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# Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech

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There is a disturbing new trend among American universities. Many universities, both public and private, are adopting regulations that punish what is commonly called "hate speech." Hate speech is expression that is viscerally offensive and degrading to particular segments of society, especially to women and minorities. Almost all of these recent regulations are extremely broad and obviously content-based, and thus a traditional rights-oriented approach to freedom of expression has no difficulty rejecting such regulations as facial violations of the First Amendment.<sup>1</sup> It is a tortured argument indeed that would uphold the current type of regulations under the traditional analysis; concomitantly, demonstrating the patent unconstitutionality of such regulations is all too easy. It is, of course, possible to imagine regulations that might pass muster under traditional first amendment jurisprudence,<sup>2</sup> but those regulations would have to be so narrow that they would rarely if ever apply to the types of incidents that have frequently sparked the rush toward hate speech regulations.

Many constitutional scholars, however, have recently begun to explore another side of our national heritage: republi-

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1. *Doe v. University of Michigan*, 721 F. Supp. 852, 866-67 (E.D. Mich. 1989).

2. For example, regulations that treat different viewpoints equally and restrict speech only in limited contexts might survive a first amendment challenge. See Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1237-39 (1984). Further, hate speech regulations limited to "fighting words" might also pass first amendment scrutiny. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573-74 (1942). However, the Court has not upheld any statutes under the "fighting words" doctrine since the *Chaplinsky* case in 1942. First Amendment jurisprudence has undergone a radical change since that time and it is therefore quite likely that all or part of *Chaplinsky* is no longer good law. See, e.g., 3 R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 197-99 (1986).

canism. One of the intellectual influences of the founding era, a republican viewpoint de-emphasizes individual rights in favor of individual responsibility to the community, or civic virtue. What makes self-government work, in the view of republicans, is the civic virtue of individual citizens.<sup>3</sup> In keeping with the recognition that a rights-oriented or liberal approach may not be appropriate to every question,<sup>4</sup> this Essay will instead analyze hate speech regulations from a republican or virtue-based standpoint.

I must begin by drawing a distinction between virtue and manners. Virtue — in particular, the civic virtue that is the basis for a republican polity — is an internal state of mind. Certainly virtue is reflected in outward behavior, but true virtue must come from within. To be virtuous, a citizen must share the values that make for good citizenship. In other words, to label a person as virtuous is to ascribe to her not only certain behaviors, but certain beliefs. One cannot be virtuous unless one subscribes to the normative underpinnings of virtue. Good manners, on the other hand, require only that a person behave in a particular way. Mannerly behavior does not implicate a corresponding set of beliefs (except, of course, the tautologous belief that one ought to behave with good manners). This is not to say that the definition of good manners cannot vary; it is only to point out that one can behave in a way that others define as mannerly without necessarily subscribing to the definition.

One important consequence of this distinction between virtue and manners is that only manners can be coerced.<sup>5</sup> A government can enforce outward behavior, but compelling people to behave in the way that a virtuous person would behave cannot make people virtuous. Imagine legislation designed to coerce a form of civic virtue from the citizenry. A law states that every person must vote. I do so, but because I am not truly a

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3. See generally D. FARBER & S. SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 1-21 (1990) (discussing the intellectual origins of the Constitution).

4. See Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 387 (“[I]t is imperative that progressive scholars begin to experiment with new ways of talking about the problems of free expression. We must find our own voice, we must find a new voice, before it is too late.”).

5. A possible exception is that coercing virtue in children, whose intellect, habits, and values are still largely unformed, may ultimately induce them to internalize the coerced behavior. See *infra* notes 42-49 and accompanying text.

virtuous person, I vote unwisely. I might vote at random or perhaps for those whose names are pleasing to my ear. Indeed, if I am so unvirtuous as to be reluctant to vote, I may react to government coercion by refusing even to consider voting seriously. The government cannot compel me to make virtuous choices without depriving me of choice altogether by telling me who to vote for. Until I have acquired the internal habit of deliberately and thoughtfully choosing who will represent me, I cannot be said to be virtuous.

