



# Faculty Conference Papers

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# 2018 FIRE Faculty Conference Papers

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## Introduction

The Foundation for Individual Rights in Education held its 2018 Faculty Conference at Loyola University Chicago from October 11–13, 2018. 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. This volume contains the eight papers selected for and presented at the conference, and it includes both original research and critical narratives.

Each of the papers collected here focuses on a narrow research topic or experience but raises broader questions about the status of free speech and academic freedom on campuses in the United States today. Jason Marsh’s paper argues that ‘no-platforming’ campus speakers is incommensurate with the tenets of a liberal society. David Rabban’s paper discusses the extent to which various forms of “offensive” speech that are otherwise protected by the First Amendment may be regulated on campus. Michael Bailey describes three controversies he has been involved in as a result of his research and teaching on sex and sexuality, as well as the broader academic freedom concerns for academics who do work on controversial topics. John Hasnas describes his experiences working to change policies at Georgetown University and provides guidelines for faculty who are interested in implementing policy changes at their institutions.

Amna Khalid and Jeffrey Snyder’s work raises the question of why so many politically left-leaning faculty are reluctant to champion free speech, and makes the case for why protecting free expression on campus is ultimately a nonpartisan issue. Michael Lanford’s research illustrates the impact that performance funding and competitive pressures have had on faculty’s control over curricula, shared governance, and scholarly inquiry in the Florida state higher education system. Jeremy Bailey discusses recent controversies involving outside grants that come with strings attached, and whether these grants, which attempt to promote

“viewpoint diversity” on campus, achieve their stated goals. And finally, Linda and Marsha Frey recount the tactics and strategies used to get the “Chicago Statement” adopted by the Faculty Senate at the University of Montana.

Some of the papers in this volume are presented largely as they were in October 2018, while others have been revised in light of feedback received at the conference or are adapted otherwise for publication here. FIRE thanks all of the authors 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 other 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 feel free to contact us at [facultyoutreach@thefire.org](mailto:facultyoutreach@thefire.org).

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## Author Biographies

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Bailey attended Rhodes College and received his PhD from Boston College, where his dissertation was the 2004 co-winner of the American Political Science Association E. E. Schattschneider Prize for best dissertation in American politics. He joined the University of Houston in 2007, and, in 2014, he was awarded the University’s Provost Core Teaching Excellence Award. He is the director of the *Phronesis* minor in the Honors College and the co-director of the Tocqueville Forum in American Ideas and Institutions.

**J. Michael Bailey** is a professor of psychology at Northwestern University. J. Michael Bailey grew up an ideological outcast near conservative Dallas, Texas. He left home to pursue higher education, obtaining a BA in mathematics from Washington University in St. Louis, but he returned to Texas for his PhD in clinical psychology, which was awarded in 1989.

Bailey has mainly studied human sexual orientation—its causes, development, expression, and sex differences—although he has also published research on intelligence, childhood sexual abuse, paraphilias, and gender dysphoria. Bailey’s primary research focus has been on understanding human sexual orientation scientifically, including questions of causation (nature versus nurture), development, expression, and sex differences. Recently, he has begun studying more unusual sexual orientations, including pedophilia.

**Linda Frey** is a graduate of the Ohio State University and currently a professor of history at the University of Montana. She specializes in the development of international law and eighteenth century Central Europe and France. Along with Marsha Frey, she has written, edited and annotated numerous books and articles including *The History of Diplomatic Immunity*, *The Treaties of the War of the Spanish Succession* and “Proven Patriots”: the French Diplomatic Corps, 1789-1799. She and Marsha have recently completed *The Culture of French Revolutionary Diplomacy*.

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**John Hasnas** is a professor of business at Georgetown University’s McDonough School of Business, a professor of law (by courtesy) at Georgetown University Law Center, and the executive director of the Georgetown Institute for the Study of Markets and Ethics. Professor Hasnas has held previous appointments as associate professor of law at George Mason University School of Law, visiting associate professor of law at Duke University School of Law and the Washington College of Law at American University, and Law and Humanities Fellow at Temple University Beasley School of Law. Professor Hasnas has also been a visiting scholar at the Kennedy Institute of Ethics in Washington, DC and the Social Philosophy and Policy Center in Bowling Green, Ohio. He received his BA in Philosophy from Lafayette College, his JD and PhD in Legal Philosophy from Duke University, and his LLM in Legal Education from Temple University Beasley School of Law.

**Amna Khalid** is an associate professor in the department of History at Carleton College. She specializes in modern South Asian history and the history of medicine. Her research focuses on colonial public health in nineteenth century British India and the role of Indian subordinates in colonial governance.

Having grown up under a series of military regimes in Pakistan, Amna is especially interested in issues pertaining to academic freedom, campus climate, and free expression more broadly.

**Michael Lanford** is a postdoctoral research associate in the Pullias Center for Higher Education at the University of Southern California Rossier School of Education. He employs qualitative research methods and a multidisciplinary theoretical perspective to study institutional innovation, globalization, educational equity, and the impact of educational policy on student development.

Lanford’s research has appeared in the *American Educational Research Journal*; *Higher Education*; *Higher Education: Handbook of Theory and Research*; and *Policy Reviews in Higher Education*, among other publications; he has articles in press with *Educational Forum*, the *Journal of Research on Technology in Education*, and *Qualitative Inquiry*. He has received funding to present his research in Canada, Hong Kong, Mexico, Taiwan, the United Kingdom, and the United States.

**Jason Marsh** is an associate professor in the department of philosophy at St. Olaf College. He has diverse interests in applied ethics, especially biomedical ethics, and the philosophy of religion. For instance, he has published on the morality of procreation, the problem of evil, the cognitive science of religion, conscientious refusal in healthcare, and disability and wellbeing. More recently, he has been exploring Socrates’ injunction to follow the argument where it leads and what it means to successfully follow this ideal in an academic context. This last topic connects up to his growing interest in academic freedom.

His research has appeared in journals such as *Bioethics*, *Philosophy and Phenomenological Research*, and *The Monist*.

**David Rabban** served as counsel to the American Association of University Professors for several years before joining the University of Texas Law School faculty in 1983. He served as General Counsel of the AAUP from 1998 to 2006 and Chair of its Committee on Academic Freedom and Tenure from 2006 to 2012. His teaching and research focus on free speech, higher education and the law, and American legal history. He is best known for his path-breaking work on free speech in American history. He is the author of *Free Speech in Its Forgotten Years, 1870-1920*, which received the Forkosch Prize from the *Journal of the History of Ideas* for “the best book in intellectual history published in 1997.” His many articles have appeared in *Yale Law Journal*, *Stanford Law Review*, *University of Chicago Law Review*, and elsewhere. He was a fellow of the John Simon Guggenheim Foundation in 2016 and of the Program in Law and Public Affairs at Princeton University in 2016–17. His most recent book is *Law’s History: American Legal Thought and the Transatlantic Turn to History*.

**Jeffrey Aaron Snyder** is an Associate Professor in the department of Educational Studies at Carleton College. His work explores the connections between the history of education and broader trends in U.S. cultural and intellectual history, examining questions about race, national identity, and the purpose of public education in a diverse, democratic society. He is the author of the book *Making Black History: The Color Line, Culture and Race in the Age of Jim Crow*. He writes frequently on educational policy, campus politics, and academic freedom in newspapers and magazines such as *Boston Review*, *The Chronicle of Higher Education* and *The New Republic*.

## Has No-Platforming Been Reconciled with Liberalism?<sup>1</sup>

Jason Marsh, St. Olaf College

### Introduction

It is commonly thought that no-platforming—the practice of blocking or disinviting speakers on campuses because of their moral or political beliefs<sup>2</sup>—is at loggerheads with political liberalism, and with the very mission of the university. According to this fairly standard view, although peaceful protest is welcome<sup>3</sup> and even encouraged, blocking or disinviting speakers on account of their political outlooks normally conflicts with liberal ideals such as academic freedom, toleration, and open debate. But some theorists, convinced that liberalism is more flexible than the standard narrative suggests, are challenging this way of framing the debate. One strategy here, influenced by Robert Post (2012) and clearly articulated in a recent paper by Robert Simpson and Amia Srinivasan (2018), contends that no-platforming needn't conflict with liberal values. Their argument does not rest on the claim that the expression of certain views would be harmful (they are not impressed with harm-based justifications of no-platforming); nor is their claim that other ideals besides freedom can easily trump liberty of expression. Their argument is rather that the very principle of academic freedom supports the exclusion of certain speakers and viewpoints and indeed requires this. The chief reason for this stance is that academic freedom, in contrast to free speech, only protects *academically respectable voices* that are rooted in disciplinary knowledge and expertise. Anti-scholarly speech or ideas that are beyond the pale thus warrant no protection on college campuses.

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<sup>1</sup> Thanks to my audience at Loyola University Chicago for their helpful feedback. Thanks, in addition, to Steven Gerrard and Tim Shiell for their written comments.

<sup>2</sup> I will follow Simpson and Srinivasan (2018) in considering disinviting a species of no-platforming and to focusing on moral and political ideas. But I am happy to expand the definition to include seemingly non-normative cases (like blocking flat earthers) and what some might think are semi-normative cases (like blocking intelligent design advocates).

<sup>3</sup> Of course, sufficiently disruptive forms of protest that make it difficult for a talk to continue might count as forms of no-platforming.



My goal in this paper is to argue that this version of the liberal case for no-platforming cannot so easily be made. More accurately, this paper evaluates two attempts to resolve the tension between liberalism and no-platforming. The first attempt is a harm-based justification. Although this view is in line with liberalism, in a sense, I follow Simpson and Srinivasan in finding it less than plausible. The second attempt to ground no-platforming is more epistemic and concerns respecting disciplinary expertise. Here I argue that Simpson and Srinivasan, for all the valuable points they make—indeed I am tempted by their view on occasion—do not adequately address some key complexities with their liberal justification of no-platforming. These complexities make it harder to endorse their claim that it's a liberal view. I close with some brief comments that make me wonder about the model's plausibility as well.

To clarify my aims, it is not my goal to defend liberalism here, nor to argue that no-platforming is *never* justified under liberalism.<sup>4</sup> As we shall see, many liberals will permit *some* instances of no-platforming on the ground: the question is whether there is a good *theoretical* account to guide these decisions that both sits well with liberal values and does not create more problems than it solves.<sup>5</sup> As for liberalism, I acknowledge an important debate about whether its claims about speech are plausible in our non-ideal world where real inequalities exist. I won't be able to address this debate here, however.<sup>6</sup> I also won't be taking a stance on how common no-platforming is or isn't, or whether college students are coddled

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<sup>4</sup> My argument thus does not presuppose what might be called 'academic freedom absolutism' according to which *no* speakers could ever be reasonably blocked on liberalism *because* of their beliefs. Although I can imagine some possible defenses of academic-freedom absolutism, liberals aren't committed to the view, from what I can see. Rejecting this view does not entail being pro NP, however: one can fail to be an absolutist and still think there is a notable tension between liberalism and many or even most forms of no-platforming. And if there are too many restrictions on speech, it will be harder to call the framework liberal, as we shall see.

<sup>5</sup> Some liberals cited below think we lack a clear criterion to judge when an idea shouldn't be heard, but try to ensure that not too many ideas are blocked, given wider liberal commitments. Perhaps some of the arguments offered here could corroborate the first idea.

<sup>6</sup> Some contend that liberalism, often defended by white, non-minorities like Mill, favors the interests of the already powerful at the expense of underprivileged groups. As Simpson and Srinivasan note, according to Herbert Marcuse, the non-ideal nature of our political order means that some things should not be communicated in society. At the same time, these matters are complex: they also note that Marcuse makes an apparent exception for campuses. Also, it is worth noting that according to some feminists (Baehr 2014), critical race theorists (Mills 2017), and defenders of gay rights (Corvino 2012) the liberal tradition is our best option. In fact, many will insist that liberalism is valuable, in part, because it gives a voice to all, including the marginalized, when those in power would, whether on the right or the left, silence their opponents. I won't be able to enter into this wider debate.

or strong: for all I say, students are generally tougher than professors and the latter are to blame if too much censorship occurs on campuses. My scope is thus relatively restricted. I want to evaluate two theoretical attempts to resolve the tension between liberalism and no-platforming and to explain why the tension hasn't yet been fully eliminated.

## 2. The Harm-Based Approach

Almost everyone will agree about the need for time, place, and manner restrictions on speech. Most people will further grant that certain forms of speech—e.g. calling one's students or colleagues horrible names, or publishing private information about them, or engaging in slanderous and libelous speech—needn't be tolerated on campuses. A more interesting question is whether liberals should acknowledge notable *content* and even *viewpoint* restrictions, at the level of normative arguments and debates on college campuses.

<sup>7</sup> That is, should we rule out even the attempt to defend various claims? More particularly, if the answer is yes, do we have a convincing account that explains why?

This question arises, in part, since toleration of diverse views, including those we might detest, is at the core of both political liberalism and liberal education. For this reason, political and pedagogical liberals will typically think that there must be compelling grounds for restricting the free expression of ideas. One proposal for a compelling ground invokes the concept of harm. Liberals have long claimed that individual liberty must, given liberalism's commitment to equality, be balanced against the harm it can cause to others. So, liberals who think that ideas can harm might come to endorse some version of the following liberty-limiting principle.

**Harm-based Principle:** The general presumption of liberty covers all kinds of speech, but it can be overridden. In particular, if the expression or defense of an idea would cause, or be sufficiently likely to cause, harm to others, then the liberty of prospective speakers may be legitimately curtailed. If expressing or defending an idea merely causes offense, by contrast, we should probably permit the offense in the name of liberty.

The harm-based principle doesn't sharply distinguish free speech from academic freedom, or academic from non-academic spaces. All that matters is whether a prospective speaker

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<sup>7</sup> I really have in mind political, or more broadly, normative arguments that are of public concern. The mere expression of an idea with no accompanying reasons isn't my focus.

would, or would likely, cause notable *harm* by sharing or defending their outlook—where ‘harm’ presumably means making people considerably worse off than they were or would have otherwise been. If the answer is yes, then academic institutions or governments are entitled (or given a stronger version obligated) to prevent harmful speech. If the answer is no then it is harder to legitimately restrict their speech.

So what should we say about this way of defending no-platforming (hereafter NP)? The question, notice, is not whether the law currently recognizes this principle. As is widely known, the First Amendment—for better or for worse—doesn’t punish speech that many will deem hateful and harmful (Volkh 2015, Waldren 2014).<sup>8</sup> Even so, harm is morally significant, even where the law does not recognize it. So, more needs to be said. Perhaps an idea that warrants far more consideration in these debates is this: even if the law gives people almost complete liberty to speak their minds in public or on campus, to the extent that words can wound, we might have strong *moral* reasons to choose to keep some of our more harmful (or offensive) ideas to ourselves. Self-restraint can be a virtue.<sup>9</sup> And justice can apply to individuals (Lebar 2014).

In any case, the question before us is whether the harm-based principle should be institutionally enforced. And here Simpson and Srinivasan (hereafter S&S) find the harm-based defense of NP wanting. Setting aside the worry that its logic would require shutting down many or even most social media websites, S&S note that difficult problems arise even if we restrict our focus to college campuses. For instance, in response to the claim that a controversial speaker’s<sup>10</sup> ideas would be not just offensive or even inflammatory, but would contribute to sufficient violence or direct harm to justify restriction, they say:

To assert this claim one must defend a stance on several contested questions about which harms suffice to justify the regulation of political speech. For instance: is merely *feeling* intimidated or discriminated against sufficient? If

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<sup>8</sup> [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/07/no-theres-no-hate-speech-exception-to-the-first-amendment/?utm\\_term=.2fa883b47df2](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/07/no-theres-no-hate-speech-exception-to-the-first-amendment/?utm_term=.2fa883b47df2)

<sup>9</sup> I realize that few think of their own ideas as harmful and that some harmful truths might be worth hearing about. But at the very least, morality might give us reasons to avoid causing gratuitous harms or offenses and to generally aim for civil communication. Those who think this advice is trivial and obvious might think otherwise if they started to read youtube comments, where it is rarely followed.

<sup>10</sup> They specifically reference Germaine Greer or Maryam Namazie in this context. But since they points they make are intended to be more general in nature I will stick to their general conclusions and invite others to get into the explore the details. This paper is already too long.

so, is it sufficient in every case, or only when the feeling is *reasonable* given what the speaker has said? And if the latter, what supplies content to our notion of reasonableness? Second, consider the indirect harms to the community, beyond [a speaker's] immediate audience, that would allegedly have resulted from her speech. Substantiating this allegation requires one to defend a stance on the question of when a speaker is responsible for the influence her speech has on her audience. For instance: does the harmful influence have to be foreseeable, or intended, or neither? And if neither, is the speaker responsible for harmful outcomes that result from unreasonable interpretations of her expressed views? If so: in all cases? And if not: what are the exceptions?

Of course, some defenders of the harm-based approach might propose answers to these questions. But one of S&S's central points is that these answers will very likely rest on highly controversial normative principles. Those who work in normative ethics and political philosophy, for instance, almost certainly won't be able to reach agreement about how, or when, the expression of an idea would cause sufficient harm—whether to those in an audience, or to those who choose not to attend—to block its presentation. They also would disagree over when a speaker is responsible when hearers use their words to justify bad actions. If the claim is that a given talk would have certain specific empirical consequences (e.g. on policy or mental health) then policy and mental health experts would have to weigh in for numerous kinds of talks. If the claim is more expressive or intrinsic in nature, one will face constant boundary questions as to what counts as an expressive or intrinsic harm.

This is not to assert that harm judgments in these contexts could *never* be reasonably made or generate widespread agreement. The vast majority of academics would surely not want to see leaders of the Klu Klux Klan be given a platform, for example. More generally, there are strong moral reasons to worry about giving a platform to views that any reasonable person could see are racist. But agreement on cases like these, as S&S will appreciate, does not show that harm based approach provides a general, plausible, policy for no-platforming speakers—or that it doesn't raise as many challenges as it resolves. This is especially the case, one might add, if we focus on speakers who defend views held by large portions of the population. Perhaps, as Elizabeth Barnes (2018) has noted, social facts about how views are distributed in the general public can give us guidance about when it's a good idea to entertain

harmful arguments. The social facts won't be the *only* relevant facts for the liberal, of course, who wants to preserve serious space for the discussion of unpopular ideas.<sup>11</sup> But the social facts might nonetheless be relevant: maybe if roughly half of the population holds a view that seems harmful, it is not generally a good idea to block defenses of this view on campus. Maybe, in that case, discussion and rebuttal are called for.

Anyhow, another worry implied by S&S is that the harm-based account can quickly overgeneralize. For there is nothing about the *method* of seeking to block harmful speech that automatically or inherently favors only a few views, or only favors views that are dominant on campus. For instance, pro-life conservatives might seek to block pro-choice feminist speakers, claiming that their views cause harm to the unborn. Or vegans might claim that defenses of eating meat (or even just meat eaters) should be blocked from speaking because their ideas and practices perpetuate structural violence against billions of non-human animals. What is more, Libertarian and Marxist groups might seek to silence each other, with both sides insisting that the views of the other side have caused grave historical harms. Anti-natalists, finally, might seek to no-platform all of these parties (and anyone else who endorses pro-natalist ideas), which, they claim, ignore the most serious and fundamental existential harm of all: namely the harm of coming to existence in this world.

I don't mean to imply that groups would request NP in precisely these ways under the harm-based view, or that all harm-based requests for NP would be legitimate. I mean only that lots and lots of people would seemingly be within their rights to call for NP, on the harm-based view. The above reasoning thus reveals a kind of dilemma. Depending on how easy it is to cause harm by defending one's ideas, even in a civil manner, academics of all ideological stripes might have to stop talking about typical political or moral controversies. By contrast, if we make it *hard* to cause harm through talks, we need to explain why, if some ideas can harm, many do not do so. Or to put the point a different way: according to S&S, the harm-based approach is either insufficiently defended (both the theory and its application to particular cases), in which case it simply begs many relevant and difficult normative

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<sup>11</sup> Sarah Conly's arguments for a one child policy or David Benatar's anti-natalist views are examples of unpopular views that seem important to discuss if we care about harm.

questions, or it is defended on the basis of extremely controversial, and perhaps selectively applied, normative principles. Either way, the harm-based approach doesn't provide a *prima facie* compelling or even plausible liberal method for restricting speech. Other challenges to the view also present themselves. Leaving aside further worries raised by S&S, some will challenge the harm-offense distinction that underpins the harm-based approach (Feinberg 1985). Others will argue that blocking large numbers of students from hearing a talk harms them, educationally or politically, so that there are competing harms to weigh in these contexts. There is also the challenge that even some rather notable harms are tolerated in liberal societies to avoid what is widely perceived to be an unacceptable violation of autonomy and individuality. As Michael Huemer notes (2004), breaking up someone might cause them serious harm, not just psychologically, but socially and economically. And yet few liberals (or even non-liberals for that matter) will defend the loss of liberty to break up with a romantic partner as a harm-reduction strategy on campus. Similarly, merely giving individuals the right to vote for their preferred political candidates, including terrible ones, has no doubt contributed to grave social harms. Yet this too is a context where identifiable harms are apparently not deemed *sufficient* by democratic liberals to curtail liberty of expression. So even those of who, like myself, worry a lot about harm and want to see it minimized should acknowledge that the relationship between harm and liberty is extremely complex.

### 3. The Expertise-Based Approach

A second possible liberal justification of NP on college campuses, and the one favored by S&S, is rooted not in an aim not to prevent harm, but in an aim to prevent ignorance. More accurately, its aim is to preserve respect for disciplinary expertise while reserving 'symbolic esteem' for those who merit it and who thus do not defend incredible views. This idea can be expressed as follows:

**Expertise-based Principle:** If a prospective speaker is widely thought to be incompetent by the relevant disciplinary experts, or if a speaker has scholarly

credentials but defends views that a sufficient number<sup>12</sup> of relevant disciplinary experts would deem beyond the pale, then such a speaker may legitimately be stopped from giving talks on campus—and perhaps *should* be blocked to avoid giving the appearance of legitimacy and to avoid violating disciplinary integrity. It makes no difference whether or not the individual was already invited to speak.

To clarify, S&S's account does not imply that *every* attempt to block a speaker will be justified. Even if some cases are easy in their view (e.g. “Holocaust deniers and climate change shills” should be blocked), they deem other cases hard in the sense that it is not clear what to do. In particular, when there is deep disagreement within and/or across departments about whether a given speaker counts as an expert, or holds a legitimate viewpoint, we have a hard case (e.g. should feminists like Germaine Greer be blocked from speaking critically about trans identity?). S&S call this a hard case since despite a general shift toward trans-inclusivism there remains notable expert disagreement among the experts about the metaphysics of gender and sex, and about what it means to be a woman. But this disagreement might not last, and feminists like Greer might soon lack any basis to complain if they lose their platform to argue that trans women are not women.

So what motivates S&S's expert-based approach to NP? Here S&S point to a particular conception of academic freedom. This conception, defended by Robert Post (2017, 2016, 2012), begins with the thought that, contrary to popular opinion, academic freedom in the United States has roots not in the First Amendment, but in an early nineteenth century Europe. Under the influence of the German model of higher education in particular, the American University is said to have reconceived its mission as a space for the creation of new and “systematized knowledge”—a space that doesn't prize an uninhibited “marketplace of ideas”, as it were, but which seeks to create and protect disciplinary expertise (the *Wissenschaft*). The aim of this expertise and *the raison d'être* of the university is thus to generate knowledge through research and transmit it to students through teaching.<sup>13</sup>

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<sup>12</sup> It is not specified by S&S how many experts would have to weigh in on whether a view is illegitimate before its expression in the form of a talk could be blocked. They do note, however, that it is better if local departments are consulted by administrators to ask about a particular speaker before they cancel her talk.

<sup>13</sup> Post acknowledges that there were, in addition, moral or “character” aims in early American colleges, most of which were religious institutions. But he focuses on the epistemic dimensions.

Universities are thus not, properly speaking, extensions of the public square; they have their own rules and aims.

On the knowledge-centered view, which is now reflected in the mottos of many American Universities, it is not that scholars cannot pursue unpopular ideas. Science has a history of debunking common-sense ideas that were initially rejected by everyone, including other scientists. It is rather that all ideas must be pursued in a scholarly way; that is, in accordance with *methods* and *standards* that are recognized by other scholars in a given field, thereby reflecting ‘disciplinary expertise.’ If the experts in relevant disciplines rule some view or thinker illegitimate then that settles the matter, for practical purposes, all over campus. As for what ultimately justifies this account, the answer, for Post, is not that knowledge is intrinsically valuable per se, but that the creation and preservation of specialized knowledge through disciplinary experts is the prospect that most benefits society. Like the American pragmatists such as John Dewey<sup>14</sup>, William James, and Charles Peirce, then, Post thinks that our educational aims are ultimately justified by human interest.

Post’s historical analysis, if correct, raises the question of whether there was such a thing as academic freedom in the US before the 19<sup>th</sup> century. It also requires that academic freedom and freedom of speech be sharply distinguished. For while freedom of speech grants *citizens* the general the right to express all kinds of ideas in public, whether or not they are well evidenced, the university is and ought to be different. In higher education *content discrimination* is the norm, since the aim is the production and transmission of knowledge. Although one frequently hears constitutional scholars, along with members of the Supreme Court, claim that the first amendment protects an uninhibited “marketplace of ideas” and “open-debate” on basically any topic so as to maximize the chances of discovering the truth, Post rejects this marketplace of ideas conception of academic freedom (2012, 9-10). Ideas that lack credibility, and which run strongly against expert consensus, may be set aside on

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<sup>14</sup> Dewey was the president of the AAUP when its *1915 Declaration of Principles* were penned. Since this document o claims that freedom in teaching and research must take place in accordance with the standards of a scholarly profession or community—which holds to competent, patient, and sincere inquiry— in this respect, it can be seen as an example of Post’s outlook. There may be some aspects of the document that don’t fall neatly into Post’s analysis, including extramural speech liberties.



campus. When this occurs, moreover, there is no First Amendment basis for complaint (2017) since even the most basic First Amendment rules don’t apply to campuses (2017b).<sup>15</sup>

So what does academic freedom protect if not a marketplace of ideas? Once again, the answer is that it protects the conditions under which expert knowledge can flourish and spread. This requires, above all, freedom from *external interference* or threats to the university’s capacity to live out its mission of scholarship and teaching. If there is to be meaningful academic freedom, ‘outsiders’ and non-experts cannot dictate what is true or what can be studied or taught to students. Post discusses the case of Edward Ross who was fired from Stanford in 1900 at the request of Jane Stanford, a non-academic who apparently didn’t like his economic views.<sup>16</sup> But more contemporary examples can be cited. For instance, when Wisconsin legislators allegedly sought to undermine a class called “The Problem of Whiteness” in 2017, this was in violation of academic freedom, on Post’s account, since the experts in critical race-theory would find the class valuable. The same would be true, on Post’s account, if Californian legislators sought to remove a course on conservative thought.

Post’s claim that academic freedom rules out such external interference is hard to deny. It is also difficult to deny his claim that universities have, and should have, academic

<sup>15</sup> Post offers the following examples.

*First Amendment Rule*

*Application to University or College Campuses*

1. No Content Discrimination	If this ruled applied, professors of medicine would be free to teach debunked science as true.
2. No true or false opinions	If this rule applied, no ideas (including 2+2=4) may be deemed false on campus.
3. Cannot compel you to speak	If this rule applied, students could not be required to write exams or to do presentations. Publish or perish would also not apply to any faculty.

While people in public parks are free to promulgate bad math, or outdated medical science, or to remain silent, the rules clearly differ on university campuses. Academic freedom thus does not exist to protect people on campus to say whatever they want or think.

<sup>16</sup> As a widow to the university’s founder, and a one-time owner of the university, she wielded a lot of power to fire at will. But she apparently had no special knowledge of economics. So people like her shouldn’t, now that academic freedom applies, have weight in determining what goes on in the university.

standards. For when it comes to *physical publication* or *professional talks* it would be strange to argue to journal editors, or to conference organizers, that one's paper should have been accepted even if the experts in all relevant fields thought its arguments were terrible on purely scholarly grounds. Likewise, if a math professor devoted the bulk of class time to discussing politics in a way that was highly disconnected from math, this could reasonably hurt their chances for tenure and promotion. For such a class would presumably fall outside of the bounds of their expertise, not to mention would contractually violate the course content they agreed to teach.

To be sure, what counts as 'expertise' is often quite flexible when teaching needs shift or when interests change. Post doesn't always give this point its due. But he does pose some limits in high stakes contexts: whoever happens to be on sabbatical, we don't want to give professors of medicine the liberty to teach junk medical science as true, which would be scientifically irresponsible and bad for society. Again, all of that seems right—though one can wonder if the medical case is best covered by worries about harm. Anyhow, so far as I can tell almost no one denies these claims. A relevant question for Post is whether he thinks having epistemic standards and content discrimination implies only that the *arguments* have to be good enough to warrant inclusion, or whether he thinks that journal editors can legitimately reject a paper on a relevant topic *solely because of its conclusion* without bothering to read the argument, or the evidence offered for its conclusion, say, because he reasonably believes that most in his field would strongly reject it. These are very different cases. But Post's examples rarely distinguish them. Some of his examples seem to include *viewpoint* discrimination (roughly: the idea couldn't be right), which is stronger than mere *content* discrimination (roughly: the idea is poorly argued but might be right).

In any case, it seems true that not all arguments are created equally and that experts tend to be uniquely good at evaluating arguments in their fields and need freedom from external influence. What follows? According to S&S, a certain kind of license to NP follows. In particular, speakers would not contribute to the scholarly mission of the university, but would in fact contradict that mission by being epistemically baseless, may be blocked. As they put it:

It is no intrinsic affront to the intellectual culture of the university, on this view, that a person should be deprived of a platform to express her views because of a negative appraisal of her credibility or the content of her views. Principles of academic freedom of the kind that Post defends can permit such exclusion, provided that it respects and supports the independent exercise of disciplinary expertise in teaching and research.

In a word, on S&S's model, epistemic gatekeeping is natural in academic life and should be extremely pervasive. The more controversial part of their view is the idea that it also extends to all speaking events—including those put on by student groups meant to raise political awareness—and to all prospective speakers, including those who have already been invited and approved by some relevant body. Now as S&S note, some disciplinary cultures, like philosophy (and we might add many scientific fields) are, at least in principle, open to almost all lines of inquiry.<sup>17</sup> They often teach their students to avoid too much viewpoint discrimination. But S&S reject the claim that if at least *one* discipline is open, then that should restrict whether others can NP some person or idea.

So how often might NP be legitimate on this view? While S&S do not say, the answer seems to be as follows: the more agreement the experts reach about which views, debates, or speakers are legitimate, the more NP will be justified, or even required, on the account.

#### 4. Is the Expertise-Based Approach Liberal?

Given these assumptions an initial question worth asking is whether S&S's account of NP sits well with liberalism. As they note, it would be easy to construct a non-liberal account or defense of NP. But that is not their task. They claim:

...[I]t is quite straightforward to formulate an internally coherent defence of no platforming premised on a rejection of the liberal values espoused by people like Lukianoff. And this sort of anti-liberal defence of no platforming might be the one that best captures the motivations of proponents of no platforming. Nevertheless, the task that is more interesting – or at least more dialectically useful, given how critiques of the practice are typically framed – is to see if there is a way to defend no platforming within the parameters of a liberal politics.

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<sup>17</sup> Some might appeal to the Socratic injunction here. See Marsh (2016) for one take on this view and for a pragmatic defense of treating some views (e.g. basic equality) as fundamental in society.

So what does it mean for a defense of NP to be liberal? Unsurprisingly, liberalism has many different meanings and strands (Gaus, Courtland, and Schmidtz 2018). S&S do not strictly speaking offer a definition of liberalism, and nor shall I. Thankfully, however, they do identify their targets somewhat by referencing the classically liberal values of “people like Lukianoff” and others (both left and right) in the tradition of John Stuart Mill.<sup>18</sup>

I will thus consider whether S&S’s account would likely appear liberal to those with views like Lukianoff—which is distinct from asking whether it would be *convincing* to these thinkers. I will then explore what S&S say about why their account is liberal. In other words, instead of making absolute claims about what all possible stands of liberalism might permit, I will argue that liberal critics of NP have not been given sufficiently clear reasons by S&S to think that the expert-based account is a liberal account.

Before doing these things, though, I want to start with a concession. When it comes to the anti-NP liberals in the US, including Lukianoff, Post and S&S are right about one thing: many of them think that the logic of the First Amendment fully applies to public universities. (In fact, this view is arguably what leads some of them to have what strike me as highly unfortunate views about racial slurs on campus).<sup>19</sup> To make things easier for S&S’s argument, then, I will assume that these individuals in the US context are mistaken and that the most fundamental debate about campus speech is not constitutional. That is, I will

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<sup>18</sup> Such figures, and traditional liberals more generally, tend to stress a presumption of liberty, equality, a sense that deep disagreement is a permanent state of liberal democracies, and a strong commitment to toleration of diverse views. Some representative passages in the tradition of liberalism are as follows:

“Liberty should be the norm, coercion always needs some special justification.” Joel Feinberg, *Harm to Others*.

“There is a general presumption against imposing legal and other restrictions on conduct without sufficient reason” John Rawls, *Justice as Fairness*.

“In practical matters, the burden of proof is supposed to be with those who are against liberty.” J.S. Mill. *Subjection of Women*

<sup>19</sup> On this view, even the use of slurs toward already disadvantaged groups, however awful, is technically to be tolerated on campus because of the First Amendment—and because those who say this normally don’t trust any individual or institution to make the call about which speech is to be blocked and which is to be protected. But I agree with Post that this degree of freedom does not further the educational mission, and that such words wound, and in fact impede education.

assume that Post is correct that since *no one* properly speaking has a “right” to speak on campus anyhow, it follows that NP does not involve a rights violation.

