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Political Correctness Askew: Excesses in the Pursuit of Minds and Manners

Kenneth Lasson
University of Baltimore School of Law, klasson@ubalt.edu

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POLITICAL CORRECTNESS ASKEW:
EXCESSES IN THE PURSUIT OF
MINDS AND MANNERS

KENNETH LASSON

Political Correctness, n., the avoidance of forms of expression or action
that exclude, marginalise or insult racial and cultural minorities.

All I want of you is a little seevility, and that of the commonest
goddamnedest kind.
— Z. W. Pease, The History of New Bedford (1918)

Forgive us all our peccadillos.

With the fullness of time, when all has been said and done in both the
heat of the moment and the cooler perspective of experience, what has come
to be called "Political Correctness" will be revealed as little more than
passionate folly—merely another skirmish in the eternal battle for the minds,
hearts, and souls of humankind.¹

"There is nothing new under the sun," said the wise King Solomon;²
life is full of futility. And, indeed, such have been the lessons of history.

¹ Professor of Law, University of Baltimore. This Article is the third in a trilogy
of excesses, following Scholarship Amok: Excesses in the Pursuit of Truth and Tenure, 103
HARV. L. REV. 926 (1990) and Feminism Away: Excesses in the Pursuit of Rights and Trifles,
42 J. LEGAL EDUC. 1 (1993). As with those two pieces, any uninteresting or unnecessary
footnotes should be blamed squarely on the editors who, while congenial and competent, have
insistently obeyed their own gods of political correctness—blindly "Bluebooking" every
paragraph, sourcing every sentence, tweaking every jot and tittle into some bizarre revelation
of citation conformity. (I am not without fault: for an excess of my own, see Kenneth
Lasson, Lawyering Askew: Excesses in the Pursuit of Fees and Justice, 74 B.U. L. REV. 723
(1994.).) I’d like to thank my research assistant, Jill Loper, for her unflagging civility in
helping me plumb the depths of political correctness.

² Ecclesiastes 1:9. Solomon himself was a model of majestic rectitude, although
modern feminists might divine a hostile environment among the extensive collection of
women in his court.

689
There is nothing new about PC, either, except perhaps the futility of defining it. Nor is it a passing fancy: like religion (and despite the dictionary), the modern-day manifestations of PC mean very different things to very different people.

Nowadays the presence of PC has gone beyond mere speech, and is felt in everything from parlor games to grocery shopping, from spectator sports to legislative drafting, from choosing an overcoat to schmoozing in the office. Thus Scrabble-players can no longer score points with certain words; politically correct butcher-shops should not sell veal; football teams nicknamed "Redskins" are considered racist; law-makers must comb their codes to remove all masculine pronouns; PC fashion-setters continue to shun fur coats and alligator shoes; and jokes at the watercooler have to be gender-neutral.

3. See Jeff Lyon, Word Police, CHI. TRIB., Oct. 9, 1994, at C10. The latest Official Scrabble Players Dictionary has correctly deleted such racist epithets as "wop," "spic," and "nigger." Also expunged, though, are words like "gyp," "welsh," "redneck," and "squaw"—said to offend, respectively, Romany-Americans (formerly gypsies), people from Wales, Appalachians, and Native Americans. Such well-mannered civility raises sticky questions among seasoned Scrabblers (not the least of which may be that "gypsies" is worth a minimum of 89 points if placed on a triple-word-score square). Tournament-level players are permitted to escape this kind of troublesome semantic dilemma by using an unabridged version of the official Scrabble Dictionary. Id.

4. See William Schmidt, Britons on the Barricades, on Veal Calves' Behalf, N.Y. TIMES, Jan. 13, 1995, at A4. Some have seen their beef boutiques firebombed by groups like the "Animal Liberation Front." Id. To be sure, even non-vegetarians might recoil at the thought of caged calves being force-fed a diet of milk and meal so that their meat will be whiter and more tender. More benign, perhaps (but no less important to their protagonists) are campaigns by various vegetable-liberation fronts against the use of nonunion labor to pick crops like lettuce or grapes. See, e.g., Amy Yannello, Unions taste success after bitter years, THE BUSINESS JOURNAL (Sacramento), Apr. 1, 1996, at 17.

5. Carol Innerst, 'Political correctness' gets a presidential chastising, THE WASH. TIMES, May 6, 1991, at A1. Likewise taboo are Indians and Braves. A Harvard University history professor was charged with racism for using "Indian" instead of "Native American" in a lecture. Id. He blamed "tenured radical[s]" hostile to any speech not "properly on the left," and "minority students . . . placed through affirmative action in institutions where they're not doing very well." Id. Similarly, various women's sports teams have abandoned their old names as sexist, such as Maryland's erstwhile "Lady Terps." The rap on the University of Pennsylvania's "Fighting Quakers," however, may have more to do with the oxymoronically-challenged than with political correctness.

6. MD. CODE ANN., STATE GOV'T § 2-1317 (1984). The Maryland General Assembly spent a great deal of taxpayers' money to rid its Annotated Code of all gender-specific pronouns, particularly the patriarchal he and his.


8. Additionally, jokes also must be gender-neutral in the faculty lounge, factory
Biblical values, meanwhile, cascade around us in gay confusion. What would King Solomon think of the American military’s current policy on sexual orientation (“don’t ask, don’t tell”)? It used to be okay for Uncle Sam to want you—so long as you didn’t want Uncle Sam.9 Now, no one knows for sure.

In the past several years, countless words have been spoken and written on the subject of Political Correctness, from a diatribe by the Prince of Wales10 to a commencement address by the President of the United States,11 from interoffice memoranda to best-selling books.12 Indeed, PC has become the “cliche of the decade,” perhaps journalism’s most overused and underexamined catchword.13

In the last year alone, revisionist PC historians have caused four different exhibits to close at the Smithsonian Museum and the Library of Congress.14 Slavery, Sigmund Freud, the atomic bomb, the war in Vietnam—each offended some group.15 The clash of ideas engendered by the PC movement has produced a philosophical furor over whether the group is more important than the individual, whether the sensibilities of minorities and women should be elevated over the freedom of expression, and whether “equality” should prevail over robust discourse. The debate has raised fundamental questions about nearly every aspect of culture and education.16

Whence the intrusion of political correctness into the American psyche? Although the term was used in mid-century by the communist apparatchik
to describe party-faithful comrades, it did not become part of the general vernacular until the 1960's—and even then it was the exclusive province of academics and intellectuals. Then, PC was generally considered a favorable concept, usually aimed at "raising consciousness about parts of our vocabulary that are saturated with implicit racism and sexism."17

Somewhere along the way, however, the line between consciousness-raising and common sense was grievously breached.

In time, many liberals came to use "politically correct" in self-mocking reference to those among them who had become obsessed with semantics, then to disdain PC completely as exclusive to the radical agenda.18 Conservatives, meanwhile, had converted the phrase to their own purposes, in the process poking fun at the Left's fanaticism over words.19 Nowadays—politics, as always, making strange bedfellows—both ends of the political spectrum regard PC talk as "an effort to save souls through language."20

The saviors, as it turns out, often become harassers themselves, imposing their own value agendas on everyone else. Political correctness has become a force all the more subtle and pernicious, as a London Times editorial put it, "because it pretends to liberalism and tolerance: the greater inclusion of women, the acknowledgment of the worth and achievements of minorities and other races, the refusal to condemn."21

Most such concerns are reflected in language, which is now officially if not unalterably askew. What began as an effort to diminish racism and sexism has turned into an orgy of Orwellian Newspeak. People are no longer "handicapped" or even "disabled," but physically challenged.22

School lunch menu-planners have become nutritionists, garbagemen have become sanitation workers, and janitors have become maintenance engineers.23

17. Morley, supra note 13, at C4 (quoting Stanley Fish, a literature professor at Duke University and perhaps the prime poobah of the modern PC movement). The first major feminist to use the term was Karen DeCrow, who as president of the National Organization of Women in 1975, stated that her group was moving in an "intellectually and politically correct direction." Id.
18. Id.
19. Id.
In less than half a century, dark-skinned Americans have traveled almost full circle in the name of PC: from “colored people” to “negroes” to “blacks” to “Afro-Americans” to “African-Americans” and, most currently, to people of color. Such arcane but scratch the surface of the word- and thought-policing that has evolved almost helter skelter over the past two decades.

Perhaps most powerful among the neolinguists are radical feminists, who with due gravity have turned chairmen into chairs, manage into womanage, and history into herstory. Thanks to PC practically all girls and ladies have become self-made women—or wimmin, womyn, or womyn, each of which is now an accepted usage according to the pre-eminent Oxford English Dictionary, together with their singular counterparts wofem, womban, womon, womyn, woperson, and person of gender. “Manholes,” on the other hand, are now correctly maintenance hatches, “manpower” should be human resources, “man-made” means artificial, and “manslaughter” is actually personslaughter.

The Los Angeles Times form book has deleted the words “deaf,” “handicapped,” and “illegal aliens.”

24. As in the yet-to-be-renamed National Association for the Advancement of Colored People.


Even I must admit that feminist stereotyping can be dangerous. For example, the WMW (White, Male, Wester) label pinned on my in the following article, Cheryl B. Preston, It Moves, Even If We Don’t: A Reply to Arthur Austin, The Top Ten Politically Correct Law Reviews, 63 TENN. L. REV. 735 (1996), is as uselessly fuzzy as if I were baldly to brand Professor Preston with a WFW. As she herself suggests, I am sometimes anti-traditional. See Preston, supra, at 742. More accurate acronyms are available for each of us. I am Jewish (Traditional at that), Artistic (having published poems and sketches), White/Western (both Whimsies, alas, of birth), and Self-Confident (or Self-Congratulatory, both characteristics of law professors, see supra note 1; Preston, supra, at 736 n.11). Although I’ve never met Professor Preston, judging from her article she appears to be Verbally Inclined (“loquacious,” see Preston, supra, at 738), Counter-Traditional (id., passim), Intellectual (id.), Mormon (id. at 739 n.30), and Serious (see id. at 751). Other “JAWS” and “VICTIMS” should be reported to the Tennessee Law Review. In any event, I think I’d rather meet Cheryl Preston than Catherine MacKinnon, a radical feminist who once threatened me in print with “a fist to the face.” Catherine A. MacKinnon, Letter to the Editors, J. LEGAL EDUC. 465 (1992).

26. See text accompanying note 1.

27. See BEARD & CERF, supra note 22.
Sometimes even boys are non-surgically re-gendered—or emasculated, depending upon your PC perspective: children alternate gender in every other paragraph of Dr. Spock's Baby and Child Care.28

This particular phenomenon of foolishness, however, takes on a different meaning altogether when viewed in the context of constitutional law. Here we encounter numerous self-appointed arbiters of propriety, occasionally well-intentioned, but most of whom regard their own idea of what is correct as one that must be enforced by law or litigation. No longer is the governess of political correctness Emily Post, but Catherine MacKinnon is.29

What were once noble and defensible goals—brotherhood, good manners, sensitivity toward others (in short, civility)—have been forged into bludgeons of moral imperatives. Instead of being urged into membership in the Very Nice Society,30 we are coerced into joining the Party of Social Awareness. Instead of looking for common ground, we are forced to focus on past injuries. Instead of blending ethnicity fairly into a melting pot, we have allowed multiculturalism to boil over into a seething cauldron of conflict.

Even if the norm sought was nothing more than civility, it would still have to pass constitutional muster. Manners, after all, cannot be coerced—at least not in America, where the native concept of civil liberties protects the right to be offensive. Most efforts toward that end, whether legislative or judicial, have rightly been held to violate the First Amendment's guarantees of individual liberty and conscience.31

Too often, of course, the goal is not civility at all but its more insidious stepchild—power. That purpose, especially when it is camouflaged in the more subtle garb of Political Correctness, frequently results in the abuse of fundamental rights, not to mention the trampling of traditional values. Here one can reflect on both the truth and irony of the old adage that freedom requires eternal vigilance.

