"THE REMEDY TO BE APPLIED IS MORE SPEECH": RIGHTS, RESPONSIBILITIES, AND OBLIGATIONS OF FREE EXPRESSION AT LAW SCHOOLS

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I. INTRODUCTION

Justice Louis D. Brandeis is justly recognized as one of the foundational figures in modern American free expression jurisprudence.[1] The interpretation of the First Amendment's free speech clause as a robust guarantee of free expression that he developed along with Justice Oliver Wendell Holmes in a series of dissenting and concurring opinions[2] in time was adopted by the Court as controlling doctrine.[3] Fundamentally, this doctrine broadly protects expression, even and perhaps especially, in Holmes' words, the "thought that we hate."[4] But this broad protection of expression has a set of categorical exceptions, among the most noteworthy of which is the incitement of imminent lawless activity.[5] Brandeis highlighted the nature of this exception in his much-quoted opinion in

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1. *See, e.g.*, MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 545-70 (2009).

2. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); Debs v. United States, 249 U.S. 211, 211 (1919); Schenck v. United States, 249 U.S. 47, 48 (1919).

3. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

4. United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

5. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-9, at 848 (Found. Press, Inc. 2d ed. 1988); *Brandenburg*, 395 U.S. at 447.

Whitney v. California,[6] ultimately adopted by the Court decades later in *Brandenburg v. Ohio*.[7] The limited basis for the exception is found in the essence of the rule. Ordinarily, the corrective to anti-social expression is to be found in the process of debate. As Brandeis famously put it, "the remedy to be applied is more speech, not enforced silence."[8] The reason that advocacy of imminent harm is an exception to the presumed protection of speech lies in the insufficiency of time for the corrective to take place. Incitement of a criminal harm which can occur before reasoned debate may interfere, and therefore, may be proscribed.

Brandeis was articulating a theory of the First Amendment to protect the general public's expressive freedoms from governmental interference. To Brandeis, these freedoms were fundamental to a democratic and self-governing society, because the "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth[.]"[9] We might profitably both narrow and broaden the reach of the doctrine advanced by Brandeis in *Whitney* and ultimately adopted by the Court. Narrow it, in the sense of applying this lens to the particular context of institutions of higher learning, and particularly schools of law. Broaden in the sense of articulating not only a constitutional theory to apply to public institutions but a normative theory that applies to college and university campuses generally, private as well as public.

Such a doctrine appears to have underpinned the approach adopted by Judge Guido Calabresi during his tenure as dean of the Yale Law School when faced with issues as to the breadth of free expression, especially with respect to "the Wall."[10] The Wall was a public space for posting fliers, posters, banners and the like, that, in a pre-internet and social media era, was a centerpiece of expressing views to a school-wide audience.[11] Calabresi developed what we might call the "jurisprudence of the Wall," premised on encouraging more speech rather than enforcing silence and then using the "bully pulpit" of the deanship to speak out on certain issues.[12]

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6. 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent.").

7. *Brandenburg*, 395 U.S. at 447.

8. *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

9. *Id.* at 375.

10. *See* 2 NORMAN I. SILBER, *Conflict, Community, and Confidence: The Wall*, *in* OUTSIDE IN: THE ORAL HISTORY OF GUIDO CALABRESI 107-26 (2022).

11. *See id.* at 108, 118.

12. *See id.* at 107-08, 111-17. This article uses incidents that occurred at Yale Law School as a point of departure for addressing issues of free expression on law school campuses. It does not

The jurisprudence of the Wall begins, as it were, at the middle of the analysis. Calabresi assumed that we would share his starting point, and I think many of us do. It is worthwhile, however, to make explicit the basis for the strong presumption in favor of expression, even hurtful or, to some extent, harmful expression. This basis finds its roots in constitutional principles for public institutions and, for private colleges and universities, in the normative values articulated in the institution's mission. We will then consider the response that Calabresi advocated in response to hurtful or harmful expressive acts and the role of his approach to such expression. These were his "teaching moments."[13] Here his coalition somewhat broke down. On a personal note, I observe that two of his prime antagonists in this debate were among my most important teachers, Professor Peter Schuck and the late Professor Robert Cover. I will suggest that what Calabresi saw as an opportunity for teaching moments at the Yale Law School is that which Justice Brandeis in *Whitney* saw as a course of action more likely to lead productively to the "discovery and spread of political truth."[14] We might push even further, however, and propose that when the right to hurtful speech is exercised in a manner that disproportionately harms certain members of the community, "more speech"[15] is in fact an obligation owed by the community and especially its leaders to those who are so disproportionately harmed.

Finally, we will consider the attending challenges to institutional leaders participating directly in difficult conversations.[16] Calabresi raised one—how to determine when to speak and when to refrain. Recent events suggest another—whether the law school or university might incur liability for expressive activities.

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directly address more recent free speech controversies that have occurred at Yale Law School. *See, e.g.*, Josh Moody, *Yale Law Once Again in Conservative Crosshairs*, INSIDE HIGHER ED (Oct. 21, 2022), https://www.insidehighered.com/news/2022/10/21/free-speech-concerns-prompt-calls-shun-yale-law-grads [https://perma.cc/E4KW-YXHZ].

