Free Speech on Campus: Countering the Climate of Fear

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ABSTRACT

Similar to the entertainment industry in the time of the blacklist, a climate of fear has descended on the nation's universities and colleges. It is the fear of being punished, not for what one does, but for what one says. Today, students and faculty frequently refrain from expressing unpopular or "offensive" positions—often conservative, libertarian, or traditional religious positions—for fear of being labeled racist, sexist, homophobic, white supremacist, or of being accused of engaging in hate speech. The fear comes in two forms: the fear of being sanctioned by the university or college and the fear of being "cancelled" by one's fellow students or faculty members. In this article, I argue that these fears arise from a set of perverse incentives on campuses. I suggest that the only way to counter these fears is by changing the incentive structure. I then show how coupling the addition of a "safe harbor" provision to a school's speech and expression policy with the creation of a pro bono legal organization devoted to the preservation of freedom of speech on campus can effectuate such a change.

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I. INTRODUCTION

Sixty-five years ago, a climate of fear gripped the entertainment industry in the United States. It was the fear of being punished not for anything one did, but for what one believed. Writers, actors, directors, and producers refrained from expressing left-wing or socialist beliefs out of fear of being labeled a communist or a communist sympathizer. This was the time of the blacklist, when such a label would render one unemployable.

Today, a similar climate of fear has descended on universities and colleges across the nation. It is the fear of being punished, not for what one does, but for what one says. Today, students and faculty frequently refrain from expressing unpopular or "offensive" positions—often conservative, libertarian, or traditional religious positions—for fear of being labeled racist, sexist, homophobic, white supremacist, or of being accused of engaging in hate speech. This is the time of "cancel culture" when such labels can subject one to investigation, social opprobrium, and reduced academic or career prospects.

Today's fear comes in two forms. The first is the fear of being sanctioned by the university or college. The second is the fear of being cancelled by one's fellow students or faculty members. The first fear is the fear of being condemned[1] or threatened[2] or disinvited[3] or removed from classroom teaching[4] or defunded[5] or fired[6] or not renewed[7] because of the things that one says or writes. Perhaps more significantly, it is the fear of having to defend oneself against the charge of violating Title IX[8] or the university's harassment policy[9] or the university's rules

1. A student at Georgetown University was condemned by the Georgetown University Student Association for publishing a blog post critical of the Black Lives Matter movement and the Supreme Court decision extending Title VII protections to transgender individuals. *See* Ethan Greer, *GUSA Senate Condemns Blog Post Written by a Georgetown Student*, GEO. VOICE, July 8, 2020.

2. A Yale law student who used the term "Trap House" in an e-mail invitation to a joint Native American Law Students Association/Federalist Society event that would be serving Popeye's chicken was threatened by an associate dean and the school's diversity director with damage to his reputation if he did not apologize. *See* Aaron Sibarium, *A Yale Law Student Sent a Lighthearted Email Inviting Classmates to His 'Trap House.' The School Is Now Calling Him To Account*., WASH. FREE BEACON (Oct. 13, 2021), https://freebeacon.com/campus/a-yale-law-student-sent-a-lighthearted-email-inviting-classmates-to-his-trap-house-the-school-is-now-calling-him-to-account/ [https://perma.cc/9QSQ-S8ZS].

3. A professor of geophysics scheduled to give a prestigious lecture on the climate of other planets was disinvited due to his opposition to academic diversity, equity, and inclusion initiatives. *See* Colleen Flaherty, *A Canceled Talk, and Questions About Just Who Is Politicizing Science*, INSIDE HIGHER ED (Oct. 6, 2021), https://www.insidehighered.com/news/2021/10/06/mit-controversy-over-canceled-lecture [https://perma.cc/4GQZ-YCJG].

4. *See* Colleen Flaherty, *Professor Who Said N-Word Twice Reinstated*, INSIDE HIGHER ED (Mar. 13, 2020), https://www.insidehighered.com/quicktakes/2020/03/13/professor-who-said-n-word-twice-reinstated [https://perma.cc/899S-CGEG].

5. Love Saxa, a Georgetown University student group whose constitution defined marriage as "a monogamous and permanent union between a man and a woman," faced a defunding hearing on the ground that it fostered "hatred or intolerance of others because of their . . . sexual preference." *See* Mary Hui, *Georgetown Students Have Filed a Discrimination Complaint Against a Campus Group Promoting Heterosexual Marriage*, WASH. POST (Oct. 25, 2017), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/10/25/georgetown-students-file-a-discrimination-complaint-against-a-campus-group-that-promotes-heterosexual-marriage/ [https://perma.cc/FYE3-A6PQ].

6. The dean of Georgetown Law School summarily fired an adjunct professor because she opined that African-American students received a disproportionate share of the lower grades in her course and suspended her co-teacher who failed to disagree. *See* Michael Levenson, *Georgetown Law Fires Professor for 'Abhorrent' Remarks About Black Students*, N.Y. TIMES (Mar. 11, 2021), https://www.nytimes.com/2021/03/11/us/georgetown-university-sandra-sellers.html [https://perma.cc/XW4N-6LFN].

7. Duke professor Evan Charney's contract was not renewed after nineteen years of teaching at the University because some students complained that his class created a hostile environment by rigorously critiquing all viewpoints. *See* James Freeman, *How to Get Fired at Duke*, WALL ST. J. (Apr. 24, 2019), https://www.wsj.com/articles/how-to-get-fired-at-duke-11556133633 [https://perma.cc/PEM6-TG5R].

8. Laura Kipnis, a Northwestern University professor, was subject to a months-long Title IX investigation for sexual harassment on the basis of an article that she published in *The Chronicle of Higher Education* criticizing the University's Title IX enforcement policies. *See* Jeannie Suk Gersen, *Laura Kipnis's Endless Trial by Title IX*, NEW YORKER (Sept. 20, 2017), https://www.newyorker.com/news/news-desk/laura-kipniss-endless-trial-by-title-ix [https://perma.cc/4MSB-LUEV].

9. Laurie Sheck, a professor at The New School, was investigated for discrimination for using the N-word when discussing James Baldwin's use of the N-word. *See* Colleen Flaherty, *N-Word at the New School*, INSIDE HIGHER ED (Aug. 7, 2019), https://www.insidehighered.com/news/2019/08/07/another-professor-under-fire-using-n-word-class-while-discussing-james-baldwin [https://perma.cc/A2UE-7VGU]. My use of "the N-word" in this note is itself evidence of the fear being discussed.

mandating civility[10] or merely of engaging in hateful behavior.[11] The second fear is the fear of being shunned by friends, being attacked on social media, being doxed, suffering damage to one's reputation and career, and—in some cases—being physically intimidated or assaulted.[12]

These fears are pervasive enough for a recent study of over 37,000 students on 159 U.S. campuses to find that 80% censor themselves due to fear of negative reactions from peers, faculty, or administrators and only 22% feel comfortable discussing a controversial political topic with their classmates.[13] They are pervasive enough for many professors to report that they avoid discussing controversial social and political issues involving race, ethnicity, sex, and sexual orientation in their classes.[14]

These two fears raise two distinct questions. The first is how to induce university or college administrations to respect student and faculty freedom of speech.[15] The second is how to reduce improper retaliation by individual members of the academic community against those who exercise their freedom of speech. Part II of this article is devoted to answering the first question. To do so, I examine the

10. Duke professor Paul Griffiths was subject to disciplinary penalties for criticizing the school's diversity training program and exhorting others not to waste their time by attending. *See* Colleen Flaherty, *Divinity, Diversity and Division*, INSIDE HIGHER ED (May 9, 2017), https://www.insidehighered.com/news/2017/05/09/duke-divinity-school-professor-objects-diversity-training-request-and-sets-debate [https://perma.cc/QJ7V-HVMZ].

11. Amelia Irvine, the president of Love Saxa, explained that being subject to the charge of being a hate group and having to prepare for and participate in the hearing required a great deal of time and effort and was a stressful experience. *See* Mary Hui, *Georgetown Students Vote Not To Take Action Against Pro-Heterosexual-Marriage Campus Group*, WASH. POST (Nov. 3, 2017), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/11/03/georgetown-students-decide-not-to-take-action-against-pro-heterosexual-marriage-campus-group/ [https://perma.cc/77VU-THCV].

12. *See* Eugene Volokh, *Anti-White Racial Insults Allegedly Fly at Library Protest by Dartmouth NAACP Chapter*, WASH. POST (Nov. 17, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/11/17/racial-insults-allegedly-fly-at-library-protest-by-dartmouth-naacp-chapter/ [https://perma.cc/796A-8WPF]; Scott Jaschik, *Who Defines What is Racist?,* INSIDE HIGHER ED (May 30, 2017), https://www.insidehighered.com/news/2017/05/30/escalating-debate-race-evergreen-state-students-demand-firing-professor [https://perma.cc/3UVC-GYU5]; Allison Stanger, *Understanding the Angry Mob at Middlebury that Gave Me a Concussion*, N.Y. TIMES (Mar. 13, 2017), https://www.nytimes.com/2017/03/13/opinion/understanding-the-angry-mob-that-gave-me-a-concussion.html [https://perma.cc/YK3L-C3D4].

13. *See* COLLEGE PULSE, FIRE & REALCLEAREDUCATION, 2021 COLLEGE FREE SPEECH RANKINGS: WHAT'S THE CLIMATE FOR FREE SPEECH ON AMERICA'S COLLEGE CAMPUSES? (2021), https://perma.cc/8HX8-WXDG.

14. *See* Cecilia Capuzzi Simon, *Fighting for Free Speech on America's Campuses*, N.Y. TIMES (Aug. 1, 2016), https://www.nytimes.com/2016/08/07/education/edlife/fire-first-amendment-on-campus-free-speech.html [https://perma.cc/B2HX-HZ24] ("The chill can affect teaching as well. Potentially offending material is being removed from curriculums; trigger warnings are included in syllabuses; and even tenured faculty are seeing career-ending reprisals by wading into discussions or using words that could be construed as racism or sexual harassment.").

15. For purposes of this article, I will use the word "speech" in a generic sense to refer to expression generally, whether written or spoken, rather than in its literal sense, which is limited to spoken expression. Thus, in this article, speech and expression will be treated as synonyms.

nature of universities' and colleges' commitment to freedom of speech and explore the reasons why institutions fail to honor them. I then suggest a mechanism for changing institutional incentives designed to bring institutions' behavior into better alignment with their commitments. Part III is devoted to answering the second question. To do so, I attempt to identify the dividing line between permissible and impermissible responses to another's exercise of his or her freedom of speech. I then suggest a way to discourage the impermissible responses. My goal is to identify a mechanism that will translate a university's or college's abstract commitment to freedom of speech into one that is meaningful in practice.