Even with these concessions in mind, it is far from clear to me that S&S’s defense of NP sits well with liberalism. For the most fundamental questions we face are arguably not legal or historical but moral, political, and cultural: whatever the law says, what picture of the university best fits with liberal values and with liberal education? Here it is worth noting that the liberal critics of NP are often very much aware that a legal framework doesn’t exhaust what is at stake. In the words of Greg Lukianoff, President of the Foundation for Individual Rights in Education (FIRE):

I am a First Amendment layer. I specialize in First Amendment law. But I am amazed by how many people think that the First Amendment and Free Speech are the same thing. The First Amendment is a wonderful manifestation of our founding fathers’ respect for freedom of speech. But the cultural idea of freedom of speech is this idea that we hear each other out, that we debate, that we discuss, that we deal with the fact that people fundamentally disagree on different issues, that we give the benefit of the doubt...[and] that we have tolerance for disagreement.<sup>20</sup>

For thinkers like Lukianoff, although the First Amendment is thought to apply to campuses, wider liberal values still include anti-censorship, viewpoint diversity, epistemic fallibility, and freedom of inquiry. Given these various claims, we can ask the following question: is it generally in line with the spirit of anti-censorship, viewpoint diversity, epistemic fallibility, and freedom of inquiry (and hearing one another out) to disinvite or silence speakers *because* their moral or political beliefs, however widely held or civilly expressed, are deemed *epistemically* illegitimate by most experts?

Classical liberals, in my experience, are likely answer no to this question. Since they prefer order to chaos, they will happily acknowledge that professors of medicine, like practicing physicians, need to be in line with professional medical standards. They will also believe in high epistemic standards for scholarly publication, conference talks, hiring, and for constructing syllabi. But they would likely see this as very different from the claim that

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<sup>20</sup> <https://www.youtube.com/watch?v=snQTAx8F4tc> Freedom From Speech? — Greg Lukianoff on Out Of Control Students, Campus Censors and #CancelColbert. Also see Lukianoff (2016).

there are *no* spaces on campus (e.g. student clubs) where talks that go against the grain of what the experts think of as legitimate are educationally appropriate.

To put the point negatively, deciding so thoroughly for others what information is worth hearing (even if the listener's plan would be to *criticize* the speaker) will likely strike them as illiberal. To put the point positively, liberals tend to prize giving citizens and students the critical tools to make their own judgments about various matters—including what political arguments are beyond the pale and whether someone or some idea is worth hearing. And even if they disagree over various matters, including whether there are limits to viewpoint diversity, they also tend to think that being fully informed about matters of public interest requires hearing from a range of persons with different backgrounds, experiences, and points of view. Since they think that even expert communities are not free from various distorting biases, moreover, they tend to be highly suspicious of unconstrained epistemic gatekeeping.

## **5. Some Liberal Voices—including Those Who See Limits to Intellectual Diversity**

To cite some examples, S&S spend time on John Stuart Mill's concerns with the repression of freedom of speech in society. But it is worth noting that Mill also makes a case for strong freedom of inquiry on campuses as well. In his inaugural address to the University of St. Andrews in 1867, which naturally has nothing to do with the First Amendment, he states:

I do not affirm that an University, if it represses free thought and enquiry, must be altogether a failure, for the freest thinkers have often been trained in the most slavish seminaries of learning. The great Christian reformers were taught in Roman Catholic Universities; the sceptical philosophers of France were mostly educated by the Jesuits. The human mind is sometimes impelled all the more violently in one direction, by an over zealous and demonstrative attempt to drag it in the opposite. But this is not what Universities are appointed for—to drive men from them, even into good, by excess of evil. An University ought to be a place of free speculation.

Mill also recognizes that young minds need epistemic authorities to defer to and notes “a modest deference, at least provisional, to the united authority of the specially instructed.” But the spirit of Mill's views of education seems to many to be one of open-mindedness and a

willingness to explore the many-sidedness of moral debates, including heretical views, which might have some truth.

Mill is very much concerned with what he takes to be the vice of “polemical” overconfidence, even among the experts. He is also concerned with what he takes to be a vice of prematurely closing off forms of inquiry that are intrinsically hard to settle—something that he believes many religious and secular persons are more than willing to do. It is not just the John Stuart Mill of *On Liberty* who affirms free thought, then, which is the only Mill that S&S cite. It is also the Mill who was rector of the University. If Post were to say that his view doesn’t capture the legal picture of the American University, this would presumably leave Mill’s normative picture of what a liberal University is supposed to be unscathed.

To cite a more contemporary example, in their joint statement “Truth Seeking, Democracy, and Freedom of Thought and Expression” (2017), Cornell West and Robert George also do not focus on the First Amendment. Instead, they mention the kind of liberal values we have been describing:

The pursuit of knowledge and the maintenance of a free and democratic society require the cultivation and practice of the virtues of intellectual humility, openness of mind, and, above all, love of truth. That’s why all of us should seek respectfully to engage with people who challenge our views. And we should oppose efforts to silence those with whom we disagree—especially on college and university campuses. None of us is infallible. Whether you are a person of the left, the right, or the center, there are reasonable people of goodwill who do not share your fundamental convictions. This does not mean that all opinions are equally valid or that all speakers are equally worth listening to. It certainly does not mean that there is no truth to be discovered. Nor does it mean that you are necessarily wrong. But they are not necessarily wrong either...Our willingness to listen to and respectfully engage those with whom we disagree (especially about matters of profound importance) contributes vitally to the maintenance of a milieu in which people feel free to speak their minds, consider unpopular positions, and explore lines of argument that may undercut established ways of thinking. Such an ethos protects us against dogmatism and groupthink, both of which are toxic to the health of academic communities and to the functioning of democracies.<sup>21</sup>

For these thinkers, the idea is not that every idea warrants equal time—which would embody the kind of epistemic relativism that Post rejects. The idea is rather that true intellectual

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<sup>21</sup> <https://jmp.princeton.edu/statement>.

diversity on campus, requires listening (or at least allowing others to listen) to ideas that many would condemn. The idea is that this helps to moderate our natural inclination to dogmatism and encourages people to critically evaluate established ways of thinking and visions of the good life.

Once again, some Millians might go too far in their apparent absolutism about open-mindedness—do we really need to welcome arguments defending slavery on campus in the name of viewpoint diversity and openness to the truth? Many liberals nowadays will answer no, and will agree that there are limits to viewpoint diversity. In fact, some liberals will further grant that these limits can extend to morality, even if they are skeptical that expert consensus alone is the criterion to determine what topics are up for debate on controversial moral topics. Nick Phillips (2018), from the Heterodox Academy, puts the point this way:

But Heterodox Academy's own statement of "The Problem" acknowledges that this idea [viewpoint diversity] has limits. For simple problems or fully resolved technical matters there is little need for viewpoint diversity," we note. "But for 'wicked problems' – those that can be framed in multiple ways and that may trigger passions or partisan motivations – viewpoint diversity is essential.... Heliocentrism is a fully resolved technical matter, and flat-earthers are excluded from the academy with good reason. But ratchet the certainty level of a problem's full resolution down a notch or two. Once we start moving down the certainty ladder, the division between fully resolved technical matters and wicked problems starts to break down. Especially vexing is that we don't even have reliable heuristics to determine resolution. ...There are indeed fully resolved [moral] issues: for instance, the immorality of slavery or genocide. Virtually no one believes that Nazis are unfairly excluded from the academy. For other issues, like the best way to design an anti-poverty program, the converse is true: many acknowledge the issue's complexity and the value of viewpoint diversity enjoys broad support within the academy...However, there is another category of issue: those that one side believes are fully resolved, but another side believes are wicked problems for which viewpoint diversity is essential. This kind of disagreement produces explosive conflict.

To be sure, some liberals will seek to push back against Phillips, claiming that there can be real educational benefits for permitting *occasional* talks on scientifically closed matters like flat-earthism.<sup>22</sup> Some will also insist that the best disinfectant for bad ideas is a clear and fair

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<sup>22</sup> For instance, it might be thought that permitting such a talk could help to soften some people's lack of trust in the experts and universities; or could help students to see whether or not the other side has any points at all; or help them to see how resistant to counter evidence some systems of belief are. Or maybe the unintended



rebuttal. In any case, even on Phillips' more flexible and dynamic approach, a challenge presents itself for S&S's model. For that model would seemingly permit something he wants to avoid: namely closing and thus blocking talks on 'wicked' problems which a) can be framed in multiple ways; b) trigger partisan commitments and passionate emotions; and c) are widely thought to be very difficult, not just to many people outside the academy, but to many students, to some non-expert faculty—and, perhaps, even to a small number of outlier experts.

So another source of worry, for the liberal, is absolute trust in expert judgment about what debates are worth having makes a bit less sense on normative topics which have properties a through c. For example, suppose that Marxism soon came to be thought not just a minority view in political science, economics, or philosophy, but beyond the pale. It would be unfortunate, given a liberal commitment to intellectual diversity, if a student group devoted to raising "political awareness" couldn't host a Marxist speaker. Similarly, most bioethicists think that abortion is morally permissible, and most philosophers<sup>23</sup> think that God doesn't exist. If these groups became more entrenched in their views, and hired accordingly<sup>24</sup>, then S&S's model could soon imply that no talks on campus should defend pro-life or pro-theistic perspectives. Now a defender of S&S might reply that we should just trust the experts for getting things right and for not *prematurely* closing wicked problems. But S&S seem to permit that disciplines can close controversial questions in a foundational way, on the basis of *axiomatic* commitments. That might be fine if it had no impact outside their department. But calls for NP often do have a wider impact.

Samantha Harris also worries about how a loss of liberal values, including intellectual diversity, can impact our ability to have social debates. As with Phillips, she wants to preserve departmental autonomy not to hire bad scholars. But she also thinks the university

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lesson would be to appreciate how reliant on experts we all must be to confidently affirm various scientific beliefs.

<sup>23</sup> I realize that specialists in philosophy of religion tend to be mostly theistic but let us simply imagine that this subfield will shrink in light of the wider judgment just mentioned. I don't condone this wider judgment.

<sup>24</sup> There is no time to get into the political demographics of higher education but see (Yancy 2015) for an argument that anti-conservative bias and anti-religious bias impacts who gets to be an expert. Yancy's research also touches on racial bias in higher education which can clearly impact racial demographics and who gets to be an expert.

should not suppress debates on matters that are still live for lots of people, including many students. She states,

FIRE welcomes a discussion with professor Post about the appropriate boundaries of the First Amendment and academic freedom. But to have that discussion, rather than just talking past each other, we must begin from the same premise: that protecting speech on campus is not about protecting classroom boors and Holocaust-denying history professors, but rather about protecting the kinds of conversations that are at the absolute heart of our national debate (2017).

Like other liberals we have been discussing, then, Harris worries that, given a culture of NP, the university could become too cut off from the national debate and could create citizens incapable of deliberating about morality and politics in a civil manner.

## 6. Why do S&S say their account is Liberal?

So far as I can tell S&S do not spend much time addressing passages or arguments from the above thinkers. And this raises the question of why S&S claim their account is liberal and could thus speak to those they deem the “most vocal critics” of NP. Their answer, which helpfully does acknowledge the possibility of epistemic paternalism, is as follows:

Why should we regard the above as a *liberal* conception of academic freedom? Post’s answer is roughly as follows. Free people cannot justifiably be subject to the brute authority of elites. Government must involve the people governing themselves in order to be legitimate. For Post, this follows from a broader theory of free speech grounded in the idea of open democratic participation as an essential requirement of democratic legitimacy (Post 1990, 2011). The realization of self-government is not just a matter of a society having formally democratic electoral and parliamentary institutions. This ideal also requires (i) that everyone should be at liberty to participate in the public discourse that underpins democratic decisions, and (ii) that everyone should have access to the knowledge and information necessary for well-informed judgements about how we ought to be governed. Principles of free speech, which safeguard disliked views against viewpoint-based restriction in the public square, serve the first requirement of open access and participation. Principles of academic freedom, by contrast, serve the second requirement. In order that everyone should have access to the information necessary for informed judgements about issues of public concern, societies need specialized institutions – including an independent university sector – devoted to the creation and dissemination of expert knowledge.

In response to these claims, liberals might think that much of the passage, while correct, understates what is going on, dialectically, in a way that re-raises the worry that Post's account of academic freedom (at least on S&S's reading of it) remains in tension with liberal values. Put more accurately, the liberal might think that (i) sits very well with liberalism, but that there are ways of reading (ii) that are required by liberal values, and other ways that oppose them. The worry is that S&S's argument seems committed to a reading of (ii) that opposes liberal values, including, as we shall see, liberal values occasionally stressed by Post.

A bit less concisely, it is certainly true that citizens in liberal democracies benefit if everyone has access to the information necessary for informed judgments about issues of public concern. It also seems right that having experts trained at universities is the single best way to accomplish that aim. This gives us good reason to build and fund universities that produce experts. It further gives us good reason to give experts the space to develop and test their disciplinary expertise according to recognized effective methods, without much external interference. This is the reading of (ii) that classical liberals can get on board with. But if (ii) means that giving people the information they need means giving them some information, and blocking other information in a way that aims to reduce viewpoint diversity on matters of public concern, this would seem to be a non-liberal way of educating people. It would risk, on Lukianoff's reasoning, impoverishing people's understanding of what various people think and could compromise their ability to be properly educated or to engage in the right kind of deliberation after graduation.

To his credit, Post appreciates a version of the worry that we have been describing. He notes,

Seen in its best light, the controversy about free speech in American universities bespeaks fear that the next generation of Americans will not have been educated to engage in public debate, which necessarily entails encounter with alien and frequently outrageous perspectives. That is a problem well worth addressing, especially as our politics grows more diverse and more polarized. Universities do have a great responsibility to educate students for citizenship in a country violently split along lines of ideology and identity. The language and structure of First Amendment rights, however, is a misguided way to conceptualize the complex and subtle processes that make such education possible (2017).

It is helpful that Post acknowledges these liberal democratic worries. This passage also sits well with his claim that “debates about the proper regulation of campus speech are thus ultimately debates about the nature of education, not about First Amendment rights.” (2018). But if the mission of the university isn’t just about creating disciplinary knowledge, but also about making democratic citizens capable of civil disagreement, then a question for Post’s defenders emerges. Why defend a model of academic freedom that makes it natural to permit or require lots of NP? Doesn’t this make it natural for students to say that many topics debated in public aren’t worth engaging or are beyond the pale?

Even if the ultimate reason for gatekeeping is to further democratic aims, this can still appear to be too paternalistic and in tension with other liberal values we have been discussing. To see this from another angle, consider the following hypothetical policy.

**Internet Policy:** It is announced at the beginning of the academic year that websites from five speakers who were been blocked on campus will no longer be available on the campus network. Faculty and students who want to access their ideas, however popular off campus, will have to look into them at home, or on their cell phone networks. The only exception is faculty members who have specialization on relevant topics and need to research these speakers: they may get a pass code.

If the expertise-based view is a liberal view *because* it helps people to be better informed voters, then why would policies like these also not be normatively permitted or perhaps required on S&S’s reasoning? In raising this example, to clarify, I do not mean to imply that Post, or S&S, will personally want to see various websites blocked on campus. For all I know, S&S do not endorse Post’s view of academic freedom, but are just exploring its implications for NP. As for Post, while he doesn’t discuss the website case, he explicitly rejects a related proposal of burning the library books of speakers who were blocked on campus—insisting that controlling people’s information base to this extent, even if technically permitted by the First Amendment, is not education but indoctrination.<sup>25</sup>

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<sup>25</sup> The common I have in mind arose during the Q&A of a recent talk Post gave at Dartmouth College. In response to the idea that a university president might call for burning the books of Charles Murray, whose views are highly morally concerning and scholarly questionable to many of us, he says:

No, there is no First Amendment Problem [here], but a real educational problem. That university president has just said “there is no independence of mind here because I have

One possible liberal concern is that the same spirit that Post worries about in the book-burning case can easily manifest itself in the website case and also in many calls for NP. This seems relevant. For if there is any question about whether S&S's account could epistemically justify these seemingly paternalistic practices, this would corroborate the thought that their account remains in tension with liberalism. In fact, even SS's account *couldn't* justify these practices on the ground—say because not all spaces on campuses are legally deemed accountable to the epistemic educational mission—there would still be theoretical reasons to wonder if a similar illiberal spirit nonetheless applies in both contexts.

The most natural way to resolve the worry then, then, is an account of academic freedom than is a little bit less stringent about epistemic gatekeeping. This does not require giving up on epistemic standards. For a liberal critic of NP might remind the reader that high epistemic standards and *quality-based* gatekeeping already dominate in most contexts on campus (e.g. publication, departmental talks, distinguished lectures, syllabi, promotion and tenure). She might add that she never proposed changing this. What she argues for instead, in my experience, is less *viewpoint-based* gatekeeping. She might further recommend permitting *some* limited space for even non-experts to challenge views that experts find incredible (e.g. talks for student groups). This needn't signal much disrespect for experts, on one view, since these talks are not normally held to the typical standards of peer review anyhow. In fact, it might be good that the experts don't fully determine people's educational opportunities on campus.

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decided for you what you're going to hear and what you are not going to hear, and what you are going to read and what you are not going to read, and you can't go outside my dictates"...I don't know what an education would be in that circumstance. That's a form of indoctrination, not education....There is a lot you can do to with respect to combating racism [e.g. policies for a more diverse student body, or banning the use of racial slurs on campus, or having a competing event while Murray speaks] but if you're imagining that you combat racism by saying that certain ideas are off limits, and you can't even think about them, even to reject them—in the Millian sense of you are actually stronger if you see what that idea is and know why you're rejecting it—then my view is that you've repudiated the basic premise of a university education (2018b).

Post, in this context, sounds a bit like an absolutist defender of J.S. Mill. Book-burning aside, since he also doesn't seem to want Murray's talk cancelled, even knowing that many experts disagree with it, this leads one to wonder how to understand his overall views about education and whether they would support much NP. Interestingly, some non-absolutist Millians might be more open than Post to seeing a talk by Murray get cancelled.

To see this point, the expert view doesn't have the most natural explanation for a liberal practice that many academics would approve: namely, of not interfering when student groups bring in speakers without advanced degrees to speak on, say, disability rights or BLM or nursing ethics. If these talks to student groups were blocked *because* they weren't strictly speaking experts—on Post's view of disciplinary expertise—and because some groups requested this, we might think that this too would be anti-liberal and bad for student education. And the reason is not merely because lots of academics happen to favor the views of these speakers. The reason is, arguably, more fundamental: it makes good educational sense to permit those with a range of voices, experiences, credentials and backgrounds, to get a voice on campus. Does this mean that the Milos of the world should automatically gain access to college campuses, on this view? Not necessarily. For there might be plenty of non-epistemic worries about lending Milo a stage on campus.<sup>26</sup> It does mean that viewpoint discrimination is generally harder for liberals to endorse.

## 7. Overall Plausibility?

I realize that these topics are hard and danger lurks everywhere. Perhaps a critic will note that liberals should more openly acknowledge not just the dangers of censorship or increased polarization, but also the dangers of spreading ignorance, which too is bad for society. Jason Brennan points out that voters are too often ignorant about what the experts say about relevant scientific, economic, and policy matters (2016). And there is no denying that democracy works better when the people are informed. The question now concerns what the best solutions to the problems of ignorance and a lack of trust in expert knowledge might be. Brennan considers the possibility that only the elites, or sufficiently educated

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<sup>26</sup> These worries are less about his viewpoint and more about some apparently terrible behaviors. For example, I am told that Milo at least threatened to publically name some students because of their immigration status and that he mocked a trans student. Whether or not that happened, tolerating such practices would go well beyond tolerating controversial ideas or debates. There is also the question of basic civility: I realize that knowing where to draw the civility line is no easy task, and that many liberals will side with liberty in cases that are ambiguous or difficult to call. But if civility were *ever* an issue, it arguably should be with Milo. But then don't liberals who endorse *some* viewpoint-based NP, but who reject S&S's model, also face the worry that their views are in tension with liberalism? They may well face a worry here. But it depends on what leads them to NP. Is it the few cases where harm seems clear to everyone? It also might depend on how much NP they permit in comparison to S&S. In short: the worry may be less severe. If they do face a worry, however, this fact won't render S&S's view more liberal.

persons who can pass a test, should get to vote. Of course, most defenders of Post would reject “epistocracy” as a political doctrine. But since ignorance is a real problem, goes this response, why not reduce as much of it as we can through epistemic gatekeeping in the form of NP?

By way of response, the current challenge really seems to come down the following questions: does NP reduce ignorance and does it increase trust in experts? These are empirical questions. It might. But, for all I know, NP might contribute to *more* ignorance and less trust, overall, by making an epistemic martyr out of those who have been blocked. There is also the old saying, often made in these discussions, that forbidden books are especially attractive. Jordan Peterson (whose expertise does not, according to many academics, extend to his political talks) claims that the attempt to NP him on campuses has been the best thing for his career. And, at least for now, he has more fans than almost any public academic. Even if his views on many topics are highly questionable to many academics, for all we know, he is right about the *empirical* connection between being silenced and increased popularity. And even if *some* instances of NP are effective, for all we know, NP is not effective in general and actually increases both ignorance and distrust in experts in comparison to more openness.<sup>27</sup> The risks of giving away ‘symbolic esteem’ illegitimately on campus might not be as severe as these other risks. And given these epistemic possibilities, there may be reasons *internal* to the epistemic-authority model of education, not to favor too much NP.

This raises a larger question of whether S&S’s model is plausible. This question is worth considering, however briefly. For even if S&S’s model were perfectly liberal, if it were not also *plausible*, then the tension between liberalism and NP wouldn’t really be eliminated anyhow. An implausible model won’t resolve the liberal’s problems, after all. This is not to assert that S&S’s model is *implausible*, only that consider that it is too premature for it to be deemed plausible. Why do I say this? For one thing, the model, despite its merits, does not seem to have the most natural explanation for preserving liberties that many faculty want to preserve, including, 1) the liberty to criticize their own institutions (e.g. some

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<sup>27</sup> After all, when a talk quietly takes place on campus it is normally attended by students and faculty who have been taught to be critical consumers of information. Very few epistemic risks are present here. By contrast, when a talk is cancelled it might make the news, in which case more people without critical training might encounter a speaker who the experts do not like.

administrational policy), and 2) the liberty to speak, extramurally, about matters of public importance to the public.

As for 1) many academics enjoy the liberty to criticize their universities, but it is not obvious how to justify this liberty on Post's logic of academic freedom— which, recall, only protects *expert* judgments. After all, most academics are not experts about administrations or how to run a university. As for 2), as others have noted (Dea 2018), many academics who engage in extramural speech discuss matters (e.g. politics on twitter or in the public library) that falls well outside of their expertise. They also often rest assured that they won't be fired for doing so. But, again, this seems to be in tension with the logic of Post's model. S&S are aware of this matter. But their claim that "the question of whether extramural speech is protected by academic freedom" won't be discussed since "nothing significant in our discussion hinges on it" seems too quick. For if Post's model does not make sense of liberties that many people think academic freedom *should* explain and protect, that might be seen as reducing the plausibility of the model, at least for the relevant persons.

Other plausibility questions concerning S&S's model also present themselves. For instance, S&S note at one point that students, even undergraduates, can be given a role in shaping disciplinary standards. This is because, as they explain, faculty are epistemically fallible and biased—for example, philosophy has often displayed methodological conservatism which has led to discouraging work on gender and race and students might challenge this. I agree with this last claim. But S&S's don't consider the *internal pressure* that giving students epistemic authority puts on their model. In particular, once they open the door to the idea that professors are epistemically fallible and potentially biased in a host of ways (which most liberal critics of NP will grant), it becomes harder not see their judgments about what *topics* are beyond the pale in the same way. Put another way, some students think that the decision to NP various topics and speakers is itself often politically biased. Should their voices be heard? If the answer yes, then S&S have not mentioned this. If the answer is no, then it is hard to see how their claim about students correcting professors and shaping disciplinary norms sits well within the rest of the account.

Relatedly, and more fundamentally, S&S briefly claim that they find it plausible to affirm the reality of normative experts. And while I agree with them, in a sense, they don't



really flag why this might be complicated. The worry here is not just that Post's highly cognitive and highly inferential model of the university works far better for scientific disciplines (e.g. physics)<sup>28</sup> than for many other disciplines (e.g. art).<sup>29</sup> The worry concerns normative disagreement, methodology, and epistemic authority across and within normative disciplines. In particular, some moral epistemologists already wonder whether we should defer to expert testimony on deep and controversial normative matters, such as whether to eat meat (Hills 2009). Given how often normative experts disagree, both at the level of methods and conclusions, and across disciplines, why should experts get to close questions that seem live to non-experts? Perhaps normative experts are uniquely talented at normative reasoning, and offer hugely valuable insights in their classes and in their papers. But given their track record of disagreement, goes the objection, they nonetheless might lack the authority to legitimately *close* questions or debates *that lots of non-experts think are still open*.

These complexities, especially when combined, seem relevant. For S&S claim that their model, while not uniquely plausible, is nonetheless plausible on its face. But even this weaker claim might seem questionable unless and until more of the above points are explored in more detail.

## 8. Conclusion

To sum up, this paper is not really about whether we should or shouldn't block controversial speakers. It is about whether the two main attempts to reconcile liberalism and NP are both liberal and plausible. In response to this paper's title, while I think liberals should be open to the claim that *some* forms of no-platforming are justified, I am not convinced we have a successful liberal theoretical account of NP. This is because the harm-based account of NP overgeneralizes and faces other worries (and this even if *some* harm-based restrictions to NP make sense). It is also because S&S's expert-based alternative, while

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<sup>28</sup> Even in science, though, some will wonder what *Wissenschaft* amounts to, in part, because expertise here cannot always be demarked from non-expertise, and science from non-science (Leiter 2016).

<sup>29</sup> For example, art departments might resist the analysis: could it make sense to claim that some abstract, non-political, art is so bad that its creators should be prevented from speaking about it, or showing it, at student clubs? Perhaps the answer is yes!

more plausible in certain respects than the harm-based approach, still faces difficulties and seems harder to square with liberalism.

To be sure, these matters are highly complex. So I don't claim to have fully resolved the debate. It may be that defenders of expert-based views could formulate important responses to my claims. Or it may be that hybrid views, which combine these two approaches to block *harmful ignorance* (e.g. let the flat earth society speak, but not anti-vaccine advocates) would offer a more promising way for liberals to defend NP. Even so, I do hope to have shown that there are reasons to think that the *prima facie* tension between liberalism and NP remains intact—and this despite S&S's novel and sophisticated arguments to the contrary.

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## **When Should Offensive Campus Speech Be Regulated More Than Speech in the Public Sphere?**

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Commentators frequently and appropriately emphasize that rights of free expression are particularly important in the university setting. The central university functions of research, teaching, and learning depend on broad freedom of expression. Commentators have also observed that these central university functions justify some restrictions on speech that could not be justified in a public forum. Most obviously, classroom speech by professors or students that is irrelevant to the subject matter or that fails to meet academic standards should not be protected. This paper will focus on a more controversial topic: the extent to which various forms of “offensive” speech that are otherwise protected by the First Amendment may be regulated on campus.

Often citing American “exceptionalism” in applying the First Amendment to protect offensive speech that is prohibited in many Western democracies, commentators increasingly have proposed novel interpretations of the First Amendment that would allow more restrictions. I generally do not share this view with respect to the regulation of offensive speech in the public sphere. But I have found my views changing about the regulation of offensive speech on campus. I continue to believe that the expression of ideas relevant to the subject of a class should be protected, even if the ideas are perceived as offensive and actually harm the ability of some students to learn. Yet I think that the educational mission of the university justifies some regulation of speech on campus that would appropriately be protected if uttered in the public sphere. A university should be able to impose some standards of civility in discussing ideas in the classroom and, to a lesser extent, on campus generally. It is often difficult, however, to draw a convincing line between protected and unprotected campus speech.

Using examples from judicial decisions and other reports of free speech controversies on campus, I will present my own intuitions about what offensive speech should not be protected, what offensive speech should be protected, and what offensive speech falls into a

difficult borderline category where it is particularly hard to determine whether protection is appropriate. I next try to generalize about the characteristics of speech that prompted me to place the examples into these three categories. After giving my tentative views about the regulation of campus speech, I consider whether current First Amendment law reflects my own intuitions. To a substantial extent, it protects offensive speech I think should be prohibited as well as offensive speech I think should be allowed. The judicial application in the university setting of the general First Amendment law protecting “offensive” speech is the main reason for the discrepancy between the law and my intuitions.

Responding to this judicial approach, I observe that in extending the First Amendment to other disputes within universities, judges have modified general First Amendment principles that apply to the relationship between the government and citizens in the public sphere. They have pointed out that in some circumstances the distinctive educational functions of universities require different First Amendment rules for faculty and students than for citizens generally. In convincing concurring opinions, Justices Stevens and Souter have even maintained that the fundamental general First Amendment principles of content and viewpoint neutrality should not necessarily be applied to universities and might even violate their academic freedom. They stressed that in making decisions about curriculum, faculty appointments and tenure, and the scope of student extracurricular activities, universities appropriately take content and viewpoint into account. I close by suggesting that the distinctive educational functions of universities similarly justify different First Amendment rules for regulating offensive speech on campus than would be appropriate in regulating the speech of citizens in the public sphere. Yet I offer these suggestions tentatively because I recognize that allowing universities more power to regulate certain kinds of offensive speech, even if justifiable in theory, may be abused in practice to prohibit offensive speech, including speech about ideas, whose suppression would undermine the university’s core educational mission.

The facts of *Doe v. University of Michigan*, the first and still the most influential judicial decision addressing a First Amendment challenge to a university speech code, provide a useful range of examples of offensive speech on campus and responses to them. A flier was distributed on the Ann Arbor campus declaring “open season” on blacks, referred to as “saucer lips, porch monkeys, and jigaboos.” Soon after, a student disc jockey broadcast jokes on the campus radio station, which the judge described as “racist” without providing details. At a subsequent demonstration protesting these two incidents, someone displayed a Ku Klux Klan uniform from a dormitory window. The Chair of the Michigan State House of Representatives Appropriations Subcommittee on Higher Education then held a public hearing on racism at the Ann Arbor campus. At the close of the hearings, the Chair stated: “Holding up funds as a club may be part of our response, but that will predicate on how the university responds.”

The University then drafted a policy on discrimination and discriminatory harassment, whose key provision subjected persons to discipline for “[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that [i]nvolves an express or implied threat to” or “[h]as the purpose or reasonably foreseeable effect of interfering with . . . an individual’s academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety . . . .” John Doe, a pseudonymous psychology graduate student who was a teaching assistant in a course called Comparative Animal Behavior, claimed that this code violated his First Amendment rights. He asserted that an appropriate topic for discussion groups in that course “is sexual differences between male and female mammals, including humans. [One] . . . hypothesis regarding sex differences in mental abilities is that men as a group do better than women in some spatially related mental tasks partly because of a biological difference. This may partly explain, for example, why many more men than women chose to enter the engineering profession.” Doe stated that some students and professors considered this hypothesis “sexist” and expressed fear that such a discussion would subject him to discipline under the university’s policy.

The judge agreed and held that the First Amendment protects the classroom discussion anticipated by Doe. In determining that Doe had standing to challenge the policy, the judge referred to three complaints in the prior year that resulted in university proceedings under its provisions. A graduate student in the School of Social Work stated in a research class that homosexuality is a disease and that he intended to counsel gay clients to become straight. A student in the business school read an allegedly homophobic limerick during a public speaking exercise in class, which ridiculed a well-known athlete for his presumed sexual orientation. In a discussion group during the orientation session of a medical dentistry class, a student stated that “he had heard that minorities had a difficult time in the course and that . . . they were not treated fairly.” The minority professor who taught the class complained that the comment was unfair and would hurt her chances for tenure.

I agree with the judge that Doe’s anticipated classroom speech should be protected. I also agree that the classroom comments about homosexuality as a disease and about the unfair treatment of minorities in a course should be protected. But I am skeptical that a homophobic limerick about a student athlete should be protected, though I would want to know more details about its contents. The judge did not address the application of the First Amendment to the speech that led to the promulgation of the policy, but it seems to me that the flier declaring “open season” on “saucer lips, porch monkeys, and jigaboos” and the display of a Ku Klux Klan uniform from a dormitory window should not be protected. As with the homophobic limerick, I am skeptical about whether the racist jokes broadcast on the campus radio station should be protected, though I would want to know more details about their contents.

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Drawing on legal decisions and other sources, I will give additional examples of speech I think should not be protected, should be protected, and plausibly could be placed in either category. I will begin with speech I do not think should be protected. The University of Wisconsin enacted a speech code after a fraternity held what it called a “slave auction”



during which pledges performed skits in black face. The University subsequently invoked the speech code to discipline a range of student speech. A student, after entering another student's bedroom without an invitation, called the student a "Shakazulu." During an argument, a student called a black female student a "fat-ass nigger." A student angrily told an Asian-American student, "It's people like you – that's the reason this country is screwed up," adding "you don't belong here." A student impersonating an immigration officer demanded to see the immigration documents of a Turkish-American student. A fraternity at Yale required pledges to march blindfolded around campus, chanting "my name is Jack, I'm a necrophiliac, I fuck dead women" and "No means yes, yes means anal." A graduate student attached a "disacknowledgments" section to his thesis expressing "special Fuck You's to the following degenerates for being an ever-present hindrance during my graduate career" and then cited the Dean and staff of the Graduate School, the library staff, the Regents, and the Governor. During the Spring 2017 semester several fliers were distributed on the campus of the University of Texas at Austin. One stated "Imagine a Muslim-Free America." Another, titled "Ethical Lessons to Chinese," claimed that in Chinese culture it isn't bad to steal another's work or lie on job applications, and described a fake course in ethics to teach integrity to Chinese students. After a black male student was taken into custody following a stabbing incident on campus that led to the death of another student, fliers depicted a caricature of a black man holding a knife alongside the words "Around blacks . . . never relax."

Here are some examples of speech considered offensive that I think should be protected. A professor offered a course entitled "The Politics of Race," which treated Nazism, apartheid, and Zionism as racist ideologies. As part of a class on "language and social constructivism" in a course entitled "Introduction to Interpersonal Communication," a professor asked students to suggest words used in the interests of the dominant culture to marginalize minorities and other oppressed social groups. Student suggestions included the words "girl," "faggot," "nigger," and "bitch." In a class on Latin American politics, a professor referred to the term "wetbacks" and discussed its origins while criticizing its use. A professor on a faculty committee formed to select a book for assignment to all incoming freshmen, after other members of the committee had suggested books that he considered to have liberal points of view, proposed four books that would challenge what he called

“academic orthodoxy,” including a book treating homosexuality as “abhorrent behavior” that had become accepted as a result of “political correctness.” A professor sent e-mails over a distribution list maintained by his college to protest its celebration of “Dia de la raza,” viewed by many Hispanics as an alternative to Columbus Day. A week later, on Columbus Day itself, he sent another e-mail declaring: “It is time to acknowledge and celebrate the superiority of Western civilization.” A third e-mail included a link to the professor’s own web site, which contained material urging the importance of maintaining a White majority in the United States and warning about the influx of Hispanic immigrants. An ad in a conservative student newspaper questioned the positive depiction of Islam during the university’s “Islamic Awareness Week” by including quotations from the Koran, such as “I will cast terror into the hearts of those who disbelieve. Therefore, strike off their heads and strike off every fingertip of them.” The ad also criticized the treatment of women and homosexuals in Islamic theocracies. An art professor’s painting depicted a Confederate flag superimposed over images of a Ku Klux Klan member carrying a torch and a lynching. The professor, who was born in Venezuela, asserted that he intended the painting to represent his negative associations with the Confederate flag. Observing that he liked to “show two sides of the coin” in his paintings, he added that he was “in the process of creating an accompanying painting of a Rebel flag that shows the image in a more positive manner.” He reported that he had lived in Georgia for four years and learned that “there is a strong heritage and pride associated with the flag that has nothing to do with the KKK or racism.”

