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# SYMPOSIUM ESSAY

## A MODERATE DEFENSE OF HATE SPEECH REGULATIONS ON UNIVERSITY CAMPUSES

W. BRADLEY WENDEL\*

*The regulation of hate speech on public and private university campuses is a fiercely contested and divisive issue. Professor Bradley Wendel defends the middle ground in this debate. This Essay argues that concerns about abuses of power by those in positions of authority are unfounded when an institution possesses greater expertise in a domain than the citizens who are affected by the institution's decision, provided that the institution is acting on the basis of reasons that are shared by the affected individual.*

There's nothing in the middle of the road but yellow stripes and dead armadillos.

—Texas populist politician and political commentator  
Jim Hightower<sup>1</sup>

I know thy works, that thou art neither cold nor hot: I would thou wert cold or hot. So then because thou art lukewarm, and neither cold nor hot, I will spue thee out of my mouth.

—God<sup>2</sup>

Despite these forceful warnings of the perils of moderation, this Essay will defend the middle ground in the debate over the regulation of hate speech on public and private university campuses. The constitutional limitations on hate speech regulation vary according to whether a university is a state actor,<sup>3</sup> but this Essay will take a normative or policy-oriented perspective on the issue, rather than one focused primarily on First Amendment doctrine. With respect to both public and private universities, the case for expressive freedom is based largely on concerns about abuses of power by those in positions of authority—either government power in the instance of public schools, or the power of large, wealthy institutions in the case

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<sup>1</sup> JIM HIGHTOWER, *THERE'S NOTHING IN THE MIDDLE OF THE ROAD BUT YELLOW STRIPES AND DEAD ARMADILLOS: A WORK OF POLITICAL SUBVERSION* (1998).

<sup>2</sup> *Revelation* 3:15–16 (King James).

<sup>3</sup> See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-1 (2d ed. 1988).

of private universities.<sup>4</sup> Those concerns are unfounded, this Essay contends, when an institution possesses comparatively greater expertise in some domain than citizens who are affected by the institution's decision, provided that the institution is acting on the basis of reasons that are shared by the affected individual.

In a brief essay it is impossible to do justice to the complexity of the hate speech debate, even in the limited context of university education. Thus, this Essay will concentrate on one fairly narrow claim: Free speech proponents' arguments should not depend on epistemological skepticism,<sup>5</sup> because this attitude is inconsistent with the purpose of higher education, which is to inculcate knowledge and alter the beliefs of students. Credentialing reasons aside, students pay to attend college in order to learn something from people who know more about that subject than they do. By its very nature, education is not a content- or viewpoint-neutral process. At the same time, there are some aspects of university life that more closely resemble the constitutional image of the marketplace of ideas. In those domains, such as bulletin boards and student quadrangles, the university's greater expertise does not justify it in taking positions on contested issues.

There is something ironic about analyzing liberties of expression and belief in the higher education setting. To put the point bluntly, colleges and universities are in the business of controlling the speech of members of their communities, and trying to affect the beliefs of students.<sup>6</sup> These con-

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<sup>4</sup> See, e.g., Ira Glasser, *Hate Crimes/Hate Speech*, in *SPEECH AND EQUALITY: DO WE REALLY HAVE TO CHOOSE?* 55, 59 (Gara LaMarche ed., 1996); Henry Louis Gates, Jr., *Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights*, *NEW REPUBLIC*, Sept. 20 & 27, 1993, at 37 (book review).

<sup>5</sup> The best known skeptical argument for expressive liberty is Mill's. He argues that government suppression of opinion is dangerous because "[w]e can never be sure that the opinion we are endeavoring to stifle is a false opinion." JOHN STUART MILL, *ON LIBERTY* 20 (Stefan Collini ed., Cambridge Univ. Press 1989) (1859). Holmes picked up on this argument in his famous dissent in *Abrams v. United States*, 250 U.S. 616, 630–31 (1919), the source for the "marketplace of ideas" metaphor that enshrines the attitude of epistemological skepticism in constitutional law: "[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . ." *Id.* at 630. To the extent one believes the purpose of the First Amendment is something other than safeguarding the process by which truth is discovered, a different defense of hate speech regulations, beyond the scope of this Essay, is required. See, e.g., LEE C. BOLLINGER, *THE TOLERANT SOCIETY* (1986) (arguing that acts of extreme tolerance strengthen society); STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANING OF AMERICA* (1999) (arguing that regulation of hate speech promotes First Amendment goals of equality and justice).

