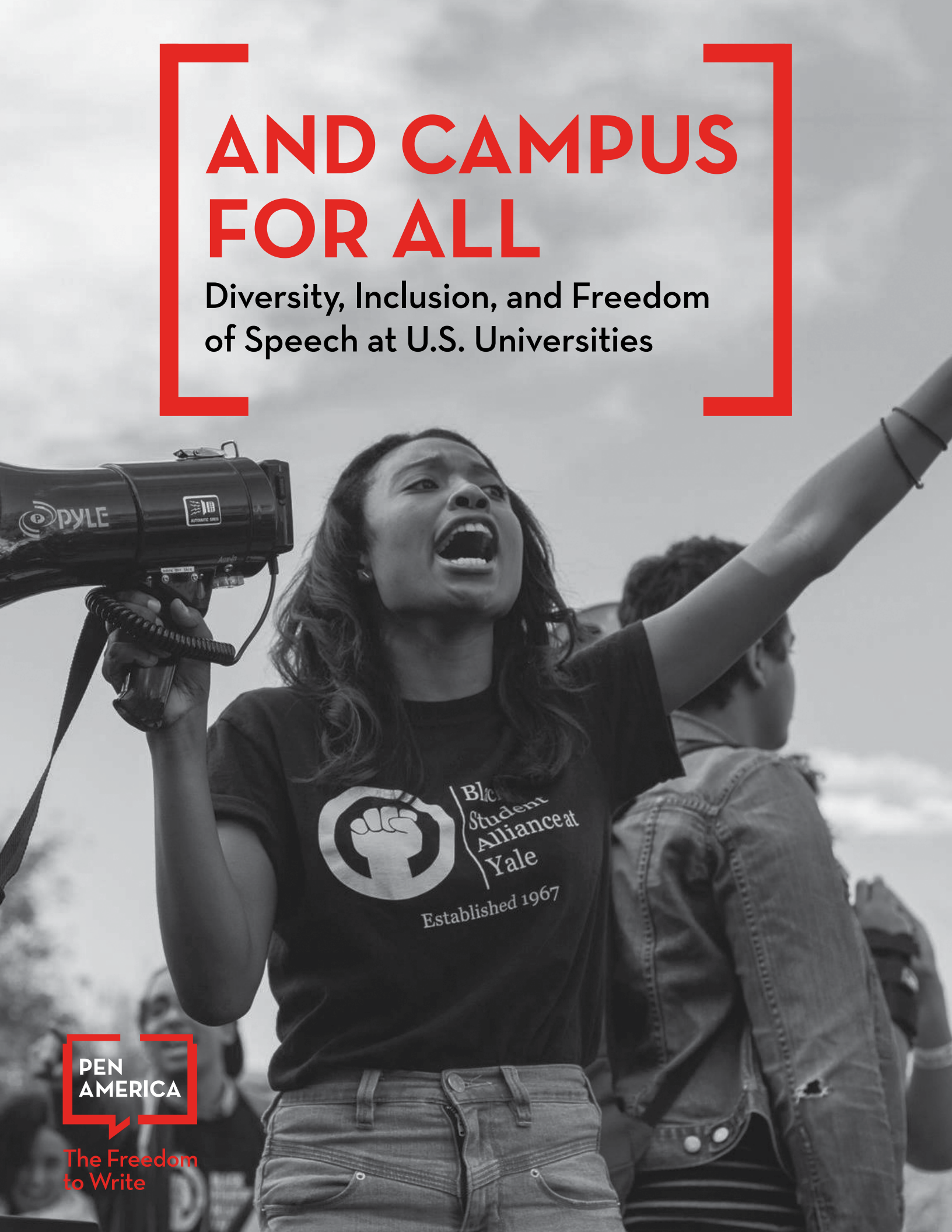
AND CAMPUS FOR ALL

Diversity, Inclusion, and Freedom of Speech at U.S. Universities



PEN AMERICA

The Freedom to Write

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October 17, 2016

PEN America stands at the intersection of literature and human rights to protect open expression in the United States and worldwide. We champion the freedom to write, recognizing the power of the word to transform the world. Our mission is to unite writers and their allies to celebrate creative expression and defend the liberties that make it possible.

Founded in 1922, PEN America is the largest of more than 100 centers of PEN International. Our strength is in our membership—a nationwide community of more than 4,000 novelists, journalists, poets, essayists, playwrights, editors, publishers, translators, agents, and other writing professionals. For more information, visit pen.org.

Cover photograph: Chris Meiamed

CONTENTS

INTRODUCTION 4
Free Speech Controversies on Campus

SUMMARY 8
PEN America Principles on Campus Free Speech

LEGAL FRAMEWORK 10
Free Speech at U.S. Universities

A CHANGING AMERICA 12
A Changing Campus

THE NEW LANGUAGE OF HARM 18
Microaggressions, Trigger Warnings, Safe Spaces

ENFORCING TITLE IX 26
Sexual Harassment and Free Speech

SPEECH IN A STRAITJACKET 32
Concerns for Expression on Campus

MORE SPEECH, BETTER SPEECH 36
Pushing Campus Expression Forward

OUTSIDE INFLUENCES 42
The New Pressures of Social Media and Evolving Educational Economics

CASE STUDY YALE 46
Chilling Free Speech or Meeting Speech with Speech?

CASE STUDY UCLA 51
Pro-Israel and Pro-Palestine Activists in Conflict

CASE STUDY NORTHWESTERN 58
Problems with Title IX Investigations

PEN AMERICA PRINCIPLES ON CAMPUS FREE SPEECH 62

ACKNOWLEDGMENTS 76

ENDNOTES 77

INTRODUCTION

Free Speech Controversies on Campus

The dean of students at the University of Chicago sends an open letter to incoming first-year students putting them on notice that the campus will not issue warnings before controversial or upsetting materials are taught and will not disinvite speakers as a result of student protests.[1]

The University of Missouri's football team goes on strike to protest what activists declare is the administration's failure to address the pervasive culture of racism on campus.[2] In the tumult, campus activists are recorded on video shouting away a student photographer, declaring their outdoor gathering a "safe space."[3]

At Yale, a viral video captures a student screaming at a professor who was serving as her residential adviser, calling him "disgusting" for not supporting her views on whether the campus should deter the wearing of offensive Halloween costumes.[4]

A Columbia student protests what she believes is the university's failure to respond adequately to her accusation of rape[5] against a fellow student by carrying a mattress with her everywhere she goes on campus as part of a senior thesis project.[6] The accused student files a federal lawsuit accusing Columbia of enabling the protest and thereby depriving him of equal educational opportunities.[7]

An Oberlin assistant professor of rhetoric and composition studies is accused of posting anti-Semitic material on her Facebook page and is suspended from teaching pending an investigation as activists around the country call for her dismissal, citing the posts as evidence of a resurgent anti-Semitism on campus.[8] A fund provided by a leading law firm to support student activities at Harvard Law School is terminated after money from the account is used to support the purchase of pizza for an event discussing "The Palestine Exception to Free Speech: A Movement Under Attack"; reports indicate that the firm did not want to be associated with programs sponsored by the event organizer, Students for Justice in Palestine.[9]

These campus controversies raise serious questions about how rights to free speech, freedom of assembly, and academic freedom intersect with the quest to address some of the most vexing challenges of diversity and inclusion faced by students, faculty, and administrators. Students (and sometimes faculty) at dozens of campuses have protested invitations to campus speakers whose ideas or actions they find offensive, sometimes culminating in the withdrawal of speaking invitations.[10] Faculty and students alike have drawn protests or been publicly shamed for emails, op-eds, or posts on social media that are considered offensive, distasteful, or even merely clumsy.[11] Faculty say they fear accidentally offending the most sensitive students and confess to omitting controversial books from their syllabi—books they had intended to examine critically—lest they be accused of harassing students by exposing them to racism, sexism, colonialism, and sexual violence.[12]

Alarm Bells for Speech

Recent incidents have raised significant concerns about the heated climate for intellectual life on U.S. campuses and the implications for the rising generation of college-educated Americans. Lawyer, writer, and cultural critic Wendy Kaminer, whose early work on pornography helped reconcile feminist concerns with free speech issues, has said:

> What we are seeing is not just phobias about language. We have gone way beyond political correctness and are seeing a real decline in critical thinking. If you don't know the difference between quoting a word and hurling an epithet, then you don't know how to think.[13]

In a widely read essay in *The New York Times* Sunday Review section titled "In College and Hiding From Scary Ideas," published in March 2015, journalist and cultural critic Judith Shulevitz raised similar concerns for a generation at risk:

> People ought to go to college to sharpen their wits and broaden their field of vision. Shield them from unfamiliar ideas, and they'll never learn the discipline of seeing the world as other people see it. They'll be unprepared for the social and intellectual headwinds that will hit them as soon as they step off the campuses whose climates they have so carefully controlled.[14]

Kaminer, Shulevitz, and dozens of other journalists, academics, and free speech advocates have expressed genuine angst over what they see as coddled students' intolerance for dissent and offense. Many have disparaged the proliferation of new concepts such as "trigger warnings," "microaggressions," and "safe spaces." Greg Lukianoff, president of the Foundation for Individual Rights in Education (FIRE), a leading libertarian free speech advocacy group based in Philadelphia, teamed up with social psychologist and NYU Stern professor Jonathan Haidt to write a September 2015 cover story in *The Atlantic* called "The Coddling of the American Mind," in which they wrote:

> The current movement is largely about emotional well-being.... [I]t presumes an extraordinary fragility of the collegiate psyche, and therefore elevates the goal of protecting students from psychological harm. The ultimate aim, it seems, is to turn campuses into "safe spaces" where young adults are shielded from words and ideas that make some uncomfortable. And more than the last, this movement seeks to punish anyone who interferes with that aim, even accidentally. You might call this impulse *vindictive protectiveness*. It is creating a culture in which everyone must think twice before speaking up, lest they

face charges of insensitivity, aggression, or worse.[15]

The ripple effects of these controversies are being felt widely. According to an August 2015 story in *The New York Times*, recent campus contretemps touching on speech have contributed to a flattening of or decline in alumni donations at certain colleges. The story describes alumni donors to institutions such as Amherst College in Massachusetts as troubled by what they see as university administrators' indulgence of oversensitivity, incivility, and a disregard for traditions. As *New York Times* columnist Anemona Hartocollis reported:

> Alumni from a range of generations say they are baffled by today's college culture. Among their laments: Students are too wrapped up in racial and identity politics.... [M]en are being demonized by sexual assault investigations. And university administrations have been too meek in addressing protesters whose messages have seemed to fly in the face of free speech.[16]

At Princeton, there was a statistical drop in alumni donations after students unsuccessfully demanded the removal of Woodraw Wilson's name from campus buildings.[17] The University of Missouri lost $2 million in alumni donation pledges due to much publicized student protests.[18]

Whose Speech Are We Talking About, Anyway?

Other journalists, advocates, and academics have countered that these free speech concerns are not only overblown but also misguided. In their view, the most potent danger exposed by current debates on campus is not the restriction of academic freedom or freedom of speech but the failure of those in authority to redress the harms suffered by people of color, victims of sexual harassment and assault, and others whose voices have historically been marginalized or silenced on campus. They have argued that the aggressive language used by some free speech advocates is dismissive of valid concerns and aimed at reinforcing an entrenched, outdated power structure. Far from threatening free speech, they argue, student activism today falls squarely within the American tradition of using free expression and civil disobedience to advance social change. To speak of coddled students, they maintain, is to turn a blind eye to the vital imperatives of racial and gender justice that have surfaced in these debates—ideas that are central to American society as a whole, not only to college campuses.

Historian and writer Jelani Cobb wrote in a November 2015 essay in *The New Yorker*, "Race and the Free Speech Diversion":

> Of the many concerns unearthed by the protests at two major universities this week, the velocity at which we now move from racial recrimination to self-righteous backlash is possibly the most revealing. The unrest that occurred at the University of Missouri and at Yale University, two outwardly dissimilar institutions, shared themes of racial obtuseness, arthritic institutional responses to it, and the feeling, among students of color, that they are tenants rather than stakeholders in their universities. That these issues have now been subsumed in a debate over political correctness and free speech on campus—important but largely separate subjects—is proof of the self-serving deflection to which we should be accustomed at this point.... The default for avoiding discussion of racism is to invoke a separate principle, one with which few would disagree in the abstract—free speech, respectful participation in class—as the counterpoint to the violation of principles relating to civil rights. This is victim-blaming with a software update.[19]

Writing in November 2015 for The Hill, American University professor Jon Gould agrees, casting concerns about speech as a media-fueled distraction from a more fundamental and essential discussion of racism:

> In turning the attention to speech restrictions, we miss the larger story of what led to student activism in the first place. Back in the 1980s, students of color protested against the "'soft racism' of jeers, affronts and slights," and yet 30 years later, we're still talking about the same behavior. To be sure, we now have different names for it, like implicit bias and microagressions, but when the student body president at Missouri reports multiple racist slurs hurdled at him, when a feces-drawn swastika appears on a dorm wall, heck, when the police make arrests for death threats against African-American students, it's evident that colleges still have more to do in repelling racism and hateful acts.[20]

Gould chastises commentators for their misplaced emphasis on relatively minor infringements on speech and beseeches them to attend to the urgent indications of resurgent racism that he places at the heart of campus controversies.[21]

Tensions on Campus

The current tensions surrounding intellectual freedom on campus are enmeshed in a larger debate in the United States about diversity, inclusion inclusion, inequality, and language. As the U.S. becomes increasingly diverse, with racial minority groups poised to account for a majority of the U.S. population in the coming decades,[22] a series of pressing questions have arisen about how to guarantee the rights of all regardless of race, ethnicity, religion, gender, sexual orientation and gender identity, disability, and myriad other personal attributes. These have given rise to fervent debates over how to balance the interests of the

country at large, individual communities, particular minority groups, and individuals. Questions are also raised about how, in an increasingly multicultural nation, members of a campus community can communicate across vast divides in experience and worldview; about when demands for respect or civility become intolerance for disagreement or ratification of an unequal status quo; about when calling out offensive behavior shades into an oppressive atmosphere of political correctness and even censorship; and about at what point—if any—the rights of individuals to provoke and offend through speech should be subordinated to the imperative of creating group environments that are welcoming and hospitable to all. As historian and Yale College dean Jonathan Holloway asked in an interview with PEN America: "Whose speech matters enough to be defended?"[23]

At times these controversies have led some groups of students to question the value of free speech itself. Students have asked whether free speech is being wielded as a political weapon to ward off efforts to make the campus more respectful of the rights and perspectives of minorities. They see free speech drawn as a shield to legitimize speech that is discriminatory and offensive. Some have argued that free speech is a prerequisite of the privileged, used to buttress existing hierarchies of wealth and power. Some have gone so far as to justify censorship as the best solution to protect the vulnerable on campus.[24] These attitudes risk giving free speech a bad name. If a new generation comes to see it as an ossified, irrelevant, even inimical concept, core freedoms that have been vigilantly guarded throughout American history could be in peril. Free speech advocates face an urgent task to articulate how to reconcile unfettered expression with acute demands for greater equality and inclusion and, indeed, how both goals are mutually complementary and reinforcing.

The controversies also tie in closely to mushrooming debates in society at large over the interplay of issues of race, marginalization, and freedom of speech. These include the decision by National Football League quarterback Colin Kaepernick and other athletes to protest racial injustice by sitting down when the national anthem is played, as well as the September 2016 controversy over author Lionel Schriver's address to a writers conference in Brisbane, Australia, arguing that fiction writers' own gender, ethnicity, and life circumstance should not constrain them from writing about characters wholly unlike them. Several members of the audience walked out in protest, conference organizers programmed a counter-panel, and there were reports that Schrivers's remarks were expunged from the conference website. As students graduate, their attitudes toward speech will permeate society at large, influencing how a new generation of teachers, scholars, courts, and citizens view the balance between sometimes competing values.

The Role of PEN America

PEN America stands at the intersection of literature and human rights to protect open expression in the United States and worldwide. We champion the freedom to write, recognizing the power of the word to transform the world. Our mission is to unite writers and their allies to celebrate creative expression and defend the liberties that make it possible. PEN America's work centers on freedom of speech and a profound commitment to open intellectual inquiry. We work to defend those principles through research, advocacy, and campaigning on behalf of individuals whose rights are threatened and denied. But PEN America's purpose also encompasses elevating unheard voices and fostering dialogue across geographic, racial, ethnic, and religious boundaries. We do so through programs like the annual PEN World Voices Festival, the United States' only festival of international literature; and the PEN America prison writing program, which allows the incarcerated to have a voice in society. We are an organization of writers and those who love literature that is committed to the defense of free expression for all.

For PEN America, the campus speech debates raise pressing concerns over how to reconcile the imperative of creating inclusive, equal societies in which all voices can be heard with the bedrock principle of protecting free speech. Our point of departure is that both of these objectives are compelling and worthy of respect and that, through reasoned efforts and dialogue, more can be done to allow them to comfortably coexist. Our aim is to shed light and spur thinking about how to nurture a campus community that allows for academic and social discourse that is truly inclusive and transcends boundaries, but also protects speech to the utmost.

To better understand the climate and concerns on campuses, PEN America undertook an investigation into the apparent chasm that has opened up between student activists and free speech advocates. We broach this issue out of a sense of related concerns that are deeply embedded in our mission: that these controversies are giving students a false sense that the speech of some takes priority over that of others; that ideas of freedom of speech and freedom of association are becoming dangerously dissociated, when in fact they depend heavily on each other; that the liberal values of free speech, non-discrimination, and inclusion are being needlessly and unhelpfully pitted against one another; and that a rising generation may be turning against free speech because some of its more forceful advocates have been cast as indifferent to other social justice struggles. Before these developments deepen and harden, PEN America hopes to open up a wider, more searching dialogue that can help all sides to these debates better identify common ground and better build on their shared appreciation of the university as an essential foundation for building a stronger and more open American society.

In addition to reading deeply and widely about these issues, we commissioned a researcher to travel to three campuses—Yale, UCLA, and Northwestern—to conduct lengthy in-person and telephone interviews with student activists, administrators, and faculty, as well as outside experts on

Students protest against hate speech

these subjects, probing their beliefs and actions about protest and free speech on campuses today.

PEN America's goal is to bring objective facts, in-depth perspective, and nuance to these issues, aiming to move the discussion toward a shared view of how liberal rights and values can be protected and advanced on college campuses. In this report we will describe representative conflicts and incidents and examine the main themes of the commentary about each. We will also offer three case studies based on our in-depth investigations: skirmishes about free speech and race at Yale; about anti-Semitism and the Boycott, Divestment, Sanctions movement directed toward Israel at UCLA; and about the implementation of Title IX, the law that bars sex discrimination at educational institutions receiving federal funding, at Northwestern. In the main body of the report, we have attempted to do justice to multiple sides in these controversies, spelling out their positions—often in the words of those who espouse them—to explicate the thoughtful reasoning, real-life experiences, and heartfelt concerns that animate so many participants in these debates. In these sections we try to refrain from making judgments, allowing the reader to weigh up the competing views and appreciate the nuances advanced on all sides. That said, these topics are sprawling, and new incidents are sprouting all the time. In this report we have tried to balance a concern for thoroughness with the imperative of producing a document that we hope can be read and digested. We apologize in advance for the many important voices, views, incidents, details, and experiences left out due to constraints of space.

We offer our conclusions and recommendations in a spirit of humility and openness, hoping that this report serves above all as an impetus for campus discussions about how best to address the challenging issues that students, faculty, and administrators confront. With every week seeming to bring a new incident, it is difficult for journalists, much less college students, faculty, and administrators caught in the middle of controversies, to step back and grope for larger principles to help govern how these controversies can be most effectively addressed. In our conclusions and recommendations we have attempted to digest the many important points raised by all sides and to suggest some guidelines that may help everyone better navigate their resolution.

Report Content and Structure

Including this introduction, the report has nine main sections. Section II summarizes the demographic trends on campuses and in the U.S. more broadly, and the implications of a more diverse student body. It closes with an overview of cases involving student protests and free speech concerns. Sections III describes the controversial, new language of harm, including the concepts of microaggressions, trigger warnings, and safe spaces, and provides the views of experts from all sides of these debates. Section IV summarizes recent cases and controversies regarding speech in the context of efforts to address Verbal forms of sexual harassment under Title IX. Sections V presents the views of prominent free speech advocates critical of the growing restrictions on college campuses; Section VI presents the contrasting views of those who support new steps to catalyze equality and are less concerned with encroachments on speech. Section VII analyzes the roles of social media and new technologies in both spreading and sensationalizing the conflicts, and describes the financial pressures that buffet today's university. Section VIII offers three emblematic case studies: 1) the skirmishes over free speech and race at Yale in connection with the Halloween email, 2) debates between supporters of Israel and Palestine at UCLA, and 3) the excesses and unintended consequences of a Title IX case at Northwestern. The final section sets out PEN America's Principles on Campus speech, a set of conclusions and recommendations aimed at reinforcing free speech, equality, and inclusion.

SUMMARY

PEN America Principles on Campus Free Speech

The PEN America Principles on Campus Free Speech begin on page 62; below is a preview of some key precepts:

OVERVIEW

- While free speech is alive and well on campus, it is not free from threats, and must be vigilantly guarded if its continued strength is to be assured.
- While current campus controversies merit attention and there have been some troubling instances of speech curtailed, these do not represent a pervasive "crisis" for free speech on campus.
- The dialogues, debates, and efforts at greater inclusion taking place on many campuses have the potential to help root out entrenched biases that have impeded the participation of members of marginalized groups.
- These conversations and controversies have the potential to unleash and amplify new and important voices that can enrich debates on campus and in wider society, thereby expanding free speech for everyone's benefit.
- At times protests and forms of expression are treated as if they are incursions on free speech when in fact they are manifestations of free speech.
- Free expression should be recognized as a principle that will overwhelmingly serve not to exclude or marginalize minority voices, but rather to amplify them.

THE CAMPUS CLIMATE

- University administrations must look hard at how physical barriers, historical traditions, inequalities, prejudices, and power dynamics can weigh against openness and take concrete steps to alleviate those burdens.
- Campus discourse should be predicated on the presumption of respect for differences, including differences of view that cause disagreement.
- Respect entails an obligation to understand what may cause offense and why, and to avoid such words and actions even if no offense is intended.
- While violence and threats are never appropriate, vociferous, adamant, and even disrespectful argument and protest have their place.
- An environment where too many offenses are considered impermissible or even punishable becomes sterile, constraining, and inimical to creativity.

CAMPUS SPEAKERS

- Once a body has decided to extend an invitation to a campus speaker, the choice to withdraw it must meet far more stringent criteria.
- Except in the most extreme cases, concerns over threats of violence or the potential outbreak of violence should not be grounds for canceling a controversial speech or event.
- That a campus event may be colored by protests should also not be a factor in a decision to withdraw an invitation.
- When a speaking invitation sparks protests, those who object and wish to protest should have an opportunity to make themselves heard.
- Protesters should not be permitted to shut down or shout down the speech, preventing others from hearing the speaker.

CALLS TO PUNISH SPEECH

- Institutions should be careful to avoid any form of discipline or punishment solely for legally protected speech.
- While demands for punishment themselves constitute protected speech, calls to punish speakers for their speech have a chilling effect and are usually inimical to an open environment for ideas.

MICROAGGRESSIONS AND THE LANGUAGE OF HARM

- The increasing diversity of college populations requires a wider conscientiousness of how words are understood by different groups of listeners.
- The task of fostering a more inclusive environment—and calling out language that undercuts it—cannot be left only, or even primarily, to students who are members of marginalized groups.
- University administrators should encourage all students to be sensitive to the ways that their words can unintentionally hurt others and should show sensitivity in their own communications.

University of Missouri student leader Jonathan Butler from at a Planned Parenthood rally on campus

MARK SCHIERBECKER

- University policies regulating everyday speech or attempting to define insults for the entire community are intrusive and risk prohibiting or even simply disfavoring permissible speech.

TRIGGER WARNINGS

- If professors wish to offer students a preview of troubling content to come in a syllabus, the university should not prevent them from doing so.
- Universities cannot and should not position themselves institutionally to ensure that every possibly upsetting encounter with course material is averted.
- Universities should therefore leave the question of trigger warnings or any other sort of alerts about course material up to individual faculty members.

SAFE SPACES

- It is the obligation of the university to foster an environment in which violent, harassing, and reckless conduct does not occur and respect is encouraged.
- It is neither possible nor desirable for the campus to offer protection from all ideas and speech that may cause a measure of damage.
- "Safe spaces" on campus should be entered into voluntarily by students wishing to associate with a certain group, not created or imposed to exclude unwelcome views.
- Campuses should enable and even support the creation and protection of spaces established by students—such as clubs, organizations, or even small gathering areas based on common themes and lifestyles.
- The campus as a whole and segments thereof that are intended for all—such as dorms, residential colleges, classrooms, and cafeterias—must be kept physically safe but intellectually and ideologically open.

SPEECH AND SEXUAL HARASSSMENT

- There is no contradiction between advocating for more stringent measures to address sexual harassment and assault on campus and insisting on measures to protect free speech and academic freedom.
- The U.S. Department of Education's Office of Civil Rights should clarify that the so-called "hostile environment" standard for sexual harassment cannot be determined solely on the basis of subjective perceptions that speech is offensive.
- Universities should reiterate the centrality of academic freedom when they address issues of harassment.

THE PLACE OF SPEECH ON CAMPUS

- There is both a need and an opportunity for expanded education and mobilization on issues of free speech on campus.
- All groups supportive of free speech should redouble their efforts to ensure that campus free speech is a cause that engages students from across the political spectrum.
- Institutions and funders with an interest in supporting free speech should invest in the next generation by underwriting grants for work to build awareness and appreciation for free speech on campus.

LEGAL FRAMEWORK

Free Speech at U.S. Universities

Freedom of Expression in U.S. Law

Freedom of expression in the United States is protected by the constitution. Under the supremacy clause, the constitution, federal laws, and ratified international treaties constitute the "supreme law of the land" and override any contradictory laws or policies at the state or local levels.[25] Free speech is a bedrock legal and political value in the U.S. and a defining element of American identity, binding together a diverse nation through a shared commitment to an open society.

The First Amendment provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.[26]

The First Amendment is a cornerstone of American law, politics, and culture, considered first among equals in the Bill of Rights. In a landmark decision written by Justice Benjamin Cardozo in 1937, the Supreme Court termed free expression "the matrix, the indispensable condition of nearly every other form of freedom."[27] The court has been especially protective of hateful and offensive speech, even by extremist groups such as the American Nazi Party and the Ku Klux Klan.[28] In a 2011 case overturning a jury verdict against the Westboro Baptist Church for organizing virulently homophobic protests at the funeral of a gay soldier killed in Iraq, the court underscored the centrality of protecting unpopular views:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure than we do not stifle public debate.[29]

The Supreme Court has carved out several narrowly defined exceptions to First Amendment protection, including fighting words,[30] threats and intimidation,[31] obscenity,[32] defamation,[33] and harassment.[34] The Supreme Court has permitted restrictions on speech judged likely to incite imminent violence. It also permits constraints on harassment, though any such restrictions on speech must be content and viewpoint neutral and narrowly tailored to the circumstances. The American Bar Association has done a detailed analysis of the constitutional constraints on prohibiting and punishing harassment on campus, observing that:

> Individuals have a First Amendment right to harass anyone they want, in the lay sense of the word "harassment" as irritating or tormenting someone, though the rights of school and college employees to do so in their professional capacities are narrower than the free speech rights of students. Yet, when a person is called a "fag" or any other derogatory term or epithet, or demeaned based on an immutable characteristic so often and so publicly that it impacts his or her peaceful enjoyment of the school or campus, then the right to peaceful enjoyment is the highest priority, and there is no First Amendment right to engage in discriminatory harassment.[35]

Freedom of Expression in International Law

Under international law, freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights (ICCPR), to which the U.S. is a state party:

> Everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[36]

Even states that have not ratified the ICCPR are obligated to respect the human right to free expression, which has "through time and universal acceptance… risen to the level of customary international law, including Article 19, and is therefore binding on all states."[37]

International law, including Article 20 of the ICCPR ("Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law"[38]) is more permissive in terms of prohibiting hate speech and incitement than the U.S. constitution, allowing restrictions on, for example, incitement to hatred and discrimination.[39] Under U.S. law, by contrast, the only form of incitement that can be restricted is incitement to imminent violence. When it comes to free expression, the U.S. Constitution is generally recognized as offering the most protective standard in the world for speech.[40]

Legal Protections for Freedom of Expression on American Campuses

The First Amendment prohibits government agencies and departments from restricting free speech, with very limited

exceptions. Public universities are therefore obligated to uphold the First Amendment when it comes to students or members of the public. The Supreme Court has generally treated employees of public academic institutions "almost identically to all other public employees,"[41] meaning that they are technically subject to the so-called public-employee speech doctrine. That doctrine allows the government to limit the speech of individuals who are in its employ unless the speech meets a two-part test: the person must be speaking in personal, not official, capacity, and the speech must relate to a "matter of public concern."[42] In Garcetti v. Ceballos, the Supreme Court held that when public employees' speech was pursuant to their official duties, the constitution did not protect their speech from employer discipline (job duties test),[43] although the 9th Circuit has since ruled that the job duties test does not apply to "speech related to scholarship or teaching."[44] The full scope of First Amendment protection for the faculty of public universities has not yet been adjudicated by the Supreme Court.

Judicial decisions upholding academic freedom on the basis of the First Amendment apply only to public campuses, where the administration represents the state.[45] Private colleges are free to restrict academic freedom and free speech as they see fit. While private colleges that receive federal funding are required to comply with federal anti-discrimination law, notably Title IX, they are not constrained by the First Amendment from imposing restrictions on speech.

In practice, however, most private schools, advertise themselves as places where students are challenged to think in critical and open-minded ways.[46] Moreover, academic freedom is protected by a range of measures beyond the First Amendment. As the American Association of Univerity Professors (AAUP) has noted, "At private institutions ... the First Amendment does not apply, but professors at many institutions are protected by a tapestry of sources that could include employment contracts, institutional practice, and state court decisions."[47]

The Supreme Court has recognized the special role of the university as it relates to freedom of speech, calling American colleges and universities the "vital centers for the Nation's intellectual life," with the crucial responsibility of preparing the next generation of informed citizens.[48] The concept of academic freedom, and its connection to free expression, was addressed in a landmark 1957 Supreme Court opinion in Sweezy v. New Hampshire, written by Chief Justice Earl Warren, holding that the First Amendment protected a lecturer at the University of New Hampshire from having to answer to the state legislature about allegedly subversive activities on campus:

> The essentiality of freedom in the community of American universities is almost self-evident.... Teachers and students must always remain free to enquire, to study and to evaluate, to gain new maturity and understanding, otherwise our civilization will stagnate and die.[49]

Courts have generally ruled in favor of university professors in challenges to curriculum selection.[50] In Linnemeir v. Board of Trustees of Purdue University, the 7th circuit found in favor of the university faculty in approving a particular senior thesis topic, stating, "Classrooms are not public forums; but the school authorities and the teachers, not the court, decide whether classroom instruction shall include works by blasphemers."[51] This ruling exemplifies the type of deference courts afford faculty on challenges to curriculum selection.[52]

University Speech Codes

Some universities have responded to tensions on campus by adopting speech codes that prohibit forms of hateful or offensive speech.[53] Starting in the 1980s, schools have adopted these codes in an effort to balance the educational value of free speech against the value of providing a safe and supportive community for all students. In recent years, speech codes have been challenged in courts, often successfully, for being vague and overbroad.

Over the past two decades, courts have overturned speech codes at a dozen colleges and universities.[54] In 2008, the 3rd Circuit struck down Temple University's sexual harassment policy that regulated speech.[55] The court stated the school, which is a public university, must show that the speech at issue will cause "actual, material disruption before prohibiting it."[56] In finding Temple's policy facially overbroad, the court concluded, "The policy provides no shelter for core protected speech."[57] The 3rd Circuit's conclusion that the policy did not protect "core protected speech" has been a consistent refrain in the speech code cases.

FIRE reports that, in addition to these court cases, there have been a number settlement agreements reached with schools to amend overly restrictive speech codes.[58] Yet despite their consistent inability to stand up to court challenges, a FIRE study found that almost 50 percent of the 440 colleges and universities they surveyed still maintain "severely restrictive" speech codes.[59] This does not indicate that these speech codes are legal, only that their legality has not been tested in court. FIRE statistics also show that campus speech codes are in retreat, with few universities adopting new codes and some acting to retire existing ones.

