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Editor's note: *The contemporary freedom of expression debate on college campuses can be enriched by a historical perspective. This image from the University of Maryland shows a recent gathering of students at a newly erected statue of Frederick Douglass. Imagine the loss if the views of Douglass or Malcolm X, or Bayard Rustin (to name a few) were not protected by the First Amendment.*

The role of freedom of expression in promoting social justice was stated years ago by Eleanor Holmes Norton (Delegate to Congress from the District of Columbia). The "historic attempts to suppress speech" she said, have "almost always" been attempts to suppress "the speech of the powerless--political dissidents, blacks, workers, anti-war protesters...If the university suppresses rather than takes on bigoted speech, it betrays our faith in the efficacy of education." (National Public Radio Commentary, published in Synthesis: Law and Policy on Higher Education *May 1990, p. 109).*

A recent article by University of Maryland President Wallace D. Loh in Time Magazine *explored ways to "reconcile academic freedom and racial justice" on college campuses. His approach can be summarized as: [1] strict adherence to established First Amendment principles; [2] structured ways to listen and respond to students calling for a more inclusive campus; and [3] presidential leadership in holding students morally accountable for hateful expression, including use of voluntary "restorative justice" interventions designed to "to develop the whole person—the heart and spirit as well as the mind."*

Colleges and universities don't address these issues in a vacuum. UC-Berkeley protests in the 1960s helped launch the career of Ronald Reagan. The resulting backlash did lasting harm to higher education. Creative campus leadership is needed to demonstrate the historical compatibility between core values of freedom of expression and racial justice.

TOPICS IN THIS ISSUE

15.55 OCR RULING/CASE LAW UPDATE

KEY QUOTATIONS:

From an Office of Civil Rights, U.S. Department of Education, 2013 letter to the University of California at Berkeley:

> "Based on the results of its investigation, OCR is closing this complaint . . . In the university environment exposure to such robust and discordant expressions, even when personally offensive and hurtful, is a circumstance that a reasonable student in higher education may experience."

From *Felber v. Yudof* (N.D. Calif., December 22, 2011) (university not liable under the facts presented for failing to prevent student-on-student harassment).

> "Plaintiffs expressly acknowledge that setting up informational tables and distributing leaflets on Sproul Plaza is protected speech, and yet they appear to be attempting to draw an untenable line that would remove from protection signs and publications that are critical of Israel and supportive of Hamas and Hezbollah. That protestors' signs may have contained language that plaintiffs believe was inflammatory, offensive, or untrue, does not warrant a different result. See *Snyder [v. Phelps,]*, 131 S. Ct. at 1217 (signs bearing messages such as "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "You're Going to Hell," which may 'fall short of refined social or political commentary,' nonetheless entitled to First Amendment protection, thereby foreclosing claim for infliction of emotional distress)."

15.56 KEY CASE REVIEW A failed effort by the University of Missouri to censor "offensive" speech in 1973: *Papish v. University of Missouri Curators* 410 U.S. 667 (distribution of newspaper with a cartoon depicting police officers raping the statue of liberty protected by the First Amendment).

ENDNOTE: from former Harvard University President Derek Bok in the March 15, 1991 *Harvard University Gazette:*

> Although it is not clear to what extent the First Amendment is enforceable against private institutions, I have great difficulty understanding why a university such as Harvard should have less free speech than the surrounding society--or than a public university, for that matter. By the nature of their mission, all universities should be at least as concerned with protecting freedom of expression as the rest of society. Like the rest of society we should also worry about who will draw the lines and how wisely they will be drawn if we begin to restrict the bounds of permissible speech . . .
>
> In addition, I suspect that no community can expect to become humane and caring by restricting what its members can say. The worst offenders will simply find other ways to irritate and insult. Those who are not malicious but merely insensitive are not likely to learn by having their flags or posters torn down. Once we start to declare certain things 'offensive,' with all the excitement and attention that will follow, I fear that much ingenuity will be exerted trying to test the limits, much time will be spent trying to draw tenuous distinctions, and the resulting publicity will eventually attract more attention to the offensive material than would ever have occurred otherwise" (p.1, 4).

