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Avern Cohn

United States District Court, Eastern District of Michigan

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LIFE ON CAMPUS REALLY AIN'T SO BAD

*Avern Cohn**

THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES. By *Alan Charles Kors* and *Harvey A. Silverglate*. New York: The Free Press. 1998. Pp. xi, 415. \$27.50.

The acquiescence of top academic leaders to the regime of speech codes, secret kangaroo courts, and mandatory attitude and sensitivity training, all under the close eyes of lawyers seeking to avoid legal or economic risks and of public relations offices seeking to avoid adverse publicity, has led to the creation of vast middle-level bureaucracies. These bureaucracies are charged with implementation of the new world of Student Life — a world in which selected students, if among the political elect, are to live with neither stress, nor insult, nor unpleasantness. That world, however, can only be achieved by police-state control, injustice, and double standards. That is what actually is happening on the watch of most of our current academic leaders. [p. 330]

INTRODUCTION

The Shadow University is a highly tendentious account of Alan Charles Kors¹ and Harvey A. Silverglate's² view of academic and student life in America's colleges and universities over the last twenty years. Kors and Silverglate see these colleges and universities turning from promoting personal and academic freedom to suppressing open expression and denying basic liberties to students and faculty alike. To make their point, they have scoured college and university campuses from coast to coast to find incidents involving student speech code violations, as well as student and faculty discipline and misbehavior proceedings. They also examine multicultural and diversity programs and other efforts to enlarge the gender and race mix of student bodies and academic staff.

Basically, Kors and Silverglate argue against any restrictions on student or faculty speech, call for the same panoply of rights afforded defendants in criminal cases for students and faculty members accused of misconduct, and would prohibit any programs for new students

* Senior United States District Court Judge, Eastern District of Michigan. J.D. 1949, University of Michigan. —Ed. I should like to thank my law clerks, Susan K. DeClercq and Kimberly Gale Musolf, for their helpful assistance in preparing this book review.

1. Professor of History, University of Pennsylvania.
2. Partner, Silverglate & Good.

tending to orient them to the more complex cultural life they are likely to encounter on campus or the more diverse community in which they will live. They assert that academic freedom for students and faculty alike can be assured only by the elimination of the particular evils they personally find to exist on college and university campuses across the United States.³

Inexplicably, Kors and Silvergate cite neither a time in which the standards they advocate were the norm, nor do they name a college or university that passes muster today as far as they are concerned. To support their assertions, they describe in meticulous detail anecdotal incidents from approximately 150 colleges and universities during the 1980s and early 1990s.⁴ The institutions referenced range from some as well known as Harvard University to some as little known as Quinsigamond Community College in Worcester, Massachusetts. Given the breadth of Kors and Silvergate's charges, the variety of the incidents they offer, and the clearly one-sided descriptions they give, the reader must inevitably be somewhat skeptical of Kors and Silvergate's descriptions and the validity of their conclusions.⁵

While most of the reviews of *The Shadow University* have been favorable,⁶ a careful read of the book, combined with thoughtful consideration of its arguments, leads to the conclusion that if one is confined to a single word to describe the text, the choice would fall somewhere among diatribe, jeremiad, philippic, and polemic. If one takes a good look at *The Shadow University's* website,⁷ the word would be self-aggrandizement.

3. Examples of such "evils" include: the zealous pursuit of political correctness, the promotion of diversity/multiculturalism, and the denial of due process to students and faculty accused of misconduct.

4. Kors and Silvergate do not explain, however, how they went about collecting the incidents described. There is no evidence of random sampling or a feel that the 150 incidents represent any sort of universe.

5. While the text is copiously footnoted, tracking back on the footnotes gives the reader who has taken the time, little comfort. Many times the footnotes reference, as authority, material in Kors and Silvergate's file or are so general as not to be traceable. For example, the account of Professor Leroy Young's dispute with Plymouth State University, p. 215, relies in part on a decision of the Appeal Tribunal of the State of New Hampshire Department of Employment. See p. 394 n.2. However, inquiry to the chair of the Appeal Tribunal brought the response that the decision was not available for public distribution under R.S.A. § 282-A:118, and that the award of compensation was not a contested matter.

