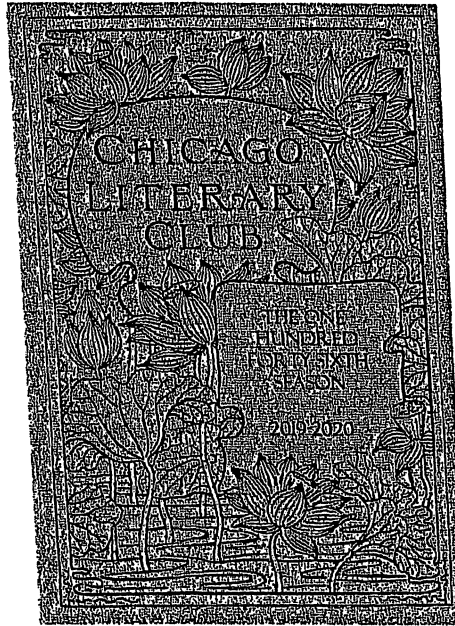


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**The One Hundred Forty-Sixth Season of
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"New Censorship in Academia"

By Donald H. J. Hermann

Subtitle: Free Speech Versus Political Correctness

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Calendar Link: [Donald H.J. Hermann - 11/4/2019](#)

**“NEW CENSORSHIP IN ACADEMIA:
Free Speech Versus Political Correctness”**

DONALD H.J. HERMANN

**THE CHICAGO LITERARY CLUB
at the Cliff Dwellers Club
Chicago, Illinois**

November 4, 2019

**“NEW CENSORSHIP IN ACADEMIA:
Free Speech Versus Political Correctness”**

DONALD H.J. HERMANN

If you and I were attending my alma mater, Stanford University, in the early 1990s, I would not have been permitted to deliver this paper, nor would you have had the opportunity to attend a campus reading of the paper. In June 1990, Stanford University added to its fundamental standards of conduct for members of the university community a provision prohibiting “discriminatory harassment.” This rule provided that: “Speech or other expression constitutes harassment by personal vilification if it: (a) is intended to insult or stigmatize an individual or small group of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin and (b) is addressed directly to the individual or individuals when it insults or stigmatizes; and (c) makes use of insulting or ‘fighting’ words or nonverbal symbols.... [I]nsulting or ‘fighting’ words or nonverbal symbols are [those] which by their very utterance inflict injury or tend to incite to an immediate breach of the peace, and which are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.”¹

Fortunately, from my point of view, I could present this paper and you could listen to my reading because in 1995, a California state court struck down the Stanford speech code provision by finding it a violation of a state statute which provides that a private university may not impose limitations on speech that would violate the First Amendment if

imposed by a public university.² The California Superior Court held that the Stanford speech code was overbroad because it prohibited speech that did not threaten to provoke immediate violence, and the prohibition was impermissibly content discriminatory because it focused on bigoted insults while leaving other insults unregulated.

While I am constrained “from public comment about the events” in my own classroom, I can acknowledge “as a factual matter that students complained about [my] use of a racial slur during two class discussions about criminal law and speech in spring 2018, that the student complaints were investigated by the Office of Institutional Diversity and Equity, that the matter was referred back to the Dean Rosato Perea for next steps in accordance with the Faculty Handbook and the Faculty Handbook processes for addressing allegations of misconduct has been followed. Dean Rosato Perea in her memorandum of May 22, 2018, stated her intention to take disciplinary action against [me].”

Rather than elucidate my own case, let me describe the events that occurred at Emory University, a private institution in Georgia; events which involved censure and discipline of a faculty member for using the N-word. The faculty member involved is Paul Zwier, a distinguished tenured professor who served as Director for Advocacy and Dispute Resolution at Emory University. He had served as a consultant to Lawyers without Borders, the World Bank and The Carter Center for almost 30 years.

Professor Zwier was reportedly involved in two incidents in which the N-word was used. There was no racist conduct occurring on either occasion: The word was not used as a slur directed at any individual. In the first incident, Zwier was leading a discussion of a

1960 court case in which a black Texas resident was refused service at a lunch counter. The court record for the case depicts a black man as being called a "negro" by a waiter who was refusing to serve the man. Zwier suggested in class that the record might have been "sanitized," and that the patron maybe have been actually called a "nigger" by the waiter. There is significance today to the use of the N-word in assessing any damages or relief that might be sought for the discriminatory conduct of the waiter.

Following student complaint, Zwier was sanctioned in this first incident by being banned for two years from teaching mandatory courses in which he draws on his expertise.

In a second incident, the professor later referred to the word during office hours when a student requested a meeting to discuss the classroom incident. According to an article in the Emory University student newspaper, *The Daily Report*, a black student came to Zwier's office to discuss the use of the word in the classroom. Apparently in defense of himself, Zwier told the student that: "His [Zwier's] father had marched for civil rights and that the son had been called a 'nigger lover' as a teenager because of his father's activity and because of own friendship with other black students." The law student quickly informed other students, faculty, the university president, and Emory's board of trustees of Zwier's use of the n-word. Zwier was placed on academic leave after the incident and the suspension is currently in effect.

