

## Speech Narcissism

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## SPEECH NARCISSISM

*Terri R. Day\* and Danielle Weatherby\*\**

### Abstract

From its embryonic stage during the civil rights era to its modern-day presence on college campuses, the political correctness movement has undergone an extreme metamorphosis. In the university setting, it was originally intended to welcome diverse views by encouraging minority students to feel part of the learning environment and to contribute to the “marketplace of ideas.” Recently, however, as students more frequently demand trigger warnings and safe spaces in response to speech that they deem personally offensive, the use of political correctness measures on college campuses has had the unintended consequence of chilling speech. Contrary to longstanding First Amendment principles, college campuses are becoming environments in which the most vulnerable among the student population can exercise a “heckler’s veto,” silencing speech that is subjectively offensive to the most sensitive students.

During the 2016 presidential election, Trump supporters praised his unfiltered campaign rhetoric and divisive Tweets while others condemned them, criticizing his unscripted approach as offensive in the name of political correctness. The contrast between Trump supporters’ chants of “lock her up” at rallies and college students’ demands for safe spaces and trigger warnings is noteworthy; these diverse groups fall at the opposite ends of a speech-tolerance spectrum. On the one end of the spectrum, political correctness is shunned; on the other end, it is demanded.

In debunking the purported justifications for the use of extreme political correctness measures on college campuses, this Article adds to the ongoing discussion of the changing landscape of privately imposed speech rules for public discourse and posits that both ends of the speech-tolerance spectrum reflect a form of speech narcissism. The new normal in speech rights has abandoned the central meaning of the First Amendment—the freedom to engage in “uninhibited, robust, and wide-open” debate on matters of public concern. The “my way or the highway”

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approach to public discourse is the antithesis of the free speech principles thought essential to secure liberty and democracy.

In response to this trend, state legislatures are passing Freedom of Speech statutes that safeguard speech in the classroom and on the quad. While these laws are a positive step toward countering the negative effects of political correctness, this Article suggests that speech offensiveness is a matter of ethics and education that cannot be remedied solely by law. “True grit” and compassion training are necessary antidotes to the thin-skinned, speech-averse students who demonstrate zero tolerance for any expression that is personally offensive.

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## INTRODUCTION

Political correctness, a term with a surprising history and various meanings, took center stage in the 2016 presidential election.<sup>1</sup> As a candidate, President Donald Trump defended his frequently uttered offensive comments and brash Tweets, quipping that he did not have time for political correctness.<sup>2</sup> In modern parlance, “political correctness” is understood in the context of speech. One reporter defined the contemporary meaning of political correctness as referring to “a reluctance or discouragement of people from saying something terribly unpopular.”<sup>3</sup> During the 2016 presidential election, political correctness became “a right-wing insult” lobbed at “lefty-liberals.”<sup>4</sup>

Wide use of this often bantered term dates back to the early-to-mid twentieth century and Stalin’s Communist Party.<sup>5</sup> In Soviet Russia, Kremlin advisers called someone who toed the party line politically correct.<sup>6</sup> It was a positive characterization of “the sort of person who would go far.”<sup>7</sup>

In the United States, the first widespread use of the term also had a positive connotation. In the 1960s, liberals supporting civil rights, black power, and the feminist movement and anti-communist conservatives believed that to be politically correct—true to their respective political views and social movements—was beneficial to society.<sup>8</sup>

A shift in the meaning and use of the term occurred in the 1990s. No longer a complimentary term, political correctness became a partisan, pejorative descriptor, “owned by the left and despised by the right.”<sup>9</sup> In the late 1990s, articles in *Forbes* and *Newsweek* used the term “thought police” as a synonym for political correctness.<sup>10</sup> But, it was Dinesh

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1. *The Unlikely Origins of the Phrase ‘Politically Correct,’* KNOWLEDGE NUTS (May 28, 2015), <http://knowledgenuts.com/2015/05/28/the-unlikely-origins-of-the-phrase-politically-correct/>.

2. Joshua Florence, *A Phrase in Flux: The History of Political Correctness*, HARV. POL. REV. (Oct. 30, 2015), <http://harvardpolitics.com/united-states/phrase-flux-history-political-correctness/>.

3. *Id.* (quoting Sanford J. Ungar, former host of NPR’s *All Things Considered* and former Washington editor of *The Atlantic*).

4. KNOWLEDGE NUTS, *supra* note 1.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. See Florence, *supra* note 2.

10. See Jerry Adler & Mark Starr, *Taking Offense: Is This the New Enlightenment on Campus or the New McCarthyism?*, NEWSWEEK, Dec. 24, 1990, at 48; see also Michael Novak, *Thought Police*, FORBES, Oct. 1, 1990, at 212 (discussing how American colleges have embraced politically correct thinking).

D'Souza's *Illiberal Education: The Politics of Race and Sex on Campus* that first linked political correctness to a negative trend on college campuses.<sup>11</sup>

Initially, the political correctness movement on college campuses was intended to welcome diverse views by encouraging minority students to feel part of the learning environment and to contribute to the “marketplace of ideas.”<sup>12</sup> Even the Supreme Court recognized the significance of a “‘critical mass’ of [underrepresented] minority students”<sup>13</sup> in enriching “the expansive freedoms of speech and thought associated with the university environment.”<sup>14</sup> University administrators directly linked increased diversity to “livelier, more spirited, and simply more enlightening and interesting” classroom discussion.<sup>15</sup> The real-life, hoped-for benefit of more robust discussion and diverse voices in the classroom was to prepare students for an “increasingly global marketplace . . . through exposure to widely diverse people, cultures, ideas, and viewpoints.”<sup>16</sup>

But, as diversity increased on campuses nationwide, colleges and universities implemented measures, including speech codes and restrictive Title IX enforcement mechanisms, to ensure “politically correct” speech and regulate hate speech. Despite their pure intent of promoting more vigorous and respectful speech and avoiding Title IX

11. See KNOWLEDGE NUTS, *supra* note 1. See generally DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1991) (discussing the impact of race and gender on scholarship in universities).

12. See Moira Weigel, *Political Correctness: How the Right Invented a Phantom Enemy*, *GUARDIAN* (Nov. 30, 2016, 1:00 PM), <https://www.theguardian.com/us-news/2016/nov/30/political-correctness-how-the-right-invented-phantom-enemy-donald-trump>; Florence, *supra* note 2; see also TAMMY BRUCE, *THE NEW THOUGHT POLICE: INSIDE THE LEFT'S ASSAULT ON FREE SPEECH AND FREE MINDS* 223–26 (2001) (discussing the argument that speech and thought control “is needed to end sexual harassment on campus”).

13. *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003), *superseded by state constitutional amendment*, MICH. CONST. art. I, § 26 (recognizing diversity as a compelling government interest and upholding race as one of many factors the University of Michigan Law School could consider in making admissions decisions). Subsequent to *Grutter*, the citizens of Michigan amended the Michigan State Constitution to prohibit race-based admissions policies. *Schuette v. BAMN*, 134 S. Ct. 1623, 1629 (2014). In *Schuette v. BAMN*, the Court upheld the constitutionality of Michigan's constitutional amendment as applied to the use of race as a criterion in admissions to public educational institutions. See *id.* at 1638.

14. *Grutter*, 539 U.S. at 329. In justifying its race-based admissions policy, the University of Michigan Law School claimed that its right to select a critical mass of racially diverse students would achieve the “robust exchange of ideas” necessary to its mission of educational excellence. *Id.*

15. *Id.* at 330.

16. *Id.* at 308.

liability, these measures had the unintended consequence of chilling speech.<sup>17</sup>

Moreover, the political correctness doctrine has provided a sword for students to silence offensive speech.<sup>18</sup> Contrary to longstanding First Amendment principles, college campuses have become environments in which the most vulnerable among the student population exercises a “heckler’s veto,” silencing speech that is subjectively offensive to the most sensitive students according to their unique, individual perspectives.

This alarming trend on college campuses has been the subject of recent commentary<sup>19</sup> by legal scholars and articles in mainstream popular media.<sup>20</sup> Greg Lukianoff, a constitutional lawyer and CEO of the Foundation for Individual Rights in Education, has contributed greatly to this dialogue.<sup>21</sup> He, like others, contrasts the current political correctness movement to that of the 1980s and ’90s as one of protecting “emotional well-being” rather than promoting diverse perspectives that enhance the educational learning environment.<sup>22</sup> The present-day political correctness movement has spawned a vocabulary of new terms such as “micro-

17. See Weigel, *supra* note 12; see also John K. Wilson, *Myths and Facts: How Real Is Political Correctness?*, 22 WM. MITCHELL L. REV. 517, 519 (1996) (discussing the negative effects of “politically correct” speech on academic freedom).

18. See, e.g., Conor Friedersdorf, *The Glaring Evidence that Free Speech Is Threatened on Campus*, ATLANTIC (Mar. 4, 2016), <https://www.theatlantic.com/politics/archive/2016/03/the-glaring-evidence-that-free-speech-is-threatened-on-campus/471825/> (noting several student attempts at speech suppression, including instances where students demanded the removal of professors after an upsetting email, passed speech codes described as “Orwellian,” demanded sanctions for “culturally insensitive” classmates, and pushed to defund a student newspaper after it published an editorial critical of Black Lives Matter).

19. See, e.g., ERWIN CHEREMINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* (2017) (defending robust free speech principles on college campuses).

20. See *id.*; Wendy Kaminer, *The Heckler’s Veto*, ATLANTIC (Mar. 31, 2010), <https://www.theatlantic.com/national/archive/2010/03/the-hecklers-veto/38252/>; see also Anne Neal, *Colleges Are Paralyzed by the ‘Heckler’s Veto,’* N.Y. TIMES (May 19, 2014), <https://www.nytimes.com/roomfordebate/2014/05/19/restraint-of-expression-on-college-campuses/colleges-are-paralyzed-by-the-hecklers-veto> (stating that “[c]olleges and universities are becoming places where fear of giving offense is silencing matters of importance”); Allan C. Brownfield, *The ‘Heckler’s Veto’ on America’s University and College Campuses*, CMTYS. DIG. NEWS (Nov. 30, 2015), <http://www.commdiginews.com/business-2/the-hecklers-veto-on-americas-university-and-college-campuses-53011/> (discussing the negative effects of the “heckler’s veto” on academic freedom); Stanley Kurtz, *Understanding the Campus Free-Speech Crisis*, NAT’L REV. (Apr. 12, 2017), <http://www.nationalreview.com/corner/446634/campus-free-speech-crisis> (discussing the “anti-free-speech” crisis on college campuses).

21. See *Free Speech Advocate on the State of College Campuses*, NPR (May 29, 2017, 5:01 AM), <http://www.npr.org/2017/05/29/530555442/free-speech-advocate-on-the-state-of-college-campuses>.

22. Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/>.

aggression,”<sup>23</sup> “safe spaces,”<sup>24</sup> “trigger warnings,”<sup>25</sup> and “vindictive protectiveness.”<sup>26</sup>

Pundits explain President Trump’s surprising victory, in part, as a backlash to this modern manifestation of political correctness, which conservative voters perceive as a liberal movement based on identity politics and cultural shifts in American society.<sup>27</sup> The contrast between Trump supporters’ chants of “lock her up” at rallies<sup>28</sup> and college students’ demands for safe spaces and trigger warnings is remarkable; these diverse groups fall at the opposite ends of a speech-tolerance spectrum. On the one end of the spectrum, political correctness is shunned; on the other end, it is demanded.

This Article adds to the ongoing discussion of this changing landscape of privately imposed speech rules for public discourse<sup>29</sup> and posits that both ends of the speech-tolerance spectrum reflect a form of speech narcissism. This new “normal” in speech rights has abandoned the central meaning of the First Amendment—the freedom to engage in “uninhibited, robust, and wide-open” debate on matters of public concern.<sup>30</sup>

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23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. See Weigel, *supra* note 12.

28. See Peter W. Stevenson, *A Brief History of the ‘Lock her up!’ Chant by Trump Supporters Against Clinton*, WASH. POST (Nov. 22, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/11/22/a-brief-history-of-the-lock-her-up-chant-as-it-looks-like-trump-might-not-even-try/?utm\\_term=.e539710adfae](https://www.washingtonpost.com/news/the-fix/wp/2016/11/22/a-brief-history-of-the-lock-her-up-chant-as-it-looks-like-trump-might-not-even-try/?utm_term=.e539710adfae).

29. This Article focuses on speech in the university context and the political correctness movement that has resulted in sanitized speech. The other end of the speech-tolerance spectrum, where individuals shun political correctness and say what they wish, will be the focus of a separate article. The scope of this Article is limited to the use of trigger warnings, safe spaces, and other political-correctness measures, as demanded by the student listener in the university setting. This Article does not address the recent controversy of violent demonstrations by Neo-Nazi and White Supremacist groups similar to what occurred on the University of Virginia campus on August 12, 2017. The authors do not condone anti-Semitic or racist speech. Hate speech coupled with violence, physical threats, a breach of the peace, or incitement to violence ceases to be pure speech. However, to quote Justice Holmes: “[F]ree thought—not free thought for those who agree with us, but freedom for the thought that we hate.” *Schnierderman v. United States*, 320 U.S. 118, 138 (1943) (quoting *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting) (discussing free expression as an imperative principle of the Constitution in a citizenship case requiring applicant to demonstrate attachment to the principles of the Constitution)).

30. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

In the legal context, the First Amendment applies to public universities only.<sup>31</sup> Under First Amendment jurisprudence, public universities may regulate student speech to various degrees depending on the type of forum and the pedagogical interest.<sup>32</sup> However, this Article discusses political correctness in a broad context, focusing on First Amendment principles, rather than doctrine. Institutions of higher learning, whether public or private, serve an important role in developing our Nation's future "intellectual leaders."<sup>33</sup> Indeed, "universities are intended to function as marketplaces of ideas."<sup>34</sup> In principle, the First Amendment's central meaning is the same as the central mission of higher education: to promote and foster a marketplace of ideas. But modern political correctness on college campuses, whether in the classroom or on the campus quad, prohibits the exchange of values, views, and ideologies, so critical to the mission of higher education.<sup>35</sup>

Part I of this Article summarizes the types of measures used by colleges and universities to chill speech on campus. The "therapeutic" justification for silencing offensive speech and providing safe spaces for college students is to protect emotional well-being or to prevent PTSD. Part II debunks this justification. The professional literature unequivocally concludes that, in treating PTSD, avoidance of upsetting triggers is counterintuitive.<sup>36</sup> Part III of this Article considers the First Amendment implications of the current political correctness movement, focusing on traditional First Amendment speech values of liberty, dignity, and equality. As early justices began to breathe life into the speech clause, Justices Oliver Wendell Holmes, Jr. and Louis Brandeis

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31. See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991) ("The initial question we face is whether [there is] . . . 'state action' . . . such that the protections of the First Amendment are triggered.").

32. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); see also *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 242 (3d Cir. 2010) (discussing the "difference[s] between the extent that a school may regulate student speech in a public university setting as opposed to that of a public elementary or high school"); *Ward v. Polite*, 667 F.3d 727, 734 (6th Cir. 2010) (explaining that "although educators may 'limit[]' or 'grade[]' speech in the classroom in the name of learning' . . . the First Amendment does not permit educators to invoke curriculum 'as a pretext for punishing [a] student for her . . . religion'"); *Kincaid v. Gibson*, 236 F.3d 342, 347 (6th Cir. 2001) (discussing how public universities can regulate student speech, to a limited degree, under First Amendment jurisprudence).

33. *McCauley*, 618 F.3d at 243 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.")).

34. *Id.* at 244.

35. See *infra* Part IV.

36. See *NCAC Report: What's All This About Trigger Warnings?*, NAT'L COAL. AGAINST CENSORSHIP (Dec. 2015), <http://ncac.org/resource/ncac-report-whats-all-this-about-trigger-warnings>.



gave meaning to the First Amendment by articulating its core values.<sup>37</sup> These pioneers of First Amendment jurisprudence recognized that public discussion, even when caustic and vehement, is essential to liberty. Their early opinions may articulate idealized notions of First Amendment values, but they are more than historical aspirations. The “my way or the highway”<sup>38</sup> approach to public discourse has permeated the classrooms of public universities and the halls of Congress. Unfortunately, this approach is the antithesis of the free speech principles thought essential to secure liberty and democracy.

Recently, state legislatures have responded to the controversy surrounding appropriate speech at public universities, where political correctness collides with First Amendment guarantees, by passing Freedom of Speech and Press statutes that apply to colleges and universities.<sup>39</sup> Part IV surveys these statutes. To the extent these statutes provide protection for teachers and students that are subject to speech codes punishing offensive speech<sup>40</sup> and retaliatory actions, Part IV posits that this legislative trend is a positive step to counter the negative effects of political correctness.<sup>41</sup> In conclusion, this Article suggests that speech offensiveness is a matter of ethics and education that cannot be remedied solely by law. “True grit”<sup>42</sup> and compassion<sup>43</sup> training are necessary antidotes to the thin-skinned, speech-averse students who demonstrate zero tolerance for any expression that is personally offensive.

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37. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .”); see also *Whitney v. California*, 274 U.S. 357, 375 (1927), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (Brandeis, J., concurring) (“Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . .”).

38. Uri Friedman, *What Is a Populist? And Is Donald Trump One?*, ATLANTIC (Feb. 27, 2017), <https://www.theatlantic.com/international/archive/2017/02/what-is-populist-trump/516525/>.

39. See *infra* Part IV.

40. See, e.g., *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 244 (3d Cir. 2010).

41. See Rick Anderson, *University of Oregon Censures White Professor for Wearing Blackface to Halloween Party*, L.A. TIMES (Dec. 23, 2016, 1:15 PM), <http://www.latimes.com/nation/la-na-oregon-blackface-20161223-story.html> (detailing the discipline of a professor who, intending to make a political statement protesting the lack of diversity in the medical field, dressed up as a doctor with a black face at a Halloween party held at her own house).

42. *Testing Students’ True Grit*, N.Y. TIMES (Mar. 4, 2016), <https://www.nytimes.com/roomfordebate/2016/03/04/testing-students-true-grit>.

43. Paul Bloom, *The Perils of Empathy*, WALL ST. J. (Dec. 2, 2016, 9:38 AM), <https://www.wsj.com/articles/the-perils-of-empathy-1480689513> (discussing the differences between cognitive empathy, emotional empathy, and compassion and effects in politics and policy).

## I. BACKGROUND: CENSORS, TRIGGER WARNINGS, AND SPEECH CODES

The First Amendment states: “Congress shall make no law . . . abridging the freedom of speech.”<sup>44</sup> While never applied absolutely, the words chosen by our Framers guaranteeing the freedom of speech (and other liberties guaranteed in the Bill of Rights) connote limitations on government.<sup>45</sup> The early decisions of Justices Holmes and Brandeis gave meaning to the First Amendment by articulating its core values.<sup>46</sup> Justice Holmes spoke of “free trade in ideas” and “the best test of truth.”<sup>47</sup> Justice Brandeis spoke of “processes of education,” “the power of reason,” and “public discussion [as] a political duty.”<sup>48</sup> Indeed, despite well-defined exceptions, the predominant and long-standing understanding of the First Amendment is that it provides a zone of privacy for citizens to speak and think what they wish without government interference.<sup>49</sup>

In contrast to this negative theory of liberty (freedom from government intrusion), there is a contrasting theory that would put government in an active role, regulating speech rights based on values of equality and dignity.<sup>50</sup> This view encourages government to protect minorities from speech that is demeaning and hateful by taking an

44. U.S. CONST. amend. I (originally, this was the third amendment proposed to the states for ratification; on March 4, 1789, two thirds of both Houses of Congress voted to present twelve amendments to the legislatures of all the states, as amendments to the U.S. Constitution, when ratified by three-fourths of the state legislatures; the first two proposed amendments were not ratified by the states).

45. See, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713, 716–17 (1971) (Black, J., concurring) (explaining that the bill of rights was intended as a limitation on government).

46. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”); see also *Whitney v. California*, 274 U.S. 357, 375 (1927), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (Brandeis, J., concurring) (“Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . .”).

47. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

48. *Whitney*, 274 U.S. at 375–77 (Brandeis, J., concurring).

49. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

50. See Frederick Schauer, *The Speech-ing of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 347 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); see also CATHARINE MACKINNON, *ONLY WORDS* 108 (1993) (discussing certain types of speech that should not be protected by the First Amendment); JEREMY WALDRON, *THE HARM IN HATE SPEECH* 105 (2012) (stating that “[d]ignity . . . is precisely what hate speech laws are designed to protect”); Barak Orbach, *On Hubris, Civility and Incivility*, 54 *ARIZ. L. REV.* 443, 456 (2012) (opining that using the terms “civility” and “incivility” may hinder group deliberation).

affirmative stance against harmful speech and officially restricting sexist and racist speech.<sup>51</sup>

These divergent positions on the role of government as a speech referee are premised on contrasting notions of the vulnerability of American citizens to tolerate offensive speech. The “laissez faire” theory of limited government<sup>52</sup> is based on the notion that Americans are “rugged individuals” who can withstand robust public debate even when the speech becomes offensive.<sup>53</sup> The other view recognizes that our nation’s history of “official” discrimination against minorities requires government to protect those minorities from the harmful effects of hate speech, especially when uttered by majority groups.<sup>54</sup>

#### A. *The Thin-Skinned Student: Hyper-Sensitive Students and Universities’ Silencing of Offensive Speech*

To some, the mere label of a “thin-skinned, hyper-sensitive” student is offensive in and of itself. No doubt, such labeling trivializes the hurt that offensive speech can cause. But, when offensiveness becomes the litmus test for what constitutes appropriate speech, a robust dialogue and a vigorous exchange of ideas become meaningless concepts.

Practically every day there are reports of more incidents of students pressing for political correctness on college campuses. The following discussion highlights a representative sample of speech intolerance on college campuses, demonstrating that the Holmesian notion of an open exchange of ideas has yielded to silence through self-censorship or censorship caused by the drowning shouts of those who oppose the speech. Although some of these incidents occurred on private campuses, lacking the state action required to trigger the First Amendment, the discussion focuses on the broader principles promoted by free speech.

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51. Schauer, *supra* note 50, at 348.

52. *Barnette*, 319 U.S. at 639–40.

[The Bill of Rights] principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men’s affairs. We must transplant these rights to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls.

*Id.*

53. See *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring) (stating that “[t]hose who won our independence by revolution were not cowards” and did not fear “free and fearless reasoning” in the context of free speech); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

54. See Schauer, *supra* note 50, at 348–49.

During the presidential campaign, students at Emory University awoke to chalk messages written across campus that read “Trump 2016.”<sup>55</sup> Students at the school said they “no longer fe[el] safe”<sup>56</sup> after seeing the messages of support for a candidate who they considered to be “the figurehead of hate, racism, xenophobia, and sexism in America.”<sup>57</sup> A group of forty to fifty students protested in the school’s quad, shouting, “You are not listening! Come speak to us, we are in pain!”<sup>58</sup> The students then moved into the administration building, yelling, “It is our duty to fight for our freedom. It is our duty to win. We must love each other and support each other. We have nothing to lose but our chains.”<sup>59</sup>

After speaking with the protestors, the university president said, “I cannot dismiss their expression of feelings and concern as motivated only by political preference or over-sensitivity.”<sup>60</sup> Though the university had expressly stated that the content of the message was not inappropriate, the president then listed measures the university would take to ensure a “safe environment” on campus and honor the concerns of the offended students, including immediate policy changes and “structured opportunities for difficult dialogues.”<sup>61</sup>

Similarly, when the College Republicans at DePaul University wrote pro-Trump messages on their campus in April, the school washed the chalk slogans away by the next morning.<sup>62</sup> Other students at the university felt that the messages were offensive and disrespectful.<sup>63</sup> Though the College Republicans maintained that they read and followed the chalking guidelines, the vice president for student affairs said that the messages qualified as public political campaigning and were therefore prohibited based on the school’s tax-exempt, nonprofit status.<sup>64</sup>

Administrators at Georgetown University have also pointed to the nonprofit tax codes as a way to limit students from engaging in political

55. Susan Svrluga, *Someone Wrote ‘Trump 2016’ on Emory’s Campus in Chalk. Some Students Said They No Longer Feel Safe.*, WASH. POST (Mar. 24, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/03/24/someone-wrote-trump-2016-on-emorys-campus-in-chalk-some-students-said-they-no-longer-feel-safe/>.

56. *Id.*

57. Max Kutner, *Emory Students Explain Why ‘Trump 2016’ Chalk Messages Triggered Protest*, NEWSWEEK (Mar. 25, 2016), <https://www.newsweek.com/emory-trump-chalk-protests-440618>.

58. *See* Svrluga, *supra* note 55.

59. *Id.*

60. *Id.*

61. *Id.*

62. Kirsten Onsgard, *Holtschneider Urges Openness and Kindness After Chalking Controversy*, DEPAULIA (Apr. 15, 2016), <http://depauliaonline.com/21685/news/holtschneider-urges-openness-kindness-chalking-controversy/>.

63. *Id.*

64. *Id.*

speech.<sup>65</sup> In September 2015, the university denied a second-year law student's request to campaign on campus with other students for Senator Bernie Sanders.<sup>66</sup> The school's written response to the student's request stated that, based on Georgetown's tax code exemptions, the IRS required that the university prohibit students from engaging in expression of their political views on campus.<sup>67</sup> A month later, the university prohibited the same group of students from attracting others on campus to come to their debate watch party.<sup>68</sup>

When students at the University of Michigan hung posters with "racially charged messages" around campus, University President Mark Schlissel first said that the university would defend individuals' right of free speech on campus.<sup>69</sup> He later "clarified" his statement, explaining that although administrators were not allowed to remove the posters and that he would probably be fired if he did so, he would stand by any student who wanted to take them down.<sup>70</sup>

At the University of Wisconsin-Stout, students and faculty voiced concerns that two 1930s Cal Peters paintings on display depicted a painful time in Native American history.<sup>71</sup> In response, the university chancellor moved the paintings to a new area "where they [could] be viewed in a 'controlled' manner."<sup>72</sup>

University of Massachusetts at Amherst resident assistants warned students last fall that jokes about the Cincinnati Zoo gorilla, Harambe, who was shot in May 2016, were "not only derogatory, but also micro-aggressions" towards other students.<sup>73</sup> Since the university has a residential community focusing on African-American heritage with a floor named "Harambe," the assistants warned that popular "Dicks out

65. Natalie Johnson, *Colleges Use Tax-Exempt Status to Excuse Restricting Free Speech*, DAILY SIGNAL (Mar. 2, 2016), <http://daily.signal.com/2016/03/02/colleges-blame-tax-code-for-suppressing-free-speech-on-campus-students-say/>.

66. *Id.*

67. *Id.*

68. *Id.*

69. Adam Steinbaugh, *University of Michigan President: I'll Stand Next to You While You Censor Posters*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Oct. 5, 2016), <https://www.thefire.org/university-of-michigan-president-ill-stand-next-to-you-while-you-censor-posters/>.