13. SILBER, *supra* note 10, at 111. Robert J. Havighurst may have originated the idea of the "teaching moment" in the context of a classroom or university. *See* ROBERT J. HAVIGHURST, HUMAN DEVELOPMENT AND EDUCATION (1953). As discussed here, Brandeis understood this in the context of a society.

14. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

15. SILBER, *supra* note 10, at 108.

16. *See infra* Part V.

II. THE PRESUMPTION IN FAVOR OF FREE EXPRESSION

Calabresi's presumption in favor of free expression may seem unexceptional and almost obvious.[17] But it ought not to be taken as a given. One could, for example, argue for a balancing approach that weighs the relative benefits and harms resulting from certain expression, providing maximum protection for beneficial speech and allowing for the regulation and even restriction of harmful speech. Or in the context of a college campus, one could argue that expression should be protected in accordance with its value or merit, much as certain student writings receive better grades than others and some work will be considering of a quality that may result in a failing grade that could ultimately contribute to expulsion from the institution. So why would we approach the issue of public expression on campus, of the kind associated with the Wall at Yale Law School in the 1980s, with a presumption in favor of expression?

To examine the case for the presumption that expression should be protected, we begin with a societal lens and will proceed to the particular context of the law school campus. It is useful to consider a relatively extreme context of expression to test the validity of the presumption, that is, not merely expression with which many people might disagree but expression that causes actual harm. It is for this reason that we begin with hate speech.

The context of hate speech, and hate crimes as well, is located at the intersection of three sets of significant individual and societal rights and interests: 1) freedom of expression; 2) personal safety for oneself, one's family, and one's property; and 3) personal dignity.[18] The third interest in particular can push up hard against the first. As developed by Jeremy Waldron in *The Harm in Hate Speech*, dignity is concerned with a person's basic social standing, and the interest in being recognized as "proper objects of society's protection and concern."[19] If the right to one's safety is inherently individualistic and about liberty, the right to one's dignity is inherently comparative and about equality—to have one's dignity respected is to be accorded the same basic social standing as any other member of the society.[20]

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17. Calabresi decided that students "had a right to speak," that he "wouldn't permit anybody to stop" students from speaking, but that correspondingly, "everybody else had the right to say anything that *they* wanted, in response." SILBER, *supra* note 10, at 107.

18. Frederick M. Lawrence, *The Contours of Free Expression on Campus: Free Speech, Academic Freedom, and Civility*, LIBERAL EDUC. ASS'N AM. COLLS. AND UNIVS., Spring 2017, at 14, 16.

19. JEREMY WALDRON, THE HARM IN HATE SPEECH 5 (2012).

20. Lawrence, *supra* note 18, at 16.

When we discuss hate speech and hate crimes, we are concerned with legitimate and significant rights on all sides, for example for both the speaker and the listener. We must proceed with great caution, protecting rights where we can, and limiting rights only when we must. By hate speech I mean that which offends or insults a group along racial, ethnic, national, religious, gender, or sexual identity lines. The definition of the German statute puts it well—attacks on “the human dignity of others by insulting, maliciously maligning or defaming . . . sections of the population”—and allows us to draw on Waldron’s idea of dignity.[21] As Waldron argues, hateful speech does cause actual harm to its listeners.[22] This is a subject to which we shall return below.

To say that there are legitimate and significant rights on all sides does not ultimately undercut the value of and need for robust protections of free expression. I ally myself here with the arguments presented by such scholars as Edwin Baker and Robert Post. Baker based his free expression understanding in a fundamental concept of autonomy.[23] In his essay “Autonomy and Hate Speech,” he wrote, “Law’s purposeful restrictions on [the speaker’s] racist or hate speech violate [that person’s] formal autonomy.”[24] Post, in *Constitutional Domains* and elsewhere has recognized the harm inflicted by hate speech, but argues persuasively that the fundamental societal interests of public discourse will almost always outweigh this harm.[25] In America, Post writes, “public discourse is an arena for the competition of many distinct communities, each trying to capture the law to impose its own particular norms.”[26] Public discourse in our democracy, he adds, thus has the “extraordinarily difficult task of ensuring democratic legitimacy in a climate of comparatively severe suspicion and distrust.”[27]

I find further foundation for an expansive view of free expression by returning to the jurisprudence of Justice Brandeis. As noted above, Brandeis is often twinned with Justice Holmes as the two great judicial champions of free speech through their dissents in the early twentieth century. It is important for our purposes, however, briefly to distinguish Holmes from Brandeis. Holmes is famous for his “marketplace of ideas”

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21. Strafgesetzbuch [StGB] [Penal Code], § 130, para. 1, sentence 2, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html [https://perma.cc/7X4R-37W5] (Ger.).

22. WALDRON, *supra* note 19, at 7, 9-10, 33.

23. *Id.* at 162.

24. *Id.* at 165.

25. *See generally* ROBERT C. POST, CONSTITUTIONAL DOMAINS (1995).

