ARTICLES
Introduction and Remarks ............................................. David Elder 471
Ten Arguments Against Hate Speech:
How Valid? ............................................................... Richard Delgado 475
Jean Stefancic
The Constitutional Status of Hate Speech:
Comments on Delgado and Stefancic ......................... Richard B. Saphire 491
"Hate Speech" and "Political Correctness":
Fruit of "Affirmative Action" ....................................... Lino A. Graglia 505
A Response to Professor Graglia's Essay on
Political Correctness .................................................. Michael L. Principe 515
Sexual Harassment: Telling the Other Victims’
Story ........................................................................ Michael S. Greve 523
The Debate Between Critics of "Political
Correctness" and Advocates of Sweeping
Antidiscrimination Codes: A Polarized
Discourse That Can Do No Good (Response
to Michael Greve) .................................................. David Goldberger 543
STUDENT ARTICLES
In Search of a Right to Escape From a
Pornographic Society ...................................................... Jill P. Meyer 553
Campus Speech Codes: What Ever Happened
to the "Sticks and Stones" Doctrine? ......................... Julie Caldwell-Hill 583

Special Feature
1995 Seibenthaler Lecture Series
A Jurisprudence from the Perspective of the
"Political Superior" .................................................. Michael Reisman 605
Special Feature
1996 Siebenthaler Lecture Series

Religion Liberty and Democratic Politics.......... *Kent Greenawalt* 629

Religious and Public Reason: A Response to
Professor Greenawalt...................................... *John T. Valauri* 647

Religious People and Public Life:
Some Reflections on Greenawalt..................... *Richard B. Saphire* 655
DEDICATION
TO
DR. MICHAEL PRINCIPE

Perhaps the greatest gift a teacher can give his or her students is a passion for learning that goes beyond the classroom and touches every aspect of the students’ lives. The students at Salmon P. Chase College of Law were fortunate during the 1994-95 and 1995-96 school years to be touched by Dr. Michael Principe, a visiting professor at the College of Law who brought an enthusiasm to the classroom that would be surpassed by none and earned him the distinction of being named the outstanding professor at the College by the 1996 graduating class.

The staff of the *Northern Kentucky Law Review* is honored to dedicate this issue to Dr. Principe for his dedication to the *Law Review*, as well as his hard work and effort which made *Political Correctness in the 1990's and Beyond* an overwhelming success.

We wish Dr. Principe luck and happiness in his future endeavors and we hope that he continues to touch lives.
As a student of the 1960s and a traditional liberal imbued with a belief in the fundamental goodness and integrity of individuals, I came late to what others on other campuses had been memorializing for some time, albeit with little public recognition or support from the American media or within academia: that America's universities have largely become self-contained fiefdoms of political correctness with a prevailing philosophical orthodoxy antipathetic to the "marketplace of ideas" prototype that, in theory but not in fact, remains the construct of the true university. In other words, a "scoundrel time" more insidious than McCarthyism ever was currently haunts most American universities.

One can no longer view as aberrational the claims of university colleagues here and elsewhere victimized by one or more of the prevailing modes of political correctness: campus speech codes or other abuses of official power to sanction offensive speech or ideas; the terrorization of faculty and/or students by allegations of racism and/or sexism, with the proponents of such charges invariably supported by an institutional university bureaucracy with an ingrained, self-righteous mentality that regularly treats charges as equivalent to presumptive evidence of guilt and heavily skews whatever procedures are available against the respondent and in favor of the complainant-"victim"; the crass politicization of academic decisions on the hiring and retention of presidents, deans and faculty, where questions of quality are regularly ignored and issues of politics become paramount, with dissenting faculty that adhere to and attempt to apply and enforce politically neutral and consistent qualitative criteria pilloried mercilessly (and, in many cases, irremediably) by col-

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2. See, for example, Professor Principe's discussion in the text, infra, of the NKU policy and procedures for dealing with allegations of harassment.
3. Such epithets may be protected speech absolutely privileged under the law of defama-
leagues and others as racist, sexist, homophobic, reactionary and worse; implementation of, or threats to implement, ongoing mandatory “sensitivity training” (actually, a truly Orwellian form of mind control) for faculty, staff and students based on subjective, unsubstantiated “perceptions” of insensitivity, even though no illegal or otherwise legally sanctionable conduct has occurred.

Indeed, one of the great anomalies of the last decade has been the world-wide collapse of Marxist ideology and its political structures abroad at the same time that its Stalinist counterparts in this country have seized control of much of higher education. “Stalinist,” you say? An apt term, I would rejoin—for individuals of politically orthodox beliefs with little, if any, respect for the “marketplace of ideas,” who are intent on inculcating “correct” values with religious-like fervor, without regard for the rights and views of others and who deny fundamentally fair procedures for protecting such competing rights and views. How has this happened? Middle-aged leftists and radicals from the ferment of the 1960s now constitute a major, tenured component of academia which, whether as ranking administrators or faculty with heavy involvement in hiring, promotion and tenure decisions, is in an entrenched position with significant leverage in implementing its agenda. Although hired through, benefitting from and tenured by a system wrought by the “marketplace of ideas” laissez-faire attitude of traditional liberalism, these activists feel little or no compunction in declining to apply the liberal tradition to those that follow in their footsteps.

I was once bemused by suggestions that these saboteurs (and saboteuses! let’s do be politically correct!) are the modern “Stalinists.” I am bemused no more. The evidence of pervasive control or influence is too compelling. What can be done about this sad and dangerous scenario in academia? First, people can meet and discuss the issues in reasoned discourse and share their thoughts and concerns with others in published form, thereby helping to educate a public largely unaware of this phenomenon. This published Symposium Issue is a modest attempt to make a balanced contribution to this public discussion—by bringing together an exciting group of recognized scholars from the political and legal left and the political and legal right (and points in between) to provide a public airing and sharing of views. (Alas, unfortunately, many “political correctness” aficionados at NKU voted by their absence not to participate in the “marketplace of ideas,” an unsurprising choice, given the pervasive

anti-intellectualism and antagonism to free and open discussion and inquiry that are the unannounced substrata of "political correctness").

Second, we as individual academics of conscience and integrity can try, through measures large and small, to reclaim our universities and, yes, our law schools. This is an intimidating concept. It is very difficult to stand up and oppose specific exemplars of "political correctness" and suffer the public and private ridicule and worse that are often the response. It is much easier to endure in silence and tut-tut in the privacy and solitude of our offices. But that is just what the "politically correct" troopers bank on us doing. It is as if they have all read (an unlikely assumption, given his status as a European white male) and taken to heart William Butler Yeats' couplet of three-quarters of a century ago: "The best lack all conviction, while the worst (a)re full of passionate intensity." 4

Third, we should be aware of and argue vociferously that the law and right are on our side in the counterattack. Campus speech codes and other official attempts to impose orthodoxy of thought, belief and expression have almost without exception been struck down by the courts. 5

Affirmative action, the cornerstone of "political correctness," is under aggressive attack in the courts, legislatures and in the executive branches—both at the state and federal level. Indeed, the recent triad of decisions—*Adarand Contractors v. Pena*, 6 *Podberesky v. Kirwan*, 7 and, most recently and importantly, *Hopwood v. State of Texas* 8—may have individually and collectively sounded the death knell of affirmative action as currently practiced and its extraordinarily corrosive influence in academia. As the court said in *Hopwood* in rejecting diversity as a compelling state interest, "(t)he use of race, in and of itself, to choose students simply achieves a student body that looks different" and is "a criterion . . .

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6. ___U.S.____, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)(the Court extended strict scrutiny to all racial classifications—whether federal, state, or local—and remanded a federal minority contracting program for reconsideration as to whether it satisfied the strict scrutiny test).


8. 78 F.3d 932, 944-55 (5th Cir. 1996)(The University of Texas School of Law admissions' criteria and procedure giving substantial racial preferences in admissions decisions were held to violate equal protection).
no more rational on its own terms than would be choices based upon the physical size or blood type of applicants.” 9 Indeed, the court’s broad attack on affirmative action may have portents far beyond the diversity in higher education setting: “Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility.” 10

In concluding, I would also like to take a moment to thank the exceptionally distinguished lead speakers and commentators for giving of their talents and time to make this provocative conference and symposium a success. I would especially like to recognize and thank Professor Michael Principe, without whose enthusiasm, conscientiousness and energy the conference and symposium would not have occurred. Professor Principe will no doubt strongly disagree with some of my comments and conclusions herein but, as a true scholar-academic, will respect my conclusions and vigorously discuss and rationally debate in an open-minded fashion the matters he disagrees with—the mark of the true educator-scholar. Professor Principe, the winner of the Justice Lukowsky Award for teaching during the 1995-96 academic year, has been an invaluable addition to the College of Law. I will miss him greatly.

I would also like to thank Dean David Short for his strong support of this conference and symposium and the Law Review generally and Woodford Webb, who did yeoman work in coordinating the various aspects of this venture. Lastly, I would like to thank the anonymous donor for the generous financial support given to the conference and symposium. From all the discussions I have had with participants and attenders, the consensus is that it was the hallmark of the academic year. I personally found it to be the most stimulating event in my eighteen year tenure at Chase. This Symposium Issue will provide a published record of the conference and, hopefully, engender further discussion of and attention to this most pressing issue in American academia, indeed, in American life.

9. Id. at 945.
10. Id.
TEN ARGUMENTS AGAINST HATE-SPEECH REGULATION: HOW VALID?

by Richard Delgado1 and Jean Stefancic2

We’d like to thank the law school, the law review, and the sponsors of this event for bringing us here to this beautiful region and school. It’s a pleasure to be here—even if Jean is the only woman on the program and the two of us are the only identifiable representatives of modern leftist thought. On a panel packed with voices from the other side of the spectrum, we will take our place in the lineup as a vote of extraordinary confidence.

Beginning about twelve years ago, many American universities began noticing an upsurge in incidents of racial violence and name calling. These ranged from out and out violence—beatings, gay bashing, arson against buildings housing black fraternities—to taunts, name-calling and anonymous leaflets demanding that blacks and others “go home.” A national institute counts over 200 campuses where incidents severe enough to make the news have occurred, and estimates that the average black undergraduate is victimized by hate speech at least twice during four years on campus. The increase seems to be real and not the product of increased sensitivity or better reporting. It comes at a time when many Western nations are reporting an upsurge of anti-Semitism, hate propa-

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The reader interested in an overview of our work in this area may wish to examine MUST WE DEFEND NAZIS? HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT (NYU Press, forthcoming 1996).
ganda, and attacks on immigrants. In the U.S., the upsurge corresponds with increased social unrest and competition over changing job markets, exactly as social science would predict.

Can campuses do anything about this—about the invective part, at any rate? Until fairly recently, the answer would have been no. But First Amendment legal realism, now belatedly appearing, suggests otherwise. First Amendment legal realism, which includes such well known legal scholars as Mark Tushnet, Jack Balkin, and a host of Critical Race theorists, is casting aside tired maxims and ancient shibboleths such as no content regulation, the best cure for bad speech is more speech, and so on, and looking instead to purpose, effect, context, and class and self interest, and turning to social science and communication theory to understand how speech really works. One realist observation, from Mark Tushnet, holds that private action, such as hate speech and hate crime, is today a more serious threat to liberty and well-being than the hobgoblin of former years, the censor. Activist courts that today reach out to strike down campus hate-speech rules enacted by communities who wish, for educational reasons, to govern themselves that way, are an example of a second realist insight—this one from Jack Balkin, namely ideological drift—the notion that a principle like the First Amendment over time can switch places so that it becomes a protector of privilege and a refuge for scoundrels. Many in the ACLU have resisted the implications of these two trends, although they cannot do so much longer. A number of breakaway chapters have chosen to endorse civil rights and hate-speech rules in defiance of the national organization’s policy; and of course, every time they defend a prominent Nazi they lose a thousand members, a rate they cannot keep up for long.

A third realist observation provides the occasion for this talk, namely that now that various clichés and conversation-ending maxims such as no-content discrimination are passing into history, issues of speech regulation will be decided on the basis of policy, or as a great judge once said, experience, not logic.

Everyone—outside the conservative judiciary, at any rate—realizes this, so that today even defenders of the current regime are beginning to hedge their bets and argue that even if hate-speech rules are constitution-al, they are a bad idea and campuses and other social institutions should abjure them. We will discuss ten such arguments and show why they are not valid. These arguments fall into three groups. Jean will discuss ones associated with our liberal friends; I will take up a group associated with
the neoconservative, sometimes called the “toughlove” school. At the end JEAN will return to discuss a final series of objections dealing with administrability. It’s worth repeating that our talk deals with arguments against regulation, with the aim of showing they are invalid. Today, we shall not be making an affirmative case for hate-speech rules. We’ve already made that argument; it’s in print; and if you are interested you can read it. Today, we deal with objections to our position that there should be rules against hate speech.

Now consider three paternalistic justifications for opposing hate-speech rules:

(1) Permitting racists to utter racist insults allows them to blow off steam harmlessly. Minorities accordingly are safer than they would be under a regime of antiracism rules. We will refer to this as the “pressure valve” argument.

(2) Free speech has been minorities’ best friend. Persons interested in achieving reform, such as minorities, should resist placing any fetters on freedom of expression. This we term the “best friend” objection.

(3) More speech—talking back to the bigot—rather than regulation is the solution to racist speech. Racism is a form of ignorance: dispelling it through reasoned argument is the only way to get at its root. Talking back to the aggressor also is empowering. It reduces victimization, strengthens one’s own identity, and reinforces pride in one’s heritage. This we call the “talk back” argument.

Each of these arguments is paternalistic, as we mentioned, invoking the interest of the group seeking protection. Each is seriously flawed; indeed, the situation is often the opposite of what its proponents understand it to be. Let us examine these arguments in detail.

1. The Pressure Valve Argument

The pressure valve argument holds that rules prohibiting hate speech are unwise because they increase minorities’ jeopardy. Forcing racists to bottle up their emotions means that they will be more likely to say or do something hurtful later. Free speech serves as a pressure valve, allowing tension to dissipate before it reaches a dangerous level. If minorities understood this, the argument goes, they would reject antiracism rules. The argument is paternalistic; it says the rules, which you think will help
you, will only make matters worse. If minorities knew this, they would join in opposing them.

How valid is this argument? Hate speech may well make the speaker feel better, but it does not make the victim safer. On the contrary, psychological evidence shows that permitting one person to say or do hateful things to another increases, rather than decreases, the chance that he or she will do so again. Moreover, others may come to believe that they may follow suit. We are not mechanical objects. Our behavior is more complex than the laws of physics that describe pressure valves, tanks, and such other mechanical things. Unlike them, we use symbols to construct our social world, a world that contains categories and expectations for "black," "woman," "child," "teacher," "inner-city gang member," and so on. Once these categories are in place, they govern perception. They also govern the way we speak and act toward members of those groups in the future.

Even barnyard animals act on the basis of categories. Poultry farmers know a chicken with a speck of blood may be pecked to death by the others. With chickens, of course, the categories are neural, functioning at a level more basic than language. But social science experiments show that the way we categorize others radically affects our treatment of them. A school teacher's famous "blue eyes/brown eyes" experiment showed that even a one-day assignment of stigma can drastically alter behavior and performance. At Stanford University, Phillip Zimbardo assigned students to the roles of prisoner and prison guard, but was forced to discontinue the study when some of the participants began taking their assignment too seriously. And Diane Sculley's interviews with male sexual offenders in her 1990 book Understanding Sexual Violence showed that many did not see themselves as criminals at all since they considered women fair game. At Yale University, Stanley Milgram showed that many subjects could be induced to act in ways that violated social norms if an authority figure ordered them to do so and assured them it was safe.

Allowing persons to stigmatize or revile others thus makes them more aggressive, not less so. Once the speaker comes to think of another as a deserved-victim, his or her behavior may easily escalate to bullying and physical violence. Stereotypical treatment also tends to generalize—what we do teaches others that they may do so as well. Pressure valves may be safer after letting off steam, but human beings are not.
2. Free Speech as Minorities’ Best Friend

Many liberals argue that the First Amendment historically has been a great friend and ally of social reformers. The national president of the ACLU, for example, argues that without free speech Martin Luther King, Jr. could not have changed America as he did. And so for the environmental movement, women’s rights, gay liberation, and so on. This argument is paternalistic, based on the supposed best interest of minorities. If they understood this best interest, the argument goes, they would not ask to bridle speech.

The argument oversimplifies the history of the relationship between racial minorities and the First Amendment. In fact, minorities often have made greatest progress when they acted in defiance of that amendment. The original Constitution protected slavery in several provisions, while the First Amendment existed alongside that institution for nearly 100 years. Free speech for slaves, women, and other outsiders was simply not a significant concern for the drafters, who appear to have thought of the First Amendment primarily as a source of protection for the kind of refined political and artistic discourse they and their class enjoyed.

Even later, when abolitionism and civil rights activism broke out, examination of the role of speech in reform movements shows that the relationship of the First Amendment to social advance is not so straightforward as First Amendment absolutists maintain. In the 1960s, for example, Martin Luther King, Jr. and others did use speech to kindle America’s conscience. But as often as not, the First Amendment (as then understood) did not protect them. They rallied, were arrested and convicted; sat in, were arrested and convicted; marched, were arrested and convicted. Their speech was deemed too forceful, too disruptive. Many years later their convictions might be reversed on appeal, at the cost of thousands of dollars and a great deal of gallant lawyering. But the First Amendment as then understood helped much less than we like to think.

Narrative theory shows how this happens: we interpret new stories in terms of the old ones we have internalized and that form our current reality. When new stories deviate too drastically from those that make up our present understanding, we reject them as false and dangerous. Free speech is useful mainly for solving small, clearly bounded disputes; it is much less useful for redressing systemic evils, such as racism, that are deeply inscribed in our current paradigm. Language requires a set of shared meanings that a group agrees to attach to words and terms. If
racism is deeply embedded in that paradigm—incorporated into a thousand scripts, stories, jokes, and roles—one cannot speak out against it without appearing incoherent or ridiculous.

The landscape of current First Amendment exceptions betrays these forces in operation. Our system has carved out or tolerated dozens of "exceptions" to free speech: official secrets; libel; conspiracy; plagiarism; copyright; misleading advertising; words of threat; disrespectful words uttered to a judge, teacher, or other authority figure; and many others. These exceptions, enacted at the insistence of a powerful group, seem familiar and acceptable, as indeed perhaps they are. But the idea of a new exception to protect some of the most defenseless members of society, young minority undergraduates at predominantly white campuses, produces consternation: the First Amendment must be a seamless web.

But it is we who are caught in a web—the web of the familiar. The First Amendment seems to us commonplace, useful, and valuable. It reflects our sense of the world, allows us to make distinctions, tolerates exceptions, and gets things done in a way we assume will be equally valuable for others. But the history of the First Amendment, as well as the landscape of current exceptions, shows that it is much more valuable to the majority than to the minority, more useful for confining change than propelling it.

3. The "More Speech" Argument

Some First Amendment purists argue that minorities should talk back to the aggressor. For example, Nat Hentoff writes that antiracism rules teach people of color to depend on whites for protection, while talking back emphasizes self-reliance and strengthens one's self-image as an active agent in charge of one's own destiny. The talk-back approach draws force from the First Amendment principle of "more speech," according to which additional discussion is always a preferred response to a message some listener finds troubling. Hentoff and others oppose hate-speech rules, then, not so much because they limit speech, but because they believe minorities should learn to speak out. A few offer another advantage: a minority who speaks out will be able to educate the utterer of a racially hurtful remark. Racism is the product of ignorance and fear. If a victim of racist hate speech explains matters, she may alter the speaker's perception so he or she no longer will utter racist remarks.
Like many paternalistic arguments, this one is offered virtually as an article of faith. In the nature of paternalism, those who offer the argument are in a position of power. They believe themselves able to make things so merely by asserting them. They rarely offer empirical proof of their argument, because none is needed. The social world is as they say because it is theirs: they created it that way.

Unfortunately, things are not as asserted. Those who hurl racial epithets do so because they feel empowered to do so. One who talks back is seen as issuing a direct challenge to that power. Often racist remarks are delivered in several-on-one situations in which responding in kind would be foolhardy. Indeed, many cases of racial homicide began in just this way: a group badgered a black person; the black talked back; and paid with his life. Other racist remarks are uttered in a cowardly fashion, by means of graffiti scrawled on a campus wall under cover of darkness, or by a flyer placed outside a black student's door. In these situations, more speech is simply unfeasible.

Racist vitriol is rarely a mistake that could be corrected or countered by discussion. How could one respond to: "N____, go back to Africa. You don't belong at the university"? Would one say: "Sir, you do not understand. According to prevailing ethics and constitutional interpretation I, an African American, am of equal dignity and entitled to attend this university in the same manner as others. Now that I have explained this, will you please modify your remarks in the future?"

The notion that talking back is safe for the victim or educative for the racist is deeply fallacious. It ignores the power dimension to racist remarks, requires minorities to run very considerable risks, and treats a hateful message as an invitation for discussion. Even when successful, talking back is a burden. Why should minority undergraduates, already burdened with their own educational responsibilities, be charged with educating others?

The three paternalistic arguments do not survive analysis. Neither current doctrine nor liberal policies pertaining to minorities' well-being dictate that there should not be antiracism rules. Could there be other reasons—perhaps associated with the conservative camp? A second group of arguments all concern the idea of victimization and tend to be associated with neoconservatives, including some of color.
Many such writers argue that mobilizing against hate speech is a waste of precious time and resources. Donald Lively, for example, urges that civil rights leaders should have better things to do. Concentrating on hate-speech reform, he writes, is myopic and able, at best, to benefit only a small number of minority persons. Instead of "picking relatively small fights of their own convenience," reformers should be examining "the obstacles that truly impede" racial progress, namely inadequate legal doctrine and financial savvy. Dinesh D’Souza writes that campus radicals champion hate-speech regulation because it is easier than working hard and getting a first-rate education. Henry Louis Gates wonders why this minor issue attracts the attention of so many academics when so much more serious work remains to be done.

But is it so clear that working to control hate speech is a waste of time and resources? What neoconservative writers may neglect is that eliminating hate speech goes hand in hand with combating what they call "real racism." Certainly, being the victim of hate speech is a less serious misfortune than being denied a job, a mortgage, or an educational opportunity. But it is equally true that a society that speaks and thinks of minorities disparagingly is tolerating an environment in which these more active forms of discrimination will occur frequently. First, hate speech, acting in concert with a panoply of media imagery, constructs and reinforces a picture of minorities in the mind of the public. This picture or stereotype, which varies from era to era, is rarely positive: minorities are happy and carefree, oversexed, criminal, treacherous, untrustworthy, immoral, stupid, and so on.

These stereotypes account for much misery in the lives of persons of color, including motorists who fail to stop to aid a stranded black driver, police officers who roust African-American youths innocently walking or talking to each other on the streets, or landlords who act on unarticulated feelings in renting an apartment to a white over an equally qualified black or Mexican. Once persons of color are rendered one-down in the minds of hundreds of actors, their victimization by what even the toughlove crowd would recognize as real discrimination increases in frequency. It also acquires the capacity to sting. A white motorist who suffers an epithet ("goddam Sunday driver!") may be momentarily stunned. But the epithet does not call upon an entire historical legacy the way a racial epithet does, nor deny the victim status and personhood.
A related reason why neoconservatives ought not throw their weight against hate-speech rules has to do with latter-day racism. Most neoconservatives, like many whites, think that acts of out-and-out discrimination are rare. The racism that remains is subtle, "institutional," "latter-day," lying in the arena of unarticulated feelings, practices, and patterns of behavior on the part of institutions and individuals. A focus on speech and language may be one of the few ways to address and cure this kind of racism. Thought and language are closely connected. A speaker asked to reconsider his or her use of language may for the first time reflect on the way he or she thinks about a subject. Our choice of word, metaphor, or image betrays the attitude we have about a person or subject. No better tool than a focus on language exists to deal with this form of subtle or latter-day racism. Since neoconservatives are among the leading proponents of the idea that this form of racism is the only one that remains, they should think carefully before opposing measures that might curb it. Of course, speech codes would not reach every form of disparaging speech or depiction. But a tool's unsuitability to redress every aspect of a problem is surely no reason to refuse to deploy it where it is effective.

Neoconservatives similarly argue against hate-speech regulation on the basis that the effort is quixotic or disingenuous. Lively, for example, writes that the Supreme Court consistently has rejected laws regulating speech on grounds of vagueness and overbreadth. He also writes that the campaign lacks a sense of "marketability"—the American people simply will not buy it. Gates asks how hate-speech activists can believe that campus regulations will be effective. If campuses are the seething masses of racism activists believe, how will administrators provide fair hearings under the codes? Elsewhere he accuses the hate-speech activists of pressing claims for "symbolic" reasons, while ignoring that the free-speech side has a valid concern over symbolism, too.

But is the effort to curb hate speech quixotic or disingenuous? If the gains to be reaped were potentially only slight, maybe so. But, as we have argued, they are not: our entire structure of civil rights laws and rules depends for its efficacy on controlling the background of pernicious depiction against which the rules and practices operate. In a setting where minorities are thought and spoken of respectfully, few acts of out-and-out discrimination would occur. In one that constantly stigmatizes and de-means them, even a determined judiciary will be hard pressed to enforce equality and racial justice.
Furthermore, success is much more within reach than the toughlove crowd acknowledges. A host of Western democracies have instituted laws against hate speech and hate crime. Some, like Sweden, Great Britain, and Canada, have traditions of respect for free inquiry rivaling ours. In recent years, several hundred college campuses have instituted student conduct codes penalizing face-to-face racial insults, many in order to advance interests the campus saw as necessary to its function, including protecting diversity or providing an environment conducive to learning. Powerful actors like government agencies, the writers’ lobby, industries, and so on have always been successful at coining free speech “exceptions” to suit their interest—copyright, false advertising, words of threat, defamation, libel, plagiarism, words of monopoly, and many others. But the strength of the interest behind these exceptions seems no less than that of a black undergraduate subjected to vicious abuse while walking late at night on campus. New regulation is of course examined skeptically in our laissez-faire age. But the history of free speech doctrine, and especially the careers of the many “exceptions,” shows that need and policy have a way of being converted into law. The same may well happen with the hate-speech movement.

5. The Bellwether Argument

A further argument is that hate speech should not be driven underground but allowed to remain out in the open. The racist who one does not know, it is argued, is more dangerous than the one who one does. Moreover, on a college campus, incidents of racism or sexism can serve as useful spurs for discussion and self-examination. Steve Carter writes that regulating racist speech will leave minorities little better off than they are now, while screening out “hard truths about the way many white people look at . . . us.” D’Souza echoes this argument when he points out that hate-speech crusaders miss a valuable opportunity. When racist graffiti or fraternity parties proliferate, minorities should reflect on the possibility this may indicate a basic problem with affirmative action itself. An editor of Southern California Law Review considers antiracism rules tantamount to “sweeping the problem under the rug,” while “keeping the problem in the public spotlight . . . enables members [of the university community] to attack it when it surfaces.”

How should we see this argument? In one respect, it does make a valid point: the racist who is known, in most cases, is less dangerous than the
one who is not. What the argument ignores is that there is a third alternative—the racist who is cured or at least deterred by official rules and policies from exhibiting the behavior he or she once did. Since most conservatives believe that laws and penalties do change conduct—indeed are among the strongest proponents of heavy penalties for crime—they ought to concede that campus guidelines against hate speech and assault would decrease those behaviors. Of course, regulation has costs of its own—something even we would concede—but this is a different argument from the bellwether one.

Other neoconservatives argue that silencing the racist might deprive the campus of the “town hall” opportunity to discuss and analyze issues of race when racist incidents come to light. But campuses could hold those discussions anyway. Even the best-drafted rules will not suppress hate speech entirely; there will continue to be some incidents of racist speech and behavior. The difference is that now there may be campus disciplinary hearings, which virtually guarantee the “town hall” discussions the argument assumes desirable. Because the bellwether argument ignores that rules will have at least some deterrent effect and that there are other means of assuring campuswide discussions short of allowing racial invective to flourish, the argument deserves little weight.

6. Victimization

Another objection many neoconservatives raise is that prohibitions against verbal abuse encourage minorities to see themselves as victims. Instead of rushing to campus authorities every time something wounds their feelings, minority group persons ought to learn either to speak back or ignore the offensive behavior. A system of rules and hearings reinforces that they are weak, that their lot in life is to be victimized rather than assertive. Carter writes that anti-hate-speech rules are the special favorite of those “whose backgrounds of oppression make them especially sensitive to the threatening nuances that lurk behind racist sentiment.” Lively warns that these rules end up reinforcing a system of “supplication and self-abasement,” D’Souza that they prevent interracial friendships and encourage a “crybaby” attitude; Gates that they reinforce a “therapeutic” mentality and an excessive preoccupation with feelings.

Would hate-speech rules have these dire effects? Not at all—in part because other alternatives will remain as before. No African American or
A gay student is required to file a complaint when targeted by verbal abuse. He or she can always talk back or ignore it if he or she prefers. Hate-speech rules simply provide one more avenue of recourse for those who wish to take advantage of them. Filing a complaint might even be considered one way of taking charge of one's destiny: One is active, instead of passively "lumping it" when racial invective strikes. Notice that we do not raise the "victimization" issue with other offenses we suffer, such as having a car stolen or a house burglarized. Nor do we encourage those victimized by these crimes to "rise above it" or talk back to their victimizer. Might it be because we secretly believe that a black who is called "n____" by a group of whites is in reality not a victim? If so, it would make sense to encourage him not to dwell on the event. But this is different from saying that filing a complaint increases victimization. Moreover, it is simply untrue: filing a civil rights complaint does not cause otherwise innocuous behavior to acquire the capacity to harm.

A related neoconservative argument is that hate-speech rules are injurious to other values that we hold, such as equal treatment of offenders. The rules will end up punishing only what ignorant or blue-collar students do and say. Refined, but much more devastating expressions of contempt of the more highly educated will go unpunished. Henry Louis Gates gives the following comparison:

(A) LeVon, if you find yourself struggling in your classes here, you should realize it isn't your fault. It's simply that you're the beneficiary of a disruptive policy of affirmative action that places underqualified, underprepared and often undertalented black students in demanding educational environments like this one. The policy's egalitarian aims may be well-intentioned, but given the fact that aptitude tests place African Americans almost a full standard deviation below the mean, even controlling for socioeconomic disparities, they are also profoundly misguided. The truth is, you probably don't belong here, and your college experience will be a long downhill slide.

(B) Out of my face, jungle bunny.

Lively and D'Souza make versions of the same argument.

In one respect, the classist argument is plainly wrong. Both blue-collar and upper-class members of the campus community will be prohibited from uttering racial slurs and epithets. Most hate-speech codes penalize serious face-to-face insults based on race, ethnicity, and a few other factors. They thus penalize the same harmful speech—for example,
“N____, go home; you don’t belong at this university”—whether spoken by the billionaire’s son or the coal miner’s daughter. If the prep school product is less likely to speak words of this kind, or to utter only intellectualized versions like those in Gates’ example, this may be because he is less racist in a raw sense. Many social scientists believe prejudice tends to be inversely correlated with educational level and social position; the wealthy and well educated may well violate hate-speech rules less often than others do. And, as for Gates’ example, there is a difference between his two illustrations, although not in the direction he suggests. “Out of my face, jungle bunny” is a more serious case of hate speech because (1) it is not open to argument or a more-speech response; and (2) it bears overtones of a direct physical threat. The “LeVon” example, deplorable as it is, is answerable by more speech and contains no element of threat.

7. Two Wrongs Don’t Make a Right

A final neoconservative argument holds that hate speech may be wrong but prohibition is not the way to deal with it. Gates, for example, warns that two wrongs do not make a right and laments that our legal system seems to have abandoned Henry Kalven’s ideal of civil rights and civil liberties as perfectly compatible goods for all. Lively writes that campaigns to limit speech end up backfiring against minorities because free speech is a vital good and even more essential for minorities than others.

But we routinely deploy prohibitory rules in connection with dozens of other kinds of speech we have decided we don’t like, ranging from disrespectful speech to an authority figure, to shouting fire in a crowded theatre and many others. Regulation always has costs. But it also has benefits—symbolic as well as real. The same should be true of hate-speech rules. It’s worth noting that the most common alternative conservatives tout—more speech—has costs, too. The black undergraduate called a n____ as he walks home from the library late at night by five toughs—and who then talks back to his offenders—may end up severely beaten. Talking back later, such as through a letter to the editor or a campus forum, does not correct the actual offenders. Besides, as we noted, why should minority or gay undergraduates or women, already saddled with the demands of their own education, be charged with constantly going around educating others?
Like the liberal arguments, none of the neoconservative ones stands as an obstacle in the way of enacting hate-speech rules. A final group of arguments concerns administrability and is not associated with any particular position. These objections all have to do with the effectuation of hate-speech rules. How would they work? Would they work too well—turn out to be boundless in their reach? Who would enforce the rules, and what would prevent that person or body from becoming a censor who seizes upon every caustic or off-color remark so that campus discourse becomes cautious and lifeless? Each of these objections reveals a degree of result-orientation, fear of the new, and distrust of those (mainly people of color) who might take advantage of the rules.

8. Where Would We Draw the Line?

Take the drawing-the-line argument first. It is no doubt true that a rule that penalizes on-campus hurling of face-to-face racial slurs would require some line drawing. What does on-campus mean? Is an epithet hurled at three African-American students from twenty feet away “face-to-face”? Is water buffalo, or honkey, or dumb baboon, a racial slur? These are indeed difficulties but they are no greater than those attending other, long-accepted doctrines that limit speech we do not like, such as libel, defamation, plagiarism, copyright, threat, and so on. Our system of law has opted for a regime of simply stated rules, trading the benefit of certainty in core cases in return for a degree of uncertainty at the periphery. Everyone knows what a clear-cut case of plagiarism looks like; at the margin we are less sure. Hate-speech rules should be no different.

9. Reverse Enforcement

The same is true with reverse enforcement. Some authorities may indeed begin charging black students with hate speech directed against whites. But the American experience with hate-speech rules shows that this is not a major concern, nor is it in most Western countries with a liberal tradition. If reverse enforcement occasionally happens, it is not necessarily a bad thing—if in fact the black or Mexican has harassed or terrorized a fellow student who is white or Asian. If the fear is that college deans and other administrative officers are so racist that they will invent or magnify charges against minority students in order to punish or
expel them from campus, this is entirely implausible. Figures from *U.S. News and World* report show that college administrators and faculty harbor less anti-black animus than the average American, even than the average college student. Indeed, it is the very concern of campus administrators over dwindling black numbers that underlies enactment of most hate-speech rules.

10. **Chilling and Censoring**

A final version of the administrability fear is that whoever is put in charge of enforcing hate-speech rules will overdo it in the *opposite* direction—will grab power and begin extending the crusade into areas such as classroom speech or editorials in the campus newspaper where speech ought to be free. With properly drafted hate-speech rules this expansion should not occur and appears not to be occurring. Like other Western societies that have enacted hate-speech rules, campuses do not report a lessening of respect for free speech and inquiry. Indeed, minorities and political dissidents feel *freer* to speak, attend school, and otherwise participate in public life. The level of dialogue goes up not down.

There seems to be little good reason, either in constitutional law or in social policy, not to enact rules against vicious face-to-face hate speech that disparages members of the campus community based on unalterable characteristics going to their deepest identity. Most campus administrators favor these rules, realizing that they are an important part of preserving a campus atmosphere of respect for all. The most common objections to these rules are easily answered. Every one of the twenty or thirty exceptions to free speech now on the books is capable of being wielded heavy-handedly. That has not prevented us from maintaining and refining rules such as libel, official secrets, assault, threat, plagiarism, copyright, and many more—rules that we have collectively decided advance important non-speech objectives such as privacy, dignity, property, or personal security. The basic values of human decency and equal respect that underlie our civil rights heritage are surely more than sufficient basis for a further limited exception. The right of the bigot to spew racial venom, like your right to punch your fist into my nose, must yield in the face of these other interests. Canada, Sweden, France, Italy, Germany, and many other societies have come to the same conclusions. Anti-hate-speech rules are desirable, necessary, and not at all inconsistent with a spirit of free inquiry. Indeed, for the reasons we mentioned they may be necessary for
its full effectuation and flowering. Thank you very much.
THE CONSTITUTIONAL STATUS OF HATE SPEECH: COMMENTS ON DELGADO AND STEFANCIC

by Richard B. Saphire

In its 1969 decision *Brandenburg v. Ohio*, the United States Supreme Court overturned a conviction under Ohio's criminal syndicalism law of a member of the Ku Klux Klan. *Brandenburg* is considered one of the Court's most significant free speech cases in the modern era. It represented one of the Court's most resounding statements about the importance of free speech, and made clear that, for the government to (criminally) sanction speech, it had to overcome the very difficult burden of proving that the speech would clearly and directly lead to "imminent lawless action."2

While *Brandenburg*’s legacy — the notion that the government must have very powerful reasons to regulate or sanction speech — represents what many lawyers and scholars take to be one of the most important and laudable features of our modern first amendment jurisprudence, there is another, less frequently noted aspect of *Brandenburg* that deserves mention: the precise nature of the speech that provided the context for the Court's decision. The defendant, along with others who wore hoods, gathered in the countryside outside Cincinnati to burn a cross. Among the words uttered by the defendant were the following: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel."3 Among the other words uttered by defendant and his cohorts were the

1. Professor of Law, University of Dayton School of Law. I was invited to prepare these comments responding to papers to be presented by Richard Delgado and Jean Stefancic as part of the symposium on "Political Correctness in the 1990s and Beyond" which was sponsored by the Northern Kentucky Law Review on March 30, 1996. Unfortunately, I did not receive a copy of the Delgado-Stefancic contribution to the symposium before March 30. Therefore, my comments represent an effort to respond to the general position on hate speech that Delgado and Stefancic have taken in earlier work, some of which is cited in the footnotes to my comments. As far as I can tell, their oral presentations at the symposium largely repeated arguments they have made elsewhere and broke no new ground. I wish to thank David Goldberger and Kim O’Leary for commenting on an earlier draft of this paper.
2. *Id.* at 449.
3. *Id.* at 447.
following: “How far is the nigger going to [go]”; “let’s give them back to the dark garden”; and references to “a dirty nigger.” In upholding the defendant’s First Amendment challenge to his conviction, the Court said not one word that would suggest that the hateful, racist nature of the language used by the defendant in any way made his free speech claim problematic or controversial. In essence, the Court assumed that the language was, all things else being equal, fully entitled to claim the protection of our Constitution.

There have, of course, been other, more recent cases in the Supreme Court, as well as the lower federal and state courts, which have questioned the constitutional status of the sort of speech at issue in Brandenburg. As a general matter, I read these cases to provide fairly strong support for the proposition assumed by the Court in 1969: that the government cannot, at least without powerful justification that it will seldom be able to provide, prohibit or punish people for uttering words that most of our society would find detestable, despicable, and even painful — at least where the reasons for regulating are based upon society’s, or a particular group’s or individual’s, general adverse reaction to the words. And this is true even though the reaction of some of us would go beyond disapproval and contempt to (for example) fear and even trauma.

What are we to make of this fact? Is a reading of our Constitution which takes it to extend some of the most serious protection it has to offer to speech which is almost universally condemned, and which is regarded by so many as harmful and destructive to some of our most important values and aspirations, something that we should regret or affirm? For Delgado and Stefancic, the answer to this question is both

4. Id. at 446 n.1. These words were among those captured on film taken of the Klan rally by a local television station which was introduced into evidence at the defendant’s trial.

5. I believe this is an accurate, general statement of First Amendment principles. I recognize that there are a number of circumstances in which the First Amendment would tolerate regulation of hate speech where, for example, it constituted “fighting words,” or was uttered in or to a “captive audience,” or where it constituted an assault, and the like. For a discussion of First Amendment principles which emphasizes these “exceptions” to the general principle, and which views the protected status of hate speech as much more tenuous than I have suggested, see Richard Delgado & David H. Yun, Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulations, 82 CAL. L. REV. 871 (1994)(hereinafter Paternalistic Objections).

6. One’s response to this question might well depend upon how “we” is defined. As I will note, that this definitional question must be taken seriously in how we think about these questions is one of the most important and valuable insights of the work of Delgado, Stefancic, and other prominent defenders of hate speech regulations.
clear and unequivocal. They believe that hate speech is devoid of any value in First Amendment terms and that the failure of so many to understand and accept this fact reflects a number of flaws in, and limitations of, the world view, and even the character, of those who would protect it. Thus, with impressive vigor, passion and frequency, they have defended, on both constitutional and policy grounds, the power of government officials — especially those in charge of public colleges and universities — to enact hate speech regulations.

Others, perhaps the principal example being the American Civil Liberties Union, have a different view which seems equally clear and unequivocal: while condemning "the ideas expressed by racist and other anti-civil libertarian speakers," the ACLU "defends their right to utter them." They have, with vigor, passion, and frequency which equals or surpasses that of Delgado and Stefancic, defended, against the regulatory efforts of university and other public officials, the First Amendment rights of hate-mongers and racists.

Unlike Delgado and Stefancic and some of those whom they criticize, my own view of the matter is, I'm afraid, characterized by a dash of ambiguity and even a dose of self-doubt. What follows will represent what is quite likely to be an incomplete and not entirely satisfactory effort to state my position on the question of hate speech, as well as the reason for it.


9. The term "hate speech" is, of course, a controversial and contested one. See Henry Louis Gates, *Let Them Talk*, NEW REPUBLIC, Sept. 20 & 27, 1993, at 37 ("the phrase 'hate speech' is ideology in spansule form"); id. (referring to the phrase "hate speech" as "allud[ing] to an argument instead of making it"). Thus, one's assessment of hate speech is likely to depend on what one understands to be included within its ambit. When I use the term "hate speech," I will refer to speech, usually consisting of epithets, which demeans or denigrates a person on the basis of race, religion, ethnicity, gender, or sexual orientation. For similar definitions, see Robert A. Sedler, The Unconstitutionality of Campus Bans on "Racist Speech": The View From Without and Within, 53 U. PITTSBURGH L. REV. 631 (1992); Larry Alexander, Banning Hate Speech and the Sticks and Stones Defense, 13 CONST. COMM. 71 (1996).
sons for, and the way I hold, that position.

II

In as succinct a way as possible, let me state my view on hate speech and its regulation. As to hate speech itself, I am against it. I believe that it is reprehensible, evil, harmful, and (at least potentially) destructive of the sort of political and moral community that America ought to be. I concede there is considerable force to their arguments. But, as to the question of whether the Constitution ought to be construed to protect a right to utter the words that constitute hate speech, I believe that the answer is that it should. As a general matter, I believe that the power of the government to regulate hate speech ought to be subject to significant constitutional limitations — limitations which should seriously constrain the power of university officials and others to enact the sort of speech codes which Delgado and Stefancic wish to defend. Finally, and for today’s purposes of considerable relevance, you should know this: I hold this constitutional view with considerable unease.

In an effort to identify the factors that probably have had the most significant influence on the development of my views about hate speech, I have (thus far) been able to identify three. In what is probably the right chronological order of these influences on my thinking, they are (1) the fact that I am Jewish; (2) the fact that I am a lawyer and a law professor, and (3) the fact that, for almost twenty years, I have been an active civil liberties lawyer, with about a dozen years of organizational involvement with the ACLU. (It should be noted, by way of disclaimer, that I am not now, nor have I been for almost ten years, organizationally active with the ACLU. That is, while I continue to be a cooperating lawyer with the ACLU, I am not involved with its policymaking processes. I therefore do not purport to speak for the organization. Indeed, in some ways I find it somewhat odd to be speaking on the topic of hate speech at a conference which includes among its speakers my good friend David Goldberger, whose involvement with the issue, both as the plaintiff’s lawyer in the Skokie case, and then as General Counsel for the ACLU of Ohio, has been more intense and direct than my own.)

10. Whether it is the words that constitute hate speech which are, or which lead to, these things, or the ideas or beliefs which the words are intended and/or understood to communicate, is, as Larry Alexander has recently argued, an important and controversial question. Alexander, supra note 10.
Let me say something about each of these influences on my thinking. The first is my Jewishness. I confess to having relatively few memories of my childhood, but my recollections of the intensely religious dimensions of my upbringing are quite strong. I lived in a community which was largely middle and upper-middle class, and which was ethnically and religiously mixed. I went to public schools, where my small circle of friends tended to be primarily Jewish, in a school system that was probably ten to fifteen percent Jewish. One of the most vivid memories of my adolescence is the fact that I was almost constantly the subject of threats and harassment visited upon me by a group of “tough-guys” and bullies. I can remember walking down the hallways or on the playground at school and being confronted by these guys. But it was not the actual fear of physical violence that now sticks out in my mind; it is the fact that every time I encountered these bullies, they would precipitate or embellish their menacing conduct with the taunt of “kike” or “dirty Jew.” I can recall how vulnerable and frightened I felt by the knowledge that among the things (if not the principal thing) that made me such an attractive target for the wrath of these ruffians was the fact that I was Jewish.

I think that this experience has helped me to appreciate the effect that vicious words and the thoughts which underlie them can have on the human psyche. (If I had been asked at the time whether I thought that my antagonists should be punished for their anti-Semitic taunts, I suspect I would have said yes.) While this experience was not an everyday occurrence.

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11. Lest anyone doubt this, consider the following reminder:
The namecalling started when Jamie Nabozny was in the seventh grade and just beginning to understand that he was gay and how hard being yourself can be.
Classmates in the halls of the Ashland, Wis., middle school near the banks of Lake Superior called him “sissy” and “queer” and “faggot.” But even though their words hurt, he said, he always knew there was nothing wrong with being gay.

He ignored the taunts the best he could. Almost everyone got teased about something, his mom told him ....

But in the next few years, the ugly words turned into kicks and punches. Once, he said, a group of boys surrounded him and performed a mock rape; another time he was shoved into a urinal and urinated on. Despite his complaints, his tormentors were never disciplined. His journey through high school became a daily battle for survival. After two suicide attempts, he dropped out in 1993 and moved to Minneapolis on his own.

“He was only 17 when he left home,” his mother, Carol said. “Letting him go was the hardest thing I’ve ever had to do as a parent. But we had to do something, because we knew we were going to lose this kid, either by him running away or by suicide.”

Don Terry, Suit Says Schools Failed to Protect a Gay Student, N.Y. TIMES, Mar. 29, 1996, at A8.

12. I suppose it is possible that this speculative, although probably accurate, “concession” could fairly be used to provide support for the pro-regulation position. That is, one could
currence in my life, neither has it been isolated. As a college student, and then as a young adult, I was the target of anti-Semitic speech on numerous occasions. Also my years of active involvement in the Jewish communities in the places in which I have lived — including relatively recent participation in efforts to develop community responses to anti-Semitic graffiti placed on synagogues and Jewish communal centers — have served to reinforce and emphasize my sense of the destructive force of hatred and bigotry. And overlaying these personal experiences has been the constant companion of every contemporary Jew — the legacy of the Holocaust. It is difficult for any Jew to be oblivious to the harms that hate can cause.\(^\text{13}\)

The second influence on my thinking about hate speech has been my acculturation into the law. My experiences as a law student can easily be dismissed. I suspect that we covered the First Amendment in my first year course in constitutional law, but I have no first-hand recollection of that fact. In any event, my legal education occurred well before Skokie, the event that probably did the most to raise a “hate speech” issue in the first place. But my years as a law professor have provided me with many occasions to consider the problem. My academic approach to law in general, and to constitutional law in particular (much to the lament of many of my past and current students), has been fairly conceptual or theoretical. For example, in my constitutional law course, I emphasize considerations of interpretive methodology and institutional roles even more than I do substantive principles and doctrine. In my approach to the First Amendment, I begin by exposing my students to the range of values and functions that have been thought to underlie a regime of freedom of expression, and urge them to consider discrete First Amendment issues like obscenity, defamation, and hate speech in light of these values and

suggest that I can afford the luxury of taking an abstractly attractive, purist view of the First Amendment in large part because I have been able to escape my childhood status as the occasional target of hate speech. On the other hand, were I capable as a youth of the contextualizing and long-view perspectives that I possess as an adult — perspectives that are such an important part of first amendment theory — perhaps I would have perceived my interests differently.

