Article

Four Ironies of Campus Climate

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INTRODUCTION

One of the central issues in the campus-climate controversy[1] is hate speech,[2] including verbal microaggressions.[3] Alt-

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1. On the controversy over campus climate, see for example, Sarah Brown et al., *At the End of a Watershed Year, Can Student Activists Sustain Momentum?*, CHRON. HIGHER EDUC. (May 24, 2016), http://www.chronicle.com/article/At-the-End-of-a-Watershed/236577; Katherine Mangan, *Mizzou Incident Rekindles Anger over Treatment of Black Students*, CHRON. HIGHER EDUC. (Sept. 29, 2016), http://www.chronicle.com/article/Mizzou-Incident-Rekindles/237929; Beth McMurtrie, *U. of Chicago's Free-Expression Letter Exposes Fault Lines on Campus*, CHRON. HIGHER EDUC. (Sept. 2, 2016), http://www.chronicle.com/article/U-of-Chicago-s/237672; Stephanie Saul, *Campuses Cautiously Train Freshmen Against Subtle Insults*, N.Y. TIMES (Sept. 6, 2016), http://www.nytimes.com/2016/09/07/us/campuses-cautiously-train-freshmen-against-subtle-insults.html.

2. On this component of the campus-climate movement and controversy, see Saul, *supra* note 1; Geoffrey Stone, *Free Expression in Peril*, CHRON. HIGHER EDUC. (Aug. 26, 2016), http://www.chronicle.com/article/Free-Expression-in-Peril/237568; Fernanda Zamudio-Suarez, *U. of Mississippi Students Stage Sit-in over Racist Social-Media Post*, CHRON. HIGHER EDUC. (Sept. 23, 2016), http://www.chronicle.com/blogs/ticker/u-of-mississippi-students-stage-sit-in-over-racist-social-media-post/114638.

3. *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 1–3, 167 (2d ed. 2012) (explaining the term); Chester Pierce, *Psychiatric Problems of the Black Minority*, *in* AMERICAN HANDBOOK OF PSYCHIATRY 512, 520 (Silviano Arieti ed., 2d ed. 1974); Peggy Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1565 (1989). On the role microaggressions play in the campus climate movement, see Saul, *supra* note 1; Peter Schmidt, *Campaigns Against Microaggressions Prompt Big Concerns About Free Speech*, CHRON. HIGHER EDUC. (July 9, 2015), http://www.chronicle

hough the controversy encompasses many other issues—such as safe spaces,[4] trigger warnings by classroom teachers,[5] curricular coverage of topics of particular interest to minorities,[6] fraternity parties that feature blackface or other odious symbols,[7] renaming buildings,[8] and hiring more minority professors[9]—hate speech is apt to be the most long-lasting and intractable of the areas in contention.[10]

.com./article/Campaigns-Against/231459?; Stone, *supra* note 2.

4. *See, e.g.*, Sarah Brown, *The Real Story Behind the U. of Connecticut's "Scholars House,"* CHRON. HIGHER EDUC. (Aug. 26, 2016), http://www.chronicle.com/article/The-Real-Story-Behind-the-U/237571; Sarah Brown & Katherine Mangan, *What "Safe Spaces" Really Look Like on College Campuses*, CHRON. HIGHER EDUC. (Sept. 8, 2016), http://www.chronicle.com/article/What-Safe-Spaces-Really/237720; Pete Grieve, *University to Freshmen: Don't Expect Safe Spaces or Trigger Warnings*, CHI. MAROON (Aug. 24, 2016), https://www.chicagomaroon.com/2016/08/24/university-to-freshmen-dont-expect-safe-spaces-or-trigger-warnings (discussing a letter from the University of Chicago's dean of students advising incoming students that the university will not coddle them or provide safe spaces where they will be free from disagreeable messages and ideas); George Will, *The Specter of the "Safe Space" Is Haunting College Campuses*, WASH. POST (Oct. 19, 2016), https://www.washingtonpost.com/opinions/the-specter-of-the-safe-space-is-haunting-college-campuses/2016/10/19/c4bb7828-9548-11e6-bb29-bf2701dbe0a3_story.html.

5. *See* McMurtrie, *supra* note 1.

6. *See* Jack Kerwick, *Professor Declares "Whiteness" a "Disease": Preaching Hate in Higher Education*, FRONTPAGE MAG. (Nov. 23, 2015), http://www.frontpagemag.com/fpm/260875/professor-declares-whiteness-disease-jack-kerwick (noting that this trend may have gone too far); *see also* Saul, *supra* note 1 (urging sensitivity training for faculty and students).

7. *See* Thomas Bartlett, *An Ugly Tradition Persists at Southern Fraternity Parties*, CHRON. HIGHER EDUC. (Nov. 30, 2001), http://www.chronicle.com/article/An-Ugly-Tradition-Persists-at/21032.

8. *See* Jonathan Holloway & John F. Witt, *Symbols and Speech: An Intellectual Framework for the Debate over Renaming Campus Buildings*, CHRON. HIGHER EDUC. (Dec. 19, 2016), http://www.chronicle.com/article/SymbolsSpeech/238712.

9. *See* Sarah Brown, *Tenure Denials Set Off Alarm Bells, and a Book, About Minority Hiring*, CHRON. HIGHER EDUC. (Oct. 19, 2016), http://www.chronicle.com/article/Tenure-Denials-Set-Off-Alarm/238100 (describing controversies over minority hiring and tenure decisions and noting that a number of universities have taken measures to improve their record in these areas, some of them prompted by campus protests and petitions).

10. The two of us are living proof of this last statement, having addressed this topic regularly for over thirty years. *See, e.g.*, RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS? HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT (1997); RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND (2004) [hereinafter DELGADO, UNDERSTANDING WORDS]; Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991) [hereinafter Delgado, *Narratives in Collision*]; Richard Delgado, *Words That Wound: A Tort Action*

One reason is that although the social norm against hate speech is now relatively well established, the legal version is not. Thirty years ago, it was possible to say, "what Jones said just now was hate speech, all right. What of it?" Today it is not. Almost everyone condemns it[11]—except the legal system.[12] This divergence, with society at large believing one thing and the legal system quite another, means that many conversations feature speakers talking past one another.[13]

This anomaly—the first of four ironies that we highlight in this Article—is especially marked with regard to campus hate speech and probably accounts for much of the lack of progress in coming to terms on which both sides of the controversy could agree. Most colleges and universities are strongly motivated to maintain an environment that is friendly to students of color, women, and sexual minorities.[14] This stands to reason, for

for Racial Insults, Epithets, and Name-Calling, 17 HARV. C.R.-C.L. L. REV. 133 (1982) [hereinafter Delgado, *Words That Wound*].

