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# Current Threats to Free Speech on Campus

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## KEYNOTE SPEECH

### CURRENT THREATS TO FREE SPEECH ON CAMPUS

ROBERT SHIBLEY\*

#### I. FREE SPEECH AND ITS CHALLENGES ON CAMPUS

The past few years have been a critical time for free speech in higher education, and for free speech around the world. Although those in the West are used to hearing about how dissidents in developing countries, as well as those in the remaining communist and Islamic dictatorships, face persecution for speaking their minds, we have also been forced to face the fact that censorship is coming home to Europe and the United States. Events such as the massacre at the *Charlie Hebdo* offices in Paris<sup>1</sup> and the attempted massacre of amateur cartoonists in Garland, Texas,<sup>2</sup> show that free speech has real, heavily armed enemies even here in our own backyard.

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<sup>1</sup> See generally *Charlie Hebdo Attack: Three Days of Terror*, BBC NEWS (Jan. 14, 2015), <http://www.bbc.com/news/world-europe-30708237>.

<sup>2</sup> See generally Ray Jalabi, *Texas Attack: Garland Muslims Caught Between Two 'Outsider' Groups*, THE GUARDIAN (May 5, 2015), <http://www.theguardian.com/us-news/2015/may/05/garland-texas-attack-muslim-community-reaction>.

Reacting to speech with violence is the act of people who lack confidence in their beliefs' ability to withstand examination. That alone should be plenty of evidence that counterarguments are worth hearing out. Instead of boldly defending the right to free speech in the face of violent attempts to suppress "erroneous" viewpoints, however, our institutions—governments, universities, corporations, the media, and even civil society—are increasingly choosing to act as a censor themselves, relying on institutional and bureaucratic power and influence to try to accomplish what the terrorists cannot: the suppression of dissenting opinions. Not only is this ultimately doomed to fail—it is anathema to a free society of autonomous individuals. Censorship is always an attempt to "win" an argument without engaging in the laborious process of persuasion, or bear the burden of being factually correct. It is a recipe for ignorance, and a free society cannot stand with an ignorant populace.

That is what makes it so damaging that the vast majority of colleges in this nation have, for decades, gone all-in on the side of ignorance. At most colleges and universities in this country, the simple act of saying or writing something "wrong," (and by wrong, I mean nothing more than "unpopular with those in power") can land you in front of a college disciplinary tribunal.<sup>3</sup> Unvarnished or barely disguised power politics have replaced principle as the driving force behind determining what is acceptable to say on campus. This, however, is not a new trend; it has been happening since the 1980's.<sup>4</sup> What is new in the last few years is that today's students, apparently ill- or mis-educated in the K-12 system about what is required to be

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<sup>3</sup> See, e.g., George Leef, *Valdosta State Case Puts College Officials On Notice: You Can't Violate The First Amendment*, FORBES (July 31, 2015) <http://www.forbes.com/sites/georgeleef/2015/07/31/valdosta-state-case-puts-college-officials-on-notice-you-cant-violate-the-first-amendment/#7bf9a2c5107a>.

<sup>4</sup> David L. Hudson, Jr., *Hate Speech & Campus Speech Codes*, FIRST AMENDMENT CENTER (Sept. 13, 2002), <http://www.firstamendmentcenter.org/hate-speech-campus-speech-codes> ("During the 1980s and early '90s many public colleges and universities sought to combat discrimination and harassment on campuses through the use of so-called speech codes.").

an enlightened, liberal thinker, have begun to support censoring their compatriots as well as themselves.<sup>5</sup>

A recent survey commissioned by the Buckley program at Yale, and conducted by the firm of McLaughlin and Associates, delivered grim news about students' opinions of free speech.<sup>6</sup> More than half of students (51%) are in favor of their college or university having speech codes to regulate student and faculty speech.<sup>7</sup> A whopping 72% of students said they support disciplinary action against "any student or faculty member on campus who uses language that is considered racist, sexist, homophobic or otherwise offensive."<sup>8</sup>