70. *Id.*

71. Alex Morey, *FIRE, NCAC Disappointed with UW-Stout's New Plan for Controversial Paintings*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Aug. 9, 2016), <https://www.thefire.org/fire-ncac-disappointed-with-uw-stouts-new-plan-for-controversial-paintings/>.

72. *Id.*

73. Sarah McLaughlin, *UMass RAs Are Not Amused by Your Harambe Memes*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Sept. 6, 2016), <https://www.thefire.org/umass-ras-are-not-amused-by-your-harambe-memes/>.

for Harambe” jokes were sexual assaults that could be subject to Title IX investigation.<sup>74</sup>

Along with protests and complaints to administration, some offended college students have been taking matters into their own hands by attempting to silence speech with which they do not agree and preventing others from hearing it. At the University of California at Berkeley, members of the Student Labor Committee stormed the stage during a public forum exploring Bay Area culture in an attempt to impose a “heckler’s veto” and shut down the event.<sup>75</sup> A member of the panel, Marc Benioff, founder of Salesforce.com, was allegedly assaulted during the forceful physical protest.<sup>76</sup>

Just a few months later, the Berkeley College Republicans were assaulted by protesting students while tabling on campus.<sup>77</sup> The table displayed a cutout of Donald Trump, which protestors believed to “represent[] hate.”<sup>78</sup> When the College Republicans refused to remove the cutout, protesters became physical with them.<sup>79</sup>

In late 2013, students at Brown University silenced the NYPD police commissioner’s speech on campus by chanting loudly so that he could not be heard during a lecture.<sup>80</sup> After twenty minutes of shouting, the commissioner left the stage.<sup>81</sup>

Finally, in 2016, the “Reedies Against Racism” (RAR), a student group at Reed College boycotted Humanities 110, a year-long freshman humanities class, designed to “train students whose ‘primary goal’ is ‘to engage in original, open-ended, critical inquiry.’”<sup>82</sup> But the student activists in RAR characterized the class material, which included texts from the ancient Mediterranean, Mesopotamia, Persia, and Egypt

74. *See id.*

75. Nico Perrino, *Berkeley Student Protesters Rush Stage at Event Hosted by Metallica Drummer, Allegedly Assault Panelist*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Mar. 16, 2016), <https://www.thefire.org/berkeley-student-protesters-rush-stage-at-event-hosted-by-metallica-drummer-allegedly-assault-panelist-video/>.

76. *See id.*

77. Zach Greenberg, *Berkeley Protesters Attack College Republicans, Campus Police Let It Happen*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Sept. 13, 2016), <https://www.thefire.org/berkeley-protesters-attack-college-republicans-campus-police-let-it-happen/>.

78. *Id.*

79. *Id.*

80. Connor McGuigan, *Brown Students Shout NYPD Commish Kelly Off Stage*, N.Y. DAILY NEWS (Oct. 30, 2013, 11:18 AM), <http://www.nydailynews.com/news/national/brown-students-shout-commish-kelly-talk-article-1.1500618>.

81. *Id.*

82. 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/>.

regions, “Eurocentric,” “Caucasoid,” and thus “oppressive.”<sup>83</sup> The boycott of “Hum 110” has received national press coverage and has led to a divisive debate on the Reed campus.<sup>84</sup> The Hum 110 debate and its aftermath has led to a reform of the class syllabus, ultimately allowing students to dictate which texts to cover in the classroom.<sup>85</sup>

### B. *Warning: This Speech May Be Offensive*

Students on college campuses have increasingly begun demanding that professors issue “trigger warnings” before discussing material in the classroom that may be offensive or trigger past trauma.<sup>86</sup> In support of a sexual assault victim in its class, a group of Columbia students demanded that one of these warnings be issued before reading Ovid’s *Metamorphoses*.<sup>87</sup> The mythological epic contains rape and suicide scenes, which the victim said made discussion of the topic feel unsafe.<sup>88</sup>

Likewise, at Oberlin College, a student requested a trigger warning for the Sophocles play *Antigone* based on its suicide-related content.<sup>89</sup> A student at Rutgers University made a similar request for Virginia Woolf’s *Mrs. Dalloway*, claiming that the book “may trigger painful memories for students suffering from self-harm.”<sup>90</sup> The student considered the warning a compromise, ensuring that the plot was not spoiled while simultaneously making students aware of forthcoming “traumatic content.”<sup>91</sup>

Clark University and others continue to support censorship and are teaching freshman students how to avoid micro-aggressions, “comments, snubs or insults that communicate derogatory or negative messages that may not be intended to cause harm but are targeted at people based on their membership in a marginalized group.”<sup>92</sup>

83. *Id.*

84. *Id.*

85. *Id.*

86. Eliana Dockterman, *Columbia Undergrads Say Greek Mythology Needs a ‘Trigger Warning,’* TIME (May 15, 2015), <http://time.com/3860187/columbia-trigger-warning-greek-mythology-metamorphoses/>.

87. *See id.*

88. *Id.*

89. Nathan Heller, *The Big Uneasy*, NEW YORKER (May 30, 2016), <http://www.newyorker.com/magazine/2016/05/30/the-new-activism-of-liberal-arts-colleges>.

90. Alison Flood, *US Students Request ‘Trigger Warnings’ on Literature*, GUARDIAN (May 19, 2014, 11:03 AM), <https://www.theguardian.com/books/2014/may/19/us-students-request-trigger-warnings-in-literature>.

91. *Id.*

92. Stephanie Saul, *Campuses Cautiously Train Freshmen Against Subtle Insults*, N.Y. TIMES (Sept. 6, 2016), [http://www.nytimes.com/2016/09/07/us/campuses-cautiously-train-freshmen-against-subtle-insults.html?emc=eta1&\\_r=0](http://www.nytimes.com/2016/09/07/us/campuses-cautiously-train-freshmen-against-subtle-insults.html?emc=eta1&_r=0).

C. *The Minority Approach: A Refusal to Censor Unpopular Speech and the Facilitation of a Healthy Debate*

Conversely, a handful of universities, including University of Chicago<sup>93</sup> and Washington University in St. Louis,<sup>94</sup> have expressed a disapproval of trigger warnings on campus and have instead encouraged discussion in response to offensive speech.<sup>95</sup> Recent events demonstrate that the encouragement of a healthy, respectful debate will ultimately drive out offensive speech.

In response to the fatal shooting of Terence Crutcher by police officers in Tulsa in 2016, Florida State University students held a “National Blackout” event on campus.<sup>96</sup> Simultaneously, controversial right-winged activist Milo Yiannopoulos gave a speech on campus.<sup>97</sup> When students wearing Donald Trump attire crossed paths with the “National Blackout” event attendees on their way to the Yiannopoulos event, the two groups engaged in a passionate and productive discussion about their views.<sup>98</sup>

When a group of University of Pennsylvania women received an offensive e-mail inviting them to a fraternity party, they responded with speech of their own.<sup>99</sup> The off-campus fraternity’s e-mail to freshman women at the University stated: “Ladies, the year is now upon us. May we have your attention please. We’re looking for the fun ones, and say ‘fuck off’ to a tease.”<sup>100</sup> The invitation also asked the women to “wear something tight.”<sup>101</sup> Rather than filing a complaint or taking formal action against the men, a group of freshman women printed and posted over 600 copies of the email around campus with a headline that read, “This is

93. IDEAS DESK, *University of Chicago: ‘We Do Not Support So-Called Trigger Warnings,’* TIME (Aug. 25, 2016), [http://time.com/4466021/uchicago-trigger-warnings/?xid=time\\_social\\_flow\\_facebook](http://time.com/4466021/uchicago-trigger-warnings/?xid=time_social_flow_facebook).

94. Laura Beltz, *Washington University in St. Louis Endorses Version of the Chicago Statement*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Sept. 12, 2016), <https://www.thefire.org/washington-university-in-st-louis-endorses-version-of-the-chicago-statement/>.

95. *Id.*

96. Sara McLaughlin, *Students at Florida State University Show What Campus Dialogue Can Look Like*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Sept. 29, 2016), <https://www.thefire.org/students-at-florida-state-university-show-what-camp>.

97. *Id.*

98. *Id.*

99. Samantha Harris, *Penn Students Choose Protest over Censorship*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Sept. 7, 2016), <https://www.thefire.org/penn-students-choose-protest-over-censorship/>.

100. *Id.*

101. *Id.*



what rape culture looks like.”<sup>102</sup> The women also listed information about sexual assault resources at the university.<sup>103</sup>

Despite some efforts to encourage student speech, some universities continue to police what can and cannot be said on campus, even before any speech offends. In August 2016, after deliberating about which of three politicians would speak during the next graduation ceremony, the University of South Carolina announced that only the university’s president would deliver graduation speeches.<sup>104</sup> While the university claimed the policy was that graduation should focus on the students and their families, some believed it was a safe way to avoid protests and disinvitations of graduation speakers.<sup>105</sup> In 2015, at least twenty would-be graduation speakers were uninvited to speak.<sup>106</sup>

#### D. *Free Speech “Tax”*

To preemptively censor speech *before* it occurs is the essence of a prior restraint, a particularly pernicious form of speech restriction.<sup>107</sup> As discussed in Part II below, the historical record of the Framers’ intent in drafting the First Amendment is scant.<sup>108</sup> However, most historians agree that, at the very least, the Framers were well aware of the speech-restrictive English licensing scheme when drafting the First Amendment and sought to prevent such government restraint on speech.<sup>109</sup> Like a prior restraint, levying a tax on speech can silence speakers and foreclose the dissemination of ideas that the government wishes to censor.

Universities have been under fire for imposing a sort of free speech “tax” on student organizations wishing to host controversial speakers.<sup>110</sup> Public universities have begun requiring that political student groups pay

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102. *Id.*

103. *Id.*

104. Andy Shain, *One Voice: Only USC President Will Address Graduates from Now On*, FREE TIMES (Aug. 11, 2016), <http://www.free-times.com/blogs/one-voice-only-usc-president-will-address-graduates-from-now-on>.

105. *Id.*

106. *Id.*

107. *See, e.g.,* *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 589–90 (Neb. 1976) (“A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: . . . it shuts off communication before it takes place[.]”) (quoting THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 506 (1970)).

108. *See infra* Part II.

109. *See* Thomas I. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 737 (1977).

110. *See* Scott Jaschik, *You Can’t Charge for Controversy*, INSIDE HIGHER ED (Aug. 3, 2010), <https://www.insidehighered.com/news/2010/08/03/speech>.

high prices for security at events at which they expect other students to protest.<sup>111</sup>

For example, in October 2016, administrators at the University of Alabama insisted that the College Republicans pay \$1,000 to host Milo Yiannopoulos on his “Dangerous Faggot Tour.”<sup>112</sup> The university then raised the fee to \$5,000 and again to \$7,000, explaining that the group could not host Yiannopoulos without security.<sup>113</sup> Only after the Foundation for Individual Rights in Education condemned the school for its actions did the university rescind its demand for the fee.<sup>114</sup>

Likewise, in February 2016, the Young Americans for Freedom chapter at California State University-Los Angeles planned to host Ben Shapiro for an event titled, “When Diversity Becomes a Problem.”<sup>115</sup> Other students voiced their disapproval of the speaker online and organized a counter-demonstration to promote “the value of safe spaces, the importance of naming microaggressions and oppressions, and the language of social justice.”<sup>116</sup> The Young Americans for Freedom said that the university tried to charge the group \$600 for security during Shapiro’s talk, and when the group refused to pay, the university president cancelled the event.<sup>117</sup>

## II. JUSTIFICATION FOR THE SPEECH POLICE ON COLLEGE CAMPUSES

There are two purported justifications for the increased rigidity in speech codes and trigger warning requirements on college campuses: (1) protecting Post-traumatic Stress Disorder (PTSD) victims and (2) compliance with Title IX guidance documents. The following discussion summarizes the purported goals served by these modern political correctness measures and then debunks their efficacy. Ultimately, the justifications for speech codes and trigger warnings are unsubstantiated, and the increased use of these measures has restricted the free exchange of ideas on college campuses.

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111. *Id.*

112. Zach Greenberg, *University of Alabama Drops \$7,000 Security Fee for Milo Yiannopoulos Event*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Oct. 12, 2016), <https://www.thefire.org/university-of-alabama-drops-7000-security-fee-for-milo-yiannopoulos-event/>.

113. *Id.*

114. *Id.*

115. Jennifer Kabbany, *Public University Cancels Conservative Speaker After Liberal Students Protest*, C. FIX (Feb. 23, 2016), <http://www.thecollegefix.com/post/26350/>.

116. *Id.*

117. Greg Piper, *Public University Demanded Conservative Students Pay \$621 in Security Fees for Ben Shapiro Talk*, C. FIX (Feb. 24, 2016), <http://www.thecollegefix.com/post/26367/>.