Students march for Black Lives Matter in Minneapolis, Minnesota

A CHANGING AMERICA

A Changing Campus

According to a 2014 Pew Research Center examination of census data published in "The Next America: Two Dramas in Slow Motion," the U.S. population in 1960 was 85 percent white; in 2010 it was 64 percent white; and by 2060, if current trends continue, it will be 43 percent white—bringing us to what many have called a "majority minority" America.[60] Pew found that Latinos make up 16 percent of the nation. Black Americans (a term that includes not just African Americans but immigrants from the Caribbean, Africa, and elsewhere in the African diaspora) make up 12 percent. Another 5 percent are Asian. Roughly 13.1 percent of the U.S. population was born outside the United States, and immigrants and their U.S.-born children amount to about a quarter of the U.S. population. Just over half of Americans who are foreign-born, or 52 percent, are from Mexico and elsewhere in Latin America; a quarter—26 percent—are from Asia, especially China and India, and that proportion is rising.[61]

College populations reflect these shifting demographics. According to the National Center for Education Statistics:

> From 1976 to 2013, the percentage of Hispanic students rose from 4 percent to 16 percent, the percentage of Asian/Pacific Islander students rose from 2 percent to 6 percent, the percentage of Black students rose from 10 percent to 15 percent, and the percentage of American Indian/Alaska Native students rose from 0.7 to 0.8 percent. During the same period, the percentage of white students fell from 84 percent to 59 percent.[62]

In recent years, other forms of diversity on campus have also achieved wider recognition and inclusion through legislation, legal rulings, and greater social acceptance. New measures have been taken to examine and foster greater socioeconomic diversity on campuses.[63] The rights of lesbian, gay, bisexual, and transgender (LGBT) students have won increased recognition as part of a society-wide transformation that has led to the legalization of gay marriage, the rapid expansion of LGBT families, and—albeit more slowly—the recognition of the rights of transgender individuals to basic health care and control over how their gender identity is acknowledged and framed. Universities have implemented policies for gender inclusion, including a proliferation of gender-neutral bathrooms.[64] The need for additional steps to realize the rights of disabled students has also received more attention as univeristies implement adaptations that foster inclusion.[65]

These tectonic demographic shifts are remaking American electoral politics, popular culture, consumer habits, and more.[66] So it's no surprise that they have helped propel new demands and debates over how colleges and universities evolve to address them. While many of the debates over campus policies and environments implicate values that transcend gender, race, and other social boundary lines and would be important regardless of shifting campus demographics, these trend lines have accelerated conversations that might otherwise have been deferred or sidestepped.

Colleges and universities have long recognized the imperative not just to diversify student population, but also to make campuses more open and hospitable for students from varied backgrounds, as well as to create curricula and approaches that prepare students for a highly diverse nation and world.[67] Elite schools actively recruit students of color and students from economically disadvantaged backgrounds. Many state schools serve student populations in which large segments are the first generation in their families to be born in the United States, the first generation to go to college, or both.

The adaptations to rising diversity have included changes in university administration, student life, curricula, disciplinary procedures, academic support, faculty recruitment training, and virtually every other facet of university life.[68]

Several recent studies have examined how increasingly diverse university populations regard freedom of speech. No study of these issues is perfect, and valid methodological questions can be raised that suggest that this data should not form the basis of too many firm conclusions.[69] That said, the survey results are interesting. An October 2015 study by McLaughlin Associates conducted for the William F. Buckley program at Yale, based on a September 2015 survey of 800 undergraduates nationally, revealed that 70 percent of students rank free speech at their college or university as "very" important to them personally. Eighty-seven percent say they approve of the job their university is doing in protecting free speech. Seventy percent say they support the university doing more to promote "the diversity of opinions" on campus. Approximately half of those surveyed say that they have had the experience of being "intimidated' when sharing views and opinions that differed from those of their professors or instructors. Sixty-three percent of those surveyed think that "political correctness" on campuses is a problem, whereas just 28 percent do not think so. And yet, in the same survey, 51 percent of students say they support "speech codes" with just 36 percent opposed. Sixty-three percent favor "trigger warnings," with just 23 percent opposed. Just 68 percent are able to identify which of the 27 amendments to the U.S. Constitution is devoted to free speech, and just 52 percent are aware that the First Amendment protects hate speech. Among those surveyed, 72 percent favor disciplinary action for a student or faculty member who "uses language that is considered racist, sexist homophobic or otherwise offensive." Fifty percent of students support (and just 40 percent oppose) colleges banning political cartoons that "would criticize any particular religion, religious figures or ethnic groups."[70]

A second study of college students on free speech, conducted by the Knight Foundation and Washington's Newseum in early 2016, surveyed more than 3,000 students. Seventy-eight percent say they favor an open learning environment that exposes students to all types of speech and viewpoints, including those that may be offensive. Just 22 percent say they favor colleges prohibiting speech that could be offensive or biased against certain groups. Yet 69 percent say colleges should enact policies to restrict slurs and other language that's intentionally offensive to certain groups; 63 percent say that such policies could extend to restricting Halloween costumes based on stereotypes. Yet only 27 percent say that colleges should be able to restrict speech expressing political views that might offend or upset certain groups. Forty-nine percent say that an expectation that the press would be unfair in its reporting is a legitimate reason to deny the media access to a campus protest.[71]

As a leading professor at a major public university put it, his campus, "once again, is at the center of a raging national controversy—this time over the issue of 'multiculturalism' and what its enemies call 'political correctness'—a storm that I believe to be, at bottom, about the shifting sands of racial privilege. It is also about the future of American education: what happens in Berkeley, one of the nation's largest public universities and the bellwether of social change and innovation in academia, will affect all of us."[72] These sentences were written 25 years ago, in 1991, by Berkeley sociology professor Troy Duster. While recent campaigns for inclusion and equality on campus may have some new goals and new language, they form part of a long tradition—dating back to the 1960s, if not before—of students and universities striving to adapt campus culture to better reflect increasingly diverse populations.

Young people arrive at college today from vastly different backgrounds, cultures, and levels of economic and even physical security. Their understanding and expectations of the college experience, of the role of the administration, of the position of faculty, and of the attitudes of fellow students may diverge wildly. When encountering classmates who may seem unfamiliar, some students gravitate toward what they already know. PEN America spoke with Liat Menna, a UCLA student, who articulated this experience:

> You enter campus, and you enter your predetermined communities. You come from your house, and go exactly to that community that's similar to your home. You don't really learn about other communities yet, and you don't learn their issues, and their sensitivities, and their challenges. I think that's really been a reason for a lot of hostility on campus, is that people just don't understand what are triggers for other communities, and what's offensive.[73]

In a piece published on December 12, 2015, *New York Times* columnist Frank Bruni blamed colleges for failing to do more to bridge the divisions that derive from differences of upbringing:

> [E]ven if a school succeeds in using its admissions process to put together a diverse student body, it often fails at the more important goal that this diversity ideally serves: meaningful interactions between people from different backgrounds, with different scars and different ways of looking at the world.[74]

These controversies are intense, hard-fought, and the subject of widespread debate in academic circles and beyond, whether they are construed as a failing of universities to do more to address the needs of their highly diverse populations, as excessive demands on the part of students for a too comfortable campus life, as natural tensions that that are the inevitable result of demographic and social change, or as vital debates that will help the next generation birth a more just society.

Taxonomy of a Controversy: Categories of the Campus Free Speech Debate

Campuses have witnessed a variety of incidents that have given rise to concerns about the climate for free speech on campus. While the incidents that have occurred are too many and diverse to catalog comprehensively, the following section aims to offer an overview of the primary battle lines.

Protests Against Campus Speakers and Honorees

At Smith, after students and faculty protested the work of the International Monetary Fund and the college's choice of its managing director, Christine Lagarde, as commencement speaker, Lagarde pulled out, she said, "to preserve the celebratory spirit of commencement day."[7576] Also facing protests, former secretary of State Condoleeza Rice withdrew her decision to speak at Rutgers's graduation, saying, "Rutgers's invitation to me to speak has become a distraction for the university community at this very special time." Under similar circumstances, [77] former deputy secretary of State Robert Zoellick declined am invitation to speak at Swarthmore, former UC Berkeley chancellor Robert J. Birgeneau at Haverford, and former presidential candidate Ben Carson at Johns Hopkins.[78]

In recent years, on scores of campuses, students—often joined by supportive faculty members—have protested choices of commencement speakers and recipients of honorary degrees, as well as guest speakers at seminars and lectures. Students have demanded that their celebrations not be marred by—and their tuition money not be spent on—speakers who embody ideas or represent institutions the students believed to be odious.

In some cases, universities themselves have responded to protests against invited speakers by withdrawing their invitations. Brandeis withdrew its offer of an honorary degree to author and activist Ayaan Hirsi Ali, who, in advocating for women's and other human rights under Islam, once called the religion "a destructive, nihilistic cult of death."[79] The rescinded invitation came in response to protests involving not only students but also leading national Muslim American organizations that described Hirsi Ali, who is of Muslim heritage, as a "notorious Islamophobe."[80] In the face of the outcry, Brandeis said that it had not properly vetted her writings prior to issuing the invitation and, once it had done so, could not "overlook that certain of her past statements are inconsistent with Brandeis University's core values."[81] Brandeis president Frederick M. Lawrence indicated that she would be "welcome to join us on campus in the future to engage in a dialogue."[82]

Other disinvited speakers included conservative commentator Ann Coulter at Fordham[83] and former secretary of State and current Democratic presidential candidate Hillary Clinton at the College of St. Catherine[84]. Students and faculty have protested the choice of countless other speakers, including activist Angela Davis at Seattle University[85], former congressman for Tom Tancredo at the American University[86], former vice president Dick Cheney at the American University[87], former governor of Massachusetts Mitt Romney at Liberty University[88], New Jersey governor Chris Christie at Rutgers[89], then-secretary of Health and Human Services Kathleen Sebelius at Georgetown[90], former mayor Michael Bloomberg at Harvard,[91] Islamic feminist Asra Nomani at Duke[92], and former NYPD commissioner Ray Kelly at Brown[93].

Campus controversies over speakers reveal complex attitudes about whose ideas should be welcome on campus. To some, the university is a place where all views—even repellent ones—should be heard. For others, it's a home environment for students and should be kept free of voices and messages that elicit feelings of disquiet and offense. In some cases the opportunity to speak reflects the university's tacit approval of the speaker's viewpoint, and those who object believe they have an obligation to protest to counter the perception of campus-wide endorsement. While some controversies end in distinvitations, withdrawals, or even speakers being shouted down, others culminate in polite displays of speech and counterspeech, with everyone having their say.

Racist Historical Figures and the Demand to Replace Names And Symbols

In recent years students, sometimes joined by faculty, on a number of campuses have mounted campaigns to rename or recast buildings, schools, residential colleges, sports teams, and official seals that have troubling historical associations.[94] For instance, at UC Berkeley, students objected to buildings named after Confederate slaveholders and munitions makers. The Daily Californian quoted one leading activist:

> It's a daily reminder that Black students are not respected on campus.... It's hypocritical of UC Berkeley to name a building after Martin Luther King,

and then have buildings named after slave-owning racists and colonizers.[95]

In response to student activists, Amherst College agreed to eschew its unofficial mascot "Lord Jeff," a colonial-era military figure who became the target of protests because he advocated giving Native Americans smallpox-infested blankets to kill them off.[96] In 2016 both Harvard[97] and Yale[98] replaced the title "master," which had been used to refer to heads of residence halls and residential colleges, with, respectively, "faculty dean" and "head of college," dissociating themselves from a term that was once used by slaves to refer to their owners. A committee formed at Harvard Law School voted to replace the school's long-standing seal, which included images from the crest of a slaveholding family.[99] And Georgetown agreed to rename two buildings named for former university presidents who helped arrange to have slaves sold in the 1830s to pay the school's debts.[100] Georgetown recently announced that it will offer admissions preference to the descendents of these slaves.[101]

Yale, on the other hand, stoked outrage among some students with its decision not to rename Calhoun College, named after the prominent slavery advocate John C. Calhoun, saying, "We cannot erase American history."[102] Yale now reports that it has convened a new committe to review that decision again.[103] Princeton seems to have decided once and for all to maintain Woodrow Wilson's name for its school of international affairs and a residential college, despite his support for racial segregation in the federal civil service.[104]

While these protests over names and symbols may not implicate speech, they have become flashpoints in the struggle over how universities adapt to changing student populations and demands. To some observers, they can appear as brazen efforts to redraw the college campus in a politically correct image that is oblivious to—and even rewrites—history and tradition. To others, they are a logical, new front in the drive to eradicate the vestiges of universities' complicity in the troubled racial history of the United States and to create an environment free of discriminatory iconography.

While these protests over names and symbols may not appear to implicate speech, they have become flashpoints in the struggle over how universities adapt to changing student populations and demands.

Censuring Faculty and Administrators for Speech

In the past few years there has been a spate of incidents in which faculty, including some with tenure, have been disciplined and censured as a result of their speech. In most cases, the speech in question is alleged to have been emotionally injurious to students or to have contributed toward a "hostile environment" that deprives students of their right to an equal education. Even in some cases where no dismissal has resulted, the outcry surrounding such acts of speech has been intense enough to cause the faculty member voluntarily to resign. These cases have given rise to a climate of insecurity and recrimination among faculty, some of whom feel that the bounds of permissible speech have been drawn along political lines.

In November 2015, five students in a University of Kansas communications course filed complaints claiming that Assistant Professor Andrea Quenette's use of the word "nigger" when discussing slurs written on the walls of another college campus had contributed to a hostile environment in her classroom.[105] Although Quenette was cleared of a charge of racial discrimination, in May 2016, following widespread calls for her ouster, the university announced that her position would be terminated, declining to comment on the reasons other than to say the decision was unrelated to the complaints regarding race.[106]

In October 2015, Claremont McKenna College Dean of Students Mary Spellman sent an email to a Latina student saying that she, as dean, "would work to serve those who 'don't fit our CMC mold'"—a comment that was interpreted to mean that Latino students do not fit the standard mold of the university population. Widespread protests and calls for Spellman's termination ensued. She apologized but resigned within a month, describing her decision as the "best way to gain closure of a controversy that has divided the student body and disrupted the mission of this fine institution."[107]

In February 2016, conservative students at Georgetown University Law Center said they were "traumatized, hurt, shaken and angry,"[108] after Professor Gary Peller sent out a campus-wide email critical of the legacy of recently deceased Supreme Court justice and Georgetown alumnus Antonin Scalia. Peller's email was an effort to rebut several campus-wide missives extolling Scalia's legacy. Two professors who are considered politically conservative, Randy

Barnett and Nick Rosenkranz, claimed that Peller's email was inimical to the climate for free speech on campus and could intimidate students from citing Scalia's ideas. Writing for *New York* magazine, Jesse Singal observed, "What's fascinating is the way Barnett and Rosenkranz are adopting campus lefty-speak in the service of a conservative argument."[109]

In June 2015, a professor writing pseudonymously under the name "Edward Schlosser" contributed an essay to Vox entitled "I'm a Liberal Professor, and My Liberal Students Terrify Me," suggesting that such incidents have had a widespread chilling effect. His contention was that students' hypersensitivity to language and to personal offense had changed his own and others' approach to teaching and writing:

> I once saw an adjunct not get his contract renewed after students complained that he exposed them to "offensive" texts written by Edward Said and Mark Twain. His response, that the texts were meant to be a little upsetting, only fueled the students' ire and sealed his fate. That was enough to get me to comb through my syllabi and cut out anything I could see upsetting a coddled undergrad, texts ranging from Upton Sinclair to Maureen Tkacik—and I wasn't the only one who made adjustments, either.[110]

In the course of our research, PEN America heard repeatedly that because traditional protections for academic freedom may not cover all categories of speech, and some forms of speech can lead to reprisals, faculty members are taking new precautions in what they teach, write, and say. The chilling effect is not hypothetical; faculty members identify specific courses, books, and topics that they no longer teach, like rape law and classic works including Greek Mythology, out of concern that they may cross the line into speech that is in some way actionable.

Sanctioning the Speech of Students

In October 2015, the student government of Wesleyan University in Connecticut threatened to cut the Wesleyan Argus student newspaper's funding in half after it published a student op-ed criticizing the tactics of the Black Lives Matter movement, and eventually did vote to reduce the paper's work-study stipends and redirect funds to other campus publications deemed to represent more diverse points of view.[111] Argus Editors Courtney Laermer and Jess Zalph wrote in an editorial that the decision to recall funding "is just one in a series of attempts to undermine our independence as a newspaper and to remove financial support, a movement that began early last semester, when the paper published a controversial opinion piece."[112]

In July 2016, after a sniper killed five police officers in Dallas, a University of Houston student government vice president wrote a Facebook post perceived as dismissing the Black Lives Matter movement. Minority student organizations demanded that she be sanctioned. Even after she apologized and met with those groups, the student body president suspended her from service on the governance body for 50 days.[113] FIRE reported that in December 2016, Colorado College suspended and banned student Thaddeus Pryor from campus for nearly two years due to a comment he posted on the anonymous social media application Yik Yak. Pryor had replied anonymously to the hashtag "#blackwomenmatter" on Yik Yak, saying, "They matter, they're just not hot." His comment was found to violate the college's policies on "abusive behavior" and "disruption of college activities" and resulted in his suspension until late August 2017.[114]

While FIRE has reported a plateau or even decline in the adoption of official campus speech codes, student must still be wary of acts of speech that may prompt reprisals.[115] Empowered student bodies, such as governments with the power to make appointments or allocate funds, do not always recognize their obligation to protect free speech and avoid enacting speech-based punishments. When they act in these capacities, students can be de facto arbiters of permissible speech on campus, resulting in chilling effects for fellow students whose ideas may be considered unwelcome. University administrations and student governments have struggled with whether and how to police acts of speech by students that, despite being private and informal, may nonetheless cause offense or even subjective feelings of harassment for other students.

Expanding the List of Unmentionables

Several incidents in recent years have prompted a concern that certain ideas are being systematically driven off campus in an effort to foster greater inclusion. Topics and perspectives that have arguably become all but off-limits on some campuses include politically conservative views, pro-Israel views, anti-Israel views, criticisms of aspects of Islam, critiques of affirmative action, and the questioning of "rape culture," among other topics.

It is fair to acknowledge that there are some categories of thought—white supremacist, eugenics, or fascist ideology, for example—that are broadly considered beyond the pale on U.S. campuses and, according to most people, rightly so. There are also categories of speech—climate change denial, for example—that may still claim a place in mainstream discourse, though many believe it should not. That certain beliefs become widely discredited and take on a kind of ideological pariah status is not new. But there is increasing concern that those categories are expanding, not because the views in question are universally discredited but because they are considered politically unpalatable by vocal minorities or even majorities who, rather than simply disagreeing with the sentiments expressed, seek to deter and punish the expression.

In March 2016 at Emory University, messages supportive of presidential candidate Donald Trump were written in chalk on campus walkways. Protests ensued, including from students who said that the pro-Trump messages made them feel unsafe—or even constituted a direct threat to their safety—due to Trump's views about racial minorities, immigrants, and Muslims.[116] The university administration came out in support of the protesters. In the aftermath, Emory junior Tyler Zelinger wrote:

> The emotional state or political opinions of one individual on campus have been institutionally verified as superior to the political beliefs or emotions of another. This is not inclusion in any sense of the word.... To dismiss political opinion based on one's interpretation of it as offensive or inflammatory, regardless of how justified those interpretations may be, is to make an assumption that is literally unverifiable.... A pro-Trump opinion, by this logic, is not a political one but a racist one.... It is also the belief that I consider to be most dangerous. Like it or not, supporting Trump is a political opinion.... The most powerful weapons against this man will be the rights to political speech and open dialogue.[117]

When Trump's campaign slogan, "Make America Great Again," was posted on the Skidmore College campus, the matter was referred to the college's Bias Response Group, which found that postings in the classrooms of female faculty of color constituted "racialized, targeted attacks."[118] The finding raised questions about whether a student Trump supporter might be considered guilty of a racist attack for hanging a major-party presidential campaign poster in a dorm room shared with other students whose race or ethnicity has been targeted by the Trump campaign.

Journalist Glenn Greenwald and others have argued that criticisms of Israel risk being forced off-limits on certain campuses. In September 2015, Greenwald described what he characterized as a concerted, heavy-handed campaign by the Board of Regents to expunge criticisms of Israel from the campuses of the University of California system through political and financial pressure. He recounts efforts to adopt a system-wide speech code that—"in the name of combating 'anti-Semitism'—would formally ban various forms of Israel criticism and anti-Israel activism." Greenwald argues that the definition of anti-Semitism that the Board of Regents had mooted was overly broad, encompassing virtually any critiques of Israel, its government, or its policies.[119] In the end the board voted against a blanket censure of anti-Zionism.[120] In February 2016, Greenwald and reporter Andrew Fishman described a "nationwide censorship effort [that] has seen pro-Palestinian professors fired, anti-occupation student activists suspended and threatened with expulsion, pro-Palestinian groups de-funded, and even discipline for students for the 'crime' of flying a Palestinian flag."[121]

Efforts to exclude speech based on viewpoints have occurred on all sides of the Israel-Palestine issue. Conor Friedersdorf reported on a 2016 incident in which Gail Hamner, a Syracuse University professor, disinvited filmmaker and NYU scholar Shimon Dotan from a conference on religion and film. He had been invited by a conference organizer based at another university to screen a film on Israeli settlers in the West Bank at the conference to take place at Syracuse. Hamner wrote to Dotan withdrawing the invitation and saying that she had been "warned" that "that the BDS faction on campus will make matters very unpleasant for you and for me if you come." She described herself as "caught in an ideological matrix and by my own egoic needs to sustain certain institutional affiliations." With the revocation being based not on Hamner's own views or assessment of the film (which she admitted to never having seen), Freidersdorf judged that "the decision was made in a strikingly anti-intellectual manner, with Syracuse colleagues speculating that other members of their community would persecute them *merely for inviting a filmmaker to show his work*." Friedersdorf further notes an irony that the result of disinviting Dotan was a missed opportunity to screen a film that portrays Israeli settlers in a highly critical light, a fact that was lost in the reflexive fear about screening any film by an Israeli director dealing with a sensitive subject.[122]

Trump and Israel are not the only taboo subjects on some campuses. "Rape culture," for example, is a term that, according to Women Against Violence Against Women, was "coined by feminists in the United States in the 1970's" to "show the ways in which society blamed victims of sexual assault and normalized male sexual violence." On some campuses, scholars and speakers who question or deny the existence of rape culture have stirred so much opprobrium that their perspective has become taboo. When Wendy McElroy, a scholar at the Independent Institute who is critical of the concept of rape culture, was scheduled to take part in a debate at Brown, her impending presence sparked an uproar. McElroy was scheduled to debate author Jessica Valenti, whose writing has substantiated the existence of a rape culture. Rather than simply let the debate play out, Brown's president, Christina Paxson, sent a campus-wide email rebutting McElroy's views[123] and scheduled a program entitled "The Research on Rape Culture" at the same time as the McElroy-Valenti debate.[124] The campus group that had organized the original debate wrote that "it is an unsettling precedent for our president to use her position to decide what counts as acceptable discourse."[125]

THE NEW LANGUAGE OF HARM

Microaggressions, Trigger Warnings, Safe Spaces

The schoolyard retort to offensive speech was "sticks and stones may break my bones, but words will never hurt me." No longer. In an age when online and offline bullying, racist demagoguery, and social media trolling are daily topics of conversation, there is little doubt that words can do harm. But the extent of this harm and what to do about it are subjects of intense debate. As the nation's diversity has increased, activists have advanced new language and concepts to discuss new speech-based frictions on campus and press for their redress. Several relatively new terms and concepts—including microaggressions, trigger warnings, and safe spaces—have come to the forefront of campus controversies. Critics have argued that student campaigns for greater recognition of these concepts are misguided, inimical to the role of the university, and at odds with the principles of liberalism and openness. Other scholars and student groups, while recognizing that any term can be misused, have articulated the value of these notions and contended that they are not inherently contrary to free speech norms. These concepts cut across multiple categories of speech-related controversies on campus, in some cases generating conflicts in and of themselves.

The Debate Over Microaggressions

"Microaggressions" is a term coined in 1970 by research psychologist Chester A. Pierce to describe "relatively innocuous" jabs (i.e., not as obvious as violence, overt segregation, or denial of voting rights) that, over time, have a harmful cumulative effect of what he described as "unimaginable magnitude."[126] In 2007, research psychologist Derald Wing Sue and his coauthors published a widely cited article about the term, defining it as follows:

> Microaggressions are the brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial, gender, sexual-orientation, and religious slights and insults to the target person or group.[127]

In a December 2011 interview, Sue described typical examples of microaggressions, like the woman who clutches her purse extra tight when riding in an elevator with a black man or a tone-deaf inquiry into an Asian American's ethnic origin.[128] As *The New York Times* noted in a March 2014 article:

> This is not exactly the language of traditional racism, but in an avalanche of blogs, student discourse, campus theater and academic papers, they all reflect the murky terrain of the social justice word du jour—microaggressions—used to describe the subtle ways that racial, ethnic, gender and other stereotypes can play out painfully in an increasingly diverse culture.[129]

In recent years, a number of universities, including the University of California system[130] and Clark University,[131] have released official guidances on microaggressions, often including lists of examples[132] that they encourage faculty, staff, and students to avoid. Some commentators see a suppression of free speech. In a June 2015 Daily Beast article titled "The University of California's Insane Speech Police," Robby Soave argues:

> [W]hen university administrators make preventing offense the paramount goal—and automatically apply the terms "racist" and "sexist" to perfectly mild forms of speech—free speech enthusiasts have every reason to worry. That's because a distressingly high number of universities are perfectly willing to resort to abject censorship to protect the delicate feelings of the easily offended, even though the First Amendment expressly prohibits them from doing so."[133]

The Case For Recognizing Microaggressions: Harms Are Genuine and Must Be Addressed

While many observers have pointed out problems with the concept of microaggressions, academics have studied their effects for years. Their research substantiates the long-term harm that can result to even from seemingly minor and inadvertent slurs.[134]

Writing on the harmful effects of microaggressions, UCLA professor Daniel Solorzano maintains that that the "micro" in microaggressions does not signify the small magnitude of aggression but the fact that it happens in the quotidian lives and practices of individuals.[135]

In a 2012 American Psychological Assocation article titled "Travyon, Troy, Sean: When Racial Biases and Microaggressions Kill," John Jay College of Criminal Justice psychology professor Kevin Nadal presents years of clinical research on the physical effects of microaggressions among people of color, including immediate distress or anxiety, depression, general feelings of hopelessness, low self-esteem, negative affect, physical pain, and/or fatigue.[136] Other researchers have found evidence that such encounters can negatively impact school and test performance.[137]

When PEN America spoke with Jerry Kang, a UCLA

Political graffiti on campus

law professor and vice chancellor for equity, diversity, and inclusion, he said that the cumulative effect of these subtle dismissals was important to bring to the surface:

> Words actually do matter, and anyone who suggests words don't matter hasn't studied history, psychology, propaganda, media.... Regardless of an author's intent, words could have consequences in all kinds of ways, especially when they echo and repeat. They can create an environment that make you feel different, or out of place, and they can undermine an equal learning environment. If there's any real value to the microaggressions discussion, it is to point out that words can matter in ways that you might not realize, and you should just understand the consequences of your actions.[138]

Kang writes an occasional online column about diversity in which he has addressed the harms related to unequal learning environments, which can come from microaggressions, implicit biases, and stereotype threats:

> Did you know there's a phenomenon called "stereotype threat" that can actually inhibit students' performance when negative stereotypes about them are in the air? Did you know that when Native American students are exposed to Indian "mascots" such as Chief Wahoo or Pocahantas, they report less self-esteem and "fewer achievement-related possible selves"? Did you know that most Americans implicitly associate Asians with "foreign," and that such associations predict the likelihood of giving national security jobs to Asians?[139]

Advocates of increased attention to learning environments maintain that such harms necessitate concerted action to address them. Because microaggressions are widely used, sometimes unknowingly, these advocates believe it is appropriate for the university to assume the responsibility of pointing them out and discouraging them in order to foster a more welcoming and inclusive environment.

Focus on Microaggressions Is Misplaced: Amounts to Pernicious Policing of Speech

In June 2015, UCLA law professor Eugene Volokh argued in *The Washington Post* that the University of California's long list of microaggressions (including "America is the land of opportunity"; "Everyone can succeed in this society, if they work hard enough"; and "Affirmative action is racist") wasn't merely about potential offense:

> It's about suppressing particular viewpoints. And what's tenure for, if not to resist these attempts to

> stop the expression of unpopular views? But I'm afraid that many faculty members who aren't yet tenured, perhaps even quite a few tenured faculty members as well, will get the message that certain viewpoints are best not expressed when you're working for UC, whether in the classroom, in casual discussions, in scholarship, in op-eds, on blogs, or elsewhere.... A serious blow to academic freedom and to freedom of discourse more generally, courtesy of the University of California administration.[140]

Social psychologist Jonathan Haidt wrote on his blog about a new sociology paper suggesting that the concept of microaggressions grew out of a new "victimhood culture," in which being oppressed raises one's moral status.[141] This leads to a tendency to exaggerate outrage at small offenses, calling on a third party to intervene, while simultaneously reinforcing an identity centered on an individual's status as damaged, weak, and aggrieved. Citing Bradley Campbell and Jason Manning's article "Microaggressions and Moral Cultures," [142] Haidt wrote:

> The key idea is that the new moral culture of victimhood fosters "moral dependence" and an atrophying of the ability to handle small interpersonal matters on one's own. At the same time that it weakens individuals, it creates a society of constant and intense moral conflict as people compete for status as victims or as defenders of victims.[143]

Haidt and Greg Lukianoff argue that the unwarranted attention on microaggressions exacerbates political divisions between students:

> The recent collegiate trend of uncovering allegedly racist, sexist, classist, or otherwise discriminatory microaggressions doesn't *incidentally* teach students to focus on small or accidental slights. Its *purpose* is to get students to focus on them and then relabel the people who have made such remarks as aggressors.[144]

In a similar vein, Conor Friedensdorf posted at *The Atlantic*, "Why Critics of the 'Microaggressions' Framework Are Skeptical," arguing not only that it was inaccurate and misleading to term minor unintentional slights as "aggressions" but also that such an intolerant approach was likely to increase conflict:

> Aggression is "hostility" or "violent behavior" or "the forceful pursuit of one's interests." If there's going to be a term for behavior that is burdensome partly because the often well-intentioned people who do it are blind to its wrongness and cumulative effect, baking "aggression" into that term is hugely confusing. What's more, the confusion seems likely to needlessly increase the tension between the person experiencing the grievance and the person who is ostensibly responsible.[145]

Critics of the concept of microaggressions worry that a focus on these slights can lead to intrusive and chilling policing of campus speech and that it encourages victims of slights to focus unduly on even the most minor harms.

He added that the term itself was confrontational and therefore potentially counterproductive: "When a person is engaged in objectionable behavior, publicly shaming rather than engaging them causes them to become defensive or hostile in turn."[146]

Critics of the concept of microaggressions worry that a focus on these slights can lead to intrusive and chilling policing of campus speech and that it encourages victims of slights to focus unduly on even the most minor harms. They also believe that this focus unproductively sows conflict between people who may not be remotely at odds but accidentally stumble into language that causes offense, then triggering a stronger-than-warranted reaction born of a commitment not to tolerate microaggressions.

The Debate Over Trigger Warnings

Trigger warnings provide advance notice that a class discussion or curricular material will address subjects that may be traumatizing for some students. The concern about trigger warnings is primarily that the demand for their use may inhibit or deter some professors from addressing complex or fraught subjects, especially those involving terms or ideas that could conceivably be construed as verbal harassment of Title IX. There are also concerns that such warnings induce students to look

upon controversial or provocative material as potentially trauma-inducing, distorting how they respond to it. Others, however, see the warnings as conducive to a comfortable classroom environment and of a piece with other kinds of content labels that have long been taken for granted, such as movie ratings.

Trigger warnings are defined by the Oxford Dictionaries this way: "A statement at the start of a piece of writing, video, etc., alerting the reader or viewer to the fact that it contains potentially distressing material (often used to introduce a description of such content): *Trigger warning: sexual assault discussed very bluntly*."[147]

In a comprehensive December 2015 report titled "What's All This About Trigger Warnings?" the National Coalition Against Censorship[148] defined them as follows:

> For purposes of the survey, trigger warnings were defined as "written warnings to alert students in advance that material assigned in a course might be upsetting or offensive. Originally intended to warn students about graphic descriptions of sexual assault that it was thought might trigger post-traumatic stress disorder (PTSD) in some students, more recently trigger warnings have come to encompass materials touching on a wide range of potentially sensitive subjects, including race, sexual orientation, disability, colonialism, torture, and other topics. In many cases, the request for trigger warnings comes from students themselves."[149]

For Trigger Warnings: Foster Greater Ease in Learning and Support for Students Who Have Undergone Trauma

Faculty and student proponents proffer various rationales for trigger warnings. As journalist Katie Rose Guest Pryal explained in Women in Higher Education in March 2013, such warnings are seen as a way to help students who have suffered traumatic experiences avoid some of the reactions documented in the medical diagnoses of posttraumatic stress disorder (PTSD).[150] The growing awareness of trigger warnings could arise from the increased social knowledge and acceptance of PTSD as a legitimate mental disorder.[151] In the context of the classroom, according to pryal, warning students who have survived rape that a book may contain a vivid discussion of sexual assault is aimed to avoid a situation wherein the student encounters such disturbing material unprepared, and may be forced to relive some of the past trauma she endured.