My final set of examples present facts that make it difficult for me to decide whether or not the speech should be protected. During a summer school course in composition designed for pre-freshmen who needed remedial work prior to matriculation, the professor initiated a “clustering” exercise, in which students called out words on a topic, as a technique to help students avoid the use of repetitive words in essays. The professor allowed the students to choose the topic for the exercise. The students chose “sex.” After initially selecting what the instructor called “very safe words,” such as “marriage,” “children,” and “wedding ring,” toward the end of the exercise students were yelling phrases including “cluster fuck,” “slamhole,” and “eating girls out,” many of which the professor wrote on the blackboard. An English professor asserted that he used words such as “pussy” and “cunt” to

point out “the chauvinistic degrading attitudes in society that depict women as sexual objects, as compared to certain words to describe male genitalia, which are not taboo or considered to be deliberately intended to degrade.” A professor acknowledged that he used an “abrasive” teaching style, including when dealing with sensitive sexual topics such as pornography, but emphasized that he generally received high evaluations from students, who often praised him for challenging them. A chemistry professor at Lincoln University, described as “the country’s oldest college in continuous existence for the higher education of black students,” wrote a letter to the faculty requesting censure of his chair for encouraging “non-quality education and non-quality character,” particularly for allowing grade inflation. According to the professor, “grade inflation is a kind of crime against students, Lincoln University, and Black people. Standards of Black Colleges are always suspect and it took 50-60 years for Lincoln to earn a high reputation for quality education and high standards. As many of our students learn to their sorrow: inflated grades and easy courses don’t help you – they hurt you, and teachers who give inflated grades and easy courses are not your friends.” A district court, reversed by a court of appeals, upheld the dismissal of the professor because his comments led to controversies that “often degenerated into name-calling and shouting matches,” which “exhibited great personal animosity.” At other universities, a professor called his department head a liar and a backstabbing sneak, and another made what a judge called “vitriolic attacks” on administrators, including calling one “a Hitler who frequently lies.”

What are the features of speech that prompted me to place my examples into these three categories? The speech in the unprotected category seems particularly crude and gross, often consisting of insults, profanity, epithets, and often directed at race, sex, sexual orientation, religion, and national origin. Some of it, such as the flier declaring “open season” on Blacks and displaying a Ku Klux Klan uniform, could be considered threatening. Entering a student’s bedroom without an invitation seems an invasion of privacy. While some of this speech arguably conveys ideas, such as the United States should restrict immigration of Asians and Muslims and that Black men are particularly dangerous, it is expressed in extremely vulgar or personal terms. All of the examples seem likely to affect students in ways that could impede their ability to learn.

The speech in the protected category, by contrast, seems legitimately related to the expression of ideas, whether in class or elsewhere on campus. Warning about the influx of Hispanics seems qualitatively different than the statement “Imagine a Muslim-Free America,” which is more pejorative and is even threatening in its similarity to saying “Imagine a Jewish-Free Germany” in Germany during the 1930s. While much of it expresses negative views related to race, sex, sexual orientation, religion, and national origin that many people understandably would consider offensive and hateful, most of it does not use profanity, epithets or vulgarity and is not directed at particular individuals. The examples of profanity and epithets in class can be justified by plausible pedagogical purposes. Much of this speech could impede the ability of some students to learn, but in my opinion this important interest is outweighed by the interests of universities and individual speakers in the expression of controversial ideas.

There are various reasons I find it hard to place some of these examples in the unprotected or the protected category. The vulgar and profane classroom speech did not seem to have much pedagogical value. But I am not sure it had no pedagogical value, and I am reluctant to restrain the pedagogical choices of professors. I also believe that the issue of pedagogical value should be determined by faculty peers, not administrators or judges. The professor who used the “clustering” exercise, for example, could have selected a topic other than sex to help students during the summer before college learn not to repeat words in essays. Even if the use of sex is pedagogically defensible, the professor seemed to lose control of the class when he allowed students to continue shouting out increasingly vulgar and profane language. Yet the purpose of the exercise is pedagogically defensible, and the exercise as reported may fall within the outer bounds of professional discretion.

Interestingly, the circuit court that addressed these facts split 2-1. The majority found no pedagogical justification for allowing the vulgar shouting to continue. The dissenter, the former general counsel of Yale, passionately defended academic freedom to support the professor. “Today,” he wrote, “the loser is a college teacher in a conservative academic setting who used an ‘alternative’ teaching technique with profane effect. In the future, the major losers are likely to be ‘traditionalists’ and unconventional college teachers, whose speech is found offensive by those who usually dominate our institutions of higher learning.”

I believe that personal attacks on colleagues and administrators during shouting matches do not generally merit protection. But the underlying importance of the topic of controversy, the decline of academic standards at a major historically black university, may suggest more tolerance for otherwise unprotected speech. The truth of personal attacks should also be relevant. Evidence of actual lying, backstabbing, and autocratic behavior provides more justification for using these terms and even for calling someone a “Hitler.”

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To what extent does current First Amendment law allow the treatment of offensive speech favored by my intuitions? Some First Amendment doctrines enable regulation of speech I think should be unprotected without specifically addressing the subject of offensive speech. The First Amendment protects speech about matters of public concern but does not extend to matters of private concern. Much offensive speech at universities relates to private rather than public concerns, and many judicial decisions have denied protection to speech by faculty and students, including offensive speech, for this reason. Even with respect to matters of public concern, courts have held that the “time, place, and manner” of expression affects its protection. A professor who expresses views on a matter of public concern by barging in on a meeting conducted by the dean, or by engaging in shouting matches with colleagues at faculty meetings, could be disciplined for the inappropriate “time, place, and manner” of expression. Speech need not be offensive to fall within these restrictions, but some offensive speech could be punished on this basis. Courts also have restricted speech about matters of public concern directed at listeners who are a “captive audience” unable to avoid it. Students in dormitories could fit within the definition of a captive audience, which could shelter them from some offensive speech. Many courts have invoked pedagogical relevance as the touchstone for protecting classroom speech and have allowed discipline for offensive speech because it cannot be justified pedagogically, not because it is offensive.

Cases directly addressing the regulation of offensive speech on campus have typically applied without modification general First Amendment doctrines on offensive speech,

which allow much of the expression I think should be unprotected. The decision in *Doe v. University of Michigan* is an influential example. The judge observed that the Supreme Court had identified a few categories of unprotected expression, such as obscenity, words inciting imminent lawless action, certain kinds of libel and slander, credible “threats of violence or property damage made with specific intent to harass or intimidate,” and “fighting words,” defined as “those which by their very utterance inflict injury or tend to incite an immediate breach of peace.” Yet he emphasized that those unprotected categories did not allow the University to “proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people.” The general prohibition against punishing offensive speech, he added, citing the two Supreme Court cases that initially recognized First Amendment rights to academic freedom, “acquire a special significance in the university setting, where the free and unfiltered interplay of competing views is essential to the university’s mission.” The unprotected categories identified by the judge are extremely narrow and often require direct expression to a particular individual. And much offensive speech directed at individuals does not fit within these unprotected categories. In declaring that the speech code at the University of Wisconsin violated the First Amendment, for example, the court emphasized that the proposed limiting construction by the Board of Regents did not prevent “reaching a substantial amount of speech outside the traditional definition of fighting words. Under the proposed construction, student speech violates the UW Rule if it: (1) is discriminatory; (2) is directed at an individual; (3) demeans the race, sex, religion, etc. of that person; (4) creates an intimidating, hostile or demeaning environment and (5) lacks an intellectual basis.” Yet much speech that meets this limiting construction, the Court observed, “is unlikely to cause an immediate breach of the peace. For example, the comment ‘you’re just a dumb black, woman, or homosexual,’ does not necessarily tend to incite violent reaction even if it demeans the addressee and creates an intimidating, hostile or demeaning environment.”

One Supreme Court decision addressed the meaning of harassment in a lawsuit brought by the parent of a fifth-grade girl seeking damages against a school board under Title IX of the Education Amendments of 1972. In the context of deciding whether the school district’s failure to respond to student-on-student harassment can support a private suit for

money damages, the Court concluded that “such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” The Court observed that in this case a boy in the girl’s class allegedly attempted to touch her breasts and genital areas “and made vulgar statements such as ‘I want to get in bed with you’ and ‘I want to feel your boobs.’” This behavior allegedly continued for many months, including an allegation that the boy rubbed his body against hers in the school hallway in “a sexually suggestive manner.” The boy ultimately pleaded guilty to sexual battery. Pointing out that the alleged “harassment was not only verbal,” but also “included numerous acts of objectively offensive touching,” the majority remanded the case for further proceedings. The Court did not indicate whether it would consider only verbal harassment sufficient to impose liability or whether it would apply its standard to the very different context of university efforts to restrict verbal harassment. Even if it would, the requirement of “severe and pervasive” harassment would preclude application to much of the speech I think should be unprotected.

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Despite the virtually unanimous application of the general First Amendment law governing offensive speech to the university setting, I believe that the judicial modification of the First Amendment in addressing other free speech issues at schools and universities provides a plausible basis for developing a distinctive First Amendment approach to offensive campus speech as well. When the Supreme Court held in the 1960s that a school board could not compel teachers “to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work,” it also stressed that “the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.” Upholding the First Amendment right of a high school teacher to publish a letter in a local newspaper that criticized the board’s allocation of money between educational and athletic programs, the Court observed that the letter was not directed towards anyone with

whom the teacher worked on a daily basis. The Court, therefore, concluded that the letter did not affect the legitimate interests of the state as employer in maintaining “discipline by immediate supervisors or harmony among coworkers.” In analyzing the competing interests of a professor and his university employer in a subsequent case, a federal district court recognized “that there must be more room for divergent views in a university situation than in a prosecutor’s office,” the setting in which another Supreme Court decision had upheld the discharge of an assistant prosecutor for distributing a questionnaire that criticized her superiors.

Another Supreme Court decision in the 1960s held that students as well as teachers do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” but also stressed that the First Amendment must be “applied in light of the special characteristics of the school environment.” In evaluating the First Amendment right of children to wear black armbands in class to protest the Vietnam War, the Court assessed whether this expression would “materially and substantially disrupt the work and discipline of the school.” Applying this approach to the refusal of a college president to grant official recognition to a student chapter of the SDS because it would be a “disruptive conference on campus,” a subsequent Supreme Court decision observed that the university was not bound by the First Amendment standard of criminal liability, which differentiates between mere advocacy and advocacy “directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.” “In the context of ‘the special characteristics of the school environment,’” the Court reasoned, “the power of government to prohibit ‘lawless action’ is not limited to acts of a criminal nature. Also prohibitable are actions which ‘materially and substantially disrupt the work and discipline of the school.’”

In addressing the right of a student organization of evangelical Christians to meet in university facilities, the Supreme Court majority noted that the general First Amendment principles that apply to public forums “must be analyzed in light of the special characteristics of the school environment.” “A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university’s mission is education, and decisions of this Court have never denied a university’s authority to impose reasonable regulations compatible with that mission upon the use of its campus and



facilities.” In his concurring opinion, Justice Stevens went further, asserting that the application of many general First Amendment concepts, including “compelling state interest,” “public forum,” and “content neutrality,” “may needlessly undermine the academic freedom of public universities.” “In performing their learning and teaching missions,” Stevens observed, “the managers of a university routinely make countless decisions based on the content of communicative materials. They select books for inclusion in the library, they hire professors on the basis of their academic philosophies, they select courses for inclusion in the curriculum, and they reward scholars for what they have written. In addition, in encouraging students to participate in extracurricular activities, they necessarily make decisions concerning the content of those activities.” Concurring in another case, Justice Souter protested that the majority had imposed “a cast-iron viewpoint neutrality requirement” while upholding a mandatory student activity fee. University students, Souter observed, “are inevitably required to support the expression of personally offensive viewpoints in ways that cannot be thought constitutionally objectionable unless one is prepared to deny the University its choice over what to teach. No one disputes that some fraction of students’ tuition payments may be used for course offerings that are ideologically offensive to some students, and for paying professors who say things in the university forum that are radically at odds with the politics of particular students. Least of all does anyone claim that the University is somehow required to offer a spectrum of courses to satisfy a viewpoint neutrality requirement.”

I believe that “the special characteristics of the school environment” similarly justify a distinctive First Amendment analysis of offensive speech on campus. Upholding the First Amendment right of *Hustler* magazine to publish a “parody” in which the evangelical minister, Jerry Falwell, stated that his “first time” was during a drunken rendezvous with his mother in an outhouse, Chief Justice Rehnquist, writing for a unanimous Court, reasoned that it impossible to develop “a principled standard” that could differentiate degrees of outrageousness. Giving examples from the history of the political cartoon, including the portrayal of George Washington as an ass, Rehnquist observed that in “public debate about public figures” outrageousness “has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of

their dislike of a particular expression.” I agree with this decision. But I also think that a university should be able to prohibit a similar parody of a well-known student athlete in the campus newspaper or during a classroom exercise in public speaking. The parody of Falwell, as Rehnquist observed, suggests that he is a hypocrite in his public statements about morality and that he should not be taken seriously by the general public. By contrast, no point relevant to “public debate” is raised by a similar parody of a student athlete in a campus newspaper or classroom exercise, even if the “well known” athlete could plausibly be considered a “public figure” within the university. The parody of the athlete, moreover, could predictably affect him in ways that could impede his education.

In at least one case, moreover, the Supreme Court has invoked the educational mission of secondary schools to limit offensive speech by a high school student that would be protected if uttered in public by an adult. At a large student assembly, a student used sexual innuendo while nominating another student for elective office. Upholding the short suspension of the student speaker, the Court called his language “obscene,” “vulgar,” and “offensively lewd,” contrasting its “sexual content” with the “political” message of the student armbands in its earlier case. The First Amendment, the Court concluded, allows school officials to determine that such speech “would undermine the school’s basic educational mission.” The Court emphasized that the audience consisted of “an unsuspecting audience of teenage students.” While acknowledging that the First Amendment prohibits restrictions on similar speech “by adults making what the speaker considers a political point,” it denied that “the same latitude must be permitted to children in a public school.” The Court’s focus on the youth of the children and on the responsibilities of school authorities to act “in loco parentis, to protect children – especially in a captive audience – from exposure to sexually explicit, indecent, or lewd speech,” suggests that it would not have reached the same result if the issue had arisen at a university. Yet the educational mission of the university to provide a healthy learning environment could provide a different plausible argument for limiting vulgar and offensive speech. Indeed, the Court indicated that in some contexts limitations on offensive speech by adults could be justified, pointing out that the Manual of Parliamentary Practice drafted by Thomas Jefferson and adopted by the House of Representatives prohibits the use of “impertinent

speech” and “indecent language,” and that senators have been censured for “abusive language” directed at each other. Justice Stevens dissented because he felt that the suspended student had not received sufficient notice of the “scope” of prohibited language and the consequences of a violation. But he agreed that high school administrators could prohibit expletives such as “damn” in “classroom discussion and even in extracurricular activities that are sponsored by the school and held on school premises.” Indicating the applicability of his reasoning to the university as well, he followed this statement with a note quoting from his earlier opinion justifying content-based regulations of student extracurricular activities in universities.

Even if courts were willing to concede that universities could prohibit some offensive speech that is protected in the public sphere, the difficulty in developing “a principled standard” to differentiate protected from unprotected speech remains. To my knowledge, every campus speech code that has been challenged in court has been declared unconstitutional on First Amendment grounds, often because judges found that the language in the codes identifying prohibited speech was too vague or broad. I often agree, including, for example, the “stigmatizes and victimizes” standard in the University of Michigan code. Tellingly, when asked to differentiate speech that “stigmatizes and victimizes” from speech protected by the First Amendment, the lawyer for the University of Michigan, with refreshing honesty that hurt his argument, answered “very carefully.” But courts have struck down much narrower codes, such as the one at the University of Wisconsin, which limited the prohibited category to speech directed at an individual that “creates an intimidating, hostile or demeaning environment” and that “lacks an intellectual” basis. As I have indicated, I think a university should be able to prohibit some speech directed at groups even if it could be construed as having a modicum of intellectual content.

I do not think there is a solution to the problem of vague, broad, and subjective standards. Yet current First Amendment law contains many such standards. The distinction between matters of public and private concern is extremely subjective, with hundreds of cases reaching different conclusions based on almost identical facts. The concept of pedagogical relevance has similarly led to different conclusions in cases that are difficult to distinguish on their facts. Claims of vagueness and subjectivity have also arisen in

the university context when tenured professors have challenged their dismissals for cause as violating the due process clause of the Fourteenth Amendment. In upholding the dismissal of a tenured professor for engaging in sexual misconduct with students, a court rejected his assertion that the university's regulations prohibiting "exploitation of students" for a professor's "private advantage" did not refer explicitly to sexual misconduct and, therefore, did not give him the "adequate notice" required by the Fourteenth Amendment. "As is the case with other laws, codes and regulations covering conduct," the court reasoned, "it is unreasonable to assume" that the drafters of the regulations "could and must specifically delineate each and every type of conduct (including deviant conduct) constituting a violation." The court added that the professor's academic peers on the faculty hearing committee "were well-qualified to interpret" the regulations and, more generally, to determine what is and is not acceptable faculty conduct within an academic setting." Relying on this decision, a court rejected a tenured professor's claim that his university had not relied on sufficiently ascertainable standards in firing him for "incompetence" because its regulations did not list incompetence as grounds for dismissal. The court stressed it was "not feasible" to include all grounds for dismissal or to provide a more specific definition of incompetence.

I agree with these decisions and would also allow some imprecision in defining prohibited campus speech. I would uphold codes that used words such as "insulting, vulgar, threatening, harassing, and demeaning" to describe prohibited speech, but not those that used words such as "inconsiderate, inappropriate, embarrassing, or obnoxious," as many codes do. Universities can also mitigate concerns about imprecision by providing examples of prohibited speech in interpretative guides to their policies, as many universities have done (though the examples often describe speech that should clearly be protected). Even more powerfully, universities could adopt policies that do not punish people for an initial violation of policies on prohibited speech. They could simply identify the speech as unprotected and warn that a second violation could lead to punishment. The warning would provide clear notice of what is prohibited, and the interests of those whose education is jeopardized by the expression would be recognized through the warning and possible subsequent punishment.

Warnings rather than initial discipline, moreover, seem consistent with the educational functions of a university.

I make these suggestions very tentatively. Universities have often cited the interest in protecting the educational environment from offensive speech while egregiously violating the legitimate free speech rights of students and faculty. Sometimes universities seem to be asserting this justification in good faith, but in many instances they seem to invoke it as a pretext for punishing unpopular speech. I do not think it is an exaggeration to maintain that a significant portion of American universities have clearly disregarded judicial precedents protecting speech, just as a significant portion of American primary and secondary schools have clearly disregarded judicial prohibitions against school prayer. Laws that would allow more regulation of offensive speech, as I propose, might encourage additional suppression of speech I think should be protected. Yet the resistance of universities to judicial precedent seems largely based on decisions taken without consideration of the law or in defiance of it. More permissive legal standards for regulating offensive speech on campus might have little or no impact on behavior within universities. But they might seem more reasonable to universities than the current law, and for that reason encourage at least some universities that currently flout the law to respect it, which would protect some speech that now is illegally punished. Apart from these practical considerations about the influence of law on behavior, I think there is independent value in formulating legal rules that make sense.

## **Academic Freedom and Sexual Hysteria: Three Controversies**

### **J. Michael Bailey, Northwestern University**

I began teaching at Northwestern University in 1989 and have both conducted sex research and taught sexuality-related courses for most of my career. My work has caused three controversies that became national news for extended periods. Each controversy has some implications for academic freedom. I present the most important details of each controversy, interspersed with my subjective experiences and the most important lessons I believe are warranted. Finally, I present some general conclusions about making the world safer for learning and teaching about sex.

#### **Controversy 1: “Lurid Epitome of Government Waste”**

On December 23, 2002 I received an early Christmas present with the publication of an article in the conservative newspaper, *The Washington Times*, entitled “Federally Funded Study Measures Porn Arousal. Women Paid to Watch Erotic Images” (McCain, 2002). This article was about my research. It was written by conservative journalist Stacy McCain, who had called me several days earlier ostensibly interested in my research. We had a pleasant enough conversation before he revealed his agenda: to publicize the fact that I had received a federal grant to conduct research in which I showed pornography to women and measuring their genital responses.

Shortly after the morning papers on December 23, I learned that I had acquired unwanted celebrity. I was discussed derisively on the *Rush Limbaugh Show*. After I declined an invitation to be on his show, Bill O'Reilly showed my picture while giving his take on government waste and academic idiocy. The story even made *The Tonight Show*, where Jay Leno joked: “Researchers at Northwestern are paying \$75 to women to watch porn. Men are paying \$150 to watch the women watch porn.”

I was also contacted both by Northwestern University's media relations department and officials of the National Institute for Child Health and Human Development (NICHD). Both advised me not to appear on conservative talk shows (advice that was entirely

unnecessary). NICHD officials warned me that I could jeopardize future federal funding for research on sexual orientation if I engaged those criticizing me and caused additional negative publicity. They also requested I help draft a press release addressing the value of my research. The result stressed its contributions to sexual health including HIV prevention, which I found about as dubious as *The Washington Times*' description of my research.

What was my research actually about? I study sexual orientation, and we showed the trait works somewhat differently in men and women. My research focused on the role of gender-specific sexual arousal, or the degree to which male-attracted persons are more sexually aroused by male erotic stimuli than by female erotic stimuli, and female-attracted persons are more sexually aroused by female erotic stimuli. "Erotic stimuli" means pictures and videos intended to be sexually stimulating, and in my research studies we used videos of same-sex couples—either two men having sex, or two women having sex. (A video of heterosexual sex contains both a man and a woman, and so if one becomes sexually aroused while watching it, it is unclear which sex is responsible.) The stimuli we used were certainly pornographic, but this was because we needed strong stimuli in order to induce sexual arousal. It would be better to study people's sexual arousal to real men and women, but this would be infeasible and no more palatable to social conservative critics.

We had known for decades that men's sexual orientations correspond precisely with their patterns of sexual arousal to such stimuli. That is, heterosexual men get much more aroused by female than by male stimuli, and homosexual men show the opposite pattern. Indeed, I have argued that men's pattern of sexual arousal to men versus women is the same thing as their sexual orientation. But what about women? Our federally funded study found that women show a very different pattern. Heterosexual women showed a bisexual pattern of sexual arousal—they were equally aroused by both female and male stimuli. Homosexual women showed an intermediate pattern, more specific than heterosexual women but less specific than males. This work might help explain why women change their sexual identities more than men do but have fewer problematic sexual interests (e.g., pedophilia). Publications funded by my notorious grant have been influential, cited more than 1,000 times (e.g., Bailey, 2009; Chivers, Rieger, Latty, & Bailey, 2004; Rieger, Chivers, & Bailey, 2005). Much more expensive grants are often much less influential.

But the scientific value of our work was unknown, and probably irrelevant, in December, 2002. During the next few months it became obvious that the attack on my lab's work was the opening salvo in a much broader attack, on government funding for sex research (mainly) and other kinds of research social conservatives found objectionable. A congressional proposal to defund five NIH sexual behavior studies failed by three votes in July, 2003 (Kessler, 2003). (Our own work had been completed by then and so we were not at risk.) In October of that year, the Traditional Values Coalition publicized a list of more than 250 grants by 157 federally funded researchers studying sexuality (mostly) as examples of taxpayer waste. The Director of the NIH asked all of those funded to justify their work (Kempner, 2008). This request likely led to both overstatement and dishonesty in many of these accounts, as it did with my own justification. And it also likely influenced subsequent funding decisions at NIH. Of course, likely no one at NIH will acknowledge this even if it is true.

### **What It Was Like**

I was both pleased and proud to win the NIH grant for the work that would be attacked. I thought the work was important, and NIH funding has not been easy to obtain during my academic lifetime. By the time the *Washington Times* article appeared I knew we had discovered interesting and important things, and I was looking forward to sharing them widely. Instead, my work was portrayed in a way that made it an object of mockery. I never doubted the work's value, but it was exceedingly frustrating that those attacking me, and those listening to them, seemed to have no interest in my side (or the truth). It was embarrassing and infuriating to be singled out in this way.

I never worried that this controversy would affect my job in any important way. To my knowledge no one at Northwestern University openly criticized this research, although a few years later my Provost told me that he had defended me from alumni angered by the news stories. I do not remember receiving much angry correspondence from those who disapproved of my research.



This controversy was no fun, to be sure, but of the three I discuss here, it was the least bad from my perspective. The fact that I never worried about my job was key, in contrast to the two other controversies.

## Broader Issues

At least since Kinsey, social conservatives have disapproved of much sex research. Their ire has been especially aroused by the performance or depiction of actual sex outside the sacred marital bed. Social conservatives have preferred to keep pornography illegal, and they do not like the idea of using taxpayer money to pay people (perhaps especially women) to watch it. That was the reason why my research was such a ripe target.

But most of the other research that was attacked alongside mine in the 2003 coordinated defunding efforts did not employ pornography, and some was not even about sex. This broader campaign was most likely intended to reduce funding for social science research, which many conservatives believe is driven more by a progressive agenda than by an unbiased search for important knowledge. Conservatives have sometimes been correct about this, although they were wrong about me in 2002-2003. My research they attacked was quite basic and had no obvious political implications. Furthermore, by 2002 I had established myself as someone willing to offend progressives and sexual minorities for the sake of scientific truth and rationality<sup>1</sup>. But the caricatures of me as a wild-eyed liberal and my research as mindless pornography pushing were more useful to the social conservatives.

## Controversy 2: “Nazi Transphobe”

Just four months after the initial *Washington Times*’ “exposé” of my research, my popular science book, *The Man Who Would Be Queen: The Science of Gender-bending and*

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<sup>1</sup> For example, concerns that searching for genes that affect sexual orientation would lead to genetic tests for homosexuality led to demands that such research be halted. Noting that those making such arguments were otherwise in favor of unfettered reproductive freedom, I coauthored a paper arguing that parents should be allowed to influence their children’s sexual orientation if this could be done without harming children. I wrote an editorial acknowledging that homosexuality was associated with some kinds of mental illness and encouraging scientists to consider all plausible explanations. I studied the association between homosexual orientation and gender nonconformity, despite many gay men’s discomfort with this topic. And I had posted on my website early drafts of book chapters on male-to-female transsexualism that offended some transgender activists.

*Transsexualism* was published by the Joseph Henry Press, the trade division of the National Academy of Sciences (Bailey, 2003). My motivations for writing the book included my exasperation about widespread ignorance of two scientifically important facts. First, gay men tend to have some markedly feminine traits, on average, along with some traits that are unremarkably masculine. It may surprise some readers that this would be non-obvious to anyone. But 2003 was before “Queer Eye for the Straight Guy” and after at least a couple of decades when it was politically incorrect to notice such things.

The second fact—genuinely unknown by almost everyone in 2003—is that one kind of transsexual who begins life as male is erotically motivated. Most often, these natal males realize during adolescence (with the onset of strong sexual feelings) that they are sexually aroused by cross-dressing (the most common manifestation of which is wearing women’s lingerie and privately masturbating). Probably most of these males live their adult lives as married men, sometimes cross-dressing in secret and sometimes doing so with their wives’ knowledge and cooperation. But some of them struggle with gender dysphoria for years before deciding they will be happier obtaining sex reassignment surgery and living as transwomen. The trait that motivates both the crossdressers and this kind of transwoman is *autogynephilia*, whose meaning can be understood with parsing: auto (self), gyne (woman), and philia (love of). The best way to think of autogynephilia is inner-directed heterosexuality. The autogynephile is a heterosexual male whose primary erotic object is the image or fantasy of himself as a woman. No kind of transsexual is common, but for decades autogynephilia has been the most common reason for sex reassignment surgery in North America and Western Europe.

Autogynephilia undoubtedly sounds strange to the uninitiated, which included myself until 1995, when I met a highly disclosing autogynephilic transsexual and then bothered to look at the scientific literature. There was a programmatic and sensible empirical body of research that has only grown more persuasive. Autogynephilia, and its contrast with a second kind of transsexualism, clarifies the puzzling claims of some natal males who were seemingly very masculine men before changing sex, often claiming they’d always been “women trapped in men’s bodies.” By the theory I believe, and wrote about, there are exactly two reasons why men ever become women. The more conceptually familiar

and understandable type, homosexual male-to-female transsexuals, includes those who were obviously feminine from a young age and grow up sexually attracted to men. Autogynephilic males were not noticeably feminine boys, and they are mainly attracted to women.

One important complication is necessary to understand the subsequent controversy over my book: Some transwomen I believe to be autogynephilic dislike and reject the theory. There are at least two reasons why. First is sexual shame and fear of rejection. They do not want others to believe their decision to become women is at all erotically motivated, because they expect this will lead to rejection. The second, deeper reason is the intrinsic conflict between belief in the theory of autogynephilia and the desire to think of oneself as like women. Although some males I believe to be autogynephilic violently deny that they are, many others not only recognize themselves in the theory but are thankful, finally, to understand their condition. And in cases who disagree with my judgment that they are autogynephilic<sup>2</sup>, denial is often unconvincing.<sup>3</sup>

The first section of my book is about boys who will become gay men, the second about gay men, and the third about the two kinds of male-to-female transsexuals. I wrote the third section first, during the late 1990s and used these chapters in teaching. They were linked on my website. I had correspondence from transgender persons reflecting a variety of reactions, from approval to rage.

I was unprepared, however, for the nuclear reaction beginning with distinguished computer scientist and transwoman Lynn Conway's call to arms in April 2003. Conway sent out a mass email, presumably primarily to other transwomen, comparing the book to "Nazi-like propaganda films about Jews in World War II." The general problem, she said, was that

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<sup>2</sup> The best supported evidence provides the following rubric to distinguish the two types of male-to-female transsexuals: Those exclusively attracted to other males are of the homosexual subtype. All others are autogynephilic. In order to understand why, you'll have to read.

<sup>3</sup> Of four transwomen who led the campaign against my book, three had clear evidence of autogynephilia: Anjelica Kieltyka (whom I wrote about as "Cher") was very open about erotic cross dressing since adolescence, as well as wearing fake breasts and vulvas during autoeroticism. Economist Deirdre McCloskey wrote about her long history of erotic cross dressing (and her lack of a feminine history) in her autobiography (McCloskey, 1999; I hasten to add, because McCloskey has previously threatened to sue me, that I am not diagnosing her, because autogynephilia is not a diagnosis. It is a theory of motivation, and it is more consistent with McCloskey's history than any other theory of transsexual motivation.) An email from 1998 from Andrea James stated that she "readily admit[ted]" to her own autogynephilia (Dreger, 2008). Only computer scientist Lynn Conway has never publicly admitted to erotic cross dressing or autogynephilic identification.

the book “paints transsexual women as deviant, bizarre, pitiful figures and never shows the diverse reality of our true lives.” She announced an investigation into the publication of my book, linked to a webpage that eventually became massive. Perhaps the key moment occurred that summer, when Conway traveled to Chicago to meet with several transwomen I’d written about pseudonymously and was still friendly with. That changed immediately. During the next two years Conway and collaborators tried to ruin my life. Early on, I thought they might.

Conway et al.’s orchestrated attacks on my book were so multifarious, I cannot not do them justice here. To give you a flavor, though, they included accusations that I conducted scientific research without ethical oversight, lied to vulnerable transwomen to get their cooperation, had sex with a transsexual research subject, practiced clinical psychology without a license, expressed my own racist opinions in the book, and fabricated the ending of the book (which pertained to the outcome of one of the individuals I wrote about).

All these accusations were false, but the one that affected my life the most requires a bit more explanation. I did in fact interview many people for my book without getting prior approval from my Institutional Review Board (i.e., the university bureaucracy where scientists are required to get approval before proceeding). I did so because I never considered writing a popular science book illustrating ideas about transsexualism and homosexuality with anecdotes about real people to be research. Conway and collaborators filed formal charges at my IRB, and Northwestern University took them quite seriously, launching an investigation that lasted more than two years. Although prior to this controversy I was unfamiliar with the federal definition of “research” requiring IRB approval, my instincts ultimately turned out to have been correct. My book did not constitute original research.

The various well-timed accusations kept the controversy in the national news, especially the *Chronicle of Higher Education*, where the reporter Robin Wilson delighted in the scandal, which she knowingly misrepresented for maximum shock value<sup>4</sup>. Oddly, Stacy McCain (who’d broken the story attacking my research as government waste) teamed up with transwoman Lynn Conway (the latter as a key source) to attack me in an article in the

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<sup>4</sup> (Dreger, 2008)

*Washington Times*, this time for wasting government money on research “to exploit and defame transsexual women in the name of science” (McCain, 2004). My situation temporarily bonded these natural enemies.

### **What It Was Like**

It was excruciating.

Again, I experienced a sudden fall, this time from excitement and pride at publishing a good book to anxiety and embarrassment about my situation.

Most of my departmental colleagues were supportive, and none were openly critical. Some were afraid, however, and with reason. Those most closely associated with me were attacked creepily on the websites dedicated to my infamy. I wanted everyone to see my predicament strictly as a naked attempt at suppression of ideas, but not everyone did. Some focused more than I liked on the issue of whether I had committed a punishable breach by not getting IRB approval for my book-related interviews. Others expressed sympathy for the transwomen inadvertently hurt by my book. I remain incapable of feeling sorry for Lynn Conway, despite the fact that the ideas I wrote about have caused her great angst.

The worst part was my concern about my job. After Northwestern University decided to conduct a formal investigation of some of the accusations, I retained an attorney who specialized in academic misconduct. I urge anyone under investigation by a university to do so. She conferred with Northwestern’s attorneys, updated me, and reassured me to the degree she could. She knew the specific legal issues and taught them to me.

