

Panelist Remarks
Department of Justice Forum on Free Speech in Higher Education
September 17, 2018

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**Statement of Emily M. Dickens, J.D.
Corporate Secretary and Chief of Staff
Society for Human Resource Management**

**for the
U.S. Department of Justice
Forum on Free Speech in Higher Education**

I appreciate the opportunity to participate in the Department of Justice Forum on Free Speech in Higher Education. I am Emily M. Dickens, J.D., Corporate Secretary and Chief of Staff of the Society for Human Resource Management (SHRM). In this capacity, I oversee the Executive Office, orchestrating projects and commitments directly involving the CEO, and I facilitate the organization's vision while enabling other members of the executive team to work together to expedite decision making.

I previously served as a member of the leadership team at the University of North Carolina (UNC) system, the Association of Governing Boards of Colleges and Universities and the Thurgood Marshall College Fund. I have also worked at Duke University and Fayetteville State University in administrative and external affairs roles.

I am passionate about higher education and the essential link between education and employment. As such, I am pleased to address the issue of campus free speech as a representative of SHRM and our 300,000 professional members. Our members work in organizations that depend on our country's educational institutions as a reliable source of the multi-faceted talent they need. Today, more than ever, people are an organization's competitive edge.

The nexus between an HR professional society and support for free speech and ideas in higher education may not immediately be evident. But consider that the students of today will staff the diverse, transforming workplaces of tomorrow. More than ever, America's businesses and workplaces need open, agile minds that have been exposed to a diversity of people, perspectives and points of view. Colleges and universities are where this happens, and always have been. Education and employment are inextricably coupled.

An integral part of preparing students for the workforce is teaching them how to think critically and independently. This "soft skill" is in high demand among U.S. employers, most of whom (68 percent) report difficulty filling open positions. According to SHRM research, the most commonly reported applied skills shortages are critical thinking/problem-solving, professionalism/work ethic, leadership, and teamwork and collaboration.

Many of the jobs incoming college freshmen will pursue after graduation don't even exist yet. Critical thinking skills can prepare students to adapt to the modern economy where the jobs of tomorrow are constantly evolving. And exposure to a wide range of ideas in school prepares

students to work with others with diverse backgrounds. Employers need people who can evaluate information in all its forms to arrive at the best solution to challenges that span every sector of the world of work.

I approach this issue with a deep understanding of the various pressures under which higher education operates today.

Although the primary mandate of colleges and universities is to educate, institutions are increasingly asked to do much more. On top of providing the highest level of academic rigor to students, they, like every other workplace, must also protect students and employees from discrimination and harassment and ensure their physical safety.

I am aware of the various concerns about campus safety issues when controversial figures come to speak. In my experience, colleges and universities, like workplaces, are organic and skilled at adapting to changing priorities and needs of students, faculty and the communities in which the schools operate. For example, the Virginia Tech shooting in 2007 served as a wake-up call to all campuses. Colleges and universities around the country adapted to emerging needs to improve communications systems with students and build and strengthen relationships between campus police and municipal police.

As we work to increase campus diversity, higher education's ability to adapt to change is just as important.

I'd like to share a story about my experience with free speech and divergent ideas as director of Government and Community Affairs at Fayetteville State University during the 2008 presidential campaign. Because it is an historically black college, part of the HBCU system, many assumed that the student body would be overwhelmingly supportive of democratic candidates. Yet, anybody who attended school or worked there knew that the picture was not so homogeneous.

The student body of Fayetteville State University is about 64 percent Black, 19 percent White and nearly 18 percent other races or ethnicities. Situated 10 miles from Fort Bragg, the school also has a large military-connected student population. During that campaign year, we hosted numerous political events, but were always careful to provide speakers with divergent views on the issues facing the country.

How did I know we were doing something right? When people on both sides were mad.

This is good practice for what graduates will experience in the workforce. As SHRM and its members are well aware, workplaces have become hotbeds for civil—and sometimes not-so-civil—discourse. Like a college campus, it's one of the few arenas of life where people cannot self-segregate (unlike where we choose to live, worship, or get our news). Campus is where future workers learn and become accustomed to receiving, distilling and working with information and points of view that may contradict their own. This experience is essential in preparing workers to be engaged and effective in diverse, inclusive workplace cultures.

I believe educators and employers alike can dispel some of the fear surrounding the public expression of controversial, even polarizing, viewpoints. Last year, SHRM invited Sean Spicer and Donna Brazile to talk with our members about the 2016 election, public policy and political campaigns. Some of our members were worried beforehand. But guess what? Most people appreciated hearing what they had to say, even if they didn't agree. And, the small number who complained came equally from liberal and conservative camps.

So, what is the best way forward?

First, we need to recognize that, like workplaces across the country, positive cultures can be built on campuses in a way that allows for real diversity that goes beyond ethnicity, gender, age and other obvious markers to include different ideas and ways of thinking. It may not be easy, but workplace leaders, including campus leaders, can set the tone for mutual respect and cooperation in the interest of fulfilling the school's educational goals and reflecting its institutional values.

Second, we can't legislate or regulate our way out of this issue. SHRM has talked a lot about this in the context of another important societal issue—workplace sexual harassment. Despite having a robust legal structure and anti-harassment policies and training in nearly every workplace, we still haven't eradicated these behaviors. Instead we approach the issue with the full understanding that we must be practical about people. Instead of relying solely on hard-and-fast rules, we urge HR and employers to take a hard look at their culture and values and make changes there.

This leads me to my last point.

We need to remember that the current challenges to free speech and ideas that higher education is facing is part of a healthy evolution. As we increase thought diversity on campus, graduates bring that diversity—and the ability to handle it—into our workplaces. I believe this is a great opportunity for colleges and universities and students alike. All benefit by encouraging more discussions on college campuses, hosting events where students are exposed to diverse thinkers, academics, researchers and others sharing the same stage. These interactions can provide important modeling for students on how to challenge and understand another's views with respect and critical thought.

This approach can not only create great campus cultures, but also can help those campuses produce future members of diverse, inclusive and engaged workforces that employers are eager to hire.

Remarks by Dr. Heather Heying
Department of Justice Forum on Free Speech in Higher Education
September 17, 2018

I have been asked to “consider ways that faculty, administrators, and students might foster free expression in higher education.” As such, rather than rehash events of the past, I would like to offer advice for members of each of those three groups.

First, I will say this: Individuals doing the right thing cannot solve this problem. Game theory tells us that as an individual, if you stand against a mob, you will be torn apart, unless one of two things are true: 1) A large number of other people are willing to stand with you, quickly, or 2) your institution has your back. Most people will not stand up for what they believe, because risk-aversion and fear are powerful motivators. Given this, if you do stand up, you nearly guarantee that you will be alone, or close to it. That leaves the second option: Your institution must have your back. Institutions of higher ed must adopt the Chicago Principles, such that administrators, faculty, and students know that, if they do stand up and defend their right to free expression, their institution will not turn on them.

The Chicago Principles are probably familiar to everyone here, but in summary, they guarantee “all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn.”

What is a University for? As Jonathan Haidt has argued, you cannot simultaneously maximize both a pursuit of truth, and a pursuit of social justice. The University of Chicago has made it clear that, as an institution, it sees its mission as the pursuit of truth. Compare this with The Evergreen State College, the public liberal arts college where I was tenured until resigning last year, an institution that was once pedagogically experimental and allowed for a deep dive into ideas both disconcerting and dangerous. In 2011, Evergreen modified its mission statement to read, in part: “Evergreen supports and benefits from a local and global commitment to social justice.” This seems innocuous on its face. Not only that, it seems morally good and, therefore, that anyone objecting to it must be, somehow, on the wrong side of issues that us “good people” care about. This is where the danger lies.

The search for truth and beauty, in its many forms, is what higher education is for, and about. The Enlightenment opened up our world, and gave us, among other things, the beginning of a formalization of the scientific method. One of the great strengths of the scientific method is its ability to reduce the role of bias and emotion in what we understand to be true. It is, at its core, a method for reducing bias. But in an era of information overload, when it seems that nothing can be trusted, many are reverting to trusting their own feelings above all else. It is ironic that, as people have come to lose faith in our system, they have run from science, and not toward it. For while scientists themselves are humans, and therefore fallible, rigorous application of the scientific method is the best cure for human fallibility ever devised.

One key distinction between human beings and most non-human animals is that we acquire insight cumulatively. Not only do we stand on the shoulders of giants, but riding on the shoulders of giants is our niche. We should learn from them when we can, and credit them always. What we should not do is trust that they are right simply because they are famous, or lauded, or because it is easier than thinking

for ourselves. Institutions of higher ed are supposed to be in the business of making, assessing, and communicating truth claims, and teaching others how to do the same.



My advice, then, to administrators, faculty, and students:

Once an institution adopts the Chicago Principles, administrators are free to embrace and uphold them by, among other things, creating an explicit expectation that protest is acceptable—honorable, even—but not if it hinders others' ability to hear, convey, and exchange ideas.

Administrators should not allow vocal authoritarian minorities to hold their campus hostage. And they certainly should not collude with such vocal minorities in order to achieve their own goals. We are, in effect, experiencing a dearth of adults, people willing to make unpopular decisions and stand by them. When someone throws a tantrum, regardless of their age, ceding to them because it is easier in the moment is always the wrong response. It creates larger tantrums down the road.

Administrators and faculty, in their role as hiring authorities, change their campus with every hire of new faculty. So when hiring a chemist, for instance, hire an actual chemist, not a “chemistry educator,” which is code for something else entirely.

To faculty, my advice is trickier, as faculty are in some ways the most entrenched lot. Those without tenure are at risk of blowback for politically incorrect actions or views, those with tenure are more likely to defend the status quo than question it, although tenure is supposed to allow for exactly the opposite.

Faculty: Do not model authoritarianism yourselves in your classrooms, labs or studios. Do not rule with fear (or pointless workload). Ruling with fear is easier, perhaps, than establishing trust and allowing dissent, but it *will* backfire.

Similarly, faculty, do not encourage students to respect you based on your credentials, either implicitly or explicitly. It is your ability to convey and wrestle with ideas that is valuable, which you can and should model for the students. This requires risking being wrong, and being willing to return to your students with information that is more accurate, or relevant to the question at hand. You need to be willing to make corrections, to be able to say: “I was wrong about *X*. Here’s why.” Think of yourself not as gatekeepers to hallowed halls, but as mentors and fellow humans who are learning as they go.