30. Kate Battersby, Thou shalt try to be A Very Nice Sport, THE DAILY TELEGRAPH (London), Mar. 23, 1994, at 38. There is in fact a Very Nice Society at Cambridge University in England, whose sole aim is to promote extreme agreeability. It has neither dues nor membership requirements. As it turns out, Prince Charles is also a member in good standing, the revelation of which created "a definite air of BFD" according to one British journalist. Id. ("And if the Prince . . . is uncertain as to what that particular set of capital letters stands for . . . the first word is 'big' and the third word is 'deal'. [sic] The second word is almost certainly outlawed by The Very Nice Society.").
31. The Supreme Court does sometimes draw a line, however, between offensive speech and expressive conduct. Indecent exposure, for example, has yet to be held protected on First Amendment grounds. See, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); Fox v. Washington, 236 U.S. 273 (1915).
Though the pursuit of civility and the protection of constitutional rights need not be mutually exclusive, they have come into conflict with increasing frequency. When that happens the appropriate standard to be applied need be neither vague nor unfathomable, but requires little more than application of the simple wisdom embodied in the language of the Founding Fathers.

What was politically correct for them, after all, was vigorous political debate in a free and open marketplace of ideas. That which is abhorrent will fester if suppressed, according to traditional First Amendment theory. Noxious speech is one price we have to pay for freedom of expression.

Examining the origin, evolution, and modern context of Political Correctness—and why it is so widely invoked by opposing elements along the political spectrum—can be a surprisingly challenging task. But fathoming the depths of the PC debate becomes an important undertaking if we are to accord the First Amendment the unique and thoughtful deference that it most assuredly deserves.

This Article will examine current PC cases and controversies, address how they conflict with (or should be governed by) constitutional principles, and suggest appropriate responses available to a democratic society seeking a fair balance between the rights of the individual and the welfare of the group.

I. THE ACADEMY AND THE CUTTING EDGE: CURRENT CASES AND CONTROVERSIES

[The professor’s] crime, it seems, was that . . . [h]is book was not written in the “inclusive” language that is gender-neutral; he had not taken into account the modern principles that feminist historians have brought to the subject; and he had failed to appreciate the importance of social history . . . . In short, he was a right-wing chauvinist, insensitive to the new politically-correct culture.

— London Times (on the decision by Oxford University Press not to publish a work it had commissioned)

32. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes. J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment."); see, e.g., Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 26 (1970) (suggesting that the Framers thought speech was special and democracy “meaningless without open and vigorous debate”). But cf. Kenneth Lasson, Group Libel vs. Free Speech: When Big Brother Should Butt In, 230 DUQ. L. REV. 77 (1984) (pointing out the failure of the theory in Nazi Germany during the early 1930s).


34. Academically Incorrect, supra note 21, at 17. The politically incorrect author was distinguished British historian John Vincent. Id. “If this case had blown up at a liberal arts college in California three years ago,” huffed the London Times, “British academics
Good intentions to redress good grievances are part of America's soul; however unsuccessful we have been in reaching a perfect democracy—including the fair and equitable governance of, by, and for the people—we never stop seeking it. Nowhere have the good intentions been more apparent than with the goal of education, from equality in the classroom to the ennobling of the human spirit.

But even after 150 years of social engineering—the Civil War, Reconstruction, separate-but-equal doctrines, desegregation, the civil rights movement, open admissions policies, affirmative action programs—education is still unequal and the human spirit somewhat less than ennobled by the institutional academy. True integration in American schools and universities is still largely an unrealized ideal. Likewise, although incidents of racism, anti-Semitism, sexism, and homophobia are still experienced mostly in the workplace, they also occur regularly on school campuses at all levels. Close to a million students report being harassed every year, and many of the cases go well beyond the bounds of simple speech.

Speech, however, is the crux of the conflict between political correctness and the Constitution. "Oppressive language does more than represent violence; it is violence," said Nobel Laureate Toni Morrison. That would have given a bemused shrug. Oxford, it has been assumed, is impregnable to the assaults of fad and foible." Id.

35. However, harassment less often results in legal action on the campus than in the workplace. A survey of Fortune 500 companies found that 90% of the companies had received sexual-harassment complaints; more than 30% of those companies had been sued; and 25% of the companies had been sued more than once. See BILLIE W. DZIECH & LINDA WEINER, THE LECHEROUS PROFESSOR xiv (2d ed. 1990); see also Carolyn M. Mitchell, Comment, The Political Correctness Doctrine: Redefining Speech on College Campuses, 13 WHITTIER L. REV. 805, 806 (1992) ("hate crimes instigated by intolerance for race, religion, ancestry or sexual orientation are increasing in great numbers"). Mitchell also points out that hate crimes are "spill[ing] over into America's university campuses." Id.

36. Stephen Goode, Campus Radicalism Lacks Mass Appeal, INSIGHT MAGAZINE, Feb. 1, 1993, at 12. At the University of Massachusetts, for example, a black resident-advisor was punched in the chest by a visitor after the RA had asked him and his friends to stop drinking. Id. The RA awoke the next morning to find racist slurs written in the hallway and feces outside his room. Id. The white students who had signed-in the visitor were forced to vacate their dormitory rooms, although they were allowed to continue attending classes. Id. Such incidents have become endemic: flyers distributed at Northwest Missouri State University stating, "The Knights of the Ku Klux Klan are watching you," William H. Freivogel, Two Forms of Intolerance are Clashing on U.S. Campuses, ST. LOUIS POST-DISPATCH, Oct. 22, 1991, at 1B; the letters "KKK" carved on the dormitory room of two black students at the University of North Carolina, Black students urge response to defacing of Gantt poster, Lexis/Nexis ARCNEWS Database, Sept. 28, 1990 (Regional News column); Asian-American students spat upon at the University of Connecticut, Mark S. Del Vecchio, Midel minority beginning to speak up; Shedding the image as 'model'; Eastern Roots: Asian-Americans in Connecticut, THE HARTFORD COURANT, Aug. 8, 1993, at A1.

philosophy has been embraced by a large number of American universities by way of stringent speech and conduct codes. According to a survey of 384 publicly-funded colleges and universities by the Freedom Forum First Amendment Center at Vanderbilt University, 231 such codes forbid "verbal abuse and harassment," and 108 codes prohibit "advocacy of offensive or outrageous viewpoints."  

At first promoters of PC on campus argued that incidents of hate crimes and sexual harassment could be diminished by the introduction of affirmative action programs, curricular reform, and speech codes, which, in turn, would increase gender and ethnic diversity among students and faculty, expand knowledge of other cultures, and heighten sensitivity toward minority groups.  

Traditionalists have been quick to point out, though, that such changes, particularly when they served to supplant (as opposed to complement) traditional norms, would lead to the "politicization" of universities and a lowering of standards needed to graduate.  

Regardless of who is more right, time and experience have amply illustrated the pervasive effect of political correctness on academia. Though in the beginning the academic PC movement infected only language, its proponents later began to identify and proscribe "politically incorrect" conduct and curricula. Along the way "deconstruction,"  

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39. See Mitchell, supra note 35, at 805-06.
40. Gertrude Himmelfarb, What to do About Education: The Universities, COMMENTARY, Oct. 1994, at 21, 23 [hereinafter Himmelfarb, What To Do About Education]. "The effect of this multipronged assault of affirmative action—in student admissions and faculty appointments—has been the Balkanization of the university. The traditional ideal of the university, as a community where professors and students are united in a common enterprise for a common purpose, has been replaced by the idea of a loose, almost amorphous, federation made up of distinct groups pursuing their special interests and agendas . . . ." Id.; see also Tom Fennell, The Silencers: A New Wave of Repression is Sweeping Through the Universities, MACLEAN'S, May 27, 1991, at 43 ("Some male professors say that forced hiring quotas are fracturing the university along gender lines." One professor called the process "tribalizing the university."); Michael Novak, Back to School, FORBES, Sept. 2, 1991, at 132 ("Diversity of viewpoint is extremely valuable in a democracy—but not when its components are kept hermetically sealed from one another in isolated enclaves"); Alexander Cockburn, Dangerous Diversions, THE NATION, May 27, 1991, at 690.
41. Zuckerman, infra note 44, at 64 (arguing that special programs for black students are not working). Law schools have also become "politicized." See Andrew J. Kleinfeld, Politicization: From the Law Schools to the Courts, ACADEMIC QUESTIONS, Winter 1993-94, at 9-19 (arguing that "the process of dispensing justice" is harmed by the politicization of law schools because judges are pressured into making decisions based on what is "politically correct"). Id.
42. See Wray Herbert, The PC Assault on Science, U.S. NEWS AND WORLD REPORT,
"multiculturalism," superscript 43 and "sensitivity training," superscript 44 were created and applauded, while "Eurocentrism," superscript 45 "traditionalism," superscript 46 and even modern science superscript 47 were denounced. Students are subjected to mandatory intensive "prejudice reduction workshops," superscript 48 and professors are hounded by "sexual harassment task forces." superscript 49

Western culture, at least as it is reflected in American or Enlightenment values, is variously scorned by both Left and Right. superscript 50 Traditionalists who deign to challenge the complete removal of "Eurocentric" classes and Western-based courses, as contrary to the purpose of fostering education, have become voices in the academic wilderness, superscript 51 as have those who question the value (and cost) of requiring students to take ethnocentric classes, superscript 52 or who claim that "sensitivity training" is at best forced politeness and, more often, simply futile. superscript 53

Politically correct overreactions, on the other hand, can cause great harm to character and career. For constitutional scholars, the abiding concern

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Feb. 20, 1995, at 64 ("The bottom line of deconstructive philosophy is that no text—neither Lord Jim nor a Cheerios box top—is privileged over any other . . . .")

43. See Cockburn, supra note 40, at 690 (stating that "multiculturalism" means race essentialism).


46. Id.

47. See Paul R. Gross & Norman Levitt, Knocking Science for Fun and Profit, SKEPTICAL INQUIRER, Mar./Apr. 1995, at 38.


50. Merle Rubin, Culture Wars: A Feeding Frenzy of Self-Identification, BALT. SUN, Nov. 19, 1995, at 1D.

51. See Goode, supra note 36, at 12. "[T]he country has lost] 'any sense of an integrated knowledge and experience'; everyone is separated into groups that don't speak to one another. Ideally, students should be 'taught within a context of the whole history,' and certainly not in fragmented segments. There are traditions that all Americans share, regardless of background" (quoting a "civil rights activist turned professor").

52. Id. at 12. Political correctness can be expensive: the University of Massachusetts funds several cultural centers where students can mingle with their own kind, not to mention countless other programs designed to "heighten and emphasize the diversity of the population on the 1,200-acre campus." Id.; see also Eric Konigsberg, UMass: A Visit to P.C. Hell, THE NEW REPUBLIC, May 31, 1993, at 14 (discussing the University of Massachusetts' programs).

53. "As at many other schools, it's not clear whether college sensitivity inflames or redresses racial tension." Konigsberg, supra note 52, at 14. Says the editor of the University of Massachusetts student newspaper: "There's been two decades of political correctness here and things only get worse." Id.
about PC has always been the stifling effect that coerced civility can have on both creative expression and academic freedom.

Where can/should the line be drawn?

The proper and civil responses to harassment of any kind would be to redress it within the bounds of the law, while remaining fully within constitutional principles of civil liberties (freedom of speech, press, religion, and assembly) and civil rights (due process, equal protection).

Consider the following stories, and ask how the troubling results might have been different had the prevailing standards been either traditional civility or constitutionality instead of what was viewed as politically correct.

The line to be drawn in each, it should become clear, is between speech and conduct.

A. Allegations of Sexual Harassment

Hostile Environments: Jell-O, Dave Stud, and the Naked Maja

In recent years there has been a noticeable upsurge in allegations of sexual harassment on campus, due in part to the large number of colleges and universities that have imposed sweeping speech and language codes, which in turn broaden the interpretations of what legally constitutes a “hostile environment” (discussed in Part II.B.).

At Pennsylvania State University, for example, an English professor claimed she was being sexually harassed by the presence of Goya’s famous painting Naked Maja in a university lecture hall. “[I]t’s a nude picture of a woman,” she said, “which encourages males to make remarks about body parts.” Although the painting had been hanging on the same classroom wall for at least a decade, it was removed as a result of her complaint.

At the University of Michigan, a student taking Introduction to American Politics was chastised for writing a paper in which he conjured up

54. See Arati W. Korwar, War of Words: Speech Codes at Public Colleges and Universities (1994). Many such codes are promulgated at state-funded schools. See id.