II. FREEDOM FROM INSTITUTIONAL SANCTION

A. The Abstract Commitment

1. Private vs. Public Institutions

Private colleges and universities may impose as many or as few restrictions on the speech of their students and faculty as they see fit. As private organizations, they are free to determine both their schools' mission and the means they will use to fulfill it. A private college whose mission is to advance a particular religious faith is free to ban advocacy of atheism or abortion on its campus. One committed to social justice could decide to ban microaggressions on its campus. And one committed to the search for truth at all costs could decide that there should be no restriction on the ideas that can be expressed on campus, even if some members of the academic community find them immoral or highly offensive. The only restriction on a private institution's discretion over how much and what type of speech to permit on campus is the ethical obligation to act with integrity—to make any restrictions on speech or guarantees of free speech clear to prospective students and faculty and to act in accordance with any representation that it makes.

Public universities do not have the same degree of freedom. Under contemporary Constitutional interpretation, the government's provision of higher education constitutes state action, which is subject to the restrictions in the Bill of Rights.[16] Thus, public universities are required to act in accordance with the First Amendment.

a. The Current Understanding of the First Amendment

In 1791, the First Amendment, which states in part that "Congress shall make no law . . . abridging the freedom of speech, or of the press," was added to the Constitution to restrain the federal government's power to interfere with citizens' ability to express their ideas and beliefs.[17] In 1925, the Supreme Court held that

16. *See* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). *See generally* Keyishian v. Bd. of Regents, State Univ. of N.Y., 385 U.S. 589 (1967); Healy v. James, 408 U.S. 169, 180 (1972); Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667 (1973); Widmar v. Vincent, 454 U.S. 263 (1981).

17. U.S. CONST. amend. I.

the Due Process Clause of the Fourteenth Amendment incorporated the protections of the First Amendment and made them binding on the state governments as well.[18] Consequently, the First Amendment, as currently interpreted, restrains the power of the federal government—directly—and state governments—indirectly through the Fourteenth Amendment—to interfere with citizens' verbal and written expression.

Nevertheless, the federal and state governments regularly ban or punish certain forms of expression. For example, treason, criminal solicitation, perjury, and fraud are all crimes that are committed by either saying or writing something, yet they are within the scope of the government's power. This is sometimes expressed by saying that in such cases the speech is "conduct" that is not protected by the First Amendment.[19]

The courts distinguish between protected expression and unprotected "conduct" on the basis of whether the government regulation is content-neutral or content-based. A law is content-neutral, and thus not violative of the First Amendment, when it is "justified without reference to the content of the regulated speech."[20] A law is content-based, and thus potentially violative of the First Amendment, when it is justified with reference to what the speech communicates. Thus,

> [t]he First Amendment generally makes conveying facts and opinions into a constitutionally immunized activity. Normally, the government may punish people for causing various harms, directly or indirectly. But it generally may not punish speakers when the harms are caused by what the speaker said—by the persuasive, informative, or offensive force of the facts or opinions expressed.[21]

A useful illustration of the range of application of the First Amendment is provided by the Supreme Court's decision in *R.A.V. v. City of St. Paul*.[22] In that case, the Court struck down the St. Paul Bias-Motivated Crime Ordinance, which prohibited placing "on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or

18. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

19. *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498–502 (1949) ("[I]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute . . . [and] it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.").

20. Bartnicki v. Vopper, 532 U.S. 514, 526 (2001).

21. Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1301 (2005).

22. 505 U.S. 377 (1992).

gender."[23] Because this ordinance applied only to expression that insulted or provoked violence "on the basis of race, color, creed, religion or gender," the Court held that "the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[24] The Court explained that "[t]he First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid."[25] Thus, because "the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out [and because t]hat is precisely what the First Amendment forbids,"[26] the Court struck down the ordinance.[27]

As currently understood, the First Amendment prohibits the state and federal governments from suppressing speech because of what is being expressed, no matter how offensive it may be to others. Thus, what has come to be called "hate speech" is protected by the First Amendment.

b. Application to Public Universities

Because they are subject to the First Amendment, public universities may not impose content-based restrictions on the speech of their students and faculty. They may impose content-neutral rules governing the time, place, and manner of speech.[28] They may ban demonstrations in the middle of the night,[29] place limits on the decibel level of loudspeakers,[30] and set capacity limits for safety reasons.[31] They may prevent demonstrations that are designed to interfere with the proper functioning of the institution,[32] or that constitute threats of violence.[33] But they cannot restrict speech because of the ideas being expressed, even if those ideas

23. *Id*. at 380.
24. *Id*. at 381.
25. *Id*. at 382.
26. *Id*. at 396.
27. *See also* Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 US 819, 829 (1995) ("When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 US 384, 390–93 (1993); Perry Ed. Assn. v. Perry Local Educators' Ass'n., 460 US 37, 46 (1983).
28. *See generally* Chi. Police Dept. v. Mosley, 408 U.S. 92 (1972); Heffron v. Int'l Soc. for Krishna Consciousness, 452 U.S. 640 (1981).
29. *See generally* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984) (upholding time, place, and manner restriction on overnight demonstration at Lafayette Park).
30. *See generally* Ward v. Rock Against Racism, 491 U.S. 781 (1989) (upholding content neutral volume regulation on Central Park).
31. *See generally* Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357 (1997) (upholding fifteen foot buffer zone outside abortion clinic).
32. *See* United States v. Kokinda, 497 U.S. 720, 733 (1990) (upholding arrest and removal of political activists on Postal Service property for speech "disruptive of business").
33. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law

are highly offensive or regarded as immoral by most of the academic community.[34] In short, the First Amendment curtails the ability of public universities to pursue their goals by means that involve suppressing the expression of students and faculty.

2. Implications for Private Colleges and Universities

This article has nothing to say to those private colleges and universities that exalt other values over freedom of speech. Schools that declare they will enforce restrictions on expression to realize other values—e.g., that announce that maintaining a comfortable learning environment is their preeminent value—may do so. For them, the optimal scope of freedom of speech on campus is determined by their own free choice.

Very few private colleges and universities take this route, however. The overwhelming majority have made commitments to extend the "broadest possible"[35] or "unfettered"[36] protection to freedom of speech on campus. What can this mean?

I maintain that it means, *at least*, that the college or university provides its students and faculty as much protection as public universities do; that is, as much protection as is provided by the First Amendment. In many cases, this level of commitment is made explicitly. For example, Harvard's policy states that "[i]t is expected that when there is a need to weigh the right to freedom of expression against other rights, the balance will be struck after a careful review of all relevant facts and will be consistent with established First Amendment standards."[37] Similarly, Yale's policy states: "We take a chance, as the First Amendment takes a chance, when we commit ourselves to the idea that the results of free expression are to the general benefit in the long run, however unpleasant they may appear at the time."[38] However, in most cases, the college or university simply incorporates the protection of the First Amendment without citing it directly. At the time of

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violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

34. *See* Saxe v. State College Area Sch. Dist., 240 F.3d 200, 209 (3rd Cir. 2001) (citing Boos v. Barry, 485 U.S. 312, 321 (1988)) ("[T]he government may not prohibit speech . . . based solely on the emotive impact that its offensive content may have on a listener . . . ."). *See generally* United States v. Playboy Ent. Grp., 529 U.S. 803 (2000); Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123 (1992).

35. *See Princeton's Commitment to Freedom of Expression*, https://odus.princeton.edu/protests/princetons-commitment-freedom-expression [https://perma.cc/3APU-UVYZ] ("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.").

36. STEVEN A. BENNER ET AL., REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION AT YALE (1974), https://yalecollege.yale.edu/get-know-yale-college/office-dean/reports/report-committee-freedom-expression-yale#Report_of_the_Committee [https://perma.cc/9YCT-HA2U] ("[T]he university must do everything possible to ensure within it the fullest degree of intellectual freedom. The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable.").

37. *Harvard Univ. Free Speech Guidelines*, https://www.fas.harvard.edu/links/free-speech-guidelines [https://perma.cc/EP3T-SALH].

38. YALE, *supra* note 36.

this writing, at least seventy-eight colleges or universities have incorporated the "Chicago Statement" into their speech and expression policies.[39] This statement, which was created by First Amendment scholars to parallel the protections of the First Amendment,[40] asserts that "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."[41]

Even in the absence of explicit language, a general commitment to the "broadest," or "most robust," or "unfettered," or "untrammeled," or "most extensive" protection of freedom of speech implies that the school accepts the constraints of the First Amendment. This is because the First Amendment provides only limited protection for freedom of speech. As noted above, the First Amendment prohibits only content-based interference with speech, allowing a broad range of content-neutral restrictions on freedom of expression.[42] I may not be able to identify what the broadest, or most robust, or unfettered, or untrammeled, or most extensive protection of freedom of speech consists of, but whatever it is, it must include the limited protections of the First Amendment.

Thus, private colleges and universities that have adopted the Chicago Statement or have otherwise made a voluntary commitment to maintain broad protection of freedom of speech are, at a minimum, bound to refrain from imposing any content-based restriction on the speech of their students and faculty. In this respect, private colleges and universities that have not expressly and publicly reserved the ability to impose such restrictions are in the same situation as public universities. Although the source of the obligation is different—for public universities, the First Amendment; for private colleges and universities, their own public representations—all are bound to refrain from restricting the speech of their students and faculty because of opposition to what is being expressed. This is the nature of the abstract commitment to freedom of speech that all public and most private colleges and universities are obligated to respect.

B. The Problem of Incentives

It is not a novel observation that abstract commitments are not self-enforcing. Solemn commitments to preserve freedom of speech announced with much fanfare can be, and often are, ignored in practice. The Foundation for Individual

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39. This group includes the Univ. of Chicago, Princeton, Columbia, Georgetown, Johns Hopkins, and Vanderbilt. *See Chicago Statement: University and Faculty Body Support*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION ("FIRE"), https://www.thefire.org/chicago-statement-university-and-faculty-body-support/ [https://perma.cc/DHS7-YL2S].

40. *See* Geoffrey R. Stone & Will Creeley, *Restoring Free Speech On Campus*, WASH. POST (Sept. 25, 2015), washingtonpost.com/opinions/restoring-free-speech-on-campus/2015/09/25/65d58666-6243-11e5-8e9e-dce8a2a2a679_story.html [https://perma.cc/7SKE-BZ8A].

41. GEOFFREY R. STONE ET. AL., REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION (2014), https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf [https://perma.cc/JN3N-D62P] ("Chicago Statement").

42. *See supra* text accompanying nn.17–34.

Rights and Expression ("FIRE") has collected myriad examples of this, which are available on its website.[43] Because limited space prevents me from addressing this host of examples, let me illustrate the problem with the actions of my own institution, Georgetown University.