26. Robert Post, *Hate Speech*, *in* EXTREME SPEECH AND DEMOCRACY 123, 133 (Ivan Hare & James Weinstein eds., 2009).

27. *Id.* at 137.

metaphor,[28] borrowed from neoclassical economics. Just as the underlying theory of the market is that a free and unfettered market will produce the most efficient allocation of goods and services in an economy, the free and unfettered marketplace of ideas allows the best ideas to emerge and aids the search for truth. The worth of expression, therefore, is in the consequences that this expression may be expected to produce.

As alluded to above, Brandeis was no stranger to consequentialist argument. In his opinion in *Whitney v. California*, he grounded the proposition that "the remedy [to 'bad speech'] is more speech, not enforced silence,"[29] in part in the consequences it would likely produce. The fundamental "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[30] But Brandeis also saw the value of free speech as fundamental to the very way in which we participate in our society. In his dissenting opinion in *Gilbert v. Minnesota*,[31] Brandeis wrote:

> The right of a citizen of the United States to take part, for his own or the country's benefit, in the making of federal laws and in the conduct of the Government, necessarily includes the right to speak or write about them; to endeavor to make his own opinion concerning laws existing or contemplated prevail; and, to this end, to teach the truth as he sees it.[32]

To Brandeis, expressive activity was essential to our very humanity and the way in which we actualize ourselves as social beings.

III. THE CONSTITUTIONAL ROOTS OF THE PRESUMPTION FOR FREE EXPRESSION

The normative argument of Post, Baker, and others finds deep resonance in American case law where we find that free expression jurisprudence, as a starting point, provides protection for hate speech. This jurisprudence begins with the underlying premise that a state may not punish a person for holding an opinion regardless of how obnoxious the opinion may be to the general public or even how good a predictor it might be for future anti-social conduct. It is striking that in 1950, Chief Justice Fred Vinson, not renowned as a strong advocate of a robust view of the First Amendment, saw no need to provide any support for his assertion

28. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting).
29. Whitney v. California, 274 U.S. 357, 377 (Brandeis, J., concurring).
30. *Id.* at 375.
31. 254 U.S. 325 (1920).
32. *Id.* at 337-38 (Brandeis, J., dissenting).

that "one may not be imprisoned or executed because he holds particular beliefs."[33]

Consider the context of flag burning, which continues to press the limits of the right to express unpopular views. The Supreme Court, even as it has become more conservative in its approach to numerous areas of the law, has repeatedly upheld the right to burn an American flag.[34] In *Texas v. Johnson*,[35] in which the Texas flag burning prohibition was struck down, the Court held that "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."[36]

Holmes was one of the greatest champions of this "bedrock principle" to which the Court referred in *Texas v. Johnson*. In 1929, he dissented from an opinion in which the Supreme Court upheld the denial of citizenship to Rosika Schwimmer.[37] The sole basis on which Ms. Schwimmer's application had been denied was her ardent pacifism that led her to state that she would not bear arms to defend the United States.[38] In his pointed dissent, Justice Holmes set out his views as to the scope of the First Amendment:

> Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country.[39]

This dissent became the law seventeen years later, when the Supreme Court overruled *Schwimmer*, relying extensively on Holmes.[40] It is thus clear that a racist may not be punished merely for his racist beliefs and, not surprisingly, no law has sought to punish mere racist beliefs.

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33. Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 408 (1950). This is the same Justice Vinson who applied the "clear and present danger" standard to permit the prosecution of leaders of the Communist Party in Dennis v. United States, 341 U.S. 494, 507-08 (1951) (Vinson, C.J., plurality opinion).

34. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414, 420 (1989); Snyder v. Phelps, 562 U.S. 443, 458 (2011) (citing Texas v. Johnson, 491 U.S. 397, 414 (1989)).

35. 491 U.S. 397 (1989).

36. *Id.* at 414.

37. *See* United States v. Schwimmer, 279 U.S. 644, 653-55 (1929) (Holmes, J., dissenting). This case was overruled by Girouard v. United States, 328 U.S. 61 (1946).

38. *See Schwimmer*, 279 U.S. at 648.

39. *Id.* at 654-55 (Holmes, J., dissenting).

40. *See Girouard*, 328 U.S. at 63-69.

Holding a belief is what Professor Thomas Emerson called "the first stage in the process of expression."[41]

However, in the 1980s many universities attempted to regulate the succeeding stages of expression using speech codes.[42] Concerned over the increase in racial tensions on campuses, these schools adopted policies proscribing the expression of bigotry. None of these codes survived a First Amendment challenge in court. Campus speech codes at public universities have been viewed as unconstitutional prohibitions of speech based solely on the content of that speech. Although sympathetic with the goals of the campus speech codes, the district courts that struck down such regulations as those adopted by the University of Michigan and the University of Wisconsin, for example, ruled that the regulations impermissibly interfered with the First Amendment.[43]

Similar arguments to support a presumption of free expression might be advanced at private institutions. The normative arguments of those such as Baker and Post are not restricted to constitutional law and the presence of state action. We may also find support for the presumptive protection of expression in the missions of those private institutions themselves. Since the advent of the modern research university well over a century ago, the mission of most institutions of higher learning has included some version of the creation, discovery, and dissemination of knowledge.[44] Mission statements may also include specific references to teaching students and preparing graduates for roles in the society. For example, the mission of Yale University states that "Yale is committed to improving the world today and for future generations through outstanding research and scholarship, education, preservation, and practice. Yale educates aspiring leaders worldwide who serve all sectors of society."[45] The mission of the Maurice A. Deane School of Law at Hofstra University is to "prepare, challenge and inspire our students to make a difference in the world while we advance important ideas through the

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41. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 21 (1970).

