



FREE SPEECH AND THE DIVERSE UNIVERSITY

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There are those who think that free speech and inclusivity on college campuses are inconsistent. The notion that the two values are in tension with one another has become a common framing for thinking about the modern campus. A Gallup Knight Foundation poll of college students asked respondents not only whether they valued free speech or diversity but also to choose between them and indicate which is “more important for colleges.”² When forced to choose, a substantial minority of students were willing to say that they would prioritize inclusivity over the freedom to express “viewpoints that are offensive” on campus.³ Following the Gallup Knight poll the American Council on Education put a similar question to college presidents, though university leaders overwhelmingly insisted that if forced to choose they would prioritize allowing students “to be exposed to all types of speech.”⁴ Those pollsters were hardly alone in wanting to focus our attention on “when core values collide.”⁵ Much of the debate surrounding campus free speech in recent years has worked off the assumption that there are choices to be made between speech and inclusivity and move on to argue over which should take priority.

It would be a mistake to set these two values in conflict with one another. Modern universities embrace both free speech and inclusivity and must seek to sustain

both. It would indeed be troubling if the two values were irreconcilable or frequently in tension with one another. The implications of such a persistent conflict would be dramatic and would require a substantial reformation of higher education. Fortunately, it should be possible to reconcile a commitment to free speech and a commitment to diversity on a university campus.

We will only be able to appreciate how the value of free speech and the value of diversity are compatible if we are clear about the very purposes of a university. The central mission of a university, I believe, is to advance the state of human knowledge and communicate what we have learned to others.⁶ Both diversity and free speech are essential to that mission. Universities were historically hobbled to the extent that they systematically excluded a wide range of participants from the campus community and the scholarly enterprise. At the same time, knowledge cannot be advanced if the scope of freedom of inquiry is circumscribed. Universities must be places where controversial ideas can be raised and freely discussed, where a range of perspectives can be brought to bear on common problems and conventional wisdom can be held up to critical scrutiny and unconventional thinking.

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- 2 Knight Foundation 2017 College Student Survey 3 (https://kf-site-production.s3.amazonaws.com/media_elements/files/000/000/147/original/Knight_Foundation_2017_Student_Survey_Questionnaire_1_.pdf)
- 3 Knight Foundation, *Free Express on Campus* 9 (2018).
- 4 Lorelle L. Espinosa, Jennifer R. Crandall, and Philip Wilkinson, *Free Speech and Campus Inclusion: A Survey of College Presidents* (2018) (<https://www.higheredtoday.org/2018/04/09/free-speech-campus-inclusion-survey-college-presidents/>).
- 5 Pareena G. Lawrence, *When Core Values Collide: Diversity, Inclusion, and Free Speech*, *Liberal Education* 104 (2018) (<https://www.aacu.org/liberaleducation/2018/spring/lawrence>).
- 6 See Keith E. Whittington, *Speak Freely* 12-27 (2018).

Ultimately, realizing free speech principles on college campuses is a matter of culture as much as it is a matter of policy. Properly designed and administered policies are important to preserving universities as vital centers of intellectual inquiry and robust debate, but they can only take us so far. If universities are to be productive in pursuit of their scholarly mission and welcoming to diverse array of individuals and groups, then they will need to nurture cultures that are supportive of the mission of the university.

Persuasion and First Principles

Universities would do well to take active measures to address free speech problems on campus. While there are no doubt critics of American higher education who act in bad faith while latching onto embarrassing free speech episodes on campus, the fact remains that the repeated free speech controversies put universities in a bad light and feed concerns about the campus climate. There have certainly been episodes of students, faculty and administrators acting contrary to the mission of the university as an institution dedicated to free thought and free inquiry. It seems evident that if universities do not take steps to reform themselves, then they will continue to see their support erode with important segments of the general public and can expect outsiders to take it upon themselves to impose reforms on college campuses. Universities should look to make sure that their own policies and practices align with their core institutional values.

The diversity of the higher education landscape in the United States is one of its attractive features, and there is no reason to think that every institution of higher education must conform themselves to the exact same expectations as every other. There is room for experimentation and differences. But those differences on such basic matters should at least be consciously chosen and reflect a careful consideration of the costs as well as the benefits of departing from industry standards.

The first task for improving the environment for free speech on college campuses might be characterized as one of persuasion, or politics in its highest sense.

Although I believe the conception of the university mission as one of the unbridled pursuit of the truth is one that has been widely shared since the late nineteenth century, I am also quite confident that there are those within universities who would disagree with significant aspects of that mission and its implications for the scope of free inquiry on a college campus. There is a necessary conversation now taking place on college campuses in which members of the campus community are trying to come to something of a common understanding of our shared values and commitments. These are conversations that need to be had, particularly among faculty and administrators. We are unlikely to reach complete consensus, but I am hopeful that it is possible to reach fairly widespread agreement on some basic commitments.

For both internal and external audiences, it would be valuable for universities to be able to say clearly what they stand for. There are too many indications that senior university administrators, university trustees, and alumni do not seem to understand the purposes of the university and what brand they should be seeking to preserve and advance. We should be developing opportunities and vehicles to clarify the purpose of the university and how free speech principles fit into that. We should be fostering those conversations and encouraging greater agreement and considering ways in which faculty and administrators can collectively articulate those principles.

When the controversial remarks of a faculty member or student go viral, the senior leadership of affected universities often seem to be caught unawares and unprepared. For too many university leaders, the public image of the university has little to do with the intellectual activities that take place on the college campus. As a result, they can find themselves “confronted with balancing free speech rights [and] protecting their brand.”⁷ Public relations professionals are inclined to advise university leaders “to protect the university’s brand” by quickly denouncing any controversial remarks by a faculty member.⁸ When controversy erupted at the University of Illinois over the hiring of Steven Salaita given his public profile as a vociferous critic of Israel, university chancellor Phyllis Wise soon found herself consulting with donors,

7 Mara Rose Williams, *Free to Speak Freely; Colleges Protecting Faculty Speech on Campus and Off*, Kansas City Star (June 15, 2018) (<https://www.kansascity.com/news/local/article212807554.html>).

8 Tim Sheehan, *Some Donors Waver, Others Firm in Support of Fresno State in Wake of Controversy*, Fresno Bee (April 20, 2018) (<https://www.fresnobee.com/news/local/article209351954.html>).

fundraisers, and public relations specialists in crafting the university's response.⁹ The faculty closest to Salaita's expertise were not brought into the inner circle. It is perhaps unsurprising that the university backed away from its initial recognition of the "freedom-of-speech rights of all our employees."¹⁰ Salaita's appointment was ultimately terminated by a vote of the board of trustees. The same public relations firm that counseled Wise was later hired by the University of Illinois to help the administration "articulate a winning vision" to potential donors.¹¹ When the anti-Israel remarks made by media studies professor Marc Lamont Hill at a United Nations event became the source of public controversy, Temple University was soon hearing calls that his employment with the university be terminated. Most troubling, those calls were coming from inside the house. The chair of Temple's board of trustees went public to declare that "we're going to look at what remedies we have" since Hill's speech "blackens our name unnecessarily."¹² The president Mount St. Mary's University moved to dismiss a faculty member who had been publicly critical of the president's policies. The president, whose professional background was in private equity rather than academia, informed the tenured professor "you owe a duty of loyalty to this university" and since his public remarks had "caused considerable damage" to the university's reputation he was banned from campus.¹³ Such episodes give rise to the question, "should professors be fired for damaging a college's reputation."¹⁴ Many university leaders would apparently say that the answer to that question should be yes.