Although these numbers may make it seem like students have decided they do not even want free speech, there is very little reason to be confident that these students really know anything substantial about the issue. As evidence of this issue, about one-third of college students surveyed did not even know which constitutional amendment dealt with free speech.<sup>9</sup> Further, one-third of those students thought the First Amendment had some kind of exception for hate speech,<sup>10</sup> which it does not. It is shocking that anyone can graduate high school without knowing about the First Amendment, let alone be in such a state after spending time in college. If one-third of today's students cannot even identify the First Amendment, chances

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<sup>5</sup> See generally David French, *Students Learn What Teachers Teach: Speech They Dislike Is Not "Speech"—It's "Violence"*, NAT'L REV. (Oct. 27, 2015), <http://www.nationalreview.com/article/426129/students-learn-what-teachers-teach-speech-they-dislike-not-speech-its-violence-david>.

<sup>6</sup> See McLaughlin & Associates, *The William F. Buckley, Jr. Program at Yale: Almost Half (49%) Of U.S. College Students "Intimidated" By Professors When Sharing Differing Beliefs: Survey*, MCLAUGHLIN & ASSOCS. (Oct. 26, 2015), <http://mclaughlinonline.com/2015/10/26/the-william-f-buckley-jr-program-at-yale-almost-half-49-of-u-s-college-students-intimidated-by-professors-when-sharing-differing-beliefs-survey/>.

<sup>7</sup> Jim McLaughlin & Rob Schmidt, *National Undergraduate Study*, MCLAUGHLIN & ASSOCS., Slide 8 (Oct. 26, 2015), <https://www.dropbox.com/s/sfmpoeytvqc3cl2/NATL%20College%2010-25-15%20Presentation.pdf?dl=0>.

<sup>8</sup> See *id.* at Slide 16.

<sup>9</sup> See *id.* at Slide 11.

<sup>10</sup> See *id.* at Slide 12.

are low that they have a real, working knowledge of why it exists in the first place.

If you have paid any attention to the news headlines of 2015, you will have seen the most talked-about result of this generation's lack of knowledge about free speech—the fervor for trigger warnings and against “microaggressions” on campuses across the nation. These are illustrative of what might be the biggest problem facing speech on campus today. I will address this issue later, but first, it is important to survey the legal and institutional setting in which today's free speech controversies are taking place.

## II. FREE SPEECH ON CAMPUS: THE NUMBERS AND THE LAW

Every year, the Foundation for Individual Rights in Education (FIRE) reviews the speech codes of more than 400 of the largest and most prestigious schools in America using a red-light, yellow-light, and green-light system.<sup>11</sup> The red-light rating is given to public universities that have speech codes that are laughably unconstitutional, and to private universities that violate their own promises of free speech.<sup>12</sup> Yellow-light schools have codes that either restrict a limited amount of protected speech or have codes that are written in such a vague way that administrators can interpret them at their will to censor protected speech.<sup>13</sup> Green-light schools have no policies that either violate the constitution nor that could reasonably be used to violate it.<sup>14</sup>

For the first time in FIRE's history, this year's survey saw the number of schools that received a red-light rating drop under 50%, with about 49% receiving this designation.<sup>15</sup> Another 44% of schools received a yellow-light designation,<sup>16</sup> and a low 5%—that's just 23

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<sup>11</sup> *Spotlight on Speech Codes 2016: The State of Free Speech on Our Nation's Campuses*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (2016), <https://www.thefire.org/spotlight-on-speech-codes-2016/>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

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

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

schools—maintained green-light policies.<sup>17</sup> That’s right—out of over 400 schools rated, only 23 took the time to ensure that their policies do not violate constitutional rights or their own promises of free speech.<sup>18</sup>

With that said, the number of green-light schools is at a record high.<sup>19</sup> FIRE worked with a number of universities this year to achieve green-light status—including UNC Chapel Hill, which became a green-light school this July.<sup>20</sup> However, this is still obviously far from an acceptable level. I am happy to say that, overall, North Carolina was one of the three best states when it comes to free speech on campus.<sup>21</sup> Unfortunately, that is not saying much, as more than one-third of North Carolina colleges currently maintain red-light speech codes.<sup>22</sup>

Fortunately, the law dealing with speech on campus remains solidly in favor of free expression, given the enormous number of colleges and universities that have not shown sufficient concern for student and faculty free speech.<sup>23</sup> Seeing that too many colleges and universities simply had no incentive to change their policies, given their enormous wealth and power as compared to the students whose speech is suppressed, FIRE determined two years ago that it was time to change the equation. On the week of July 4, 2014, FIRE launched four simultaneous speech code lawsuits against schools across the nation, spanning from California to Ohio.<sup>24</sup> By the follow-

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (“[This is] the first time in FIRE’s history that the figure is below 50 percent.”).