### A. PTSD and Its Treatment

The claim that trigger warnings and safe spaces protect against PTSD episodes for students previously traumatized is contrary to medical and scientific research.<sup>118</sup> While the pedagogical goal served by classroom debates and university quad rallies should be far-removed from treating students' PTSD reactions, the emotional well-being of student-victims continues to foster an "offense-free" educational environment. Indeed, it is the consensus of medical experts that avoidance of a triggering image or topic is *not* an effective method for treating PTSD.<sup>119</sup>

#### 1. Trigger Warnings Are Counterintuitive to PTSD Treatment

Despite the contradicting medical evidence, one justification for the current prevalence of trigger warnings in higher education is to protect sexual assault victims from the onset of PTSD caused by viewing graphic images or descriptions of sexual violence.<sup>120</sup> Trigger warnings were originally an online creation from internet blogs,<sup>121</sup> designed to warn

118. See Lukianoff & Haidt, *supra* note 22.

119. The most common form of treatment for PTSD is known as trauma-focused Cognitive-Behavioral Therapy (TF-CBT). STEPHEN REGEL & STEPHEN JOSEPH, POST-TRAUMATIC STRESS 52 (2010). See generally Marie Wargo, Handbook for Post Traumatic Stress Disorder: Evidence Based Treatment and Relapse Prevention (July 20, 2006) (unpublished Psy.D. dissertation, Antioch New England Graduate School) (on file with ProQuest Information and Learning Company) (discussing treatment models for PTSD and effective ways to reduce or eliminate symptoms associated with this disorder). With the goal of training individuals to confront and eventually overcome the trauma associated with their fears and anxiety, it is active, direct, and systematic. *Id.* All cognitive behavioral methods are: (1) structured and directive in nature; (2) problem- and technique-oriented; (3) directed toward helping the individual achieve their goals, (4) collaborative; (5) focused on the present; and (6) based upon agreed treatment strategies. It is a challenging form of treatment because it forces the patient to confront a prompt that activates a response of fear and pain. All techniques involve some form of exposure, whether the exposure occurs through imagination or *in vivo* (in real life). *Id.* Exposure is "a form of 'emotional physiotherapy.'" *Id.* For example, a patient who has suffered a broken limb after an accident or injury often participates in a

prescribed a course of physiotherapy, which they have to attend regularly and is often painful, sometimes causing some discomfort for some hours afterwards, perhaps even a few days. When done in frequent, regular and repeated sessions, there is a cumulative effect and the distress and discomfort gradually decrease in time. In addition, exercises are also recommended and suggested. In this way, the individual gradually learns to use their limb again.

*Id.* Like physiotherapy, the frequent and repetitive nature of cognitive exposure trains the individual to develop a resistance to the trigger and eventually reduces the anxiety the individual feels upon confronting it. *Id.*

120. See Lukianoff & Haidt, *supra* note 22.

121. *Id.*

readers who may be victims of sexual assault about the content in the blog that could trigger a negative reaction.<sup>122</sup> The use of this intervention soon spread to college campuses and is now used to “alert students in advance that material assigned in a course might be upsetting or offensive.”<sup>123</sup> Indeed, “trigger warnings have come to encompass materials touching on a wide range of potentially sensitive subjects, including race, sexual orientation, disability, colonialism, torture, and other topics.”<sup>124</sup>

By definition alone, trigger warnings are counterintuitive to recommended PTSD treatments, which stress the importance of exposure, not avoidance.<sup>125</sup> This is why Harvard psychologist Richard McNally does not endorse trigger warnings.<sup>126</sup> According to McNally, “trigger warnings are designed to help survivors avoid reminders of their trauma, thereby preventing emotional discomfort. Yet *avoidance* reinforces PTSD [and] systematic exposure to triggers . . . is the most effective means of overcoming the disorder.”<sup>127</sup>

It is illustrative that instructors from the field of abnormal psychology tend to oppose trigger warnings.<sup>128</sup> “If trigger warnings are necessary for sensitive topics, Abnormal Psychology instructors should be at the forefront of their use, but this does not appear to be the case.”<sup>129</sup> A recent study found that almost 50% of abnormal psychology instructors had a negative view of trigger warnings.<sup>130</sup> One participant of the study stated, “There is a false notion that students are fragile and must be protected from topics that might result in emotional distress. This is absurd.”<sup>131</sup> Another participant stated, “If a student really needs trigger warnings, he or she shouldn’t take Abnormal Psychology, major in psychology, or, most likely, be enrolled in college at all.”<sup>132</sup>

In essence, trigger warnings are problematic for recovery from PTSD. They enable avoidance, which is a symptom of PTSD.<sup>133</sup> “Avoidance

122. *Id.*

123. NAT’L COAL. AGAINST CENSORSHIP, *supra* note 36.

124. *Id.*

125. See Katy Waldman, *The Trapdoor of Trigger Words*, SLATE (Sept. 5, 2016, 8:00 PM), [http://www.slate.com/articles/double\\_xcover\\_story/2016/09/what\\_science\\_can\\_tell\\_us\\_about\\_trigger\\_warnings.html](http://www.slate.com/articles/double_xcover_story/2016/09/what_science_can_tell_us_about_trigger_warnings.html).

126. NAT’L COAL. AGAINST CENSORSHIP, *supra* note 36.

127. *Id.* (emphasis added).

128. See Guy A. Boysen et al., *Instructors’ Use of Trigger Warnings and Behavior Warnings in Abnormal Psychology*, 43 TEACHING PSYCHOL. 334, 334 (2016).

129. *Id.* at 338.

130. *Id.* at 337.

131. *Id.*

132. *Id.*

133. Mariah Flynn, *The Trouble with Trigger Warnings*, GREATER GOOD MAG. (Nov. 1, 2016), [https://greatergood.berkeley.edu/article/item/trouble\\_with\\_trigger\\_warnings](https://greatergood.berkeley.edu/article/item/trouble_with_trigger_warnings).

means helplessness and helplessness means depression.”<sup>134</sup> Moreover, the use of trigger warnings underestimates the resilience of trauma survivors and sends the wrong message to survivors who may develop PTSD: that their trauma defines them.<sup>135</sup> While traumatic incidences are common, the development of PTSD is not.<sup>136</sup> The development of PTSD is more common among survivors of sexual assault, yet these survivors often recover within months.<sup>137</sup> Trigger warnings reinforce “the toxic messages young women have gotten our entire lives: that we’re inherently vulnerable.”<sup>138</sup>

Additionally, the potential for actual triggers is infinite. For this reason, trigger warnings are ineffective in preventing all traumatic episodes. Professor Metin Basoglu, an internationally recognized expert on trauma, explained that triggers of traumatic episodes are unique to each survivor.<sup>139</sup> For example, one of his patient’s triggers were white socks.<sup>140</sup> Due to the infinite possibility of traumatic triggers, trigger warnings are futile. According to Basoglu, it is simply impossible for “a person to avoid triggers in their day-to-day lives.”<sup>141</sup> He opines that patients recover faster with more opportunities to confront their trauma reminders, not less.<sup>142</sup>

## 2. Trigger Warnings in the Classroom

In addition to disturbing the healing process for PTSD patients, trigger warnings are problematic for the learning environment. A study conducted by the National Coalition Against Censorship found that 45% of educators think that trigger warnings have a negative impact on classroom dynamics.<sup>143</sup> One instructor informed the National Coalition Against Censorship that “[i]n the last two years, I’d had students want pretty detailed and specific trigger warnings for, well, everything, which seems kind of stifling.”<sup>144</sup> As one instructor explained, “trigger

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134. Florence Waters, *Trigger Warnings: More Harm than Good?*, TELEGRAPH (Oct. 4, 2014, 2:00 PM), <http://www.telegraph.co.uk/culture/books/11106670/Trigger-warnings-more-harm-than-good.html>.

135. Richard J. McNally, *Hazards Ahead: The Problem with Trigger Warnings, According to the Research*, PAC. STANDARD (May 20, 2014), <https://psmag.com/hazards-ahead-the-problem-with-trigger-warnings-according-to-the-research-4f220f7e6c7e#.u450b2n1g>.

136. *Id.*

137. *Id.*

138. Waters, *supra* note 134.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. NAT’L COAL. AGAINST CENSORSHIP, *supra* note 36.

144. *Id.*

warnings . . . seem to have a couple of adverse effects. First, they create an expectation that exchanges will likely be contentious rather than cooperative. Second, they seem to suppress free inquiry and speculative ('what if') discussions, primarily for students but also for me."<sup>145</sup> As Dr. David Alderson, a senior lecturer of English Literature at Manchester University said, "The problem with demands for 'triggers' to be applied to course content is that it reflects a consumerist sense that the world should be inoffensive to us personally."<sup>146</sup>

### B. Title IX Enforcement<sup>147</sup>

The second justification for the implementation of speech codes and trigger warnings in the collegiate setting is to comply with Title IX to avoid losing federal funding. Congress passed Title IX in 1972 with the purpose of ensuring that women had access to the same educational opportunities as men.<sup>148</sup> Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance."<sup>149</sup> The Administrative Procedure Act delegates rulemaking authority to administrative agencies tasked with ensuring compliance with statutes, such as Title IX.<sup>150</sup> When administrative agencies properly exercise congressionally delegated authority, courts give deference to

145. *Id.*

146. Waters, *supra* note 134.

147. The current administration has significantly changed Title IX sexual harassment policies and guidelines discussed in this Section. Secretary of the Department of Education Betsy DeVos issued a new interim guidance Q & A and announced the withdrawal of the Dear Colleague Letter on Sexual Violence dated April 4, 2011, and the Questions and Answers on Title IX Sexual Violence dated April 29, 2014. *See Department of Education Issues New Interim Guidance on Campus Sexual Misconduct*, OCR PRESS RELEASE (Sept. 22, 2017), <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct>. To the extent that these documents have the force of law, their withdrawal and replacement with an interim guidance Q & A changes the rules applicable to investigations of sexual harassment complaints on college campuses. However, the old policies and guidance documents remain relevant to the discussion of their speech effects on the college quad and in the classrooms.

148. *See* Susan H. Duncan, *College Bullies—Precursors to Campus Violence: What Should Universities and College Administrators Know About the Law?*, 55 VILL. L. REV. 269, 281 (2010); *see also* LINDA JEAN CARPENTER & R. VIVIAN ACOSTA, TITLE IX 3 (2005) (Title IX was enacted . . . against a backdrop of changing social awareness about discrimination.”).

149. 20 U.S.C. § 1681 (2012).

150. 5 U.S.C. § 553 (2012).

administrative agencies' rulemaking and policy interpretation.<sup>151</sup> Consequently, properly promulgated agency regulations have the force of law.<sup>152</sup>

The Department of Education's Office for Civil Rights (OCR) has been delegated this authority.<sup>153</sup> In addition, the OCR has the authority to create policy interpretations and letters of clarification, to which the courts should defer, in order to promote compliance with Title IX objectives.<sup>154</sup> Exercising its delegated authority, the OCR issued directives that were intended to enforce the anti-discrimination mandates of Title IX and protect students from the on-campus effects of sexual assault, an epidemic that received little attention before the OCR's enhanced enforcement efforts.<sup>155</sup> The OCR directives have expanded the nature and scope of Title IX and conditioned funding to educational institutions on compliance.<sup>156</sup> In interpreting the meaning of Title IX's prohibition of "sex discrimination," the OCR expanded the statutory definition to include sexual harassment, which encompasses verbal comments.<sup>157</sup>

The force of these OCR policy interpretations and letters of clarification seem to have sparked the emergence of speech codes on campuses.<sup>158</sup> The directives' expansion to encompass subjectively offensive speech began in 1997 when OCR issued its *Sexual Harassment Guidance*, where it defined sex discrimination to include sexual harassment.<sup>159</sup> Up until 2010, a Title IX recipient's duty to respond to

151. The first draft regulations were presented to Congress on June 18, 1974, and after further revision, the regulations came into effect on July 21, 1975. See CARPENTER & ACOSTA, *supra* note 148, at 6–7.

152. See *id.* (explaining that because the executive branch created the regulations and the legislature accepted the regulations as the best method of ensuring compliance, courts must give the regulations as much force as the words in the actual law).

153. 20 U.S.C. § 3413 (2012).

154. See CARPENTER & ACOSTA, *supra* note 148, at 17–19.

155. Larry Alexander et al., *Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault* 8 (May 16, 2016), <https://www.lankford.senate.gov/imo/media/doc/Law-Professor-Open-Letter-May-16-2016.pdf>. The directives are cited in endnote 1 of the Law Professors' Open Letter. As defined in the endnote, "'directive' may refer individually or collectively to . . . advisory documents issued by OCR" from 1997–2015, and listed in chronological order in the footnote. *Id.* at 8 n.1.

156. See Max Larkin, *The Obama Administration Remade Sexual Assault Enforcement on Campus. Could Trump Unmake It?*, WBUR (Nov. 25, 2016, 9:13 AM), <http://www.wbur.org/edify/2016/11/25/title-ix-obama-trump>.

157. CARPENTER & ACOSTA, *supra* note 148, at 149.

158. See TAMMY BRUCE, *THE NEW THOUGHT POLICE: INSIDE THE LEFT'S ASSAULT ON FREE SPEECH AND FREE MINDS* 223–26 (2001).

159. U.S. Dep't of Educ., Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (1997), <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html>.

sexual harassment in a college environment required the following factors: (1) school control; (2) actual knowledge; (3) deliberate indifference; (4) severe, pervasive and objectively offensive harassment; and (5) occurring under an educational program.<sup>160</sup>

However, after a series of new directives from the OCR, these requirements have essentially become void.<sup>161</sup> In a policy statement on bullying, the OCR eliminated the “pervasive” requirement, stating that harassment does not require repeated incidents to be actionable.<sup>162</sup> In 2011, the OCR lowered the standard of proof to a preponderance of the evidence.<sup>163</sup> In a 2013 Letter of Findings to the University of Montana, the OCR mandated that sexual harassment included any unwelcome conduct, disregarding the Court’s objectively offensive standard.<sup>164</sup> And in 2014, the OCR mandated that schools have an affirmative obligation to consider and investigate the effects of off-campus conduct, undermining the requirement that actionable conduct occur within an educational program.<sup>165</sup> In interpreting the text of the guidance, courts

160. See Duncan, *supra* note 148, at 286–87.

161. It should be noted that the directives were issued in response to the ongoing problem of sexual misconduct on college campuses. For a detailed article outlining Title IX compliance issues, see generally Brian A. Pappas, *Dear Colleague: Title IX Coordinators and Inconsistent Compliance with the Laws Governing Campus Sexual Misconduct*, 52 TULSA L. REV. 121 (2016). But “perhaps the most important thing for Congress to do legislatively is not very much. Don’t react to bad speech by enacting bad laws that confuse offensive words with discriminatory action. Freedom of speech is freedom from government interference. It depends on official inaction.” *First Amendment Protections on Public College and University Campuses: Hearing Before the Subcomm. on the Constitution and Civil Justice*, 114th Cong. 67 (2015) (statement of Wendy Kaminer, Writer/Lawyer, and Free Speech Feminist), [https://judiciary.house.gov/wp-content/uploads/2016/02/114-31\\_94808.pdf](https://judiciary.house.gov/wp-content/uploads/2016/02/114-31_94808.pdf).

