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next three decades.

As recently as 1992, in *Lee v. Weisman*, 112 S. Ct. 264, the Supreme Court declared unconstitutional prayers at a public school graduation ceremony,

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its momentous decision; it is an even clearer reality today.

The First Amendment was designed as an article of peace. The founding fathers clearly feared that the federal government might overreach itself in

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'Fighting Words' Redux

By Harvey A. Silverglate SPECIAL TO THE NATIONAL LAW JOURNAL

IT IS A CROWNING irony that our universities, which in theory should be bastions of free expression and historically have accepted, protected and even cultivated dissidents, are now the nation's last bastion of formal institutional censorship. Even though the Supreme Court has imposed near-impossible burdens on governments seeking to censor or impose prior restraints upon the most noxious and subversive speech, private universities, not bound by the Bill of Rights, in recent years have implemented restrictive "hate speech" codes that would never pass constitutional muster in "the real world."

The greater irony is that universities which seek to rectify racism, sexism and ethnic, religious and other bigotries, base their codes on a now-discredited wartime decision of the Supreme Court that, for a fleeting moment in constitutional history, approved a governmental effort to outlaw "fighting words"—a decision that has not been followed since by the high court and which scholars believe to be a dead letter. Indeed, not only has the court refused to follow its infamous opinion in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), but it has repeatedly *overturned* convictions based on "fighting words." The fighting words doctrine is alive, it seems, only on our campuses.

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The fighting words doctrine is an example of how the court can eviscerate—without directly overruling—a decision that, in retrospect, is seen as an error. The court has never again reached the question of whether the language used by the defendant in any given case constituted prohibited fighting words. Instead, it has chosen to invalidate the statutes at issue on grounds of vagueness or overbreadth, thus sparing itself the dubious task of actually having to declare whether any particular words qualify as "fighting." See, e.g., *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), and *R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1991).

Chaplinsky richly deserved the death-by-desuetude visited upon it. Walter Chaplinsky, a proselytizing Jehovah's Witness angry at a police officer for refusing to protect him from an angry mob, called the officer a "racketeer" and "Fascist." The court held that New Hampshire had the right to outlaw "the use in a public place of words likely to cause a breach of the peace," and "the appellations 'damn racketeer' and 'damn Fascist' are epithets likely to provoke the average person to retaliation."

In subsequent cases, the court refined and narrowed this definition to require that, to be proscribed, the words uttered must constitute a very provocative personal insult, have a direct tendency to elicit an immediate and violent

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Pollution Cleanup Has Created a Legal Mess

By Edward M. Dunham Jr. and Daniel W. Cantú-Hertzler

SPECIAL TO THE NATIONAL LAW JOURNAL

THE QUESTION OF who is going to pay for the cleanup of thousands of highly contaminated hazardous waste sites around the country is of enormous importance to insurers, policyholders and taxpayers. Some have suggested that the cleanup of this national mess invariably should be funded by insurance, except when it can be proven that the contamination is the result of knowing and intentional polluting activities. [Podium, NLJ, Nov. 7.] We submit that this "solution" is no solution at all.

The notion that there is a single, simple answer is belied by years of expensive, time-consuming and arguably unproductive insurance coverage litigation between policyholders and their carriers. The unsuccessful efforts of Congress to resolve the question this year through an extension of the existing Superfund legislation buttress the point. In spite of insurance industry willingness to respond to the overwhelming sense that "there must be a better way," and a Congress pressured by its constituents to rewrite the Superfund legislation to do what it was supposed to do in the first place, nothing happened this year. These failed (and frustrating) efforts suggest that a simple solution just is not available.

Mr. Dunham and Mr. Cantú-Hertzler, both of Philadelphia's Miller Dunham Doering & Munson P.C., represented Aetna Casualty & Surety Co. in Texas Eastern Transmission Corp. v. Fidelity & Casualty Insurance Co. of New York, *U.S. 93-2070 (1994).*

Congress has made it abundantly clear that it is the polluter who must pay in the first instance. In the 1976 Resource Conservation and Recovery Act, it laid down a detailed mandate for hazardous waste management applicable to generators and transporters of hazardous waste and owners and operators of hazardous waste facilities. The act provided for substantial criminal and civil penalties for violations by policyholders who fall into these categories.

In 1980, Congress passed CERCLA, the Comprehensive Environmental Response, Compensation and Liability Act, which provides for the cleanup, remediation and abatement of environmental disaster sites. This act made generators and transporters of hazardous waste and owners and operators

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'Fighting Words' Echo on Campuses

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response from the average listener, be delivered in a face-to-face confrontation, and be directed to a particular individual. Yet in subsequent cases, convictions that seem to fit these criteria have been routinely overturned.

Indeed, in one case, *Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974), the court even went so far as to declare that the word "Fascist" is "part of the conventional give-and-take in our economic and political controversies" and declared it protected speech under federal labor law.

In that same year, on First Amendment overbreadth grounds, the court invalidated an Arkansas statute that proscribed speech that would "arouse to anger" the recipient. The dissent, understandably, complained that it was "at a loss to understand" how a standard could be narrower or more readily fit *Chaplinsky*'s "fighting words" definition. *Lucas v. Arkansas*, 416 U.S. 919 (1974). No less an authority than Prof. William L. Prosser declared in his authoritative "Handbook of the Law of Torts," that such distress-inflicting language does not constitute even tortious conduct.

