

Faculty Conference Proceedings

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2017 FIRE Faculty Conference Proceedings

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Introduction

The inaugural Foundation for Individual Rights in Education (FIRE) Faculty Conference took place in Dallas, Texas, from October 5-7, 2017 at the University of North Texas College of Law. The conference brought together approximately sixty faculty members from various disciplines and institutions to present and discuss research related to academic freedom and free expression on university and college campuses in the United States. The conference proceedings in this document contain both original research and critical narratives on a wide variety of topics of interest to college and university faculty.

Included in the research presented here is work by April Kelly-Woessner, which shows the declining political tolerance among college-aged individuals and presents solutions for how university faculty and administrators may reverse that decline. Also included is Joseph Yockey's paper on Bias Assessment and Response Teams, which argues that while the goals of these programs are legitimate, policy and governance missteps justify worries about speech suppression on campus. David Hodge's paper calls for increased diversity of metaphysical outlook and religious understanding in the discipline of psychology—for the benefit of patients and researchers. David Demers describes his experience as a faculty member whose free speech rights were challenged on campus, and his attempts to sue for vindication of those rights. And finally, Kathleen Bartzen Culver and Jason Shepard's work addresses the impact of politicized responses to campus controversies. Each paper focuses on a narrow research topic or experience but raises broader questions about the status of free speech and academic freedom on campuses today.

Some of the papers in this volume are presented largely as they were in October 2017, while others have been revised in light of feedback received at the conference or are adapted from versions that are to be published in

forthcoming journal issues. FIRE thanks all of the authors published here for their participation and enthusiasm in presenting their work. Readers are invited to contact the authors directly with questions or feedback related to the work published here.

As an organization, FIRE is dedicated to advancing and defending freedom of speech, due process, academic freedom, and civil liberties in institutions of higher learning. We hope the publication of this volume will contribute to both the academic research and the national conversation taking place on these topics. We welcome feedback or questions from anyone—faculty, students, or administrators—interested in working with FIRE to protect and sustain academic freedom and free speech on campus. Please contact us at facultyoutreach@thefire.org.

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The Silencing Generation: Explaining the Decline in Political Tolerance Among America's Youth and its Impact on Higher Education

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In his critique of American society, Alexis de Tocqueville observed that American culture showed signs of widespread intolerance, "I know of no country in which there is so little independence of mind and real freedom of discussion as in America... In America the majority raises formidable barriers around the liberty of opinion" (Tocqueville 1835 [2000]).

Recent events on college campuses appear to lend credence to Tocqueville's observation, suggesting that not much has changed. Yet for the past sixty years, social scientists have been fairly optimistic about America's growing support for free expression and democratic rights. Since Samuel Stouffer's (1955) study of America's intolerance toward communists, social scientists have optimistically concluded that younger people are consistently more tolerant than their parents and that the country will become more tolerant over time due to generational replacement.

I present evidence from the General Social Survey (GSS) that the relationship between age and tolerance has recently reversed. For the first time since we began to study political tolerance, young people are now less tolerant than their parents. I argue that this increase in youth intolerance is the result of (1) reduced exposure to intellectual diversity and (2) declines in both civic knowledge and confidence in civic skills. I conclude with a discussion on the consequences of these trends for higher education, followed by suggestions for reversing the growth in political intolerance.

The observation that young people are less politically tolerant than their parents may surprise some people. In fact, the youth is frequently praised by those on the Left for

their exceptional tolerance. By this, people mean that young people are more accepting of groups of people who have been historically subject to discrimination. For example, young people are more supportive of gay marriage and other homosexual rights, and have more positive attitudes towards racial and religious minorities.

This, however, is not what social scientists mean by political tolerance. Political tolerance is not merely having positive feelings towards disenfranchised groups. Rather, political tolerance is a measure of how one treats members of those groups one dislikes or finds threatening. Tolerant people allow members of their disliked groups to fully exercise their democratic rights and participate in the democratic process.

Tolerance been traditionally measured on the General Social Survey (GSS) by asking people whether they would (1) allow members of unpopular groups to speak in one's community, (2) allow members of unpopular groups to teach a college course, or (3) support removing books by members of these groups from the public library. The GSS uses a fixed-group approach, meaning that the survey asks about a specific list of controversial groups, including communists, atheists, homosexuals, militarists, racists, and radical anti-American Muslims. An alternative approach, the "least-liked" approach, asks respondents to identify their own least-liked group and then measures their willingness to extend rights of speech and expression to those particular people.

Samuel Stouffer's 1955 study revealed, at the time, that Americans had generally negative attitudes toward communists. Large numbers of survey respondents would not allow communists to speak in their communities or exercise other democratic rights.

In Stouffer's work and in the research that followed, political intolerance was consistently treated as a major social problem. James Gibson (2006) concluded that political intolerance is studied so widely because "it is one of the most pressing problems in the world today." Intolerance is a result of fear and threat. It promotes political oppression and creates a "culture of conformity" that limits political freedom for all groups. According to Gibson (1992):

Without a culture that legitimizes political opposition, those outside the centrist mainstream have few political opportunities. Ultimately, the political system loses its

democratic vitality. If this is a consequence of mass political intolerance, then, certainly, intolerance matters.

Youthful Tolerance

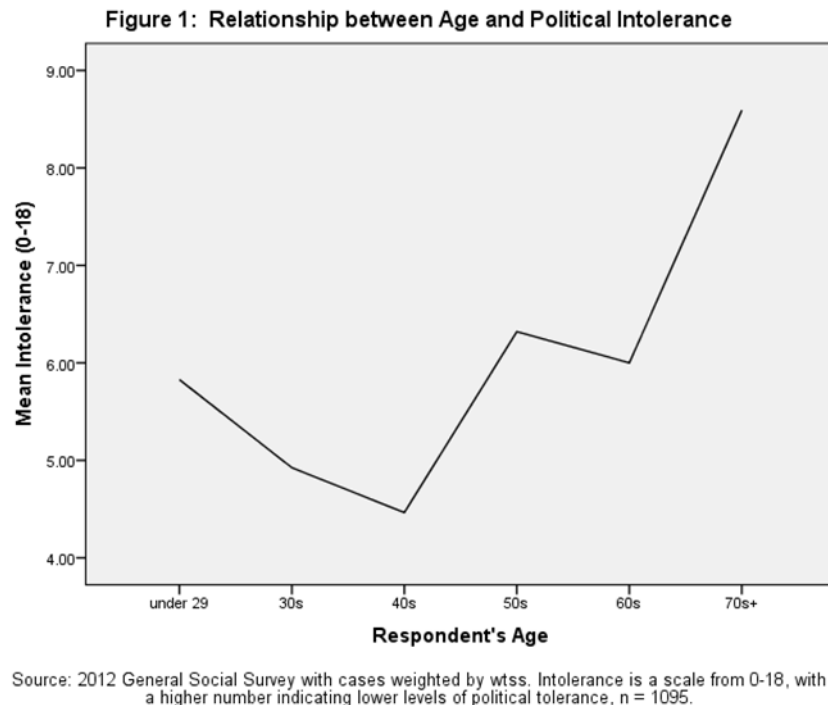
In his 1955 study, Stouffer finds large cohort differences in political tolerance. For example, young people were more willing to let communists and other groups speak than were older cohorts. In fact, the relationship between age and tolerance was clearly linear, with each generation being more tolerant than the one before it. This was true despite young people's more negative attitudes towards some groups. For example, young people had harsher views towards racists than their parents and grandparents, but were still more willing to let racists speak.

Studies that followed reached consistently similar conclusions about the relationship between age and tolerance. Cutler and Kaufman (1975) concluded that younger people were more tolerant because they were more liberal. Nunn, Crocket and Williams (1978) concluded that higher education levels, greater urbanization, and greater diversity of experience led young people to be more tolerant. Sullivan, Piereson and Marcus (1982) again found that young people to be more tolerant than previous generations.

Using the same GSS data as these previous studies, I find that this is no longer the case. In recent years, the relationship between age and tolerance appears to have changed. For the first time since we started measuring political tolerance, young people are no longer more tolerant than their parents.

Figure 1 shows the relationship between respondent's age and a political intolerance scale that ranges from 0 (most tolerant) to 18 (least tolerant). The scale is comprised of three tolerance questions on the General Social Survey, each of which is asked for six controversial groups: racists, radical Muslims, homosexuals, communists, militarists and atheists. For each group, respondents were asked whether they would permit a member of this group to speak in their community, whether they would allow a member of this group to teach at a college or university, and whether they would support efforts to remove a book from the public library that was written by a member of the group. Each of these responses

has been coded as 1 = intolerant response (removing the book, not allowing speech, and not allowing teaching) or 0=tolerant response. A person who is intolerant on all three measures of all six groups would score an 18 on the mean intolerance scale.



Respondents in their 40s have the most politically tolerant scores. The relationship between those in their 40s and older respondents shows the familiar trend between age and tolerance, with younger respondents being more politically tolerant than their parents. However, for those under 40, the curve changes direction. People in their 30s and 20s are no longer more politically tolerant than their parents. The difference in mean intolerance between those in their 40s ($M = 4.60$, $SD = 4.93$) and those under 29 ($M = 6.14$, $SD = 4.58$) is statistically significant; $t(424) = 3.32$, $p = .001$, marking a clear reversal in previously observed trends (see, for example, Sullivan, Piereson and Marcus (1982), p. 135).

Explanation #1: Reduced exposure to intellectual diversity

When Samuel Stouffer observed that education contributed to political tolerance, he argued this was because education exposed people to political and intellectual diversity

(1955). Since then, a number of studies have provided evidence for the positive effect that exposure to intellectual diversity has on political tolerance levels.

In a study of community political homogeneity, Campbell (2006) finds that politically homogeneous communities establish strong social norms which foster civic participation and political order. However, this social cohesion comes at a cost. Adolescents in politically isolated communities also have lower levels of political efficacy – the belief that one has the skills necessary to be engaged in politics – and lower levels of political tolerance. In fact, the political diversity of one’s community is a stronger predictor of both efficacy and tolerance than are traditional measures of community diversity centered on race, ethnicity, or income. Campbell concludes that “commonality is a double-edged sword” as homogeneity has the potential to “breed intolerance for people who fall outside the boundaries of whatever the homogeneous group holds in common” (p. 122).

The positive relationship between political tolerance and exposure to diversity is supported by a number of other studies. People who encounter differences of opinion in their political conversations are more politically tolerant than those who discuss politics with like-minded people (Mutz 2002, 2006; Mutz and Mondak 2006; Pattie and Johnson, 2008). Political diversity within one’s peer group also contributes to perceptions of political freedom and a greater willingness to engage in political discussion (Gibson 1992).

Since people prefer to self-isolate into homogeneous political groups (Mutz 2006), exposure to political disagreement may be more likely in environments where one cannot easily choose their discussion partners. For many people, Mutz and Mondak (2006) argue that people are more likely to encounter dissonant opinions in the workplace. In Stouffer’s (1955) view, educational environments increased tolerance by increasing exposure to people with different backgrounds and perspectives.

At the college level, the extent to which students are exposed to political and intellectual diversity likely varies by institution. For example, Abrams (2016) finds differences in the ideological diversity of college professors by region, with universities in the Northeastern United States being the most liberal. While liberals outnumber conservatives in academia by a margin of 6 to 1, Abrams finds the imbalance in New

England to be approximately 28 to 1. Abrams also argues that political diversity in higher education has declined over time.

This means that the positive benefits of education that have been observed in the past will decline as higher education becomes more ideologically uniform. Thus, one of the solutions to the growth of intolerance among America's young people is to increase viewpoint diversity within the academy.

Explanation #2: Decline in civic knowledge

In January 2016, the American Council of Trustees and Alumni (ACTA) issued a report showing low levels of political and civil knowledge among America's youth. The report, titled "A Crisis in Civic Education," surveys over 1,100 colleges to reveal that only 18% require students to take a course in American government or American history. Accordingly, the report finds that college graduates lack basic knowledge of American government. For example, more than half of college graduates don't know how a constitutional amendment is ratified and 40% don't know that Congress has the power to declare war. Almost half of college graduates can't properly identify the terms of office for members of Congress.

The problem of low civic knowledge isn't isolated to college students. Last month, CNN reported the results of a poll from The University of Pennsylvania's Annenberg Public Policy Center, with the headline "Americans know literally nothing about The Constitution."

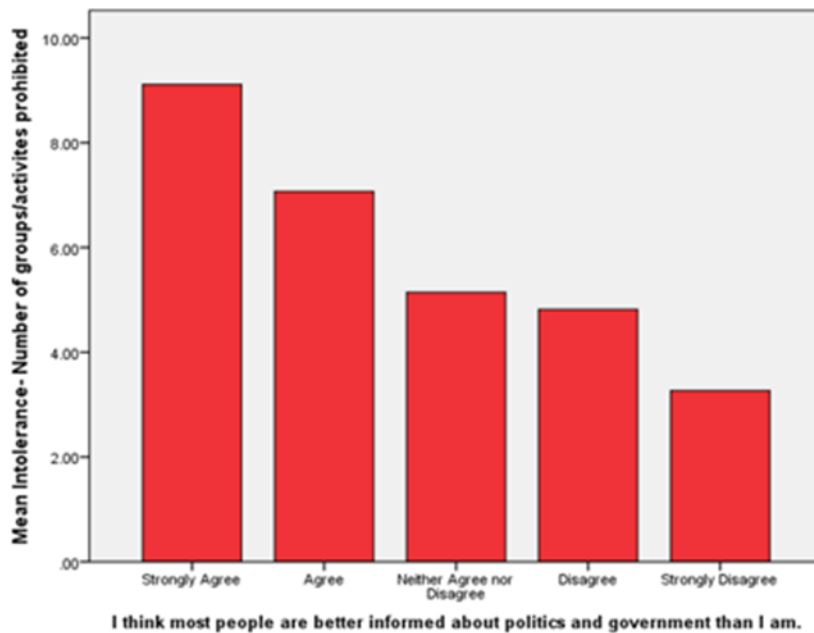
There is evidence that political expertise leads to greater tolerance. As acrimonious as political dialog is in Washington, political elites have historically shown high levels of support for democratic norms and exercise considerable tolerance compared to the masses (Sullivan et al. 1993, Nunn et al 1978; McClosky & Brill 1983). While they may not engage in polite discourse, elites are nonetheless protective of discourse.

Political intolerance is also related to psychological insecurity and poor self-esteem (Sullivan et al, 1982; McClosky and Brill 1983). Insecure people more easily see others as a threat and perception of threat is a consistent predictor of political intolerance. Similarly, a lack of political understanding may lead to intellectual insecurity, as people lose

confidence in their ability to market and defend their ideas. Evidence from the General Social Survey supports this theory.

Figure 2 below is based on the GSS data from 2012, using the same measure of political tolerance as described for Figure 1. The x-axis is a measure of one’s agreement with the statement, “I think most people are better informed about politics and government than I am.” On a scale of 1-5, a higher number indicates greater confidence in one’s own political knowledge. The relationship is true across all political ideologies.

Figure 2: Relationship between tolerance and confidence in civic knowledge



Source: 2012 General Social Survey, n= 568.

The relationship supports the hypothesis that those who are least confident in their political knowledge are most likely to deny others’ rights of political expression. People who rate their own level of political knowledge low are consistently less tolerant than those who are more confident in their political knowledge (Pearson’s correlation coefficient of - 2.65, p. <.001). The relationship holds even after controlling for traditional predictors of tolerance, such as education, gender, and ideology.

As civic knowledge declines, we will likely see a growth in political intolerance. Civic knowledge provides one with confidence to engage in dialog and debate. People who have

high civic knowledge, relative to others, can effectively counter ideas with which they disagree. Those who lack this confidence choose instead to silence others.

Implications for Higher Education - The Least Tolerant Environment

Declines in political tolerance have direct negative impacts on America's colleges and universities. Despite the ideal that higher education serve as a "marketplace of ideas" and a space for the intellectual pursuit of truth, the public is generally intolerant towards college professors and distrusting of their political agendas.

In fact, of the measures of political intolerance included in the General Social Survey, those directed at the rights of college professors consistently produce the lowest measures of tolerance. For example, when it comes to tolerance of atheists, only 23% of GSS respondents would advocate removing an atheist's book from the library and 22% would forbid them to speak in public. But a higher number of people, 33% of respondents, would not allow an atheist to teach college. Similarly, 50% of respondents would remove a book by a radical Muslim from a public library, 56% would forbid them from speaking in public, and 67% would prohibit them from teaching college. This pattern is consistent across the different groups; tolerance for controversial ideas among college professors is consistently lower than the other measures.

This distrust of academia is nothing new. During the McCarthy era, academics were subject to intense public scrutiny and forced to sign loyalty oaths. However, in their comprehensive study of social scientists at this time, Lazarsfeld and Thielens (1958) found that many academics perceived the environment on campus to be relative safe compared to the outside world and that they were "willing to take a stand on campus as long as the matter could be kept within its confines." (p.99)

The atmosphere for academic freedom is remarkably different today. Social media makes it nearly impossible for professors to confine controversial remarks to campus. As political tolerance among the youth declines, classroom discussions become political minefields. In recent examples, both liberal and conservative professors have been subject to intense public demands that they be fired, after students took offense to their comments and made a case against them on social media.

Yet America's colleges and universities are not creating intolerance. In fact, people with a college education are still consistently more politically tolerant than people without one. With that said, higher education is charged with finding solutions to problems, even those that it does not create. The evidence presented here suggests that colleges and universities have at least two tools with which to help change the tide of growing political intolerance.

First, institutions of higher education can commit themselves to creating space for intellectual diversity. This does not mean bringing to campus the most outrageous, bombastic conservatives and allowing them to hurl insults at students. In fact, this sort of exposure to "diversity" is probably counterproductive to the goal of fostering political tolerance. Rather, colleges need to design space for serious intellectual debate. This means introducing students to ideas that challenge their own and teaching them to first seek understanding. Productive intellectual dialog cannot begin with moral outrage or offense. Unfortunately, colleges have too often encouraged outrage by committing to specific political positions rather than fostering genuine political dialog.

Second, institutions of higher education need to recommit to the study of civics and citizenship. Students who lack an understanding of the political process are more inclined to shut down debate than those who are confident in their political knowledge. There is already some positive movement in this direction. The Colorado Board of Regents, for example, is currently reviewing a bipartisan proposal to require a course on The Constitution and "civic literacy," with the goal of teaching students to engage in civil discourse.

Overall, institutions of higher education need to reaffirm their commitment to a vibrant marketplace of ideas. This is not an argument for intellectual pluralism. All ideas are not created equal. Yet, silencing ideas is counterproductive to both the mission of higher education and to the practice of deliberative democracy. It is also counter to the goal of fostering political tolerance. The consequences of political intolerance on democratic vitality are well documented. Silencing undesirable or offensive groups reduces political freedom and voice for everyone, including the vulnerable groups one aims to protect.

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Bias Response on Campus

Joseph W. Yockey*

This article also appears in the *Journal of Law & Education*, Volume 48, Issue 1 (forthcoming 2019).

Bias Assessment and Response Teams (BARTs) are becoming ubiquitous at universities in the United States. These programs rely on administrative personnel to investigate and intervene in alleged bias incidents on campus. BART proponents maintain that the programs play an important role in promoting safety, diversity, and inclusivity. Critics, on the other hand, worry that the investigatory and regulatory nature of BARTs—together with their often-vague definitions of actionable bias—will silence debate and chill student and faculty expression.

This article assesses BARTs in light of these concerns. It finds that while the goals of BARTs are legitimate, most programs suffer from policy missteps that justify fears of speech suppression and skepticism about their utility. In response, the article suggests that universities should reinvent bias response strategy through greater reliance on principles-based and meta-regulatory governance. By doing so, universities can create safe and supportive learning environments while still ensuring that students and faculty remain free to engage in critical, open inquiry.

INTRODUCTION

Imagine four students, each at a different university in the United States. Student A happens to be jogging across campus during winter. She rounds a corner near a residence hall and observes a sculpture made of snow. As she gets closer, she sees that the sculpture is in the shape of a penis.¹

Student B does not run by a sculpture, but she does come across a group of her peers at a table displaying cookies, cupcakes, and other pastries. The group is conducting what it calls an “Affirmative Action Bake Sale,” which entails charging different prices based on the

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¹ This example is based on an incident reported at the University of Michigan. Ron Dicker, *Someone at UMich Reported a Snow Penis as a ‘Bias Incident’*, Huffington Post, Feb. 26, 2016, https://www.huffingtonpost.com/entry/someone-reported-a-snow-penis-as-a-bias-incident_us_56d07a3fe4b03260bf7685d7.

race or ethnicity of each customer. Asians must pay more than Caucasians, and Hispanics must pay more than Native Americans.²

Student C observes a group of African American students walking quietly together in front of the student union. Some of the students in the group carry placards. A few of the placards contain the following statement: “All lives don’t matter...White lives don’t matter...Blue lives don’t matter...Black lives matter.”³

Student D is in an undergraduate political science class. During a class discussion on immigration policy, one of her classmates expresses strong support for the construction of a wall between the border of the United States and Mexico. A few days later, another student in the class argues that consumers should boycott products made in Israel to show support for Palestinian causes.⁴

The students who encounter these scenarios could respond in any number of ways. They might consider them distasteful, distressing, humorous, insightful, frightening, or inconsequential. They might tell a campus police officer about what they see or hear. They might notify the Dean of Students office. They might do nothing. Increasingly, though, students are choosing another option: reporting these kinds of incidents to a Bias Assessment and Response Team (BART).

BARTs operate at roughly a third of the universities in the United States, and the number is growing. The programs are known by a variety of names—Bias Response Team, Bias Education Team, Inclusive Community Response Team, Campus Climate Response Team—but they work much the same from school to school. In essence, BARTs investigate, assess, and intervene in reported bias incidents on campus. If a student encounters a penis-shaped snow sculpture or feels offended by a classroom comment, for example, she can report the matter to a BART through an online reporting portal. From there, the BART has a range of options, including referring the matter to law enforcement or opening a

² This example comes from the University of Texas at Austin. University of Texas at Austin, Campus Climate Response Team, Campus Climate Trend Report, 2013–2014, at 20 (2014).

³ This example is based on an incident reported at Texas Tech University. Foundation for Individual Rights in Education, Bias Response Team Report 15 (2017).

⁴ These examples are based on incidents reported at Ohio State University, Fordham University, and Connecticut College. See Foundation for Individual Rights in Education, *supra* note 3, at 16–17; Dina Sayedahmed, Students Await Judgment in Suit Over Fordham University Banning of Pro-Palestine Club, *The Intercept* (Jan. 7, 2018), <https://theintercept.com/2018/01/07/palestine-israel-fordham-sjp-lawsuit-bds/>.

disciplinary investigation. The BART might also question a reported speaker about an incident, offer support to the reporting party, or facilitate some form of mediation between the speaker and the reporting party.

For BART proponents, the programs serve to reinforce institutional commitments to diversity and inclusivity. They believe that bias reporting and investigation protocols will enable schools to prevent discrimination and cultivate educational environments free from hostility. Universities now approach these longstanding and important goals with greater urgency in light of recent high-profile anti-discrimination protests and the ever-intensifying competition to recruit students.

But BARTs do carry risks. The most immediate risk relates to speech-related chilling effects. Universities exist to advance knowledge through open and critical inquiry. However, serving that purpose becomes more difficult when students and faculty feel reluctant to challenge orthodoxy or share unpopular opinions. The worry with BARTs is that the risk of facing an investigation into one's reportedly biased speech will discourage certain avenues of intellectual pursuit. Students may elect silence over the discussion of controversial topics. Faculty may alter their pedagogical methods or research agendas to eliminate any chance of causing offense.

The often-vague definitional and jurisdictional features of BARTs reinforce these fears. Many BARTs define actionable bias as any comment or incident that makes someone angry, afraid, or alarmed, as well as any remark that someone perceives as derogatory, negative, or insensitive on account of race, sex, ethnicity, religion, and so on. These definitions can obviously cover speech that is truly threatening or harassing, but they are also flexible enough to cover speech occurring in legitimate scholarly debate, political satire, and artistic expression. Moreover, BARTs generally provide team members with wide enforcement latitude, generating fears of inconsistent outcomes, process abuse, and the possibility that personnel will engage in viewpoint discrimination along the lines of their political or ideological whims.

The goal of this article is to analyze the question of whether universities can balance the need to mitigate bias with the parallel need to promote free inquiry and prevent self-censorship. Other commentators discuss BARTs from the perspective of First Amendment

rights or from the perspective of academic freedom and pedagogical philosophy more generally.⁵ This article approaches the bias response debate from a new and narrower angle: institutional governance. It suggests that the perceived tension between student safety and free speech arises from how universities structure and monitor their decision-making processes. The biggest problem—which extends beyond BARTs—is that many universities retreat from commitments to free inquiry as they become more fragmented, less accountable, and increasingly prone to top-down rulemaking that ignores the insights of students and faculty on the ground. Accordingly, the article proposes a shared-governance pathway capable of re-calibrating bias response strategy to address those issues and complement the needs and values of all university constituents.

The analysis proceeds in four parts. Part I describes the structure of BART programs. It discusses the composition of BARTs, how BARTs define bias, how BARTs respond to bias, and examples of individual bias incident reports. Part II outlines the arguments in support of and against BARTs. Part III sets forth potential reforms to advance the objectives of bias response strategies while ameliorating the risks that they will chill speech and inquiry. It focuses on several soft law approaches to private ordering, including greater reliance on principles-based governance, clearer rules, improved internal coordination, ongoing multi-stakeholder engagement, and more meaningful transparency and training efforts. Part IV concludes.

I. WHAT IS A BIAS ASSESSMENT AND RESPONSE TEAM (BART)?

A recent survey by the Foundation for Individual Rights in Education (FIRE) found that approximately 230 colleges and universities in the United States feature Bias Assessment and Response Teams (BARTs).⁶ This total encompasses thirty percent of all four-year institutions and represents an enrollment of 2.8 million students.⁷ It is difficult

⁵ See, e.g., Foundation for Individual Rights in Education, *supra* note 3, at 20-23; Jeff Aaron Snyder & Amna Khalid, The “Rise of Bias Response Teams” on Campus, *New Republic* (Mar. 30, 2016), <http://https://newrepublic.com/article/132195/rise-bias-response-teams-campus>.

⁶ Foundation for Individual Rights in Education, *supra* note 3, at 4. Of the 232 schools identified in the FIRE Report, 143 are public institutions, and 89 are private. *Id.*

⁷ Foundation for Individual Rights in Education, *Spotlight on Speech Codes 2018 FIRE* (Dec. 19, 2017), <https://www.thefire.org/report-campus-speech-codes-decline-for-10th-straight-year>

to pin down the first school to create a BART, but proliferation of the model began during the late 2000s and continues to this day.⁸ This part describes the general structure and composition of BARTs, as well as the methods and procedures that BARTs utilize. It also provides examples of recently filed BART reports and disclosures.

A. Structure and Composition

Though their specific names and mandates vary slightly from school to school, all BART programs follow the same basic structure: they institute a formal process whereby students, faculty, staff, and community members can report incidents of bias to an administrative body within the school.⁹

The definition of bias under each program generally tracks the language of federal anti-discrimination statutes. Thus, at a minimum, every BART program provides that reportable bias incidents include speech or conduct made with animus toward a person based on age, sex, race, nationality, ethnicity, or religion.¹⁰ Most programs further expand their definition of bias to encompass negative speech or conduct relating to a person's military service, immigration status, sexual orientation, gender identity, marital status, disability, political affiliation, or socio-economic status.¹¹ Some schools provide examples of reportable bias incidents. For instance, the University of Wisconsin-Madison states that

Incidents of bias can include, but are not limited to: slurs, degrading language, epithets, graffiti, vandalism, intimidation, symbols, and harassment; that are directed toward or affect the targeted individual or group. Incidents of bias contribute to a hostile campus environment and

⁸ I first became aware of BARTs in early 2016 after serving on a joint faculty-staff advisory committee at the University of Iowa charged with developing the school's BART policy. That committee is no longer active, but I have endeavored to stay current on issues relating to BARTs ever since. My experience on the faculty and as a member of the University of Iowa's Faculty Senate and Faculty Council also continues to inform my thinking on the subject. This article is informed by my work in university governance, but it is not based on any confidential information shared with me, and all comments and opinions are my own.

⁹ Other names for programs matching this description include Bias Response Team, Bias Education and Response Team, Bias Incident Response Team, Campus Environment Team, Campus Climate Response Team, and Inclusive Community Response Team. See Foundation for Individual Rights in Education, *supra* note 3, at 11; Snyder & Khalid, *supra* note 5.

¹⁰ Foundation for Individual Rights in Education, *supra* note 3, at 7.

¹¹ *Id.*

can occur even if the act itself is unintentional or delivered as a joke, prank, or having humorous intent.¹²

The staffing of BARTs consists mainly of administrators from student services or student conduct departments. Approximately 40% of teams also include representatives from law enforcement, and nearly a third include faculty members.¹³ Less than a third of programs include public-relations personnel or students.¹⁴ To illustrate how one public research institution staffs its BART, Ohio State's team of six "Primary Responders" consists of one member from the department of Residential Life; one member from the Office of the Senior Vice President for Student Life; two members from the university's Multicultural Center; one member from the department of Student Advocacy; and one member from the department of Student Conduct.¹⁵

B. Reporting and Response Procedures

The mechanics of BART operations remain relatively consistent. The Bias Response Team (BRT) at the University of Michigan is typical. Through the BRT, students, faculty, staff, and community members are encouraged to report incidents of bias by calling a dedicated telephone number or by submitting an online form.¹⁶ The online form asks the

¹²Dean of Students Office, Division of Student Life, Bias Reporting Process, University of Wisconsin-Madison, <https://doso.students.wisc.edu/services/bias-reporting-process> (last visited Mar. 10, 2018).

¹³ Foundation for Individual Rights in Education, *supra* note 3, at 8.

¹⁴ *Id.*

¹⁵ According to the Ohio State BART website: "The ... First Responders on the BART Team ... are the first line of review for all cases. Based on the nature of the situation, this team may refer cases on to other departments or convene a team of Secondary Responders. This primary team is also responsible for generating all BART reports." Office of Student Life, Bias Assessment and Response Team, The Ohio State University, <https://studentlife.osu.edu/bias/history-of-bart.aspx> (last visited Mar. 10, 2018). In comparison, the membership of the private University of Chicago's fourteen-person Bias Education and Support Team (BEST) looks like this: Assistant Director of Spiritual Life, Advisor for Muslim Affairs; Community Assistant Director, Housing & Residence Life; Assistant Dean of Students in the University for Student Affairs and Associate Director for Student Emergency Response Systems; HR Generalist, Campus and Student Life; Senior Program Coordinator, Student Disability Services; Assistant Dean and Director, Career Services, School of Social Service Administration; Deputy Chief of Police, Field Services Bureau; Director, Graduate and PostDoc Programs, Office of Development and Diversity; Associate Director, Office of Event Services; Director, Office of Multicultural Student Affairs; Director, Student Support Services; Director, Resources for Sexual Violence Prevention; Associate Director for Diversity Initiatives, Biological Sciences Division (BSD); Associate Dean of Students in the University for Student Affairs and Director of Student Emergency Response Systems. Campus and Student Life, Bias Education and Support Team, University of Chicago, <https://csl.uchicago.edu/get-help/bias-education-support-team-best> (last visited Mar. 10, 2018).

¹⁶ Office of the Dean of Students, Bias Response Team, University of Michigan, <https://deanofstudents.umich.edu/article/bias-response-team> (last visited Mar. 30, 2018).

reporting party to provide her name and contact information, the location of the incident, the names of the individuals or groups involved, and a description of what happened.

The University of Chicago's Bias Education and Support Team (BEST) takes a similar approach. The BEST online reporting portal allows reporting parties to provide their names and contact information; the date, time, and location of the incident; the parties involved; and a description of the problem or issue.¹⁷ It also includes a series of check-the-box fields that inquire about the nature of the alleged bias (e.g., age, religion, color, sex, sexual orientation, etc.) and the nature of the alleged incident (e.g., bullying, classroom comments, online comments, discrimination by faculty, hazing, intimidation, physical assault, property damage, vandalism, verbal assault, etc.).¹⁸

What happens after the filing of a bias incident report is often less clear. At Michigan, beyond asking the reporting party if she consents to being contacted for additional information, neither the BRT's website nor the online form describes what occurs next.¹⁹ Will there be an investigation? Will a counselor contact the reporting party? Will the school use reports to collect data? The Michigan BRT does not answer these questions.

Other schools provide slightly more detail. At Ohio State, the school's BART website states that the "BART receives, monitors, refers, and as necessary, coordinates university responses to hate and bias-related incidents that impact all or a significant portion of the university community."²⁰ The site goes on to say that "[a]ll persons who report receive some type of follow up either from the BART Team or from an office to which a report is referred."²¹

At the University of California at Davis, the school's BART states that it will respond to bias complaints in one of two ways. The first is an "early resolution" response. If that route is taken, the BART will pursue one or more of the following steps: (a) Helping the parties communicate about the matter; (b) Arranging for a UC Davis official to talk with the

¹⁷ Campus and Student Life, *supra* note 15.

¹⁸ *Id.*

¹⁹ Office of the Dean of Students, *supra* note 16.

