

# Political Correctness, the Law, and the Legal Academy

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The spring squall of 1991 about political correctness on campus has passed, leaving behind a muddy residue in the nation's political rhetoric.<sup>1</sup> Although the squall initially may have seemed to develop from a detached interest in campus developments,<sup>2</sup> it rapidly became clear that the campaign against "political correctness" was this year's version of conservative concern about liberalism in the universities.<sup>3</sup> The timely publication of Dinesh D'Souza's *Illiberal Education*, and D'Souza's understandable efforts to promote the book's sales by publishing op-ed articles and appearing on news programs,<sup>4</sup> offered a continuing news-hook for stories about political correctness. Conservatives took up the attack on political correctness, until it worked its way into President Bush's commencement speech at the University of Michigan.<sup>5</sup>

Predictably, the conservative appropriation of the attack on political correctness has obscured more than it has clarified. I intend this essay mostly to lay out precisely what ought to be at issue. Given the conservative domination of the discourse, much of what follows attempts to show how overblown or distorted the conservative characterization of the issue is. I draw upon my experience as an academic in a law school, and therefore focus on some incidents in the literature on political cor-

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1. I asked the Georgetown University Law Library to monitor articles in NEXIS on political correctness from early 1991 to the present. In spring 1991 there were a number of substantial discussions; since then the search picks up an occasional editorial, op-ed piece, or letter (along with speeches by the leadership of the People's Republic of China and their allies).

2. For a relatively early article representative of this approach, see Adler et al, *Taking Offense*, NEWSWEEK, Dec. 24, 1990, at 48.

3. The prior year's version was Allan Bloom's *The Closing of the American Mind*, which, as I argue below, makes what is in many ways precisely the opposite challenge to what it presents as liberal orthodoxy.

4. I want to be clear that, although I disagree with D'Souza, I find nothing objectionable in his efforts at self-promotion. I know that it is difficult to make a living as a writer, and anyone trying to do so is surely entitled to try to maximize sales.

5. William Neikirk, *Bush on Diversity: His Critics Fear a Harder Line on Civil Rights*, CHI. TRIB., May 12, 1991, at 4:1 (discussing President Bush's May 4 speech).

rectness that arose in law schools, although I will also bring in other incidents as appropriate.

The first section of the essay shows how little a casual reader of news accounts would know about what actually has happened. The second argues that the attack on political correctness simply overlooks serious issues of pedagogy when it criticizes challenges to insensitive classroom presentations as "PC" without considering whether the presentations were pedagogically sound. Because the language of academic freedom and free speech has been tossed around in these discussions, the third section tries to slice up the problem to see exactly where serious questions of academic freedom might be raised; I argue that critics of political correctness have actually identified only a handful of such questions.

Despite the fact that the attack on political correctness has been wildly overstated, there may be a problem associated with political correctness, defined as the enforcement, in some sense, of politically-derived standards of scholarship. The final section attempts to identify what that problem is. In brief, I argue that the fundamental problem occurs when academic administrators, lacking a vision of what a university should be, bend to whatever wind happens to be blowing the strongest. Under these circumstances, it seems likely that there has been little change recently in the number of departures from the vision of the university as the locale for disinterested scholarly inquiry, although perhaps there have been more departures leftward than there used to be.<sup>6</sup> If we really want to make universities places where disinterested scholarly inquiry occurs, though, we have to look at administrators, not faculty or students. Ironically, the attack on political correctness may exacerbate the difficulty because academic administrators will treat the conservative challengers of "PC" as just another interest group to be satisfied, another wind to bend to.

### I. QUESTIONS OF EVIDENCE

The ordinary reader of newspapers and popular magazines has received a distorted account of what has been happening on campuses. One distortion, which I mention here only to relegate to footnotes hereafter, is that the rhetoric about political correctness is triggered solely by what are presented as efforts by liberals to "enforce" their views against conservatives. There is, however, a parallel phenomenon of conservative "enforcement" against liberals, feminists, and others. California State University at Long Beach, for example, paid \$110,000 to settle a suit by six former faculty members in the university's Women's Studies program who alleged that "campus administrators joined followers of the conservative activist Phyllis Schlafly in 1982 to 'purge' the program of what

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6. Which is not to say that there have been fewer departures rightward.

its critics saw as 'Marxist and lesbian indoctrination' of students."<sup>7</sup> In the law schools, Richard Abel offers an "incomplete list" of twelve people associated with critical legal studies who "suffered adverse personnel decisions—denials of tenure, contract terminations, and reversals of lateral appointments voted by faculty."<sup>8</sup> A full consideration of the problem of political correctness ought to take these incidents, and other similar ones, into account.

To avoid grievance collecting and a fruitless discussion of comparative victimization, though, I will try to take the challenge to political correctness on its own terms. There is, however, yet another difficulty. Pinning down the evidence of political correctness is extraordinarily difficult. Reporting of incidents is woefully incomplete, at least from the point of view of one familiar with how universities operate. The accounts have gaps that a serious reporter would have tried to fill.

#### A. *Political Correctness as an Urban Legend*

Many of the stories about political correctness resemble what folklorists have called "urban legends." Undoubtedly something happened, but the newspaper reader would be well-advised to be cautious about drawing any conclusions from the news accounts. Drawing upon some additional library research and my knowledge of how universities operate, I will offer alternative accounts of the events, consistent with what has been reported and, in my judgment, more likely to describe what really happened.

Journalism's demands provide one reason for the inadequacy of the reporting. Reporters want a "hot lede," which grabs the reader's attention. But, it is hard to convey nuance and detail in a "hot lede." The simplified version that the reporter presents then becomes the basis for the event's entry into the canon of political correctness stories.<sup>9</sup> Even

7. *Faculty Notes*, CHRONICLE OF HIGHER EDUCATION, June 26, 1991, at A12. The University did not admit wrongdoing, and one might arguably treat the firings as bending to the wind in 1982 and the settlement as bending to the wind, which had shifted direction, in 1991. For another example, see Laura A. Kiernan, *Sturnick: Tough Enough to Weather the Storm*, BOSTON GLOBE, May 26, 1991, New Hampshire Weekly, at 1 (Republican Governor Gregg of New Hampshire and the conservative newspaper demanded firing of state college president who moved religious baccalaureate ceremony off campus.) After Professor Anita Hill testified in hearings on the nomination of Clarence Thomas to the Supreme Court, a state legislator wrote the president of the University of Oklahoma that "this 'Left-Wing Extremist'" should be fired. *Ways & Means*, CHRONICLE OF HIGHER EDUCATION, Oct. 23, 1991, at A23. I do not recall seeing the term "political correctness" being used in connection with that letter.

8. Richard L. Abel, *Evaluating Evaluations: How Should Law Schools Judge Teaching?*, 40 J. LEGAL EDUC. 407, 410 and n.17 (1990). Professor Abel's thesis is that these personnel decisions were based on these people's association with critical legal studies. The last category is particularly important, given my later focus on the case of Ian Macneil, where D'Souza takes political correctness as the reason why Macneil's lateral appointment was not taken up by the Harvard Law School faculty.

9. A very nice, self-conscious example of the use of a "hot lede," precisely to make the point in the text, is Ken Fireman, *'Political Correctness' In Dispute*, NEWSDAY, May 12, 1991, at 34, discussed in more detail below, text accompanying note 35.

more important, virtually everyone who has participated in events reported the next day in the newspapers knows that the stories almost inevitably get some of the more significant details wrong even when they get the basic outlines of the story right. Where, as I argue is the case with political correctness, the more important phenomena are revealed by the details rather than by the broad outlines, newspaper accounts will fall short of what one needs to understand the events.

Finally, most reporting on political correctness has been inadequate even by ordinary journalistic standards. Stories rely on accounts provided by those who believe themselves victimized by political correctness, and rarely acknowledge that these sources have a variety of understandable biases that a reader ought to take into account. When the reports draw on interviews with those on the other side of the controversy, the structure of the presentation—victim's account, taken to be presumptively correct, followed by opponent's account, asserting that the events were more complicated (and thereby not overcoming the presumption)—leaves the victim's account standing.

A good example is an op-ed article published on July 29, 1991, in the *Christian Science Monitor*, a reputable newspaper ordinarily careful about getting facts straight. The article is a skeptical look at the attack on political correctness. To establish that he takes the attack seriously, the author acknowledges that "there have been cases like essayist Edward Hoagland denied tenure at Bennington College because he was supposedly homophobic (which he does not seem to be)."<sup>10</sup> This is a false statement of fact.

On June 15, Hoagland published an op-ed article in the *New York Times*.<sup>11</sup> He reported that the English department at Bennington first voted to renew his contract and then reversed that decision.<sup>12</sup> The first thing to note is that Hoagland describes the department's initial decision as one to "rehire" him. Hoagland, like many writers, appears to have had a renewable non-tenure track contract as something like a writer-in-residence at Bennington,<sup>13</sup> an arrangement that freed him from some of

10. Keith C. Burris, *Conformity's Newest Guise*, CHRISTIAN SCIENCE MONITOR, July 29, 1991, at 18.

11. Edward Hoagland, *Fear and Learning in Vermont*, N.Y. TIMES, June 15, 1991, at A23.

12. Hoagland had published an essay in *Esquire* magazine on "the current literary scene" in which he commented on the AIDS epidemic, saying that:

the disease had spread with faxlike speed 'because of a gale of often icy promiscuity' enjoyed through an orifice animals had all but stopped using sexually when the cloaca was abandoned 70 million to 100 million years ago. As a nature writer, I argued that anal sex is dangerous because it's not provided for physiologically, not because it is morally wrong.

*Id.* In my view, it is not unreasonable to call this "homophobic," although I probably would not. It is, I think, a clearly callous way of making a point, and therefore some evidence of unfitness for a candidate for appointment to a faculty at a college at which some students are homosexual. For a more complete discussion of the pedagogical issues implicit in the preceding statement, see Part II *infra*.

13. The entry for Hoagland in *Who's Who* is consistent with this inference. Its relevant part reads: "Mem. faculty New Sch. for Social Research, N.Y.C., 1963-64, Rutgers (N.J.) U., 1966,

the ordinary obligations of full-faculty status while providing him with some financial security. He describes the nonrenewal as being fired. If Bennington's usual practice has been to rehire people in such positions as many times as they want, that description is accurate. Calling the nonrenewal a tenure denial, however, is not.

The second and more important point is that when Hoagland's article was published, a month before the *Christian Science Monitor* article, Hoagland had in fact been rehired. Hoagland's article ended by noting that he had appealed his case to the college's Personnel Review Committee. According to Bennington's president, "before the article appeared . . . [the committee] concluded that an injustice had been done and recommended that it be remedied." The college, again according to its president, "acted promptly and decisively . . . by deciding to offer him the position for which he had been a candidate."<sup>14</sup>

The *Christian Science Monitor's* off-hand summary of the Hoagland episode is unfortunately typical of the reporting on political correctness. Its most characteristic feature, in fact, is that it relies on no reporting whatsoever. The victim's account of the incident is the only source of evidence. The reports never note that victims have a perfectly understandable desire to present what happened to them in a way that makes them appear best. When the reports are offered by people with a political ax to grind, one can fairly wonder exactly what happened. The proper conclusion, I think, is that accounts offered by politically interested people drawn almost entirely from the victim's side of the story almost certainly overstate the extent to which something called political correctness came into play.