11. Almost to a fault. To many on the right, we have gone too far in this direction and are, in fact, an overly politically correct society in which one cannot say anything controversial or critical having to do with race. *Compare* John C. Knechtle, *When To Regulate Hate Speech*, 110 PA. ST. L. REV. 539, 542–43 (2006) (arguing the need for hate speech regulation because of the widespread persecution and discrimination of minorities throughout history), *with* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 489 ("Because civil libertarians have learned that free speech is an indispensable instrument for the promotion of other rights and freedoms—including racial equality—we fear that the movement to regulate campus expression will undermine equality, as well as free speech."), *and* Catherine Rampell, *Liberal Intolerance Is on the Rise on America's College Campuses*, WASH. POST (Feb. 11, 2016), https://www.washingtonpost.com/opinions/liberal-but-not-tolerant-on-the-nations-college-campuses/2016/02/11/0f79e8e8-d101-11e5-88cd-753e80cd29ad_story.html (discussing a study showing that liberal-minded students are more likely to be willing to shut down speech they find offensive), *and* Stone, *supra* note 2 (arguing that university dialogue requires an open exchange of ideas).

12. *See, e.g.*, UWM Post, Inc. v. Bd. of Regents, 774 F. Supp. 1163, 1181 (E.D. Wis. 1991) (holding that freedom of speech concerns outweigh problems of bigotry and discrimination); Doe v. Univ. of Mich., 721 F. Supp. 858, 867 (E.D. Mich. 1989) (holding the conduct policy too vague to adequately support free speech at a public institution).

13. For example: Speaker *A* says, "Hate speech is so tacky. I can't believe that those fraternity kids did what they did." Speaker *B* responds, "What's the matter? Don't you believe in free speech? It's the cornerstone of democracy. Of all places, universities should be bastions of it." *See* Jesse McCarthy, *The Long Grudge: A History of White Resentment of Blacks Since the Civil War*, N.Y. TIMES, June 26, 2016, at SS2-18 (noting that white resentment of minority groups is generating a backlash that emerges after gains in civil rights movements).

14. *See, e.g.*, WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER:

many campus administrators are committed to the goal of educating students for roles in a multicultural and multiracial world, and if the campus is cold or hostile, this goal will be difficult to achieve.[15]

At a number of campuses, this commitment has taken the form of official policies condemning speech and remarks that would make these students feel oppressed and unwelcome. Beginning about twenty years ago, campuses began instituting campus conduct codes or freestanding rules discouraging such remarks.[16] These rules quickly came under fire by free-speech organizations,[17] invariably with the same result: the courts struck them down as infringing the First Amendment.[18]

The string of defeats did not deter many universities, which responded by enacting more narrowly tailored rules in hopes of avoiding judicial rejection.[19] Many of these second-generation rules met the same fate.[20] Still, over 200 universities have such rules on the books, in clear defiance of judicial precedent, thereby evincing their concern that the campus climate be as civil as possible, or at least devoid of the worst forms of racial or sexual harassment and invective.[21]

I. THE FIRST IRONY: A GROWING PUBLIC NORM AT ODDS WITH A TIME-HONORED LEGAL NARRATIVE

We call the above disparity the first irony of campus hate speech—namely, that the law in action is radically different from the law on the books. University presidents and administrators believe in one norm and the courts believe in another. The administrators outnumber the judges and, until the Supreme Court issues a broad ruling, are likely to continue to ignore lower-court rulings in other jurisdictions, believing that doing so is necessary to their mission of maintaining a happy,

LONG-TERM CONSEQUENCES OF CONSIDERING AFFIRMATIVE ACTION IN COLLEGE AND UNIVERSITY ADMISSIONS 252 (1998).

15. *See id.*

16. *See* Delgado, *Narratives in Collision*, *supra* note 10, at 344.

17. Organizations like the Foundation for Individual Rights in Education and the ACLU have challenged such codes. *See* Strossen, *supra* note 11, at 492.

18. *See id.* at 501–04.

19. *See* JON B. GOULD, SPEAK NO EVIL: THE TRIUMPH OF HATE-SPEECH REGULATION 20–21 (2005) (describing the large number of campuses that have enacted such rules).

20. *Id.* at 77–79.

21. *Id.* at 76.

diverse community that will contribute to the kind of peaceful, multiracial society that campus leaders aspire to as a matter of faith.[22] The administrators cite *Grutter v. Bollinger*[23] and common sense in support of their position.[24] For them, minority students and young women are at a formative age in their development and, in many cases, lack either the critical mass or powerful allies to defend themselves from a tide of microaggressions and insults.[25] Unless campus leaders make plain that hateful speech and behavior are out of bounds, these students will not flourish.

The administrators thus take action of the kinds mentioned above.[26] This, of course, frustrates free-speech absolutists, who cannot understand why campuses continue to defy their favorite value. For their part, the defenders of campus hate-speech codes deplore the refusal of U.S. courts to realize that societal norms have changed, as they have in many other countries.[27]

22. *See Diversity in Academe*, CHRON. HIGHER EDUC. (May 27, 2014), http://www.chronicle.com/section/Diversity-in-Academe-2014/799 (listing several articles demonstrating administrators' dedication to fostering diverse student bodies); Jennifer Newton, *Texas A&M University Apologizes to High School Visitors after They Were Racially Abused by Students as They Toured Campus*, DAILY MAIL (Feb. 18, 2016), http://www.dailymail.co.uk/news/article-3452573/Texas-M-University-apologizes-High-school-visitors-racially-abused-students-toured-campus.html.

23. 539 U.S. 306 (2003) (upholding affirmative action policy at University of Michigan Law School as necessary to create a diverse legal profession and citizenry).

24. *See* Mark G. Yudof & Rachel F. Moran, *Race-Conscious Admissions Policies Face More Tests After* 'Fisher,' CHRON. HIGHER EDUC. (July 17, 2016), http://www.chronicle.com/article/Race-Conscious-Admissions/237151.

25. *See* Saul, *supra* note 1.

26. For example, administrators take action by instituting safe spaces, sensitivity training and courses, hate-speech rules, and changes in the curricula. *See supra* notes 1–10 and accompanying text.

27. *See, e.g.*, TIMOTHY GARTON ASH, FREE SPEECH: TEN PRINCIPLES FOR A CONNECTED WORLD (2016) (discussing legal protection for this value in other countries and societies); DELGADO, UNDERSTANDING WORDS, *supra* note 10, at 195; JEREMY WALDRON, THE HARM IN HATE SPEECH 13–14 (2012). For a discussion on how students and administrators in other countries are struggling with campus-climate issues, see for example, Eve Fairbanks, *The Global Face of Student Protests*, N.Y. TIMES, Dec. 13, 2015, at SR4.

