

# Academic Freedom and Free Speech

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I want to thank the Johnson Center for inviting me to speak to you today about academic freedom and free speech. That's a burning issue across the country, of course, as you'll see from the incidents I'll mention in a minute. That will give you just a glimpse of the problem, however. It's that big. And it covers a wide range of areas where today's colleges and universities are involved—from teaching to publishing, administering, policing student and faculty behavior, and more.

Let me make it clear at the outset, however, that in each of the areas I'll touch on, I'm not here to defend insensitive or boorish speech or behavior as such, the remedy for which in any event, in most cases, is more speech or simple shunning, not the often draconian sanctions we see so often today. But I *am* here to defend the *right* to speak, a right that beyond the campus is protected in the public sector by the First Amendment, as here at a public university, and in the private sector by freedom of contract. In fact, the failure to distinguish between defending the right to speak and defending the speech that flows from the exercise of that right will be at the core of my remarks today.<sup>1</sup>

And one more preliminary: In today's context, I suppose I need also to begin with a “trigger warning.” Some of you may find some of what I have to say to be a “micro-aggression.” So be it. This is, after all, a university. If one cannot speak freely here, where can one?

Yet we know that today, university speech codes and campus free-speech zones are not only ubiquitous but solicitous of anything but free speech—turning the campus free-speech movement of the 1960s on its head. These codes typically prohibit comments and actions that are “unwelcomed or offensive,” as if the speaker would know what was subjectively unwelcomed or offensive in the mind of another. And consistent with today's identity politics, these codes prohibit and punish speech or conduct concerning sex, race, age, religion, national origin, color, marital status, pregnancy, disability, sexual orientation, and more. And the speech or conduct can take the form of gestures, remarks, jokes, innuendo, satire—even shunning or exclusion.

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<sup>1</sup> Roger Pilon, *Desecrating Principle for the Sake of a Symbol*, Wash. Post (June 14, 1995), <https://www.washingtonpost.com/archive/opinions/1995/06/14/desecrating-principle-for-the-sake-of-a-symbol/11581b4c-dbae-483c-a1f4-d217a9f80c59/>.

Lest it be thought by the unaware that these restrictions have been imposed by imperious university administrators on an unwilling faculty and student body, it's more complicated than that. The radicals of the '60s, ensconced in the academy ever since, have nurtured a culture of "political correctness" that is the very foundation of these codes and all that surrounds them. Thus it takes but a spark to propel those immersed in this culture into action across the country. In the current academic year, that spark arose from racial incidents at the University of Missouri, which led to charges by students there that the university president didn't respond quickly and sensitively enough and, in short order, to his resignation.<sup>2</sup>

That led in turn, however, to nation-wide protests. At Amherst, for example, students demanded that the college president issue a statement saying that the Amherst community does not tolerate the actions of students who posted "All Lives Matter" posters and "Free Speech" posters that stated "in memoriam of the true victim of the Missouri Protests: Free Speech."<sup>3</sup> At Brown, protesters demanded "visible and administrative accountability for departments and centers that have a tradition of racist hiring and retention policies and anti-Black pedagogy."<sup>4</sup> Princeton students demanded the removal of Woodrow Wilson's name from Princeton buildings.<sup>5</sup> An ugly scene at Dartmouth included Black students taking over the library and harassing white students studying there.<sup>6</sup> And at Claremont, students drew up a long list of demands, including sensitivity training for all faculty.<sup>7</sup>

But it was perhaps at Yale that what has come to be called the "crybully" phenomenon drew the greatest attention. It arose when lecturer Erika Christakis, associate master of one of Yale's residential colleges, responded to an email from the school's Intercultural Affairs Council asking students to be thoughtful about the cultural implications of their Halloween costumes.<sup>8</sup> Ms. Christakis protested that it was not her business to police Halloween costumes, that the council's email was infantilizing and threatened free expression, and, to cut to the chase, that "free speech and the ability to tolerate offense are the hallmarks of a free and open society."<sup>9</sup> Well you'd think she'd killed one of the king's deer. All hell broke loose on the Yale campus as

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<sup>2</sup> Elliott C. McLaughlin, *University of Missouri president and chancellor step down amid race row*, CNN (Nov. 9, 2015, 10:06 PM), <http://www.cnn.com/2015/11/09/us/missouri-football-players-protest-president-resigns/>.

<sup>3</sup> Allison Pohle, *Amherst students release list of demands protesting 'free speech' signs*, Boston.com (Nov. 13, 2015), <http://www.boston.com/news/education/2015/11/13/amherst-students-release-list-of-demands-protesting-free-speech-signs>.

<sup>4</sup> Louise Sloan, *Keeping Brown Accountable*, Brown Alumni Magazine, <http://www.brownalumnimagazine.com/content/view/4098/31/> (last visited Apr. 12, 2016).

<sup>5</sup> Andy Newman, *At Princeton, Woodrow Wilson, a Heralded Alum, Is Recast as an Intolerant One*, N.Y. Times (Nov. 22, 2015), <http://www.nytimes.com/2015/11/23/nyregion/at-princeton-addressing-a-racist-legacy-and-seeking-to-remove-woodrow-wilsons-name.html>.

<sup>6</sup> Jessica Chasmar, *Black Lives Matter protesters berate white students studying at Dartmouth library*, Washington Times (Nov. 16, 2015), <http://www.washingtontimes.com/news/2015/nov/16/black-lives-matter-protesters-berate-white-student/>.

<sup>7</sup> Hannah Oh, *CMC Students Feel Marginalized, Demand Resources and Resignations*, Claremont Independent, (Nov. 12, 2015), <http://claremontindependent.com/cmc-students-feel-marginalized-demand-resources-and-resignations/>.