6. See, e.g., Charles Platt, *When Worlds Collide*, WASH. POST, July 26, 1998 (Educ. Rev.), at 14 (reviewing *The Shadow University*) (calling *The Shadow University* "a wake-up call."); Sam Tanenhaus, *P.C. 101*, N.Y. TIMES, Nov. 8, 1998, § 7 (Book Rev.), at 35 (reviewing *The Shadow University*) (saying Kors and Silvergate "have performed a useful service"). But see Carlin Romano, *Double Barreled Outrage Over Betrayal of Campus Liberty*, PHILADELPHIA INQUIRER, Oct. 25, 1998, at Q1 (reviewing *The Shadow University*) ("A space alien reading it would think American campuses operate as political states when, most of the time, academics and students say what they think without reprisal.").

7. *The Shadow University Web Site* (last modified Apr. 21, 2000) <<http://www.shadowuniv.com>> [hereinafter <www.shadowuniv.com>]. Especially self-aggrandizing is the

A view of campus life in a more tumultuous time can be found in Professor Sidney Hook's book, *Academic Freedom and Academic Anarchy*.⁸ In his discussion of the polemicists who embroiled the American campuses in the 1960s, Professor Hook says:

[A] university is fundamentally a community of scholars dedicated to the discovery and teaching of the truth. No one is compelled to seek entry to it It can therefore require both of its students and faculty conformity with a code of manners, speech, and conduct, provided it is not unreasonable or unjust, *higher* than what obtains in the marketplace.⁹

In addition, to better understand the campus of today with its significantly more diverse faculties as well as student bodies, one should read Professor Lawrence Levine's book, *The Opening of the American Mind*.¹⁰ In it, Levine, a professor of history at George Mason University, explains:

Just when a significant number of historians have begun to study the intricacies of race, ethnicity, class, and gender, just when they are beginning to penetrate the intriguing and difficult questions that the various pluralist hypotheses have posed, just when they are entering into constructive debates on these issues with their colleagues and students, others are crying that the sky is falling and that *any* deviation from the strict assimilationist melting-pot orthodoxy spells the end of the Republic as we have known it. The results of the new historiography have dismayed critics who don't like the message and all too humanly have wanted to kill the messenger, or more accurately to denounce the messenger as "politically correct." They don't mount a scholarly campaign against this work; they don't attempt to disprove it with their own scholarship; they simply denounce it as "politically correct" and "injurious" to the national tradition, as "trivial" distractions from the essential political and diplomatic work of historians.¹¹

Simply put, Kors and Silvergate are but two more authors joining in the chorus of voices "who don't like the message."

THE AUTHORS

The authors, Alan Charles Kors and Harvey A. Silvergate, met as undergraduates at Princeton University in the 1960s and have continued as friends and collaborators. Kors is now a Professor of History at the University of Pennsylvania, where he has taught since 1965. An

display of Kors and Silvergate's lecture schedules. See *id.* at <www.shadowuniv.com/tour/past.html>.

8. SIDNEY HOOK, *ACADEMIC FREEDOM AND ACADEMIC ANARCHY* (1970).

9. *Id.* at 195.

10. LAWRENCE W. LEVINE, *THE OPENING OF THE AMERICAN MIND: CANONS, CULTURE, AND HISTORY* (1996).

11. *Id.* at 165.

expert in seventeenth and eighteenth century European intellectual history, Kors is clearly a notable scholar. He was one of the early members of, and remains active in, the National Academy of Scholars,¹² an organization whose first major assembly was headlined in *The Chronicle of Higher Education* November 23, 1988, issue as: "Conservative Scholars Call for a Movement to 'Reclaim' Academy."¹³

Apparently, little has changed between the time of the 1988 Assembly, where Kors reportedly said that the policies at the University of Pennsylvania dealing with racial and sexual harassment made scholars "afraid to speak freely for fear of being accused of offensive behavior,"¹⁴ and today, except that Kors has been promoted from associate to full professor. The current literature distributed by the National Association of Scholars suggests that if it is asked to participate as an amicus in the current litigation involving the University of Michigan's race-sensitive admissions policies to achieve diversity in its student body, it would weigh in on the plaintiffs' side with Kors's enthusiastic endorsement.¹⁵ In sum, Kors is a highly regarded scholar and a well-known conservative.

Silvergate is a practicing lawyer in Boston, specializing in civil liberties and criminal defense matters. He is also a columnist for the *Boston Phoenix* and the *National Law Journal*, and is active in the American Civil Liberties Union. Silvergate has cooperated over the years with Kors defending students charged with misconduct and, according to the biographical sketch in the end papers of *The Shadow University*, "threatened with the new tyrannies" (p. 415). Precisely how Kors and Silvergate divided responsibility for writing *The Shadow University* and whether Silvergate actually shares Kors's dismal view of campus legal life today is not clear.

