

# FREE SPEECH AND THE DIVERSE UNIVERSITY

*Keith E. Whittington\**

## INTRODUCTION

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 was “more important for colleges.”<sup>1</sup> When forced to choose, a substantial minority of students said they would prioritize inclusivity over the freedom to express “viewpoints that are offensive” on campus.<sup>2</sup> Following the Gallup-Knight poll the American Council on Education put a similar question to college presidents. University leaders overwhelmingly insisted that if forced to choose they would prioritize allowing students “to be exposed to all types of speech.”<sup>3</sup> Those pollsters were hardly alone in wanting to focus attention on “when core values collide.”<sup>4</sup> Much of the debate surrounding campus free speech in recent years has assumed that choices must be made between speech and inclusivity and has moved on to argue over which should take priority.

It is 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

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\* William Nelson Cromwell Professor of Politics, Princeton University. I am grateful for the support of the University of California National Center for Free Speech and Civic Engagement for its support of this project. This Article was prepared for the Symposium entitled *Gender Equality and the First Amendment*, hosted by the *Fordham Law Review* on November 1–2, 2018, at Fordham University School of Law. For an overview of the Symposium, see Jeanmarie Fenrich, Benjamin C. Zipursky & Danielle Keats Citron, *Foreword: Gender Equality and the First Amendment*, 87 FORDHAM L. REV. 2313 (2019).

1. KNIGHT FOUND., 2017 COLLEGE STUDENT SURVEY 3 (2017), [https://kf-site-production.s3.amazonaws.com/media\\_elements/files/000/000/147/original/Knight\\_Foundation\\_2017\\_Student\\_Survey\\_Questionnaire\\_1\\_.pdf](https://kf-site-production.s3.amazonaws.com/media_elements/files/000/000/147/original/Knight_Foundation_2017_Student_Survey_Questionnaire_1_.pdf) [https://perma.cc/5R2N-DTYQ].

2. GALLUP & KNIGHT FOUND., FREE EXPRESSION ON CAMPUS: WHAT COLLEGE STUDENTS THINK ABOUT FIRST AMENDMENT ISSUES 10 (2018), [https://kf-site-production.s3.amazonaws.com/publications/pdfs/000/000/248/original/Knight\\_Foundation\\_Free\\_Expression\\_on\\_Campus\\_2017.pdf](https://kf-site-production.s3.amazonaws.com/publications/pdfs/000/000/248/original/Knight_Foundation_Free_Expression_on_Campus_2017.pdf) [http://perma.cc/3Y44-QRPG].

3. Lorelle L. Espinosa, Jennifer R. Crandall & Philip Wilkinson, *Free Speech and Campus Inclusion: A Survey of College Presidents*, HIGHER EDUC. TODAY (Apr. 9, 2018), <https://www.higheredtoday.org/2018/04/09/free-speech-campus-inclusion-survey-college-presidents/> [https://perma.cc/E9US-6NNQ].

4. Pareena G. Lawrence, *When Core Values Collide: Diversity, Inclusion, and Free Speech*, LIBERAL EDUC., Spring 2018, at 14, 14.

both.<sup>5</sup> 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 can only appreciate how the value of free speech and the value of diversity are compatible if we are clear about the core 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.<sup>6</sup> 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 we circumscribe the scope of freedom of inquiry. Universities must be places where controversial ideas can be raised and freely discussed, 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.

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

This Article proceeds in three Parts. Part I explores the need for universities to clearly articulate their position on free speech. Part II explains why it is crucial to integrate community members into an inclusive intellectual culture. And Part III identifies discrete administrative steps that must be taken to implement these policies.

## I. PERSUASION AND FIRST PRINCIPLES

Universities should 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 incidents on campus, the fact remains that repeated free speech controversies put universities in a bad light and feed concerns about campus climates.<sup>7</sup> There have certainly been episodes where students, faculty, and administrators acted contrary to the mission of the university as an institution dedicated to

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5. Pareena Lawrence, *When Core Values Collide*, INSIDE HIGHER ED (Mar. 19, 2018), <https://www.insidehighered.com/views/2018/03/19/balancing-free-expression-unrepresented-students-sense-belonging-opinion> [https://perma.cc/Z9VR-BL9K].

6. See KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH 12–27 (2018).

7. See generally COMM. ON GOV’T RELATIONS, AM. ASS’N OF UNIV. PROFESSORS, CAMPUS FREE-SPEECH LEGISLATION: HISTORY, PROGRESS, AND PROBLEMS (2018).

free thought and free inquiry.<sup>8</sup> If universities do not take steps to reform themselves, they will continue to see their support from important segments of the general public erode and can expect outsiders to intervene to impose reforms on college campuses. Universities should proactively ensure 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 to the exact same expectations. There is room for experimentation and differences. But differences on such basic matters should be consciously chosen and reflect a careful consideration of the costs and 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. I believe that the conception of the university mission as being the unbridled pursuit of the truth has been widely shared since the late nineteenth century. However, 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 taking place on college campuses in which members of the campus community are trying to come to a common understanding of shared values and commitments. These conversations are necessary, 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 clearly articulate what they stand for. There are too many indications that senior university administrators, university trustees, and alumni do not understand the purposes of the university and what brand they should be preserving and advancing.<sup>9</sup> We should develop opportunities and vehicles to clarify the purpose of the university and the place of free speech principles in light of that purpose. We should foster those conversations, encourage greater agreement, and consider 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 unaware and unprepared. For too many university leaders, the public image of the

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8. See *infra* notes 63–64 and accompanying text.

