## Reverse Enforcement

### Better but Longer- Strossen

#### Both globally and domestically, speech codes worsen hate and *target minorities* – empirics prove.

**Strossen 1** Strossen, Nadine. [John Marshall Harlan II Professor of Law, New York Law School] “Incitement to Hatred: Should There Be a Limit?” *Southern Illinois University Law Journal*, Vol. 25, 2001.

Based on actual experience and observations in countries around the world, the respected international human rights organization, Human Rights Watch, concluded that suppressing hate speech does not effectively promote equality or reduce discrimination. In 1992, Human Rights Watch issued a report and policy statement opposing any restrictions on hate speech that go beyond the narrow confines permitted by traditional First Amendment principles. Human Rights Watch's policy statement explains its position as follows: The Human Rights Watch policy attempts to apply free speech principles in the anti-discrimination context in a manner that is respectful of both concerns, believing that they are complementary, not contradictory. While we recognize that the policy is closer to the American legal approach than to that of any other nation, it was arrived at after a careful review of the experience of many other countries .... This review has made clear that there is little connection in practice between draconian "hate speech" laws and the lessening of ethnic and racial violence or tension. Furthermore, most of the nations which invoke "hate speech" laws have a long way to go in implementing the provisions of the Convention for the Elimination of Racial Discrimination calling for the elimination of racial discrimination. Laws that penalize speech or membership are also subject to abuse by the dominant racial or ethnic group. Some of the most stringent "hate speech" laws, for example, have long been in force in South Africa, where they have been used almost exclusively against the black majority.42 Similar conclusions were generated by an international conference in 1991 organized by the international free speech organization, Article 19, which is named after the free speech guarantee in the Universal Declaration of Human Rights. That conference brought together human rights activists, lawyers, and scholars, from fifteen different countries, to compare notes on the actual impact that anti-hate-speech laws had in promoting equality, and countering bias and discrimination, in their respective countries. The conference papers were subsequently published in a book, Striking A Balance: 43 Hate Speech, Free Speech, and Non-Discrimination. The conclusion of all these papers was clear: **not** even any **correlation,** let aloneany **causal relationship, could be shown between** the enforcement of anti-hate**-speech laws** by the governments in particular countries **and** an improvement in **equality** or inter-group relations in those countries. In fact, often there was an inverse relationship. These findings were summarized in the book's concluding chapter by Sandra Coliver, who was then Article 19's Legal Director: **Laws which restrict hate speech** have been flagrantly abused by the authorities. Thus, the laws **in Sri Lanka and South Africa have been used almost exclusively** against **the oppressed** and politically weakest communities**. In** Eastern **Europe** and the former Soviet Union these **laws were vehicles for the persecution of critics who were often also victims of** state-tolerated or sponsored **anti-Semitism.** Selective or lax enforcement by the authorities, including in the United Kingdom, Israel and the former Soviet Union, allows governments to compromise the right of dissent and inevitably leads to feelings of alienation among minority groups. Such laws may also distract from the need for effective legislation to promotenon-discrimination. The rise of racism and xenophobia throughout Europe, despite laws restricting racist speech, calls into question the effectiveness of such laws in the promotion of tolerance and non- discrimination. One worrying phenomenon isthe sanitized language now adopted to avoid prosecution by prominent racists inBritain, France, Israel and other countries, which may have the effect of making their hateful messages more acceptable to a broader audience." She adds: The British experience parallels what has happened in the United States, as evidenced by the campus hate speech codes for which enforcement information is available.7 One such code was in effect at the University of Michigan from April 1988 until October 1989. Because the ACLU brought a lawsuit to challenge the code (which resulted in a ruling that the code was unconstitutional),"2 the university was forced to disclose information that otherwise would have been unavailable to the public about how it had been enforced. This enforcement record, while not surprising to anyone familiar with the consistent history of censorship measures, should come as a rude awakening to any who believes that anti-hate-speech laws will protect or benefit racial minorities, women, or any other group that traditionally has suffered discrimination. Even **during the short time that the** University of **Michigan rule was in effect,** there were more than twenty cases of whites charging blacks with racist speech. More importantly, there were only two instances in which the rule punished speech on the ground that it was racist-rather than conveying some other type of bias-and both involved the punishment of speech by or on behalf of black students. Let me underscore that:100% **of the speech punished as racist was by or on behalf of African-Americans.** Moreover, the only student who was subjected to a full-fledged disciplinary hearing under the Michigan rule was an African-American student accused of homophobic and sexist expression. In seeking clemency from the punishment that was imposed on him after this hearing, the student asserted that he had been singled out because of his race and his political views.73 Others who were punished at the University of Michigan included several Jewish students accused of engaging in anti-Semitic expression (they wrote graffiti, including a swastika, on a classroom blackboard, saying they intended it as a practical joke) and an Asian-American student accused of making an anti-black comment (his allegedly "hateful" remark was to ask why black people feel discriminated against; he said he raised this question because the black students in his dormitory tended to socialize together, making him feel isolated). Likewise, the student who in 1989 challenged the University of Connecticut's hate speech policy, under which she had been penalized for an allegedly homophobic remark, was Asian-American. She claimed that other students had engaged in similar expression, but that she had been singled out for punishment because of her ethnic background. Representing this student, the ACLU persuaded the university to drop the challenged policy.7" Following the same pattern, [T]he first complaint filed under Trinity College's then-new policy prohibiting racial harassment, in 1989, was against an African-American speaker[.] who had been sponsored by a black student organization, Black-Power Serves itself. Again, I stress that [T]hese examples are not just aberrational. Rather, they flow from the very premises of those who advocate hate speech codes. As they rightly note, discrimination and prejudice is, unfortunately, endemic **in** United States society-including on campus and in our legal system. Indeed, exhaustive studies of state and federal courts throughout our country consistently show entrenched patterns of racial and gender bias**."** So, for those of us who are committed to **eradicating discrimination,** the last thing **we should** want to **do is** to **hand over to discriminatory** officials and **institutions power to enforce** necessarily vague hate **speech codes** that inevitably call for subjective, discretionary decisions. This discretionary power predictably will be used in a way that is hardly helpful to disempowered groups.

### Shorter- Friedersdorf

**Speech codes are clear policy failures – they don’t decrease bigotry, but they’re used against those they’re seeing to help.**

Conor **Friedersdorf 15**, 12-10-2015, "The Lessons of Bygone Free-Speech Fights," Atlantic, http://www.theatlantic.com/politics/archive/2015/12/what-student-activists-can-learn-from-bygone-free-speech-fights/419178/

He was writing after the University of **Michigan**, the University of **Wisconsin**, **and Stanford implemented speech codes targeted at racist and sexist speech.** These were efforts to respond to increasing diversity on campuses, where a number of students spewed racist and sexist speech that most everyone in this room would condemn. But **those** speech codes **were policy failures. There is no evidence that hate speech or bigotry decreased on any campus that adopted them. At Michigan**, the speech code was analyzed by Marcia Pally, a professor of multicultural studies, who found that “**black students were accused of racist speech in almost 20 cases. Students were punished only twice** under the code’s anti-racist provisions, **both times for speech by or on behalf of blacks.**”

## Retargeting

**People with the ideologies you want to censor are still out there and use the censorship apparatus against you.**

Bart **Cammaerts 9**, London School of Economics and Political Science, England, 11-2009, "Radical pluralism and free speech in online public spaces," International Journal of Cultural Studies, http://eprints.lse.ac.uk/27895/1/Radical\_pluralism\_and\_free\_speech\_in\_online\_public\_spaces\_(LSERO).pdf

