Dealing with Hate in the Feminist Classroom: Re-Thinking the Balance

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I. Introduction

Feminists have long argued that an absolutist view of free speech maintains and privileges the speech of the dominant and undermines and silences the speech of those outside the dominant class.[2] Absolutist here means the position that any action explicitly interfering with speech – even hate speech, harassment or pornography – violates free speech principles and cannot be tolerated. It is based on a liberal ideal that views all individuals in society as equally autonomous agents, free to choose what to do and say. From a feminist viewpoint, one of the problems with an absolutist approach is that it does not take into account that significant burdens on "free" speech already exist for the disenfranchised and powerless. That is, the liberal model assumes an ideal that is not true for everyone. Contrary to the liberal ideal, the feminist view is that American culture and society is replete with constraints on speech that are the results of decades of discrimination and oppression. The absolutist approach ignores the existence of these past-created constraints on speech – it forbids only *additional* action that interferes with speech. As a result, the free speech promise of absolutism is illusory for those whose speech is already burdened. A better name for this approach would be the "status quo" approach, because what absolutism accomplishes in reality is to maintain the status quo

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[2] Catharine A. MacKinnon, *Only Words* 3-10 (Harvard 1993) (arguing that pornography as free speech silences women through sexual terror); Morrison Torrey, *Why the First Amendment Operates to Stifle the Freedom and Equality of a Subordinated Majority*, 21 Women's Rts L. Rep. 25, 35 (1999); Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 Univ. Col. L. Rev.

of unequal power, allowing 'unfettered' speech to those already free to speak and doing nothing about the fetters that bind the speech of the less powerful.[3]

In the university context, the absolutist approach, which is a common administrative response to peer hate speech and sexual harassment, makes hate speech "an effective tool" for excluding and silencing outsider students.[4] The absolutist approach is especially misguided in the educational arena, because hate speech can stop learning and teaching, the sine qua non of the university. Students who are silenced, frightened or intimidated cannot learn. I know this, because I saw the consequences of hate speech in the classroom first-hand in 1999, in my Law and Feminism seminar, when I watched a male student intentionally disrupt and destroy the educational environment of my class. His hateful speech interfered with the free exploration of issues in class by bullying his targets into silence and creating an atmosphere in which the women in the class were reluctant to express their views. There was little meaningful discussion, little curious exploration of issues, and almost no personal engagement with the material in the class. In short, I could not teach, and my students, all women except for the lone perpetrator, could not learn.

In addition to teaching me about the real damage that hate speech inflicts on the educational

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975, 1019-21 (1993).

[3] Torrey, *supra* n. 2, at 35 (First Amendment has been manipulated to maintain the power of a dominant minority). See also Becker, *supra* n. 2, at 1019-21. Professor Becker notes that while historically, free speech claims were brought by draft resisters, labor organizers and similar progressive grouped with less than their share of power and all too easily silenced by a hostile majority, today free speech claims are increasingly likely to be brought by rich, powerful commercial entities (like tobacco and porn) or racist speakers (Klan, Nazis). *See also Saxe v. State College*, 240 F.3d 200, 203-04 (3d Cir. 2001)(successful challenge to college speech code brought by Christian students who argued that speech code interfered with their religious duty to speak out about the immorality and harm of homosexuality) Thus, if free speech continues to mean protection equally of the speech of the powerful and the powerless, it is likely to mean that the effect on racial and sexual minorities is negative. *Id.*

[4] *E.g.* Mary Becker, *How Free is Free Speech at Work ?*, 29 U.C. Davis L. Rev. 815 (1996) (arguing that sex harassment is discrimination because it gives men an effective tool for managing the

rights of students, the experience also gave me a real-life introduction to the tension that exists between speech rights and education. I consulted many in the academy about what to do about this disruptive student; almost exclusively, the solutions embraced a version of the absolutist approach, in that they forbade my interfering with the disruptive speech itself. None of the absolutist solutions worked. Ultimately, I dealt with the tension between the perpetrator's freedom of speech and my other students' right to learn by explicitly interfering with the perpetrator's speech rights: I forbade him from speaking in class by threatening to fail him or have him ejected from the class. Although I did this with the support of the law school administration, and after trying numerous less drastic measures, it was by no means an uncontroversial decision.

Many professors felt that this was an unacceptable exercise of professorial power to enforce a code of "political correctness" and a serious violation of student speech rights. On the other end of the spectrum were those, including my female students, who felt I had waited far too long in the semester to take action and that my hesitance had deprived them of a valuable educational opportunity. My experience and the resultant controversy moved me to write about the topic of student hate speech in the classroom, the very real damage it inflicts, especially upon students in law school in a class devoted to feminist legal thought, and what can be done about it.

The goals of this Essay are two-fold. First, by describing the experience I had in Law and Feminism, the Essay will show how hateful and harassing speech in a seminar devoted to issues of gender, race and sexuality can rob students of important educational experiences by chilling, thwarting and misdirecting class discussion. The story of my class is meant to remind legal educators and administrators of the concrete harm, both personal and educational, of hate speech. Too often the hate speech debate focuses on the theoretical and the abstract, the participants

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economic competition created by women's entry into the work force).

forgetting that the principles at stake have demonstrable consequences for real people.

Second, while this essay does not endorse university institution of hate speech codes, it does take issue with the absolutist position on free speech. The absolutist view is the source of the administrative policy of non-interference with student speech. In my classroom, this view thwarted me from taking effective steps to stop the disruptive speech, and allowed an extreme example of educationally disruptive hate speech to continue. In some ways, the egregious nature of my experience is what makes it instructive; quite simply, if the speech I describe here cannot be regulated under the absolutist approach, then that approach needs to be rethought. It is the modest goal of the Essay to offer my unfortunate experience as a way to demonstrate how illustrate the need for a more balanced approach to hate speech and harassment in the law school context.

II. The Facts[5]

Law and Feminism is a law school class that is devoted to exploring the history and evolution of feminist legal theory. It begins with the early stages of feminist legal theory – when the phrase was barely a part of the law's language. In the second and third segments of the course, it focuses on how the early theories have been critiqued and expanded based on their treatment of race, class and homosexuality. The course readings runs from "mainstream" feminist legal theory to critical race theory to lesbian legal theory. As such, it touches not only on the law's treatment of gender, but on

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[5] In telling this story, I am telling it, of course, from my own perspective. I want to make clear, however, that in telling my story, I do not, in any way, mean the story, or any statements in this Essay, to be disrespectful of or accusatory toward any of the people who spoke to me about my problem with John. I have nothing but tremendous respect (and affection) for the people who talked to me about this, which is why I sought them out for advice. They were doing their best to help me in a way that was fair to me and to all my students in a situation that was new, extreme and largely uncharted academic territory. I also recognize that everything in this Essay is 20/20 hindsight – at the time, I did not know what to do either and I am still not sure what the appropriate "solution" is. I write this paper not to criticize, but to offer additional information that would have helped in making the balance a bit fairer and to help any professors who find themselves in this unfortunate situation in the future.

the related issues of the law's treatment of race, class and sexuality.

In the Winter of 1999, I was gearing up for my second time teaching the class. I was, and still am, untenured because my primary area of teaching is legal writing. At the time, I was in the second half of a one year contract – a position most within the academy would consider a fairly vulnerable employment position. When I received my class list from the registrar, I noted with alarm the name of a student – let's call him John – who was notorious at the school as a stalker and harasser of women students. There were disciplinary charges pending against John, but the case had not yet gone to hearing because of delays related to victims' reluctance to testify. I could not imagine what this student's motive was in taking my class in Law and Feminism – though I soon learned.

On the first day of class, I went through my usual introduction to the course, which includes an admonition that the class covers politically and personally sensitive topics, and that while I expected students to disagree, I also expect them to behave with respect and civility toward each other. I had some minor disciplinary problems with John in the first couple of classes – he came late, was noisy and disrespectful when others were talking, did not bring the reading and the like. I confronted him about it and made sure he was clear about the rules.

The next few classes were nightmarish. Far from curbing John's disruptive behavior, my conversation with him seemed to exacerbate it. His behavior in class changed from being minor and irritating to being hateful, bullying and harassing. For example, during a discussion of the problem pregnancy poses for the equal treatment model of feminism, John yelled directly at another student who had commented on the difficulty posed by the lack of affordable birth control and the stigma attached to abortion. He was sitting two seats away from the student, and berated her about how women from other countries thought nothing of having nine or ten abortions and considered them to be "no big deal." He admonished her for being a typical spoiled American woman by insisting upon

having sex, but then being so weak and passive by refusing to have an abortion and then whining about the burdens of pregnancy. In a classroom discussion of *Price Waterhouse v. Hopkins*,[6] a case in which a woman was denied partnership at Price Waterhouse in part because of her lack of traditionally feminine characteristics, John exclaimed that 'everybody knows that all women are sluts who sleep their way to the top.' He sneeringly referred to the author of a critical race article as 'a black lesbian' who 'obviously' could not understand the law.[7] And, the incident that sent me to the law school administration, John stood up in his seat, turned on a woman of color who was speaking about being followed by security personnel in a department store and yelled 'you are full of shit!'

These are only a few examples of John's behavior in my class. After the first few incidents, I simply stopped recognizing him when he raised his hand. His response was to yell whether I recognized him or not, as was the case with the 'full of shit' comment. If I told him to be quiet, which I did, he did stop speaking for a while, but often started again after a half hour or so – seemingly as soon as the class had somewhat recovered from the last comment. The powerful effect he had on the class amazed me. Often, the class simply became silent and refused to discuss the material, which often revolved around personal and difficult to discuss issues like rape, sex discrimination, abortion, racism and homophobia. No one in the class, myself included, was willing to share any personal experiences to explain or discuss a theory in the readings. No one in the class

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[6] 490 U.S. 228 (1989).

[7] Of course, calling someone "black" or a lesbian is not necessarily derogatory and I do not mean to suggest that it is. But John's demeanor and tone (as well as the comment about the author "obviously" not understanding the law) made clear that he was using both words pejoratively, an intent not lost on the other students. I think it is also relevant to note that the author to whom John was referring did not identify herself as a lesbian in her article, nor has she in any of the other articles of hers that I have read. John apparently assumed that the author was a lesbian because of her feminist writing, which is not surprising since he also referred to Law and Feminism as "the lesbian class" to several other students, including my teaching assistant. This illustrates also the use of the term "lesbian" as a way of controlling

was taking the kind of intellectual or personal risks associated with speaking on the topics covered by the class. I ended several class periods significantly early because of this silence, something that had not happened when I taught the class previously and has not happened in the many times I have taught the class since. Other times, John succeeded in simply redirecting class discussion away from the readings because some of the women in the class responded (angrily) to the gender or race stereotypes in his comments, as well as their personal tone.

