THE FREE MARKETPLACE OF IDEAS: WHY IS IT SO ILLUSIVE?

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Individual political courage is at the heart of academic freedom, and such courage cannot flourish if the institution does not itself have the courage to defend free speech, including hateful speech, against all objections, whether from the right or the left.

I. INTRODUCTION

I have spent much of my life in higher education, seven years as a student and forty-four years as a law professor, Dean, and university administrator. Although I continue to teach full-time, it seems an appropriate time to undertake a series of short essays about academe as I have observed it and participated in it. In this, the first of what I hope will be a series, the focus is the search for the free marketplace of ideas in higher education as the freedom has ebbed and flowed over the past fifty-plus years.

The essay form seems appropriate in major part as a recognition of the fact that a quite opinionated travelogue is presented, and in lesser part because I am tired of footnotes. More often than not, the essay reports personal observations and opinions rather than empirical fact, and speculates about why the ideal free marketplace has been and continues to be a goal rather than a fact, a continuing illusion. In essence, it asks why the freest nation in the world has been unable or unwilling to establish a free marketplace of ideas at its universities, or, stated in another form, why the free marketplace has remained an ideal rather than becoming a reality. At times we have come close to the ideal, but have always fallen short. The primary limitations on speech rarely stem from direct statutory, ad-

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ministrative, or judicial restrictions. Rather, individual self restraint has been the primary controlling factor, although as explained below, pressures, from peers as well as from outside the academy, often motivate faculty members (and students) to exercise that self restraint.

To put the free marketplace in context, the essay first presents a variety of free speech issues with which I have been involved directly or have observed at close hand over the past fifty years. It then explores the free speech problems of today, including the role played by political correctness. It asks whether current inhibitions on speech are part of a continuum or are unique. Finally, alternate answers are suggested to the question: Why have we failed to achieve a free marketplace of ideas?

II. THE CONSISTENT GOAL

Universities are in the idea business. We deal with ideas on a broader scale than any other segments of society does, although other segments obviously do deal in depth with them. All who deal with ideas know that it is a dangerous activity. Failing to deal with them, of course, is even more dangerous. Freedom to generate and test ideas and to pass them on to students and to society generally is at the heart of a university’s mission. Higher education at its best provides a forum in which ideas can be tested, transmitted, exchanged, challenged, and understood. A faculty member’s right to speak as a citizen should be no more or less than the freedom accorded all citizens. A faculty member’s freedom to speak as a teacher and scholar, however, warrants special protection, although in an ideal society, the free marketplace of ideas would exist in all forums.

The First Amendment is couched in absolute terms: “Congress shall make no law . . . abridging the freedom of speech.” Those persuaded by Justice Black think of “free speech” and the “free marketplaces.” In fact, of course, the speech right is not and has never been absolute. At times it must give way to other societal interests that, in the context, seem more important. One test of a free society is that it limits speech rarely and only (1) when clearly superior community interests are seriously and directly implicated; and (2) the speech is restricted only to the extent necessary to protect those community interests. I make no claim that universities need absolute freedom of speech to accomplish their goals. What they need is a system that defines the necessary limits narrowly, and, one in which doubts about the need to limit speech are resolved in favor of the freedom to speak.

The ideal campus environment is one that not only permits free
exchanges of ideas, but actively encourages them. A key facet of the free marketplace of ideas is that it includes hateful ideas—ideas that test our restraint. It is easy to defend the expression of ideas with which we agree, harder when we disagree, and much harder when we are asked to defend legal speech that is hateful—so hard that we often fail to protect it. It is trite but true that our willingness to defend a speaker’s right to say hateful things is the test of our commitment to free speech. In sum, then, what might be called the purist’s ideal is a university that assures members of the university community not only that the institution will refrain from censoring speech or punishing people for what they say, but will actively encourage members of the community to speak up and to speak out.

Although at times I have claimed to be a pragmatic purist on speech issues, I recognize that I cannot have it both ways. Be that as it may, my own ideal is not far from the purist’s. It calls for individual faculty members to exercise restraint and good judgment while feeling wholly at ease to speak freely. The pragmatic side recognizes that the ideal at times must give way to other societal interests. The purist in me, however, insists that departures from the ideal be rare and short-lived and occur only in true crisis situations. Further, it is essential that everything reasonable be done, before and after the event, to deter those who would disrupt the free marketplace.