### B. *D'Souza and Macneil as Sources*

I use an incident involving Harvard Law School reported, if that is the word, by Dinesh D'Souza, as the vehicle for a more detailed analysis. D'Souza's political orientation is clear. He began his career in journalism as the editor of the controversial *Dartmouth Review*. According to a profile in the *Washington Post*, there was "an old joke on his name—'Distort D'Newsa.'" <sup>15</sup>

In a favorable review of D'Souza's book, C. Vann Woodward says of D'Souza's "accuracy of reporting" that D'Souza "occasional[ly] stretch[es] evidence and logic to score a point" and provides "fairly

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Sarah Lawrence Coll., Bronxville, N.Y., 1967, 1971, CUNY, 1967, 68, U.Iowa, 1978, 82, Columbia U., 1980, 81; with Bennington Coll. Vt., 1987, 88, 89, Brown U., 1988, U.Calif., Davis, 1990-."

14. Elizabeth Coleman, *Letter to the Editor*, N.Y. TIMES, June 25, 1991, at A24. I must note, of course, that it remains possible that the college knew that Hoagland's article was about to appear and acted as promptly and decisively as it did precisely to allow the president to be able to write such a letter.

15. Charles Trueheart, *Big Man Off Campus*, WASHINGTON POST, April 19, 1991, at B4. I should note that, in the present context, it is not entirely clear whether I ought to quote this "joke."

detailed, if sometimes very selective" documentation.<sup>16</sup> This demonstrates Woodward's generosity of character. In describing the debate at Stanford over revising its "Western culture" requirement, D'Souza states that a "sparsely attended" faculty meeting voted to replace a "'great books' curriculum" with a new program. The former director of the Stanford News Service has written, "Perhaps [D'Souza] confuses Stanford with St. John's College," because there was no previous "great books" curriculum. Further, the director said, the faculty meeting "was filled to overflowing," with 51 of 55 voting representatives attending.<sup>17</sup>

D'Souza devotes a little over two pages to the incident I examine.<sup>18</sup> In 1989 Ian Macneil of the Northwestern University Law School was Robert Braucher Visiting Professor of Law at Harvard. In late March the Harvard Women's Law Association published an "open letter," with copies specifically distributed to "five top administrators, including the dean," criticizing Macneil for "repeated instances of sexism." Macneil responded with his own letter to the Harvard Women's Law Association.

What can a reader of D'Souza and Macneil find out about what happened? Less than one needs to evaluate the incident's implications for political correctness. D'Souza relies on the published letters and, apparently, an interview with Macneil; there is no evidence in his book that he attempted to discuss the incident with representatives of the HWLA or the Law School administration.

I begin at the end of the story. According to D'Souza, Macneil was "bitter" and "chose [ ] not to seek an extention [sic] of his teaching appointment but to move on to Northwestern University School of Law." This sentence ought to set off bells of suspicion to one familiar with elite law school hiring practices. These schools tend to distinguish sharply, and relatively explicitly in their negotiations with visitors, between "look-over" visits, that is, those in contemplation of a permanent position, and other visits, typically to fill temporary curricular needs. D'Souza hints, without ever quite saying, that Macneil did not receive an appointment because of the controversy. Macneil is more cautious, writing that he "very much doubt[s] that Harvard ever intended" to offer him a permanent position, "but if it had, I am quite sure that the

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16. C. Vann Woodward, *Freedom and the Universities*, NEW YORK REVIEW OF BOOKS, July 18, 1991, at 32.

17. Beyers, *Machiavelli Loses Ground at Stanford; Bible Holds Its Own*, CHRONICLE OF HIGHER EDUCATION, June 19, 1991, at B2. For additional challenges to D'Souza's reporting, see Jon Wiener, *What Happened at Harvard*, NATION, Sept. 30, 1991, at 384; Maurice Isserman, *Travels with Dinesh*, TIKKUN, Sept.-Oct. 1991, at 81, 83-84; George M. Fredrickson, *Letter to the Editor*, N.Y. REV. BOOKS, Sept. 26, 1991, at 74; Gene H. Bell-Villada, *Letter to the Editor*, N.Y. REV. BOOKS, Sept. 26, 1991, at 75. In response to the last item, Professor Woodward stated that he "was wrong . . . —another score as well against Mr. D'Souza." C. Vann Woodward, *Reply*, N.Y. REV. BOOKS, Sept. 26, 1991, at 76. At this point, I believe that one would go seriously wrong in relying solely on D'Souza as a source of information about events on which he reports.

18. DINESH D'SOUZA, *ILLIBERAL EDUCATION 197-99* (1991). In my account I also rely on Macneil's detailed *Letter to the Editor*, COMMENTARY, March 1990, at 10, 11.

very making of such charges would have rapidly changed its mind, not out of principle, but out of a desire to avoid controversy." Macneil was, after all, the Braucher *Visiting* Professor, which suggests that he was holding a position designed for one-year appointments. Lateral appointments to the Harvard Law School faculty are relatively unusual,<sup>19</sup> and the word "Visiting" in the title suggests, as Macneil indicates, that Harvard did not intend to consider him for a permanent position.<sup>20</sup>

Suppose, then, that the HWLA letter had no immediate consequences for Macneil's career.<sup>21</sup> What are we to make of the incident? According to D'Souza, it placed Macneil's reputation "on the line," and, "because of the nature of the charges, their gravity, and their essential unanswerability, Macneil . . . felt that 'I could not really clear myself.'"<sup>22</sup> The charges were indeed grave; the HWLA letter said that Macneil expressed sexist attitudes and failed to take women's concerns seriously. The sense in which they are unanswerable, though, is puzzling. Macneil might have defended himself by saying that he did not make the comments; that surely would be an answer. Or he might have defended himself, as he did, by saying that the comments were not really sexist. If persuasive, that too would be an answer. The problem, as I will argue briefly below and more extensively in the next section, is that Macneil's claim that he was not sexist was unpersuasive. It is not so much that the charges were grave and unanswerable as that they were grave and unanswered, even by Macneil.

Macneil suggested that there was another problem with the charges. About two weeks after the HWLA letter was distributed, Macneil replied with his own.<sup>23</sup> Not only were they wrong on the merits, he wrote, but he

had been convicted of an offense without a hearing, indeed without

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19. Working with the 1990-91 AALS Directory of Law Teachers, I conclude that since 1985 Harvard Law School has made three lateral appointments (Mary Ann Glendon in 1986, after a visit in 1974-75, Reinier Kraakman in 1987, after a visit in 1986-87, and William Alford in 1990, after a visit in 1988-89). In my judgment, the two most recent lateral appointments are special cases (because Professor Kraakman was hired from Yale Law School and because Professor Alford specializes in Pacific Rim law).

20. It is hard to avoid some psychological speculation here. Harvard being what it is in the academic hierarchy, I suspect that, despite whatever official signals Macneil got, in his heart of hearts he would have liked to get an offer of a permanent position even if he did not want to stay at Harvard. (Receiving such an offer has obvious psychological attractions, and it could be used in bargaining with one's home institution.) By March, when the incident erupted, I suspect that he would have had to be close to reconciling himself to the fact that he was not going to get such an offer. Attributing that fact to the incident rather than to Harvard's judgment on the merits is obviously psychologically attractive.

21. It might have long-term consequences, if Macneil gets a reputation as a sexist because of the incident. My sense of the legal academic community is that that has not happened yet. It is also my sense, based on the analysis of Macneil's response I provide in Part II, that if he does get that reputation, it will not be because of the HWLA letter but because he is.

22. D'SOUZA, *supra* note 18, at 197, 199.

23. The HWLA letter was dated March 23; Macneil's response was dated April 3. D'SOUZA, *supra* note 18, at 295.

even knowing that I had been charged; . . . the conviction was based on statements of unnamed informers; and . . . punishment had already been administered in the form of libel.<sup>24</sup>

Here too one has to be alert to what is implicit in the incident. First, note the language of criminal charges and convictions, which would seem to be inapposite where, as it seems, no material consequences flowed from the HWLA letter. Macneil said that the letter itself was "intimidating," and he obviously was extremely upset by it. Still, on the face of it the letter simply says that some students disagreed with what Macneil had said in class. Later Macneil said that "teachers and students are entitled to express . . . views [like his] without fear."<sup>25</sup> Why should not students be entitled to express views contrary to his without eliciting such an extreme response as Macneil's?<sup>26</sup>

Second, notice the reference to unnamed informers. We are supposed to think back to the McCarthy era, to which Macneil refers, when people were indeed fired from jobs on the basis of information provided by unnamed informers. But what exactly was involved? The HWLA letter, which was signed by the Association's chair, criticized Macneil's casebook for including probably the most celebrated quotation from Byron's *Don Juan*, referring to Julia, who, "whispering, 'I will ne'er consent,'—consented."<sup>27</sup> The quotation does appear in the book, and, although referring to unnamed informers would seem entirely irrelevant as to this charge, surely the signature of the HWLA's chair is sufficient.

Other charges involved some of Macneil's comments in his contracts class. "Unnamed informers" might be more relevant here, but it is not. First, Macneil never denied making the statements; his defense was that they did not show that he was sexist. Second, at Harvard the contracts course runs for a full year. Consider a woman student who found Macneil's comments objectionable. Surely it would be reasonable for her to believe that disclosing her name to Macneil might place her at risk during the grading process—if only by making it less likely that Macneil would increase her grade because of her class performance after giving her an exam grade through an anonymous process.<sup>28</sup>

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24. Macneil, *supra* note 18, at 10 (summarizing opening of Macneil's letter in response to HWLA letter).

25. *Id.* at 11.

26. For additional discussion, see Part III *infra*.

27. For another appearance in the legal literature, see *Everson v. Bd. of Educ.*, 330 U.S. 1, 19 (1946) (Jackson, J., dissenting). This quotation does not appear in the excerpts of the case in GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK TUSHNET, *CONSTITUTIONAL LAW* 1493 (2d ed. 1991), or WILLIAM B. LOCKHART, YALE KAMISAR, JESSE CHOPER & STEVEN SHIFFIN, *CONSTITUTIONAL LAW* 1093-94 (7th ed. 1991). *But see* GERALD GUNTHER, *CONSTITUTIONAL LAW* 1507 (12th ed. 1991); WILLIAM W. VAN ALSTYNE, *FIRST AMENDMENT* 773 (1991). My hypothesis is that sensitivity to the use of the quotation varies on generational lines.

28. I should note as well that faculty members at Georgetown have been told that some students here simply do not believe that exams are graded anonymously.



Finally, Macneil seems not to have appreciated the significance of the fact that he did not "even know[ ] that he had been charged." Why did the women students choose to express their disagreements through a public letter rather than through a private discussion with Macneil? Macneil says that "HWLA's expressed goal was to prevent Harvard from making me an offer of a permanent appointment."<sup>29</sup> That, however, only shifts the question back one stage. Why did the association want to block a permanent appointment?

My experience suggests that the HWLA's course of action provides evidence of a breakdown in classroom communication that lends support to the charges of sexism. Although I am uncomfortable with using specific personal experiences as the basis for a critical analysis of another teacher's performance,<sup>30</sup> I recently had some that bear on the Macneil episode. In successive years students came to me after the class in which I discussed *Bowers v. Hardwick*.<sup>31</sup> One year a conservative student told me that I characterized Chief Justice Burger's concurring opinion in an unnecessarily harsh way, making it difficult for students who agreed with the result to speak up in class. The following year a gay student told me that I had characterized the claim that homosexuality was an immutable trait in an unnecessarily deprecating way.

What I find significant about these incidents is that the students, believing that I had behaved badly in class, told me so to my face in an informal setting. The fact that the women students in Macneil's class were not comfortable in doing the same with him suggests that, whatever the possibility of an articulate defense against the particular charges, something was going on in Macneil's classroom to which he should have been paying attention but was not.<sup>32</sup>

In short, there is both less and more to the Macneil incident than

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29. Macneil, *supra* note 18, at 10.

30. See Mark Tushnet, *On Being a Bad Law Teacher*, CLS: NEWSLETTER OF THE CONFERENCE ON CRITICAL LEGAL STUDIES 22 (May 1987).