A. THE SHAPE OF THE DEBATE: FOUR IRONIES

Although we have taken a side in the past,[28] we do not do so in this Article. Instead, we consider some general features of the debate over campus climate, hate speech in particular, beginning with brief remarks on First Amendment formalism. We do this because the rather extreme version of it that pervades that area of discourse today seems responsible for much of the stasis—the inability to progress—that we see in the campus-hate-speech debate, including the four ironies of our title.[29]

After describing the three remaining ironies and noting how all four block productive conversation and exchange,[30] we return to the issue of formalism with which we began and offer, as diplomatically as possible, a suggestion for those remaining First Amendment absolutists who we see as standing in the way of progress in this area.[31] We conclude by offering a few suggestions for how discussions may nevertheless proceed even if this group does not moderate its position.[32]

B. FIRST AMENDMENT LEGAL FORMALISM

As mentioned, First Amendment discourse remains mired in legal formalism nearly a century after the early realists brushed it aside and nearly three decades after critical legal studies showed its conceptual impossibility as a model for legal thought.[33] Since one of us has elucidated this concept on a

28. Our sympathies lie with the faction advocating efforts to improve campus climate, including restraints on hate-speech. *See, e.g.*, *supra* note 10. We do not advocate either position in this Article, but merely point out certain features of the debate that appear to be blocking progress.

29. That is, the gap between law and public sentiment. *See supra* notes 22–27 and accompanying text (noting how much of the public now condemns hate speech, while courts routinely strike down controls on it). This gap alone accounts for much of the inability of the debate to progress beyond angry argument. Speaker *A*: "You don't care." Speaker *B*: "You're the one who doesn't care. What about free speech? And, those ridiculous safe spaces you're always asking for would just reinstate segregation and Jim Crow."

30. *See supra* Part I (noting a number of ironies that interfere with progress on the campus-climate issue, assuring that it is even less likely to come to a satisfactory resolution than the usual campus controversy, for example, about whether football players should receive more generous allowances for living expenses or whether graduate teacher assistants should be permitted to unionize).

31. *See infra* notes 74–115 and accompanying text.

32. *See infra* note 116 and accompanying text.

33. *See supra* notes 28–30 and accompanying text. For a general discussion of this progression, see Lucille A. Jewel, *Old-School Rhetoric and New-*

number of occasions,[34] we merely summarize it here. Essentially, we believe that the unwavering approach that finds a home in First Amendment jurisprudence—almost alone—is largely responsible for the inability of the various sides to arrive at a resolution of the controversy over campus hate speech, a failure that has real, unfortunate consequences: it makes campus administrators uncertain of what they can do, and can easily lead to self-righteous posturing by both sides, each certain, for different reasons, that they are correct.[35]

This is paradoxical, for the First Amendment is said to be a principal tool that our political system uses to evaluate and facilitate change.[36] Racial equity and multicultural values are hotly contested and under consideration right now,[37] so that a frozen, inflexible view of free speech law is a serious obstacle to the search for a better America. Consider how this can and does happen.

II. IRONY NUMBER TWO: A CONSTITUTIONAL PRINCIPLE OUT OF KEEPING WITH ITS OWN FOOTING

When legal realism swept the law in the early years of the twentieth century, spelling the end to what realists such as Roscoe Pound called "mechanical jurisprudence," one area that

School Cognitive Science, 13 LEGAL COMM. & RHETORIC 39, 55–61 (2016) (noting that rights discourse, one kind of formalism, offers little of value to its intended beneficiaries); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984) (same).

34. *E.g.*, Richard Delgado, *First Amendment Formalism Is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.-C.L. L. REV. 169 (1994) [hereinafter Delgado, *Giving Way*]; Richard Delgado, *Toward a Legal Realist View of the First Amendment*, 113 HARV. L. REV. 778 (2000) (reviewing STEVEN SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANING OF AMERICA (1999)) [hereinafter Delgado, *Legal Realist View*].

35. That is, one camp believes (with some justification) that it has the law on its side while the other camp believes it has history on its side.

36. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (examining the role of freedom of speech in a self-government political system) [hereinafter MEIKLEJOHN, SELF-GOVERNMENT]; Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 [hereinafter Meiklejohn, *An Absolute*] (noting that a key purpose of our system of free speech is to facilitate deliberative democracy). Yet an absolutist position, on campus hate-speech rules for example, that refuses to take seriously other values can prematurely terminate that very deliberation. *See infra* notes 43–50 and accompanying text (explaining how this risk can set in).

37. *See, e.g.*, *supra* notes 14–17, 22, and accompanying text.

survived the critical onslaught was the First Amendment.[38] In that area alone, rigid generalizations (no content regulation), high-sounding platitudes (we must protect, most of all, the speech we hate), hidebound doctrinal boxes (speech versus action), and thought-ending clichés (the best cure for bad speech is more speech) still hold sway.[39] The realists introduced attention to empirical and multidisciplinary knowledge, the role of politics and social influence on judges and judging, and the need for balancing and taking into account competing perspectives on any legal question.[40] Legal realism paved the way for law and economics, critical legal studies, critical race theory, feminist theory, and a host of other legal movements that helped legal thought move beyond sterile doctrinal analysis, which pretended that every legal question had one right answer.[41]

It enabled the law to respond more flexibly to the needs of a modern, changing society and to benefit from the perspectives of a host of companion disciplines, such as the social sciences.[42] But little of this found a home in First Amendment theory, with the result that American law in this respect evokes wonder in the minds of thoughtful judges and scholars in other parts of the world, including in nations, such as Canada and Australia, that in many respects pattern their legal system after ours.[43]

Nowhere is this truer than with decisions having to do with hate speech and hate crime. One of two Supreme Court decisions that considered criminal prohibitions of cross-burning

38. *See supra* note 34.

39. Richard Delgado & Jean Stefancic, *Southern Dreams and a New Theory of First Amendment Legal Realism*, 65 EMORY L.J. 303, 304 (2015).

40. *Id.*

41. *Id.*

42. *Id.* In the law of contracting, realists showed, for example, how form contracts could frustrate the goal of freedom of contract. *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1693 (1976); *see also* Karl N. Llewelyn, *Some Realism About Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931) (noting the applicability of the realists' insight in a host of legal areas, including torts, business law, and the law of corporations); Note, *Legal Realism and the Race Question: Some Realism About Realism on Race Relations*, 108 HARV. L. REV. 1607 (1995) (applying realism to the law of race relations).