<sup>6</sup> See CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 199–202 (1993); Robert Post, *Subsidized Speech*, 106 *YALE L.J.* 151, 164–76 (1996) (analyzing government support for speech in "managerial domains" such as the public university, the judicial system, and the military). A public university is a managerial domain in Post's sense, but notice that the objectives the government seeks to accomplish are not limited to circumstances in which it is speaking in its own voice. The central mission of the university is free inquiry, which requires the institution to make some viewpoint-based judgments

tent- and viewpoint-based limitations on the expressive activities of teachers and students are so familiar as to be taken for granted. Universities and their academic departments can impose restrictions on topics that may be discussed in the classroom and may make viewpoint-based judgments about the acceptability of certain positions. A familiar example is the response of history departments to the unfortunate persistence of Holocaust deniers.<sup>7</sup> A department would be well within its rights to punish a professor who taught students that there is doubt, based on the historical record, regarding whether the Holocaust occurred.

Presumably, departments may also require that students majoring in a discipline take certain courses, even though the courses may slant toward a particular point of view. Imagine a political science department that imposes a curriculum heavily weighted toward rational choice theory; it adopts one position among several competitors on a contestable issue, to be sure, but no one thinks it is engaging in some kind of invidious thought control. Universities make allocation decisions based, in part, on their sense of the school's mission and of what fields are worthy of long-term investment.<sup>8</sup> Finally, faculty hiring, promotion, and tenure decisions are often based on the same kind of contestable judgments, again without any suggestion of intellectual impropriety. These academic decisions sometimes lead to nasty fights, such as the well-documented feud at Harvard Law School between traditionalists and critical legal scholars,<sup>9</sup> but the terms of the battles assume that the university is acting properly by taking positions—the debate is over *which* position it should adopt.

Although this kind of content- and viewpoint-based discrimination is widespread, civil libertarians frequently express alarm at the possibility that, through education, “the state is able to engage in a dangerous form of political, social, or moral thought control that potentially interferes with a citizen's subsequent exercise of individual autonomy.”<sup>10</sup> The use of the term “thought control,” like that of its cousins “orthodoxy,” “indoctrination,” and “censorship,” is a rhetorically effective technique to introduce the bogeyman of the state, but it is important to specify more precisely what kind of thought control one is objecting to, and what is wrong with it. For

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but to withhold judgment on some matters.

<sup>7</sup> See generally Stanley Fish, *Holocaust Denial and Academic Freedom*, 35 VAL. U. L. REV. 499 (2001).

<sup>8</sup> See Judith Jarvis Thomson, *Ideology and Faculty Selection*, 53 LAW & CONTEMP. PROBS. 155, 157–58 (1990).

<sup>9</sup> For representative accounts, see, for example, ELEANOR KERLOW, POISONED IVY: HOW EGOS, IDEOLOGY AND POWER POLITICS ALMOST RUINED HARVARD LAW SCHOOL (1994); Jerry Frug, *McCarthyism and Critical Legal Studies*, 22 HARV. C.R.-C.L. L. REV. 665 (1987) (reviewing ELLEN W. SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES (1986)).

<sup>10</sup> Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 67 (2002). See also Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1871–76 (1996).

example, it seems likely that no one would argue that a social psychologist could not tell her students that the methods of empirical investigation—observation, induction, testing, replication, peer review, and so on—are better tools for predicting human behavior than consulting horoscopes. The teacher is engaging in indoctrination in some sense, by inculcating a particular set of beliefs and dispositions in her students, but is this an illegitimate exercise of state power? Civil libertarians who worry about “selectively instilling in students a predetermined set of normative values and empirical assumptions”<sup>11</sup> cannot possibly mean that it is never permissible for a powerful institution, whether a state or private university, to inculcate values. Humanitarianism, tolerance, civility, rigor, precision, respect for inquiry, open-mindedness, empathy, and compassion are all values that society hopes are promoted by higher education.<sup>12</sup> A serious attempt to make education value-neutral would be incoherent, because the educational process itself aims at creating a reasonably well-informed, open-minded citizen, not a person who believes in nothing at all.