²⁰ Office of Student Life, *supra* note 15.

²¹ *Id.*

accused (a “no-fault” or “notice” conversation); (c) Helping the parties agree to certain changes in how they interact; (d) Separating the parties; (e) Negotiating a disciplinary agreement with the accused; or (f) Conducting training.²² If the BART opts against using the early resolution process, it will appoint an official investigator to review the matter for possible violations of university policy.²³

The Campus Climate Response Team (CCRT) at the University of Texas at Austin indicates that one of its core functions is to gather information and support individuals involved in a bias incident, including both those targeted by the incident and those who initiated the incident.²⁴ The CCRT’s website does not describe the nature of the “support” given to those who allegedly initiate a bias incident. However, Texas’s 2013-14 Campus Climate Trend Report lists several examples of individual CCRT responses.²⁵ The examples include: (a) “Educational conversations/meetings with those initiating an incident regarding the intent and impact of their actions”; (b) “Investigation and resolution of incidents classified as a criminal act (coordinated with UT Police Department) or university policy violation (coordinated with the Office of the Dean of Students and the Office for Inclusion and Equity)”; and (c) “Initiation of an informal, non-discrimination policy resolution process (through the Office for Inclusion and Equity).”²⁶ In comparison, the university’s 2014-15 and 2015-16 Campus Climate Trend Reports provide that “responses to reported incidents include continuing conversations with off-campus residence halls regarding best practices for residential communities; facilitating conversation between those who were targeted by and those who initiated an incident; and making referrals to campus resources such as the UT Austin Police Department, the Office of the Dean of Students, and the Office for Inclusion and Equity (OIE).”²⁷

²² Report Hate and Bias: Complaint Resolution, University of California—Davis, <http://reporthatandbias.ucdavis.edu/complaintprocess.html> (last visited Mar. 10, 2018).

²³ *Id.*

²⁴ Division of Diversity and Community Engagement, Campus Climate Response Team, FAQs, University of Texas at Austin, <http://diversity.utexas.edu/ccrt/faqs> (last visited Mar. 10, 2018).

²⁵ Katherine Green et al., Campus Climate Response Team Hopes Trend Report Will Help Reduce Bias Incidents, *The Daily Texan*, (Feb. 9, 2015), <http://www.dailytexanonline.com/2015/02/09/campus-climate-response-team-hopes-trend-report-will-help-reduce-bias-incidents> (last visited Sept. 25, 2017) (attaching University of Texas at Austin, Campus Climate Trend Report, 2013–2014).

²⁶ *Id.*

²⁷ University of Texas at Austin, Campus Climate Response Team, Campus Climate Trend Report, 2015–2016 (2016).

The responses taken by the Bias Response and Advocacy Coordinator (BRAC) at the University of Wisconsin-Madison “range from educational conversations and restorative justice initiatives to possible conduct sanctions which include written reprimands, educational sanctions and housing contract jeopardies.”²⁸ The BRAC also notes that

Responses to incidents will vary based on the incident and the individuals involved. Some incidents will be referred to the student conduct process if there was a violation to our code of conduct or to law enforcement. It is important to note that the majority of incidents will not travel that path. This occurs for a variety of reasons including at the request of the targeted student or because the action would not be considered a violation of the conduct code.²⁹

For all bias incident reports at the University of Chicago that include contact information, one of the school’s BEST members will contact the reporting party and offer to meet to discuss the incident and explore options for resolution. When incidents do not involve violations of law or university policy, BEST members may pursue one or more of the following strategies: (a) facilitated dialogue with the affected community; (b) facilitated dialogue with parties involved in the incident; (c) restorative circles, such as hearing circles and peace circles; (d) educational opportunities; and/or (e) speak-outs and testimonials.

BART programs at a few schools provide additional guidance about the role of speech and expression on campus. These guidelines typically clarify that certain forms of speech or conduct do not arise to the level of a legal or rule violation. For instance, the BEST program at the University of Chicago provides on its website that “[e]xpressions that cause hurt or discomfort can, but do not for that reason alone, constitute a violation of the law or of University policy.” Wisconsin-Madison’s BRAC echoes this remark:

Although the expression of an idea or point of view may be offensive or inflammatory to some, it is not necessarily a violation of law or university policy. The university values and embraces the ideals of freedom of inquiry, freedom of thought, and freedom of expression, all of which must be vitally sustained in a community of scholars.”³⁰

²⁸ University of Wisconsin-Madison, Dean of Students Office, Bias Response and Advocacy Coordinator, Spring 2017 Bias Incident & Report Summary.

²⁹ Dean of Students Office, *supra* note 12.

³⁰ *Id.*

At the same time, most BART programs, including those sampled above, contemplate the possibility of a formal investigation into and/or engagement with the parties identified in a bias incident report.

C. Reports and Disclosures

As the number of BART programs continues to increase, more information is emerging about the types of bias reports that they receive. The amount of incident-specific detail provided by each school varies widely, however.

As one example, rather than provide factual details about specific incident reports, the Wisconsin-Madison BRAC program releases high-level statistics about the number and type of reports that it receives each term. For the Spring 2017 semester, the BRAC disclosed that it received 92 reports relating to 74 incidents.³¹ The most common type of bias alleged related to “race/ethnicity.”³² Allegations of bias toward “national origin” and “gender” were the second and third most commonly reported categories, respectively.³³ Ohio State also releases a brief annual summary of the number reports made to the BART. The school’s most recent annual summary indicates that 90 bias incident reports came in between June 2015 and May 2016.³⁴

The CCRT at the University of Texas at Austin discloses a combination of high-level statistics and brief factual descriptions of particular incidents. Its 2015-16 Report states that the CCRT received 194 reports relating to 104 incidents.³⁵ The three most common types of alleged bias were “race/ethnicity” (59%), “gender” (21%), and “sexual orientation” (18%).³⁶ The Report identifies the following as examples of reported incidents:

- Insulting and insensitive posts on social media or group chat apps pertaining to race, gender identity, or sexual orientation;

³¹ University of Wisconsin-Madison, *supra* note 28.

³² *Id.*

³³ *Id.*

³⁴ Office of Student Life, Bias Assessment and Response Team, Policies and Reports, The Ohio State University, <https://studentlife.osu.edu/bias/policies-and-reports.aspx> (last visited Sept. 25, 2017). The Ohio State BART report includes the caveat that the BART’s reliance on self-reporting means that it cannot eliminate the possibility of multiple reports being filed for the same incident. *Id.*

³⁵ University of Texas at Austin, *supra* note 27.

³⁶ *Id.*

- Derogatory faculty and student commentary in the classroom;
- Graffiti/vandalism on and off campus based on race, religion, and/or sexual orientation;
- Hostile and insensitive treatment or interaction with a campus department/unit;
- Messaging by the university that is insensitive or based upon negative stereotypes;
- Physical harassment/assault;
- Harassment by strangers or campus community members based on perceived sexual orientation;
- Slurs and verbal/physical harassment on and off campus.³⁷

Finally, the Report notes that 59 incident reports concerned a demonstration at a single event hosted by the university's Institute for Israel Studies of the Schusterman Center for Jewish Studies.³⁸ Another 57 reports related to a "speaker event on campus," although the Report does not identify the speaker nor describe the circumstances surrounding the event.³⁹

Additional incident-specific reports include the following, organized alphabetically by school:

- *Case Western Reserve University*: A bias incident report was filed against a professor for assigning a writing exercise that asked students to "[w]rite about a gay child being kicked out of their house, and make the audience feel sorry for the person kicking them out." Another report was filed against a professor for asking students to read from a play that the complaining students believed contained racist depictions of Native Americans.⁴⁰
- *Cornell University*: A faculty member was reported as biased for referring to police as "terrorists" during a political rally. Another report was filed against the

³⁷ Id.

³⁸ Id.

³⁹ Id.

⁴⁰ Foundation for Individual Rights in Education, *supra* note 3, at 18.

- entire student government for engaging in efforts to make Cornell's campus a sanctuary campus.⁴¹
- *John Carroll University*: A complainant filed a bias incident report stating that a student protest by the African-American Alliance was making Caucasian students uncomfortable.⁴²
 - *Ohio State University*: A group of students was reported to the school's BART after comparing Hillary Clinton to Adolf Hitler during a political discussion. Other reports were made after a message in chalk appeared on campus stating, "Build the Wall."⁴³
 - *Texas Tech University*: A complainant filed a bias report against the Black Student Union (BSU) after the group posted on its social media account that "All lives don't matter...White lives don't matter...Blue lives don't matter...#BlackLivesMatter."⁴⁴
 - *University of Michigan*: A bias complaint was filed after a student perceived a snow sculpture on campus to be in the form of a penis.⁴⁵
 - *University of Oregon*: Complainants filed bias incident reports alleging that the school newspaper did not devote enough attention to issues affecting transgendered students and students of color.⁴⁶

Two further high-profile incidents at universities in Canada and the United States implicate similar bias-related reporting policies. In the first, at Wilfred Laurier University in Ontario, graduate teaching assistant Lindsay Shepherd became subject to a formal investigation in late 2017 following her decision to show her communications class a five-minute video clip from a Canadian news program.⁴⁷ The clip featured a debate between two

41 Id. at 17.

42 John Carroll University, *Bias Reports (2014–2015)* (on file with author).

43 Foundation for Individual Rights in Education, *supra* note 3, at 17–18.

44 Id. at 15.

45 Ron Dicker, *Someone at UMich Reported a Snow Penis as a 'Bias Incident'*, *Huffington Post* (Feb. 26, 2016),

https://www.huffingtonpost.com/entry/someone-reported-a-snow-penis-as-a-bias-incident_us_56d07a3fe4b03260bf7685d7.

46 Foundation for Individual Rights in Education, *supra* note 3, at 16.

47 Simona Chiose, *Wilfrid Laurier University Exonerates TA Lindsay Shepherd*, *The Globe and Mail* (Dec. 21, 2017),

<https://www.theglobeandmail.com/news/national/education/wilfrid-laurier-university-exonerates-ta-lindsay-shepherd/article37377602>.

academics on the law concerning the use of gender pronouns. One professor on the program, Jordan Peterson, argued that the law should not require Canadians to use the pronouns that other people choose for themselves. Another professor, Nicholas Matte, took the opposite position. The program did not criticize or disparage persons of any gender or gender identity, nor did Shepherd take a stance on the debate.⁴⁸ Shepherd presented the debate to facilitate a discussion about the grammatical use of the singular form of the pronoun “they.”

Despite the fact that no complaint was filed regarding the in-class video, Shepherd’s supervising professor, Nathan Rambukkana, rebuked her for remaining neutral during the class discussion.⁴⁹ Specifically, by failing to object to Peterson’s position in the debate, Rambukkana accused Shepherd of creating a “toxic environment.”⁵⁰ A school administrator also accused Shepherd of potentially violating the school’s Gendered and Sexual Violence Policy by showing the clip.⁵¹

The second example comes from Howard University’s School of Law. In May 2017, the school found tenured law professor Reginald Robinson liable for sexual harassment after two students complained about a 2015 exam question from his course on agency law.⁵² The question under consideration asked students to determine whether the owner of a spa would win a demurrer motion in a suit filed by a customer who claimed improper touching by the licensed aesthetician who performed a bikini-waxing procedure. The question described how the customer slept through the wax treatment but thought that she had been improperly touched while asleep.

In finding Robinson liable for sexual harassment, the school cited his use of the word “genital” in the question’s fact-pattern; the complaining students’ beliefs that the

48 Uri Harris, Wilfrid Laurier and the Creep of Critical Theory, *Quillette* (Nov. 21, 2017), <http://quillette.com/2017/11/21/wilfrid-laurier-creep-critical-theory>.

49 Chiose, *supra* note 47.

50 Tristin Hopper, Here’s the Full Recording of Wilfrid Laurier Reprimanding Lindsay Shepherd for Showing a Jordan Peterson Video, *Nat’l Post* (Nov. 21, 2017), <http://nationalpost.com/news/canada/heres-the-full-recording-of-wilfrid-laurier-reprimanding-lindsay-shepherd-for-showing-a-jordan-peterson-video>.

51 *Id.*

52 Debra Cassens Weiss, Law Prof’s Exam Question on Brazilian Wax is Deemed Harassment; Is Academic Freedom Threatened?, *ABA Journal* (July 10, 2017), http://www.abajournal.com/news/article/law_prof_exam_question_on_brazilian_wax_is_deemed_harassment_he_sees_threa.

question was designed to cause them to reveal personal details; the students' claims that their revelations had a negative impact on them; and the administration's belief that the question was not necessary to teach the subject of his course.⁵³ Due to these findings, a letter of reprimand was placed in Robinson's file and he was ordered to attend sensitivity training. Robinson must also receive prior approval for all future exam questions.⁵⁴

II. REACTIONS TO BARTS

Reactions to BART programs run the gamut from positive to negative. Those in favor believe that they promote student safety and well-being. Critics agree on the importance of both goals but worry that the reporting and investigatory aspects of BARTs will create an illiberal chilling effect. They fear that students and faculty will refrain from discussing important but controversial topics due to the risk of formal questioning and sanction if someone disagrees with their comments or takes offense. This part outlines the main points on each side of the debate.

A. Arguments in Support

BART supporters emphasize the importance of advancing diversity and inclusivity on campus. They suggest that BART protocols alert school officials to potential campus-climate problems, help them form response strategies to particular bias incidents or trends, and, ultimately, protect students from harassment and discrimination.⁵⁵

For example, an official at Ohio State says that the school's BART is a tool for "creating a diverse and welcoming community."⁵⁶ Others note that BARTs communicate to the public and prospective students that discrimination is taken seriously on campus.⁵⁷ Officials at the University of Oregon and the University of Texas add that their BARTs exist to increase levels of cultural awareness and sensitivity. As an assistant dean at Oregon puts

53 Id.

54 Id.

55 Jake New, *Defending BARTs*, Inside Higher Ed (Sept. 12, 2016), <https://www.insidehighered.com/news/2016/09/12/despite-recent-criticism-college-officials-say-bias-response-teams-fill-important>.

56 See id.

57 John Carroll University, *supra* note 42.

it, “bias is often a result of not having the right information or being miseducated about certain topics, certain populations and various cultures. We see [BART] as an opportunity to educate our students, faculty and staff.”⁵⁸ These sentiments follow from legitimate concerns that biased or hateful speech will discourage civil discourse, generate feelings of insecurity, compromise the dignity of listeners, and cause lasting emotional harm.⁵⁹

From a practical perspective, incidents of bias and discrimination can also trigger a wide range of deleterious effects on the operations of a university, including aspects of student life, recruiting and admissions, research and development, faculty-student relations, alumni relations, and intercollegiate athletics. The 2015 unrest at the University of Missouri at Columbia (“Mizzou”) illustrates the urgency of this point. Sparked by complaints that the administration was too passive in response to episodes of bigotry, hundreds of Mizzou undergraduates, graduate students, and student-athletes launched a series of forceful protests that soon culminated in the resignations of the university system president and the campus chancellor.⁶⁰

Though the protests spanned only a few weeks, the subsequent consequences for the institution have been severe. The prior administration’s perceived insensitivity to issues affecting racial and ethnic minorities has made recruiting students and student-athletes from traditionally underrepresented groups an ongoing challenge. As of July 2017, overall freshman enrollment at Mizzou had fallen by approximately thirty-five percent since 2015, with the decline among African American students approaching forty-five percent.⁶¹ In addition, the school faced intense criticism from many of its alumni for what they saw as an inability or unwillingness to control the protests and maintain order.⁶²

Ultimately, the decreases in tuition revenue and state appropriations that came in the wake of the protests at Mizzou led to the temporary closings of several dorms and over 400 layoffs—including the dismissal of several untenured faculty members.⁶³ And the

58 New, *supra* note 55.

59 Erwin Chemerinsky & Howard Gillman, *Free Speech on Campus* 84–85 (2017).

60 Anemona Hartocollis, *Long After Protests, Students Shun the University of Missouri*, *N.Y. Times* (July 9, 2017), <https://www.nytimes.com/2017/07/09/us/university-of-missouri-enrollment-protests-fallout.html>.

61 *Id.*

62 *Id.*

63 Anemona Hartocollis, *Long After Protests, Students Shun the University of Missouri*, *N.Y. Times* (July 9, 2017).

situation at Mizzou is not unique. Over the past two years, protests over perceived failures to mitigate incidents of racial discrimination and bias led to significant unrest, faculty departures, and public-relations battles on the campuses of Middlebury College,⁶⁴ Cornell University,⁶⁵ Rutgers University,⁶⁶ Boston College,⁶⁷ the University of California-Berkeley,⁶⁸ the University of Virginia,⁶⁹ the University of Michigan,⁷⁰ and Evergreen State College.⁷¹

The development of bias-response strategies thus continues to be a top priority for universities, and it is easy to understand why many faculty, students, and administrators support BARTs as part of their plans. Many campuses have a genuine problem with racism and other forms of prejudice, and the potential costs of failing to address it are great. Nonetheless, BART initiatives remain controversial. They face widespread criticism inside and outside of the academy, with concerns focusing mainly on the risk that they put unwarranted pressure on academic freedom, political discourse, and free expression.

B. Criticisms and Concerns

Writing for *The New Republic*, Carleton College Professors Jeffrey Aaron Snyder and Amna Khalid posit that BARTs “degrade education by encouraging silence instead of dialogue, the fragmentation of campuses into groups of like-minded people, and the

<https://www.nytimes.com/2017/07/09/us/university-of-missouri-enrollment-protests-fallout.html>.

64 Katherine Q. Seelye, Protestors Disrupt Speech by ‘Bell Curve’ Author at Vermont College, *N.Y. Times* (Mar. 3, 2017), <https://www.nytimes.com/2017/03/03/us/middlebury-college-charles-murray-bell-curve-protest.html>.

65 Laura O’Brien, Cornell Black Students United Protests in Wake of Racial Incidents, *The Ithacan* (Sept. 20, 2017), <https://theithacan.org/news/cornell-black-students-united-protest-following-racial-incidents>.

66 Associated Press, Rutgers Students Protest Donald Trump’s Deportation Plans, *Wash. Times* (Nov. 16, 2016), <https://www.washingtontimes.com/news/2016/nov/16/rutgers-students-protest-against-trump-deportation>.

67 Laura Krantz, Boston College Students Face Discipline over Protests, *Boston.com* (Dec. 19, 2016), <https://www.boston.com/news/local-news/2016/12/20/boston-college-students-face-discipline-over-protests>.

68 Steph Solis et al., Milo Yiannopoulos’ Speech at UC-Berkeley Canceled as Protest Turns Violent, *USA Today* (Feb. 2, 2017), <https://www.usatoday.com/story/news/politics/2017/02/01/uc-berkeley-campus-protest-milo-yiannopoulos-breitbart/97378104>.

69 Joe Heim, Recounting a Day of Rage, Hate, Violence and Death, *Wash. Post* (Aug. 14, 2017), https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm_term=.c27b9b7ac1e9.

70 Jessica Finn, University of Michigan Protests over Campus Racism Turn Violent: One Person is Arrested After Demonstrators Spill Out into the Street and Brawl During Rally Over N-Word Vandalism, *Daily Mail* (Sept. 21, 2017), <http://www.dailymail.co.uk/news/article-4905374/University-Michigan-protests-campus-racism-turn-violent.html>.

71 Abby Spegman, Evergreen Professor at Center of Protests Resigns; College Will Pay \$500,000, *Seattle Times* (Sept. 16, 2017), <https://www.seattletimes.com/seattle-news/evergreen-professor-at-center-of-protests-resigns-college-will-pay-500000>.

deliberate avoidance of many of the most important—and controversial—topics across all academic disciplines.”⁷² The overarching problem, they argue, is that “[n]othing quite kills intellectual exploration like the fear of causing offense.”⁷³ They maintain that students and faculty will naturally be reluctant to challenge orthodoxy or share unpopular opinions when doing so puts them at risk of being reported as “biased” to university administrators (and/or law enforcement), facing a formal investigation into their actions, and possibly being the subject of an official disciplinary proceeding, conflict-resolution session, or other intervention effort. Even if no punitive consequences result from reported incidents, they contend that just the possibility of entanglement within the BART process can, on its own, produce a chilling effect on protected speech and academic inquiry (i.e., a “process-as-punishment” phenomenon).⁷⁴

Similar considerations prompted Judge Jose Cabranes of the U.S. Court of Appeals for the Second Circuit—and former general counsel at Yale University—to describe BARTs as a form of campus “civility police.”⁷⁵ He fears that BART-like systems will prompt the creation of directories of “subversive” professors, as well as “watchlists” compiled by liberal and conservative activists with the shared aim of chilling unwanted speech.⁷⁶ If these things happen—and they already have in some places⁷⁷—Judge Cabranes believes that honest efforts to promote inclusivity will lead to “civilizational decline.”⁷⁸

The remainder of this section explores these and similar concerns.

⁷² See Snyder & Khalid, *supra* note 5.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Jose A. Cabranes, *If Colleges Keep Killing Academic Freedom, Civilization Will Decline, Too*, Wash. Post (Jan. 10, 2007),

https://www.washingtonpost.com/opinions/if-colleges-keep-killing-academic-freedom-civilization-will-die-too/2017/01/10/74b6fcc2-d2c3-11e6-9cb0-54ab630851e8_story.html?utm_term=.8f6b2120f18c.

⁷⁶ *Id.*

⁷⁷ See, e.g., Professor Watchlist, <http://www.professorwatchlist.org> (last visited Sept. 25, 2017) (“The mission of Professor Watchlist is to expose and document college professors who discriminate against conservative students and advance leftist propaganda in the classroom.”); see also Drew Van Voorhis, *San Diego State College Republicans Out Professors They Say Indoctrinate Students*, College Fix (Jan. 10, 2018), <http://www.collegefix.com/post/40812>.

⁷⁸ Jose A. Cabranes, *If Colleges Keep Killing Academic Freedom, Civilization Will Decline, Too*, Wash. Post (Jan. 10, 2007),

https://www.washingtonpost.com/opinions/if-colleges-keep-killing-academic-freedom-civilization-will-die-too/2017/01/10/74b6fcc2-d2c3-11e6-9cb0-54ab630851e8_story.html?utm_term=.8f6b2120f18c.

1. Academic Freedom and Expression

The most significant worry about BARTs is the risk that they will infringe upon academic freedom and personal expression: will faculty and students refrain from studying or debating certain topics out of fear of being reported as biased and facing an investigation into their speech?

In contemplating this question, a key reason why self-censorship represents a material risk relates to the breadth and ambiguity that many BART policies exhibit. Without clear guidelines and specificity about what speech is within a BART system's purview, vague and ambiguous language is vulnerable to highly subjective, unpredictable, arbitrary, and inconsistent applications that would leave students and faculty in constant states of uncertainty—particularly when programs assess bias from the perspective of the complaining party's subjective feelings and perceptions.

At the University of Texas at Austin, the school's Campus Climate Response Team notes that “[f]aculty and student commentary in the classroom *perceived as derogatory and insensitive*” is illustrative of the types of reports it receives.⁷⁹ Similarly, the University of Northern Iowa's definition of a bias-related incident includes “any word or action directed toward an individual or group based upon actual or perceived identity characteristics or background of a group or person that is *harmful or hurtful*.”⁸⁰ Western Washington University defines bias as “language...that could potentially cause *alarm, anger, or fear* in others.”⁸¹ Several other universities state that reportable bias incidents include political expression, political cartoons, and comments regarding political or social affiliations, with Wisconsin-Madison's BRAC adding that incidents of bias may include comments that are unintentional or delivered with humorous intent.⁸²

Any of these definitions can cover speech that is truly threatening or harassing. But they are also broad enough to extend into political satire or commentary, legitimate debate,

79 Katherine Green et al., Campus Climate Response Team Hopes Trend Report Will Help Reduce Bias Incidents, *The Daily Texan* (Feb. 9, 2015), <http://www.dailytexanonline.com/2015/02/09/campus-climate-response-team-hopes-trend-report-will-help-reduce-bias-incidents> (last visited Sept. 25, 2017) (attaching University of Texas at Austin, Campus Climate Trend Report, 2013–2014) (emphasis added).

80 Foundation for Individual Rights in Education, *supra* note 3, at 13.

81 *Id.*

82 Dean of Students Office, *supra* note 12.

and discussions where parties' political or social views diverge. Many comments and statements occurring within the course of ordinary scholarly activity could be seen by some to express negativity toward a person's age, sex, race, nationality, ethnicity, religion, military service, immigration status, sexual orientation, gender identity, marital status, disability, or socio-economic status.⁸³ Professors Chemerinsky and Gillman sum up the issue by noting that

Much of what we debate as a society—including on college campuses—relates to whether certain forms of expression should be considered demeaning or insulting...[s]uppose gay and lesbian students complain that they are demeaned by a Christian student's expressed belief that traditional heterosexual marriage is the only true marriage. Should the university deny that this belief is demeaning, or punish the student? What if the Christian student complains that the gay students' complaint demeans and stigmatizes her religious beliefs? The door is open to an endless succession of claims and counterclaims.⁸⁴

Again, these concerns are especially salient when definitions of bias extend to any speech that might make someone angry or upset, even if it does so inadvertently ("cause anger in others"; "perceived as insensitive").⁸⁵

In a 2016 incident at the University of Northern Colorado, an adjunct writing professor came under investigation for possible bias after asking his class to read an article in *The Atlantic* titled "The Coddling of the American Mind."⁸⁶ The teacher, Mike Jensen, used the article as a jumping-off point to play "devil's advocate" during a classroom discussion of transgender rights. After a bias complaint was made against him, Northern Colorado's executive director of human resources summoned Jensen to his office. At that meeting—which Jensen recorded—the director said that expressing opinions on transgender rights could be perceived as discriminatory under various federal statutes, including Title IX. The director also "advised [Jensen] not to revisit transgender issues in his classroom if possible to avoid the student's expressed concerns [and] ... to avoid stating

⁸³ Jonathan Rauch, *Kindly Inquisitors* 132 (2013).

⁸⁴ Erwin Chemerinsky & Howard Gillman, *Free Speech on Campus* 104-05 (2017).

⁸⁵ Rauch, *supra* note 83, at 133.

⁸⁶ Tyler Silvy, *University of Northern Colorado's Handling of Speech Deemed Offensive Raises Questions, Concerns*, Greeley Trib. (June 28, 2016), <http://www.greeleytribune.com/news/local/university-of-northern-colorados-handling-of-speech-deemed-offensive-raises-questions-concerns/>.

opinions (his or others) on the topic as he had previously when he was working from the Atlantic article.”⁸⁷

After the director’s comments to Jensen became public, Northern Colorado’s president conceded that school officials might have engaged in “an inappropriate effort to influence what happens in our classrooms.”⁸⁸ Yet this recognition did not alleviate other faculty members’ concerns about possible interference with their academic freedom, and eventually Northern Colorado eliminated its BART program.

While the program’s critics viewed this decision favorably, the episode highlights how the specter of investigation and discipline risks inhibiting faculty from addressing controversial topics in class. After all, Jensen was not invited back to teach at Northern Colorado, and critics suggest that worries about falling victim to similar bias complaints will discourage faculty from analyzing or asking students to discuss subjects like the role of women in the military, same-sex marriage, immigration, the law of sexual assault, and human rights.⁸⁹ Media accounts and case law are replete with examples where academic discussions and political satire involving these topics have come under challenge for being offensive. Indeed, many BARTs received reports during the 2016 election cycle from students upset by the mere sight of political signs posted in support of now-President Donald Trump.⁹⁰ Could students also be reported to a BART for challenging empirical data about, say, the rate of violence against Irish-Catholics in early America?

People are easily deterred from speaking when there is a risk of sanction. As Professor Geoffrey Stone notes, the costs often outweigh the benefits: “the individual speaker usually gains very little personally from signing a petition, marching in a demonstration, handing out leaflets, or posting on a blog. Put simply, except in the most unusual circumstances, whether any particular individual speaks or not is unlikely to have

⁸⁷ Adam Steinbaugh, University of Northern Colorado Defends, Modifies ‘Bias Response Team’ as Criticism Mounts and Recording Emerges, Foundation for Individual Rights in Education (July 7, 2016), <https://www.thefire.org/university-of-northern-colorado-bias-response-team-recording-emerges>.

⁸⁸ Id.

⁸⁹ Michael Herz & Peter Molnar, Introduction, in *The Content and Context of Hate Speech* 3 (Michael Herz & Peter Molnar eds., 2012).

⁹⁰ Foundation for Individual Rights in Education, *supra* note 3, at 15; Susan Svrluga, Someone Wrote ‘Trump 2016’ on Emory’s Campus in Chalk; Some Students Said They No Longer Feel Safe, Wash. Post (Mar. 24, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/03/24/someone-wrote-trump-2016-on-emorys-campus-in-chalk-some-students-said-they-no-longer-feel-safe/?utm_term=.f408e8db83c5.

any appreciable impact on the world.”⁹¹ Andrew Sullivan adds that “[i]f voicing an ‘incorrect’ opinion can end your career, or mark you for instant social ostracism, you tend to keep quiet.”⁹²

Universities generally do a good job of assessing the quality of scholarly research and teaching, but if faculty members feel at risk of an investigation due to scholarly engagement with controversial words or topics—as assessed under broad, vague, and morally-charged definitions—it seems reasonable to imagine that many will forgo those examinations altogether due to fear of being formally associated with bigotry or the perception that they sympathize with bigotry. The potential negative ramifications—both professional and personal—of discussing controversial political issues would be too severe. Even if they avoid formal sanction, the mere accusation of bias, discrimination, or racism can cause considerable emotional distress and career complications.⁹³ This is true for all teachers, but it becomes uniquely pressing for those who lack the protections of tenure, including adjunct instructors, graduate teaching instructors, and faculty on the tenure-track.⁹⁴

The unfortunate risk, then, is that more faculty members will choose to stay silent. This means that the “thinking process of the community” will suffer.⁹⁵ Bias response protocols will effectively be manipulating the scope and direction of academic discourse outside of traditional channels like tenure and peer review.⁹⁶

Beyond the classroom, another argument in support of BARTs is the need to protect students from harassment throughout campus, including in their social interactions at

91 Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 *Pepp. L. Rev.* 273, 277 (2009).

92 Andrew Sullivan, *We All Live on Campus Now*, *New York* (Feb. 9, 2017), <http://nymag.com/daily/intelligencer/2018/02/we-all-live-on-campus-now.html>.

93 Rauch, *supra* note 83, at 147–49 (noting that some academics say they are scared to talk about Egyptian origins out of fear of being labeled as racist, and describing examples of faculty under stress due to accusations of bias).

94 Tenured professors typically stand on the strongest contractual and procedural grounds that any faculty member can hope to possess. Of course, tenured status does not eliminate the risk of reputational consequences or formal sanctions as a result of a bias investigation, but it does afford considerably more job security than any other teaching classification. Adjunct instructors, by comparison, generally teach pursuant to short-term, at-will contracts. Most can be let go for any reason, at any time. See also Sarah McLaughlin, *Drexel Professor Resigns after Months-long Investigation, Exile from Campus*, *Foundation for Individual Rights in Education* (Dec. 29, 2017), <https://www.thefire.org/drexel-professor-resigns-after-months-long-investigation-exile-from-campus>.

95 Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 *Pepp. L. Rev.* 273, 277 (2009) (quoting Alexander Meiklejohn).

96 *Id.*

residence halls, dining halls, sporting events, and within student organizations. This is an understandable and laudable goal. As part of maintaining campus safety and security, schools need to be able to monitor student behavior and address potential misconduct, and a BART can help with that endeavor.

Yet there are potential costs that come from campus-wide surveillance and monitoring via a BART program. Just as in the context of in-class, academic discussions, when BART-driven surveillance casts a wide net over extracurricular speech, students may choose to stay silent out of fear that they will face questioning by school administrators for—perhaps unknowingly or unintentionally—causing offense to others.

This concern encompasses nearly all extracurricular activities, including theatrical and comedic performances⁹⁷; opinion columns in student newspapers; policy advocacy efforts; peaceful protests; Halloween parties⁹⁸; or the simple act of reading a book in public.⁹⁹ Receiving a formal summons from a school administrator in the context of any of these activities takes on an aura of interrogation. There is an element of “compulsion, force, or at least doggedness” to this approach that makes the BART process look quasi-punitive.¹⁰⁰ Probing into an accused student’s personal, political, or religious background as part of a bias investigation can feel particularly threatening.¹⁰¹ One major research university is even considering hiring students for the express purpose of identifying and reporting bias incidents.¹⁰² If students begin to think of their peers as possible BART “informants,” one can hypothesize that they will refrain from openly discussing many of the same controversial topics that their instructors might avoid for the same reason.¹⁰³

97 Sopan Deb, *Brandeis Cancels Play about Lenny Bruce After Protests*, N.Y. Times (Nov. 6, 2017), <https://www.nytimes.com/2017/11/06/theater/brandeis-cancels-lenny-bruce-play.html>.

98 Erika Christakis, *My Halloween Email Led to a Campus Firestorm—and a Troubling Lesson about Self-Censorship*, Wash. Post (Oct. 28, 2016), https://www.washingtonpost.com/opinions/my-halloween-email-led-to-a-campus-firestorm--and-a-troubling-lesson-about-self-censorship/2016/10/28/70e55732-9b97-11e6-a0ed-ab0774c1eaa5_story.html?utm_term=.3dd194ff0acf.