American republicans and those who influenced them have recognized the impossibility of coercing virtue. John Locke, a major influence on eighteenth century Americans, criticized governmental enforcement of religious virtue on philosophical grounds: "it is one thing to persuade, another to command; one thing to press with arguments, another with penalties."<sup>6</sup> The drafters of the 1787 Constitution deliberately rejected a provision enabling Congress to enact sumptuary laws, which would have given Congress the power to regulate virtue.<sup>7</sup> Abraham Lincoln, who is often considered to be a direct political descendant of the eighteenth century republicans,<sup>8</sup> once said that if you "assume to dictate [a man's] judgment, or to command his action, or to mark him as one to be shunned and despised, . . . he will retreat within himself, close all the avenues to his head and his heart."<sup>9</sup> These thinkers all recognized that enforcing virtuous behavior does not lead, in adult citizens, to internalization of the underlying virtuous beliefs.

Compelling good manners, on the other hand, is simple. It would, for example, be easy for the government to compel me to vote in a mannerly way. The government might refuse to count my vote, or perhaps even punish me in some other way, unless I wait my turn, refrain from electioneering at the polling place, speak pleasantly to the election officials, and place my completed ballot in the appropriate basket. Even if I do not agree that these are appropriate behaviors for voters, I can still fulfill the entire purpose of the law with mannerly behavior. The lawmakers care only about my behavior, and not about my

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6. J. LOCKE, *A Letter Concerning Toleration*, in 6 THE WORKS OF LOCKE 11 (1801).

7. See D. FARBER & S. SHERRY, *supra* note 3, at 140.

8. See, e.g., G. WILLS, *INVENTING AMERICA* xiv-xvii (1978); D. FARBER & S. SHERRY, *supra* note 3, at 253-71.

9. Address by Abraham Lincoln, Springfield, Ill. (Feb. 22, 1842), in 1 THE COLLECTED WORKS OF ABRAHAM LINCOLN 273 (1953).

beliefs. Thus, legislative fiat can make the voting process mannerly, but not virtuous.

So it is with behavior on campus. Universities that wish to maintain a certain civility on campus may be able to enforce that type of behavior coercively. Universities that wish to create or maintain certain values in their students, however, cannot accomplish their aim merely by coercing virtuous behavior. Indeed, as with voting, an attempt to compel virtuous behavior may backfire, creating nothing but resentment and a refusal to consider the underlying normative questions. In particular, censoring expression in an attempt to create virtue is likely to make the censored speech more, rather than less, appealing.<sup>10</sup>

This Essay will examine whether the recent spate of university regulations against hate speech are an attempt to coerce manners or an attempt to coerce virtue, and will then discuss in more detail the inappropriateness of university attempts to coerce virtue.

Some of the proponents of hate speech regulations appear to be attempting to regulate manners, not virtue. One commentator has in fact suggested that the proponents "wish . . . to maintain or restore civility to an often uncivil environment."<sup>11</sup> The preamble to the Ohio State University's draft regulations notes that a purpose of the regulations is "to create and protect an atmosphere in which all students can learn and work effectively."<sup>12</sup> An official letter explaining the University of Michigan policy disclaims any intent to "impos[e] a set of beliefs and values on all members of the [university] community."<sup>13</sup> These statements suggest that the proponents of hate speech regulations simply wish to coerce the manners necessary for a civil environment on university campuses.

However, more thorough analysis of the *application* of hate speech regulations, as well as a closer reading of the actual policies and the written justifications for the promulgation of

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10. Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 554 & n.358.

11. O'Neil, *Colleges Should Seek Educational Alternatives to Rules that Override the Historic Guarantees of Free Speech*, Chron. of Higher Educ., Oct. 18, 1989, at B1, col. 1.

12. OHIO STATE UNIVERSITY, AFFIRMATIVE ACTION AND DISCRIMINATION/DISCRIMINATORY HARASSMENT POLICIES 1 (draft Apr. 4, 1990) [hereinafter OHIO STATE POLICY] (on file with author).