Finally, if the itineraries published on *The Shadow University* website¹⁶ are any indication, Kors and Silvergate have enjoyed a good life from their authorship. In 1998, together or separately, they made

12. See Denise K. Magner, *10 years of Defending the Classics and Fighting Political Correctness*, CHRON. HIGHER EDUC., Dec. 12, 1997, at A12.

13. Carolyn J. Mooney, *Conservative Scholars Call for a Movement to 'Reclaim' Academy*, CHRON. HIGHER EDUC., Nov. 23, 1988.

14. *Id.* at A11.

15. See *Gratz v. Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998) (denying intervention in a case challenging the University of Michigan's college of Literature, Science, and the Arts admission standards), *rev'd*, 188 F.3d 394 (6th Cir. 1999); *Grutter v. Bollinger*, 16 F. Supp. 2d 797 (E.D. Mich. 1997) (rejecting reassignment of a case challenging the University of Michigan Law School's admission standards).

With these two cases, the viability of *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (holding that a state university law school's admissions program that discriminated in favor of minority applicants by giving substantial racial preferences in its admission program violated equal protection), beyond the Fifth Circuit will be examined.

16. See <www.shadowuniversity.com>, *supra* note 7.

more than 100 appearances, personally or on radio or television broadcasts, across the country. In 1999, they made a like number of appearances, and in 2000, for the first part of the year, made approximately 25 appearances.¹⁷

THE BOOK

The Shadow University is divided into five parts and some fourteen chapters. Part I: "The Assault on Liberty," begins with a description of "The Water Buffalo Affair" at the University of Pennsylvania, (pp. 9-33). In 1993, a student was charged with harassment because he shouted at female students celebrating below his window in a high-rise dormitory, "Shut up, you water buffalo! . . . If you want a party there's a zoo a mile from here" (p. 9). After several months, in more of a display of political ineptitude than an effort at political correctness, the charges were dismissed to the dismay of the complainants.

Kors and Silvergate put their own spin on the Water Buffalo Affair, using it to vent their personal view that Sheldon Hackney, then president of the University of Pennsylvania and now a professor of history, failed miserably in his executive responsibility by not putting an end to the prosecution of the student under the University's judicial procedures. Kors and Silvergate also find fault with the report of the Board of Inquiry, created to examine how the University's judicial procedures functioned during the case, finding the report to be "reminiscent of those Southern sheriffs in the early '60s talking about 'outside agitators' stirring up trouble in their counties, where justice was fine . . ." (p. 33). Presumably, Kors, as a faculty member, was offended by the report's conclusion that the complainants were justified in their assertions that the judicial system had treated them unfairly, that the accused was also treated unfairly but was not injured "as seriously as were the complainants,"¹⁸ and that the judicial adviser in charge of the case had allowed herself to be manipulated by the accused and Kors, who was the faculty adviser of the accused.

A fair read of the articles in the university newspaper, *The Daily Pennsylvanian*, which followed the progress of this case,¹⁹ suggests that there was fault enough for everyone involved, and Kors's and Silvergate's position, which singles out Hackney as the principal culprit, is more scapegoating than reasoned analysis. As stated by a

17. See *id.* at <www.shadowuniv.com/tour/past.html>.

18. Univ. of Pa., *Inquiry into the Procedural Aspects of a Case of Alleged Racial Harassment in the Spring of 1993*, ALMANAC, Apr. 5, 1994, at 3.

19. Archived articles can be found at *The Daily Pennsylvanian* (last modified June 2, 2000) <<http://www.dailypennsylvanian.com>>, using the search term: "board of inquiry water buffalo" (displays 3561 matches overall).

colleague and friend of Kors, following an exchange between Hackney and Kors shortly after *The Shadow University* was published:

Professor Kors' column responding to Professor Hackney was neither gracious nor restrained. Nor was it, in its hyperbolic attacks on Professor Hackney's integrity, in any way fair. Intellectual life and intellectual freedom flourished at Penn during Sheldon Hackney's tenure as president, and Professor Kors' one-sided interpretation of that period in Penn's history does an injustice both to the University and to its former president.²⁰

Inexplicably, we do not learn until Chapter 14 of *The Shadow University* that the student in the Water Buffalo Affair sued the University (p. 348). An examination of the docket of the lawsuit,²¹ as well as a running account of the case in *The Daily Pennsylvanian*, suggests that going to court (as any lawyer or judge knows) is really not a good way to obtain satisfaction or find the truth of a dispute. The case was filed in 1994, claiming a litany of wrongs pertaining to the way the University handled the matter, and asked for "in excess of \$50,000" in damages. In 1996, a good portion of the case was dismissed on the University of Pennsylvania's motion and in 1997, the case was discontinued with no payment to the student and only a modest amount to his attorney. Ultimately, the Water Buffalo Affair, like so many incidents of its kind, was, in reality, part of a learning process of coming to grips with the "intricacies of race, ethnicity, class and gender"²² newly present in the 1980s and 1990s on college and university campuses.