99 Associated Press, *University Says Sorry to Janitor over KKK Book*, NBCNews.com (July 15, 2008), http://www.nbcnews.com/id/256080655/ns/us_news-life/t/university-says-sorry-janitor-over-kkk-book/.

100 Matthew T. Bodie et al., *The Law and Policy of People Analytics*, 88 *Colo. L. Rev.* 961, 993 (2017).

101 *Id.* at 999.

102 Howard Fischer, *University of Arizona Reconsiders Plan to Hire ‘Social Justice Advocates’*, Arizona Capitol Times (May 15, 2017), <https://azcapitoltimes.com/news/2017/05/15/university-of-arizona-reconsiders-social-justice-advocates-speech-police>.

103 Snyder & Khalid, *supra* note 5.

Moreover, depending on how a BART is situated within the university's governing architecture, its engagement with students may escape meaningful review by other constituents on campus who might possess more leverage than students to monitor for potential abuses.

A parallel concern is the use of BARTs to facilitate pranks or abuse. Most programs lack basic procedural safeguards, such as the right to prior notice of a complaint, the assistance of a representative during questioning, or avenues of appeal. They also usually allow anonymous reporting. While anonymous reporting is a wise protective measure for whistleblowers who face risks of retaliation, it can also be used for malicious or political purposes. At John Carroll University, the school's 2014-15 Bias Report revealed that over twenty percent of the incident reports filed during the year were the product of a prank against a single student.¹⁰⁴ Administrators reacted to this problem by acknowledging that

If a person is able to report a peer, professor, supervisor, or other community member for "speech code violations," and particularly if those reports result in punitive action toward the offender, the system could shut down, rather than open up, critically important dialogue. On a university campus with an implicit commitment to the free exchange of ideas, such a result must be considered unacceptable.¹⁰⁵

Other schools have reacted similarly. For example, in 2016, the University of Iowa abandoned its plan to create a BART on the basis that the proposed program's investigatory focus risked chilling legitimate and protected speech.¹⁰⁶

2. Transparency, Due Process, and Agency Costs

Monitoring BARTs for potential abuses is challenging because transparency surrounding the programs is low. Few metrics are disclosed beyond the raw number and types of reports filed during a given time period. Many programs release no annual or

¹⁰⁴ John Carroll University, *supra* note 42.

¹⁰⁵ *Id.*

¹⁰⁶ Jeff Charis-Carlson, University of Iowa Changing Course on Bias Response Team, *Iowa City Press-Citizen* (Aug. 18, 2016), <http://www.press-citizen.com/story/news/education/university-of-iowa/2016/08/18/university-iowa-changing-course-bias-response-team/88962048> (quoting Iowa's Chief Diversity Officer as saying "some BARTs have actually been critical of classroom content, and we hold academic freedom very dear at [Iowa], and we don't want to set up a situation where we have those kinds of things.").

periodic summaries or disclosures.¹⁰⁷ There is little available information about whether or how decision-makers and shared-governance participants within universities use, analyze, or debate the significance of the few metrics that are available.¹⁰⁸ In addition, when bias incident reports are anonymous, it is difficult to verify underlying factual allegations or reach out to the people who claim to have been hurt—either to garner additional information or to provide assistance.

Questions also persist as to what data is kept about individuals who are identified as perpetrators of bias incidents (particularly when the only support for an allegation is an anonymous report); what notice is given to alleged perpetrators (if any); and what persons or groups have access to the information within BART records. Students and faculty are left to wonder, for example, whether or how accusations made in the course of a BART report or investigation might affect their academic or employment status—accusations that they may never learn of unless administrators decide to share them.

The sheer number of anti-bias programs at many universities further heightens the risk of miscommunication, mistake, and inconsistency. For example, Fordham University boasts 87 different programs that purportedly address bias concerns on campus.¹⁰⁹ On one hand, this elaborate structure sends a powerful message about the importance that Fordham places on bias response strategy. On the other hand, without thorough oversight and planning, a program featuring so many components carries a greater likelihood of disorganization.

Related due process risks extend back to the definitional ambiguity and subjectivity that permeates BART programs. The assessment of “biased” speech can easily vary depending on the identity, power, and ideological preferences of the decision-makers charged with reviewing it. As Justice Harlan famously observed, “One man’s vulgarity is another’s lyric.”¹¹⁰ Professor Nadine Strossen similarly notes that “all of us are, in some

107 Foundation for Individual Rights in Education, *supra* note 3, at 24–26.

108 *Id.* at 24 (noting that approximately 28% of institutions do not disclose who reviews bias incident reports).

109 Dean of Students and Student Life, *Actions against Bias*, Fordham University,

https://www.fordham.edu/info/24936/biashate_crimes_faq/7368/actions_against_bias (last visited Sept. 25, 2017).

110 *Cohen v. California*, 403 U.S. 15, 25 (1971).

way, a despised minority, whether it be political, religious, or demographic.”¹¹¹ Speech may be classified as biased—and a speaker labeled as racist or bigoted—based on little more evidence than its relative popularity among students, faculty, or BART personnel—with this determination then triggering responses ranging from mere data collection to the questioning of a reported speaker and the start of disciplinary proceedings.¹¹²

Many of these concerns reflect the ever-present problem of agency costs. Agency costs are the negative effects that arise when agents (or employees) take actions that benefit themselves at the expense of the organizations that hire them. Political differences, personal animosity, and competing career aspirations are all factors that can cause agents to act selfishly.

The risk of selfishness manifests in BARTs in part because of the number of objectives that the programs attempt to address. Most seek to serve simultaneously as student-wellness resources, data-tracking tools, public relations offices, and investigatory tools. As a result, agents enjoy broad flexibility to set priorities across multiple different dimensions and in accord with their subjective social and political whims. This, in turn, hinders efforts at accountability.

The situation that Mike Jensen faced at Northern Colorado illustrates this nuance. There, the suggestion by a school official that Jensen refrain from discussing certain topics in class may not have been the administration’s preferred response—as evidenced by subsequent public remarks—but the risk of that behavior was present as long as the program left space for independent, idiosyncratic, and unchecked forms of intervention.

A similar issue recalls the work of professional consultants. A longstanding concern in the private sector is that independent consultants face strong incentives to exaggerate the regulatory risks that companies face in order to expand the market for their services. In the wake of myriad post-scandal financial reforms, as well as in response to shifts in employment law and an increase in federal anti-corruption enforcement, the consulting industry has risen to newfound prominence as firms attempt to grapple with the legal

111 Nadine Strossen, Interview with Nadine Strossen, in *The Content and Context of Hate Speech* 395 (Michael Herz & Peter Molnar eds. 2012).

112 Robert Post, Interview with Robert Post, in *The Content and Context of Hate Speech* 29 (Michael Herz & Peter Molnar eds. 2012).

uncertainties wrought by those changes. Though many consultants operate in good faith, others may exaggerate their importance to generate greater revenue.¹¹³

Relating this concern to BARTs, agents working on bias response initiatives face at least some incentive to define their roles and responsibilities in ways that make it easier for them to entrench their influence and status. For instance, taking direct and observable action allows BART members to show that they are “doing something” about a perceived problem—bias on campus—even when the “something” at issue may not be in the institution’s collective best interests or in line with the needs of other stakeholders (e.g., faculty or students).

This is not to suggest that BART personnel are any more or less likely to act in bad faith than other university constituents. The point is simply to observe that agency-cost tensions arise whenever agents see opportunities to protect their careers, or when they face implicit or explicit pressure to justify the importance of their positions. As is true in any quasi-regulatory environment, policies and practices are constrained by human limitations. Errors and accidents will happen. Poor planning and a lack of resources will happen. Conscious acts of malfeasance will happen.

These issues are especially salient when BART programs arise only in response to specific crises. For public relations and branding purposes, schools have strong incentives to launch new initiatives that appear as ready-made solutions to emerging scandals. However, institutions often face comparably less pressure to examine how existing resources might be used, leveraged, or repurposed to accomplish the same goals with more efficiency, or how reactive measures might conflict with long-term strategies or current university policies.

Something similar emerges in First Amendment jurisprudence. Judges and politicians frequently “rush headlong to suppress speech they can demonize as dangerous” due to a sense of panic during “times of crisis, real or imagined.”¹¹⁴ A related criticism frequently extends to the federal criminal law.¹¹⁵ Like the proliferation of new

113 See Robert Bird & Stephen Park, Turning Corporate Compliance into Competitive Advantage, 19 U. Penn. J. Bus. Law 285, 336 (2017).

114 Geoffrey R. Stone, Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century, 36 Pepp. L. Rev. 273, 278 (2009).

115 See, e.g., Julie R. O’Sullivan, The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes as Case Study, 96 J. Crim. L. & Criminology 643 (2006).

administrative departments and programs on American campuses, the federal criminal code continues to expand as legislators draft new laws to address fresh controversies without first checking for potential overlap or inconsistency with provisions already on the books. Policymakers can expect to gain political capital by quickly responding to crises, but the larger, systemic consequence of this behavior is an ever-growing regulatory morass that hinders predictability and consistent application.

3. Unintended Consequences

The last critical point to consider is the danger that BARTs might undermine the very objectives that they seek to advance. For example, with respect to the oft-cited goal of protecting minority communities on campus, the risk of BART-related chilling effects runs in every direction. BARTs do not restrict who can file reports or who can become the subject of an investigation. Caucasian students can file reports against African Americans, Republicans can file against Democrats, and Christians can file against Muslims—and vice versa. These occurrences happen regularly, reinforcing the worry that BARTs can be weaponized to inflame tensions and inhibit the sharing of all potential viewpoints, including those from members of underrepresented groups.¹¹⁶

Dr. Glyn Hughes, a sociologist and administrator at the University of Richmond, takes this concern a step further. He suggests that most bias-response measures are merely cosmetic and tend to focus so much on public relations that they ignore larger structural and environmental factors contributing to discrimination.¹¹⁷ He writes:

By reasserting moral principles (tolerance, civility, inclusion), denunciations of bias incidents can recuperate the “reality principle” that was distressed by the incident—for example, that the University is an upstanding racial actor that truly “values” diversity. The campus convenes the Bias Response Team, denounces the incident as a despicable anomaly, implores civility, and pledges a transparent, law-

116 See generally Foundation for Individual Rights in Education, *supra* note 3, at 24–26; Snyder & Khalid, *supra* note 5; John Carroll University, *supra* note 42; see also Nadine Strossen, *Hate Speech and Pornography*, 46 *Case Western L. Rev.* 449, 465-70 (1996) (noting that even though speech codes are nominally created to protect minority groups, they often get used by majority to suppress minority students).

117 See Glyn Hughes, *Racial Justice, Hegemony, and Bias Incidents in U.S. Higher Education*, *Multicultural Perspectives*, 2013, at 126–32 (2013), <http://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1022&context=socanth-faculty-publications>.

and-order commitment to finding the perpetrator. In this way, the incident becomes an opportunity to reinvigorate the campus (brand) as being on the good side of racism.¹¹⁸

The consequence of this approach is that bias incidents “are reframed not as mere symptoms of systemic racial inequality, but as the disease itself; and the systemic features drop out of view.”¹¹⁹ BARTs might therefore paradoxically serve to distract from the harder task of addressing institutional attitudes and behaviors that contribute to the problems their proponents hope to discourage. They could falsely suggest to school officials that the problem of bias has been taken care of, and that they can move forward without worrying about future issues. A related risk is that speech-related investigatory programs could turn targeted speakers into martyrs for racist causes.¹²⁰

III. PROPOSALS FOR GOVERNANCE AND REFORM

The discussion surrounding BARTs makes two things clear: first, that the goal of mitigating bias on campus is rightfully here to stay, and second, that any university policy or program targeting expression will inherently generate fears of censorship and abuse. Mindful of these realities, one way to move the debate forward is to recognize and respond to the critical role that governance plays within all complex institutions, including institutions of higher education.

Governance refers to “the systems and processes concerned with ensuring the overall direction, control and accountability of an organization.”¹²¹ When deployed effectively, governance enables stakeholders to develop and execute strategic plans, minimize agency costs, comply with external regulatory requirements, and respond to risks and pressures in ways that stay consistent with institutional goals. Ideally, good governance will encompass every activity within a university’s shared-governance architecture, from decision-making by the president to initiatives undertaken by student

¹¹⁸ Id.

¹¹⁹ Id.

¹²⁰ C. Edwin Baker, *Hate Speech*, in *The Content and Context of Hate Speech* 70, 72–73 (Michael Herz & Peter Molnar eds. 2012).

¹²¹ Cornforth & Brown, *Nonprofit Governance: Innovative Perspectives and Approaches* (2014).

and faculty government. A governance breakdown at any level can quickly complicate matters for others. For example, poor communication and accountability in the provost's office will soon disrupt strategic planning within individual colleges and departments.

Many strategies exist to help institutions implement good governance practices. Some focus on economic theory, viewing organizational behavior through a lens of rational economic interest. Others rely less on economics and more behavioral psychology. One method that holds particular promise in the context of bias response strategy is the so-called "new governance" approach to organizational behavior.

New governance theory "emerged as a school of thought that focuses on the significance of institutional design and culture."¹²² Though the theory primarily addresses questions bearing on public regulation, its lessons hold traction in any complex, heterogeneous environment. The hallmarks of a new governance approach are soft law techniques for ordering internal processes that build from the ground up rather than from the top down to encourage self-regulation. Many of the techniques center on defining core organizational values and principles, facilitating collaborative problem solving, promoting stakeholder engagement, encouraging ongoing learning and adaptability, and utilizing insights from the expressive powers of law.¹²³ Hard law rules, including punitive sanctions, still play a role in this model, but they remain largely in the background as methods of last resort. New governance is thus not a substitute for other governance mechanisms, but it complements them and bolsters their effectiveness.

In applying a new governance approach to the dual aim of mitigating bias and protecting expression on campus, the first step is defining the university's mission as it relates to free inquiry. A focalized mission makes it easier to facilitate meaningful dialogue among university stakeholders on controversial subjects like bias and expression. It orients parties toward a clear, principles-based framework for decision-making. Strict attention to a mission driven by inquiry will also provide clarity when setting the parameters of permissible intervention into student and faculty speech, thereby mitigating the risk of agency costs.

¹²² Orly Lobel, *New Governance as Regulatory Governance*, in *The Oxford Handbook of Governance* (David Levi-Four ed. 2012).

¹²³ Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 *Ala. L. Rev.* 100, 132 (2015).

Universities can facilitate these efforts by creating a coordinating body to implement bias-response initiatives and monitor them for alignment with mission. This body should include a diverse range of stakeholders, and it should be responsible for guiding the process of engagement, designing robust accountability and transparency rules, implementing training programs, and acting as a check on noncompliance.

A. Defining the University's Mission

Mission represents an institution's focal point. Collaborative and multi-dimensional success is difficult when parties disagree on what they are trying to accomplish. Unifying around an overarching principle or set of values helps to minimize that hurdle. Doing so makes it easier to determine the criteria and desired culture that will provide the guiding force for a dialogic brand of policy development. Clarity of mission also stimulates conversations and mutual understanding around issues before individual concerns arise. For example, keeping specific values and principles at the forefront of policy discussions—and consistently reinforcing their primacy—should reduce or eliminate disagreement among constituents over how to set priorities. In this way, mission forms the connecting thread within organizational governance. It provides the filter through which stakeholders are to assess ideas and weigh consequences.

The importance of mission means that extreme care is necessary when defining it. For colleges and universities, the threshold step is resolving the question of purpose: how should an institution of higher education conduct itself in society? The answer that follows will reflect the larger values that a school should apply to every strategic and policy decision it faces, including decisions about anti-bias initiatives.

As described by the American Association of University Professors (AAUP), “[a]cademic institutions exist for the transmission of knowledge, the pursuit of truth, the development of students, and the general well-being of society.”¹²⁴ The successful pursuit of this mission is only achievable through a governing framework that protects open inquiry and allows for the free exchange of ideas. Again, the AAUP's guidance is instructive:

¹²⁴ American Association of University Professors, Joint Statement on Rights and Freedoms of Students (1967).

“As members of the academic community, students should be encouraged to develop the capacity for critical judgment and to engage in a sustained and independent search for truth....[they] should be free to examine and discuss all questions of interest to them and to express opinions publicly and privately.”¹²⁵

The courts express similar sentiments when ruling on matters involving the First Amendment and campus speech. In *Keyishian v. Board of Regents*, the United States Supreme Court wrote that “the college classroom with its surrounding environs is peculiarly the ‘marketplace for ideas.’”¹²⁶ The Court continued:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.¹²⁷

The 10th Circuit Court of Appeals adds that universities “routinely require students to express a viewpoint that is not their own in order to teach the students to think critically: For example, a college history teacher may demand a paper defending Prohibition, and a law-school professor may assign students to write ‘opinions’ showing how Justices Ginsburg and Scalia would analyze a particular Fourth Amendment question...Such requirements are part of the teachers’ curricular mission to encourage critical thinking...”¹²⁸

These characterizations of academic values remain consistent throughout history. Students at the first universities were educated to “see two sides of a problem, to apply

¹²⁵ Id.

¹²⁶ *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

¹²⁷ Id.

¹²⁸ *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004).

authority flexibly in solving it, and to defend [their] action[s] articulately.”¹²⁹ In 1950, Michael Oakeshott stressed that the business of a university is to “release...pupils from servitude to the current dominant feelings, emotions, images, ideas, beliefs, and even skills, and to bring to their notice what the current world may have neglected or forgotten.”¹³⁰ More recently, Jonathan Rauch defined the “moral charter” of universities as being “first and foremost to advance human knowledge by practicing and teaching criticism.”¹³¹

The University of Chicago has gone so far as to adopt a formal statement to the effect that:

[T]he University’s fundamental commitment is to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed. It is for the individual members of the University community, not for the University as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose.¹³²

This statement—the Chicago Statement—has since been adopted by dozens of prominent universities, including Princeton, Columbia, Johns Hopkins, Georgetown, the University of Wisconsin, and the University of Minnesota. It closes with an observation from former University of Chicago president Robert Hitchens to underscore the resolve of its claim: “without a vibrant commitment to free and open inquiry, a university ceases to be a university.”¹³³

Of course, organizing around a mission focal point of knowledge-building and free inquiry does not mean that universities should avoid establishing safety and support

¹²⁹ James Axtell, *Wisdom’s Workshop: The Rise of the Modern University* 41 (2016).

¹³⁰ Michael Oakeshott, *The Character of a University Education*, in *What is History? And Other Essays* (Luke O’Sullivan ed., 2004).

¹³¹ Rauch, *supra* note 83, at 86

¹³² University of Chicago, *Report of the Committee on Freedom of Expression* (2015).

¹³³ University of Chicago, *Report of the Committee on Freedom of Expression* (2015); see also *Rodriguez v. Maricopa Co. Cmty Coll. Dist.*, 605 F.3d 703, 708 (2010) (“The right to provoke, offend and shock lies at the core of the First Amendment. This is particularly so on college campuses. Intellectual advancement has traditionally progressed through discord and dissent, as a diversity of views ensures that ideas survive because they are correct, not because they are popular. Colleges and universities—sheltered from the currents of popular opinion by tradition, geography, tenure and monetary endowments—have historically fostered that exchange. But that role in our society will not survive if certain points of view may be declared beyond the pale.”).

systems for students. Bias and discrimination are legitimate, important issues that require thoughtful attention. Colleges and universities have long endeavored to keep students safe and comfortable.¹³⁴ Today's students enjoy access to a wide range of health and wellness services, transportation services, housing and dining services, campus police forces, counseling services, disability resources, and mentoring programs. Even beyond any historical, moral, or contractual obligation to provide students with these protections, the increasingly intense competition to attract new students—both domestic and foreign—creates a strong practical incentive for schools to show credibly that they care for, welcome, and respect all persons. Schools must further respond to the safety-related legal requirements imposed by various state and federal statutes and regulations, including Title IX and the Clery Act, as well as the wider prospect of tort liability.

Still, in acting to serve each of these obligations, the vital need to protect students does not stand in isolation: it intersects with the university's overarching mission to pursue knowledge. The policies that schools adopt should therefore serve this multi-faceted mission, meaning that protocols for student safety must be balanced alongside measures designed to transmit knowledge and engage in open, critical inquiry—with the latter forming part of a matrix of factors that contribute to student development.

There is nothing novel about this observation. Colleges and universities can and should serve many interests, and student safety belongs at the top of the list. However, if schools are to stay faithful to their ultimate purpose of knowledge creation and dissemination, then the principle of complete freedom of inquiry should permeate every governance decision they make—including steps taken in response to bias concerns on campus, as well as those designed to promote student safety and well-being more generally.

¹³⁴ See James Axtell, *Wisdom's Workshop: The Rise of the Modern University* 5–10 (2016) (noting how, in the thirteenth century, major universities in France and England regulated the sounds and smells emanating from nearby buildings to prevent distraction. The same schools also built enclosed quadrangles with defensible gates to protect students and faculty from outsiders who sought to do them harm—with local animosity often arising because of the food, drink, and other amenities that were only available to members of university communities.).

B. Implementation and Oversight

The process of building a principle-based governance system that supports students while protecting free expression can proceed as soon as the university establishes its core set of values. A straightforward, accessible statement of mission creates the framing device necessary for developing the policies that will drive its influence throughout the institution. This is a fundamental aspect of new governance's meta-regulatory nature: emphasizing ways to guide the process of regulation through norms and reflexive design, rather than setting specific and static terms to regulate issues directly.¹³⁵

Here, a useful strategy is the adoption of a statement akin to the Chicago Statement. If a school is unwilling or unable to do this, then the prospects of preserving a strong commitment to free inquiry while designing individual programs and policies diminishes. Schools will be forced instead to rely on individual thought leaders to articulate the importance of free inquiry. Even if those persons exist at an institution, their influence is often unpredictable. They will be left to reference a university's purpose in the abstract, as opposed to drawing on the support of a superseding and specific institutional commitment.

The adoption of a statement in keeping with the Chicago Statement's values of free expression and free inquiry mitigates that obstacle. Moreover, from a new governance perspective, doing so nudges parties toward a policy-making approach that stresses ongoing dialogue, learning, and adaptability.

1. Coordinating Mechanism

The complexity and breadth of the modern university means that a nimble coordinating body is necessary to cultivate the influence of mission throughout a school's bias response efforts—as well as in all university decision and policy-making activities. Thoughtful attention to the composition of this body is of paramount importance. This group or team will not necessarily serve as a replacement for BARTs; rather, it will represent a recalibration of the BART idea so that those tasked with implementing bias response strategy do not drift from a commitment to free inquiry as they work to care for

¹³⁵ Yockey, *supra* note 123, at 132.

anxious or alarmed students and address systemic problems. The necessary recalibration extends to both membership and terminology.

a. Membership.

In terms of membership, diversity within the bias response coordinating body is crucial. The circumstances surrounding bias claims are often complex, subjective, and ambiguous. It is challenging to maintain a process of collaborative problem solving under these conditions if stakeholders stay siloed in subgroups that rarely interact, or if they are put on committees or teams that underrepresent the university as a whole. This is the problem with BARTs that consist only of administrative personnel and those that are staffed only by individuals who promote the same ideology or political agenda.¹³⁶ These arrangements increase the risk of groupthink and discriminatory enforcement. Governance becomes unbalanced, making it difficult to benefit the university in a holistic manner.

The body tasked with coordinating bias response initiatives therefore needs to reflect the diversity within the university's traditional shared-governance system so that the interests of all stakeholders are taken into account. It should include faculty members who are active researchers, as well as lawyers who can analyze actions under the First Amendment (and any comparable protections at private institutions). The group must also include meaningful representation—not tokenism—from persons across the political and demographic spectrum.¹³⁷

Exposing ideas to a diverse crowd will provide a richer picture of potential programmatic impact. It discourages administrative tunnel vision, where the interests of only a small segment of the student, faculty, or staff populations comes to exert an outsized influence over policies meant to apply broadly to all facets of the institution. Committees that consist only of persons from student services departments, for instance, may not fully

136 Only 27% of BARTs include faculty representation (24% at public institutions, 33% at private institutions). Foundation for Individual Rights in Education, *supra* note 3. The same report finds that 63% of BARTs feature administrators from student conduct departments (56% public, 73% private), and 42% of programs feature members from law enforcement (41% public, 43% private). *Id.*

137 Admittedly, this may be difficult in light of research suggesting that university faculty overwhelmingly identify as moderate (46%) or liberal (44%) rather than conservative (9%). See Scott Jaschik, *Professors and Politics: What the Research Says*, *Inside Higher Ed* (Feb. 27, 2017),

<https://www.insidehighered.com/news/2017/02/27/research-confirms-professors-lean-left-questions-assumptions-about-what-means>.

appreciate the nuances of academic freedom in the classroom because their primary responsibilities run to student comfort in the short-term. The same would be true for a group composed of only those on the political left or right—the temptation to equate disagreement with bias will likely increase under those circumstances.

Importantly, truly diversifying the relevant team by bringing more players and ideas into the fold should force participants to manage conflicts of opinion and work to persuade others of the wisdom of a given course of action.¹³⁸ In this way, the challenge of bias response falls into alignment with a mission of free inquiry—it compels participants to talk to one another and find common ground along the axis of speech and safety rather than defer to whichever side has the most political power.¹³⁹

b. Terminology and Signaling.

A corollary concern is the terminology that the coordinating body or team uses, as well as the image that it seeks to project. Laws, rules, symbols, and policies all hold expressive power. In the case of law, legal requirements send signals about societal beliefs and attitudes toward certain issues. The classic example is anti-discrimination legislation. Anti-discrimination statutes express society’s view that discrimination is wrong.¹⁴⁰ Similarly, environmental regulations express a collective assessment about the importance of clean air and water.

The very act of creating a BART communicates a message about a university’s desire to prevent bias and offer student support, but the content and implications of that message are open to subjective interpretation. Couching the program as a “response team,” for example, brings to mind a policing or disciplinary function. Common BART terminology that refers to parties as “perpetrators,” “victims,” and “investigators”—to say nothing about teams that include members from law enforcement—further reinforces this perception.¹⁴¹

138 Rauch, *supra* note 83, at 67, 101-02 (“‘One of the strengths of science,’ the philosopher and historian David L. Hull has written, ‘is that it does not require that scientists be unbiased, only that different scientists have different biases’; Big arguments get disaggregated into smaller ones as people hunt for consensual ground. Arguments are between individuals and small groups, not between powerful belief states.”)

139 *Id.* at 68.

140 Susanna Kim Ripken, *Corporate First Amendment Rights After Citizens United: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. Pa. J. Bus. L. 209, 248–54 (2011).

141 Foundation for Individual Rights in Education, *supra* note 3, at 22.

A few schools are taking strides in a better direction. The University of Chicago's anti-bias program distances itself from a punitive or investigatory characterization through its name: Bias Education and Support Team.¹⁴² Similarly, the University of Iowa softens its expressive message by referring to its BART replacement as the Campus Inclusion Team.¹⁴³ Better still would be program titles that directly reference free expression or free inquiry, but both the Chicago and Iowa formulations at least offer a less-aggressive posture from which to engage stakeholders. Dialogue can open with an emphasis on counseling and education, for example, rather than the common BART impulse to police the content of speech.

Worries about cosmetic reform also ought to dissipate when programs signal an emphasis on education rather than judgment. Instead of using an investigatory or punitive approach to reinvigorate the university's anti-discrimination message—something that might distract from the real problem of bias—greater attention and resources can be directed to understanding root causes for *why* certain students and faculty feel unwelcome.

2. Engagement and Dialogue

Many of the concerns surrounding BARTs stand a better chance of mutually satisfactory resolution through a richer and more deliberate approach to collaborative dialogue. This follows from the goal of policy implementation, which should be problem solving, not ordering, as well as from the observation that each pillar of the university shared-governance system—faculty, staff, students, and administration—possesses unique levels of experience and expertise.

Charging a coordinating body to look beyond its membership and pursue a deliberate strategy of expansive stakeholder engagement will encourage constituents with varying beliefs and worldviews to hear and respond to the positions taken by others. If all faculty members receive an opportunity to weigh in on bias response strategy early in its development, for example, the odds increase that they will flag important questions about academic freedom before it is too late to make policy changes. Likewise, consulting a wide

¹⁴² Campus and Student Life, *supra* note 15.

¹⁴³ University of Iowa, Campus Inclusion Team, <http://inclusionteam.uiowa.edu>.

swathe of students throughout the planning phase will provide greater understanding about how policies might affect people of every faith, ethnic, racial, and political background. Many students and faculty members, including Christians, Muslims, Jews, African-Americans, Caucasians, Asians, Hispanics, Republicans, Democrats, and members of the LGBT community—to name just a few demographic categories—will have different outlooks, personal stories, and suggestions for how bias response efforts might affect them or their affiliated groups.

A variety of tools exist to promote these exchanges, including open public forums, university radio and television programs, student newspapers, podcasts, online videos, and seminars on cultural competency and perspective. To be sure, all stakeholders will need equal access to communication channels and opportunities, and space should be set aside for replies and alternative viewpoints.¹⁴⁴ Some exchanges could occur in the context of specific educational programs, such as seminars on the role of the First Amendment during the U.S. Civil Rights Movement or the circumstances surrounding the Berkeley Free Speech Movement.¹⁴⁵

Universal accord on the issues of bias and expression might not emerge from these efforts, but robust conversations among stakeholders will help to fuel the process of constant learning that underlies much of the new governance emphasis on adaptability and responsiveness. This observation mirrors an important normative claim about the value of the First Amendment. A primary benefit of the First Amendment is its ability to allow diverse groups to come together in public discourse by not imposing the viewpoint of one dominant group. The First Amendment makes sure everyone feels safe and welcome to speak, with no single group controlling a monopoly on cultural norms.¹⁴⁶

3. Definitional and Jurisdictional Clarity

Perhaps most critical to developing a bias response strategy within a framework of free inquiry is the establishment of definitional and jurisdictional clarity. Even with a

144 Katharine Gelber, Reconceptualizing Counterspeech in Hate Speech Policy (with a Focus on Australia), in *The Content and Context of Hate Speech* 210, 214 (Michael Herz & Peter Molnar eds. 2012).

145 Nadine Strossen, *Regulating Campus Speech: A Modest Proposal*, 1990 *Duke L. J.* 484, 563 (1990).

146 Robert Post, Interview with Robert Post, in *The Content and Context of Hate Speech* 16–18 (Michael Herz & Peter Molnar eds. 2012).

diverse coordinating group in place and an emphasis on norms of free inquiry, perfect neutrality in execution is impossible.¹⁴⁷ Agency costs are never zero. But the risk of subjective or discriminatory investigations dissipates when the definitions of terms like bias are specific and clear. The same holds true when setting the boundaries of a university's disciplinary powers in connection with bias allegations. Detailed descriptions of student and faculty rights and responsibilities that comport with applicable law should help prevent abuses that spring from ambiguous policies.

Again, some promising templates already exist. The University of Chicago's BEST program sets forth a clear and narrow definition of bias incidents:

A bias incident involves actions committed against or directed toward a person or property that are motivated, in whole or in part, by a bias against race, color, religion, sex, sexual orientation, gender identity, national or ethnic origin, age, status as an individual with a disability, protected veteran status, genetic information, or other protected classes as required by law and that interferes with one's educational opportunities or disrupts the learning environment.¹⁴⁸

In enumerating specific legally protected classes, this definition avoids vague catchall categories like political affiliation and political belief, and it limits subjective application by declining to encompass speech that merely causes anger or is perceived as hurtful.

A further check on over breadth and subjectivity is the definition's limitation of scope to cover only those bias incidents that interfere with educational opportunities or disrupt the learning environment. This language is similar to that used by the Supreme Court in cases involving harassment and potential speech-related disruptions on campus. In *Davis v. Monroe County Board of Education*, the Court defined unlawful peer-on-peer harassment in the educational context as conduct that is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."¹⁴⁹ Similarly, in *Healy v. James*, the Court opined that under

147 Rauch, *supra* note 83, at 143.

148 Campus and Student Life, *supra* note 15.

149 *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

the First Amendment, “associational activities need not be tolerated where they ... substantially interfere with the opportunity of other students to obtain an education.”¹⁵⁰

These two cases envision conduct or speech that is stronger in kind than the BEST’s definition of bias incident, but both formulations indicate that the relevant behavior must be sufficiently serious to limit a student’s ability to participate in an educational program. This reinforces the interpretation that speech that one finds disagreeable or disrespectful does not, for that reason alone, rise to the level of objective bias.

The BEST program provides additional guidance and signaling through its external communications. Before describing the program’s policies and procedures, the BEST website opens with the following statement: “The University of Chicago is a community of scholars dedicated to research, academic excellence, and the pursuit and cultivation of learning. Freedom of expression is vital to our shared goal of the pursuit of knowledge and should not be restricted by a multitude of rules.”¹⁵¹ The site also notes that expression causing hurt or discomfort does not necessarily constitute a violation of the law or of University policy, and it clarifies that the mission of BEST is “to educate and support students affected by bias incidents and empower them to respond effectively”—not to conduct investigations or impose discipline.¹⁵²

When the University of Iowa chose to create a Campus Inclusion Team rather than a BART, it too specified that the program “does not conduct investigations or have the ability to impose discipline.”¹⁵³ The CIT’s website adds that the university “encourages and supports open, vigorous, and challenging debate across the full spectrum of human issues as they intersect with this community.”¹⁵⁴ As for speech that one finds hurtful, the CIT describes its role as solely to provide “resources and support for those who are hurt by another’s words or actions.”¹⁵⁵

150 *Healy v. James*, 408 U.S. 169 (1972).