III. THE PAST

Whichever ideal marketplace of ideas is accepted, that of the purist or the pragmatist, the ideal has been honored more in the breach than in fact. During most of my undergraduate, law school, graduate school, and early teaching days (1946 through 1954), a “McCarthyism” virus infected our society; the House Un-American Activities Committee (HUAC) was functioning; and baby HUACS were established in several states. Whatever the initial purpose of the various investigations, all ended up seeking to identify and punish persons who thought Un-American thoughts and even worse, made their thoughts public. What you did was rarely at issue. What you thought and said were the key elements of the inquiry.

The red-scare paranoia at the time was substantially more widespread and as strongly held as the anti-government paranoia we currently see in the various private militia across the country. In the university world, some (although relatively few) tenured faculty members lost their jobs and others were denied tenure because of what they believed and
said; loyalty oaths were imposed in a several states. More significantly, however, virtually everyone felt a substantial constraint on their freedom to speak. A major effect of McCarthyism at universities was that it created an atmosphere that persuaded most faculty members and students to remain silent. Discretion was thought to be the better part of valor. (The students were called the silent generation, a description that also fit most faculty members). In theory, the right to speak publicly was present, but it was a right rarely exercised. In a technical sense, the silence was self-imposed in that no government or institutional rules required silence. It is fair to say, however, that the pressures to remain silent were as real to most members of campus communities as statutes or regulations would have been. The self-restraint imposed by members of university communities on themselves was in response to very strong outside pressures. In essence, we had “externally” imposed self restraint, perhaps a non sequitur.

As the McCarthy era ended, racial discrimination issues came to the fore. In the mid- to late-1950s, the University of Mississippi’s governing board barred a law faculty member from the classroom because he said in class that the school desegregation case, was the law of the land.1 The Mississippi Board permitted him to be paid, but would not permit him to teach. I was the very inexperienced Chair of the Academic Freedom and Tenure Committee of the Association of American Law Schools (AALS) when the Committee was asked to lend assistance to the faculty member. Rather than send an investigating team to Mississippi as would have been the norm, the Committee asked the Deans of two distinguished southern law schools to meet with the governing board informally to persuade it to reverse itself. Although the effort succeeded, the environment at Mississippi and some other southern schools at that time did not change with the Board’s reversal of itself. Whatever else the speech environment was, it was not one that encouraged a free exchange of ideas about racial issues in many places. Not all campuses were fortunate enough to have a Jay Murphy.

Much like the “censorship” on campuses nationally during the McCarthy era, restraints on free speech on many southern campuses during the racial wars of the mid-1950s and the 1960s might be described accurately as a system of externally imposed self restraint, with the external pressure coming from the political right. At the same time at many, and probably most, universities outside of the South, pressure from faculty

colleagues and some students tended to silence those faculty members who viewed the opinion as both bad law and bad history, or believed in the right of states to regulate their own school systems free of federal interference, even if it meant a continuation of a segregated system of public education. Thus, during that period, the inhibitions on the exercise of free speech on many campuses came from the political left as well as the right. The left’s intolerance for what it viewed as distasteful speech matched the intolerance of the right. Neither side seemed interested in a free marketplace except for its own ideas.

Starting with the McCarthy era and continuing to date, people whose views were very unpopular with a segment of the university community often have been denied invitations to speak because of the fear that their appearances would spark protests. In such cases, the free marketplace gives way to expediency, a major enemy of the free exchange of ideas at universities. Speakers should not be denied access because the position they take is likely to cause others to protest. Protests are an integral part of the free marketplace, and must be protected.

Potential protests as such cannot justify a decision to deny access. I use the word “protest” throughout the essay as excluding disruptive actions that impinge in any significant way on the rights of others. Disruptions are not part of the free marketplace. They are an anathema to it if the disruptions deny free speech to others. The starting point is to protect the speaker’s right to speak. It is only when a reasonable judgment is made that serious disruptions are probable to occur that consideration should be given to inhibiting speech. Even then, the strong likelihood of disruptions standing alone would not justify denying a speaker access. In resolving the tension between the free speech interest and campus interests in keeping the peace, the speech interest should give way only if it is probable that the disruptions cannot be controlled without doing substantial physical harm to individuals or property. (In constitutional terms, the least restrictive alternative to protecting speech should be used). Anything less than a standard based on the real danger of substantial physical harm makes it too easy to ignore the speech interest in favor of keeping the peace. One thing we should have learned from our World War II experience is that the cost of maintaining a peace-at-any-cost policy, like the pre-Churchill policy in England before World War II, leads only to disaster. I realize how difficult it is to predict with certainty when a real danger of physical harm exists, and I recognize the real dangers if the judgment is in error. Striking the proper balance between avoiding physical danger and protecting the right to speak is one of the difficult assign-
ments for university administrators.