42. Lawrence, *supra* note 18, at 17.

43. *See* Doe. v. Univ. of Mich., 721 F. Supp. 852, 854-57, 866-68 (E.D. Mich. 1989) (striking down speech code at the University of Michigan as a violation of students' First Amendment right of free expression); UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163, 1164-66, 1168, 1172-75, 1177, 1181 (E.D. Wis. 1991) (striking down the speech code at University of Wisconsin as a violation of students' First Amendment right of free expression).

44. *See* ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 63 (2012); ANTHONY T. KRONMAN, EDUCATION'S END: WHY OUR COLLEGES AND UNIVERSITIES HAVE GIVEN UP ON THE MEANING OF LIFE 59-62, 91-92 (2007).

45. *Mission Statement*, YALE UNIV., https://www.yale.edu/about-yale/mission-statement [https://perma.cc/KGK4-MHU5] (last visited Apr. 1, 2023).

legal academy, the profession and society—making an impact of our own."[46]

Research, scholarship, and education all require wide-ranging free inquiry and free expression. The process of studying a topic to reveal new insights begins with the ability to inquire, to consider, and to reflect. Placing restrictions on this ability necessarily limits the processes that are essential to the furthering of the university's mission. If this is true for colleges and universities generally, it is especially true for schools of law. The very structure of legal education and its traditional reliance on the Socratic method is premised on creating and furthering a culture of inquiry, challenge, and debate.[47]

Universities and colleges, and especially law schools, ought approach controversies concerning free speech with a strong presumption in favor of expression. To be sure, this is a rebuttable presumption. There are two categories of cases where the presumption of protecting speech on campus will be rebutted. The first mirrors the general First Amendment exception for actual threats, behavior that although verbal in character is intended directly to cause fear.[48] The second is behavior that disrupts a class or other campus program in a way that precludes others from being able to speak or hear a speaker.[49] Consistent with the underlying premise of the strong presumption in favor of free expression, both sets of exceptions should be invoked in exceptional circumstances, consistent with such countervailing interests as the right to express controversial views that are not threatening and the right to protest a program in a manner that does not prevent the event from going forward.

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46. *About the Law School*, HOFSTRA UNIV., https://law.hofstra.edu/about [https://perma.cc/3GNS-23DB] (last visited Apr. 1, 2023).

47. *See generally* WILLIAM P. LAPIANA, LOGIC & EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION (1994) (discussing the evolution of legal education amongst many schools throughout the United States).

48. *See* Elonis v. United States, 575 U.S. 723, 740 (2015). I have argued elsewhere that the basis for permitting the proscription of threats lies not in a speech-conduct distinction but rather in the fact that threats intend to cause harm whereas expression of even hateful views is intended to communicate. *See* FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 80-109 (1999); Frederick M. Lawrence, *Vigorous Civility: Aspirations for Free Expression on Campus*, *in* CONTEMPORARY ISSUES IN HIGHER EDUCATION 98-116 (Marybeth Gasman & Andres Castro Samayoa eds., 2019); Lawrence, *supra* note 18, at 18.

49. *Report of the Committee on Freedom of Expression at Yale*, YALE COLL. (Dec. 23, 1974), https://yalecollege.yale.edu/get-know-yale-college/office-dean/reports/report-committee-freedom-expression-yale [https://perma.cc/A2R6-QY7Y] ("This committee, therefore, finds a need for Yale to reaffirm a commitment to the principle of freedom of expression and its superior importance to other laudable principles and values, to the duty of all members of the University community to defend the right to speak and refrain from disruptive interference, and to the sanctions that should be imposed upon those who offend.").

IV. RESPONDING TO HARMFUL SPEECH – THE "TEACHING MOMENT"

To say that universities and colleges ought to protect most verbal activity on campus as free expression is not the end of the matter. Instead, this broad protection of speech on campus, both under the First Amendment and under basic principles of free expression and free inquiry as integral to the academic mission, is best thought of as a threshold matter, however important. How, for example, should institutions of higher learning respond to hateful speech on campus? This brings us back to Justice Brandeis's call for "more speech" and Judge Calabresi's "teaching moments." We find an instructive approach in art and social critic Robert Hughes's analysis of the controversy over an exhibition of photographs by Robert Mapplethorpe in the early 1990s in Cincinnati, Ohio.[50] Hughes observed that the debate over the photographs had become largely constitutionalized, that is, it focused on whether, as a matter of a constitutional right, a museum may exhibit this work, or whether a city may, as Cincinnati did, shut down such an exhibition.[51] Hughes wrote that the focus on questions of constitutional limits precluded the discussion of an arguably more important question: the merit of these works of art as a matter of art criticism and aesthetics.

