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A Chilling of Discourse

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A CHILLING OF DISCOURSE

DAVID BARNHIZER*

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ABSTRACT

I argue that a key consequence of the collectives of multiculturalists, postmodernists, radical feminists, critical race activists, sexuality advocates, and others working for radical change is not only the politicization of knowledge in what is after all a realm of politics we call law, but the incoherence of knowledge and the loss of the quality and integrity of our pursuit of knowledge through scholarship.¹ One result is that much of the

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1. Martha Nussbaum argues that even with the current excesses of the postmoderns and multiculturalists the intellectual sky is not falling. See MARTHA C. NUSSBAUM, CULTIVATING HUMANITY: A CLASSICAL DEFENSE OF REFORM IN LIBERAL EDUCATION (1997). She concludes:

Nor is it a cause for grave concern, ultimately, that many contemporary critics espouse forms of moral relativism deriving from French postmodernist philosophy, denying the objectivity of value judgments. One may certainly take issue with the conclusions of these critics, and find fault with their arguments. On the whole,

scholarship and teaching found in the humane and political or noncumulative disciplines such as law are forms of self-interested propaganda in which honesty is muted or excluded and truth-seeking and balance are subordinated to predetermined political agendas.²

The dominant premise of this Essay is that we have established a culture of argument, condemnation, and subtle pressure within our academic institutions that is “chilling” honest discourse about fundamental social concerns in ways that destroy the ideal of the university as a center of open communication in which freedom of discourse in teaching and scholarship are paramount.³ Academia—which ought to provide solutions and linkages—has itself become a vehicle of intolerance. I challenged such behavior when it was being done by an orthodoxy that used its power to inhibit free thought when I first came into the law school world, and I challenge it here when the identity and ideology of the actors have been reversed and a newly dominant orthodoxy is imposing its will on others.

I. INTRODUCTION

A substantial part of the analysis offered here relates to the phenomenon of collectivist activism because that is the primary source of power and abuse. This personalized, impassioned and self-referenced set of movements has altered the intellectual culture of law schools by its politicization of knowledge as just another strategic weapon in pursuit of its aims rather than an end in itself. One result is the lessened ability of emotionally engaged “scholars” to perceive their own abusive or repressive behavior. Others’ vices are always far easier to detect than our own, and we also tend to make virtues of our vices while demonizing opponents. The intensity, ideological nature, and passion of the several “righteous” movements—along with the general effects of academic Leftism—have politicized knowledge and pressed it into the service

philosophers thinking about truth and objectivity have not been very impressed by the arguments of the postmodernist critics

Id. at 108.

2. See CRANE BRINTON, *IDEAS AND MEN: THE STORY OF WESTERN THOUGHT* 13 (1950) (expressing the idea of *noncumulative* knowledge). Brinton spoke of *noncumulative* knowledge as knowledge relating to wisdom, human nature, values, and morality. *Id.* He stated:

Men of letters make certain propositions, entertain certain ideas, about men, about right and wrong action, about beautiful and ugly things. Over two thousand years ago, men of letters were writing in Greek on these matters But our contemporary men of letters are today writing about the very same things the Greek men of letters wrote about, in much the same way and with no clear and certain increase in knowledge.

Id.

3. For a compelling portrayal of modern academic culture as being based on dishonest political argumentation rather than discourse, see DEBORAH TANNEN, *THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE* (1998).

of group agendas. This has caused a chilling of scholarship in areas relating to fundamental social issues.

I want to make clear that I don't care whether what we are dealing with are propaganda and intimidation arising from cultures of the Left or the Right. My point is that law schools and universities lose their central moral reason for being if they suppress the free and independent thought they are responsible for nurturing. When we allow cultures of either hard or soft repression to emerge in which independent thinking and honest critical discourse are undermined, we have sabotaged our very justification for existing. This includes the rather amazing privilege of lifetime tenure. If we "pack" law school and university faculties with people who think the same, write about the same issues in the same way, and share the same values, we have blinded ourselves to the intellectual richness and diversity of American society and betrayed our fundamental mission.

Why be concerned about such things? Few would dispute that American society is increasingly trapped in a culture of spin, lies, and propaganda. It is telling that most of the critiques of such behavior are coming from outside the university. While our complex society needs citizens and leaders who can be honest, principled, knowledgeable, and clear in their missions, as well as open to diverse and competing positions of the kind inevitably generated by a complex and diverse society, the reverse is occurring.

Let me put forth a set of very basic premises that drive this criticism of the chilling effects of the culture of soft repression that I conclude now exists in American law schools and in the humanistic disciplines. One principle is that when *any* monoculture gains control of a system, the independent clash and tension of competing ideas are lost. While this is more important for some types of systems than others, for law schools it is a fundamental problem. I am arguing that an ideological monoculture (admittedly working behind a legitimate and meaningful diversity of gender, race, and ethnicity that I have always supported) has gained control of law schools and the *noncumulative* academic disciplines.

Providing legitimate opportunities to people of backgrounds that have been unjustly denied a presence in the university is a vital moral enterprise, and the success of this effort is admirable. The problem, however, is that tolerance for gender, racial, and ethnic diversity has not translated into tolerance for intellectual and political diversity for positions incompatible with those advanced by the new orthodoxy. One result has been the illegitimate suppression of independent thinking and diverse intellectual analysis. This has been accompanied by diminishing willingness and ability to engage in the critique of fundamental political ideas and ideals. This prevents the balanced assessment of the various "solutions" advanced by members of the ideological monoculture, or the offer of solutions that are seen as potentially encroaching on the perquisites of the new orthodoxy. The new political monoculture

operates within a cloud of diversity. It has successfully cloned itself through hiring and promotion practices to the extent that its base of power has expanded and most likely is now unassailable.

This ideological monoculture brings to mind Lord Acton's telling reminder that "all power corrupts and absolute power corrupts absolutely." My position is that too much power has flowed to the ideological cliques that comprise the new monoculture. They have been allowed to intimidate the rest of the system to the extent there is no real discourse or debate on many of the issues at the center of concern in American society. This intimidation is not only an informal consequence of ideologically driven identity collectives but it has also been built into the institutional system that governs law schools.

While much positive can be said about the commitment to rectify past injustices and the necessary compromises this demands, the problem for the scholar is that those who hold predetermined visions and specific political agendas with which they personally identify do not look at the general good of society as opposed to that which benefits the members of their particular identity collective. I believe this offers a critical distinction between what I have come to think of as the "new" scholars and their collectivist strategies and "old" activist scholars who were driven by a commitment to advancing comprehensive social good across the board.

The "new collectivist scholars" possess visions driven by specific issues with which they personally identify. Those issues are subjectively and inseparably a psychological and emotional part of the persons seeking their implementation.⁴ The "old activist scholars" of the 1960s and 1970s operated according to a broader commitment to justice and the advancement of society as a general matter, recognizing that they were themselves fortunate and privileged. Whether this attitude is approved as a moral position based on the desire to do "good works" for those who have been denied fair opportunity, or scorned as some kind of elitist "noblesse oblige," the cultural value of giving to others, rather than seeking for oneself and those like you, represents a fundamental break between the "old" and "new" scholars.

At the center of the dilemma is that many "new scholars" possess agendas that cannot be pursued without resort to radical, condemnatory, and sometimes dishonest intellectualism.⁵ This has produced an academic culture in which

4. See, e.g., Joan Acker et al., *Objectivity and Truth: Problems in Doing Feminist Research*, in *BEYOND METHODOLOGY: FEMINIST SCHOLARSHIP AS LIVED RESEARCH* 133, 135 (Mary Margaret Fonow & Judith A. Cook eds., 1991) [hereinafter *BEYOND METHODOLOGY*] (noting women researchers' intense commitment to the women's movement).

5. Camus writes that "[r]eal mastery consists in refuting the prejudices of the time, initially the deepest and most malignant of them, which would reduce man, after his deliverance from excess, to a barren wisdom." ALBERT CAMUS, *THE REBEL: AN ESSAY ON MAN IN REVOLT* 300 (Anthony Bower trans., Vintage Books 1956) (1951) [hereinafter *CAMUS, THE REBEL*]. He goes on to warn:

intimidation of discourse in teaching and scholarship is common. Nor is intimidation of scholars difficult. It tends to occur through a culture of “soft” extremism in which the tacit boundaries have been established. Scholars understand the etiquette of “proper” courtesies and where the “no fly zones” of intellectual critique are located.

The “soft” repression works because the ordinary academic is a curious being, not a courageous one. Academics seek comfort, contentment, and compensation, not conflict. Political collectives willing to engage in condemnation and conflict consequently represent a disproportionately powerful force fully capable of intimidating and repressing the majority of academics who just want to be left alone to enjoy the privileged jobs they have been fortunate to obtain.⁶ Such scholars “run for cover” when surrounded by intensely aggressive critics. As part of their defensive coloration they either take on a public stance in which they appear to be in support of those others’ agendas, or they withdraw into a safe disengaged cocoon so as to not draw attention to themselves.

Either posture is unacceptable in an institution purportedly devoted to the pursuit of truth through honest research and analysis. We need to move past the bitterness, anger, suspicion, and vituperation that have increasingly characterized our communications, and make progress toward a healthier sense of community and social action.⁷ We aren’t even close to that state of capability or willingness. In large part, the reasons for the obstinacy combine unwillingness with inability. Our overall intellectual culture has become so degraded and politicized that many scholars no longer understand how to be honest rather than political.

II. MULTICULTURALISM AND FRAGMENTATION

Martha Nussbaum suggests that

[u]nder the label “multiculturalism”—which can refer to the appropriate recognition of human diversity and cultural complexity—a new antihumanist view has sometimes emerged, one that celebrates difference in an uncritical

We all carry within us our places of exile, our crimes and our ravages. But our task is not to unleash them on the world; it is to fight them in ourselves and in others. Rebellion, the secular will not to surrender . . . is still today at the basis of the struggle. Origin of form, source of real life, it keeps us always erect in the savage, formless movement of history.

Id. at 301.

6. Gabriel Marcel warns of the improbability of having effective discourse in a politically polarized environment. GABRIEL MARCEL, *MAN AGAINST MASS SOCIETY* 135–36 (G.S. Fraser trans., Henry Regnery Co. 1962) (1952). “[T]he fanatic never sees himself *as* a fanatic; it is only the non-fanatic who can recognize him as a fanatic; so that when this judgment, or this accusation, is made, the fanatic can always say that he is misunderstood and slandered.” *Id.*

7. See, e.g., ELLIS COSE, *COLOR-BLIND: SEEING BEYOND RACE IN A RACE-OBSSESSED WORLD* 230–44 (1997) (proposing “twelve steps toward a race neutral nation”).

way and denies the very possibility of common interests and understandings, even of dialogue and debate, that take place outside one's own group.⁸

She adds the vital point that “[t]his view denies the possibility of the task [Ralph] Ellison set himself: of revealing the human universals hidden within the plight of one who was both black and American.”⁹

Russell Jacoby joins Nussbaum in criticizing the application of the phenomenon of multiculturalism, observing:

The ideas of multiculturalism, cultural pluralism and diversity turn sacrosanct. They become blank checks payable to anyone in any amount, lacking meaning or content. They not only suggest a politics, but often replace politics. However, even with adjectives like *radical* or *transformative* attached, what politics do they designate? Apart from the wish to include more voices in the curriculum or different faces at the office, no vision drives multiculturalism.¹⁰

He adds: “The rise of multiculturalism correlates with the decline of utopia, an index of the exhaustion of political thinking.”¹¹

The point Nussbaum and Jacoby make establishes a key difference between those who seek strategies that strive to bring us together in common community and those who argue this is undesirable, unlikely, or impossible. This raises the need to understand the effects on our intellectual, social, and political cultures of the increasing dominance inside the academic world of political collectives whose members consider the university to be just another institution to be used for their political aims. These interests envision scholarship as only one more strategy in the attempt to implement their desired agendas.¹²

The multicultural malady Nussbaum and Jacoby describe represents not only a refusal of discourse among broad sets of humans but also takes the position that discourse is neither possible nor desirable.¹³ This denial of the

8. NUSSBAUM, *supra* note 1, at 110.

9. *Id.* (internal quotation omitted).

10. RUSSELL JACOBY, *THE END OF UTOPIA: POLITICS AND CULTURE IN AN AGE OF APATHY* 33 (1999).

11. *Id.*

12. See JOHN PATRICK DIGGINS, *THE RISE AND FALL OF THE AMERICAN LEFT* 290 (1992) (“Today the Left’s life-support system is the university, which has produced a ‘new class’ credentialed with advanced degrees and enjoying elite status, what Thorstein Veblen—whose *Higher Learning in America* bears the subtitle ‘A Study in Total Depravity’—would probably have called ‘The Leisure of the Theory Class.’”).

13. Peter Suber suggests that it is important not to allow discourse to be subordinated to repression and speech codes, even while acknowledging that some restrictions on deliberately harmful speech are possible. Peter Suber, *Unsimplicifying Political Correctness: When the Left and Right Are Right and Wrong*, EARLHAMITE, Spring 1992, at 23, 25, available at <http://www.earlham.edu/~peters/writing/pc.htm>. He offers:

spirit of human development within the intellectual and social community of the university leads to a collapse of the idea of a shared quality that binds us in a common effort. The logical outcome is our devolution into a balkanized political and social condition resulting in an internecine struggle for control of the institutions of power—whether to use that power against others or to prevent it from being used against you. This of course is the inevitable outcome of a system such as *cultural democracy* in which the values and processes of traditional Liberal democracy are seen as immoral and illegitimate.¹⁴

The truth is that multiculturalism is a political tactic rather than an intellectual conception. It requires no coherent intellectual vision of the kind Jacoby suggests it lacks because it is part of a strategy to acquire power for the groups asserting its moral superiority. Cloaked in its claim of representing a higher social morality because of its deconstructive critique of the biases inherent within existing political order, multiculturalism is a device to limit the power of those who have traditionally possessed it. Those in power, who are the object of critique, are seen as responsible for having previously silenced the interests represented by the *multicultural perspective*. By claiming the higher moral ground, the burden of justifying existing power relationships and entitlements is shifted from the multiculturalists to the existing society they

If this book, or that epithet, or that photograph, offends me, should we punish the offender? The question arises because everyone is offended by something, and offense hurts. But the absurdity of treating offended sensibilities as true injuries is shown by the converse fact: that anything will offend someone. None of us could teach anything if an offended student sufficed to stop us. No professor of literature could assign Salman Rushdie's *Satanic Verses*, or even *Huckleberry Finn*. No religion professor could assign any book of the Bible. No biology professor could teach evolution. Even if we could find pabulum that would pass the no-offense test, we would eviscerate our mission to fill our curriculum with it.

Id.

14. See John Fonte, *Ill Liberalism*, NAT'L REV., Feb. 6, 1995, at 48.

Ten years ago Sidney Hook forcefully restated the liberal-democratic concept of civic assimilation, declaring that "precisely because" American liberal democracy is a "pluralistic, multiethnic, and uncoordinated society" all citizens need a "prolonged schooling in the history of our free society, its martyrology, and its national tradition." Today, the traditional idea of assimilating immigrants into a national identity is officially rejected by the governments of Canada and Australia, and is under constant attack by elites in the United States. The leading organization of American civic educators declares that national assimilation is often "neither democratic nor humane." Suggestions that liberal-democratic regimes should limit immigration to levels consistent with steady civic assimilation are fiercely denounced as both impossible and immoral. Put bluntly, cultural democrats are saying that traditional liberal democracies do not have the moral right to reproduce themselves, either by fostering civic assimilation, by limiting immigration, or by some combination of the two.

Id. at 53–54.

seek to undermine and supplant. It doesn't even matter if the group or persons being attacked, "chilled" or condemned were historical oppressors. The real issue is whether they are obstacles or competitors for power. The mantra of the multiculturalists is "all's fair in love and war."

Multiculturalism of the variety Nussbaum and Jacoby describe is a political tool. The quest for power is the most common element in an otherwise loose and shifting alliance of interests. The academic political collectives represent a kaleidoscope of divergent beliefs, goals, and ideologies.¹⁵ They cooperate because it is in their interest to do so. But the collectives have little in common other than the need to fight what is perceived to be a common political enemy, i.e., those already entrenched in coveted positions of power and those who might question the legitimacy and agendas of the newly emergent movements.¹⁶ When the "enemy" is weakened and power is available for redistribution, the collectives will start fighting or "negotiating" with each other to acquire their "rightful" shares.¹⁷

15. See Heather Mac Donald, *Law School Humbug*, CITY J., Autumn 1995, at 46, 48–49, available at http://www.city-journal.org/html/5_4_a2.html. Mac Donald argues:

The core claim of both critical race theory and feminist jurisprudence is that law is merely a mask for white male power relations. Law, in other words, is indistinguishable from politics; the purported objectivity and neutrality of legal reasoning is a sham.

....

Like many of the Realists, the Crits (as CLS practitioners called themselves) argued that law is just politics wearing robes. But the Crits' real gripe was not with law but with liberal society. They berated liberalism's emphasis on individual freedom and limited state power. Many called for a world without distinct public and private spheres, in which the individual would not be "alienated" from the collectivity. The Crits were particularly scornful of "illegitimate hierarchies," a phrase that included every possible type of ranking or distinction among individuals. Harvard's Duncan Kennedy . . . infamously called for breaking down law school hierarchies by rotating all law school jobs from dean to janitor on a regular basis and paying all employees the same salary.

Id. at 48–49.

16. Sandel describes the problem as one in which the liberal and conservative debate does not speak to the two concerns at the heart of our discontent. One is the fear that, individually and collectively, we are losing control of the forces that govern our lives. The other is the sense that, from family to neighborhood to nation, the moral fabric of community is unraveling around us. These two fears define the anxiety of the age.

Michael J. Sandel, *America's Search for a New Public Philosophy*, ATLANTIC MONTHLY, Mar. 1996, at 57, 57–58.

17. An intriguing analysis of how this works is offered by Eric Hoffer who argues:

The intellectual goes to the masses in search of weightiness and a role of leadership. Unlike the man of action, the man of words needs the sanction of ideals and the incantation of words in order to act forcefully. He wants to lead, command, and conquer, but he must feel that in satisfying these hungers he does not cater to a petty self. He needs justification, and he seeks it in the realization of a grandiose design, and in the solemn ritual of making the word become flesh. Thus he does battle for the downtrodden and disinherited, and for liberty, equality, justice, and truth, though, as Thoreau pointed out,

Let me offer one example of what I consider institutional intimidation and abuse of power by the two primary accrediting powers governing American law schools. Not long ago I was asked to be a candidate for dean at another law school. After thinking about it for several days I asked the chair of the dean search committee to send me some background materials. The materials were sent and included the most recent ABA and AALS accreditation reports and follow-ups relating to the law school. I read them with interest because the law school struck me as one that had significant potential for development. After reading the reports I withdrew my name from their search. The reason I withdrew had nothing to do with the law school but with the AALS/ABA accreditation report and the degree to which the culture of soft repression had reached inside the accreditation mechanisms of those two institutions.

At this point it will be easy to misinterpret my comments, and I ask the reader to pay close attention to the intent of my statements. Two main criticisms were voiced as serious concerns by the AALS/ABA report to the extent that immediate action was needed to avoid a negative final accreditation report. One criticism was that of twenty-three faculty members, only eight were women. It was expected that something must be done immediately to fix this problem. I had several problems with this particular situation and none of them related to the issue of women law faculty. One problem was the fact that the school had added women to a previously largely male faculty at a substantial pace. Since 1983, eighteen faculty members had been hired with ten being men and eight women. While perhaps it could have been ten women and eight men, it still seemed to me the school should be commended for its commitment rather than condemned and threatened. Of course this figure does not compare with that of my own law school (which historically has a very good hiring record on diversity) where of twenty-three total faculty hires between 1984 and 2003, sixteen were women and seven men, with two minority males among the seven men and three minority women.