This begs the question of what a university's brand should be. For university leaders focused on building relationships with such external constituencies as donors, parents, politicians and journalists, it is all too easy to fall into

thinking that the university's reputation revolves around the "inspiring stories" that might be "key to inspiring donor support."¹⁵ There are certainly many stories to be told about a university, but first and foremost a university should be understood to be an arena in which a diverse set of people gather to seriously engage with difficult ideas. The myriad scholars, students and speakers who move in that shared intellectual space will often disagree vehemently with one another. The fact that a university gives them space to explore ideas does not mean that the institution endorses the substance of any of the ideas expressed on campus or by members of the campus community. If universities were obliged to silence anyone whose words could not be endorsed by or might be taken as representative of the institution broadly, then the campus would be a very quiet place indeed.

Universities are sites of contestation. Provoking controversy is central to the enterprise. The brand to be protected is that the university is a place that respects freedom of thought and welcomes spirited disagreements. There is a likely-apocryphal joke of Mark Twain's to the effect that if you don't like the weather, just wait a few minutes.¹⁶ Similarly, if you don't like what someone says on a college campus, just ask for the opinions of the next person. One does not have to look far to find a welter of conflicting arguments, ideas and opinions being expressed on a college campus. If you do not encounter ideas that provoke offense or disagreement at a university, then you are not looking very hard – or the university is likely failing to fulfill its most basic mission.

University leaders should be able to explain to the sometimes baffled members of the public what goes on at a university. That means explaining that the members of

9 Corey Robin, *Reading the Salaita Papers* (updated, with more and better email addresses for trustees), Crooked Timber (September 3, 2014) (<http://crookedtimber.org/2014/09/03/reading-the-salaita-papers/>).

10 Gwendolyn Bradley, *After Salaita*, Academe Blog (September 22, 2015) (<https://academeblog.org/2015/09/22/after-salaita/>).

11 Julie Wurth, *Fee: \$550,000 for Branding*, The Champaign News-Gazette (July 26, 2015) (<http://www.news-gazette.com/news/local/2015-07-26/fee-550000-branding.html>).

12 Craig R. McCoy, *U.N. Speech by Temple Prof Draws Fire from University's Board Chair*, The Philadelphia Inquirer (November 30, 2018) (<http://www2.philly.com/philly/news/breaking/marc-lamont-hill-temple-israel-anti-semitic-20181130.html>).

13 Scott Jaschik, *Purge at the Mount*, Inside Higher Ed (February 9, 2016) (<https://www.insidehighered.com/news/2016/02/09/mount-st-marys-president-fires-two-faculty-members-one-tenure>).

14 Laura McKenna, *Should Professors Be Fired for Damaging a College's Reputation?*, The Atlantic (February 25, 2016) (<https://www.theatlantic.com/education/archive/2016/02/should-professors-be-fired-for-damaging-a-colleges-reputation/470976/>).

15 Nathan Gregoire and Kimberly Kicenuik Hubbard, *Three Ways to Leverage Effective Storytelling in Higher Education*, Philanthropy Now (July 20, 2018) (<https://ccsfundraising.com/three-ways-to-leverage-effective-storytelling-in-higher-education/>).

16 Mark Twain, *Speech on the Weather*, in *20 The Writings of Mark Twain* 394 (1910) ("Yes, one of the brightest gems in the New England weather is the dazzling uncertainty of it.").

the campus community will not speak with a single voice, that the intellectual enterprise requires giving space for the articulation of ideas that might be shocking and wrong if we are also to draw out ideas that are innovative and true. Universities provide a home to the unorthodox so that they can resist falling prey to orthodoxy; they shelter the retrograde so that they can nurture the progressive. Universities have placed a bet on the prospect of unforeseen benefits arising from unplanned explorations, of brilliant insights emerging from stormy debates.

University leaders will have a hard time explaining and defending the central commitments of the university if the faculty cannot themselves agree on those commitments. The 2014 University of Chicago Statement on Principles of Free Expression is a relatively recent entry in a line of reports written by university faculty explaining and defending the centrality of free speech to the modern American university.¹⁷ The Chicago statement, drafted by University of Chicago law professor Geoffrey Stone, has the advantage of being relatively brief and adhering closely to the principles embedded in contemporary American constitutional law regarding free speech.

Adoption of the Chicago statement by the faculty of other schools has become one viable mechanism for engaging in the task of building agreement about the core commitments of the university. In 2015, the faculty of Princeton University became the second university in the country to adopt the main body of the Chicago statement as its own.¹⁸ A number of other universities have now followed suit, which have been tracked by the Foundation for Individual Rights in Education (FIRE), a civil libertarian advocacy group.¹⁹

There is substantial value to university faculty adopting the Chicago statement as part of the process of building support for free-speech principles on college campuses. First, university faculty across the country should give voice to their own commitment to these core values of

the university. Adopting a clear statement of principle reaffirms and clarifies the values of a scholarly community and sends a message to both students and administrators as to what the expectations and priorities of the faculty are. In some cases, such as Princeton's, the inclusion of the statement in governing documents has the effect of providing guidance to and constraints on senior university leadership as they go about administering other university policies. But even if a such a resolution is not integrated into binding policy, the process of discussing and voting on a statement on free speech helps build consensus on the principles that ought to guide the university and rationale behind those principles.

Second, in contemplating local statements regarding free speech, there is no reason to reinvent the wheel. There is nothing magical about the Chicago statement. It is possible to write something at greater length or phrased differently but still consistent with the spirit of the 2014 statement. In 1974, the faculty of Yale College called on the president of the university to appointment a committee to examine the condition of free expression and dissent at Yale after an incident in which a speaker was shouted down by students. The resulting Woodward Report, named after the committee chair and eminent historian of the American South C. Vann Woodward, elaborated at some length on its understanding of the truth-seeking mission of the university and the centrality of intellectual freedom to that mission.²⁰ An earlier generation of faculty at the University of Chicago itself produced in 1967 the Kalven Report, named after its primary author the First Amendment scholar Harry Kalven, Jr.²¹ Responding to student demands that the university take a stand on the social causes of the day, the Kalven Report emphasized that the "university is the home and sponsor of critics; it is not itself the critic" and best performed its societal role by encouraging "the widest diversity of views within its own community" and securing the freedom of each member of the campus community to develop and voice their own opinions on matters of

17 University of Chicago, Statement on Principles of Free Expression (July 2014) (<https://freexpression.uchicago.edu/page/statement-principles-free-expression>).

18 "Faculty Adopts Statement Affirming Commitment to Freedom of Expression at Princeton" (April 7, 2015) (<https://www.princeton.edu/news/2015/04/07/faculty-adopts-statement-affirming-commitment-freedom-expression-princeton>).

