

# Culture Wars on Campus: Academic Freedom, the First Amendment, and Partisan Outrage in Polarized Times

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## I. INTRODUCTION

Controversies over free expression rights are not new to American college and university campuses.<sup>1</sup> In recent years, faculty and student free expression rights and responsibilities have emerged as battlegrounds in a broader culture war. Pitched conflicts have included speech codes banning racist, sexist, and homophobic expression; sexual harassment investigations under Title IX; the policing of “micro aggressions” and classroom “trigger warnings”; the call for “safe spaces” free from intellectual conflict or offense; disinventing or disrupting campus speakers; campus protest incidents and policies for “free speech zones”; politicians and governing boards punishing faculty or enforcing ideologies; and responses to faculty and student expression on social media.<sup>2</sup>

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1. For two definitive accounts of campus free expression controversies in recent generations, see ALAN CHARLES KORS & HARVEY A. SILVERGLATE, *THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA’S CAMPUSES* (1998) and GREG LUKIANOFF, *UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE* (1st American ed. 2012). For a more historical perspective, see ELLEN W. SCHRECKER, *NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES* (1986) (tracing threats to academic freedom from anti-Communist investigations) and *ACADEMIC FREEDOM ON TRIAL: 100 YEARS OF SIFTING AND WINNOWING AT THE UNIVERSITY OF WISCONSIN-MADISON* (W. Lee Hansen ed., 1998) (discussing controversies in the late nineteenth and early twentieth centuries).

2. See SIGAL R. BEN-PORATH, *FREE SPEECH ON CAMPUS* (2017); ERWIN CHEMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* (2017); JOHN PALFREY, *SAFE SPACES, BRAVE SPACES: DIVERSITY AND FREE EXPRESSION IN EDUCATION* (2017); see also Conor Friedersdorf, *The Rise of Victimhood Culture*, *ATLANTIC* (Sept. 11, 2015), <https://www.theatlantic.com/politics/archive/2015/09/the-rise-of-victimhood-culture/404794/> [<https://perma.cc/UV9T-JZZ5>]; Conor Friedersdorf, *Why Critics of the ‘Microaggressions’ Framework Are Skeptical*, *ATLANTIC* (Sept. 14, 2015), <https://www.theatlantic.com/politics/archive/2015/09/why-critics-of-the-microaggressions-framework-are-skeptical/405106/> [<https://perma.cc/8SPM-WQAK>]; Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, *ATLANTIC* (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/> [<https://perma.cc/8WL5-5GXE>]; Greg Lukianoff & Jonathan Haidt, *Why It’s a Bad Idea to Tell Students Words Are Violence*, *ATLANTIC* (July 18, 2017), <https://www.theatlantic.com/education/archive/2017/07/why-its-a-bad-idea-to-tell-students-words-are-violence/533970/> [<https://perma.cc/QX74-F8M4>]. For a discussion on speech codes, see DONALD ALEXANDER DOWNS, *RESTORING FREE SPEECH AND LIBERTY ON CAMPUS* (2006) and *SPEAKING FREELY: THE CASE AGAINST SPEECH CODES* (Henry Mark Holzer ed.,

The election of Donald J. Trump as President of the United States in November 2016 created yet more controversies in which campuses across the country wrestled with the necessary free expression push-and-pull between rights and responsibilities.<sup>3</sup> At a time when many people felt the nation was more politically divided than it had been in their lifetimes, administrators, faculty, and students faced a gamut of challenging questions, ranging from feelings of insecurity among those who felt targeted by Trump's rhetoric to the reactions among those who felt marginalized because of their support for him.<sup>4</sup>

The campus climate was not lost on conservative advocates who had long argued liberal orthodoxy within universities threatened independent thought.<sup>5</sup> Indeed, within months of taking office, President Trump and his cabinet initiated several moves to address conservative complaints about campus activities. Trump's education secretary, Betsy DeVos, pledged to retool Title IX, the federal gender anti-discrimination law to provide greater due process protections,<sup>6</sup> while the attorney general, Jeff Sessions, promised more aggressive defenses of free speech from the Department of Justice.<sup>7</sup> In a speech at Georgetown Law School filled with examples of censorship of the political right by the political left, Sessions said, "The American university was once the center of academic freedom—a place of robust debate, a forum for the competition of ideas. But it is transforming into an echo chamber of political correctness and homogeneous thought, a shelter for fragile egos."<sup>8</sup>

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1994) [hereinafter *SPEAKING FREELY*]. For a discussion on Title IX, see LAURA KIPNIS, *UNWANTED ADVANCES: SEXUAL PARANOIA COMES TO CAMPUS* (2017).

3. See PALFREY, *supra* note 2, at 2 ("We will remember the academic years between 2014 and 2017 as times of turmoil on our campuses. . . . The election cycle that vaulted Donald J. Trump to victory only exacerbated the tension and polarization of our nation with regard to these core issues.")

4. Robin DeRosa, *Election 2016: How Did Higher Ed Leaders Respond?*, *CHRON. HIGHER EDUC.* (Nov. 14, 2016), <http://www.chronicle.com/blogs/profhacker/election-2016-how-did-higher-ed-leaders-respond/63156>.

5. See, e.g., DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* 20–21 (1991).

6. Andrew Kreighbaum, *New Instructions on Title IX*, *INSIDE HIGHER ED* (Sept. 25, 2017, 3:00 AM), <https://www.insidehighered.com/news/2017/09/25/education-department-releases-interim-directions-title-ix-compliance> [<https://perma.cc/3M2D-JYTV>].

7. Jeff Sessions, *Attorney General Sessions Gives an Address on the Importance of Free Speech on College Campuses*, U.S. DEP'T JUST. (Sept. 26, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-gives-address-importance-free-speech-college-campuses> [<https://perma.cc/A9L8-7LV2>].

8. *Id.*

This Article examines one particularly illustrative campus free expression controversy that erupted in the days after President Trump's election. A professor and student on the campus of Orange Coast College (OCC), a community college in Costa Mesa, in Orange County, California, became unwitting combatants in one campus free expression battle in the larger culture war.<sup>9</sup> Professor Olga Perez Stable Cox, a veteran instructor for forty-two years, shared a sharp critique of Trump's election during introductory remarks at the start of her human sexuality class that she said were intended to provide assurances to students upset about the election.<sup>10</sup> Freshman Caleb O'Neil recorded some of her remarks after being primed earlier in the day at a meeting of the OCC College Republicans to be on the lookout for anti-conservative speech.<sup>11</sup> The group posted his video on its Facebook page.<sup>12</sup> In the weeks and months that followed, Cox and O'Neil played lead roles in a national drama exploring the limits of free speech and academic freedom in higher education and the roles of both technology and outside advocates in these cases.

This research provides an in-depth case study, drawing from a wide range of primary and secondary sources, including news reports, social media feeds, websites of conservative media and advocacy groups, statements from individuals and institutions, case law, and a broad sweep of scholarly literature. We explore important questions regarding faculty and student speech rights, as well as matters of outside influence and the role of technology in cases involving campus free expression controversies. We examine related legal doctrines and policies in historical and theoretical frameworks rooted in academic freedom and the First Amendment. We evaluate the systems of communications and media that catapult viral videos to national prominence. We probe questions that include: What are the limits of partisan faculty expression in classroom settings? What are the

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9. See Roxana Kopetman, *Caught on Video: Trump's Election was an 'Act of Terrorism,' Says Orange Coast College Professor in Class*, ORANGE COUNTY REG. (Dec. 9, 2016, 8:00 AM) [hereinafter *Caught on Video*], <http://www.ocregister.com/2016/12/09/caught-on-video-trumps-election-was-an-act-of-terrorism-says-orange-coast-college-professor-in-class/> [https://perma.cc/TBG7-LNF4].

10. Roxana Kopetman, *Orange Coast College Honors Anti-Trump Instructor, Olga Cox, but She Turns it Down*, ORANGE COUNTY REG. (Mar. 22, 2017, 1:13 PM) [hereinafter *Anti-Trump Instructor*], <https://www.ocregister.com/2017/03/22/orange-coast-college-honors-anti-trump-instructor-olga-cox-but-she-turns-it-down/> [https://perma.cc/R6BS-8E6P].

11. Roxana Kopetman, *Suspended OCC Student Felt 'Bullied,' but Says Instructor in Trump Video Doesn't Deserve Death Threats*, ORANGE COUNTY REG. (Feb. 20, 2017, 8:00 AM) [hereinafter *Death Threats*], <http://www.ocregister.com/2017/02/20/suspended-occ-student-felt-bullied-but-says-instructor-in-trump-video-doesnt-deserve-death-threats/> [https://perma.cc/T4JR-RQTF].

12. Orange Coast College Republicans, FACEBOOK (Dec. 5, 2016) [hereinafter *Facebook Post*], <https://www.facebook.com/occrepublicans/videos/1041841262593330/> [https://perma.cc/MF6R-GM5B].

rights of students to be protected from classroom speech that challenges their world views? What is the role of outside advocates in campus controversies as part of larger culture wars? How can higher education institutions protect both expression rights and vibrant, diverse intellectual communities?

The case provides clear evidence that current threats to campus free expression are not only creatures of the political left, but also of the political right. These threats are often fueled by a conservative media “outrage machine” that stokes anger and resentment toward overt and perceived expressions of left-leaning viewpoints by faculty and often involves calls for firings and punishment based on the expression in troubling ways.<sup>13</sup>

This research leads us to make four general arguments. First, the First Amendment should provide robust protection for faculty partisan speech, but doctrinally the extent of protections is far from absolute and faculty are on strongest ground when the content and nature of the expression is defensible as pedagogically germane. Second, while students have a right to be protected from legally proscribed harassment and discrimination, they do not have a right to be protected from partisan speech that challenges their world views, and the rights to record others without permission in educational settings is dictated by context. Third, while partisan advocates serve as an important check on academic institutions, the rise of social media has invited discipline against professors in ways that raise serious questions about academic freedom, and as such, politically motivated calls for discipline must be evaluated carefully by academic institutions. Fourth, academic institutions have a responsibility to defend the academic freedom of faculty and also ensure openness to viewpoint diversity, and they are best served by common-sense responses to politically motivated calls for faculty discipline.

Part II of this article sets forth what happened in the OCC classroom to spark a national free expression controversy and discusses the ways in which new technologies affect classroom interactions and how viral videos extend controversies in today’s media ecosystem. Part III explores the tensions between faculty and student rights and responsibilities presented by the OCC case and explores the relevant historical, theoretical, doctrinal,

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13. See, e.g., George CiccarIELlo-Maher, *Conservatives are the Real Campus Thought Police Squashing Academic Freedom*, WASH. POST (Oct. 10, 2017), [https://www.washingtonpost.com/news/posteverything/wp/2017/10/10/conservatives-are-the-real-campus-thought-police-squashing-academic-freedom/?tid=ss\\_tw-amp&utm\\_term=.88c995fe2a9e](https://www.washingtonpost.com/news/posteverything/wp/2017/10/10/conservatives-are-the-real-campus-thought-police-squashing-academic-freedom/?tid=ss_tw-amp&utm_term=.88c995fe2a9e).

and legislative frameworks of academic freedom and the First Amendment. Part IV summarizes the resolutions of the OCC controversy, discusses their implications, and provides recommendations for legal doctrine and institutional responses.

## II. CLASSROOMS GOING VIRAL: A NEW PHENOMENON

### A. *OCC Case: From the Classroom to National News*

Caleb O’Neil, nineteen, enrolled at Orange Coast College in fall 2016, following in the footsteps of his father and uncles and hoping to study business after transferring later to a four-year university.<sup>14</sup> His family was involved in Republican politics and his grandmother had served as president of the Newport Harbor Republican Women.<sup>15</sup> O’Neil said he had experienced hostility against Trump firsthand when he attended a Trump rally in Costa Mesa.<sup>16</sup> “People were getting in my face and calling me a racist,” he said.<sup>17</sup> “I was a Rand Paul guy until I got punched . . .”<sup>18</sup>

On the night of November 15, 2016, O’Neil arrived at Professor Olga Perez Stable Cox’s human sexuality class after having attended a College Republicans meeting earlier in the day, he later told the *Orange County Register*.<sup>19</sup> He said two campus officials had attended the meeting to accuse the club of harassing a liberal club on campus.<sup>20</sup> The club’s president told students to document incidents where they felt threatened as a result of their political ideologies, O’Neil said.<sup>21</sup>

When Professor Cox began criticizing Trump at the start of class, O’Neil said he pulled out his phone and began recording Cox’s comments because “[he] was honestly scared [he] would have repercussions with [his] grades because she knew [he] was a Trump supporter.”<sup>22</sup> While O’Neil said he thought Cox was “a good teacher,”<sup>23</sup> he felt bullied by her comments, harkening to how he felt when he had attended the Trump rally.<sup>24</sup> “She wasn’t cussing

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14. Death Threats, *supra* note 11.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Roxana Kopetman, *OCC Student Suspended for Recording Teacher Speaks Out, Files Appeal*, ORANGE COUNTY REG. (Feb. 16, 2017, 8:00 AM) [hereinafter Student Files Appeal], <http://www.ocregister.com/2017/02/16/occ-student-suspended-for-recording-teacher-speaks-out-files-appeal/> [<https://perma.cc/ZK28-VM49>].

23. *Id.*

24. Death Threats, *supra* note 11.

at me, but it was the same thing as the protesters,” O’Neil said.<sup>25</sup> “I was getting bullied again . . . I was scared to go to my car because after people get riled, they want to wreak havoc.”<sup>26</sup>

Two video clips recorded by O’Neil were ultimately disseminated online. It was unclear from the videos what prompted the comments, or what was said before and after the short clips. In the first, Professor Cox says:

[W]hite supremacist and a vice president that is one of the most anti-gay humans in this country. So we are in for a difficult time, but again, I do believe that we can get past that.

Our nation is divided, we have been assaulted, it’s an act of terrorism. One of the most frightening things for me and most people in my life is that the people creating the assault are among us. It is not some stranger from some other country coming and attacking our sense of what it means to be an American and the things that we stand for, and that makes it more painful, because I’m sure that all of us have people in our families and our circle of friends that are part of that movement and it is very difficult.

We are way beyond Republicans and Democrats and we’re really being back to being at civil war and I don’t mean that in a fighting way, but our nation is divided as clearly as it was in Civil War times and my hope is we will get leadership to help overcome that.

I will go over some coping skills, but before I do that, I do want you to know that the optimist in me—First of all, we are the majority, more of us voted to not have that kind of leadership, and we didn’t win because of the way our Electoral College is set up, but we are the majority and that’s helping me to feel better. I’m relieved that we live in California. It is one of the best states, and I love that and I love living here but I’m especially proud of our Legislature who did put out a message I hope you can see. One of the things I’m doing to cope is to look for positive messages and glimmers of hope. That’s the optimist in me—and California legislative leaders did . . . put something and these are things you can find . . .<sup>27</sup>

A second video clip posted several days after the first, appearing to be from the same set of remarks by the instructor, shows Professor Cox saying:

I’m also happy for the first time that Orange County voted my way. That’s rare. Since the 1930s Orange County has never had a Democratic vote majority. And so, it does mean that we are impacting our friends and families. It is getting better. Orange County is one of the most conservative counties in the nation, and the fact that we did vote Democrat says a lot and it gives me a hope for my neighbors and

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25. *Id.*

26. *Id.*

27. Joshua Recalde-Martinez, *Orange Coast College Teacher Call Trump Supporters Terrorist*, YOUTUBE (Dec. 6, 2016) [hereinafter Video One], <https://www.youtube.com/watch?v=C5wUAaldF6c>.

people in this area. Living in Orange County is scary when you know you are surrounded by so many people that are so hateful. But I am optimistic that we are the majority, and that we will make a difference.

I've been looking for days to find a positive statement from the president of the college and I hear it's online on the website. I can't find it, but one of my colleagues sent me a link and I will make it available to you next week or I will send you an email. The president of OCC has also made a statement like the state Legislature that we will continue to make OCC a safe place for all of our students. We will protect you. I will go over some phone numbers you can call if you find anyone being racist or in any way prejudiced or treating you in an unfair way. We are going to try to keep OCC safe. I'm going to always do my best to keep my classroom safe and if anyone of you get treated unfairly by anyone in this class . . . .<sup>28</sup>

After class, O'Neil shared the videos with the OCC College Republicans.<sup>29</sup> On November 30, the group, along with attorney Shawn Steel, a former chairman of the California Republican Party, complained to OCC's administration.<sup>30</sup> They asked Cox "to apologize to her students and take an anger-management class, and for a dean to send out a letter to the faculty saying it needs to treat students with respect."<sup>31</sup> After not receiving a satisfactory response, the College Republicans posted the first video on its Facebook page on December 5.<sup>32</sup> The Facebook post began, "Did you know you're a terrorist for having supported Trump? I didn't but apparently that's what they're teaching in Orange Coast College[']s classrooms post election."<sup>33</sup>

The classroom recordings went viral.<sup>34</sup> A story on the website HuffPost on December 7 launched media attention in Southern California,<sup>35</sup> including that of Los Angeles broadcast news programs and the *Orange County Register*, before making it to conservative blogs and sites including The

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28. Joshua Recalde-Martinez, *Orange Coast College Professor a Hypocrite*, YOUTUBE (Dec. 10, 2016) [hereinafter Video Two], <https://www.youtube.com/watch?v=Zohfo5VwQHE>.

29. Death Threats, *supra* note 11.

30. Caught on Video, *supra* note 9.

31. *Id.*

32. Facebook Post, *supra* note 12.

33. *Id.*

34. *See id.*

35. Chris Epting, *VIDEO: SoCal Professor Calls Trump Election "Act of Terrorism" in Class. UPDATE: Teacher's Union Threatens Action Against Student Who Recorded*, HUFFPOST (Dec. 7, 2016, 3:52 PM), <http://www.huffingtonpost.com/entry/58486e59e4b08f092ddd98be?timestamp=1481143940036> [<http://perma.cc/LS4N-7JYW>].

Daily Caller,<sup>36</sup> campus watchdog sites—including Campus Reform<sup>37</sup> and College Fix.<sup>38</sup> On the evening of December 9 Fox News addressed the recordings, first on The Kelly File.<sup>39</sup> Other national news organizations, including CNN and the *Washington Post*, also reported on the video.<sup>40</sup>

The second recording was posted to Facebook on December 11, the same day the incident was covered on the Fox and Friends morning show.<sup>41</sup> The College Republicans launched an online petition to “Fire Olga Perez UnStable Cox.”<sup>42</sup> On the night of December 12, Tucker Carlson hosted Joshua Recalde-Martinez, president of the OCC College Republicans, and Attorney Shawn Steel on his Fox News show.<sup>43</sup> Both called for the professor’s firing.<sup>44</sup> Steel and Carlson noted the power of the video. Steel stated:

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36. See Justin Caruso, *California Prof Calls Trump’s Election an ‘Act of Terrorism,’ Student Who Took Video Gets Legal Threat*, DAILY CALLER (Dec. 10, 2016, 4:10 PM), <http://dailycaller.com/2016/12/10/california-prof-calls-trumps-election-an-act-of-terrorism-student-who-took-video-gets-legal-threat/> [https://perma.cc/HDU2-87BM].

37. See Peter Van Voorhis, *OCC Recording a ‘Politically Motivated Effort,’ Faculty Claim*, CAMPUS REFORM (Dec. 22, 2016, 10:02 AM), [https://www.campusreform.org/?ID=8560&&fb\\_comment\\_id=1237743642951398\\_1237981822927580#f1cb7da6b185468](https://www.campusreform.org/?ID=8560&&fb_comment_id=1237743642951398_1237981822927580#f1cb7da6b185468) [https://perma.cc/KNE5-LF97].

38. See Jeremy Beaman, *Professor Tells Students: Trump’s Election an ‘Act of Terrorism’* (VIDEO), C. FIX (Dec. 9, 2016), <https://www.thecollegefix.com/post/30300/> [https://perma.cc/ZYS2-4995].

39. See *The Kelly File: Episode 314* (Fox News Channel television broadcast Dec. 9, 2016).

40. Roxana Kopetman, *Police Look Into Threats Against OCC Professor Who Called Trump’s Election an ‘Act of Terrorism,’* ORANGE COUNTY REG. (Dec. 16, 2016, 8:100 AM) [hereinafter *Police Look Into Threats*], <http://www.ocregister.com/2016/12/16/police-look-into-threats-against-occ-professor-who-called-trumps-election-an-act-of-terrorism/> [https://perma.cc/65VM-CHHG].

41. See Facebook Post, *supra* note 12; *Student Faces Backlash for Recording Anti-Trump Lecture*, FOX NEWS (Dec. 12, 2016, 4:41 PM), <http://video.foxnews.com/v/5243495055001/?#sp=show-clips>.

42. Joshua R., *Fire Olga Perez Unstable Cox*, CARE2 [hereinafter *Petition*], <https://www.thepetitionsite.com/770/731/302/fire-olga-perez-unstable-cox/> [https://perma.cc/WY5W-PES5].

43. Fox News Channel, *Tucker Carlson Tonight 12/12/16 – Fox News*, YOUTUBE (Dec. 12, 2016), <https://www.youtube.com/watch?v=1caMC1L2bdY> [https://perma.cc/RFV4-7NE4].