31. 478 U.S. 186 (1986).

32. I acknowledge that the gay student may have approached me as he did because he believed that I was fundamentally on his side, and that the conservative student may have done so because he was just a nice guy. As to the latter, and without reference to the particular student (who I have no reason to believe was involved), I note that about a month later I returned from vacation to find out that some apparently conservative students had distributed an unsigned letter to some members of the faculty criticizing me partly on political grounds. I did not care enough about the incident to investigate, so I do not know precisely what was in the letter or who received it. I gather, however, that it criticized me in part for trying to indoctrinate my students in my left-wing views, for being a bad teacher, and for being on leave a great deal while drawing a large salary. (It struck me that the authors might not have realized that they had written a classic "bad news, good news" letter: "The bad news is that he tries to indoctrinate students; the good news is that he's not very good at it, and he's not around enough to do much of it anyway.") I recount the incident to show only that not all conservative students at Georgetown are nice. Perhaps the anonymity of the letter signals the kind of breakdown in classroom communication I mentioned in connection with Macneil, but, from what I gathered about the letter, it did not have the accusatory tone rooted in specific classroom incidents that the HWLA letter did, which suggests to me that the author(s) were not particularly concerned about what had happened to *them*.

D'Souza and Macneil present. There is less to it because, for all the suggestions about losing a job and McCarthyism, Macneil seems not to have suffered a great deal materially from the incident. There is more to it because, for all the suggestions that the HWLA was inappropriately attempting to advance a particular political agenda, there is reason to believe that the women students were accurately perceiving difficulties in Macneil's pedagogy. On the basis of the published reports, though, a detached observer would find it hard to figure out exactly what had happened.

### C. Conclusion

The political correctness story plainly needs better reporting. And again, when serious reporters actually pursue a story in detail, it can turn out to be rather different from the "urban legend" that the underlying incident generates. Here is an account of an incident at a lecture sponsored by the National Association of Scholars, dealing with the fall of the Berlin Wall.<sup>33</sup> *Newsday* reporters did serious reporting about the incident, relying on interviews and "an audio tape of the first 60 minutes of the talk."<sup>34</sup> A rumor circulated on campus that a member of the Ku Klux Klan was to speak at the meeting. Hispanic and African-American students organized a protest. Outside the lecture hall a faculty member leading the group admonished them "to refrain from disruption." They entered the hall "in an orderly manner." The disruption occurred about 15 minutes into the talk and lasted, according to the tape, for four minutes, after which the lecture concluded "without incident or interruption." The student who disrupted the lecture exchanged obscenities with the lecturer, "tossed a wad of chewing gum" at one of the lecturer's colleagues, and deposited a used Kleenex in the lecturer's coffee cup. The lecturer afterwards said that "more forceful acts seemed possible" and that the situation "felt quite ugly to him." An investigator for the campus police said that "it was just one case of disruption by one individual."<sup>35</sup> Here is how a *Wall Street Journal* editorial, "Return of the Storm Troopers," described the incident:

Two hundred students—some carrying sticks and canes—come roaring into a quiet lecture hall and post themselves menacingly in the aisles and at the exits. The threat of violence is clear and soon fulfilled. The mob disrupts the talk, jeers the speaker. An elderly, distinguished professor in the audience barely escapes a beating at

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33. The National Association of Scholars is a group of professors who organized to offer an alternative to what they perceived as the political correctness movement.

34. That there was a tape of the first 60 minutes already suggests that the talk could not have been too terribly disrupted.

35. Fireman, *supra* note 9, at 34.

the hands of one of the mob.<sup>36</sup>

## II. QUESTIONS OF PEDAGOGY

Two issues routinely get confused in discussions of political correctness: whether someone had a right to say something, and whether he was right to say it. The Macneil incident is typical. Macneil calls his critics “McCarthy-ite” because they objected to his expressing the view, at least for pedagogic purposes, that “the sexual relation was in fact—and properly so—like a commercial exchange.”<sup>37</sup> That, however, was not what they objected to (or at least so it appears from the accounts by D’Souza and Macneil, a qualification I will hereafter omit). They did not object *to his expressing the view*. They objected *to the view*, that is, to the claim that the sexual relation was in fact like a commercial exchange, and, more important, they objected to *the way in which* he expressed the view. My concerns as an educator lie with the latter issue, because it raises important questions about appropriate pedagogy.<sup>38</sup>

### A. *The Politics of Language and Failed Jokes*

Macneil got into trouble, he says, in part because of his efforts at humor. Unfortunately, he plainly does not understand what the problem was. The HWLA letter said that Macneil had made “flippant, disparaging remarks” in

dealing with language that might be considered sexist. Among them: ‘Posner was the grandfather—or should I say grandmother?—of this idea.’ ‘That would be a strawman—or do we use that word anymore?’ ‘Sauce for the goose, sauce for the gander—I don’t know, is that sexist?’<sup>39</sup>

According to D’Souza, Macneil

claimed that ‘the joke is about the difficulties of using the poor old common everyday English language.’ If he were to stop students or himself every time they used a gender-specific phrase, Macneil said, ‘the class would come to a grinding halt.’ Finally Macneil said he believed his humor was in good form and was part of his teaching style.<sup>40</sup>

It seems helpful to examine the examples to see what, pedagogically,

36. *Return of the Storm Troopers*, WALL STREET J., April 10, 1991, at A22.

37. Macneil, *supra* note 18, at 11.

38. A teacher who holds a view that a substantial number of students finds offensive faces the pedagogical problem of finding a way to induce those students to consider that view on its merits. For a brief discussion, see note 32 *supra*. I believe Macneil’s difficulties arose at least in part because he failed to solve that problem.

39. D’SOUZA, *supra* note 18, at 198.

40. *Id.*

might have been going on.<sup>41</sup> No one contends that when one mentions an identified male person, one ought to follow up with a gender-neutral reference.<sup>42</sup> In flagging the reference to Posner, then, Macneil, not his women students, interrupted the class and singled out the issue of gender references as a matter for attention. The other examples are similar in pedagogic effect. As Macneil put it, these were “jokes about the difficulties of using everyday English to do everything everyone wants to do with it” because they “juxtapos[ed]” gender-specific language with “a non-gender idea.”<sup>43</sup> I confess to being puzzled about how ordinary everyday English cannot do the job of identifying the originator of an idea without a gender-specific reference; I think I just did it.<sup>44</sup>

There is a more important issue here. To characterize his comments as “jokes,” even as failed jokes, is to miss the pedagogic point.<sup>45</sup> Once Macneil makes an issue in the classroom about whether he ought to use gender-neutral references, at least some students are going to start paying attention to whether he uses such references or not, rather than to contract law. Those who are interested in promoting gender-neutral references do not advocate “stopping the class” whenever a gender-specific reference is used. They hope that the references will become as natural as gender-specific references used to be. From their point of view, it is probably worse to flag the issue obtrusively than to use male-specific references unobtrusively. By obtrusively interjecting the question of gender

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41. I believe that serious pedagogic issues are raised by an instructor’s decision to refrain from using gender-neutral terms, but Macneil’s actions, which did not involve a considered decision to do so, raise different pedagogic issues, to which I direct my attention.

42. I recall reading an article, David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247 (1990), in which a mad search-and-replace function had substituted “she” and “her” for every “he” and “his,” even when the reference was to identified people like Warren Burger. I understand that the entire issue of the *Law Review* was reprinted with a corrected version of the article.

43. Macneil, *supra* note 18, at 11.

44. Robin West has suggested to me that Macneil’s statements might helpfully be compared to these: “He was a real blackguard—or do we use that word anymore?” or “The natural law idea has a dark side—I don’t know, is that racist?”

45. When Joel Conarroe called it “startling to see Joseph Epstein . . . amusing himself . . . by likening feminists to pit bulls and making little jokes about ‘Dykes on Bikes,’” Joel Conarroe, *How I’m PC*, N.Y. TIMES, July 12, 1991, at A29, Epstein responded by missing the point and, startlingly, criticizing Conarroe for failing “to practice intellectual scrupulosity.” Joseph Epstein, *Letter to the Editor*, N.Y. TIMES, July 30, 1991, at A14. The first reference, Epstein says, was a remark on “the snarly humorlessness of academic feminists, . . . [whose] behavior made understandable the joke about the couple in Manhattan who, to ward off burglary, argued about whether to get a revolver or a pit bull and finally compromised and got a feminist.” The second reference was based on a misquotation Epstein picked up, in which the female president of the Modern Language Association was said to have said that “the attack on the more bizarre aspects of literary studies was . . . nothing more than an attempt ‘to preserve the cultural and political supremacy of white heterosexual males.’” Epstein’s comment was that this was “less appropriate to the president of the MLA than to a member of Dykes on Bikes.” Epstein’s response ended, “under political correctness, one attempts humor at one’s peril.” Not quite. Under any circumstances, offensive comments are rarely funny. And, when one presents offensive comments under the pretense that they are humorous, one is fair game for criticism—for being both offensive and not funny, which is what Conarroe said. To find that Conarroe’s statement lacked “intellectual scrupulosity” is precisely to demonstrate the vice Conarroe identified.

references, Macneil made an issue of something irrelevant to the course he was teaching. And, in flagging the issue by making jokes, Macneil trivialized it.<sup>46</sup>

Macneil was sensitive to the issue when it affected him. He complained that

after receiving the . . . letter I found myself more distracted than ever from what I was trying to teach. There was one case, for instance, involving a male lawyer who had started off representing both parties to a real-estate transaction. Later, in violation of his ethical obligations, the lawyer threatened one of the parties with stringent enforcement of the contract. I referred to him as having switched from being a Big Brother to trying to batter the clients and then caught myself. 'Oh, my God, brother—battered women!' It took five minutes before I really got my mind back to the subject again.<sup>47</sup>

Yet, that is precisely what the HWLA objected to in Macneil's "jokes." As D'Souza puts it, they found his pedagogy "a barrier to learning and therefore a form of discrimination."<sup>48</sup> When Macneil interrupted himself to flag the issue of gender-neutral language, he distracted some of his students from the subject of the course. He may have had a right to do that, but he was not right to do it.

Perhaps, though, the correct response to the HWLA's objection is that students ought not react to that sort of behavior as they do. Here complex pedagogic issues arise. A teacher has to start with students where they are even as he or she attempts to help them move elsewhere. That some students react badly to a teacher's pedagogic style is a fact of life with which the teacher has to deal. Teachers, particularly as they get older and as the generations of students pass before them, sometimes find themselves in a pedagogic environment where enough students hold views that the teacher thinks completely wrong-headed that some pedagogic adjustment is essential. One cannot "get away" with some pedagogic styles any more, even if one believes that those pedagogic styles are more effective than alternatives. At that point the teacher has to do something. Of course he or she can ignore the student reaction, but then he or she can hardly be heard to complain that those students object to the pedagogic style.

Suppose, for example, a teacher believes that her job is to make students uncomfortable with the ideas they have come complacently to accept, and also believes that students have become hypersensitive to dis-

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46. I recall attending a conference at which Michael Perry gave a talk in which he routinely and naturally used female terms to refer to judges. He was followed on the podium by Daniel Oliver, then (I believe) of the Federal Communications Commission, who commented on how barbarous he thought Perry's practice was. Oliver was followed on the podium by Judge Ruth Bader Ginsburg.

47. Macneil, *supra* note 18, at 10.

48. D'SOUZA, *supra* note 18, at 199.

comfort. She will not be effective in her primary task—making students uncomfortable with their complacency about ideas—if she makes them uncomfortable about themselves. Given the students' hypersensitivity, the teacher must somehow insinuate herself into the students' lives, in some sense making them comfortable with being in the classroom as a predicate to making them uncomfortable with their ideas.