However, in a context where a powerful extreme right actively propagates such racist ideologies, both implicitly and explicitly, this becomes another issue altogether. And it is here that the limits of a radical plurality of voices within a democracy expose themselves. It is therefore to some extent understandable that some Belgian politicians from left to right, from federalists to nationalists are calling for more pro-active government intervention regarding online hate speech, preferably at a European level of governance. Of course, given the deeply offensive and repulsive nature of many of the comments being made online and the context in which they were produced, it is difficult to remain neutral here; rational detachment is not an option. Such vitriolic discourses should make any democratic person angry, demanding that something be done about this. The question remains what that something then is. Whilst laws and regulation or even technical solutions might be able to remove some of these discourses from the public space, therefore **the ideas and ideology** behind these discourses **have not disappeared from the political.** It might be useful in this regard to briefly recount Butler’s (1997) work on ‘excitable speech’ in which she uses Foucault’s History of Sexuality to argue that forbidding hate-speech all together through (state) censorship above all aids in proliferating these discourses further throughout society. This can also be related to what Mouffe calls the inherently conflictual nature of the political. Butler is not per se against limitations to the freedom of speech, but points to the need to be aware of the difficulties of combating hate speech through legal measures and the practical consequences of this. She refers to difficult questions such as: who defines what is hurtful, offensive, wounding or injurious speech and what is the context in which such language is being used? But whilst there might be an overall consensus that the discourses being discussed in this paper are totally unacceptable and do not belong in a democracy, not even from the perspective of a radical democracy or pluralism, the question of where and how we draw the line as a democracy between what is acceptable within a pluralist perspective and what is not? And how is this then implemented and enforced? Internet filtering and monitoring remain technical and policy options when it comes to combating hate speech on the internet. However, active **censorship** in a democracy **tends to backfire**s in several ways. In relation to this case study, it could be argued that democracy might lose out in two ways. **First, anti-democratic forces are able to construct democratic parties and institutions as ‘undemocratic’** on a continuous basic, claiming that they suppress ‘the true thoughts of the people’, using in effect the formal rules of democracy to destroy democratic culture arguing for a democratic right to be a racist. **Second, how to guarantee that once a regime of content control online is in place, it will not be used to silence other voices that at some future moment in time are considered** to be **undesirable by a majority?** And do we really want content on the internet controlled, monitored and filtered on a permanent basis? This is, however, by no means a plea for complacency and/or ignorance, but to carefully think through the implications of intervention to exclude voices from public spaces of communication and interaction all together. Efforts to combat the incitement of hatred through democratic and legal ways should be encouraged, ‘in order to to secure a minimum of civility’ (Rosenfeld, 2001: 63). Exposure in the mainstream media of those that produce such discourses and formal legal complaints by racism watchdogs are important and fairly effective tools for achieving that (except when anonymity is invoked). **The embracement of censorship** of online content by democratic societies in addition to this, would not only represent crossing the rubicon, but also **focuses merely on removing some of the symptoms of racism, not the root causes of it.**

**UC proves – government interests aggressively pushed anti-BDS speech codes. They become political pawns and give more influence to the people already in charge**

Conor **Friedersdorf 16** (a staff writer at The Atlantic, where he focuses on politics and national affairs; the founding editor of The Best of Journalism) “The Glaring Evidence That Free Speech Is Threatened on Campus” The Atlantic, March 4, 2016. http://www.theatlantic.com/politics/archive/2016/03/the-glaring-evidence-that-free-speech-is-threatened-on-campus/471825/

Or forget big speeches and look to another example of left-leaning speech that is threatened. As Glenn Greenwald wrote at The Intercept, “One of the most dangerous threats to campus free speech has been emerging at the highest levels of **the U**niversity of **C**alifornia **system**, the sprawling collection of 10 campuses that includes UCLA and UC Berkeley. The university’s **governing Board of Regents, with the support of University President** Janet **Napolitano and egged on by the state**’s **legislature**, **has been attempting to adopt new speech codes that**—**in the name of combating ‘anti-Semitism’**—**would formally ban various forms of Israel criticism.”** He continued: Under the most stringent such regulations, **students found** to be **in violation of these codes would face suspension or expulsion. In July, it appeared that the Regents were poised to enact the most extreme version, but decided** instead **to push the decision off** until September, when they instead would adopt non-binding guidelines to define “hate speech” and “intolerance.” **One of the Regents most vocally advocating for the most stringent version** of the speech code **is Richard Blum, the multi-millionaire defense contractor** who is **married to Sen.** Dianne **Feinstein** of California. At a Regents meeting last week, reported the Los Angeles Times, **Blum expressly threatened that Feinstein would publicly denounce the university if it failed to adopt far more stringent standards** than the ones it appeared to be considering, and specifically demanded they be binding and contain punishments for students found to be in violation. The San Francisco Chronicle put it this way: “Regent Dick Blum said his wife, U.S. Sen. Dianne Feinstein, D-Calif., ‘is prepared to be critical of this university’ unless UC not only tackles anti-Jewish bigotry but also makes clear that perpetrators will be punished.” The lawyer Ken White wrote that “Blum threatened that his wife … would interfere and make trouble if the Regents didn’t commit to punish people for prohibited speech.” As campus First Amendment lawyer Ari Cohn put it the following day, “Feinstein and her husband think college students should be expelled for protected free speech.”

## Backlash

### Better But Longer- Honig

**backlash – the attempt to close political space is always imperfect and engenders resistance – censoring speech doesn’t change minds but redirects them – that threatens institutions and leaves supporters less prepared to defend their gains. Resistance to abortion proves.**

Bonnie **Honig 93**, Nancy Duke Lewis Professor in the departments of Modern Culture and Media (MCM) and Political Science at Brown, 4-15-1993, "Political Theory And The Displacement Of Politics," Cornell University Press.

The perpetuity of contest is not easy to celebrate. My own afﬁrmation of it is animated, not by the benighted teleological belief that politically active lives are necessarily fuller or more meaningful than their alternatives, but by my conviction that the displacement of politics with law or administration engenders remainders that could disempower and perhaps even undermine democratic institutions and citizens. The US. Supreme Court’s recent decision in Planned Parenthood of Southeastern Pennsylvania v. Carey supplied compelling new justiﬁcations for a woman's right to control her sexuality and reproductive freedom, but it also endorsed new restrictions on that right. **When a woman’s right to choose was ﬁrst recognized** in 1973 by a very different Court in Roe v. Wade, **many** citizens **celebrated** the Court‘s decision as **the end of a battle.** Those opposed to the decision, however, vowed to roll back Roe v. Wade and. nineteen years later, they have had great success.6 **The battle is being refought** in the Court and in the state houses. **Those who thought it was won** in 1973 were surprised by this sequence of events. Many **assumed that,** once juridically recognized, **the right** to abort a pregnancy **would never be returned to** the space of **political contest.** In the past two decades they went on to ﬁght other battles, doing relatively little to mobilize citizens and communities to protect and stabilize this new right, leaving pro-life organizations relatively free to repoliticize and redeﬁne the issues. In response to the juridical settlement of a woman's right to choose, pro-lifers focused on the fetus and the family and on the relations of obligation and responsibility that tie women to them. Soon abortion became known as baby killing. pro-choice became antifamily, and pregnant single women became icons of danger whose wanton, (literally) unregulated sexuality threatens the safety and the identity of the American family. These identities and identiﬁcations are not stable. But in the absence of resistance to them, they could be stabilized. That realization has energized pro-choice citizens into action in the last few years. and the sites of the battle are proliferating. ¶ These observations are by no means meant to imply that it would be better not to entrench a woman's right to terminate a pregnancy—that is a different debate, one that turns on considerations of political strategy and equal justice. My point is that there is a lesson to be learned from the experience of those who misread Roe as the end of a battle and later found themselves ill equipped and unprepared to stabilize and secure their still unstable rights when they were repoliticized and contested by their opponents. **In their mistaken belief that the agon had been successfully shut down** by law, **pro-choice citizens** ceded the agon to their opponents and **found**, years later, **that the terms of the contest had shifted against them. Disempowered by their belief that the law had settled** the issue without remainder, **they failed to engage** the concerns of moderate citizens who harbored doubts about the morality of abortion, **leaving them and their doubts to be** mobilized and **radicalized** by those who had no doubts about the practice‘s immorality and who were determined to see it outlawed again.7 ¶ To afﬁrm the perpetuity of contest is not to celebrate a world without points of stabilization; it is to afﬁrm the reality of perpetual contest. even within an ordered setting, and to identify the afﬁrmative dimensions of contestation. It is to see that **the always imperfect closure of political space tends to engender remainders** and that, if those remainders are not engaged, **they may return to haunt and destabilize the very closures that deny their existence.** It is to treat rights and law as a part of political contest rather than as the instruments of its closure It is to see that attempts to shut down the agon perpetually fail, that the best (or worst) they do is to displace politics onto other sites and topics, where the struggle of identity and difference, resistance and closure, is then repeated.8 These are the platforms of a virtu) theory of politics

### Shorter- Herron

#### Speech codes cause backlash from dominant groups

**Herron:** Herron, Vince [Class of 1994, University of Southern California Law Center. B.A. 1990, University of California, Los Angeles.] “NOTES: INCREASING THE SPEECH: DIVERSITY, CAMPUS SPEECH CODES, AND THE PURSUIT OF TRUTH.” Southern California Law Review. January 1994.