The constitutional and jurisprudential questions that have occupied us thus far are critically important, but they do not reach the ultimate societal issue. To address them, there must be a context for a moral response to protected hate speech, just as there must be room for aesthetic questions as to the merits of constitutionally protected art. The need for the institution to respond to hateful speech recognizes not only that hateful speech causes harm to many who are exposed to it, but that this harm is often not evenly spread across all groups within the community. In all too many instances, members of certain groups on campus bear more than their fair share of the harms caused by certain expressive behavior. It would be inconsistent with the presumption in favor of free expression to prohibit this behavior, but the presumption does not require institutional silence in response.

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50. Robert Hughes, *Art, Morals, and Politics*, N.Y. REV. BOOKS, Apr. 23, 1992.

51. *See* Eric Harrison, *Mapplethorpe Display Brings Smut Charges*, L.A. TIMES (Apr. 8, 1990), http://articles.latimes.com/1990-04-08/news/mn-1692_1_mapplethorpe-photographs [https://perma.cc/H2LH-W2HA]; Isabel Wilkerson, *Cincinnati Gallery Indicted in Mapplethorpe Furor*, N.Y. TIMES (Apr. 8, 1990), http://www.nytimes.com/1990/04/08/us/cincinnati-gallery-indicted-in-mapplethorpe-furor.html [https://perma.cc/C9U9-U6N5]; Isabel Wilkerson, *Cincinnati Jury Acquits Museum in Mapplethorpe Obscenity Case*, N.Y. TIMES (Oct. 6, 1990), http://www.nytimes.com/1990/10/06/us/cincinnati-jury-acquits-museum-in-mapplethorpe-obscenity-case.html [https://perma.cc/5H2T-DJM2].

The required response to hateful speech is to describe it as such and to criticize it directly. This is how I understand Brandeis's teaching in *Whitney v. California*—that, except in those rare cases in which the harm from speech is real and imminent, the answer to harmful or hateful speech is not "enforced silence" but, rather, "more speech."[52] This is also how I understand Calabresi's efforts to turn matters of controversial speech into teaching moments in which he expressed, for example, an aversion to pornography.[53]

Consider the case that occurred at the University of Oklahoma in March 2015. Members of the Sigma Alpha Epsilon fraternity, on their way to a fraternity "Founders Day" event, engaged in horrific racist chanting that included the use of the n-word and celebrations of violence. Two student leaders of the fraternity were expelled from the university.[54] I am highly sympathetic to the impulse for this expulsion and share in full the sentiment expressed by the university's president, who said in a statement that he was "sickened" by the event.[55] But I question the case for the expulsion. Had the context been different, had this occurred outside of a predominately African American fraternity house, for example, this could have been a case of a threat, what we might call a "verbal assault," warranting punishment. But with the actors chanting on a chartered bus in the presence solely of their own members, this was an instance of protected hate speech—vulgar, disgraceful, and indeed sickening, but also protected. There was no intent to threaten or cause direct harm to anyone. The well-intended impulse to punish the leaders stems, in large part, from a correct sense that this behavior required the strongest possible condemnation, but also from an incorrect assessment of the possible responses. An opportunity to educate the offending students and advance the difficult community discussion, that is, a teaching moment, was lost.

We bind ourselves to an impoverished choice set if we believe that we can either punish speech or validate it. There is a middle position, expressed in Brandeis's dictum of "more speech," that allows us to respond without punishing. In the face of hate speech, the call for more

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52. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

53. *See* SILBER, *supra* note 10, at 112.

54. *See* Manny Fernandez & Erik Eckholm, *Expulsion of Two Oklahoma Students Over Video Leads to Free Speech Debate*, N.Y. TIMES (Mar. 11, 2015), https://www.nytimes.com/2015/03/12/us/expulsion-of-two-oklahoma-students-leads-to-free-speech-debate.html [https://perma.cc/WYP3-5QND].

55. Allie Bidwell, *University of Oklahoma President 'Sickened' by Racist Fraternity Video*, U.S. NEWS & WORLD REP. (Mar. 9, 2015, 1:39 PM), https://www.usnews.com/news/articles/2015/03/09/university-of-oklahoma-president-sickened-by-racist-fraternity-video [https://perma.cc/JS44-3VP4].

speech is not merely an option; it is a professional or even moral obligation.

V. THE RISKS AND CHALLENGES OF THE INSTITUTIONAL RESPONSE

Performing this professional and moral obligation, especially by campus leaders, is not without its challenges and risks. We turn now to considering two. First, there is the risk that the relative position of power of the dean or provost or president renders their participation in certain campus conversations necessarily inconsistent with principles of free expression and our fundamental presumption in favor of protecting speech. This was the concern that my teachers Robert Cover and Peter Schuck expressed about Calabresi's teaching moments.[56] It proves too much, however, to suggest that positions of relative power restrict the ability to speak. A similar argument could be made broadly within the campus community, largely if not entirely limiting the ability of administrators and perhaps even all faculty to participate in controversial debates on campus. Instead, the critique suggests that a campus administrator must be aware of the potential silencing effect of their criticism, make such potential explicit, and commit not to utilize an undue power that might flow from their position.