Chapter Two, "Free Speech in a Free Society" (pp. 34-47), is a run-through of the free speech cases from *Gilow v. New York*²³ to *R.A.V. v. City of St. Paul*,²⁴ concluding correctly that *R.A.V.* "likely has fatal implications for attempts to adopt a double standard — applying punishments to speech to 'protect' some groups but not others, restricting 'hate' speech but not other speech" (p. 49). Overall, the chapter does a good job of tracking through the cases.

Chapter Three, "What Is Academic Freedom" (pp. 50-66), describes important academic freedom milestones (both good and bad) from the 1915 American Association of University Professors' Statement, through its 1940 update, to the 1967 Joint Statement on Rights and Freedom of Students. The road described, is understandably a checkered one, particularly the 1960s effort to ferret out "subversion."

20. Richard Beeman, Letter to the Editor, *THE DAILY PENNSYLVANIAN*, Dec. 10, 1998, at 6 (identifying himself as a friend of Kors).

21. *Jacobowitz v. Trustees of the Univ. of Pa.*, No. 2457 (Phila. Ct. C.P., 1994) (unpublished).

22. LEVINE, *supra* note 10, at 165.

23. 268 U.S. 652 (1925).

24. 505 U.S. 377 (1992).

This chapter ends with a detailed description of Princeton University's effort to limit access to its campus, which fell afoul of the New Jersey Supreme Court when the Court held that Princeton's campus was a public forum.²⁵

Chapter Three also describes Harvard University's efforts to prevent a film crew from interviewing undergraduates on campus. This incident seems to be a rather fatuous effort to link an ordinary trespass, at best (or worst), with a violation of principles of academic freedom. Surely, applying principles of the law of trespass to keep an intrusive television crew from access to the public parts of a campus does little more than make a hero of the crew, which is exactly what the TV station that sent them was looking for. Faculty and students can always find their way to the front of a camera lens and are unlikely to be deterred by an effort to make their travel a bit longer.

Chapter Four, "Marcuse's Revenge" (pp. 67-96), reveals the crux of Kors's and Silvergate's view on the origins of the conspiracy to suppress free speech: Herbert Marcuse's 1965 essay entitled *Repressive Tolerance*.²⁶ In Kors's and Silvergate's view, "Marcuse's prescriptions are the model for the assaults on free speech in today's academic world" (p. 71). This chapter attempts to reinforce its principal point by including an extended discussion of the writings of Richard Delgado, Charles R. Lawrence III, Mari Matsuda, Catharine MacKinnon, and Stanley Fish, as well as the proliferation of college and university speech codes and some of the case decisions that have invalidated them. Since these codes and their constitutional infirmities, as well as the arguments in support, have been extensively discussed elsewhere,²⁷ there is no need to discuss them in this essay. What is missing from Kors's and Silvergate's assessment of speech codes, however, is any effort to assess the codes in a scholarly way as to their application and enforcement, and why they continue to exist in the face of the constitutional barriers the courts have erected against them, as others have made.²⁸

25. *New Jersey v. Schmid*, 423 A.2d 615 (N.J. 1980), *appeal dismissed*, 455 U.S. 100 (1982).

26. Herbert Marcuse, *Repressive Tolerance*, in ROBERT PAUL WOLFF ET AL., *A CRITIQUE OF PURE TOLERANCE* 81 (1965).

27. See, e.g., MILTON HEUMANN & THOMAS CHURCH, *HATE SPEECH ON CAMPUS: CASES, CASE STUDIES, AND COMMENTARY* (1997); ROBERT M. O'NEIL, *FREE SPEECH IN THE COLLEGE COMMUNITY* (1997); TIMOTHY C. SHIELL, *CAMPUS HATE SPEECH ON TRIAL* (1998).

28. See Jonathan B. Gould, *Symbolic Speech: Legal Mobilization and the Rise of Collegiate Hate Speech Codes* (1999) (doctoral thesis, Univ. of Chicago; UMI Dissertation Services); see also NAT HENTOFF, *FREE SPEECH FOR ME — BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER* (1992); MARTHA T. ZINGO, *SEX/GENDER OUTSIDERS, HATE SPEECH, AND FREEDOM OF EXPRESSION: CAN THEY SAY THAT ABOUT ME?* (1998) (discussing free speech rights outside of the college and university campus setting).