I would be a better teacher than I am if I could spell out ways of doing so. I believe that simple self-assurance and confidence in one's own authority—in the sense that one is an authority on the subject of study—can go a long way toward creating a classroom atmosphere in which students can become uncomfortable with their ideas. Unfortunately, few teachers today have the required degree of authority; more often, we pretend that we are authorities in the relevant sense, and then bluster in the classroom for fear of being found out.<sup>49</sup> Alternatively, one might model the engaged scholar for one's students, by visibly wrestling with difficult issues about which one remains uncertain. Again, few teachers today have the requisite uncertainty; most of us, across the political spectrum, are overly confident that we know the right answers.<sup>50</sup> In any event, an "in your face" attitude does not promise much success.

Macneil acknowledged this, but failed to appreciate its implications. His letter to *Commentary* opened,

Socratic teachers demanding attendance, preparation, promptness, and class participation win few popularity contests in American law schools. Especially at Harvard Law School the advocates of such professionalism have largely either long since died, retired, fled, or hunkered down into quiet safety. As a visitor I therefore hardly expected a very warm welcome in my contracts class.<sup>51</sup>

Here Macneil expressly aligns himself with an old-fashioned pedagogy, which is perfectly all right, although the contemptuous tone—albeit adopted after the events—suggests other difficulties Macneil might have anticipated. He might have gone on to consider that a teacher who starts out setting himself against his students is likely to find that some students will magnify other dimensions of his behavior, making, for example, a big issue of his sexism when it might have gone less noticed had they liked

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49. There may be a special difficulty in asserting this sort of authority in teaching law. Simply put, there is rather little for law teachers to be authorities about. In first-year classes, we purport to be teaching people to think like lawyers, which I suppose means that we are trying to instill in them a desire to make extremely precise statements about contested issues of value, and to use a relatively small number of distinctive substantive arguments that characterize common-law reasoning.

50. I recall being told that Malcolm Sharp once came to his first year Contracts class and, visibly distressed, told his students that they had to get in touch with the students who had taken the course the year before to tell them that Sharp had changed his mind about "the cow case," *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887). The story may be apocryphal, or Sharp may have been feigning distress, but as a story it illustrates behavior that one rarely sees today.

51. Macneil, Letter, *supra* note 18, at 10.

him more as a teacher.<sup>52</sup>

Alternatively, the teacher can try to accommodate the difficulty, even while trying to move the students away from their oversensitivity. I can imagine a decent contracts class being taught around the issue of “the difficulties of using everyday English to do everything everyone wants to do with it.” Indeed, I can imagine that issue being the whole point of a contracts course. And I can imagine that it might be appropriate at some point to discuss the question of gender-specific terms used to convey gender-neutral ideas as an illustration of the problem. Finally, I can imagine the point of the lesson being that, at least with some culturally rooted references like “sauce for the goose, sauce for the gander,” the juxtaposition ought to raise no problems. I suspect, however, that only a truly extraordinary teacher could, by making jokes about the question, help students who find gender-specific references interfering with their ability to learn, move to what the teacher thinks is a more appropriate position.<sup>53</sup>

### B. *The Politics of Literary Allusions*

That Macneil believed that he had answered the HWLA’s letter by his analysis of jokes indicates, once again, that there were more problems in his classroom than he was willing to acknowledge. His response to the *Don Juan* quotation, which D’Souza calls “the main charge” against Macneil, provides more evidence of the pedagogic difficulties that his attachment to old-fashioned ways caused in the environment in which he found himself.

What can a teacher accomplish by citing something, like *Don Juan*, outside the range of the subject matter? Macneil explained that the quotation was “a perfect summary” of an issue in contract law, the so-called “Battle of Forms,” which occurs, as D’Souza puts it, “when parties attempt to negotiate contracts on their own terms [and] believe that they are not dealing on the other person’s terms; yet they go ahead with the contract, knowing that both parties’ initial terms cannot have been satisfied.”<sup>54</sup>

For a quotation like this to work pedagogically, students who are somewhat confused by the legal discussion of the Battle of the Forms must be able to draw on their appreciation of the quotation’s more

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52. I also find it hard to avoid the wisdom of the evidentiary rule, “*falsus in uno, falsus in omnibus*” in a variant—“Old-fashioned in one thing (pedagogy), old-fashioned in others (sexism).”

53. Although I agree with the main point of Eugene Genovese’s review of *Illiberal Education*, *The New Republic*, April 15, 1991, at 30, I believe that Genovese underestimates the pedagogic difficulties that would confront a teacher who adopted Genovese’s “First Law of College Teaching,” that an instructor should “seize every opportunity to offend the sensibilities of his students.” *Id.* at 33. A superb teacher could do so from the outset of the class, and a good one probably ought to do so by the end of a semester. Less talented teachers, though, are likely to fail *as teachers* if they follow Genovese’s law these days.

54. D’SOUZA, *supra* note 18, at 198.

homely way of putting the point. They will learn the law, that is, if they think, "What happens in the Battle of the Forms is just like what happens when Julia, whispering I will ne'er consent, consents. Oh, I get it." The HWLA letter said that the quotation "exemplif[ie]d" the attitude that "women mean yes when they say no," thereby promoting a dangerous misperception which has come under fierce attack.'"<sup>55</sup> This makes a substantive point, which bears on the pedagogy of the quotation. The letter implies that, whatever might have been true in the past, for some students today the quotation fails to work pedagogically. For them, the quotation describes a woman being raped, and Macneil's pedagogic point becomes, "The Battle of Forms is just like a rape." I can imagine that that was the point Macneil was trying to get across—it is not inconsistent with his description of the Battle of the Forms, and it may be an accurate way of thinking about the Battle—but, somehow, I doubt it.

Indeed, Macneil seems to have doubted it. For, he told the HWLA, if it gave him "an equally concise, apt and literate quotation which makes this point without sex identification," he "would use it in future revisions of the casebook."<sup>56</sup> Here we can see another, non-pedagogic function of the quotation. Using it demonstrates to students that Macneil is in contact with certain classics of literature. His request to the HWLA suggests that he believes that they ought to be in contact with similar classics. The quotation, that is, simultaneously makes a substantive point and indicates a cultural affiliation which Macneil has and recommends to his readers.

Once again, though, Macneil's traditionalism may get in the way of his pedagogy. It may be merely a regrettable fact of life, but these days a quotation from *Don Juan* is, for many students, roughly like Cervantes's allusions to *Orlando Furioso*. Rather than linking the author backward to Byron and forward to his or her students, it separates the students from the author. And, an author who insists on using such a quotation—and here the substantive point the quotation is intended to make is irrelevant—is deliberately distancing himself or herself from the students. One might adopt the pedagogic strategy of distancing, as a way of demonstrating that one is an authority on the relevant subject to students for whom one is trying to be model. Yet, when the "distancing" occurs in connection with a collateral matter such as general cultural literacy, it seems likely to get in the way of effective pedagogy. It becomes another example of the kind of behavior that may have led the HWLA to act through a public letter rather than a private discussion.

But, Macneil went further. He "asked" the HWLA to provide an alternative quotation. I confess that I find this outrageously insensitive.

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55. Quoted from Macneil, *supra* note 18, at 10.

56. D'SOUZA, *supra* note 18, at 198.



Macneil is a senior professor of law, self-consciously a traditionalist in pedagogy and, as his quotation from Byron indicates, in culture as well. Asking law students to supply *him* with an alternative quotation "equally concise, apt and literate" can only reinforce the sense of powerlessness in the classroom that the students were already expressing.<sup>57</sup> The overall impression left by reading Macneil's response to the HWLA letter, I think, is that he still did not get the point.

### C. Conclusion

A final example of how the political correctness controversy has obscured serious pedagogic issues comes from New York University Law School. As reported by Nat Hentoff, the moot court board at NYU designed a problem in which a father's representative was to argue against awarding a five-year-old child's custody to her mother, who was living in a lesbian relationship with a companion.<sup>58</sup> Some students objected that they were being forced to argue a position that they found morally repugnant, and that the father's position, as they saw it, was "so weak" that they would be "at a disadvantage" in the moot court competition. The moot court board then substituted a problem dealing with homeowner liability for injuries resulting from untrimmed trees, and ultimately allowed students to choose whether they would argue the custody case or the tort case.

Anthony Amsterdam argued that the students who objected to the custody problem were wrong. "How can we ever rid our society of anti-gay biases unless we formulate the strongest arguments we can possibly make against those biases? And how can we do that if we don't also formulate the strongest arguments that could be made to support the biases?" Amsterdam, normally quite attentive to questions of pedagogy, seems to have slipped here. Although Hentoff, and elsewhere in his argument Amsterdam, seem to think that the underlying issue is one of foreclosing "intellectual inquiry," the only real issue is pedagogic. Will requiring law students to present arguments on behalf of a position they find morally repugnant make them better lawyers?

There are many issues to sort out. First, it seems entirely irrelevant that "to rid the society of anti-gay biases," someone will have to be able to rebut the strongest arguments that can be made to support the biases. Not all law students—not even all gay law students—will actively take part in the struggle for gay rights, and it is not clear why future real estate lawyers should be forced to take a position they find morally repugnant simply to exercise their mental muscles.<sup>59</sup>

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57. But, just to help Macneil out, how about: "Ad Reinhardt's paintings or John Cage's music."

58. Nat Hentoff, *Politically Correct at NYU Law*, WASHINGTON POST, Nov. 3, 1990, at A23.

59. I have been struck by the fact that Amsterdam's argument suggests that students who were indifferent to the issues raised by the problem ought to have objected to the custody problem

Second, there is a difference between coming up with arguments in order to rebut them, and being forced to stand up, even in the artificial setting of a moot court competition, and present them. Trial and appellate advocates often say that truly effective lawyers present themselves as if they really believe the positions they are asserting. It seems to me quite problematic, morally, to urge a student to become a good lawyer by appearing to believe a position he or she finds morally repugnant. At the very least, raising the issue, as the objecting students did, ought to provoke serious thinking about the moral dimensions of legal education rather than mindless invocations of academic freedom.

Third, and related, the passage from ordinary citizen to lawyer is morally hazardous, and law schools ought to be sensitive, in their pedagogy, to the shoals on which students might founder.<sup>60</sup> The lawyer's role-differentiated morality, in which a lawyer becomes a hired gun without standing behind the client's position, makes strenuous moral demands on a person trying to be good. At some point, I believe, lawyers have to take on the moral burdens, but a law school attentive to the morally hazardous passage would do well not to thrust those demands on its students too early or abruptly, as the custody problem did.<sup>61</sup>

The problem, then, is not that Macneil and the NYU moot court board were politically incorrect. The problem is that they were pedagogically incorrect.

### III. QUESTIONS OF ACADEMIC FREEDOM

In introducing the issue of the morally hazardous passage into the legal profession, I have opened up a set of issues about academic freedom. I approach these issues by triangulating them. First, I consider the appropriate stance an institution of higher education is permitted to take with respect to the moral formation of its students. For, if a university can take a position about that, many issues that have come up under the heading of political correctness look very different: rather than enforcing an orthodoxy in violation of academic freedom, the universities are performing their permissible role of helping shape the characters of their students.<sup>62</sup> Second, I consider the relation between student exercises of

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because, on Amsterdam's argument, they were being deprived of the opportunity to develop the best arguments in favor of a position they found morally objectionable.

60. A nice recent discussion of the hazards is CHRIS GOODRICH, *ANARCHY AND ELEGANCE* (1990), a journalist's account of the first year at Yale Law School.

61. I simply note the additional hazard posed to young gay and lesbian people, who routinely must confront the conflict between their sexual identities and the society's most frequent communications about what is morally appropriate, by the custody problem. The hazard is probably heightened by the fact that it is a custody problem, and therefore raises issues about the relationship between one's sexual identity and the mechanisms of legacy, which, again, students of law-school age are likely to be quite concerned about.