19 "Chicago Statement: University and Faculty Body Support" (December 5, 2018) (<https://www.thefire.org/chicago-statement-university-and-faculty-body-support/>).

20 Report of the Committee on Freedom of Expression at Yale (December 23, 1974) (<https://yalecollege.yale.edu/deans-office/reports/report-committee-freedom-expression-yale#Chairman's%20Letter>).

21 Report on the University's Role in Political and Social Action (November 11, 1967) (<http://www-news.uchicago.edu/releases/07/pdf/kalverpt.pdf>).

scholarly and public concern.²² The number of significant faculty statements about the importance of free speech and academic freedom in higher education could be multiplied and extended back to include such documents as the 1915 Declaration of Principles on Academic Freedom and Academic Tenure issued at the founding of the American Association of University Professors (AAUP).²³ Each such statement had its own utility in its time, building support for free inquiry in modern universities. It is possible to echo the Chicago statement with a new document, but it is also possible to write something more compromised and less precise. It would be better to take advantage of Stone's expertise as a First Amendment lawyer and Chicago's unflinching willingness to dedicate itself to the value of freedom of thought than to run the risk of embarking on a task of writing something new and locally generated but less artfully crafted, less consistent in its tone and commitments, and more subject to qualifications and caveats.

Third, there is value in faculty across the country making a common statement on these important principles that are coming under pressure from both the political right and the political left. The Chicago statement was not issued in response to a local incident but was instead drafted in response to "recent events nationwide."²⁴ It reaffirmed the University of Chicago's own history and values, but importantly entered into a national dialogue about "institutional commitments to free and open discourse."²⁵ Adopting the Chicago statement has local benefits, but it also bolsters the position of faculty seeking to defend free and open discourse elsewhere and makes visible to outside observers what values lie at the heart of American higher education.

Adding more universities to the list of those that have adopted the Chicago statement is hardly a panacea. Some institutions might well hesitate to embrace those principles in their entirety. Some institutions should

hesitate. The American landscape of higher education is characterized by diversity. Although the Chicago statement points to a set of values and commitments that are close to the heart of most modern American universities, there are certainly some institutions that understand their mission to be slightly different. Many religiously affiliated colleges and universities, for example, start with some articles of faith that set boundaries to the unrestrained search for truth on those campuses. Faculty at such institutions would benefit from a deliberate effort to consider how they should reconcile those commitments of faith with the scholarly mission of skeptical inquiry. Similarly, some institutions might choose to take a more restricted view of the scope of freedom that they wish to give students as they embark on the academic enterprise. Over the course of the twentieth century, American universities have withdrawn the paternalistic hand that they once maintained over the lives of their students, giving them more freedom to form their own associations and to explore ideas on their own.²⁶ Some universities might now want to reconsider their relationship with their students and take them under a closer tutelage, providing firmer guidance to how they are introduced to the world of ideas. Public universities, of course, are bound by the Constitution to respect the rights of faculty and students, and are thus obliged to adhere to something like the Chicago statement. Private universities have greater flexibility, and some might choose to distinguish themselves from institutions like the University of Chicago and Princeton University and offer a more limited menu of choices to prospective students. If the faculty of Williams College agrees with the group of students who have resisted the Chicago statement on the grounds that the institution should not prioritize "ideas over people" by allowing free speech to be "weaponized" to support "discursive violence," they have the freedom to announce that Williams will pursue its own path.²⁷ A self-conscious consideration of the mission of individual institutions and how it relates to freedom of speech would provide greater

22 Ibid.

23 American Association of University Professors, 1915 Declaration of Principles on Academic Freedom and Academic Tenure (December 1915) (<https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf>).

24 Report of the Committee on Freedom of Expression (<https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>).

25 Ibid.

26 On shifts in the relationship between universities and the students, see generally David A. Hoekema, *Campus Rules and Moral Community* (1994).

27 *A Collective Student Response to the "Chicago Statement,"* *The Feminist Wire* (November 23, 2018) (<https://thefeministwire.com/2018/11/a-collective-student-response-to-the-chicago-statement/>). See also, Rebecca Tauber and Samuel Wolf, *Students, Faculty Discuss Free Speech, The Williams Record* (December 5, 2018) (<https://williamsrecord.com/2018/12/students-faculty-discuss-free-speech/>).

transparency to those who might consider joining those campus communities as well as greater clarity about how those institutions should organize themselves and what culture and policies they should adopt.

Advocates of campus free speech should also be cognizant of the fact that endorsing the appropriate principles of free expression is only a first step toward advancing the goal of securing a campus in which ideas can be taken seriously and a wide range of voices can be heard. As Sigal Ben-Porath has pointed out, simply endorsing the Chicago statement can provide “false assurance” that the free-speech problem has been solved. A “legalistic and formal framework” for securing free speech is a “blunt tool” that will not, by itself, address many of the underlying concerns that are driving the free speech debate.²⁸ Securing some faculty agreement on first principles sends a useful message to external and internal constituencies about what the core values of a university should be understood to be and can begin to set expectations about what behavior should be accepted on a university campus and why. But having forged some agreement around a set of principles that can underwrite the scholarly mission of the university, university leaders must then take on the difficult task of insuring that those principles actually inform university practices.

Socialization into an Inclusive Intellectual Culture

The second task for improving the environment for free speech on college campuses might be thought of as one of socialization. The campus community is distinctive in that it is constantly changing. New members are always joining the community, even as many members are always departing. Universities have a particular need to integrate those new members into a common community and socialize them into the commitments, values and expectations of that community. I am not sure that we have generally done a very good job of that.

We spend a great deal of time and substantial resources trying to recruit students to campus, and universities have

adopted various efforts to “orient” students to their new campus environment. But I think we have too often, and mistakenly, taken for granted that students understand the purposes and value of the enterprise that they are entering. We now spend more time than we once did in providing “professional development” for graduate students and prospective faculty members, but I believe that professional development generally spends very little time trying to socialize graduate students into academia as such. They might learn to be political scientists, but they do not necessarily learn to be members of a university community. There is a need to socialize that constant stream of students so that they might become responsible members of the campus community, oriented to the values and principles of the university as such, a kind of civic education for those who will be citizens of the campus community.

My own initial thinking about these issues was sparked by a controversy at the University of North Carolina that seemed to highlight the misunderstanding of the very purposes of a university on the part of many in and around American colleges. The University of North Carolina at Chapel Hill has long run a summer book program for incoming students. Summer reading programs have become more common in recent years, but the Carolina Summer Reading Program remains distinctive in its willingness to adopt relatively sophisticated books that challenge students to grapple with important and contentious ideas and expose them to the kinds of texts that they might be expected to read in a college-level class.²⁹ In the aftermath of the attack on the World Trade Center and the launch of the American war against Islamic-inspired terrorism, the University of North Carolina assigned for its 2002 summer reading program a scholarly book that provided an introduction to the Islamic faith and commentaries on the Koran. The assignment created an immediate uproar. Some state legislators insisted that the university give equal time to a discussion of other religious faiths.³⁰ Fox News anchor Bill O'Reilly compared the assignment to the university forcing students to read *Mein Kampf* in 1941 and suggested that students tell

28 Sigal Ben-Porath, *Against Endorsing the Chicago Principles*, Inside Higher Ed (December 11, 2018) (<https://www.insidehighered.com/views/2018/12/11/what-chicago-principles-miss-when-it-comes-free-speech-and-academic-freedom-opinion>).

