SAFS Newsletter
Society for Academic Freedom and Scholarship
Maintaining freedom in teaching, research and scholarship
Maintaining standards of excellence in academic decisions about students and faculty
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SAINT MARY'S UNIVERSITY DISRUPTED BY PROTESTERS

Mark Mercer

Jose Ruba, an anti-abortion activist and speaker, came to Saint Mary's last February, at the invitation of a campus group. Protesters shouted him down. Security Chief Bill Promaine asked once, maybe twice, for order, but the protesters paid him no mind, and Mr. Promaine didn't press the matter.

A police officer passed by just to check on things, Mr. Promaine having notified the police a few hours earlier that a protest of some sort was in the works. The officer took the measure of the crowd and called for assistance. Two other officers arrived and the three instructed those bent on disrupting the event to stop it or face the consequences. The disruptive protesters settled down.

That was about thirty-five or forty minutes after Mr. Ruba had begun his presentation.

Despite the fact that Mr. Ruba was now free to continue without interruption, Bridget Brownlow, the Conflict Resolution Advisor at Saint Mary's, Mr. Promaine, and Dan Kelly, the university's chaplain and one of the organizers of the event, had a brief scrum. Fr Kelly was asked to move the talk off campus. Not wanting to create a fuss, Fr Kelly complied. Mr. Ruba and those who wished to hear him left Saint Mary's.

Much of the disruptive protest was caught on video, now posted at http://www.youtube.com/user/Joerugby07.

The following Monday (9 February), Saint Mary's University issued a press release (http://www.smu.ca/newsreleases/2009/02-09-2009.html). It characterized the disruption as unsuccessful; it gave as grounds for this incredible claim that the presentation continued once relocated. The press release did not condemn the disruption. Moreover, by declaring that Saint Mary's "supports open debate in a forum that does not put … the rights of our community at risk," it suggested that the protesters had valid grounds to try to end the presentation. In his public statements, the (then) vice-president external of Saint Mary's, Chuck Bridges, implied that Mr. Ruba and his sponsors were also at least a little at fault. (I contributed to our campus newspaper two opinion pieces about all this. The first is at http://smujournal.ca/view.php?aid=39901. The second is at http://www.smujournal.ca/view.php?aid=39915.)

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There are three serious questions we at Saint Mary's need to consider, even now that the disruption is half a year behind us.

1) Why didn't Security try to halt the disruption? Mr. Promaine thought that because the protesters were threatening neither violence nor vandalism, all was well. Section 7j of the Student Code of Conduct (*Academic Calendar*, p. 27), though, forbids disruption of university functions. Mr. Promaine might have been acting on instructions he received earlier in the day, at a meeting called to discuss what to do in case of a protest.

Mr. Promaine should, of course, have called the police immediately after recognizing the event was no longer under his control, and halted it until the police arrived.

2) Why did university officials ask the organizers to relocate the presentation even though police officers were on hand? Because they feared that the police would physically remove or, even, arrest protesters who continued to disrupt it. They preferred avoiding that result to letting the event continue on Saint Mary's property.

3) Why has Saint Mary's University responded so weakly both to the disruption and to Security's failure to safeguard a campus event?

Besides the evasions and half-truths of the press release and Mr. Bridges's comments to a newspaper, the university's administration has said nothing publicly. (The university might be in the process of disciplining a student for encouraging the disruption, though she herself was not part of it.) Saint Mary's President Colin Dodds has refused to invite Jose Ruba back to campus to give his presentation. Dr. Dodds commissioned a report on the events, but declines to release it.

Administrators at Saint Mary's are unwilling to recognize their mistakes, let alone to try to correct them. It seems they have gone on to make one more: now, Mr. Promaine recently told me, orders are that should trouble break out, he is to call a senior administrator, and not himself to call the police.

Most worrisome is that the university has given us no reason to think it will commit itself to protecting controversial campus events. Signs are that it will seek to prevent them from occurring.

The university acted badly in the days and weeks following the disruption not, I think, or not mainly, because the president and administrators themselves think the disruption justified, though given our university's constant rhetoric about providing a safe learning environment for all, that's a part of it. The central reason is fear and pandering. The president and others, I think, fear that speaking against the disruption would upset those who supported it, and those who supported it are many and active on campus. Who needs that headache, when all that's at stake is Saint Mary's integrity as a university.

Mark Mercer is professor of philosophy at Saint Mary's University and a member of SAFS Board of Directors.

Article written for SAFS newsletter.

WE DON'T NEED NO THOUGHT CONTROL[1]

Ezra Levant. *Shakedown: How our government is undermining democracy in the name of human rights*. McLelland & Stewart, Toronto, 2009.
Foreword by Mark Steyn.

Reviewed by Doreen Kimura

Steyn in his foreword perfectly encapsulates the book, "This book is a portrait of an insane system by a man who has been on the receiving end of it." The recent infamous trials of Levant as publisher of the Western Standard, and of Steyn as contributor to Macleans, proceeded from charges brought by the Canadian Islamic Congress under Section 13 (Hate messages) of the Canadian Human Rights Act. Thus, it is an offence to communicate anything that "is likely to expose a person or persons to hatred or contempt… on the basis of a prohibited ground of discrimination." The internet is explicitly included in the prohibition.

This very broad definition of hate speech could, for example, forbid criticism of either side in a history of most wars (national origin being a "protected" category). Under this section almost any negative commentary on protected groups could be construed as illegal. All that is required is that a complaint be filed.

The suit against Levant, and his sharp and widely publicized rebuttals, "I want to lead a fight to take back our real civil rights" made many more people aware of the blatant suppression of opinion exercised by the Human Rights Commissions (HRCs), both provincial and federal. The author provides several examples that are both entertaining and horrifying. I give briefly just one much publicized example: A minister of a church in Alberta wrote a letter to his local newspaper strongly condemning homosexuality on moral and religious grounds. A complaint against him (by an avowedly heterosexual man) was lodged with the Alberta HRC for hate speech.

Five painful years later, the Reverend was found by AHRC to have broken the law. He was ordered to pay his complainant thousands of dollars. Most worrying of all was the ruling that he "cease publishing… disparaging remarks about gays and homosexuals." We infer that, for AHRC, gay rights trump religious rights, and that censoring speech is okay. To their credit, a large gay rights lobby group refused to benefit financially from the decision, arguing that it was unacceptable censorship.

HRCs have come to embody the Canadian trait of politically correct self-righteousness, gone berserk. Although perhaps originally intended to be mediation mechanisms, HRCs now frequently encourage claimants in their sense of grievance, no matter how irrational or nonsensical the claim, making human rights offices a self-perpetuating industry. Even Alan Borovoy, who helped draft the original legislation, has strongly opposed its use in muzzling speech.

The rise of similar so-called human rights tribunals in Canadian universities and the "culture of comfort"[2] in academia in the early 90s, will be recalled by most members of our Society (SAFS), as providing a strong impetus for the formation of our organization. Along with others we have criticized the practices of HRCs. (see www.safs.ca, Issues). Levant's book has pointed relevance to our mission.

The fact that HRC tribunals do not have to abide by the principles of law that guide the regular courts, and that there is no appeal within the HRC system, overwhelmingly favours either conviction, or submission to intimidation by anyone named in a suit under the HRCs.

Some may say that since both Levant and Macleans/ Steyn were exonerated, the system works. But Levant points out that both cases were exceptions in HRC history; and that even when you "win", you lose. It costs nothing (except to taxpayers) for any loose cannon with an imagined grievance to bring a charge against a person or a group. But the defendant at the very least incurs punishing legal expenses (Levant reports his as over $100,000). A convicted defendant may also be required to pay a fine and/or a recompense and may have heavy constraints placed on future activities. All this, remember, due to an opinion spoken or written, not a threat or any other hostile act. Most individuals or small corporations cannot afford this, so the mere possibility of a suit is intimidating.