Other students, writers, and professors argue that the warnings are merely a matter of thoughtfulness and consideration for the diversity of students and their experiences.[152] They enable students to prepare to encounter troubling material and ease their participation in course work and class discussion, proponents argue.[153] Kathryn Pogin, a Northwestern graduate student, told PEN America that she finds value in the concept in that it makes all students aware of the possibility that someone in their midst may have endured the experience under discussion, so that they can speak with care.[154]

Cornell University assistant professor Kate Manne:

> Trigger warnings are nothing new. The practice originated in Internet communities, primarily for the benefit of people with post-traumatic stress disorder. The idea was to flag content that depicted or discussed common causes of trauma, like military combat, child abuse, incest and sexual violence. People could then choose whether or not to engage with this material.
>
> But trigger warnings have been adapted to serve a subtly different purpose within universities. Increasingly, professors like me simply give students notice in their syllabuses, or before certain reading assignments. The point is not to enable—let alone encourage—students to skip these readings or our subsequent class discussion (both of which are mandatory in my courses, absent a formal exemption). Rather, it is to allow those who are sensitive to these subjects to prepare themselves for reading about them, and better manage their reactions. The evidence suggests that at least some of the students in any given class of mine are likely to have suffered some sort of trauma, whether from sexual assault or another type of abuse or violence. So I think the benefits of trigger warnings can be significant.... It's not about coddling anyone. It's about enabling everyone's rational engagement.[155]

In February 2014, the University of California at Santa Barbara student government passed a resolution asking for trigger warnings on syllabi.[156] According to a piece in *The New York Times* by the resolution's sponsor, Bailey Loverin, then a second-year student, the request was aimed to yield warnings that would alert anyone who has had such traumatic experiences as molestation, sexual assault, family violence, suicide, or war so that they could "be prepared to face uncomfortable material and could better contribute to the discussions or opt to avoid them."[157]

In May 2015, the Organization of American Historians published a roundtable that asked history professors to discuss how best to teach about violent and troubling events. Angus Johnston, adjunct assistant professor at Hostos Community College, CUNY, wrote:

> We have a responsibility to take reasonable steps to ensure that students don't experience trauma in the classroom, and we can do that in a variety of ways. Among them are these: We shouldn't goad students gratuitously or capriciously. Shock for shock's sake is rarely pedagogically useful, and can alienate students in ways we don't intend. We should also give students notice if we know that

> upcoming material may be emotionally or psychologically challenging. And we should be alert to students' personal responses to material presented in class and be ready to engage with such responses where appropriate.[158]

In the same roundtable, writer and historian Jacqui Shine commented:

> I don't think that trigger warnings have ever been a controversial subject of discussion among academics. I don't think historians have a responsibility to "protect" anyone from even the most difficult truths of the past. I do think that we have an obligation to grapple with them and to teach and talk about them. Quite separately, we also have an obligation, not to keep our classrooms "safe," but, at minimum, to consider the conditions under which we ask students to think and learn and to consider how we ourselves create those conditions.... Students live full lives outside of our classrooms, ones that sometimes include personal trauma. I think what some students are asking for here is a fuller consideration of that one fact.[159]

Erik Baker, a Northwestern student activist who graduated in 2016, believes that trigger warnings can foster, rather than deter, student engagement with difficult material:

> [T]he psychological phenomenon of shutting down or disengaging is something that is really underestimated by a lot of critics of trigger warnings. Regardless of whether or not you slap a trigger warning on a book that's in the curriculum, if someone's a survivor, and there's a book about rape, there's a decent chance they're not going to read the book. That was just as true today as it was 25, 40, however many years ago.

Proponents of trigger warnings believe that they foster not just a more comfortable classroom environment but a more constructive one. They believe that by offering signposts for challenging material to come, faculty can signal respect to affected students, encourage other students to likewise be mindful of others' sensitivities, and ensure that students are prepared to confront material that may be difficult for them. Where faculty members do not see fit to adopt trigger warnings of their own accord, some advocates would situate this responsibility with the university.

Against Trigger Warnings: Challenging Material Is What College Is All About; It Needs No Special Label

The push for trigger warning on campus has provoked a torrent of critical comment. In May 2014, cultural commentator Kathleen Geier wrote in The Baffler that trigger warnings are antithetical to the university's core educational mission of preparing students for the intellectual rigors of the outside world, where challenging ideas and differences of opinion must be tolerated and respected:

> Particularly in an academic context, there's something infantilizing and inherently anti-intellectual about flagging every potentially disturbing work with a trigger warning. The trigger warning is an engraved invitation to opt out of a challenging intellectual experience. To the extent trigger warnings proliferate, they encourage habits of mind that are not conducive to intellectual inquiry.[160]

Along similar lines, writer Jenny Jarvie wrote in a in a March 2014 article in The New Republic called "Trigger Happy" that "[t]he trigger warning signals not only the growing precautionary approach to words and ideas in the university, but a wider cultural hypersensitivity to harm and a paranoia about giving offense.[161]

In August 2014, the American Association of University of Professors (AAUP) issued a report, "On Trigger Warnings," opposing them on the grounds that they harm both academic freedom and the intellectual engagement necessary for education:

> [E]ven voluntary use of trigger warnings included on syllabi may be counterproductive to the educational experience. Such trigger warnings conflate the exceptional individual experience of trauma with the anticipation of trauma for an entire group, and assume that individuals will respond negatively to certain content. A trigger warning might lead a student to simply not read an assignment or it might elicit a response from students they otherwise would not have had, focusing them on one aspect of a text and thus precluding other reactions.
>
> Some discomfort is inevitable in classrooms if the goal is to expose students to new ideas, have them question beliefs they have taken for granted, grapple with ethical problems they have never considered, and, more generally, expand their horizons so as to become informed and responsible democratic citizens. Trigger warnings suggest that classrooms should offer protection and comfort rather than an intellectually challenging education. They reduce students to vulnerable victims rather than full participants in the intellectual process of education. The effect is to stifle thought on the part of both teachers and students who fear to raise questions that might make others "uncomfortable."[162]

Haidt and Lukianoff warned that trigger warnings offered precisely the wrong solution to the problem of trauma,

since some psychologists have written that desensitization—engaging with rather than avoiding the stimulus that reminds the trauma sufferer of the original event—is healthier and more likely to foster recovery in the long term:

> [T]he very idea of helping people with anxiety disorders avoid the things they fear is misguided. Students who call for trigger warnings may be correct that some of their peers are harboring memories of trauma that could be reactivated by course readings. But they are wrong to try to prevent such reactivations. Students with PTSD should of course get treatment, but they should not try to avoid normal life, with its many opportunities for habituation. Classroom discussions are safe places to be exposed to incidental reminders of trauma.... And they'd better get their habituation done in college, because the world beyond college will be far less willing to accommodate requests for trigger warnings and opt-outs.
>
> The expansive use of trigger warnings may also foster unhealthy mental habits in the vastly larger group of students who do not suffer from PTSD or other anxiety disorders. People acquire their fears not just from their own past experiences, but from social learning as well. If everyone around you acts as though something is dangerous—certain neighborhoods, novels depicting racism—then you are at risk of acquiring that fear too.[163]

Others point out that while trigger warnings may be problematic, they don't merit alarm because they're not widely used. The December 2015 report by the National Coalition Against Censorship (NCAC) was subtitled, "The emerging campus free speech problem might not be all that it seems. It could be worse."[164] The NCAC received survey responses from more than 800 members of the Modern Language Association and the College Art Association. Many faculty were concerned about the possibility that some requests for trigger warnings were cloaked requests to avoid controversial material and could chill intellectual engagement. But the NCAC found that fewer than 1 percent of respondents said their home institutions had a policy on trigger warnings, 7.5 percent reported that students had requested such a policy, and 15 percent reported individual requests for warnings.[165] While 62 percent of respondents said they thought trigger warnings had or would have a negative affect on academic freedom, more than half said that they had voluntarily provided less formal "warnings about course content."[166] The survey revealed widespread agreement that the decision of whether or not to use warnings should be the exclusive prerogative of individual instructors and not influenced by department heads, deans, or administrators. Pressure from administrators was of particular concern to non-tenured and contingent faculty.

Opponents of trigger warnings see them as a dangerous step along the slippery slope of warnings, red flags, and prohibitions that will circumscribe the subject matter taught in college classrooms. They question the social science rationale for trigger warnings, arguing that they will lead students to avoid rather than engage with material that may echo their own traumas, deferring recovery. They are concerned that trigger warnings prejudge how students may react to course material, depriving the class of the chance for authentic and unfiltered responses.

The Debate Over Safe Spaces

At schools across the country, including Oberlin, UCLA, NYU, and UC Berkeley,[167] students have demanded designated "space spaces" such as dedicated dorm floors or student centers devoted to the interests of, for instance, students of African descent, where those in the minority can gather with the expectation of being temporarily in the majority, among others with similar experiences or points of view.[168] While there is little debate that universities bear an absolute responsibility to keep their campuses physically safe, when it comes to psychological and emotional safety the questions become more fraught. This is particularly in instances when dangers to physical and emotional safety for vulnerable students overlap.[169]

The Oxford Dictionary defines a safe space as: "A place or environment in which a person or category of people can feel confident that they will not be exposed to discrimination, criticism, harassment, or any other emotional or physical harm: *Women's refuges provided a safe space for victims of domestic violence*."[170]

Discussing the rape culture debate at Brown, which led the university's president to help arrange an alternative gathering in an adjacent room, Judith Shulevitz described the designated safe space: "The room was equipped with cookies, coloring books, bubbles, Play-Doh," and other accoutrements of childhood, offering those attending the debate a retreat for when they got too distressed to keep listening.[171]

During the fall of 2015, University of Missouri students of color and their allies held a series of protests against racial discrimination on campus. One of the organizers, graduate student Jonathan Butler, launched a hunger strike demanding that the university president resign. In solidarity, the university's varsity football team refused to play. Within days the president and chancellor had resigned. The protesters who had been camping out on the university quadrangle celebrated and pushed away a student journalist who was trying to photograph their gathering, saying that their outdoor convening was a "safe space," and that they wanted to be free from journalistic scrutiny.[172]

The concept of a safe space is not always limited to a specific site, moment, or group; its sometimes encompasses the entire campus. At Yale, as discussed in the case

study included in this report, administrators and faculty were challenged by students for failing to make particular residential colleges, and perhaps event the campus as a whole, a safe space.[173]

Eitan Peled, a UCLA student whom PEN America interviewed, demonstrates the amorphous and sometimes elusive meaning of safety implied by the concept of safe spaces. When asked what it means to "be safe," he replied:

> It means a lot of things. It means knowing that I can walk around during the day or at night freely from point A to point B. Being able to express myself as I wish on campus, speak my mind, write my mind. Wear what I want to wear.... So it's a spafe space where I can do that. Go home at night, close the door behind me, feel safe at home. I mean , there's a lot of different places.

For Safe Spaces: Students Need Places to Retreat and Be Free From Offense

Safe spaces have their influential defenders. Stanford University comparative literature professor David Palumbo-Liu argued in Buzzfeed that federal law mandates that the campus be a safe place when it comes to racism and other forms of denigration:

> Much of the talk about safe spaces amounts to justifiable demands for true, unhampered access to education. Here, "safe" means you do not have to negotiate racist slurs, denigrating behavior, and administrations that give lip service to both diversity and antiracism. And this kind of safety is promised to students by Title VI of the Civil Rights Act of 1964, which is enforced by the Department of Education and bans racial discrimination at institutions that receive federal financial assistance.[174]

Roxane Gay, a writer and associate professor of English at Purdue, wrote in *The New York Times*:

> Safe spaces allow people to feel welcome without being unsafe because of the identities they inhabit. A safe space is a haven from the harsh realities people face in their everyday lives.... Those who mock the idea of safe space are most likely the same people who are able to take safety for granted. That's what makes discussions of safety and safe spaces so difficult. We are also talking about privilege. As with everything else in life, there is no equality when it comes to safety.
>
> While no one is guaranteed absolute safety, and everyone knows suffering, there are dangers members of certain populations will never know.... Those who take safety for granted disparage safety because it is, like so many other rights, one that has always been inalienable to them. They wrongly assume we all enjoy such luxury and are blindly seeking something even more extravagant. They assume that we should simply accept hate without wanting something better. They cannot see that what we seek is sanctuary. We want to breathe.[175]

In January 2016, Morton Schapiro, president of Northwestern, published an article in *The Washington Post* titled "I'm Northwestern's President. Here's Why Safe Spaces Are Important," which argued that safe spaces mean nothing more than the right to eat together at lunch or have a cultural center where a group can relax among others with similar interests, experiences, and backgrounds. He told an anecdote about a proposal to relocate the university's multicultural affairs office in the Black House, a black student center, which elicited powerful opposition:

> One black alumna from the 1980s said that she and her peers had fought to keep a house of their own on campus.... [S]he said, we should put that office elsewhere, leaving a small house with a proud history as a safe space exclusively for blacks.
>
> A recent white graduate agreed. She argued that everyone needed a safe space and that for her, as a Jew, it had been the Hillel house. She knew that when she was there, she could relax and not worry about being interrogated by non-Jews about Israeli politics or other concerns. So why is the Black House an issue in the eyes of some alumni who write saying that we should integrate all of our students into a single community rather than isolate them into groups? I have never gotten a single note questioning the presence of Hillel, of our Catholic Center or any of the other safe spaces on campus.[176]

Yale College dean Jonathan Holloway feels that the concept of safe spaces has been badly misinterpreted, as he explained in an interview with Time magazine in December 2015:

> Students calling for a safe space are not saying they want their classroom to be a safe space. They know the class is going to be a place to push and be pushed, where unusual or different ideas are going to be put out there and they have to wrestle with them. What the students are talking about when they say they want a safe space is, "I would like to be able to come back to my college if I forgot my ID, and somebody is going to let me in because they recognize me, instead of being that black kid at the

> gate who can't get in because he's forgotten his ID." They just want to be students. The safe space issue has really been bent beyond recognition from the way I understand it.[177]

Defenders of safe spaces believe that subjecting students to offenses based on their identity undercuts their ability to participate fully and confidently in campus life, depriving them of their right to educational equality. In addition to emotional and psychological safety, safe spaces can provide physical safety for minority groups, like the LGBT community, who statistically face more discrimination than their heterosexual peers. Some argue that aspersions cast on the need for safe spaces come disproportionately from those whose status, race, ethnicity, or sexual orientation renders them inherently better protected than others.

Against Safe Spaces: Assured Emotional Safety on Campus Is Inimical to Intellectual Openness

In a high-profile guesture that quickly became a rallying cry for those who believe that student activists have gone too far, University of Chicago Dean of Students John Ellison sent a strongly worded letter in August 2016 to all incoming members of the class of 2020 before they arrived on campus. The letter was an unequivocal defense of free speech and a reaction to the new language of harm: "Our commitment to academic freedom means that we do not … condone the creation of intellectual "safe spaces" where individuals can retreat from ideas and perspectives at odds with their own."[178]

Writer Mark Hemingway, in his Eugene C. Pulliam lecture at Hillsdale College on March 17, 2016, argued that safe spaces jeopardize free speech, and the riskiest kind of speech—speaking truth to power—has nothing to do with safety:

> It is emphatically not true that the right to free speech depends on whether you are in a "safe space," a concept college kids like to talk about but doesn't really exist. Rather, the entire notion of America stands or falls on the assertion that our absolute right to free speech predates and stands apart from any authority that threatens it.
>
> History is full of heroes and martyrs who can testify to that. Were he alive, Patrick Henry would no doubt inform [UC Berkeley] Chancellor Dirks that "Give me liberty insofar as we feel safe and respected asking for it!" doesn't quite have the same ring to it.[179]

Judith Shulevitz points out that certain safe spaces on campus have historically been useful to activists working to build movements and plot campaigns—for example, the feminist consciousness raising circles of the 1960s. But the concept as applied on campus today has mushroomed to impinge on open discourse. She wrote:

> Now students worry whether acts of speech or pieces of writing may put them in emotional peril.... But while keeping college-level discussions "safe" may feel good to the hypersensitive, it's bad for them and for everyone else. People ought to go to college to sharpen their wits and broaden their field of vision. Shield them from unfamiliar ideas, and they'll never learn the discipline of seeing the world as other people see it. They'll be unprepared for the social and intellectual headwinds that will hit them as soon as they step off the campuses whose climates they have so carefully controlled. What will they do when they hear opinions they've learned to shrink from? If they want to change the world, how will they learn to persuade people to join them?[180]

Writing in an August 2016 piece called "The Fine Line Between Safe Space and Segregation," Atlantic senior associate editor Emily Deruy noted that safe spaces can lead groups of students to reject encounters with those with different views and backgrounds: "While many see the creation of safe spaces for black students, LGBT students, and other minorities as a positive step toward helping them navigate campus, others see it as re-segregation and a step backward."[181]

Opponents of safe spaces worry that these enclaves are inimical to open intellectual exchange, create cocooned settings inhabited by the likeminded, and will impair students' preparation for the world. They argue that student who inhabit safe spaces will be impoverished in terms of their intellectual experience on campus and dependent on environments that do not test their ideas or force them to hone their beliefs based on rigorous interchange.

ENFORCING TITLE IX

Sexual Harassment and Free Speech

Some of the most controversial incidents on American campuses have arisen in the context of Title IX, the landmark federal civil rights law prohibiting gender and sexual discrimination in American education.[182] The enactment of Title IX, signed into law by President Nixon in 1972, marked the culmination of years of concerted campaigning by women's rights advocates to address pervasive discrimination against women in hiring and employment practices at universities as well as to require equality in scholarships, financial aid, and other policies.[183] The statute reads:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance.[184]

For several decades after its passage, the primary impact of Title IX was seen in the requirement that universities expend equivalent resources on men's and women's sports, inaugurating a dramatic expansion in the athletic opportunities available to collegiate women.[185] While public universities were immediately subject to Title IX, numerous regulations and court rulings were required to clarify precisely what the law required at private universities.[186] In 1987 Congress passed the Civil Rights Restoration Act, which specified that universities that receive any federal funds, including money for student financial aid, must comply with civil rights laws in all areas, not just in the particular program or activity that received federal funding. The 1987 law extended the reach of Title IX to encompass virtually all U.S. universities, public and private.[187]

Title IX and Sexual Harassment

Investigations into alleged violations of Title IX are carried out by the U.S. Department of Education's Office of Civil Rights (OCR).[188] Since the 1990s, Title IX has become a powerful instrument to address sexual harassment and violence on campus. The justification for addressing harassment under this law is that "sexual harassment of students, including sexual violence, interferes with students' right to receive an education free from discrimination and, in the case of sexual violence, is a crime."[189]

Since its passage in 1972, the scope of Title IX has expanded significantly as a result of judicial and administrative interpretation. A series of Supreme Court precedents have extended it to cover sexual harassment perpetrated by students on other students if the harassment is serious enough and if it creates a "hostile environment" for students.[190] To ensure compliance with the law's complex requirements, OCR has issued several "Dear Colleague" letters—administrative guidelines—and distributed them to nearly all universities.[191]

The stakes for universities are high. Those that fall under the cloud of a Title IX investigation may face unwanted media scrutiny and reputational damage, not to mention fines and penalties. By June 2016, the OCR was pursuing about 300 active investigations into complaints of sexual violence or harassment against about 200 universities.[192] While no institutions have actually lost federal funding for non-compliance, those facing investigations and lawsuits have had to expend millions of dollars for litigation and attorney's fees.[193]

The 2011 Dear Colleague Letter

Many commentators trace the recent spike in campus speech controversies involving sexual harassment to the OCR's April 2011 "Dear Colleague" letter, which significantly altered the way institutions of higher education are required to evaluate and respond to student charges.

Across the country, students had mobilized to protest the failure of their universities to adequately protect victims of sexual harassment and assault. Surveys showing disturbingly high levels of sexual abuse throughout public and private universities received widespread media coverage, sparking a national debate over physical safety on college campuses.[194] The numbers were and are alarming:

> In a 2009 study, 19 percent of undergraduate women reported that they had been sexually assaulted or had experienced an attempted sexual assault while they were students. Another study found that nearly 14% of undergraduate women had been sexually assaulted at least once during their time in college.[195]

The 2011 Dear Colleague letter highlighted these statistics on the first page:

> The statistics on sexual violence are both deeply troubling and a call to action for the nation. A report prepared for the National Institute of Justice found that about 1 in 5 women are victims of completed or attempted sexual assault while in college. The report also found that approximately 6.1 percent of males were victims of completed or attempted sexual assault during college.... The Department is deeply concerned about this problem and is committed to ensuring that all students feel safe in their school, so that they have the opportunity to benefit fully from the school's programs and activities.[196]

The 2011 letter established new guidelines for university

compliance, broadening the definition of sexual harassment to encompass not only offensive conduct but also offensive speech "of a sexual nature" that creates a "hostile environment" for education.[197] This conflation of conduct and speech lies at the root of recent Title IX controversies.

The guidelines also stressed schools' obligation to be proactive: "In addition to ensuring full compliance with Title IX, schools should take proactive measures to prevent sexual harassment and violence. OCR recommends that all schools implement preventive education programs and make victim resources, including comprehensive victim services, available."[198] The OCR also required offending institutions to take immediate remedial steps once a hostile environment was found to exist:

> If a school determines that sexual harassment that creates a hostile environment has occurred, it must take immediate action to eliminate the hostile environment, prevent its recurrence, and address its effects. In addition to counseling or taking disciplinary action against the harasser, effective corrective action may require remedies for the complainant, as well as changes to the school's overall services or policies.[199]

The 2011 Dear Colleague letter further stated that students should be encouraged to report sexual harassment to authorities as soon as the unwelcome sexual conduct takes place, even if it does not create a hostile environment, in the hope that it can be nipped in the bud.[200] The OCR has since elaborated on the broadened definition of harassment set out in the 2011 letter. In a 2013 resolution decision reached with the University of Montana in Missoula, OCR clarified that "sexual harassment is unwelcome conduct of a sexual nature" and found fault with Montana's written policy for "improperly suggest[ing] that the conduct does not constitute sexual harassment unless it is objectively offensive." [201]

AAUP Report on Title IX

In June 2016, the American Association of University Professors presented a report outlining its free speech concerns with Title IX called "The History, Uses and Abuses of Title IX."[202] The authors of the report and many of those who have voiced support for it underscore that they recognize the vital importance of Title IX writ large, and also specifically as an enforcement mechanism to combat sexual harassment. Their quarrel is with the specific interpretation set out in 2011, which can turn lawful and protected speech into grounds for legal complaints, lengthy investrigations, and even punitive sanctions. While offering strong support for the imperative of ending sexual discrimination in American education, the AAUP report catalogs a long list of faculty complaints with Title IX, citing several high-profile campus incidents in which faculty members were disciplined or fired by their universities for speech that was determined to create a hostile environment.[203]

Echoing the concerns of free speech advocates, the AAUP report highlighted the problem of conflating speech and conduct:

> The OCR's separation of sexual harassment from hostile environment creates a seemingly limitless definition of harassment that encompasses any "unwelcome conduct" (including speech).... The collapse of the distinction between speech and conduct is glaring. We are not free speech absolutists. We are saying that the danger of saying that all forms of speech are potentially sexual harassment is that it violates academic freedom, because there is no investigation into what is appropriately regulated speech and what is not. The line between discomfort and harassment has been blurred.[204]

Several of the co-authors of the AAUP report interviewed by PEN America are prominent and accomplished academics who have played leading roles in advancing women's rights, including through Title IX, over many years. Historian Joan Wallach Scott, professor emerita at the Institute for Advanced Study, told PEN that recent changes have gone too far, creating warped incentives and distracting from the core purpose of Title IX. She contended that administrators—in their anxiety to avoid the bad publicity and potential economic penalties of being investigated by OCR, let alone found in violation—have mistakenly come to treat verbal disputes involving personal pain and discomfort as actionable harassment. Scott further noted that administrators were handing down excessive penalties to those found to violate the overbroad definition of sexual harassment, a classic case of chilling speech through administrative overreach based on vaguely defined legal standards. Scott termed this response a "sex panic." Faculty now worry that oversensitive students could charge them with creating a hostile environment by, say, asking disquieting questions about the limits of consent during a discussion of rape law. Scott said that some faculty members have changed their syllabi to ensure that students won't encounter ideas that could elicit such harassment claims.[205]

The AAUP report described a reinforcing cycle of chilled speech: Administrators are incentivized by their fear of OCR scrutiny to overreact to student concerns over offensive speech, and faculty are incentivized to keep quiet on controversial topics that might enmesh them in an official inquiry with inadequate due process protections and dangerous career consequences. It described a "sharp increase in the number and scope of OCR's investigations and findings that universities have violated Title IX ... a frenzy of cases in which administrators' apparent fears of

being targeted by OCR have overridden faculty academic freedom and student free speech rights."[206]

The conclusions of the AAUP report were damning:

> As currently interpreted, sexual harassment consists not only of sexual misconduct but also of speech that creates a "hostile environment." When speech and conduct are conflated, however, the constitutional and academic freedom protections normally afforded speech are endangered. We do not argue that speech can never create a hostile environment nor that all speech is protected, only that matters of speech are difficult to negotiate and always require attention to First Amendment guarantees and to considerations of academic freedom. We do argue that questions of free speech and academic freedom have been ignored in recent positions taken by the Office for Civil Rights (OCR) of the Department of Education, which is charged with implementing the law, and by college and university administrators who are expected to oversee compliance measures.[207]

Tenured Professors Fired

Many commentators say that the most chilling cases of campus speech involve discipline taken against tenured professors for speech on campus. Journalist Michelle Goldberg reported in an article titled "This Professor Was Fired for Saying 'Fuck No' in Class"[208] that Louisiana State University had fired a tenured professor because the language she used in class was sexually inflected enough to create a hostile environment:

> On June 19, Teresa Buchanan, a tenured associate professor of education at Louisiana State University, was fired from the school where she'd taught for twenty years for using off-color language. Her alleged offenses included saying, in class, "fuck no" and making a joke about sex declining in long-term relationships, as well as using the word "pussy" in an off-campus conversation with a teacher....
>
> A faculty committee determined that there was no evidence that her words were "systematically directed at any individual." Nevertheless, the committee said her language created a "hostile learning environment" that constituted sexual harassment. It recommended that she be censured and nothing more, concluding: "The stress already inflicted on Dr. Buchanan by the ... hearing process itself is seen as an adequate punishment, given the nature and apparent infrequency of the noted behaviors." The administration rejected that and decided to go further, dismissing her.[209]

Buchanan sued, as The Chronicle of Higher Education reported.[210] Her lawsuit asserted that Louisiana State based its decision to fire her on an overly expansive definition of sexual harassment shaped by federal guidance that oversteps the law. Citing the university's own policies, Buchanan's complaint says, "No suggestion has ever been made that Professor Buchanan engaged in any kind of 'physical behavior of a sexual nature,' 'quid pro quo harassment,' or 'sexual discrimination' of any kind." Instead, it says, "the purported violations of LSU policies were based entirely on occasional comments that some later claimed offended them."[211]

Goldberg documented another instance of Title IX overreach, in which tenured sociology professor Patti Adler was forced to stop teaching at University of Colorado at Boulder. Students of her class on deviance in American society reported feeling uncomfortable after witnessing "a skit, in which teaching assistants, former students and friends collaborate on scripts about various figures in the prostitution world, then act them out in front of the class."[212] Her role-playing exercise was reviewed by the university's Office of Discrimination and Harassment, which found it to be a "risk" to the university in that it could potentially form the basis for a complaint of harassment under Title IX. Provost Russell Moore wrote a campus-wide email about the case, saying: "Academic freedom does not allow faculty members to violate the University's sexual harassment policy by creating a hostile environment for their teaching assistants, or for their students attending the class."[213]

Risa Lieberwitz, a co-author of the AAUP report, feels that these cases have created "a high fear environment" among her colleagues and notes the "irony that feminist women are the targets of these publicized cases, partly because they teach uncomfortable topics like sexual deviance."[214]

Against: Overbroad Definition of Harassment Chills Speech, Hampers Teaching and Impairs Campus Environment

The expansion of Title IX's definition of harassment at the expense of academic freedom has been widely criticized by a growing chorus of free speech advocates—not only on campus but across the country. These critics maintain that the combination of OCR interpretations that allow speech to be construed as conduct; that recognize harms from subjectively offensive speech; and that require conduct to be reported and investigated even when it does not rise to the level of creating a hostile environment can and has led to a broad chilling of academic speech. There are concerns that, absent reform, current applications of these Title IX provisions incentivize teaching and learning in the lowest emotional registers, avoiding texts or themes that provoke, challenge, or test boundaries. The problem is compounded, in the view of critics, by OCR's failure to acknowledge, or even mention, the critical role that free speech plays in the educational mission of universities.

Prior guidance from OCR did make reference to the importance of upholding academic freedom and free speech in the course of Title IX enforcement.[215]

As the Foundation for Individual Rights in Education put it:

> With regard to freedom of expression, the April 4 letter fails to explicitly acknowledge that colleges owe free speech rights to their students. It also fails to recognize the fact that truly harassing conduct (as defined by the law) is distinct from protected speech.... The reason this lack of clarity is so important (and so disappointing) is that many colleges already enforce vague and overly broad sexual harassment policies, and often confuse speech protected by the First Amendment with speech or conduct that is actually punishable as harassment. With its lack of guidance on this issue, OCR's April 4 letter compounds these problems.[216]

The National Coalition Against Censorship agrees that the 2011 Dear Colleague letter has resulted in actions by university administrators that impinge upon free expression. On June 11, 2015, its executive director, Joan Bertin, submitted comments to the U.S. House Judicary Committee, writing:

> In our view, in an otherwise laudable effort to eliminate discrimination in education, OCR has adopted an expansive and vague definition of harassment that encompasses speech that is clearly protected under the First Amendment. Given its enforcement powers, and the threat of charges, investigations, and possible disciplinary action, this effort to prevent discrimination has reached well beyond what the enabling statutes—as interpreted by the Supreme Court—envisioned and has instead created a climate of fear on college and university campuses that not only threatens free speech and academic freedom but also undermines the educational environment and the cause of equality. [217]

Commentators have serious concerns that the recent OCR interpretations of Title IX have had a broad and damaging impact not just on the intellectual climate on campuses but also on scholarly and social interactions among students, and between students and faculty. High-profile stories about professors being disciplined and dismissed as a result of errant speech subjectively considered offensive has put faculty on notice that even a fleeting slip-up could prompt an investigation with draconian consequences.[218] Critics argue that an environment where students have become highly sensitized to offense, faculty are on guard lest they trigger complaints, administrations are averse to risk and fearful of liability, and the OCR stands ready to investigate any complaint of sexually tinged speech in the classroom may itself amount to harassment.[219]

Contingent and non-tenured faculty are particularly exposed. Scott, an author of the AAUP report, told PEN America:

> Untenured professors and the adjuncts who are on year-to-year contracts, the contingent faculty, are the most vulnerable. They don't even have to be told why they're not being renewed. AAUP's argument is that tenure is the best protection, but it hasn't protected cases from coming up. Laura Kipnis, Patti Adler, and Teresa Buchanan all had tenure. We quote a couple of deans in the report who say: When it's tenure versus OCR, OCR will win. OCR trumps tenure protections every time.[220]

Former ACLU president Nadine Strossen, in a 2015 lecture at the Shorenstein Center on Media, Politics and Public Policy, emphasized the extent of the pressure that OCR investigations place on all schools, even those with financial means to pay potential penalties:

> By threatening to pull federal funds, the OCR has forced schools, even well-endowed schools such as Harvard, to adopt sexual misconduct policies that violate many civil liberties.... In short, campuses are pressured to punish as harassment any expression with any sexual content that anyone subjectively finds offensive, no matter how unreasonably or irrationally."[221]

Strossen summarized the case against Title IX overreach by citing a string of high-profile examples involving the discipline of faculty where, in her view, universities have trampled on free speech:

> The Naval War College placed a professor on administrative leave and demanded he apologize because, during a lecture that critically described Machiavelli's views about leadership, he paraphrased Machiavelli's comments about raping the goddess Fortuna.
>
> The University of Denver suspended a tenured professor and found him guilty of sexual harassment for teaching about sexual topics in a graduate-level course in the course unit entitled "Drugs and Sin in American Life from Masturbation and Prostitution to Alcohol and Drugs."
>
> A sociology professor at Appalachian State University was suspended because she showed a documentary film that critically examined the adult film industry.
>
> A sociology professor at the University of Colorado

was forced to retire early because of a class in her course on deviance in which volunteer student assistants played roles in a scripted skit about prostitution.