44. *Id.*

We're asking that every conservative college student . . . make sure that their phone is always charged before they get into the classroom and when things get crazy, absolutely record it because that's the only way to keep these professors honest. The intellectual diversity doesn't exist on college campuses, it's one-sided, and it's mean-spirited.<sup>45</sup>

Carlson responded:

I totally agree, and God bless you for saying that . . . [I]f you're watching this show and you have kids in college, send videos here: Tucker Carlson Tonight at Fox News dot com. We will put them up, and whatever you do, be sure to get it on tape.<sup>46</sup>

Additionally, the union representing OCC faculty posted a comment on the OCC College Republicans' Facebook page, saying the student who recorded the video violated university and state policy, fueling anger that the student who recorded the videos may be in legal jeopardy.<sup>47</sup>

University administrators said they were launching an investigation into the professor's comments and the student's recording.<sup>48</sup> Both supporters of the professor and of the student held protests on campus.<sup>49</sup> With calls to fire Cox, punish O'Neil, and arm conservative students with cameras across the country to catch professors making offensive statements, the outrage machine had been unleashed at Orange Coast College.<sup>50</sup>

### *B. New Technologies and Unintended Consequences*

The videos from Cox's anti-Trump tirade are not the first in which short clips of classroom comments by professors have gone viral on social media thereby causing trouble for faculty and universities.<sup>51</sup> *Inside Higher Ed* has called this phenomenon the "TMZ-ification of higher education," noting, "professors 'caught on tape' is a growing genre, and some think it could have a chilling effect on academe."<sup>52</sup>

As digital technologies developed over recent decades, their diffusion into classroom settings was inevitable. Desktop and laptop computers, as well as tablets and cell phones, are mainstays in most U.S. educational

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45. *Id.*

46. *Id.*

47. Epting, *supra* note 35.

48. Caught on Video, *supra* note 9.

49. Police Look Into Threats, *supra* note 40.

50. See Epting, *supra* note 35; Petition, *supra* note 42.

51. See Jack Stripling, *Video Killed the Faculty Star*, INSIDE HIGHER ED (Nov. 18, 2010, 3:00 AM), <https://www.insidehighered.com/news/2010/11/18/videos> [<https://perma.cc/Z3WL-K2AD>].

52. *Id.*

settings, from kindergarten rooms to college lecture halls.<sup>53</sup> Some of their uses have proven productive, including digital media assignments to better engage creative output and expand use of data and analytics.<sup>54</sup> Yet these technologies also brought unintended consequences—sometimes known in technology studies as “revenge effects.”<sup>55</sup> While a laptop computer might be intended as a means to more efficient and searchable notetaking, it also often brings the consequence of distracting students from the very subject they’re supposed to be learning. It might enable, for instance, more efficient online shopping during class.<sup>56</sup>

In the current case, mobile phones in the learning space offer virtually unfettered access to record high-definition video and audio of course content, including instructors’ expression.<sup>57</sup> This can offer benefits. For instance, students with learning disabilities might request the opportunity to record lectures if they are not strong aural learners, so they may return later to continue comprehending the information shared.<sup>58</sup> Students whose instructors behave inappropriately might record evidence of their actions in efforts to hold them accountable.<sup>59</sup> But it also opens the door to revenge effects, when students use capture capabilities to shame, mock, or give false impressions of their professors or teachers.<sup>60</sup>

In some cases, viral videos from surreptitious recording in classrooms—purported to be clear “proof”—are later found to have distorted actual events. In 2010, Campus Reform posted a clip that purported to show a professor attacking students who did not believe in global warming.<sup>61</sup> The

53. See Benjamin Herold, *Technology in Education: An Overview*, EDUC. WK. (Feb. 5, 2016), <https://www.edweek.org/ew/issues/technology-in-education/index.html>.

54. See John Nworie & Noela Haughton, *The Unintended Consequences of the Application of Technology in Teaching and Learning Environments*, 52 TECHTRENDS 52, 52–53 (2008).

55. EDWARD TENNER, *WHY THINGS BITE BACK* 8 (Vintage Books 1st ed. 1997).

56. Nworie & Haughton, *supra* note 54, at 54, 57.

57. Rob Kuzina, *Case of Cursing LAUSD Teacher Raises Legal Questions About Secret Recordings*, DAILY BREEZE (Oct. 12, 2013, 12:00 AM), <http://www.dailybreeze.com/social-affairs/20131012/case-of-cursing-laUSD-teacher-raises-legal-questions-about-secret-recordings> [<https://perma.cc/VZ2U-ZFDJ>].

58. See *Smart Phones for the Disabled Student*, MY CHILD WITHOUT LIMITS, <http://www.mychildwithoutlimits.org/plan/assistive-technology/smart-phones-for-the-disabled-student/> [<https://perma.cc/GX3F-W7XB>].

59. Kuzina, *supra* note 57.

60. See *id.*

61. Stripling, *supra* note 51.

video was allegedly recorded by someone who was not enrolled in the class.<sup>62</sup> The clip showed Bradley Schaefer, a professor of physics and astronomy at Louisiana State University, telling students who did not support government regulation of carbon emissions that “blood will be on [their] hands.”<sup>63</sup> An examination of the full video, not posted by Campus Reform, showed the professor making equally incendiary comments to self-identified liberals about how many deaths would occur without the internal combustion engine.<sup>64</sup> In an interview after the video went viral, the professor explained that in dividing students by their self-identified political affiliations and antagonizing both, his aim was to get students to defend their views on climate change as they relate to the concepts in the classroom.<sup>65</sup> “I was challenging all sides, he said.”<sup>66</sup> “I was presenting all sides, and in a case like that you can always edit out and make anyone say anything.”<sup>67</sup>

In Schaefer’s case, the short video clip provoking outcries of liberal bias clearly told an incorrect story and while Campus Reform was used in that case to distribute the misleading video, other ideologically motivated outside groups have used students as tools to capture “gotcha” footage of faculty.<sup>68</sup> In 2006, the conservative “Bruin Alumni Association” offered students at UCLA money to turn over course materials and video recordings demonstrating what its founder saw as faculty liberal bias.<sup>69</sup> The group had previously created UCLAprofs.com to call out such alleged bias and drafted “a list of the ‘Dirty Thirty’” professors it most targeted.<sup>70</sup> The group’s site now appears defunct.<sup>71</sup>

Universities have sometimes taken swift action against professors as a result of videos that go viral, only to backpedal later.<sup>72</sup> “Michigan State University removed a tenured professor of creating writing from the classroom”

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62. Bradley Schaefer, *LSU Prof, Targeted by Activists for Global Warming Lecture*, HUFFPOST (Nov. 18, 2010, 8:24 AM), [https://www.huffingtonpost.com/2010/11/18/bradley-schaefer-lsu-prof\\_n\\_785272.html](https://www.huffingtonpost.com/2010/11/18/bradley-schaefer-lsu-prof_n_785272.html) [https://perma.cc/6PE8-EEWH].

63. *Id.*

64. Stripling, *supra* note 51.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. Scott Jaschik, *The New Class Monitors*, INSIDE HIGHER ED (Jan. 18, 2006, 4:00 AM), <https://webcache.googleusercontent.com/search?q=cache:B26lCqP7CPkJ:https://www.insidehighered.com/news/2006/01/18/ucla+&cd=1&hl=en&ct=clnk&gl=us&client=safari> [https://perma.cc/PLK4-9WUB].

70. *Id.*

71. *See* UCLAprofs.com.

72. *See, e.g.,* Brandon Howell, *Michigan State Professor Who Called GOP Racists, Rapists to Return to Classroom*, MLIVE.COM (Nov. 18, 2013, 6:00 AM), [http://www.mlive.com/lansing-news/index.ssf/2013/11/michigan\\_state\\_professor\\_who\\_c.html](http://www.mlive.com/lansing-news/index.ssf/2013/11/michigan_state_professor_who_c.html) [https://perma.cc/F23P-R2GY].

after Campus Reform posted a video of comments the professor, William Penn, made on the first day of class in fall 2013.<sup>73</sup> In the video, the professor said Republicans had “raped” the country and suggested voter suppression efforts were motivated by race.<sup>74</sup> “The professor’s tone was sometimes playful, and it’s unclear how much of what he said was in jest, or partial jest. Students can be seen laughing throughout the video,” *Inside Higher Ed* reported.<sup>75</sup> University officials were not laughing, however, and removed Penn from the classroom, reassigning his classes to other instructors.<sup>76</sup> The tenured professor was allowed to return to the classroom the following semester, after Michigan State launched a review of the responsibilities of faculty members and the impact of social media on teaching and learning.<sup>77</sup>

Video and audio recordings in classrooms raise legal questions. First, instructors may enjoy copyright protection under 17 U.S.C. § 102<sup>78</sup> if their original work takes a tangible form, such as a prepared written lecture. Student distribution of recordings without permission may violate those rights.<sup>79</sup> Privacy concerns also arise when students capture video in their classes. Their classmates may have causes of action, such as intrusion or publicity of private facts, depending on the jurisdiction and the specifics involved.<sup>80</sup> Finally, students who capture video and audio of their instructors face questions of consent. Most states apply so-called “one-party consent” approaches, wherein only one person involved in the recording must consent.<sup>81</sup> Eleven states require consent from all parties involved in the recording.<sup>82</sup> Given the size of many classes, this might make recording in some jurisdictions

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73. Colleen Flaherty, *Michigan State Suspends Professor from Teaching Following Anti-Republican Remarks*, INSIDE HIGHER ED (Sept. 6, 2013, 3:00 AM), <https://www.insidehighered.com/news/2013/09/06/michigan-state-suspends-professor-teaching-following-anti-republican-remarks> [https://perma.cc/H438-88J5].

74. *Id.*

75. *Id.*

76. *Id.*

77. Howell, *supra* note 72.

78. *See* 17 U.S.C. § 102 (2012).

79. Dina Leytes & Christine E. Weller, *Risks and Best Practices When Recording Classroom Lectures*, LEGAL INTELLIGENCER (Mar. 14, 2017), <http://www.thelegalintelligencer.com/id=1202780942892/Risks-and-Best-Practices-When-Recording-Classroom-Lectures?slreturn=20170729114614> [https://perma.cc/R9MW-VUJ5].

80. *See id.*

81. Berkman Center for Internet & Society, *Recording Phone Calls and Conversations*, DIGITAL MEDIA L. PROJECT, <http://www.dmlp.org/legal-guide/recording-phone-calls-and-conversations> [https://perma.cc/5W6Z-TNMW].

82. *Id.*

all but impossible, but in some states, it may be sufficient that all parties are aware of the recording, even if they do not explicitly consent.<sup>83</sup>

This range of legal implications, as well as the controversy that ensues when instructor videos like the OCC Trump snippet go viral, has prompted some institutions to bar all video capture in classrooms without express consent from anyone being recorded.<sup>84</sup> After the Cox dustup, students arriving in OCC classes after the winter break found signs informing them that such capture without consent is prohibited.<sup>85</sup> The signs conformed with OCC policy that was in place before Cox made her comments, but students and news media saw a clear—and for some, problematic—correlation.<sup>86</sup>

### C. *The Conservative Media's "Outrage Machine"*

When amplified by what some refer to as a conservative media “outrage machine,” the “going viral” phenomenon can be particularly troubling to faculty and universities.<sup>87</sup> Political communication researchers have documented what Jeffrey M. Berry and Sarah Sobieraj describe as an “outrage industry” on the left and the right.<sup>88</sup> While political discourse marked by incivility may expand the public sphere, increase attention to political content, and encourage those who feel politically isolated to engage and participate, such discourse is not without negative consequences.<sup>89</sup> This political incivility cannot be reduced simply to a refusal to “play nice.” Instead, incivility may decrease trust and diminish feelings of political efficacy, both of which can be detrimental to participation.<sup>90</sup> It can also decrease interaction with counter arguments and damage tolerance for “others.”

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83. *Id.*

84. *See, e.g.,* Roxana Kopetman, *Can Students Record a Teacher, as a Study Tool or to Ward Off Politics?*, ORANGE COUNTY REG. (Feb. 13, 2017, 8:00 AM) [hereinafter *Can Students Record*], <http://www.ocregister.com/2017/02/13/can-students-record-a-teacher-as-a-study-tool-or-to-ward-off-politics/> [https://perma.cc/SLM8-VAP6].

85. *Id.*

86. *Id.*; Epting, *supra* note 35.

87. *See, e.g.,* Eric Boehlert, *Are Conservatives Rethinking the Fox News Outrage Model?*, MEDIA MATTERS FOR AM. (Jan. 24, 2013, 11:00 AM), <https://www.mediamatters.org/blog/2013/01/24/are-conservatives-rethinking-the-fox-news-outra/192374> [https://perma.cc/8BPQ-SR27].

88. JEFFREY M. BERRY & SARAH SOBIERAJ, *THE OUTRAGE INDUSTRY: POLITICAL OPINION MEDIA AND THE NEW INCIVILITY* 6, 17–18 (2014).

89. *Id.* at 7, 22; *see also* DIANA C. MUTZ, *IN-YOUR-FACE POLITICS: THE CONSEQUENCES OF UNCIVIL MEDIA* 23–24 (2015).

90. J. BENJAMIN TAYLOR, *EXTREME MEDIA AND AMERICAN POLITICS* 99, 117 (2017); *see also* Sarah Sobieraj, Jeffrey M. Berry & Amy Connors, *Outrageous Political Opinion and Political Anxiety in the US*, 41 *POETICS* 408–09 (2013).

For many happy producers and devoted fans, outrage is invigorating, but our research suggests it may pose a threat to some of our most vital democratic practices. At the individual level, outrage discourse may undercut our tolerance of other views and promote misunderstandings about public issues. At the institutional level, outrage is working to stigmatize compromise and bipartisanship, and undercutting the political prospects of more moderate voices.<sup>91</sup>

In the context of campus speech, the outrage machine that eventually wends its way to conservative news outlets—like Fox News or Breitbart—often begins with organizations focused on combating what they see as liberal orthodoxy within America’s colleges and universities.<sup>92</sup>

One of the most prominent websites producing original content is Campus Reform, which has a professional staff of writers and editors and uses students to track what it calls “liberal bias and abuse on America’s campuses.”<sup>93</sup> Campus Reform purports to hold itself to “rigorous journalism standards and strives to present each story with accuracy, objectivity, and public accountability.”<sup>94</sup> The website bills itself as “America’s leading site for college news” and is run by the Leadership Institute,<sup>95</sup> a non-profit based in Virginia committed to training conservatives in political, governmental, and media activism.<sup>96</sup> The Leadership Institute boasts supporting “more than 1,700 conservative campus groups and newspapers” nationwide.<sup>97</sup> Its president, Morton C. Blackwell, has called most of higher education “a left-wing indoctrination center.”<sup>98</sup> Its editor, Sterling Beard, a former staff writer at *The Hill* newspaper,<sup>99</sup> said new technologies have been a big help

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91. BERRY & SOBIERAJ, *supra* note 88, at 221.

92. See Chris Quintana & Brock Read, *Signal Boost: How Conservative Media Outlets Turn Faculty Viewpoints into National News*, CHRON. HIGHER EDUC. (June 22, 2017), <http://www.chronicle.com/article/Signal-Boost-How-Conservative/240423> [<https://perma.cc/>]

93. *Id.*

94. *Mission*, CAMPUS REFORM, <https://www.campusreform.org/about/> [<https://perma.cc/C3KF-SU2Y>].

95. *Id.*

96. *LI’s Headquarters*, LEADERSHIP INST., <https://www.leadershipinstitute.org/about-us/hq.cfm> [<https://perma.cc/MD9B-SJKD>]; *About the Leadership Institute*, LEADERSHIP INST., <https://www.leadershipinstitute.org/aboutus/> [<https://perma.cc/ZY9G-WP9G>].

97. *About the Leadership Institute*, *supra* note 96.

98. Peter Schmidt, *Higher Education’s Internet Outrage Machine*, CHRON. HIGHER EDUC. (Sept. 8, 2015), <https://www.chronicle.com/article/Higher-Educations-Internet/232879>.

99. *Mission*, *supra* note 94.

in exposing what he sees as liberal indoctrination: “[A]ll it takes these days is one kid with a smartphone who turns on their recording app.”<sup>100</sup>

Another conservative website at the campus outrage forefront is The College Fix, a smaller operation established in 2010 by a non-profit called the Student Free Press Association founded by John J. Miller, who also directs the Dow Journalism Program at conservative Hillsdale College.<sup>101</sup>

Perhaps the most provocative website of late is Professor Watchlist, a site funded by Turning Point USA, a non-profit founded in 2012 by Charlie Kirk whose mission is to “build the most organized, active, and powerful conservative grassroots activist network on college campuses across the country.”<sup>102</sup> The website is “dedicated to documenting and exposing professors who discriminate against conservative students and promote anti-American, left wing propaganda in the classroom.”<sup>103</sup> The site aggregates photos, names, contact information, and links of professors it identifies as advancing radical agendas.<sup>104</sup> Kirk says his mission is “to raise ‘awareness’” of liberal bias and not squelch the free expression rights of the faculty he targets; others have suggested his site is “stoking the worst impulses of authoritarian populism” that invites harassment or worse.<sup>105</sup>

An examination of common cases invoking conservative outrage yields a map of their predictable path through the current media landscape. Campus Reform posts a story, sometimes with attempts to reach a professor or university for comment, and runs a click-bait headline.<sup>106</sup> The piece then gets picked up by conservative online media, from more traditional outlets like National Review to newer players like Heat Street, The Blaze, or the Daily Caller.<sup>107</sup> It then may make its way into the show lineup for TV personalities such as Tucker Carlson or Sean Hannity on Fox News.<sup>108</sup> Even if the original piece had been fair—which in the case of Campus Reform it often is not—it gets twisted and exaggerated over time. “As the signal is boosted, it is slowly but inexorably mutated, as in a game of

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100. Schmidt, *supra* note 98.

101. *Id.*

102. *About Turning Point USA*, TURNING POINT USA, <https://www.tpusa.com/aboutus/> [<https://www.tpusa.com/aboutus/>].

103. Kim LaCapria, ‘Professor Watchlist’ Monitors ‘Anti-American,’ ‘Leftist’ Educators, SNOPE (Nov. 22, 2016), <https://www.snopes.com/2016/11/22/professor-watchlist-monitors-anti-american-leftist-educators/> [<https://perma.cc/4AJ9-LGZH>].

104. Rebecca Schuman, *Oh Good, a ‘Professor Watch List,’* SLATE (Nov. 23, 2016, 11:19 AM), [http://www.slate.com/articles/news\\_and\\_politics/education/2016/11/professor\\_watchlist\\_is\\_a\\_grotesque\\_catalog\\_of\\_left\\_leaning\\_academics.html](http://www.slate.com/articles/news_and_politics/education/2016/11/professor_watchlist_is_a_grotesque_catalog_of_left_leaning_academics.html) [<https://perma.cc/M4JD-BRRH>].

105. *Id.*

106. See Quintana & Read, *supra* note 92.

107. *Id.*

108. See *id.*

telephone.”<sup>109</sup> These controversies almost always lead to calls for institutions to discipline professors or diversify ideologies on campus and have, in some cases, led to threats against faculty and security problems on campus.<sup>110</sup>

Well-funded conservative organizations are spending significant money to provoke campus outrage. For example, the Young America’s Foundation in 2016 funded 111 speakers on seventy-seven campuses, including provocateurs Ann Coulter and Robert Spencer, as well as less divisive conservatives.<sup>111</sup> The organization, which has drawn on major gifts from conservative donors including Charles and David Koch, Robert and Rebekah Mercer, and Robert Ruhe, also provides training for conservative students on the legal rights of recording, negotiating over security costs for speakers, and regulations on chalking and the placement of promotional flyers.<sup>112</sup>

Other controversial speakers appear to take full advantage of this predictable outrage machine, perhaps even staging events to achieve maximum blowback. In fall 2017, extremist provocateur Milo Yiannopoulos said he was planning “Free Speech Week” at the University of California, Berkeley, in response to previous attempts to thwart his appearances.<sup>113</sup> When the event fizzled, however, it seemed it may have been a public relations stunt from the start, designed to court university censorship and student counter-protest and reliably bring the outrage machine into full throttle.<sup>114</sup> At least one speaker said the event was “set up to fail.”<sup>115</sup> The source of Yiannopoulos’s funding is murky, although documents suggest he has long been funded by Robert and Rebekah Mercer, billionaire hedge fund

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109. *Id.*

110. Beth McMurtrie, *What Colleges Can Do When the Internet Outrage Machine Comes to Campus*, CHRON. HIGHER EDUC. (June 26, 2017), <http://www.chronicle.com/article/What-Colleges-Can-Do-When-the/240445>.

111. Stephanie Saul, *The Conservative Force Behind Speeches Roiling College Campuses*, N.Y. TIMES (May 20, 2017), <https://www.nytimes.com/2017/05/20/us/college-conservative-speeches.html>.

112. *Id.*; see also Tina Nguyen, *Steve Bannon’s Populist Media Empire is Funded with Offshore Cash*, VANITY FAIR HIVE (Nov. 7, 2017, 10:46 AM), <https://www.vanityfair.com/news/2017/11/steve-bannon-paradise-papers-offshore-cash> [<https://perma.cc/2JBP-F42U>] (noting the Mercers’s donations).

113. Emily Deruy, Louis Hansen, & Lisa P. White, *UC Berkeley’s ‘Free Speech Week’ Officially Canceled, Appeared to be a Set-Up from the Start*, MERCURY NEWS (Sept. 23, 2017, 10:20 AM), <http://www.mercurynews.com/2017/09/23/uc-berkeley-free-speech-week-officially-canceled/> [<https://perma.cc/9SJB-2MMV>].

114. *Id.*

115. *Id.*

managers who fund Breitbart and donated millions to elect Trump.<sup>116</sup> In April 2017, Yiannopoulos said he had secured \$12 million from undisclosed donors to start a conservative media company aimed at “the destruction of political correctness and the progressive left.”<sup>117</sup>

Conservative critiques of higher education come as survey data shows that conservatives have adopted more negative views of colleges and universities in recent years. A study from the Pew Research Center found that in 2017, for the first time, a majority of Republicans said colleges and universities “are having a negative effect on the way things are going in the country.”<sup>118</sup> The trend over time was stark: in 2015, 37% of Republicans said colleges and universities had a negative effect on the country; in 2017, 58% of Republicans said so.<sup>119</sup> University, college, and community college faculty do, survey research shows, lean left, with one study—though now dated—showing only 9.2% of full-time faculty identifying as conservative.<sup>120</sup> Moderates were the largest group, at 46.1%, followed by liberals at 44.1%.<sup>121</sup> This effect was far stronger among older faculty, with 17.2% of those in the fifty to sixty-four age range describing themselves as activists on the left while only 1.3% of those in the twenty-six to thirty-five range did so.<sup>122</sup> While some conservatives argue that this is evidence of discrimination in graduate education and hiring, studies find the more likely contributors are self-selection and conservatives’ tendency to favor professional terminal degrees—such as law or business—while liberals are more likely to enroll in Ph.D. programs.<sup>123</sup>

Acknowledgment of scant numbers of conservative faculty inexorably leads to concerns about the impact of this on conservative students. Education Secretary Betsy DeVos assumes the road is rocky for these

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116. See Joseph Bernstein, *Leaked Documents Suggest Secretive Billionaire Trump Donors are Milo’s Patrons*, BUZZFEED NEWS (July 13, 2017, 11:21 AM), [https://www.buzzfeed.com/josephbernstein/leaked-documents-suggest-secretive-billionaire-trump-donors?utm\\_term=.bgxYAlERen#.strYrLRQAm](https://www.buzzfeed.com/josephbernstein/leaked-documents-suggest-secretive-billionaire-trump-donors?utm_term=.bgxYAlERen#.strYrLRQAm) [<https://perma.cc/TYV3-RASV>].