According to Professor Jonathan Gould, Professor of Law at George Mason University, a review of the principle cases, *Doe v. University of Michigan*,²⁹ *UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*,³⁰ and *Corry v. Leland Stanford Junior University*,³¹ leads to the conclusion that more is involved than simple stubbornness, or an effort to put a square peg into a round hole.³²

Gould found that between 1987 and 1992, almost one-third of four-year colleges and universities created such speech policies, but that only eighteen percent "created the kind of speech codes that challenged First Amendment doctrine."³³ Taking a considerably broader and more analytical view than Kors and Silverglate, Gould says in his conclusion:

While student demands may have put the issue into play at some schools, the codes owe more to the decisions of high-level administrators. Primed as they were by their schools' liberal or activist traditions, these officials had more instrumental or institutional motives in mind in advancing the speech codes.

Even if the hate speech codes do not represent social activism — whether traditional social movement or extra-judicial legal mobilization — their creation and persistence speaks to the social construction of law. . . . That the speech codes persist even in the face of contrary precedent challenges the depiction of courts that both initiate social change and command adherence to their decisions. The codes' history also conflicts with an immutable view of the First Amendment. Court decisions are undoubtedly important, but the range of accepted expression is more regularly established by social convention.

It is important not to overreach from these conclusions, for we have been unable (so far) to determine exactly why the speech codes persist and expand even in the face of contrary legal precedent. . . . But the fact that these policies continue is remarkable in itself. Not only does their persistence defy popular understandings of the speech code controversy, but it challenges advocates of traditional jurisprudence to explain the codes' continued existence.³⁴

29. 721 F. Supp. 852 (E.D. Mich. 1989) (Cohn, J.).

30. 774 F. Supp. 1163 (E.D. Wis. 1991).

31. No. 740309 (Super. Ct. County of Santa Clara, Cal., Feb. 27, 1995) (unpublished).

32. In his doctoral dissertation, Gould says:

[T]he codes owe less to identity politics and collective action than they do to university administrators who sought symbolic measures to improve the racial climate on campus. However, despite five court cases in the early 1990s that ostensibly found many speech codes unconstitutional, several policies remain in force and a surprising number have been adopted subsequently. Thus, while the speech codes do not represent legal or political mobilization, they do raise questions about the power of courts to control constitutional meaning.

Gould, *supra* note 28, at xi.

33. *Id.* at 386.

34. *Id.* at 386-87.

Also, still to come is a study done under the auspices of the American Bar Foundation, entitled *Hate Speech and Freedom of Expression on College Campuses*, by Jonathan D. Casper and Dennis Chong of Northwestern University.³⁵ Casper and Chong are studying the frequency with which hate speech occurs on selected campuses, the forms that it takes, the places where expression occurs, the characteristics of perpetrators, and the responses by individuals and institutions.

It is all well and good to be critical of a solution to a problem if it exists, but critics should take care if they have no constructive alternative. In *The Shadow University*, Kors and Silvergate, as we shall see later, propose a solution; however, its merits can be seriously questioned.

Chapter Five, "The Moral Reality of Political Correctness" (pp. 97-110), continues with Kors's and Silvergate's views of the link between speech codes and what they see as the efforts to maintain "political correctness," and the abuse of power that such efforts represent. Anecdote after anecdote is related, with little effort to link them to some common plan, or any attempt to assess their frequency in the totality of campus life. Kors and Silvergate again conclude on a wild swing saying: "The struggle for liberty on American campuses is, in its essence, the struggle between Herbert Marcuse and John Stuart Mill" (p. 110). Kors and Silvergate quote Mill: "[It is] imperative that human beings should be free to form opinions, and to express their opinions without reserve."³⁶

Likely few administrators today, and certainly the vast majority of judges involved with speech codes, have ever heard of Herbert Marcuse,³⁷ and all of them, administrators and judges alike, would endorse Mill. The few untoward occurrences involving speech codes Kors and Silvergate describe are, more likely than not, reflective of the ineptitude of administrators rather than an effort at political correctness or suppression of speech.

35. For a description of the study's parameters, see the 1999 Report of the American Bar Foundation. See also, Jonathan D. Casper and Dennis Chong, *Hate Speech and Freedom of Expression on College Campuses, A Proposal to the Board of the American Bar Foundation*, October 1996.