A professor of English and film studies at San Bernardino Valley College was punished for requiring his class to write essays defining pornography. Yes, that was just defining it, not even defending it.[222]

For: Title IX's Current Approach to Harassment and Speech as an Essential Tool to Combat Rampant Rates of Harassment

The Department of Education's approach to speech and harassment has its defenders. Advocates for aggressive enforcement of Title IX point to the shocking prevalence of sexual violence and discrimination on campus to justify the need for intense vigilance against even early manifestations of conduct that could evolve into harassment. A public white paper issued by prominent law professors and scholars in support of the OCR's recent actions began by noting that "three decades of research showing epidemic levels of sexual harassment at colleges and universities"[223] is sufficient to validate robust enforcement, arguing that: "If the 2011 DCL came as a surprise to any school it could only have been because that school had not been paying attention either to what OCR had been regulating as sexual harassment or to what was happening on its own campus."[224]

The white paper described the long-term harms suffered by survivors of sexual violence and harassment—especially those re-victimized by schools failing to provide them with proper support and access to justice:

> Evidence shows that many victims are at serious risk of experiencing a downward spiral of damaging health, educational and economic effects.... The cost that school cultures of masculine sexual aggression and entitlement impose on women, girls and gender minorities compel action, and we applaud the OCR for taking such action. Indeed, as an Office *for Civil Rights*, OCR must act to redress injuries that such a culture disproportionately inflicts on certain groups of students based on gender and various intersectional, multidimensional identities (emphasis in original).[225]

A number of prominent feminist university professors have also challenged the AAUP report's assessment that Title IX investigations jeopardize free speech. Faculty Against Rape, an ad hoc association with more than 300 professors and civil rights activists, released a public letter criticizing the AAUP report for factual and legal errors and disputing its central contention that the OCR is conflating protected speech and sexual harassment:

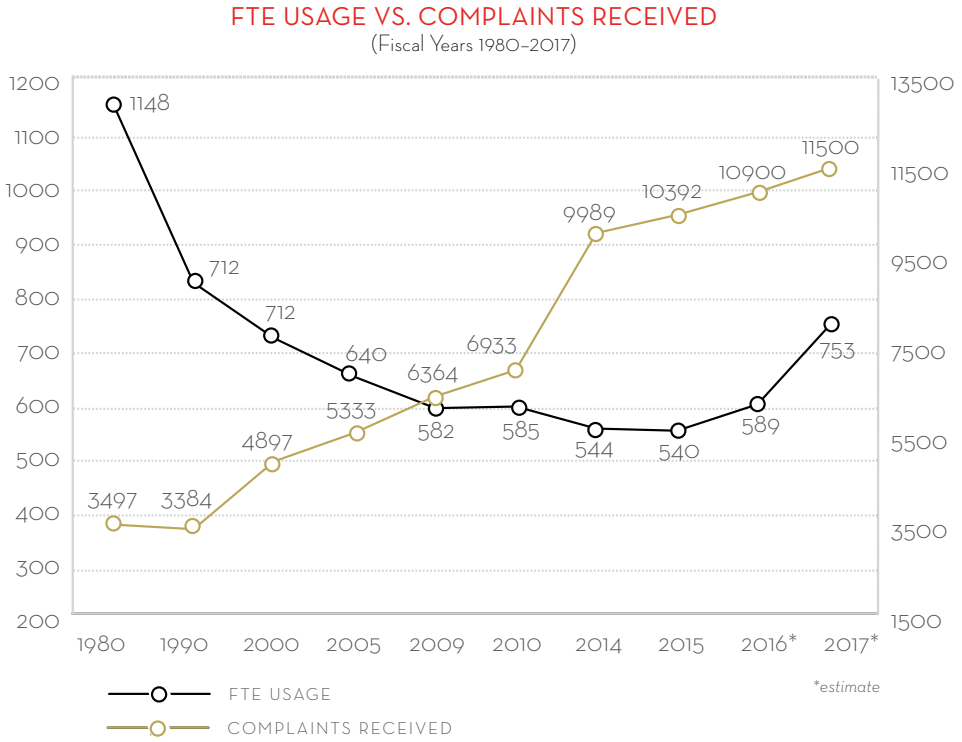
> We believe that the AAUP's claim that the OCR's 2011 DCL "conflates conduct and speech" is a misinterpretation. The 2011 DCL never uses the word "speech" and only uses the word "verbal" in connection with "conduct of a sexual nature." AAUP also claims that it refers to a speech-based hostile environment when it does not. However, it makes us wonder if the authors of the report think that evaluations of alleged sexual harassment should never consider the verbal component of conduct, in the interest of protecting free speech and academic freedom. That would obviously be a very problematic stance. Not all forms of speech conduct are protected in this way under the law.[226]

If the 2011 DCL came as a surprise to any school it could only have been because that school had not been paying attention either to what OCR had been regulating as sexual harassment or to what was happening on its own campus.

The letter also pointed out a serious concern relating to free expression that was not addressed in the AAUP report, namely high rates of retaliation against those who report instances of campus rape and assault, detering those who fear a loss of job security or other benefits from speaking out. Campuses concerned about legal liability and public reputations can discourage reporting as well.[227]

The OCR directly addressed, and dismissed, the criticism that its enforcement policies infringed on academic freedom and speech. In an April 2014 "Frequently Asked Questions" document relating to sexual violence, it wrote:

> When a school works to prevent and redress discrimination, it must respect the free-speech rights of students, faculty, and other speakers. Title IX protects students from sex discrimination; it does not regulate the content of speech. OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a hostile environment under Title IX."[228]



Comparing the decline in "full time employees" (FTE) at the Office of Civil Rights with the rise in Title IX complaints since 1980.

In the view of Title IX defenders, rather than being guilty of administrative overreach and the chilling of speech, the OCR is simply fulfilling its statutory mandate. The National Women's Law Center has complained that the OCR "is facing unwarranted criticism for doing its job" to redress the disturbing prevalence of sex-based discrimination on campuses and urged "the Department to continue helping schools understand their legal obligations."[229]

To make matters worse, these critics point out that OCR's budget has been slashed in half since 1980 while student complaints have tripled.[230] This has created a large backlog of cases and heightened the imperative of transferring the onus of policing harassment from the OCR to the universities themselves, as well as the need to emphasize prevention. The OCR sets a goal to complete cases within 180 days, but in 2014 the average time to resolve a complaint was 1,469 days, up from 379 days in 2009.[231] As the white paper points out:

> OCR is not initiating these complaints—victims are. At times, critics of the 2011 DCL seem to suggest that OCR has created a problem that schools must then solve, but the but the problem originates at the schools themselves. The problems is the thousands of students who are assaulted and harassed each year, and who feel re-victimized by their institutions' handling of their complaints, and who then, logically, ask the office charged with ensuring equal educational opportunity to help them and students like them to find redress.[232]

In fact, some advocates call for OCR to expand rather than limit its mandate, arguing that the severity and pervasiveness of harassment, particularly in light of new social media platforms, warrant broad and aggressive measures that should not be forestalled by concerns over free speech.[233] An October 20 letter sent by more than 50 women's rights, gay rights, and other civil rights groups to then-secretary of Education Arne Duncan and his deputy for civil rights complained that "many schools have shirked these legal obligations by citing vague First Amendment concerns."[234] The letter urged measures to intensify the application of Title IX, particularly to target social media sites such as Yik Yak that allow users to post anonymously. The letter stated that these applications were being used to:

> harass, threaten, and attack their peers while hiding behind a perceived shield of anonymity. So far, academic institutions have not adequately responded to this new phenomenon, essentially allowing students to engage in sex- and race-based harassment that would otherwise be prohibited by Title IX and Title VI.[235]

SPEECH IN A STRAITJACKET

Concerns for Expression on Campus

The dozens of incidents described above and countless others on campuses nationally have spurred a raft of writings, speeches, and commentaries outlining a series of critiques of the current intellectual and social climate on American college campuses. The major categories of concern can be summed up as follows.

Liberalism Under Attack

A number of commentators have sounded the alarm that freedom of thought is being policed with dictatorial determination and that conformity of ideas is replacing the liberal principle of open intellectual inquiry that is at the core of the role of the university. They cite dangers to the intellectual climate on campus, to the principles being instilled in the next generation of graduates and to the values that animate American polity writ large.

Washington Post columnist Catherine Rampell wrote in October 2015 in response to the Wesleyan student newspaper controversy:

> Crippling the delivery of unpopular views is a terrible lesson to send to impressionable minds and future leaders, at Wesleyan and elsewhere. It teaches students that dissent will be punished, that rather than pipe up they should nod along. It also teaches them they might be too fragile to tolerate words that make them uncomfortable; rather than rebut, they should instead shut down, defund, shred, disinvite.[236]

Writing in *New York* magazine, Jonathan Chait articulated these risks, and the risks that political correctness poses to democracy, in an article entitled "Can We Start Taking Political Correctness Seriously Now?":

> The reason every Marxist government in the history of the world turned massively repressive is not because they all had the misfortune of being hijacked by murderous thugs. It's that the ideology itself prioritizes class justice over individual rights and makes no allowance for legitimate disagreement....
>
> American political correctness has obviously never perpetrated the brutality of a communist government, but it has also never acquired the powers that come with full control of the machinery of the state. The continuous stream of small-scale outrages it generates is a testament to an illiberalism that runs deep down to its core...
>
> The scene in Columbia [Missouri] and the recent scene in New Haven share a similar structure: jeering student mobs expressing incredulity at the idea of political democracy. As far as the students are concerned, they represent the cause of anti-racism, a fact that renders the need for debate irrelevant.... They are carrying out the ideals of a movement that regards the delegitimization of dissent as a first-order goal.[237]

Writing for *the Atlantic*, writer and social critic Caitlin Flanagan discerned notes of Stalinism in the campus conflicts, writing that while mainstream comedians have become leery of campus gigs for fear of triggering a politically correct backlash against their jokes, the moral authority is being ceded to those who invoke free speech to protect bigotry:

> O, Utopia. Why must your sweet governance always turn so quickly from the Edenic to the Stalinist? The college revolutions of the 1960s—the ones that gave rise to the social-justice warriors of today's campuses—were fueled by free speech. But once you've won a culture war, free speech is a nuisance, and "eliminating" language becomes a necessity....
>
> Meanwhile—as obvious reaction to all of this—frat boys and other campus punksters regularly flout the thought police by staging events along elaborately racist themes, events that, while patently vile, are beginning to constitute the free-speech movement of our time.[238]

Atlantic staff writer Conor Friedersdorf wrote in November 2015 about what he called the "new intolerance" on campuses.[239] He called activists at Yale "bullies" for their angry response to assistant house master Erika Christakis's email questioning a campus directive on avoiding offense in Halloween costumes. To Friedersdorf her email was "a model of relevant, thoughtful, civil engagement":

> Hundreds of Yale students are attacking them, some with hateful insults, shouted epithets, and a campaign of public shaming. In doing so, they have shown an illiberal streak that flows from flaws in their well-intentioned ideology....
>
> Their mindset is anti-diversity, anti-pluralism, and anti-tolerance, a seeming data-point in favor of April Kelly-Woessner's provocative argument that "young people today are less politically tolerant than their parents' generation."[240]

Even some who are sympathetic to the demands of student protesters have questioned certain of their tactics. In a January 14, 2016 essay in The *New York Review of*

Books, "The Trouble at Yale," Georgetown Law Professor David Cole wrote:

> The emergence of a nationwide movement for racial justice, in which students have been inspired to voice their grievances and challenge the status quo, is a welcome change from the much-bemoaned apathy of previous generations. But … the students have sometimes sought to suppress or compel the expressions of others, a fundamentally illiberal tactic that is almost certain to backfire, and that risks substituting symbol for substance in the struggle for justice.[241]

A number of commentators have sounded the alarm that freedom of thought is being policed with dictatorial determination.

Fostering a Culture of Victimhood

A series of articles published between 2014 and 2016 shared the view articulated perhaps most vividly by Scott Greer of The Daily Caller who, in November 2015, wrote that students were "whiny babies" attempting to stay within a cocoon of protection from any possible offense.[242] By talking about their feeling "unsafe" because of offensive speech, he argued, students have not only lost perspective but are conflating emotional distress with actual physical harm, retreating from vigorous engagement with differing and even objectionable ideas, and nurturing a self-fulfilling pathology within themselves.[243]

Among the most prominent exponents of this point of view are Greg Lukianoff and his coauthor psychologist and New York University business professor Jonathan Haidt in their widely discussed September 2015 Atlantic cover story, "The Coddling of the American Mind."[244] The pair argued that this hypersensitivity and self-protectiveness are crippling both students' mental health and their ability to learn:

> What exactly are students learning when they spend four years or more in a community that polices unintentional slights, places warning labels on works of classic literature, and in many other ways conveys the sense that words can be forms of violence that require strict control by campus authorities, who are expected to act as both protectors and prosecutors?
>
> … It prepares them poorly for professional life, which often demands intellectual engagement with people and ideas one might find uncongenial or wrong. The harm may be more immediate, too. A campus culture devoted to policing speech and punishing speakers is likely to engender patterns of thought that are surprisingly similar to those long identified by cognitive behavioral therapists as causes of depression and anxiety. The new protectiveness may be teaching students to think pathologically…
>
> The recent collegiate trend of uncovering allegedly racist, sexist, classist, or otherwise discriminatory microaggressions doesn't *incidentally* teach students to focus on small or accidental slights. Its *purpose* is to get students to focus on them and then relabel the people who have made such remarks as aggressors…[245]

In August 2014, the AAUP 's Committee A on Academic Freedom and Tenure issued a report on trigger warnings that said:

> The presumption that students need to be protected rather than challenged in a classroom is at once infantilizing and anti-intellectual. It makes comfort a higher priority than intellectual engagement…
>
> Some discomfort is inevitable in classrooms if the goal is to expose students to new ideas, have them question beliefs they have taken for granted, grapple with ethical problems they have never considered, and, more generally, expand their horizons so as to become informed and responsible democratic citizens. Trigger warnings suggest that classrooms should offer protection and comfort rather than an intellectually challenging education. They reduce students to vulnerable victims rather than full participants in the intellectual process of education. The effect is to stifle thought on the part of both teachers and students who fear to raise questions that might make others "uncomfortable."[246]

In June 2016 in *the New York Times*, columnist Frank Bruni quoted Nate Kreuter, an assistant professor of English at Western Carolina University, as saying:

> '[W]e've contributed to the weakening of student resilience, because we're so willing to meet their needs that they never have to suffer. That makes them incredibly vulnerable when things go wrong, as they invariably do.' He was speaking

> in the context of sharp upticks at many colleges in the number of students reporting anxiety and depression and turning to campus mental health clinics for help.[247]

In May 2014, cultural commentator Kathleen Geier wrote in The Baffler specifically about trigger warnings:

> But, particularly in an academic context, there's something infantilizing and inherently anti-intellectual about flagging every potentially disturbing work with a trigger warning. The trigger warning is an engraved invitation to opt out of a challenging intellectual experience. To the extent trigger warnings proliferate, they encourage habits of mind that are not conducive to intellectual inquiry.[248]

Some argue that the emphasis on students as vulnerable victims is exiling certain difficult subjects from campus conversations and curricula. Harvard University law professor Jeannie Suk Gersen wrote in *The New Yorker* that students seemed increasingly anxious about classroom discussion, particularly about sexual violence. She bemoaned the fact that this anxiety was chilling the teaching of rape law, which feminists had fought so hard to add to the curriculum:

> [Student women's organizations] also ask criminal-law teachers to warn their classes that the rape-law unit might "trigger" traumatic memories. Individual students often ask teachers not to include the law of rape on exams for fear that the material would cause them to perform less well. One teacher I know was recently asked by a student not to use the word "violate" in class—as in "Does this conduct violate the law?"—because the word was triggering. Some students have even suggested that rape law should not be taught because of its potential to cause distress.[249]

These commentators worry that current campaigns and concepts risk turning the university from an intellectual breeding ground to a psychological nurturing ground. They are concerned that overemphasis on vulnerabilities may exacerbate rather than ameliorate student anxieties.

Denying Agency to Students

Some critics are concerned that the top-down solutions sought by students—campus-wide policies, administrative interventions, disciplining of those responsible for errant speech—cedes too much power to university administrators, depriving the students of the ability to shape their own communities and denying them of a sense of agency required to solve one's own problems. They worry that by favoring solutions that center on official intervention to enforce social norms or change attitudes, students are ceding power and giving in to centralization and even authoritarianism.

In a November 2015 article in *The Atlantic*, Conor Friedersdorf urged students to understand—and universities to teach—that students possess far greater power and authority than they may recognize or claim:

> [These ideas] ought to be disputed rather than indulged for the sake of these students, who need someone to teach them how empowered they are by virtue of their mere enrollment; that no one is capable of invalidating their existence, full stop; that their worth is inherent, not contingent; that everyone is offended by things around them; that they are capable of tremendous resilience; and that most possess it now despite the disempowering ideology foisted on them by well-intentioned, wrongheaded ideologues encouraging them to imagine that they are not privileged.[250]

In his Novemmber 2015 artitle in Tablet Magazine, "Person Up, Yale," Yale graduate and adjunct professor Mark Oppenheimer describes students who "have elected to suspend their adulthood, to put it in escrow for four years, and to willingly bow before the judgment of their elders."[251] He suggests that students have been overly focused on seeking solutions from administrators, rather than taking matters into their own hands: "If ending racism (or racist Halloween costumes) is your goal, it will actually *work better* to shame students who wear such costumes than to ask committees to send annual emails... I would beg these students—my students—to look at us, their teachers and administrators, and ask themselves: Do you really want more of us? More control, more intrusion, more say-so?"[252]

Writing in December, 2014 in Inside Higher Ed, former Barnard College President Judith Shapiro notes "a tendency toward what we might see as self-infantilization on the part of students, who are now in the habit of seeking formal institutional support and approval for the kinds of activities they used to be capable of managing themselves."[253]

The American Enterprise Institute points out that this emphasis on top-down solutions could have concrete financial costs for students. They have argued that he big winners in the current bout of campus protests will be administrators who will be able to justify adding multiple non-faculty positions to university rosters in order to deal with student demands, passing on the costs to students in the form of higher tuition and fees.[254]

Poor Preparation for Adult Life

Numerous analysts and commentators have voiced concern that the current controversies will result in a generation of students who lack resilience and are poorly prepared to navigate the personal and professional dimensions of adult life. These issues are compounded by what some see as the problem of upper middle class "helicopter

parents" who hover over their children's every move, certain commentators worry that this trend unhelpfully prolongs childhood and adolescence, delaying the time at which young adults are ready to handle themselves in the world. Lukianoff and Haidt ask: "What are we doing to our students if we encourage them to develop extra-thin skin just before they leave the cocoon of adult protection?"[255]

In *Newsweek*, writer and journalist Nina Burleigh suggested universities were at risk of sending their students off into the world woefully under-prepared:

> Graduates of the Class of 2016 are leaving behind campuses that have become petri dishes of extreme political correctness and heading out into a world without trigger warnings, safe spaces and free speech zones, with no rules forbidding offensive verbal conduct or microaggressions, and where the names of cruel, rapacious capitalists are embossed in brass and granite on buildings across the land. Baby seals during the Canadian hunting season may have a better chance of survival.[256]

The Universe of Acceptable Speech on Campus Is Shrinking

Some commentators are concerned that the net effect of protests, online outcry and even pointed forms of counter-speech is to relegate certain legitimate viewpoints, attitudes and ideas to the outer margins of campus life. The fear is that such an approach can shut down inquiry, deter dissent, and reify orthodoxies that do not deserve to be above question. The concern is that ideological fervor, rather than forceful reasoning, is what has drawn these new and narrow boundaries of permissible speech.

In July 2015, writing for *Newsweek* about efforts in the United Kingdom to expunge radical extremism from university campuses, Thomas Scotto decried efforts to delimit the acceptable bounds of speech, arguing that free speech rights exist to safeguard precisely that speech that may be most vulnerable to censure:

> The right to free speech exists precisely to protect whatever speech the majority finds abhorrent and so is inclined to censor. Many of the ideas that led to substantial moral progress in history emerged out of viewpoints that swam against the currents of public opinion. And as John Stuart Mill famously noted, even odious ideas can lead to progress, as we sharpen our understanding of the truth by observing its "collision with error" in public debate.[257]

Jeffrey Aaron Snyder of Carleton College writing for Inside Higher Ed, notes some of the topics and views that students may hesitate to voice. Students, he writes, are:

> understandably reluctant to have frank conversations—in classrooms and in proverbial late-night bull sessions—about questions that might veer into controversial territory. Questions like: Is sexual orientation hard-wired or a personal choice? How do you tell the difference between cultural mixture and cultural appropriation? And is the Black Lives Matter movement achieving its objectives?

Snyder goes on to argue that by declaring some arguments functionally off-limits on campus, the quality of intellectual discourse writ large will be compromised:

> If colleges and universities shrink from engaging with materials students find too sensitive, controversial or offensive, the growth of their critical thinking skills will be severely stunted. We already have a tendency to misrepresent ideas that we disagree with. And that's when we actually expose ourselves to them. Only 16 percent of college students say Americans do a good job at "seeking out and listening to differing viewpoints from their own." A "just say no" approach to "objectionable" materials will turn us into intellectual sloths. Without the stimulation to interrogate our basic assumptions or to consider alternatives to our preferred explanations, our own ideas will devolve into pathetic caricatures. If you are in favor of affirmative action, for instance, how sophisticated can your position really be if you refuse to engage with the claims and evidence advanced by its critics?[258]

Writing for the Williams Record in early 2016 Williams College Art History Professor Michael Lewis decries what he calls a "blacklist" of speakers blocked from airing their views on campus. He offers a personal cautionary tale about the risks of declaring certain opinions and perspectives—or even political candidates—out of bounds. He recounts being in college during the administration of Jimmy Carter, during which time:

> I never heard the slightest suggestion that mighty shifts in American public opinion were underway that would lead to the Ronald Reagan landslide of 1980. My professors probably were unaware of their omission. But by being unable to give students a fair and well-informed summary of the basic tenets of the Reagan platform, other than a mocking caricature of it, Haverford failed in its duty to prepare its students for American life.[259]

Free speech advocates argue that the exclusion of certain ideas and perspectives from campus discourse not only violates principles of free expression, but also impoverishes the university intellectual environment in ways that can cause lasting damage to students and to public discourse.

MORE SPEECH, BETTER SPEECH

Pushing Campus Expression Forward

Student protesters, supportive faculty members and some outside observers and administrators have pointed to a range of ways in which current student protests and debates are propelling greater awareness of social justice concerns on campus and promoting a more inclusive and equal campus environment. While some supporters of current campaigns may acknowledge certain instances of overreach that could impinge upon speech, these risks are judged less significant than the positive effects of a student body that is mobilized to address persistent forms of racism, sexism and other forms of injustice on campus. In fact, some argue that students are forging new dynamics in academia, that rather than curbing speech they are creating new arenas for free discourse; that the hysteria over trigger warnings and the ilk is at best misplaced and at worst elitist. These interpretations include the following lines of reasoning:

Students' Demands Foster a Fuller Realization of the Liberal Values that Universities Espouse

Some students believe that a gap exists between their university's articulated ideals and the experience on campus, a gulf that misleads students and betrays supposed core values. In a speech written by a group of students and delivered at a November 2015 protest by students of color on the Cornell University campus, Noelani Gabriel, '16 appealed to the vision of the university's founder:

> If this institution truly expects to uphold the values of Ezra Cornell's utopian institution on a hill, it will realize that 'any student, any study' should not be an empty quip, but a promise of a full, wholehearted, and steadfast commitment to ensure that every student in every school and college has the resources, the love, and the support to survive and thrive the rigors of our institution and the trials and triumphs of life.[260]

Then Yale senior Aaron Z. Lewis wrote of the fall 2015 campus controversies in Medium, saying

> The protests are not really about Halloween costumes or a frat party. They're about a mismatch between the Yale we find in admissions brochures and the Yale we experience every day. They're about real experiences with racism on this campus that have gone unacknowledged for far too long. The university sells itself as a welcoming and inclusive place for people of all backgrounds. Unfortunately, it often isn't.[261]

In "The Big Uneasy," a May 30, 2016 article in *The New Yorker*, staff writer Nathan Heller concluded that while certain specific student demands, including for more culturally authentic ethnic food choices in the cafeteria, may come off as petty, the student protests on campus could be seen as an effort to hold the college to its ideals:

> I began to wonder whether they were noticing an ideological incongruity some older people weren't. A school like Oberlin, which prides itself on being the first to have regularly admitted women and black students, explicitly values diversity. But it's also supposed to lift students out of their circumstances, diminishing difference...
>
> "This is the generation of kids that grew up being told that the nation was basically over race," Renee Romano, a professor of history at Oberlin, says. When they were eleven or twelve, Barack Obama was elected President, and people hailed this as a national-historic moment that changed everything. "That's the bill of goods they've been sold," Romano explains. "And, as they get older, they go, 'This is crap! It's not true!' " They saw the deaths of Michael Brown, Eric Garner, Tamir Rice. And, at schools like Oberlin, they noticed that the warm abstractions of liberalism weren't connecting with the way things operated on the ground...
>
> The kids in college now could be called the Firebrand Generation. They are adept and accomplished, but many feel betrayed by their supposed political guardians, and aspire to tear down the web of deceptions from the inside.[262]

In a dialogue with three college presidents published in the *Huffington Post* in Davidson College President Carol Quillen said of student protesters: "I don't think they're saying 'fix my problem' or 'my feelings are hurt, you need to tell the person to say sorry' ... I think they're saying 'you make claims about what you believe in and we would like you to live in a way that reflects your values. That's what you ask us to do.'"[263] "That's fair enough," Quillen concluded.[264]

Tackling the Unfinished Business of Civil Rights

Writing for *Slate* in November 2015, Harvard Law Professor Tomiko Brown-Nagin commented that an incident of vandalism of portraits of African-American professors at the law school did not trouble her. She came of age in the 1970s South where far worse manifestations of racism were commonplace. But rather than dismissing a campus culture where lesser forms of discriminatory conduct are now the basis for widespread outcry, Brown-Nagin lauds current campaigns for drilling into the bedrocks of racism that previous efforts left regrettably intact:

Students march for racial justice

They are asking whether universities that profess a commitment to access for students of color—or what I call "quantitative" diversity—will address demands for improving relational experiences in daily campus life—or what I call "qualitative" diversity.

Students of the current generation are drilling down on the qualitative aspects of diversity. Their critique of campus life poses a profound challenge to those who have never seriously contemplated how inclusion might or should change institutional practices inside the classroom and outside of it. Judging from the concerns expressed by groups on many different campuses, I gather that students hope to achieve four major components of qualitative diversity: representation, voice, community, and accountability...

The conversations are hard, in part, because the students are talking about race at a far more demanding level than is usual for most people.... The students are asking society to engage diversity at a deeper level: inquiring not merely about how campuses should look, but what diverse campuses should do in terms of classroom and community dynamics.[265]

In a piece for NPR, blogger Gene Demby noted that older generations of African-Americans can be dismissive of current students' demands regarding racial equality, "suggesting they're 'whiny' and 'entitled.'"[266] Demby notes that "it's *because* so many older black folks survived a gantlet of racial jankiness in college that they've adopted a "kids these days" attitude toward today's protesters and their grievances."[267] His piece, entitled *The Long, Necessary History of 'Whiny' Black Protesters in College*, argues that despite that sentiment, current student campaigns are the rightful heir to the storied movements that led to racial inclusion on campus decades ago:

> [A]gitation for more resources, more active inclusion, more safe spaces and more black faculty has been a through-line for black students on university campuses for generations. Indeed, a young man named Barack Obama engaged in exactly this sort of demonstration as a Harvard law student in the early 1990s.And for as long as black students have been asking for these accommodations, critics have been painting them as unreasonable, entitled and dangerous.[268]

With respect to campaigns to more fully address the problems of sexual harassment and assault on campus, some commentators have likewise situated the moves in the context of broadening and more evolved recognition

of the severity and consequences of sexual assault. In *the New York Times*, as noted above, Judith Shulevitz argued that Brown anti-sexual assault activists were infantilizing themselves by creating a "safe space" into which those "triggered" by a debate on rape culture could retreat.[269] Journalist Amanda Marcotte, in a March 23, 2015 response to Shulevitz entitled, "Are College Campuses Really in the Thrall of Leftist Censors?" is uneasy with the form of that the "safe space" in question took, but maintains that the rationale behind it was legitimate:

> If you've been raped and seen your rapist walk away without any punishment—which is the experience of the majority of rape victims—being told that your trauma isn't real or valid in this way can be severely upsetting. In that context, a safe space isn't just a shelter from disagreement. It's a place where you can pull yourself together after hearing demeaning rhetoric. After all, if you don't want to deal with the discussion at all, you don't need a "safe space." You would just not go to the debate in the first place. You don't need a time-out area for those who don't time-in... There is a way both to keep healthy debate going and acknowledge that people who have suffered trauma might need a little emotional help... People who try to silence disagreement should be called out for that. But taking a time-out during a heated, extremely personal debate is nothing to be ashamed of.[270]

Renegotiating the Campus for a Majority Minority America

With rapidly changing demographics both on campus and nationally, some renegotiation of the bounds of the permissible in discourse is an inevitable and healthy adaptation to a changing America, some commentators argue. NPR blogger Gene Demby characterizes campus protests and tensions over race as a natural product of demographic shifts on campus and across the nation:

> [T]he increased volume of this fall's protests comes on the heels of profound demographic shifts in American higher education over the past few decades. More Americans are going to college across the board, but enrollment among blacks and especially Latinos has jumped dramatically since the mid-1990s. And even as colleges and universities tout that their incoming freshman classes will be their most diverse ever, the high schools that produce each new freshman crop remain thoroughly and increasingly racially segregated. What we've seen in this year's campus turmoil is the inevitable collision of these trendlines... making space for black and brown people in the name of diversity can't work without preparing for the fact that their presence will necessitate new, sometimes awkward, sometimes disruptive adaptations and considerations.[271]

William H. Frey, author of "Diversity Explosion: How New Racial Demographics are Remaking America" has also linked student demand and tactics to population shifts. Writing for the Los Angeles Times in December, 2015, he noted that today's diverse crop of college graduates faces a tighter job market and far greater income disparities than did the white majority baby boomers of the 1960s. He also notes that the appetite on the part of aging boomers to make substantial investments to foster economic opportunity for future generations is limited:

> These facts, and America's inevitable demographic future, put recent campus protests into sharp perspective. The complaints voiced by black, Latinos and other minority students (and their white allies) strongly indicate that a racially prejudicial environment still exists at four-year colleges, which remain more white (61%) than the students in the K-12 pipeline. Yet it is imperative that minority students succeed at these colleges. These slow-to-change institutions must successfully invest in diversity, making minorities' contributions, voices and concerns central to their educational mission.[272]

In January 2016 the American Council on Education fielded a survey of college asked presidents to inquire about the racial climate on campuses. The survey generated responses from 567 college and university presidents. The study reported that:

> Seventy-five percent of four-year presidents and 62 percent of two-year presidents believe high-profile events (e.g., those related to #BlackLivesMatter, immigration, Islamaphobia) increased the campus-wide dialogue or dialogue within certain groups. As one president wrote, "The national issues have manifested at my campus as a genuine focus on eliminating the disparity in student academic achievement by ethnicity and on being more proactive in diversifying the faculty."[273]

College presidents also indicated that issues of race are being given greater priority than they were just three years ago, with 44 percent of two-year and 55 percent of four-year presidents indicating as such. In terms of concrete actions that had received increased emphasis, the most common steps cited were measures aimed at increasing student, faculty and administrators.[274]

Many university presidents and senior administrators consider pressure from student demands to have a positive and ameliorating effect on the school. In June 2016, Frank Bruni of *the New York Times* reported that Oberlin's

president Marvin Krislov saw current student demands as healthy:

> [Krislov] acknowledged that the student demands of recent years had been bigger and more numerous than those of a decade or two ago, but he attributed this to such positive developments as greater diversity on campuses... 'The nature of the student population these days requires us to listen in a way that perhaps we haven't before.'"[275]

The Onus of Fostering Inclusion Cannot Fall Solely on Minority Students

For critics of measures including "safe spaces" and "trigger warnings" that can risk encroaching on speech, the favored solution to offensive speech and actions on campus tends to be "more speech." As Yale Law Professor Stephen Carter put it in a dialogue published in *The Atlantic* in June, 2016, "So when people sit where I sit on campus say that we're First Amendment absolutists, which I pretty much am, when we say the cure for speech is more speech, it's not a slogan, it's not a way of escaping hard issues, it's a way of embracing hard issues, it's a way of saying, if this is really so terrible, that's exactly the reason to talk about it."[276]

Yet some students and observers point out that if the primary answer to objectionable speech is counter-speech, students of color, women, students from disadvantaged backgrounds and other minority students face a burden in having to continually explain, rebut, counter and educate in response to the speech of others. They note that such efforts—including explaining why certain statements can be construed as offensive on the basis of race, gender, or sexual orientation—can be burdensome, time-consuming and emotionally draining.[277] Alejandra Padin-Dugon, a Yale student, acknowleged the danger of adding such pressure on minority students:

> It seems, students of color have an ongoing responsibility to invest in this unwanted extracurricular duty: Educating the white people who simply do not have the cultural or historical context to understand our experiences as a result of criminal mis-education or lack of education at this university and in society at large. This is not a position that students of color signed up for. This is not a position that is sustainable for their mental or physical health.... This is exploitation of student emotional labor and intellectual labor in order to further the conversations the university itself has a responsibility to foster.[278]

For example, part of the objective of students who urged the university to send out an email drawing attention to the potential for Halloween costumes to be offensive, was to shift the burden of such an explanation from students to the administration. Doing so would free students to focus on their studies and activities and also allow them to avoid awkward and potentially contentious encounters centered on taking fellow students to task for attire seen as racist or otherwise offensive.