Because I could not stop John from his disruptive behavior by the usual methods and I had required him to come to class, I was not sure how to deal with the situation. Others to whom I explained the situation were similarly unsure, but all seemed to agree that I could not interfere directly with John's speech. Some said directly that I could not do anything that would silence John or make him uncomfortable. As a result, much of the advice I received focused on changing the behavior and responses of the *women* in the class – such as calling on them to force them to speak. However, I was reluctant to force women to speak about topics such as rape and homophobia in such a hostile context – this was qualitatively different from requiring someone to speak about land use or sales of goods. It is difficult enough to talk about rape and racism and homophobia in the best of contexts, much less in a context where ridicule or aggression is virtually guaranteed.

Others suggested that I try to "use" the comments as a springboard for class discussion, another seriously flawed approach. Feminist legal theory is not a class which is centered around answering racist, misogynist or homophobic stereotypes, especially when the stereotypes are raised in a way that is not meant to elicit an answer or a discussion. In addition to derailing my conception of the tone and substance of the course, this suggestion seemed to give John a great deal of power to redirect the attention of the class away from the readings and away from what I wanted the class to

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women who are perceived as having overstepped accepted gender boundaries.

be. Also, most students who have experience with sexism, racism or homophobia have ample other opportunities in which they are called upon to defend against hate speech. I strongly believed that Law and Feminism should not be another venue in which they were forced to do this.

About a month into the semester, I learned that John had openly admitted to several other students that his motivation for his behavior was to 'make me sorry that I had decided to teach this class' and sorry that I confronted him about coming to class on time. Armed with what I thought was the 'smoking gun,' I approached two law school administrators with my story. This was the first time I had approached the administration, as opposed to my colleagues. I had also looked at the Code of Student Conduct, which has a provision directly prohibiting the kind of behavior in which John was engaging.[8] Nevertheless, I was told that despite John's behavior and the evidence of his intent, notwithstanding his well-known problems with sexual harassment outside my class, I should not single him out for any kind of targeted treatment that would interfere with his speech. They suggested that I announce in the next class a new policy for the class. The policy was that no one was permitted to speak without being recognized and that any unrecognized, unproductive comments would risk disciplinary action. In retrospect, I see the many flaws of this suggestion as applied to a small seminar in feminist legal theory. But, at the time, I was willing to try anything.

The policy did not do anything to stop John's behavior. In fact, it seemed to make it worse. On top of the escalation in John's behavior, the policy also had the unfortunate effect of creating a more stilted atmosphere in the class than already existed. Between the chilling effect of John's speech and the new formality imposed by the policy, Law and Feminism had been stripped of the last

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[8] Temple Law School Code of Student Conduct, Section II, Part Q. The Code states that "[i]t shall be a violation of this Code for a TLS [Temple Law Student] knowingly to do or attempt to do or to assist in any of the following:" and Part Q states "seriously and unreasonably disrupt, interfere with, or attempt to disrupt or interfere with the conduct of classes or any other normal or regular activities of the

vestiges of the kind of open dialogue most professors strive for in small seminar classes. John appeared to be unaffected by the policy; on the other hand, the students whose speech had already been curtailed by John's behavior were further silenced by the policy. On the day that I explained the policy, John violated it.[9] And, as soon as John violated the rule by yelling out a comment designed to bait the women in the class, one or two women in the class rapidly violated it in their zeal to respond.

The policy hamstrung me. I could file a disciplinary charge against John, but the likelihood that the charge would get any meaningful attention before the end of the semester was almost zero, and by then it would be moot. I needed an emergency preliminary injunction, which is not a remedy offered by the disciplinary process. And, because the policy was at least facially imposed upon the entire class, John had a built in defense to the charge – one that I had handed him – because others had violated the rule as well and I was not going to charge them.

The failure of this policy seriously undermined my credibility with the class and led John to the perception that I was an ineffectual and powerless adversary. As a result, a week or so after I instituted the policy, he turned his attention away from goading my female students and turned his attention to me. I lecture infrequently in Law and Feminism – with two exceptions. I lecture briefly at the beginning of each class, summarizing what we covered in the last class and adding any points or references not fully covered or for those who wished to explore the topic further. I also lecture briefly if one of the students asks a question that is related to the reading, but not answered by it. In

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Law School." (from the Temple Wise Guide, copy on file with author).

[9] One explanation for this is that John knew, from his other experience, how slow the disciplinary process could be. Plus, with the much more serious charges facing him, the threat of another charge for his behavior in my class probably did not make much difference. He truly did not have much to lose. John's history with the disciplinary process and his history of anti-social behavior and disregard of consequences made this policy very unlikely to succeed.

the wake of the failed policy in the class, John began interrupting my lectures. His interruptions were fairly constant (at one point he interrupted me five times in a ten minute lecture) and usually consisted of rudely phrased challenges to my knowledge or inappropriate questions. For example, when I was summarizing one author's critique of anti-discrimination law, John yelled "That's not what Title VII says" and "Tell me what Title VII says, if you know. Do you even know?" When I used New Jersey's marriage application as an example of American society's pre-occupation with race (New Jersey requires that both parties wanting to get married disclose their race), John yelled, "What's your husband? Is he black?"

I was able to get through my lectures, but the substance of what I was trying to convey was peppered with my responses to John ("be quiet", "we're not going to talk about that now" and the like). After the first class in which he interrupted me, I told John that he had to stop and wrote him a memorandum detailing his interference with the class and its inappropriateness. I then went to yet another faculty member, who referred me to another administrator. That administrator was the first one to allow me to deviate from the policy of non-interference. Based on the advice of this administrator, I told John that he had forfeited the right to speak in my class because of his disruption of the educational environment, and that if he did speak, I would have him removed from the class. I memorialized this in a memorandum to John the next day and John remained relatively quiet for the rest of the semester.[10]

III. The Problem with Student Hate Speech in the Law School Classroom

Most people within the legal academy with whom I spoke about my problem with John had

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[10] There is a coda to this story. In May of 1999, after a full disciplinary hearing, John was expelled from the law school for his stalking and harassing of women students. He filed a lawsuit against the school, which was dismissed on summary judgment by the United States District Court for the Eastern District of Pennsylvania.

serious concerns about any solution that constrained John's right to speak in my class. This policy of non-interference raised a significant obstacle to solving the problem, since John's speech was the primary weapon he used to disrupt my class and any effective solution would have to be some kind of burden on his right to speak.

In this part of the Essay, I use my experience with John – an experience most would categorize as an extreme example of disruptive behavior – to illustrate how a policy of non-interference with student hate speech overvalues the rights of the hate speaker and undervalues the rights of other students to speak and learn. My purpose in this part of the Essay is not to argue that student free speech in the classroom is a trivial concern – to the contrary, free and unfettered expression in the classroom is essential to the educational environment. But my experience trying to deal with John left me with the clear impression that John's free speech rights seemed to command undue reverence – greater reverence than that accorded to the free speech rights of students in traditional law classes, greater than demanded by First Amendment principles, and so great as to outweigh the legitimate rights of the other students in the class. How – and why – did this happen?

In the first section, the Essay notes that, despite the virtual unanimity of the academics with whom I spoke about John, both courts and most commentators (ranging from feminist legal theorists to civil libertarians) agree, at least in principle, that free speech in the university context can be regulated when it is disruptive and interferes with educational purpose or equality principles. This seeming agreement on principle raises an important question. If there is relative agreement on principle, why did so many insist that I could not do anything to overtly interfere with John's speech rights? Why the insistence on absolute non-interference?

The Essay posits several reasons why this principle did not function more effectively to allow regulation of John's speech in my Feminism class. First, the balance of free speech against education

and equality requires a deep understanding of how the biases inherent in the law school context can lead to an overvaluation of student hate speech. These biases made my desire to control classroom dialogue in Law and Feminism look like unfair viewpoint control, when really it was the same process of classroom control that is exercised by professors in doctrinal classes as a matter of (largely) unquestioned tradition and protected by academic freedom. Put another way, the law school context artificially inflated the impact of my attempt to control John's speech, making it stand out as both an extreme and unusual burden on free speech. One purpose of this Essay is to point out the artificiality and the unfairness of that inflation, and to argue for consideration of that phenomenon when assigning value to student hate speech within the law school context.

Second, the principle that speech can be regulated if it is so disruptive as to interfere with education and equality is a balance that requires an appreciation of the real harms of hate speech and harassment on the targets. Despite the numerous pieces of scholarship outlining these harms, scholarship spanning more than a decade, many within the law school community continue to devalue them in the balancing process.[11] Perhaps part of it is that my regulation of John's speech is an easier harm to see than his impact on my class: professorial power is more obvious and easier to document than the silence of students – especially the silence of students whose voices are already muted by law school.[12] If students do not usually speak in law school what harm comes from silencing them?

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[11] Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 5 Mich. J. Race & L. 847, 905-09 (2000) (author discusses her own experience with hate speech); Charles R. Lawrence, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. Cal. L. Rev. 2231, 2280-81 (1992); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2336-40 (1989).

[12] *See* Stephanie M. Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. Leg. Educ. 147, 147 (1988) ("Society often does not see those who are voiceless.").

In part, this imbalance is a result of the muting of outsider viewpoints in law school. But, especially in the context of a critical legal class, the imbalance also misunderstands the important function served by critical legal classes in the legal academy, and the importance of outsider speech to their pedagogy. In the second part of this Essay, I argue that critical legal classes like Law and Feminism have an important place in the legal academy that should not be devalued in the balancing process. The Essay also argues that a fair balancing of speech and education rights in the context of a critical legal classroom require a full understanding of the pedagogy of these classes and the devastating impact that hate speech can have on them.