<sup>8</sup> Anemona Hartocollis, *Yale Lecturer Resigns After Email on Halloween Costumes*, N.Y. Times (Dec. 7, 2015), [http://www.nytimes.com/2015/12/08/us/yale-lecturer-resigns-after-email-on-halloween-costumes.html?\\_r=0](http://www.nytimes.com/2015/12/08/us/yale-lecturer-resigns-after-email-on-halloween-costumes.html?_r=0).

<sup>9</sup> Abby Jackson, *Yale lecturer whose email ignited a debate about racism has decided not to teach there in the future*, Business Insider (Dec. 3, 2015, 3:34 PM), <http://www.businessinsider.com/yale-professor-erika-christakis-will-not-teach-next-year-due-to-racial-controversy-2015-12>.

student protests filled the air for weeks: 70 faculty members signed an open letter supporting Ms. Christakis, but far more signed a letter expressing solidarity with students' concerns about "racism and devaluation," all of which led to her resignation from her teaching position.<sup>10</sup>

I could go on with countless other examples of political correctness run amuck on our college campuses, but before turning to a closely related issue, let me offer one more very recent incident not unlike the Yale "cultural appropriation" fiasco. As the *Washington Post's* Catherine Rampell detailed less than a fortnight ago, two members of Bowdoin College's student government are facing impeachment proceedings for attending a tequila themed birthday party last month where some of the guests wore tiny sombreros.<sup>11</sup> When photos of the event showed up on social media, Rampell reports, students and administrators went ballistic. Administrators launched an investigation into a possible act of "ethnic stereotyping." Partygoers ultimately were reprimanded or placed on social probation and the hosts have been kicked out of their dorm for their act of "cultural appropriation"—for creating an environment where students of color "feel unsafe."

But here's the kicker: On the very night of the "tequila party," Rampell reports, Bowdoin held its annual administration-sanctioned "Cold War" party just across campus. Students arrived dressed in fur hats and coats to represent Soviet culture; one even referred to herself as "Stalin," making light of the regime's brutal history. But there's more. When a Bowdoin alumna read Rampell's column, she sent the writer an email and photos about last year's on-campus reunion at which the school *itself* provided a photo booth replete with various hats, mustaches and other props conducive to taking celebratory photos. And guess what those props included: sombreros! Not only did Bowdoin provide sombreros, but the school actually posted photos on Facebook of people donning them for the photo booth. You can't make this stuff up. As Rampell remarks: "Let's get this straight. If students wear their own sombreros during a whimsical celebration, that's an act of cultural appropriation so odious that they must be ousted from their dorm, campus social events and student government. But if alumni and students wear sombreros *provided by the school* during a whimsical celebration, that's all in good fun, and the images ought to be flaunted on the school's own Facebook page. Talk about mixed messages."<sup>12</sup>

Let me turn now, however, to a closely related area where free speech has long been in decline in the academy. With commencements just ahead, we're fast coming into what the Foundation for Individual Rights in Education, or FIRE, has called "disinvitation season," although speaker disinvitations happen year-round.<sup>13</sup> In most cases, of course, it's conservative or libertarian speakers who are invited and then, once faculty or student objections arise, disinvited—most recently, people like Condoleezza Rice, Charles Murray, Ayaan Hirsi Ali, and George Will. But occasionally it's someone with no such ideological "baggage," like former

<sup>10</sup> Erika Christakis to stop teaching at Yale, Wash. Post, Dec. 04, 2015, <http://www.nhregister.com/article/NH/20151204/NEWS/151209757>.

<sup>11</sup> Catherine Rampell, *Political correctness devours another college, fighting over mini sombreros*, Wash. Post (Mar. 3, 2015), [https://www.washingtonpost.com/opinions/party-culture/2016/03/03/fdb46cc4-e185-11e5-9c36-e1902f6b6571\\_story.html](https://www.washingtonpost.com/opinions/party-culture/2016/03/03/fdb46cc4-e185-11e5-9c36-e1902f6b6571_story.html).

<sup>12</sup> Catherine Rampell, *Bowdoin update: On Facebook, school flaunted photos of alumni, students in school-provided sombreros*, Wash. Post (Mar. 4, 2015), <https://www.washingtonpost.com/news/rampage/wp/2016/03/04/bowdoin-update-on-facebook-school-flaunted-photos-of-alumni-students-in-school-provided-sombreros/>.

<sup>13</sup> GREG LUKIANOFF, *FREEDOM FROM SPEECH*, 29-36 (2014).

University of California, Berkeley, Chancellor Robert Birgeneau or International Monetary Fund head Christine Lagarde. FIRE president Greg Lukianoff recently wrote that FIRE had uncovered 257 such incidents since 2000, with 137 happening just since 2009, most by revocation of the invitation, but some by withdrawal or by “heckler’s veto”—the speaker shouted down, chased off the stage, or otherwise prevented from speaking.<sup>14</sup>

But it isn’t simply those with big names who face disinvitation. Late last month, for example, Breitbart editor-at-large Ben Shapiro had his speech on diversity cancelled by California State University, Los Angeles, President William Covino.<sup>15</sup> Sponsored by the Young America’s Foundation and twice approved by the university’s student budget board, the speech generated faculty objections nonetheless, leading President Covino to postpone it until “opposing views” could be included—a rationale risible on its face since the school had a long history of solo speeches on that very subject by such well-known leftists as Angela Davis, Cornel West, and others.<sup>16</sup>