29 For an assessment of college-level summer reading programs, see Keith E. Whittington, *Free Speech and Ideological Diversity on American College Campuses*, in *The Value and Limits of Academic Speech* 47, 56-60 (Donald Alexander Downs and Chris W. Surprenant, 2018).

30 Kate Zernike, *Talk, and Debate, on Koran as Chapel Hill Classes Open*, New York Times (August 19, 2002), A1.

their professors to “shove it. I ain’t reading it.”³¹ A group of students and a conservative interest group filed federal suit arguing that the assignment violated the religious liberties of incoming students and sought to “impose a uniform favorable opinion of the religion of Islam.”³² The university chancellor was forced to explain that the book “is provocative in the best sense of the word, provocative of inquiry, even controversy. Universities thrive on controversy.”³³ Although a district court dismissed the lawsuit, concluding that the summer reading program was “academic, and not religious, in nature,”³⁴ the university’s board of governors declined to endorse a faculty-backed resolution affirming the importance of academic freedom at the North Carolina college campuses and the centrality of the free “exchange of ideas,” the “examination of different cultures,” and “thoughtful study and intellectual inquiry” to the mission of the university.³⁵ At least some students shared the view of politicians in the state that “you shouldn’t be made to read anything against your religion.”³⁶ In the end, the university held its discussion sections about the book and retained its summer reading program. More students were probably bothered by the fact that the text “was pretty boring” than by its potentially controversial content, but the fracas revealed the extent to which many have difficulty distinguishing between the indoctrination of ideas and the critical engagement with ideas.³⁷ For some, a university education did not imply that students should be confronted with ideas that ran against the grain of their personal identities and their deeply held beliefs.

Such episodes emphasize the importance of universities not taking for granted that others will understand their essential mission. One would hope that university boards of trustees could be counted on to defend the ideals of academic freedom and the free exchange of ideals, but

even members of governing boards need an introduction to the scholarly values that animate campus culture but that might be quite foreign from the everyday professional environment within which those board members normally operate.³⁸ Similarly, one might hope that students would arrive on a college campus with a full understanding of the scholarly enterprise, but such an understanding should not be assumed. Primary and secondary education often does not prepare students for the kind of wide-open intellectual debate that characterizes higher education. Prospective students are often enticed onto campus with a promise of economic mobility, vocational skills training, and the bread and circuses of college athletics and social life, and they might thus be unsurprisingly flummoxed upon encountering the kind of intellectual expectations that college faculty would want to emphasize. Even graduate students, who are encouraged to think about disciplinary norms of scholarly research, are likely to be left to their own devices in coming to appreciate (or not, as the case may be) the history and nature of universities as distinctive institutions, the importance of academic freedom, and the challenges of sustaining an environment of intellectual curiosity and tolerance of dissenting ideas.

Universities should strive not only to expose students to provocative ideas but also to explain to students why and how they should engage with provocative ideas. This might on occasion suggest the value of adopting for a summer reading program a work that deals with the purposes of university education and the value of free inquiry (as Princeton University did by selecting *Speak Freely* as the Pre-Read for 2018).³⁹ Such extensive efforts are impractical as a repeated exercise, but it is possible to routinely make more modest efforts to spur discussion and contemplation of free speech principles on college campuses. Discussion of free speech principles, university commitments to free

31 Robert Mortino, “*Our Enemies Among Us!*”: *The Portrayal of Arab and Muslim Americans in Post-9/11 American Media*, in *Civil Rights in Peril 95* (Elaine C. Hagopian, 2004).

32 Beth Henry, *Sura Reading; The University of North Carolina Makes the Koran Required Reading for Incoming Freshmen*, *The Daily Standard* (July 25, 2002).

33 William L. Holmes, *Book on Quran at Center of Academic, Religious Fight at University of North Carolina*, *Associated Press International* (August 14, 2002).

34 *Yacovelli v. Moeser*, 324 F. Supp. 2d 760, 764 (M.D.N.C., July 7, 2004).

35 Richard Morgan, *Resolution Affirming Academic Freedom Fails to Win Approval of U. of North Carolina Board*, *Chronicle of Higher Education* (August 13, 2002). The board later agreed to adopt a resolution affirming academic freedom in the University of North Carolina system. *Twenty-First Alexander Meiklejohn Award*, 89 *Academe* 91 (September-October 2003).

36 *Students saw Quran Reading as School Mandate*, *Associated Press State & Local Wire* (August 18, 2002).

37 *Ibid.*

38 See also, Keith E. Whittington, *Free Speech is a Core Tenet of the Academy. College Trustees Really Ought to Know That*, *Chronicle of Higher Education* (December 5, 2018).

39 Russell K. Nieli, *Princeton Takes a Stand for Free Speech on Campus*, *Minding the Campus* (June 20, 2018) (<https://www.mindingthecampus.org/2018/06/20/princeton-takes-a-stand-for-free-speech-on-campus/>).

inquiry, and training in such modes of critical engagement with others as “deliberative dialogue” can be incorporated into regular freshman orientation exercises. Discussions of the history and principles of academic freedom can be built into regular programs of professional development for graduate students. Colleges now annually host public events for “Constitution Day” to discuss issues relating to the Constitution. Although such events might not take the form of simple civic education that federal legislators imagined when prodding colleges to adopt such programming, they do generate regular public discussion of constitutional issues on college campuses. Similarly, colleges might find it in their own interest to program public events revolving around issues of free speech and academic freedom.

Integrating a discussion of free speech and academic freedom into standard orientation programs can help institutionalize a culture of free inquiry on a college campus. If the goal of adopting the Chicago statement is to inculcate a culture of intellectual freedom and not merely to set up a legalistic framework of speech regulations, then practical conversations about expectations about how members of the campus community should conduct themselves are needed to foster such a culture. Purdue University has been at the forefront of integrating such training into freshman orientation. As the chair of the task force that created training modules for freshman orientation noted, “if Purdue has a freedom of expression statement, then students need to be educated about what freedom of expression is.” “We can’t just expect them to read a statement on their way in and understand what it meant, or how to engage in freedom of expression in a way that would be effective and would create productive dialogue within an educational setting.”⁴⁰ Princeton’s President Christopher Eisgruber has observed that while free speech on college campuses might once have been assumed as “fundamental to what we do at universities,” the place of free speech had become “precarious” and “It’s become apparent that we really do need to be talking about it.”⁴¹ Talking about it, in this context, means precisely the kind of effort “to include all of our students in a community

of free inquiry” that Ben-Porath calls for.⁴² Talking about how free speech and freedom of thought should work on campus requires a genuine “commitment to listening and responding to the legitimate demands of students who feel excluded, while helping them grow and recognize their agency and power.”⁴³ The goal of such an orientation should not simply be to lay down a set of rules with which students must comply, but to inculcate an understanding of what genuine intellectual diversity and free inquiry on a college campus would mean. Universities should seek to engage students early in a conversation about how a commitment to inclusivity can be reconciled with a commitment to truth-seeking and robust debate. Inclusivity necessitates the tolerance of a diversity of ideas as well as a diversity of people, and the empowerment of a broad range of students and faculty to give voice to their ideas.