It should be added that the salaries at the law school in question were not particularly competitive with most other schools. This creates competitive disadvantages when seeking highly qualified candidates. But because the law school was eager to solidify its status with the AALS/ABA, it was particularly vulnerable to the pressure. The result was that it hired a woman only one year out of law school who would otherwise probably not have been hired at that point in her legal career.

the grievance which animates him is not mainly "his sympathy with his fellows in distress, but, though he be the holiest son of God, is his private ail." Once his "private ail" is righted, the intellectual's ardor for the underprivileged cools considerably. His cast of mind is essentially aristocratic.

ERIC HOFFER, *The Intellectual and the Masses*, in *THE ORDEAL OF CHANGE* 36, 39-40 (1963).

The other problem identified in the AALS/ABA accreditation report dealt with the size and wording of the sign the law school posted decrying the United States military's "Don't Ask, Don't Tell" policy regarding gays and lesbians. The AALS/ABA critique was that the words used by the law school were not sufficiently condemnatory of the military's policy regarding gays and lesbians. The problem was that the school's message included a statement that it appreciated the fact that the military was an important source of employment for the school's graduates. The AALS/ABA follow-up included sending a sign with very large and explicit wording that it "suggested" the law school might use instead of its own weaker version.

My response to each situation has nothing to do with my substantive positions on either the desirability of having women as members of law faculty (I am all for it) or the tension between the U.S. military's policy and gay and lesbian rights. My concern is with the emergence of a culture that has extended even to the main accrediting institutions of law schools to the extent that they feel entitled to issue what are little more than thinly veiled threats to an institution's accreditation. Each situation struck me as abuse of power against a vulnerable law school, an approach that would never have been attempted against a more powerful institution higher up the pecking order in the prestige hierarchy.

My belief is that two of the most important purposes of a law school are to teach students how to think critically, and to insist that legal scholars engage in independent critiques of society as our political system tries to cope with vital social dilemmas through the mechanisms offered by law and legal institutions. If we abuse our power over students in ways that foreclose their ability to think clearly and with precision and integrity, we have failed them and the system that provides us the privilege of the career of the law professor. When we compel institutions to adopt explicit consensus positions, even to the extent of dictating the wording, prominence, and size of signs they must display in order to retain their accreditation, we have abused institutional power.

III. LOSS OF OBJECTIVITY AND INTELLECTUAL INTEGRITY

A cartoon that captures our dilemma recently caught my eye. The panel describes "*The opening ceremony of the annual dogma day parade*" and depicts an urban intersection at which four men stand, each poised to march in a different direction, each carrying an identical sign proclaiming "Follow me to the truth."¹⁸ Intellectual life has become a strange domain made up of people

18. For a reprint of the comic strip, see Wiley Miller, *Non Sequitur*, ST. LOUIS POST-DISPATCH, Aug. 23, 2002, at E5. But any answer of course depends on how we intend the idea of "true." If we define truth only in terms of a single ultimate, unvarying measure for any proposition then there is little, even in science, that has been proved true. The ideas of uncertainty, randomness, and relativity that have come to dominate our intellectual structure have

convinced their “truth” is the only truth. Propagandists and *power-seekers* distort reality in the interests of groups seeking to acquire or maintain power; of *cultists* who lead quasi-religious sects of true-believers organized around impassioned issues; and of *prophets* who seek to challenge the decay and dishonesty they see all around them.

Within the world of the modern intellectual, our behavior mimics the “dogma day parade.”¹⁹ Intellectuals have prostituted themselves for economic and ego gains by serving others’ agendas. They join political movements and surrender honesty and the pursuit of truth in exchange for membership in a group to which they swear allegiance. Their payment is in the form of identity, status, and financial rewards.²⁰ For many academics, entering the service of masters of one kind or another has been done at the price of intellectual balance, honesty, and integrity.

In reading an earlier version of this Essay, a prominent member of the original version of the Critical Legal Studies (CLS) movement (as opposed to the various *neo-Crit* movements that have emerged in areas of race, ethnicity, and gender politics over the past twenty years) responded that while he found the analysis interesting he didn’t feel there was any suppression of independent thought and research in law schools. He admitted, however, that it was happening in other academic disciplines. I answered that we obviously

produced a significant degree of uncertainty regarding claims to truth. The dimension of law possesses even higher levels of uncertainty given the complexity and subtlety of its subject matter.

19. See, e.g., Gary Younge, *Culture War Casualties: Polarisation in US Politics Reflects the Huge Rift That Has Emerged over Individual Lifestyle and Moral Values*, GUARDIAN UNLIMITED, Apr. 5, 2004, <http://www.guardian.co.uk/comment/story/0,,1185691,00.html>. William Strauss and Neil Howe take the idea of argument even further, “arguing” the problem is a culture war. WILLIAM STRAUSS & NEIL HOWE, *THE FOURTH TURNING: AN AMERICAN PROPHECY* 202–03 (1997). They suggest:

By the early 1990s, America’s niche group conflict came to be known as the Culture Wars, defined by Irving Kristol as a “profound division over what kind of country we are, what kind of people we are, and what we mean by ‘The American Way of Life.’” Three basic battlegrounds emerged: multiculturalists against traditionalists . . . media secularists against evangelicals . . . and public planners against libertarians The Culture Wars had as many combatants as America had niches As each group exalted its own authenticity, it defined its adversary’s values as indecent, stupid, obscene, or (a suddenly popular word) evil.

Id.

20. Martin Buber argues: “In our age, in which the true meaning of every word is encompassed by delusion and falsehood, and the original intention of the human glance is stifled by tenacious mistrust, it is of decisive importance to find again the genuineness of speech and existence as We. . . . Man will not persist in existence if he does not learn anew to persist in it as a genuine We.” MARTIN BUBER, *What Is Common to All*, in *THE KNOWLEDGE OF MAN* 108 (Maurice Friedman ed., Maurice Friedman & Ronald Gregor Smith trans., Harper & Row 1965) (1962).

disagreed and that I not infrequently saw pre-tenure faculty avoid controversial topics because, prior to their tenure votes, they did not want to offend academic groups with political agendas.

A consequence for these young scholars is that their formative years are devoted to the creation of scholarly capital in politically “safe” areas rather than ones in which they might be more interested and insightful. But even when they reach tenure there is no necessary re-opening of academic curiosity. Since rewards flow from early success in “acceptable” topic areas, their chance to do original substantive work is often lost entirely. Avoidance behavior is not limited to pre-tenure faculty who do not want to offend a powerful sect but also infects more senior faculty who do not want a carefully built reputation ruined. This calls into question the legitimacy of tenure. If tenure fails to encourage intellectual openness in teaching and scholarship, it has no real justification.

I also responded to my CLS friend that the idea of “soft repression” is central to what is going on in the law schools. My perspective is that the “wars” of the 1980s and 1990s—ironically ones in which I not only supported many of the attacking critics but was one myself—shaped the prudential nature of “survivor” behavior inside law schools. We are now operating in a culture where there is little dispute on the surface but a substantial amount of subterranean muttering. Value disputes on such things as hiring policies, tenure and promotion standards, what comprises legitimate scholarship, and the extent to which we allow political orientations to influence teaching have been forced “underground” as a matter of survival for faculty who elect not to incur the wrath of the now dominant groups. This is further heightened by the fact that hiring over the past ten to fifteen years has concentrated on people with superficially diverse characteristics but homogenous politics, agendas, and value systems. The result is that a critical mass of ideologically committed faculty has been created that works together to further expand their numbers and to inhibit challenges to their emergent hegemony.

In such a context it is unsurprising that a member of CLS would not easily perceive the intellectual and political cultures of law schools as repressive. I suspect this reaction is generated because the individual in question is no longer an outsider challenging the abuses of power by a repressive orthodoxy, but an insider who figures prominently within the new orthodoxy. Many members of the original CLS movement that began in the 1970s made significant intellectual contributions to the analysis of law. Certainly their Leftist politics affected individual analyses, but the infusion of their ideas and methods into what was, at the time, a largely stagnant system of doctrinal explication masquerading as serious intellectual work was a breath of fresh

air.²¹ That original form of CLS has essentially disappeared as a coherent political movement.²² It has been replaced by political movements dedicated to identity politics.²³

As the original CLS scholars moved into the mainstream of the law school world, many of their ideas were reinterpreted and made part of general academic discourse. The CLS movement—whatever its ideological flaws and intellectual pretensions—offered an important vehicle for challenging and opening up a self-satisfied system of rigid doctrinal analysis. While the basic CLS movement was always political, and its politics clearly those of the European Left, it was a more intellectualized and generic sort of ideology.²⁴ The *neo-Crits*, on the other hand, as they emerged in the late 1970s and 1980s, represent an ideological and identity-politics driven set of aggressive advocates for their groups' agendas.²⁵

The argument is not that activism or even collective organization within the university is illegitimate. In fact activism and political organization are key functions of an institution responsible for pursuing not only truth but social justice. My concerns are ones of balance versus extremism. Activism and collective organization are means for scholars in emerging or cutting edge areas of knowledge to defend themselves from retaliation by the high priests of a discipline's controlling orthodoxy. It also increases the likelihood that their ideas are heard and taken into account.²⁶ In a political conflict, isolated voices

21. See David Barnhizer, *Freedom to Do What? Institutional Neutrality, Academic Freedom and Academic Responsibility*, 43 J. LEGAL EDUC. 346, 347 (1993); David Barnhizer, *The Justice Mission of American Law Schools*, 40 CLEV. ST. L. REV. 285, 285–311 (1992); David Barnhizer, *The Purposes of the University in the First Quarter of the Twenty-first Century*, 22 SETON HALL L. REV. 1124 (1992); David Barnhizer, *The University Ideal and Clinical Legal Education*, 35 N.Y.L. SCH. L. REV. 87, 88 (1990); David Barnhizer, *The Revolution in American Law Schools*, 37 CLEV. ST. L. REV. 227 (1989); David Barnhizer, *The University Ideal and the American Law School*, 42 RUTGERS L. REV. 109, 144–52 (1989); David Barnhizer, *Prophets, Priests and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127, 190–94 (1988).

22. See Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517, 525 (2000) (“[C]ritical legal scholars admit the decline of the movement and attribute it to the advent of ‘identity politics.’”).

23. See *id.*

24. See Arthur F. McEvoy, *A New Realism for Legal Studies*, 2005 WIS. L. REV. 433, 444–45 (2005) (describing the emergence of the CLS movement).

25. See Ellickson, *supra* note 22, at 525.

26. See M. MITCHELL WALDROP, *COMPLEXITY: THE EMERGING SCIENCE AT THE EDGE OF ORDER AND CHAOS* (1992). Waldrop relates:

[Brian] Arthur was left in helpless rage [at being unable to convince mainstream economics journals to publish his new ideas]. Martin Luther could nail his ninety-five theses to the church door of Wittenberg to be read by one and all. But in modern academia, there are no church doors; an idea that hasn't been published in an established journal doesn't officially exist. And what he found doubly frustrating, ironically, was the

at odds with the dominant orthodoxy are far too easily ignored or suppressed. But while activism is an essential element of the modern university, it also produces consequences for the scholar who, like Icarus, risks coming too close to the “sun” of power, ideology, and politics.²⁷ When this occurs the scholar may not plummet to her death like the youth of Greek tragedy, but she will lose the scholar’s perspective, balance, and intellectual integrity. The independent and open-minded search for truth is the victim.²⁸

Our dilemma combines the extreme politicization of academia with the abandonment of any belief in guiding ideals, including truth and truth-seeking.²⁹ The heightened connection between social movements and law schools and universities has made the walls of academia porous and intensified the politicized nature of the university. An example is found in the observations of feminist scholars who freely admit the emancipatory and political aims of their work. Fonow and Cook state, for example, that

[a] feature of the feminist approach to research is the emphasis on action. This action orientation is reflected in the statement of purpose, topic selection, theoretical orientation, choice of method, view of human nature, and definition of the researcher’s roles. This emphasis on action is something feminists share

fact that the idea of increasing returns was finally beginning to catch on. It was becoming something of a movement in economics—and so long as his paper was in limbo, he couldn’t take part in it.

Id. at 49–50.

27. *See id.* at 47–48.

But Arthur also sensed that the hostility went deeper than that [intellectual conservatism and the weight of orthodox thinking]. American economists are famous for being far more passionately devoted to free market principles than almost anyone else in the world. . . . And the reason for that passion, as Arthur slowly came to realize, was that the free-market ideal had become bound up with American ideals of individual rights and individual liberty: both are grounded in the notion that society works best when people are left alone to do what they want.

Id.

28. One scholar argues that the postmodern critics may not believe in the search for truth, but states:

They do, however, believe in politics—and most especially in identity politics. Thus, efforts to equalize genders, races, and cultures become the value that academic freedom presumably protects, while the criteria of truthfulness (as argued through evidence and rational argument) is seen as that which continues to exploit women, people of color, homosexuals, the poor and other victimized groupings. Not surprisingly, the two conditions usually overlap; and . . . defending academic freedom is harder now than at any time in this century.

Sanford Pinsker, *Tenure Can Rescue the Academy*, WASHINGTON TIMES, Oct. 31, 1996, at A23.

29. *See id.* Also, in commenting on the positions taken by some radical scholars, Martha Nussbaum suggests: “Socratic argument is suspected . . . of being arrogant and elitist[.] . . . [T]he elitism is seen as that of a dominant Western intellectual tradition that has persistently marginalized outsiders. The very pretense that one is engaged in the disinterested pursuit of truth can be a handy screen for prejudice.” NUSSBAUM, *supra* note 1, at 19.

with other traditions of social thought such as Black Studies, Marxism, and Gay and Lesbian Studies.³⁰

All these elements, from topic selection, assumptions about human nature, and redefinition of the role of the scholar, are *a priori* choices with deeply determinative political implications that are value- and agenda-driven.

University-based law schools and the “soft” or humane disciplines in universities are now “owned” by political collectives striving to implement their particular visions of the “good society.”³¹ These new “scholars” have formed into aggressive political collectives that are not looking at society from an objective distance and seeking to offer objective insights and solutions, but are acting as advocates for predetermined political positions. Not surprisingly in a society that operates according to the “looking out for Number One” principle, the political positions and solutions provide benefits to those who share their identity characteristic. In law schools, the members of the identity collectives are seeking to engineer their preferred vision of society through control of law and the language of scholarly discourse. They are also applying hiring practices that mirror their own values, preferences, and identity affiliations.³²

30. Mary Margaret Fonow & Judith A. Cook, *Back to the Future: A Look at the Second Wave of Feminist Epistemology and Methodology*, in BEYOND METHODOLOGY, *supra* note 4, at 1, 5 (internal citation omitted). Acker et al. indicate that “the women’s movement outside of academia posed new questions and new formulations of women’s situation which then could be taken up in the academic setting. Women researchers, in addition, were usually members of the women’s movement and had, and still have, a political commitment to ending women’s oppression.” Acker et al., *supra* note 4, at 133, 135.

31. See Fonte, *supra* note 14, at 52–53.

Rhetoric impugning the legitimacy of liberal democracy is now commonplace in the West. When university leaders, foundation officials, and mainline clerics routinely speak about “the patriarchy,” “oppressive structures,” or “institutional” racism and sexism, and declare that minorities and women constitute “the oppressed” or “the marginalized,” they are stripping the liberal-democratic regime of its legitimacy. If Britain’s parliamentary democracy and America’s constitutional republic are “patriarchies” that “oppress people,” they are by definition illegitimate. People are, of course, sometimes unfairly discriminated against in liberal democracies, but this does not constitute systemic oppression. “Discrimination” implies that there are remedies available under the rule of law; a “patriarchy” that “oppresses” people suggests that the system itself is illegitimate. The former is the rhetoric of reform; the later is language that justifies the deconstruction of the old liberal order and the creation of a new regime.

Id.

32. Examples are easily found. Drucilla Cornell, a leading law school feminist, describes her background:

I was a student radical and a feminist very early on. I was active in civil rights activities in high school from the age of sixteen. I went on to college, but I dropped out for a while and went to study Marxism in Germany, in 1969, when there was still a great deal of uproar at the Free University, which is where I went. I considered myself a Left Hegelian. Then I came back to Berkeley, briefly; then went to Santa Barbara. I went to

The changes wrought by the shift to self-interested political collectives are fundamental. Objectivity, discipline, and evidence were formerly considered central to serious academic work. Now those *virtues* have become suspect as alleged tools of inappropriate subordination and discriminatory power. Reason, truth, evidence, rigorous method, and even honesty are claimed to be devices of political control and power.³³ The dilemma is that those approaches have unquestionably had the consequences of protecting a dominant academic orthodoxy built on a veiled foundation of discrimination that denied fair opportunity to women and racial and ethnic minorities. I am not defending the hypocrisy, discrimination, and inadequacies of our academic community. Change was needed. But corruption of the core commitment of the university's basic mission of truth-seeking with intellectual independence through collective politicization was not.

The fact of abuse and past discrimination does not invalidate the critical principles on which the university ideal is grounded. It does impose the responsibility to expose the abuses, rectify the injustices that were created, and ensure the system is regulated in such a way to prevent future abuses. Rejecting principled methods, values, and ideals, while substituting subjectivity and personal "voice" for disciplined inquiry, denies the search for understanding through replicable and shared methods. This demeans the ideal of the university and the scholar's search for truth. Ideology, passion, rage, and the correctness of shaping conditions into whatever politically constructed version of reality a particular collective desires have replaced actual discourse.³⁴ That will inevitably happen in a politicized system. Honesty and evidence are obstacles to a political outcome.³⁵

study Heidegger in Freiburg and I ended up at Stanford, where I became involved in the student movement. I joined a Marxist-Leninist organization, since I had decided that if feminism was going to be a truly popular movement it would have to go into factories and organize.

Interview of Drucilla Cornell, "Feminism, Deconstruction and the Law," RADICAL PHILOSOPHY, Sept./Oct. 1995, at 23, 23.

33. See generally NUSSBAUM, *supra* note 1. See also Pinsker, *supra* note 28 (arguing that an increasing number of academics believe that "truthfulness" is a tool of exploitation).

34. Mac Donald cites Lucinda Finley disapprovingly for proclaiming the infusion of emotive and irrational content and processes into scholarship as being a kind of virtue that moves us beyond rational discourse. See Mac Donald, *supra* note 15, at 51.

35. The power to condemn is seen by the collectives as a one-way street. This has been demonstrated in university speech codes that reflect academics' agreement with the suppression of open discourse.

These codes have their roots in theories, which gained favor with campus radicals in the 1960s, contending that (as Silverglate and Kors put it in a book they cowrote) "[i]f the powerful and the weak were required to play by the same rules . . . the powerful always would win." In other words, this theory goes, the disadvantaged need different rules. What's more, these rules should extend to speech, not just to actions, because speech can be just as powerful and hurtful.

This mutation of scholars into ideologues driven to join with other ideologues in self-conscious and self-centered political collectives represents a significant departure from what Aristotle considered the highest virtue, that of justice.³⁶ Justice was argued to be the highest virtue in a political community because it was the expression of concern for others rather than self. Liberalism, in fact, traditionally took the well-being of the less fortunate in society as a central tenet of its ideology. The idea is that concern for others harmonizes and enriches the quality of the overall community, much like the Golden Rule of “do unto others as you would have them do unto you.”

In the emergent context of extreme identity politics, selfishness, and multicultural fragmentation we have abandoned the central moral tenet of Western civilization. To the extent members of the collectives look outside themselves, they seek either primarily or exclusively to benefit the other members of their clan and their essential allies.³⁷ This identifies the “other” entitled to being helped by looking in the mirror, and thus reverses the ideas of selflessness and altruism by substituting the less-than-virtuous slogan “make others do for you as you desire.”³⁸

Seth Stevenson, *The Thought Police*, BOSTON MAG., Jan. 2003, at 50, 52, available at <http://www.boston-magazine.com/index.cfm/fuseaction/article.view/articleID/8045ab53-c085-4916-be1d-34055d5b6dc3>.