Some will argue that speech codes were never intended to solve the underlying problems of racism, sexism, and homophobia. According to this theory, speech codes are meant only to give minority groups respite from verbal attacks while the university employs other mechanisms to attack root problems. These proponents argue that speech codes achieve these rather temporary and modest goals. Speech codes, they will argue, improve the situation for the minority students and give the university time to defeat the ignorance and intolerance that originally necessitated the promulgation of the speech codes. But it is unlikely that speech codes are so unambitious that they envision only preventing injury without attempting to address real problems. To believe the above proposition, one must believe that university administrators, in an at- tempt to foster better relations on campuses, produce codes with no more in mind than the vain hope that speech codes will be a quick fix to a long-term problem. The argument then, is that because they are offered only as a quick fix to a long-term problem, speech codes in fact do succeed in their goal of injury prevention. Even if it is true that administrators are so short-sighted, there is some evidence that speech codes actually serve to exacerbate already strained tensions on campuses. **Dominant groups,** which consider codes to be abridgements of free expression created to solve a problem reported only by minority groups (a problem whose gravity the dominant group does not recognize or understand), **may struggle to accept the restrictions.** Also, **both dominant and minority group members** alike have been and **will be sanctioned by university administrators under these codes that,** doubtless, **exacer- bate tensions among** members of **these groups.** It has also been suggested that **censoring certain expression makes the expression more,** rather than less, **attractive.** This leads to increased, not decreased, use of this expression, and, there- fore, more injury, not less. Speech code proponents may disagree with the proffered evidence and dispute that the codes actually exacerbate tensions. They may continue to assert that speech codes in fact benefit minority group members by protecting them from injurious speech. But even if this assertion is accepted, **these modest gains will be short-lived and are far out- weighed by what both minority group members and educational environments sacrifice** when speech codes are estab- lished and enforced.

## Counter Speech

### Majeed

#### Empirics show community counter-speech solves. Majeed Majeed, Azhar. [J.D., University of Michigan] “Defying the Constitution: The Rise, Persistence, and Prevalence Of Campus Speech Codes.” *Georgetown Journal of Law & Public Policy*, 7 Geo. J.L. & Pub. Pol’y 481, 2009.

Moreover, the **counterspeech** approach **can have significant benefits** **for minority students.** One commentator writes that “only by pointing out the weaknesses and the moral wrongness of an oppressor’s speech can an oppressed group realize the strength of advocating a morally just outcome.” [250] As is the case whenever one participates in campus dialogue and debate, minority students can expect to bolster their arguments and sharpen their views; “Through the active, engaging, and often relentless debate on issues of social and political concern,” they “learn the strengths of their own arguments and the weaknesses of their opponents’. With this knowledge, these groups are better able to strike at the heart of a bigoted argument with all of the fervor and force necessary to combat hateful ideas.” Therefore, the experience and knowledge gained through the process of debate and discussion will serve minority students well in the long run. Minority students also benefit in that engaging in **counterspeech, rather than appealing to** the **authorities for protection, may provide** a **strong** sense of self-autonomy and **empowerment.** The **efforts of minority students will often be met by a receptive** **campus audience,** one which is curious to hear how they respond to hateful and prejudicial messages, affording these students the opportunity to meaningfully impact the way many individuals on campus think about important issues. **Counterspeech “can** serve to define and underscore the community of **support enjoyed by** the **targets** of the hateful speech, faith in which may have been shaken by the hateful speech.” Consequently, when minority students respond to hateful speech with counterspeech, successfully engage the campus community, and inform their fellow students’ views, they gain “a sense of self-reliance and constructive activism” as well as “a sense of community support and empowerment.”[254] Nadine Strossen asserts that, for this reason, counterspeech “promotes individual autonomy and dignity.”[255] These are significant benefits that other methods of responding to hateful speech do not offer, and it is difficult to place a value or measure on the positive impact this can have on students’ lives. He adds: Charles Calleros provides two illustrative examples of such an opportunity. The first arose **at Arizona** State University, where one of **a group of female African-American students who found a racist poster** in a dormitory **convinced** one of the **students who had put up the poster to voluntarily take it down,** then sent a copy of the poster to the campus newspaper along with a letter discussing its racist stereotypes. Calleros, supra note 216, at 1259. She also requested action from the director of the residence hall, which resulted in a residents’ group meeting to discuss the issues involved. Id. Ultimately, **“the result was a series of** opinion **letters** in the campus newspaper **discussing** the problem of **racism,** numerous workshops on race relations and free speech, and overwhelming approval in the Faculty Senate of a measure to add a course on American cultural diversity to the undergraduate breadth requirement.” Id. The second episode took place **at Stanford** University. There**, students**, faculty, and administrators at the law school **responded to** a student’s **homophobic speech by sending** opinion **letters** to the campus newspaper, writing comments on a poster board at the law school,and signing a published petition disassociating the law school from the speaker’s message. Id. at 1261. Several students even wrote a letter reporting the incident to a prospective employer of the speaker. Id. These two experiences, by their very facts and the results achieved, speak volumes about the effectiveness of counterspeech when used to respond to hateful messages.

### Calleros- Best

**Counterspeech is especially effective- it bolsters campus-wide movements and mitigates the risk of dealing with censorship issues which sacrifices focus on the movement**

**Calleros 95** **[Calleros, Charles R. “Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun” (Professor of Law, Arizona State University). HeinOnline. Arizona State Law Journal. 1995]**