Those conversations should not stop with orientation exercises. Universities are educational institutions, and that teaching mission extends to mentoring students as they find themselves engaging with ideas with which they disagree. Ideally, professors should be modelling productive engagement with difficult ideas both inside and outside of the classroom, but we should recognize that the terms of engagement are going to be different in the public sphere than they are in the seminar room. Students should not simply be left on their own to figure out how to navigate social media and the campus quad. Regular engagement by campus administrators and faculty with students as they organize campus events and participate in campus activities can help clarify how exchanges over disagreeable ideas can be productive and not simply stressful and how encounters with opposing viewpoints can be carried off in a fashion that is respectful of the rights of everyone involved.

A focus on anticipatory constructive engagement with protestors is more useful on a college campus than a focus on subsequent draconian disciplinary processes when protests get out of hand. Reflecting political pressures, the board of regents of the University of Wisconsin made headlines when it imposed on system campuses a new

40 Alex Morey, *Free Speech Orientation Program Keeps Conversation Going at Purdue*, FIRE (December 5, 2016) (<https://www.thefire.org/free-speech-orientation-program-keeps-conversation-going-at-purdue/>).

41 Alice B. Lloyd, *Is Free Speech on Campus Making a Comeback?*, *The Weekly Standard* (August 31, 2017).

42 Ben-Porath, *supra* note 1.

43 *Ibid.* See also, Sigal Ben-Porath, *Free Speech on Campus* (2017).

policy for “suspending and expelling students who disrupt campus speeches,” giving rise to the fear by some that the “policy will chill and suppress free speech.”⁴⁴ Codes of conduct, with associated disciplinary sanctions, no doubt have a role to play on campus, but it would be preferable if discipline were a last resort. The University of Chicago has implemented a “deans-on-call” program in which campus administrators “may be called upon to actively preserve an environment of spirited and open discourse and debate” by working with event organizers and protesters to facilitate the robust expression of competing views while minimizing disruption.⁴⁵ The University of Pennsylvania has created a system of “open expression monitors” to “diffuse or intervene when anyone’s right to express her views freely is limited or blocked by another party.”⁴⁶ Although the enforcement of rules and calls for civility are useful, “there is no substitute for the ongoing commitment to a deliberate dialogue on the importance of free speech, to the protection of all individuals and groups (especially minority groups), and to the establishment and maintenance of a campus atmosphere where opinions can be debated openly and honestly.”⁴⁷ The embarrassing incident in the spring of 2017 in which students at Middlebury College shouted down the conservative writer Charles Murray as the college president stood impotently by has become the symbol of a supposed free speech crisis on college campuses, but the failings at Middlebury College began well before Charles Murray ever arrived on campus and not merely with the slap on the wrists that some disruptive students received after the fact. Ultimately, university officials must be proactively engaged with establishing expectations for students and channeling debate and not simply be left with cleaning up the mess when things go awry.

Conservatives have been particularly critical of the creation of so-called “bias response teams” and “safe spaces” on college campuses, but there may be ways to direct the energies behind such movements toward useful reforms. In both concept and design, such efforts to encourage students to anonymously initiate disciplinary proceedings for perceived acts of bias or to shelter

themselves from disagreeable ideas are likely to be subversive of sustaining an environment of free and open inquiry and to invite fears of political favoritism. At the same time, universities should be emphatic that members of the campus community deserve to be recognized with equal dignity and respect. Treating all members of the community with the appropriate respect means taking seriously their concerns and responding aggressively to acts of bullying, harassment, and intimidation, but it also means insisting that the campus be open to the reasonable exchange of ideas. Campuses can make space for solidarity with like-minded individuals and support for their projects, but it must also be open to the often competing and conflicting range of perspectives, ideologies and projects that come with a heterogeneous society.

Successfully cultivating a robust intellectual environment also requires some judgment and selectivity. To serve their truth-seeking function, universities must avoid stifling orthodoxies and hold open the possibility that even deeply held beliefs can be critically scrutinized. The lack of ideological diversity on most college campuses is palpable and damaging to the aspirations of universities to be homes of unconventional thinking and free of echo chambers.⁴⁸ It is both too simple and counterproductive, however, to respond to that homogeneity by inviting to campus the most provocative speakers possible. Self-consciously designed speaker series for “unpopular” or “uncomfortable” ideas risks degenerating into a platform for cranks while effectively segregating conservative speakers from the campus mainstream. Supporting free speech and intellectual diversity on college campus does not mean removing all standards or engaging in provocation for the sake of provocation. When white nationalist Richard Spencer reached out to Geoffrey Stone seeking an invitation to speak at the University of Chicago, Stone appropriately engaged in an assessment of the intellectual merits of bringing Spencer to campus and declined the offer, noting that “from what I have seen of your views they do not seem to me [to] add anything of value to serious and reasoned discourse, which is of course the central goal of a university.”⁴⁹ Although

44 Todd Richmond, *University of Wisconsin Approves Free Speech Policy that Punishes Student Protesters*, Chicago Tribune (October 6, 2017).

45 “High Profile Events,” (<https://csl.uchicago.edu/node/132802>).

46 Ben-Porath, *Free Speech on Campus*, supra note __, at 113-114.

47 *Ibid.*, 26-27.

48 See, e.g., Neil Gross, *Why Are Professors Liberal and Why Do Conservatives Care?* (2013); Jon A. Shields and Joshua M. Dunn Sr., *Passing on the Right* (2016).

49 Osita Nwanevu, *When “Free Speech” is a Marketing Ploy*, Slate (March 23, 2018).

some might dismiss Stone's response as rank hypocrisy and an indication that arguments about free speech are little more than political rhetoric and marketing ploys, the response is better understood as a reasonable, if contestable, effort to realize the university's mission of fostering serious debate about serious ideas.

Universities should not place artificial limits on the scope of intellectual inquiry on campus and should try to construct a pluralistic intellectual ecosystem that makes it relatively easy for all members of the campus community to pursue the ideas of interest to them. At the same time, however, universities should be actively encouraging excellence and members of the campus community should be exercising judgment in providing to the campus community the best representatives of ideas worthy of examination. There will be disagreements over what counts as ideas worthy of examination, which is precisely why a decentralized, pluralistic intellectual environment is helpful in order to give free play to those disagreements. The fact of such disagreements does not discharge members of the campus community from their own responsibility to exercise mature judgment about what ideas should be pursued and how. Responsible members of the campus community may well disagree about which ideas are worthy of discussion and which speakers might have valuable things to say, but responsible members of the campus community nonetheless have an obligation to act in good faith in pursuing the intellectual mission that universities are constituted to undertake. There is no tension between giving students the freedom to make their own choices about what ideas to debate and asking those students to use that freedom to make good choices and criticizing them when they fail to do so.⁵⁰