<sup>20</sup> *UNC Earns FIRE’s ‘Green Light’ Rating for Free Speech*, UNIV. GAZETTE (Jul. 14, 2015), <http://gazette.unc.edu/2015/07/14/unc-earns-fires-green-light-rating-for-free-speech/>.

<sup>21</sup> *Id.* (“Carolina becomes the 21st green light institution in FIRE’s Spotlight database of more than 400 colleges and universities, as well as the only green light school in the state of North Carolina.”).

<sup>22</sup> *See supra* note 11.

<sup>23</sup> *State of the Law: Speech Codes*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., <https://www.thefire.org/in-court/state-of-the-law-speech-codes/>.

<sup>24</sup> Jennifer Medina, *Advocacy Group Sues 4 Universities in Challenge to Policies It Says Curb Free Speech*, N.Y. TIMES (Jul. 1, 2014),

ing year, FIRE had coordinated 10 lawsuits total through the program, and had not lost any of them.<sup>25</sup> Seven have settled in FIRE's favor, resulting in schools eliminating the challenged speech codes and agreeing to five- and six-figure settlements to cover damages to the student plaintiffs and attorneys' fees (totaling more than \$300,000).<sup>26</sup> Litigation continues at three schools.<sup>27</sup> With this program in place, if a university ignores its Constitutional duties, it is running a real and serious risk of a lawsuit. So, at least in the courts, the news about student free speech on campus is good.

### III. FEDERAL REGULATORY THREATS TO FREE SPEECH ON CAMPUS

Unfortunately, that is not the case when it comes to the executive branch of the federal government. On May 9, 2013, the Departments of Justice and Education issued a findings letter announcing a resolution agreement with the University of Montana that marked the end of a federal investigation into the college's sexual harassment and assault policies, particularly with regard to their basketball team.<sup>28</sup> Ultimately, the findings letter referred to the accompanying agreement as "a blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault," thus creating an impact for universities extending far beyond the state of Montana.<sup>29</sup> But despite FIRE's warning that

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<http://www.nytimes.com/2014/07/02/us/advocacy-group-sues-4-universities-in-challenge-to-policies-it-says-curb-free-speech.html>.

<sup>25</sup> *Id.* FIRE's Stand Up For Speech Litigation Project: a litigation project to abolish campus speech codes nationwide, STAND UP FOR SPEECH, <http://www.standupforspeech.com>.

<sup>26</sup> *College Students and Faculty Return to Campus with FIRE on Their Side*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Sept. 3, 2015), <https://www.thefire.org/college-students-and-faculty-return-to-campus-with-fire-on-their-side/>.

<sup>27</sup> See generally Medina, *supra* note 24.

<sup>28</sup> See *Departments of Justice and Education Reach Settlement to Address and Prevent Sexual Assault and Harassment of Students at the University of Montana in Missoula* (May 9, 2013), U.S. DEPT. OF JUSTICE <http://www.justice.gov/opa/pr/departments-justice-and-education-reach-settlement-address-and-prevent-sexual-assault-and>.