162. See Dear Colleague Letter, Russlynn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights 1 (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> (outlining how some bullying behaviors “may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by the [OCR]”); see also Alexander et al., *supra* note 155, at 1 (arguing OCR guidance “unlawfully expanded the nature and scope of institutions’ responsibility to address sexual harassment,” forcing universities “to choose between fundamental fairness for students and their continued acceptance of federal funding”).

163. Dear Colleague Letter, Russlynn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights 11 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (“[I]n order for a school’s grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard . . . .”); see also Alexander et al., *supra* note 155, at 2–3 (discussing the Dear Colleague Letter’s mandate that college tribunals lower their standard of proof to preponderance of the evidence standard).

164. See Letter from Joel J. Berner, Reg’l Dir., U.S. Dep’t of Educ., to Martha C. Minow, Dean, Harvard Law Sch. (Dec. 30, 2014), <https://www2.ed.gov/documents/press-releases/harvard-law-letter.pdf>; see also Alexander et al., *supra* note 155, at 2 (discussing the 2013 Letter of Findings to the University of Montana).

165. See Alexander et al., *supra* note 155, at 3.



have placed some limitation on Title IX with respect to the guarantees of the First Amendment.<sup>166</sup>

According to OCR directives, Title IX grantees have the responsibility to investigate complaints of and remedy, if appropriate, “any unwelcome conduct of a sexual nature” that creates a hostile environment on campus.<sup>167</sup> OCR enforcement actions have defined “unwelcome conduct” broadly to include verbal comments.<sup>168</sup>

The consequences of these directives have been monumental. Schools concerned about violating Title IX have felt compelled to censor and punish subjectively offensive speech or risk the loss of federal funding tied to Title IX compliance.<sup>169</sup> In an open letter, several law professors wrote to protest the OCR directives, opining that the directives infringe on free speech and due process rights.<sup>170</sup> The professors called for clarification of the legal status of OCR directives, to impose a clearer and

166. See B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 322 (3d Cir. 2013) (finding primary school district’s sexual harassment policy overbroad and inconsistent with Davis *ex rel.* Lahshonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 651 (1999)); DeJohn v. Temple Univ., 537 F.3d 301, 320 (3d Cir. 2008); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001); Booher v. Bd. of Regents, N. Ky. Univ., No. 2:96-CV-135, 1998 WL 35867183, at \*9–10 (E.D. Ky. July 22, 1998) (finding that a university’s policy differed from proposed guidance and infringed upon protected speech).

167. Alexander, *supra* note 155, at 2, 9 n.19 (citing U.S. Dep’t of Educ., Office for Civil Rights, Resolution Agreement (May 9, 2013), <https://www.justice.gov/sites/default/files/crt/legacy/2013/05/09/montanaagree.pdf> (“[C]haracterized by OCR as a ‘blueprint’ for all schools.”)).

168. *Id.* at 2.

169. See generally Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 52, 61–62 (2013) (discussing the due process rights of defendants accused under Title IX and the biases risk-adverse institutions have in punishing these defendants). But see Catherine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2038 (2016) (calling for the deliberate indifference standard to be changed to due diligence standard in order to better effectual sex equality in education by shifting power into the hands of victims).

170. See Alexander et al., *supra* note 155, at 6; see also *First Amendment Protections on Public College and University Campuses: Hearing Before the Subcomm. on the Constitution and Civil Justice of the Comm. on the Judiciary*, 114th Cong. 60 (2015) (statement of Jamin B. Raskin, Professor of Law, and Director, Program on Law and Government, American University Washington College of Law) (“As the Court wrote in the seminal *Tinker v. Des Moines School District* case, when a student is in the cafeteria or on the playing field on the campus during authorized hours, he may express his opinions even on controversial subjects like the conflict in Vietnam, if he does so without materially and substantially disrupting the educational process and without colliding with the rights of other students. This has become the standard doctrine. All student speech is accepted which does not interfere with the operation of the school and does not violate the rights of other students. And if this principle was right, the current trend of setting up a free speech zones, or what students call free speech pens, is totally antithetical to free speech values. Under the First Amendment, the whole country is a free speech zone, or at least the public places within it.”).

narrower definition of harassment, and to return discretion to institutions for disciplinary policies.<sup>171</sup> In the interim, schools must abide by the directives, and risk-averse schools are censoring speech on campuses with the use of free speech zones, speech codes, and the use of trigger warnings.<sup>172</sup>

Like race-based admissions policies, enhanced Title IX enforcement actions ensuring that students are not denied equal educational opportunities due to sex discrimination were intended to serve the compelling interest of diversity in higher education.<sup>173</sup> Both of these initiatives spawned conduct and speech codes intended to make students feel “safe” in order to stimulate the exchange of diverse ideas in classroom discussions, thought crucial for preparing students to enter an “increasingly global marketplace.”<sup>174</sup>

### III. FIRST AMENDMENT PROTECTIONS: LIBERTY INTERESTS V. DIGNITY AND EQUALITY

Despite the express words of the First Amendment, the Supreme Court, from its first speech case, has never interpreted the Speech Clause as an absolute.<sup>175</sup> In fact, Congress does make laws abridging the freedom of speech.<sup>176</sup> There are many instances in which government can restrict speech.<sup>177</sup> For example, people can be prosecuted for perjury, securities fraud, misrepresentation, true threats, and a whole host of other crimes which are perpetrated by speech.<sup>178</sup>

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171. See Alexander et al., *supra* note 155, at 5.

172. See *First Amendment Protections on Public College and University Campuses: Hearing Before the Subcomm. on the Constitution and Civil Justice of the Comm. on the Judiciary*, 114th Cong. 66–67 (2015) (Statement of Wendy Kaminer, Writer/Lawyer, and Free Speech Feminist) (“On the left, censorship is an extension of the drive for civil rights. It equates words with actions and insists that equality requires policing offensive words or micro-aggressions. . . . Campus censorship, like Western European bans on hate speech, establishes a right of particular audiences not to be offended at the expense of a universal right to speak.”); see also Alexander et al., *supra* note 155, at 3 (discussing the directives and ways schools are censoring speech on campuses).

173. See Alexander et al., *supra* note 155, at 1.

174. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003), *superseded by state constitutional amendment*, MICH. CONST. art. 1, § 26.

175. *Id.* at 329.

176. See *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (plurality opinion) (explaining that “content-based restrictions on speech have been permitted . . . only when confined to the few ‘historic and traditional categories’ [of speech]”).

177. *Id.*

178. *Id.*

### A. *Liberty Interests*

When Congress voted on the first twelve amendments to send to the state legislatures for ratification (only ten were actually ratified by the states),<sup>179</sup> there was little discussion on the House or Senate floor about the First Amendment.<sup>180</sup> As a result, the Framers' intent in proposing the Free Speech Clause is based on historical events, rather than the words of the Framers themselves.<sup>181</sup> Fifteen years after the Declaration of Independence, announcing the thirteen American colonies as sovereign states, the war to free the colonies from the tyranny of the English crown was still fresh in the minds of the First Amendment drafters.<sup>182</sup> In England, freedom of speech and press was limited.<sup>183</sup> Prior to mass publication made possible by the printing press, any publication had to be approved by the King or the King's designee.<sup>184</sup> Unfavorable statements against the King, even if true, led to harsh penalties.<sup>185</sup>

Against this historical backdrop, the constitutional Framers ensured that speech and press would be free and open, and not subject to the control of a tyrannical government which licensed or controlled speech through severe punishment.<sup>186</sup> In fact, the Framers drafted the Constitution to create a federal government of three separate, but coequal, branches of government, providing some overlap in powers as a check and balance, so that no one branch of government would accumulate too much power.<sup>187</sup> By design, the federal government's power was further limited by the constitutional grant of states' rights. The individual states are sovereign governments retaining all those powers which the Constitution does not expressly delegate to the federal government or expressly prohibit to the states.<sup>188</sup>

So concerned were the Framers about divesting power among three separate branches of government and between the federal government and states that the First Amendment was indispensable to a government

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179. David A. Anderson, *The Origins of the Press Clause*, 30 *UCLA L. REV.* 455, 486 (1983).

180. *Id.* at 478–83.

181. *Id.* at 487–88.

182. For several law reviews discussing the history surrounding the First Amendment, see STEVEN H. SHIFFRIN ET AL., *THE FIRST AMENDMENT CASES-COMMENTS-QUESTIONS* 4 n.1 (6th ed. 2015).

183. Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 *IND. L. REV.* 295, 298 (2001).

184. *Id.*

185. *Id.* at 299–300.

186. *Id.* at 321.

187. Anderson, *supra* note 179, at 489–91.

188. U.S. CONST. amend. X.

“by the people” ensuring democracy over tyranny.<sup>189</sup> The Framers understood that representative democracy could only exist if government officials, elected by the voters, were truly accountable to the electorate.<sup>190</sup>

In a landmark case, the U.S. Supreme Court identified the central meaning of the First Amendment Free Speech Clause as ensuring democracy; the Court said that without robust public debate on matters of public concern, democracy would not exist.<sup>191</sup> This case recognized that the First Amendment “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.”<sup>192</sup> The opinion acknowledged that this concept of free speech is not universally held: “To many this is, and always will be, folly; but we have staked upon it our all.”<sup>193</sup>

This notion of free speech and its connection to democracy is well entrenched in First Amendment jurisprudence. So odious is the notion of government censorship, and so fearful are we of its consequences, the Court has repeatedly held that even false statements must be protected, because “erroneous statement[s] are] inevitable in free debate.”<sup>194</sup> The Court embraced the principle that public debate must be “uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>195</sup> Finally, the Court characterized public officials as “men of fortitude, able to thrive in a hardy climate.”<sup>196</sup>

### B. *Human Dignity and Equality*

In 1791, when the First Amendment was ratified, and for more than a century beyond, the American people were presumed to be “men of fortitude.”<sup>197</sup> While history belies the notion that politics were more genteel and courteous during the Founding era than today,<sup>198</sup> certainly,

189. Anderson, *supra* note 179, at 489–91.

190. *Id.* at 491.

191. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

192. *Id.* at 270.

193. *Id.*

194. *Id.* at 271.

195. *Id.* at 270.

196. *Id.* at 273 (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947)) (discussing a previous case that protected criticism of judges or their decisions and referring to judges as “men of fortitude,” concluding that if judges must tolerate criticism that contains “half-truths” and “misinformation,” certainly elected officials can tolerate these types of statements).

197. *See, e.g., Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) (“Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth.”).

198. Terri R. Day, “*Nasty as They Wanna Be*” *Politics: Clean Campaigning and the First Amendment*, 35 OHIO N. U. L. REV. 647, 649 (2009).

the twenty-four-hour news cycle and the Internet are game-changers in terms of how information is distributed, received, and interpreted. Therefore, the impact of coarse public debate is amplified exponentially in today's media environment.

So, advocates of speech codes argue that offensive speech in public debate between white men of means did not cause the type of psychological harm that is caused when the powerful and dominant segments of society spew hateful words toward members of marginalized minorities.<sup>199</sup> While this is a non-provable assumption, many civilized countries governed by robust political and civil rights guarantees take a very different approach to free speech. Indeed, in these countries, human dignity and equality are the guiding principles of free speech rights.

The United Nations Charter and the Universal Declaration of Human Rights were the first international documents to recognize human dignity as a basic human right to be universally protected.<sup>200</sup> Before 1945, only five countries included the term "human dignity" in their constitutions.<sup>201</sup> As of 2012, 162 countries ("comprising 84% of the world's 193 sovereign countries that are members of the United Nations") incorporated concepts of guaranteed human dignity in their constitutions or governing documents.<sup>202</sup>

The United States, however, is in the 16% of those United Nations member countries that does not include human dignity as a constitutionally protected right.<sup>203</sup> In fact, the term "human dignity" does not appear anywhere in the U.S. Constitution.<sup>204</sup> Any concept of human dignity as applied to protecting people from offensive speech is contrary to American First Amendment principles. In contrast, the Supreme Court has characterized individual dignity as strengthened by free expression:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is

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199. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2326–30 (1989).

200. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

201. Doron Schultziner & Guy E. Carmi, *Human Dignity in National Constitutions: Functions, Promises and Dangers*, 62 AM. J. COMP. L. 461, 461 (2014).

202. *Id.*

203. *Id.* at 461, 469.