The government has occasionally engaged in invidious efforts at thought control through education, which should properly be the concern of all citizens, not just civil libertarians. A depressing example was furnished by a school board in Florida, which adopted a resolution declaring that state-mandated instruction about other cultures “shall include and instill in our students an appreciation of our American heritage and culture such as: our republican form of government, capitalism, a free-enterprise system, patriotism, strong family values, freedom of religion and other basic values that are superior to other foreign or historic cultures.”<sup>13</sup> School administrators are susceptible to being caught up in patriotic fervor created by crises such as the Red Scare and the threat of terrorism, as familiar rituals such as flag-salutes and the Pledge of Allegiance indicate.<sup>14</sup> The reaction of courts, as in the decision in *Barnette*<sup>15</sup> striking down a requirement that children participate in saluting the flag and reciting the Pledge, and the controversial Ninth Circuit decision prohibiting forced recitation of the “under God” language in the Pledge,<sup>16</sup> reveals concern over the coercive effect of these rituals on the beliefs of schoolchildren. One can read these cases as standing for the proposition that, in

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<sup>11</sup> Redish & Finnerty, *supra* note 10, at 67.

<sup>12</sup> Steven H. Shiffrin, *The First Amendment and the Socialization of Children: Compulsory Public Education and Vouchers*, 11 CORNELL J.L. & PUB. POL’Y 503, 511–12 (2002).

<sup>13</sup> *School Board Will Recognize Other Cultures, but as Inferior*, N.Y. TIMES, May 13, 1994, at A16, *quoted in* NATHAN GLAZER, WE ARE ALL MULTICULTURALISTS NOW 1 (1997).

<sup>14</sup> *See, e.g.*, Redish & Finnerty, *supra* note 10, at 79–80 (describing “devotional rites of patriotism”); Shiffrin, *supra* note 12, at 512 (recounting Oregon’s effort to preserve mandatory public schooling, in part to fight Communism and Catholicism).

<sup>15</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>16</sup> *Newdow v. United States Cong.*, 328 F.3d 466, 490 (9th Cir. 2003) (as amended on denial of rehearing en banc), *cert. granted in part sub nom. Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 384 (U.S. Oct. 14, 2003) (No. 02-1624) (argued Mar. 24, 2004).

some domains of belief, “the government must leave to the people the evaluation of ideas.”<sup>17</sup> Granting that these cases tend to involve primary and secondary schoolchildren, similar concerns might be expressed about rituals and programs at colleges and universities that are aimed at inculcating certain kinds of values, beliefs, and dispositions.<sup>18</sup>

How can the requirement that government be agnostic among competing ideas in some cases be reconciled with the observation that education must inevitably occur through the selective transmission of ideas? Redish and Finnerty would permit the government to make “value-neutral educational choices” about what subjects to cover and what to say about those subjects.<sup>19</sup> Their choice of the label “value-neutral” obscures the question, because most of the educational choices they would permit are non-neutral among competing values—for example, the difference between open-minded inquiry and dogmatism.<sup>20</sup> Thus, rather than using the term “value-neutrality,” it might be more helpful to think in terms of two categories of beliefs or values:

(1) those about which it is permissible for an educational institution to inculcate beliefs, or on which the institution may take positions; and

(2) those about which evaluations of truth or falsity must be left to individual students.

In this scheme, for any proposed restriction on speech, the question is not whether it is facially “neutral” in terms of value, content, or viewpoint, but whether the restriction is intended to further the permissible inculcation of belief (Category 1) or whether it is an impermissible interference with the autonomy of individuals respecting belief in some domain (Category 2). The question of whether an institution may permissibly take a position on a particular matter is, in turn, resolved by whether it is justifiable to trust that institution to make a better judgment on that matter than citizens (students, in the case of a university) are able to make, acting alone.<sup>21</sup> On a wide range of curricular issues, educators are reasonably trusted to make value judgments because they have greater expertise regarding these issues, as compared with others. Those cases

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<sup>17</sup> *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 327 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986).

<sup>18</sup> *See, e.g.,* ALAN CHARLES KORS & HARVEY A. SILVERGLATE, *THE SHADOW UNIVERSITY* 210–32, *passim* (1998) (describing freshman orientation, sensitivity-training, and diversity programming that the authors contend constitute an assault on freedom of conscience).

<sup>19</sup> Redish & Finnerty, *supra* note 10, at 103.