Many people now use the internet for discussion of deep, resonant, complex ideas, which can be fruitful. But if you do so *rather* than coming together in real life, with people who may disagree, you guarantee finding yourself in a silo, out of which you cannot see. Such echo chambers can become so loud and self-referential that you can cease to believe in the reality of anything outside of them. Too many classrooms are not places for engagement, but rather for bland dissemination of facts. Time together is precious: Let us be willing to disagree with respect, and able to shift as we take new ideas and ways of thinking on board. The revisioning of belief in the face of new evidence is core to the scientific method. Everyone claiming a life of the mind should be willing to do the same: change their minds when the evidence calls for it.

And finally, to students, I have the following advice, although truly, this applies to everyone:

- Consider the distinction between being part of a group, and being a follower. Speak up in small conversations, among friends, when you know that there is social pressure not to do so. Perhaps you lack the confidence that your convictions are apt, but being silenced into not exploring them is evidence that something is amiss.
- Be open. Walk around with positive expectation rather than a feeling of grim defeat, and more diverse experiences will come your way. Do not seek safe spaces, be on the lookout for microaggressions, or demand trigger warnings. Yes, there are moments when what you want is the familiar. But if you allow yourself to take umbrage at that which is unfamiliar—by convincing yourself that *unfamiliar* is synonymous with *outrageous*—you will have an ever narrower horizon. Embrace the *idea* of the unexpected—not just the unexpected itself. This will be easier to do if you:
 - a) have friends who think differently from you or have truly different life experiences;
 - b) travel, leaving behind as many of the reminders and comforts of home as you can, so that you actually immerse yourself in other people's worlds; and
 - c) explore the physical world, not just the social one. The physical world provides non-gameable feedback on how well you are doing. Spend time engaging with experiences and tools that do not respond to emotion and manipulation, and you will learn much about the universe.
- Remember, or come to realize, that all brains are different. Nearly all students at elite colleges, and many students at all institutions of higher ed, have a particular way of being academically successful: They read easily, follow commands to do homework (even when it feels pointless), have at least some facility with writing and math. But there are many brilliant people out there who do not fall into this rubric. Neurological diversity crosses all demographic lines.
- Do not let anyone tell you: *We don't ask those questions here*. Dangerous questions exist. And there are going to be some ugly answers. Education and research, the twin goals of post-secondary institutions, are the routes towards understanding, and ultimately minimizing, the prevalence of ugliness in human interactions moving forward. Disappearing ugly facts, or silencing those who speak about them, gives them power that they do not deserve. Choose an institution that has adopted the Chicago Principles, and then learn how to shed light on the dark corners of inquiry, and of your own mind.

Heather Mac Donald – Manhattan Institute

Remarks by Heather Mac Donald
Thomas W. Smith Fellow, Manhattan Institute
Department of Justice Forum on Free Speech in Higher Education
September 17, 2018

Today I am going to make two contrarian arguments. First: that unfettered debate is *not* the core function of higher education, however useful such debate is. And second, that the assault in free speech is not the greatest problem facing universities today, however dangerous that assault on free speech is.

But first let me state some core principles.

Trying to silence speech with which you disagree, whether by institutional fiat, by shouting over the speaker, or by mob violence is the start of a terrifying descent towards a world in which brute power rules. Anyone who can watch windows being smashed and the sucker punching of ideological opponents—that would be Trump supporters of course-- without feeling foreboding at these hallmarks of 1930s fascism is in deep denial.

The resort to brute force in the face of disagreement is particularly disturbing in a university, which should provide a model of civil discourse. The anti-fascist moniker adopted by those who use violence to silence speech is stunningly ironic. A Facebook post from “We, students of color at the Claremont Colleges” announced grandiosely that “as a community, we CANNOT and WILL NOT allow fascism to have a platform. We REFUSE to have Mac Donald speak.” They succeeded.

And these are the people who claim to be against hegemonic power?

Students’ ignorance of the role of free speech in a free society tells us yet again that our educational system is failing miserably. These self-righteous censors claim that free speech is a weapon to further oppress minorities. Tell that to Frederick Douglass, who in 1860 wrote that “slavery cannot tolerate free speech. Five years of its exercise would banish the auction block and break every chain in the South.”

It is also remarkable that the proponents of censorship, many of them professors, are unable to engage in the most basic abstract reasoning: understanding that a precedent, once set, applies across a range of situations. The campus silencers may currently monopolize the power to define hate speech, but do they really want that power in the hands of their arch-enemy, Donald Trump?

Now in understandable outrage against this sometimes violent close-mindedness, conservative defenders of free speech have been claiming that the debating of opinion is the very essence of an education.

It is not.

Heather Mac Donald – Manhattan Institute

The essence of an education is this: cramming as much *knowledge* into the empty noggins of students as a mere four years will allow. For most of that knowledge, the Socratic or dialogic model of education is simply irrelevant. It makes no sense for a student to say: I have an opinion about the periodic table or the laws of thermodynamics but I am willing to listen to other views; or, I have an opinion about German case endings but I will keep an open mind towards dissent. There exists a bedrock of core facts and ideas that students should simply absorb in humility and gratitude. They would include, at a bare minimum: the events that led to the creation of the nation-state in Europe; the achievements of Greco-Roman civilization; familiarity with key works of Shakespeare, Twain, Dickens, and Swift, among others; an understanding of genetics and the functioning of neurons; and the philosophical basis for constitutional democracy, among hundreds of other essential strata of human geology.

Moreover, the dialogic model of education currently embraced by conservatives has a presentist focus. It tends ineluctably towards current affairs which should be *last* on the list of things that education concerns itself with. The issues about which students are going to have the strongest opinions concern current political and policy matters: Is Donald Trump a fascist? Which bathrooms should “trans” individuals use? The fact that only one answer to these questions is acceptable on college campuses is indisputably a problem. But they are not the questions that undergraduate education should focus on. There will be time enough after students graduate to debate current affairs. Frankly, I’m not even a big fan of *me* coming to college campuses to talk about policing. College is a precious opportunity to plunge into the splendors of the past for which the time is already too short.

But my vision of a pure ivory tower education is sadly probably not realistic. So if we could assure that dissenting voices from the reigning political orthodoxies were allowed onto campus, would that cure the deepest malaise there? It would not.

Censorship is the natural result of the paramount mission of today’s university: assigning guilt and innocence within the ruthlessly competitive hierarchy of victimhood. Almost the entire university has been taken over by a single idea: that to be a minority, a female, or one of the ever multiplying varieties of non-binary genders in America today is to be the target of endless, life threatening bigotry.

That bigotry is particularly acute, we are to believe, on college campuses. Minority and female students are being taught to believe that they are quite literally under existential threat. UC Berkeley’s Division of Equity and Inclusion until recently hung banners throughout campus reminding students of the contemporary university’s paramount mission: assigning guilt and innocence within the ruthlessly competitive hierarchy of victimhood. One banner, showing a female black and a male Hispanic student, read: “Create an environment where people other than yourself can exist.”

Such maudlin expressions of self-pity are now encouraged and rewarded. You may recall the Black Lives Matter protests that erupted on college campuses in fall 2015, following the threatened football strike at University of Missouri and the ouster of the university’s president. My favorite moment during these protests occurred at Princeton, where black students intoned:

Heather Mac Donald – Manhattan Institute

“We’re sick and tired of being sick and tired.” This phrase was first uttered by Fannie Lou Hamer, a civil rights activist who grew up on a Mississippi cotton plantation and who was beaten for trying to vote in the 1950s. Fannie Lou Hamer had grounds for being sick and tired of being sick and tired. But *any* Princeton student, I don’t care if he is green, purple, or blue, who thinks of himself as downtrodden and oppressed is completely out of touch with reality.

A petition by “students of color” at the Claremont colleges in California claimed that I posed “threats to the safety of students of color.”

As long as this ideology of victimhood remains the dominant narrative on college campuses, the movement to suppress ideas that challenge that narrative will remain overpowering. We can invoke John Stuart Mill all we want, but it’s not going to make a damn bit of difference. Taught by a metastasizing campus diversity bureaucracy to see bias where none exists, students will continue to equate nonconforming ideas with “hate speech,” and “hate speech” with life-threatening conduct that should be punished, censored, and repelled with force if necessary.

It therefore becomes imperative to rebut the victimology narrative head-on. It is not enough to call for freedom of expression. That is, if I may borrow a term, a relatively safe stance to take. Even many liberals will back you up. No, if we are going to restore both sanity and civil harmony, we are going to have to take on victim ideology directly and assert that racism and oppression are not the predominant characteristic of American society and colleges today. For all our undoubted flaws, there has never been a more tolerant, opportunity-filled polity than our present one.

Who will make those arguments? Not college presidents, not the complicit or cowed faculty, and certainly not the diversity bureaucrats. It is incumbent on the rest of us to speak out against the myth of endemic bias and to remind students that they are the most privileged human beings in history by dint of having at their fingertips the thing that Faust sold his soul for: Knowledge.

**U.S. DEPARTMENT OF JUSTICE
FORUM ON FREE SPEECH IN HIGHER EDUCATION**
Great Hall - Robert F. Kennedy Building 9
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*Securing Free Speech and Free Inquiry:
Lessons from the Notre Dame Experience*

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Remarks as Prepared for Delivery

September 17, 2018

I would like to thank the Department of Justice, Attorney General Sessions, and his staff for convening us today and inviting me to share a few remarks on this important and pressing topic.

I am professor of political science at the University of Notre Dame where I have the privilege of directing the University's Potenziari Program in Constitutional Studies. I am here today, at least in part, because my program hosted one of Charles Murray's first post-Middlebury lectures. As you might imagine, the event was quite controversial. It generated a large protest and considerable media attention. But unlike at Middlebury, Mr. Murray was able to deliver his lecture without interruption. I think Notre Dame did a number of things right that might provide insight on how to better protect and promote free speech and free inquiry on our nation's campuses.

Let me tell you that story of Murray's Notre Dame visit. On the afternoon March 2, 2017, students hung posters all over campus advertising Charles Murray's visit to Notre Dame, which was scheduled for later that month. That very evening, Murray visited Middlebury. So on the morning of March 3rd, as Notre Dame students, faculty, and administrators were learning about the Middlebury riot, they also learned that Murray would soon be visiting Notre Dame.