Facing the cancellation, the Young Americas Foundation announced that it planned to appear on campus anyway, along with a camera crew, at the originally scheduled time, and that “the university can use its security forces to force conservatives to shut up if they feel so threatened by the free exchange of ideas.”<sup>17</sup> With that, President Covino reversed his earlier decision, saying that although he “strongly” disagreed with Shapiro’s views, “if Mr. Shapiro does appear, the university will allow him to speak.”<sup>18</sup> Many faculty and students had other ideas, however. When Shapiro arrived at the campus he was met with a near-riot from students and professors who blockaded entrances and exits and threatened those who wanted to hear him speak with physical violence.<sup>19</sup> In fact, a female Breitbart reporter *was* assaulted.<sup>20</sup> After police cleared the way, the speech went on, but with interruptions, such as when someone pulled a fire alarm.<sup>21</sup> Shapiro had to be escorted by police from the campus. But things didn’t end there either. After the event, the student board voted no confidence in President Covino, which means that his case will now be sent before the Academic Senate, composed of faculty, and from there, if needed, to the chancellor’s office.<sup>22</sup>

If that debacle were an isolated event we might discount it. But it’s hardly that. Indeed, just last week across town at the University of Southern California we find that the president of

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<sup>14</sup> *Id.*

<sup>15</sup> Eugene Volokh, *Cal State L.A. cancels speech by conservative writer Ben Shapiro*, Wash. Post (Feb. 25, 2015, 5:00 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/25/cal-state-l-a-cancels-speech-by-conservative-writer-ben-shapiro/>.

<sup>16</sup> Melanie Graysmith, *Cal State LA cancels conservative speaker amid backlash over freedom of speech* (Feb. 27, 2016, 3:24 AM), <http://www.examiner.com/article/cal-state-la-cancels-conservative-speaker-amid-backlash-over-freedom-of-speech>.

<sup>17</sup> Nick Kangadis, *Violent Protestors Disrupt Shapiro’s Speech, Trap Crowd Inside*, MRC-TV (Feb. 25, 2016, 6:22 PM), <http://www.mrcvtv.org/blog/breaking-violent-protesters-disrupt-shapiros-speech-trap-crowd-inside>.

<sup>18</sup> Volokh, *supra* note 15.

<sup>19</sup> Kangadis, *supra* note 17.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Gerardo Amezcua, *ASI Board votes for Covino’s resignation*, University Times (Mar. 8, 2016), <http://csulauniversitytimes.com/6029/news/asi-board-votes-for-covinos-resignation/>.

the College Republicans, Jacob Ellenhorn, has been asked formally to leave his position in the university's student government.<sup>23</sup> In the interest of time I won't go into the details, which are still unfolding, but it seems that at the heart of the matter is a charge that Ellenhorn violated USC's "Principles of Community" when on behalf of the college Republicans he invited another Breitbart editor, Milo Yiannopoulos, to the USC campus to speak—a speaker, the complaint reads, who “blatantly perpetuates sexism.”<sup>24</sup>

And that affords me a springboard to another area where speech is restrained on today's campuses, although the underlying and more serious issue is one of due process. I allude to the issues of sexual harassment and, in particular, to the so-called trials that college administrators conduct to adjudicate allegations of sexual assault, where the speech and due process rights of the accused are severely restricted.

Here the driver is not simply radical feminism but its manifestation in an expansive reading of Title IX of the Civil Rights Act of 1964 as amended. That reading has evolved over the years, but it took a sharp turn in the fall of 2010 when the Obama administration's Department of Education, Office of Civil Rights (or OCR), sent a “Dear Colleague” letter to every college and university receiving federal funding—which is all but a handful.<sup>25</sup> The letter outlined Title IX's obligations, as reconceived by OCR, and threatened the withdrawal of all federal funds for failure to comply. The “guidance” contained numerous directives aimed at preventing discrimination on the basis of sex. But the one that's drawn the most attention mandates that schools use the “preponderance of the evidence” standard—50 percent plus 1—when adjudicating sexual assault claims, not the higher standard that most schools had been using, much less the “beyond a reasonable doubt” standard used in criminal trials for sexual assault.<sup>26</sup>

Rationalized as the standard used in civil proceedings like contract disputes, the OCR directive ignores the fact that many of the procedural protections that are available in civil proceedings are unavailable in campus proceedings: “legal representation, the right to discovery of evidence, the right to cross-examine opposing witnesses, rules of evidence guaranteeing the exclusion of hearsay and other irrelevant or unreliable evidence, and sworn witnesses who testify under penalty of perjury, to name just a few.”<sup>27</sup>

The faculty dismissal cases in this area are bad enough. Last year, for example, two students filed Title IX charges against Northwestern University Professor Laura Kipnis after she wrote an article in the *Chronicle of Higher Education* about sexual controversies on campus,

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<sup>23</sup> Todd Starnes, *Student senator faces impeachment for conservative beliefs*, Fox News (Mar. 9, 2016), <http://www.foxnews.com/opinion/2016/03/09/student-senator-faces-impeachment-for-conservative-beliefs.html>.

<sup>24</sup> *Id.*

<sup>25</sup> George F. Will, *The legislative and judicial branches strike back against Obama's overreach*, Wash. Post (Feb. 19, 2016), [https://www.washingtonpost.com/opinions/the-legislative-and-judicial-branches-strike-back-against-obamas-overreach/2016/02/19/15f403b8-d672-11e5-be55-2cc3c1e4b76b\\_story.html](https://www.washingtonpost.com/opinions/the-legislative-and-judicial-branches-strike-back-against-obamas-overreach/2016/02/19/15f403b8-d672-11e5-be55-2cc3c1e4b76b_story.html).