<sup>20</sup> Thomson, *supra* note 8, at 164 & n.9.

<sup>21</sup> *Cf. JOSEPH RAZ, THE AUTHORITY OF LAW* 21–22 (1979) (explaining the exclusionary nature of authoritative directives by analogy to authority of experts).

appear to deal with Category 1 judgments, on which it is permissible for government actors to behave in a manner that is not value-neutral. Still, the very idea of government actors making value judgments continues to trouble civil libertarians, who attempt to shift as many judgments as possible into Category 2.<sup>22</sup> Focusing on the notion of expert authority can help illuminate the source of this concern.

Free speech arguments are often animated by a concern that the government might choose up sides in debates on matters of public importance. According to Judge Easterbrook, writing for the Seventh Circuit in *Hudnut*, for example, citizens have an “absolute right to propagate opinions that the government finds wrong or even hateful.”<sup>23</sup> In other contexts, however, the citizenry is perfectly comfortable with the idea of government agencies choosing up sides, because it assumes that those agencies have expert authority. No one gets upset if the FDA bans a fraudulent weight-loss remedy on the grounds that it does not help people lose weight—at least, no one claims that the case involves the denial of expressive freedom to the diet-pill manufacturer. The difference between the diet-pill case and the sort of disputes that are usually taken as implicating the First Amendment is that we have confidence that the FDA’s decision is reliable, because we have faith in the methods of medical research relied upon by agency scientists. Citizens trust that the FDA can accurately identify a medical swindle because they have shared standards of medical truth. Moreover, they share the reasons that motivate the agency’s scientists and regulators—namely, the desire not to be swindled by purveyors of quack medicines. Because these reasons are shared between affected individuals and the government agency, and individuals do better at achieving compliance with these reasons by deferring to the agency’s expert judgment, the agency has legitimate authority over the individual.<sup>24</sup> Paradoxically, the state’s authority does not reduce our freedom,<sup>25</sup> but enhances it, by increasing the reliability of our judgments on the basis of reasons that are *our* reasons.

By contrast, notice something about the quote from *Hudnut*: The words “the government finds”<sup>26</sup> indicate Judge Easterbrook’s skepticism about truth in the moral domain. Easterbrook’s rhetoric implicitly contends that, unlike in the diet-pill case, there is no truth of the matter regarding whether pornography is harmful to women, just the government’s say-so. If all the government has as a basis for its judgment is its mere belief about the

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<sup>22</sup> See Redish & Finnerty, *supra* note 10, at 67.

<sup>23</sup> 771 F.2d at 328.

<sup>24</sup> RAZ, *supra* note 21, at 23 (explaining the force of authoritative directives issued by experts).

<sup>25</sup> Gary Wills has observed the popular American belief that “[a]ny power given to the government is necessarily subtracted from the liberty of the governed.” GARRY WILLS, *A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT* 16 (1999).

<sup>26</sup> 771 F.2d at 328.

matter in question, what is to stop it from abusing its power to suppress opinions with which it disagrees? In addition, the pornography case does not exhibit the same disparity of information between the government and individual citizens as the diet-pill case. Consumers may not have access to epidemiological and pharmacological data, but they know enough about pornography to reach a reasonably reliable judgment about the moral issues it raises. The American people may trust the government to protect them from scientific swindles, but at the same time, they do not believe that the government has greater expertise, as compared with citizens, in detecting moral swindles.

It is worth asking whether this attitude of universal moral skepticism is warranted. Surely there are some moral swindles. People do not have to be skeptical about the truth of every proposition just because it cannot be verified using the methods of natural science research. Although the processes of justifying these statements are different, they are equally true:

The speed of light in a vacuum is  $3.00 \times 10^8$  m/s.

You cannot eat all the Krispy Kreme donuts you want and still lose weight while you sleep.

State-enforced racial segregation is a great moral evil.

A person who denies the third proposition is just as wrong as someone who denies one of the first two.<sup>27</sup> More to the point, a university would be selling the educational equivalent of snake oil if it taught the negation of any of these three propositions. People tend to agree, with respect to the first two, because they have some degree of confidence in the ability of empirical science to deliver truths.<sup>28</sup> The methods of ethics do not work in the same way—for one thing, bridges don't fall down if one's ethical reasoning is wrong—and people should not expect normative argument to produce the same broad agreement as scientific investigation. Nevertheless, there are matters, such as the evils of slavery, segregation, and racial bigotry, about which there is no reasonable disagreement. In these cases, why is it a bad thing for universities to take sides? If there is a

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<sup>27</sup> For a non-technical philosophical overview of how moral propositions can be justified, see generally W. Bradley Wendel, *Teaching Ethics in an Atmosphere of Skepticism and Relativism*, 36 U.S.F. L. REV. 711 (2002).

