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## **Campus Speech and The Functions of the University**

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# **Campus Speech and The Functions of the University**

**R. George Wright\***

## **I. Introduction**

This Article addresses the status of free speech on contemporary public and private university campuses.<sup>1</sup> There has been historically, and is now, no consensus on the proper scope of free speech in general on campus. Doubtless a number of considerations partially account for this lack of consensus. This Article, however, focuses on one fundamental such consideration. In particular, the Article adopts what might be called a loosely functionalist<sup>2</sup> approach.

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<sup>1</sup> Thus the presence or absence of state action and the applicability of the first and fourteenth amendments of the federal Constitution are not of central concern herein. We also do not especially emphasize below the obvious differences among universities in size, geography, prestige, endowment, religious orientation, selectivity, co-educational status, and identity as an historically black college or university.

<sup>2</sup> The loosely functional approach adopted herein encompasses what are called manifest and latent functions, and is intended to be compatible with institutional critique of the university, of any depth and direction. For general inspiration, see the classic formulation in Robert K. Merton, *Social Theory and Social Structure* ch. III (rev. ed. 1968) (elaborating in particular on

The functionalism employed herein attends not so much to the functions of freedom of speech, as to the functions of the contemporary university. As employed here, the idea of a ‘function’ encompasses broad, sustained, significant effects of the university on any aspect of its environment or on its own membership, whether such effects are consciously intended or not.<sup>3</sup> The idea of a university function may include university aims, purposes, and missions, whether actual or proposed, traditional or emerging, tangible or intangible, conservative or insurgent, sustaining or disruptive, concrete or abstract, mundane or aspirational, explicit or implicit, unreflective or critical.<sup>4</sup>

Functions of a university can thus vary in the extent to which they are immediately contained within the university context, or else affect persons, institutions, cultures, and other entities beyond the university setting,<sup>5</sup> though drawing any such lines will often be difficult,

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the distinction between manifest and latent institutional functions). See also Melvin Tumin, *The Functionalist Approach to Social Problems*, 12 *Social Probs.* 379 (1965); Whitney Pope, *Durkheim as a Functionalist*, 16 *Sociological Q.* 361 (1975). For a critique, see Paul Helm, *Manifest and Latent Functions*, 21 *Phil. Q.* 51 (1971). We make no assumptions as to any broader merits or limits of sociological functionalism in general.

<sup>3</sup> See the authorities cited *supra* note 2. Most of the major potential functions of the university will have conscious defenders, but we should hold open the possibility that a particular function of a university could play a role in university speech policy even in the absence of much conscious reflection on that function.

<sup>4</sup> See *id.*

<sup>5</sup> Thus university functions can be mostly internal or even intrinsic, or else mostly external in their reference.

if not hopeless.

The key assumption below is a blend of descriptive, predictive, and normative considerations. The crucial assumption is this: there are various sorts of university free speech cases, but whatever the case, sensible university free speech rules and policies will tend to, and perhaps should, largely reflect what the various decision makers and others take to be important relevant functions of the university.<sup>6</sup>

The crucial step is then to recognize that in our era, the speech-relevant functions of the university will be not only plural and various,<sup>7</sup> but divergent, and for practical purposes, irreconcilably conflicting. The irreconcilability of partially conflicting university functions -- in the clearest cases, partial conflicts in explicitly articulated visions of the university -- is fundamental to understanding the nature of campus free speech issues today.

Thus university campus speech policies become contestable, and often irresolvably so, when they implicate some aspect of the unresolved conflicts among partially competing understandings of university function, purpose, and mission. Any given person, group, or

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<sup>6</sup> It may be possible to sensibly decide some university speech cases on grounds entirely independent of any putative major function or purpose of a university, and such function-independent grounds may well supplement a functionalist approach to some university speech cases. But we should not expect considerations foreign to any purported function of the university to usefully guide the apt resolution of typical university speech cases. Concisely put, considerations extrinsic to university functions will rarely be of primary importance in adjudicating university speech cases. For the role of functionalism or purposivism in free speech law, see the references cited *infra* note 25.

<sup>7</sup> See *infra* Sections II–III.

institution, on or off campus, may well reject one or more of the commonly asserted university functions. But this does not fundamentally change -- indeed, it helps to constitute -- the underlying dynamic of conflicting visions of university function and thus of speech on campus.

If this functionalist approach is on the right track, we should expect genuine consensus on the range of potential campus speech cases only if and when universities are widely thought to have some single identified and coherent basic function, or at least some hierarchical, weighted, harmonized, or otherwise non-conflicting plural set of such functions. Absent such unlikely developments, we should expect speech policies on campus to be typically subject to irreconcilable contest.<sup>8</sup>

And if we reasonably assume persistent incompatibilities among conceptions of university functions,<sup>9</sup> then a certain futility must attach to advocacy in endorsing or rejecting any normative theory of campus speech in practice. We should, however, continue to look for

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<sup>8</sup> A university whose operation is genuinely dominated by the pursuit of some single coherent basic function or goal could still experience some degree of dissensus on basic free speech issues. But in such hypothetical circumstances, we should expect the scope and frequency, if not the emotional intensity, of free speech conflicts to be meaningfully reduced.

<sup>9</sup> Competing visions of university functions may be irreconcilable, for reasons of sustained conflicts in economic and other material group interest, cultural conflicts, conflicting visions of the good or just society, and conflicts among values. Such value conflicts could involve not only freedom of speech in general, but dignity, equality, opportunity, well-being, material and cultural progress, civility, community, knowledge, and harmony, as well as conflicts internal to the value of free speech itself. Such conflicts may well contribute to the actual shape of conflicting views of the proper functions of a university. It is also possible that a sense of the proper functions of a

and reflect upon genuine overlaps and commonalities of commitment.

To illustrate these themes, this Article considers some of the most prominent discussions, descriptive and normative, of basic university functions.<sup>10</sup> Among such discussions, thorough and comprehensive inventories of the diverse such basic university functions are uncommon.<sup>11</sup> The more typical approach is to focus on some preferred or conspicuous limited set of or single such functions,<sup>12</sup> even if the single function is itself then differentiated into related components. Such treatments then commonly defer to or endorse some favored view,<sup>13</sup> while perhaps alluding to some alternative view in adversary fashion. In pursuit, ultimately futile, of common ground, the discussion below takes up in particular the popular theme of the university as manifesting or somehow committed to overall community and particular communities,<sup>14</sup> to practices of

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university might affect our views on how to adjudicate among these various conflicts of interests and values.

<sup>10</sup> See *infra* Sections II-III.

<sup>11</sup> See *infra* Sections II. Loosely relatedly, Professor Steven Brint has referred to multiple purposes or dimensions of college student development: “social, personal, academic, civic, and economic.” Steven Brint, *The Multiple Purposes of an Undergraduate Education*, available at [www.cshe.berkeley.edu/publications/research-university](http://www.cshe.berkeley.edu/publications/research-university) (October, 2015) (visited February 21, 2016).

<sup>12</sup> See *infra* Sections II-III.

<sup>13</sup> See *id.*

<sup>14</sup> See *infra* Section III.

civility,<sup>15</sup> and to genuine conversation.<sup>16</sup> The idea of community, however, inescapably poses as many unresolved questions as answers.

In the context of these varied conceptions of university function, the Article then more concretely addresses apparently intractable debates over, specifically, hostile and hate speech on the contemporary university campus;<sup>17</sup> limits on speech by university faculty on matters of public interest;<sup>18</sup> and cases of controversial speech by university students transitioning to entry into a profession with certification or other relevant requirements.<sup>19</sup> Based on these considerations, a brief Conclusion then follows.<sup>20</sup>

## **II. Diverse and Conflicting Understandings of Basic University Functions**

There is no single canonical formulation of the various basic functions of the contemporary university. If we look, merely to begin with, to the historically prestigious English universities, we find a quite understandable emphasis on an assumed coherence, if not unity, as opposed to unresolved conflict, among university functions and purposes. Thus the University of Cambridge announces that its mission “is to contribute to society through the pursuit of

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<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> See *infra* Section IV.

<sup>18</sup> See *infra* Section V.

<sup>19</sup> See *infra* Section VI.

<sup>20</sup> See *infra* Section VII.

education, learning, and research at the highest international levels of excellence.”<sup>21</sup> The potential for conflict of functions on even this understanding may depend partly upon whether we focus here on the arguably unitary idea of contributing to society, or on the unfortunately complex relations between student learning<sup>22</sup> and faculty research.<sup>23</sup>

Cambridge University then declares itself to hold two core values.<sup>24</sup> These are “freedom of thought and expression,”<sup>25</sup> and “freedom from discrimination.”<sup>26</sup> Together with the above

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<sup>21</sup> The University’s Mission and Core Values, available at [www.cam.ac.uk/about-the-university/how-the-university-and-colleges-work](http://www.cam.ac.uk/about-the-university/how-the-university-and-colleges-work) (visited January 3, 2016).

<sup>22</sup> One would hope that the compatibility of, at a minimum, education and learning could be taken for granted.

<sup>23</sup> At the very least, even this formula implicates the traditionally debated relationship – perhaps mutually supportive, or conflicting -- between classroom teaching and professorial research. For a start, note the unabashed emphasis on research, as distinct from teaching, in Robert Maynard Hutchins, *The Spirit of the University of Chicago*, 1 *J. Higher Educ.* 5, 5 (1930), and the emphasis on teaching in John Henry Newman, *The Idea of a University* 1 (Aeterna Press ed., 2015) (1852).

<sup>24</sup> See *The University’s Mission and Core Values*, supra note 21.

<sup>25</sup> *Id.* For recent descriptions of the basic functions and purposes of freedom of expression in general, see Alexander Tsesis, *Free Speech Constitutionalism*, 2015 *U. Ill. L. Rev.* 1015 (2015); Brian C. Murchison, *Speech and the Truth-Seeking Value*, 39 *Colum. J.L. & Arts* 55 (2015). Classically, see John Stuart Mill, *On Liberty and Other Essays* ch. II (John Gray ed., 1991) (1859) (“On the Liberty of Thought and Discussion”). For a brief popular exposition, see Steven

Cambridge Mission Statement, these core values could be unpacked to implicate a number of possible university functions. But there is certainly no effort here by Cambridge to endorse or reject some broadly inclusive explicit typology of basic university functions. And yet, even the

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Pinker, *Why Free Speech Is Fundamental*, available at

[www.bostonglobe.com/opinion/2015/01/26](http://www.bostonglobe.com/opinion/2015/01/26) (visited January 25, 2016).