A. The Problem is Not the Principle

Interestingly, there is little debate about the basic rules that govern the balance between free speech and education rights. Federal courts, feminist scholars and free speech advocates (including the American Civil Liberties Union) appear to agree on the basic point: principles of free speech in the educational context must be balanced against educational goals and principles of equality.[13] Even those with an exceptionally broad view of the First Amendment agree that the First Amendment does not necessarily protect targeted harassment merely "because it happens to use the vehicle of speech."[14] Professor Nadine Strossen, former Executive Director of the American Civil Liberties Union, has noted that

> Meaningful equality of opportunity in the educational and employment spheres requires more than mere non-discrimination at the entry level. It is not enough

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[13] Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment-Avoiding a Collision*, 37 Vill. L. Rev. 757, 762-64 (1992) (noting that there is "broad consensus" for the notion that "hate speech in a public forum is protected, but hate speech that harasses particular individuals in certain other settings, such as the campus or the workplace, may be prohibited."); MacKinnon, *supra* n. 2, at 54-55; *Healy v. James*, 408 U.S. 169, 188-89 (1972).

[14] Nadine Strossen, *Frontiers of Legal Thought II the New First Amendment: Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 Duke L. J. 484, 498 (1990).

> simply to open the doors of universities and workplaces to African Americans, women and members of other groups that have been traditionally excluded. Meaningful equality of opportunity also encompasses a full chance to participate and to succeed in both arenas. . . . [C]ourts and Congress have recognized that employees should be protected from harassment that is based on their race, gender or other group membership. Likewise, many universities have taken measures to protect students from such harassment. . . . In both settings, the prohibited harassment may consist of words or expressive conduct. Yet, this expression may be prohibited, consistent with the First Amendment . . . [15]

This view is consistent with the ACLU policy on campus speech regulation, which permits the enactment of disciplinary codes that restrict harassment based on gender, race and sexual orientation.[16] For example, the policy of the American Civil Liberties Union permits regulation of speech that "is directed at a specific student *or gender* [and] has definable consequences for the student that demonstrably hinders her or his learning experience as a student."[17] Under the ACLU policy, the speech must do more than create an "unpleasant" learning environment.[18] Mirroring the criteria for a successful Title VII hostile work environment claim, the ACLU requires that the speech demonstrably interfere with the education of the targeted students.[19]

On its face, this view seems consistent with that of feminist scholars, who have long urged that greater weight be given to educational equality in the free speech debate.[20] Much like Strossen's argument, the feminist argument is that without due weight to educational equality, harassment and

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[15] Strossen, *supra* n. 13, at 762-63.

[16] *Id*. at 765 (quoting ACLU policy, Free Speech and Bias on College Campuses).

[17] Strossen, *supra* n. 14, at 498 (quoting ACLU policy on campus harassment) (emphasis added). *See also* Strossen, *supra* n. 13, at 762.

[18] Strossen, *supra* n. 14, at 498 (quoting ACLU policy on campus harassment).

[19] *Id.*

[20] Amy H. Candido, *A Right to Talk Dirty?: Academic Freedom Values and Sexual Harassment in the University Classroom*, 4 U. Chi. L. Sch. Roundtable 85, 108 (1997) (citing *Only Words* at 54-55).

hate speech will reinforce gender and racial hierarchy.[21] Harassment, whether based on race, gender, sexual orientation or other group affiliation, creates an environment inhospitable to learning and can function "in much the same way as overt exclusion to create a significant barrier to equal opportunity in education."[22] Harassment not only silences student participation, but can affect attendance and academic performance.[23] At a minimum, it can distract the targets from their primary goal to educate themselves, pay attention in class and study.[24]

Feminists have also argued that harassment and hate speech is more like an act of discrimination than speech.[25] In many areas, the First Amendment permits regulation of speech that is a verbal act. For example, the law treats defamatory and threatening speech, as well as bribery, as verbal acts.[26] These types of speech are not protected if they have the same harmful consequences as unprotected conduct.[27] Thus, regulation of these types of speech does not implicate the First Amendment because the speech is regulated for what it *does* rather than for what it *says*.[28] Similarly, an employer who discharges an employee by saying "I don't want people of your religion to work for

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[21] MacKinnon, *supra* n. 2, at 71-95 et seq.; Becker, *supra* n. 2, 1046.

[22] Candido, *supra* n. 20, at 108.

[23] *Id.*

[24] Wildman, *supra* n. 12, at 150 (relating a story of female Yale law student that illustrates the distracting power of classroom sexism).

[25] MacKinnon, *supra* n. 2, at 11-4.

[26] *Id.*

[27] *Id.*

[28] *Id.*

me" would certainly run afoul of Title VII.[29]

Even on this point, the ACLU policy seems consistent, at least in principle. The American Civil Liberties Union policy states that the First Amendment is not "inconsistent with reasonable regulations ... so intense as to be assaultive ... [and] that apply only to time, place and manner."[30] Among other criteria, reasonableness depends on the size of the area, the duration or frequency of the conduct, whether the target can avoid the area and the volume and intensity of the assaultive speech.[31]

As applied to my situation with John, this seeming agreement on the core principles of free speech among civil libertarians and feminists raises an important question: why was the John situation not an "easy" case? That is, why wasn't this a case where the importance of the educational goals obviously trumped concerns over speech regulation? It is difficult to imagine that anyone would argue that John's speech was especially valuable or added anything meaningful to the educational environment (and no one did). Not only is John's behavior pretty easily characterized as disruptive, there was evidence that it was meant to be disruptive (not to spur class discussion or make a point). Moreover, my educational goals for the course, as well as student learning, were being seriously compromised. I told many people how my students were quite literally made silent and that John was directly interfering with my teaching. So why wasn't this a clear instance in which the

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[29] This example is taken from Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. Chi. L. Rev. 795, 836 (1993).

[30] Strossen, *supra* n. 13, at 762 (quoting ACLU Policy Statement).

[31] *Id.* The criteria that asks whether the target can avoid the area is related to the First Amendment concept of captive audience. The 'captive audience' rationale allows the restriction of some speech where the individuals exposed to the speech must be in a particular place at a certain time to pursue an important purpose. *Id*. at 761. My female students were the classic captive audience. Their attendance in class was required, as was John's. To avoid John meant losing out on an educational experience and

safety hatch for disruptive speech should have allowed me to suppress John's speech?

That the balancing principle didn't work in John's case casts serious doubt on its workability. If it didn't work here, I have serious doubts about whether it can be used at all to achieve a fair balance between education and speech. The question then becomes why the principle malfunctioned when applied in this context. That no one took the position arguing the value of John's speech suggests that the malfunction occurred at some other point in the balancing process. I have two theories about the malfunction. First of all, I believe that the politics of law school may make the balance very difficult to apply in certain contexts: while law schools routinely regulate (and silence) student speech, often on the basis of content and viewpoint, there seemed to be something deeply unnerving to my colleagues about a feminist law professor regulating the anti-feminist speech of a white male student. The situation was probably also complicated by my status as a legal writing professor on a one year contract. Somehow, that scenario seemed viscerally wrong or worrisome to my colleagues in a way that other professorial regulation does not. In the first part of this Essay, I attempt to explore how this visceral feeling of wrongness is highly political, creates a double standard for professorial regulation of student speech, and, in this case, resulted in excessive concern over the regulation of John's speech, speech that almost everyone could agree had virtually no First Amendment value.

Second, I believe that it was very difficult for people to acknowledge and understand the serious educational disruption that John's speech caused, so that the "disruptive" part of the balancing test was misapplied. Part of this has to do with the general "pooh-poohing" of the harm of misogynist and racist speech (why can't you just ignore it?), despite decades of scholarship attesting to the harms of this kind of speech. Also at work here might have been a problem with my

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jeopardizing their success in the class.

credibility as the primary witness about the disruptive nature of John's speech because, as a feminist, I would be expected to be overly sensitive to "politically incorrect" statements about women and therefore not an "objective" judge of what is disruptive. Finally, that the speech occurred in a class like Law and Feminism – a small seminar devoted to the exploration of feminist theory – also likely contributed to the undervaluation of the disruption caused by John because of a lack of familiarity with the pedagogy of critical legal classes.

B. The Uneven Application of Free Speech and Academic Freedom Principles in the Legal Academy.

A tricky part of the hate speech problem is how to define the difference between student speech that is challenging but productive and student speech that is unproductive, hurtful and disruptive enough to interfere with the education rights of other students.[32] The difficulty of making this distinction is part of what many find attractive about the non-interference absolutist approach: the easiest, most superficially "neutral" policy is never to take any new, additional actions that overtly interfere with speech. The concern over where to draw the line, and the fear that regulation of classroom speech will be perceived as "politically correct" viewpoint control, seems to have contributed to my struggle to convince others to let me stop John's speech.

The reality, however, is that there is no such thing as absolute "non-interference" with student (or even professorial) speech. Law school isn't an "open mike" event. The job of teaching institutions is to direct the content of a student's education, and that will always affect speech. In this sense, law school continuously interferes with speech, on both a content and viewpoint basis and in

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[32] *See* Jon Gould, *The Triumph of Hate Speech Regulation: Why Gender Wins but Race Loses in America*, 6 Mich. J. Gender & L. 153, 182 (1999) (arguing that the difference between the constitutional analysis of hate speech codes and Title VII hostile work environment cases rests on unwillingness of courts and academicians to confront thorny question of when speech is merely unpleasant and when it is harassing).

neither case is the interference "politically neutral." On a macro level, speech is regulated (and chilled) by – among other things – faculty selection and hiring, the determination of which law courses are required and which courses are valued (both in terms of number of credits and in terms of their presumed "rigor"), and the resultant power imbalances among faculty. On a micro level, speech is routinely curtailed by professorial decision-making: the choice of case books, determinations of the content of the course coverage, and the Socratic method. All this "interference" with speech is not insignificant, but it is ingrained and therefore beyond question, even when the decisions are influenced by the politics of those who make them, as they almost always will be.