This book is easy reading. It is well organized and the message is clear and well argued. It will of course be seen as biased, and it is. Levant takes a strong unequivocal stand in favour of freedom of speech and freedom of the press, as superceding any opposing claim to be free from offence, "...having a government

agency so powerful… is a much more troubling danger than the odd vicious comment…". SAFS members will surely share that "bias", but I recommend the book to others as well. People who believe that there should be legal limitations on "offensive" speech need to think seriously about the repressive repercussions.

Levant suggests that the best solution might be scrapping the Canadian Human Rights Act and provincial counterparts altogether as doing more harm than good. A growing number of Canadians at the *very least* want to have Section 13 rescinded. Even if you don't agree with him that there is little or no systematic discrimination in Canada today, one must ask whether whatever discrimination remains could possibly justify the oppressive, costly and punitive system we have allowed to develop under human rights legislation.

Footnotes:

1. Pink Floyd, 1979
2. John Furedy, 1997

Doreen Kimura is founding president of SAFS.
Review written for *SAFS Newsletter*.

YALE SURRENDERS
Why did Yale University Press remove images of Mohammed from a book about the Danish cartoons?

Christopher Hitchens

The capitulation of Yale University Press to threats that hadn't even been made yet is the latest and perhaps the worst episode in the steady surrender to religious extremism—particularly Muslim religious extremism– that is spreading across our culture. A book called *The Cartoons That Shook the World*, by Danish-born Jytte Klausen, who is a professor of politics at Brandeis University, tells the story of the lurid and preplanned campaign of "protest" and boycott that was orchestrated in late 2005 after the Danish newspaper *Jyllands-Posten* ran a competition for cartoons of the Prophet Mohammed. (The competition was itself a response to the sudden refusal of a Danish publisher to release a book for children about the life of Mohammed, lest it, too, give offense.) By the time the hysteria had been called off by those who incited it, perhaps as many as 200 people around the world had been pointlessly killed.

Yale University Press announced last week that it would go ahead with the publication of the book, but it would remove from it the 12 caricatures that originated the controversy. Not content with this, it is also removing other historic illustrations of the likeness of the Prophet, including one by Gustave Doré of the passage in Dante's *Inferno* that shows Mohammed being disemboweled in hell. (These same Dantean stanzas have also been depicted by William Blake, Sandro Botticelli, Salvador Dalí, and Auguste Rodin, so there's a lot of artistic censorship in our future if this sort of thing is allowed to set a precedent.)

Now, the original intention of limiting the representation of Mohammed by Muslims (and Islamic *fatwas*, before we forget, have no force whatever when applied to people outside the faith) was the rather admirable one of preventing idolatry. It was feared that people might start to worship the man and not the god of whom he was believed to be the messenger. This is why it is crass to refer to Muslims as Mohammedans. Nonetheless, Islamic art contains many examples—especially in Iran — of paintings of the Prophet, and even though the Dante example is really quite an upsetting one, exemplifying a sort of Christian sadism and sectarianism, there has never been any Muslim protest about its pictorial representation in Western art.

If that ever changes, which one can easily imagine it doing, then Yale has already made the argument that gallery directors may use to justify taking down the pictures and locking them away. According to Yale logic, violence could result from the showing of the images—and not only that, but it would be those who displayed the images who were directly responsible for that violence.

Let me illustrate: The Aug. 13 *New York Times* carried a report of the university press' surrender, which quoted its director, John Donatich, as saying that in general he has "never blinked" in the face of controversy, but "when it came between that and blood on my hands, there was no question."

Donatich is a friend of mine and was once my publisher, so I wrote to him and asked how, if someone blew up a bookshop for carrying professor Klausen's book, the blood would be on the publisher's hands rather than those of the bomber. His reply took the

form of the official statement from the press's public affairs department. This informed me that Yale had consulted a range of experts before making its decision and that "[a]ll confirmed that the republication of the cartoons by the Yale University Press ran a serious risk of instigating violence."

So here's another depressing thing: Neither the "experts in the intelligence, national security, law enforcement, and diplomatic fields, as well as leading scholars in Islamic studies and Middle East studies" who were allegedly consulted, nor the spokespeople for the press of one of our leading universities, understand the meaning of the plain and common and useful word *instigate*. If you *instigate* something, it means that you wish and intend it to happen. If it's a riot, then by instigating it, you have yourself fomented it. If it's a murder, then by instigating it, you have yourself colluded in it. There is no other usage given for the word in any dictionary, with the possible exception of the word *provoke*, which does have a passive connotation. After all, there are people who argue that women who won't wear the veil have "provoked" those who rape or disfigure them … and now Yale has adopted that "logic" as its own.

It was bad enough during the original controversy, when most of the news media—and in the age of "the image" at that—refused to show the cartoons out of simple fear. But now the rot has gone a serious degree further into the fabric. Now we have to say that the mayhem we fear is also our fault, if not indeed our direct responsibility. This is the worst sort of masochism, and it involves inverting the honest meaning of our language as well as what might hitherto have been thought of as our concept of moral responsibility.

Last time this happened, I linked to the Danish cartoons so that you could make up your own minds about them, and I do the same today. Nothing happened last time, but who's to say what homicidal theocrat might decide to take offense now. I deny absolutely that I will have instigated him to do so, and I state in advance that he is directly and solely responsible for any blood that is on any hands. He becomes the responsibility of our police and security agencies, who operate in defense of a Constitution that we would not possess if we had not been willing to spill blood—our own and that of others—to attain it. The First Amendment to that Constitution prohibits any prior restraint on the freedom of the press. What a cause of shame that the campus of Nathan Hale should have pre-emptively run up the white flag and then cringingly taken the blood guilt of potential assassins and tyrants upon itself.

Christopher Hitchens is a columnist for Vanity Fair and the Roger S. Mertz media fellow at the Hoover Institution.

Slate, August 17, 2009.

WHY NO ONE SHOULD BE SILENCED ON CAMPUS

Robert L. Shibley

WHEN CONSERVATIVE columnist Don Feder spoke at UMass-Amherst last month, his speech was cut short by a large group of students whose noisy and disruptive antics drove Feder off the lectern midway through his speech. As one UMass student wrote after the event, "I am embarrassed of the way my fellow classmates have chosen to express their discontent." She should be – but she should also know that she is not the only one who is due for some embarrassment.

America's campuses are seeing a growing movement by students to shut off debate by organized groups and silence speakers with whom they disagree. Rather than engage in the give-and-take that should be characteristic of the university as a "marketplace of ideas," these students have decided that opposing views don't even bear hearing. And all too often they are aided by administrators whose policies reward hecklers rather than students who wish to engage in civil debate and dialogue.

UMass is one of those campuses. After word got out that students were planning to protest Feder's speech, the UMass-Amherst Police Department pressured Feder's hosts, the Republican Club, into paying nearly three times as much in security costs for the event as they had planned. Of course, the student hecklers disrupted the event anyway with no interference by the police.

Feder's hecklers were thereby handed a double victory by the university – not only did they manage to silence

Feder, but they also succeeded in forcing their political enemies on campus to pay a huge security bill for little return. This tactic was so successful it's hard to imagine that the same UMass students won't do it again, and it's unlikely that the lesson has been lost on students who sympathize with Feder.

The real casualty of the heckling "arms race" fostered by such policies will be the possibility of getting a truly liberal education. The more violent and disruptive the threatened protest, the higher the security costs will be demanded of the host, giving those most willing to be violent the strongest veto over campus discourse.

