarcastically shouted across her backyard fence "happy Jew day" on the

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[130] *Id.* at 287-305 (Jackson, J., dissenting).

[131] R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992).

[132] Imperial Diner, Inc. v. State Human Rights Appeal Bd., 417 N.E.2d 525, 527-28 (N.Y. 1980).

morning of Rosh Hashanah—an epithet for which she was ordered by a New York state trial judge to do appropriate penance.[133] While such laws were occasionally challenged in lower state courts in the early and mid-1980s, they seem later to have languished on the books or been quietly repealed in the courts of major code revisions and have thus incurred the judicial fate of the group libel laws. Meanwhile, David Riesman had shifted his attention in a dramatically different direction, leaving Buffalo's law school and legal education to join Harvard's Social Relations Department and to author such highly visible works as *The Lonely Crowd*.[134] While it would be wholly unfair and unwarranted to fault Riesman for urging the adoption of group libel and other hate-speech as the one viable antidote to Nazi propaganda in the post-war era, candor compels admiration of the choice of a social science discipline that he later embraced and for which he was justifiably renowned.

For the capstone of this drama, we fast forward to more recent times and an anomalous pair of Supreme Court cases. When a major challenge to state and local laws restricting hate speech reached the high Court in the early '90s, about all that seemed clear was that the Justices would be sharply divided, as indeed they were. The medium was a St. Paul, Minnesota ordinance that made it a crime to "place[] on public or private property a symbol, object . . . or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[135] The defendant was a white juvenile who had just burned a cross on the lawn of an African-American family.[136]

The state courts rejected traditional First Amendment challenges, and the Supreme Court granted review.[137] To Justice Scalia, writing for a novel majority in *R.A.V. v. City of St. Paul*,[138]

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[133] *L.I. Woman Sentenced to Community-Service Work for Ethnic Slur*, N.Y. TIMES, May 14, 1982, *available at* http://www.nytimes.com/1982/05/14/nyregion/li-woman-sentenced-to-community-service-work-for-ethnic-slur.html.

[134] *See generally* RIESMAN, *supra* note 114.

[135] *R.A.V.*, 505 U.S. at 380.

[136] *Id.* at 379.

[137] *Id.* at 380-81.

[138] *Id.* at 377-97.

the fatal flaw in the ordinance proved to be its reliance on content or viewpoint differentiation.[139] While a state or city could ban all speech of a certain genre, it could not selectively target only regulable speech that evoked tension or hostility solely "on the basis of race, color, creed, religion or gender" but not for other reasons or in other realms of advocacy.[140] The four Justices who concurred only in the result but did not share Scalia's novel approach, argued that the conviction should simply have been reversed because of the overly broad reach of the St. Paul ordinance.[141] Three of those who concurred strongly implied they would have been ready to recognize state power to proscribe such hateful activity even if it involved some speech elements.[142]

That latter suggestion soon proved prophetic. In the very next term, again by a formally unanimous vote, the Court held in *Wisconsin v. Mitchell*[143] that states might impose harsher sentences for those who commit certain acts on the basis of the race of the victim.[144] Many states had, in fact, enacted model laws that ratcheted up the sanction on the basis of proof that a defendant had "select[ed] the person against whom the crime [] is committed [] because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person."[145] In retrospect, distinguishing between hate crimes and hate speech might have proved a daunting if not impossible task for a Court willing to recognize the subtlety of that difference.

The *Mitchell* Court, however, seemed determined to have it both ways. To the extent that a sentence-enhancement statute or ordinance indirectly—though unavoidably—targeted an actor's or speaker's motive, that was not markedly different from relying on animus or motive for a host of other purposes, such as routine criminal sentence enhancement or aggregation.[146] The Supreme Court, in fact, conveniently overlooked two recent rulings that had

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[139] *Id.* at 391-94.

[140] *Id.* at 391-93.

[141] *Id.* at 397-415 (White, J., concurring); *Id.* at 415-16 (Blackmun, J., concurring); *Id.* at 416-36 (Stevens, J., concurring).