Thus, the lip service paid to the importance of student free speech in the classroom belies the reality that institutional and professorial control over the substance and process of law school consistently interferes with free speech. In fact, the professorial control of student speech is seen as the normal and traditional method of teaching, and is protected by academic freedom, a concept of paramount importance in the legal academy.[33] This raises the question of why my control over the process and content of student speech in Law and Feminism was viewed as a clear free speech problem, as opposed to the usual operation of law school teaching protected by academic freedom. For example, is my silencing of John's speech somehow more political (and less legitimate) than a tax professor who decides to stop calling on a student whose comments constantly challenge the authority of the government to tax?[34]

At the very least, law professors must ask themselves how they can simultaneously think that the behavior of the tax professor in my hypothetical does not raise free speech concerns, but my

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[33] Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom"*, 45 Stan. L. Rev. 1835, 1835-36 (1993). Professor Olivas describes professors as having "nearly absolute autonomy" to determine how materials are taught in the classroom.

regulation of John does. Such a dichotomy certainly raises the spectre of a double standard.[35] This double standard can serve to suppress outsider speech in both mainstream doctrinal classes and in critical classes. The loss of outsider speech within the critical classroom is especially significant, because critical legal classes emerged as a response to the conservatism of mainstream doctrinal law classes.

While the line between productive controversial speech and speech that is disruptive and hostile may be a fine one, that line drawing is almost always left to individual professors. Professorial regulation of classroom discussion is a routine, widespread and uncontroversial part of teaching that almost never raises free speech concerns.[36] Cass Sunstein, among others, has argued that colleges and universities routinely regulate student expression that materially disrupts class work or unduly interferes with the rights of others.[37] In fact, Professor Sunstein argues that colleges and universities are in the *business* of controlling speech – and outside the context of hate speech codes,

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[34] I am grateful to my colleague, Professor Nancy Knauer, for this hypothetical.

[35] Becker, *supra* n. 2, at 1033-43. It is also important to note here that the double standard extends beyond critical classes, although those are the primary subject of this Essay. Often, professors in doctrinal, mainstream law school classes who try to inject perspectives relevant to race, gender, or sexual orientation are criticized by students, and this criticism is frequently validated by law school administrations who believe that it represents inappropriate professorial viewpoint control of the class. *See* Olivas, *supra* n. 34, at 1842 (describing Derek Bell's experience trying to incorporate a racial perspective to introductory Constitutional Law at Stanford Law School); Patricia Williams, *The Alchemy of Race and Rights*, at 25-32 (describing a conversation with her law school Dean over student complaints about her attempts to include other perspectives in her Contracts class).

[36] Gould, *supra* n. 32, at 173-74 (discussing how "civility restraints" are constraints on the *manner* of speech (as opposed to content) and do not even raise the spectre of the First Amendment); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 Tex. L. Rev. 687, 751-53 (1997); Sunstein, *supra* n. 29, at 830-31.

[37] Sunstein, *supra* n. 29, at 830. *See also* Becker, *supra* n. 2, at 1033.

universities' control of student speech is hardly ever thought to raise free speech problems.[38] Arguing that professors have always controlled the content of class discussion, Professor Mary Becker has pointed out that universities are not "simply places where speech is valued in itself; it is quality speech that is valued, and it is valued for its quality, its content, its viewpoint."[39] In other words, controlling the substance of class discussion is what professors *do*.[40]

Professor Sunstein notes that much of this control of student speech is content based: "[t]here are major limits on what students can say in the classroom. For example, they cannot discuss the presidential election if the subject is math. . . . A paper or examination that goes far afield from the basic approach of the course can be penalized without offense to the First Amendment."[41] Similarly, when I took my first year Criminal Law examination in law school, I had to analyze the rape hypothetical focusing on the Model Penal Code's approach to the law of rape, which I found extraordinarily misogynist, or risk an F. Isn't this control over the content of speech?

Moreover, and perhaps more to the point, both my criminal law professor and the tax professor from my hypothetical are regulating student speech based on political viewpoint. Wasn't the professor's teaching of the Model Penal Code "political" because he did not teach the many (even at that time) feminist critiques of the Code's approach to rape? That approach certainly silenced me

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[38] Sunstein, *supra* n. 29, at 830.

[39] Becker, *supra* n. 2, at 1033.

[40] *Id*. at 1032-33; *See also* Stanley Fish, *There's No Such Thing as Free Speech and it's a Good Thing, Too* 107-112 (1993). Although content restrictions in other contexts raise serious constitutional problems, within the educational context the control of content is presumed. *See Bishop v. University of Alabama*, 926 F.2d 1066, 1075 ("educators do not offend the First Amendment by exercising editorial control over the style and content of student or professor speech in school sponsored expressive activities so long as their actions are reasonably related to legitimate pedigogical concerns.")

[41] *Id*.

– I knew I did not like the Code's approach, but as a first year law student I had no way to articulate that discontent in legal discourse without knowing what feminist theorists like Susan Estrich had said about it.[42] And, so, I kept my thoughts to myself, in class and on my exam. My silence was the direct result of my professor's exercise of power over the content of criminal law – and exercise that cannot honestly be termed politically neutral. In terms of the result for free speech, the criminal law example is indistinguishable from my desire to regulate the content and dialogue of Law and Feminism. In fact, my criminal law professor's regulation of course content probably silenced other feminists as well – making it arguably a broader restraint on speech. Yet, the criminal law professor's regulation of the content of that class is "business as usual" in law school while my regulation of the content of dialogue in Law and Feminism raises serious free speech concerns. We owe it to ourselves, and our students, to ask why – and to force ourselves to move beyond superficially satisfying answers.

The reality is, if we look closely, we see that professorial regulation of the content of class discussion is often, in practice, viewpoint based.[43] Professor Sunstein posits that speech regulation based on viewpoint is "undoubtedly pervasive in practice" in universities.[44] Professor Becker points out that educational institutions

> define what counts as knowledge, as important, relevant to the world and the human condition. Inevitably, such assessments regulate speech in terms of content, viewpoint and even ideology. Indeed, that is the whole point: to promote quality

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[42] *See* Susan Estrich, *Rape*, 95 Yale L.J. 1087 (1986).

[43] Sunstein, *supra* n. 29, at 830; Becker, *supra* n. 2, at 1032-33. Content-based regulation that is viewpoint neutral is presumptively unconstitutional, but can be acceptable in certain narrow circumstances, such as the regulation of defamatory speech. Viewpoint discrimination singles out a particular view for approval or disapproval and is constitutionally prohibited. Sunstein, *supra* n. 29, at 796.

[44] *Id*. at 831.

> speech as quality is understood within the relevant academic community or by the relevant administrator (or both). [45]

Importantly, the viewpoint-based regulation of speech within universities often serves to suppress issues of importance to women and minorities because that speech is considered not as valuable or irrelevant.[46] This is certainly true in my criminal law example.

On a macro level, the content of the law school curriculum – especially in the prescribed first year of law school – is another. The required first year curriculum is an excellent example of viewpoint and speech control imposed on students. It has long been criticized by critical race and feminist scholars as biased in content toward mainstream viewpoints.[47] What are the justifications for adherence to the same first year curriculum developed decades ago? Put another way, why Torts and Contracts and Property as the foundations of the first year, and not Employment Discrimination, Environmental Law and Race and Ethnicity and the Law? Decisions about what courses are "required" are, if not intentionally political decisions, at least decisions that have serious political implications – implications that without doubt impact the "freedom" of professorial and student speech. Why are these constraints somehow less of a free speech concern than my regulation of John's statements? They certainly constrain student free speech on a greater scale than one

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[45] Becker, *supra* n. 2, at 1033.

[46] *Id*.

[47] The March/June 1988 volume of the Journal of Legal Education devoted to study of women in legal education contains numerous feminist critiques of the first year curriculum, law texts, and law school pedagogy. *See* Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. Leg. Educ. 3 (March/June 1988); Mary Irene Coombs, *Crime in the Stacks, or A Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. Leg. Educ. 117 (March/June 1988); Nancy S. Erickson, *Sex Bias in Law School Courses: Some Common Issues*, 38 J. Leg. Educ. 101 (March/June 1988). There are many others. Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (Cambridge 1983); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 Yale L. J. 997 (1985); Mary Jo Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 A. U. L. Rev. 1065 (1985); Margaret E. Montoya, *Mascaras, Trenzas y Grenas: Un/Masking the Self*

professor's silencing of one disruptive student.

Similarly, the emphasis of most law school curricula has also been criticized for overvaluing mainstream courses, such as business law, and marginalizing courses in critical race theory and feminism.[48] Despite the critiques of the curriculum, some of which are decades old, the law school curriculum has not changed significantly. Professors and law schools continue to require students to learn its content and speak its discourse.[49] The difference is that the viewpoint controls embedded within the substance and pedagogy of the first year curriculum are not obvious constraints on speech. No "additional" present action is necessary to enforce them beyond the status quo – they were institutionalized long before anyone began thinking about critical legal studies and outsiders in law school. That highly effective constraints on speech flourish in institutions embracing the policy of non-interference demonstrates, however, the questionable neutrality of the non-interference approach.

Moreover, the speech control of law school pedagogy does not end with content control of courses. These content controls of the required law school curriculum are reinforced by traditional law school pedagogy. Law teaching takes place in a strictly controlled classroom environment.[50]

While Un/Braiding Latina Stories and Legal Discourse, 17 Harv. Women's L. J. 185 (Spring 1994).

[48] Erickson, *supra* n. 50, at 103-04 (often law school treats feminist courses as "fringe" courses of less importance than others). Richard Delgado, *Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411, 2419-20 (August 1989).

[49] Montoya, *supra* n. 50, at 260-265; Kimberle Williams Crenshaw, *Forward: Toward a Race-Conscious Pedagogy in Legal Education*, 11 Nat'l Black L. J. 1, 3-10 (1989); Scott N. Ihrig, *Sexual Orientation in Law School: Experiences of Gay, Lesbian, and Bisexual Law Students*, 14 Law & Ineq. 555, 556-58 (1996).

[50] This makes the 'free marketplace of ideas' rationale seem especially disingenuous when made in the law school context. Most law professors retain strict substantive control over law classes – they decide who will speak, for how long, and what the topic will be. This can hardly be described as a 'free' marketplace. Off point comments or incorrect answers are usually cut off quickly. And, sometimes,

The professor sets the substantive content of the class though the syllabus and assignments. Students in a class do not choose what to study; the professor dictates what cases and materials will be read and discussed. Through the exercise of power that looks unquestionable, these decisions determine, decisively, what will be relevant and productive student speech in the class and what will be irrelevant and disruptive. In fact, this aspect of professorial power is so ingrained it doesn't even register for many of us as an exercise of power.