Delgado and Yun summarize the support for the counterspeech argument by paraphrasing Nat Hentoff: "[A]ntiracism rules teach black people to depend on whites for protection, while talking back clears the air, emphasizes self-reliance, and strengthens one's self-image as an active agent inchargeofone'sowndestiny."50 DelgadoandYunalsocitetothosewho believe that **counterspeech** may help **educate the racist speaker** by addressing 51 the ignorance and fear that lies behind hostile racial stereotyping. But they reject this speech-protective argument, stating that "it is offered blandly, virtually as an article of faith" by those "in a position of power" who "rarely offer empirical proof of their claims. ,,52 The authors argue that talking back in a close confrontation could be physically dangerous, is unlikely to persuade the racist speaker to reform his views, and is impossible "when racist remarks are delivered in a cowardly fashion, by means of graffiti scrawled on a campus wall late at night or on a poster placed outside of a black student's dormitory door." 53 They also complain that "[e]ven when successful, talking back is a burden" that minority undergraduates 54 should not be forced to assume. In rejecting the counterspeech argument, however, Delgado and Yun cast the argument in its weakest possible form, creating an easy target for relatively summary dismissal. When the strategies and experiential basis for successful counterspeech are fairly stated, its value is more easily recognized. First, **no responsible free speech advocate argues that a target of hate speech should directly talk back** to a racist speaker in circumstances that quickly could lead to a physical altercation. If one or more hateful speakers closely confronts a member of a minority group with racial epithets or other hostile remarks in circumstances that lead the target of the speech to reasonably fear for her safety, in most circumstances she should seek assistance from campus police or other administrators before "talking back." Even staunch proponents of free speech agree that such threatening speech and conduct is subject to regulation and justifies more than a purely educative response. The same would be true of Delgado's and Yun's other examples of speech conveyed in a manner that defaces another's property or 56 When offensive or hateful speech is not threatening, damaging, or impermissibly invasive and therefore may constitute protected speech, 57 education and counterspeech often will be an appropriate response. However, proponents of free speech do not contemplate that counterspeech always, or even normally, will be in the form of an immediate exchange of views between the hateful speaker and his target. Nor do they contemplate that the target should bear the full burden of the response. Instead, **effective counterspeech often takes the form of letters, discussions, or demonstrations** joined in by many persons and aimed at the entire campus population or a community within it. Typically, it is designed to **expose the moral bankruptcy of the hateful ideas**, to demonstrate the strength of opinion and numbers of those who deplore the hateful speech, and to spur members of the campus community to take voluntary, constructive action to combat hate and to remedy its ill effects. 58 Above all, it can serve to define and underscore the community of support enjoyed by the targets of the hateful speech, faith in which may have been shaken by the hateful speech. Moreover, having triggered such a reaction with their own voices, the targets of the hateful speech may well feel a sense of empowerment to compensate for the undeniable pain of the speech. 59 One may be tempted to join Delgado and Yun in characterizing such a scenario as one "offered blandly, virtually as an article of faith" and without experiential support. 6° However, **campus communities that have creatively used this approach** can attest to the surprising power of counterspeech. Examples of counterspeech to hateful racist and homophobic speech at **Arizona State and Stanford** Universities are especially illustrative.61 In an incident that attracted national attention, the campus community at Arizona State University ("A.S.U.") constructively and constitutionally responded to a racist poster displayed on the outside of the speaker's dormitory door in February 1991. Entitled "WORK APPLICATION," it contained a number of ostensibly employment-related questions that advanced hostile and demeaning racial stereotypes of African-Americans and Mexican-Americans. Carla Washington, one of a group of African- American women who found the poster, used her own speech to persuade a resident of the offending room voluntarily to take the poster down and allow her to photocopy it. After sending a copy of the poster to the campus newspaper along with an opinion letter deploring its racist stereotypes, she demanded action from the director of her residence hall. The director organized an immediate meeting of the dormitory residents to discuss the issues. In this meeting, I explained why the poster was protected by the First Amendment, and the women who found the poster eloquently described their pain and fears. One of the women, Nichet Smith, voiced her fear that all nonminorities on campus shared the hostile stereotypes expressed in the poster. Dozens of residents expressed their support and gave assurances that they did not share the hostile stereotypes, but they conceded that even the most tolerant among them knew little about the cultures of others and would 62 benefit greatly from multicultural education.  The need for multicultural education to combat intercultural ignorance and stereotyping became the theme of a press conference and public rally organized by the student African-American Coalition leader, Rossie Turman, who opted for highly visible counterspeech despite demands from some students and staff to discipline the owner of the offending poster. The **result was a series of** opinion **letters** in the campus newspaper discussing the problem of racism, numerous **workshops** on race relations and free speech,and overwhelming approval in the Faculty Senate of a measure to add a course on American cultural diversity to the undergraduate breadth 63 requirement.  The four women who initially confronted the racist poster were empowered by the meeting at the dormitory residence and later received awards from the local chapter of the NAACP for their activism.64 Rossie Turman was rewarded for his leadership skills two years later by becoming the first African-American elected President of Associated Students of A.S.U.,65 a student body that numbered approximately 40,000 students, only 66 2.3 percent of them African-American. Although Delgado and Yun are quite right that the African-American students should never have been burdened with the need to respond to such hateful speech, Hentoff is correct that the responses just described helped them develop a sense of self-reliance and constructive activism. Moreover, the **students' counterspeech inspired a community response that lightened the students' burden** and provided them with a sense of community support and empowerment. Indeed, the students received assistance from faculty and administrators, who helped organize meetings, wrote opinion letters, spoke before the Faculty Senate, or joined the students in issuing public statements at the press conference and public rally.67 Perhaps most important, campus administrators wisely refrained from disciplining the owners of the poster, thus **directing public attention to the issue of racism** and ensuring broad community support in denouncing the racist poster. Many **members** of the campus and surrounding communities **might have leapt to** the racist **speaker's defense** **had the state attempted to discipline** the speaker and thus had created a First Amendment issue. **Instead, they remained united with the offended students** because the glare of the **public spotlight** remained sharply **focused on** the racist **incident without t**hedistraction of cries **of state censorship.** Although the counterspeech was not aimed primarily at influencing the hearts and minds of the residents of the offending dormitory room, its vigor in fact caught the residents by surprise. 68 It prompted at least three of them to apologize publicly and to display curiosity about a civil rights movement that they were too young to have witnessed first hand. 69 This effective use of education and counterspeech is not an isolated instance at A.S.U., but has been repeated on several occasions, albeit on smaller scales.7° One year after the counterspeech at A.S.U., Stanford University responded similarly to homophobic speech. In that case, a first-year law student sought to attract disciplinary proceedings and thus gain First Amendment martyrdom by shouting hateful homophobic statements about a dormitory staff member. The dean of students stated that the speaker was not subject to discipline under Stanford's code of conduct but called on the university community to speak out on the issue, triggering an avalanche of counterspeech. Students, staff, faculty, and administrators expressed their opinions in letters to the campus newspaper, in comments on a poster board at the law school, in a published petition signed by 400 members of the law school community disassociating the law school from the speaker's epithets, and in a letter written by several law students reporting the incident to a prospective employer of the offending student.71 The purveyor of hate speech indeed had made a point about the power of speech, just not the one he had intended. He had welcomed disciplinary sanctions as a form of empowerment, but the Stanford community was alert enough to catch his verbal hardball and throw it back with ten times the force. Thus, the argument that counterspeech is preferable to state suppression of offensive speech is stronger and more fully supported by experience than is conceded by Delgado and Yun. In both of the cases described above, the targets of hateful speech were supported by a community united against bigotry. The community avoided splitting into factions because the universities eliminated the issue of censorship by quickly announcing that the hateful speakers were protected from disciplinary retaliation. Indeed, the counterspeech against the bigotry was so powerful in each case that it underscored the need for top administrators to develop standards for, and some limitations on, their participation in such partisan speech. 72 Of course, the community action in these cases was effective and empowering precisely because a community against bigotry existed. At A.S.U. and Stanford, as at most universities, the overwhelming majority of students, faculty, and staff are persons of tolerance and good will who deplore at least the clearest forms of bigotry and are ready to speak out Of course, the community action in these cases was effective and empowering precisely because a community against bigotry existed. At A.S.U. and Stanford, as at most universities, the overwhelming majority of students, faculty, and staff are persons of tolerance and good will who deplore at least the clearest forms of bigotry and are ready to speak out against intolerance when it is isolated as an issue rather than diluted in muddied waters along with concerns of censorship. Just as the nonviolent demonstrations of Martin Luther King, Jr., depended partly for their success on the consciences of the national and international audiences monitoring the fire hoses and attack dogs on their television sets and in the print media,73 the empowerment of the targets of hateful speech rests partly in the hands of members of the campus community who sympathize with them. One can hope that the counterspeech and educational measures used with success at A.S.U. and Stanford stand a good chance of preserving an atmosphere of civility in intellectual inquiry at any campus community in which compassionate, open minds predominate. On the other hand, counterspeech by the targets of hate speech could be less empowering on a campus in which the majority of students, faculty, and staff approve of hostile epithets directed toward members of minority groups. One hopes that such campuses are exceedingly rare; although hostile racial stereotyping among college students in the United States increased during the last decade, those students who harbored significant hostilities (as contrasted with more pervasive but less openly hostile, subconscious racism) still represented a modest fraction of all students.74 Moreover, even in a pervasively hostile atmosphere, counterspeech might still be more effective than broad restrictions on speech. First, aside from the constitutional constraints of the First Amendment, such a heartless campus community would be exceedingly unlikely to adopt strong policies prohibiting hateful speech. Instead, the campus likely would maintain minimum policies necessary to avoid legal action enforcing guarantees of equal educational opportunities under the Fourteenth Amendment 75 or federal antidiscrimination statutes such as Title V176 or Title IX. 77 Second, counterspeech even from a minority of members of the campus community might be effective to gradually build support by winning converts from those straddling the fence or from broader regional or national audiences. Such counterspeech might be particularly effective if coupled with threats from diverse faculty, staff, and students to leave the university for more hospitable environments; even a campus with high levels of hostility likely would feel 78 pressures to maintain its status as a minimally integrated institution. The A.S.U. and Stanford examples illustrating the efficacy of counterspeech also lend support to the argument that "[firee speech has been minorities' best friend ...[as] a principal instrument of social reform."79 In both cases, demonstrations, opinion letters, and other forms of counterspeech dramatically defined the predominant atmosphere on each campus as one that demanded respect and freedom from bigotry for all members of the community; it is doubtful that passage of a speech-restrictive policy could have sent a similar message of consensus any more strongly. Moreover, in the A.S.U. case, the reasoned counterspeech, coupled with the decision to refrain from disciplining the hateful speaker, persuaded the Faculty Senate to pass a multicultural education proposal whose chances for passage were seriously in doubt in the previous weeks and months.8 The racist poster at A.S.U. may have been a blessing in disguise, albeit an initially painful one, because it sparked counterspeech and community action that strengthened the campus support for diversity.

### Strossen

Social science proves that couterspeech is a more effective remedy to hate speech– studies should outweigh. **Strossen 1** (Nadine, National President, American Civil Liberties Union; Professor of Law, New York Law School, 25 S. Ill. U. L. J. 243, “Incitement to Hatred: Should There Be a Limit?”, lexis)

**A study** that was done by a professor at Smith College in Massachusetts **demonstrated the effectiveness of this kind of counterspeech in combating** bias and **prejudice.** It showed that **when a student who hears a statement conveying discriminatory attitudes also promptly hears a rebuttal to that statement-**especially from someone in a leadership position-**then the student will probably not be persuaded by the initial statement**. Dr. Fletcher Blanchard, a psychologist at the college who conducted the experiment, concluded that "**A few outspoken people who are vigorously anti-racist can establish the kind of social climate that discourages racist acts.**' "'2 Thus, this study **provides empirical social scientific support for the free speech maxim**

###

## Martyrdom

### Leonard

#### Silencing speakers turns them into martyrs and boosts their popularity.

**Leonard** Leonard, James [Director of Law Library and Professor of Law, Ohio Northern University] “Killing with Kindness: Speech Codes in the American University.” *Ohio Northern University Law Review.* Volume 19. 1993.