9. See, e.g., Frank Edler, *After Salaita: Keep Pushing for Academic Freedom!*, ACADEME BLOG (Sept. 22, 2015), <https://academeblog.org/2015/09/22/after-salaita/> [<https://perma.cc/QU5P-RHEJ>]; Keith E. Whittington, *Free Speech Is a Core Tenet of the Academy. College Trustees Really Ought to Know That.*, CHRON. HIGHER EDUC. (Dec. 5, 2018), <https://www.chronicle.com/article/Free-Speech-Is-a-Core-Tenet-of/245264> [<https://perma.cc/9QCW-YCAA>]; Editorial, *College Activists Mock Academic Freedom with Their Objections to Commencement Speakers*, WASH. POST (May 19, 2014), [https://www.washingtonpost.com/opinions/college-activists-mock-academic-freedom-with-their-objections-to-commencement-speakers/2014/05/19/3bec63d2-df91-11e3-810f-764fe508b82d\\_story.html](https://www.washingtonpost.com/opinions/college-activists-mock-academic-freedom-with-their-objections-to-commencement-speakers/2014/05/19/3bec63d2-df91-11e3-810f-764fe508b82d_story.html) [<https://perma.cc/A9B5-PPR3>].

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.”<sup>10</sup> 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.<sup>11</sup>

When controversy erupted at the University of Illinois over the hiring of Steven Salaita due to his public profile as a vociferous critic of Israel, university chancellor Phyllis Wise soon found herself consulting with donors, fundraisers, and public relations specialists to craft the university’s response.<sup>12</sup> The faculty closest to Salaita’s expertise were not brought into the inner circle.<sup>13</sup> It is perhaps unsurprising that the university backed away from its initial recognition of the “freedom-of-speech rights of all [its] employees.”<sup>14</sup> Salaita’s appointment was ultimately terminated by a vote of the board of trustees.<sup>15</sup> 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.<sup>16</sup>

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 soon after heard calls for the university to terminate his employment.<sup>17</sup> More troubling, those calls came from inside the university. 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.”<sup>18</sup>

The president of Mount St. Mary’s University moved to dismiss a faculty member who had been publicly critical of his policies. The president, whose professional background was in private equity rather than academia, informed the tenured professor that he “owe[d] a duty of loyalty to th[e]

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10. Mará Rose Williams, *Free to Speak Freely; Colleges Protecting Faculty Speech on Campus and Off*, KAN. CITY STAR (June 15, 2018, 5:30 AM), <https://www.kansascity.com/news/local/article212807554.html> [https://perma.cc/D447-8FB5].

11. See, e.g., Tim Sheehan, *Some Donors Waver, Others Firm in Support of Fresno State in Wake of Controversy*, FRESNO BEE (Apr. 20, 2018, 5:41 PM), <https://www.fresnobee.com/news/local/article209351954.html> [https://perma.cc/P55D-362K].

12. See Corey Robin, *Reading the Salaita Papers (Updated, with More and Better Email Addresses for Trustees)*, CROOKED TIMBER (Sept. 3, 2014), <http://crookedtimber.org/2014/09/03/reading-the-salaita-papers/> [https://perma.cc/5LW8-N8C2].

13. See Edler, *supra* note 9.

14. *Id.* (quoting an initial university statement in response to Salaita’s public statements).

15. *Id.*

16. Julie Wurth, *Fee: \$550,000 for Branding*, NEWS-GAZETTE (July 26, 2015), <http://www.news-gazette.com/news/local/2015-07-26/fee-550000-branding.html> [https://perma.cc/4E69-47ZV].

17. Scott Jaschik, *A Professor’s Comments, a Board Chair’s Reaction and Academic Freedom*, INSIDE HIGHER ED (Dec. 3, 2018), <https://www.insidehighered.com/news/2018/12/03/temple-defending-academic-freedom-professor-when-board-chair-says-he-seeking-ways> [https://perma.cc/QA7E-BDY3].

18. Craig R. McCoy, *U.N. Speech by Temple Prof Draws Fire from University’s Board Chair*, PHILA. INQUIRER (Nov. 30, 2018), <http://www2.philly.com/philly/news/breaking/marc-lamont-hill-temple-israel-anti-semitic-20181130.html> [https://perma.cc/9VLS-FXJG].

university" and, since his public remarks had "caused considerable damage" to the university's reputation, he was banned from campus.<sup>19</sup> Such episodes give rise to the question of whether professors should be fired for damaging a college's reputation.<sup>20</sup> Many university leaders would apparently answer that question in the affirmative.

This raises the question of what a university's brand should be. For university leaders focused on building relationships with external constituencies such as donors, parents, politicians, and journalists, it is all too easy to think that the university's reputation revolves around "inspiring stories" that might be "key to inspiring donor support."<sup>21</sup> 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 the 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 were not endorsed by or representative of the institution broadly, then campuses would be very quiet places indeed.

Universities are sites of contestation. Provoking controversy is central to the enterprise. The brand to be protected is that of the university as 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.<sup>22</sup> Similarly, if you do not 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 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

19. Scott Jaschik, *Purge at the Mount*, INSIDE HIGHER ED (Feb. 9, 2016), <https://www.insidehighered.com/news/2016/02/09/mount-st-marys-president-fires-two-faculty-members-one-tenure> [<https://perma.cc/33GU-TT8C>].

20. See Laura McKenna, *Should Professors Be Fired for Damaging a College's Reputation?*, ATLANTIC (Feb. 25, 2016), <https://www.theatlantic.com/education/archive/2016/02/should-professors-be-fired-for-damaging-a-colleges-reputation/470976/> [<https://perma.cc/RJJ6-ESR3>].

21. Nathan Gregoire & Kimberly Kicenuk Hubbard, *Three Ways to Leverage Effective Storytelling in Higher Education*, CCS FUNDRAISING BLOG (July 20, 2018), <https://ccsfundraising.com/three-ways-to-leverage-effective-storytelling-in-higher-education/> [<https://perma.cc/9M84-AWR5>].