In general, functionalist approaches to freedom of speech often refer to values such as the pursuit of truth, democratic self-governance, and the promotion of autonomy. As a practical matter, though, the appropriate role of each of these and other functionalist approaches to freedom of speech is persistently contested. For a sampling of mutually incompatible perspectives on the pursuit of truth as a function of free speech, see C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 27 *UCLA L. Rev.* 964, 964-66 (1978); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 *Duke L.J.* 1; Steven D. Smith, *Skepticism, Tolerance, and Truth in The Theory of Free Expression*, 60 *S. Cal. L. Rev.* 696 (1987); Eugene Volokh, *In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection*, 97 *Va. L. Rev.* 595 (2011). For conflicting contemporary views on the relationship between free speech and promoting democracy, see Ashutosh Bhagwat, *Free Speech Without Democracy*, 49 *U. Cal. Davis L. Rev.* 59 (2015); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 *Va. L. Rev.* 491 (2011). For hate speech on campus as arguably tending to impair the autonomy, in the relevant sense, of its targets, at least as much as it may genuinely promote the autonomy of its speakers, see R. George Wright, *Traces of Violence: Gadamer, Habermas, and the Hate Speech Problem*, 76 *Chi.-Kent L. Rev.* 991 (2000).

<sup>26</sup> The University's Mission and Core Values, *supra* note 21.

most casual reflection raises the possibility of conflict between, for example, Cambridge's commitments to freedom of expression and to freedom from discrimination in any robust sense.<sup>27</sup>

As an example of a perhaps more consciously plural formulation of university functions, we might consider that of President Amy Gutmann of the University of Pennsylvania.<sup>28</sup> President Gutmann indicates that the "tripartite mission"<sup>29</sup> of the university in general<sup>30</sup> embraces "increasing educational opportunity, optimizing creative understanding, and contributing the fruit of that understanding to society."<sup>31</sup> This formulation, whether intended to be broadly encompassing or not, does not explicitly identify any possible conflicts among the cited university purposes. It would nonetheless be sensible to recognize that even the reference to "optimizing"<sup>32</sup> creative understanding implicitly grants the reality of at least some sort of

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<sup>27</sup> See *infra* Sections III, IV, and VI. By way of comparison, the University of Oxford Strategic Plan 2013-18 comprises numerous elements, with no apparent attempt to distinguish those elements that might amount to basic university functions or purposes. See [www.ox.ac.uk/about/organisation/strategic-plan](http://www.ox.ac.uk/about/organisation/strategic-plan) (visited January 3, 2016).

<sup>28</sup> Amy Gutmann, *The Fundamental Worth of Higher Education*, 158 *Proceedings Am. Phil. Society* 136 (2014), available at [www.upenn.edu/president/images/president/pdfs](http://www.upenn.edu/president/images/president/pdfs) (2012) (visited January 3, 2016).

<sup>29</sup> *Id.* at 137.

<sup>30</sup> See *id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* President Gutmann explicitly notes the possibility of conflicts, in educating for democratic citizenship, between the values of individuality or autonomy and social diversity. See Amy

resource tradeoff, if not some deeper conflict, between creative understandings and other university functions and purposes.

With a similarly plural focus, Michigan State University President Lou Anna K. Simon asserts that for her institution, “[t]he basic purposes of the University are the advancement, dissemination, and application of knowledge,”<sup>33</sup> with “[t]he most basic condition for the achievement of these purposes [being] freedom of expression and communication.”<sup>34</sup> This commitment is importantly prefaced, though, by defining her university as a “community,”<sup>35</sup> in particular, as a “community of scholars,”<sup>36</sup> explicitly encompassing the university’s students.<sup>37</sup>

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Gutmann, *Civic Education and Social Diversity*, 105 *Ethics* 557 (1995). More broadly, see Amy Gutmann, *Democratic Education* chs. 6-7 (rev. ed., 1999); Nel Noddings, *Education and Democracy in the 21<sup>st</sup> Century* ch. 10 (2013).

<sup>33</sup> Lou Anna K. Simon, *President’s Statement on Free Speech Rights and Responsibilities* 1, available at <http://president.msu.edu/communications/statements/free-speech.html> (visited January 3, 2016). See also Stanley Fish, *Versions of Academic Freedom: From Professionalism to Revolution* 132 (2014) (“[t]he values of advancing knowledge and discovering truth are not extrinsic to academic activity; they constitute it”).

<sup>34</sup> See Simon, *supra* note 33.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See *id.* See also the attempt by John W. Boyer of the University of Chicago to respectively or jointly prioritize “critical thinking, writing, and argumentation;” a “capacity for bold, self-confident questions,” and “civility and respect for intellectual divergence.” At a minimum, there can be no guarantee of compatibility between what one person or group takes to be bold, critical

The complex relationships between preserving various forms of community and freedom of expression are noted separately below.<sup>38</sup>

Another prominent university president, Drew Gilpin Faust of Harvard, refers to a number of possible university functions with obvious potential for mutual conflict. President Faust refers to “economic justifications for universities,”<sup>39</sup> including the university as “a source of economic growth,”<sup>40</sup> as well as to “a market model of university purpose,”<sup>41</sup> as contrasted with “narratives of liberal learning, disinterested scholarship, and social citizenship,”<sup>42</sup> and then further to the university’s role as “society’s critic and conscience.”<sup>43</sup> Whether we take these

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argumentation, and another person or group takes to be incivility. See John W. Boyer, An Introduction to the Annual Lecture on the Aims of Education (2016), available at <http://aims.uchicago.edu/page/history> (visited February 21, 2016). For a recent discussion of possible conflicts between the university as a bazaar of perhaps heterodox competing ideas and associated offensiveness, distress, rudeness, and any resulting cacophony, see *Doe v. Rector and Visitors of George Mason Univ.*, \_\_\_\_ F. Supp. 3d \_\_\_\_ (E.D. Va. 2016), slip op. at 34 (quoting *Kim v. Coppin State Coll.*, 662 F.2d 1055, 1064 (4<sup>th</sup> Cir. 1981)).

<sup>38</sup> See *infra* Section III.

<sup>39</sup> Drew Gilpin Faust, *The University’s Crisis of Purpose*, available at [www.nytimes.com/2009/09/06/books/review/Faust](http://www.nytimes.com/2009/09/06/books/review/Faust) (visited January 3, 2016).

<sup>40</sup> *Id.* at 3.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* President Faust is at this point drawing upon the work of former Dean George Fallis of York University in Toronto.

enumerated university functions to be exhaustive or not, the potential for serious conflict, if not overt antagonism, among these distinct functions seems evident.<sup>44</sup>

Taken in the aggregate, along with complementary discussions below,<sup>45</sup> these various accounts provide some sense of the range of possible basic university functions, with at least a

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<sup>44</sup> President Faust also recognizes the essential conflict between the university's disinterested pursuit of knowledge for its own sake, however this idea might be clarified, and providing various sorts of material, immediate benefits to the society. See *id.* at 1.

<sup>45</sup> See, e.g., the institutionally-focused suggestion by Professor Gordon Graham that universities should promote the university's transcendence of pure vocationalism; of pure utilitarianism in research; and of financial and legal dependence upon the state, or more positively phrased, the value of university autonomy. See Gordon Graham, *Universities: The Recovery of an Idea* 5-6 (2d ed. 2008), and at the individual level, the typology offered by Professor Harry Brighouse of the aims to which the well-educated student should aspire: "personal autonomy; the ability to contribute to social and economic life broadly understood; personal flourishing; democratic competence; and the capacity for cooperation." Harry Brighouse, *Moral and Political Aims of Education*, in *The Oxford Handbook of Philosophy of Education* 35, 37 (Harvey Siegel, ed.) (2009) (available online at [www.oxfordhandbooks.com](http://www.oxfordhandbooks.com)). At this point, note merely the classic potential for tragic conflict between the goals of personal autonomy and of genuine group or institutional flourishing.

Crucially, though, even if the basic functions of the university are to some degree inseparable and mutually interdependent, this hardly precludes their mutual conflict. For a strong claim of mutual interdependence among basic university functions, see the argument of Karl Jaspers, *The Idea of the University* (H.A.T. Reiche & H.F. Vanderschmidt, trans.) (Beacon

minimal sense of potential conflicts among such functions. Let us elaborate a bit further on the range and disparate nature of typically cited basic university functions, whether endorsed and desired, or merely acknowledged or critiqued, by any given observer.

Classically, Plato drew a distinction between paideia, or culture, and the mere training of a particular capacity, or between perfection of character and the enhancement of power.<sup>46</sup> The cultivation of mind has thus long been seen as a fundamental duty.<sup>47</sup> In founding the University of Virginia, Thomas Jefferson sought “[t]o develop the reasoning faculties of our youth, enlarge their minds, cultivate their morals, and instill in them the precepts of virtue and order.”<sup>48</sup> If such purposes are re-formulated, in contrast, with no explicit moral or character element, the basic educational aim, pursued through acquainting oneself “with the best that has been thought and

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Press ed., 1959) (1946) (citing, as the three basic functions of the university, “professional training, education of the whole man, research,” with the university thus serving as, indissolubly, “a professional school, a cultural center, and a research institute”).

<sup>46</sup> See 2 Werner Jaeger, *Paideia: The Ideals of Greek Culture* 133-34 (Gilbert Highet trans., 1986) (1943).

<sup>47</sup> See Immanuel Kant, *Education* § 12, at 11 (A. Churton trans., 1900) (1960 ed.) (1803) (“[m]an’s duty is to improve himself; to cultivate his mind”).

<sup>48</sup> Thomas Jefferson, *Report of the Commissioners for the University of Virginia*, in *Writings* 457, 460 (Merrill D. Peterson ed., 1984) (1818). See also John Locke, *Some Thoughts Concerning Education* § 134, at 104-05 (2000) (1698) (on education for “Virtue, Wisdom, Breeding, and Learning”).

said in the world”<sup>49</sup> is then judged by Matthew Arnold to be “to get to know [oneself] and the world.”<sup>50</sup>

This general emphasis on the cultivation of the self, in one respect or another, can plainly both support and conflict with a variety of broad social goals. Consider, in this respect, the popular view that a university education should prepare the student to play a role in strengthening the broad democratic political system, through capable and responsible democratic citizenship.