As well as the possibility of backlash, **there is a great risk that speech codes** will have the ironic effect of publicizing and **glorifyi**ng **the very ideas** which the **censors would abolish.** Professor Nadine Strossen has argued cogently that **attempts at suppressing racist speech** (and by implication other forms of discriminatory expression) **generate** publicity and attention that **the speaker would never have attracted on** his or **her own. There** i**s** some **psychological evidence that** attempts by government **to censor speech makes it more appealing to many,' and may** even **transform censored speakers into martyrs.** Although I am wary of basing law or policy on psychological theory,8 2 I have personally observed how censorship can glorify the most abominable thoughts. When I was an undergraduate at the **U**niversity of **N**orth **C**arolinain the early 1970's, the Student Union **issued an invitation to David Duke to** participate in a **speak**ers series**.** At that time **Duke was a full-sheet K**u **Kl**ux **K**lan **leader who had not yet attained national prominence. He never got the chance to speak.** His presentation was drowned out by the chants of student protesters. Had he been allowed to speak, I am sure that he would have presented a racist, anti-semitic explanation for America's falling star, sanitized for presentation to a university audience. Duke on his own would have attracted modest media attention **and** then have left campus, soon forgotten."3 As it turned out, he **left town a well-publicized martyr in the cause of free speech.** Fortunately, the sympathy for David Duke faded quickly. However, unlike particular speakers, speech codes are a fixture of campus society. Glorification of censored speech is a risk that we endure as long as the censorship continues.

### Rosenbloom

**To silence problematic speech is to both legitimate it and aid in its dissemination—links turns arguments about problematic speech**

Oliver **Rosenbloom 11** (Summer Intern @ FIRE), "Can a College that Protects Free Speech be ‘Gay-Friendly’?", Foundation for Individual Rights in Education, 07/26/2011, [*https://www.thefire.org/can-a-college-that-protects-free-speech-be-gay-friendly/*](https://www.thefire.org/can-a-college-that-protects-free-speech-be-gay-friendly/)

Like any other list of rankings, people can validly agree or disagree with the outcomes. But the fact that Newsweek perceives Penn as being very gay-friendly shows that that **perception does not have to be dependent upon the existence of policies that silence the mouths of those who disagree** with a campus’s stance on political and social issues. While it seems that nothing will prevent them from trying, it is crucial to realize that beliefs and attitudes cannot be imposed from above by college administrators. **Speech codes are attempts to force a superficial veneer of civility or "right-thinking"** onto free individuals. Noted civil libertarian Jonathan Rauch writes of the futility of censoring unpopular ideas in his book Kindly Inquisitors: The New Attacks on Free Thought: The Inquisition failed to keep Copernicanism down. All it did was slow the progress of knowledge and kill people. The new inquisitions won’t work any better. **Attempts to suppress beliefs only succeed in calling attention to them** and making them causes célèbres. **The insistence that racist or homophobic** or any other **opinions not be tolerated only guarantees that any college sophomore can make the headlines by being outspokenly racist or homophobic**, and for many sophomores the temptation is too much to resist. **Nasty speech gets nastier as people get angry** and start picking fights. Outrage escalates on every side. **But nobody’s mind is changed**.

## Underground

### Burrus

#### Speech codes make hate a “forbidden fruit,” increasing racism.

**Burrus 15** Burrus, Trevor. [Contributor, *Forbes*] “Why Offensive Speech is Valuable.” March 2015.

Fostering self-expression and self-development is another important reason we have a strong and uncompromising First Amendment. As homosexuals who have “come out” know all too well, expressing something publicly is crucial to defining oneself. Does this apply to those who hate other races, religions, and ethnicities? Yes. They have as much right to define themselves through speech as anyone. And those who abhor the hateful have a right to shun them, expose them, and call them out. Government **prohibitions on hate speech drive the hateful underground, where they can proliferate** freely andwithout pushback from those who dare not enter. **Sunlight, not government, is the best disinfectant.** I, for one, would like racists and bigots to speak freely. I want to know who not to invite to my parties. **Government is not as effective as civil society in properly squelching** and shaming **hate**ful **speech. If the government defines the parameters of acceptable speech,** then **many** peopl**e will break those boundaries just because the government told them not to** do it. They will explore the hidden, underground world of hate speechjust because it is a forbidden fruit.There they will find whole new ways to offend people because offensive people, like water, will always find a way. In fact, there is no correlation between the strength of a country’s hate speech laws and the eradication of hateful views. Greece, for example, has passed laws that try to combat “certain forms and expressions of racism and xenophobia by means of criminal law.” Yet according to the Anti-Defamation League, 69 percent of Greeks hold anti-semitic views, compared to just 9 percent of Americans. Just like drug laws, driving hate speech underground will do little to eliminate the habit, and could make the situation worse. So go forth and offend and be offended. Do it for Lenny Bruce.

### Calleros

#### Speech codes drive oppression underground – students can’t mobilize against racism if they never see it.

**Calleros 95** Calleros, Charles R. [Professor of Law, Arizona State University] “Paternalism, Counterspeech, and Campus Hate-Speech Codes.” *Arizona State Law Journal*, Winter 1995.

One cannot eliminate the possibility that an extremist with a propensity for hostile conduct may be emboldened by his own hostile speech or that of others. n96 Indeed, one can imagine a racist "painting himself into a corner" by taunting a target in front of the speaker's similarly [\*1269] racist buddies and feeling personal or peer pressure to act violently when the target responds in kind. On balance, then, I suspect that the pressure-valve theory against restrictions on speech applies with varying force in different circumstances and that Delgado's and Yun's challenge to it is a fair one. However, they have not adequately addressed another potential problem of driving hateful speech underground: the missed opportunity to learn from and react appropriately to the hateful message. When such opportunities are embraced, a campus may not only preserve the autonomy of the hateful speaker but also realize Mills's ideal of enjoying "the fuller understanding of truth which comes from its conflict with error." In a yet more recent article in which Delgado and Yun respond to the neoconservative case against hate-speech regulations, n98 the authors concede that "all other things being equal, **the racist who is known is less dangerous than the one who is not."** n99 They argue, however, that a "cured, or at least deterred" racist is less dangerous still n100 and that rules against racially offensive speech and the consequent disciplinary hearings would not preclude educational measures designed to analyze problems of race or to address their root causes. Of course, rules that restrain speech carry their own educational message, a message of censorship, which should be reserved for the most egregious abuses of speech. In some cases, moreover, an educational response alone is more constructive and healing than one that is coupled with prior restraint of speech or subsequent discipline. Indeed, disciplinary proceedings may dilute the educational measures by diverting attention from the inquiry into bigotry and redirecting it to an equally newsworthy controversy about restraints on speech. For example, in the case described in part B above of the racist poster at A.S.U., the campus community used the racist poster as a "wake-up call" about the need for multicultural diversity. n102 In initial discussions about the poster, students concluded that it reflected fear and ignorance and that it revealed a general gap in the education of many students. The need for multicultural education consequently became a theme of the campus counterspeech, which in turn helped to persuade the Faculty Senate to [\*1270] include a course in American diversity as part of the undergradu- ate breadth requirement. Had the dormitory banned racially offensive posters, the speaker might have been deterred from revealing his bigotry, or a staff member might have removed the poster before it was found by the four African- American women who exposed it to the entire campus community. The lesson of the poster was a painful one, but the campus community learned from it and acted on it. The campus affirmatively used the hateful speech to underscore the need for multicultural education, a truth that was underscored by its collision with the error of hostile racial stereotyping. Moreover, the campus was successful in its educational response precisely because it kept public attention focused on the problem of bigotry and ignorance; it did this by avoiding any action that would raise a competing issue regarding protection of speech. Delgado and Yun argue that rules against hateful speech will not entirely deprive campuses of information about bigotry, because they are not likely to suppress all hate speech. However, it is possible that such rules would provoke the least dangerous kinds of speakers to spew offensive speech: those who use outrageous language simply to make a point about the breadth of their freedom of speech. n103 **A speaker with a** more **troubling agenda might observe the rule against bigoted speech but engage in more injurious conduct that leaves less of a paper trail** than does a hateful poster or other public utterance. For example, in another case **on the A.S.U. campus,** residents of a dormitory complained about **a partially nude female pinup displayed on** the outside of **a resident's door**. The display was not obscene under legal standards n104 but was offensive to many who saw it. Two female staff members responded by organizing a dormitory meeting in which the students could air their views on the matter. Unfortunately, before the meeting could take place, university **police confiscated the poster,** thus violating free speech by singling out the offensive poster among many other similarly displayed posters on the basis of its content. n105 Within a week, the police department admitted its error, returned the poster (which the resident chose not to [\*1271] display again) and stated that it would leave such matters to the residence hall staff in the future. In my discussions of this event with students, I have suggested that the poster, though offensive to many, served an important educative purpose: it warned other residents of the dormitory about the apparent values of the person engaging in the display. If a student objectified women to such a degree that he displayed a female pinup on the outside of his door, **the most conspicuous** forum from which to exclaim his identity to every passerby, one could reasonably wonder -- and a group discussion at the dormitory could examine -- whether he was likely to display any respect for the autonomy of women who visited his room. The display on his door arguably served as a **warning to women on his floor**: "Until you learn more about this person, enter at your own risk and with your guard up." **A rule prohibiting such a display might have deterred him from revealing his values,** thus **depriving a** trusting **visitor of valuable information** or a residence hall advisor of the incentive to secure assurances of proper behavior from him. In sum, **bigotry** or the potential for discrimination **is sometimes best** revealed. On the other hand, the information value of speech that warns of a speaker's bigotry is not so great that a campus would affirmatively encourage its bigoted students to reveal their most hostile feelings at every turn.