In the early 1960s while I was on the faculty at the University of New Mexico, several years after McCarthyism had become quiescent, local units of the American Legion and Veterans of Foreign Wars demanded an investigation of subversive activities at the University of New Mexico, particularly at its College of Law. They specifically named three or four law faculty members, including me, as having consistently followed the Communist Party line. My crime was that I had publicly favored abolishing the House Un-American Activities Committee and, as President of the State Conference of Chapters of the American Association of University Professors (AAUP), had joined John F. Kennedy and James Roosevelt, among many others, in opposing the continuation of the National Defense Education Act disclaimer affidavit. The latter required students who wanted federal educational loans to swear that they did not belong to a long list of specifically-named "subversive" organizations. Other faculty members named by the veterans organizations were alleged to be guilty of comparably serious subversion.

The demand for the investigation caused a furor on campus and in the State. The uproar lasted for six weeks during which time little academic work was done at the University. Virtually all faculty members were obsessed with the threatened investigation, even those who were completely apolitical. With the help of a strong University President and the hard work of dozens of people both from inside and outside the University, the State Senate Committee, after a preliminary hearing, decided by an eight to five vote not to seek out Un-American activities at the University. The University of New Mexico, and its President, defended the free marketplace effectively. Although the investigation was not undertaken, the threat remained an external force pressuring faculty members to remain silent on controversial issues.

Another example of a McCarthyism kind of paranoia, this time not about communism but about lesbianism and homosexuality, occurred in several states. Legislators fumed and fretted about the issue and in 1992, Alabama passed a statute attempting to control speech on the issue. In 1995, Iowa's lower house attempted to follow suit. By vote of 50 to 21, it passed a resolution that prohibited the use of state funds by universities to "carry out a program . . . that has either the purpose or effect of encouraging or supporting homosexuality as a positive alternative lifestyle." (The bill was a reaction to the fact that the University of Iowa had hosted the Sixth North American Lesbian, Gay, and Bisexual Studies Conference). Although the Iowa Senate did not concur in the House bill, the
Governor of Iowa commented that "the House vote sent university officials a message that they should heed." He indicated that the signal the House sent was that the universities must "respect their responsibilities to the taxpayers." Just what the Governor meant is unclear. He may have meant that faculty members ought not say anything that might offend taxpayers (voters). Since it is virtually impossible to say anything that does not offend some taxpayers, that standard would prohibit all speech. I doubt that he intended to do that. It is more likely that he meant that because many Iowa taxpayers are uneasy about and opposed to lesbianism and homosexuality, faculty members should not discuss in a public forum the issues involved in those relationships. One thing is clear. The Governor understands that ideas are dangerous. He fails to recognize, however, that failing to deal with them is even more dangerous. Rather he seems to view as acceptable public policy the restricting of speech with which he (and some Iowa taxpayers) disagree. Once again, no law was passed or regulation adopted, but the threat of legislation can provide external pressure that tends to inhibit speech. Neither those in the House who supported the bill nor the Governor seemed to care about what people did, but what they said—McCarthyism was revisited.

During the late 1960s and early 1970s, universities faced, and to some extent flunked, a serious test of its resolve to maintain a free marketplace. The pressure to censor came primarily from inside universities. On most campuses, voices that supported government policy in Vietnam were stifled, either by being shouted down, or by the absence of invitations to speak. Again, and understandably, campus peace was often considered a more important value than free speech. The shootings at Jackson State and Kent State and the bayoneting of students at the University of New Mexico demonstrated clearly that, at times, the danger of physical harm was very real.