But she could not honestly tell me that she knew everything would be fine. I started receiving envelopes stamped “Personal and Confidential” shoved under my door before I arrived at my office. It became aversive to come to campus, for fear of receiving yet another formal letter. Some of these detailed the specific charges for which I was to be investigated. Others requested information (“Please provide the Committee....”). Others detailed the processes I would undergo. Some mentioned possible penalties if I were found in violation, ranging from remedial training to loss of tenure. Although I did not think it plausible that I would be fired, the range of outcomes was discomfiting.

Although the Northwestern investigation lasted a mere 2.5 years (!), the effect on my morale lasted longer. Some of these effects were regrettable, including a temporary diminished passion for my job and even my research. Realistically, this controversy made it unlikely I would ever be hired by another university. What university wants the kind of publicity I generated? Another effect was positive, though. This was an antifragile experience for me. The mob had not killed me, I still had my job, and so I got stronger in one important way: I began to worry less about the opinions of people who didn't know me or the truth of my predicament. Why should I agonize over strangers reading incendiary false accusations against me? This was obviously a psychologically healthy adjustment to my predicament. But it also has made me even more likely to take positions I believe are well supported by evidence and argument, even if they are unpopular.

The bright spot for me in this episode was my good fortune in meeting Alice Dreger, who conducted a thorough examination of the controversy. She first published her findings in a lengthy scholarly article (Dreger, 2008), later summarized in her fine book, *Galileo's Middle Finger* (Dreger, 2015). Dreger exonerated me of most charges (with exceptions including insensitivity, in her opinion), and this was tremendously validating. It hastened my recovery by years.

## Broader Issues

One important issue this episode exemplified is the potential use of IRBs to attack research for political reasons. One of my primary attackers, the well-known economist Deirdre McCloskey, had been on her institution's IRB, and it was her idea to attack me this way<sup>5</sup>. It was very effective. IRB-related complaints put universities at risk. And IRBs have vastly increased the kinds of scholarly pursuits that require IRB approval and oversight (Schrag, 2010). I was part of the academic generation in which this change occurred. When I arrived at Northwestern, IRB approval was necessary, and sometimes changes were

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<sup>5</sup> McCloskey identifies as a libertarian. It might seem that libertarians would oppose regulations that even many non-libertarians believe are unnecessary and onerous. She also was involved with filing charges against me for "practicing psychology without a license" for writing letters of support for transwomen so they could get sex reassignment surgery. These letters, written without compensation, specified that I was not a licensed clinical psychologist but an academic expert. Most libertarians dislike licensing requirements and would scoff at the idea that people should be punished for giving someone a letter for free.

requested in initial submissions. But approval was quick and the application process was not onerous. And I doubt that many academics in 1989 would have assumed that writing about people one knows in a popular science book in order to exemplify scientific ideas requires IRB approval. This changed during the late 1990s due to several high-profile cases in which IRB rules were apparently violated and the federal government temporarily froze research funding for entire universities. Thus, attacking researchers through IRBs became an effective and attention-grabbing tool. It certainly was with me. The legal scholar Philip Hamburger has argued that IRBs are by nature and certainly by experience tools of censorship (Hamburger, 2005).<sup>6</sup>

Another issue unique to this controversy, compared with the two others I write about here, is the role of identity politics. Despite the various specific accusations made against me that instigated stressful investigations, the transwomen who attacked me did not try to hide the real reason for their attack: perceived insult to their identity. In particular, they disliked the idea that their gender identity was erotically motivated, rather than reflecting exactly the same factors that cause female gender identity in natal women.

Calling me transphobic and Nazi-like was an effective way to rally certain troops, especially autogynephilia-denying transwomen. But not all autogynephiles are in denial. It is important to remember that many entirely acknowledge this motivation and are happy to have it openly discussed in a nonjudgmental way, as I did in my book. I know this because of private correspondence I received regarding my book—and I have received quite a bit. I received slightly more messages praising than condemning my discussion of autogynephilia from transgender persons. It is impossible to know what percentage of transwomen are in denial of versus in agreement with the idea of autogynephilia. My attackers managed to convey the impression that almost all transwomen reject autogynephilia as false and stigmatizing. They achieved this, in part, because for poorly understood reasons, autogynephilia is associated with sophisticated and determined use of computers, including the Internet. This was before Twitter, but these transwomen were masters (or if you will,

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<sup>6</sup> The issue whether merely talking to people should ever require approval from Institutional Review Boards is one I hope will be reconsidered someday. That said, Northwestern's current IRB has been reasonable and cooperative with me.

mistresses) of Internet strategies available in the early 2000s. I believe they were able to give the impression of vastly greater numbers than actually existed. I have given several talks about my book on autogynephilia in which hostile transwomen might have been expected to attend in protest. There has never been more than a small handful, and usually there were none. Anti-autogynephilic transwomen were able to convey the impression that their attitude was universal by intimidating autogynephilia-endorsing transwomen into silence. The cruelty that denying autogynephiles displayed towards identifying autogynephiles was breathtaking. To this day, even prominent pro-autogynephilia transsexuals mostly write under assumed names and are careful to protect their identities. The suppression of autogynephilia has been especially effective in the realm that matters most: the clinical management of gender dysphoria. Certainly, the best clinical decisions depend on honest and accurate case conceptualization. This has been actively discouraged by autogynephiles in denial. I also worry whether universities, who are currently all about transgender, will be open to hiring scholars who study autogynephilia.<sup>7</sup> Without autogynephilia, we cannot understand the world of transgender phenomena.

The other group who responded positively to the use of identity politics was the Left. I was, for example, investigated by the Southern Poverty Law Center, which accused me of being part of an intellectual cabal that “tries to turn back the clock on sex, gender and race using eugenics and controversial genetic theories” (Dreger, 2008). The investigation was another prompted by the transwomen trying to ruin my life. The evidence for these particular charges was my participation in a Listserv begun by journalist Steve Sailer to discuss aspects of “biodiversity,” including sex, gender, and race. Many fine, heterodox, minds were on that Listserv, and I am proud to have been among them. The idea that the SPLC should attempt to discourage membership on private email lists because it disapproves of topics discussed on them is representative of what the SPLC has become.

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<sup>7</sup> I will have some information about this soon, because my graduate student is now on the academic job market.



I have had other, less explosive, controversies related to identity politics during my career.<sup>8</sup> All have involved hostility from the Left.

### **Controversy 3: “Live Sex Demonstration”**

By 2011 my psychology class “Human Sexuality” was the most popular course at Northwestern University, enrolling about 600 students every winter term. My lectures were highly substantive (Bernstein, 2011). A common complaint on course evaluations—one that made me proud—was that the course was “too scientific.” But a separate component of the class that also contributed to its notoriety was a series of after class events. These events most often comprised speakers recruited from outside Northwestern, although there were also a few films. The speakers included a variety of persons relevant to class material. In the past, these had included a panel of gay men (who answered all questions about their sex lives), male-to-female transsexuals, a drag queen, a sex offender who had been surgically castrated and served a prison sentence, a dominatrix, a couple who engaged in swinging, an expert in sexual pleasure, and a sex therapist, among others. These events were entirely optional, and exams did not refer to material from them. My goals for these speakers were that they would be informative and engaging.

On February 21, 2011 I was to lecture on the physiology of sexual response, and the after-class panel was a group of “Kinky people.” Near the end of my lecture I addressed the topic of “female ejaculation” and told the class that that phenomenon was controversial with respect to whether it actually occurs. While I said this, the panel of speakers arrived. When I finished my lecture, I invited the speakers onstage and asked students who were not going to stay for the event to leave during the next five minutes. When the four speakers came onstage, their leader told me that they had overheard my remarks about female ejaculation, that one of the women was capable of female ejaculation, and that they would like to use a

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<sup>8</sup> For example, in 2005 my lab published a paper showing that the sexual arousal patterns of bisexual-identified men looked more like those of homosexual men than what we would expect of bisexually-oriented men (Rieger et al., 2005). This research was widely denounced by those offended on behalf of bisexual men.

sex toy on her to show the class what female ejaculation looks like. I had not anticipated anything like this request. I hesitated briefly and said “okay.”<sup>9</sup>

I assume most readers doubt my judgment and perhaps my sanity. Why did I agree to allow an explicit live sexual demonstration to occur in front of my students? In order to prepare for my lecture I had recently read the popular science book *Bonk* by Mary Roach (2009). Roach details some of the moralistic attempts to suppress research and teaching about sexuality during the twentieth century. These accounts angered me, and they were on my mind when I made this quick decision. On the one hand, I was well aware that such a demonstration would be highly unusual and would outrage many socially conservative people if they ever found out (but I doubted they would). On the other hand, I asked myself whether there was any legitimate reason why the demonstration should not happen. I did not believe anyone who voluntarily witnessed it would be harmed. I also thought this was an opportunity to model a rational, non-reflexive, non-negative approach to sexuality.

When the class reconvened after the five-minute break, I told students what the panel would do. I warned that they should leave if the demonstration might be upsetting, or if they didn’t want to see it for any reasons. I repeated this warning several times. Thus, I had an opportunity to change my mind, but I did not. During this interval I primarily felt anxious. I have little memory of the actual demonstration, which was fairly brief. (I later read that it lasted three minutes.) I was relieved when it ended. The panel of speakers then conducted a more conventional presentation in which they talked to students and answered their questions for about an hour. Students enjoyed their presentation.

I worried I would hear from upset Northwestern administrators, but I did not. After a few days I believed that the event was over, as I thought it should be. Then I received an email from a reporter from the campus paper, the *Daily Northwestern*, asking for an interview about what happened. I ignored it. I received another one, which I also ignored, and then finally the reporter left a voicemail asking for my comment for an article that would appear in the paper. I did not return the call. At that point I emailed my Dean, explaining

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<sup>9</sup> He also said they had brought some equipment to engage in “fire play,” and although I wasn’t sure what that meant, I immediately said “no, we’d get in trouble.”

what happened but insisting that I did not wish to respond in a way that encouraged sex negativity. I did not hear back from the Dean.

The news story appeared a week after the incident and was about as good as I could expect (Svitek, 2011). While acknowledging the controversial nature of the event, the article began: “Northwestern students and administrators are defending an explicit after-class demonstration involving a woman being publicly penetrated by a sex toy on stage in the popular Human Sexuality course last week.” Northwestern also released the following press release: “Northwestern University faculty members engage in teaching and research on a wide variety of topics, some of them controversial and at the leading edge of their respective disciplines. The university supports the efforts of its faculty to further the advancement of knowledge.<sup>10</sup>” That both seemed correct and made me proud of Northwestern.

Those warm feelings didn’t last long. Soon after the *Daily Northwestern* article hit the wires, the mainstream media picked it up. After teaching Human Sexuality on March 2, I saw that I had received a voicemail from *Fox News*. I did not call them back and quickly left campus to meet someone. Shortly afterwards campus erupted with reporters aggressively chasing down students to ask for witnesses. Around this time, Northwestern President Morton Schapiro said in a press release that he was “troubled and disappointed” by the incident, that it “represented extremely poor judgment by our faculty member,” and that he was launching an investigation.

Perhaps relevant to understanding all that followed are several statements I made. First, after the incident but before the *Daily* article, during the next Human Sexuality class, I began the lecture discussing potential fallout. I ended this discussion by saying: “Sticks and stones may break your bones, but watching naked people on stage doing pleasurable things will never hurt you.” After the story broke, I released two statements on my website, the first an explanation of what happened, which included:

Do I have any regrets? It is mostly too early to say. I certainly have no regrets concerning Northwestern students, who have demonstrated that they are open-minded grown ups rather than fragile children. I have not

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<sup>10</sup> I am not certain whether he signed the press release, but Dean of Students Burgwell Howard, now at Yale, defended me from numerous angry parents, with no clear incentive to do so except for academic freedom. He is another person in this stressful episode to whom I will be eternally grateful.

enjoyed the press, because I have assumed that reporters will sensationalize what happened and will not provide my side. (A welcome exception to this, mostly, was the *Daily Northwestern* article.) I suspect that my Dean is not enjoying this publicity, and I do not like displeasing my Dean.

To the extent that this event provokes a discussion of my reasoning, above, I welcome it. I expect many people to disagree with me.

Thoughtful discussion of controversial topics is a cornerstone of learning.

I began my second statement in a conciliatory manner: “I regret allowing the controversial after class demonstration on February 21<sup>st</sup>. I regret the effect that this has had on Northwestern University’s reputation, and I regret upsetting so many people in this particular manner. I apologize.” But I also revealed my exasperation with my critics:

The demonstration was relevant to a topic relevant to my course, it occurred after class in a completely voluntary setting with ample information about what would occur. It involved an act that although unusual, had no harmful effect on anyone. Observers were Northwestern students legally capable of voting, enlisting in the military, and consuming pornography, as well as making many other serious decisions that legal adults are allowed to make.

Those who believe that there was, in fact, a serious problem have had considerable opportunity to explain why: in the numerous media stories on the controversy, or in their various correspondences with me. But they have failed to do so. Saying that the demonstration “crossed the line,” “went too far,” “was inappropriate,” or “was troubling” convey disapproval but do not illuminate reasoning. If I were grading the arguments I have seen against what occurred, most would earn an “F.” Offense and anger are not arguments.

Northwestern administrators did not contact me directly, only through my Chair. And it was clear that they were displeased and wanted me to shut up, as soon as possible. At the time, I was unnerved by their silence, interpreting it as preparation for my firing. I am certain they at least explored this possibility. As public outcry grew (with numerous emails rebuking me and a smaller but still appreciable number advising me to steer the course), I became scared. I had certainly not thought at the time of the incident that my job was at risk. Now I did. Northwestern students created an online petition in my defense (“Online

petition, 2011), and more than 1,000 students signed. This was immensely reassuring, and I will always remember it gratefully.

Knowing people who knew important people, I heard rumors that sounded likely true. These included the fact that several of Northwestern's most important donors were furious and wanted me fired. In 2011 alumnus and comedian Steven Colbert gave the university-wide commencement speech, and naturally remarked on the incident. When his speech was uploaded to the Northwestern website, these remarks were excised.

Despite my concern for my job, however, I never was officially contacted or formally punished by Northwestern. (Obviously, my raises and status among administrators were affected.) The only official actions related to the fate of my Human Sexuality class. Northwestern conducted an "investigation" that included both university administrators and parents of Northwestern students. They interviewed students and read my course evaluations. Their report—if there is one—is secret, but its most important result was the decision not to offer the class the next year. As I have noted, the class was the most popular course at Northwestern. It received good evaluations (and I have been told the course investigators noticed the high number of comments about its challenging content). It had earned me a spot on the student-elected Faculty Honor Role three times, the last time after that final offering of the class. During the awards ceremony—I am told, for I was not there—faculty gave me an ovation when my name was announced. But Human Sexuality has not been offered since.

Simultaneous with the deletion of Human Sexuality came the announcement of a new course "Sexual Subjects: Introduction to Sexuality Studies," first offered by popular professor Lane Fenrich in the Gender and Sexuality Studies Program (formerly Gender Studies; Black, 2012). The obvious hope and expectation was that this course would replace mine in students' hearts and minds. I do not think this happened<sup>11</sup>, but even if it had, the two courses contained utterly different content. For example, mine included all the following topics, among others: ways in which men and women differ in their approach to sex and mating, guided by evolutionary theory; sexual orientation and its causes; gender identity and its causes; childhood sexual abuse (including the controversial but correct idea that it is

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<sup>11</sup> The course has never had more than 150 students.

overrated as a cause of harm); rape (I did not suggest rape is overrated in harmfulness, but I did address false accusations, which occur at a non-trivial rate); pedophilia (I tried to help students understand and sympathize with the pedophiles' predicament, without endorsing child-adult sex); and sexually transmitted diseases (which in the 1990s was my most controversial lecture, because I told students, correctly, that heterosexual college students were at extremely low risk for HIV). I believe most of these topics were both interesting and useful to students in living their lives. I am confident that none of them was covered in a similar manner in the new course in Gender and Sexuality Studies.

### **Lessons from the Third Controversy**

Let me begin by acknowledging that my decision to allow the classroom demonstration was a mistake, as were my various subsequent public pronouncements. Only a few days after the public outcry following the incident, I deeply regretted my involvement, and I have regretted it ever since. Let me also be clear about my reason: no conceivable lesson from the classroom demonstration was worth the eruption that followed, resulting in the discontinuation of a good, vital class. What important lesson could have been conveyed by the demonstration? How women ejaculate (or not; the demonstration failed in this regard, apparently) is a slight curiosity, certainly not worth the fallout of the demonstration. That voluntarily watching a live sex act on an American campus is harmless is true, but this lesson is not nearly as valuable as what was lost. Nor was it useful to antagonize conservative alumni, or even socially conservative commentators in the media. Of my three controversies, this is the one I wish I had avoided. It occurred because of a lapse in judgment rather than during principled pursuit of unpopular truth. If I did not want to be known primarily as "the guy who allowed the sex demonstration in his class"—and I did not—it was hardly surprising that Northwestern administrators disliked the university's association with the incident.

Despite my intense regret at causing this controversy, I continue to believe that my reasoning at the time (including everything I wrote in my statements) was mostly correct. The sex demonstration was not intrinsically harmful, and there was no rational reason why

anyone should have cared. Of course, counting on rationality in all situations is foolish.<sup>12</sup> Still, I made a mistake while teaching a class because I was trying to do the best I could. Academic freedom must also apply to well-intentioned mistakes, or we will become cautious sheep.

### Some General Lessons

The most obvious lesson from the history I've just provided is the importance of academic tenure. Without it, I certainly would have been fired for the live sex demonstration. I suspect I would also have been let go after the transsexuals' various accusations. Of course, many people outside the academy (and perhaps some within it) will count my career as an argument *against* tenure, but they are incorrect. I have pursued knowledge about sexuality where it led. I have been willing to offend both the Right and the Left. I have found and taught knowledge about important things. I have been fortunate to have my tenured position, and those interested in the things I study have been fortunate too.

The existence of organizations such as FIRE and AAUP were also likely crucial to my survival. After the live sex demonstration a sympathetic acquaintance who is a constitutional lawyer told me that the most powerful reason a university would protect (or at least not fire) someone in my predicament is to avoid both outrage among faculty who care about academic freedom and disapproval by organizations that monitor academic freedom. FIRE and AAUP do good work by their actions, but they also do good simply by existing.

Relatedly, I believe that I have generally been treated fairly by Northwestern University, the place where I hold tenure. I have certainly been ambivalent at times. Being investigated by one's university provokes some negative feelings, but one needs to ask realistically whether another university would have done better. I do not know of a university that would have behaved more favorably towards me during any of the three controversies I have remembered here. I know that Northwestern has been criticized for

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<sup>12</sup> I believe it is irrational for anyone to become angry because someone draws a picture of a religious figure, but if I had allowed after class speakers to draw nude pictures of certain religious prophets, this would have created a terrible situation.

actions concerning Alice Dreger and Laura Kipnis (Morey, 2017), and I agree with those criticisms. But I have had less cause to complain.

### **The Sexual Minefield**

This is not to say that universities are addressing sex-related controversies well. They are not. Some of our most vexing controversies, both in the past and in the present, have concerned sexual topics whose discussion can benefit from relevant knowledge. Recent cases include sexual assault accusations under Title IX, transgender bathroom access, whether minors who identify as transgender should be allowed to have medical procedures to transform their bodies, sexual abuse by Catholic priests, #MeToo, reliability of reports of sexual assault, and the effects of childhood sexual abuse, among many others. I don't believe many university-based researchers have done a good job providing accurate and useful information about most of these.

For example, it is interesting and concerning that the best recent analyses of the literature on sexual assault (including prevalence estimates of assault and false accusations) have come from journalists, especially Emily Yoffe (2017) and Stuart Taylor (although Taylor collaborates with K. C. Johnson, who is an academic; see Johnson & Taylor, 2017), rather than from sexual scientists. This partly reflects the fact that the topic is an ideological minefield. In the Academy, it is too often ideologues who are drawn there.

Another very recent example concerns medical transition of transgender adolescents. Transgender has been an immensely popular topic during the past few years, and the progressive view is that transgender identifying individuals should be encouraged to change sex as early as possible. But it has become clear that there is an epidemic of adolescent girls who do not fit the previous well-recognized transsexual pattern. Instead, they show evidence of social contagion of the false belief that they are transgender. Despite this concern, these girls can receive testosterone injections (permanently deepening their voices and also causing some other partially reversible changes) immediately if their parents agree, and at age 18 if their parents disagree. The researcher who published the first academic article on this (Littman, 2018) is an adjunct professor at Brown University. Brown publicized the publication briefly before activists successfully pressured the university to remove it from its



webpage. In contrast, researchers conducting transgender research reaching progressive conclusions (that it's great for transgender children to socially transition early) are darlings (e.g., Mervis, 2018). These differing reactions have nothing to do with the quality of evidence; they reflect current ideological preferences.

The most consistently explosive issue across the past several decades has been the effects of child-adult sexual contact (or childhood sexual abuse: CSA). There is one allowable answer: CSA is the worst thing, short of murder, that can happen to anyone. The two most serious problems with this belief are first, that most data don't support it, and second, that the belief causes more harm than good. In a controversy dwarfing any of mine, psychologist Bruce Rind published a very thorough quantitative review of the correlates of CSA among college students, in one of psychology's best journals in 1998 (Rind, Tromovitch, & Bauserman, 1998). The main conclusion was that differences in psychological functioning between respondents with and without childhood sexual experiences with adults were small. The story first reached the non-academic world in attacks by conservative radio host Dr. Laura, who accused the authors of promoting pedophilia, among many other things. Eventually, the study was condemned as "severely flawed" by an act of the U.S. Congress: 355 votes for to 0 against (with 13 abstaining; Lilienfeld, 2002). It was not severely flawed, however, and its general findings have been replicated by others.<sup>13</sup> When I taught about the Rind study in Human Sexuality, I often received emails from students who'd had early sexual experiences with adults. These students were uniformly relieved that their lives had not necessarily been destroyed, in contrast to the impression they had been given all their lives.

### **Political Diversity Is Not the Solution**

The Rind controversy is perhaps the best exemplification of the fact that in some problem areas for academic freedom, political diversity won't help much. It is difficult to think of a more politically diverse body than the U.S. Congress. The nearly unanimous vote

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<sup>13</sup> One of the best presentations consistent with Rind et al.'s findings was given by psychologist David Finkelhor in the wake of the Jerry Sandusky case at Penn State. Finkelhor is perhaps the most respected scholar on CSA, and during the 1990s he was associated with the view that CSA is gravely harmful. But in the 2012 talk, available on YouTube, he presents conclusions generally consistent with Rind et al.'s. (See: <https://www.youtube.com/watch?v=G-fViw7Uuxs>)

against Rind et al. reflected uniform intellectual intolerance of an idea rather than politically balanced deliberation, however. Although there are areas of sexual controversy that can rightly be blamed on the Right (mindless attacks on pornography) or the Left (reflexive acceptance of any claim by a favored sexual minority), other important issues needing sexual science are contentious because of the hesitation to consider certain uncomfortable ideas likely to be true. This is nothing new—the Rind controversy occurred nearly two decades ago. Nor is it confined to sexual issues. Matters of racial inequality are similarly fraught. The fear of uncomfortable ideas—or the fear of being attacked for studying and discussing them—is a powerful deterrent to knowing some important things. The good news is that unlike political diversity, which is unlikely to return to the university anytime soon, the willingness to engage uncomfortable ideas is already there, albeit latent. Many of my uniformly liberal colleagues are willing to discuss controversial ideas about sex and race in private. But there is currently no forum to get people talking openly about these things. To the contrary, open discussion is feared and discouraged. The contemporary university dislikes controversy, discomfort, and takes great pains to avoid even unreasonable offense. I do not know the solution to this problem. But I am sure that solving it is more important, and more plausible, than increasing the number of Republican-voting faculty in the social sciences.

### **Researching and Teaching Sex**

Sex is important, and sex is interesting, and sex will be studied and taught. The question is where and how. The current trend is to ghettoize sex in “Gender and Sexuality Studies,” as has happened at my university. Sex can also be studied in medical schools and hospitals, because sexual health is usually inoffensive.

While I don’t want to discourage any academic department from studying sex, neither Gender and Sexuality Studies nor medical schools are likely to provide much information useful to understanding our most controversial sex-related issues. Gender and Sexuality Studies are highly ideological, and generally more of the humanities than of science. Thus, they are not well-suited to discover things. And what things are said to be learned are highly predictable in advance. If Gender Studies (from which sprung “Gender and Sexuality Studies”) has contributed an important true idea, I do not know it. And sex research in

medical schools is generally highly applied, targeted to receive maximum funding. Some hospitals outside the United States have become important centers for the study of issues such as gender dysphoria or sexual offending, both of which can be controversial. For some reasons, however, this does not happen in the U.S.

Teaching goals in Gender and Sexuality Studies emphasize identity politics (while never challenging identities of favored minorities) and “problematizing” scientific approaches to studying sexuality. What they do not emphasize is an open-minded search for truth. (I am not sure if the word “truth” is allowed there without scare quotes.)

I have not asked (nor been asked) to teach Human Sexuality since 2011, believing early on that I would be turned down, and gradually getting used to my life without teaching the course. Writing this essay, however, has reminded me what Northwestern students need but are not getting. Thus, I intend to send the essay to my Chair, Dean, Provost, and President with a request that I teach the course again next academic year. I’ll keep you posted.

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## How to Change University Policy: A Case Study

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In his classic novel, *1984*, George Orwell create the idea of “doublethink,” the process by which the all-powerful state required people to hold simultaneously two opinions which cancelled out, knowing them to be contradictory and believe in both of them.<sup>1</sup> This is usually regarded as a wonderful literary device, but one with no referent in reality because it is obviously impossible to believe both halves of a contradiction. But, in fact, it is far from impossible to hold contradictory beliefs. People do it all the time. The trick is simple not hold them simultaneously. People have no difficult believing one thing at one time and its exact opposite at another.

This is equally true of institutions such as universities. Universities have no difficult making contradictory commitments merely by making the first at one point in time and the second at another. Indeed, it is even easier for universities to make such inconsistent commitments because they are often made by different people who are not paying attention to what each other is doing. By way of illustration, the members of the university administration who assert a robust institutional commitment to freedom of speech are usually not the members of the administration who supervise the university’s bias reporting board. As a result, it is not unusual for universities to be firmly *and honestly* committed to incompatible objectives.

This observation is not necessarily cause for despair. *1984* imagined a bleak future in which communication technology enabled the state to maintain oppressive control over individuals. But, in fact, the advance of communication technology has undermined the state’s ability to effectively control its citizens as demonstrated by Chinese dissidents’ use of fax machines during the Tiananmen Square uprising and protesters’ use of cell phones during the Arab Spring. Similarly, universities’ lack of an integrated governing intellect can negatively result in them making inconsistent commitments, but it can also have the positive effect of greatly facilitating efforts to reform university policy.

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<sup>1</sup> George Orwell, *1984*, 32 (The New American Library 1949).

What follows is a case study of how to use the lack of integration within the typical university administration to produce positive change to university policy. Over the course of several years, I have been able to motivate significant changes to the official policies of Georgetown University. Specifically, in the past six years, I have been able to produce changes to the university's faculty hiring and freedom of expression policies, and I am currently in the process of working (apparently successfully) to change its harassment policy. What follows is what I learned from this experience.

## **II. General Prescriptions**

Many academic activists are not willing to devote the time and energy required to actually change the policies of their universities. This is perfectly understandable. Ideological grandstanding and publicly decrying the fallen state of the academy are pleasurable and have much lower opportunity costs than working within a bureaucracy to effectuate change. But for those who are genuinely interested in changing university policy, I can distill my experience of the past six years into seven general prescriptions.

### **1) Have patience.**

In each case in which I have been involved, it took two years or more to produce a major policy change. I can recall that during the process it seemed to take an unreasonably long time to make any progress. Yet, when the process was complete, I marveled at how quickly the change had come.

If your goal is to change university policy rather than to obtain an impressive sounding but practically meaningless faculty declaration, then you are pursuing a long-term goal. You are trying to make a change that will potentially remain in effect for decades. It may take two years to get the proposal through the myriad bureaucratic levels—faculty committees, student review boards, administrators, provost, university president, and Board of Trustees, but that is a reasonable temporal price to pay for a long term payout on your investment.

### **2) Be willing to do boring work.**

Changing university policy is not intellectually engaging work. It carries none of the intellectual pleasure of resolving a complex problem in your field of academic expertise or publishing an article that bring enlightenment to the benighted academic masses. It consists mostly of saying the same painfully obvious things time after time to different people, and often to the same person. It means serving on committees that frequently discuss irrelevancies and require you to listen to two hours of discussion to make five minutes worth of progress. It means constantly addressing objections derived from exquisitely specific counter-examples designed to show that your proposal should not be adopted because it will not produce the perfect utopian outcome. It means that after the passage of weeks or months, you will have to re-convince those that you previously persuaded who have forgotten that they ever agreed with you. In short, it means spending many hours engaged in mind-numbing repetition, why, by the way, underscores the importance of prescription 1 above.

### 3) Be scrupulously non-ideological

Your motivation for trying to change university policy may be ideological, but if so, never let it show. Professors frequently are ideologues, administrators almost never are. The amount of openness and cooperation you receive from administrators and faculty committees is likely to be inversely proportional to the extent to which you appear to be on an ideological crusade. Note that this implies that the resistance you encounter is almost never ideological in nature. Always keep in mind that you are fighting bureaucratic inertia, not evil-minded socialists, neoliberals, progressives, conservatives, or whatever group you believe to be the intellectual nemesis of truth and justice, and...(you know).

### 4) Enlist allies by advancing their interests and agenda.

You will need institutional allies to move your proposal through the university bureaucracy. You are unlikely to enlist these with the brilliance of your argument for your proposal. Administrators are not only rarely ideologues, they often do not possess the highest degree of analytical reasoning ability. However, if you can show them how your



proposal helps them accomplish their goals or fulfill their institutional roles more effectively, they will readily sign up to help you achieve your goal.

5) Get used to compromising.

We all begin the process knowing precisely what the proper outcome should be. Insisting on achieving it is a recipe for failure. Once you identify the core principle that you are trying to achieve, be ready to compromise on everything else. Saying things like, “I see your point,” “you are right,” or “let’s go with your idea” makes you seem reasonable to others. More importantly, when others make a contribution to the proposal, they take ownership of it and become invested in its success.

6) Always act for the good of the institution.

Some members of the university community and administration may share your policy reform goals. Many will not. But people serving on university committees and in administration positions share one goal. They are interested in advancing the good of the University. If not, they would not be in those positions. They are much more receptive to proposals that will enhance the status of, protect, or otherwise benefit the University as a whole than those that appear to advance any parochial interest or abstract conception of justice.

7) Never take credit.

You are attempting to reform *University* policy. You want your reform to be viewed as the considered, impersonal action of the University, not the machinations of some crackpot professor (or, in my case, some crazy libertarian). Progress should always be attributed to whatever committee, board, task force, or other group that you are working within. The more broadly you distribute credit, the more broadly supported the reform appears. (Please do not share this essay with my colleagues back at Georgetown.)

### III. Case Study: Hiring Policy

Prior to 2013, faculty hiring at Georgetown University was contained in a memorandum prepared by the Provost's office, which by its own terms was "to be shared in its entirety with department chairs and other faculty with responsibility for faculty searches and hiring in your schools so that all search committee chairs will begin work with the benefit of this guidance."<sup>2</sup> In the first section of this memorandum entitled, "Introduction and General Guidance," the document states

I approved the recommendations of the 2009-10 Diversity Initiative working groups that we be more deliberate, thorough, and successful in hiring to diversity at every level. Accordingly, we should make clear expectations about the search process for Ordinary Faculty...I look to you to impress strongly on hiring offices that unvarying mantra that **every search is a diversity search**. (Emphasis in the original.)<sup>3</sup>

The second section entitled, "Specific Guidance and Reminders," enumerates "ten key guidelines." The third of these guidelines states, "Every faculty search is a diversity search, and everyone involved in every search has an obligation to think and act on that assumption."<sup>4</sup> This is reinforced in the seventh guideline that required "that the short list (including cv's) of candidates be shared with the Dean and Provost at the time the list is constructed" along with a report demonstrating "genuine efforts to attract a broad and diverse applicant pool," and including "preliminary results as seen from the candidate pool."<sup>5</sup> After reviewing this report, the Dean and Provost "might well send some committees back for further consideration of other applicants in the pool among other remedies before interviews are scheduled."<sup>6</sup>

The memorandum was scrupulously crafted to ensure that it never recommended any action that violated the law. But the memorandum just as scrupulously avoided providing any information regarding what the law governing faculty hiring was. This is significant

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<sup>2</sup> Provost's Memorandum: Ordinary Faculty Searches and Offers, March 5, 2012, page 1 (on file with the author).

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.* at 4.

<sup>6</sup> *Id.*

because almost none of my faculty colleagues had, or have, any knowledge of employment law.

Most of them have a dim awareness of the 2003 Supreme Court decision in *Grutter v. Bollinger* that held that the Equal Protection Clause of the Fourteenth Amendment permits public universities to consider an applicant's race in their admission decisions for the purpose of promoting a diverse student body.<sup>7</sup> But few of them understand that this has nothing to do with whether universities can consider race and gender in deciding whom to hire as faculty. Faculty hiring is an employment decision. Employment decisions are governed by Title VII of the Civil Rights Act, which applies to both public and private universities. And, with the narrow exception of temporary plans designed to remedy "conspicuous racial [or gender] imbalances in traditional segregated job categories,"<sup>8</sup> Title VII does not permit employers to make any hiring, promotion, termination, or other employment decisions on the basis of race, color, religion, sex, or national origin.

Under Title VII, universities may undertake strenuous efforts to assemble the most diverse pool of applicants possible. They may specifically recruit African-Americans, women, and other minorities to apply for faculty positions. But once the applicant pool has been assembled and the selection process has begun—once the search committee begins compiling its list of candidates for further consideration, deciding whom to put on the short list for on-campus interviews, and ultimately, whom to hire—Title VII prohibits any consideration of the candidate's race, color, religion, sex, or national origin.<sup>9</sup>

None of this was explained in the Provost's memorandum. As a result, the message that was being received by search committees was to give hiring preference to women and minorities in the selection process, which was, and is, illegal.

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<sup>7</sup> *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

<sup>8</sup> *United Steelworkers v. Weber*, 443 U.S. 193, 209 (1979).