<sup>28</sup> There is in fact considerable controversy in the philosophy of science over the extent to which truth in the sciences is relative to convention and the claim that there are no theory-independent criteria for scientific truth. See generally PAUL FEYERABEND, *AGAINST METHOD* (1988); THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962). The argument here does not depend on any particular epistemological position in natural science or any other domain. Rather, the position of this Essay is that, because people's level of confidence in empirical science to deliver truth *in the relevant cases* is sufficient to warrant permitting universities to inculcate beliefs, universities should be allowed to inculcate beliefs on normative questions as well, as long as people have a comparable degree of confidence in the particular case.



normative matter on which university faculty have greater expertise than their students, the First Amendment is no more offended than it would be by a physicist teaching that the speed of light is a constant.

To return to the example of Holocaust denial, if one is interested in coming to a reliable conclusion about whether the Holocaust occurred, the best course of action would be to rely on professional historians who have long experience with the relevant evidence.<sup>29</sup> No non-specialist would be in a better position to reach a reliable judgment about the truth of this matter. Most people have never seen the minutes of the Wannsee Conference, and even if they had, they would require an expert evaluation for reassurance that the documents were not forgeries and to explain the context of the Conference in relation to other policies of the Nazi government. Surely the same is true for most college students. If a university refused to hire a Holocaust denier as a history professor, the rejected applicant would not have a claim against the university under the First Amendment because the university would be acting on the basis of a permissible (Category 1) evaluative position. The reason is that the university's expertise would be relevant to the subject matter on which the person intended to communicate. Civil libertarians might attempt to characterize this decision at a higher level of abstraction, calling it "thought control" instead of "refusing to hire someone who intends to peddle bunk to students." The reason for this move is to eliminate discretion from an untrusted decision maker,<sup>30</sup> but if we trust universities to make this decision reliably, there is no reason to limit their discretion in this way.

It is important to frame carefully the issues in which the university is supposed to have greater expertise. Consider the controversy over inviting poet Tom Paulin to give a lecture at Harvard University.<sup>31</sup> By the time he was invited, Paulin had achieved considerable notoriety for several anti-Semitic remarks and poems.<sup>32</sup> One can disaggregate two questions in

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<sup>29</sup> Fish, *supra* note 7, at 508–11. See also DEBORAH LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY 197–98 (1993) (recounting response by history department at Duke University to an ad in the student newspaper promoting Holocaust denial as simply another "view" or "idea" competing in the marketplace, and noting that there is no historical doubt about the actuality of the Holocaust). There seems to be a bootstrapping problem with Fish's advice simply to rely on criteria of truth put forward by historians. Reliance on the standards of historical truth constructed by historians is justified only if those standards have established a good record of separating truth from untruth. If there are no standards for historical truth separate from "what historians do," however, there appears to be no basis for making this assessment. Notice, however, that the argument is not that standards of historical truth are accessible *only* to historians, but that historians are better at making these judgments than non-experts. The truth of a matter is not the property of some community's judgment, even though that community may be more efficient or reliable at ascertaining truth in a particular domain.

<sup>30</sup> See Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. CHI. L. REV. 397, 414 (1989).

<sup>31</sup> See Jeffrey Toobin, *Speechless: Free Expression and Civility Clash at Harvard*, NEW YORKER, Jan. 27, 2003, at 32.

<sup>32</sup> *Id.*

the free-speech fracas that followed the decision of the English department to disinvite Paulin.<sup>33</sup> One is whether the department is competent to judge the literary merit of Paulin's poems, to which the answer is fairly obviously yes. The other issue, however, is a much broader political and moral one, including considerations of the relevance of artists' characters to the evaluation of their works. An analogy might be the distinction between the questions of whether *Tristan und Isolde* is a great opera (on which musicians have particular expertise) and whether the works of Wagner should be played in Israel (on which musicians have no more or less expertise than other Israeli citizens). In the Paulin case, several law professors contended that the controversy over the invitation posed the second question, in which case there would be no reason to permit the English department to withdraw the invitation unilaterally.<sup>34</sup> Of course, a university is still free to choose not to invite anti-Semitic poets to give readings, but that ground for decision is not within the expertise of a specific academic department. Thus, the argument in this Essay for permitting content- and viewpoint-based discrimination would not apply.