Intolerance was a hallmark of the late '60s and early '70s. Persons with views contrary to those of the majority on most campuses often were silenced, either directly or, more often, by not being invited to speak. As a pragmatist, I appreciated the need to avoid violence and, thus, at times, was willing to accept less than a free marketplace of ideas. By turning the other cheek too often when buildings were seized and other disruptions occurred, however, many universities actually encouraged a continued disruption of the free marketplace. Expediency—peace at any cost—often was the touchstone of decision-making. The marketplace of ideas gave way more often than it should have. The trouble was real, not simply imagined, and, when the costs of resisting the disruptions
entailed a very real danger of bloodshed, I concurred in the retreat from the free marketplace. In retrospect, I believe that I concurred more often than I should have.

One of the more disturbing aspects of the Vietnam era was that universities were used as political tools by persons seeking to force a change in a national policy unrelated to higher education. The stated goal of those disrupting the educational processes was to end the “immoral” war in Vietnam. A subsidiary or parallel goal for many was to end the drafting of white middle-class students. (It was the latter issue that caused middle-class parents to oppose the War and in the end, to bring about a cease fire). Demonstrations against the War and the Draft were perfectly legitimate and were an important part of the free marketplace of ideas. My objection was and is not to the demonstrations but to the disruptions, the burning and occupying of buildings, the threats of physical violence to those who disagreed or wished to accomplish the same goals in a different way, and the complete disregard of the rights of others, both on and off campuses.

The anti-War movement was emotional and apparently many of those involved thought that the goals they sought—ending both an immoral War and the draft—were sufficiently important to override the rights both of those with whom they disagreed substantively and those who agreed with their goals but not the means used. The end was thought to justify the means. In my experience, the end may be used to rationalize means that are not otherwise justifiable, but cannot be used to justify improper means. Throughout history, rights have been trampled in the name of a higher good known best to those who did the trampling. It has been suggested that many of those who were disrupting campuses and communities were good people who were simply caught up in the emotions of the time and a mob psychology. I am not at all sure that those who permitted their emotions and the cries of a mob to move them to ignore the rights of others were, underneath it all, good people.

The difference between the civil rights movement of the ‘50s and ‘60s and the later anti-War movement is that the former directly attacked those who discriminated while the latter attacked those who had virtually nothing to do with and no control over either the draft or the war. Civil disobedience, i.e., violating laws, rules, and regulations, is a legitimate tool in a protest movement when it is directed against those with whom the protesters have a quarrel (as long as those who protest do not protest when they are prosecuted for violating the law). Using civil disobedience to attack bystanders as distinguished from those with whom the protesters
have an argument is an abuse of the tactic. The bystanders, universities and members of the university community, were used as pawns by the anti-Vietnam war groups in order to attack government policy.

I find it difficult to accept the concept that the "good" motives of those in the anti-War/draft movement who disrupted, and thereby denied rights to others, somehow made their actions less blameworthy. For me, violent opposition that trampled on the rights of others was as unjustifiable as the War itself, and for many of the same reasons. I sympathized with those who opposed the War and often spoke out against it. (I also favored the draft, however, as the only way in a democracy to avoid an all poor and mainly minority army.) I was then, and still am, unable to accept the idea that opposing the War warranted disrupting the educational process and stifling free speech on campuses. While I concede that the protests and even the disruptions contributed to end both the war and the draft, the cost in loss of freedom was extraordinarily high and still plagues our society.

As disquieting as it might be to some, the disruptive actions of those who opposed government policy in Vietnam and those who oppose current government policy by joining private militia strike me as being quite similar in many ways. During the Vietnam era, many of the disrupters viewed the United States government as the Evil Empire whose immoral policies had to be stopped by any means. Similarly, the Evil Empire analysis is used by Militia leaders to urge that the government's immoral policies and actions must be stopped, again by any means. (One thing that gives me pause is that at the time of the American Revolution, I assume that the rebels viewed George III as the head of an Evil Empire that acted immorally by imposing taxation without representation.)

During the Vietnam era, the free-marketplace ideal of a university community that exercised restraint while feeling free to speak was not achieved very often except for those whose views coincided with those of the majority. There were few speech purists in the majority who raised their voices to call for a full and free exchange of ideas. In my view, free speech at universities was stifled more during the Vietnam era than at any other time during the past fifty years, including the McCarthy era. From the perspective of the free marketplace of ideas, it was a disaster from which higher education has yet to recover.