117. Brooke Seipel, *Milo Yiannopoulos Announces \$12M in Funds for New Media Company*, HILL (Apr. 28, 2017, 9:39 PM), <http://thehill.com/blogs/blog-briefing-room/news/331189-milo-yiannopoulos-announces-formation-of-new-media-company-with> [<https://perma.cc/KFR4-R9H7>].

118. PEW RESEARCH CTR., SHARP PARTISAN DIVISIONS IN VIEWS OF NATIONAL INSTITUTIONS 3 (2017), <http://assets.pewresearch.org/wp-content/uploads/sites/5/2017/07/11101505/07-10-17-Institutions-release.pdf> [<https://perma.cc/TF8J-XK6H>].

119. *Id.*

120. Scott Jaschik, *Research Confirms That Professors Lean Left, but Questions Assumptions About What This Means for Conservatives*, INSIDE HIGHER ED (Feb. 27, 2017, 3:00 AM), <https://www.insidehighered.com/news/2017/02/27/research-confirms-professors-lean-left-questions-assumptions-about-what-means> [<https://perma.cc/6T83-74SK>].

121. *Id.*

122. *Id.*

123. *See id.*

undergraduates.<sup>124</sup> “The faculty, from adjunct professors to deans, tell you what to do, what to say, and more ominously, what to think,” DeVos said at the Conservative Political Action Conference in February 2017.<sup>125</sup> Yet research does not bear out this conclusion. Pennsylvania State University-Harrisburg researcher Matthew Woessner, a self-described conservative,<sup>126</sup> argues students may not be as ideologically fickle and easily influenced as some assume.<sup>127</sup> The reasons, he posits, include faculty commitment to impartiality despite their own politics, student commitment to the values they have honed in their time preceding college, and the resistance of those with solid political beliefs to conversion to a new worldview.<sup>128</sup>

These snapshots of evolving student beliefs don’t suggest that faculty refrain from shaping student values, or even trying to influence their political views. Whereas some disciplines, such as political science, often shun partisan advocacy, many fields, including sociology, ethnic studies, and social work, openly advocate a distinct ideological worldview. If these and similar studies are correct, it suggests that student beliefs are surprisingly resilient. For every one student who is actively recruited to a leftist political cause, a vast majority complete their education with their values largely intact.<sup>129</sup>

Despite the lack of empirical evidence demonstrating the impact of liberal faculty tilt on students or on the body of knowledge, the partisan outrage machine continues as a well-funded and ideologically motivated challenge to colleges and universities. The events at Orange Coast College demonstrate exactly how effective it can be at transforming an exchange between an instructor and students into a nationwide controversy.<sup>130</sup>

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124. Scott Jaschik, *DeVos vs. the Faculty*, INSIDE HIGHER ED (Feb. 24, 2017), <https://www.insidehighered.com/news/2017/02/24/education-secretary-criticizes-professors-telling-students-what-think> [<https://perma.cc/T4NK-WBDS>].

125. *Id.*

126. Matthew Woessner, *Rethinking the Plight of Conservatives in Higher Education*, ACADEME, Jan.–Feb. 2012, at 23.

127. Matthew Woessner, *Academe’s Persuasion Paradox*, INSIDE HIGHER ED (July 15, 2013), <https://www.insidehighered.com/views/2013/07/15/essay-how-theories-why-liberal-academics-dont-change-views-students> [<https://perma.cc/WAF4-XSCX>].

128. *Id.*

129. *Id.*

130. *See supra* Section II.A.

### III. ACADEMIC FREEDOM LAW

#### A. OCC Case: Legal Issues Presented

In addition to the media outrage, the Orange Coast College case presents several key legal questions. Prior to posting Professor Cox's comments to Facebook, the College Republicans and their lawyer wanted an apology from the professor.<sup>131</sup> But after not being satisfied by a meeting with administrators, they called for her to be fired.<sup>132</sup> They said the comments were an example of "leftist indoctrination in the classroom"<sup>133</sup> that created a hostile environment for conservative students.<sup>134</sup> "She's using her power as a teacher who gives grades, with a captive audience, to basically scare and shame students," said attorney Shawn Steel.<sup>135</sup> He continued, "It's alarming. It's scare-mongering. It's irrational. It's a rant. And it doesn't belong in a classroom."<sup>136</sup> Joshua Recalde-Martinez, president of the OCC College Republicans, said, "OCC is supposed to be a school of diversity, equity and [inclusivity], and her comments do not allow for that."<sup>137</sup>

These calls raise two important legal questions: First, is Professor Cox's speech protected by academic freedom and the First Amendment? And second, do students have a right to be protected from partisan speech that offends their worldviews?

In subsequent media accounts, some students also reported that during her remarks, Cox asked Trump supporters to stand.<sup>138</sup> "She tried to get everyone who voted for Donald Trump to stand up and show the rest of the class who to watch out for and protect yourself from," student Tanner Webb said.<sup>139</sup> Webb said he enjoyed Cox's class and called her a good teacher, but said of the incident, "Professor Cox's anti-Trump rant was no open debate to engage students."<sup>140</sup> However, other students said the professor did not ask Trump supporters to stand.<sup>141</sup> Cox also denied it.<sup>142</sup> "I never did that. What I said was, for those of you who are happy that your candidate

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131. Caught on Video, *supra* note 9.

132. Petition, *supra* note 42.

133. Caught on Video, *supra* note 9.

134. Petition, *supra* note 42.

135. Caught on Video, *supra* note 9.

136. *Id.*

137. *Id.*

138. Roxana Kopetman, *OCC Professor Received Threats, Left the State After Video of Her Anti-Trump Comments*, ORANGE COUNTY REG. (Dec. 14, 2016, 3:10 PM) [hereinafter Professor Received Threats], <http://www.ocregister.com/2016/12/14/occ-professor-received-threats-left-the-state-after-video-of-her-anti-trump-comments/>.

139. *Id.*

140. *Id.*

141. Police Look Into Threats, *supra* note 40.

142. *Id.*

won, celebrate. Stand up, cheer. Whatever. It was generic. It wasn't stand up now. It wasn't that at all. That didn't happen."<sup>143</sup> A union spokesman said that a student stood up spontaneously when Cox said some people would be happy with the election results, leading her to encourage others to do so if they wished.<sup>144</sup>

Shawn Steel penned an op-ed in the *Orange County Register* with the headline, "OCC should fire bully professor."<sup>145</sup> In it, Steel criticized Cox's characterizations of the Orange County community that pays her salary.<sup>146</sup> He said her "extremist statements" were unrelated to course materials and showed a "disdain for [their] community."<sup>147</sup> He explained a professor cannot inspire critical thinking when she "spews hateful rhetoric and bullies students into disclosing their political affiliations."<sup>148</sup> He suggested Cox "jeopardized the safety of the Trump supporters."<sup>149</sup> He concluded, "It's time for our community—yes, the same people who Perez Stable Cox finds so 'scary'—join their effort to resist the daily indoctrination by far-left extremists."<sup>150</sup>

The case also raised a third legal question: Do students have a right to record video in classrooms and disseminate them publicly?

The issue was first raised in the comments section of the College Republicans' Facebook page.<sup>151</sup> There, the Coast Federation of Educators, AFT Local 1911, the union representing faculty at OCC, posted that the recording was a violation of the college's Student Code of Conduct and the California Education Code.<sup>152</sup> "The student who is sitting in assigned seating will be identified and may be facing legal action," one of the posts said, ratcheting up the heat for all involved.<sup>153</sup>

Steel's op-ed lauded the power of video to propel the case against Professor Cox.

143. Roxana Kopetman, *OCC Instructor: No Regrets Calling Trump's Election 'An Act of Terrorism'*, ORANGE COUNTY REG. (Jan. 16, 2017, 8:00 AM) [hereinafter No Regrets], <http://www.ocregister.com/2017/01/16/occ-instructor-no-regrets-calling-trumps-election-an-act-of-terrorism/>.

144. Professor Received Threats, *supra* note 138.

145. Shawn Steel, *OCC Should Fire Bully Professor*, ORANGE COUNTY REG. (Dec. 18, 2016, 12:00 AM), <http://www.ocregister.com/2016/12/18/occ-should-fire-bully-professor/>.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. Epting, *supra* note 35.

152. *Id.*

153. *Id.*

Today's college students have a weapon the Free Speech Movement of the 1960s never had: the ability to record. Those recordings of professorial intimidation and indoctrination have the power to break what Register contributor and Chapman University professor Joel Kotkin describes as progressive 'social control and the consolidation of a cognitively determined world order.' Thankfully, Orange Coast College students are resisting this academic intimidation. College Republicans have used social media to share their videos.<sup>154</sup>

The OCC case also raises novel legal questions about the rights of students to record video in classrooms. The prohibition of classroom recordings emanates from stated government interests in creating safe environments for frank discussion and critical thinking and protecting privacy interests of students and faculty.<sup>155</sup> There are also copyright issues about who controls the intellectual property of lectures, as well as privacy rights of students that are also implicated by the Family Educational Rights and Privacy Act (FERPA).<sup>156</sup>

A provision in OCC's Student Code of Conduct prohibits unauthorized recordings of any person without their permission, except in public places commonly recognized as public forums.<sup>157</sup> Additionally, the California Education Code prohibits recording in classrooms without the prior consent of the instructor.<sup>158</sup> It also prohibits classroom recordings for any commercial

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154. Steel, *supra* note 145.

155. The Crimson Staff, *Keep It in the Classroom*, HARV. CRIMSON (Apr. 2, 2014), <http://www.thecrimson.com/article/2014/4/2/harvard-video-recording-in-classrooms/> [<https://perma.cc/4F4H-JUTF>].

156. Ioanna Opidee, *Lecture Capture: Privacy, Please*, U. BUS. MAG. (May 28, 2014), <https://www.universitybusiness.com/article/lecture-capture-privacy-please> [<https://perma.cc/DDG5-WPSW>].

157. COAST CMTY. COLL. DIST., ADMINISTRATIVE PROCEDURE ch. 5, app. B at 25 (2015), [https://www.orangecoastcollege.edu/student\\_life/deanofstudents/Documents/Code\\_of\\_Conduct.pdf](https://www.orangecoastcollege.edu/student_life/deanofstudents/Documents/Code_of_Conduct.pdf) [<https://perma.cc/G975-JMHM>].

158. CAL. EDUC. CODE § 78907 (West 2013) ("The use by any person, including a student, of any electronic listening or recording device in any classroom without the prior consent of the instructor is prohibited, except as necessary to provide reasonable auxiliary aids and academic adjustments to disabled students. Any person, other than a student, who willfully violates this section shall be guilty of a misdemeanor. Any student violating this section shall be subject to appropriate disciplinary action. This section shall not be construed as affecting the powers, rights, and liabilities arising from the use of electronic listening or recording devices as provided for by any other provision of law.").

purposes.<sup>159</sup> Exceptions to these policies include accommodations for students with documented disabilities.<sup>160</sup>

The dispute over classroom recording rights was initially answered on February 9, 2017, when OCC suspended O’Neil for the current spring and upcoming summer semester.<sup>161</sup> O’Neil was found to have violated campus policy and ordered to write a three-page essay discussing why he recorded the professor, why he shared the video, and his thoughts on “the impact of the video going ‘viral’ and the ensuing damage to Orange Coast College students, faculty, and staff.”<sup>162</sup> OCC’s College Republicans President Joshua Recalde-Martinez said, “I’m disgusted that they imposed such excessive sanctions against [O’Neil], especially when the student was just trying to document a case where he personally felt targeted by a faculty member and his student rights were violated.”<sup>163</sup>

O’Neil retained a lawyer, William “Becker, president of Freedom X, a nonprofit dedicated to preserving religious and conservative freedom of expression” and appealed his suspension.<sup>164</sup> He was allowed to continue classes during his appeal.<sup>165</sup> Becker called the suspension excessive and discriminatory, and referred to it as “an attack by leftists in academia to protect the expressive rights of their radical instructors at the expense of the expressive rights of conservative students on campus.”<sup>166</sup> O’Neil’s lawyer also threatened to file a federal civil rights lawsuit if the suspension was not lifted.<sup>167</sup>

159. EDUC. § 66450(a) (“[N]o business, agency, or person, including, but not necessarily limited to, an enrolled student, shall prepare, cause to be prepared, give, sell, transfer, or otherwise distribute or publish, for any commercial purpose, any contemporaneous recording of an academic presentation in a classroom or equivalent site of instruction by an instructor of record. This prohibition applies to a recording made in any medium, including, but not

160. *Rights and Responsibilities*, ORANGE COAST C., [http://www.orangecoastcollege.edu/student\\_services/special\\_services/Pages/Rights-and-Responsibilities.aspx](http://www.orangecoastcollege.edu/student_services/special_services/Pages/Rights-and-Responsibilities.aspx) [<https://perma.cc/74X4-WL6M>] (“A student with a verified disability may be entitled to auxiliary aids or academic accommodations.”); *see also* EDUC. §§ 66450(b), 78907.

161. Student Files Appeal, *supra* note 22.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. Shawn Steel, *Orange County’s Conservative Students Under Attack*, ORANGE COUNTY REG. (Feb. 22, 2017, 12:00 AM), <http://www.ocregister.com/2017/02/22/orange-countys-conservative-students-under-attack/>.

### B. Campus Polarization Over Free Expression: The National Context

While OCC found itself as a battleground in a campus culture war, it was just one of many fuses lit in recent years over balancing free expression and tolerance for diverse viewpoints against principles of diversity, inclusivity, and civility. Since the 1980s, prompted by unprecedented expansion of the administrative bureaucracies<sup>168</sup> and increased attention to the psychological wellbeing of students,<sup>169</sup> colleges and universities have taken actions that prohibited, punished, and suppressed expression in new ways.<sup>170</sup> Many of these efforts have been made to combat both overt and subtle issues of racism, sexism, and homophobia that may affect students from minority and underrepresented groups, which is certainly an important and necessary government interest.

Campus speech codes, which attempted to prohibit and punish offensive expression based on race, gender, religion, sexual orientation, and the like, were attempts by colleges and universities to create safer environments for minority students. The impetus for speech codes comes from the ideology of psychological harm that words and ideas can cause, invoking the “harm principle” advanced by philosopher John Stuart Mill, who said the only legitimate “purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”<sup>171</sup> In the 1993 groundbreaking book *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, four critical race theory scholars argued that racist, sexist, and homophobic speech often “degrades and humiliates” members of historically marginalized groups, and notions of freedom and liberty need to combat this so-called “hate speech” through balancing First Amendment freedoms and substantive equality.<sup>172</sup> Other critical race theory scholars advanced proposals to narrow First

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168. See, e.g., BENJAMIN GINSBERG, *THE FALL OF THE FACULTY: THE RISE OF THE ALL-ADMINISTRATIVE UNIVERSITY AND WHY IT MATTERS* 28 (2011) (documenting staggering growth of administrators and professional staff that far outpaces faculty growth).

169. See, e.g., JONATHAN ZIMMERMAN, *CAMPUS POLITICS: WHAT EVERYONE NEEDS TO KNOW* 4–5 (2016).

170. For two definitive accounts, see KORS & SILVERGLATE, *supra* note 1 and LUKIANOFF, *supra* note 1.

171. JOHN STUART MILL, *ON LIBERTY* 10 (David Spitz ed., Norton Critical ed. 1975) (1859) (footnote omitted).

172. MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO, & KIMBERLÉ WILLIAMS CRENSHAW, *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 15 (1993).

Amendment doctrines by advancing definitions of psychological harm,<sup>173</sup> as well as expanding hate speech definitions to include pornography.<sup>174</sup>

In response, scholars have used historical and theoretical approaches to argue that definitions of hate speech are often overly broad and impossible to define with sufficient constitutional precision, and that censorship of hate speech is problematic for reasons that include undue deference to government authority and invasions of personal liberty.<sup>175</sup>

While many more narrowly tailored campus speech codes were aimed at preventing targeted harassment and discrimination, universities also implemented policies that were vague and overbroad, raising questions about how the subjectivity of a listener's interpretation of words and ideas would dictate consequences for a speaker.<sup>176</sup> Across the country, universities adopted codes that prohibited both student and faculty expression in troubling ways.<sup>177</sup> Courts consistently found such codes on the wrong side of constitutional protections for expression though some persist on campuses to this day.<sup>178</sup>

173. See, e.g., Laura J. Lederer & Richard Delgado, *Introduction*, in *THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY 7* (Laura Lederer & Richard Delgado eds., 1995); RICHARD DELGADO & JEAN STEFANCIC, *UNDERSTANDING WORDS THAT WOUND 2* (2004).

174. See, e.g., CATHARINE A. MACKINNON, *ONLY WORDS* 88–89, 91–92 (1993).

175. See, e.g., *Introduction* to *THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES 6* (Michael Herz & Peter Molnar eds., 2012); SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 2* (1994); JEREMY WALDRON, *THE HARM IN HATE SPEECH 16* (2012).

176. See, e.g., *SPEAKING FREELY*, *supra* note 2, at xi; DONALD ALEXANDER DOWNS, *RESTORING FREE SPEECH AND LIBERTY ON CAMPUS*, at xv (2005).

177. See, e.g., *SPEAKING FREELY*, *supra* note 2; DOWNS, *supra* note 176.

178. As cited in the *First Amendment Protections on Public College and University Campuses: Hearing Before the Subcomm. on the Constitution & Civil Justice of the H. Comm. on the Judiciary*, 115th Cong. 3 n.3 (2017) [hereinafter *Hearings*] (written testimony of Greg Lukianoff, President & Chief Executive Officer, Foundation for Individual Rights in Education), the cases in which university speech codes have been struck down by courts include *McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, No. 1:12-cv-155, 2012 U.S. Dist. LEXIS 80967 (S.D. Ohio June 12, 2012); *Smith v. Tarrant Cty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Booher v. N. Ky. Univ. Bd. of Regents*, No. 2:96-cv-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998); *Corry v. Leland Stanford Junior Univ.*, No. 740309, slip op. (Cal. Super. Ct. Feb. 27, 1995); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wisc. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

The Foundation for Individual Rights in Education has tracked campus speech codes since its founding in 1999 and has issued annual report cards on universities since 2005.<sup>179</sup> Its 2017 report found that many universities have become more attuned to concerns about free speech violations.<sup>180</sup> It reported that only 33.9% of public universities have “red light” speech codes, characterized as universities with policies that are not public or are “clearly and substantially” restrictive of free speech, which was down from 55% in 2015.<sup>181</sup>

In addition to speech codes, policies and practices around campus protests have caused media and legal controversies for colleges and universities. Many universities have struggled with responding to violence as well as policies that limit the location of protests or require groups to participate in permitting schemes and payments for security.

As concerns about police violence against young black men beginning in 2014 developed into the Black Lives Matter movement, campus expression drew broad-based media attention.<sup>182</sup> Incidents of hateful speech at colleges and universities appeared to increase in number though some argued this was less an increase in the *rate of hate* and more a matter of increased awareness.<sup>183</sup> Such expressions ranged from white students at the University of North Dakota posting photos of themselves painted in blackface to swastikas posted at such campuses as San Jose State University<sup>184</sup> and the University of Wisconsin-Madison.<sup>185</sup> After Trump’s election, some incidents took on a new character, including a free speech wall at the Ohio State University defaced with a black figure being lynched and the “build the wall” slogan common at Trump rallies, which was interpreted as an attack on Latino students and immigrants.<sup>186</sup>

Against the backdrop of these incidents, many students organized protests calling for change, including stronger administrative response to expressions

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179. *Mission*, FOUND. FOR INDIVIDUAL RTS. EDUC., <https://www.thefire.org/about-us/mission/> [<https://perma.cc/DVU7-S6B7>].

180. *See Spotlight on Speech Codes 2017*, FOUND. FOR INDIVIDUAL RTS. EDUC., <https://www.thefire.org/spotlight-on-speech-codes-2017/> [<https://perma.cc/R7CZ-TTDL>].

181. *Id.*

182. *See* Nathalie Baptiste, *Origins of a Movement*, NATION (Feb. 9, 2017), <https://www.thenation.com/article/origins-of-a-movement/> [<https://perma.cc/BK6V-8GRS>].

183. *See* Anna North, *The Scope of Hate in 2017*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/opinion/hate-crime-lebron-james-college-park-murder.html>.

184. Scott Jaschik, *Epidemic of Racist Incidents*, INSIDE HIGHER ED (Sept. 26, 2016), <https://www.insidehighered.com/news/2016/09/26/campuses-see-flurry-racist-incidents-and-protests-against-racism> [<https://perma.cc/E6N9-ND7C>].

185. Nico Savidge, *Swastikas Drawn on Dorm White Boards, UW-Madison Officials Say*, WIS. ST. J. (Sept. 14, 2016), [http://host.madison.com/wsj/news/local/education/university/swastikas-drawn-on-dorm-white-boards-uw-madison-officials-say/article\\_676779af-da68-56b2-87ea-a1de8fd9ae62.html](http://host.madison.com/wsj/news/local/education/university/swastikas-drawn-on-dorm-white-boards-uw-madison-officials-say/article_676779af-da68-56b2-87ea-a1de8fd9ae62.html) [<https://perma.cc/X3JP-XZG7>].