The relatively easy case of denying a position in the history department to a Holocaust denier can be made more difficult in several ways. First, the nexus between the university's expertise and the speech in question can be loosened. Instead of being a candidate for a faculty position in the history department, imagine that the Holocaust denier was a professor of engineering who wished to publish an article in the campus newspaper claiming that the Holocaust was a hoax.<sup>35</sup> Assuming that the professor's classroom teaching and research in engineering always satisfied rigorous professional standards of competence, is there any ground for the university to deny him permission to print the article, or to discipline him (say, by denying tenure or promotion) for writing it? The university as a whole has comparatively greater expertise than the engineering professor with respect to the question of whether the Holocaust was a hoax. The professor's function within the university, however, is to teach engineering, not history. Arguably his article about the Holocaust is not germane to his function within the university, so the administration would have no business disciplining him.

One might respond that this is a rather cramped sense of germaneness. The professor's bigotry and contempt for Jews may interfere with his ability to interact with others, including colleagues and students, in a respectful

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<sup>33</sup> *Id.* at 35. There is some question over whether the English department revoked its invitation or whether the department and Paulin mutually agreed that he would not deliver the lecture. *Id.* This factual ambiguity is irrelevant to the analysis of whether the department could disinvite Paulin if it chose to do so.

<sup>34</sup> *See id.*

<sup>35</sup> *See generally* Geri J. Yonover, *Anti-Semitism and Holocaust Denial in the Academy: A Tort Remedy*, 101 DICK. L. REV. 71 (1996) (discussing the controversy generated by Northwestern University engineering professor Arthur Butz, a self-styled "Holocaust revisionist"). *See also* LIPSTADT, *supra* note 29, at 123-36 (same).

manner.<sup>36</sup> As Judith Jarvis Thomson recognizes in her perceptive article on academic freedom, however, a bigoted professor might not misbehave on campus.<sup>37</sup> If there were an instance in which a Holocaust-denying professor had accumulated a record of problem-free relationships with students and colleagues, including Jews, the evidentiary significance of his prejudice, *vis-à-vis* respectful interactions with others, would be minimal.<sup>38</sup>

A fairly tight nexus between the university's mission and the content of the speech is necessary to preserve liberty of expression and conscience for students in non-educational contexts. A university may properly decide to inculcate in students a belief in racial equality, and for this reason may refuse to permit a professor to praise *Plessy v. Ferguson*<sup>39</sup> in class. The commitment to teaching the value of racial equality does not necessarily empower the university to punish a student for sending an e-mail message disparaging students of color.<sup>40</sup> As the Supreme Court has recognized, public college and secondary school students have a right to dissent, agitate, protest, and organize, even if the messages they seek to communicate are antithetical to the beliefs the educational institutions seek to inculcate.<sup>41</sup>

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<sup>36</sup> See Thomson, *supra* note 8, at 165–68.

<sup>37</sup> *Id.* at 168.

<sup>38</sup> Compare the case of law school graduate and avowed white supremacist Matthew Hale, who passed the bar but was denied admission to practice law in Illinois on character and fitness grounds. The record in his admissions proceedings showed that when he had worked in a law office, he never engaged in acts of racism toward African American clients. See *In re Hale*, Comm. on Character & Fitness for the Third Appellate Dist. of the Supreme Court of Ill. (1998), reprinted in GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 875, 877 (3d ed. 1999). Nevertheless, on appeal from the Inquiry Panel's decision, a different committee of the state bar denied Hale's application on the ground that his racist beliefs made it unlikely that he would comply with a state disciplinary rule prohibiting discriminatory treatment of participants in the litigation process. See *In re Hale*, Comm. on Character & Fitness for the Third Appellate Dist. of the Supreme Court of Ill. (1999), reprinted in GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING: TEACHER'S MANUAL* app. C, at 290–96 (3d ed. 2000).

<sup>39</sup> 163 U.S. 537 (1896).