Although the Vietnam era is long gone, intolerance at most universities and in society generally continues unabated. A major difference at universities is that the moral fervor that dominated the rhetoric of the large-scale disruptions of the 1960's and 70's is now expressed by a tiny faction of the student body. Rather than having hundreds and, at times, thousands of students demonstrating (and disrupting, at times), we now have fewer than 100 people (and at times fewer than ten) on most campuses prepared to express their moral indignation by undertaking the immoral act of disrupting the speech of others. Another major difference is the development on campus of a large number of single issue blocs that seek to forward their own interests above all else and without much regard to the overall institutional welfare. (The development of single issue groups on campus mirrors the same movement in society generally.)

A disagreement over the meaning and significance of free speech emerged during the 1980's and '90's. Until then, virtually all members of the university community viewed free speech in its broadest sense as a core value of the academic enterprise. To many, it defined that enterprise. Despite the failure to achieve the ideal, until the last fifteen or so years, most thoughtful people on campuses, while recognizing the need for reasonable time and place restrictions, viewed the free exchange of ideas without inhibition as being at the heart of higher education. There has been a change. The Supreme Court's observation that "[a]ll declare for liberty and proceed to disagree among themselves as to its true meaning," has become a reality on campuses.2

From an intellectual point of view, the challenge comes primarily from feminist and critical race theory scholars. Some have urged that the free speech values of the First Amendment are simply white male values that allow white males to continue to denigrate women and minorities, and, thus, continue to dominate society. The new theories attack the entire premise on which traditional free speech values have been based. In essence, and I do not think I overstate, any speech that denigrates women or minorities is thought to be subject to regulation on the ground that such speech reinforces social stereotypes based on gender or race, and, thus, violates equality values. When there is tension between speech and equality values, the new theorists believe that the speech value should

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give way.

At times, the newly-developed theories have manifested themselves on campuses in the form of speech codes that regulate hate speech, a development that is an anathema to traditional free marketplace advocates. The issues raised by the new theorists are significant and deserve to be taken seriously. I certainly find hate speech offensive. Life would be more pleasant if it were not used. Despite its offensiveness, however, for me the free expression of all ideas at universities is so vital to the enterprise in which we engage, that I resist efforts to impose sanctions on those who use hate speech.

Civility has become a sufficiently important value at universities that any effort to understand the present status of the free marketplace requires that the role of civility be considered. On the surface, it seems anomalous that in the past, when our society generally was polite and civil, civility was not consciously an important part of free speech theory. It surfaced only when politeness and civility were no longer the norms of social relationships. The anomaly disappears, however, with the realization that when civility was the norm, there was no need to think or talk about it. It was ingrained and happened naturally. Conceiving of it as a specific and conscious value in the free speech area became necessary only after civility ceased to be society’s norm. Civility is an important element of the free marketplace of ideas because it encourages discussion without invective.

Partially as a result of pressures within themselves and partially as the result of social pressure from colleagues and students, most faculty members and students consciously try to choose words that describe things accurately and do not offend rather than using words that are equally accurate and do offend. Thus, many members of the university community refer to Native Americans and African Americans rather than Indians and Blacks, and to sight challenged and disabled rather than those who are legally blind and crippled. At most, the choice of words that do not offend inhibits speech in a minor way, as long as the words used are as accurate and effective in expressing the ideas involved as the offensive words. As noted, the use of inoffensive words has the potential to contribute to the development of full and free discussions of substantive issues by encouraging conversation without invective. The pressure for appropriate or “civil” word choices is labeled “political correctness” by some and, as such, is automatically denigrated. Those who label language as politically correct in order to denigrate it are certainly not friends of free speech. Their intolerance is as intolerable as what they think of as
“politically-correct” intolerance. Only if the pressure to choose descriptive words that do not offend inhibits full discussion of substantive issues should the pressure for the politically correct description be condemned. My very strong impression is that "politically correct" word choices—Native American rather than Indian—do not inhibit substantive discussions of ideas in any way. If they make people in the group being described more comfortable, no harm is done and some advantage gained. If they the members of the affected group do not care, however, insisting on a specific usage is hard to defend.