At the Foundation for Individual Rights in Education (FIRE), where I work, we tell students that if they have gone through four years of college without ever being offended or having their beliefs challenged, they should ask for their money back. John Stuart Mill, in his 1859 treatise "On Liberty," observed that nobody is infallible, and that an opinion we detest might be right, or, even if wrong, might "contain a portion of truth" that we would otherwise have missed. Might Feder's opinions have contained that "portion of truth?" UMass students may never know.

Charging a higher security fee for controversial speeches is not just unwise; on a public university campus it is also unconstitutional. In Forsyth County v. Nationalist Movement (1992), the Supreme Court struck down a county ordinance that permitted the local government to set varying fees for events based upon how much police protection they believed an event would need. The Court stated that "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." Public universities must meet the same First Amendment standard.

FIRE has asked UMass to revoke its excessive security fee for Feder's speech – so far, without response. However, other campuses have begun to address the problem. After *FIRE* protested the University of California at Berkeley's decision to charge a student group $3,000 to host a speech about the Arab-Israeli conflict, Berkeley agreed to reduce the fee to the normal amount and to use only viewpoint-neutral criteria to determine such fees going forward. *FIRE* has also asked the University of Colorado at Boulder to revoke a similar fee charged for an event featuring controversial professors William Ayers and Ward Churchill. CU-Boulder has yet to respond.

Berkeley has it right. The First Amendment has made America unique in the world in its respect for the rights of controversial speakers – some of whom, inevitably, turn out to be right. In a free society like ours, universities should serve as the ultimate "free speech zones," where anyone's ideas can be examined and discussed. Eliminating the "heckler's veto" is the only way to ensure that the nation's universities can continue to serve this vital function.

Robert L. Shibley, an attorney, is vice president of the Foundation for Individual Rights in Education.

New York Times, April 9, 2009.

UCSB DROPS CASE AGAINST PROFESSOR
Investigation of Academic Freedom Comes to a Close

Elliott Rosenfeld

After months of controversy, UCSB has terminated the investigation against global studies and sociology professor William Robinson.

Since January, Robinson — who came under fire for forwarding online material to his students that compared Israeli soldiers to Nazis — has been the focal point of a highly publicized debate on academic freedom. The affair ended on June 24, however, when UCSB officials announced they had dismissed the case and cleared Robinson of all charges.

According to UCSB Executive Vice Chancellor Gene Lucas, the Academic Senate Charges Committee found no cause to discipline Robinson.

“The Committee did not find probable cause to undertake disciplinary action in this matter,” Lucas wrote in a letter to Robinson on June 24. “I have accepted the findings of the Charges Committee. Accordingly, this matter is now terminated.”

The case against Robinson arose when two of his students dropped his class (SOC130, the Sociology of Globalization) after receiving the material from the course list server, which included a statement written by Robinson as well as a forwarded Internet photo

essay. "Gaza is Israel's Warsaw—a vast concentration camp that confined and blockaded Palestinians," Robinson wrote. "… We are witness to a slow-motion process of genocide."

The two students filed complaints with UCSB stating that Robinson had unfairly pushed anti-Semitic material on them. An ad hoc committee was then formed to investigate the professor on the grounds of faculty misconduct and abusing academic freedom by feeding his students propaganda.

Although the case has been swept under the carpet by the university, almost everyone who took part in the entangled argument has a sour outlook on the events.

Professor Robinson declined to comment, but according to a press release from the Committee to Defend Academic Freedom at UCSB — a student group formed in support of Robinson — he may be filing grievances with the university for the manner in which they handled his case.

Daniel Olmos, a sociology graduate student and CDAF member, said the whole ordeal has had a chilling effect on UCSB. He said the case has raised concerns within the academic community about the influence of pro-Israel groups such as StandWithUs and the Anti-Defamation League.

"We're happy that this case is dropped," Olmos said. "However, what we'd like is for the university to ensure that we can trust the process, and that this is a safe campus for discussion. I guarantee [that] other TAs and other professors are concerned about what they are going to put on their syllabi because they are asking themselves, 'Am I going to get attacked by the Israeli lobby?"

Two days before the case was dropped, SWU — an international nonprofit Israel education organization — delivered a petition to the UCSB administration that had 6,000 signatures stating public support for the case. After hearing UCSB's decision, SWU International Director Roz Rothstein said the university bungled the investigation.

"We are surprised and disappointed that UCSB chose not to uphold their standards for professional conduct, and that it has blurred the lines between responsible education and the peddling of propaganda," Rothstein said in a press release. "It is unfortunate that students will continue to be victims of partisan indoctrination and misinformation."

Some groups, such as Scholars for Peace in the Middle East, have stated that Robinson should not be punished for what he forwarded to his students, but reprimanded for his ignorance. An international academic collective made up of over 28,000 academics, researchers and professionals from around the world, SPME released a statement last Monday, June 29 voicing concerns about Robinson.

"…Professor William Robinson committed no infraction worthy of further charges or sanctions," the release said. "Nevertheless, we feel obligated, as faculty colleagues, to point out that… a tenured professor chose to draw such exploitive analogies and to impose them on his students raises serious questions about his judgment and the value of his teaching. Concern for academic freedom does not justify or erase what is clearly and profoundly flawed pedagogy."

However, the Foundation for Individual Rights in Education — a nonprofit education organization based in Philadelphia — called the investigation of Robinson an egregious violation of the First Amendment and academic freedom standards in a letter to Chancellor Henry T. Yang on June 10.

Meanwhile, Cyndi Silverman, regional director of the ADL, said she hopes the university ultimately learns a lesson from this saga.

"I think it's unfortunate that there wasn't some kind of recognition of what [Robinson] had done wrong," Silverman said. "I think that the students need some kind of a program on campus to help them understand what is academic freedom, and how it can be violated by faculty members espousing their own political agendas." Olmos said the CDAF expects the university administration to review the Academic Senate's investigation procedures and to hold an educational conference about academic freedom for students next year. Additionally, Olmos said, the CDAF believes that a number of people unduly politicized the university investigation when it was underway and that the university needs to identify and discipline those individuals.

Daily Nexus, Issue 40, Vol 89, July 15, 2009.
http://www.dailynexus.com/article.php?a=19191.

WARD CHURCHILL GETS NOTHING

Scott Jaschik

The University of Colorado won just about everything it wanted, and Ward Churchill lost just about everything he wanted, in a ruling Tuesday by a state judge in Colorado.

Judge Larry J. Naves ruled that the University of Colorado Board of Regents had "quasi-judicial immunity" when it voted to fire Churchill from his tenured position teaching ethnic studies, after faculty panels found that he had committed multiple instances of research misconduct. Naves vacated an April ruling by a jury in the case that found that Churchill had been inappropriately fired. Based on that ruling, Naves could have ordered Churchill reinstated or ordered Colorado to pay him — issues that would have been moot given that Naves vacated the jury's decision. But Naves went on and said that, even based on the jury's findings, Churchill was not entitled to his job back, or to any money.

And Naves went out of his way to stress that he found the university's findings of misconduct credible, and that the return of Churchill to the faculty would be damaging.

Not surprisingly, the university praised the decision and Churchill denounced it. Phil DiStefano, chancellor at the university's Boulder campus, said in a statement: "The judge's decision today is a victory for faculty governance. It reinforces the idea that faculty set the standard for academic integrity on our campus and all campuses across the country. His decision reinforces the notion that faculty establish research standards, abide by them and enforce them."

In an interview Tuesday evening, David Lane, Churchill's lawyer said that he would "absolutely, positively appeal." The decision, Lane said, "sends out to America a very, very bad message that if the University of Colorado fires you because they don't like what you said, don't look for justice from this court."

Lane said that an appeals court decision would probably be around a year away — extending the life of a controversy that started in 2005.

Ward Churchill started teaching at Boulder in 1978 and won tenure in 1991. The author of numerous books and essays about Native American history, Churchill uses fiery rhetoric to describe the wrongs committed by the United States. In the years prior to 2005, Churchill became a popular figure on the campus lecture circuit — although he tended to attract attention from those who shared his views, and he was not widely known outside academe.