Implementing Free Speech

The third task for improving the environment for free speech on college campuses might be thought of as primarily administrative. We need to insure that the regulations and procedures that help organize campus life and coordinate the various activities of the members of the campus community are conducive to creating an environment in which freedom of thought flourishes. These policies have often been the subject of controversy themselves. Organizations like FIRE have been particularly concerned with clearing out ill-conceived speech codes that unduly restrict free expression on campus, and the AAUP has long battled university policies that were thought to be too restrictive on the freedom of faculty members to research and teach. Such watchdog groups serve an important and valuable purpose, and public universities are backstopped by the willingness of the courts to enforce constitutional constraints on the discretion of university administrators to limit speech on campus.⁵¹

Universities have their own reasons for wanting policies that do a good job of preserving academic freedom and free speech on campus, but it should now be obvious that if universities do not take care to do so then outsiders will step into the breach. The University of Wisconsin System Board of Regents was driven by political pressures to draft a policy for disciplining campus protesters.⁵² Both state and federal legislatures have been actively considering a variety of proposals for regulating speech on college campuses.⁵³ The issue of campus free speech has become deeply politicized, with conservative politicians and activists mobilized by high-profile incidents of conservative students, speakers, and professors being harassed on college campuses.⁵⁴ Activist groups such as the Goldwater Institute, the American Legislative Exchange Council, and Alliance Defending Freedom are promoting their own favored sets of policies to be imposed on colleges by

50 Of course, as professors frequently demonstrate, students are not the only ones who might use their freedom of speech unwisely. For one example of internal discussion of the virtues and pitfalls of choices of speakers, see Gabriel Rossman, *Open Letter to the Bruin Republicans Who Invited Milo Yiannopoulos to UCLA*, *The Weekly Standard* (February 14, 2018); Conor Friedersdorf, *A Mentor's Advice to UCLA's Campus Republicans*, *The Atlantic* (February 20, 2018).

51 For a useful discussion of those constitutional constraints, see Erwin Chemerinsky and Howard Gillman, *Free Speech on Campus* (2017).

52 Karen Herzog, *Regents Approve Punishments up to Expulsion for UW Students who Repeatedly Disrupt Speakers*, *Milwaukee Journal Sentinel* (October 6, 2017).

53 Teri Lyn Hinds, "Untangling the Threads: 2018 State Legislation Addressing Campus Speech Concerns," NASPA (May 31, 2018) (<https://www.naspa.org/rpi/posts/untangling-the-threads-2018-state-legislation-addressing-campus-speech-conc>); Peter Schmidt, *State Lawmakers Seek to Force Public Colleges to Protect Speech Rights*, *Chronicle of Higher Education* (February 10, 2017).

54 Beth McMurtrie, *Why Conservative Lawmakers are Turning to Free-Speech Bills as a Fix for Higher Ed*, *Chronicle of Higher Education* (June 8, 2017).

politicians.⁵⁵ The substance of these proposals is often a mixed bag, but they certainly have the consequence of reducing institutional autonomy and flexibility and invite greater political oversight of university affairs. To argue that conservative politicians are more interested in scoring political points than securing free speech is to miss the point. Politicians usually act out of mixed motives and are spurred on by the hope of winning political points. Universities give fuel to that political fire to the extent to which they fail to articulate and defend their own institutional values, fail to keep their own house in order, and fail to live up to their own stated ideals of intellectual openness and political neutrality.⁵⁶ Universities would be better off thinking through those policies on their own rather than having them imposed by outside forces.

Securing Academic Freedom

At the very heart of the scholarly enterprise maintained by universities is the research and teaching of the faculty. The concept of academic freedom is designed to protect the ability of faculty to freely engage in scholarly inquiry without fear of repercussions because of the questions they ask or the findings that they uncover run afoul of the beliefs or interests of students, parents, donors or politicians. It has often been the case that academic freedom protections are most critical to progressive and minority voices within academia who are more likely to find themselves at odds with more conservative interests beyond the campus gates. The widely accepted expectations of academic freedom have been embodied in the AAUP's 1940 Statement of Principles. At the very least, universities should integrate those principles into their own governing documents and employment contracts so as to provide clear and binding commitments that can help protect professors from reprisal

for their scholarly activities.⁵⁷ The Wisconsin Supreme Court, for example, recently relied on the inclusion of those principles in a faculty handbook in a landmark case enforcing principles of academic freedom as a matter of contractual rights in a case involving Marquette University.⁵⁸ Responding in part to a U.S. Supreme Court decision that seemed to leave open the question of whether academic freedom was constitutionally protected at public universities,⁵⁹ faculty bodies such as the Faculty Council at the University of North Carolina passed resolutions observing that it is important to “reaffirm from time to time the fundamental importance of institutional protections for the academic freedom of research and publication, teaching, shared governance, and participation in public debate.”⁶⁰ Such periodic official reaffirmations have also been useful opportunities to insure that governing documents are kept up to date and include provisions protecting faculty members from being terminated or sanctioned for how they exercised their academic freedom in teaching or research.⁶¹

Tenure for faculty members remains a bulwark of academic freedom. As a practical matter, restrictions on the ability of universities to terminate tenured faculty at will helps secure an intellectual environment in which faculty can speak freely regardless of the sensitivities of powerful university stakeholders. Temple University professor Marc Lamont Hill lost his position with CNN when controversy erupted over his comments about the Israeli-Palestinian conflict, but the chair of the Temple board of trustees discovered to his chagrin that tenure made it difficult for the university to “fire him immediately.”⁶² There has been a vast expansion of the use of contingent faculty rather than tenure-track faculty in universities, and women and minorities have disproportionately filled the

55 Ibid.

56 See also, Nicholas B. Dirks, *How Colleges Make Themselves Easy Targets*, Chronicle of Higher Education (October 28, 2018); Michael S. Roth, *The Opening of the Liberal Mind*, Wall Street Journal (May 11, 2017); Sarah Taylor, *University of Chicago President Blasts Suppression of Free Speech on Campus*, “Privileging Feelings,” The Blaze (October 17, 2018).

57 American Association of University Professors, 1940 Statement of Principles on Academic Freedom and Tenure (<https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>).

58 *McAdams v. Marquette University*, 2018 WI 88 (2018).

59 *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006). On faculty responses, see Azhar Majeed, *Resolutions to Protect Academic Freedom of Faculty at UNC-Chapel Hill*, University of Delaware, FIRE (November 19, 2010) (<https://www.thefire.org/resolutions-to-protect-academic-freedom-of-faculty-at-unc-chapel-hill-university-of-delaware/>).

60 University of North Carolina Faculty Council, Resolution 2010-5. On Supporting a Resolution of the University of North Carolina Faculty Assembly on Academic Freedom (<http://faccoun.unc.edu/files/2011/03/Resolution-2010-5.pdf>).

61 In response to the University of North Carolina faculty resolution, for example, the board of governors incorporated explicit references to the AAUP standards of academic freedom into faculty grievance procedures. University of North Carolina Board of Trustees, Resolution on Academic Freedom (<https://bot.unc.edu/files/archives/HO%201110%20Coble-%20FAAcademicFreedomRes2010.pdf>).