Although I do not believe that politically correct word choices are the cause, many members of the campus community seem more reluctant to express unpopular substantive views now than in the past. (I may be seeing the past through rose-colored glasses). For example and with notable exceptions, there is little or no freedom on many campuses for speakers who wish to defend the conclusions of "The Bell Curve." If the defense is made in class, some, often many, students will be offended. Protests, although not necessarily disruptions, well may follow. If speakers from off-campus come and attempt to defend the conclusions of "The Bell Curve," on some campuses there is a real risk that they will be shouted down. (Panel discussions or the allocation of time for a rebuttal may avoid excessive reactions and permit the pros and cons to be tested.)

More destructive to an open educational process than the treatment of outside speakers is the fact that on many campuses, some students feel substantial peer pressure to refrain from stating their conservative views in class on some social issues, particularly abortion, race, and gender issues. Many of these students, although fewer than before the elections in 1994 and 1996, opt to remain silent to avoid confrontations. On other campuses, often church-related schools, liberal students feel similar inhibitions. Outside of the classroom, expediency—the "peace-at-all-cost attitude"—continues to dominate the thinking of many campus administrators. They seek campus peace by failing to invite controversial speakers to speak, and most often, although not always, those who are deemed controversial depends on the political climate on campus.

For whatever reason, whether it is peer pressure, fear of official sanction, a sense of civility, or something else, some important substantive issues are rarely discussed openly on many campuses. Issues stemming from affirmative action efforts, whether for minorities or women, continue to create tensions. While the issues often are discussed, all viewpoints on the issues are rarely discussed openly, fully, and rationally. The fear of being viewed as a racist or sexist deters most, although not all,
faculty members and students from challenging the majority liberal position, which happens to be my position, on those subjects. In many places, those on campus who question the propriety of lesbian and homosexual relationships often are silent lest they are labeled homophobic. Abortion is another issue that often defies free, open, and rational discussion. Abortion is both a moral issue and a political issue that transcends parties. Pro-choice and pro-life positions have adherents across the political spectrum. Both on campus and off, the issue stirs so much emotion that people find it difficult to discuss it rationally.

The pressure felt by faculty members and students to refrain from stating their views on these and other matters is inconsistent with the free marketplace ideal. Neither concepts of civility nor pressures from campus-based politically-correct groups are at the base of the problem, however. The inhibitions that exist come mainly from an intolerance that goes well beyond campus boundaries and permeates our society. Most in our society support a free marketplace of ideas for themselves, but not for those whose views they dislike. They seem unwilling to listen to views contrary to their own strongly held views. To some extent, the geometric expansion of single issue political groups has contributed to the intolerance. Political correctness of the left is properly criticized because of its intolerance, but intolerance is not a monopoly of the left. Nor is sanctimoniousness. Both permeate the right as well as the left. Many of the critics and adherents of political correctness display identical intolerance. If intolerance and political correctness are synonymous, and it often is, too many of its critics are as guilty of political correctness as those they criticize. How many of the critics would be as critical, or critical at all, if they did not disagree so strongly with the substance of the politically-correct views being expressed?

Disrupting speakers, one of the holdovers from the 1960s, is still present at some universities. Beyond internal campus pressures, pressures from the community also still play a censorship role. Thus, it is, and always has been, difficult for faculty members at state supported agricultural schools to publish research paper on the evils of red meat. Similarly, at both public and private institutions, it may be difficult to take a position contrary to the economic or social interests of a member of the governing board.

Changing views of the scope and function of universities have had and continue to have an significant impact on the concept of the free marketplace of ideas. For the past several years, many state and national office holders, and some governing boards, have seen universities as
producing two basic products: (1) graduates, to provide an educated staff to increasingly complex industries, and (2) research, to fuel the economy of the state and nation. If our primary function is to turn out products that fuel the economy, the free marketplace loses much of its significance. The traditional role of higher education, at least undergraduate education, is to produce an educated electorate receptive to new ideas and capable of thinking critically and independently, to encourage a lifetime of learning, and to help students appreciate the life of the mind. To accomplish these purposes, the free marketplace is vital because without it, ideas cannot be tested, evaluated, and accepted or rejected. The campus view of the traditional institutional role is inconsistent with the view of some of the powers that be. If the views remain inconsistent, the campus view is unlikely to prevail.