In defense of the censorship and punishment, the acting Emory Law Dean James B. Hughes, affirmed the school's commitment to diversity. The Emory law dean stated:

Emory University's commitment to the core values of diversity, inclusion and respect is longstanding and non-negotiable. We have been guided by those

values in responding to a racial incident that occurred earlier this semester. Following that incident, we agreed to numerous steps to help our community [to] heal and grow. I have received reports that Professor Zwier used for a second time the same racial slur and have begun the process of gathering the facts regarding these allegations.... I met with law school leaders yesterday evening to listen to their concerns, to share the information I have observed to date, and to outline the processes that will be followed to address the solution.

It is significant that after Zwier's second suspension, a group of black students launched an effort to have Zwier's tenure contract terminated. A petition by this group claimed that these black students felt the need possibly to transfer because of Zwier's presence at the law school, and because Zwier had endangered these students' "safety and emotional well being."

It should be noted that the classroom occasion involved the use of a word in a situation where it is likely that the legal actors would have actually used that word and that the use of the word had legal significance. In law schools it often occurs that the actual language used by the various legal actors has significance and is relevant for students learning about the operation of the law in the real world. Particular words (not euphemisms) that individuals actually use have legal significance. In Zwier's class the actual use of the word is significant for determining the degree of discrimination experienced by a plaintiff. Particular words and phrases are the focus of arguments by attorney as well. And these words find their way into legal opinions.

As my colleague Professor Terry Smith, an African American, has informed me: The word "nigger" has appeared 7,162 times in federal court opinions.

The nature of the criticism directed at Professor Zwier for using the N-word is captured in the September 13, 2019 blog of Joe Patrice which was captioned "Why Can't Emory Law School Professors Stop Using the N-word all the time?" Arguing that the context is irrelevant and that no white person should ever speak the word, the blogger wrote: "The thing about tossing around the n-word in class is that there's just never any reason to do it. Does the hypothetical change when posited as 'and then the manager grabbed the man's plate and used a racial epithet'? As we pointed out before: It takes a special kind of narcissism for a random white professor to think he's the one 'educating' a group of black students about racist slurs."

The argument is that context is irrelevant and that reverse racism precludes a white person from using a word whose use is solely the privilege of black people. The argument is that white people should never use the word "nigger" and that it is irrelevant in what context the word is used by a white person. The argument goes on to assert that the use of the word by a white person causes emotional harm and distress, no matter the context, when the word is spoken by a white person. I regret that anyone is offended or suffers emotional distress when hearing a particular word. Surely gratuitous use of the n-word should be avoided. However, I maintain that there are occasions when the use of the word is appropriate and its use communicates significant meaning.

In Zwier's case, he has had an advocate in the person of Howard Candler, Professor of Law Emeritus at Emory University who asked the American Association of University Professors and the American Bar Association to place Emory University on academic probation, arguing that the University violated Professor Zwier's academic freedom guaranteed by his tenure status by penalizing Zwier's use of a racial epithet in a non-derogatory way.

George Scholtz, Director of the AAUP Department of Academic Freedom, Tenure, and Governance wrote in a letter on May 15, 2019 to the President of Emory University expressing concern over the sanctions imposed on Professor Zwier. Scholtz wrote for the AAUP: "We are...troubled by the serious substantive issues this poses, as Professor Zwier has plausibly claimed that the action against him was affected in violation of his academic freedom." The AAUP's letter to the President of Emory University provided a succinct statement of the reasons that the use of charges such as "racist harassment" or vague charges of inappropriate academic conduct for use of racial terms in an appropriate academic context is wrong. "Rules that ban or punish speech based upon its content cannot be justified. An institution of higher learning fails to fulfill its mission if it asserts the power to proscribe ideas – and racist or ethnic slurs, sexist epithets, or homophobic insults almost always express ideas, however repugnant. Indeed by proscribing any idea, a university sets an example that profoundly deserves its academic mission."

Contrary to the assertion that context is irrelevant and that a white person should never use the word, I offer the opinion of Randall Kennedy, an African-American law professor at Harvard University who, in his book *nigger: The Strange Case of a*

Troublesome Word, wrote: "There is nothing necessarily wrong with a white person saying 'nigger,' just as there is nothing necessarily wrong with a black person saying it. What should matter is the context in which the word is spoken – the speaker's aims, effects, alternatives. To condemn whites who use the N-word without regard to context is simply to make a fetish of [the word] nigger. Harriet Beecher Stowe (*Uncle Tom's Cabin*), Mark Twain (*Huckleberry Finn*), William Dean Howells (*An Imperative Duty*), Edward Sheldon (*The Nigger*), Eugene O'Neill (*All God's Children*), Lilian Smith (*Strange Fruit*), Sinclair Lewis (*Kingsblood Royal*), Joyce Carol Oats (*Them*), E.L. Doctorow (*Ragtime*), John Grisham (*A Time to Kill*), and numerous other white writers have unveiled nigger-as-insult in order to dramatize and condemn racism's hateful presence.³

