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Equality and Freedom of Speech (Eighteenth Annual Law Review Symposium: Demise of the First Amendment? Focus on RICO and Hate Crime Litigation)

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Transcript:
Opening Address
Equality and Freedom of Speech

TERRANCE SANDALOW¹

The editors responsible for today's symposium have posed an alarming question: whether we are witnessing the demise of the First Amendment. I want to dispel at the outset any anxiety the question may have aroused. The First Amendment is alive and well; indeed, it is thriving. I believe, though I cannot prove, that public respect for the values it expresses has never been greater than it has been in recent years. Whether or not I am correct in that belief, however, it is certain that constitutional protections against governmental efforts to limit speech and other forms of expressive activity are greater today than ever before in our history.

The importance of the wide range of freedoms we now associate with the First Amendment is so deeply embedded in the contemporary American psyche that many forget that the establishment of those freedoms is almost entirely the work of the twentieth century. At the beginning of the century, even Justice Holmes—who is now regarded as the modern father (or perhaps grandfather) of contemporary First Amendment jurisprudence—opined that the First Amendment prohibited only prior restraints, a concept that he understood much more narrowly than courts now do.² Four score and seven years later, the range of speech and conduct protected by the First Amendment is so vast that it defies description in the time available. A few illustrations, selected mainly to convey a sense of the breadth of the amendment's current reach, will, therefore, have to suffice. As currently interpreted, the First Amendment protects the publication and exhibition of most sexually explicit material, including topless and bottomless dancing,³ and significantly limits governmental authority to award a remedy to individuals who have been defamed.⁴ It substantially restricts legislative power to control the financing of political campaigns⁵ and, with

1. Edson R. Sunderland Professor of Law, The University of Michigan.

2. See *Patterson v. Colorado*, 205 U.S. 454 (1907).

3. See, e.g., *Schad v. Borough of Mt. Ephraim*, 452 U.S. 661 (1981); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Jenkins v. Georgia*, 418 U.S. 153 (1974).

4. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times, Co. v. Sullivan*, 376 U.S. 254 (1964).

5. See, e.g., *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *Federal Election Comm'n v. National Conservative PAC*, 470 U.S. 480 (1985); *Buckley v. Valeo*, 424 U.S. 1 (1976).

limited exceptions, denies government the power to hire and fire employees on the basis of their political affiliations.⁶ The amendment confers broad protection for commercial speech,⁷ denies government the authority to prohibit desecration of the American flag,⁸ and prevents government from punishing the advocacy of violence and other illegal acts unless the advocacy is "directed to inciting . . . imminent lawless action and is likely to incite . . . such action."⁹ And in addition to creating broad areas of protected speech, the Court has stacked an armory with an array of weapons—*e.g.*, the doctrines of vagueness, overbreadth, and content neutrality—that the judiciary can employ when it concludes that government has gone too far in attempting to control communicative activities.¹⁰

These restrictions on governmental authority, and many others that might be mentioned, were virtually unthinkable until relatively recently. The Supreme Court's use of the First Amendment to restrict governmental authority over communicative activities began and then developed slowly during the 1930s, gathered significant steam during the decade of the 1940s, slowed and perhaps even suffered some setbacks during the 1950s, and then exploded during the constitutional revolution of the 1960s. Had a person of my generation, one who had come to constitutional awareness during the 1950s, been able to foresee the increasingly "conservative" cast of the Court over the quarter century following Chief Justice Warren's retirement—*i.e.*, from 1969 to the present—he might well have predicted that one result would be a significant retrenchment in constitutional protection for communicative activities. In fact, no such retrenchment has occurred. To the contrary, the range of such activities to receive judicial protection under the First Amendment was significantly enlarged over that period. The extension of protection to commercial speech and the repudiation of the "spoils" system, to take but two examples, did not occur until the mid-1970s. Yet another example of the continuing expansion of First Amendment freedoms is provided by the justices' attitudes toward flag desecration. As recently as 1969, Chief

6. See, *e.g.*, *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976).

7. See, *e.g.*, *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

8. See *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

9. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); see also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Hess v. Indiana*, 414 U.S. 105 (1973).