13. Letter from John Schwartz, Advisor to the Director of Affirmative Action, University of Michigan, to the University Community (Mar. 7, 1989) (on file with author).

these policies, belies the notion that the motivation is the regulation of manners.

The proposed and actual applications of hate speech regulations provide the most persuasive evidence that such regulations are designed to improve the virtue of an unvirtuous population. Sanctions seem to depend not so much on the speaker's civility (or lack of it) as on his or her political viewpoint. Moreover, rude speech is apparently perfectly acceptable as long as it does not betray wrongheaded ideas.

One advocate of hate speech regulations, for example, provides a list of examples of speech that would or would not be prohibited under her scheme: anti-white speech by blacks would be permitted, but not anti-Semitic speech by blacks or whites. Zionism would be permitted only to the extent that it "aris[es] out of the Jewish experience of persecution," but not where it is a statement of white supremacy (the latter, presumably, typified by Arab-Israeli conflicts). Claims that the Holocaust never occurred would be prohibited, for such claims "are just as hateful, for all [their] tone of distorted rationality," as other anti-Semitic speech. Finally, as to collecting and displaying Nazi regalia or similarly hateful symbols, the Anti-Defamation League would be permitted to do so but a hypothetical "Gestapo Collector's Club" would not.<sup>14</sup>

Another influential proponent of hate speech regulations notes explicitly that the evil of hate speech depends in large part on "the context of the power relationships within which [the] speech takes place."<sup>15</sup> Thus, for example, his proposal "would prohibit a white woman from disparaging a black or gay man, but not a white, heterosexual man."<sup>16</sup> Moreover, neither epithets such as "honky" nor the demeaning and silencing of political conservatives would qualify as prohibitable hate speech.<sup>17</sup> Another law professor proposed a similar hierarchy on the ground that "[c]alling a white a 'honky' . . . is not the same as calling a black a 'nigger'" and thus only the latter should be punished.<sup>18</sup>

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14. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2361-70 (1989).

15. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 456.

16. Strossen, *supra* note 10, at 559 n.387 (paraphrasing Professor Lawrence's oral clarification of his proposal).

17. Lawrence, *supra* note 15, at 450 n.82, 455-56, 477 n.160.

18. Strossen, *supra* note 10, at 507 n.110 (quoting Stanford law professor Robert Rabin).

Motivation is obviously everything in this scheme. American Civil Liberties Union Director Morton Halperin has also noticed this bias, commenting that he could find "no cases where universities discipline students for views or opinions on the Left, or for racist comments against non-minorities."<sup>19</sup>

Formal or informal sanctions have also been applied to speech that is perfectly civil and rational, *if* it is considered to display an unvirtuous state of mind. The University of Michigan regulations were applied against a student who stated in a social work class that he believed that homosexuality was a disease and that he "intended to develop a counseling plan for changing gay clients to straight,"<sup>20</sup> and against a student who stated in an orientation session that he had heard minorities had a difficult time, and were not treated fairly, in a particular course.<sup>21</sup> Yet University of Michigan administrators refused to act on another student's complaint, ruling that a similarly civil classroom comment that "Jews cynically used the Holocaust to justify Israel's policies toward the Palestinians" was protected speech.<sup>22</sup> Condemnation of Israeli policies is apparently politically correct enough to remove any taint of anti-Semitism from the remark.

At least one proponent of hate speech regulations would apparently also ban politically incorrect remarks from serious faculty discussions. Professor Charles Lawrence of the Stanford law faculty draws an analogy between the racially motivated defacement of a Beethoven poster (an incident that is frequently cited as an example of punishable hate speech by advocates of regulation) and the faculty discussion of whether to retain the Western Civilization curriculum at Stanford, implying that he would censor the latter if he could.<sup>23</sup>

A pamphlet intended as an interpretive guide to enforcement accompanied the University of Michigan's regulations, and serves as a further illustration of proposed applications of hate speech regulations.<sup>24</sup> According to this guide, discriminatory harassment has occurred if "[a] male student makes remarks in class like 'Women just aren't as good in this field as

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19. See Finn, *The Campus: "An Island of Repression in a Sea of Freedom,"* COMMENTARY, Sept. 1989, at 17, 21 (quoting Morton Halperin).