62. This is one dimension of what has been called "institutional" academic freedom, which sometimes appears to conflict with "individual" academic freedom. For extensive discussions, compare J. Peter Byrne, *Academic Freedom: A "Special Concern" of the First Amendment*, 99 *YALE*

their free expression rights, as in the HWLA's distribution of its letter, and the university's position on academic freedom. These inquiries frame the residual issues of academic freedom more precisely.

*A. Universities, Moral Formation, and Academic Freedom*

The easiest examples of universities properly taking an interest in their students' moral formation are religious institutions with a faith commitment to a particular vision of moral formation. When a Catholic university, for example, issues official statements indicating its disapproval of homosexuality, it is surely acting within its rights (although, again, it may not be acting rightly). Georgetown University engaged in protracted litigation to assert its right to do no more than its faith commitments permitted in its treatment of student gay and lesbian organizations.<sup>63</sup> Notably, when the litigation ended with the applicable human rights ordinance interpreted in a way that the University found acceptable, Congress intervened to tell Georgetown and other religious institutions in the District of Columbia that, if they wanted to, they could ignore the human rights ordinance.<sup>64</sup>

Religious institutions present a particularly strong case for allowing the university to take a position about moral formation, but the case is, I think, only slightly weaker for private universities without distinctive religious commitments.<sup>65</sup> Thus, to use an example that routinely comes up in discussions of political correctness, it hardly seems objectionable for Smith College, a private institution, to give new students a pamphlet alerting them to "lookism," the "construction of a standard for beauty" that may lead people to place value (positive or negative) on what people say simply because of the degree to which they fit the standard of beauty.<sup>66</sup> Or, at least, it could be objectionable only on the merits, for example, on the ground that lookism is not a serious enough problem to alert students about.

That the merits are what conservative critics of political correctness avoid can be seen by noting the controversy over higher education that immediately preceded the political correctness controversy. This controversy over higher education was precipitated by Allan Bloom's *The Clos-*

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L.J. 251 (1989) (leaning toward resolving conflicts in favor of institutional freedom), with David A. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227 (Summer 1990) (leaning the other way).

63. *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1 (D.C.D.C. 1987).

64. P.L. 101-168, § 141 (1989).

65. On the constitutional level, *Oregon Dep't of Human Services v. Smith*, 494 U.S. 872 (1990), seems rather clearly to imply that arguments about religious and non-religious universities are to be analyzed in the same way. For a somewhat more extended discussion, see Tushnet, *Public and Private Schools: Is There a Constitutional Difference*, 1991 U. CHI. LEGAL F. 43.

66. For a citation to the pamphlet, see Lucas, *Free Speech Falls to the Campus Thought Police*, THE INDEPENDENT, June 9, 1991, at 13. For a discussion of the problems created by lookism, see NAOMI WOLF, *THE BEAUTY MYTH* (1991).

ing of the *American Mind*, whose message was precisely that universities were shirking their obligation to assist in the moral formation of their students by accepting the orthodoxy of relativism. It seems particularly confused to criticize universities both for trying to tell their students that some behavior is right and other behavior is wrong (as with lookism, sexism, or racism), and for inculcating relativism, but it has been done.<sup>67</sup>

The only way to make sense of this discourse is to understand that critics of political correctness are trying to disagree with some particular values that the universities are inculcating, without explaining why universities should attempt to inculcate different values. The role that the "lookism" statement plays in discussions of political correctness is, I think, revealing. The rhetorical moves are evident: the writer takes concern about lookism to be almost universally regarded as silly. The implicit message is, "You'd have to be a real fanatic to be concerned about something as frivolous as 'lookism.'"<sup>68</sup> The writer then associates that effort with communications about sexism and racism. Having discredited the concern for lookism, the writer attempts to discredit the latter as well.<sup>69</sup> And, of course, all this occurs without any overt discussion of whether it is a good thing or a bad thing for universities to be concerned about their students' moral formation regarding racism and sexism.

To proceed further, I must expand the examples in two directions. First, suppose the university takes its position, not in a generalized statement, but in a more focused setting. For example, according to *Newsweek*, Mt. Holyoke's president "upbraided" students who "mocked" the college's gay and lesbian student association "by proclaiming 'Heterosexual Awareness Week,'" saying that they "violat[ed] the spirit of 'community.'"<sup>70</sup> To clarify the problem, let me assume that the *only* thing the president did was issue a statement, and that the statement included a forthright declaration that, although the students were within their rights to mock other students, they should not have done so. Second, suppose

67. See, e.g., Novak, *Thought Police*, FORBES MAGAZINE, Oct. 1, 1990, at 212.

68. In light of this assumption, I suppose I should state explicitly that I do not regard the concern as frivolous. For a discussion of discrimination on the basis of appearance, see Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035 (1987). Discrimination on the basis of weight or size, which is certainly related to lookism, is widespread. See, e.g., Note, *The Rehabilitation Act of 1973: Protection for Victims of Weight Discrimination?*, 29 UCLA L. REV. 947 (1982); Paul Steven Miller, *Coming Up Short: Employment Discrimination Against Little People*, 22 HARV. C.R.-C.L. L. REV. 231 (1987). I am reasonably confident that law school faculties discriminate on the basis of appearance in hiring, on the margins (where all decisions are made). And, I find statements like "dumb blonde" on one end, and "So pretty, and so smart too," on the other, quite offensive. Finally, lookism is bound up with, though not identical to (consider the image of the dumb surfer guy), sexism, and I doubt that it is accidental that the statement about lookism was issued by Smith College, a historically female college.

69. I believe that something quite similar is involved in the failed efforts at humor discussed *supra*, text accompanying notes 41-48.

70. See Adler, *Taking Offense*, *supra* note 2, at 48.

that the president's statement is directed not at student behavior but at some comments a professor made in the classroom. Again, assume that the president's statement simply "upbraids" the professor while acknowledging that academic freedom protected his right to make the comments. Does the tighter focus of the college's statement about what it believes its role in students' moral formation to be, in the first example, and the more indirect connection between the professor's comments and student moral formation, in the second, alter the analysis?<sup>71</sup>

Although a university may properly take an interest in student moral formation, the values of academic freedom certainly impose some constraints on what universities ordinarily can do.<sup>72</sup> This essay is not the place to provide a full analysis of the relation between institutional self-definition, which is what the question of moral formation raises, and the academic freedom of students and professors. For present purposes, it seems sufficient to identify two kinds of constraints. The first is that the university ought not pursue its interest in moral formation in ways that violate well-established norms of the academy. An intemperate denunciation of identifiable students, for example, is almost certainly inappropriate, in part because it conflicts with the aim of communicating to other students how they should behave, but in part because it is unprofessional.<sup>73</sup> A strong generalized statement, in contrast, seems consistent both with professional norms and the university's interest, if it chooses to take one, in moral formation.

The second constraint is best described as political.<sup>74</sup> A college may discredit its own efforts at moral formation if those efforts become the focus of political contention on campus or off. From the institution's point of view, prudence dictates some restraint. And, more descriptively, every university president knows that many constituencies are alert to what happens on campus. Actions that alienate some constituencies without generating offsetting support from others will impair the university's ability to continue on the course it has chosen.<sup>75</sup>

The political constraints on moral formation are particularly relevant when we turn from private institutions to public ones. My primary con-

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71. It seems appropriate to note that a strikingly high number of the incidents identified as particularly outrageous by critics of political correctness involve questions of sexuality, either feminism or gay and lesbian rights.

72. Here as elsewhere I use the term "academic freedom" to refer to a set of values bound up with education, not to a constitutional doctrine, because the values are relevant, but the Constitution is not, to the behavior of private institutions.

73. Thus, the *Newsweek* account does not provide sufficient information for one to evaluate the statement "upbraiding" the students. As we have seen, a proper understanding of the issues often involves consideration of details that are omitted from journalistic accounts.

74. For reasons that lie behind Part IV, I have refrained from identifying the professional norms of the academy as a political constraint, though in other settings I would do so.

75. The political correctness controversy itself is part of the political environment. By raising the political heat, conservatives have tried to influence the direction and amount of moral formation that colleges and universities try to accomplish.

cern in this essay lies with the appropriate role of universities in moral formation, but the ability of public institutions to play that role may be constrained by the Constitution. The extent to which the Constitution allows public institutions to shape moral character is, I believe, one of the most difficult issues in constitutional law; the free expression and establishment of religion questions are excruciating. Whatever the ultimate resolution of those questions, though, it seems reasonably clear that a large portion of the answer will rely on ordinary political processes to limit moral formation by public institutions.<sup>76</sup> Within broad limits and in the long run, that is, whatever public institutions decide to do in connection with moral formation is likely to be normatively acceptable, given that they face substantial political constraints. The political setting in which they operate means that universities—both public and private—are likely to locate a relatively stable equilibrium point. Passing events may shift the university away from the equilibrium temporarily, but it is likely to be reestablished relatively quickly.<sup>77</sup>

Universities that have a role in moral formation must accommodate interests in individual freedom, but there is little reason to think that the right accommodation is simple. The best illustration, perhaps, comes from discussions of campus hate-speech regulations.<sup>78</sup> Taking off from outrageous examples of bureaucratic mindlessness in applying such regulations,<sup>79</sup> critics of political correctness treat hate-speech regulations of any sort as clear infringements on individual liberty. Proponents of such regulations, whose arguments the critics essentially ignore,<sup>80</sup> have shown that the question is more complicated.

I only summarize the arguments here, to show how a university's proper concern for student moral formation complicates the analysis further. The core of free speech law has two parts. One involves statutes that attempt to ban speech because the government believes that the speech may cause harms like law-breaking or violence. The other involves regulations of streets and parks, which protestors want to use to get their messages across. In both parts, the Supreme Court has imposed rather substantial limits on what governments can do, because, it

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76. The most acute constitutional analysis remains the relatively early MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983).

77. Of course, because those constraints operate over time, undoubtedly there will be incidents of excessive zeal. For those involved in the disturbing incidents, the costs are high, and university leaders have not always done all they could to minimize those costs and restore the equilibrium more promptly. For a more extended discussion, see Part IV *infra*.

78. The literature is already enormous. For complementary discussions which cite the literature, see Peter Linzer, *White Liberal Looks at Racist Speech*, 65 ST. JOHN'S L. REV. 187 (1991); Grey, *Civil Rights Versus Civil Liberties: The Case of Discriminatory Verbal Harassment*, 8 SOCIAL PHIL. & POL. 81 (1991).

79. For a discussion of the dynamics of regulation, see Part IV *infra*.

80. The most acute criticisms of hate-speech regulations have come from liberals, not the conservatives who talk about political correctness. (I exempt Nat Hentoff from this observation; he is a liberal who has been as mindless about the issue as conservatives have.)

believes, the society as a whole benefits from the wide availability of speech.

The key to understanding free speech law is that the Court understands that its rules do not come for free. When the government cannot ban speech unless it can show that violence is extremely likely to occur, occasionally speech really will cause violence (when the low probability event actually occurs, as it inevitably will). And, if the government must make streets available for demonstrations, commuters will have to put up with some disruption of their ordinary activities. Notice, however, that in these core areas of free speech, the costs of allowing speech are distributed across the whole population. Everyone bears the risk that violence will occur; everyone who uses the streets has to put up with the disruption.

“Hate speech” regulations are different. There, the costs of the regulated speech are concentrated on vulnerable populations. Proponents of hate speech regulations argue that this difference justifies more stringent regulation of hate speech than we ought to allow for other types of political speech. That might be particularly true on campus. The vulnerable populations might be even more vulnerable because of their relative youth. And, although everyone might benefit to some degree by hearing hate speech (a premise of the First Amendment that need not be challenged), the amount of benefit is reduced to the degree that the university believes that such speech is incompatible with the character it is trying to shape in its students—those who utter the speech as well as those who hear it.