David Palumbo-Liu, the Louise Hewlett Nixon Professor and Professor of Comparative Literature at Stanford University has argued in Buzzfeed that "safe spaces" are a necessary form of compensation for students of color and others from minority groups who bear a disproportionate burden in having to represent their identities on campus for the benefit of others:

> Students of color are exploited for their "diversity" and told they cannot ask for anything in return... At universities, I have witnessed and heard of cases of trans people asked about their genitalia, female students' complaints about sexist language in the classroom greeted with smirks or eye-rolling, senseless generalizations about lower-income students defended completely with dubious anecdotal evidence, and students of color told they are too sensitive and egotistical when they dare to dispute racist stereotypes.
>
> Students of color and others are asked to act as unpaid instructors of their race or identity. If they object to a particular point, professors often say, "Well, then, tell us what the real truth is, educate us." (Yes, my colleagues actually say this.)
>
> Students tell me that they don't necessarily mind educating others, although they get irritated when it happens in nearly every class. They just wish they received a stipend for it. They are asked to be expert informants, and yet when they offer information, often it is ignored, questioned, or criticized. Imagine having to constantly enter a classroom and wonder when you will be quizzed as to your background, feelings, identity. And then to be told your contributions are "terrifying," or uncivil.[279]

A story in the New Haven Register during the height of the Fall 2015 controversies on the Yale campus quoted senior Sebastian Medina-Tayac, a student who is a member of the Piscataway Indian Nation in Maryland and the Senior and Managing Editor of Down Magazine, a campus publication for students of color:

> He said that besides overt racism, minority students such as himself feel pressure to speak for their ethnic group. 'My contribution is important ... but it's also exhausting to be the only one speaking when an issue of Native Americans comes up.' Students

of color are 'expected to be the representative or the voice of their people.'[280]

Student Protesters Are Using, Rather than Foreclosing, Speech

Some observers commented that the student protesters were doing what students protesters and social change advocates have always done, making their points vigorously and loudly through all means available. While certain specific demands may be excessive, these commentators often concede, that overreach can be chalked up to youthful naivete and zeal and does not outweigh the positive value of students who are mobilized and engaged in trying to create a more inclusive and equal campus[281].

Yale Dean Jonathan Holloway suggested in a December, 2016 interview with Time Magazine that it is the critics of campus protests who can be the most censorious of speech:

> Somebody who is totally normative, whatever that means for the context, they have more freedom to say and do what they want than someone who isn't. And I think it's fascinating how a lot of people who are actually in that normative space are the ones who are crying foul, saying we can't really say our unpopular idea. And I'm like, well, you can, but you have to take a risk. And the people who are in those marginal communities are taking that risk every day when they just walk around campus.
>
> None of the activists were trying to deny anyone's free speech. Yelling at somebody, yeah, you shouldn't act like that, and everyone here knows that. But we also all understand that we have our moments, we get worked up and we express ourselves in ways we wish we hadn't. That's just called life.[282]

In a May 2014 online essay in *The New York Times*, Henry Reichman, a former California State University professor and chair of the committee on the American Association of University Professors' Committee on Academic freedom and Tenure, wrote an article entitled, "Protesting a Graduation Speaker Is a Sign of a Healthy Democracy," in which he cast current student activists as using speech and protest in a way parallel to students in the 1960s:

> At my own commencement 45 years ago, graduates walked out in silent protest when the university president, viewed as an apologist for the Vietnam War, spoke. Academic freedom survived.
>
> While awarding degrees, including honorary degrees, should be in the purview of the faculty, university administrators and trustees often seek to honor individuals who might enhance the institution's reputation or bolster its bottom line, frequently with scant attention to their personal histories or views. That some students and faculty find a few of these individuals objectionable—or simply dull—is hardly surprising. Indeed, we should be encouraged that students are engaged and eager to advocate their own views and not just passively accept choices imposed by others. Protest, after all, is a vital element of the very democracy that our higher education system seeks to nurture.[283]

In a November 18, 2015 *New York Review of Books* article, Georgetown Law professor David Cole saw it both ways. While saying he was troubled by attempts by the charge that Yale students were attempting to silence their critics, he wrote:

> Most of what has transpired at Yale and other colleges reflects the best traditions of the First Amendment: students of color and others have been organizing politically and speaking out in packed rallies. They are using the First Amendment to stand up, communicate their experiences, and demand equal justice. That's exactly how the First Amendment should work.
>
> [I]nstead of condemning Yale students for trampling on free speech, we should commend them for using their speech rights to push the institution to become more inclusive and welcoming for all.[284]

Free Speech Concerns are a Red Herring, Diverting Attention from Issues of Equality

Many observers have suggested that while some student demands may be overblown, fervent expressions of concern for the fate of academic freedom and campus life are likewise exaggerated. Some go so far as to suggest that cries of alarm over the fate of free speech on campus veil can mask a surreptitious agenda to defend the status quo and put off demands for greater racial, gender and other forms of justice.

That was the larger point in David Cole's November 18, 2015 *New York Review of Books* article:

> Focusing on offensive speech also distracts from the more significant issues of racial injustice that persist more than sixty years after *Brown* v. *Board of Education* declared segregation unconstitutional—and that remain the Yale students' principal concerns. These are the pressing racial problems of our time—not Erika Christakis's email. As media reactions illustrate there is a real risk that by going after the Christakises the students' very legitimate complaints about much more serious problems will be drowned out.

> Yale students are right to complain that their critics have failed to look beyond the viral video. If we want to understand the controversy at Yale, or at any of the many colleges that are experiencing similar protests, we must take seriously the deep and lasting wounds that continue to afflict the African-American community. We must demand, with the students, more diversity in faculty and staff, greater resources for minority students, and greater sensitivity to the challenges of building an integrated community of mutual respect.[285]

Cole acknowledges that, in some cases, students have unhelpfully given their critics fodder, noting, "[d]emands to punish Erika Christakis because her genuine expression of opinion was deemed offensive undermine the cause. The students would do well to abandon that request and focus their and our attention on the more systemic problems of equal justice that continue to plague Yale, and the nation."[286]

In a November 10, 2015 *New Yorker* article titled "Race and the Free Speech Diversion," Jelani Cobb wrote that the Yale conflicts had been misrepresented, and asked readers to attend to the larger racial context:

> To understand the real complexities of these students' situation, free-speech purists would have to grapple with what it means to live in a building named for a man who dedicated himself to the principle of white supremacy and to the ownership of your ancestors [Ed. Note: John C. Calhoun]....[287]

At Columbia Journalism Review, Danny Funt wrote a December 12, 2015 article, "At Yale, a fiery debate over who's being silenced," that explored some students' belief that concerns over speech were an attempt to divert attention from their underlying concerns with institutional racism.[288] Funt noted that they were at times naïve about how their protests would be reported by the media: "Students I spoke with were severely disappointed that news coverage has fixated on concerns over speech suppression. The issue for those actually on the ground, they stressed, is solely institutional racism."[289]

On December 17, 2015, Angus Johnston, an academic who studies the history of student protest, wrote a *Rolling Stone* article entitled "There's No PC Crisis: In Defense of Student Protesters."[290] He mentioned a widely ridiculed January 2015 decision by Mount Holyoke Project Theatre students not to stage the once-risqué "Vagina Monologues" after running it annually for ten years. Students decided to instead create a new show themselves out of concern for the sensitivities of transgender women who do not have vaginas.[291] Some critics decried the decision as an example of political correctness in overdrive, causing students to self-censor and mothball and important feminist play out of fear of offending a small sub-group. Yet Johnston wrote that the focus on free speech suppression had it precisely backwards, because the decision not to perform the play was itself an act of protected speech:

> When word of this decision broke in the media, the troupe was widely accused of censorship... But who exactly was being censored here? Who was being silenced? What was being regulated? The troupe hadn't been forbidden to stage the play. They'd just decided not to. Surely the same freedom of speech that had given them the right to perform it gave them the right to stop. And even if other students had encouraged them in their decision—if, say, activists had gone to the troupe and explained their objections to the play and asked them not to put it on again, and the performers had mulled the request and decided to honor it—that wouldn't have been censorship either. It would have been dialogue, discussion—exactly the encounter of minds and ideas that the university is supposed to nurture.[292]

Northwestern University associate professor in sociology Laura Beth Nielsen wrote on May 16, 2015, in the online magazine *The Smart Set*, that vigorous campus debates about race, gender, and sexual assault had been mischaracterized as censorship issues. She references the famed Halloween memos at Yale:

> [H]ow did we get here? By "here," I mean a place where: "advice" to not be offensive is characterized as censorship; a productive discussion about cultural appropriation is taken as threatening and declared "silencing;" and the expression of disagreement about that discussion is said to be chilling. In the end, the argument about who is the most censored replaces the important discussion of racial equality and how to accomplish that on a college campus. And no one is hearing what anyone else has to say...
>
> It's been said that, "when you are accustomed to privilege, equality can feel like oppression." Or, in the case of speech on campus, "When you are accustomed to privilege, movement toward equality can feel like oppression." Put differently, we are in a new era of being thoughtful about the inclusion of people who have been historically excluded from institutions of higher learning. This inclusion—whether forced through protest and litigation or extended voluntarily—means taking claims about the harms of speech and the perpetuation of inequality seriously and balancing them with our desire for robust free speech.[293]

OUTSIDE INFLUENCES

The New Pressures of Social Media and Evolving Educational Economics

No longer are campus differences debated safely within the walls of academia. With social media amplifying campus controversies, and in some instances, distorting them these contretemps can reverberate nationally, and even globally, and are preserved in perpetuity through archived stories, comments, and social media posts. Because of its reach, viral quality, and durability social media is making the stakes much higher for both the university administrations, and those whose vantage points are at odds. The following section briefly examines some of these outside influences.

Social Media's Role As a Polarizing Force in Campus Speech Conflicts

Many commentators on campus protests and speech note the sometimes pernicious role of social media in exacerbating tensions by drawing outsized attention to the most extreme and contentious statements and moments in ways that may not do justice to the broader and more nuanced debates for which they become shorthand.[294] Social media is a potent force on campus, facilitating enormous quantities of speech, fostering connections among students and affording opportunities for sharing and engagement that were unknown in prior eras. Yet, intemperate, ill-considered musings or behaviors can be captured in tweets and cellphone videos and circulated out of context, far beyond what would have been possible in previous generations of campus protest. The ability and impetus to respond instantaneously to objectionable comments, images and videos can feed furious rounds of vitriolic criticism, unfettered outrage, hate spewing and even direct threats of violence. Immersion in fast and furious debates carried out over social media can fuel passions and undermine a sense of distance or perspective. Social media feeds are also constructed like echo chambers, tending to reinforce rather than challenge extant opinions.

Individual moments of incivility or youthful passion, or offhand remarks by faculty and administrators, can be readily memorialized on video and widely circulated on social media. The ubiquity of handheld recording devices and the ease of sharing and replaying mean these vivid moments—with their hard-to-resist viral qualities of being unscripted, unexpected and unbecoming to those depicted—become part of the permanently available record.

Two videos in particular have become strongly associated with the student antiracism movement: Yale's "shrieking girl," who screamed at Nicholas Christakis for not understanding her;[295] and a group of University of

Melissa Click, former professor at University of Missouri, telling a student journalist to leave a student safe space

Missouri students, including a professor, who told a student photographer to leave their group alone and said she needed "some muscle" to keep him away.[296] In an earlier era, while these incidents might have been documented in writing or even photos, they would not have been so dramatic, so widely seen or so influential in shaping how related events were perceived.

Journalist Danny Funt at CJR wrote that Yale students were angry that that video, taken by FIRE's Greg Lukianoff, was widely circulated while their intentional and well-organized protests seemed to be virtually ignored: "National media pounced on the video of the protest as prime evidence of this illiberal streak: Christakis, a model of polite intellectual disagreement; students, a zealous, belligerent mob."[297]

David Cole, in his January 2016 article "The Trouble at Yale" in the *New York Review of Books*, interpreted the video differently:

> But the overall impression is not so much that she is rude as that she is angry and frustrated; it looks not unlike the rage that many teenagers occasionally vent at their parents. Critics seized on the one-minute-twenty-second video, condemning the students for their intolerance and incivility. But because it captures only a single inflammatory exchange, the video has distorted perceptions about the issue at Yale and elsewhere.[298]

Melissa Click, the University of Missouri assistant professor depicted in the viral video threatening a student journalist later told CBS News she was embarrassed by her actions but felt that the video failed to "represent the good I was doing there that day.[299]" During the course

of a university investigation into Click's actions, another video surfaced in which she was seen cursing at a police officer.[300] Click was subsequently fired from her post at the University of Missouri for "conduct that was not compatible with university policies and did not meet the expectations for a university faculty member."[301]

Cultural commentators have noted a rising trend of online trolling in the context of campus conflicts. The pattern can unfold this way: a putative offense goes viral, collective fury builds, hundreds or even thousands of online vigilantes verbally attack the purported offender on social media. Some of the most frightening mob tactics include direct threats of violence, doxxing (revealing of personal information such as a targeted individual's personal email, phone number, address or even social security number), or online or even offline stalking where the target faces unwanted and harassing contact from their critics.[302]

Danny Funt explained how the Yale student who yelled at Christakis was made into a target of social media-driven mob hatred:

> "The shrieking girl" became internet shorthand for the student who cursed at Christakis. A Daily Caller article[303] reported her name, her family's business, the location of their house, and its estimated cost. Facing a barrage of hostility, the student deleted her social media accounts. A Facebook page still exists titled "Don't hire [Her Name]." Friends say she's received death threats. All this for the poster child of speech suppression.[304]

New Yorker staff writer Kelefa Sanneh explored this phenomenon in his August 10, 2015 article, "The Hell You Say," with a story of a female student who convinced a bar near the University of North Carolina at Chapel Hill campus to stop playing a song that she thought evoked threats of rape:

> [A]n account of the incident in the student paper, the *Daily Tar Heel*, was picked up by an irreverent site called Barstool Sports, which expressed its certainty that the complaining student was a "crazy ass feminist" who hated fun, and then by Yahoo News... The complaining student has become the target of online vituperation. More than a year after the incident, a Google search for her name brings up, on the first page, a comment thread titled "Eatadick dumbcunt." We live in a world where an undergraduate who protests at her local bar can find herself vilified around the world, achieving the sort of Internet infamy that will eventually fade but never entirely dissipate.[305]

Such online harassment can be so disruptive and disturbing that it deters many students, faculty and commentators from wading into social media discussions on hot button topics. The weight of opprobrium on social media can swing in all directions; while the shrieking Yale student was one prime target, Erika and Nicholas Christakis were also in the crosshairs. While retractions, apologies and retreats may have some impact in the physical world, they are easily ignored online where errors and misstatements can be etched permanently.

Economic Pressures Affecting Campus Protests and Free Speech

Several commentators note that current campus controversies are exacerbated by a series of escalating economic pressures affecting the universities. At least three categories of such influence were cited: the trend toward increasing reliance on non-tenured faculty who can be terminated at will and may lack robust protections for academic freedom; the economic imperatives that lead universities to increasingly treat students like consumers; and the financial pressures that drive ever-heightened attention to fundraising considerations on the part of university administrators.

Decline of Tenure

The National Education Association documented that in the 1970s, 80 percent of college professors were full-time employees[306]; according to the AAUP, currently more than half of college faculty are part-time adjunct professors, paid by the course with no fringe benefits[307]. Numerous studies and analyses have documented the glaring weaknesses in protections for academic freedom available to adjunct faculty, who generally enjoy no job security from semester to semester[308]. The relationship between this trend and the risks to freedom of expression on campus is clear: if professors have reason for concern that an allegedly offensive comment, syllabus or social media post might lead to a complaint, discipline or even termination, such fears will be heightened among the swelling ranks of faculty who do not enjoy tenure or other employment security safeguards. The impetus for such adjunct faculty to avoid statements, subjects and readings that could cause even hypothetical offense may be powerful. In its report on Title IX the AAUP makes this connection, noting that "politically controversial topics like sex, race, class, capitalism, and colonialism . . . are likely to be marginalized if not avoided altogether by faculty who fear complaints for offending or discomfiting their students. Although all faculty are affected by potential charges of this kind, non-tenured and contingent faculty are particularly at risk.[309]"

Students As Consumers

A second economic factor buffeting the environment for speech on campus lies in the growing trend toward viewing students as paying consumers who must be satisfied by their experience on campus, lest they vote with their

checkbooks by transferring to a new institution, or use their influence on social media and elsewhere to tarnish the university's reputation.

Writing for *the New York Times* in June, 2016 Frank Bruni documented the trend toward viewing college enrollees not as students, much less a new generation to be molded and nurtured, but rather as consumers.[310] Bruni chalked up the expanding list of student demands—for trigger warnings and safe spaces, but also grade inflation and better dining hall food as indicating "the extent to which they have come to act as customers—the ones who set the terms, the ones who are always right—and the degree to which they are treated that way. Bruni described the shift as "one of the most striking transformations in higher education over the last quarter-century," noting that colleges are investing millions in spruced up dining halls, more luxurious dormitories, better equipped gymnasiums, and state of the art swimming pools, putting greens, arcades, theatres and even water parks.[311] Such amenities help justify ever-rising tuition; increased fees, in turn, generate heightened expectations and demands from the campus. The consumer mentality, Bruni reports, also carries over into a rising emphasis on student evaluations of their professors, which are increasingly mandatory and have growing influence over enrollments and faculty contracts.

Bruni argues that this climate puts a premium on pleasing, rather than challenging students. Consumer corporations aiming to appeal to as many customers as possible tend to avoid controversy at all cost. Faculty courses, syllabi, lectures and ideas that are controversial and may cause offense may become an unnecessary risk in a campus setting that centers on customer satisfaction. Bruni wrote that such an approach

> defin(es) the higher-education experience in a way that has nothing to do with academic rigor, with intensive effort, with the testing of students' boundaries and the upending of their closely held beliefs. When students are wooed on the front end by catalogs and websites that showcase the recreation at their disposal and then arrive to encounter teachers who twist themselves into knots in the name of making the learning experience fun, they are told that college is a place and a time largely for amusement, for revelry.[312]

Bruni notes that colleges "have not abandoned setting boundaries and requiring sacrifices" citing Oberlin College's rejection of student demands for a guaranteed grade of C or above, but ends on a cautionary note, commenting that when student demands are fueled by not just political passions but also a sense of consumer entitlement, the quality of academic discourse and rigor will lose out.[313]

Pleasing—or Appeasing—Alumni

Consumer corporations aiming to appeal to as many customers as possible tend to avoid controversy at all cost. Faculty courses, syllabi, lectures and ideas that are controversial and may cause offense become an unnecessary risk in a campus setting prioritizes customer satisfaction.

With universities under ever increasing financial pressures, a seemingly inevitable question is how student protests and universities' responses might affect donations from alumni—and whether fear of this impact would alter university administration behavior when faced with such disputes. A December 2015 story in *Inside Higher Education*, by freelance journalist Kellie Woodhouse, notes alumni scrutiny and, in some cases, displeasure with the nature and handling of campus controversies in the fall of 2015[314].

Woodhouse cites an essay published in the *Boston Globe* by Harvard Law student Bianca Tylek who, in the wake of an incident in which campus portraits of African-American faculty were defaced, called on alumni to suspend donations absent a more robust response on the part of the school administration. Tylek wrote: "I ask our alumni to use the power of the purse to bring change to the school. Do not let us go into the third century propagating the same hate that our institution has over the last 200 years. I ask that they withhold contributions until change is enacted.[315]" Woodhouse recounts that the law school's dean, Martha Minow, sent an email to alumni describing working groups being formed to address student concerns and inviting alumni input, as well as a public statement she made calling racism a "serious problem" on the campus.[316]

As Woodhouse notes, alumni pressure can also cut the other way. She recounts an incident at Dartmouth College in which a boisterous late night protest by Black

Students gather at library before a protest

PAUL CSIZMADIA

Lives Matter reportedly disrupted students working in the library. Woodhouse quotes a conservative blogger and Dartmouth alum saying that his giving to the college could be negatively impacted if he judged that the administration's response to the incident was "ridiculously left wing."[317]

In addition to reconciling the sometimes competing demands and expectations of students and alumni hailing from different generations, Woodhouse notes that colleges "nowadays woo an increasingly diverse set of donors, including millennials and minorities as well as a donor base that has traditionally been a strong source of fund-raising: the older, predominately white and perhaps more conservative set."[318] At Yale, Woodhouse notes, hundreds of alumni weighed in by signing petitions both for and against Erica Christakis and the campus protests regarding race.

In an August, 2016 story in *the New York Times*, Anemona Hartocollis reported on alumni who have curtailed or withdrawn donations to register their opposition to university's handling of speech-related controversies. She recounts the story of Scott MacConnell, a devoted alum of Amherst who cut the college out of his will, writing in a letter to the alumni fund that "As an alumnus of the college, I feel that I have been lied to, patronized and basically dismissed as an old, white bigot who is insensitive to the needs and feelings of the current college community.[319]"

Hartocollis sums up what she characterizes as a widespread sense of discontent that is responsible for flat or lower donations at dozens of colleges and universities:

> Alumni from a range of generations say they are baffled by today's college culture. Among their laments: Students are too wrapped up in racial and identity politics. They are allowed to take too many frivolous courses. They have repudiated the heroes and traditions of the past by judging them by today's standards rather than in the context of their times. Fraternities are being unfairly maligned, and men are being demonized by sexual assault investigations. And university administrations have been too meek in addressing protesters whose messages have seemed to fly in the face of free speech.[320]

Writing in *Forbes* Tom Lindsey, the Director for the Center for Higher Education and the Center for Tenth Amendment Action, notes that the impact of campus protests and controversies is not limited to private donors.[321] He notes a trend toward diminishing taxpayer support for the costs of public higher education. He cites a poll taken of Missouri voters in the aftermath of the controversy there and notes that 62 percent of voters responding disagreed with the actions of student protesters, and 48 percent disapproved of the role played in the crisis by the university's football team, which refused to play unless and until the university's president was removed in response to his failure to adequately address a series of racial incidents on campus. In terms of the university administration, Fifty-eight percent reported having a more negative view in the wake of the controversy, whereas just only 11 percent voiced a positive response to officials' handling of the crisis.[322]

Some might argue that the alumni perspective could provide a useful corrective, bucking up administrators who might otherwise be too quick to cave in to student demands. Others might regard alumni as a reactionary influence, fixated on the past and shielded from the forces that are driving essential change on campus.

The following case studies were compiled based on research and interviews conducted in the Spring and Summer of 2016. Not all individuals contacted by PEN America were willing to speak to us, and a few individuals were willing to speak only anonymously. These case studies do not attempt to provide a comprehensive account of all related developments. The administrations of all universities concerned were given an opportunity to be interviewed and to provide their perspectives.

Case Study

YALE

Chilling Free Speech or Meeting Speech with Speech?

For the outside world, the controversies at Yale in the fall of 2015 first came into focus through a viral online video. The video captures a young woman screaming at a seemingly mild-mannered faculty member in an open square on campus. The faculty member was Nicholas Christakis, Yale's Sol Goldman family professor of social and natural science, co-director of the Yale Institute for Network Science, and then-master of Silliman College, one of Yale's residential colleges. The student was demanding that the professor and his wife, Erika Christakis, resign from their roles at Silliman because of an email that Erika had written to students.

The Halloween Letter

Erika Christakis, a lecturer in early childhood education at the Zigler Center in Child Development and Social Policy at the Yale Child Study Center, had sent the email in response to a memo from the Yale Intercultural Affairs Committee.[323] That memo, circulated in late October, asked students to consider how racially inflected Halloween costumes might be received by their fellow students:

> Halloween is … a time when the normal thoughtfulness and sensitivity of most Yale students can sometimes be forgotten and some poor decisions can be made….
>
> Yale is a community that values free expression as well as inclusivity. And while students, undergraduate and graduate, definitely have a right to express themselves, we would hope that people would actively avoid those circumstances that threaten our sense of community or disrespects, alienates or ridicules segments of our population based on race, nationality, religious belief or gender expression….
>
> So, if you are planning to dress-up for Halloween, or will be attending any social gatherings planned for the weekend, please ask yourself these questions before deciding upon your costume choice:
>
> Wearing a funny costume? Is the humor based on "making fun" of real people, human traits or cultures?
>
> Wearing a historical costume? If this costume is meant to be historical, does it further misinformation or historical and cultural inaccuracies?
>
> Wearing a 'cultural' costume? Does this costume reduce cultural differences to jokes or stereotypes?
>
> Wearing a 'religious' costume? Does this costume mock or belittle someone's deeply held faith tradition?
>
> Could someone take offense with your costume and why?[324]

In her reply, Erika Christakis acknowledged the value of respecting diversity and avoiding giving offense on campus, "in theory," but objected to the patronizing tone of the memo and the effort to constrict students' freedom to transgress in the spirit of Halloween:

> I don't wish to trivialize genuine concerns about cultural and personal representation, and other challenges to our lived experience in a plural community. I know that many decent people have proposed guidelines on Halloween costumes from a spirit of avoiding hurt and offense. I laud those goals, in theory, as most of us do. But in practice, I wonder if we should reflect more transparently, as a community, on the consequences of an institutional (bureaucratic and administrative) exercise of implied control over college students…. I wonder, and I am not trying to be provocative: Is there no room anymore for a child or young person to be a little bit obnoxious … a little bit inappropriate or provocative or, yes, offensive? American universities were once a safe space not only for maturation but also for a certain regressive, or even transgressive, experience; increasingly, it seems, they have become places of censure and prohibition."

Christakis criticized what she saw as an unwarranted intrusion into student social life by the university administration, pointing out that "the censure and prohibition come from above, not from yourselves! Are we all okay with this transfer of power? Have we lost faith in young people's capacity—in your capacity—to exercise self-censure, through

social norming, and also in your capacity to ignore or reject things that trouble you?"[325]

Writing for *The Atlantic*, journalist Conor Friedersdorf appraised the controversy as follows:

> That's the measured, thoughtful pre-Halloween email that caused Yale students to demand that Nicholas and Erika Christakis resign their roles at Silliman College. That's how Nicholas Christakis came to stand in an emotionally charged crowd of Silliman students.... Watching footage of that meeting, a fundamental disagreement is revealed between professor and undergrads. Christakis believes that he has an obligation to listen to the views of the students, to reflect upon them, and to either respond that he is persuaded or to articulate why he has a different view.... But many of the students believe that his responsibility is to hear their demands for an apology and to issue it. They see anything short of a confession of wrongdoing as unacceptable. In their view, one respects students by validating their subjective feelings.[326]

PEN America sent a researcher to Yale to hear about these events directly from those involved. The Christakises declined to speak to PEN America. The controversy at Yale implicated the dual roles of both the university itself and the faculty involved: to provide an academic environment that fosters intellectual growth and a hospitable and supportive community for students. The role of the Christakises spanned their academic appointments as Yale faculty members as well as their status as what were then called master and associate master of Silliman College (the role of master was subsequently renamed head of college in response to student concerns about the associations of "master" with slavery). The role of college heads is described as follows on the Yale website and itself encompasses both academic and psychosocial duties:

> The head is the chief administrative officer and the presiding faculty presence in each residential college. He or she is responsible for the physical well-being and safety of students in the residential college, as well as for fostering and shaping the social, cultural, and educational life and character of the college.[327]

Context: A Two-Year Student Uprising to Demand Respect and Equality

Students interviewed by PEN said that, from their perspective, the impetus for the Intercultural Committee email was concern about several developments, including a proposal that would have merged four separate student cultural centers (Afro-American, Latino, Native American, and Asian-American), into a single center and a January 2015 incident in which campus police held an African-American junior at gunpoint, mistakenly identifying him as a suspect in a burglary.[328] In prior years the Intercultural Committee had distributed flyers with less formal guidance on Halloween costumes, suggesting a range of questions to consider, including "Is it racist? Is it offensive? Will people get it?" The 2015 email was more specific, more directive, and more formal.

In the summer of 2015, inspired by successful efforts to decommission the Confederate flag after a mass shooting in Charleston, South Carolina, activists launched a campaign demanding the renaming of Yale's Calhoun College, which honors John C. Calhoun, a prominent proponent of slavery during the years before the Civil War.

The more pointed Intercultural Affairs Halloween email grew out of a months-long campaign to shift the onus of addressing potentially offensive costumes away from students of color. Activists maintained that they were faced with having to either silently tolerate costumes they considered insensitive or raise their objections directly with other students and engage in awkward, often draining dialogue on fraught questions of race, culture, and ethnicity. Alejandra Padin-Dujon, a spokesperson for the student activist group Next Yale, explained that "students of color felt it was a much needed step in the right direction."[329]

Some student activists were outraged by Erika Christakis's critical response to the memo, particularly her refusal to recognize the burden posed for students of color in having to police Halloween costumes themselves and her failure to put the issue of costumes in the larger context of historical racism. Padin-Dujon recounted:

> Part of the email that struck people the worst was when she said that if students found something that offended them then they should just walk away.... Or confront it, which is almost a little bit worse.... On Halloween, when [Native American] students inevitably see Native American headdresses or some bastardization thereof, they *will* actually confront people and take off the feathers. But the thing is, this is dangerous. Extremely dangerous. Because often times the people who are wearing these headdresses are inebriated frat boys.
>
> The idea that this kind of educational process should happen at physical risk to these women of color is very ridiculous.... It puts the entire imperative to foster intercultural understanding upon people who are most likely to be at risk of physical harm and people who are most likely to suffer academically from have to explain this constantly.
>
> The kind of insults that people would be up in arms about hearken back to histories of extermination,

> genocide, of slavery, of discrimination.... The idea that she could think of these aggressions—that she could think of these institutional marginalizations—as a simple matter of one-on-one abuse or insult essentially is mind-boggling. And the idea that she thinks they can be solved with one person having the patience or kindness or understanding to try to correct it is also mind-boggling. The fact is, these are extremely large systems that students of color are up against. They're not equipped to fight it alone.[330]

Meeting Speech with More Speech

The Christakis email galvanized students of color, explained Eshe Sherley, a class of '16 graduate and former vice president of the Black Student Alliance.[331] It was compounded by an allegation raised by a student in a Facebook post (which Yale later investigated and found to be unfounded) claiming that organizers of a Halloween fraternity party had turned away students of color, saying that the party was open to "white girls only."[332] It also coincided with major national events that stoked racial tensions, including protests against racism at the University of Missouri. Students sought a meeting with the Christakises (which they later dubbed unsatisfactory due to its brevity and what they regarded as the Christakises' failure to listen), organized a "March of Resilience" attended by roughly 1,200 people,[333] and encouraged students to display their views and experiences in chalk on campus walkways. Activists also confronted Jonathan Holloway, Yale College's first black dean, in an intense, three-hour impromptu colloquy on campus amid the chalking event.[334]

The student activists then put forward a list of six demands, including the renaming of Calhoun College and a new bias reporting system.[335] Students also demanded the immediate "removal of Nicholas and Erika Christakis from the positions of Master and Associate Master of Silliman College."[336] From the students' points of view, their actions were not censorship or intolerance but more speech. As Eshe Sherley put it:

> People act as if protest is not a form of speech. It doesn't necessarily foreclose other people's speech.... Whenever there is a protest on Yale's campus, I can point to days, months, or years of quote unquote "civil conversation" that students of color tried to have, and that was ignored by the people in power. So the question is, what do you do next?[337]

Asked whether requesting that the Christakises be removed as master and associate master constituted censorship or punishment for speech, the students pointed out that they had not called for the couple to be removed from their faculty positions, in which academic freedom was paramount. Rather, they said, they wanted them ousted as house masters because they had failed to demonstrate empathy for students of color, a prerequisite for effective service in those positions.

Alejandra Padin-Dujon said:

> It is not a teaching position. It is a head-of-student-life position.... With Erika Christakis, it doesn't matter how brilliant she is. It doesn't matter how great her class is. If she is unable to make students of color feel at home in her college ... then she is not suited to being an assistant master even though she may be suited to being a professor or lecturer.
>
> I think her intentions were good. I think what she was trying to do was create a fun, inclusive environment for students on campus.... It's just unfortunate that this desire failed to recognize that students of color don't have the luxury of enjoying Halloween because they are the ones being offended.... It's very difficult to mock someone with memories of genocide unless they have that in their historical background.[338]

Eshe Sherley elaborated further on the question of whether the students had impeded speech:

> When people occupy certain roles, there are discussions that I think should not be happening through that role. So, I don't think that the Head of College should tell students that it's okay if they appropriate other students' culture. Not because I don't think that she should be able to say that *in general*, but because I think that she's supposed to be the ambassador of the college, and that sentiment is not in line with the college's values.[339]

Sherley was later echoed by Purdue University literature professor and feminist author Roxane Gay, who wrote in *The New York Times* about the Yale students:

> As a writer, I believe the First Amendment is sacred. The freedom of speech, however, does not guarantee freedom from consequence. You can speak your mind, but you can also be shunned. You can be criticized. You can be ignored or ridiculed. You can lose your job. The freedom of speech does not exist in a vacuum.[340]

Sherley maintained that the student protesters could also pay a price for their speech.

> When students speak collectively in ways that are unpopular, it's actually us who bear the brunt of the consequences, whether it's from the media, whether it's from our mental health deteriorating from doing that work, or from the possibility of university sanctions.... And also, the video of the girl yelling at Christakis —a media outlet was doxxing that girl

too. I mean, she is getting death threats at home.[341]

Reflecting on the controversies, Yale president Peter Salovey expressed pride in students' vigorous use of free speech:

> I think what the students are asking for is: I don't want to be speaking into the wind. Not because they demand that people agree with them. It's different to say 'I don't want to speak in vain' than to say 'I demand to be agreed with.' I think they are saying, 'Validate what I'm saying by making it clear you're listening to me. Even if you don't agree - if you can empathize with me meaning I can understand why you feel that way.'[342]

Along with emphasizing the vitality of freedom of expression, Salovey underscored the importance of being able to exercise this right without fear of punishment. He stated:

> I certainly believe that everyone on all sides of that issue, from the intercultural counseling to Erika Christakis to the students who then reacted to Erika Christakis, are absolutely entitled to the opinions that they stated and that they should be allowed to say them—shouldn't have to be punished in any way for saying them.[343]

Yale College dean Jonathan Holloway agreed that the students were fully within their rights and were engaging in free speech when they asked to have the Christakises removed:

> The thing that really bothers me about what happened in terms of media representations in the fall regarding student responses—as they were referred to as crybabies and coddled—is that what the students were doing was free speech. I think for me the big question or big issue is whose free speech is valued more. We can't value anybody's free speech more than another's.[344]

Dean Holloway understood that the demand for the Christakises' removal was not a challenge to free speech; it *was* free speech.

