



January 1992

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### Recommended Citation

Paul Brest, *The Disorderly University: A Reply to Mark Tushnet*, 4 *YALE J.L. & HUMAN.* (1992).

Available at: <https://digitalcommons.law.yale.edu/yjlh/vol4/iss2/8>

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# Critical Response

## The Disorderly University: A Reply to Mark Tushnet

**Paul Brest**

Can free inquiry and high academic standards flourish in our universities at the same time as those institutions welcome, teach, and learn from the most diverse student bodies in their histories? This is the charged question at the center of the “PC debate” now preoccupying the academy and the media.<sup>1</sup> I believe the answer is “yes,” but getting there requires a degree of dispassionate thought that has been strikingly absent from the debate.

Mark Tushnet’s *Political Correctness, the Law, and the Legal Academy* is typical of writings on the subject.<sup>2</sup> Though he makes several valuable observations along the way, Tushnet’s obsession with order, his aversion to ambiguity, and his quest for a scapegoat for the ills of the university, produce a bizarre analysis of the PC phenomenon.

Tushnet defines the problem of political correctness as “the enforcement . . . of politically-derived standards of scholarship [and teaching].”<sup>3</sup> In the first half of the article, he points out that coverage of PC by the

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1. See DEBATING P.C.: THE CONTROVERSY OVER POLITICAL CORRECTNESS ON COLLEGE CAMPUSES (Paul Berman ed., 1992) for a survey of the positions.

2. 4 YALE J.L. & HUMAN. 127 (1992) [hereinafter Tushnet].

3. Tushnet 128. Most of his examples in fact concern teaching.

press in general, and by Dinesh D'Souza in particular,<sup>4</sup> has been overblown, inaccurate, and one-sided.<sup>5</sup> Even writers who are not ideologically motivated don't let the complexities of actual events stand in the way of a good story. Tushnet makes this point through a case study of the controversy surrounding a visiting professor at Harvard Law School whom students criticized for being sexist, taking him to task for making light of gender-specific pronouns and for using the famous quotation from Byron's *Julia* ("whispering 'I will ne'er consent'—consented") to make a point about contract law. In sections entitled "The Politics of Language and Failed Jokes" and "The Politics of Literary Allusions," Tushnet uses the incident as a platform for some astute generalizations about pedagogy. He concludes that the Harvard visiting professor was not particularly badly treated and deserved what he got.

Having thus analyzed one plot in detail to demonstrate that it was not really an instance of "PC," he turns to sketching the more general story line of the phenomenon—which, in preference to the baggage-laden term "PC," I shall call "coercion to orthodoxy." Any campus drama has at least three possible groups of actors—faculty, students, and administrators.<sup>6</sup> Tushnet's script assigns the roles of victim and villain respectively to the faculty and administration. Though students participate in several of his scenes, they are never the objects of coercion and they seldom bear any responsibility for coercing others.

Professors-as-victims have received almost all of the media's attention, and certainly some have suffered coercion to orthodoxy. Some have probably been denied tenure—mostly leftist professors, Tushnet suggests, referring to the plight of some members of the critical legal studies movement.<sup>7</sup> Others have been the victims of concerted and occasionally quite vicious harassment by students. And who knows how many others have exercised caution, at the expense of probing scholarship and challenging teaching, to avoid the same fate? Tushnet, who is a distinguished member of the Georgetown Law Center faculty, is understandably sympathetic to the professoriate. He describes his own experience of teaching constitutional law as "walking through a minefield."<sup>8</sup>

To be sure, teaching about affirmative action and abortion calls for skillful pedagogy, and even that is not always enough to keep students from getting upset and angry.<sup>9</sup> As a sometime constitutional law profes-

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4. DINESH D'SOUZA, *ILLIBERAL EDUCATION* (1991).

5. For example, the press focuses on the enforcement of leftist but not conservative political orthodoxy. See Tushnet 128-29.