My inbox exploded.

Administrators wanted to know our security plan. Many on the faculty wanted me to disinvite him.

When word got out that, no, I was still planning to host Murray, the pressure came.

I was warned by faculty members that there would be trouble. Protests for sure. Possibly violence. And minority students, my colleagues said, would be victimized if I gave Murray a platform. They made clear to me that, in their view, I would be victimizing Notre Dame's minority students if my program went ahead with Murray's lecture.

These warnings and threats were disconcerting. Of course I was especially concerned about the possibility of violence brought to campus by outside groups. But there was no way I was going to cancel Murray's visit. After Middlebury, his Notre Dame lecture became a referendum on whether violence and the threat of violence could silence those who make arguments that some find offensive. It did not matter what I thought of Charles Murray or his scholarship, his visit was now about free speech and free inquiry.

So we hosted Murray. There was a large protest outside, but it was peaceful; and inside the venue, every available seat was taken. Murray spoke, a respondent from our faculty offered criticism, students asked tough and pointed questions. We did what universities are supposed to do.

All things considered, I think Notre Dame handled Murray's visit relatively well. So let me attempt to draw three lessons from our experience on how free speech and free inquiry might be better secured on our nation's campuses.

First – Intellectual Diversity

The University of Notre Dame has a sufficiently intellectually diverse faculty that we bring to campus speakers from all sides of the political spectrum. Notre Dame's faculty, like most faculty on elite campuses, leans left. In some departments, we lean heavily left. But there are a sufficient number of conservatives and fair-minded liberals that non-liberal views are given a place at the table.

Notre Dame thus avoids one of the most deleterious effects of the ideological homogeneity that is typical at elite universities—an intellectual monoculture where individuals look different but all think the same and have the same political opinions.

The problems that attend intellectual homogeneity become manifest when it comes to speaking invitations. Faculty tend to invite to campus the scholars they know. In academia, just like other professions, professional networks and social circles overlap, which means an overwhelmingly liberal faculty will tend to invite speakers that are overwhelmingly liberal. That is just how it works.

This helps explain why conservative speakers are usually brought to campus by student groups. At many universities, among the professors who have authority to bring speakers to campus, none are willing to bring in a conservative. Either they do not know thoughtful conservatives or, what is more likely, they do not want to face the social and professional repercussions of

bringing a conservative to campus, especially when it comes to social justice issues involving race, sexuality, and gender. So it is often left to students to invite conservative speakers, and students, regrettably, often issue injudicious invitations.

As I said, at Notre Dame we have a number of conservatives on the faculty. I invited Charles Murray to Notre Dame because one of my colleagues asked me to. He was teaching a class titled “Liberalism and Conservatism” and he thought, perfectly understandably, that a lecture by Murray on his then-recent book *Coming Apart* might nicely supplement what he was teaching in the classroom.

I knew hosting Murray would be controversial – I had no idea how controversial because we invited him months before Middlebury – but I also knew that for every five Notre Dame faculty that were irritated or angered by the invitation, at least one would find it defensible. There are a sufficient number of conservatives and free speech liberals at ND that the “Protest Left” can’t simply silence their opponents through bullying or intimidation. I was confident that I would receive some faculty support. And in fact, I did. Two of the more liberal members of my department defended the event on grounds of free inquiry.

This intellectual diversity made the event’s success possible.

Notre Dame’s intellectual diversity results from the second point I would like to emphasize.

We are intellectually diverse because Notre Dame has stayed true to the underlying purpose of the university—to seek and uncover the truth.

Intellectual diversity, academic freedom, and freedom of speech are means to an end—the end of truth-seeking. If a university does not retain its traditional mission of seeking the truth through reasoned discourse, it will not remain committed to freedom of inquiry or freedom of speech. Freedom of the mind is a necessary prerequisite of truth seeking through reasoned discourse.

Here I must give credit to Notre Dame’s senior leadership. President Fr. John Jenkins, our Provost Tom Burish, Executive Vice President John Afflect-Graves, and my then-Dean John McGreevy did two things, neither of which involved public actions, but both of which followed from their commitment to truth-seeking.

First, they let me run my program consistent with the norms of academic freedom. As director of Notre Dame’s Program in Constitutional Studies, I chose to invite Charles Murray. They might not have liked or agreed with that choice, but they respected it and the authority that they had entrusted to me.

Secondly, they didn’t succumb to the pressures brought upon them to cancel the event. I have no doubt that some of my faculty colleagues went over my head and pressed the provost and my dean to cancel the lecture. After Middlebury, the easy way out would have been to say that the threat of violence was too great and that we had to cancel the event out of an “abundance of concern for the safety of our students.” Notre Dame’s senior leadership didn’t take the easy way

out. Instead, they made sure we had enough resources to provide sufficient security for the lecture and the simultaneous protest.

Notre Dame's senior leadership team was guided by the university's mission to "the pursuit and sharing of truth for its own sake." As we recognize in our mission statement, truth seeking requires "free inquiry and open discussion."¹

Universities are either committed to truth-seeking through reasoned inquiry or they are committed to something else. If they are committed to truth-seeking, free inquiry and free speech will be safeguarded. If they are committed to something else—be it social change or overcoming historical oppression or job training or something else—that something else will inevitably trump free inquiry and free speech if and when that primary goal requires it. It's not that complicated.

The reason why many professors and administrators call for limitations on speech is that they don't actually believe that the fundamental purpose of the university is truth-seeking for its own sake.

The third point I would like to address is the expectations of students. And here Notre Dame's record is mixed. Students in Notre Dame's Constitutional Studies Program expect that in their classes they will read and debate issues from a diversity of views. One of our core gateway classes examines contemporary moral and political issues from left, right and center. In their other core course, students read the founders, debate with Lincoln and Douglas—and John C. Calhoun and Frederick Douglass, and study the speeches of FDR, LBJ, Ronald Reagan, Barack Obama, and Clarence Thomas. Students are taught to engage arguments, especially the arguments with which they most vehemently disagree. A result, I believe, is intellectual moderation. When students know that there are good arguments on the other side, even if they are not persuaded, they become more respectful.

Not all Notre Dame students, however, have this expectation, which was made apparent to me during Charles Murray's visit. A group of students, including one of my politically progressive students, asked the program to facilitate a private student-only conversation with Murray. They proposed that leaders of the Campus Democrats, the College Republicans and a few other political groups be invited. This was not to be a public event; it wouldn't even be advertised. It was to be a private event that only those who were invited would know about. The only attendees would be the students and Mr. Murray. The ground rules were that students could ask him any questions or pose any challenges they wanted.

This was a student-requested and a student-initiated effort. None of the student leaders from the Campus Democrats would participate. Apparently they thought it noxious even to engage in conversation with Murray.

¹ I am sometimes asked whether academic freedom exists at a Catholic university such as Notre Dame. I have never been at a university that offers more academic freedom, and I have been a faculty member at a large state research university and a small private elite liberal arts college. As a Catholic university, Notre Dame is committed to the unity of faith and reason. Indeed, because God is understood to be the author of all that is true, the university is confident in and can offer reasons for its commitment to seeking the truth.

I was disappointed by those students. But the blame lies with their professors who teach them that the best way to win an argument is to avoid and demean your opponents. That's not truth seeking.

Those faculty members, their ideological dogmatism, and the administrators who cave to them, are what most threaten free speech and free inquiry on our college campuses. Until our faculties become more ideologically diverse, until our universities recommit themselves to truth seeking, and until our students are taught that college is where you engage arguments and encounter people and ideas with whom you disagree, intellectual freedom, both on campus and in America more generally, will be threatened.

Thank you.

Department of Justice Forum on Free Speech in Higher Education
“Free Speech and Campus Culture” Panel
17 September 2018

Written testimony of
Robert L. Shibley
Executive Director
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Keith John Sampson was a 58 year-old undergraduate at Indiana University-Purdue University Indianapolis, putting himself through school as a janitor on campus. One day, during his break, he sat down in the break room to read a book.

That Indiana-appropriate book was called “Notre Dame Vs. The Klan: How the Fighting Irish Defeated the Ku Klux Klan.” It’s a historical account of how the anti-Catholic KKK came to Notre Dame’s campus in 1924, and how the student body confronted it, sending the message that they did not share the Klan’s values. On the cover of the book was a picture of a KKK cross burning superimposed onto the Notre Dame campus.

Unfortunately for Mr. Sampson, a coworker saw him reading the book — silently, and to himself — and reported him to the University for racial harassment. Without a hearing, Mr. Sampson was deemed guilty of the charge and suspended from campus.

My organization, FIRE, the Foundation for Individual Rights in Education, came to his aid. FIRE is a nonpartisan, nonprofit organization dedicated to defending student and faculty rights on university campuses, regardless of politics or viewpoint. After months of advocacy by FIRE, Mr. Sampson was finally allowed back on campus to continue his education.

This incident, which occurred way back in 2007, is just one of the hundreds of examples of cases in which college students and faculty members were punished for expressing or even just holding unpopular viewpoints. I bring up this eleven-year-old case for two reasons: first, to highlight the longstanding nature of this problem, and second, to point out that the culture of respect for controversial expression on campus has become so threadbare that students and faculty members may face punishment based on the subjective reaction of a person who literally judged a book by its cover.

FIRE annually reviews the written policies at approximately 450 of the country’s top institutions of higher education. According to our most recent report, 90.9% have at least one written policy that either directly infringes on the free speech rights of students or is written broadly enough to allow campus administrators to do so. And FIRE, over the years, has documented hundreds of examples of censorship of students and faculty members from all parts of the political spectrum that have faced campus censorship.

Critics have suggested that these hundreds of examples — and those are just the ones that FIRE has been able to document and make public — are insignificant given the millions of students on campus at any one time. It’s not clear why they believe that this would be a convincing argument, given that Americans tend to view blatant denials of civil rights to individuals to be a very big deal, and rightly so. But in the case of free speech, it’s doubly unconvincing. Underlying much First Amendment jurisprudence is the recognition of the “chilling effect” — the observation, made since

Foundation for Individual Rights in Education (FIRE)

ancient times, that that the punishment of one person for his or her speech will prompt others to silence themselves for fear of similar treatment.