Governing boards of many universities are going beyond their traditional role of setting general policy and are micro managing, at times by regulating speech and at times by regulating curriculum. One governing board, wanting to protect students, mandated that students be (1) forewarned that possibly offensive materials might be used to make a point in class, and (2) excused from attending the class in question. The board apparently believes either that good education means education that does not offend sensitive students or that non-offensiveness is a higher societal interest than good education, conclusions about which I have serious doubts. Good practice certainly would call for faculty members (a) to inform students about course content; (b) to restrict materials presented to those that forward the substance of the course—students are entitled to take courses without faculty members imposing on what is a “captive audience,” their views on matters unrelated to the course; and (c) to avoid soliciting students to live styles or political causes favored by the faculty member.

The board rule, while relatively innocuous, restricts the flexibility of faculty members as they plan their courses and then seek to adjust them during the term. It is hard to know what will offend. In many contexts, stimulating teaching occurs when the teacher takes positions that may offend in an effort to stimulate discussion and critical analysis. It is both trite and true that liberty regulated often results in liberty lost.

V. Conclusion

Currently, as in the past, the censorship on campuses tends primarily to be self-imposed by faculty members, but often because of subtle and
unofficial pressures brought by faculty colleagues and by less subtle pressures brought by students, legislators, and governing boards. As in the 1950s, timidity is descriptive of most of us in the 1990s. Interestingly, the broad recognition of civility as an important value at universities plays a dual speech role. Civility makes possible a fuller exchange of ideas among people who are in fundamental disagreement by encouraging discussion without invective, but it also inhibits the expression of ideas we know will offend.

Those who wish to censor campus speech can rationalize what they do. From the right, we find objections to the espousing of anti-family and other politically incorrect values. From the left we hear of the need to bar speech that exhibits gender or racial bias, seeks to impose further burdens on the poor, or is otherwise inconsistent with specific social views. For what may be the ultimate rationalization, a letter to the editor of the student paper at Iowa defended actions by a group of students who disrupted Newt Gingrich's consultant by arguing that those who hooted had a First Amendment right to hoot, and, thus, silence the speaker.

Most of the time, we fail to defend speech we find distasteful. Here the ACLU has done well and should be commended, although its record during the McCarthy era was not as good as it has been since. Tolerating the destruction of a student newspaper or preventing its distribution because the particular issue contained an item that some found offensive, as at least one university has, amounts to the institution assisting in the destruction of the marketplace of ideas. The failure of universities to impose sanctions on those who destroy the marketplace encourages more and more destruction. A balancing of interests may warrant suspending the free marketplace at times to avoid substantial physical harm. That balancing, however, does not warrant a failure to impose sanctions on those who disrupt and thereby destroy the free marketplace of ideas. The damage caused by institutional inaction is too high a price to pay for peace. Individual political courage is at the heart of academic freedom, and such courage cannot flourish if the institution does not itself have the courage to defend free speech, including hateful speech, against all objections, whether from the right or the left.

If we fail to protect the rights of the right, there will be few left for the left. The assault on free speech at universities comes from both sides of the political spectrum and, to a substantial extent, is encouraged by university administrators who fail to impose sanctions on those who prevent others from speaking freely. We have not yet established a truly free marketplace of ideas at universities because very few people value
free speech as the touchstone of freedom and education that it is. Protecting our own right to speak ranks high as a value for most of us, but protecting the rights of others to speak, particularly when we do not like what they say, is not at the top of very many people's agenda. It must be or we will fail.

The pattern has changed very little over the fifty years. The good fight continues to be fought. Despite our failure to achieve nirvana, we no longer have the extremes of McCarthyism or the large scale disruptions of the Vietnam era. We are better off than we were. If we remain vigilant, we may be able to avoid a return to the excesses we experienced earlier, although success cannot be predicted with any confidence. If the conservative swing exhibited in the 1994 election and the centrist swing of 1996 persist, it seems likely that inhibitions that have been felt by some conservative and moderate students will abate substantially. If governing boards can be persuaded to let academics make the academic decisions, we can avoid the imposition of excessive restrictions from above. If those, both on and off campuses, whose rigidity leads them to find no merit in any views contrary to their own can somehow be persuaded to a modicum of flexibility, progress will be made towards a climate in which all sides of all issues are explored. If university administrators come to understand the critical importance of the free marketplace to the educational mission of the institution, they will opt more often for boldness rather than timidity, for speech rather than peace. Even if all the "ifs" become realities and we work together, the fact is that we remain human and subject to frailties. Thus, the ideal will remain just that, but the joy of seeking it will continue.