56. Id.

57. Id.; see also John Leo, PC Follies: The Year in Review, U.S. News and World Report, Jan. 27, 1992, at 22 (listing several examples of political correctness taken to the extreme) [hereinafter Leo, PC Follies]. Similar sensitivity occurs in other venues. In 1993 Vermont officials hung bedsheets over a mural in a state office building because of complaints by female employees that the painting, a depiction of Christopher Columbus landing in the New World which contained bare-breasted native women, constituted sexual harassment. Nadine Strossen, Defending Pornography: Free Speech, Sex, and the Fight for Women’s Rights 21-22 (1995).
a polling example featuring "Dave Stud." The paper was initially reviewed by a female teaching assistant, who found it to be sexually biased and contrary to the department's "Checklist for Nonsexist Writing." Her concerns were forwarded to the professor teaching the course, who agreed that the passage constituted verbal assault and harassment. She warned him against similar conduct in the future. Rather than run the risk, he decided to drop the course.

Of greater concern, perhaps, is what happens to unwittingly incorrect professors who find themselves accused of sexual harassment.

Take the case of James Maas, who has been teaching at Cornell University for 30 years and whose Psychology 101 is perhaps the largest undergraduate course in the country (attracting some 1000 students every semester). He has won numerous teaching awards.

In 1994 Maas was called before Cornell's "Professional Ethics Committee" to defend himself against charges of sexual harassment. The allegations centered around his "overly friendly and affectionate behavior"—which, it turns out, were hugs and occasional social kisses, most often in front of class or family.

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58. Language Censors, WALL ST. J., Jan. 5, 1993, at A14. The offending passage was this:

Another problem with sample polls is that some people desire their privacy and don't want to be bothered by a pollster. Let's say Dave Stud is entertaining three beautiful ladies in his penthouse when the phone rings. A pollster on the other end wants to know if we should eliminate the capital gains tax. Now Dave is a knowledgeable businessperson who cares a lot about this issue. But since Dave is "tied up" at the moment, he tells the pollster to "bother" someone else.

Id.

59. Id. The teaching assistant told the student:

This is ludicrous & inappropriate & OFFENSIVE. This is completely inappropriate for a serious political science paper. It completely violates the standard for non-sexist writing. Professor . . . has encouraged me to interpret this comment as an example of sexual harassment and to take the appropriate formal steps. I have chosen not to do so in this instance. However, any future comments, in a paper, in class or in dealings w/me will be interpreted as sexual harassment and formal steps will be taken. Professor . . . is aware of these comments -& and is prepared to intervene. You are forewarned!

[sic]

Id.

60. Id.
61. Id.
62. Id.
64. Id. at 11.
65. Id.
66. Id.
A “confidential” investigation ensued, Maas was found guilty, and he was given a token punishment. During the entire spring semester of 1995, however, the Cornell Daily Sun ran stories and cartoons depicting him as a sexual aggressor and took the university to task for not firing him. The affair soon found its way into The New York Times, Time Magazine, and The Chronicle of Higher Education, and was sent out over at least one wire service.

Although he never conceded any wrongdoing, Maas may have been willing to live with Cornell’s administrative slap on the wrist had it been kept in-house as promised. But now he felt that his reputation had been grievously and unfairly damaged, and he sued the university for $1.5 million. His case is pending.

Cornell in fact keeps a “locked box” of informal complaints lodged against faculty. Professors are not informed that such a file exists, much less told about potential grievances bubbling up against them. If a student decides to press formal charges against an offending professor—even years after the fact—the box is opened and its contents examined.

67. See Docket Report of the Center for Individual Rights (Aug. 1995). Could the fact that Maas was also a substantial fund-raiser for Cornell have had anything to do with the committee’s conciliatory tone? Its report said that “Professor Maas has had a long history of dedicated service to Cornell University and to students, faculty, staff and alumni. It is the university’s hope that with the conclusion of this proceeding that service will continue.” Id.; see also Tony Allen-Mills, American Men Push Back the PC Steamroller, London Times, Sept. 3, 1995 (Overseas News).

68. Hymowitz, supra note 63, at 12.
69. Id.
70. See id.
71. Id.
72. Id.
73. Id.
74. Hymowitz, supra note 63, at 1, 10-12. It is difficult to understand how such a procedure could be calculated to eradicate or inhibit sexual harassment, in view of the fact that the offending professor is never told of the complaints filed in the secret box.

John Aist, a science professor at Cornell, had the temerity to voice his opinion that homosexuality is a treatable disorder and was sanctioned for it. Heterodoxy, Nov. 1995, at 1. He too sued, and like Maas, awaits vindication in the courts while suffering ridicule on campus. Id.

Two similarly bizarre cases are currently pending in California. In one, a history professor at Los Angeles Valley College responded to an inquiry about extra course credit by saying that additional work was permissible, but he did “not accept credit cards or sexual favors.” The Defender, Jan. 1995, at 5. A female student (who attended only the first class) took those words as slightly too flip a comment, charged him with sexual harassment, and the college moved to discipline him. Id. In the other case, a creative writing instructor at San Bernardino Valley College assigned his class Jonathan Swift’s A Modest Proposal, and asked students to write an essay on pornography. Id. He was officially reprimanded, and ordered to undergo sensitivity training. Id.
Many professors, feeling the chill of PC, guard their every comment and gesture; Maas-like hugs would be out of the question. Others, who find themselves already caught in webs spun by students and administrators overzealously on the lookout for hostile environments, quietly resign themselves to various forms of censure and fade back into academic anonymity. Those who deign to challenge the system face years of litigation, which they are less prepared to undertake than the institutions on the other side.75

Professor Graydon Snyder of the Chicago Theological Seminary, for example, had to spend close to $75,000 of his own money to restore his reputation.76 Professor Snyder (who has been teaching and tenured for over thirty years) often uses an obscure Talmudic passage to illustrate to his classes the difference between Christianity and Judaism: “A roofer was blown off his scaffolding and landed atop a woman below—in the process accidently having sex with her.”77 According to the New Testament, said Professor Snyder to his unsuspecting minions, even if you only think about doing the act you’ve committed a sin; but according to the Talmud, if you had no intention of doing the act you’re not responsible even if in fact you did it.78

For this analytical insight Professor Snyder was brought before a “student-faculty sexual harassment task force”—which in 1992 charged him with sexual harassment.79 The Seminary subsequently placed him on probation, ordered him to write an apology and to enroll in a sexual-harassment workshop, and forbade him to be alone with students or staff members.80 In addition, Seminary administrators issued a formal reprimand, put notices in every student and faculty mailbox announcing that Snyder had engaged in sexual harassment, and assigned a school official to monitor his classes.81

75. Students at Swarthmore College accused the college's mental health center of having an "outmoded and insensitive approach" to matters such as rape and eating disorders. Marie McCullough, Swarthmore in '94?, PHILADELPHIA INQUIRER, June 22, 1994, at B1. After months of discussion, Swarthmore finally arranged a hearing by outside experts to evaluate student grievances. Id. The center’s director, wounded by what he perceived was a lack of support, resigned instead. Id. Students unhappy with the resignation went public with their complaints. Id. They were denounced by Swarthmore’s president, whom they accused of a cover-up. Id.
76. Telephone conversation with Professor Graydon Snyder, Chicago Theological Seminary (Jan. 24, 1996) [hereinafter Telephone conversation with Professor Snyder].
77. Id.
78. Id.; see also Ted C. Fishman, Kangaroo Campus, PLAYBOY, Oct. 1994, at 41.
79. Telephone conversation with Professor Snyder, supra note 76.
80. Id.
81. STROSSEN, supra note 57, at 28.
Snyder sued for defamation. "Academic freedom is the principle here," he said through his attorney.82 "[I]t is important for other professors around the country to know that their every word will not be reviewed by a cultural swat team."83

Realizing it would not likely prevail on the merits, the Seminary offered to settle out of court—provided Snyder would resign.84 He refused.85 Eventually, in early 1996, a settlement was reached, with a clause stipulating that neither side would publicly disclose its terms.86

The most notable example of a professor who stood his ground against sexual-harassment charges and won a very public apology is Donald Silva, a tenured member of the Communications faculty at the University of New Hampshire.87 When a student in his technical writing course asked for an example of a "working definition," Professor Silva fell back on a somewhat vulgar word-picture but one he had used many times before: "Belly dancing," he said, is "like a plate of Jell-O with a vibrator underneath."88 Within days he found himself accused of sexual harassment.89

The University of New Hampshire’s sexual harassment policy defines speech as sexually harassing if it "has the purpose or effect of unreasonably interfering with an individual’s work performance or creating a hostile or offensive working or academic environment ... whether intended or not."90 The offended party’s misperception, in other words, can be grounds for sanction.

Shortly thereafter, Silva was suspended from his job, ordered to pay the university $2,000 for a replacement teacher, and directed to undergo psychological counseling with a university-approved therapist.91 But the professor was not ready to end his thirty-five year teaching career, and certainly not under the stigma of sexual harassment. "I am not sick," he said, "and I am not going to give up my right to trial by jury."92 He filed

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83. Id.
84. Telephone conversation with Professor Snyder, supra note 76.
85. Id.
86. Id.
88. Id. at 299.
89. Id. at 300.
90. Id. at 298.
91. Marvel & Kessler, supra note 38, at IA. The complaining students said that this was not the first time Dr. Silva had made them uncomfortable by using sexual innuendos, such as when he told a woman on her knees rummaging through a card catalog that "It looks like you’ve had a lot of experience down there"—a statement she took as demeaning. He claims that he was merely lauding her studiousness." Id.
92. Id.; see also Eye to Eye with Connie Chung (CBS television broadcast, Apr. 7, 1994).
suit in federal court, arguing that dismissal of a tenured professor on the basis of statements made in class violates principles of academic freedom, federal statutes, and the First Amendment. He compared the therapy-order to brainwashing that might be done by a totalitarian regime bent on convictions for thought crime.

The court ultimately ordered Silva’s reinstatement. The university, which had already expended close to $200,000 in legal fees, chose to settle rather than appeal, and paid him another $250,000.

Silva’s triumph, however, is rare. Most of those similarly hounded appear to have considerably less gumption for litigation.

At Mankato State University in Minnesota, for example, members of the Women’s Studies department set up a group of student informants to watch out for any sexist, racist, or homophobic language in classroom discussions. Such a system breeds unfounded complaints, serves to suppress heretical views, and discourages fair hearings. This is what the law calls a failure of due process, and what has caused various speech codes to be struck down in the courts.

That professors must be ever more careful about what they say and how they say it is illustrated by numerous cases of classroom speech chilled by the specter of investigation. Several years ago at the University of Minnesota, four women students brought sexual harassment charges against all six members of the Scandinavian Studies department (including a female professor), complaining of such things as disagreeing with a student about the role of a female character in a story and greeting a student in a “nonsupportive” way. After an eight-month investigation, all the charges were dismissed as groundless. But the accused faculty members were profoundly shaken, describing the experience as “terrifying” and “totally demoralizing.”

Michael Krauss, a law professor at George Mason University, suffered a similar fate. During a class in 1993, he gave two examples of conduct

94. See Eye to Eye with Connie Chung (CBS television broadcast, Apr. 7, 1994).
95. Silva, 888 F. Supp. at 332.
96. His victory in court, however, has not stifled continued criticism. New Hampshire Representative Richard L. Cogswell, for example, wrote a blistering letter to a local newspaper, in which he asked: “SHOULD a tenured professor . . . at a major New England university, who is being paid by the parents and good taxpayers of the State of New Hampshire, be using sexually explicit language and metaphors, to teach young, impressionable, male and female students at UNH? The answer is NO!!!!!” Silva: Lesson Unlearned, Offender Unpunished, NEW HAMPSHIRE FORUM, Dec. 9, 1994, at 23.
98. Id.
99. Id. at 114 (referring to Hamilton).
100. Id. at 114-15.
101. Id. at 115.
that might constitute the tort of assault. One involved a demonstration in front of a Holocaust survivor's home, where a group of neo-Nazis advocated Hitler's "Final Solution." The other was about a Ku Klux Klan cross burning outside the house of a newly-arrived Black family, where hooded Klansmen shouted "Kill the Niggers!" Several faculty colleagues and twenty students—none of whom had attended the class—filed a complaint with the dean, demanding that Kraus apologize. The media were also notified. Three full-scale investigations (one of them by the Civil Rights Division of the United States Department of Education) over a two year period yielded no evidence of racial discrimination. There was no counting how many hours Kraus had to spend defending himself, nor telling the effect it had on his career.