<sup>29</sup> *Id.*; see also *Frequently Asked Questions Regarding the Federal "Blueprint" for Sexual Harassment Policies on Campus*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC.

speech codes making “unwelcome” expression punishable were in violation of the Constitution, the Departments chose to define sexual harassment as “any unwelcome conduct of a sexual nature,” including “verbal conduct.” This definition, of course, is nothing more than an attempt to cast speech as conduct.<sup>30</sup> The First Amendment makes no guarantee to protect individuals from ideas they would rather not hear. But here came the federal government, telling schools that this massively overbroad standard was to be the “blueprint” for following Title IX, the 1972 law against sex discrimination in federally funded educational programs.<sup>31</sup>

The Departments’ adoption of this standard is wholly without basis in law. Huge amounts of speech that might constitute unwelcome verbal conduct of a sexual nature are manifestly not harassment. Under this standard, telling one of Amy Schumer’s jokes about sex in front of someone who does not want to hear it, for whatever reason, is punishable harassment. Additionally, arguing that women should or should not be in combat roles in the military, or that women should or should not have paid family leave, or that trans women either should or should not be considered to enjoy male privilege is punishable harassment. These are all forms of expression that have to do with sex or sexuality, and the various viewpoints expressed are certainly and frequently considered unwelcome. According to the blueprint, they are also forms of sexual harassment. No objective standard is required. No showing of severity or pervasiveness is required. No actual discrimination on the basis of a protected category is required. This expression is automatically deemed to be harassment.

What makes this blueprint such a clear assault on campus free speech is that the Supreme Court, in 1999, actually did come up with a standard suitable for peer-on-peer harassment in the educational context.<sup>32</sup> In *Davis v. Monroe County Board of Education*,<sup>33</sup> the

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(May 28, 2013), <https://www.thefire.org/frequently-asked-questions-regarding-the-federal-blueprint-for-sexual-harassment-policies-on-campus/> [hereinafter *Frequently Asked Questions*].

<sup>30</sup> See Mary Lou Byrd, *Free Speech Under Fire*, FREE BEACON (May 15, 2013), <http://freebeacon.com/politics/free-speech-under-fire/>.

<sup>31</sup> *Frequently Asked Questions*, *supra* note 29.

<sup>32</sup> See *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999).



Court wrote that schools become liable for sexual harassment on campus when they show at least deliberate indifference towards the harassment, which must be comprised of targeted, discriminatory conduct “that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.”<sup>34</sup> This carefully-crafted standard allows schools to identify and punish expression that virtually everyone would agree rises to the level of harassment, while protecting speech that is merely controversial or unwelcome. The Department of Education is well aware of this standard, not least because FIRE has written to the Department about it.<sup>35</sup> Yet, instead of following Supreme Court precedent, the Departments of Education and Justice have decided to tell schools to deem huge amounts of innocuous speech as harassment.

Because of the immense power of the executive branch, especially of the Department of Education’s Office for Civil Rights (“OCR”), schools have begun to do just that. OCR is a uniquely powerful government agency with regard to schools, as it has the power to take them to court and strip them of all of their federal funding.<sup>36</sup> This is a death sentence for virtually any university, whether public or private. That is presumably why, for example, Georgia Southern University quickly adopted a policy that defines sexual harassment as “unwelcome conduct of a sexual nature,” including “verbal or physical conduct of a sexual nature.”<sup>37</sup> That is the precise language of the blueprint. The University of Louisiana at Monroe now defines

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

<sup>34</sup> *Id.* at 631.

<sup>35</sup> Will Creeley, *Letter from FIRE, to Office for Civil Rights Assistant Sec’y for Civil Rights Russlynn Ali, May 5, 2011*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (May 5, 2011), <https://www.thefire.org/fire-letter-to-office-for-civil-rights-assistant-secretary-for-civil-rights-russlynn-ali-may-5-2011/>.

<sup>36</sup> Letter from Russlyn Ali, Assistant Sec’y of the U.S. Dep’t of Educ. Office for Civil Rights, to Colleague (Apr. 4, 2011) <https://d28htnjz2elwuj.cloudfront.net/pdfs/0559f332d909e0024ac3bc0d07081e60.pdf>.