22. Cf. 20 Mark Twain, Speech on the Weather at the New England Society's Seventy-First Annual Dinner, New York City, in THE WRITINGS OF MARK TWAIN 392, 394 (Harper & Bros. 1910) ("Yes, one of the brightest gems in the New England weather is the dazzling uncertainty of it.").

that the members of the campus community will not speak with a single voice and 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 agree on those commitments. The 2014 University of Chicago statement on its 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.<sup>23</sup> 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.<sup>24</sup>

Adoption of the Chicago statement by the faculty of other schools has become one viable mechanism for building agreement about the core commitments of the university. In 2015, Princeton University became the second university in the country to adopt the main body of the Chicago statement as its own.<sup>25</sup> A number of other universities have since followed suit, which have been tracked by the Foundation for Individual Rights in Education (FIRE), a civil libertarian advocacy group.<sup>26</sup>

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 principles reaffirms and clarifies the values of a scholarly community and sends a message to both students and administrators as to what the faculty expects and prioritizes. In some cases, such as Princeton's, the inclusion of the statement in governing documents provides guidance to and constraints upon senior university leadership as they administer other university policies. But even if 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 the rationales behind those principles.

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23. See, e.g., Geoffrey R. Stone et al., *Report of the Committee on Freedom of Expression*, U. CHI., <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf> [<https://perma.cc/CAK5-JACJ>] (last visited Apr. 10, 2019).

24. See *id.*

25. Office of Commc'ns, Princeton Univ., *Faculty Adopts Statement Affirming Commitment to Freedom of Expression at Princeton*, PRINCETON U. (Apr. 7, 2015), <https://www.princeton.edu/news/2015/04/07/faculty-adopts-statement-affirming-commitment-freedom-expression-princeton> [<https://perma.cc/CMZ2-LBFX>].

26. See *Chicago Statement: University and Faculty Body Support*, FIRE (Mar. 8, 2019), <https://www.thefire.org/chicago-statement-university-and-faculty-body-support/> [<https://perma.cc/8EL6-R5PC>].

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 longer or phrased differently that is still consistent with the spirit of the 2014 statement. In 1974, the faculty of Yale College called on the president of the university to appoint 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.<sup>27</sup> 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.<sup>28</sup> In 1967, an earlier generation of faculty at the University of Chicago itself produced the “Kalven Report,” named after its primary author, First Amendment scholar Harry Kalven, Jr.<sup>29</sup> 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.”<sup>30</sup> It further emphasizes that the university best performs 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 scholarly and public concern.<sup>31</sup>

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 in the General Report of the Committee on Academic Freedom and Academic Tenure issued at the founding of the American Association of University Professors (AAUP).<sup>32</sup> 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 Professor 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 risk writing something new and locally

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27. See generally *Report of the Committee on Freedom of Expression at Yale*, YALE, <https://yalecollege.yale.edu/deans-office/reports/report-committee-freedom-expression-yale#Report%20of%20the%20Committee> [https://perma.cc/Y7ND-8NXH] (last visited Apr. 10, 2019).

28. See generally *id.*; Letter from C. Vann Woodward, Chairman, Comm. on Freedom of Expression at Yale, to the Fellows of the Yale Corp. (Dec. 23, 1974), <https://yalecollege.yale.edu/deans-office/reports/report-committee-freedom-expression-yale#Chairman's%20Letter> [https://perma.cc/Y7ND-8NXH].

29. *Kalven Committee: Report on the University's Role in Political and Social Action*, U. CHI., <http://www-news.uchicago.edu/releases/07/pdf/kalverpt.pdf> [https://perma.cc/WL7J-HS3P] (last visited Apr. 10, 2019).

30. *Id.*

31. *Id.*

32. Edwin R. A. Seligman et al., Comm. on Acad. Freedom & Acad. Tenure, Am. Ass’n of Univ. Professors, *General Report of the Committee on Academic Freedom and Academic Tenure*, 1 AAUP BULL. 15, 20 (1915).

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.”<sup>33</sup> 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.”<sup>34</sup> 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 missions to be slightly different. Many religiously affiliated colleges and universities, for example, start with some articles of faith that set boundaries on the unrestrained search for truth.<sup>35</sup> 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 they once maintained over the lives of their students and have given students more freedom to form their own associations and explore ideas on their own.<sup>36</sup> Some universities might now want to reconsider their relationship with their students and provide closer tutelage to firmly and actively guide their introduction 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

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33. Stone et al., *supra* note 23, at 1.

34. *Id.*

35. See, e.g., *Articles of Faith: What We Believe*, JOHN BROWN U., <https://www.jbu.edu/faith/articles-of-faith/> [https://perma.cc/RWD6-AK9X] (last visited Apr. 10, 2019).

36. On shifts in the relationship between universities and their students, see generally DAVID A. HOEKEMA, CAMPUS RULES AND MORAL COMMUNITY: IN PLACE OF *IN LOCO PARENTIS* (1994).

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.<sup>37</sup> A self-conscious consideration of the mission of individual institutions and how it relates to freedom of speech would provide greater 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 where ideas can be taken seriously and a wide range of voices can be heard. As Sigal Ben-Porath observes, simply endorsing the Chicago statement can provide “false assurance” that the free speech problem has been solved.<sup>38</sup> 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.<sup>39</sup> 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. This 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 ensuring that those principles actually inform university practices.

## II. SOCIALIZATION INTO AN INCLUSIVE INTELLECTUAL CULTURE

The second task that would improve 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. The community perpetually gains new members even as current members depart. 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 that very well.

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,

37. Coal. Against Racist Educ. Now, *A Collective Student Response to the “Chicago Statement,”* FEMINIST WIRE (Nov. 23, 2018), <https://thefeministwire.com/2018/11/a-collective-student-response-to-the-chicago-statement/> [<https://perma.cc/S6JP-8S9U>]; see also Rebecca Tauber & Samuel Wolf, *Students, Faculty Discuss Free Speech*, WILLIAMS REC. (Dec. 5, 2018), <https://williamsrecord.com/2018/12/students-faculty-discuss-free-speech/> [<https://perma.cc/AS3E-F5S4>].

38. Sigal Ben-Porath, *Against Endorsing the Chicago Principles*, INSIDE HIGHER ED (Dec. 11, 2018), <https://www.insidehighered.com/views/2018/12/11/what-chicago-principles-miss-when-it-comes-free-speech-and-academic-freedom-opinion> [<https://perma.cc/Z8CT-MFTR>].