6. Alumni, politicians, and others outside the university may also play parts.

7. Tushnet 129. To the extent this is true, it is ironic in view of the media's take on PC, which casts moderates and conservatives as the victims and leftists as the victors.

8. Tushnet 154.

9. Though it is worth noting that, whether because of good pedagogy or character, or by sheer chance, some professors—even ones who espouse politically controversial views—are well respected and treated kindly by students.

sor, I would welcome a hazardous duty supplement. But in truth, it is our job to make the students confront these difficult issues; that's what we get paid for. However unhappy our lot may be, the faculty wield much of the power in America's major research universities and liberal arts colleges. Criticism by students seldom threatens our job security or our reputations as scholars; our peers are other professors, and that's who we consort with professionally and socially.

By contrast, students are highly vulnerable to coercion to orthodoxy—by their peers, and by their professors as well—and it is no wonder that many of them choose to be silent. In my experience, the students who suffer the most are not the outspoken ones with strongly held views on the right or left. Rather, they are the majority who do not have set convictions about various controversial issues of morality, politics, and law.<sup>10</sup> College, and even law school, is a time to explore those issues through discourse. We test our ideas by speaking them, hearing how others respond to them, and, indeed, noticing how they sound to our own ears. Remaining silent until one's views are fully considered and artfully formed makes for dull classes and dull students. Of course, students have to be tough enough to endure their trial balloons' falling to earth, whether shot down by others or just deflated. But an atmosphere of ideological orthodoxy deters students from floating any but the most innocuous thoughts, and causes them to load down any possibly controversial idea with a ballast of caveats. (“I hope that everyone understands that I am not a —ist, but isn't it just possible that . . . ?”) Students are enormously vulnerable to peer opinion, and one of the challenges that faculty and administrators face in the contemporary university is to maintain an environment that encourages their experimentation with ideas.

Who are the agents of coercion to orthodoxy? Although students inflict the injuries in some of Tushnet's episodes, he exonerates them either because they acted with justification in the particular instance (as at Harvard) or because they are “private actors” in the context of the university. He thus responds to the use of terms like “McCarthy-ite” and “storm troopers” to describe student activists:

A large part of what made McCarthyism wrong was that behind Senator McCarthy's expressions lay the force of government—or, more broadly, official power. [Similarly as to Storm Troopers, at least after 1933.] . . .

Discussions of political correctness rarely provide examples of incidents in which, at the end of the day, official power was used to enforce political correctness . . . .<sup>11</sup>

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10. Precisely because they are silent, the many “uncommitted” students do not get the same media attention as the occasional publicly-hounded professor. Of course, silence is a choice for which they are responsible. But it is our responsibility as educators to create an environment that is not a minefield for students.

11. Tushnet 152 & n.90 (in brackets). Vigilantism actually played a greater role in these

Why does it matter that students are not exercising official power when they coerce others to political orthodoxy? One possible answer—which I think is basically right—is that, although students are answerable for their own behavior, the *ultimate* responsibility for governing the institution and dealing with their behavior falls on the faculty and administration. The excerpt just quoted has a different focus, however. It implies that students, as private actors, are formally incapable of interfering with academic freedom. If students were capable of such interference, a university would sometimes have to balance their freedom of speech against the freedom of others from discriminatory harassment. In Tushnet's well-ordered university, however, such balances should not have to be made, because any particular institution should have an unambiguous, unitary mission.

Whatever the role of Tushnet's students in enforcing ideological orthodoxy, his professors are exonerated by omission. He does not discuss the familiar complaint, heard from students all over the political spectrum, that professors stifle the presentation of opposing views in their classrooms.<sup>12</sup> Nor does he focus on the point that it was faculty who wielded the ax in many of his examples where professors were denied tenure or reappointment for ideological reasons.<sup>13</sup> For Tushnet, professors are only the victims and never the enforcers of orthodoxy.