\(^\text{13}\) The fact that Jews have borne the brunt of so much hatred and persecution might suggest that we would overwhelmingly be in favor of the regulation of hate speech. The ACLU’s experience with many of its Jewish members after the Skokie case suggests that many American Jews would be quite sympathetic to the Delgado-Stefancic position. What might well be more surprising is that so many Jews have opposed the pro-regulation position. \textit{See, e.g.}, A. Neier, \textit{supra} note 8; Strossen, \textit{supra} note 9, at 540 n. 283 (quoting Gerald Gunther as citing his experiences in Nazi Germany as part of the reason for opposing the regulation of hate speech).
functions. Students quickly become aware of the fact that when First Amendment values are conceptualized in fairly general terms, as I believe they should be, a presumption against the power to regulate any kind of speech can seem increasingly compelling.

This pedagogical approach to First Amendment jurisprudence reflects the way I have come to think about it outside the classroom, as both a scholar and a lawyer. And I think it has considerable value for helping students achieve a practical understanding of First Amendment principles, and the ability to effectively engage in constitutional advocacy and argument. I have also found, however, that this approach has certain limitations or drawbacks. For once students become convinced of the centrality of free speech to our system of government, once they have been forced to appreciate the significance of First Amendment values such as the search for truth, the marketplace of ideas, the importance of toleration and self-realization or autonomy, and the very notion of democratic self-government; once they have internalized the mantra of the First Amendment as it sings out from the classic opinions of Holmes and Brandeis and Harlan and Brennan; their thinking about free speech can become what I consider to be dangerously abstract. So, when it comes time to consider defamation or obscenity, many students seem to find it difficult to relate to the "harms" side of the First Amendment balance. (Is it really plausible to believe that obscenity can cause serious harms? Should injury to reputation really count as a serious problem and a legitimate governmental concern? Can a First Amendment jurisprudence which is sensitive to these considerations really perform the crucial systemic function which makes free speech so important?)

This problem of abstraction — a problem which I believe informs many of the pro-regulation arguments of scholars like Delgado and Stefancic — becomes especially pronounced when we get to the topic of hate speech. It is compounded by certain realities of the law school at which I teach. Clearly, those students who are in the best position to fully appreciate the harms associated with hate speech are the ones who have experienced it first hand — primarily students of color, gays and lesbians, and religious minorities. At my law school, however, stu-

14. Women, of course, have also been the victims of speech which is demeaning, insulting, and otherwise hurtful. But my experience is that the women in my classes are no less prone to the problem of First Amendment abstraction than are their male counterparts. I recognize that this may be attributable to a range of factors, not the least of which is their reluctance to report personal victimization by hate speech in a class, presided over by a male professor, a majority of whose students are male.
dents of color are in the distinct minority, and my sense is that there are relatively few religious minorities. I have no way, of course, of assessing the numbers of students who are gay, but a number of factors present at my school (not to mention in the broader society) suggest that gay students would be especially reluctant to report in class incidents of hate speech victimization.

Given these realities, I frequently find myself in the position of trying to combat the problem of abstraction by asking students to role play, or asking them to empathize with the litigants who bring hate speech complaints in the cases they read in their casebooks or that are reported in the media. I have also begun to incorporate into my materials some of the narrative scholarship of critical race scholars such as Delgado and Stefancic to provide students with at least second hand exposure to the points of view of hate speech victims. Ultimately, I ask my students to read a memorandum I have prepared in which I identify the abstraction problem and urge them not to lose sight of the fact that they have an obligation to recognize and accept responsibility for the positions they take and the arguments they make as lawyers, including responsibility for the injury that legal doctrine — regardless of how sound it may seem in theory or principle — can cause or tolerate in the lives of all of the litigants. Sometimes, this memo provokes a student to ask, “Precisely what is my responsibility in this regard?”, or “Can I help further the important values of free speech without being the instrument of harm?”, or “How can I minimize the harm that my legal arguments either create or tolerate?” These questions are among the most important and difficult ones I know of in the law, and there are no easy answers.

The third influence on my thinking about the hate speech problem is my experience as a civil liberties lawyer. I became active in the ACLU around the time that the Skokie controversy arose. I participated in many efforts to explain the ACLU’s position in Skokie to a variety of audiences, including a number of Jewish groups. I have also participated

15. If attendance at the Jewish Law Student Association meetings is a valid indicator, Jewish students at my law school compose less than five percent of the student body. I am also unaware of any more-than-token members of other religious minority groups.

16. The University of Dayton School of Law does not have a gay and/or lesbian student organization. I suspect that any effort to start one, in the context of a school affiliated with the Catholic Church, would be greeted with considerable controversy.

17. My colleague, Vernellia Randall, has also participated in some of these classes and has provided valuable insights from her personal experiences and world view as an African American.

over the years in a variety of policy debates within the ACLU about hate speech, and I have been involved in litigation on the issue. I have witnessed first hand how difficult it is to persuade people to take seriously a notion that is central to our First Amendment jurisprudence, and one to which I am deeply committed: that the protection of speech for those whom we despise can further not only the interests of the speaker, but the interests of us all. I have had to confront the dilemma of reconciling my strong libertarian instincts about free speech with the prospects of representing a client whose ideas, beliefs, and expressive conduct I have found despicable.

Over these years, I have been convinced of the essential correctness of the anti-regulation position espoused by the ACLU and others. I am deeply concerned about ceding to the government the power to control how and what we can speak. I agree with Delgado and Stefancic that it may well be possible to overstate the steepness and the perils of the "slippery slope" which informs much modern Supreme Court doctrine protective of speech, as well as much of the ACLU’s opposition to hate speech regulation. But I also believe that the power to control what people can say is (or at least easily becomes) the power to control what people can believe, and that there is no power that is more destructive to the liberty and equality to which we all say we are committed.

Delgado and Stefancic have emphasized that, in a non-absolutist First Amendment world, at least some First Amendment exceptions must be recognized. They have also suggested that once one concedes that some (and perhaps many) harms justify the regulation of speech, one’s refusal to recognize an exception for the serious harms associated with hate speech represents either a fundamental ignorance of, or callous indifference to, the plight of the victims of racism, or worse. But the ACLU,

19. Delgado and Stefancic have argued that the experience of other countries has suggested "that limited regulation of hate speech does not invariably cause deterioration of the respect accorded free speech." Shifting Balance, supra note 9, at 742.

20. In his previous work, Delgado has raised questions about the motives or agendas of some (many?) of those in the anti-regulation camp. For example, he has argued that some of those who defend hate speakers, "including First Amendment purists, are guilty as well: insisting on free speech over all, as though no countervailing interests are at stake, and putting forward transparently paternalistic justifications for a regime in which hate speech flows freely." Paternalistic Objections, supra note 5, at 890. He has also suggested that "we must seriously entertain the possibility that low-grade racism benefits powerful whites, including the very ones who most sincerely deplore it and would themselves never utter a racist slur." Id. at 885. Elsewhere, he has written of the possibility that some who argue against hate speech regulations may, at least unconsciously, be motivated by the possibility that "low-grade racism and hassling on the nation’s campuses may even confer a benefit on the status quo." Loving Com-
which, after all, seems to be the principal antagonist of pro-regulation forces, has taken a very narrow view concerning the justification and appropriateness of First Amendment exceptions, a view much narrower than the one that has prevailed on the Supreme Court. In my judgment, its strong commitment to First Amendment principles has been entirely justified.

III

Let me conclude these remarks by trying, briefly, to tie together the three sets of experiences which I have identified as influences on my thinking about the problem of hate speech. Delgado and Stefancic (as well as other scholars who have written on the issue from a similar perspective, such as Charles Lawrence and Mari Matsuda) have provided a much-needed reminder that First Amendment jurisprudence is not “natural,” that it is socially constructed and reflects the experiences and world view of those who are responsible for its creation and superintendence. My experiences as a childhood victim of anti-Semitic epithets, taunts, and verbal harassment, and perhaps more indirectly, my more recent experience with strains of persistent and sometimes virulent anti-Semitism in America today, have helped me appreciate the importance of standpoint and perspective in the evaluation of the hate speech debate. I am not suggesting that my personal experiences have been the equivalent of those whose interests Delgado and Stefancic claim to defend — people of color and other minorities who attend largely white colleges and universities.21

21. There was a time, of course, when anti-Semitism on American campuses was considerably more pervasive and virulent that it appears to be today.

Recent discussions with my colleague Vernellia Randall have helped me appreciate the extent of the burden that hate speechon campusinflicts on many African-American students.
Nor do I claim that my personal experiences provide me any sort of privilege or license to speak on behalf of those people they claim are the victims of the anti-regulation position. To do so would indeed represent the sort of patronizing that they have so vigorously (and, in my view, importantly) condemned. But I believe that these experiences have made it more difficult than I suspect it might otherwise be for me to dismiss or undervalue the not insignificant costs that are associated with the anti-regulation position. Hate speech is not a problem whose resolution should be left exclusively to the realm of high First Amendment theory or theorists.

This leads me to the lessons drawn from my experience as a law professor, both as a teacher of law students and as a fairly voracious consumer of First Amendment scholarship. From this experience I have learned how easy it is for some to succumb to the problem of theoretical abstraction to which I earlier referred. While I just suggested that hate speech should not be left solely to the domain of First Amendment theorizing, I do not deny the relevance of theory to the creation of solutions to the hate speech dilemma. In an important sense, the First Amendment without animating theory would be a First Amendment not worth having. But a theory which is oblivious to the conditions and consequences of its own application is a theory not worth having. Anti-regulation proponents would do well not to lose sight of this fact.

These discussions help me better understand the “thought experiment” in which Delgado and Stefancic have challenged their readers to engage: “Imagine that one’s body were somehow magnetically charged. One would go through life astonished at how many metal filings there are in the world and how much we need a clean-up operation.” *Images of the Outsider*, supra note 8, at 1283. *See also* Sara Farr and Lisa Morawski, *Vigil Sheds Light on Cultures, Promotes Harmony*, *Flyer News*, Feb. 27, 1996, at 1 (describing recent hate speech incident at the University of Dayton and the campus’s (largely non-regulatory) response).

22. I should note my view that while it is certainly patronizing (as well as arrogant and presumptuous) to purport to speak for those who are willing and able to speak on their own behalf — to substitute one’s own perceptions and experiences about reality for those on behalf of whom one claims to speak — it is not patronizing (at least, not in the pejorative sense) to feel and express concern for the welfare of others and to respectfully disagree about how that welfare might best be achieved.

23. Among the lessons of First Amendment theory is that the impulse to suppress speech is quite strong, and that a “fortress-like” understanding of the amendment, even one which concededly overprotects speech, is necessary to wall off from easy reach potentially valuable speech that we might instinctively seek to suppress. Perhaps the best explication of this idea can be found in *Lee C. Bollinger, The Tolerant Society: Freedom of Speech and Extremist Speech in America* (1986). Bollinger does not suggest that the fortress model of the First Amendment is free of significant costs, among which is its reliance on abstractions and the risk of “introducing an unattractive elitist outlook into free speech thinking and analysis.” *Id.* at 101. This cost is, of course, especially relevant to the Delagado-Stefancic critique.
Both of these experiences incline me to take heed of the criticisms and warnings that Delgado and Stefancic have offered. Indeed, the sort of critique they have offered of the anti-regulation position has been a principal reason for the “uneasiness” that has characterized my anti-regulation inclinations. But while I regard their arguments as both important and powerful, I have not (yet) found them to be persuasive. For my experiences as a civil liberties lawyer have convinced me that the costs of drawing a hate speech exception to the First Amendment would not be justified by the costs such an exception would allow us to forgo.24 It is not that I believe that a recognition of such an exception would necessarily result in, for example, the return of McCarthyism and its loyalty oaths (although it might). Instead, my resistance to the Delgado-Stefancic position lies more in the suspicion that it is not the power to ban hate words which they are defending, but the power to control the beliefs and ideas which those words represent.

As Larry Alexander has recently noted, the First Amendment in general and the resistance to hate speech regulations in particular, are both based largely on a hunch. As Alexander puts it:

The operative hunch is that it is more prudent to disable our officials even where we are certain they are right than to license them to back up their certitude with bans on speech. It is in the end a gamble based on nothing more than a hunch, but that may be all that supports the first amendment and all the support it requires.25

The “hunch” that animates Delgado and Stefancic is that a hate speech exception to the First Amendment will do its intended beneficiaries, and the nation at large, much more good than harm. They believe that government officials and the courts can be trusted to make and administer fairly and responsibly one more exception to First Amendment protection — that there is little (or insufficient) reason to fear that such an exception will have perverse effects on the interests it would be designed to further, and that it would do little to diminish the ability of the First Amendment to do what they seem to concede is its valuable and essential work. My view about the benignness of such an exception — a view that has been informed by all of the experiences I have described — is considerably less optimistic. While Delgado and Stefancic have made me somewhat

24. At the risk of belaboring the point, I am painfully aware that this position is (much?) easier to defend when the forgone costs are paid disproportionately by others. I should also say that I am troubled by the idea that these costs are likely to be borne by those whose opportunities to get out from underneath them are seriously constrained.

more open to their position, they have not persuaded me to it.
“HATE-SPEECH” CODES AND “POLITICAL CORRECTNESS”: FRUIT OF “AFFIRMATIVE ACTION”

Lino A. Graglia

“Political correctness” is a pejorative phrase used to characterize and criticize a regime or atmosphere of repression. It refers to practices and policies that make the expression of certain views dangerous and costly. Paradoxically, political correctness exists most prominently and importantly in the university context, precisely where one would expect to see the greatest encouragement of open discussion of controversial issues. As Chester Finn, a leading scholar of American education, has put it, the American college campus has become “an island of repression in a sea of freedom.”

That efforts to suppress speech are real and serious at American colleges and universities, including many of the most prominent, is beyond doubt. In recent years, these institutions have suddenly discovered a need for the sanctioning of speech and expression of ideas that never existed before. They have responded to this need in a manner that one would have thought unimaginable given their former commitment to unrestricted freedom of expression. They have adopted open and explicit speech suppression measures in the form of “hate speech” and “anti-harassment” codes. The best known and best documented of these codes, typical of others, is the one adopted by the University of Michigan, the one first to be challenged in court and declared unconstitutional as violative of speech rights protected by the First Amendment. Almost as if it were meant as a parody rather than an expression of political correctness, the code prohibited: “Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicapped or Vietnam-era veteran status . . . .”

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2. Such behavior is prohibited when it
   a. Invokes an express or implied threat to an individual’s academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
   b. Has the purpose or reasonably foreseeable effect of interfering with an individual’s academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
   c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.
It is relevant to my thesis to note that the University of Michigan had earlier established a University Office of Affirmative Action, located, to indicate its importance, in the Office of the President of the University. Such offices have now existed for many years on all or nearly all major American institutions of higher education as well as throughout the business world. The existence of these offices provides a strong clue as to the origin of the sudden need for suppressive speech codes. Such offices will, almost by definition and as a job requirement, be staffed by persons who have raised sensitivity to supposed racial and other slights to new heights, by persons who are virtuosos in the art of taking offense. They have made sensitivity a profession and have created a growth industry out of the teaching of it to others. Their discipline is victimology, and their function is consciousness-raising, that is, inculcation of the belief by members of certain groups that their failings are due to their being victims of oppression.

The services of these "affirmative action" officials have the happy characteristic—from their point of view—that the more they are utilized the more they are needed. Little is more likely to produce increased feelings of animosity towards members of allegedly oppressed groups than a coerced course of sensitivity training imposed on the alleged oppressors. As Professor Stephen Thernstrom of Harvard has pointed out, "The whole subject of the pernicious influence of the race relations bureaucracy on campus cries out for study."

The Director of the Office of Affirmative Action at Michigan drafted a new code for the regulation of speech—of "verbal behavior" as the code put it—with the help of University Counsel and apparently, to their shame, of several University of Michigan law professors. It was unanimously adopted by the Board of Regents in 1988. The Office of Affirmative Action then issued an interpretative guide to the new speech policy. According to the guide, sanctionable behavior included such things as,

A male student makes remarks in class like "women just aren't as good in this field as men," thus creating a hostile learning atmosphere for female classmates.

Students in a residence hall have a floor party and invite everyone on their floor except one person because they think she might be a lesbian.

Two men demand that their roommate in the residence hall move out and

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REGULATING RACIAL HARASSMENT ON CAMPUS: A LEGAL COMPENDIUM (1994), citing DISCRIMINATION AND DISCRIMINATORY HARASSMENT BY STUDENTS TO UNIVERSITY ENVIRONMENT, University of Michigan (April 15, 1988).
be tested for AIDS.

"You are a harasser," the guide states when, for example, "you tell jokes about gay men and lesbians," "you laugh at and joke about someone in your class who stutters," or "you comment in a derogatory way about a particular person or group's physical appearances or sexual orientation, or their cultural origins or religious beliefs."

This code makes clear that there is indeed an unprecedented atmosphere of oppression and harassment on the American campus. Its principal source, however, is not the students, but the thought control police of the "affirmative action" bureaucracy. In the one year that the Michigan code was in operation, students were on at least three occasions disciplined or threatened with discipline because of statements made in a classroom. For example, a student in a social work research class was subjected to a formal hearing because he stated his belief that homosexuality was a disease that could be psychologically treated. That idea, of course, may or may not be correct, but it is astounding and frightening that a major American university attempted to make it unsayable. In another incident, a student was sanctioned for saying that "he heard that minorities have a difficult time in [this] course and that he had heard they were not treated fairly."

A minority professor filed a complaint claiming that this comment hurt her chances for tenure. Counterparts of the Michigan code have been adopted on many other campuses. At the University of Massachusetts, for example, the Board of Regents adopted a "Policy Against Racism," stating that "institutions must vigorously strive to achieve diversity in race, ethnicity, and culture sufficiently reflective of our society." Having adopted this highly debatable policy, the Board immediately undertook to ensure that there would be no debate. It stated: "There must be a unity and cohesion in the diversity which we seek to achieve," which is to say, with unusual candor, that no opposition or disagreement will be tolerated. "Racism in any form," the statement continues, "expressed or implied, intentional or inadvertent, unstructured or institutional, constitutes an egregious offense to the tenets of human dignity. . . ." One would have to be very brave indeed to risk committing that "egregious offense" by questioning the new policy. He would probably quickly learn that the prohibition of "racism in any form" includes a prohibition of challenging the "racism in any form" policy, at least in the view of the officials in charge of enforcing it.

To take another example, the University of Connecticut adopted a set of regulations entitled "Protect Campus Pluralism." It provided that offenses are to be reported to something called the "Discrimination and
Intolerance Response Network,” or the D.I.R.N., which, when translated into Russian, I am told, is K.G.B. The regulations prohibit “actions . . . that undermine [any person’s or group’s] security or self-esteem.” Examples of such actions are “inappropriately directed laughter” and “conspicuous exclusion from conversations.” You may not think that these are serious offenses, but as a conservative in academia, I have personally been a victim of these offenses on many occasions. Indeed, in the faculty lounge of the University of Texas Law School most of my comments result in “inappropriately directed laughter.” Someone less familiar with this problem than I am might object, of course, that complaining about such things is a sign of hypersensitivity. Well, they had better not object at the University of Connecticut. The rule makers were foresightful enough to provide that “attributing objections to any of the above actions to ‘hypersensitivity’ of the targeted individual or group” is itself an offense.

Was even Stalin clever enough to make it a crime to complain that there are too many crimes? In fairness, I should point out that although you had better be very careful about what you say at the University of Connecticut, at least you won’t have to worry about your sexual behavior; the school’s handbook makes clear that “the university shall not regard itself as the arbiter or enforcer of the morals of its students.” Speech the University is willing to regulate; sexual immorality is your own business.

When the University of Pennsylvania instituted mandatory “racism seminars,” a student wrote a note in which she stated her “deep regard for the individual and . . . desire to protect the freedoms of all members of society.” A university administrator sent the note back to her with the word “individual” circled and the comment “This is a RED FLAG phrase today, which is considered by many to be RACIST.” Indeed, under the regime of the new thought police, there is little today that is not considered to be racist. A University of Colorado administrator, for example, sought to ban as objectionable such phrases as “a chink in his armor” and “a nip in the air.” It is easy to laugh at the excesses of the political correctness police, but the atmosphere of repression which they have imposed on the American campus is real and far from a laughing matter.

How can these suppressive codes be explained? Why are our most liberal colleges and universities, famous for their toleration, if not their encouragement, of even the most extreme, radical, and provocative speech, suddenly acting to make their campuses the most dangerous places in America for the expression of disfavored opinions? The source
of these codes and the turmoil that is tearing our campuses apart is not
difficult to find; the controversies that political correctness seeks to sup-
press arise from a single source. That source is the adoption and imple-
mentation, under the rubric of "affirmative action," of racially discrimi-
natory practices in the admission of students and in providing financial
and other benefits. There is no doubt that we have a serious racism prob-
lem on our campuses, but its source is not the sudden emergence of an
unusually racist generation of students; surveys show that today's stu-
dents are the most racially tolerant and free of prejudice in our history.
The source of the problem is that colleges and universities themselves
have put racism on their campuses as a matter of deliberate academic
policy.

The only surprise about "affirmative action" programs is not that they
produce protest and turmoil, but that the protest has not come sooner and
been much greater. Who would have thought that American citizens
would submit so quietly and so long to discrimination against themselves
and, especially, their children because of their race? This apparent acqui-
escence has been due in part to the fact that "affirmative action" pro-
grams have from the beginning been characterized by misrepresentation
and deceit. They were introduced and are still defended as programs for
the "culturally or economically disadvantaged" although in fact they were
and are based solely on race.3

Race is not, however, a proxy for cultural or economic disadvantage,
because not all blacks and not only blacks (the primary concern and basis
of "affirmative action" programs) have been disadvantaged. Indeed, the
beneficiaries of racial preferences in higher education are typically among
the most advantaged of blacks. It is not the children of the "underclass,"
unfortunately, the children truly in need of help, who typically apply for
admission to colleges, universities and graduate schools. As Professor
Glenn Lowry has pointed out, "The suffering of the poorest blacks cre-
ates, if you will, a fund of political capital upon which all members of
the group can draw when pressing racially-based claims."

That race is the only concern and criterion of such programs is shown
by the fact that no black has ever been refused preferential admission to
the University of Texas Law School, for example, on the ground that he
was not economically or culturally disadvantaged. It is always quite
sufficient that he is black, even if he is the child of highly educated and

3. The following analysis of "affirmative action" is based on LINO A. GRAGLIA, Racial
Preferences in Admissions to Institutions of Higher Education, in THE IMPERILED ACADEMY
wealthy parents and has enjoyed exceptional advantages since birth. The claim that the purpose of "affirmative action" programs is to provide compensation to disadvantaged individuals must be clearly seen and rejected as the fraud that it is.

Another and probably even more important reason for the apparent acceptance by whites of discrimination against themselves is not that they have acquiesced — they have not — but that proponents of "affirmative action" have successfully intimidated them into silence. To question preferential treatment for blacks has been to subject oneself to the devastating charge of "racism," even though it is the proponents of "affirmative action" who insist on the centrality of race. In academia, there has been something of a contest among professors as to who could best demonstrate his goodness by establishing that he is the most "anti-racist." To voice the slightest question about "affirmative action" would be to disqualify oneself from this contest, and that is a burden that few academics have been willing to bear.

As the extent and seriousness of racial preferences has become more clear, however, as the number of victims has increased, and as the false facade of providing a remedy for the disadvantaged has dropped away, more and more people have found their voice in opposition to "affirmative action" and the courage to use it. The function of the insistence on "political correctness" that pervades our campuses is to intimidate them again into silence, to make it as costly and threatening as possible to object to racial discrimination.

"Affirmative action" can mean different things to different people, but it is controversial only insofar as it is a euphemism for racial discrimination—"diversity" is simply the current buzz word for racial discrimination as "affirmative action" has become less a euphemism than a pejorative. While this is widely recognized, the magnitude of the discrimination involved, the size of the gap in the standards applied to the different racial groups, is still not generally known, even to college and graduate students. As Richard Herrnstein and Charles Murray point out in *The Bell Curve*, "data about the core mechanism of affirmative action—the magnitude of the values assigned to group membership—are not part of the public debate."

"Affirmative action" can and should be opposed in principle, the principle that government should not disadvantage any person on the basis of race. The size of the gap, however, means that, principle aside, "affirmative action" must also be opposed on the purely practical ground that it cannot possibly be productive of good results. "Affirmative action" is still often misunderstood as involving the use of race as something of a
tie breaker in making selections among roughly equal applicants or candidates. Its proponents invariably insist that although the programs are "race conscious," as they delicately put it, only "fully qualified" people are selected. In practice, however, "affirmative action" means not the bending or shading of the usual standards but the virtual abandonment of standards and the award of benefits to persons of preferred races who would not be considered for a moment if they were white.

The facts as to the difference between whites and blacks in performance on standard tests of academic ability or achievement are grim to the point of being brutal. It is easy to understand why most people are extremely reluctant to discuss or even to consider these facts. Indeed, one of the greatest values and benefits of a policy of race neutrality—of treating people as individuals rather than as members of racial groups—is that it makes all issues of racial group differences irrelevant. Discussion of such issues is then made not only unnecessary, but perhaps even objectionable. "Affirmative action," however, by making racial group membership paramount, makes the facts as to racial group differences crucial and discussion of them unavoidable.

The central fact of racial group differences relevant to higher education is that since the beginning of intelligence or academic ability testing more than sixty years ago, there has been a consistent and apparently intractable difference of about fifteen points between the mean score of blacks and the higher mean score of whites on standard tests. It is an artifact of distributional curves that even a small difference in the mean results in very large differences at the extremes. A difference of fifteen points, about one standard deviation, is not small. This difference means that only about 11 percent of blacks have an I.Q. above 100, as compared with about 50 percent, by definition, of the population as a whole, that 30.9 percent of whites but only 2.32 percent of blacks have an I.Q. above 110, and that 13.4 percent of whites but only .32 percent blacks have scores above 120.

There is, of course, a close correlation between I.Q. scores and scores on the SAT and similar tests of academic readiness. In 1993, for example, only 129 blacks in the country scored 700 or better on the SAT verbal test, as compared with 7,114 whites. Such facts mean that obtaining large numbers of blacks at selective colleges requires admitting them with scores much lower than those required of whites. The result is that the premium for black skin in application to selective colleges today is about 180 combined SAT points. In 1988 the difference between the SAT score of the average white and the average black admitted to the University of California at Berkeley, the flagship institution of California
public higher education, was 288 points. Less than 15 percent of the black admittees overlapped with white admittees, and the gap between blacks and Asians was even larger.

In 1976, 13,151 whites had a LSAT test score above 600 and a college G.P.A. of 3.25 or better; the number of blacks with these qualifications was 39. In 1992, only 7 percent of incoming black law students had scores above the white median. A 1977 study of ten selective law schools showed that the average black law student was in the bottom one percent of the white distribution. At the University of Texas Law School, recent litigation revealed, the score required for the automatic admission of blacks was lower than the score applied for the automatic rejection of whites.

One of the perverse affects of "affirmative action" is virtually to guarantee that most black students, even those among the highest scoring, will be placed in schools above the level at which they can be fully competitive. A student meeting or nearly meeting the ordinary admission qualifications to the University of Texas Law School, for example, would likely be bid away from Texas by Harvard or Yale, just as Texas takes students away from the many lesser schools where they would be fully competitive. Again, all questions of principle aside, it is difficult to imagine a race-based policy better calculated to maximize frustration on the part of blacks and unfavorable stereotyping on the part of whites.

Racial discrimination does not end with admissions. At the University of Texas Law School, for example, students who would be automatically rejected if they were white are not only admitted, but offered and given scholarships regardless of need. The specially-admitted children of well-off black professionals—judges, lawyers, doctors, businessmen—are automatically awarded unneeded financial aid that better qualified white students in real need are denied. My colleagues frequently point out to me that, as a believer in free markets, I am in no position to object to this. The blacks are simply selling what we want, black faces—they make the school immune from the devastating charge that it is "lily white" or that blacks are "grossly underrepresented"—and in a market economy, you must expect to pay for your wants.

At Penn State, black students, and black students alone, are paid $580.00 for every year in which they achieve an average of C and $1,160.00 for any average above C. This is in addition to any financial aid, and is not related to need. At Florida Atlantic University, all blacks admitted are offered free tuition regardless of need. Even Harvard University has recently discovered that simply admitting black students may not be sufficient to induce them to enroll. It lost one black admittee,
it discovered, to another school that gave him a straight grant of $85,000.00 plus $10,000.00 for summer travel expenses. The market in skin color, it appears, is working well. George Orwell famously said: "There are some ideas so preposterous that only an intellectual could believe them." Only an intellectual could insist that admissions, scholarships, and hiring be allocated on the basis of race, despite the enormous differences in qualifications involved, and then purport to be dumbfounded as to the source of racial tensions on campus. "Affirmative action" is a prescription for racial conflict and animosity, and the prescription is being filled.

"Affirmative action" students are almost always convinced, reasonably enough, that they are qualified to compete and expected to succeed at the institutions that have made such great efforts to induce them to enroll. When they discover, as most soon must, that they cannot compete with their classmates, no matter how hard they try, their perception that they have not been helped but used and deceived is well founded. Finding themselves unable to play the game being played, they will insist, as self-respect requires, that the game be changed. Thus are born demands for black studies and multiculturalism. These innovations perform the twin functions of reducing the need for ordinary academic work while also providing support for the view that the academic difficulties of the black students are the result, not of their substantially lower qualifications, but of racial antipathy. If racial preferences engender white resentment, as they must, it will be taken to indicate only that whites require additional specialized instruction in the deplorable history and moral shortcomings of their race. Thus are born racism seminars and compulsory sensitivity training.

Forces powerful enough to institute so radical and misguided a program will necessarily be powerful enough to respond to its disastrous consequences with something other than an admission that they have made a terrible mistake. When there is no credible response to criticism of a policy that will not be changed, the response will be an attempt to suppress the criticism. Thus is born the insistence on political correctness and its enforcement with "hate speech" and "anti-harassment" codes. The very epitome of political incorrectness, as law student Timothy Maguire discovered at Georgetown University Law School, is to point out that a school's "affirmative action" policy is actually a policy of racially preferential admissions. The only thing worse is to specify the actual disparity in the admissions standards being applied to persons from different racial groups. Proponents of "hate speech" codes are certainly correct that it is extremely humiliating to racially preferred students to
have a public discussion of the standards by which they were admitted. Instead of concluding that the policy must, for that reason alone, be rejected, they conclude that such discussions must be banned.

In sum, the insuperable obstacle for proponents of "affirmative action" is that their program must be carried out in the dark, without general public understanding of just what they are doing. We have "affirmative action" in higher education only because blacks are not academically competitive with whites, but to admit this is largely to defeat the purpose of "affirmative action" which is to show that blacks can compete with whites. Concealment and evasion are essential, therefore, to all such programs, but concealment and evasion can succeed, of course, only if others can be prevented from pointing out the truth. Political correctness is therefore a necessary and inevitable consequence of "affirmative action" programs. It is "affirmative action" that has made our colleges and universities the most repressive as well as the most racist institutions in our country. Political correctness is the fruit of "affirmative action," and it will remain with us as long as that self-defeating policy, the principal source of today's racial antagonisms, is permitted to continue.
A RESPONSE TO PROFESSOR GRAGLIA'S ESSAY ON POLITICAL CORRECTNESS

by Michael L. Principe

Let me begin by saying how honored I am to be part of such a distinguished panel and to be speaking before an audience as respected as this. I must also add that it is with great pleasure that I comment on Professor Graglia's presentation. For years I have admired his fortitude in professing his beliefs, even in those moments when he clearly was in the minority.

As in many of his earlier works, I must admit that I agree with some of the premises Professor Graglia assumes. For example, I, too, believe that some of the efforts to sanction speech and free expression at American colleges and universities have resulted in very real and serious abridgements of our First Amendment protections. Likewise, additional efforts at political correctness on certain campuses have resulted in limiting other important constitutional protections.

These efforts have even found their way to Northern Kentucky University. For instance, in an effort to address the depressing history of sexual harassment found on many campuses in general, N.K.U. has enacted a process that effectively eliminates notions of fundamental fairness and due process. Rather than beginning from a point whereby the accused is innocent until proven guilty, the process very nearly assumes the guilt of the accused, unless innocence can be established.

The process begins for the accused at the informal hearing stage, where he/she is "orally" informed of the complaint and given the option of either accepting the complainant's demands for satisfaction or facing a formal hearing. If the accused cannot, in good conscience, accept such demands, then he/she is subjected to a formal hearing process whereby the Affirmative Action Coordinator is not only responsible for "counseling the complainant on whether the Sexual Harassment Grievance Process . . . appears to be appropriate," but is also responsible for forming

1. Ph.D. (Political Science), University of California, Santa Barbara, 1992; J.D., University of Washington, 1983; B.A. (Sociology), Whitman College, 1978; Fulbright Scholar, Victoria University, New Zealand, 1990-91; Visiting Scholar, St. Edmund's College, Cambridge University, 1993-97; Visiting Assistant Professor, Salmon P. Chase College of Law, January 1995-June 1996.

2. NORTHERN KENTUCKY UNIVERSITY, STUDENT HANDBOOK 84-87 (1995-96)

3. Id. at 85-86.
the three-member hearing panel, selecting a chair, controlling the hearing as a pseudo-judge, and participating in the deliberation process as a non-voting member. In addition, attorneys are not allowed to participate in the questioning, and the safeguards of hearsay as well as other procedural protections are nonexistent. Even if no conclusive evidence is offered at the hearing, the decision still boils down to which party the panel chooses to believe.

It is subjective processes like this that undermine a faculty’s faith in the system. Rather than assuming the integrity of a faculty member who has devoted his/her life to the noble profession of teaching and requiring proof of impropriety, this process smacks of the tainted echoes from the McCarthy era, where entire careers were ruined on the whispers of lies.

A further evidence of agreement between Professor Graglia and myself surely comes in our passionnel affection for free speech. Rooted in the opinions of a variety of jurists, freedom of speech has evolved in this century to a point where it has assumed a preferred position among Constitutional freedoms. Examples of this development include:

a) Learned Hand’s attempts in Masses Publishing Co. v. Patten to articulate a less harsh test than clear and present danger by ignoring words that are just critical of the law and instead focusing on whether the words “counsel or advise others to violate the law as it stands;”

b) Oliver Wendell Holmes’ attempts in his Abrams v. United States dissent to shore up the problems of the clear and present danger test by first stating that “we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law,” and then, in presenting his case against the suppression of opinion, Holmes stated “the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out;”

c) Benjamin Cardozo’s statement in Palko v. Connecticut that First

4. Id. at 86.
5. 244 F. 535 (S.D.N.Y. 1917).
6. Id. at 540.
7. 250 U.S. 616 (1919).
8. Id. at 630.
9. Id. at 630.
Amendment liberties were on "a different plane of social and moral values," and that freedom of speech and thought is "the matrix, the indispensable condition, of nearly every other form of freedom." Neither liberty nor justice would exist if they were sacrificed; and finally,


In addition to these arguments, I must also add that I, too, long for the day when we can live together in a color and gender blind society, when a person's value is not determined by the color of their skin or their sex. Unfortunately, since this is not the case today and since First Amendment freedoms do not live in a constitutional vacuum, but must instead exist in balance with other constitutional protections, such as equal protection, it is here that I must part company with Professor Graglia.

In my view, it is not the case that the theories of political correctness or affirmative action lack merit. Rather, it is that some of those in charge of these programs have lost sight of the constitutional balance so necessary in implementing them. As stated by Nadine Strossen: "[E]quality will be served most effectively by continuing to apply traditional, speech-protective precepts to racist speech, because a robust freedom of speech ultimately is necessary to combat racial discrimination."

While Professor Graglia's suggestion (that proponents of affirmative action have in the past intimidated opponents from protesting against such programs by charging them with racism) is true to some degree, to subsequently blame the turmoil present on college campuses today on affirmative action programs is somewhat simplistic and ignores too many other obvious factors.

I would argue that we as a society have never stopped being color and gender conscious and that tagging affirmative action as the main culprit really just shifts the blame to something convenient. For example, a number of recent studies suggest that racism has continued to flourish throughout society. Some of these would include:

First, a 1994 study conducted by the World Council of Churches,
which revealed that “racism remains deeply ingrained in the fabric of American society and should be an international human rights issue.”

The study went on to recommend that the U.S. Government’s compliance with international human rights laws be monitored by the United Nations Human Rights Commission;

Second, of the 7,684 hate crimes reported to the FBI in 1993, the agency reported that 61.8% of these were motivated by racial/ethnic prejudices, 15.4% were motivated by religious prejudices, and 10.4% were motivated by sexual orientation prejudices;

Third, an ongoing study conducted by the Southern Poverty Law Center has shown a dramatic increase in black church burnings since 1994.

This year alone, there have already been ten. Increasingly, people in the South are being reminded of similar terrorism in the 1960’s;

Fourth, a 1995 Justice Department report examined a “good ol’ boys roundup” in Tennessee where federal agents were in attendance and where “nigger-hunting licenses” were distributed; and

Fifth, an investigation by The Nashville Tennessean (which was published in 1995) indicated that, even though the creation of the U.S. Sentencing Commission was to insure equality in federal criminal sentencing, blacks still receive on average 10% longer sentences than whites for similar crimes. In fact, in some federal districts, the average discrepancy can be up to 40%. Interestingly, of the four major regions, the region with the lowest disparity was the South at 3%.

As for Professor Graglia’s comment that “Race is not ... a proxy for cultural or economic disadvantage, because not all blacks and not only blacks ... have been disadvantaged,” I must first say that affirmative action has also benefitted women as well as other minorities. Thirty years ago, university campuses were generally populated with white males. Today, although still predominately white and male, campuses reflect

17. Desda Moss, Activists Say Bias Level “Surprising”, USA TODAY, Oct. 20, 1994, at 7A.
18. Id.
19. Id.
21. Id.
22. Id.
23. Id.
24. Laura Frank, Blacks Get Stiffer Sentences, USA TODAY, Sept. 25, 1995, at 3A.
25. Id.
26. Id.
societal populations to a far greater degree. Second, concerning race and disadvantages, I must point out a couple of recent studies concerning poverty in the United States.

In a study overseen by Nobel laureate economist Robert Solow, it was discovered that in 1993, 15.7 million children lived in poverty, a 30-year high. What is even more revealing is the fact that, although 13.2% of all white children lived in poverty, 39.9% of all hispanic children and 46.6% of all black children also lived in poverty. Since poverty results in greater health problems, slower education development, and increasing odds of abuse, neglect, delinquency, and crime, the study estimated that the country "loses $36 billion in future worker productivity" yearly. As Professor Solow stated: "This report provides evidence, possibly for the first time, that we can save money by reducing child poverty."

In another 1993 study, this one conducted by the National Center for Children in Poverty, it was discovered that, although only 9% of the (26.1 million) married couple families with children lived in poverty, 22.5% of the (1.6 million) families headed by unmarried men and 46.1% of the (8.8 million) female-headed families lived below the poverty line. In addition, whereas only 22.4% of all whites will ever spend part of their childhood in poverty, 67.2% of all blacks will live in poverty during their childhoods.

What these studies boiled down to is the fact that it's no great surprise to find median scores for minorities to be below those for whites. They, on average, have far more obstacles in their path. Besides the startling disparity in poverty statistics in the 1990's, also consider the fact that not until the 1960's were the majority of school districts in the U.S. even observing the essence of the Brown v. Board of Education requirements.

27. Patricia Edmonds, The Bottom Line of Poverty: New Study Says it Costs Billions, USA TODAY, Nov. 16, 1994, at 3A.
28. Id.
29. Id.
33. As stated by the eminent political scientist C. Herman Pritchett, although it was originally thought that "the Brown mandate could be interpreted to mean only that school districts must stop using discriminatory practices, not that they had a positive duty to undertake desegregation plans," in Green v. County School Board of New Kent County, 391 U.S. 430 (1968), "the Court took the occasion to announce that school boards had a positive duty to
Yet, even with these enormous hurdles, many minorities are closing the gap on standardized test scores. For example, during the 1992-93 school year, whereas 25.7% of all whites taking the LSAT had a score at or above 160, 11.5% of hispanics and 12.7% of the native americans scored the same. And, although blacks still lagged far behind (with only 2.9% of those taking the LSAT scoring 160 or better), compared with 39 blacks who Professor Graglia mentioned did as well in 1976, having 258 achieve it in the 1992-93 school year is certainly an improvement, especially considering that only approximately twenty-five law schools have median LSAT scores above 160.

What, then, is to be done? In terms of political correctness and the issue of how far to allow regulation of speech on campus, as Professor Graglia suggests, it is imperative to begin with the notion that First Amendment freedoms stand in a preferred position to the Constitution. It is through dialogue that ideas are exchanged and the learning process enhanced. Just because an idea is repugnant to someone does not mean it should be proscribed.

Yet at the same time, it must also be remembered that the Fourteenth Amendment’s Equal Protection Clause guarantees (as Professor Delgado phrases it) “equal personhood on campus.” Since the framers were concerned with tyrannical majorities and their effect on minorities, it seems logical that we should be concerned when free speech conflicts with an individual’s equal opportunity to speak. This is not to say that we should regulate in every instance where an unpleasant environment has resulted from harassing speech. Rather, as in the limited exceptions to free speech carved out by the Supreme Court, we should be careful to only regulate that which is most harmful and limiting towards the equal access to education. Since this boundary is elusive at best, I would argue that it is better to err on the side of free speech.

In arriving at a workable set of rules, it might do well to reflect on the evolution of racial consciousness. Not only has the U.S. progressed to the point where most people find it repugnant to cast racial slurs

formulate plans promising prompt conversion to a desegregation system. The goal was complete integration, achievement of a unitary, nonracial system of public education.” C. HERMAN Pritchett, Constitutional Civil Liberties 264-65 (1984).

35. Id. at H-5.
36. Id. at D-5.
publically, but internationally, a variety of laws have been enacted addressing this awareness. For example, besides the fact that countries such as Great Britain, France, Austria, Italy and New Zealand have all enacted laws dealing with hate-speech, a number of international treaties and conventions have been ratified which aim to condemn discrimination and racial violence. Some of these include: the European Convention for the Protection of Human Rights and Fundamental Freedoms; the Universal Declaration of Human Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; and the International Covenant on Civil and Political Rights.

As for the second part of Professor Graglia’s thesis, that affirmative action in itself is improper, I would disagree. Although I must admit that the central focus of affirmative action should always be to pursue equality of opportunity for everyone, I also maintain that in certain instances of obvious and invidious discrimination, equality of result is warranted. As a whole, society has greatly benefited from affirmative action. Women and minorities, once regulated to blue collar or entry level positions, now are productive in management and policy-making positions throughout the land. As for academia, the benefits have also been obvious, resulting in increased self esteem among traditionally discriminated individuals, a variety of new role models for future generations, an extension of the multiplicity of intellectual perspectives, and a closer reflection of society in general.

What would seem to be warranted therefore would be a greater effort to remain true to the central focus of affirmative action. One way to achieve this is by making a serious effort at improving test results for minorities. Of course, this would eventually require attacking the perils of poverty.

In conclusion, Professor Graglia correctly identifies some of the problems presently being addressed on university campuses across the land. However, while it is true that some administrators have strayed quite a bit off course from their constitutional mandates, I would argue that what is needed is a reigning-in on the abuses of power, rather than what Professor Graglia suggests, which amounts to what my grandmother called “throwing the baby out with the bathwater.”

38. Id. at 364-71.
39. Id. at 362-63.
SEXUAL HARASSMENT: TELLING THE OTHER VICTIMS' STORY

by Michael S. Greve

Feminism has waged a hugely successful campaign to weave sexual harassment into public consciousness and into the law. "Hostile environment" and similar harassment claims did not even exist in civil rights law until around 1980, when courts and regulatory agencies began to pick up legal theories urged upon them by Catharine A. MacKinnon and other feminist scholars. Since then, however, sexual harassment law has become a civil rights growth industry and the cutting edge of anti-discrimination law. The increasingly frequent and aggressive pursuit of harassment claims is widely viewed as a good thing—a reflection of society's long-due recognition of sexual harassment as a systemic and urgent social problem.

Lately, there has been a ripple of dissent from the orthodox view of sexual harassment law and litigation as an unmixed blessing. Practical experience with sexual harassment cases, especially cases arising in an academic setting, has led scholars and journalists to conclude that the preoccupation with stamping out harassment has a tendency to suppress free speech, to abrogate elementary due process protections, and to ruin the reputation of innocent parties.

This article explains why I share this skeptical perspective on sexual harassment law. It argues, moreover and in particular, that violations of basic procedural safeguards and the conviction of innocent parties are not

1. Executive Director, Center for Individual Rights (CIR), Washington, D.C.; Ph.D. (Government), Cornell University, 1987. CIR has served or is serving as plaintiff's counsel in Silva v. University of New Hampshire and in Maas v. Cornell University, discussed infra. CIR is serving as the defendant Antonio Morrison's counsel in Brzonkala v. Virginia Tech, see infra notes 38-46 and accompanying text.

2. Claims are Increasing, Attorney Notes, and Claimants Have Become Sophisticated, 2 BNA EMPLOYMENT DISCRIMINATION REPORTER 703 (June 8, 1994).

and directly from the feminist theory of sexual harassment.\footnote{Throughout, "feminist" means a position that is generally consistent with Professor MacKinnon's perspective on sexual harassment as a manifestation of the male power structure. See \textit{Catharine A. MacKinnon, Sexual Harassment of Working Women} (1979). Feminists who reject this view are few in number.}

Feminists do not really disagree with this assessment; they celebrate, rather than lament, the demise of due process (although rarely put it this way). As I will show in conclusion, feminism's disregard for due process has progressed—if that is the word—to the point where its advocates no longer have qualms about framing innocent black men for rape. But it may be best to start with cases that carry a little less emotional baggage.

\section*{Two Cases}

\textit{Silva v. The University of New Hampshire} arose over the defendant-university's dismissal of a tenured professor who had made two remarks of a mildly sexual content in his creative writing class. Although the remarks had a legitimate educational purpose and were neither demeaning nor even graphic, female students charged that the comments created a "hostile learning environment."\footnote{Silva's remarks were as follows: 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. Belly dancing is like jello on a plate with a vibrator under the plate. Silva v. University of New Hampshire, 888 F.Supp. at 299.} Following a complaint and a hearing, UNH dismissed Silva without pay, demanded that he pay for a substitute teacher, and required him to undergo psychiatric counseling prior to reinstatement. Silva brought suit in federal court, alleging violations of his First Amendment rights. In 1994, on the plaintiff's motion for a preliminary injunction, the court ordered Silva's immediate reinstatement. UNH subsequently settled the case, agreeing to reinstate Silva permanently and to pay $230,000 in back pay, damages, and attorneys' fees and costs.\footnote{Linda Seebach, \textit{First Amendment Wins a Round in Academe}, \textit{Orange County Register}, Dec. 19, 1994.}

\textit{Maas v. Cornell} arose over the sexual harassment conviction of James B. Maas, a long-time professor of psychology at Cornell University and one of its most popular and most prominent faculty members. The charges against Maas, discussed in greater detail below, were brought by
four former students who had also, and variously, served as his research assistants and as nannies to his family's children. The principal allegation was what the complainants described as Maas's "overly friendly" and "affectionate" behavior. This "harassment"—hugs, social kisses, and little gifts of appreciation for hard work—occurred typically in front of Maas's wife or other third parties. All of these witnesses considered Maas's conduct "innocuous or... expressions of a warmly paternal affection." However, after a proceeding marred by numerous procedural irregularities, the so-called Professional Ethics Committee ("PEC") of Cornell's College of Arts & Sciences, which adjudicated the Maas case, determined that Maas "repeatedly behaved both unprofessionally and inappropriately in his relationship with [the complaining] students and that in effect this behavior constituted sexual harassment" (emphasis added).

The PEC imposed only modest sanctions upon Maas, such as a moratorium on merit pay raises. However, despite Cornell's repeated assurances to Maas that the proceeding against him would be confidential, participants in the hearing process leaked the complaints and the prosecutor's indictment to the press—before the PEC had reached its decision. As a result, Maas suffered grave damage to his reputation, and otherwise. Maas has sued under various tort, contract, and other theories to restore his reputation and to recover damages for the losses he incurred as a result of Cornell's conduct.