In 1993, a group of female law students threatened Professor Alan Dershowitz with formal charges of sexual harassment for having created a hostile atmosphere during two days of classroom discussion about men falsely accused of rape. According to Dershowitz, many professors avoid teaching classes where issues of race, gender, or sexual preference might arise.

Unfair claims of discrimination often take on lives of their own, well beyond the ability of the alleged offender even to apologize. Murray Dolfman, a lecturer at the University of Pennsylvania, was talking about "involuntary servitude" in his legal studies class. He commented that while he, as a Jew and a descendant of former slaves in Egypt, celebrated Passover, there were few if any Blacks who celebrated the passage of the Thirteenth Amendment.

Several minority students accused him of racial insensitivity. Dolfman apologized. Some time later, however, during Black History Month, the incident was raised repeatedly to support the claim that racism is endemic at the University of Pennsylvania. The university president Sheldon Hackney (now head of the National Endowment for the Humanities) reprimanded Dolfman and initiated an investigation. Students disrupted
Dolfman again apologized. About 200 students occupied Hackney's office, demanding the professor's dismissal. Hackney suspended him for a semester, and ordered him to undertake sensitivity training.

Words and Phrases: Bimbos, Hussies, and Streetwalkers

Although not one campus speech code has survived a test in court and a few have been rescinded or modified, many such rules and regulations continue to be promulgated and administered. The enforcers are often radical feminist students and professors, whose sometimes blunderbuss approach frequently shoots down more than idle or boorish racist and sexist comments.

The University of Connecticut's ban on all "inappropriately directed laughter and conspicuous exclusion of students from conversations," for example, is a good illustration of impossible expectations camouflaged as good intentions. Can students at UConn shun a hate-mongering bully—or a classmate who has bad breath?

Words can and do offend, but they take on different meanings in different contexts. To PC guardians, however, the determinative test is whether the words have ever offended anyone.

At the University of Minnesota, official definitions of sexual harassment may include such vague crimes as "callous insensitivity to the experience of women." Nowadays (as the cases above illustrate) such insensitivity can be evidenced merely by a professor's choice of language.

At the University of Baltimore School of Law, a professor was chastised by a female student for having used the word "whore" to describe some consultants who testify as expert witnesses. Luckily for him the student (who was president of the school's Gay & Lesbian Student Bar Association) chose not to charge him with sexual harassment. Suppose, however, that the same professor had (a) asked a hypothetical in class concerning the size of Dolly Parton's chest, (b) used the name "Chas. Tittybelt" on an exam.

116. Id.
117. Id.
118. Id.
119. Id.
120. Id. at 77.
122. Strossen, supra note 57, at 132.
123. She apparently was satisfied with spending the remainder of the class writing a long memorandum to the offending professor (wasting both her time, he says, and his).
question, or (c) wrote a casebook mentioning a fictional lingerie store called "Tanks for the Mammaries"?

Many words have perfectly innocent origins, but no self respecting feminist would permit their use in any venue except perhaps a formal allegation of sexual harassment. Consider, for example, the terms "bimbo," "hussy," or "streetwalker." In the modern vernacular they often appear as *dumb bimbo* (referring to a vacuous sexpot), *brazen hussy* (a forward, overbearing matron), and *common streetwalker* (a prostitute). "Bimbo," on the other hand, is derived from the Italian "bambino" (baby). "Hussy" was born into the King's English as the affectionate British

124. As the reader might surmise, the suppositions are not entirely speculative. To wit:

(a) At a UB symposium on sexual harassment, a student complained about the Dolly Parton hypothetical (giving no other facts than those presented here). One of the expert panelists responded immediately by saying, "That's a no-brainer. The professor should be fired on the spot." She did not take kindly to being challenged by the dean, who asked if a law school didn't owe its students an obligation to teach about due process, much less question the context of the offensive hypothetical before rendering a judgment.

(b) Law professors are well known for using titillating names in their exam problems. This one is courtesy of a UB professor who for purposes of this Article wishes to remain anonymous. Bar examiners are less reticent. The February 1994 California bar exam contained an essay question taken from a real case about a landlord's male agent sexually harassing a woman tenant by asking her, "How many times did you get laid last week?" and "How'd you like to have this big sausage?" accompanied by a gesture to his groin. A Sexual Harassment Question Spurs Complaint Over Bar Exam, NAT'L. L. J., Mar. 21, 1994, at A6. A woman law graduate filed a formal complaint. *Id.* The chairman of the California bar committee responded by saying, "The goal is to replicate problems lawyers are going to face in real life. We don't seek to offend anyone." *Id.*

(c) The "Tanks for the Mammaries" lingerie shop was created by a law professor at North Carolina to "keep his classes interested." He is currently in private practice at a law firm "known for its political incorrectness." (Telephone conversation, Dec. 20, 1995. I'll supply the name if requested.)

125. *Saturday Celebrity,* BOSTON HERALD, July 1, 1995, at 9 ("Not too many men have wised up to worldly women," said comedienne Roseanne Barr. "They want the dumb-bimbo blondes . . . ").

126. See, e.g., Nina Martin, *Farewell Perfect Breasts,* HEALTH, Sept. 1995, at 82 ("In popular as well as feminist dogma, women who get implants are either brazen hussies or pathetic neurotics under the thumb of men . . . ").

127. See, e.g., Reagan Upshaw, *John Bellany at Terry Dintenfass,* ART IN AMERICA, May 1995, at 114 ("The fatal woman of the Romantics, the Lola of the Victorians, is still with us, though often reduced to a common streetwalker."). The preferred occupational title for prostitute is now *sex worker.* BEARD & CERF, supra note 22. "Prostitute" is said to be judgmental and difficult to define without including wives, who "also exchange sexual services in return for support." *Id.* Other terms to note include "sex care provider," "sexual surrogacy," and "persons presenting themselves as commodity allotments within a business doctrine." *Id.*
diminutive for “housewife.” And “streetwalkers” have been considered in quite different lights by different courts.128

While circumspect professors nowadays would likely think twice before using words they know will be taken by some to be offensive, can they be prevented from doing so? Should they be?

Double Standards and Situational Ethics: Battered Women and Biscuits

Under the new conduct codes it becomes awkward to engage in campus humor (however sophomoric) or challenge reverse discrimination (however blatant).

There was an uproar, for example, when the University of Baltimore law school’s student newspaper published a cartoon of a woman on a bakery table being doused and powdered by a baker, the caption underneath reading: “Every fourteen seconds a woman is battered somewhere in the United States.”129 The paper happened to appear during “Domestic Violence Awareness Week” in Maryland. A number of women students were outraged, and staged a rally on the law school’s plaza during which the offending cartoonist was roundly excoriated.130

Given the paper’s arguably questionable taste and poor judgement, to what extent could the offensive humor have been tolerated?

In 1991 a fraternity at George Mason University staged an “ugly woman contest” as part of a series of events whose proceeds went to charity.131

128. The author’s familiarity with at least two of these terms stems from my own brief encounters with PC I once took some flak for suggesting that an out-of-the-closet chauvinist friend name his Maryland-bred filly “Uppity Bimbo.” (I liked the rhythm of that name then, and still do. Uppity Bimbo won a few races, too, against male competition.) Also early in my law-teaching career I was chastised by a feminist colleague for illustrating how to use the legal-bibliographical tool WORDS & PHRASES by having my students research the word “streetwalker.” Some notable women themselves have come to admire streetwalkers. “They are goddesses,” says renegade feminist Camille Paglia. Roger Clarke, Pagan Deities in Drag, THE INDEPENDENT, Apr. 1, 1995, at 26. Political correctness has also caught up with James Bond, the master chauvinist whose track record with women has outraged feminists for decades. “Gone are the bikini-clad bimbos in the latest Bond adventure Goldeneye.” See Martina Devlin, Bond’s Goldeneye is Still on Girls—But Bimbos Are Out, PRESS ASSOCIATION NEWSFILE, Jan. 22, 1995.

129. University of Baltimore Law School student newspaper on file with the author.

130. The offending cartoonist’s protestations that he was actually trying to raise sensitivity to the abuse issue drew waves of derisive scorn. None of the women present would likely have believed G. K. Chesterton, either, who once observed: “It is true there are many very polite men, but none that I ever heard of who were not either fascinating women or obeying them.”

131. Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993).
Various fraternity members dressed up as caricatures of different types of women. The stereotypes were offensive to a number of students and administrators. The fraternity was suspended from all activities for the rest of the semester, and given additional sanctions (including the requirement that it develop an educational program addressing cultural differences and the concerns of women).

That the fraternity went to court and won was a bitter pill for the aggrieved students to swallow, but how much of their discomfort stemmed from the traditionally chauvinistic behavior of college men? Would the same women students have been offended by the film *Coming to America*, in which Arsenio Hall plays a Black preacher who whinnies out among a course of amens, "*Girl, y'looks so good I'd like to put y'on a plate and sop y'up with a biscuit!*"?

Such situational ethics manifest themselves most clearly in rarely reported "reverse discrimination." At California State University in Sacramento, for example, a woman professor regaled her mixed-gender class in psychology with "tales of sexual exploits, illustrated the lecture with close-up photographs of genitalia, extolled the bliss of autoeroticism, and invited students looking for the perfect Christmas gift to stop by her office after class for copies of a sex-toys catalog." A number of male and female students charged the professor with having created a sexually hostile classroom environment in violation of the university's harassment code, which prohibits both explicit sexual statements and pictures. University administrators, however, declined to press the matter, declining even a reprimand.

Similarly seldom challenged are women's groups, classes, or events that exclude or discriminate against men. Every year, for example, the Ms. Foundation for Women sponsors a "Take our Daughters to Work Day." However, parents of boys complained that their sons were being excluded from such an important national event. But many women argued

132. *Id.* at 388.
133. *Id.*
134. *Id.*
137. *Id.*
138. *Id.* One member of the faculty responded to the students by telling them to "grow up." *Id.* The professor's lawyer dismissed the complainant as a prude and his complaint as "fundamentalist Christian McCarthyism." *Id.*; see also 20/20: *The Speech Police—Is Sexual Speech Sexual Harassment?* (ABC television broadcast, May 12, 1995).
140. *Id.*
against the inclusion of boys on the grounds that they are constantly exposed to role models and opportunities that "girls just don't enjoy." 141

Over Here, Over There: The Danger of Platonic Love

The current PC climate has also served to chill campus romance. Antioch University's celebrated "sex code" requires that partners ask specific permission before engaging in any physical contact—for example, "May I kiss you?" and "May I put my hand there?" 142 Amorous Antioch students are reported to circumvent the code by agreeing verbally to "activate the policy." 143

There once was a time when hugging and kissing—the polite embrace or peck on the cheek—was as much a matter of civility as the tip of a gentleman's hat. Now any such behavior, especially when it happens on campus, could well evoke litigious visions of a hostile environment if not actually invite a charge of sexual harassment.

"Gifts such as candy or flowers, while they may suggest 'fondness' for the woman, are actually a vehicle for rendering the woman submissive, dependent and obliged." 144 "Similarly, treating a woman to a candlelight dinner is really an offer to exchange an economic reward for sexual favors—in other words, prostitution." 145 Romance, according to Andrea Dworkin, "is nothing more than 'rape embellished with meaningful looks.'" 146

Such pre-emptive feminist strikes are by no means limited to American campuses. The University of Western Ontario has a code of conduct which makes sexist humor and language grounds for complaint. 147 The code provides for hearings which could ultimately lead to a professor's dismiss-

141. Id. Those who might ask why "Career Day for Girls" is held during the school year instead of during summer recess just don't get it. One businesswoman commented, "The idea of the day is so much more than a career day. It's specifically designed to reverse the negative messages that girls get: messages that they should be pretty and thin, quiet and polite." Id. (emphasis added). Apparently, this woman believes that girls should be fat and ugly, loud and rude.

The double standards do not seem to bother most people. Men are mostly bemused, rather than insulted, by the popular poster that reads, "If you want the job done right, get a woman to do it." How long would such a poster last were "woman" changed to "man"?