151 *Campus and Student Life*, *supra* note 15.

152 *Id.*

153 University of Iowa, Campus Inclusion Team, <https://inclusionteam.uiowa.edu/freedom-of-expression>.

154 *Id.*

155 *Id.*

The guidelines from Chicago and Iowa illustrate the potential to balance concerns about student well-being and inclusivity alongside an overarching commitment to free inquiry and expression. First, by expressly disavowing any investigatory or sanctioning function, both programs respond to concerns about chilling effects. To improve on this front, however, anti-bias teams and programs should add specific examples of speech that falls within or outside of clearly defined parameters for bias incidents. They should also clearly state that they do not pursue mandatory or uninvited formal questioning of reported speakers.

Second, by centering on support for students affected by speech, programs like the ones at Chicago and Iowa leave room for students to seek counseling and support if they feel depressed or anxious because of comments they perceive as biased or hurtful. The programs also allow for the collection of data on bias concerns among students and faculty. This addresses one of the primary goals of BART advocates: maintaining an ability to identify larger trends on campus in order to develop “heat maps” of areas, residence halls, or departments where complaints appear to concentrate. Universities can rely on those trends when organizing educational programs and outreach, including programs that take shape through a process of multi-stakeholder engagement.

Lastly, when defining bias and setting jurisdictional boundaries, students and faculty should be reminded that they always remain free to contact law enforcement if they believe that they are victims of hate crimes, true threats, harassment, or assault. Of course, as before, clear definitions of those terms are necessary to avoid confusion and mitigate the potential for discriminatory application. A university’s general counsel should take the lead on drafting those definitions since they are terms of art under state and federal law.

4. Transparency and Accountability

Some existing BARTs provide periodic disclosures and reports, but many do not, and the overall range of available information about BART activities remains mixed. To improve, transparency in anti-bias efforts should start by providing all university

constituents with detailed descriptions of applicable policies and procedures.¹⁵⁶ This disclosure should indicate the nature and type of data that the school collects on bias incidents, including to what extent the school records, preserves, or shares the identities of reporting or reported parties. The disclosure should further identify who has access to that information and describe how they might use it. Additional reports should follow on a quarterly or annual basis to summarize the categories of bias reports that come in, as well as what anti-bias efforts the university has undertaken in response and how those efforts align with mission.

Transparency along these lines will better enable university constituents and the public at large to participate in monitoring efforts. Moreover, it will reduce information asymmetry and thereby facilitate productive dialogue on any issues of expression, censorship, or student support that emerge. Ultimately, the greater the transparency, the greater the trust that stakeholders will likely put in the actions that university programs take. This approach will not resolve every potential concern, but it can mitigate major points of uncertainty.

In terms of specific reports of bias that come before the coordinating body, each incident should be subject to a thorough review by everyone on the team prior to making any decisions about next steps. Training plays a vital role here. Anyone with the ability to take action in response to a bias complaint will need guidance on the role of free inquiry in the university's mission, as well as what specific types of speech or conduct rise to the level of a policy or legal violation.

To promote fair and consistent assessments, part of the necessary training must include detailed instructions about how to apply the (hopefully) clear and precise definitional and jurisdictional parameters established by the anti-bias coordinating body. In addition, training should feature a reflexive component that encourages individuals to anticipate, assess, and describe how policies or actions might affect speech or inquiry.

¹⁵⁶ This is an area where a program like the University of Iowa's CIT could benefit from change. For example, the CIT does not disclose what happens when a student reports an incident to the CIT. The reporting student is told that she will be contacted by a staff member to set up an appointment, and it appears that her report will be used to assess campus trends, but the CIT's website does not address its data or record retention protocols, and it is uncertain what information might be kept about reported "perpetrators." University of Iowa, *supra* note 153.

Within the coordinating body, for example, there should be a requirement that each member consider—in a written evaluation—how his or her proposed actions intersect with the promotion of free inquiry, in addition to how other stakeholder groups might respond to any given bias response. Guided reflection along these lines can counteract pressures that contribute to mission drift. It forces agents to look outside of themselves, prompting them to pause to consider how their actions align with the university’s mission whenever they face the need to make subjective judgment calls.

This latter aspect of training will be especially powerful if members of senior leadership model it. Senior leaders are uniquely positioned to show how the objectives of protecting students, creating a welcoming campus, and protecting free expression can coexist without becoming either/or propositions. If leaders take their role seriously in this regard, they will inspire a greater sense of shared responsibility among stakeholders and university constituents, as well as signal the importance of mission fidelity.

Too often, though, university presidents, deans, and department heads present mixed-messages—one moment lauding the values of freedom of expression, and the next arguing that restrictions on viewpoint diversity are sometimes necessary for the sake of promoting sensitivity.¹⁵⁷ This type of qualifying response risks adding to the considerable confusion that many students, faculty, and staff already display in the context of academic freedom and inquiry. It is also more likely to emerge where schools lack a strong top-down emphasis on the prioritization of free inquiry and debate.

One of the better examples of role modeling came after the incident at Wilfred Laurier University involving graduate student Lindsay Shepherd. As noted earlier, Shepherd was reprimanded by her supervising professor and accused by an administrator of potentially violating the school’s sexual violence policy for staying neutral after showing her communications class three minutes of a televised debate on pronoun usage. After a

¹⁵⁷ See, e.g., Dean’s Statement to Law Community, University of San Diego School of Law (Sept. 19, 2017),

https://www.sandiego.edu/law/school/news/detail.php?_focus=64233; Office of the President, Letter on John Derbyshire’s Scheduled Appearance at Williams, Williams College (Feb. 18, 2016), <https://president.williams.edu/letters-from-the-president/john-derbyshires-scheduled-appearance-at-williams> (“We respect—and expect—our students’ exploration of ideas, including ones that are very challenging, and we encourage individual choice and decision-making by students. But at times it’s our role as educators and administrators to step in and make decisions that are in the best interest of students and our community. This is one of those times.”).

video of her meeting with the two men became public, the critical reaction was fast and furious. Many observers strongly supported Shepherd, arguing that her supervising professor and the school's administration were behaving illiberally, engaging in viewpoint discrimination, and interfering with academic freedom. Others disagreed and said that Shepherd was in the wrong for staying neutral. For her part, though, Wilfred Laurier president Deborah MacLatchy quickly apologized to Shepherd, adding that "Laurier is committed to the abiding principles of freedom of speech and freedom of expression."¹⁵⁸

MacLatchy then went further by turning to governance. She immediately hired an independent investigator to review and prepare a report on the incident.¹⁵⁹ One month later, MacLatchy accepted the findings of the investigator's report. She determined that the meeting with Shepherd was an "institutional failure," and that Shepherd did not engage in any wrongdoing.¹⁶⁰ Indeed, the report found that the meeting in question never should have happened because no complaint—formal or informal—was ever made against Shepherd.¹⁶¹

Going forward, MacLatchy committed to taking personal responsibility for implementing improved training for faculty and students on the meaning and application of policies relating to gender and sexual violence.¹⁶² She also announced the launch of a complete administrative review of those policies, as well as the launch of a new task force to develop and implement "clear, tangible" guidelines on academic freedom.¹⁶³ She closed her statement on the Shepherd report by reaffirming the importance of both free inquiry and student support. She explains: "Ideas that one finds objectionable should be challenged and debated," while at the same time, "[m]embers of the university community must be supported to work and study in an environment free of discrimination and harassment..."¹⁶⁴ This comment serves as an important reminder that people who exhibit

158 President's Statement re: Independent Fact-Finder Report, Wilfred Laurier University, (Dec. 18, 2017),

<https://wlu.ca/news/spotlights/2017/dec/president-statement-re-independent-fact-finder-report.html>.

159 Id.

160 Id.

161 Id.

162 Id.

163 Id.

164 Id.

concerns about promoting free expression do not often oppose measures to enhance student safety. Where differences emerge, they usually relate to how best to counter biased or hateful speech, with those in the former group typically arguing that speech suppression is the wrong way to go.¹⁶⁵

Ultimately, an important aim of anti-bias programs should be to provide a level of training and accountability that allows each stakeholder within the university to become accustomed to thinking about free inquiry and its relationship to knowledge building in everything that they do. Mission is much more likely to take hold when constituents understand the reasons behind its adoption. Being told to value free inquiry may seem largely meaningless to some without an accompanying conversation about *why* free inquiry is a foundational component of a university education. Initiatives like the task force at Wilfred Laurier, Chicago's BEST, Iowa's CIT, or the coordinating body described in this article can provide a platform for organizing that conversation through face-to-face training, orientation, and educational programs that involve students, faculty, and staff.

IV. CONCLUSION

In closing, rather than push for an end to BARTs and all anti-bias measures in the face of concerns about speech suppression—which many universities will find intractable in the current political climate—this article offers a more nuanced alternative. It does so by sketching a governance model that relies on principles-based decision-making, meaningful stakeholder engagement, definitional clarity, and robust transparency and accountability measures. This approach should aid in the development of organic anti-bias strategies capable of promoting student safety without compromising the university's foundational mission of open inquiry.

Admittedly, taking this route will require institutional buy-in. Universities must want to protect expressive rights when responding to bias concerns. Some schools, or some stakeholders, might object to that desire, preferring instead to subvert speech and debate in the name of student safety. That would be unfortunate. As this article shows, it is entirely

¹⁶⁵ Peter Molnar, Responding to "Hate Speech" with Art, Education, and the Imminent Danger Test, in *The Content and Context of Hate Speech* 183 (Michael Herz & Peter Molnar eds. 2012).

possible to build an institutional framework that both safeguards free inquiry and addresses the concerns that inspired BARTs in the first place.

The Lack of Metaphysical Diversity in Psychological Discourse: How the Privileging of Secularism Hinders Scientific Advancement and Impacts Clients

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Diversity is essential to scientific progress. Homogenous discourse hinders scientific advancement, with the effects being most acutely felt among minority groups without a voice in the professional conversation. The thesis of this paper is that a lack of metaphysical diversity in psychological discourse affects the profession's ability to provide ethical and effective services to clients. After establishing that most psychologists affirm secular worldviews, the privileging of secularism in much of mainstream culture is discussed, a dynamic which serves to validate and reinforce secular perspectives in psychological discourse. Drawing from the philosophy of science literature, it is argued that the privileging of secularism vis-a-vis other metaphysical understandings of reality limits scientific advancement by facilitating the creation of a homogenous discourse that disadvantages metaphysical minorities and their perspectives. As a result, many people with mental health problems may not seek services from psychologists due to concerns about their inability to respect spiritual beliefs and values in clinical settings. The paper concludes by suggesting that increasing metaphysical diversity in psychology will facilitate scientific advancement by countering bias that negatively impacts spiritual clients and enhancing problem solving.

Key Words: Metaphysical Diversity; Secularism; Religion; Spirituality; Cultural Competence

Diversity benefits scientific advancement. As Medin, Lee and Bang (2014) state, diversity among scientists provides different ways of looking at the world while concurrently reducing bias. Put differently, a lack of diversity hinders scientific progress. Furthermore, the negative effects of scientific homogeneity are often most acutely felt among underrepresented minority groups. Although science has produced many societal benefits, it is important to note that it is a socially situated enterprise (Feyerabend, 1975/2005). Those without a voice in shaping professional discourse often pay a high price

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for homogeneity, as the participants in the Tuskegee syphilis experiment can attest (Jones, 2000).

The thesis of this paper is that a lack of metaphysical diversity in psychological discourse is affecting the profession's ability to provide ethical and effective services to clients. The metaphysical refers to the transcendent or to a spiritual reality that exists beyond the senses (Merriam-Webster, 2017). Thus, metaphysical diversity can be understood in terms of different ways of understanding transcendent reality. People construct different cognitively based assumptions about the nature of reality.

These understandings of reality are all held by faith and cannot be empirically falsified (Guba & Lincoln, 1998). Examples include secular perspectives (e.g., atheism), which can be defined as worldviews that are oriented toward the temporal or material world rather than the spiritual or transcendent world (Dictionary.com, 2016; Merriam-Webster, 2016). Similarly, spiritual-based perspectives (e.g., traditional Catholicism) represent other manifestations of metaphysical diversity (Richards & Bergin, 2014).

As such, metaphysical diversity represents an important form of cognitive diversity (Wang, Kim & Lee, 2016). To cite just some examples, Atheism, Buddhism, Christianity, and Islam, all represent distinct worldviews. These worldviews offer different understandings regarding many aspects of existence, including health and wellness. In the next section, the status of metaphysical diversity in psychology is examined.

Metaphysical Diversity in Psychology

Survey research indicates that psychologists are less invested in spiritual belief systems relative to the general public (Shafranske & Cummings, 2013). For instance, while 64 percent of the public believes that God exists, only 32 percent of clinical psychologists are convinced God exists (Delaney, Miller & Bisono, 2013). Similarly, 72 percent of the public base their whole life upon their religion. In comparison, 35 percent of clinical psychologists report basing their life upon religion (Delaney et al., 2013), with the extant research suggesting the percentage is even lower among APA leaders (Shafranske & Cummings, 2013).

Indeed, many of the most influential thought-leaders in the history of psychology are atheists. Examples include Sigmund Freud, Albert Ellis, Carl Rogers, Abraham Maslow, B.F. Skinner, John B. Waston, G. Stanley Hall, Hans Ernest Jones Eysenck, and Raymond B. Cattell, to list just some (Martin, 2007). These individuals represent the founders of some of the most prominent theoretical frameworks for understanding health and wellness. Examples include psychodynamic theory, behaviorism, cognitive theory, and humanistic theory (Slife & Williams, 1995).

Furthermore, many other key theorists rejected traditional religious beliefs while still retaining a nominal religious affiliation. In other words, traditional theistic beliefs were re-interpreted to conform with a secular perspective. Theorists that fall into this category might include individuals such as Jean Piaget (Evans, 1973) and Carl Jung (Homans, 1982).

In sum, psychologists—especially those that create and shape disciplinary discourse—tend to affirm a secular worldview that stems from the European movement commonly known as the Enlightenment (Gellner, 1992; Jafari, 1993). Enlightenment thinkers posited that human beings are autonomous individuals who can objectively discern material reality apart from any type of transcendent revelation (Lyotard, 1979/1984). Authority stemming from spiritual sources was largely rejected by Enlightenment thinkers and repositioned in individuals. Within this worldview, human beings are viewed as islands of authority in a materialistic world (Skinner, 2010). The spiritual world is discarded in favor of a naturalistic world.

It is important to note that the relative metaphysical homogeneity among psychologists is not unique. Many other helping professions are also dominated by a secular perspective, including, for instance, social work, family therapy, nursing, and psychiatry (Kanpol & Poplin, 2017). In addition, the secular value system is also widely disseminated in many other key societal venues.

The Privileging of Secularism in Mainstream Culture

As Sue (2010) notes, ultimate power resides in the ability to define reality. In contemporary society, reality is largely defined by what some observers have called the

post-industrial knowledge sector or knowledge class (Gouldner, 1979). This class includes those sectors of society engaged in the production and dissemination of symbolic knowledge, a consolation that includes entities such as the education system and the media complex (Hunter, 1991).

A secular orientation dominates the knowledge sector (Gouldner, 1979). The privileging of secularism has been observed in many reality defining venues (Smith, 2003), including the K-12 educational system (Nord, 2010), higher education (Marsden, 1994), broadcast news (Haskell, 2011; Kerr, 2003), comic strips (Lindsey & Heeren, 1992), corporate advertising (Maquire, Sandage & Weatherby, 1999; Maquire & Weatherby, 1998), films (Powers, Rothman & Rothman, 1996), film reviews (Moore, 2014), popular periodicals (Perkins, 1984; Woodward, 2005), news media (Bolce & De Maio, 2008; Kabir, 2006), and fictional television programming (Clarke, 2005; Moore, 2014).

Television programming has been singled out as being especially influential in shaping perceptions of reality (Stone, English, Ekman & Fujimori, 2008). The average American watches approximately five hours of television a day (Lind, 2014). Through exposure to this carefully scripted content, television essentially teaches viewers how to understand life-- how various groups should be understood, what issues should be considered problems, and how these problems should be addressed (Signorielli, 2004).

Content analyses indicate that spiritual people and their perspectives are essentially absent from television programming (Clarke, 2005; Lind, 2014; Moore, 2014; Skill, Robinson, Lyons & Larson, 1994; Skill & Robinson, 1994). One analysis of 20 years of programming did not uncover any scripts that affirmed the importance of faith, the power of prayer, or the possibility of miracles (Lichter, Lichter & Rothman, 1994). In other words, the scripts did not depict beliefs commonly affirmed among members of the general population (Stark, 2008).

As a result of this invisibility, observers have noted that traditional theists and their values are essentially de-legitimized as culturally valid options (Lind, 2014; Skill & Robinson, 1994). Heroes and leaders in fictional programming are typically framed as secular (Engstrom & Valenzano, 2010; Grigg, 2007). In a manner analogous to how African Americans have been portrayed (Pierce, Carew, Pierce-Gonzalez & Wills, 1977), spiritual

people tend to be depicted pejoratively, as outdated, out of touch, and even dangerous, in the few instances when spiritual people do appear (Lichter et al., 1994). For example, an examination of Christian and secular leaders found that Christian leaders tended to be disproportionately depicted as bland, shallow, and participants in unlawful activities (Skill & Robinson, 1994). Conversely, secular leaders were depicted as comparatively more loving, compassionate, caring, and attractive.

Through these various knowledge sector venues, secular values are disseminated throughout society, shaping understandings of reality (Kinnaman & Lyons, 2007; Kinnaman & Lyons, 2016). In turn, the secular perspective that pervades psychology is reinforced in societal discourse (Smith, 2003). This functions to further privilege secular perspectives among psychologists.

Secular Privilege and Psychologists

In brief, the concept of privilege refers to benefits that flow from structural power differentials (McIntosh, 2015). Groups with cultural power tend to shape discourse in a manner that serves to favor their beliefs and values. The values of dominant groups are unconsciously embedded into societal discourse at multiple levels (Adams, 2015). This embedding process is ubiquitous and largely unintentional; a function of structural power imbalances. As a result, those with access to cultural power tend to reap a number of often unacknowledged benefits as their values are widely accepted as normative. Many populations tend to benefit from this dynamic. For instance, structural power differentials often function to advantage those who are European American (Kwate & Goodman, 2014), male (Case, 2007), able-bodied (Banks, 2015), upper or middle class (Casey, 2005), native English-speaking (Vandrick, 2015), younger (Umphrey & Robinson, 2007) and thin or physically attractive (van Amsterdam, 2013).

In keeping with the content reviewed previously, secular people represent another group that tends to benefit from power imbalances (Hodge, 2009). As discussed above, the educational system, television programming, and other knowledge sector venues function to reaffirm the secular worldview commonly held by psychologists. Psychologists are socialized to see secular values as the cultural center, as the way society should be

structured. Although secularism is just one of many different metaphysical orientations, mental health professionals are socialized to see it as normative (Richards & Bergin, 2014).

Due to the pervasiveness of secularism, psychologists can be unaware of its status as just one culturally distinct understanding of reality (Vandrick, 2015). Value systems that occupy the cultural center are—by definition—often hard to recognize (Torino, 2015). To draw from McIntosh’s (2015) work, the cultural pervasiveness serves to obscure the structural power imbalances that advantage the understandings of psychologists. Benefits are not viewed as benefits since group members believe the advantages they possess are reasonable, rationale, or even ideal—a reflection of the way in which society should be ordered in a model world.

Table 1

Advantages that secular psychologists tend to enjoy

1. I can assume children will be exposed to curricular content in the K-12 educational system that features secular role models and values.
2. If I pursue advanced educational opportunities, I can expect to encounter many people in positions of power that share my metaphysical perspective.
3. I can assume the historical accomplishments achieved by people from my cultural group will typically be positively depicted in textbooks.
4. When I share my perspective in class, especially on controversial issues, I can expect teachers will generally agree with, or at least be sympathetic to, my views.
5. I can expect university professors to highlight content that agrees with my worldview.
6. I can likely find people who share my values to recommend me for graduate programs.
7. I can read influential psychological theorists and typically expect that my metaphysical perspective will be affirmed, rather than challenged.
8. If I graduate with a Ph.D. in an area with numerous faculty openings, I can pretty sure I will get a job and teach in an educational setting that corresponds to my qualifications.
9. I can send off manuscripts for publication and assume they will be assessed on their merits.
10. When I go up for tenure, I can expect most professors who will review my portfolio will share my basic assumptions about the nature of reality.

11. I can read influential newspapers and be pretty sure their editorial positions on issues will be similar to my own and, in any case, I can be confident that the patterns of reasoning will be familiar to me.
12. When I watch the broadcast news, I can expect to be provided with updates on problems and issues I believe are significant.
13. When I watch fictional television programming, I can assume characters from my culture will generally be depicted in a positive, nuanced manner.
14. When I tune into the most popular radio stations, I can expect the lyrical content will typically reflect my interests and beliefs.
15. I can expect advertisers to present their products in a manner that speaks to my metaphysical belief system.
16. I can read weekly periodicals, such as <i>Time</i> and <i>US News and World Report</i> , and expect that issues of importance to me will be brought to my attention and covered sympathetically.
17. I can go to award-winning films and assume the hero will be a representative of my cultural group.
18. I never have to worry about where or when to “come out” regarding my core social identity.
19. If I find myself around people from religious cultures, I can usually reorient the conversation in a way that reflects my perspective.
20. I can remain largely unaware of the values of traditional religious people—who may comprise the majority of the world’s population—without feeling any penalty within my social circles for this lack of knowledge.

Adapted from: Hodge, D. R. (2009). Secular privilege: Deconstructing the invisible rose-tinted sunglasses. *Journal of Religion and Spirituality in Social Work: Social Thought*, 28(1/2), 8-34.

Table 1 depicts some of the advantages secular psychologists generally enjoy. As psychologists move through life, their secular value system is reinforced at multiple points. Their educations, role models, information sources, and entertainment options all tend to reflect and buttress secular beliefs and values. Through this symbiotic process, secularism is not seen a distinct culture or value system; but simply the way the world is, and should be, structured.

These are not benefits that spiritual people typically experience in mainstream venues. Reality shaping institutions such as Harvard University have long abandoned the values of their spiritually animated founders in favor of establishing secularism as their

guiding ethos (Kendrick, 2006). In the same way that devout Puritans in a previous era once benefited from enrolling in elite schools such as Harvard, secularists now enjoy the advantages that come with matriculating in the most prestigious societal institutions (Smith, 2003).

The advantages listed in Table 1 help to illustrate the ubiquity of the secular perspective. The omnipresence of secularism in mainstream culture functions to authenticate—often at a deeply unconscious level—the correctness of the secular narrative in the lives of many psychologists. Since reality is continually viewed through the prism of a materialistic lens, over time people come to assume their naturalistic view of the world is accurate, normal, and correct (McIntosh, 2015).

To sum up, most psychologists—especially those shaping the profession’s discourse—hold secular worldviews. This secular ethos is accentuated in most mainstream cultural venues, a dynamic that serves to validate the secular value system in psychological discourse. The resulting metaphysical homogeneity has important implications for scientific advancement in psychology as illustrated by the following content drawn from the philosophy of science literature.

How Homogeneity Limits Scientific Advancement

Science is a value informed enterprise (Losee, 2004). With the intellectual collapse of the logical positivist movement, it is now acknowledged that each scientific observation is shaped by the observer’s theoretical perspective (Popper, 1963). All scientific products—including theories of health and wellness, interventions designed to ameliorate mental health problems, and even instruments designed to measure psychological constructs—are all based upon and informed by a certain set of unprovable assumptions about the nature of reality (Inbar & Lammers, 2016).

In the absence of alternative perspectives, homogenous epistemic communities emerge that reflect shared assumptions about the nature of reality. A guiding theoretically based worldview, or paradigm, tends to develop (Kuhn, 1970). These paradigms are transmitted to successive students through textbooks, journal articles, and other disciplines.

Paradigms function to highlight certain information while simultaneously obscuring other data and in the process serve to sanction a particular set of problems or puzzles for scientists to solve. Certain research questions are implicitly legitimized while other agendas are disfavored (Smith, 2014). Alternative perspectives tend to be seen as incommensurable. Information that falls outside the dominant worldview is often framed as unscientific and subsequently ignored, mischaracterized, or disenfranchised (Kuhn, 1970).

These effects are not just theoretical notions in the philosophy of science literature. Rather, the effects of limited diversity are widely accepted in psychological discourse (Duarte et al., 2015). This is particularly true in the areas of race and gender, two areas in which diversity advocates have successfully highlighted the pernicious effects of homogeneous discourse (Medin, Lee & Bang, 2014). For instance, European American males have traditionally dominated psychology. Accordingly, intelligence tests tended to reflect the values of European Americans. As a result, African American children have been historically disadvantaged when taking such tests (Zuberi & Bonilla-Silva, 2008). Since they are often unfamiliar with the language and examples that serve as common reference points in European American culture, they tend to record lower test scores.

Another example is provided by Kohlberg's (1981) theory of moral development (Medin, Lee & Bang, 2014). Kohlberg, a male psychologist, drew upon the work of other male theorists, such as Piaget and Darwin, to develop his stage theory of morality. He subsequently tested his theory using all male subjects and confirmed his hypothesis that the traditional male values of rationality and justice represented the pinnacle of moral development. Research indicated that men, in aggregate, tended to report higher levels of moral development relative to women. As Gilligan (1993) subsequently illustrated, this differential was to be expected, a natural outcome given the theoretical orientation of Kohlberg's developmental framework. Since females tend to prioritize care and love over the male values of rationality and justice, women necessarily recorded lower levels of moral development relative to men. The masculine values that characterized academic discourse essentially biased Kohlberg's theory against women in the same way that European Americans values biased intelligence tests against African Americans.

As these two examples illustrate, homogeneity of thought in psychological discourse tends to yield biased outcomes for perspectives that are largely excluded from disciplinary discourse. In a similar manner, the lack of metaphysical diversity in psychology has negative effects on people of faith. The same dynamics—a differential in worldviews in tandem with a power differential—fosters to bias in psychological discourse against individuals who view reality through a spiritual prism (Medin, Lee & Bang, 2014).

How the Lack of Diversity Affects Psychological Discourse

Due to the privileged status of secularism in professional discourse, as well as the wider society, it is assumed that other reasonable, intelligent people will also share the same Enlightenment-derived understanding of reality (Yancey & Williamson, 2014). Spiritual values, which fall outside the cultural center, are, at best, understood to have marginal utility, especially in terms of facilitating health and wellness (Brandt, Reyna, Chambers, Crawford & Wetherell, 2014). It is important to emphasize that this is not necessary a conscious process (McIntosh, 2015). Perceptions that are inconsistent with the reigning epistemic paradigm are unconsciously viewed as being inconsistent with scientific discourse (Kuhn, 1970).

In keeping with this understanding, content analyses have illustrated that secular views dominant the professional literature in psychology (Bergin, 1980; Lehr & Spilka, 1989; Redding, 2001; Weaver et al., 1998a). These findings are consistent with content analyses conducted in other disciplines who are important providers of mental health services (Heisler & Bagalman, 2015). In a manner similar to psychology, religious perspectives are essentially absent in social work (Cnaan, Wineburg & Boddie, 1999; Hodge, Baughman & Cummings, 2006; Tompkins, Larkin & Rosen, 2006), family therapy (Glenn, 1997; Kelly, 1992), nursing (McEwen, 2004), and psychiatry (Weaver et al., 1998b).

This is not to say that religion has been completely absent from psychological discourse (Leach & Sato, 2013). The Society for the Psychology of Religion and Spirituality (Division 36) has been existence for well over half a century. Rather, the central point is that spiritual perspectives have been relegated to peripheral status. As such, they are

largely delegitimized in mainstream discourse in a manner akin to African Americans and women in the above-mentioned examples.

This is illustrated by a content analysis of the *Diagnostic and Statistical Manual of Mental Disorders (DSM), III-R* (Larson, Milano & Lu, 1998). This study found that the DSM authors linked spirituality with psychopathology. This may reflect the influence of leading psychologists positing that religion fosters, or is a form of, psychopathology. For instance, both Freud (1966) and Ellis (1980)—the respective founders of the psychodynamic and cognitive movements—both argued that devout theistic faith represented a form of pathology.

From within the context of a secular worldview, value systems that deviate from the cultural center are implicitly seen as maladaptive. Accordingly, the DSM authors unconsciously equated spirituality and maladaptation. The linkage is a natural expression of unconsciously held beliefs that privileges secularism in mental health discourse. Since secularism is assumed to represent wellness, spirituality is assumed to represent a form of psychopathology.

This posited linkage between spirituality and ill-health is interesting in light of subsequent research. Indeed, subsequent editions of the DSM eliminated the linkage between spirituality with psychopathology. A few thousand studies have now examined the empirical relationship between spirituality and mental health (Koenig, McCullough & Larson, 2001; Koenig, King & Carson, 2012). In aggregate, this body of work indicates that the relationship between spirituality and health runs in the opposite direction than suggested by the *DSM, III-R* and key theorists such as Freud and Ellis. In other words, research has associated spirituality with health, rather than illness (Koenig & Shohaib, 2014).

Other studies provide an illuminating perspective on the degree to which people of faith are perceived to be outside the bounds of legitimate discourse. In a classic study, Gartner (1986) used an experimental design featuring mock applications to examine admissions to APA doctoral programs. Faculty at all APA accredited doctoral programs in the United States received one of three applications (a secular applicant, an applicant who mentioned he was an evangelical Christian, and an applicant who was an evangelical

Christian and hoped to integrate his religious orientation with his psychological work). Applicants who mentioned they were evangelical Christians were less likely to be admitted than equally qualified secular applicants. Evangelical Christians were rated less favorably than secular applicants regardless of whether they wanted to integrate their values into their work or just self-identified as an evangelical Christian. These results have been replicated using a similar methodology with other samples of helping professionals (Neumann, Thompson & Woolley, 1992; Neumann, Harvill & Callahan, 1995), including psychologists (Neumann, Thompson & Woolley, 1991). For instance in the latter study, psychologists with the Veterans Administration were asked to rate publication abstracts featuring Christian values and secular humanist values. Abstracts featuring Christian values were ranked significantly lower, suggesting those seeking to publish work that reflects Christian values face difficulties disseminating their scholarship.

The results obtained these are consistent with more recent research featuring self-report. One in six psychologists report they would be willing to discriminate against conservatives in reviewing their work (Inbar & Lammers, 2012). One in four would discriminate in reviewing grant applications and one in three state they would discriminate in hiring decisions. Thus, the greater the potential to influence professional discourse, the greater the willingness to discriminate (Crawford & Pilanski, 2014), with social conservatives being perhaps particularly at risk for discrimination (Inbar & Lammers, 2012).

These findings mirror those found in other academic disciplines. For instance, Yancey (2011) examined self-reported willingness to discriminate in hiring decisions. The results indicated that faculty across a range of disciplines indicated they would discriminate against conservative Christians when hiring new faculty members. For instance, in political science, 41% of faculty indicated they would be less likely to hire conservative Christians. In other disciplines even greater percentages of faculty indicated a willingness to discriminate. More specifically, 49% of faculty in sociology, 52% in history, 54% in philosophy, 67% in anthropology, and 71% in English reported a willingness to discriminate.

Consequently, it is unsurprising research indicates that psychologists are rarely exposed to content on spirituality or religion during their training (Jafari, 2016). Although many students recognize the importance of content on religious diversity, most psychologists report receiving little, if any, training on this topic during their educations (Shafranske & Cummings, 2013; Vogel, McMinn, Peterson & Gathercoal, 2013). Similar findings have been documented in other disciplinary settings, including social work (Canda & Furman, 2010; Oxhandler, Parrish, Torres & Achenbaum, 2015; Sheridan, 2009), counseling (Walker, Gorsuch & Tan, 2004), and family therapy (Carlson, Kirkpatrick, Hecker & Killmer, 2002).

Without exposure to spiritual and religious content, it is unclear how psychologist can provide ethical and effective services to people of faith. To be clear, psychologists are typically taught fundamental clinical skills, such as the importance of asking questions, empathetic listening, and framing information in a manner that is consistent with clients' worldview. These skills can help clinicians work with clients from different religious cultures but they are not sufficient. Effective service provision is predicated upon cultural competence. Indeed, cultural competence is necessary for effective therapeutic work in any cross-cultural context (Sue & Sue, 2015). In the context of the present paper, cultural competence can be understood as a dynamic process in which psychologists develop a growing awareness of their own secular worldview and its associated assumptions and biases, in tandem with an empathic understanding of a client's spiritual worldview. It is at this point of empathetic understanding that clinicians are able to create effective interventions that resonate with the client's value system (Hodge, 2015).