43. *See, e.g.*, R. v. Keegstra, [1990] S.C.R. 697, 744 (noting that Canada patterns its system of free speech after ours but treats hate speech differently); WALDRON, *supra* note 27, at 12–14 (noting that many other societies discourage hate speech in their laws and official documents).

is a model of flexibility and thoughtful consideration. The author, Sandra Day O'Connor, begins the opinion with a several-pages-long review of that practice as a form of racial intimidation, and goes on to find a carefully crafted Virginia law, that forbids it, constitutional.[44] A prior decision by the same court dealing with the identical practice under a St. Paul ordinance arrived at the opposite decision by a means so categorical and devoid of attention to realist concerns as to suggest an exercise in abstract algebra.[45] Cases in federal and state courts striking down campus hate-speech rules in various universities exhibit much the same quality. Many strike down such rules under precedents having to do with theater marquees, overlooking that the two settings present radically different interests.[46]

The debate about campus climate could benefit from the more flexible form of analysis which the early realists showed could improve practically every area of the law, ranging from torts to contracts, property, and most areas of constitutional law.[47] Law was simply better, the realists argued, when judges and other lawmakers gave express consideration to history, social science, economics and policy on their way to rendering judgment in close cases with a great deal at stake. And it was certainly better if judges explicitly recognized that they were fallible human beings with preconceptions and political orien-

44. *See* Virginia v. Black, 538 U.S. 343 (2003).

45. R.A.V. v. St. Paul, 505 U.S. 377, 383 (1992) (noting that "a limited categorical approach has remained an important part of our First Amendment jurisprudence" and then proceeding to dispose of the case by attending *only* to the incident's effects in light of the existing categorical system, including overbreadth, speech versus action, content discrimination, and various types of fighting words—with virtually no attention to cross-burning's effects on real people, the fabric of society, the history of the practice, its social meaning, or the needs of a multiracial community such as St. Paul); *cf.* WALDRON, *supra* note 27 (urging attention to these other aspects of hate speech).

46. *See R.A.V.*, 505 U.S. at 389 (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), which stands for the idea that a city could prohibit the establishment of movie theatres in a residential community because the prohibition was aimed at mitigating a social evil—seedy movies—in a specific community on an across-the-board basis); Delgado & Stefancic, *supra* note 39, at 309 (noting the Court's frequent use of incongruent precedents in First Amendment cases).

47. The benefits could include: the ability to balance competing interests and demands, including campus safety and the needs of a multicultural student body; the ability to resolve the issue in light of the university's basic interests in educating all comers; and the ability to tap social science evidence on hate speech and the toll it takes on its targets. *See, e.g.*, Delgado, *Words That Wound*, *supra* note 10 (discussing some of the harms of racism and of hate speech).

tations, and made allowance for them in their decision-making process.[48]

The abovementioned truncation constitutes the second irony of campus climate. The formalistic, clipped jurisprudence in this area is ironic because the First Amendment supposedly protects and encourages a full debate of important public issues.[49] But with campus hate speech, as with free speech in general, it does not. It assures exactly the opposite: cliché-ridden argumentation and judicial opinions that give scant attention to valid arguments that the other side may be advancing, and even less to social science, political science, history, or the demands of an emerging multiracial, multicultural society.[50]

48. *See* Delgado & Stefancic, *supra* note 39.

49. *See* MEIKLEJOHN, SELF-GOVERNMENT, *supra* note 36, at 24–27; Meiklejohn, *An Absolute*, *supra* note 36, at 255; *see also* Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929 (1991) (noting the difficulty of following through on this promise). On the formalistic quality of much contemporary First Amendment jurisprudence, see Delgado, *Giving Way*, *supra* note 34; Delgado, *Legal Realist View*, *supra* note 34. On the need for balancing in this area of discourse, see Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1 (2016).

50. *See* Delgado, *Giving Way*, *supra* note 34, at 169–73; Delgado, *Legal Realist View*, *supra* note 34, at 778. For example, many closely contested free speech questions are not readily resolved by resort to earlier case law, but instead would benefit from analysis under accepted social science knowledge on such issues as the effect of an empowered speaker on credibility or the manner in which certain speech (harsh belittlement, for example) can silence another speaker, resulting in less rather than more speech. *See* DELGADO & STEFANCIC, *supra* note 3, at 49–51, 65, 172; STANLEY MILGRAM, OBEDIENCE TO AUTHORITY (1974); Solomon E. Asch, *Opinions and Social Pressure*, 193 SCI. AM. 31 (1955). Recent social science examines confirmation bias, in which evidence or a statement that confirms a listener's pre-existing beliefs or commitments receives careful consideration, while speech that goes the other way merely generates skepticism and disbelief. *See* Shahram Heshmat, *What Is Confirmation Bias?*, PSYCHOL. TODAY (Apr. 23, 2015), https://www.psychologytoday.com/blog/science-choice/201504/what-is-confirmation-bias. By the same token, case law often ignores and cannot easily take account of how words can wound, *see* Delgado, *Words That Wound*, *supra* note 10, and how hate speech (like most forms of racial revilement) is apt to be concerted, so that the victim is apt to have heard similar remarks many times before and thinks, "here we go again." *See* Delgado, *Narratives in Collision*, *supra* note 10, at 383–86.

III. IRONY NUMBER THREE: CAMPUS ADMINISTRATORS REASON IN A FORWARD-LOOKING MANNER, WHILE THEIR OPPONENTS HARKEN BACK TO PRECEDENT AND POLICY LAID DOWN IN EARLIER TIMES

Another reason why controversies over campus hate speech persist and never come to a resolution lies in the radically different perspectives that the two sets of protagonists take. Campus administrators generally favor restraints on hate speech and action, believing that they are necessary to maintaining a healthily diverse climate in which all can flourish. Their approach, in short, is pragmatic and forward looking. They value speech and a robust exchange of views but believe that in order to maximize that value they must first assure a variety of speakers and points of view, something that is unlikely to come about until they are able to provide a campus atmosphere in which all contributors feel welcome and safe.

Legal scholars, by contrast, may approach the very same issues from a backwards-looking perspective in which the dominant question is what did we do in this or that case which we decided twenty-five years ago, when society was less diverse than it is now. Those cases might be ones in which Nazis sought to march in Skokie, or a movie theater operator sought permission to show pornographic movies in a quiet, middle-class neighborhood.[51] To the campus administrator merely trying to get things to simmer down in time for finals, all these matters may seem beside the point. To the legal scholar, they may be the whole point; for such a person, the First Amendment must be a seamless web—and if one-quarter of the blacks and Latinos on a campus transfer to Howard or UC-Riverside because of a torrent of hate mail, messages, and Confederate symbols, that is the price we pay for living in a free society.