Where to begin? Perhaps, with the obvious: the claims against Silva and Maas do not come within shouting distance of satisfying the legal definition of actionable sexual harassment. There were no allegations of "quid pro quo" harassment, and the claimants in either case did not begin to establish the existence of a "hostile environment" as the courts have defined the term—that is, "unwelcome" conduct of a "sexual nature" that is sufficiently "severe or pervasive" to affect the terms and conditions

9. In addition, two complainants alleged sexual innuendo by Maas; a third raised a single, six-year-old allegation of breast touching by Maas. As described below, however, these allegations are extremely implausible, and the Cornell committee that heard the case against Maas considered them unproven—although it still convicted Maas on the charges. See infra note 26 and accompanying text.

10. Cornell University, Report of the Professional Ethics Committee in the Case of James B. Maas, Dec. 9, 1994 [hereinafter "PEC Report"]. This remarkable document is on file with the author, who will make it available upon request.

11. See infra note 30 and accompanying text.

of employment or education.\textsuperscript{13}

Silva’s two comments were sexual and unwelcome, but surely not pervasive or severe. Maas’s conduct was, by the lights of every witness, not sexual in nature and, by the complainants’ lights, not unwelcome: at the time, the accusers-to-be never communicated their alleged discomfort to Maas and, in fact, thanked him profusely for his attention and kindness.\textsuperscript{14} Nor was there any allegation that Maas had created a “hostile environment.” To the contrary: the allegation was that Maas was too nice, and the PEC recognized the overwhelming evidence that the complainants, along with hundreds of other students, had benefitted greatly from Maas’s attention and generosity.

Thus, UNH and Cornell—reputable institutions, by most measures—aggressively pursued sexual harassment charges that could not possibly “stick” in a court of law, convicted the accused on the allegations, and proceeded to defend their conduct in court and in the press. Similar incidents have occurred elsewhere.\textsuperscript{15} We may safely infer that at least in the academic setting, individuals who are plainly innocent in a legal sense may easily be found guilty, with all the attendant damage to their livelihood and reputation.

The cases just described teach a second, somewhat less obvious object lesson. The conduct of the accused parties fell well outside the legal definition of sexual harassment because it failed to satisfy two critical elements of that definition: the pervasiveness requirement, and the unwelcomeness requirement (or, to put it the other way around, the notion of consent as a defense against sexual harassment claims). Feminists, however, have harshly criticized precisely these requirements as odious obstacles to the eradication of sexual harassment, and have called for

\textsuperscript{13}See, e.g., Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1543 (10th Cir. 1995); Weiss v. Coca-Cola Bottling Co. of Chicago, 990 F.2d 333, 337 (7th Cir. 1993) (isolated incidents do not constitute actionable hostile environment).

\textsuperscript{14}Upon her departure from Cornell, one of the complainants wrote the following letter to James Maas:

\textit{Jim, I can’t thank you enough for everything you have done (and continue to do) for me over the years. You have made my Cornell experience an invaluable treasure. Knowing that you will always be a source of encouragement and support for me is the only thing that makes leaving Cornell bearable . . . . I am especially flattered to have been ‘adopted’ by you, Nancy and the boys. You are such a special family and I am thrilled that I have gotten to know you all so well.}

their elimination from sexual harassment law.16 Thus, the Silva and Maas prosecutions, in which the pervasiveness and unwelcomeness criteria were ignored, provide a glimpse of feminist harassment theory in action.

SEXUAL HARASSMENT AS AN IDEOLOGY

We have come to think of civil rights law (and especially Title VII) as the exclusive remedy against sexual harassment, or nearly so. Certainly, most laymen will be inclined to think that a world without sexual harassment as a distinct legal claim would leave the victims of such conduct legally defenseless. However, this is not the case, and was not the case prior to the invention of sexual harassment as a civil rights violation. In her pathbreaking 1979 book, Sexual Harassment of Working Women, Catharine MacKinnon explained that there have always been common law rules—both criminal and civil tort actions—against physical and verbal harassment, such as assault and battery. Employment contracts can easily be written so as to protect against sexual harassment (not to mention the ultimate contractual remedy, which is to quit an unpleasant environment and to take one’s talents elsewhere).

MacKinnon’s book gave a generally positive description of contract and tort law as a means of protecting women against harassment, and acknowledged that common law doctrines could be extended to provide even greater protections.17 Still, MacKinnon insisted on constructing a separate legal edifice, built on the notion of sexual harassment as a form of employment discrimination, on top of the common law. She provided three interrelated and partially overlapping arguments for doing so:

1. Common law doctrines treat women as individuals and violence against women as violence by individual men against individual women. This perspective, according to MacKinnon, ignores that sexual harassment is structural, institutionalized violence against women as members of a group or class.18

2. In treating sexual harassment as an individual offense, common law doctrines ignore the power dimension of sexual harassment. The labor market systematically segregates and oppresses women. Harass-

ment, therefore, is not simply an individual employer's abuse of power; the labor market being what it is, the extortion of sexual favors is "part of her duties and his privileges."\textsuperscript{19} The law should conceptualize harassment not as a discrete (if widespread) offense but as the ubiquitous, day-to-day instrument of pervasive, systematic oppression—of a patriarchal society that persistently forces women to trade sexual favors for physical survival. (The other two instruments of male oppression are prostitution and marriage.)\textsuperscript{20}

(3) The common law draws lines that separate and distinguish offenses that fit under the rubric of sexual harassment as institutionalized violence against women. For instance, common law doctrines distinguish rape from "mere" assault, and both from consensual sex; redressable harms from mere discomfort with the workplace climate; and so forth. Sexual harassment theory, in contrast, rightly emphasizes and unites what the various offenses have in common—male exploitation and domination. It is not a weakness but the strength of sexual harassment law to subsume seemingly trivial offenses (say, the occasional dirty joke or the centerfold on the wall) under the same legal heading with rape and assault.\textsuperscript{21}

This brief summary warrants two inferences. First, the characterization of trivial conduct—such as Don Silva's two remarks—as sexual harassment is not an excess of but central to the feminist project. After all, if the "sexual harassment" captured only serious offenses, we might as well make do with torts and contracts. Feminism's aspiration is to capture the conduct that escapes the common law and to subject it to ideological critique—and to legal sanction. "The entire structure of domination," MacKinnon writes, "the tacit relations of deference and command, can be present in a passing glance"\textsuperscript{22}—not to mention repeated hugs and social kisses. From the feminist perspective, James B. Maas had it coming.

The second inference arises from MacKinnon's stark paradigm of sexual harassment at work: a powerful male employer with direct control over a female employee's employment status uses his power to extract sexual favors from the employee, who has no choice but to comply. To be sure, such situations do occur, although MacKinnon's repeated insistence that women must accede to sexual exploitation to ensure their own physical survival seems shrill and exaggerated, to put it gently.\textsuperscript{23} But

\begin{itemize}
\item \textsuperscript{19} Id. at 18.
\item \textsuperscript{20} Id. at 174-75.
\item \textsuperscript{21} Id. at 161.
\item \textsuperscript{22} Id. at 95.
\item \textsuperscript{23} E.g., id. at 7, 173.
\end{itemize}
feminism implausibly construes all questions of sex and work as examples of sex-for-survival. Without missing a beat, MacKinnon bounces from the drastic quid-pro-quo paradigm to hostile environment cases—despite the obvious fact that in these cases, the boss (if he is the culprit) wants no quid for the quo, and despite the equally obvious fact that the objectionable conduct typically comes from male or female co-workers, who have no power over the objecting employee. Similarly, feminism cuts through all the complex and awkward aspects of sexual relations—infatuation, seduction, missed social signals, romances gone bad, lust later regretted—and reduces them to the single dimension of raw power. In so doing, feminist sexual harassment theory does violence to logic, facts, and real people.

FROM HARM TO SYMBOLS

From the feminist perspective of sexual-harassment-as-discrimination, the female accuser is never simply an individual woman but also, and always, a representative of an oppressed class. Whatever the theoretical merits of this perspective, it has the disturbing practical consequence of casting the female accuser in the role of a victim or "survivor," more or less regardless of the facts and of the accuser's motives. If the "victim's" alleged harms seem trivial from an ordinary, objective standpoint, it is only because that standpoint is a male standpoint. Reflecting this shift in perspective, sexual harassment law has moved from a "reasonable person" standard to what is effectively a "reasonable woman standard." 24

24. E.g., Ellison v. Brady, 924 F.2d 872, 879-80 (9th Cir. 1991) ("reasonable woman"); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994) (following Ellison); Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 962 N.3 (8th Cir. 1993) (same); Andrews v. City of Philadelphia, 895 F.2d 1469, 1485-86 (3d Cir. 1990); Spain v. Gallegos, 26 F.3d 439 (3d Cir. 1994) (following Andrews); The Supreme Court's ruling in Harris v. Forklift Sys., 510 U.S. 17 (1993), referred to the "reasonable person" in deciding a harassment case arising in the Sixth Circuit, which employs the "reasonable woman" standard. See Yates v. Avco Corp., 819 F.2d 630, 636-37 (6th Cir. 1987). However, even courts that once employed a purely objective reasonable person standard have gradually particularized that test to focus on the characteristics of the complainant, including sex. Compare Brooms v. Regal Tube Co., 881 F.2d 412, 419 (7th Cir. 1989) ("reasonable person standard") with Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1454 n.8 (7th Cir. 1994) (standard of "reasonable person in the plaintiff's position," citing proposed EEOC regulation that would have included "consideration of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability"); Saxton v. AT&T, 10 F.3d 526, 534 n.13 (7th Cir. 1993) (leaving open the possibility that a "reasonable woman" standard might be more appropriate than a "reasonable person" standard). But see DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 594 (5th Cir. 1995) ("the test is an objective one, not a standard of offense to a "reasonable woman").
Feminists have criticized even this standard as patriarchal and as too restrictive, arguing that it tends to slight the authentic experiences of particular women.  

At the end of this road, administrative or judicial sexual harassment proceedings serve not to ascertain the facts but to “validate” women’s “narratives.” To all intents, the accusers’ account of their pain must be accepted as true, however implausible it may be. Silva’s accusers, for example, maintained with a straight face that his two remarks had done them irreparable harm—that they could not function in such an environment. Far from dismissing the idea that adult women are so meek and weak as to be devastated by two passing mentions of sex, the university convicted Silva.

Similarly, in the Maas case, two complainants (twin sisters who worked for Maas at the same time) accused him of repeated sexual innuendo. Maas denied the charge, and witnesses testified that the complaints were false. The PEC considered it “likely” that the complainants “misheard or misinterpreted what Professor Maas said.” Nonetheless, the PEC continued, “we believe that the [complainants] did think that there was sexual innuendo” (emphasis added). As near as one can tell from the PEC’s equivocal report, the Committee convicted Maas on the charge.

A third complainant alleged that Maas had touched her breast on a research trip to Kyoto six years prior to the filing of her complaint. Maas fiercely denied this allegation, and the PEC found no evidence to support it except the young woman’s highly suspect ipse dixit. But although the PEC could “reasonably be sure only that something occurred in Kyoto which [the complainant] found very upsetting at the time,” it nonetheless declared the complainant’s “case convincing and especially significant because it suggests a pattern over time.” In other words, the Committee transformed a single, six-year-old, unproven allegation into a “pattern” for which there was not a shred of evidence. On this evidence, the PEC found Maas guilty of “especially egregious” conduct.

Further, the premise that women must be believed effectively rules out consent as a defense. In the Maas case, as noted, the complainants very much welcomed their mentor’s attention at the time it occurred. But, said the PEC, the “power differential” was so great that the complainants

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26. The complainant shared with the PEC long, intimate letters to her mother, which cover minute details of her relation to Jim Maas at the time but make no mention of the allegedly traumatic incident. The complainant subsequently accompanied Maas on four extended research trips; several witnesses testified to her jovial mood during this period.
could not be expected to tell Maas to keep a distance. Of course, the PEC said, it was "very unfortunate and misleading" that the complainants never expressed their misgivings to Maas; but this was Maas's problem, and no obstacle to a conviction. Consent, gratitude, and appreciation—expressed in the Maas case, for example in the complainants' gifts and appreciative letters to Jim Maas—are irrelevant if the "victims" later change their minds.

The questions of why the accusers changed their minds and what made them do so are ruled off limits, even when they are relevant and pressing. The principal instigators of the campaign against Maas (the twin sisters) had served as teaching assistants to Andrea Parrot, a prominent Cornell feminist who teaches that anyone who feels "pressured into sexual contact on any occasion is as much a victim [of rape] as the person who is attacked in the streets." When the complainants-to-be inquired whether Maas's friendliness, which they appreciated at the time, might constitute "harassment," faculty advisors suggested that they should maintain their relationship with Maas and monitor his behavior. Pursuant to this advice, the twins kept a log of suspect gestures or utterances. The allegations of sexual innuendo against Maas were based on these logs.

The twins recruited a third complainant who, subsequent to her departure from Cornell, had developed serious psychological problems. A therapist attributed her patient's conflicted emotions to Maas's conduct, and eventually persuaded the young woman that the very acts of kindness and affection for which she had previously expressed profound gratitude were in fact the transgressions of a sexual predator. The three accusers then contrived to contact scores of current and former female associates of Maas—film crew members, students, and secretaries—from as much as 17 years ago. This search-and-destroy mission netted numerous angry refusals to cooperate in such a smear campaign. Only after countless strike-outs did the complainants connect with the fourth accuser, who

27. In haec verba:

[Maas] habitually gives lavish and often very thoughtful gifts to many people and uses his influence generously on their behalf. He also habitually expresses his affection in physical terms. It is precisely because of his generosity with time, attention, gifts, and influence, however, that students who feel uncomfortable or intimidated find it difficult to understand what is going on, to sort out their own responses, and to disengage themselves from relationships with him.

Cornell University, Report of the Professional Ethics Committee in the Case of James B. Maas, Dec 9, 1994.

28. CHRISTINA HOFF SOMMERS, WHO STOLE FEMINISM? HOW WOMEN HAVE BETRAYED WOMEN 220 (1994) (quoting ANDREA PARROT, ACQUAINTANCE RAPE AND SEXUAL ASSAULT PREVENTION TRAINING MANUAL 1 (Cornell University 1990)).
raised the six-year-old charge of breast touching.

In short, the complaints against Maas were readily discernible as part of a political campaign. But of all this, one finds not one word in the PEC's report or in any other official document in the Maas case. Questions concerning the accusers' motives were summarily dismissed with glib statements to the effect that the women had nothing to gain and much to lose by coming forward. What exactly they had to lose was left unexplained.

The problem for Silva and Maas was not simply that they were forced to defend themselves against idiosyncratic and ideologically inspired complainants; their problem was worse. In the Silva case, it was a UNH women's center called SHARPP that transformed the originally vague and incoherent complaints into an allegation of sexual harassment. The complainants against Maas originally failed to characterize most of the complained-of conduct as "harassment," and they stated specifically that they did not wish to see Maas punished. Only after consultation with the Arts College's sexual harassment counselor, who prosecuted the Maas case, did the complainants demand Maas's removal from the faculty. In both cases, the allegations consisted not of idiosyncratic experiences and unproven facts but of vicarious interpretations of those experiences and non-facts by administrators who had an ideological axe to grind and an institutional interest in processing allegations on which their bureaucratic fiefdoms depend.29 Maas and Silva had to defend themselves against these interpretations without being permitted to challenge their authenticity.

RULES 'R' US

In the administration and adjudication of sexual harassment complaints, feminist theory has been widely interpreted to require special rules and procedures. Due to the often shameful and embarrassing nature of the underlying incidents and to the power differential between the male harasser and the female accuser, the arguments goes, institutions must create an environment that makes women comfortable in coming forward with complaints. The procedures under which complaints are adjudicated, moreover, must level the playing field between the powerful (presumed) harasser and his accuser.

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29. Maas was only the second case brought to the PEC in the three years of its existence. At the time, the PEC faced re-evaluation by the faculty; having been established on the premise that sexual harassment was so pervasive as to require special procedures, the PEC was in desperate need of a live body. It produced James Maas.
The PEC procedures under which James Maas was sentenced were created by an ad-hoc faculty committee heavily dominated by committed feminists and members of Cornell’s Women’s Studies Department. They were specifically intended to create “an atmosphere where one could come forward” and to establish “provisions for people who feel extremely vulnerable.” In pursuit of these objectives, the procedures provide for a so-called “locked box,” which contains secret allegations of sexual harassment against faculty members. Teachers are not informed, even at their request, of the existence of such charges, never mind their content or source. There is no expiration date; ancient, unsubstantiated charges can be dredged up decades later—with the claimants’ approval—as proof of a “pattern” of harassment. Informing the accused of charges against him, the argument goes, would expose complainants to retaliation and discourage them from coming forward.

Similarly, the PEC procedures recognize no right to counsel, because effective counsel might make the accusers “uncomfortable.” They contain no statute of limitations, no rules of relevance or evidence, and no right to confront one’s accusers, which is not a trivial thing. They contain no penalty for frivolous complaints. And the anonymity of the complainants is jealously guarded even when, as in the Maas case, the accusers air unfounded allegations in public.

It is probably true that many women feel uncomfortable in bringing sexual harassment allegations. But the things that cause accusers discomfort are the things we call due process. And it may be true that discomfort over the consequences of coming forward result in serious underreporting of sexual harassment. But the same is true of other undesirable social practices. In academia, for instance, integrity in scientific research is a serious concern, and one could argue that graduate students—who are often in an excellent position to know when and how their professors cut corners—are often deterred from coming forward. There would be less underreporting if students could file anonymous allegations without a risk of being confronted or even questioned. But we do not permit such allegations and we refrain from eviscerating due process, because we recognize the risk of ruining people’s lives over unfounded allegations.

The same risk is much more serious in the context of sexual harassment. But feminism insists that it is a risk not worth worrying about.

Sandra L. Bem, a prominent Cornell feminist and a principal architect of the PEC procedures, declared after the Maas conviction that the procedures were a success because the accused has been found guilty in every instance.\textsuperscript{32} This frank remark captures the spirit of feminist justice.

**PRESUMED GUILTY**

Sexual harassment proceedings effectively operate on a presumption that the accused is guilty. Much as the accuser is a representative of an oppressed class whose narrative must be believed and validated, so the accused is a symbol or representative of the patriarchal system. To let him off the hook would mean to let patriarchy off the hook, which is unthinkable. If the accused disputes the evidence against him and fails to acknowledge his culpability, it is usually because of his misogynist bias: he simply does not “get it,” and must be cured of his bias through sensitivity training or, like Don Silva, through psychiatric counseling.

As already noted, “sexual harassment” encompasses conduct ranging from ogling and awkward gestures to forcible rape, with all of these offenses being indistinguishable in principle.\textsuperscript{33} Thus, to reach a “guilty,” verdict, it is not necessary—from the feminist vantage point—that the offense be described and proven with any specificity. Again, the PEC’s “findings” in the Maas case provide a textbook illustration. The PEC did not engage in a complaint-by-complaint, charge-by-charge examination of the evidence against Maas; nor did it pause to consider (never mind explain) which of the alleged incidents were “unwelcome,” or “sexual in nature,” or sufficiently “severe” to constitute harassment. Instead, the PEC submitted a stream of equivocation, inferences and suppositions, culminating in an unequivocal conclusion that Maas was guilty of something that constitutes sexual harassment.

On the charge of excessive “friendliness,” for example, the PEC words said that Maas’s close relations with his students “created a climate in which it was hard to detect when the line between proper and improper behavior was being crossed.” The passive construction avoids any mention of the individual complainants or, for that matter, of James

\textsuperscript{32} See, e.g., SANDRA L. BEM, THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY (1993). Bem made the comment on the PEC procedures before numerous witnesses at a faculty meeting of the Arts College.

\textsuperscript{33} MacKinnon, supra note 17, at 2 (no principled difference between “verbal sexual suggestions or jokes . . . , a friendly pat . . . , and forced sexual relations”) (quoting Sexual Harassment on the Job: Questions and Answers, (Ithaca, N.Y.: Working Women United Institute, 1975 [mimeograph])).
Maas. Moreover, the “line” that the climate (not Maas!) may have crossed is impropriety, as opposed to harassment. A few sentences later, the PEC states with much greater confidence that Maas repeatedly behaved “unprofessionally”; but neither here nor elsewhere does the PEC explain which actions in particular crossed the line. And yet, a single sentence later, the Committee concludes that the unprofessional conduct constituted “in effect” sexual harassment. Thus, if the alleged violations did not exactly amount to harassment, they were still inappropriate and the kind of thing that could have made women uncomfortable, and were therefore harassment.

Just as offenses that could have been sexual harassment are sufficient for a guilty verdict, so the accused need not actually have committed the alleged offenses: it is enough that he could have done so. Maas’s convictions on the unproven breast touching allegation and the affirmatively disproven allegations of innuendo are prime examples, but there are others. In the course of an administrative hearing over transparently trumped-up harassment charges against a Vassar student, for instance, the accused demanded to know on what day he was supposed to have harassed the accuser. The hearing officers replied that the panel was concerned not with “when the event occurred, but whether it could have occurred.” The panel having settled on a specific date, the accused attempted to introduce evidence that he was in the infirmary on that day. Of course, the request was denied.34

Finally, feminism cannot be satisfied with sanctioning sexual harassment as boorish, rude, or unprofessional (never mind ungentlemanly) behavior: doing so would reduce institutional oppression to individual wrongs and would separate male misconduct from the larger, structural evil it represents.35 Accordingly, in sexual harassment proceedings, the accused will be found guilty of harassment, as opposed to a less stigmatizing offense such as impropriety or lack of professionalism. Don Silva was prepared to admit that his two remarks were “improper” and to apologize to the offended complainants. UNH would have none of it, and instead adhered to the absurd position that Silva’s remarks were “unwelcome conduct of a sexual nature sufficiently severe to affect the terms and conditions” of the students’ education.

So, too, in the Maas case: throughout the proceedings, Maas expressed a strong interest in mediation, as well as a willingness to acknowledge
“inappropriate” behavior and to apologize for any offense he might have given, simply to end his travails. For Cornell, such a compromise would have offered a way of ending a highly embarrassing affair, to preserve a highly valued employee’s good will, and to mollify its restless trustees and donors, many of whom were close personal friends with Maas. Instead, Cornell declared Maas guilty of sexual harassment, though not without adding in its press release on the case:

Professor Maas was not found . . . to have either had, or sought, an intimate sexual relationship with any of his students nor to have engaged in the physically abusive behaviors often associated with the term “sexual harassment.” Nonetheless, any conduct that constitutes sexual harassment is an affront to the entire Cornell community and will not be tolerated.

Cornell never deigned to explain what Maas did do. In stating for the record what he did not do, Cornell went as far as possible towards exculpating Maas, without saying publicly that Maas was “not guilty” of sexual harassment. Once Cornell had permitted campus constituencies to turn James B. Maas into a symbol, it took courage to say, “we have looked into the allegations, and there is nothing here.” Cornell did not have that courage, and James B. Maas was convicted—not for his conduct, but as a feminist metaphor.

SCOTTSBORO, 1996

One may wish to contend that Silva and Maas are outliers—outrageous, exceptional cases well outside ordinary institutional practices. First, however, even leaving aside evidence of similar cases elsewhere, Cornell and UNH do not view their conduct as extraordinary. In both the Silva and Maas cases, university attorneys were closely involved at all stages of the proceeding—and informed the faculty and administrators that everything was in good order. Even after a federal judge had declared that Professor Silva was so obviously innocent that the students and faculty members who sentenced him could be held personally liable for violating his First Amendment rights, UNH would not admit that it had done anything wrong.36

Second, individuals who are accused of sexual harassment are in a terrible bargaining position: whether eventually proven or not, the allegations spell ruin once they become public. (Maas and Silva were able to

fight back only after the damage had been done.) Moreover, it is beginning to dawn on teachers and students that a fair hearing on sexual harassment charges is out of the question. At best, the case will be heard by faculty members or administrators whose incentives—in the form of federal regulations and pressure from campus agitators—uniformly cut in the direction of convicting innocent faculty members; the less fortunate, such as Maas and Silva, will be asked to appear before a panel of ideologues and equal opportunity officers with an institutional interest in maximizing the number of convictions. Either way, a conviction is a foregone conclusion.

Since any serious defense will pose an extraordinary risk to the defendant’s livelihood and reputation, the only realistic option for accused parties is to knuckle under, confess to something (anything!), express remorse, and attend a re-education seminar. Maas and Silva refused to do so; from this perspective, their cases are exceptional. But it is hardly a perspective that casts sexual harassment proceedings in a better light.

Is there any defense for the intimidation, the railroading, and the reckless disregard for the reputation of innocent parties that have come to surround sexual harassment proceedings? Perhaps, the best defense is to tie these practices directly to its feminist origins. Sexual harassment theory is an exercise in social transformation, and any such an ambitious project, feminists might say, will entail costs. Perhaps, Don Silva and Jim Maas deserve sympathy and regret, although they are, after all, members of a privileged class of white male university professors. But as a general rule, we need not respect the misogynists’ preferences any more than the civil rights revolution respected the racists’ preferences and prejudices. In the end, the costs will be transitional and limited: like the racists before them, the misogynists will eventually adjust to the new rules.

Ideological ambitions, however, are not so easily confined or targeted at particular constituencies of privileged white males. And it is at least an open question whether any social transformation, however urgent it may appear, justifies the wholesale demise of due process and of protecting innocent parties. A final case example illustrates these concerns.

In a case pending before U.S. District Judge Jackson L. Kiser, the nominal plaintiff, Christy Brzonkala, a former student at Virginia Tech,
has raised federal and state claims against the university and three individuals. The individual defendants are black male Virginia Tech students and members of its football team.

The case arises from the following facts: Returning from a party at around 2:00 am on a fateful morning in September 1994, Brzonkala and a female friend knocked on the dorm room door of the defendants, whom they had never met. They were let in. The talk quickly turned to sex. Brzonkala's friend left; no attempt was made to hold her back.

At this point, the accounts diverge. Brzonkala claims that Morrison and his roommate, James Crawford, took turns raping her. Morrison denies the rape allegation, and has steadfastly maintained that he was involved only in a consensual encounter. Crawford denies any involvement with Brzonkala, and even she admits that Crawford left shortly after her friend did. Crawford returned some time later with a teammate, Cornell Brown; in a prank on Morrison, the two clamored that the coach was checking up on the players. Morrison hurried the girl out of the room.

All of the publicly available evidence points strongly towards Morrison's innocence. Morrison's story, unlike the plaintiff's, fits with the accounts given by his friends and by the female witness. There is no physical evidence to suggest rape, and Brzonkala did not seek medical treatment after the alleged incident. None of the numerous Virginia Tech officials called upon to examine the case has been able to find Morrison or Crawford guilty of rape. In April 1996, a grand jury refused to issue indictments against Morrison and Crawford.

Brzonkala did not complain to any public authority until April 1995, seven months after the alleged incident. Then, she fell into the hands of the Virginia Tech women's center. At the staffers' urging, Brzonkala brought administrative charges under Virginia Tech's "Abusive Conduct Policy," alleging gang rape by Morrison and Crawford.

On less than a week's notice, Morrison and Crawford were drummed through a hearing that featured serious procedural irregularities. For instance, there was no face-to-face confrontation between the accuser and

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40. Id.
41. Transcripts of two hearings on the case at Virginia Tech, which buttress Morrison's claims of innocence, are under a protective order. See A Hokie Linebacker's Crime and Punishment, COLLEGIATE TIMES, Nov. 28, 1995.
42. Hayden, supra note 39, at A1.
SEXUAL HARASSMENT: OTHER VICTIMS

the accused; Brzonkala testified over the telephone. Asked to describe the alleged rapists (whose pictures she claimed to have recognized in a football program given to her in April 1995), just about the only thing Brzonkala got right was that the offenders were black.

No disciplinary measures were taken against Crawford, which strongly suggests that the hearing committee did not buy the rape story. Morrison was found guilty, though not of rape but of “sexual misconduct.” It was not explained what precisely that misconduct might be. Perhaps, it was consensual, interracial sex; perhaps, it was Morrison’s rude, post-coital remark that “you better not have any diseases.” In any event, Morrison received a one-year suspension, effective immediately.

However, Virginia Tech had not published the sexual misconduct policy at the time of the event; Morrison had violated a standard he had no way of knowing. Thus, the suspension was set aside, and a new hearing—as problematic, from a procedural perspective, as the first—was held. Morrison was found guilty of the offending “diseases” remark, and the one-year suspension was re-instated. In an act of courage, Virginia Tech’s Provost (herself a woman) determined than the penalty was a bit much for a single remark and deferred the one-year suspension, meaning that Morrison was placed on probation.

It appears that at this point, the American Association of University Women referred the plaintiff to Eileen Wagner, an attorney and long-time feminist activist. Wagner filed a federal lawsuit on Brzonkala’s behalf. Among several other state and federal causes of action, the suit alleges federal claims against the individual defendants under the federal Violence Against Women Act (VAWA).43

43. The pendent state law claims are assault and battery, false imprisonment, and defamation (on the theory that Morrison’s insistence that any sex was consensual amounts to an accusation of fornication, a crime of moral turpitude in Virginia). Further, Brzonkala alleges discrimination by Virginia Tech under Title IX of the Civil Rights Act, 20 U.S.C. 1681-88 (1995), claiming, in essence, that Virginia Tech discriminated against her by granting Morrison due process (such as it was) “solely because he is a member of Virginia Tech’s all-male football team.” Brzonkala v. Virginia Polytechnic Inst., No. 95-1358-R (W.D. Va. 1995). The district court granted Virginia Tech’s motion to dismiss the claim. See Nina Bernstein, Virginia Tech Wins Dismissal of Rape Suit, N.Y. TIMES, May 8, 1996, at A16.

44. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 8,18,42 U.S.C. (1995)) The statute owes its 1994 enactment in large measure to Lorena Bobbit who, in a highly publicized incident, severed her husband’s penis with a kitchen knife, took the member for a car ride, and eventually tossed it onto a Virginia highway. Patricia Ireland, President of the National Organization for Women, proclaimed at the time that the Bobbit affair “underscore[d] the need for Congress . . . to get about the business of passing a comprehensive violence against women act.” Quoted in NY REVIEW OF BOOKS, April 18, 1996, at 69 (letter to the editor). In the Brzonkala case,
VAWA created, inter alia, a federal tort claim for crimes against women that are motivated wholly by a discriminatory animus toward the victim’s gender. This cause of action implies either that sexual torts against women by men who like women is somehow less serious than torts inflicted by misogynists. Or else, it implies that violence against women is inherently “discriminatory” and misogynist. While feminism, as noted, accepts and indeed propagates this ideological absurdity, VAWA rejects it and requires the plaintiff to prove the defendant’s discriminatory animus.

In the Brzonkala case, the evidence of Morrison’s animus is said to consist of his alleged failure to use a condom during the alleged incident; the “disease” remark; and an allegation by the plaintiff’s roommate that Morrison once graphically expressed his desire of having sex with drunk girls. Morrison categorically denies making the latter remark, which the witness claims to have overheard in a dining hall full of football players. To the limited extent that these allegations are even relevant, they are so thin as to raise the question why the plaintiff brought the VAWA claim at all—especially since it is pled alongside viable (though unprovable) state law claims.

The answer is that Brzonkala is a feminist symbol and part of a crusade against misogynists and especially college athletes. The suit originally demanded $8.3 million in damages, a sum chosen explicitly for its symbolic value: it happens to be the amount Virginia Tech earned in the 1994 Sugarbowl game. The complaint further demands “an injunction directing Virginia Tech to provide at least five hours of mandatory sexual assault awareness education to student athletes . . . and to bring nationally recognized speakers on sexual harassment and sexual assault issues to its university forum at least twice a year.” And, Wagner wants the entire defendants have moved to dismiss the VAWA claims against Morrison on the grounds that the enactment exceeds Congress’ power under the Commerce Clause and Section 5 of the Fourteenth Amendment. NOW has filed an amicus brief on the plaintiff’s side, opposing dismissal of the VAWA claims.

45. If the point needs belaboring: is a male-against-female car accident “discriminatory”? Is sexual violence by males against their girl friends or wives—that is, most sexual violence—“gender motivated” and driven by dislike of women as a class? Or is it rather the case that the parties do not get along and the men, as a rule, are physically stronger? Also, women act violently against men with amazing frequency. See John Leo, Gender-Bent Discord, WASH. TIMES, May 10, 1996, at A21 (discussing National Family Violence Survey data showing that while men are more likely than women to inflict serious damage on their partners, the female dangerous domestic assault rate is twice as high as the male rate). What does this say about the feminist theory of sexual violence as a manifestation of male oppression and “discrimination”?
starting line-up and coaching staff of Virginia Tech's football team to appear at trial, for whatever relevance the players' and coaches' testimony may have on the case. For good measure, Wagner asserts a VAWA claim against Cornell Brown—Crawford's fellow prankster, whose only conceivable crime is that he, too, is a male football player.

In opposition to defendant Morrison's motion to dismiss the VAWA claim, plaintiff's counsel averred that

Plaintiff believes her case will forever change the cavalier attitude widely used to dismiss the sufferings of sexual assault survivors everywhere. Plaintiff anticipates this litigation will re-focus crime prevention efforts for sexual assault on the behavior of the perpetrator. Plaintiff expects this litigation to dissect the ancient misogynistic myth that women secretly desire to be raped. Further, she hopes for a wide national debate about why the "no means yes" myth still persists. Plaintiff expects litigation in this forum will set a high level for national legal discourse about the true seriousness of criminal sexual assault as it affects the majority of American victims—females.

This passage shows the feminist paradigm at work: with casual brutality, feminist attorneys and activists have dragged Christy Brzonkala into a case in which she and the defendants serve as mere symbols of a larger "legal discourse." Brzonkala is not a lawsuit; feminists have framed it as a referendum on an issue.

It may well be futile to remind feminists that lawsuits are supposed to be about individuals, not symbols; over facts and evidence, not social theories; over guilt or innocence, not social transformation. But if feminists continue to insist on turning lawsuits into referenda, let us be clear about the issue: we have once again reached the point of hanging rape charges on innocent black men.

THE DEBATE BETWEEN CRITICS OF "POLITICAL CORRECTNESS" AND ADVOCATES OF SWEEPING ANTIDISCRIMINATION CODES: A POLARIZED DISCOURSE THAT CAN DO NO GOOD [Response to Michael Greve]

by David Goldberger

There is no end in sight to the furious debate between the critics of so-called "political correctness" and the advocates of expansive remedies for gender and race discrimination of debatable constitutionality. On the contrary, the ongoing debate has become so polarized that it is not clear that anything constructive is being accomplished. Academic journals and editorial pages are filled with commentary proclaiming the virtues of one side and the defects of the other. Indeed, the debate seems much more like a cottage industry generating notoriety for intransigent participants rather than progress towards answers to fundamental constitutional and social questions.

At one extreme lies the view that the legal system should treat the need to remedy discrimination as America's most important social priority. Standing alone, that point is not a startling one. However, there is a corollary of this view that is indisputably controversial. The corollary is that the Equal Protection Clause of the Fourteenth Amendment is so important that it should trump virtually all other provisions of the Bill of Rights when they are in tension with its goals. For example, where equal protection interests are in tension with the First Amendment, the right to freedom of speech should yield. If hate speech is upsetting to minorities, it should be illegal.

On the face of things, this emphasis on the Equal Protection Clause seems perfectly plausible. Like every other country in the world with a heterogenous population, America has had its share of the problems generated by racial, religious, and gender discrimination. Furthermore, while we have made admirable progress in addressing these national problems, we still have a long way to go before they are solved.

In particular, advocates of broad antidiscrimination remedies have supported the enactment of antidiscrimination codes and private workplace antidiscrimination laws that often impose legal sanctions on

speech and conduct that existing case law treats as protected. Thus the advocates of legal restrictions on speech propose laws and regulations punishing "language intended to demean by reference to race . . . [or gender]." In court, offensive as such communication can be, it has been treated as protected by the First Amendment. However, as the debate has become more heated, an increasing number of commentators are now taking the position that the First Amendment protects too much speech. According to this view, the right to freedom of speech should be reformed in a way that punishes offensive references to race and gender by white males while protecting identical references when made by society's traditional outsider groups. This double standard is justified on grounds that bigoted speech by members of outsider groups is not tied to perpetuation of subjugation of outsider groups. Supporters of this view point, with glee, to the decision of the Canadian Supreme Court in *The Queen v. Butler*, which upheld Canada's obscenity law on a theory crafted by American feminists that obscenity is unlawful because it is a form of discrimination against women.

At the other pole of the debate are the critics of "political correctness", like Mr. Michael Greve. They believe that overly broad and excessively punitive laws, designed to fight discrimination, have victimized many individuals, including white male academics who now work in constant fear of being the targets of unfair claims of sexual harassment and racial bias. The critics of "political correctness" contend that the reformist desire to root out race and gender discrimination has overridden basic considerations of fundamental fairness and the right to freedom of speech.

There is much force to this criticism. For example, Ohio State University has enacted a sexual harassment policy which punishes, among other things, "any unwelcome . . . reference to gender or sexual orientation . . . when . . . such conduct has the effect of unreasonably interfer-

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ing with and individual’s . . . educational experience, or creates a[n] . . . offensive environment for working, learning, or living on campus, and has no legitimate relationship to the subject matter of a course.” The language is so broad and vague that it appears to cover everything from tasteless jokes to instances of harassing physical contact. The zeal of supporters of the policy was highlighted by the fact that it was enacted pursuant to a summary procedure that by-passed the University Senate, apparently to avoid the perils of genuine parliamentary debate.

Unfortunately, the critics of so-called “political correctness” do not draw the line at criticizing the excesses that have, in fact, harmed innocent people. Instead these critics are adopting the over-zealous tactics of their adversaries by employing divisive rhetoric and heavy handed legal tactics which serve only to further polarize the debate. Thus, Mr. Greve accuses feminists who support legal restrictions on sexual harassment as engaging in “gender warfare.” Furthermore, he dismisses the notion that America has a serious problem of job-related gender discrimination by asserting that “[l]abor markets in particular are far more stratified, segregated, and un-equalized by education than by gender.” He is similarly dismissive of sexual harassment proceedings as if every such proceeding is little more than a kangaroo court in which “disregard for the facts” is a defining characteristic. Such polemics do nothing to redress the excesses of the proponents of draconian antidiscrimination remedies. Like the one-sided arguments of those he criticizes, Mr. Greve’s rhetoric provokes onlookers to get mad and choose sides. He gives little weight to the fact that there is significant gender discrimination in the United States, just as there is significant racial and religious prejudice.

The leading gender discrimination cases decided by the United States Supreme Court do not address occasional behavioral aberrations. They address deeply entrenched problems. For example, in Reed v. Reed, one of the original gender discrimination cases, the Supreme Court invalidated an Idaho statute providing that, when a man and a woman are equally entitled to be appointed as an administrator of an estate, the man must be appointed. Admittedly, Reed was decided twenty-five years ago. However, the social attitudes that led to the enactment of the Idaho stat-

8. OHIO STATE UNIVERSITY, SEXUAL HARASSMENT POLICY (1993)
9. See Greve, supra note 1.
10. Id.
11. Id.
ute remain with us today. One needs only to look at America's large libraries. Although staffs are comprised largely of women, the comparatively few male librarians receive higher pay and occupy a disproportionate number of high status administrative positions.13

The polarization of the debate is destructive because it implies that there is no possible common ground between the disputants. This implication is wrong. It is not as if one side believes there is discrimination and the other side believes there is none. Then why should we not confine legal remedies to those situations in which there is actual misconduct in the form of one-on-one threats evidencing coercive, discriminatory conduct in which there is provable harm? To the extent that Professor Delgado wants to stop tasteless or socially inappropriate communication or conduct, look to social disapproval and jawboning rather than actual enforcement of legal standards. To the extent that Mr. Greve wants to rein in irresponsible enforcements proceedings, look to the kinds of civil rights challenges to unconstitutional government conduct that have been proven effective for nearly fifty years.14

As a consequence, the real debate is not over the presence of discrimination, but rather the appropriateness and scope of the various means proposed as remedies for discrimination. Thus, in the context of the debate over the virtues and vices of sexual harassment laws and regulations, the basic disagreement is whether those who view gender discrimination as a paramount issue are right in advocating sweeping antidiscrimination laws and regulations of questionable constitutionality that have terrible consequences for individuals innocent of anything worse than poor taste. This is because there is no universal consensus about how broadly to define the words and deeds that are to be prohibited by broad gauge antidiscrimination laws and regulations. Horror stories abound and show no sign of abating. We have heard some from other presenters at this symposium.

Unfortunately, because the debate is so polarized, the participants refuse to look for an intellectual or common sense middle ground. Consequently, the judiciary has been required to stand in as the primary institution to decide which position is to prevail. For example, several years ago the University of Michigan enacted a regulation that prohibited, among other things, "[a]ny behavior, verbal or physical, that stigmatizes


or victimizes an individual on the basis of sex or sexual orientation where such behavior . . . [c]reates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.\(^{15}\) The validity of the regulation was challenged, and was found to be constitutionally defective because, even though the university had the power to punish fighting words, [w]hat the University could not do, however, was establish an antidiscrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed. . . . Nor could the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people.\(^{16}\)

A short time after Doe, the University of Wisconsin drafted a regulation presumably designed to avoid the defects of the University of Michigan regulation. The regulation prohibited “racist or discriminatory comments, epithets or other expressive behavior directed at an individual . . . if such comments, epithets, or other expressive behavior . . . demean . . . and [c]reate an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.”\(^{17}\) Again the judiciary was called upon to intervene. As a result, a Wisconsin district court invalidated the University of Wisconsin regulation on constitutional grounds.\(^{18}\) It rejected the university’s reliance on Title VII standards as unpersuasive because . . . “Title VII addresses employment not, educational settings.”\(^{19}\) Furthermore, even if it were applicable to educational settings, “[S]ince Title VII is only a statute, it cannot supersede the First Amendment.”\(^{20}\)

In spite of these two decisions, however, other universities have plunged forward in their effort to enforce broad gauge gender discrimination regulations. Thus, Ohio State officials chose to ignore the Michigan and Wisconsin court decisions, by enacting a regulation that, like Wisconsin’s failed regulation, incorporated Title VII standards that were originally drafted to cover workplace rather than academic settings.\(^{21}\)


\(^{16}\) Id. at 863.

\(^{17}\) UMW Post, Inc. v. Board of Regents of the University of Wisconsin, 774 F. Supp. 1163, 1163 (E.D. Wis. 1991).

\(^{18}\) Id.

\(^{19}\) Id. at 1177.

\(^{20}\) Id.

\(^{21}\) OHIO STATE UNIVERSITY, supra note 8, 3.
The insistence of universities like Ohio State on enacting such indiscriminate regulations in the face of hostile judicial rulings further fuels the fires of critics like Mr. Greve whose rhetoric demonizes the proponents of such legal restrictions.

Unfortunately, recourse to the courts in order to invalidate unconstitutional regulations and laws is not the last chapter of this debate. The predictable excesses caused by such laws and regulations is generating a legal counterattack which creates new constitutional problems. Among the approaches that have been proposed is an expansive resort to the courts beyond the already successful challenges to the constitutionality of ill advised laws and regulations.\(^22\) Instead Mr. Greve and others propose to file lawsuits designed to hold those who participate in enforcement proceedings personally liable for violation of the alleged harasser's rights.\(^23\)

This policy of suing individuals participating in enforcement proceedings to enforce antidiscrimination laws may be as damaging to individual rights as are the excesses caused of “political correctness.” It sounds ominously like a proposal to file SLAPP suits which injects new First Amendment violations into the battle. SLAPP is an acronym for “Strategic Lawsuits Against Public Participation.”\(^24\) Traditionally, a SLAPP suit has been regarded as a lawsuit filed as a tactic to intimidate or burden an individual defendant because that individual has sought the assistance of government in redressing a wrong or changing a policy.\(^25\) The typical SLAPP suit plaintiff is someone who is a target of or who has the most to lose from a successful effort to get government assistance in redressing a wrong or changing a policy that the plaintiff is purportedly responsible for. I first ran into SLAPP suits years ago when I was involved in representing a private individual who had been sued for libel by a police officer because the individual had filed a police brutality complaint with the Internal Inspections Division of the Chicago Police Department and had described the alleged brutality to the press.

\(^{22}\) They also propose administrative sanctions for intentionally false charges of discrimination. This does not seem to be a controversial proposal. The current Ohio State University Sexual Harassment Policy provides: “It is a violation of this policy for anyone to knowingly make false accusations of sexual harassment. Failure to prove a claim of sexual harassment is no equivalent to a false allegation. Sanctions may be imposed for making false accusations of sexual harassment.” Id. at 7.


\(^{24}\) GEORGE W. PRING & PENELOPE CANAN, SLAPPs: GETTING SUED FOR SPEAKING OUT (1996).

\(^{25}\) Id. at 8-9.
The SLAPP suit label is applicable in the context of today’s discussion about “political correctness” because suits that Mr. Greve advocates are filed against the officials, in their personal capacities, and, presumably, against private citizens involved in the sexual harassment proceedings that critics of “political correctness” believe to be out of control. One message of such litigation is that participation in administrative proceedings designed to redress harassment or discrimination is that such participation will carry a significant personal price for all participants. If the litigation is successful the defendants will have to pay damages from their own pockets for having participated in the proceedings. Moreover, the individual defendants may have to bear the high costs of attorneys fees in the course of defending against unmeritorious litigation.

An increase in the number of cases that appear to be SLAPP suits filed in response to sexual harassment complaints is being documented by attorneys who specialize in sex discrimination cases.26 What is important here is that, to the extent that such litigation is retaliatory in nature, it has the capacity deter the initiation of charges for harassment or discrimination without regard to their merit. Thus, like irresponsible charges of harassment or discrimination, the use of SLAPP suits or similar retaliatory devices will burden First Amendment rights by punishing the innocent. As the Supreme Court recognized in Bill Johnson’s Restaurant v. NLRB:

A lawsuit no doubt may be used . . . as a powerful instrument of coercion or retaliation. . . . Regardless how unmeritorious the . . . suit is, the [target] will most likely have to retain counsel and incur substantial legal expenses to defend against it. . . . Furthermore . . . the chilling effect . . . upon a [target’s] willingness to engage in [constitutionally] protected activity is multiplied where the complaint seeks damages in addition to injunctive relief.27

Several years ago, the Supreme Court considered a case concerning a quintessential SLAPP suit. In City of Columbia v. Omni Outdoor Advertising, Inc., an outdoor advertising company filed an antitrust suit against a competitor and the City of Columbia South Carolina on grounds that a local competitor had conspired with the City to keep Omni out of the market by self-interested lobbying.28 Omni claimed that the defendant, a local competitor, had persuaded the city to enact billboard restric-

tions that gave the local competitor a monopoly. The Court upheld dismissal of the suit, in part, on the ground that the relief sought would violate the defendant's First Amendment right to petition the local government for redress of grievances by lobbying for a change in the city's zoning laws. Even if the purpose that the defendant petitioned for a change or enforcement of the law resulted in a government decision to give a private party an unfair advantage, the petitioning was constitutionally protected. The "selfish motives" of the party who was petitioning the government are irrelevant. According to the opinion, the courts could only entertain lawsuits seeking damages or other relief against individuals requesting the assistance of government without violating the First Amendment in situations in which persons use the governmental process — as opposed to the outcome of that process — as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay.

Although this point is made in the context of antitrust litigation, it surely is applicable to the retaliatory suits proposed by critics of political correctness who seek to punish or prohibit use of governmental processes by resort to SLAPP suits. Whether or not the resort to broad-gauge harassment and antidiscrimination provisions is constitutionally sound, an effort to deter enforcement proceedings with costly retaliatory personal damages suits will frighten many would-be participants into silence. Thus, such suits have the same damaging effect on participants that Mr. Greve says that antidiscrimination proceedings have on people who are wrongly accused or unfairly treated.

In short, it appears that we are now coming full circle. The use of SLAPP suits or other kinds of retaliatory proceedings to deter threatened abuses parallels the irresponsible enforcement of harassment and antidiscrimination laws. Advocates on both sides of the debate are employing excessively destructive weapons to enforce their views.