20. *Doe v. University of Michigan*, 721 F. Supp. 852, 865 (E.D. Mich. 1989).

21. *Id.* at 865-66 n.14.

22. *Id.* at 866.

23. Lawrence, *supra* note 15, at 479 n.165.

24. The University of Michigan later withdrew the pamphlet. *University of Michigan*, 721 F. Supp. at 859-60.

men.'"<sup>25</sup> Apparently, this statement by a man would be sanctionable no matter how dispassionate the discussion and no matter what evidence was offered to support the claim, but would be perfectly permissible if made by a woman. Discriminatory harassment has also occurred, according to the interpretive guide, if "[s]tudents in a residence hall have a floor party and invite everyone on their floor except one person because they think she might be a lesbian."<sup>26</sup> Because the hate speech regulation only prohibits speech or behavior that "stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status,"<sup>27</sup> students refusing to invite someone to a floor party because she is overweight and unattractive, or because she is shy and nobody likes her, presumably would be permitted to act equally rudely. A particular brand of political virtue, not civility, is the crux of the policy.

Unvirtuous students and faculty have suffered even in the absence of new hate speech regulations. An editor and a cartoonist for the University of California at Los Angeles student newspaper were suspended for running a cartoon in which a rooster, asked how he got into the University of California at Los Angeles, replies, "affirmative action."<sup>28</sup> At Dartmouth, a student received a grade of "D" on a French exam, despite his excellent French, because he refused to condemn the *Dartmouth Review*, which had recently been involved in a contretemps with a black music professor. The exam asked students to evaluate the *Review* (in French). The student did so in excellent French, but failed to condemn the *Review*. The professor declared that she could not "in good conscience reward an 'A' to someone who is writing racist remarks, no matter how well it is said."<sup>29</sup> Students at the Harvard Law School accused

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25. UNIVERSITY OF MICHIGAN, WHAT STUDENTS SHOULD KNOW ABOUT DISCRIMINATION AND DISCRIMINATORY HARASSMENT BY STUDENTS IN THE UNIVERSITY ENVIRONMENT 1, quoted in *University of Michigan*, 721 F. Supp. at 857-58.

26. *Id.* at 2.

27. UNIVERSITY OF MICHIGAN, DISCRIMINATION AND DISCRIMINATORY HARASSMENT BY STUDENTS IN THE UNIVERSITY ENVIRONMENT 3 (Fall 1988) [hereinafter UNIVERSITY OF MICHIGAN POLICY], quoted in *University of Michigan*, 721 F. Supp. at 856.

28. Hentoff, *Free Speech on the Campus*, THE PROGRESSIVE, May 1989, at 12.

29. *The Privileged Class*, Wall St. J., Sept. 20, 1989, at A24, col. 1. The administration ultimately supported the student, but the incident is representative of the trend toward enforced orthodoxy.



a visiting professor of sexism — and sent letters to administrators in an attempt to prevent the school from making the professor a tenure offer — for asking whether “sauce for the goose, sauce for the gander” was sexist and for suggesting that successful contract negotiation contained important psychological elements analogous to those in successful lovemaking.<sup>30</sup>