<sup>26</sup> *Id.*

<sup>27</sup> Samantha Harris, *Campus Judiciaries on Trial: An Update from the Courts*, Heritage Foundation Legal Memorandum No. 165 (Oct. 6, 2015), <http://www.heritage.org/research/reports/2015/10/campus-judiciaries-on-trial-an-update-from-the-courts>.

concluding that “sexual paranoia reigns; students are trauma cases waiting to happen.”<sup>28</sup> What followed was a two-month kangaroo-court “trial” at which she wasn’t allowed to have an attorney, wasn’t apprised of the charges before meeting with the investigators, and had to fight with the investigators over recording the session. Only after she published another *Chronicle* article titled “My Title IX Inquisition” was the investigation ended.<sup>29</sup>

Louisiana State University Professor Teresa Buchanan wasn’t so fortunate. Nearly two decades on the LSU faculty and widely published and respected, she was pulled from her spring 2014 classes and later fired after a student complained about a few comments Buchanan had made in a 2012 class that LSU administrators, apparently afraid of losing federal funds, decided met OCR’s standard for “unwelcome conduct of a sexual nature,” including verbal conduct.<sup>30</sup> FIRE is now representing Buchanan in her suit for reinstatement.<sup>31</sup>

But outrageous as most of these Title IX pure speech cases are, the sexual assault cases are even more chilling, because they strike at centuries of progress in establishing procedural protections for those accused of serious crimes. Just last Thursday, for example, we read at CNN that the two-year captain of the Yale men’s basketball team, Jack Montague, after facing a university-led investigation, has been expelled from Yale just as the team has won the Ivy-League title and is on its way to the NCAA tournament for the first time in more than five decades.<sup>32</sup> According to Montague, he had consensual sexual relations with another student in 2014. But a year later, in fall 2015, he was summoned to appear before Yale’s University-Wide Committee on Sexual Misconduct, instituted in response to the 2011 OCR directive. Yet neither the New Haven nor the Yale police departments has ever received any complaints over any such misconduct.<sup>33</sup>

Understandably, Montague and his family are under strict orders from their lawyer to say nothing publicly about this unfolding case. But fortunately, Brooklyn Law’s professor KC Johnson is on top of it.<sup>34</sup> He’s the co-author, with Brookings’ Stuart Taylor, of the definitive

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<sup>28</sup> Eric Wemple, *Northwestern University professor Laura Kipnis details Title IX investigation over essay*, Wash. Post (May 29, 2015), <https://www.washingtonpost.com/blogs/erik-wemple/wp/2015/05/29/northwestern-university-professor-laura-kipnis-details-title-ix-investigation-over-essay/>.

<sup>29</sup> Laura Kipnis, *My Title IX Inquisition*, *The Chron. of Higher Educ.* (May 29, 2015), <http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-.pdf>.

<sup>30</sup> Will Creeley, *How the Sex-Harassment Cops Became Speech Police*, *Wall St J.* (Feb. 19, 2016), <http://www.wsj.com/articles/how-the-sex-harassment-cops-became-speech-police-1455924459>.

<sup>31</sup> *Fired LSU Professor Files First Amendment Lawsuit Challenging Speech Code Championed by Feds*, FIRE (Jan. 21, 2016), <https://www.thefire.org/fired-lsu-professor-files-first-amendment-lawsuit-challenging-speech-code-championed-by-feds/>.

<sup>32</sup> Jill Martin, *Source: Yale basketball captain expelled after sexual allegation*, CNN (Mar. 10, 2016, 8:35 PM), <http://www.cnn.com/2016/03/10/us/yale-basketball-captain-expelled/>.

<sup>33</sup> *Id.*

<sup>34</sup> KC Johnson, *The Montague Case* (Mar. 5, 2016), <https://academicwonderland.com/2016/03/05/the-montague-case/>.

account of the egregious Duke Lacrosse Rape case of a few years ago, where the faculty rush to judgment did serious damage to the lives of five innocent students.<sup>35</sup>

Speaking of faculty, it's heartening, as George Will recently noted, that 28 Harvard Law School faculty members, in an October 2014 letter to the *Boston Globe*, voiced "strong objections" to OCR's diktats, stating: "As teachers responsible for educating our students about due process of law, the substantive law governing discrimination and violence, appropriate administrative decision-making, and the rule of law generally, we find the new sexual harassment policy inconsistent with many of the most basic principles we teach."<sup>36</sup> Sixteen University of Pennsylvania law professors have expressed similar concerns.<sup>37</sup> But to date there has been all too much faculty silence about the OCR diktats, with the need for federal funds the likely explanation.

There are many other such cases, of course, and other areas too in which speech is stifled in university settings. To little more than mention two such areas, chief among them is global warming—excuse me, climate change. This subject, we're officiously told, is "settled science," by people who should know that so too were geocentric cosmology, Newtonian physics, phlogiston theory, ether theory, and eugenics said to be settled science—so much so, in the last mentioned case, that we sterilized some 70,000 Americans in our effort to raise the average intelligence of the nation's population.<sup>38</sup> (Judging from the way this election is going, we failed.)

But this record of scientific certainty hasn't slowed the sustainability movement, which a new 260-page report by the National Association of Scholars (or NAS) has dubbed "Higher Education's New Fundamentalism."<sup>39</sup> Middlebury College offers 422 courses in sustainability, the report tell us—about 25 percent of all course offerings. Cornell offers 290 sustainability courses—13 percent of all course offerings. And right behind the sustainability movement, also critiqued by NAS in a 200-page report, is the divestment movement, pressing colleges and universities to sell off their fossil fuel investments.<sup>40</sup> As the eminent literary critic Stanley Fish wrote after reading the sustainability study, "The business of the academy is the advancement of knowledge, not the advancement of social or environmental justice."<sup>41</sup>

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<sup>35</sup> UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE (2008).

<sup>36</sup> George F. Will, *The legislative and judicial branches strike back against Obama's overreach* (Feb. 19, 2016), [https://www.washingtonpost.com/opinions/the-legislative-and-judicial-branches-strike-back-against-obamas-overreach/2016/02/19/15f403b8-d672-11e5-be55-2cc3c1e4b76b\\_story.html](https://www.washingtonpost.com/opinions/the-legislative-and-judicial-branches-strike-back-against-obamas-overreach/2016/02/19/15f403b8-d672-11e5-be55-2cc3c1e4b76b_story.html).