36. Our self-interest makes a mockery of Aristotle’s “greatest virtue”—justice. Aristotle says about justice that

justice is often thought to be the greatest of virtues And it is complete virtue in its fullest sense, because it is the actual exercise of complete virtue. It is complete because he who possesses it can exercise his virtue not only in himself but towards his neighbor also For this same reason justice, alone of the virtues, is thought to be “another’s good,” because it is related to our neighbor; for it does what is advantageous to another, either a ruler or a copartner.

ARISTOTLE, NICHOMACHEAN ETHICS, BK. V, C. 1 (W.D. Ross, ed. & transl., 1925).

37. Fonte, *supra* note 14, suggests the depth and nature of the problem:

[F]or the large numbers of Western academics, politicians, and bureaucrats who may be described as cultural democrats, the major actors in the civic culture are no longer individual citizens operating through voluntary associations, but distinct peoples, ethnic groups and cultural blocs with their own world views, values, histories, heritages, and sometimes languages, which often require different legal rights and separate educational programs. Cultural democrats not only de-emphasize the role of the individual citizen but weaken the concept of citizenship itself by blurring the distinctions between citizens and non-citizens.

Id. at 49.

38. This is a problem throughout academia as those already in place hire others who share their politics. See Hunter Lewis, *Political Debate Sweeps Campus*, THE HERALD-SUN, Feb. 13, 2004, at A1.

In the ad, the DCU published the political affiliation of faculty from several departments, including history, literature, sociology and English. Its claim was that the departments had a ratio of 32-to-0, 11-to-0, 9-to-0 and 18-to-1, respectively, in favor of registered Democrats over Republicans.

A lamentable result is that the integrity of the university is being consumed by intolerant political collectives.³⁹ The intolerance operates in numerous areas of concern, but the conflict over sexual preference is the most personal and heated. It is tearing friends and families apart. Consider, for example, experiences involving people I know that occurred over a period of only three weeks. In one, a high school classmate sent around an e-mail that stated if any one of his friends on the circulation list didn't support gay marriage he would no longer consider that person to be his friend. It was not an offer of discussion or education but an ultimatum throwing away friendships of more than forty years. In another situation during a discussion among colleagues at another law school, a lesbian faculty member—in fact an associate dean—informed the others present that they were bigots if they didn't affirmatively support gay marriage and they wouldn't be her friends if they didn't do so.⁴⁰

A similar study by The Center for the Study of Popular Culture found large disparities in political affiliation at Duke, as well as at 31 other elite colleges and universities.

Id.

39. The dispute that exploded over John Silber's use of the term *epistemopathologies* is chronicled in Alice Dembner, *Silber Defends Record, Calls Faculty Leader Liar*, BOSTON GLOBE, Dec. 1, 1993, Metro/Region, at 1 [hereinafter *Silber Defends Record*], and Alice Dembner, *Silber Says New Theories Can Put Limit on Freedom*, BOSTON GLOBE, Nov. 30, 1993, Metro/Region, at 1 [hereinafter *New Theories*]. The basic problem was created by Silber's published remarks that Boston University had remained "highly resistant to political correctness and ideological fads." *New Theories, supra*. The areas resisted, Silber said, included "critical legal studies, revisionist history, Afro-centrism, multiculturalism and radical feminism." *Id.* Silber had stated that "certain versions of radical feminism, multiculturalism, and other intellectual theories should be resisted because they are 'inhospitable to free intellectual inquiry.'"

Id. The report added that

Marxism was not included in Silber's earlier remarks as an area that had been "resisted." Those mentioned in the April 15 report to [BU] trustees were critical legal studies, revisionist history, Afro-centrism, radical feminism, multiculturalism, the Frankfurt School of Critical Theory, structuralism and deconstructionism, dance therapy, gay and lesbian liberation and animal liberation.

Id.

40. Consider this example reported in Brian Onorio, *The Intolerance of Tolerance*, TECHNICIAN ONLINE, Feb. 26, 2004, <http://technicianonline.com/story.php?id=00894>. Onorio asks:

What exactly is tolerance? What I've known the word to mean in an academic setting is a mutual respect for all ideas and all people, even if you disagree with them. The First Amendment guarantees the freedom of speech and it is the responsibility of everyone to respect this right.

Id. He then reports:

A recent incident down the street at the University of North Carolina seems to be another terrible demonstration of the intolerance of tolerance. In a "Literature and Cultural Diversity" course, a student found himself singled out by the instructor for hate speech, after the student said he opposed homosexuality. [The instructor] wrote in an e-

The third situation was one in which a family was about to gather for an annual reunion in which family members came from all over the eastern United States to spend a week together. A few days prior to the event, a gay member of the extended family unit sent an e-mail insisting that everyone in the mostly Southern Baptist family would have to be willing to endorse gay marriage. When the overall endorsement didn't immediately arrive via e-mail responses, the person then sent a message to everyone stating he was not attending the gathering and would never again participate in family events.

I am not saying anything about whether that choice is right or wrong. But I am saying that the kind of subjective intensity and unwillingness to engage in discourse *is* wrong when it is played out in academia. The university is not simply intended to be some microcosm of everyday society, dominated by the most powerful political forces of the moment. It is a vital sanctuary and institution in which we are morally and ethically required to strive for open-minded interchange of assumptions, ideas, and analyses.⁴¹ When we corrupt truth-seeking and honest discourse within the university we have cheated our students, our society, and ourselves in regard to one of the central justifications for the university's subsidized existence—that of teaching members of society to think, communicate, and work through inevitable disputes about important social rules and values. The position of my former classmate “Eddie” is of course a legitimate position for him to take in a free society if that is what he wants to do. But it is an offensive and destructive position if it were voiced within what should be the critical and free-thinking world of the university, where learning how to deal with each other and conflicting values and perspectives is at the center of the mission.

The intensity of these impassioned judgments is such that if a person does not support a political position on a fundamental issue the result is not honest discussion but a “carpet bombing” campaign ruthlessly aimed at destroying relationships, reputations, careers, and even families. This may or may not be acceptable political or personal behavior in general society. But even if allowable in a free society in the sense that it violates no law, it is vile, malicious, and infantile. Regardless of how one feels about its appropriateness in general society, it is absolutely corrupt behavior when brought into teaching and scholarship because it creates a powerful negative force that inhibits

mail to the class that the student was a perfect example of white privilege. She claimed that the student used “hate speech” and it created a hostile environment in the classroom.

But [the instructor] didn't stop there. She referred to the student as “a white, heterosexual, [C]hristian male” who “can feel entitled to make violent, heterosexist comments and not feel marked or threatened or vulnerable.”

Id.

41. See, e.g., GEORGE DENNIS O'BRIEN, ALL THE ESSENTIAL HALF-TRUTHS ABOUT HIGHER EDUCATION (1998). O'Brien reminds: “The fault in so many high-minded presentations of the university is that they forget that the university is not an *idea*; it is an *institution*.” *Id.* at 3.

academic and social discourse. Consider the example offered by the law school associate dean mentioned above and ask what effects such an open communication by a senior administrative official and influential faculty member might have on other faculty and students. In a culture increasingly characterized by lies, deception, half-truths, and manipulation, it is vital that the university withstand the pressures of politicization and collectivism. It is, however, well on its way to being just another instrumentality of organized political groups.

In saying this I am not taking a position on the morality or legitimacy of gay marriage when I suggest that an institution (however flawed) such as heterosexual marriage that has nonetheless dominated our thinking on the appropriate nature of the relationship for thousands of years should not be expected to yield its primacy or exclusivity in a span of fifteen or twenty years. Nor should it be surprising that many people who are confused or disturbed by a situation that is at odds with everything with which they have been morally inculcated throughout their personal and religious lives have a desire to better understand, move cautiously, or resist something they consider truly transformative.⁴²

In this age of “instant phobias,” if it is homophobic to ask people who are seeking to alter the dimensions of a fundamental cultural and religious institution such as marriage to actually discuss such issues and to consider the nature of their own interactive obligations in a political community, then some people will choose to label others who feel it necessary to engage in such a discourse as being homophobic. Unfortunately for our society they will be defining that term to mean anyone who does not automatically and unquestioningly accept the dictates of those who seek to advance a particular political agenda. In such a situation it is fair to ask where lies the deepest bigotry and fanaticism. If that is in fact the state of “discourse” in American universities and the society—and it is—then we do have a bit of a problem.⁴³

42. BUBER, *supra* note 20, at 69. Discourse requires interaction and tolerance, not preemptive strikes. Buber offers a sense of the difference between honest discourse and propaganda as well as any. *See, e.g., id.*

Genuine conversation, and therefore every actual fulfilment [sic] of relation between men, means acceptance of otherness The strictness and depth of human individuation, the elemental otherness of the other, is . . . not merely noted as the necessary starting point, but is affirmed from the one being to the other. The desire to influence the other then does not mean the effort to change the other, to inject one's “rightness” into him; but it means the effort to let that which is recognized as right, as just, as true . . . through one's influence take seed and grow in the form suited to individuation. Opposed to this effort is the lust to make use of men by which the manipulator of “propaganda” and “suggestion” is possessed

Id.

43. Mac Donald, *supra* note 15, at 46. Mac Donald criticizes what is occurring and reports one student's experience:

IV. THE EFFECTS OF CHILLING ON THE INTEGRITY OF THE SCHOLAR

Russell Jacoby notes that scholars' self-imposed restrictions on intellectual independence are in part a result of prudence—knowing that there are consequences to communicating unpopular views and trying not to offend those who have the power to harm us.⁴⁴ He comments on the disappearance of the independent intellectual, observing that

[m]en of letters, wrote Voltaire, are “isolated writers,” who have neither “arguified on the benches of the universities nor said things by halves in the academies; and these have nearly all been persecuted.” He added that if you write odes to the monarch, “you will be well received. Enlighten men, and you will be crushed.”⁴⁵

Scholars have no more desire to be “crushed” than anyone else. They quickly learn the forms of behavior and expression that will help their careers and those that will hurt or destroy their prospects.⁴⁶

Law schools across the country have taken on a new function: cleansing students' souls. The taint to be extirpated, of course, is racism and sexism, and in many classes the sometimes dramatic measures needed to root out such blights have driven away the more mundane task of teaching legal analysis.

“I was going home crying every day,” says Linda P., a law student at New York University. The source of her unhappiness was her “Race and Legal Scholarship” course. “No matter what I said, the response was: you don't know because you're white. Some students wouldn't speak to me after class. It scared me, because I thought I was this big liberal, and I was treated like the devil.”

Id.

44. See JACOBY, *supra* note 10, at 105. George Lipsitz adds that, in the context of political scientists who disagreed with each other but limited their critiques of American studies, “neither side wished to risk revealing their doubts about the corporate liberal cold war state that emerged out of World War II, and consequently exposing themselves to charges of disloyalty to the national project.” GEORGE LIPSITZ, *AMERICAN STUDIES IN A MOMENT OF DANGER* 70 (2001).

45. JACOBY, *supra* note 10, at 105. In the *noncumulative* disciplines we may have even gone beyond Ellul's fear about an *intelligentsia* in service to a technologically driven society and added various forms of specialized incantations expressed in symbolic political language that are dividing us into increasingly fragmented units of interest. See JACQUES ELLUL, *THE TECHNOLOGICAL SOCIETY* 349 (1969). “The intelligentsia will no longer be a model, a conscience, or an animating intellectual spirit for the group. . . . They will be the servants, the most conformist imaginable, of the instruments of technique.” *Id.* In this “mode” of discourse we are unwilling to communicate because it is interest group politics rather than intellectual discourse. We are unable to communicate because we lack the shared language and values that are essential to the enterprise.

46. ANTHONY J. DIEKEMA, *ACADEMIC FREEDOM AND CHRISTIAN SCHOLARSHIP* 34 (2000).

Self-censorship is often a result of the “chilling effect.” As one writer puts it: “It is not the iron fist of repression but the velvet glove of seduction that is the real problem.” Faculty simply do not always say what they believe, or what they know to be true, because they don't want to deal with what may be the resulting hassle—peer alienation, negative student opinions, or the ire of a constituent community. Self-censorship is often

The chilling of intellectual freedom through a combination of “carrot and stick” is one where the incentives and disincentives come from several sources. If a scholar is part of an identity collective and accepts the “party line” or set of issues and political “truths” that represent the dogma of the particular sect, then that person’s work will be shaped by the allegiance or be a product of the closed perspective.⁴⁷ This is negative in the sense that intellectual independence is lost. But for the scholar, the arrangement can be positive. This is because there is a clearly defined research agenda and a ready-made audience to approve the work as long as it fits within the collective’s aims and needs. Rewards are offered for becoming part of the collective in the form of a support group committed to advancing their work due to their own self-interest in legitimating the collective’s perspective as a field of study. New scholars are therefore drawn into membership in a collective as a result of career self-interest, or they can risk being condemned for taking a different stance.⁴⁸

a matter of personal convenience for faculty. They simply assess the potential costs before speaking out

Id.

47. Mac Donald, *supra* note 15, at 48, argues: “The core claim of both critical race theory and feminist jurisprudence is that law is merely a mask for white male power relations. Law, in other words, is indistinguishable from politics; the purported objectivity and neutrality of legal reasoning is a sham.” For an overview of the critical race movement, see Richard Delgado and Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993). The authors identify ten primary strands they see as part of Critical Race Theory: (1) critique of liberalism, (2) storytelling/counterstorytelling and “naming one’s own reality,” (3) revisionist interpretations of American civil rights law and progress, (4) a greater understanding of the underpinnings of race and racism, (5) structural determinism, (6) race, sex, class, and their intersections, (7) essentialism and anti-essentialism, (8) cultural nationalism/separatism, (9) legal institutions, Critical pedagogy, and minorities in the bar, (10) criticism and self-criticism; responses. *Id.* at 462–63.

48. See, e.g., Derrick Bell, *The Strange Career of Randall Kennedy*, NEW POLITICS, Summer 1998, at 55 (criticizing, among other writings, RANDALL KENNEDY, RACE, CRIME AND THE LAW (1997)). When Bell questioned what he considered Kennedy’s disloyal approach to scholarship and teaching, Bell indicates:

His response to my warning was: “Can’t I write what I think?” “Of course, Randy” I agreed, “but whenever a black person is in a position to get his views on race published, he or she should keep in mind that white people who do not like what we are doing, do not play fair.” I explained that those with an anti-black axe to grind take our words out of context and use them with what they will claim is black-endowed legitimacy to harm those blacks less well off than we are. My prediction proved accurate. Kennedy’s article was hailed by white critics of our work and condemned by most black and some white scholars.

Id. at 57. To prove his point, Bell cites a variety of responses, including:

Lloyd Cohen, “A Different Black Voice in Legal Scholarship,” 37 *New York Law School Law Review*, 322 (1992), (“Professor Kennedy’s thesis or presentation . . . is merely a very thorough, scholarly, well argued, and well written essay. It is written in the only “voice” that ultimately matters in legal literature, that of the reasonable and articulate scholar. That is enough to sharply distinguish it from the works that it criticizes.”).

Since there is no clear or common disciplinary methodology by which individuals are trained to be legal scholars, they are at risk of taking as gospel what sounds like a deep intellectual approach without really understanding what they are doing.⁴⁹ New scholars easily succumb to the lure of trendy or faddish topics. These enhance the probability of having work published even if it contributes little of substance to intellectual discourse. Passionate and critical language on compelling topics that uses long intellectual words—preferably ones of great opacity—has a seductive impact on neophyte scholars struggling to identify an intellectual path. There is also a hidden advantage to opacity. If others cannot understand what you are saying it becomes less important that you actually know what you are talking about.

One of my main concerns with chilling is that younger scholars may seek to suppress lines of inquiry they might otherwise desire because of the entirely realistic fear they will offend a political collective. The collective may be entrenched as the dominant orthodoxy in the field or one in the process of ascendance. Either way they fear their career will come to an abrupt halt, or their advancement opportunities limited, as a result of incurring disfavor with a powerful collection of interests.⁵⁰ This kind of intimidation arises because scholars with views that differ from those of strong political collectives avoid taking positions that will demonstrate the extent of their alternative views.⁵¹

While it is easy to label such behavior as a form of intellectual cowardice, in American academia the risks are real.⁵² Too many of those who sought and

Id. at 67 n.5.

49. Certainly, for those in other disciplines that do possess a system of training and years of submersion in a particular body of knowledge, American legal scholars' exposition of the works of such Continental theorists as Derrida, Foucault, and Habermas must seem "interesting." Nussbaum suggests that Continental scholars are less than fully persuaded by the work of their American counterparts derived from European theorists and critics. *See generally* NUSSBAUM, *supra* note 1.

50. DIEKEMA, *supra* note 46, at 19.

Arthur Koestler . . . observes that "professionals with a vested interest in tradition and in the monopoly of learning" always tend to block the development of new concepts. "Innovation is a twofold threat to academic mediocrities," he writes. "It endangers their oracular authority, and it evokes a deeper fear that their whole laboriously constructed intellectual edifice might collapse."

Id.

51. *See, e.g.*, DAVID E. BERNSTEIN, *YOU CAN'T SAY THAT!: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS* (2003); DIANE RAVITCH, *THE LANGUAGE POLICE: HOW PRESSURE GROUPS RESTRICT WHAT STUDENTS LEARN* (2003).

52. Stevenson, *supra* note 35, describes an episode at Harvard's law school:

When a professor . . . argued that "feminists, Marxists, and the blacks" had contributed nothing to tort law (he says he was referring to academic proponents of race theory), the Black Law Students Association demanded he be publicly reprimanded and barred from teaching mandatory first-year classes. The law-school dean responded by appointing a "Committee on Healthy Diversity" and agreeing to tape the professor's lectures for

gained acceptance into the academy based on an appeal to the principles of tolerance and diversity—an appeal made to a generation of faculty with strong commitments to social justice, equity, and opportunity—have themselves demonstrated an intellectual and political intolerance that would make any ward politician proud once the situation has been reversed and they occupy decision-making positions.⁵³ I have often heard activist friends with feminist or racial allegiances justify this discriminatory behavior with the statement “you had yours—it’s our turn now.” This includes women admitting they would never vote to hire a white male faculty candidate over a woman as a “matter of principle”—even though my law school has a long and positive record on hiring and granting tenure to women law teachers. This culture of reward and repression is both subtle and overt. It is, of course, anathema to any true intellectual (contrasted with political) enterprise. As a strategy of political control, it is brilliant.⁵⁴

This latter set of strategies is dominated by goal-oriented political collectives and has generated a highly personal and subjective body of written and oral discourse. Much of this discourse reflects the propaganda of political

students who do not wish to attend his course. When another professor suggested that a mock trial be held in which the entire controversy would be aired, students complained about him, too, and he was forced to stop teaching his first-year class on torts.

Id. at 50. In the same period: “When he questioned them about their proposal for a speech code, Harvard Law Professor Alan Dershowitz reports, representatives from the Black Law Students Association told him he was violating the code simply ‘by being tough with [them] and demanding specifics.’” *Id.*

53. Daphne Patai, *Speak Freely, Professor—Within the Speech Code*, CHRON. OF HIGHER EDUC., June 9, 2000, at B7. See generally DAPHNE PATAI, HETEROFOBIA: SEXUAL HARASSMENT AND THE FUTURE OF FEMINISM (1998).