The justifications given by proponents of hate speech regulation provide further evidence of the intent to regulate virtue. The Ohio State preamble noted above, for example, states that “acceptance, appreciation of diversity, and respect for the rights of others must be institutional values for a major public university and are *values that it must impart to its students and to society* as a whole.”<sup>31</sup> The most thoughtful and thorough scholarly defense of hate speech regulations distinguishes hate speech from speech advocating Marxism by noting that racism, unlike Marxism, is “universally condemned” and “wrong, both morally and factually.”<sup>32</sup> The president of a major public university forwarded his proposed hate speech regulation to the university chancellors with a cover letter that noted that the university “strives to create campuses that *foster the values of mutual respect and tolerance.*”<sup>33</sup> Another public university’s policy states that the “[u]niversity community is dedicated . . . to the *development of ethical and responsible persons,*” which includes “tolerance of and support for cultural, ethnic, and racial differences.”<sup>34</sup> A public law school has threatened to impose sanctions for any speech that indicates that “the student lacks ‘*sufficient moral character* to be admitted to the practice of law.’ ”<sup>35</sup> One draft regulation goes so far as to state that the university’s mission includes combating intolerance, which it defines as “an *attitude, feeling or belief*” of prejudice based on certain listed characteristics.<sup>36</sup> All of these justifications for

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30. MacNeil, *Letter to the Editor*, COMMENTARY, Mar. 1990, at 10-11.

31. OHIO STATE POLICY, *supra* note 12, at 1-2 (emphasis added).

32. Matsuda, *supra* note 14, at 2359-60 & n.203; see also Chen, *Preface to Jens B. Koepke's The University of California Hate Speech Policy: A Good Heart in Ill-Fitting Garb*, 12 HASTINGS COMM. & ENT. L.J. 593, 594 (1990) (“Students ignorant of our history of racial injustice and hostile to affirmative action must be taught about the history of American race relations, the struggle for civil rights, the principles of equality, and the value of diversity.”).

33. Letter from David Pierpont Gardner to the Chancellors of the University of California (Sept. 21, 1989) (emphasis added) (on file with author).

34. KANSAS STATE UNIVERSITY, POLICY PROHIBITING RACIAL AND/OR ETHNIC HARASSMENT 1 (rev. Nov. 1989) (emphasis added) (on file with author).

35. Matsuda, *supra* note 14, at 2370 n.248 (quoting a proposed policy at SUNY-Buffalo Law School) (emphasis added).

36. PENNSYLVANIA STATE UNIVERSITY, POLICIES AND RULES FOR STU-

hate speech regulations clearly depend on the underlying assumptions that hate speech is sinful as well as uncivil, and that a university ought to curb the sinful impulses of its students.

The addition of hate speech regulations to many student codes of conduct which already prohibit harassment without defining it in terms of victimized groups further illustrates that these universities are attempting to coerce particular values rather than merely to create a civil environment. One university currently prohibits "[p]hysically abusing, harassing, or intentionally inflicting severe emotional distress upon a member of the university community."<sup>37</sup> Nevertheless, this same university is considering a proposed additional policy condemning hate speech, which is defined as "the use of racial epithets by a dominant group or member of a dominant group to oppress, harass, or fluster a member of a subordinate group."<sup>38</sup>

In contrast, a few universities have already recognized that civility is not dependent on race, gender or other similar characteristics. In response to a request for regulations "which prohibit speech that libels, stereotypes, etc. women and members of minority groups," one university counsel provided, without further ado, its code of student conduct: the relevant portion of that code simply prohibits "[h]arassing, annoying or alarming another person . . . [or] addressing abusive language to any person."<sup>39</sup> Another university apparently used the typical list of protected characteristics only as an example: "An individual who harasses another because of his or her race, sex, sexual orientation, ethnic background, religion, expression of opinion, or any other factor irrelevant to participation in the free exchange of ideas" is subject to discipline.<sup>40</sup>

The actions and statements of proponents of hate speech

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DENTS 1 (draft Oct. 13, 1989) (emphasis added) (on file with author). The listed characteristics are the usual ones: "race, color, national origin, gender, sexual orientation or political or religious belief." *Id.* The University of Michigan policy adds age, marital status, handicap, and Vietnam-era veteran status. UNIVERSITY OF MICHIGAN POLICY, *supra* note 27, at 3. Every other actual or proposed policy (except the generalized ones discussed *infra* in text accompanying notes 39-40) lists some combination of these characteristics.