As with my criminal law example, these decisions are hardly "apolitical." Choosing not to teach feminist critiques of rape law is a political decision that has serious free speech ramifications – and many professors still teach first year criminal law without any reference to the feminist critiques of rape law. Spending two months of first year Constitutional Law on the Commerce Clause and two days on *Roe v. Wade* is a political decision with free speech ramifications. These decisions reflect the priorities and values of the professor who designed the course and picked the case book. The decisions will affect what students learn about the law and whether they will see the law as open to question; it will also affect how students view the relative importance of the topics – by quietly but firmly demonstrating what is and is not germane to Criminal or Constitutional Law. By withholding this information, the content of the course effectively robs some students of a legal voice with which to critique the law. That is silencing. And it is viewpoint control. It occurs because of overt action on the part of professors. And it happens every day and every year in required doctrinal courses with no objection from those who embrace the "absolutist" model of free speech.

Silencing of student speech on a viewpoint basis also occurs through more obvious methods in mainstream courses. The methodology of law school teaching reinforces the broad professorial power to control the content of the course. The most widely followed approach to teaching in law

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when a student becomes known for irrelevant comments and questions, professors will simply not call on

school – the Socratic method – permits the professor strict and unilateral control over class discussion, including silencing individual students whose participation is inconsistent with the professor's goals for class. In the Socratic classroom, the professor has almost total control of class discussion – who participates, what is discussed, how long the discussion will last. The professor calls on a student and, if dissatisfied with the content of the student's responses, may stop that student from speaking and move on to another student. The professor is free to refuse to call on any student, for any reason, including the content of the student's addition to class discussion.[51] The professor can also stop a student who has begun to speak from continuing if the professor deems the question or comment not appropriate, for whatever reason, for class discussion. All this professorial control is an accepted – and lauded – method of law school pedagogy and protected under the rubric of academic freedom.

In my Tax example, accepted law school pedagogy permits (in fact encourages) the professor to deal with the student who continually raises his hand to argue that the federal government has no right to tax, that the tax system is not legitimate and other tax protestor viewpoints, by cutting the student off, refusing to call on him or otherwise "silence" this particular speech. This is not apolitical. It is interference with student speech based on the professor's view that constant diatribes about the illegitimacy of the tax system are not relevant to a course in Basic Tax, and are not productive. While the student is free to espouse these beliefs, he cannot share them if they interfere with the basic premise of the course *as defined by the professor*. In terms of the viewpoint or

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the student.

[51] Becker, *supra* n. 2, at 1035. One common method is what my students have referred to as the professor "hand wave" – a gesture in which the professor makes a hand motion that indicates to a student for the student to put her hand down. The "hand wave" is usually employed to discourage a particular student from speaking, when the professor believes (usually based on the student's identity and prior comments) that the student's comment is likely to be unproductive or disruptive.

political nature of the control on the speech, the tax professor's silencing of the tax protestor student is not distinguishable from my silencing of John's comments that, in my view, undermined the substantive goals that I had for the class.

In fact, the institutionally supported power of professors to control the content of courses, along with their unquestionable power to regulate class dialogue, reveals the superficiality of the argument that my silencing of John is somehow different because it is an "overt" act of viewpoint speech control. In this version of the liberal free speech argument, my regulation of John is different from the acts of my professor in the criminal law example because I wanted to tell John that he could not speak certain views in my class, whereas my criminal law professor never told me that I could not raise feminist critiques of rape in criminal law. In fact, the argument goes, had I previous knowledge of these critiques, my criminal law professor could not, consistent with free speech norms, forbid me from speaking them in class.

This argument conveniently ignores that my criminal law professor did not have to take any overt or direct act to silence me, or other feminists in the class, because his acts defining the content of the course (supported with the full power of the law, culture and values of American society) had already unquestionably established that feminist critiques of rape law were irrelevant to criminal law. The argument also ignores that having set the standard of what was relevant, my criminal law professor, like the tax professor in my hypothetical, could have rejected or seriously limited my dissenting comments based on their "irrelevance" to the material set out in the syllabus and case book, and their disruption of what he wanted to cover in criminal law. These kinds of content decisions happen all the time in law school, and professors are, by and large, assumed to have the

freedom to control the content and discourse of their classes.[52] Why didn't this broad view of academic freedom protect my decision about what discussion and content to permit in Law and Feminism?

Speech control in law school occurs on a macro level as well. The viewpoint regulation of student speech is accomplished and supported through viewpoint-based hiring and promotion practices within universities.[53] For example, critical legal scholars may not be hired or promoted because their disciplines are not highly valued. Women are still vastly under-represented in tenured or tenure track positions in law schools.[54] This will change the character – the viewpoint – of the speech at the law school. Fewer (if any) critical and feminist classes will be offered and there will be

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[52] Indeed, the high value placed on the academic freedom of professors has led courts to permit professorial behavior in the classroom that almost certainly would constitute a hostile work environment under Title VII if it took place in the employment context. *See* Jon Gould, *Title IX in the Classroom: Academic Freedom and the Power to Harass*, 6 Duke J. Gender Law & Policy 61(1999) (arguing that courts have given too much deference to the academic freedom of professors in professorial sexual harassment cases). Gould cites *Cohen v. San Bernardino Valley College*, in which the Ninth Circuit found no violation of the College's sexual harassment policy when a professor of remedial English read articles from Hustler and Playboy to class, told female students that he looked down their shirts and told one female student that she would get a better grade if she met him at a bar. *Id.* (citing 92 F.3d 968 (9th Cir. 1996)). The Ninth Circuit's finding seemed to rest in part on the professor's freedom to teach in his preferred "controversial" style, noting that the College had not given the professor any notice of a problem with his "longstanding teaching style." *Id.*

Similarly, in *Silva v. University of New Hampshire*, the District Court overturned a disciplinary action against a communications teacher who had sexualized class discussion and made sexual comments to female students outside of class. 888 F. Supp. 293 (D.N.H. 1994). Considering statements such as the teacher's analogizing focus on a thesis to sexual intercourse and describing a belly dancer as being "like a bowl of jello being stimulated by a vibrator," the District Court found that the statements were made in advancement of a "valid educational objective" and in a "professionally appropriate manner." *Id.* Nothing in the cases referred to or addressed the possible impact of the professor's speech on the speech or educational rights of the women in the class. In these cases, the academic freedom of the professor trumped student free speech.

[53] Becker, *supra* note 2, at 1034.

[54] Women are, by contrast, *over*-represented in low pay, low status positions within most American law schools. Richard K. Neumann Jr., *Women in Legal Education: What the Statistics Show*, 50 J. Legal Educ. 313 (2000); Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law*

less critical and feminist speech in the more traditional classes.[55] So, criminal law professors will continue to teach rape without teaching the feminist critiques of rape, and generations of law students may never learn that such critiques exist.[56] Yet, this institutional practice is not widely viewed as an intolerable constraint on free speech and it passes largely unnoticed, even by free speech absolutists within the academy.

In terms of institutionalized policies that affect the substance of speech within the academy, legal writing is an even starker example. The treatment of legal writing in the law school hierarchy reveals an embedded and serious restraint on academic freedom – and a restraint that impacts primarily women. Lawyers who wish to teach legal writing full time often must resign themselves to an academic position that is lower paying, lower status, and non-tenure track.[57] Tenure, one of the primary safeguards of professorial academic freedom, is not available to most legal writing professors; it was not (and still is not) available to me.[58] One of the most widely articulated reasons for tenure – a level of job security enjoyed almost exclusively by academics – is that professors cannot do their jobs (well) without a high level of professional freedom. This freedom includes the

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School's Dirty Little Secrets, 16 Berkeley Women's L. J. 1 (2001).

[55] Becker, *supra* note 2, at 1034.

[56] Catharine A. MacKinnon, *Mainstreaming Feminism in Legal Education*, 53 J. Leg. Educ. 199 (June 2003) (arguing that traditional law courses like torts and criminal law should include discussions of gender and feminism). As MacKinnon's essay points out, issues surrounding gender are still treated by law school as separate from mainstream courses.

[57] Jan M. Levine, *Leveling the Hill of Sisyphus: Becoming a Professor of Legal Writing*, 26 Fla. State U. L. Rev. 1067 (Summer 1999).

[58] I am very lucky; I now enjoy a higher level of job security than many other legal writing professors. Thanks to an enlightened Dean and Faculty, Temple's legal writing faculty enjoy ABA 405(c) status, sometimes referred to as "clinical tenure." We have multi-year contracts, voting rights and are otherwise treated like "equals" on the faculty. However, unlike the tenured faculty, every six years I go through an intensive review for contract renewal during which my teaching, scholarship and service are evaluated. Moreover, at the time I taught John, I did not have even this level of security.

freedom to hold, teach, and publish positions that may be controversial – all of which are a type of free speech rights. Yet, law schools have institutionalized the denial of tenure to legal writing professors – simply based on the subject matter of their expertise. This restraint on academic freedom is very much out in the open, and largely not considered to present any kind of free speech problem. It does, however, chill professorial speech in many ways. It certainly chilled my speech in my dealings with John and my colleagues.

Moreover, the restraints on speech posed by the treatment of legal writing professors are even more complicated than mere "chilling" of legal writing professors: legal writing is a place where gender, lack of power, and lack of academic freedom intersect. The profession of legal writing is often referred to as a female ghetto.[59] Women comprise 73% of legal writing professors in law schools; by contrast, they are only 25% of tenured or tenure track professors.[60] Therefore, the limited academic freedom afforded to legal writing professors has a disparate impact on the speech of women within the legal academy. In my case, there is no question that, at the very least, my feelings of insecurity in my job limited my perception of my own academic power – which may have made me overly cautious and deferential to the advice of my colleagues. Again, however, this is generally not viewed as a "real" restraint on professorial freedom, but rather a fact of life in the legal academy; it is the way things are.

All these constraints on speech within the legal academy beg the question of why student free speech should have a greater claim to protection when the speech involves hate speech in the critical legal classroom. If strict professorial control over content and process of class discussion is the norm

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[59] Jo Anne Durako, *Second Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. Leg. Educ. 562 (2000).