[142] *Id.* at 399-403 (White, J., concurring).

[143] 508 U.S. 476 (1993).

[144] *Id.* at 479, 490.

[145] *Id.* at 480 (internal quotation marks omitted).

[146] *Id.* at 484-85.

allowed, what was in that context a judicially created, discretionary use of words that revealed bias and the mandatory use of such evidence under the Wisconsin sentence-enhancement statute.[147] Even modest candor should have induced the *Mitchell* Court to have acknowledged more fully the degree to which penalty-enhancement laws in fact do impose sanctions on protected speech, albeit in a slightly different fashion than did the St. Paul ordinance. The proffered distinction clearly remains untenable, although courts and prosecutors alike seem to have been remarkably ready to embrace that distinction despite its illogical premise.

Finally, we encounter what may be not only the strangest of such cases, but the one in which the Court actually recognized a new exception to First Amendment protection. A sharply divided Court reviewed a Virginia statute that made it a crime to burn "with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another . . . Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."[148] The majority in *Virginia v. Black*[149] eventually invalidated the cross burning law because of the "prima facie evidence" provision, noting that the jury instruction applied in the actual case created a constitutionally infirm presumption that, for example, a defendant had been charged solely on the basis of evidence relating entirely to the act of burning a cross, without more.[150] Indeed, the two younger cross-burning defendants saw their convictions simply remanded.[151] Save for the taint created in Barry Black's case by flawed instruction about prima facie evidence, the Court could well have sustained those convictions.

It was, however, on the core First Amendment issues that Justice O'Connor's prevailing opinion broke striking new ground. After a lengthy review of the sordid history of Ku Klux Klan activity and advocacy, Justice O'Connor offered two central

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147 *Id.* at 485-86.

148 Virginia v. Black, 538 U.S. 343, 348 (2003) (internal quotation marks omitted).

149 *Id.* at 343-68.

150 *Id.* at 363-67.

151 *Id.* at 367.

conclusions.[152] The first premise served to distinguish *R.A.V.* as a case that involved a form of statutorily disfavored expression, while leaving open the plausible option that a state might validly impose such a ban without selectively favoring or disfavoring a particular viewpoint—as in Justice Scalia's approach, the *R.A.V.* Court had done in the St. Paul case.[153]

While that conclusion might seem to have sufficed for one day, there was much more. The second and clearly dominant element in *Black* lay in this substantive declaration:

> The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence.[154]

The words may have been those of Justice O'Connor, but the import was unmistakably that of Justice Thomas, in one of the very few oral arguments in which he has engaged over the years.[155]

What is most striking is the degree to which the Court in *Black* almost unwittingly came nearly full circle back to *Chaplinsky*, albeit in a different context. While cross burning remains a uniquely heinous form of brutality, that characterization alone enlightens us modestly if at all. As a nearly unanimous Court (with Justice Alito alone dissenting) would later remind us, the majority's firm commitment to maximum free expression would encompass such seemingly uncongenial activities as homophobic banners deploring funerals of military heroes[156] and abusive animal cruelty videos,[157] not to mention racial and sexist slurs to note only the latest such exceptions.

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[152] *Id.* at 352-63.

[153] *Id.* at 360-63.

[154] *Id.* at 363.

[155] Oral Argument, Virginia v. Black, 538 U.S. 343 (2003) (No. 01-1107), *available at* http://www.oyez.org/cases/2000-2009/2002/2002_01_1107.

[156] *See* Snyder v. Phelps, 131 S. Ct. 1207 (2011).

[157] *See* United States v. Stevens, 559 U.S. 460 (2010).