In June 2017, Georgetown University officially incorporated the Chicago Statement into its speech and expression policy. Georgetown's official policy now states:

> Georgetown University is committed to free and open inquiry, deliberation and debate in all matters, and the untrammeled verbal and nonverbal expression of ideas. It is Georgetown University's policy to provide all members of the University community, including faculty, students, and staff, the broadest possible latitude to speak, write, listen, challenge, and learn.
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> The ideas of different members of the University community will often and naturally conflict. It is not the proper role of a university to insulate individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Deliberation or debate 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 ill conceived.
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> . . . .
>
> As a corollary to the University's commitment to protect and promote free expression, members of the University community must also act in conformity with the principle of free expression. Although members of the University community are free to criticize and contest the views expressed by other members of the community, or by individuals who are invited to campus, they may not obstruct or otherwise interfere with the freedom of others to express views they reject or even loathe. To this end, the University has a solemn responsibility not only to promote lively and fearless freedom of deliberation and debate but also to protect that freedom when others attempt to restrict it.
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> In 1990 Ernest Boyer, President of Carnegie Foundation wrote, "[A] university is an open, honest community, a place where freedom of expression is uncompromisingly protected, and where civility is powerfully affirmed." Because it is essential to free and open inquiry, deliberation, and debate, all members of the University community share in the responsibility for maintaining civil and respectful discourse. But concerns about civility and mutual respect can never be used as a justification for closing off the discussion of ideas, no matter how offensive or disagreeable those ideas may be to some members of our community.[44]

One of Georgetown's officially-recognized student groups is "Love Saxa," whose mission statement asserts:

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43. *See Spotlight Database*, FIRE, https://www.thefire.org/resources/spotlight/ [https://perma.cc/6PKQ-HYTU].

44. *Student Life Policies*, GEO. UNIV., https://studentaffairs.georgetown.edu/policies/student-life-policies/speech-expression/ [https://perma.cc/SCR8-5HZW].

> In a society where dating and courtship are largely forgotten, structures of marriage and family are eroding, traditional understandings of gender complementarity are distant concepts, the use of pornography is prevalent, and sexual assault is rampant, Love Saxa exists to promote healthy relationships on campus through cultivating a proper understanding of sex, gender, marriage, and family among Georgetown students. Through programs consisting of discussions, lectures, and campaigns, we hope to increase awareness of the benefits of sexual integrity, healthy dating relationships, and the primacy of marriage (understood as a monogamous and permanent union between a man and a woman) as a central pillar of society.[45]

In October of 2017, an undergraduate student filed a complaint against Love Saxa with the Student Activities Commission on the ground that the group's definition of marriage as "a monogamous and permanent union between a man and a woman" fostered "hatred or intolerance of others because of their . . . sexual preference."[46] The Commission held a hearing to determine whether Love Saxa should be defunded.[47] Despite Georgetown's speech and expression policy, Love Saxa was threatened with punishment solely and explicitly on the basis of the beliefs it was expressing.

In October of 2019, Acting Homeland Security Secretary Kevin McAleenan was scheduled to deliver the keynote address at a conference on immigration at Georgetown University Law Center. Every time he tried to speak, protesters in the audience stood up, held up banners blocking the view of many members of the audience, and shouted over his words so that he could not be heard. McAleenan made three attempts to speak, was shouted down each time, then left the conference.[48] The law school's Dean of Students and several officers of the law school's public safety office were present at the event. Despite Georgetown's policy statement that protesters "may not obstruct or otherwise interfere with the freedom of others to express views they reject or even loathe" and its commitment to "a solemn responsibility not only to promote a lively and fearless freedom of deliberation and debate, but also to protect that freedom when others attempt to restrict it," they took no action to exclude those who were disrupting the event.[49]

In March of 2021, two adjunct professors at Georgetown University Law Center were speaking to each other after class without realizing their remarks were being captured by the class recording system. One professor stated her opinion that African-American students made up a disproportionate share of those

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45. *See About,* LOVE SAXA, https://lovesaxa.wordpress.com/about/ [https://perma.cc/4QNZ-SZXM].

46. *See* Hui, *supra* note 5.

47. In the event, the hearing panel voted 8 to 4 not to defund the group. *See* Hui, *supra* note 11.

48. *See* Nick Miroff, *Protesters Shout Homeland Security Chief off Georgetown University Stage*, WASH. POST (Oct. 9, 2019), https://www.washingtonpost.com/immigration/protesters-shout-homeland-security-chief-off-georgetown-university-stage/2019/10/07/1f2892d2-e915-11e9-9c6d-436a0df4f31d_story.html [https://perma.cc/2PWJ-RGFE].

49. Personal observation of the author, who was present at the event.

with the lowest grades in her courses and expressed her dismay over this. The other listened and did not actively express disagreement. When this recording came to light, the dean of the law school summarily fired the first professor and placed the second on administrative leave in response to their "abhorrent" conversation in which they made "reprehensible statements concerning the evaluation of Black students."[50] Despite the University's commitment not "to insulate individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive" or suppress debate "because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or ill conceived," the first professor was fired and the second disciplined purely because of the content of their speech.

In January of 2022, the incoming director of Georgetown Law School's Center for the Constitution expressed his opposition to President Biden's decision to appoint an African-American woman to the Supreme Court by tweeting: "Objectively best pick for Biden is Sri Srinivasan, who is solid prog & v smart. Even has identity politics benefit of being first Asian (Indian) American. But alas doesn't fit into latest intersectionality hierarchy so we'll get lesser black woman."[51] Many students found this statement offensive. In response, the dean of the law school issued a campus-wide e-mail in which he called the tweet "appalling" and "at odds with everything we stand for at Georgetown Law."[52] He subsequently placed the director on "administrative leave, pending an investigation into whether he violated our policies and expectations on professional conduct, non-discrimination, and anti-harassment" and barred him from campus.[53] Despite the University's commitment to "free and open inquiry, deliberation and debate in all matters, and the untrammeled verbal and nonverbal expression of ideas" and not to suppress ideas "thought by some or even by most members of the University community to be offensive, unwise, immoral, or ill conceived," the school disciplined the director purely because others found his speech offensive.[54]

There is nothing particularly surprising about the fact that, in each of these cases, Georgetown acted in direct contravention of its abstract commitment. Given the incentives of the relevant parties, this is what one would expect. Deans get no reward for upholding abstract principles in the face of student outcry and protest. Their incentive is to quell the dissension as quickly as possible, which usually means mollifying the protestors. Standing on principle will almost

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50. *See* Michael Levenson, *Georgetown Law Fires Professor for 'Abhorrent' Remarks About Black Students*, N.Y. TIMES (Mar. 11, 2021), https://www.nytimes.com/2021/03/11/us/georgetown-university-sandra-sellers.html [https://perma.cc/2W4L-4TE2].

51. *Ilya Shapiro Tweets about Biden Supreme Court Nominee*, FIRE (Jan. 26, 2022), https://www.thefire.org/ilya-shapiro-tweets-about-biden-supreme-court-nominee [https://perma.cc/T4DH-28JK].

52. *See* Email from Bill Treanor, Dean of Georgetown University Law Center (Jan. 27, 2022).

53. *See* Email from Bill Treanor, Dean of Georgetown University Law Center (Jan. 31, 2022).

54. *Speech and Expression Policy*, GEO. UNIV., https://studentaffairs.georgetown.edu/policies/student-life-policies/speech-expression [https://perma.cc/G9DF-YCFR].

certainly exacerbate the strife by provoking more student protests and generating negative media coverage. It will also subject the dean to personal attacks and charges that his or her school is insensitive to the plight of minority students or creates an unsafe learning environment for them. Deans who successfully quiet the disruption often earn praise from the administration,[55] but they suffer no personal blowback for violating the institution's abstract commitment to freedom of speech.

Further, like most colleges and universities, Georgetown has its own bureaucracy devoted to ferreting out and punishing any incident of bias on campus. At Georgetown, this is the Office of Institutional Diversity, Equity & Affirmative Action (IDEAA).[56] The staff of this office is dedicated to creating a bias-free campus environment that is comfortable for all students regardless of race, sex, ethnicity, and sexual orientation. They pursue this mission zealously, regularly referring students, faculty, and staff to the online discrimination and bias reporting forms and encouraging them to fill one out whenever they encounter an instance of bias. The staff are rewarded for effectively investigating and sanctioning behavior that is offensive to members of minority groups. They are not rewarded for making careful distinctions between reports in which the offense comes from threats or insults directed at particular individuals because of their race, sex, ethnicity, or sexual orientation and those in which the offense comes from the ideas being expressed. They are subject to criticism and may be penalized for failing to act on an allegation of bias, but they suffer no penalty for pursuing allegations based exclusively on the content of speech.

There is nothing unique about Georgetown. Colleges and universities that layer an abstract commitment to freedom of speech onto an incentive structure that rewards the suppression of offensive behavior are committing the classic managerial blunder of "hoping for A, but paying for B."[57] This invariably produces B. For the abstract commitment to freedom of speech to have any practical effect, colleges and universities must alter their incentive structures. Those responsible for enforcing the commitment to freedom of speech must either be rewarded for doing so or, more importantly, be liable to punishment for failing to do so. How can this be done?

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55. This is precisely what happened at Georgetown when the law school dean disciplined the professors for their speech. *See supra* note 50. The president of the university published a campus wide message praising his actions as "essential and consistent with the ethos and ideals we strive to sustain at Georgetown." *See* Email from John DeGioia, President of Georgetown University (Mar. 12, 2021) (on file with author).

56. *Institutional Diversity, Equity & Affirmative Action*, GEO. UNIV., https://ideaa.georgetown.edu [https://perma.cc/UBT9-2GM5].

57. *See* Steven Kerr, *On the Folly of Rewarding A, While Hoping for B*, 18 ACAD. MANAGE. J. 769 (1975).

C. Solving the Problem of Incentives

Two things are necessary to overcome the problem of incentives. First, the college or university must adopt a safe harbor provision. Second, there must be a pro bono legal group willing to litigate for clients whose free speech rights have been abridged by college or university administrations.

1. The Safe Harbor Provision

The first step toward overcoming the perverse incentives is to make the nature of the abstract commitment to freedom of speech definite and explicit. Regardless of whether the source of the commitment is the First Amendment or their own public representations, colleges and universities are obligated to refrain from placing any content-based restrictions on the speech of their students and faculty.

This can be made clear by adding the following sentence to the school's policy on freedom of expression:

> The University will summarily dismiss any allegation that an individual or group has violated a policy of the university if the allegation is based solely on the individual's or group's expression of his, her, or its religious, philosophical, literary, artistic, political, or scientific viewpoints.