10. See generally LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 785-1061 (2d ed., 1988).

Justice Warren and Justices Black and Fortas, three “liberal” members of the Court who in their time were especially sympathetic to First Amendment claims, thought that the First Amendment did not require reversal of a conviction for flag-burning under a statute that made it a misdemeanor “to publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon” the flag of the United States.¹¹ Two decades later, the Court held otherwise, a decision joined by Justices Scalia and Kennedy, two of its most “conservative” members.¹² The contrast between these votes speaks volumes about the shift in the center of gravity of the Court’s free speech jurisprudence. I am, for these reasons, entirely confident in offering a negative answer to the editors’ question and in asserting that the First Amendment’s vital signs are very strong.

But to maintain that the First Amendment is alive and well is not to deny that significant issues about its reach remain to be resolved, among them those that are the subject of today’s symposium. Merely to recognize the latter as issues, and thereby to see them as still open to discussion, will seem to some to mark a retreat from established First Amendment principles. It is, I think, more useful to recognize that contemporary controversy over those issues is intrinsic to the process by which the meaning of the First Amendment evolves.

“Freedom of speech” is not a concept of invariant meaning. It does not mean today what it meant in the 1950s, and neither now nor then does it mean what it meant in 1791. As the years go by, circumstances change and, as they change, new issues emerge and old issues are seen in a new light. The consequences of protecting or failing to protect certain kinds of communication may now be understood to be very different from what they were once thought to be. Legal protection of certain expressive activities may, in some circumstances, be thought to collide with other values that now seem more important than they did at an earlier time. Values that at one time seemed harmonious may now seem to diverge. In such circumstances, we—or at least those responsible for fashioning our law—cannot avoid the necessity of choice. We can, of course, pretend that we have no choice, that principles articulated at an earlier time—principles formulated in response to issues very different from those we now confront—are somehow dispositive of the latter. But the consequence of indulging in that pretense is to assure that the issues will not be intelligently resolved. To be sure, the resulting decision

11. *Street v. New York*, 394 U.S. 576, 578 (1969). A majority of the Court, in an opinion by Justice Harlan, avoided the question, holding that Street’s conviction could not be sustained because it depended upon the words he had spoken while burning the flag. *Id.*

12. *See United States v. Eichman*, 496 U.S. 310 (1990).

may nonetheless be desirable, but if it is, that will be purely a matter of chance, for neither we nor our predecessors will have made a decision with an adequate appreciation of what is at stake.

I do not mean to suggest that the past is irrelevant in making the choices we now confront. My point, rather, is that principles and doctrines formulated at an earlier time are not a set of blinders designed to shield us from knowledge of current circumstances and the issues they present. They are, however, materials that, carefully employed, can assist in reaching a wise decision. An understanding of the past—of the principles and doctrines fashioned to give content to constitutional concepts and of the circumstances to which they were addressed—is a resource upon which to draw in thinking our way through the issues we currently face. As we explore the past, seeking to understand the reasons advanced in support of principles formulated at an earlier time and the similarities and differences between that time and our own, we are likely to see more clearly and evaluate more wisely the choices we now confront. Still, however useful an understanding of the past may be in clarifying those choices, it cannot dictate our response to them. That prerogative—and the responsibility that goes with it—belongs to the present.¹³

The topics to be addressed in the two panel discussions scheduled for today are facets of a more general issue that illustrates my point. During the past decade or so, the argument has increasingly been heard that some speech threatens realization of our national commitment to the ideal of equality and should, therefore, be prohibited. Thus, a growing number of legal scholars, led by my colleague Catharine MacKinnon, urge that pornography—defined as sexually explicit words or pictures that depict women as sexually subservient objects—should be forbidden.¹⁴ Their claim is that by sexualizing male dominance pornography contributes to the denial of equality to women. So too, many colleges and universities have adopted codes prohibiting speech that creates a “hostile environment” for the members of certain groups.¹⁵ Similarly, Title VII of the Civil Rights Act of 1964, as interpreted by the Equal Employment Opportunity Commission, imposes sanctions on employers that fail to prevent their employees from engaging in such speech.¹⁶ Speech of that kind, it is said,