54. See, e.g., Harvey A. Silverglate, *Harvard Law Caves In to the Censors*, WALL ST. J., Jan. 8, 1996, at A18. Following the Law School’s adoption of a speech code relating to gender sensitivity, Silverglate reports:

A first-year law student wrote in the Dec. 8, 1995, issue of the Harvard Law Record, the official student-run newspaper, that it was “tragic and ultimately short-sighted” for the faculty to adopt a policy that “seeks to protect students from offensive behavior or dialogue on the basis of sex, yet failed to adopt a comparable policy on the basis of race.” Ominously, but instructively, what the student columnist was complaining about was the showing of a film in his criminal law class, which depicted a debate between a prosecutor and defense attorney over an encounter between a black college student and a white police officer who used a racial epithet.

“I became miffed, confused, and ultimately offended as the film progressed,” wrote the student. Showing the film in class without giving students “proper warning” of its offensive content constituted racial harassment, he argued in all seriousness.

Dean Clark and the faculty are about to learn that once principle is sacrificed in the name of expedience, there is no end to the demands from ever-proliferating groups of self-described victims seeking to cleanse the campus—and the classrooms—of unpleasant speech, not to mention uncomfortable ideas.

Id.

collectives seeking specific political outcomes rather than scholarly insight.⁵⁵ The incompatibility of subjectivity and objectivity in the process of serious analytic work is pointed out in Camus's poignant observation voiced in the context of the creativity of the artist and the need to keep sufficient distance from the heated conditions of society in order to retain a clear perspective. He writes:

[I]t is not possible to be a militant in one's spare time. . . . [T]he artist of today becomes [either] unreal if he remains in his ivory tower or sterilized if he spends his time galloping around the political arena. . . . [T]he writer must be fully aware of the dramas of his time and . . . must take sides every time he can. . . . But he must also maintain or resume from time to time a certain distance in relation to our history.⁵⁶

The continual tension between reality, politics, and independent balanced thought generates a need to gain sufficient experience to understand the context on which one is commenting. It also implies the moral responsibility to take action to improve society, but ultimately accepts that real understanding requires some distance from the fray for one's perspective to be accurate. The problem is that many members of the academic collectives never withdraw from the "dramas" of their core agendas. They consequently never achieve the essential distance that would allow them to understand the full context being critiqued. One result of the ever-present subjectivity is that many groups of collective-scholars are speaking almost exclusively to each other.⁵⁷

55. See NUSSBAUM, *supra* note 1, at 19. "The very pretense that one is engaged in the disinterested pursuit of truth can be a handy screen for prejudice." *Id.*

56. ALBERT CAMUS, *The Wager of Our Generation*, in RESISTANCE, REBELLION, AND DEATH 237, 238 (Justin O'Brien trans., Alfred A. Knopf, Inc. 1961) (1957). Compare this with Jung's point that

the gift of reason and critical reflection is not one of man's outstanding peculiarities, and even where it exists it proves to be wavering and inconstant, the more so, as a rule, the bigger the political groups are. The mass crushes out the insight and reflection that are still possible with the individual, and this necessarily leads to doctrinaire and authoritarian tyranny

Rational argument can be conducted with some prospect of success only so long as the emotionality of a given situation does not exceed a certain critical degree. If the affective temperature rises above this level, the possibility of reason's having any effect ceases and its place is taken by slogans and chimerical wish-fantasies.

C.G. JUNG, THE UNDISCOVERED SELF 4-5 (R.F.C. Hull trans., 1957).

57. DIGGINS, *supra* note 12, at 290.

Once inside academe, the New Left gave up all pretense of reaching "the people," to whom "all power" was supposed to belong. Unlike veterans of the Lyrical Left and Old Left, or true public intellectuals who carried on as editors or journalists for widely circulating magazines, New Left veterans regrouped as a professoriate and wrote primarily for each other in small, arcane academic journals.

Id.

The independent scholar's task is to test and question everything, not to accept convenient assumptions—no matter how attractive or comfortable. But conflict and “truths” that don't conform to the dominant assumptions make people uncomfortable, and scholars tend to be easily discomfited. Traditionally, those who entered the cloisters of academia sought peace and reflection, not conflict. The desire to avoid conflict and to receive the privileges and life-time benefits flowing from alignment with the in-group have inhibiting and directive effects on scholars' work—both in terms of what they say and what they leave out or don't pursue. The real challenges to the lack of diversity of politics and values in academia have been made outside the university through other forms of communication, including the Internet.⁵⁸

V. CHALLENGING “SOFT” REPRESSION

The “criticism of criticism” is vital because of the acceptance of the postmodern genre's view that truth is socially constructed and relative and represents the claim to legitimacy that justifies and benefits existing power relationships.⁵⁹ Postmodernist and collectivist critical interpretations are a relatively thin and largely incoherent set of interesting but limited observations that emerge more from the extreme intellectualization of French academic culture than from any deep understanding of the human condition. But whatever its deficiencies as an intellectual system, the rejection of the ideal of truth and the interpretation that it and other social rules are means of unjust discrimination is an assault on the legitimacy of social institutions and rules of operation.⁶⁰

When looked at strategically it is easy to understand why some feminists, gender and sexuality, and critical race scholars have spent so much time on

58. See Mark O'Keefe, *Right Wing's Strength in Talk Radio, New Media Frustrates Democrats*, THE PLAIN DEALER (Cleveland), Nov. 24, 2002, at A8. O'Keefe reports:

The days when the Associated Press, three major television networks and East Coast newspapers led by The Washington Post and The New York Times dominated the flow of political news are gone. Technological advances have spawned “narrowcasting” in which political communication can be tailored to niche audiences through cable channels, local radio stations and Web sites—all seemingly dominated by conservatives.

Id.

59. A scholar critical of the postmodern position regarding truth argues: “Truth, among postmodernists, is whatever you can get away with saying in whatever specific context you find yourself. Power lies in the context (the prevailing mentality) and, thus, power becomes truth.” DIEKEMA, *supra* note 46, at 2–3 n.1.

60. Joseph Hamburger says of Mill that his mission was to cause a restructuring of society and human from the ground up. See JOSEPH HAMBURGER, JOHN STUART MILL ON LIBERTY AND CONTROL 18 (1999). Eric Hoffer describes the role of “faultfinding [men] of words” whose role is to undermine the principles of an existing orthodoxy, in effect softening up the existing system so another can replace it. See ERIC HOFFER, THE TRUE BELIEVER: THOUGHTS ON THE NATURE OF MASS MOVEMENTS 127 (1951).

anti-harassment policies, speech codes, and other efforts to create and define a new set of legally objectionable—and therefore intimidating and authoritative—limitations on expression. It is a powerful strategy and effective political weapon. In another culture and age it might be criticized as a form of thought control.⁶¹

The expanding definition of racism in the European Union implicates rights to free expression as a social virtue. For an American it seems our European counterparts have criminalized speech we would consider boorish or insensitive but nonetheless protected by our constitutional commitment to free speech.⁶² We seem no longer satisfied to look at boors and judge them deficient and then go on. I find racism, sexism, and most other *isms* repulsive. But I find repression and the silencing of members of a political community purportedly based on freedom of expression and an intellectual community grounded on free and independent thought to be unacceptable, even as a means of pursuing noble ends.

Return to Camus's warning that the militant must periodically withdraw from the subjectivity of the struggle to regain perspective as a commentator on society. Within law schools and the university, the activist-intellectual never withdraws from the "dramas" of the culture and thus never regains the greater perspective of distance. Rather than lament our new-found clouding of perception, we have glorified it.⁶³ One result of the lack of challenge and

61. Jacques Ellul emphasizes:

A stereotype is a seeming value judgment The stereotype arises from feelings one has for one's own group, or against the "out-group." Man attaches himself passionately to the values represented by his group and rejects the clichés of the out-group. . . . The stereotype . . . helps man to avoid thinking, to take a personal position, to form his own opinion.

JACQUES ELLUL, PROPAGANDA: THE FORMATION OF MEN'S ATTITUDES 163 n.3 (Konrad Kellen & Jean Lerner trans., Alfred A. Knopf 1965) (1962).

62. See the discussion of the increased criminalization of speech in the European Union, *infra* note 128, reporting the proposed "gay insults" law in France and the successful criminal prosecution of Brigit Bardot for comments made in her best selling book, *Un Cri dans le Silence* (*A Cry in the Silence*). It was reported that Bardot cried as she defended herself against criminal charges based on language in the book that was said to contain "inflammatory rhetoric on immigration, homosexuality, the role of women in politics and unemployment," as well as opposing what Bardot decried as the "Islamisation of France." See *Tears as Bardot Denies Race Charge*, THE GUARDIAN (London and Manchester), May 17, 2004, at 17.

63. HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 202 (1982). Regarding the connection of power and truth, Dreyfus and Rabinow propose:

A doctor can stand outside a patient and treat him objectively, but a practitioner of interpretive analytics has no such external position. The disease he seeks to cure is part of an epidemic, which has also affected him. Hence, we must return again, one last time, to the problem of the analyst. For surely these dramatically new characterizations of power relations must put the analyst in a different position from that of the traditional intellectual

alternative criticism is that it is easy for politicized scholars to mistake their personal beliefs for more valid insights. In that context one becomes convinced that anything said by use of their personal “voice” is a form of irrefutable “truth.”

The problem is that true believers are trapped within the closed system of their own circular logic. This cage of assumption and agenda renders them unable to hear or comprehend other viewpoints except to consider them heresy or the voices of the opposition. This closed-mindedness is a danger even for an individual activist-intellectual without ties to a group, but the risk expands by orders of magnitude when someone becomes part of a political collective. This results in a substantively sterile—though impassioned—form of discourse that offers little beyond the speakers’ prejudices. It traps and blinds by the extreme personalization of reality and the pursuit of political ends.

In an intellectual system where a scholar submits her work to an open “marketplace of ideas,” the uncritical culture common to closed political collectives restricts the process of testing and criticism.⁶⁴ Preaching to choirs of already-converted true believers does not challenge one’s assumptions, evidential flaws, or failures of logic. The arguments are never tested and, while the writing can appeal to those who already agree with the writer or dazzle the ignorant, the work suffers from never being evaluated by the criticisms of others with distinct perspectives who might refine and enrich the insights. Such work may well accurately represent the “voice” of the individual or group. It can even offer an important body of raw material to be studied by scholars. But it is not scholarship in any realistic sense.⁶⁵

Carol Gilligan writes in a voice that admits the fact that it is a special kind of raw experience that must then be interpreted. She states:

or philosopher. Foucault has provided some indications of how he sees the problem. He has systematically criticized the self-proclaimed master of truth and justice, the intellectual who claimed to speak truth to power and thereby to resist power’s supposed repressive effect.

Id.

64. Mac Donald, *supra* note 15, at 51.

Legal storytelling has redefined the goal of legal scholarship and, with it, standards of evaluation. The purpose of stories is to “build community”—defined in racial and gender terms. Good scholarship strengthens community; bad scholarship threatens it. The implicit corollary is that only those within that community can contribute to the scholarly effort. Critical race theorists are virtually all minorities; feminist theory is almost exclusively the domain of women. Anyone who suggests applying traditional meritocratic standards to critical race scholarship (or to hiring decisions regarding those who produce it) is branded a racist. A central contention of race theorists is that meritocratic standards are a front for white supremacy.

Id.

65. See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT xviii (1993).

At present, I find that women writers, and especially African-American poets and novelists who draw on an oral/aural tradition and also on searing and complex experiences of difference, are taking the lead in voicing an art that responds to the question which now preoccupies many people: how to give voice to difference in a way that recasts our discussion of relationship and the telling of truth.⁶⁶

My point is not that such innovative and original expression is invalid, but that it is a *different* phenomenon than scholarship based on painstaking research and the application of disciplined and replicable methods. The kind of “searing and complex” literature Gilligan describes, when done within an academic discipline based on analysis and a disciplined assessment of data, is not scholarship. It represents an admirable and necessary form of communication on which powerful new scholarly interpretations can be based, but it is not scholarship. It is a form of raw data.

Scholarship of the kind pursued in law and other *noncumulative* disciplines is derivative, analytic, and synthetic. It stands at a distance from events in order to assess their meaning with greater accuracy. The qualities of distance, method, and structure provide its legitimacy within its sphere of operation. Scholars in a discipline such as law focus on original works by others—such as judges, legislators, and scientific investigators, explaining them while structuring and expanding their insights. But legal scholarship is not fundamentally creative or original in the way described by Gilligan. This understanding of the necessary division of function among varied and distinct forms of communication has been lost in many disciplines.

The culture of intellectual freedom and independence is altered when interest groups seeking to infiltrate, challenge, and replace the existing system attack those who fail to demonstrate complete allegiance, even if that “failure” is manifested by simply questioning or not fully agreeing with the preferred position. The sins of intolerance and subjectivity are not one-sided. An existing orthodoxy that perceives itself as under attack will demand allegiance to its conditions and values. Those who seek independence from a controlling

66. *Id.* But there is once again a problem with the role of truth. Mac Donald offers:

In this new scholarship, factual accuracy is no longer important. Writes Stuart Alan Clarke in the *Yale Journal of Law and the Humanities*: “It is naive, if not disingenuous, to suggest that all that matters is the promotion of the truth.” Patricia Williams’s portrayal *à clef* of her teaching stint at Stanford Law School is deeply distorted, according to former colleagues there—leftists all. Williams fittingly takes refuge against such charges in the shadow of Tawana Brawley: “When students . . . believed and then claimed that I had made . . . up [another of her personal victimization stories], they put me in a position like that of Tawana Brawley.” Indeed, Brawley, whom Williams beatifies as the patron saint of victimized black women, is the perfect symbol of the movement: as Brawley’s supporters on the radical left would have it, it didn’t matter if her story of racial brutalization wasn’t actually true, because it *could* have happened that way.

Mac Donald, *supra* note 15, at 52.

orthodoxy risk falling prey to the rubric that “you are either with us or you are against us,” or that “if you aren’t part of the solution, you are part of the problem.” This vicious “game” has manifested itself in university disciplines that are seeking to purge scholars who are not of their specific credo or to achieve or preserve political dominance by controlling the numbers of faculty who share their beliefs. Columbia University offers one example, but there are many others.⁶⁷

The purging or avoidance of scholars whose positions are in part similar but who are independent and honest in their intellectual efforts seems a paradox. But it is politically astute. In a political struggle, interests directly opposed to your position offer a clear opponent against which we can rail. This allows us the means of staking out intellectual and political positions. Consider the “non-debate” over abortion. In the academic world, women who oppose abortion are likely to find themselves to be outsiders. There is, for example, an organization named *Feminists for Life of America*, whose website includes a section on “Feminist Foremothers.”⁶⁸ A few citations show these antecedent *feminists* as being somewhat different from what normally comes to mind.⁶⁹ For one thing, the “Feminist Foremothers” are clearly opposed to abortion and present the views of several of America’s great feminist leaders.

Susan B. Anthony warns that

[n]o matter what the motive, love of ease, or a desire to save from suffering the unborn innocent, the woman is awfully guilty who commits the deed. It will burden her conscience in life, it will burden her soul in death; But . . . thrice guilty is he who drove her to the desperation which impelled her to the crime!⁷⁰

Elizabeth Cady Stanton is quoted as saying: “When we consider that women are treated as property, it is degrading to women that we should treat our children as property to be disposed of as we see fit.”⁷¹

The problem is that the voices of strong women opposed to abortion present a view that is not popular. While I have had conversations with women faculty who share this perspective on abortion, they do not announce it because they fear repercussions from Pro-choice women who “take no prisoners” when it comes to tolerating opposition. Rather than risk wrath and ostracism or suffer tenure and promotion problems, some women simply avoid the topic. They also don’t want to provide “aid and comfort” to the opposition

67. See Karen W. Arenson, *Columbia Soothes the Dogs of War in Its English Dept.*, N.Y. TIMES, Mar. 17, 2002, at 1 (reporting serious rifts within Columbia’s English Department regarding the theoretical and political pedigree of new prospective faculty hires).

68. Feminists for Life of America, *Feminist History: Voices of Our Feminist Foremothers*, <http://www.feministsforlife.org/history/foremoth.htm> (last visited Oct. 17, 2005).

69. *Id.*

70. *Id.* (quoting the July 8, 1869 issue of Anthony’s newspaper, THE REVOLUTION).

71. *Id.* (quoting the Feb. 5, 1868 issue of THE REVOLUTION).

because they understand that what they say would be used by those seeking to advance anti-feminist agendas.

In this regard, a colleague offered an example of self-censorship. In critiquing a much-earlier version of the ideas contained here, he wrote:

Speaking of issues that are contrary to the dominant opinion is something many avoid because of the marginalization of that scholar's writings. For example, you discuss the issue of abortion, and scholarship and the difficulty in challenging the orthodoxy [that has emerged around this point] in the academy. I have a friend who, before obtaining tenure at her institution, gave a speech on Catholic social thought, feminism and abortion. After the speech, I told her she should publish her remarks. She told me that she would not be able to do that before obtaining tenure. She has subsequently obtained tenure, but has [still] not published her rather critical views of the state of abortion law. I don't know why, but one guess is because she believes that this will affect her reputation in other areas of legal scholarship, or otherwise marginalize her.⁷²

VI. CHILLING OF DISCOURSE THROUGH CONTROL OF ALLOWABLE SPEECH

Numerous terms have been used to describe what is happening inside law schools and universities, including *political correctness*, *thought police*, and even the fascinating idea of *epistemopathologies*.⁷³ The terms all seek to criticize a process in which political groups attempt to trump, shame, or intimidate others into remaining silent, or speaking only in language the collectives have determined is acceptable.⁷⁴ That many of the newly emergent political collectives seek to gain power through control of language is undeniable. Frug argues: "The postmodern position locating human experience as *inescapably within language* suggests that feminists should not overlook the constructive function of legal language as a critical frontier for feminist reforms. *To put this 'principle' more bluntly, legal discourse should be recognized as a site of political struggle over sex differences.*"⁷⁵

72. E-mail from Michael Ariens, Professor of Law, St. Mary's University School of Law, to David Barnhizer, Professor of Law, Cleveland State University, Cleveland-Marshall College of Law (on file with author).

73. See *New Theories*, *supra* note 39, at 1.

74. See HOFFER, *supra* note 60, at 127, for a discussion of how the "faultfinding man of words" attacks a dominant orthodoxy in order to undermine its perceived legitimacy and hold on to power.

75. Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1046 (1992) (emphasis added). A criticism of Frug's argument is found in Martha Minow, *Incomplete Correspondence: An Unsent Letter to Mary Joe Frug*, 105 HARV. L. REV. 1096, 1104 (1992) ("[P]ostmodernism risks a relativism that conflicts with feminist commitments to political engagement, and with a continuing ability to name, authoritatively, and to fight, effectively, what is oppressive . . .").

Control of the language of discourse not only provides the concepts that can be used but inhibits the use of disfavored concepts. This is an inevitable process in a general political community, particularly one constructed by postmodernists intent on using their power to construct their own “truths.” The question is the degree to which this kind of control is desirable or appropriate in the university, or whether universities have a duty not only to the immediate society, but to the past and future. This includes the duty to resist strategies aimed at controlling intellectual freedom and discourse.⁷⁶

Frug’s position brings to mind Deborah Tannen’s description of the *argument culture* where everything is said as part of a struggle to “win” an advocacy interchange rather than to actually understand whatever is the subject of discussion and to reach agreement on its truth, validity, probability, or consequences.⁷⁷ This collapse of the processes of honest discourse challenging the deceptions and processes of politicized argumentation makes a mockery of the pretense of reasoned discourse that underlies the principles of academic life and a democratic system where decisions are supposedly based on evidence. As part of our calculated political advocacy we speak in code and false tongues. We shape our words to gain political goals that put power at the center, not truth. Everything becomes goal-oriented and the goal is neither truth nor understanding but the furtherance of political ends. Outcome is the dominant factor, not intellect, honesty, and insight.