Then he accepted an invitation to speak at Hamilton College, a liberal arts college in upstate New York, in early 2005. Some professors there circulated some of his writings, including an essay with the now notorious remark comparing World Trade Center victims on 9/11 to "little Eichmanns." Within days, the controversy spread, with talk radio hosts, politicians, and the survivors of 9/11 victims expressing shock that a man with such views would be given a platform on a college campus. Hamilton initially stood by its invitation, on academic freedom grounds, but in the end called off the appearance, citing threats of violence.

At that point, the discussion shifted to Colorado, where numerous politicians — from the governor on down — were demanding that Churchill be fired. After several weeks of reviews, the university announced that the 9/11 essay could not be grounds for dismissal, given Churchill's rights to free expression and academic freedom and the lack of any evidence that his political views interfered with his teaching. But at the same time, Colorado announced that Churchill could be investigated and possibly fired for scholarly misconduct. That was because — once the controversy broke — scholars, journalists and others checked out Churchill's scholarship and quickly heard from researchers who said that Churchill had plagiarized or distorted their work.

Colorado then started a series of investigations in which various faculty panels examined the charges and considered potential punishments. While the panels were far from united in urging Churchill to be fired, there was consensus that he was guilty of repeated, intentional academic misconduct — plagiarism, fabrication, falsification and more. That was May 2006. After still more reviews, the University of Colorado Board of Regents fired him in July 2007. Churchill maintained throughout that he was a victim of his politics — although at least some of those who

accused him of inappropriately using their academic work are scholars of Native American history who share his belief that those they studied were treated in horrific ways.

Churchill's suit charged that political concerns dominated the review of the charges against him. Significantly, under Colorado law, the jury that found in his favor did not have to believe that he never committed research misconduct (although he has repeatedly denied doing so). Rather the standard was that to find in Churchill's favor, the jury had to determine that his political views were a substantial or motivating factor in his dismissal, and that he would not have been fired but for the controversy over his opinions.

The jury's ruling set the stage for a hearing last week, at which Judge Naves heard testimony from Churchill's supporters that he should get his job back, and from university officials arguing against that.

Naves started his ruling with an analysis that led him to throw out the jury's findings. He noted that the university had preserved a defense of legal immunity when it argued the rest of the case, because that issue is decided by a judge not a jury. He then reviewed why he viewed the Board of Regents as immune in the case, as a "quasi-judicial body." Churchill maintained that the entire process of reviewing the allegations against him was tainted, including the final review by the Board of Regents. But Naves said that the procedures in place — multiple layers of review, the chance for Churchill to question witnesses, introduce evidence, receive guidance from a lawyer and so forth — both provided for a reasonable process and gave the regents protection from being sued.

Then Naves turned to the issue of whether Churchill should get his job back. Naves stressed the importance of colleges and universities making their own determinations on academic matters, including research misconduct. He said that faculty committees, not courts, should "define the standards of academic misconduct."

Naves said: "I conclude that reinstating Professor Churchill would entangle the judiciary excessively in matters that are more appropriate for academic professionals."

While leaders of the ethnic studies program backed Churchill's return, Naves said that their program would be damaged with Churchill back on the faculty. "The evidence was credible that Professor Churchill will not only be the most visible member of the Department of Ethnic Studies if reinstated, but that reinstatement will create the perception in the broader academic community that the Department of Ethnic Studies tolerates research misconduct. The evidence was also credible that this perception will make it more difficult for the Department of Ethnic Studies to attract and retain new faculty members. In addition, this negative perception has great potential to hinder students graduating from the Department of Ethnic Studies in their efforts to obtain placement in graduate programs," Naves wrote.

More broadly, Naves said that "I also fully understand" the concerns expressed by other faculty members that Churchill's presence on the faculty would make it difficult to hold students to "high standards of honesty in research and writing."

Finally, Naves rejected the idea that Churchill deserved compensation for being dismissed as he was. Naves wrote: "Professor Churchill's own statements during the trial established that he has not seriously pursued any efforts to gain comparable employment, but has instead chosen to give lectures and other presentations as a means of supplementing his income. Reportedly, he even 'received a few job offers' that he declined to pursue." Noting that Churchill has continued to give lectures and publish, Naves questioned whether Churchill has been harmed by what happened.

Lane, Churchill's lawyer, said that the comments by the judge "simply show the world that he is a Churchill-basher just like everyone at CU."

Cary Nelson, national president of the American Association of University Professors, said that "there are so many problems with the judge's decision that it would require a full essay to respond to them."

To cite one example, he noted that Naves noted critical statements Churchill made about the university administration to argue that relations between Churchill and the university were so bad that he couldn't return to the faculty. "That shows remarkable ignorance about what faculty members conventionally

say about administrators and their impact," Nelson said.

Ultimately, Nelson said, the jury recognized "that the university president's decision to fire Churchill was fruit of the poisoned tree — the public outrage over Churchill's extramural speech. But it was the judge's responsibility to honor the jury's decision by reinstating him."

But DiStefano, the Boulder chancellor, said in his statement that the ruling was a victory for professors. "The judge elected not to expose us to a double standard. Professor Churchill was found to have committed research misconduct by a number of committees. The judge recognizes that we cannot hold one faculty member to a different standard than we hold the rest of the faculty and the students. To have that double standard would have been very harmful to the campus," he said. "This is not an issue about free speech or about academic freedom. This is an issue about research misconduct."

Inside Higher Ed., July 8, 2009.

IS FREEDOM OF SPEECH DISAPPEARING ON CAMPUS?

Abby Deshman and Carolyn Cody

"Freedom of speech encompasses not only your right to express, but also my right to hear: a university campus is not a nursery, and students should not be coddled as though it were."

Are Canadian universities and students losing their tolerance for free speech?

It's a question that comes to mind these days, after a variety of restrictions have been enforced against student groups' activities on campuses across the country.

Some student groups have been denied university club status or have faced limits on how they can argue their opinions. The Canadian Civil Liberties Association (CCLA) has taken to task both students' unions and university administrations for what it sees as censorship bowing to political correctness.

Often, these student groups want to take an unpopular stand in very public places on campus. Some highly publicized cases involve anti-abortion student groups prohibited from displaying posters of aborted fetuses in prominent places on campus and refused “student club status” by student unions.

University Affairs decided to host an e-mail debate on the topic of academic freedom, from the viewpoint of students. We asked Abby Deshman, a CCLA staff member, to argue in favour of free speech, especially as it concerns the rights of anti-abortion student groups. Her debating opponent is Carolyn Cody, internal coordinator of the University of British Columbia Okanagan Students' Union, which successfully defended its right to deny club status to an anti-abortion student group in the B.C. Supreme Court this past winter. The opening volley begins with Ms. Deshman.

Abby Deshman:

While the Canadian Civil Liberties Association always has been a strongly pro-choice organization, we have growing concerns regarding the actions various students' unions have taken against anti-abortion groups on campuses. The rationale some student leaders have offered for refusing to accord official club status to student anti-abortion groups has led CCLA to conclude that many students may not fully appreciate the vital role freedom of expression plays on university campuses. These concerns have not been limited to student leadership; CCLA recently strongly criticized several university administrations for banning controversial student materials reproduced in connection with Israel Apartheid Week.

Some of the central tenets of a university education are critical thinking, intense debate and the adventurous search for truth. Faculty and students must be free to ask challenging questions and to express provocative and even at times offensive opinions without fear of official sanction or censorship. If university campuses become places where highly controversial subjects cannot be vigorously debated and challenged through words, images and non-violent actions, then where in society can we expect freedom of expression to prevail?