13. See generally Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1068-72 (1981).

14. See CATHARINE A. MACKINNON, *ONLY WORDS* (1993); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 261-70 (1993).

15. See *Preliminary Report on Freedom of Expression and Campus Harassment Codes*, 77 ACADEME 23 (May-June, 1991).

16. See 42 U.S.C. § 2002 *et seq.*; 29 C.F.R. § 1604.11(a).

discriminates against the members of these groups, depriving them of their right to equal treatment as students and employees. Less obviously, current controversy over demonstrations at abortion clinics also arises out of a perceived conflict between a claim resting on the idea of equality and a claimed right of free expression. The demonstrators' arguments are not significantly different from the claims made by civil rights demonstrators a generation ago. But whereas the latter demonstrated to achieve equality, it is now the targets of the demonstrations who ground their claims in the ideal of equality, arguing that the freedom of women to obtain abortions is an essential condition for achieving gender equality.¹⁷

The assertion that in these instances equality trumps freedom of speech is a function of the increasing salience and weight of the former as an ideal. Equality has, of course, been a prominent theme throughout American history,¹⁸ but during the past several decades, beginning with the civil rights movement, claims resting on the ideal of equality have been especially prominent. As various groups—blacks, various ethnic groups, women, gays, and others—strive to achieve the benefits of full participation in American life, the moral claim they assert has most frequently been cast not in terms of freedom or welfare or other values that might have been invoked, but in terms of equality. Traditional practices, established norms of behavior, and deeply held values have all been challenged in the name of equality. Social institutions and practices as different from one another as the traditional family and academic admission and grading standards have come under attack as impediments to realization of the ideal.

Perhaps in these circumstances it should occasion no surprise that embedded ideas about freedom of speech should also be questioned in the name of equality. Still, it does occasion surprise that those who claim to speak on behalf of groups alleged to be among society's oppressed should seek to invoke governmental power to limit speech. Historically, such groups have not sought to invoke governmental power to suppress speech, but to limit that power. Governmental suppression of speech has been a means by which those who hold power have attempted to maintain it against those who seek social change or to suppress those who are merely different. As the late Harry Kalven once wrote, we owe much of the modern history of the First Amendment to Jehovah's Witnesses, Communists, and

17. See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 114 S. Ct. 909 (1994); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1198-1209 (1992).

18. See, e.g., ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, Vol. II (Reeve ed. 1945).

Negroes,¹⁹ groups no one would have counted among society's powerful at the time they struggled to expand the reach of the First Amendment. A generous conception of freedom of speech has played so significant a role in the efforts of the disenfranchised to achieve equality that one would suppose that those who claim to speak on their behalf would be especially loathe to narrow the reach of the concept. Yet, as today's symposium demonstrates, the opposite seems to be the case.

A cynic might conclude that, as is so often the case, it's all a question of whose ox is being gored. Or, as Nat Hentoff put it in the title of his recent book, *Free Speech For Me But Not For Thee*.²⁰ I have no doubt that there is some truth in the cynic's response. Those who now seek to limit speech in the name of equality would hardly be the first to reconsider principles they once held dear when those principles begin to cut against their interests. In the end, however, the cynic's response is not an entirely satisfactory one, for it fails to consider whether speech of the kind that its critics now seek to suppress in the name of equality is different from the speech that heretofore has been held to be constitutionally protected.

The central insight of those who urge that some limitations should be placed upon speech that threatens equality is that private power may be as oppressive as governmental power. Limitations upon speech that threatens equality are, therefore, not to be judged in the same way as limitations aimed at achieving equality because the former merely reinforce private power, while the latter act as a countervailing force to it. One may or may not be persuaded by that argument, but I do not see how it can be ignored. It does point to an arguable difference between traditional free speech claims and those that are currently being made against efforts to limit speech that threatens equality. The reality and significance of the asserted difference are questions that must be addressed in any serious effort to confront the claims made by those who propose to restrict speech in the service of equality.