<sup>9</sup> See *Shuford v. Al. State Bd. Of Educ.*, 897 F. Supp 1535, 1553 (M.D. Ala. 1995). See also *Duffy v. Wolle*, 123 F.3d 1026, 1039 (8<sup>th</sup> Cir.1997). Preferential treatment in the selection process is legally permitted only in the context of an affirmative action plan that satisfies the *Weber* requirements. Preferential treatment in assembling the applicant pool is not so limited. For a more detailed explanation of the legal significance of the distinction between assembling the applicant pool and selecting candidates from the pool, see Kate McCormick, *The Evolution of Workplace Diversity*, 44 *Houston Lawyer* 10 (2007).

I personally observed what I believed to be illegal conduct on three occasions. The first occurred when a search committee that I was on concluded that a white male was the most qualified candidate for the position and sent its recommendation to the Provost for authorization to make an offer. The recommendation was denied on the ground that there was a well-qualified female candidate in the pool. The committee then agreed to recommend the female candidate for the offer, thereby basing its selection on the sex of the candidate.

The second occurred at a meeting of all search committee chairs called by our dean to discuss our diversity efforts and the need to increase the number of female faculty members. During that meeting, one of the search committee chairs sought to reassure the dean by saying, “Don’t worry. We will only bring in female candidates this year,” again indicating that the sex of the candidates would play a role in the selection process.

And the third occurred when a search committee I was on identified four finalists for the position, two male and two female. After interviewing the two female candidates, the deputy dean decided to recommend making an offer to one of them before the male candidates were interviewed. The reason given for this decision was that the deputy dean was not willing to send a recommendation to hire a white male to the Provost.

After the third incident, I came to the conclusion that the University’s hiring policy needed to be reformed to make the law governing faculty hiring clear to all parties. But how could I produce such a change?

### Step 1: Enlist Allies, Be Non-Ideological, Act for the Good of the Institution

Obviously, I needed allies, so I made an appointment with the University Counsel. At the meeting, I asked for instruction on the law governing faculty hiring. She confirmed the account of the law that I provide above. I then described to her the three incidents I had observed, and expressed my concern that if such practices were widespread and knowledge of them became public, the University would be in legal jeopardy. I assured her that my faculty colleagues had no intention of violating the Civil Rights Act, but were acting in ignorance of its requirements. I then reviewed the Provost’s memorandum with her, showing how those who were not legally trained could be misled into thinking that they were being instructed to consider race and sex in the selection process. I ended with the

suggestion that the University's hiring policy be amended to provide the faculty with an accurate account of the legal requirements of the Civil Rights Act.

This approach proved to be effective. I had appealed to her interest, which was to protect the University against lawsuit. I had done so in a non-ideological way, expressing neither support for nor opposition to the University's diversity initiative, proposing only that the faculty be better informed about the Civil Rights Act, which also advanced her institutional interest.

With the University Counsel on board, we next approached the President of the Faculty Senate. This individual was politically liberal and a supporter of the effort to increase faculty diversity, but more importantly, he was 100% committed to the good of the University. He immediately recognized the danger to the University for it to be seen as violating the Civil Rights Act, and worse, to have an official policy that apparently encouraged the faculty to do so. He was easily persuaded that the solution was to amend the hiring policy to ensure that the faculty had a correct understanding of the law.

University Counsel and the President of the Faculty Senate agreed that they would take the matter up with the Provost, and I left things in their hands.

### Step 2: Have Patience, Do the Work, Don't Take Credit

Being naïve, I expected the reform to be quickly implemented. But that was because I had an unreasonable perspective on the matter. Reforming the hiring policy was the only University level issue of concern for me. But for the University Counsel, the President of the Faculty Senate, and the Provost, this matter was one among many issues that they had to deal with. While I thought that nothing was being done, the bureaucratic process was grinding on.

University Counsel and the President to the Faculty Senate had brought the matter to the attention of the Provost's office. Apparently, the Provost was not amendable to the reform proposal, perhaps because he recognized that it would make it more difficult to achieve the desired faculty diversity. However, there was no real way to oppose a proposal to accurately inform the faculty of the requirements of the Civil Rights Act, so the proposal got put on the back burner.

As one academic year waned and another approached, I got back in touch with the University Counsel and the President of the Faculty Senate to remind them that another hiring memorandum would be distributed at the beginning of the fall semester and to ask them how things were going. Their subsequent inquiry apparently stimulated the Provost's office to take some action, and the President of the Faculty Senate eventually forwarded a draft of the revised hiring memo to me. It contained what can only be described as a grudging concession to the reform proposal that included the minimal amount of information to technically comply with the request.

At this point, I finally woke up to the fact that I was dealing with a bureaucracy, not a specific human being with personal interests at stake. For most of the parties involved on either side of the issue, the revision of the hiring memo was one issue among the many that they had to address, and constituted an additional item of uncompensated work. Although this meant that it was unreasonable for me to expect the parties to give their careful attention, it also meant that if I did the work for them and supplied a finished product, they were much more likely to simply accept it.

I responded to University Counsel and the President of the Faculty Senate that the revised memo was certainly an improvement, but that it could still be misleading to those without legal training. I said I had hoped for something more explicit, and then attached a draft of the relevant sections as an illustration. That seemed to do the trick because the next draft I received was pretty much all that I had hoped for when beginning the process.

In the end, the section of the memorandum entitled, "Introduction and General Guidance" 1) no longer included the statement, "I look to you to impress strongly on hiring offices the unvarying mantra that every search is a diversity search," 2) did include the statement "We must work toward diversity by expanding the pool of applicants and attracting the most diverse applicant pool possible, because no preferences based on race, sex, age, religion, national origin, or any other legally protected category may be a fact in selecting applications from the pool or ultimately in the hiring decision itself," and 3) ended with the following paragraph emphasized in italics:

*Georgetown University is committed to increasing the diversity of its faculty in compliance with the requirements of the Civil Rights Act. Accordingly, we require every search committee to use its utmost efforts to assemble the most*

*diverse pool of applicants possible before making any decisions regarding whom to place on the short list, interview, or extend an offer. Once the pool of applicants has been assembled and approved, we require that all subsequent decisions be made without consideration of the applicant's race, sex, age, religion, national origin, or any other factor prohibited by law.*

The third guideline in the section entitled, "Specific Guidance and Reminders," now stated:

We must take steps to produce stronger candidate pools in every regard, and thus to improve the chances of recruiting and retaining the very best and most diverse faculty possible. Everyone involved in every search has an obligation to think and act on this instruction.

*Because we are prohibited from using race, sex, age, religion, national origin, or any other factor prohibited by law as a factor in employment decisions, it is crucial to produce strong and diverse pools to improve the chances of building a diverse faculty. Our goal is hiring that results from the recruitment efforts so resourceful and effective that the natural result of selecting for the best talent is to bring a broader range of peoples and backgrounds to the campus and community. (Emphasis added.)*

And the seventh guideline included the sentence, "Again, no individual selection decisions may be made on the basis of applicants' race, sex, religion, national origin, or any other factor prohibited by law."

At that point, I thanked University Counsel and the President of the Faculty Senate for their help, shut up, and tried to make sure that no one associated the revised policy with me. It was—and I wanted it to be seen as—the well-considered, carefully crafted policy of the faculty and administration of Georgetown University.

#### **IV. Case Study: Speech and Expression Policy**

In the wake of the 2015 campus protests that rocked the University of Missouri and Yale, the faculty of the University of Chicago endorsed the report of the University's Committee on Freedom of Expression that committed the University to maintain the "broadest possible latitude to speak, write, listen, challenge, and learn." Princeton and Purdue quickly followed suit and endorsed their own version of the "Chicago statement." I believed that Georgetown should adopt this statement as well. How could I make that happen?

### Step 1: Enlist Allies, be Non-ideological, Act for the Good of the Institution

While working on the University's hiring policy, I developed a good relationship with the President of the Faculty Senate. I had a great deal of respect for him, and he was me as someone who was genuinely interested in the well-being of the University, not as someone pursuing an ideological agenda. As a result, I felt comfortable contacting him to propose that the Faculty Senate consider endorsing the Chicago statement. In making the proposal, I thought that once the Faculty Senate took up the matter, my work would be done. Instead, the Preside of the Faculty Senate invited me to make the proposal to the Faculty Senate Steering Committee, which served as a reminder that there is no way to change University policy on the cheap. If one really wants to effect change, one must be willing to pay the opportunity costs.

I was uncertain about how to approach the Committee. Over the past several years, there had been a deluge of broadcast messages from the University administration affirming the University's commitment to providing an inclusive, welcoming, and comforting learning environment for students. There undoubtedly were some members of the faculty who valued the ideal of inclusiveness and student comfort more than that of freedom of speech. These were likely to be highly invested in the issue, and hence willing to actively and publicly support measures designed to reduce "offensive" speech. I suspected that the majority of the faculty were supportive of freedom of speech, but I also worried that most would not be concerned enough to become embroiled in a controversial issue or risk being the target of student protects or public opprobrium.

Given this, I offered the Steering Committee two non-ideological reasons to hold a vote on the Chicago statement. First, I pointed out that Georgetown's speech and expression policy had been on the books for a long time, and that the vast majority of Georgetown's faculty had been hired after its adoption and had no personal role in its creation. Indeed, it was not clear that many of the faculty were even aware of the policy. Thus, holding a faculty vote on the Chicago statement would give the University administration a clear idea of the extent to which its faculty supported freedom of speech on campus, and if the statement was approved, provide the administration with faculty support for any potentially controversial actions it took to preserve free speech.



Second, I argued that although as a private university Georgetown is not bound by the strictures of the First Amendment, it is bound by its own commitments. To act with integrity, the University must honor the public commitments it makes to its students and faculty. This implies that the University cannot make conflicting commitments that cannot be simultaneously fulfilled. Currently, the University represents itself as supplying an inclusive and welcoming educational environment for people of all backgrounds. It also represents itself as committed to ensuring freedom of speech on campus. However, the expression of certain ideas can offend some members of our academic community and make them feel unwelcome. This creates a situation in which it is difficult, if not impossible, for the University to live up to both of its representations.

I suggested that a faculty vote on the Chicago statement would resolve this conflict. A vote in favor of the statement would imply that freedom of speech took priority—that the University’s commitment to inclusion and comfort should be understood as a commitment to do everything in its power to create the most inclusive and welcoming environment that it can *short of restricting any student’s or faculty member’s ability to express his or her sincerely held beliefs on any controversial matter*. In contrast, a vote against adopting the statement would imply that the commitment to inclusion and comfort took priority, and that the University’s commitment to freedom of speech was limited by its obligation to ensure its students were not subject to offensive expression. Either way, a vote on the statement would clarify the commitment the University makes to its students and faculty.

The Steering Committee decided not to authorize a faculty vote, but to revise the University’s speech and expression policy to incorporate the commitment to freedom of speech made in the Chicago statement. It then voted to form an ad hoc committee to understand the revision and asked me to serve on the committee. I agreed.

## Step 2: Be Willing to Do Boring Work, Have Patience, Get Used to Compromising, Don’t Take Credit.

Revising the policy took close to two years. First, there had to be agreement among the members of the ad hoc committee on the wording of the proposed policy. This required incorporating language about Georgetown’s heritage and Jesuit tradition into the policy

statement and reviewing the language of the Chicago statement in exquisite detail. Once a draft was satisfactory to the committee was produced, it had to be distributed to various outside parties for review and comment, e.g., the Office of Student Affairs, the standing committee on speech and expression, University counsel, the Office of Institutional Diversity, Equity & Affirmative Action, etc. The committee then had to review and incorporate or reject the comments of these outside parties to produce a final draft policy, which had to be approved by all relevant parties—University counsel, the Vice-President for Student Affairs, the Vice President for Institutional Diversity and Equity, the Faculty Senate, and the University President’s office. If the draft was approved, it would then be forwarded to the Board of Trustees for final approval and adoption.

It would be an understatement to say that this was not a linear process. The third paragraph of the Chicago statement specifies the limits of freedom of speech on campus. (See the Chicago Statement in Appendix I.) This paragraph soon became the longest paragraph in our draft policy. The Office of Student Affairs wrote the University’s harassment policy into the middle of it and deleted the clause stating “it is vitally important that these exceptions never be used in a matter that is inconsistent with the University’s commitment to a completely free and open discussion of ideas.” Members of the standing committee added an exception for appointment letters, contractual agreements, and confidentiality, professional conduct, and HR policies.

We then had to repeatedly explain why we would not write the University’s harassment policy into the speech and expression policy—that the problem we were trying to resolve was the conflict between the University’s commitments to freedom of speech and to maintaining a welcoming, non-offensive academic environment; that this required distinguishing the range of application of both the speech and expression and harassment policies, clarifying the relationship between them, and identifying the limits of each; and that incorporating the language of the harassment policy into the speech and expression policy meant that the speech and expression policy would have to be revised whenever there was a change to the harassment policy. We also had to continually resist efforts to dilute the policy by reiterating that the commitment to freedom of speech necessarily carried the cost that members of the University community would be permitted to express highly offensive ideas.

Eventually, we produced a final draft that was pretty close to the original and preserved the force of the Chicago statement.<sup>10</sup> The draft's last hurdle was a meeting of all interested parties to decide whether it should be sent to the Board of Trustees. I got the impression at this meeting that the Vice Presidents for Student Affairs and Institutional Diversity, Equity, and Affirmative Action were still not happy with the proposed policy and preferred one that left the University more discretion to discourage offensive speech. As the meeting progressed, the Vice President for Student Affairs raised the need to promote civility on campus several times; at one point, quoting Ernest Boyer, the President of the Carnegie Foundation, who wrote "[A] university is an open, honest community, a place where freedom of expression is uncompromisingly protected, and where civility is powerfully affirmed." In what I now regard as a moment of inspiration, I responded, "That sounds great. Why don't we incorporate it into the policy." The President of the Faculty Senate then worked with the Vice President for Student Affairs to produce a paragraph that included the quote, stressed the importance of civility, but noted that concerns about civility could not justify restricting speech. With that addition, all parties approved sending the draft to the Board of Trustees for adoption as official University policy. The Board approved and the draft became University policy on June 8, 2017. (See Appendix II for the full text of the policy.)

Two years of meetings and bureaucratic struggle taught me six important lessons.

1) Attend every meeting - Serving on University committees is no one's priority.

Members frequently miss meetings and rarely devote a great deal of time to preparing for them. Being able to say "We settled that last month" or "Professor X previously raised that point" can keep things moving in the right direction. And refraining from making such statements can result in the reconsideration of points that you believe to have been wrongly decided.

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<sup>10</sup> I was unable to convince the committee to return to the original language of the Chicago statement. The limiting sentence in the Chicago statement states: "The University may restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, that unjustifiably invades substantial privacy or confidentiality interests, or that is otherwise directly incompatible with the functioning of the University." The corresponding sentence in our draft states: "The University prohibits expression that violates the law, falsely defames a specific individual, constitutes a genuine threat, **violates the University's harassment policy**, or unjustifiably invades substantial privacy or confidentiality interests." At the time, I regarded the change from "harassment" to "violates the University's harassment policy" as a major setback. However, it ultimately proved useful to my current efforts to reform the University's harassment policy, as I hope will become apparent below.

2) Do the work - Because the main interest of most of those serving on University committees is to minimize their workload, they are usually happy to sign onto work that has already been done for them by others. Writing up and distributing analyses of contentious issues and draft solutions in advance of meetings often caused the draft solutions to be accepted without much discussions. (At least part of the reason for this is that several members would not read the analysis in advance and would thus not volunteer opinions about it.)

3) Avoid unnecessary fights - Most members of University committees are not highly invested in particular policy outcomes, have not thought deeply about the issues under consideration, and do not prepare fully for meetings. As a result, committee meetings regularly go off on tangents or pursue irrelevancies. Do not become embroiled in controversies that do not help you achieve your primary goal. Because the Office of Student Affairs proposed writing the University harassment policy into the speech and expression policy, our committee spun its wheels for several months discussing the adequacy of the University's harassment policy. As much as I wanted to revise that policy, I had to point out that it was not necessary to do so to revise the speech and expression policy, and that we should drop the matter until after that was done.

4) Let those who disagree with you talk at length - Your task is not to win arguments, but to build consensus. If you let those who disagree with you talk long enough, they will say several things you can agree with. Do so whenever possible. And because many of them will not have thought deeply about the issue, they will sometimes talk themselves around to your position. That is the time to stop them.

5) Co-opt your opposition - To the extent that you find common ground with those who disagree with you, build their ideas into the proposal. You can convert opponents into allies by making them co-owners of the proposal. The Vice-President for Student Affairs had been skeptical of our policy proposal. Building his language into the policy got us across the finish line.

6) Wait - No one else is as invested in your proposal as you are. You are on a mission. Almost everyone else is either just doing his or her job or meeting his or her faculty service requirements. Everything will move at what seems like a glacial pace to you. It is important

to understand that there is nothing you can do to speed this up that will not be self-defeating. Get used to making proposal and then just waiting. (This is just a reprise of the general guideline to have patience.)

## **V. Case Study: Harassment Policy**

In approving the adoption of the revised speech and expression policy, the Board of Trustees also approved a resolution delegating to the President authority “to revise and modify other policies as may be necessary to conform with the Policy on Speech and Expression.” The President then delegated the task to our committee. With that, the committee turned its attention to revising the University’s harassment policy. We have been working on this for about a year now, which suggests that we are probably halfway through the process.

### **Step 1: Do the Work, Be Non-ideological**

I did not need to begin this project by enlisting allies. I was already ensconced in the committee designated to undertake the revision. What was required in this case was a willingness to do a massive amount of uncompensated work. Revising the harassment policy would require the equivalent of writing a law review article and teaching a course. The analog of writing a law review article was developing a legally accurate policy statement. The analog of teaching a course was getting the members of the committee and other parties with decision making authority to understand it.

The first sentence of Georgetown’s current harassment policy is, “Harassment is a form of discrimination prohibited by law.” This implies that the University’s definition of harassment is coextensive with the legal definition of harassment. In fact, it is not. The current policy statement is much broader than the law. This situation allows me to make the entirely non-ideological argument that Georgetown’s harassment policy should be revised to make it legally accurate. The virtue of this approach is that it is very difficult to oppose a proposal to make sure that University policy does not misstate the law.

Importantly, ensuring that the University’s harassment policy is coextensive with harassment law, also ensures that it is consistent with freedom of speech. To see why, keep in

mind that the First Amendment to the United States Constitution limits the range of application of all federal (and state) law. Therefore, harassment law cannot infringe upon expression protected by the First Amendment. Because “hate speech” is protected by the First Amendment, hate speech alone cannot constitute illegal harassment. As Justice Alito pointed out when a judge on the 3<sup>rd</sup> Circuit Court of Appeals,

There is no categorical ‘harassment exception’ to the First Amendment’s free speech clause...

“Harassing” or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections. As the Supreme Court has emphatically declared, “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.”<sup>11</sup>

Therefore, if the University’s harassment policy parallels harassment law, the expression of unpopular, offensive, or hateful ideas without more is not and cannot be sanctioned as harassment.

So, step 1 was to do the necessary legal research, and then go through Georgetown’s harassment policy line by line to make it correspond with harassment law. (See Appendix III.) The two most important features of the resulting draft policy were 1) the definition of an offensive educational environment and 2) the safe harbor provision.

1) Definition of an offensive educational environment – Harassment consists of discriminatory verbal or physical conduct that has the purpose or effect of unreasonably interfering with an individual’s academic performance or *creating an intimidating, hostile, or offensive educational environment*. The definition of an offensive educational environment has traditionally been highly plastic, creating a classic “chilling effect” on speech. Without a clear idea of what can get one in trouble, individuals tend to censor their own speech and conduct. This is what Jonathan Haidt refers to as the “walking on eggshells” syndrome.

Georgetown’s current definition—“a hostile, intimidating, or offensive environment exists when conduct is severe or pervasive”—is almost entirely uninformative. The proposed draft policy replaces it with language taken directly from *David v. Monroe County Board of*

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<sup>11</sup> *Saxe v. State College Area School District*, 240 F.3d 200 (3<sup>rd</sup> Circuit 2001).

*Education*,<sup>12</sup> the leading Supreme Court decision addressing this issue, defining an offensive educational environment as “one in which the offensive conduct is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victims are effectively denied equal access to an institution’s resources and opportunities.”<sup>13</sup>

2) Safe Harbor Provision – The newly adopted speech and expression policy contains a paragraph detailing the limitations on the reach of that policy. The proposed harassment policy adds the following two sentences to serve the same function.

The Georgetown University Policy on Speech and Expression extends to the members of the Georgetown community the same level of protection for the expression of one’s religious, philosophical, literary, artistic, political, or scientific views that the First Amendment extends to the students and faculty of public universities. This means that the University will not pursue allegations of harassment that are based exclusively on the content of such views, regardless of how offensive the ideas being expressed may be to others.

This is the most important change to the present policy. It is an explicit guarantee that the harassment policy cannot be used to undermine the University’s commitment to freedom of speech. Its addition alone would be sufficient to render the harassment policy acceptable. I offer this short paragraph as a simple and effective way to improve the harassment policy of any university or college.

### Step 2: Sell It

Having created a draft policy, I now had to sell it to my colleagues. To my surprise, there was little resistance to the strengthened definition of an offensive educational environment. However, the explanation for this may be that it was overwhelmed by the almost universal resistance to the safe harbor provision.

The safe harbor provision gives the University’s commitment to freedom of speech its bite. It is easy to sign on to a ringing endorsement of free speech in the abstract, but the safe harbor provision confronts one with the practical effect of doing so. The objections to

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<sup>12</sup> 526 U.S. 629 (1999).

<sup>13</sup> *Id.* at 651.

including the safe harbor provision in the harassment policy almost always begin with the words, “But that means that someone could say...”

Committee discussion of this provision consisted of a recitation of examples of the horrible things that students and faculty could say without running afoul of the harassment policy. “This means that a professor could say that African-Americans or women are inferior to whites or men without being charged with harassment.” “This means that evangelical students could say that homosexuals are going to hell.” “This means that a professor could have a confederate flag up in his or her office during office hours.” “This means that fill in the blank could say fill in the blank without violating the harassment policy.”

This is where the work became an analog of teaching a course. To answer these objections, I had to teach my colleagues a course in both First Amendment law and logic. (For those interested in attempting to implement a similar reform at their institutions, I include four of the “lesson plans” I used in Appendix IV.) This took quite a while, but eventually, I felt comfortable enough to make the following proposal to the committee:

I have a proposal for the committee to consider at tomorrow’s meeting. I propose that we revise paragraph 6 of the draft policy to read:

The Georgetown University Policy on Speech and Expression extends to the members of the Georgetown community the same level of protection for the expression of one’s religious, philosophical, literary, artistic, political, or scientific views that the First Amendment extends to the students and faculty of public universities. This means that the University will not pursue allegations of harassment that are based exclusively on the content of such views, regardless of how offensive the ideas being expressed may be others.

Rationale for the proposal...

- 3) The inclusion of both sentences of the paragraph is essential to our mission. The argument on this point is conceptually simple, but ideologically and political difficult.

It is conceptually simple because:

- The First Amendment does not permit restrictions of speech based on the content of what is being expressed. Therefore, speech that *does no more than* expressive offensive content cannot constitute illegal harassment.



- The University has adopted a Speech and Expression Policy that states:  
As an institution of higher education, one specifically committed to the Catholic and Jesuit tradition, Georgetown University is committed to free and open inquiry, deliberation and debate in all matters, and the untrammelled verbal and nonverbal expression of ideas. It is Georgetown University's policy to provide all members of the University community, including faculty, students, and staff, the broadest possible latitude to speak, write, listen, challenge, and learn.

The ideas of different members of the University community will often and naturally conflict. It is not the proper role of a University to insulate individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Deliberation or debate 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 ill conceived.

For the University's harassment policy to be consistent with this policy, it cannot ban speech as harassment because "the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or ill conceived." Paragraph 6 of the Draft Harassment Policy simply makes it clear that this is the case.

- The paragraph embodies the University's compliance with the Department of Education guidance that "[I]n regulating the conduct of its students and its faculty to prevent or redress discrimination prohibited by Title IX (e.g., in responding to harassment that is sufficiently serious as to create a hostile environment), a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights."
- The paragraph inoculates the University against the use of complaints of harassment to suppress unpopular viewpoints. This is the University's anti-SLAPP suit provision, or perhaps its anti-Laura Kipnis suit provision.

The simplicity of the conceptual argument for this paragraph is confronted by the desire of nearly all parties to see the University as tolerant of sexual, racial, religious, etc. harassment. Objections to the proposed paragraph will instantly be raised by citing myriad examples of offensive speech that will not be suppressed as harassment; e.g., if this policy is adopted, then a

processor could say that African-Americans or women are inferior to whites or men without being charged with harassment.

The answer to such objection is that their assertions are entirely correct. That is precisely what freedom of expression means. A commitment to freedom of expression means that official sanctions will not be applied to those who express “offensive, unwise, immoral, or ill conceived” views. The only permissible response is to confront such views with better arguments.

For a commitment to freedom of expression to be meaningful, it must have some bite. The purpose of our committee is to ensure that the University does not make commitments it cannot simultaneously satisfy. If we are to realize this purpose, we must make it clear that the University’s harassment policy cannot be used to suppress unpopular or offensive speech.

The proposal was adopted and the committee reached consensus on the draft policy.

The next step is to gain the approval of University Counsel. In past discussion, he has proposed alterations to the draft which I accepted with thanks, indicating that he is the legal expert. None of these changes have been damaging to the core project. The remaining hurdle is getting him to sign off on the safe harbor language. I am hopeful that he will because 1) the language is legally accurate and 2) it is difficult to argue against the inclusion of language designed to clarify the policy.

I hope by next June, I will be able to report that Georgetown University has adopted a harassment policy that is fully consistent with its commitment to freedom of speech.

#### **Appendix I: Excerpt from the University of Chicago Report of the Committee on Freedom of Expression**

Because the University is committed to free and open inquiry in all matters, it guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn. Except insofar as limitations on that freedom are necessary to the functioning of the University, the University of Chicago fully respects and supports the freedom of all members of the University community “to discuss any problem that presents itself.”

Of course, the ideas of different members of the University community will often and quite naturally conflict. But it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Although the University greatly values civility, and although all members of the

University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.

The freedom to debate and discuss the merits of competing ideas does not, of course, mean that individuals may say whatever they wish, wherever they wish. The University may restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, that unjustifiably invades substantial privacy or confidentiality interests, or that is otherwise directly incompatible with the functioning of the University. In addition, the University may reasonably regulate the time, place, and manner of expression to ensure that it does not disrupt the ordinary activities of the University. But these are narrow exceptions to the general principle of freedom of expression, and it is vitally important that these exceptions never be used in a manner that is inconsistent with the University's commitment to a completely free and open discussion of ideas.

In a word, the 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. Indeed, fostering the ability of members of the University community to engage in such debate and deliberation in an effective and responsible manner is an essential part of the University's educational mission.

As a corollary to the University's commitment to protect and promote free expression, members of the University community must also act in conformity with the principle of free expression. Although members of the University community are free to criticize and contest the views expressed on campus, and to criticize and contest speakers who are invited to express their views on campus, they may not obstruct or otherwise interfere with the freedom of others to express views they reject or even loathe. To this end, the University has a solemn responsibility not only to promote a lively and fearless freedom of debate and deliberation, but also to protect that freedom when others attempt to restrict it.

## **Appendix II: Georgetown University Policy on Speech and Expression**

Approved June 8, 2017

As an institution of higher education, one specifically committed to the Catholic and Jesuit tradition, Georgetown University is committed to free and open inquiry, deliberation and debate in all matters, and the untrammelled verbal and nonverbal expression of ideas. It is Georgetown University's policy to provide all members of the University community, including faculty, students, and staff, the broadest possible latitude to speak, write, listen, challenge, and learn.

The ideas of different members of the University community will often and naturally conflict. It is not the proper role of a University to insulate individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Deliberation or debate 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 ill conceived.

It is for the individual members of the University community, not for the University as an institution, to judge the value of ideas, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting those arguments and ideas that they oppose. Fostering the ability of members of the University community to engage with each other in an effective and responsible manner is an essential part of the University's educational mission.

The freedom to debate and discuss the merits of competing ideas does not mean that individuals may say whatever they wish, wherever they wish. The University prohibits expression that violates the law, falsely defames a specific individual, constitutes a genuine threat, violates the [\*University's Harassment Policy\*](#), or unjustifiably invades substantial privacy or confidentiality interests. In addition, the University may reasonably regulate the time, place, and manner of expression to ensure that it does not disrupt the ordinary activities of the institution. Finally, to the extent that appointment letters, confidentiality agreements or policies, professional conduct policies, or HR policies regulate conduct that may include speech and expression, they are not superseded by this policy. But these are narrow exceptions to the general principle of freedom of expression, and it is vitally important that these exceptions not be used in a manner that is inconsistent with the University's commitment to a free and open discussion of ideas.

As a corollary to the University's commitment to protect and promote free expression, members of the University community must also act in conformity with the principle of free expression. Although members of the University community are free to criticize and contest the views expressed by other members of the community, or by individuals who are invited to campus, they may not obstruct or otherwise interfere with the freedom of others to express views they reject or even loathe. To this end, the University has a solemn

responsibility not only to promote a lively and fearless freedom of deliberation and debate, but also to protect that freedom when others attempt to restrict it.

In 1990 Ernest Boyer, President of Carnegie Foundation wrote, “[A] university is an open community, a place where freedom of expression is uncompromisingly protected, and where civility is powerfully affirmed.” Because it is essential to free and open inquiry, deliberation, and debate, all members of the University community share in the responsibility for maintaining civil and respectful discourse. But concerns about civility and mutual respect can never be used as a justification for closing off the discussion of ideas, no matter how offensive or disagreeable those ideas may be to some members of our community.

### Appendix III: Georgetown University Harassment Policy

#### Current Policy on Harassment (Relating to Protected Categories)

Revised February 2014

##### 1. Policy

Harassment is a form of discrimination prohibited by law. It is the policy of Georgetown University to prohibit harassment on the basis of age, color, disability, family responsibilities, gender identity and expression, genetic information, marital status, national origin and accent, personal appearance, political affiliation, pregnancy, race, religion, sex, sexual orientation, source of income, veteran's status or other factors prohibited by federal and/or District of Columbia law ("Protected Categories"). Sexual harassment is addressed under the University's Policy Statement on Sexual Misconduct.

Harassment is verbal or physical conduct that denigrates or shows hostility or aversion to an individual because of a Protected Category as specified above, when such conduct has the purpose or effect of: unreasonably interfering with an individual or third party's academic or work performance; creating an intimidating, hostile, or offensive educational or work environment; or otherwise adversely affecting an individual or third party's academic or employment opportunities.<sup>[11](#)</sup>

Harassment may include, but is not limited to: verbal abuse or ridicule, including slurs, epithets, and stereotyping; offensive jokes and comments; threatening, intimidating, or hostile acts, and displaying or distributing offensive materials, writings, graffiti, or pictures. Harassment may include conduct carried out through the internet, email, social media, or other electronic means.

##### *Interpretive guidance:*

- A hostile, intimidating, or offensive environment exists when conduct is severe or pervasive. Factors to be considered in determining whether conduct is severe or pervasive include the nature, scope, frequency, and duration of the conduct and the number of persons involved. Simple teasing, offhand comments, or isolated incidents that are not severe or pervasive do not create a hostile or offensive environment.
- If an issue of harassment is raised in strictly academic areas, such as coursework, the matter will be handled in consultation and coordination between IDEAA and the Executive Vice President or Dean of the faculty member's school because such matters may also concern issues of academic freedom.
- To constitute harassment, the conduct in question must be objectively intimidating, hostile or offensive, and must interfere with a person's ability to participate in

employment or educational programs or activities of the University. The injured party's perception of the offensiveness of the alleged conduct, standing alone, is not sufficient by itself to constitute harassment.

- Harassment is especially serious when it occurs between teachers and students or supervisors and subordinates. In such situations, harassment unfairly exploits the power inherent in a faculty member's or supervisor's position. Although harassment often occurs when one person takes advantage of a position of authority over another, the University recognizes that harassment may also occur between people of equivalent status. This includes peer harassment.

### **Draft Revised Policy with Explanations**

#### Policy Statement on Harassment (Relating to Protected Categories)

Harassment is a form of discrimination prohibited by law. It is the policy of Georgetown University to prohibit harassment on the basis of age, color, disability, family responsibilities, gender identity and expression, genetic information, marital status, national origin and accent, personal appearance, political affiliation, pregnancy, race, religion, sex, sexual orientation, source of income, veteran's status or other factors prohibited by federal and/or District of Columbia law ("Protected Categories"). Sexual harassment is addressed under the University's Policy Statement on Sexual Misconduct.

(No change.)

Harassment is verbal or physical conduct that denigrates or shows hostility or aversion to an individual because of a Protected Category as specified above, when such conduct has the purpose or effect of: unreasonably interfering with an individual or third party's academic or work performance or creating an intimidating, hostile, or offensive educational or work environment.

(Eliminated the third prong of the definition stating "or otherwise adversely affecting an individual or third party's academic or employment opportunities." Reasons: This language is not part of the legal definition of harassment. It is taken from the DC Human Rights Act and Americans with Disabilities Act definitions of *discrimination*, but harassment.

Discrimination is the genus of which harassment is the species. Harassment is a type of discrimination, but the concept of discrimination is broader than harassment. Therefore, using language designed to identify the limits of discrimination in the definition of harassment is inappropriate. The third clause is so broad that it renders the preceding two categories superfluous.

Note that harassment is defined to include "verbal conduct," not speech. This reflects the First Amendment's limitation on all federal and state statutes. The government cannot Constitutionally restrict or ban speech on the basis of the content of what is expressed.)

Harassment may include, but is not limited to: offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, and offensive objects or pictures. Harassment may include conduct carried out through the internet, email, social media, or other electronic means.

(Language changed to correspond more precisely with the language employed by the EEOC.)

An intimidating, hostile, or offensive environment is one in which the offensive conduct is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victims are effectively denied equal access to an institution's resources and opportunities. Factors to be considered in determining whether conduct is severe, pervasive, and objectively offensive include the nature, scope, frequency, and duration of the conduct and the number of persons involved; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with the victim's academic performance. Simple teasing, offhand comments, or isolated incidents that are not severe or pervasive do not create a hostile or offensive environment.

(The definition of an intimidating, hostile, or offensive environment is made part of the policy, not merely "interpretive guidance." The first sentence defining an offensive environment is taken from the Supreme Court's decision in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). The second sentence is taken from the *Yan Yan v. Penn State Univ.*, 529 F. App'x 167, 171 (3d Cir. 2013) and *Hayut v. State Univ. of New York*, 352 F. 3d 733, 745 (2d Cir. 2003). The third sentence is retained from the current policy.)