15.55 Freedom of expression and peer harassment: OCR and judicial perspectives*

OCR addressed the subject of freedom of expression and peer harassment two years ago in a letter to then University of California at Berkeley Chancellor Robert J. Birgeneau. The letter closed a complaint alleging that Jewish students at UC-B had been subjected to "a hostile environment on the basis of their national origin, and the University failed to respond promptly and effectively to notice of the hostile environment."

> **Editor's note**: We are indebted to our colleague Paul Grossman (former Chief Regional Attorney, US Department of Education, Office for Civil Rights, San Francisco, retired) for alerting us to the OCR letter. Click here for a related UC-B press release.

Allegations in the OCR complaint correspond with the statement of facts in a related lawsuit: *Felber v. Yudof* (N.D. Calif., December 22, 2011) (university not liable under the facts presented for failing to prevent student-on-student harassment). In that case, plaintiffs alleged they had been "subjected to harassment and intimidation from members of two student organizations, Students for Justice in Palestine (SJP) and the Muslim Student Association (MSA), also known as the Muslim Students Union." Excerpts from *Felber* appear below in our Key Case Review.

The following excerpt from the August 19, 2013 OCR letter to the University of California at Berkeley is a concise statement of the protections given to freedom of expression in a "university environment where academic freedom fosters the robust exchange of ideas . . ."

> "OCR has consistently maintained that the statutes and regulations it enforces protect students from prohibited discrimination, and do not restrict the exercise of expressive activities or speech that are protected under the First Amendment of the U.S. Constitution. This is particularly relevant in the university environment where academic freedom fosters the robust exchange of ideas . . ."
>
> In addressing allegations of harassment, OCR recognizes that in order to be prohibited by the statutes and regulations that OCR enforces, the harassment must include something beyond the expression of views, words, symbols or thought that a student finds personally offensive. The offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment. Under OCR's standards, in order to establish a hostile environment conduct must be sufficiently severe, persistent, or pervasive as to limit or deny the student's ability to participate in or benefit from the educational program. This requires that conduct be evaluated from the perspective of a reasonable person in the alleged victim's position."
>
> "Based on the results of its investigation, OCR is closing this complaint . . . In the university environment exposure to such robust and discordant expressions, even when personally offensive and hurtful, is a circumstance that a reasonable student in higher education may experience. In this context, the events that the complainants described do not constitute actionable harassment."

A related key case review: *Felber v. Yudof* (N.D. Calif., December 22, 2011) (university not liable under the facts presented for failing to prevent student-on-student harassment).

Excerpts from *Felber* follow in added question and answer format:

HOW DID THIS CASE ARISE?

Sproul Plaza, on the campus of the University of California, Berkeley, was the birthplace of what came to be known as the Free Speech Movement in 1964. To this day, Sproul Plaza remains a place where students and others gather to engage in vigorous and sometimes contentious expressions of political speech. Plaintiffs in this action, one current and one former UC student, allege that certain individuals and organizations have repeatedly exceeded the boundaries of free speech, engaging in conduct that amounts to harassment, intimidation, threats, assault, and even battery, both on Sproul Plaza, and elsewhere on the Berkeley campus and other schools in the UC system.

In this action, plaintiffs seek to hold the University, certain of its administrators, and the Associated Students of the University of California ("ASUC") responsible for the actions of those individuals and organizations, and to require defendants to adopt certain policies and rules purportedly designed to curtail wrongful conduct by such persons.

WHAT ARE THE FACTS OF THE CASE?

Plaintiff Jessica Felber graduated from UC Berkeley in December of 2010. Plaintiff Brian Maissy remains enrolled as an undergraduate on the campus. Both describe themselves as being of "Jewish ancestry and religion." Plaintiffs allege that they have been subjected to harassment and intimidation from members of two student organizations, Students for Justice in Palestine ("SJP") and the Muslim Student Association ("MSA"), also known as the Muslim Students Union.