> I don't see it as a free speech challenge at all. Erika Christakis had every right to send that email. She had every right to do it. No one said she didn't have a right to do it. Free speech is not going to be free from consequence, so we saw consequence. Students getting upset and demanding her ouster: That is free speech as well.
>
> Are there consequences to that? There certainly were—lots of disagreements within the community, lots of anger, and lots of upset. What I think we saw in the fall was one big free speech happening. It was painful and ugly and I was very happy to see the fall over with. It upset my stomach. It raised my stress level. But it was all free speech. The expectation is always for people to be civil. But there will be occasions when not being civil is not unreasonable.[345]

Holloway believed that some of the questions about free speech were born of discomfort with what the student activists were trying to say. He asked:

> People are making judgments about whose speech is free. People didn't like [the students'] speech. For those who didn't, they need to ask themselves why. And there might be some ugly truths in that.
>
> I absolutely believe in the right to free speech, absolutely. I do think it's worth, though, considering just because we have the right doesn't mean we should. If you care about the team, it might make sense to say, "You know what? I don't have to say everything that is on my mind right now. Am I saying something because it is an idea that I really should think about or am I saying something that hurts? I have the right to say both, but should I?"[346]

At the same time, Holloway said, while the students were fully within their rights to demand the ouster of the Christakises, he and President Salovey had "reaffirmed [the Christakises] in their position."[347]

Safe Spaces: Balancing Inclusion and Academic Freedom

This is not to say that Yale administrators were sanguine about respect for academic freedom and intellectual inquiry on campus. They expressed particular concern with the concept of safe spaces and the expectation that all of Silliman College, a residence of several hundred students, should be considered safe from points of view that some students might find discomfiting. Dean of Students Burgwell Howard put it in a way that summarized what other college administrators told PEN as well:

> I tend not to use the phrase "safe space." I don't think universities are places that are free from discomfort. When I think of safety, I think of physical safety. I think students—not just Yale students but college students—use the concept of safe space knowing that universities have to respond to concerns about physical safety first. Using that language forces an institution to respond to something that is actually discomfort. But if they are saying, "I feel unsafe," you have an obligation to investigate and

> look after them. If a parent hears that the university is not going to respond to my child's concerns about safety, they are thinking: "Oh, my God, you're not going to have security on campus, you're not going to lock the doors? My child is unsafe?" They are using that language to force institutions to respond and probably get some respect.[348]

Asked to respond to some students' claim that they felt "unsafe" at Silliman under the Christakises' leadership, Dean Howard said:

> I think it is a series of questions, unpacking what that means. Is it your physical safety? Is it your access to resources and spaces? Is it my room is too hot? Is it somebody followed me in through the security system? What is the unsafety? There are many people within the institution that can help students navigate Yale. So if it is about feeling uncomfortable leaning on someone in particular as they are trying to navigate this place, okay, we can help them think about who else might serve as their guide.[349]

President Salovey believed that some form of safe space on campus might be a perfectly legitimate need, depending on its parameters:

> What I think students mostly need is having some time in their week when they can recharge their batteries, develop some self-confidence, so that they can spend most of their week interacting in spaces where their views count. That's the pattern I see. I think the students are asking for places on campus where they can catch a break once in a while, that's what they need… [and] I think that's a legitimate request. Do they mean safe from ideas, safe from speech, safe from expression? That's not the way people talk about it here.
>
> I'll tell you one very quick story. I was talking to a student after a dinner in a cultural center, I believe the Hillel, which is the cultural center for the Jewish students. We were having a conversation, why do we have these cultural centers? And he said, Look, I grew up in a neighborhood in Brooklyn where everyone was like me, an observant Orthodox Jew. My family, my parents, every one of their friends was like that, observant Orthodox Jews. I want to live a life where I am interacting all over the world with people who are very different from me. That's why I chose to come here. That's why I want a Yale education, that's why I don't avoid anyone. But you know something? It's challenging and effortful to interact with people who are so unlike you. They're just unfamiliar. I can't make assumptions about what they can believe, as I can about people who are more similar. I need once or twice a week to come to a place like this cultural center, have a meal, chat with people whose backgrounds are more similar to mine, feel the shot to my self-esteem that that creates, feel the rise in my self-confidence, and then use it to go out and get what I want out of the Yale education, which is the interaction with all kinds of people who are different from me, which is what the rest of my week is like.[350]

For his part, Nicholas Christakis sought to articulate the interconnectedness of greater inclusivity and the protection of free speech. In a June 2016 piece in *The New York Times*, he wrote:

> Students are demanding greater inclusion, and they are absolutely right. But inclusion in what? At our universities, students of all kinds are joining traditions that revere free expression, wide engagement, open assembly, rational debate and civil discourse. These things are worth defending. In fact, they are the predicates for the very demands the students have been making across the United States.
>
> Conversely, it is entirely illiberal (even if permissible) to use these traditions to demand the censorship of others, to besmirch fellow students rather than refute the ideas that they express and to treat ideological claims as if they were perforce facts. When students (and faculty) do this, they are burning the furniture to heat the house.[351]

Yale's leaders eventually defended Erika and Nicholas Christakis, though Tablet columnist James Kirchick judged the administration's support as "perfunctory" and argued that it left the couple's continued residence at Silliman College "untenable."[352] Both of them stepped down from their administrative roles at Silliman at the end of the 2015–16 school year. Nicholas Christakis remains the Sol Goldman family professor of social and natural science, the director of the Human Nature Lab, and the co-director of the Yale Institute for Network Science.[353] Erika Christakis stepped down from her teaching role at Yale at the end of 2015, telling *The Washington Post* that "I have great respect and affection for my students, but I worry that the current climate at Yale is not, in my view, conducive to the civil dialogue and open inquiry required to solve our urgent societal problems."[354] The administration initially decided against renaming Calhoun College, with President Salovey asserting that "hiding our past" does not advance the "tough conversations" that need to take place on campus.[355] But the university has since convened a committee to consider criteria to govern whether and when campus buildings should be renamed.[356]

Case Study

UCLA

Pro-Israel and Pro-Palestine Activists in Conflict

As a public university in one of the country's most racially and ethnically diverse cities and states, UCLA has a highly diverse student body. Of the 25,060 undergraduates enrolled in the 2014–2015 academic year, about 28 percent of the domestic students were white, with 30 percent Asian, 20 percent Hispanic, 3 percent African-American, and 13 percent international.[357]

In recent years, a series of controversial resolutions on Israel-Palestine issues were considered at various levels of student government. In 2013 the UCLA undergraduate student council voted against a resolution that would have blocked future efforts to press for the university to divest from companies tied to the Israeli occupation.[358] On February 25, 2014, after a months-long divestment campaign led by the UCLA chapter of SJP, the student government held hearings to culminate in a vote by the 12-member governing body on a resolution that would have called on the Board of Regents to divest from companies said to profit from the Israeli occupation.[359] The student hearings went on for nine hours, with scores of speakers for and against the resolution, including from SJP, Bruins for Israel, Jewish Voice for Peace, and other on- and off-campus organizations. The discussions got heated, and many students reported leaving the proceedings deeply shaken, feeling that they had been misunderstood and personally attacked.[360]

Liat Menna, a member of the class of 2018 and the founder of Students Supporting Israel at UCLA, has been active in the school's Hillel, Bruins for Israel, the advisory council for the Center for Jewish Studies, and the Younes and Soraya Nazarian Center for Israel Studies. Menna told PEN America that the language used in the hearings was hateful and felt like an attack on students who support Israel:

> When this type of rhetoric is brought … over and over and over again, it's directed at us. It's not directed at the prime minister of Israel, and it's not directed on any official diplomat, it's directed at the Zionists. I cannot tell you the type of emotional pain that has caused people. People have left the room crying, they stop eating, it's such an emotional pain, and we have to acknowledge that emotional pain can be sometimes as disturbing as physical pain.[361]

A Palestinian UCLA student, who wished to remain anonymous for fear of reprisals, emphasized that the arguments in favor of the resolution were not directed toward fellow students:

> The university is invested in corporations that profit off of the occupation. I have family members that live under the occupation, so this very greatly and in a very concrete way affects the family that I have. My tuition dollars are being invested, without my consent, into corporations that are actively and knowingly complicit in the occupation.... I don't see this an attack on any group of people, or even on Israelis themselves. This is a campaign focused on neutrality because UC has taken a very active stance on supporting the occupation, and so by removing those investments, they're bringing themselves to neutral. We don't even mention Israeli companies. Just American.[362]

In the end, the student government voted against the resolution by a vote of 7 to 5.[363]

The failed divestment resolution reverberated on campus for months, as both Jewish and pro-BDS groups lobbied for their points of view, each accusing the other of using language that was unfair and even hateful.[364] The pro-BDS organizations asked candidates for student government to sign a pledge to refuse free trips to Israel organized by pro-Israel groups and to conferences or meetings sponsored by organizations that "promote discriminatory and Islamophobic positions," including the Anti-Defamation League and the American Israel Public Affairs Committee.[365] Leaked emails then revealed that a major UCLA donor, real estate investor and pro-Israel advocate Adam Milstein,[366] had helped raise thousands of dollars, donated through Hillel, to support pro-Israel student government candidates. In the spring of 2014, SJP filed charges with the student judicial council, asking it to consider whether council members' acceptance of free trips from pro-Israel groups before voting on the BDS resolution should be considered a conflict of interest under UCLA's student government bylaws.[367]

Debating the Language of Harm

Some students who belonged to pro-Israel or Jewish groups objected to the divestment campaign and efforts to preclude the Israel trips on grounds that the trips were intended to foster firsthand knowledge of Israel and that such efforts bordered on being anti-Semitic. UCLA junior Tessa Nath wrote in The Tower that the failure of the BDS resolution to distinguish between anti-Zionism and anti-Semitism "undermines the identity of most Jewish students, which is, in turn, predicated on the connection between Israel and Judaism."[368]

Some of the Jewish students invoked the new language of harm in explaining why they perceived the critiques of Israel and Zionism as personal attacks on them as Jews.

Liat Menna told PEN America that the BDS movement struck at the core of her Jewish identity, in which being "Zionist and Jewish becomes the same thing." She said that in campus debates Zionism had been equated with racism, a comparison she viewed as inimical to reasoned dialogue:

> While Israel is not perfect, and nobody is going around saying Israel is perfect, and no country is perfect, every country has its problems. However BDS denies Israel's right to exist, denying our right to exist as Zionists, and saying that we have an illegitimate identity, and that's when the line is crossed.
>
> "Zionism is racism": It's not even like "Oh, well, by wanting to have a Jewish state you're perhaps drawing lines between different people." No, it's just "Zionism is racism." There's no conversation, there's no dialogue, there's nothing....
>
> Last year a girl got pushed because she wore an [Israel Defense Force] shirt. That comes from a lack of understanding and a lack of respect.... We're asking to be looked at as human beings, and we don't even get that. We're seen as just villains for our so-called support for so-called "genocidal activities."... I encourage free speech. But what I don't encourage is inflammatory language. I would never say Palestinians are terrorists.
>
> We just want to the administration to know that this is something that's hurting us, and bothering us, and making us feel unsafe and threatened. What do I mean by unsafe? When this type of rhetoric is brought, in instances like the BDS hearings, ... it's directed at us.[369]

On the other hand, Eitan Peled, a Jewish-Israeli UCLA student and member of Jewish Voices for Peace, a Jewish group that supports BDS, does not view efforts to target Israel on campus as in any way anti-Semitic. He said: "As a Jewish Israeli student, I don't even know how to begin to tell you what a ridiculous allegation that is, to say such a thing. And I think that such accusations do a disservice to anybody who has experienced such discrimination or bigotry."[370]

The anonymous Palestinian UCLA student looked at the debate through a different prism, that of her own family suffering under occupation: "I'm talking about the experiences of my family and the reality of the occupation.... I should at least not have to contribute to the hardships of my family. To make it about others' feelings is just wrong."[371]

Rabbi Chaim Seidler-Feller, who recently retired after leading UCLA's Hillel for 40 years, told PEN America that anti-Israel sentiment has fed into a broader effort to recast the role and position of Jews both on campus and beyond:

> There's an undercurrent that you hear within student groups about Jews' privilege, wealth, and power in ways you didn't hear years ago. And it comes up in the debate on BDS on campus. Part of the response is to invalidate Jewish claims to be vulnerable in any way or to have suffered from any prejudice is that Jews are themselves now part of the oppressive class. So you have disturbing trends, and it seems to me that with these disturbing trends, overt vulgar anti-Semitism and what I call the politics of resentment manifest themselves, which produces discomfort. I think that the response is -how can we do something about it? What can be done?[372]

As the disputes went on, in late December 2015 one UCLA student, not known to be affiliated with SJP or any other group, wrote on her private Facebook that Jews were "troglodyte albino monsters of cultural destruction," prompting a flurry of social media posts, some of them demanding that the student be fired from her on-campus job.[373] While the UCLA condemned the post as not representing the university, senior administrators told PEN America that the university was enable to sanction the author, citing her free speech rights on her private Facebook page.

The BDS campaign continued as pro-Palestinian groups reintroduced their divestment resolution. In November 2014, the newly elected student government council held new hearings. This time, SJP took steps to assert more control over speakers from its side. As Rahim Kurwa, a sixth-year graduate student in sociology, said, "We were able to explain what types of speech we felt were productive to our campaign and what types of speech were antithetical to our principles."[374] The UCLA administration also helped structure the hearings far more tightly, creating a less contentious gathering. Only UCLA students were permitted to attend the meeting, and rules were established so that equal numbers of speakers for and against the resolution would be given the floor, with time limits. Montero commented on the administration's strategy of devoting additional resources to provide counseling and support for students to be able to address the controversies in a more constructive manner:

> I'm there. Our counseling and psychological services executive director is present. We have additional staff present to watch, to support, who's leading, who's crying, how are the emotional reactions to what's happening? Trying to not insert ourselves into the discussion but just provide a safety net of discussion or support.[375]

Those efforts appear to have helped. As the Daily Bruin, UCLA's student newspaper, reported:

> Rauya Mhtar, a fourth-year philosophy student, said she thought Tuesday's meeting was less tense and fostered a more civilized discussion on divestment than the meeting in February, when the council voted on a similar resolution. "There was a lot more solidarity in the room and people seemed to focus much more on the humanitarian aspect of the issue this time around," Mhtar said.[367]

Aftermath of the Resolution

After the resolution passed by a vote of 8 to 2 with two abstentions, the administration sent out an email affirming that it nonetheless did not intend to divest. The anonymous Palestinian UCLA student was disappointed in the administration's response, reading the message as "a signal that 'your experiences and your family in the West Bank does not matter.'"[377]

A few months later, on February 10, 2015, then-sophomore Rachel Beyda was nominated for a spot on the student Judicial Board. In an interview conducted by 15 members of the undergraduate student council,[378] Beyda was asked whether her Jewish identity would affect her judgment on such issues as the ethics case. As *The New York Times* reported:

> "Given that you are a Jewish student and very active in the Jewish community," Fabienne Roth, a member of the Undergraduate Students Association Council, began, looking at Ms. Beyda at the other end of the room, "how do you see yourself being able to maintain an unbiased view?"
>
> For the next 40 minutes, after Ms. Beyda was dispatched from the room, the council tangled in a debate about whether her faith and affiliation with Jewish organizations, including her sorority and Hillel, a popular students group, meant she would be biased in dealing with sensitive governance questions that come before the board, which is the campus equivalent of the Supreme Court.
>
> The discussion, recorded in written minutes and captured on video, seemed to echo the kind of questions, prejudices and tropes—particularly about divided loyalties—that have plagued Jews across the globe for centuries, students and Jewish leaders said.
>
> The council, in a meeting that took place on Feb. 10, voted first to reject Ms. Beyda's nomination, with four members against her. Then, at the prodding of a faculty adviser there who pointed out that belonging to Jewish organizations was not a conflict of interest, the students revisited the question and unanimously put her on the board.[379]
>
> In a statement, SJP said: "SJP was not involved in, had no knowledge of, and would not support the questioning of Beyda or anyone else based on their identity."[380]

In discussing this incident with PEN America, David Myers, a UCLA professor of Jewish history, explained that opposition to Israel or its policies is not necessarily anti-Semitic but that that at times the boundary could be "porous." Referring to the Rachel Beyda interview, he said:

> There we see the slippage between anti-Israel expression and concerns about one's Jewishness. That's the slippage. The slip was not intentional. Meaning, I think it was not intended to be anti-Semitic. I think it was a very natural, and rather dangerous, progression.[381]

Undergraduate Gil Bar-On echoed the idea that the relationship between anti-Israel and anti-Semitic viewpoints can assume multiple forms, depending on the speaker:

> I obviously think there's totally room for criticism of Israel, and I don't think that all cases of anti-Zionism are just anti-Semitism. But a lot of times that does blend together. If your professor is pretty much completely singling out or demonizing Jewish people or Jewish statements, they may cross a line. But I'm definitely on the side of being able to challenge people on all sides of the issue.[382]

After the Beyda questioning, Myers taught a short course on the history of anti-Semitism, which was attended by one of the students involved in the Beyda case. Myers explained:

> So that became proof positive to the AIPAC crowd that anti-Semitism was rampant on campus. But one should not assume that all anti-Israel, or even all BDS activity is by definition anti-Semitism. That is the crux of the debate. That's where you intervene trying to make sense of how does this intersect with free speech. It's a very tricky, difficult line for demarcation.
>
> From personal experience, I can say it is clear to me that not all supporters of BDS, by any stretch of the imagination, are anti-Semitic. It is also clear to me that a) some supporters of BDS unwittingly

> got into this slippage, and b) some supporters hold some ideas that are quite anti-Semitic. I think the grave danger is the slippage. What are you supposed to do? Censor your critique of behavior that you find completely objectionable? Refuse to allow that critique because it may be interpreted as anti-Semitism by some?
>
> The university is supposed to be an open marketplace for ideas, the one place where you can push beyond convention and articulate disconcerting and difficult thoughts. Of course the challenge is how to do so without creating an uncomfortable or hostile environment.[383]

Numerous media outlets—including *The Atlantic*[384], *The New York Times*[385], and *The Guardian*[386]—reported on the questioning of Beyda, often positing that it was a sign of rising anti-Semitism at UCLA and on campuses generally.

Intimidating Protesters On Campus

Two weeks later, in late February, UCLA students found posters around campus that, according to witnesses, showed masked men with assault rifles standing over a kneeling, bound, masked man.[387] The posters read "Students for Justice in Palestine

> At a recent Undergraduate Students Association Council meeting, a few council members unfairly questioned the fitness of a USAC Judicial Board applicant because of her Jewish identity. Another upsetting incident occurred last weekend when inflammatory posters on our campus implied that Students for Justice in Palestine was a terrorist organization.
>
> We should all be glad that, ultimately, the judicial board applicant was unanimously confirmed for her position and that the posters were taken down by members of our community. We are pleased that the students who initially objected to the Jewish student's appointment apologized, and we are reassured that the UCLA Police Department is vigorously investigating the matter of the posters.
>
> Yet we should also be concerned that these incidents took place at all. No student should feel threatened that they would be unable to participate in a university activity because of their religion. And no student should be compared to a terrorist for holding a political opinion. These disturbing episodes are very different, but they both are rooted in stereotypes and assumptions.
>
> Political debate can stir passionate disagreements. The views of others may make us uncomfortable. That may be unavoidable. But to assume that every member of a group can't be impartial or is motivated by hatred is intellectually and morally unacceptable. When hurtful stereotypes—of any group—are wielded to delegitimize others, we are all debased.
>
> A first-rate intellectual community must hold itself to higher standards.[388]

Soon after, conservative activist David Horowitz told the *Jewish Journal*, a local weekly newspaper, he had commissioned and hung the posters as "part of a campaign … to raise awareness of the epidemic of Jew hatred on college campuses, like at UCLA."[389] It was later revealed that Horowitz had received funding for this poster campaign from Sheldon Adelson, the casino tycoon, Republican mega-donor, and committed Israel supporter who bankrolls a wide range of Zionist causes. According to the L.A. Times, with $10 million in funding, Adelson had launched a task force to implement projects that would counteract the BDS movement on campuses and "target what he called 'lies' about Israel perpetuated by Students for Justice in Palestine."[390]

Similar anti-SJP posters appeared on campus in April and November 2015. Then the following April, another round of posters appeared, this time listing SJP members by name and calling them terrorists. As undergraduate Gil Bar-On recounted, the Jewish community at UCLA "responded pretty quickly, condemning the posters and very much stressing that this is not our opinion whatsoever." Bar-On described "a very rare show of unity" between pro-Israel students and SJP in voicing outrage over the posters.[391]

In a campus-wide commentary posted online, Jerry Kang, UCLA's vice chancellor of equity, diversity, and inclusion, condemned the "focused, personalized intimidation that threatens specific members of our Bruin community." The poster campaign was seen potentially to cross the line from protected, if hateful speech, to impermissible and menacing harassment. Kang wrote:

> [I]f your name is plastered around campus, casting you as a murderer or terrorist, how could you stay focused on anything like learning, teaching, or research? In modern times, we may have to resign ourselves to the reality of negative, unfair, and often anonymous statements about us strewn throughout the Internet, with little practical recourse. But I refuse to believe that we can do nothing about hateful posters pushed into our school and workplaces by outsiders.

> First, we repudiate guilt by association.... The chilling psychological harm cast by such blacklist campaigns, especially when pushed into our physical campus grounds, cannot be dismissed as over-sensitivity. If you don't find these posters repulsive, consider your own name on them with whatever ludicrous stigmas that outsiders could conjure up. And if this isn't enough, consider what might follow. What will you say when the next round of posters on campus includes photos, phone numbers, email addresses, home addresses, names of parents, names of children? These are not just hypotheticals. They have happened in other political contexts, such as the website called the "Nuremberg Files," which targeted individual doctors who provided lawful abortions.
>
> [UCLA] will deploy all lawful resources to counter any harassment or intimidation.[392]

Student and Community Responses

According to Janina Montero, the recently retired vice chancellor of student affairs, passions were inflamed by two factors. The first was a stark campus split along racial and socioeconomic lines:

> All of the communities of color associated in support of BDS. Systematically, each one of them. For instance, the undocumented students made the connection with not being able to cross borders, people coming into your house and taking you away. That created a painful rift. Traditionally the Jewish community have felt connected with supporting communities of color, especially African-Americans. It was a significant cultural and political split. The feelings were and are very raw.[393]

Rabbi Aaron Lerner, now the executive director of Hillel at UCLA, wrote in an email:

> The anti-Israel student groups have been successful in passing Boycott, Divestment, and Sanctions (BDS) resolutions only because they have partnered with other radical and marginal groups to create coalitions in which each group supports one another's special interest projects... This coalition then runs for election on a supposedly progressive platform, brings out their voters en masse, and succeeds in essentially colonizing various student leadership groups.[394]

UCLA undergraduate Gil Bar-On put a very different spin on a similar phenomenon, speaking of the frustration of many Jewish students who faced a quandary in wanting to support a range of other social justice causes on campus but find that it can be difficult to make common cause without supporting BDS:

> There's kind of a coalition between a lot of social justice groups, and part of that coalition is also SJP.... It's kind of frustrating that, let's say you're a Jewish student and you want to be involved in some social justice groups or minority groups that aren't 100 percent involved with divestment or BDS. It's pretty difficult to be part of those spaces unless you're fine with completely shutting your ears to a lot of things that make you feel uncomfortable.[395]

Pro-Israel student activist Liat Menna has led objections when the university's Alan D. Leve Center for Jewish Studies hosted speakers that in any way challenged Zionism. In May 2015, Princeton professor emeritus Cornel West was scheduled to be the keynote speaker at a conference at the Center for Jewish Studies about the work of Abraham Joshua Heschel; West was a student of Rabbi Heschel's and has written about his contributions and legacy. Menna and others (including the AMCHA Initiative, a group that fights campus anti-Semitism) objected, citing West's public support of the BDS movement.[396] When the conference hosts, the Center for Jewish Studies, invited Gil Hochberg, an associate professor of comparative literature and gender studies at UCLA, to present her research findings about Israeli policy toward Palestinians, Menna and allies advocated canceling the presentation on the grounds that the center should be a pro-Israeli place that supports, rather than critiques, Jewish identity.

After Menna asked Todd S. Presner, the director of the center, to cancel the Hochberg talk, he she suggested that she read Hochberg's latest book, *Visual Occupations: Vision and Visibility in a Conflict Zone,* and then come to a discussion with other students about the book and Hochberg's planned lecture. Menna told PEN America that after the discussion and meeting with Presner, she came away with a new perspective: "Sitting through that meeting, while I was so uncomfortable—to be honest, it helped me to not only be more convicted in my cause but realize where there needs to be more conversation."[397]

In an interview with PEN America, Menna continued to express the view that being Jewish and being a Zionist are part of a single, indivisible identity, rendering any attack on Zionism anti-Semitic. But there are signs that her engagement in campus controversies is adding new shades and perspectives. While Menna argued that demanding the cancellation of a speaking invitation itself constitutes protected speech, she also evinced some appreciation of alternative tactics:

> At the end of the day, I can respond to free speech

> with more speech, and I can condemn it, and I can react to it. I think, while there may be incidents when students really want to shut down a speaker from speaking … that's part of free speech.... I think initially we want the free speech to stop when it makes us uncomfortable, but as time goes on you realize its benefit.[398]

Rabbi Chaim Seidler-Feller of UCLA Hillel commented on the tension between ethnically oriented safe spaces and values of free speech:

> Here you do have people who will say, "Community survival trumps free speech." Because [Hillel is] a particular institution and we have these values. It seems to me some of what's going on regarding Jews on campus has to do with this clash between the internal Jewish instinct for survival and being confronted with more universal values and principles that can seem to be antagonistic to our own self-interest.[399]

UCLA grad student Rahim Kurwa, one of the BDS activists who was branded a terrorist on David Horowitz's posters, also expressed a growing appreciation of free speech protections. In an interview with PEN America, he described younger students who may begin thinking that theirs is the only valid position but come to appreciate different perspectives as they mature, valuing the free exchange of ideas as essential to their cause. As Kurwa explained:

> One cannot have diversity and social justice speech in spaces without free speech. That's very clear from my experiences on campus. Without the protections of free speech rules, almost every activity that SJP engages that is outward facing, in other words, that engages with the public in some way, would be shut down or silenced. And that's not my opinion, that's documented by relatively powerful groups, that have stated so in their agendas, and have worked, and at some degree been successful.... So, my take on it would be that free speech is not incompatible with our campaign but essential to it.[400]

PEN America asked Kurwa for his thoughts on students who said that the campus controversies made them feel unsafe and called on the university to provide so-called safe spaces. Kurwa responded:

> I don't want it to sound demeaning when I say this, but there are things you say when you are at one age that you may not say a few years later.... I try to think about it from a perspective of a younger minority student on this campus, a campus that is extraordinarily fraught with tension around race, gender, immigration status, political views, etc. And I can really understand the desire to carve out some space for peace of mind, to just be yourself. Of course minority students want some kind of safe spaces. Those can be important and positive for students of color, particularly underrepresented minorities, most often with no impact on any other part of the campus community.... But social change isn't frictionless. It only happens with friction. You have to engage.[401]

In becoming involved with the BDS campaign, Kurwa knew that his exercise of free speech could lead to unforeseen and unwanted consequences. With his name on the Horowitz posters, which he believed encouraged violence against him and his fellow activists, and with his name listed as a terrorist on the website Canary Mission, Kurwa is concerned that his prospects of landing an academic job once he graduates may be compromised. He disputes the idea that student activists are the ones suppressing free speech. In his mind, those with power are the ones suppressing outsider perspectives.

> The university itself has incredible power over the speech forums it controls, and in my estimation it has used that power to elevate only the voices it is comfortable with—those that do not challenge the political status quo in any meaningful way.[402]

Safe Space and Free Speech in the Social Media Era

Some at UCLA brought safe spaces into discussions. Both Montero and Blandizzi voiced concerns with the concept as advanced by student activists. Blandizzi described the university's approach to such demands as centering, at least in part, on encouraging students to define their concerns and fears more precisely:

> What threats are we talking about? Tell me more about who's threatening you with what, and how. So we try to really unpack the "I feel unsafe" statements in a way that helps us narrow in as to what we potentially need to provide direct support.[403] I'm trying to figure out what happened. Is what happened an actionable situation? Most of the time it's not, because of freedom of speech and other freedoms.