This may be thought of as a "safe harbor" provision—an assurance that one may safely express his or her thoughts without fear of official sanction by the college or university.

In addition to clarifying the nature of the institution's commitment, such a safe harbor provision can act as a prophylactic against self-censorship. People are inhibited from expressing opinions or beliefs that others may deem offensive or hateful not only out of fear of punishment, but also out of fear of the accusation. Defending oneself against charges of discrimination, harassment, or "hate speech" can be an arduous experience that carries significant costs in time and expense, as well as great emotional strain. The self-censorship that results from the desire to avoid such expense and strain is what the courts refer to as the "chilling effect" of a law or regulation.[58] Adopting a safe harbor provision can counteract the chilling effect of having to undertake such a defense. In addition, it can prevent the academic analog of SLAPP suits.

In the political realm, a SLAPP suit is a strategic lawsuit against public participation. This is a lawsuit brought to intimidate and silence those opposed to the

58. *See* Walker v. City of Birmingham, 388 U.S. 307, 344–45 (1967) (Brennan, J., dissenting) ("To give these freedoms the necessary 'breathing space to survive,' . . . the Court has modified traditional rules of standing and prematurity. We have molded both substantive rights and procedural remedies in the face of varied conflicting interests to conform to our overriding duty to insulate all individuals from the 'chilling effect' upon exercise of First Amendment freedoms generated by vagueness, overbreadth and unbridled discretion to limit their exercise.").

plaintiff's political interests by burdening them with the cost of a legal defense until they abandon their criticism or opposition. Those bringing a SLAPP suit do not expect to win the lawsuit. They simply want to raise the financial and psychological costs of publicly opposing their interests.[59] A typical SLAPP suit might accuse the defendants of defaming the plaintiff in the course of their public opposition to the plaintiff's political position.

The academic analog of a SLAPP suit would be to file complaints against students or faculty for the violation of university policies on the basis of their verbal or written statements. This would force those who hold unpopular positions to devote their time and efforts to answering the complaint and undergoing the hearing that constitutes the academic analog of a trial, all while under a cloud of suspicion of wrongdoing. Even if the complaints had little or no chance of being upheld, they would significantly raise the psychological costs of speaking out. The fear of being subjected to such a process can inhibit individuals from expressing unpopular or controversial opinions.

Perhaps the most famous example of this type of intimidation is the case of Laura Kipnis, a Northwestern University professor who was subject to a Title IX investigation for sexual harassment on the basis of an article that she published in *The Chronicle of Higher Education* that criticized Title IX enforcement policies.[60] Although the investigation ultimately found that the accusation was without merit,[61] Kipnis nevertheless had to endure three months of interrogations, hearings, and vilification before this result was reached.[62]

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59. *See* Carson Hilary Barylak, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 OHIO ST. L.J. 845, 846 (2010) ("Corporations, developers, and other private interests use strategic lawsuits against public participation (SLAPPs)–defined as suits that '(1) involve communications made to influence a government action or outcome, (2) which result in civil lawsuits (complaints, counterclaims, or cross-claims) (3) filed against non-governmental individuals or groups (4) on a substantive issue of some public interest or social significance'—to intimidate individuals and organizations that speak out against corporate decisions, development projects, government actions or operations, or other activities that affect their financial interests.").

60. *See* Rachel Cooke, *Sexual Paranoia on Campus–and the Professor at the Eye of the Storm,* GUARDIAN (Apr. 2, 2017) https://www.theguardian.com/world/2017/apr/02/unwanted-advances-on-campus-us-university-professor-laura-kipnis-interview [https://perma.cc/4FFS-BEMT]; Gersen, *supra* note 8.

61. *See* Brock Read, *Laura Kipnis Is Cleared of Wrongdoing in Title IX Complaints*, CHRON. HIGHER EDUC. (May 31, 2015) https://www.chronicle.com/blogs/ticker/laura-kipnis-is-cleared-of-wrongdoing-in-title-ix-complaints?bc_nonce=slikpoknia9bz8verv1y&cid=reg_wall_signup [https://perma.cc/3RMP-JECF].

62. A textbook illustration of the academic analog of a SLAPP suit is supplied by Georgetown's treatment of Ilya Shapiro, the director of its Center for the Constitution. *See supra* Part II.B. He was placed on leave pending an investigation into whether his speech violated the school's non-discrimination and anti-harassment policies. Given the definitions in these policies, there was no reasonable prospect of Shapiro being found in violation of them. Nevertheless, the law school hired outside counsel to conduct the investigation, guaranteeing that it would take considerable time. Meanwhile, Shapiro was under constant attack as a racist and sexist. For example, Georgetown's student newspaper, *The Hoya,* ran a front page story with Mr. Shapiro's photograph directly above the headline: *GULC To Investigate Racist Admin*, HOYA, Feb. 4, 2022. This treatment sent an unmistakable message

By guaranteeing that students and faculty will not have to undergo such investigations and hearings merely on the basis of the content of their speech, the safe harbor provision can reduce the chilling effect of colleges and universities' discrimination, harassment, and civility policies.

a. The Litmus Test: Harassment Policy

All colleges and universities have policies designed to discourage the harassment of members of the academic community because of their sex, race, religion, sexual orientation, disability, or membership in any other protected category.[63] The most pronounced chilling effect on campus speech derives from the fear of being accused of violating these policies. Hence, the litmus test for a college or university's commitment to freedom of speech is whether it crafts and enforces its harassment policy in a way that is consistent with this commitment.

i. What Is Harassment?

Legally speaking, harassment is a form of discrimination. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of an individual's race, color, religion, sex, or national origin.[64] The Age Discrimination in Employment Act of 1967[65] and the Americans with Disabilities Act of 1990[66] respectively prohibit employment discrimination on the basis of age and disability. The federal courts and federal Equal Employment Opportunity Commission (EEOC) have held that these statutes "afford[] employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."[67] Thus, conduct that creates an intimidating, hostile, or offensive work environment for individuals because of their race, color, religion, sex, national origin, age, or disability constitutes illegal discrimination.[68] This form of discrimination is called harassment.[69] As defined by the EEOC,

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to the larger law school community that it was not safe to say anything that may be construed as offensive by women and people of color.

63. For example, the DC Human Rights Act of 1977 includes age, marital status, personal appearance, gender identity, family responsibilities, genetic information, matriculation, or political affiliation as protected categories.

64. *See* Civil Rights Act of 1964 §7, 42 U.S.C. § 2000(e).

65. *See* The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–634.

66. *See* Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213.

67. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

68. For purposes of simplicity, I discuss only federal law at this point. The definition of harassment is the same for state statutes, but often applies to additional protected categories. For example, under the DC Human Rights Act of 1977, there could be harassment on the basis of sexual orientation, gender identity, marital status, personal appearance, family responsibilities, genetic information, matriculation, or political affiliation.

69. There is another form of legally prohibited harassment that constitutes a form of sex discrimination–quid pro quo harassment. This type of harassment occurs when an employer or supervisor makes satisfaction of sexual demand a condition of employment. I do not discuss quid pro quo harassment in this article because its enforcement usually does not generate a conflict with freedom of speech.

> Harassment is unwelcome conduct that is based on race, color, religion, sex (including sexual orientation, gender identity, or pregnancy), national origin, older age (beginning at age 40), disability or genetic information (including family medical history). Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.[70]

Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color, or national origin in any program receiving federal financial assistance. Title IX of the Educational Amendments Act of 1972 prohibits discrimination on the basis of sex in any program receiving federal financial assistance. Because almost all colleges and universities accept federal financial assistance—either directly or indirectly by accepting students who receive federal grants or loans—almost all colleges and universities are subject to Title VI and Title IX.[71] Title VI and Title IX extend Title VII's prohibition on workplace harassment to the educational environment. Therefore, almost all colleges and universities are legally required to ensure that their campuses are not intimidating, hostile, or offensive environments for women and racial and ethnic minorities.

Federal courts and the EEOC have held that more than merely insulting behavior is necessary for conduct to create a hostile environment. In the language of the EEOC, "[p]etty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work [or educational] environment that would be intimidating, hostile, or offensive to reasonable people."[72] Note, however, that the conduct that can create an intimidating, hostile, or offensive educational environment can include both verbal and written expression. Once again, in the words of the EEOC, the "[o]ffensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance."[73] This leads directly to the question of what types of speech or written expression can constitute illegal harassment.

The answer to this question is determined by the First Amendment. We saw above that the First Amendment is designed to limit the range of application of federal and state statutes. Specifically, no statute can limit protected speech on the basis of the ideas being expressed.

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70. *Harassment*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, https://www1.eeoc.gov//laws/types/harassment.cfm?renderforprint=1 [https://perma.cc/7VJD-M73X].

71. There are a few notable exceptions, such as Hillsdale College, Grove City College, and Patrick Henry College, that do not accept any Federal assistance and so are not subject to Federal anti-discrimination law.

72. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 70.

73. *Id.*

The Civil Rights Act, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, and the Educational Amendments Act of 1972, which give rise to the legal prohibition on harassment, are all federal statutes. Hence, harassment law must be understood as a content-neutral restraint on expression. It can outlaw expression to the extent that it is the equivalent of harm-causing conduct, but not to the extent that the harm is caused by the content of what is being expressed. Harassment law cannot ban or punish expression merely because of its offensive content.[74]

The limited reach of harassment law was illustrated in *Saxe v. State College Area School District*, in which the Third Circuit reiterated that "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause."[75] In striking down a school district's harassment policy as unconstitutionally overbroad, the court explained,

> There is of course no question that non-expressive, physically harassing *conduct* is entirely outside the ambit of the free speech clause. But there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs. When laws against harassment attempt to regulate oral or written expression on such topics, however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications. "Where pure expression is involved," anti-discrimination law "steers into the territory of the First Amendment."[76]

Because "[t]he Supreme Court has made it clear . . . that the government may not prohibit speech under a 'secondary effects' rationale based solely on the emotive impact that its offensive content may have on a listener,"[77] and because the

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74. *See, e.g.*, UWM Post, Inc. v. Board of Regents of Univ. of Wis. Sys., 774 F.Supp. 1163, 1177 (E.D. Wis. 1991) ("Since Title VII is only a statute, it cannot supersede the requirements of the First Amendment."); *see also* Doe v. Univ. of Mich., 721 F. Supp. 852, 856, 861–68 (E.D. Mich. 1989) (rejecting University of Michigan's "discrimination and discriminatory harassment" speech code on grounds of overbreadth and vagueness. The code had prohibited any speech "that stigmatizes or victimizes an individual" on the basis of protected group membership (e.g., race or sex) that has the "effect of interfering with an individual's academic efforts."); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1185 (6th Cir. 1995) (striking down a discriminatory harassment policy); Bair v. Shippensburg Univ., 280 F. Supp. 2d 357, 370 (M.D. Pa. 2003); Roberts v. Haragan, 346 F. Supp. 2d 853, 874 (N.D. Tex. 2004) (a sexual harassment policy and free speech zone); College Republicans at S.F. State Univ. v. Reed, 523 F. Supp. 2d 1005, 1024–25 (N.D. Cal. 2007) (a civility policy); DeJohn v. Temple U., 537 F.3d 301, 320 (3d Cir. 2008) (a sexual harassment policy); Smith v. Tarrant Cnty. Coll. Dist., 694 F. Supp. 2d 610, 637 (N.D. Tex. 2010) (a "cosponsorship" policy and free speech zone); McCauley v. Univ. of the V.I., 618 F.3d 232, 236 (3d Cir. 2010) (a "hazing/harassment" policy).

75. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001). The opinion for a unanimous court was written by Justice Samuel Alito, who was then a Third Circuit judge.

76. *Id.* at 206.

77. *Id.* at 209.

court found that the school district's harassment policy did precisely that, it found the policy to be unconstitutional.

This analysis demonstrates that, in the academic context, harassment consists of *conduct* directed toward women or members of other minority groups that creates an intimidating, hostile, or offensive educational environment for them. It does not consist of the expression of ideas, even if the expression of those ideas creates such an environment.

Crucially, the test is not whether an intimidating, hostile, or offensive educational environment exists. The existence of such an environment is a necessary but not a sufficient condition for a finding of harassment. The other necessary condition is that the environment must have been created by conduct directed toward the victim; in the words of the EEOC, by conduct such as "offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance." The offensive environment cannot have been created by antipathy to the ideas being expressed. Simply put, the expression of highly offensive beliefs or opinions does not, and cannot, constitute illegal harassment.[78]

ii. Harassment Policy

Colleges and universities have a duty to suppress illegal harassment on their campuses. We have seen that they also have a duty to refrain from suppressing the speech of their students and faculty because of the offensiveness of the beliefs or opinions being expressed. There is no conflict between these duties *because the expression of offensive beliefs or opinions cannot constitute harassment*.

To say that this is not well-understood would be a considerable understatement. Just as most lay people wrongly believe that hate speech is not protected by the First Amendment, they also wrongly believe that the expression of offensive ideas can constitute harassment. This misunderstanding is one of the main sources of self-censorship on campus. To avoid this chilling effect, a properly designed college or university harassment policy must target only the illegal conduct that constitutes harassment while scrupulously refraining from targeting the content of anyone's speech. Few do.

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78. *See Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html#Guidance [https://perma.cc/QYN6-HGL6]. This conclusion is reinforced by the Department of Education's guidance for complying with Title IX (and by implication, Title VI of the Civil Rights Act), which instructs colleges and universities that "[i]n cases of alleged harassment, the protections of the First Amendment must be considered if issues of speech or expression are involved. Free speech rights apply in the classroom . . . and in all other education programs and activities of public schools . . . . In addition, First Amendment rights apply to the speech of students and teachers. . . . Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. . . . Moreover, in regulating the conduct of its students and its faculty to prevent or redress discrimination prohibited by Title IX (e.g., in responding to harassment that is sufficiently serious as to create a hostile environment), a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights." *Id.*

There is usually nothing wrong with what college and university harassment policies say. It is what is left unsaid that is the problem. In this respect, Georgetown's harassment policy is typical enough to justify the continued use of the institution as an illustrative example.

Beginning with the statement that "[h]arassment is a form of discrimination prohibited by law," Georgetown's policy goes on to provide a reasonably accurate definition of harassment as follows:

> Harassment is verbal or physical conduct that denigrates or shows hostility or aversion to an individual because of [membership in a protected class], when such conduct has the purpose or effect of: unreasonably interfering with an individual or third party's academic or work performance; creating an intimidating, hostile, or offensive educational or work environment; or otherwise adversely affecting an individual or third party's academic or employment opportunities.[79]

What it fails to do, however, is clearly distinguish between "verbal conduct" and protected speech. It never explicitly states that the ideas one expresses cannot be the verbal conduct that constitutes harassment.

The potential to confuse the content of speech with prohibited verbal conduct is exacerbated by Georgetown's bias reporting system. Georgetown's IDEAA regularly exhorts students and faculty to report "Bias Related Incidents" explaining that "[t]he term 'bias related' refers to *language and/or behaviors* which demonstrate bias against persons because of, but not limited to, others' actual or perceived: color, disability, ethnicity, gender, gender identity and expression, national origin, race, religion, and/or sexual orientation."[80] It then cautions students "that just because the expression of an idea or point of view may be offensive or inflammatory to some, it is *not necessarily* a bias-related incident."[81] But defining prohibited conduct in terms of "language and/or behaviors" obscures rather than clarifies the distinction between speech and conduct, and stating that "the expression of an idea or point of view . . . is not necessarily a bias-related incident" suggests that it can be. The IDEAA goes on to note that while the

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79. *Human Resources Policy Manual §1004 Policy Statement on Harassment*, GEO. UNIV., https://policymanual.hr.georgetown.edu/1000-university-policies/1004-policy-statement-on-harassment/ [https://perma.cc/9X5P-L4KN]. Strictly speaking, this definition is not legally accurate. The third prong of the definition stating "or otherwise adversely affecting an individual or third party's academic or employment opportunities" is not part of the legal definition of harassment. This language was taken from the DC Human Rights Act and American with Disabilities Act definitions of discrimination, not harassment. Discrimination is the genus of which harassment is a species. Harassment is a type of discrimination, but the concept of discrimination is broader than harassment. Therefore, using language designed to identify the limits of discrimination in the definition of harassment is inappropriate. This is made evident by the fact that the third clause is so broad that it renders the preceding two superfluous. Although this problematically broadens Georgetown's definition of harassment beyond its proper legal definition, this inaccuracy is not relevant to the point currently under consideration.

80. *What is a Bias Related Incident?,* GEO. UNIV., https://biasreporting.georgetown.edu/what-is-a-bias-incident/# [https://perma.cc/ZH96-27E8] (emphasis added).

81. *Id*. (emphasis added).).

University's "value of openness protects controversial ideas, it does not protect harassment,"[82] which at least suggests that the expression of controversial ideas can constitute harassment, and ends with the admonition that "[t]o better understand the University's approach to assuring free expression and its limits, you are encouraged to consult the University's Speech and Expression Policy."[83] This reference would be quite helpful if the Speech and Expression Policy contained the proposed safe harbor provision, but it does not.

Fortunately, the confusion of protected speech with prohibited verbal conduct can be greatly reduced and its chilling effect significantly dissipated rather easily. All that is required is the inclusion of a safe harbor provision in the harassment policy. The addition of the following two sentences would suffice:

> An expression of one's religious, philosophical, literary, artistic, political, or scientific views regarding any protected category either in writing or verbally does not constitute harassment and is not prohibited by this policy. The University will dismiss any harassment allegation that is based solely on such expression.

The purpose of the first sentence is to prevent the confusion; the purpose of the second, to undermine its chilling effect.

A college or university that wants to honor its commitment to freedom of speech would seek to clarify—rather than obscure—the distinction between the conduct that can constitute harassment and the speech that cannot. A safe harbor provision would go a long way toward accomplishing this goal.

b. Passing the Test

The greatest danger to freedom of speech on campus today comes from universities or colleges extending their harassment policy beyond its proper bounds. That is why an institution's harassment policy is a litmus test for its commitment to freedom of speech.

It is easy to describe how a college or university can meet this test. The first step is for the college or university to write the two-sentence safe harbor provision into its harassment policy. This is necessary, but not sufficient. The next step is for the institution to alter its anti-harassment training program to ensure that it clarifies the distinction between banned conduct and protected speech. This would mean that in addition to including examples of the kind of conduct that can constitute harassment—e.g., offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, and offensive objects or pictures—the training would include examples of the kind of speech that cannot constitute harassment. This would mean that the training would itself include potentially offensive statements as illustrations of

82. *Id.*
83. *Id.*

protected speech such as: "On average, women are not as good at math as men," or "Homosexuality is against God's law," or "Illegal Mexican immigrants are stealing American jobs," or "Jews have dual loyalty and cannot be trusted" or "Affirmative action disadvantages African-Americans by forcing them to compete with more qualified whites," or "White people are privileged and fragile."

At present, one could wander the earth with a lantern vainly searching for a college or university that has such a harassment policy and training. That's because the same incentives that cause schools to act inconsistently with their abstract commitment to freedom of speech are at work in this context as well. No college or university administrator benefits from a clear distinction between prohibited conduct and protected speech. Deans want the freedom to act quickly to quiet dissension without being burdened by having to draw distinctions between individuals who feel aggrieved by actionable conduct and those who feel aggrieved by intellectual assertions they find repugnant. Similarly, the jobs of the institution's Diversity, Equity, and Inclusion (DEI) bureaucracy staff are infinitely easier if they do not have to make such distinctions, and its mission of stamping out all things that make protected minorities feel unwelcome or unsafe is significantly advanced by ignoring this distinction.

That is why there must be a pro bono legal group that is willing to litigate for clients whose free speech rights have been abridged.

2. The Pro Bono Legal Group

Most colleges and universities publish student and faculty handbooks that identify parties' respective rights and responsibilities. These typically contain statements of the institution's speech and harassment policies. The representations made in these handbooks are legally binding on the institutions that publish them. In many states, the handbooks are viewed as containing the terms of a contract between the school and its faculty and/or students.[84] Even where that is not the case, institutions may be held liable for material misrepresentations that others rely on to their detriment.[85] In this sense, colleges and universities are legally liable for living up to the representations they make to prospective and present students and faculty.

This is largely irrelevant to the abstract commitment to freedom of speech. Impressive declarations that "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

84. *See, e.g.*, Breiner-Sanders v. Geo. Univ., 118 F. Supp. 2d 1, 7 (D.D.C. 1999) (finding that "Georgetown's Faculty Handbook" "defines the rights and obligations of the employee and employer, and is a contract enforceable by the courts"). Georgetown University's faculty handbook states, "[a]ppointment to the University faculty carries with it the rights and responsibilities set forth in this Faculty Handbook or in any policies, contracts, or letters of appointment applicable to the faculty member." *Faculty Rights and Responsibilities*, *in* GEORGETOWN UNIVERSITY FACULTY HANDBOOK, https://facultyhandbook.georgetown.edu/section3/c// [https://perma.cc/4S9R-KWV4].