Those questions are among the issues posed in two different contexts by the panel discussions that follow. The civil rights movement and the Vietnam protests taught us that street demonstrations are an important means of communication that, despite the dangers they pose, are worthy of constitutional protection. Are demonstrations at abortion clinics different in a way that justifies their suppression or, if they are not different, have we learned from them that we

19. HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 173-75 (1965).

20. NAT HENTOFF, *FREE SPEECH FOR ME BUT NOT FOR THEE* (1992).

should reconsider the extent to which demonstrations should be constitutionally protected? If anti-abortion demonstrations are constitutionally protected in at least some circumstances, as they surely are,²¹ does the use of RICO against demonstrators who employ violence threaten to chill constitutionally protected demonstrations? Last Term, in *National Organization for Women, Inc. v. Schiedler*, the Supreme Court recognized that question, but declined to decide it because the issue had not been properly presented.²² The question is properly presented here and will be addressed later this morning.

In the afternoon, we turn to another aspect of the current tension between equality and freedom of speech, the prosecution of so-called "hate crimes." Our legal tradition does not permit the prosecution of individuals for their beliefs. Is legislation of the kind sustained in *Wisconsin v. Mitchell*,²³ legislation that provides for enhanced sentences when criminal acts are motivated by prejudice against the members of certain groups consistent with that principle? Does the fact that enhanced sentences are imposed only when criminal acts are motivated by certain beliefs—say, anti-Semitism—constitute impermissible content or even viewpoint discrimination? What evidence may be introduced to prove that the defendant was motivated by prejudice? For example, may the government introduce evidence that a defendant convicted of assault is (or was at one time) a member of the Aryan Brotherhood or of the Nation of Islam, or would the introduction of such evidence effectively penalize the defendant for the exercise of First Amendment freedoms?

Since these and other questions about RICO and "hate crimes" legislation are to be fully addressed by the panelists, I want to consider very briefly the current tension between equality and freedom of speech in another context in which controversy has arisen, the adoption of harassment codes by colleges and universities. Over the past decade, scores, perhaps hundreds, of colleges and universities, including many public institutions, have adopted so-called harassment codes aimed at protecting members of groups defined in terms of race, ethnic origin, sex, sexual preference and at times other characteristics. To the extent that the codes are directed at harassing conduct—e.g., physical assault, vandalism, or stalking—the codes are unproblematic. The only conceivable objection to them is that similar conduct, differently motivated, is treated differently, and perhaps less severely, thereby revealing that the institution is really attempting to

21. *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994).

22. *NOW v. Schiedler*, 114 S. Ct. 798, 806 n.6 (1994).

23. 113 S. Ct. 2194 (1993).

suppress certain beliefs. But that objection appears to be foreclosed, at least for the time being, by the Supreme Court's decision in *Wisconsin v. Mitchell*.²⁴ A state might reasonably conclude, the Court said, that "bias-inspired conduct" should be punished more severely because such conduct is "thought to inflict greater individual and societal harm" than similar conduct differently motivated.²⁵ "Bias motivated crimes" it reasoned, may well be "more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest."²⁶

The proscription of such conduct by harassment codes is relatively uncontroversial, but many of the codes reach beyond conduct in an effort to protect the members of certain groups from speech that denigrates those groups and thereby contributes to creating or maintaining an environment hostile to their members. Speech of that kind, it is argued, inflicts emotional injury on the members of the protected groups and, in doing so, denies them equal opportunity to benefit from institutional programs. The idea that behavior that creates a hostile environment for members of protected groups should be proscribed because it discriminates against them draws support from *Meritor Savings Bank v. Vinson*,²⁷ in which the Supreme Court held that the ban on sex discrimination in Title VII of the Civil Rights Act of 1964²⁸ extends to conduct that creates a hostile working environment for female employees.²⁹ Following that decision, a number of educational institutions promulgated regulations that rest upon the same idea. The University of Michigan, for example, adopted a code that subjected students and employees to discipline for, *inter alia*,

1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status, and that . . .

b. has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University-sponsored extra-curricular activities . . . or

c. creates an intimidating, hostile, or demeaning environment for educational pursuits, employment, or participation in University sponsored extra-curricular activities.³⁰

24. 113 S. Ct. 2194 (1993).