<sup>37</sup> *Id.*

<sup>38</sup> Adam Cohen, *The Supreme Court Ruling That Led to 70,000 Forced Sterilizations* (Mar. 7, 2016, 1:22 PM), <http://www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations>.

<sup>39</sup> Peter Wood and Rachele Peterson, *Executive Summary – Sustainability: Higher Education's New Fundamentalism*, Nat'l Ass'n of Scholars (Mar. 25, 2015), [https://www.nas.org/articles/sustainability\\_higher\\_educations\\_new\\_fundamentalism1](https://www.nas.org/articles/sustainability_higher_educations_new_fundamentalism1).

<sup>40</sup> William M. Briggs, *Inside Divestment: The Illiberal Movement To Turn A Generation Against Fossil Fuels*, Nat'l Ass'n of Scholars (Nov. 2015), [https://www.nas.org/images/documents/NAS\\_insideDivestment\\_fullReport.pdf](https://www.nas.org/images/documents/NAS_insideDivestment_fullReport.pdf).

<sup>41</sup> *Stanley Fish Praises the NAS's Sustainability Report*, Nat'l Ass'n of Scholars (Apr. 6, 2015), [https://www.nas.org/articles/stanley\\_fish\\_praises\\_nass\\_sustainability\\_report](https://www.nas.org/articles/stanley_fish_praises_nass_sustainability_report).

Yet a seriously misguided sense of social justice is precisely what is behind the last academic movement I'll mention, the drive to isolate and vilify Israel. By a vote of 10 to 1 the American Anthropological Association recently advanced a resolution boycotting Israeli institutions of higher learning, rejecting a compromise offered that called for Israeli-Palestinian dialogue and academic exchanges.<sup>42</sup> In a world in which Iran hangs children in public, North Korea starves its people and executes distant relatives of political offenders, Russia oppresses homosexuals, and Palestinians fire rockets indiscriminately into civilian populations, the American Anthropological Association singles out the only democracy in the Middle East for its opprobrium—as before this did the American Studies Association, the Association of Asian-American Studies, and the Native American and Indigenous Studies Association. And as with the just-mentioned environmental orthodoxy, woe be unto those members who speak out against such measures.

So let's step back from all of this and draw a few threads together in an effort to discern what unites these various developments. Plainly, they all involve, in various ways, threats to free speech and open inquiry in the university setting. The speech codes and constricted free-speech zones speak for themselves on that score. With student demands for “trigger warnings” and “safe spaces,” it's freedom *from* speech that's at issue. But on the other side of those demands, the issue is a professor's freedom *to* speak, with a Damoclean sword overhead if a professor misspeaks. Then too it's freedom *to* speak that's compromised when politically correct movements, often coupled with sanctions of various kinds and degrees, result in intimidation—or worse, as in the sexual-assault trials. And of course when outside speakers are dismissed out of hand, again for political reasons, or are invited and then disinvited, it's their speech, and the interests of others in hearing them, that's compromised.

And nearly all of this, let's be clear, is related in one way or another to elements in the political agenda of the left—not the agenda of the liberals of old, certainly, the classical liberals, as evidence from John Locke to John Stuart Mill makes clear; nor even in significant part the agenda of those 20<sup>th</sup> century liberals who were among the staunchest defenders of free speech and open inquiry, as the evidence of a century of First Amendment jurisprudence makes clear. In fact, it is precisely that respect for free speech and open inquiry that is not only absent from these examples but is outright rejected.

These opponents of free speech are certain that they're right, in every respect, and they will have no truck with alternative views or even with doubt. Their epistemic certainty renders them dogmatic to the core. And the delicate students—“snowflakes” they've come to be called—who condemn micro aggressions while demanding trigger warnings and safe spaces raise even deeper concerns, psychologically.<sup>43</sup> As FIRE's Greg Lukianoff has written, “when students take advantage of a psychological term developed to help those traumatized in the ghastly trenches of World War I justify being protected from *The Great Gatsby*, sleepwalker statues, and, as the Oberlin policy specified, [Nigerian novelist] Chinua Achebe, it becomes clear

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<sup>42</sup> Elizabeth Redden, *Big Night for Boycott Movement*, Inside Higher Ed (Nov. 23, 2015), <https://www.insidehighered.com/news/2015/11/23/anthropologists-overwhelmingly-vote-boycott-israeli-universities>.

<sup>43</sup> Will, *supra* note 36.



that there is virtually no limit to the demands that will be made if we universalize an expectation of intellectual comfort.”<sup>44</sup>

But Lukianoff, who has studied these issues up close for well over a decade, goes on to point a finger at the proximate cause of this pathology, and I now quote him at length:

The increased calls for sensitivity-based censorship represent the dark side of what are otherwise several positive developments for human civilization. ... I believe that we are not passing through some temporary phase in which an out-of-touch and hypersensitive elite attempts—and often fails—to impose its speech-restrictive norms on society. It’s worse than that: people all over the globe are coming to expect emotional and intellectual comfort as though it were a right. This is precisely what you would expect when you train a generation to believe that they have a right not to be offended. Eventually, they stop demanding freedom *of* speech and start demanding freedom *from* speech.

To be crystal clear, I am in no way absolving higher education of its culpability in exacerbating the movement against free speech. Higher education deserves profound criticism for maintaining and promoting illiberal and unconstitutional speech codes and punishing students and faculty for what they say. However, I believe the even greater failure of higher education is neglecting to teach the intellectual habits that promote debate and discussion, tolerance for views we hate, epistemic humility, and genuine pluralism, [all of which creates] an increasingly suffocating environment for speech on campus.