204. *Id.* at 469. Recently, Justice Kennedy, writing for the majority in *Obergefell v. Hodges* found a constitutional right to same sex marriage that was a guaranteed liberty under the Fourteenth Amendment Due Process Clause. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015). In holding that same sex marriage is a constitutionally protected right, Justice Kennedy spoke about human dignity. *Id.* at 2594–96. However, any references in U.S. Supreme Court cases to human dignity are entirely the opinion of individual justices, who interpret the Constitution as guaranteeing a host of implied rights, such as privacy and human dignity—two terms that do *not* appear in the U.S. Constitution.

designed and intended to remove governmental restraints from the arena of public discussion . . . [;] no other approach would comport with the premise of individual dignity and choice upon which our political system rests.<sup>205</sup>

Americans are not impervious to the fact that words can inflict injury. In 1942, the Supreme Court established what has been called the “categorical approach” to First Amendment free speech rights.<sup>206</sup> The Court recognized that some speech has such slight social value that the “social interest in order and morality” in restricting these categories of speech is clearly outweighed by any First Amendment interest in protecting these “well-defined and narrowly limited classes of speech.”<sup>207</sup> Since this 1942 case until the present, the Court has carved out narrow categories of speech falling outside the protections of the First Amendment.<sup>208</sup> These categories are fighting words; obscenity (depictions specifically defined by state law and satisfying a constitutional threshold); child pornography; true threats; private defamation (to the extent that a plaintiff can prove negligence and actual damages); and advocacy that is intended to incite or produce criminal activity and is likely to incite or produce the illegal activity.<sup>209</sup>

In recent years, the Supreme Court has refused to carve out other categories of unprotected speech. In 2011, the U.S. Supreme Court held that violent video games for minors do not constitute a new category of unprotected speech.<sup>210</sup> Several states passed laws prohibiting the sale or rental of violent video games to minors without parental consent.<sup>211</sup> The U.S. Supreme Court invalidated these laws saying that violent video games are protected by the First Amendment.<sup>212</sup> Without evidence that playing violent video games actually causes harm to children, the Court was unwilling to restrict their access to children.<sup>213</sup> Since violence is

205. *Cohen v. California*, 403 U.S. 15, 24 (1971).

206. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (determining that fighting words are not protected by the First Amendment). Fighting words are offensive words specifically targeted to an individual that would likely cause an average person to fight. Since *Chaplinsky*, there has never been another case upholding punishment against a speaker based on the fighting words doctrine.

207. *Id.* at 571–72.

208. *United States v. Stevens*, 559 U.S. 460, 468–69 (2010).

209. *Id.*

210. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 794–95 (2011).

211. See Terri R. Day & Ryan C.W. Hall, *Déjà Vu: From Comic Books to Video Games, Legislative Reliance on “Soft Science” to Protect Against Uncertain Societal Harm Linked to Violence v. the First Amendment*, 89 OR. L. REV. 415, 418 n.14 (2010) (listing federal cases invalidating similar violent video game restrictions from many jurisdictions over nine-year span).

212. *Brown*, 565 U.S. at 804.

213. *Id.*

pervasive in society and appears in revered texts from the Bible and classic epic tales to everyday news coverage, the Court emphatically rejected a cost-benefit analysis to create new categories of unprotected speech.<sup>214</sup> The Court said that such a proposition is “startling and dangerous.”<sup>215</sup>

Again in 2012, the Court rejected an attempt to carve out an unprotected category of speech for lies about receipt of military medals.<sup>216</sup> Although respect for veterans and the sacrifices they make in service to their country is extremely important, there is no general exception from First Amendment protection for false statements that do not involve perjury, fraud, or speech integral to criminal conduct.<sup>217</sup> Any finding that certain types of lies are unworthy of First Amendment protection would lead to a perilous position whereby government can decide what speech should or should not be protected based on its subject matter or content.

From a perspective of individual autonomy and liberty, the First Amendment principle of government neutrality in the content, viewpoint, or subject matter of speech is the best assurance against tyranny. As one Supreme Court justice so eloquently stated: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”<sup>218</sup> The American approach to free speech and hate speech, in particular, emphasizes the individual and his right to speak free from government censorship. Rather than recognize that some individuals have been targeted for abuse because of their identities as members of certain groups, the approach valuing individualism and autonomy “isolates human beings by forcing them to take the consequences of painful [words] and ignores the particular susceptibility of certain groups to injury, especially when the offense of the speech seems to be targeted at such groups because of their identity.”<sup>219</sup>

Many European countries take a very different approach to hate speech. For instance, thirteen European nations and Israel criminalize speech that denies the Holocaust.<sup>220</sup> In taking a stand against Holocaust revisionism and other hate speech, these countries’ free speech

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214. *Id.* at 792.

215. *Id.*

216. *United States v. Alvarez*, 567 U.S. 709, 715 (2012).

217. *Id.* at 717.

218. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

219. Sionaidh Douglas-Scott, *The Hatred of Protected Speech: A Comparison of the American and European Approaches*, 7 WM. & MARY BILL RTS. J. 305, 343 (1999).

220. Michael J. Bazzyler, *Holocaust Denial Laws and Other Legislation Criminalizing Promotion of Nazism* (Dec. 25, 2006), [http://www.sissco.it/download/dossiers/istitutointernazionale\\_olocausto\\_2006.pdf](http://www.sissco.it/download/dossiers/istitutointernazionale_olocausto_2006.pdf).

jurisprudence embraces the values of dignity, protection of personal identity, and equality.<sup>221</sup> No government could remain neutral toward hate speech when the values of human dignity and equality define its guaranteed right of free speech.

There is a body of scholarship that justifies government restriction of specific offensive speech, particularly hate speech targeting race, gender, sexual orientation, and religion, based on equal protection doctrine.<sup>222</sup> Given our country's history of racial and gender subordination, the notion is that legislative inaction to that type of offensive speech amounts to governmental sanction or, at the very least, indifference. Those opposing government neutrality toward offensive or hate speech embrace a First Amendment liberty concept that requires government to act for the protection of those harmed by offensive speech. Rather than viewing the First Amendment as a limit on government, the proactive view is that government must protect the right of people to be free from harm caused by offensive speech.

This proactive view of universities as speech regulators, protecting specific vulnerable groups from offensive speech, is the model endorsed by proponents of political correctness. Public universities may defend their proactive stance in restricting offensive speech by arguing that First Amendment speech protections wane when government acts in its proprietary role.<sup>223</sup> Although the Supreme Court has carved out special rules for permissible regulations of student speech in public primary schools,<sup>224</sup> universities possess less flexibility to regulate student speech

221. *Id.*

222. Schauer, *supra* note 50, at 348; *see also* Alan E. Brownstein, *Regulating Hate Speech at Public Universities: Are First Amendment Values Functionally Incompatible with Equal Protection Principles?*, 39 *BUFF. L. REV.* 1, 4–5 (1991) (attempting to reconcile equal protection with freedom of speech); James E. Fleming, *Securing Deliberative Democracy*, 72 *FORDHAM L. REV.* 1435, 1436 (2004) (discussing “what to do when confronting clashes between freedom of expression and equal protection”); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 *DUKE L.J.* 431, 442 (categorizing anti-discrimination laws as regulations of the content of racist speech); Cedric Merlin Powell, *The Mythological Marketplace of Ideas: R.A.V., Mitchell, and Beyond*, 12 *HARV. BLACK LETTER L.J.* 1, 6 (1995) (suggesting that the “First and Fourteenth Amendments . . . should be read in harmony”). *But see* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (carving out certain fighting words targeting race is a viewpoint discrimination regulation that cannot survive strict scrutiny).

223. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302–03 (1974) (“Although American constitutional jurisprudence, in the light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question.”).

224. *Morse v. Frederick*, 551 U.S. 393, 397 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).



than administrators of public elementary and high schools.<sup>225</sup> This is because, in contrast to public K-12 schools, universities do not assume an *in loco parentis* role over their adult students.<sup>226</sup>

Nevertheless, Circuit Courts of Appeals have upheld speech restrictions in the university setting under the *Hazelwood School District v. Kuhlmeier*<sup>227</sup> standard.<sup>228</sup> This standard permits educators to exercise control over the “content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”<sup>229</sup> Although the Supreme Court has not yet considered whether *Hazelwood* applies in the university setting,<sup>230</sup> lower federal courts applying a *Hazelwood* analysis in public university student speech cases first consider the type of forum in which the student speech occurs.<sup>231</sup> Pursuant to *Hazelwood*, since public classrooms are not traditional or limited public forums, educators may regulate the content of student speech as long as the regulation is viewpoint neutral and reasonably related to a pedagogical concern.<sup>232</sup>

In reality, when students demand trigger warnings and dedicated safe spaces in response to an academic assignment or classroom discussion, the speech at risk of censorship is the professor’s or administrator’s speech, not the students’. For this reason, the *Hazelwood* analysis is not a seamless doctrinal fit.<sup>233</sup> But, the principles articulated in *Hazelwood* are germane.

Indeed, when students demand trigger warnings and safe spaces, to which professors and administrators bow, students are exercising editorial control over the classroom speech of their professors and peers. In essence, students, not educators, become the gatekeeper, deciding what content and viewpoint is appropriate for classroom discussion. In dictating what content is offensive enough to require the use of a trigger

225. *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 242 (3d Cir. 2010).

226. *Id.* at 242–43.

227. 484 U.S. 260.

228. *See* *Keefe v. Adams*, 840 F.3d 523, 531 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 1448 (2017); *Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 874–76 (11th Cir. 2011); *Hosty v. Carter*, 412 F.3d 731, 734 (7th Cir. 2005); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004); *Brown v. Li*, 308 F.3d 939, 949 (9th Cir. 2002).

229. *Hazelwood Sch. Dist.*, 484 U.S. at 273 (holding that school did not violate the First Amendment when exercising editorial control over a student newspaper published as part of a journalism class which was part of the school curriculum).

230. *See* Meggen Lindsay, *Tinker Goes to College: Why High School Free-Speech Standards Should Not Apply to Post-Secondary Students*—Tatro v. University of Minnesota, 38 WM. MITCHELL L. REV. 1470, 1474, 1480 (2012).

231. *Hazelwood Sch. Dist.*, 484 U.S. at 273.

232. *Id.*

233. *See* *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 971 (9th Cir. 1996). *But see* *Roberts v. Madigan*, 921 F.2d 1047, 1057 (10th Cir. 1990) (not “draw[ing] a distinction between teachers and students where classroom expression is concerned”).

warning or avoidance mechanism, students are regulating the marketplace of ideas both in the classroom and elsewhere on university campuses.

The pedagogical interest purportedly justifying the use of these political correctness measures on college campuses is the avoidance of offense. But even if decisions about when to apply these measures are totally educator-driven, they are often imposed in a viewpoint-discriminatory way. Even under the *Hazelwood* standard, educators cannot make editorial decisions about appropriate student speech based on viewpoint discrimination.

The fact that students are insisting upon the use of trigger warnings and safe spaces does not change the constitutional implications of the censorship, and the use of these measures in the collegiate setting still offends First Amendment principles. By granting individual students the power to decide what speech should be subject to mandatory warnings or require safe spaces for speech avoidance, universities are sanctioning the exercise of a “heckler’s veto,” where unwilling listeners may silence a speaker.<sup>234</sup>

It is a bedrock principle of the First Amendment that unwilling listeners cannot silence offensive words simply because of their displeasure with the content.<sup>235</sup> Repeatedly, the Supreme Court has stated that, absent a breach of the peace, offensive speakers cannot be punished<sup>236</sup> or silenced by the threat of damage claims for intentional infliction of emotional distress.<sup>237</sup> In *Snyder v. Phelps*,<sup>238</sup> the Court overturned a jury verdict awarding damages to a grieving father who claimed that protestors at his son’s funeral were liable for intentional infliction of emotional distress.<sup>239</sup> His deceased son was a fallen soldier, and the jury found that the protesters’ words were outrageously offensive to the grieving father, causing him emotional distress during his time of mourning.<sup>240</sup>

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234. See *supra* note 19 and accompanying text.

235. *Cohen v. California*, 403 U.S. 15, 21 (1971); see also Leslie Gielow Jacobs, *Is There an Obligation to Listen?*, 32 U. MICH. J.L. REFORM 489, 501 (1999) (stating that “listeners’ reactions to speech are not generally a sufficient justification for suppressing the communication”); Andrew L. Reisman, *Speak of the Devil: First Amendment Protection of Immoral Conduct*, 1992 U. ILL. L. REV. 879, 910 (discussing the benefits of the exchange of conflicting ideas).

236. *Cohen*, 403 U.S. at 22.

237. *Snyder v. Phelps*, 562 U.S. 443, 451 (2011).

238. 562 U.S. 443.

239. *Id.* at 459.

240. *Id.* at 458.

In reversing the jury award, the Court opined that emotional distress claims pose a particular danger to free speech.<sup>241</sup> Because offense is a vague and subjective standard determined by the tolerance level of a particular listener,<sup>242</sup> the threat of crushing monetary damages based on offense could have the harmful consequence of chilling speech on matters of public concern. Like intentional infliction of emotional distress claims, the political correctness doctrine demands that offensiveness, a “toothless standard,” determines when and what speech may be regulated or silenced. For this reason, individual offense cannot serve as a basis for encroaching upon speech in the university setting.

### C. Political Correctness and an Offensiveness Standard

Just months ago, in its most recent speech case, the Supreme Court reiterated a basic First Amendment tenant that “[s]peech may not be banned on the ground that it expresses ideas that offend.”<sup>243</sup> In *Matal v. Tam*,<sup>244</sup> the Supreme Court invalidated the disparagement clause, a provision of the Lanham Act that prohibited the registration of offensive trademarks.<sup>245</sup> Mr. Tam, the Asian-American plaintiff, challenged the disparagement clause when the Patent and Trademark Office denied his application for federal registration of the mark *THE SLANTS*, the name of his rock group.<sup>246</sup>

Similar to a hate speech regulation, the statutory language of the disparagement clause considers whether the meaning of a mark refers to “identifiable persons, institutions, beliefs or national symbols” and, if so, whether “a substantial composite of the referenced group would find the term objectionable.”<sup>247</sup> In essence, the assumed offensiveness of a portion of the referenced group, which in the *Matal* case was people of Asian ethnicity, determines whether the mark is disparaging. If the mark satisfies the test for disparagement, the burden shifts to the applicant.<sup>248</sup> Unless the applicant can prove that the mark is not disparaging, the application for federal registration is denied.<sup>249</sup>

In *Matal*, the Court rejected several arguments that would have excluded the disparagement clause from the protective umbrella of the

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241. *Id.*

242. *Id.* (noting “outrageousness” for speech purposes is a “highly malleable standard with an inherent subjectiveness about it”).