62 Craig R. McCoy, *U.N. Speech by Temple Prof Draws Fire from University's Board Chair*, The Philadelphia Inquirer (November 30, 2018).

ranks of contingent faculty.⁶³ Such faculty members have traditionally been far less protected by norms of academic freedom, with potentially significant consequences for the freedom of instructors in the classroom.⁶⁴ Although such faculty will always be vulnerable, universities should affirm that principles of academic freedom apply to contingent faculty as well as to tenure-track faculty and work to provide greater security for their employment by resting decisions regarding their hiring in the hands of permanent faculty (rather than administrators) and providing long-term contracts.

Extramural Speech

The AAUP has long incorporated extramural speech into the broader category of academic freedom.⁶⁵ Extramural speech refers to public remarks by faculty members on matters of general concern. Such comments, whether made in the media, on the Internet, or at a political rally, may not rest on the particular scholarly expertise of the professor or communicate her expert knowledge but often simply reflect her personal opinions as a member of the polity.⁶⁶ Nonetheless, universities have a stake in respecting the freedom of faculty members to engage in such extramural speech as part of their commitment to preserving the campus as a redoubt of intellectual freedom.⁶⁷ It is precisely such extramural remarks that come to public attention and can generate demands for the termination of faculty.⁶⁸

University leaders have not always responded well when professors on their campuses find themselves in a storm of public controversy. In public statements, university presidents have sometimes been inclined to feed the flames rather than tamp them down by joining the mob in denouncing the faculty member for their comments. When Fresno State professor Randa Jarrar stoked public

controversy with her intemperate remarks on the death of Barbara Bush, the university's president was quick to declare that "we share the deep concerns expressed by others" over the Twitter posts and that those posts were "obviously contrary to the core values of our University."⁶⁹ When Marquette University professor John McAdams published his controversial blog post criticizing the conduct of another instructor at the university, a dean moved to revoke his tenure and terminate his employment, contending that "your value to this academic institution is substantially impaired" because he had not shown adequate "respect for others' opinions."⁷⁰

The message university leaders should send when controversy erupts is more basic. The university is the home of many students and scholars who speak and act as individuals and who hold myriad and conflicting beliefs, opinions and ideas. The university is committed only to the inviolability of freedom of thought and freedom of inquiry. It does not endorse the ideas and opinions of any individual on campus, nor does any individual on campus represent the university. Members of the faculty think for themselves and can formulate and defend their own ideas. They recognize that their ideas can be scrutinized and criticized, sometimes embraced by others and sometimes rejected. The university holds members of the faculty responsible to their disciplinary norms when they teach and research within their area of expertise, but the university does not sanction members of the campus community for expressing unpopular or controversial ideas.

63 See Phillip W. Magness, "Are Full-Time Faculty Being Adjunctified? Recent Data Show Otherwise," James Martin Center (May 19, 2017) (<https://www.jamesmartin.center/2017/05/full-time-faculty-adjunctified-recent-data-show-otherwise/>); Colleen Flaherty, *More Faculty Diversity, Not on Tenure Track*, Inside Higher Ed (August 22, 2016) (<https://www.insidehighered.com/news/2016/08/22/study-finds-gains-faculty-diversity-not-tenure-track>).

64 Stephen A. Smith, *Contingent Faculty and Academic Freedom in the Twenty-First Century*, 49 *First Amendment Studies* 27, 28 (2015).

65 AAUP, 1940 Statement of Principles, *supra* note 1.

66 On the relationship between expertise and academic freedom, see Robert C. Post, *Democracy, Expertise, Academic Freedom* 60-70 (2012).

67 See also, Keith E. Whittington, *Academic Freedom and the Scope of Protection for Extramural Speech*, 105 *Academe* (January-February 2019).

68 See, e.g., Keith E. Whittington, *Tolerating Campus Dissent, Left and Right*, Princeton University Press Blog (April 25, 2018) (<http://blog.press.princeton.edu/2018/04/25/keith-whittington-tolerating-campus-dissent-left-and-right/>).

69 Joseph I. Castro, President Joseph I. Castro Statement Regarding Faculty Member's Tweet (April 17, 2018) (<http://www.fresnostatenews.com/2018/04/17/president-castro-statement-regarding-faculty-members-tweet/>).

70 Richard C. Holz, Letter to John McAdams (January 30, 2015) (<https://docs.google.com/file/d/0B4jS38HQ3f8dSDhNX1FQRnlpcTQ/edit?pli=1>).

Codes of Conduct

Codes of conduct are a necessary feature of a university campus. With a large group of individuals making use of a common space, there need to be some rules of the road to coordinate their activities and minimize counterproductive behavior. Such codes of conduct need to be not merely compatible with but supportive of the core mission of the university to advance and disseminate knowledge. Unfortunately, such rules and regulations for campus life sometimes inhibit rather than enhance a culture of intellectual freedom.

To secure an inclusive campus, it is essential that a university code of conduct prohibit bullying, threats, harassment, and intimidation. To secure an intellectually open campus, it is essential that a university code of conduct not interfere with the free exchange of ideas. Unfortunately, universities sometimes fall short in balancing these two goals. FIRE's Spotlight Database of universities earning a "red light" for policies that clearly and significantly infringe on free speech is littered with examples of schools that have adopted policies that extend well beyond prohibiting legally actionable cases of harassment and into the territory of restricting constitutionally protected speech and ideas.⁷¹ Kentucky State University's cyberbullying policy, for example, prohibits "posting derogatory comments" on social media,⁷² and Georgetown University's incivility policy prohibits speech that "disrespects another individual."⁷³ Such policies may reflect well-meaning efforts to encourage better behavior among students or to provide more detailed guidance about the range of activities that might run afoul of university policy, but they are too often drafted and implemented in ways that have the effect of infringing on the ability of members of the campus community to freely exchange ideas about

which they care passionately.⁷⁴ Universities should clearly prohibit, as Kansas State University does, "conduct directed towards another person(s) that is intended to and does substantially interfere with another's educational and employment opportunity, peaceful enjoyment of residence, or physical security,"⁷⁵ preferably while affirmatively stating, as Claremont McKenna University does, that "statements or conduct legitimately and reasonably related to the College's mission of education do not constitute harassment, and unlawful harassment must be distinguished from behavior that, even though unpleasant or disconcerting, is reasonable and appropriate in view of the relevant circumstances."⁷⁶

When university codes of conduct embrace the aspirational and are untethered from narrow exceptions to the domain of protected expression, they find themselves attempting to weigh competing objectives in the context of particular controversies. The ability of members of the campus community to freely express their ideas and engage in robust arguments about matters of common concern will often be curtailed in such an exercise and the freedom of inquiry on campus will be chilled. A free-floating insistence that members of the campus community "take care not to cause harm, directly or indirectly" to others on campus will, as in the case of Marquette University moving to terminate a tenured professor over a blog post, have the effect of undercutting the central mission of the university to advance human knowledge.⁷⁷ There are those who would seek to use academic freedom and free speech "as an excuse for the most abusive and uncollegial behavior."⁷⁸ Universities have a responsibility to be clear that claims of free speech are not a get-out-jail-free card for those who impinge on the rights of others or disrupt the functioning of the educational environment, but they also have a duty not to suppress disfavored or unpopular ideas if they are to

71 Spotlight Database, FIRE (<https://www.thefire.org/spotlight/>).

72 Kentucky State University Student Code of Conduct, 16 (<http://kysu.edu/wp-content/uploads/2014/04/Code-of-Conduct.pdf>).