None of this is to say that the principle of free speech justifies what universities are said to have done. The only point is that hate speech regulation, in the university setting, is not obviously incompatible with the complex blend of institutional and individual academic freedom that universities must develop.<sup>81</sup>

### *B. Students' Free Expression and Intimidation*

Macneil writes that the HWLA letter was “intimidating” and was intended “entirely to stifle thought and expression it did not like.”<sup>82</sup> In Canada, an instructor reports that he believed he had his “first brush with the thought police” after what he calls a “good humored[]” discussion in his office of a student’s misunderstanding of what he had said in

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81. My own view on these questions draws on a different strand of First Amendment theory, concerned with the capacity of people charged with censorship decisions to make sound judgments. I believe that hate-speech codes are likely to be administered by people quite insensitive to real issues of liberty and discrimination, and therefore think that they are unlikely to be a good thing as actually implemented. (My suspicion of administrators is the primary theme of Part IV *infra*.) For a more optimistic view of the capacity of university administrators, see J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 *GEO. L.J.* 399 (1991).

82. Macneil, *supra* note 18, at 10.

class about the origins of jazz.<sup>83</sup> D'Souza says that his diaries of his travels promoting his books show a "pervasive illiberalism" on campus.<sup>84</sup> As an illustration, he offers an account of a lecture he gave at Tufts University. About 300 hundred students attended. There were "armed policemen" in the auditorium.<sup>85</sup> "Even more unsettling to me," he continues, "two black students, a man and a woman, showed up bound to each other in heavy metal chains. They sat in the front row and proceeded to chain themselves to their seats." D'Souza spoke, he writes, "for the usual 40 minutes." There were no disturbances, but "on four or five occasions, apparently disgruntled by my remarks, the two chained students announced their presence in the audience by loudly rattling their accessories."

There is something quite peculiar here. Macneil calls the students "McCarthy-ites," D'Souza calls them "goons." And what did they do? They published a letter and rattled some chains but did not interrupt a lecture. On the face of it, the students appear to have been exercising their ordinary freedom of expression.<sup>86</sup> Of course they disagreed with what Macneil and D'Souza said, but surely neither intends us to take seriously the claim that people who disagree with them are engaged in intimidation or, to use another phrase in the literature, are storm troopers.

Consider a range of activities Macneil's students might have engaged in. They could have gone to an associate dean to express their discomfort at what Macneil said in class. They could have passed out the letter in the halls outside Macneil's classroom. They could have urged students not to enroll in Macneil's elective courses. Finally, suppose that the students did some or all of this intending to make it less likely that Macneil would receive an offer of a permanent appointment or, if he received an offer, less likely that he would accept it. Would the students have behaved "intolerantly" or otherwise wrongly? If they really did find Macneil's statements offensive, it is hard to see anything wrong in their actions. Students should of course be tolerant of views they disagree with. Toleration, however, does not mean nodding sagely while someone says something offensive, or refraining from saying anything to indicate disagreement with the statement. It may mean that serious and sustained disruption of a speech or lecture should be avoided, so that others can come to appreciate how offensive the speaker is. But, neither Macneil nor D'Souza contends that their lectures were disrupted to that

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83. Lynda Hurst, 'Politically Correct'? *Think Before You Speak*, TORONTO STAR, June 2, 1991, at A1.

84. Dinesh D'Souza, *Cap and Goon*, WASHINGTON POST, April 7, 1991, at D4.

85. *Id.* D'Souza does not indicate what the university's ordinary police practices were.

86. With a modest qualification, dealing with the modest noise and distraction of attention that rattling the chains presumably occasioned. For a brief discussion of this qualification, see text accompanying note 87 *infra*.



degree.<sup>87</sup>

Perhaps toleration means putting up with a lecturer's inanities or offensive statements in the lecture hall, confining the response to hisses and groans, while reserving more sustained criticism for other forums. That, however, is precisely what the HWLA did. And, even here, there might be distinctions to be drawn. Perhaps a tolerant student ought to be particularly sensitive to causing disruption at lectures like D'Souza's, where people attend because they choose to and where, as D'Souza indicates, an opportunity for audience discussion is available immediately after the lecture. But, perhaps the case is different for Macneil's class, which was required rather than elective, and in which, his discussion of his pedagogy suggests, opportunities for disagreement were likely to be rare.<sup>88</sup>

In what sense, then, was the HWLA letter coercive or intimidating? It did not directly obstruct Macneil's ability to get his views, whatever they were, across. Of course it made Macneil feel bad, as his reaction makes abundantly clear. But, after all, Macneil's expression made some of his students feel bad too. I am puzzled why a professor finds it intimidating that some of his students express their disagreement with him by writing a letter explaining what they found offensive in his actions.<sup>89</sup>

D'Souza's account of his Tufts lecture is plainly meant to convey that he ran a real risk of physical violence; at one point he writes that he took "a step backward" when, after his speech, a professor of Afro-American studies said to him, "You want to know why I have my hands in my pockets now? That's because I'm so angry I have to restrain myself." The Canadian professor reports that a colleague told him, "Next time . . . the attack will be more organized." The language of intimidation would be appropriate if there were a real risk of physical violence. No such risk attended Macneil, and the evidence as to D'Souza rather strongly suggests that he has an exaggerated sense of physical risk to his person.

The key, I believe, is D'Souza's statement that the charges against Macneil were unanswerable. But Macneil offered an answer to the charges. I have already argued that, on most of the points, his answer was unpersuasive. To say that the HWLA was intimidating because it

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87. It is not even clear that the incident reported by *Newsday* involved such disruption. See text accompanying notes 33-35 *supra*.

88. In labor law, managers must sometimes provide opportunities for organizers to use their property (roughly, where there are no real alternative means of getting access to workers to convey the organizers' message). There might be an analogy in the university context, particularly in connection with required courses. The labor law requirements, though, are triggered only under quite restrictive circumstances, such as the unavailability of other ways of reaching the target audience, and the analogies to those circumstances are unlikely to exist on campus.

89. On the psychological level, the letter may have been intimidating because it "threatened"—metaphorically to me, but really to Macneil—the degree of control over the classroom that he found essential to his self-image. (A comment by Robin West led me to this formulation, which is not hers.)

made unanswerable charges is, under these circumstances, to say that it is intimidating to disagree with Macneil. If there is any totalitarianism in these events, it is that assertion.

### C. *Official Power and Intimidation*

Critics of political correctness toss about terms like "McCarthy-ite," "storm troopers," and "thought police." As applied to incidents like the HWLA letter or D'Souza's Tufts lecture, those terms seem strikingly inapt. A large part of what made McCarthyism wrong was that behind Senator McCarthy's expressions lay the force of the government—or, more broadly, official power.<sup>90</sup> Most of the remainder of what made McCarthyism wrong was that official power was called down upon people for what they did outside the classroom.<sup>91</sup>

Discussions of political correctness rarely provide examples of incidents in which, at the end of the day, official power was used to enforce political correctness; the Hoagland story that I opened with is typical.<sup>92</sup> At most, the incidents show administrations taking too long to do the right thing. That is an important phenomenon, to which I devote the next section. But, what is then involved is the failure of universities to exercise their power, which raises another set of issues. Thus, I am confined to a hypothetical case, to show once again that what is at issue in the political correctness discussion is much more complicated than most participants are willing to admit.

Stanley Fish of Duke University proposed that university officials refrain from appointing members of the National Association of Scholars to university committees dealing with tenure and promotion. I suspect that Fish was not entirely serious in making this proposal, and to no one's surprise it was rejected. Suppose, however, that the university had agreed with Fish. It would certainly look like an exercise of official power—denial of positions otherwise available to faculty members—in the service of political correctness.

Consider, though, the following scenario. Suppose that literary studies and political science had both been dominated for years by ethical rela-

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90. Similarly as to Storm Troopers, at least after 1933.

91. See ELLEN SCHRECKER, *NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES* (1986); Gerald Frug, *McCarthyism and Critical Legal Studies*, 22 HARV. C.R.-C.L. L. REV. 665 (1987). The rest of what was wrong with McCarthyism is that it was wrong on the merits. Once again, we see how a particular rhetoric is used to avoid discussion of the merits.

92. For another example, see Editorial, *PC at Hampshire College*, WALL ST. J., Jan. 4, 1991, at A6. As usual, the incident is complicated and badly reported. Apparently, a faculty committee had recommended reappointment for two professors whose comments had attracted adverse comments as politically incorrect. The president referred the matter to the college committee on faculty appointments; the editorial suggests that was unusual (although in one case the faculty vote was 20-7, and many institutions do take special care in cases where there are a substantial number of negative votes). The committee recommended against renewal. One professor then appealed to the committee on academic freedom, which found in his favor. When the editorial appeared, the president had referred the matter to "yet another academic body," otherwise undescribed.

tivists who did not believe that there were correct interpretations of texts or events, only constructs observers imposed on them afterwards. Recently, however, serious students of literature have come to believe that texts do indeed have objectively correct readings. That has caused turmoil in the discipline, with charges of bad scholarship and bad faith being flung by the relativists and the objectivists. At one university, after going through many struggles over hiring and promotion decisions, the literature faculty has reached an accommodation between the old-fashioned relativists and the new objectivists. They are concerned, however, that appointments and promotions in their department will be considered by a university-wide committee that has members from the political science department, where the old relativist orthodoxy prevails unchallenged. The literature faculty could, I think, reasonably be concerned that such a committee might not be able to consider fairly their recommendations on appointment and tenure, because the political scientists are likely to think that the objectivist works some literature candidates present are simply outside the bounds of scholarly acceptability. The literature faculty might propose that the university authorities not appoint to the university-wide tenure and promotion committee members of the political science department.

With some modifications, that is Fish's proposal.<sup>93</sup> I am inclined to think that it ought to be rejected because the assumption that people with strongly held views about what counts as serious scholarship cannot fairly assess work by people with different criteria for judging serious scholarship is probably wrong. But, I do not believe that the proposal necessarily rejects fundamental premises of academic freedom. Indeed, it aims to promote academic freedom, and it can be rejected only after fairly considering whether it or the traditional practice is the better way to do so.

#### IV. PROBLEMS OF UNIVERSITY ADMINISTRATION

I have argued that the issues associated with political correctness are far more complicated than most discussions have assumed. I do not mean to suggest that there are no problems whatever. The problem, though, is not that universities are under a reign of terror in which a liberal orthodoxy is imposed on an unwilling faculty and student body. The problem, I believe, is that university administrators really do not have any idea about the educational aims of their university. They see

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93. Given the circumstances under which he made the proposal, and his likely lack of seriousness about it, I take it to be a minor misstep that Fish suggested that *no* members of the National Association of Scholars be appointed to the relevant committee. If, as I suspect, there is a fairly high correlation between membership and belief in objectivism, the misstep is understandable, but properly stated the proposal ought to be that no one who believes in objectivism ought to be appointed.

themselves as politicians and managers who happen to work in an educational institution, but do not see education as something that they are particularly concerned about except when it comes time to make speeches. Lacking a vision for the university, some administrators become bureaucrats mindlessly pursuing specific programs without considering how those programs fit into some overall vision; others become crisis managers, handling specific problems as they arise and losing interest once the political pressure to do something about the problem passes.

#### A. *The "Base Rate" Problem*

This characterization of the problem rests on some inferences about what has been happening on campus, and I doubt that I can make the case fully here. Some of the inferences can be drawn from the political correctness literature, particularly from comments on administrators' ineffective response to incidents of political correctness. There is, however, an important gap in the literature, known to social scientists as the "base rate" problem. We really do not know how many problems arise from liberal political correctness and how many from efforts by conservatives to enforce their orthodoxy, and despite the claims in the newspapers we certainly have no way of determining whether incidents of orthodoxy-enforcement have occurred more frequently recently.