143. Id.; see also Dirck, supra note 25 and accompanying text.

144. Id. (quoting Sue Rosenberg Zalk).

145. Id. (quoting University of Colorado Professor Alison Jaggar).

146. Id.

147. Fennell, supra note 40, at 40, 42.
al. 148 At the University of Toronto, a professor of chemical engineering was convicted of sexual harassment in 1989 because of his “prolonged and intense staring” while swimming in the university pool. 149 At the University of Waterloo, faculty and teaching staff carefully guard their words to avoid anything that might be considered anti-feminist, anti-homosexual, or anti-minority. 150 “Some professors say that if they even mention an author’s sexual orientation during a discussion of his work, they could leave themselves open to attack.” 151

Wollongong University in Australia has “a policy that forbids not only student-teacher sex, but platonic love as well.” 152 Cornell’s hugging professor James Maas 153 wouldn’t stand a chance Down Under. 154 Neither would Post-structuralist literary critic Jane Gallop, who was accused of sexual harassment by two women students for flirting with them, and kissing one of them on the mouth; 155 nor would the international politics faculty at Beijing University, which was told by the Chinese Education Ministry to focus on Marxism and stop their lucrative sideline of selling women’s underwear. 156

The pernicious nature of such political correction is best illustrated by its absurd extremes—no better example of which is the University of Connecticut’s aforementioned code banning “inappropriate laughter and conspicuous exclusion of students from conversations.” 157

Thus again does it become clear that the most sensible line to be drawn is between speech and conduct.

B. Allegations of Discrimination

First Amendment problems are also presented when aggrieved parties or their advocates make charges of discrimination based on race or ethnicity and rely upon the new conduct codes for enforcement of sanctions.

Sombreros, Water Buffalo, and Inappropriate Laughter

148. Id.
149. Leo, PC Follies, supra note 57, at 26.
150. Fennell, supra note 40, at 41.
151. Id. at 42.
153. See supra notes 63-72 and accompanying text.
154. See Schine, supra note 152, at 82.
155. Id.
156. Id.
157. Carroll, supra note 121.
A fraternity at the University of California was disciplined for violating the "high moral and social standards of the Greek community on campus" because it designed a t-shirt showing a cartoon figure of a man holding a beer and wearing a sombrero.\(^{158}\) The caption on the t-shirt read, "It doesn't matter where you come from, as long as you know where you are going."\(^{159}\) The campus Hispanic organization found this to be a racist slur against Spanish people.\(^{160}\) The fraternity defended itself by explaining that the T-shirt was part of an effort to promote and celebrate a South-of-the-Border party and, as such, had been designed by a Hispanic member of the fraternity, and that, in fact, twenty-two of its forty-seven members were Hispanic.\(^{161}\) The university nevertheless suspended the fraternity for three years and directed its members to attend sensitivity-training sessions.\(^{162}\)

Perhaps the most infamous example of political correctness gone askew occurred in 1993 at the University of Pennsylvania. Eden Jacobowitz, an Israeli-born undergraduate, shouted, "Shut up, you water buffalo!" at a group of five Black sorority sisters who were making loud noises outside his dorm window late at night.\(^{163}\) The women complained to campus authorities, who charged Jacobowitz with racial harassment under Penn's hate-speech code, and threatened him with expulsion.\(^{164}\) Despite Jacobowitz' explanation that the particular epithet he used was the translation of the Hebrew word "behemah" (slang for "obnoxious person"), a host of scholars was assigned the task of locating the term's racial antecedents.\(^{165}\) They couldn't, but the university found "water buffalo" to be racially offensive.\(^{166}\) The university offered to drop proceedings against if Jacobowitz would admit his guilt and allow himself "to be re-educated" through a "program for living in a diverse community environment."\(^{167}\)

\(^{158}\) Nat Hentoff, Sombrero Scrap, WASH. POST, Jan. 1, 1994, at A23.
\(^{159}\) Id.
\(^{160}\) Id.
\(^{161}\) Id.
\(^{162}\) Id. The fraternity went to court, citing both the First Amendment and a provision of the California Code prohibiting sanctions on the basis of speech. The court ordered the university to reinstate the fraternity, and various administrators to undertake "First Amendment sensitivity training." Id. At the University of Florida, a sorority held a fund-raising event to benefit poverty-stricken children. The sorority sisters planned to do stepdancing, but backed down when the president of the National Panhellenic Council ordered the African dance "not to be imitated." Dave Gentry, A Few Hopeful Signs This Year Amid the Usual Campus PC, WASH. TIMES, July 5, 1995, at A17.
\(^{163}\) See Buffalloed, TIME, Nov. 29, 1993, at 67.
\(^{164}\) Id.
\(^{165}\) Id.
\(^{166}\) Id.
\(^{167}\) Id.; see also Charles Krauthammer, Defining Deviancy Up, THE NEW REPUBLIC, Nov. 22, 1993, at 20, 24-25. Jacobowitz has since sued the university for damages. Speech Suit, USA TODAY, Apr. 8, 1996, at 3A.
At DePaul University, a private Catholic school, the student newspaper ran an allegedly racist article about a fight at a Black fraternity.\textsuperscript{168} Black student activists shredded 3,000 copies of the newspaper and took over its offices.\textsuperscript{169} The president of the university decided to shut down the paper for two weeks, provide tutors for the protesters, and appoint an outside consulting firm to monitor future articles involving minorities.\textsuperscript{170}

A white professor at the predominantly Black Florida A & M University was punished for saying this to his class: “What I want you to be aware of is that in this day and age, a person . . . who doesn’t take advantage of the opportunities that are there, or who doesn’t make opportunities . . . may be guilty of what some would call ‘a nigger mentality’—the sort of thinking that can keep us all on the back of the bus forever.”\textsuperscript{171} Several students contended that the remark was “derogatory,” “unethical,” and “inappropriate.”\textsuperscript{172} Although the professor apologized, he was nevertheless suspended for two weeks without pay.\textsuperscript{173}

Similarly, the University of Arizona has a “Diversity Action Plan” which deals with discrimination against students because of “age, color, ethnicity, gender, national origin, physical and mental ability, race, religion, sexual orientation, Vietnam-era veteran status, socio-economic background or individual style.”\textsuperscript{174} In response to a telephone inquiry, a “diversity specialist” stated that “individual style” would include “nerds and people who dress differently” because the school “didn’t want to leave anybody out.”\textsuperscript{175}

At Harvard University, a new conduct code prohibits “unwelcome” speech whose “effect” might create an “offensive working or educational

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\textsuperscript{168} Gentry, supra note 162, at A17.

\textsuperscript{169} Id.

\textsuperscript{170} Id. Does true racism require that the speaker have power? At the University of Cincinnati—whose official administrative handbook states that only white people can be racist—students at a rally supporting the Persian Gulf War shouted racial insults at a group of Arab students. Leslie A. Horvitz, Public-Interest Law Center Fights Political Correctness, WASH. TIMES, Nov. 6, 1995, at 16. The university did not know what to label the one black student spotted in the crowd. Id. An Egyptian student suggested calling him a “European-influenced African.” Id. Professor Robert Lande of the University of Baltimore relates a similar story. When he was a student at Harvard a comment was made that “only whites can be racist.” A schoolmate from Singapore (many of whose citizens are of Chinese descent) reacted with incredulity; in his country, he explained, the saying is that “if you see an Indian and a snake and have but one bullet you shoot the Indian—because snakes aren’t as dangerous.”

\textsuperscript{171} Horvitz, supra note 170, at 16.

\textsuperscript{172} Id.

\textsuperscript{173} Id. After a hearing in federal court, the school later agreed to revoke what remained of his suspension. The case is still pending. Id.

\textsuperscript{174} Leo, PC Follies, supra note 57, at 22, 26.

\textsuperscript{175} Id.
Even before it was adopted at the end of last year, two white medical students were formally chastised for having celebrated Halloween by painting their faces black and dressing as Anita Hill and Clarence Thomas. Their punishment: to draft and submit a syllabus and bibliography on medicine in a multi-ethnic society.

A similar incident happened at the University of California at Santa Cruz, which was planning a dinner featuring Asian food. An Asian staff member noticed that the date for the dinner coincided with Pearl Harbor Day, and suggested that the menu be changed and the date postponed. Her suggestion was adopted. Students then staged demonstrations and wrote letters claiming the administration was racially insensitive, grouping all Asians together and thereby implicitly blaming them for the actions of their distant ancestors. There were several resignations, and lawsuits were filed on both sides.

In each of the above cases, had the distinction been made clearly between offensive speech and conduct—protecting the former, prosecuting the latter—the legal entanglements would have been significantly diminished and, moreover, the goals of sensitivity and inclusiveness may have well been achieved to a greater degree.

C. Attacks on Traditional Teaching

Classicists, Patriarchs and Eurocentrists

"The reason that academic politics are so sordid," said an anonymous but insightful professor, "is that the stakes are so low."

Political correctness may be on the run in the pop culture of radio talk, but it is no laughing matter in the Ivory Tower. Though scarcely reported by the media, hundreds of American colleges and universities, from the backwoods of Appalachia to the august quadrangles of the Ivy League, are currently engaged in an entrenched battle over the nature and development

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177. Id.
178. Id. The Harvard code would be eminently subject to challenge for its unconstitutional vagueness or overbreadth—were it not for the saving clauses tacked on at the end: "No speech or combination of speech and conduct shall be deemed violative of this guideline if it is reasonably designed or intended to contribute to legal or public education, academic inquiry or reasoned debate on issues of public concern or is protected by the Massachusetts Civil Rights Act or the First Amendment."
180. Id.
181. Id.
182. Id.
183. Id.
of the curriculum. At many of them, traditional teachings of Western civilization have been supplanted with compulsory feminist-oriented and "Third-World" courses.\textsuperscript{184}

Middle Tennessee State University, for example, created a "Committee for Curricular Transformation," which in short order distributed a "gender consciousness-raising questionnaire."\textsuperscript{185} One of its eighty-six questions asked "whether women and men mentioned in the course material were (a) treated separately and not compared; (b) described both separately and comparatively; (c) described both separately and comparatively, stressing interrelationships, or (d) described both separately and comparatively, stressing interrelationships and changes over time."\textsuperscript{186}

Florida State University no longer requires that English Literature majors take at least one course in Shakespeare—but all students at FSU now have to enroll in at least two "multicultural studies" programs in order to graduate.\textsuperscript{187} Forget The Bard at Stanford as well, where even classic theater has been caught in the PC clutch:\textsuperscript{188} \textit{The Tempest} is staged from a "slavery perspective" to teach about the evils of Western imperialism.\textsuperscript{189} \textit{Richard II} was presented in Los Angeles as a power struggle between whites and non-whites, where Richard's supporters were played by the "nasty Caucasians," while the supporters of Henry Bolingbroke were played by "honorable Blacks, Latinos, and Asian-Americans."\textsuperscript{190}

The Johns Hopkins University, widely revered as one of the world's premier institutions of higher learning, has seen fit to alter the reading list in its Introduction to American Politics course by replacing the Constitution, \textit{The Federalist Papers}, and \textit{Democracy in America} with the writings of Malcolm X, Martin Luther King, Jr., and films such as \textit{Do the Right Thing} and \textit{Platoon}.\textsuperscript{191}

The conflict between campus advocates of political correctness and the First Amendment has not always been so out in the open. Before World War II, the university was governed by a strict, not always democratic, hierarchy. Faculties were said to have "a faith in reason and knowledge, in the rational, dispassionate search for truth, and in the dissemination of knowledge for the sake of knowledge."\textsuperscript{192} Students and professors were

\textsuperscript{184} Fennell, \textit{supra} note 40, at 41; \textit{see also} D'Arcy Jenish & William Lowther, \textit{War of Words: Academics Clash Over 'Correctness,'} MACLEAN'S, May 27, 1991, at 44.

\textsuperscript{185} Leo, \textit{PC Follies, supra} note 57, at 25.

\textsuperscript{186} \textit{Id.}

\textsuperscript{187} Don Horine, \textit{UF Student: It's Incorrect To Be 'Politically Correct' on Campus, THE PALM BEACH POST}, Jan. 24, 1994, at 1A.

\textsuperscript{188} Leo, \textit{PC Follies, supra} note 57, at 29.