## Legal Precedent DA

### ACLU

Deregulating campus speech sets legal precedents that enable movements and protests, even if it protects bigots – Civil Rights prove.

**ACLU**: The American Civil Liberties Union. “Hate Speech on Campus,” American Civil Liberties Union, 2016.

A: Free speech rights are indivisible. **Restricting the speech of one group or individual jeopardizes everyone's rights because the same laws or regulations used to silence bigots can be used to silence you.** Conversely, **laws that defend free speech for bigots can be used to defend the rights of civil rights workers, anti-war protesters, lesbian and gay activists and others fighting for justice.** For example, **in** the 1949 case of **Terminiello v. Chicago, the ACLU successfully defended an ex-Catholic priest who had delivered a racist and anti-semitic speech. The precedent set in that case became the basis for the ACLU's successful defense of civil rights demonstrators in the 1960s and '70s.** The indivisibility principle was also illustrated in the case of Neo-Nazis whose right to march in Skokie, Illinois in 1979 was successfully defended by the ACLU. At the time, then ACLU Executive Director Aryeh Neier, whose relatives died in Hitler's concentration camps during World War II, commented: "Keeping a few Nazis off the streets of Skokie will serve Jews poorly if it means that the freedoms to speak, publish or assemble any place in the United States are thereby weakened." Q: I have the impression that the ACLU spends more time and money defending the rights of bigots than supporting the victims of bigotry!!?? A: Not so. Only a handful of the several thousand cases litigated by the national ACLU and its affiliates every year involves offensive speech. Most of the litigation, advocacy and public education work we do preserves or advances the constitutional rights of ordinary people. But it's important to understand that the fraction of our work that does involve people who've engaged in bigoted and hurtful speech is very important: **Defending First Amendment rights for the enemies of civil liberties and civil rights means defending it for you and me.** Q: Aren't some kinds of communication not protected under the First Amendment, like "fighting words?" A: The U.S. Supreme Court did rule in 1942, in a case called Chaplinsky v. New Hampshire, that **intimidating speech directed at a specific individual in a face-to-face confrontation amounts to "fighting words," and that the person engaging in such speech can be punished if "by their very utterance [the words] inflict injury or tend to incite an immediate breach of the peace."**

Outweighs:

A. Mobilization—white nationalist groups garner support in the status quo by posing as oppressed minorities—they claim that their speech is being targeted by liberals, but the aff prevents them from gaining a foothold.

B. Turns arguments about certain forms of speech are bad—categorical defense of free speech spills over to civil rights which ensures real world activism is promoted. It also ensures that individuals are more likely to act on their beliefs as opposed to just speaking them.

### White

#### *All* speech codes are arbitrary and reify state power, even if a particular type of speech is bad – exceptions are modeled and undermine free speech.

**White 16** White, Ken. [Criminal Defense Lawyer, Brown, White, & Newhouse] “Lawsplainer: Why Flag Burning Matters, And How it Relates To Crush Videos.” Popehat,November 2016.

In free speech analysis**,** how you get to a conclusion often has much more long-lasting impact than the conclusion itself. **Our legal system runs on precedent.** The significance of the precedent isn't "the Supreme Court said that flag burning is protected by the First Amendment." The significance of the precedent is "someone wants to punish this speech and we have to figure out whether or not it's protected by the First Amendment. Let's look at the logic and methods the Supreme Court used to resolve that question when flag burning was the issue, and then apply it here." But the Supreme Court has decided lots of cases about the First Amendment. This is just one precedent, one example of a method of reaching a conclusion. What makes it particularly important? The Supreme Court's flag burning cases are crucial — not because of how they analyze existing exceptions to the First Amendment, but because they address whether the government can create endless exceptions to the First Amendment. Just like crush videos. You know, videos of women stomping on small helpless animals. That's . . . that's a thing? Of course it's a thing. Ugh. What does that have to do with flag burning? Or the First Amendment? Congress — having salved all of the nation's ills — passed a law banning crush videos. Because who wouldn't vote for someone who stands against hurting baby animals? The law made it a federal crime to create or sell depictions of animal cruelty in interstate commerce. In 2010, in United States v. Stevens,, the Supreme Court found that the statute violated the First Amendment. That sounds pretty straightforward. Why is it significant? It's significant because of the way the government defended the statute. The government's lead argument wasn't that crush videos were outside of First Amendment protection because they fell into an already-recognized exception, like defamation or obscenity or incitement. They argued that the Supreme Court should recognize a new categorical exception to First Amendment protection for animal cruelty, because animal cruelty is so awful. They also argued that courts can recognize new exceptions to the First Amendment by weighing the "value" of the targeted speech against the harm it threatens. The Supreme Court — in an 8 to 1 decision — firmly rejected those two arguments. First, the Court said, the historically recognized **exceptions to First Amendment protection are well-established, and you can't just go around adding new ones:** From 1791 to the present,” however, the First Amendment has “permitted restrictions upon the content of speech in a few limited areas,” and has never “include[d] a freedom to disregard these traditional limitations.” Id., at 382– 383. These “historic and traditional categories long familiar to the bar,” Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd. , 502 U. S. 105, 127 (1991) ( Kennedy, J. , concurring in judgment)—including obscenity, Roth v. United States , 354 U. S. 476, 483 (1957) , defamation, Beauharnais v. Illinois , 343 U. S. 250, 254–255 (1952) , fraud, Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc. , 425 U. S. 748, 771 (1976) , incitement, Brandenburg v. Ohio , 395 U. S. 444, 447–449 (1969) ( per curiam ), and speech integral to criminal conduct, Giboney v. Empire Storage & Ice Co. , 336 U. S. 490, 498 (1949) —are “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” Chaplinsky v. New Hampshire , 315 U. S. 568, 571– 572 (1942) . Second, the Court said, [T]he government's proposed methodology — that the Court should identify new categorical exceptions by balancing, on a case-by-case basis, the value of speech against its harm — is antithetical to First Amendment analysis and dangerous[.]: “ The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: “Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.” Brief for United States 8; see also id., at 12. As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment ’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document “prescribing limits, and declaring that those limits may be passed at pleasure.” Marbury v. Madison , 1 Cranch 137, 178 (1803). So: in 2010, the Supreme Court overwhelmingly and clearly rejected the idea that legislatures and courts can create new exceptions to the First Amendment based on how strongly they hate speech or how awful it is. He adds: The flag-burning cases are important, like the crush videos case was important, because they draw a crucial line between having a few strictly limited exceptions to the First Amendment, on the one hand, and having as many exceptions as we feel like having, on the other hand. Flag burning isn't speech that's uniquely valuable or important to protect. **What's important is** that we protect **the** principled **method by which we determine which speech is protected and which isn't. The argument that flag burning should be outside the First Amendment can be applied with equal force to** just about anything — **"hate speech," "**cyber-bulling,**" "revenge porn**," "pro-ISIS speech," **or whatever the flavor of the month is. If** think the majority was wrong in the flag burning cases, here's what you're saying: **"the** Supreme **Court makes bad judgments,** and I wan**t to give that S**uprem**e Court the power to decide,** on a **case-by-case** basis**, whether the harm of speech outweighs its value**. I don't want the courts to be limited to established, well-defined categories outside of First Amendment protection." But tha**t's ridiculous.** You're damn right it is.