37. WASHBURN UNIVERSITY OF TOPEKA, STUDENT DISCIPLINARY CODE § II(7) (on file with author).

38. WASHBURN UNIVERSITY OF TOPEKA, PROPOSED STATEMENT ON LEARNING ENVIRONMENT 1 (May 7, 1990) (on file with author).

39. UNIVERSITY OF LOUISVILLE, CODE OF STUDENT CONDUCT § 7.t (rev. May 1, 1990) (on file with author).

40. UNIVERSITY OF CHICAGO, STUDENT RESPONSIBILITIES POLICY (preamble) (emphasis added) (on file with author). Whether the listed characteristics are in fact exemplary or exhaustive can only be determined by an examination

regulations thus demonstrate that the regulations are indeed intended to legislate virtue, not manners. The regulations are an attempt to dictate primarily how students (and faculty) think, and only secondarily (if at all) how they behave. As such, the regulations are a part of the larger movement in higher education toward enforcement of a "politically correct" orthodoxy.<sup>41</sup> The remainder of this Essay will consider the extent to which university attempts to coerce virtue are appropriate in a republican polity.

I see two major problems with such university attempts to coerce virtue. Both deal mainly with the differences between primary and secondary education on the one hand, and university education on the other. First, unlike primary and secondary schools, producing virtuous, responsible citizens is not a major purpose of the university, and indeed conflicts with more important purposes. Second, even if improving the virtue of its students were a legitimate university purpose, coercion at the university level cannot accomplish this goal.

Teaching virtue is at least arguably one of the purposes of primary and secondary education. A republican polity in particular would recognize the importance of instilling in children the values and virtues necessary for life in that democratic society. Historically, public education in the United States was in fact designed to transmit shared moral values, including civic virtue.<sup>42</sup> Many modern scholars — especially neo-republicans of one sort or another — also stress the necessity of allowing schools to transmit values rather than remaining ideologically neutral.<sup>43</sup> This indoctrination aspect of primary and secondary

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of how the regulation has been applied, but that information is not publicly available.

41. See Bernstein, *The Rising Hegemony of the Politically Correct*, N.Y. Times, Oct. 28, 1990, § 4 (Week in Review), at 1, col. 1.

42. Rebell, *Schools, Values, and the Courts*, 7 YALE L. & POL'Y REV. 275, 280-82 (1989).

43. See, e.g., W. BENNETT, OUR CHILDREN AND OUR COUNTRY: IMPROVING AMERICA'S SCHOOLS AND AFFIRMING THE COMMON CULTURE 15-26, 69-102 (1988); A. GUTMANN, DEMOCRATIC EDUCATION 48-52 (1987); Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 19 (suggesting that value transmission still requires a respect for autonomy); Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1654-55 (1986) (same); Sherry, *Outlaw Blues* (Book Review), 87 MICH. L. REV. 1418, 1434-36 (1989); *Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045, 1053 (1968) [hereinafter *Developments*]. See also *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (reaffirming *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1978), in stating that objective of public

education is, of course, still controversial. Some scholars would restrict or prohibit explicit value transmission at any educational level,<sup>44</sup> and some suggest that virtue is best taught by example rather than by force.<sup>45</sup> Finally even some who concede the importance of value inculcation would restrict it to the classroom, and not allow coercive action to infect more voluntary spheres.<sup>46</sup>

Even assuming, however, that value inculcation is a legitimate function of primary and secondary schools, that does not necessarily mean that it is legitimate at the university level. Although one purpose of primary and secondary education is the transmission of societal values, the main purpose of a university is the search for knowledge. University students and faculty participate together in a disinterested search for truth.<sup>47</sup> For that reason, any coercive curtailment of unpopular viewpoints in the name of virtue is inconsistent with the very foundation of a university education. One scholar has insightfully captured the essence of this inconsistency:

A school cannot ban the Students for a Democratic Society from campus because it disagrees with or fears its social goals, but it can ban fraternities if it views them as trivial and anti-intellectual. This dis-

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education is the inculcation of fundamental values); Board of Education v. Pico, 457 U.S. 853, 864 (1982) (Brennan, J., plurality opinion) (stating that school officials must be permitted to design curricula that transmit community values).