If, as I suspect, this push for freedom *from* speech is something like a predictable and natural (if pernicious) force, the single institution that could be doing the most to combat it is higher education, both within and outside the United States. Unfortunately, far from teaching the intellectual discipline that welcomes a free and robust exchange of ideas, campuses are actively accelerating the push for freedom from speech.<sup>45</sup>

But how could it be otherwise? Students were not the first to seek emotional and intellectual comfort. Their professors were way ahead of them. Look at the ideological and political complexions of faculties across the country. The point is so well-known that it hardly needs documenting, but here are just a few indications. In the 2012 presidential election, 157 Princeton faculty and staff donated to Barack Obama’s campaign, 2 to Mitt Romney’s—a visiting engineering professor and a janitor.<sup>46</sup> Last October the *Cornell Daily Sun* reported that from 2011 to 2014, 96 percent of the funds Cornell’s faculty donated to political candidates or parties went to Democratic campaigns; only 15 of 323 donors gave to conservative causes—perhaps a product of Cornell’s agricultural school.<sup>47</sup> Interestingly, the *Harvard Crimson* tells us

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<sup>44</sup> LUKIANOFF, *supra* note 13, at 57.

<sup>45</sup> *Id.* at 12–14.

<sup>46</sup> Stephanie Liu, *99 percent of donors from Princeton give to Obama*, *The Daily Princetonian* (Nov. 6, 2012), <http://dailyprincetonian.com/news/2012/11/99-percent-of-donors-from-princeton-give-to-obama/>.

<sup>47</sup> Phoebe Keller and Emily Friedman, *Cornell Faculty Donations Flood Left, Filings Show*, *The Cornell Daily Sun* (Oct. 15, 2015), <http://cornellsun.com/2015/10/15/cornell-faculty-donations-flood-left%E2%80%88filings-show/>.

that that same ratio, 96 percent, describes the contributions of Harvard’s Faculty of Arts and Sciences to Democratic candidates during that same period.<sup>48</sup>

If you want the latest on this subject as it concerns law schools across the country, an exquisitely detailed study by Northwestern’s James Lindgren has just come out in the *Harvard Journal of Law & Public Policy*, the flagship publication of the Federalist Society.<sup>49</sup> And in that same issue you’ll also find a lengthy analysis of Lindgren’s data by a Berkeley Ph.D. candidate who examines why it is that there are so few conservatives and libertarians in the legal academy.<sup>50</sup> In a word, numbers so skewed do not come about by accident.

It’s only human, of course, to want to be with “our own,” to want to avoid or reduce the intellectual and emotional discomfort of battling across political and ideological divides. In fact, both AEI’s Charles Murray<sup>51</sup> and NYU’s Jonathan Haidt<sup>52</sup> have recently documented our growing polarization in many domains. But ideological conformity in academia is anathema to the institution’s very mission—the pursuit and dissemination of knowledge. Knowledge emerges and grows from challenges, not from comforting confirmations. It emerges from the competition of ideas.<sup>53</sup>

Brookings’ Jonathan Rauch drew this out in his 1993 book, *Kindly Inquisitors: The New Attacks on Free Thought*.<sup>54</sup> The three great pillars of the modern world, Rauch wrote, are democracy, capitalism, and liberalism, all of which entail checking, criticism, competition, and intellectual and emotional discomfort. For all three to survive, dissent must not only be protected but encouraged.<sup>55</sup> Do we need any better example of that than the adversarial process in our law, the aim of which is to get to the truth of the matter by pitting interested parties against each other under a system of fair rules?

And that brings me to just a few thoughts about what I take to be the still deeper problem before us today, namely, that in these threats to free speech—emanating, again, almost entirely from the left—we are seeing a manifestation, and an important one, of a much broader attack on the basic American vision. That vision arises, of course, from the nation’s birth certificate, the Declaration of Independence. Penned near the start of our struggle for independence, the Declaration paints a picture of individual liberty secured by limited government, thus enabling each of us to pursue happiness however we wish, following our own subjective values, provided

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<sup>48</sup> Karl M. Aspelund and Meg P. Bernhard, *Harvard Faculty Donate to Democrats by Wide Margin*, *The Harvard Crimson* (May 1, 2015), <http://www.thecrimson.com/article/2015/5/1/faculty-political-contributions-data-analysis/>.

<sup>49</sup> James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013*, 39 *HARV. J.L. & PUB. POL’Y* 90, 90-151 (2015).

<sup>50</sup> James C. Phillips, *Why Are There So Few Conservatives and Libertarians in Legal Academia? An Empirical Exploration of Three Hypotheses*, 39 *HARV. J.L. & PUB. POL’Y* 153, 153-207 (2015).

<sup>51</sup> CHARLES MURRAY, *COMING APART: THE STATE OF WHITE AMERICA, 1960-2010* (2012).

<sup>52</sup> JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2012).

<sup>53</sup> KARL POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* (2002).

<sup>54</sup> Jonathan Rauch, *KINDLY INQUISITORS: THE NEW ATTACKS ON FREE THOUGHT* (1993).

<sup>55</sup> George Will, *A summer break from campus muzzling*, *Wash. Post* (May 29, 2015), [https://www.washingtonpost.com/opinions/childishness-on-campus/2015/05/29/dba1fac0-0562-11e5-a428-c984eb077d4e\\_story.html](https://www.washingtonpost.com/opinions/childishness-on-campus/2015/05/29/dba1fac0-0562-11e5-a428-c984eb077d4e_story.html).

only that we respect the equal rights of others to do the same.<sup>56</sup> We'll pursue our different ends in a variety of different ways, of course, making for a far more interesting world than if we acted only collectively, as the evidence of history makes clear. And in the course of so doing, we'll often say and do things that offend others, intentionally or not. But we have never held that there is a right not to be offended, or challenged. Threats and force are forbidden, not disagreements or slights.

But that vision, which the Constitution sought to secure, came under systematic attack during the Progressive Era, which rejected the robust individualism the Declaration envisioned and sought instead to bring ever more of our affairs under collective direction.<sup>57</sup> Yet interestingly, while these collective efforts were focusing mainly, but not entirely, on economic affairs, there was a parallel push throughout the 20<sup>th</sup> century to expand individualism and hence freedom in the area of speech.