Although David Howard’s *faux pas* occurred outside the university world, it symbolizes the climate that has emerged inside law schools and many other university departments.⁷⁸ Howard, aide to Washington, D.C. Mayor Anthony Williams, used the word “niggardly”—meaning “Scrooge-like”—to describe how he administered a Washington city government fund and it cost him his job.⁷⁹ The obvious problem was that to some, including several of Howard’s co-workers who took offense, the word *sounded like* a racial slur.⁸⁰ Williams,

76. Fonte, *supra* note 14, at 48, warns that “[j]ust when you thought history was over, liberal democracy faces what may be its greatest challenge yet. In the name of ‘diversity’ cultural democrats want to remake man in their image.” He adds:

As Professor Sorensen and others have pointed out, liberal democracy is a combination of two theories: liberalism (individual rights) and democracy (popular sovereignty). Thomas Jefferson declared that “the first principle of republicanism [democracy] is *Lex Majoris Partis*”—majority rule or popular sovereignty—because without some form of majority rule a people would not be sovereign or self-governing. Today the majoritarian principles of liberal democracy are increasingly under attack in the name of supranational and subnational ideals.

Id.

77. TANNEN, *supra* note 3, at 3.

78. *Misunderstood Word Causes Official to Resign; ‘Niggardly,’ Mistaken for a Racial Slur, Costs D.C. Mayoral Aide His Job*, BALTIMORE SUN, Jan. 28, 1999, at 3A.

79. *Id.*

80. *Id.*

who is black, said that Howard, who is white, “showed poor judgment even though, ‘He didn’t say anything that was in itself racist.’”⁸¹ The culture is one in which one group is granted the moral and even legal authority to determine the nature of what others are allowed to say without suffering disapprobation, disgrace, or discharge.

Another report criticized Stanford University’s approach to developing a multicultural curriculum.⁸² The authors suggest that students were censured for “incorrect” views.⁸³ They describe the process leading up to the curricular changes as one that intimidated anyone opposed to the proposals.⁸⁴ As to some aspects of multicultural criticisms of Western society, the report argues that “[a]n honest study of other cultures might entail a drastic reassessment of the role and nature of the West, but hardly in the direction [the West’s critics might expect].”⁸⁵ One interpretation that might offend the multicultural perspective is the observation that “[w]hile many cultures have practiced slavery, only in the West did the doctrine of individual rights develop, that shattered the cultural basis for slavery.”⁸⁶ The authors of the report argue, “If there is a consistent intellectual mistake made by the West’s critics, it appears to be this: Because the West has recognized its episodes of historical injustice, it is judged more harshly than cultures that present a rosier, but less accurate, accounting of themselves.”⁸⁷

Certainly anyone who examines the abhorrent history of the slave trade must (or should) acknowledge the significant participation of both North African Muslims and other Africans who willingly profited from the obscene system.⁸⁸ This in no way relieves America and other Western nations from the fact of their participation. But it insists that others who operated in non-Western and non-market cultures be called to account for their participation. Honesty demands that we question why a continuing slave trade still exists in

81. *Id.*

82. Elizabeth Fox-Genovese, *Foreword* to DAVID O. SACKS & PETER A. THIEL, *THE DIVERSITY MYTH: “MULTICULTURALISM” AND THE POLITICS OF INTOLERANCE AT STANFORD*, at xi, xi–xii (1995).

83. *Id.* at xiii.

84. SACKS & THIEL, *supra* note 82, at 13. The authors concluded: “At the very least, the charges of racism, sexism, and ethnocentrism—often explicit, always implicit, and constantly repeated in protests, classroom discussions, dormitory programs, and the *Stanford Daily*—discouraged supporters of the existing program from voicing their views.” *Id.*

85. *Id.* at 8.

86. *Id.*

87. *Id.*

88. *See* JOHN READER, *AFRICA: A BIOGRAPHY OF THE CONTINENT* 393 (Alfred A. Knopf 1998) (1997).

East Africa.⁸⁹ The same question can be asked concerning the widespread sexual enslavement that is rampant in Eastern Europe, Russia, and Thailand.⁹⁰

Heather Mac Donald offers an example of the skewed approach that too often characterizes the practice of critical theory in American law schools. She reports:

[A] professor . . . asks students in his critical race theory seminar to write an essay about race relations, challenging, among other things, “the assumption that blacks, Jews, and Latinos are allies.” When a black student wrote about her indelible dislike of white people, . . . [he] knew he had struck gold. He asked the student to read her essay aloud in class; [as this occurred] an Italian-American woman burst into tears and fled the room.⁹¹

Mac Donald continues:

[C]ritical race teachers are prepared for such disruptions. “Getting in touch with your feelings is difficult,” explains . . . [the law professor]. “We let [the Italian-American woman] experience out her grief. She sat out a class or two, and when she came back, she wouldn’t talk.” It was a useful lesson, [he] concludes: “She was naive to think there’s not a lot of cross-racial hatred.”⁹²

Mac Donald concludes that the criticism may be tolerated only if it flows in one direction, noting that “[h]owever open-minded critical race teachers may be about ‘cross-racial hatred,’ it is difficult to imagine this story coming out as it did had a white student written of his dislike for blacks.”⁹³ In fact, the insights of cross-racial hatred are important if we are to have a useful dialogue on these matters. My concern is not in the fact of bringing out the existence of such intense feelings but how to use the opportunity to enrich the communication among all the participants on issues of such social and personal consequence.

Although many have begun looking to the extremes of political movements as the danger to law schools and academia generally, I am convinced the real danger is in the more “moderate” interstices.⁹⁴ Certainly the

89. See KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* 7 (1999); see also *New Slavery Case in Mauritania*, AFROL NEWS, Feb. 9, 2004, <http://www.afrol.com/articles/11247>.

90. BALES, *supra* note 89, at 38, 69, 251.

91. Mac Donald, *supra* note 15, at 48.

92. *Id.*

93. *Id.*

94. See Roger Kimball, *Political Correctness, or, the Perils of Benevolence*, NAT’L INT., Winter 2003/2004, at 158, 159–60. The idea of “infantilizing” us and our discourse is traced by Kimball to de Tocqueville. Kimball reports:

Political correctness can also be enlisted in what Alexis de Tocqueville, in his *Democracy in America*, called “democratic despotism.” In pre-democratic societies, Tocqueville noted, despotism tyrannized. In modern democracies, it infantilizes. Democratic despotism is both “more extensive and more mild” than its precursors: it

event reported by Mac Donald is contemptible if accurate. It offers (I hope) an extreme and infrequent example of abusing a process in a one-sided and discriminatory way. It also reveals the immoral tactic of objectifying the silenced woman rather than affording her the dignity of being treated as an individual. Rather than being pleased by her trauma and silence, any teacher in this situation has the responsibility to use it in a balanced way that allows all the participants to work through their anger, grief, and false, as well as true, assumptions. Pain, confusion, and discomfort can be legitimate educational strategies. But I fear the main message learned by the law school class at the law school in question was that communication is one-sided, that “silence is golden,” and that it is appropriate for an authority figure to take advantage of a person in a weaker or more subordinate role. I hope that this situation was an extreme and isolated event. One hopes—even prays—that Mac Donald overstated her point, but in this political climate, the probability is otherwise.

When I say the dangers are greater in the “moderate” interstices of the academic culture than in the obvious poles, I mean to suggest we are in a period of “soft extremism” masquerading as reasonableness and as a perverse kind of reverse justice. Hard and soft extremism are distinct phenomena. In my judgment soft extremism is more dangerous and repressive due to its subtlety and seeming reasonableness. Consider, for example, the case of Catharine MacKinnon as one of our most extreme radical feminists. Although she has made some “interesting” claims that essentially define the air coming out of a man’s mouth as pornographic,⁹⁵ extremists such as MacKinnon are easily labeled and compartmentalized. Opponents can dismiss her simply by proclaiming: “That’s just Kitty MacKinnon sounding off again!” Many other

“degrades men without tormenting them.” In this sense, Tocqueville continued, “the species of oppression by which democratic nations are menaced is unlike anything that ever before existed in the world.”

Tocqueville’s analysis, although written in the 1830s, seems remarkably contemporary. Let me quote a few sentences. The force of democratic despotism, Tocqueville wrote, would

be like the authority of a parent if, like that authority, its object was to prepare men for manhood; but it seeks, on the contrary, to keep them in perpetual childhood. . . . [I]t every day renders the exercise of the free agency of man less useful and less frequent; it circumscribes the will within a narrower range and gradually robs a man of all the uses of himself. . . . [T]he supreme power then extends its arm over the whole community. It covers the surface of society with a network of small complicated rules, minute and uniform, through which the most original minds and the most energetic characters cannot penetrate, to rise above the crowd. The will of man is not shattered, but softened, bent, and guided. . . . Such a power does not destroy . . . but it enervates, extinguishes, and stupefies a people, till each nation is reduced to nothing better than a flock of timid and industrious animals, of which the government is the shepherd.

Id.

95. See CATHARINE MACKINNON, ONLY WORDS 45–68 (1993).

feminists would at least tacitly concede the point.⁹⁶ Except for a relatively small group of people who also suffer from whatever experiential malady afflicts MacKinnon, most people have little difficulty identifying the absurdity of her more extreme assertions.⁹⁷ This does not mean, however, that hard extremists do not serve a vital purpose. One consequence of their irrationality and virulence is that they open a space for soft extremism to flourish. Quiet repression through soft extremism is aided by extremists such as MacKinnon because they spew such bile that they cause others' positions to seem blissfully reasonable.⁹⁸

This fits into a classic negotiation strategy where one negotiator enlists someone to make aggressive or irrational demands. When I practiced civil rights law, the tactic of the enraged minority client storming out of a meeting with a group of middle class white people had a truly amazing effect on their subsequent willingness to work with me. They were willing to make concessions they might not otherwise offer to avoid being confronted by someone they feared or who simply made them feel very uncomfortable. The moderately radical position was magically converted to the reasonable. This has the psychological effect of making the quieter demands seem more reasonable than they are. It also makes the opponent from whom concessions are being sought less willing to resist the intermediate demands, because doing so will lead to the unleashing of the "rabid dogs." Since few people enjoy the

96. See, e.g., Kathleen Trigani, *As Long As Men Like Mr. Mars and Venus Exist*, FEMINISTA! THE ONLINE JOURNAL OF FEMINIST CONSTRUCTION, <http://www.feminista.com/archives/v3n8/trigiani.html> (last visited Jan. 14, 2006).

[W]hen friends would vilify Catherine [sic] MacKinnon, I would try to make cute remarks, as in "Well, I just don't understand half of what Kitty says, but then, she's a lawyer. So should we start telling radical feminist lawyer jokes?" While I had understood MacKinnon's works enough to know that she too had never said "all sex is rape" and would always challenge her accusers on that point, the truth is that I got angry at her because she would never tell me her vision.

Id.

97. Susan Estrich is somewhat ignobly following in MacKinnon's footsteps in her frequent willingness to use diatribe and invective against opponents. For example, consider the dismal episode involving *L.A. Times* op-ed editor Michael Kinsley, and a scathing critique of Estrich's unprincipled willingness to use any device to achieve her ends, including revealing a target's diagnosis of Parkinson's Disease and suggesting he didn't do what she demanded (publish her op-ed in the *L.A. Times*) due to the effects of the disease on his mind. Heather Mac Donald, *Feminists Get Hysterical: First It Was Harvard vs. Summers—and now Estrich vs. Kinsley*, CITY J. ONLINE, Feb. 24, 2005, http://www.city-journal.org/html/eno_02_24_05hm.html; see also Avi Dov Klein, *The Jomo Kenyatta Professor of Law*, AM. SPECTATOR ONLINE, Mar. 2, 2005, http://www.spectator.org/dsp_article.asp?art_id=7833.

98. Acker et al., *supra* note 4, at 134. Acker et al. write: "Understanding the processes that result in inequalities is a necessary step toward changing women's position [in the social sciences]. For us this understanding comes from a theoretical perspective which has its roots in feminism, Marxism, and critical theory." *Id.*

hostility this kind of aggression engenders, it is easier to “be reasonable.” This kind of conflict avoidance has allowed a culture of “reasonable repression” to emerge that has silenced free thought in law schools or at least the willingness to engage in free intellectual discussion about important controversial matters.

Extremism therefore does have the important strategic function of making the moderately unreasonable seem more reasonable but, unlike Mac Donald,⁹⁹ I am less concerned with the extremists than with the *kindler and gentler* inner core. It is through this intermediate dynamic that discourse is controlled by strategies that seem quite reasonable on the surface, but create a dampening field characterized by intellectual hesitance. The end result is the inhibition of free expression and avoidance of fair critiques. This offends our responsibility to nurture free and open communication.¹⁰⁰

In my institution we are quite devoted to “collegiality,” even to the extent everyone knows not to make waves or offend certain interests. But several interesting events occurred that I believe suggest the reality of the “soft” repression by which the new system operates. One, and we will assume this occurred elsewhere but that I have knowledge of it, involves a tenure and promotion vote in which the three candidates were one white male and two females. The man had several times been voted “teacher of the year” by first-year students and had a publication record that, while not at the top of his faculty’s charts, still at least matched or exceeded that of the two women candidates. Let me add that the law school in question had not rejected a tenure candidate in more than twenty years. The discussion on the male candidate became an involved ninety minutes of heated and conflicted discussion. He was finally approved. The group then approved the women candidates in five minutes. There was no discussion beyond, “Have you read the committee reports?” and “Does anyone have anything to add?” The respective answers were something like “yes, or *maybe*” and “no.” The process as to these two individuals was nothing more than a rubber stamp. The

99. See *supra* note 97 and accompanying text.

100. David Brooks, Op-Ed., *Age of Political Segregation*, N.Y. TIMES, June 29, 2004, at A27, recently argued that the political polarization we are experiencing is in fact more extreme in the case of college-educated people, and that they show a very strong tendency to align with political parties and not change. He adds:

As the Emory political scientist Alan Abramowitz has shown, a college-educated Democrat is likely to be more liberal than a high-school-educated Democrat, and a college-educated Republican is likely to be more conservative than a high-school-educated Republican. The more you crack the books, the more likely it is you’ll shoot off to the right or the left.

Once you’ve joined a side, the information age makes it easier for you to surround yourself with people like yourself. And if there is one thing we have learned over the past generation, it’s that we are really into self-validation.

Id. This obviously has important implications for the composition of university faculty and their tendency to replicate themselves in order to validate themselves.

standards applied were not even in the same universe. In my world that equals invidious discrimination based on gender.¹⁰¹

Another example involves the recent election of a search committee for a new dean. We have about fifteen female faculty members on a total tenure-track faculty of forty-three.¹⁰² The decision was to elect five faculty representatives to the search committee, and we had a “diverse” nominating process that produced a range of candidates. When the final vote was announced, many people were stunned to discover that all five members were women. While there are several interpretations as to how this could happen, the most likely one suggests a strategy of gender-based strategic voting that would have been immediately condemned if the results had been a committee of five men and no women. All criticisms of the process were voiced in private. No one said a thing publicly.

A third situation involved a fear of budget cuts in the university due to the likelihood of reduced state funding of higher education. The fear was that this might lead to layoffs. Three male faculty members, all white and all senior in length of service, received anonymous notes in their faculty mailboxes. The notes proclaimed the three were the main problem in the school and were poor teachers. It was suggested that they would be doing everyone a favor if they quit and freed up resources for others while simultaneously improving the quality of the institution by their very departure. I was somewhat offended because I did not receive one of the notes, but also felt compelled to support one of the recipients at a faculty meeting. I suggested these anonymous attacks represented a cowardly form of discrimination that would have everyone up in arms if the targets had been women or minority faculty. The most telling and disappointing point for me was that many of the other faculty barely hid their amusement at the fact that white male senior faculty had been the victims of such behavior. The message taken away from the meeting was not only that

101. John Leo observes:

The sad truth is that the diversity industry is narrowly focused and perfectly happy to use double standards to get what it wants. On a panel at a newspaper convention some years ago, I said that getting more blacks, Hispanics, Asian-Americans and women into the newsroom was a great step forward, but where are the Russian Jewish immigrants, the fundamentalist Christians, the Muslims, the black conservatives and so forth? This was a major gaffe. I had mistakenly used the word “diverse” in its old English language sense, instead of its modern sense of group rights for narrowly selected race-and-gender constituencies.

John Leo, *‘Diversity’ Proponents Should Learn What the Word Means*, JEWISH WORLD REVIEW ONLINE, Jan. 28, 2002, <http://www.jewishworldreview.com/cols/leo012802.asp>.

102. I should note that my law school has a long and proud history of providing opportunity for women faculty members stretching back over several generations and has similarly educated many female lawyers long before gender discrimination became an official concern of more elite institutions. Offering equal opportunity for women and minorities is something we have long chosen to do and seen as a part of our core mission.

anonymous attacks against this particular group of faculty based on their gender, age, or race were not only not offensive, but that they were humorous.

These events and others have forced me to confront the fact of the gap between the Liberals of the 1960s and 1970s and the special interest “Liberals” of today.¹⁰³ In the situations described above nothing was said publicly about discriminatory behavior. There was considerable anger among male faculty and, to their credit, some female faculty in relation to the obviously different standards applied in the tenure situation. But no one was willing to deal with the situation due to the sensitivity of the problem. In the same way, while a significant part of the faculty were surprised at the outcome on the dean search committee vote, because one strong possibility was that women were voting for other women as a collective political gender bloc rather than on the merits of individual candidates, nothing was said except behind closed office doors. Nor was the fact brought out that such a committee could have a negative effect on our ability to attract candidates (regardless of gender) who might interpret the situation as one in which an organized political constituency was in control of the institution, even to the extent that a new dean would be immediately answerable to a specific political clique and inhibited in the ability to implement strategies.

Although Saul Bellow is correct to warn about the dangers of too close an interaction between society and university,¹⁰⁴ the real game is being fought inside the academic institutions—and open and honest discourse in teaching and scholarship is losing.¹⁰⁵ Daphne Patai cites Bernard Metzger for the proposition that

103. See, e.g., DIGGINS, *supra* note 12, at 276, who explains:

[I]n the late seventies and eighties a substantial number of former New Left students found themselves comfortably inside the very institution they had once assaulted as part of the corrupt “system” that must be destroyed—the college and university of the “higher learning.” Here Marcuse’s idea of “critical theory” would flourish, as would a development he failed to anticipate, the women’s revolution, perhaps the single most important social movement to emerge from the sixties.

104. See Saul Bellow, *Foreword* to ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* at 11, 18 (1987) (“[B]y consenting to play an active or ‘positive,’ a participatory role in society, the university has become inundated and saturated with the backflow of society’s ‘problems.’”).

105. I find it absolutely ironic that the only real mobilization in favor of protecting freedom of discourse from within the university has been directed outside the institution toward the Bush administration and university faculty who sought to criticize its policies Post 9/11. See, e.g., Polly Curtis, *US Scholars Attack Campus ‘Intimidation,’* *GUARDIAN UNLIMITED*, Feb. 17, 2003, <http://education.guardian.co.uk/higher/news/story/0,,897550,00.html>. The irony is that many universities simultaneously felt it necessary to suppress student activities such as signs, flags, and protests directed in favor of the Administration’s actions on the grounds that other students might be offended. The point is that repression is repression in a democracy such as ours, and the burden (a heavy one) should always be on those who seek to suppress, whether it is John Ashcroft or a university.

threats to academic freedom today come not from outside the academy, but from those seeking to enforce speech codes and policies outlawing sexual and racial harassment in the name of protecting various identity groups. Although such codes plainly infringe on academic freedom, he noted, protests from the professoriate have been few.¹⁰⁶

One reason for the lack of protests or resistance is, as indicated earlier, that law school and university faculties have been captured by special-interest political collectives seeking to implement their agendas.¹⁰⁷ The capture has been made considerably easier by the fact that the composition of faculties has changed radically over the past twenty-five years. Other than in consciously religious law schools or institutions dedicated to examining the law from the perspective of market-based economic principles and methods such as the University of Chicago and George Mason, the vast majority of law faculty members now share the same values, agendas, and politics.¹⁰⁸ Not only are people perceived by these interests as direct opponents condemned by labels and slogans, so is anyone seen as disloyal. This intolerance aimed at those considered disloyal to the movement exists because those who share the collective's identity characteristics but challenge its analysis of issues and solutions are greater threats. Their attempt to be honest and balanced as they see it undermines the group's political solidarity and provides ammunition to opponents.¹⁰⁹

106. Patai, *supra* note 53, at B7.

107. In part it is a *Pogoesque* "we have seen the enemy and he is us" situation due to the increasing political homogeneity of law and university faculties. "When leftists take over a department, they almost always hire their own, so except in some technical fields, non-leftists tend to disappear." Leo, *supra* note 101. He continues:

Though Frank Luntz's survey [of the political party affiliations of university faculty] may not prove anything, his comment on the poll seems fitting: "I think universities should insist on the same diversity in their faculty that they look for in their students. I have a problem when these faculties have no Republican or conservative representation at all."