\textsuperscript{189} \textit{Id.}

\textsuperscript{190} \textit{Id.}


\textsuperscript{192} Himmelfarb, \textit{What to do About Education, supra} note 40, at 21.
not equals, and not all subjects were studied. Just as World War II brought women into the workforce, the post-war GI Bill supplied the universities with large numbers of students; while America was reconfiguring gender roles, academia reconsidered its curriculum.\textsuperscript{193} An influx of funds came from both government and private sources, which in turn generated projects, programs, institutes, and centers—few of them related to the conventional academic functions of traditional teaching and research.\textsuperscript{194}

Much of the grant money was aimed at the social sciences, which many viewed as the means by which society’s shortcomings could best be addressed. Over time, the socially-conscious university became a politically-conscious one, and the age-old struggle between Right and Left became significantly more subtle. The civil rights movement created “identity politics”—the crusades for women’s rights, gay and lesbian liberation, and ethnic pride.\textsuperscript{195}

Now such movements are firmly entrenched in the university cosmos. Each demands that its views be brought into classrooms via the curriculum, and brought to bear upon faculty appointments and official pronouncements on political affairs.\textsuperscript{196} What could not be achieved by group demonstrations, sit-ins, and marches is now sought by way of sophisticated lobbying techniques aimed at legislation and litigation. The universities have either allowed themselves to become masterfully manipulated, or perhaps worse, they have unwittingly played favorites.\textsuperscript{197} From this perspective artificially rigid speech and behavior codes, dramatically changed core-curriculum requirements,\textsuperscript{198} altered tenure qualifications\textsuperscript{199}—all contributions of the

\textsuperscript{193} Id.
\textsuperscript{194} Id.; see also Gertrude Himmelfarb, \textit{Looking into the Abyss: Untimely Thoughts on Culture and Society} (1994).
\textsuperscript{195} See Berman, supra note 11, at 11. The latter includes black nationalism. See id.
\textsuperscript{196} Himmelfarb, \textit{What To Do About Education}, supra note 40, at 24. (“Rival groups, recognizing no common mission, are engaged in a continual power struggle, not only about such matters as appointments, tenure, and the like, but about the very substance of education—what should be taught and how it should be taught.”)
\textsuperscript{197} Cockburn, \textit{supra} note 40, at 690 (“Universities are scared of lawsuits and demonstrations initiated by minority groups”); Zuckerman, \textit{supra} note 44, at 64 (“To show compassion and to avoid confrontation, academic leaders who would never have given whites separate dorms have given them to blacks, along with their own student unions, homecoming dances, yearbooks and the like”); McCullough, \textit{supra} note 75 (“In the Quaker tradition, Swarthmore strives for accommodation to end conflict”); see also Konigsberg, \textit{supra} note 52, at 14 (noting that leftist students have even faked hate crimes on occasion to call attention to their causes).
\textsuperscript{198} D’Arcy, \textit{supra} note 184, at 44 (stating that some universities have abolished formerly required courses dealing with European society because of the belief that Western culture has historically been responsible for the oppression of women, blacks, and other minorities); see also Goode, \textit{supra} note 36, at 12 (noting the University of Massachusetts’
"politically correct" agenda—have certainly infringed upon academic freedom, if not substantially curtailed it.

The current PC environment also encourages professorial bickering on a new level. The University of California, responding to the growing ethnic diversity in its student body and what it perceived as an increased need for multicultural understanding, introduced a new "World Culture" course taught by five professors from diverse backgrounds.\(^{200}\) Unfortunately, some of the professors felt that their area of study was not being treated as "equally" as others.\(^{201}\)

During a lecture on Islamic culture one of the instructors, a former Jesuit from Spain, commented on the role of women in Islam.\(^{202}\) Another professor, a self-described "scholar of color," objected by stating that he was "deeply disturbed" by the Jesuit’s treatment of the subject and he requested half of the next lecture period in which to respond.\(^{203}\) He was concerned with the fact that the preceding lecturer, while apparently criticizing Islamic culture, had not "acknowledged faults within our own culture."\(^{204}\)

Similarly, today’s political correctness forbids study or discussion of the "myths" about Christopher Columbus. The University of Cincinnati’s student senate demanded that the school declare itself a "Columbus-myth-free campus."\(^{205}\) Such revisionist history carries over beyond the campus. In Montgomery County, Maryland, ceremonies marking the 500th anniversary of Columbus’ voyage to the New World began with a proclamation that "Columbus’ arrival . . . opened an era marked by the clash of cultures, the exploitation of peoples and the near extinction of civilizations."\(^{206}\) In the end it was conceded that Columbus taught the New World about

\(^{199}\) D’Arcy, supra note 184, at 44 (reporting that a University of Toronto political philosophy professor was denied tenure at Yale because he was too conservative in his beliefs); see also Carroll, supra note 121, at 57 ("[W]e’re running short of professors sufficiently secure to speak out against the gathering forces of compulsory group-think."); Fennell, supra note 40, at 41 ("[P]rofessors who object to the new conformity are heckled into submission or refused full-time professorships."). Unbelievable as it may sound, an advertisement in the Chronicle of Higher Education for a "dynamic classroom teacher" was deemed politically incorrect because it sent the message that the hiring university was only interested in a certain kind of teaching style, which might tend to exclude minorities and women. George Will, Sensitivity to 'Lady-like' Women, BALT. SUN, Jan. 11, 1996, at 15A.

\(^{200}\) Neu, supra note 179.

\(^{201}\) Id.

\(^{202}\) Id.

\(^{203}\) Id.

\(^{204}\) Id.

\(^{205}\) Leo, PC Follies, supra note 57, at 26.

humankind’s “potential for both good and evil ... compassion and cruelty.”  

There is certainly nothing wrong with re-evaluating history. Offering new interpretations to old events—in fact, challenging entrenched dogma of all kinds—is what the academic enterprise is about. But discarding past culture because it is deemed “patriarchal” or “Eurocentric” or “white” can hardly be understood as the honest scholar’s quest for Truth.

II. THE CONSTITUTION AND ITS PROGENY: FREE SPEECH AND HOSTILE ENVIRONMENTS

Courts ought not to enter this political thicket.
— Felix Frankfurter, in Colegrove v. Green

A. The First Amendment

The most radical PC advocates disdain the First Amendment as “the first refuge of scoundrels,” its foundations “built on sand.” Perhaps that is why most speech codes pay little heed to established jurisprudence. Though many of them promulgated during the current PC wave have never been tested in court and continue to be broadly implemented—some to the destruction of careers and reputations—others have already been struck down as being unconstitutionally broad or vague in prohibiting speech that would otherwise be protected, or as being too arbitrary in the manner in which punishments are meted out.

Even a narrowly-drawn, specifically-tailored speech code may be deemed unconstitutional because of its content-based discrimination. In *R.A.V. v. City of St. Paul*, a St. Paul ordinance was found wanting because it punished the placing of a “symbol, object, appellation, characterization or graffiti . . . which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . . .”

Understanding that content-based regulations are presumptively invalid under the First Amendment, St. Paul had sought to save the ordinance by limiting its application only to those expressions which constitute fighting

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207. *Id.*
208. 328 U.S. 549, 556 (1946).
words, within the meaning of Chaplinsky v. New Hampshire.\textsuperscript{212} The Court held, however, that even fighting words cannot be regulated on the basis of their content, ruling that the government may not regulate use based on hostility or favoritism toward the underlying message.\textsuperscript{213} Thus any speech code which attempts to restrict speech based on its content is of questionable constitutionality.

Perhaps the most interesting argument in support of campus speech codes is that the Supreme Court’s landmark decision in Brown v. Board of Education\textsuperscript{214} should be read as having gone well beyond simply ordering schools to integrate, but as a command to dismantle “the systematic group defamation of segregation” by way of guaranteeing equal access to education.\textsuperscript{215} Today, the argument goes, recurring acts of hate on campus are reminiscent of the pre-Brown era and threaten the promise of equality for all.

While the immediate goal of Brown may have been to acknowledge that segregated schools were “inherently unequal,” the Supreme Court left undefined the exact contour of the principle of equal access to education. Is it conceivable that the Court “mandated the creation of an atmosphere of diversity, participation, and fulfillment of career aspirations beyond the mere ability to enroll in the institutions of learning?”\textsuperscript{216} Such a creative reading of Brown is said to address “the more central issue” of an individual’s right to equal opportunity in education.\textsuperscript{217} The PC debate is thus reframed as one between two equally important constitutional doctrines: Free Speech versus Equal Protection. From this perspective, the argument concludes, the best way to constitutionally protect such competing interests is to balance them.\textsuperscript{218}

While this kind of analytical approach may be intellectually appealing, it also has serious shortcomings. First, the Supreme Court found only government-sponsored programs to be unconstitutional; it neither required nor authorized the regulation of private conduct.\textsuperscript{219} Even if one accepts

\begin{itemize}
\item \textsuperscript{212} 315 U.S. 568 (1942).
\item \textsuperscript{213} R.A.V., 505 U.S. at 386.
\item \textsuperscript{214} 347 U.S. 483 (1954).
\item \textsuperscript{215} Charles R. Lawrence, \textit{If He Hollers Let Him Go: Regulating Hate Speech on Campus}, DUKE L.J. 431, 441 (1990).
\item \textsuperscript{216} Nooshin Namazi & James H. Cahill, \textit{University Hate Speech Codes: A Necessary Method in the Process of Eradicating the Universal Wrong of Racism,} 10 TOURO L. REV. 561, 582-85 (1994).
\item \textsuperscript{218} Lawrence, \textit{supra} note 215, at 446-47.
\item \textsuperscript{219} For a discussion on why Brown and other cases invalidating governmental discrimination does not justify regulation of private racist speech, see Nadine Strossen, \textit{Regulating Racist Speech on Campus: A Modest Proposal?}, 1990 DUKE L.J. 484, 541-47 (1990).
\end{itemize}
the argument that Congress can regulate private discriminatory conduct under the Commerce Clause, there is little authority to support the proposition that private discriminatory speech can be controlled under the First Amendment.220

Throwing equal protection into the free-speech fire only creates more smoke. Censoring speech, even that which is outrageous or offensive, is contrary to the underlying principle of equal protection. After all, "every individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member."221 Why should the acceptable topics of discussion be defined by those who deem themselves politically correct? Speech codes enable people to restrict speech when it serves their own agendas.222 They do just the opposite of what educators should be doing—namely, addressing the problem of inequality by diminishing the pressures that political correctness has created.223 One way to accomplish this is by increasing speech on campus, not limiting it.224

Even if one were to assume arguendo that speech codes were constitutional, they are undesirable for a number of other reasons. Perhaps most obvious is that such rules seek only to prevent the results of abusive speech, not the underlying cause. "Students bring to college their prejudices, their fears, their doubts, their misconceptions. If they spend four years cooped up under repressive regulations, they might dutifully obey the rules, offend no one, enjoy [politically correct] acceptance and leave with their prejudices, fears, doubts, and misconceptions firmly intact."225

In fact speech codes may exacerbate the very tensions they seek to alleviate. Censorship often makes the banned expression more attractive. This could lead to greater harm, not less.226 Even if they could offer temporary relief from racism, sexism, and prejudice, speech codes do not address the root problems. Similarly, speech codes impede the process of learning. Their coercive restriction of unpopular viewpoints is inconsistent with the idea of a university education, and their concurrent limitation of

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223. Id.

224. Id.


226. Id. at 421.
academic freedom is much too high a price to pay for whatever short-term gains may be obtained through arbitrary codes.\textsuperscript{227}

Most important, however, is that there are other ways for universities to combat the problem of hateful and bigoted speech that do not interfere with students' constitutionally protected rights. All educational institutions (both public and private), for that matter, should teach civility and tolerance. All should lead by example. That too few do may be a sign of the times, but an indication as well to wake up and smell the politically-correct coffee. Some of it is stale, much of it unconstitutional.

\textbf{B. Title VII}

Title VII of the Civil Rights Act of 1964 made it an unlawful employment practice to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."\textsuperscript{228} Although its legislative history indicates that gender was added "in a failed parliamentary maneuver aimed at defeating the entire bill," Title VII has been interpreted in such a way that eliminating gender discrimination on the job is considered a compelling government interest.\textsuperscript{229}

Two theories of recovery are available under Title VII: for harassment that was \textit{quid pro quo}—the demand of a sexual favor in return for something like promotion—and that which created a "hostile environment."\textsuperscript{230} It is generally agreed that \textit{quid pro quo} harassment, although speech-related, was never protected by the First Amendment.\textsuperscript{231} Recovery under the theory of hostile environment, however, is much more problematic.