Complaints about the use of racist terms in an academic environment, while not commonplace, have occurred in a number of disciplines. At Princeton University, Professor Emeritus Lawren Rosen was the subject of complaints filed by students in his anthropology class.⁴ During a lecture on oppressive symbolism, the professor reportedly asked his class, 'What is worse, a white man punching a black man or a white man calling a black man a n*****?' Dismissing the complaint, Princeton University administrators strongly endorsed the maintenance of a policy of classroom free speech. A university spokesperson said to the Associated Press: "The values of free speech and inclusivity are central to Princeton University's mission and critical to the education we provide to our students.... The conversations and disagreements that took place in the seminar led by Professor Rosen (last week) are part of the vigorous engagement and robust debate that are central to what we do." The chairperson of Princeton's Anthropology Department

suggested there may be different student attitudes at different institutions about restrictions on campus speech when she observed "that Rosen had previously given the same lectures at both Princeton University and Columbia Law School, but his use of the N-word has never invited similar backlash." The administrator said that the professor decided to cancel class voluntarily for the rest of the semester even though she had encouraged him not to.

A similar vindication was the result of a four-month investigation of Professor Andrea Quenette, a professor of Communication Studies at the University of Kansas.⁵ Professor Quenette used the "'n-word' during a discussion about how to talk to undergraduate students on college campuses about sensitive racial issues." A number of graduate students filed a formal complaint against the professor, because of the professor's use of the racial term. The professor "noted that some of the complaints were filed by students who were present when she used the slur but that others were not." This involvement of many students protesting a particular professor's use of the N-word seems to be the case in most of the schools where protest has occurred. Politically activist students take these occasions to stage broader protest events. Nevertheless, University of Kansas officials found the professor's use of the term was not intended as a slur. The administrators agreed with the professor that: "The word is offensive, but it was used in the context of retelling a factual event that occurred at another campus.... It was not used with racist animus."

The threat of employment disciplinary action for use of the n-word is not limited to the academic world as made clear in a recent op-ed in *The New York Times* by Walter Mosley, an African-American novelist and screenwriter.⁶ Mr. Mosley had used the n-word in

the "writer's room" when repeating an experience to his coworkers. Mr. Mosley wrote: "I had indeed said the word in the room. I hadn't called anyone it. I just told a story about a cop who explained to me, on the streets of Los Angeles, that he stopped all niggers in paddie neighborhoods and all paddies in nigger neighborhoods, because they were usually up to no good. I was telling a true story as I remembered it." According to Mr. Mosley, a staff member of the Human Resources department later "said, very nicely, that I could not use the word except in a script. I could write it but I could not say it."

Mr. Mosley maintained that because use of the word makes some other employees uncomfortable is not sufficient reason for banning the use of a word. Mr. Mosley argued that his free speech rights were at issue and should be respected even if his words make someone uncomfortable; he continued: "As far as I know, the word is in the dictionary. As far as I know, the Constitution and the Declaration of Independence assure me of both the freedom of speech and the pursuit of happiness. How can I exercise these freedoms when my place of employment tells me that my job is on the line if I say a word that makes somebody, an unknown person, uncomfortable?" Mr. Mosley correctly identifies "political correctness" as the underlying reason for the banning of speech; he concludes: "I do not believe that it should be the object of our political culture to silence those things that make some people uncomfortable. Of course, I'm not talking about verbal attacks or harassment. But if I have an opinion, a history, a word that explains better than anything how I feel, then I also have the right to express that feeling or that word without the threat of losing my job." Faced with a threat of employee discipline for use of a word, Mr. Mosley was unequivocal in his views; he said, "My answer to H.R. was to resign and move on."

It has been asserted by more than one commentator that the contemporary concept of political correctness was taken up by American radicals in the 1960s from the English edition of Mao Zedong's *Little Red Book*, which set out "correct" communist party or Marxist doctrine on a number of significant issues.⁷ It has been suggested that Mao's essay "*On the Correct Handling of Considerations among the People*" and his sayings like "let a hundred flowers bloom" provided direction for *politically correct* behavior.⁸

It was during the first phase of political correctness in the 1980s and 1990s that speech codes like the one adopted at Stanford University were promulgated. Jonathan Zimmerman, in his book *Campus Politics*, reports that both language and related thinking were the objects of concern by advocates of political correctness: "Racial minorities become 'people of color,' the handicapped were renamed 'differently abled,' older students were 'nontraditional learners.'"⁹ From the beginning, political correctness focused on policing language as a way to ultimately affect thinking. As Zimmerman points out: "Most definitions of 'political correctness' focus on language, emphasizing efforts to replace unkind or offensive terms with more neutral ones. Consider this recent definition of PC from the *Oxford Advanced Learner's Dictionary*: 'The principle of avoiding language and behavior that may offend particular groups of people.' Or this, from *Merriam-Webster*: 'Agreeing with the idea that people should be careful to not use language or behave in a way that could offend other people.'"¹⁰

Of course, language is important as the means to expressing ideas. It is also important for conveying precision in meaning. Saying "I love to read 'Shakespeare'" is not the same as saying "I use the L-word when I speak of my reading Shakespeare."