Id.

108. Luntz's survey suggests that the figures on political diversity are extreme. "[T]hose on the conservative side of the political spectrum don't have much of a place in the Ivy League faculty lounges. Just 6 percent of Ivy League professors would describe themselves as either conservative or somewhat conservative, and only 3 percent consider themselves to be Republicans." Frank Luntz, *Inside the Mind of an Ivy League Professor*, FRONTPAGEMAGAZINE.COM, Aug. 30, 2002, <http://www.frontpagemag.com/articles/Printable.asp?ID=2642>.

109. The experience of Randall Kennedy offers a clear example. See, e.g., Interviews, *That Word: Randall Kennedy, the Author of 'Nigger,' Talks About the Boundaries That Culture—and Language—Should and Shouldn't Have*, ATLANTIC UNBOUND, Jan. 17, 2002, <http://www.theatlantic.com/unbound/interviews/int2002-01-17.htm>.

VII. CHILLING THROUGH INTOLERANCE AND THE SCHOLARSHIP OF RAGE

Activist collectives of scholars are often comprised of people who possess what Camus called a “residue of anger” he felt dominated France following the end of Nazi occupation.¹¹⁰ In his essay “*Defense of Intelligence*,” Camus states that after four years of continual repression, atrocities, and collaboration by many French with evil, “[w]e were left with the rage that consumes our souls at the memory of certain images and certain faces. The executioners’ hatred engendered the victims’ hatred. And once the executioners had gone, the French were left with their hatred only partially spent.”¹¹¹ He concluded that in this situation, “it is essential that we never let criticism descend to insult; we must grant that our opponent may be right and that in any case his reasons, even though bad, may be disinterested. It is essential, in short, that we remake our political mentality.”¹¹² Given the culture of insult and intimidation we are experiencing, this goal seems like an impossible dream.

The rage of those who were silenced, oppressed, and denied fair access to opportunities is understandable. For the scholar, the problem is that suppression, subordination, mistreatment, and injustice are unlikely stimuli for engaging in dispassionate analysis. It is this inevitable passion that concerns some scholars who fear that the emotional subjectivity that is an almost inevitable part of subordinated peoples’ experience skews the scholars’ work by increasing the probability that at least some of it is highly politicized argumentation rather than the more objective search for truth.¹¹³ A simple formula is that “rage empowers, rage blinds, and rage frightens.” Open and honest discourse is chilled not only by control of language, but the natural desire to avoid unpleasant conflict. The work of activist scholars who see themselves as part of an identity group that has historically been oppressed is often a “scholarship of rage” involving heightened levels of indignation and resentment.¹¹⁴ The argument is that scholarship based on passion and rage at

110. CAMUS, *Pessimism and Tyranny: Defense of Intelligence*, in RESISTANCE, REBELLION, AND DEATH, *supra* note 56, at 61, 62.

111. *Id.*

112. *Id.* at 63; *see also* CAMUS, THE REBEL, *supra* note 5, at 300 (arguing that “mastery consists in refuting the prejudices of the time . . .”).

113. *But see* Frug, *supra* note 75, at 1047–48.

Indeed, the oppositional character of the style arguably coincides with the oppositional spirit of feminism. Irony, for example, is a stylistic method of acknowledging and challenging a dominant meaning, of saying something and simultaneously denying it. Figures of speech invite ideas to break out of the linear argument of a text; they challenge singular, dominant interpretations.

Id.

114. This is not only its effect but its intention. One critic, Mac Donald, *supra* note 15, at 51, describes that intent:

The problem with white male legal stories, these [race and feminist legal] theorists say, is that they “silence” the voices of women and minorities. Law does this, some feminists

some very real injustices—as well as conditions perceived as unjust but that may or may not be—is not objective.¹¹⁵ Deep-seated rage, often unconscious and masked even from the author, makes an author highly subjective, and subjectivity changes the character of the scholar's work. While such work will often be admirable in its eloquence, message, and passion, there are problems with its balance and objectivity. This can be a particular problem once the scholar is past the point of stating the depth of the problem with which virtually all of us will agree, and moves to issues of causation, accountability, and solutions.

Use of intellect to repress on behalf of political movements is something else that Camus warned about. He lamented:

If you merely make an effort to understand without preconceptions, if you merely talk of objectivity, you will be accused of sophistry and criticized for having pretensions. . . . I know as well as anyone the excesses of intelligence, and I know as well as anyone that the intellectual is a dangerous animal ever ready to betray.¹¹⁶

argue, through the bogus patina of reason in judicial opinions, which masks self-interest and political manipulation. Other feminist critics seem to grant the reality of rationality, only to dismiss it as a perversely male way of approaching experience. Lucinda Finley, for example, a feminist professor at SUNY/Buffalo, argues that “rationality, abstraction, [and] a preference for statistical and empirical proofs over experiential or anecdotal evidence” reflect the “life experiences typical to empowered white males.” (Women who adopt “male” ways of thinking have been co-opted, according to Finley.) Triumphant, Finley enumerates what male legal stories silence: “Rage, pain, elation, the aching, thirsting, hungering for freedom on one’s own terms, love and its joys and terror, fear, utter frustration at being contained and constrained by legal language—all are diffused by legal language.” (And a good thing, too, [Mac Donald adds] since dispassionate legal reasoning is meant to *correct* the distortion of “rage” and other emotions.)

115. George Will raises the point of honesty and perceptions versus reality in a recent column. See George F. Will, *Feminists’ Textbooks Fail Women*, THE PLAIN DEALER (Cleveland), May 19, 2002, at H5. Will reports on a study by Christine Stolba, senior fellow at the Independent Women’s Forum. Stolba’s study, *Lying in a Room of One’s Own: How Women’s Studies Textbooks Miseducate Students*, argues that there are numerous mistakes and myths contained in the primary women’s studies texts that in Will’s words, “illustrate the extent to which political screeds, the cultivation of grievances and anti-intellectualism have gained academic respectability.” *Id.* There are, however, serious questions that have been raised about the “independence” of the Independent Women’s Forum. A group called Media Transparency argues: “The Independent Women’s Forum is neither *Independent* nor a *Forum*. Not independent because it is largely funded by the conservative movement. Not a forum, because it merely serves up women who mouth the conservative movement party line.” Recipient Profile, Independent Women’s Forum, <http://www.mediatransparency.org/recipientprofile.php?recipientID=163> (last visited Oct. 5, 2005) (some emphasis omitted). A copy of Stolba’s report is available at <http://www.iwf.org/pdf/roomononesown.pdf>.

116. CAMUS, *Pessimism and Tyranny: Defense of Intelligence*, in RESISTANCE, REBELLION, AND DEATH, *supra* note 56, at 61, 64.

Then he tells of his perception of the consequences of following such a path when he says: “[T]hat is not the right kind of intelligence. We are speaking of . . . [intelligence] that is backed by courage, the kind that for four years paid whatever was necessary to have the right to respect. When that intelligence is snuffed out, the black night of dictatorship begins.”¹¹⁷

Dictatorship can take more than one form. The result of the climate of intolerance in law schools and universities is that ideas are hidden and discourse is often one-sided in teaching and scholarship. Many scholars are, by nature, easily intimidated. When other scholars express their rage and bitterness it creates an academic climate that represses intellectual difference. As a result of the rage, fear, self-interest, and quest to defend and attain power and opportunity, we are in a period when real discourse is virtually absent.¹¹⁸ This situation may be beyond the point of no return because the faculties of law schools and universities have been successful in adopting hiring practices that have selected people who “collegially” share their political values.

At this point the real problem may not be chilling of faculty discourse because nearly all faculty members share the same agendas and beliefs. On a faculty of forty-three tenure track members, my law school has one token conservative, a small number of middle-of-the-roaders, and somewhere between thirty-five and thirty-eight faculty of the Liberal/Left persuasion. It is no longer a chilling of discourse when nearly all scholars want to take the same positions, say the same things, and advance the same strategic agendas. Nor is this an atypical situation in many law schools. The irony is that although law faculty might be clones when it comes to their controlling values, there is a greater divide in values and politics between faculty and students.

Much of my life has been spent as an activist working on social reform causes through civil rights, poverty law, criminal defense, and human rights. It should be obvious that I am not opposed to the agendas being advanced by the political collectives. Nor is the struggle for social, political and economic rights, and equality over.¹¹⁹ But there is an atmosphere breathed by modern

117. *Id.*

118. See Mac Donald, *Law School Humbug*, *supra* note 15, at 56.

The speech code movement in academia owes its theoretical scaffolding to the critical race scholars. From its onset, critical race theory has singled out the First Amendment for particular scorn: free speech, the theory argues, is nothing more than a tool of the powerful to oppress the weak. The marketplace of ideas will never correct racist views, the theorists claim, because racism silences its victims. Therefore, censorship is needed. “We should not let a spurious motto that speech be ‘everywhere free’ stand in the way of outlawing speech that is demonstrably harmful,” argue Richard Delgado and Jean Stefancic of the Colorado Law School. “Overextending [the First Amendment] provokes the anger of oppressed groups.”

Id.

119. See, e.g., Polly Toynbee, *Women Have No Choice Now but to Halt This Backlash*, THE GUARDIAN (London and Manchester), July 14, 2004, at 20.

academics—particularly in the *noncumulative* disciplines—that believes that anything said by an identifiable member of a group that had previously been a target of discrimination is automatically true. Someone who is not a full-fledged member of the particular group can question the proffered “truths” only at great peril. This claim to ownership of some form of occult “identity” knowledge is a denial of the entire project of mutual understanding on which both the university and Western culture are grounded.¹²⁰ It represents a seizure of the power to trump and preempt others’ commentary and to control their willingness to offer valid interpretations of experience. Taken to extremes, it represents a claim of difference operating on a level that asserts we are alien to each other to such a degree we are unable to understand others outside our specific identity characteristics. If true, we are locked hopelessly inside sealed frames of reference.¹²¹

Wearily, I am dusting down some old files long relegated to ancient history. Can it really be that the case for some basic women’s rights has to be made all over again? On abortion, on nurseries and the right to combine work and motherhood, backlash is in the air—some of it from surprising quarters. So old battles need to be fought again, arguments re-made from first principles.

Some of this was territory only grudgingly won at the time: old enemies have lurked in the bushes ever since. On abortion, the Catholics and the pro-lifers never went away and now they are joined by evangelicals and Muslims. The far left that once supported women’s rights and gay rights now flirts with Muslim fundamentalists instead.

Id. Toynbee’s fear is reflected in a proposal authored by David Steel to reduce the timing within which an abortion can be sought in the UK. See Nicholas Watt, *Steel Calls for Abortion Limit to Be Cut*, THE GUARDIAN, July 5, 2004, at 5. This was considered vital because Steel introduced Britain’s abortion laws, and now argues that the time period be changed from 24 to 12 weeks since medical capabilities now can save premature babies as young as 22 weeks. *Id.*

120. See Fonte, *supra* note 14, at 49.

The challenge to the “liberal” half of liberal democracy—individual rights, equality of individual citizenship, freedom of expression, and a private sphere free from political interference—is more explicit and direct than the challenge to popular sovereignty and majority rule. Not only do important segments of the Western elite in education, government, and law question the traditional principles of liberalism; they essentially advocate an alternative world view: cultural democracy.

Id.

121. See Stevenson, *supra* note 35, at 50.

Harvey Silverglate sums up his take on free speech in a single sentence, spoken in the cozy clutter of his Atlantic Avenue office. “You are not immune,” he says, “from being called an asshole.”

Colorfully put. In many ways, though, it’s the very basis of the First Amendment: You may disagree with what I’m saying, but you may not silence my voice. Even when I’m calling you a bad name; even if what I say is not “politically correct.” This is a bedrock constitutional principle, yet lately one local college in particular—let’s call it Harvard—seems to have forgotten all about it.

Id.

Although it can be overstated, a useful parallel for understanding the nature of our polarization might be found in the distinction between the work of Sigmund Freud and that of Abraham Maslow. It almost seems that Edvard Munch's disturbing painting, *The Scream*, captures the essence of humanity given us by Freud. In Freud, we see a system by which the human is understood according to a database interpreted through the neuroses of Austrian housewives. As powerful as Freudian psychology and its intellectual metaphor have been for Western society, the portrait of the human Freud paints is only partial and is focused on the culture of the troubled rather than the healthy. The result is a skewed, partial, and misleading portrayal of the nature of being human with an almost total emphasis on our negative characteristics.

Maslow alternatively sought to describe the essential characteristics of the healthy human in society rather than the neurotic.¹²² This positive perspective is radically different in its quality and guidance as we seek to understand the conditions that nurture emotional well-being in persons, relationships, and community. Rather than focusing on that which tears us apart and creates fragments of divided and conflicting community, Maslow describes factors that have the ability to draw us together in a dynamically positive culture.¹²³ Of course neither vision is complete in itself. The integrated picture must join the Freudian and Maslovian perspectives because we are complex mixtures of demon and saint.

The connection I am making is that the political collectives of gender, race/ethnicity, and sexual identity are locked into a "Freudian" state. This too often involves bitterness, condemnation, and intolerance—with the focus almost exclusively on the negative. We have yet to identify a psychology of healthy characteristics in those areas of protest and criticism involving gender, race, ethnicity, sexuality, and class because we are still feeding off rage, bitterness, and insecurity as a consequence of both real and perceived discriminatory behavior.

The tragic aspect of the strategies of political collectives is that they depend on demonizing opponents. It is characteristic of such "rage-based" work that the rejection, vilification, and demonization of the "other" (most often the white male power structure that appears to be considered the source of all evil in the world) are at the core of the critique. This reinforces a collective's own sense of solidarity, and isolates and intimidates those who might offer a different perspective. Once this is accomplished, the isolated constituency that has been blamed for the behavior of its historical antecedents offers an easily identifiable target. The strategy offers a useful way to organize a collective's constituents who are eager to assign blame and accountability

122. ABRAHAM H. MASLOW, TOWARD A PSYCHOLOGY OF BEING 5 (1968).

123. *Id.* at 5.

and who are willing to engage in unfair and unbalanced accusations and condemnation. In a “culture war” anything goes.

This problem emerges in any system that delegates the authority to predetermine the conditions of allowable discourse to any self-interested group. The result of such a delegation is intellectually circular and destructive. Careless, vindictive, and strategic indictments of speech as sexist, racist, or homophobic, or the freshly minted *Islamophobic*,¹²⁴ have become far too commonplace. These terms are gross and oversimplified accusations. But they are very effective means to consolidate a collective movement’s political power through attack and intimidation.

The terms are political propaganda rather than insight—except to the extent they allow insight into the motives, politics, anti-intellectualism, and even ignorance of the users. They are strategies aimed at seizing the “high ground” of principle. Unfortunately, one of their real (and intended) effects is to shift power and the burden of proof from the attacker to the persons being attacked. This forces the target to try to prove a negative, i.e., “No, I’m not a bigot, racist, sexist, homophobe, Islamophobe” and so forth. Even if those labels are not available, a disfavored individual can be undermined by the use of terms such as being “insensitive.” Thus, while Lawrence Summers was never accused of being a racist during the debacle with Cornel West, he was accused of insulting his “dignity.”¹²⁵ For example, a *phobia* is part of a dialectical opposition. If there is a “phobia” there must be a state of “normalcy” against which that phobia is evaluated and compared. But consider the various “phobias” or similarly weighted terms that have made their way into our political life. For each condition ask who is it that decides the standards and whose interests are served by possessing that power? Once we are past the margins where extreme bias exists, who determines what behavior or statements indicate “Islamophobia” or “homophobia”? Past the obvious margins, who decides when someone is acting in a “sexist” or “racist” way? There are reasonable ways to inhibit or sanction that behavior at the margins without shutting off the richness of social discourse on critical issues.¹²⁶

124. Polly Toynbee, *Get Off Your Knees: Afraid of Being Labelled Islamophobic, the Left Has Fallen into an Embarrassed Silence on Religion. We Must Speak Up*, THE GUARDIAN (London and Manchester), June 11, 2004, at 25.

125. For an excellent and fair analysis of the controversy, see John H. McWhorter, *The Mau-Mauing at Harvard*, CITY J., Spring 2002, at 67.

126. The process of formal intimidation is far along in Europe. Use of controls and inhibitions on speech is a main part of the strategy, and is reaching frightening levels in Western societies. France, oddly enough, seems to be at the forefront. Consider, for example, the recent criminalization of “insults” proposed by the French Cabinet for legislative approval. A report in THE GUARDIAN relates:

Each slogan and label—regardless of the user’s political orientation—is a preemption of discourse. It is an effort to acquire power or protect an existing power base rather than an attempt to make an intellectual contribution. To the extent we in the university give credence to such labels, we offend the intellectual spirit of our tradition. This exchanges our culture of the aspiration to truth—however flawed and limited our methods—for service to the culture of power and politics. No one can stop the choices from being made, but at least we can be honest about what is occurring. Our responsibility is to condemn the use of cant and diatribe as a substitute for honest inquiry and intellectual challenge.¹²⁷

My point is not that there aren’t really bad and offensive behaviors in each of the categories mentioned above. It is that there are subjective, political, and even selfish motivations behind allocating the power to determine the meaning of a hateful term. Such accusations should be applied only to specific and egregious behavior rather than in loose and *in terrorem* ways.¹²⁸ I believe that

The French cabinet yesterday gave its backing to a bill authorising penalties of up to a year in jail for anyone found guilty of making an anti-gay or sexist remark.

“This law puts the fight against homophobia and sexism on the same footing, legally speaking, as the fight against racism and anti-semitism,” said the justice minister, Dominique Perben.

.....

Proffering an anti-gay insult in public—including any remark “of a more general nature tending to denigrate homosexuals as a whole”—could fetch a fine of euro 22,500 and six months’ jail.

Jon Henley, *Jail Sentence for Sexist Insults Under New French Law*, THE GUARDIAN (London and Manchester), June 24, 2004, at 14.

127. On the importance of fighting back against irresponsible or politically strategic use of the “phobia” strategy, see Toynbee, *supra* note 124:

Those who are as anti-Christian as they are anti-Islamic can oppose state promotion of any religion without discrimination. Equally repelled by Christianity and its atrocities, they can challenge Islamic beliefs with an unembarrassed even-handedness.

But the rise of the concept of Islamophobia has struck too many dumb. They no longer express anti-religious views for fear of being Islamophobic. So, apart from protests by the doughty scions of the National Secular Society and their British Humanist Association allies, the left has fallen into an embarrassed silence on the subject of religion, just as it needs to speak up.