39. *Id.*

and mistakenly, taken for granted that students understand the purposes and value of the enterprise that they are entering into. 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. 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 can become responsible members of the campus community, oriented to the values and principles of the university: 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 (UNC), which seemed to highlight the misunderstanding of the very purposes of a university on the part of many in and around American colleges. UNC 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 UNC 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 will be expected to read in a college-level class.<sup>40</sup> In the aftermath of the attack on the World Trade Center and the launch of the American war against Islamic-inspired terrorism, UNC assigned a scholarly book that provided an introduction to the Islamic faith and commentaries on the Qur'an for its 2002 summer reading program.<sup>41</sup> The assignment created an immediate uproar. Some state legislators insisted that the university give equal time to a discussion of other religious faiths.<sup>42</sup> 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 their professors: “[S]hove it. I ain't reading it.”<sup>43</sup> A group of students and a conservative interest group filed a federal lawsuit arguing that the assignment violated the religious liberties of incoming students and sought to “impose a uniform favorable opinion of the religion of Islam.”<sup>44</sup> The university chancellor was forced to explain that the book “is provocative in the best sense of the word,

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40. 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: PHILOSOPHICAL, POLITICAL, AND LEGAL PERSPECTIVES 47, 56–60 (Donald Alexander Downs & Chris W. Surprenant eds., 2018).

41. Kate Zernike, *Talk, and Debate, on Koran as Chapel Hill Classes Open*, N.Y. TIMES (Aug. 20, 2002), <https://www.nytimes.com/2002/08/20/us/talk-and-debate-on-koran-as-chapel-hill-classes-open.html> [https://perma.cc/96DB-2MHE].

42. *Id.*

43. Robert Morlino, “Our Enemies Among Us!”: *The Portrayal of Arab and Muslim Americans in Post-9/11 American Media*, in CIVIL RIGHTS IN PERIL: THE TARGETING OF ARABS AND MUSLIMS 71, 95 (Elaine C. Hagopian ed., 2004).

44. Beth Henary, *Sura Reading: The University of North Carolina Makes the Koran Required Reading for Incoming Freshmen*, WKLY. STANDARD (July 25, 2002, 12:00 AM), <https://web.archive.org/web/20021004093037/https://www.weeklystandard.com/content/public/articles/000/000/001/496wsuyf.asp> [https://perma.cc/K5HK-KP38].

provocative of inquiry, even controversy. Universities thrive on controversy.”<sup>45</sup>

Although the district court dismissed the lawsuit and concluded that the summer reading program was “academic, and not religious, in nature,”<sup>46</sup> the university’s board of governors declined to endorse a faculty-backed resolution affirming the importance of academic freedom at UNC 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.<sup>47</sup> At least some students shared the view of politicians in the state that “you shouldn’t be made to read anything against your religion.”<sup>48</sup> 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 indoctrination and critical engagement with ideas.<sup>49</sup> 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 that universities must not take 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 ideas. However, even the members of governing boards need an introduction to the scholarly values that animate campus culture but which might be quite foreign to the everyday professional environment within which those board members operate.<sup>50</sup> 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 leaves students unprepared for the kind of wide-open intellectual debate that characterizes higher education. Prospective students are often enticed onto campuses with promises of economic mobility, vocational skills training, and the circuses of college athletics and social life. Thus, they might be unsurprisingly flummoxed upon encountering the kind of intellectual engagement that college faculty emphasize and expect. Even graduate

45. William L. Holmes, *Quran Assignment Stirs Heated Debate*, TALLAHASSEE DEMOCRAT, Aug. 17, 2002, at D1.

46. Yacovelli v. Moeser, 324 F. Supp. 2d 760, 764 (M.D.N.C. 2004).

47. Richard Morgan, *Resolution Affirming Academic Freedom Fails to Win Approval of U. of North Carolina Board*, CHRON. HIGHER EDUC. (Aug. 13, 2002), <http://www.chronicle.com/article/Resolution-Affirming-Academic/116344> [http://perma.cc/3PJZ-UE6W]. The board later agreed to adopt a resolution affirming academic freedom in the UNC system. See Richard Veit, President, Faculty Assembly of the Univ. of N.C., Address at the Twenty-First Alexander Meiklejohn Award for Academic Freedom at the Eighty-Ninth Annual Meeting of the AAUP, in ACADEME, Sept.–Oct. 2003, at 89, 91.

48. *Students Saw Quran Reading as School Mandate*, ASSOCIATED PRESS ST. & LOC. WIRE, Aug. 18, 2002.

49. *Id.*

50. See Whittington, *supra* note 9.

students, who are encouraged to think about the 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 for 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 adopting a work that deals with the purposes of university education and the value of free inquiry for a summer reading program (as Princeton University did by selecting *Speak Freely*<sup>51</sup> as the “Pre-Read” for 2018).<sup>52</sup> 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 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 U.S. Constitution.<sup>53</sup> Although such events might not take the form of simple civic education that federal legislators imagined when prodding colleges to adopt such programming,<sup>54</sup> they do generate regular public discussion of constitutional issues on college campuses. Similarly, colleges might find it in their own interests 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 it is necessary to set expectations about how members of the campus community should conduct themselves through practical conversations. 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:

[I]f 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

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51. WHITTINGTON, *supra* note 6.

52. Russell K. Nieli, *Princeton Takes a Stand for Free Speech on Campus*, MINDING CAMPUS (June 20, 2018), <https://www.mindingthecampus.org/2018/06/20/princeton-takes-a-stand-for-free-speech-on-campus/> [https://perma.cc/HB3X-PW8N].

53. *Constitution Day and Citizenship Day*, AM. ASS'N ST. COLLEGES & U., <http://www.aascu.org/programs/adp/constitutionday/> [https://perma.cc/56KP-MBT3] (last visited Apr. 10, 2019).