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<sup>49</sup> Matthew Arnold, *Thoughts On Education* 243 (Leonard Huxley ed., 1912). The broad knowledge acquisition function is of broader ideological interest. See V.I. Lenin, *The Tasks of the Youth Leagues*, in *The Lenin Anthology* 663 (Robert C. Tucker ed., 1975) (“assimilating the wealth of knowledge amassed by mankind” as essential to being a Communist).

<sup>50</sup> Arnold, *supra* note 49, at 243. Similarly, if naively, Goethe’s Faustian student reports to Mephistopheles that “I should like to be erudite; and from the earth to heaven’s height know every law and every action. . . .” Johann Wolfgang von Goethe, *Faust* (part I) 197 (Walter Kaufman trans.) (1990 ed.) (1808). More recently, Professor Daniel Bell echoes Matthew Arnold in declaring that the university can serve to “liberate young people by making them aware of the forces that impel them from within and constrict them from without.” Daniel Bell, *Reforming General Education*, available at [www.college.columbia.edu/core/sites/core/files/Bell](http://www.college.columbia.edu/core/sites/core/files/Bell) (February 28, 1966) (visited January 5, 2016). On such theories, the image of the “committed faculty member” interacting with “an engaged student,” as classically in “Mark Hopkins on one end of a log and a student on the other,” can arise. Michael S. McPherson & Morton Owen Schapiro, *Mark Hopkins and the Log-On* 10, 10, available at [www.educause.edu/pub/er/erm.html](http://www.educause.edu/pub/er/erm.html) (May/June 2002) (visited January 5, 2016).

Thus according to President Derek Bok, for example, today's universities provide not only various sorts of discoveries,<sup>51</sup> and trained, knowledgeable professionals,<sup>52</sup> but the developed capacity to “strengthen our democracy by educating its future leaders; preparing students to be active, knowledgeable citizens; and offering informed critiques of government programs and policies.”<sup>53</sup> A university's emphasis on social justice could be encompassed hereunder. More concisely, President Robert M. Hutchins argued that “[t]he college . . . meets the needs of society indirectly by making some contribution toward the formation of good citizens.”<sup>54</sup>

Democratic citizenship is thus typically assumed to be not simply a matter of directly supporting the current operations of the established political system. The university may also be thought to serve the purpose of providing critique.<sup>55</sup> Again, this could encompass a university's

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<sup>51</sup> See Derek Bok, *Higher Education in America* 1 (rev. ed., 2015).

<sup>52</sup> See *id.*

<sup>53</sup> *Id.* See also Richard Arum & Josipa Roksa, *Academically Adrift: Limited Learning on College Campuses* 31 (2011) (“[r]egardless of economic competitiveness, the future of the democratic society depends upon educating a generation of young adults who can think critically, reason deeply, and communicate effectively”).

<sup>54</sup> Robert M. Hutchins, *The College and the Needs of Society*, 3 *J. Gen. Educ.* 175, 181 (1949). See also *id.* at 179 (on the university function of encouraging thoughtful citizenship).

<sup>55</sup> See Bok, *supra* note 51 at 1. There may, however, turn out to be a sort of long-term contradiction between promoting the value of democracy, even on pragmatic grounds, and academically popular skeptical approaches to metaethics, freedom and autonomy, the dignity of the person, and materialism.

social justice mission. On such a view, the university may “serve the public culture by asking questions the public doesn’t want to ask, investigating subjects it cannot or will not investigate, and accommodating voices it fails or refuses to accommodate.”<sup>56</sup>

The university thus need not be seen as invariably endorsing or reinforcing all important aspects of the broader society, even if that society invests in, financially sustains, attempts to guide, and crucially depends upon various aspects of university functioning. The university’s manifold relationships with the broader society’s politics, economy, social justice practices, and culture will inevitably be contested, both on campus, and between the campus and elements of the broader society.

A bit more concretely, writers such as Dean Anthony Kronman have more specifically suggested that among the “non-economic contributions”<sup>57</sup> made by contemporary universities is “the cultivation of habits of respectfulness and tolerance on which responsible citizenship in a

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<sup>56</sup> Louis Menand, *The Marketplace of Ideas* 158 (2010). More elaborately, but outside the formal academic setting, see Plato, *Apology*, in *Five Dialogues* 21, 34 (John M. Cooper, trans.) (2d ed., 2002) (~399 BCE) (“gadfly” metaphor). Within official academia, see Report of the Committee on Freedom of Expression at Yale (Woodward Report) (December 23, 1974), available at <http://yalecollege.yale.edu/faculty-staff/faculty/policies-reports> (visited January 15, 2016) (re the right to “challenge the unchallengeable”).

<sup>57</sup> Anthony T. Kronman, *Education’s End: Why Our Colleges and Universities Have Given Up on the Meaning of Life* 38 (2007). See also Stefan Collini, *What Are Universities For?* 87 (2012) (beyond today’s “semi-marketized, employment-oriented institutions, there remains a strong popular desire that they should, at their best, incarnate a set of ‘aspirations and ideals’ that go beyond any form of economic return”).

democracy depends.”<sup>58</sup> The quality of tolerance is then linked with the potentially distinct virtue of open-mindedness.<sup>59</sup>

Finally, but arguably of greatest importance, one might look for basic university functions, and for elemental conflicts therein, as well in the realm of social and economic production and stratification. The university may to one degree or another reflect a pre-existing status hierarchy,<sup>60</sup> or may help to determine and perhaps legitimize, reproduce, and solidify a status hierarchy.<sup>61</sup> As to any of these university functions, one might again be supportive, indifferent, or critical.<sup>62</sup>

In any event, the contemporary university clearly operates as a linkage, of whatever sort, between future employees, civil servants, and entrepreneurs, and their actual post-university

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<sup>58</sup> Kronman, *supra* note 57, at 38.

<sup>59</sup> *Id.* See also Andrew Delbanco, *College: What It Was, Is, and Should Be* 3 (2011 ed.) (arguing that colleges should promote, among other personal qualities of mind, “[a] willingness to imagine experience from perspectives other than one’s own”) (to which one might add the underlying capacity to do so, with some degree of fidelity).

<sup>60</sup> See, e.g., Daniel Bell, *About the Reforming of General Education*, 37 *Am. Scholar* 401, 401 (1968). See also Antonio Gramsci, *Selections From the Prison Notebooks* 26 (Quintin Hoare & Geoffrey Nowell Smith, trans.) (1971 ed.) (~1930).

<sup>61</sup> See Bell, *supra* note 60, at 401. For brief discussion in a much broader educational context, see Antonio Gramsci, *The Antonio Gramsci Reader* chs. II, X (David Forgacs ed., 1988).

<sup>62</sup> See, e.g., Bell, *supra* note 60, at 401.

social and economic opportunities, niches, and outcomes.<sup>63</sup> American universities of a century ago accommodated perhaps a mere five percent of the college age population.<sup>64</sup> Today, the figure is closer to 60 percent.<sup>65</sup> These figures suggest the possibility, if not the fulfilment, of a university's catalyzing the social and economic mobility of groups historically underrepresented within the various professions.<sup>66</sup>

It is certainly possible, though, to support nearly any program of mobility, opportunity, and equality<sup>67</sup> without broadly endorsing contemporary university practices in that regard, let

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<sup>63</sup> Henry Giroux argues that “the university is gradually being transformed into a training ground for the corporate workforce.” Henry A. Giroux, *On Critical Pedagogy* 112 (2012 ed.). See also Peter J. Stokes, *Higher Education and Employability: New Models For Integrating Study and Work* (2015). Debates as to how universities perform this function, and their efficiency in doing so, are secondary to whether or the degree to which the universities should serve such a function. For a critique, see Joseph Arum & Josipa Roksa, *Aspiring Adults Adrift* (2014).

<sup>64</sup> See Faust, *supra* note 39, at 2.

<sup>65</sup> See *id.* Earlier, Clark Kerr had noted the “transition from elite to mass access to universal access higher education,” however incomplete or contested the transition. Clark Kerr, *Higher Education: Paradise Lost?*, 7 *Higher Educ.* 261, 266 (1978). See also Collini, *supra* note 57, at 41.

<sup>66</sup> See, e.g., Collini, *supra* note 57, at 92 (2012). On some scale, such a function has of course long been undertaken by historically black college and universities. For background, see the contributions to *Historically Black College and Universities* (Charles L. Betsy, ed.) (2008).

<sup>67</sup> For an inventory of fundamental approaches to the idea of distributional equality, see R. George Wright, *Equal Protection and the Idea of Equality*, 34 *L. & Inequality* \_\_\_\_ (2016).

alone judging such practices to be central to the fundamental purposes of the university.

Consider in this regard the uncompromising language of philosopher Alasdair MacIntyre:

The aim of a university education is not to fit students for this or that particular profession or career, to equip them with theory that will later on find useful application to this or that form of practice. It is to transform their minds, so that the student becomes a different kind of individual, one able to engage fruitfully in conversation and debate, one who has the capacity for exercising judgment, for bringing insights and arguments from a variety of disciplines to bear on particular complex issues.<sup>68</sup>

Thus there is, as Robert M. Hutchins noted, “a conflict between one aim of the university, the pursuit of truth for its own sake, and another which it professes too, the preparation of men and women for their life work.”<sup>69</sup> Hutchins also contrasts his favored conception of the university as

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<sup>68</sup> Alasdair MacIntyre, *God, Philosophy, Universities* 147 (2009) (at this point largely endorsing the perspective of John Henry Newman). One could certainly argue that these are among the qualities that promote long-term success in business and the professions. If the Newman-MacIntyre approach is pressed to an extreme, it becomes transformed into the claim that “the distinguishing mark of universities, as opposed to other institutions of further and higher education, is their concern with knowledge and the pursuit of learning for their own sake, not for the sake of some external practical end.” Graham, *supra* note 45, at 28 (discussing, rather than unequivocally endorsing, such a view).