But is it happening on campus? Is hostility to dissent having an impact on the way our campuses function? Last year, thanks to a grant from the John Templeton Foundation, FIRE was able to conduct a major survey of college students to try to find out. The result of this national survey of 1,250 undergraduates, administered for FIRE by YouGov, exposed some major areas for concern.

I'll start on a positive note: 87% of American students said they agree or strongly agree with the statement "In my college classes, I feel comfortable sharing my ideas and opinions." Those numbers don't actually vary much across lines of race or gender. But when it comes to ideology, we saw that "very liberal" students are 14 points more likely to feel comfortable sharing opinions in class than their "very conservative" peers. And that high number is even less a reason to rejoice when you consider that more than half of students surveyed — 54% — said they had stopped themselves from sharing an idea or opinion in class at some point since beginning college.

Why did these students hold back? 53% of those who did indicated they were worried about being incorrect or mistaken. Another 20% reported concern that they would be given lower grades by their professors if they shared their opinions. Disturbingly, 48% also cited fear of judgment from their peers. That starts to look like an awful lot of incidents in which students think they have a good point to make, but don't make it for fear of peer pressure.

Probably more alarming, because of its sheer avoidability, is that 16% of students who have self-censored inside the classroom, did so at least in part because they feared professors or fellow students would report them to "campus employees." Combined with self-censorship due to peer pressure, it turns out that a substantial number of student have been holding back their views, even in class, out of fear of facing some sort of retribution.

Thus far I've discussed student attitudes regarding their own speech, but the picture looks different when we look at student attitudes towards *others' speech*. More than half of students, 58%, agreed with the statement that "it is important to be part of a campus community where I am not exposed to intolerant and offensive ideas." There is an ideological difference here, with 63% percent of very liberal students and 45% of very conservative students feel this way—but in terms of percentages, it's not as wide a gap as today's culture warriors might have guessed.

Again, though, that "top line" number conceals some very real differences in what sort of speech counts as comfortable. For example, while there is no legal definition of "hate speech" in our nation and most of what people call hate speech is protected by the First Amendment, only 24% of very liberal students believed that so-called "hate speech" should be protected, compared to 60% of very conservative students. Yet when it comes to another constitutionally protected form of speech—campus protest—64% of very conservative students agreed that they "should not have to walk past student protests on campus," while only 17% of liberal students agree. This poses a severe problem for those who believe that if campuses can get speech regulations *just right*, they can get rid of the "bad" speech while still allowing the "good." The fact is, while students agree that there is good and bad speech, their definitions of good and bad often conflict.

In the time remaining, I'd like to highlight one more set of findings from the study. Given how much controversy in campuses in recent years has centered around guest speakers visiting campuses, from conservative provocateurs to the first female head of the IMF, some colleges have suggested

that bringing in outside speakers is simply not worth the trouble. The University of South Carolina, for instance, has decreed that henceforth, the university president shall be the commencement speaker every year, thereby dodging the political bullet entirely. And after the riot at Berkeley last year during Milo Yiannopoulos' abortive attempt to speak on that campus, the college spent a shocking \$600,000 to secure the campus for a visit from conservative speaker Ben Shapiro. Given that a university should be a place where students have access to all sorts of differing perspectives, are controversial speakers a luxury that campuses can afford to lose?

The results of our survey answer this question with a resounding "no." First, it would be enormously unpopular, as 92% of students feel that having the opportunity to hear "diverse" guest speakers is important. The survey made the reason for this clear: guest speakers often serve to challenge students' deeply held beliefs, or introduce students to new ways of thinking about the world. And they are amazingly successful in doing so. 64% of students admit that they "changed at least one of my attitudes, perspectives, or opinions" after hearing a guest speaker. This high number suggests not only that guest speakers bring valuable perspectives, but that students probably have not been sufficiently exposed to those perspectives through the campus culture alone, if so many have changed their minds on an issue after a single speech.

It's also reason to be deeply concerned that despite their value, more than half of students (56%) agree that there are instances wherein a college should disinvite a speaker, though there is again widespread disagreement on just who should be disinvited. This short-sighted mode of thinking among students is contrary to the principles of liberal education. It deprives students not only of a potential opportunity to have their minds changed, but also of the chance to have their own arguments strengthened by exposure to new ideas.

Given the data from this survey, the hundreds of written speech codes that we continue to count for our annual speech code report, and the many cases of campus censorship, both in our files and those discussed today, it is clear to FIRE that censorship on college campuses, and the culture it fosters, remains a topic of national concern. To bring an end to this threat to free speech and academic freedom, we will need to work together as a nation to ensure that students and faculty of all political backgrounds are free to express their views, and we are glad to see the Department of Justice taking an interest in this important issue.

Free Speech and Campus Culture:
A View from the Trenches
Department of Justice Forum on Free Speech in Higher Education
September 17, 2018
Lee Tyner

I was asked to share some thoughts from the perspective of a General Counsel and campus leader with responsibility for advising universities on campus speech. In the few minutes I have today, I want to discuss three things:

First, I would like to consider whether we are actually facing an acute crisis with respect to First Amendment violations by universities. **Second**, I would like to discuss three challenges universities face in dealing with expression, especially offensive speech. **Third**, I would like to share some insight into campus culture and talk about what actually works in dealing with campus expression.

So, are we facing a crisis?

We have all read (and have heard today) about troubling, real world cases of someone facing consequences in the academy for breaking with orthodoxy or expressing unpopular views. We can find examples where the values of diversity and inclusion have been used to shut-down debate.

We should not minimize or explain away these troubling examples. But can we draw any broad conclusions from these anecdotes? When we look at the daily life of colleges and universities, what are the facts?

Universities provide resources and support for hundreds of student groups organized around a wide-range of religious beliefs, political ideologies, causes, interests, identities, affinities, activities, and hobbies. If we just look to universities in my new home state of Texas, at Texas Christian University students belong to more than 250 student organizations, and at the University of Texas, more than 1300 student groups receive some measure of access or support from the university.

Each day at more than four thousand colleges and universities in this country, there are hundreds of thousands of classroom lectures, assignments, and discussions about every controversial subject under the sun. In a given week, there are thousands more extracurricular lectures, town hall meetings, sermons, performances, and exhibits dealing with difficult topics. Not to mention student protests or expression by outside, uninvited speakers or groups. For the most part occurring without incident.

At my previous institution, a few years ago in the space of just more than one week the University of Mississippi hosted Salmon Rushdie, the King of Jordan, and Spike Lee. Within a few semesters of that same week, the university hosted a presidential debate, inviting special interest groups as diverse as the ACLU and the NRA to set-up shop in "issues alley" on the day of the debate, giving each group an opportunity to speak to the assembled crowd. We also dealt

with a demonstration by the Klan in full regalia on the same day we hosted a football game against LSU.

The point: we can find anecdotes to support any narrative we prefer. But I don't think the lived experiences on campuses or the objective data establish that we are facing a crisis, at least with respect to formal university actions, policies, or decisions.

Frankly, we would be hard-pressed to find any civic institutions better than universities and colleges when it comes to civil discourse on issues that divide us. It is not surprising that when we experience First Amendment conflicts in our country, those conflicts are most likely to occur where speech and debate are most likely to occur: on college campuses.

FIRE, the group led by my colleague on the panel Robert Shibley, rates universities' policies with respect to free speech. According to this watchdog group, we have more institutions with "green lights" and fewer with "red lights" than ever before¹. In other words, university policies with respect to speech are more consistent with First Amendment principles today than they were last year or the year before.

FIRE also tracks incidents of disinviting speakers or "no-platforming." The number of "dis-invitations" across the country over the last several years has ranged from 6 to a high of 24 in 2016, dropping to twenty-one last year, with only five reported so far in 2018². Given the number of speakers each year on the campuses of more than 4,000 institutions, we are talking about microscopic, *de minimis* numbers.

More than forty years of data gathered through the General Social Survey shows that overall support for free speech has risen over time and that those who earn college degrees support First Amendment rights more strongly than those who have not spent time on campuses³. This and other studies suggest that attending college increases one's commitment to First Amendment values.

I would also ask my fellow panelists and those in attendance: What is the issue we are really discussing today? The culture of victimhood and a rigidly enforced academic orthodoxy described by Ms. McDonald? A drift towards authoritarianism or the self-censorship noted by Mr. Shibley? A lack of viewpoint diversity in the academy? Or are we concerned about the

¹ See "Foundation for Individual Rights in Education Annual Report for 2016-2017," at page 9. Foundation for Individual Rights in Education, https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2017/11/02103107/Annual_Report_2017.pdf.

² See "Disinvitation Database." Foundation of Individual Rights in Education, <https://www.thefire.org/resources/disinvitation-database/>

³ Iglesias Matthew. "Everything We Think We Know about the Political Correctness Debate is Wrong." *Vox*, March 12, 2018, <https://www.vox.com/policy-and-politics/2018/3/12/17100496/political-correctness-data>. See also Murphy, Justin. 2018. "Who's afraid of free speech in the United States?" <https://jmrphy.net/blog/2018/02/16/who-is-afraid-of-free-speech/> (September 9, 2018) (compiling and analyzing data from General Social Survey from 1972-2016).

formal use of power by universities to suppress offensive or unpopular but protected expression? If the concern is the latter, I simply do not see a crisis.

Which brings me to my second point. While I do not think we face a crisis on campus with respect to violations of First Amendment rights, universities do face real challenges managing and protecting speech, in particular offensive speech. As someone on the front lines trying to manage a campus, I will mention three.

First, when it comes to offensive but protected expression, what many call “hate speech,” universities are on the horns of a legal dilemma. Universities have a legal obligation under Title VI⁴ and Title IX⁵ to protect students from a hostile environment, and universities are under a similar duty under Title VII⁶ to protect employees. In fostering a marketplace of ideas, universities are also under a duty, for public universities a constitutional duty, not to punish protected expression.

In discharging these competing duties, many commentators posit that universities cannot and should not prohibit harassing speech until it has actually created a hostile environment. But if a university is indifferent to harassing speech and allows a hostile environment to develop, the university has breached its duty under Title VI or Title IX, and perhaps under Title VII. The university must pick its poison. The university is either liable to the speaker for prohibiting harassing speech before it creates a hostile environment, or the university is liable to the target of harassment for failing to stop the harassment before it has created a hostile environment. An difficult task to fulfill one duty without creating liability for breaching the other.