Zimmerman maintains that even during the first period, PC went “beyond language and into ideology: it’s an effort to inscribe new ways of thinking, not just of talking, and sure the words we choose affect the thoughts we communicate. If you call someone a ‘bum,’ for example, you’re making a statement about the person’s culpability that isn’t present in the term ‘homeless.’ So one of the earliest definitions of PC, from *Webster’s College Dictionary* in 1991, said that political correctness was ‘marked by or adhering to a typically progressive orthodoxy on issues involving especially race, gender, sexual affinity, or ecology.’ That’s a much broader formulation, referring to active promotion of certain ideas rather than the avoidance of negative words and phrases. And it can also carry a tinge of despotism.”¹¹

Michael Roth, President of Wesleyan University, in his book *Safe Enough Spaces*, wrote that the term “politically correct” became “a label that connotes hypocrisy and conformity among those who considered themselves as progressive.”¹² Roth identified a new era of political correctness beginning around 2010 which provoked “a renewed concern that college campuses had become leftist, politically correct bastions of protectionist educational policies aimed at guarding [students] against encountering ideas with which they might be uncomfortable.”¹³

Jonathan Chalt, writing about political correctness in *New York Magazine*, in January 2015, observed that: “After political correctness burst onto the academic scene in the ‘80s and early ‘90s, it went into remission. Now it has returned.”¹⁴ The new political correctness combines its repression of what is characterized as offensive speech with the

creation of “safe spaces” for students, which privileges the effort [by university bureaucrats and administrators] and to protect students from negative emotional experience.

Chalt reported in his *New York Magazine* article that: “At a growing number of campuses, professors now attach ‘trigger warnings’ to texts that may upset students, and there is a campaign to eradicate ‘microaggressions,’ or small slights that might cause searing trauma. These newly fashionable terms merely replace a control tenet of the first p.c. movement: that people should be expected to treat even faintly unpleasant ideas or behaviors as full-scale offenses.”¹⁵ There is an ideological foundation to the speech prohibitions imposed in pursuit of political correctness according to Chalt, who wrote that: “Political correctness is a style of politics in which the more radical members of the left attempt to regulate political discourse by defining opposition views as bigoted and illegitimate.”

Michael Roth advocates for a different kind of safe space; he argues for an academic environment where “[s]tudents then feel free (safe enough) to disagree with one another and even the professor.”²⁶ He strongly criticizes the politically correct concept of “safe space” understood as the protection of students from words or ideas that may evoke a negative emotional response. Roth wrote: “By the ‘safe-enough’ classroom, I do not mean that oft-imagined place where frightened teachers and undergrads ‘walk on eggshells’ for fear of saying something that might be offensive to someone else.”²⁷

Advocates of political correctness defend the suppression of free speech and censorship of offending words including racial slurs or epithets because of the offense, distress, or emotional response of some minority students experience upon hearing such

words spoken in any context. Administrators at institutions of higher learning have become advocates of making the university a safe space where students will be protected from teachers' use of such terms. Some advocates of safe space for students urge the requirement of warning students of forthcoming discussion of subject matter that students might find disturbing. The use of language which is regarded as objectionable is viewed as disrespectful, unnecessary, and not to be tolerated. The advocates of political correctness maintain that there is no valid reason for using such language because in their view neither the training of effective professionals nor full intellectual discourse has any place for such objectionable speech notwithstanding its existence in the broader society. The mantra of academic correctness is diversity and inclusion necessitating safe space which precludes speech which causes offense or emotional distress.

Contrast the position maintained by advocates of political correctness with the policy issued by the University of Chicago in 2019: the University of Chicago has made its defense of free speech and intellectual combat an essential aspect of its identity in the academic marketplace. In the summer of 2019, university administrators decided to warn its incoming students about its tough-minded rejection of student demands for equity and inclusion. The University of Chicago's dean of students informed those individuals entering the University as part of the class of 2020, that the University rejects any practice of trigger warnings, intellectual 'safe spaces' or the canceling of visiting speakers. "'You will find that we expect the members of our community to be engaged in rigorous debate, discussion and even disagreement,' [stated] Dean Ellison."¹⁸ Here we can hear a champion of free speech and academic freedom who flatly rejects political correctness, along with clear

opposition to censorship and suspension of free speech that are cornerstones of political correctness.