<sup>69</sup> Robert Maynard Hutchins, *The Higher Learning in America* 33 (2009 ed.) (1936). Roughly this conflict was earlier articulated by Thorstein Veblen. See Thorstein Veblen, *The Higher Learning in America* 68 (Richard F. Teichgraber ed., 2015) (1918) (noting the conflict between

“a center of independent thought”<sup>70</sup> with, respectively, conceptions of the university as “service-station,”<sup>71</sup> “public-entertainment,”<sup>72</sup> and “housing-project.”<sup>73</sup> Each of these latter conceptions exercises some contemporary influence, and thereby exacerbates the functional contradictions of the university.

However we choose to classify the various basic functions and purposes of the university, we are left with potential conflicts and practical contradictions. Consider together the incomplete and overlapping census of basic university functions above: learning and research;<sup>74</sup> anti-discrimination;<sup>75</sup> providing educational opportunities and making societal contributions;<sup>76</sup> advancement of knowledge;<sup>77</sup> freedom of expression and communication;<sup>78</sup> promoting economic growth;<sup>79</sup> disinterested scholarship;<sup>80</sup> serving as societal critic;<sup>81</sup> moral cultivation of the

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“the needs of the higher learning and the demands of business enterprises”). See also Christopher Dawson, *The Crisis of Western Education* 149 (2010 ed.) (1961) (the modern technological order as requiring that university-level and general education be coordinated with the needs of business and industry).

<sup>70</sup> Robert M. Hutchins, *The Freedom of the University*, 61 *Ethics* 95, 104 (1951).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* The expansion of these latter functions is ascribed by Hutchins to the need, or the temptation, “to get money.” *Id.*

<sup>74</sup> See *supra* note 21 and accompanying text.

<sup>75</sup> See *supra* note 26 and accompanying text.

<sup>76</sup> See *supra* note 31 and accompanying text.

<sup>77</sup> See *supra* note 33 and accompanying text.

students;<sup>82</sup> professional training;<sup>83</sup> preparation for competent democratic citizenship;<sup>84</sup> reflecting or determining status and opportunity hierarchies or promoting social mobility;<sup>85</sup> and fundamental personal transformation.<sup>86</sup>

The potential for conflict within, as well as among, any such set of university functions is clear enough in general, and almost equally clearly in the more particular area of campus speech. If there were to be any hope of wringing harmony out of conflict, the likeliest possibility would seem to be through emphasizing the concept, briefly alluded to above,<sup>87</sup> of community. But as we shall now see, the idea of community actually contributes more to the intractability of the problems of campus speech than it does to their consensual resolution.

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<sup>78</sup> See supra note 34 and accompanying text.

<sup>79</sup> See supra note 40 and accompanying text.

<sup>80</sup> See supra note 42 and accompanying text.

<sup>81</sup> See supra note 43 and accompanying text.

<sup>82</sup> See supra note 48 and accompanying text.

<sup>83</sup> See supra note 52 and accompanying text.

<sup>84</sup> See supra note 53 and accompanying text.

<sup>85</sup> See supra notes 60-61 and accompanying text.

<sup>86</sup> See supra notes 66-68 and accompanying text.

<sup>87</sup> See supra text accompanying notes 35-37. For a sense of a possible conjunction of the general pursuit of knowledge with an individually or collectively experienced imaginative zest and excitement therein, see Alfred North Whitehead, *Universities and Their Function* (1927), available at <http://la.utexas.edu/users/hcleaver/33OT> (visited February 21, 2016).

### **III. Community, University Function, and Campus Speech**

The linkages between various forms and senses of community and the university are multiple, and in some respects contested. The most basic such linkages may be at the level not precisely of the functions of a university, but of the very definition of a university. Thus it has been variously argued that the university is a community;<sup>88</sup> that it is an aggregate of multiple or diverse communities;<sup>89</sup> that the university aspirationally should be a community, whether that ideal is realized in practice or not;<sup>90</sup> that the experience of university community should be optional;<sup>91</sup> and that the university should promote some form of community in the broader society beyond the campus boundaries.<sup>92</sup> The very idea of community and disputes over the nature of the university thus open the possibility of multi-front conflict, as much as to harmony.

At the level of language itself, the word ‘college’ refers to an association, if not to a genuine community.<sup>93</sup> From the beginning, the university amounted to “an association of

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<sup>88</sup> See *infra* notes 93-98 and accompanying text.

<sup>89</sup> See *infra* note 101 and accompanying text.

<sup>90</sup> See *infra* note 99 and accompanying text.

<sup>91</sup> See *infra* notes 109, 112 and accompanying text.

<sup>92</sup> See *infra* note 100 and accompanying text.

<sup>93</sup> See Robert S. Rait, *Life in the Medieval University* 5 (Forgotten Books ed., 2015) (Cambridge Univ. Press ed., 1918) (1912). The classic distinction between a mere association and a genuine community is elaborated in Ferdinand Tonnies, *Community and Society* [*Gemeinschaft und*

masters and scholars leading the common life of learning.”<sup>94</sup> It is thus natural to think of the traditional, geographically localized,<sup>95</sup> non-cyber university as a community,<sup>96</sup> and perhaps in particular as a community of scholars,<sup>97</sup> however broadly or narrowly defined.<sup>98</sup> Ironically, it is

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Gesellschaft] 226-32 (Charles P. Loomis trans.) (Dover ed., 2002) (1887). Very roughly, this distinction gestures at differences between family and small village life on the one hand and city life on the other. See *id.* For some relevant contemporary developments, see Marc J.

Dunkelman, *The Vanishing Neighbor: The Transformation of American Community* (2014);

Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (2000).

<sup>94</sup> Charles Homer Haskins, *The Rise of Universities* 24 (1965 ed.) (1923). See also Clark Kerr, *The Uses of the University* 1 (1964) (“[t]he university started as a single community -- a community of masters and students”); Jacques Barzun, *The American University* 244 (2d ed. 1993) (1968).

<sup>95</sup> Thus one might decline to think of, say, the University of California system, or the California State University system, as a whole, as genuine communities. See Daniel Bell, *About The Reforming of General Education*, 37 *Am. Scholar* 401, 403 (1968).

<sup>96</sup> See, e.g., Ellen Condliffe Lagemann & Harry Lewis, *Renewing the Civic Mission of American Higher Education*, in *What Is College For?: The Public Purpose of Higher Education* 9, 11 (Ellen Condliffe Lagemann & Harry Lewis eds., 2012) (“[c]ollege are communities”). See also *Healy v. James*, 408 U.S. 169, 171 (1972) (referring to “the academic community” in the context of potential tradeoffs among free expression and campus orderliness and non-disruption).

<sup>97</sup> See, e.g., Michael Oakeshott, *The Idea of a University*, available at

[www.cse.cuhk.edu.hk/irwin.king](http://www.cse.cuhk.edu.hk/irwin.king) 23, 24 (originally published 1950) (“a university . . . is a corporate body of scholars, each devoted to a particular branch of learning: what is characteristic

also natural, but distinctly different, to think of community as an aspirational ideal toward which the university ought to strive,<sup>99</sup> or even of the university residential or scholarly community as a model community for emulation on much larger scales.<sup>100</sup>

The potential for conflicting impulses in free speech cases begins to emerge, however, if we believe that the university, whether itself a community or not, encompasses a plurality of communities,<sup>101</sup> perhaps for quite distinct purposes. Even if the various campus communities are

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is the pursuit of learning as a co-operative enterprises. . . . A university . . . is a home of learning”) (emphasis added); Simon, *supra* note 33, at 1 (“Michigan State University is a community of scholars whose members include its faculty, staff, students, and administrators”).

<sup>98</sup> See Simon, *supra* note 33, at 1.

<sup>99</sup> See Robert Paul Wolff, *The Ideal of the University* 127 (1969) (“[t]he ideal university . . . is a community of learning”) (emphasis in the original). Professor Wolff elaborates: “a university ought to be a community of persons united by collective understandings, by common and communal goals, by bonds of reciprocal obligation, and by a flow of sentiment which makes the preservation of the community an object of desire, not merely a matter of prudence or a command of duty”).

<sup>100</sup> Howard Gardner, Discussion, in William G. Bowen, *Higher Education in the Digital Age* 97, 100 (2014 ed.). For the importance of community in the broader societal context, see Robert A. Nisbet, *The Quest For Community* 30 (1973 ed.) (1953).

<sup>101</sup> See Kerr, *supra* note 94, at 1 (“[t]oday the large American university is . . . a whole series of communities and activities”). See also the distinct sense in which each classroom, or more

somehow “nested,”<sup>102</sup> or perhaps otherwise related, there can be no guarantee of harmony<sup>103</sup> of purposes among the various constituent campus communities.

At the level of the university itself, and of its various constituent communities, meaningful community typically requires “people of like purpose.”<sup>104</sup> The members must share, in the words of John Dewey, “aims, beliefs, aspirations, knowledge -- a common understanding.”<sup>105</sup> Thus ‘community’ refers to both a distinct kind of group, and to one or more qualities shared by the group members.<sup>106</sup> In the educational context, there may thus be “a common zeal”<sup>107</sup> for “a common pursuit.”<sup>108</sup>

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literally each particular class, is or can be itself a genuine community, as outlined in bell hooks, *Teaching to Transgress: Education as the Practice of Freedom* 8 (1994).

<sup>102</sup> This term is adapted from John D. Inazu, *Virtual Assembly*, 98 *Cornell L. Rev.* 1093, 1096 (2013).

<sup>103</sup> Consider, by possible contrast, the community constituted by the well-functioning symphony orchestra, as briefly elaborated in Ronald Dworkin, *Liberal Community*, 77 *Cal. L. Rev.* 479, 493 (1989).

<sup>104</sup> Barzun, *supra* note 94, at 244.

<sup>105</sup> John Dewey, *Democracy and Education* 4 (Dover ed., 2004) (1916).

<sup>106</sup> See Robert Paul Wolff, *The Poverty of Liberalism* 163 (1968).

<sup>107</sup> R.S. Peters, *Ethics and Education* 58 (1966).