Now enter the academy. One of the nation's most prestigious institutions of higher learning, Stanford University, adopted in 1990 a code that banned "speech or other expression," defining it as "harassment by personal vilification," if it: is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation or national and ethnic origin; is addressed directly to the individual or individuals whom it insults or stigmatizes; and makes use of insulting or "fighting" words or non-verbal symbols.

"Fighting words" were defined by Stanford as "words or symbols which by their very utterance inflict injury or tend to incite to an immediate breach of the peace, and which are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation or national and ethnic origin.

Lest one conclude that the speech code phenomenon is peculiar to California or the West Coast, the Massachusetts Institute of Technology, one of the world's leading institutions heretofore dedicated to the rule of reason, recently adopted an even broader "harassment" policy:

"Harassment is any conduct, verbal or physical, on or off campus, which has the intent or effect of unreasonably interfering with an individual's or group's educational...performance at MIT or which creates an intimidating, hostile or offensive educational, work or living environment.

"Harassment on the basis of race, color, gender, disability, religion, national origin, sexual orientation or age includes harassment of an individual in terms of a stereotyped group characteristic, or because of that person's identification with a particular group. Sexual harassment may take many forms...[and may consist of] visual displays of degrading sexual images, sexually suggestive conduct, or offensive remarks of a sexual nature."

'Deep Throat' and MIT

Several years ago, Adam Dershowitz, an MIT undergraduate, was charged by a dean with violating this code because he sponsored a campus showing of the sexually explicit movie "Deep Throat." The Committee on Discipline, after a hearing at which the student was represented by his uncle, Alan Dershowitz, a law professor at a sister institution up-river on the Charles, and Prof. Louis Menand of the MIT faculty, acquitted the student on ground that even though the code had been clearly violated, the principles of academic freedom must take precedence. (The author wrote an amicus memorandum for the Civil Liberties Union of Massachusetts in this case.)

The next year, when young Dershowitz again showed the movie, the dean—acting as accuser and judge/jury wrapped into one—placed a letter of admonition in the student's file, refusing (indeed, fearing) to bring the charge before the official tribunal again. Thus did MIT demonstrate another aspect of the Orwellian world on our campuses—if notions of due process get in the way of the administration's agenda, due process follows free speech to the dustbin. Consequently, our colleges are the last bastion of censorship, as well as home to the last vestiges of the Court of Star Chamber on our continent. (For the mid-western version of speech codes, see *Doe v. University of Michigan*, 721 F. Supp. 852 [E.D. Mich. 1989], in which a code was declared unconstitutional. The phenomenon is indeed national in scope.)

What is equally remarkable about the MIT case is that the student was told that *before* he could show a movie on campus he would have to obtain permission from a special board of censors. Such permission, of course, would not be forthcoming, since the movie clearly would have been deemed violative of MIT's proscription against "visual displays of degrading sexual images." MIT thus has implemented a system of prior restraint of speech that the Supreme Court has declared time and again to bear a heavy burden of unconstitutionality, and which the court in practice has never allowed, even in the face of national security claims.

Thus, only on our campuses are the fighting words and prior restraint doctrines implemented. While "state colleges and universities are not enclaves immune from the sweep of the First Amendment," *Healy v. James*, 408 U.S. 169, 180 (1972), the Constitution does not constrain the vast majority of universities that are private. In the absence of the occasional state constitutional or statutory protection applying to private institutions, academic freedom alone stands between liberty and tyranny.

But academic freedom appears not to be up to the task, for colleges have come to see their immunity from First Amendment restrictions as a loophole. Consequently, "'Shut up,' he reasoned," rather than the "free marketplace of ideas," has become the operative mantra on many campuses. NLJ

Let's Keep Our Schools Prayer-Free

['PRAYER' FROM PAGE A21]
interfering with the affairs of its citizens. They also saw that a religion imposed by the king or central government risked being, by its very nature, oppressive. The Inquisition, religious wars and crusades of the Old World were really about the hunger for power, not a concern for souls. For this reason, it was decided at the birth of this nation that the central government could favor no religion, nor could it establish a national religion.

Church and state were free to exist side by side. The two institutions would not interfere with each other's functions, and Americans would be permitted to live according to their own faith (with a few exceptions when religious custom interfered with the rights of others or contravened laws deemed vital to the society at large).

State-Mandated Religion

There was a certain illogic in the founding fathers' decision because each state was permitted to mandate a state religion. The states still had a great deal of built-in power, which remained in effect until after the Civil War amendments. The process whereby the states incorporated the separation clause into their own constitutions was slow; it culminated in the 14th Amendment.

Thus began a long line of Supreme Court cases balancing that relationship between church and state. On the whole, this has been good for religion and good for the nation, although the balance was not achieved without strife. But we agreed to let the U.S. Supreme Court strike that balance.

That is, until 1963.

A vocal segment of the American people became disturbed when, in *Vitale* and *Schempp*, the court declared devotional prayer unconstitutional in schools. For many Americans this made school "godless," "secularistic," "exclusionary of God." God, they insisted, should be an