But there's a tension here, especially as modern liberalism moves further left. As economic collectivism expands, speech can be put at risk—and plainly is at risk in the extreme cases. We see it clearly in highly collectivized regimes: the Soviet Union, China, North Korea, Cuba, increasingly in Venezuela. Let me be clear: We're not there yet—far from it. But the risk is real and more than real, as some of the earlier-mentioned incidents indicate. Indeed, it's implicit in the slogan we've heard coming from the White House so often in recent years, especially concerning Obamacare: “We're all in this together.”<sup>58</sup> Well if we are in fact all in this together, whether we want to be or not, then presumably no one should be rocking the boat. We should all “get with the program,” because dissent and controversy can only impede our progress. Progress toward what? Toward whatever the collective decides in the post-New Deal democratic order.

But of course collectives “decide” only in the fevered minds of philosophy seminarians. In the real world it's those who gain control of the collective who make the decisions, as early progressives like Woodrow Wilson understood as when he envisioned ruling elites—social engineers and planners—with “large powers and unhampered discretion”<sup>59</sup>—those who today run the modern administrative state, the nearly 450 executive branch agencies in Washington where most of our law is actually written, not by legislators but by bureaucrats at the IRS, EPA, FEC, FTC, SEC, and on and on.

The process is well understood. In fact, I'm sure that the economists here at the Johnson Center would be more than happy to acquaint those of you new to the idea with what is called

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<sup>56</sup> Roger Pilon, *Declaration of Independence, U.S.*, INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES, 2<sup>ND</sup> EDITION (2007), <http://object.cato.org/sites/cato.org/files/articles/pilon-iess-declaration.pdf>.

<sup>57</sup> Roger Pilon, *The United States Constitution: From Limited Government to Leviathan*, Economic Education Bulletin, American Institute for Economic Research (Dec. 2005), <http://object.cato.org/sites/cato.org/files/articles/CT05.pdf>.

<sup>58</sup> Roger Pilon, *We're Not 'All in This Together' Mr. Obama, and We Don't Want Obamacare*, Forbes (Oct. 17, 2013), <http://www.cato.org/publications/commentary/were-not-all-together-mr-obama-we-dont-want-obamacare>.

<sup>59</sup> George F. Will, *Battling the modern American administrative state*, Wash. Post (Nov. 27, 2015), [https://www.washingtonpost.com/opinions/battling-the-modern-administrative-state/2015/11/27/a1c639ba-9392-11e5-8aa0-5d0946560a97\\_story.html](https://www.washingtonpost.com/opinions/battling-the-modern-administrative-state/2015/11/27/a1c639ba-9392-11e5-8aa0-5d0946560a97_story.html).

public choice theory, which like nothing else will take the gloss from democracy as it's presently practiced.<sup>60</sup> In an oversimplified nutshell, the theory examines the incentives at play in creating, maintaining, and expanding public programs and explains how, for our purposes, it's perfectly understandable that much of the behavior at issue here occurs—none of which makes it right, even if understandable.

A central lesson that emerges from public choice theory, therefore, is that if you don't like the consequences that flow from the public programs the theory examines—rooted as those programs are in government's monopoly on the use of force—then don't have the programs to begin with. The virtue of markets is that the multiplicity of players and the competition that entails keeps everyone relatively honest and relatively efficient. The relevant incentives are absent from the public sector. It's no accident that parents in the District of Columbia are clamoring to get their children in voucherized private schools, where the incentive to serve the parents is direct and stronger than in the public schools, because if private schools fail, they go out of business.

And so we come to a question like this: Why would a public university want to establish a religiously affiliated dorm on its campus—just to pick a random example from the local air.<sup>61</sup> To do so raises thorny practical as well as constitutional questions, of course. But it also leads to a different question: Why is a university in the business of housing in the first place—or food services, or health services, or adjudication services for sexual-assault claims? It isn't as if those services would not otherwise be provided. Speaking for myself, I used private housing for my undergraduate, graduate, and law schools—and as a result there were no entangling headaches, no disciplinary problems for me or for any of the schools. Markets work, efficiently. So if I may make a modest proposal: *Sell* the dorms, all of them. Get rid of the headaches. I'm sure the proceeds will find better uses, more directly related to the university's core mission.

But that's not the way many people think of these things today, especially those with an institutional mind-set. We've come increasingly to think instead that we are indeed “all in this together,” and that little can be done that is not done collectively. And that has created an ethos of interdependency. That's not the vision that animated earlier generations. But it's the mind-set that works in subtle and not so subtle ways to suppress the kind of robust debate that challenges the status quo.

The system that has produced the restrictions on speech that I outlined earlier needs shaking up, and where better to begin than with the institutions that should welcome and thrive on the freest speech, our institutions of higher learning. Fortunately, we have a model for the mind-set that is called for. It comes from my graduate alma mater, the University of Chicago, in the form of a January 2015 *Report of the Committee on Freedom of Expression*, appointed in July 2014 by the university's president and provost “in light of recent events nationwide that have tested institutional commitments to free and open discourse.”<sup>62</sup> And it articulates “the

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<sup>60</sup> JAMES M. BUCHANAN AND GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962).

<sup>61</sup> Kim Severson, *The Religious Dorm at the Public University*, N.Y. Times (Oct. 3, 2013) [http://www.nytimes.com/2013/10/04/education/the-christian-dorm-at-the-public-university.html?\\_r=0](http://www.nytimes.com/2013/10/04/education/the-christian-dorm-at-the-public-university.html?_r=0).

<sup>62</sup> Laura Demanski, *Opening inquiry*, The U. of Chicago Mag. (Jul.–Aug. 2015), <http://mag.uchicago.edu/university-news/opening-inquiry>.