85. *See* RESTATEMENT (SECOND) OF TORTS § 525 (AM. L. INST. 1977).

to be offensive, unwise, immoral, or wrong-headed"[86] do not commit the universities making them to any concrete action and are not legally enforceable. This is why university counsel are not overly concerned when deans and other administrators act in contravention of such declarations.

The addition of safe harbor provisions into an institution's speech and harassment policies changes things. Safe harbor provisions explicitly state that the college or university will not pursue allegations that one has violated a university policy—and specifically, its harassment policy—if the allegation is based solely on the content of one's speech. A college or university that pursued such allegations would open itself up to lawsuit by the aggrieved party. Thus, a college or university that forced a student club to undergo a defunding hearing for advocating that marriage is a monogamous relationship between a man and a woman would face a breach of contract or misrepresentation lawsuit, as would a college or university that fired an adjunct professor for speculating about the relative performance of African-American students.[87]

The obvious problem with thinking that this could make a difference in practice and the reason why we do not see many such lawsuits today is cost. Few students or professors can afford to hire an attorney to litigate such matters. Further, the prospects for recovering sufficient damages to entice attorneys to take such cases on a contingency fee basis are slim.

But the problem of litigation cost can be overcome by the creation of a pro bono legal organization dedicated to bringing such cases at no charge to the client. Imagine an organization dedicated to protecting freedom of speech on campus that raises capital from like-minded donors. This organization volunteers to pay legal fees for anyone alleging that his or her right to freedom of speech has been infringed by a college or university administration (subject to review to ensure that the allegation has merit).[88] Colleges and universities would now face a realistic prospect of lawsuit should they violate their own commitments, especially the safe harbor provision.

The prospect of such lawsuits does not change the incentives of deans or DEI administrators. But it does change the incentives of one relevant party: university counsel. University counsel are usually not interested in *winning* lawsuits brought against the college or university. They are interested in *preventing* lawsuits from being brought against the college or university in the first place. The combination

86. Chicago Statement, *supra* note 41.

87. Even in the absence of safe harbor provisions, a college or university that assumed definite enough obligations in its policy statements could be subject to legal liability for failing to meet them. Thus, a campus group that incurred the expense of bringing a speaker to campus who was shouted down could sue a college or university whose speech policy stated that "members of the University community . . . may not obstruct or otherwise interfere with the freedom of others to express views they reject or even loathe . . . [and] the University has a solemn responsibility . . . to protect that freedom when others attempt to restrict it" if the school failed to take any action to prevent the disruption.

88. There is actually no need to imagine this. FIRE is currently in the process of creating such an organization. *See* Will Creeley, *Censored on Campus? FIRE Will Defend You,* FIRE (Aug. 1, 2016), https://www.thefire.org/censored-on-campus-fire-will-defend-you/ [https://perma.cc/38PH-JBN5].

of the safe harbor provision and the realistic threat of suit for its violation can motivate university counsel to restrain the conduct of deans and other administrators. Perhaps the university counsel would require allegations of harassment, discrimination, or incivility to be reviewed by a member of the counsel's office who knows how to distinguish content-based complaints from content-neutral complaints before an investigation could proceed. Perhaps they would require DEI staff and other administrators to undergo training to be able to make such a distinction themselves. They would almost certainly insist on revising the college or university's anti-harassment training to stress that students and faculty should *not* file complaints based solely on the content of the viewpoint being expressed. But whatever steps they take would give the college or university's abstract commitment to freedom of speech some real, practical effect.

D. Defeating the First Fear

The fear of being sanctioned by colleges and universities for advocating unpopular ideas does not arise from a lack of institutional commitments to freedom of speech. Almost all colleges and universities make such commitments. The fear arises from the fact that no college or university administrator has the incentive to honor the commitment when it would interfere with the attainment of other institutional goals. The abstract commitment to freedom of speech does not commit the college or university to any definite action and no one is punished for ignoring it. In contrast, administrators are often subject to intense criticism or sanction for failing to achieve the other institutional goals that require its violation. The only way to defeat this fear is to change the incentives of the relevant college or university administrators.

This can be done by adding a safe harbor provision into the college's or university's speech policy (which ideally would be reinforced by a similar provision in the school's harassment policy) and organizing a pro bono legal organization dedicated to protecting free speech rights on campus. The former would reduce the abstract commitment to a definite course of conduct that is legally enforceable. The latter makes legal enforcement feasible.

It is not reasonable to expect college and university bureaucrats to act against their own interests merely to uphold an abstract principle. There must be some cost associated with failing to do so. The threat of damage awards can be that cost. This cost would not alter the bureaucrats' incentives directly, but by motivating university counsel to rein in bureaucratic action, would do so indirectly. And this could go a long way toward defeating the first fear.

III. FREEDOM FROM INDIVIDUAL RETALIATION

Universities and colleges are barred by either the First Amendment (public universities) or their own voluntarily adopted commitment (private universities) from punishing or attempting to suppress the speech of their students and faculty on the basis of its content. No such commitment binds the individual members of the academic community. They are under no obligation to respect other students' or faculty members' freedom of speech, and, indeed, some of them regard

freedom of speech as a tool of oppression wielded by entrenched interests to keep the poor and minorities subordinated.[89] Many believe that it is perfectly appropriate to undertake efforts to restrict or suppress speech that they consider harmful or offensive because of its content. What can be done about this?

To a large extent, the answer is nothing. Expressing an unpopular or offensive position on campus exposes the speaker to a wide range of responses. Some will reply with reasoned argument. But others will respond with expressions of shock or disgust, derision, or *ad hominem* attacks. The speaker may lose friends and suffer varying degrees of social ostracism for his or her words. Such consequences must be borne. Others have as much right to make their own judgments and express their own opinions as the speaker. Disagreement, dislike, derision, and isolation simply go with the territory of advocating a position most people find offensive. Sixty-five years ago this was the plight of those who advocated socialism. Today, it is the lot of those who advocate capitalism. The only thing that can be done about these responses is to tell the speaker to get used to them.

But there are some responses to unpopular speech that speakers should not have to bear. These are efforts to do personal harm to the speaker either emotionally, economically, or physically. These sorts of responses should be discouraged. But how?

There is little point in appealing to university or college administrations in such cases, because the same incentive to quell dissension and mollify protesters that prevents them from living up to the abstract commitment to freedom of speech also prevents them from cracking down on the excesses of those who see themselves as fighting for social justice. Taking action, especially punitive action, against student protesters will usually escalate the conflict, draw additional charges of racial, sexual, and ethnic insensitivity, and generate more media attention. Deans and college presidents will, of course, publicly issue pleas for civility and decry violence and other forms of intimidation, but the lack of concomitant consequences for students employing such tactics sends a clear message that the denunciation is mere rhetoric and may be ignored. The lack of sanction for those who occupy classrooms,[90] dean's or president's offices,[91] and disrupt,[92]

89. *See, e.g.*, Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 444 (1990) ("[A]ll racist speech constructs the social reality that constrains the liberty of non-whites because of their race.").

90. *See* Chris Bodenner, *The Surprising Revolt at the Most Liberal College in the Country*, ATLANTIC (Nov. 2, 2017), https://www.theatlantic.com/education/archive/2017/11/the-surprising-revolt-at-reed/544682/ [https://perma.cc/DKF6-7UEL].

91. *See* Anemona Hartocollis, *Day of Absence Turns Into Days of Rage*, NY TIMES (June 17, 2017), https://www.nytimes.com/2017/06/16/us/evergreen-state-protests.html [https://perma.cc/67XB-6QKC]; Katherine Long, *Students Occupy Seattle University Dean's Office*, SEATTLE TIMES (May 11, 2016), https://www.seattletimes.com/seattle-news/education/students-occupy-seattle-university-deans-office/ [https://perma.cc/9SZ6-WFM3].

92. *See* Miroff, *supra* note 48; Peter Beinart, *A Violent Attack on Free Speech at Middlebury*, ATLANTIC (Mar. 6, 2017), https://www.theatlantic.com/politics/archive/2017/03/middlebury-free-speech-violence/518667/ [https://perma.cc/2T9W-D2PE].

threaten,[93] jeer and spit on,[94] falsely accuse,[95] and intimidate or assault[96] others makes it clear that the university and college will impose no personal cost on those who engage in such behavior.

Similarly, speakers subject to abuse or intimidation for expressing their ideas cannot seek succor by appealing to the university's or college's anti-harassment bureaucracy. This is because harassing people because you don't like their ideas is not harassment. Remember that harassment as defined by law and embodied in university and college policies is a form of discrimination. According to the EEOC, harassing behavior is harassment only when it is "unwelcome conduct *that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information*" (emphasis added). Continuing to use Georgetown as an example, Georgetown's harassment policy defines harassment as "verbal or physical conduct that denigrates or shows hostility or aversion to an individual *because of a Protected Category*" (emphasis added). Harassment *because of opposition to an individual's ideological beliefs* is not illegal, and is not a violation of university or college harassment policy. Such conduct is not within the jurisdiction of the university's or college's DEI bureaucracy—it obviously cannot give rise to a *bias* report. Hence, filing a complaint with the DEI office would be to no avail.

In contrast to my proposal in Part II, in this context, there will almost never be the ability to use the threat of civil liability against the school to motivate it to take official action against students. This is because universities and colleges are not legally responsible for the actions of their students who cause harm to others. At common law, there is no general duty to control the behavior of others. In the absence of an agreement or a special relationship, parties cannot be held liable for the wrongful conduct of others.[97] Unless a university or college has undertaken a voluntary commitment to ensure that its students and faculty do not engage in tortious actions, it cannot be sued for such actions.[98]

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93. *See* Volokh, *supra* note 12; Jaschik, *supra* note 12.

94. *See* Monica Wang, Joey Ye & Victor Wang, *Students Protest Buckley Talk*, YALE DAILY NEWS (Nov. 9, 2015), https://yaledailynews.com/blog/2015/11/09/students-protest-buckley-talk/ [https://perma.cc/8XPD-CT5K].

95. *See* Michael Powell, *Inside a Battle Over Race, Class and Power at Smith College*, N.Y. TIMES (Feb. 24, 2021), https://www.nytimes.com/2021/02/24/us/smith-college-race.html [https://perma.cc/7QBZ-AS6N].

96. *See* Beinart, *supra* note 92.

97. *See* Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 435 (Cal. 1976) ("[U]nder the common law, as a general rule, one person owe[s] no duty to control the conduct of another."); Bradshaw v. Rawlings, 612 F.2d 135, 138 (3d Cir. 1979) ("[C]ollege is not an insurer of its students.").

98. Employers can be sued for the torts of their employees committed in the course of their employment. This is *respondeat superior* liability. However, such liability does not apply to the school/student relationship.