The centerpiece of the complaint's allegations of unlawful harassment involve an incident that took place during an event held annually on campus known as "Apartheid Week." Plaintiffs allege that Apartheid Week is organized by SJP and MSA in an effort to compare the policies of the State of Israel with those of South Africa between 1948 and 1993. Activities include setting up informational tables and distributing leaflets on Sproul Plaza, which plaintiffs acknowledge is "certainly protected free speech." Event organizers, however, also set up "check points," at which students dressed as soldiers and carrying "realistic-looking" simulated "assault weapons" challenge passing students, demanding them to state whether they are Jewish or not.

During Apartheid Week in March of 2010, Felber was participating in an event called "Israel Peace and Diversity Week," organized by a campus group to present viewpoints "differing from 'Apartheid Week." Felber was holding a placard reading, "Israel wants Peace." Another student, Husam Zakharia, who has a leadership role in SJP, allegedly rammed a shopping cart into Felber intentionally, causing her physical injuries that required medical attention. Felber had previously encountered Zakharia more than a year earlier at a political rally. On that occasion, Zakharia allegedly spit at Felber and yelled, "you are disgusting." After these two incidents, Felber obtained a permanent restraining order from the Alameda County Superior Court requiring Zakharia to stay away from her, even on campus. For the remainder of the time Felber was enrolled at UC, however, she recounts being fearful to walk on campus alone.

IS MORE THAN A SINGLE ASSAULT INVOLVED?

Plaintiffs insist that this case is "about much more" than Zakharia's assault on Felber. They contend that defendants have tolerated the "development of a dangerous anti-Semitic climate" on UC campuses, and

have failed to adopt policies, regulations, and procedures to protect Jewish students from threats, intimidation, and harassment by SJP and MSA. The complaint describes all of the following incidents, and the response to those incidents by UC authorities.

• In 1995, MSA conducted a rally on the Berkeley campus in support of Hamas. Students carried signs depicting the Israeli flag with a swastika in the middle, and some expressly volunteered to serve as future suicide bombers. A Jewish observer was spit on by a demonstrator. Defendants allegedly issued no effective condemnation.

• In October of 2000, the president of the UCLA chapter of MSA led a crowd of demonstrators at the Israeli consulate in chanting, “Death to Israel” and “Death to the Jews.”

• The first Apartheid Week with a mock checkpoint on the Berkeley Campus was staged by SJP in 2001. Although condemned by the campus newspaper as violating the campus Code of Conduct, similar events were permitted to continue in subsequent years. Defendants allegedly have “done nothing to prevent the continuance of these hostile ‘checkpoints’” despite complaints from many students.

• In April of 2001, SJP demonstrators were arrested after a six-hour “siege” of a campus building.

• In December of 2001, a member of Chabad, a Jewish religious group at UC Berkeley was assaulted near the Chabad house. The following spring, a window of the house was smashed and graffiti stating, “Fuck the Jews” was painted on the wall.

• In May of 2002, a demonstration sponsored by JSP and MSA at UC Irvine featured mock “body bags” of Palestinians claimed to have been murdered by the Israeli army.

• In April of 2002, newsmagazines published by JSP and MSA at UCLA and UC Irvine jointly circulated a magazine that was highly-critical of Israel and laudatory of Hamas and Hezbollah.

• In 2004, SJP activists disrupted a lecture by Middle East scholar Daniel Pipes, until ejected by campus police.

• In 2007, SJP activists disrupted a speech by author Nonie Darwishspoke, until ejected by campus police.

• In March of 2008, SJP sponsored a “die-in,” in which 30-40 protesters lay on the ground in Sproul Plaza, obstructing foot traffic. Demonstrators’ signs accused Israel of starting another Holocaust, and equated Israelis to Nazis. SJP demonstrators have blocked and tried to destroy signs of Jewish students attempting to conduct peaceful counter-protests.

• In November of 2008, during an “Israel event,” SJP protesters disrupted a concert, by draping two Palestinian flags from a balcony over the stage. Campus police responded to the resulting “riot.”

• In January of 2011, SJP and MSA protesters were disruptive at a speech given by the Israeli ambassador, resulting in indictments brought against eleven students by the Orange County District Attorney.