The Georgetown University Policy on Speech and Expression extends to the members of the Georgetown community the same level of protection for the expression of one's religious, philosophical, literary, artistic, political, or scientific views that the First Amendment extends to the students and faculty of public universities. This means that the University will not pursue allegations of harassment that are based exclusively on the content of such views, regardless of how offensive the ideas being expressed may be to others.

(This language should not be controversial. The fact that it is demonstrates that its inclusion is absolutely essential.

We have adopted a speech and expression policy that states:

As an institution of higher education, one specifically committed to the Catholic and Jesuit tradition, Georgetown University is committed to free and open inquiry, deliberation and debate in all matters, and the untrammelled verbal and nonverbal expression of ideas. ***It is Georgetown University's policy to provide all members of the University community,***



***including faculty, students, and staff, the broadest possible latitude to speak, write, listen, challenge, and learn.***

The ideas of different members of the University community will often and naturally conflict. It is not the proper role of a university to insulate individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. ***Deliberation or debate 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 ill conceived.***

The statement that “the expression of one’s religious, philosophical, literary, artistic, political, or scientific views without more does not constitute harassment and is not prohibited by this policy regardless of how offensive the content of such expression may be to others” is nothing more than a watered-down restatement of that policy drawn from Supreme Court language identifying types of speech that are clearly protected by the First Amendment. In addition, it is legally accurate. The federal and status statutes from which harassment law is derived cannot ban or restrict speech on the basis of its content. That is why harassment law speaks in terms of “verbal conduct,” not speech.

The problem that our committee is addressing is the contemporary tendency to ban or restrict speech because its content is offensive to some members of the community. If we create a speech policy that includes that statement that “The University prohibits expression...that violates the University’s harassment policy,” and then create a harassment policy that permits the suppression of religious, philosophical, literary, artistic, political, or scientific views because they are offensive to some members of the community, then we have done nothing to address the problem. We have created a harassment policy that completely undermines the speech policy.

Given the widespread false belief that “hate speech” is not protected by the First Amendment and the even more widespread misunderstanding of what can constitute harassment under the civil rights acts, it is absolutely essential that Georgetown’s harassment policy include the proposed clarifying safe harbor language.

A note on the law. The law of harassment does not, and Constitutionally cannot, punish expression protected by the First Amendment. As Justice Alito pointed out when a judge on the 3<sup>rd</sup> Circuit Court of Appeals,

There is not categorical ‘harassment exception’ to the First Amendment’s free speech clause...

“Harassing” or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections. As the Supreme Court has emphatically declared, “[i]f there is a bedrock principle underlying the First Amendment, it is that the

government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.”<sup>14</sup>

Because the failure to suppress Constitutionally protected expression *including what some would call “hate” speech*, cannot constitute harassment, the University cannot be legally liable for failing to suppress such expression.

In addition, the Department of Education has issued Guidance stating: “[I]n regulating the conduct of its students and its faculty to prevent or redress discrimination prohibited by Title IX (e.g., in responding to harassment that is sufficiently serious as to create a hostile environment), a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights.”

The proposed paragraph, which is derived from language used by the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), would represent Georgetown’s compliance with this guidance.)

If an issue of harassment is raised in strictly academic areas, such as coursework, the matter will be handled in consultation and coordination between IDEAA and the Executive Vice President or Dean of the faculty member’s school because such matters may also concern issues of academic freedom.

(No change.)

To constitute harassment, the conduct in question must be objectively intimidating, hostile or offensive, and must interfere with a person’s ability to participate in employment or educational programs or activities of the University. The injured party’s perception of the offensiveness of the alleged conduct, standing alone, is not sufficient by itself to constitute harassment.

(No change.)

Harassment is especially serious when it occurs between teachers and students or supervisors and subordinates. In such situations, harassment unfairly exploits the power inherent in a faculty member’s or supervisor’s position. Although harassment often occurs when one person takes advantage of a position of authority over another, the University recognizes that harassment may also occur between people of equivalent status. This includes peer harassment.

(No change.)

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<sup>14</sup> *Saxe v. State College Area School District*, 240 F. 3d 200 (3<sup>rd</sup> Circuit 2001).

## Appendix IV: Arguments for the Safe Harbor Language

### A. Understanding the Law: Part 1

It is important to understand the limits the First Amendment places on places on harassment law. The range of application of the federal (and state) statutes that give rise to the legal prohibition on harassment is limited by the First Amendment. As presently interpreted by the Supreme Court, the First Amendment does not permit limitations on expression that are based on the content of the expression. The First Amendment permits only content neutral limitations on expression.

In *R.A.V. v. City of St. Paul*, the Supreme Court struck down an ordinance that prohibited placing “on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.” Because the ordinance applied only to expression that insulted or provoked violence “on the basis of race, color, creed, religion or gender,” the Court held that “the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.” The Court explained that “[t]he First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.” In the words of Justice Alito, when a Circuit Court judge, “[t]he Supreme Court has made it clear . . . that the government may not prohibit speech under a ‘secondary effects’ rationale based solely on the emotive impact that its offensive content may have on a listener.”

This means that harassment law must be understood as a content-neutral restraint on expression. It can outlaw expression to the extent that it is the equivalent of harm-causing conduct, but not to the extent that the harm is caused by the content of what is being expressed. Harassment law does not and Constitutionally cannot ban or punish expression merely because of its offensive content.

As counter-intuitive as it seems, this means that an offensive educational environment created by the expression of offensive or hateful ideas does not constitute an offensive educational environment that is illegal under federal civil rights statutes. There can be an offensive educational environment as a matter of fact that does not constitute harassment as a matter of law.

If we want our freedom of expression policy to give the members of the Georgetown community the same level of protection that the First Amendment gives the students and faculty of public universities, then we need a harassment policy that makes it clear that the content of expression cannot be used to establish the type of offensive environment that constitutes harassment.

The Department of Education currently instructs universities that

[i]n cases of alleged harassment, the protections of the First Amendment must be considered if issues of speech or expression are involved. Free speech rights apply in the classroom...and in all other education programs and activities of public schools...In addition, First Amendment rights apply to the speech of students and teachers...

Title IX is intended to protect students from sex discrimination, not to regulate the content of speech...

Moreover, in regulating the conduct of its students and its faculty to prevent or redress discrimination prohibited by Title IX (e.g., in responding to harassment that is sufficiently serious as to create a hostile environment), a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights.

The language I included in my draft policy was an attempt to comply with these instructions. I strongly believe that we should. I was not successful in persuading the committee to agree with me on this point at the meeting. However, I would like to continue the discussion of this matter.

We have adopted a policy on speech and expression that opens with:

As an institution of higher education, one specifically committed to the Catholic and Jesuit tradition, Georgetown University is committed to free and open inquiry, deliberation and debate in all matters, and the untrammelled verbal and nonverbal expression of ideas. It is Georgetown University's policy to provide all members of the University community, including faculty, students, and staff, the broadest possible latitude to speak, write, listen, challenge, and learn.

The ideas of different members of the University community will often and naturally conflict. It is not the proper role of a university to insulate individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Deliberation or debate 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 ill conceived.

I read this as committing us to provide at least as much protection for expression on our campus as the First Amendment requires at public universities. That means that we cannot have content-based restrictions on expression. A commitment to freedom of expression entails permitting the expression of ideas whose content is highly offensive. The "verbal conduct" that can constitute illegal harassment does not and Constitutionally cannot include expression that is offensive solely because of its content. I believe that we should make this clear in our harassment policy.

## B. Understanding the Law: Part 2

You claim that speech alone can constitute harassment. You provide the following argument:

1. The University's Speech and Expression policy does not permit speech that is illegal.
2. Speech that constitutes harassment is illegal and so not permitted by our Speech and Expression Policy.
3. Speech constitutes harassment if it creates an intimidating, hostile, or offensive work or educational environment for individuals because of their race, religion, sex, etc.

I would quibble with your rendition of premise 2 and disagree with premise 3. Premise 2 would be more accurate if it stated, "Verbal conduct that constitutes harassment is illegal and so not permitted by our Speech and Expression Policy." However, premise 3 is false as a matter of law. It could be rendered true by altering it to state: "Verbal conduct constitutes illegal harassment if it creates an intimidating, hostile, or offensive work or educational environment for individuals because of their race, religion, sex, etc. *independently of the content being expressed.*"

A problematic sticking point is the example you gave of a professor who sees students during office hours in an office that has a sign declaring "Whites are the master race." I'm afraid that I disagree that this could constitute illegal harassment. The offense results from the content of the expression. This can be highly offensive to students, but it cannot be illegal harassment.

Georgetown University may adopt as many content neutral rules as it sees fit to prevent offensive conduct. It may ban professors from holding office hours in rooms that display any controversial opinions on any subjects. It can require professors to hold office hours in a setting that is comfortable to all students. But it may not ban professors from holding office hours in rooms that display statements that are offensive to African-Americans on the grounds that such conduct constitutes illegal harassment. It does not.

If we are to be true to the policy we adopted last year, we can have rules regulating the time, place, and manner of speech, but we may not ban speech because what it says is offensive to those who hear it. And that applies to our harassment policy as well.

Your comments implicitly recognize the problem. You say: "What makes the professor's speech illegal is that expressing that content in the professor's specific context creates an intimidating, hostile, or offensive environment for non-white people. Having that content is critical to the speech creating such an environment." If having that content is critical to the speech creating the offensive environment, then the restriction on the speech cannot be content neutral.

Laws prohibiting perjury ban all lies, not only lies about African-Americans or Jews or women. Perjury is content neutral. Fraud bans all intentional misrepresentations designed to cause another to suffer a loss, not only misrepresentations about certain races or to

certain people. Fraud is content neutral. The First Amendment allows restrictions on where one can speak, on how loud one can speak, on when one can speak, but not on what one can say. The First Amendment does not allow a ban on a sign stating that whites are the master race because its content creates an offensive educational environment for African-Americans.

You state that “The time, place, and manner of speech is essential to its constituting harassment. The speech has to occur in a work or educational environment, and must have the effect of making that environment intimidating, hostile, or offensive.” But the fact that the speech has to occur in an educational environment and create an offensive environment cannot transmute a content-based restriction into a time, place, or manner restriction if the offense arises from the content of what is being expressed.

All this is why a genuine commitment to freedom of expression is not for the faint of heart. If the First Amendment permits Nazis to march in Skokie, IL, it permits professors to have signs stating that whites are the master race in their offices. And one cannot escape the reach of the First Amendment by saying that there is a statute against harassment because the purpose of the First Amendment is precisely to limit the reach of statutes.

### **C. Argument for Including the Safe Harbor Language**

Thanks, X. I am grateful for your input and your perspective on this matter.

I am glad that you appreciate that because the First Amendment curtails the reach of all federal (and state) statutes, harassment law cannot restrict expression on the ground that others find the content of what is being expressed offensive. If the First Amendment protects the expression of unpopular, hateful, and offensive ideas—and it does, then harassment law cannot outlaw the expression of unpopular, hateful, and offensive ideas, even if others who hear them find that their expression makes the educational environment hostile, intimidating, or offensive. Harassment law prohibits verbal conduct that creates an intimidating, hostile, or offensive educational environment; it does not prohibit the expression of ideas whose content creates an intimidating, hostile, or offensive educational environment.

I also understand your reasoning for not wanting to include the language I am proposing in the revised harassment policy. Although I appreciate the point that you are making, I respectfully, but strongly disagree with it. Let me see whether I can explain why.

You are concerned that including a clear statement that our harassment policy does not curtail protected expression (in compliance with current Department of Education guidelines) could be misinterpreted by students to allow conduct that would amount to harassment. I cannot say that this is not a possibility. But I strongly believe that it is a cost that must be borne.

I believe that a clear statement of the limits of our harassment policy is absolutely essential in the current cultural climate. The belief that offensive expression may be banned is widespread. The majority of undergraduate students incorrectly think that “hate speech” is not protected by the First Amendment. Virtually everyone incorrectly believes that the expression of ideas that are offensive to women and members of minority groups constitutes illegal harassment. Indeed, the prevalence of this belief was evidenced by our own discussion at yesterday’s meeting. The current climate of fear on university campuses arises, at least in part, from the belief that one can be accused of harassment on the basis of the content of what one says. I believe that the purpose of our committee is to reduce that fear at Georgetown. In undertaking to commit Georgetown to “the untrammelled verbal and nonverbal expression of ideas,” we undertook an obligation to make it clear that no member of the Georgetown community would be subject to sanction on the basis of the content of what he or she says or writes. I think that it is crucially important that we make it clear that our harassment policy is consistent with this commitment.

Including a clear statement of the limitation of the harassment policy carries some costs. It may cause some students to misinterpret the policy as you suggest. It may make X’s job at IDEAA more difficult. X and her staff have the crucially important job of preventing, correcting, and if appropriate punishing harassment on campus. As important as this job is, it is not supposed to be an easy one. Pursuing it in a way that is consistent with a clearly articulated commitment to freedom of expression is certainly more difficult than pursuing it in the absence of such a commitment, but that is, and should be, the nature of the job. I have every confidence that X and her staff will be able to handle it successfully.

The University of Chicago may have beaten us to the punch on articulating a commitment to freedom of expression. But Georgetown can still be the leader in making such a commitment real. Many universities adopt the University of Chicago statement, notify FIRE, and declare victory. That is why the advocates for freedom of speech on campus (such as Nadine Strossen, who spoke here last week) refer to those universities as having good “stated” policies. We are in a position to make Georgetown’s commitment real by acting on the Board’s permission to “to revise and modify other policies as may be necessary to conform with the Policy on Speech and Expression.”

This suggests that we should not stop once we are done with the harassment policy. What we ultimately need is a more general commitment such as:

The Georgetown University Policy on Speech and Expression extends to the members of the Georgetown community the same level of protection that the First Amendment extends to the students and faculty of public universities. In accordance with this policy, the expression of one’s religious, philosophical, literary, artistic, political, or scientific views *without more* does not constitute ***a violation of any University policy*** and is not prohibited by ***any such*** policy *regardless of how offensive the content of the expression may be to others*. If the University determines that an allegation of ***a violation of a***

**University policy** is based exclusively on the content of an individual's or group's expression, it will dismiss the allegation.

But for now, we are working on the harassment policy.

Although you are correct that a clear statement that protected speech—the expression of one's religious, philosophical, literary, artistic, political, or scientific views—cannot alone constitute a violation of Georgetown's harassment policy could be misinterpreted, I do not believe that this is a good reason to omit such a statement. I believe that the language I am proposing (that has been referred to as “safe harbor” language by civil libertarians) is essential to ensure against the “chilling effect” on speech produced by the fear that the content of what one says can constitute harassment.

#### **D. A Synopsis of the Argument**

If I may, the issue is not who is expressing their beliefs in an offensive way. The issue is that the expression of offensive beliefs alone by anyone cannot constitute illegal harassment. Here are several statements that I believe to be true.

- 1) Georgetown University has adopted a speech and expression policy that states:

As an institution of higher education, one specifically committed to the Catholic and Jesuit tradition, Georgetown University is committed to free and open inquiry, deliberation and debate in all matters, and the untrammelled verbal and nonverbal expression of ideas. It is Georgetown University's policy to provide all members of the University community, including faculty, students, and staff, the broadest possible latitude to speak, write, listen, challenge, and learn.

The ideas of different members of the University community will often and naturally conflict. It is not the proper role of a university to insulate individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Deliberation or debate 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 ill conceived.

- 2) Such a policy entails that the members of the Georgetown community have at least as much protection as the First Amendment extends to the students and faculty of public universities.
- 3) Georgetown University has an obligation to prevent illegal harassment on campus.
- 4) The expression of one's religious, philosophical, literary, artistic, political, or scientific views without more does not and Constitutionally cannot constitute illegal harassment regardless of how offensive the content of such expression may be to others.



- 5) Georgetown University is not legally obligated to have a harassment policy that defines the expression of highly offensive religious, philosophical, literary, artistic, political, or scientific views without more as harassment.
- 6) Georgetown University cannot have a harassment policy that defines the expression of highly offensive religious, philosophical, literary, artistic, political, or scientific views without more as harassment that is consistent with the speech and expression policy that it has adopted.

Here some explanation is required.

Our speech and expression policy states:

Georgetown University is committed to free and open inquiry, deliberation and debate in all matters, and the untrammelled verbal and nonverbal expression of ideas...It is not the proper role of a university to insulate individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Deliberation or debate 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 ill conceived.

It also states:

The freedom to debate and discuss the merits of competing ideas does not mean that individuals may say whatever they wish, wherever they wish. The University prohibits expression that violates...the University's harassment policy...

If the University's harassment policy permits the suppression of offensive religious, philosophical, literary, artistic, political, or scientific views *without more*, it constitutes an exception that completely undermines the policy, rendering it vacuous.

- 7) Georgetown University should ensure that its harassment policy does not define the expression of religious, philosophical, literary, artistic, political, or scientific views *without more* as harassment *regardless of how offensive the content of such expression may be to others*.
- 8) If Georgetown University adopts such a harassment policy, it should do so clearly and explicitly.

Again, some explanation.

There is presently widespread misunderstanding of what expression is protected by the First Amendment—most people incorrectly believe that offensive “hate speech” is not protected,

and there is even more widespread misunderstanding of what constitutes harassment under the civil rights acts—most people falsely believe that the expression of ideas that women or minorities find offensive or that make them uncomfortable is harassment. Furthermore, it is these widespread misconceptions that help create the climate of fear that “chills” the open expression of belief on campus.

We are tasked with reforming the University’s harassment policy in the face of these widespread misconceptions. At least part of the purpose for which our committee was formed was to reduce the fear of speaking openly on controversial political and ideological subjects. We can do so only by making it explicitly clear that one cannot be accused of violating the University’s harassment policy merely for expressing one’s religious, philosophical, literary, artistic, political, or scientific views (language taken directly from the Supreme Court’s definition of expression protected by the First Amendment) even if others—women and members of minority groups—find it to be offensive.

9) The revised harassment policy should explicitly include “safe harbor” language such as:

The Georgetown University Policy on Speech and Expression extends to the members of the Georgetown community the same level of protection that the First Amendment extends to the students and faculty of public universities. In accordance with this policy, the expression of one’s religious, philosophical, literary, artistic, political, or scientific views without more does not constitute harassment and is not prohibited by this policy *regardless of how offensive the content of such expression may be to others*. If the University determines that an allegation of harassment is based exclusively on the content of an individual’s or group’s expression, it will dismiss the allegation.

## **Not a Vast Right-Wing Conspiracy: Why Left-Leaning Faculty Should Care About Threats to Free Expression on Campus**

**Amna Khalid and Jeffrey Aaron Snyder, Carleton College**

“There’s No Free Speech Crisis on Campus, So Please Shut Up About It.” This is a representative headline from an emerging genre of commentaries from the left that claim “the free speech crisis is an ideological myth” perpetrated by right-wing media and organizations.<sup>1</sup>

As scholars on the left, we are disappointed by the fact that so many self-identified social progressives are hostile to the possibility that campus free expression may be threatened. And while few of our faculty friends on the left are outright deniers, many of them are dubious or indifferent when it comes to campus free speech concerns.

Higher education’s fundamental mission of developing critical thinking skills is being compromised by threats to free expression. What’s more, these threats jeopardize the *very* scholarly topics and political projects that the left holds most dear.

There are more than 1.5 million faculty members at colleges and universities in the United States.<sup>2</sup> By any measure, left-leaning faculty members make up a majority of the professoriate. One recent study found that 60% of faculty members describe themselves as far left/liberal, 30% as moderate and 10% as far right/conservative.<sup>3</sup>

Love us or hate us, faculty on the left have a significant role in shaping the objectives, values and culture of higher education. So it seems vital to us that our faculty peers on the left—

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<sup>1</sup> See Rich Smith, “There’s No Free Speech Crisis on Campus, So Please Shut Up About It,” *The Stranger*, March 14, 2018; and Anthony Leaker, “Against ‘Free Speech,’” *Cato Unbound*, June 13, 2018. See also Ulrich Baer, “What ‘Snowflakes’ Get Right About Free Speech,” *New York Times*, April 24, 2017; William Davies, “The free speech panic: how the right concocted a crisis,” *The Guardian*, July 26, 2018; Andrew Hartman, “People always think students are hostile to free speech. They never really are,” *Washington Post*, March 15, 2018; Mari Ueyehara, “The Free Speech Grifters,” *GQ*, March 19, 2018; and Matthew Yglesias, “Everything we think about the political correctness debate is wrong,” *Vox*, March 12, 2018.

<sup>2</sup> Race/ethnicity of College Faculty, National Center for Education Statistics, <https://nces.ed.gov/fastfacts/display.asp?id=61>.

<sup>3</sup> Samuel J. Abrams, “There Are Conservative Professors. Just Not in These States,” *New York Times*, July 1, 2016.

from mainline Democrats to Democratic Socialists, Marxists and beyond—take more of an interest in academic freedom and campus free expression.

Why are so many left-leaning faculty so reluctant to champion free speech?

In short: Free speech has joined the “culture wars.” Embraced by many conservatives, appropriated by the alt-right, given up for dead by a vocal contingent on the far left, free speech is increasingly seen as a right-wing cause.

For some on the left, especially those with a strong social justice orientation, free speech is perceived as “nothing more than a weapon of the rich, the powerful and the privileged.”<sup>4</sup> This is due in part to a string of Supreme Court cases—decided on free speech grounds—that have infuriated the left, from *Citizens United* in 2010 to *Janus* this past summer.

Beyond the courts, the left’s skepticism toward free speech has been fueled by the xenophobia and racism that animated the Trump campaign and continues to suffuse the Trump administration. Coinciding with Trump’s rise, college campuses exploded with controversies surrounding the appearance of incendiary speakers such as Richard Spencer, Ann Coulter and Milo Yiannopoulos. For many of today’s college students, then, their first real introduction to debates and discussions surrounding free speech have been tied to the question of whether Neo-Nazis, conservative trolls and right-wing flamethrowers should be allowed to speak on campus. This unfortunate fact has led some students to conclude that the right to free speech is effectively a license to offend and oppress historically marginalized groups, especially people of color.

Confronted by the aggressive, bullying rhetoric of Trump and the spectacle of right-wing trolls masquerading as free speech martyrs, increasing numbers of students—not to mention faculty and administrators—have been challenging the wisdom of the old schoolyard maxim about “sticks and stones.” From this words-that-wound perspective, speech is sometimes a form of violence—and speech that denigrates, critiques or offends the members of a particular identity group should be constrained by “hate speech” rules and regulations.<sup>5</sup>

Accompanying all of these developments is the booming refrain from the right that free speech is being quashed on campuses because higher education is a breeding ground for

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<sup>4</sup> Jeffrey Aaron Snyder, “Free Speech? Now, That’s Offensive!” *Inside Higher Ed*, September 1, 2016.

<sup>5</sup> See Mari J. Matsuda, ed., *Words That Wound: Critical Race Theory, Assaultive Speech, And The First Amendment* (Boulder: Westview Press, 1993).

liberal orthodoxies. We shouldn't be terribly surprised, then, to see the left charge that "campus free-speech advocates are dupes of a vast right-wing conspiracy."<sup>6</sup>

In the *Washington Post*, Andrew Hartman breezily dismisses concerns about campus speaker disinvitations and shout-downs as "a few high-profile instances" where conservative speakers "have been denied the opportunity to air their views." "Outrage about threats to free speech is overblown," he concludes. In a Cato Unbound forum on free speech, Anthony Leaker declares that the "so-called free speech crisis is a self-serving myth" propagated by "racist opportunists" and reactionaries, "part of an onslaught against a range of oppressed minorities and progressive gains of the last half century." Or as Jim Sleeper puts it in an op-ed for the *New York Times*: "today's conservative 'free speech' campaign doesn't want you to know" that "free speech and open inquiry are alive and well on campus." This campaign's true purpose, according to Sleeper, is to dress down "politically correct" students and to stand up for "free markets."<sup>7</sup>

With debates about campus free expression, as with so many other hot button issues, we have fallen into the George W. Bush you're either *with* us or *against* us trap.

Every time President Donald Trump, Attorney General Jeff Sessions or Secretary of Education Betsy DeVos assert that "freedom of speech and thought" are "under attack" on campus, we suspect the left's skepticism only hardens.<sup>8</sup> It is a kind of "guilt by association" in the realm of ideas.

Our friends on the left, of course, have good reason to be skeptical when the right cries that the "sky is falling." For years now, right-wing news organizations have aggressively embraced the following technique of persuasion: Zoom in on a handful of extreme incidents, magnify their importance and extrapolate to make wild, unfounded claims. (Left-wing media do this too, of course, but right-wing news organizations have turned it into a high art.)

Consider this Fox News segment from 2007 titled "Minnesota: America's First Somali-Muslim State?" Fox News personality John Gibson warned his viewers that immigrants from Somalia were "bringing the Muslim culture of that desert country to Minnesota's snowy woods." Gibson used three anecdotes to make his case, including a situation at Target where

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<sup>6</sup> "Campus free-speech advocates are dupes of a vast right-wing conspiracy," UO Matters blog, September 3, 2016, <http://uomatters.com/2016/09/campus-free-speech-advocates-are-dupes-of-a-vast-right-wing-conspiracy.html>.

<sup>7</sup> Hartman, "People always think students are hostile to free speech"; Leaker, "Against 'Free Speech,'" Sleeper, "Political Correctness and Its Real Enemies."

<sup>8</sup> Katie Benner, "Sessions Says Justice Dept. Has Helped Preserve Free Speech on Campuses," *New York Times*, September 17, 2018.

Somali cashiers complained about having to handle packages of bacon. “Target,” Gibson said, “has now reassigned those people so they don’t have to handle pork, which means that Target has agreed to go along with Sharia law.”<sup>9</sup>

This is sensationalized, spurious news reporting at its worst.

The left rightfully regards this right-wing model of persuasion as intellectually and morally bankrupt. So we have become accustomed to automatically discrediting or disregarding the doomsday messages broadcast by right-wing media.

If the right is ringing the alarm bell on free speech, then it must be a false alarm.

This conundrum reminds us of Joseph Heller’s famous line from *Catch-22*: “Just because you’re paranoid doesn’t mean they aren’t after you.”

We reject chicken-little claims about “The Death of Free Speech on College Campuses.”<sup>10</sup> However, just because campus free expression is not on life support does not mean that it is in a robust state of health.

Today, there is clear evidence that campus free expression is threatened, whether in the form of disinvitations and shout-downs, trigger warnings, bias response teams, censorship by committees, Deans and Presidents or self-censorship. While we don’t have the space here to present the relevant evidence, we would like to underscore one crucial point:

Campus climate is almost certainly chillier than the official thermometer registers.

High-profile events and incidents that are a matter of the public record--think Milo at Berkeley and Murray at Middlebury--represent the tip-of-the-iceberg when it comes to threats to campus free expression. (As Musa Al-Gharbi points out, “the default assumption should be that the problem is likely worse than the available data suggest.”)<sup>11</sup> Beyond the startling, hand-wringing cases, we should be even more worried about the countless daily threats to free expression that go unreported, whether that’s a professor quietly dropping a “controversial” text from a course syllabus or a student staying quiet to avoid censure from her peers.

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<sup>9</sup> “Minnesota: America’s First Somali-Muslim State?”, *Fox News*, March 19, 2007.

<sup>10</sup> A. Barton Hinkle, “The Death of Free Speech on College Campuses,” *Reason*, March 18, 2015.

<sup>11</sup> Musa Al-Gharbi, “Vox’s Consistent Errors on Campus Speech, Explained,” HxA blog, August 16, 2018, <https://heterodoxacademy.org/vox-consistent-errors-explained/>.

Sean Stevens and Jonathan Haidt cogently argue that campus climate is influenced not only by the views of the average college student regarding free expression but also, more significantly, by “the perception of the average college student about how easy it is to speak up, dissent or challenge dominant views on campus.”<sup>12</sup>

A 2017 Knight Foundation survey found that more than six out of ten college students “agree that the climate on their campus prevents some students from expressing their views because others might take offense.”<sup>13</sup> This number lines up with the finding from a 2017 Foundation for Individual Rights in Education survey that nearly half of students self-censor in the classroom. (Forty-eight percent answered yes to the following prompt: “In my college classes, I have stopped myself from sharing my ideas and opinions.”)<sup>14</sup>

With respect to viewpoint diversity, students of all political stripes agree that conservative views are less socially acceptable and that conservative students are more likely to keep their ideas and opinions to themselves. On too many campuses, the fear of articulating a point-of-view that falls outside the narrow bounds of a liberal-progressive frame creates the illusion that conservative views don’t exist.

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Across college campuses, there is one value that remains eminently uncontroversial: the development of critical thinking skills as central to the mission of higher education.

We believe that threats to campus free expression are stunting our intellectual growth, diminishing the prospects we will learn how to: 1. challenge our own presuppositions and biases 2. construct evidence-based arguments by anticipating and addressing critiques and counterpoints and 3. consider and assess multiple, sometimes competing, interpretations of scientific and social phenomena as well as creative work.

The “right to hear,” as Frederick Douglass put it, is a prerequisite for intellectual growth and intellectual self-defense.

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<sup>12</sup> Sean Stevens and Jonathan Haidt: “The Skeptics are Wrong Part I: Attitudes About Free Speech on Campus are Changing,” HxA blog, March 19, 2018, <https://heterodoxacademy.org/skeptics-are-wrong-about-campus-speech/>.

<sup>13</sup> “Free Expression on Campus: What College Students Think About First Amendment Issues.” Knight Foundation, March 11, 2018, <https://knightfoundation.org/reports/free-expression-on-campus-what-college-students-think-about-first-amendment-issues>.

<sup>14</sup> “Speaking Freely: What Students Think About Expression at America’s Colleges.” FIRE, October 2017.

Only 16 percent of college students say Americans do a good job at “seeking out and listening to differing viewpoints from their own.”<sup>15</sup> Campus speaker disinvitations and shout-downs, unfortunately, send a strong signal that it’s acceptable to not just tune out but to silence the voices of speakers you disagree with or dislike. Over the past several years, the roster of speakers subjected to concerted disinvitation campaigns ranges from Ben Shapiro, Charles Murray and Betsy Devos to Chelsea Manning, Angela Davis and the Dalai Lama.

Without any exposure to alternative perspectives and opposing viewpoints, we are starved of the stimulation required to develop as serious thinkers, including invaluable opportunities to change our minds. The tyranny of conformity exacted by speaker disinvitations and shout downs, not to mention a stay-in-your-lane call-out culture, makes us prisoners of our own perspectives.

“Sick of living in an echo chamber” when he was at Williams, Zachary Wood became co-president of a student-led “Uncomfortable Learning Initiative.” Wood, a self-described “black liberal Democrat from a disadvantaged background,” welcomed the opportunity to lock horns with controversial speakers like John Derbyshire and Suzanne Venker. Much to his chagrin, both of these speakers were disinvited after his peers voiced their loud disapproval. “Only with a better understanding of offensive views,” Wood insisted, would Williams students “learn how to combat them more effectively.”<sup>16</sup>

Trigger warnings are another regrettable campus phenomenon that restrict the space for “uncomfortable learning.” The original trigger warning policy of Oberlin College suggested a content advisory for Chinua Achebe’s *Things Fall Apart* as it might “trigger readers who have experienced racism, colonialism, religious persecution, violence, suicide, and more.”<sup>17</sup> At other campuses students earmarked *The Great Gatsby*, *Mrs Dalloway*, Ovid’s *Metamorphoses*, and Shakespeare’s *Merchant of Venice* as needing trigger warnings. At Duke students refused to read the sexually explicit graphic novel *Fun Home* because “Jesus forbids his followers from exposing themselves to anything pornographic.”<sup>18</sup>

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<sup>15</sup> “Free Speech on Campus,” Knight Foundation, 2016, <https://knightfoundation.org/reports/free-speech-campus>.

<sup>16</sup> Zachary Wood, “I ran a speaker series to expose Williams students to unpopular ideas. It was deemed ‘too offensive,’” *Washington Post*, October 27, 2015.

<sup>17</sup> Alison Flood, “US students request ‘trigger warnings’ on literature,” *Guardian*, May 19, 2014.

<sup>18</sup> Brian Grasso, “I’m a Duke Freshman. Here’s why I refused to read ‘Fun Home,’” *Washington Post*, August 25, 2015.



One of the biggest problems with trigger warnings is that they prescribe the way that a particular work should be interpreted. As Jay Caspian Kang explained, his professor's trigger warning that *Lolita* was about "the systemic rape of a young girl" ruined the novel for him. Kang, who had read *Lolita* several times before and seen it as a masterpiece of language play, could no longer pick up the book "without feeling the weight of his [professor's] judgement."<sup>19</sup>

In addition, trigger warnings take away the element of surprise and wonder that only art and literature can provide. As Kang put it, they "disrupt the creation of those highly pressurized, vital moments in literature that shock a reader into a higher consciousness."

Gaining an initial notoriety in English classes, trigger warnings have marauded across the humanities and social sciences, with student demands for warnings in subjects from anthropology to philosophy. And while some proponents of trigger warnings say they are intended to allow students to "delve into difficult material on [their] own terms," in practice, they increase the likelihood that students will opt-out from particular readings and class sessions.

With such a heightened awareness of the potential for course material to cause "harm," it is no surprise that self-censorship is pervasive. As Northwestern Professor Laura Kipnis attests, many of her colleagues "now routinely avoid discussing subjects in classes that might raise hackles."

Many of these dropped subjects, alas, are precisely those that liberal and left-leaning faculty have fought for years to be able to teach. For instance, Harvard Law Professor Jeannie Suk Gersen reported that some students don't want rape law taught "because of its potential to cause distress." About a dozen of her colleagues at multiple institutions are no longer including rape law in their criminal law courses because it's not worth the risk of student complaints. Before the 1980s, rape law was not even a part of the curriculum because "it wasn't considered important or suited to the rational pedagogy of law-school classrooms."<sup>20</sup> Feminists fought hard to have it included. When rape law is scrapped, not only will students simply not learn the material but we will also have fewer lawyers with the requisite expertise to represent rape victims.

For offended, distressed or irked students who would like to file complaints about alleged instances of conscious or unconscious bias, more than 230 colleges and universities across

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<sup>19</sup> Jay Caspian Kang, "Trigger Warnings and the Novelist's Mind," *New Yorker*, May 21, 2014.