The guidelines of the Equal Employment Opportunity Commission (EEOC) concerning implementation of Title VII provide that "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."\textsuperscript{232}

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  \item \textsuperscript{227} \textit{Id.} at 424-25.
  \item \textsuperscript{230} See, e.g., Harris v. Forklift Systems, 510 U.S. 17 (1993).
  \item \textsuperscript{232} 29 C.F.R. § 1604.11 (1995) (emphasis added). Similarly, a "racially hostile environment" can be created by harassment that is "physical, verbal, graphic, or written."
What is "verbal conduct of a sexual nature"? What if an overly sensitive person has been offended by unintentionally offensive speech? Who is to decide what is offensive, and what is a hostile environment? According to the guidelines, even if the effect of the speech in question is an interference with an individual's work performance, a federal action can be brought.

A hostile environment can thus be generated by classroom discussion of a controversial subject, the assignment of an "offensive" text, or use of "off-color" language or hypotheticals. Although punishment of such purely verbal activity appears to run directly afoul of the First Amendment, there have been few cases testing its constitutionality.

In fact, the guidelines have been used by students, administrators, and faculty on many campuses to establish harassment surveillance and enforcement bureaucracies and to enforce campus speech and conduct codes. Under the watchful gaze of "abuse awareness counselors," the accused are routinely denied due process—that is, the right to counsel, to confront accusers, to present exculpatory evidence. "Anti-harassment tribunals regularly mete out stiff penalties after little or no investigation."

Those who support the hostile-environment concept argue that sexist speech in the workplace amounts to equality-depriving conduct. Epithets and innuendo are said to have meaning beyond dictionary definitions; their use conjures up a painful historical context of powerlessness, subjugation, and the lack of legal and social identity, except as men's chattel; their true power lies in their ability to evoke the present-day realities of rape and domestic violence. Such utterances are often perceived as threats; women are forever uncertain as to whether they will escalate into a physical assault.

Although even among women this view is far from universal,
liability under Title VII has become substantially more risky. In *Meritor Savings Bank v. Vinson*, the Supreme Court treated the EEOC guidelines (which give employees the right to "work in an environment free from discriminatory intimidation, ridicule, and insult") as authoritative. Since *Meritor*, hostile-work-environment claims have become one of the fastest-growing fields of employment discrimination law.

This is especially true in the area of academic freedom. To be sure there are types of verbal expression that amount to harassing conduct—such as sustained and calculated group defamation—and such behavior may well create an actionable hostile environment. The EEOC guidelines, especially as they are enforced by the Office for Civil Rights (OCR, an investigatory agency under the Department of Education), sweep much more broadly.

The defendant in *Meritor*, however, did not present a First Amendment defense, and the Supreme Court did not rule on the free-speech issue. Indeed Title VII has not yet faced a serious constitutional challenge. As the Ninth Circuit has noted, "Title VII . . . has for over a decade restricted harassing speech in the workplace, but . . . because First Amendment defenses were rarely raised, harassment law evolved with little concern for free speech."

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240. *Meritor*, 477 U.S. at 65; see Gerard, supra note 231, at 1005.


243. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). The elements of such a cause of action are: A plaintiff must prove that she belongs to a protected group; that she was subject to unwelcome sexual harassment; that it was sufficiently severe to interfere unreasonably with work performance or to create an intimidating, hostile, or offensive workplace; and that (where the employer is the defendant) the employer should have known of the conduct and failed to take prompt remedial action. *Id.* at 903-05.

244. See *Meritor*, 477 U.S at 57.

245. United States v. X-Citement Video, Inc., 982 F.2d 1285, 1296 n.7 (9th Cir. 1992) (Kozinski, J., dissenting in part).
The first and only reported case dealing with the conflict between the First Amendment and Title VII was *Robinson v. Jacksonville Shipyards, Inc.* The court concluded that there was no First-Amendment problem because (a) the employer was not expressing itself through language used by its employees; (b) speech creating a hostile environment is actually conduct similar to speech which constitutes a crime; (c) limitation of such discriminatory speech is nothing more than a constitutional time, place, and manner regulation; (d) workers are part of a captive audience which should be protected from offensive language; and (e) the speech in question must be weighed against the government’s interest in cleansing the workplace of impediments to the equality of women.

Each of these arguments is flawed: (a) employees are usually within the scope and course of their employment when making offensive comments, and even if they were not, both employer and employee have free-speech rights; (b) a speech crime (e.g., blackmail) is criminal not solely because of its content but because of its unlawful effect (e.g., extortion); (c) time, place, and manner restrictions are valid only if they are neutral as to the content of the speech; (d) Supreme Court jurisprudence to date has applied the captive-audience theory only to the home, and not to the workplace (where, to the contrary, free-speech rights have been repeatedly recognized); and (e) a proper balancing argument would require that the state’s interests be weighed against all expression suppressed by the law in question, not just speech subjectively deemed offensive.

Application of Title VII to speech-based hostile-environment claims is the first icy patch on the slippery slope to repression of unpopular ideas. Misuse of the federal law has already occurred. In 1990, for example, an employee won a religious-harassment suit against his (private) employer based on the religious content of the company’s newsletter and the Biblical verses printed on its paychecks.

How and where should the line be drawn between protected “political” speech and offensive “sexist” speech? All speech should be considered political unless it is specifically targeted at an individual or group with the

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247. *Id.* at 1534-35.
248. *Id.* at 1535.
249. *Id.*
250. *Id.* at 1535-36.
251. *Id.* at 1536.
intention to harass, or it amounts in fact to harassing conduct (such as a
type of phone calls in the middle of the night).

Robinson v. Jacksonville Shipyards was wrongly decided. Where work
environments are made hostile solely because of verbal expression—
however abhorrent it may be—it should be protected. A finding of liability
for discrimination based on a Title VII hostile-environment claim, where the
offensive conduct was merely expressive and not targeted at an individual
or group with the intent to harass, is a clear violation of the Constitution as
embodied in the First Amendment.

Nevertheless, OCR’s enforcement of the sexual-harassment guidelines
poses a powerful and potentially lethal threat to the traditional American
idea that individual rights and responsibilities are more important than group
insults. Many who would never engage in racial or sexual harassment are
being forced to defend themselves against frivolous or vengeful claims. Even
if formal charges under Title VII are never brought, campus PC
courages other constitutionally questionable procedures (OCR
attorneys do not rule out the possibility of an investigation based on the
assignment of Huckleberry Finn or a classroom discussion of affirmative
action.)

The academy has thus become a decidedly unwelcome nesting place for
people with different points of view. As those with highly sensitive PC
antennae, particularly radical feminists, have assumed greater degrees of
power, the standards describing sexual harassment have become ever more
vague. The conflict between perceived offensive conduct and free speech
is often much sharper on campus than in the ordinary employment context.
Academic freedom is clearly at risk.

The rules regarding harassment deter not only genuine misconduct but
also harmless (and even desirable) speech, which in higher education is
central both to the purpose of the institution and to the employee’s
profession and performance. Faced with legal uncertainty, many professors
will avoid any speech that might be remotely interpreted as creating a

254. Walters, supra note 234, at A19.
255. Such as the infamous “locked box” at Cornell University. See Hymowitz, supra
note 73 and accompanying text.
256. Wolf, supra note 241, at 63-65 (discussing the OCR’s policy to “‘make no
predeterminations’ prior to investigating”).
ABA JOURNAL, Feb. 1994, at 40. Even staring at a stranger has been cited by some radical
feminists as “a well-established cultural taboo.” Cynthia G. Bowman, Street Harassment and
teaches at a small women’s college in New England was put through several years’ worth of
harrowing litigation because he had deigned to suggest at a search-committee meeting that
a certain candidate “might not necessarily be a good role model.”
hostile environment. Even staring at a stranger has been cited by some radical feminists as "a well-established cultural taboo."\textsuperscript{258}

Once again, the clear line to be drawn between academic freedom and actionable harassment is the same as that between speech and conduct.

C. Campus Codes and State Regulations

Most states have enacted laws that prohibit harassment based on race, color, religious beliefs, or national origin. Many states have statutes specifically aimed at sexual harassment.\textsuperscript{259}

This legislation may be distinguished from hate-crime measures, which punish conduct related to bias.\textsuperscript{260} Few people, however, are likely to be charged with violating a hate-crimes statute as a result of their politically incorrect speech. Everyday citizens are more prone to encounter the effects

\textsuperscript{258} Bowman, \textit{supra} note 257, at 517.


\textsuperscript{260} In Maryland, for example, even if the harassment is not associated with a separate crime, the perpetrator can be found guilty of a misdemeanor and imprisoned up to three years or fined up to $5,000. \textit{Md. Ann. Code, art. 27 \textsection 470A} (1995). The constitutionality of the Maryland statute has been questioned in light of the \textit{R.A.V.} decision because a person’s speech may be used to prove a biased motive. \textit{See} Kevin Sullivan, \textit{Area Jurisdictions Call Hate-Crime Laws Solid; Statutes Said to be Narrower Than St. Paul’s}, \textit{Wash. Post}, June 23, 1992, at A6. However, this law was upheld in \textit{Ayers v. State}, 645 A.2d 22, 35, 38 (Md. 1994) (state’s hate-crime statute found not to violate the First Amendment even though it permits the trial court to inquire into the defendant’s beliefs and associations, and despite the fact that a defendant’s prior racist speech may be used to prove motive).
of PC on the job, either in the form of universal sensitivity training or a particular hostile-environment claim.\textsuperscript{261} It is hard to say exactly how many colleges and universities have enacted speech and conduct codes, but the number appears to be growing.\textsuperscript{262} Practically all of the codes seek to enforce civility by regulating speech. None of them, however, has yet to pass Constitutional muster.

The most notable university codes to be overturned to date have been those at the Universities of Michigan, Wisconsin, and Stanford. In 1989, a federal judge struck down the University of Michigan code as an unconstitutional restriction on free speech; among other complaints was one from a graduate student in biopsychology who said he feared the rules would prevent him from discussing controversial theories about biological differences among the sexes and races:

\begin{quote}
[Even] if [the speech] exceed[s] all the proper bounds of moderation, the consolation must be that the evil likely to spring from the violent discussion will probably be less, and its correction by public sentiment more speedy, than if the terrors of the law were brought to bear to prevent the discussion.\textsuperscript{263}
\end{quote}

In 1991, the University of Wisconsin’s speech code was declared unconstitutionally vague and overbroad. The university, which had been one of the first to ban racial and sexual slurs on campus, redrew its code more narrowly, then dropped it entirely in 1992.\textsuperscript{264}

Perhaps the most surprising code to fail has been Stanford’s. Crafted by Stanford law professor Thomas Grey, it had carefully sought to avoid any chilling effect on the debate of sensitive topics by forbidding only

\begin{footnotesize}
\begin{enumerate}
\item The University of Baltimore, for example, encourages all faculty to take part in an annual “staff diversity training session.” Part of the training includes tips for the faculty on how to handle diversity in the classroom and how to avoid gender specific terms when teaching. CLAY BALLANTINE & CHERYL BLACKBURN, UNIVERSITY OF BALTIMORE: STAFF DIVERSITY TRAINING, NOV. 15, 1994 (a collection of articles from a variety of sources on file with the author).

Such training can begin very early on in one’s education. At least two Maryland schools require children to run for student elections on “multicultural slates”—a practice that, as at least one nay-saying school board member has pointed out, means class officers are being chosen by classmates on the basis of “what [they] are rather than who [they] are.” Charles Babington, Diversity and Grade School Politics; Mandating Female, Minority Candidates Stirs Outcry in Montgomery, WASH. POST, JUNE 3, 1994, AT D1, D5.

\item See HAMILTON, supra note 97, at 74. The movement to enforce civility on campus has been called “the most successful effort in American history to restrict offensive speech.” Id. at 77.