25. *Id.* at 2201.

26. *Id.*

27. 477 U.S. 57 (1986).

28. 42 U.S.C. § 2000e *et seq.*

29. *Meritor*, 477 U.S. at 73.

30. *See Doe v. University of Michigan*, 721 F. Supp. 852, 856 (E.D. Mich. 1989).

This language tracked that of Guidelines adopted by the Equal Employment Opportunity Commission and approved by the Supreme Court in *Meritor*.³¹ But *Meritor* did not involve behavior arguably protected by the First Amendment and, not surprisingly, the Court did not even mention, much less consider, the tension between the guidelines and the First Amendment when the hostile environment is created by speech or other forms of communicative activity. In an academic setting, however, issues arising out of that tension were bound to arise fairly quickly. And, of course, they did.

The Michigan experience is illuminating. A student in a graduate social work class stated his view that homosexuality is a disease and went on to describe how, as a therapist, he would treat the disease. The student was prosecuted for violating the harassment code.³² At about the same time, the University distributed to all students and employees two pamphlets explaining the code and providing examples of forbidden conduct and speech. An opponent of the code intent upon demonstrating its potential for restricting constitutionally protected speech could not have posited a more convincing "parade of horrors." Among the examples of forbidden speech were a statement that "women just aren't as good in this field as men" and "jokes about gay men and lesbians."³³ It requires no great stretch of the imagination to think of other, equally troublesome applications of the code. Thus, the language of the code seems broad enough to cover the following hypothetical, but hardly very improbable, case: Following a ceremony honoring Vietnam veterans, a middle-aged faculty member who as a student had demonstrated against the Vietnam war makes a speech in which he states that those who fought in the war were not heroes, but murderers. Like the statements the University regarded as prohibited by the code, that speech stigmatizes the members of a protected class and thereby creates an "intimidating, hostile, or demeaning environment" for them, and thus has the "reasonably foreseeable effect of interfering with an individual's academic efforts, employment, or participation in . . . extra-curricular activities."³⁴

These and myriad other actual or hypothetical situations sharply present the conflict between equality and freedom of speech. The potentially wounding effect of hearing it said that one's sexual ori-

31. *Meritor*, 477 U.S. at 66.

32. *Doe*, 721 F. Supp. at 854.

33. *Id.* at 857-58.

34. Indeed, the pamphlet explicitly informed readers that "you are a harasser when [y]ou comment in a derogatory way about a particular person or group's physical appearance or sexual orientation, or their cultural origins, or religious beliefs." *Id.* at 858.

entation is a disease, that members of one's sex are less capable than others of pursuing the profession one has chosen, or that one is regarded as a murderer seems to me beyond doubt. Nor do I doubt that the psychic injury that results from such statements will interfere with the ability of some to benefit from the institution's programs. Statements like these do not, after all, stand alone. They occur within an environment in which the views reflected in the statements are likely to be sufficiently widespread that they have been heard before. The cumulative effect of that repetition may well cause anger, self-doubt, or other emotions likely to interfere with equal enjoyment of the institution's programs.

At the same time, the attempt to proscribe statements that have these effects strikes at the core of our First Amendment tradition. The First Amendment, as it has come to be understood, represents our national commitment to the belief that debate on issues of public policy should be, as Justice Brennan wrote in *New York Times, Co. v. Sullivan*, "uninhibited, robust and wide-open."³⁵ Codes like Michigan's can be upheld only if that commitment does not extend to certain subjects, if those subjects or certain views about them can be put beyond the bounds of lawful discussion. The range of subjects on which "uninhibited, robust, and wide-open" discussion would no longer be permissible is potentially very large, for much that may be said may well be understood to create a hostile environment for members of one or another protected class. Ridicule of the Roman Catholic Church's position on contraception and abortion or of fundamentalist Protestant belief in the literal truth of the Bible and opposition to minority preferences in student admissions or faculty employment on the ground that they diminish the intellectual quality of the university are no less likely to create a hostile environment for some members of the university community than the statements discussed previously.³⁶ Nor does it require a great deal of imagination to think of other subjects on which discussions would be restricted.