So we come, finally, to the villains of Tushnet's drama: the administration. "Political correctness problems arise," he asserts, "because university administrators have no real sense of what their institutions should be doing, aside from accommodating political pressures."<sup>14</sup> "Administrators, lacking a vision of what a university should be, bend to whatever wind happens to be blowing the strongest."<sup>15</sup> Even though they may eventually "do the right thing," they take too long to do it, and "even then, their response is often qualified by inappropriate concessions to ideologues."<sup>16</sup> On Tushnet's most "generous account," administrators "are bureaucrats who follow the rules no matter what the circumstances . . .

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repressive movements than Tushnet acknowledges, and the boundary between public and private action is often vague. See, e.g., the discussion of the roles of the American Legion, the Daughters of the American Revolution, and other "patriotic" organizations in RICHARD M. FRIED, *NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE* 156, 161-63 (1990), and the discussion of the *Sturm Abteilung* before 1933 in ALAN BULLOCK, *HITLER, A STUDY IN TYRANNY* 167-69 (rev. ed. 1962); WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH* 147, 159-60 (1960).

12. See Steven Bahls, *Political Correctness and the American Law School*, 69 WASH. U. L.Q. 1041 (1991).

13. Tushnet 129, citing Richard L. Abel, *Evaluating Evaluations: How Should Law Schools Judge Teaching*, 40 J. LEGAL STUD. 407, 410 & n.17 (1990); and Tushnet 130-31, citing the Bennington faculty's non-reappointment of a supposedly homophobic lecturer, which was appealed and reversed. (The lecturer's op-ed article in the New York Times refers to a departmental "vote," which implies a vote of the faculty. See *Fear and Learning in Vermont*, N.Y. TIMES, June 15, 1991, at A23.)

14. Tushnet 162.

15. *Id.* at 128.

16. *Id.* at 157.

in part out of deference to faculty autonomy.”<sup>17</sup> Less generously, they “see themselves as politicians and managers who happen to work in an educational institution.”<sup>18</sup> He suggests that their response to any crisis is to manage it, first by delay, in the hope that the problem will disappear, and then by compromise to buy off pressures. “The best of them hope that once all the pressures are diffused and set against each other, they will have some freedom to move the university in some direction.”<sup>19</sup>

Tushnet implies that administrators cause the PC problem in two related ways. First, because they lack a vision for higher education, they do not delineate clear boundaries between permissible and impermissible behavior; they are willing to compromise with those who would politicize the university. Second, they do not respond quickly or unequivocally to incidents of improper harassment. Both of these are symptoms of the underlying ailment—that administrators are bureaucrats and managers rather than educators. Tushnet’s remedy is

administrators who *have* a vision of the university—any vision at all . . . . The examples [that] come to mind of institutions whose administrators do have a vision—Hillsdale College on the right, New College on the left—are small ones. Perhaps the large multiversities are so far removed from being able to fulfill the classical ideal of the university that we cannot expect more vision from their managers.<sup>20</sup>

In Tushnet’s two exemplary institutions, political orthodoxy is not a problem because it is part and parcel of the mission. What is important is singleness of vision:

In a society with many, potentially diverse institutions of higher education, what we need are universities that forthrightly take a position [with respect to the moral formation of students and the pursuit of disinterested scholarship]. Some could decide to take an extremely active role in moral formation; they might then adopt stringent ‘hate speech’ codes. Others . . . might . . . treat their campuses as free fire free speech zones. What matters, though, is that, once the institutions have taken a position, they defend it vigorously and without embarrassment as embodying a permissible vision of the university in contemporary society.<sup>21</sup>

Political orthodoxy only becomes a problem in what I will call (ideologically as well as religiously) “nonsectarian” institutions, that is, most major research universities and many liberal arts colleges. A nonsectarian institution abjures institutional orthodoxy in the interest of aca-

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17. *Id.* at 157-58. I can’t help but wonder how Tushnet would react to administrators who did *not* defer to faculty autonomy.

18. *Id.* at 153-54.

19. *Id.* at 161.