54. *Id.*

how to engage in freedom of expression in a way that would be effective and would create productive dialogue within an educational setting.<sup>55</sup>

Princeton President Christopher Eisgruber 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 “[i]t’s become apparent that we really do need to be talking about it.”<sup>56</sup> 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 Professor Ben-Porath calls for.<sup>57</sup> 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.”<sup>58</sup> 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 means. Universities should 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 engage with ideas with which they disagree. Ideally, professors should be modeling 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. Campus administrators and faculty should regularly engage with students as they organize campus events and participate in campus activities. By doing so, they can help clarify how exchanges over disagreeable ideas can be productive and not simply stressful and how encounters with opposing viewpoints can be conducted with respect for the rights of everyone involved.

A focus on anticipatory constructive engagement with protesters 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 System made headlines when it imposed a new policy on system campuses for “suspending and expelling students who disrupt campus speeches,” which gave rise to the fear by some

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55. Alex Morey, *Free Speech Orientation Program Keeps Conversation Going at Purdue*, FIRE (Dec. 5, 2016), <https://www.thefire.org/free-speech-orientation-program-keeps-conversation-going-at-purdue/> [https://perma.cc/3NHX-48RS].

56. Alice B. Lloyd, *Is Free Speech on Campus Making a Comeback?*, WKLY. STANDARD (Aug. 31, 2017), <https://www.weeklystandard.com/alice-b-lloyd/is-free-speech-on-campus-making-a-comeback> [https://perma.cc/DTM2-RCMV].

57. Ben-Porath, *supra* note 38.

58. *Id.* See generally SIGAL BEN-PORATH, *FREE SPEECH ON CAMPUS* 103–16 (2017).

that the “policy w[ould] chill and suppress free speech.”<sup>59</sup> Codes of conduct, with associated disciplinary sanctions, no doubt have a role to play on campus, but discipline should be 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.<sup>60</sup> 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.”<sup>61</sup> Although the enforcement of rules and calls for civility are useful, “[t]here 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.”<sup>62</sup> An embarrassing incident occurred at Middlebury College in the spring of 2017 in which students shouted down the conservative writer Charles Murray as officials stood by impotently.<sup>63</sup> It has become the symbol of a supposed free speech crisis on college campuses, but the failings at Middlebury College began well before Charles Murray arrived on campus and did not end with the slap on the wrists that some disruptive students received after the fact.<sup>64</sup> Ultimately, university officials should proactively engage 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,<sup>65</sup> 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 subvert free and open inquiry and invite fears of political favoritism. At the same time,

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59. Todd Richmond, *University of Wisconsin Approves Free Speech Policy That Punishes Student Protesters*, CHI. TRIB. (Oct. 6, 2017, 8:19 PM), <https://www.chicagotribune.com/news/nationworld/midwest/ct-university-of-wisconsin-protest-punishment-20171006-story.html> [<https://perma.cc/H8HR-537Y>].

60. *High Profile Events*, U. CHI., <http://csl.uchicago.edu/node/132802> [<http://perma.cc/SQ8V-5HU9>] (last visited Apr. 10, 2019).

61. BEN-PORATH, *supra* note 58, at 113–14.

62. *Id.* at 26–27.

63. See Scott Jaschik, *Shouting Down a Lecture*, INSIDE HIGHER ED (Mar. 3, 2017), <https://www.insidehighered.com/news/2017/03/03/middlebury-students-shout-down-lecture-charles-murray> [<https://perma.cc/YN9A-VFHM>].

64. Stephanie Saul, *Dozens of Middlebury Students Are Disciplined for Charles Murray Protest*, N.Y. TIMES (May 24, 2017), <https://www.nytimes.com/2017/05/24/us/middlebury-college-charles-murray-bell-curve.html> [<https://perma.cc/9CU3-5XVL>].

65. See, e.g., Jasmine Putney & Shelby Knowles, *Bias-Response Teams Criticized for Sanitizing Campuses of Conservative Voices*, CRONKITE NEWS (Sept. 11, 2018), <https://cronkitenews.azpbs.org/2018/09/11/bias-response-teams-conservative-campus-hate/> [<https://perma.cc/5PN9-5VNA>].

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 appropriate respect means taking their concerns seriously 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 they 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.<sup>66</sup> It is both too simple and counterproductive, however, to respond to that homogeneity by inviting the most provocative speakers possible to campus. Self-consciously designed speaker series for “unpopular” or “uncomfortable” ideas risk degenerating into a platform for cranks while effectively segregating conservative speakers from the campus mainstream. Supporting free speech and intellectual diversity on college campuses does not mean removing all standards or engaging in provocation for the sake of provocation. When white nationalist Richard Spencer reached out to Professor 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.<sup>67</sup> “From what I have seen of your views,’ Stone replied, ‘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.’”<sup>68</sup> Although 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 ideas that interest them. At the same time, however, universities should actively encourage excellence, and members of the campus community should exercise judgment in providing to the campus

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66. See, e.g., NEIL GROSS, WHY ARE PROFESSORS LIBERAL AND WHY DO CONSERVATIVES CARE? 303–06 (2013); JON A. SHIELDS & JOSHUA M. DUNN SR., PASSING ON THE RIGHT: CONSERVATIVE PROFESSORS IN THE PROGRESSIVE UNIVERSITY 1–16 (2016).

67. Osita Nwanevu, *When “Free Speech” Is a Marketing Ploy*, SLATE (Mar. 23, 2018, 1:48 PM), <https://slate.com/news-and-politics/2018/03/when-campus-free-speech-is-a-marketing-ploy.html> [https://perma.cc/RYD7-CSKY].