Surprising as it may seem to a contemporary student of the First Amendment, the Supreme Court decision most closely on point suggests that such statements can be prohibited. In a 1952 decision,

35. 376 U.S. 254, 270 (1964).

36. Since the codes, like the EEOC Guidelines, often do not contain an intent requirement proponents of minority preferences may also be limited in the arguments they may present. Thus, the argument that minority preferences are necessary because of the devastating impact their elimination would have upon minority enrollments, see Terrance Sandalow, *Minority Preferences in Law School Admissions* in *CONSTITUTIONAL GOVERNMENT IN AMERICA* (R. Collins, ed. 1980), may have no less a tendency to create a hostile environment than the argument that the presence of minorities has an adverse effect on the intellectual quality of the institution.

Beauharnais v. Illinois,³⁷ the Court sustained, though only by a 5-4 vote, an Illinois group libel law that prohibited publication or exhibition in any public place of material that “portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion, which . . . exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy. . . .”³⁸ Although *Beauharnais* has never been explicitly overruled, nearly all students of constitutional law believe that the decision does not survive more recent interpretations of the amendment.³⁹ In the years since *Beauharnais*, the Supreme Court has made clear that the expression of opinion is constitutionally protected. There are, as Justice Powell once wrote, no false ideas under the First Amendment.⁴⁰ I suppose an argument might be made that the statement that women “are not as good in this field” as men, whatever that might mean, or that Vietnam veterans are murderers are statements of fact, not opinion, and therefore susceptible to a demonstration of falsity. Surely, however, that argument misconceives the import of the statements. The statements are not meant to assert that no woman is “as good” as any man in this field or that all Vietnam veterans would be convicted if prosecuted under a statute prohibiting homicide, but to express a judgment about the abilities of women generally or the moral status of those who served in the Vietnam War. Moreover, it is clear that under our law as it now stands, when issues of public concern are involved, truth is a defense to any suit based on libel.⁴¹ The need for that defense is even more compelling when government seeks to restrict speech on such matters. Proscribing speech that tends to create a hostile environment for members of a protected class thus presents the distasteful prospect of litigating such questions as whether women are as good as men in various fields, how we should regard Vietnam veterans, or whether minority admission preferences reduce the intellectual quality of universities.⁴² But these and similar issues are not matters for which our tradition permits the establishment of an official truth. They are, rather, subjects of continuing public discussion, a discussion that government may not terminate. As individuals we may dishonor those who make such statements, but they are not statements of a kind that we trust government to forbid.

37. 343 U.S. 250 (1952).

38. *Id.* at 251.

39. See, e.g., GERALD GUNTHER, CONSTITUTIONAL LAW 1077 (12th ed. 1991).

40. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

41. *Philadelphia Newspapers, Inc. v. Hepp*, 457 U.S. 767, 768-69 (1986).

42. See Robert Post, *Free Speech and Religious, Racial, and Sexual Harassment: Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 290-300 (1991).

These considerations suggest that codes like Michigan's cannot easily be reconciled with the contemporary understanding of the First Amendment,⁴³ but they do not fully meet the argument of the codes' proponents that legislation restricting the speech of the powerful in the service of equality should be judged differently from other restrictions on speech. There are, however, at least two difficulties with that argument. First, the widespread enactment of the codes, similar restrictions upon speech imposed by EEOC regulations, and the wide-ranging legislative successes of the groups for whose protection the codes were adopted demonstrates that "power," public or private, is a far more complex concept than the argument recognizes. If women, minorities, and homosexuals (and Vietnam veterans?) are as powerless as the argument appears to assume, one wonders how these measures came to be adopted.

Second, though I doubt that proponents wish to acknowledge it, the argument appears to assume that the idea of equality and the nation's commitment to it are beyond debate. But the meaning of equality and its implications for social policy toward various groups are, and for the indefinite future are certain to remain, unresolved issues. American society has not achieved, nor is there any prospect that it will achieve, unanimity regarding the appropriate role of women in our society, the normality or morality of homosexuality and, therefore, of its practitioners, and the continuing controversies over race and ethnicity that have for so long plagued the nation. In the course of the ongoing discussion of these matters, it is inevitable that much will be said that is deeply offensive to—and, therefore, creates a hostile environment for—many citizens. Especially in view of the role of universities in our society, it would be ironic if they alone were closed to that discussion.