Given the present state of discourse in psychology, it is difficult to see how clinicians can develop the empathic understanding upon which effective work is predicated. It is essentially impossible to develop empathy or understanding if psychologists are not exposed to content that reflects the beliefs and values of people of faith in disciplinary literature, training, or popular culture. The situation is analogous to European Americans raised in a homogeneous 1950s cultural milieu attempting to work with African Americans without any exposure to beliefs and values that animate African American culture. Indeed, both theory and research suggest the lack of empathic exposure to different

understandings of metaphysical reality is engendering some degree of bias toward people of faith in disciplinary discourse. Furthermore, potential clients wrestling with mental health problems also appear to be aware of the resulting bias as well.

Effects on Mental Health Service Provision

In advanced nations, it is estimated that over 50 percent of the population will have at least one mental disorder during their lifetime (Trautmann, Rehm & Wittchen, 2016). In the United State (US), 17.9% of adults have some type of mental disorder at any given time (National Institute of Mental Health, 2015). The annual treatment of mental health disorders tops the list of most costly healthcare procedures in the US, at 201 billion USD (Roehrig, in press).

Furthermore, the treatment gap for mental health problems is among the highest in the health sector (Trautmann et al., 2016). On a global level, the economic cost of untreated mental health problems is estimated to be approximately \$1 trillion USD per year (Chisholm et al., 2016). Such figures do not fully capture the human suffering associated with untreated mental health problems. They do, however, serve to underscore the importance of providing culturally relevant services to all potential clients so as to reduce the treatment gap.

Some research has explored why people chose not to seek professional help for mental health problems (Boorstin & Schlachter, 2000). Using a national sample of likely voters, this study found that most common rationale was respondents' belief that they can handle their problems on their own. This is not an unexpected finding given the ethic of self-reliance that pervades the American psyche. Particularly notable, however, was the second most widely cited response. After self-reliance, the most widely listed rationale for not seeking professional help with mental health problems was fear that their spiritual values and beliefs would not be respected or taken seriously in clinical settings. Concern about professionals' lack of spiritual competence ranked ahead of financial considerations, which was the third most prominent reason offered for refraining from seeking help.

Anecdotal evidence suggests concerns about psychologists' lack of spiritual competence exist across numerous religious groups (Richards & Bergin, 2014). These

concerns are understandable given the literature reviewed above. Therapeutic modalities developed in a homogeneous disciplinary environment reflect secular assumptions about the nature of health and wellness. Modalities developed by atheists may not be a good fit for many people of faith, even if psychologists have the necessary training and capabilities to deliver such interventions in a spiritually sensitive manner. To be clear, not all approaches developed by, for example, atheists, necessarily conflict with the values of all theists (Andrews, Watson, Chen & Morris, 2017). In many cases, assumptions about the nature of health and wellness overlap. In other words, the metaphysical assumptions embedded in certain interventions are consistent with the assumptions held by people of faith.

Nevertheless, completely secular modalities may lack validity with many people of faith in same way that moral development theory lacks validity with women. For instance, approaches that make no mention of spirituality or religion are not a good fit with many American Indians (Hodge, Limb & Cross, 2009). Since many tribal cultures view the spiritual dimension as a fundamental aspect of healing, secular approaches may be viewed as fundamentally flawed. Thus perceived, many Native American clients will reject treatment.

Similar comments can be made about cognitive behavioral therapy (CBT), one of the most effective and widely used therapeutic modalities (Tolin, 2010). As implied above, Ellis is widely considered to be the founder of contemporary CBT (Ellis, 1962), with later theorists, such as Beck (1976), building upon Ellis' foundation. Ellis' Enlightenment-based assumptions regarding human wellness are embedded in CBT in the same manner that European American values are embedded in intelligence tests. In keeping with Ellis' (1980) view that devout theism fosters mental illness, his health engendering self-statements make no mention of God, the transcendent, or community. Accordingly, Muslims, traditional Catholics, and other theists may believe that CBT lacks social validity (Husain & Hodge, 2016). In keeping with the metaphysical assumptions of such clients, interventions may be more effective if the interventions reflect clients' beliefs and values regarding health and wellness. Indeed, a limited body of research indicates that CBT adapted to incorporate clients' spiritual values is effective in treating mental health problems such as depression (Tan, 2013).

To sum up, the costs associated with mental disorders are substantial. Yet, many members of the public refuse to seek mental health treatment due to concerns about spiritual biases in service provision. The extant literature suggests these concerns are not unfounded. A solution, however, exists for this problem—namely, increasing diversity in psychological discourse.

How Increased Diversity Can Facilitate Scientific Advancement

Science advances most efficiently in an open and pluralistic environment; an atmosphere in which incompatible views are expressed and pursued (Popper, 1963). Progress occurs through critical debate in which competing claims are subjected to rigorous debate and testing (Losee, 2004). Ideally, the scientific enterprise should be characterized by the robust interaction of diverse, theoretically informed perspectives (Medin, Lee & Bang, 2014).

Diversity helps mitigate the unproductive dynamics associated with homogenous epistemic communities (Duarte et al., 2015). For example, scientific discourse characterized by a multiplicity of voices helps mitigate confirmation bias. This can be understood as the tendency to favor, search for, and interpret data that confirms pre-existing hypotheses about the nature of reality.

Consider recent findings published by the Open Science Collaboration (2015). This group selected 100 studies published in leading psychology journals and attempted to replicate the findings. In the majority cases (64%), scientists could not replicate the findings. Furthermore, in the studies that could be replicated, the effect sizes were substantially smaller than reported in the original studies.

Given that these studies appeared in some of the profession's most rigorous journals, the Collaboration's findings raise the possibility that many, if not most, findings reported in disciplinary journals are false (Ioannidis, 2005). Furthermore, secular psychologists are poorly positioned to identify problematic findings in the wider literature, in much the same way that Kohlberg (1981) had difficulty recognizing gender bias in his research. Individuals have difficulty seeing problems in scientific products that confirm or reflect their own assumptions about reality (Medin, Lee & Bang, 2014). Rather, people who

view reality through different prisms are ideally situated to detect bias and move science forward (Richards & Davison, 1992).

Psychologists with minority metaphysical perspectives advance science through the critical lens they bring to disciplinary discourse. Take, for instance, instruments designed to assess spirituality (Watson, 2008). An instrument that assesses spirituality with items such as “I exercise regularly” and “I feel sexually fulfilled” may effectively measure this construct with certain secular individuals (Whitfield, 1984). The values embedded in these items reflect commonly held assumptions about spirituality in secular culture (Hodge, 2015). Such instruments, however, have limited validity with many people of faith (Richards & Bergin, 2014). Based upon such measures, a celibate Catholic sister who forsakes a systematic exercise program to spend more time in prayer and service to the poor out of love for God, would necessarily record comparatively lower levels of spirituality than a libertine secularist who regularly works out. In short, psychologists who understand reality through alternative, non-secular worldviews are more likely identify problematic research (Inbar & Lammers, 2016).

A second avenue through which metaphysical diversity advances science is related to problem solving (Medin, Lee & Bang, 2014). More specifically, cognitive diversity helps to solve problems by bringing different epistemic perspectives to bear on challenges (Wang et al., 2016). Psychologists with different values, beliefs and experiences can shed new light on existing problems, provide novel explanations of phenomena, and craft previously unconsidered solutions to problems (Popper, 1963).

Take, for instance, the treatment gap regarding untreated mental health problems (Trautmann et al., 2016). As discussed in the previous section, this is a serious problem with significant financial ramifications for society. A central factor in explaining this treatment gap appears to be the fact that many potential clients refrain from seeking mental health treatment due to concerns their spiritual beliefs and values will not be respected (Boorstin & Schlachter, 2000). People of faith are uniquely positioned to address this problem. Their metaphysical lens allows them to see factors that contribute to this perception among potential clients. Many of these factors may escape the notice of psychologists who have been socialized to see secular beliefs and values as normative.

For instance, seminal authors play a key role in creating disciplinary paradigms that shape understandings of various populations (Kuhn, 1970). Biased portrayals of theistic spirituality by key theorists such as Freud (1966) and Ellis (1980) may be taken for granted. Since such portrayals are common in the psychological literature (Larson et al., 1998), and reinforced in mainstream cultural shaping forums such as television programming (Clarke, 2005; Skill et al., 1994; Skill & Robinson, 1994), they may be accepted as normative and overlooked.

In a manner analogous to African Americans in area of race (Pierce et al., 1977), people of faith can identify biased framing that engenders negative perceptions toward spiritual people. Since they view life through a spiritual lens, they tend to be sensitive to depictions that are inconsistent with common self-descriptions among members of their cultural groups. In turn, correcting biased depictions of people of faith, in tandem with other steps designed to create a more inclusive professional discourse will help alter perceptions among the potential clients.

Conclusion

The lack of diversity in psychology is affecting the profession's ability to address the needs of clients. While many clients affirm spiritual beliefs and values, most psychologists hold secular perspectives (Richards & Bergin, 2014). Furthermore, psychologists' personal understandings of metaphysical reality are validated and reinforced in psychological literature, in their professional training, and in mainstream culture. As a result, secularism is not seen as just one metaphysical option among many, but is implicitly privileged, viewed as normative and foundational to health and wellness. Consequently, it is unsurprising that many people of faith appear to refrain from seeking help from psychologists for mental health problems.

As is the case with other underrepresented populations in the past, increasing metaphysical diversity in psychology is the solution (Inbar & Lammers, 2016). Fostering a more diverse professional conversation will help psychologists identify and eliminate biases in their scholarship, clinical practices, and training modules. Research agendas that reflect the metaphysical assumptions of people of faith offer the potential of new

interventions that represent a better fit with clients. In a manner analogous to Gilligan's (1993) work in the area of moral development, psychologists might develop and test new strategies for engendering health and wellness.

Increased metaphysical diversity is a critical prerequisite for scientific progress in psychology (Popper, 1963). While a lack of diversity hinders scientific advancement, increased diversity results in better science, interventions that are more effective and client-centered. Indeed, the diversity of ideas is the most important form of diversity for a profession's intellectual vitality (Smith, Mayer, & Fritschler, 2008). Given the costs associated with the burgeoning mental health crisis, a homogeneous professional discourse is not an acceptable option. Psychological discourse has benefited by including the perspectives of African Americans and women. In a similar manner, the profession's discourse will benefit by including the voices of people of faith.

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The Enemy Within: Why Faculty Themselves Are Often the Greatest Threat to Academic Freedom

Dr. David Demers*

The greatest foes of academic freedom are university administrators obsessed with social order, conservative politicians who are opposed to progressive scholarly ideas, and special interest organizations that want to control the distribution of knowledge that might hurt them. The veracity of this three-part proposition and its corollary — that legal scholars, journalism professors and faculty leaders are the greatest defenders of academic freedom — is rarely challenged by scholars and legal experts who work with free-speech issues on campus. But I do not count myself among them. Over the past three decades, I have watched faculty with backgrounds in journalism or the law and Faculty Senate leaders do nothing when free-speech controversies erupt. Tepid support among faculty, I argue, is a far more important threat to academic freedom than the anti-free-speech actions taken by administrators, special interests, or conservative politicians. Much of the tepidness can be blamed on structural conditions in which professors work rather than weak morals. To combat this problem, structural changes in the form of rules, laws and judicial decrees are needed to encourage faculty to speak out, and such changes are only possible through organized social action, especially from pro-First Amendment organizations like FIRE and labor unions.

Political science professor Jeffrey Gerson had just told his students that flag burning is legal in the United States and now he was leading them outside to burn one.

It was March 11, 1991. Forty-two degrees. Chilly.

But Gerson's mind was on the day's lesson, not the weather. He was hoping the demonstration would "put a fire under the students and get them thinking."¹ That was not always an easy thing to do at the University of Wisconsin in River Falls. A survey of full-time UW-RF students showed that half of them spent fewer than six hours studying per week.²

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¹ Telephone interview with Jeffrey Gerson, November 29, 1999.

² A total of 1,368 students completed the College Student Experiences Questionnaire March 1-5, 1993. Source: Unpublished report prepared by Roger A.

Poor study habits bothered Gerson. This was his first year at UW-RF, and he was determined to make education a meaningful experience for his students.³

The 1991 Gulf War was in the news. So, to set the stage for a vibrant class discussion, he divided the students into two groups. One in opposition to the war and the other in support.

Gerson gave a short lecture on the U.S. Supreme Court decision in *Texas v. Johnson* (1989), which held that flag-burning was speech protected by the First Amendment.⁴ He then escorted the students outside of South Hall.⁵ As they gathered around, Gerson took a match from his pocket and carefully ignited the 4-by-6-inch American flag, which burned quickly.

Later, Gerson told a newspaper reporter: “It was a good class. I think people really got into the discussion on both sides. I think it was an effective teaching tool.”⁶ Many of his students agreed. “Once he burned the flag, people started talking about it,” one said. “I think it was a very effective teaching method. It did spark discussion.”

But at least one student wasn’t pleased. She called her father, a county government official, who complained to the university’s top administrator, Chancellor Gary Thibodeau. “If this guy wants to go burn a flag someplace, that’s certainly his right,” C. W. King, director of community programs for Chippewa County, told the *St. Paul Pioneer Press Dispatch* after contacting Thibodeau. “But, in his role as a professor, to force students to witness this kind of thing is an abuse of his position.”⁷

Thibodeau quickly issued a written statement condemning Gerson for using “extraordinarily bad judgment in his choice of illustrations” and “offensive and insensitive”

Ballou, Dean of Students, University of Wisconsin–River Falls (April 1993).

³ Gerson had a one-year appointment at UW-RF while the university searched for a permanent hire. He was one of the applicants for that permanent position.

⁴ *Texas v. Johnson*, 491 U.S. 397 (1989).

⁵ Gerson forgot to take a flag, so he went back to the political science office to get a small one. Some students brought their own flags, but only Gerson burned one.

⁶ Bill Gardner, “Prof’s Flag-burning Ignites Controversy,” *St. Paul Pioneer Press Dispatch* (March 13, 1991), p. 1A.

⁷ *Ibid.*

teaching methods.⁸

Gerson disagreed. Administrators, he said, “should be encouraging faculty to take chances and not try to stifle them.”⁹ An informal survey of 200 faculty by the UW-RF *Student Voice* newspaper backed him up: Six of ten supported his right to burn the flag.¹⁰

Gerson planned to burn another flag in a separate class three days later but changed his mind after more than 200 students protested outside of his classroom. They recited the Pledge of Allegiance, sang the national anthem and chanted “U-S-A.” “Everyone was just out showing their true colors,” one student protestor said. “There was a lot of patriotism today.”¹¹

In a letter to UW System President Kenneth Shaw, state Sen. Marvin Roshell (D-Chippewa Falls) suggested that “Gerson be returned to wherever he came from and not be invited back.”¹² Roshell later questioned “whether academic freedom is the best thing we have” and described Gerson as “inept at his profession.”

The law was on Gerson’s side, of course — and so was the Faculty Manual, which explicitly protected the free-speech rights of professors. But none of that mattered.

On April 10, 1991, Gerson was informed that his one-year teaching contract would not be renewed and that he would not be a finalist for a permanent position in the department.

The head of the political science department later said the decision not to renew Gerson’s contract was unrelated to the flag-burning incident. But he conceded that he could “probably not convince a lot of people of this.” Gerson was one of them.¹³

8 Ibid.

9 Ibid.

10 Student journalists telephoned more than 200 faculty. They also surveyed students, who, by a 6-to-4 margin, said the flag burning was inappropriate teaching tool. Source: Associated Press, “Faculty Back Professor Who Burned Flag,” (March 24, 1991), p. 4C.

11 Ibid.

12 Ibid.

13 Bill Gardner, “UW-River Falls Professor Who Burned Flag Loses Job,” *St. Paul Pioneer Press Dispatch* (April 27, 1991), p. 11A. Also see Robert Justin Goldstein, *Burning the Flag: The Great 1989-1990 American Flag Desecration Controversy* (Kent, OH: Kent State University Press, 1996), p. 356, and Michael Welch, *Flag Burning: Moral Panic and the Criminalization of Protest* (New York: Walter de Gruyter, 2000), p. 84.

THE ENEMY WITHIN: A CASE STUDY

The greatest foes of academic freedom on campus are university administrators obsessed with social order, conservative politicians who are opposed to progressive scholarly ideas, and special interest organizations that want to control the distribution of knowledge that might hurt them.

The veracity of this three-part proposition and its corollary — that legal scholars, journalism professors and faculty leaders are the greatest defenders of academic freedom — is rarely challenged by scholars and legal experts who work with free-speech issues on campus.

But I do not count myself among them.

Over the past three decades, I have watched faculty with backgrounds in journalism or the law and Faculty Senate leaders do nothing when free-speech controversies erupt. In the flag-burning incident above, for instance, none of the faculty, including members of the journalism department and Faculty Senate, publicly criticized the chancellor for failing to support Gerson's First Amendment right to burn the flag. In fact, over the years I have even witnessed four journalism administrators — including a dean who was a mass communication law scholar — actively work to restrict free-speech on campus.

Tepid support for civil libertarian ideals among faculty, I argue in this paper, is a far more important threat to academic freedom than the anti-free-speech actions taken by administrators, special interests, or conservative politicians. Although faculty gleefully express their support for academic freedom in opinion polls, very few of them are willing to publicly defend that principle in public, especially when they believe they have something to lose or nothing to gain. The result is that administrative violations of free speech rights, such as the one exhibited by the UW-RF chancellor (and more to be revealed later), go unchecked, slowing whittling away at the principles of academic freedom and shared governance as university administrations centralize power even more.

To be sure, part of the tepidness stems from the fact that many faculty do not care very much about free speech. That issue does not ignite them or others to action the way racism, sexism and discrimination can. Some of us would even sacrifice our lives for these other causes. But who among us — even among journalism and mass communication law

professors — would give our lives in defense of free speech and the First Amendment?

Okay, that may be asking too much. But how about giving up other things to defend the First, like a raise, good will with our bosses, a promotion, or even our jobs? My experience is that very few faculty are willing to sacrifice even the smallest of benefits to defend free speech. But what about tenured faculty? Don't they have more protection from retaliation? Aren't they more likely to stand up for free-speech?

Although tenure provides faculty with a right to due process, ironically, it has been my experience that tenure also lessens the chances of faculty speaking out on controversial issues, because tenured faculty have been co-opted into the "privileged club" and now have a lot more to lose, financially and socially, should they end up on the wrong side of the administration.

Although all administrators and faculty have a (moral) choice when it comes to deciding whether to speak out on controversial issues or defend a colleague or a student for speaking out, I assert here that much of the blame for tepidness should be leveled at the structural conditions in which professors work rather than lack of moral fortitude. State law and university rules do not provide much protection for faculty who push the free-speech envelope, and let's be frank: Administrators wield a lot of power, and many do not hesitate to use that power to punish lower-level administrators and faculty, even if they prefer co-optation instead. As Machiavelli reveals, a Prince prefers to be loved and feared at the same time — but when the former is not possible, the latter will do quite nicely.

This paper presents what I informally call the "tepid theory of academic freedom" and offers several case studies in support, including two major free-speech lawsuits in which I played a central role and several other incidents in which deans and faculty have tried to restrict or punish faculty speech.¹⁴ As a cautionary note, I must point out that case studies such as this can suffer from the problem of generalizability. I cannot quantitatively prove to you that my experiences apply to all universities in all places at all times. There are certainly exceptions, especially when the free-speech violation is highly egregious and it's easy for everyone to jump on the pro-speech bandwagon. But the vast majority of cases are

¹⁴ Portions of this paper are adapted from the author's 2015 book, *The Lonely Activist: An American Odyssey* (Spokane: Marquette Books, 2015).

more subtle, requiring faculty to weigh other kinds of evidence, such as whether an outspoken source has good motives.

Another caveat is that, as a participant observer, I concede that I am not representative of faculty in general. I have been a social activist all of my adult life, which means that I, as a former newspaper reporter and professor, have always been more willing than other faculty to speak out on issues of social injustice or public concern. In fact, to prove it, I am the only person I know who has been accused of being a “sociopath” when defending free speech. Try to top that one. In my defense, I prefer to think of myself as a watchdog for abuse of power in the academy – an antibiotic in search of pathogens. No institution in America, I assert, can be healthy if it punishes people for expressing ideas, opinions or knowledge, and all institutions need courageous people to serve as a check on aberrant executives and administrators.¹⁵

I also will argue in this paper that educating faculty on the importance of free speech and academic freedom is a laudable goal but one that offers a limited solution to problem of tepidness. Real change will come only when universities, courts and legislative institutions make substantive structural changes to laws, rules and policies that offer more protection for speech on the job – policies that expand due process, democracy and openness in decision-making. And these changes are most likely to come about through organized social action from Faculty Senates, faculty unions or organizations like the Foundation for Individual Rights in Education and the American Association of University Professors.

Finally, this paper will attempt to convey to the reader what it is like when a university tries to mob a faculty member who tries to combat social injustice or engage in controversial speech. Some workplace mobbing victims suffer from Post Traumatic Stress Disorder; some even commit suicide. I’ll talk briefly about what saved me from falling off the deep end.

Like two bookends, my first major free-speech experience in the academy took place at the beginning of my academic career and the second began near the end. The former controversy revolved around this question: Can a university fire a faculty-adviser professor

¹⁵ The whistleblower role might not seem radical, but the U.S. Supreme Court has ruled that public employees are not allowed to play that role. See *Garcetti v. Ceballos*, 547 U.S. 410 (2006) – a case that will be addressed in some depth later in this article.

who helps students sue the university to obtain access to student evaluations of faculty?

The latter free-speech case addressed the question: Can a university fire a faculty member who implicitly criticizes administrators' policies and offers alternative plans for structuring an academic unit? That case ended with a Ninth Circuit Court of Appeals ruling that, for the first time, circumscribed the authority of a highly unpopular 2006 U.S. Supreme Court decision (*Garcetti v. Ceballos*), which restricted free-speech rights of public employees.¹⁶ The only downside to the decision is that it only applies to nine Western states. In the rest of the country, faculty, like all other government employees, can be punished for speech uttered during service-related activities or during faculty meetings — a condition not well recognized even in the academy.

HELPING STUDENTS SUE A UNIVERSITY

When I began teaching at the University of Wisconsin-River Falls in the fall of 1991, I was unaware of the Gerson flag-burning incident.¹⁷ I learned about it several months later, from another UW-RF professor, who speculated that no faculty on campus criticized the chancellor because they feared retribution. (Gerson, by the way, went on to obtain tenure at the University of Massachusetts in Lowell. As of this writing, he still teaches there.¹⁸)

Meanwhile, as the weeks passed, I quickly forgot about the Gerson flag-burning incident. Like other professors, I came to see it — or perhaps wanted to see it — as an outlier, not indicative of a systemic leadership or organizational problem. I should have known better. After all, I was a social structural theorist.

Before becoming an academic, I had worked as a newspaper reporter and market research analyst. As a reporter, I was drawn to stories of injustice, partly because of ideals I learned during my Lutheran elementary school years and during my undergraduate college years. I earned a bachelor's in journalism from Central Michigan University and worked as

¹⁶ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

¹⁷The St. Paul Pioneer Press Dispatch had covered the controversy, but I subscribed to the Minneapolis Star Tribune, which ignored the story. I conducted an archival search of the Star Tribune website on July 29, 2012, but could find no references to the flag-burning incident at the University of Wisconsin-River Falls.

¹⁸I spoke with him on several occasions about his experience at UW-RF. He told me he never burned another flag in class.

a newspaper reporter for four years, earning two first-place statewide awards for investigative reporting (one for an environmental disaster and the other for an alleged abuse at a foster care home).

I eventually earned a Ph.D. in mass communication (sociology was my theoretical area) from the University of Minnesota.¹⁹ While there, my students and I conducted two precision-journalism (social scientific research) projects, one which found that Minneapolis Police were twice as likely to sustain complaints filed against police by whites than by minorities. Police initially refused to release the records. I sued the city with the help of an attorney, and the case eventually wound its way into the Minnesota Supreme Court, which ruled that information about the complainants was public data but not info on police officers. The second precision-journalism project involved an analysis of statewide property sales records. Our study found that as the sales price of the property increased, the assessed valuation of the property decreased in relative terms, which meant owners of expensive properties were paying less than their fair share of property taxes.

Bureaucrats in both instances took no action after our research appeared in a Twin Cities weekly newspaper. I learned through the years that government and private industry more often than not resist changes that would democratize their organizations or equalize economic, social and political discrepancies. This essentially is the same conclusion reached by Law Professor Erwin Chemerinsky, whose found that the U.S. Supreme Court is more likely to uphold government abuses of power than to stop them.²⁰

My first three years at UW-RF were very pleasant. I taught courses in reporting, editing, media law, public opinion and media history. I received better than average teaching evaluations. I was also very successful in terms of publishing. I had published more than ten refereed articles and one book. My department chair put me up for early promotion to associate professor; tenure would come later.

¹⁹ My Ph.D. adviser was Phillip J. Tichenor, a social structural theorist who helped coin the Knowledge-Gap Hypothesis and develop structural theories about the news media.

²⁰ Erwin Chemerinsky, *The Case Against the Supreme Court* (New York: Viking, 2014).

Student Evaluations of Faculty

My free-speech controversy began in the fall of 1993, when I asked the dozen or so students attending the first meeting of the UW-RF chapter of the Society of Professional Journalists what they wanted to do for a project. For the past two years, I had been adviser to the group, which represents the interests of student and professional journalists and promotes First Amendment rights and open government and records.

“I’d like to see us go after student evaluations of faculty,” one female student said. “There are a lot of terrible professors on campus. Why doesn’t the university do something about that?”

Others nodded in agreement. I told the SPJ students that “university officials will argue those records are confidential, because they are part of a faculty member’s personnel file. They will fight attempts to release the records.” But the students wanted to press on. Although I was an ardent advocate of government accountability, I hadn’t formed an opinion on whether the teaching evaluations should be opened to the public. But that didn’t matter. My role as adviser was to help students achieve their goals, not dictate their projects. Although I was certain the university would reject the students’ request, what a great learning experience this could be for the students, I reasoned.

To start the process, the students contacted a spokesperson in the Wisconsin Attorney General’s office, who surprisingly told the students that the AG believes the student evaluation records should be available to the public. But he said the AG does not have the power to release them.

On November 17, 1993, the students wrote a letter to Chancellor Thibodeau, requesting the records. The letter cited Wisconsin’s Open Records Law as justification for releasing the records.²¹

Meanwhile, I informally talked with about two dozen faculty and administrators about the issue. Everyone was against opening the records except one. “Our department allows students to see those evaluations if they ask,” said Bill Turnabout,²² chair of the

²¹ Wisconsin Public Records Law, Wis. Stat. §§ 19.31 through 19.39. The law was enacted in 1981.

²² Except for top-level administrators, all of the names for academics at UW-RF are pseudonyms.

English department, at a college-level committee meeting I was attending. Turnabout pointed out that there was no formal university policy prohibiting release of student evaluations, so the department wasn't violating any rules. But most departments, like journalism, did treat them as confidential personnel records.

On Dec. 2, Chancellor Thibodeau responded to the SPJ students' request: "There is a need to protect the integrity of the evaluation process, both to ensure that evaluations are candid and thorough and to permit the university, as an employer, to use them as a basis for improving performance. Further, disclosure of this information could expose the reputations of individuals to possible damage."

Several days after Chancellor Thibodeau's response, Damon Smith, my department chair, appointed me adviser to *The Student Voice*. The job could be controversial. For example, several months before I took the position, the newspaper published a display advertisement stating that the holocaust never occurred. The ad came from a man who for many years would send it to college newspapers across the country, hoping some would publish it. Almost none did. But the *Voice* advertising student staffers didn't read the content of the ad. Neither did the faculty adviser at the time. The students pasted it onto the page and accepted the payment check from the man. Of course, controversy erupted after it was published. Many administrators, faculty, and Jewish and Christian leaders around the area condemned the ad, its creator and the student journalists. Chancellor Thibodeau also criticized the *Voice* editors, saying they showed poor judgment. Everyone was demanding an apology.

"So what do you intend to do," I asked one of the editors.

"We are going to apologize."

"For what?" I said. "For not censoring someone? You know, a U.S. Supreme Court justice once said that prior restraint or censorship isn't the solution for evil or bad speech. More speech is. And this is exactly what happened. The local community has responded with what many would call 'good speech' and the 'hateful speech' has been drowned out. The system worked. You don't need to apologize. You actually helped remind the community that this is a society that respects free-speech rights, even for those who hold controversial, false ideas."

A day later the student editors apologized. So much for my big speech. But I wasn't surprised. The students were scared. I probably would have done the same thing as an undergraduate.

Once again, it appeared to me that Chancellor Thibodeau had failed in his role as administrator to support free-speech rights on campus. He had the right to personally disagree with publication of the advertisement, but he should have defended the students' right to publish the ad. University rules protected such speech. I was a lone wolf on this issue. None of the other journalism professors stood up for the students' free-speech rights.

Faculty Salary Series

In January 1994, I began teaching an advanced reporting course in which I asked students to develop an investigative project. Several students were interested in looking at faculty salaries, so I helped them conduct a computer analysis of faculty salaries. I had co-authored a book on the use of quantitative social science research methods in journalism, otherwise known as "precision journalism."²³ University officials gave us a file containing information on salaries. I ran multivariate computer analyses and showed the students how to interpret them.

The findings revealed disparity in faculty salaries between various departments on campus. For example, business professors who taught research methods were paid about 50 percent more than social science professors who taught similar courses. English professors and library scholars made less than journalism and social science professors. University officials attributed these differences to "market factors." Business professors are paid more because comparable jobs in the real world pay more. English professors are paid less because demand for those jobs is far greater than the number of positions available. The principle of equal pay for equal work does not apply to universities.

The study also found that female faculty earned slightly less than male faculty, about \$1,700 a year less. This difference persisted even after statistically removing the effects for years of service, tenure, age, department, and other factors.²⁴ In percentage terms, women

²³David Pearce Demers and Suzanne Nichols, *Precision Journalism: A Practical Guide* (Newbury Park, CA: Sage Publications, 1987).

²⁴The study employed multiple regression and other multivariate statistical techniques and controlled for a number of factors, including age, years of

were making about 4 percent less per year than men — a differential that I thought was quite small given the national differential for women at that time was 21 percent after removing the effects of demographics.²⁵

In March, I helped the students write a three-part series for *The Student Voice*, the last of which published the salaries of all university faculty and administrators. I wrote up the results from the statistical analysis. The students conducted the interviews and wrote the rest of the series.

Chancellor Thibodeau was upset over the finding that female faculty were paid slightly less than male faculty, presumably because it made his administration look biased. He told a reporter for the Student Press Law Center that the study was not “complex enough,” but his administration never even asked to look at the data or methodology.²⁶

Some faculty and administrators also were angry about their salaries being published in the newspaper. This surprised me, because we were all public employees, and salaries for public officials are public data. My democratically driven, open-government journalistic philosophy was appreciated by most students, but not by many faculty and administrators, I was learning.

In mid-January 1994, the SPJ students and I contacted the SPJ regional director, who was delighted to help the students obtain access to the student evaluations. The regional chapter committed several hundred dollars to hire an attorney.

The Freedom of Information Lawsuit

The “freedom of information” lawsuit was filed March 23, 1994. “We’re the reason professors are here,” Tiffany Thibideau, one of the SPJ students, told the *Milwaukee Sentinel*, which published a story about the lawsuit.²⁷ “We do the evaluating, and we should

service, tenure status, department, rank and gender.

²⁵Joseph G. Altonji and Rebecca M. Blank, “Race and Gender in the Labor Market,” pp. 3143-3259 in Orley Ashenfelter and David Card (eds.), *Handbook of Labor Economics*, Vol. 3 (Netherlands: Elsevier Science B.V., 1999).

²⁶“Professor Fights School for Job,” Student Press Law Center Report XVI, (3):36-37 (Washington, D.C., Fall 1995), p. 37. Available online at <<http://issuu.com/splc/docs/v16n3-fall95>>.

²⁷Joe Williams, “Access: Students Sue School to See Evaluations,” *Milwaukee Sentinel* (April 8, 1994), p. 1A.

be able to see them. A student should be able to know what other students thought of a professor.”²⁸

One day after the story appeared, the attorney representing the SPJ students called me and asked whether I might have any evidence that might help the case. I told him about the English professor who said his department allows students to see the records.

“Great. That shows capriciousness in the handling of the evaluations.”

He called the English professor and then called me back a day later. “Turnabout denies ever telling you that the English Department gave the evaluations to the students.”

“That’s false,” I said. “We talked openly about it at a meeting, and several other faculty were there.”

The next day, my journalism chair, Damon Smith, came into my office. “Dave, Bill Turnabout wants a written apology from you. He said Peter (the SPJ attorney) called him and asked him about the English Department’s policy of giving students the evaluations of faculty. He denies telling you that. He wants an apology.”

I told Damon that “Bill is lying and that I won’t apologize.” Of course, I expected my boss to back me up, not only because I worked for him but also because journalism faculty are supposed to be devoted to openness in government. He didn’t. He was getting angry.

“Bill is my friend, Dave,” he shouted. “You will apologize or he can destroy your career.”

I couldn’t believe what I was hearing. I had failed to take into account the politics of a small university – me, a sociologist. Loyalty often trumps principles.