Perhaps the most notorious case of efforts at suppression of free speech and denial of academic freedom is that of Amy Wax, a professor of law at the University of Pennsylvania Law School. *The Wall Street Journal* announced on March 19, 2019, in a headline: "The campus mob at the University of Pennsylvania Law School has scored a hit. Professor Amy Wax will no longer be allowed to teach required first year courses, [according to] the school's dean."¹⁹ In her "Russell Kirk Memorial Lecture" to the Heritage Foundation in September 2018, Professor Wax discussed her case and provided a compelling analysis of the operation of the new political correctness in undermining academic freedom and suspending free speech.²⁰

Professor Wax identified the events that were significant in generating punitive actions against her by administrators at the University of Pennsylvania. The first was the publication of an article which she co-authored in *The Philadelphia Inquirer* on August 9, 2018, which argued that not all cultures are equally socially beneficial: "The piece listed some of the ills currently afflicting American society and suggested that a renewed embrace of so-called bourgeois values -- and a revival of a well-worn cultural script for mature adulthood that prevailed before the 1960s -- might help relieve some of our problems." The reaction of her fellow teachers and school administrators was reflected in an article in the university's student newspaper *The Daily Pennsylvanian* which denounced Professor Wax with a charge of racism. Other critics labeled Professor Wax "a racist, bigot, white supremacist, xenophobe, hater." It also led the Dean of the Penn Law

School to suggest that Professor Wax take a leave of absence and abandon teaching her first-year civil procedures course; these suggestions were rejected.

The second incident involved a *Bloggingheads* TV podcast Professor Wax had made several months before. This material was retrieved by members of the Penn Black Law Students Association who labeled the content racist. In discussing affirmative action at her law school, Wax had maintained that a history of grade disparity observed between minority and other students could not be explained by racism when courses were graded anonymously. She further remarked that she could not recall any black students graduating in the top echelons of the law school.

The publication of Professor Wax's observations about student performance and affirmative action generated a campaign to remove her from teaching a mandatory first-year course, Professor Wax reported that the dean quickly responded to the law school community with the announcement that Professor Wax would be relieved of her teaching assignment. He stated that her claims were false and violated confidentiality policies without he himself providing any proof or citing any authority for his contrary view. In his statement, the dean maintained that the professor's "belittling" statements made about black students might "adversely affect their learning environment."

In an environment of political correctness, the objective is not to generate counterargument or to challenge evidence but to end or prevent further statement or argument about a matter by censorship and silencing critical thought in order to protect students from "hurt, discomfort, offense or disparagement." As Professor Wax argues: "Professors who hold unpopular positions or make inconvenient empirical assessments

are psychologically toxic – and that's all that counts. If their presence causes offense and distress, feelings of disparagement or insult, a fear of ill treatment and discrimination, that is enough to justify ejecting them from the classroom. Of course, these perceptions and feelings are subjective and self-confirming and thus immune to challenge. It is all in the mind of the beholder and the beholder's mind reigns supreme."

Professor Wax is right on point when she identifies the very mechanism of political correctness enforcement. She said: "The academy is now replete with growing numbers of diversity bureaucrats who stand ready to monitor attitudes, receive complaints, entertain grievances, and guard sensitivities. In their never-ending quest to protect victims, who are everywhere, they police vocabulary, identify dog whistlers, call out slights, and dictate which terms and ideas are forbidden crime-think."

Even before the clear emergence of political correctness and before the term "politically correct" had become part of the academic vocabulary, Allan Bloom, a professor at the University of Chicago, in 1987 published *The Closing of the American Mind*, in which he described the acceptance of relative truth, which placed greater emphasis on avoiding giving offense rather than pursuing truth with intellectual rigor. Amy Wax suggests that this is the very consequence of the prevailing climate of political correctness. Professor Wax concluded: "What are the implications of what I have been talking about for the future of educational institutions and academia? Right now, we are dwelling in a climate of enforced orthodoxy, fear, and intimidation. Students, faculty, administrators, alumni, and donors do not feel free to dissent from approved opinions. For a growing number of topics only a narrow range of views are heard or allowed on campus. The irony here is that

measures designed to advance the universities' announced goals – improving and broadening the educational experience through greater diversity and inclusion – have had exactly the opposite effect. Greater diversity is supposed to expand the mind through exposure to a fuller range of thoughts and ideas. Instead, the range of acceptable facts and opinions on campus has become more constructed. Diversity means that students must be 'protected' from untoward notions, so orthodoxy and political correctness reigns."

Professor Wax's concerns are not unfounded. Students and faculty members who support the academic freedom of their colleagues and oppose the censorship being imposed by university of administrators express fear of speaking out. When students and faculty are approached by the press for comment on imposed censorship and punishment of professors for their advocacy, they hesitate to speak up or they often demand anonymity for fear of social and academic retribution from their peers and professors supporting academic political correctness.

Central to this paper is the theme of the threat to the speech and academic freedom posed by political correctness. Perhaps the most significant writing on the importance of free speech is by Thomas Emerson, *The System of Freedom of Expression*. Emerson identifies the principal values advance by free speech; these include advancing knowledge and "truth" in the marketplace of ideas; and the promotion of individual autonomy, self-expression and self-fulfillment; along with promoting representative democracy and self-government.²¹ Given the centrality of the mission of a university to advance the search for truth and knowledge, free speech and academic freedom are central to the enterprise. Erwin Chemerinsky, dean of the law school at the University of California, co-authored a

recent book, *Free Speech on Campus*, which undertakes the task of reconciling free speech and the current quest for greater diversity and inclusion in higher education.²² Chemerinsky and his co-author maintain: "College and universities must create an inclusive learning environment for all students and protect freedom of speech. To achieve both of these goals, campuses may do many things, but they must not treat the expression of ideas as a threat to the learning environment. Freedom of expression and academic freedom are at the very core of the mission of colleges and universities, and limiting the expression of ideas would undermine the very learning environment that is central to higher education."²³