A conclusion that the First Amendment does not—and should not be read to—permit public colleges and universities to outlaw the expression of certain ideas in the service of equality does not, however, entail the further conclusion that they must tolerate every speech act. Threats of violence and other forms of intimidation, even if purely verbal, lie well beyond the amendment's protection. The amendment should confer no greater protection on language that, when directed to individuals, is commonly understood to be assaultive—those abusive, racial, ethnic, and sexual epithets that, as the Supreme Court once wrote of "fighting words," "by their very utterance inflict injury

43. Not surprisingly, therefore, such codes have not fared well in the courts. *See, e.g.*, *UWM Post, Inc., v. Board of Regents*, 774 F. Supp. 1163 (1991); *Doe v. University of Michigan*, 721 F. Supp. 852 (1989).

or tend to incite an immediate breach of the peace.”⁴⁴ I do not mean to suggest that the use of such epithets can or should be outlawed. In some contexts—as when they are employed ironically, or for instructional purposes, or even when they are employed in the course of argument to characterize a group—such epithets may serve communicative purposes inextricably entwined with the idea that the speaker intends to convey. In these situations, constitutional protection is justified by the same reasons that justify the protection of speech generally. But when the epithets are specifically directed to one or a small group of individuals, with the intention of degrading or humiliating those to whom they are directed, their importance in communicating an idea is dwarfed by their assaultive character. “[S]uch utterances,” as the Court said of “fighting words,” are “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”⁴⁵

The Court’s recent decision in *R.A.V. v. City of St. Paul*⁴⁶ indicates that it may nonetheless invalidate even so limited a prohibition. The defendant in that case, who together with several other teenagers had burned a cross inside the fenced yard of a black family, had been convicted for violating an ordinance prohibiting the placement “on public or private property [of] a symbol, object, appellation or graffiti, including . . . a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender. . . .”⁴⁷ The state supreme court had interpreted the ordinance to reach only those expressions that are “fighting words,” but in a 5-4 decision the U.S. Supreme Court nevertheless held the ordinance unconstitutional.⁴⁸ Because the ordinance prohibited only those “fighting words” based on “race, color, creed, religion, or gender,” the Court reasoned, it violated the First Amendment’s ban on “content” and “viewpoint” discrimination.⁴⁹

R.A.V. cannot, in my judgment, be persuasively reconciled with the Court’s subsequent unanimous decision in *Wisconsin v. Mitchell*.⁵⁰ In the latter, as discussed above, the Court recognized that physical assaults motivated by hostility to the characteristics typically specified

44. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

45. *Id.*

46. 112 S. Ct. 2538 (1992).

47. *R.A.V.*, 112 S. Ct. at 2541.

48. *Id.* at 2550.

49. *Id.* at 2547-48.

50. 113 S. Ct. 2194 (1993).

in harassment codes may be especially harmful and, therefore, call for distinctive treatment.⁵¹ Yet, it is no less true of verbal than of physical assaults that they attack attributes of an individual that are often central to personal identity. To the extent that the attributes are the basis for widespread invidious discrimination the injury to the individual is likely to be cumulative and, therefore, felt with greater intensity. A university might, thus, reasonably conclude that, as the Court said in *Mitchell*, special measures are required to deal with such verbal assaults because they are "more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest."⁵²

The issues raised by campus harassment codes, to put the argument somewhat differently, are too complex to be resolved by asking, simplistically, whether free speech is more important than equality or whether the opposite is true. Room exists, as we may hope the court will yet come to realize, for making distinctions that take account of context. First Amendment doctrine abounds with such distinctions elsewhere. There is no apparent reason that it cannot do when it confronts the current tensions between equality and freedom of speech.

51. *Mitchell*, 113 S. Ct. at 2201.

52. *Id.*