One camp, in short, looks forward, the other back. Since overt racism was more acceptable in earlier times than it is today,[52] the legal system is apt to have exhibited a higher tolera-

51. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978). At least one prominent judge takes issue with formalism as the exclusive avenue for deciding cases, and opts instead for a more pragmatic, open-textured approach. *See* Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 23, 2012), https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism.

52. Earlier times Indian massacres, slavery, Jim Crow, Chinese Exclusion, the Bracero Program, and the internment of blameless Japanese Ameri-

tion for it then than we believe is desirable today.[53] Thus, the debate over forward- or backward-looking—pragmatic versus "principled"—perspectives and ways of reasoning is fraught with implications. This is one reason that the debate seems never to come to a happy end. Each side embeds a conclusion and a point of view in the very terms of the argument and the values and premises it deems acceptable.

IV. IRONY NUMBER FOUR: HEROES, METAPHORS, AND LESSONS FROM HISTORY

Partly as a result of the predictable, stereotyped, dogmatic quality of the debate over hate speech and campus climate—itself the product (on one side, anyway) of the high degree of legal formalism that characterizes it—the debate makes little progress. The rhetorical gaps that pervade this area go beyond the usual tendency of advocates to want to make points by invoking high-sounding phrases and catchwords;[54] they seem instead to correspond to actual structures of belief. First Amendment absolutists not only talk about campus events, demonstrations, sit-ins, and prayer vigils using a different framework and set of images from those of the more pragmatic, policy-minded campus administrators who worry about keeping the peace and preserving the university's image,[55] they actually see those very same events differently. And of course the way they see and describe them differs even more radically from those of the student activists and faculty supporters who want to change the campus climate so as to make it more friendly to the multicultural crowd.

A typical member of the free speech faction is apt to cite heroic figures such as Voltaire ("I may disagree with what you say but will defend to the death your right to say it"[56]), Galileo

cans during World War II, for example.

53. *Brown v. Board of Education*, 347 U.S. 483 (1954), and the civil rights revolution focused attention on equality and nondiscrimination. Before then, the legal system produced a host of decisions that today seem almost incomprehensibly biased. *See* STEVEN W. BENDER, MEA CULPA: LESSONS ON LAW AND REGRET FROM U.S. HISTORY 135–37 (2015).

54. For example, one side may argue for human freedom and economic opportunity, while the other advocates mere efficiency and the desire to regularize all of human behavior.

55. *See supra* notes 22–23, 33, 46, and accompanying text.

56. Biographer Evelyn Beatrice Hall formulated this phrase "to describe [Voltaire's] attitude." Steven Poole, *A Beginner's Guide to Voltaire, the Philosopher of Free Speech and Tolerance*, THE GUARDIAN (Jan. 18, 2015), https://

(who stood up to Catholic orthodoxy), bookseller John Peter Zenger,[57] and Clarence Darrow (who defended unpopular clients such as John Scopes, prosecuted for teaching evolution in a public school).[58] Such a person is apt to deploy metaphors such as the marketplace of ideas[59] or the notion of a system of free speech as a garment that must be protected against a single rent. The catchwords and maxims of such a person ("the best cure for bad speech is more speech"; "we must protect the speech we hate as much as, or more than, the speech we love"; hate speech as a pressure valve)[60] tend to cluster together too, as well as the lessons such a person draws from history ("[F]ree speech has been minorities' best friend;" if they knew their own history, they would realize how unwise it is for them to be arguing for speech-restriction now").[61] Of course, the campus-climate protection side has its predictable parade of heroes (Martin Luther King, the early abolitionists),[62] catch-words (implicit bias, microaggressions),[63] metaphors (hate speech as silencing instrument),[64] and maxims, too.[65]

Each side deploys all these rhetorical tools against each other with varying degrees of certitude and impatience. The resulting intransigence that affects both sides naturally limits productive discussion: How can one reason with a maxim or a catch-word? The devices close down discussion, which often they aim to do. How unsurprising then that the debate over campus climate never ends, or even advances much beyond a statement of the two initial positions.[66] One has the law on its side, courtesy of First Amendment formalism and a very slow rate of change; the other has (or believes it has) history, whose

www.theguardian.com/books/shortcuts/2015/jan/18/beginners-guide-voltaire-philosopher-free-speech-tolerance.

57. *See* Delgado, *Narratives in Collision*, *supra* note 10, at 346–47.

58. *People & Events: Clarence Darrow (1857–1938)*, PBS, http://www.pbs.org/wgbh/amex/monkeytrial/peopleevents/p_darrow.html (last visited Apr. 1, 2017).

59. *See* Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871, 883 (1994).

60. *Id.* at 876–86.

61. *Id.* at 877, 882–83.

62. Delgado, *Narratives in Collision*, *supra* note 10, at 347.

63. *See supra* note 22 and accompanying text.

64. *See supra* note 46 and accompanying text.

65. "Words are important." "Speech matters." "Black lives matter."

66. One side says we need more controls, while the other says there should be fewer.

arc, it thinks, bends in its direction.[67] By their very nature, these assertions are poorly calculated to help uncommitted listeners evaluate their merits.

V. A CONCLUDING NOTE AND WARNING: TWO FALLACIES OF FORMALISM AND ONE OF LEGAL REALISM

We now turn to the promised parting word about formalism. As mentioned, we offer it in the nature of an advisory to the parties. To those with whom we have dueled in the past over First Amendment absolutism, we offer two reasons why they should temper their approach. One is methodological, having to do with the approach one takes in thinking and speaking about the campus climate controversy, especially hate speech. The other is more personal, having to do with lawyers' lives. In some respects, the two considerations merge.

A. A METHODOLOGICAL ADMONITION: ACT IN ACCORDANCE WITH STRUCTURAL DUE PROCESS

The methodological admonition is easy to state. Power alone, even the judicial kind taking the form of dozens of lawsuits in different jurisdictions, seems unlikely to resolve the question of campus climate.[68] That means that we are left with (a) talking with each other; and (b) struggle—including nonviolent demonstrations, teach-ins, and other actions by which one side tries to persuade the other of the righteousness of its cause.[69] If so, that conversation should be as open as possible. We should adopt the smallest number of strictures,[70] so as to enable each side to argue its case in its full complexity, as it

67. *See* David A. Graham, *The Wrong Side 'of the Right Side of History,'* THE ATLANTIC (Dec. 21, 2015), https://www.theatlantic.com/politics/archive/2015/12/obama-right-side-of-history/420462 (attributing the much-quoted phrase to Martin Luther King, Jr.).