About two weeks after the SPJ lawsuit was filed, the UW-RF Faculty Senate suspended the student evaluation process. The resolution also contained language supporting Chancellor Thibodeau’s earlier decision not to release the records. In contrast, UW-RF students, in a campus-wide referendum conducted just before the resolution, voted 7-to-1 in favor of the SPJ students’ attempts to get access to the records. But Student Senate on campus ignored the referendum results and passed a resolution supporting the Faculty

²⁸Two other students were named as plaintiffs.

Senate and Thibodeau. Student senators identified with the university power structure, not with their own rank-and-file.

On April 13, 1994, I received a call from one of the SPJ students. “Dave, the attorney general’s office has ruled that the student evaluations of faculty are public data. We won. Isn’t that incredible?” I could hear students rejoicing and laughing in the background. All I could think of at that moment was *what a great lesson this had been for the students. They took action and made government more accountable to the people. They helped changed the world.*²⁹

In May 1994, the Midwest Region 7 Society of Professional Journalists Board of Directors named the UW-RF chapter the Top Regional Student Chapter. I was proud of the students. At the awards banquet, I was surprised when the regional chapter gave me a Director’s Award for Outstanding Service as faculty adviser. Later, the national SPJ Board of Directors presented the UW-RF student chapter with a national First Amendment Award, one of the most prestigious national awards that could be granted to a student chapter.

It was a glorious time for the students.

But not so much for me.

I’m in Trouble

In late May, several faculty and staff told me that my role in helping students sue the university and publish the faculty salary stories may have an adverse impact on my chances of being promoted and retained. I initially dismissed the comments, because academic freedom clearly protected my involvement in those matters. But I had trouble sleeping. I had to know for sure. So a short time later I wrote to College of Liberal Arts and Sciences Dean Cal Stricter, Damon Smith’s superior and friend, asking whether my involvement in the SPJ lawsuit and faculty salary project could “be used to deny me tenure, or are tenure decisions based solely on one’s performance in teaching, research and community service?”

“Yes,” Stricter responded.³⁰

²⁹To this day, student evaluations of faculty in the entire University of Wisconsin System are public data. See

<<https://www.wisconsin.edu/regents/policies/student-evaluation-of-instruction>>.

³⁰I wrote to the dean on June 27, 1994.

Meanwhile, tensions were high in the journalism office. Smith and another journalism faculty member avoided personal contact with me. The fourth faculty member sympathized to some degree, but he reported to Smith and would not publicly defend me. He did tell me, however, that faculty from various departments across the campus complained frequently about me at lunch. I used to be invited to those lunches.

A number of university professors also complained to Smith, who told me that one professor even asked: “What is Demers’ hidden agenda?” Another faculty member told a student: “Demers is a sociopath.” The whole thing was surreal. It reminded me of Gary Cooper in “High Noon” — in that classic scene where the camera pans back to show Cooper standing alone in the street as the bad guys arrive in town. “Colleagues, let’s get the rope,” I could hear the faculty saying at lunch.

Fortunately, the semester ended without a hanging. But I was an emotional wreck. My career was on the line. What university would hire a professor who has been fired from his job?

Through it all I kept telling myself that the university couldn’t fire me. After all, SPJ, the nation’s leading journalism organization, had just given the students and me awards for our work. I had better-than-average student evaluations and an outstanding publication record. I had more publications than most of the full professors on campus. Damon had even supported my decision to go up early for promotion to associate professor. Surely the principle of academic freedom also protected me. But I decided to contact an attorney, just in case.

In July 1994, I spoke with an out-of-town employment attorney, one whom I hoped would not be tainted by local university politics. I gave him a summary of the situation and he didn’t pull any punches. “If they decide to fire you, you’ll lose,” he said.

“You’re kidding?” I responded. “What about academic freedom?”

“Listen, no one wins those cases. The only cases that win are those arising from the so-called protected categories. If you’re a woman, a minority, over age 50, or have a unique set of religious beliefs, you might have a chance. But none of those apply to you, and even if they did the university will create a host of other reasons to fire you. Right now, university officials are probably developing a long list of things to hang you on, and your boss and

other faculty and administrators are actively helping to develop that list. Academic freedom and the First Amendment are noble ideals, but it is virtually impossible to win a lawsuit using them as a defense...I wish I could be more positive, but the legal system doesn't really provide much protection for faculty who speak their minds."

I consoled myself with the thought that this attorney was not a First Amendment expert, so maybe he was wrong. I continued my search. I had hoped summer break of 1994 would cool things down a bit. It didn't. When school started up again in fall, Smith continued to shun me. I was excluded from some of the decisions affecting the department. I became, in the lexicon of the scholar, *persona non grata*, an "unwelcomed person." In ancient Greece, the worst punishment that could befall someone was not death — it was banishment from the community.

I knew I would be denied early promotion and probably renewal of my contract. What I didn't know, however, was how the university would justify the decision. My performance on all three criteria for tenure and promotion — teaching, research and service — was good for three straight years. So how could they justify a firing?

Collegiality

"Collegiality," my business professor colleague told me sometime in September 1994. "They can fire you if they think you're not nice enough or if you don't play well with others on the playground."

"What?"

"I'm not kidding. Go look at university rules."

Sure enough, there it was, in Chapter 4 of the UW-RF Faculty Handbook, under "Promotional Criteria," under subsection "Contribution to the University," paragraph (b): "Ability and willingness to maintain such working relations with colleagues as are essential to effective accomplishment of the mission of the academic unit, the college and the university."

My career is over, I thought.

But then I remembered from one of my sociology courses that autocrats often used collegiality as a tool to prevent experts and professionals from challenging their arbitrary

authority.³¹ Was it possible that UW-RF's collegiality clause violates constitutional law or state policies? I called the UW System office in Madison, and, to my delight, a spokesperson there told me that several years earlier the UW System central office instructed all of its satellite campuses to strike collegiality clauses from their faculty handbooks and administrative rules. In other words, when it comes to evaluating an employee, the key criterion is job performance or behavior, not attitude or whether others like you.³² The clause was still on the books at UW-RF because someone at the university had failed to carry out the order to strike it.³³

But this turn of events didn't end the dispute.

The Ranks Are Closing

On December 16, 1994, Smith and three other faculty from other departments met in closed session to consider my request for promotion to associate professor as well as to issue an advisory vote on progress toward tenure. As expected, the Journalism Department Retention Committee rejected my request and issued an adverse vote on progress toward tenure. "Professor Demers' inability to maintain productive communication channels within his department has inhibited his ability to contribute to department goals," the committee said.

The next three months were difficult. I had now achieved pariah status on campus. Administrators and professors avoided interactions with me. Only the students and the sweet receptionist in our office would talk to me.

On March 6, 1995, the retention committee issued its final decision regarding my request for promotion and contract renewal. I lost again. "Tenure is based on some

³¹Weber writes: "Collegiality as employed in agencies acting under the direction of higher authorities has been primarily intended to promote objectivity and integrity and to this end to limit the power of individuals."

³²Despite the decision by UW System attorneys to strike the collegiality clause, courts across the country often have ruled that universities may take collegiality into account when assessing the performance of faculty. See Mary Ann Connell and Frederick G. Savage, "Does Collegiality Count? While Academics Debate the Importance of Collegiality in Faculty Personnel Decisions, the Courts Have Spoken. They Won't Protect Truculent Professors," *Academe*, 87(6) (November/December 2001). Retrieved January 31, 2009, from <<http://www.aaup.org/AAUP/pubsres/academe/2001/ND/Feat/Conn.htm>>.

³³The collegiality clause was eliminated sometime after my lawsuit. The 2011 UW-RF Faculty Handbook contains no mention of the word "collegiality" in its criterion for promotion and tenure. Retrieved September 1, 2012, from <<http://www.uwrf.edu/FacultySenate/Handbook/Chapter4/Handbook4s3.cfm>>.

assurance that a good, productive working relationship over the long term is likely. Without evidence of that, an institution is playing loose with the best interests of students in the long run.”

On March 15, I got a bit of good news. The College of Arts and Science Promotion Committee had voted in favor of my request for promotion. This committee was composed of faculty from other departments — faculty who were not personally involved in or affected by the dispute. The committee concluded that my teaching, service and research met or exceeded university standards for promotion. But support from this committee didn’t matter. Administrators hold final power when it comes to tenure and promotion decisions.

I met with Dean Cal Stricter, who said he was going to vote against retention because a “faculty member must have good working relations with colleagues.” To ensure collegiality was the basis of his decision, I baited him with the “outlawed” wording taken directly from of the UW-RF Faculty Manual. “Do you think ‘ability and willingness to maintain good working relations with colleagues is essential to accomplishing the mission of the department and university’ and should this policy be used to assess whether I should be granted tenure and promotion here?”

“Of course,” he said.

I got it all on the record. The dean even allowed me to openly tape record our meeting.

The vice chancellor at the university, who was the next up the chain of command in terms of ruling on my request for retention, also allowed me to tape record our meeting. He, too, confirmed that collegiality was the reason he would vote against me. The chancellor of the university, Gary Thibodeau, refused to allow me to tape record our conversation, so I left his office without an interview. But that meeting would not have affected the outcome. Thibodeau had already made up his mind.

My subsequent appeals were ignored as the school year came to a close. The university gave me one year to pack my bags.³⁴ The extra year didn’t give me much solace.

³⁴At most universities, when contracts are not renewed, faculty are allowed to teach for one more year. This gives them some time to find another job.

My thoughts were filled with anxiety that my academic career was coming to an end. I also began to question my own theory of bureaucracies.

Bureaucracies and Meritocracy, Objectivity

My Ph.D. dissertation,³⁵ completed three years earlier, had found that corporate (or large, bureaucratic) newspapers, when compared with entrepreneurial newspapers, produce content that is more critical of dominant institutions and elites; emphasize quality product more than profits; hire more competent employees; conduct more investigative reporting projects; and place more emphasis on codes of ethics. Corporate newspapers were, according to my theory, social institutions that helped other institutions adapt and change, partly because they were more meritocratic and objective than other forms of organization.

But my personal experience with the bureaucracies in the Minnesota Court System, the Minneapolis Police Department, the Minnesota Department of Revenue, and at the University of Wisconsin–River Falls suggested the opposite. Political interests and personal loyalties seemed to trump good judgment. There especially was nothing objective about the tenure process. In one moment, UW-RF administrators were going to promote me to associate professor two years early, and a short time later I was fighting for my job.

But I wasn't ready to give up.

A New Attorney and Lawsuit

I hired a new attorney, Marshall Tanick of Minneapolis, who was an expert in First Amendment law and employment law. "If we file a lawsuit in Wisconsin," he told me in spring 1995, "we'll lose. The state courts will identify strongly with the UW administrative system. Instead, we'll file in federal court. We'll have a chance there." His observation that state bureaucracies could not render an objective decision contradicted classic bureaucratic theory, of course. He was probably right.

³⁵David Demers, *The Menace of the Corporate Newspaper: Fact or Fiction?* (Ames: Iowa State University Press, 1996).

Tanick told me that filing a free-speech case in federal court means that I, as a plaintiff, would not be able to seek punitive damages. The financial remedies would be limited.

“We can fight to keep your job. Is that what you want?”

“Yes,” I said. “This is not about money. All I want is an apology, and I can continue to work at River Falls, if I have to. This dispute is about protecting the First Amendment rights for faculty.”

If Tanick thought I was naive, he never told me.

On May 12, 1995, he filed a notice of claim with the state of Wisconsin. The notice is required before one can file a lawsuit. Basically, the notice gives the state a chance to fix things before going into litigation. The university took no action on the claim.

The lawsuit was filed September 11, 1995, in Federal District Court in Madison. The complaint claimed my contract was not renewed because I helped students publish articles about student evaluations of faculty and faculty salaries. “Because of his involvement in those articles,” the complaint stated, “he encountered hostility from ... his colleagues and superiors within the Department of Journalism and other administrators at the university.”

I put together a news release about the lawsuit. The Student Press Law Center, *Quill* magazine, which is published by the Society of Professional Journalists, and local newspapers covered the story. The media coverage upset many university officials. I talked freely and openly about the case. But privacy laws limited their ability to comment to the press. It was one of the few advantages I had over the powerful billion-dollar UW bureaucracy.

In late spring 1995, after UW-RF administrators notified me that my contract would not be renewed, the director of the journalism and mass communication program at the University of Minnesota, Dan Wackman, asked me if I wanted to teach in the program during the following school year. I accepted.

The \$64,000 Settlement

In late March 1996, I received a call from Tanick. “Dave, the attorney for the UW system and I have reached a possible settlement in your case.”

I was surprised, because I didn’t even know a settlement was in the works. “Is the university going to apologize?” I asked.

“No. Bureaucracies don’t apologize. The legal system doesn’t operate like that. The courts are a place where money is exchanged for a wrong that is committed. The UW system is offering you a \$62,000 cash settlement. In exchange, you’ll have to drop the lawsuit and leave your job.”

I was disappointed. What I really wanted was an apology.

“Dave, take the money and declare victory,” Tanick said. “The payment will be interpreted by others as a sign that the university wronged you. You can use that to your advantage.” He pointed out that the alternative was a long and drawn out lawsuit with an ending that couldn’t be guaranteed. The settlement, on the other hand, would cover my costs and I could give some to a scholarship fund. Tanick suggested that I ask the university to increase the settlement to \$64,000, to draw attention to the crooked game show from the 1950s.

I laughed and consented. The university agreed.

After the settlement, Tanick and I issued press releases to news media. The story was widely covered in local newspapers and professional media in journalism, including *Quill*. He was right. The payment was seen as an admission of guilt.

All told, I piled up about \$31,000 in attorneys fees, court costs and other costs. I gave my wife an extra \$5,000 for her “pain and suffering.” I gave \$9,000 in scholarships to River Falls journalism students. I gave \$2,000 in bonuses to Tanick and his assistant attorney. The rest, which amounted to \$17,000, I used to pay off my car. Tanick’s law firm gave several \$500 scholarships to UW-RF students.

Fortunately, I also was offered a job at Washington State University. Some faculty there were concerned about my activist ways, but others were impressed.

Faculty Role in the Dispute

During the controversy at UW-RF, several students offered words of encouragement to me and several testified on my behalf at a couple of hearings. I also had some support from colleagues at other universities. But on campus I had no support from faculty.

One UW-RF colleague of mine in another department initially offered support, but he quickly reversed his position after a committee he served on heard one aspect of my case. Not one UW-RF faculty member or administrator at the university, including those from journalism, supported my First Amendment lawsuit. As noted above, the chair of the journalism program might have been supportive had he not been friends with one of the administrators who lied about access to the student evaluations. The other two journalism faculty also refused to support my free-speech lawsuit, partly because, I speculate, they had a good working relationship with the journalism chair and neither wanted to jeopardize their careers. Professional envy also might have played a role.

The American Association of University Professors, by the way, refused to become involved in the dispute after learning that I had hired an attorney (that's their policy). The Foundation for Individual Rights in Education did not exist at the time of the dispute. It was founded in 1999, three years after the settlement in my case.

At the time, I kept telling myself that things would be different at my new job at Washington State University, because it was a larger university, and larger bureaucracies should place greater value on meritocracy and objectivity in decision making.

I was wrong again.

A CONTROVERSIAL PLAN TO IMPROVE A JOURNALISM PROGRAM

As the controversy at UW-RF was winding down, I was fortunate to land a tenure-track position in the Edward R. Murrow School (now a College) of Communication at Washington State University. I began teaching there in fall 1996. I was tenured three years later.

My first decade at WSU was calm and peaceful. I published nine more refereed papers (20 to date) and four more scholarly books, including one university press (six books

total). My conference papers earned two more national awards (five total), and I had very good student evaluations. I provide these statistics not to brag, but to point out that objective job performance does not ensure job security, even in a bureaucracy allegedly committed to meritocratic ideals.

In 2002, I created Marquette Books, a book publishing company, to publish collections of papers presented at two international conferences sponsored by the Center for Global Media Studies, a nonprofit educational organization I had created to promote awareness of global mass communication issues.³⁶ To my surprise, a number of scholars, including the late John Merrill and Melvin DeFleur, began asking me to publish some of their scholarly books. Fifteen years later, my company had published more than 70 scholarly books and scores of other nonfiction and fiction books.

I diligently followed university rules in establishing Marquette Books and when using some of the scholarly books in my classes. But some administrators and scholars apparently were envious of the success, and university officials eventually conducted two extensive investigations of my company, neither of which found any ethical, administrative or legal violations. Although some university officials would continue to make veiled threats, the book-publishing issue never became a major issue of concern in later legal proceedings. Instead, the key issue became a 7-Step Plan I created to improve the quality of what I perceived to be mediocre programs in mass communication, including print journalism, my home department. I had tried for years to get administrators and faculty to seek national accreditation for the programs. They repeatedly refused.³⁷

Background

The origins of the controversy can be traced to 2006, when the current director of the Murrow School, who I supported, was denied reappointment. The new interim director, Erica Austin, was a full professor in the Murrow School who I liked very much.³⁸

³⁶During the decade, Marquette Books also published three books I edited and a dictionary of mass communication I wrote. The dictionary was selected as the second most significant publication in the department in 2005.

³⁷The strength of accreditation is that it ensures journalism students obtain a liberal arts education, which many scholars, including me, believe is crucial for becoming a good journalist. Some faculty dislike accreditation because it restricts the number of courses that students can take in the major.

³⁸Her real name. Austin would become the first name mentioned as a defendant in my free-speech lawsuit against the university. Real names are used in this

But the feeling apparently was not mutual. By that time, I had amassed a publishing record that put me squarely into a leadership role in the School.³⁹ The Center for Global Media Studies had sponsored two international conferences under my leadership, and Marquette Books was also doing well, adding several scholarly journals to its list of publications.

In fall of 2006, Austin and other administrators initiated an effort to restructure the School. I served on the “structure committee,” where my views about improving the quality of the program were not well received. When some of the committee members began bashing the school’s professional advisory board, I decided to develop my own plan for restructuring the Murrow School. That plan, which I distributed to then Provost Warwick Bayly in January 2007, contained seven recommendations. The most controversial were the call to seek national accreditation for the mass communication programs and a call to move the communication studies program out of the School and into the College of Liberal Arts. The latter program was consuming one-fourth of the Murrow School’s resources but served fewer than 50 of the 1,000 or so majors in the School. My plan also called for improving relations with the professional community and giving non-tenured professional faculty a more active role in the development of the programs. I was so committed to the plan that I even offered to donate \$50,000 of my own money if the university would implement it.

In fall 2007, I met with the new university president, President Elson Floyd, who was intrigued by the plan, especially the donation, but he never acted on it. That was OK. I figured the plan was a long shot. I proposed it because I had fewer than ten years or so before retirement. I was hoping I might be able to improve the program before I left. I failed.

Although the plan angered Austin as well as number of faculty,⁴⁰ at no point did it cross my mind that my plan was not protected speech under the First Amendment.

paper for all WSU administrators at or above the rank of director.

³⁹“Productivity of Tenured Faculty in the Murrow College of Communication Since Obtaining Ph.D. and Between 2006 and 2008,” unpublished report prepared by David Demers, Washington State University (February 2011).

⁴⁰I have encouraged WSU administrators to criticize my 2015 book from which the content you are now reading was adapted. Before publishing the book, I gave all administrators and other officials a chance to criticize the content. Two responded and their comments are included in the appendix of the book. I also have offered to debate them in public if they desired, but they thus far have refused.

Administrators later would even argue in court that faculty do not deserve free-speech rights when speaking in their service-related or professional roles. They asserted, in other words, that even tenured faculty could be terminated if they said something administrators didn't like during a committee meeting, such as a Faculty Senate meeting. That was preposterous, in my opinion.

But administrators were smart enough to know that firing faculty for what they say is not good public relations. So, with the assistance of upper-level administrators, the director of the program initiated a plan to challenge my competency as a scholar and teacher. The key element of that plan was a 2008 internal audit, which would falsely accuse me of canceling classes in 2007. I provided material evidence to counter the charge, but the internal auditor and administrators refused to acknowledge or accept it. I was dumbfounded — until a faculty member informed me that the internal auditor's sister worked for the director of the Murrow School.

A conflict of interest, of course.

I wanted to file a complaint against the internal auditor, Heather Lopez, but I could find no university or state agency that would hear my grievance. President Floyd said he would investigate and get back to me but never did. What I didn't know at the time was that Floyd had asked Washington State Auditor Brian Sonntag (elected by voters statewide) to investigate my conflict-of-interest allegation. Sonntag concluded that Lopez did, indeed, violate auditing codes of ethics, which of course invalidated the audit of me. But instead of making that news public, Floyd deliberately withheld Sonntag's report and tried to force me into mediation. I agreed but only if everything, including the settlement agreement, was made public. Floyd's attorneys refused, so mediation fell through.

For two years in a row Austin had given me below satisfactory annual reviews, even though during that time I had very good student evaluations and had published or written two scholarly books, one of which was theoretically based. The other was a dictionary of mass communication, which was selected in 2006 as second most important work in the program during the previous year.

But none of that mattered.

Notice Concerning Neglect of Duty

On April 16, 2008, the Murrow School interim director drafted a letter, titled “Notice Concerning Serious or Repeated Neglect of Duty.” The letter falsely claimed I gave a final exam in the 14th week of the semester in one of my classes, rather than during finals week; that I conducted only two and not three class sessions per week in my classes in fall 2007, which also was false; and that I had failed to file a form about my involvement with Marquette Books. The last item was true, but I was waiting for the university to explain why its interpretation of the rules was more accurate than the interpretation of its own vice provost for research.

I followed up the Notice of Neglect letter with a detailed response, refuting each charge and repeating again that the vice provost for research told me that Marquette Books did not have to file the report. I also included an e-mail in which the vice provost confirmed that my interpretation of his conversation to me was correct. There was no response from Austin or the university. Nevertheless, the handwriting was on the wall. The university was trying to fire me. I started looking for an attorney.

On October 14, 2008, I sent an e-mail to President Floyd, pointing out that my 2006 and 2007 annual reviews contained six errors of commission and omission.⁴¹ I asked him to direct university administrators to fix the errors. Floyd turned the matter over to interim provost Warwick Bayly, who didn’t respond for several months. Not sure why it took so long.

There was no question in my mind that Austin and other administrators were violating my First Amendment rights and were harassing me with no good reason. But Austin and other administrators at WSU were smart enough to know that if the dispute were framed as a battle over free speech, they would be on soft ground. So they tried to frame the dispute as a case of professorial incompetence. Everything came to a head at a meeting with the provost on February 18 2009.

⁴¹I didn’t include some of the smaller errors identified in the first annual review.

Bayly's Court of Justice?

"Hello. I'm here for a meeting with Provost Bayly," I said to the receptionist. "I'm a few minutes early."

"Yes, please take a seat," she said cordially but plainly not interested in small talk.

Five minutes later WSU Ombudsman Ken Struckmeyer arrived. University officials refused to allow me to tape record the meeting, so I asked if the ombudsman could sit in on the "appeal" of my annual reviews. I handed everyone in the room a copy of the errors in my two annual reviews and initiated the conversation.

"The reason I asked for this meeting," I said, "was to correct errors in my annual reviews and the internal audit, particularly the false allegation that I had canceled classes in 2007."

As I talked, I looked at Bayly for his reaction. For the first minute or so he refused to look me in the eye. He stared at the documents on the table I had given him. I suspected he probably had already made up his mind on the case. His body language completed the story.

"Listen," he said, interrupting me after a couple of minutes and sitting more upright in his chair. "As I understand it, your director (Erica Austin) already fixed the errors in your annual review. Isn't that correct, Ken?"

Ombudsman Struckmeyer was sitting on my left. He was fidgeting, and his face was redder than a radish. He hesitated, an action that Bayly quickly interpreted as confirmation that the errors had been corrected.

Was Struckmeyer going to betray me?

"Ken," I intervened, "at the meeting on June 30 (2008) with Dean (Erich) Lear and Austin, Lear conceded that the accusation that I had canceled classes was false and that Austin would correct the error. But Austin failed to make that correction. You were there. You were the one to ask them to correct that error. Do you remember?"

"Yes, that is correct."

"What?" Bayly interjected. "Ken, are you sure that's what happened?"

"Yes, Lear agreed to correct the error."

Bayly's brow furrowed. He apparently had not been fully informed of what happened at the meeting with Lear, Austin, Struckmeyer and me. But Bayly wasn't ready to

toss the noose onto the ground. He tried, on two other occasions during the conversation, to get Struckmeyer to admit that the error was corrected or that the allegation that I had canceled classes was true. On both occasions, Struckmeyer stood behind my version of the story. That must have taken a lot of courage, because it was clear Struckmeyer was on good terms with Bayly.

Bayly switched topics.

“I don’t think your performance here has been satisfactory,” he said to me.

“Oh, really?” I responded. “What makes you say that?”

“I’ve looked at your book [*History and Future of Mass Media*] and I don’t see much theory in there.” Austin, by the way, had given me virtually no credit in my 2006 annual review for writing the book, which was published by Hampton Press of New Jersey in 2007.

Fortunately, I had a copy of the book with me and I pushed it to Bayly’s side of the table. “My theory of corporate mass media is one of the most unique theories in the field,” I said. “The last five chapters of the book focus heavily on my theoretical model.”

“Well, I haven’t read the whole thing, but it didn’t look very significant to me.”

I then told Bayly that I ranked first or second on three measures of research productivity and scholarship among tenured faculty in the Murrow School. I had written or edited 10 academic books (four edited books through Marquette Books), 20 first-author or sole-authored refereed articles and more than 100 professional publications, and that I had earned five national research awards.

“Well, I hear your teaching isn’t very good,” he said, looking at Vice Provost Frances McSweeney, who was also in attendance. “Isn’t that true?”

Before McSweeney could respond, I said: “No, that’s not true. My evaluations are at or above department and university averages. I get good evaluations and I love teaching.”

McSweeney confirmed that my teaching evaluations were good.

“Let’s face it,” Bayly said, “You really don’t care much about your job, do you?”

Where the hell did that comment come from? I wish I had this conversation on tape.

McSweeney then chimed in that the administration was concerned I was giving too many quizzes and exams online. She implied that this was inappropriate. I was caught off-

guard again. Was this a new charge? No one has ever criticized me for giving too many online quizzes or exams in my classes?

“Fran, do you really want to go there?” I asked. “Hundreds of professors at the university conduct quizzes online and hold classes online. In fact, a substantial number of credit hours being offered at the university are offered exclusively online. If you indict me for conducting quizzes online, then you’ll be indicting the entire university system.”⁴²

She didn’t respond. She looked scared. Her case was falling apart.

But “Judge” Bayly didn’t see it that way. My guess is that administrators had told him I was incompetent. “I don’t see any merit to your complaint, and I’m not going to change your annual reviews. I’ll speak with Dr. Lear and Dr. Austin and I’ll send you my response.”

Court was adjourned.

I gave Struckmeyer one of those shoulder-shrugging “I-can’t-believe-this-happened” looks. His face had turned another deeper shade of red. He turned his head away.

As we got up to leave the room, Struckmeyer asked McSweeney if he could meet with her after the meeting.⁴³ The next day Struckmeyer e-mailed me with questions about whether my quizzes or exams were conducted during class or at other times. I assumed the questions came from his meeting with McSweeney.

“Always during class,” I responded, “except when we had problems with the Internet service. Then I gave the students more time. The reason I conducted the quizzes during class time is that it reduces cheating and I know all of the students have to be available to do the quiz during class time.”

“And do you have records of this?” Struckmeyer asked.

“Yes. I have hard copies of all of the quizzes. They even have the time and date stamped on them.”

⁴²For \$30,000, a student can earn a master’s in Business Administration at WSU and never step on campus. The entire course is online.

⁴³At the end the meeting with Bayly, I told Struckmeyer that I would probably re-file my complaint with the Faculty Status Committee, because that “appears to be the only option left.” But I later changed my mind. It was unlikely that the committee would hear the case again, because the committee could subject itself to criticism for not hearing the case in the first place. There was nothing to be gained in obtaining another rejection from that committee.

A Moving Target

It was easy to see where administrators were going with this. If I had not conducted the quizzes or exams during class time, they could accuse me of canceling classes (or the administration's favorite new phrase, "not holding them"). But a week or so after the meeting with Provost Bayly, Dean Lear sent an e-mail saying that the administration was no longer focusing on the issue of canceling classes. Instead, the problem now was that I conducted too many online quizzes and exams. I usually gave seven to 11 quizzes or exams per semester. Students perform better when the course content is broken up into smaller sections. But Lear implied that I should have spent more time lecturing or on other activities.

This comment seemed to support what Vice Provost McSweeney was saying at the Provost meeting. Once again, I was dumbfounded. "Is this a moving target?" I wrote in an e-mail to Lear.

"No, it isn't," he responded. He said the university administration has the authority to control the number of quizzes and other decisions affecting content in courses. But if that were the case, then why did the administration wait so long to raise this issue? I felt "boxed in" until it dawned on me: Simply concede they have the authority to control the number of tests and quizzes and ask them how many I should give. No administrator wants to get into micro-managing a professor's class.

I e-mailed Austin, Lear and McSweeney and asked them how many online tests or quizzes would be appropriate. Austin replied: "As many as you would like."

BAZINGA!

But, of course, it didn't matter.

More Bad Reviews

In February 2009 I submitted my 2008 annual review. Although I had written one book and part of another, Austin gave me a 2.0 rating for the book (3.0 is meeting expectations) and an overall rating of 2.05, the lowest rating I ever received in an annual review. Her review stated that I should have published a refereed journal article, even

though university rules weighted books and journal articles equally and she did not have the authority to single out one over the other.

Austin also criticized me again for “failing to hold classes.” That charge puzzled me, because two of her superiors (Lear and McSweeney) were no longer accusing me of canceling classes. Instead, they continued to accuse me of giving too many quizzes or exams in my classes. My guess is that Austin was unaware of the events that took place during the meeting in Interim Provost Bayly’s office. This is one of the big weaknesses of bureaucratic systems (but a good thing for people fighting them): one part doesn’t know what the other part is doing.

She also criticized me for allegedly giving grades that were too high, and then later backed off when she actually looked at my grades. The sloppiness of the administrative review process was appalling. But she refused to correct the canceling classes error, and she refused to give me service credit for editing and formatting six open-access scholarly journals, even though the work I did for Marquette Books counted as service because by then I had filed the requisite form.⁴⁴

Thus, in March 2009, the only apparent option I had left to get the errors corrected and save my job was a lawsuit. I ended up hiring attorney Judith Endejan of Graham & Dunn of Seattle. She had once worked as a newspaper reporter in the Midwest. She understood my idealism.

My Colleagues React

When I started teaching again in August 2009, most of my colleagues were uncomfortable in my presence. One of the school’s part-time receptionists was very friendly, but she appeared to be nervous. The sister of the internal auditor was evasive, not surprisingly. We had a polite greeting but it was clear neither of us would engage in any small talk from here on out.

Some faculty with whom I had been friends before the dispute deliberately avoided sitting next to me at the first faculty meeting. I was, of course, *persona non grata* — a role to

⁴⁴She made no mention in her review of my volunteer work for the open-access journals.

which I was no stranger. One faculty member at one point told me that he thought I was being unfairly singled out for retribution, because he and other faculty also had failed to file forms outlining their consulting and outside business interests. I advised him to file the form as soon as possible. Six months later, after the lawsuit was filed, I asked him again if he thought I was still being unfairly targeted. He said he never recalled telling me that I was being unfairly targeted. He still hadn't filed the form but was not being investigated or punished by Austin.

Needless to say, the “banishment” was very stressful. I did seek medical assistance, but I held it together fairly well through the next five years of the eight-year-long dispute. The single most important factor sustaining me, however, wasn't the anti-depressant drugs – it was my principles. I later learned that research on workplace mobbing shows that many victims suffer mental breakdowns and some even commit suicide. But those who fight for a higher principle usually survive and even prosper. Principles give people a purpose. It also didn't hurt that at home I had a beautiful daughter (who I adopted from China eight years earlier when I was single) and a supportive spouse, Theresa.

Meanwhile, the permanent new dean, Lawrence Pintak, began his job in fall 2009. He was a former professor at a university in Egypt and a former international broadcast journalist who had done work for CBS and other news organizations. He and I initially seemed to hit it off. But it was clear he didn't know much about my case. A month later he would switch sides. I knew it would happen, even though my case now was being framed as a First Amendment dispute.

For more than two years I tried unsuccessfully to get WSU university officials to correct errors in my annual reviews and in the internal audit. In the beginning, I thought the error about canceling classes would be corrected quickly because I had the physical evidence to dispute the allegations. The facts spoke for themselves. But, as the years passed, I realized that a simple resolution would not be forthcoming. As a media sociologist, I couldn't help but run a series of questions over in my mind – questions that related this dispute to bigger issues involving the impact of institutions in society:

How could very bright people – administrators trained in scientific methods and one of its core principles, objectivity – engage in irrational,

nonobjective behavior? Why would they persist in trying to punish a faculty member who had followed university rules? Why would they repeatedly fail to explain or justify their actions and refuse to provide an explanation as to why my interpretations of the rules were wrong?