68. *Id.*

community the best representatives of ideas worthy of examination. There will be disagreements over what qualifies as an idea worthy of examination, which is precisely why a decentralized, pluralistic intellectual environment is helpful 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 to pursue them. Responsible members of the campus community may well disagree about which ideas are worthy of discussion and which speakers 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.<sup>69</sup>

### III. 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 ensure 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,<sup>70</sup> and the AAUP has long battled university policies that were thought to be too restrictive of the freedom of faculty members to research and teach.<sup>71</sup> 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.<sup>72</sup>

Universities have their own reasons to implement policies that preserve academic freedom and free speech on campus, but it should now be obvious

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69. Of course, as professors frequently demonstrate, students are not the only ones who might use their freedom of speech unwisely. For examples of internal discussion of the virtues and pitfalls of choices of speakers, see Conor Friedersdorf, *A Mentor's Advice to UCLA's Campus Republicans*, ATLANTIC (Feb. 20, 2018), <https://www.theatlantic.com/politics/archive/2018/02/a-mentors-sage-advice-for-uclas-campus-republicans/553724/> [https://perma.cc/Z86C-2MRK]; Gabriel Rossman, *Open Letter to the Bruin Republicans Who Invited Milo Yiannopoulos to UCLA (Update: Milo Canceled)*, WKLY. STANDARD (Feb. 14, 2018, 9:39 AM), <https://www.weeklystandard.com/gabriel-rossman/open-letter-to-the-bruin-republicans-who-invited-milo-yiannopoulos-to-ucla-update-milo-canceled> [https://perma.cc/6UJV-3AWG].

70. See, e.g., *Mission*, FIRE, <https://www.thefire.org/about-us/mission/> [https://perma.cc/NY5N-2ZJN] (last visited Apr. 10, 2019).

71. See, e.g., Seligman et al., *supra* note 32, at 20.

72. For a useful discussion of those constitutional constraints, see ERWIN CHEMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 111–52 (2017).

that if universities do not take care to do so, 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.<sup>73</sup> Both state and federal legislatures have actively considered a variety of proposals for regulating speech on college campuses.<sup>74</sup> President Donald Trump has directed federal agencies to develop regulations “to foster environments that promote open, intellectually engaging, and diverse debate,” with the threat that those institutions that fail to maintain such environments will lose their access to federal research grants.<sup>75</sup> 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.<sup>76</sup> Activist groups such as the Goldwater Institute, the American Legislative Exchange Council, and Alliance Defending Freedom promote the imposition of their own favored sets of policies by politicians.<sup>77</sup> 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 over university affairs. To argue that conservative politicians are more interested in scoring political points than in securing free speech is to miss the mark. Politicians usually act out of mixed motives and are spurred by the hope of winning political points. Universities give fuel to that political fire when 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.<sup>78</sup> Universities would be better off thinking through those policies on their own than having them imposed by outside forces.

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73. See Karen Herzog, *Regents Approve Punishments up to Expulsion for UW Students Who Repeatedly Disrupt Speakers*, MILWAUKEE J. SENTINEL (Oct. 6, 2017, 10:02 AM), <https://www.jsonline.com/story/news/education/2017/10/06/regents-consider-punishments-uw-students-who-disrupt-speakers/738438001/> [https://perma.cc/24GN-3NMN].

74. Teri Lyn Hinds, *Untangling the Threads: 2018 State Legislation Addressing Campus Speech Concerns*, NAT'L ASS'N STUDENT PERSONNEL ADMINISTRATORS (May 31, 2018), <https://www.naspa.org/rpi/posts/untangling-the-threads-2018-state-legislation-addressing-campus-speech-conc> [https://perma.cc/S3NN-S648]; Peter Schmidt, *State Lawmakers Seek to Force Public Colleges to Protect Speech Rights*, CHRON. HIGHER EDUC. (Feb. 10, 2017), <http://www.chronicle.com/article/State-Lawmakers-Seek-to-Force/239171> [http://perma.cc/HW7S-SCRE].

75. Exec. Order No. 13,864, 84 Fed. Reg. 11,401 (Mar. 21, 2019).

76. See Beth McMurtrie, *Why Conservative Lawmakers Are Turning to Free-Speech Bills as a Fix for Higher Ed*, CHRON. HIGHER EDUC. (June 8, 2017), <https://www.chronicle.com/article/Why-Conservative-Lawmakers-Are/240297> [https://perma.cc/UEV7-WPE8].

77. *Id.*

78. See, e.g., Nicholas B. Dirks, *How Colleges Make Themselves Easy Targets*, CHRON. HIGHER EDUC. (Oct. 28, 2018), <https://www.chronicle.com/article/How-Colleges-Make-Themselves/244921> [https://perma.cc/8JT9-6SDT]; Michael S. Roth, *The Opening of the Liberal Mind*, WALL ST. J. (May 11, 2017, 11:06 AM), <https://www.wsj.com/articles/the-opening-of-the-liberal-mind-1494515186> [https://perma.cc/HVR2-Q6Y6]; Sarah Taylor, *University of Chicago President Blasts Suppression of Free Speech on Campus, “Privileging Feelings”*, BLAZE (Oct. 17, 2018), <https://www.theblaze.com/news/2018/10/17/university-of-chicago-president-blasts-suppression-of-free-speech-on-campus-privileging-feelings> [https://perma.cc/WVY6-A359].

### A. Securing Academic Freedom

At the very heart of the scholarly enterprise maintained by universities is faculty research and teaching. The concept of academic freedom is designed to protect the ability of faculty to freely engage in scholarly inquiry without fear of repercussions because the questions they ask or the findings 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.<sup>79</sup> The widely accepted expectations of academic freedom have been embodied in the AAUP's 1940 statement of principles.<sup>80</sup> At the very least, universities should integrate those principles into their own governing documents and employment contracts to provide clear and binding commitments that can help protect professors from reprisal for their scholarly activities.<sup>81</sup> 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.<sup>82</sup>

Responding in part to a U.S. Supreme Court decision that left open the question of whether academic freedom was constitutionally protected at public universities,<sup>83</sup> faculty bodies, such as the Faculty Council at UNC, passed resolutions observing that it is important to “reaffirm from time to time the fundamental importance of institutional protections for the academic freedoms of research and publication, teaching, shared governance, and participation in public debate.”<sup>84</sup> Such periodic official reaffirmations have also been useful opportunities to ensure that governing documents are kept up-to-date and include provisions protecting faculty members from being terminated or sanctioned for how they exercise their academic freedom in teaching or research.<sup>85</sup>

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79. See Jay Stanley, *Civil Rights Movement Is a Reminder That Free Speech Is There to Protect the Weak*, ACLU (May 26, 2017, 4:45 PM), <https://www.aclu.org/blog/free-speech/civil-rights-movement-reminder-free-speech-there-protect-weak> [https://perma.cc/J2BY-7ZXD].