I can draw on my experience in the legal academy for two points about the base rate. First, if the measure of orthodoxy-enforcement is denial of tenure or nonrenewal of appointments, the problem of political correctness pretty clearly arises from the right rather than from the left at many universities.<sup>94</sup>

Second, and more important here, the population of law students today exercised about deviations from liberal orthodoxy is almost certainly no larger than the population exercised by deviations from conservative orthodoxy.<sup>95</sup> Teaching some aspects of constitutional law—notably, affirmative action and abortion—is like walking through a mine field. An instructor who articulates firmly held views on these subjects either way will inevitably offend a substantial segment of the class. Worse, an instructor who tries to suggest that the issues raised by affirmative action or abortion are more complicated than either liberal or conservative orthodoxy will satisfy almost no one. I should stress, though,

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94. See, e.g., Abel, *supra* note 8, which enumerates adverse personnel decisions about people associated with the left. I do not believe that a similarly long list could be compiled of people associated with the right who suffered adverse personnel decisions.

95. Part of the reason for the concern about deviations from conservatism may be peculiar to law schools. Most law students come into law school as naïve positivists, and many end that way. They believe that whatever the courts and legislature articulate as the law must for that reason be correct, and anyone who criticizes the present state of the law must be doing so for merely political reasons. Because the current Supreme Court is conservative, naïve positivism makes students exercised about deviations from conservatism.

that in this form the difficulties present only a pedagogic problem—or opportunity, if one is optimistic. Few instructors are likely to get across the mine field unscathed, though: student visits to the associate dean, letters to the student newspaper, public letters, and the like may well occur. To the extent that these actions make a teacher's life more difficult, as Macneil's account shows they do, they impair the teacher's ability to teach.

Note, however, that the threat to effective pedagogy, at least in constitutional law, comes from both, or all, sides of the political spectrum. That is why, in my view, the real problem cannot be attributed to partisans of particular political viewpoints. It must be found in the ordinary operation of universities as institutions.

### *B. Orthodoxy in Institutional Self-Definition*

The problem must be narrowed even more, for there are situations in which even a secular college or department might properly enforce a certain kind of orthodoxy.<sup>96</sup> Some political science departments, for example, are Straussian. They find it easy to hire someone who can refer in an off-handed footnote to “the less thoughtful egalitarianism and socialism of Eastern academe as expressed in the works of men like Professors Robert Nozick, John Rawls, and Michael Walzer,”<sup>97</sup> a statement that, despite its charming loopiness, would be disqualifying in other departments. An economics department striving to gain a national reputation might notice that there is an open niche in the market for a department that concentrates in blending Austrian and Marxist economics, and might deliberately refuse to hire superbly qualified neo-classicists.

Everyone involved in academic hiring knows that faculties make decisions like these all the time, at least in the sense that these factors influence choice on the margin (which, as I noted earlier, is where all choice occurs). No decent theory of academic freedom could condemn such decisions, even though in an important sense people are denied jobs on political or ideological grounds.<sup>98</sup> Judith Jarvis Thomson has argued

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96. I put aside the special questions raised by church-related institutions that impose a religious orthodoxy, which may also be political in some of its dimensions, on students and faculty. For a slightly out-of-focus discussion, see Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities*, 53 *LAW & CONTEMP. PROBS.* 303 (Summer 1990). The discussion is out-of-focus because it is structured as a criticism of the position taken by the American Association of University Professors, that institutions which restrict academic freedom in certain ways ought not be entitled to claim that they are real colleges. To which the proper response ought to be, So what? McConnell does explain, however, the values served by allowing religious institutions to impose orthodoxy on students and faculty, which is different from explaining why such institutions ought to be called colleges and universities.

97. Broyles, *Partisans of Federalism*, in *E PLURIBUS UNUM: CONSTITUTIONAL PRINCIPLES AND THE INSTITUTIONS OF GOVERNMENT* 261 n.29 (Sarah B. Thurow ed., 1988).

98. I distinguish the two, although in many cases there is such a high correlation between ideology and politics—there are, I think, almost no Straussians located on the traditional left-wing (although some Straussians define others, who are insufficiently conservative, as left-wing)—that

that the theory of academic freedom should permit these decisions when they result from good faith consideration of professionally relevant factors, such as institutional need and mission.<sup>99</sup> The difficulty, of course, is that all parts of the political spectrum sometimes try to enforce their views without the requisite good faith.

Once we see that the problem is bad faith, though, its contours shift. For, though it is easy to see how small groups or departments might act in bad faith, it is harder to understand how it comes about that the college or university as a whole stands back and lets that bad faith action take effect. To do so, we have to consider how universities operate.

### C. *Administrators as Bureaucrats and Crisis Managers*

Macneil found the "administration and faculty response" to his situation "of particular interest." Faculty colleagues "made private supportive comments." An administrator "offered administration 'help' several times—surely in an effort to smooth the waters rather than to face the issues." The administration, that is, did not affirmatively do anything wrong. In Macneil's view, what was wrong was that the administration did not do anything to "recognize[ ] publicly the dangers to academic freedom of the politicized classroom that the Women's Law Association seeks to impose on faculty and students alike."<sup>100</sup>

The theme of administrative inaction in the face of threats to academic freedom is pervasive. An example from the other side of the political spectrum is instructive. Professor Sally Sedgwick of the Dartmouth philosophy department was the object of a scurrilous campaign against her by the *Dartmouth Review*. The *Review* mobilized supporters outside the college to place pressure on Sedgwick and the college, erroneously reporting that she had accused a member of the *Review*'s staff of plagiarism because he disagreed with her political positions.<sup>101</sup> According to Andrew Bowers, who reported the story, "throughout" the period, "Sedgwick waited for Dartmouth President James O. Freedman to speak out on her behalf. Instead, his office sent the professor a bunch of roses. . . . Privately, the administration was telling her that she had acted properly. Publicly, it made no such statement." The episode ended when the administration reduced the sanction imposed on the student for inadequately footnoting his research paper from a two-term suspension to a one-term suspension; the student agreed not to sue the college. "An administration source said that Dartmouth had acted out of compassion"

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faculties might well be skeptical about the ideological credentials of a candidate who held the "wrong" political views.

99. Judith Jarvis Thomson, *Ideology and Faculty Selection*, 53 LAW & CONTEMP. PROBS. 155 (Summer 1990).

100. Macneil, *supra* note 18, at 11.

101. For what appears to be a full account, see Andrew Bowers, *Politics and Pedagogy at Dartmouth*, LINGUA FRANCA, Feb. 1991, at 22.

to alleviate the strain on the student. "Sedgwick, for her part, wonders how much concern there was for her." Finally, "three months after the affair began," the dean of faculty distributed a statement saying that Sedgwick "did exactly what she should have done," but tempered that statement by expressing concern about the faculty's rules regarding plagiarism and failure to footnote adequately.

The Sedgwick incident has most of the characteristics of the political correctness problem even though it involves a right-wing attack. The difficulty is not that university administrations fail, in the end, to do the right thing; rather, the difficulty is that it takes them too long to do it, and even then their response is often qualified by inappropriate concessions to ideologues.<sup>102</sup> That, in my view, is the real political correctness problem.<sup>103</sup> Why does it happen?

The usual story is embodied in the title of Roger Kimball's *Tenured Radicals*.<sup>104</sup> The most active members of today's faculties were, as I was, students in the 1960s and, the story goes, continue to hold the radical values we adopted then. Now, having access to institutional power as faculty members, we enforce political correctness. Yet, if the problem is administrative inaction, that story cannot be correct. For, even if we are now influential members of the faculty, we are not administrators: James Freedman was not a student radical; when Harvard's alumni magazine profiled the university's new president, its story opened with an anecdote showing how "responsibly" he had behaved during the student turmoil of the 1960s;<sup>105</sup> and Robert Clark, dean of Harvard Law School during the Macneil incident, is well-known for being unsympathetic personally to the left.<sup>106</sup>

Administrators are slow to act, then, not because they agree with the attacks on faculty members or students.<sup>107</sup> They are slow, in part, because they are bureaucrats, who follow the rules no matter what the circumstances. They also follow the rules in part out of deference to

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102. The Macneil incident is different in form (and, I have argued, in substance as well, to the extent that the HOLA letter was not aimed at "politicizing the classroom" but was aimed at Macneil's inappropriate pedagogy). Because Macneil was a visiting professor, a delayed response by the administration amounted to no response at all, which is probably what the administration wanted in the first place, for reasons discussed in text accompanying notes 111-12 *infra*.

103. For a similar perspective, offered in the heightened tone of his polemical writings, see Genovese, *supra* note 53.

104. ROGER KIMBALL, *TENURED RADICALS: HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION* (1990).

105. Lambert, *Renaissance President*, *HARVARD MAGAZINE*, May-June 1991, at 31.

106. I am reasonably confident that, given complete freedom to take sides, Freedman would have agreed with Sedgwick on the merits. I am less confident that, given similar freedom, Clark would have sided with Macneil, because, as I have argued, Macneil's defense of his actions on the merits was not persuasive (and because I believe that Clark's position would be determined substantially by his assessment of the merits).

107. The analysis in the remainder of this section has a more speculative aspect than what has gone before, in large measure because, although I am a faculty member and have, I believe, a reasonably good sense of faculty culture, I am not an administrator and am less confident about my sense of that culture.

faculty autonomy. For example, when the Bennington English department acted inappropriately in refusing to renew Edward Hoagland's contract,<sup>108</sup> the college's president did not simply jump in and reverse the decision; she referred it to the campus academic freedom committee for investigation and report. When events are unambiguous, perhaps administrators ought to forgo the ordinary mechanisms of review. But, unhappily, events are rarely unambiguous except to the victims and their tormentors. In a world filled with ambiguity, we have to worry about authorizing administrators to intervene promptly when *they* conclude that events were unambiguous; sometimes they will find things clear when they were actually unclear, and the campus climate might then be even chillier than it is when administrators always wait for the routine mechanisms of review to kick in.

That is the generous account of what happens to slow down the public presentation of the right response to student or faculty misbehavior. Bureaucracy, though, can cause another kind of problem. University administrators delegate a lot of their functions to units like affirmative action offices, which take their specialized missions single-mindedly. Consider what happens when a hate-speech regulation is proposed. Because such regulations are generated at least in part by pressure from minority students and faculty and their sympathizers, an administrator might well assign the job of developing the regulations, or writing a pamphlet explaining them, to the affirmative action office. That guarantees trouble. The affirmative action office will try to extend the reach of the regulations as far as it can, disregarding any contrary free expression concerns.<sup>109</sup> Nor can central offices like the chancellor's or provost's be counted on to tone down the regulations. They may not pay attention carefully enough. More important, though, what the separate specialized offices develop can be melded into a coherent educational program only if the chancellor, provost, or president actually has such a program, or thinks it a good thing to try to develop one. That, however, is precisely what administrators who see their jobs as merely political lack.

As this analysis suggests, though bureaucracy is certainly part of the story, there is much more. For, university administrators are not only bureaucrats; they are crisis managers as well. Today's administrators are indeed children of the 1960s, but they were not the radicals on campus; they were the centrists. They learned their lessons about politics from John Kennedy and their lessons about universities from Clark Kerr, the former president of the University of California who clearly articulated

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108. See text accompanying notes 10-14 *supra*.