That leads us to the final question: if neither of the polar extremes in the debate over "political correctness" is making a persuasive case for its approach and both are resorting to constitutionally dubious enforcement

29. Id. at 367.
30. Id. at 381-82.
31. Id.
32. Id. at 380. See also Pring & Canan, supra note 24, at 27.
tools, how can the deadlock be broken? No panacea is immediately obvious. The opposing debaters are self-righteously committed to their perceptions of wrongdoing and remedies, and the gulf between them is unbridgeable. Moreover, neither side seems worried about the impact that their proposed remedies is having on innocent people. It is most likely that the deadlock will only be broken in the tried and true way: incrementally through case-by-case adjudication to sort out the appropriate limits on the conduct of both sides. The sorting process is likely to be slow and costly, as litigation always is. There will be mistakes and injustices along the way. Nonetheless, there is no other feasible way because in its currently polarized form the political debate over so-called "political correctness" continues to generate far more heat than light.
IN SEARCH OF A RIGHT TO ESCAPE FROM A PORNOGRAPHIC SOCIETY

by Jill P. Meyer

I. INTRODUCTION

It is everywhere. From the seediest street corners to the classiest board rooms. From the demented fantasies of a convicted rapist to the innocent curious thoughts of the ten-year old boy next door. "It" is pornography. It infiltrates every aspect of our society, most often without a sound and without giving the receivers of its effects a chance to respond.

Amidst all of the political controversy surrounding the propriety of its content, the constitutionality of its existence, and its effects on those who view it or participate in it, one undeniable fact remains. Pornography portrays women, first and foremost, as objects of sexual pleasure.

Women have been fighting a war since the beginning of time to be viewed as equals of men. Women have proven over and over again that they are, in fact, capable of succeeding in what used to be, and in many aspects still is, a man's world. Despite this growing success, women still face the same obstacles that the first women to break out of their traditional women's roles faced. In every setting, women are either evaluated by men according to their sexual desirability, or have other women's sexual desirability shoved down their throats. What is frightening is that this evaluation process is conducted, in most instances, without any conscious awareness of it happening.

This is not to say that pornography causes this subconscious process. Since women traditionally were wives and mothers with the main job of keeping their husbands satisfied and homes happy, this process was, as unnerving as it sounds, quite efficient in creating and maintaining happy homes. As long as men were pleased with their "property," women received in return roofs over their heads, food on their plates (which they of course prepared), and a place in society as "Joe Blow's wife." While the rest of society has advanced with the notion that women are capable of much more than satisfying men, pornography remains a front-runner in perpetuating the role of women as mere sex objects placed on earth to
please men.¹

Pornography shreds from women every ounce of respect they have earned as individuals with minds, souls, and feelings. Pornographers replace that respect with pictures of women who are nothing more than bodies responding to the demands, thrills, and perverted desires of men. This is not the accountability that women have strived for so many years to obtain. Women, as a whole, have broken out of the caretaker role where they were held for so long. Women have proven skills, intelligence, and foresight far beyond that ever imagined by the founding fathers. Yet, in every man's mind, there remains the scale that weighs women by the sexual pleasures they can provide. What is most disturbing about the entire process is that many men conduct it automatically without giving even a thought as to the oppressive result it creates.

What is “Pornography”?  

By “pornography,” I refer to the magazines, the films, the topless and nude bars, the prostitutes on the street corners, the prostitutes for hire through “entertainment” agencies,² and other similar forms of placing women in subordinate positions. I do not refer to sexually explicit materials which some characterize by the term “erotica.”³ Rather, the pornography that is the subject of this article is “material that combines sex and/or the exposure of genitals with abuse or degradation in a manner

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¹. “Pornography makes the world a pornographic place through its making and use, establishing what women are said to exist as, are seen as, are treated as, constructing the social reality of what a woman is and can be in terms of what can be done to her, and what a man is in terms of doing it.” CATHARINE A. MACKINNON, ONLY WORDS 25 (1993).

². These prostitutes are commonly referred to as “dancers” or “strippers.” Men like to think that when they pay one of these women to strip at their private parties it is just “good fun” and not the same as paying a whore for a night of sex in a cheap hotel. I stand firm in my position that these private hire “dancers” are an even more disgusting form of prostitution that are given a title so that men who like to claim that they respect women can feel that they are not participating in an activity so repulsive as to pay a woman money to humiliate and disrespect her through her sexuality “all in the name of good clean fun.” What is even more disturbing is that many women accept this behavior from the men in their lives, writing it off as “boys will be boys.” These are the same women who would feel completely violated and sickened if those same men in their lives instead spent a few hours in the local motel with “Bambi” from the nearest street corner.

³. Erotica is defined as: “[S]exually suggestive or arousing material that is free of sexism, racism, and homophobia, and respectful of all human beings and animals portrayed.” DIANA E. H. RUSSELL, MAKING VIOLENCE SEXY 3 (ed., 1993). The term, however, is used by propornography feminists to include all sexually explicit material (including pornography) in a deliberate attempt to cloud the distinction antipornography feminists have drawn between purely erotic material and erotic pornographic material.
that appears to endorse, condone, or encourage such behavior." Al-
though this broad definition encompasses more than just women as the objects being exploited by pornography, the focus of this article is wom-
en in pornography, as they are the biggest victims of the industry.

Pornography is not divided by the make-believe distinction some have created to divide materials as "soft" or "hard-core" porn. This distinction is false, because many materials that some refer to as "soft," demean women in the same manner as other "hard-core" materials. Therefore, materials such as Playboy do not escape the definition of pornography.

"Pornography" does not label all sexually explicit material as subordi-
nating or demeaning to women. Rather, pornography is the label for sexually explicit material that does subordinate or demean women. This may be a fine line to sketch. Nevertheless, it is a line that needs to be drawn in order to eradicate the ill effects that pornographic materials continue to perpetuate in society. How to go about drawing the line has been a heated topic of discussion among feminists and, as those discus-
sions show, is not an easy task. The fact that there is not a simple answer does not mean that the job should be abandoned, as one faction of femi-
nists seems to suggest.

Feminists Catharine A. MacKinnon and Andrea Dworkin created an

4. Id. at 2-3.
5. In this context, the definition of pornography as applied to women would read: "mate-
rial created for heterosexual males that combines sex and/or the exposure of genitals with the abuse or degradation of females in a manner that appears to endorse, condone, or encourage such behavior." Id. at 3.
6. Playboy does not escape the definition because:
Playboy is a bona fide part of the trade in women. The format of Playboy was devel-
oped to protect the magazine from prosecution under obscenity law. . . . The use of women as objects in Playboy is part of how Playboy helps to create second-class status for women. Women in Playboy are dehumanized by being used as sexual objects and commodities, their bodies fetishized and sold. . . . The women in Playboy are presented in postures of submission and sexual servility. Constant access to the throat, the anus, and the vagina is the purpose of the ways in which the women are posed. . . . Underlying all of Playboy's pictorials is the basic theme of all pornography: that all women are whores by nature, born wanting to be sexually accessible to all men at all times. Playboy particularly centers on sexual display as what women naturally do to demon-
strate this nature. . . . The sexual exploitation of women is what the magazine is, what it does, what it sells, and how it is produced.
RUSSELL, supra note 3, at 79-80 (excerpted from ANDREA DWORKIN & CATHARINE MACKINNON, ORGANIZING AGAINST PORNOGRAPHY 67-90 (1988)).
7. American Civil Liberties Union President Nadine Strossen argues that any attempt to limit the treatment and display of women in pornographic films would be unconstitutional be-
cause the definitions that have been proposed are amorphous and would encompass all sexual speech.
anti-pornography ordinance in the early eighties which included a detailed definition of pornography.\( ^8 \) After having been adopted by the city of Indianapolis, Indiana, it was struck down as unconstitutional.\( ^9 \) Although the particular ordinance adopted in that case was unconstitutional, the definition included in the ordinance provides a strong basis for a definition that could withstand constitutional challenges. Such a definition would protect sexual "speech" that is not "pornography."

A purpose of this article is to create awareness about pornography. Awareness that pornography exists to a greater extent than many would believe. Awareness that women are injured for and as a result of pornography. Awareness that pornography forces society to maintain a view that women are the subordinates of men. Awareness that pornography is the antithesis of every right women have fought to attain over the past two hundred years.

When confronted with the issue of pornography in everyday life, many people choose to turn their heads the other way. They justify its existence with such statements as "Well, if she wants to humiliate herself that way who am I to say she can't?" or "I think that any woman who does that is completely disgusting and obviously has no self-respect. But if she has no respect for herself, why should I respect her?" These, and other similar statements, are nothing more than feeble attempts by women to pretend that their husbands', boyfriends', or sons' participation in such activities really does not reflect badly on them. Men rely upon these statements to place the blame for their participation in such practices solely on the women who perform.

8. It is defined as "the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

(1) Women are presented as sexual objects who enjoy pain or humiliation; or
(2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
(3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
(4) Women are presented as being penetrated by objects or animals; or
(5) Women are presented in scenarios of degradation, injury abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.


9. Id. at 332.
Many people will agree that pornography is harmful to women, or society as a whole, and claim an utter hatred for its existence. However, when confronted with battling the issue on a personal level, these people shrink back and accept the presence of pornography in their lives because that is how it has always been. It is much easier to accept the status quo than to speak up for a change that is threatening to the existence of society as we have known it, and as some want to keep it. If this lack of response continues, society and women shall remain in danger.

This article does not profess to give scientific evidence or statistical backup to every one of the views and observations regarding the effects of pornography on women. This article will review what other writers have proposed on the topic and will propose some changes that would advance women from our second-class status. In doing so, this article explores the reactions of men and women who struggle with the existence of pornography. It also examines the glaring effect that pornography leaves on all women whether they “choose” to participate in it or whether they try to combat it as women worthy of recognition for their minds and capabilities, not simply their bodies.

II. TWO MAJOR FEMINIST SCHOOLS OF THOUGHT ON PORNOGRAPHY

Many different authors have expressed strong views on pornography and women. Two writers, Catharine A. MacKinnon and Nadine Strossen, have taken particularly strong positions on the subject and most effectively represent the current dichotomy of approaches employed in dealing with it. Their opposing positions also demonstrate the complexity of the problem. This helps to explain why a solution is so difficult to obtain.

Ultimately, the polemic between Catharine MacKinnon and Nadine Strossen is akin to the traditional arguments about placing limits on the First Amendment rights of individuals. However, if we begin with realistic pictures of individual men and women, society, and pornography, then some of the emotion-laden propositions expounded merely as scare tactics to gain extra support for one side will not succeed in taking the focus from the real issue. Both MacKinnon and Strossen do raise valid support for their respective positions. However, they get so one-minded...

at times that their refusals to admit honest facts creates the notion that they are not approaching the subject to realistically find a solution to the problem.

A. Catharine MacKinnon

Catharine MacKinnon, professor at the University of Michigan, is a motivating force in the battle with pornography. Her latest book, *Only Words*, proposes a strong civil rights argument to advance the position that there should be controls on pornography. Acknowledging the First Amendment arguments in support of protecting pornography, MacKinnon admits that “[p]ornography contains ideas, like any other social practice.”

Instead of dismissing pornography as constitutionally protected for that reason, she extracts that “the way it works is not as a thought or through its ideas as such, at least not in the way thoughts and ideas are protected as speech.”

MacKinnon proposes her constitutional argument in support of regulations on pornography pursuant to equality guaranteed by the Fourteenth Amendment. According to MacKinnon, we have gotten so caught up in evaluating everything by First Amendment implications, that the other guarantees of the Constitution are overlooked. Her definition of pornography includes these protections by recognizing “its function as defamation or hate speech . . . [and] its role as subordination, as sex discrimination.”

Throughout her book, MacKinnon points out glaring inconsistencies with the First Amendment analyses traditionally applied. Judges have ignored the action that is often a part of the “speech.” As applied to pornography, MacKinnon differentiates the role of mere ideas and the action involved:

There are many ways to say what pornography says, in the sense of its content. But nothing else does what pornography does. The question becomes, do the pornographers-saying they are only saying what it says-have a speech right to do what only it does?

12. Id.
13. Basically defined as “graphic sexually explicit materials that subordinate women through pictures or words.” *Id* at 22.
14. Id.
15. “[S]ocial life is full of words that are legally treated as the acts they constitute without so much as a whimper from the First Amendment. What becomes interesting is when the First Amendment is invoked and when it is not.” *Id* at 12.
What pornography does, it does in the real world, not only in the mind. . . . In pornography, women are gang raped so they can be filmed. They are not gang raped by the idea of a gang rape. It is for pornography, and not by the ideas in it, that women are hurt and penetrated, tied and gagged, undressed and genitally spread and sprayed with lacquer and water so sex pictures can be made. Only for pornography are women killed to make a sex movie, and it is not the idea of a sex killing that kills them. It is unnecessary to do any of these things to express, as ideas, the ideas pornography expresses. It is essential to do them to make pornography. 16

The thrust of MacKinnon's analysis is that, at some point, a person's "speech" is recognized as the act that it really is (even though it contains an idea) and often, at that point, discrimination enters the picture. 17 However, as if equality is not also a constitutional right, free speech analysis becomes the focal point of every claim involving both. 18 MacKinnon succinctly states: "The law of equality and the law of freedom of speech are on a collision course in this country." 19

It is a result of this practice that pornography is evaluated only according to its First Amendment implications, under the obscenity doctrine, 20 and not according to implications in the equality arena. 21 MacKinnon ex-

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16. Id. at 15.
17. See id. at 29-31. Interestingly, MacKinnon points out a serious flaw in the free speech analysis versus the analysis required to prove discrimination: "Indeed, discriminatory intent, a mental state, is required to prove discrimination under the Fourteenth Amendment. Does this 'thought' make all that discrimination 'speech?'" Id. at 30.
18. See id. at 71-78.
19. Id. at 73. MacKinnon also comments:
   Americans are taught this view by about the fourth grade and continue to absorb it through osmosis from everything around them for the rest of their lives . . . and trot it out like something learned from their own personal lives every time a problem is denominated one of "speech," whether it really fits or not. . . . This approach is adhered to with a fundamentalist zeal even when it serves to protect lies, silence dissent, destroy careers, intrude on associations, and retard change.
   Id. at 76-77.
20. See id. at 87-91. "What is wrong with pornography is that it hurts women and their equality. What is wrong with obscenity law is that this reality has no role in it." Id. at 88.
21. "If speech were seen through an equality lens, nude dancing regulations might be tailored to ending the sex inequality of prostitution, at the same time undermining the social credibility of the pimp's lie that public sex is how women express themselves." Id. at 85.
plains that although child pornography is evaluated according to a test that has nothing to do with sexual speech, pornography involving adult women is only evaluated according to the obscenity test, which is not "designed to perceive the rape, sexual abuse of children, battering, sexual harassment, prostitution, or sexual murder in pornography." Discrimination laws, however, are designed with those perceptions in mind.

If pornography is evaluated according to standards typically used in discrimination cases, the free speech argument for protecting it loses its appeal. MacKinnon states:

Discrimination has always been illegal because it is based on a prohibited motive: "an evil eye and an unequal hand," what the perpetrator is thinking while doing, what the acts mean. Racial classifications are thought illegal because they "supply a reason to infer antipathy." A showing of discriminatory intent is required under the Fourteenth Amendment. Now we are told that this same motive, this same participation in a context of meaning, this same hatred and bigotry, these same purposes and thoughts, presumably this same intent, protect this same activity under the First Amendment. The courts cannot have it both ways, protecting discriminatory activity under the First Amendment on the same ground they make a requirement for its illegality under the Fourteenth. To put it another way, it is the "idea" of discrimination in the perpetrator's mind that courts have required be proven before the acts that effectuate it will be considered discriminatory. Surely, if acts that are otherwise legal, like hiring employees or renting rooms or admitting students, are made illegal under the Constitution by being based on race or sex because of what those who engage in them think about race or sex, acts that are otherwise illegal, like coercion, force, and assault, do not become constitutionally protected because they are done with the same thoughts in mind.

MacKinnon applauds the Supreme Court of Canada, which upheld an obscenity provision of the country's Charter of Rights and Freedoms on sex equality grounds, for recognizing "the reality of inequality . . . [and] a law passed to stand behind a comparatively powerless group in its social fight for equality against socially powerful and exploitative

22. Child pornography is evaluated by the rule that "if the harm of speech outweighs its value, it can be restricted by properly targeted means." Id. at 91 (citing New York v. Ferber, 458 U.S. 747, 762 (1982)).

23. Id. at 91.

24. Id. at 95.

25. Id. at 101 (citing Butler v. The Queen, 1 S.C.R. 452 (1992 Canada)). In that decision, the Court said that "if true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material." Id.
The Canadian court, MacKinnon observes, refused to reduce the harm that results from pornography to mere "offensiveness" as it routinely is in the United States. In MacKinnon's view, a new model for free expression needs to be created in this country so that free speech no longer supports social dominance, but results "in a society in which equality is a fact, not merely a word."

B. Nadine Strossen

On the opposite end of the spectrum is American Civil Liberties Union President Nadine Strossen. Strossen wrote *Defending Pornography* in a response to the theories espoused in MacKinnon's *Only Words*. A staunch supporter of the First Amendment right to free speech, Strossen asserts that the only way to advance the feminist movement is to allow unbridled avenues for free speech. She, therefore, draws a thick line between the group of feminists she refers to as “antipornography, procensorship feminists... aptly labeled ‘antisex’” and those on her side of the issue to whom she refers as “anticensorship, prosex.”

Strossen goes to great pains in her book to separate her branch of

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26. *Id.* at 103.
27. *Id.* at 104-06.
28. *Id.* at 109.
29. "[W]e are convinced that censoring sexual expression actually would do more harm than good to women’s rights and safety. We adamantly oppose any effort to restrict sexual speech not only because it would violate our cherished First Amendment freedoms... but also because it would undermine our equality, our status, our dignity, and our autonomy." *NADINE STROSSEN, DEFENDING PORNOGRAPHY* 14 (1995).
30. *Id.* at 14-20. Strossen also refers to them as "MacDworkinites," *id.* at 14, and throughout the book as "pornophobic." She attributes these views to the fact that, "[w]e are in the midst of a full-fledged ‘sex panic,’ in which seemingly all descriptions and depictions of human sexuality are becoming embattled... [and of which] pornophobic feminists have played a very significant role in fomenting." *Id.* at 20.
31. *Id.* at 35. Interestingly, Strossen very rarely, if ever, refers to her position as "propornography."
feminism from the views asserted by the “MacDworkinites.” At times, she asserts that her followers are the ones who rightfully deserve the label of “feminist,” as if saying that a “true” feminist would not assert antipornography views.\(^{32}\) The premise for this argument stems from Strossen’s contention that:

In the women’s rights context, freedom of speech consistently has been the strongest weapon for countering misogynistic discrimination and violence, and censorship consistently has been a potent tool for curbing women’s rights and interests. Freedom of sexually oriented expression is integrally connected with women’s freedom, since women traditionally have been straitjacketed precisely in the sexual domain, notably in our ability to control our sexual and reproductive options.\(^{33}\)

Strossen argues that any attempt to limit “speech” in the name of feminism is really a stab in the back of the movement that advanced to where it is today only through the benefit of free speech.

It is Strossen’s position that any attempt to censor what the MacDworkinites label as “pornography” would result in the wrongful censorship of any material that contains a sexual reference\(^{34}\) (including works written by Catharine MacKinnon and Andrea Dworkin\(^ {35}\)) or any other type of “expression that might ultimately have a negative effect.”\(^{36}\) These references, she argues are protected under the free speech right because they are “political ideas,”\(^ {37}\) which cannot be regulated simply because someone does not agree with the content or because it is hateful.\(^ {38}\)

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32. Although numerous statements are sprinkled throughout the book, one such example is a quote Strossen includes from Sheila Suess Kennedy, a feminist attorney: “As a woman who has been publicly supportive of equal rights for women, I frankly find it offensive when an attempt to regulate expression is cloaked in the rhetoric of feminism.” Id. at 78.
33. Id. at 30.
34. “Make no mistake: if accepted the profeminist procensorship analysis would lead inevitably to the suppression of far more than pornography. At stake is all sexually oriented speech, any expression that allegedly subordinates or undermines the equality of any group, and any speech that may have a tendency to lead to any kind of harm.” Id. at 40. Strossen also provides some examples of how the “antisex” movement has already been taken to the extreme in the classroom setting. Id. at 26-29.
35. Strossen provides examples of writings from MacKinnon and Dworkin which “fall squarely within their own definition of pornography.” Id. at 157-60.
36. Id. at 39-40.
37. “The MacDworkinite concept of pornography, in focusing expressly on the political ideas conveyed by sexual expression, would necessarily threaten other forms of political expression, too.” Id. at 38. “If MacDworkinism should prevail in the courts, it would jeopardize all of the foregoing free speech precedents and principles.” Id. at 39.
38. Yet the Supreme Court has repeatedly held that the First Amendment protects not only speech that is full of hate on the speaker’s part, but also speech that is hateful to its audience.
Aside from the traditional First Amendment argument that pornography should be protected as speech, Strossen also supports pornography because women’s participation in it helps to further women’s rights. Initially, she asserts that asking the government to protect women, instead of women attacking pornography with their own speech, perpetuates the role of women as victims in need of protection. Instead, women need to utilize their right to free speech to show they are strong enough to speak out for their own causes. She quotes one writer as saying:

I do not like pornography. In fact, I think it probably does harm people. . . . [P]robably, all those ugly pictures do encourage violence against women. What should we do about it? Well, my answer is: not a goddammn thing. The cure for every excess of freedom of speech is more freedom of speech. . . . I need the First Amendment so that I’ll be able to say to people who say things I do not agree with, “Look, you yellow-bellied son of a bitch-you run on all fours, you molest small children, you have the mind of an adolescent tyrant.” I need to . . . be able to answer them back. That’s what this whole fuss is about. Asking the government to help by means of “[a] statute that formally equates women with children and men with satyrs is hardly a step toward sexual equality.”

Her next argument in this context is that women’s participation in pornography furthers the right of all women to be free to express themselves sexually. She vehemently disagrees with the views of some anti-pornography advocates who akin all intercourse to rape. She insists that pornography enhances women’s opportunities for sexual pleasure. “In asserting that sex and sexual expression degrade women, procensorship feminists not only repudiate central tenets of 1970s-era feminism, but also revive traditional, patriarchal, subordinating stereotypes that the feminism of the 1970s had in turn sought to repudiate.”

As former justice Oliver Wendell Holmes declared,

"[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought-not free thought for those who agree with us but freedom for the thought we hate." Id. at 39.

39. Id. at 48.
40. Id. at 67.
41. Id. at 114 (quoting Brief of the American Civil Liberties Union, Indiana Civil Liberties Union, and the American Civil Liberties Union of Illinois, amici curiae, at 28, American Booksellers Assoc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985)).
42. See id. at 161-98.
43. Id. at 107-18.
44. Id. at 161-68.
45. Id. at 114.
In Strossen's analysis, women can, and do, derive sexual pleasure from both watching and performing in pornography without feeling degraded or dehumanized.46

The presumption that women are demeaned by sexual references to them is applicable in the sexual harassment arena also. According to Strossen, the antipornography feminists' views on sexual harassment will actually harm the feminist movement in the same way that their fight against pornography will. She gives three reasons:

First, when women, employers, or campus officials cry "sexual harassment!" at any passing reference to sex, they trivialize the issue, make it a laughingstock, and deflect attention and resources from the serious ongoing problems of gender discrimination in employment and education . . .

Second . . . the accelerating presumption that the mere presence of sexual words or pictures in the workplace or on campus is somehow inherently incompatible with women's full and equal participation in those arenas, resurrects the very traditional, and very disempowering, notion that sex is intrinsically demeaning to women . . .

Third, procensorship feminists' concepts of sexual harassment subvert women's rights by making it harder for women to get jobs and to succeed in those jobs.47

The attempt to censor "pornography" in the name of feminism, based on speculation of harm but not hard facts, will harm the cause for which women have fought48 and, to this point in time, have made great stride. Seeking to suppress the First Amendment right to free speech in the name of feminism will suppress the very right that brought feminism to the place where it is today and will prevent it from moving forward.

III. DISCRIMINATION DISGUISED AS SPEECH

The views of Catharine MacKinnon and Nadine Strossen represent the polar ends of an emotional debate that has created a split in feminism. On the one side, MacKinnon calls for women to speak up and press for recognition by the government that pornography discriminates against women and depicts women as the subordinates of men. This is done in an attempt to put an end to an age-old attitude about women that feminists have long fought to overcome. On the other side, Strossen urges women

46. Id. at 141-44. "The fact that many women find much that excites or otherwise pleases them in commercial erotica is indicated by their large and growing share of the burgeoning market for such imagery." Id. at 144. See also id. at 179-98.
47. Id. at 137-39.
48. Id. at 39, 247-64.
to accept pornography as a fundamental constitutional right to the same free speech that created feminism. The acceptance helps the progress of the women’s movement by recognizing that women are sexual beings capable and desirable of the same social treatment as their male counterparts. This dichotomy has resulted in a debate that is split completely down the middle without either side willing to compromise on any aspect for the good of the whole. Through all the discourse on the topic, we are still left without even a remotely workable solution.

From the very start, the two sides cannot even agree on what material is correctly labeled as pornography. MacKinnon does give an explicit definition: “graphic sexually explicit materials that subordinate women through picture or words.” Strossen acknowledges that this is the definition MacKinnon is working from, but proceeds to expand it to include all “sexual expression.” She bases her arguments on this extreme definition, even though she knows that MacKinnon is not calling for the removal of such a broad category of material. Rather, this is the conclusion of Strossen’s analysis; but she errs by using that very conclusion as a scare tactic to reach her desired end.

Admittedly, Strossen’s analysis through which she proceeds to reach the end result that pornography (whatever that term may mean) is protected under the First Amendment, may be correct under some current tests for free speech. However, MacKinnon’s analysis, calling for more of a focus on equality as a constitutional right just as important as free speech, is more in tune with current issues in today’s society and with the notion that the United States Constitution was intended to be a document that would be able to keep up with a changing society. As women continue to advance, the laws affecting them must also advance. On the other hand, Strossen seems content to keep the laws at the same status as they existed when the system was run by men. She also is content to keep taking the blows unfairly swung in the faces of women who are still trying to rise out of the second-class citizenship imposed on them by men.

Strossen continues her feminist battle as a woman living in a man’s world. She is afraid to step outside of the boundaries created by her

49. MACKINNON, supra note 1, at 22.
50. STROSSEN, supra note 29, at 14, 17-20.
51. Concededly, Strossen does argue that MacKinnon’s definition of pornography is “so amorphous that it can well encompass any and all sexual speech,” id. at 19, but she treats the topic as if MacKinnon has in fact called for the suppression of all sexual speech.
52. MacKinnon has proposed one possible reason for this position.
male counterparts in an attempt to make the world a man’s and woman’s world. Further, she criticizes MacKinnon and Dworkin for having the guts to challenge established laws that perpetuate the role of all women as second-class citizens. It is true that the right of free speech has done much for the women’s movement. However, the time has come for feminists to not only tell society how they expect to be treated, but to also demand the treatment they deserve.

Many of Strossen’s arguments are based on moments in history when women’s rights were infringed.

Freedom of sexually oriented expression is integrally connected with women’s freedom, since women traditionally have been straitjacketed precisely in the sexual domain, notably in our ability to control our sexual and reproductive options. Accordingly, during the first wave of feminism in this century, Margaret Sanger, Mary Ware Dennett, and other pioneering birth control advocates were prosecuted... for disseminating birth control information. Significantly, this information was held to violate antiobscenity statutes. Such laws were used not to promote women’s equality, but rather to erode it.53

This example given by Strossen fails to consider that the reason for these prosecutions was that women were attempting to step forward and take control over an aspect of their sexuality that men had dominated for so long. For fear of losing this patriarchal control, men used statutes based

[T]hose feminists who... "speak for the pornographers"... fail to recognize that "pornography is a major social force for institutionalizing a subhuman, victimized, and second-class status for women in this country."... "Why are women lawyers, feminists, siding with the pornographers?"

[When] they defend pornographers they are “defending a source of their relatively high position among women under male supremacy, keeping all women, including them, an inferior class on the basis of sex, enforced by sexual force.”

In “the established abstract refuges of academia” also, women do not question “the structure of power that has put [them] where they are” and seem unaware “that their failure to question it helps to keep most women out and down. Some of the women... who are the most successful in existing terms... are... the most likely to defend those abuses of women, such as prostitution and pornography, which keep their own value high, high at least among women.”

These women... defend the status quo... simply engaged in a "denial of reality.”


on the First Amendment to keep women from gaining autonomy over their bodies. Similarly, the First Amendment is now being offered as the sacred basis for protecting pornography from feminists who wish to do away with the male dominance that pornography imposes on them, both in their sexual and human existences.

Strossen claims to be a feminist with the main concern of advancing women's rights. Unfortunately, she allows her fight for advancement to be stifled by boundaries imposed years ago when women had no say in creating them. She states: "Ironically, the feminist procensorship faction apparently does not view women as capable of such self-help, but instead sees them as helpless."54 In her view, the method of "self-help" to be pursued is to stand next to the pornographers and see who can shout the loudest. In her eyes, "helpless" women are those who challenge an age-old, unfair law head-to-head by shedding new light on the constitutionality of it, instead of bowing down and accepting the words of those men who came before them.55

Another aspect of the antipornography attack with which Strossen finds fault is the fact that they "have forged frighteningly effective alliances with traditional political and religious conservatives."56 Strossen seems afraid that if feminists agree with the supposed "enemy" on any one issue that all the feminist achievements will be lost. In light of the status that many women, including women of those particular "conservative" parties, have achieved, it is ludicrous to believe that there is any completely anti-woman platform capable of destroying the many victories of the feminists or repressing future victories. Strossen relies on history to show "that when women's rights advocates form alliances with conservatives over an issue such as pornography, prostitution, or temperance, they promote the conservatives' antifeminist goals, relegating women to tradi-

54. Id. at 48.
55. Another author, blinded by the First Amendment panic, has decided that MacKinnon's challenge, instead of acceptance, of the current system of laws portrays women as weak. The author also fails to realize that in order to change the future of a practice, one must first deal with the current practice.

Catharine MacKinnon seems to underestimate the power of women to change the law and to redefine their position with regard to the opposite sex. . . . [MacKinnon does not attack the problem] by emphasizing ways in which women can change the state of the world. To this criticism, I think MacKinnon would say she is just relating things as they are; however, MacKinnon flatly ignores the possibility of a more optimistic state of the world.

Amy Miles, Feminist Theories of Interpretation: The Bible and the Law, 2 GEORGE MASON L. REV. 305, 331 (Spring, 1995).
56. STROSSEN, supra note 29, at 13.
tional sexual and gender roles.” 57 Interestingly, Strossen relies on this example: “As late as 1914, feminists were rediscovering once again that the state ‘protection’ of young women inevitably led to coercive and repressive measures against those same women.” 58 As late as 1914? Call me crazy, but I am certain that the treatment of women in 1914 would not last one minute in 1996. 59 Moreover, antipornography feminists are not asking for “protection” from the state, but rather that the constitutional right to equality be recognized and enforced.

Strossen is side-tracked by the fear of being thrust back into the early 1900s. She approaches the pornography issue theoretically, never delving into the realities of pornography or the real injuries it creates. Strossen comments that antipornography feminists often include in their works detailed accounts of pornographic pictures or films, insinuating that this is so because they like pornography and need a reason to view or talk about it. 60 This ludicrous insinuation demonstrates Strossen’s own discomfort with facing pornography and explains why she does not go into any greater detail than calling it “sexually explicit.” By ignoring the facts that make pornography such an emotional issue to many women, she is able to keep it on a superficial level, as simple “speech” that should be protected at all costs.

In Strossen’s mind, all persons are autonomous beings and capable of making informed independent decisions. 61 Therefore, if women choose

57. Id. at 91.
58. Id. at 91 (citing JUDITH R. WALKOWITZ, PROSTITUTION AND VICTORIAN SOCIETY: WOMEN, CLASS, AND THE STATE 256 (1980)).
59. In the United States, women did not yet even have the right to vote in 1914, much less the myriad of other rights women cherish today.
60. “As political scientist Walter Berns commented about MacKinnon: ‘Obsessed with pornography, yes, but does she really hate it? . . . As she puts it [in Only Words], talking sex is having sex, and the fact is, Catharine MacKinnon talks a lot of sex. She talks sex right off and never lets up. And some sex!’ STROSSEN, supra note 29, at 158 (citing Walter Berns, Dirty Words, PUBLIC INTEREST, Winter 1994 at 121).
61. Id. at 146-60. “The feminist antipornography faction disavows individual control over thoughts and actions, assuming that viewers of pornography will react to it in a simplistic, ‘monkey-see, monkey-do’ fashion. This debased view of humanity is invoked to justify legal controls.” Id. at 146-47.

Strossen is not alone in the need for a reality check. Another writer has proposed that MacKinnon’s analysis is flawed because she

might proffer that some women are coerced such that their ability to consent is subverted . . . . In a system built on autonomy and individual freedom of choice, such a dilemma cannot be considered coercive. . . . MacKinnon’s oversight, like her definition of coercion, undermines individual autonomy by assuming that at least some viewers of pornography all react to the images in a ‘monkey-see, monkey-do’ fashion.

Amy Miles, Feminist Theories of Interpretation: The Bible and the Law, 2 GEORGE MASON L.
to pose for pornographic materials, this can only reinforce the fact that they are able-minded individuals. Those who choose to view pornography are, likewise, able-minded individuals making choices that do nothing more than exercise their autonomy. This position, however, is not based in reality. MacKinnon's views are based in reality. Strossen's position originates from an elitist attitude and the make-believe notion that pornography is only speech that does not harm anyone, but only gives persons more autonomy in life.

"Surely men can be sexual beings at the same time that they are human beings with other attributes and potentialities. Why not women too?" Strossen asks this question after pondering "[t]he notion that all expressions, looks, or gestures that recognize a woman's sexuality are [deemed] somehow antithetical to her personhood and equality." The answer to her question is that when women are portrayed over and over as mindless objects worth only the sex they can provide, they do not fit into other categories easily and are not given an equal chance to become both sexual, as well as human beings. "[T]he goal of feminism [is not] to eliminate moments during the day when a heterosexual man considers a woman . . . to be sexually desirable," but to eliminate being sexually desirable at every moment of every day, in every setting. Until the law recognizes that women do face this discrimination on a daily basis, no words alone can do justice.

Strossen states: "In a 1994 interview, MacKinnon described the pornography business as a $10 billion annual enterprise, and that figure is corroborated by the Justice Department. This number underscores the
fact that many members of the American public enjoy sexual materials." What this number shows us is that many people enjoy pornography as opposed to "sexual materials" which encompass much more than pornography. This supports the pervasiveness of the image of women as sex objects. What this number does not tell us is why pornography should remain legal. Many people owned slaves at the time they gained their independence. Despite the fact that a large number of violent crimes are committed each year, we have yet to declare murder or assault legal just because some people like to do it.

Strossen and her followers refuse to face any of the evidence that has been offered in support of the antipornography movement. They refuse to face the reality that many women are forced into it, many more are injured as a result of it, and all women are discriminated against by it. Strossen blasts the Meese Pornography Commission's Report for relying "essentially upon morality . . . 'common sense,' 'personal insight,' and 'intuition.'" She, however, ignores the real-life stories of abuse, violence, and discrimination that victims of pornography have offered through the antipornography feminists. She alleges that the calls to

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66. STROSSEN, supra note 29, at 160 (citations omitted).
67. See supra note 10.
68. STROSSEN, supra note 29, at 251.
69. See RUSSELL, supra note 3. A very small sample of real-life stories she provides include:

"Linda's account . . . includes guns put to her head, turning tricks while being watched through a peephole to make sure she couldn't escape, and having water forced up her rectum with a garden hose if she refused to offer such amusements as exposing herself in restaurants or to passing drivers on the highway." Id. at 25.

"The first time it happened I was 11. My father showed me a porn movie. . . . He touched me and I got nauseated. . . . One time he beat me up. Then he put me out of the house." Id. at 35.

"My pimp controlled every aspect of my life. . . . Sometimes he took me to a bar where other pimps showed off 'their women.' We weren't allowed to speak or leave our pimps' sides. We were traded from pimp to pimp." Id. at 37.

There were usually two or three men there. After I had sex with them, they'd take pictures of me in various pornographic poses. I didn't have the vocabulary to call them pornographers. . . . This man recruited adult women by advertising for models. . . . He'd then use magazines like Playboy to convince her to pose for "soft-core" porn. He'd then engage her in a love affair and smooth talk her into prostitution. . . . If sweet talk didn't work, violence and blackmail did. . . . My thighs are permanently scarred from repeated beatings. Many of my teeth are missing and cracked from blows to my face. I am infertile due to chronic venereal disease . . . . It took close to 20 years to undue the physical and emotional trauma of being used in prostitution and pornography. Id. at 38-39.

My father used the pornography for several purposes. First of all, he used it as a teaching tool . . . .
“suppress” pornography are “based on speculation that it may lead to
discrimination or violence against women in the long run, despite the
lack of evidence to substantiate these fears.” Once again, Strossen ar-
gues with one eye closed, ignoring the facts that show the real effects of
pornography on women in society. These are the effects that make por-
nography such a threat to equality for females, the goal of most femi-
nists.

The real facts are addressed by the antipornography feminists. Al-
though the statute originally proposed by MacKinnon and Dworkin was
defeated, this does not mean that we should all sit back and watch por-
nography continue to take its toll. The First Amendment argument
Strossen proposes is a paranoid dissertation of the current law of free
speech. She fails to include in her analysis any facts. A recitation of the
law will always impress someone. However, the reason the topic is being
propelled into debate is because of the frightening facts that make por-
nography an issue of equality for all women. Ignoring the facts does not
change the issue and will not make the problems go away.

IV. HOW SHOULD THE ISSUE BE RESOLVED?

A. What Is the Issue?

By turning pornography’s effects on women in today’s society into a
political argument about what limits on free speech may be acceptable,
the heart of the real issue has been overshadowed. Question anyone
who supports or enjoys viewing pornography about the practice and the
programmed response will be “I have a right to look at pornography if
that is what I choose to do.” Rarely, if ever, will the inquiry get you to a
discussion about the real effects of pornography, both personally and on a

Second, my father used the pictures to justify his abuse and to convince me that
what we were doing was normal. The idea was that if men were doing it to women in
the pictures, then it was OK for him to do it to me.

Finally, he used the pornography to break down my resistance. The pornography
made the statement that females are nothing more than objects for men’s sexual gratifi-
cation. Id. at 43-44.

“Later he started to drink, and, after he started using pornography, sex became
especially abusive. He got his ideas from the pornography. Having sex, how he wanted
it, was nonnegotiable.” Id. at 46.

“But I know the memories and the scars will remain. Pornography is not a fanta-
sy. It was my life. Reality. It involved abuse to my body.” Id. at 54.

70. STROSSEN, supra note 29, at 39.

71. This is not to say that the First Amendment does not have any role in the debate.
People do not want to acknowledge that pornography, imbedded as a part of society, has such horrifying consequences for the population. Just as other political issues get lost in the plethora of hype that surrounds any perceived attempt to restrict someone’s “rights,” the pornography debate has been overtaken by paranoid activists who choose to cloud the real issue with fears of returning to the days of Draconian laws and silent voices of women.

Initially pornography is not “speech” at all, but illegal actions caught on film, thereby bringing it into the free speech arena. Prostitution is illegal in every state except Nevada; yet, when it is filmed it becomes legal. Assault, battery, and murder are also illegal in every state. Yet, when this type of abuse is portrayed on film for the purpose of sexual stimulation, it also becomes, not only legal, but the utmost of protected speech. Granted, not all pornography involves such violent, illegal activities, and those that do may be difficult to follow up if the victims are still under the control of their pimps, unwilling, or unable to report the abuse or continue with the prosecution of it. As a result, because some pornography allegedly involves a form of “expression,” the entire issue is dragged into the First Amendment arena. The pornography involving only abuse and humiliation gets sucked in along with it, even though the acts involved are not protected speech but illegal actions.

The protected ideas in pornography are that women are nothing more than sexual objects good only for pleasing men’s sexual desires by treating them in any way the man desires; that women are not human beings with minds and feelings; that, even though women may enjoy sex acts too, the acts they must perform are those that will please the men. Undisputedly, if a person wants to preach these ideas, write books containing these ideas, or communicate the ideas by other “speech” methods, those ideas, no matter how revolting, are protected. However, pornographers convey these messages by direct actions against real wom-

72. See Lawrence Jensen, Dangerous Ideas Are Part and Parcel of Free Expression, THE RECORDER, Sept. 5, 1995, at 3 and Richard Erlich, If pornography is bad, exactly what is the matter with it?, THE CINCINNATI POST, Sept. 5, 1995. Both provide typical responses from men who feel that there is no real harm and any alleged exists only in the imaginations of feminists.

73. Granted, there may be some policy considerations involved that only apply to prostitutes turning tricks on the street corners. But since much pornography is made by those same prostitutes as a part of or during the “trick,” those policy considerations would apply equally to much pornography. See RUSSELL, supra note 3, at 18-19, 58-62.

74. They all do include prostitution, because someone is making money off of persons having sex. However, it is acknowledged that often it is not the women in the films who are paid. Some of them do not even know their acts are being recorded.
en-actions that cannot be cloaked as “speech.”

Writer Molly Ivins' praised free speech for allowing her to give this response to someone with whom she does not agree: “Look, you yellow-bellied son of a bitch—you run on all fours, you molest small children, you have the mind of an adolescent tyrant.” This speech is, clearly, fully protected by the First Amendment. However, according to the logic employed in defending pornography as “speech,” Ms. Ivins has another choice, also protected as “speech.” She can express her ideas about this person by beating the hell out of him or even murdering him, while catching it all on film to later sell to other people who share her opinion or to convince a few new minds to join her. Better yet, she may even become sexually aroused while watching it. Because this film was produced to express her hatred for this individual, under Strossen’s logic it would be protected as free speech. In reality, this film would serve as glaring evidence that Ms. Ivins is a criminal, not a speech artist.

However, because the First Amendment has been established to hold a firm place in the pornography debate, it cannot be avoided now. Therefore, a resolution needs to be created that will both protect free speech rights, as far as they are involved, and vindicate women’s rights to equality. Until this is achieved, pornography will continue to degrade women. This will force women to retain a place in society, in the minds of many, as second-class citizens.

B. Speaking of Equality

As a society governed by a body of laws that are supposed to protect all persons and provide all persons with equality, we have evolved to the point of acknowledging that the right to speak whatever one wishes is not an absolute right. Aside from the familiar example that a person cannot shout “Fire!” in a crowded theater just for fun, most also would not be so eager to throw the issue of free speech in the face of African-Americans or Jews if a multi-billion dollar industry was churning out film after film depicting members of those groups in a discriminatory manner.

75. STROSSEN, supra note 29, at 67.
76. Just for fun, let's assume it is a man.
77. RUSSELL, supra note 3, at 11.
Indeed, there would be a public outcry—and rightly so—if there were special nonpornographic movie houses where viewers could see whites beating up people of color, or Christians beating up Jews, and where the victims were portrayed as enjoying or deserving such treatment. But if it’s called pornography and women are the victims, then it is considered sex and those who object that it is harmful to women are regarded
This same logic should extend to the depiction of women as subordinated, mindless objects available for using, beating, or murdering at the whim of men in "need" of sex. As a society, we need to craft a law to guarantee that the right to equality, supposedly granted to women under our current laws, becomes a reality.

The ordinance that Catharine MacKinnon proposed is a solid base with which to start. The definition included limits pornography to that material that degrades or subordinates women, instead of all sexually explicit material. In order to restrict the material or impose any liability for the production of it, the material should additionally meet a component of the obscenity test. It should be without serious literary, artistic, political, or scientific value. Such a requirement would protect works such as W.B. Yeats's poem "Leda and the Swan," Homer's "Iliad," James Joyce's "Ulysses," and medical books. The requirement would focus on pornographic materials created for no other reason than for men to have sex while watching women being beaten and humiliated.

If the argument is advanced that pornography should be protected as political speech, then the door opens wide for MacKinnon's equality argument. Other forms of "expression" have been limited in the past in the name of equality for all citizens. Acknowledging that the advancement of equality rights for all persons far outweighs a segment of what is debatably labeled "speech" that suppresses those equality rights is the only way to truly guarantee that all persons do enjoy the right to equality.

Some local governments have recently enacted regulations to attack pornography from a different angle, focusing on the regulation of the "secondary effects" of the industries and on the notion of local community standards. An ordinance in East Hartford, Connecticut requiring the

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78. See supra note 8. One minor addition should be made to have number (4) of that definition read "Women are presented as objects being penetrated by objects or animals." The reference to objects should be included as it is possible that sexually explicit material showing women penetrated by objects or animals would be possible without qualifying as pornography.

79. These particular works and other of the same caliber were used by the court in Hudnut to point out depictions of women that would qualify as pornography under the ordinance enacted in Indianapolis.

80. Anyone who wants to argue that such a purpose would qualify as "artistic" or "political" needs to either take an art appreciation class or ask pornographers what their political messages are. Just because some men get off by watching women used and tortured does not make a political message.


81. See Thomas Scheffey, The Ordinance's New Clothes, THE CONNECTICUT LAW TRI-
elimination of doors, curtains, and darkness from peep-show cubicles was held constitutional and has served as a model for many other cities around the country. Ordinances have also been enacted in the Connecticut cities of Tolland and Vernon, imposing strict requirements for obtaining a license. The ordinances contain additional requirements that will revoke the license once it has been granted. Critics of these ordinances call them merely "political" ordinances that, in effect, amount to an unconstitutional prior restraint on free speech.

Whatever the method chosen-crafting a new law criminalizing pornography, allowing a civil remedy for those harmed by pornography, or enacting tough licensing ordinances locally-the extensive existence of pornography in our society needs to be challenged. While we can certainly speak out against pornography and try to educate others as to its effects, we must become creative in designing a remedy that will establish a place in society for women's equality rights, co-existent with the precious right to free speech.

C. How Far Will the Courts Go?

The obscenity cases do not provide much real guidance for rectifying the debate. The closest that courts have come to addressing the effects of pornography on women is in cases involving claims of sexual harassment. The very basis for bringing sexual harassment charges is the subordinating effect on women in the workplace that is reinforced or perpetuated through the use of sex. In this area, courts are willing to limit individuals' rights in the name of equality and fairness. In fact, the detrimental effects on women brought about by inappropriate sexual conduct is almost a given. Courts rarely have a problem determining that when women are treated as mere sex objects it affects their positions and well-being in the workplace.

The behavior that gives rise to sexual harassment claims is a good place to start. A brief glance through the cases inevitably provokes the initial disdain and thought of "What makes this man (or these men as the
case may be) think that they can treat women this way?” One does not need to be well-schooled in feminism to know that much of the conduct is simply wrong because it shows utter disrespect for another human being. There is other conduct that most women would find offending, but their male counterparts cannot figure out why that is so.

One obvious reason for the conflict is that men and women are just different. Wholly apart from this manifestation, however, is the thought that, whether conscious of the influence or not, men are conditioned to look at women for their aesthetics and sex appeal. Regardless of whether the women are in a strip-tease act or working by men’s sides in the work place, society tells men that it is acceptable (if not expected) to look at women in this light. Pornography perpetuates the idea that it is acceptable for men to treat all women as sex objects. Why else would men treat intelligent capable women in the workplace in such a demeaning way?

Aside from these inquiries, courts have lent much credence to the theory that pornography has a detrimental effect on women. Sexual harassment was given the breath of life as a viable claim for injuries in Meritor Savings Bank, FSB v. Vinson. Since then, the sexual harassment cause of action has provided many women justice from their humiliation and unequal treatment in the workplace. As with any new idea, more courts are willing to find harassing conduct now than when the claim was just burgeoning.

In Rabidue v. Osceola Refining Co., the court refused to impose liability for sexually harassing conduct despite the fact that the plaintiff

85. See Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (M.D. Fla. 1991)(holding that harassing behavior directed at women and motivated by animus against women satisfied the requirement for a hostile work environment claim).

86. Frequently, the sexually harassing acts constitute behavior similar to that in Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987), where the plaintiff’s supervisor “customarily made obscene comments about women,” and other male employees “displayed pictures of nude or scantily clad women in their offices and/or work areas to which the plaintiff and other women employees were exposed.” Id at 615.

In Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), the plaintiff, who was up for partnership at a large accounting firm, was told (among other sexist comments) to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” Id. at 235. Obviously, the male partners wanted her to be more conducive to their sexual fantasies.

87. This rationalization, which may be basically true, should make one wonder if men and women are actually born genetically different or if they are socialized to be different according to the behavior that we, as society, deem acceptable for men and acceptable for women.


had been subjected to "verbal conduct and poster displays of a sexual nature."°° A strong dissent, however, was based on the belief that "no woman should be subjected to an environment where her sexual dignity and reasonable sensibilities are visually, verbally or physically assaulted as a matter of prevailing male prerogative."°° Most important was the dissenting judge’s statement:

I hardly believe reasonable women condone the pervasive degradation and exploitation of female sexuality perpetuated in American culture. In fact, pervasive societal approval thereof and of other stereotypes stifles female potential and instills the debased sense of self worth which accompanies stigmatization. The presence of pin-ups and misogynous language in the workplace can only evade and confirm the debilitating norms by which women are primarily and contemptuously valued as objects of male sexual fantasy. That some men would condone and wish to perpetuate such behavior is not surprising.°°

That some women would condone and perpetuate the same behavior is frightening. It is refreshing that more and more courts are unwilling to ignore this type of subordination of women.

In addition to sexual harassment claims, even the court in American Booksellers Association v. Hudnut,°° admitted:

Words and images act at the level of the subconscious before they persuade at the level of the conscious . . . . Therefore we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, “pornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women’s opportunities for equality and rights [of all kinds].”°°

Even though the court agreed that pornography is a form of discrimination against women that harms women’s equality, it focused completely on First Amendment concepts. The court’s acknowledgment of the discrimination and lack of equality produced by pornography does provide a
solid basis for a future ordinance that could be designed to meet the same
goals without infringing on the right to free speech. It is possible that a
court could finally be convinced that these goals constitute an interest
compelling enough to regulate pornographic “speech.”

Cases upholding the prohibition of inmates receiving obscene publications
also indicate judicial support for the theory that the state can have
legitimate interests sufficient to limit a person’s free speech right to
pornography. In Hodges v. Commonwealth of Virginia,95 the court held
that the “state’s interest in rehabilitation outweighed prison inmates’ First
Amendment rights, and, therefore, justified a prison’s ban on sexually
explicit materials.”96 The Hodges court relied on previous cases where
courts have upheld bans on pornography based on the fact that the mate-
rials could cause inmates to act out sexual aggression97 or could exacer-
bate the non-consensual sex between the inmates problem.98 Although
these cases involve different state interests than equality for all citizens,
they demonstrate the willingness of courts to find that there are other
interests more important than free speech. The court in Hodges also
acknowledged that pornography causes reactions in some persons that
infringe on the rights of others.

Keeping in line with the logic applied in these cases, courts need to be
shown that states do have a compelling interest justifying restrictions on
pornography. The state interest in seeking to restrict pornography affects
all of society, not just a small portion like prisons or workplaces.
MacKinnon’s proposal, that the constitutional right to equality is as
equally important as the constitutional right to free speech, is the most
rational argument. Her reasoning is most consistent with similar regula-
tions espoused in the name of freedom for all persons under the Constitu-

V. LIFE IN A PORNOGRAPHIC SOCIETY

Pornography has created a vicious circle. People buy pornography
because women will pose for it. Women pose for it because people will
buy it. There are many women who, for whatever reason, do not have a
great deal of self-respect, intelligence, support, or direction.99 Pornogra-

96. Margo L. Ely, Logic, public policy and sexual hostility, CHICAGO DAILY LAW BULLE-
98. See Thompson v. Patterson, 985 F.2d 202 (5th Cir. 1993).
99. “Some studies show that 65 to 75 percent of the current population of women in
ESCAPE FROM A PORNOGRAPHIC SOCIETY

phy offers them an opportunity to make some money, a false sense of appreciation, and a place to be (whether a street corner, a strip bar, or their pimp's "studio"). Most of these women find that they end up in worse positions than they were in before they entered the world of sex for money. They end up with even less self-respect, even less respect from others, feeling bruised and scarred, and often, literally bruised and scarred.

The circle of pornography must be broken. Women are not born with a lack of self-respect and hope. This is a result of how they are treated and viewed by the society around them. From time immemorial, women were viewed as the subordinates of men. Thankfully, women have fought off many of the restrictions which taught that idea. Pornography's time has expired. We cannot, while allowing a nationwide practice of discrimination against women, think that men will learn to stop discriminating and start respecting. When this discrimination ends, the circle will be broken. No women will seek refuge in an industry of exploitation. They will have self-respect and confidence in themselves to create worlds of opportunity and, hopefully, no industry of exploitation will be around to convince them otherwise.

From a young age, boys are flooded with images of women as sex objects appearing on their television screens, selling them products, and cheering on their favorite sports teams. Society has made it acceptable for boys to satisfy their curiosities in whatever ways they need to "express" their sexuality. When boys become men, society talks away inappropriate sexual conduct by males, attributing their attitudes to the age-old notion that men just think about sex and need to have more sex than women. These notions have even convinced many women, including Nadine Strossen, that males actually have a right to discriminate against women, all in the name of sexual desire.

The attitudes that develop in young males about the important features of a woman cannot realistically be expected to stay in one tiny little corner of the brain. The attitudes carry over into every aspect of men's lives that involve women, whether men realize it or not. In a social setting, in the workplace, or in a professional setting, men perform an assessment of the women's sexual traits either because they know that is what men are supposed to do or because that is what they have been taught to do.

prostitution and pornography . . . have been abused as children . . . . Women in pornography are poor women, usually uneducated. Pornography exists in a society in which women are economically disadvantaged." RUSSELL, supra note 3, at 80-82. The propornography feminists do not acknowledge this reality.
Individuals naturally do view people they find sexually attractive in a sexual light. Because women are degraded over and over by being presented as nothing more than objects of sexual desire in pornography, a tough barrier has been unfairly placed in front of women's achievement. Overcoming this stigma and obtaining success without being evaluated by sex appeal will be a true triumph for women. Until this happens, women cannot claim to possess equality with men because it does not exist.

We cannot force persons to respect one another. However, as individuals, women can do much to educate the men in their lives as to how to show respect for us as persons. Women need to speak out when the men around us engage in conduct that is demeaning to women. Women who are insulted or upset by certain male behavior but do nothing to remedy their feelings are as much to blame for the pervasiveness of the pornography problem as the men who partake in the activities. Men need to be taught that when their alleged “right” comes at the expense of the right of all women to equality, it will not be tolerated. This does not mean censorship. This means responding in ways that show women will no longer tolerate being treated with disrespect, and demanding a society where all the citizens are equal and are treated as such.

100. Yes, women, too, are included in this statement.
101. A common argument is that pornography may have harmful consequences, but censoring it would have even worse effects because it would undermine freedom of speech. Therefore, the proliferation of increasingly extreme forms of pornography must be tolerated no matter how destructive the effects are. The fallacy here is in assuming that censorship is the only way to try to combat pornography. There are many ways to do this that do not involve censorship, for example, writing letters, editorials, and articles in newspapers, magazines or books; education about the detrimental effects of pornography; speak-outs by pornography survivors; demonstrations, marches, confrontations with pornographers and their defenders; graffiti protests of pornographic ads, window displays, porn stores, and so forth. . . .

It is also fallacious to think that all legal actions constitute censorship. For example, restricting pornography in ways that are consistent with the First Amendment is not censorship, even if it is done by government action.

Russell, supra note 3, at 14.
102. One anticensorship writer has also suggested a variety of actions that individuals can take to attack the pornography industry. I include some them to give ideas to women who wish to fight pornography on an individual basis and to point out the discrimination on a level that some people will understand more readily. I also include them to demonstrate that even feminists of the “anticensorship” agenda, by calling for such actions, obviously agree that pornography does harm women.

Some of the suggested actions are as follows: “boycott businesses that make money on pornography, and inform the management of [your decision],” “complain to bookstore owners and other storekeepers, not just about the presence of pornographic magazines but also about the absence of feminist periodicals,” place a sticker reading “this degrades women” on bill-
If we continue to allow pornographers to hold a huge class of women down, then the problems many women face today, such as poverty and violence, they will continue to face. Both sides of the debate agree that these are major problems in women's struggles. It is now time to agree to find a solution that works from the bottom up by attacking the rights of some that unfairly deprive others of equally important rights. As long as we have a system of laws that breeds inequality and disrespect for women and allows them to be treated as second-class citizens, we will have a society that views women on unequal grounds, showing them disrespect as persons and treating them as second-class citizens. This, I propose, is not a goal of any feminist. The First Amendment has given us the opportunity to educate others about why women deserve equality. It is now time that we stop merely talking about it and begin demanding that equality be recognized.

boards, ads in public transit systems, and in store window displays, "refuse to sell offensive magazines or rent offensive videos in store that we work in," write articles and letter to editors, speak in classrooms, organize pickets, "challenge the men we know who use pornography." MARY JO FRUG, WOMEN AND THE LAW 742 (1992)(citing MARIANA VALVERDE, SEX, POWER, AND PLEASURE (1987)).

103. STROSSEN, supra note 29, at 273-79.
CAMPUS SPEECH CODES: WHAT EVER HAPPENED TO THE “STICKS AND STONES” DOCTRINE?

by Julie Caldwell-Hill

“By speech we enlighten or confuse, lead or mislead, wound or console, amuse or enrage, unite or divide, create or destroy a community. It is an art whose every use is shadowed by a possible misuse.”¹

Can it really be true that “one [person’s] vulgarity is another’s lyric”?² This is a hard pill to swallow in light of the vile, ignorant ideas expressed by racist and sexist speech. However, offensive as the idea of tolerating racist and sexist slurs may be, “the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”³

The right, which we hold so dear, to criticize our government as well as our neighbors, stems from one small paragraph in the Constitution: “Congress shall make no law . . . abridging the freedom of speech.”⁴ This phrase has been the subject of heated debate over the years, as well as, at times, a strained application of its meaning by the courts. The First Amendment is dually designed to “assure that debate on public issues is ‘uninhibited, robust, and wide open,’ . . . [and] protect[] speech which we hate as much as that which we hold dear.”⁵ Therefore, we should tolerate the repulsive words uttered by racists and sexists in order to protect our own words.

“[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it.”⁶ One author provides that tolerance is necessary to further the search for truth, even when the idea espoused is ludicrous:

Arguments for the genetic inferiority of certain races, so far as these are made by geneticists, seem to me clearly to belong to the category of outra-

⁴. U.S. CONST. amend. I.

583
geous: they are upsetting but, so far as I can see, they may be tolerated without limit. . . . [Geneticists'] methods, at least ostensibly, are scientific, thus inviting reasonable dispute and refutation. To be intolerant toward them under these conditions compromises our relationship to the truth. It announces our determination to believe only what we approve of, not what reason requires.  

To promote tolerance of the ideas of others is to promote tolerance of one's own ideas in the community.

The free speech principle is grounded as much in a desire to avoid being the slaves of our own intolerant impulses as it is in a desire to preserve an unshackled freedom to speak one's mind as one wishes. . . . [One] can understand [the] choice to protect the free speech activities of Nazis, but not because people should value their message in the slightest or believe it should be seriously entertained, not because a commitment to self-government or rationality logically demands that such ideas be presented for consideration, . . . not because a line could not be drawn that would exclude this ideology without inevitably encroaching on ideas that one likes—not for any of these reasons nor others related to them that are a part of the traditional baggage of free speech argumentation; but rather because the danger of intolerance towards ideas is so pervasive an issue in our social lives, the process of mastering a capacity for tolerance is so difficult, that it makes sense somewhere in the system to attempt to confront that problem and exercise more self-restraint than may be otherwise required. On this basis, then, tolerance becomes . . . a symbolic act indicating an awareness of the risks and dangers of intolerance and a commitment to developing a certain attitude toward the ideas and beliefs of others.  

Discriminatory speech, present a "singularly difficult" application of First Amendment concerns because it usually arises from "certain classes of words or symbols" which cause "gross offense to the sensi-

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7. GLENN TINDER, TOLERANCE 162 (1976).
9. The term discriminatory speech is used to refer to slurs and epithets based on race, gender or other protected classes. Most of the theorists couch their arguments in terms of race or gender, but also they admit that the reasoning will substantially apply to other protected classes. See, e.g., Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L. J. 431, note 27 (1990).
11. Id.
bilities." To assert that restrictions on communication of particular ideas is only constitutional if a demanding test is satisfied, "implies that the state is powerless to protect the sensibilities of an unconsenting audience against grossly offensive expression. Conversely, any restriction upon expression narrowly tailored to protect sensibility against gross assault is almost by definition tied to content and thus subject to attack as discriminatory." 

However, the measure of offense is an extremely subjective standard. "[D]esecration of the flag is deeply offensive to many. But the same might be said, for example, of virulent ethnic and religious epithets. . . . [T]he Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." 

Rules which ban the use of discriminatory language will allow substantial discretion to the enforcers. As such, allowing these rules will "cede[e] to the government the power to pick and choose whose words to protect and whose to punish." This power is "fundamentally antithetical to the free speech guarantee." Consequently, when punishment is allowed for content-based speech, "free expression exists only for those with power." 

Discriminatory epithets "are speech, and as such we ought to protect them unless there is a very good reason for not doing so." Initially, it seems that there is no reason to protect speech that has such a vicious aim. However, one reason is "that it reinforces our society's commitment to the value of tolerance, and that, by shielding racist speech from government regulation, we will be forced to combat it as a community." Furthermore, to ban some speech because of its offensive content directed at certain groups, implies "tacit government approval" of offensive speech aimed at unprotected groups. The government may not "regulate speech in ways that favor some viewpoints or ideas at the expense of others." 

12. Id.
13. Id.
16. Id.
17. Id.
18. Delgado, supra note 5, at 380.
19. Lawrence, supra note 9, at 435-36.
21. Id.
THE DILEMMA

The dilemma of enforcing campus hate-speech rules results from differing priorities of the First and Fourteenth Amendments to the Constitution, and how, if at all, they can be reconciled. Those who place greater importance on the First Amendment view campus antidiscrimination rules as "parts of a much longer story: the centuries-old struggle of Western society to free itself from superstition and enforced ignorance." Whereas, those who place superior importance on the protection of minorities via the Fourteenth Amendment "see a nation's centuries-long struggle to free itself from racial and other forms of tyranny."

Civil libertarians have criticized enforcement of campus hate-speech rules as being a form of censorship, which has "traditionally has been the tool of people who seek to subordinate minorities, not those who seek to liberate them." It is for this reason that minorities should view a hate-speech code as restrictive of their rights, not protective. One scholar aptly states: "We should not let the racist veneer in which expression is cloaked obscure our recognition of how important free expression is and how effectively it has advanced racial equality." However, even though free speech principles are an important consideration, where speech infringes on the rights of equality in education or employment, that speech cannot be condoned, even if it has expressive elements.

Conversely, advocates of campus hate-speech codes argue that free speech principles are important, yet are illusory unless equality of citizenship is established and applied in conjunction with, and as a prerequisite to the First Amendment. Professor Lawrence argues that the decision in Brown v. Board of Education provides a broad principle of equality which extends to the context of hate-speech regulation, as it represents the "principle of equal citizenship." Hence, "it requires the affirmative disestablishment of societal practices that treat people as members of an

(citations omitted).

23. Delgado, supra note 5, at 346-47.
24. Id. at 347.
26. Id. at 570.
27. Id. at 499.
28. See generally, Lawrence, supra note 9 (arguing that racial insults defy the purpose of the First Amendment); Delgado, supra note 5 (arguing that racist speech is different from other protected speech because the overall cumulative impact goes against the societal goal of equality).
30. Lawrence, supra note 9, at 438-39.
inferior or dependent caste, as unworthy to participate in the larger community.”

Nevertheless, while the arguments for each side of the dilemma have merit, neither “clearly prevails in connection with campus antiracism rules.” There is no constitutional mandate that absolutely requires one answer or the other; hence, judges and university administrators must ultimately choose.

While the Supreme Court remains silent on the issue of campus hate-speech, it has clearly made that proverbial choice with regard to hate-speech in general, in its decision in *R.A.V. v. City of St. Paul.* In *R.A.V.*, the offender engaged in an act of “cross burning” on the yard of an African-American family’s residence, and was charged under St. Paul’s Bias-Motivated Crime ordinance. The Court struck down the ordinance as an impermissible content-based, and viewpoint-based restriction on speech. The Court acknowledged the reprehensibility of the act in question, yet reasoned that the ordinance prohibited otherwise permitted speech solely on the basis of its content, and that the Ordinance’s limitation to epithets based on color, creed, religion or gender, made it a viewpoint-based restriction as well. Further, a content-based regulation is presumptively invalid because of the dangers of censorship; as such, the regulation must be necessary to serve a compelling interest. The Court held that the only interest served in the ordinance was the city’s special hostility toward the particular biases singled out in the ordinance, and that this special prohibition on disfavored speech was precisely what the First Amendment forbids.

There can be absolutely no excuse for the display of ignorance and venom shown by the cross burning act in *R.A.V.* or any other case, for that matter. The victimized family should never have had to suffer through such humiliation, insult, and degradation, nor should any other family or person. However, as long as there are cruel, ignorant people in our country, there will be cruel, ignorant expressions that follow. This particular act could have been charged under a criminal ordinance, but

31. Id.
32. Delgado, supra note 5, at 383.
33. Id. at 348.
35. Id. at 379-80.
36. Id. at 391.
37. Id. at 396.
38. Id. at 395.
39. Id. at 396.
the message it conveyed could not. In *R.A.V.*, as in other hate-speech cases, it is the message that is so offensive and seems to invoke an equal protection issue. It is precisely the message that invokes First Amendment protection. Such an abhorrent message cannot morally be justified on any grounds, yet it cannot be restricted on any legal grounds.

More recently, the Court distinguished the bias-motivated expression in *R.A.V.* from a bias-motivated crime in the case of *Wisconsin v. Mitchell.* In *Mitchell*, the Court upheld a statute that enhanced the penalty for bias-motivated crimes. The Court reasoned that the statute was aimed at conduct, not expression; hence, no First Amendment protection was necessary. The Court further rationalized its decision by finding that bias-inspired conduct inflicts a greater individual and societal harm. It is more likely to incite retaliatory crime and community unrest, and it inflicts distinct emotional harm. The *Mitchell* decision has been criticized as a "civil rights exception [to] First Amendment jurisprudence."

However, even on a more basic level, the Court appears to be saying that bias-motivated crime inflicts distinct emotional harm, whereas bias-motivated expression does not. Clearly, the cross burning act in *R.A.V.* would tend to inflict a far more distinctive emotional injury than the battery in *Mitchell*. The battery inflicts harm in and of itself, and the physical and emotional harm remain the same regardless of the motivation. Daily we hear stories on the news of robberies resulting in death or injury where the amount stolen was a mere pittance. The senselessness of these crimes cannot inflict any more emotional harm than the senselessness of a bias-motivated crime.

Furthermore, a community that sees a cross burner go unpunished is far more likely to be at unrest and seek retaliatory action than one in which a criminal is punished for the actual crime committed. If criminal penalty statutes are designed to deter particular levels of crimes, then the penalty should be such as to do so, regardless of the motivation. The en-

40. 113 S. Ct. 2194 (1993).
41. *Id.* at 2201.
42. *Id.* at 2199.
43. *Id.* at 2201.
44. *Id.*
45. Michael P. McDonald, *Unfree Speech*, 18 HARV. J. L. & PUB. POL'Y 479, 484 (1995) (stating "Sad to say, recently the Court has become more willing to write what one may call a civil rights exception into its First Amendment jurisprudence; that is, the Supreme Court will vigorously protect free speech and ensure the government's neutrality, except in the context of civil rights.").
CAMPUS SPEECH CODES

enhanced penalty statute in *Mitchell* punishes the offender’s biased opinion in addition to the crime. As such, the statute constitutes an impermissible content-based regulation.

**THE MARKETPLACE OF IDEAS, A CONCEPT OF FREE EXCHANGE**

The traditional application of First Amendment jurisprudence has been to promote the search for truth by a free exchange of ideas in the marketplace:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

This “marketplace” theory has been criticized as inapplicable where society treats minorities unequally. Professor Lawrence posits that ideas offered by European-Americans are accepted into the marketplace more readily than ideas offered by African-Americans or other racial minorities, thus producing a market place which is not a true depiction of the search for truth but a distorted one.

The real problem is that the idea of the racial inferiority of non-whites infects, skews, and disables the operation of the market (like a computer virus, sick cattle, or diseased wheat). Racism is irrational and often unconscious. Our belief in the inferiority of non-whites trumps good ideas that contend with it in the market, often without our even knowing it. In addition, racism makes the words and ideas of blacks and other despised minorities less saleable, regardless of their intrinsic value, in the marketplace of ideas. It also decreases the total amount of speech that enters the market by coercively silencing members of those groups who are its targets. Racism is an epidemic infecting the marketplace of ideas and rendering it dysfunctional.

The free exchange of ideas in the marketplace is based on more speech, not less. If one idea, such as racism, is opined in the market-

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47. See generally, Delgado, supra note 5 (arguing that the stigmatization of minorities gives the majority an advantage in the “marketplace”); Lawrence, supra note 9 (arguing that the “marketplace” is distorted because society places a lesser value of speech of racial minorities).
48. Lawrence, supra note 9, at 470.
49. Id. at 468 (footnotes omitted).
place, it should be countered with the truth, not silenced. The traditional speech-protective doctrines should be applied to racist speech because “a robust freedom of speech ultimately is necessary to combat racial discrimination.” The idea of more speech can only be viable, though, if more speech is actually promoted. Professor Lawrence very aptly notes that in the context of hate-speech, more speech is rarely produced, but rather, due to the nature of racial and gender assaults, less speech is promoted because of the tendency to withdraw, and the inadequacy of any response.

Even so, the issue of regulating such speech poses the question, “whether it is more desirable to allow offensive speech and have it defeated through a free exchange of ideas, or to regulate offensive speech and risk having the suppression of speech that should be protected?”

The ... harm that results from content-based regulation of speech is the imprint on thinking for current and future generations. Free exchange of ideas leads to diversity of thinking and understanding on issues. ... Those that hold minority views are free to express these ideas in an effort to persuade the majority, and truth is given greater clarity and vitality by exposing freely expressed error. A cap placed on the assertion of some ideas deprives the entire population of these benefits. ... The surviving view does not win through the natural process of the market; it is simply the product of governmental intervention. In the end, something more insidious occurs other than deprivation of the ... benefits of free exchange: thought is controlled by a regulating body rather than the competitive forces of the market.

The answer to the question posed must be in favor of protecting speech.

51. Lawrence, supra note 9, at 452-53.

Women and minorities often report that they find themselves speechless in the face of discriminatory verbal attacks. This inability to respond is not the result of oversensitivity among these groups ... Rather, it is the product of several factors, all of which reveal the non-speech character of the initial preemptive verbal assault. The first factor is that the visceral emotional response to personal attack precludes speech. ... Speech is usually an inadequate response. When one is personally attacked with words that denote one’s subhuman status and untouchability, there is little (if anything) that can be said to redress either the emotional or reputational injury.

52. Cullers, supra note 20, at 645.
53. Id. at 652-53 (footnotes omitted).
CAMPUS SPEECH CODES WILL HAVE A CHILLING EFFECT ON SPEECH

The danger posed by campus speech codes is that they will have a chilling effect on protected speech. "The expansive nature of speech codes present a great likelihood that speech worthy of protection will be swallowed up with speech that may be arguably regulated. Inevitably, speech and thoughts worthy of protection will vanish under these codes." These codes may "influence thinking on a particular issue, but as the proscribed view disappears from public discourse, the [codes] eventually control thinking." In the anti-racism context, perhaps it would not be such a bad idea that the "proscribed view" (racism) would disappear from public discourse; surely the world without racism would be a far better place to live. Yet, where ideas and thoughts disappear because of government regulation, fears of an Orwellian society are unavoidable.

Proponents of campus hate-speech codes acknowledge that reasons against the codes are that they "run counter to the ideal of the university as a bastion of free thought"; the campus is "the locus of the freest expression to be found anywhere," where the unpopular truth may be pursued—and imparted with impunity"; and that such codes "might chill academic exchange or teaching." The code proponents counter the chilling effect arguments with, among other things, the experience of other countries which have implemented anti-hate legislation. After a thorough review of other countries, Delgado concludes that "there appears to have been little of a snowball effect towards censorship. Thus, it is evidently possible to regulate the more vicious forms of race-hate speech, while remaining committed to free expression." Delgado's astute conclusion is well grounded. Unfortunately, all arguments on both sides of the dilemma must engage in some degree of speculation as to the actual result. For example, Strossen posits the theory that:

[T]here is an inescapable risk that any hate speech regulation, no matter how narrowly drawn, will chill speech beyond its literal scope. Members of the university community may well err on the side of caution to avoid

54. Id. at 653-54 (footnotes omitted).
55. Id. at 654 (emphasis in the original).
56. Delgado, supra note 5, at 359.
57. Id.
58. Id.
59. Id. at 371 (footnote omitted).
being charged with a violation.\textsuperscript{60} . . . In addition to their chilling effect on the ideas and expressions of university community members, policies that bar hate speech could engender broader forms of censorship.\textsuperscript{61}

While there is an inherent risk of chilling protected speech, and an equally possible result that no chill will occur, it is better to err on the side of safety. Any chance that even one opinion will go unstated is significant enough to warrant protection.

RACE DOES NOT QUALIFY AS AN EXCEPTION TO FREE SPEECH

While the chilling effect must be minimized, the Supreme Court has made certain exceptions to protected speech, such as, "fighting words."\textsuperscript{62} In \textit{Chaplinsky v. New Hampshire}, the Court held that:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those by which their very utterance inflict injury or tend to incite an immediate breach of the peace. . . . [S]uch utterances are no essential part of any exposition of ideas, and are of 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.\textsuperscript{63}

Even with these narrow exceptions, there still exists a danger that the government may engage in viewpoint discrimination. Government regulation in this subjective manner can be based on approval or disapproval of the underlying idea rather than on advancing the purposes of the exception.\textsuperscript{64} Professor Lawrence criticizes the fighting words doctrine as a "paradigm based on a white male point of view."\textsuperscript{65} If viewpoint-based discrimination is the "most egregious form of censorship and almost

\textsuperscript{60} Strossen, \textit{supra} note 15, at 521.

\textsuperscript{61} Id. at 530.


\textsuperscript{63} Id. at 571-72 (footnote omitted).

\textsuperscript{64} Cullers, \textit{supra} note 20, at 645.

\textsuperscript{65} The fighting words doctrine is a paradigm based on a white male point of view. In most situations, minorities correctly perceive that a violent response to fighting words will result in a risk to their own life and limb. Since minorities are likely to lose the fight, they are forced to remain silent and submissive. This response is most obvious when women submit to sexually assaultive speech or when the racist name-caller is in a more powerful position—the boss on the job or the mob. Certainly, we do not expect the black women crossing the Wisconsin campus to turn on their tormentors and pummel them.

Lawrence, \textit{supra} note 9, at 454 (footnote omitted).
always violates the first amendment," then "viewpoint discrimination is proscribed even in regulations that govern non-public forum government property and regulations that protect captive audiences." 67

A broader view of previous attempts at censoring hate-speech suggests the necessity of applying consistent principles each time the issue resurfaces. 68

Every person may find one particular type of speech especially odious and one message that most sorely tests his or her dedication to free speech values. But for each person who would exclude racist speech from the general proscription against content-based speech regulation, recent experience shows that there is another who would make such an exception only for anti-choice speech, another who would make it only for sexist speech, another who would make it only for anti-Semitic speech, another who would make it only for flag desecration, and so on. 69

Likewise, the sheer subjectivity of even deciding what constitutes fighting words leaves far too much latitude and room for error. Each individual may decide differently as to what would provoke them to breach the peace. For example, the epithet "the only good Indian is a dead Indian" 70 may cause some to say, "So what?". Yet others would take great offense, partly as a result of hundreds of years of oppression. Thus, the degree of offense depends on the background and emotional baggage of an individual.

Some scholars invoke victim-focused rationale for excepting racist speech from First Amendment protection. 71 In fact, Professor Lawrence contends that a full understanding of the nature of the harm caused by racist speech is required before any debate of the issue may ensue. 72 At one level, the harms of racist speech can be seen as various physiological

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67. Id. (footnote omitted).
68. Id. at 534.
69. Id.
70. This kind of epithet has not received the same national attention as some others, yet it has been in existence for a long time, and would cause great offense to many. Originally coined by General Sheridan, "the only good Indians I ever saw were dead", in 1868, the remark was made after a vicious massacre of Black Kettle's village where 103 Native's were killed, only 11 of which were warriors, the others old men, women and children. DEE BROWN, BURY MY HEART AT WOUNDED KNEE 164-66 (1970).
71. See infra notes 72-86.
72. "To engage in a debate about the first amendment and racist speech without a full understanding of the nature and extent of the harm of racist speech risks making the first amendment an instrument of domination rather than a vehicle of liberation." Lawrence, supra note 9, at 459.
and emotional conditions suffered by the victim. 73 However, on a higher level, the harms extend past the individual harm to encompass an immense harm to society, that is greater than the sum of its parts. 74 Delgado argues to except racist speech from First Amendment protection because

racist speech is different because it is the means by which society constructs a stigma-picture of disfavored groups. It is tacitly coordinated by its speakers in a broad design, each act of which seems harmless, but which, in combination with others, crushes the spirits of its victims while creating culture at odds with our national values. Only by taking account of this group dimension can we capture the full power of racially scathing speech—and make good on our promises of equal citizenship to those who have so long been denied its reality. 75

The argument continues that creation of the “stigma picture” 76 and communication of this “shared cultural image of the victim group as inferior,” 77 is a source of comfort that rationalizes the disparity in power and resources between ourselves and the stigmatized group; and that, the stigmatization of the group is aided by most civil rights law, as it fosters the idea that “the group is so vulnerable that it requires social help.” 78 Consequently, the majority group holds free speech as an asset, where it

73. Lawrence, supra note 9, at 462.

Racial epithets and harassment often cause deep emotional scarring, and feelings of anxiety and fear that pervade every aspect of a victim’s life. Many victims of hate propaganda have experienced physiological and emotional symptoms ranging from rapid pulse rate and difficulty breathing, to nightmares, post-traumatic stress disorder, psychosis and suicide.

74. Lawrence, supra note 9, at 442-43.

The goal of white supremacy is not achieved by individual acts or even by the cumulative acts of a group, but rather it is achieved by the institutionalization of the ideas of white supremacy . . . [which has] created conduct on the societal level that is greater than the sum of individual racist acts.

Delgado, supra note 5, at 384.

[Prevailing first amendment paradigm predisposes us to treat racist speech as an individual harm. . . . This mistake is natural, and corresponds to one aspect of our natures—our individualistic selves. In this capacity, we want and need liberty. But we also exist in a social capacity; we need others to fulfill ourselves as beings . . . . Constitutional narratives of equal protection and prohibition of slavery—narratives that encourage us to form and embrace collectivity and equal citizenship for all—reflect this second aspect of our existence.

75. Delgado, supra note 5, at 387.

76. Id. at 383.

77. Id. at 384.

78. Id.
is much less helpful to minorities.\textsuperscript{79}

The end result of this theory is the societal creation of a vicious cycle whereby the "source of the problem [is] the speech that creates the stigma-picture."\textsuperscript{80} This is what makes the speech harmful in the first place, because it perpetuates the stigma-picture which results in more harmful speech; thus rendering "almost any other form of aid—social or legal—useless."\textsuperscript{81} The conclusion is that "the speech by which society 'constructs' a stigma picture of minorities may be regulated consistently with the first amendment. Indeed, regulation may be necessary for full effectuation of the values of equal personhood we hold equally dear."\textsuperscript{82}

The only flaw in this very compelling argument is that it assumes that racist speech is always made by a majority group, and directed at a minority group. Certainly this may be the case most of the time. However, it would seem a stretch to regulate only racist speech made by the majority against the minority. Further, it seems likewise inapplicable to racist speech made by one minority against another minority.

As an extension of the victim-focus argument, speech code proponents argue that racist speech has no social value; and therefore, should not be protected. Delgado maintains that society has a "strong interest in seeing that expression is as unfettered as possible,"\textsuperscript{83} yet racist expression has "no great social worth and can cause serious harm."\textsuperscript{84} This proposition cannot logically be disputed. However, Delgado bases this contention on the fact that "racial slurs [are] . . . hardly . . . essential to self-fulfillment, . . . [they] impair . . . the growth of the [speaker], . . . serve little dialogic purpose, and do not connect the speaker and addressee in a community of shared ideals."\textsuperscript{85} Excepting racist speech on this basis does not really except it, but rather, places it in a category with much other speech, that no one seems intent to regulate. The aforementioned attributes are true of any slur, not just a racial one. It would be difficult to argue that calling someone "four-eyes" or "fatso" has any dialogic purpose or furthers a community of shared ideals and individual self-fulfillment. Consequently, racial slurs should not be regulated, apart from other slurs, on the basis of the purpose they serve or fail to serve.

Likewise, Professor Lawrence asserts that racial insults should be

\begin{thebibliography}{99}
\bibitem{79} Id. at 385-86.
\bibitem{80} Id. at 386.
\bibitem{81} Id.
\bibitem{82} Id. at 383 (footnote omitted).
\bibitem{83} Id. at 381.
\bibitem{84} Id.
\bibitem{85} Id. at 379 (footnote omitted).
\end{thebibliography}
regulated, similar to a fighting words exception, because they disserve the First Amendment's purpose of fostering speech, by causing immediate injury, and by the offender's intent not to initiate dialogue, but to injure the victim.\textsuperscript{86} Again, even if an offender shouts a non-racist name at someone, it is not likely that she intends to initiate dialogue, nor is it likely that she has any other intention other than to cause emotional injury to that victim. The argument could be made that racist insults carry a greater source of injury because of their history. However, if the focus is on the injury to the victim, the victim's past experiences could supply enough history that a non-racist name could engender an equally painful experience.

Making a legal argument to regulate all name calling as unprotected speech would certainly be pressing extremes; it is merely used as an example here. But making "free speech exceptions for only racist speech would create a significant risk of a slide down the proverbial 'slippery slope.' To be sure, lawyers and judges are capable of—indeed, especially trained in—drawing distinctions between similar situations . . . [Thus,] slippery slope dangers should not be exaggerated."\textsuperscript{87}

The "slope" has been substantially curbed by the Court, however. The \textit{Chaplinsky} fighting words doctrine has since been limited by the Court to protect the content of speech and except only that speech which is "likely to cause an imminent breach of the peace under the circumstances in which they are uttered."\textsuperscript{88} The definition has been so narrowed that "the

\textsuperscript{86} Lawrence, \textit{supra} note 9, at 452 (footnote omitted).

The experience of being called [a racist name] is like receiving a slap in the face. The injury is instantaneous. There is neither an opportunity for intermediary reflection on the idea conveyed nor an opportunity for responsive speech. The harm to be avoided is both clear and present. . . . If the purpose of the first amendment is to foster the greatest amount of speech, then racial insults disserve that purpose. Assaultive racist speech functions as a preemptive strike. The racial invective is experienced as a blow, not a proffered idea, and once the blow is struck, it is unlikely that dialogue will follow. Racial insults are undeserving of first amendment protection because the perpetrator's intention is not to discover truth or initiate dialogue but to injure the victim.

\textsuperscript{87} Strossen, \textit{supra} note 15, at 537.

\textsuperscript{88} [S]ince \textit{Gooding v. Wilson} [405 U.S. 518 (1972)] the Court consistently has invalidated fighting words definitions that refer only to the content of words. Instead, it has insisted that these words must be evaluated contextually, to assess whether they are likely to cause an imminent breach of the peace under the circumstances in which they are uttered. Strossen, \textit{supra} note 15, at 524-25.

"In \textit{Gooding}, as well as every subsequent fighting words case, the Court disregarded the dictum in which the first prong of \textit{Chaplinsky}'s definition was set forth and treated only those words that 'tend to incite an immediate breach of the peace' as fighting words." \textit{Id.} at 509.
doctrine probably would not apply to any of the instances of campus racist speech that [speech code proponents] seek to regulate." 89

For campus speech codes, "[t]he issues [become] whether the social interest in reining in racially offensive speech is a great as that which gives rise to these ‘exceptional’ categories, and whether the use of racially offensive language has speech value." 90 Granted, no recent Supreme Court decision directly addresses these issues. 91 However, in R.A.V., 92 the Court specifically stated that if the ordinance in question had limited its reach to "fighting words" directed at a specific person or group, the ordinance would have been facially valid (absent any other Constitutional infirmity). 93 Accordingly, if the campus hate-speech issue comes before the Court, it should rule that only campus speech codes which prohibit hate-speech rising to the level of fighting words will be held facially valid.

However, even a speech code restricted to fighting words can only be constitutionally applied in circumstances where the "utterance almost certainly will lead to immediate violence . . . in effect, incorporating the clear and present danger test into the fighting words doctrine." 94 "Even if there were a real danger that racist or other fighting words would cause reflexive violence, and even if that danger would be reduced by the threat of legal sanction, the fighting words doctrine still would be problematic in terms of free speech principles." 95 Therefore, much of the injury sought to be prevented by application of a fighting words exception to campus hate-speech codes will remain untouched.

UNIVERSITIES POWER TO RESTRICT SPEECH

Schools may regulate speech when the purpose is reasonably related to legitimate pedagogical concerns, 96 where the speech materially and substantially interferes with the requirements of appropriate discipline in the operation of the school, 97 and where the regulation upon use of facilities is compatible with the educational mission. 98 Furthermore, "universities

89. Id. at 508.
90. Delgado, supra note 5, at 378.
91. Id.
93. Id. at 392.
94. Strossen, supra note 15, at 509.
95. Id. at 511.
have considerable power to enact regulation protecting minority interests," yet, "courts have held or implied that a university's power to effectuate campus policies, presumably including equality, is also limited."

Attempts by universities to limit speech through hate-speech codes have been severely criticized:

The ideas [they] condemn are false and offensive, but the universities do not condemn all false and offensive ideas . . . . Individuals within the community may not espouse some forms of race and gender superiority, but may espouse others . . . . This discrimination makes clear that those who promulgate these regulations assign to themselves the authority to determine which ideas are false, and which ideas people may not express as they choose . . . . [S]ome of the proponents of these codes scorn the idea of content-neutrality. The ban is an exercise of power. It shows who is boss. Thus the holders of noxious ideas are suppressed and the rest of the community is impressed and intimidated by this display of political might.

Because First Amendment freedoms need breathing space to survive, schools may regulate in the area only with narrow specificity. The traditional civil libertarian approach has been that "any restrictions on expressive activity must be drawn narrowly, and carefully applied, to avoid chilling protected speech." Therefore, rules aimed at intentional, abusive, face-to-face racial slurs, excluding classroom, public forum, and satirical speech, may withstand constitutional scrutiny because "the university forum has a strong interest in establishing a nonracist atmosphere." However, several university codes have been struck down on grounds of overbreadth and vagueness; overbreadth and impermissible viewpoint-
based restriction. Thus, "[t]here is almost always a less speech-restrictive means for achieving any state interest."[108]

CAMPUS SPEECH CODES MAY VIOLATE THE ACADEMIC FREEDOM DOCTRINE

University speech codes as applied to professors take on a slightly different twist, because faculty and staff in public universities are considered public employees. "[T]he State's interests as an employer in regulating the speech of its employees differs significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[109] A public employees' rights of free speech can be restricted unless the speech is on a matter of public concern, evaluated in light of the "content, form, and context of a given statement."[110] Under the rules established by Connick, "when a state employee speaks as a citizen regarding matters of public concern, the state is limited in its ability to discipline based on the speech."[111] Hence, the state has greater authority to regulate the speech of staff on issues not of public concern.

Speech about political issues clearly regards matters of public concern, while speech that relates only to the speaker's personal interests does not. . . . [A] person is speaking as a citizen when discussing issues of obvious political or social importance, and is speaking as an employee when issues of office administration or work-related grievances are discussed.[112]

Application of campus speech codes to a professor's classroom speech has posed a peculiarly difficult issue to resolve, because academic freedom can be affected, and academic freedom is vigorously protected.

Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The classroom is peculiarly the "marketplace of ideas." "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas

107. Iota Xi v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993).
110. Id. at 159.
112. Id. at 651-52.
which discovers truth "out of a multitude of tongues, (rather) than through any kind of authoritative selection." "The essentiality of freedom in the community of American universities is almost self-evident. . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."113

The importance of maintaining academic freedom is that if it is subject to limitations, a resulting chill may ensue. Fear of sanctions is a strong deterrent to an exercise of ostensibly protected speech.114 "It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery."115

A more modern theory establishes a balance of academic freedom against its effects on society. There can be no question that "the law should afford students special protection from racist insults directed at them by their professors."116 Yet, even in the classroom, "the calculus to determine the level of speech protection is complex."117 The classroom is considered the "quintessential 'marketplace of ideas,' which should be open to the vigorous and robust exchange of even insulting or offensive words," because "such an exchange ultimately will benefit not only the academic community, but also the larger community, in its pursuit of knowledge and understanding."118 Conversely, developing authority implies that the "antidiscrimination imperative will at times prevail" over academic freedom and possibly freedom of speech.119

In the recent case of Dambrot v. Central Michigan University,120 a coach was fired for his locker room use of a racial epithet, directed at a student athlete.121 The coach filed suit alleging violations of his First Amendment rights to free speech and academic freedom.122 Several of the student athletes joined the suit alleging the university's code against discriminatory harassment was vague and overbroad.123 The Sixth Circuit Court held that the university's code was overbroad, vague, and an impermissible viewpoint-based code, and thus, violated the First Amend-

114. Id. at 604.
115. Id. at 601.
116. Strossen, supra note 15, at 505-06.
117. Id. at 504.
118. Id.
119. Delgado, supra note 5, at 383.
120. 55 F.3d 1177 (6th Cir. 1995).
121. Id. at 1180-81.
122. Id. at 1181.
123. Id.
However, the court held that, since the coach was a public employee, and his speech was not on a matter of public concern, but merely used as a motivational tool, and because a coach in the locker room has a different role than a classroom professor with regard to discussion and debate, the coach's termination did not violate his First Amendment rights.

In two similar recent cases, New Hampshire and California District Courts came to divergent conclusions based on similar facts. In Silva v. University of New Hampshire, a New Hampshire District Court case, a writing professor made the following statements during two separate class periods. On February 24, he illustrated a point by stating:

I will put the focus on 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.

On April 30, the professor made the following statement as an example of a metaphor, "Belly dancing is like jello on a plate with a vibrator under the plate." Several female students were offended at his remarks and filed complaints with the university. The professor was suspended and required to undergo counseling. The court held that the university's sexual harassment code violated his First Amendment rights. The professor's speech was a matter of public concern, as it was related to "legitimate pedagogical" concerns, it was related to "preservation of academic freedom," and it was related to the issue of whether students must tolerate offensive speech in American schools. The court ultimately ordered the university to reinstate the professor to his previous status, as requested by the professor's motion for preliminary injunction.

Conversely, the California District Court, in Cohen v. San Bernardino Valley College, arrived at a different conclusion, while the issues

124. Id. at 1185.
125. Id. at 1193.
127. Id. at 299.
128. Id. at 293.
129. Id. at 311.
130. Id. at 314.
131. Id. at 316.
132. Id. at 332.
were much the same. In Cohen, an English professor used a unconventional teaching style which involved discussions and assignments on topics of obscenity and pornography, among others.134 Similarly, several of his female students were offended at the sexual topics and filed complaints with the college.135 The professor was required to provide a syllabus to the department chair, attend a sexual harassment seminar, and undergo a formal evaluation.136 The court applied the same tests as did the court in Silva, yet surprisingly, held that even though the professor's comments were a matter of public concern,137 the restrictions were permissible because they were narrowly tailored and reasonable.138 The court's flawed logic reasoned that since case law established that a professor could be regulated on the use obscenity or profanity in the classroom, then a discussion of subjects themselves was also a proper place for regulation.139 Clearly, a discussion on pornography and obscenity necessarily entails the use of some examples to define it. Much of such a discussion would center on the definition and likely present opposing views as to what actually constitutes pornography or obscenity. These are appropriate issues to be discussed by adult college students. Our future leaders, as the saying goes, may someday have to actually make a decision as to what constitutes pornography or obscenity.

In the end, college students are considered adults and expect to be treated as such; likewise, they should be required to exhibit the same degree of maturity and tolerance as adults. Any student who feels offended at the subject, style, or language of a professor, during the course of a lecture, is free to exit the room, or drop the class. "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."140

SPEECH CODES WILL NOT ERADICTE RACISM AND SEXISM

Proponents of campus hate-speech codes suggest an effective theory on fighting racism. "The main inhibiter of prejudice is the certainty that it

134. Id. at 1410.
135. Id.
136. Id. at 1411.
137. Id. at 1417.
139. Id. at 1416.
This "confrontation theory" is based on the idea that "rules, formalities, and other environmental reminders put us on notice" of the unacceptability of racist beliefs, and that the "threat of public notice and disapproval operates as a reinforcer." The mere existence of [campus hate-speech codes] will often cause members of the campus community to behave in a more egalitarian way, particularly when others are watching. Even in private settings, some people will refrain from acting because the law has set an example. Those whose prejudice is associated with authoritarianism will do so because the rules represent society's legitimate voice. . . . A large body of literature shows that incessant racial categorization and treatment seriously impair the prospects and development of persons of minority race, deepen rigidity and set the stage for even more serious transgressions on the part of persons so disposed.

However, "[d]isciplinary rules are the least effective way that a university can enhance the quality of speech or foster racial tolerance among its members." Bans on racist speech can be seen as a "quick fix" to the problem of racism, but "racist speech is only one symptom of the pervasive problem of racism," which will not be eradicated by the mere ban of one symptom. Since the only constitutional speech codes will have to be narrowly drafted, they can only affect the most blatant forms of racism; hence, the more subtle, and perhaps more dangerous, forms of racism will slip through the cracks.

Because civil libertarians have learned that free speech is an indispensable instrument for the promotion of other rights and freedoms—including racial equality—we fear that the movement to regulate campus expression will undermine equality, as well as free speech. Combating racial discrimination and protecting free speech should be viewed as mutually reinforcing, rather than antagonistic, goals. A diminution in society's commitment to

141. Delgado, supra note 5, at 374.
142. Id. "The confrontation theory is probably today the majority view among social scientists on how to control racism. Most who subscribe to this approach hold that laws and rules play a vital role in controlling racism." Id.
143. Id. at 375 (footnotes omitted).
144. J. Peter Byrne, Racial Insults and Free Speech Within the University, 79 Geo. L. J. 399, 440 (1990). "Without the university's consistent action on a commitment to reasoned discourse as central to its mission, the university's attempt to prohibit insulting or lewd speech may seem a hypocritical denial of its own failings. Similarly, prohibiting racial insults will advance racial harmony on a campus only when the university has effectively committed itself to educate lovingly the members of every ethnic group." Id. at 441.
145. Strossen, supra note 15, at 554.
146. Id. at 560.
racial equality is neither a necessary nor an appropriate price for protecting free speech. Those who frame the debate in terms of this false dichotomy simply drive artificial wedges between would-be allies... 147

Racial minorities have more to lose by the regulation of hate speech because the “racist attitudes and conduct—of which all these words are symptoms—would remain. Those who share the dual goals of promoting racial equality and protecting free speech must concentrate on countering racial discrimination, rather than on defining the particular narrow subset of racist slurs that constitutionally might be regulable." 148

Racism can only truly be eliminated by open and frank discussions about the similarities and differences of the individual races. “[E]ducation, free discussion, and the airing of misunderstandings and failures of sensitivity are more likely to promote positive intergroup relations than are legal battles.” 149

CONCLUSION

In conclusion, lest the point of this comment be misinterpreted, eliminating discrimination of every kind is a very sympathetic cause, and should not be taken lightly. Years ago, there were doubtless numbers of people who would have liked to silence the great speakers of the civil rights movement. Likewise, today there are doubtless numbers of people who would like to silence Louis Farrakhan. 150 Either way, silence is not the answer. As the ancient motto puts it, “If you have nothing to say, it is necessary to shout.” 151 Although it is perhaps not a practical view, nevertheless, symbolically, the right to shout about nothing is deeply ingrained in our country and our existence, and should be protected as much as possible. “It may be asked whether the standard of tolerance requires openness toward every absurdity someone happens to express. It seems to me that the answer is: Yes, so far as there is time... . We cannot infallibly, at a glance, identify absurdities, and what strikes us as highly implausible may nevertheless be true.” 152 Imposing our own values on the opinions of others is simply wrong. Maybe one person’s vulgarity is another’s lyric.