The second challenge facing universities concerns provocateurs, people who do not come to campus to engage our students or our community in civil discourse or to advance dialogue or debate, but who use our campuses as a foil or a stage to draw attention. Supporters and opponents come dressed for battle, not to exchange ideas but to exchange blows. The players in these dramas are not members of our campus communities, but outside groups hoping to use our campuses as a theatrical backdrop or to become a martyr in the culture wars. In these cases, our security costs are not related to protests or counter-protests by members of the academic community.

All agree that protecting the campus community from violence is a compelling state interest. Last year the University of California at Berkeley spent nearly four million dollars on security for free speech events over the course of the month of September⁷. So how much should a university be required to spend in providing a stage for provocateurs? Or stated differently, how

⁴ Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d *et seq.*

⁵ Title IX of the Education Amendments of 1972, 20 U.S.C. § 1682 *et seq.*

⁶ Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

⁷ Wong, Ashley. "UC Berkeley Spent \$4 Million on 'Free Speech' Events Last Year." *The Daily Californian*, February 4, 2018, <http://www.dailycal.org/2018/02/04/uc-berkeley-split-4m-cost-free-speech-events-uc-office-president/>.

much more should a student have to spend in tuition so a provocateur may use a campus to grab headlines? Is there any limit?

The third challenge is we teach to a parade. Each year we admit new classes of eighteen-year-olds who are not fully-formed and have not considered many of the civic values and core principles of a free society that we hold dear. Many of these students are from homogenous, non-diverse backgrounds.

If we do our jobs really well, and we mold the freshman class into resilient, citizen scholars ready to meet the challenges of the academy today and the real world tomorrow, we have a whole new batch of freshmen the next year. We start over.

When we recruit new students and welcome them to campus, we communicate the campus's core values around respect for the individual and collegiality. We tell them we are a community, a family. We tell them we value difference and diversity. We tell them our campus is their campus – their new home.

So when someone comes into the living room of their new home and spews divisive, discredited, racist or fascist ideas, many do not understand how, in light of the university's values, we can allow the speech to take place. Students conflate allowing a speaker to use university facilities with some sort of imprimatur or approval.

Which leads us to some best practices in dealing with offensive speech.

First and foremost, universities must do what universities do best. Teach. We must teach the importance of a robust marketplace of ideas for intellectual inquiry. We must teach that the push for diversity in higher education has always been grounded in the notion of the marketplace of ideas – that we need people from different backgrounds and perspectives in the classroom so that all may glean the educational benefits of a diverse learning environment. We must teach students to expect to be confronted with new and uncomfortable ideas that demand reflection and self-examination. We must teach students that the best remedy for bad ideas, even hateful or offensive ideas, is more ideas.

To that end, some institutions are reimagining orientation and the first-year curriculum, particularly programing aimed at introducing students to the academy and campus life. Universities are addressing expectations with respect to expression, promoting resilience, and teaching the importance of First Amendment values. Purdue University is a leader on this front⁸.

Universities that manage offensive speakers most effectively use incidents of hate or intolerance as teachable moments. Faculty and student life professionals advise students on how to make their voices heard, how to join issue with the ideas that offend. Faculty organize opportunities to debate the issues in a meaningful way. Universities teach students the

⁸ Morey, Alex. "Free Speech Orientation Program Keeps Conversation Going at Purdue." Foundation for Individual Rights in Education, December 5, 2016, <https://www.thefire.org/free-speech-orientation-program-keeps-conversation-going-at-purdue/>.

importance of surfacing and confronting pernicious ideas rather than forcing them underground. Faculty help students organize meaningful counter-protests promoting the values of the university community. Students must learn that offensive speech and extremist speakers often generate discussion, debate, and reflection that lead to tremendous personal and community growth.

But in defending free speech, especially the rights of others to spread hateful, pernicious ideas, we must never, ever act like hate speech is benign. We must never dismiss students as “snowflakes” because they feel subjective injury when they are exposed to virulent, toxic, and divisive ideas. The old adage, “sticks and stones may break my bones, but words will never hurt me” is the biggest lie our mothers ever told us. We do not protect speech because it does no harm or because hate poses no threat in the marketplace of ideas. To the contrary, we protect expression of unpopular ideas precisely because of their power to change society and to challenge power.

When we say speech is “free” we do not mean it has no cost. In dealing with our students, we must remember that the cost of offensive speech is disproportionately born by historically underrepresented minorities and marginalized peoples. We must acknowledge and tend to pain, fear, and loss. We must acknowledge that some ideas are malevolent and dangerous.

But even as we seek to remedy and combat the impact of hate speech, we must help students understand why we may not do so by punishing the speaker. We must help students understand why we have chosen not to give those in authority, people like me, the power to punish unpopular speech. The power to punish unpopular speech rarely works-out well for the under-represented or the marginalized, the reformer or the revolutionary.

Finally, if we tell students that the best remedy for offensive speech is more speech rather than prohibition, then universities must use our words. The best universities know how to protect the speaker while joining issue with the idea expressed. They know how to allow speech without suggesting all ideas have equal merit. They know how to vindicate and promote all of the academic community’s values – opposing hate and dangerous notions of tribalism and authoritarianism while protecting the rights of others to hold and express those same discredited notions.

One last thought. The First Amendment gets it right. We do not need more rules. Rules will not change the hearts or minds of anyone, lead to more viewpoint diversity on our faculties or win any ideological battles in the marketplace of ideas.



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Freedom of Speech at American Universities

Eugene Volokh, UCLA School of Law

Department of Justice Forum on Free Speech in Higher Education, Sept. 17, 2018

A. *The Dangers to Free Speech*

Free speech at American universities is threatened in many ways. Among others:

1. Students are disciplined for the views they express, and campus speech codes that threaten such discipline deter students from expressing their views.
2. Some speakers are shut out by university authorities who demand that controversial speakers pay high security fees, precisely because of a fear of the mobs.
3. Professors are disciplined for their speech, or are deterred from speaking by the threat of discipline.
4. Some speakers (including faculty) get shouted down, or even physically attacked by mobs.
5. Students and professors are deterred from speaking, and from inviting controversial speakers, by a fear of social ostracism.

Each of these areas is subject to different legal rules, and to different ethical standards. But all undermine the role of universities as places where free inquiry can flourish, and knowledge can be developed and propagated. In these remarks, I'll talk briefly about some examples from categories 1 through 3, and set forth the First Amendment rules applicable to such actions.

B. *The Scope of the Problem*

Throughout the country, universities are restricting speech, including speech on important social, political, and religious topics. Just to offer a few examples:

1. In 2012, the University of New Mexico medical school imposed disciplinary sanctions on a student who posted, on his own Facebook page, a statement harshly condemning abortion and the Democratic Party's toleration for abortion. The University's theory was that the student's statements violated a policy that banned (in relevant part) "unduly inflammatory statements" or "harass[ment] of others"; the "others" being allegedly harassed apparently consisted of "all of you who support the Democratic candidates." (The student's post hadn't called out any particular people by name.)

While the student's speech included some vulgarities, it's clear that the university wasn't enforcing an across-the-board no-vulgarity policy: The university demanded that

the student rewrite his statement in a “professionally appropriate” way, but then rejected his first attempt at the rewrite, which contained no vulgarities. The university was satisfied only when the student submitted a second rewrite, which softened the substantive condemnations of abortion.¹

2. In 2005, a Muslim student-employee at William Patterson University (a public university in New Jersey) was charged with sexual harassment. His offense: responding to a professor’s message promoting a film labeled “a lesbian relationship story” with an e-mail opining that homosexuals are “perver[ted].” It took an appeal to a New Jersey hearing officer to get the sanction reversed.²

3. In late January 2015, some University of Minnesota professors put together a panel on the Charlie Hebdo murders; the panel was promoted with a flyer that includes the cover of the first post-murder issue, with a “CENSORED” stamp added over it:

**Can One Laugh At Everything?
Satire and Free Speech After Charlie**

CHARLIE HEBDO
JOURNAL IRRESPONSABLE
TOUT EST PARDONNÉ

**January 29, 2015
4pm**

**Anderson Hall 230
West Bank
University of Minnesota**

Free Speech Laws: A Comparative Study
Anthony S. Winer
Professor of Law, William Mitchell College of Law

Figurative Representation in the Islamic Tradition
William Beeman
Professor and Chair of Anthropology, University of Minnesota

"As Welcome as a Bee Sting": Why We Must Protect "Outrageous" Speech
Jane E. Kirtley
Silha Professor of Media Ethics and Law | School of Journalism and Mass Communication
Director, Silha Center for the Study of Media Ethics and Law, University of Minnesota

Antisemitism and Islamophobia: A Double Standard?
Bruno Chaouat
Professor and Chair, French and Italian, University of Minnesota

Brief Reflections on Editorial Cartoons
Steven Sack
Editorial Cartoonist, Minneapolis Star Tribune

¹ Eugene Volokh, *Discipline of UNM Med Student for "Unduly Inflammatory" Anti-Abortion Post Upheld*, Reason, Sept. 7, 2018, <https://reason.com/volokh/2018/09/07/discipline-of-med-student-for-expressing>.

² *Hearing Officer's Report and Recommendation*, Dec. 1, 2005, <http://d28htnjz2elwuj.cloudfront.net/pdfs/671e15c787690657d8f6c7bd47779804.pdf>.

After the event—which was apparently quite successful—the university got petitions signed by hundreds of people complaining that the flyer was offensive to them. And the university’s Office of Equal Opportunity and Affirmative Action ordered staff to take down copies of the flyers, both from bulletin boards and from any university Web sites.

Fortunately, the dean of the College of Liberal Arts, John Coleman, promptly reversed that order, and has also refused to go along with the Office’s request that he publicly condemn the use of the Muhammad image. But the Office continued to formally investigate the matter, and though it ultimately concluded that the flyer didn’t violate any campus speech codes, the director of the Office defended her actions:

Kimberly Hewitt, the director [of the Office], said her office had no choice but to investigate. “There are limits on free speech, and that would be where you have harassment of an individual based on their identity,” she said. “We got complaints from eight individuals and a petition from 300 people saying that they felt that this was insulting, disparaging to their faith.”

When word of the complaints got out, a college administrator sent out an e-mail asking that the fliers be taken down. Coleman, the dean, said he promptly reversed that order when he learned about it....

In the end, the investigation concluded that the flier “does not rise to the level of discriminatory harassment that would violate University policy,” according to a March 27 report.