68. *See* GOULD, *supra* note 19, at 123–48.

69. Usually this means the weaker side (the students and their defenders) trying to persuade the conservative right and their defenders. *See, e.g.*, Susan Brown, *How One University Took Its Student Protestors Seriously*, CHRON. HIGHER EDUC. (Mar. 25, 2016), http://www.chronicle.com/article/Video-How-One-University-Took/235834?cid=cp29 (interviewing Ajay Nair, dean of campus life at Emory University, about racial climate protests at Emory).

70. That is, rules of evidence, presumptions that fall heavily on one side or the other, and—in interpersonal exchanges—the accusation that one's adversary is merely engaging in political correctness.

sees it, to the other side and the public at large.[71] As we write, society is of two minds about diversity, campus climate, ethnic studies departments, and affirmative action. The composition of the citizenry is changing, and American politics is in transition as well. We have little idea how we will feel about campus programs in ten or twenty years. In such a situation, what Laurence Tribe called structural due process argues for keeping an open mind, not pressing for a final judicial interpretation, and not running either group off campus in contempt.[72] Many campus administrators seem to be acting, consciously or unconsciously, with this precept in mind.[73]

B. A FURTHER ADMONITION FOR FREE-SPEECH ADHERENTS: FREE SPEECH FORMALISM IS PASSING INTO HISTORY

Since one of the two sides (the free speech one) is more apt than the other to ignore our admonition—perhaps because they realize that case law is currently on their side—we close on a personal note. Elsewhere, we have outlined our case that legal realism is likely to arrive in the First Amendment area relatively soon.[74] It is the one remaining redoubt, and its defenders are unlikely to be able to hold on much longer: realism is, simply, the better option when considering almost any legal rule or practice.

Moreover, for most lawyers, legal formalism is a joyless exercise.[75] In a recent book and article, we show that this is so

71. *See* Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 304–06 (1975).

72. *Id.* at 302–03, 306.

73. *See, e.g.*, Katherine Knott, *What Should Colleges Do To Discipline Students Who Spew Hate?*, CHRON. HIGHER EDUC. (Sept. 30, 2016), http://www.chronicle.com/article/What-Should-Colleges-Do-to/237942 (advocating that the two sides talk with each other); Katherine Mangan, *A Gorilla-Masked Student's Attempt To Provoke Is Met with Peace*, CHRON. HIGHER EDUC. (Oct. 3, 2016), http://www.chronicle.com/article/A-Gorilla-Masked-Student-s/237964 (approving of same); Stone, *supra* note 2 (same).

74. *See* Delgado, *Giving Way*, *supra* note 34; Delgado, *Legal Realist View*, *supra* note 34, at 779, 798–802; Delgado & Stefancic, *supra* note 39, at 354–58. On the broad movement away from formalism as an explanation for judging and legal reasoning, see for example, Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 453–54 (1930) (arguing for a non-categorical approach to legal reasoning and positing that legal arguments that proceed merely by placing cases in one's favorite category are suspect); Tushnet, *supra* note 33, at 1384–94.

75. *See* JEAN STEFANCIC & RICHARD DELGADO, HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS 48–51 (2005).

and that during periods when legal formalism reigns, lawyers tend to be notably unhappy.[76] The dominant epistemology recreates itself in law-office management, so that the work becomes time-pressured, highly regimented, and dull.[77] As we put it, if you agree to think like a machine, someone is likely to come along and make you work like one.[78] This is not just coincidental. A highly constrained way of thinking and working is apt to lead to regimentation in the circumstances in which one conducts the work.[79] For most lawyers (indeed, human beings), these are prescriptions for stress, drug-taking, marital unhappiness, and depression, maladies that myriad studies have shown afflict the legal profession to a much higher degree than they do most other professions.[80]

Today, however, we add a new reason for eschewing legal formalism whenever possible: it limits your intellectual options. It makes you less smart and less flexible than you ordinarily are and a poor lawyer. Lawyers who learn to reason, write, and argue like a hornbook full of black-letter law are apt to perform inadequately, particularly on key occasions. Consider a few examples of how this can happen.

Recently, a law school clinic engaged a prominent constitutional lawyer to attempt to reverse an adverse trial court ruling in an important case having to do with the educational prospects of minority children in a major city. In *Arce v. Douglas*,[81] the lawyer found himself arguing before the Ninth Circuit Court of Appeals in an effort to reverse a trial court ruling that

76. *Id.* at 61; *see also* Richard Delgado, *Recent Writing on Law and Happiness*, 97 IOWA L. REV. 913, 928 (2012). Other professions are beginning to reject formalism, with similar results. *See, e.g.*, STEFANCIC & DELGADO, *supra* note 75, at 72–76 (noting how many physicians dislike managed care regimes that require them to spend hours filling out code numbers on insurance forms or haggling with insurance companies over a course of treatment they prescribed for a patient). Many academics dislike the new accountability forms that require them to submit lesson plans or fill out monthly forms reporting how much time they spent on particular activities. *See, e.g.*, *id.* at 51 (discussing the effects of formalism on those in academia).

77. STEFANCIC & DELGADO, *supra* note 75, at 47–61.

78. *Id.* at 77–80.

79. That is, the work is apt to assume a high degree of specialization and be carried out in an authoritarian atmosphere with intense competition for the best assignments and partnerships, and an emphasis on rain-making and billable hours. *Id.* at 39, 64, 77–80.

80. *Id.* at 47–53.

81. 793 F.3d 968 (9th Cir. 2015). The trial court opinion, which the lawyer was trying his best to reverse, is *Acosta v. Huppenthal*, No. CV 10–623–TUC–AWT, 2013 WL 871892 (D. Ariz. Mar. 8, 2013).

a program of Mexican American Studies in Tucson, Arizona, public schools violated Arizona law.[82] The innovative program had been both popular and successful.[83] But in the minds of authorities in the state capital, it taught the students radical thoughts and ideas and contravened a hastily drafted law prohibiting any such course of instruction.[84]

As though he were mentally reviewing his own constitutional treatise, the lawyer tried this line of authority, then that, getting nowhere.[85] A video of the argument showed the faces and demeanor of the appellate judges, who were visibly sympathetic with the students deprived of an opportunity to receive stimulating instruction with culturally relevant materials but increasingly frustrated with the lawyer's inability to give them a plausible ground for finding in their favor.[86] A number of the judges asked whether the case did not reek of racial animus.[87] The lawyer avoided the question as though he found it distasteful. The court ended up by remanding the case for retrial (before the same hostile judge who had given it short shrift earlier) on a narrow, and not very promising, ground.[88] The lawyer probably left believing he did the best anyone could have done.