186. Jaschik, *supra* note 184.

of hate based on race, religion, gender, or sexual orientation.<sup>187</sup> Protests unfolded at campuses across the nation, including Evergreen State College in Washington,<sup>188</sup> St. Olaf College in Minnesota,<sup>189</sup> Eastern Michigan University,<sup>190</sup> Yale University,<sup>191</sup> and Wesleyan University.<sup>192</sup> Emerging a year after the 2014 police shooting death of Michael Brown in Ferguson, Missouri, protests at the University of Missouri's flagship campus in Columbia drew international media attention and eventually led to the resignation of the university system president and the Mizzou chancellor stepping down into a less prominent role.<sup>193</sup> Faculty member Melissa Click was dismissed after trying to keep student journalists out of a public area protesters had deemed a safe space and calling for "some muscle" to oust them.<sup>194</sup>

Protests present a number of legal issues. Some universities have established or expanded so-called "free-speech zones," limiting protests and distribution of literature to particular areas on campus, oftentimes far removed from major campus hubs. At Pierce College in Los Angeles, student Kevin Shaw filed a lawsuit after being prohibited from passing out the U.S. Constitution in Spanish outside of the campus's free speech zone, which comprises just

187. See e.g., Lee DeVito, *EMU Drops Punishments Against Black Students for Protesting Racism*, DET. METRO TIMES (Feb. 2, 2017, 1:11 PM), <https://www.metrotimes.com/news-hits/archives/2017/02/02/emu-drops-punishments-against-black-students-for-protesting-racism> [https://perma.cc/NFC2-QSLW].

188. Kyler Sumter, *Protests Erupt over Racism at Evergreen State College*, USA TODAY C. (May 30, 2017, 5:36 PM), <http://college.usatoday.com/2017/05/30/protests-erupt-over-racism-at-evergreen-state-college/> [https://perma.cc/D9VC-G8KL].

189. Paul Walsh, *Protest at St. Olaf After Latest Racist Threat Against Black Student; Class Boycott in Works*, STAR TRIB. (May 1, 2017, 8:40 AM), <http://www.startribune.com/protest-on-st-olaf-campus-after-latest-racist-incident-a-this-one-threatening-black-student/420846393/> [https://perma.cc/5A2Z-SUK6].

190. DeVito, *supra* note 187.

191. Jenny Wilson, *Yale Students March to Protest Racism on Campus*, HARTFORD COURANT (Nov. 9, 2015, 9:19 PM), <http://www.courant.com/education/hc-yale-racial-protest-1110-20151109-story.html> [https://perma.cc/6AGY-94FU].

192. *Wesleyan Students of Color Group Protests 'Institutional Inequities,' Issue Demands*, MIDDLETOWN PRESS (Nov. 19, 2015, 7:27 PM), <http://www.middletownpress.com/article/MI/20151119/NEWS/151119559> [https://perma.cc/5BBD-DC5A].

193. John Eligon & Richard Pérez-Peña, *University of Missouri Protests Spur a Day of Change*, N.Y. TIMES (Nov. 9, 2015), [https://www.nytimes.com/2015/11/10/us/university-of-missouri-system-president-resigns.html?\\_r=0](https://www.nytimes.com/2015/11/10/us/university-of-missouri-system-president-resigns.html?_r=0).

194. *Gonzaga Hires Melissa Click, University of Missouri Professor Fired over Protest Conduct*, CHI. TRIB. (Sept. 4, 2016, 2:15 PM), <http://www.chicagotribune.com/news/nationworld/midwest/ct-melissa-click-mizzou-20160904-story.html> [https://perma.cc/ZHL2-ENC7].

616 square feet of the 426-acre campus.<sup>195</sup> The *Los Angeles Times* editorialized, “when a public college or university squeezes the expression of political views into a tightly circumscribed area, it not only undermines its commitment to the free exchange of ideas; it runs afoul of the 1st Amendment.”<sup>196</sup> Universities have often backpedaled on these policies after legal challenges.<sup>197</sup>

The safe spaces and trigger warnings shorthand became ammunition for the campus culture war battlefield. Nowhere did this become clearer than in the 2017 disinvitation and disruption of a variety of conservative speakers visiting campuses.<sup>198</sup>

To be clear, disrupting and disinviting campus speakers have been going on for some time.<sup>199</sup> However, in recent years, many universities have instituted new policies to govern when and how speakers might be invited to campus, some of which have raised legal challenges from student groups for being unnecessarily complicated, onerous, and costly.<sup>200</sup> In 2014, FIRE issued a report documenting the growing trend of disruptions and disinvitations.<sup>201</sup> FIRE found that successful disinvitations were on the rise, categorizing cases as “formal disinvitations,” in which universities publicly rescind invitations; “withdrawal by [a] speaker in the face of protest”; or “heckler’s vetoes” disruptions, in which speakers are prevented from speaking by protesters or audience disruptions.<sup>202</sup>

The University of California, Berkeley, became a particularly notable hotspot when violent protests erupted in response to the appearance of alt-right figure and firebrand provocateur Milo Yiannopoulos.<sup>203</sup> In February 2017, CNN carried live dramatic video showing large fires on the Berkeley

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195. *Don’t Squeeze Free Speech on College Campuses*, L.A. TIMES (Apr. 5, 2017, 5:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-college-freespeech-20170405-story.html> [https://perma.cc/G5PU-BASV].

196. *Id.*

197. See *Spotlight on Speech Codes 2017*, *supra* note 180 (“FIRE’s Stand Up for Speech Litigation Project [reports] successful challenges to free speech zone policies at Modesto Junior College; the University of Hawaii at Hilo; Citrus College; California State Polytechnic University, Pomona; Dixie State University; and Blinn College.”); see also *Hearings*, *supra* note 178, at 9–10 (written testimony of Greg Lukianoff).

198. See e.g., Stanley Kurtz, *Understanding the Campus Free-Speech Crisis*, NAT’L REV. (Apr. 12, 2017), <http://www.nationalreview.com/node/446634/print> [https://perma.cc/ZX5D-XW84].

199. *See id.*

200. See Jeremy Bauer-Wolf, *Free Speech, Safety and the Constitution*, INSIDE HIGHER ED (Apr. 21, 2017), <https://www.insidehighered.com/news/2017/04/21/auburn-berkeley-incidents-illustrate-how-difficult-it-public-colleges-bar-speakers> [https://perma.cc/76Q4-5T63].

201. *Disinvitation Report 2014: A Disturbing 15-Year Trend*, FOUND. FOR INDIVIDUAL RTS. EDUC. (May 28, 2014), <https://www.thefire.org/disinvitation-season-report-2014/> [https://perma.cc/CK7S-44YX].

202. *Id.*

203. See Bauer-Wolf, *supra* note 200.

campus started by leftist protestors that caused more than \$100,000 in damage.<sup>204</sup> Critics blasted the university for not arresting more of the protestors and lawbreakers.<sup>205</sup> On Twitter, President Donald Trump responded by threatening to revoke federal funding from UC Berkeley.<sup>206</sup> Conservative writer Ann Coulter had an event cancelled at Berkeley as a result of planned protests.<sup>207</sup> As a response to criticism, new Berkeley Chancellor Carol T. Crist announced 2017 as the “Free Speech Year” at the university, telling students, “You have the right to expect the university to keep you physically safe, but we would be providing you less of an education, preparing you less well for the world after you graduate, if we tried to protect you from ideas that you may find wrong, even noxious,” Crist said.<sup>208</sup> But Berkeley was not alone in wild protests.

Political scientist Charles Murray faced hostile, and at times violent, opposition after being invited to give talks at the University of Notre Dame<sup>209</sup> and Middlebury College in Vermont.<sup>210</sup> Murray, the author of a book about the white working class, was accused of using “deceptive statistics masking unfounded bigotry,” although a sample of seventy scholars who later reviewed his remarks found them to be “middle of the road,” and hardly inflammatory.<sup>211</sup> Two Cornell University professors writing later said, “Not everyone deserves to get to speak at a college campus. But those like Mr. Murray who use reasoned, evidence-based approaches to investigate

204. Madison Park & Kyung Lah, *Berkeley Protests of Yiannopoulos Caused \$100,000 in Damage*, CNN (Feb. 2, 2017, 8:33 PM), <http://www.cnn.com/2017/02/01/us/milo-yiannopoulos-berkeley/index.html> [https://perma.cc/8KN5-9D7V].

205. *Id.*

206. See Donald Trump (@realDonaldTrump), (Feb. 2, 2017, 3:13 AM), <https://twitter.com/realdonaldtrump/status/827112633224544256?lang=en> [https://perma.cc/74KY-4YMK].

207. Susan Svrluga, William Wan & Elizabeth Dwoskin, *Ann Coulter Speech at UC Berkeley Canceled, Again, Amid Fears for Safety*, WASH. POST (Apr. 26, 2017), [https://www.washingtonpost.com/news/grade-point/wp/2017/04/26/ann-coulter-speech-canceled-at-uc-berkeley-amid-fears-for-safety/?utm\\_term=.23fb0f396242](https://www.washingtonpost.com/news/grade-point/wp/2017/04/26/ann-coulter-speech-canceled-at-uc-berkeley-amid-fears-for-safety/?utm_term=.23fb0f396242) [https://perma.cc/62MF-3YP8].

208. Teresa Watanabe, *UC Berkeley Chancellor Unveils ‘Free Speech Year’ as Right-Wing Speakers Plan Campus Events*, L.A. TIMES (Aug. 15, 2017, 8:25 PM), <http://www.latimes.com/local/lanow/la-me-uc-berkeley-chancellor-20170815-story.html> [https://perma.cc/EB2M-XKC2].

209. Mitchell Wellman, *Student Protests Follow Charles Murray to Notre Dame*, USA TODAY C. (Mar. 28, 2017, 5:34 PM), <http://college.usatoday.com/2017/03/28/student-protests-follow-charles-murray-to-notre-dame/> [https://perma.cc/4EVS-A33E].

210. Wendy M. Williams & Stephen J. Ceci, *Charles Murray’s ‘Provocative’ Talk*, N.Y. TIMES (Apr. 15, 2017), <https://www.nytimes.com/2017/04/15/opinion/sunday/charles-murrays-provocative-talk.html>.

211. *Id.*

matters of scholarly concern shouldn't be forcibly silenced after they have been invited to do so.<sup>212</sup> At Middlebury, a mob of violent protesters physically attacked Murray and another professor, Allison Stanger, who was sent to the hospital with neck injuries.<sup>213</sup>

The violence from protestors at Berkeley and Middlebury gave other universities cause to try to stop speakers from future events. In August 2017, the University of Florida denied a request by the National Policy Institute to host its leader, Richard Spencer, to rent a space and speak on campus.<sup>214</sup> The university said they cancelled the event after determining there was a high likelihood of violence and injury following a white supremacist rally in Charlottesville, Virginia, that resulted in death and injuries.<sup>215</sup> Spencer, described by the Southern Poverty Law Center as a “radical white separatist whose goal is the establishment of a white entho-state in North America,”<sup>216</sup> was among the organizers of the Charlottesville rally.<sup>217</sup> Earlier in 2017, Auburn University tried to prevent Spencer from speaking on its campus, but a federal judge ruled that the university could not block him from speaking.<sup>218</sup> His April 2017 speech resulted in large protests at Auburn.<sup>219</sup> After a threat of legal action, the University of Florida worked with Spencer, who held his event October 19, 2017, in Gainesville amid significant public response and three arrests of apparent neo-Nazis.<sup>220</sup>

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212. *Id.*

213. Robby Soave, *A Professor Who Attended Charles Murray's Middlebury Talk is Now Wearing a Neck Brace. Protestors Attacked Her.*, REASON.COM (Mar. 3, 2017, 5:31 PM), <http://reason.com/blog/2017/03/03/a-professor-who-attended-charles-murrays> [<https://perma.cc/Q36P-5MUB>].

214. Sarah Larimer, *University of Florida Denies White Nationalist Event Request, Citing Safety Concerns*, WASH. POST (Apr. 16, 2017), [https://www.washingtonpost.com/news/grade-point/wp/2017/08/16/university-of-florida-denies-white-nationalist-event-request-citing-serious-concerns-for-safety/?utm\\_term=.7909fdac2499](https://www.washingtonpost.com/news/grade-point/wp/2017/08/16/university-of-florida-denies-white-nationalist-event-request-citing-serious-concerns-for-safety/?utm_term=.7909fdac2499) [<https://perma.cc/AQ46-FKNV>].

215. *Id.*

216. *Richard Bertrand Spencer*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/individual/richard-bertrand-spencer-0> [<https://perma.cc/92KL-M2GP>].

217. *See* Hawes Spencer & Matt Stevens, *23 Arrested and Tear Gas Deployed After a K.K.K. Rally in Virginia*, N.Y. TIMES (July 8, 2017), <https://www.nytimes.com/2017/07/08/us/kkk-rally-charlottesville-robert-e-lee-statue.html>.

218. Jeff Weiner, *White Nationalist Richard Spencer to Challenge Cancellation of UF Speech*, ORLANDO SENTINEL (Aug. 16, 2017, 3:40 PM), <http://www.orlandosentinel.com/news/politics/political-pulse/os-richard-spencer-university-of-florida-20170816-story.html> [<https://perma.cc/9NNA-LG3E?type=image>].

219. *Id.*

220. Eric Levenson, *Police: 3 Men Made Nazi Salutes, Shot at Protesters After Richard Spencer Event*, CNN (Oct. 21, 2017, 2:56 PM), <http://www.cnn.com/2017/10/20/us/richard-spencer-florida-speech-arrest-shooting/index.html> [<https://perma.cc/6NC5-C6KH>]; Susan Svrluga, *University of Florida Considers Allowing Speech by Richard Spencer in October*, WASH. POST (Sept. 7, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/>

Other conservative speakers to draw protests include Ben Shapiro.<sup>221</sup> Shapiro's speech at the University of Wisconsin-Madison was briefly delayed by disruptive protesters.<sup>222</sup> At California State University, Los Angeles, a student group filed a lawsuit against the university after the university initially cancelled a talk by Shapiro that was titled, "When Diversity Becomes a Problem."<sup>223</sup> The university initially required that the student group include Shapiro in a wider panel on diversity issues.<sup>224</sup> When Shapiro showed up anyway, his speech was interrupted by protestors, and he was ushered away under police protection.<sup>225</sup> Conservative groups sued the university for its action, dropping the lawsuit after the university agreed to not cancel speakers or charge for extra security costs based on the viewpoints of speakers.<sup>226</sup>

Academic freedom has faced different threats at different social and political times. In the early and mid-20th century, three periods of social upheaval presented unprecedented challenges to protections of academic freedom in the United States: opposition to U.S. involvement in World War I; the passage and enforcement of the Smith Act in 1940; and the era of McCarthyism in the 1950s.<sup>227</sup> The current era no doubt will be defined by attempts to strike a balance between the values of unfettered, free discussion on the one hand and diversity, inclusion, and civility on the other.

09/07/university-of-florida-considers-allowing-speech-by-richard-spencer-in-october/?utm\_term=.13aa75d106e [https://perma.cc/KQ9X-RCPB].

221. Pat Schneider, *Fighting Words: The Campus Free Speech Battle at UW Often Focuses on Guest Speakers*, CAP. TIMES (Apr. 5, 2017), [http://host.madison.com/ct/news/local/education/university/fighting-words-the-campus-free-speech-battle-at-uw-often/article\\_31f9abea-78d3-5211-b41c-7ba535a87abf.html](http://host.madison.com/ct/news/local/education/university/fighting-words-the-campus-free-speech-battle-at-uw-often/article_31f9abea-78d3-5211-b41c-7ba535a87abf.html) [https://perma.cc/4DV2-9WN5].

222. *See id.*

223. Dennis Romero, *Conservative Pundit Sues Cal State L.A. over Free Speech*, L.A. WKLY. (May 19, 2016, 3:53 PM), <http://www.laweekly.com/news/conservative-pundit-sues-cal-state-la-over-free-speech-6947601> [https://perma.cc/E3K8-CLAK].

224. Sid Garcia & Tim Rearden, *Ben Shapiro Escorted by Police from CSULA Due to Angry Protesters*, ABC7 (Feb. 25, 2016), <http://abc7.com/news/ben-shapiro-escorted-from-csula-due-to-angry-protesters/1219358/> [https://perma.cc/XGF3-TMV2].

225. *Id.*

226. ADF, *Cal State L.A. Agrees to Drop Discriminatory Speech Policies, Settles Lawsuit*, ALLIANCE DEFENDING FREEDOM (Feb. 28, 2017), [http://adflegal.org/detailspages/press-release-details/cal-state-la.-agrees-to-drop-discriminatory-speech-policies-settles-lawsuit?utm\\_content=bufferadb70&utm\\_medium=social&utm\\_source=twitter.com&utm\\_campaign=buffer](http://adflegal.org/detailspages/press-release-details/cal-state-la.-agrees-to-drop-discriminatory-speech-policies-settles-lawsuit?utm_content=bufferadb70&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer) [https://perma.cc/AU5N-8287].

227. *See* JOHN K. WILSON, A HISTORY OF ACADEMIC FREEDOM IN AMERICA 152–53, 198–201, 209 (2014), <https://ir.library.illinoisstate.edu/cgi/viewcontent.cgi?article=1256&context=etd>.

While many calls from the political left have raised questions about censorship, a new trend is emerging in cases involving campus expression rights: one in which conservative students have adopted arguments for censoring professors and students who express liberal bias.<sup>228</sup> In arguing that “liberal bias” is a form of discrimination and harassment against their political ideology, conservative students, including those at Orange Coast College, have adapted censorial arguments used by some liberal students for the past three decades.<sup>229</sup>

Regardless of the partisanship censorship cries, scholars on the left and right have criticized universities for being intolerant of dissent and debate as they try to make their environments more diverse and inclusive.<sup>230</sup> Many believe that threats of censorship grow as administrators and students increasingly believe that freedom of speech is the enemy of social progress or political equality.<sup>231</sup> Allan Bloom made this argument in 1987 in *The Closing of the American Mind*, in which he lamented the diminution of the university as a place for unfettered, reasoned discourse.<sup>232</sup>

More recently, scholar Joanna Williams argues that a new generation of censorial students and pressures for scholars to self-censor are creating a new era of threats to academic freedom, enhanced by a culture that has grown skeptical of traditional notions of truth and objectivity.<sup>233</sup> In *Academic Freedom in an Age of Conformity*, Williams argues that an international trend “has emerged whereby some within universities see the Enlightenment origins of academic freedom as tainting it with an elitism that serves only to further the interests of already dominant voices.”<sup>234</sup> Williams argues that underlying the university should be a belief that individuals have a capacity for reason, and academics and others have a responsibility to encourage reasoned discussion and debate without allowing the prevention of offense to be placed above the right to debate.<sup>235</sup>

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228. Nicholas Kristof, *A Confession of Liberal Intolerance*, N.Y. TIMES (May 7, 2016), <https://www.nytimes.com/2016/05/08/opinion/sunday/a-confession-of-liberal-intolerance.html>.

229. *Id.*; see Orange County Register Editorial Board, *OCC Reversal Isn't End of Campus Bias*, ORANGE COUNTY REG. (Feb. 26, 2017, 12:00 AM), <https://www.ocregister.com/2017/02/26/occ-reversal-isnt-end-of-campus-bias/>.

230. See Kristof, *supra* note 228.

231. See *id.*

232. See ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987).

233. JOANNA WILLIAMS, *ACADEMIC FREEDOM IN AN AGE OF CONFORMITY* 1 (2016).

234. *Id.* at 12.

235. *Id.* at 198.

### C. Historical and Theoretical Foundations of Academic Freedom

Universities aim to create and communicate knowledge through teaching, research, and service; therefore, professors and students need freedom to test controversial hypotheses in constructing and deconstructing truths. The concept of academic freedom has long supported both institutions and individuals in these pursuits.

Principles of academic freedom emerged from ancient Greece, with the pursuit of critical debate by Socrates, Plato, and Aristotle, and the Enlightenment, as ideas of progress, reason, and the scientific method emerged in public life and challenged dominant views enshrined by the church and state in the Eighteenth Century.<sup>236</sup> Protections to support academic freedom have long been a central component of the mission of universities and colleges.

Scholar Jonathan Rauch calls the theoretical framework of academic freedom that has developed “liberal science.”<sup>237</sup> In short, liberal science refers to the intellectual system in which humans raise and settle differences of opinion through the testing of truths and falsehoods.<sup>238</sup> Rauch juxtaposes this liberal system against alternatives he characterizes as *fundamentalist*, “[t]hose who know the truth should decide who is right”; *egalitarian*, “all sincere beliefs have equal claims to respect”; and *humanitarian*, first principle is “to cause no hurt.”<sup>239</sup> The liberal system of checking truths through a system of skeptical inquiry and intellectual humility “is the only legitimate way to decide [what] is right,” Rauch argues.<sup>240</sup>

For more than a century, the American Association of University Professors has been a leading institution in defining and defending academic freedom.<sup>241</sup> In 1915, it published the *Declaration of Principles of Academic Freedom*, still one of the most significant statements articulating the values of academic freedom in universities.<sup>242</sup> In his forward to scholar Hans-Joerg Tiede’s book *University Reform: The Founding of the American Association of*

236. *Id.* at 28, 32.

237. JONATHAN RAUCH, *KINDLY INQUISITORS: THE NEW ATTACKS ON FREE THOUGHT* 4 (1993).

238. *Id.* at 4.

239. *Id.* at 6.

240. *Id.*

241. *See Protecting Academic Freedom*, AAUP, <https://www.aaup.org/our-work/protecting-academic-freedom> [<https://perma.cc/AK6E-CLVL>].

242. John K. Wilson, *AAUP’s 1915 Declaration of Principles: Conservative and Radical, Visionary and Myopic*, 7 *AAUP J. ACAD. FREEDOM*, 2016, at 1, [https://www.aaup.org/sites/default/files/Wilson\\_1.pdf](https://www.aaup.org/sites/default/files/Wilson_1.pdf) [<https://perma.cc/WA7M-USW4>].