<sup>37</sup> *Georgia Southern University Policy Prohibiting Sexual Harassment*, GA. S. UNIV. (Jul. 20, 2015), <http://president.georgiasouthern.edu/diversity/policy-and-procedures/sexual-harassment/> [hereinafter *Ga. S. Univ.*].

sexual harassment as “any unwelcome conduct of a sexual nature,” including “offensive verbal or physical contact of a sexual nature.”<sup>38</sup> Eastern Illinois University defines sexual harassment as “unwelcome conduct of a sexual nature,” which may include even “a single incident” of “offensive or inappropriate language or jokes (including electronic content).”<sup>39</sup> These definitions are expansive and easily used to punish undesirable opinions and expression.

The restrictions do not stop at targeting speech about the act of sex itself, however. At Norfolk State University, until 2015, sexual harassment included “comments or questions about a person’s body, dress or personal life . . . even if those acts do not involve conduct of a sexual nature.”<sup>40</sup> At the University of Alabama-Birmingham, harassment includes “[a]ny unwelcome conduct based on actual or perceived status including: sex, gender identity/expression, race, color, age, national origin, creed, disability, religion, sexual orientation, pregnancy, or veteran status.”<sup>41</sup> Needless to say, veteran status is not covered under Title IX.<sup>42</sup>

To make matters worse, colleges and universities are not satisfied with simply deeming broad swaths of speech to be sexual harassment when someone actually feels harassed. Schools are also making efforts to get students to report all such speech, regardless of severity. For example, Georgia Southern University adopted the blueprint, but went further, saying, “Students should and employees must report any unwelcome conduct of a sexual nature regardless of severity or the number of occurrences so that Georgia Southern can

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<sup>38</sup> *Sexual Misconduct Complaint Policy*, UNIV. LA. MONROE (Aug. 31, 2015), <http://www.ulm.edu/titleix/policy.html>.

<sup>39</sup> *Internal Governing Policy #175 – Sexual Harassment*, E. ILL. UNIV., <http://castle.eiu.edu/auditing/175.php> (last visited Feb. 26, 2016).

<sup>40</sup> *BOV Policy #05 (2014) Sexual Misconduct*, NORFOLK STATE UNIV. (May 9, 2014), <https://www.nsu.edu/Assets/websites/policy-library/policies/01/BOV-Policy-05-Sexual-Misconduct.pdf>.

<sup>41</sup> *Non-Academic Student Code of Conduct Policy, Advocacy, Rights and Conduct*, UNIV. ALA. BIRMINGHAM <http://www.uab.edu/students/images/documents/sarc/non-academic-student-code-of-conduct-policy.pdf> (last visited Feb. 20, 2016).

<sup>42</sup> Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq. (2015).

take steps to address harassment before it creates a hostile environment.”<sup>43</sup>

Not only *should* students report when someone tells a dirty joke or says something that could be perceived as sexist, employees *must* report it when this happens. Granted, it is hard to imagine employees or students at Georgia Southern taking this regulation all that seriously, because if they did, the university would have no time to do anything other than process reports. But that cannot be used to defend such a rule.

In fact, let me take a moment to explore the moral bankruptcy of rules like this that claim to strip certain people of their rights, but that generally fly under the radar because they are so rarely enforced. Rules like Georgia Southern’s are the logical equivalent of putting “whites only” signs up over drinking fountains but generally allowing non-white students to use those fountains anyway. We would all recognize this as an outrageous violation of civil rights. Telling people that they do not have a right in the hopes that they won’t exercise it is reprehensible. But it is the reality of how universities have become accustomed to treating free speech, and how they get away with censorship—not only at campuses that use the blueprint, but on every campus that has an unconstitutional speech code. The volume and tenor of campus speech (and off-campus speech, of course) is such that no speech code prohibiting and punishing “offensiveness” can be enforced 100 percent of the time, or even 10 percent of the time. Colleges know this, and they know these codes are unconstitutional. The codes therefore exist for only two reasons, both of them disgraceful. Either they are intended to misinform students about certain civil rights, or they are there to punish students whose speech offends those with power on campus. The fact that academia has tolerated this unjust regime for so long is shameful.

It is not only students who have to fear this unholy combination of campus censors and federal government pressure. Faculty members also have ample reason to be fearful that their expressive rights and academic freedom are on the chopping block, as well. Once again, Title IX has recently been the preferred vehicle for attempts at censorship. You may have heard about the case concerning

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<sup>43</sup> *Ga. S. Univ.*, *supra* note 37.