[60] Richard K. Neumann Jr., *Women in Legal Education: What the Statistics Show*, 50 J. Legal

in traditional law school classes, why should professors of critical legal subjects be discouraged from exercising similar control? Put another way, why do content or viewpoint controls that suppress critical speech in the law classroom pass unnoticed, but control over hate speech in a critical classroom raise seemingly insurmountable free speech problems? What is the real difference, in terms of professorial freedom and student speech, between silencing the tax protestor and silencing John?[61]

It will not be a surprise to most feminists that, upon close examination, the "absolutist" or "neutral" free speech principle is applied in a distinctly non-absolutist and non-neutral way. Somehow, the same principle that allows some professors to set the agenda, substance and process of "mainstream" law courses and then enforce that agenda through widely accepted (and sometimes silencing) pedagogical methods forbids me from taking any action to suppress John's speech. In Professor Becker's view, my situation with John is an example of how the academy's suppression of critical speech seems viewpoint neutral and therefore acceptable because it reflects conventional expectations, whereas any regulation of John's speech stands out as viewpoint discrimination.[62] Put

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Educ. 313 (2000)

[61] I am not suggesting here that the absolute unfettered autonomy permitted to mainstream doctrinal law professors is always a positive. In many ways I agree with the concerns expressed about unfettered academic freedom by Professor Olivas, especially in the context of professors who espouse racist, sexist and homophobic views that compromise their ability to educate and teach fairly. My goal here is to point out the inconsistency (and bias) inherent in the absolutist approach, which permits control in some instances and not in others and yet still calls itself "neutral." *See* Olivas, *supra* n. 34, at 1856-57.

[62] Becker, *supra* n. 2, at 1035; See also Sunstein, *supra* n. 29, at 818-19. Professor Sunstein notes that although the Supreme Court has stated that viewpoint discrimination is unconstitutional, it has upheld several laws that clearly are viewpoint regulations, such as laws prohibiting gambling advertisements. The reason, Sunstein posits, is that gambling, smoking and the like seem like such obvious risks that the "viewpoint" based regulation of them does not even "register" as viewpoint discrimination. *Id.* at 819. Sunstein wonders why the same principle does not operate when government seeks to regulate pornography, even in the face of convincing evidence that it contributes to violence against women. *Id.*

another way, the decision to silence a student in a doctrinal course is considered "objective" quality control, even when that decision is political, but when contested social views are discussed in the critical classroom, the professor is considered unable to exercise "objective" control without being influenced by her "political" agenda. This distinction between "objective" control in a traditional doctrinal class and "political" viewpoint control in a critical class dissolves upon close examination, however; as feminists and critical legal scholars have long pointed out, what passes as "objective" in law is, in reality, often a political viewpoint.[63]

In the context of John's behavior in Law and Feminism, colleagues who insisted that I could not single John out for any kind of "special" speech prohibition or do anything that would look like I was intolerant of his views failed to factor into their calculations the routine suppression of free speech – mostly critical speech – in the law school context. The same kind of miscalculation also contributed to the suggestion that I impose a "neutral" speech policy on the entire class and to the lingering suspicion of some faculty that my solution to the problem was an example of a faculty member using power to impose political correctness. These reactions simultaneously over-inflated free speech implications of my regulation of John's speech, and seriously under-valued the enormous impact of other, more widely accepted constraints on speech.

The point here is not that viewpoint control of student speech is a good thing in law schools, but that it is a common and accepted part of professorial control of the substance and process of the doctrinal law school classroom. Educators constantly make compromises about the "freedom" of student speech so as to serve the goals of education. The point here is to require educators to

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[63] *See, e.g.*, Catharine A. MacKinnon, Toward Feminist Jurisprudence, in Toward a Feminist Theory of the State, 237-39 (Harv. Univ. Press 1989).

consider these controls on student speech when applying the balancing test to student hate speech.[64] The "free speech" standard cannot be applied one way to "tax protestor" student speech in Basic Tax (or to dissenting speech in criminal law or Constitutional law) and another way to misogynist student speech in Law and Feminism without losing its claim of neutrality. If my Tax colleague gets to make the final decision about how much, if any, tax protestor student speech she will tolerate in her class, then I must be the final decision-maker about how much misogynist speech I will tolerate in Law and Feminism. Recognition of the propensity toward a double standard does not make the problem easier, but is essential to a fair and meaningful balance of hate speech and education and equality rights.

Moreover, the reality of institutional and professorial control over student speech undermines the non-interference position and reveals the flimsiness of its claim to neutrality. Since neutrality and fairness is about the strongest thing that the "non-interference" approach has going for it, my experience with how the principle applied to the situation with John suggests that absolutist free speech advocates have to rethink the application of the balance. Real (as opposed to formal) neutrality may not be achievable – and may be undesirable. In the meantime, however, we should not allow ourselves to be comfortable with a standard that is neutral only in the most superficial sense.

C. <u>What about Time, Place and Manner Regulation?</u>

Another facet of the balance relevant to John's speech in Law and Feminism is whether regulation of John's speech might have been effectively accomplished through regulation of the

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[64] The ongoing debate about the nature of academic freedom and how it applies in a professional school environment is beyond the scope of this Essay. [cite Rabban, Byrne etc]. The point here is simply that academic freedom supports broad professorial regulation of speech in many ways, yet the principle of my academic freedom to regulate the content and discourse in my class was not brought up by those advising me about John. The focus was almost exclusively on his speech rights without reference to any professorial academic freedom issues.

manner in which John chose to express himself, as opposed to content or viewpoint.[65] In addition to outright content and viewpoint control within law school, universities and professors have long imposed restrictions on appropriate behavior and type of speech in the classroom without raising free speech concerns.[66] This is consistent with First Amendment principles that permit reasonable time, place and manner restrictions on speech.[67] For example, Professor Sunstein has noted that "[i]t would certainly be legitimate to suspend a student for using consistently abusive language in the classroom, even if that language would receive firm constitutional protection on the street corner."[68]

Several commentators have advocated the use of so-called "civility restraints" to curtail egregious instances of harassing, hateful speech in the classroom.[69] Civility restraints focus on how speech is expressed – the intent, the demeanor, the tone of the speech – as opposed to its content.[70] The theory is that professors and universities must lay down "a set of ground rules that say open dialogue rests on an assumption of decorum, that free speech is impossible in an atmosphere of personal attack."[71] Proponents of civility restraints note that regulation of the manner of hate speech can help "to prevent the type of poisoned attacks that destroy rational deliberation and the "possibility of constructive engagement."[72]

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[65] Gould, *supra* n. 32, at 173-74; Estlund, *supra* n. 36, at 751-53.

[66] Sunstein, *supra* n. 29, at 830.

[67] *Healy v. James*, 408 U.S. 169, 193 (1972).

[68] Sunstein, *supra* n. 29, at 830.*; See also* Strossen, *supra* n. 14, at 490, 498-507.

[69] Estlund, *supra* n. 36, at 772-75.

[70] *Id*. at 749-753.

[71] Gould, *supra* n. 32, at 173.

[72] *Id*.

For proponents of civility restraints, there is a (clear?) difference between questions or comments about harmful stereotypes that are meant to, and do, advance the dialogue or discussion about a given issue and those comments that are meant to, and do, stop the dialogue. But a problem arises because civility restraints, just like content and viewpoint regulation, seem to come down to the decision, made by somebody, that a particular comment is productive to class discussion or not. The idea of civility restraints rests on the ideal of a common ground about what is uncivil. There is undoubtedly an area of widespread agreement about certain types of comments – and perhaps some of John's comments fall into this clear category. Most professors can probably agree that John's "full of shit" comment, as well as the constant interruption of the professor and other students, is inconsistent with "rational deliberation."

However, my experience with John certainly suggests that there is a significant "gray" area of student speech over which reasonable minds could differ about what is uncivil and how much incivility should be tolerated. Thus, although I appreciate the potential effectiveness of civility restraints – and wish that I had known (or been informed) of their existence during my problems with John – I have lingering concerns about their use against hate speech like John's. My concern is two-fold: one is that there may be significant areas of disagreement about what is uncivil. The second concern is that when reasonable minds do differ about the incivility of a comment, whose view should carry the day? Who gets to say what is abusive or uncivil – what is a "poisoned attack" that destroys "rational deliberation"? And can a determination of what is "uncivil" or "abusive" really be divorced from content?

One example of the gray area of civility is the problem I encountered when I attempted to chastise John about the "full of shit" comment. He complained that I permitted other students to use profanity and that I was unfairly singling him out. It is true that I let students use profanity

occasionally in Law and Feminism – but only when, in my judgment, it is relevant and necessary to class discussion. The fact is that some feminist legal theory readings use profanity – for example, Catharine MacKinnon's writings quite purposefully and frequently use the word "fuck"(as does Drucilla Cornell's response to MacKinnon) and Regina Austin, in *Sapphire Bound*, uses the term "black bitch."[73] In the context of Law and Feminism, I have made the decision that these readings are valuable and important to learn, and that the authors' language is an important part of the readings, even though the language might, in other contexts, be considered "uncivil." When the class discusses these readings, students (and I) often use the language of the authors in commenting on or describing the work. I do not consider these comments "uncivil" in this context – and, in my experience, they facilitate deliberation and dialogue (as opposed to thwarting it). My initial response to John's complaint about being singled out was that he had missed the point – I did not object to the profanity, but to the personal attack, in the same way that I (and most other professors) would object to his calling another student "stupid" or telling a peer to "shut up."

But the some of the other comments present a tougher problem, such as the comment about women as "sluts" and the "black lesbian" comment. The word "slut" is undoubtedly uncivil. But more so than "fuck?" And there is nothing inherently "uncivil" about the use of the label "black" or the label "lesbian" – particularly if contrasted (without reference to content) with Austin's phrase. In retrospect, in writing this paper, I had to acknowledge that what I did not like about these comments

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[73] Catharine A. MacKinnon, Method and Politics, in Toward a Feminist Theory of the State 124 (Harv. Univ. Press 1989) ("Man fucks woman; subject verb object."); Catharine A. MacKinnon, Desire and Power, in Feminism Unmodified: Discourses on Life and Law 61 ("And I would like you to address a question that I think few here would apply to the workplace, to work, or to workers: whether a good fuck is any compensation for getting fucked.")(Harv. Univ. Press 1987); Drucilla Cornell, *Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon's Toward a Feminist Theory of the State*, 100 Yale L.J. 2247, 2250-53 (May 1991); Regina Austin, *Sapphire Bound*, 1989 Wis. L. Rev. 539, 540 (1989).

were partially *how* they were said – in anger, with derision, to hurt and to silence. But the comments cannot be divorced from their ultimate message – and the message, in both cases, was a "personal attack." This is more evident when the content of the entire comment is looked at – either that "all women are sluts" or the author is a "black lesbian" who misunderstands the law. But all of this represents my judgment about what a personal attack is – and it is difficult to point to something wholly separate from the content of the statement that explains why I and my female students perceived the comment as hateful. And I wonder how is this any more "neutral" than my judgment about the content of the statements, which is a lot easier to explain, and which I did not like either?