*University Professors*, Professor Michael Bérubé called the 1915 Declaration “one of the cornerstones of a free society.”<sup>243</sup>

The Declaration said a university has three core purposes: “to promote inquiry and advance the sum of human knowledge; to provide general instruction to students; and to develop experts of various branches of public service.”<sup>244</sup> As such, “[a]cademic freedom in this sense comprises three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extra-mural utterance and action.”<sup>245</sup> Faculty rights were far from absolute and required faculty to understand their roles in gradually introducing “immature” students to new concepts and in presenting countervailing thoughts and opinions.<sup>246</sup> The Declaration states:

The responsibility of the university teacher is primarily to the public itself, and to the judgment of his own profession; and while, with respect to certain external conditions of his vocation, he accepts a responsibility to the authorities of the institution he serves, in the essentials of his professional activity his duty is to the wider public to which the institution itself is morally amenable.<sup>247</sup>

Notably, the 1915 Declaration emphasized a professor’s responsibility to present countervailing opinions but also adopted a suspicion toward the ways in which public opinion could target academics who express controversial viewpoints.<sup>248</sup> A professor should feel free to present controversial matters and opinions, but should also:

[S]et forth justly, without suppression or innuendo, the divergent opinions of other investigators; he should cause his students to become familiar with the best published expressions of the great historic types of doctrine upon the questions at issue; and he should, above all, remember that his business is not to provide his students with ready-made conclusions, but to train them to think for themselves, and to provide them access to those materials which they need if they are to think intelligently.<sup>249</sup>

The Declaration called upon the law to protect the unauthorized dissemination of classroom materials to protect against uninformed public opinion.<sup>250</sup> “Discussion in the classroom ought not to be supposed to be utterances for the public at large. They are often designed to provoke opposition or arouse debate. It has, unfortunately, sometimes happened

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243. Michael Bérubé, *Forward* to HANS-JOERG TIEDE, *UNIVERSITY REFORM: THE FOUNDING OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS*, at ix (2015).

244. Wilson, *supra* note 242, at 2.

245. *Id.*

246. *Id.* at 5.

247. *Id.* at 3.

248. *Id.* at 4–5.

249. *Id.*

250. *Id.* at 4.

in this country that sensational newspapers have quoted and garbled such remarks.”<sup>251</sup>

In 1940, the AAUP issued a Statement of Principles of Academic Freedom and Tenure, revised in 1970 “with [i]nterpretative [c]omments.”<sup>252</sup> This statement was an extension of the 1915 Declaration, aimed at explicitly linking the idea of tenure and with principles of academic freedom.<sup>253</sup> The Statement said, “Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.”<sup>254</sup> As it relates to classroom teaching, the 1940 Statement declared that, “Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to the subject.”<sup>255</sup> In 1970, the AAUP added a footnote to clarify that it was not aiming to “discourage what is controversial,” writing, “Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for teachers to avoid persistently intruding material which has no relation to their subject.”<sup>256</sup>

The AAUP has also issued reports on specific controversies and topics. In 2013, for example, the AAUP issued a report titled *Academic Freedom and Electronic Communications*, that covers a myriad of new issues raised by recording technology, online learning systems, and social media.<sup>257</sup> The report noted the problems with “[s]urreptitious recording of classroom speech and activity,” as well as the challenges that social media might present for faculty when discussing public affairs.<sup>258</sup>

Scholar Robert C. Post argues that the values of academic freedom and its First Amendment implications highlight one area of important constitutional

251. *Id.*

252. AAUP, 1940 STATEMENT OF PRINCIPLES OF ACADEMIC FREEDOM AND TENURE 13 (1970), <https://www.aaup.org/sites/default/files/1940%20Statement.pdf> [<https://perma.cc/H7X4-GXD6>].

253. *See id.*

254. *Id.* at 14 (footnote omitted).

255. *Id.*

256. *Id.* at 14 n.4.

257. *See generally* AAUP, *ACADEMIC FREEDOM AND ELECTRONIC COMMUNICATIONS* (2013), <https://www.aaup.org/file/Academic%20Freedom%20%26%20Electronic%20Communications.pdf> [<https://perma.cc/7RD6-E87E>].

258. *Id.* at 47.

principle: that of “democratic competence.”<sup>259</sup> Providing institutions that construct expert knowledge with First Amendment coverage is important for the protection of an informed citizenry. In *Democracy, Expertise, Academic Freedom: A First Amendment Jurisprudence for the Modern State*, Post develops the concepts of democratic legitimization and democratic knowledge as First Amendment principles.<sup>260</sup> He juxtaposes these ideas with the more traditional “marketplace of ideas” theory, noting that while the marketplace of ideas allows for equal treatment of ideas, democracies require more than simply equality of ideas—they require that truths become separated from fictions through a system of democratic competence that is enhanced by academic freedom.<sup>261</sup> This requires “practices that demand both critical freedom to inquire and affirmative disciplinary virtues of methodological care,” Post writes.<sup>262</sup> Post concludes that democratic competence can be assured by the constitutional protection of the institutions and practices that inform it; “[y]et, the lamentable disarray of judicial precedents regarding academic freedom illustrates how inchoate and untheorized is our present understanding of the constitutional value of democratic competence.”<sup>263</sup> There should be important tensions as the law struggles with these questions, Post acknowledges.<sup>264</sup>

Scholar Stanley Fish argues for a much narrower version of academic freedom protection under the First Amendment than others.<sup>265</sup> In *Versions of Academic Freedom: From Professionalism to Revolution*, Fish claims that “[a]cademic freedom is rhetorically strong but legally weak.”<sup>266</sup> He presents five “schools” of academic freedom and critiques expansive notions of academic freedom as a legal principle.<sup>267</sup> His conclusion is that if academic freedom is to mean anything as a legal principle, it protects the discipline-appropriate intellectual pursuit of scholarship.<sup>268</sup> Notably, he suggests that many academic freedom claims by faculty members are undeserving of academic freedom protection.<sup>269</sup> He approvingly cites another scholar

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259. ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE*, at xiii (2012).

260. *See id.* at 1–27.

261. *See generally id.* (theorizing that democratic competence requires academic freedom).

262. *Id.* at xii (emphasis omitted).

263. *Id.* at 96.

264. *Id.*

265. STANLEY FISH, *VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION* 14–19 (2014).

266. *Id.* at x.

267. *Id.* at 9–14.

268. *See id.* at 14–19.

269. *Id.* at 19.

in saying, “If ‘academics are functioning not as academics, but as political advocates, then they do not merit academic freedom.’”<sup>270</sup>

#### D. Current Legal Doctrines of Academic Freedom

As a legal principle, academic freedom embraces several theories of the First Amendment, including the pursuit of truth and “marketplace of ideas” metaphor that undergirds much of First Amendment jurisprudence.<sup>271</sup>

In the formative years of 1919 to 1927, the U.S. Supreme Court began to articulate strong First Amendment principles, first in dissents by Justices Oliver Wendell Holmes and Louis Brandeis.<sup>272</sup> “[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market,” Justice Holmes wrote in his 1919 dissent in *Abrams v. United States*, a case upholding the conviction of a man for distributing leaflets opposing U.S. involvement in World War I.<sup>273</sup> Holmes also embraced deep skepticism toward censorship of any ideas, stating “we should be eternally vigilant against attempts to check the expression of opinions we loathe and believe to be fraught with death.”<sup>274</sup> Eight years later, in a famous concurrence in *Whitney v. California*—upholding a woman’s sentence for attending California Communist-Labor Party meetings—Justice Brandeis wrote another passionate defense of the importance of free speech—even offensive and potentially dangerous speech.<sup>275</sup> He also narrowed the justifications for when speech should be legitimately curtailed, embracing the seeds of the “incitement” test that would become the First Amendment standard fifty years later in *Brandenburg v. Ohio*.<sup>276</sup> In his 1927 concurrence in *Whitney*, Justice Brandeis wrote,

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270. *Id.*

271. See Jill Gordon, *John Stuart Mill and the “Marketplace of Ideas,”* 23 SOC. THEORY & PRAC. 235, 235 (June 1, 1997) (“This metaphor describes a situation in which people speak and exchange ideas freely . . .”).

272. See e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

273. *Id.*

274. *Id.*

275. See *Whitney v. California*, 274 U.S. 357, 372–380 (1927) (Brandeis, J., concurring), overruled by *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

276. *Id.* at 357; see *Brandenburg v. Ohio*, 395 U.S. 444, 444, 447 (1969) (per curiam).

It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.<sup>277</sup>

The emergence of First Amendment principles from this pivotal period underscored the pursuit of truth and skepticism of certainty that would warrant censorship.

Supreme Court precedents in the middle of the 20th century refined First Amendment standards that mirrored many of the values from academic freedom theory, including the admonition that “debate on public issues should be uninhibited, robust, and wide-open,”<sup>278</sup> “[u]nder the First Amendment there is no such thing as a false idea,”<sup>279</sup> “one man’s vulgarity is another’s lyric,”<sup>280</sup> and “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>281</sup>

In 1969, the Supreme Court ruled in *Brandenburg v. Ohio* that the First Amendment protects even speech that *may* advocate violence or lawlessness.<sup>282</sup> The government cannot punish provocative speech unless it “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>283</sup> The *Brandenburg* “incitement test” has become a critical threshold stopping colleges and universities from shutting down controversial speakers and protests.

During this period of First Amendment doctrine in the mid-20th century, the Supreme Court explicitly endorsed the concept of academic freedom as being protected by the First Amendment, first in the 1957 case *Sweezy v. New Hampshire*,<sup>284</sup> and again in 1969 in *Keyishian v. Board of Regents*.<sup>285</sup> In *Sweezy*, the Supreme Court overturned a contempt conviction and jail sentence of Paul Sweezy, a professor at the University of New Hampshire, who had refused to answer some questions about his political beliefs as part of an investigation into “subversive” groups including the Community Party.<sup>286</sup> “We believe that there unquestionably was an invasion of petitioner’s liberties in the areas of academic freedom and political expression—areas

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277. *Whitney*, 274 U.S. at 376.

278. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

279. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

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

281. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

282. *See Brandenburg*, 395 U.S. at 444, 447.

283. *See id.*

284. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion).

285. *Keyishian v. Board of Regents*, 385 U.S. 589, 590 (1967).

286. *Sweezy*, 354 U.S. at 234.

in which the government should be extremely reticent to tread,” Justice Warren wrote for a plurality of the Court.<sup>287</sup> Justice Warren continued:

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

Equally manifest as a fundamental principle of a democratic society is political freedom of the individual. Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.<sup>288</sup>

While Justice Warren was writing for a four-justice plurality that included noted First Amendment stalwarts Justices Black, Douglas, and Brennan, Justices Frankfurter and Harlan wrote a concurrence that was equally protective of academic freedom in rather absolutist language.<sup>289</sup> “When weighed against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate,” Justice Frankfurter wrote.<sup>290</sup> Frankfurter discussed the role of the social sciences in academia, and wrote, “For society’s good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others reflection upon them, must be left as unfettered as possible.”<sup>291</sup>

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287. *Id.* at 250.

288. *Id.* at 250–251.

289. *Id.* at 261 (Frankfurter, J., concurring).

290. *Id.*

291. *Id.* at 262.

A decade later, the Supreme Court again enshrined academic freedom under First Amendment protection. In *Keyishian*, the Supreme Court struck down a New York law policing the presence of “subversive” public employees in a case involving the firing of faculty members who refused to sign certificates pledging they were not nor never had been Communists.<sup>292</sup> “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. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom,” the Court wrote.<sup>293</sup> “The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, rather than through any kind of authoritative selection.’”<sup>294</sup>

Such questions of First Amendment protections within academic settings apply to students, as well as to faculty. In a landmark 1969 ruling in *Tinker v. Des Moines Independent School District*, the Supreme Court held, 7-2, that students’ wearing of armbands to school to protest the Vietnam War constituted speech, and their rights to such speech did not end when they were on school property.<sup>295</sup> The district, the Justices held, could only bar the armband protests if they could prove the displays “materially and substantially interfere” with school operations.<sup>296</sup> While dissenting Justices Black and Harlan would have afforded the district more latitude in controlling student speech, the majority expressed suspicion that the action may “have been based upon an urgent wish to avoid the controversy which might result from the expression.”<sup>297</sup> Singling out opposition to the Vietnam war but allowing other symbols, such as political campaign buttons or iron crosses, amounted to viewpoint discrimination that runs afoul of the First Amendment. “Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.”<sup>298</sup>

A more divided court, however, gave greater deference to school administrators in its 1988 decision in *Hazelwood School District v. Kuhlmeier*.<sup>299</sup> The Hazelwood case involved a principal’s decision to censor a newspaper

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292. *Keyishian v. Board of Regents*, 385 U.S. 589, 590 (1967).

293. *Id.* at 603.

294. *Id.* (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

295. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 503 (1969).

296. *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

297. *Id.* at 510.

298. *Id.* at 511.

299. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

students produced in a class, removing two pages that included two stories he found objectionable: one on teen pregnancy within the school and another on the effects of divorce on students, in which a girl faulted her father's actions for problems in their family.<sup>300</sup> The principal said the pregnancy story threatened its subjects' privacy, even though their names had been changed, and included content too sensitive for younger students.<sup>301</sup> He also argued the father in the divorce story had not been given a chance to respond and neither parent had agreed to publication.<sup>302</sup> Drawing a distinction between the facts of the case and those in *Tinker*, a 5-3 Court held "that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities, so long as their actions are reasonably related to legitimate pedagogical concerns."<sup>303</sup>

First Amendment protections for student speech, then, may seem more uncertain than those afforded to faculty, particularly when focusing on the difference between secondary and higher education. The extent to which the First Amendment protects university professors engaging in political speech might appear to have robust historical precedent, but it became far less certain after the 2006 Supreme Court decision in *Garcetti v. Ceballos*.<sup>304</sup>

Prior to *Garcetti*, the holdings and dicta in *Sweezy* and *Keyishian* provided theoretical frameworks for courts to give deference to academic freedom claims, and the basic analytical framework applied to government-employee speech claims from *Pickering v. Board of Education*, known as the "Pickering-balancing test," produced additional safeguards for faculty speech rights.<sup>305</sup>

In *Pickering*, decided in 1968, the Court recognized five factors to consider in cases that pit government employee free rights against the interests of their employers.<sup>306</sup> The case involved the firing of a high school teacher for writing a letter to the editor in which he criticized the board of education for its funding priorities and bond proposals.<sup>307</sup> The Board of Education said the letter by one of its employees was "detrimental to the efficient

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300. *Id.* at 260.

301. *Id.*

302. *Id.*

303. *Id.* at 273.

304. *See generally* *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

305. Pat Fackrell, *Demers v. Austin: The Ninth Circuit Resolves the Public Employee Speech Doctrine's Uncertain Application to Academic Speech*, 51 IDAHO L. REV. 513, 517 (2015); *see generally* *Pickering v. Board of Education*, 391 U.S. 563 (1968).

306. *See id.* at 568.

307. *Pickering*, 391 U.S. at 564–65.

operation and administration of the schools of the district,” and the Illinois Supreme Court agreed, upholding the dismissal.<sup>308</sup> The U.S. Supreme Court overturned in an 8-1 decision written by Justice Thurgood Marshall, ruling in favor of the teacher.<sup>309</sup> In its ruling, the Court declined to issue a bright-line rule but applied five analytical factors to its analysis, saying it aimed to seek “a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>310</sup> The analytical factors, the Court said, are whether

1. A close working relationship existed between the educator and the people whom he criticized;
2. The speech addressed a matter of public concern;
3. The speech had a detrimental impact on the administration of the education system;
4. The educator’s performance of his daily duties was impeded; [and]
5. The educator spoke as a public employee or a private citizen.<sup>311</sup>

The Court ruled the teacher’s letter was not targeted at any particular individual, did not affect his job duties, did not disrupt the regular operation of the schools, and was about matters of public concern.<sup>312</sup> The Court concluded, “a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.”<sup>313</sup>

Fifteen years later, the Supreme Court narrowed the analytical framework for government employee speech cases in *Connick v. Myers*.<sup>314</sup> The case involved the firing of an assistant district attorney who alleged the firing was retaliation after she distributed a questionnaire about the workplace environment to colleagues.<sup>315</sup> Lower federal courts reinstated the attorney, determining that questionnaire involved matters of public concern and “had not ‘clearly demonstrated’ that [it] ‘substantially interfered’ with the [office’s] operations.”<sup>316</sup> Writing for a divided 5-4 Court, Justice White traced

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308. *Id.* at 564.

309. *Id.* at 574–75.

310. *Id.* at 568.

311. Fackrell, *supra* note 305; *see Pickering*, 391 U.S. at 569–73.

312. *Pickering*, 391 U.S. at 569–74.

313. *Id.* at 574.

314. *See generally Connick v. Myers*, 461 U.S. 138 (1983).

315. *Id.* at 140–42.

316. *Id.* at 142.

the history of employee-speech cases and the *Pickering* progeny, saying the case hinged on whether the speech was a matter of public concern.<sup>317</sup>

When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.<sup>318</sup>

. . . [If the speech is not a] matter[] of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.<sup>319</sup>

Justice White concluded that the employee's survey was aimed at addressing personal grievances in the office following a transfer she did not like, not about bringing to light any perceived wrongdoing to breach of public trust.<sup>320</sup> "While, as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs," Justice White wrote.<sup>321</sup>

The *Pickering-Connick* framework governed employee speech cases for more than two decades, generally supporting employees in cases where speech was determined to be of public concern but not in cases involving purely personal grievances. The 2006 decision in *Garcetti v. Ceballos* upended this framework squarely in favor of greater deference to government authority over employees.<sup>322</sup>

In *Garcetti*, a deputy district attorney in Los Angeles County alleged that he was retaliated against for writing a memo accusing the sheriff's office of misrepresenting facts in a search warrant affidavit.<sup>323</sup> While a district court sided against the deputy D.A., the Ninth Circuit ruled in his favor, applying the *Pickering-Connick* framework by ruling that the memo involved

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317. *Id.* at 146–47.

318. *Id.*

319. *Id.* at 147 (citing *Bishop v. Wood*, 426 U.S. 341, 349–50 (1976)).

320. *Id.* at 148.

321. *Id.* at 149.

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

323. *Id.* at 414–15.

an allegation of “governmental misconduct [that] was ‘inherently a matter of public concern.’”<sup>324</sup> However, appellate judges disagreed on whether the key distinction should be “between speech offered by a public employee acting *as an employee* carrying out his or her ordinary job duties and that spoken by an employee acting *as a citizen* expressing his or her personal views on disputed matters of public import.”<sup>325</sup>

A divided 5-4 Court ruled that the deputy district attorney’s speech was not independently protected by the First Amendment because it was made in the context of the employee’s official job duties.<sup>326</sup> In other words, the employee was speaking in his role as an employee when he wrote the memo, not in his role as a private citizen. Therefore, the employee does not have a First Amendment right to be protected against employer actions resulting from his expression. Writing for the majority, Justice Anthony Kennedy wrote, “Government employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services.”<sup>327</sup> In tracing past precedents, Justice Kennedy wrote, “Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to ‘constitutionalize the employee process.’”<sup>328</sup>

As Justice Kennedy wrote, the central holding of *Garcetti* is that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>329</sup> Importantly, the majority opinion includes a caveat about the applicability of the holding to educational settings. Justice Kennedy noted in response to a dissent from Justice Souter,

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. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.<sup>330</sup>

Justice Kennedy’s decision elicited three dissents. Justice Souter, joined by Justices Stevens and Ginsburg, said the majority was unduly deferential to employer interests and said that when the interests of addressing official

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324. *Id.* at 416 (quoting *Garcetti v. Ceballos*, 361 F.3d 1168, 1174 (9th Cir. 2004)).

325. *Id.* (quoting *Garcetti*, 361 F.3d at 1187).

326. *Id.* at 426.

327. *Id.* at 418.

328. *Id.* at 420 (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

329. *Id.* at 421.

330. *Id.* at 425.

wrongdoing outweigh the efficient implementation of government employee policies, public employees should be eligible to claim First Amendment protection.<sup>331</sup> Justice Souter’s dissent specifically addressed fears that the decision would undercut academic freedom principles. He wrote,

This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching a public university professor, and I have to hope that today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write “pursuant to . . . official duties.”<sup>332</sup>

The *Garcetti* decision was immediately criticized as being unduly deferential to government at the expense of free speech principles.<sup>333</sup> As David Hudson, Jr., ombudsman for the Newseum Institute First Amendment Center, testified before a House of Representatives committee in 2017, “That breathtakingly broad standard means that ‘when public employees make statements pursuant to their official job duties,’ they have zero First Amendment protections.”<sup>334</sup>

Despite specifically noting that the decision did not address academic freedom issues, *Garcetti* was also a harbinger of new threats to speech from professors and academics. Some scholars see *Garcetti* as a threat to future academic freedom claims in the courts, including those resulting from issues raised by social media.<sup>335</sup>

Since the decision, lower courts have split on whether, or how, to apply to *Garcetti* to First Amendment claims from university faculty. Two Circuits have explicitly ruled that *Garcetti* does not apply to academic speech—a category described as a “*Garcetti*” exception—the Ninth<sup>336</sup> and Fourth Circuits.<sup>337</sup> Three other Circuits, the Third,<sup>338</sup> Sixth,<sup>339</sup> and Seventh,<sup>340</sup> have applied *Garcetti* to conclude that faculty speech related to official duties is not immune from discipline based on the First Amendment.

331. *Id.* at 428.

332. *Id.* at 438.

333. *See e.g., Hearings, supra* note 178, at 2 (statement of David L. Hudson, Jr., Ombudsman, Newseum Institute First Amendment Center).

334. *Id.* (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2010)).

335. *See, e.g., Michael H. LeRoy, #AcademicFreedom: Twitter and First Amendment Rights for Professors*, 90 NOTRE DAME L. REV. ONLINE 158, 159 (2015).

336. *Demers v. Austin*, 746 F.3d 402, 402–03 (9th Cir. 2014).

337. *Adams v. Univ. of N.C. Wilmington*, 640 F.3d 550, 551 (4th Cir. 2011).