<sup>108</sup> *Id.*

Absolute and exceptionless commitment to the broader university community, however, may not be desirable,<sup>109</sup> and is in any event not widely in evidence. One element of campus multiculturalism could be described as promoting “safe harbor”<sup>110</sup> communities of various sorts, within, but quite distinct from, a broader campus community. The meaning of ‘safety’ itself may vary as among campus groups. On occasion, the university may seek undue homogeneity in values and in priorities, in the name of furthering the overall campus community. But insufficiently informed universalism can inadvertently depreciate some nested campus cultures.<sup>111</sup> The broader campus community may or may not actually be strengthened, over time, in such cases.

What is clear, in such cases, is the potential conflict between visions of the overarching university community and the self-perceived interests of one or more perhaps mutually quite distinct constituent campus communities. The university community may thus be called upon to

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<sup>109</sup> See Jaroslav Pelikan, *The Idea of the University: A Re-Examination* 65 (1992) (“[i]t is not an inconsistency to insist that the healthiest community . . . is one in which scholars are not obliged to be in the community incessantly, and therefore that one of the functions of the community of scholars is to protect the right and need of the scholars in the community to be by themselves”) (or, presumably, within some sub-community).

<sup>110</sup> See Jim Sidanius, et al., *Ethnic Enclaves and the Dynamics of Social Identity on the College Campus: The Good, the Bad, and the Ugly*, 87 *J. Personality & Social Psych.* 96, 96 (2004). The university has long been thought of as a safe or protective space in other respects. See Collini, *supra* note 57, at 56.

<sup>111</sup> See, e.g., Roderick A. Ferguson, *The Re-Order of Things: The University and Its Pedagogy of Minority Differences* 81 (2012).

acknowledge the differences between a constituent community's defensive, protective, partial withdrawal from the broader campus community, and the inadvertently or insensitively imposed isolation, burdening, or exclusion of that constituent community.<sup>112</sup>

Crucially, there are inherent contradictions between the broadly encompassing campus community's functioning as a space for robust and uninhibited expression and debate generally,<sup>113</sup> even on sensitive social issues, and as a space in which responsible consideration and accommodation are broadly exercised on behalf of all members of the campus community,<sup>114</sup> including those distinctly representing diverse societally subordinated communities.

These contradictions among presumably basic university functions help to account for the unresolvability of a substantial number of campus speech problems. Actually, these

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<sup>112</sup> See Sidanius, *supra* note 110, at 96; Pelikan, *supra* note 109, at 65. Concisely put, uninhibited debate may well not be fully compatible with an assumed pre-existing genuine campus community. The University of Chicago appears to endorse the former, even at some cost in the latter, but then registers a number of function-based exceptions to that endorsement. See Report of the Committee on Freedom of Expression, available at <http://provost.uchicago.edu/FOECCCommitteeReport.pdf> (2015) (visited January 15, 2016). For a similar stance, see the Princeton University Faculty Statement, available at [www.princeton.edu/main/news/archive](http://www.princeton.edu/main/news/archive) (April 7, 2015) (visited January 15, 2016).

<sup>113</sup> See *supra* notes 25, 33, 34, 69, 70 and accompanying text.

<sup>114</sup> See *supra* notes 26, 58, 96, 99, 110 and accompanying text. Consider also the implications for this conflict of classifying the promotion of social justice and broad sustainability as genuinely basic university functions.

contradictions, when manifested in campus speech contexts, exemplify an even broader and more fundamental contradiction among basic university functions: the inescapable conflict between the uninhibited pursuit of knowledge and truth, as variously as those notions may currently be envisioned,<sup>115</sup> and the university's obvious need to somehow act, authoritatively, officially, and uniformly, on the basis of such knowledge and truth, or approximations thereto, as the university currently believes itself to possess.<sup>116</sup>

The university, in a phrase, cannot always defer action in the hope of obtaining a better perspective through yet further pursuit of the truth. And in campus speech contexts, the free pursuit of truth -- at least from the perspective of willing speakers and listeners -- must inevitably

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<sup>115</sup> For a sense of the disparate contemporary understandings of the very idea of truth, see, e.g., Timothy M. Mosteller, *Theories of Truth: An Introduction* (2014); *Truth* (Oxford Readings in Philosophy) (Simon Blackburn & Keith Simmons eds., 1999).

<sup>116</sup> It is certainly possible to argue that at least some theories of knowledge or truth are not themselves neutral with regard to the values, aims, interests, and priorities of minority communities on campus. If so, then to whatever degree a given campus reflects such theories, there is the possibility of either reduced or enhanced conflict between the uninhibited pursuit of truth, and the values and interests of minority campus communities. This Article will not, however, assume that concrete political, moral, or cultural implications are genuinely built into any popular theory of truth or knowledge. For broader discussion, see Simon Blackburn, *Truth: A Guide* (2007).

remain distinct<sup>117</sup> from the responsible exercise of that freedom, from the perspective of various other campus community groups and members.<sup>118</sup>

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<sup>117</sup> The campus cultural contradiction between freedom of inquiry and responsibility in inquiry is not resolved merely by rhetorically pairing the ideas of freedom and responsibility conjunctively. See, e.g., Pelikan, *supra* note 109, at 58, 65. For an extended argument for supplementing and tempering a speaker's freedom of expression with the values of civility, self-restraint, and respect, see Edward Shils, *The Virtue of Civility: Selected Essays on Liberalism, Tradition, and Civil Society* (Steven Grosby, ed.) (1997). See also Cheshire Calhoun, *The Virtue of Civility*, 29 *Phil. & Pub. Aff.* 251 (2000), and more broadly, the concept of a conversation, as developed in Sherry Turkle, *Reclaiming Conversation: The Power of Talk in a Digital Age* (2015). The idea of a genuine conversation might in turn be linkable to the idea of genuinely discursive public decision making, as in Jurgen Habermas, *Moral Consciousness and Communicative Action* (Christian Lenhardt & Shierry Weber Nichol森 trans., 1990) (1983).

<sup>118</sup> For present purposes, we set aside the otherwise increasingly important question of who is to count, in the first place, as a member of any relevant campus community. This question notably arises in the context of students whose connection with the physical or residential university campus is largely or entirely virtual, or online, and in the context of the increasing percentages of adjunct and temporary faculty, whose connection to any particular campus may in some respects be attenuated.

On the general question of virtual or remote college-level education, see, e.g., Nannerl O. Keohane, *Higher Education in the Twenty-First Century: Innovation, Adaptation, Preservation*, 46 *PS: Political Science & Politics* 102, 103 (2013); Frank B. McCluskey & Melanie L. Winter, *Academic Freedom in the Digital Age*, 22 *On the Horizon* 136, 127 (2014). See also Jonathan

**IV. Plurality of Basic University Function  
and the Problem of Hostile Speech  
On Campus**

Crucially because the university<sup>119</sup> has some more or less familiar if contested set of basic functions, campus speech in general, and hostile, offensive, or injurious speech on campus<sup>120</sup> in particular, pose distinctive issues. In the latter kinds of cases, irreconcilable

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Haber, MOOCs (2014). On the role of adjunct or contingent faculty, see House Committee on Education and the Workforce Democratic Staff, *The Just-in-Time Professor*, available at [www.mpsanet.org/portals](http://www.mpsanet.org/portals) (January, 2014) (visited January 15, 2016); Noam Chomsky, *How America's Great University System Is Being Destroyed* (February 28, 2014), available at [www.alternet.org/corporate-accountability-and-workplace/chomsky](http://www.alternet.org/corporate-accountability-and-workplace/chomsky) (visited January 15, 2016); Delbanco, *supra* note 59, at 4-6.

<sup>119</sup> Again, we do not herein emphasize the differences between public and private universities, or other differences within each of these categories. See *supra* note 1.

<sup>120</sup> We also set aside here questions of the increasingly murky, and as yet largely judicially unresolved, boundaries between on-campus and off-campus, but directly campus-related, speech. For a sense of some of the options at the pre-university level, see, e.g., *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379 (5<sup>th</sup> Cir. 2015) (en banc); *Wynar v. Douglas Sch. Dist.*, 728 F.3d 1062 (9<sup>th</sup> Cir. 2013); *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565 (4<sup>th</sup> Cir. 2011); *J.S. ex rel. Snyder v. Blue Mt. Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (en banc); *Layshock v. Hermitage*

conflicts among arguably basic university functions largely drive the conflicts in any observer's preferred case analyses and outcomes.

Consider in particular the problem of on-campus resort to invidious group identity epithets. Even in the broader society, there is at least some impulse to conclude that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."<sup>121</sup> This impulse would suggest that such epithet speech should not be considered constitutionally protected speech, or perhaps even as speech at all in the sense relevant to constitutional purposes. One might thus conclude that "[r]esort to epithets or personal abuse is not in any sense communication of information or opinion safeguarded by the Constitution. . . ."<sup>122</sup>

Such an approach might have a certain appeal in many contexts. With regard to hostile speech on university campuses in particular, it would not be difficult to link the Chaplinsky logic quoted above to one or more of the commonly cited basic university functions and purposes. It has thus been argued that the university prepares its students for tolerant, responsible democratic citizenship, and on some theories, even seeks to build character in certain respects, while

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Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc); *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008).

<sup>121</sup> *Chaplinsky v. State*, 315 U.S. 568, 572 (1942).

<sup>122</sup> *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940)). More broadly, one might easily argue that some of the leading discussions of free and open discussion on campus are not at all logically committed to condoning the use of vulgar epithets. Consider, in this context, e.g., John Henry Newman, *supra* note 23, at 473.

embodying or at least striving for meaningful and mutually respectful community.<sup>123</sup> On such views, hostile epithet speech on campus seems contrary to basic university function and purpose.

Undeniably, though, there are other conceptions of basic university function that may fail to meaningfully address, or may reluctantly tolerate at the level of formal legal sanction, some instances of distinctly and overtly hostile speech on campus. Thus the university as bastion of free thought, free expression, the exploration of ideas, and of free communication, at least for some speakers and listeners;<sup>124</sup> the university as poser and prober of socially uncomfortable questions;<sup>125</sup> and the university as generator, reflector, reinforcer, and replicator of status hierarchies<sup>126</sup> could all be brought to bear on the side of the legal toleration of hostile speech on campus.