But it also found that, because many people found the poster “personally offensive and hurtful,” it had contributed to an “atmosphere of disrespect towards Muslims at the University.” In a letter to Coleman, Hewitt recommended that he “communicate that [the College of Liberal Arts] does not support the flier’s image of the Charlie Hebdo depiction of Muhammad.”³

Of course, whatever limits on “harassment of an individual based on their identity” might be (a complicated question, partly because “harassment” is so ill-defined), here there was no harassment of an individual. The flyer didn’t call people’s homes to leave offensive messages. The flyer didn’t follow anyone, calling them names. The flyer didn’t even mention any faculty, staff member or student whom it was criticizing by name (though most such criticism would indeed be protected free speech).

Rather, the flyer contained an image that some individuals find offensive because of their religion—and the University of Minnesota has signaled to its students and faculty that speech will be investigated if enough people say that it is “disparaging to their faith.” Yet universities must be places where people feel free to criticize (and defend) any ideology, including religious ideologies. Islam, Christianity, Judaism, Buddhism, atheism, feminism, socialism, capitalism, nihilism, existentialism—all of these (and much more) are proper subjects for academic discussion and critique, no matter who might find it “personally offensive and hurtful.”

³ Eugene Volokh, *More on the University of Minnesota Charlie Hebdo controversy: ‘There are limits on free speech’*, Wash. Post, May 6, 2015, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/06/more-on-the-university-of-minnesota-charlie-hebdo-controversy-there-are-limits-on-free-speech/>.

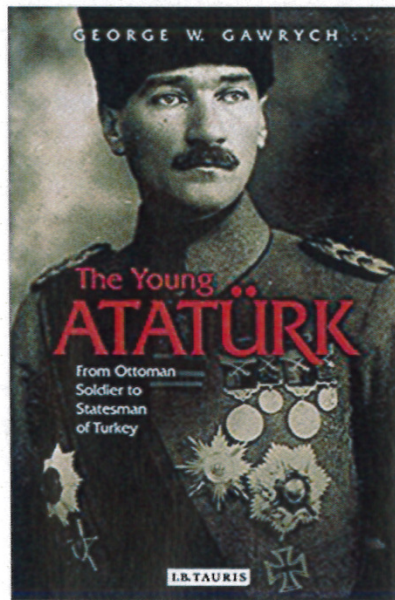
4. Just this year, a student at the City University of New York was subjected to an extended investigation because he sharply criticized Israel and Zionism:

On June 1, an announcement was posted to the City University of New York's Earth and Environmental Sciences listserv advertising Fulbright grants to study in Israel. The next day, Rafael Mutis, a sixth-year Ph.D. student in that department, responded, "Thanks for passing this on, but this is some sick Zionist propaganda. Is this a Trump initiative? Maybe there are post docs in Palestine? Free Free Palestine!"⁴

According to a letter sent to CUNY by Palestine Legal, ... [two-and-a-half weeks after the post,] Mutis was asked, via email, to come in for a meeting with ... [the] vice-president for student affairs at the Graduate Center.... [A week later, he was told,] "I am investigating a complaint and it is important that you meet with me as required by CUNY's Student Conduct Code," wrote Schoengood. "There are no pending charges against you, but failure to meet with me may result in such."

It was only two months later that the student was told that the university had "found no basis for the issuance of charges," even though the statement—a criticism of the institution (CUNY), a country (Israel), and an ideology (Zionism)—was indubitably protected by the First Amendment.

5. In 2016, a faculty member in the Middle Eastern and Islamic Studies program at California State University, Northridge (in Los Angeles), invited Prof. George Gawrych to give a lecture. Gawrych, Professor of History at Baylor University, has written extensively about the Balkans and the Middle East; his book about Kemal Atatürk, the founder of modern Turkey (*The Young Atatürk: From Ottoman Soldier to Statesman of Turkey*) got the 2014 Society for Military History Distinguished Book Award.



⁴ Jesse Singal, *A CUNY Student Was Investigated for Criticizing Israel*, Daily Intelligencer, Sept. 11, 2018, <http://nymag.com/daily/intelligencer/2018/09/a-cuny-student-was-investigated-for-criticizing-israel.html>.

But various activists, including apparently some students, wouldn't allow that to happen. The Armenian Youth Federation proudly described the incident, with video included:

Armenian students at California State University Northridge (CSUN) shut down a planned lecture about Mustafa Kemal Atatürk, citing historical evidence Atatürk continued Turkey's genocidal policies and the event's purpose to distract from the crisis in Turkey today....

Our presence at these events will send a clear message to the Turkish community that college and university campuses are not incubators for denialists. Treating college campuses as breeding grounds for Turkish nationalist ideology is offensive for the number of Armenian students who attend these colleges.⁵

The university's student newspaper elaborated:

Scholar George Gawrych got through no more than five sentences during his presentation on his book about Turkish army officer Mustafa Kemal Atatürk before students raised their voices in protest Thursday at the Aronstam Library in Manzanita Hall.

Over 20 protesters stood up from their seats, turned their backs on Gawrych and repeatedly chanted "Turkey guilty of genocide" and "genocide denialist."

Gawrych waited briefly as other attendees voiced their opinions to let him speak, until he began walking up and down the aisle trying to get the protesters to face him.

Two police officers who guarded the entrance escorted Gawrych, a Baylor University Boal Ewing chair of military history, out of the library to sounds of chanting protesters.

As best I could tell (and I asked about this), there was no attempt by Cal State Northridge to eject the shouters and allow the speech to go on, or to punish them after the fact.

Just as with the University of Minnesota panel on speech after Charlie Hebdo, this was exactly the sort of lecture one would expect at a university, on a subject (the life of Kemal Atatürk) that is of obvious importance to anyone interested in recent Middle Eastern history. If some people think the author was going to be too soft on Atatürk's involvement in attacks on Armenians, and the denial of such attacks, they were certainly entirely free to ask these questions after the lecture, or to hand out leaflets outside the building before and after the lecture. If they were displeased with the author's own past statements about the genocide (apparently he had said that he prefers to describe it as a set of "massacres," and suggests that it may have been less coordinated than some claim⁶), they could have questioned him about that, though this wasn't the

⁵ Citations available in Eugene Volokh, *Student group at Cal State Northridge boasts of 'shutting down' speech by award-winning scholar*, Volokh Conspiracy, Wash. Post, Nov. 15, 2016, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/15/student-group-at-cal-state-northridge-boasts-of-shutting-down-speech-by-award-winning-scholar/>.

⁶ See Terri Jo Ryan, *Family Tree Tied to Forgotten Genocide*, Waco Trib.-Herald, https://www.aarweb.org/sites/default/files/pdfs/Programs_Services/Journalism_Award_Winners/2006Ryan.pdf: "He struggles with the term 'genocide' (race-murder) to describe what happened to the Armenians. He said he prefers 'massacre,' which he considers a more powerful term, to describe the conditions that allowed for violence without repercussions. 'We need better terms,' Gawrych said. 'With 'ethnic cleansing,' you don't feel the human agony, do you?' The

subject of his lecture or his book. But when universities allow lecturers to be just shouted down—and thus shut down—with impunity, something is very badly wrong in American higher education.

C. *The First Amendment Law and Academic Freedom Principles*

Let me turn now to a brief and necessarily incomplete summary of the law.

1. University discipline for student speech

Student speech outside the classroom and outside academic assignments. Most clearly, students generally may not be expelled, suspended, or otherwise disciplined for what they say in student newspapers, at demonstrations, in out-of-class conversations, and the like. The Supreme Court made this clear in *Papish v. Board of Curators*, 410 U.S. 667 (1973), and *Healy v. James*, 408 U.S. 169 (1972); and in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), the Court reaffirmed that students (and student groups) continue to have the right to “express any viewpoint they wish—including a discriminatory one,” which is part of the “Court’s tradition of ‘protect[ing] the freedom to express “the thought that we hate.””

Lower courts have followed suit, striking down many campus speech codes. *See, e.g., McCauley v. Univ. of V.I.*, 618 F.3d 232, 237-38, 250 (3d Cir. 2010); *DeJohn v. Temple Univ.*, 537 F.3d 301, 316-17, 320 (3d Cir. 2008); *Dambrot v. Central Michigan Univ.*, 55 F.3d 1177, 1184-85 (6th Cir. 1995); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.3d 386, 388-89, 391, 393 (4th Cir. 1993); *College Republicans v. Reed*, 523 F. Supp. 2d 1005, 1010-11, 1021 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 870-72 (N.D. Tex. 2004); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 373 (M.D. Pa. 2003); *Booher v. Bd. of Regents of N. Ky. Univ.*, 1998 U.S. Dist. LEXIS 11404, *28-*31 (E.D. Ky. 1998); *UWM Post, Inc. v. Regents*, 774 F. Supp. 1163, 1165-66, 1173, 1177 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 856, 864-66 (E.D. Mich. 1989).

Of course, student speech may be restricted if it falls within the narrow categories of speech that’s generally unprotected (e.g., threats of violence, personal face-to-face insults likely to cause a fight, or intentional incitement of imminent and likely unlawful conduct). Likewise, the university may impose a substantial range of content-neutral time, place, and manner restrictions, such as bans on the use of sound amplification that would be audible from classrooms. And the university may impose reasonable and

Ottomans were fighting the growth of nationalistic fervor among its peoples, not just the Armenians, said Gawrych. An Armenian guerilla movement was fighting for statehood, and massacres happened on both sides: Armenian insurgents killing soldiers and wiping out Muslim villages, and soldiers killing Armenians and wiping out their villages. Gawrych said it was hard to sift through the carnage. But was an extermination of Armenians ordered? Gawrych said the official Ottoman position was that no such order existed, and that the bloodshed was just a series of unfortunate massacres in reaction to nationalistic fervor and ethnic tensions. ‘But too many women and children died. Too many old people. There was some government involvement,’ he said, at least in creating the atmosphere of lawlessness that allowed the worst to happen.”

viewpoint-neutral limits on student speech on “nonpublic forum” property, such as building corridors and the like.

Still, generally speaking, student speech outside the classroom and outside academic assignments is protected from university punishment, even if it’s offensive, wrongheaded, racist, contemptuous, anti-government, or anti-administration. Of course, it’s not protected from university criticism. The university is itself free to publicly speak to condemn student statements that university officials find to be unsound or improper.