<sup>40</sup> Consider the example of the anonymous “grocodile” message sent to a Harvard Law School student who had complained about the use of the n-word in another student's outline posted on a website: “If you, as a race, want to prove that you do not deserve to be called by that word, work hard and you will be recognized. If you just complain and ask others to do the job for you, it will have the opposite effect.” Toobin, *supra* note 31, at 36. The law school did not in fact punish “grocodile,” whose identity was discovered by some technologically proficient students, but a professor proposed using the event as an opportunity to have a mock trial. *Id.* at 37. Ironically, the prospect of a trial seemed to cause more friction than the original e-mail. *Id.* at 37–38.

<sup>41</sup> See *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that a state university could not bar a registered student religious group from conducting meetings in university facilities); *Healy v. James*, 408 U.S. 169 (1972) (holding that there was a First Amendment associational interest in Students for a Democratic Society becoming an officially recognized campus organization at a state-supported college and that the college had the burden of justifying its nonrecognition of the group); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969) (offering First Amendment protection to public high school students wearing black armbands in protest of the Vietnam War).

The expertise of universities, which permits them to take positions with respect to the content or viewpoint of certain communications by members of university communities, however, does not compel a complete surrender of First Amendment liberties. To balance the need to discriminate on the basis of content and viewpoint in order to accomplish the university's educational mission against the expressive rights of teachers and students, any restriction on the content or viewpoint of a speaker's message must be as narrowly tailored as possible. Restrictions should not reach speech outside official educational channels such as classrooms, except to the extent permitted for restrictions on speech in traditional public forums. The argument that a restriction on student speech is germane to the university's educational mission will be unavailing with respect to communications in physical public spaces, such as quads, student union buildings, public areas of dormitories, and bulletin boards,<sup>42</sup> and in the university's corner of cyberspace, including e-mail systems and websites maintained by the university.

Apart from loosening the nexus between the university's expertise and the speech in question, the second way to make the easy case difficult is to imagine that the speaker does not express an ethical view that is itself false, but rather takes a position that can be made to sound false, perhaps through distortion by opponents in a political debate. This appears to be what happened during a well-publicized hate speech controversy at Harvard Law School. Consider the comment attributed to torts professor David Rosenberg, "the blacks have contributed nothing to torts."<sup>43</sup> Rosenberg later said he was referring to critical race theory scholars and expressed his alarm that a faculty member could be criticized or threatened with formal sanctions for making comments critical of a genre of scholarship.<sup>44</sup> The view that critical race theory has not made a contribution to torts scholarship, while wrong in my view, is defensible and well within the range of views that faculty members should be permitted to offer in class discussion. People can disagree about the scholarly merits of a particular school of thought, and professors are permitted to take sides in these disagreements, although as a matter of pedagogical effectiveness they probably ought to be more open to competing views. Rosenberg's inartful choice of words, however, makes his statement susceptible to an interpretation that is not within the range of views that a university should be permitted to offer—namely, that black lawyers, scholars, and litigants have contributed nothing to tort law. Because of his bluntness, Rosenberg's statement was easily portrayed as one that is false,

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<sup>42</sup> William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79, 124–25 (1990).

<sup>43</sup> Toobin, *supra* note 31, at 36.

<sup>44</sup> *Id.* at 37.

which considerably complicated the debate over the appropriateness of his remarks.

The final way to weaken the expertise-based case for permitting universities to select for particular viewpoints is to question the very idea of normative expertise.<sup>45</sup> On pure normative issues, the expertise-based case for the university's authority is more difficult to sustain because moderns tend not to believe in moral experts. In First Amendment discourse one frequently meets the aphorism attributed to Voltaire, "I disapprove of what you say, but I will defend to the death your right to say it."<sup>46</sup> This quotation means that expressive liberties should not depend on the truth of the speaker's assertion because, in a pluralistic society, we are bound to disagree sometimes with our fellow citizens. This claim is the most serious challenge to a moderate First Amendment position because it denies authority to universities over any purely normative domain, including matters implicated by hate speech regulations. If there is no such thing as a better or worse position on the civic, political, and social equality of people of color, women, gays and lesbians, and other historically disadvantaged groups, then the university has no business limiting speech that takes a hostile position toward the claims of equality by disadvantaged members of the university community. In the terms introduced earlier, all speech dealing with issues of race, sex, gender, ethnicity, and sexual orientation would be Category 2 speech, implying that the evaluation of truth or falsity must be left up to the consciences of individuals. Universities must be agnostic on questions about which there is reasonable disagreement and on which they do not have comparatively greater expertise than students.