CAMPUS SPEECH CODES – A SPECIAL AND INTRIGUING VARIANT

To round out this review, a brief postscript on the topic of campus speech codes may serve to bring us back to the uniquely academic setting where we began. A few clearly recognized features of the "speech code" saga may be helpful in defining an appropriate context. Starting in the early to mid-1980s, a growing number of mostly public colleges and universities began adopting policies that regulated and restricted student expression that created offense on the basis of racial, ethnic, religious, sexual orientation, nationality, age, and other suspect criteria.[158] The very first such code or policy—at least the first to be legally challenged—was that of the University of Connecticut, which forbade on the Storrs campus "use of derogatory names, inappropriately directed laughter, inconsiderate jokes, anonymous notes or phone calls, and conspicuous exclusion from conversations and/or classroom discussions."[159] A federal judge in Hartford made short shrift of his classically imprecise language, striking down on both free speech and due process.[160]

The private sector, meanwhile, was unlikely to be spared from such simplistic regulatory approaches. The University of Pennsylvania initially forbade "'any behavior . . . that stigmatizes or victimizes.'"[161] A white female Penn undergraduate was charged under this policy for having angrily shouted "water buffalo" out a dormitory window at a small group of African-American women whom she apparently did not know, but was ready to disparage freely.[162] The premise of this novel approach was that calling any student a "water buffalo" (especially in close proximity to the Philadelphia zoo) might well "stigmatize or victimize," though without offering any guidance to university administrators, much less to courts and judges.[163] But the incident very nearly derailed the pending appointment of Penn's then

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158 *See generally* O'NEIL, *supra* note 25, at 2-11.
159 *Id.* at 11.
160 *Id.*
161 *Id.*
162 *Id.*
163 *Id.* at 11-12.

president, the late Sheldon Hackney, to head the National Endowment for the Humanities.[164]

Despite the urgent quest for greater precision in the drafting process, along with mounting pressure (chiefly, but not alone, from minority students) to adopt such bans, the actual experience on American campuses is strikingly unpromising. The courts have been unsparingly and unanimously negative in their condemnation of such codes.[165] Indeed, to this day, no federal or state court has ever sustained such a policy despite commendable institutional efforts to craft narrower and more clearly defined codes. Every case that has ever been filed against such a policy has been resolved against the college or university on either free speech or due process grounds, and often on both.

Occasionally, a court will acknowledge that relevant campus policies might be capable of survival on the basis of essentially conduct-driven (but potentially speech-affected) grounds such as arson, defacement of university property, or certain forms of harassment (which could include verbal harassment under special conditions).[166] But that's as far as courts have ever ventured in the thirty years and more that such policies have been challenged. While most of the cases have understandably involved state-supported institutions, there is one reported (indeed highly celebrated) case involving Stanford University.[167] A California statute (called the *Leonard Law* and unique to the Golden State) proscribes institutional bans on the speech of students attending secular or non-religious colleges and universities.[168] Such students are singularly entitled by state law to legal protections equivalent to regulations of the University of California and Cal State campuses under the federal and state bill of rights.[169]

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[164] *Id.* at 12.

[165] *See, e.g.*, Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989).

[166] *See* O'NEIL, *supra* note 25, at 23-26.

[167] *See* Corry v. Leland Stanford Junior Univ., No. 740309 (Cal. Super. Ct. Feb. 27, 1995).

[168] *Id.* at 21.

[169] *Id.* Ironically, the actual speech policy of the UC system has never been challenged in court on either free speech or due process grounds; accordingly, Stanford, as a wholly private institution, turns out to have been disadvantaged vis-a-vis its public neighbors across the Bay.

The process of adopting speech codes involves a host of ultimately fruitless variants. Many code-seeking institutions have simply banned the public ethnic language, with increasingly precise definitions attached to the probation. There are also a growing number of such policies that are mainly hortatory, and simply implore students to avoid offending fellow students by using slurs and racial epithets that offend or stigmatize on the basis of ethnically or otherwise sensitive grounds.[170]

If no such speech-restrictive code has thus far survived judicial challenge, as has been the case during a three-decade experience, it may be fair to ask whether it may ever be possible to craft a legally defensible institutional policy. There may have been one moment of potential promise. When Professor Mark Yudof was a budding constitutional scholar at the University of Texas at Austin (UT-Austin), and later its dean, he fashioned a narrow and potentially acceptable option.[171] His putative code would apply with special urgency, only to race, not gender, sexual orientation, age, or nationality.[172] Yudof's language would have required specific proof of intent, an element that remarkably few codes included.[173] Most important, the Texas policy would demand some evidence of actual impact or effect—not necessarily in the form of direct physical injury or harm, but at least of mental anguish or comparable and demonstrable effect.[174]