• In May of 2011, during Apartheid Week, a disabled student’s wheelchair became entangled in the simulated barbed wired used at a “checkpoint.” When plaintiff Maissy reported observing this incident to defendant Jonathan Poullard, Dean of Student Affairs, the response he received was that although the disabled student had a “moment of difficulty” in passing the barricades, campus police observed that SJP members quickly assisted him.

WHAT IS THE PLAINTIFFS' FIRST LEGAL CLAIM?

The first claim for relief . . . asserts that defendants have violated plaintiffs' right to the free exercise of religion, by "failing to adequately secure and monitor the hostile campus environment."

HOW SHOULD THE FREE EXERCISE CLAIM BE RESOLVED?

[F]rom the facts presently alleged, it is far from clear that any person interfered with plaintiffs' free exercise of religion. Nevertheless, even assuming that plaintiffs have alleged, or could amend to allege, sufficient acts of harassment and intimidation directed against them based on their religion to be deemed as an interference with their free exercise of that religion, they simply have no basis for pursuing such constitutional claims against defendants. With exceptions not implicated here, state actors have no constitutional obligation to prevent private actors from interfering with the constitutional rights of others. See *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 196 (1989) (holding that the purpose of the Due Process clause was "to protect the people from the State, not to ensure that the State protected them from each other."); cf. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 639-640 (1999) (finding potential statutory liability for school's "deliberate indifference" towards preventing student-on- student sexual harassment).

Plaintiffs insist that federal courts have jurisdiction to, and routinely do, order educational and other institutions to adopt policies and procedures to protect First Amendment rights of individuals. Plaintiffs, however, have misread the precedents on which they rely. For example, plaintiffs contend that *Saxe v. State College Area School. Dist.,* 240 F.3d 200 (3rd Cir. 2001) "cogently and accurately" states the law applicable here. In *Saxe,* the plaintiffs were challenging the constitutionality of an "Anti-Harassment Policy" adopted by a state college with the stated goal of "providing all students with a safe, secure, and nurturing school environment." Although the court was careful to avoid implying that restrictions on "harassment" will never pass constitutional muster, it ultimately held that the particular policy in dispute was unconstitutionally overbroad . . .

Saxe at most stands for the proposition that a school district may adopt a speech and conduct code provided it is drawn narrowly enough not to infringe on First Amendment rights. Nothing in *Saxe* implies, much less holds, that a school has a constitutional obligation to attempt to craft and to adopt a code regulating speech that walks that narrow constitutional line. See also *LaVine v. Blaine School District* 257 F.3d 981 (9th Cir. 2001) (reviewing constitutionality of disciplinary action taken against student for writing poem with violent imagery; no implication that school had constitutional obligation to impose discipline); *College Republicans at San Francisco State v. Reed*, 523 F.Supp.2d 1005 (ND Cal. 2007) (analyzing constitutionality of existing Student Conduct Code; no implication of constitutional obligation to adopt such a code).

Accordingly, plaintiffs have failed to allege a tenable federal constitutional claim, and there is no basis to believe they could do so by alleging additional or different facts . . .

DID DEFENDANTS VIOLATE TITLE VI?

Title VI of the 1964 Civil Rights Act, 42 U.S.C §§ 2000d et seq. provides that, "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Title VI, thus provides at least a theoretical basis on which the University could be required to regulate the conduct of other students, unlike plaintiffs' purported constitutional claims . . . To bring such a claim, however, plaintiffs would have to allege conduct that is, "so severe, pervasive, and objectively offensive that it denies its victims the equal access to education" that the statute is designed to protect, and that the University acted with "deliberate indifference" towards that conduct.

[Plaintiffs'] allegations do not satisfy these requirements for several reasons. First, a very substantial portion of the conduct to which plaintiffs object represents pure political speech and expressive conduct, in a public setting, regarding matters of public concern, which is entitled to special protection under the First Amendment. *Snyder v. Phelps,* 131 S. Ct. 1207, 1219 (2011). "Such speech cannot be restricted simply because it is upsetting or arouses contempt. . . . '[The point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.'" (quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995)). Plaintiffs expressly acknowledge that setting up informational tables and distributing leaflets on Sproul Plaza is protected speech, and yet they appear to be attempting to draw an untenable line that would remove from protection signs and publications that are critical of Israel and supportive of Hamas and Hezbollah. That protestors' signs may have contained language that plaintiffs believe was inflammatory, offensive, or untrue, does not warrant a different result. See *Snyder*, 131 S. Ct. at 1217 (signs bearing messages such as "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "You're Going to Hell," which may "fall short of refined social or political commentary," nonetheless entitled to First Amendment protection, thereby foreclosing claim for infliction of emotional distress).