44. See, e.g., B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 162 (1980); Gottlieb, *In the Name of Patriotism: The Constitutionality of "Bending" History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497, 498-500 (1987); Yudof, *When Governments Speak: Towards A Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 876-78 (1979). See also Ingber, *supra* note 43, at 21-25 (suggesting that value transmission should still respect autonomy and expose children to alternative beliefs); Tushnet, *Free Expression and the Young Adult: A Constitutional Framework*, 1976 U. ILL. L. F. 746, 749 (suggesting that value inculcation might be less appropriate at primary and secondary levels because of children's inability to think critically about what they are told).

45. See, e.g., *Pico*, 457 U.S. at 882 (Blackmun, J., concurring); A. GUTMANN, *supra* note 43, at 57.

46. See *Pico*, 457 U.S. at 869 (Brennan, J., plurality opinion).

47. See, e.g., Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251, 258-59 (1989) (discussing functions of university in general, although contending that only faculty engage in search for truth); Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1297, 1342-44 (1976) (noting different purposes of different educational levels); Ingber, *supra* note 43, at 33 (defining function of university as search for truth); *Developments, supra* note 43, at 1050 (noting different functions, but suggesting that knowledge discovery occurs to some extent at all levels).

tion is valuable, because it permits a college to make choices that promote educational values while deterring sectarian exclusivity.<sup>48</sup>

Moreover, even if value inculcation is one legitimate function of a university, it cannot be permitted in this context because it conflicts with the more important function of critical analysis.<sup>49</sup>

Finally, even if the most important university function is value transmission — which would be a sad commentary on the state of American universities — using coercive methods in an attempt to inculcate virtue in young adults is bound to fail. Most studies suggest that civics courses and other attempts to inculcate civic virtue are unsuccessful, even at the high school level, because students have already acquired a nearly unalterable belief system.<sup>50</sup> Only teaching critical thinking might induce them to change their minds.<sup>51</sup> Hate speech regulations, by suppressing or eliminating the need for critical thought about crucial social issues, undermine even this possibility. Moreover, enforcing virtuous behavior reduces the likelihood of producing truly virtuous citizens, because virtue requires taking responsibility for one's actions, and taking responsibility requires choice.<sup>52</sup> Finally, coercing tolerance of cultural diversity — the stated goal of many hate speech regulations — is especially difficult: as one author has noted, "you cannot indoctrinate for pluralism."<sup>53</sup>

In summary, university hate speech regulations, as an attempt to coerce virtue rather than manners, are both illegitimate and unlikely to succeed. This condemnation applies whether one takes the traditional rights-oriented approach or the more innovative republican view. Hate speech regulations are thus explainable only as the use of raw political power to enforce orthodoxy.

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48. Byrne, *supra* note 47, at 316-17 (citation omitted).

49. See Barnes, *Report of The Committee on Freedom of Expression at Yale*, 4 HUM. RTS. 357 (1975).

50. See, e.g., R. DAWSON, K. PREWITT & K. DAWSON, *POLITICAL SOCIALIZATION* 141-44 (2d ed. 1977); Langton & Jennings, *Political Socialization and the High School Civics Curriculum in the United States*, 62 AM. POL. SCI. REV. 852, 858-59 (1968); Van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 263-89 (1983).

51. See A. GUTMANN, *supra* note 43, at 173.

52. See, e.g., Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 301 (1988); Sherry, *Righting an Unwritten Constitution*, 64 CHI.-KENT L. REV. 1001, 1010 (1988).

53. Lowenthal, *The University's Autonomy versus Social Priorities*, in *UNIVERSITIES IN THE WESTERN WORLD* 75, 81 (P. Seabury ed. 1975).