20. *Id.* at 162 & n.119 (emphasis in original).

21. *Id.* at 162-63.

democratic freedom for the heterodox views of its faculty and students, and it often has multiple missions, including the moral formation of students as well as the pursuit of knowledge.

Although Tushnet gives almost no concrete examples of how these nonsectarian institutions should be administered,<sup>22</sup> his capsule history of the contemporary academy<sup>23</sup> provides a clue. The tragic heroes of Tushnet's history are the Marxist scholars who "rejected the administrators' characteristic way of thinking—compromise and balance—in favor of a vision of the university as a place where disinterested scholars pursued the truth."<sup>24</sup> He presents the distinguished Marxist historian, Eugene Genovese, as an exemplar,<sup>25</sup> and cites Genovese's adulatory review of D'Souza's *Illiberal Education* with strong approval.<sup>26</sup> Tushnet finds it a "hopeful statement" on the PC controversy,<sup>27</sup> and he "agree[s] with the main point" of the review.<sup>28</sup>

Actually, it is not easy to discern a "main point" in Genovese's broadside attack on the contemporary university nor exactly what it is that Tushnet agrees with. Is it the supposed evils of affirmative action ("many black students who cannot compete receive passing grades while

22. He criticizes the President of Dartmouth for not coming quickly and publicly to the defense of a professor attacked by the *Dartmouth Review*. See Tushnet 156. In his lengthy discussion of the Harvard Law School incident, however, he does not indicate whether the administration should have (a) sided with the student critics (who, Tushnet says, were justified and did not behave inappropriately), (b) defended the professor, (c) done something else, or (d) done nothing at all. In the case of a lecturer not reappointed for political reasons by the Bennington College English department (see note 13, *supra*), he does not contradict the president's statement that the decision was appealed and that the appropriate committee acted "promptly and decisively" to reverse the decision.

23. Because Tushnet's history may not be familiar or obvious to many readers—it is not to me—I quote it at some length:

The radical students of the 1960s argued that the multiversity had become politicized. As they saw it, universities had abandoned their mission of disinterested truth-seeking to serve the immediate interests of the political interest groups of the larger society. The argument then developed in two divergent directions. First, a Marxist-influenced strand, confident that the disinterested pursuit of truth would liberate the oppressed, tried to restore what it presented as the university's traditional mission, that is, to "de-politicize" it. Second, a strand that I associate with populism and progressivism tried to shift the political direction of the university, to "re-politicize" it in the correct way.

Tushnet 159-60.

Today's administrators are indeed children of the 1960s, but they were not the radicals on campus; they were the centrists. They learned . . . their lessons about universities from Clark Kerr, former president of the University of California, who clearly articulated the view that the modern university was simply a political enterprise . . .

Tushnet 158-59. In Tushnet's story, the Marxists lost, and the interests of the progressive re-politicizers and the administrators as managers coalesced: "Not that administrators welcomed the re-politicizers, who, after all, did disrupt systems of administrative behavior that had settled into place. Rather the re-politicizers were people administrators could deal with, as the [Marxist] restorationists were not." *Id.* at 161.

24. *Id.* at 161.

25. *Id.* at 160 n.115.

26. Eugene Genovese, *Heresy, Yes—Sensitivity, No*, THE NEW REPUBLIC, April 15, 1991, at 30.

27. Tushnet 163.

28. *Id.* at 141 n.52.

being treated with contempt”<sup>29</sup>)? Or “the alarming assault on Western civilization—on the civilization [itself], not just on the courses on the civilization”?<sup>30</sup> Perhaps it is “Genovese’s First Law of College Teaching”—“[a]ny professor who, subject to restraints of common sense and common decency, does not seize every opportunity to offend the sensibilities of his students is insulting and cheating them, and is no college professor at all.”<sup>31</sup> (Though Tushnet applauds this ideal, he observes that Genovese “underestimates [its] pedagogic difficulties.”<sup>32</sup>)