That many students may find the material distributed by some anti-abortion groups disturbing, offensive or misleading likely provides valid grounds to challenge

these groups. The proper response, however, is argument – not censorship. To quote Noam Chomsky, "if we do not believe in freedom of speech for those we despise we do not believe in it at all."

Carolyn Cody:

This debate is about the right of students' unions to govern printed materials that can be posted on their campuses. When it comes to student groups that fall under the banner of the students' union, then the students' union has absolute say over what can and cannot be said by those student groups. How this responsibility is decided upon is of the utmost importance.

No one, I suspect, is seriously suggesting that there should be no restrictions on on-campus posting – for example, that pornographic materials should be allowed to be posted in the campus daycare. If you agree, then you agree in principle that there should be a process to regulate what should be posted, and where.

On the UBC Okanagan Campus, a group wanted a venue to display the Genocide Awareness Project. The UBC Students' Union Okanagan provided a classroom in which they could display the posters and the film. This is still public space, but people could be warned that these are graphic images which they could reasonably expect not to see on campus.

It is entirely reasonable of a students' union, or any other society with closed membership, to place restrictions on the use of its resources, as long as judgments are applied fairly.

There is nothing any students' union can do to prevent people from organizing on campus, calling themselves whatever they wish and representing any political position they choose. All the students' union can do is set a consistent, democratic standard for accessing its resources – whether it be money, bulletin boards, space or any other form of support.

Ms. Deshman:

Your first statement, that students' unions have an absolute say over what can and cannot be said by those student groups they recognize, sends shivers down my civil liberties spine. Let's be clear, however, about what we are debating. I may criticize the way students' unions have exercised their discretion. This does not mean that I would argue that this discretion does not exist, or that it should be removed. I personally think there is very significant value in student self-governance.

We should also be clear about what is at stake when students' unions exercise this discretion. At many Canadian universities, students' unions have the exclusive authority to recognize official student groups. That frequently affects groups' ability to book free rooms across campus, post notices on university boards and advertise their existence through university websites and club fair days.

This is not, then, about accessing students' union funding. It is about the ability of these students to function as a typical campus group within the larger university environment.

Within this context, what's truly of concern is the criteria many students' unions are using to exercise this discretion. Many would seem to find it acceptable to deny ratification to a student group because they disagree with the group's message. In principle, I have no problem with students' unions, or university administrations, disciplining student groups that knowingly contravene clear, objective, fair policies that recognize the importance of freedom of speech. I do have concerns when the underlying policies and criteria governing acceptable behaviour are unclear or overly subjective, or when they allow student groups to be denied status simply because those in power, or the majority of students, find the content of the groups' speech objectionable.

Ms. Cody:

If the membership of a student society decides not to support a specific group, it is within its rights to do so. A problem arises when people conflate our decision to withhold support for a given cause with an attack on their free speech.

Freedom of speech has a very narrow definition: that someone cannot be persecuted by the government or other institutions for expressing his or her opinions. Free speech does not include the right to display disturbing images without any warning. That is what many anti-choice groups on campuses are doing; under the guise of "freedom of speech," they are publicly

posting images of holocaust victims and other examples of genocide next to aborted fetuses. The University of Calgary requested that the anti-choice group turn their signs and images inward, to protect the general public from accidentally viewing the graphic images. The group was allowed to voice their opinions and engage the public in debate.

A violation of free speech occurs when someone is denied something to which they would normally be entitled because of their opinions. In this context, it could be penalties from the university, or it could be a students' union denying someone the baseline of services, to which all members are entitled, because that individual criticized the students' union.

When extra privileges are denied, that is not a free-speech violation. We need to distinguish between real violations of free speech and cases where individuals are suffering from a false sense of entitlement.

Ms. Deshman:

You state it would violate freedom of speech if the university levied penalties – academic or otherwise – on someone because of their opinions. Indeed, I hope students' unions would strongly criticize an administration that refused student group ratification, or curtailed posting or room booking abilities, solely because the administration disagreed with the group's message. If a students' union has been delegated this authority, however, this power must be accompanied by similar scrutiny.

With regard to graphic images, not all anti-abortion groups should be penalized because some may have violated campus rules. In any event, the principle of free speech would require allowing those groups some reasonable opportunity to expose campus members to their material. It is difficult to assess from a distance whether the restrictions imposed in individual cases strike a reasonable balance. As others have noted, however, such restrictions must not turn freedom of speech into freedom of soliloquy. Freedom of speech encompasses not only your right to express but also my right to hear: a university campus is not a nursery, and students should not be coddled as though it were.

Ms. Cody:

Neither side in this debate has proposed that students' unions or universities should prevent individuals from using their own resources to promote their own opinions, and yet that is the point to which we keep returning.

Where I part company with these sorts of quasi-libertarian arguments is when they suggest that the students' union has a responsibility to promote points of view with which its members disagree. If it's the case that any membership-based organization has the responsibility to dedicate resources to every opinion of every member, then the whole system descends into absurdity pretty quickly.

Ms. Deshman:

To sum up, this debate requires the resolution of a key question – students' unions' role on university campuses. Students' unions often act both as representatives of student interests and as regulators through which students access university-wide resources. Acting as the former, it would be improper – indeed impossible – to require active support for every student cause. Acting as the latter, however, they must have an overarching mandate to protect freedom of speech. The issue is not, and cannot be, whether we agree with their cause. Again, if we do not believe in freedom of speech for those we despise, we do not believe in it at all.

Ms. Cody:

There is a process in place that determines who can have access to the resources regulated by the students' union. If people want to flagrantly violate these regulations and still act within our system and have access to our resources, we will not accommodate them. Any discussion of the right to free speech must include our right to self-determination; otherwise it is only a discussion of the rights of a few carefully selected stakeholders.

Posted on *University Affairs*, June 8, 2009.

Bequest to SAFS

Please consider remembering the Society in your will. Even small bequests can help us greatly in carrying on SAFS' work. In most cases, a bequest does not require rewriting your entire will, but can be done simply by adding a codicil. So please do give this some thought.

Thank you.

Clive Seligman, President

THE URGE TO CENSOR

Comment on Cody/Deshman Debate

Philip Sullivan

In view of the BC Supreme Court's ruling on the UBC Okanagan Student Union's decision to deny club status to an anti-abortion group, I do not comment on this particular case. Nevertheless, as does the Canadian Civil Liberties Association's Abby Deshman, I find the attitudes espoused by the Okanagan Student Union's Carolyn Cody to be deeply disturbing. In "Free Speech For Me But Not For Thee" Nat Hentoff, citing examples of suppression of debate in US universities, quotes an editor of a prominent US newspaper as saying that the strongest human instinct is the urge to censor, with sex a weak second.

Various actions by Canadian university administrations and student unions provide text-book examples of this dictum, with ideology or concern over giving offense overriding legitimate academic debate.

As an example, somebody in our bloated equity bureaucracy ordered the removal from our campus posters depicting the notorious Danish Cartoons. This individual sent examples to the Toronto Police, apparently deeming them hate literature. But the police – not known for their advocacy of free speech – did not. Given that many scholars have raised the need for a vigorous debate on the relationship between Islam and modernity, it is shameful that a university would not allow these posters to help prompt that debate. The presence of this trend on Canadian campuses is the principal reason why I am a member of the Society for Academic Freedom and Scholarship; this organization seems to me to be the only one in Canada advocating unequivocally the core values essential for the effective functioning of universities, whose primary mission should be the search for truth through the conflict of ideas.

Among other things, Ms. Cody apparently thinks that adult persons should be protected from viewing images that her particular group finds disturbing. A case can be made that the public should be protected from viewing disturbing images in certain contexts; for example, one might ban provocative advertising on billboards directed towards motorways on the grounds that it inappropriately distracts drivers, but in this case, what is the rationale?