University's overarching commitment to free, robust, and uninhibited debate and deliberation among all members of the University's community."

The report begins with a brief account of the University of Chicago's long, proud history of commitment to freedom of expression. It then states clearly that:

Because the University is committed to free and open inquiry in all matters, it guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn. Except insofar as limitations on that freedom are necessary to the functioning of the University, the University of Chicago fully respects and supports the freedom of all members of the University community 'to discuss any problem that presents itself.'"

The report then adds a note that is particularly salient in light of recent events, and I quote again:

It is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.

There are limits, however, but they're narrow. The report states them and then puts them in context. Again, I quote:

The freedom to debate and discuss the merits of competing ideas does not, of course, mean that individuals may say whatever they wish, wherever they wish. The University may restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, that unjustifiably invades substantial privacy or confidentiality interests, or that is otherwise directly incompatible with the functioning of the University. In addition, the University may reasonably regulate the time, place, and manner of expression to ensure that it does not disrupt the ordinary activities of the University. But these are narrow exceptions to the general principle of freedom of expression, and it is vitally important that these exceptions never be used in a manner that is inconsistent with the University's commitment to a completely free and open discussion of ideas.

In a word, the University's fundamental commitment is to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed. It is for the individual members of the University community, not for the University as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose.

Putting all of this in context, the report concludes that "without a vibrant commitment to free and open inquiry, a university ceases to be a university."

Since its appearance a little over a year ago, the University of Chicago report has been incorporated largely in statements coming from Princeton, Purdue, Johns Hopkins, American University, and other institutions.<sup>63</sup> And FIRE has launched a national campaign urging all colleges and universities to adopt similar policies.<sup>64</sup> But in October we also saw a thoughtful critique of the Chicago report coming not from the left, as one might have expected, but from Peter Wood, president of the National Association of Scholars. In the interest of providing a bit more fodder for the panel that follows here this morning, let me conclude with just a summary of the concerns Wood raises.<sup>65</sup>

While he welcomes the Chicago statement, Wood calls it "half a loaf." "The basic problem with the statement," he writes, "is that it presents a context-free defense of freedom of expression. ... It makes sense as a tactical move against "social justice warriors" who want to preempt important debates. ... But the statement does not contextualize itself to outside speakers and appears to apply equally to speech within the university." Thus, he continues, "it is easy to imagine circumstances where the positions laid forth in the Chicago statement would themselves become impediments to good education."

For example, the statement says freedom of expression, inquiry, and debate are "fundamental." But "other principles are no less fundamental," Wood says: "The pursuit of truth; the obligation to distinguish the important from the trivial; integrity in research; respect for freedoms besides academic freedom; and genuine care for the welfare and educational prospects of students." The "fundamental" regard of the university for freedom of expression, he notes, "is in direct tension with the fundamental regard the university must also have for the truth." But the statement is silent on that, he continues. It proscribes "defamation, threats, harassment, and violations of privacy," but on matters such as "fabrication of data, perjury, deliberate historical misrepresentation, suppression of discrepant evidence, false testimony, plagiarism, and the like, the statement says nothing."

Second, the statement elevates free speech over teaching, Wood writes, "as something unmoored by the curriculum." But "universities have to make practical choices to teach *this* subject and not *that* one." Who decides—the individual professor or the university? "The 'fundamental' right of free expression is dramatically limited in the single most important context of higher education: the college or university's decisions about what should be taught."

Third, Wood argues that "the assertion that freedom of expression is 'fundamental' sidesteps the underlying rationale for free expression," namely, "as the antidote to intellectual

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<sup>63</sup> *Universities and free speech – Hard to say*, The Economist (Jan. 30, 2016), <http://www.economist.com/news/united-states/21689603-statement-heart-debate-over-academic-freedom-hard-say>.

<sup>64</sup> *FIRE Launches Campaign in Support of University of Chicago Free Speech Statement*, FIRE (Sep. 28, 2015), <https://www.thefire.org/fire-launches-campaign-in-support-of-university-of-chicago-free-speech-statement-pr/>.

<sup>65</sup> Peter Wood, *The University of Chicago's Flawed Support for Freedom of Expression*, Nat'l Ass'n of Scholars (Oct. 13, 2015), [https://www.nas.org/articles/the\\_university\\_of\\_chicagos\\_flawed\\_support\\_for\\_freedom\\_of\\_expression](https://www.nas.org/articles/the_university_of_chicagos_flawed_support_for_freedom_of_expression).

complacency and the slumber of settled propositions. It does not allow ‘consensus’ or appeal to the authority of either the crowd or the expert to settle a dispute.” And he adds that “as far as the statement goes, all expressions enjoy the same title to ‘freedom of expression.’ That’s a view that comports pretty well with the First Amendment, but comports very poorly with the reasons why higher education values freedom of expression.” Contrasting the Chicago statement with a much longer 1974 Yale statement, Wood concludes that the latter explains “*why* freedom of expression should matter to a university. Its first sentence declares: ‘The primary function of a university is to discover and disseminate knowledge by means of research and teaching.’”

Finally, Wood argues that the Chicago statement “is conducive to the further trivialization of the university. ... In treating free expression as an end in itself and divorcing it from any concern about the processes that establish and dis-establish intellectual authority, the statement gives license to the forces that have brought on the regime of triviality, curricular incoherence, narcissistic teaching, and intellectual aimlessness that have beset so many colleges and universities.”

Plainly, Wood’s critique goes well beyond the limited concerns of the Chicago statement. I include it simply to bring that perspective to bear on our subject, which is not simply free speech but the larger aims of free speech in the academic setting, which should not be ignored if the academy is to serve its function in a free society. And now I welcome your questions and I look forward to the panel discussion ahead. Thank you for your kind attention.