Most likely—based on Tushnet’s similar though more toned-down rhetoric—the main point is “Genovese’s Law of Liberation Through Counterterrorism.” Remarking that “[a]dministrators capitulate to terrorists primarily because they are damage control experts obsessed with the smart move” and that a “university president who negotiates with storm troopers who have occupied any part of his campus, much less his own office, should be fired,” Genovese proposes: “In every such political struggle honorable men and women can defeat terrorism only by unleashing counterterrorism against cowardly administrators and their complicit faculty.”<sup>33</sup> He recommends that defenders of the true university should “trash them as front men for a new McCarthyism, as hypocrites who preach diversity and practice totalitarianism, as cowards, whores, and rogues.”<sup>34</sup>

I have been a law school dean for the past five years. A reader will therefore understand if I am somewhat alarmed by this exhortation, and also will take my response with a grain of salt. Yet the missions of the university and hence the tasks of its administrators strike me as considerably more complex than Tushnet and Genovese imply. While I haven’t (yet) been sat-in on, let me offer some examples from my experience, which I think are typical of the issues that face a contemporary administrator. These include dealing with the aftermath of Derrick Bell’s painful experience as a visiting professor at Stanford Law School;<sup>35</sup> a peaceful but noisy student march through the Law School and Faculty Club to protest the faculty’s failure to hire a woman visiting professor; the Marine Corps’ attempt to recruit students by placing flyers in their Law School (not U.S.) mailboxes in violation of the Placement Office’s nondiscrimination policy;<sup>36</sup> and the circulation of a petition during a professor’s

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29. Genovese, *supra* note 26, at 31.

30. *Id.* at 32.

31. *Id.* at 33.

32. Tushnet 141 n.53.

33. Genovese, *supra* note 26, at 32.

34. *Id.*

35. See [Stanford] Campus Report, Dec. 2, 1987, at 15; Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1767 n.87 (1989).

36. “Stanford Law School makes its facilities and services open only to employers who do not discriminate on the basis of age, religion, disability, ethnic background, national origin, gender, race, sexual orientation, or veteran status.” The Marine Corps refuses to consider gay and lesbian

class urging the faculty not to extend an offer to a (different) visiting minority professor—where many students thought that a white visiting professor would not have been the object of such conduct.

I approached each of these situations with the mindset of a manager.<sup>37</sup> Unlike Tushnet, however, I do not regard this as damning. Contrary to his and Genovese's unitary—some might say simplistic—notion, a non-sectarian college or university embraces principles that compete with each other, and their accommodation often calls for the exercise of judgment and managerial skill. Not expediency, but a commitment to the multiple values of the university, calls for trying to reconcile rather than choose among those values.

For example, the same institution that must protect free academic discourse about issues of race and sexual orientation may also be committed to making the campus a welcoming environment for students of color and gay and lesbian students; and this, in turn, requires protecting members of those groups against certain forms of harassment. Recently, a law student entered an undergraduate dormitory at Stanford and screamed homophobic epithets. There was much public discussion of the episode, of which the greatest part consisted of condemnations of the student's behavior. The right thing for the Administration to do was by no means obvious. The student's conduct was arguably punishable under Stanford's "hate speech" code,<sup>38</sup> and by prosecuting the student the University would manifest a clear commitment to protecting gay and

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students for employment. *See also* Association of American Law Schools (AALS), Executive Committee Regulation 6.19.

The decision to adopt, or not to adopt, a nondiscrimination policy itself calls for an accommodation of the multiple aims of the university. In explaining the University of Chicago's decision not to require more of the military than was demanded by public law, President Hanna Gray quoted the University's 1967 "Kalven Report" (chaired by law professor Harry Kalven, Jr.):

The instrument of dissent and criticism is the individual faculty member or the individual student. The University is the home and sponsor of critics; it is not itself the critic. . . . A university, if it is to be true to its faith in intellectual inquiry, must embrace, be hospitable to, and encourage the widest diversity of views within its own community.