Two ironies qualify this account. First, after having forcefully championed the narrowly drawn (and presumptively viable) Texas code, Professor Yudof promptly abandoned the quest. On the morning that he first read Justice Scalia's majority opinion in the *R.A.V.* (St. Paul ordinance) case, he promptly cautioned hopeful colleagues in Austin and elsewhere that he had withdrawn his initial support for this promising draft policy. Despite urging from others to persist, he felt that the Supreme Court had effectively foreclosed such efforts, despite the potential that seemed to have survived a host of pointless drafts. He thus turned this daunting task over to colleagues in the First Amendment field, none of

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170 *See* O'NEIL, *supra* note 25, at 23-35.
171 *Id.* at 9.
172 *Id.*
173 *Id.*
174 *Id.*

whom seems to have assumed it. The UT-Austin draft code thus remains, if only by default, the only potentially promising option for regulating such offensive campus speech.

The other irony is that, after serving as president of the UT-Austin and the University of Minnesota, Yudof later assumed the presidency of the University of California, a position from which he retired in midsummer of 2013. Upon his retirement, a close observer might have noted that while in Texas he got it right the first time, while a far broader and much less precise University of California policy (based largely if inelegantly on "breach of peace" language) has apparently survived with impunity over the years.

Despite the unanimous and persistent rejection of speech codes by the courts, the topic remains of keen interest to university administrators, student affairs officials, First Amendment scholars, and of course student organizations. Several recent publications may attest to such continuing interest. On a monthly basis, Foundation for Individual Rights in Education (FIRE) updates one of its most widely read documents, *Challenging Your College's Speech Code*, not least because of the continuing outflow of relevant cases.[175] The absolute futility of the code-drafting process seems not to matter—perhaps because in this regard as many others, "hope springs eternal." Meanwhile, persistent pressure from student organizations and off-campus groups to provide greater protection against racist, sexist, and homophobic speech are never likely to abate, for the great majority of institutions that seek to nurture (and protect) growing racial and ethnic diversity.

Just as the new academic year beckoned, the *Chronicle of Higher Education* marked the start of the current fall semester with a long and detailed article on September 9, 2013, entitled *As Slurs and Offenses Multiply, Colleges Scramble to Respond*.[176] The article focused mainly on challenges facing a small and hitherto neglected liberal arts college in central Pennsylvania (named

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[175] *See Challenging Your College's Speech Code*, FOUN. FOR INDIVIDUAL RTS. EDUC., http://thefire.org/public/pdfs/df3e8553a174de83e4a9d73519fead6c.pdf?direct (last visited Feb. 20, 2014).

[176] Casey McDermott, *As Slurs and Offenses Multiply, Colleges Scramble to Respond*, CHRON. OF HIGHER ED. (Sept. 9, 2013), http://0-chronicle.com.umiss.lib.olemiss.edu/article/As-SlursOffenses/141479.

Elizabethtown), recently troubled by a spate of bias-related incidents involving vandalism, slurs on message boards, and offensive remarks to students.[177] During the past academic year, the college embraced a battery of novel responses including diversity-oriented residence hall programs, special sessions designed to engage the concerns (and fears) of LGBT students, involving faculty and staff as well as students, and opening in late summer a brand new living-learning community.[178]

Interestingly, the one visible response that Elizabethtown apparently *did not contemplate* was the adoption of a speech code, even though a private college could have done that with apparent impunity following the example of a host of independent institutions that have yielded to such pressures. Such institutions as Elizabethtown seem, by contrast, to have embraced preeminently educational approaches that eschew coercion in favor of comprehension. The lessons that have emerged entail the perils of constitutional litigation, not to mention recurring frustrated hopes and disappointments on the part of neglected students. And in the end, education is, after all, the preeminent mission of the academic community.

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[177] *Id.*
[178] *Id.*