These stark oppositions among arguably basic university purposes of course require some refinement. No single basic university function is monolithic and utterly unequivocal on all reasonable interpretations. Some basic university functions can be internally contradictory in their implications for campus speech. Thus one might well argue that some instances of hostile campus speech can suppress, rather than encourage, speech, including any possible “counter-speech,” by the targets of such speech.<sup>127</sup>

Thus there are conflicts within each purported basic university function, as well as among those basic functions. Crucially, though, it is unlikely that in all instances of potential conflict

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<sup>123</sup> See *supra* notes 26, 35-37, 48, 53-54, 58, 88-90, 93-99 and accompanying text.

<sup>124</sup> See, e.g., *supra* notes 25, 34, 70 and accompanying text.

<sup>125</sup> See *supra* note 56 and accompanying text.

<sup>126</sup> See *supra* note 60 and accompanying text.

<sup>127</sup> See the authorities cited *infra* notes 131, 134.

among basic university functions, the conflicts internal to each such function will be aligned, like the cylinders of a combination lock, so as to generate some unique and largely uncontroversial outcome at the level of basic university purpose. Realistically, the prominent basic university purposes, however granulated or refined, individually and collectively will typically point in opposing directions on questions of hostile speech, and on questions of campus speech more broadly.

Nor is the interaction between jurisprudential free speech doctrine and basic university functions likely to point toward an unequivocal solution. Consider the language ultimately adopted in the classic hostile speech case of *Chaplinsky v. New Hampshire*.<sup>128</sup> *Chaplinsky* declares to be constitutionally unprotected what it calls “insulting or ‘fighting’ words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>129</sup> The crucial problem with *Chaplinsky* is not one of systematic underprotectiveness of speech, but of undue and unfortunate indeterminacy of judicial outcome, in light of the basic university functions.

Many members of the university community sense that not all verbal insults should be legally or administratively treated in similar ways. Some insults may reflect not so much any social or political point, as some displaced autobiographical personal resentment.<sup>130</sup> More importantly, the most reasonable legal, administrative, and moral responses to insults often depend upon prior interactions, if any, between the relevant parties; their relationships; and any

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<sup>128</sup> See supra note 121.

<sup>129</sup> *Id.* at 572.

<sup>130</sup> Consider the classic essay by W.H. Auden, *Anger*, in *The Seven Deadly Sins* 78, 83 (2002 ed.) (1962).

relevant differences in statuses and power relationships. Asymmetries of power often translate into asymmetries in the harms of insulting or abusive language, including epithets.<sup>131</sup> And the most significant harms of some insulting speech may be either collective; as distinct from individualized,<sup>132</sup> or cumulative and aggregative, rather than being confined to the particular incident in question.<sup>133</sup>

Thus while it is important to recognize that seriously intended insults may well not be intended as contributions to a dialogue, or to any ongoing conversation or exchange of ideas,<sup>134</sup> not all genuinely insulting language has the same sorts of effects. Consider, for example, a few of the calculated insults directed at Richard, Duke of Gloucester by women nobility in

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<sup>131</sup> See, e.g., Richard Delgado & Jean Stefancic, *Understanding Words That Wound* (2004); Jeremy Waldron, *The Harm in Hate Speech* ch. 1 (2012); Ronald Turner, *On Free, Harmful, and Hateful Speech*, 82 *Tenn. L. Rev.* 283 (2015).

<sup>132</sup> See Waldron, *supra* note 131, at 4-6.

<sup>133</sup> See Delgado & Stefancic, *supra* note 131, at 12, 117.

<sup>134</sup> For background, see Habermas, *supra* note 117; Michael Oakeshott, *Rationalism in Politics and Other Essays* 304, 312 (reprint ed., 1984) (1962) (education in general and the university in particular as crucially a matter of conversation); H.P. Grice, *Logic and Conversation*, available at <http://edge.edx.org/asset-v1:Brown> 45 (on “conversationally unsuitable” moves) (visited January 20, 2016); Michael Oakeshott, *The Idea of a University* 25-26, available at [www.cse.cuhk.edu.hk/irwin/king](http://www.cse.cuhk.edu.hk/irwin/king) (1989) (1950) (visited January 20, 2016) (“[t]he pursuit of learning is not . . . an argument or a symposium; it is a conversation”). See also R. George Wright, *Traces of Violence: Gadamer, Habermas, and the Hate Speech Problem*, 76 *Chi.-Kent L. Rev.* 991 (2001).

Shakespeare's play: "Blush, blush, thou lump of foul deformity;"<sup>135</sup> "Never hung poison on a fouler toad;"<sup>136</sup> "Villain, thou know'st nor law of God nor man."<sup>137</sup> Should even such unsparing insults, directed at a remarkably unscrupulous would-be king, be judged the cultural equivalent of invidious and directly targeted epithet speech, aimed at any of various identity groups, on a contemporary campus?<sup>138</sup>

The Chaplinsky case itself does not much reflect upon any relevant differences among the class of insulting words that by their very utterance inflict one sort of injury, or another.<sup>139</sup> Nor is the more frequently litigated Chaplinsky second prong or "fighting words" itself of determinate scope. The idea of words likely, under the circumstances, to immediately provoke an average -- as distinct from a 'reasonable' -- addressee to physically fight is locally historically conditioned, culture-bound, and certainly far from neutral among cultures.<sup>140</sup>

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<sup>135</sup> William Shakespeare, *Richard III*, act 1, scene 2, line 59 at 25 (Folger ed., 2014) (~1623).

<sup>136</sup> *Id.* line 16 at 33.

<sup>137</sup> *Id.* line 75 at 25.

<sup>138</sup> Interestingly, the English medieval universities of very roughly Richard III's time may have disciplined rather similarly what we might consider "scurrilous or offensive language" in general, and invidious comparisons among countries, races, and sciences in particular. See Robert S. Rait, *Life in the Medieval University* 65, 67 (Forgotten Books ed., 2015) (1912).

<sup>139</sup> See *Chaplinsky*, 315 U.S. at 572.

<sup>140</sup> Nor does the first, or verbal injury, prong invariably balance out the second prong's lack of cultural neutrality.

The Chaplinsky Court's own attempt to provide guidance regarding this second prong holds that "[t]he test is what men<sup>141</sup> of common intelligence would understand would be words likely to cause an average addressee to fight."<sup>142</sup> What amounts to an unprotected fighting word is thus not left entirely to the person making the decision, in the moment, to fight or not to

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<sup>141</sup> Note the assumption not so much that men will be doing the fighting, as that men, in whatever sense, will be doing the judging.

<sup>142</sup> Chaplinsky, 315 U.S. at 573.

fight.<sup>143</sup> The courts are instead to focus on the likely reaction of an “average addressee.”<sup>144</sup>

In university campus cases, the Chaplinsky question thus requires attention to any relevant attributes of what is somehow thought to be an average student. The victim of fighting words in a given case may in reality have been targeted precisely as a member of, say, a particular ethnic, racial, religious, or sexual minority. Is it clear, though, that an average member of the campus community is a member of, or sufficiently understands and identifies with, the relevant ethnic, racial, religious, or sexual minority?

A typical student who does not genuinely identify with any of the characteristics or beliefs at issue in a given instance of possible fighting words will be unlikely to react by physically fighting. The category of fighting words would then reflect the characteristics, values, and beliefs of the dominant groups on campus, as distinct from those of less represented groups. Redressing such a judicial injustice<sup>145</sup> would, however, presumably take us back some distance from Chaplinsky toward a focus on instead taking the victim of fighting words as we find her,<sup>146</sup> with her relevant characteristics.

By itself, then, Chaplinsky offers no stable solution to what should count as fighting words, or as unprotected language, in campus incidents. On both the inflicted injury prong and on the likely-to-fight prong, Chaplinsky invites, but does not meaningfully specify, a choice as to

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<sup>143</sup> See *id.*

<sup>144</sup> *Id.*

<sup>145</sup> If not also an equal protection or civil rights violation.

<sup>146</sup> See, e.g., *People v. Stamp*, 2 Cal. App. 3d 203, 210, 82 Cal. Rptr. 598, 610 (1970); A.M. Honore, Review: Legal Cause in the Law of Torts, 77 Harv. L. Rev. 595, 600 (1964) (reviewing Professor Robert M. Keeton’s treatment).

how to conceive of the speech target or victim. At the extremes, we might think of the victim as nearly an abstract, bodiless, cultureless universal, and thus as unlikely to physically fight, whatever sense of justice we ascribe to such an entity. Or we might instead take the victim much more as we find her, including her sensitivities, but perhaps without what the rest of us somehow take to be any inappropriate hypersensitivities on her part.<sup>147</sup> As to where, in between such extremes,<sup>148</sup> campus authorities and others should focus their attention, the Chaplinsky test is silent.

The problem of hostile speech on campus is further complicated by doubts as to the relevance, in some such cases, of the university function of free and uninhibited discussion of issues and “learning through open debate and study.”<sup>149</sup> In cases of campus hate speech, some persons may judge the best response to be one of “more speech,”<sup>150</sup> or counter-speech, as though

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<sup>147</sup> Note that courts have occasionally felt up to the task of distinguishing between appropriate sensitivity and legally unreasonable hypersensitivity in matters of religious response and belief. See, e.g., *Books v. Elkhart Cnty*, 401 F.3d 857, 867 (7<sup>th</sup> Cir. 2005) (citing authority).

<sup>148</sup> Thinking of a victim in the most appropriate terms, somewhere between abstract, nearly empty universalism and detailed, concrete particularism, poses issues similar to those associated with the broader problem of a proper choice among levels of generality in description. See, e.g., Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. Chi. L. Rev. 1057 (1999).

<sup>149</sup> This language is borrowed from the American Civil Liberties Union discussion *Hate Speech On Campus 2*, available at [www.aclu.org/hate-speech-campus](http://www.aclu.org/hate-speech-campus) (visited January 25, 2016).

<sup>150</sup> See, classically, Justice Brandeis’s nominal concurrence in *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). See also *Brown v. Hartlage*, 456 U.S. 45, 61 (1982)

such incidents were an implicit invitation to discussion, dialogue, and debate. But if at least some instances of campus hate speech are, and are intended to be, largely assaultive speech, or akin to the tort of battery committed through the medium of words,<sup>151</sup> the idea of counterspeech may be not only unresponsive, but itself undignified.<sup>152</sup>

Some campus authorities may believe more broadly that the most effective overall response to hate speech involves generally exposing prejudice and fallacy through open debate,<sup>153</sup> and even that an official disciplinary response may be “infantilizing and disempowering”<sup>154</sup> to the targeted victims. This is partly an empirical, but as well partly a normative, debate. Such debates cannot be resolved until the relevant university functions have been settled upon and interpreted at a sufficiently specific level. As we have seen, universities in general seem far from any such settlement.