## White People Shouldn’t Decide

#### *The type of speech being censored doesn’t matter*. The question isn’t whether all speech is good, but whether colleges have the right to define which speech stays and which goes.

Glasser 16 Glasser, Ira. [Former Executive Director, American Civil Liberties Union] Quoted in Jonathan Haidt’s “Hate Speech is Free Speech.” Spiked-online.com, June 12, 2016.

**How is ‘hate speech’ defined, and who decides** which speech comes within the definition? Mostly, it’s not us. **In the** 19**90s** in America, **black students favoured ‘**hate **speech’ bans because they thought it would ban racists** from speaking on campuses. **But the deciders were white. If the codes** the **black s**tudent**s wanted had been in force in the** 19**60s, their most frequent victim would have been Malcolm X.** In England, Jewish students supported a ban on racist speech. Later, Zionist speakers were banned on the grounds that Zionism is a form of racism.Speech bans are like poison gas: **seems like a good idea when you have your target in sight — but the wind shifts, and blows it back on us.**

## Thin Skin

#### Allowing limitations on free speech because its “offensive” creates emotional trauma and more violence in the real world.

Lukianoff and Haidt 15 Jonathan Haidt (social psychologist and professor of ethical leadership at the NYU-Stern School of Business) and Greg Lukianoff (president and CEO of the Foundatino of Individual Rights in Education) “The Coddling of the American Mind” The Atlantic September 2015 <http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/>

Cognitive behavioral therapy is a modern embodiment of this ancient wisdom. It is the most extensively studied nonpharmaceutical treatment of mental illness, and is used widely to treat depression, anxiety disorders, eating disorders, and addiction. It can even be of help to schizophrenics. No other form of psychotherapy has been shown to work for a broader range of problems. Studies have generally found that it is as effective as antidepressant drugs (such as Prozac) in the treatment of anxiety and depression. The therapy is relatively quick and easy to learn; after a few months of training, many patients can do it on their own. Unlike drugs, cognitive behavioral therapy keeps working long after treatment is stopped, because it teaches thinking skills that people can continue to use. The goal is to minimize distorted thinking and see the world more accurately. You start by learning the names of the dozen or so most common cognitive distortions (such as overgeneralizing, discounting positives, and emotional reasoning; see the list at the bottom of this article). Each time you notice yourself falling prey to one of them, you name it, describe the facts of the situation, consider alternative interpretations, and then choose an interpretation of events more in line with those facts. Your emotions follow your new interpretation. In time, this process becomes automatic. When people improve their mental hygiene in this way—when they free themselves from the repetitive irrational thoughts that had previously filled so much of their consciousness—they become less depressed, anxious, and angry. The parallel to formal education is clear: cognitive behavioral therapy teaches good critical-thinking skills, the sort that educators have striven for so long to impart. By almost any definition, critical thinking requires grounding one’s beliefs in evidence rather than in emotion or desire, and learning how to search for and evaluate evidence that might contradict one’s initial hypothesis. But does campus life today foster critical thinking? Or does it coax students to think in more-distorted ways? Let’s look at recent trends in higher education in light of the distortions that cognitive behavioral therapy identifies. We will draw the names and descriptions of these distortions from David D. Burns’s popular book Feeling Good, as well as from the second edition of Treatment Plans and Interventions for Depression and Anxiety Disorders, by Robert L. Leahy, Stephen J. F. Holland, and Lata K. McGinn.Burns defines emotional reasoning as assuming “that your negative emotions necessarily reflect the way things really are: ‘I feel it, therefore it must be true.’ ” Leahy, Holland, and McGinn define it as letting “your feelings guide your interpretation of reality.” But, of course, subjective feelings are not always trustworthy guides; unrestrained, they can cause people to lash out at others who have done nothing wrong. Therapy often involves talking yourself down from the idea that each of your emotional responses represents something true or important. Emotional reasoning dominates many campus debates and discussions. A claim that someone’s words are “offensive” is not just an expression of one’s own subjective feeling of offendedness. It is, rather, a public charge that the speaker has done something objectively wrong. It is a demand that the speaker apologize or be punished by some authority for committing an offense. There have always been some people who believe they have a right not to be offended. Yet throughout American history—from the Victorian era to the free-speech activism of the 1960s and ’70s—radicals have pushed boundaries and mocked prevailing sensibilities. Sometime in the 1980s, however, college campuses began to focus on preventing offensive speech, especially speech that might be hurtful to women or minority groups. The sentiment underpinning this goal was laudable, but it quickly produced some absurd results. **What are we doing to our students if we encourage them to develop extra-thin skin just before they leave the cocoon of adult protection**? Among the most famous early examples was the so-called water-buffalo incident at the University of Pennsylvania. In 1993, the university charged an Israeli-born student with racial harassment after he yelled “Shut up, you water buffalo!” to a crowd of black sorority women that was making noise at night outside his dorm-room window. Many scholars and pundits at the time could not see how the term water buffalo (a rough translation of a Hebrew insult for a thoughtless or rowdy person) was a racial slur against African Americans, and as a result, the case became international news. Claims of a right not to be offended have continued to arise since then, and universities have continued to privilege them. In a particularly egregious 2008 case, for instance, Indiana University–Purdue University at Indianapolis found a white student guilty of racial harassment for reading a book titled Notre Dame vs. the Klan. The book honored student opposition to the Ku Klux Klan when it marched on Notre Dame in 1924. Nonetheless, the picture of a Klan rally on the book’s cover offended at least one of the student’s co-workers (he was a janitor as well as a student), and that was enough for a guilty finding by the university’s Affirmative Action Office. These examples may seem extreme, but the reasoning behind them has become more commonplace on campus in recent years. Last year, at the University of St. Thomas, in Minnesota, an event called Hump Day, which would have allowed people to pet a camel, was abruptly canceled. Students had created a Facebook group where they protested the event for animal cruelty, for being a waste of money, and for being insensitive to people from the Middle East. The inspiration for the camel had almost certainly come from a popular TV commercial in which a camel saunters around an office on a Wednesday, celebrating “hump day”; it was devoid of any reference to Middle Eastern peoples. Nevertheless, the group organizing the event announced on its Facebook page that the event would be canceled because the “program [was] dividing people and would make for an uncomfortable and possibly unsafe environment.” **Because there is a broad ban in academic circles on “blaming the victim,”** it is generally considered unacceptable to question the reasonableness (let alone the sincerity) of someone’s emotional state, particularly if those emotions are linked to one’s group identity. **The thin argument “I’m offended” becomes** an **unbeatable** trump card**.** This leads to what Jonathan Rauch, a contributing editor at this magazine, calls the “offendedness sweepstakes,” in which opposing parties use claims of offense as cudgels. In the process, the bar for what we consider unacceptable speech is lowered further and further. Since 2013, new pressure from the federal government has reinforced this trend. Federal antidiscrimination statutes regulate on-campus harassment and unequal treatment based on sex, race, religion, and national origin. Until recently, the Department of Education’s Office for Civil Rights acknowledged that speech must be “objectively offensive” before it could be deemed actionable as sexual harassment—it would have to pass the “reasonable person” test. To be prohibited, the office wrote in 2003, allegedly harassing speech would have to go “beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.” But in 2013, the Departments of Justice and Education greatly broadened the definition of sexual harassment to include verbal conduct that is simply “unwelcome.” Out of fear of federal investigations, universities are now applying that standard—defining unwelcome speech as harassment—not just to sex, but to race, religion, and veteran status as well. Everyone is supposed to rely upon his or her own subjective feelings to decide whether a comment by a professor or a fellow student is unwelcome, and therefore grounds for a harassment claim. **Emotional reasoning is now accepted as evidence**. If **our universities** are teaching students that their emotions can be used effectively as weapons—or at least as evidence in administrative proceedings—then they **are teaching students to nurture a kind of hypersensitivity that will lead them into countless drawn-out conflicts** in college and beyond. Schools may be training students in thinking styles that will damage their careers and friendships, along with their mental health. fortune-telling and trigger warnings Burns defines fortune-telling as “anticipat[ing] that things will turn out badly” and feeling “convinced that your prediction is an already-established fact.” Leahy, Holland, and McGinn define it as “predict[ing] the future negatively” or seeing potential danger in an everyday situation. The recent spread of demands for trigger warnings on reading assignments with provocative content is an example of fortune-telling. The idea that words (or smells or any sensory input) can trigger searing memories of past trauma—and intense fear that it may be repeated—has been around at least since World War I, when psychiatrists began treating soldiers for what is now called post-traumatic stress disorder. But explicit trigger warnings are believed to have originated much more recently, on message boards in the early days of the Internet. Trigger warnings became particularly prevalent in self-help and feminist forums, where they allowed readers who had suffered from traumatic events like sexual assault to avoid graphic content that might trigger flashbacks or panic attacks. Search-engine trends indicate that the phrase broke into mainstream use online around 2011, spiked in 2014, and reached an all-time high in 2015. The use of trigger warnings on campus appears to have followed a similar trajectory; seemingly overnight, students at universities across the country have begun demanding that their professors issue warnings before covering material that might evoke a negative emotional response. In 2013, a task force composed of administrators, students, recent alumni, and one faculty member at Oberlin College, in Ohio, released an online resource guide for faculty (subsequently retracted in the face of faculty pushback) that included a list of topics warranting trigger warnings. These topics included classism and privilege, among many others. The task force recommended that materials that might trigger negative reactions among students be avoided altogether unless they “contribute directly” to course goals, and suggested that works that were “too important to avoid” be made optional. It’s hard to imagine how novels illustrating classism and privilege could provoke or reactivate the kind of terror that is typically implicated in PTSD. Rather, trigger warnings are sometimes demanded for a long list of ideas and attitudes that some students find politically offensive, in the name of preventing other students from being harmed. This is an example of what psychologists call “motivated reasoning”—we spontaneously generate arguments for conclusions we want to support. Once you find something hateful, it is easy to argue that exposure to the hateful thing could traumatize some other people. You believe that you know how others will react, and that their reaction could be devastating. Preventing that devastation becomes a moral obligation for the whole community. Books for which students have called publicly for trigger warnings within the past couple of years include Virginia Woolf’s Mrs. Dalloway (at Rutgers, for “suicidal inclinations”) and Ovid’s Metamorphoses (at Columbia, for sexual assault). Jeannie Suk’s New Yorker essay described the difficulties of teaching rape law in the age of trigger warnings. Some students, she wrote, have pressured their professors to avoid teaching the subject in order to protect themselves and their classmates from potential distress. Suk compares this to trying to teach “a medical student who is training to be a surgeon but who fears that he’ll become distressed if he sees or handles blood.” However, there is a deeper problem with trigger warnings. According to the most-basic tenets of psychology, the very idea of helping people with anxiety disorders avoid the things they fear is misguided. **A person who is trapped in an elevator during a power outage may panic and think she is going to die. That** frightening experience **can** change neural connections in her amygdala, **lead**ing **to** an elevator **phobia. If you want this woman to retain her fear for life, you should help her avoid elevators. But if you want to help her return to normalcy, you should** take your cues from Ivan Pavlov and guide her through a process known as **expos**ure therapy. You might start by asking the woman to merely look at an elevator from a distance—standing in a building lobby, perhaps—until her apprehension begins to subside. If nothing bad happens while she’s standing in the lobby—if the fear is not “reinforced”—then she will begin to learn a new association: elevators are not dangerous. (This reduction in fear during exposure is called habituation.) Then, on subsequent days, you might ask her to get closer, and on later days to push the call button, and eventually to step in and go up one floor. This is how the amygdala can get rewired again to associate a previously feared situation with safety or normalcy. Students who call for trigger warnings may be correct that some of their peers are harboring memories of trauma that could be reactivated by course readings. But they are wrong to try to prevent such reactivations. Students with PTSD should of course get treatment, but they should not try to avoid normal life, with its many opportunities for habituation. Classroom discussions are safe places to be exposed to incidental reminders of trauma (such as the word violate). A discussion of violence is unlikely to be followed by actual violence, so it is a good way to help students change the associations that are causing them discomfort. And they’d better get their habituation done in college, because the world beyond college will be far less willing to accommodate requests for trigger warnings and opt-outs. The expansive use of trigger warnings may also foster unhealthy mental habits in the vastly larger group of students who do not suffer from PTSD or other anxiety disorders. People acquire their fears not just from their own past experiences, but from social learning as well. If everyone around you acts as though something is dangerous—elevators, certain neighborhoods, novels depicting racism—then you are at risk of acquiring that fear too. The psychiatrist Sarah Roff pointed this out last year in an online article for The Chronicle of Higher Education. “One of my biggest concerns about trigger warnings,” Roff wrote, “is that they will apply not just to those who have experienced trauma, but to all students, creating an atmosphere in which they are encouraged to believe that there is something dangerous or damaging about discussing difficult aspects of our history.”