All colleges and universities operate by charters granted by the states or federal government which commit them to providing education and fostering the pursuit of truth and knowledge. When it comes to protecting free speech and promoting academic freedoms, there should be no difference between public and private institutions of higher learning. The authors of *Free Speech on Campus* support this position when they write: "We recognize, of course, that the First Amendment applies only to public colleges and universities -- But academic freedom -- above all the ability to express all ideas and viewpoints, no matter how offensive -- is necessary at all colleges and universities. Freedom of expression therefore should be the same at all institutions of higher education."²⁴

Rather than primary reliance on constitutional provisions, courts are recognizing the significance of academic freedom as the basis for protection of speech which is guaranteed by university and college faculty contracts and grant of tenure. This gives new significance to the principles governing academic freedom which is guaranteed by the

contract terms of tenure established by agreement of colleges and universities to adhere to the statements set out by the American Association of University Professors. In its 1940 Statement of Principles of Academic Freedom and Tenure, the AAUP stated that: "Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject."²⁵ This statement was made subject to the following comment in 1970: "The intent of this statement is not to discourage what is 'controversial.' Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster."²⁶

In 2018, the Supreme Court of Wisconsin in *McAdams v. Marquette University* recognized academic freedom which is guaranteed by the tenure contract as a basis for protecting a professor from discipline for publishing a blog critical of a graduate student teaching an undergraduate class.²⁷ The professor posted on his personal blog statements attributed to a philosophy instructor who made statements to students declaring that some opinions are not appropriate in her class, such as racist opinions, sexist opinions, that "you don't have a right in this class to make homophobic comments." This blog was interpreted as a criticism of the philosophy instructor which generated further adverse comments by readers of the blog. Following complaints to university officials, a faculty disciplinary process was conducted to evaluate charges of harassment and unprofessional conduct leading to the decision by the University President to suspend the blogging professor.

The Wisconsin court found that the university's actions violated the academic freedom of the professor. The court found that the "tenure" term of the contract establishes

"[A] faculty status that fosters an environment of free inquiry without regard for the need to be considered for reappointment."²⁸ The University's Faculty Statutes provided that tenured faculty are entitled to yearly appointment excepting cases of intervening termination for cause. The university maintained that the professor's conduct constituted harassment which met the standard required for termination for cause. The court formulated the question before it as whether the doctrine of academic freedom encompassed the publication of the professor's blog post. The court concluded that the university breached the professor's tenure contract by suspending him for his exercise of his contractually protected academic freedom right. The court was explicit that its decision was not constitutionally based; in a footnote it observed: "The court, however, does not rely upon the United States Constitution for any part of its decision."²⁹ It is the faculty tenure contract that guarantees academic freedom and supports the full right of free speech.

There is an explicit rejection by the Wisconsin court of political correctness practice which punishes speech because it gives offense or causes emotional harm to members of the university community or to sanction speech because it conflicts with objectives of diversity and inclusion thus providing reasons for limiting academic freedom. The court explicitly replied to such an argument which was forcefully made by the university when the court stated that: "The university posited that educational institutions 'assume academic freedom is just one value that must be balanced against 'other values core to their mission.' Some of these values, it says, include the obligations to 'take care not to cause harm, directly or indirectly, to members of the university community,' 'to respect the dignity of others and to acknowledge their right to express differing opinions,' 'to safeguard [] the

conditions for community to exist,' to 'ensur[e] colleagues feel free to explore undeveloped ideas,' and to carry out 'the concept of *cura personalis*,' which involves working and caring 'for all aspects of the lives of members of the institution.'" "The Wisconsin court observed that: "These are worthy aspirations, and they reflect well on the University. But they contain insufficiently certain standards by which a professor's compliance may be measured. Setting the doctrine of academic freedom adrift among these competing values would deprive the doctrine of its instructive power, it would provide faculty members with little to no guidance on what it covers."³⁰

In a concurring opinion in the Marquette University case, Justice Rebecca Bradley provides a compelling analysis of the invariably linked relationship of academic freedom to free speech.³¹ Moreover, Justice Bradley makes clear the need for academic freedom and the protection of free speech to prevail over political correctness; she writes of the need to refuse to "succumb to the dominant academic culture of microaggressions, trigger warnings, and safe spaces that seeks to silence unpopular speech by deceptively recasting it as violent. In this battle, only one could prevail, for academic freedom cannot coexist with Orwellian speech police. Academic freedom means nothing if faculty is forced to self-censor in fear of offending the unforeseen and ever-evolving sensitivities of adversaries demanding retribution."³²