A private bakery recently won a $44 million defamation judgment against Oberlin College as a result of student protests falsely accusing it of racial profiling and racial discrimination. However, the judgment was based on the actions of Oberlin's employees, including its dean of students, for supporting the protest and facilitating the publication of defamatory material, not on the actions of Oberlin's students. *See* Anemona Hartocollis, *Oberlin Helped Students Defame a Bakery, a Jury Says. The*

Nevertheless, civil liability is the answer. It is just that the lawsuits will have to be brought directly against the individuals engaging in the wrongful behavior rather than the institution.

Civil liability is the way our legal system links freedom with responsibility. Our liberal legal system invests us with both the freedom to live our lives as we see fit and the responsibility to do so in a way that does not impose unjustified harm on others.[99] We can do what we want, but when our wrongful actions impose harm on others, civil liability shifts the cost of that harm from the victim back onto us. It makes us personally bear the costs of our wrongful behavior.

A. The Torts

1. The Dignitary Torts: Battery, Assault, and False Imprisonment

The three primary intentional torts are battery, assault, and false imprisonment. Although these torts are usually thought of as designed to protect physical security, they are not so limited in application. In fact, they are designed to protect individuals' dignity from certain forms of insulting intrusion.

At common law, a battery was an intentional touching of another person in a rude, insolent, or angry manner.[100] The essence of the tort was not the touching, but the insult that was being offered along with it. In more contemporary language, a battery is understood as an intentional harmful *or offensive* contact.[101] Thus, a light tap accompanied by a personal insult is a battery. In fact, there does not even have to be direct person to person contact. Snatching a plate out of someone's hand when accompanied by a degrading racial comment constitutes a battery that can give rise to punitive damages.[102]

Similarly, at common law, an assault was an intentional "offer to touch the person of another in a rude or angry manner [that creates] a well-founded fear of an

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Punishment: $33 Million, N.Y. TIMES (June 14, 2019), https://www.nytimes.com/2019/06/14/us/oberlin-bakery-lawsuit.html#:~:text=A%20jury%20found%20that%20the%20college%20and%20its,million%20in%20compensatory%20damages%20awarded%20the%20week%20prior [https://perma.cc/5VGZ-4824]. Conor Friedersdorf, *From Public Shame to the Courtroom,* ATLANTIC (June 15, 2019), https://www.theatlantic.com/ideas/archive/2019/06/the-publicly-shamed-sue-oberlin-college-verdict/591379/ [https://perma.cc/3P8R-SDHW].

99. The term "unjustified" hides complex philosophical issues. What makes harm unjustified? How does one distinguish between harms one may impose on others—dashing another's hopes by breaking off a romantic relationship—from those one may not—punching another in the face for breaking off a romantic relationship? In the present context, none of these issues needs to be addressed. This is because "justified" is not being used as a proxy for any theory of justice or abstract ethical theory. It is simply a standard that encapsulates what ordinary members of the community serving on juries over decades and sometimes centuries believe is fair—one that evolves along with changing societal norms and conventionally accepted morality.

100. *See* Wallace v. Rosen, 765 N.E.2d 192 (Ind. Ct. App. 2002).

101. *See* RESTATEMENT (SECOND) OF TORTS § 13 (AM. L. INST. 1965).

102. *See* Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967).

imminent battery"[103] or in more contemporary language, an intentional effort to make another think that he or she is about to suffer a harmful or offensive contact.[104] Since, by definition, an assault causes no physical harm, the tort must be designed to protect our dignity and sense of safety and well-being.

False imprisonment, too, has this feature. It is not limited to unlawfully locking up or directly restraining another but includes surrounding or enclosing another in such a way that "even though there may be a perfectly safe avenue of escape, . . . the circumstances are such as to make [taking] it offensive to a reasonable sense of decency or personal dignity."[105]

Several of the more high-profile protests of recent years involved tortious attacks on the dignity of speakers. For example, consider the student protests of Charles Murray's speech at Middlebury College that was hosted by Middlebury professor Allison Stanger. Both Murray and Stanger were surrounded, prevented from moving both on foot and in a car, and were pushed and shoved by protestors. Professor Stanger was thrown to the ground and sustained a concussion.[106] In this case, the protesters engaged in conduct that constitutes each of the three torts: false imprisonment, assault, and battery. Protesting students at Yale who lined an exit route from a conference and spit on the attendees as they left were also committing batteries.[107] Student supporters of the Black Lives Matter movement at Dartmouth who entered the library and pushed and physically intimidated the students who were studying there were committing assaults and batteries.[108] Any of the students or other protesters who engaged in these actions (most of which were recorded on video) could have been sued for violating one of the basic dignitary torts.

2. Intentional Infliction of Emotional Distress

Another tort designed to protect our dignity and mental tranquility is the intentional infliction of emotional distress ("IIED"). One commits this tort when one intentionally or recklessly engages in extreme and outrageous conduct that causes another severe emotional distress.[109] IIED does not allow lawsuits for mere insults, threats, annoyances, or petty oppressions. It requires behavior that goes beyond the bounds of decency and should not be tolerated in a civilized community. Where assault and battery protect us against intentional insult to our person, IIED protects against intentional insult to our psyche.

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103. W. Union Telegraph Co. v. Hill, 150 So. 709 (Ala. Ct. App. 1933).

104. *See* RESTATEMENT (SECOND) OF TORTS § 5 (AM. L. INST. 1965).

105. RESTATEMENT (SECOND) OF TORTS § 36 cmt. a (AM. L. INST. 1965).

106. *See* Stanger, *supra* note 12; Beinart, *supra* note 92.

107. Wang et al., *supra* note 94.

108. *See* Khaleda Rahman, *'F*** You, You Filthy White F****!' Black Lives Matter Protesters Scream Epithets at White Students Studying in Dartmouth Library*, DAILY MAIL (Nov. 16, 2015), https://www.dailymail.co.uk/news/article-3321190/F-filthy-white-s-Black-Lives-Matter-protesters-scream-epithets-white-students-studying-Dartmouth-library.html [https://perma.cc/2KJY-GCVL].

109. RESTATEMENT (SECOND) OF TORTS § 46 (AM. L. INST. 1965).

Its relevance to the question of speech on campus is that it can partially close the gap left by the restricted range of application of the law of harassment. Although harassing people because you don't like their ideas may not be illegal harassment, it can constitute IIED. Thus, activities designed to discomfort those one disagrees with—e.g. cyber bullying, doxing, posting false or damaging accusations on social media, organized shunning, etc.—can give rise to a lawsuit when they go too far. A high-profile example of this kind of conduct is the case of Bret Weinstein, a professor at Evergreen State College. When he expressed opposition to a planned "day of absence" on which white students and professors would be asked to stay away from campus, he was subjected to a campaign of intimidation that included being followed, harassed, doxed, and threatened with physical harm sufficient to drive him off campus.[110]

3. Defamation and False Light

The torts of defamation—libel and slander—and false light are designed to protect individuals from harm to their reputations and from public humiliation and embarrassment. Defamation consists of the spoken (slander) or written (libel) publication to a third person of a defamatory statement that one either knows or should know to be false. A statement is defamatory "if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[111] False light consist of giving publicity to a matter that places the other before the public in a false light that would be highly offensive to a reasonable person with knowledge or reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.[112] These torts are designed to protect both our psychological and economic well-being.

Currently, the most psychologically and economically damaging statement that can be made against a member of a university or college community is that he or she has engaged in racial, sexual, or sexual orientation harassment. For professors, such a charge can result in their being removed from the classroom and can significantly impair their prospects for career advancement, if tenured, and retention, if not. For students, it can produce the fear of academic sanctions and social ostracism. When such statements are false, they can be devastating to the individuals accused. They can also give rise to lawsuits for defamation or false light.

When false accusations are made, the person accused may sue for defamation. So if a student who is cleared of sexual misconduct is continually accused of rape by other students, he would have a good defamation suit to bring against his accusers.[113]

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110. *See* Jaschik, *supra* note 12.

111. RESTATEMENT (SECOND) OF TORTS § 559 (AM. L. INST. 1977).

112. *See* RESTATEMENT (SECOND) OF TORTS § 652E (AM. L. INST. 1977).

113. *See* Yaron Steinbuch, *Columbia Settles with Student Accused of Raping 'Mattress Girl,'* N.Y. POST (July 14, 2017), https://nypost.com/2017/07/14/columbia-settles-with-student-accused-of-raping-mattress-girl/ [https://perma.cc/FMM3-M5TU].

So would a professor whose use of the N-word was factually misrepresented in a public letter to portray the professor as racist.[114]

Perhaps more significantly, students and faculty who are subject to attacks on their character that are not clear misrepresentations of fact may seek redress by bringing a false light lawsuit. Thus, a school cafeteria worker who told an African-American student that she was eating at a location reserved for a high school summer camp would have a good case of false light if the student subsequently posted her name, email, and photograph on Facebook above a caption that said, "This is the racist person."[115] Similarly, a professor who was a life-long progressive liberal and a supporter of civil rights but opposed a call to exclude white people from campus for a day could bring a lawsuit against students who mounted a campaign to depict him to the public as a white supremacist.[116]

B. Transaction Costs

If many of the protests against unpopular or offensive speech involve tortious conduct that is personally damaging to the speakers, why don't we see a host of lawsuits being brought? If civil liability is really an effective solution to the problem of individual retaliation, why hasn't it already been used?

The answer is the same as it was when we were discussing suing the university or college as an institution. The transaction costs are too high.[117] Students and professors who have been the targets of such conduct can rarely afford a private attorney, and the prospects for damage awards sufficient to justify a contingency fee are vanishingly small, especially since many of the potential defendants are students who may be judgment proof.

But the solution to this problem is also the same. The pro bono freedom-of-speech-oriented legal organization that was proposed to bring lawsuits against universities and colleges that fail to honor their obligation to preserve freedom of speech on campus can also bring lawsuits against individuals who respond to unpopular or offensive speech with tortious conduct. This can reduce the transaction costs of using the legal system sufficiently to make the threat of lawsuit an effective deterrent to wrongful efforts to suppress or punish unpopular speech.

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114. *See* Debra Cassens Weiss, *Law Prof Sues over N-word Suspension and Says Being White Led to Different Treatment*, A.B.A. J. (Aug. 10, 2020), https://www.abajournal.com/news/article/law-prof-suspended-over-n-word-sues-says-being-white-led-to-different-treatment#:~:text=A%20professor%20at%20the%20Emory%20University%20School%20of,he%20was%20treated%20differently%20because%20he%20was%20white [https://perma.cc/5LR5-CMJ2].