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(citing authority); ACLU, *supra* note 149, at 2; A.C. Grayling, *Wimpering [sic] Students Need to Grow Up or Get Out of University 2*, available at [www.telegraph.co.uk/education/educationopinion](http://www.telegraph.co.uk/education/educationopinion) (December 4, 2015) (visited January 25, 2016).

<sup>151</sup> See the authorities cited *supra* notes 131, 134.

<sup>152</sup> See *id.*

<sup>153</sup> See ACLU, *supra* note 149, at 2; Grayling, *supra* note 150, at 2.

<sup>154</sup> Grayling, *supra* note 150, at 2. Professor Grayling begins his argument, interestingly, by conceding that “[a] university . . . should be a safe place for diverse ethnicities, sexualities, and viewpoints. It should be a domain founded on tolerance and mutual respect, where no one feels excluded or marginalized.” *Id.*

**V. Plurality of Basic University Function  
and the Problem of Professorial Speech  
On Matters of Public Concern**

For public employees in general, the scope of free speech protection from adverse action by one's public employer is largely derived from the Supreme Court case of *Garcetti v. Ceballos*.<sup>155</sup> In such cases, *Garcetti* requires that for free speech protection to attach, the public employee speech must have been on a subject of public interest and concern; the employee's interest as a citizen in thus speaking must outweigh the government employer's relevant interests in workplace order, efficiency, discipline, confidentiality, and morale; and crucially that the speech in question not have occurred within and pursuant to the scope of the public employee's actual job responsibilities.<sup>156</sup>

The possibility of the disciplinary sanctioning of public university professorial speech, whatever the motive or political context, assuming merely that the speech took place in the course of professional job responsibilities, perhaps reflecting the speaker's distinct academic

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<sup>155</sup> 547 U.S. 410 (2006).

<sup>156</sup> See *id.* at 419-22. The *Garcetti* majority thus built upon the foundations of *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). To see the logic of the *Garcetti* majority in this respect, one might think of speech within the scope of one's job responsibilities as "hired" speech, with the content being bought, and specifiable, by the government employer, as distinct from, for example, a letter by the public employee to a general newspaper editor, or an occasional op-ed column.

expertise, prompted an expression of concern on the part of Justice Souter.<sup>157</sup>

The majority in *Garcetti*, however, merely set aside such academic freedom concerns without prejudice. The majority thus acknowledged that

[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.

We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.<sup>158</sup>

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<sup>157</sup> See *Garcetti*, 547 U.S. at 427, 438 (Souter, J., dissenting). Justice Souter cited a number of the most familiar academic freedom related cases, including *Grutter v. Bollinger*, 539 U.S. 306, 309 (2003) (“the expansive freedoms of speech and thought associated with the university environment”); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“[o]ur nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us”); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (academic freedom as an area “in which government should be extremely reticent to tread”). See also *Healy v. James*, 408 U.S. 169, 180 (1972) (“[t]he college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas’”); *Keyishian*, *supra*, at 603 (“[t]he classroom is peculiarly the ‘marketplace of ideas’”). But see *Urofsky v. Gilmore*, 216 F.3d 401, 412 (4<sup>th</sup> Cir. 2000) (en banc) (“[t]he Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs”).

<sup>158</sup> *Garcetti*, 547 U.S. at 425.

In the absence of Supreme Court guidance in this area, the courts and commentators have been divided on whether to extend professorial speech rights beyond those of non-academic public employees.<sup>159</sup> In particular, the Seventh Circuit<sup>160</sup> may currently be less open to thus extending professorial speech rights based on academic freedom considerations than are the Fourth<sup>161</sup> and Ninth Circuits.<sup>162</sup>

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<sup>159</sup> For a sense of the judicial division in this area, see the discussion in *Klaassen v. Univ. of Kansas School of Medicine*, 84 F. Supp. 2d 1228, 1251 (D. Kan. 2015). For a sense of the university reaction, see, e.g., Robert M. O’Neil, *The AAUP in the Courts*, available at [www.aaup.org/article/aaup-courts](http://www.aaup.org/article/aaup-courts) (January-February, 2015) (visited February 21, 2016); Modern Language Association Committee on Academic Freedom, *Ramifications of the Supreme Court’s Ruling in Garcetti v. Ceballos*, available at [www.mla.org/Resources/Research/Surveys](http://www.mla.org/Resources/Research/Surveys) (2010) (visited February 21, 2016).

<sup>160</sup> See *Renken v. Gregory*, 541 F.3d 769, 775 (7<sup>th</sup> Cir. 2008) (“Renken made his complaints regarding the University’s use of NSF funds pursuant to his official duties as a University professor. Therefore his speech was not protected by the First Amendment”). Note, though, that the speech in question may seem more administrative than classically scholarly or pedagogical in nature. See *Recent Case*, 127 Harv. L. Rev. 1823, 1828 (2014) (emphasizing such a distinction).

<sup>161</sup> See *Adams v. Trustees of Univ. of N.C.*, 640 F.3d 550, 563 (4<sup>th</sup> Cir. 2011) (noting that the professional speech involved “scholarship and teaching” as distinct from “declaring or administering university policy”).

<sup>162</sup> See *Demers v. Austin*, 746 F.3d 402, 411-12 (7<sup>th</sup> Cir. 2011) (*Garcetti* . . . consistent with the First Amendment, cannot . . . apply to teaching and academic writing that are performed ‘pursuant to the official duties’ of a teacher and professor”). *Demers* cites *Adams*, *supra* note

The most crucial reason for disagreements over the proper scope of any distinctive protection for academic speech draws upon inevitable conflicts among purported basic purposes or functions of the university. Of course, one's general assessment of the functions of an institution does not by itself decide concrete cases.<sup>163</sup> But diverging conceptions of the basic functions of the university will inevitably be crucial to our contested notions of individual, as well as institutional, academic freedom.<sup>164</sup>

There may well be occasions on which even some single, agreed upon basic university function itself points in opposing directions.<sup>165</sup> But the broader and more typical conflicts will

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161, as well as the Grutter, Keyishian, and Sweezy cases, *supra* note 157. See also Leonard M. Niehoff, *Peculiar Marketplace: Applying Garcetti v. Ceballos in the Public Higher Education Context*, 35 *J. College & U.L.* 75 (2008) (noting critiques of the extensions of *Garcetti* into academic freedom contexts); Kermit Roosevelt, III, *Not As Bad As You Think: Why Garcetti v. Ceballos Makes Sense*, 14 *U. Pa. J. Const. L.* 631, 658-59 (2012) (*Garcetti* as it stands, or with only limited modification, as protecting the university's institutional decision making autonomy, assuming the appropriate availability of tenure systems, civil rights and anti-discrimination statutes, and whistle-blower protection statutes).

<sup>163</sup> See *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (“[g]eneral propositions do not decide concrete cases”).

<sup>164</sup> For background, see D.W. Hamlyn, *The Concept of a University*, 71 *Phil.* 205, 207-09 (1996) (noting certain inevitable limitations on a university's institutional autonomy, given substantial external funding for partly externally chosen purposes).

<sup>165</sup> Legendarily, in a faculty hiring context, Professor Bertrand Russell's potential interest in speaking freely about university campus lifestyle issues once came into conflict with particular

involve contradictions between and among the several purported basic university functions. In particular, whether we think that the above Garcetti test, without further constitutional level modification,<sup>166</sup> should be applied broadly to public university professorial speech in the realms of teaching and scholarship will ultimately reflect what we think about university functions, and their prioritizing.

Thus we will tend to resist extending a constitutionally unmodified Garcetti rule into public university academic speech if we choose to think of university function in terms of individual, if not institutional, free thought and expression;<sup>167</sup> the advancement and dissemination, internally or externally, of knowledge;<sup>168</sup> disinterested scholarship;<sup>169</sup> or of the university as a center for independent thought, by individuals if not at the institutional level,<sup>170</sup> at least if the speech at issue is not otherwise inconsistent with other acknowledged university missions.

But these considerations clearly do not exhaust the widely recognized and endorsed basic functions of a university, public or private. We will tend to favor something like a Garcetti rule, 

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conceptions of a university as promoter of civic responsibility and of student character and virtue. See the remarkable case of *Kay v. Bd. of Educ.*, 18 N.Y.S. 2d 821 (Sup. Ct.), *aff'd mem.*, 20 N.Y.S.2d 1016 (App. Div. 1940). See *supra* note 48. Or consider, say, a faculty member's deep critique of a student's basic abilities.

<sup>166</sup> Note the qualifications referred to in Roosevelt, *supra* note 162, at 658-59.

<sup>167</sup> See *supra* notes 25, 34 and accompanying text.

<sup>168</sup> See *supra* note 33 and accompanying text.

<sup>169</sup> See *supra* note 42 and accompanying text.

<sup>170</sup> See *supra* note 70 and accompanying text.

all else equal, in academic speech cases if we instead choose to think of university functions in institutional or hierarchy-governed terms, whether the governing hierarchy is internal, in the form of a university administration, or external, as in the form of corporate stakeholders, a board of trustees, a legislature, or other elected officials. For those who choose to prioritize the university's economic production or market sorting and signaling functions;<sup>171</sup> or training professionals to accommodate and enter into markets;<sup>172</sup> or generally re-inscribing existing social hierarchies, the individual speech-restrictive Garcetti rule may be unobjectionable, or a matter of indifference.<sup>173</sup> Visions of the university as an ultimately hierarchical community, or set of such communities,<sup>174</sup> also seem better attuned to something like an unmodified Garcetti rule, even at some cost in purely individual academic expression.

We should thus expect a consensus on the proper role of relatively restrictive Garcetti-like rules for professorial speech only when we reach a corresponding consensus, not presently envisionable, on the putative basic functions of the university.

## **VI. Plurality of Basic University Function and the Speech of Students Transitioning to Professions**

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<sup>171</sup> See supra notes 39-41 and accompanying text, and classically, the designated foils critiqued in Thorstein Veblen, supra note 69.

<sup>172</sup> See supra note 52 and accompanying text.