Second, a broad swath of the conduct alleged occurred at times and in places where plaintiffs were not present. While such conduct may, to the extent plaintiffs were actually aware of it, have some extremely marginal relevance to plaintiffs' contention that they perceived a hostile environment, acts occurring years before plaintiffs ever enrolled at UC Berkeley, and/or on different campuses entirely, does little to demonstrate that plaintiffs suffered severe and pervasive harassment.

Next, plaintiffs have not alleged facts showing that they were denied access to the University's educational services in any meaningful sense. Despite the fact the Sproul Plaza likely serves as an important campus thoroughfare and gathering place, it is not even clear that activities on Sproul Plaza or at Sather Gate necessarily would significantly impede any student's access to the educational services offered by the University, regardless of the nature of those activities. The incident in which Felber was assaulted with a shopping cart, for example, did not occur in the context of her educational pursuits. Rather, that event occurred when she, as one person attempting to exercise free speech rights in a public forum was allegedly attacked by another person who likewise was participating in a public protest in a public forum.

Finally, plaintiffs fail to show how defendants have acted with "deliberate indifference" in ignoring wrongful conduct otherwise not amounting to protected speech. To the contrary, plaintiffs have alleged facts that campus police have made arrests of disruptive protestors, and that the administration has engaged in an ongoing dialogue with the opposing parties in an attempt to ensure that the rights of all persons are respected, and to minimize the potential for violence and unsafe conditions. That the University may not have acted as plaintiffs would prefer does not rise to "deliberate indifference."

> **Footnote 5:** As one example, plaintiffs fault Dean Poullard for asking Felber whether she had been spit on or merely spit at, and for appearing to take the matter less seriously when she acknowledged that she had not been spit on. As offensive as spitting at someone maybe, it very well could constitute protected expressive conduct, depending on the precise circumstances, whereas spitting on someone much more likely could rise to an assault or battery, criminally punishable or civilly actionable.

WHAT IS THE OUTCOME?

Because plaintiffs have failed to allege facts supporting a claim that defendants have violated plaintiffs' constitutional or other legal rights, or that they have a legal duty to take further action to control the conduct of other persons, defendants' motions to dismiss will be granted, with leave to amend in part.

* This content first appeared in *TPR* 13.42 and has been revised for this issue.

15.56 KEY CASE REVIEW A failed effort by the University of Missouri to censor "offensive" speech in 1973: *Papish v. University of Missouri Curators* 410 U.S. 667 (distribution of newspaper with a cartoon depicting police officers raping the statue of liberty protected by the First Amendment).

Editor's introduction: *Irony sometimes results from historical insensibility. University of Missouri students challenging racial injustice in the 1970s claimed that otherwise lawful, but "offensive" speech was protected by the First Amendment. Most judges on the Supreme Court ultimately agreed--while a conservative minority (Burger, Rehnquist, and Blackmun) dissented. Now the political sides and legal arguments on this issue are reversed. "Offensive" speech--especially if deemed harmful to minorities--is said to be outside First Amendment protection. Many contemporary conservatives disagree.*

Progressives aware of this ideological reversal argue that there can be "good" or "bad" forms of offensive speech, depending on the viewpoint expressed. The Supreme Court, however, has routinely rejected that reasoning, grounded in a famous observation from Justice Jackson in West Virginia State Board of Education v. Barnette, *319 U.S. 624 (1943) (compulsory flag salute unconstitutional):*

> *"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act."*

College administrators caught in the middle of a renewed free speech debate need to know that the Supreme Court has expressed a strong presumption against most kinds of viewpoint discrimination. Harm to the feelings and sensibilities of listeners does not override this perspective. Consider the following language from Texas v. Johnson 491 U.S. 397 (1989) 491 U.S. 397 (1989) (publicly burning an American flag as a means of political protest protected by the First Amendment):

> If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable . . . We have not recognized an exception to this principle even where our flag has been involved . . .
>
> The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. 'To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is *more speech*, not enforced silence.' *Whitney* v. *California,* 274 U. S. 357, 377 (1927) (Brandeis, J., concurring).
>
> And, precisely because it is our flag that is involved, one's response to the flag burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by — as one witness here did — according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

Excerpts from Papish v. University of Missouri Curators **in added question and answer format:**

WHAT ARE THE FACTS OF THE CASE?