147. Id. at 489 (footnote omitted).
148. Id. at 550.
149. Id. at 561.
151. TUSSMAN, supra note 1, at 110.
152. TINDER, supra note 7, at 163-64.
I take as my text a passage from John Austin. When Austin delivered his inaugural lectures as the first chairholder of the Professorship of Jurisprudence at the University of London in 1828, he imprinted a conception of law on popular and scholarly thinking that has endured for almost two centuries. Austin defined law as the command of a political superior to a political inferior accompanied by the threat of the imposition of a sanction-an “evil”-for deviation from the command.

Of the laws or rules set by men to men, some are established by political superiors, sovereign and subject: by persons exercising supreme and subordinate government, in independent nations, or independent political societies. The aggregate of the rules thus established... is the appropriate matter of jurisprudence, general or particular. To the aggregate of the rules thus established... the term law, as used simply and strictly, is exclusively applied.

In framing his definition and, in particular, in breaking with Bentham’s broader and more pragmatic notion of sanctions, Austin was probably concerned with certain larger social issues. His followers were not. They gravitated toward the second half of this relational definition and assumed that the proper, indeed only jurisprudential focus was the perspective of the political inferior, the subordinate, the receiver of the command. The perspective of those at the upper end of Austin’s diad, the political superior, was ignored or excluded from the definition of law. That perspective became “political,” a term which supposedly removed the operations associated with it from the legal process and, hence, from legal inquiry.
The perspective of the low man on the totem pole has become the major focus for Anglo-American legal study and conceptualization. Law, in this conception, is a body of rules, the particularized expressions of the command of the legal superior. While the person issuing the command is certainly making a choice in identifying and selecting a particular practicable option, the content of that choice, the command, is beyond the appraisal of the subordinate who receives it. From the perspective of the political inferior, law does not allow for choice; it is merely the result of the commands of the political superior, a body of rules to which the inferior is subordinated. The function of the subordinate is to comply personally or, where appropriate, to implement the command. The function of jurisprudence is to instruct on when and how to comply.

Austin's formula is frequently referred to as "the command theory" of law, but it is actually the "commanded's theory of law" or the "subordinate's theory of law." That perspective has determined what the "important" jurisprudential problems are. Subordinates, who expect to be the target of evils for deviations from commands of superiors, know that they had better get the command right. Hence this perspective is almost obsessively concerned with how one identifies law or, in a phrase recurring in international legal inquiry, what comprise the "sources" of law and, when they are inconsistent or contradictory, which of them is to receive priority. Terms like "obliged" and "obligation" are, even now, endlessly analyzed and detailed syntaxes of obedience are developed. Because political superiors do not always make themselves clear, their subordinates develop elaborate hermeneutic and interpretive codes to ensure that the person receiving the command does exactly what the political superior—omnipotent in everything but clarity of expression—wanted. Because the commands of the political superior sometimes run athwart personal or sub-group moral codes, detailed and often anguished justifications for contingencies of non-compliance—"civil disobedience"—must be generated.

This jurisprudence is not descriptive of how people actually perform legal roles or how they actually comply. If that were the case, the commanded's theory of law would be an even more complicated enterprise, for self-defined political inferiors engage in a great deal of choice in the course of compliance. Rather, the commanded's jurisprudence is prescriptive or "censorial," examining how the political inferior should

act. This observation is not a criticism. Jurisprudence is not sociology; it is prescriptive or deontological. Its major contribution is to explicate how legal tasks *should* be performed. And, to be sure, how one should obey is sometimes a relevant and, for that reason alone, a jurisprudentially worthy question.

Legal theories that take account of the inherent indeterminacy of language or, as Hohfeld demonstrated, the multiple meanings hidden in apparently univocal statutory formulations, generate angry and passionate responses from those who adopt the commanded theory of law. For the political inferior, such theories that, as it were, take this legal system off the gold standard, are worse than nihilistic. They kill the prince, the boss, the king—indeed God (a quintessential political superior in Austin's conception). They appear to threaten not only the integrity of the legal and political system, but even the fabric of the individual personality. Of course, even the applier committed to the "commanded theory of law" must often make social choices, i.e., choices with policy impacts on many others, because of the linguistic indeterminacy of much communication and the potential for multiple meanings of commands. But the power of the "commanded theory of law" is such that many appliers making these choices still hold themselves out as political inferiors and pretend (and may even persuade themselves) that they are not making choices. They are simply divining the will of the superior and obeying.

Austin used the term "political inferior" in an entirely designative and even honorable fashion. This term is not pejorative nor should the importance of the lower half of Austin's diad be minimized. All of us must learn, among the repertory of roles we are assigned in life, when and how properly to play the part of the political inferior. Learning when and how to obey is indispensable to the operation of any organization. Indeed, an organization, whether military or civilian, cannot exist if some actors do not learn and perform the role of the subordinate.

However, the person who, as part of his or her professional function, is knowingly and legitimately making social choices, and not the person who is or believes that he or she should only be faithfully implementing them, needs a theory of law for the self-conscious political superior. A jurisprudence for the political superior identifies the intellectual tasks and necessary legal and moral conceptions of this perspective. Its focus is not rational choice as such, but the jurisprudence of rational choice. That is

5. See Austin, supra note 2, at 1-2.
not an oxymoron. Choice need not be an inherently unbridled or arbitrary exercise of discretion or capriciousness nor is it inherently illegal, a-legal or super-legal. But choice that is practiced covertly and publicly denied is more likely to be some or all of the above. Choice is itself part of the legal process and can be subject to authoritative policies.

Paradoxically, the need for a jurisprudence from the perspective of the political superior is particularly acute in democratic political systems. Authoritarian systems, whatever their myth, enable the elite to do what it deems best for itself and to lie about it, if convenient. Socrates extolled the “noble lie” as an indispensable elite technique in his imagined Republic. Pharaonic systems were believed to have exalted the capriciousness of the monarch as a way of distinguishing the god-king from all other mortals. The Caesarist system said “quod voluit Caesar habet vigorem legis.” In such systems, a theory of rational choice might have been useful. A jurisprudence of choice would have been irrelevant. But democratic systems, in contrast, derive political authority from the consent of the governed and expect authorized power to be used in ways that contribute to the common good. One of the functions of jurisprudence, properly determined, in a democratic political system, is to identify the points of choice in the legal process—the inescapable roles of political superior—and to clarify the policies that should govern its execution and appraisal.

This proposal is a prerequisite of rational and responsible elite behavior. Yet it is not an exclusively “elitist” approach, as that term is popularly used. Nor is it inherently undemocratic or anti-democratic. The opportunity and inescapable burden of choice-making is, in fact, rather widely dispersed in the lives of people in modern industrial social systems, in politics and in the performance of legal roles everywhere. While many of us often find ourselves in the position of the “political inferior,” we also find ourselves, more and more frequently, in a position to make social choices. Like Moliere’s M. Jourdain, who discovers that through all these years, and without realizing it, he has been speaking prose, we have all functioned at different times as political superiors.

The relatively wide distribution of the opportunities and competence to make choices is a rather recent feature in the history of our species. It is an inherent part of what we call the modern world or period. For most of the history of our species, choice was the prerogative of a small group of people, some of whom made choices regularly for themselves and others, some of whom made choices, if at all, only a few times in their lives. The rest rarely made choices for themselves or by themselves. Choices were made by parents, village elders, priests and shamans. Mates were
often selected by others, ethical choices, if the opportunity for making them even arose, were made by others, decisions about crops, planting and harvesting were dictated by transmitted cultural forces or by certain leaders, and so on. Even those who were making choices usually described and may have considered their operations as interpretation of and compliance with superior orders.

Outside of nascent cities, people were largely self-sufficient. The market was primitive and generally not based on cash exchange, so the role of "consumer" making all sorts of choices (purchases) from options of varying ranges, simply did not exist. Even where some ambit of choice was allowed, the parameters were tightly drawn due to primitive technologies of transportation and communication.

The modern, in contrast, is constantly making choices: in politics, from the local to the national level; in the market-place; in learning processes; in matters of personal health; in matters of friendship and sexual expression; in matters of religious affiliation; if not, indeed, in every sector of life.

The possibilities and ambit of these personal choices shape and are shaped by the community processes within which they take place. The community, whether by collective or by imposed decision and whether by intention or inadvertence, has made and sustained certain critical choices about the range and distribution of individual choice. There are, thus, always correlations between larger social arrangements and the distribution and ambit of personal choice. Consider a few examples:

In political terms, one may correlate choice opportunities, in the aggregate, with the degree of democratic power-sharing, whether in the polis, work place, the school, the family, or any other setting in which the way that people influence each other affects the distribution of the things produced there. The prerequisite for the distribution of choice in this sphere is collective maintenance of minimum order. Assuming that minimum order is assured, the increasing complexity of economic life and the interdependence of all actors in the market is a factor inducing further power sharing. Any situation in which people must take account of what others do and think accords those others a degree of influence they would otherwise not have.

In economic terms, choice presupposes a productive market with a wide variety of consumables. Where the market operates, choice opportunities are found at the intersection of (i) discretionary income left after survival needs are satisfied and (ii) the diversity and abundance of goods and services produced in the accessible market. The more discretionary income a person has, the more opportunities for choice he or she has:
whether to conserve or spend and, if the latter, how to spend. The more diverse and abundant the products of the market, the more opportunities the consumer has to exercise choice. Discretionary income without diversity and abundance of goods and services, like diversity and abundance of goods and services without discretionary income, means no choice.

In terms of the cultivation of enlightenment and skill, choice opportunities correlate with a political system that maintains minimum order and a market that has produced an abundance sufficient to satisfy survival. Such a situation allows a diversion of some of the surplus to inquiry that is not necessarily concerned with the enhancement of survival and material production and that has continued this practice long enough to permit the intergenerational transmission and hence accumulation of knowledge. In terms of personal opportunities, the ability to cultivate enlightenment and skill correlates with the extent to which whatever class, caste, racial, religious, and gender boundaries obtain are permeable to individual ability or energy and the extent to which time and energy may be diverted by the individual from the basic struggle for survival.

In personal matters, opportunities for choice depend upon legal and ethical systems that tolerate or encourage the exploration and cultivation of agapic and erotic affection, and technologies, such as prophylaxis and abortion, that permit participants to concentrate on the cultivation of affection by postponing or evading the biological or epidemiological consequences of the activity.

Implicit in these examples is a contextual dimension to choice opportunities. The opportunities for making political choices depend, for all but absolute rulers, on a degree of effective and stable democracy. The opportunity for making economic choices depends upon a vigorous market. The opportunity for choices with regard to the cultivation of enlightenment depends upon cultural toleration and institutional arrangements. Obviously many of these environmental factors are themselves the results of collective social choices. Democratic politics itself is an institutionalized process of making choices.

It is also clear that because the ambit of choice available to individuals is determined by the system in which they find themselves, the distribution of choice options, at any moment, will vary from country to country, from class to class, from gender to gender, and so on. At this moment, a young American will have more choice options than, let us say, a young Chinese, and an Iranian man will have more choice options than an Iranian woman. There is nothing new about this unequal distribution of life opportunities. What is new is that people the world over have come increasingly to share a common set of expectations about which
issues constitute “problems” requiring resolution and that the task of selecting the means of resolution should be within the province of individual choice. The opportunity to make such choices is also widely demanded and the comparative deprivation of these opportunities is increasingly viewed as intolerable.

Lurking behind modern social structures, which create opportunities for making choices, are fundamental assumptions that run deep in our civilization and distinguish it from others. Whatever the congruence of perception and reality, any discussion of choice presupposes most fundamentally a common assumption of the efficacy of human agency, that what humans do precipitates consequences, whether on the self, on others, on the environment, or on all of them. The conception of the efficacy of human agency also has a larger social vector in our civilization. Our civilization is premised on a notion of progress, a constant accumulation and intergenerational transmission of improvements in the self and the environment. Our conception of time is linear. There is a future; it will be different because of things we do, and it may be better. We should be able to look toward it with confidence. Within this framework of assumptions, human beings can be efficacious, for the potential effectiveness of human agency is beyond doubt. In other civilizations, in which these assumptions do not obtain, the character and even veneration of choice is substantially different. In civilizations in which conceptions of time are circular rather than linear, in which material achievements are viewed as maya, and in which the self and the efficacy of human agency may be believed to be pathetic illusions, our notions of and concern with choice are viewed as part of an exotic cult of collective self-delusion. Nevertheless, the emergence of a homogenized global civilization of science and technology appears inexorably, like it or not, to be moving all of us toward more rather than less choice.

CHOICE-POINTS IN CONTEMPORARY LEGAL SYSTEMS

Lawyers and legal scholars in our civilization tend to view judicial application as the paramount function in law. Judges’ roles are certainly important but, as an empirical matter, there are many other critical functions in legal decision. The specification of existing norms to a particular dispute, whether by courts, arbitrators, administrators, military officers, or whoever, and the resolution of the dispute, perhaps by fashioning some remedy, presuppose the prior authoritative establishment of norms. That function may be best called “prescription,” because the term is broader than the word “legislation.” “Legislation” evokes a legislature, but so much of the corpus of critical norms in any social arrangement is
created in private sectors and through so-called customary processes that use of the word "legislation" would narrow the aperture of observation and miss a good deal of choice activity that is important in law. Prescription, for its part, is anticipated and followed by other functions that are part of decision. In all, my colleagues and I have found it useful to identify seven functions of decision. They are:

(1) *intelligence*, or the gathering, processing, and dissemination of information relevant to making social choices;

(2) *promotion*, or the processes by which individual or collective awareness of a discrepancy between a desirable state and one that is or is about to take place gradually leads to a demand for some type of community intervention and regulation;

(3) *prescription*, or law-making, which occurs when actors, with varying degrees of authority, select and install certain preferences about policy as community law. This may be accomplished by a legislature or some other organized law-maker; but it is usually, and, especially in international law, largely accomplished in informal and sometimes even chaotic processes whose outcomes are generally referred to as "custom."

(4) *invocation*, or the provisional characterization of a certain action as inconsistent with a prescription or law that has been established. Invocation is often accompanied by the demand that an appropriate community institution act;

(5) *application*, which involves the organization of the facts of a particular dispute, the specification of a norm or norms that apply, and the fashioning of a mandatory formulation. When this takes place in a court, it is called a judgment, but it also occurs in informal, unorganized situations;

(6) *termination*, or the abrogation of existing norms and the social arrangements based upon them, the development of transitional regimes and, where appropriate or necessary, the design of compensation programs for those who have made good-faith value investments on the expectation that the old regime would continue; and

(7) *appraisal*, which is concerned with evaluating the aggregate performance of all decision functions in terms of community requirements.

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Each of these functions of decision presents distinctive opportunities for making choices and poses special jurisprudential questions about how those choices should be made. Thus, persons engaged in gathering information for decision must decide what items are important or are “problems.” Persons engaged in promotion have a relatively wide discretion to select the programs for which they will agitate.

A jurisprudence that directs itself to the first half of Austin’s diad must be concerned with the efficiency with which each of these decision functions is performed but, equally, with the normative or prescriptive dimensions that should guide each function’s performance. In much the same way that the jurisprudence of the political inferior is largely concerned with exploring how to obey, the jurisprudence of the political superior must be concerned with how to choose.

There are four intellectual tasks whose performance is pertinent to all seven of the functions.

FIRST INTELLECTUAL TASK: CERTIFICATION OF STANDPOINT

We may use tools to increase the accuracy and efficiency of some of our intellectual operations, but in all such activities the individual self-system is the ultimate instrument of perception, appraisal and, in particular, choice. We take it for granted that it is necessary, from time to time, to calibrate all the instruments we use, but we do not insist on a corresponding self-calibration. A jurisprudence of social choice insists on the development of a praxis of self-calibration through various techniques of self-scrutiny. The person performing a decision function is urged to examine the self for latent emotional problems or neurotic tendencies, for subgroup parochialisms, and for the distortions that may arise from professional conditioning or what the French call déformation occupationelle. Self-scrutiny is not a single act. It is not accomplished once and for all but should be a continuing process of searching inquiry into the dynamics of one’s self. Each contemporary experience is, in part, a stimulus for self-examination in what will hopefully result in a cumulatively better understanding of the self.

Certain psychological and possibly psycho-biological features of choice must be understood. An element in all choice is the psycho-biological impulse to end the tension and dysphoria created by the need for choice by resolving an uncertainty by doing something that will hopefully relieve the tension. People making choices should be aware of the role that tension and dysphoria play in pressing one to decision and should not yield to them automatically; in many circumstances, it may be better to resist
and to do nothing, as a matter of choice. Or, to invert the common-place, as Lewis Carroll put it, “Don’t just do something. Sit there!”

The choice-maker should also be aware of certain cultural fantasies that are nourished by some epistemological dynamics within our civilization. One of the reasons why we are not always realistic in our targets for choice or in our time tables for achievement may be due to the mass visual reinforcement, on a daily basis, of a truncated and simplified image of cause and effect through space and time. Viewers of the mass media in advanced industrial systems perceive selected events presented as “cause” and selected events presented as their “effect” as a relatively straight-forward and unnuanced sequence and in an unusual, if not wholly unreal, physical and temporal proximity. This technique has been called the “cinematographic effect.” The cinematographic technique has become a fundamental part of the epistemology and “reality” of the modern human being. We are able to operate in an extraordinarily complex world by having a simplified artifact of reality in which cinematographication cuts even further through complexity to establish an order of cause and effect. Its virtual simultaneity gives viewers who are force-fed on it an illusion—designed to have high verisimilitude and, ultimately coming, for the viewers, to be reality itself—of accelerated and generally successful wish fulfillment or goal realization.

Cinematographication, as currently used, also exaggerates the contribution of individual acts to collective efforts and to their consequences. In the industrial democracy characterized by a widely shared sense of the appropriateness of personal choice, by a belief in the popular capacity to make informed judgments, and by the enlargement of the civic conscience, the cinematographic effect reinforces a belief in the effectiveness of individual action and the sense of responsibility for it. All of this reinforces the perception of the actuality of accelerated change in this century and contributes to inflated expectations about social and geographical mobility, the extravagant sense of possibility in several significant social strata, and the unwillingness to wait or defer gratification. Clarification of standpoint must address these biological and cultural factors that play upon choice-making.

There is another dimension to this first intellectual task concerning certification of standpoint. Modern science has been acutely conscious of

9. RUDOLF ARNHEIM, FILM AS ART 20-29 (1957); see also Reisman, supra note 3, at 504-05 (discussing cinematographic effect).
the need for sensitivity and clarity about the perspective from which phenomena are viewed. For any phenomenon, there are many possible standpoints, each of which affects and shapes what is viewed and how it is viewed. An indispensable intellectual tool concerns clarity with regard to what contemporary philosophy of science refers to as “observational standpoint.” Both the reference and content of the term “law” or “choice” will vary depending on whether the standpoint is that of a member of the elite or the rank-and-file, whether the observer is a member of the system observed and has internalized its folklore, myth and miranda, or is an outsider. Perception of the same phenomenon may vary depending on the culture, class, gender, age, or crisis-experience of the observer. Even within the legal establishment, reference and content will vary depending on whether the observer is a legislator, a judge, a prosecutor, a jurymen, a defense attorney, an accused, or a victim.

No particular standpoint in this jurisprudence is more authentic than another, but both scholar and choice-maker must be sensitive to the variations in perception which attend each perspective, try to disengage him- or herself, select one that is appropriate to the task, and then carefully certify and consistently maintain it.

SECOND INTELLECTUAL TASK: CAREFUL SELECTION OF FOCAL LENSES

The political inferior is concerned with following a rule. The political superior is concerned with changing or stabilizing some part of the social process. A jurisprudence for this latter perspective must develop techniques for focussing upon those aspects of the social process that impinge upon choice-making and are targets of choice, whether for stabilization or change. The “techniques” are conceptual categories. We look at our environment and specific issues within it “through” a variety of conceptual categories. It may be useful to think of them as lenses. In the physical sciences, different lenses and dyes permit the observer to bring different features or properties of the same viewed object into sharper focus or greater prominence. A comparable function may be performed in the social sciences by carefully crafted conceptual categories which serve as “focal lenses.”

a. Comprehensiveness and Contextuality

The political superior must avoid the temptation, so common in conventional legal method, to drastically reduce the universe of variables to be considered to either a text or a few purportedly key social factors. This reduction is an understandable inclination on the part of the political
inferior. In the search for the command, it is useful and sometimes politically safer to narrow the focus to a single authoritative source. Personal responsibility is greatly minimized if one is not obliged to scan a wide range of variables and make independent judgments, on the basis of all of them, as to what the appropriate response is. From the perspective of a political superior consciously making choices, however, this limitation would be self-defeating. Whitehead’s conception of “reality” as a manifold is the appropriate starting point. This approach requires the choice-maker to use the popular technique of “modeling” with great caution, for every model is built on the assumption that one or a few key variables may be relied upon, to the exclusion of all others, for explanatory and predictive purposes.

A person making choices, especially those on behalf of large aggregates of people, must operate initially with a focal lens that permits the scanning of the widest range of factors within the broadest context imaginable. This means dealing with a lot of information. It does not mean that the task is unmanageable. In advanced, industrial, and science-based civilizations, some major decisions are ongoing and incorporate—in collecting relevant information, exploring alternative possible arrangements, and implementing choices—the efforts of many people, sometimes totaling many thousands of hours, extending over long periods.

b. Selectivity

Yet one cannot study everything, especially for decisions that must be made quickly or decisions whose aggregate social value could be less than the costs of processing vast amounts of information. Hence the need to acknowledge the demands of economy and to develop various selective techniques, especially when decision-making must be rapid. But selectivity must not be carried to the point of frustrating the need for comprehensiveness and contextuality.

c. Law as Authoritative and Controlling Decision

The notion of law as a body of rules, existing independently of decision-makers and unchanged by their actions, is a congenital part of the intellectual and ideological equipment of the political inferior operating in complex organizations. It makes no sense in the jurisprudence of the political superior. The political superior necessarily conceives of law as a process that is generated by human beings, in which some, playing the role of political superior, try to influence the way social choices are
continuously made about the production and distribution of resources, including considerations about the ways that decisions should be made about those things.

Hence the informed political superior will find it most useful to conceive of law, not as rules, but as the ongoing process, of which rules are a part, through which human beings make authoritative decisions. A distinction can be drawn between decisions which are taken entirely on the basis of naked power without regard to the expectations of rightness of the people influenced by them and decisions which conform to those expectations, but lack all effectiveness. From the perspective of a jurisprudence of social choice, the word “law” is reserved for those processes of decision which are both consistent with the expectations of rightness held by members of a community (authoritative decisions) and which are effective (controlling decisions). These are, one might add, likely to be the most efficient decisions, for they draw, for their support, both on effective power and on the expectations of authority of those to whom they are directed. While the particular mix of authority and control may vary widely, a conception of law as authoritative and controlling decision protects the person making choices from exercises in irrelevance, whether because of absence of authority or absence of control.10

d. Constitutive Process

In any group process, some decisions will be concerned with the way decisions henceforth will be taken in that setting. Surely the political superior will be concerned about choices that not only deal with a particular issue, whose importance may loom large for the parties concerned but not necessarily for the community and its destiny, but with choices that fundamentally restructure the way community decision-making will be taken in the future. The term “constitutive process” refers to that portion of a group’s activity concerned with establishing, maintaining, or changing the fundamental institutions and procedures of decision-making. From the perspective of a jurisprudence for those making choices, a focal lens which clearly identifies when constitutive decisions are being taken and how they are likely to impact on and shape the constitutive process in the future is important.

THIRD INTELLECTUAL TASK: A MAP OF COMMUNITY PROCESSES

Focal lenses address the question of how scientific observers and persons charged with making choices for the community look at pertinent data. We have yet to consider what these observers look at. Beginning law students painfully learn that conventional legal analysis and theories that take the perspective of the political inferior and that conceive of law as a body of rules, look only at a limited number of texts, characterized as “legal,” and at those artifacts of social events, “facts,” to which the rules direct attention. But political superiors are concerned with understanding and influencing decision in ways that will enhance their ability to precipitate desired social outcomes. Hence the what of inquiry in the jurisprudence of the political superior must be broader than the political inferior’s what.

The New Haven School of Jurisprudence has adapted, with a number of adjustments, a scheme of cultural anthropology, in which any social process is described systematically in terms of those who engage in it (the participants), the subjective dimensions that animate them (their perspectives), the situations in which they interact, the resources, upon which they draw, the ways they manipulate those resources and the aggregate outcomes of the process of interaction, which are conceived in terms of a comprehensive set of values.

The participants in any decision process include those formally endowed with decision competence, such as judges, and all those other actors who, though not endowed with formal competence, may nonetheless play important roles in influencing decision outcomes. In international decision, the observer must examine, in addition to formal international organizations, state officials, non-governmental organizations, pressure groups, interest groups, gangs, and individuals, who act on behalf of other participants and on their own.

By the same token, the inventory will not be of much use if it does not take account of the perspectives of these actors. These perspectives include their specific patterns of identification and disidentification, their matter-of-fact expectations of past and future and the value demands they project. It is clear that in a complex arena, such as international politics, the perspectives of the various participants actually playing a role in decision often diverge greatly in critical ways.

Situations, as the New Haven School uses the term, refers generally to where decisions are made and the distinctive properties of that “where.” Conventional legal analysis generally looks to courts, secondarily examining the work of executive branches and legislatures. The New Haven School adopts a more functional approach in which it tries to focus on the
range of centralized and decentralized settings in which decisions are actually taken, their varying degree of organization and formality, the extent to which they are specialized or not specialized, and the extent to which they are continuous or episodic. We also consider it important to examine the extent to which participants in a particular situation perceive themselves to be in a state of crisis in which critical values are deemed to be at stake.

The resources on which participants draw—their "bases of power"—incorporate both effective power and symbols of authority. The New Haven School considers it appropriate for the jurist to correlate the extent to which control of power is available to support particular formulations that are presented as law. The ways in which resources are manipulated, or the strategies used by different participants, involve the management of resources aimed at optimalizing preferred outcomes. Strategic modes include military, economic, propagandistic, and diplomatic techniques in varying ensembles.

Conventional legal analyses that take the perspective of the political inferior usually characterize the outcome of a legal decision as a more specific statement of a rule. The political superior making a choice conceives of outcomes in terms of the confirmation or redistribution of the values at stake: of power, wealth, enlightenment, skill, well-being, affection, respect, and rectitude.

FOURTH INTELLECTUAL TASK: A PRAXIS OF CHOICE-MAKING

The political inferior complies with a command. Hence the methodology developed by jurisprudence that takes the perspective of the political inferior is primarily concerned with identifying and interpreting that command. From the perspective of the political superior, however, making choices requires a different methodology. It consists of five steps.

a. Goal Clarification

A conception of purposive behavior requires an idea of what end that behavior seeks to secure. A person engaged in performing any decision function that involves choosing should examine the demands of particular actors in terms of their congruence with the common interest, expressed as preferred patterns of production and distribution of every value within a system of stable minimum order. This is not a derivation from some higher authority, but an act of willing a goal oneself.
b. Trend Analysis

Once a goal has been specified, it is necessary to examine the degree to which it has been achieved in past decisions. This essentially historical task requires the identification and organization of trends in pertinent past decision in terms of the goal expressed.

c. Factor Analysis

In making policy choices, it is important to correlate identified trends in past decisions with the conditions that influenced them and to note whether that context of conditions has changed in material and pertinent ways.

d. Predictions

What will be is a function of what actors elect to do now. Projecting different decision options and then examining the prospective aggregate value consequences of each in terms of the goals that have been clarified permits the jurist to select and, through time, to adjust particular recommendations so that they increase the probability of the eventuation of a preferred future while minimizing the eventuation of dystopic ones.

e. Invention of Alternatives

Making a choice involves, by its nature, much more than canvassing and selecting from the rules of the past. When, as is often the case, predictions suggest a likely discrepancy between a goal preference and a probable future, the jurist with responsibility for making a choice should explicitly explore possible new arrangements to increase the probability of the occurrence of a desired future. This intellectual task is active and inventive and, moreover, is potentially interventionist. It engages the fundamental responsibility of the jurist and the citizen.

JURISPRUDENTIAL POLICIES

The critical contribution of most contemporary jurisprudence is the clarification of policies that can guide the performance of the legal functions that the particular school or frame of jurisprudence is addressing. Jurisprudential theories that explicitly or implicitly take the perspective of the political inferior are primarily concerned with developing policies for the efficient identification of the command, the determination of its significance in the new context, and its efficient implementation. A jurispru-
dential theory which takes the perspective of the political superior and is concerned with providing normative guidance for choice must approach the matter differently. Let us look briefly, then, at policies for each decision function that are appropriate for this perspective

a. Policies for Intelligence

Intelligence comprises the gathering, evaluation, and dissemination of information relevant to decision-making; prediction based on the intelligence derived; and the planning for future contingencies. The sequential phases of intelligence are gathering, processing, and dissemination. The processing phase itself may be subdivided into sequences such as storage, retrieval, and utilization.

Many individuals performing manifest legal functions are engaged in intelligence. Judges and their assistants, in assembling facts and assessing the aggregate consequences of alternative decisions, depend upon intelligence that they either gather themselves or receive. Legislators, whose role requires them to seek to devise instruments and programs to determine, first, what are desired social effects and, second, how to achieve them, also depend on intelligence. Many modern legislatures develop their own intelligence gathering entities, though in modern complex societies, politically relevant intelligence is also gathered and processed in media, industry, universities, and "think tanks."

In order for the intelligence function optimally to serve a decision process, it must be dependable, comprehensive, readily available and economic in the consumption of resources in producing of intelligence.

The individual who engages in intelligence has considerable freedom of choice in determining what he or she wishes to investigate. This choice should not be made capriciously or on the basis of unexamined likes or dislikes, but on the basis of a systematic intellectual effort to determine which matters of concern to the common interest require additional study and recommendations. Once having settled upon a subject, responsibility requires the exercise of independence and integrity and a degree of self-awareness sufficient to enable the investigator to distinguish the rigorous interpretation and assessment of the trend material that is being assembled from the individual preferences of the person performing the intelligence function. This is not a particularly novel notion. Most scientific disciplines have explicit or implicit professional codes or codes of ethics that are relevant to the proper performance of the intelligence function.
b. Policies for Promotion

The function of promotion involves active advocacy to the community of policy alternatives. Promotion is ubiquitous. We promote policy alternatives on committees, in faculties, in government departments when we espouse a particular viewpoint, before parliaments, through the media when we speak as commentators, or through violent street confrontations and other forms of intense and coercive agitation.

Promotion is a high choice function. In contrast to intelligence, which requires the suspension of the operation of personal preference for disengaged observation and reporting, promotion invites the self to select arrangements that it believes are conducive to its own and others' interests and to press, with increasing degrees of intensity and clarity, for acceptance of that formulation as community policy. In the United States, much promotion is conducted by lobbyists in capitals at the state and federal level. For a fee, lobbyists undertake to persuade law-makers to accept one version of the common interest and to assist them in establishing legislative programs that will secure and protect it. "Lobbying" has earned a dubious name because it is associated with the act of promoting special interests, rather than those that sound in the commonweal. Not all promotion, however, is lobbying.

Plainly, the exercise of choice in promotion should be animated by a concern to find a policy or legislative instrument that expresses the common interest of the entire community rather than the special interest of a particular actor.

c. Policies for Prescription

The function of prescription or law-making involves the selection of a particular policy and the design of a program for its implementation. The sequences of this function are initiation, exploration of potentially relevant facts and policies, formulation or characterization of the facts and policies as relevant, and promulgation of the prescriptive outcome to a target audience.

In purely organizational terms, prescription seeks efficiency, clarity in communication to the designated audience and a credibility of commitment to make the prescription effective. Clarity of communication and credibility are prerequisites to securing compliance. A community may elect not to prescribe for many sectors of community life, but the law-making function is a requirement of any community. As a structural matter, prescription should operate promptly and should be comprehensive in its scope such that it addresses all the prescriptive needs of the
community. In its procedures, it should be contextual in exploring the range of facts and policies relevant for its conclusions and should ensure that its content is consistent with the common interest of the community. It should be effective in promulgating its content to the target audience.

In democratic systems, two critical policies act to limit the range of prescription. The first is respect for a private sphere, which restrains the putative law-maker from making more law than is minimally necessary for the common interest of the community. Respect for a private sphere maintains a broad and vigorous “civic order” which is characterized by minimum community intervention. A second and even more profound restraint arises from the fundamental respect that a democratic system has for the unique individuality of each of its members. Democracy is more than majority decision; the majority, by itself, can constitute a tyranny. Majority decision is simply one of a repertory of techniques of democracy, which is preferred because of an underlying acceptance of and respect for the individuality and unique worldview of each person. But this postulate of democracy acts as an inherent limit on what a majority, its numbers notwithstanding, can do and forces the cultivation of a continuing respect for the interests of minorities, which must be reflected in the ongoing refashioning of the common interest. Thus, the majority and its spokesmen must refrain from characterizing a minority’s demands as “obstructive” and must be willing to defer some of its own preferences until a broad consensus emerges.

d. Policies for Invocation

Invocation refers to the provisional characterization of facts as deviating from prescribed policy and the provisional assertion of control to prevent or abate the deviation or to secure control of individuals or values necessary for subsequent application. The word “provisional” is critical in this function, for enormous value deprivations may flow from hasty and irresponsible characterizations of delinquency or defection from community norms.

The phases of invocation include initiation, exploration of facts and policies, provisional characterization and, critically, the initiation of applicative arenas in circumstances in which provisional characterizations indicate a violation of community prescriptions.

In modern complex societies in which communication networks are widespread, many individuals without official sanction may play roles in invocation. Precisely because invocation can be so destructive, it may be very tempting to individuals who are frustrated or who seek outlets for
violence to exploit invocative opportunities for their own ends. Hence the jurisprudential policies for invocation should seek a balance between promptness and efficiency, on the one hand, and adequate safeguards against irremediable value deprivations on the other. Those who would invoke must understand themselves and the factors that motivate them. When those factors go beyond or conceal themselves behind indignation at the apparent violation of law, the responsible choice is not to invoke.

\textit{e. Policies for Application}

Application represents the transformation of authoritatively prescribed policy into controlling event. Its components are initiation, exploration of potential facts and policies, characterization of facts and policies, enforcement, and review. The policies of application are concerned, first, with the reinforcement of expectations of effectiveness about the decision process as a whole and, secondly, with a provision of a remedy for a particular case. The rights of individuals in application are critical.

From the perspective of a jurisprudence of the political inferior, application may involve little more than the identification of a rule and its specification to a particular case, without regard to the aggregate consequences that result. The guiding maxim might well be taken from Joshua: "[d]o all that is written in the book of the law . . . turning aside from it neither to the right hand nor the left."\textsuperscript{11} From the perspective of a jurisprudence of the political superior, however, aggregate consequences are the very purpose of the law and the responsibility of those making choices. That requires the applier to be highly contextual, capable of relating alternative possible decisions to the most inclusive community policies, conscious of the need for effectiveness of decision, and cost-conscious about enforcement.

Rules play a special role in application. From the perspective of the political inferior, rules are, of course, commands, to be interpreted and strictly applied. From the perspective of the political superior, who is making choices, however, rules are not meaningless nor, as some Critical Legal Studies scholars suggest, are they to be simply ignored. But they are necessarily viewed differently than they are from the perspective of the political inferior. Rules are a species of communication that conveys information. In the legal context, rules express community policies. The function of responsible appliers, who are cognizant of the restraints that their role imposes as well as of the mandate to make the choices that it

\textsuperscript{11.} \textit{Joshua} 23:6.
requires, is to relate the authoritative information in the rule to its context and to the most inclusive community policies, and then to design a decision that best approximates the aggregate of community policies that are engaged, within the limits that the political situation sets. The responsible applier must be careful to avoid the nihilism of deconstructive theories, the irresponsibility of theories that purport to liberate appliers from all social controls, and the sterility (from this perspective) of a jurisprudence of strict obedience. Metaphors such as Dworkin's "chain novel" may express the spirit of the activity, but do not supply policy guidelines for its execution.

**f. Policies for Termination**

Termination deals with the abrogation of extant prescriptions and the design of arrangements that minimize the disruption of an expected and demanded regime. Termination involves initiation, exploration, cancellation, and amelioration. Maintaining a congruence between our expectations and formally prescribed law is essential to an efficacious process of decision. Terminations are potentially disruptive because, in varying degree, they "expropriate" those who have made good-faith value investments on the supposition (indispensable for public order) that the prescriptions that had been made would continue to be honored and applied. The expropriations may be material, in the sense of loss of property or title, or psychological.

Choice-making in termination operates at many levels of consciousness. Deep antagonisms toward an existing social arrangement or unresolved neurotic memories may lead to great exuberance in termination, a kind of iconoclastic "high." The person engaged in this activity, as in all other decision functions, should self-scrutinize carefully.

The primary policies of termination are the reduction of the cost of social change and the encouragement of change in directions that more closely approximate the common interest of the community. The effectiveness of these policies depends on the cultivation of a climate which is sympathetic to change. But this, in turn, depends upon general expectations that changes when undertaken will minimize the destructive consequences of the abrogation of existing legal regimes.

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The political inferior grinds on and on, secure, morally and intellectually, within the universe bounded by the commands of his political superior. Like Henry V’s soldiers, he can say, “We know enough if we know we are the king’s subjects. If his cause be wrong, our obedience to the king wipes the crime of it out of us.” The political superior accepts responsibility and knows that the decision process and the political and social system of which it is a part is an artifact, created by human beings for human beings. As such, it will incorporate and replicate all the limits of their knowledge, experience, and ability. Institutional arrangements for making social choices sometimes seem to acquire a life of their own. As contexts change, they may become less and less synchronized with it.

From the perspective of the political superior, then, it is clear that complex decision processes must provide for an examination of the extent to which their aggregate performance continues to approximate the fundamental goals for which they were established. This is not an easy task. People involved in decision are frequently defensive or narcissistic. Hence the practice of establishing autonomous appraisal agencies, like controllers or inspectors-general is to be applauded. Whatever the structure, effective appraisal requires of those who perform it a cultivation of a capacity for disengagement. It can only proceed if the persons carrying it out operate with integrity, rigor, impartiality, and concern for individual rights.

CONCLUSION

While the jurisprudence of the political superior is easy to caricature as elitist and anti-democratic, the characterization more accurately applies to the jurisprudence of the political inferior, which disempowers those who live under its empire. From the perspective of a jurisprudence of choice, the word “law” is only designative. Unlike other theories of jurisprudence, characterizing a communication as “law” does not necessarily imply approval for its content or, as in commanded theories of jurisprudence, a commitment to obey, to comply, or to implement regardless of how one feels about its content. The jurisprudence of the political superior requires those who apply the law to consider every statement presented as “law” in terms of its policy consequences. Not only is this jurisprudence not incompatible with democracy, the operational reality of democracy dictates it. Accordingly, great responsibility is placed on the individual performing decision roles. But such responsibility is characteristic of every role in democracy. In some respects, an abiding goal in every
democracy is to make everyone a political superior in as many sectors of life as possible.
Some time ago, President Clinton talked to a gathering of religious journalists about abortion. He said that he did not believe that the biblical passages often cited by those who are “pro-life” indicate clearly that abortion is wrong and should be prohibited. The reasons many people have for wanting abortion to be prohibited, or for allowing abortion, relate to their religious convictions. These people, for the most part, regard it as perfectly appropriate that religious perspectives help determine public policy on abortion in the United States. Others object. They say that the religious views of some people should not be imposed on others. Who is right? Is this a question of simple right or wrong, or are matters much more complex?

My main subject is the use of religious convictions in the making of public political decisions. Abortion is the most controversial illustration, but it by no means stands alone. Welfare provisions, capital punishment, treatment of animals, environmental protection, military policy, and a host of other political issues may be tied to religious understandings. Should these understandings influence public policy?

Let me clarify a crucial point at the outset. None of us can wholly compartmentalize our convictions. Strong religious convictions will influence political opinions; people cannot help themselves. But that does not mean people should self-consciously rely on religious convictions to settle political questions. Perhaps they should develop opinions and formulate views in some other way. By comparison, if a child grows up feeling

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1. This is the text of a Siebenthaler Lecture delivered on February 23, 1996. It summarizes ideas developed at fuller length in Private Consciences and Public Reasons (New York, Oxford University Press 1995). That book contains references and more detailed analysis. Remarks closely similar to those found here were distributed in a pamphlet, called Religious Liberty, Nonestablishment, and Political Discourse, of the Judaic Studies Program of the University of Cincinnati. I am very grateful for the warm hospitality of the faculty and students during my visit at Salmon P. Chase College of Law.
strong hostility toward her parents, that also will influence her political judgment, but she should try to address political issues in other terms. Should she treat her religious views similarly, or is it all right to rely on them self-consciously?

If what follows, I draw many distinctions. The most fundamental ones are between private citizens and public officials and between one's actual bases for judgment and one's stated reasons. Very briefly, I think private individuals should regard themselves as free to rely upon and state religious reasons; public officials acting in their official capacity should rarely state religious reasons as their bases for political decisions, and they should be more hesitant even to rely on religious reasons than private citizens. The particular restraints vary depending upon the kind of official.

The restraints I have primarily in mind are definitely not direct legal restraints; those would themselves be unconstitutional in the main. The restraints are not even the indirect restraints of invalidating legislation based on religious grounds. Rather, I am talking about self-restraint, supported by mutual expectations.

II. THE RELIGION CLAUSES

I want first to say a few words about the free exercise and establishment clauses of our constitution. The First Amendment says, "Congress shall make no law respecting an establishment of religion, or prohibiting the force exercise there of . . . ."

What have these legal constraints to do with my primary topic? Perhaps certain religious grounds for political decisions will actually violate one of the religion clauses. Even if no violation of constitutional law occurs, perhaps values that underlie the clauses will tell us something about appropriate behavior. When people say, for example, that the pro-life position on abortion offends separation of church and state, do they mean that if the position were enacted into law, the establishment clause would actually be violated, or do they mean only that some spirit of separation is offended? Do they even know which they mean?

Let us begin with the free exercise clause. Most importantly, people in the United States are free to believe what they choose, to express their beliefs, and, with limited exceptions, to worship as they wish. As many of you know, the last six years has seen a storm of controversy about standards for free exercise claims. In 1990, the Supreme Court decided whether members of the Native American Church had a constitutional
right to use peyote as a sacrament in their worship services. Rejecting
the claim, the court said that if a law has a valid secular purpose, it can
be applied across the board. Those with religious reasons to disobey are
no better off than those disobeying for other reasons.

The decision was attacked by a wide spectrum of religious groups and
by constitutional scholars; and Congress has voted to re-establish the
previous constitutional test, a version of the compelling interest test.3

What has free exercise to do with the problem of how political deci-
sions are made? One point is obvious. Many people, including a high
percentage of Christians, Jews, and Muslims, see their religious convic-
tions as having some political implications. One aspect of the full exercise
of their religion is the acting upon these implications. Thus, for someone
who thinks God disapproves homosexual behavior and wants human
societies to restrict this behavior, acting on this belief in the political
sphere is experienced as part of the exercise of religion.

Another point is less obvious. If some people act on their religious
convictions, that may thwart the free exercise of people with other reli-
gious convictions. Thus, if enough people vote their religious conviction
that drug use is sinful, that can impair the free exercise of people whose
religion calls for the use of drugs. Here we perceive a crucial difference.
Only some uses of religious convictions genuinely thwart the free exer-
cise of others. Other uses do not. I shall return shortly to this difference.

The establishment clause forbids the government's establishing any
particular religion in the manner in which the Anglican Church is made
the Church of England. Beyond this, it forbids the preferring of some
religions or churches over others. According to modern Supreme Court
interpretation, government cannot prefer all religions to no religion or
antireligion. According to modern Supreme Court interpretation, govern-
ment cannot prefer all religions to no religion or antireligion. According to modern Supreme Court
interpretation, government cannot prefer all religions to no religion or
antireligion. This last principle is controversial; many think a general
preference for religion should be permissible. After the last term of the
Supreme Court, establishment clause doctrine is in disarray;4 but it re-

2. Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S.
872 (1990). In 1986, it had sustained application of the Air Force's rule that personnel must
not wear headgear indoors against an Orthodox Jewish clinical psychologist who wore a yar-
mulke. Goldman v. Weinberger, 475 U.S. 503 (1986). To most observers, the government's
interest in forcing Dr. Goldman to remove his yarmulke seemed much less than compelling;
but the Court emphasized deference to military authorities.


4. See Rosenberger v. Rector and Visitors of the University of Virginia, 115 S. Ct. 2510
(1995); Capitol Square Review and Advisory Board v. Pinette, 115 S. Ct. 2440 (1995); see
generally Kent Greenawalt, Quo Vadis: The Status and Prospects of "Tests" Under the Religion
Clauses, 1995 Supreme Court Review 323.
mains true that the outright promotion of religion is not permitted.

What are the implications for political decision and discourse of the establishment clause? Suppose a law was overwhelmingly based on religious grounds and was designed to promote that religious understanding; and all this was announced in the preamble to the statute. That would be an establishment of that religious point of view. Some writers have concluded that whenever officials, or citizens, promote particular political positions because of religious grounds, this involves an actual or potential breach of the establishment clause. These writers do not suppose that the courts can correct all these wrongs, but nevertheless the Constitution has been violated.

A more moderate position is that each reliance on a religious ground offends some spirit of nonestablishment. On this view, the values underlying the establishment clause press toward nonreligious political judgment and discourse. We can see, then, that the most expansive idea of free exercise might allow citizens and officials to use religious grounds whenever they find them to be relevant. The most expansive idea of nonestablishment might discourage use of religious grounds. How can we work our way out of this dilemma?

III. RELIGIOUS IMPOSITIONS AND OTHER USES OF RELIGIOUS GROUNDS

The first step is to distinguish between religious impositions and other uses of religious grounds in political judgment. This is the difference I mentioned earlier. Suppose that out of Christian convictions, someone proposes that all nonChristians be taxed, with the benefits going to Christian churches. This step would straightforwardly prefer the Christian religion; it would discourage the practice of other religions. It would constitute a religious imposition. Such legislation is at odds with the religion clauses. When legislators and citizens have a similar motivation to adopt laws that are not so obviously preferential, they offend at least the spirit of the religion clauses.

On the other hand, suppose a legislator proposes to restrict factory farming. She thinks on religious grounds that higher animals deserve more consideration from human beings than they have received. She does not wish to promote her religious beliefs or discourage anyone's religious practice. She wants only to give animals a more decent life. If the legislation is adopted, no one's religious beliefs and practices will be directly

affected. This use of religious grounds does not involve an imposition. Here no one's free exercise is affected and no religious views are established.

People often miss this distinction. They may simply assume that any use of religious grounds involves an imposition. Or they may condemn use of religious grounds that oppose political positions they favor and welcome religious grounds that support their own positions. Some of those who complain about the religious sources of pro-life positions had no difficulty with religious grounds for civil rights or against capital punishment. If we are going to come to grips with this subject in a serious way, we must resist the easy conclusion that religion is fine when it supports our views and illegitimate when it opposes them. The beginning of wisdom is to recognize that religious impositions and motives to impose are wrong; they are not appropriate in our liberal democracy. It is other uses of religious grounds that require more careful examination.

I shall use the factory farming example. It is less controversial than abortion, but troubling enough to draw our attention. Most animals that we eat for meat live pretty awful lives, caged without the ability to move; but should we care very much about this? Do pigs and chickens count for a great deal or should we regard their lives as essentially for our own purposes? Some people inform themselves on this subject without respect to religious convictions. Others draw from religious beliefs. That does not mean any neat connection exists between most religions and any particular positions. Some Christians, for example, believe that the Bible establishes that animals are for human dominion; if so, we don't have to worry about factory farming, except for assuring the health of human beings. Other Christians think that we are called to care seriously for all creatures. From this perspective, aspects of factory farming are much more disturbing. Maybe a higher price for meat would be worth paying in order to give the animals we kill more freedom to move about and engage with other animals. When they face this issue, is it all right for citizens and legislators to make up their minds on religious grounds and to defend their choices in these terms, or should people try to rely on nonreligious bases of decision?