Laura Kipnis, identified by *The Nation* as a “provocative feminist film professor”<sup>44</sup> at Northwestern University, whose story provides a prime example of how the combination of out-of-control administrators and federal regulators can abuse the law in order to censor a professor’s ability to discuss matters of public concern.

In February 2015, Northwestern subjected Professor Kipnis to a 72-day-long Title IX investigation based on an article she wrote for *The Chronicle of Higher Education*, titled *Sexual Paranoia Strikes Academe*.<sup>45</sup> The article spoke to multiple issues, including the language surrounding consent, sexual assault, emotional “triggers,” student-professor relationships, and lawsuits confronting the lack of due process in campus judicial systems.<sup>46</sup> Kipnis’s central contention was that blanket bans on professor-student relationships were overkill given the commonality of those relationships in the past.<sup>47</sup> Regarding the movement against such relationships, and about the attitude towards sex on campus more generally, she wrote, “If this is feminism, it’s feminism hijacked by melodrama.”<sup>48</sup> As if to prove her point, two students read Kipnis’s article and supposedly found it so offensive that they reported her to Northwestern’s Title IX office.<sup>49</sup> One student claimed that “the essay had a ‘chilling effect’ on students’ ability to report sexual misconduct,”<sup>50</sup> while the other took issue with Kipnis’s mention of a case in which the student was involved—not because it was mentioned at all, but because the student felt that more information should have been included.<sup>51</sup> Kipnis

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<sup>44</sup> Michelle Goldberg, *The Laura Kipnis Melodrama*, NATION (Mar. 16, 2015) <http://www.thenation.com/article/laura-kipnis-melodrama/>.

<sup>45</sup> Susan Kruth, *Laura Kipnis’s “Title IX Inquisition” Reveals Absurdity of the Current Campus Climate*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (May 29, 2015), <https://www.thefire.org/laura-kipniss-title-ix-inquisition-reveals-absurdity-of-the-current-campus-climate/>.

<sup>46</sup> Laura Kipnis, *Sexual Paranoia Strikes Academe*, CHRONICLE REV. (Feb. 27, 2015), <http://chronicle.com/article/Sexual-Paranoia/190351/> [hereinafter *Sexual Paranoia*].

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 3.

<sup>49</sup> Laura Kipnis, *My Title IX Inquisition*, THE CHRONICLE REV. (May 29, 2015), [laurakipnis.com/.../My-Title-IX-Inquisition-The-Chronicle-Review-.pdf](http://laurakipnis.com/.../My-Title-IX-Inquisition-The-Chronicle-Review-.pdf).

<sup>50</sup> *Id.* at 5.

<sup>51</sup> *Id.*

named no names from the lawsuit she discussed, despite the case being reported nationwide.<sup>52</sup>

Of course, it is completely within students' rights to criticize Kipnis's essay, even if such criticism is unreasonable. But Professor Kipnis also had what should have been an obvious right to write in a national newspaper about an issue of both public concern and academic interest—sex between students and faculty members—without facing a Title IX inquisition.

It was not just Kipnis who had to face Title IX investigations. Her support person, a fellow faculty member who had the gall to talk about the case at a Faculty Senate meeting, was also charged with retaliation under Title IX for daring to speak about the case in public, and was told that he could no longer act as her support person.<sup>53</sup> It is likely that Northwestern decided to launch this second absurd investigation despite the fact that it was already under siege for Kipnis's inquisition because failure to investigate a Title IX complaint can trigger a complaint to OCR and the ensuing long, embarrassing, expensive, and high-stakes government probe.<sup>54</sup> Northwestern may well have picked what it saw as the least bad option for its institutional pride. That does not, however, excuse its meritless persecution of yet another faculty member.

What is more, Kipnis had to fight tooth and nail even to get Northwestern to tell her the specific charges against her before she was interrogated, she was denied the right to bring in an attorney of her own despite the fact that the university hired expensive outside attorneys to perform the investigation, and she was barred from recording any investigation sessions.<sup>55</sup> None of this is unusual in FIRE's experience. I cannot stress enough how common it is to see faculty or students denied these basic due process rights.