Student speech within the classroom. The Supreme Court has never faced this question expressly, but the logic of the Court’s cases strongly suggests that university professors have broad authority to refuse to call on students, to punish students for talking out of turn, and to stop calling on students who insult other students. Purely passive speech, such as speech on T-shirts, may still be protected, *see Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1969). But oral statements, which can easily disrupt the class discussion, are within the professor’s authority.

Student speech in academic assignments. Evaluating students’ academic performance necessarily involves making content-based, and often even viewpoint-based, judgments. Did the student give the correct answer? Do the student’s arguments make sense? Is a student essay well-written, well-reasoned, calm, and rhetorically effective?

There are no Supreme Court cases squarely on the subject, and very few lower court cases, but First Amendment principles generally suggest that universities must have very broad authority to judge such student speech. This is especially so because judges often lack the competence to evaluate the quality of work in various disciplines; they therefore rightly defer to the judgments of academics who are better able to tell what’s a good student paper and what’s a bad one.

Naturally, academic freedom requires tolerance of a broad range of student viewpoints, so long as they are thoughtfully argued and pay attention to counterarguments. But judges generally stay out of such grading decisions, and leave their limits to professional ethics rather than to First Amendment law.

Extended investigations of constitutionally protected speech:

2. Restrictions on speakers because of fear of audience reaction

Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992), held that the government may not charge controversial speakers extra security fees. Any such restriction, the Court held, was inherently content-based, because “[i]n order to assess accurately the cost of security” under such a scheme, “the administrator “must necessarily examine the content of the message that is conveyed.”” It is even more clear, of course, that it is unconstitutional to outright shut down speakers because of a risk that people might attack them. *See, e.g., Bible Believers v. Wayne County* (6th Cir. 2015).

Indeed, under *Matal v. Tam*, 137 S. Ct. 1744 (2017), extra fees imposed on speech because of public reaction to its offensive viewpoint would be viewpoint-based and not merely content-based. “Giving offense is a viewpoint,” at least when the offense stems from the supposedly derogatory qualities of the speech—including, as in *Matal* itself, the supposedly racially derogatory qualities. (That’s from the plurality opinion, but the concurrence took the same view, and expressly said, “The Government may not insulate

a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience.”).

Forsyth County dealt with speech in a traditional public forum; most disputes about speech by controversial speakers on campus deal with speech in “limited public fora” or “designated public fora” such as auditoriums that the university voluntarily opens up for certain classes of speakers. But even in limited public fora, viewpoint-based restrictions (and restrictions that are so vague that they can easily be applied in viewpoint-based ways) are unconstitutional. This is why the Fifth Circuit applied *Forsyth County* to on-campus speech, even if the campus wasn't a traditional public forum: *Sonnier v. Crain*, 613 F.3d 436 (5th Cir. 2010), *modified as to other matters*, 634 F.3d 778 (5th Cir. 2011). Recent district court decisions have taken the same view. *See College Republicans of Univ. of Wash. v. Cauce*, 2018 WL 804497 (W.D. Wash. Feb. 9); *Padgett v. Auburn Univ.*, 2017 BL 163237 (M.D. Ala. Apr. 18).

3. University discipline for faculty speech

Faculty speech outside teaching and scholarship. Government employers generally have considerable authority over the speech of their employees, much more than public universities have over the speech of their students. Generally speaking, an employer may fire an employee for the employee's speech when (1) the speech is on a matter of private concern, such as general small-talk, or the employee's concern about his own job conditions, or (2) the speech is so likely to disrupt the employer's functioning that the likely disruption outweighs the value of the speech to the employee and his listeners, or (3) the speech is made as part of the employee's official duties. *See Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Ed.*, 391 U.S. 563 (1968); *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Nonetheless, the Supreme Court has repeatedly stressed, including in university professor speech cases, that “our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned,” *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Even speech that's part of an employee's duties—which would normally be unprotected under *Garcetti*—might be protected for public university professors: The *Garcetti* Court noted that, “There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence”; the Court therefore expressly declined to decide whether the *Garcetti* limitation on employee speech “would apply in the same manner to a case involving speech related to scholarship or teaching.”

And speech outside teaching and scholarship—such as letters to the editor, Facebook posts, blogs, and the like—is protected, even when it causes controversy. As the Second Circuit held in *Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992), which involved racially inflammatory letters to the editor and similar publications, “the commencement, or threat thereof, of disciplinary proceedings against Professor Levin predicated solely upon his protected speech outside the classroom violates his First Amendment rights.” (*Jeffries v. Harleston*, 52 F.3d 9 (2d Cir. 1995), held that faculty members who are serving as *administrators* could be removed from their administrative posts for sufficiently controversial outside speech, but precisely because such a removal leaves them as professors and thus doesn't infringe their “academic freedom.”) *See also, e.g., Mabey*

v. Reagan, 537 F.2d 1036, 1050 (9th Cir. 1976); *Adamian v. Jacobsen*, 539 F.2d 929, 934 (9th Cir. 1975). Therefore, while normal employers are generally entitled to fire employees who have (for instance) offended customers or members of the public, universities are probably bound by the First Amendment to tolerate similarly offensive speech by teachers, at least outside the classroom.

Faculty scholarship. There is virtually no caselaw having to do with discipline based on faculty scholarship. Just as student academic assignments must be evaluated by the university based on its content and sometimes even its viewpoint, so faculty scholarship must be evaluated, when candidates are hired or not hired, when professors are tenured or not tenured, and when other promotion decisions are made. It seems likely that here too the constraints on university action will stem from professional norms of academic freedom, and not from judicially enforced First Amendment principles.

Firing of a tenured professor for the viewpoints expressed in his scholarship, on the other hand, would violate the tenure contract, would likely violate the Due Process Clause by stripping the professor of the rights secured by the tenure contract. It may violate the First Amendment as well, since the university wouldn't be able to defend the firing as just a normal employment decision that is routinely made on the basis of the professor's scholarship.

Faculty teaching. A public university professor's First Amendment rights are likely at their narrowest when it comes to his teaching. The professor teaches at the behest of and on behalf of his academic department; and both the university and the public have an interest in making sure that certain materials get taught, and taught effectively. For example, scholarship often aims at upsetting conventional wisdom, but in most undergraduate classes, the conventional wisdom is precisely what must be taught. Likewise, professors usually have broad flexibility in choosing their scholarship topics, but may not have the same flexibility in choosing what to cover in their Introduction to Constitutional Law course.

Most universities give professors substantial flexibility in their choice of syllabus and teaching techniques, and this may generally make sense. But no court cases suggest that the First Amendment secures the same flexibility. The Supreme Court has never expressly considered the question, and lower courts have generally not faced it at the college or university level. Nonetheless, it seems likely that courts would hold that the administration is constitutionally allowed to dictate what matters a professor teaches, to require a professor to use a certain teaching method, and even to require the professor to teach certain viewpoints (e.g., the view that the Earth is much older than 6000 years) as true.

On the other hand, before a university disciplines a professor for supposedly improper teaching, the university likely has to make clear to the professor what is allowed and what is not. A professor cannot, for instance, be punished for using allegedly excessive sexual humor and metaphor as a teaching tool under a general "sexual harassment" policy that never made clear that such sexual allusions are forbidden. See *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996); *Silva v. Univ. of N.H.*, 888 F. Supp. 293 (D.N.H. 1994).

Finally, note that under the First Amendment, what one level of supervisor (the dean) may do, higher-level supervisors — such as college administrators, the Regents,

or even the legislature—likely may do as well. Broader academic freedom principles, and (usually) simple good sense, may suggest that the curriculum or teaching styles in public university classes should be dictated chiefly by fellow academics. But the First Amendment draws no such line; if the speech of a professor as university employee is regulable, it would be regulable by the university's ultimate controllers (the Regents or the legislature, representing the people) as well as by university officials.

Remarks by Professor Amy L. Wax
Robert Mundheim Professor of Law, University of Pennsylvania Law School
Department of Justice Forum on Free Speech in Higher Education
September 17, 2018, Washington DC

Thank you for inviting me here to speak today on the very important topic of free expression on campus.

This topic has been of special interest to me for a long time. I have grown increasingly concerned about a campus climate that is overwhelming left of center. The so-called progressives, including students, professors, and administrators who now dominate and effectively control the universities, have become steadily and aggressively more intolerant of the full range of political and intellectual views.

Within the past year, my own experiences have confirmed my concerns. Very briefly, my troubles began a year ago when I co-wrote an op ed in the Philadelphia Inquirer entitled “Paying the Price for the Breakdown of the Country’s Bourgeois Culture.” The piece attributed some of our country’s current ills to the abandonment of so-called bourgeois values and suggested that a revival of the habits and practices that defined adult behavior during the 1950s and before – a code that valorized probity, patriotism, sobriety, hard work, sexual responsibility, family cohesion, decorum, and the like—might alleviate some of our nation’s problems. The piece also stated that not all cultures are equal in preparing people to be productive citizens in a modern society. The next day, in response to a student reporter’s accusation that I was advocating “white supremacy,” I made the simple observation, subsequently quoted in the student newspaper, that global migrants’ tendency to flock to white European countries suggested that those countries’ cultures are functionally superior to others around the world.

My remarks produced a firestorm of student and faculty protest and a torrent of slurs and accusations – that I was a racist, xenophobe, hater, and white supremacist. Calls went out to fire me and strip me of my teaching responsibilities. Thirty-three of my colleagues signed an “open letter” categorically rejecting and condemning “all my views.” The letter offered no arguments or evidence of any kind, and didn’t even specify which views were being condemned. In short, it was pure denunciation without explanation. I have provided additional details and evidence of my colleagues’ hostility and responses in a Wall Street Journal op ed I wrote last February.

A few months later, some minority student activists at Penn Law discovered a podcast of an interview I did with Glenn Loury, a black economist from Brown University. While briefly discussing the topic of affirmative action, I observed that I could not recall any black law students graduating in the top quarter of the Penn Law School class during my time there, and that, in my own procedure course, I had rarely seen a black student rank in the top half. Based on those assertions, my Dean soon sent an e-mail to everyone at my school in which he announced I would no longer be teaching the mandatory first year class in civil procedure. He accused me of uttering falsehoods about student performance, of belittling our minority students, and of upsetting them by engendering the impression that I was 'biased' against them. No evidence was offered for any of these accusations. The e-mail was backed up by nothing; it was completely fact-free.