<sup>20</sup> Jeannie Suk Gersen, "The Trouble with Teaching Rape Law," *New Yorker*, December 15, 2014.

the country now have Bias Response Teams. Tasked with investigating and responding to complaints about so-called “bias incidents,” they define these incidents as conduct targeted against “an individual or group based upon actual or perceived identity characteristics.”<sup>21</sup> Examples include telling ethnic jokes, using language that objectifies women and making disparaging comments about someone else’s political beliefs.

“No incident is too small to report.” (A survey conducted by the Foundation for Individual Rights in Education counted over 60 different “categories of bias” total, including “height,” “weight,” “medical condition,” “veteran status” and “smoker status.”)<sup>22</sup> These explicit instructions to students have led to some eyebrow-raising complaints, including a “phallic snow object,” a faculty member who made “inappropriate” jokes about “grading like a Nazi” and the “upsetting” demolition of a Donald Trump piñata in a student center.

Bias Response Teams run the risk of trivializing genuine instances of bias or hatred by equating, say, derogatory comments about Jews with the offhand comment “grading like a Nazi.” Instead of making us pay attention to truly troubling instances of prejudice, they cheapen the very concept of “bias” by devolving into a crude, box-ticking exercise. This all-or-nothing approach towards bias makes us blind to nuance and context in ways that privileges knee-jerk reactions over considered responses. The left is justifiably concerned with the disturbing persistence of different kinds of bias, from anti-Semitism to Islamophobia. But complaints about snow penises will only reinforce the position of many conservatives and right-wingers who deny the very existence of prejudice and discrimination.

The rush to judge that is encouraged by Bias Response Teams strikes yet another blow to nuance and complexity when applied to creative works.

These are just three examples of works of art that have been banned, removed or sequestered from college campuses in the past two years: satirical posters urging “all white Americans” to report “any and all illegal aliens” because they are “criminals” in a “white country” (put up by a student-organized Diversity Leadership Council at Gustavus Adolphus College)<sup>23</sup>; *Untitled (Flag 2)*, an American flag, which included “an abstracted image of the US split into two parts

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<sup>21</sup> Jeffrey Aaron Snyder and Amna Khalid, “The Rise of ‘Bias Response Teams’ on Campus,” *New Republic*, March 30, 2016.

<sup>22</sup> “Bias Response Team Report 2017.” FIRE.

<sup>23</sup> Susan Du, “Gustavus Adolphus students post racist flyers to prove a point about racism,” *City Pages*, March 22, 2017.

to symbolize the deeply divided state of the country” at the University of Kansas<sup>24</sup>; and a stylized painting of Klan members for an exhibit entitled “State of the Union” at Salem State University.<sup>25</sup>

Earlier this year Sehrat Tanyolacar, whose seven-foot Klansman installation covered with newspaper stories of racial violence was censored at the University of Iowa in 2014, came under fire again when he submitted his work *Death of Innocence* to an open faculty show at Polk State College, where he was an adjunct professor. In this piece Tanyolacar features dozens of graphic illustrations of Trump in “compromising positions” to represent the moral decay of the Trump administration. The repetition of Trump’s face, the artist explained, was intended to invoke all of the misleading statements from the White House, which “repeat themselves just like a copycat.” “You repeat one thing over and over and over again, you can make your subject numb, you can train them,” Tanyolacar said. Polk college authorities refused to display the work, deeming it “too controversial.” When Tanyolacar pressed them to elaborate on their rationale, he received no answer.<sup>26</sup>

In certain cases artistic expression is censored even before it sees the light of day. California State University Long Beach canceled a play because its title alone was considered too incendiary. The production, N\*W\*C (or N\*GGER, WETB\*CK, CH\*NK,) was written by and stars three actors of African American, Asian and Latino descent. It tackles the meaning of race in America, especially the power of taboo racial slurs. “If we’ve been called these words,” one of the show’s creators said, “then we have the right to confront them.”<sup>27</sup>

The decision to cancel the play reflects a more widespread failure to distinguish between articulating an idea, concept or position and endorsing it.<sup>28</sup> The ability to draw this distinction is a foundational building block of critical thinking. What place will satire, comedy and art have in a world where we conflate simply saying something with fervently believing and preaching it?

Any censorship of art constitutes a gross attack on our creative and critical sensibilities. It assumes that art may be interpreted with ease and that there is a singular, “correct”

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<sup>24</sup> Sarah Cascone, “Politicians Blasted Josephine Meckseper’s Stained American Flag as ‘Beyond Disrespectful.’ So a Kansas University Took It Down,” *artnet news*, July 12, 2018.

<sup>25</sup> Scott Jaschik, “Students and Art on the Klan,” *Inside Higher Ed*, December 1, 2016.

<sup>26</sup> Claire McNeill, “Polk State College deems explicit anti-Trump art “too controversial” for campus display,” *Tampa Bay Times*, February 21, 2018.

<sup>27</sup> Andrew R. Chow, “A Charged Title. A Canceled Show. Now a Cal State Official Resigns,” *New York Times*, September 13, 2016.

<sup>28</sup> See, for example, Dick Gregory, “Language, Racism and a Protest,” *Inside Higher Ed*, May 26, 2016.

interpretation of individual artworks. The left should be especially anxious when art that offers a searching examination of today's most troubling and pressing social developments, including the rise of the alt-right, draconian and inhumane border policies as well as the shameful shenanigans inside the White House, is shuttered. When Trump has his Twitter megaphone, the left should fight to make space for works of art like N\*W\*C\* and the Death of Innocence in the public sphere.

Threats to academic freedom pose a particularly acute risk to minority faculty and faculty who teach about third-rail subjects like race, gender and sexuality in the humanities and social sciences. As early as 2014, seven "faculty of color, female, and/or queer faculty" warned that they would be "disproportionate targets of student complaints" about "difficult" and "unsettling" material.<sup>29</sup> The chances that students will ask for content advisories for lessons on chromosomal mutations or differential equations are slim to none.

Consider the case of Assistant Professor Lucia Martinez Valdivia, who helped teach the iconic Humanities 110 course at Reed. In the fall of 2016, the student group Reedies Against Racism began an extended series of aggressive sit-ins to disrupt the course, which they saw as "Eurocentric", "white supremacist" and "a cruel test for students of color." Valdivia, a self-described "gay mixed-race woman," said she was "intimidated" by her own students--and that she and other instructors "including people of color, immigrants and those without tenure, found it impossible to work under these conditions." The experience, she reported, made her "scared to teach courses on race, gender, or sexuality, or even texts that bring these issues up in any way."<sup>30</sup>

The left is committed to increasing faculty diversity within the academy. Minority faculty are under-represented among the ranks of tenured and tenure-track professors and over-represented among the ranks of instructors and adjuncts. Subject to summary dismissal, these latter two groups are in an especially perilous position in terms of their ability to teach controversial material and to speak their minds. Valdivia's trial-by-fire suggests that threats to academic freedom could stymie efforts to diversify the faculty talent pipeline. Why would prospective faculty of color join a profession where their authority and expertise might be undermined because the content they teach is too charged?

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<sup>29</sup> Elizabeth Freeman et al., "Trigger Warnings are Flawed," *Inside Higher Ed*, May 29, 2014.

<sup>30</sup> Lucia Martinez Valdivia, "Professors like me can't stay silent about this extremist moment on campuses," *Washington Post*, October 27, 2017; Chris Bodenner, "The Surprising Revolt at the Most Liberal College in the Country," *The Atlantic*, November 2, 2017.

In today's hyper-partisan political environment—where ideological purity is at a premium—we automatically reject the concerns of our political “opponents” as fabrications, hoaxes and myths.

Yet, threats to free expression on college campuses are most certainly real and much more pervasive than the skeptics on the left would have us believe. When free expression is constrained, curiosity is the biggest casualty.

Curiosity is arguably the most important single source behind the development of critical thinking skills. It inspires, provokes and excites, encouraging us to push the limits of our intellect. It's also a prerequisite for empathy and cultivating a sense of self that extends beyond the individual, facilitating imaginative engagement with people and perspectives foreign to our own.

As intellectual freedom declines, so too will the impetus to broaden our horizons. And that's something we should all care about—left, right or center.

## **The Effects of Performance Funding on Academic Freedom: A Case Study from Florida**

**Michael Lanford, University of Southern California**

### **Introduction**

Approximately two years ago, I was in the beginning stages of my doctoral dissertation field research—a yearlong ethnography that examined the progress of remedial education reforms at a Florida state college. In 2013, the state of Florida took unprecedented steps to reform remedial education. Through the passage of State Bill 1720, all recent public high school graduates (and active duty members of the Armed Services) were allowed to opt-out of college placement examinations and remedial coursework. By 2014, Florida state colleges were compelled to create and implement innovative academic support programs to help students who may not be prepared for college-level coursework. These educational reforms were concurrent with the 2015 adoption of a performance funding system that either financially rewards or penalizes Florida state colleges based on four measures: first-year retention rates, degree completion rates, the job placement of graduates, and students' entry level wages.

Like many open-access institutions situated in small to midsize American cities, the college where I conducted my study had tight-knit groups of staff, administrators, and professors. This environment greatly facilitated my interview process. During the first month alone, I was able to interview approximately 15-20 people, observe several classes, and spend an appreciable amount of time talking informally with workers and students throughout the college. I had scheduled several interviews for upcoming weeks. I was also getting to know people in the surrounding community and finding a few great places to eat and relax. In general, I was feeling hopeful about the upcoming year of research and writing.

After the completion of an interview with a high-ranking administrator at the college, it was suggested that I might want to briefly introduce the topic and trajectory of my research to the institution's highest-level administrators and board members during an upcoming meeting. I already had approval for my research from the institutional review

boards at my home university and the host college. However, she felt that it might be a smart move to make them aware of my continued presence on campus - just in case any questions arose about the middle-age man from California who was asking students personal questions about their coursework, their past educational experiences, and their home lives. Such a move was unconventional, but it was also a rare opportunity. I would meet an entirely different group of influential people whose perspectives are all-too-frequently absent from educational research. After taking a moment to weigh the potential upsides and downsides, I agreed and thanked the administrator for her thoughtfulness and willingness to help.

Two weeks later, I found myself observing a sparsely attended afternoon meeting, anxiously awaiting the allotted five minutes so I could share my educational background, introduce my research topic, and field questions. The first hour of the meeting was thoroughly consumed with concerns about the college's standing amidst its peer institutions in Florida. Hence, the environment of the room was marked by frustration over the institution's overwhelming enrollment of part-time students, concern about the increased number of international students who needed ESL (English as a second language) coursework, irritation about the perceived inadequacies of local high schools' college prep curricula, and exasperated sighs over the former students who immediately left the area after graduation and were blank digits on the important metrics of job placement and starting salary.

In short, the meeting was a real bummer. And I decided that it might be nice to inject a little optimism into the proceedings before the daily 4 o'clock afternoon thunderstorm descended upon our area of Florida. One reason I had chosen the institution for my dissertation research was that the English Department and the Division of Academic Support had developed some potentially innovative ways to help students who were stuck in remedial writing coursework. Normally, I would have been circumspect in detailing what I planned to study and what the findings might entail, but I instead portrayed the writing-related reforms with unusual enthusiasm, explaining how they had the potential not only to significantly improve the college's retention and graduation rates, but also inform educational pedagogies and reforms around the country. My intent with this rhetorical shift

was to send the administrators and board members off with a positive feeling that the institution's hard work was not thoroughly overlooked and unrewarded.

Upon completing my five-minute speech, I glanced over the assembled group and felt an initial rush of excitement as their mood had seemed to soften considerably. The individual tasked with taking minutes of the meeting even flashed a quick smile; I felt a surge of pride as I organized my notes at the lectern. For several moments, I even thought there might not be any question, but then I noticed one board member—a prominent businessman from the area—with a troubled look on his face. I nodded at him to encourage a question. He paused for a minute, then carefully chose his words:

I think I speak for all of us in saying that this is welcome news. We're very happy that something, anything can maybe improve students' writing. But if what we're doing is so good—and it's something that can really help us [in the performance funding] race—why do we want anyone else to know about it?

### **The Setting**

I relate this story because it succinctly illustrates a fundamental tension in American higher education today. On the one hand, U.S. colleges and universities have operated on the belief that academics need the freedom to question received wisdom and produce knowledge that should be openly shared for the public good. On the other hand, colleges and universities around the world are engaged in a highly-competitive marketplace for talented faculty and students, public and private resources, and global and regional partnerships that can enhance institutional branding. Hence, there is a growing inclination for higher education institutions to view other institutions as competition, to stifle research that critically examines untested initiatives, and to limit access to new research and ideas that could benefit society. As I intend to show through this paper, each of these inclinations has a deleterious impact on the assumption that both society and the country benefit from the open and free exchange of ideas—that what we have thought of as “academic freedom” is beneficial for higher education and society.

In what follows, I first provide additional context about the American community college landscape, which is currently beset by three competing issues: 1) the nationally-defined need for more college graduates; 2) the fact that few students are prepared for



college-level coursework; 3) and concerns about the efficacy and efficiency of remedial classes that prepare students for college-level coursework. Then, I will draw a connection between the problems of the community college sector and the rise of performance funding as an accountability measure in higher education. Afterwards, I will briefly review the notion of academic freedom, along with allied concepts such as shared governance, control over the curriculum, and tenure. The remainder of this chapter will consist of a presentation and analysis of findings from ethnographic fieldwork in the Florida state college system. This data will depict how both performance funding and competitive pressures have negatively impacted faculty's control over the curriculum, shared governance, and scholarly inquiry. These three consequences, in turn, have undermined academic freedom for many professors currently working in such environments.

### **The Problem of Community College and Remedial Coursework Outcomes**

To meet the labor market demands of today's knowledge economy, the United States forecasts a need for more college graduates. By most estimates, 60% of the U.S. citizenry will need some sort of postsecondary credential to be competitive for future jobs (e.g., Lumina Foundation, 2014). Nevertheless, as of 2016, only 34.2% of Americans 25 years of age and older held a four-year college credential (U.S. Census Bureau, 2017).

One of the major complications preventing better is that large numbers of students need remedial coursework in order to be allowed to take college-level classes. Students who enroll in remedial education do not receive college credits, yet they still must pay considerable amounts of money and devote substantial time to their studies. Billions of dollars are spent annually on remedial education, and the results are poor (Clotfelter, Ladd, Muschkin, & Vigdor, 2015; Complete College America, 2012; Scott-Clayton, Crosta, & Belfield, 2012).

### **The Emergence of Performance Funding**

This problem is especially acute in the American open-access, community college system, where institutions are attempting to mitigate criticism while dealing with decreased state financial support (Mitchell, Leachman, & Masterson, 2017). Increasingly, it is

perceived that the value of a college degree is not often commensurate with the extraordinary investments - in terms of both time and money - that are required for enrollment and completion. Some have called for increased accountability from American colleges and universities, especially if they are to continue receiving taxpayer monies (Hillman, Tandberg, & Fryar, 2015).

Performance funding has become an especially popular way for individual states to discipline higher education institutions. The guiding theory behind performance funding is relatively simple: By tying state funding to clearly defined metrics (such as credit completion and job placement), performance funding compels institutions to focus on specific goals and channel their resources in support of measurable improvement that can enhance higher education outcomes. These outcomes, in turn, can be readily communicated to important external stakeholders. For politicians, performance funding is also appealing in that it generates broad popular sentiment among voters, especially during periods in which college tuition is rising at a faster rate than inflation (Dougherty et al., 2011).

Performance funding was initially tested by the states of Tennessee and Connecticut in the 1980's as part of a broader push in two directions: 1) the centralization of power in the hands of state-level trustees and 2) the search for a more efficient and effective method to allocate institutional funding than the "enrollment headcount" paradigm (McLendon & Hearn, 2013). For much of the 1990's, performance funding fell out of favor, however, due to complaints about grade inflation, perpetually shifting measures, and the limited ways in which college "performance" was conceptualized and measured (Dougherty & Natow, 2010).

In recent years, performance funding has enjoyed resurgent attention, with over 30 states utilizing formulae that tie institutional financial allocations to competitive metrics. The proportion of state funding associated with performance can be relatively tiny in some states (such as Illinois, where it is less than 1%) or nearly everything (somewhere between 80-90% in Ohio and Tennessee). Aside from the reasons outlined earlier, performance funding's renewed popularity is attributable to pressure from wealthy private foundations and influential public policy institutions (Dougherty et al., 2016). For example, the Lumina Foundation contends that "outcomes-based funding, although not perfect, is a significant step toward ensuring that taxpayers' significant investments in higher education result in

more graduates.”<sup>1</sup> Similarly, the National Governors Association argues that traditional funding methods give “colleges and universities little incentive to focus on retaining and graduating students or meeting state needs... Performance funding instead provides financial incentives for graduating students and meeting state needs.”<sup>2</sup> In whatever form it is implemented, performance funding has become an integral part of the accountability movement in higher education, especially for community colleges.

### **Academic Freedom**

While performance funding is a relatively new part of the higher education landscape, the concept of academic freedom has been enshrined for as long as American colleges and universities have been prominent on the world stage. Since the 1915 formation of the American Association of University Professors (AAUP) by a coalition of professors led by John Dewey, American colleges and universities have staunchly defended the concept of academic freedom. Their belief was that “the professoriate [needs] a significant degree of autonomy in the manner in which they conduct their work in order to have the freedom of thought and expression that is seen as necessary to advance knowledge and learning” (Tierney, 2001, p. 9).

Three related concepts - shared governance, control over the curriculum, and tenure - are important for understanding the role of academic freedom in contemporary higher education. According to the concept of shared governance, faculty should have the ability to determine how a university is administered (Gerber, 2014). The result is that academics have the ability - some might say the responsibility - to speak out when affairs pertinent to the day-to-day operations of higher education, in general, and their institutions, in particular, transpire. They also have a primary role in deciding which courses are necessary and what constitutes the curricula for those classes. Tenure provides the structural protection under which academic freedom can be exercised. Theoretically, they can speak against an educational policy, the manner in which curricula are designed, or even a

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<sup>1</sup> See <https://www.luminafoundation.org/outcomes-based-funding-faq>

<sup>2</sup> See <https://www.insidehighered.com/views/2016/10/06/evaluation-whether-performance-funding-higher-education-works-essay>

statement made by a prominent university official, and, due to academic freedom, they should not be threatened with the loss of their job (Tierney & Lanford, 2014). However, as I will detail later, not every level of the complex American higher education sector enshrines academic as a core value, and tenure, in particular, is a concept largely absent from the nation's community and state colleges.

### **Data Collection**

This paper's data were initially gathered during a year-long, ethnographic study of a single Florida state college. Researchers using qualitative methods such as ethnography are embedded in a given field for an extended period of time so that they can compare and analyze multiple perspectives (Denzin & Lincoln, 2005). Through such a detailed investigation, the researcher is able to "[produce] a richly written account that respects the irreducibility of human experience" (O'Reilly, 2005, p. 3) in an effort to better understand evolving phenomena. A series of interviews were also conducted with faculty and administrators at two other Florida state colleges. The interviews occurred as the result of snowball sampling, and they established credibility for the preliminary findings that were elicited from the initial site. Due to the sensitivity of the topic, the names of participants have been completely redacted.

Each of the colleges under study face serious financial challenges due to the recent statewide implementation of Florida's performance-based funding system. In relationship to their peer institutions (many of which are situated in cities with major research universities and/or larger, more affluent, populations), each of the colleges are perceived as having a high proportion of students who have a low socioeconomic status and need remediation in one or more subjects.

### **Findings**

Before presenting the findings, it is important to note that many participants felt State Bill 1720 represented the "spirit of innovation" in that it granted institutional autonomy to experiment with new approaches to developmental education. The bill was also credited with focusing attention on remedial education and galvanizing support for

much-needed reforms. However, many aspects of State Bill 1720 were highlighted by participants as being problematic for academic freedom and the cultivation of an institutional climate that promoted scholarly inquiry and innovation. These findings are explained below.

## **1. Control over the Curriculum**

The most common critique by administrators and faculty members concerned the temporal aspects of planning and implementing comprehensive educational reforms of the sort required by State Bill 1720.<sup>3</sup> Many administrators and faculty members expressed their opinion that the bill was passed in an “overnight fashion” and did not give individual state colleges the necessary time or resources to test or develop truly innovative ideas. One administrator, for example, termed the passage of the bill as “impetuous” and “drastic.” A professor at the same institution shared, in a deflated voice, that “he [had] lots of ideas on how to help students, but no place to try them and no support.” An administrator at a different college was more pointed in his response, declaring that “there is no way the people who passed this bill would want to actually deal with the millions of details necessary to make it truly effective, truly viable. I know very committed, caring people who retired - rather than deal with the massive headache of trying to replace hundreds of classes with new curricula and new support programs, all in a matter of months.”

Hence, participants told me that colleges throughout the state went into “survival mode.” Rather than pilot new pedagogical methods, gather data about successes and failures, and determine future policies and programs based on contextual evidence and student outcomes, most colleges just adopted whichever measure seemed most expedient at the time. As a result, administrators took control over curricular decisions traditionally thought to be under the jurisdiction of the professoriate.

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<sup>3</sup> Four delivery strategies for helping students in need of remediation were approved by the Florida state legislature: 1) modularization, in which specific skill areas are isolated and converted into “sub-unit parts”; 2) compression, in which the subject is covered in a more concentrated fashion; 3) contextualization, in which course content is linked with a specific area of study in which the student intends to major; and 4) co-requisite coursework, in which a lab or study group provides supplemental instruction while the student is enrolled in the related credit-bearing course.

For example, math professors who argued that co-requisite coursework should be based on face-to-face interaction with knowledgeable instructors and/or tutors were largely ignored. Instead, co-requisite coursework provided by lab software proved to be the most popular strategy for math support. In confidential interviews, professors explained, however, that the math labs adopted by many Florida colleges were completely unsupervised and cheating was rampant. In the majority of cases, the only requirement was to “finish the modules” by getting at least a “70.” Students verified this in a focus group:

Student 1: They set me up at a computer... but it doesn't teach you anything, though. It's like, literally for any question, you take it, you try it again. And when you get it wrong again, you move on to the next question. So, for anything I didn't know - I still don't know!

Student 2: What I did was - I would like get the wrong answer twice, and then I'd get the right answer. And then I'd write it down. So, I'd like do that for like four different modules so I'd have all the right answers. And I'm like, “Doof, doof, doof,” and just go do it all.

Student 3: My friend did it before me, and so I got the answers from him for the last few modules.

As the year progressed, it became well known that the co-requisite lab classes were a waste of time for most students. And yet, professors told me that they still did not have the agency to change coursework or develop new curricula. One professor explained it thusly:

When the bill was passed, administrators gathered a few of us full-timers in a room. Then they told us, “This is what we're doing. This is how we're doing it.” And we all looked at each other and said, “OK, then.” It's pretty much understood that any ideas from the peanut gallery are not welcomed, so why try?

Therefore, many professors viewed the harried reaction to the state's remediation reforms and performance funding measures as an infringement on the faculty's right to make informed, thoughtful decisions about the structure and content of individual classes, the delivery of such course content, and the pedagogical approaches that would be most appropriate for the college's student population. Additionally, professors were loath to test their institutions' commitment to academic freedom through criticism in a public forum. The majority of professors at all three colleges worked as contingent labor, not knowing if their contracts would be renewed from one semester to the next. There was an implied “understanding,” according to one adjunct, that a “certain percentage of students need to

pass if I am to be retained.” This created a “chilling effect,” with one professor stating that “The head of my department is responsive and sympathetic. But I would be crazy to make enough noise that administrators could hear - at least as long as I need to work here.”

Faculty were not the only ones frustrated by their lack of agency. Administrators were also reluctant to complain to state officials. An administrator explained the following:

Every year the funding formula changes, and we don't know why. Some colleges are the “model” colleges that the state likes to publicize. So it's all for show. “Here's a picture of a smiling student. See? The reform is working!” But if we don't fall in line, maybe we will find that the formula doesn't favor us next year. We can't risk that!

Consequently, one interesting “chilling effect” of performance funding was the feeling that it could be adapted, from year to year, to punish specific institutions who were willing to publicly criticize state policy or the implementation of remediation reforms.

## **2. A Decline in Shared Governance**

A second concern among faculty involved the questionable allocation of resources and precipitous decline in shared governance in the wake of performance funding priorities. As one faculty member put it, “Here, we've never had shared governance the way you might think about it at research one institutions. But we did think that our voice mattered. At the very least, we could share our ideas and talk openly about the goals of the college. And when something was obviously wrong, we could make noise about it and hope to get it fixed. Now, we get told where to go and what to do. Or we don't know about a new administrative program until it's far too late... The whole thing is depressing.” Another faculty member flatly remarked, “The craziness of the past couple of years has destroyed any and all agency we [as professors] have to affect change.”

One example of such an administrative initiative might help to demonstrate how administrative edicts have gone unchecked by faculty in recent years. Ever since the introduction of performance funding in 2015, the state has mandated that first-time, full-time students are the sole group to be included in statistical analyses, even though such students only made up 35% of the total student population in the entire Florida state college system. Many institutions that are not located in large urban areas - or near research

universities - have a much smaller proportion of full-time, first-time students. Hence, that specific constituency, usually wealthier and younger than their peers, receives an outsized amount of resources and attention from their respective colleges.

The most obvious example occurred at one institution that was struggling to attract full-time, first-time students. According to statistics from the college's institutional research office, approximately seven out of every ten students live at or below the poverty threshold. The vast majority of enrolled students had previously attended one or more postsecondary institutions. Few students who were going to college for the first time had the financial means - or the time - to attend on a full-time basis.

Therefore, to ensure a ready supply of new first-time, full-time students, the institution made a concerted decision to massively expand its athletics programs. A large, expensive multi-purpose stadium was constructed. A handful of math and writing tutors were reassigned dedicated hours with athletes. A few coaches even recruited heavily in foreign countries.

Professors and administrators across the institution were well aware of the reasons why the athletics programs were suddenly receiving such special attention. One professor joked, "I don't know if its rational - or a rationalization. But it's definitely an innovative response." An administrator shrugged his shoulders when I asked about the investments in athletics, commenting, "You do what you have to do."

But no one felt comfortable in openly questioning how the massive allocation of resources in athletics fit in with the institution's mission of "[providing] access" to traditionally-marginalized individuals. Probing during interviews resulted in hopeless shrugs and comments along the lines of "there's very little we can do." One professor groused that she had been labelled as a "troublemaker" and advised by older faculty to "keep her head down." Another professor was willing to relate how he had recently accompanied his teenage daughter, a highly sought-after athlete, to several universities for official campus visits. According to him, the experience was eye-opening:

I always knew these universities had great facilities for athletes, but I had no idea the extent of their support. Tutors everywhere! Updated computers. It made me think, "Gosh, if we could only support *all* of our



students like that here.” This is where it’s most necessary - and it could be really powerful.

Financial shortcomings in other departments meant that any new initiative to help students usually had to start with the personal financial contributions of professors and/or staff who understood the difficult daily lives led by many of their students. For example, several professors launched an initiative to combat homelessness among the student population at their college. Such initiatives nevertheless had limited reach, unfortunately. Since the initiatives tended to impact students who were attending classes on a part-time basis and, therefore, were not directly associated with performance metrics, institutions pledged limited support.

In short, the colleges I examined completely lacked shared governance insofar as virtually all institutional decisions concerning curricula, degree programs, and the allocation of resources were made by a small group of administrators. When faculty had ideas, they were rarely voiced and even more rarely heard. Instead, faculty attempted to work outside the institutional system to affect meaningful change.

### **3. The Chilling Effect on Scholarly Inquiry and Innovation**

As I described in the introduction, colleges that developed promising approaches to student success were incentivized to see other state colleges as “rivals,” rather than as colleagues with whom innovative ideas could be shared and cultivated. Discoveries that could help student retention and graduation rates throughout the state were “held in-house.” The chilling effect on scholarly inquiry also had other ramifications for faculty life, however. Failed initiatives at helping students were treated as “state secrets,” largely because there was considerable state pressure to disseminate “positive” results even when important lessons could be learned from the “negative” outcomes. This unfortunate state of affairs was most apparent with the administrative and political push to move nearly all coursework online.

While a handful of faculty were supportive of the push to move coursework online, most faculty expressed exasperation with “[the] incessant, moronic push to move everything to ‘the digital space.’” As one instructor stated, the “digital literacy needs of adult learners

[preclude] them from having success in math and writing classes... What makes us think they'll be successful in completely-online environments?" During one focus group, tutors from the writing center agreed that they spent "around 50% of their time helping students with papers and around 50% their time helping students use a computer." For adult learners, the percentages might flip to a 25%-75% split. In several cases, I witnessed writing center tutors grabbing a USB drive from a "secret stash" to give to students in need. One staff member explained that the stash was necessary so that many students could learn to save their work - and have a way to store future papers. As she described, "We probably have about five heart-wrenching tragedies every semester during the first month where students write an entire paper on a writing center computer. But they fail to save the document, and there's very little we can do."

Unfortunately, the Florida state colleges I observed were understaffed and often overwhelmed by students' digital literacy needs. One administrator working in academic support expounded upon the issues faced by her staff:

You see, it's even just showing students how to find their assignments and how to submit them digitally. I had a lady come, I think, six times to make an appointment just to get help with her class's online submission system because she wasn't confident enough to turn in her own paper. Another student regularly made appointments with me whenever he needed to print a single document... After enough sessions like that, you wonder if you're making a difference.

A couple of faculty shared that they thought about writing a critical paper on the topic of online coursework for students who had obvious deficiencies with digital literacy. Ultimately, though, they decided against it: "Unless it makes the college look good, there really isn't going to be support for research along those lines." Another professor who said that he regularly spoke up in faculty meetings about "meeting students halfway on this issue" disclosed that he was tired of fighting. With a sigh, he said, "I'm tired of being called 'the college Luddite'... I created one of the first online classes [at this college]. I know its potential. But I also know it's just not going to work for some students... I think there are other ways to help students who don't have internet access or enough skills to be successful right now in online classes. But, hey, I guess I'll never get to try those ideas out."

The issue of incentives and motivation cropped up repeatedly in interviews. Administrators and professors complained that colleges were incentivized to meet “meaningless quantitative measures that did not promote deep learning.” And yet, they felt powerless to publicly criticize the specific elements of performance funding they felt were “meaningless” due to external pressure to win “the performance funding arms race.” One example of a “meaningless” measure concerned the pressure to graduate students within a specific time frame, even when it was known that most enrolled students needed to balance multiple jobs, childcare and/or other family issues, and financial challenges from semester to semester. The absurdity of pushing students through coursework as quickly as possible was singularly apparent when it concerned the adult learners that constituted a large percentage of the overall student populations of all three colleges. Thus, the performance funding criteria, in conjunction with the haphazard way in which State Bill 1720 was passed, undermined the normally high levels of intrinsic motivation academic support staff typically relied upon to get through difficult periods during each semester.

### **Conclusion**

Increasingly throughout the United States, educational policies with deep implications for student success and the academic life are being enacted without faculty, staff, or student consultation. This paper offers a prominent example of how political hubris can compel institutions to acquiesce to the whims of state-level actors, even when knowledgeable researchers and administrators have important questions about the viability of a particular reform measure. It also demonstrates how institutions in the contemporary higher education landscape are compelled to adopt competitive attitudes to the production and dissemination of knowledge, even when such attitudes are antithetical to essential traditional scholarly values, such as academic freedom and shared governance.

More specifically, we see that performance funding in Florida has created at least four conditions which are untenable for stimulating innovative ideas and creative programs. First, the state adopted strict timelines that prevent new ideas from being piloted, examined, and reconceptualized. Second, it placed institutions in competition with each other, so that discoveries which might aid student retention and graduation are “held in-house” and do not

contribute to public knowledge. Third, in a strange twist, the financial incentives that the state of Florida employed in hopes of stimulating extrinsic motivation have had the unanticipated effect of undermining intrinsic motivation. Fourth, the ways in which performance funding have been implemented have encouraged resource allocation that only focuses on the metrics being evaluated, not broader considerations of the institutions' and students' well-being.

Therefore, this paper takes a critical view of funding that is aligned with "performance" and policy that is enacted without faculty consultation. We know, from years of empirical research, that specific values supporting institutional innovation and individual motivation work hand-in-hand with academic freedom and shared governance (Tierney & Lanford, 2016). These values include the sharing of research and knowledge between institutions and disciplines, support for intrinsic motivation, the refinement of knowledge through trial and error, and resource allocation that adheres to an institution's mission statement.

Perhaps most troubling, however, is the fact that the rush to institutional competitiveness seemingly precludes reasoned debate and the academic freedom to interrogate complex phenomena. Colleges and universities, at their best, are supposed to stand for free inquiry and serve as arenas where disagreement occurs. Few professors choose to enter higher education because they hope to verify preconceived beliefs or stand quiet when policies are having a negative impact on their students. Instead, they purposefully study controversies and invite critique. Scientific or humanistic topics are never improved by a scarcity of diverse voices and a lack of critical discourse. Instead, a healthy exchange of ideas must be fostered so that we better understand the complex social, cultural, economic, and scientific issues that require extended, concentrated study and professional expertise. Only through such inquiry can colleges and universities avoid the inscription of institutional hierarchies that thwart greater social equity while continuing to make positive contributions to human development.

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## Academic Diversity and the Problem of Strings

Jeremy D. Bailey, University of Houston

Conservatives have rallied to defend freedom of thought and expression on college campuses. Were it not for the larger context, this would be welcome development, as conservatives have not always been so devoted to this kind of liberty. That context is that college administrations have wavered in their commitment to freedom of expression, and students are no longer reliable defenders. Given the recent history of higher education, it is tempting to conclude that if conservatives are for it, then freedom of thought and expression on college campuses are doomed. But this is not the whole story. In my view, part of the problem is that the new conservative embrace of free speech as a means toward “viewpoint diversity” seems opportunistic rather than principled. This point can be illustrated by recent controversies involving grants with strings attached. In my view, these events offer an admonition to conservatives who embrace the argument of “viewpoint diversity” to influence hiring and curricular decisions on campus.

My university offers an example. In 2011, two faculty members affiliated with a center on campus negotiated a grant with the bank BB&T that included the “stipulation” that the University offer a course with Ayn Rand’s *Atlas Shrugged* on the syllabus. Specifically, one of the two professors agreed to, first, modify an existing “special topics” course to add *Atlas Shrugged* to the syllabus and, second, to petition to have the course formally added to the political science course catalog and taught on a yearly basis. In exchange, this center and the University of Houston would receive \$100,000 a year for 10 years. The University’s Provost approved the grant without consultation from Honors or Political Science, even though under Political Science bylaws all new courses would have to be approved by the Political Science Undergraduate Committee and then by the Undergraduate Committee of the Faculty Senate. Special topics courses normally do not require approval by the faculty, so in theory the course could have been offered up to five times as special topics course instead of becoming part of the official catalog.