To further complicate matters, in another semester's Law and Feminism class, a student raised the issue of women using their sexuality to advance in the workplace by noting that she had known women who dressed provocatively to get attention from male superiors. She related this back to MacKinnon's dominance theory, which we had read for class and which in part theorizes that men dominate women by controlling women's sexuality.[74] Although somewhat similar in content to John's comment, this student's comment did not stop the classroom discussion. In fact, it provoked a flurry of comments. Why?

The comments are superficially similar in content, but differed in tone. For example, John's comment used global words (*everyone* knows that *all* women are sluts) that clearly expressed that the women in the room were "sluts", which makes it closer to a "personal attack" on his colleagues. And, I can tell you that his tone was ridiculing and hateful. But this distinction seems like a weak one on which to base a general civility policy – and it comes back to my judgment that John's comment was, for a variety of linguistic and tonal reasons, a "personal attack" in a way that my other

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[74] Catharine A. MacKinnon, Difference and Dominance: On Sex Discrimination, in Feminism Unmodified, *supra* note ___, at 40-41.

student's comment was not. In some ways, the female student's comment provides a contrast that makes it easier to define John's speech as uncivil, but nevertheless I remain concerned that "civility" is just another approach that satisfies us because of its superficial "neutrality" when really, it comes down to the professor's judgment about what is civil and what is not in the particular context of that class. That is not to say that civility restraints would not work – I think that they would have helped my situation – but that they are not insulated from the "neutrality" argument any more than my content or viewpoint regulation.

As an example, the suggestion that I impose on the class the requirement that all comments be both recognized and productive was a version of an "across the board" civility restraint. It was a clever suggestion in that it tried to get at the heart of the problem with John while still maintaining a outward "neutrality." But this quality of it was also what made it, in the end, unworkable. I did not want to punish the occasional unrecognized comment, or scrutinize all of them for relevance. The presentation of it as a "neutral" policy that covered all students in the class, without any mention of John's behavior or comments specifically, obscured the real problem. Students are occasionally rude to one another in class and sometimes the discussion of issues gets impassioned and students can lose control over what is "proper" classroom behavior. While that should be policed by the professor and the students should be chastised for their breach of classroom etiquette, occasional impassioned "rudeness" was not the problem in Law and Feminism, and it is usually not the problem with hate speech generally.

Regulating John's speech like any other "rude" or "uncivil" comment might be a way to stop it while still appearing "neutral," but it is also a gross understatement. John's speech was more than rude. It was directed toward those he despised because of their sex, race or sexual orientation. His speech made my students feel like they did not belong in law school, that people of their ilk (women,

of color, gay) are worthy of disgust and ridicule and their perspectives on the law are laughable. All of this was conveyed through tone, but content was important, too. So even if a more targeted across the board "neutral" civility policy might have worked, focusing on the "incivility" of John's comments seems to miss the heart of the problem.

But even though the policy suggested to me "missed the mark," the more essential problem is that "hitting the mark" with a neutral civility policy is extremely difficult in hate speech cases. Judging tone and "civility" is hard enough; pre-ordaining it is even harder. In some ways, the extreme nature of John's speech (that it was beyond "rude") makes it a poor example of where to draw the "civility" line. Most everyone would agree that aspects of John's behavior were not appropriate for the classroom, especially because it was constant, it continued after I asked him to stop, and it was intentionally designed to impede the class. But this isn't exactly what made John's speech so troublesome (though it certainly played a part) and to articulate what exactly made some of John's individual comments "uncivil" or rude, especially without any reference to the content, is not easy.

The bottom line is that John's hate speech was a complex combination of tone, intent and content. Divorcing content from tone may be a futile exercise, and it is an exercise that masks what is (at least in part) truly "uncivil" about the speech. In many instances, therefore, "civility restraints" are no more "objective" than anything else – they come back, essentially, to the exercise of professorial judgment.

D. The Devaluation of the Impact of Hate Speech on the Targets' Right to Equality and Education.

In addition to the over-valuation of student hate speech and the bias attached to professorial regulation of hate speech, the other problem with the application of the balancing principle is the under-valuation of the impact of hate speech on the targets. When hate speech is directed toward

outsiders in the law school context, the question of what is "disruptive" speech must take into account the experiences of outsider students in law school. Law school constantly interferes with speech – in a distinctly *non-neutral* way. There is considerable evidence – anecdotal and empirical – that the day-to-day ordinary operation of the law school process alienates and silences people of color, lesbians and gays and women.[75] Permitting hate speech compounds the harm, and a policy of non-interference reinforces this compound harm because it values the speech of the harasser over the pain (and potential speech) of the silenced.

The problem of outsider silence in law school has been long recognized and well-documented in legal scholarship.[76] Many outsiders express feelings of profound alienation in law school.[77] Many outsider students sit in silence in law school because they feel that their views are unimportant and irrelevant, and likely to be dismissed by the professor or classmates.[78] There are still far too few professorial role models for outsider students and too many law school classrooms and environments in which students of color and out gay and lesbian students comprise a tiny, highly

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[75] *See, e.g.*, Crenshaw, *supra* n. 52, at 1-10; Erickson, *supra* n. 50, at 103, 105; Melling, *supra*, at 1300-02; Montoya, *supra* n. 11, at 879-85; Ihrig, *supra* n. 52, at 556-60, 574-80. This is just a sampling of the articles that discuss or reference the problem of outsider silence and alienation in law school.

[76] Wildman, *supra* n. 12, at 147-52 (problem of women's silence in law school); *See generally*, Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. Leg. Educ. 137 (March/June 1988) (analyzing survey of women's low participation in law school); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 Stan. L. Rev. 1299 (May, 1988) (law school silencing of women); Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Marginalization of Outsider Voices*, 103 Dick. L. Rev. 1 (1998) (law school and legal writing pedagogy "mute" outsider voices); Crenshaw, *supra* n. 52, at 9-10; Montoya, *supra* n. 11, at 879-85; Scott N. Ihrig, *supra* n. 52, at 559. For a particularly powerful story of outsider student silencing, see Rita Sethi, *Speaking Up! Speaking Out! The Power of Student Speech in Law School Classrooms*, 16 Women's Rts. L. Rep. 61 (1994).

[77] *See supra* n. 74.

[78] Banks, *supra* n. 75, at 139; Crenshaw, *supra* n. 52, at 2-10; Montoya, *supra* n. 11, at 890-99. *See also* Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of*

visible minority. It is no wonder that outsider students feel that law school is a hostile environment and react to it by trying to navigate it quietly.

The problem of outsider silence in law school raises is a problem that directly implicates the quality of the educational experience. In the law school context, the silencing of a segment of the student population means that these students are being excluded from the educational environment and flourishing debate that comprise the university ideal. The pedagogy of law school presumes that speaking in class is essential to learning. The Socratic method is based on the idea that when students speak about the law, they learn the law.[79] Moreover, law school pedagogy, particularly the Socratic method, also assumes that students benefit from hearing the ideas of other students.[80] So, when one student's speech silences others, an important part of the learning experience is lost for both the silenced students and the students who would have benefitted from the speech.

My experience in Law and Feminism stands as evidence that hate speech silences its targets, even within a classroom where almost all other variables would encourage that participation. The professor was female – and feminist. The substance of the class was devoted to feminist legal theory and issues of concern to women. One of the explicit purposes of the class was to give voice to those who felt silenced by law school. Despite this, John's hate speech literally silenced the women in my class. This was no metaphor; this was real. The women did not talk or engage or participate in any meaningful way.

Silence and alienation also have significant affects beyond participation in a particular class.

Legal Reasoning, 64 Notre Dame L. Rev. 886, 897-900 (1989).

[79] June Cicero, *Piercing the Socratic Veil: Adding An Active Learning Alternative In Legal Education*, 15 Wm. Mitchell L. Rev. 1011, 1016 (1989); James R. Beattie, Jr., *Socratic Ignorance: Once More Into the Cave*, 105 W. Va. L. Rev. 471, 477-80 (Winter 2003).

[80] Cicero, *supra* n. 78, at 1016; Beattie, *supra* n. 78, at 478-79.

Hate speech is not only effective in the short term. Rather, it can have a serious impact on equality of opportunity through silencing, distracting, discouraging and further alienating law students already wondering whether law school is a harbinger of the kind of hostile environment they are likely to confront in the legal profession. Hate speech impacts student confidence, attendance, attention to studies, and motivation. All of these things will have an impact on student success in law school: both by lowering grades and by discouraging their full participation in law school academic life, such as journals and moot court and other activities. It may even encourage outsider students to drop out of law school. Of course, this will affect their future legal careers. In fact, this is arguably the goal of hate speech: like workplace harassment, it is a reaction to the encroachment of women and other outsiders on traditional white male enclaves.[81]

Moreover, many of the solutions suggested to me had the effect of devaluing the impact of John's speech and devaluing the psychological burdens of being a woman, of color, or gay or lesbian in law school. The suggestions that I require the women in the class to speak by incorporating the Socratic method or use the comments as part of class discussion failed to give weight to the anguish that outsiders can feel when required to hear and discuss racist, misogynist and homophobic comments. They also misjudge the seriousness of the problem of outsider silence in law school, as well as its likely genesis in feelings of anger, insecurity and shame that spring from the law's frequent omission of (or dismissal as irrelevant) concepts central to outsider personhood. These harms are compounded by the expectation that a class like Law and Feminism will be different, because it will be a place where those same concepts will be addressed and valued.

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[81] Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2324, 2337-40 (1989); Richard Delgado, *Words That Wound: A Tort Action For Racial Insults, Epithets, and Name-Calling*, 17 Harv. C. R. C.L. L. Rev. 133, 135-49 (1982); Becker, *supra* n. 4, at 831-32.

Any balance of speech rights must give adequate consideration to these very real harms. Non-interference ignores them – a disregard that is not lost on the targets of the hate speech, for whom non-interference may very well look like administrative or faculty support for hate speech. It certainly may lead to the perception that outsider silence is not important or serious or real.