There's lots to say about all this, but a few points are worth noting. The first concerns the reaction to the initial Inquirer op ed. The immediate response of students and colleagues was not to question its assertions on their merits, but to denounce and condemn the ideas expressed as immoral, illegitimate, unacceptable, and harmful.

What is the purpose of such a reaction? The attempt to depict me as someone who deserves condemnation is directed at discouraging the very expression of my views. The goal is to drive disfavored opinions on matters of public importance from the marketplace of ideas, not to encourage discussion of them.

I submit that the antipathy towards my op ed that my colleagues expressed is fundamentally at odds with what the core mission of the university should be, which is to engage in civil and open discussion in an attempt to weigh alternatives and get at the truth.

The second important point pertains to my Dean's decision to take me out of the first year law school classroom. That decision shows how decisions and judgments in the academy have been overtaken by subjectivity and feelings. My Dean asserted that some minority students, members of designated victim groups, might 'feel' that I am biased against them. He suggested they might experience distress from my statements, which would interfere with their learning. They shouldn't have to sit in a classroom with me, or be taught by me. No objective proof of bias or distress was offered. Indeed, no objective evidence was adduced that my observations about student performance were false or inaccurate. The Dean's message was clear: Facts and

evidence had nothing to do with it. Because the students demand it, for whatever reason, this woman must be penalized.

The academic left, the prime peddlers of a grievance culture, have learned that the appeal to discomfort, upset, and offense works like a charm – as it did in this case. Appeals to discomfort, psychological harm, hurt and offense is an effective way to shut down unpopular opinions and banish inconvenient facts. This variant on the classic Heckler's veto is powerful because it is irrefutable and unanswerable. The beauty is that feelings are subjective; they are not readily amenable to proof or disproof, to evidence or objective fact. No one can really argue with feelings, so feelings always win – and especially the feelings of members of protected victim groups, of which there are growing numbers.

To support and encourage this ploy of subjectivity, universities are now replete with professors and diversity bureaucrats who stand ready to monitor attitudes, receive complaints, and guard exaggerated sensitivities. In their quest to protect victims, they police vocabulary, identify offending thoughts, and create elaborate rules for what opinions may and may not be expressed, what observations made, and what facts noticed, voiced, and aired.

Of course, this is all in the name of diversity and inclusion, which have become prime academic watchwords. What do the imperatives of diversity and inclusion require?

In a nutshell, they require a strict, egalitarian identity politics that insists upon equality of results for all identity groups, and attributes any deviation to societal failures, structural biases, and illegitimate motives.

What this means is that ideas about group differences and the sources of those differences must be suppressed, tarred and banned unless they fit the dominant narrative, which is that ours is an irredeemably corrupt and evil society in which all group disparities flow from discrimination, racism, sexism, oppression and other evils perpetrated by a dominant white population.

The ideas I expressed in my various utterances obviously transgressed that code – and so I was perceived as a threat. Aggressive efforts were made to ostracize and marginalize me – to discourage the further expression of my unacceptable notions.

For other professors without tenure, and even for those like myself who do have that protection, the message comes through clearly: if you depart from the accepted narrative, you will suffer the consequences. In the atmosphere of orthodoxy and intimidation that now prevails on many campuses, few who value their livelihood or their hard-won positions will risk those consequences. And of course that is how many progressives in the academy would have it – they want it that way.

These tactics don't just affect faculty. The orthodoxy is especially potent among students, who are in constant fear of being called out by a vocal faction of their peers for sexism, racism, xenophobia, hate, and other violations. And those in authority routinely stand by idly. Rarely are students who engage in these tactics chided or reined in by faculty, and certainly not by academic administrators. And those who find themselves under attack are almost never defended by those in charge. Rather, dissenters are left to the tender mercies of their accusers.

It is not uncommon to hear the misbegotten view that name-calling and slurs are on a par with the reasoned arguments and rigorous, fact based, substantive inquiries that ought to be the lifeblood of the university. Of course, they are not, and students should be taught that lesson. But in today's academy they rarely are.

So what is to be done? What steps can feasibly be taken to address this sad state of affairs.

It is no secret that academia today is overwhelmingly dominated by the so-called progressive left. What is the source of that dominance? Historically and institutionally, the academy is charged with self-administration, and has many means for self-perpetuation and social reproduction. Having once gained a foothold, left-leaning factions have taken over. By exercising the power to hire, fire, pay, promote, and reward, the academic left has created a closed system that is virtually impossible to disrupt. It is they who determine who gets to speak and who is excluded, who is praised and who condemned, which opinions and ideas are deemed 'legitimate,' palatable, civil, or 'nice,' and which not. And, above all, they function as gatekeepers; they get to decide who will teach and who will influence young minds.

To be sure, the government has a hand in this – it runs many universities. But many – and often the most prestigious – universities are private, not public. In our system, the

public/private line matters, and often to the good. But what this divide means for higher education is that the government does not automatically control most academic power centers. And many Constitutional mandates and protections – and especially those pertaining to free speech and expression – do not limit them.

Of course, Government provides copious funding for education at every level. It can exercise some controls even over private schools through legislation or the spending power. Congress has seen fit to forbid identity-based discrimination through Title IX, Title VI, and other instruments – laws that have, perversely, been used to fuel a “cultural Marxism” on campus. What it has not done so far is meddle with the content of courses, published research, and the views expressed by faculty and students.

Some have suggested that the proposed PROSPER Act, a House Republican-backed reauthorization package for the Higher Education Act of 1965, might enable disciplinary oversight over educational content through language denigrating “free speech zones or codes,” a requirement that funded schools disclose speech protections, and proposals allowing students to complain about discrimination against particular viewpoints.

I doubt that such provisions will do much good. There are sound reasons that Congress and the Department of Education have so far resisted mandating or regulating viewpoint diversity on campus. This goal is highly resistant to formalized legal regulation. What seems like intolerance to some is for others the relaxation of legitimate academic standards, and it is very hard to codify the distinction.

For better or worse, the academy has arrogated to itself the task of deciding what ideas rightly belong in its own marketplace, and which comprise legitimate contributions to the search for truth. Maintaining dissent while not compromising quality requires a case by case exercise in impartial and balanced judgment – precisely what is missing in many universities today. In today’s highly politicized atmosphere, it is not clear that legislators or government overseers can or will do it better, at least not without introducing fresh perversities and engendering more division and distrust.

The integrity of the academy is a matter primarily of informal norms and standards, developed in light of the academy’s historic purposes. Customarily, universities have been

dedicated to preserving the best in our culture, to cultivating free and disciplined minds, and to seeking and discovering the truth. Because the academy has of late been hijacked for political objectives, and the advancement of so-called “social justice,” these traditional practices, and these purposes, have suffered much erosion. Unfortunately, the best way to reverse that trend is through the commitment and integrity of individuals committed to the original, laudable conception of the academy and to strong free speech values. The bulwarks of academic integrity must be found principally in private forces.

My own experiences in the past year have led me to believe that, because much of the academy is in the grip of illiberal ideas, the most promising avenue for reform is through the power of the purse as wielded chiefly by private actors and only secondarily by the government.

Parents, alumni, and wealthy donors keep the modern university afloat to the tune of truly staggering sums of money. No doubt these participants believe that, by supporting elite universities, they are preserving the best of our culture and securing a positive future for our country. I wish they were right, but I believe they are wrong. Our universities have become thoroughly corrupt places where western and American ideas and achievements are routinely deprecated, white people and males are indiscriminately tarred as toxic and oppressive, discrimination, racism, and sexism have become the obsessive, uni-dimensional explanations for social and personal failings, and divisive identity politics are promoted relentlessly.

Unfortunately, donors and alumni have little incentive or occasion to confront these realities. Boards of trustees are chosen for their docility and support for administrative priorities, and donors are flattered and feted on the condition that they don't rock the boat.

Above all, there is what I have deemed the “Little Caitlin” problem – donors and alums are determined to secure places at prestigious universities for their children, friends, and family. And who can blame them? These institutions are the gateway to high status and financially rewarding jobs. Questioning the priorities of administrators and faculty is not the way to guarantee access to those precious admissions slots. For this reason among others, the free play of ideas, and the university's classic mission of searching for truth, are not uppermost in donors' minds. What is important is that Caitlin gets in, and gets out of, her prestigious program so she can move on to bigger and better things. What she learns and is taught at the university is of distinctly secondary importance.

It is hard to know how to change the priorities of people who control the power of the purse. As A.E. Houseman once trenchantly stated, “The search for truth is the faintest of human passions.” Nonetheless, it is worth trying to win the hearts and minds of alumni and big donors by making them more aware of how the universities are conducting business these days, and some people – including our own valiant Penn Law alum, Paul Levy, who vociferously protested my treatment, are doing just that.

Above all, as I plan to write about in the future, the civic minded among them – and there are many -- should be made to see that supporting elite universities is not the wisest or most fruitful use of their hard-earned money. There are in fact better ways to improve people’s lives and, most importantly, to help the ordinary, average, unspecial people who have been unduly neglected by our elites and are increasingly walled off from them. Supporting vocational education, providing grants for job training, funding local infrastructure improvement, cleaning up, monitoring, and beautifying public spaces, rebuilding civic institutions, establishing K-12 public school art, music, and enrichment programs, helping pay relocation costs of ordinary workers, supporting regional theaters, and contributing to summer camp or travel funds for children of modest means, are just a few possibilities that the wealthy should consider in lieu of large, high-profile gifts to elite private universities, which serve only a very tiny slice of the population.

The government also has a role to play here: it should seriously consider cutting back on the funds to universities for areas of study and research in the humanities and social sciences that are too often the sites of partiality, indoctrination, antipathy to national identity and values, and the unbalanced advancement of a particular political agenda.

Although scientific and medical research would seem to be above distortionary politics, they are not. Support for them should also come under scrutiny and funds should be shifted as much as possible to non-university-based institutions unencumbered by lavish overhead rules and allotments, unnecessary regulations, mandates for “diversity and inclusion,” and other wasteful and irrelevant requirements. There are in fact not a few areas of medical and scientific research – cancer clinical trials is an example that comes to mind – where the non-university-based sector does it better, and without the social-justice bells and whistles that serve as a distraction and promote the pet ideologies of one side of the political spectrum. In short,

defunding the elite research universities – which already have plenty of money – should be on the national agenda.