36. P. 110 (quoting JOHN STUART MILL, ON LIBERTY (1859), reprinted in JOHN STUART MILL, UTILITARIANISM, LIBERTY, REPRESENTATIVE GOVERNMENT (H.B. Actin ed., 1972)) (internal quotation marks omitted).

37. Herbert Marcuse was an influential philosopher and political activist in the United States during the 1960s and 1970s. A university professor, author, and theorist of revolutionary change, Marcuse was dubbed the "father of the New Left" by the media for his "critical perspectives on contemporary capitalism and state communist societies." Douglas Kellner, *Illuminations: Herbert Marcuse*, <<http://www.uta.edu/huma/illuminations/kell12.htm>>. For more information on Herbert Marcuse, see Herbert Marcuse's Home Page at <<http://web.missouri.edu/~tapscifk/dolcevita1.html>>, or the documentary film, HERBERT'S HIPPOPOTAMUS — MARCUSE IN PARADISE, by Paul Alexander Juutilainen.

One last example of the looseness with which Kors and Silvergate treat speech code incidents is reflected in Kors and Silvergate's criticism of the University of Michigan's guide, *What Students Should Know about Discrimination and Discriminatory Harassment by Students in the University Environment* (pp. 103-04). Kors and Silvergate fail to note that the University of Michigan withdrew the guide "because the information in it was not accurate."³⁸ While there was little in the *Doe* experience that reflected wisdom on the part of the administrators at the University of Michigan responsible for the *Doe* debacle, they are at least entitled to credit for disavowing (albeit implicitly) the interpretive guide.

Part II, "The Assault On Free Speech," divides itself into chapters on faculty speech disciplinary incidents, (ch. 6, "The Assault on Faculty Speech," pp. 113-46) and, again, student disciplinary incidents, mostly involving speech codes (ch. 7, "'Shut Up,' They Reasoned: Silencing Students," pp. 147-83). In neither case does the reader get any sense that he or she has heard the other side, i.e., why the administration instituted the code in the first place.³⁹ The underappreciation of the breadth of the First Amendment's free speech rights when it comes to activities by faculty or students on college and university campuses cannot be doubted, and the fact that college and university presidents can be high-handed in dealing with such matters is well known. We have come a long way from the 1930s, however, when the president of the University of Michigan could dismiss a student, with no right of appeal, simply by a letter stating:

It has been decided by the authorities of the University of Michigan that you should be asked not to re-enter the University. It has proved to be impossible to persuade you to refrain from interfering with the work of the University and with the work of other students.⁴⁰

Not to mention the experiences in the 1950s, when summary dismissals and black lists were a common response to charges of disloyalty by faculty members.⁴¹

Professor Hook's observations, previously quoted,⁴² are certainly still relevant. The struggle to find the correct balance between the right of faculty and students to speak freely in and out of the class-

38. *Doe v. University of Mich.*, 721 F. Supp. 852, 858 (E.D. Mich. 1989) (Cohn, J.) (internal quotation marks omitted).

39. Cf. Thomas Grey, *How to Write a Speech Code Without Really Trying: Reflections on The Stanford Experience*, 29 U.C. DAVIS L. REV. 891 (1996). Professor Grey is the author of the Stanford University speech code.

40. Petition for Writ of Mandamus, *Cohen v. Regents of the University of Michigan*, No. 14089, at 4 (E.D. Mich. filed Nov. 7, 1939).

41. See ELLEN W. SCHWECKER, *NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES* (1986).

42. See *supra* text accompanying notes 8-9.

room at public and private institutions of higher learning, and the need to maintain an environment conducive to their mission, will likely continue for some time. Taking the "Chicken Little" approach, reflected in *The Shadow University*, does little to assist finding a proper balance.

Part III, "The Assault On Individuals," is composed of three chapters, the first two of which (ch. 8, "Individual Identity: The Heart of Liberty" pp. 187-209 and ch. 9, "American Thought Reform" pp. 210-32) are devoted to a description of a variety of programs promoting diversity and multiculturalism, which, in Kors and Silverglate's view, fail to recognize "the primacy of individual conscience over the social benefits of conformity" (p. 190). In Kors and Silverglate's view, such programs perpetrate fraud:

All that the social engineers of diversity mean, in fact, is the appreciation, celebration, and study of those people who think exactly as they do about the nature and causes of oppression, wherever they are found and however nonrepresentative those thinkers might be of the broader groups that they purportedly represent. Academic diversity and multiculturalism have remarkably narrow limits — race, gender, "oppressed" ethnicity, and sexual preference — as articulated by self-proclaimed "progressives." The academic use of the terms "diversity" and "multicultural" has become a politicized perversion of language. [pp. 192-93]

What Kors and Silverglate ignore, of course, are the mammoth changes that occurred on college and university campuses following World War II, particularly with regard to the racial, gender, and ethnic composition of faculty and student bodies. As demonstrated by the work of Professor Lawrence Levine,⁴³ what is at work is not the heirs of Marcuse plotting evil, but a reflection of the social changes that have taken, and continue to take place in our society generally, and on campuses particularly.