What was needed, of course, was a non-formalist approach that included considerations of the unique pedagogical significance of the course in question in light of adolescent psychology and development theory, and an unflinching review of the cultural battle raging in Arizona over immigrant rights and public education. Almost any educated journalist, social science teacher, or sympathetic minister could have provided the material that the judges were seemingly looking for.[89] But of course,

82. For the history of the controversy, see Richard Delgado, *Precious Knowledge: State Bans on Ethnic Studies, Book Traffickers (Librotraficantes), and a New Type of Race Trial*, 91 N.C. L. REV. 1513 (2013).

83. *Id.* at 1527–30.

84. *See id.* at 1521–22 (discussing the statute, which prohibited courses of instruction that catered to one ethnic group only, that aimed to enhance racial solidarity rather than to treat students as individuals, that stirred racial resentment, or that aimed to overthrow the U.S. government).

85. *See Maya Arce v. John Huppenthal Oral Argument*, C-SPAN (Jan. 12, 2005), https://www.c-span.org/video/?323730-1/maya-arce-v-john-huppenthal-oral-argument.

86. *See id.*

87. *See id.*

88. To wit, the court's decision turned on the question of whether Arizona's discontinuation of the program violated legislative due process. *See* Arce v. Douglas, 793 F.3d 968, 985–90 (9th Cir. 2015).

89. *See, e.g.*, Sheen S. Levine & David Stark, Opinion, *Diversity Makes*

those arguments were nowhere to be found in First Amendment case law concerning socialist party agitators[90] or owners of movie theater chains wishing to operate a pornographic theatre in a residential neighborhood.[91]

In a second example, the *Chronicle of Higher Education* recently reported that a prominent legal scholar is planning to leave law teaching for a career as both student and visiting scholar at Union Theological Seminary.[92] The scholar, who recently published a much-admired book comparing America's current imprisonment crisis, which includes the large number of African American men locked away for long terms, to a new Jim Crow, was at the top of her game, her book having glowing reviews and sold innumerable copies.[93] Instead of basking in newfound glory, however, the author had decided to call quits to her law-teaching career. Prime among her listed reasons was her inability to stimulate a productive conversation about race and justice within the confines of that discipline.[94] To conduct a deep, more meaningful analysis of social problems and issues, she concluded, one needed to abandon law and doctrine, with its strait jackets limiting what one can think and say, and how one can reason, and seek broader intellectual horizons.[95]

A final example of how legal formalism and doctrinal teaching can stultify one's intellectual and imaginative powers stems from our own recent teaching of an innovative course at a top law school.[96] Entitled Practicum: Lawyers and Social Change, the course attracts some of the most adventurous and intellectually advanced members of the student body. But in a

You Brighter, N.Y. TIMES, Dec. 9, 2015, at A35 ("When surrounded by people 'like ourselves,' we are easily influenced, more likely to fall for wrong ideas. Diversity prompts better, critical thinking. It contributes to error detection. It keeps us from drifting toward miscalculation.").

90. *See* Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978) (discussing members of the National Socialist party challenging local ordinances prohibiting their conduct).

91. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (discussing locating an adult motion picture theatre in a residential neighborhood).

92. *See* Alexander C. Kafka, *A Prominent Scholar-Activist Trades Law for the Seminary*, CHRON. OF HIGHER EDUC. (Sept. 22, 2016), http://www.chronicle.com/article/A-Prominent-Scholar-Activist/237869.

93. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (rev. ed. 2012).

94. *See* Kafka, *supra* note 92.

95. *See* ALEXANDER, *supra* note 93; Kafka, *supra* note 92.

96. Specifically, the University of Alabama School of Law.

discussion of the abovementioned Tucson case,[97] the students could not think of how a theory of surplus educational value, similar to Marx's famous one explaining labor and market contradictions,[98] could apply to the predicament of Mexican American students confronting obstinate authorities in the capital.[99] The students could see that something was wrong in what the authorities had done and that it was likely, ultimately, to fail, but instinctively searched for a solution in First Amendment doctrines such as the right to receive information or case law forbidding censorship in library collection policy, that they could see would be unavailing—in short, in the very doctrines that the famous constitutional lawyer employed unsuccessfully in the actual case.[100] Their education to that point had not taught them to think sufficiently flexibly.[101]

Indeed, formalistic First Amendment reasoning can, ironically, lead to failure to protect speech as fully as it should be in situations that would seem to call for the highest level of protection, such as book-banning. Consider how, in the Tucson case mentioned above,[102] local school authorities, fearing that the legislature would cut off their funding, not only discontinued the much-loved program—they sent staff to the classroom where energetic young teachers had taught hungry young Mexican American children about their own history and culture.[103] There, in front of crying students and surrounded by colorful

97. Which we billed as an example of a legal problem requiring outside-the-box analysis and lawyering. *See supra* notes 81–88 and accompanying text.

98. *See* 1 KARL MARX, CAPITAL 270–80 (Ben Fowkes trans., Vintage Books 1st ed. 1977) (1867) (explaining his theory of labor surplus value, in which workers in a capitalist system are not the owners of the means of production but produce goods or services that the owner sells for a higher price than the sum he or she pays the workers, thus reaping a profit that the workers do not enjoy).

99. The parallel in question would note how school authorities cannot easily limit education to that which is practical and job-oriented. *See, e.g.*, Richard Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 IOWA L. REV. 1505, 1509–10 (2009) (discussing this contradiction as a counterpart to Marx's famous version).

100. *See supra* notes 81–88 and accompanying text.

101. Law school exams, which are time-pressured and cover an entire term's work, may contribute to some students' fixation on blackletter rules of the type found in legal outlines and hornbooks, which can serve as security blankets for the harried and the overworked.

102. *See supra* notes 81–88 and accompanying text.

103. *See* Delgado, *supra* note 82, at 1523.

posters, Aztec designs, calendars, rugs, and slogans,[104] they boxed up the texts that the classes had been using, including Shakespeare's *The Tempest*,[105] Howard Zinn's *A People's History of the United States*,[106] Paulo Freire's *Pedagogy of the Oppressed*,[107] Rodolfo Acuña's *Occupied America: A History of Chicanos*,[108] Sandra Cisneros's *The House on Mango Street*,[109] and two books by the current authors.[110] They then trundled the boxes of books to trucks for transportation to a storage facility outside of town.[111]

As mentioned, the ACLU and other free-speech organizations were nowhere to be found. The state's actions were a classic case of censorship, reminiscent of past struggles over *Ulysses*,[112] *Lady Chatterley's Lover*,[113] or the poem, *Howl*.[114] Might this remarkable silence have stemmed, ironically, from the very inflexibility of current First Amendment doctrine? For, if you agree to conceive of speech as a pristine value, everywhere protected and not subject to balancing, you will need to find some way to account for the dozens of "exceptions" that riddle your favorite value—words of threat, defamation, libel, copyright, plagiarism, false advertising, untrue words uttered under oath,

104. *See* PRECIOUS KNOWLEDGE (Dos Vatos Productions 2011).