Justice Bradley identified two strands of academic freedom, one of which privileges free speech. She writes: "Academic freedom encompasses 'two distinct concepts': (1) 'professional academic freedom' tied to AAUP standards, and (2) the 'legal concept of academic freedom' tied to the First Amendment."³³ Justice Bradley goes on to observe

that: "[A]cademic freedom and free speech are interconnected concepts and frequent companions' whose significance has been recognized by the United States Supreme Court in such cases as *Sweezy v. New Hampshire*."³⁴ Justice Bradley observed that the United States Supreme Court has repeatedly recognized the importance of academic freedom and freedom of expression on America's college campuses without which our civilization will be strangled. Moreover, the United States Supreme Court has suggested that there are no higher stakes at issue when officials attempt to limit the free expression at stake in the exercise of academic freedom; in *Sweezy*, the Court declared: "To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."³⁶

What is at stake, then, is free speech in the academic environment. The decisions of the United States Supreme Court have repeatedly made it clear that free speech is not an absolute.³⁷ However, it is important to understand that the Court is reluctant to find new categories of speech unprotected by the First Amendment. In *United States v. Stevens*, the Court struck down a statute punishing depictions of animal cruelty distributed for commercial gain.³⁸ The court explained that it lacks "freewheeling authority to declare new categories of speech outside the scope of the First Amendment" while noting the existence of explicitly recognized categories of speech that are specifically outside the scope of the First Amendment such as defamation, true threats, obscenity, imminent incitement to violence, and crime-facilitating speech.

The question here is whether spoken words which may be offensive or result in emotional distress can be prohibited and their utterance punished. An opinion by Justice

Alito written while he was a member of the United States Court of Appeals makes it clear that the use of racial terms which may be taken as offensive or the cause of emotional distress cannot be punished as a racial harassment because such censorship violates the First Amendment.³⁹

Judge Alito was unequivocal in stating that: "There is no categorical 'harassment' exception to the First Amendment free speech clause."⁴⁰ The case before the Third Circuit involved an Anti-Harassment Policy that had the purpose of "providing all students with a safe and secure, and nurturing environment." To that end, the school policy prohibited harassment through verbal or physical conduct based on various characteristics including race that would have the "effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment." Citing opinions of the U.S. Supreme Court, Judge Alito reasoned: "There is of course no question that non-expressive, physically harassing conduct is entirely outside the ambit of the free speech clause. But there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs."⁴¹ The judge goes on to address the legality of harassment laws which punish mere words: "When laws against harassment attempt to regulate oral or written expression on such topics [as race]: however detestable the views may be, we cannot turn a blind eye to the First Amendment implications. 'Where pure expression is involved,' anti-discrimination law 'steers into the territory of the First Amendment.'⁴²

Judge Alito admits that the Supreme Court “has never squarely addressed whether harassment when it takes the form of pure speech is exempt from First Amendment protection.”⁴³ Nevertheless, he cites persuasive authority for the fact that: “The Supreme Court has made it clear, however, that the government may not prohibit speech...based solely on the ‘emotive impact’ that its offensive content may have on a listener.”⁴⁴ The Court’s opinion in *Tinker v. Des Moines Independent Community School Dist.* is cited for the proposition that such a limitation on speech is not permitted in the educational context: “The Supreme Court has held time and time again, both within and outside the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibition.”⁴⁵ More recently, a federal court ruled: “Nor could the University prescribe speech simply because it was found offensive, even gravely so, by large numbers of people.”⁴⁶

This leads to the conclusion that censorship and punishment for the use of racist terminology involves a suppression of Free Speech which is guaranteed by academic freedom which in turn is guaranteed to university professors, whether they teach in a public or a private university. But what of the validly pursued objectives supported by political correctness, namely diversity and inclusion? A reasoned response is that the objectives of diversity and inclusion should be pursued within an environment that supports free speech and academic freedom which are at the core of the purpose of the university in transmitting and discovering knowledge and truth. This means that those who identify as progressive should seek the ‘realization of diversity and inclusion,’ not by suppressing free speech but by supporting the development and maintenance of academic debate and by empowering

members of minority populations to fully engage in that debate and argument. That includes the positions progressives hold in contradiction to traditional thought.

Even those students who currently complain about a professor's use of words they find offensive are ill served by actions of censorship, suppression of speech, and related punishment of faculty. Instead, vigorous debate and discussion should be encouraged and supported by university administrators. A safe space should be an environment where there is support and encouragement for expression of opposing ideas. Let complaining students express their objection to the use of certain language. Let traditionalist professors defend their use of language by explaining the context and the reason for using particular language. The motto of my alma mater, Stanford University, should prevail: "Die Luft Der Freiheit Weht." ["Let the Winds of Freedom Blow."]