Workplace Mobbing

I found part of the answer in fall 2009, when I began doing research on workplace mobbing and came across Canadian sociologist Kenneth Westhues' book, *The Envy of Excellence: Administrative Mobbing of High-Achieving Professors*. The book focuses on the case of one Canadian professor, Herbert Richardson, who, in Westhues' opinion, was wrongly mobbed by his administrators. Westhues writes: "How does it happen that a thousand accusing fingers all get pointed in one way, toward a target who is doing little harm and much good?"⁴⁵

The process that led to the dismissal of Richardson, who was a protestant theologian teaching in a Catholic university, was a "form of savagery," according to Westhues.⁴⁶ He blames part of the problem on the fact that universities are not bound by rigorous legal rules and principles.

Like courts, these in-house, quasi-judicial (academic) bodies can discredit and punish an accused person, destroy the person's life, but they are governed not by criminal law but only the newer, looser rules of administrative law. Proof beyond reasonable doubt is not required, just the weighing of probabilities. Charges need not be so specific as in criminal courts, nor rules of evidence so strict. Most of the professors and staff members sitting in judgment are unschooled in law. Procedures are informal, haphazard, entangled in campus politics, and free of the presumption of innocence of the accused. At worst, domestic tribunals function as kangaroo courts — better to say wallaby courts, the latter being a smaller marsupial.⁴⁷

Although universities "are places where the 'law of reason' appears to reign supreme

⁴⁵Kenneth Westhues, *The Envy of Excellence: Administrative Mobbing of High-Achieving Professors* (Lewiston, Canada: The Edwin Mellen Press, 2005), p. 5.

⁴⁶*Ibid.*

⁴⁷*Ibid.*, p. 3

... on most issues,” Westhues writes that “in these same places, on exceptional occasions, people ‘riot in complete exemption from that law.’” He adds: “Academic knives are more polished and keen than those made of steel, and they are thrown with such grace that targets sometimes barely know they have been stabbed in the back until their campus lives are lost.”

So why do administrators mob?

Westhues places much of the blame on “envy.” High-achieving professors are usually the victims. This theory fits well with explanations many of my friends and colleagues also gave me. Perhaps there is some validity to these psychologically oriented theories. All social systems seek to control their members, and they dislike members who rock the boat. I have never been afraid to take a position that runs contrary to the dominant view. I’ve always assumed that this is what makes America and its universities great.

But as a structural theorist, I believe a more complete explanation must go beyond the confines of psychology and individual motivation.

A Structural Explanation

Part of the reason the errors in my annual reviews were never corrected and why a mobbing atmosphere emerged at WSU can be attributed to rules that dole out rewards and guide the annual review process. The rules limit the ability of faculty to challenge administrative decisions. There was, for example, no appeals process for the internal audit. And although I appealed my evaluation ratings to a campus grievance committee, it refused to hear my case because it was too busy working on tenure-denial cases.

In addition, even when one can appeal an administrative decision, the “judge” usually has a conflict of interest, as Westhues points out. If faculty do not like how their supervisor rates them, they can appeal to the next highest level, which is usually a dean or provost. But the “judges” have a vested interest in the outcome. Higher-level administrators need the political support of the administrator who gave the review, so their independence is compromised. Moreover, the system presumes the higher-level administrator is knowledgeable about the performance of the faculty member. But rarely is that the case, nor do they have resources to investigate.

Although the higher-level administrator could support the lower-level administrator's decision, the safest approach is to simply provide no rating at all, which the rules allow. This insulates higher-ups from responsibility, forcing lower-level administrators to take responsibility should something go wrong. That's what Dean Lear did in my case. He didn't formally endorse Austin's first two reviews, he simply refused to change them. Because power in administrative structures is derived partly through loyalty and mutual support, obtaining an objective assessment is extremely difficult. Clearly, a more objective, independent appeal process is needed, yet administrators will resist such changes, because that could seriously dilute their power.

At WSU, administrators enjoyed a wide latitude of power over professors, because administrators know few faculty will fight a bad review. However, one dysfunctional side effect of not having a more independent review process is illustrated by my case: the dispute may end up in litigation, consuming thousands of person-hours and university resources and go on for many years. The real victim, in the end, is the taxpayer.

My First Amendment Lawsuit

My First Amendment lawsuit against four Washington State University administrators was filed electronically in U.S. District Court in Spokane, Washington, on October 28, 2009. I issued a four-page news release and distributed it via e-mail to hundreds of local and national news media, pro-speech organizations, social scientists and colleagues.

LAWSUIT ACCUSES WSU'S MURROW COLLEGE OF
VIOLATING J-PROFESSOR'S FIRST AMENDMENT RIGHTS:
University Auditor Also Accused of Conflict of Interest
SPOKANE, WA — A Washington State University journalism professor today filed a federal lawsuit against four administrators at his university who, he says, violated his First Amendment rights when they punished him for proposing a "7-Step Plan" to improve the quality of the unaccredited undergraduate mass communication programs in the Edward R. Murrow College of Communication.

Tenured associate professor David K. Demers filed the lawsuit in U.S. District Court in Spokane. The defendants are Erica Austin, former

interim director and dean of the Murrow program; Warwick Bayly, interim provost and vice president; Erich Lear, former dean of the College of Liberal Arts; and Frances McSweeney, vice provost for faculty affairs. ...

[T]he complaint asserts that Austin falsely accused Demers of canceling classes in 2007 and 2008. One of those accusations was duplicated in a report issued by WSU Internal Auditor Heather Lopez, whose sister worked for Austin in the Murrow office. The complaint contends that the auditor had a “patent conflict of interest.”

The defendants, through their state-appointed attorney, Kathryn M. Battuello, denied the allegations.⁴⁸ The defendants would provide more details about their case a year later, when they filed a motion to have the case thrown out of court (details to come). The defendants did not issue a press release, but a university spokesman told local media that WSU would “vigorously” defend them against the lawsuit.

Reaction to the Lawsuit

Short stories about the lawsuit appeared in several regional news media, including the *Seattle Times*, *Lewiston Tribune*, and *Moscow-Pullman Daily News*, and in *the Chronicle of Higher Education*. But the *WSU Daily Evergreen* and the *Spokane Spokesman-Review*, the two most important local media, ignored the story.

I wasn't too surprised by the *Spokesman-Review* snub. I had, through the years, become an unwitting critic of the newspaper's management (the Cowles family) after learning the newspaper was censoring citizen commentaries and letters to the editor. I had also been critical of the family's involvement in the River Park Square garage scandal, in which it was alleged the family was profiting at the expense of the taxpayer. Another factor that may have contributed to the snub was the organization's linkage to the university: Elizabeth Cowles, who managed the family's broadcasting stations, was a member of the WSU Board of Regents from 2000 to 2005.⁴⁹

⁴⁸“Defendants' Answer and Affirmative Defenses to Plaintiffs' Complaint for Violation of Civil and Constitutional Rights,” Demers v. Austin, et al., Case NO. CV-09-334-LRS, U.S. District Court, Eastern District of Washington, filed November 25, 2009.

⁴⁹The Regents had to approve the university's decision to defend itself in the lawsuit. They also were updated on progress of the lawsuit through the years during closed sessions.

But the *Evergreen* rebuff was puzzling. Although student journalists most likely identified with the administrative power structure at WSU, even the most biased of editors could not have failed to see that a federal lawsuit alleging a journalism program director was violating the First Amendment rights of a faculty member was one helluva story. Were WSU students getting proper instruction in their journalism classes? The newspaper, by the way, also would refuse four years later to cover the Ninth Circuit Court of Appeals ruling, which favored me.

But there was no time to pout about lack of local media coverage. I just circumvented the media. I assembled e-mail lists of several hundred WSU faculty and administrators and sent it directly to them. Of course, administrators tried for a while to punish me for e-mailing faculty, but they eventually backed off when it was determined I had violated no university rules and that I had a free-speech right to distribute such information.

The lawsuit produced relatively little public response from WSU students and faculty. Some faculty were sympathetic. But none would support me in public. I wasn't surprised that non-journalism faculty were reticent. But I was a bit surprised at the lack of support from my journalism faculty colleagues. Murrow print and broadcast journalism faculty presumably had a greater vested interest in First Amendment issues. But not one of them publicly supported the idea that faculty should have the right to criticize the administration and offer alternative plans for restructuring a program — nor did they, later, criticize the university administration for arguing that faculty do not deserve free-speech rights in their professional or service-related roles.

In addition, some of the WSU faculty on campus who were associated with the American Association of University Professors, which is one of the strongest voices for free speech in higher education, were tepid in their support. "I have to be very careful about how I approach all this," said one AAUP member, who was worried that he would jeopardize his chances of being elected to an important position in Faculty Senate if he took a strong stand on the issue.

On another occasion I asked a WSU junior administrator whether he would defend a faculty member who was being falsely accused of violating university rules.

“Are you kidding?” the administrator said, laughing. “I have a family to support.”

That administrator, by the way, eventually became the head of an academic unit at a major university. He is the kind of person who succeeds in bureaucratic systems.

The WSU Faculty Senate, which presumably had a vested interest in supporting free-speech on campus, also ignored the lawsuit, even when WSU administrators later argued in court that faculty do not deserve free-speech protection when acting in their service-related or professional roles.

I believe that most of these lapses in judgment can be explained by three factors. The first is fear — of retribution and of not getting the rewards that a faculty member thinks he or she deserves from the university. The second factor is that faculty, especially the Faculty Senate leadership, strongly identifies with the administration on most issues, whether by choice or through co-optation. A third factor is a lack of faculty leadership on issues involving academic freedom. None of Faculty Senate leaders had a background in First Amendment law and, thus, did not have the knowledge to understand what was protected speech. Two of the Senate presidents even denied me an opportunity to speak to the senate body about the legal issues at stake in my lawsuit, apparently unaware that Faculty Senate is a public body that legally cannot deny citizens or faculty the opportunity to address it.

Although WSU insiders may have been reluctant to speak out on the issues surrounding the lawsuit, this did not apply to observers outside of the university. Some even advised me to withdraw my lawsuit. “You should drop this lawsuit,” one expert on disputes between faculty and universities told me shortly after I filed the free-speech lawsuit. “Your university will destroy you. They are too powerful. They will build a case against you that you can never beat. You can never win. It will cost you hundreds of thousands of dollars and you will end up bankrupt and bitter. I’ve seen it happen many times before. Life is too short.”

“Do you really think anyone cares about your case?” said an attorney familiar with the lawsuit. “Do you really want to work at WSU? You should settle it while you can. Even if you win, you will lose. You will never get your money back. Life is too short.”

The only significant support I received with respect to the lawsuit came from friends, family and colleagues outside of the Murrow College and from nationally based free-speech organizations. Most of my colleagues were former journalists-turned-professors who valued the fight for free speech. This included one retired dean. “This is an incredible situation,” he said, “and one that has my deepest sympathy, and a good deal of empathy as well. I hope you win this case quickly and hands down...The ‘mobbing’ behavior is [a] new [concept] to me, but outrageous, and the faculty and other participants should be ashamed.” [bracketed material added for clarification]

One unexpected positive event to occur amidst the controversy came in February 2010, when the Society for Collegiate Journalists honored me with a Louis Ingelhart Freedom of Expression Award.⁵⁰ The award is given to individuals who contribute to freedom of expression at the risk of personal or professional cost. I have received a fair number of awards through the years, but it is the only award currently on display in my office to this day.

Two major free-speech organizations — the American Association of University Professors and the Thomas Jefferson Center for the Protection of Free Expression — also would provide supporting legal briefs later in the case. The Foundation for Individual Rights in Education periodically published stories about the lawsuit on its website. I appreciated that. I tried to obtain some financial assistance from these organizations and others, but no funds were available. I was, in this respect, a lonely activist.

The Secret State Audit Report

The lawsuit discovery stage began in early 2010. The entire process took about a year and produced more than ten thousand pages of documents. I had already seen many of the documents when, two years earlier, I made a Freedom of Information Act request. But one document was not available at that time.

The “secret” state audit report.

I called my attorney immediately. “Judy, Washington state Auditor Brian Sonntag

⁵⁰See <<http://www.scj.us/awardwinners.shtml>> for a list of recipients.

investigated Internal Auditor Heather Lopez and concluded that she, indeed, had a conflict of interest. But President (Elson) Floyd withheld that information from me. The internal audit is tainted. That's why his administration wanted to settle the case through mediation.”

Indeed, now it all made sense.

The university's case against me had fallen apart when Sonntag concluded that Lopez had a conflict of interest, and Floyd's administration was trying desperately to Duct-Tape it back together. The events leading up to the Sonntag's report began in fall of 2009, when I asked Floyd to give me instructions on how to file a conflict-of-interest complaint against Lopez. Lopez's sister, who reported to Murrow interim Dean Erica Austin, informed Austin that her sister was the WSU Internal Auditor. Austin also had instructed Lopez's sister to monitor my classes on at least one occasion.⁵¹

Floyd never gave me instructions on how to file a conflict-of-interest complaint against Lopez. But he and his administration obviously were worried about it. On March 2, 2009, Floyd, without my knowledge, asked Washington state Auditor Brian Sonntag to investigate, who concluded in a March 23, 2009, letter to Floyd that Lopez had violated auditors' codes of ethics.

Thank you for your letter asking us to review whether the independence of the University's Director of Audit was impaired during an investigation. After consulting Government Audit Standards, we concluded that a conflict of interest and impairment to independence did exist based on the facts you provided...Specifically, the Audit Director's investigation of her sister's co-worker was based on assertions from the sister. This relationship creates not only a personal impairment for the Director but also for all audit staff members who are under the Director's control and influence...

Floyd never gave me a copy of Sonntag's letter, no doubt because it undermined the administrative case against me. Floyd's administration then tried to settle the case through mediation. But that failed when I demanded that any settlement be made public.

⁵¹Lopez's sister told me that she never spoke to Lopez about her investigation of me, but my conflict of interest allegation was based on the "halo effect." In other words, Lopez put more trust in the information she obtained from Austin and trusted me even less because her sister reported to and was liked by Austin.

Shortly thereafter, Floyd's administration asked the auditor at the University of Idaho to issue a new audit report. The UI auditor never contacted me, nor was I even aware another audit was being conducted. The auditor duplicated the errors contained in the original audit. The UI auditor's failure to interview me also violated auditor codes of ethics. Provost Warwick Bayly sent me a copy of that new audit report on December 4, 2009, four weeks after I filed the lawsuit.

When Floyd was asked during his deposition why he refused to give me a copy of Sonntag's report, he paused and looked down at the table. He was nervous. Because it was "minuscule," he said. "I had more important things to do." Floyd's response was enlightening. If he was telling the truth — that he failed to give me a copy of Sonntag's report because he had more important things to do — it meant that, to him, academic freedom and due process were not very important issues. If he was lying, it meant he deliberately violated the administrative due process rights of a faculty member.

In either case, the failure to provide that document radically altered the outcome of the dispute. It meant that taxpayers now would have to fork out hundreds of thousands of dollars to defend the WSU administrators. It meant that Floyd could not be trusted to protect due process rights of faculty.

Not surprisingly, though, no WSU group or state agency ever followed up on the allegations that President Floyd had violated the administrative due process rights of a faculty member when he refused to provide me with a copy of Sonntag's letter. That's the way it usually works in large bureaucracies. To bring down a powerful figure like a university president, you have to have a powerful elite behind the effort, such as a member of the WSU Board of Regents or the Faculty Senate. But not one WSU senator openly criticized the president for his unethical behavior, or the fact that WSU had for years been terminating professors in violation of AAUP standards. WSU administrators were trying to frame my lawsuit as case of "incompetence," not "free speech," and the leadership of the WSU Faculty Senate had been sucked into that story line — like sheep.

But four months later the "incompetence frame" unraveled. WSU administrators and their attorney decided they did not want to go to trial and fight the case out on its merits. Instead, they asked the U.S. District Court judge to declare that WSU faculty do

NOT deserve free-speech rights when speaking in their service-related roles. They cited *Garcetti*.

Big mistake.

This not only elevated the “free-speech frame,” it cast the defendants and the university administration as free-speech bullies. And, ironically, it reinforced my original claims that university administrators did not respect free-speech rights of faculty. “This is a very bizarre legal strategy,” I told a colleague. “The administration is cutting off its nose to spite its face.”

Expert Witnesses

The WSU defendants and I both hired “expert witnesses” to help our cases. I hired Kenneth Westhues, the sociologist mentioned earlier who is an expert on workplace mobbing at universities, to analyze the case. His overall analysis helped me understand why administrators did not appreciate a civil-liberties-loving professor like me. He began by comparing Austin’s academic record to mine:

To judge by her vita, [Morrow Interim Director Erica] Austin is above-average in the sense of having more than an average number of refereed articles to her credit. Demers is above-average in a different sense: not only having more than an average number of books to his credit, but having transcended, far more than most professors, a narrowly academic and professional definition of a professor’s role. Demers is a culture critic in an era of academic specialists and ideologues. Excelling in this way tends to threaten colleagues and call forth animosity from them, especially when coupled, as in the Demers case, with undisguised disdain, even contempt for puffed-up ivory-tower professionals — “legends in their own minds,” as he has called them.

Demers is not only a bigger thinker than most professors, he is also bigger in practical engagement toward implementing the kind of scholarship he believes in. He is an activist, outspoken in support of the First Amendment of the U.S. Constitution, willing even to take his employer to court in defense of free expression. He is a reformer, appealing publicly to the Morrow alumni and the WSU administration for support of his “7-Step Plan,” agitating for higher priority on “green-eyeshades” skills than on “chi-square” abstractions. He is an organizer,

founding the Center for Global Media Studies ... and directing it for some years. He is an entrepreneur, founding and making a stupendous success (to judge by its website) of his publishing company, Marquette Books.

In sum, Demers is a type of social-science professor who tends to get in steadily deeper trouble, the more success he enjoys in his work.

To be clear, I don't think I am a bigger thinker than other professors. But the main point in the write-up above is that I, as a scholar, was far more likely than other faculty to fight for what I believed in. I thought other journalism faculty had the same commitment. I was wrong.

In fact, the university even hired a journalism dean to discredit my academic record. Her name was Jean Folkerts, dean of the University of North Carolina's School of Media and Journalism. At the time, I considered her an amiable colleague. I was surprised to hear WSU had hired her to discredit me, because years earlier she told me she wanted me to work for her when I interviewed for a position in the School of Media and Public Affairs at George Washington University, a program she once directed. In addition, as editor of *Journalism & Mass Communication Quarterly* in the 1990s, she had accepted for publication eight of nine refereed manuscripts I had submitted to the journal. To undermine my academic record, she would have to devalue the very journal that she edited for more than a decade and then explain why she wanted to hire me. Moreover, Folkert's own academic publication record was much weaker than my own. She hadn't published a refereed manuscript in nearly two decades and, after 28 years as an academic, she only had published nine refereed journal articles and three books, two of which were textbooks and one an edited book. She never published the more highly valued theoretical-monograph book. I had three times as many publications.

Of course, I was shocked then and still am today that a journalism dean would actually help administrators develop an anti-free-speech case against faculty. But the financial rewards for her were big. Folkert's charged about \$300 an hour for her services. I had to pay half of the cost of her deposition, which alone was more than \$12,000 for two days work.

The District Court Hearing

Oral arguments were heard on May 12, 2011, before Judge Robert H. Whaley, a senior U.S. District Court judge for the Eastern District of Washington in Spokane. Two weeks later he threw my case out of court. He cited *Garcetti v. Ceballos* (2006), writing that “the First Amendment does not prohibit managerial discipline based on an employee’s expressions made pursuant to official responsibilities.” These “expressions” included my speech about accreditation, whether the college should emphasize professional training or theoretical research, the restructuring of the college, and my 7-Step Plan. He also ruled that these speech expressions dealt with “internal matters at WSU” and “were not matters of public concern.”

***Garcetti v. Ceballos* (2006)**

The defendants’ and judge’s legal arguments were predicated in large part on the 2006 U.S. Supreme Court decision in *Garcetti v. Ceballos*, which held that public employees do not have free-speech rights when acting in their official duties. Prior to *Garcetti*, the courts had relied on what came to be known as the “Pickering Balancing Test.”⁵² This involved balancing the interests of a public employer with employees’ right to free speech using the following three questions:

1. Did the employee’s speech address a matter or matters of public interest and concern?
2. Was the employee’s speech a significant or motivating factor in the employer’s decision to punish or terminate the employee?
3. Did the interests of the individual commenting on matters of public concern outweigh the public employer’s interest in “promoting the efficiency of public service?”

To prevail, an employee had to convince the court that the answers to all three questions were “yes.” *Garcetti* basically mooted the first two questions and assumed that all speech from employees was contrary to the efficiency of public service. A conservative majority of five justices — led by Justice Anthony M. Kennedy — ruled that a Los Angeles assistant prosecutor (Richard Ceballos) could be punished by his superiors even after he

⁵²*Pickering v. Board of Education of Township High School District, 205, Will County, 391 U.S. 563 (1968).*

reported that police had fabricated evidence to obtain a search warrant. Government employees, the majority opinion stated, only have free-speech rights when they speak as citizens, not employees.

In dissent, Justice David H. Souter wrote that he hoped the *Garcetti* ruling did not apply to public universities, “whose teachers necessarily speak and write ‘pursuant to official duties.’” Kennedy’s majority opinion seemed to agree: “We need not ... decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”

But over the next four years, federal courts ignored these comments and on eight separate occasions denied free-speech rights to professors who criticized administrators for hiring too many adjunct faculty, for making comments in support of a student during a disciplinary hearing, and for criticizing the use of grant monies.⁵³ Not one federal court after 2006 ruled in favor of a faculty member whose workplace speech was uttered outside of the classroom or their scholarship. The situation was so grave that, by early 2011, the American Association of University Professors was urging faculty “to defend their academic freedom ... not through the courts but through clear university policies.” Several universities, including the University of Michigan, followed that advice.

The Notice of Appeal and More Reactions

Endejan filed a notice of appeal with the Ninth Circuit Court of Appeals shortly after the District Court’s decision. She would file the brief in the case for another seven months.

In the meantime, taking the First Amendment high ground did little to improve my image in the Murrow College and the university as a whole during the 2011 calendar year. I volunteered or was a candidate for four department and university committees, including head of the journalism sequence, and was not appointed or elected to any of them. The Faculty Senate administration also refused to allow me to run for a position on the university-wide Graduate Committee, because it said my lawsuit would interfere with my

⁵³Visit <<http://www.acfcl.org/latestonwsulawsuit.html>> and scroll down about halfway to the following headline: “Courts Rule 7-1 that Professors Have No Free-Speech Rights When Performing Their Service-Related Roles, Analysis Shows U.S. Supreme Court May Decide the Fate of Shared Governance” (November 1, 2013). Note that one additional case was added to the list after 2013.

ability to make decisions. That made no sense to me, but why fight that one.

I eventually was appointed to the campus library committee, where I volunteered to chair the committee. This presumably was a position that would keep me marginalized in terms of university politics. Nevertheless, I enjoyed working with and learning from the head librarian at WSU and the members of the committee. One was a vocal critic of Floyd's policies.

The American Association of University Professors contacted me and said it would be filing an *amici curiae* brief in support of my lawsuit against the four WSU administrators. The Thomas Jefferson Center for Free Expression also joined in.

Algora Publishing of New York City sent out for blind review a draft manuscript of my book, *The Ivory Tower of Babel: Why the Social Sciences Are Failing to Live Up to Their Promises*. Fortunately, the review was positive, and Algora published the book.

Administrators had threatened to fire me if the book was not published. I was in the midst of an administrative gauntlet, doing my best to avoid the blows.

In August 2011, the four defendants and I tried to mediate a solution to the dispute. Mediation was required under federal rules before a case could be heard before the Ninth Circuit Court of Appeals judges. The mediation failed. But I was not disappointed. More than ever, I wanted the free-speech issue to be adjudicated, win or lose. The only problem was that I was running out of money. By this time, I had spent more than \$85,000 in legal fees and court costs. I still owed Graham & Dunn \$45,000. If I were unable to recover attorney fees from the lawsuit, I might have to file for bankruptcy.

In fall 2011, I asked the Faculty Senate leadership whether I could give a brief presentation to the Senators about the implications of the administration's anti-free speech position. The leadership refused my request. When I pointed out that the Faculty Senate is a public body that cannot, under law, refuse one of its own "citizens" a right to speak before it, the leadership backed down. But I never gave the talk, mainly because the Senate couldn't fit me into its agenda for several months.

The Ninth Circuit Court Appeal

Judy Endejan, my attorney, filed the appeals brief with the Ninth Circuit Court of

Appeals on February 7, 2012. Although I have always argued that professors have a right to criticize administrators on any topic related to university operations, Endejan took the safe approach and, following *Garcetti* and other court rulings, argued more narrowly that my speech regarding the 7-Step Plan was protected because it came from Demers the citizen, not Demers the employee.

The *amici curiae* brief from the American Association of University Professors and the Thomas Jefferson Center for the Protection of Free Expression was more interested in a broader legal strategy, arguing that “affirming the district court’s opinion will diminish open and honest debate in public universities.”⁵⁴ The *amici* brief acknowledged that the 7-Step Plan did not fit neatly under either the teaching or scholarship exceptions carved out for protection by the federal courts. But the Plan still deserves free-speech protection, the brief argued, because “where an employee is hired to explore new and controversial topics, punishment for a researcher’s ideas would defeat the purpose of his employment.”⁵⁵ This argument was similar to my own, which contends that it is illogical and ethically wrong to ask faculty for input on restructuring a program if administrators then punish them for the ideas they offer.

On March 1, 2012, about a month after the appeals were filed, legal writer Peter Schmidt of the *Chronicle of Higher Education* published a story headlined “LEGAL DISPUTE PITS WASHINGTON STATE U.’S JOURNALISM SCHOOL AGAINST FREE-SPEECH GROUPS.” Here are the first two paragraphs:

Washington State University’s college of journalism has found itself at odds with groups that advocate a First Amendment right to academic freedom after persuading a federal district court to adopt a limited view of the speech rights of faculty members at public colleges.

The case is now pending before the U.S. Court of Appeals for the Ninth Circuit and expected to be heard in the fall. In a friend-of-the-court brief submitted to that court last month, the American Association of University Professors and the Thomas Jefferson Center for the

⁵⁴The authors of the *amici curiae* brief were Robert M. O’Neil and Kathi Wescott of the AAUP and J. Joshua Wheeler and Susan Kruth of the Thomas Jefferson Center.

⁵⁵*Amici Curiae Brief of American Association of University Professors and the Thomas Jefferson Center for the Protection of Free Expression In Support of Appellant’s Request for Reversal*, filed February 14, 2012, in *Demers v. Austin*, Ninth Circuit Court of Appeals, p. 13.

Protection of Free Expression jointly warn the Ninth Circuit that a ruling upholding the district court's logic would set "a dangerous precedent" jeopardizing academic freedom and the sound governance of public higher-education institutions.⁵⁶

On April 26, 2012, the WSU defendants, through their attorney Kathryn Battuello, filed their response to our initial brief:

Indisputable facts establish that Demers' 7-Step Plan originated as an internal academic communication made by Demers as an employee of WSU on the structure of an academic department, a matter irrelevant to the public. The plan was not original research or scholarship, nor was it an example of controversial classroom teaching. It cannot serve as the basis for a First Amendment claim...⁵⁷

The 7-Step Plan emanated from an internal power struggle and was motivated by Demers' self-interest ... Demers' alleged protected speech reflects personal and/or personnel related grievances from a disgruntled employee who is engaged in a workplace power struggle between "Com Studies" and "Mass Com" faculty. As such, Demers' speech is not entitled to First Amendment Protection...⁵⁸

In short, despite Demers' efforts to characterize the 7-Step Plan as citizen speech presented by his alter-ego, the publisher of Marquette Books, the record is clear that his proposals for restructuring Murrow School are inextricably related to his discharge of faculty responsibilities and are therefore employee speech, not citizen speech.⁵⁹

Oral arguments before a Ninth Circuit panel of three judges was set for November 7, 2012.

More (Lack of) Reaction from Faculty Senate

By this time, most faculty on the entire WSU campus were aware of my free-speech lawsuit and the fact that the WSU defendants, through their university attorney, had argued that faculty do not deserve free-speech rights when speaking in their service-related roles. But why hadn't the WSU Faculty Senate "publicly gone on the record condemning

⁵⁶Peter Schmidt, "Legal Dispute Pits Washington State U.'s Journalism School Against Free-Speech Groups," *The Chronicle of Higher Education* (March 1, 2012), retrieved April 22, 2015, from <<http://chronicle.com/article/Legal-Dispute-Pits-Washington/130979>>.

⁵⁷Appellees Responding Brief, *Demers v. Austin* (Ninth Circuit Court of Appeals, Case No. 2:09-cv-00334-RHW), pp. 32-33.

⁵⁸*Ibid.*, p. 49.

⁵⁹*Ibid.*, p. 54.

the administration for its anti-professional free-speech position?” On April 8, 2012, I e-mailed and posed that question to Faculty Senate President David Ray Turnbull.⁶⁰ He responded on April 19: “After consulting with a number of people, we have determined that it is not appropriate for us to take any position or become involved in a situation where there is a pending lawsuit.”⁶¹ One WSU AAUP member familiar with the inner workings of politics at WSU said Turnbull probably consulted with administrators before generating that response.

I responded to Turnbull the following day: “I didn’t ask you take a position on the lawsuit. I asked you why the Faculty Senate has refused to criticize a university administration which is arguing in court that faculty do not, as employees, deserve the right to criticize the administration (in our service roles). You should know that if the appeals court rules in favor of the administration on this issue, all of you will lose the right to criticize the administration without fear of reprisal. Any protestations on the legal issues after that point will be too late.”⁶²

He did not respond.

In early May 2012, I wrote a letter to the editor to the *WSU Daily Evergreen* which explained the anti-free-speech arguments in the university’s legal briefs and added:

I am dumbfounded that WSU administrators and the Board of Regents could make such arguments while claiming they embrace the principle of shared governance, which presumes free-speech protection. I am even more baffled by the lack of response from the Faculty Senate leadership, which is failing to protect faculty interests. Faculty Senate leaders apparently have forgotten philosopher John Stuart Mill’s advice: “Bad men need nothing more to compass their ends, than that good men should look on and do nothing.”

In fall 2012, I also asked the new Faculty Senate president, Robert E. Rosenman, why the Faculty Senate had not condemned the anti-free-speech position of President Elson Floyd’s administration. He responded: “It is not the practice of this Faculty Senate Chair to respond to requests for information about our activities, including votes of record,

⁶⁰E-mail from David Demers to David Turnbull (April 8, 2012).

⁶¹E-mail from David Turnbull to David Demers (April 19, 2012)

⁶²E-mail from David Demers to David Turnbull (April 20, 2012).

which are publicly available.”

In the fall of 2012, I decided to take early retirement at the end of the semester. My best friend from high school had died and there were a lot of things I wanted to do before following him. Oral arguments before a three-judge panel of the Ninth Circuit Court of Appeals were heard on November 7, 2012.

Ninth Circuit Ruling

Judge William Fletcher penned the ruling, which was issued in September 2013. As expected, he and his colleagues held that my 7-Step Plan was not citizen or private speech, but job-related speech. Like the district court, the panel ruling also extended qualified immunity to the defendant-administrators, because the Ninth Circuit had not yet provided guidance in cases like mine. The immunity ruling meant that I could not recover punitive damages even if I won my lawsuit at trial. I could only recover court costs and attorney’s fees.

But, to my complete delight, the panel declared that my 7-Step Plan was protected speech because it focused on an issue of public concern and was “related to scholarship or teaching.”

[T]eaching and academic writing are at the core of the official duties of teachers and professors. Such teaching and writing are “a special concern of the First Amendment.” ... We conclude that if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court. ... The Supreme Court has repeatedly stressed the importance of protecting academic freedom under the First Amendment. ... We conclude that *Garcetti* does not — indeed, consistent with the First Amendment, cannot — apply to teaching and academic writing that are performed “pursuant to the official duties” of a teacher and professor...

Fletcher wrote that my Plan did not focus on a personnel issue or an internal dispute, nor did it address the role of particular individuals in the Murrow School or voice personal complaints. Rather, the Plan proposed changes to the direction and focus of the School.

The manner in which the Plan was distributed reinforces the conclusion

that it addressed matters of public concern. ... Here, Demers sent the Plan to the President and Provost of WSU, to members of the Murrow School's Professional Advisory Board, to other faculty members, to alumni, to friends, and to newspapers. He posted the Plan on his website, making it available to the public. ... Demers's Plan contained serious suggestions about the future course of an important department of WSU, at a time when the Murrow School itself was debating some of those very suggestions.

The WSU defendants and their counsel had argued that the 7-Step Plan was not protected speech under *Garcetti* because it was not uttered in the classroom or in scholarship or research. They were arguing that the location of the speech — where it was uttered — was crucial.

The Ninth Circuit panel disagreed. The issue isn't where the speech is uttered. The issue is whether it is "related" to scholarship or teaching — language taken directly from dicta in *Garcetti*. In fact, Fletcher's opinion cited a host of court decisions to back up the idea that professors qualify for First Amendment protection when they speak on issues related to scholarship or teaching. In concluding that *Garcetti* did not apply to *Demers v. Austin*, the panel said *Pickering* is the governing standard for faculty.