In this respect, given that humans constantly elevate the customary into the axiomatic, provocative images can be an essential tool in stimulating much needed debate. In the case of abortion, involving – among other concerns – a difficult balance between the competing rights of the mother and the developing fetus, I suggest that most Canadians reject the extremes of both advocates' camps, and are uncomfortable with the absence of any framework regulating conditions under which abortion may be permitted. Thus, as crude as the activists' equating untrammeled abortion rights to genocide may seem to the majority of thoughtful individuals, I suggest that the activists' tactics are within the norm of spirited debate. Surely university campuses should be places where such hard-hitting debate is encouraged or even provoked?

Particularly distressing is Ms. Cody's claim that her students' union has an "absolute say over what can and cannot be said by" student groups operating under its aegis. Is not this totalitarian assertion a quintessential example of Hentoff's quote? Given that students' unions are supported by compulsorily extracted fees, surely her union has to balance any legitimate concern over content against its obligations to students, provided of course that they meet basic operational criteria such as payment of student fees and minimum group size?

Philip A. Sullivan, Professor Emeritus, University of Toronto, Institute for Aerospace Studies, is a former member of the SAFS Board of Directors.

Posted on *University Affairs*, June 26, 2009.

SUBMISSIONS TO THE SAFS NEWSLETTER

The acting editor welcomes articles, case studies, news items, comments, readings, local chapter news, etc. Please send your submission by e-mail attachment.

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THE FREE WORLD BARS FREE SPEECH

Jonathan Turley

For years, the Western world has listened aghast to stories out of Iran, Saudi Arabia and other Middle Eastern nations of citizens being imprisoned or executed for questioning or offending Islam. Even the most seemingly minor infractions elicit draconian punishments. Late last year, two Afghan journalists were sentenced to prison for blasphemy because they translated the Koran into a Farsi dialect that Afghans can read. In Jordan, a poet was arrested for incorporating Koranic verses into his work. And last week, an Egyptian court banned a magazine for running a similar poem.

But now an equally troubling trend is developing in the West. Ever since 2006, when Muslims worldwide rioted over newspaper cartoons picturing the prophet Muhammad, Western countries, too, have been prosecuting more individuals for criticizing religion. The "Free World," it appears, may be losing faith in free speech.

Among the new blasphemers is legendary French actress Brigitte Bardot, who was convicted last June of "inciting religious hatred" for a letter she wrote in 2006 to then-Interior Minister Nicolas Sarkozy, saying that Muslims were ruining France. It was her fourth criminal citation for expressing intolerant views of Muslims and homosexuals. Other Western countries, including Canada and Britain, are also cracking down on religious critics.

Emblematic of the assault is the effort to pass an international ban on religious defamation supported by United Nations General Assembly President Miguel d'Escoto Brockmann. Brockmann is a suspended Roman Catholic priest who served as Nicaragua's foreign minister in the 1980s under the Sandinista regime, the socialist government that had a penchant for crushing civil liberties before it was tossed out of power in 1990. Since then, Brockmann has literally embraced such free-speech-loving figures as Iranian President Mahmoud Ahmadinejad, whom he wrapped in a bear hug at the U.N. last year.

The U.N. resolution, which has been introduced for the past couple of years, is backed by countries such as Saudi Arabia, one of the most repressive nations when it comes to the free exercise of religion. Blasphemers there are frequently executed. Most recently, the government arrested author Hamoud Bin Saleh simply for writing about his conversion to Christianity.

While it hasn't gone so far as to support the U.N. resolution, the West is prosecuting "religious hatred" cases under anti-discrimination and hate-crime laws. British citizens can be arrested and prosecuted under the 2006 Racial and Religious Hatred Act, which makes it a crime to "abuse" religion. In 2008, a 15-year-old boy was arrested for holding up a sign reading "Scientology is not a religion, it is a dangerous cult" outside the organization's London headquarters. Earlier this year, the British police issued a public warning that insulting Scientology would now be treated as a crime.

No question, the subjects of such prosecutions are often anti-religious – especially anti-Muslim – and intolerant. Consider far-right Austrian legislator Susanne Winter. She recently denounced Mohammad as a pedophile for his marriage to 6-year-old Aisha, which was consummated when she was 9. Winter also suggested that Muslim men should commit bestiality rather than have sex with children. Under an Austrian law criminalizing "degradation of religious doctrines," the 51-year-old politician was sentenced in January to a fine of 24,000 Euros ($31,000) and a three-month suspended prison term.

But it is the speech, not the speaker, that's at issue. As insulting and misinformed as views like Winter's may be, free speech is not limited to non-offensive subjects. The purpose of free speech is to be able to challenge widely held views.

Yet there is a stream of cases similar to Winter's coming out of various countries:

In May 2008, Dutch prosecutors arrested cartoonist Gregorius Nekschot for insulting Christians and Muslims with a cartoon that caricatured a Christian fundamentalist and a Muslim fundamentalist as zombies who meet at an anti-gay rally and want to marry.

Last September, Italian prosecutors launched an investigation of comedian Sabina Guzzanti for joking about Pope Benedict VXI. "In 20 years, [he] will be dead and will end up in hell, tormented by queer

demons, and very active ones," she said at a rally.

In February, Rowan Laxton, an aide to British Foreign Secretary David Miliband, was arrested for "inciting religious hatred" when, watching news reports of Israel's bombardment of Gaza while exercising at his gym, he allegedly shouted obscenities about Israelis and Jews at the television.

Also in February, Britain barred controversial Dutch politician Geert Wilders from entry because of his film "Fitna," which describes the Koran as a "fascist" book and Islam as a violent religion. Wilders was declared a "threat to public policy, public security or public health."

And in India, authorities arrested the editor and publisher of the newspaper the Statesman for running an article by British journalist Johann Hari in which he wrote, "I don't respect the idea that we should follow a 'Prophet' who at the age of 53 had sex with a 9-year-old girl, and ordered the murder of whole villages of Jews because they wouldn't follow him." In India, it is a crime to "outrage religious feelings."

History has shown that once governments begin to police speech, they find ever more of it to combat. Countries such as Canada, England and France have prosecuted speakers and journalists for criticizing homosexuals and other groups. It's the ultimate irony: free speech curtailed for the sake of a pluralistic society.

Even countries that the United States has helped liberate have joined the assault on free speech, rejecting the core values of our First Amendment. Afghan journalist Sayed Perwiz Kambakhsh was sentenced to death under Sharia law last year just for downloading Internet material on the role of women in Islamic societies that authorities judged to be blasphemous. The provincial deputy attorney general, Hafizullah Khaliqyar, has been quoted as saying: "Journalists are supporting Kambakhsh. I will arrest any journalist trying to support him after this."

Not only does this trend threaten free speech, freedom of association and a free press, it even undermines free exercise of religion. Challenging the beliefs of other faiths can be part of that exercise. Countries such as Saudi Arabia don't prosecute blasphemers to protect the exercise of all religions but to protect one religion. Religious orthodoxy has always lived in tension with free speech. Yet Western ideals are based on the premise that free speech contains its own protection: Good speech ultimately prevails over bad. There's no blasphemy among free nations, only orthodoxy and those who seek to challenge it.

After years of international scorn, the United States can claim the high ground by supporting the right of all to speak openly about religion. Otherwise, free speech in the West could die with hope of little more than a requiem Mass.

Jonathan Turley is a law professor at George Washington University.

The Washington Post, April 12, 2009.

IRONY: AMAZON ERASES ORWELL BOOKS FROM KINDLE SERVICE

In a case of life imitating art, Amazon has angered some customers of its Kindle electronic book service by remotely deleting two George Orwell books, *Animal Farm* and *Nineteen Eighty-Four*.

Copies of the novels, which feature dystopian worlds, were wiped from the book readers this week.