The challenge that we describe is faced by many if not all academic administrators at some point. Calabresi, for example, when accused by Schuck for chilling speech by not remaining neutral as a dean, replied:

> Yes, of course. I am chilling, in the way that anyone who speaks chills. That is what free speech is about! I have a right to speak; I know I am dean, but everyone knows that I am not going to use my deanship to punish anyone for their views. Being Dean doesn't cause me to lose the right to say how I feel! This is what the law of free expression is about.[57]

During my tenure as President of Brandeis University, I encountered a similar case when a faculty listserv that included vulgar and disgusting language directed at, among others, my predecessor and the State of Israel, became public and went viral. Most of the advice that I received suggested either of two approaches. One was to protect the expressive activity of that listserv and leave it at that. The other was to sanction the participating faculty in some manner. I chose a third course of action. First, in keeping with the threshold core principle of the presumption in favor of expression, I made clear that there would be no negative

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56. *See* SILBER, *supra* note 10, at 108-09, 112.
57. *Id.* at 112.

consequences whatsoever for any faculty involved in the listserv. But I also stated my own view that some (not all) of the sentiments expressed in the listserv were inconsistent with the best values of the university, values of decency, dignity, and inclusion. Predictably, perhaps, this approach did not satisfy those who had advised me. One university trustee, who had suggested that certain faculty be fired over this incident, felt that my critical statements would be without any effect. And several of the faculty involved accused me of creating a "chilling effect" on their right and ability to express themselves.

I met with a group of the faculty who had participated in the listserv. My response will be surprising to some but not to Calabresi: not all "chilling effects" are bad. Some are cases of the type of enforced silence of which Justice Brandeis spoke; this is classically what we mean by a chilling effect, and these are pernicious and contrary to our system of free expression and the core mission of a university campus. But then there are those that are cases in which we seek to influence each other for the good. This kind of "chilling effect," if that is even the right term, is what Calabresi rightly described as "chilling[] in the way that anyone who speaks chills."[58]

The obligation of a university administrator to address, not suppress, controversial expression on campus, is especially pressing in those instances in which the expression disproportionately affects certain groups on campus. This was an approach adopted, for example, at the University of Florida and Texas A&M University when noted White supremacist Richard Spencer spoke on those campuses.[59] The presidents of those universities permitted the events to go forward, while strongly criticizing Spencer's views and labeling them as antithetical to the values of the institution. Not only is this significant as an expression of the university's position—a teaching moment—but it is a statement of solidarity with those who are particularly targeted and affected by the expression at the heart of the controversy.

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58. *Id.*

59. Kent Fuchs, *Statement from President Fuchs About Richard Spencer Appearance*, UNIV. FLA. (Oct. 10, 2017), https://statements.ufl.edu/statements/2017/10/statement-from-president-fuchs-about-richard-spencer-appearance.html [https://perma.cc/ARR3-2XJ6] ("UF has been clear and consistent in its denunciation of all hate speech and racism, and in particular the racist speech and white-nationalist values of Mr. Spencer . . . [however,] UF is required by law to allow Mr. Spencer to speak his racist views on our campus . . . ."); Max Blau et al., *Richard Spencer's Appearance at Texas A&M Draws Protests*, CNN (Dec. 7, 2016), https://www.cnn.com/2016/12/06/politics/richard-spencer-texas-am/index.html [https://perma.cc/YR78-6KZ4] ("Before the event, Texas A&M Senior Vice President Amy Smith said in a statement that the school 'finds (Spencer's) views as expressed to date in direct conflict with our core values.'").

The second challenge that is presented by a formal institutional response to certain harmful expression is well illustrated by the recent case of *Gibson Bros., Inc. v. Oberlin College*.[60] Following a controversy arising from the treatment of an African American Oberlin student by Gibson's Bakery (the bakery) and the College's response, the owners of the bakery, the Gibson brothers (the Gibsons), brought suit against Oberlin and its Dean of Students, Meredith Raimondo, claiming that they lost business and were the target of harassment by Oberlin and its students. Because the implications of the litigation for expression by college and university administrators are significant, it is worth considering the facts of the case in some detail.

Gibson's Bakery is a family-run bakery and convenience store in Oberlin, Ohio, close to the Oberlin campus. For more than 130 years, the bakery has had a relationship with the Oberlin College community, including supplying the college's dining halls with food from the bakery. On November 9, 2016, three African American Oberlin students, one man and two women, were in the bakery while an owner's son (young Allyn[61]) was working. According to young Allyn, he believed that the male student was shoplifting wine and using a fake I.D.[62] The student fled the store, and young Allyn chased him across the street to apprehend him and wait for police arrive. A physical altercation ensued between young Allyn and the student; the two female students were also involved. The police arrested all three students, who ultimately entered guilty pleas and were convicted.