The WSU defendants' asked the panel to reconsider its decision and petitioned the Ninth Circuit Court of Appeals to for an *en banc* hearing. They argued that the Constitution does not protect employee grievances, implying that my 7-Step Plan was a grievance. More important, they argued that none of the other federal courts since *Garcetti* had ever extended free-speech protection to speech arising from "professional duties." On this point, they were correct.

On January 29, 2014, the appeals court issued a revised ruling, which rejected the WSU's arguments and included a new section called "Speech Related to Scholarship or Teaching' Under *Garcetti*" that quoted liberally from my 7-Step Plan. "We conclude that The 7-Step Plan prepared by Demers in connection with his official duties as a faculty member of the Murrow School was "related to scholarship or teaching" within the meaning of *Garcetti*. See 547 U.S. at 425."

In Demers's view, the teaching of mass communications had lost a critical connection to the real world of professional communicators. His Plan, if

implemented, would restore that connection and would, in his view, greatly improve the education of mass communications students at the Murrow School. It may in some cases be difficult to distinguish between what qualifies as speech “related to scholarship or teaching” within the meaning of *Garcetti*. But this is not such a case. The 7-Step Plan was not a proposal to allocate one additional teaching credit for teaching a large class instead of a seminar, to adopt a dress code that would require male teachers to wear neckties, or to provide a wider range of choices in the student cafeteria. Instead, *it was a proposal to implement a change at the Murrow School that, if implemented, would have substantially altered the nature of what was taught at the school, as well as the composition of the faculty that would teach it.* [emphasis added]

The WSU defendants decided not to appeal the case to the U.S. Supreme Court.

In sum, the Ninth Circuit ruling means that faculty in nine Western states may criticize administrators on issues of public concern related to teaching and scholarship. The rest of the country, however, is governed by *Garcetti*. I’ve been hoping another case would emerge to expand the issue to all Circuits, but so far I know of none.

The Aftermath

I was extremely pleased with the Ninth Circuit Court ruling. But to recover my attorney’s fees, I needed another \$50,000 to \$100,000 to go trial.

Unfortunately, I was broke and was not able to find any free-speech organizations that could help with the costs. I had paid out more than \$100,000 and I still owed about \$250,000. I was forced to file for bankruptcy in January 2014, two weeks before the Appeals Court handed down its final decision. Several lawyers had predicted this would happen. I knew it was a possibility, but I would do it all over again. Fortunately, I was able to keep my retirement funds, my Spokane house (I continued to make payments on it), and my 9-year-old Volvo.

Nine months later, on October 28, 2014, the WSU defendants and I settled the case out of court. As usual, I wrote another overly wordy news release, which was distributed on November 4, 2014. “Washington State University is paying former journalism professor David Demers \$120,000 to drop his five-year-old federal free-speech lawsuit against four

WSU administrators,” the lead of a news release stated. Most of the money went to my attorneys; the rest to creditors. So in the end, my attorneys came out OK — they earned about \$200 per hour for their work. But the taxpayers were the real losers. I don’t know exactly how much the lawsuit cost the university and taxpayers. But it was probably far more than the what it cost me, because scores of different public officials, attorneys and employees were working on the case at various times. My best guess is that the university spent somewhere between \$450,000 and \$1 million, enough money to employ a full-time tenured faculty member for up to 10 years.

My family and I moved to Arizona in summer 2014. The Murrow College is still not accredited.⁶³

Some of the administrators involved in my case are still working in administration at WSU.

And it appears that some WSU administrators never learned a lesson from *Demers v. Austin*. In 2017, several high-level university administrators tried to discrediting a Wolf researcher at the university in order to curry favor with state legislators who hold the purse strings on a proposed medical school in Spokane to be named after Elson Floyd, who died in 2015 of cancer.⁶⁴ Recent news reports show administrators also are continuing to terminate faculty in violation of AAUP rules.⁶⁵

More Aberrant Anti-Free-Speech Activity

Demers v. Austin began having an impact on policymaking at universities almost immediately. In one incident, faculty used the decision to promote a more liberal free-speech policy — but oddly, a journalism dean took sides with the anti-free-speech administration.

The incident occurred at the University of Oregon, where faculty in spring 2013 voted to unionize. The UO faculty committee supporting the expansion of free-speech

⁶³The Daily Evergreen, WSU’s student newspaper, did publish a story on the settlement.

⁶⁴Cody Cottier, “Emails: Facing threats to med school, WSU disavows wolf researcher,” WSU Daily Evergreen (August 11, 2017).

⁶⁵Cody Cottier, “CAHNRS conflicts undermining academic freedom, faculty say: Administrators in agricultural college often punish professors who frustrate industry, according to multiple sources,” WSU Daily Evergreen (September 12, 2017).

rights for faculty cited *Demers v. Austin* to back up its position that faculty deserved First Amendment protection when speaking in their service-related, or shared-governance, roles.⁶⁶

The university is governed by the faculty and the president...Institutional policies and practices are informed by consultation and advice from the faculty, staff, and students. Therefore, members of the university community have freedom to address, question, or criticize any matter of institutional policy, action, or administration, whether acting as individuals or as members of an agency of institutional governance.⁶⁷

UO President Mike Gottfredson's administration initially rejected the faculty proposal. Gottfredson then tried to limit academic freedom to only speech uttered in the classroom or in scholarship. The administrative proposal also tried to require faculty members to be civil when "discharging his or her duties."

One of Gottfredson's lieutenants in the fight against free-speech rights for faculty was Tim Gleason, a professor of mass communication law at the university and former dean of the University of Oregon's School of Journalism Mass Communication, who was now serving as UO's strategic communications consultant. Gleason and another administrator fought against OU faculty free-speech rights for 18 months before Gottfredson capitulated in May 2014 and signed into effect a policy that provides strong protection for service-related speech.⁶⁸

That action came after O'Neil, the former University of Virginia president, told *Inside Higher Education* that administrators and faculty at Oregon "need to make sure the adequate language currently reflects *Demers [v. Austin]*."⁶⁹

Several months after Gottfredson signed the pro-speech policy, he resigned (many

⁶⁶Academic Freedom Work Group, "Rationale for Policy on Academic Freedom and Draft Academic Freedom Policy," unpublished memo to University of Oregon President Michael Gottfredson and University Senate (January 7, 2014), p. 2, retrieved May 26, 2015, from <<http://senate.uoregon.edu/sites/senate.uoregon.edu/files/Academic%20Freedom%20rationale%20memo%20and%20proposal,%20January%202014.pdf>>.

⁶⁷ Ibid., p. 5.

⁶⁸ Betsy Hammon, "University of Oregon President Michael Gottfredson Signs Academic Freedom Policy Faculty Say Is Among Strongest in Nation," *The Oregonian* (May 28, 2014), retrieved May 26, 2015, from <http://www.oregonlive.com/education/index.ssf/2014/05/university_of_oregon_president_12.html>.

⁶⁹ Colleen Flaherty, "Requiring Civility," *Inside Higher Education* (September 12, 2013), retrieved May 26, 2015, from <<https://www.insidehighered.com/news/2013/09/12/oregon-professors-object-contract-language-divorcing-academic-freedom-free-speech>>.

faculty say he was forced out) from his position as president. The UO Board of Trustees gave him a \$970,000 severance package.⁷⁰ But before he left, Gottfredson appointed Gleason to the position of university Faculty Athletics Representative for the NCAA, which pays more than \$100,000 a year for a half-time appointment. The rest of Gleason's pay, about \$150,000, came from his job as a professor in the journalism program.⁷¹ Needless to say, the appointment angered some OU faculty who believed that Gleason had worked against their best interests.⁷²

On June 2, 2015, Greg Lukianoff, president and chief executive officer of the Foundation for Individual Rights in Education, urged the Subcommittee on the Constitution and Civil Justice for the U.S. House of Representatives to enact a law that will protect freedom of expression at public colleges and universities in the United States.⁷³ A law is needed, he said, because the courts have handed down mixed rulings on the issue of speech on campus. He cited *Demers v. Austin* and other cases to back this up.

“By leaving unanswered the question of whether an academic freedom exception applies to public employee speech doctrine following *Garcetti*, the Supreme Court's decision threatens academic freedom and free speech,” he testified. “Congress should statutorily protect academic freedom by making clear that there is an exception to *Garcetti* for academics.”

Lukianoff proposed several draft bills. One of the them borrowed directly from the language of the Ninth Circuit Court ruling in *Demers* and would amend a section of the Higher Education Act of 1964:

No publicly operated institution of higher education ... shall take adverse personnel action, or maintain a policy that allows it to take adverse

⁷⁰ Don Kahle, “One UO President Was Fired, One Simply Quit? Yeah, Right,” *The (Eugene, OR) Register-Guard* (August 15, 2014), p. A9, retrieved May 26, 2015, from <<http://projects.registerguard.com/rg/opinion/32011301-78/one-uo-president-was-fired-one-simply-quit-yeah-right.html.csp>>.

⁷¹ Office of Institutional Research, “Unclassified Employees with a Record of Employment During the 10/1/2014 to 12/31/2014 Period,” retrieved April 10, 2015, from <<http://ir.uoregon.edu/sites/ir.uoregon.edu/files/Unclassified100114to123114.pdf>>.

⁷² Some of the critical comments are posted at the UOMatters.com website. See, e.g., <<http://uomatters.com/2015/05/mike-gottfredsons-last-act-was-appoint-tim-gleason-as-far-so-hows-he-doing-on-representing-the-faculty.html#more-14862>> and <<http://uomatters.com/2014/05/gottfredson-pads-resume-with-credit-for-academic-freedom-after-getting-tim-gleason-and-randy-geller-to-fight-it-for-18-month.html>>.

⁷³ Written Testimony of Greg Lukianoff, President and Chief Executive Officer, Foundation for Individual Rights in Education, Before the United States House of Representatives Committee on the Judiciary, Subcommittee on the Constitution and Civil Justice, June 2, 2015 Hearing on First Amendment Protections on Public College and University Campuses, retrieved June 6, 2015, from <http://docs.house.gov/meetings/JU/JU10/20150602/103548/HHRG-114-JU10-Wstate-LukianoffG-20150602.pdf>>.

personnel action, against a faculty member in retaliation for expression related to scholarship, academic research, or teaching ... *or within the context of the faculty member's activities as an employee of the institution of higher education, related to matters of public concern, including matters related to professional duties, the functioning of the institution of higher education, and the institution's positions and policies ...*⁷⁴ [emphasis added]

The chances of enacting such a law are not very good, especially with a Republican-controlled House. But, as maverick journalist I. F. Stone advised, “The only kinds of fights worth fighting are those you are going to lose, because somebody has to fight them and lose and lose and lose until someday, somebody who believes as you do wins.”

ARE BUREAUCRACIES EVIL?

This paper has put much of the blame for anti-free-speech activity onto bureaucratic structure, which is rule-driven and often restricts democratic processes and due process. Bureaucracies frequently monopolize information to the detriment of an open society. They often resist change, especially when the call for action comes from outside sources, such as social movements and activists. Bureaucratic hierarchies increase social distance and reduce understanding between those at the bottom of the hierarchy and those at the top. Each level of management above those at the bottom also reminds those at the bottom of how little power, influence and autonomy they have. Democracy suffers. Bureaucracies also can de-skill work and increase feelings of alienation. That's because they are characterized by a complex division of labor and seek to reduce complex jobs into simple discrete tasks that anyone or a machine can do.⁷⁵

Of course, as the 1950s-era sociologists argued,⁷⁶ bureaucracies need compliant workers to achieve their goals. Compliancy is not unique to bureaucracies. All organizations, even dyads, such as a married couple, need individuals who can cooperate to

⁷⁴Ibid., p. 29.

⁷⁵ David Demers, *History and Future of Mass Media: An Integrated Perspective* (Cresskill, NJ: Hampton Press, 2007).

⁷⁶ David Riesman, *The Lonely Crowd: A Study of the Changing American Character*, in collaboration with Reuel Denney and Nathan Glazer (New Haven, CT: Yale University Press, 1950), and William H. Whyte, Jr., *The Organization Man* (Garden City, NY: Doubleday Anchor Books, 1957; originally published in 1956 by Simon & Schuster).

achieve goals. But bureaucracies differ from other types of organization in terms of how that cooperation is achieved. In traditional or small entrepreneurial organizations, social control is achieved mainly through simple rules, often unwritten, that usually prohibit certain kinds of behavior. A married couple, for example, might agree to follow the Ten Commandments. Those rules prohibit, or *proscribe*, certain kinds of behaviors, such as lust or infidelity. But bureaucracies are characterized by formal, written rules that not only proscribe, but also increasingly *prescribe*. In other words, they not only tell subordinates what they can't do, they also tell them what they must do!

Folks over age 40 remember a time when wearing a seat belt in an automobile was optional. Now every state except New Hampshire requires drivers and passengers to wear seat belts, and all states require them for juveniles. By the way, seat belt laws were created not only to save lives, but also to reduce insurance pay-outs to accident victims. Insurance companies heavily lobbied state legislatures and the federal government to pass such laws, because it saved them and their investors money.⁷⁷ Yes, the profit motive can lead to positive outcomes for individuals (if you assume, for the moment, that the loss in freedom stemming from mandatory seat belt laws is less important than the reduction in injuries and deaths from accidents).

In short, the main reason bureaucracies represent such a threat to civil liberties and freedom is that they create more rules that prescribe. Bureaucracies are rule-driven — rule crazy, say some sociologists. They constantly attempt to reduce uncertainty and improve efficiency of the organization through the creation of more and more rules. But, as every sociologist knows, rules often get in the way of the goals of the organization and in the way of civil libertarian ideals, especially democracy and due process.

But bureaucracies are not inherently evil. They are only as good or bad as the leadership that runs them. If the leaders refuse to acknowledge the problems with bureaucratic structure, or create a culture that de-emphasizes democracy and due process, then the organization will reflect those deficiencies. Leaders of organizations, including

⁷⁷ See, for example, Press Release, "Senators Warner and Clinton Introduce Legislation to Enact National Primary Enforcement Seat Belt Law: Coalitions of Highway Safety and Medical Groups Lend Support," Advocates for Highway and Auto Safety (December 9, 2003), retrieved June 18, 2015, from <<http://www.saferoads.org/national-primary-enforcement-seat-belt-law>>.

universities, must actively create a culture that fully embraces civil liberties to counter the structural tendencies of bureaucracies to subvert those ideals.

But what is one to do, then, when such a culture is lacking? What if the federal and state courts continue to rule in favor of university administrators on free-speech or shared governance cases?

The only viable option I can see is unionization. The benefits of faculty unionization at most universities far outweigh the disadvantages, according to AAUP officials and numerous reports from universities with unions. At most universities where a faculty union exists, faculty pay is higher and faculty have better due-process protection, enjoy higher levels of shared governance and are happier.⁷⁸

However, only about one-fifth of all colleges and universities have faculty unions and only about a third of all public universities have them. Opposition from administrators and conservative politicians is one factor for the low numbers. It also is harder to organize unions at privately owned colleges. But even at public universities, tenured faculty are often reluctant to organize because they often feel they will lose something.⁷⁹ Most receive a comfortable income and unions are usually associated with blue-collar workers, which have a lower social status than white-collar workers.

The strongest growth in faculty unions currently comes from adjunct faculty, who are organizing in large part because they typically are poorly paid — about 50 percent to 74 percent less than tenured faculty for teaching a course.⁸⁰ Part-time adjunct faculty also generally receive few or no benefits, such as health insurance. The pay for some full-time adjuncts is so low that they are on public assistance.⁸¹ After unionizing, adjunct faculty are

78 A question-and-answer session with Lisa Klein of AAUP at Rutgers University and Bill Lyne of Western Washington University at Washington State University (May 12, 2011), retrieved May 1, 2015, from <http://public.wsu.edu/~wsu-aaup/Faculty_Unionization.pdf>.

79 About one-third of public universities have unions. See “What Does the History of Faculty Unions Teach Us About Their Future?” an interview with Timothy Reese Cain, assistant professor, College of Education, University of Illinois at Urbana-Champaign <<https://www.higheredjobs.com/higheredcareers/interviews.cfm?ID=315>>.

80 Sam Hananel, “Adjunct Faculty Increasingly Joining Unions To Push For Better Pay,” Associated Press (November 1, 2013), published online in the Huffington Post, retrieved May 1, 2015, from <http://www.huffingtonpost.com/2013/11/01/adjunct-faculty-unions_n_4194652.html>.

81 Arizona State University paid me \$3,700 to teach mass media law in fall 2013. I spent three hours of teaching per week in the classroom and about 10 hours in preparation time and grading. So, over a 15-week semester, I earned about \$18.50 per hour, slightly more than a McDonald’s hourly worker in Seattle or Los Angeles.

typically paid about 25 percent more than their nonunion counterparts.⁸² The number of adjunct faculty teaching at U.S. universities has skyrocketed since the 1970s, when 70 percent of the professors were tenured or on tenure-track. Today, only half are tenure track. Universities are hiring more adjunct faculty two major reasons: (1) They can pay adjuncts less, and (2) They are easier to control. Most adjunct faculty cannot obtain tenure status and, hence, have far less free-speech and due process protections.

In sum, I believe that unionization and organized social action are the only sure ways to enhance shared governance and academic freedom at American universities.

⁸² Ibid.

Conservative Outrage Machine Feeds Campus Free Speech Battles

By Kathleen Bartzen Culver and Jason M. Shepard*

When right-wing provocateur Milo Yiannopoulos appeared on stage at California State University, Fullerton on October 31, 2017, he wore a cleric's collar – a visual reinforcement of his running theme of the night, using Halloween as yet one more way to offend. But his larger message in this campus visit – a stop on his “Troll Academy Tour” that followed his “Dangerous Faggot Campus Tour”¹ – was simple: conservative students on campus face sustained threats of liberal indoctrination, and free expression is the cure.

“The conservative students of California are made of sterner stuff than the pussywhipped pansies of the press,” Yiannopoulos said, according to his posted transcript.² “You’re under attack twenty-four hours a day, and from apparitions more terrifying even than bitter BuzzFeed bloggers.”

Those apparitions, apparently, are the “decaying” liberal professors Yiannopoulos and many other conservative commentators say are dominating college campuses, squelching right-leaning students and silencing challenging speakers.

Yiannopoulos's appearances – brimming with comedic political commentary and satire offensive to many – are new tests for college campuses balancing free speech principles and campus security procedures. At Cal State Fullerton, security costs topped \$90,000.³ While eight people were arrested and there were moments of tense standoffs with protestors, it was a smashing success compared to Yiannopoulos's visit to Berkeley in February, when protestors caused \$100,000 in property damage from riots and fires broadcast live across the country on cable news. President Donald J. Trump threatened on

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1 <https://youtu.be/z8IUfb249ew>

2 <https://milo.yiannopoulos.net/2017/10/halloqueen/>

3 <https://dailytitan.com/2017/11/milo-yiannopoulos-csuf-tentative-cost/>

Twitter⁴ to pull federal funding for Berkeley’s failures to control leftist protesters who wanted to shut down Yiannopoulos’s talk.

The message to campus leaders was clear: they must not let liberal protestors have a heckler’s veto over conservative speakers.

While conservatives have long decried liberal bias on campuses, a new survey paints a more nuanced picture. In November, the University of Wisconsin-Madison published the results of a survey of some 8,000 students⁵ exploring their assessment of the campus climate on a range of issues, including diversity and hostile or harassing behavior. While overall, about 80 percent of students reported “feeling very or extremely safe, welcome and respected” on campus, the survey also covered ideological diversity, and the results might prove surprising – even dissatisfying – to Yiannopoulos and other reactionaries.

Overall, conservative students were statistically significantly more likely than moderates or liberals to answer “very often” or “extremely often” to questions about how often they feel welcome, feel respected or feel like they belong: 85% of conservatives

reported feeling respected on campus, compared to 82% of moderates and 78% of liberals.

The study found no significant differences between conservatives, moderates and liberals in how respected they felt in class by students, teaching assistants or instructors, nor in how comfortable they were in approaching faculty or TAs. It

did, however, find significant differences in how students of different ideologies felt those ideologies were respected on campus. All three groups were more likely to respond that

Very/Extremely Often Feel:	Conservatives	Moderates	Liberals
Welcome	87%	81%	81%
Respected	85%	82%	78%
Like you belong	77%	71%	67%

Treated Somewhat/Extremely Respectfully	Conservatives	Moderates	Liberals
Conservative political views	34%	50%	48%
Liberal political views	91%	85%	84%

4 <https://twitter.com/realdonaldtrump/status/827112633224544256?lang=en>

5 <https://diversity.wisc.edu/uw-madison-to-use-new-survey-data-to-improve-campus-climate/>

liberal political views were treated somewhat or extremely respectfully than conservative views, but the chasm was wider for conservative students.

So while conservative students themselves felt significantly more respected, conservative viewpoints drew less respect. The picture is further complicated by responses to how groups felt about representing their point of view in class. The three groups were roughly equal when asked if they ever felt expected to represent their identity's point of view in class, about three-quarters no to one-quarter yes. For those who felt expected to do so, conservatives and moderates felt far more positive about the experience than liberals. (Identity, in this case, could mean anything the respondent chose, so while it might be related to political ideology, it also might include gender, race, etc.)

These survey results dovetail interestingly with our recent research on campus free expression. Using a notable incident following the election of Donald Trump as president of the United States as a case study, we examined such things as viral videos of supposed faculty bias, demands for the firing of professors who make overtly partisan comments, speaker disinvitations and disruptions, and calls for safe spaces, trigger warnings and the like. Our research found an expression climate too focused on a protectionist framing, a theory of academic freedom too vulnerable to misapplication, and an outrage machine too fixated on sensationalizing individual incidents.

Campus Free Expression Fracas

The case we examined unfolded on the campus of Orange Coast College, a community college in Orange County, California, after Trump was elected. Caleb O'Neil, 19, was a first-year student from a family with history in Republican politics in an area well known for its conservative leanings. Originally seeing himself as a Libertarian, O'Neil said he turned toward Trump after protesters cursed at him during a Trump rally because he was wearing a "Hillary for Prison" t-shirt.⁶

Just after his candidate won the nation's highest office, O'Neil attended a meeting of OCC's College Republicans student organization. Leaders told members to be on the

⁶ <https://www.ocregister.com/2017/02/20/suspended-occ-student-felt-bullied-but-says-instructor-in-trump-video-doesnt-deserve-death-threats/>

lookout for harassment based on their views and report situations in which they felt threatened.

O'Neil then attended a human sexuality class taught by longtime OCC faculty member Olga Perez Stable Cox. The Nov. 15, 2016, class would touch off a national firestorm, sweeping both the student and the professor into a swirl of outrage, accusation and even death threats.

Cox opened the class, the first since the election, by tackling Trump's victory head-on. Calling it an "act of terrorism," Cox said the election was evidence "our nation is divided as clearly as it was in Civil War times."⁷ O'Neil, who says he feared repercussions because of his visible support for Trump, used his cell phone to surreptitiously record Cox's comments, later sharing the video with the OCC College Republicans.

The group, joined by attorney and former California GOP chair Shawn Steel, complained to the college's administration, demanding Cox apologize and take anger management training. After they did not receive what they saw as a satisfactory response, the College Republicans posted clips from the video to their Facebook page Dec. 17, 2016, leading with "Did you know you're a terrorist for having supported Trump? I didn't but apparently that's what they're teaching in Orange Coast Colleges (sic) classrooms post election."⁸

The videos quickly went viral, wending their way through the conservative media sphere all the way to Fox News primetime. Host Tucker Carlson ran a "caught on camera" segment, saying Cox had forced Trump supporters to stand in the class, something she and others denied. While the college and teachers union expressed support for Cox and academic freedom, the professor was swamped with negative reaction, including hate mail and death threats. She left campus for the remainder of the semester, fearing for her own safety – a development O'Neil said troubled him. "I think what happened to her is terrible," he told the Orange County Register, which covered the case extensively.⁹ "She might have

7 <https://www.ocregister.com/2016/12/09/caught-on-video-trumps-election-was-an-act-of-terrorism-says-orange-coast-college-professor-in-class/>

8 <https://www.facebook.com/occrepublicans/videos/1041841262593330/>

9 <https://www.ocregister.com/2017/02/20/suspended-occ-student-felt-bullied-but-says-instructor-in-trump-video-doesnt-deserve-death-threats/>

crazy political views, but in the classroom she's very nice. And no one deserves death threats."

The OCC case came at a moment of heightened scrutiny of free expression on campus. Organizations like the Foundation for Individual Rights in Education (FIRE) pointed to disinvitation and disruption of controversial speakers on campus as evidence that universities' commitment to the exchange of ideas was not as robust as it should be. Calls by some students for so-called "trigger warnings" before they were confronted with upsetting content and "safe spaces" where they felt protected struck others as unacceptably needy demands coming from an increasingly pampered generation.¹⁰ At base, colleges and universities were wrestling with how to balance free expression and tolerance for opposing viewpoints with important principles of diversity, inclusivity, and civility.

O'Neil's video capture also tied into a viral trend on campus – what one publication called the "TMZ-ification of higher education."¹¹ Digital technologies offer some advantages in classes but also present unintended consequences, including an unprecedented ability to bring attention to what faculty say in the classroom. Statements caught on video can be stripped of their surrounding context, making events seem more sensational than they actually were. At Louisiana State University, for instance, a professor was attacked by conservative outlet Campus Reform for supposedly demanding conservative students defend their views on climate change. Missing from the video, however, was the professor asking the exact same of liberal students. What he designed as a rigorous debate was twisted into a claim of ideological discrimination.

The Conservative Outrage Machine

The controversy at Orange Coast College was fueled in part by a larger conservative media outrage machine. "It's part of a national campaign to, I guess, destroy liberal education," Professor Cox told the Orange County Register.¹²

¹⁰ <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/>

¹¹ <https://www.insidehighered.com/news/2010/11/18/videos>

¹² <https://www.oregister.com/2017/01/16/occ-instructor-no-regrets-calling-trumps-election-an-act-of-terrorism/>

Scholars Jeffrey M. Berry and Sarah Sobieraj found that the “outrage industry” – which exists on the political left and right – can expand the public sphere by increasing attention to political issues and engaging people who may not be active citizens. However, it can also undermine trust and feelings of political efficacy while decreasing tolerance and engagement with alternative viewpoints.

The OCC case catapulted to national attention after Fox News ran multiple segments about the incident, including on Fox and Friends, the Kelly File, Tucker Carlson Tonight, and the O’Reilly Factor.

The incident also was reported extensively on several websites whose mission is to document liberal bias on college campuses. The conservative-leaning Leadership Institute runs Campus Reform, whose founder Morton C. Blackwell has called most of higher education “a left-wing indoctrination center.” A smaller site called The College Fix also disseminates stories targeting purported liberal bias. A third, Professor Watchlist, targets individual professors for notoriety. The site is funded by Turning Point USA, whose mission to “build the most organized, active and powerful conservative grassroots activist network on college campuses across the country.”

Conservative media outrage over liberal bias on college campuses may be having effects on public opinion. Pew Research Center found in 2017 that a majority of Republicans believe colleges and universities “are having a negative effect on the way things are going in the country.” In 2015, 37 percent of Republicans agreed with this. By 2017, it was 57 percent.

Academic Freedom

The partisan divides have led conservative leaders to demand that colleges and universities better protect conservative students from liberal bias and viewpoint discrimination under the umbrella of academic freedom.

The Cox case, in contrast, shows that conservatives also are quick to call for censorship and punishment when, in their view, liberals overstep bounds. Similar tensions – calls for protections for the likeminded but punishments for critics – have long been a

thread in the history of free expression rights. Today's campus culture wars are no different.

For more than a century, the American Association of University Professors (AAUP) has been at the forefront of advocacy for academic freedom rights, beginning in 1915 with a profound statement of academic freedom principles. The U.S. Supreme Court has found strong protections for academic freedom in the First Amendment, including in two cases in 1957 and 1969 involving the discipline of faculty allegedly part of "subversive" groups. But some scholars, such as Stanley Fish in his 2014 book *Versions of Academic Freedom: From Professionalism to Revolution*, have concluded that academic freedom "is rhetorically strong but legally weak."

Does it protect a professor from calling Trump's election an act of terrorism? In the face of calls for Cox's firing, a First Amendment defense was not necessarily a slam dunk though a 2014 Ninth Circuit Court of Appeals case, *Demers v. Austin*, provided her additional legal protections for workplace speech in academic contexts.

Prompted by conservatives who say academic freedom is under threat from the left, new legislation has been introduced in several states and in Congress to ostensibly expand academic freedom protections. Several states have considered bills modeled after a proposal from the conservative Goldwater Institute titled *Campus Free Speech: A Legislative Proposal*. And in 2017, the House and Senate both held hearings on several proposals aimed to punish disruptors, expand free speech zones and provide faculty and students with greater legal protections from punishment and retaliation for their expression. Critics, however, argue that these proposals, emanating entirely from GOP-controlled bodies, are thinly veiled efforts to silence protestors who challenge universities, particularly on matters of race.

Rights and Responsibilities: 4 Tensions

While Orange Coast College initially suspended Caleb O'Neil for his surreptitious video recording, which violated campus policy and California's education code, its Board of Trustees later rescinded the action after criticism, saying it was "in the interest of fairness

and equity for all.”¹³ Cox and O’Neil moved on, both still at OCC. But their case offers important lessons about the climate for expression on campus and how best to ensure rights while accepting responsibilities.

First, Cox enjoyed strong – but not absolute – academic freedom rights, rooted in theory, history and law. Some criticize the extension of these rights to expression that is not germane to the course subject matter. Yet this case demonstrates the importance of faculty and administrators both explaining and defending the concept of academic freedom and countering media narratives that may seek to subvert such protections. Particularly in an age when universities zealously seek to defend the image of their “brand,” it’s key to step up when controversy hits. Cox also benefited from a supportive, and vocal, union.

While our research argues strongly in favor of those academic freedom rights, we also believe faculty have responsibilities in exercising them. They must make room for diversity, whether that be ideological or otherwise, engaging students who offer a variety of backgrounds and perspectives. This engagement will almost certainly be more meaningful when professors can show clear connections between expression and course content, as well as openness to alternative viewpoints.

Second, O’Neil’s role in the OCC controversy shows that students also enjoy academic freedom but do not have an analogous right to be protected from partisan speech. Strains of paternalism are evident in school speech decisions in the K-12 arena, but colleges and universities are another matter entirely.

Students at these levels must have full speech rights, so they can meaningfully participate in their education and mature intellectually and emotionally. That meaningful participation simply cannot exist when students seek to be protected from, rather than engaged with, ideas that challenge them. Our research illustrates disconcerting strands on the political left and political right to demand just this kind of protection.

Students are right to be concerned about unfair treatment, whether that’s based on differing from faculty ideologically or failing victim to implicit biases based on race, class, gender or religion. Faculty have absolutely no right to let their own biases enable

¹³ <https://www.oeregister.com/2017/02/24/occ-rescinds-suspension-of-student-who-recorded-teachers-anti-trump-comments/>

discrimination against students. We similarly agree that it's important to understand and counter the harm that comes with some speech. Yet censorship cannot be the solution to such harm. We would encourage students to turn not to viral videos or safe spaces but instead to their own efforts to stoke deliberation and debate on campus.

Third, robust expression and ideological diversity on campus would be best served if outside advocates begin to recognize their own responsibilities in these cases. The outrage machine may be profitable and sensational, but it is neither responsible nor proportional. Advocates in advertising and public relations adhere to such things as codes of ethics, yet little has been done to extend this thinking to other public communicators.

Research demonstrates that higher education faculty do tilt liberal but also that students are remarkably resilient in their ideology. Olga Cox may have called the Trump election “an act of terrorism,” but Caleb O’Neil, in a “Make America Great Again” cap, was not buying it. Outside advocates can be a critical check on the institutional power of universities, but when they embrace outrage, they can fail in this mission, serving not as a check but as a distortion.

Finally, the OCC case illuminates why and how colleges and universities must examine the delicate balance between free expression and the need for campuses that are inclusive, diverse and civil. These institutions are wise to question structures that may bring discrimination and expression that may cause harm while simultaneously championing robust intellectual engagement at the heart of academic freedom.

A Time for Courage

We began this research amid a shared concern that support for free expression on campus was under fire from multiple fronts. A 2016 Gallup survey¹⁴ commissioned by the Knight Foundation found broad-based student support for campus speech but also tolerance for restrictions on offensive speech. “Roughly two-thirds of college students say colleges should be allowed to establish policies that restrict slurs and other language that is intentionally offensive to certain groups (69%), as well as the wearing of costumes that

14 https://www.knightfoundation.org/media/uploads/publication_pdfs/FreeSpeech_campus.pdf

stereotype certain racial or ethnic groups (63%).” When we looked to paths forward, we found one in a landmark 2014 statement by the University of Chicago.¹⁵

Now is a time for courage. The Chicago faculty were right in calling free expression and the robust exchange of ideas an “essential element of the University’s culture.” We need faculty to courageously examine their own biases – political and otherwise – and live up to the responsibilities that accompany their academic freedom rights. We need students to shed their inclinations toward being protected and use courage to engage with ideas that may make them uncomfortable or offended. We need institutions to thread the needle of ensuring inclusive campus environments while safeguarding free expression.

And we need politicians and advocates to treat campuses as the heady intellectual environments they should be, not merely a weapon in a cultural war.

¹⁵ <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>