80. See generally Am. Ass'n of Univ. Professors, *Academic Freedom and Tenure: 1940 Statement of Principles and Interpretive Comments*, 64 AAUP BULL. 108 (1978).

81. *Id.*

82. *McAdams v. Marquette Univ.*, 914 N.W.2d 708, 718–21 (Wis. 2018).

83. *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 (Nov. 19, 2010), <https://www.thefire.org/resolutions-to-protect-academic-freedom-of-faculty-at-unc-chapel-hill-university-of-delaware/> [https://perma.cc/SMJ5-C4AC].

84. *Resolution 2010-5. On Supporting a Resolution of the University of North Carolina Faculty Assembly on Academic Freedom*, U.N.C. CHAPEL HILL, <http://faccoun.unc.edu/files/2011/03/Resolution-2010-5.pdf> [https://perma.cc/4DVG-6YHA] (last visited Apr. 10, 2019).

85. In response to the UNC faculty resolution, for example, the board of governors revisited the provisions on faculty academic freedom. *Board of Trustees Meeting: The University of North Carolina at Chapel Hill*, U.N.C. CHAPEL HILL (Nov. 17, 2010), <https://bot.unc.edu/files/archives/MIN%201110.pdf> [https://perma.cc/89LK-WFXG].

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 at 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.”<sup>86</sup> There has been a vast expansion of the use of contingent faculty rather than tenure-track faculty in universities,<sup>87</sup> and women and minorities have disproportionately filled the ranks of contingent faculty.<sup>88</sup> 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.<sup>89</sup> 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 placing decisions regarding their hiring in the hands of permanent faculty (rather than administrators) and by providing long-term contracts.

### B. Extramural Speech

The AAUP has long incorporated extramural speech into the broader category of academic freedom.<sup>90</sup> 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.<sup>91</sup> 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.<sup>92</sup>

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86. McCoy, *supra* note 18.

87. See Phillip W. Magness, *Are Full-Time Faculty Being Adjunctified? Recent Data Show Otherwise*, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (May 19, 2017), <https://www.jamesgmartin.center/2017/05/full-time-faculty-adjunctified-recent-data-show-otherwise/> [<https://perma.cc/ZZ4R-W752>].

88. Colleen Flaherty, *More Faculty Diversity, Not on Tenure Track*, INSIDE HIGHER ED (Aug. 22, 2016), <https://www.insidehighered.com/news/2016/08/22/study-finds-gains-faculty-diversity-not-tenure-track> [<https://perma.cc/6RCD-3NL5>].

89. Stephen A. Smith, *Contingent Faculty and Academic Freedom in the Twenty-First Century*, 49 FIRST AMEND. STUD. 27, 28 (2015).

90. Am. Ass’n of Univ. Professors, *supra* note 80.

91. On the relationship between expertise and academic freedom, see ROBERT C. POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 31–42 (2012).

92. See, e.g., Keith E. Whittington, *Academic Freedom and the Scope of Protections for Extramural Speech*, ACADEME, Jan.–Feb. 2019, at 20, 22.

It is precisely such extramural remarks that come to public attention and generate demands for the termination of faculty.<sup>93</sup>

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 faculty members 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."<sup>94</sup> 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.<sup>95</sup> The dean contended that McAdams's "value to this academic institution is substantially impaired" because he had not shown adequate "respect for others' opinions."<sup>96</sup>

The message university leaders should send when controversy erupts is more basic. The university is home to 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, embraced by others, or 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.

### C. 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 needs to be some rules of the road to coordinate their activities and minimize counterproductive behavior. Such codes of conduct must not be merely compatible with, but must be supportive of, the core mission of the university

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93. See, e.g., Keith E. Whittington, *Tolerating Campus Dissent, Left and Right*, PRINCETON U. PRESS BLOG (Apr. 25, 2018), <http://blog.press.princeton.edu/2018/04/25/keith-whittington-tolerating-campus-dissent-left-and-right/> [https://perma.cc/S5CK-JJP4].

94. Eddie Hughes, *President Joseph I. Castro Statement Regarding Faculty Member's Tweet*, FRESNO ST. NEWS (Apr. 17, 2018), <http://www.fresnostatenews.com/2018/04/17/president-castro-statement-regarding-faculty-members-tweet/> [http://perma.cc/S942-GK3X].

95. Letter from Richard C. Holz, Dean, Marquette Univ., to John McAdams (Jan. 30, 2015), <http://docs.google.com/file/d/0B4jS38HQ3f8dSDhNX1FQRnlpcTQ/> [http://perma.cc/MRN3-AC2W].

96. *Id.*

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.<sup>97</sup> Kentucky State University's cyberbullying policy, for example, prohibits "posting derogatory comments" on social media,<sup>98</sup> and Georgetown University's incivility policy prohibits speech that "disrespects another individual."<sup>99</sup> 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 that they passionately care about.<sup>100</sup> 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."<sup>101</sup> Preferably universities should also affirmatively state, as Claremont McKenna University did, that "[s]tatements 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."<sup>102</sup>

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

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97. See *Spotlight on School Ratings*, FIRE, <https://www.thefire.org/spotlight/> [<https://perma.cc/CZ8T-FQ5Y>] (last visited Apr. 10, 2019).

98. KY. STATE UNIV., STUDENT CODE OF CONDUCT 16 (2017), <http://kysu.edu/wp-content/uploads/2014/04/Code-of-Conduct-.pdf> [<https://perma.cc/T9Q4-CK8F>].

99. GEORGETOWN UNIV., CODE OF STUDENT CONDUCT 12 (2018), <https://studentconduct.georgetown.edu/code-of-student-conduct> [<https://perma.cc/HZL4-4ZKK>].