Many have compared the move to the workings of the totalitarian government in *Nineteen Eighty-Four*, in which documents deemed inappropriate are dropped into a "memory hole" and erased forever.

Amazon said the books were uploaded by a publisher who didn't have the rights to reproduce copies of them.

"When we were notified of this by the rights holder, we removed the illegal copies from our systems and from customers' devices, and refunded customers," Amazon spokesman Drew Herdener told the *New York Times.*

An authorized digital edition of *Nineteen Eighty-Four* was made available for Kindle users, but no versions of *Animal Farm* are being offered yet.

Some customers said they were upset after discovering that Amazon could erase books that were already in a Kindle owner's possession.

"I never imagined that Amazon actually had the right, the authority or even the ability to delete something that I had already purchased," said Charles Slater, who bought *Nineteen Eighty-Four* for 99 cents US last month.

"We are changing our systems so that in the future we will not remove books from customers' devices in these circumstances," Herdener told the Times.

CBC News, July 19, 2009.

TO THE EDITOR, SAFS NEWSLETTER

In his address to York University's Senate (Newsletter, April 2009), the President of that troubled institution emphasized its commitment to "social justice" as one of its "core values." Such a commitment is fundamentally incompatible with a university's proper role in society.

In order to promote "social justice," one has to decide what the term means. Is the ideal to be equal opportunity, allowing differences among individuals to produce unequal outcomes? Are rewards for superior ability, energy and initiative to be regarded as consistent with justice, or must there be a government guarantee of at least approximately equal social status and standards of living? If equality of outcomes is the goal, should that principle apply to individuals or to group averages? In the latter case, how are the relevant groups to be defined?

Without an answer to such questions, rhetoric about "social justice" is meaningless. But a university that does answer them is bestowing its institutional blessing on a particular vision of "social justice," and thus on a political cause. Aligning itself with one party or faction in political controversy is something that a university should never do. If it declares (or implies) that whatever it means by "social justice" represents the correct political position, it risks creating an atmosphere of repression in which the ideas of those who reject the institution's definition of "social justice" are prejudged as illegitimate.

A university should be content to provide the highest feasible quality of education, along with an impartial forum for free debate on political (and other) issues, taking no stand as an institution except to uphold freedom – for example, by providing adequate security against disruption of meetings and intimidation of speakers.

Kenneth H.W. Hilborn, Professor Emeritus of History, University of Western Ontario, is a former member of SAFS Board of Directors.

AFFIRMATIVE ACTION IS JUST A DISTRACTION

Shelby Steele

America's war over affirmative action has gone on longer than any of the country's military conflicts, and over the decades each side of this debate has spawned a vast literature of argument. So I feel some dread in seeing the debate newly enlivened today. Yet the Sotomayor nomination, the Supreme Court's decision in the *Ricci* case and the election of our first black president make it inevitable.

What is the future of group preferences in America? Doesn't a black president render them obsolete? Or does an incident like the arrest of Harvard professor Henry Louis Gates – with its implication of racial profiling – point to the continuing need for affirmative action?

Unfortunately, this preoccupation with preferences may be a fool's errand. With black youths performing worse on the SAT in 2000 than in 1990, the obsession with affirmative action may only help us avoid the more troubling reality: the ongoing underdevelopment that keeps so many blacks non-competitive.

It is important to remember that the original goal of affirmative action was to achieve two redemptions simultaneously. As society gave a preference to its former victims in employment and education, it hoped to redeem both those victims and itself. When America – the world's oldest and most unequivocal democracy – finally acknowledged in the 1960s its heartless betrayal of democracy where blacks were concerned, the loss of moral authority was profound. In their monochrome whiteness, the institutions of this society –universities, government agencies, corporations – became emblems of the very evil America had just acknowledged.

Affirmative action has always been more about the restoration of legitimacy to American institutions than the uplift of blacks and other minorities. For 30 years after its inception, no one even bothered to measure its effectiveness in minority progress. Advocates of racial preferences tried to prove that these policies actually helped minorities only after 1996, when California's Proposition 209 banned racial preferences in all state institutions, scaring supporters across the country.

But the research following from this scare has been politicized and discredited. Most important, it has completely failed to show that affirmative action ever closes the academic gap between minorities and whites. And failing in this, affirmative action also fails to help blacks achieve true equality with whites – the ultimate measure of which is parity in skills and individual competence. Without this underlying parity there can never be true equality in employment, income levels, rates of home ownership, educational achievement and the rest.

But affirmative action has been quite effective in its actual, if unacknowledged, purpose. It has restored moral authority and legitimacy to American institutions. When the Supreme Court seemed ready to nullify the idea of racial preferences in the 2003 University of Michigan affirmative action cases, more than 100 amicus briefs – more than for any other case in U.S. history – were submitted to the court by American institutions in support of group preferences. Yet there was no march on Washington by tens of thousands of blacks demanding affirmative action, not even a threat of such a move from a people who had "marched" their way to freedom in the '60s. In 2003, the possible end of racial preferences did not panic minorities; it panicked institutional America.

So the question that followed from the Michigan cases – how long will minorities need some form of racial preferences? – is the wrong question. A better question is: How long it will take American institutions to feel legitimate without granting racial preferences? After the Michigan cases, Justice Sandra Day O'Connor famously surmised that blacks would need preferences for 25 more years. Sadly, it will probably take blacks longer than that to completely overcome nearly four centuries of oppression. But O'Connor was probably calibrating institutional America's timeline to retrieve legitimacy. She wasn't measuring the achievement of true equality.

How will the law continue to define and uphold group preferences?

We are headed now, it seems, into a legal thicket created by the incompatibility of two notions of equality: "disparate impact" and "equal protection under the law." The former is a legalism evolved from judicial interpretations of Title VII of the 1964 Civil Rights Act; the latter is a constitutional guarantee. Disparate impact lets you presume that an entire class of people has been discriminated against if it has been disproportionately affected by some policy. If no blacks do well enough on a firefighters promotion exam to win advancement while many whites do (*Ricci v. DeStefano*), then this constitutes discrimination against blacks.

Disparate impact has two inherent corruptions: It allows discrimination to be established by mere presumption, and it makes victimization collective. By disparate impact, all blacks in the New Haven, Conn., fire department were presumed victims of discrimination without any evidence that the city actually discriminated against any of them. And the city threw out the test because it knew that a failure to promote blacks (while whites were being promoted) would automatically make the city guilty of and liable for discrimination. The *Ricci* case illustrates the irrationality of disparate impact. As New Haven threw out the firefighter's test because of its disparate impact on blacks, it created a disparate impact on whites.

Racial preferences only extend the misguided logic of disparate impact. They, too, presume discrimination without evidence. All blacks, even President Obama's children, are eligible for the redress of a racial preference. We must presume that, even in the Sidwell Friends School by day and the White House by night, the president's daughters – as blacks – encounter a racial animus that so predictably disadvantages them that the automatic redress of a racial preference is required. Obama himself has pointed out the absurdity of this, and yet privileged blacks such as his daughters remain the most sought-after minorities by admissions officers seeking "diversity."

Disparate impact and racial preferences represent the law and policymaking of a guilty America, an America lacking the moral authority to live by the rigors of the Constitution's "equal protection" – a guarantee that sees victims as individuals and requires hard evidence

to prove discrimination. They are "white guilt" legalisms created after the '60s as fast tracks to moral authority. They apologize for presumed white wrongdoing and offer recompense to minorities before any actual discrimination has been documented. Yet these legalisms are much with us now. And it will no doubt take the courts a generation or more to disentangle all this apology from the law.