## Divert Resources

#### Speech codes take resources away from better methods of combatting hate

**Strossen:** Strossen, Nadine. [John Marshall Harlan II Professor of Law, New York Law School] “Incitement to Hatred: Should There Be a Limit?” *New York Law School.* 2000.

**Now I will comment on yet another reason why censoring hate speech may well undermine, rather than advance, equality causes: its diversionary nature. Focusing on biased expression diverts us from both the root causes of prejudice-of which the expression is merely one symptom-and from actual acts of discrimination**. The track record of campus hate speech codes highlights this problem, too, just as it highlighted the previous problem I discussed, of discriminatory enforcement. **Too many universities have adopted hate speech codes at the expense of other policies that would constructively combat bias and promote tolerance. In fact, some former advocates of campus hate speech codes have become disillusioned for this very reason**. One example is the minority student who was initially a leading advocate of one of the earliest campus hate speech codes, at the University of Wisconsin, Victor DeJesus. After the ACLU successfully challenged that code under the First Amendment, Mr. DeJesus opposed the University's efforts to rewrite the code in the hope of coming up with something that would pass constitutional muster. As the New York Times reported: Victor DeJesus, co-president of the Wisconsin Student Association, said that he initially supported the hate speech rule, but that he had changed his mind because he felt the regents were using it as an excuse to avoid the real problems of minority students. "**Now they can finally start putting their efforts into some of our major concerns like financial aid, student awareness, and recruitment retention**," Mr. DeJesus said.76

## Perm

#### Speech targeting specific groups isn’t protected

**Tsesis 10** Tsesis, Alexander [Professor, Loyola University School of Law] “Burning Crosses on Campus: University Hate Speech Codes.” December 2010.

**In Beauharnais, the Court upheld the constitutionality of a group libel statute that rendered it actionable to "portray depravity, criminality. .. or lack of virtue of a class of citizens, of any race, color, creed, or religion" and to expose those citizens to "contempt, derision, or obloquy."' The majority found that, given Illinois's history of racial friction, its legislature could enact legislation to punish the dissemination of demeaning messages**, such as those opposed to neighborhood integration, because those messages threatened "the peace and well-being of the State." The opinion conceived of government playing a role in establishing a standard of decency designed to prevent intergroup friction.

## Paternalism

#### Speech codes make oppression worse and are paternalizing.

**Shelton 93** Shelton, Michael W. [Professor, Department of Communications, Weber State University] “Hateful Help – A Practical Look at the Issue of Hate Speech.” November 1993.

Many hate speech codes are also designed to protect women, minorities, and others who might be victimized by hate speech. Hate speech reformers and advocates are often driven by the goal of "creating and sustaining true equality on campus by eradicating speech that makes minorities, women, and gays feel unwanted."' The protection of minorities and others often victimized by hate speech is certainly a noble goal. Hate speech codes are not an effective device for such protection. A number of critics of hate speech codes suggest that "informal constraints already present in the academic setting on teachers and students "can work to curb racism.' Hate speech restrictions have actually made the struggle for equality more difficult. Bartlett and O'Barr explain: A **focus on the verbal** and symbolic **abuse has the** unintended **consequence of** further **reinforcing the** invisibility of those everyday forms **of oppression.** First, by comparison, these behaviors seem so trivial, so harmless, so ordinary …Second, this focus on **regulation reinforces a conceptualization of racism,** sexism, and heterosexism **as** blatant and **intentional with specific perpetrators** and specific victims. This conceptualization makes it more difficult to recognize and respond to the kind of racist, sexist, or heterosexist behaviors that are subtle, unknowing, and without a single clear perpetrator or intended victim. Obviously, the use of a regulatory response to hate speech is problematic. "Some black scholars and activists maintain that an anti-racist **speech policy may perpetuate a paternalistic view** of minority groups" because **such a policy suggests** "that **they are incapable of defending themselves** against biased expressions." Some members of the black community felt that such policies are not only paternalistic, but incapacitating as well: The basic problem with all these regimes to protect various people is that the protection incapacitates. To think that I [as **a black man] will be told that white folks have the moral character to shrug off insults**, and I do not…That is the most insidious, the most insulting, the most racist statement of all!' **Hate speech restrictions** do appear to **place blacks** and other groups **in a special class** that is **deemed incapable of defending itself**

####