IV. Some Basic Positions and Perspectives of Judgment

Political philosophers disagree. Here, in a nutshell, are some of the major positions. Some say that people and officials are completely free to rely on whatever grounds seem compelling to them. An opposing position is that people in a liberal democracy should make decisions on bases that are widely shared and accessible to all citizens. At least at this point in
history, the ideas that the government should show equal concern for citizens and not discriminate against people because they belong to an inferior race are fundamental tenets of all liberal democracies. These ideas would be good starting points for political decisions. The notion that Genesis establishes that animals are subject to dominion for human use would not. A somewhat different position claims that religious grounds in particular are improper bases for political positions because of the establishment clause and the fundamental idea of religious plurality. Then there are various intermediate positions. One is that everything depends on the kind of religious understanding involved. Views that are not too dogmatic and sectarian, that are open to competing points of view, play a useful role in politics. Views that are narrow and dogmatic, that leave nothing for dialogue with others, do not belong in the politics of a liberal democracy. A different intermediate position distinguishes ordinary political issues from constitutional issues and issues of basic justice. For ordinary issues, religious grounds are appropriate; but for constitutional issues people should rely on reasons that would have persuasive force for all reasonable citizens.

How can we judge between the positions that are offered? The two crucial variables are fairness and the health of our political life. The fairness argument against using religious grounds is that it is unfair to adopt coercive legislation on bases that one cannot expect a significant portion of the population to accept. Thus, it would be unfair to restrict factory farming, because some people make religious judgments that many farmers and consumers reasonably do not accept. The fairness argument on the other side is that it is not fair to prevent people from relying on grounds that they find most convincing.

When one turns to the quality of political life, one may worry that large injections of religion will cause conflict and dissension, and feelings of exclusion. Certainly the wars at the time of the Reformation show that religion can be a terribly divisive force, and the modern world is far from free of violence related to religion. On the other hand, our society is a lot different from Europe in the 16th and 17th centuries. An open airing of religious positions may enhance understanding of political possibilities and of the relevance of religion for society. These various arguments stand in powerful opposition; choosing between them is not easy. When we look more closely, we see that the strength of these arguments

6. This is the position of John Rawls, most fully developed in Political Liberalism (New York, Columbia University Press 1993).
varies depending on the persons and behavior on which one focuses. It is this truth that underlies my position.

V. HISTORY, CULTURE, PRACTICES, AND EXPECTATIONS

I am going to discuss judges, legislators, ordinary citizens, and religious groups. I should say at the outset that I do not think basic premises of liberal democracy settle exactly how far religious convictions should count in political life. Much depends on the history and cultural life of particular societies.

The relevance of history and culture is most apparent if one asks whether people now should feel restrained about employing religious grounds in political judgments. We can think of self-restraint in using religious grounds as involving a kind of reciprocal concession: “I won’t use my religious grounds to coerce you if you, in turn, will not use your religious grounds to coerce me.” Suppose virtually everyone in a society now uses religious grounds freely in reaching political conclusions. Telling some people that they should stop would not be fair; they would then forfeit their own use of religious grounds but be exposed to the widespread use of others. If we ask what can reasonably be expected of people here and now, we have to ask about present practices and expectations.

Suppose we ask a different question: what would be desirable attitudes about using religious grounds in the United States if we could develop them over time? For this inquiry, present practices and expectations are less central. One might say, “People have long relied on religious grounds in politics, but our political life would be fairer, and more healthy if they stopped doing so.” Still, I think much depends on what our culture is like, especially the range of its religious positions and the attitudes members of different religious groups have toward each other. Suppose very few people took religion seriously any longer, what may be the condition in the Netherlands and some Scandinavian countries. It would hardly make sense to tell people they should discipline themselves not to rely on religious grounds; since such reliance would have slight influence in any event. Or, suppose people of different religious views were nearly all open minded and anxious to grasp insights from other religious positions. The realm of politics might seem one domain of fruitful discourse among people with various religious views. On the other hand, if many religious views were held fairly dogmatically, and distrust and tension were considerable, removing religion from politics might seem desirable. Our conclusions about what political life should be like must be made in light of cultural conditions.
VI. DISCOURSE AND JUDGMENT

Before I turn to our liberal democracy, I want to make one other general observation, providing a personal illustration. The observation is that outsiders and individuals themselves can monitor their discourse much more easily than they can monitor their bases of judgment. When I attended college (Swarthmore, a private college), the Student Council allocated money to student organizations from a central fund. Each year the Christian Fellowship received some money, to invite speakers, etc. One year a majority of members of the Fellowship decided to adopt a statement of faith; subscribing to the statement was a condition of membership, although nonmembers could attend activities. There was controversy within the fellowship over whether there should be any such statement and over how inclusive it should be. What resulted was a statement that I thought could be subscribed to by everybody who genuinely considered themselves to be Christians.

Members of the Student Council divided sharply over whether funds should be given to any organization with an exclusive membership. Those of us who belonged to the Fellowship favored funding; we urged that such an organization might limit membership to people who subscribed to its principles. Opponents of funding happened to be people who did not have very positive views about religion, but they did not attack religion. They argued that funded student organizations should not have exclusive memberships.

I remember feeling that arguments about the value of religion and Christianity were really inapt, but I did not have a strong view that I should try to decide about funding without referring to my own views about religion, or indeed without reference to my sense of loyalty to other members of the Fellowship. I suspected that negative views about religion influenced opponents of funding, and I did not feel I should try to disregard my own positive feelings.

Telling whether someone else is reasoning publicly in terms of religious grounds is much easier than telling whether they are self-consciously influenced by such grounds. Engaging in a discourse that does not employ religious grounds is much easier than barring such grounds from one's considered judgment. These realities lead me to favor greater restraints on discourse than judgment. I shall address shortly the worrisome argument that such a difference encourages dishonesty and concealment.
VII. JUDGES

Among public officials, judges are the most constrained in their bases for decision. Since appellate judges justify their results in formal opinions, we know precisely what grounds they use to defend their decisions. Generally, they provide reasons based on legally authoritative sources, like statutes and prior cases. Sometimes however, they must give meaning to basic concepts like fairness and equality. Then they may engage in reasoning that is broader in scope. What one does not find, however, is argument that depends on any source of insight that the judges do not think is available and forceful for lawyers or members of society in general. One does not find religious grounds. Judges rarely say behavior is wrong because it violates one particular authoritative religious point of view. Matters were different in the 19th Century, when the common law was said to be Christian; but we now find essentially nonreligious arguments for why actions or laws are acceptable or unacceptable.

Judges may employ references to religious morality to indicate traditions in this country, say about abortion or homosexual acts; but judges do not claim that the morality of Christianity, or any other religion, is correct because the religion is correct. Opinions claim to rely on bases for decision that would be authoritative for any judge; no directly religious ground has this status. Present practices preclude judges from advancing directly religious grounds for decision.

What of the actual bases for decision. The ideal of judging is that judges rely on the arguments that they present in opinions, more or less. I say more or less, because most opinions are not fully candid in at least three respects. Typically opinions make cases seem easier than they are. First, they rely heavily on traditional legal sources even when those sources are indecisive. Second, they overstate the force of arguments in favor of the result the judges reach. That is, the opinions make their own side seem stronger than the judges really think it is, and they make the opposing side seem weaker than the judges really think it is. Finally, opinions for an entire court, or for more than one judge, submerge and conceal differences of view among judges joining the opinion. So, opinions are not fully candid. But, still the arguments they state are usually the arguments that persuade the judges.

On very rare occasions, judges may find all the legal and other arguments of general force to be indecisive. They may find they need to rely on some more personal source of insight to tip the balance. Is this ever appropriate? If it is appropriate, may a judge rely on a religious position as the more personal source of insight? The first point is arguable. Perhaps judges should always strain to be guided by public reasons, reasons
that they recognize have force for all judges and that they would feel comfortable putting into an opinion. I think they should strive hard to be guided by public reasons, but that when they find these reasons to be evenly balanced, they may give some weight to more personal reasons they would not put in an opinion. An example would be, "I can't explain why, but I feel deeply that a seventh month old fetus counts just as much as a new born baby." In those rare instances when judges rely on personal reasons they would not put in opinions, I believe they may treat their own religious beliefs as they would other personal sources of judgment.

To sum up, the public discourse of judges in legal opinions should not include religious reasons, or "personal" nonreligious reasons. This is the present practice. Judges should very rarely allow themselves to give weight to unstated personal reasons or religious reasons.

VIII. LEGISLATORS

Other public officials present more serious issues. I will concentrate on legislators. Some documents containing legislative justifications are formal in the way that judicial opinions are formal. Of course, legislators often self-consciously change the law, so legislation does not need to be tied to existing law in the manner that judicial decisions are tied to existing law. Straightforward arguments that the law is unjust or ineffective and needs to be changed are fully appropriate. Still, in things like preambles to statutes and committee reports, we find justifications and arguments that are claimed to have general power; in that respect, those resemble judicial opinions.

The troublesome questions concern arguments offered by individual legislators inside and outside the legislatures, and their actual bases for judgment. Should a legislator proposing a bill to restrict factory farming say on the legislative floor: "The Bible calls on us to give greater consideration to animals than we have done so far. If we are to be faithful to God's will, we should enact this legislation." Should a legislator explain his or her position in that manner to constituents? Should legislators make up their own minds on such grounds, even if they do not reveal them publicly?

At least at a national level, I believe we have reached a general understanding that legislators should not make such religious arguments. They represent all their constituents, members of diverse religions. They should not present as crucial arguments grounds that are applicable only to members of certain religions. This practice is not as securely established or uniformly followed as the practice regarding opinion writing; but such overtly religious arguments about particular laws and policies
are not frequently offered by members of Congress.

I think this practice respects the religious diversity of our population. Since religious tensions remain significant in the United States, this practice also reduces political and religious conflict in a desirable way. This restraint involves only a minor impairment of the religious liberty of legislators. They have chosen a public role and they often say less than everything that they think about particular issues. Moreover, the number of legislators in the country is small in comparison with the number of citizens. If legislators forego public religious arguments about political issues, that entails only a slight diminution of people's freedom to act upon religious understandings.

How legislators should make up their minds is troubling. Unlike judges, they may often find that public reasons are indecisive. Legislators should focus primarily on public reasons, but we should not expect them systematically to disregard personal reasons and religious grounds.

As my Student Council example illustrated, purging one's discourse is much simpler than purging one's judgment; and it is much simpler to tell whether others are restraining their discourse than whether they are restraining their judgment. The primary restraint on legislators should be conceived as a restraint on public discourse, not on judgment.

Does this proposal endorse dishonesty and concealment? No one expects legislators to reveal all their grounds for decision. If this is not expected, their failure to develop religious arguments that carry considerable weight with them is not really dishonest. The issue of concealment is more difficult. Some people believe that citizens should know as completely as possible the bases on which legislators decide. Such knowledge can help the citizens decide what to do at the next election. This is a telling point, but not telling enough to justify wide political speech cast in religious terms. I do believe legislators appropriately mention that religious grounds matter to them, and certainly they should not lie about that. What they should not do is to make full religious arguments in the public political forum.

I have talked about legislators using their own religious convictions. There is another question. Should they follow constituent opinion that is based on religious convictions? Suppose most constituents have religious reasons for thinking fetal research is wrong. Should that affect a legislator's vote? The answer depends on how ordinary citizens should make up their own minds and discuss issues. I will discuss that subject in a moment.
IX. THE EXECUTIVE BRANCH

Many functions of chief executives and other administrators are legislative. In these functions executives should be guided by essentially the same principles as legislators in using religious grounds. In some other functions, executives are more like courts, interpreting and enforcing existing law; in these functions the guiding principles should be similar to those for judges.

X. CITIZENS

Ordinary citizens are not trained to restrain their judgments and discourse in the manner of judges or legislators. For many of them, religious convictions have implications for political issues, and acting to realize these implications is an aspect of the exercise of their religion. Many of those who believe that God ensouls the embryo at the time of conception feel that working for restrictive laws on abortion is an aspect of carrying out God’s will. Most citizens play little direct role in political processes beyond voting, and many do not even vote. Votes for candidates merge impressions about many issues. Asking citizens to distill the judgments they would have if they put their religious convictions aside on each of these issues is asking a great deal, and it is unrealistic to think that most citizens could be very successful. Certainly most citizens would be skeptical that others would be successful, and the most conscientious among them in sticking to public reasons would suspect that they were unfairly foregoing grounds of judgment others were using. People should be encouraged to give a priority to public reasons, but they should feel free to be influenced by religious grounds.

What of discourse by ordinary citizens? Most of their discourse takes place with family, friends, co-workers, and members of groups to which they belong. What any one person says has very little effect on political life as a whole. Asking citizens to censor themselves in their private conversations would work a serious inhibition, with limited positive effect. The issue is closer when citizens write to members of Congress or to newspapers. Perhaps then they should aim for nonreligious discourse. Most letters are not read with any care; politicians are interested in the bottom line. The arguments made in newspapers have greater significance. It is desirable for most such letters to be cast in terms of public reasons, but this forum is also an occasion for the expression of diverse points of view. This forum is not significant enough to justify a principle of self-restraint that citizens should restrict themselves to public reasons.

In a discussion on another occasion, Richard Saphire raised the prob-
lem of speakers at public school board meetings, and similar community meetings, who forcefully make religious arguments. Based on conversations with some of these people, Professor Saphire believes they would find it virtually impossible to formulate their views in any nonreligious form, but he also believes the effect of such discourse is divisive. These meetings raise a more serious problem than letters to legislators or newspapers. I am inclined to the view that even in such situations, citizens should feel free to express what matters most to them, but I do not hold this view with confidence.\footnote{That is, I also find appealing the competing view that citizens should be encouraged to present "public reasons" at such public meetings, and that that encouragement could be formulated as an expectation of how citizens would best comport themselves. Of course, no such formulation is likely to have much effect on how people who believe they are called upon by God to speak in religious terms will express themselves.}

In sum ordinary citizens should feel much freer to rely on religious grounds than are public officials. Since legislators should be able to rely on views that are properly formed, legislators may give weight to constituents views that rest partly on religious bases.

What about what I call quasi-public citizens, citizens who play a largely public role but are not in the government? Presidents of major nonreligious organizations are important public figures, and they represent diverse constituencies. They should be guided by principles similar to those for legislators, and that is how they generally perform their roles. This is how major columnists should mainly regard their responsibilities when they comment on pressing political issues, but the argument that they should feel free to express their unique personal perspectives is stronger than it is for the heads of major nonreligious organizations.

\section*{XI. Religious Leaders and Organizations}

Finally, I want to discuss the place of religious organizations, local churches and synagogues, etc. and their ministers and rabbis, and larger institutions. I shall briefly pose and answer six questions. Those are:

1. When addressing their own members, should clergy and churches limit themselves to general moral ideas or should they draw specific political conclusions? (2) Should their recommendations extend to supporting or opposing particular parties or candidates? (3) Should clergy, while strongly identified as clergy, run for public office? (4) Should clergy and churches engage in ordinary political activities, such as educational campaigns, lobbying, demonstrations, and other attempts to put strong electoral pressure on officials? (5) In communications to nonmem-
bers, should they draw highly specific policy conclusions, or limit themselves to more general recommendations? (6) If they should act in the public arena, should they make specifically religious arguments, or nonreligious arguments, or both?

Each of these questions can be faced from within a religious tradition or from the standpoint of independent political theory that does not rely on theological premises. I am adopting the second, nonreligious, perspective here.8

Before I tackle the questions, I want to clear up one fairly common misperception. When Jerry Falwell criticized Supreme Court nominee Sandra Day O'Connor, Senator Barry Goldwater accused his organization, The Moral Majority, of "undermining the basic American principles of separation of church and state by using the muscle of religion towards political ends," Goldwater said:

I'm frankly sick and tired of the political preachers across the country telling me as a citizen that if I want to be a moral person, I must believe in "A," "B," "C," and "D." Just who do they think they are and from where do they presume to claim the right to dictate their moral beliefs to me? The great decisions of Government cannot be dictated by the concerns of religious factions. . . . We have succeeded for 205 years in keeping the affairs of the state separate from the uncompromising idealism of religious groups, and we mustn't stop now!9

Senator Goldwater's last sentence rings with a version of the American history of religion and politics that we often hear. That version is about as inaccurate as history can be. Churches have been involved in politics throughout this nation's history. It is with this understanding that I approach the six questions.

One, when addressing their own members, should clergy and churches and synagogues limit themselves to general moral ideas or should they draw specific political conclusions? Preaching about morality is undoubtedly appropriate, even if that morality has political implications. Thus, no one could object that ministers stray from their domain if they preach that consenting sexual acts between adult homosexuals are or are not sinful, or that rich people have a duty to aid poor people. Controversy begins when preaching goes beyond morality to cover specific political conclu-

8. I might add that the entire subject of this talk might be approached in either of these two ways, and that I am adopting throughout the standpoint of independent political theory.

sions. There is a difference between telling people that an active homosexual life is sinful and telling them that they should support criminal sanctions for that behavior. Some have suggested that ministers and churches should limit themselves to moral pronouncements. Much rests on just how and when political conclusions are drawn. If a minister offers conclusions as her own working out of relevant moral principles, but does not suggest that all others of good faith must agree with her, she recognizes the freedom of her members and the limits of any special competence she has. The ease of conclusions and their moral importance also matter. Sometimes political conclusions will flow in a straightforward way from moral judgments. For example, if the minister preaches that an active homosexual life is perfectly acceptable to God and not inferior to a heterosexual life, the conclusion that any criminal sanctions should be repealed follows closely. If a political decision has great moral significance, preaching directly about it is especially appropriate. Desegregation and decisions about war or peace have this significance; so does abortion for many on both sides of the issue. No principle of liberal politics precludes clergy drawing out specific policy conclusions in their communications to members.

Two, should the recommendations of clergy and churches to their members extend to supporting or opposing particular parties or candidates? Favoring particular laws and policies is a step beyond advocating moral positions; supporting or opposing candidates and parties is a further involvement in politics. Most Americans probably now feel uncomfortable when religious leaders take this further step; they feel uncomfortable with the suggestion that, overall, one candidate or party is more on God's side than another. These feelings of discomfort are well grounded. But some political issues are of such overriding significance that churches are warranted in opposing candidates who take positions they strongly believe are wrong. Suppose, for example, a white candidate explicitly takes the position that racial segregation should be reinstated. In our present understanding that position seems so blatantly immoral, so contrary to the values of almost all religions, preaching opposition to his election is proper.

Three, should clergy, strongly identified as clergy, run for office? In this country, clergy are not bound to the role of clergy for life. But suppose a minister retains a parish, continues preaching on a regular basis, and runs for important office. When practicing clergy are legislators or high executive officials, the mixing in personnel of politics and religion is too great. People should choose between being fully active ministers and being public officials or political candidates.
Four, should clergy and churches try to reach a larger public by educational efforts, by lobbying, and by participating in direct action such as demonstrations? Many other religious groups now engage in these activities; but over time would it be desirable for these activities to cease or diminish?

We need to narrow this question. Some pieces of legislation directly affect churches or religious practices. As affected institutions, churches should certainly be involved over legislative questions concerning aid to church schools or property tax exemptions for religious property. They should also speak out when matters, such as school prayer, concern religious practices and their appropriate settings.

The harder question concerns broader issues of morals or social justice. Here, the question is whether churches and clergy should move beyond recommendations to members and participate in the political process as one might expect General Motors, or the American Medical Association, to do? There are two powerful arguments for such involvement. One is that churches should not be regarded as different from other non-governmental organizations, and the legislative process is now replete with lobbying by such groups. The other argument is that churches, and larger organizations in which they are dominantly involved, often think seriously about public welfare and conscience; they are a healthy corrective to self-interested pleadings. On the negative side are concerns that religious involvement makes political life harsher and more divisive, and that churches may appear to control the legislative process. The results may include resentment against particular churches or against the arrogance of organized religion.

The worry about "control" is met fairly easily on the national level. There is such diversity of religious views, and such disagreement about political implications, that neither control, nor its appearance, is very likely for most issues. Control may be a pervasive concern within a few states.

The effect of religious involvement in political life is much more complicated. For some issues, like abortion, debate is more strident because religious groups have staked out powerful positions. On many other issues, religious involvement does not have that consequence. Judgments may differ, but mine is that in most cases the ordinary political activities of religious leaders and organizations are an aspect of political good health rather than ill health.

Five, should churches limit themselves to general recommendations or draw highly specific policy conclusions? Effective lobbying usually involves support for or opposition to specific proposals, and may involve
formulating proposals. Just as they may appropriately recommend specific conclusions to members, churches may support those conclusions in a public arena.

I have already suggested that churches should strongly hesitate to endorse particular candidates or parties to their own members. The mixing of religion and government is much worse if this endorsement is made to a general public and the entire citizenry is urged by church leaders to vote for particular parties and candidates. That has happened between some prominent conservative Christian clergy and the Republican Party. There is a disturbing quality when one party or candidate is embraced as being more in tune with the religiously correct view. The special "debt" a candidate or party may have to those who directly helped put them in office and whose support may also be necessary at the next election is also worrisome.

Sixth, if churches and clergy should involve themselves in political issues, should they make specifically religious arguments, or nonreligious arguments, or both? Perhaps religious leaders should try to develop and present reasons that will have force outside their own particular membership; but it seems evident that they need not limit themselves to nonreligious arguments. They have special competence to present a religious understanding, and an aspect of what they present should be understanding should be that understanding.

XII. CONCLUSION

Let me review the major points I have made. There is a deeply serious question what role religious convictions should play in political judgment and discourse. The question is not primarily a legal one, but it is related to the constitutional values of free exercise and nonestablishment. Full free exercise points toward use of religious convictions along with other bases for judgment; full nonestablishment points towards restraint.

When use of religious convictions involves religious imposition, it is not appropriate. Even when no imposition is involved, public officials should be hesitant to rely on their religious convictions. Private individuals should feel much freer to do so. Restraint in discourse should be greater for legislators, and some other officials, than restraint in judgment. Religious organizations properly play an active role in politics and they make relevant religious arguments, but they should rarely endorse candidates and parties.
RELIGION AND PUBLIC REASON: A RESPONSE TO PROFESSOR GREENAWALT

by Professor John T. Valauri

INTRODUCTION

Professor Greenawalt’s Siebenthaler Lecture topic is “Religious Liberty and Democratic Politics.” Why should we be interested in it? It will not be on the bar exam, and we cannot deduct it on our income tax returns. Yes, but it will influence the world we live in and the government we live under for the rest of our lives far more than any “practical” subject could. Today’s philosophical argument is tomorrow’s constitutional doctrine and the next day’s common sense. He has turned our attention from transitory things to some larger, long term issues for liberal democracy, and for this we are in his debt.

There are actually two different, but related, subjects treated in Professor Greenawalt’s lecture. One is the constitutional and jurisprudential question of the proper role of religion in legislation and constitution making. The other is the philosophical question of the nature and role of public reason in a liberal democracy. These two topics have been mainly discussed independently by different groups of scholars. Yet, they are related in that the first question is a specific and practical application of the second, more general, question.

Professor Greenawalt has helped greatly in bringing these two lines of inquiry together, thereby promoting mutual illumination. Drawing upon his expertise in constitutional law, jurisprudence, and political philosophy, he has shown how the two debates parallel each other and how arguments and analogies from one discussion bear upon the other. A consequence of this parallelism is that problems on one level will also manifest themselves on the other level.

Moreover, his treatment of these complex topics, where controversy abounds, is universally hailed as reasonable, lucid, and moderate. I cannot hope to outdo his refined analysis. However, I can try to play, as depicted in Isaiah Berlin’s metaphor, hedgehog to his fox.1 While the fox leaps gracefully from idea to idea, the old hedgehog sticks doggedly to his one basic point. Yet, the hedgehog has his uses, too, especially when

it comes to rooting out basic misconceptions in doctrines. My aim is to say briefly why the well-seeming notion of public reason is, in fact, misguided and counterproductive, and that these problems affect even judicious and tolerant conceptions of the doctrine, like Professor Greenawalt’s. I will also try to indicate how our own constitutional tradition of free expression and free exercise already offers a better, more inclusive, model of public debate.

The two main ways the notion of public reason has sought to justify itself are metaphysically and politically. The metaphysical route is to show that the doctrine is true. My reply to this line is to note some of the inconsistencies and contradictions of the concept. The political route does not aim at justification by demonstration of truth, but rather by trying to show that it is ours, as one of the major premises of our constitutional democracy. My response is simply that it is not. Whether as a legal/constitutional standard or simply as a principle of self-restraint, it is highly counterintuitive in its requirements. The political route attempts to replace some main principles of our way of government.

THE CONTRADICTIONS OF PUBLIC REASON

The aim of the doctrine of public reason is simple and unassailable. The doctrine insures that public debate on political, legal, and constitutional issues in our pluralistic society is fair, open, and reasonable. It seeks to achieve this by filtering out unfair or illiberal grounds for governmental action from that debate. The easiest way to describe its general operation is to note its origins and define some key concepts of the doctrine.

Public reason is the child of the social contract school of thought. Social contract theories derive basic political principles through social choice mechanisms, typically hypothetical social choice mechanisms. This is the case with the notion of public reason, too, which aims at “categorization of certain moral and political arguments based on hypothetically fair conditions.”

There are two dangers with this sort of process, both related to weaknesses in the hypothetical choice method. The first danger is the tendency to reduce the community of choosers to a single person or, in other

3. John Rawls, Justice as Fairness: Political Not Metaphysical, 14 Phil. & Pub. Affairs 223 (1985) (Rawls marked the path change from one sort of justification to the other for himself and modern liberal theory in the title of this article).
words, to a community of clones. The second danger is that the single person the community gets reduced to is the theorist performing the thought experiment. Both dangers manifest themselves in the doctrine of public reason.

The main requirement of public reason is that "people in a liberal democracy should make decisions on bases that are widely shared and accessible to all citizens." This is because the decision procedure that social contract theory employs seems to require that choosers share both premises and modes of reasoning in order to establish principles of justice. In fact, their choices are, by definition, principles of justice. As Greenawalt says, "[T]he choices that artificially conceived persons in the original position would make out of self-interest in constructing social institutions are the choices that are just in liberal democracies."6

This may seem unexceptional so far, but what has been accomplished is positively Orwellian. For, in the name of fairness, diversity, and rationality, the process has promulgated a constitutional orthodoxy without the benefit of actual political choice, and it has disenfranchised all views which do not meet its threshold criteria.

The views excluded here are said to be based on "nonaccessible" grounds which derive from subjective, personal experience. Another related way of describing excluded grounds is as comprehensive perspectives or doctrines. A doctrine is comprehensive "when it includes conceptions of what is of value in human life."7 In this context, religious grounds are often both nonaccessible and comprehensive.

Recent social contract theory, to varying degrees, rejects nonaccessible and comprehensive views as public justifications because they are dogmatic, not democratic. Professor Greenawalt sums this all up, saying, "Views that are narrow and dogmatic, that leave nothing for dialogue with others, do not belong in the politics of a liberal democracy."8 This quotation highlights several central difficulties with the notion of public reason which can be brought out as the answers to basic questions about the concept.

The first difficulty is the question of self-reference. What happens when Greenawalt's assertion is applied to itself? The doctrine of public reason is destructive of political dialogue within society because it auto-

6. GREENAWALT, supra note 4, at 30 (citation omitted).
8. Greenawalt, supra note 5, at 634.
matically excludes different views because of their sources and content. Moreover, it removes from public discussion questions of basic principle.

Second, is public reason itself a nonaccessible ground or comprehensive perspective of political inquiry? Clearly, public reason once was a comprehensive perspective when it presented itself as part of John Rawls' earlier, metaphysical conception of justice. How does a doctrine cease being a comprehensive doctrine? For Rawls' theory of justice, which is here foundational for Greenawalt's account of public reason, it was by substituting the notion of an overlapping consensus for an assertion of metaphysical truth. A metaphysical conception of justice is part of the one purportedly true comprehensive perspective. Still, there may be no one true philosophy; there may be a diversity of reasonable comprehensive doctrines. In fact, liberal pluralism assumes the truth of the preceding statement. There can still be agreement on a political conception of justice if these otherwise different reasonable comprehensive doctrines share the same principles of justice in an overlapping consensus.

The gain that this doctrinal modification provides is the possibility of agreement on principles of justice even in the absence of metaphysical agreement. However, is it clear why we should be any more confident here of political than metaphysical agreement? More important, the unnoticed price paid for a small gain in confidence is major internal consistency. For if foundational diversity can be finessed through the device of overlapping consensus with regard to basic principles of justice, then why can this not also be done in choosing lesser rules in the system?

If this is allowed, then the whole notion of public reason as a filter mechanism on public choice is gone. Citizens/choosers would no longer have to agree on the grounds of political decision because there would be no need for agreement. Moreover, they could no longer be accused of "undermining basic premises of liberal democracy" by their political behavior because there would be no single foundation for those premises.

If the principle of public reason vanished, we would have as our public discourse filter the hornbook constitutional rule that an otherwise constitutional statute will not be invalidated because of an allegedly improper purpose. The attempt to regulate and limit the role of religious and other comprehensive doctrines in politics would fail.

There are related problems with the concept of nonaccessible grounds for political decisions. Greenawalt himself recognizes one difficulty,
saying, "This problem of political philosophy is genuine only if some moral or political judgments do have a more solid or widely comprehensible basis than others." Do they? Nonaccessibility doesn't imply unintelligibility, Greenawalt tells us. However, is not our depth of commitment to basic deeply held beliefs often, if not always, more a function of personal experience and our reaction to it than it is of any rational argument?

To what degree does the personal and subjective source of belief determine the accessibility or objectivity of the belief in any case? I recall once reading that the discoverer of the ring structure of benzene had that notion come to him in a dream when a snake bit its tail. Yet, the presumably subjective and irrational origin of this knowledge hardly renders organic chemistry nonaccessible, no matter how strongly we may have felt in high school.

The benzene ring example suggests a distinction between the context of discovering knowledge and the context of justifying knowledge. As with my hornbook constitutional standard of public reason, the former bears no necessary relation to the latter. Greenawalt hints at this distinction when he says, "Of course, if one has full-dress rational arguments for ethical insight, one need not rely on the experience directly at all (though the experience may have initially led one to the arguments)."

Reasonable though it is, this concession creates more problems than it solves for public reason. First, cannot full-dress rational arguments be given for many religious and other nonaccessible grounds? We have several millennia of argument over the rationality of religion, without a clear resolution one way or the other. Second, and more basically, just what would such an argument for basic principles of justice look like? What would the premises be? At some point, as with H.L.A. Hart's rule of recognition, we would have to accept the premises or face an infinite regress. Third, Greenawalt's rationality seems to exclude informal and non-deductive arguments. If narrative and other rhetorical techniques are reasonable modes of argument elsewhere, why not here?

This insistence on "full-dress rational arguments" is not consistent with the switch from the metaphysical to the political mode of justification. Rawls asserts now that the original position is only a representational
device, not a method of proof for his principles of justice. If that is so, why cannot personal experience, narrative, and other presumably nonaccessible grounds be permissible representational devices in liberal democratic dialogue?

GREENAWALT AND PRINCIPLES OF SELF-RESTRAINT

So far, my critique has been directed mainly at a coercive version of public reason in the form of legal or constitutional limitations on motivation in public decision making. Is that critique substantially different when public reason is presented instead as a principle of self-restraint, as it is in Professor Greenawalt's Siebenthaler Lecture? No, ultimately the contradictions of public reason obtain in both the mandatory version where its rules are enforced by a Supreme Court and the precatory version where they appear as principles of self-restraint. In the former instance, they are unfairly coercive; in the latter, they are improperly deceptive. In both, they act to restrict permissible, constitutional citizen political expression and action.

It is true that the difficulties take different forms in the two versions of public reason. While coercive public reason directly prohibits some political expression and argument, self-restraint has a chilling effect on public discourse. Both are content-based. One is censorship; the other is self-censorship. Self-restraint may obviate coercion. However, where self-restraint does not work, there is the tendency for the ethical goal of self-restraint to become a legal gag rule.

One difference between coercive public reason and self-restraint, as formulated by Professor Greenawalt, is that, while the former is the same for all, the latter varies according to public status. Judges are the most restrained, legislators, executive branch members, and quasi-public citizens somewhat less so, and ordinary citizens are the freest.

This sliding scale of self-restraint does, I think, roughly correspond to popular opinion regarding the discretion appropriate to these offices. Yet, this opinion is not based on public reason principles of self-restraint. Instead, it is based on the degree of personal discretion seen to be appropriate to the office. As law appliers rather than law makers, judges have the least discretion. They are interpreters of the law, not legislators.

The legislative role in less bounded. Obviously, legislators properly

15. See RAWLS, supra note 7, at 24ff.
16. See id. at 231-40.
17. See Greenawalt, supra note 5, at 635.
18. See id. at 637-38.
legislate. What is less clear is, within their representative role, the degree of freedom they appropriately have to follow their personal preferences rather than those of their constituents. Ordinary citizens are neither law appliers nor representatives. They are the freest because they lack the institutional constraints that come with public office.

However intuitively appealing this sliding scale of self-restraint may be, it creates one serious problem not present with the uniformly coercive version of public reason. This is the notion, which arose in the context of race discrimination in *Palmore v. Sidoti*,¹⁹ that government cannot indirectly act upon an impermissible motive upon which it could not act directly. If citizens are less restrained by public reason than are legislators, there must be some situations where it would be permissible for citizens to rely on religious views where it would not be appropriate for legislators to do so.

Could legislators properly act upon the religiously based views of their constituents in these cases? Here, public reason is confronted with a dilemma. If the answer to the question is no, then the legislators are not equally representing their constituents. On the other hand, like Professor Greenawalt, one may say, "[L]egislators may give weight to constituents' views that rest partly on religious bases."²⁰ However, if "may give weight to" occasionally means "may act upon," then the phrase carves out a major exception to the role of public reason, permitting legislators to indirectly act upon views they may not properly advance directly.

I realize that all the foregoing points, even if valid, are unlikely to change any minds. Why? The reason for the foregoing is that most opinions relating to this area are determined by views regarding the underlying, but usually unstated and unargued, question of whether or not a liberal democracy must be secular. Public reason doctrine assumes the necessarily secular nature of democracy, but there is an alternative view.

CONCLUSION: GOD, LIBERTY, AND PUBLIC REASON

In the political, not metaphysical, conception of justice as fairness, the doctrine of public reason is designed to illustrate rather than to prove the basic premises of the liberal democratic system of government. The goal is recognition rather than demonstration. So, why, then, are many of the features of the doctrine of public reason counterintuitive? Perhaps, the features are counterintuitive because, as Justice Douglas once wrote in a

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²⁰. See Greenawalt, *supra* note 5, at 641.
religious education "released time" case, "We are a religious people whose institutions presuppose a Supreme Being." 21

Perhaps, liberty is a more basic principle of our system than equality. To briefly illustrate that assertion, let me offer the model of *Cantwell v. Connecticut* 22 as an alternative to the model of public reason. Recall that in *Cantwell*, a proselytizing Jehovah's Witness unwittingly played an anti-Catholic phonograph record for two Catholics, who took offense to the message. 23

The Supreme Court overturned the Witness's convictions for violation of a solicitation statute and breach of the peace on free exercise grounds, saying, "But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." 24 If this is so, we do not need the filter of public reason because *Cantwell* provides a more intuitive model of the proper limitations on public. 25 It establishes some common sense points. Normally, the use of nonaccessible grounds will not be successful in public debate because they are not publicly shared. However, even error and falsehood, let alone nonaccessible grounds for argument, can contribute to public debate by providing additional perspectives. It is not necessarily most rational to permit the airing of only reasonable views. Moreover, it hardly comports with notions of freedom and autonomy to proclaim constitutional orthodoxy. Is there a danger to unpopular views and speakers? No. All is safe because speaker and hearer retain the protection of their fundamental rights of free expression and free exercise of religion.

Beyond that, there is no need for limitations on public debate. Public reason ought to be inclusive. Additional restrictions on the ability of the majority to enact its will, where no violation of minority rights is involved, deny the freedom, franchise, and political equality of all.

22. 310 U.S. 296 (1940).
23. Id. at 303.
24. Id. at 310.
25. Id.
RELIGIOUS PEOPLE AND PUBLIC LIFE: SOME REFLECTIONS ON GREENAWALT

by Richard B. Saphire

I

In a message to the participants in the recent Congress on Secularism and Religious Freedom marking the thirtieth anniversary of the Second Vatican Council's Declaration on Religious Freedom ("Dignitatis humanae"), Pope John Paul II stated the following:

I am thinking here of the claim that a democratic society should delegate to the realm of private opinion its members' religious beliefs and the moral convictions which derive from faith. At first glance, this appears to be an attitude of necessary impartiality and "neutrality" on the part of society in relation to those of its members who follow different religious traditions or none at all. Indeed, it is widely held that this is the only enlightened approach possible in a modern pluralistic State.

But if citizens are expected to leave aside their religious convictions when they take part in public life, does this not mean that society not only excludes the contribution of religion to its institutional life, but also promotes a culture which redefines man as less than what he is? In particular, there are moral questions at the heart of every great public issue. Should critics whose moral judgments are informed by their religious beliefs be less welcome to express their most deeply held convictions? When that happens, is not democracy itself emptied of real meaning? Should not genuine pluralism imply that firmly held convictions can be expressed in vigorous and respectful dialogue?

1. Professor of Law, University of Dayton. A version of this paper was presented at a colloquium sponsored by the Northern Kentucky Law Review on February 24, 1996. The colloquium focused on Kent Greenawalt's 1996 Harold J. Siebenthaler Lecture, entitled "Religious Liberty and Democratic Politics," published in this issue of the Law Review. Many of my remarks are directed toward an earlier, but substantially similar, version of Professor Greenawalt's paper, entitled Religious Liberty, Non-Establishment, and Political Discourse which was published as an occasional paper in 1994 by the University of Cincinnati Judaic Studies Program. Most of my references to Greenawalt's paper will be to the earlier version. References to the later version will be specifically designated as such. I would like to express my appreciation to Dean David C. Short, Professor John Valauri, and the other organizers of the Siebenthaler Lecture and the subsequent colloquium, and to Kent Greenawalt and Dan Conkle for their comments on my paper.

The Pope apparently was responding to the view that religion and religious convictions are things that are best consigned to private life—that religious beliefs and values are appropriate subjects of discussion and bases for action in one’s place of worship or in one’s home, but not in the public realm.

An observer of the American scene might well get the impression that this view accurately characterizes the role of religion and religious believers in our contemporary culture. Such an impression might be reflected in a recent cartoon by Cheney depicting a man walking on the sidewalk in front of a house; on the lawn is a large sign reading “BEWARE OF DOG”; on the porch sits a dog (with tail wagging) holding high above its head a sign reading “JESUS LOVES YOU.” Or this impression might be suggested by the facts of a recent decision of the United States District Court for the Eastern District of Virginia. In that case, a motorist had applied for a personalized automobile license plate with the letters “GODZGUD.” His application was denied pursuant to a license bureau policy prohibiting the issuance of personalized plates with, among other things, “any reference to drug culture, lewd and obscene words [or] deities, or combinations which might otherwise be considered offensive.” A policy which excluded public references to “deities” immediately after “obscene words” might easily be taken to suggest a moral equivalence between the two, a suggestion which, at least on most accounts, does not speak well of religion. Indeed, such a policy might lend support to those, like United States Supreme Court Justice Antonin Scalia, who lament the possibility that our society may have come to the point of casting “piety in with pornography,” and that our political and constitutional system may have become “more hospitable to private expletives than to private prayers.”

Indeed, no less a figure than Bill Clinton, who made frequent use of religious imagery in his 1992 presidential campaign and who has been

4. Id. at 416.
5. Although the policy in question did permit references to “religion in general” on personalized license plates, the court found that it constituted an impermissible viewpoint regulation of constitutionally protected speech. Id. at 418.
reported to take religion quite personally and quite seriously,\(^8\) has been reported to have expressed concern that the current political and cultural environment is too unfriendly to religion.\(^9\)

Of course, whether, and the extent to which, contemporary American culture is hostile or hospitable to the public expression of religious convictions, and to religious believers who enter the public square due, at least in part, to religious motivations, is itself a subject of controversy.\(^{10}\) But what might be called a resurgence of religious, political activism in recent years, especially (although not exclusively) by the "Christian Right,"\(^{11}\) has created renewed interest in the sort of questions raised in

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9. See, Fred Barnes, *Rev. Bill*, NEW REPUBLIC, Jan. 3, 1994 at 11 (quoting Clinton as saying: "Sometimes I think the environment in which we operate is entirely too secular. The fact that we have freedom of religion doesn't mean we need to try to have freedom from religion. It doesn't mean that those of us who have faith shouldn't frankly admit that we are animated by that faith.").

10. For an extended assessment of the extent to which this attitude is prevalent in the United States, concluding that there is widespread concern about, and disapproval of, religion in public, see Stephen L. Carter, *The Culture of Disbelief* (1993).

Polling data seems consistently to show that Americans are among the most religious, and religiously observant, people in (at least) the Western world. See, e.g., Kenneth L. Woodward, *The Rites of Americans*, NEWSWEEK, Nov. 29, 1993, at 80. This, and the fact that religion has been so much a part of the recent (and not so recent) public landscape, has led some commentators to question whether contemporary attitudes about religion in public are as derisive as people like Professor Carter have suggested. See, e.g., David R. Dow, *On Reading Stephen Carter's THE CULTURE OF DISBELIEF — A Dissenting Opinion*, 11 J.L. AND RELIG. 417, 418 (1994-95)(book review)(arguing that Professor Carter's thesis that religion is not appropriately respected in our culture "seems so untethered from modern American life...that it causes one to wonder how to explain not only the book itself but also its near universal embrace.").

11. The terms "Religious Right" and "Christian Right" are sometimes used to describe religiously (and politically) conservative Christians, including fundamentalists and evangelicals. See, e.g., John B. Judis, *Crosses to Bear*, NEW REPUBLIC, Sept. 12, 1994, at 21; Frank Rich, *The God Patrol*, N.Y. TIMES, July 12, 1995, at A2; Anthony Lewis, * Merchants of Hate*, N.Y. TIMES, July 15, 1994, at A16. The most prominent and important element of this group, with the most general political agenda, is probably the Christian Coalition. Other groups tend to be more focused on particular issues, such as the National Right To Life Committee's principal focus on abortion. See Dallas A. Blanchard, *The Anti-Abortion Movement and the Rise of the Religious Right* (1994). For a reminder that religious groups, even groups composed largely of conservative Christians, are not of one mind concerning public policy questions, see Peter Steinfels, *Evangelical Group Defends Endangered-Species Laws as a Modern Noah's Ark*, N.Y. TIMES, Jan. 31, 1996, at C19. For a debate about whether religious liberals should become more actively engaged in politics, see Bonnie Erbe and Betsy Hart, *Pro/Con: Should Liberals Try to Create a Religious Left?*, DAYTON DAILY NEWS, Mar. 9, 1996, at 15A.

It is important to note that conservative Christians are not the only religious group that maintains an active political posture. See, e.g., Peter Steinfels, *Catholic Bishops Urge Congress*
Pope John Paul II's message. Interest in the area, and concern about the role of religious political activism, has also been heightened by specific and high-profile cases of religiously inspired violence, including the recent conviction of Moslem cleric Sheik Omar Abdel Rahman for conspiring to engage in assassinations and bombings in the United States and Egypt, and the prosecutions of persons accused of violence directed at abortion clinics and those who run them.

How should we think about these questions in the context of the current American political and social condition? Professor Kent Greenawalt, in his 1996 Harold J. Siebenthaler Lecture and, more extensively, in his superbly thoughtful, stimulating, and insightful recent book, *Private Consciences and Public Reasons*, has reminded us that these questions have both legal and (more broadly) political-moral dimensions. From the perspective of law, the questions include whether and how the United States Constitution protects or restrains individual citizens and public officials who would self-consciously bring their religious convictions to bear in their private and public decision-making and behavior. These questions are resolved primarily through the interpretation of the Free Exercise, Free Speech, and Establishment Clauses of the First Amendment. Stated quite generally, the constitutional principles that have evolved provide a fairly extensive, but not unqualified, regime of religious liberty which ensures a broad range of protection for religious believers who wish to participate in the nation's public and political life.

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16. State constitutions also have provisions concerning the appropriate relationship between the state and religion, and the rights of religious believers and religious communities to think and act religiously in public (and private) life. My reference in the text is directed to federal constitutional principles.

17. Although modern religion clause doctrine is notoriously complex — so complex and convoluted that it has been called “next to useless,” see STEVEN SMITH, FOREORDAINED FAILURE: THE QUEST FOR A PRINCIPLE OF RELIGIOUS FREEDOM 3 (1995) — a general, although not exhaustive, statement of the constitutional rights of religious believers might look something...
But constitutional law, and constitutional lawyers and judges, can only provide incomplete answers to the questions under consideration. For while the law may tell us what it is that religious believers may have a right to do when they enter the public realm, it provides few answers to those who are concerned about what they ought to do. For example, not too many years ago, then-New York Governor Mario Cuomo, in a lecture at Notre Dame University entitled “Religious Belief and Public Morality: A Catholic Governor’s Perspective,” addressed the question of the proper relationship between his (Catholic) religious morality and his politics. The problem he was concerned with was whether, by virtue of political-moral principles that might be thought fundamental to our political system, he should refrain from self-consciously relying upon his religious beliefs in deciding how to act — in deciding what positions to take and what policies to support.

It is this domain — the domain of political and moral theory — which is the primary subject of Professor Greenawalt’s recent work. It may be helpful to situate Professor Greenawalt along a continuum of positions that have been staked out in recent academic commentary exploring the appropriate role of religious convictions in public life. At either end of the continuum we can find extreme versions of positions which have been called “exclusivist” and “inclusivist.” According to the (extreme) exclusivist position, it is almost never appropriate for persons to make, like this:

Religious beliefs, and to a more limited extent, religiously motivated conduct are protected by the Free Exercise Clause. Where religious conduct is expressive, it is also protected by the Free Speech Clause. Thus, the government (whether state or federal) cannot prevent religious believers from participating in the nation’s public and political life; it cannot prevent citizens from endorsing, advocating and debating issues of public policy on the basis of their religious convictions; it cannot prevent religious believers from running for or holding public office, nor can it prevent public officials who are religious believers from taking or justifying positions on the basis of their religious values or beliefs.

However, the Establishment Clause does impose some limitations on what public officials can do (officially) while in office. They cannot enact a law where the primary motivation for the law is religious. Since public officials cannot constitutionally defend a law by acknowledging that its primary motivation is religious, the citizens who elect them may indirectly be limited as well: they can argue for laws on religious grounds, but they may not be able to insist that the law be defended in court on such grounds; the law may have to be defended on secular grounds.


19. Professor Perry has argued that the question whether to “rely on a religious belief in making a public political argument” is not a “serious question.” Instead, Perry argues that the “question worth taking seriously” is whether one should make a “political choice” that cannot be defended without relying on (contested) religious beliefs. Michael J. Perry, Religious Morali-
defend, or justify a policy position or official conduct on religious grounds, or at least to do so exclusively on religious grounds.\textsuperscript{20}

At the other end of the continuum lies the inclusivist position. In its strongest form, the inclusivist position holds that it is never inappropriate, as a matter of political morality,\textsuperscript{21} for a religious believer to rely upon her religious convictions in publicly explaining or defending a policy preference. Michael Perry, who has been a prominent proponent of an (extreme) inclusivist position, has put it this way: "there is no good reason to exclude religious beliefs — religious beliefs that, in the view of those who embrace them, support controversial moral beliefs — as a basis for a political choice even when no other basis is available."\textsuperscript{22}
For a number of reasons, both the exclusivist and inclusivist positions have been subject to vigorous criticism. According to some, the exclusivist position fails to respond to important political and moral principles that lie at the foundation of our liberal democratic traditions and commitments. A nonexhaustive list of objections to the exclusivist position includes: (a) it denies religious believers (at least) part of the concern and respect they are due as equal citizens; (b) it values, arbitrarily, non-religious over religious modes of believing and knowing; (c) it deprives members of our political community of valuable information and perspectives they may find useful in ordering their lives and evaluating public policies; and (d) it engenders discontent among many religious believers who are admonished to stifle expression of their true (religious) motivations for political choice and action and it thus threatens to create significant disaffection, alienation, and perhaps even political instability.