Petitioner, a graduate student in the University of Missouri School of Journalism, was expelled for distributing on campus a newspaper "containing forms of indecent speech" in violation of a bylaw of the Board of Curators. The newspaper, the Free Press Underground, had been sold on this state university campus for more than four years pursuant to an authorization obtained from the University Business Office. The particular newspaper issue in question was found to be unacceptable for two reasons. First, on the front cover the publishers had reproduced a political cartoon previously printed in another newspaper depicting policemen raping the Statue of Liberty and the Goddess of Justice. The caption under the cartoon read: ". . . With Liberty and Justice for All." Secondly, the issue contained an article entitled "M_____f_____ Acquitted," which discussed the trial and acquittal on an assault charge of a New York City youth who was a member of an organization known as "Up Against the Wall, M_____f_____."

Following a hearing, the Student Conduct Committee found that petitioner had violated Par. B of Art. V of the General Standards of Student Conduct which requires students "to observe generally accepted standards of conduct" and specifically prohibits "indecent conduct or speech." Her expulsion, after affirmance first by the Chancellor of the University and then by its Board of Curators, was made effective in the middle of the spring semester. Although she was then permitted to remain on campus until the end of the semester, she was not given credit for the one course in which she made a passing grade.

WHAT DID THE LOWER COURTS DECIDE?

After exhausting her administrative review alternatives within the University, petitioner brought an action for declaratory and injunctive relief pursuant to 42 U.S.C. 1983 in the United States District Court for the Western District of Missouri. She claimed that her expulsion was improperly premised on activities protected by the First Amendment. The District Court denied relief, . . . and the Court of Appeals affirmed, one judge dissenting . . .

The District Court's opinion rests, in part, on the conclusion that the banned issue of the newspaper was obscene. The Court of Appeals found it unnecessary to decide that question. Instead, assuming that the newspaper was not obscene and that its distribution in the community at large would be protected by the First Amendment, the court held that on a university campus "freedom of expression" could properly be "subordinated to other interests such as, for example, the conventions of decency in the use and display of language and pictures." Id., at 145. The court concluded that "[t]he Constitution does not compel the University . . . [to allow] such publications as the one in litigation to be publicly sold or distributed on its open campus." Ibid.

WHAT DID THE U.S. SUPREME COURT DECIDE?

This case was decided several days before we handed down *Healy v. James*, 408 U.S. 169 (1972), in which, while recognizing a state university's undoubted prerogative to enforce reasonable rules governing student conduct, we reaffirmed that "state colleges and universities are not enclaves immune from the sweep of the First Amendment." Id., at 180. See *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). We think *Healy* makes it clear that the mere dissemination of ideas - no matter how offensive to good taste - on a state university campus may not be shut off in the name alone of "conventions of decency." Other recent precedents of this Court make it equally clear that neither the political cartoon nor the headline story involved in this case can be labeled as constitutionally obscene or otherwise unprotected. E. g., *Kois v. Wisconsin*, 408 U.S. 229 (1972); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Cohen v. California*, 403 U.S. 15 (1971).There is language in the opinions below which suggests

that the University's action here could be viewed as an exercise of its legitimate authority to enforce reasonable regulations as to the time, place, and manner of speech and its dissemination. While we have repeatedly approved such regulatory authority, e. g., *Healy v. James*, 408 U.S., at 192 -193, the facts set forth in the opinions below show clearly that petitioner was expelled because of the disapproved content of the newspaper rather than the time, place, or manner of its distribution.