Again, Michael Roth, President of Wesleyan University, provides a corrective understanding of "safe space"; he writes that "a classroom, then should be a 'safe space'....a space where students know that if they espouse unpopular views, they will not be attacked, that there will be no reprisals. Students then feel free (safe enough) to disagree with one another and the professor."⁴⁸ At the same time, Rosen rejects the notion that the speech of professor should be suppressed because some students claim that it offends them or causes them emotional distress. Roth argues: "By the 'safe' classroom, I do not mean that oft-imagined place where frightened teachers and undergrads 'walk on eggshells,' in fear of saying something that might be offensive to someone else."⁴⁸ Roth identifies the danger of political correctness in shielding students from the realities they will face in the real world, rather than preparing students for robust debate and controversy they

will face after they leave the protective confines of the academic world. Roth correctly warns: "In preparing students for civic participation after graduation, universities must not be too safe -- they must not coddle. But they must be safe enough to provide encounters with different diversities, enhancing the capacity of students to think for themselves while empathizing with others, making them more resistant to the growing danger of orthodoxy and authoritarianism."⁴⁹

The prescription of President Roth is for an academic environment that provides a space for safe but robust discourse. The alternative approach of political correctness mandates safe space which excludes sensitive and potentially disturbing discussion; it is a program of censorship rather than debate, a policy of forbidding the utterance of certain proscribed words. Greg Lukianoff and Jonathan Haidt in their book *The Coddling of the American Mind* provide a disturbing account of what is at stake.⁵⁰ The authors report: "Many professors now say that they are "teaching on tender hooks" or "walking on eggshells" which means that fewer of them are willing to try anything provocative in the classroom -- or cover important but difficult course material. For example, writing about her experience teaching sexual assault, Professor Jeannie Suk Gersen of the Harvard Law School observed in *The New Yorker* that "asking students to challenge each other in discussion of rape law has become so difficult that teachers are starting to give up on the subject.... If the topic of sexual assault were to leave the law-school classroom, it would be a horrendous loss -- above all to victims of sexual assault."⁵⁷

The conflict between free speech and political correctness is real. It is a conflict between the popular political practice of censorship and repression or full protection of free speech. The future is open as to whether censorship or academic freedom will prevail.

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34. *Id.* at citing *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957).
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DePaul law professor subject of complaints - Chicago Sun-Times (IL) - February 28, 2018

February 28, 2018 | Chicago Sun-Times (IL) | Mitch Dudek

Several DePaul University law students have complained to the school's dean about a professor's use of the N-word in class last week.

Professor Donald Hermann said he used the **word** in class last Thursday while discussing this hypothetical situation: a white supremacist attends the funeral of a civil rights leader and hurls the **word** at funeral attendees. The crowd comes after him. Can he shoot them and claim self defense?

"In this case he can't, he'd be guilty of murder, he's the aggressor," Herman told the Sun-Times during a phone conversation Wednesday afternoon.

"My argument was that almost every other slur would not be enough in a similar context to make the harasser an aggressor," Hermann said.

Hermann said he used the **word** with full knowledge of its weight.

"The alternative (to using the **word**) is there, of course, but it waters down the discussion and the significance of the **word**. I think their reaction to it is the very justification for the use of it in this context," he said, adding that he didn't shout the **word** or point it at anyone, but said it in a plain voice.

"Some of these students will be public defenders, prosecutors, defense attorneys. Words like this will be a common part of their practice. I can understand their sensitivity about it. But in preparing people to go out into the real world, if during their education we have to be so sensitive to provide a safe space to harbor them from words that could be emotionally upsetting, I don't think we're doing our job of educating these students to be lawyers."

DePaul spokeswoman Carol Hughes said university's Office of Institutional Diversity and Equity, which oversees discrimination and harassment **complaints**, was notified and meetings had been arranged to interview Hermann and his students.

"The OIDE staff will complete their inquiries in accordance with established university procedures," she Hughes said in an emailed statement.

Terry Smith, who is African-American and a law professor at DePaul, said that he supports his colleague's use of the **word** in the context in which he used it.

"Increasingly, we are dumbing down legal education for students. And increasingly they are ill-prepared to go out and represent clients. They will encounter this terminology and worse in

practice. What will they do then?" Smith said.

Smith said he received an email from a female African-American student who was in Hermann's class.

"She was upset that Professor Hermann had previously used the euphemism 'n-word' but on that day he did not and she said no white person should be permitted to use that term," Smith said.

Smith spoke bluntly when asked to comment further about the student complaints.

"I think that their reaction is prompted by: A) A sense of entitlement that they should not be offended or provoked in the classroom. And, B) [it] represents something of a double standard in which many of the students who are complaining regularly go to movies where the N-word is regularly used where there's no teaching context for it. ... Now in the classroom where there's a teaching justification, suddenly they're upset by it. I find that to be hypocritical."

"His use of the word was not gratuitous," Smith said. "(Hermann) and I pulled up more than 5,500 federal cases that use the word n--- and did not substitute the word with the 'N-word,'" Smith said. "If these students are preparing to become lawyers, how can it be objectionable for a professor, in the proper teaching context, to use the word?"

Smith said he's never had any experiences that would cause him to believe Hermann is at all racist.

"Frankly, relative to my other white colleagues, he would rank as perhaps the most progressive white colleague I have," he said.

Hermann said other professors have found themselves similarly critiqued for using graphic language while discussing case law related to sexual assault.

Hermann, who's been teaching since 1972, said he was sorry that the students had been offended or hurt and said he planned to skip the "fighting words" discussion in future classes.

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