Two publications from the University of Michigan explain the merits of diversity and multicultural initiatives as administrators see them. The publications should allay any fears that there is something wrong with programs dealing with the realities of bringing together diverse groups of students and introducing them to life in a campus community. Both recognize that dealing with the cultural mix resulting from such diversity is a better way to go than any effort at homogenization. The first publication, *The Compelling Need for Diversity in Higher Education*, is a collection of the expert witness reports collected for the defense of the pending cases challenging the University's admission policies described above.⁴⁴ The second publication, *The Climate and Character, Perspectives on Diversity*, is an assessment of the University's diversity initiatives as of 1987.

43. See LEVINE, *supra* note 10.

44. See cases cited *supra* note 15.

Part III concludes with Chapter Ten, "Double Standards: Some Are More Equal Than Others" (pp. 233-61), which again, is a collection of anecdotal accounts displaying a picture of disparities in the treatment of offenders of speech and conduct codes depending on their race or ethnicity. White students and conservative publications and their editors, in Kors and Silverglate's view, are discriminated against and punished more severely than their counterparts in the minority community. Given the lack of any effort at a systematic collection of data or scholarliness in analysis, it is difficult to give any credibility to Kors and Silverglate's conclusions. Again demonstrating their swinging style, they say:

The worst catastrophe would be if other Americans actually came to believe what universities believe: that they do not have to tolerate what offends their private and commonly shared values, and that they rightfully and proudly may dispense freedom and justice unequally — the Constitution be damned — according to their sense of decent and indecent beliefs and groups. Where will all our self-proclaimed progressives find shelter when those winds blow, after they themselves have attempted to convince everyone who passes through their portals that the protections of liberty and legal equality are wholly dispensable? [pp. 260-61]

There is really no way, descriptively or analytically, to respond to a conclusion as broad as this, other than to observe that, once again, Kors and Silverglate have utilized their rhetorical skills in substitution for a constructive contribution to find a solution to what they see as an evil.

Part IV, "The Assault on Due Process," is no more than a reformulation of previous parts of the book. The three chapters of this Part, "The Rules of Civilization" (pp. 265-88; ch. 11), "The Courts of Star Chamber" (pp. 289-311; ch. 12), and "Not On My Watch" (pp. 312-35; ch. 13), are a collection of anecdotal accounts of disciplinary proceedings that were conducted without the same panoply of rights usually afforded defendants in criminal trials. To Kors and Silverglate, college and university disciplinary proceedings are invariably one-sided, unfair, irrational, and lack adequate mechanisms for factfinding (p. 279). Such proceedings are, in their view, designed to appease the militant leaders of potentially disruptive groups (p. 314), and are motivated by the fear of disruption or of causing offense, as well as being linked to careerism (p. 329). To Kors and Silverglate, "[t]he extent to which lawyers now serve as policy officers in higher education is an untold scandal of the modern academic age" (p. 329). The short answer to all of this is that such disciplinary proceedings are not that frequent, and on the occasions when they end up in court, there does not seem to be a series of overwhelming successes on the side of plaintiffs.

In Part V, "Restoring Liberty," Kors and Silverglate offer a solution to the problems and dire circumstances they find to exist in

America's colleges and universities — litigation. In Chapter 14, "Sue the Bastards?" (pp. 339-354), they recommend a vigorous effort to achieve justice through the courts. They say: "The university may be an enclave, but it is not a sovereign nation. Ultimately it will have to answer for its betrayal of the nationals and its own traditions" (p. 354).