Id. The irony, of course, is that Toynbee is urging the Left to fight back against a conservative Islam that threatens the dominance of Leftist programs. Her column earned an intense response in which (unsurprisingly) she was called an Islamophobe. See Press Release, Islamic Human Rights Commission, *Winners of Islamophobia Awards 2004 Announced* (June 26, 2004), www.ihr.org (search site for “Islamophobia Awards 2004”) (naming Polly Toynbee as the recipient of the spoof award “Most Islamophobic Media Personality”).

128. One form of using *in terrorem* strategies is open-ended “crimes against the state” laws such as those that served the Chekists (the Soviet secret police) well in the Soviet Union. See GEORGE LEGGETT, *THE CHEKA: LENIN’S POLITICAL POLICE* 31 (1981). Due process on which the Rule of Law is grounded requires clarity and notice of what kinds of actions will bring down

the experiences of previously subordinated groups and individuals must inform the meaning and scope of these terms, but they must never be considered as being exclusively “owned” by anyone.

When specific accusations can’t be easily advanced the fall-back position is that even if someone can’t point to specific people or specific bad acts, there is systemic, institutional, or pervasive discrimination emanating as some kind of dark force from a faceless system that discriminates against (fill in the blanks) because it (continue filling in the blanks). Patai raises this point:

Extending an already bad, absurdly elastic idea—that harassment consists of creating a hostile environment for various groups—some feminists have come up with the new category of “antifeminist intellectual harassment.” That is typically defined in such sweeping terms that . . . [it would include] any criticism of feminist ideas or of the women who espouse them.¹²⁹

Obviously my position is that granting a self-interested group the power to label anything said by another as harassment is an unwise delegation of authority. Such a transfer of authority, whether overtly through codes or covertly by not requiring those who make such accusations to provide specific proof and justifications, makes it inevitable that there will be a dearth of fully honest discourse. This is so for several reasons—few of them intellectual. Honesty has little to do with politics and much of what is being offered by the political collectives now housed in academia is political speech. By definition such speech contains strong elements of advocacy and propaganda.

Of great importance is the fact that fully honest discourse will make people “uncomfortable,” and this is at odds with some activist scholars’ preferences.

the power of the State against a citizen. Coupled with the bright line of the assumption in favor of a citizen’s right to relatively unrestricted free speech, this establishes a foundation for critical discourse. Europe is ahead of America in moving toward *in terrorem* restriction on social discourse and away from free speech and clear notice. Consider the charge levied against former film star Brigitte Bardot based on comments made in a book she wrote:

Brigitte Bardot, the film star turned animal-rights activist, broke down in tears when she left a Paris courtroom yesterday after testifying at her latest trial on charges of inciting racial hatred.

Bardot, 69, previously convicted of similar offences, is on trial over her book *A Scream in the Silence*, which attacks gays, immigrants and the jobless.

. . . .
 . . . She also condemns the presence of women in government and denounces the “scandal of unemployment benefit.”

. . . She also criticized the “Islamisation of France”—which has five million Muslims—and the “underground and dangerous infiltration of Islam.”

. . . .
 . . . Four months earlier, she was fined for saying France was being overrun by “sheep-slaughtering Muslims.”

Tears as Bardot Denies Race Charge, supra note 62, at 17.

129. Patai, *supra* note 53, at B8.

The feeling of discomfort has several variations, however, and each has different implications. The university is a place of free and honest interaction, but there must be some limits to this principle of complete freedom. One limitation is speech delivered with malice that is intended to wound rather than discuss. In America many forms of speech are protected by the First Amendment. But in the university, speech that is deliberately malicious and hurtful may be outside the limits.¹³⁰ I consider careless or strategic use of accusations of the various “phobias” without being able to produce specific and substantial evidence to be malicious and hurtful behavior that should be open to sanction.

If so, the presumption is that speech is allowed, and a bright line drawn that sets up a broad zone of tolerated speech in teaching, scholarship, and open communication. We do not have the right not to be made uncomfortable by others’ speech. In a democracy, limitations on honest speech are dangerous to the system itself.¹³¹ Understanding that this position against both explicit and implicit limitations on non-maliciously intended honest speech interferes with its power to trump, condemn, and intimidate others’ discourse is a main reason that curtailing others’ right to free speech is at the heart of the postmodernist movement.

The aim and the result is that we have constructed a system of intellectual repression inside the university that intimidates and chills discourse. We have done this through a mixture of formal and informal rules and sanctions that punishes transgressors and creates a culture that mutes independent thought and expression. Allowing this system to take hold has conferred on the members of political collectives the power to control others’ speech to the degree that society has become increasingly fragmented and polarized.

130. Suber, *supra* note 13, represents a balanced attempt to describe the conflict.

The more thoughtful conservative critics do not object to the domination of leftist thinking per se; they object to rigging this domination through the stigmatization and abuse, if not formal punishment, of students and faculty who take the unpopular side of any of these controversies, vitiating the freedom of discussion.

Id. at 23.

131. James Madison recognized the need to balance competing interests in his analysis of factious groups. He sets out the idea of faction in the following words: “By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” THE FEDERALIST NO. 10, at 43 (James Madison) (Bantam Books 1982). Locke and others have also described the important role of the legal system as umpire. See JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 68 (J.W. Gough ed., Basil Blackwell & Mott 1946); see also A. JOHN SIMMONS, ON THE EDGE OF ANARCHY: LOCKE, CONSENT, AND THE LIMITS OF SOCIETY (1993).

Scholars have been silenced or forced to join political collectives in order to protect themselves.¹³²

Nor do members of the academic collectives feel themselves constrained by rules of reciprocity, fairness, and balance. The intimidation is intended to be one-sided. In making this point Daphne Patai reports that

[Harvey] Silverglate . . . rejected the arguments of critical race theorists [made at an AAUP conference] that offensive speech uttered by historically oppressed minorities should be protected, while comparable speech by their supposed oppressors can [properly] be suppressed. Academic freedom, he warned, cannot continue to exist with such a double standard.¹³³

Patai observes that this position was not broadly shared, concluding that “the prevailing view was that curtailing free speech is acceptable if the objective is to make women and members of minority groups ‘comfortable’ in the university.”¹³⁴

While one result of such independence is that some have attempted to isolate Patai from the academic mainstream by accusing her of being a “Conservative” or anti-feminist, the deliberate chilling of academic discourse in scholarship and teaching is very real. Consider the words of the late feminist scholar Mary Joe Frug. She wrote in the *Harvard Law Review*, “The liberal equality doctrine is often understood as an engine of liberation with respect to sex-specific rules. This imagery suggests the repressive function of law, a function that feminists have inventively sought to appropriate and exploit through critical scholarship, litigation, and legislative campaigns.”¹³⁵ She went on to say that an example of the success of such strategies is found in the expansion of sexual harassment doctrine.¹³⁶

It is through the form of harassment doctrines, hostile workplace claims, and speech codes that the chilling of discourse has gained momentum. It has infiltrated the culture of the academic world after being “appropriated and

132. Suber, *supra* note 13, at 23–24, explains some of the problem:

Because liberalism includes a commitment to the freedom of vigorous, even offensive discussion, the left wing should not be called “liberal” here. For the same reason, the proper name for what conservatives are demanding is “liberalism.” These routine controversies have jumbled the customary political alliances. But popular opinion has not caught up with the nuances of this inverted world. The hegemony of leftist opinion on campus has made it difficult for liberal students and faculty to join conservatives in the call for more liberalism. The hegemony of rightist opinion off campus, similarly, has made it hard for conservative columnists and politicians to join the left in revising the curriculum and amending campus regulations. These pressures therefore increase polarization.

133. Patai, *supra* note 53, at B8.

134. *Id.*

135. Frug, *supra* note 75, at 1046 (emphasis added).

136. *Id.* For a not-very-flattering critique of postmodern scholarship, see Dennis W. Arrow, *Spaceball (Or, Not Everything That’s Left is Postmodern)*, 54 VAND. L. REV. 2381 (2001).

exploited” through a deliberate strategy of scholarship, litigation, and legislation. Law schools and universities are just another set of institutions that can be made to conform to the desired vision. This is achieved through the shaping of scholarship, teaching, and speech in ways that suppress an opponent’s views, and advances those of a collective. One can argue, with bare irony, that an intended result of this conscious strategy is the creation of a “hostile environment” for speakers who might wish to engage in forms of speech that offend or challenge the agendas or preferred cultural characteristics of a political collective.

Such a deliberate chilling of discourse is offensive when overt, but in that mode at least can be confronted directly. It is far more pervasive and insidious when the repression becomes a tacit part of the overall academic culture. In such a culture the inhibitions are either unstated or converted into superficially positive “principles” such as that of the virtue of “collegiality” that has come to permeate the atmosphere of my institution. I don’t want “collegiality”; I want intellectual challenge and discussion.

Courtesy is certainly desirable, and a lack of basic civility is not my preference or aim. But *collegiality* has become a code word for hiring and promotion practices that really means hiring and promoting people who “get along,” “don’t offend,” “fit in,” “don’t make the wrong people feel bad through criticism,” and similar *virtues*. These are at odds with a dynamic intellectual culture dedicated to the free exchange of ideas and debates over fundamental issues and values. While collegiality is a seemingly positive term, it is actually an open-ended and slippery preference that allows a wide range of discretionary judgments. One effect of its elevation into a virtue is that it conceals the ability to discriminate. Making a judgmental term such as collegiality a basis for hiring and promotion decisions not only creates the incentive to be pleasant and unchallenging, but also allows members of political collectives to “clone” themselves in the same way the cliques they replaced did when they hired “people like us, with the *proper* backgrounds.”

VIII. CHILLING THROUGH THE CLAIM OF EXCLUSIVE “IDENTITY”

The new collective movements are intensely political. They use language and intellectual concepts as weapons to attack and to pursue political agendas, not for constructing a system of understanding. Part of the strategy of the political collectives has involved the development of an extreme fixation on a pathological form of “identity.” Let me return to the story of “Eddie’s Ultimatum” mentioned earlier. I recently had dinner with twelve people from my high school class who were coming together for a visit from a classmate most of us hadn’t seen for more than thirty years. One person reported that she had been in touch for years with a classmate, Eddie, who had moved to San Francisco after graduation and “come out.” We all knew this, and it had nothing to do with how we felt about Eddie, which was uniformly positive.

The problem was that Eddie had recently sent an e-mail in which he said he refused to be friends or communicate again with anyone who didn't completely accept and support gay marriage.¹³⁷

Those of us who were present didn't know exactly how to work this through. Eddie's ultimatum was one in which he felt so strongly about his position and this aspect of his identity that all other relationships were subordinated or subservient to his political agenda, even to the point of termination. To paraphrase George W. Bush, you were either "with him or against him." There was no openness to discourse, no reasonable middle ground, and no room for even long-time friends to discuss, be persuaded, compromise, or "agree to disagree."

The reason I raise this as an example is that it has increasingly struck me that the non-negotiable, non-discussable attitudes Eddie holds have become part of the culture of law schools and universities and this politicized intensity is both shaping and suppressing discourse. Who would choose to confront someone who feels so strongly about a matter? Why voluntarily walk into a buzz saw? If you happen to be a young or conservative scholar (neither of which fit me), how would your awareness of such political and moral positions on the part of organized groups of faculty members affect how you wrote, taught, and spoke? Such preemptive "takeouts" have an enormous potential to stifle honest discourse. I pray we haven't gone that far on fundamental issues afflicting America, but I suspect strongly that we have. The only solution is for us to become "intolerant of intolerance" in all its forms and from whatever direction it comes.

At the heart of the problem is that organization along the fault lines of gender, religion, race, ethnic group, or sexuality has fractured us by making us define our essential *selves* first as white, black, Native American, Hispanic, male, female, gay, lesbian, heterosexual, Catholic, Jew, Muslim, Asian, Liberal, Conservative, Marxist, Libertarian, and so on *ad infinitum*—rather than as people. This pathology of special interest tribal or clan identity is an essential piece of political strategy and necessary for the acquisition of group power, but it is profoundly dehumanizing and results in polarization and division.¹³⁸

This new form of what has been called *cultural democracy* rejects the more individualistic rights-based values of *liberal democracy*.¹³⁹ It seeks to

137. The assault on the nature of marriage is nothing new. Joseph Schumpeter criticized the institution of marriage seventy years ago in his classic work *Capitalism, Socialism and Democracy*. See JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 156–63 (3d ed., Harper & Row 1950) (1942).

138. See STRAUSS & HOWE, *supra* note 19, at 201–04 (describing the spiral of personal alienation caused by the proliferation of "niche groups").

139. See Fonte, *supra* note 14, at 49–52 (comparing the "different ends" and "different means" of individualistic *liberal democracy* versus more collective *cultural democracy*).

legitimate a splintered system based on racial, ethnic, gender, and other characteristics while rejecting the historical validity of the American political system and culture.¹⁴⁰ At this point I must confess allegiance to a value system that will not allow me to accept the tenets of such collectivism and extreme identity allegiances. I have spent my life believing in the common bonds between humans of all races, creeds, beliefs, and the like. I understand the utility of concerted political action and the creation of negotiation leverage of the kind that characterizes the political collectives. This is tactical and strategic thinking that we all know is required in a difficult world in order to achieve your goals.

My problem lies in the belief that when such strategic and tactical thought and action become confused with other ideals, such as those of honesty, equity, integrity, the duty to treat each person as a person rather than an object, and the importance of the search for truth through inquiry and shared discourse, we end up with the destructive, polarized, and corrupted system that now exists. Even knowing the tactical implications of how knowledge can be used for political advantage, I refuse to accept as valid the explicit and implicit corruption of the ideals of truth-seeking, evidence, method, and honesty.

I also refuse to accept the denial of honest discourse. Of course criticisms about our shortcomings are fair and necessary because human institutions *always* fall short of the ideal. But that is a reason to work to close the gap between “is” and “ought,” rather than to discard the most vital values tying us together through space, time, and culture. There are important questions to be dealt with about the nature and functions of truth and intellectual honesty, including the relative and political nature of the process of inquiry and the quality of the results. But the ideals of truth and honesty are far too vital to be discarded because consequences result from that rejection.¹⁴¹

Rejecting the ideals of truth, truth-seeking, and honest communication leaves us in a sort of parallel universe or Hobbesian state of nature. Reason, truth, and fairness become subjugated to political desires and the agendas of interest groups covering the entire social and political spectrum.¹⁴² In such a universe, power and position are the goals, and privilege the currency by which

140. In contrasting the difference between cultural and liberal democracy, Fonte argues: “Toffler favors a ‘mosaic democracy’ throughout the Western world that would ‘postmodernize the entire system’ and ‘strengthen the role of diverse minorities.’ He recommends measures similar to those advocated by Lani Guinier, such as weighted voting on issues of special importance to ethnic minorities.” *Id.* at 49.

141. We have two institutions supposedly dedicated to truth. These are the university and our free press. Each suffers from an extreme “truth deficit.” For journalists, the point was made recently in an article by Geoff Mulgan. Geoff Mulgan, *The Media’s Lies Poison Our System: The Ethic of Searching for Truth Has Gone; Now There Is Just Cynicism*, THE GUARDIAN (London and Manchester), May 7, 2004, at 24.

142. See generally Fonte, *supra* note 14.

“integrity” is bought. Truth becomes an inconvenience and, as admitted by Al Pacino in his role as Satan in the movie *Devil’s Advocate*, everything is open to negotiation.¹⁴³

IX. CHALLENGING AN IDENTITY GROUP’S CLAIM TO EXCLUSIVE KNOWLEDGE

Collectivist identity is typically based on the disturbing claim that someone must be “of” a particular background to understand the concerns or to make any valid statement regarding others of that background. This is understandable as a political ploy to try to tie members of a group together. It helps to create a space or “turf” that a group stakes out for its own.¹⁴⁴ But (and I suppose this might provoke some negative reactions) from the standpoint of truth, intellectual honesty, and social health, such claims are cynically sexist, racist, bigoted, and absurd. They are power plays, not insightful analyses. They divide and separate, not build.

They divide and separate as natural consequences of interest group solidarity. Robert Dahl describes how organizational behavior not only defines us but limits our intellectual focus. He emphasizes: “Organizations . . . are not mere relay stations that receive and send signals from their members about their interests. Organizations amplify the signals and generate new ones. Often they sharpen particularistic demands at the expense of broader needs, and short-run against long-run needs.”¹⁴⁵ It is typical for such organizations and their key members to behave strategically. Dahl suggests that one of the ways they do this is that organizational leaders “*play down potential cleavages and conflicts among their own members and exaggerate the salience of conflicts with outsiders.*”¹⁴⁶ He adds that a political collective acts to “strengthen both solidarity and division, cohesion and conflict; they reinforce

143. JULES HENRY, *CULTURE AGAINST MAN* 50 (1965); JONATHAN LEMKIN & TONY GILROY, *THE DEVIL’S ADVOCATE* 138 (1997) (screenplay based on the novel by Andrew Neiderman), available at http://www.dailyscript.com/scripts/devils_advocate.pdf.

144. Mac Donald, *supra* note 15, at 59, offers the view that

[r]ace and gender studies take legal training further away from that analytic ideal than any previous critical theory. The Critics were at least interested in doctrine; many were excellent teachers. But the proper response to the oppression stories favored by race and feminist theory is not analysis but empathy. Indeed, warn Daniel Farber and Suzanna Sherry of the University of Minnesota Law School, “some advocates of storytelling come close to suggesting that silence is the only permissible response to stories. Whites who sympathetically attempt to analyze or even recount stories told by people of color are said to be guilty of misappropriating the storyteller’s pain.” This antagonism to critical thought is antithetical to everything law school once stood for. It is particularly ironic in theorists who denounce the “silencing” of “voices.”

145. ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL* 44 (1982).

146. *Id.* (emphasis added).

solidarity among members and conflicts with nonmembers.”¹⁴⁷ Part of this process involves condemnation of those who might undermine the power of the group.

The solidarity and divisiveness of which Dahl speaks may be exacerbated in the context of the feminist movement. This includes the extent to which we accord substance to some of the more extreme feminist statements about the characteristics that tend to be found in women versus men and that make women “better” than men.¹⁴⁸ By seeking to elevate a characteristic seen as an empowering claim to a unique faculty that “proves” their special identity, such assertions carve out a separate niche into which only those possessing the naturally occurring attributes are allowed. They also explain the willingness to repress and chill the work of others who are seen as outsiders to the movement or who might betray the movement by offering a different interpretation of a foundational assertion. Differences construct a special fiefdom for those who fit within the specific quality. But they exclude from the identity collective all those who do not possess the intrinsic characteristic. The claim to difference is not only a search for identity. It is also a quest for power.

Women, we are told, instinctively tend to work together more than men and tend to have greater empathic abilities than male counterparts.¹⁴⁹ They are said to be less competitive and more oriented toward community.¹⁵⁰ The problem is that such claims can actually be dangerous in several dimensions. Let us do a little thought exercise and consider how the claimed “differences”

147. *Id.*

148. *E.g.*, HELEN FISHER, *THE FIRST SEX: THE NATURAL TALENTS OF WOMEN AND HOW THEY ARE CHANGING THE WORLD* 4 (1999) (“What are women’s natural talents? How will women change the world? I begin with how women think.”).

149. *See id.* at xvii. This perspective raises other issues, including the accountability for individual research to the point of being able to understand the quality of each scholar’s performance and contribution. Fonow and Cook report that

[researchers] found that being female and writing about gender increased the propensity to publish joint-authored rather than solo-authored work. They also found that coauthorship is least common in high-status mainstream national sociology journals, suggesting that feminists who prefer collaboration may in fact be at a disadvantage when the rewards of the academy are meted out.

Fonow & Cook, *supra* note 30, at 5.