The inclusivist position has also been subject to criticisms. Chief among these have been: (a) the concern that (at least some) religious convictions may be “inaccessible” to nonbelievers, thus creating the possibility that people may be subject to (especially, coercive) government policies whose underlying rationale they are unable to understand and/or accept; (b) the concern that religious convictions may be held as “infallible,” so that those who base their public positions on them may be (especially) close-minded and thus unopen to the possibilities of reflection and persuasion that are thought to be central to democratic political dialogue; and, (c) that unconstrained reliance on religious convictions threatens political and social harmony and thus sows the seeds for political divisiveness and instability.

Awareness of these concerns about the extreme exclusive and inclusive positions has led many scholars to search for a middle ground, a position somewhere on the continuum between the two extremes, which can respond adequately to criticisms of the extremes. Kent Greenawalt’s

ed his inclusivist views. See RELIGION IN POLITICS, supra note 21. However, his most recent position seems to represent a qualified form of inclusivism (or, if it makes any difference, a qualified exclusivism). He now believes that, with respect to what he refers to as arguments about “human well-being,” public officials and others should be, at the least, “exceedingly wary” about relying on religious arguments unless they believe that secular arguments independently support their positions. Id. at Chapter 3. For another exposition and defense of a broadly inclusivist position, see David Smolin, Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry, 76 IOWA L. REV. 1067 (1991)(book review).

23. While many scholars have been open to the possibility of a middle ground position, Michael Perry has been especially forceful in rejecting the plausibility of any middle ground. Perry, supra note 19, at 713 (“[w]e Americans should not accept any exclusivist ideal. . .not
work represents an unusually careful, sophisticated and important effort to define and defend such a middle ground position.

II.

Greenawalt's approach goes something like this: Especially where a religiously motivated political position (and the public policy it would call for) would result in (religious) "impositions,"24 and in at least some other circumstances,25 reliance on such a position can come into serious tension with liberal democratic principles. As a general matter, these tensions are more problematic where people rely upon their religious convictions when engaged in public advocacy and justification of their positions26 than when they actually formulate their positions.27 The nature of these tensions, and their seriousness, varies depending upon a number of factors, including the historical and current social and political circumstances of the (democratic) political system in question. They also vary according to the particular role or position occupied by different public persons.

Under the political and social conditions which currently prevail in the United States, Greenawalt believes that the following principles of restraint are appropriate: Legislative officials ought not, as a general mat-

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24. Greenawalt develops the distinction between "imposition reasons" and "nonimposition reasons," and the related distinction between policies which create impositions and those which do not. GREENAWALT, supra note 15, at 57-61. He defines an imposition as "seriously discouraging, or aiming to discourage, the holding of other religious views or the practice of those religions." Id. at 59. He argues that "the basic premises of liberal democracy definitely preclude practices of religious imposition and reliance on" imposition reasons. Id. at 57. See also Greenawalt, Religious Liberty, supra note 14.

25. Professor Greenawalt is especially concerned with religious impositions and imposition reasons. He does acknowledge that reliance on religious grounds which does not amount to religious imposition may also be problematic. GREENAWALT, supra note 15, at 60.

26. Greenawalt argues that restraints upon formulating positions or making judgments are, however, sometimes appropriate, particularly with respect to judicial decisionmaking. He argues that judges should feel free to rely on their religious convictions only in the limited situations where they are free to rely more generally upon personal sources of judgment. Greenawalt, Political Discourse, supra note 14, at 10; Greenawalt, Religious Liberty, supra note 14.

27. The view that the role of religious convictions is more problematic in judgment than discourse, in formulating positions as opposed to publicly advocating or defending positions, is one which is widely shared among academic commentators. Reasons for this distinction include the extreme difficulty at least some people will have in bracketing their religious beliefs from other beliefs they have about important matters; the sense of trauma and alienation that would be entailed by a social convention which required such a separation; and the difficulty of administering or (self) enforcement of such a requirement. See GREENAWALT, supra note 15, at 137-38.
ter, make religious arguments on behalf of policies which they support (and, presumably, against policies which they do not support.) With respect to making judgments, legislators should focus primarily on public reasons (and thus not on religious and other personal convictions), but their reliance on religious convictions is not seriously inappropriate. Executive officials should be restrained, when performing legislative-like functions, in generally the same way as are legislators; given the fact their constituency is likely to be broader and more diverse, however, it may be appropriate for their self-restraint to be greater.28 Judges are the most constrained. According to current practice and tradition, judges are precluded from advancing religious grounds in support of their decisions, and they should only rarely rely upon religious convictions as bases for their decisions.29

Greenawalt’s views on the extent to which citizens should feel restrained from relying upon their religious convictions as a basis for their public positions are particularly nuanced. The degree of restraint varies, depending upon whether one is an ordinary citizen or a “quasi-public” citizen. In making judgments, ordinary citizens “should be encouraged to give a kind of priority to public reasons but should feel free to be influenced by religious grounds.”28 In engaging in public discourse, Greenawalt believes that it would be desirable for ordinary citizens to

28. Greenawalt, Political Discourse, supra note 14, at 12. To the extent that executive officials perform judicial functions, the restraints they should respect are the same as for judges. Id. at 13.

29. It is worth noting that Greenawalt’s principles of restraint do not apply to generalized references to religion or to a deity — what, in an undifferentiated sense, might be referred to as “God-talk.” See S. Carter, supra note 10, at 18-22. He has been careful to note that his concern about the nature of religious discourse is limited “to a fairly narrow use of religiously grounded arguments to sustain [i.e.] legislative judgments,” including “explanations that connect particular religious premises to conclusions of policy.” GREENAWALT, supra note 15, at 158. He is not concerned with “all use of religious imagery or mention of religious tradition,” nor is he concerned with “officials calling on God’s help in deliberations or participating in wider cultural discussions of the significance of religion for human life and moral values.” Id. Thus, a principle of restraint should not apply to the person who wished to purchase the “GODZGUD” license plate, see supra note 3 and accompanying text, nor should it apply to a public official who meets with religious leaders to discuss questions of policy or morality, see Gustav Niebuhr, Clinton Works to Expand Dialogue on Church Issues, N.Y. TIMES, Sept. 13, 1994, at A9 (discussing numerous meetings at the White House between Bill Clinton and various religious leaders). Similarly unproblematic would be a public official who announces a policy position after engaging in “prayerful consideration.” see Alison Mitchell, Clinton Seeks to Loosen Bill to Ban an Abortion Method, N.Y. TIMES, Feb. 28, 1996, at A3 (President Clinton announcing his position on legislation regulating late-term abortions after having “studied and prayed about the issue”), or who concludes a public speech with “God bless America.”

"aim for nonreligious discourse," but that, as a general matter, they should "feel much freer to rely on religious grounds than are public officials." With respect to "quasi-public" citizens, Greenawalt favors greater restraint. He believes that such persons should respect restraints similar to those that should apply to legislators.

As I said earlier, Greenawalt's work and thinking is very careful and nuanced. He has attempted to stake out a moderate position which acknowledges both the importance and value of religion and religious liberty in a democratic society while, at the same time, accounting for, and seeking to minimize, the potential threat that religion (and religious believers) poses to democratic principles. His work has much to offer those who are of (at least) two minds about the relationship of religion to a fair, just, and vibrant political order — those who, on the one hand, see religion as a source of, and force for, good in our national life, but who, on the other hand, believe that religion has its darker side and who wish to limit the (potential) harm that can be done in its name.

While I find Greenawalt's analysis exceptionally illuminating, and while I acknowledge the important influence his work has had on my own thinking about the relevant issues, I find many of his general arguments and proposed principles of restraint quite problematic. In what follows, I set out, in necessarily abbreviated fashion, several concerns I have with Greenawalt's position. Two of these concerns address more specific aspects of his analysis. The third addresses a more general problem I have with any exclusivist position concerning the role of religious convictions in public life — even the moderately exclusivist position Greenawalt proposes.

31. Id. Greenawalt's discussion of ordinary (public) citizens focuses on a limited set of situations in which people participate in public life. He discusses citizens who write letters to members of Congress or to newspapers. Elsewhere, he has discussed the voting behavior of citizens. GREENAWALT, supra note 15, at 159. These represent very limited acts of public participation by ordinary citizens. Whether Greenawalt believes that principles of restraint should apply when citizens become more fully engaged in public life — for example, as lobbyists, active participants in public (including legislative-like) meetings, or as candidates for public office — is not entirely clear. See id. at 13 n.8. For further discussion of this issue, see Greenawalt supra note 14, at 635-41.

32. This is not to say that at least some limits on religious liberty are not compatible, or even required, by democratic principles. For example, few would argue that at least some of the core constitutional limits on religious freedom — say, the prohibition against official coercion of religious beliefs or practices, see, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2226 (1993)("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.) — are not compelled by (our) democratic assumptions. Similarly, few would argue that at least some restraints...
The Problem of Separating Religious and Nonreligious Beliefs.

As indicated earlier, exclusivists argue that reliance on religious convictions in making and publicly explaining or defending one's policy preferences is problematic because, and to the extent that, it threatens the sort of genuinely deliberative and open dialogue contemplated by democratic principles, and because it threatens the conditions necessary to preserve a modicum of social and political harmony and stability. Moreover, exclusivists argue that reliance on religious beliefs as the exclusive basis for public policies can lead to a serious problem of justice. Especially where the policies in question are applied coercively, it is argued that it is (unacceptably) unfair to make impositions upon persons who do not endorse or accept the beliefs in question and who may even be unable to (fully) understand the basis or justification for the beliefs. A principle of restraint asks religious believers to separate the religious grounds for their beliefs from available nonreligious grounds, and to (try to) make and/or defend their policy choices exclusively on the basis of nonreligious grounds, or on the basis of both religious grounds and nonreligious grounds, where the nonreligious grounds are adequate to support the choices in question.

While Greenawalt endorses an exclusivist position with respect to legislators, judges, executive officials and certain "quasi public" citizens, he acknowledges that asking (at least some, and perhaps many) religious believers to separate their religious beliefs from their nonreligious beliefs is to ask a lot. A principle which requires and expects religious believers to bifurcate their religious beliefs from other beliefs which they hold must acknowledge and account for several problems. First, such a princi-
ple must be administrable: it depends upon the proposition that those to whom it applies are capable of (1) accepting as coherent a bifurcation or distinction between religious and nonreligious beliefs; (2) separating the two kinds of beliefs from each other; and (3) "bracketing" their religious beliefs, so that only nonreligious beliefs are used to reach or justify their positions, or so that they can self-consciously restrain themselves from formulating or defending their positions solely on the basis of their religious beliefs. Second, a principle of restraint, which itself is defended, in part, on the grounds of fairness, must itself be fair, and be capable of fair administration. Whether Greenawalt's principle(s) of restraint, or indeed whether any such principle(s), can satisfy these requirements is, it seems to me, open to serious question.

In his recent book, Greenawalt acknowledges, based upon his own experience, that the separation of religious from nonreligious beliefs may be quite hard. As he puts it: "people have a great difficulty trying to face particular political issues free of the push of their religious or other comprehensive views. It requires an exceptional discipline to do so with any success. It is doubtful whether one should recommend to ordinary people a self-restraint that is so hard to perform." The ease or difficulty one will have in accepting and complying with a principle of restraint will, of course, depend upon a number of factors. Among these will be the

35. Greenawalt proposes principles of restraint, not as legal principles subject to imposition by the state, but as political-moral principles capable of being conscientiously applied by people to regulate their own behavior, and in evaluating the propriety of the behavior of others. For further discussion of the proper role of a principle of restraint, see Lawrence B. Solum, Constructing an Ideal of Public Reason, 30 SAN DIEGO L. REV. 729, 733 (1993)(discussing Rawls' principle of public reason).

36. GREENAWALT, supra note 15, at 138. Greenawalt suggests this is true because of the inherent difficulty of separating religious from nonreligious beliefs and because the fairness of asking one to accept such a requirement depends upon whether one can reasonably expect others to reciprocate. Id. at 138-39 ("It is demanding a great deal to ask people strenuously to aim to distance themselves from their comprehensive views when they will inevitably suspect that their political opponents are failing to do so.") See also S. CARTER, supra note 10, at 111 ("For the religiously devout citizen, faith may be so intertwined with personality that it is impossible to tell when one is acting, or not acting, from religious motive . . . .").

37. One would, of course, have to accept a principle of restraint, even if only reluctantly, in order to be expected to comply with such a principle. Whether or not it is reasonable to expect acceptance of such a principle will depend upon a number of considerations. These will include one's conviction that the principle is reasonable or fair in itself, that others can be expected to reciprocate one's compliance, and that, at some basic intellectual or psychological level, compliance is possible. If one were convinced, due to the nature of one's religious consciousness (or the religious consciousness of others to whom the principle is directed), or for other reasons, that good faith compliance were simply not possible, one would presumably be less likely to accept the principle of restraint in question.
nature and extent of one's religious consciousness or awareness and the
strength of one's religious values and beliefs.

A taxonomy of religious believers (and religious belief systems) would
probably have to include at least three types, and the plausibility of any
principle of restraint would vary depending upon which type of religious
person one were to consider. First, there are those persons whose
worldview or value system has (distinctly?) identifiable religious and
nonreligious components. Such persons reasonably might be expected to
comprehend and comply with principles of restraint like those Greenawalt
proposes. A second type of religious believer consists of persons whose
religious value system is (more) unitary or comprehensive. The very
concept of a principle of restraint might well be (or border on the) in-
comprehensible for such persons, and compliance would presumably be
more difficult. After all, if one essentially rejects the notion that truth,
knowledge or meaning has two dimensions, one religious and the other
nonreligious, can one be expected to accept and comply with a principle
that requires one to either discount or subordinate one's religious be-
liefs?

38. By this I mean a religious value system which is "complete" or "total," in the sense
that it leaves no room for beliefs or values which could coherently be understood as "secular."
For example, an Orthodox Jewish Rabbi with whom I have recently discussed these matters has
suggested that, from the perspective of Torah Judaism, "everything in this world has to be
refracted through the eyes of the Torah," and that, from the perspective of Torah thinking, "a
non-Torah opinion is an oxymoron." For him, any dichotomy between the secular and the
religious is, at best, artificial. For an account of "haredi," or "ultra-orthodox" Jews, many of
whose belief systems constitute a seamless web leaving little or no room for the sort of reli-
gious-nonreligious dichotomy of beliefs contemplated by (exclusivist) principles of restraint, see

39. This group of religious believers is especially problematic for a principle of restraint
which requires one not only to be able to articulate a nonreligious basis for one's public posi-
tions, but to offer (or rely upon) a nonreligious basis which one is prepared to regard as
adequate to support one's positions. I am not entirely clear concerning Greenawalt's views on
the extent to which the nonreligious justifications required by his principles of restraint must be
sincere or genuine justifications, ones not merely offered pro forma in compliance with prin-
ciples of restraint, but ones which are believed to support a position independently of applicable
religious justifications. When I prepared the original draft of this paper, I believed that
Greenawalt would insist that a principle of restraint should require more than a bare articu-
lation of a nonreligious reason, since requiring that alone would raise a number of familiar
problems, such as the notion that democratic principles ought to require some degree of sincer-
ity and candor on the part of (especially) public officials. Greenawalt's comments in discussions
of this paper after its initial presentation have caused me to doubt this assumption. This is an
issue to which scholars have given considerable attention. See, e.g., RELIGION IN POLITICS,
supra note 21, at 3-19 (arguing that, where it is applicable, a principle of restraint should
require that political choices be made based upon "at least one persuasive secular argument
(i.e. one secular argument that [the proponents of a position] themselves find persua-
sive) . . . . ").
There is a third type of religious believer for whom principles of restraint are likely to be especially problematic, and it is with this type that I am particularly concerned here. As representative of this type of behavior, I now introduce Olivia. Olivia has a strong personal sense of religious consciousness. She accepts and believes in a religious value system, but has never (fully) developed an explicit or direct connection between her religious values and their foundation in the sources that are normally regarded as authoritative for her religious community or tradition. (Or, if she had at one time been aware of the grounding of her religious values in some authoritative source(s), she no longer is able to identify, or without research, trace, the pedigree for (at least some of) those values.) If Olivia were asked whether she considered herself to be a member of a particular religious group (for example, whether she considered herself Jewish or Christian), she would answer in the affirmative. And if she were asked whether she identified with certain general principles or tenets commonly associated with that group, she would also say that she did (even though she might not be aware of the specific origins or theological basis for them). For example, Olivia believes strongly that each person has an obligation to help others who are less fortunate, that each person has a duty to treat others as she herself would wish to be treated, and that each person has an obligation to work for social justice. She understands and accepts these beliefs as religious in nature; perhaps they are central to her religious tradition and she learned them as a child in religious school.

Unlike those who are associated with the second type of religious persons I discussed above, however, Olivia considers herself to be a "modern" person. Her religious outlook is one which can comprehend and accept the idea that at least some values are important and worthwhile independent of whether they are rooted in a Supreme Being or Force. She accepts the possibility, indeed she may even embrace the notion, that secular society has generated a set of political and moral values that are important and worthwhile in their own right — values which have no necessary connection with any particular religious community or tradition. For example, she finds in our political history and

40. By an "authoritative source," I mean some text, person, or principle that is taken to be the foundation of norms for one's religious community or tradition and that one who identifies with that community or tradition would be prepared to regard as controlling.

41. As is the case with the judge described by Greenawalt, GREENAWALT, supra note 15, at 147, Olivia may believe that at least some of society's political-moral values have been influenced by religious thinking, but she does not take this religious influence as essential to her decision to endorse any of these values.
tradition important evidence of a commitment, or at least an aspiration, to treat every person with respect and as an equal.

In recent periods of deep reflection about the nature and sources of her beliefs, Olivia has encountered what she takes to be a dilemma. In an effort to reconsider and more fully understand the nature of her own religious identity and values, she has struggled to determine with whatever precision and clarity she can muster the reasons why she holds the important beliefs that she has. At some level, a level she regards as basic, she believes that her views on many important social and policy issues are fundamentally religious. She can recall being exposed, probably for the first time, to positions on some of these issues from the perspective of her religious tradition, perhaps in the context of her early (formal and/or informal) religious education. And she can recall how comfortable she was with those perspectives: how persuasive she found them and how enthusiastically they were held and shared by many of those in her religious community (including her parents, close relatives, her minister or rabbi, etc.) whose judgment she respected. At the same time, however, Olivia can associate some of her current beliefs with what she understands to be the commitments and values of the secular culture in which she has grown up and in which she lives. She has concluded that some of these "secular values," including some with which she most closely identifies, are quite close to the religious values about which she feels most deeply. She is also aware that there is substantial disagreement among and between various religions about some of these "secular values," and that in several important instances, the views of religions other than her own are in sharp disagreement concerning some of these values and their implications for public policy.

Let us assume that Olivia has considered carefully the arguments of scholars such as Professor Greenawalt and has accepted the notion that, as a (public or "quasi-public") citizen in our liberal democracy, she is at least sometimes obliged to refrain from relying upon her religious beliefs as a basis for judgment or discourse about certain matters of public significance. She has therefore accepted the idea that she should restrain herself from relying upon her religious beliefs in the way that Greenawalt's principles of restraint would recommend. Let us further assume that she feels quite strongly about some policy question — say, whether and how the current system of welfare or environmental or abortion regulation should be reformed — and she wants to participate in the public debate about the question, and to influence policy in a way which conforms to the views that she holds. Having recently engaged in the process of personal reflection described above, she understands and
accepts that in an important and perhaps even essential way, the views that she holds are grounded in her religious beliefs. Although she also believes that her views have a secular dimension, in the sense that they can also find support in the political morality of contemporary culture, she suspects that the religious dimension of her views strongly predominates over any nonreligious dimension.

As a good liberal democratic citizen, Olivia wishes to comply with Greenawalt's principles of restraint. What do these principles require of her? Were we to assume that Olivia is a "quasi-public" citizen or a legislative official, she would be required to forego making religious arguments in public discussions about political issues. But given the nature of her religious beliefs, she may find it very difficult, and perhaps even impossible, to make the sort of distinction between religious and nonreligious beliefs that Greenawalt's principles of restraint would require. We might characterize her predicament as one in which she is unable to discern where her religious beliefs "end" and her nonreligious beliefs "begin." Or, we might characterize it as based on the possibili-

42. By "suspects," I mean that, to the extent that she is able to separate the religious from the nonreligious basis of her beliefs, Olivia has serious reasons to doubt whether she would hold the views that she does, or hold them as strongly as she does, were it not for their grounding in her religious values. Having undertaken the process of reflection I have attributed to Olivia — or perhaps it is more accurate to say that having begun such a process — it is difficult for me to characterize Olivia's confidence in her position more strongly. Indeed, were Olivia certain of the nature and strength of the religious bases for her convictions, she would be in a better position to decide what she must do to conform with a principle of restraint.

43. Given the scenario I have posited, of course, Olivia cannot say with certainty that she would not hold the views that she does, or that she would hold them less strongly, if she did not hold the relevant religious beliefs.

44. For Greenawalt's definition of a "quasi-public" citizen, see GREENAWALT, supra note 15, at 160. For reasons which I discuss below, I find Greenawalt's definition of a public (or non-private) citizen quite narrow, and his views concerning the restraints that are appropriate for such citizens quite troublesome.

45. Recall that, at least with respect to public discourse, Greenawalt believes that legislators and "quasi-public" citizens should be restrained in the same way.

46. Greenawalt, Political Discourse, supra note 14, at 11. At one point, Greenawalt writes that legislators "should not present as crucial arguments grounds that are applicable only to members of certain religions." Id. He does not clarify what he means by "crucial," although I suspect he means that the argument to be foreclosed must in some sense be essential to one's support for the position in question — i.e. an argument without which the position would not be maintained.

47. Although the type two, devout religious believer described earlier, see text accompanying notes 38-39, supra, also finds it difficult or impossible to distinguish between religious and nonreligious beliefs, his reasons are different from Olivia's. Unlike Olivia, he does not comprehend or accept the distinction and he holds no beliefs he would recognize as nonreligious.

48. This characterization may be somewhat awkward or misleading. As I have described
ty that religious and nonreligious stimuli for (some of her) beliefs coalesced, or reinforced each other in ways which make it very difficult for her to sort them out.

Professor Greenawalt has addressed the possibility that, at least for some people, sorting out the religious and nonreligious dimensions of their beliefs is likely to be difficult. \(^{49}\) For example, in discussing the attitudes of some national political leaders, he acknowledges that "religion undoubtedly influences decisions of officials, even when they do not say so," and that he does "not doubt the truth of this influence." \(^{50}\) Nonetheless, he minimizes the extent to which religion actually determines the public positions of these officials; he believes that "as people become adults, particularly with strong political interests, they may incline toward churches and ideas of religion that fit comfortably with their political views." \(^{51}\) Moreover, he argues that "even assuming religious views influence political judgment to a considerable degree, that does not establish that the legislators themselves see the connections or that they will self-consciously take religion into account." \(^{52}\)

But Greenawalt’s effort to minimize the ways in which religion actually does influence the views of people \(^{53}\) does not easily explain Olivia’s predicament. \(^{54}\) Olivia has never left the religion into which she was born; she has not "inclined" toward a particular religion or set of religious ideas just because they "fit comfortably" with her political views. \(^{55}\) And Olivia does "see the connection" between her religious

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49. This problem has been widely recognized by commentators in this area, and may well be one of the most difficult, if not intractable, problems for exclusivist theories. See, e.g., Perry, supra note 19, at 719 (questioning the possibility of (fully) defending at least some political choices without relying on religious beliefs). For a particularly thoughtful and important discussion of the relationship between religious and general (nonreligious) epistemology, see Larry Alexander, Liberalism, Religion, and the Unity of Epistemology, 30 San Diego L. Rev. 763, 781 n.42 (1993) (noting the difficulty of separating religious and nonreligious views).

50. GREENAWALT, supra note, 15 at 155.
51. Id.
52. Id.
53. Greenawalt addresses public officials, but I can see no reason to confine his analysis to officials.
54. Greenawalt acknowledges that judgments about the actual effect that religious values have on the positions of public officials are difficult to make and that more confident assessments would require fuller information than may be presently available.
55. This is not to deny the possibility — perhaps even the likelihood — of a synergistic
views and the public positions she supports; to the extent that it is possible for her to do so, she has "self-consciously take[n] religion into account."56

Olivia might try to comply with the relevant principle of restraint in two ways. First, she might conclude that none of her beliefs concerning the policy questions she is considering is really religious in the sense that concerns Greenawalt and that she should not feel constrained in taking and defending her positions on those questions in whatever way she believes best explains her positions.57 Second, she might conclude that her views do have the sort of religious character that would make them...
subject to the principle of restraint and she — and here, the problem gets especially dicey — might simply be unable to decide how she could explain or defend her views without breaching the principle of restraint. Indeed, were Olivia especially conscientious, she might decide that the only responsible thing she could do was simply to refrain from offering any explanation or defense of her views for fear of acting illiberally.\textsuperscript{58} 

That compliance with a principle of restraint might require Olivia to do either of these things raises serious problems concerning the integrity or viability of such a principle. If Olivia followed the first course of action, she would be free to say (just about) anything she believed or felt about her public positions even though she concedes — indeed, even though she willingly affirms — that her religious values and beliefs have had, and still have, an important, and perhaps determinative, effect on the reasons she holds those positions. Not only would this seem to conflict with at least some of the reasons that Greenawalt and others believe require a principle of restraint, but it would raise serious questions about the equitable administration of exclusivist principles: on the one hand, Olivia, a self-consciously religious person, can offer reasons for her positions which she believes and understands to be religious; she can do this because of the particular way she defines her religious awareness, and because of the way she holds her religious beliefs. On the other hand, a person who was more “certain” or “confident”\textsuperscript{59} about the identity or origins of his religious beliefs — a person who could sort them out from his other beliefs more easily than can Olivia — would be compelled, if he wished to avoid acting illiberally, to bracket and withhold the religious reasons for his positions.

If, on the other hand, Olivia followed the second course described above, she would be able to say little, and perhaps even nothing, in support of her public positions. She would be deprived of (some or all of) the persuasive force that the reasons she has might add to her views, and of whatever personal gratification she might receive by being able to

\textsuperscript{58} Thus, Olivia might find herself in a position similar to the (more) devout religious believer who does not recognize a distinction between religious and nonreligious beliefs, or who, if able to comprehend the distinction, would claim that all of his beliefs are religious. If such a person felt morally or politically obliged to comply with a principle of restraint, he effectively would be foreclosed from saying anything in support of his public positions.

\textsuperscript{59} I was tempted at first to use the words “less ambivalent” here, but resisted the temptation. For, as I have described Olivia, it is difficult to characterize her position as ambivalent: she does not doubt, nor is she trying to deny or disaffirm, her religious background and beliefs. She has just not been able to get as clear a sense as she would like of the role they actually play in her life.
say what she actually believed about the positions she has. Moreover, were a principle of restraint to operate this way with respect to Olivia, it would also create serious inequities. A religious believer who was able to sort out his religious from his nonreligious beliefs in a (much) more clear and confident way than can Olivia is likely to find himself in a much better position to say more (i.e. clearly nonreligious things) about why he supports the positions that he does than can Olivia. Such a person would be in a preferred position to gain any inherent or instrumental benefits associated with this greater explanatory opportunity.

Even if Olivia's dilemma raises legitimate problems for Greenawalt's principles of restraint, I concede the difficulty in deciding how much

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60. In addition, the broader society (or at least that part of society which constitutes the potential audience for Olivia's views) would be deprived of the potentially valuable information that a fuller exposure to Olivia's thinking would entail. On the extent to which exclusivist principles act to deprive people of potentially useful information, and how this tends to weaken the force of exclusivist positions, see RELIGION IN POLITICS, supra note 21.

61. In conversation with me about Olivia's dilemma, Professor Greenawalt has suggested that, while Olivia may well be hard put to comply easily with his principle of restraint in reaching her positions, she would find it considerably less difficult to comply with the limits his principle imposes on her ability to engage in (public) discourse concerning her positions. (Recall that Greenawalt believes that restraints on judgment are more problematic than restraints on discourse — in part because of the difficulty many religious people are likely to have in separating their religious and nonreligious beliefs). For, to the extent that Olivia is capable of distinguishing the difference between religious and nonreligious beliefs and of acknowledging the existence (for her) of beliefs or values which are not grounded in religion, she might well be capable of complying with a principle which requires only that she be able to articulate a nonreligious basis for her views. Greenawalt does not believe that Olivia must endorse or accept the nonreligious justification that his principle would require her to advance, or that she find this justification independently adequate to support her position.

Greenawalt's point is (for me) a difficult one, and I can now offer only a somewhat tentative and qualified response to it. I have described Olivia's belief system as one which accepts, in principle, the distinction between religious and nonreligious beliefs and values. But while she accepts the fact (or at least the possibility) that (at least) some of her beliefs have a "secular dimension," she also believes that they have a "religious dimension" which she suspects predominates. While she may be able to articulate this complex belief in language which she assumes an exclusivist like Greenawalt would accept as "nonreligious" — i.e., without direct references to religious texts or tenets — it may seem to her, and perhaps to others like her, that her arguments are really religious after all, or only artificially nonreligious.

In part, this raises the issue of whether compliance with principles of restraint will be plagued with problems of incompleteness and insincerity which may tend to undermine or diminish the principles' viability. Greenawalt has argued that reliance on grounds which are admittedly incomplete as explanations for one's views does not itself conflict with liberal principles, GREENAWALT, supra note 15, at 163-64, a position which I find quite problematic, but which I do not wish to take up here. Relatedly, were Olivia to offer a "secular" justification for some position she wished to advocate, and that justification was perceived by her to be somewhat artificial or contrived, that fact might diminish the effect of her arguments on an audience which expected her to neutralize the religious nature or content of her justifications. And an audience which questioned the secular bona fides of Olivia's arguments might be less
weight it should carry in a critique of Greenawalt’s overall theory. Greenawalt acknowledges that principles of restraint must account for the particular circumstances and conditions that characterize and define the society in which they are expected to operate.\textsuperscript{62} Thus, and with particular reference to Olivia’s dilemma, if relatively few people in (our) society were situated in Olivia’s position, and thus few who were confronted with her dilemma, the problems raised by her dilemma for the exclusivist position might well be discounted. I, of course, have no way of knowing precisely (or even approximately) how many Olivias we have among us today. But I can say that Olivia’s position and dilemma very much approximate my own, and, based upon my own experience and conversations, those of many others.\textsuperscript{63} If Olivia’s dilemma is as common as I believe it to be, it ought to be counted as an important reason to be wary of Greenawalt’s brand of exclusivism.

The Problem of Restraints on the Religious Convictions of Public Citizens.

Citizens can participate in public life in many ways. They can attend meetings at which public issues are discussed; they can vote; they can communicate their views on issues that concern them directly to public officials (for example, by telephoning officials, visiting them in their offices or elsewhere, writing letters, and so on), or indirectly (for example, by writing letters to the newspapers or by trying to influence important constituents); they can participate directly in the legislative process (by attending legislative sessions and asking to speak, or by offering testimony at legislative hearings); and, ultimately, they can run for or seek appointment to public office.

Greenawalt discusses how principles of restraint should apply to “ordinary citizens”\textsuperscript{64} who decide to participate in public life. He focuses on


\textsuperscript{63} For the sake of disclosure, I should say that I am Jewish, and that, institutionally at least, I am affiliated with the Reform movement in the American Jewish community. It is my sense that the views I have characterized as belonging to Olivia are shared by many, although by no means all, Reform Jews, as well as by many non-Jews.

\textsuperscript{64} As noted earlier, Greenawalt applies principles of restraint to several types of individuals, including various public officials, the leaders of religious organizations, and “ordinary citizens.”
two basic types of citizens. The first is the citizen engaged in the rather minimal sort of public (political) conduct associated with writing a letter to an elected representative or to a newspaper. He believes that "perhaps [these citizens] should aim for nonreligious discourse" and that "it is desirable for most such letters to be cast in terms of public reasons," but that "this forum is not significant enough to justify a principle of self-restraint that citizens should restrict themselves to public reason."67

The second type of ordinary citizen Greenawalt discusses consists of "quasi-public" citizens. These are people "who play a largely public role but are not in government."68 They include leaders of major corporations, universities, and labor unions, as well as newspaper columnists. Greenawalt believes that these citizens "should be guided by principles similar to those for legislators."69

Below, I indicate reasons why I find problematic Greenawalt's general theory of restraint. But I find his analysis of proper restraints on ordinary citizens of special concern. In part, this is because Greenawalt's description of the nature and level of political involvement of ordinary citizens provides an incomplete, limited, and in some ways distorted, view of reality. This is important because it is not possible to evaluate a principle of restraint or its application to various people unless one has a clear view of the impact of the principle on the lives of those who are to be affected by it.

While it is true that many citizens participate minimally in public life — for example, whose public activity consists only of voting, or writing

65. Greenawalt briefly discusses whether principles of restraint should apply to truly private citizens, understood as people whose discourse takes place mostly in private conversations with family members, friends, co-workers, and the like. He concludes — as has (almost?) everyone else who has discussed this question — that principles of restraint should not apply in this setting. Greenawalt, Political Discourse, supra note 14, at 13; Greenawalt, Religious Liberty, supra note 14. He also discusses the application of principles of restraint to otherwise private persons who lead religious organizations, a subject with which I will not deal in this paper.

66. To say that such participation is minimal is not to belittle it or underestimate its (cumulative) impact on our politics. Indeed, given the apparent apathy that has characterized many recent elections in the United States, the act of letter writing is something to be praised. But compared to other forms of political participation, letter writing (for many) involves a rather limited commitment to political involvement.

67. Greenawalt, Political Discourse, supra note 14, at 14 (footnote omitted).

68. Id.

69. Id. Recall that Greenawalt believes that legislators should not make religious arguments and should try to avoid relying upon them in making judgments. He believes that "major columnists" should have somewhat greater freedom to rely upon religious beliefs when they comment on important public issues.
an occasional letter to their political representatives or to the local newspaper's op-ed page — many, and, from what I can tell from my own participation in (primarily) local political events as well as from news accounts of religious activism around the country, increasing numbers of religious people engage in a much more active level of public political participation.\textsuperscript{70} In fact, the rise of religious (primarily Christian conservative) political activists has generated fairly widespread (and often near-hysterical) concern in some quarters, as suggested by many recent reactions to the so-called "stealth candidate" phenomenon.\textsuperscript{71}

Political activism, of course, is not a cost-free endeavor. Even the rather modest commitment of time and energy necessary to vote and write letters is, for many people, not insignificant. And the more robust forms of political involvement usually entail not only a high degree of motivation, but considerable personal sacrifice as well.\textsuperscript{72} It thus seems fair to assume that (many, if not most of) those people who decide to enter the public square in a significant way on behalf of an issue, a cause, or a candidate take these matters quite seriously. Of course, this is likely to be true whether or not one's motivation for political involvement is religious. But to the extent that reports of a public climate which is highly skeptical of, if not hostile to, religious political activism are true, the costs and the risks associated such activism may be even higher than those which confront activism that is secularly motivated.\textsuperscript{73}

\begin{footnotes}


\item [72] For many people, a decision to become significantly engaged politically involves more than a commitment of time and money. It also involves sacrificing much of the anonymity and privacy associated with the private life, and exposing oneself not only to the "verbal cacophony" that often characterizes public debate, see \textsc{Cohen v. California}, 403 U.S. 15 (1971), but to vitriolic criticism, personal insult, and worse.

\item [73] I recognize that there are limits to this observation. It is quite likely the case that the costs of any form of political activism, including religious activism, will vary depending on the issues and the perspectives that are being advanced. Professor Carter is surely right when he suggests that recent hostility toward public religious activism has varied substantially depending
Comparative judgments here are both speculative and risky. But my own observations have provided me with at least an intuitive sense that many religious activists approach their public involvement with an unusual degree of commitment, passion, and even zeal. And this seems clearly, if not especially, true in the case of the activism of people who are religiously devout. It is no accident that evangelical and fundamentalist Christians have come under the most intense, and often the most critical, scrutiny in the media and elsewhere. It is not the bare fact that these folks have gone political that has stirred so much controversy, nor is it simply the forms of political action in which they have engaged which has invited criticism. After all, the lack of political involvement by most Americans is something that is frequently lamented, and emphasis on the virtue of public participation has been at the heart of whole schools of social thought. Instead, what seems to raise the hackles of many of the critics of religious activism is the nature of the religious beliefs of some activists, and the ways in which those beliefs are held.

An extensive discussion of this issue is beyond the scope of these comments. But were I to undertake such a discussion, I would want to on the issues and the perspectives being advanced. S. Carter, supra note 10, at 48-51, 56-66.

74. Of course, some forms of religiously motivated activism are likely to attract more public attention and alarm than others. One thinks especially of the controversy that has surrounded the activism of at least the "radical" wing of the pro-life movement. See generally Blanchard, supra note 11.

I have heard it suggested that religious political activists should be subject to special scrutiny because they are more likely than their nonreligious counterparts to be deceitful, dishonest, or lack integrity. (This is a view that was widely expressed in some circles when conservative Christians recently attracted the label of "stealth candidates" when they ran for local elections around the country while allegedly concealing their religious identities and agendas. See supra note 71.) I do not think this is true, and I doubt that many readers will either. Indeed, what often motivates religious people to become politically engaged is the sense that too many incumbent politicians are dishonest and lack integrity. In fact, I would venture the opinion that for every Jim and Tammy Bakker in this world, there are probably a dozen more conventional (i.e., nonreligiously motivated) political activists who are either corrupt or corruptible. And to the extent that integrity consists of a willingness to stand up for one's principles, to struggle for one's beliefs in the face of considerable adversity, and to try to affect one's environment in ways which one reasonably believes to be positive and constructive, there is little reason to believe that integrity is a quality as to which religious activists come up short.

75. One thinks here of the rise of civic republicanism in contemporary American political thought, although one might also think beyond it. See generally R. Parker, Here the People Rule (1994)(arguing for a restoration of a Populist orientation in American political discourse).

76. Indeed, it has been suggested that exclusivist principles might well be calibrated to account for the different nature of religious beliefs and the ways in which they are held. Daniel O. Conkle, Different Religions, Different Politics: Evaluating The Role of Competing Religious Traditions in American Politics and Law, 10 J. Law and Religion 1 (1993).
talk about the confidence and the passion with which many (especially, but not exclusively) devout religious believers hold their beliefs. But for present purposes, let me return to an issue I touched on earlier. Recall that in discussing various types of religious believers, I referred to those people for whom religion provides a complete and exhaustive set of standards for living life and evaluating the world. For them, religion provides the lens through which all experience is refracted. I suggested that for these believers, the notion of having to exclude religious values or convictions from what they think or believe (or the way in which they think or believe) about an issue would be (or would border on the) incoherent.

Let me provide an example from my own experience. Not long ago, I attended a public meeting held at a local public school. The meeting was called so that various individuals and groups from the community would have an opportunity to express their views about certain changes that had been proposed for the school’s curriculum. Many of the proponents of these changes were self-described Christians, who believed that some of the materials that were included in the curriculum were morally problematic and unacceptable. During the ensuing discussion and debate, approximately twenty-five people expressed their views from the floor. Several of the most vigorous critics of the existing policies framed their objections exclusively in terms of religious morality. Time and again, they cited scripture for their views, often to the chagrin, and ultimately to the vocal and clearly hostile response, of many in the crowd. The official who was moderating the discussion, and several members of the general audience, repeatedly urged these critics to make their arguments in religiously neutral terms. As I watched this "discussion" unfold, I remember...
being struck by the looks on the faces of some of the religious activists who were the targets of these requests. I remember thinking that their reactions were what one might have expected had they been asked to recast their arguments in ancient Greek, or perhaps even Hebrew. Eventually, one of these activists advised the moderator that he was unable to comply with this request. He made it quite clear that this inability did not represent simply an unwillingness to do something that was within his competence, but with which he disapproved. Instead, he assured the moderator (and the audience, many of whose members were clearly amused by what they were witnessing) that he could not phrase his concerns in religiously neutral language because he did not, indeed could not, think of the matter in religiously neutral terms. Eventually, the religious activists who had participated in this exchange sat down — to the applause of many in the audience — in obvious frustration and, from my perspective, in apparent humiliation.

Although Professor Greenawalt does not address in any depth precisely how his principles of restraint would apply in this situation, he has, in footnote to a recent article that responds to my question about how his principles would apply here, said the following:

These meetings raise a more serious problem than letters to legislators or newspapers. I am presently inclined to the view that even in such situations, citizens should feel free to express what matters most to them, but I do not hold this view with confidence. (That is, I also find appealing the competing view that citizens should be encouraged to present “public reasons” at such public meetings, and that encouragement should be formulated as an expectation of how citizens would best comport themselves. Of course, no such formulation is likely to have much effect on how people who believe they are called upon God to speak in religious terms will express themselves.81)

Greenawalt’s response reflects how difficult these questions are (as well as how careful and balanced his thinking is about them.) Moreover, his response suggests one of the fundamental dilemmas inherent in any exclusivist position concerning the role of religion and religious people in public life. As noted earlier, principles of restraint are frequently justified

81. Greenawalt, Political Discourse, supra note 14 at 19, n.8. Greenawalt includes this response in the text of his 1996 Siebenthaler Lecture. Greenawalt, Religious Liberty, supra note 14. I should note that the question to which Greenawalt was responding was first put to him in the context of a public lecture he gave in November, 1994, at the University of Cincinnati. My recollection is that neither at the lecture itself, nor in a brief and informal discussion with Greenawalt afterward, did I have an opportunity to describe the school board scenario that was the focus of my question as fully as I have described it in this paper.
as necessary to further basic democratic ideals. Among these are the notion that people should be treated with fairness and respect, and that self-government entails a modicum of openness, civility and participatory opportunity as people engage in some sort of meaningful conversation about how they should live their shared life together. Greenawalt acknowledges that any “choice for or against restraint sacrifices something of value.” Indeed. Concepts (and attitudes) of fairness, respect, civility and the like are notoriously elusive and contested. The exclusivist suggests that it is unfair to subject people to policies whose grounds are not intelligible or comprehensible to them, and that it is also unfair to coerce people on the basis of grounds that they cannot reasonably accept. An inclusivist can point to the unfairness of requiring people to bracket their religious beliefs as the price of admission to the public square, an unfairness which is compounded by the possibility that some people — for example, Olivia, or the devoutly religious participants in the school curriculum controversy — may simply be incapable of putting their religious convictions aside (or of leaving them behind.) And where the exclusivist can point to the potential divisiveness of admitting the religious believer as a full and equal participant in our public life, the inclusivist, with equal conviction and substantial plausibility, can point to the divisive and destabilizing potential of a social rule or convention

82. This ideal has been expressed in a number of ways. Among the most resonant is Professor Perry’s notion of an “ecumenical political dialogue.” Love and Power, supra note 22; see also David Tracy, Dialogue With the Other 4 (1990).
83. Greenawalt, supra note 15, at 133.
85. Love and Power, supra note 22 at 105-12.
86. Greenawalt believes that the problem with religious beliefs is not (so much) that they cannot be understood by nonbelievers, but that nonbelievers may be unable to acknowledge their force. Greenawalt, supra note 15, at 145; id. at 72-78; see also Kent Greenawalt, Some Problems With Public Reason in John Rawls’s Political Liberalism, 28 Loy. L.A. L. Rev. 1303, 1304 (1995).
87. While Greenawalt and other exclusivist theorists argue for principles of self-restraint, they also assume that their principles will be regarded as, in some meaningful sense, morally binding by those to whom they are applicable. There would be little (practical?) sense in proposing principles which one reasonably could not expect to be taken seriously.
88. For a discussion of Olivia and her dilemma, see supra notes 40-63 and accompanying text.
89. Greenawalt and other exclusivists apply their principles of restraint to all forms of personal and comprehensive beliefs, not just religious ones, a point which some exclusivists claim satisfies any requirements of liberal neutrality. Greenawalt acknowledges that “[n]o liberal principle of ‘neutrality’ is itself neutral.” Greenawalt, supra note 15, at 102. For a powerful challenge to this claim to neutrality, see Alexander, supra note 49.
which requires people either to forego their claim to full participation in
the public life of their communities or to check their most deep and abid-
ing reasons for participating at the door leading to the public square.

Whether or not the fairness achieved through the application of a
principle of restraint is worth the fairness sacrificed in its application
generally, and to Olivia and the school curriculum activist in particular,
is a subject of legitimate debate. I believe that the equivocation in
Greenawalt’s response to my question suggests his keen awareness and
sensitivity to the complexity and difficulty of determining how that debate
is best resolved. But I cannot erase from my mind the expression on
the face of the religious believer who was asked to purify his thoughts, or
at least his words, of religious content. Nor can I erase the memory of
the price he paid for saying what he thought needed saying in the only
way that he could say it. For a principle of restraint which can inflict
such pain and humiliation to be at all justifiable, its benefits, understood
in terms of furthering liberal democratic ideals or otherwise, must be
clear and significant. Greenawalt has not convinced that such a case has
yet been made.

III

In concluding these reflections on Greenawalt’s work, let me offer
some final comments about the exclusivism/inclusivism debate. It is diffi-
cult not to have some sympathy for the notion that some constraints on
public discourse can have positive social value. In discussions about these
issues with a variety of individuals and groups, I have been struck by the
sometimes dramatically different kinds of responses I have received from
different audiences. Perhaps predictably, conservative, fundamentalist and
devout religious believers have tended to react with considerable alarm at
the notion that part of the price they should pay for being considered
good citizens is to abandon or forego religious thinking or talking when
they enter public life. I have also been struck by the strong exclusivist
impulse I have sensed among audiences consisting of more liberal, pro-
gressive, or modern religious believers. For example, in lectures to Re-
form Jewish audiences — audiences whose members, on other occasions,
have expressed a broadly libertarian conception of expressive freedom —
I have found significant resistance to the notion that, with respect to
religiously motivated political debate and discourse, an open and uncon-

90. Greenawalt’s response to my question is characteristic of the balance and sensitivity he
brings to all of his work.
strained public square best serves the interests of democracy in general, and of Jews in particular.

At one level, this response is certainly understandable. As Sheldon Nahmod has recently noted, throughout history Jews have been perceived and persecuted as "the Religious Other": "After two millennia of experience, [Jews] are unlikely to believe that religious passions will gradually fade and that greater tolerance for the Religious Other will eventually emerge. When religious values are combined with political power, Jews become especially concerned." It would be naive and foolish for Jews and other religious minorities to forget the "dark side" of religious fervor or to discount the harm that has been, and can be, done in religion's name.

But it is far from clear that the exclusivists' response to this realization — to treat the public expression of religious convictions, to a greater or lesser degree, as presumptively hostile to and subversive of democratic values — is likely to be conducive to the regime of mutual (religious) respect and toleration to which exclusivism aspires. Nor is it clear, at least under the conditions of religious pluralism and diversity that characterize the American scene at the close of the Twentieth Century, that, in Sheldon Nahmod's words, "[i]f the public square is pervaded by [religious] views and perspectives. . .religious minorities and non-believers can only be the losers." As Michael Perry and others have noted, many religious views and arguments are fully consistent with, indeed are promotive (and often foundational) of, the idea of the moral equality of all citizens. A public square in which religious believers are cautioned to muzzle or mute their religious voices may well become a less vibrant, interesting, and democratic place.

91. Nahmod, supra note 20, at 866.
92. Id. at 868. For an argument that a regime of maximum expressive freedom is ultimately conducive to the interests of minority groups in general, and Jews in particular, see A. NEIER, DEFENDING MY ENEMY (1979). It is worth noting that neither inclusivism nor exclusivism presupposes any particular position on the extent to which constitutional or other legal rules are appropriate to safeguard a regime characterized by optimal religious freedom (in both the free exercise and anti-establishment senses.) Inclusivism is a theory about the set of attitudes and dispositions one ought to adopt when considering the propriety of one's own, or others', religious participation in public life. Inclusivism need not entail the view that all legal restraints on religious activism are unwarranted.
93. RELIGION IN POLITICS, supra note 21.