243. *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017).

244. 137 S. Ct. 1744.

245. *Id.* at 1763.

246. *Id.* at 1754.

247. *Id.* at 1753–54.

248. *Id.* at 1754.

249. *Id.*

First Amendment. After concluding that the clause was not saved by the government speech doctrine,<sup>250</sup> the government subsidy cases,<sup>251</sup> or a new “government-program” doctrine,<sup>252</sup> the Court discussed the government’s argument that trademarks are commercial speech governed by the less restrictive *Central Hudson* test, intermediate scrutiny review.<sup>253</sup> Otherwise, strict scrutiny would apply because the disparagement clause is a content-based restriction.<sup>254</sup> Without deciding whether trademarks are commercial speech, the Court held that the Disparagement Clause violated the First Amendment under either the strict or intermediate scrutiny test.<sup>255</sup> As an aside, the Court noted that even if the commercial speech intermediate scrutiny standard applied, it rejected the notion “that commercial speech may be cleansed of any expression likely to cause offense.”<sup>256</sup>

In reaffirming eighty years of jurisprudence regarding offensive speech, the Court said: “We have said time and again that ‘the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.’”<sup>257</sup> Surely, if restriction of offensive trademarks fails First Amendment scrutiny—even under the less restrictive commercial speech standard—speech on matters of public concern in university classrooms and on campus quads cannot be restricted based on offensiveness.

It is the antithesis of First Amendment principles to make offensiveness the touchstone of speech restriction. “The point of all speech protection [under the First Amendment] is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful.”<sup>258</sup> Outside of the home, where privacy interests are greatest, the

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250. See *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015) (holding that state license plates are government speech not subject to the restrictions that the First Amendment imposes on private speech); *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009) (recognizing that government speech is not regulated by the Free Speech Clause); *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 566–67 (2005) (finding generic advertising funded by targeted assessment on beef producers was government speech).

251. See *Rust v. Sullivan*, 500 U.S. 173, 201 (1991) (upholding government programs that subsidize speech expressing a particular viewpoint, such as family planning services that favor childbirth over abortion).

252. *Matal*, 137 S. Ct. at 1763 (rejecting the government’s proposed new doctrine applying to “government-program” cases that essentially merges the government speech cases and the government subsidy cases).

253. *Id.* at 1763–65.

254. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2224 (2015).

255. *Matal*, 137 S. Ct. at 1765.

256. *Id.*

257. *Id.* at 1763 (citations omitted).

258. *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (citing *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 574 (1995)).

First Amendment does not permit discourse to be silenced “solely to protect others from hearing it.”<sup>259</sup> Whether public or private, the university—a place to foster the exchange of ideas—should not decide what speech is “sufficiently offensive to require protection for the unwilling listener or viewer.”<sup>260</sup> Even more inconsistent with bedrock First Amendment principles is when universities place the decision of what speech passes muster under an offensiveness standard in the hands of individual students.

University actions that require trigger warnings in classes, prohibit political activity on campus, and disinvite controversial speakers constitute the most egregious form of speech regulation.<sup>261</sup> Regulating speech based on a standard of offensiveness is a particularly pernicious form of content-based discrimination that is presumptively unconstitutional.<sup>262</sup> “[D]isapproval of a subset of messages” because the speech offends “is the essence of viewpoint discrimination.”<sup>263</sup> The danger of this type of selective speech regulation is that it skews debate and silences a multitude of voices.

A university that prioritizes political correctness over robust public discourse is failing in its mission to educate. Under the mantle of political correctness, universities are allowing the most vulnerable members of the student body to decide what subjects and viewpoints are permissible by granting those students a “heckler’s veto.”<sup>264</sup> Speech that is sanitized to the most vulnerable in society drowns out opposition and silences minority viewpoints. Modern-day political correctness on college campuses inhibits the free exchange of ideas and fails to prepare students for an increasingly global marketplace.

#### IV. THE ANTIDOTE TO THE OVERZEALOUS POLITICAL CORRECTNESS MOVEMENT ON CAMPUS

While individual requests for trigger warnings or other political correctness devices on campus may seem harmless, in the aggregate, when every student demands a trigger warning before confronting material they deem personally offensive, the expectation turns into an

259. *Cohen v. California*, 403 U.S. 15, 21 (1971).

260. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 (1975) (expecting even children to avoid their eyes from nude scenes in outdoor movies viewable from the road by cars driving by).

261. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015) (invalidating city sign ordinance that discriminates based on the content and explaining the dangers of content- and viewpoint-based speech regulations).

262. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995) (discussing viewpoint discrimination has an egregious form of content-based speech discrimination that is presumptively a violation of the First Amendment Free Speech Clause).

263. *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring).

264. *See supra* note 19 and accompanying text.

entitlement which leads to a system where the most sensitive of listeners decides what is appropriate speech for the classroom or the campus quad. This leads to an environment in which offensiveness becomes the litmus test for what speech or material is appropriate, making difficult conversations impossible. The following Section proposes two remedies to counteract the chilling effect caused by the overzealous political correctness movement on college campuses.

### A. *Campus Freedom of Speech and Press Acts*

As a backlash to the overzealousness of the political correctness movement on college campuses, state legislatures have begun passing laws that regulate the amount of control that universities can exercise over campus speech. Recently, state legislatures have proposed more than twenty bills that restrict university control over campus speech in higher education.<sup>265</sup> These freedom of expression acts generally aim to preserve the freedom of expression on college campuses.

The steep rise of freedom of expression acts has occurred in unison with increasing reliance on political correctness measures in the university environment. These acts do several things. Some expressly designate the outdoor areas of campuses as traditional public forums.<sup>266</sup>

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265. Twelve states have passed bills protecting student speech on college campuses: Arizona, Colorado, Kentucky, Maryland (student journalism protections), Missouri, Nevada (student journalism protections), North Carolina, North Dakota (student journalism protections), Tennessee, Utah, Vermont (student journalism protections), and Virginia. ARIZ. REV. STAT. ANN. §§ 15-1864, 15-1865 (2018); COLO. REV. STAT. § 23-5-144 (2018); KY. REV. STAT. ANN. § 158.183 (West 2018); MD. CODE ANN., EDUC. §§ 7-121, 15-119 (LexisNexis 2018); MO. REV. STAT. § 173.1550 (2018); NEV. REV. STAT. § 388.077 (2018); N.C. GEN. STAT. §§ 116-300–116-304 (2018); N.D. CENT. CODE § 15-10-55 (2018); TENN. CODE ANN. § 49-7-2405 (2018); UTAH CODE ANN. § 53B-27-203 (LexisNexis 2018); VT. STAT. ANN. tit. 16, § 1623 (2018); VA. CODE ANN. § 23.1-401 (2018). Nine states have proposed similar bills or amendments that are currently pending: California (proposed constitutional amendment), Georgia, Illinois, Michigan, New Hampshire, New York (funding bar to “hate speech” organizations), Texas, Washington, and Wisconsin. Assemb. Const. Amend. 14, 2017 Leg., Reg. Sess. (Cal. 2017); H.R. 471, 154th Gen. Assemb., Reg. Sess. (Ga. 2017); H.R. 2939, 100th Gen. Assemb., Reg. Sess. (Ill. 2017); S. 350, 99th Leg., Reg. Sess. (Mich. 2017); H.R. 477, 2017 Leg., 165th Sess. (N.H. 2017); S. 2493, 2017 Leg., 240th Sess. (N.Y. 2017); S. 1151, 85th Leg., Reg. Sess. (Tex. 2017); H.R. 1362, 65th Leg., Reg. Sess. (Wash. 2017); S. 250, 103d Leg., Reg. Sess. (Wis. 2017). Two states have attempted to address campus speech, but the bills failed: Louisiana (governor vetoed) and North Dakota (broad campus speech bill failed to pass Senate). H.R. 269, 2017 Leg., 43d Reg. Sess. (La. 2017); H.R. 1329, 65th Leg. Assemb., Reg. Sess. (N.D. 2017).

266. Seven states have enacted laws, and four state legislatures have proposed laws, that expressly designate the outdoor areas of campuses traditional public forums. See ARIZ. REV. STAT. ANN. § 15-1865 (2018) (barring free speech zones); COLO. REV. STAT. § 23-5-144 (2018) (protecting “student expression”—lawful communication, including peaceful assembly and voter registration—in a “student forum,” any generally accessible, open, outdoor area on campus); KY. REV. STAT. ANN. § 158.183 (West 2018) (explicitly barring restrictions on speech that occurs

Others either explicitly or implicitly bar “free speech zones.”<sup>267</sup> Free speech zones are limited areas, often out of the way, designated for the exercise of free speech.<sup>268</sup>

In light of the sharp focus on Title IX compliance in colleges across the nation, some freedom of expression acts directly address the possibility that speech may serve as the basis for a claim of harassment. Indeed, Tennessee’s freedom of speech act, and six other proposed acts, expressly define “peer-on-peer harassment” consistent with the strict *Davis ex rel. LaShonda D. v. Monroe County Board of Education*<sup>269</sup> standard, providing the greatest level of protection for student speech in the context of university liability for peer harassment under Title IX.<sup>270</sup>

Several states have passed laws that adopt language from the Goldwater Institute’s proposal for campus free speech acts.<sup>271</sup>

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outdoors on college campuses); MO. REV. STAT. § 173.1550 (2018); TENN. CODE ANN. § 49-7-2405 (2018); UTAH CODE ANN. § 53B-27-203 (LexisNexis 2018); VA. CODE ANN. § 23.1-401 (2018) (barring time, place, and manner restrictions for speech in “outdoor areas of institution’s campus”); *see also* H.R. 471, 154th Gen. Assemb., Reg. Sess. (Ga. 2017) (deeming “generally accessible outdoor areas of campuses of public institutions of higher educations” as “traditional public forums for expression”); H.R. 477, 2017 Leg., 165th Sess. (N.H. 2017) (defining “public forum” as “any open, outdoor area on the campus of a university or college”); S. 1151, 85th Leg., Reg. Sess. (Tex. 2017) (protecting “expressive activities” on college campuses); H.R. 1362, 65th Leg., Reg. Sess. (Wash. 2017) (“The outdoor area of a campus of an institution of higher education must be considered a traditional public forum.”).

267. Six states have enacted laws, and three state legislatures have proposed laws, that prohibit free speech zones. *See* ARIZ. REV. STAT. ANN. § 15-1864 (2018); COLO. REV. STAT. § 23-5-144 (2018); MO. REV. STAT. § 173.1550 (2018); TENN. CODE ANN. § 49-7-2405 (2018); UTAH CODE ANN. § 53B-27-203 (LexisNexis 2018); VA. CODE ANN. § 23.1-401 (2018); *see also* H.R. 2939, 100th Gen. Assemb., Reg. Sess. (Ill. 2017) (stating that “the public areas of campuses of the institution are traditional public forums, open on the same terms to any speaker”); S. 350, 99th Leg., Reg. Sess. (Mich. 2017); S. 250, 103d Leg., Reg. Sess. (Wis. 2017).

268. *See* Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 582 (2006).

269. 526 U.S. 629 (1999).

270. TENN. CODE ANN. § 49-7-2406 (West 2018); *see also* Assemb. Const. Amend. 14, 2017 Leg., Reg. Sess. (Cal. 2017) (defining peer-on-peer harassment); H.R. 471, 154th Gen. Assemb., Reg. Sess. (Ga. 2017) (defining harassment); H.R. 2939, 100th Gen. Assemb., Reg. Sess. (Ill. 2017) (defining peer-on-peer harassment); S. 350, 99th Leg., Reg. Sess. (Mich. 2017); S. 250, 103d Leg., Reg. Sess. (Wis. 2017).

271. The Goldwater model campus speech legislation does several things:

It creates an official university policy that strongly affirms the importance of free expression, nullifying any existing restrictive speech codes in the process.

It prevents administrators from disinviting speakers, no matter how controversial, whom members of the campus community wish to hear from.

It establishes a system of disciplinary sanctions for students and anyone else who interferes with the free-speech rights of others.

California's proposed Campus Free Speech Act requires the adoption of a policy with language stating that it is not the proper role of an institution to shield individuals from offensive speech.<sup>272</sup> North Carolina's enacted law imposes sanctions for those who interfere with free expression of others, including protests and demonstrations that infringe upon the rights of others to engage in and listen to expressive activity.<sup>273</sup> Tennessee's law bars institutions from rescinding invitations to speakers invited by students or faculty and requires governing bodies of institutions to adopt a policy that affirms several principles, including "concerns about civility and mutual respect shall never be used by an institution as a justification for closing off the discussion of ideas, however offensive."<sup>274</sup>

Finally, four states have passed laws that strengthened protections for student journalists.<sup>275</sup> New York is attempting to bar public university funding to student organizations involved in hate speech, intolerance, or promotion of boycotts of Israel or U.S. allies.<sup>276</sup>

Despite these legislative measures, universities still struggle with free speech issues, even when the law is clearly on the side of the speaker. Just recently, the University of Florida denied Richard Spencer's application to speak on its campus.<sup>277</sup> Like many public universities, the University of Florida rents space to third parties, creating a designated

It allows persons whose free-speech rights have been improperly infringed by the university to recover court costs and attorney's fees.

It reaffirms the principle that universities, at the official institutional level, ought to remain neutral on issues of public controversy to encourage the widest possible range of opinion and dialogue within the university itself.

It ensures that students will be informed of the official policy on free expression.