Rumors about the incident quickly spread across campus. Many Oberlin students believed the students were victims of racial profiling, and they staged large protests outside the bakery on November 10 and 11.[63] Of particular relevance, the protests were attended by some administrators[64] and faculty members. At the protests, a one-page flyer was distributed, which alleged that the bakery was a "RACIST establishment

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60. *See Gibson Bros. v. Oberlin Coll.*, 187 N.E.3d 629, 637-40 (Ohio Ct. App. 2022), *appeal not accepted*, 193 N.E.3d 575 (Ohio 2022). The facts of the case come from the Ohio intermediate appellate court opinion.

61. The bakery was, at the time, owned by Allyn W. Gibson (Grandpa Gibson) and his son, David R. Gibson. David's son, Allyn D. Gibson (young Allyn), was an employee of the bakery. *See id.* at 638.

62. As the N.Y. Times explained the story, the student "tried to buy a bottle of wine with a fake ID while shoplifting two more bottles by hiding them under his coat . . . ." Anemona Hartocollis, *After a Legal Fight, Oberlin Says it Will Pay $36.59 Million to a Local Bakery*, N.Y. TIMES (Sept. 8, 2022), https://www.nytimes.com/2022/09/08/us/oberlin-bakery-lawsuit.html [https://perma.cc/RJC8-ZR9N].

63. Testimony at trial indicated that 200 to 300 people demonstrated outside the bakery on these days. *Gibson Bros.*, 187 N.E.3d at 639.

64. Defendant Meredith Raimondo, Oberlin's Dean of Students, was in attendance. *Id.*

with a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION."[65] The flyer also stated that Allyn Gibson, presumably referring to young Allyn, racially profiled the male student, improperly chased him out of the store, and assaulted him. On the evening of November 10, the Oberlin student Senate passed a student Senate Resolution concerning the incident, which it emailed to the entire student body and placed in a glass display case in the student center. The letter, in addition to urging students to cease supporting the bakery, made claims about the incident. The letter stated in part that:

> A Black student was chased and assaulted at Gibson's after being accused of stealing. Several other students, attempting to prevent the assaulted student from receiving further injury, were arrested and held by the Oberlin Police Department. In the midst of all this, Gibson's employees were never detained and were given preferential treatment by police officers.
>
> Gibson's has a history of racial profiling and discriminatory treatment of students and residents alike.[66]

Because of the incident at the bakery, in what Raimondo described as an "effort to appease the angry students," Raimondo instructed a staff member to direct the college's dining hall supplier to stop supplying the college with food from the bakery.[67]

Three of the Gibsons' claims made it to trial,[68] and the jury found for the Gibsons. On appeal, Oberlin unsuccessfully raised many challenges to the verdict. Our main subject of concern is the very basis for a claim against the college altogether, though there are other free expression issues raised in this case. For example, Oberlin argued that the First Amendment protected its students' right to free speech and protest and that the imposition of defamation liability for student speech would chill their constitutional rights. The trial court did grant partial summary judgement to Oberlin based on the verbal protests by Oberlin students and imposed liability only where it found that expressions of a factual nature, not of opinions, contained false and defamatory statements.

For our current purposes, the cautionary tale of *Gibson*[69] concerns the ways in which an institution of higher learning might find itself liable for substantial damages (here in excess of $36.5 million for an

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65. *Id.* at 643 (emphasis in original).
66. *Id.* at 643-44.
67. *Id.* at 639.
68. The claims were libel, intentional infliction of emotional distress, and a claim against Raimondo for intentional interference with business relationship. *Id.* at 637.
69. *Id.*

institution with operating expenses of roughly $182 million[70]) for expressive activity.

There were two main bases of institutional liability upheld by the appellate court in *Gibson*. The first concerns two allegedly defamatory statements which were considered at trial: 1) the flyer distributed during the protests, and 2) the student Senate Resolution. Oberlin argued that the college did not publish[71] these statements for purposes of a claim for defamation. The court rejected Oberlin's argument, finding that a reasonable fact finder could have concluded that Oberlin published both the flyer and the Senate Resolution. With respect to the flyer, the court relied on evidence that Raimondo, as the college's Dean of Students, handed at least one copy of the flyer to a reporter with the *Oberlin News-Tribune*, had a large stack of flyers that she gave to students to distribute, and told students they could make more copies of the flyer in the conservatory office. Further evidence indicated that the associate director of Oberlin's multicultural resource center handed out flyers and that an Oberlin professor monitoring the protests told students they could place flyers on car windshields. The court also relied on evidence that Oberlin provided students a room in a nearby building to take breaks during the protests, supplied coffee and pizza, and agreed to reimburse a student for money spent on gloves to keep protestors warm.[72] As to the Senate Resolution, the court stressed that the resolution was written and published by a school-sanctioned college governing body. For example, the jury heard evidence that Oberlin "assisted the student senate in its activities by providing it with financial support; a faculty advisor, Raimondo; an office in the student center; and a nearby glass display case within which it could post announcements."[73] Because Oberlin facilitated the initial publication of the resolution, it could be held liable for its defamatory content.