There are good and bad arguments for shunting normative issues into Category 2, and it is important to distinguish them. Normative disagreement may be the result of reasonable ethical pluralism, which is the result of the complexity of human life and its engagement with numerous competing sources of value, which lead to incompatible rankings of ethical demands.<sup>47</sup> As Isaiah Berlin puts it, "[s]ome among the Great Goods cannot live together. That is a conceptual truth. We are doomed to choose, and every choice may entail an irreparable loss."<sup>48</sup> Ethical pluralism entails a wide range of reasonable disagreement over questions pertaining to rights, justice, the duties we owe to each other, and other political issues that are implicated by university education.<sup>49</sup> On the other hand, notwithstanding ethical pluralism, there are normative matters, such as the evil of segregation and the civic equality of women, about which there is

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<sup>45</sup> One could also quibble with the choice of Holocaust denial as a test case because the question of whether the Holocaust occurred is an empirical one, not a normative issue.

<sup>46</sup> BARTLETT'S FAMILIAR QUOTATIONS 317 (Justin Kaplan ed., 17th ed. 2002).

<sup>47</sup> See JOHN RAWLS, POLITICAL LIBERALISM 54-58 (1993).

<sup>48</sup> Isaiah Berlin, *The Pursuit of the Ideal*, in *THE CROOKED TIMBER OF HUMANITY* 13 (Henry Hardy ed., 1990).

<sup>49</sup> See generally JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

no reasonable disagreement. These matters fall into Category 1, and a university may appropriately make content- and viewpoint-based judgments based on these principles. Another plausible reason to treat some matters under Category 2 is the worry that the university might abuse its power and attempt to preclude what would otherwise be an intellectually fruitful discussion by simply declaring a matter settled by fiat. This is essentially the argument of “political correctness” in universities.

Where there is reasonable normative disagreement, a university should be open to competing ideas and not engage in unwarranted viewpoint discrimination. To return to an earlier example, a political science department may decide to hire mostly rational choice theorists if it believes that this paradigm is likely to be the most fruitful avenue of inquiry in its discipline. At the same time, the ideal of open inquiry would counsel the department to be receptive to the possibility of hiring critics of rational choice theory as well, to enliven the debate and ensure that the department’s views do not simply become dogma. Similar considerations extend to the classroom. A political science department that is enamored of rational choice theory should not set it up as an orthodoxy and require students to parrot those beliefs in order to obtain a good grade. Again, this view assumes the existence of reasonable disagreement within a discipline; a political science teacher need not give a good grade to a student who argues that consulting oracles is a superior method of predicting the outcome of elections.

It is necessary to point out, in conclusion, that the domain of reasonable ethical pluralism is a large one, because even in the case of clear Category 1 principles, there may be application questions, the resolution of which falls within Category 2. For example, it may be a matter beyond reasonable dispute that African Americans deserve full political and social equality, but that principle does not, by itself, resolve debates about affirmative action, race-based redistricting, vouchers, and the like, which touch on the civic rights of African Americans. Similarly, a commitment to the equal rights of women does not necessarily count for or against any particular proposed regulation of abortion, or decide the issue of whether certain kinds of expression are sexually harassing. As stated at the outset, this Essay takes a moderate position. It does not go as far as some progressive critics of traditional First Amendment civil libertarianism would probably favor.<sup>50</sup> The hope is that the debate over hate speech regulations in universities takes into account some of the observations made here. Education is not value-neutral and, as Stanley Fish wrote in a slightly different context, “it’s a good thing, too.”<sup>51</sup> The values that educators may in-

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<sup>50</sup> See, e.g., Mari Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989).

<sup>51</sup> STANLEY FISH, *THERE’S NO SUCH THING AS FREE SPEECH, AND IT’S A GOOD THING, TOO* (1994).

culcate in students include ethical ones. For all the rhetorical power of the marketplace of ideas metaphor, it has its limitations. The state has always been able to regulate transactions in the marketplace, with the aim of punishing hucksters and con artists. Those people exist in the moral marketplace as well, and it is properly the role of the university to fight moral swindles. For this, we should be thankful.