E. Permitting Hate Speech in a Seminar Devoted to Issues of Race, Gender and Sexual Orientation Defeats the Purpose of Having Such a Class and Destroys the Qualities that Make the Class A Unique and Valuable Educational Experience.

When applied to a critical legal class, non interference also devalues the goals and importance of those classes, and reveals a misunderstanding of their pedagogy. The primary goal of critical legal classes like Law and Feminism is to "free" ideas and voices of those students who feel silenced by mainstream legal discourse.[82] Hate speech in these classes can destroy the only forum outsider students have to express their ideas, which not only impacts the quality of their education, but also increases their sense of alienation and decreases the likelihood that they will speak in other classes and engage with the law school community. This alienation certainly can have a serious deleterious effect on a student's future.

Moreover, classrooms devoted to issues related to gender, race and sexuality differ significantly from the traditional legal classroom in content and pedagogy.[83] They touch on issues of personal and emotional significance to students, in every class. Imagine the most uncomfortable

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[82] Judy Scales-Trent, *Using Literature in Law School: The Importance of Reading and Telling Stories*, 7 Berkeley Women's L. J. 90, 97-100 (1992) [hereinafter Scales-Trent, *Using Literature*]; Judy Scales-Trent, *Sameness and Difference in a Law School Classroom: Working at the Crossroads*, 4 Yale J. Law and Fem. 415, 433-38 (1992) [hereinafter Scales-Trent, *Sameness and Difference*]; Montoya, *supra* n. 11, at 894-902; Delgado, *supra* n. 51, at 2436-38 (arguing the benefits of storytelling for members of outgroups).

[83] *See e.g.*, Scales-Trent, *Using Literature*, *supra* n. 86, at 97-100; Scales-Trent, *Sameness and Difference, supra* n. 86, at 433-38; Patricia A. Cain, *Teaching Feminist Legal Theory at Texas: Listening to Difference and Exploring Connections*, 38 J. Leg. Educ. 165, 171-72, 175 (March/June 1988).

conversations you have had with people of different races, genders or sexual orientations about the law's treatment of race, gender or sexuality. That is what the learning environment is like in a critical classroom. Even more so than in a traditional doctrinal class, the effectiveness of the learning environment depends on students' willingness to engage with the material and have an open, frank discussion of the issues. This quality of critical legal classes mean that hate speech and harassment can be especially harmful within them.

For Law and Feminism, for example, it is part of the pedagogical and substantive agenda of the class for students to describe their experiences and bring them to bear on the theories read.[84] In the case of feminist law classes, this pedagogical difference is a purposeful departure from traditional law pedagogy, which eschews overt emotional content and discourages the telling of personal stories in the classroom. For both pedagogical and political reasons, emotion and narrative are a significant part of the pedagogy of the feminist legal classroom. Hate speech can strip these unique qualities from the critical class.

Pedagogically, critical classes use students' personal experiences to make concrete one of the jurisprudential premises of critical theory – that the law often appears neutral but in reality works to exclude certain viewpoints. Feminist legal theorists – and other critical legal scholars – have argued that traditional legal doctrine contains only the perspectives of white, heterosexual men, a perspective so pervasive that it appears neutral and objective.[85] One response to the exclusivity of the law has been for those whose experiences are not represented to speak out about their experiences and the

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[84] *See, e.g.*, Scales-Trent, *Using Literature, supra* n. 86, at 97-100; Scales-Trent, *Sameness and Difference, supra* n. 86, at 433-38; Patricia A. Cain, *supra* n. 87, at 171-72, 175 (March/June 1988) (personal stories and emotional connection as important to the pedagogy of Feminist Legal Theory).

[85] *See* Catharine A. MacKinnon, *Toward a Feminist Jurisprudence*, 237-38, in Toward a Feminist Theory of State (Harv. Univ. 1989); Delgado, *supra* n. 51, at 2413-15, 2422, 2439; Lawrence, *supra* n.

law's neglect of their perspectives.[86] Allowing students to talk about experiences of exclusion is a classroom extension of narrative scholarship, and has many of the same goals.[87] By applying the theories of the readings to concrete experiences they have had because of their gender, race or sexuality, students can better understand and interact with the reading. It gives students a factual context for the somewhat complex jurisprudential theories and makes the theories more accessible and real.[88] And, those listening to the stories learn about experiences other than their own and are given a concrete example of how the theories of the readings work in 'real life.'

As a result, classes devoted to issues of gender, race and sexuality can be consistently charged with emotion in a way that the traditional doctrinal classroom is not. Legal issues related to gender, race and sexuality touch on the core of personhood. How the law – and law school – treats these issues can often be a source of anger, frustration and alienation. In doctrinal classes, women and minority students often have issues and facts important to them dismissed as irrelevant.[89] When issues of race, class, gender or sexual orientation do come up, students who are members of these groups are often called upon to "represent" their group and asked to make dispassionate, reasoned legal arguments to convince others, sometimes in response to laws and arguments grounded in racist,

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11, at 2251; Crenshaw, *supra* n. 52, at 2-3, 6, 9.

[86] *See e.g.* Delgado, *supra* n. 51, at 2436-41. For feminists, storytelling harkens back to the feminist method of consciousness raising. Katharine Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 829 (1990).

[87] *See e.g.* Susan Estrich, Rape, 95 Yale L. J. 1087, 1089 (1986); Montoya, *supra* n. 50. See generally, Jane B. Baron, *Resistance to Stories*, 67 S. Cal. L. Rev. 255 (1994); Kathryn Abrams, *Hearing the Call of Stories*, 79 Cal. L. Rev. 971 (1991).

[88] Cain, *supra* note 87, at 171-72, 175.

[89] Becker, *supra* n. 2, at 1035; Stanchi, *supra* n. 75, at 34-5; *See e.g.*, Montoya, *supra* n. 50, at 260-65.(giving an example of how issues of race, gender and class are removed from the legal discourse).

sexist and homophobic views. [90] For students who have personal experience with racism, sexism, classism and homophobia, this is exceedingly difficult and places a great burden on those who already feel a degree of alienation. Law and Feminism, and other critical classrooms, are meant to be classes where the contextual issues ignored by traditional doctrine can be expressed freely.

The distinct pedagogy and substance of critical classes like Law and Feminism are among its most important qualities. For many students, critical classes are the only places in the law school environment where they will read theories written by respected lawyers and legal scholars who share and value their experiences and perspectives. They are the only classes devoted to learning about law from the perspective of women, racial minorities, and lesbians and gay men.

The pedagogy and substantive goals of critical legal classes make the classes especially vulnerable to hate speech, because hate speech can strip from the class the very qualities that make it a unique and compelling learning environment. Hate speech chills the telling of personal stories and interferes with the learning process that begins with personal involvement with the readings. When the readings in a class center on personally sensitive issues such as rape, homophobia and racism and the law's misunderstanding of and ineffective remedies for these wrongs, student participation can be uneasy in the most welcoming of environments. Students who take critical classes often have personal experience with rape, sexism, homophobia, racism and violence and will not participate in class if they feel personally attacked. Many will have encountered sexism, racism and homophobia in the law they read and the classes they take elsewhere in law school. They will not speak if they feel that the critical classroom is yet another place that their perspectives and experiences will be met with disbelief, hate or ridicule. And, if students are unwilling to engage in difficult discussions about the readings, much of the learning in the class will stop.

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[90] *See e.g.* Crenshaw, *supra* n. 52, at 2-3.

When dealing with hate speech in the context of a critical legal class, these considerations must be part of the balance of speech, education and equality. This point, however, can be quite difficult to convey to teachers of traditional, doctrinal courses who do not understand, or do not respect, the pedagogy or substance of critical legal classes. For example, I found myself struggling to convey to colleagues why personal stories were such a critical part of feminist legal theory and why John's chilling of this aspect of the class was such a significant pedagogical loss. I also had difficulty explaining why emotion and personal catharsis are often inextricably intertwined with the learning process in the class and that John's interference with this had a significant impact on the learning in the class. Critical classes are relative newcomers to the legal academy. Both the pedagogy and the content of the classes are not without controversy. Many law professors and administrators view critical classes as not as "rigorous" or intellectual as traditional doctrinal courses.[91] Other law professors are uncomfortable with the idea that a law class involves emotional and personal exploration and may not understand the sound pedagogical reasons for use of these techniques in teaching critical classes. However, a meaningful application of the free speech balance requires a full understanding – and respect – of these issues.

IV. Conclusion

My experience with John is, unfortunately, not unique, although it may be among the more severe examples of student backlash against critical legal courses. As law school faculties and student bodies become more diverse, the problem may be exacerbated. In any event, it is not going to go away. Professors and administrators much educate themselves about the issues raised by hate speech, especially when it occurs in a critical legal classroom. An automatic response of "non-

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[91] Becker, *supra* n. 2, at 1034 (noting that many powerful men within universities consider women's issues uninteresting, with the result that critical legal scholars may lose hiring and promotion

interference", despite its superficial neutrality, is misguided and potentially harmful. Our students deserve a more thoughtful approach to this complex problem. There is a vast area between imposition of a blanket hate speech code and the absolutist approach of total non-interference.

This Essay urges that the balance between free speech and education and equality be made carefully and with full knowledge of the issues on both sides of the equation. It is not the same thing to say that a student's right to speak his mind and make earnest contributions to class discussion, however critical of the material (or the professor), is compelling and to say that all speech is of equal value. Of course it is sometimes difficult to distinguish productive from disruptive speech. The non-interference approach, however, abandons even a case by case effort to make judgments about the value of speech. The result of this inaction is that non-interference places a high value on disruptive speech because it passively allows disruptive speech to silence productive speech. Moreover, non-interference ignores how the culture, doctrine, and pedagogy of law school has already put in place institutions that work to silence some speakers and empower others. Thus, non-interference gives hate speech special treatment twice over: once through already institutionalized fetters on non-traditional speech and then by allowing hate speech to flourish through inaction. Finally, in the context of critical legal classes, non-interference devalues the goals and pedagogy of those classes, and the important role they play in law schools.

In short, an absolutist approach in the educational context makes a devil's bargain: in exchange for alleged neutrality of the flimsiest sort, it forsakes equality and education, and does so for those students for whom educational environment and educational equality are already compromised. Like all devil's bargains, it is ultimately a losing proposition, and it should be re-examined.

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opportunities).