73 Georgetown University Code of Student Conduct, 12 (<https://studentconduct.georgetown.edu/code-of-student-conduct>).

74 See also, Spotlight on Speech Codes 2019, FIRE (<https://www.thefire.org/spotlight/reports/spotlight-on-speech-codes-2019/#fr28>).

75 Kansas State University Student Code of Conduct (<https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2015/09/10071953/Student-Code-of-Conduct.pdf>).

76 Claremont McKenna University Civil Rights Handbook, 11 (<https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2015/12/01051500/Civil-Rights-Handbook-Claremont-McKenna-College-Acalog-ACMS%E2%84%A2.pdf>).

77 *McAdams v. Marquette University*, supra note 1.

78 Gary A. Olson, *The Limits of Academic Freedom*, Chronicle of Higher Education (December 9, 2009).

advance their core institutional mission.

Access to Campus Spaces

Universities should provide space to expressive activities on campus, subject only to the constraint of preserving the good functioning of the educational mission of the institution. As they have developed across the twentieth century, universities have become more than institutions dedicated to teaching and scholarly research. They have provided a forum for important public conversations about matters of general concern. In doing so, they have helped satisfy the goal of cultivating democratic citizens who are capable of critically assessing the values and ideas that they will encounter across their lifetimes.⁷⁹ Similarly, universities have emerged as an important component of the public sphere, fostering opinion formation on emerging issues that will shape politics, society and culture broadly.⁸⁰ They host conversations that are outside the societal mainstream and provide opportunities to evaluate ideas that are not heard elsewhere.

Universities need to regulate expressive activity so as to effectively coordinate the many individuals and groups seeking to make use of the common space, and they can reasonably prioritize the needs of the members of the campus community for the use of campus resources, but those regulations should be designed and administered so as not to exclude or unduly burden the expression of a wide range of views. So-called campus free speech zones often have the practical effect of sharply limiting the ability of students to communicate effectively with other members of the campus community and should be used with caution. A better model would seem to be the general acceptance of outdoor campus spaces as traditional public forums, at least for members of the campus community, that are subject to limited regulation with an orientation toward tolerating expressive activity that does not materially and substantially disrupt the

functioning of the institution or infringe on the rights of others. Similarly, schools have sometimes used permitting requirements to limit the ability of student groups to engage in spontaneous protests, and by placing substantial discretionary authority in the hands of campus administrators have created the risk of arbitrary restrictions on campus free speech. While campus officials should be able to disperse demonstrations that prove to be disruptive of university operations, they should not force students to seek permission before engaging in oral or written communication in the open spaces on campus.⁸¹

In response to high-profile incidents of speakers being prevented from speaking on college campuses, there is a temptation to overcorrect and adopt regulations that are themselves overly restrictive of the expression of dissenting views. That temptation should be resisted. The “no platforming” movement has led to numerous efforts to disinvite, block and shout down controversial speakers on college campuses in the United States and abroad. Professors have appealed to the idea to denounce universities and journals for giving “a platform” to scholarship that they find ideologically verboten.⁸² Others have argued that because universities have a pluralistic process of allowing small groups to invite speakers to campus, others on campus should have the opportunity to “curate” the content of what is presented to the campus community by determining “what they don’t need to know.”⁸³ Female speakers on the political right such as Ann Coulter, Heather MacDonald, Christina Hoff Sommers, and Mona Charen have been frequent targets of campus activists, but women from elsewhere on the political spectrum such as Linda Sarsour, Madeline Albright, Germaine Greer, and Janet Napolitano have faced their own difficulties. It is, of course, part of free speech to criticize the substance of lectures on campus or criticize the choice of lecturers, and universities should welcome such debates. It is likewise part of free speech to put critiques to speakers or mount protests to sway potential

79 On universities and democratic citizenship, see Martha C. Nussbaum, *Why Democracy Needs the Humanities* (2016).

80 On the public functions of the modern university, see Simon Marginson, *Higher Education and Public Good*, 65 *Higher Education Quarterly* 411 (2011).

81 These proposals would be consistent with the model Campus Free Expressional Act advocated by FIRE and adopted by some state legislatures for public universities. See *Frequently Asked Questions: The Campus Free Expression (CAFE) Act*, FIRE (<https://www.thefire.org/frequently-asked-questions-the-campus-free-expression-cafe-act/>). Protests that interfere with the conduct of classes would pose such an inappropriate disruption of university operations. See Keith E. Whittington, *Campus Protests Should Stop at the Door of the Classroom*, *Aeon* (June 20, 2018) (<https://aeon.co/ideas/campus-protests-should-stop-at-the-door-of-the-classroom>).

82 See, e.g., Joanna Williams, *Academic Freedom in An Age of Conformity* 8 (2016); Brittney Cooper, *How Free Speech Works for White Academics*, *Chronicle of Higher Education* (November 16, 2017).

83 Aaron R. Hanlon, *Why Colleges Have a Right to Reject Hateful Speakers Like Ann Coulter*, *The New Republic* (April 24, 2017).

audiences, and universities should provide opportunities for such active engagement with ideas. At the same time, universities cannot allow a minority, or even a majority, of students to prevent members of the campus community from hearing from the speakers of their choice. A prohibition on “violent or disorderly conduct that materially and substantially disrupts” legitimate campus activities echoes the constitutional standard that courts have developed since *Tinker*.⁸⁴ It is no part of free speech properly understood that some are empowered to significantly hinder the ability of others to pursue their rightful activities on campus, but students should not be punished for minor or brief disruptions that do not significantly impede others. Hecklers are to be tolerated; the heckler’s veto is to be curtailed.

Conclusion

Universities are best able to realize their truth-seeking mission if they can bring together a diverse community of individuals to freely exchange ideas and critically examine claims about the world. They should welcome onto campus anyone who is interested in pursuing knowledge, but the campus onto which they are admitted must maintain itself as a realm of open inquiry and diverse perspectives if they are to be true to their mission and social function. There are those both off campus and on campus who would significantly limit the range of ideas that can be freely discussed at universities. They imagine that society will be better off if only their own ideas are heard and discussed, and they presume that they will ultimately be in control of decisions about what ideas to exclude and suppress. The temptation to exercise the power of the censor should be resisted, and universities should reaffirm their commitment to the unfettered pursuit of knowledge. It would be preferable if universities were to take up that task on their own, but they run the risk that outsiders with less interest in the long-term health of these institutions will impose solutions of their own if university faculty do not act to effectuate basic principles of academic freedom and free speech.

⁸⁴ *Tinker v Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969). This is the language incorporated into the University of Wisconsin’s controversial anti-heckler policy. Board of Regents of the University of Wisconsin System, Commitment to Academic Freedom and Freedom of Expression (https://www.wisconsin.edu/regents/download/meeting_materials/2017/october/Board-of-Regents-Friday-Agenda-and-Materials—October-2017.pdf). Although any policy can be badly administered, the difficulty with the substance of the Wisconsin policy is less with its standard of prohibited conduct than with its process of discipline.