<sup>173</sup> As in some interpretations of the sources cited in notes 60-61 supra and accompanying text.

<sup>174</sup> See supra notes 88-90 and accompanying text.

To what extent should universities censure speech and beliefs of students formally aspiring to a particular profession, where such speech or beliefs if held by a practitioner would be formally deemed unprofessional by the major official oversight body of that profession? This broad and increasingly important<sup>175</sup> question has arisen in several recent cases, including the exemplary *Tatro v. University of Minnesota*.<sup>176</sup>

*Tatro* involved the imposition of university discipline on a professional program student for her personal Facebook posts, allegedly in violation of university curricular program rules requiring discretion and confidentiality, and reflecting both official professional ethical standards formally binding on practitioners, and program accreditation standards binding on the university.<sup>177</sup> On the record, the court in *Tatro* held the university program rules to be sufficiently well-established, non-pretextual, and sufficiently narrowly tailored to the appropriately weighty interests at stake.<sup>178</sup>

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<sup>175</sup> See Robert J. Gordon, *The Rise and Fall of Growth* 649 (2016) (“the percentage of jobs subject to occupational licensing has expanded from 10 percent in 1970 to 30 percent in 2008”).

<sup>176</sup> 816 N.W.2d 509 (Minn. 2012). This discussion assumes that the student speech bears a sufficient nexus to the university, and that the speech cannot reasonably be attributed to the university itself.

<sup>177</sup> See *id.* at 516, 517, 520.

<sup>178</sup> See *id.* at 521, 523. For helpful commentary on *Tatro* and related cases, see Emily Gold Waldman, *University Imprimaturs on Student Speech: The Certification Cases*, 11 *First Amend. L. Rev.* 382 (2013); Mark A. Cloutier, Note, *Opening the Schoolhouse Gate: Why the Supreme Court Should Adopt the Standard Announced in Tatro v. University of Minnesota to Permit the*

In this general run of cases, the judicial results have been mixed.<sup>179</sup> A distinction between straightforwardly applying a legitimate university professional program rule, and penalizing officially disfavored student speech,<sup>180</sup> may or may not always be dispositive, or even readily drawn. Any free speech analysis of such cases must also recognize the irony that in this context, university students, and graduate or professional school students in particular, may be subject to speech restrictions not imposed upon elementary or high school students.<sup>181</sup>

A functionalist approach would suggest that campus speech restrictions imposed upon mature graduate students but not on sixteen year old high school students may well be

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Regulation of Certain Non-Curricular Speech in Professional Programs, 55 B.C. L. Rev. 1659 (2014).

<sup>179</sup> Consider the more and less student speech-protective outcomes in *Oyama v. University of Hawaii* \_\_\_ F.3d \_\_\_ (9<sup>th</sup> Cir. 2015); *Ward v. Polite*, 667 F.3d 727 (6<sup>th</sup> Cir. 2012); *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11<sup>th</sup> Cir. 2011); *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10<sup>th</sup> Cir. 2004).

<sup>180</sup> See *Oyama*, \_\_\_ F.3d at \_\_\_\_.

<sup>181</sup> For an introduction to whether public high school student free speech rules should generally apply to more mature college and university students, see *Hosty v. Carter*, 412 F.3d 731 (7<sup>th</sup> Cir. 2005) (en banc). See also Eric Posner, *Universities are Right—and Within Their Rights—to Crack Down on Speech and Behavior*, available at [www.slate.com/articles](http://www.slate.com/articles) (February 12, 2015) (visited February 21, 2016) (interrogating the distinction in maturity level between college and high school students). Much more broadly, see *Butler v. Michigan*, 352 U.S. 380 (1957) (adult speech not to be held legally hostage to only that which is fit for children).

accommodating differences in the basic functions of high schools<sup>182</sup> and of universities. But as we would by now expect, conflicting judgments as to university student speech in tension with professional program standards most deeply reflect conflicting visions and priorities among basic university functions. Consider, by way of illustration, language from the recent Ninth Circuit Oyama case:

The importance of academic freedom at a public university does not disappear when one walks down the hall from a political philosophy seminar to a professional certification program. . . . Indeed, the progress of our professions . . . may depend upon the “discord and dissent” of students training to enter them: it is by challenging the inherited wisdom of their respective fields that the next generation of professionals may develop solutions to the problems that vexed their predecessors.<sup>183</sup>

On the other hand, we would also strongly sympathize with a school that refused to professionally certify a medical student who consistently and carefully denied, in curricular or non-curricular speech, any causal relation between any prescription drugs, or surgery, and patient health.<sup>184</sup>

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<sup>182</sup> For a classic, if doubtless less than comprehensive, statement, see *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (education as today linked to good citizenship, socialization, later training, and discharge of public responsibilities).

<sup>183</sup> *Oyama*, \_\_\_\_\_ F.3d at \_\_\_\_\_.

<sup>184</sup> Note that a graduate student in astronomy who intends solely to tout the explanatory and predictive power of astrology poses, in the absence of any fraud or deception, a much less disturbing case. Further afield, a professorial tenure candidate whose research and teaching

Whatever the outcome in any case not based sheerly on arbitrary dislike of the student's viewpoint, conflicting understandings of basic university functions will underlie any debate on the merits of that case. Cases involving the speech of students transitioning into professions will often involve a conflict, classically noted by Robert M. Hutchins, "between . . . the pursuit of truth for its own sake, and . . . the preparation of men and women for their life work."<sup>185</sup> And in any case in which the transitioning professional would arguably deny equal treatment to prospective clients, there is also a conflict between, for example, the University of Cambridge's two most fundamental values: "freedom of thought and expression,"<sup>186</sup> on the one hand, and "freedom from discrimination,"<sup>187</sup> as practiced by or received from certified graduates, on the other.

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interests universally strike institutional and external peers as bizarre, trivial, groundless, or eccentric, and as uninterestingly and unprovocatively so, should not rely on a sensible approach to individual academic freedom to save the tenure case. For background, see, e.g., the 1940 AAUP Statement of Principles on Academic Freedom and Tenure, available at [www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure](http://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure) (visited February 4, 2016). On presumed academic competence, see Robert C. Post, Academic Freedom and Legal Scholarship, 64 J. Legal Educ. 530, 533 (2015).

<sup>185</sup> Hutchins, *supra* note 69 and accompanying text. See also Thaddeus Metz, A Dilemma Regarding Academic Freedom and Public Accountability in Higher Education, 44 J. Phil. Educ. 529 (2010) (noting possible conflicts between pursuing knowledge for its own sake and benefiting society).

<sup>186</sup> See *supra* note 25 and accompanying text.

<sup>187</sup> See *supra* note 26 and accompanying text.

More broadly, the transitioning professional cases evoke the university functions of free expression and communication;<sup>188</sup> the university as the locus of individual-level critique of society and culture;<sup>189</sup> and the asking, again at an individualized level, of questions with which the broader culture may be uncomfortable.<sup>190</sup> These considerations will generally tend to favor the dissenting student speaker's case.

But no less, the transitioning professional speech cases will also inevitably evoke a sense of the university's responsibilities to its various external constituencies, including taxpayers and consumers of vital, licensed services provided by its graduates.<sup>191</sup> The university as provider of trained, knowledgeable, responsible professionals<sup>192</sup> arguably fails in that respect to the extent that it knowingly certifies licensed professionals who would betray basic norms binding on vital service providers and reasonably anticipated by consumers.<sup>193</sup> Basic function-level conflicts are again inevitable.

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<sup>188</sup> See supra note 34 and accompanying text.

<sup>189</sup> See supra note 43 and accompanying text.

<sup>190</sup> See supra notes 55-56 and accompanying text.

<sup>191</sup> See supra notes 39-41, 52 and accompanying text.

<sup>192</sup> See supra note 52 and accompanying text.

<sup>193</sup> The literature on individual and institutional academic freedom in general is of course immense. Beyond the works cited above, see, e.g., *The Concept of Academic Freedom* (Edmund L. Pincoffs ed., 1975); Judith Butler, *Exercising Rights*, in *Who's Afraid of Academic Freedom?* 293 (Akheel Bilgrami & Jonathan R. Cole, eds.) (2015) (emphasizing the basic material prerequisites of academic freedom); J. Peter Byrne, *The Social Value of Academic Freedom Defended*, 91 *Ind. L.J.* 5 (2015); Stanley Fish, *It's Not About Free Speech or Academic*

## VII. Conclusion

This survey of the major presumed functions of the university, generally and as reflected in several particular campus speech contexts, explains at a fundamental level the irresolvability of typical campus speech issues. Such issues will be irresolvable to the extent that they reflect persisting conflicts of vision as to the basic functions of the university.

It is certainly possible to think of the university, and speech therein, in terms that make no direct and explicit reference to any university function. One could, for example, adopt a sophisticated utilitarian approach to the scope and limits of speech on campus. Or one could think in terms of human flourishing, and of relevant virtues and vices, in the context of campus speech. Inevitably, though, such approaches must at some level address, incorporate, and crucially depend upon some account of the basic university functions inventoried above. No sensible approach to campus speech can bypass the relevant ongoing practical contradictions

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Freedom, available at [www.huffingtonpost.com/stanley-fish/its-not-about-free-speech](http://www.huffingtonpost.com/stanley-fish/its-not-about-free-speech) (November 23, 2015) (visited February 5, 2016); Aziz Huq, Easterbrook On Academic Freedom, 77 U. Chi. L. Rev. 1055 (2010); Robert Post, Why Bother With Academic Freedom?, available at [http://digitalcommons.law.yale.edu/fss\\_papers/4936](http://digitalcommons.law.yale.edu/fss_papers/4936) (2013) (visited February 5, 2016); Frederick Schauer, Is There a Right to Academic Freedom?, 77 U. Colo. L. Rev. 907 (2006); Ellen Schrecker, The New McCarthyism in Academe, Thought and Action 103 (Fall, 2005); Robert J. Zimmer, Address Delivered at Columbia University Conference on “What Is Academic Freedom For?,” available at <https://president.uchicago.edu/page/address-delivered-columbia-university> (October 21, 2009) (visited February 5, 2016).

among such functions. Thus as long as visions of the basic university functions remain locked in crucial practical contradiction, the broad problem of the proper scope and limits of campus speech must remain unresolved.