It authorizes a special subcommittee of the university board of trustees to issue a yearly report to the public, the trustees, the governor, and the legislature on the administrative handling of free-speech issues.

Stanley Kurtz et al., *Campus Free Speech: A Legislative Proposal*, GOLDWATER INST. 2 (Jan. 30, 2017), [https://goldwaterinstitute.org/wp-content/uploads/cms\\_page\\_media/2017/2/2/X\\_Campus%20Free%20Speech%20Paper.pdf](https://goldwaterinstitute.org/wp-content/uploads/cms_page_media/2017/2/2/X_Campus%20Free%20Speech%20Paper.pdf).

272. Assemb. Const. Amend. 14, 2017 Leg., Reg. Sess. (Cal. 2017).

273. N.C. GEN. STAT. §§ 116-300–116-304 (2018).

274. TENN. CODE ANN. § 49-7-2405 (2018).

275. MD. CODE ANN., EDUC. §§ 7-121, 15-119 (LexisNexis 2018); NEV. REV. STAT. § 388.077 (2018); N.D. CENT. CODE § 15-10-55 (2018); VT. STAT. ANN. tit. 16, § 1623 (2018).

276. S. 2493, 2017 Leg., 240th Sess. (N.Y. 2017).

277. Claire McNeill, *UF Rejects White Nationalist's Request to Speak on Campus*, TAMPA BAY TIMES (Aug. 16, 2017), <http://www.tampabay.com/uf-rejects-white-nationalists-request-to-speak-on-campus/2333981>.



public forum for private speakers.<sup>278</sup> When government property is opened to private speakers, the rules governing traditional public forum apply.<sup>279</sup> Strict scrutiny applies when government actors, like the University of Florida, deny a speaker access to the designated public forum based on the speaker's identity, the subject matter, or the viewpoint of the speech.<sup>280</sup>

Previously, Richard Spencer spoke at the University of Georgia at Auburn after a court granted his motion for injunctive relief when the University denied his application to speak.<sup>281</sup> Despite the court's ruling in Georgia, the University of Florida justified its rejection of Mr. Spencer's application to speak on campus based on safety concerns.<sup>282</sup> In the aftermath of the tragedy at the University of Virginia, the President of the University of Florida stated concern for safety as a compelling interest to deny Mr. Spencer access to speak at the University.<sup>283</sup> Facing a lawsuit, President Fuchs changed his position; Richard Spencer spoke at the University of Florida on October 19, 2017.<sup>284</sup> Governor Scott declared a state of emergency which enabled the coordination of law enforcement from various jurisdictions.<sup>285</sup> The reported cost for security was \$500,000.<sup>286</sup>

Ultimately, as racial and political tensions continue to play out in an ongoing culture war, colleges and universities will continue to grapple with when and how to regulate speech on campus. While the campus freedom of speech and press acts serve as a safety net for speech that occurs on public university grounds, professors and administrators in institutions of higher learning will undoubtedly struggle with student demands to silence or soften campus speech.

### B. *Teaching Civil Discourse and the Importance of True Grit*

At its best, political correctness was intended to avoid offense where avoidable but not to prevent difficult conversations from

278. *Id.*

279. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998).

280. *See id.*

281. *See* McNeill, *supra* note 277.

282. *See id.*

283. *Id.*

284. Anemona Hartocollis, *University of Florida Braces for Richard Spencer*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/us/florida-richard-spencer.html>; *see also* Joe Heim et al., 'Go home, Spencer!' Protesters Disrupt White Nationalist's Speech at the University of Florida, WASH. POST (Oct. 19, 2017), [http://wapo.st/2yroBal?tid=ss\\_mail&utm\\_term=.6edd9711de09](http://wapo.st/2yroBal?tid=ss_mail&utm_term=.6edd9711de09) (discussing the events that took place when Richard Spencer spoke at the University of Florida).

285. Hartocollis, *supra* note 284.

286. *Id.*

happening in the first place.<sup>287</sup> In the real world, students will encounter offensive speech without any warning. By creating an environment where every topic that may cause offense is subject to a trigger warning, universities are robbing students of the opportunity to learn how to withstand slight offense in the real world.

The antidote for this ongoing problem may not be the law. As Dean Erwin Chemerinsky writes in his new book, *Free Speech on Campus*, “rather than create disciples who will preserve some unchanging wisdom, institutions of higher education might dedicate themselves to the creation of disciplined free thinkers who seek new knowledge and are willing to challenge received wisdom if that’s where the facts and reason take them.”<sup>288</sup> Arguably, universities have a civic responsibility to train students to engage in civil discourse.

Current research suggests that the millennial generation is less hearty than previous generations, and their collective intolerance for what they perceive as offensive is greater.<sup>289</sup> The feebler the listener, the more likely it is that she will demand the implementation of political correctness measures. Where the diagnosis of the problem stems from the vulnerability of the listener, the cure may be in strengthening the listener’s resolve and returning to the American virtues articulated by Holmes and Brandeis.

Recent scholarship has debated the efficacy of “true grit,” defined as “perseverance and passion for long-term goals,” and other traits of good character in the context of professional performance and performance in higher education.<sup>290</sup> Carol Dweck, a psychologist that studies Mindset

287. Florence, *supra* note 2.

288. CHEMERINSKY & GILLMAN, *supra* note 19, at 51 (recognizing that a vibrant university community that functions as a marketplace of ideas “would value expert training and rigorous training, but it would also value curiosity, discovery, skepticism, and dissenting viewpoints. Ideas that seemed wrong would not be censored or shouted down but engaged and exposed through argumentation. People who advocated such ideas with rigor and expertise would not be ignored or denied a chance to be heard; rather, they would be permitted, and even encouraged, to challenge authorities with whom they disagreed”).

289. See Angela Duckworth, *Why Millennials Struggle for Success*, CNN (May 3, 2016, 1:41 PM), [http://www.cnn.com/2016/05/03/opinions/grit-is-a-gift-of-age-duckworth/index.html?eref=rss\\_latest](http://www.cnn.com/2016/05/03/opinions/grit-is-a-gift-of-age-duckworth/index.html?eref=rss_latest); Jacob Poushter, *40% of Millennials OK with Limiting Speech Offensive to Minorities*, PEW RES. CTR. (Nov. 20, 2015), <http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/>.

290. See Emily Zimmerman & Leah Brogan, *Grit and Legal Education*, 36 PACE L. REV. 114, 118 (2015) (citing Angela L. Duckworth et al., *Grit: Perseverance and Passion for Long-Term Goals*, 92 J. PERSONALITY & SOC. PSYCHOL. 1087, 1087 (2007) and Katherine R. Von Culin et al., *Unpacking Grit: Motivational Correlates of Perseverance and Passion for Long-Term Goals*, 9 J. POSITIVE PSYCHOL. 306, 306, 310, 311 (2014)) (examining the relationship between grit and performance in law school and suggesting that grit is only one of a number of factors that may influence success in law school and the legal profession); see also Heather D. Baum, *Inward*

Theory and its influence on individual success, suggests that students with a “growth mindset”—meaning, essentially, that the person is open to adapting and learning from his or her failures—are “grittier” than students with a fixed mindset, one that believes that intelligence and ability is fixed, regardless of their individual efforts.<sup>291</sup> Research on mindset and emotional intelligence suggests that grit can be learned.<sup>292</sup>

Indeed, studies stress the role “noncognitive skills”—character traits like “persistence, self-control, curiosity, conscientiousness, grit, and self-confidence” play in determining life-long success.<sup>293</sup> Angela Duckworth’s research has found a significant correlation between high levels of grit and high scholastic performance.<sup>294</sup>

This recent attention to the role grit plays in achieving academic and lifelong success is reminiscent of the founders’ early characterization of the American people as “men of fortitude.”<sup>295</sup> The limitations upon the First Amendment were never intended to shield the most vulnerable members of society from offense; instead, the First Amendment was intended to foster vigorous debate, even when the dialogue became caustic or offensive.

In addition to expecting millennials to practice grit and perseverance, compassion training could also counteract the impact of the easily offended listener who jumps to conclusions and assumes the worst without giving the speaker the benefit of the doubt. The ancient Greek philosopher Zeno of Citium once said “we have two ears and only one mouth, that we may hear more and speak less.”<sup>296</sup> By practicing compassion and empathy in listening, a listener is less likely to experience offense from another person’s speech or expression and more likely to seek to understand and perhaps learn from the different perspective. Some even believe the power of compassionate listening can

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*Bound: An Exploration of Character Development in Law School*, 39 U. ARK. LITTLE ROCK L. REV. 25, 52–63 (2016) (opining that grit and other positive character traits may correspond to success in the practice of law).

291. Baum, *supra* note 290, at 50 (citing CAROL S. DWECK, *MINDSET: THE NEW PSYCHOLOGY OF SUCCESS* (2006)); see also Elizabeth Adamo Usman, *Making Legal Education Stick: Using Cognitive Science to Foster Long-Term Learning in the Legal Writing Classroom*, 29 GEO. J. LEGAL ETHICS 355, 372–77 (2016) (discussing the basics of Mindset Theory).

292. Usman, *supra* note 291, at 378–79.

293. Jason Lee, *Too Cruel for School: LGBT Bullying, Noncognitive Skill Development, and the Educational Rights of Students*, 49 HARV. C.R.-C.L. L. REV. 261, 263 (2014) (considering the role of noncognitive skills education in preventing bullying and its impact on anti-harassment law in the K-12 school context).

294. *Id.* at 267–68 (citing Duckworth et al., *supra* note 290, at 1100).

295. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964).

296. DIOEGENES LAERTIUS, *THE LIVES AND OPINIONS OF EMINENT PHILOSOPHERS* 268 (Charles Duke Yonge trans., London: George Bell & Sons 1853) (quoting ancient Greek philosopher Zeno of Citium).

reduce violence, increase productivity, and decrease depression and loneliness.<sup>297</sup>

Instead of silencing offensive speech or coddling the most sensitive listeners by implementing extreme political correctness measures on college campuses, universities should hearken back to the core values upon which the country was founded. Grit and the practice of compassionate listening are two non-legal solutions that will rebuild the character recognized by the founders of the Constitution in drafting a First Amendment that safeguarded the uninhibited expression of ideas and the free exchange of information. By teaching students to first listen with an open mind and then to practice perseverance and grit in withstanding offense, they will become heartier, more tolerant listeners. Their tolerance, in turn, will lessen the demand for trigger warnings, safe spaces, and disinvitations and rekindle the bedrock principles of the First Amendment on college campuses.

#### CONCLUSION

At two opposing ends of the speech-tolerance spectrum exist individuals that exemplify speech narcissism. At one end, the Donald Trumps of the world shun political correctness and applaud blunt, unfiltered commentary, even when it is offensive or crass; at the other end sits the hypersensitive, highly offended generation demanding sterilized speech, safe spaces, and trigger warnings. The Trump-types, who feel entitled to utter what they wish in an unfiltered manner, and the students, who demand that controversial speakers soften what they wish not to hear, both suffer from a form of speech narcissism. Accommodating this form of speech narcissism with the various values underscoring speech rights—whether those values are individualism and liberty or human dignity and equality—will challenge the idealized assumptions about free speech at the core of the First Amendment.

Almost a century ago, Justices Holmes and Brandeis began to define the central meaning of the First Amendment, recognizing that the freedom to criticize government policy and public officials was essential to liberty.<sup>298</sup> In eloquent parlance, Justice Holmes professed that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>299</sup> He cautioned against silencing “the

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297. Sara Schairer, *Listen Up! 6 Podcast Episodes for Cultivating Compassion: NPR's TED Radio Hour – “The Act of Listening,”* CHOPRA CTR., <http://www.chopra.com/articles/listen-up-6-podcast-episodes-for-cultivating-compassion#sm.000ik70edfkheii10ev2410m5wvc4>.

298. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

299. *Abrams*, 250 U.S. at 630.

expression of opinions that we loathe.”<sup>300</sup> Justice Brandeis, another early champion of free speech, viewed public discussion a civic duty and full discussion, through the “processes of education,” as requiring more speech, not “enforced silence.”<sup>301</sup>

Ironically, in defending free speech, Justices Holmes and Brandeis invoke the marketplace of ideas and the processes of education.<sup>302</sup> In contrast, the political correctness movement justifies its restrictions on free speech as a means of enhancing the educational experience by hoping to facilitate a marketplace of ideas. The universities seeking to achieve excellence in education and a robust exchange of ideas on campus have not learned the lessons of Holmes and Brandeis.

Instead, in the name of political correctness, universities have prioritized the heckler’s veto with little regard to the traditional First Amendment values of individualism, liberty, human dignity, or equality and have ignored the damage such abrogation does to their students. This form of speech narcissism elevates the individual to judge, jury, and enforcer of permissible speech in public discourse. Despite their pure intent, political correctness measures intended to promote more vigorous speech have resulted in less speech.

While the campus freedom of speech acts are a step in the right direction in safeguarding the principles of the First Amendment, there are other, non-legal efforts necessary to remedy the underlying problem with the modern-day political correctness movement. Grit and compassion training are vital in combating the demands made by the easily offended listener in the name of political correctness.

Ultimately, the university campus exists as a laboratory for thought, a place where creativity is rewarded and academic ideas are tested and challenged. Rather than police potentially offensive speech, universities should instill in their students a sense of civil tolerance, rooted in the faith that a speaker’s expression, whether in the classroom or on the quad, comes from a shared pursuit of greater knowledge and understanding. By promoting an unfettered dialogue, universities are serving their central mission by allowing students to find truth in learning rather than silencing expression simply because it could be offensive to even the feeblest of listeners.

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300. *Id.*

301. *Whitney*, 274 U.S. at 377.

302. *Id.*; *Abrams*, 250 U.S. at 630.