THE UNIVERSITY OF CHICAGO CHRONICLE, Oct. 11, 1990, at 2. (The University of Chicago nonetheless granted an exemption for its law school in order to comply with the nondiscrimination policy of the AALS, an accrediting agency. *Id.*)

Though I agree with this eloquent statement of the nature of a nonsectarian university, I do not view Stanford's nondiscrimination policy as criticism of or dissent from military policy, but rather as a reflection of the view that the services of the School's placement office should be available only to employers who are willing to consider each of our students on his or her individual merits. No matter how one resolves the matter, however, one cannot avoid balancing some fundamental competing values.

37. As a matter of interest: I invited Derrick Bell to campus and publicly apologized on behalf of the School; did nothing at all with respect to the student march; did not remove the Marine Corps flyers but put notes in the students' boxes reaffirming the nondiscrimination policy; and made no public statement about the petition but worked with the dean of students to organize several meetings where the students in the visiting professor's class (including those who initiated the petition) talked through the issues.

38. The matter is uncertain because it is not clear whether the epithets were directed to particular individuals, as specified by the code. Of course, even when behavior is plainly unlawful—for example, a sit-in that, though peaceful, amounts to a criminal trespass—punishment may be educationally or communally counterproductive, or just overkill.

lesbian students against harassment. But, though screaming epithets is outside the core of discourse protected by academic freedom, his prosecution might be misinterpreted by other students and chill the expression of views that lie within the core. Moreover, his prosecution would have fed into the student's self-styled role as a martyr for civil liberties and would likely have distracted members of the community from considering their own response. In the event, the President of the University decided not to prosecute, though he publicly condemned the student's behavior. I joined in a strong but civil statement signed by over four hundred Law School students, faculty, and staff.<sup>39</sup> I believe these responses made gay and lesbian students feel more accepted and protected than the Administration's punishment of the student could have.<sup>40</sup> But, of course, widespread condemnation can also silence opposing viewpoints. And while silence in such a situation may be read as a lack of support for the victims, any expression of judgment by a senior administrator is inherently coercive.<sup>41</sup>

A reader may or may not think that the University responded appropriately. But my point is that the situation, quite typically, demanded the accommodation of competing concerns. Contrary to Tushnet's assertion, keeping faith with the university's multiple values often calls for nonintervention, delay, mediation, and other management-like strategies. Of course, administrators sometimes just shilly-shally. They are no less prone than anyone else to confusion, indecisiveness, lack of courage, the desire to please and appease, or just plain stupidity. But much of the behavior that Tushnet regards as a sign that administrators are lacking in vision indicates, rather, that universities have complex and sometimes internally competing missions.

Like Tushnet, I sometimes wish that academic life were simpler. But scapegoating won't make it so. Faculty and administrators share in the governance of the university and thus share responsibility for protecting academic freedom while opening their institutions to an increasingly diverse and demanding population.<sup>42</sup> If we are serious about this project, we must acknowledge its complexities and be willing to live with some ambiguity as we work toward its manifold goals.

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39. "We . . . were saddened, angered, and embarrassed to learn of the expressions of hatred that were inflicted on this campus . . . We have been reminded that ignorance can survive education and escape formal repercussions. But as members of this community, we condemn bigotry in any form." STANFORD DAILY, Feb. 11, 1992.

40. BGLSA, the Bisexual, Gay, and Lesbian Law Students Association, sent a letter of thanks to the entire School. So, too, did the Black Law Students Association.

41. I also met with the student to say that I regarded him as a full member of the community and would work with him to help him succeed in it. After all, he is a *student*, still learning about himself as well as the law; and when the dust settles, he and those he offended will continue to have to live with each other.

42. The responsibility is also shared because faculty and administrators are often the same people, moving from one role to another or performing both at the same time. "Hypocrite lecturer! . . ." (*But see* Tushnet 141, on The Politics of Literary Allusions.)