Since the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech, and because the state University's action here cannot be justified as a nondiscriminatory application of reasonable rules governing conduct, the judgments of the courts below must be reversed. Accordingly the petition for a writ of certiorari is granted, the case is remanded to the District Court, and that court is instructed to order the University to restore to petitioner any course credits she earned for the semester in question and, unless she is barred from reinstatement for valid academic reasons, to reinstate her as a student in the graduate program.

Dissent by Chief Justice Burger

The present case is clearly distinguishable from the Court's prior holdings in *Cohen*, *Gooding*, and *Rosenfeld*, as erroneous as those holdings are. *Cohen*, *Gooding*, and *Rosenfeld* dealt with prosecutions under criminal statutes which allowed the imposition of severe penalties. Unlike such traditional First Amendment cases, we deal here with rules which govern conduct on the campus of a state university.

In theory, at least, a university is not merely an arena for the discussion of ideas by students and faculty; it is also an institution where individuals learn to express themselves in acceptable, civil terms. We provide that environment to the end that students may learn the self-restraint necessary to the functioning of a civilized society and understand the need for those external restraints to which we must all submit if group existence is to be tolerable.

I find it a curious - even bizarre - extension of *Cohen*, *Gooding*, and *Rosenfeld* to say that a state university is impotent to deal with conduct such as that of the petitioner. Students are, of course, free to criticize the university, its faculty, or the Government in vigorous, or even harsh, terms. But it is not unreasonable or violative of the Constitution to subject to disciplinary action those individuals who distribute publications which are at the same time obscene and infantile. To preclude a state university or college from regulating the distribution of such obscene materials does not protect the values inherent in the First Amendment; rather, it demeans those values. The anomaly of the Court's holding today is suggested by its use of the now familiar "code" abbreviation for the petitioner's foul language.

Dissent by Justice Rehnquist

We held in *Healy v. James*, 408 U.S. 169, 180 (1972), that "state colleges and universities are not enclaves immune from the sweep of the First Amendment." But that general proposition does not decide the concrete case now before us. *Healy* held that the public university there involved had not afforded adequate notice and hearing of the action it proposed to take with respect to the students involved. Here the Court of Appeals found, and that finding is not questioned in this Court's opinion, that "the issue arises in the context of a student dismissal, after service of written charges and after a full and fair hearing, for violation of a University rule of conduct." 464 F.2d 136, 138 . . .

I continue to adhere to the dissenting views expressed in *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972), that the public use of the word "M_____f_____" is "lewd and obscene" as those terms were used by the Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). There the Court said:

"There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or `fighting' words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances

are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Id., at 571-572.

But even were I convinced of the correctness of the Court's disposition of *Rosenfeld,* I would not think it should control the outcome of this case. It simply does not follow under any of our decisions or from the language of the First Amendment itself that because petitioner could not be criminally prosecuted by the Missouri state courts for the conduct in question, she may not therefore be expelled from the University of Missouri for the same conduct. A state university is an establishment for the purpose of educating the State's young people, supported by the tax revenues of the State's citizens. The notion that the officials lawfully charged with the governance of the university have so little control over the environment for which they are responsible that they may not prevent the public distribution of a newspaper on campus which contained the language described in the Court's opinion is quite unacceptable to me, and I would suspect would have been equally unacceptable to the Framers of the First Amendment. This is indeed a case where the observation of a unanimous Court in *Chaplinsky* that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" applies with compelling force.

The Court cautions that "disenchantment with Miss Papish performance, understandable as it may have been, is no justification for denial of constitutional rights." Quite so. But a wooden insistence on equating, for constitutional purposes, the authority of the State to criminally punish with its authority to exercise even a modicum of control over the university which it operates, serves neither the Constitution nor public education well. There is reason to think that the "disenchantment" of which the Court speaks may, after this decision, become widespread among taxpayers and legislators. The system of tax-supported public universities which has grown up in this country is one of its truly great accomplishments; if they are to continue to grow and thrive to serve an expanding population, they must have something more than the grudging support of taxpayers and legislators. But one can scarcely blame the latter if, told by the Court that their only function is to supply tax money for the operation of the university, the disenchantment" may reach such a point that they doubt the game is worth the candle.

[end of *TPR* issue]