And that answer, Kors and Silverglate believe, will come through successes in lawsuits. They are too sanguine. As noted previously, this is the chapter in which the reader first learns of the University of Pennsylvania student offender in the Water Buffalo Affair going to court. If the result of his lawsuit reflected any success, or gave him any satisfaction, a read of the papers in the court file certainly does not disclose it.⁴⁵ Likewise, an examination of the court file in the case of Professor Leroy Young of Plymouth State University⁴⁶ suggests that litigation has its limitations.⁴⁷

Professor Young filed his case in February 1996. As of February 8, 2000, it was set for trial on April 18, 2000. On September 21, 1999 the court informed the professor that his substantive due process claim had no merit: "Nothing in Wharton's (the college president) decision making is sufficiently outrageous or egregious that a reasonable jury could find it conscience shocking. The decision to dismiss Young based on [the] charges of sexual harassment, perhaps influenced by the other charges of sexual harassment, even if wrong, was not outrageous."⁴⁸

Both experienced lawyers and long-serving judges can attest to the fact that a case in court should never be looked upon as a profit center, and is a poor, very expensive, and seldom successful way, to achieve worthwhile social change. Although at times there is no alternative to litigation, we certainly do not need to duplicate the road from *Plessy v. Ferguson*⁴⁹ to *Brown v. Board of Education*⁵⁰ to achieve a balance of evils in college and university policies and practices today regarding speech codes, discipline, and efforts to achieve diversity and assure appropriate multicultural programming.

The concluding chapter, "Sunlight Is the Best Disinfectant" (pp. 355-74), principally describes what Kors and Silverglate believe are salutary changes at the University of Pennsylvania taking place

45. See *Jacobowitz v. Trustees of Univ. of Pa.*, No. 2457 (Phila. C.P. 1994).

46. *Young v. Plymouth State College*, No. 96-75-JD, 1999 WL 813887 (D.N.H. Sept. 21, 1999) (granting defendant university's summary judgment motion on a suit brought by a professor to obtain recompense for what he asserted was a wrongful discharge, when he was terminated based on a sexual harassment charge).

47. The authors of *The Shadow University* agree: "Young, however, faced three potential difficulties in the gender pathologies of academic life." P. 291.

48. *Young*, 1999 WL 813887, at *9.

49. 163 U.S. 567 (1896).

50. 347 U.S. 483 (1954).

through the appointment of a new high-level administrator to the position of vice-provost for university life and a new president. If a change in personalities can effectuate such remarkable changes in so short a period of time, one has to question the fundamental premises of *The Shadow University*, that the evils they describe are systemic rather than a reflection of personal disagreement.

Kors and Silverglate end with this advice:

Let us keep our wits about us, for Marcuse's heirs almost all and always think tactically. The theory of "repressive tolerance," or, more precisely, its practice of "progressive intolerance," still governs the extracurricular lives of nearly all of our students. It is easy, however, to identify the vulnerabilities of the bearers of this worst and, at the time, most marginal legacy of the '60s: They loathe the society that they believe should support them generously in their authority over its offspring; they are detached from the values of individual liberty, legal equality, privacy, and the sanctity of conscience toward which Americans essentially are drawn; and, for both those reasons, they cannot bear the light of public scrutiny. Let the sunlight in. [pp. 372-73]

CONCLUSION

This has not been a particularly kind review because *The Shadow University* is not a particularly good book. Professor Kors obviously has an ax to grind and apparently persuaded his longtime friend, Silverglate, who is not at the University of Pennsylvania, to join with him in his efforts to sharpen it. Of course, all is not always well on college and university campuses. But then, all is not always well in most institutions of society, as the frequency of civil rights cases involving incidents of police brutality and the abuse of incarcerated persons tell us.

If one wants to work the Internet hard and long enough, one can put together a succession of incidents that would appear to create the impression of a pattern and practice of wrongdoing and little positive response in almost any area of public life. However, if one is willing to take the time to personally inquire and cull the websites of, for example, The Chronicle of Higher Education,⁵¹ Justice On Campus,⁵² National Association of State Universities and Land-Grant Colleges,⁵³ National Association of College and University Attorneys,⁵⁴ and American Association of University Professors,⁵⁵ one will come away

51. *The Chronicle of Higher Education* (last modified June 2, 2000) <<http://www.chronicle.com>>.

52. *Justice on Campus* (visited June 2, 2000) <<http://www.joc.mit.edu>>.

53. *NASULGC* (visited June 2, 2000) <<http://www.nasulgc.org>>.

54. *NACUA* (visited June 2, 2000) <<http://w.nacua.org>>.

55. *AAUP* (last modified June 2, 2000) <<http://www.aaup.org>>.

with two impressions. First, most, if not all, have never heard of *The Shadow University*. Second, by-and-large, college and university administrations are doing rather well at their tasks, and college and university students, for the most part, are trying to equip themselves to make a good living when they get out in the world.