109. That appears to have been what happened at the University of Michigan, where the affirmative action office wrote a set of explanations of the hate-speech regulations that extended their reach in a grossly excessive manner. See *Doe v. Univ. of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989).



the view that the modern university was simply a political enterprise and then failed as a politician.<sup>110</sup> Seeing the university as a political enterprise, administrators see their job as accommodating the conflicting pressures they feel from all sorts of constituencies, inside and outside the university. The best of them hope that, once all the pressures are diffused and set against each other, they will have some freedom to move the university in some particular direction. But, they tend to believe that their freedom is quite constrained, and that most of what they do involves keeping the university on course, not developing some distinctive educational mission.

How, then, do politicians and crisis managers respond to political correctness problems? First, they move slowly. Macneil found that the HWLA letter absorbed an "incredible amount of [his] time and psychic energy."<sup>111</sup> But, while the events were surely the most important thing happening to him at the time, they almost certainly were much less important to the administration. Macneil was going to leave Harvard in a few months anyway, and the administration could reasonably expect that most people would have forgotten the events by the fall.

Strikingly, administrators have reason to delay even when the charges are frivolous. They know that, in the main, precisely because the charges are frivolous, at the end of the day nothing is going to come of them. When students bring the charges, administrators know that the students will graduate, or will find another atrocity to protest next semester.<sup>112</sup> As politicians, administrators find it senseless to buy trouble today by trying to explain in the heat of controversy that one side was clearly right and the other clearly wrong, when they know that tomorrow or—as in Sedgwick's case—three months later the explanation will go down smoothly.

After delay, the administrator's second response is compromise. Facing diverse pressures from students, alumni, politicians, the media, federal bureaucrats, and many others, administrators believe that the most sensible short-term strategy is to buy off as many pressures as they can. If they can give in to one constituency without seriously offending another, they will. When students criticize a professor, the easiest course for the administrator is to do nothing. The students publish the student newspaper; the professor has many fewer resources to make political trouble for the administration.

The managerial mind-set originated in what was perceived as a transformation in the university's role in the years after 1945. The radical

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110. See CLARK KERR, *THE USES OF THE UNIVERSITY* (1963). For a discussion of Kerr's failure at the managerial task, see W.J. RORBAUGH, *BERKELEY AT WAR: THE 1960S*, at 10-40 (1989).

111. Macneil, *supra* note 18, at 10.

112. The Sedgwick incident is different precisely because the *Dartmouth Review's* successful efforts at mobilizing outside support mean that the episode is much less likely to blow over.

students of the 1960s argued that the multiversity had become politicized. As they saw it, universities had abandoned their mission of disinterested truth-seeking to serve the immediate interests of the political interest groups of the larger society.<sup>113</sup> The argument then developed in two divergent directions. First, a Marxist-influenced strand, confident that the disinterested pursuit of truth would liberate the oppressed, tried to restore what it presented as the university's traditional mission, that is, to "de-politicize" it. Second, a strand that I associate with populism and progressivism tried to shift the political direction of the university, to "re-politicize" it in the correct way.<sup>114</sup>

Neither direction proved terribly effective, but the restorationist effort failed sooner and more dramatically.<sup>115</sup> The restorationists were committed to acknowledging the possibility that people they disagreed with politically might still have found out something true; their mind-set, that is, was incompatible with the oppositionist tenor of much radicalism. Further, the restorationists faced a difficult rhetorical task. They had to show that some of their opponents were falsely claiming to be engaged in the disinterested pursuit of truth when they really were pursuing a political agenda. By engaging in such an argument, the restorationists had a "baseline" problem; the argument was over where to find the proper baseline of the disinterested pursuit of truth, and such arguments are notoriously difficult to win. The people they opposed claimed to be pursuing truth while, as they put it, the restorationists were trying to politicize the university. This problem was exacerbated by the Marxist element in the restorationist camp, because, in the political culture of the United States, to say that someone is a Marxist is precisely to say that he or she is not interested in the pursuit of truth.

The populist-progressive camp, in contrast, had a somewhat easier time. As Marxism was discredited, that camp offered the only alternative to what all on the left agreed was a university politicized in the wrong way. Also, it was able to ride post-Marxist currents of European social thought that argued that all scholarship was political. These currents made it possible for "re-politicizers" to ignore their opponents' scholarship, but, more important, they also displaced the argument

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113. The language of "abandonment" suggests that universities once had, but recently lost, the disinterested mission. Some radical students did not make that historical claim, but argued that universities, whatever they had been and were, ought to pursue truth disinterestedly.

114. I am unaware of a comprehensive history of these developments. PETER NOVICK, *THAT NOBLE DREAM: THE "OBJECTIVITY" QUESTION AND THE AMERICAN HISTORICAL PROFESSION* (1988), provides essential background, but as it reaches the 1960s its analysis becomes increasingly sketchy.

115. I think it important to note that, in history, the field with which I am most familiar, the Marxist-influenced restorationists, Eugene Genovese and Sean Wilentz, are among the most important and productive scholars, which makes the attack on "political correctness" particularly misplaced. These scholars would be happy to see the university taken out of politics; some, however, believe that it is already so deeply implicated in politics that a determined attack on the political character of the university is essential.

entirely. If all scholarship was political, it could not be a criticism of their work—or of anyone's—that it was not neutral or apolitical.

In its best form, represented for example by Stanley Fish, this line of argument leads to genial tolerance of the tolerant. The only point it needs to make is that adherents of traditional scholarship ought not rule new forms of scholarship out of bounds by arguing that proponents of the new forms are trying to “politicize” the university. On populist-progressive argument, the university is always already politicized, and the populist-progressive camp is simply trying to get in the door.

At this point, the interests of the “re-politicizers” and administrators as managers came into line. Not that administrators welcomed the re-politicizers, who, after all, did disrupt systems of administrative behavior that had settled into place. Rather, the re-politicizers were people administrators could deal with, as the restorationists were not. The restorationists rejected the administrators' characteristic way of thinking—compromise and balance—in favor of a vision of the university as a place where disinterested scholars pursued the truth. The re-politicizers, in contrast, simply wanted to bargain with everyone else over dividing the university's goods. And, for a while, they did reasonably well in the bargaining process.

Yet, the strategies of delay and compromise, though sensible in the short run, can cause trouble in the long run. Other constituencies, particularly those outside the university, can start to bring pressure on the administration. Indeed, seen politically, that is precisely what the attack on political correctness is: the mobilization of outside forces to put political pressure on university administrations.<sup>116</sup> It seems significant in this connection that Benno Schmidt, the president of Yale University and a man of the liberal-left, responded to the political correctness controversy by calling the criticisms “substantial.”<sup>117</sup> If I were Dinesh D'Souza, though, I would not wait a long time hoping to notice differences in Yale's behavior.<sup>118</sup>

Schmidt's statement, indeed, may be typical. Sophisticated administrators, those who become presidents of major universities, give half a loaf to each side. Instead of changing policies, they issue statements. And, in doing so, they point out to both sides that, if they continue to complain, the other side will get even more upset. And, when that hap-

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116. For an articulate presentation of this point, see the remarks of Stanley Fish on the *MacNeil/Lehrer Newshour*, (PBS television broadcast, June 19, 1991) (Transcript #4058 available on NEXIS).

117. *Yale Chief Decries 'Politically Correct' Limits on Speech*, CHI. TRIB., June 6, 1991, at A28.

118. Yale, though, may present a special case, because Donald Kagan, dean of Yale College, has been a prominent supporter of the political correctness attack. See, e.g., *MacNeil/Lehrer Newshour*, (PBS television broadcast, June 20, 1991) (Transcript #4059 available on NEXIS). But see Alex Beam, *The Fall of Yale's Poster Child*, BOSTON GLOBE, Oct. 10, 1991, at A17 (reporting “depth of anti-Kagan feelings” at faculty meeting).

pens, the implicit threat is, the university will have to respond to the greater pressure, which will make the complainers worse off than ever.

## V. CONCLUSION

Critics of political correctness believe that universities have become politicized. Ordinarily, that means that universities are bastions of liberal orthodoxy. There is a small grain of truth to that. Conservatism has prevailed in virtually all the society's major institutions, but it has not yet taken over the universities. To suggest that the remedy for "politicizing" the universities is to politicize them differently, though, is a little peculiar.

The political correctness controversy ironically confirms the analysis students offered in the 1960s. Political correctness problems arise because university administrators have no real sense of what their institutions ought to be doing, aside from accommodating political pressures. And, the political correctness controversy itself became just another source of political trouble for university administrators, something to be "handled."

Under these circumstances, it seems almost fruitless for a non-administrator to advance a vision of "the university"; what I have to say, as a member of a faculty, will inevitably be taken by those in positions of power merely as another claim by a member of a pressure group. And, in light of what I have already said, what I can contribute to developing a vision of "the university" is quite limited in any event. For, when all is said and done, what we need are administrators who *have* a vision of the university—a vision at all.<sup>119</sup>

I have argued that there are two dimensions on which universities ought to take a position: the degree to which they take their mission to include the moral formation of their students, and the degree to which they are committed to the pursuit of disinterested scholarship (acknowledging that today the idea that scholarship can be disinterested is itself contested). In a society with many, potentially diverse institutions of higher education, what we need are universities that forthrightly take a position along these dimensions. Some could decide to take an extremely active role in moral formation; they might then adopt stringent "hate speech" codes. Others could decide to leave moral formation to other

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119. The examples come to mind of institutions whose administrators do have a vision—Hillsdale College on the right, New College of Law on the left—are small ones. Perhaps the large multiversities are so far removed from being able to fulfill the classical ideal of the university that we cannot expect more vision from their managers. A university manager who tried to implement a vision might bring the university to a halt. Yet, if that is true, I wonder what the premise of the attack on "political correctness" could possibly be; certainly, on this assumption, one could not reasonably expect a university administrator to try to restore the university to its pre-multiversity state. If the major Catholic universities like Georgetown ever make the transition to multiversity status, it will be interesting to see how they handle the issue of maintaining their distinctive religious commitment.

institutions; they might then treat their campuses as free fire free speech zones. What matters, though, is that, once the institutions have taken a position, they defend it vigorously and without embarrassment as embodying a permissible vision of the university in contemporary society.<sup>120</sup>

This course is unlikely to be easy. Opportunists and careerists within and outside the university, and ignoramuses on the right and the left, will surely attack any institution that takes a position with which they disagree. And, as we have seen, precisely because many positions on the issues of moral formation and disinterested scholarship are defensible, these attacks can be formulated in intellectually respectable terms. The correct response to them, though, should be, "If you don't like the way we do things here, go somewhere else."

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Despite some hopeful statements,<sup>121</sup> I find little in the discussions of political correctness to suggest that the controversy's outcome will be a new commitment within the university to the disinterested pursuit of truth. The issue has been hijacked by a particular political tendency, and there is little reason to believe that many people on either the left or the right will find it profitable to try to rescue it.

In writing this essay I have been reminded of Joseph Haennig, a French lawyer who wrote an article during the Vichy regime arguing that Nazi statutes defining who was a Jew ought to be construed narrowly.<sup>122</sup> Richard Weisberg, who brought Haennig to our attention, notes the moral dilemma he was in. To argue that the statutes should be construed narrowly might save the lives and property of some Jews. To argue about how the statutes should be construed, though, was to participate in a vicious system, if only as a matter of necessity. So too, I have felt, about participating in the discussion of political correctness. Not that the critics of "political correctness" are in the same moral category as Henri Petain, but they have structured a discussion on premises that are so removed from moral and empirical reality that it is problematic to engage in the discussion at all.<sup>123</sup>

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120. I would make the same argument about the disinterested pursuit of scholarship: universities should determine their position on the contested question of whether such a pursuit is possible, and then develop personnel and other policies compatible with that position.

121. See especially *Genovese*, *supra* note 53.

122. See R. WEISBERG, *THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION*, 1 (1984).

123. And, I think, with less justification than Haennig, who, if he was to act as a lawyer at all, had to act within the system as it was (and who may have been trying to save lives).