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<sup>52</sup> Ciara McCarthy, *Northwestern Professor Resign After Sexual Harassment Investigation*, THE GUARDIAN, (Nov. 3, 2015, 14:50), <http://www.theguardian.com/us-news/2015/nov/03/northwestern-professor-peter-ludlow-resigns-sexual-harassment>.

<sup>53</sup> *My Title IX Inquisition*, *supra* note 49, at 11.

<sup>54</sup> James R. Marsh, *What You Need to Know About Title IX*, MARSH L. FIRM PLLC (2014–2016), <http://title9.us/overview/#.VplpZPkrJD8>.

<sup>55</sup> *Sexual Paranoia*, *supra* note 46, at 4.

The *in terrorem* effects of OCR's actions are very real, but they are magnified by colleges' and universities' unwillingness to stand up for academic freedom and free expression in the face of even potential difficulty. In reality, if Northwestern had decided to stand on principle at the outset and refused to investigate Kipnis's newspaper column as an instance of sexual harassment, it is highly unlikely that OCR would have pressed the case and courted legal disaster by so clearly linking its regulations with newspaper censorship.

So, students' free speech rights are not safe. Faculty members' rights are not safe. What about the rights of anonymous campus community members? The effort to jeopardize their rights is also underway. This past October, 72 feminist, civil rights, and victims' advocacy groups sent a letter to OCR asking it to issue guidance stating that colleges and universities have an obligation to "prevent and remedy all forms of prohibited harassment, including harassment through anonymous social media applications."<sup>56</sup> The call was driven by remarks made on the location-based social media app, Yik Yak, which supposedly threatened students following the tragic murder of student Grace Mann earlier in the year, allegedly by a male housemate.<sup>57</sup> To be clear, there is no evidence that Yik Yak or indeed any form of social media had to do with the murder. The focus, instead, is on alleged death threats and harassment made on the platform.

Law enforcement should, of course, follow up on serious threats of physical violence. But Yik Yak already works with the police to identify users who deliver such threats. For instance, last November, when a Michigan State University student published a "Yak" saying, "I'm gonna [image of a pistol] the school at 12:15 p.m. today," Yik Yak worked with the police, and the alleged perpetrator was arrested within 45 minutes of his post.<sup>58</sup> When a plausible threat is

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<sup>56</sup> Josh Logue, *Who Should Prevent Social Media Harassment?*, (Oct. 22, 2015), INSIDE HIGHER ED, <https://www.insidehighered.com/news/2015/10/22/colleges-face-new-pressure-monitor-social-media-site-yik-yak>.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

made, competent law enforcement agencies are already capable of handling the problem.

Yet, the supposed remedies suggested by the groups writing to OCR read like the handbook for a police state. Among their demands are the following: geo-fencing of anonymous social media applications, barring the use of campus Wi-Fi to view or post to these applications, and monitoring social media applications to ensure immediate response to online harassment and intimidation.<sup>59</sup> So, to be clear, they want to make it impossible to use the application in certain areas, want it banned from college networks, and want the authorities to monitor everything said online. This may be considered normal in Iran or China, where Internet blocking and/or monitoring is a daily fact of life.<sup>60</sup> It is, however, the farthest thing from appropriate in the United States, and especially on a college campus where free exchange of ideas—even objectionable ideas—is so important. Eliminating an entire forum for speech because you don't like some of the speech in or on it is an enormous and illiberal over-reaction.

It is also counterproductive. To the extent that Yik Yak or other social media platforms make real threats detectable, that's an advantage in terms of actual physical safety. A common mistake made by campus censors and their supporters is the unspoken assumption that if we do everything we can to stop threats of violence, we can somehow stop violence from occurring. Threats in and of themselves are not physically dangerous, and indeed we know that many more threats of violence are made than are actually carried out. For example, the Michigan State student discussed above did not actually intend to commit a campus shooting. He was convicted of making a false terrorist threat, given two years of probation, and ordered to pay about \$1500 in fines and restitution.<sup>61</sup> If he had been

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<sup>59</sup> *Id.*

<sup>60</sup> Dana Liebelson, *MAP: Here Are the Countries That Block Facebook, Twitter, and YouTube*, MOTHER JONES (Mar. 28, 2014, 05:00 AM), <http://www.motherjones.com/politics/2014/03/turkey-facebook-youtube-twitter-blocked>.