105. WILLIAM SHAKESPEARE, THE TEMPEST (Bantam Books 2006).

106. HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES (Harper Perennial Modern Classics 2005).

107. PAULO FREIRE, PEDAGOGY OF THE OPPRESSED (Myra Bergman Ramos trans., Bloomsbury Publishing 30th anniversary ed. 2000) (1968).

108. RODOLFO ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS (8th ed. 2014).

109. SANDRA CISNEROS, THE HOUSE ON MANGO STREET (Vintage Contemporaries 1991).

110. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (3d ed. 2017); THE LATINO/A CONDITION: A CRITICAL READER (Richard Delgado & Jean Stefancic eds., 2d ed. 2011).

111. *See* Jeff Biggers, *Who's Afraid of "The Tempest"?*, SALON (Jan. 13, 2012), http://www.salon.com/2012/01/13/whos_afraid_of_the_tempest (describing Tucson Unified School District's book ban); Debbie Reese, *A Copy of Tucson's Banned Book List*, NEWS TACO (Jan. 31, 2012), http://www.newstaco.com/2012/01/31/a-copy-of-tucsons-banned-book-list (reproducing Tucson Unified School District's banned book list).

112. JAMES JOYCE, ULYSSES (Wordsworth Classics 2010).

113. D.H. LAWRENCE, LADY CHATTERLEY'S LOVER (Wordsworth Classics 2005).

114. *See, e.g.*, RONALD K.L. COLLINS & DAVID M. SKOVER, MANIA: THE STORY OF THE OUTRAGED & OUTRAGEOUS LIVES THAT LAUNCHED A CULTURAL REVOLUTION (2013) (describing censorship in the United States, culminating in the trial of poet Allen Ginsberg's bookseller for selling Ginsberg's allegedly obscene book, GINSBERG, HOWL, AND OTHER POEMS (1956)).

disrespectful language hurled at a judge, police officer, or other authority figures, and many others.[115] This way of proceeding will make it easy to sacrifice your core value in a new case, since your reaction can easily be that, surely, there must be an exception—somewhere—for such a pressing matter as the one before you. Outright censorship, as in Tucson, becomes a mere case of curricular modification, for example. The reason for the real loss of First Amendment liberty in such cases resides in the habit of First Amendment formalism. We create, in our imagination, a pristine field, namely speech, with no balancing—except, of course, for those pesky exceptions that we don't like to talk about. The dangers inherent in such a way of proceeding should be obvious.

C. FLEXIBILITY ISN'T EVERYTHING: A PARTING ADMONITION FOR THE CAMPUS-CLIMATE CROWD

Although we believe that it is the opponents of campus reforms who are most in need of introspection, we should note that our friends in the multicultural movement need to realize the limitations of some of their favorite forms of argument as well. In particular, not every colorable argument in favor of an improvement in campus climate is likely to be seen as a legal argument. They should stop making them to lawyers or even people who think like lawyers, as many campus administrators do.

To see this, imagine that one encountered a book professing to be a treatise on patent law that opened by declaring, on page one, that all inventions belonged to the world and ought to be available to everyone for free. One might reply that the book isn't a patent law treatise at all, but perhaps a fantasy. The point is that not all arguments are legal arguments. To be seen as such, they must be grounded in premises that are recognizably legal and part of the legal tradition. Merely saying "the campus must change in such-and-such a respect in order that I and my friends will feel comfortable there" is not a legal, or even a very good policy argument. One needs to explain why the reform is sensible, not too costly, and will not damage other values and practices that the campus holds dear. One needs to show that the reform will not collide with other measures and practices that we rely on to run a campus.

115. *See, e.g.*, Delgado, *Legal Realist View*, *supra* note 34, at 794 (discussing many of these exceptions).

Notions of what is an acceptable argument are constantly in transition, but that transition is usually measured and orderly. A treatise on the law of property written in 1700 that declared that human beings could not belong to others as slaves would have struck most readers then as absurd—as not-law. That perception, of course, changed. By the same token, a chapter in a contemporary engineering book that began by proposing a new approach to bridge building—suggesting, perhaps, that bridges over 800 feet long are too expensive and dangerous in high winds and that society should consider investing in underwater tunnels instead—would probably not meet such cavalier rejection ("that's not engineering"). Readers would instead consider the substance of the author's suggestion and arrive at their own conclusion. The reason is that the engineering suggestion engages and draws on familiar ideas in the world of engineering—cost, safety, available alternatives.

The realists, then, should bear in mind that with the campus-climate debate, they should deploy arguments in light of the times and the setting against which they will be received and evaluated. Otherwise they will bear as much responsibility for the ensuing deadlock as formalists who recite a favorite case[116] and declare the matter closed.

CONCLUSION: ESCAPING PROFESSOR KINGSFIELD'S TRAP

In the movie *The Paper Chase*, Professor Kingsfield, the esteemed but much-feared contracts professor, announces that "[w]e do brain surgery here. . . . You come in here with a skull full of mush, and you leave thinking like a lawyer."[117] Unfortunately, legal education that exalts doctrine above all can leave a student with the impression that law consists almost entirely of a mass of rules governing the fields of contracts, torts, civil procedure, criminal law, property, and a few second- and third-year subjects that build on them. Lawyers trained in that fashion and who do not later surmount it have essentially undergone a lobotomy. Part of their intellectual apparatus that would ordinarily govern flexibility and the ability to respond effectively to new challenges vanishes. Lawyers who approach campus

116. *E.g.*, N.Y. Times v. Sullivan, 376 U.S. 254 (1964) (holding that public officials suing a newspaper for defamation must show that the newspaper was guilty of actual malice).

117. THE PAPER CHASE (Twentieth Century Fox 1973).

climate issues armed with such a withered intellectual repertoire are unlikely to carry out helpful roles. They are much more likely to impede progress and do real harm.

Perhaps that is why campus administrators bent on solving real-life problems instinctively turn somewhere else. Lawyers seeking to be helpful agents during troubled times must adopt the intellectual tools and modes of discourse that will enable them to carry out the historic role that many have performed in the past.[118]

118. *See, e.g.*, MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950 (2004) (detailing the litigation strategy of the NAACP's fight against segregated education and the legal skills of staff members that led to the success of public interest law).