The second basis of institutional liability upheld by the appellate court in *Gibson* concerned the claim against the college for intentional infliction of emotional distress, which requires a finding that Oberlin's

70. The payment of $36.59 million to Gibson's Bakery consists of "about $5 million in compensatory damages, nearly $20 million in punitive damages, $6.5 million in attorney's fees and almost $5 million in interest." Hartocollis, *supra* note 62. For 2021, Oberlin College's operating expenses was over $182 million. *See Oberlin College Report of the Vice President for Finance & Administration*, OBERLIN COLL. 6 (2021), https://www.oberlin.edu/sites/default/files/content/controller/documents/reports/2021_oberlin_college_vpfa_report.pdf [https://perma.cc/32PB-6NA4].

71. To establish defamation, the plaintiff must show that defendant published the statement. *Gibson Bros.*, 187 N.E.3d at 642.

72. *See id.* at 645-46 (describing the evidence presented at trial).

73. *Id.* at 646-47.

actions rose to the level of "extreme and outrageous."[74] The evidence found to support this part of the verdict was drawn from text and email messages between and among senior college administrators. These messages demonstrated that Oberlin did not believe it should work with the Gibsons to resolve the situation. One assistant dean said she hoped the college would "rain fire and brimstone" on the bakery.[75] In response to a retired Oberlin professor who criticized the school's response, Raimondo stated in a text message, "F-him. I'd say unleash the students if I wasn't convinced this needs to be put behind us."[76]

It is worthwhile to consider the implications of the *Gibson* verdict for the jurisprudence of the Wall. If the law school dean, or another senior member of the university administration, speaks out clearly on a controversial issue, to what extent does she or he expose the institution to liability? Presumably the liability found in *Gibson* could not attach to a dean's expression of views. Suppose, however, that Dean Raimondo had only joined the protests, urging a boycott of the bakery. Perhaps the gravamen of the claim in *Gibson* is simply that the allegations of racial discrimination were found to be false. But there was no sense that a standard akin to that established in *New York Times Co. v. Sullivan*[77] to protect the freedom of the press would be applied to protect expression by a university leader. It was not necessary for the Gibsons to demonstrate actual knowledge of falsehood or a reckless disregard for the truth. A dean joining a student protest that calls for action based on allegations that turn out not to be true could plausibly expose the institution to liability. Moreover, proof of the dean's intent might be based on internal e-mail communications.

Gibson, of course, is one highly fact-specific case. Its more general applicability remains to be seen. As we have seen, there are instances where it is of great importance that a dean express the views of the institution. Fear of liability ought properly be restricted to outright false claims by the dean. Even in *Gibson* itself, where claims were based on expression of opinions, not facts, those claims were dismissed. Thus, a decanal declaration that the institution ought not do business with any institution found to have engaged in racial profiling, fully consistent with the approach articulated above, would appear to be, and as a matter of free expression policy ought to be, protected.

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74. *Id.* at 650.
75. *Id.* at 640.
76. *Id.*
77. 376 U.S. 254 (1964).

VI. FINAL REFLECTIONS

A university worthy of the mission to create, discover, and disseminate knowledge must be a place of free and open inquiry, expression, and debate. This is especially true of schools of law, dedicated as they are not only to scholarship but to preparing law students to become members of a profession based in expressing ideas, debating issues, and exploring and understanding a wide range of possible positions on those issues. Universities are also communities, in which the safety of members must be protected. It is the perceived tension between these two goals that has led to conflicting claims over free speech: protecting all speech, whatever its consequences, or canceling speech that is harmful to some members of the community.

Robust free expression can exact a cost on an academic community, as it does on the broader society. Some, perhaps many, may be hurt by the exercise of such expression. If we are to further the missions of our universities and our law schools, this is a cost worth bearing. Bearing, but not ignoring. Calls to cancel certain speech are often in fact calls for a recognition of the harm caused by that speech. The articulation of that harm is a more constructive means to address it, and one that is consistent with the underlying protection of expression essential to the missions of our institutions of higher learning.

A final cautionary note. The goal that has been described here is to enhance the ability of an academic community to engage in serious and sustained debate in a civil manner that is respectful of the members of that community. This is what I have described as the process of "vigorous civility."[78] For vigorous civility to exist and to thrive, it need come from the community up, not from the administration down. The obligation to engage in "more speech," in the Brandeisian framework, falls on all members of the campus community, not just the leaders. A university president or law school dean runs the risk of restricting the development of this process, and thus should forcefully enter into campus debates with care, and do so infrequently. The president or dean should choose her or his spots. It is an unfortunate aspect of our time that these opportunities present themselves, and it is rare for any academic leader to complete a term without confronting at least one.

When Calabresi told Schuck "[b]eing Dean doesn't cause me to lose the right to say how I feel! This is what the law of free expression is about[,]"[79] he may have been overstating the point, likely intentionally so. The dean may not lose the right to say how she or he feels, but given

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78. *See, e.g.*, Lawrence, *Vigorous Civility*, *supra* note 48, at 98-116.
79. *See* SILBER, *supra* note 10, at 112.

the power of the position, it is a right to be exercised carefully and cautiously. This is the reason that many of us, upon stepping down from positions of academic leadership, experience the sense of re-gaining the full rights of expression. We then join all others on campus who, in the face of "bad speech," incur the obligation to engage in the kind of speech that raises up the highest values and aspirations of our academic communities.