Both students and faculty observed that the attention paid to the UCLA controversies on social media and in the national press contributed to a heightening of tensions and, at times, a hardening of positions. For instance, after

SJP-UCLA photo campaign: #DivestNow

FAIZAN GHORI

the February 2014 BDS resolution failed, a cellphone video of a student government representative getting extremely upset about the loss was posted online under the heading "UCLA Student Melts Down After Divestment Defeat."[404] The video has been viewed more than 115,000 times on YouTube and was commented on by pundits and outlets including conservative commentator Michelle Malkin, The Jewish Press, Breitbart, and The Daily Caller. The student depicted in the video reported that she subsequently received hate mails and death threats.[405]

After the Rachel Beyda questioning became national and international news, according to the UCLA administration, the students involved apologized to Beyda and UCLA administrators stepped in to help the students understand the implications of the questions. However, the students who did the original questioning received hostile emails telling them, Montero told PEN America, "You will never work, I'll make it my business that you will never find a job."[406]

Blandizzi discussed about how social media heightened passions, making controversies feel like catastrophes:

> Whether it's social media or the activism of the community they surround themselves with, it's an all-in phenomenon. They're constantly thinking about it, so that it permeates all their experiences. That level of intensity fuels some of the discourse in a way that makes the opinions and thoughts come out very fast and very quick, and they feed off that level of intensity. It's impacting their ability to function and see clearly. A student might be in the midst of really losing themselves in understanding the bigger calling: They have come to be a student here at UCLA. They have responsibilities that they have to fulfill. [407]

Montero noted that not all UCLA students arrived on campus with a strong understanding of free speech protections and the rationale for them:

> Principles of freedom of speech, First Amendment, all of those important issues, don't easily translate to the experience of many of our students. It's not part of their educational makeup. It's not part of their social capital, if you will.[408]

UCLA's administration has planned educational events bringing together various stakeholders with diverse views to share perspectives on free speech. But Montero expressed concern that these efforts, including periodic dinners for students and faculty to discuss free speech challenges, tend not to be popular or well attended. "There is something about freedom of speech that is not as sexy as microaggressions or safe spaces," she said. "We've done all sorts of things, bringing faculty members and others, legal experts, to talk about freedom of speech in different contexts … it does not cause the response that one would hope."[409]

Case Study

NORTHWESTERN

Problems with Title IX Investigations

In January 2014, Northwestern University issued a new policy forbidding "romantic and sexual relationships" between faculty and students, opening the door to sanctions for professors who had sex with undergraduates, regardless of consent.[410]

The timing of the introduction of this policy, which is consistent with similar bans at certain other elite universities,[411] may have related to the events underlying a complaint by a Northwestern undergraduate against the university for violating Title IX.[412] The student complained to the university in 2012, as a freshman, that philosophy professor Peter Ludlow had gotten her drunk and sexually assaulted her. Ludlow denied the allegations, saying that the student had initiated the encounter and he merely responded.[413] Northwestern investigated and found that he had sexually harassed the student and sanctioned him by denying him the endowed chair that he had been promised, denying him a raise, and banning him from sexual or romantic relationships with students.[414] The university assessed the evidence to be insufficient grounds to fire him.[415]

Ludlow appealed to a faculty committee, which upheld the charges, concluding that Ludlow had made inappropriate and unwelcome advances on the undergraduate, who was too drunk to grant consent.[416] Ludlow then threatened legal action against the student on defamation grounds. Meanwhile, he kept his existing position and continued to teach.[417]

In February 2014 the student, who was reportedly depressed and suicidal, sued Northwestern in federal court under Title IX, alleging that the university had shown "deliberate indifference" in allowing Ludlow to continue to teach and failing to prevent him from threatening to retaliate against her with a defamation action.[418] Based on the same alleged events, the student also sued Ludlow in state court for violating the Illinois Gender Violence Act.[419]

Soon after the undergraduate's lawsuit against Northwestern became public, a philosophy graduate student told her faculty adviser that she had been the victim of a similar assault by Ludlow. Fearing retribution, she had not brought charges.[420] Once the faculty adviser informed the university of the second alleged incident, Northwestern initiated a Title IX investigation into the graduate student's case.[421] In June 2014, Ludlow filed lawsuits against the undergraduate for defamation;[422] the graduate student for defamation (alleging in public filings that they had had a consensual relationship, which she denied[423]); against the faculty adviser for bringing the graduate student's charges to the university;[424] against Northwestern for mishandling the investigations and misrepresenting its decisions to the media;[425] and against local media outlets for their coverage.[426]

As the crisis deepened, student activists and some faculty pressed for more transparency and stronger sanctions for violating the ban on student-faculty relationships. The student government endorsed this request.[427] A student group organized a sit-in targeting Ludlow's class. When he canceled class to avoid the protest, they instead marched on the dean's office to a protest against what they contended were the university's inadequate sexual assault policies.[428]

In the end, Ludlow's suits were dismissed, and a tentative job offer he had received from another university was withdrawn.[429] Northwestern commenced termination hearings against him. On November 13, 2015, he resigned.[430] The undergraduate's lawsuit against Northwestern was dismissed;[431] her suit against Ludlow is still pending.[432]

About a year after the undergraduate's lawsuits were filed, on February 27, 2015, Northwestern film professor Laura Kipnis published an essay in The Chronicle of Higher Education called "Sexual Paranoia Strikes Academe," which adopted a mocking tone to decry the year-old Northwestern policy banning romantic or sexual relationships between faculty or staff and undergraduate students, regardless of consent.[433] Kipnis talked about longtime marriages that began with romance between professors and students and rejected the premise of the ban as assuming that professors inherently wield more power than students. In her article, without mentioning names, Kipnis implicitly credited Ludlow's contested claim that his relationship with the graduate student had been consensual, writing:

> What a mess. And what a slippery slope, from alleged fondler to rapist. But here's the real problem with these charges: This is melodrama. I'm quite sure that professors can be sleazebags. I'm less sure that any professor can force an unwilling student to drink, especially to the point of passing out. With what power? What sorts of repercussions can there possibly be if the student refuses?...
>
> In fact, it's just as likely that a student can derail a professor's career these days as the other way around, which is pretty much what happened in the case of the accused philosophy professor....
>
> What becomes of students so committed to their own vulnerability, conditioned to imagine they have no agency, and protected from unequal power arrangements in romantic life?[434]

Faced with this potent public critique, proponents of the relationship ban mobilized to defend it. Then-undergraduate Erik Baker, a member of Men Against Rape and Sexual Assault and founder of an organization called Title IX at Northwestern, rallied 41 student signatories for an open letter published

in the student online publication North by Northwestern on March 2, 2015:

> As activists, peer educators, and compassionate human beings on Northwestern's campus, we are writing to publicly express our outrage and disappointment with RTVF Professor Laura Kipnis' recently published article about professor-student relationships in the Chronicle of Higher Education. Kipnis' full-throated support of sexual encounters between faculty and their students is anathema to the safe culture of healthy sexuality towards which the Northwestern community ought to aspire. Professor Kipnis does not speak for us....
>
> We are concerned that Kipnis' arguments have the potential to further erode the few protections for vulnerable students on campus that have not already been exposed as a cruel joke. And we can only hope that the Northwestern community will meet Kipnis' toxic ideas with resounding opprobrium, because they have no place here.[435]

Baker and others also mounted a petition asking the administration to reiterate its support for the ban on faculty-student relationships and to issue an "official condemnation of the sentiments expressed by Professor Kipnis."[436] Title IX at Northwestern then organized a march, complete with carried mattresses and taped mouths, both widely recognized symbols of university indifference to sexual assault.[437] Northwestern's president, Marvin Schapiro, announced that he would consider the students' petition.[438]

Even some of Kipnis's supporters criticized her face-value acceptance of Ludlow's claim that the relationship between him and the graduate student had been consensual, asking her to rephrase her characterization, since there was no evidence underpinning it.[439] Kathryn Pogin, another graduate student in Northwestern's philosophy department, wrote a letter to Kipnis and to the editors at the Chronicle disputing Kipnis's account of the alleged assault,[440] as well as a piece in the Huffington Post strongly criticizing Kipnis for "willfully misleading the public" about the facts of the case. The Chronicle eventually issued a correction, clarifying that while Ludlow claimed the relationship was consensual, this allegation was disputed.[441]

Philosophy graduate student Kathryn Pogin underscored to PEN America the devastating impact of Kipnis's assumptions about the graduate student's relationship with Ludlow. She noted that the graduate student had reported the assault reluctantly, fearing retaliation and damage to her professional reputation. Even though Kipnis did not mention the graduate student's name, Ludlow's defamation suit had made it widely known. Pogin reported that the unnamed graduate student felt that precisely the negative personal and professional consequences she had feared would result from bringing a complaint came to pass once her charges were publicly described by Kipnis as baseless:

> Now a piece has been published in the newspaper most widely read by her professional community alleging that her allegation of rape is an incidence of sexual paranoia. It's only sexual paranoia if the women who have accused Ludlow are paranoid and don't have a legitimate complaint, right? This is all being dissected on philosophy blogs because she was sued in public, so on the philosophy blogs she's being picked out by name.[442]

The graduate student and a fellow student and supporter of hers told PEN that they asked Northwestern administrators if they could lodge a retaliation complaint against Kipnis, given what they said was a misrepresentation of the facts of an ongoing legal case involving the university, and in light of Kipnis' refusal to correct the factual record.[443] The graduate students argued that Kipnis could be considered an agent of the university, and, accordingly, her inaccuracies could constitute a form of retaliation against the student for filing charges against Ludlow.[444] They maintained that Kipnis' article and others like it could pose a potent deterrent to Title IX claims by students who would have reason to fear public or near-public reprisals.

The graduate student and her supporter told PEN that they were told by a university representative that Northwestern could address the question of whether Kipnis's article was retaliatory only if the graduate student filed a formal Title IX complaint against Kipnis.[445] The graduate student therefore filed a complaint. The university's Title IX coordinator reportedly had a legal conflict of interest in addressing the case, as she was also being sued by Ludlow alongside the graduate student. After an interval of two weeks, during which time the graduate student received no response to her complaint, another graduate student intervened in the hope of getting the university to take action. The second student characterized her involvement as necessary to bypass a problem of conflict of interest that had apparently arisen in relation to the original affected graduate student.[446]

Faced with charges of unlawful retaliation under Title IX, Laura Kipnis detailed her experience in a second Chronicle article, "My Title IX Inquisition," published on May 29, 2015.[447] She recounted being notified by Northwestern's Title IX coordinator that two students had filed complaints based on her article and a subsequent tweet, and that these complaints would be handled by an outside investigator.

> I wrote back to the Title IX coordinator asking for clarification: When would I learn the specifics of these complaints, which, I pointed out, appeared to violate my academic freedom? And what about my rights—was I entitled to a lawyer?... No, I could not have an attorney present during the investigation, unless I'd been charged with sexual violence. I wouldn't be informed about the substance of the complaints

> until I met with the investigators. Apparently the idea was that they'd tell me the charges, and then, while I was collecting my wits, interrogate me about them. The term "kangaroo court" came to mind.[448]

Asked about the case by PEN, Northwestern's administration said that it could not comment on the specifics of any individual investigation but that it is their policy to inform anyone charged with Title IX violations in writing of what the charges are.[449]

Eventually, Kipnis wrote, she learned of the charges:

> Both complainants were graduate students. One turned out to have nothing whatsoever to do with the essay. She was bringing charges on behalf of the university community as well as on behalf of two students I'd mentioned—not by name—because the essay had a "chilling effect" on students' ability to report sexual misconduct. I'd also made deliberate mistakes, she charged (a few small errors that hadn't been caught in fact-checking were later corrected by the editors), and had violated the nonretaliation provision of the faculty handbook....
>
> Much of this remains puzzling to me, including how someone can bring charges in someone else's name, who is allowing intellectual disagreement to be redefined as retaliation, and why a professor can't write about a legal case that's been nationally reported, precisely because she's employed by the university where the events took place. Wouldn't this mean that academic freedom doesn't extend to academics discussing matters involving their own workplaces?[450]

During the course of the investigation, Kipnis had a two-and-a-half-hour, in-person session with the investigators, followed by "numerous phone calls, emails, and requests for further substantiation, including copies of emails and tweets." She also reported that the lawyers, attorneys from a private law firm paid for by Northwestern, interviewed "an expanding list of witnesses," all at a presumably significant cost in billable hours.[451]

While Kipnis was told to keep the charges against her confidential as the investigation was under way, Lauren Leydon-Hardy, a graduate student, published a piece in which she mentioned that the complaints against Kipnis had been filed.[452] Before the inquiry was closed, the investigators asked Kipnis if she wished to file her own retaliation complaint against those who had filed charges against her, or those who had exposed the existence of the charges publicly. Kipnis declined. A faculty support person who was permitted to accompany Kipnis to her hearings was then hit with a new Title IX complaint on the basis of statements *he* had made touching on the case at meetings of the Faculty Senate.[453] A new investigation of that charge ensued.[454] In late May 2015, Kipnis learned that the investigation of her had concluded and that she had been cleared of all charges.[455]

Kipnis noted in her piece recounting her Title IX odyssey that she did not think Northwestern "necessarily wanted to be the venue for a First Amendment face-off" and that she had learned that any Title IX charge filed has to be investigated, which, she wrote, "effectively empowers anyone on campus to individually decide, and expand, what Title IX covers." She went on:

> The Title IX bureaucracy is expanding by the minute. A recent emailed update from my university announced new policies, programs, hires, surveys, procedures, websites, and educational initiatives devoted to sexual misconduct. What wasn't quantified is how much intellectual real estate is being grabbed in the process. It's a truism that the mission of bureaucracies is, above all, to perpetuate themselves, but with the extension of Title IX from gender discrimination into sexual misconduct has come a broadening of not just its mandate but even what constitutes sexual assault and rape.
>
> Nothing I say here is meant to suggest that sexual assault on campuses isn't a problem. It is. My concern is that debatable and ultimately conservative notions about sex, gender, and power are becoming embedded in these procedures, without any public scrutiny or debate. But the climate on campuses is so accusatory and sanctimonious—so "chilling," in fact—that open conversations are practically impossible. It's only when Title IX charges lead to lawsuits and the usual veil of secrecy is lifted that any of these assumptions become open for discussion—except that simply discussing one such lawsuit brought the sledgehammer of Title IX down on me, too.
>
> Many of the emails I received from people teaching at universities pointed out that I was in a position to take on the subjects I did in the earlier essay only because I have tenure. The idea is that once you've fought and clawed your way up the tenure ladder, the prize is academic freedom, the general premise being—particularly at research universities, like the one I'm fortunate enough to be employed at—that there's social value in fostering free intellectual inquiry. It's a value fast disappearing in the increasingly corporatized university landscape, where casual labor is the new reality. Adjuncts, instructors, part-timers—now half the profession, according to the American Association of University Professors—simply don't have the same freedoms, practically speaking.
>
> I learned that professors around the country now routinely avoid discussing subjects in classes that might raise hackles. A well-known sociologist wrote that he

> no longer lectures on abortion. A tenured professor on my campus wrote about lying awake at night worrying that some stray remark of hers might lead to student complaints, social-media campaigns, eventual job loss, and her being unable to support her child. I'd thought she was exaggerating, but that was before I learned about the Title IX complaints against me.[456]

Kipnis told PEN America that she didn't mind the students marching against her article, which only caused it to be more widely read. With respect to the graduate students who brought the retaliation charges, in Kipnis's view they "were using Title IX to try to rebuke or censure me over something I had written that had a different point of view that they disagreed with."[457]

Kipnis and the students with whom she disagreed had one thing in common: They all experienced the Title IX process as seriously flawed. Erik Baker spoke about this:

> One piece of common ground for sexual violence activists and the FIRE (Foundation for Individual Rights in Education) crew is that the Title IX process and the way a lot of university disciplinary systems work is broken. [FIRE et al.] would say it's because it deprives the accused of due process. We will say it's because it re-traumatizes survivors and doesn't provide just outcomes. In both cases I think that there is some approximating consensus that significant reforms do need to be made. So I think it's very possible that [Kipnis's] claims may be true and she may have been treated unjustly by the Title IX system.
>
> All of the things that they did, that kind of questioning and very lengthy, arduous process, her lack of information on what other conversations [the investigators] were having—all of that is also true for people who are making accusations. In a lot of cases those people are going to be fresh off of a very traumatic situation, too. I think it would be nice if people could articulate that consensus as grounds for future conversation about how to improve the process.[458]

When PEN America interviewed Kipnis, she spoke of her understanding of how the Title IX process applied in her case:

Part of what's happening is there is this incredible ramping up of administrative tyranny in these Title IX and sexual assault areas. These people are vastly overreaching their positions, and their findings and really trodding on everyone's life. There's no oversight.

> A lot of it is to stay in compliance with Title IX. So the rise in administration is partly to stay in compliance but also because there's this kind of panic/paranoia about sexual assault and to show that they're doing things to stay on the right side of the issue. So this new army of administrators has really expanded the apparatus to put people, and mostly other students, on trial and find them guilty.[459]

Graduate student Kathryn Pogin agreed that the Title IX process is gravely flawed:

> People absolutely should have the charges in writing, with whatever complaint is filed against them.... They should be allowed to record all their interactions with any investigator or university administrator.
>
> Unfortunately, that's never going to happen. Universities are not going to allow people to record conversations, because university Title IX processes by and large are constructed not actually to protect students or faculty or staff from discrimination or harassment. They're designed to protect the university from legal liability. And the more you allow people to record conversations, the more you're going to catch administrators screwing up how they handle cases.
>
> If you look at Title IX coordinators across the country, a huge number of them, their legal background is not in advocating for students, not working in sexual harassment, not working in sexual discrimination. It is protecting corporations from discrimination complaints.... So they're all coming at this with an eye toward how to protect the university from legal claims. And in order to protect the university from a legal claim, you just have to show that they did not treat it with "deliberate indifference." So you take some kind of action, no matter how bad the outcome is. Unless you can show that it was deliberately indifferent, it's really hard to file a Title IX complaint.[460]

The Northwestern example suggests that the avenues for redress available to students who are victims of alleged assault are inadequate, particularly given the risks of retaliation and other forms of psychological and professional harm that can result from bringing an assault complaint. Students who have experienced assault face an array of disincentives that can deter prompt reporting, impede remedial action, and allow perpetrators to continue to function on campus. At the same time, the breadth and vagueness of Title IX can form the basis of complaints that do not address actionable conduct but can nonetheless chill speech, encumber academic freedom, and cause a significant drain on human and financial resources.

PEN AMERICA PRINCIPLES ON CAMPUS FREE SPEECH

The State of Free Speech on Campus

One of the most talked-about free speech issues in the United States has little to do with the First Amendment, the legislature, or the courts. A set of related controversies and concerns have roiled college and university campuses, pitting student activists against administrators, faculty, and, almost as often, against other students. The clashes, centering on the use of language, the treatment of minorities and women, and the space for divergent ideas, have shone a spotlight on fundamental questions regarding the role and purpose of the university in American society. Those wary of what they see as encroachments on the freedom to express unpopular ideas worry that the campus's role as a marketplace of ideas, a guardian of intellectual integrity, and a breeding ground for new generations of free thinkers is at risk. Supporters of new guidelines and intensified vigilance regarding speech-related offenses argue, by contrast, that in an increasingly diverse country struggling to eradicate persistent racism and other forms of discrimination, norms governing language and discourse must evolve to effect greater inclusion and equality. Many on both sides emphasize that the campus is an incubator for young adults, not only educating them but also nurturing and shaping their identities, self-confidence, and sense of community. These debates are occurring amid other changes on university campuses, including the rapidly increasing diversification of student bodies; challenges to traditional protections for academic freedom, including the decline of tenure; growing financial pressures on students and universities alike; and the rise of digital technologies and social media.

While free speech is alive and well on campus, it is not free from threats, and must be vigilantly guarded if its continued strength is to be assured. When waged with respect for different viewpoints, the movements afoot on campus to advance equality and counter discrimination can open up the university as a place where all students and faculty can participate more fully across racial, religious, gender, sexual orientation, disability, political, and social boundaries. The challenge for campuses is to find ways to expand all students' participation in intellectual life, inside and outside the classroom, without limiting the speech of one another. **PEN America's view, as of October 2016, is that while the current controversies merit attention and there have been some troubling incidences of speech curtailed, there is not, as some accounts have suggested, a pervasive "crisis" for free speech on campus.**

Unfortunately, respect for divergent viewpoints has not been a consistent hallmark of recent debates on matters of diversity and inclusion on campus. Though sometimes overblown or oversimplified, there have been many instances where free speech has been suppressed or chilled, a pattern that is at risk of escalating absent concerted action. In some cases, students and university leaders alike have resorted to contorted and troubling formulations in trying to reconcile the principles of free inquiry, inclusivity, and respect for all. There are also particular areas where legitimate efforts to enable full participation on campus have inhibited speech. The discourse also reveals, in certain quarters, a worrisome dismissiveness of considerations of free speech as the retort of the powerful or a diversion from what some consider to be more pressing issues. Alongside that is evidence of a passive, tacit indifference to the risk that increased sensitivity to differences and offense—what some call "political correctness"—can bleed into significant levels of self-censorship that suppress dissenting ideas.

That said, **the dialogues, debates, and efforts at greater inclusion on many campuses have the potential to help root out entrenched biases that have impeded the participation of members of marginalized groups. These conversations and controversies can help unleash and amplify new voices that can enrich debates on campus and in wider society, expanding free speech for everyone's benefit.** While the calls for change are sometimes framed in ways that appear inconsistent with free speech, there are also instances in which justifiable and legitimate demands (some of which may come across as challenging or hostile to traditions or norms) are wrongly dismissed because they're said to be motivated by "political correctness" run amok.

At times protests and forms of expression are treated as if they are incursions on free speech when in fact they are manifestations of free speech. Some entreaties for or against the use of particular language (even if the terms sound neologistic, overly politically correct, or otherwise distasteful to some ears) should be recognized as adaptations to students whose ethnic and racial backgrounds, upbringing, and priorities may bear scant resemblance to the populations that dominated the university campus during the second half of the 20th century. **While liberal values and principles remain fundamental, the implications of these precepts necessarily evolve from generation to generation, reflecting social changes and new norms.** No cohort has the power to freeze the interpretation of values such as liberalism, academic freedom, or even free expression, and new ways of thinking deserve to be understood and considered, rather than dismissed.

In PEN America's view, the drive for greater equality and inclusion on campus is to be strongly encouraged.

Free expression should be recognized as a principle that will overwhelmingly serve not to exclude or marginalize minority voices but rather to amplify them. Where principles of free expression have been subordinated inappropriately, as has happened on certain campuses—impinging on openness, dissent, or intellectual freedom—calling out and fighting these encroachments are essential to ensuring that the core value of free speech remains intact even as the campus evolves to better reflect a changing America. But cries of "free speech" have on occasion been used to refute or delegitimize protest and outrage—to dismiss the forms that speech takes and thereby avoid considering its substance. Yet protest and outrage, however infelicitously or unfamiliarly it may be expressed, must also be protected as free speech.

The discussion that follows elaborates PEN America's key findings and the priorities and recommendations that stem from this analysis.

Campus Protagonists: Administration, Faculty, Students

Campus speech controversies have no consistent protagonist or antagonist. University presidents, administrators, faculty, staff, and students can all be cast both in the role of speaker, and that of inhibitor of speech. These permutations vary by controversy, requiring all parties to think carefully about their roles and obligations when it comes to openness, inclusion, and free speech.

Especially in the era of social media and digital communications, legitimate, protected speech can have the effect of chilling other speech. A faculty member subtly signaling that certain views are disfavored in the classroom or in written work, student protests deterring an invitation to a certain speaker, or fear of criticism on social media preventing a student from publishing an op-ed in a student newspaper are all circumstances in which speech can deter speech.

At times, protests by those who lack the power to formally sanction speakers can feel as punitiveas official discipline. Being mobbed, doxxed, or shamed online for speech that is thought to be objectionable can be the emotional, psychological, social, and professional equivalent of a heavy punishment. To express a view—for example, opposition to affirmative action or support for the Republican nominee for president—that risks getting the speaker branded as racist. stigma. The effect of such reproach is exacerbated in the internet era, when the underlying speech—and the criticism thereof—may be memorialized in perpetuity online.All these factors can conspire to escalate appropriate caution and sensitivity into fear and self-censorship. The informal incentives and disincentives surrounding the expression of controversial opinions can enforce conformity, pushing unorthodox views to the margins. **While some degree of caution and forethought in speech is healthy, college should be a place where ideas can range free, dissent is welcomed, and settled wisdom is reconsidered.** To keep the campus as open as possible, speech and expression should be approached with an awareness of these ambient inhibiting forces, and with an effort to avoid approaching debates in ways that further foreclose speech.

The university administration holds special authority as both speaker and inhibitor of speech. When the university speaks out, its voice carries force. When the university constrains speech—by, say, promulgating a policy or disinviting a speaker—it does so not just as one of many actors vying in a debate but as a locus of power that all those on campus ignore at their peril. In the case of a public university, the administration carries the mantle of government prerogative. But even private universities have the power to hire, fire, suspend, and expel, dominating all levels of the campus. Moreover, universities, whether public or private, hold heavy sway over society at large through the influence of their scholars, their alumni, and the students they educate and send out into the world. **When a university's values are breached, its precepts threatened, or its constituents violated in a significant way, it is incumbent on top administrators to speak out. If the offense came in the form of speech, it may be appropriate for them to condemn the message, even while defending the speaker's right to express it.**

The old adage, coined by Beatrice Evelyn Hall as a characterization of Voltaire's approach to free speech—that one can disapprove of what is said while staunchly defending the right to say it—is central to the role of the university. Following this precept, the university can both demonstrate essential solidarity with those who may be justifiably offended by speech and uphold its role as a guardian of free speech rights for all. In some cases, concerns over fueling a controversy or even attracting negative press can silence an administration. University presidents and top officials may be so fearful of alienating one or another constituency that they fail to speak out when speech controversies rock their campuses. Amid fundamental debates concerning the role and values of the university, top leaders should not abdicate their duty to provide principled guidance. Even those who do not agree with everything they say should applaud those university presidents who have used speeches, open letters, and op-eds to provide moral clarity that helps reconcile competing interests.

Depending on their position and their circumstances, students can range from virtually powerless or startlingly powerful. Campuses that on the surface seem to offer an even playing field for all viewpoints may be experienced by some as subtly enforcing conformity. **Students who are in the position of advocating marginalized viewpoints or whose backgrounds, arguments, and agendas are not made to feel fully welcomed can perceive that their powers of speech are being abridged or denied.** In

classrooms where opinionated faculty do not make a point of inviting opposing views into the discussion, students can feel that expressing themselves will put their grades or standing at risk.

Equally, student complaints, protests, and outcry can lead to policies being changed, speakers being disinvited, or staff and faculty being disciplined or fired. The exercise of students' power can have the effect of inhibiting speech: rendering professors fearful of teaching rape law lest they fall afoul of Title IX, of showing a film that could generate protests, or of discussing a controversial classic book in a lecture. **As many students recognize, they have as much of a stake in the protection of academic freedom and free expression as any other campus stakeholders.** Activists who seek to challenge the system need those protections to ensure that they can pursue their aims without fearing reprisals. While it may be tempting to deter or seek to punish the expression of views one disagrees with, students need to be mindful of exercising their influence in ways that keep speech protected for all.

The role of faculty is also multidimensional. They depend on academic freedom to pursue their life's work. In certain cases, though, the voice of a professor may be, appropriately or not, construed as the authoritative voice of the university itself. At times, faculty members have been disingenuously characterized as agents of the university administration in an effort to undermine their academic freedom and call out or punish speech that would be inappropriate if it came from the administration but is perfectly permissible from a faculty member. At other times, though, faculty may wear both academic and administrative hats, without specifying which one is on for the purposes of particular speech. Even where this isn't the case, faculty members are in positions of authority and need to be cognizant of the potential for their speech to foster or impair inclusion and to enable or inhibit students' speech.

Inviting Speakers to Campus

Controversies over invitations to outside speakers have provoked fierce debates over who deserves a platform on campus and how to address objections that certain speakers' views or actions are offensive.

The first distinction to make in considering such questions is that between inviting and disinviting a speaker. Most campuses, academic departments, student groups, and the university as a whole have procedures or practices for deciding whom to invite. These procedures can range from formal to entirely ad hoc. Although all such bodies ought to be broad-minded in their choice of guests, it is fair for a deliberative process to rule out certain prospective speakers for any number of reasons; no one has a right to be invited to speak to any group. **But once a campus body has decided to extend an invitation, the choice to withdraw it must meet far more stringent criteria.** Otherwise the campus risks surrendering veto power to the loudest constituents, subverting its own decision-making procedures and limiting the range of ideas allowed on campus.

It should be possible in all but the most unusual cases to avoid withdrawing speaking invitations. **Bodies tasked with selecting speakers in the first place should involve key constituents in the process as appropriate.** While it may be perfectly acceptable for an academic department chair to choose speakers for a faculty colloquium, for an undergraduate forum students should ordinarily have a say. Especially for high-profile forums, administrators should ask themselves whether particular groups or constituencies on campus have reason to hold strong views about a possible speaker and should ensure that those perspectives are considered. Frequently, controversies over campus speakers focus on the selection process rather than the speaker chosen; students complain that promises of consultation in decision-making went unfulfilled. Such complaints can provide powerful fodder to mobilize criticisms of particular speakers. When it comes to important platforms at the university where administration decisions on speakers may be questioned, administrators should articulate clear procedures and follow them.

Rescinding a Speaking Invitation

When a university faces widespread calls to rescind a speaking invitation or honorific, a series of considerations should be taken into account. **Except in the most extreme cases, concerns over threats of violence or the potential outbreak of violence should not be grounds for canceling a controversial or event.** To do so gives those willing to resort to violence effective veto power over what the rest of the campus is entitled to see and hear. Whenever possible, threats of violence should be met with ample security to ensure the safety of speakers and listeners while allowing controversial speech to be heard. Those responsible for making such threats should be investigated and prosecuted, making clear that when protests crosses the line into unlawful threats or actual violence, they will be met with the full weight of the law. Only in the very rare instances when even additional resources and maximum precautions are judged by police and security experts to be insufficient to address a specific and credible threat should speech be shut down. Threats or even intimations of violence should be strongly condemned from all sides, regardless of whether the speaker in question is broadly considered objectionable. The "assassin's veto"—the ability of those willing to resort to violence to determine what speech can be heard—is anathema to free speech. It cedes control to the most extreme and lawless elements. It is the responsibility of the university administration and, where necessary, local law enforcement to ensure the safety of the speaker, the audience, and protesters.

Students march in anti-Trump demonstration

That a campus event may be colored by protests should also not factor into a decision to withdraw an invitation. The university needs to have the integrity to stand by its choice and to embody the idea that divergent perspectives must be allowed to coexist, even if noisily, rather than allowing one point of view to simply shut out others. It is also important to consider that whereas some students may forcefully object to a particular speaker, there may well be others who wish to hear the speaker but have not voiced their views as vociferously. Individuals who are invited to speak and then targeted by protests should resist the temptation to withdraw, allowing hecklers a victory. Understandably, invited guests may find it uncomfortable to be at the center of a speech-related controversy, but to acquiesce in demands that they be silenced will make it easier for other noisy objections to win the day without so much as a fight. Far from a diplomatic solution, the voluntary withdrawal amounts to a form of pressure-driven self-censorship that in its own way restricts the terrain of acceptable speech.

A more difficult situation arises when the concern is not violence or protests but rather that the original decision to invite the speaker was made with genuinely incomplete information or consultation and that subsequent revelations or perspectives call the worthiness of the speaker into doubt. This can be particularly complex when minority perspectives have not been factored into the original decision. In these situations, it is vital for the university to find specific public ways to allow alternative perspectives to be aired and heard. **While university decision-makers should not rule out acknowledging a mistake and reversing course if an initial judgment was made on an erroneous basis, such outcomes almost unavoidably give rise to embarrassment, divisions, and doubts about the sanctity of speech on campus.** It is frequently better to honor both the original invitation and the right of students or others to protest it and engage in counter-speech. If criticisms of the selection prove legitimate, it is important to develop more thorough and inclusive procedures for the future.

Distinguishing Among Types of Campus Speakers

It is important to **distinguish between the university's role as an open forum for a wide range of views and the administration's role as conferring prestige on the basis of academic and intellectual achievement**. Certain campus speaking opportunities signify a measure of approval for an individual's contributions and views, but not all do. The awarding of an honorary degree, for example, elevates the recipient to a permanent position of status by the university. A protest against such a conferral can therefore be directed less against the individual than against the administration, for its judgment in choosing an honoree whose work or actions may be viewed as inconsistent with the values of the institution or the student body. The same is true for commencement and class day speakers and honored lectureships. **A protest against the university for making a disfavored choice for a prestigious honor is not, in itself, an attack on free speech.** Protesters may have no quarrel with the invitee's right to speak freely but simply not want their school to endorse or honor that speech.

Nonetheless, when controversies erupt over honored speakers and pressure mounts to rescind an invitation, the nature of the speaker's words and actions inevitably comes into focus. **A protest directed at the university for making a poor choice of honoree can readily morph into a controversy that centers on whether certain views and ideas are considered out of bounds.** When an invitation for a speech or honorary degree is withdrawn, the speaker is effectively punished for holding certain views and the campus is denied the chance to hear a particular perspective, limiting the range of speech that is permissible on campus. In the heat of controversy, nuances and fine distinctions can be lost.

Administrators should be mindful up front that

commencement and other distinguished speeches confer not just a platform but an honor and should be thoughtful about the messages they may be sending to both internal and external constituencies with their selections. These feel-good celebrations, where universal attendance is strongly expected, don't allow for ready back-and-forth with the speakers or honorees and, with their tradition of rousing applause and heavy emphasis on positive public relations, can imply that the messages conveyed from the podium have wide approval.

That said, **to avoid speakers who might generate any controversy at all would make graduations dull and render honorary degrees an affirmation of only the most obvious and uncomplicated accomplishments.** Many of the world's foremost thinkers and leaders were at some point in their careers, in the eyes of some antagonists, considered heretics worthy of protest. Virtually every U.S. president and world leader has attracted protests based on some failing or blind spot. Rejecting the "heckler's veto" is a principle that should apply not just once an invitation has been extended but also earlier, when names of potential speakers are up for consideration. Decision-makers must resist the temptation to turn down valid choices simply because they might draw some protest.

Allowing Diverse Voices and Risk-Taking

Distinguished lectureships, while also a mark of prestige for chosen speakers, should not be subject to the same threshold of broad approval as ceremonial events like commencement addresses. Such lectureships represent important opportunities for a university to attract high-profile and important thinkers. Administrators and faculty should not limit themselves to crowd-pleasing choices. **When controversies arise, universities should promote dialogue and the airing of alternative viewpoints, making clear that while the choice of a lecturer indicates that a particular speaker deserves to be heard, it does not imply agreement.**

For more routine campus speakers—lectures in a specific department, panel discussions, or book talks—the campus should be as open as possible. These forums do not imply endorsement of an individual's views by the a university, or even by an inviting campus department or organization. **A critical function of the university is to expose students to a diversity of viewpoints, including those with which some may vehemently disagree.** In these instances, calls for speaking invitations to be withdrawn do amount to an effort to shut down speech, and should be rejected. **Those who object to a speaker should instead be invited to meet the objectionable speech with counter-speech. If there are legitimate obstacles to mounting counter-speech – a lack of funds on the part of a group that would like to host a speaker with an opposing stance, for example – the university can play a role in providing resources to be sure that all perspectives can be heard.** Ensuring that there is an equitable, accessible, and established mechanism to enable such speech and counter-speech is an important university function, and one that builds protection of campus free expression should controversy arise.

Handling Protests

When a speaking invitation draws protests, the detractors should have an opportunity to make themselves heard. Appropriate areas for protest and the dissemination of literature can be offered outside or adjacent to speaking venues. But protesters should not be permitted to shut down or shout down the speech, preventing others from hearing the speaker. The right to assemble and protest is not a right to deprive others of the freedom to speak. This "heckler's veto" hands the decision-making power over who gets heard to those with the loudest voices, allowing them to drown out others. Demonstrators who make it impossible for a speaker to deliver remarks should be encouraged to leave and, if necessary, should be removed to appropriate sites of protest that do not interfere with the speech itself. Where disruptive protests can be reasonably anticipated, the university and the hosts should make advance provisions to avoid disruptions and address any attempts to interfere with the speech itself or with the safety of audience members. Regardless of which campus entity has arranged the event, it is the role of the administration to work with the hosting group to ensure that, in the face of protests, the speech can go on.

Considering the Totality of the Speaker

The culture of the internet and social media, with its emphasis on brief excerpts and selective images that offer shock value, can lead to a reductionist perspective on the merits of any particular speaker or speech. People with long careers and numerous writings to their name may be judged on a few sentences or one position, often taken many years before and sometimes even subsequently recanted. While there certainly are singular acts that could, in of themselves, disqualify an individual from receiving an accolade, universities should seek to bring a broader perspective to the discussion of the merits of individual speakers. **If any stray comment, ill-advised position, or mistake can be grounds for invalidating an entire distinguished professional or personal record, a great many notable individuals would suddenly become unworthy of recognition.** The reassessment of one's views in light of new evidence or maturing thought is an intellectual process that should be encouraged and respected in an academic setting. Moreover, the fear that one poorly received remark gone viral could outweigh a life's work can itself chill speech. While the internet and social media may unavoidably amplify controversy, it should be the role of the university to offer an antidote, providing context and depth that allow members of the community to evaluate individuals and ideas in their most complete form.

The Concept of Safe Spaces

Safe spaces are among the most contentious concepts inflaming the campus debate, evoking caricatures of students seeking to surround themselves with the likeminded and avoid dealing with people and ideas they may find disagreeable.