But fortunately race relations in America are not much driven by the courts. We argue over affirmative action and disparate impact because we don't know how to talk about our most profound racial problem: the lack of developmental parity between blacks and whites. Today a certain contradiction runs through black American life. As many of us still suffer from deprivations caused by historical racism, we also live in a society where racism is simply no longer a significant barrier to black advancement – a society so sensitized that even the implication of racism, as in the Henry Louis Gates case, triggers a national discussion. We blacks know oppression well, but today it is our inexperience with freedom that holds us back almost as relentlessly as oppression once did. Out of this inexperience, for example, we miss the fact that racial preferences and disparate impact can only help us – even if they were effective – with a problem we no longer have. The problem that black firefighters had in New Haven was not discrimination; it was the fact that not a single black did well enough on the exam to gain promotion.

Today's "black" problem is underdevelopment, not discrimination. Success in modernity will demand profound cultural changes – changes in child-rearing, a restoration of marriage and family, a focus on academic rigor, a greater appreciation of entrepreneurialism and an embrace of individual development as the best road to group development.

Whites are embarrassed to speak forthrightly about black underdevelopment, and blacks are too proud to openly explore it for all to see. So, by unspoken agreement, we discuss black underdevelopment in a language of discrimination and injustice. We rejoin the exhausted affirmative action debate as if it really mattered, and we do not acknowledge that this underdevelopment is primarily a black responsibility. And yet it is – as historically unfair as it may be, as much as it seems to blame the victim. In human affairs we are responsible not just for our "just" fate, but also for our existential fate.

But continuing black underdevelopment will flush both races out of their postures and make most discussions of race in America, outside a context of development, irrelevant.

Shelby Steele is a senior fellow at the Hoover Institution at Stanford University and the author of *White Guilt: How Blacks and Whites Together Destroyed the Promise of the Civil Rights Era.*

The Washington Post, July 26, 2009. □

BASELESS BIAS AND THE NEW SECOND SEX

Christina Hoff Sommers

Claims of bias against women in academic science have been greatly exaggerated. Meanwhile, men are becoming the second sex in American higher education.

In 2006 the National Academy of Sciences released *Beyond Bias And Barriers: Fulfilling the Potential of Women in Academic Science and Engineering*, which found "pervasive unexamined gender bias" against women in academic science. Donna Shalala, a former Clinton administration cabinet secretary, chaired the committee that wrote the report. When she spoke at a congressional hearing in October 2007, she warned that strong measures would be needed to improve the "hostile climate" women face in university science. This "crisis," as she called it, "clearly calls for a transformation of academic institutions. Our nation's future depends on it."

The study was controversial from the beginning. John Tierney of the New York Times interviewed several researchers who dismissed it as politically driven propaganda—the "triumph of politics over science." Linda Gottfredson of the University of Delaware said, "I am embarrassed that this female-dominated panel of scientists would ignore decades of scientific evidence to justify an already disproved conclusion, namely, that the sexes do not differ in career-relevant interests and abilities."

This past Tuesday the National Academy of Sciences (NAS) released a non-political, objective study of women in academic science entitled *Gender Difference at Critical Transitions in the Careers of Science, Engineering and Mathematics Faculty*. The study was sponsored by the National Science Foundation (NSF) and mandated by Congress. It contradicts key findings of *Beyond Bias and Barriers*. According to its executive summary:

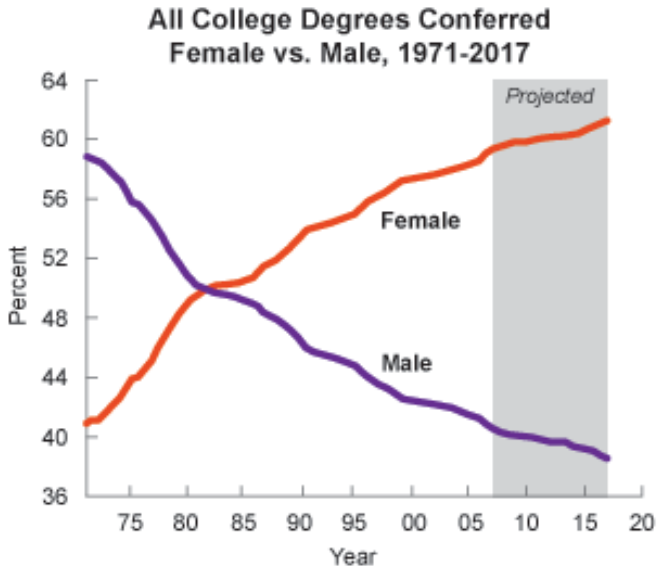
Our survey findings do indicate that, at many critical transition points in their academic careers (e.g., hiring for tenure-track and tenure positions and promotions) women appear to have fared as well as or better than men... These findings are in contrast to the COSEPUP [Shalala] committee's general conclusions, that "women who are interested in science and engineering careers are lost at every educational transition" and the "evaluation criterion contain arbitrary and subjective components that disadvantage women."

To give one typical finding, in the years studied, 2004 and 2005, women accounted for approximately 20 percent of applicants for positions in mathematics, but were 28 percent of those interviewed and 32 percent of those who received job offers. Furthermore, once women attained jobs in math or science programs, their teaching loads and research resources were comparable to men's. Female full professors were paid, on average, 8 percent less than males. But the committee attributed this to the fact that the senior male professors had more years of experience. There were no differences in salaries for male and female assistant and associate professors. "I don't think we would have anticipated that in so many areas that there would have been such a balance in opportunities for men and women," said Dr. Sally Shaywitz, Yale University research scientist and co-chair of the committee that wrote the report.

The new study does not claim that women have achieved parity with men. It found, for example, that women with Ph.D.s in math and science are far less likely than men to pursue a career at a research-intensive university. Why should that be? The report does not say, but suggests it would be an important question to pursue. In fact, there is now a lively and growing literature on gender and vocation. While some scholars contend that "unconscious bias" and persistent stereotypes are primary reasons for the paucity of women in the high echelons of math and science, others, perhaps a majority, suggest that men and women, on average, have different career interests and propensities. (AEI Press will soon be publishing *The Science on Women and Science*, a collection of articles by scholars who argue different sides of this issue.)

The unfortunate news is that this temperate, well-reasoned, and objective new NAS study has come after the Shalala/*Bias and Barriers* report has already accomplished its purpose. Many members of Congress from both parties (especially Republican Congressman Vernon Ehlers and Democratic Senators Ron Wyden and Barbara Boxer) were electrified by the *Bias and Barriers* report—as well as by the volumes of highly tendentious advocacy research that preceded it (see my "Why Can't A Woman Be More Like a Man?"). Congress has already authorized NSF to spend millions of dollars on anti-bias programs, and instructed federal agencies such as NASA and the Department of Education to begin stringent Title IX gender equity reviews of science programs in the nation's universities. These expensive and aggressive policies and programs were put in place without any genuine evidence that sexist bias against women in academic science is actually a problem.

Members of Congress who are concerned about gender equity should take a look at what is happening in the academy as a whole. University of Michigan economist Mark Perry, using Department of Education data, has prepared this useful c*hart:*



Source: Mark Perry of the University of Michigan, using Department of Education data.

Perry shows that men are now on the wrong side of the degree gap at *every* stage of education. Here are his figures for the class of 2009:

- Associate's degrees: 167 for women for every 100 for men.
- Bachelor's degrees: 142 for women for every 100 for men.
- Master's degrees: 159 for women for every 100 for men.
- Professional degrees: 104 for women for every 100 for men.
- Doctoral degrees: 107 for women for every 100 for men.
- Degrees at all levels: 148 for women for every 100 for men.

Education Department projections though 2017 show a worsening picture for men with every passing year. If there is a crisis in the academy that merits a congressional investigation, it is not that women Ph.D.s are being shortchanged in math and science hiring and tenure committees, for that is not true. It is that men are quickly becoming the second sex in American education.

Christina Hoff Sommers is a resident scholar at the American Enterprise Institute**.**

The American, June 10, 2009.

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