338. *Gorum v. Sessoms*, 561 F.3d 179, 179 (3d Cir. 2009).

339. *Savage v. Gee*, 665 F.3d 732, 732 (6th Cir. 2012).

340. *Renken v. Gregory*, 541 F.3d 769, 769 (7th Cir. 2008).

In the most substantive discussion of how *Garcetti* may apply to First Amendment claims by faculty facing discipline over their expression, the Ninth Circuit in *Demers v. Austin* explicitly held “that *Garcetti* does not apply to ‘speech related to scholarship or teaching,’” and provided an expansive reading of the exception to also include curriculum and program proposals as being matters of public concern under the *Pickering-Connick* framework.<sup>341</sup> The 2014 decision has been heralded as significant precedent supporting academic freedom.<sup>342</sup>

The *Demers* case involved a dispute between a tenured professor, David Demers, and the administration at Washington State University.<sup>343</sup> Demers alleged that he “went from being a popular teacher and scholar with high evaluations to a target for termination” as a result of retaliation after he distributed a restructuring plan for the Edward R. Murrow School of Communication.<sup>344</sup> The district court ruled that the plan was “distributed as part of Demers’s official duties” and about internal workplace issues that were not matters of public concern, therefore under *Garcetti* was not speech protected from retaliation under the First Amendment.<sup>345</sup> The Ninth Circuit reversed, ruling that Demers’s work was protected under the academic freedom umbrella.<sup>346</sup> The Court wrote,

Demers presents the kind of case that worried Justice Souter. Under *Garcetti*, statements made by public employees “pursuant to their official duties” are not protected by the First Amendment. But teaching and academic writing are at the core of the official duties of teachers and professors. Such teaching and writing are “a special concern of the First Amendment.” We conclude that if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court.<sup>347</sup>

The Ninth Circuit ruled that based on the Supreme Court’s academic freedom cases, *Garcetti* cannot apply to teaching and academic writing performed pursuant to official duties of a teacher and professor, and it then

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341. *Demers*, 746 F.3d at 406 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2010)).

342. See, e.g., Scott Jaschik, *Protecting Academic Freedom*, INSIDE HIGHER ED (Feb. 13, 2014), <https://www.insidehighered.com/news/2014/02/13/court-ruling-takes-stand-faculty-free-speech#ixzz2tELz4TEI> [<https://perma.cc/4Y2C-E7LC>]; Thomas Sullivan & Lawrence White, *For Faculty Free Speech, the Tide is Turning*, CHRON. HIGHER EDUC. (Sept. 30, 2013), <http://www.chronicle.com/article/For-Faculty-Free-Speech-the/141951>; Mark Walsh, *Appeals Court Boosts Speech Protection for ‘Teaching,’* EDUC. WK. (Sept. 9, 2013, 10:41 AM), [http://blogs.edweek.org/edweek/school\\_law/2013/09/appeals\\_court\\_boosts\\_speech\\_pr.html](http://blogs.edweek.org/edweek/school_law/2013/09/appeals_court_boosts_speech_pr.html) [<https://perma.cc/R496-SV98>].

343. *Demers*, 746 F.3d at 406.

344. *Id.* at 407. For a detailed discussion of the issues leading up to the case, see generally DAVID DEMERS, *THE LONELY ACTIVIST: AN AMERICAN ODYSSEY* (2015).

345. *Demers*, 746 F.3d at 409.

346. *Id.* at 411–13, 418.

347. *Id.* at 411 (citations omitted).

applied the *Pickering-Connick* framework to determine that Demers's speech was about matters of public concern.<sup>348</sup> In completing that analysis, the Court noted that the academic context will make the *Pickering* balancing process "particularly subtle and 'difficult,'" given the nuances of scholarly and academic disputes.<sup>349</sup> The Court went on to conclude that Demers's reorganization plan, which he distributed broadly and posted publicly on a website, was "related to scholarship and teaching" by its nature of affecting what was taught at the school and who would teach it.<sup>350</sup> While the decision was a significant doctrinal precedent, the case was remanded and resolved with a settlement that left Demers to file bankruptcy after retiring from the university.<sup>351</sup>

To date, the only other Circuit to rule that *Garcetti* does not apply to the academic context is the Fourth Circuit. In *Adams v. University of North Carolina-Wilmington*, the appellate court ruled that if *Garcetti* applied to the academic work of university professors, academic freedom would be undermined, as would faculty members' speech rights.<sup>352</sup> Three other Circuits have issued less clear rulings on the applicability of *Garcetti* to academic disputes. The Third Circuit, in *Gorum v. Sessoms*, rejected First Amendment-based retaliation claims from a professor fired for misconduct in forging grades, which he allegedly admitted.<sup>353</sup> In doing so, the Court ruled that finding the professor's conduct to be part of his official duties did not implicate issues of scholarship and teaching that might raise legitimate First Amendment-based academic freedom claims and left open the question about the applicability of *Garcetti* to academic freedom issues.<sup>354</sup>

The Sixth Circuit, in *Savage v. Gee*, rejected a retaliation claim for a university librarian who resigned after a controversy erupted over his recommendation of a book offensive to some for inclusion in a class.<sup>355</sup> In dismissing the case, the Court declined to rule that a book recommendation was protected academic speech and instead said the recommendation came in the context of a committee discussion pursuant to the librarian's official

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348. *Id.* at 417.

349. *Id.* at 413 (quoting *Connick v. Myers*, 461 U.S. 138, 150 (1983)) ("Recognizing our limitations as judges, we should hesitate before concluding that academic disagreements about what may appear to be esoteric topics are mere squabbles over jobs, turfs, or ego.").

350. *Id.* at 414 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006)).

351. DEMERS, *supra* note 344, at 430.

352. *Adams v. Univ. of N.C. Wilmington*, 640 F.3d 550, 562–64 (4th Cir. 2011).

353. *Gorum v. Sessoms*, 561 F.3d 179, 182–84 (3d Cir. 2009).

354. *See id.* at 186.

355. *Savage v. Gee*, 665 F.3d 732, 734–36 (6th Cir. 2012).

duties and likely unrelated to academic scholarship.<sup>356</sup> Finally, in *Renken v. Gregory*, the Seventh Circuit rejected a retaliation claim by a tenured professor who had a grant taken away from him after he complained about restrictions his dean had placed on the grant's implementation.<sup>357</sup> The Seventh Circuit ruled that the administration of the grant fell within the professor's official duties and therefore did not afford First Amendment protection for the related speech.<sup>358</sup>

As this doctrinal review shows, First Amendment protection for academic freedom claims is far from clear. While First Amendment precedents provide clear categories of protected speech based on theoretical frameworks such as pursuit of truth and viewpoint neutrality, and invoke the notion that academic freedom falls within the ambit of First Amendment protection, cases involving faculty discipline in employee contexts show that courts give deference to institutional decisions that implicate faculty speech rights in ways that may not prioritize academic freedom.

#### *E. Faculty and Student Rights: Recent Cases*

For faculty, it is unclear to what extent the *Garcetti* precedent has empowered university administrators to seek discipline and dismissals of faculty over their expression. Potential discipline for faculty can arise in several contexts: workplace and committee work; classroom teaching and student interactions; scholarly publications and presentations; public commentary, including on social media; and other extramural or non-work-related activities. The above discussion demonstrates that faculty and student speech rights are far from absolute. In addition to cases setting legal precedent discussed above, cases below from recent news reports demonstrate how fraught the legal climate for academic freedom can be today. Many times, legal doctrines are only one piece of the puzzle in addressing legal controversies that can arise. Political commentary, which can be amplified with social media, can and does prompt disciplinary action against faculty, including tenured faculty. Social media use by faculty has caused increasing incidents of discipline, often amplified by outside calls for discipline and firing.

The University of Illinois at Urbana-Champaign rescinded a tenured, full professor job offer to Steven Salaita in 2013 after it discovered tweets criticizing Israel and supporting Palestinians that the university characterized

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356. *Id.* at 738–39.

357. *Renken v. Gregory*, 541 F.3d 769, 770–73 (7th Cir. 2008).

358. *Id.* at 774–75.

as “harassing, intimidating . . . hate speech.”<sup>359</sup> As details of the case spread through national media, faculty at the university and in organizations such as the AAUP began to rally to Salaita’s defense.<sup>360</sup> The university’s Chancellor, Phyllis M. Wise, resigned during subsequent litigation,<sup>361</sup> and the university paid an \$875,000 settlement to Salaita, in addition to its own \$1.3 million in legal costs.<sup>362</sup> As part of an agreement, Salaita would not join the faculty.<sup>363</sup>

At the University of Kansas, David Guth, a tenured journalism professor was suspended for a Tweet that read: “#NavyYardShooting The blood is on the hands of the #NRA. Next time, let it be YOUR sons and daughters. Shame on you. May God damn you.”<sup>364</sup> In response, the Kansas Board of Regents adopted a policy allowing professors to be fired “for improper use of social media,” which includes comments that, “when made pursuant to (i.e. in furtherance of) the employee’s official duties, [are] contrary to the best interest of the university” or comments that have a “detrimental impact on close working relationships for which personal loyalty and confidence are necessary.”<sup>365</sup>

At Evergreen State, self-professed “deeply progressive” biology professor Bret Weinstein faced demands for his removal when he opposed a call for

359. Greg Piper, ‘Civility’ Requirement Crushes Academic Freedom, Says Report in Salaita Case, C. FIX (Dec. 25, 2014), <https://www.thecollegefix.com/post/20604/> [<https://perma.cc/H2BQ-N3JP>]; see also Jodi S. Cohen, *University of Illinois OKs \$875,000 Settlement to End Steven Salaita Dispute*, CHI. TRIB. (Nov. 12, 2015, 2:55 PM), <http://www.chicagotribune.com/news/local/breaking/ct-steven-salaita-settlement-met-015112-story.html> [<https://perma.cc/S6S2-V9JE>].

360. Patrick M. O’Connell, *Group Blasts University of Illinois for Yanking Steven Salaita Job Offer*, CHI. TRIB. (Apr. 28, 2015, 11:51 AM), <http://www.chicagotribune.com/news/local/breaking/ct-steven-salaita-university-of-illinois-aaup-report-met-20150427-story.html> [<https://perma.cc/9S8Z-TSPZ?type=image>].

361. Phyllis M. Wise Steps Aside as Urbana-Champaign Campus Chancellor, U. ILL. (Aug. 6, 2015), <https://emails.uofi.uillinois.edu/newsletter/77294.html> [<https://perma.cc/QX54-M6HV>].

362. Cohen, *supra* note 359.

363. See *id.* For Salaita’s account of the facts of the case prior to the settlement, see STEVEN SALAITA, *UNCIVIL RITES: PALESTINE AND THE LIMITS OF ACADEMIC FREEDOM* 1–3, 29–34 (2015).

364. Scott Jaschik, *Fireable Tweets*, INSIDE HIGHER ED (Dec. 19, 2013), <https://www.insidehighered.com/news/2013/12/19/kansas-regents-adopt-policy-when-social-media-use-can-get-faculty-fired> [<https://perma.cc/J597-BKBR>].

365. *Id.*

white students and faculty to stay away from campus for a day to highlight problems with diversity and campus climate.<sup>366</sup>

Another area of increased tensions between faculty and student rights have come from the expansion of Title IX investigations that have implicated faculty speech in new ways. Title IX, the federal law prohibiting gender-based discrimination in educational institutions receiving federal funding,<sup>367</sup> has exploded in scope and effect in recent years. In 2011, a memo from the Department of Education's Office of Civil Rights expanded the scope of gender discrimination, inviting investigations into a broader scope of conduct than had traditionally been defined as discrimination or harassment.<sup>368</sup> Scores of faculty members found themselves under investigation under broad interpretations.

At Howard University, a private institution where faculty cannot claim the protections of the First Amendment, law professor Reginald Robinson was found guilty of sexual harassment for using an exam question with a fictional case involving bikini waxing.<sup>369</sup> At Louisiana State University, tenured education professor Teresa Buchanan was fired for using profanity and sexual humor, determined to violate an LSU policy prohibiting "unwelcome verbal, visual, or physical behavior of a sexual nature."<sup>370</sup> The university fired her despite a recommendation from a faculty committee that she should not lose her job.<sup>371</sup> The AAUP and the LSU faculty senate censured

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366. Bari Weiss, *When the Left Turns on Its Own*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/opinion/when-the-left-turns-on-its-own.html>.

367. 20 U.S.C. § 1681 (2012).

368. *See generally* RUSSELLYNN ALI, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE (2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/WB58-DVSX>].

369. Colleen Flaherty, *Brazilian Wax Question Lands Professor in Hot Water*, INSIDE HIGHER ED (July 7, 2017), <https://www.insidehighered.com/quicktakes/2017/07/07/brazilian-wax-question-lands-professor-hot-water>.

370. *Fired LSU Professor Files First Amendment Lawsuit Challenging Speech Code Championed by Feds*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Jan. 21, 2016) [hereinafter *Fired LSU Professor*], <https://www.thefire.org/fired-lsu-professor-files-first-amendment-lawsuit-challenging-speech-code-championed-by-feds/> [<https://perma.cc/DH5N-AKGL>].

371. Joe Gyan Jr., *LSU Professor Fired for Using Profanity Seeking Damages, Reinstatement; 'I Don't Regret Anything that I Did.'* ADVOCATE (Jan. 22, 2016, 1:46 AM), [http://www.theadvocate.com/baton\\_rouge/news/education/article\\_d3b2a12f-614e-5e64-a071-d231b7fbfb59.html](http://www.theadvocate.com/baton_rouge/news/education/article_d3b2a12f-614e-5e64-a071-d231b7fbfb59.html) [<https://perma.cc/QXU3-7823>].

the university for the firing,<sup>372</sup> and Buchanan attempted to pursue a lawsuit in federal court alleging LSU's policy violated the First Amendment.<sup>373</sup>

Even scholarly books have become subjects of Title IX investigations. A bizarre case at Northwestern University highlights the ways in which Title IX has been used against professors in novel and troubling ways. Northwestern Professor Laura Kipnis was the subject of a Title IX investigation after penning an op-ed decrying sexual "paranoia" on campus.<sup>374</sup> The essay itself was alleged to have caused "retaliation" against students who filed a Title IX complaint against another professor.<sup>375</sup> After writing a book on that and other incidents of egregious Title IX investigations that threatened faculty free-expression rights, she now faces defamation and invasion of privacy claims.<sup>376</sup> The book itself was the subject of yet another Title IX investigation, and the university sought Kipnis's answers to eighty written questions about dozens of quotations in her book.<sup>377</sup> Writing about the Kipnis case, Jeannie Suk Gersen noted, "For many, Title IX has become synonymous with the imperative to address sexual assault among students. But Title IX can also be used to discourage disagreement, deter dissent, deflect scrutiny, or register disapproval of people whom colleagues find loathsome."<sup>378</sup>

This brief summary of noteworthy faculty disciplinary cases suggests that, while academic freedom affords faculty expression rights related to their professional roles, there are many ways in which they can be and are disciplined for controversial speech.

372. *See id.* ("The American Association of University Professors . . . came to her defense in July, criticizing the firing and pledging money to aide her legal defense."); *Fired LSU Professor*, *supra* note 370 ("[T]he LSU Faculty Senate adopted a resolution censuring the administration . . . [and the AAUP] issued a report finding that Buchanan's rights to due process and academic freedom were violated.").

373. Joe Gyan Jr., *LSU Professor's Lawsuit Against University for Firing Her over Remarks Dismissed by Federal Judge*, *ADVOCATE* (Jan. 12, 2018, 4:19 PM), [http://www.theadvocate.com/baton\\_rouge/news/courts/article\\_afc5ea14-f7e1-11e7-b337-5b9bb2215a6f.html](http://www.theadvocate.com/baton_rouge/news/courts/article_afc5ea14-f7e1-11e7-b337-5b9bb2215a6f.html) [<https://perma.cc/K2YY-B4YA>].

374. Colleen Flaherty, *From Title IX 'Witch Hunt' to Suit*, *INSIDE HIGHER ED* (May 17, 2017), <https://www.insidehighered.com/news/2017/05/17/graduate-student-who-subject-title-ix-critic-laura-kipniss-new-book-sues-defamatio> [<https://perma.cc/C8FQ-7TFE>].

375. *Id.*

376. *Id.*

377. Jeannie Suk Gersen, *Laura Kipnis's Endless Trial by Title IX*, *NEW YORKER* (Sept. 20, 2017), <https://www.newyorker.com/news/news-desk/laura-kipniss-endless-trial-by-title-ix> [<https://perma.cc/G9NB-PH32>].

378. *Id.*

Similarly, students face a broad and at-times unpredictable terrain for disciplinary action related to speech.<sup>379</sup> Speech codes of the 1980s and 1990s and pitched fights to undo them captured a great deal of attention.<sup>380</sup> But the dawning of social media tools has expanded what some administrators see as the speech platforms on which they can monitor and punish student expression.<sup>381</sup> A federal court in 2013 overturned the expulsion of students from the Johnson County Community College for posting photos to Facebook of them posing with a placenta they were examining in an obstetrics and gynecology course.<sup>382</sup> The Minnesota Supreme Court, however, upheld a failing grade given to a mortuary sciences student for Facebook posts about a cadaver she worked on during her program.<sup>383</sup> And in October 2016, the Eight Circuit Court of Appeals upheld the expulsion of student Craig Keefe from the nursing program at Central Lakes College, a Minnesota community college, because of “unprofessional” Facebook posts that referred to using whiskey for “anger management,” injuring others with a pencil sharpener, and saying of another student, “I completely understand why you[’re] going to fail out of the RN program you stupid bitch.”<sup>384</sup> Discipline has also extended beyond the realm of professional programs, such as the expulsion of Navid Yeasin from the University of Kansas over a series of tweets and other actions deemed to amount to sexual harassment.<sup>385</sup>

As demonstrations and speech disruptions roiled campuses in recent years, some university governing bodies focused disciplinary attention on those who seek to protest other speakers.<sup>386</sup> For instance, the University

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379. See e.g., *Byrnes v. Johnson Cty. Cmty. Coll.*, No. 10-2690-EFM-DJW, 2011 WL 166715 (D. Kan. Jan. 19, 2011).

380. See Greg Lukianoff, *Speech Codes: The Biggest Scandal on College Campuses Today*, FORBES (Dec. 19, 2012, 10:41 AM), <https://www.forbes.com/sites/realspin/2012/12/19/speech-codes-the-biggest-scandal-on-college-campuses-today/#32e04a646d4b>.

381. See e.g., *Byrnes*, 2011 WL 166715.

382. *Id.* at \*1, 4–5.

383. See generally *Tatro v. Univ. of Minn.*, 816 N.W.2d 509 (Minn. 2012). For more on threats and disciplined speech in professional courses, see Andrew M. Pauwels, *Social Media and Student Speech in Colleges and Universities*, AUGMENTED LEGALITY (June 7, 2013), <http://www.wassom.com/social-media-and-student-speech-in-colleges-and-universities.html> [<https://perma.cc/T584-US7R>].

384. *Keefe v. Adams*, 840 F.3d 523, 526–27, 537 (2016).

385. Marieke Tuthill Beck-Coon, *Decision in Tweeting Case Leaves Students None the Wiser About Online Speech Rights*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Dec. 12, 2016), <https://www.thefire.org/decision-in-tweeting-case-leaves-students-none-the-wiser-about-online-speech-rights/> [<https://perma.cc/NXL7-42S6>].

386. See e.g., Todd Richmond, *University of Wisconsin Students Could be Expelled for Disrupting Campus Speeches Under New Policy*, WIS. ST. J. (Oct. 7, 2017), [http://host.madison.com/wsj/news/local/education/university/university-of-wisconsin-students-could-be-expelled-for-disrupting-campus/article\\_f06bcb48-52c5-59ab-9582-983e4d97eb50.html#utm\\_source=host.madison.com&utm\\_campaign=%Femail%Fbreaking-news%2F&utm](http://host.madison.com/wsj/news/local/education/university/university-of-wisconsin-students-could-be-expelled-for-disrupting-campus/article_f06bcb48-52c5-59ab-9582-983e4d97eb50.html#utm_source=host.madison.com&utm_campaign=%Femail%Fbreaking-news%2F&utm) [<https://perma.cc/8BAD-TMEJ>].

of Wisconsin System Board of Regents adopted a policy in October 2017 that requires suspension and eventually expulsion for repeated attempts to disrupt the free expression of others.<sup>387</sup> The policy, which adopts the *Tinker* standard of material and substantial disruption, will not go into effect until the UW System writes rules defining its implementation.<sup>388</sup>

#### F. Recent Legislative Proposals

As a result of campus culture wars fueled by the conservative outrage machine, conservative lawmakers in a number of states have responded legislatively.<sup>389</sup> Beginning in 2002, conservatives have pushed for state legislation, including David Horowitz's national campaign for an "Academic Bill of Rights."<sup>390</sup> In recent years, in Iowa, a bill emerged calling for partisan diversity in faculty hiring, essentially proposing that liberal professors not be hired until a specific offsetting ratio of conservative faculty was achieved.<sup>391</sup> In Wisconsin, Republican legislators sought to set mandatory penalties for disrupting campus speakers.<sup>392</sup> Similar efforts arose in Illinois, Tennessee, Arizona, and Colorado, among others.<sup>393</sup>

Many recent state legislative bills appeared to use model legislation proposed by the conservative Goldwater Institute, which issued a report titled *Campus Free Speech: A Legislative Proposal*.<sup>394</sup> The proposal calls on legislatures to (1) require that universities adopt strong free expression

387. *Id.*

388. *See id.*

389. *See* JOHN K. WILSON, PATRIOTIC CORRECTNESS: ACADEMIC FREEDOM AND ITS ENEMIES 61–97 (2008).

390. *Id.* at 61.

391. Adam Goldstein, *Iowa Bill Seeking Partisan Balance in Higher Ed Faculty Likely Unconstitutional*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Mar. 1, 2017), <https://www.thefire.org/iowa-bill-seeking-partisan-balance-in-higher-ed-faculty-likely-unconstitutional/> [<https://perma.cc/96R9-HKJS>].