\item The UVM Post, Inc. v. Board of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163 (E.D. Wis. 1991).
\end{enumerate}
\end{footnotesize}
"fighting words" linked to sex and race. Yet it was thrown out in 1995 by a lower state court because it inhibited free speech. Said the judge simply: "[Stanford] cannot proscribe speech that merely hurts the feelings of those who hear it."265

III. THE PEOPLE AND THEIR ADVOCATES: ANGER AND ENLIGHTENMENT

Civility costs nothing.
—Proverb

A. Taboo or Not Taboo?

Political Correctness has served to blur significantly the divide between the Left and the Right, but some generalizations remain apt. Liberals still advocate inclusiveness: the gates of opportunity in the socio-economic framework should be open to all who choose to enter, they say, regardless of whether those who would seize the opportunity have the skill to master the course. No one should feel excluded or unwanted.266

Conservatives, on the other hand, seek the order of the status quo—a strict hierarchy in which every member has a place, depending on individual qualifications. The ability to perform is more important than the desire to participate; those unable to unlock the gates of opportunity should not have to have them opened by others. In this view, open-admissions policies and affirmative-action programs make college accessible to students, especially blacks and other minorities, who would otherwise not meet the regular requirements.267

Neither extreme necessarily speaks for the great numbers of people who seldom take to the courts, the airwaves, or the op-ed pages.

Women in the mainstream may be the most unrepresented. Says novelist Erica Jong:

I feel more able to deal with old goats chasing me around the desk than with the ideology commandoes who want to scrutinize my writing to make sure I never say a non-PC thing . . . . I want a feminist movement that allows for singing, dancing, humor, sex and free speech . . . . If we


266. As the "diversity specialist" explaining the University of Arizona's "Diversity Action Plan" stated, even nerds and people who dress differently should be included because "[w]e don't want to leave anyone out." See Leo, PC Follies, supra note 57, at 26.

267. Himmelfarb, What To Do About Education, supra note 40, at 22; see also Academic Watch, NAT'L REV., Nov. 19, 1990, at 18 (stating that Baruch College in New York was deferred accreditation "on the grounds that [it] was not graduating enough blacks and Hispanics [although there] was no complaint about the number of blacks and Hispanics admitted to the college").
demand a feminism so pure that no human being is good enough, we won’t be able to join our own movement.268

Camille Paglia weighs in with similar gusto. “Leaving sex to the feminists,” she says, “is like letting your dog vacation at the taxidermists.”269

Besides radical feminists, so too, it seems, have deconstructionists, critical race theorists, and critical legal studies “story-tellers” alienated large numbers of their colleagues in the academy. Alienation, in fact, is their mission. “[E]verybody should get anti-racist, anti-sexist, anti-heterosexist training,” says one.270

“The strategy I am proposing,” says another, “involves fighting with your elders and betters—sassing them, maybe; undermining them, maybe; hurting their feelings, certainly.”271

David Fraser writes:

We can disrupt faculty meetings with various acts of civil or, preferably, uncivil disobedience. We can engage in subversion by memorandum. The possibilities are limited only by the available concepts of the absurd. Our challenge is to put ourselves on the line, to engage in acts of ‘macho self-immolation,’ to become moral terrorists, to ‘whack-off’ in faculty meetings, to construct a praxis which is meaningful, public, and dangerous.272

But few people read law reviews, and the deconstructionists are left sniping at one another in the relatively harmless wasteland that is called legal scholarship.273 Much more harmful, and powerful, are the PC-motivated regulatory actions of the government. Not far behind are the conservative PC campaigns conducted in the mass media.


269. Kevin Lynch, These Art Profs Can Do, Too, THE CAPITAL TIMES (Madison, Wis.), Dec. 15, 1994, at 1D.


B. Media and the Politics of Profit

Conservatives have amply demonstrated their own ability at playing the PC game, especially since the Republican revolution of 1994.

Particularly noticeable has been the Right’s enlistment of the media, who are likely motivated less by ideology than by the lure of profit.274 Consider, for example, how Swarthmore College’s “rape policy” was handled by U.S. News and World Report. In 1990 the magazine published an article declaring that the college, “driven by feminist ideology,” had expanded the definition of date rape to include “inappropriate innuendo.”275 The guide was never a reflection of official school policy. Nevertheless, U.S. News and World Report printed the piece about innuendo, unadorned by accuracy. No correction or apology was ever offered, nor was a letter of clarification ever published.276 To the contrary, the magazine stood by as its “inappropriate innuendo” story and it was picked up by the Washington Times, Reason, Playboy, New York Magazine, and Time.277

PC-bashing has proven as contagious as it is fun and popular. Witness the phenomenon of Rush Limbaugh, whose three-hour radio show draws 13 million listeners daily and whose book, The Way Things Ought To Be, was a best-seller. As a British commentator observed, “His capacity to outrage is ... mesmerising [sic]. He’s the virtuoso of bile, senior wrangler of twisted prejudice, but he’s also discovered that hatred delivered with humour is insidiously disarming.”278 Limbaugh attributes his success to the fact that he conveys “a unique conservative message.”279 Still, he is candid

274. See Berman, supra note II; see also Carroll, supra note 121, at E7 (“If the campus is where PC began, it has strong roots in the media”).
275. Jon Weiner, “Rape by Innuendo” at Swarthmore, THE NATION, Jan. 20, 1992, at 44. The guide included the following sentence: “Acquaintance rape . . . spans a spectrum of incidents and behaviors ranging from crimes legally defined as rape to verbal harassment and inappropriate innuendo.” Id. In fact the source of that phrase was an out-of-date, student-authored discussion guide which suggested topics for date-rape prevention workshops. Although the sentence is ambiguous and poorly written, the student writer expressly stated that he “didn’t mean to equate innuendo with rape . . . .” Id. Moreover, when a researcher for the magazine story specifically asked if the college considered inappropriate innuendo to be rape, a dean unequivocally said, “No.” Id. Perhaps searching for a different response, the researcher then asked the same question of a student assistant in the school’s public-relations department. She also said, “No.” Id.
276. One such letter had been written by the student responsible for putting together the guide in question. Id.
277. Eventually Time Magazine ran the letter, but in a context that robbed it of its significance. Id.
279. Peter Johnson, Rush Limbaugh’s Right of Way: Politically Incorrect and Loving
enough to concede that he is not out to save America, only to profit from
it.280

The polemical power of conservative PC-bashing is dependent upon
confusing its meaning. Liberal notions about race, gender, and power are
characterized as official compulsion and censorship, while conservative
ideology is dressed up in the noble rhetoric of the First Amendment. Thus
any new idea, however moderately progressive it may be, is likely to be
condemned as "politically correct" and therefore suspect.281

Although the media's motivation for airing conservative talk shows may
be mostly a matter of ratings, the reason for right-wing criticism is more
subtle. On the surface, conservatives often claim they are merely protecting
free speech.282 It is not difficult to discern the political agendas lurking
barely beneath the surface.283 The PC debate has become a fight for
political power, between old enemies (or at least the loudest voices among
liberals and conservatives) who have merely forged new weapons.284

C. Reasoned Responses

"The bright students," says William F. Buckley, "will not stand for
political correctness."285 Students may indeed be the first to recognize that
campus speech codes will not end campus racism, but may in fact exacer­
bate the very tensions they seek to alleviate. The pendulum appears to
swing slower among educators, but an increasing number of them are
beginning to articulate a backlash. More now feel that coercive restriction
of unpopular viewpoints is inconsistent with the idea of a university
education, and that limitation of academic freedom is much too high a price
to pay for whatever short-term gains to be obtained through arbitrary
codes.286

Most important, however, is that there are other ways for universities to
combat the problem of hateful and bigoted speech that do not interfere with

It, USA TODAY, Oct. 28, 1992, at 1D.
280. Id.
70; see also Morley, supra note 13, at C4 (observing that politically correct may mean
"conforming to liberal or far-left thought on sexual, racial, cultural or environmental issues").
282. D'Arcy, supra note 184, at 44; Novak, supra note 40, at 132. But the result is
the amusing experience of watching conservatives argue for the First Amendment and liberals
against it. Berman, supra note 11, at 24.
283. Sheila McIntyre, Backlash Against Equality: The "Tyranny" of the "Politically
Correct," 38 MCGILL L.J. 1 (1993) (stating that anti-PC literature is highly political and
partisan); Himmelfarb, What To Do About Education, supra note 40, at 21.
284. See Berman, supra note 11, at 15.
285. Gentry, supra note 162, at A17.
286. See Stephen Fleischer, Campus Speech Codes: The Threat to Liberal Education,
students' constitutionally protected rights. All public and private educational institutions should teach civility and tolerance and should lead by example.

No one should be asked or ordered to rewrite history, to abandon Western curricula, or to declare certain subjects to be taboo. We should all be encouraged, rather, to seek balance and openness.287

Both academic freedom and the rights of individuals have been violated by misguided efforts to combat sexual and racial harassment. Not surprisingly, a chill has descended on academic discussions of sensitive but legitimate topics. Worse, procedures have been widely adopted that violate the canons of due process.

The brightest line to be drawn is still between speech and conduct. The First Amendment and its jurisprudence have been proven by time and experience to be the best guarantee of individual liberty. But offensive speech that clearly becomes conduct—an established pattern of verbal harassment, for example—should be forcefully redressed.

No campus speech code promulgated to date has come close to meeting First Amendment requirements. Some that have been tested in court and found wanting, such as those at Pennsylvania and Wisconsin, have been abandoned altogether. Others have been dropped without formal challenge. Still others, like those at Harvard and Stanford, are so tempered with constitutional guarantees that they are little more than redundant statements of suggested civility and required deference to free speech.288

Perhaps the best balance of these competing tensions, at least as they exist on university campuses, is the National Association of Scholars’ policy on academic freedom. Seeking "reasoned scholarship in a free society," the NAS guidelines call for precise definitions.289 Sexual harassment, for example, should be confined to "individual behavior that is manifestly sexual and that clearly violates the rights of others."290 There should also be a reasonable statute of limitations on bringing sexual-harassment charges; separation of the offices of investigator, prosecutor, judge, and jury; observation of the established requirements for due process; assurance that the accused has the opportunity to make an adequate defense; punishment of those who knowingly lodge false accusations; and forceful action against proven harassers, by dismissal if necessary.291

287. As one English instructor put it, "If a professor is teaching about great 19th century composers, you can’t dredge up a fictitious black woman composer,. . . but you can ask ‘why weren’t there any? Who decided this? Who were the gatekeepers in that day?’" Stephen Buckley, Professor Changing the World One Curriculum at a Time, WASH. POST, Aug. 19, 1993, at M1.

288. See The American Communication Association’s Model Campus Speech Code (based on those at Yale University and Harvard University).

289. Id.

290. Id.

291. SEXUAL HARASSMENT AND ACADEMIC FREEDOM: A STATEMENT OF THE
IV. CONCLUSION

Good breeding consists in concealing how much we think of ourselves and how little we think of other persons.

— Mark Twain

I have always been of the mind that in a democracy manners are the only effective weapons against the bowie-knife.

— J.R. Lowell

There is no gainsaying that discrimination and harassment exist abundantly in American society, just as do ignorance and prejudice. But much of what is being done to combat those evils in the name of Political Correctness is fueled by a new culture of victimization—nurtured by the desire of special-interest groups for more political power. Such groups may be spurred by a strong inclination to atone for a variety of perceived wrongs, both past and present; some of them do indeed see formerly helpless people seizing the chance to change the balance of power. But instead of using this new opportunity for the greater good of all, those who should be advocates of civility have become zealots of PC, wielding censorship, intimidation, and brainwashing as battle-axes in ideological warfare. Instead of promoting tolerance of different opinions through education and good example, they seek merely to ensure that all ways of thinking pay homage to their own.

Too often the call for sensitivity is in truth the pursuit of power, pure and simple—the high-minded rhetoric little more than camouflage. As the cases described above starkly demonstrate, subjective standards subjectively administered yield nothing but a stewpot of disputed facts, hard feelings, and bad law.

In the long run, tolerating offensive talk should be a small price to pay to ensure the ideals of academic freedom and the liberty of conscience. If the debate is about equality, the lesson for all of us, perhaps, is that allowing everyone to speak their minds—using whatever words they want—assures a healthy measure of common sense in response.

Listening carefully, when all is said and done, is still the best path toward reason.

NATIONAL ASSOCIATION OF SCHOLARS (statement available by fax or mail via National Association of Scholars, 575 Ewing Street, Princeton, New Jersey 08540).

292. "This ethos is fueled by a hypersensitivity so delicately calibrated that it can detect racism in the inflection of a voice, discover sexism in a classroom’s seating pattern and uncover patriarchal oppression in a mascara stick or Shakespearean sonnet.” Charles J. Sykes, Oh, Say, Can We Whine, CHI. TRIB., Sept. 20, 1992, at C16.