150. FISHER, *supra* note 148, at 4, argues:

I believe there are subtle differences in the ways that men and women, on average, organize their thoughts—variations that appear to stem from differences in brain structure Feminine thinking is even affecting our basic beliefs about justice, health, charity, leisure, intimacy, romance, and family [W]omen, on average, take a broader perspective than men do—on any issue. Women think contextually, holistically. They also display more mental flexibility, apply more intuitive and imaginative judgments, and have a greater tendency to plan long term—other aspects of their contextual perspective [W]omen’s broad, contextual, holistic way of seeing will pervade every aspect of twenty-first-century economic and social life.

might be interpreted in a different light. When these “different tendencies” are turned around and looked at neutrally rather than as virtues, then if the assertions are true as a general proposition (and this is not obvious) it can be expected that women will behave differently as scholars than will men. This seems a simple and innocuous proposition, at least until we begin asking what this “fact” might portend.

For “difference” to have any meaning it presumably must involve distinctive values, preferences, and behaviors. If we accept Helen Fisher’s conclusions, women’s tendency to work more collaboratively and with greater empathic awareness could mean that women are less likely to criticize each other as aggressively as men. The qualities of collaboration, empathy, reduced competitiveness, and community orientation could mean that women feel more comfortable operating as part of a collective movement. In that mode it is not irrational to wonder if women are less likely to be willing to create conflict with their peers.

The question is what are the implications of these alleged differences? If honest critique of other scholars’ positions is an essential element of a scholarly community, are members of a particular collective made up of women sharing these characteristics that differentiate them from men able (or more probably, willing) to properly evaluate the work of others who are operating from within that feminist identity collective? The concern would be whether there is a veiled “pulling of the punches” that allows work to be approved or even praised when it does not actually deserve the approbation. My point is not that assertions about male/female differences are valid or invalid but that we should take claims about women’s or men’s natural qualities with a grain of salt regardless of who utters the proclamation. Such claims can have unintended consequences that are quite unpleasant.

Think about it. Does anyone really think that because I am a white male (and I refuse to actually think of myself in such simplistic and limiting terms) that I have either the right or some sort of special knowledge that privileges me against all others who are not white males to say anything of consequence relative to my purported identity? If the multicultural, radical feminist and critical race theory advocates actually think that only people defined by a particular characteristic that they have elevated into a sacrament have some form of secret occult knowledge allowing them and no others to validly comment on matters related to the nature or interests of that characteristic, then I would be forced to conclude that they have no business intruding on *my* space and talking about the deep *inner meaning* of how white men have behaved for millennia, including motivations, agendas, and intentions. This absurd argument would be (and I am not making it) that anyone who is not a white male has an entirely deficient understanding of *white maleness* and all it involves in the same way that they would claim I can not meaningfully offer insight into matters involving gender, race, ethnicity, or other “defining”

characteristics. I obviously feel that those who make such claims, whether they are explicit or implicit, are wrong and engaging in the political or philosophical equivalent of “junk science.” I also suggest they are either disingenuous or are displaying a limited ability to either understand human nature or to appreciate humans’ intellectual and empathic ability to derive and generalize insights from experience.

I do not make that absurd claim of “ownership” nor do I feel a territorial need to fence others out from my presupposed (and happily non-existent) “fiefdom” of white male expertise. I do not know what “white maleness” means, nor do I ever want to define myself in that way. The same holds true for all those who seek to pronounce that they have a special insight into some state of being simply as a matter of their race, ethnicity, or gender and that others cannot validly enter that domain. Part of the absurdity of such positions is that we are all such complex mixtures of qualities that artificially isolating one general characteristic and making it the dominant standard and interpretive device simply cannot be done. Attempting to do so offends our humanity and complexity even if it empowers us politically—for the short-term.

X. IDENTITY EXCLUSIVITY AS A DESTRUCTIVE FORM OF REVERSE STEREOTYPING

We exist in a world where many have fought against the lamentable human tendency to stereotype people by category. Women, racial and ethnic minorities, and others who are involved in a struggle for fair treatment and equal opportunity have long been victims of illegitimate stereotyping. Yet the academic political collectives organized around gender, race and ethnicity, and sexual identity are engaged in self-stereotyping. They do this to gain political advantages.¹⁵¹ This creates a short-term advantage for purposes of political organization and solidarity, but has destructive effects when played out over time because it justifies the same behavior by others. It is also a false way of looking at humans in community.

My own background suggests why single characteristic identity stereotypes are fundamentally flawed and false. I have a blue-collar background somewhat atypical of the law professor and scholar. My grandfather worked for thirty-eight years in the steel mills of Youngstown, Ohio, and helped organize the United Steel Workers during the violent labor turmoil of the 1930s. He received a gold watch on retirement that sits in a glass case on the mantle in my uncle’s house. My father’s father died before he was born, and my father was an unloved stepchild who spent years laboring on his new family’s farm. In his diverse life, my father was a truck driver, a steel worker, a decorated Army Ranger, a Nazi hunter, an intimate of

151. See, e.g., David Davenport, *Few Universities Are Open to Conservative Views*, THE PLAIN DEALER (Cleveland), Apr. 12, 2002, at B11.

celebrities, and various other things. My mother graduated at the top of her high school class and then could have been a poster child for the modern women's movement. She worked as a secretary before marrying, having children, and spending her life as a housewife. She is the smartest and wisest person I know, and she would neither claim nor feel she wasted her life. My aunt worked in the defense industry in World War II building weapons until she lost her job when the soldiers came home. I was the second person in my extended family to go to college and the first to become a lawyer. I could offer numerous other factors representing the nature and diversity of my background, but the point I am making is that we are all collections of many different relationships and experiences. No single factor or characteristic defines who we are, what we know, and what insights we have to offer. If we choose to allow one characteristic to define who we are, then we do it for a reason and that is because it works to our advantage.

My point is that I do not claim to speak for white people and would be quite offended if someone suggested that he could do so or that I could. I also do not claim to speak for blue-collar union workers even though I was a member of the United Steel Workers. Nor can any feminists, Critical Race theorists, members of the gay and lesbian movement, Catholics or Protestants, etc. convincingly make the claim that they have been anointed and are the only ones able to offer final or even necessarily accurate insights into the conditions of people with the alleged specific characteristics. Such claims demean and trivialize the humanity of the complex people who share some common characteristic but possess many others that make up their multifaceted identity. They may offer important opinions based on their particular experience and knowledge, and that opinion may be accepted as valid. But they do not "own" the area of inquiry. Nor do I believe that they automatically hold the key to "mysteries" that others of a more objective perspective do not, or that they somehow are able to fairly and accurately understand and represent all the members of their "special group." In the words of Georg Brandes, that kind of thinking is best labeled "fugitive rubbish."¹⁵²

XI. CONCLUSION: THE IMPLICATIONS OF LAW SCHOOL (AND UNIVERSITY) "CAPTURE"

There is a fundamental tension between objectivity and subjectivity, and between narrow focus special interest activism and the search for truth.¹⁵³ The

152. GEORG BRANDES, *CREATIVE SPIRITS OF THE NINETEENTH CENTURY* 1 (R.B. Anderson trans., 1923).

153. See MICHAEL WALZER, *THE COMPANY OF CRITICS: SOCIAL CRITICISM AND POLITICAL COMMITMENT IN THE TWENTIETH CENTURY*, at x (1988) (reminding that "it does make a difference where the critic stands, inside the cave or out; and it makes a difference how he relates to the cave-dwellers").

Rule of Law in America is being damaged by the many interests relying on the control and inhibition of others' language to further their own agendas. A challenge to such control and a reemphasis of the importance of open discourse has been voiced by Daphne Patai in her challenge to the assertion that those who are from a subordinated class have the right to use offensive speech against other dominant groups, while members of those dominant groups must be condemned if they ever use a disfavored term.¹⁵⁴

Such behavior is understandable and inevitable in a system without a clear and compelling core of values and principles.¹⁵⁵ The situation is exacerbated in the case of postmodern and Leftist scholars who are also political activists. If such academics do not believe in the possibility of attaining any ultimate or absolute truth, and if truth is entirely relative and linked with and defined by those who control a culture and define power, then seeking to create the outcome you and other members of your identity group desire makes great sense.¹⁵⁶ Since there is no real possibility of a unified coherent social synthesis, political collectives on both the Left and Right—as well as those who have a single special interest agenda rather than an ideology—understand that they can succeed in implementing their agendas and defending their existing power base only if they control the reins of legal power. For those hooked on television's insipid "reality" shows, it really is the academic world's version of *Survivor*.

This behavior is at least made more legitimate by the unfortunate fact that even if there were serious attempts by an "honest" intellectual identity group to engage in truth-directed discourse, their opponents would use the truth they fairly expressed against them. But it would be taken out of context to serve the opponent's agenda.¹⁵⁷ This unfortunate reality in which neither side can trust

154. Patai, *supra* note 53, at B8.

155. Daniel Boorstin concluded:

The discovery, or even the belief that man could make his own laws, was burdensome. . . . [N]early every man knew in his own heart the vagueness of his own knowledge and the uncertainty of his own wisdom about his society. Scrupulous men were troubled to think that their society was governed by a wisdom no greater than their own.

DANIEL BOORSTIN, *THE DECLINE OF RADICALISM: REFLECTIONS ON AMERICA TODAY* 73 (1963).

156. Justice Rehnquist, dissenting in *Furman v. Georgia*, quoted from John Stuart Mill's *On Liberty*:

The disposition of mankind, whether as rulers or as fellow-citizens, to impose their own opinions and inclinations as a rule of conduct on others, is so energetically supported by some of the best and by some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power.

Furman v. Georgia, 408 U.S. 238, 467 (1972).

157. See, e.g., COSE, *supra* note 7, at xxvi; see also Bell, *supra* note 48, at 57. Derrick Bell criticizes the work of Randall Kennedy, see *supra* note 48, on the basis that opponents will act in

the other to “play fair” perpetuates the cycles of overblown rhetoric, absurd claims, and propaganda. While this behavior is common in general society, it undermines the central spirit of the university that is intended to serve the best of society over generations rather than succumb to the corruptions and heated pressures of a particular cultural moment.

The politics of society have invaded and overwhelmed the university to the extent the Ivory Tower no longer exists. The challenge is one of seeking to regain some balance and degree of honesty. If the university is entirely disconnected from society and unwilling to confront injustice, then it is hypocritical, cowardly, and ignorant. But if the university is captured by political movements and ideologies to the extent it loses its credibility and integrity, it becomes a legitimate target for those possessing different agendas. The core ideal that must be reestablished is that of truth-seeking and honest discourse. Otherwise law schools and their university hosts become politicized to the extent that their ability to contribute meaningfully is dissipated just at the moment society needs credible sources of active wisdom.

The struggle focuses to a great extent on language. In a Rule of Law system, control of language through law and other potent forms of opprobrium and sanction are sources of great leverage. George Lipsitz writes that Jacques Derrida’s *deconstruction* “challenged the very fiber of criticism and interpretation by revealing the metaphysical priority given to language within Western thought. This [traditional] ‘logocentrism’ presumes that careful naming can uncover fixed meanings about the world, but deconstruction’s interrogation of language reveals the provisional, contingent, and unstable nature of naming.”¹⁵⁸ Derrida’s argument, in a culture undergoing rapid and fundamental change while experiencing the emergence of intellectual activists operating as political *cadres* intent on achieving specific social agendas, offered a powerful weapon. It allowed widespread attacks on all social systems, values, and institutions. In a war of propaganda, ideas *are* weapons. They need to be honed and applied in service to your agenda and denied to the “enemy.”¹⁵⁹ The ideas of deconstruction, *difference*, and interpretive subjectivity have proved potent weapons in a verbal society grounded on the Rule of Law.

This is the point where law becomes the focus of attack and law schools a vital base of operation. Derrida’s position can be interpreted as one where

bad faith to use the words of a minority scholar against the interests of the minority movement. Unfortunately, Bell is correct in far too many ways, and we have not yet learned how to deal with the opposed dishonesties that result.

158. LIPSITZ, *supra* note 44, at 97.

159. The language used by each collective movement (and counter-movement) has been language of attack, protest, and opposition. It is language used as weapons to gain or defend power. On such themes, see generally MAX LERNER, *IDEAS ARE WEAPONS: THE HISTORY AND USES OF IDEAS* (1939). See also Mac Donald, *supra* note 97.

institutional power can appropriately be used to “legislate morality” in the effort to create a different kind of human and culture by redefining the terms of allowable discourse.¹⁶⁰ In words that echo Ruth Anshen’s conclusion that humans don’t just *use* language but *are* the language they use, this is political activism.¹⁶¹ In such a context it is fair and important to ask about the implications of a strategy to “design” a new version of humanity and social organization through application of linguistic “governors” that dictate awareness and reward or sanction behavior in an information- and language-based culture.

It is ironic that many who are using the language of postmodernism within the political collectives—and rejecting the possibility of truth while attacking others’ use of power—are themselves seeking to impose their versions of “truth” on the general social systems. They are unhesitatingly using the law to achieve that end. Although postmodernism and critical theory allegedly take such values as mutual discourse, tolerance, equality, and the like as central virtues, it has become clear that those values are intended to apply only in one direction.¹⁶² Of course, because the ideas emerged from a collage of European socialists and Marxist critics with allegiances to the Left who see themselves as involved in a class war against illegitimate power, the fact that ideas are used as strategic weapons rather than in a search for true understanding is not surprising. There are numerous examples of repression representing attempts to prevent free speech or to punish others who seek to say something a powerful, organized group doesn’t like. Although such behavior is not preventable in a free society, there should be growing concern about the extent to which we have lost the ability to tolerate others’ views. This intolerance is reflected in the fact that prevention of free speech and punishment of disliked speech is a strategy of Left, Right, and special interests in American society.

160. See *supra* and *infra* notes 158–62 and accompanying text.

161. RUTH NANDA ANSHEN, LANGUAGE: AN ENQUIRY INTO ITS MEANING AND FUNCTIONS 3 (1957) (concluding: “[M]an is that being on earth who does not have language. Man is language.”).

162. This is because the movements are tactical, not intellectual. The process was never intended to be a two-way street. This is entirely consistent with Hoffer’s description of the need for political causes to weaken and supplant dominant systems. HOFFER, *supra* note 60, at 66–67. Diggins suggests:

[The Left] has become excessively intellectual and academic and hooked on European “postmodern” theories that have more to do with domination than with liberation. Earlier in the century the Left fought power with ideas provided by knowledge; today knowledge is suspect in its claims to efficacy and objectivity, and ideas are simply “discourses” about this or that. A Left without power is familiar and perhaps a defining characteristic of its historical predicament; a Left without knowledge loses its excuse for being.

DIGGINS, *supra* note 12, at 16.

The “suppressionists” are coming from all directions. The Right punishes the Dixie Chicks and Linda Ronstadt for speaking out against the Iraq War.¹⁶³ The Left and the American Jewish community go berserk over Mel Gibson’s movie, *The Passion of the Christ*, portraying the final hours leading up to the death of Christ.¹⁶⁴ Never having seen the film but being inflamed by leaders’ opinions, Jewish groups protested vehemently that it would stir up bitterness against Jews and should be boycotted. Because he was a person with deep Roman Catholic faith, Gibson was denounced as a religious fanatic.¹⁶⁵ Hollywood heavyweights announced that they would never again work with Gibson.¹⁶⁶ The speech “sanction and suppression” movement that has emerged in America goes on. The Masters Golf tournament lost corporate sponsors (at least for a few years) because the Augusta Country Club does not admit women as members.¹⁶⁷ Cincinnati lost convention business because it passed an ordinance some considered anti-gay.¹⁶⁸ Philadelphia gained convention business because it announced it was pro-gay.¹⁶⁹ Ours has become a culture whose intelligentsia and leaders are driven by a value of “don’t offend anyone.” This extends to the national media. CBS, for example, caved into a coordinated protest effort by supporters of Ronald Reagan about what they considered to be a negative (or not sufficiently adulatory) content and tone in parts of a portrayal of the Reagan Presidency.¹⁷⁰

163. John Soeder, *Artist Activism Talk Tackles Prickly Anti-war Minefield*, THE PLAIN DEALER (Cleveland), Mar. 17, 2003, at C1.

164. See David Briggs, *Passion Movie Raises Religious Fervor, Fears; Some Say Film Builds Faith; Others Warn of Bias*, THE PLAIN DEALER (Cleveland), Feb. 7, 2004, at A1.

165. See *id.* This kind of portrayal of deep religious faith as inherently suspect is an unfortunate facet of the thinking that has come in under the rubric of secular humanism. See Stephen Carter’s conclusion that there is

a common rhetoric that refuses to accept the notion that rational, public-spirited people can take religion seriously. . . . More and more, our culture seems to take the position that believing deeply in the tenets of one’s faith represents a kind of mystical irrationality, something that thoughtful, public-spirited American citizens would do better to avoid.

STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 6–7 (1993).

166. Sharon Waxman, *New Film May Harm Gibson’s Career*, N.Y. TIMES, Feb. 26, 2004, at E1.

167. See Damon Hack, *What’s Missing at Augusta? Controversy*, N.Y. TIMES, Apr. 6, 2005, at D1.

168. Dennis Cauchon, *Boycotts on Heels of Gay-Rights Law Repeal*, USA TODAY, Nov. 11, 1993, at 3A.

169. Peter Van Allen, *City Courting Gay Travelers*, PHILADELPHIA BUS. J. ONLINE, Oct. 10, 2003, <http://philadelphia.bizjournals.com/Philadelphia/stories/2003/10/13/story4.html>.

170. Suzanne C. Ryan, *‘Reagans’ Flap is a Reality Check for Moviemakers*, BOSTON GLOBE, Nov. 20, 2003, at C16.

Even though it had previously agreed to do so, Disney reneged on a deal to back Michael Moore's movie *Fahrenheit 9/11*,¹⁷¹ and many theaters in the U.S. refused to book it.¹⁷² Critics who had no idea of the actual content of the film, and never even saw it, nonetheless felt entitled to launch protests that were ignorant in the sense that they had a complete lack of the kind of information essential to an informed judgment.¹⁷³ The power to control others' speech, and the willingness to attack perceived opponents en masse with a mob's mindless mentality, derives in part from a shift in our society. We have created a system in which there is a "nobody's feelings should be hurt" mindset. The quite positive idea that it is courteous to avoid deliberately or carelessly hurting others' sensitivities is something most of us would agree is the preferred way to behave in a civilized society. But we have allowed a principle of basic courtesy to be transformed into a strong legal and operational rule where strong sanctions flow from violating the newly imposed system of courtesy. This is unwise, intolerant, and repressive. It is also a deliberate strategy of both the Right and Left. Because collectives that are fairly described as Left/Liberal dominate law school faculties, it can be expected that their values and agendas are in control of those institutions. With the Right working through media such as talk radio and Internet blogs, a different set of messages are encountered, but they are still wrapped in the same kind of political clothing.

Strategies of language control—and the attempt to control others' behavior through law and organized informal sanctions as advocated by activist scholars such as Frug—have been successful.¹⁷⁴ This strategy seeks to gain control over the language of power (i.e., law, economic sanctions, systemic condemnation, and shaming) and to shift the burden of justification to speakers (scholars and others) who say things a particular collective does not like. The new system requires the "offending" speakers to carry the almost impossible burden of proving a negative to escape an elastic linguistic trap. Someone accused of saying, intending, or feeling something a political collective doesn't like has virtually no chance of proving the negative of which they have been accused. The result is that, to escape condemnation, many scholars either say nothing or agree with the collective's language, critique, and agenda. The result is a chilling of discourse.

171. *Disney Blocking Release of Moore's 9/11 Film, Miramax Confirms That It Has Been Told Not to Distribute 'Fahrenheit 9/11,'* MSNBC, May 5, 2004, <http://www.msnbc.msn.com/id/4906829>.

172. Robert Brent Toplin, *The Long Battle Over Fahrenheit 9/11: A Matter of Politics, Not Aesthetics*, *FILM & HIST.* 35(2), 2005, at 8, 9.

173. *See id.*

174. Frug, *supra* note 75, at 1047–48.