392. Nico Savidge, *Republican Bill to Penalize Disruptive Speech on Campus Moves Forward in Legislature*, WIS. ST. J. (May 31, 2017), <http://host.madison.com/wsj/news/local/education/university/republican-bill-to-penalize-disruptive-speech-on-campus-moves-forward/article0a51e127-3d3b-52b8-8f77-510fb5666540.html> [<https://perma.cc/95J8-H85Y>].

393. Samantha Raphelson, *States Consider Legislation to Protect Free Speech on Campus*, NPR (May 5, 2017, 6:29 PM), <http://www.npr.org/2017/05/05/527092506/states-consider-legislation-to-protect-free-speech-on-campus>.

394. Stanley Kurtz, James Manley & Jonathan Butcher, *Campus Free Speech: A Legislative Proposal*, GOLDWATER INST. (Jan. 30, 2017), [https://goldwaterinstitute.org/wp-content/uploads/cms\\_page\\_media/2017/2/2/X\\_Campus%20Free%20Speech%20Paper.pdf](https://goldwaterinstitute.org/wp-content/uploads/cms_page_media/2017/2/2/X_Campus%20Free%20Speech%20Paper.pdf) [<https://perma.cc/WD3S-QWG3>].

policies that nullify existing speech codes; (2) “prevent administrators from disinviting speakers” to campus; (3) establish “disciplinary [procedures] for students . . . who interfere[] with the free-speech rights of others”; (4) provide people whose speech rights have been violated the ability to recover court costs and legal fees; (5) require universities as institutions to “remain neutral on issues of public controversy”; (6) ensure students are informed of campus expression policies; and (7) authorize a subcommittee of a university’s governing board to issue an annual report on its “handling of free-speech issues.”<sup>395</sup>

At the federal level, both the House and Senate held hearings in 2017 to examine the state of campus free expression and consider proposed legislation to better enforce free speech principles on university campuses.<sup>396</sup> Much of the tone from witnesses and committee members embraced the notion that free speech on universities is under attack from the left.<sup>397</sup>

In the House, several bills were advocated for adoption at an April 2017 hearing of the House judiciary committee.<sup>398</sup> Greg Lukianoff, president and chief executive officer of the Foundation for Individual Rights in Education (FIRE) urged Congress to pass the Campus Anti-Harassment Act, a bill requiring campuses to align anti-harassment and anti-discrimination policies with the legal standards from the Supreme Court’s 1999 decision in *Davis v. Monroe County Board of Education*.<sup>399</sup> The case involved the extent to which Title IX protected peer-to-peer harassment in the educational environment.<sup>400</sup> In the decision, the Supreme Court defined harassment as discriminatory, unwelcomed conduct “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”<sup>401</sup> A federal law codifying these standards would “end decades of confusion and the abuse of harassment policies on campus, eliminating what has historically been the most common

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395. *Id.* at 2.

396. Conor Friedersdorf, *Congress Finds Consensus on Free Speech on Campus*, ATLANTIC (Aug. 1, 2017), <https://www.theatlantic.com/politics/archive/2017/08/highlights-from-a-congressional-hearing-on-campus-speech/535515/> [<https://perma.cc/M5HV-8ML8>]; Nick Roll, *Congress Rallies Around Campus Free Speech*, INSIDE HIGHER ED (Oct. 27, 2017), <https://www.insidehighered.com/news/2017/10/27/senate-hearing-explores-free-speech-college-campuses> [<https://perma.cc/8ANB-MXSG>].

397. See Friedersdorf, *supra* note 396.

398. See, e.g., *Campus Anti-Harassment Act*, AM. LEGIS. EXCHANGE COUNS., <https://www.alec.org/model-policy/campus-anti-harassment-act/> [<https://perma.cc/4MA9-HGKQ>].

399. Alex Morey, *FIRE Asks House Judiciary Committee to Strengthen Protections for Campus Free Speech*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Apr. 5, 2017), <https://www.thefire.org/fire-asks-house-judiciary-committee-to-strengthen-protections-for-campus-free-speech/> [<https://perma.cc/5JQU-WBVF>].

400. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 632 (1999).

401. *Id.* at 650.

form of speech code,” Lukianoff said.<sup>402</sup> Second, he also urged Congress to pass a bill titled the Campus Free Expression Act, limiting universities’ use of free-speech zones.<sup>403</sup> Third, he urged Congress to pass a federal New Voices Act, protecting student journalism on campuses from censorship and punishment.<sup>404</sup> Stanley Kurtz, senior fellow at the Ethics and Public Policy Center in Washington D.C., outlined the Goldwater Institute’s proposal for state legislative action and called on Congress to require universities to protect student speech and association rights, such as the proposals FIRE advocated, as a condition of federal funding.<sup>405</sup> Kurtz cited recent events as evidence that “as both a deeply held commitment and a living tradition, freedom of speech is dying on our college campuses.”<sup>406</sup> David L. Hudson, Jr. also discussed other troubling legal trends, including the lack of protection for students’ off-campus, online expression and the precedent in *Garcetti v. Ceballos*,<sup>407</sup> and advocated for laws to correct those court doctrines.<sup>408</sup>

In the Senate hearing in June 2017, Senator Chuck Grassley (R-Iowa), chair of the Senate of Judiciary, said that recent events show that “those who would curtail free speech have been emboldened,” and those who might challenge orthodoxies have been chilled into silence.<sup>409</sup> He singled out UC Berkeley and Middlebury College’s weak responses to mob violence.<sup>410</sup> He said too many universities have sacrificed the principle of free thought in the name of political correctness, which he said includes the right to engage in offensive speech free from viewpoint-based restrictions in public forums.<sup>411</sup> Grassley continued,

Many administrators believe that students should be shielded from hate speech, whatever that is, as an exception to the First Amendment. Unfortunately, this censorship is not at all different from any other examples in history

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402. *Hearings, supra* note 178, at 16 (written testimony of Greg Lukianoff).

403. *Id.*

404. *Id.*

405. *Hearings, supra* note 178, at 5–9 (statement of Stanley Kurtz, Senior Fellow, Ethics and Public Policy Center, Washington, DC).

406. *Id.* at 2.

407. *See* *Garcetti v. Ceballos*, 547 U.S. 410, 444 (2006).

408. *Hearings, supra* note 178, at 2 (statement of David L. Hudson, Jr.).

409. *Free Speech 101: The Assault on the First Amendment on College Campuses: Hearing Before the S. Judiciary Comm.*, 115th Cong. (2017) 1 (statement of Sen. Chuck Grassley of Iowa, Chairman, S. Judiciary Comm.), <https://www.judiciary.senate.gov/imo/media/doc/06-20-17%20Grassley%20Statement.pdf> [<https://perma.cc/NX6Z-QEMB>].

410. *Id.*

411. *Id.* at 2.

when speech that authorities deemed to be heretical has been suppressed based upon its content.<sup>412</sup>

The events in recent years make it clear that the culture wars on college campuses are not subsiding, nor are the threats to academic freedom raised by difficult questions about the limits of free speech in polarized times. For faculty, students, administrators, advocates, and lawmakers, the controversies will likely continue.

#### IV. ANALYSIS AND RECOMMENDATIONS

The OCC case encapsulates the dramatic free expression stage on which campuses find themselves in today's polarized political climate. When should offense trump free expression rights? Which is paramount: faculty academic freedom or some students' desires to be free from offense? Can robust protection of free expression co-exist with intellectual environments that are open, engaging, and secure for all? From a pedagogical perspective, where is the line of appropriateness when talking politics in the classroom? What role should campuses play in larger cultural issues? Analysis of the OCC case offers a path to important understanding of the proper interplay between rights and responsibilities in university communities.

##### A. OCC Case: Outcomes After the Outrage

At Orange Coast College, the controversy played out for months after O'Neill's secretly recorded video clips of Professor Cox went viral and garnered national news attention.<sup>413</sup> Within days of the calls to dismiss the professor and suspend the student, the professor, union officials, and OCC administrators received more than 1,000 emails, calls, and social media messages, which were mostly negative.<sup>414</sup> The police investigated several threats, including calling on its Hazmat team to investigate a suspicious powder sent in a letter.<sup>415</sup>

One threatening message included a picture of the professor's house and address, saying it was going to be sent "everywhere" and called her a "libtard, Marxist, hatermonger, nutcase."<sup>416</sup> Cox said she was horrified to find her personal information posted online. "My privacy has been demolished. And that's awful. I'm a very private person. And it's very scary," Cox said.<sup>417</sup> Some of the messages were explicitly threatening. "People are watching you

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412. *Id.*

413. Professor Received Threats, *supra* note 138.

414. *Id.*

415. No Regrets, *supra* note 143.

416. Professor Received Threats, *supra* note 138.

417. No Regrets, *supra* note 143.

and your family beware the night cometh.”<sup>418</sup> Another read, “You want communism, go to Cuba . . . try to bring it to America and we’ll put a [expletive] bullet in your face.”<sup>419</sup> One message encouraged Cox to kill herself. “Go out in the middle of the football field, pull out a handgun, put it to your temple, and shoot yourself. Or better yet, douse yourself in gasoline and set yourself on fire.”<sup>420</sup>

The threatening messages prompted Cox and her partner to temporarily leave the state in the days after the videos were posted, while the university found a substitute teacher for the final weeks of the semester.<sup>421</sup> “We were terrorized,” Professor Cox later said.<sup>422</sup> “We were afraid people were going to follow us . . . that they were going to follow on their suggestions, that I should be shot in the face and things like that.”<sup>423</sup>

After the videos had been widely disseminated, Professor Cox, who had worked at OCC for more than forty years, reflected on her classroom remarks in an interview with the *Orange County Register*, which had covered the OCC case in all its machinations.<sup>424</sup> “I didn’t say anything wrong or do anything wrong. I didn’t say anything that thousands of Americans weren’t feeling or saying . . . I don’t regret it,” Professor Cox said.<sup>425</sup> Cox explained her intent with the remarks, in the days after the election, had been to calm students who feared what Trump’s election meant for them.<sup>426</sup> She said she empathized with those fears “as a woman, as a Latina, as a lesbian, as a refugee.”<sup>427</sup> She characterized her comments as “just a few moments to acknowledge an experience most of us were having.”<sup>428</sup> “I was talking about the feelings people had feeling betrayed. I didn’t attack anyone . . . I never said anyone was a terrorist,” she said. “A lot of us were in pain and were afraid because of all the things that had been said throughout the campaign and all the ways women and minority groups had been disrespected and made fun of.”<sup>429</sup>

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418. Professor Received Threats, *supra* note 138.

419. No Regrets, *supra* note 143.

420. Police Look Into Threats, *supra* note 40.

421. Professor Received Threats, *supra* note 138.

422. No Regrets, *supra* note 143.

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.*

At OCC, the university's administration and faculty union seemed supportive of the professor's academic freedom rights from the outset. OCC President Dennis Harkins issued a statement on December 12, 2016, saying "the administration support[ed] instructors' rights to 'respectfully respond to student questions and to express views that may challenge student opinions, world view, or ideology.'"<sup>430</sup>

The faculty union also strongly defended the professor. "This faculty member is known for her open and engaging ways in class, open to all sides of the issues . . . It's unfortunate that this student chose to not engage in an open dialogue, which she encourages," union president Rob Schneiderman told the *Orange County Register* in one of its first stories on the case.<sup>431</sup> Schneiderman also suggested the incident shows that students need to learn about academic freedom and free speech. "Harsh criticism of a politician . . . is not discrimination," the *Orange County Register* quoted Schneiderman as saying.<sup>432</sup> "Surely, this current generation can listen to political statements they disagree with and not claim discrimination."<sup>433</sup>

Both Cox and the union said the incident was a "gotcha" moment, part of a movement by conservatives to intimidate liberal professors.<sup>434</sup> "It's part of a national campaign to, I guess, destroy liberal education," Cox said.<sup>435</sup> "By attacking me, they're hoping to intimidate and scare others to not open their mouths. This is an attack on freedom of speech."<sup>436</sup>

O'Neil and his supporters launched a public campaign to defend him. The chairman of the Orange County Republican Party, Fred M. Whitaker, said the suspension was "abhorrent" and that it "clearly affirms their disdain for one of our nation's most cherished freedoms: freedom of speech."<sup>437</sup> OCC received hundreds of emails and calls in support of O'Neil.<sup>438</sup> "Mr. O'Neil is a de facto whistleblower who has sunshined an instructor that is wasting the taxpayers' monies and the students' tuition," wrote Robert

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430. *Id.*

431. Caught on Video, *supra* note 9.

432. Roxana Kopetman, *Republican Club Wants OCC Trustees to Reject Faculty Member of the Year Award for Anti-Trump Instructor*, ORANGE COUNTY REG. (Apr. 6, 2017, 7:00 AM) [hereinafter Republican Club], <http://www.ocregister.com/2017/04/06/republican-club-wants-occ-trustees-to-reject-faculty-member-of-the-year-award-for-anti-trump-instructor/>.

433. *Id.*

434. No Regrets, *supra* note 143.

435. *Id.*

436. *Id.*

437. Student Files Appeal, *supra* note 22.

438. Roxana Kopetman, *'They're Crucifying This Poor Guy': Suspended OCC Student Receives Support from Across the Country*, ORANGE COUNTY REG. (Feb. 17, 2017, 8:00 AM) [hereinafter Crucifying This Guy], <http://www.ocregister.com/2017/02/17/they-re-crucifying-this-poor-guy-suspended-occ-student-receives-support-from-across-the-country/>.

Bernosky, a school board member of the Hollister School District and regional vice chair of the California Republican Party.<sup>439</sup>

The *Orange County Register*, which had comprehensively reported on the story in its news section, lambasted the suspension on its editorial page.<sup>440</sup> The Register's editorial campaign was impassioned and specific. It called on readers to use the hashtag #StandWithCaleb on social media and directed readers to support O'Neil financially through a GoFundMe page.<sup>441</sup> In an editorial titled "Recall board if OCC student isn't reinstated," the newspaper said the college's "board members should be recalled and the president should be fired" if the college doesn't rescind O'Neil's suspension.<sup>442</sup> The newspaper called rules against recording "absurd," saying the "public has a right to know if their money is being spent on education or on erecting a bully pulpit to demonize certain students and express inflammatory viewpoints."<sup>443</sup> The newspaper said the instructor's "opinions don't belong in the classroom. Teachers are meant to teach, not persuade or indoctrinate students with their bias."<sup>444</sup>

In an editorial titled, "Let voices be heard on OCC speech scandal," the newspaper said, "Academic freedom is threatened by the very organization tasked with protecting it."<sup>445</sup> It called on readers to contact OCC administrators and board members and provided phone numbers, email addresses, fax numbers, and office hours.<sup>446</sup> The newspaper urged readers to let them know "that the board members should be recalled, and the president should be fired, unless action is taken to reverse the shameful decision to suspend O'Neil for exposing left-wing bias in the classroom."<sup>447</sup>

After the outcry over O'Neil's suspension, the Coast Community College District Board of Trustees rescinded the suspension.<sup>448</sup> "The board believes

439. *Id.*

440. See Orange County Register Editorial Board, *Let Voices be Heard on OCC Speech Scandal*, ORANGE COUNTY REG. (Feb. 21, 2017, 12:00 AM) [hereinafter *Let Voices be Heard*], <https://www.ocregister.com/2017/02/21/let-voices-be-heard-on-occ-speech-scandal/>.

441. *Id.*

442. Orange County Register Editorial Board, *Recall Board if OCC Student Isn't Reinstated*, ORANGE COUNTY REG. (Feb. 19, 2017, 12:00 AM), <http://www.ocregister.com/2017/02/19/recall-board-if-occ-student-isnt-reinstated/>.

443. *Id.*

444. *Id.*

445. *Let Voices be Heard*, *supra* note 440.

446. *Id.*

447. *Id.*

448. Roxana Kopetman, *OCC Rescinds Suspension of Student Who Recorded Teacher's Anti-Trump Comments*, ORANGE COUNTY REG. (Feb. 24, 2017, 6:25 AM), <http://www.>

this is in the interest of fairness and equity for all,” a statement read.<sup>449</sup> “It is time to move forward with increased empathy and understanding of the differences that have existed and will exist on a campus filled with individuals from an array of backgrounds who bring with them a wide range of political views, religious affiliations, and ideals.”<sup>450</sup> The faculty union criticized the board’s decision.<sup>451</sup> The board “capitulated to individuals and groups who threatened and bullied students, faculty, and administration,” union president, Rob Schneiderman said.<sup>452</sup> “Faculty and students are less likely to explore controversial issues, guest speakers are hesitant to present on campus, and students giving presentations are concerned that they may be cyber-bullied.”<sup>453</sup>

As the ordeal ended, O’Neil said he was relieved that he was not facing suspension.<sup>454</sup> He also empathized with Cox. “I think what happened to her is terrible,” O’Neil told the *Register*.<sup>455</sup> “She might have crazy political views, but in the classroom she’s very nice. And no one deserves death threats.”<sup>456</sup> Cox, meanwhile, was recognized with OCC’s “Colleague of the Year” award in 2017, an honor selected by a committee of faculty, staff, and administrators.<sup>457</sup>

After the OCC controversy, the College Republicans requested several legal fixes, including adding political affiliation and ideological beliefs to the university’s anti-discrimination policies and making procedures easier to file reports of misconduct.<sup>458</sup> The California State Legislature considered SB 677, titled the Student Whistleblower Protection Act, introduced by Republican Senator John Moorlach, which would have added a provision to the state education code stating that it is not a violation of the policy if the recording is done by someone who reasonably believed the activities violated federal, state, or local laws or policies.<sup>459</sup> Moorlach said current law “goes too far when it attempts to silence the truth” and that in education settings, “students should feel the freedom to question their instructors—

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[ocregister.com/2017/02/024/occ-rescinds-suspension-of-student-who-recorded-teachers-anti-trump-comments/](http://ocregister.com/2017/02/024/occ-rescinds-suspension-of-student-who-recorded-teachers-anti-trump-comments/).

449. *Id.*

450. *Id.*

451. *Id.*

452. *Id.*

453. *Id.*

454. *Id.*

455. Death Threats, *supra* note 11.

456. *Id.*

457. Republican Club, *supra* note 432.

458. *Id.*

459. See *California Community Colleges: Prohibited Acts: Electronic Listening or Recording Devices: Hearing on S.B. 677 Before the S. Comm. on Educ., 2017–2018 Reg. Sess.* (Cal. 2017) [hereinafter *California Community Colleges*] (summarizing S.B. 677).

and even more so, should be protected when they seek to expose activities which violate laws or school policies.”<sup>460</sup>

A legislative summary of the bill from the Senate Judiciary Committee noted opposition from multiple education associations that believed the bill would “contribute to a chilling effect on free speech in the classroom.”<sup>461</sup> In opposing the bill, the California Scholars for Academic Freedom said it feared “the bill is an attempt to change the environment of free exchange of ideas in the classroom” and would “foster an unnecessarily adversarial relationship between students and faculty.”<sup>462</sup> The group said the bill

will provide political and interest groups with an opportunity to silence dissent and limit academic freedom by allowing the recording and reporting of class lectures and discussions out of context, and, in this age of social media sensationalism, with no concerns for accuracy, transparency and due process. In a word, it will give people and organizations with a political agenda the tool to smear at will anyone’s academic reputation and gravely jeopardize academic freedom as a whole on university campuses.<sup>463</sup>

Others suggested the bill was unnecessary given that other parts of the education code prohibit administrators from retaliating students for engaging in speech that would be protected by the First Amendment outside of the educational context.<sup>464</sup> The Senate Judiciary Committee’s analysis stated: “Allowing the covert recording of classrooms encourages a surveillance environment for teachers and students. Under surveillance, intellectual freedom and creativity languish.”<sup>465</sup> The bill died in committee in April 2017 after failing to get the requisite support to move forward.<sup>466</sup>

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460. *Id.*

461. *Id.*

462. California Scholars for Academic Freedom, *Letter to Ca. Senate Education and Judiciary Committees about SB 677*, CAL. SCHOLARS FOR ACAD. FREEDOM (Apr. 11, 2017), <https://cascholar4academicfreedom.wordpress.com/2017/04/19/> [<https://perma.cc/4DQU-QZWD>].

463. *Id.*

464. *See* CAL. EDUC. CODE § 66301 (West, 2018).

465. *See* California Community Colleges, *supra* note 459.

466. Roxana Kopetman, *Sen. Moorlach’s Whistleblower Bill for College Students Dies in Committee*, ORANGE COUNTY REG. (Apr. 26, 2017, 11:55 AM), <http://www.ocregister.com/2017/04/26/moorlachs-whistleblower-bill-for-college-students-dies-in-committee/>.

### B. Faculty Expression and Partisan Speech

For Professor Cox, the framework of faculty expression rights might have provided some solace when she was first confronted with public outcry about her classroom comments. As discussed above, faculty do have strong academic freedom rights, based on a rich theoretical framework underscoring the importance of educational systems in the development and dissemination of knowledge; a robust historiography shows the significance of academic freedom principles in the evolution of higher education and the modern university; and a legal framework rooted in administrative policies and constitutional law. However, like most rights, faculty free-expression rights are not absolute, and even if litigated, the level of First Amendment protection provided by Supreme Court precedent is murky at best. These rights need to be more clearly defined in First Amendment jurisprudence after the *Garcetti* decision.

If a university determines a faculty member's workplace expression is inconsistent with its values, *Garcetti* at least theoretically opens the door to deference by the courts toward university sanctions.<sup>467</sup> The increased political polarization may be a reason for universities to encourage faculty to minimize inflammatory words in expressing partisan viewpoints, and certainly there is evidence that Cox's use of "terrorism" in describing the presidential election was a factor in making her comments spark national attention.<sup>468</sup> Hot-button issues and inflammatory language have prompted other universities, including the University of Kansas and University of Illinois in the cases discussed above, to discipline and rescind job offers to professors for the expression of controversial political viewpoints that have gone viral on social media.<sup>469</sup>

Academic freedom must include the right of faculty to express partisan views, but this, too, is not absolute. Stanley Fish's version of academic freedom is highly skeptical of including partisan commentary such as Cox's within the ambit of academic freedom, while others, such as Erwin Chemerinsky and Howard Gillman, take a broader view.<sup>470</sup>

Notably, Cox defended her comments with the clear support of her faculty union and the implied support of her university's administration. The case demonstrates the importance of multiple university constituencies defending and explaining academic freedom and responding to media narratives that may undermine those values.