115. *See* Powell, *supra* note 95. As would the school janitor who was not on campus at the time of the event whose name, email, and photograph were also posted with the same caption. *See id*. The cafeteria worker, who was hounded by reporters, hate-filled messages, and public ignominy asked a reporter "What do I do? When does this racist label go away?" *Id*. The answer might be when she brings a lawsuit for false light against the student.

116. *See* Jaschik, *supra* note 12. This is not designed to be an exhaustive list of the civil actions that can be used to fight attempts to suppress unpopular speech. Certain situations can give rise to suits for tortious interference with contractual relationships, trespass, trespass to chattels (intentional damage to private property), and breach of contract as well as those listed above.

117. *See supra* Part II.D.

This use of civil liability would not produce a flood of lawsuits because the pro bono organization would vet the cases in deciding which to pursue. And even then, many of these cases would fail to produce a settlement or a judgment for the plaintiff. But to be effective as a deterrent, a legal sanction—whether civil or criminal—need not be successfully applied to all instances of wrongdoing. It works by making people fear that they will be sanctioned, and this requires only a small number of successful lawsuits. A few $5,000 or $10,000 settlements or judgements against students for spitting on, shoving, intimidating, or harassing people who express unpopular or offensive beliefs, properly publicized, will send a powerful message to the student body to rein in their abusive behavior. A few successful defamation or false light suits against professors, students, or individual administrators will encourage all parties to refrain from making false or unsupported accusations against those with whom they disagree.

Perhaps more significantly in the present context, the existence of the pro bono organization can be an effective deterrent merely by making individuals fear the expense of having to defend against a potential tort suit. This is an example of the chilling effect discussed in Part II,[118] but in this context, the fear is chilling wrongful, rather than permissible, behavior. The fear of having to defend oneself against a lawsuit designed to discourage free expression is indeed malign, but the fear of having to defend oneself against a lawsuit designed to discourage wrongfully harming others is precisely the type of chill we want members of the academic community to feel.

Furthermore, there is good reason to believe that many of these lawsuits will be successful. This is because they would be tried before juries comprised of ordinary members of the community, not academics or students. There is a considerable gulf between conventional notions of justice and fairness and those prevalent on many university and college campuses. The members of a typical jury are likely to believe that racism requires actual racial animus, not merely opposition to affirmative action or diversity training. People who were raised on the bromide that "sticks and stones may break my bones, but names will never hurt me" are unlikely to regard offensive remarks as the equivalent of violence. And unlike university and college administrators, they are unlikely to construe conduct intended to harm or discomfort others as encompassed by students' right to protest.[119]

Evidence for this is supplied by a recent lawsuit brought by Gibson's Bakery against Oberlin College. Following a shoplifting incident that involved the arrest of an African-American student, Oberlin students, apparently with some support from college personnel, mounted a protest against the bakery, accusing it of being

118. *See supra* text accompanying notes 60–62.

119. For example, in response to a defamation lawsuit brought against Oberlin College based in part on the actions of its students, the college released an official statement declaring, "Colleges cannot be held liable for the independent actions of their students. Institutions of higher education are obligated to protect freedom of speech on their campuses and respect their students' decision to peacefully exercise their First Amendment rights." Friedersdorf, *supra* note 98.

"a racist establishment with a long account of racial profiling and discrimination."[120] The students exhorted others to boycott the bakery, and Oberlin suspended its purchase contract with the bakery for two months. After months of this protest, the bakery sued Oberlin for libel, slander, and tortious interference. Being presented with evidence of the virulent nature of the protest and the lack of any record of racial profiling or racial discrimination by the bakery, a jury of ordinary citizens awarded the bakery $11 million in compensatory damages and $33 million in punitive damages.[121]

C. Defeating the Second Fear

As was the case with the first fear, the second persists because of the underlying incentives of the parties. Opponents of unpopular speech derive significant personal benefit from demonstrating outrage at the "offensive" ideas of others. Specifically, they derive enhanced status within their particular "in-group" by engaging in what has come to be called moral grandstanding.

Moral grandstanding is the use of moral talk to cause others to believe that "one is worthy of respect or admiration because one has some particular moral quality—for example, an impressive commitment to justice, a highly tuned moral sensibility, or unparalleled powers of empathy."[122] One can engage in moral grandstanding by "piling on"—reiterating a proposition others have endorsed to show that one is on the right side; "ramping up"—making increasingly stronger claims about the matter being considered (e.g., that statement is offensive; that statement is not just offensive, it makes me feel unsafe; that statement does not just make me feel unsafe, it denies my existence); "trumping up"—insisting on the existence of a moral problem where there is none; displaying levels of excessive outrage, and claiming the moral position one supports is self-evidently true.[123] These behaviors, all of which may be found in the current campus protests, benefit those who engage in them by elevating their standing within the aggrieved group.

Abstract calls for civility and engagement in respectful dialogue fall on deaf ears. None of those attempting to stifle unpopular or offensive speech on campus gains by responding to such calls. And, like the abstract commitment to freedom of speech discussed in Part II, no campus administrator has an incentive to enforce them.

Many of us can remember either being kids or raising kids. Those of us who can, recall that kids learn what constitutes appropriate behavior by pushing boundaries. They keep testing the limits of acceptable conduct until they meet firm resistance coupled with adverse consequences. In this respect, college "kids" are acting precisely as we should expect them to. With university and college

120. *Id.*
121. *See id.*
122. Justin Tosi & Brandon Warmke, *Moral Grandstanding*, 44 PHIL. & PUB. AFFS. 197, 199 (2016).
123. *See id.* at 203–08.

administrations unwilling to enforce limits on what constitutes an acceptable response to unpopular speech, it should be no surprise that student behavior crosses the line from peaceful protest to harmful and oppressive conduct.

Given these incentives, it is pointless to continually decry the state of campus culture and exhort students (and sometimes faculty) to behave better. Defeating the second fear requires us to alter the incentive structure. Fortunately, the tool that is needed to do so is right at hand: civil liability.

The common law embodies centuries of trial-and-error learning about the limitations on our freedom that are necessary to produce peaceful, cooperative behavior. Civil liability is the way we enforce those limits. As noted above,[124] it is the way our system links freedom with responsibility. In the present context, civil liability is a way of making those who respond to unpopular speech by personally harming the speaker pay a price for doing so. It supplies the needed incentive for them to restrain themselves. And all that is required to operationalize it in the academic context is the pro bono legal organization discussed in Part II that can reduce the transaction costs of bringing suit, educate students and faculty about their opportunity to do so, and publicize successful results.

There is no way to fully defeat the second fear. Advocates of unpopular positions will always face not merely disagreement, but derision, ignominy, and ostracism. But this is how it should be. It takes courage to speak out against socially entrenched positions. Nevertheless, those who take such a stand should not have to fear that they will be subject to personal harm for doing so. This aspect of the second fear can be significantly reduced by employing civil liability to impose the cost of such harm back on its authors.

IV. CONCLUSION

In the 1950s, the entertainment industry was paralyzed with fear. Those labeled a communist or communist sympathizer would lose their jobs and be "blacklisted" to prevent them from obtaining another one. This would be the case regardless of whether the allegation was true. They would also lose many of their friends, who became afraid to associate with them for fear of being added to the list. The only way one under suspicion could avoid being blacklisted was to identify others as communists—to "name names." No one dared express sympathy for left-wing or socialist causes for fear of being overheard and named.[125]

Victims of the blacklist could not turn to the government for help because it was the government that was promoting the blacklist. The House Un-American Activities Committee was publishing official booklets instructing the public how to identify communists and communist sympathizers[126] and identifying the

124. *See supra* Part III.A.3.

125. There are many accounts of the blacklist. The one most relevant to this article is contained in LOUIS NIZER, THE JURY RETURNS 225–33 (1966).

126. *See* COMM. ON UN-AM. ACTIVITIES, 100 THINGS YOU SHOULD KNOW ABOUT COMMUNISM, H.R. DOC. NO. 82–136 (1949).

groups and individuals who should be shunned.[127] Edward R. Murrow famously took on Senator Joseph McCarthy in a series of broadcasts of his CBS news show *See It Now*.[128] Although this helped end McCarthy's political attacks on government employees, it did not end the blacklist.

The blacklist was ended by two men: attorney Louis Nizer and his client John Henry Faulk. Faulk was a radio performer in the 1950s who was falsely accused of communist ties and blacklisted. He and Nizer brought a libel suit against the organization and individuals that not only made the accusation against him but were in the business of maintaining the blacklist, asking for compensatory damages and $2 million in punitive damages, a huge sum for the time. Over the course of the trial, Nizer acquainted the twelve ordinary citizens who comprised the jury with the practices of those behind the blacklist. During its deliberations, the jury sent the judge a note asking whether it was permitted to award the plaintiff more money in punitive damages than he had requested.[129] Informed that it could, the jury awarded Faulk $3.5 million in punitive damages. The blacklist ended the next day.

The blacklist was not ended by the intelligentsia of the time issuing either high-minded public exhortations to adhere to the American values of openness and toleration or vituperative condemnations of it as an ideological inquisition. Such calls to the public's conscience did not change the incentives of those maintaining the blacklist, who reaped both psychological benefits—the feeling power over the entertainment industry—and financial rewards—collecting fees for clearing names—from it. The blacklist was ended by a plaintiff's attorney and his client using the civil liability system to change the incentives of the parties.

Today, it is the academy that is haunted by fear. Those who advocate unpopular or "offensive" positions can be labeled racist, sexist, homophobic or merely insensitive to the plight of socially subordinated minorities, whether the allegation is true or not. This can result in significant career reverses for faculty and reduced educational opportunities for students. It can also result in shunning by friends or colleagues and increased social isolation. As a result, many are afraid to openly express heterodox positions.

Neither abstract commitments to freedom of speech, high-minded calls for civil discourse, nor stern condemnation of abusive responses to unpopular speech are likely to change this situation. Such general appeals to conscience do not affect the incentives of those driving the abuse. Countering the climate of fear on today's university and college campuses requires changing these incentives. Fortunately, the tool for doing so is readily available, and Louis Nizer and John Henry Faulk have shown us how to use it. All that is needed is the adoption of the safe harbor provision and the creation of a pro bono legal organization dedicated to the preservation of freedom of speech on campus.

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127. *See* COMM. ON UN-AM. ACTIVITIES, GUIDE TO SUBVERSIVE ORGANIZATIONS AND PUBLICATIONS, H.R. DOC. NO. 82–137 (1951).

128. *See* Joseph Wershba, *Murrow vs. McCarthy: See it Now*, N.Y. TIMES, Mar. 4, 1979 (§ SM), at 12.

129. This event was depicted in the movie *The Verdict* and is often regarded as overly melodramatic and unrealistic. But it was the real-world outcome of the John Henry Faulk trial.