100. See *Spotlight on Speech Codes 2019*, FIRE, <https://www.thefire.org/spotlight/reports/spotlight-on-speech-codes-2019> [<https://perma.cc/3ARH-FKPU>] (last visited Apr. 10, 2019).

101. *Student Code of Conduct*, KAN. ST. U., <https://www.k-state.edu/sga/judicial/student-code-of-conduct.html> [<https://perma.cc/J7DL-99D9>] (last updated Jan. 7, 2019).

102. *Civil Rights Handbook*, CLAREMONT MCKENNA U. (July 1, 2016), <http://catalog.claremontmckenna.edu/content.php?catoid=18&navoid=1760> [<http://perma.cc/7TMY-CFLK>].

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.<sup>103</sup> There are those who seek to use academic freedom and free speech “as an excuse for the most abusive and uncollegial behavior.”<sup>104</sup> Universities have a responsibility to be clear that a claim of free speech is 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 advance their core institutional mission.

#### *D. Access to Campus Spaces*

Universities should provide space for expressive activities on campus, subject only to the constraint of preserving the proper 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.<sup>105</sup> Similarly, universities have emerged as an important component of the public sphere by fostering opinion formation on emerging issues that will shape politics, society, and culture broadly.<sup>106</sup> 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 to effectively coordinate the many individuals and groups seeking to make use of the common space. Universities 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 implemented with caution. A better model would be the general acceptance of outdoor campus spaces as traditional public

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103. *McAdams v. Marquette Univ.*, 914 N.W.2d 708, 732 (Wis. 2018).

104. Gary A. Olson, *The Limits of Academic Freedom*, CHRON. HIGHER EDUC. (Dec. 9, 2009), <https://www.chronicle.com/article/The-Limits-of-Academic-Freedom/49354> [<https://perma.cc/ES6M-5T3E>].

105. On universities and democratic citizenship, see generally MARTHA C. NUSSBAUM, *NOT FOR PROFIT: WHY DEMOCRACY NEEDS THE HUMANITIES* (2010).

106. On the public functions of the modern university, see generally Simon Marginson, *Higher Education and Public Good*, 65 HIGHER EDUC. Q. 411 (2011).

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, universities have sometimes used permit 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.<sup>107</sup> 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.<sup>108</sup>

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.<sup>109</sup> Professors have likewise denounced universities and journals for giving “a platform” to scholarship that they find ideologically verboten.<sup>110</sup> 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.”<sup>111</sup> Female speakers on the political right such as Ann Coulter, Heather Mac Donald, and Christina Hoff Sommers have been frequent targets of campus activists, but women from elsewhere on the political spectrum such as Linda

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107. See, e.g., Daniel J. Hemel & Joshua P. Rogers, *Deans May Not Allow Protest*, HARV. CRIMSON (Apr. 12, 2005), <https://www.thecrimson.com/article/2005/4/12/deans-may-not-allow-protest-student/> [https://perma.cc/4PFA-BLAS].

108. These proposals would be consistent with the model Campus Free Expression Act advocated by FIRE and adopted by some state legislatures for public universities. See *Frequently Asked Questions: The Campus Free Expression (CAFE) Act*, FIRE (Dec. 17, 2015), <https://www.thefire.org/frequently-asked-questions-the-campus-free-expression-cafe-act/> [https://perma.cc/T29H-WE7H]. 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> [https://perma.cc/Y7BC-S5NR].

109. See Mark Peters, *Coulter, Milo, and the Censorious History of ‘No-Platforming’*, BOS. GLOBE (May 16, 2017), <https://www.bostonglobe.com/ideas/2017/05/16/coulter-milo-and-censorious-history-platforming/V5xoR6sUabA9at5yd8WhrK/story.html> [https://perma.cc/EYQ3-QVXP].

110. See, e.g., JOANNA WILLIAMS, ACADEMIC FREEDOM IN AN AGE OF CONFORMITY 8 (2016); Brittney Cooper, *How Free Speech Works for White Academics*, CHRON. HIGHER EDUC. (Nov. 16, 2017), <https://www.chronicle.com/article/How-Free-Speech-Works-for-241781> [https://perma.cc/3XT8-XXS9].

111. Aaron R. Hanlon, *Why Colleges Have a Right to Reject Hateful Speakers Like Ann Coulter*, NEW REPUBLIC (Apr. 24, 2017), <https://newrepublic.com/article/142218/colleges-right-reject-hateful-speakers-like-ann-coulter> [https://perma.cc/KV84-E8DQ].

Sarsour, Madeleine Albright, Germaine Greer, and Janet Napolitano have faced their own difficulties.<sup>112</sup> 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 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 other disorderly conduct that materially and substantially disrupts”<sup>113</sup> legitimate campus activities echoes the constitutional standard that courts have developed since the seminal case *Tinker v. Des Moines Independent Community School District*.<sup>114</sup> 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 it is to be true to its mission and social function. There are those both off 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 for universities 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

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112. Steven Morris, *Germaine Greer Gives University Lecture Despite Campaign to Silence Her*, GUARDIAN (Nov. 18, 2015), <https://www.theguardian.com/books/2015/nov/18/transgender-activists-protest-germaine-greer-lecture-cardiff-university> [https://perma.cc/NS8B-2CLP]; *Disinvitation Database*, FIRE, <https://www.thefire.org/resources/disinvitation-database/> [https://perma.cc/8H2U-6BY6] (last visited Apr. 10, 2019).

113. This is the language incorporated into the University of Wisconsin’s controversial anti-heckler policy. Bd. of Regents of the Univ. of Wis. Sys., *Regent Policy Document 4-21: Commitment to Academic Freedom and Freedom of Expression*, U. Wis., <https://www.wisconsin.edu/regents/policies/commitment-to-academic-freedom-and-freedom-of-expression/> [https://perma.cc/8B3K-6YUY] (last visited Apr. 10, 2019). Although any policy can be poorly administered, the difficulty with the substance of the Wisconsin policy is less with its standard of prohibited conduct than with its process of discipline.

114. 393 U.S. 503, 513 (1969).

their own if university faculty do not act to effectuate basic principles of academic freedom and free speech.