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

468. SALAITA, *supra* note 363.

469. Flaherty, *supra* note 73.

470. See CHEMERINSKY & GILLMAN, *supra* note 2.

While faculty should have strong rights to express political views, they also have responsibilities in exercising these rights. As teachers and scholars, professors must allow, and even encourage, expression of alternative viewpoints. They have a responsibility to engage students who bring diverse backgrounds and perspectives in ways that provide context, inclusion and intellectual rigor. In cases invoking public controversy, the more the instructor demonstrates a nexus to course material and evidence of the presentation and openness toward alternative viewpoints, the more likely that academic freedom principles will help inform responses.

### *C. Student Engagement in Learning*

Robust academic freedom extends beyond faculty into the student body and justifiably so. While students do not have a right to be protected from partisan speech by instructors or peers, they do have a right to an environment to fully participate in educational and intellectual growth in ways that are free from discrimination and harassment. A system of expression that protects only the most powerful in the room is inconsistent with the First Amendment—both theoretically and as applied. Rather than the paternalistic view of regulation in elementary and high school educational settings inherent in the Supreme Court’s precedent in *Hazelwood School District v. Kuhlmeier*,<sup>471</sup> college students should enjoy extensive freedom of expression in academic and social contexts. Students must be invested with these speech rights to allow them to mature intellectually and emotionally, as well as to fully participate in their education.

To be clear, nothing in Cox’s anti-Trump tirade *directly* interfered with the expression rights of the students in her class that day. She did not overtly censor anyone in the room. Faculty are free to challenge students and their beliefs; though, we would argue that ethically, such challenge should be equitable, related to the material at hand in the course, and considerate of alternative viewpoints. Faculty, however, are not free to allow their own biases—political or otherwise—to lead them to discriminate against students with whom they may disagree by treating them differently in assignment evaluation or classroom activities.

While Cox was neither censorial nor harassing in this case, it is key to consider how an undergraduate might have concluded that her words alone were sufficient to silence them. Faculty and students operate in an inherently

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471. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

hierarchical power structure. Even the most collaborative, open, and approachable instructor is, in the end, operating with complete authority over her students. An instructor dictates course content, manages the conduct of discussion, and assigns grades. Students are not wrong in weighing what price they may pay in speaking up in disagreement with their professors. Yet in the current climate, it appears these rightful concerns about retribution have given way to a larger and more pernicious desire for campuses to become protective states. The “trigger warning” and “safe spaces” discussion can be overblown by critics, yet some on campus do seem unwilling to engage in the brave and robust intellectual engagement a college education demands.

The OCC case demonstrates this feeling on the political right—that students in Cox’s class somehow needed to be protected from her brash critique of then-President-elect Trump. These inclinations also appear on the left, including the disruption of speakers with conservative or nationalistic views. It is critical to recognize the harm some can feel at the hands speakers who challenge student viewpoints, as in the Cox case, or who may deny their very right to exist, as in the case of the neo-Nazi marchers at the University of Virginia in August 2017. Academic freedom and our system of freedom of expression dictate the remedy for such harm is not censorship but instead more and counteractive speech. Such courageous expression in the face of ideological disagreement or even hatred cannot exist within a protectionist campus environment. It is possible only when faculty, administrators, and students foster settings in which they do not merely tolerate but, instead, endorse and encourage a robust exchange of ideas.

Whether those heady environments can or should be open for video recording and dissemination is a separate but also important consideration. In general, university bans on video and audio recording in class makes sense and, if content-neutral, serve as reasonable time, place, and manner restrictions on speech. Administrators are wise to consider such factors as instructors’ intellectual property rights and other students’ privacy rights. They are also right to consider the self-censorship and limitations on intellectual experimentation that would result from the knowledge that classroom expression is ripe for public consumption and dissemination. But in the end, context must dictate whether students have a right to capture and disseminate video of classroom activities without permission. Students using new technologies to challenge their professors’ inappropriate conduct or excessive partisanship can make a valid claim that they have a constitutional right to do so. And if they disseminate that information responsibly—in context and with appropriate comment—they also have a strong argument that they are acting ethically as public communicators. In this case, it is questionable whether the dissemination of the short videos was a legal and ethical act by a student rightly aggrieved, or if it the dissemination of short,

edited clips distorted the context and intent of the remarks—in light of the full clip.

Student O’Neil’s response to the shaming and abuse Cox faced after his video went viral illustrate yet one more area in which students can have a positive effect on their learning environments and the inclusion of multiple voices and viewpoints. He responded to the backlash against her with empathy, something that seems in short supply when the culture war outrage machine descends on campus.<sup>472</sup>

What seems lost in today’s climate for free expression is the very idea of nuance. Students interested in reclaiming the fertile deliberative ground campuses offer would be best served by getting involved in student-led efforts to support intellectual diversity. For example, Williams College student Zachary R. Wood created a student club called “Uncomfortable Learning,” using alumni gifts to bring speakers to campus to talk about the need for students to engage with controversial and offensive views.<sup>473</sup> The more students talk with—and not at—each other and their instructors, the more likely they are to make progress on resolving barriers between them, including differences of ideology, race, gender, and the like.

#### *D. Responsibilities of Outside Advocates*

Campuses are battlegrounds in culture wars, and all combatants matter. It is virtually impossible to analyze the speech rights and responsibilities of faculty and students today without simultaneously engaging with the rights and responsibilities of the outrage machine that propels campus expression to the pages and airtime of media outlets.

The rights question is fairly easily settled. Take, for instance, the website Professor Watchlist,<sup>474</sup> the effort by Turning Point USA, a partisan non-profit organization founded in 2012 to train students in conservative principles and organizing.<sup>475</sup> Professor Watchlist is a curated list, searchable by name and school and presenting an array of “Featured Professors,” designed “to expose and document college professors who discriminate against conservative

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472. Death Threats, *supra* note 11.

473. See generally *Hearings*, *supra* note 178 (statement of Zachary R. Wood, President, Uncomfortable Learning).

474. PROFESSOR WATCHLIST, <http://www.professorwatchlist.org/> [<https://perma.cc/3FN3-7YUH>].

475. TURNING POINT USA, <https://www.tpusa.com/> [<https://perma.cc/NEG5-PVHV>].

students and advance leftist propaganda in the classroom.”<sup>476</sup> The site currently does not defame, threaten, or incite violence against the faculty included, so Turning Point is well within its First Amendment freedoms to publish these posts.<sup>477</sup>

Unlike these fairly well demarcated rights lines, however, the questions of responsibilities are thornier. Partisan advocates are an important check on the power of academia as an institution, and conservatives and liberals are correct in questioning whether that institution has sufficient power to indoctrinate students.

Blithe assumptions about the influence of liberal faculty and leftist ideology can provoke overwrought reactions to campus speech incidents, regardless of how nakedly partisan they may be. In fall 2016 in the United States, more than twenty million students were enrolled in higher education institutions.<sup>478</sup> A tiny sliver were in Olga Perez Stable Cox’s classroom. Yet the tumult and vitriol spewing forth from the outrage machine made it seem that her impact was vast.

While advocates on the right have rights to engage in these activities, they also have responsibilities in doing so. Scholars wrestle with the application of ethics—moral philosophy—to matters of persuasion, which, ultimately, is the goal of the outrage machine. While law guides us on what we can—and cannot—do, ethics provides the ground on which to reason what we ought—and ought not—to do. Philosopher Sissela Bok<sup>479</sup> and others argue that ethics is not about rationalization of actions to the self, but rather justification of actions to others. “To justify is to defend as just, right, or proper, by providing adequate reasons,” Bok writes.<sup>480</sup>

Little has been done to extend this philosophical grounding to matters of public communication beyond the well-established realms of journalism, public relations, and advertising ethics. Yet differentiating between a public relations press release and a post on Professor Watchlist or between the *Orange County Register* editorial page and a Tucker Carlson segment on Fox News may well be a distinction without a difference. Why should certain advocates or persuaders hew to sets of reasoning while others are free from any constraint that would encourage them to justify their behaviors to others?

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476. PROFESSOR WATCHLIST, *supra* note 474; *About Us*, PROFESSOR WATCHLIST, <https://www.professorwatchlist.org/about-us/> [<https://perma.cc/H7HM-MZF4>].

477. *See* PROFESSOR WATCHLIST, *supra* note 474.

478. *Fast Facts: Back to School Statistics*, INST. EDUC. SCI. & NAT’L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=372> (last visited June 2, 2018).

479. *See* SISSELA BOK, *COMMON VALUES* 3 (2002).

480. SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 91 (1999).

Public communicators of all stripes have, in the end, obligations to the public. At times these are matters of right and wrong that do not demand ethical reasoning. For instance, a speechwriter who takes another person's words and presents them as his own has no dilemma requiring moral philosophy. Plagiarism is wrong—no ethical reasoning needed. Instead, we call upon ethics when choosing between wrong versus wrong or right versus right. A journalist who has received confidential information from a source, for instance, is choosing between the twin goods of disclosing the identity of the source to fully inform the public of his motives and protecting the identity of the source to ensure his privacy and security.

Focusing on the right versus right construction, Rushworth Kidder identifies four “dilemma paradigms” that represent the varying goods that can come into conflict because they are, in essence, rooted in shared social values.<sup>481</sup> First, truth versus loyalty examines the conflict between honesty and fidelity with family, friends, or groups.<sup>482</sup> Second, individual versus community shows the clash between individual speakers' interests and their effect on broader communities.<sup>483</sup> Third, short-term versus long-term demonstrates that some goods that come from immediate gratification can fly directly in the face of longer-term positive outcomes.<sup>484</sup> Finally, justice versus mercy calls to question the inherent conflict between equity and compassion.<sup>485</sup>

Applying these paradigms to the case of ideologically motivated publicity of campus expression fracas, we see a pattern that advocates are favoring loyalty, individuals, short-term ends, and justice-based responses. In many cases, truthful portrayals of the environment for free expression in higher education classrooms have lost the battle to advocates' loyalty to and advancement of the conservative cause.

It is important to remember that truth and accuracy are not synonymous. Accurate facts alone do not equal truth. Instead, truth is the sum of accurate facts plus their proper context. It is a fact that Cox called Trump's election an “act of terrorism.” But the wildly disproportionate coverage of her speech stripped away its context, making it appear larger and more widespread than it was. In fact, if we accept the premise that university faculties are

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481. See generally RUSHWORTH M. KIDDER, HOW GOOD PEOPLE MAKE TOUGH CHOICES 109–39 (1995).

482. *Id.* at 118.

483. *Id.* at 127.

484. *Id.* at 133.

485. *Id.* at 139.

overwhelmingly slanted to liberal ideologies, the real story is that this did *not* happen on more campuses in the wake of Trump’s election.

Similarly, the outrage machine has little tolerance for community-based arguments about the effects of certain kinds of speech, focusing instead on an individual rights-based framing, sometimes wildly perverted. Suggestions that speech denigrating others on the base of their race, ethnicity, or gender is legal yet wrong brings cries of “political correctness.” Expression conflagrations on campus are short-term matters—with advocates raising a hue and cry in the moment. But what of the effect of this outrage on conservatives’ view of an important social institution and participation in education that research clearly demonstrates advances individuals economically and socially? While it is important not to draw a causal line back to the outrage machine, it is worth noting that conservatives’ belief in colleges and universities as positive elements in society has dropped precipitously—from 58% to 45% in just one year in a recent Pew study.<sup>486</sup>

Finally, while one might predict a rights-based framing would be protective of faculty and student speech and academic freedom, it appears that in almost all cases, the outrage machine responds with calls for justice—institutional enforcement—when faculty or students are expressing views that run counter to conservative principles. A student who tries to shout down Milo Yiannopoulos at a public university is not framed as exercising his First Amendment right to assemble and speak, for instance. Instead, he should be subject to academic sanction, according to some of the bills advancing in Republican-led state legislatures.

As noted above, the response of ideologically motivated speakers to what they see as orthodoxy on campus *can* be an important check on an exceptionally powerful social institution. Yet the question is whether that response *will* be such a check. Unless conservative commentators move past the outrage machine orientation and into more responsible persuasion, they are not checking but instead distorting. This kind of disproportionate, manipulative, and untruthful portrayal serves not to hold institutions accountable to the public they serve, but to foment disgust and distrust. In so doing, it is likely contributing to the diminution of deliberation and civil public engagement.

#### *E. Institutional Necessities*

Finally, analysis of the OCC case brings into focus the need for higher education institutions to both defend academic freedom and encourage responsible use of that freedom. Administrators thread a contentious needle

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486. *Sharp Partisan Divisions in Views of National Institutions*, PEW RES. CTR. (July 10, 2017), <http://www.people-press.org/2017/07/10/sharp-partisan-divisions-in-views-of-national-institutions/> [<https://perma.cc/TA9P-JDT4>].

in addressing such responsibilities. On one hand, they must recognize the harms that arise from hateful or offensive speech and discourage such expression through public responses, not through regulation. On the other, they must ensure robust intellectual engagement—complete with ideological diversity—rather than a paternalistic mindset that seeks to protect students from that which may offend them. The hair-thin thread that makes it through this needle is a strand that recognizes both rights and responsibilities and puts speech in the at-times dueling contexts of that which is protected by the Constitution and that which is disdained by the majority of the campus community. Edwin Chemerinsky, dean of UC Berkeley’s law school, and Howard Gillman, chancellor of UC Irvine, argue that university leaders must do more to defend academic freedom in times of challenge. “College and university leaders are well versed in providing full-throated defenses of civility and tolerance, but their arguments for protecting the expression of all ideas, even those considered offensive and hateful, are often less clear or convincing.”<sup>487</sup>

Colleges and universities have a responsibility to defend the academic freedom of faculty and students. As much as a public university administrator would like to fire a faculty member who launches into an in-class tirade against a newly elected president, that professor has a right to that expression. Pressure will be enormous to sanction such speech, but if defense of expression protections yields in these cases, it is necessarily weakened in other cases. Faculty sanctioned for calling a Trump vote an act of terrorism are inherently less protected when questioning Trump’s tweets about North Korea in a foreign policy class or the failings of the Affordable Care Act in an economics class. Faculty speech must be broadly protected—even when it is partisan and not directly germane to the subject matter of a course—to ensure administrators, legislators, or executives do not meddle in the critical exchange of ideas between instructors and students.

Institutions have a companion responsibility to ensure openness to viewpoint diversity. Campuses should be spaces safe from acts of violence, not acts of expression. The OCC case made clear that the “safe spaces” idea so derided when emerging from supposed “snowflakes” on the left also is a growing strain among students on the right. At base, the response of the conservative outrage machine was that O’Neil deserved to be *protected* from Cox’s partisan speech. Students should use their time in college to mature intellectually, ideologically, and emotionally. If they are shielded

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487. CHEMERINSKY & GILLMAN, *supra* note 2, at 155.

from anything that confronts their senses or beliefs, they are denied this maturation. The demonstrated dearth of conservative faculty on campuses, however, shows that institutions should be vigilant in encouraging faculty to consider ideological diversity within their classrooms and how to the ideas above that partisan speech should be minimized, tolerant, and germane to the subject at hand.

College and university administrations will be best served by common-sense responses to the outrage machine. And they should be aware that the machine does not exist exclusively on the right. When a fan attended a 2016 University of Wisconsin-Madison football game dressed in a jail inmate costume with masks depicting Hillary Clinton and Barrack Obama with a noose around his neck, administrators initially responded primarily with a defense of his free speech rights to do so—though athletics staff asked that the noose be removed under existing stadium rules.<sup>488</sup> The fan who originally alerted UW-Madison about the costume had tweeted: “At the @UWBadgers game and there is a man with a mask of President Obama and a noose. This is racism, why was this allowed into the stadium?”<sup>489</sup> The university rightly responded that it is allowed because it was an exercise of free expression rights though the costume was “repugnant and counter to the values of the university and the Athletic Department.”<sup>490</sup> Social media users responded forcefully, as did sports-focused outlets with headlines like “Wisconsin Fans’ Trump-Lynching-Obama Costumes Are Just About Racist As it Gets.”<sup>491</sup> Many expressed dissatisfaction with the UW’s response, including such tweets as: “Lynching costume of this country’s first AA [African American] pres, it’s not free speech. It’s hate speech. Go read a history book.”<sup>492</sup> Days of media coverage followed, with the university eventually promising a review of stadium policies.<sup>493</sup>

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488. University of Wisconsin-Madison (@UWMadison), TWITTER (Oct. 29, 2016, 8:39 PM), <https://twitter.com/UWMadison/status/792571502251999232> [<https://perma.cc/86EN-QEFG>].

489. #NoCopAcademy (@woahohkatie), TWITTER (Oct. 29, 2016, 4:25 PM), <https://twitter.com/woahohkatie/status/792507579549102080> [<https://perma.cc/F3BY-Z2X6>].

490. University of Wisconsin-Madison, *supra* note 488.

491. Liam Daniel Pierce, *Wisconsin Fans’ Trump-Lynching-Obama Costumes are Just About Racist as it Gets*, VICE SPORTS (Oct. 30, 2016, 9:55 AM), [https://sports.vice.com/en\\_us/article/mgzyz3/wisconsin-fans-trump-lynching-obama-costumes-are-just-about-racist-as-it-gets](https://sports.vice.com/en_us/article/mgzyz3/wisconsin-fans-trump-lynching-obama-costumes-are-just-about-racist-as-it-gets) [<https://perma.cc/6AZT-KGFM>].

492. Laura Davis (@lcdavis1), TWITTER (Oct. 29, 2016, 10:35 PM), <https://twitter.com/lcdavis1/status/792600684390559744> [<https://perma.cc/566H-664S>].

493. Nico Savidge, *UW-Madison Launching Review of Camp Randall Policies After Noose Costume Stirs Uproar*, WIS. ST. J. (Nov. 2, 2016), [http://host.madison.com/wsj/news/local/education/university/uw-madison-launching-review-of-camp-randall-policies-after-noose/article\\_490ccc72-00c6-5f4c-b3bc-e1d1992031c1.html](http://host.madison.com/wsj/news/local/education/university/uw-madison-launching-review-of-camp-randall-policies-after-noose/article_490ccc72-00c6-5f4c-b3bc-e1d1992031c1.html) [<https://perma.cc/X536-7RH8>].

While this incident did not have the sustained reach or fervor of the conservative outrage machine fueled by Campus Reform or the Professor Watchlist, it did lay bare the clear gap in public understanding of constitutional protections for hate speech and the risks institutions run when emphasizing those rights over the repugnance of the speech itself. Responses to incidents of explosive speech should be swift, acknowledge the rights at hand, and articulate the responsibilities of both the speakers and the campus community. It is not only possible, but critical, for colleges and universities to be both defenders of free expression and advocates for civil and inclusive campus communities.

## V. CONCLUSION

Olga Perez Stable Cox prefaced her human sexuality classes at Orange Coast College following the election of President Trump with remarks that called the election an “act of terrorism” and lamented the divisions and discrimination in the country. When she did so, she unwittingly became engulfed in a conservative outrage machine that used a surreptitiously recorded viral video of her remarks to portray her as a sensational example of the liberal bias that should be excised from America’s colleges and universities. Conservative advocacy groups, like liberal ones, serve as an important check on public institutions. These are amplified with today’s media machine that rewards sensational stories with clicks, likes, and retweets on social media. However, the OCC case demonstrates that conservatives are adopting the same language of victimhood and censorship they have long decried when liberals have called for limits on free speech and academic freedom on campuses. In their demands for Cox’s firing, conservatives claimed that Cox’s overt expression of partisanship discriminates against and harasses students with conservative political affiliations. It also shows how the outrage machine can provoke extreme and vile responses, including death threats that temporarily forced the professor to flee her home. In addition to the legal questions presented, such overreactions and distortions raise profound ethical questions for the future of public discourse on America’s campuses and their role in the nation’s culture war.

The Cox case, as well as a host of other threats to free expression on campus—from protesters interrupting speakers to legislators interfering with academic freedom—demonstrate that it is clearly time for a recommitment to bedrock expression principles on all partisan sides and by all parties involved. In its landmark 2014 statement, the University of

Chicago blazed a trail for such a recommitment across America's campuses.<sup>494</sup> In articulating its institutional commitment to free expression as an "essential element of the University's culture," a faculty committee powerfully and coherently attended to both the benefits and risks of the university's dedication to an open exchange of ideas.<sup>495</sup> "Of course, the ideas of different members of the University community will often and quite naturally conflict. But it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive."<sup>496</sup>

It is the proper role of the university to safeguard the free and open exchange of ideas on campus while simultaneously ensuring an environment that is inclusive in all regards. It is the proper role of faculty to encourage debate and respect ideological diversity. It is the proper role of students to courageously engage with ideas, especially those with which they disagree and from which they might seek to be protected. It is the proper role of political figures to disentangle themselves from the workings of universities and keep their partisanship to the statehouse. And it is the proper role of public communicators, even those with the most partisan of ends in mind, to fairly and proportionally comment on campus issues.

Yet the bloodied speech battlefields of 2017 find many combatants declining to adhere to these proper—and necessary—roles. Their failures to live up to their responsibilities threaten not just expression but the very idea of a university education itself. The University of Chicago committee recognized this in quoting Robert Hutchins's observation that, "without a vibrant commitment to free and open inquiry, a university ceases to be a university."<sup>497</sup> It matters not whether the threats come from white supremacists trying to provoke violence at the University of Virginia or from eager faculty trying to suppress speech in the name of social justice at the University of Missouri. In the end, without a firm recommitment to free expression across the political spectrum, universities cannot live up to their solemn duty to advance the human cause without fear or favor.

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494. GEOFFREY R. STONE ET AL., REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION (2014), <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf> [<https://perma.cc/JX8U-TC43>].

495. *Id.* at 1.

496. *Id.* at 2.

497. *Id.* at 3.