These events were not unique to my campus. Rather, they were part of a larger attempt by BB&T's Charitable Foundation to change academic curricula and culture at universities in the Southeast. Over 60 such grants with the "stipulation" had been issued to colleges and universities. As BB&T's former CEO John Allison explained, BB&T's motivation was at least partly economic. Their leadership had long been puzzled because what they considered to be superior intellectual arguments about the benefits of capitalism had been rejected or ignored by university professors, and they eventually "concluded that the free market economic arguments were routinely defeated by moral arguments." Because these moral arguments were about the distribution of wealth, "we wanted Rand's ideas to be heard in the academic community." Moreover, distributing Rand's work would be good for business, and so therefore "BB&T tries to fund charitable projects that are clearly in our shareholders' long-term best interest, but have goals that would be difficult for shareholders to achieve on their own."<sup>1</sup> So, as BB&T saw it, their goal was to change the hearts and minds of college students and in so doing, improve the value of their shareholders' portfolios. The most important step would be requiring that students read a book by Ayn Rand.

Reasonable people may differ on whether doubling down on *Atlas Shrugged* was a wise investment, but, in my view, the "stipulation" requiring the book raises larger questions about the meaning of academic freedom, about what it is and what it is not. The stipulation therefore presents an opportunity for faculty to establish safeguards – transparency, checks and balances at a minimum – to ensure that future stipulations receive the scrutiny and deliberation they deserve.

One lesson I learned is that college professors are generally risk adverse and do not want to challenge what they see as the decisions of the upper administration. More surprisingly, faculty members are unwilling to challenge senior colleagues if they think that those senior colleagues have support within the administration.<sup>2</sup> So even though most faculty members I talked to expressed strong concern about the terms of the grant, it was very difficult to find anyone on campus who would express those concerns in the form of

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<sup>1</sup> John Allison, "About those BB&T Courses," Sept 9, 2012, on PopeCenter.org

<sup>2</sup> Public accounts suggest that this grant is typically negotiated between the foundation, an individual faculty member, and the university administration and then presented to the faculty after the deal has already been approved.



actual votes or public criticism. So, for example, the chair of political science at the time recommended that the department do nothing because the department “had not been consulted.” Because we had not been consulted by the Provost, the chair reasoned, any problem that arose would be a problem for the Provost but not for the department. My chair would simply look the other way and then blame the provost if and when anyone ever asked about it. Sometimes, this logic toward inaction sometimes took the form of threatening innuendo made in private. When I expressed my objections to the grant on the grounds of academic freedom, two senior colleagues warned me about getting a reputation for “being difficult.” A supervisor “reminded” me that the Provost makes all decisions “about counteroffers” and “merit raises.”

Another lesson I learned had to do with conservative academics on other campuses. Conservatives generally had one of two responses. One group agreed with me and unequivocally condemned the action on grounds of academic freedom. A considerable number of these faculty had been given grants by different outside organizations, and they worried that the publicity of some of the BB&T controversies would taint their own efforts to bring speakers to campus. That is, they believed that they were engaged in legitimate fundraising and institution building efforts, and they worried that those efforts would now be seen by their colleagues as less than legitimate even though their own grants lacked such a stipulation. The second group responded that I was too uptight, that “everybody does it.” A good number of professors also argued that such grants, even with strings attached, were necessary to bring “intellectual diversity” to campus. It is to these arguments that I now turn.

### *The Case for the Grant*

Defenders of the BB&T grant typically make several arguments, and a 2015 essay by C. Bradley Thompson, executive director of the Clemson Center for the Study of Capitalism, is fairly representative.<sup>3</sup> One argument is that everybody does it, including donors on the Left. As Thompson puts it,

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<sup>3</sup> C. Bradley Thomson, “Do Corporate Donors Threaten Academic Freedom?”  
<https://www.mindingthecampus.org/2015/11/15/do-corporate-donors-threaten-academic-freedom/>

This recurrent focus on corporate, libertarian and conservative donations to universities is a bit ironic. After all, consider the dominance of the left over the campuses and the enormous amount of money poured into academic coffers by the ideological left without attracting the sort of protests provoked by donations from the corporate world and the right.

Pointing to gifts aimed at diversity or peace and social justice studies, Thompson reminds us that big money gifts have already been used to tilt the academic world to the left. A second common argument has to do with meaning of academic freedom. Pointing to the “standard dictionary definition” of academic freedom, Thompson argues that the concept has to do with the liberty of individual faculty members to “teach or learn without interference.” So, by this definition, Thompson argues, the BB&T grant does not interfere with any person’s freedom to teach and learn what they want, therefore, academic freedom is not threatened.

The BB&T and Koch academic programs have done nothing to interfere with the freedom of anyone to teach or learn what they want. At every university that has accepted BB&T or Koch money, not a single faculty member’s academic freedom has been denied or compromised in any way. I publicly challenge the critics of these donations to name one faculty member anywhere in America whose academic freedom has been threatened by these grants.

By this view, there is no problem with grants with strings attached because no string accepted by one professor affects the courses or research of anyone else. Thus, in the worst-case scenario, the string is a fairly normal and uncontroversial part of modern university life. In the best case, it represents an exciting collaboration between corporate partners and underfunded academics and offers another opportunity for academics to bring ideas beyond the ivory tower.

These arguments, in my view, are not persuasive because they are not honest enough with the facts. With respect to the “everybody does it” argument, it is true that other gifts come with strings attached. Endowed chairs, lecture series, etc., are frequently designated to be connected to a particular field of study or methodological approach --- lecture series on public health, or an endowed chair in classics, for example. What distinguishes the BB&T grant from other grants is that the grant stipulates curriculum (usually by requiring a single book) and therefore threatens one of the “core functions” of the university. If defenders of the BB&T grant truly wish to rely on the “everybody does it” defense, then they need to be more specific about what it is that everybody does. In particular, they need to show that

these other grants have a stipulation about specific texts that must be taught in order for the university to receive the money. I have been following this debate for almost a decade, and I have never seen a second example of grant that required a specific book to be taught in a college classroom. Given that the book in question is highly polemical and almost certainly would not merit being on the syllabus without the grant, this point is critical.<sup>4</sup> In short, I do not think that everybody actually does this, at least, not yet.

This point is related to the second argument, the one about the definition of academic freedom. It is true that the meaning of academic freedom varies across the faculty. In the case of religious universities, for example, administrations often regards academic freedom as the power to require faculty to adhere to the mission of the university or religious sect, not the freedom of individual faculty to state their opinions in class. As we have seen, Thompson argues that academic freedom is in fact a protection of individual faculty. In my own experience, academic freedom was sometimes used to ward off resistance to the grant. For example, an Associate Dean warned me that my opposing the approval of the course would be a violation of the academic freedom of the person teaching the course and that I might find myself on the other end of an academic grievance on those grounds. Similarly, Ohio University economist Richard Vedder charges critics of the grants with “attempting to stifle intellectual diversity” and to “impose a monopoly of ideas on college campuses.”<sup>5</sup>

The reality is that Academic freedom has had a specific and limited meaning. Going back to 1915, the AAUP has written that academic freedom requires that the faculty be free from outside pressures when they disseminate research and instruct students. Historically, these outside pressures have come from religious groups, big business, and government. This means the concept of academic freedom has long been grounded on a very simple principle: the faculty of a university must control its curriculum. This principle in turn means that the concept of academic freedom goes well beyond the freedom of an individual professor to research and teach. It does not allow a single instructor (or administrator, or development

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<sup>4</sup> Indeed, it is revealing that the book was typically not on the syllabus before the grant. I would propose this as a simple test: has the book in question already been on the syllabus without the financial incentive attached?

<sup>5</sup> <https://www.forbes.com/sites/richardvedder/2018/05/07/academic-freedom-intellectual-diversity-and-the-charles-koch-foundation/#5b1fc7e92719>

officer) to accept a stipulation that would undermine faculty control over the curriculum. As recently as 2008 and 2012, the AAUP has affirmed this principle:

Faculty members and administrators often cite academic freedom to justify their objections to standards for regulating contracts. Their arguments obscure the fact that academic freedom evolved as a concept not only to protect individual rights but to insulate the academy and safeguard the discovery process from powerful social forces, initially the church and later big business. Some rules are necessary to preserve freedom of research, teaching, and inquiry. At stake are the standards that govern universities, their reputations, and public trust.

Academic freedom does not entitle faculty members to accept outside responsibilities that make it impossible to do their primary jobs. Academic freedom does not entitle faculty members to sign away their freedom to disseminate research results. Academic freedom does not entitle faculty members to ignore financial conflicts of interest that could dangerously compromise the informed-consent process and the impartiality of research. It follows, therefore, that academic freedom does not guarantee faculty members the freedom to take money regardless of the conditions attached to receipt of the funds.<sup>6</sup>

The AAUP has long been clear that academic freedom is more than a protection to individual faculty members. “Academic independence has always been rooted, historically, in the university’s core belief that it must retain the ability to control its own internal academic affairs.” The principle at stake is “academic self-governance or academic autonomy.” At the heart of the movement for academic freedom, the idea was to protect universities from undue influence by powerful forces outside the university. “The rationale for this remains straightforward: If universities allow themselves to be guided by the narrow dictates and interests of their outside financial supporters, they could not simultaneously—or credibly—perform their core academic and public-interest missions to: advance high-quality scholarship and research across all disciplines; generate reliable public knowledge; engage in dispassionate inquiry; offer expert advice free from the influence of special interest groups; and deliver a broad-based education as well as advanced specialized training.” In practice, this means, “No academic institution should accept any financial support that is either

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<sup>6</sup> From AAUP. *Recommended Principles & Practices to Guide Academy-Industry Relationships*. See also AAUP, Report of Committee A, 2007-8.

explicitly or implicitly conditioned on the donor's ability to influence or control such core academic functions."<sup>7</sup>

From this perspective, academic freedom has long been understood as both an individual freedom and a collective duty. Just as I cannot persecute my colleague for teaching or learning what he or she wants, I cannot accept a grant with a string attached because such a string would undermine the ability of my colleague to teach or learn what he or she wants. By accepting such a string, I would undermine my colleague's teaching by inviting outside influence and by calling into question the basis for the texts on his or her syllabus.

In the *New York Times*, Stanley Fish has pointed to the BB&T example to illustrate the specificity of the meaning of academic freedom: "My general point is that academic freedom is a useful notion only if it is narrowly defined." After pointing to claims of academic freedom by individual faculty that in his view had incorrectly applied the principle, he used the BB&T example at Florida State to show an easy case where academic freedom had been jeopardized: "if assigning *Atlas Shrugged* is the price for the receiving of monies and the university pays that price, it has indeed sold its soul."<sup>8</sup> Some universities have agreed with Fish. At Florida State and Clemson, there had been controversy over stipulations attached to faculty hiring and promotion.<sup>9</sup> A handful of universities – including Virginia, Texas State, McGill, and Cornell – have rejected the grant because of the string. At Cornell, vice-Provost Sciliano explained,

Cornell just cannot accept money with those kinds of strings attached because it directly undermines our own responsibility to determine internally what we teach and how we should be teaching it. The problem isn't really any different from one in which the government sought to specify what should be taught in universities. The fact that this is a private donor rather than the government really doesn't change the threat that such conditions pose to the academic freedom that is crucial to the effective functioning of universities. Put simply,

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<sup>7</sup> From *Recommended Principles & Practices to Guide Academy-Industry Relationships* by the American Association of University Professors.

<sup>8</sup> "[FSU Dean] Rasmussen's most egregious comments concern another matter. BB&T, the bank holding company, funds an ethics course on the condition that Ayn Rand's *Atlas Shrugged* be required reading."

<sup>9</sup> These grants stipulate that the donor be allowed to add its own members to search committees and tenure and promotion committees. (See news reports on Florida State controversy).

we don't sell our curriculum.<sup>10</sup>

Others, like Duke, negotiated terms in way to exclude the stipulation. At several universities, faculty complained they were not consulted until the grant was already in place, and Florida State and University of North Carolina have since added disclosure requirements to their grant process.

All this suggests that the meaning of academic freedom is either contested or in flux. This would not be surprising, because, in everyday political life, we continue to debate the meaning of liberty and which rights are among those that governments are, in the words of the Declaration of Independence, instituted among men to secure. But the fragility of the meaning of academic freedom is concerning in that it has to do with the question of influence from outside campus and the growing question of the intellectual climate on campus.

### **Academic "Diversity"**

This brings me to the third common argument made in defense of these grants. This argument has to do with what is now called "viewpoint diversity." According to Thompson, the grants with the Ayn Rand string "have actually *increased* rather than diminished the sphere of academic freedom. Their explicit goal is to expand the marketplace of ideas on college campuses so that students can be exposed to a broader range of ideas." In his view, university faculty have become overwhelmingly liberal and overwhelmingly hostile to libertarian economic policies, so the course and the grant do a service to the academic community by adding more voices to the marketplace of ideas.

The argument from viewpoint diversity is at first glance quite compelling. It argues that orthodoxy is a threat to the reasoned pursuit of truth because of the problem of confirmation bias. If everyone around us believes the same thing, then it is possible that what we think is rational is actually an echo chamber of prejudice. Thus we need to surround ourselves with diverse points of view so that we can constantly test and sharpen what we think the evidence demonstrates.<sup>11</sup> As we have seen, Richard Vedder relies on a similar argument.

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<sup>10</sup> "C.U. avoids conflicts of interests with acceptance of donations," *Cornell Daily Sun*, March 13, 2008.

<sup>11</sup> See the website for the video for Heterodox Academy.

This argument is compelling in part because it sounds very similar to what John Stuart Mill argued in his 1859 treatise, *On Liberty*. As he put it, in politics there are two natural parties, a party of “order and stability” and a party of “progress or reform.” Both sets of ideas “are necessary elements of a healthy state of political life.” This is to say that neither party sees the whole, and “each of these modes of thinking derives its utility from the deficiencies of the other.” Thus, “it is in a great measure the opposition of the other that keeps each within the limits of reason and sanity.” The problem, however, is that “ninety-nine in a hundred” educated men “can argue fluently for their opinions,” but “they have never thrown themselves into the mental position of those who think differently from them.”<sup>12</sup>

It is also compelling because it offers a potential corrective to a malady that has in the past lacked a name. That malady is the brute fact of numbers. Studies have consistently found that the disciplines such as political science are relatively conservative in that Democrats enjoy only an 8 to 1 advantage over Republicans on the faculty. In the humanities, in departments such as history or anthropology, the numbers are way more extreme. Recently, Mitchell Langbert found similar results in a study of party affiliation of tenured or tenure track faculty at 51 the top 66 liberal arts colleges, that is over 8,000 faculty. History is 17 to 1, and English 48 to 1. Perhaps more telling, over one third of those colleges had zero registered Republicans.<sup>13</sup> In other words, in a country that is more or less evenly divided between two parties, something like 20 of America’s top liberal arts colleges have no Republicans among their faculty. To be sure, this study would not capture Republican leaning faculty who are registered as independents or who are not registered, but this is nothing less than stunning. These numbers are reinforced by studies done by Sarah Lawrence political scientist Sam Abrams, who has also found that among college administrators liberals outnumber conservatives twelve to one.<sup>14</sup> Abrams also argues this is a problem because it suggests a lack of intellectual diversity on campus.<sup>15</sup>

In a recent op-ed, Cass Sunstein pointed to these numbers to acknowledge a problem

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<sup>12</sup> John Stuart Mill, *On Liberty and the Subjection of Women*, ed. Alan Ryan (London: Penguin, 2006) 55, 44.

<sup>13</sup> [https://www.nas.org/articles/homogenous\\_political\\_affiliations\\_of\\_elite\\_liberal](https://www.nas.org/articles/homogenous_political_affiliations_of_elite_liberal)

<sup>14</sup> <https://www.nytimes.com/2018/10/16/opinion/liberal-college-administrators.html>

<sup>15</sup> <https://www.nationalreview.com/2018/11/college-professor-targeted-over-op-ed-viewpoint-diversity/>

with higher education, and he, too, casts the problem in terms of viewpoint diversity. If there is a reigning orthodoxy on campus, then “students and faculty might end up in a kind of information cocoon. If a political-science department consists of 24 Democrats and 2 Republicans, we have reason to doubt that students will be exposed to an adequate range of views.” Sunstein writes that he does not recommend affirmative action for conservative faculty as a solution. Rather, he wants liberal faculty to teach “both sides” and he recommends that “those who run departments lacking ideological diversity have an obligation to find people who will represent competing views — visiting speakers, visiting professors and new hires.”

It should be remembered, however, that Mill argued that teaching both sides is insufficient, that we need to hear arguments “from persons who actually believe them.” But there are several additional problems with Sunstein’s solution and with the larger argument from viewpoint diversity.<sup>16</sup> The first has to do with Sunstein’s proposed solution to the problem. He seems to think that the problem can be fixed by hosting lecturers and hiring *visiting* and new faculty who can offer different perspectives to students. This is to say that the perspective of the faculty member, not the research or teaching excellence, is what would be driving the decision. Even if this did result in surveys in the future that showed incremental gains by Republicans among the faculty, a better result would be a survey that showed party diversity – nay, parity – without there having been attempts to construct that result.

The problem as I see it is that it is very hard to explain how the imbalance came to be. One explanation is that Republicans stopped being interested in becoming college faculty, or that, if they do want to become college faculty, they prefer jobs at research universities. Another is that liberals began to exclude faculty they thought might be Republican, and they have been most successful at elite liberal arts colleges. Either way, it seems that something other than academic excellence (excellence in research and excellence in teaching) is motivating the seeking and gaining of faculty jobs, and that something has something to do with politics. If that is the case, then the whole premise behind academic freedom is fundamentally flawed because it presumes a notion of faculty excellence, a notion of a

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<sup>16</sup> Mill, *On Liberty*, 44.



common understanding of what it is that faculty do with their freedom, that in fact does not exist. Or to put it differently, it seems as if some universities, especially liberal arts colleges, have embraced a new mission, and, although they are less explicit about it than their religious counterparts, they are in some ways very similar.

In my view, then, the problem is not primarily or even immediately the information cocoon. The problem instead is that the universities and colleges have been fooling themselves and the public into thinking that they were most interested in academic excellence when in fact it seems that they have been interested in something else. If this were not the case, surveys of college faculty should find deep if not equal pockets of Republicans in the same way that surveys of other professionals should find naturally occurring pockets of Republicans. The study of chemistry and math should be in, theory, non-partisan. So too should be economics and political science if the social sciences are, as they claim, a real science. If survey after survey reveals the absence of Republicans, then there is a *prima facie* problem. To put my point differently, what the argument from viewpoint diversity gets wrong is that it presumes we want conservative faculty on campus when it could be the case that what all we really want is faculty who *happen* to be conservative.

Seen this way, it becomes more clear that this situation would be fixed not by finding speakers and visiting faculty “from the other side” to put in front of our students. Rather, it would be fixed when surveys produce substantial groups of Republicans and *nobody knew who they were*. Nobody would know who they were because their political identity would not be central to their teaching and research and to their identity as college professors. And the same would be true for Democrats. Republicans would be hard to identify because it would not be clear who the Democrats on campus actually were because these Democrats would not see their partisan affiliation and their work as having anything to do with each other.

In this, I think I disagree with the Millian model of debate among people who actually believe the arguments. While I agree that this is perhaps better than a partisan attempting to present (sincerely or not) both sides, the better path is to reject the debate model altogether. Whether or not critics of Mill were right to respond *On Liberty* with the point that society is not a debate club, I think their point is stronger in the context of the university. The

university is at its best when it is not a debate club. Rather, the best university is the one where its faculty wants most of all to see things as they are, to investigate nature without qualification. This does not require faculty members to give up on politics or even to give up on being partisan in public life. But it requires them to separate their partisan identity from their scientific identity and to model for their students what it means to pursue truth without precondition.

This campus may never exist, but it is certainly possible for an academic department to model itself in this way. In fact, I would say that my home department is such a place—I could not predict the partisan affiliation of about half my colleagues in part because even though I work in a political science department very few of my colleagues talk about politics at all. Our research is our research, and that research only “counts” if it lands in high quality peer reviewed journals and books. More practically, a step toward this ideal would involve repudiating the argument from viewpoint diversity. While that argument claims the respectable mantle of luminaries such as Mill, its great problem is that it politicizes the campus more rather than less. It does so by elevating perspective over quality. In place of excellence in research and teaching, token-ism becomes the guiding philosophy. These tokens are likely to take the form of “fair and balanced” speaker series that will not do much for thoughtful conservatives on campus and, in some cases, will make their views seem even more extreme. These tokens are likely to take the form of visiting professorships by washed up politicians or trendy social media personalities, thus reducing the likelihood that they will take the form of tenure track positions in fields where conservatives are represented at higher rates. More fundamentally, these tokens and these programs are steps in the wrong direction and away from what it means to be truly free in the best and most meaningful sense.

**“There’s More Than One Way into the Castle”:  
Strategies to Persuade the Faculty to Endorse the Chicago Principles on  
Free Expression**

**Linda Frey, University of Montana & Marsha Frey, Kansas State  
University**

Mark Twain once remarked that there were only a few who could use the authorial we, pregnant women and a man with a mouse with his pocket. We think there is another exception, identical twins. So I speak with one voice for the two of us.

There are many ways to take a castle. You can throw your forces at it, although such tactics expends many men. Witness Tilly at Magdeburg in 1631. You can tunnel under it as the Turks did in 1683 at Vienna (here not successfully), you can invest the fortress and rely on starvation to force them to surrender as Julius Caesar did Vercingetorix at Alesia, in 52 BC., ending Gallic resistance to Rome. You can proceed through an unlocked and unguarded door (the Turks at Constantinople in 1453) with a combination of other strategies including a greased runway for ships. You can also sneak in through a back door or a bolt hole. The key is perseverance. This paper discusses the tactics and strategies used to get the Chicago principles adopted at the University of Montana.

**“He who knows only his side of the case, knows little of that” (John Stuart Mill).** Too many of our students would neither agree with nor even understand this position. The president of Augustana College, Steven Bahls, called the issue of free speech on campus a manufactured or imaginary crisis.<sup>1</sup> To those of us to use another military analogy in the proverbial trenches, the challenge to free expression on campuses is very real. Recent incidents at the University of California-Berkeley where protesters threw Molotov cocktails and broke windows at the site of a sponsored lecture, and at Middlebury College where protesters assaulted a professor, highlight a disturbing trend in higher education: the assault

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<sup>1</sup> <https://www.insidehighered.com/views/2018/06/06/free-speech-under-attack-many-campus-opinion>

on free expression. This flouting of the norms of civil discourse and debate imperils our democracy and endangers the very heart of the university, for freedom of expression is essential to its mission and a fundamental constitutional right.

Given the current crisis we need to get our institutions to support free speech. The Faculty Senate at the University of Montana at its spring meeting in May of 2017 overwhelmingly endorsed the University of Chicago's statement on principles of free expression. The university thus joined 20 other institutions which had done so at that time and 42 who have done so as of June 2018.<sup>2</sup> By doing so, the faculty encouraged others, especially our students, to cultivate the crucial virtue of toleration and to respect the basic rights of all.

So how were the faculty able to persuade the University of Montana Faculty Senate to accept the Chicago principles on free expression<sup>3</sup> in spite of significant and stiff opposition? How can an individual get the faculty to endorse free speech on campus in an era of both faculty and student indifference, if not hostility? Faculty must rely on multiple strategies to accomplish this goal. This paper is based on my experience at the University of Montana but is applicable to other universities. The University of Montana has a population of about 12,000 students and emphasizes the liberal arts. We hope the discussion will persuade others to share their experiences and still others to adopt successful strategies.

### What is to be done?

**First: Get Involved in Faculty Governance.** It is easier to head off disastrous policies or even slow them down from the inside. A preemptive strike is always easier to achieve. Once a given policy is implemented it is difficult to change. Knowledge is power so get appointed to key committees that set policies. I volunteered for the rape task force and was able to halt some of their initiatives that threatened free speech. Try to get elected to faculty governing bodies such as the faculty senate. I served as chairman of the graduate council, a thankless job but it enabled me to establish contacts across the university. I also served on

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<sup>2</sup> *Wall Street Journal*, June 18, 2018.

<sup>3</sup> <https://freeexpression.uchicago.edu/page/statement-principles-free-expression>

the Executive Committee of the Faculty Senate. These individuals set the agenda for meetings and also vet a number of university policies. Fellow members are hesitant to implement a policy if someone is vehemently opposed. At the meeting of the Executive Committee I would put forward a motion to endorse of the Chicago Statement on Principles of Free Speech on the agenda for the spring 2017 meeting. So much for great expectations. No one said a word. I could not even get a second. I did not get the support of a single individual on that body.

And that leads me to the second principle.

**Second: Try to create a support network.** I have one in my twin. When I told her about my abysmal failure she urged me to find another way to introduce a motion. I also had a certain number of senators with whom I had worked on other issues. Each institution has a unique set of circumstances.

**Third: Master the rules of engagement or find another way into the castle.** I submitted the motion using a back-door approach, that is through the by laws governing the senate in particular the one that provided that "Upon the written request of twenty members of the faculty, or on the written request of 10 members of the Senate, the Senate shall consider either at its regular meeting or in a special session the agenda item accompanying such a request." (Articles II D). I did not think I could get 10 senators so I went with 20 faculty members. I only had the weekend so I called every faculty member I thought would help and asked them to call another. We then got 20 signatures and it went on the agenda.

**Fourth: Engage the students—with caution.** At last year's FIRE conference Professor April Kelly-Woessner noted that her research found young people less tolerant than their parents.<sup>4</sup> Unfortunately, too many students advocate suppression of speech. Nonetheless, there are a few who will support you. Contact them and ask them to attend the meeting and

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<sup>4</sup> April Kelly-Woessner, "The Silencing Generation," 2017 FIRE Faculty Conference, Dallas, Texas.

speak out. You just need a couple. Faculty members are notoriously hesitant to contradict students.

**Fifth: beware of any ambushes or diversionary attacks.** Only one faculty member ultimately voted against the motion. This was the individual who asked if I was bringing out a conservative speaker when I called him for his support. Another suggested a committee should study the question and come up with a proposal. This is the trap in which many proposals die. Suggesting it be sent to a committee is akin to Sartre's play *No Exit*. It will never be seen again. An example, can be seen in a reform attempt on a widely viewed satirical televised series in Britain, *Yes, Prime Minister*. In one episode the quintessential bureaucrat responds to the prime minister's suggestion to eliminate the Department of Education to pave the way for reform. In a classic rejoinder Sir Humphrey Appleby responds "they will react with some caution to your rather novel proposal. They will give it the most serious and urgent consideration and insist on a thorough and rigorous examination of all the proposals allied with a detailed feasibility and budget analysis before producing a consultative document for consideration by all interested parties, seeking comments and recommendations to be included in a brief for a series of working parties who will produce individual studies which will provide the background for a more wide-ranging document. To consider whether or not the proposal should be taken forward to the next step." In other words, the prime minister notes, they will kill the proposal.

We have all witnessed this strategy: refer it to a committee or table the motion. (The latter I should say did not arise.) I responded to the suggestion that it be referred to a committee with the riposte that most of the senators were overwhelmed with committee work and might not appreciate another assignment. This proved to be a telling argument. Professors always think they are overwhelmed. I also pointed out the schools that had endorsed the policies. Any senator could have made a motion to table it but no one did.

**Sixth, Cast the proposal in a positive light.** The faculty might welcome an initiative that allowed them to act. I appealed to the university culture of intellectual freedom and the

desire of the faculty to do something positive at the end of the academic year. Many faculty were concerned about the university's reputation because the University of Montana in 2011 became entangled in the Obama Administrations Title IX policy which included the notorious Dear Colleague letters.<sup>5</sup> The faculty at the University of Montana were demoralized by the so-called "rape crisis" when the Department of Education and the Department of Justice had descended on us with a vengeance.<sup>6</sup> The decisions of these kangaroo courts created in the wake of government intervention have triggered more than 225 lawsuits by students who claim have they been denied constitutional rights.<sup>7</sup> The faculty were only too well aware of this blackening of our reputation. Those individuals who fought the government in 2011 came to my support. At the same time, faculty were also demoralized when they faced a series of budget cuts. So there was a coalition of the unwilling. In an era of budget cuts, the Senate could implement a policy that would resonate well throughout the state.

**Seventh: Open the debate to the public.** Letters to the editor that open these initiatives to public scrutiny are often useful and cast questionable procedures into the sunshine. We did not have the time to do this because the school year was drawing to an end.

**Eighth: Good news, bad news.** There are some positive signs. Such as the role of FIRE, of ACTA and of Heterodox Academy. The current Department of Justice supported Speech First's lawsuit against the University of Michigan and argued that university's policies "ban a broad swath of core protected speech based solely on listeners' reaction."<sup>8</sup> The questioning

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<sup>5</sup> The University of Montana was forced to sign a consent letter that stipulated the implementation of certain procedures. Those procedures meant that the accused was often denied counsel. They set a weaker standard the "preponderance of evidence" instead of the "beyond a reasonable doubt."

<sup>6</sup> Why we were targeted by both the Department of Justice and the Department of Education was never explained. I hired a lawyer, a group of faculty including myself consulted another and FIRE came to our rescue with a Seattle firm. I thanked them then and I thank them yet again. The most egregious parts of the agreement imposed on us were avoided but it still resonated with loaded language, assumed the guilt of the accused and threatened free speech.

<sup>7</sup> *Wall Street Journal*, May 8, 2018.

<sup>8</sup> *Wall Street Journal*, June 18, 2018.

of a number of these policies by the Department of Justice and the Department of Education indicates a significant shift in attitudes.

Unfortunately, the administrative structure, both staff and officials, are still in place in colleges and universities. They could not imagine lowering the drawbridges, opening the gates, and inviting people into the castle's inner bailey. Moreover, more than 200 universities have "bias response teams." There are even indications that the ACLU is no longer an unequivocal defender of free speech. They have asserted that "free speech can harm 'marginalized' groups by undermining their civil rights."<sup>9</sup> What is also disturbing is the atmosphere of self-censorship which prevails among the faculty and students on university campuses. Two-thirds of the 2018 graduate class of Harvard remarked that "they had at some point chose not to express an opinion during their time at Harvard out of fear that it would offend others."<sup>10</sup> Evergreen vaunts its bias response team and has increased funding for its social justice administrators and staffers. Employees there must undergo "cultural competency, sensitivity and anti-bias training."<sup>11</sup>

The attacks on speakers and the creation of "safe spaces," bias response teams, microaggressions, and trigger warnings underline the threat. Michael Poliakoff, the head of ACTA, quoted a Gallup survey of 2016 that found that 27% of college students "believe it's OK to censor political speech if its offends a particular group." The "ideological straitjacketing,"<sup>12</sup> so prevalent on university campuses undermines the spirit of free inquiry for "consensus narrows, while dissent opens the mind."<sup>13</sup> We have witnessed this homogenization of thought among our students in often chilling ways. One student told me he cheered Antifa's destruction of property and even attacks on individuals. These Orwellian policies must be challenged. What is perhaps most demoralizing is that in the past the threat has been from without now it is from within. **"And a man's foes shall be they of his**

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<sup>9</sup> *Wall Street Journal*, June 21, 2018

<sup>10</sup> *Wall Street Journal*, June 18, 2018

<sup>11</sup> *Wall Street Journal*, May 23, 2018

<sup>12</sup> The phrase is that of Michael Rechtenwald, "Social Justice and its Modern Parentage," *Academic Questions*, 31, No.2 (Summer 2018), 130-139.

<sup>13</sup> Charlan Nemeth, *In Defense of Troublemakers*, Basic, 2018.



**own household” (Matthew 10:36).** Boards of Regents, as we have seen, are unlikely to act. Presidents of institutions have mostly been mute, if not complicit, in the silencing of dissent.

To declare that one believes in free speech is not enough, as Duke illustrated. Its actions contradict its words. When the distinguished Professor Paul Griffiths dared to challenge the existing orthodoxy, he was forced out. This is not free speech or academic freedom. He had urged his colleagues not to attend Racial Equity Institute Phase 1 Training: “Don’t waste your time by doing so. It’ll be, I predict with confidence, intellectually flaccid: there’ll be bromides, clichés, and amen-corner rah-rahs in plenty. When (if) it gets beyond that, its illiberal roots and totalitarian tendencies will show. Events of this sort are definitively anti-intellectual. (Re)trainings of intellectuals by bureaucrats and apparatchiks have a long and ignoble history.”<sup>14</sup> Professor Pfau came to his defense: “Any academic unit . . . can only flourish if differences of opinion on any variety of subjects are respected and engaged on their intrinsic merits...it would be nothing less than politically coercive and intellectually irresponsible to imply that his statement amounts to an ‘expression of racism.’”<sup>15</sup> This case is but one of many. We do not know how many are intimidated into silence and engage in self-censorship.

Rumpole, a barrister in a British television series ends up in an episode fittingly entitled *Rumpole and the Fascist Beast*, defending a person whose ideas he abhors. Nonetheless, he defends him and asks “is this a free country?” It is easy to support the free speech for those we agree with. And then he quotes Voltaire “I disagree with everything you say but I will defend to the death your right to say it.” Each of us individually can demonstrate our commitment to open inquiry and to education, not indoctrination by encouraging our students to speak freely and think critically. Administrators are unlikely to

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<sup>14</sup> <http://www.theamericanconservative.com/dreher/duke-divinity-crisis-griffiths-documents/>

<sup>15</sup> If DDS wishes to remain a vibrant intellectual community, then all kinds of different perspectives must be engaged analytically and in good faith, as propositions and judgments warranting earnest scrutiny rather than facile condemnation. To tar communications such as the one that Paul Griffiths has shared with the faculty as politically retrograde, let alone to contemplate institutional sanctions, is to take an alarmingly illiberal approach that, ironically, will end up confirming at least some of Paul Griffiths’s criticisms regarding the proposed initiative.” <http://www.theamericanconservative.com/dreher/duke-divinity-crisis-griffiths-documents>

take the initiative so it is up to us. Do not be silent. As Justice Kennedy recently argued “Freedom of speech secures freedom of thought and belief.”<sup>16</sup>

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<sup>16</sup> *Wall Street Journal*, June 27, 2018 in *National Institutes of Family and Life Advocates v. Becerra*.