Arguments over the terms "safe" and "safety" are partly—though not entirely—semantic. In its most familiar meaning, safety refers to protection from physical danger, something that most everyone agrees is desirable not just at universities but in all public spaces. But beyond physical danger, there are situations in which students who have experienced trauma or other psychological burdens may understandably seek out places where they need not worry about conflicts or stress, at least temporarily. This usage in turn has gradually broadened to the point where the term "safe space" can connote something closer to comfort or freedom from upsetting ideas. When the word "safe" is used in such a catholic manner, it often strikes critics as hyperbolic, leading to charges that students are being oversensitive or coddled. It is important to distinguish among the need to keep all students physically safe; the need, also important, to be sensitive to students who have suffered trauma; and the more general desire to avoid conflictual or upsetting debates or confrontations. These objectives are not the same and should not be treated as if they are.

Freedom of Association

At least in some of its conceptions, the idea of a safe space is rooted in traditional and legally protected notions of freedom of association—the right to be with groups of one's choosing that undertake activities of their own choosing. The right to form groups based on particular viewpoints, where opposing

ideas are considered unwelcome, is nothing new: Political parties, religious groups, issue-specific movements, and interest-based clubs all establish either soft or hard criteria for membership and can rightfully refuse admission to those who disagree with their precepts. The idea that such groups provide members with a measure of "safety," in the form of an environment where they will be free from the intellectual rigor and emotional trials of debating their views or dealing with hostile attitudes, is perfectly acceptable. Being part of a club, social circle, or society where one can relax in the knowledge that one is in friendly company where values are shared is a widespread desire. Millions of organizations at every level of American society help to fulfill this need. There is no requirement that everyone be open to hearing out every viewpoint all the time and anywhere. That students on college campuses seek out groups in which their ideas about race, gender, culture, and politics go unchallenged is perfectly acceptable and has always been the case. The difficult questions arise in relation to what form these groups take and what "spaces" are declared "safe" from opposing ideas.

Most campuses, academic departments, student groups, and the university as a whole have procedures or practices for deciding whom to invite. These procedures can range from formal to entirely ad hoc.

Physical Safety on Campus

While the concept of safety is often mocked, it is hardly without basis, given, for example, the statistics regarding the number of LGBT high school students who have been assaulted and the more general incidence of sexual assault and hate crimes on campuses. No one would argue against the idea that colleges should keep students safe from physical violence and threats. It is also difficult to deny that making campuses safe from violence and threats requires more than the standard policing practiced in any public place. Campus attitudes toward LGBT students, minority groups, and women, the role of drugs and alcohol, and norms of student conduct all directly effect whether campuses are physically safe. **It is the obligation of the university to foster an environment in which violent, harassing, and reckless conduct does not occur and respect is fostered.**

Emotional and Psychological Safety

More nebulous terrain regarding safe space arise in relation to the emotional and psychological harms that can result from environments where offensive words bleed into offensive behavior. . In some cases, harms are inflicted through speech—for example, anti-LGBT slurs or the sexualized denigration of women—sit on a continuum with physical assaults motivated by animus toward particular groups. While some free speech traditionalists minimize the significance of less tangible forms of harm, ample psychological data shows that the damage caused by denigrating statements, stereotypes, and social exclusion is real.

Marchers at Slutwalk in Knoxville, Tennessee to raise awareness for rape victims

Such harm can hamper students' self-confidence, increase anxiety, and hinder academic performance. Fostering education, sensitivity and thoughtfulness among all students and faculty about the challenges and offenses faced by groups that have historically been marginalized can be an honorable part of the university mission.

That said, outside the realm of small, self-selected groups united by shared views, it is neither possible nor desirable to offer protection from all ideas and speech that may cause a measure of damage. Insisting that the campus be kept safe from all these forms of harm would create a hermetically sealed intellectual environment where inhabitants could traffic only in pre-approved ideas. Responding to opposing views is an essential feature of the college experience, and a prime mechanism to enable students to hone their own viewpoints as they are tested against contrary notions. **This experience of being tested is a fundamental part of how the college years prepare students for adulthood, and for a rewarding life based on strong values that are truly their own.** Dealing with intellectually unfriendly environments can lead also students to find specific tactics for dealing with offense, as well as a broader resilience to navigate a less protective world postgraduation. Because it is not possible to avoid such offenses in all situations, developing skills to respond and cope is essential. College should be one place where those capabilities are honed.

Enabling the Creation of Voluntary Safe Spaces

While campuses should enable and even support safe spaces established by students—such as clubs, organizations, or even small gathering areas based on common themes and lifestyles—**the campus as a whole, while physically safe, should be intellectually and ideologically open.** A physically safe *place*—like a safe town, a safe school, or a safe park—is one designated for a distinct purpose (residential, educational or recreational, for example) that also has the quality of being safe, as in free of danger. A safe *space*, on the other hand, as students use the term, is closer to something purpose-built for safety—an environment where the parameters are constructed with safety as a prime objective, more like the way the terms "safe house" or "safe zone" are used. While safe spaces serve a purpose, the campus as a whole is better conceived as a safe place.

Safe spaces on campus should be entered into voluntarily by students wishing to associate with a certain group, not created or imposed to exclude unwelcome views. In general, safe spaces should be places to visit and spend time socializing, recharging, venting, enjoying solidarity, and making joint plans rather than places to dwell day in and day out to the exclusion of different views and experiences. Safe spaces should consist of constellations of the likeminded who converge for shared purposes, rather than physical rooms or centers where ideological conformity is enforced. Those who advance broad use of the term "safe" as a desired facet of campus life should bear in mind that not all connotations of the word are positive or in keeping with the ideal of a robust intellectual environment. In addition to freedom from danger, "safe"

can connote a lack of creativity or adventurousness, an aversion to risk-taking, a predictability, even dullness. In art, film, and literature, the greatest achievements are those that take risks. In that sense, a campus that is too safe could be one that lacks intellectual challenge, surprise, or inspiration.

Campus centers—often intended primarily for students of a particular racial or religious background, or those sharing a particular experience, gender, or sexual orientation—occupy a zone in between safe spaces and open spaces. Their stated purpose of offering a gathering place for people of a shared identity should not be taken to imply ideological uniformity or to place certain ideas and beliefs off-limits. Students who are black, Latino, Jewish, Muslim, Catholic, LGBT, or female may have widely divergent views and are hardly immune to being offended by one another. That said, the integrity of such centers in fulfilling their mission for the group that they aim to serve may mean that certain activities and topics are better addressed elsewhere. The lines are not always bright, and the bounds of what should go on at such centers are a legitimate topic of debate.

At times, one group's safe space can result in discrimination against other groups. For example, on some campuses single-sex clubs or fraternities may correlate with high levels of sexual harassment or violence. United States law has examined clashes between the freedom to associate and prohibitions based on race and gender and other characteristics, a boundary line that will continue to be tested in court. There is, of course, a different between spaces created for the empowered to exclude the less enfranchised and those created for marginalized to fortify their own strength in numbers. At times, though, those boundaries are challenged (for example, in controversies over whether traditionally all-female colleges should admit women who have transitioned from being male, or continue to enroll men who were admitted as women but transitioned subsequently[483]). **Except in limited cases where the very form of safety sought is related to a protected class, the creation of safe spaces should and must avoid pernicious discrimination based on protected criteria such as race, gender, sexual orientation, and gender identity.**

One of the most potent arguments advanced by some proponents of safe spaces is that the residence hall, or even the campus as a whole,should be a safe space because it's a student's home while on campus. No one would deny that a home should feel physically safe and free from harassment. **But for the few years of life spent at college, students are choosing to enter into a community that is more open, complex, and challenging than perhaps anywhere else they may ever call home.** College shouldn't be a home that feels as nurturing and protected as the well of a close family. It should be conducive to discovering things personally, academically, and intellectually that go beyond the reach of a more cloistered environment. It should provide for students' physical, intellectual and psychological needs, including by offering support to withstand many types of difficulties, buta misguided desire to make students feel emotionally safe at all times cannot override its role as an academic training ground and diverse community that foster all kinds of encounters. If, after graduation, students choose to live in what feels like a safe space—a homogeneous suburb, a religious enclave, a neighborhood with strong allegiance to a particular political party—they may make those decisions. But with the exception of a small number of institutions—religious colleges with self-selecting student bodies, for example—American universities should not offer such controlled experiences.

Opening the Space on Campus

The notion of a campus as an open space does not mean that university discourse should be impervious to questions of offense and harm. While it is not a traditional home, the campus is a community that must be sensitive to the needs of individuals and groups, as well as to those of the campus as a whole. **To be truly open to students of all backgrounds, orientations, lifestyles, viewpoints, and persuasions, the university must be cognizant of factors that impair the ability of particular students and groups to participate freely and fully in campus life.** It must be willing to look hard at how physical barriers, historical traditions, inequalities, prejudices, and power dynamics can block openness and to take concrete steps to clear those obstructions. Even rules or norms that may seem neutral should not be above question—like, for example, the notion that all-male and all-female clubs are and can be treated equally, when the all-male clubs have long histories, large alumni rosters, prime real estate, and substantial endowments that the all-female clubs do not. Likewise the contention that nothing stands in the way of the full participation of students from racially, ethnically, or socioeconomically disadvantaged backgrounds—a view that ignores the possibility that the barriers faced by these students may be invisible to others, may predate these students' arrival on campus, or may have valid justifications but unequal effects (for example, academic requirements that—absent adequate support services—lead to disproportionate numbers of minority students failing).

To fully understand the barriers to full inclusion and participation requires attending to the experiences of students from minority groups, which involves discussing, exploring, and listening at length to varied stories and viewpoints. This necessitates affirmative efforts; it is not enough simply to count on students from minority groups to make themselves heard in environments that may be inhibiting or marginalizing. It requires creating settings where all students feel comfortable speaking out, listening, and probing how their concerns can be addressed in

practical ways. While universities need not (and cannot) address every subjective experience, perception, or demand, the campus environment should include settings where such perspectives can be voiced freely, without fear of ridicule or reprisal.

Campus "Civility"

Some administrators have put forward the norm of "civility" as an affirmative value aimed to foster an inclusive, intellectually open environment. British scholar Timothy Garton Ash has advanced the concept of "robust civility," a kind of active demonstration of goodwill and acceptance of difference that he argues is necessary to alleviate friction in an increasingly diverse world. The calls for civility recognize that while speech should be unfettered and honest, it should also aspire to be respectful and attentive to the perspectives of those holding different views. Civility implies making an affirmative effort most of the time to avoid causing offense. It entails assuming a level of conscientiousness in understanding what may cause offense and why, and avoiding such words and actions even if no offense is intended and even if the speaker disagrees that the words in question are objectively offensive.

Still, some have derided "civility" as a class-laden term or, worse, code for subjectively declaring certain politically unpopular sentiments out of bounds. While some norms of civility might be broadly agreeable, others depend on attitudes, traditions, and perceptions that can vary widely among communities.

There may be no perfect term to embody the norms and values that can help undergird a campus that is at once open, inclusive, and fair. But **one promising contender is respect: the idea that the preferable response to differences is to try to understand them and, even if one disagrees with them, to express that dissent in a way that fosters dialogue rather than escalates tension. A workable starting point may be to imbue campus life with the *presumption of respect*—the will to respect others, accept differences, and avoid offense where possible.** If everyone and every idea is entitled to the presumption of respect in the first instance, the circumstances in which the obligation to show respect is overridden by strong disagreement or disapproval will be more episodic than constant.

It is important to note that a norm of most people avoiding offense *most* of the time is not the same as a norm where everyone is expected to avoid offense *all* the time. While violence and threats are never appropriate, vociferous and adamant protests have their place. In rare instances, even disrespectful protests and speech have their place; there are some issues and circumstances in which the presumption of respect can justifiably be overridden, but this is the rare exception, not the norm. In some situations—heated political or ideological arguments, satire, the promulgation of new and provocative ideas—statements and concepts that are genuinely offensive can also be legitimate and important. **An environment where too many offenses are considered impermissible or even punishable becomes sterile, constraining, and inimical to creativity.** In many of the recent campus controversies, flashpoints came against the backdrop of multiple slights directed at specific racial, religious, or other marginalized groups. As incidences of disrespect compound, tensions rise and each subsequent conflagration burns more intensely. By contrast, where respect is a strong norm, offenses are isolated occurrences, tempers are lower, and it is easier to defuse conflicts through dialogue, explanations, apologies, and reconciliation.

Some forms of expression, such as theater, stand-up comedy, and political polemics, depend on a degree of provocation for their effectiveness. In the wake of recent controversies, major comedians have said they are reluctant to do shows at colleges because audiences are too easily offended. Some schools have contracts that bar performers from using particular words or raising certain subjects. While these trends may in part reflect changing mores, whereby some of what was considered amusing to prior generations is now passé or even groan-worthy, **it is essential to ensure that satire and humor do not disappear from the campus.** Comedy is a treasured form of free expression. When jokes about sensitive subjects land in settings where tensions are high, they can feed divisions and feelings of offense. In settings where mutual respect is presumed, events or performances that push boundaries are less likely to hit raw nerves.

Dealing With Offense

Maintaining campus as an open space requires accepting that certain offenses will occur; in no community or home is everyone comfortable all the time. When offensive conduct or speech occurs, members of the campus community face important choices about how to address the problems, whether through conciliation, confrontation, or something in between. While dialogue and more speech to answer offensive speech is the preferred response, it is also fair to recognize that there will be some offenses so severe, pervasive, or deeply rooted that they will provoke more forceful reactions. **On an open campus students and others cannot be expected to confine themselves to calm, measured responses to every affront.** Occasionally the response to protected speech will be impassioned, unforgiving, and hostile. An open environment is one where overreaction is sometimes inevitable.

Keeping a campus both open and respectful requires avoiding the temptation to play "gotcha," to vindictively catch faculty, students, or administrators for any misstep, regardless of intent, circumstances, or evidence of malice. Universities should foster, and students should embrace, a more tolerant posture whereby it is understood that shifting norms and varying expectations across diverse communities will result in mistakes, misstatements, and

Maintaining campus as an open space requires accepting that certain offenses will occur; in no community or home is everyone comfortable all the time.

accidental offenses. A measure of goodwill, patience, and forgiveness can help prevent inadvertent offenses from blowing up into crises that roil tensions and risk careers. Such offenses should be viewed in light of the totality of the circumstances, including the context and intent of the speech in question and the rest of the speaker's record. Overreaction to problematic speech may impoverish the environment for speech for all.

Calls to Punish Speech

One of the thorniest aspects of free speech controversies are calls to punish speakers for their speech. Such calls—for disciplinary measures, terminations, or boycotts—are themselves permissible speech. Except where they rise to the level of incitement to violence or threats, no one should be punished for calling for the punishment of another based on an act of speech. That said, some forms of punishment clearly violate free speech protections. If faculty members or administrators are fired for speaking out, academic freedom is compromised. At public universities, such reprisals would also likely violate the First Amendment. Even where the reprisals sought would not violate free speech or academic freedom, they can nonetheless have devastating chilling effects. Calls to punish individuals solely on the basis of speech should be treated warily, recognizing the potential to curb speech that deserves full protection.

In some cases, it can be less than clear whether the sanctions demanded are in response to speech or not. Those raising objections may be savvy to avoiding the perception that they are asking for speech to be punished, so may link the request to other grounds; for example the notion that the speaker is unfit to continue in a particular role not because of what they have said, but because of the underlying attitudes they have evinced or because of how they are perceived by those they have to teach or serve. Sometimes these justifications are genuine, and those advocating sanction may genuinely regard the requested reprisal not as punishment, but as an appropriate consequence of speech that renders an individual no longer able to perform their role credibly, or destroys the trust necessary to serve the students with whom they work.

In certain instances, of course, acts of speech can indeed destroy speakers' ability to effectively carry out their role. A statement may be so egregious that it colors every aspect of an individual's fitness for a position. An overtly racist, derisive comment about a student made by a professor in the classroom would likely fall into this category. In other instances, though, statements are more ambiguous, other aspects of an individual's conduct and performance may indicate a fitness to continue, a comment may be interpreted differently by particular audiences, or it may be a fleeting misstatement for which the individual apologizes. **When the charge is that speech disqualifies an individual from doing a job, the egregiousness of the speech in question should be evaluated against the totality of the person's job performance.** While student attitudes may be one factor in such a determination, it is important to canvass not just those students who are most outspoken and outraged by the speech in question but also others who may have a different perspective. Context is also relevant. Statements made in a professional capacity and in public forums warrant more weight than those made privately.

Colleges and universities need to be prepared to withstand public pressures, defend conduct that can be defended, and affirmatively support those who find themselves in the middle of uproars and online mobs, even when the underlying speech or sentiments are ones with which the university leadership disagrees. Absent that full-hearted and open institutional support, the outcry can lead to resignations that, while "voluntary," nonetheless leave the impression that even protected speech can result in serious reprisals.

Striving Toward New Levels of Inclusion and Equality

For decades Universities have actively tried to foster inclusion and equality on campus. The early experiences of women, African-Americans, and members other underrepresented groups who integrated campuses were often isolating and difficult. Some campuses had to be integrated by force. Elsewhere administrators were determined that even if they were compelled to accommodate these students, nothing else would change. Gradually living spaces, curricula, athletics, and other activities have been transformed to make campuses more open to all. Recent demands for greater inclusion are new only in that they target nuances of exclusion and discrimination that previous generations left unaddressed.

Today many aspects of university life are being scrutinized through the lens of whether they foster or impair inclusivity. Students, faculty, and administrators are asking whether practices that have long gone unquestioned—such

as course curricula, dining hall foods, Halloween costumes, campus crests and mascots, and building names—may in fact serve to discriminate or exclude. There is a tendency in some quarters to dismiss these controversies as hypersensitivity or political correctness run amok. **But is not surprising that a new generation of students raises new questions about which names, symbols, icons, and traditions are to be embraced and sustained and which deserve to be modified or even discarded as outdated or offensive.**

Over time, cultural norms change. Words once considered standard, such as "Oriental" for Asian, or "coed" for a female undergraduate, have come to be seen as archaic and offensive. The evolution of words, images, and even certain intellectual assumptions about, for example, colonialism or cultural relativism, is part of how societies change and not in and of itself cause for alarm. The driving force that prepares new generations of Americans to innovate and create, universities have never been and cannot be frozen in time. As American society adapts to greater diversity, so must the campus. That the shape of that evolution is being drawn by students from diverse backgrounds is as it should be.

> One of the most visible flashpoints in the debate over when and in what respects universities should change with the times relates to campaigns to rename buildings with troubling historical associations, such as those named after slaveholders. While debates over the naming and renaming of campus buildings are discussed briefly alongside many of the other controversies addressed in this report, they do not implicate free speech. There is nothing sacrosanct about the name of a building, nor is there any right to a particular name. The same is true of campus crests and symbols. Such names and symbols have, on certain campuses, come to be viewed by some as emblems of particular values, both treasured and deplored. In some cases name changes have been used to demonstrate sensitivity and attentiveness to student concerns. In other instances they have been resisted as attempts to erase history or as unwarranted concessions to political correctness. We do not opine on those judgement calls, except to say that neither the campaigns for name changes nor the decisions of whether or not a change is warranted impinge in any way on speech.

Microaggressions and the Language of Harm

Much of the campus discourse about inclusion and speech turns on questions of harm: Are individuals or groups being hurt by certain words, symbols, or practices? Is such hurt grounds for grievance or for changing the rules about what speech is considered out of bounds? Does the status quo approach to campus life unwittingly permit forms of harm that have historically been overlooked or dismissed as unimportant? It is legitimate, when harms are inflicted, that people protest and demand change. But it is also important that changes are instituted thoughtfully, so that the remedy for such harms is not worse than the ill it is intended to cure**. There is also a risk, when discussing harm, of eliding important differences among the damage caused by actual violence, threatened violence, harassment, denigration, intimidation, and lesser forms of offense. Each can be recognized as worthy of attention without drawing unsupported equivalencies.**

One point of recurring controversy has been the concept of microaggressions, and the effort to spread awareness of everyday slights that, although unintentional and seemingly minor, can cumulatively inflict harm. Even if one recoils at the coinage of new jargon, drawing attention to microaggressions can serve a positive good if it makes people aware that insults made out of lack of knowledge can cause real pain. **The increasing diversity of college populations requires a wider appreciation that words that may seem innocent to one group, generally in the majority, can mean something very different to members of a minority group, and that their reactions should not simply be dismissed as oversensitivity.** Also, while the term may be new, the underlying concept isn't: Calling someone "Oriental" or a "coed" was once acceptable but came to be considered offensive, and the terms were eventually retired from common usage.

One problem is that, like the word "safe" to connote a supportive space, "microaggression" is not ideal for its purposes. "Aggression" implies intentionally hostile, even violent action. But while some microaggressions do evince hostility or ignorance, others plainly do not. Many of the slights labeled as microaggressions aren't intentionally hostile; indeed, they are often hard to correct because they are the products of unfamiliarity or ignorance of another person's culture, background, or experience. Universities do not help when they compile long lists of alleged microaggressions that students and faculty should uniformly avoid. Some of these lists have included statements such as "America is the land of opportunity" and the use of "you guys" to address a mixed-gender group. But however they are perceived, such phrases are typically not uttered with aggressive intent. **Calling attention to microaggressions may make individual speakers more aware of the impact of their words, but to imply that these words were deliberately hostile may elicit a defensive reaction and undermine mutual understanding.** Distributing lists of verboten words or phrases also risks overlooking the context that invariably shapes all speech. Clearly, a statement may have different connotations depending on the speaker, the audience, and the circumstance in which it is uttered.

University administrators should encourage all students to be sensitive to the ways that their words can unintentionally hurt others. And they should show such sensitivity in their own communications. But they should be wary of setting out their own definitions or catalogues of microaggressive or offensive terms. **The administration should not take on the**

role of listing such slights nor of policing thems across the campus. Students and faculty members should feel emboldened to draw attention to such subtle transgressions. Where students are aware that certain language has potential to be considered offensive, they should point it out regardless of whether they personally experience the offense. The task of fostering a more inclusive environment cannot be left only, or even primarily, to students who are themselves members of marginalized groups. When other students engage affirmatively in spreading awareness about the implications of problematic language, this work is spread widely and the norms that avoid offense can take hold without provoking needless controversy. University policies regulating everyday speech at this level, or attempting to define such insults for the entire university community, are intrusive and run the risk of prohibiting or even simply disfavoring permissible speech.

Trigger Warnings

A second flashpoint of controversy in recent years has been the use of so-called trigger warnings. There is reason to believe that a lot of the debate about these warnings is overblown. According to the National Coalition on Censorship, very few universities actually have policies prescribing trigger warnings. Nonetheless, in some instances they have been mandated, demanded, and used, giving rise to controversy.

The belief that trigger warnings are needed on syllabi and in classrooms rests on a broad definition of harm, in this case harm relating to past trauma. What originated as a valid effort to help students with diagnosable trauma-related disorders stemming from rape or other acts of extreme violence has in some cases been broadened to apply to a vast range of experiences that could conceivably distress students. The range of material that can evoke traumatic memories is potentially boundless: not just rape and assault but also racism, abortion, homophobia, combat, suicide, the death of a loved one, illness, injury, and more. Moreover, the question of whether material has the potential to "trigger" the experience of trauma–and a host of related questions about the value of trigger warnings-- are matters of dispute among scholars, psychologists and scientists.[484] With both the need for and the benefits of trigger warnings in doubt, universities should not position themselves institutionally to ensure that every possibly upsetting encounter with course material is averted. **Universities should therefore leave the question of trigger warnings or any other sort of alerts about course material up to individual faculty members.**

If professors wish to alert students to troubling content in a syllabus, the university should not prevent them. Some may believe that a heads-up fosters better class discussion, strengthens the relationship between teachers and students, or enhances the receptivity of certain students to challenging material. Likewise, if students wish to ask for notifications regarding particular course material, they should be free to make their case. But for the university to require or even recommend that certain topics be ring-fenced by warning labels would be deleterious. It needlessly involves the university in subjective debates about which topics do and do not warrant flagging, it risks discouraging students from exploring valuable works of art or scholarship or dealing with important topics, and it creates incentives for professors to avoid certain topics altogether. **The few universities that are asking faculty to use trigger warnings should retire such policies and trust in the judgment of their instructors to be mindful of the needs of their own students.**

Much of the campus discourse about inclusion and speech turns on questions of harm: Are individuals or groups being hurt by certain words, symbols, or practices? Is such hurt grounds for grievance or changing the rules about what speech is considered out of bounds?

The Role of Alumni

One of the more gaping disconnects documented in this report is the one that can arise between students and alumni. The gulf is understandable, even natural. Alumni, particularly those who are heavily engaged with their alma maters, may have warm memories of their time on campus and often lionize the norms that were then in place. There are understandable concerns that rifts, criticisms, and new ways of thinking may destroy traditions, values, and facets of campus life that they feel should be appreciated. From the student point of view, alumni may at times feel like reactionary forces, fortifying outdated approaches at a time when change is sorely needed. Rather than having these two constituencies communicate at cross purposes in the media, in separate conversations with administrators, or in the form of contributions silently withheld, **universities should do more to foster direct dialogue between students and alumni.**

While those charged with filling the college coffers may fear that such exchanges could alienate generous alumni, keeping alumni and students apart for fear that they may antagonize each other is not a workable strategy in the long-term. Students and alumni are both essential constituencies on campus. **PEN America's own experience of reaching out to students, engaging in direct dialogue, and hearing their points of view has helped us better understand positions and demands that may have come across from a distance as self-indulgent or misguided.** Ultimately, the views of the next generation about how to address diversity, deal with offensiveness, and protect speech will have a decisive impact on the disposition of these questions. Their views cannot be wished away or waited out. On the flip side, students seeking to reshape power structures will need to learn to engage with them. Both sides have much to gain from direct engagement, which university is well placed to facilitate.

Addressing the Excesses of Title IX's Approach to Speech and Harassment

The current implementation of Title IX's interpretation of the relationship between speech and harassment presents direct and worrying instances of encroachment on free expression rights as well as a far broader but no less damaging chilling effect that is suppressing legitimate speech on campuses. Title IX has a storied history as a vehicle to achieve gender equality on campuses. The continuous evolution of its interpretation and enforcement has brought sophisticated and important new approaches to the essential battle to address sexual harassment and assault on campus. The epidemic levels of harassment and assault on campus are a direct threat to our system of higher education. the department of education and many university administrations deserve credit for developing a robust, evolving and innovative set of approaches to addressing this problem. **With the constant emergence of new technologies, platforms and techniques of harassment, significant resources, skills and investments must be made to ensure that prevention measures and legal and psychosocial responses to harassment and assault can keep pace.**

While the concerns for free speech surrounding the impact of the 2011 guidance on title ix has received careful scrutiny from academic bodies
, the larger free speech, legal, and policy communities have yet to fully address the risks that current approaches to this law pose to free expression, academic freedom, and the role of universities. **The U.S. Departments of Education and Justice should urgently attend to these risks, implementing essential reforms that affirm the role of freedom of expression in Title IX enforcement.** That some universities may be layering in their own interpretations of what Title IX requires and taking problematic measures out of an abundance of caution underscores rather than obviates the need for Department of Education's Office of Civil Rights (OCR) to provide clarity that will help avoid such overreach. The prevalence of overzealous investigations and reprisals directed at speech by university administrations demonstrate that the ambiguities and gaps in OCR's guidance are putting academic freedom at risk.

The AAUP's thorough June, 2016 report, "The History, Uses and Abuses of Title IX," provides an essential analysis that includes important recommendations on how to ensure respect for free speech and academic freedom. PEN America endorses many of those recommendations and is indebted to the AAUP for its important work in this area. We do not address issues relating to Title IX, or proposals for possible reform, that go beyond concerns regarding free speech.

There is no contradiction between advocating for more stringent measures to address sexual harassment and assault on campus, on the one hand, and on the other, insisting on measures to restore proper protections for free speech. Both are essential. OCR has long embraced these dual imperatives, including in its guidance interpretations of Title IX, which encompass protections for academic freedom and freedom of speech. Clear reference to the imperative of protecting free speech and academic freedom should be made in all OCR documents that deal with harassment that may be based on speech**. As the AAUP has recommended, the OCR should clarify that so-called "hostile environment" sexual harassment cannot be proven solely on the basis of subjective perceptions that speech is offensive**. While verbal conduct can undoubtedly constitute harassment, the current, vague standard is infinitely malleable and forces students and faculty to be constantly on guard against speech that could conceivably be found offensive to someone. This elastic standard has had a particularly damaging impact on a core dimension of the university's role in fostering gender equality: the research, teaching, and discussion of sexuality and gender issues. By raising the specter that discussions of these issues may cross ill-defined lines and be considered harassment, the Title IX interpretations have cast a chill on the teaching of subjects including the law of rape. This effect is pernicious and damaging to the very objectives of Title IX, and can be reversed only with strong measures to reassert the role of academic freedom and open discourse in the context of addressing harassment.

Restoring adequate protections for free speech in to Title IX requires a reaffirmation of OCR's prior 2001 guidance, which states that "[i]n order to establish a violation of Title IX, the harassment must be sufficiently serious to deny or limit a student's ability to participate in or benefit from the education program." This is not to say that lesser forms of harassment should be ignored or minimized. There are all kinds of steps that a university can and must take—dialogue, education, counseling, mediation—to address speech that is problematic on the basis of gender but does not rise to the level of a Title IX violation. Simple

analyses of sex and gender that may leave some feeling embarrassed or uneasy should not be enough to define speech as problematic as a matter of law.

Universities, too, should reiterate the centrality of academic freedom when addressing allegations of harassment. The AAUP's report offers valuable resources in this regard. As the AAUP has stressed, "[P]olicies against sexual harassment should distinguish speech that fits the definition of a hostile environment from speech that individuals may find hurtful or offensive, but is protected by academic freedom." While the lines are not always bright, by helping to flesh out such distinctions, campus policies can begin to clarify the nebulousness of current OCR definitions, helping to ensure that protected speech is not chilled. Again, this does not mean that there is no remedy for students concerned with offensive or hurtful speech but rather that the remedies must stop short of punishing or suppressing the speech.

OCR and university administrators must also adopt a robust approach to deterring and punishing all forms of retaliation against those who register Title IX complaints or reports under Title IX. In addition to the protections against retaliation that Title IX itself provides, both the First Amendment and university free expression policies prohibit reprisals against those exercising their free speech rights to bring forward information concerning harassment and assaults. ." It is clear that the deterrents to reporting harassment and assaults on campus are formidable. the legal, social, professional and emotional consequences of filing such a report and dealing with its repercussions pose a powerful barrier to eradicating abuse and achieving equality on campus. the us department of education and university administrations should work with faculty and students to systematically examine these hurdles and develop mechanisms to prevent, deter and punish reprisals against those who lodge complaints of harassment and assault.

As the AAUP further points out and our research made clear, faculty need to be educated and mobilized to defend their free speech rights, both in the context of Title IX investigations and long before they arise. Faculty unions or other voluntary bodies can serve as important defenders of academic freedom, helping to shape campus policies, defend against encroachments on speech, and support those who are targeted. Faculty should work with engaged and receptive groups of students to build shared understandings of academic freedom and verbal harassment that can be communicated across the campus.

Student Awareness, Education and Mobilization on Free Speech

Two major studies in the past year have documented that students on U.S. campuses mostly believe in free expression and the need to protect it. On the other hand, significant numbers of students report support for measures and approaches that would restrict speech on campus, including speech codes. In some important ways, student attitudes toward free speech have shown confusion, contradictions, or a lack of awareness.

The recent findings on student attitudes point to the need and opportunity for expanded education on issues of free speech. The Foundation for Individual Rights in Education (FIRE) does a valued job documenting, publicizing, and mobilizing to resist constraints on campus speech. FIRE also maintains a student network that holds an annual conference and distributes resources to student free speech activists. While FIRE staff have a range of political leanings and the organization is mindful of considerations of diversity and multiculturalism, FIRE is often regarded as libertarian or conservative and is viewed suspiciously by some liberal or progressive students and faculty. There are other groups, such as the American Civil Liberties Union, which is generally seen as liberal, that offer resources to student groups focused on free expression campaigns. But because FIRE's level of activity and visibility exceeds that of other free expression groups, and because some of the most vociferous defenders of campus free speech are conservative or libertarian, it is becoming increasingly common to see efforts to defend free expression described as part of a right-leaning agenda. Yet free expression has historically enjoyed support from advocates of a wide range of political viewpoints, and it should continue to do so. **All groups supportive of free speech should redouble their efforts to ensure that campus free speech is a cause that animates students from across the political spectrum.**

Given studies that show that up to a third of college students may be unaware that free speech is addressed by the First Amendment, there is an opportunity for education that could help make students cognizant of the importance of free expression in vindicating their rights and advancing their agendas. While students at UCLA, the University of Chicago, and elsewhere have expressed some measure of resistance to messaging on free expression when it comes from faculty or administrators, there are indications that they would be more receptive to student voices from across the political spectrum in peer-to-peer education. **Liberal to left-leaning organizations that are active on campus should consider integrating free speech awareness into their agendas. Free speech organizations of all political persuasions should direct energy toward campuses, positioning free expression as a value that transcends politics and ideology. Institutions and funders that believe in this cause should invest in the next generation by underwriting grants for projects that build awareness and appreciation for free speech on campus.**

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ENDNOTES

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