<sup>61</sup> Kevin Grasha, *Former MSU Student Sentenced for Yik Yak Shooting Threat*, LANSING STATE J. (Mar. 4, 2015, 04:19 PM),

making a real threat, however, the fact that he made the threat instead of simply going about his crime gave the police time to find him and gave campuses time to lock down in response. The value of free speech as a warning mechanism should not be gainsaid. As Harvey Silverglate, the Jewish, Boston-based civil liberties lawyer who co-founded FIRE, has often said, "If there are Nazis in the room, I want to know who they are so that I can keep an eye on them."<sup>62</sup>

#### IV. THE ILLUSION UNDERLYING THE PROMISE OF CENSORSHIP

The other, largely unspoken, assumption underlying these censorship efforts is that if we can control what people say or hear, we can control how they think and prevent "bad" ideas from taking hold. In a society that in any way resembles a liberal democracy, this will not work. In fact, we can know it will not work, because some European countries have provided us examples.

In France, Holocaust denial has been illegal since 1990.<sup>63</sup> In 2011, the nation convicted 359 people for engaging in "hate speech," defined as "insult," "defamation," or "provocation to discrimination, hatred or violence . . . toward a person or a group of persons because of their origin or their belonging or non-belonging to an ethnic group, a nation, a race, or a determined religion."<sup>64</sup> In 2015, French police arrested more than 70 people for praising the *Charlie Hebdo* terrorist attack, mostly on social media.<sup>65</sup> In France, writing on Face-

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<http://www.lansingstatejournal.com/story/news/local/2015/03/04/yik-yak-sentence/24373391/?from=global&sessionKey=&autologin=>.

<sup>62</sup> *Censoring Bigoted Speech at UC San Diego: Who Does it Help?*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Mar. 11, 2010), <https://www.thefire.org/censoring-bigoted-speech-at-uc-san-diego-who-does-it-help/>.

<sup>63</sup> Richard Brody, *Injure Raciale*, NEW YORKER (Mar. 2, 2011), <http://www.newyorker.com/culture/richard-brody/injure-raciale> ("[T]he Gayssot Act, which both bans Holocaust denial and reinforces the law against ethnic discrimination.").

<sup>64</sup> Erik Bleich, *French Hate Speech Laws are Less Simplistic Than You Think*, WASH. POST (Jan. 18, 2015) <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/01/18/french-hate-speech-laws-are-less-simplistic-than-you-think/>.

<sup>65</sup> Jill Lawless, *Charlie Hebdo Raises the Question: Is Hate Speech Protected In France?*, HUFFINGTON POST (Jan. 27, 2015, 7:26 AM),



book, “Tonight, as far as I’m concerned, I feel like Charlie Coulibaly,” as French comedian Dieudonné M’bala M’bala did, mixing the name of *Charlie Hebdo* with the name of one of the shooters, will get you arrested and convicted of glorifying terrorism.<sup>66</sup> France has put real teeth into laws that punish offensive speech.

Yet, according to an enormous survey by the Anti-Defamation League (“ADL”), as of 2014, 37 percent of the French harbored what ADL defines as anti-Semitic opinions,<sup>67</sup> including 31 percent who believe “Jews don’t care what happens to anyone but their own kind” and an amazing 18 percent who believe that “Jews are responsible for most of the world’s wars.”<sup>68</sup>

The United States, on the other hand, has never banned Holocaust denial or hateful speech, thanks to the First Amendment. M’bala would face no official sanction here. Has that made America a cesspool of anti-Jewish hate? The ADL found the percentage of Americans holding anti-Semitic attitudes to be nine percent, the sixth-lowest in the world.<sup>69</sup>

Obviously, a comparison like this cannot capture all the differences between the two nations, and a 2015 survey of Western Europe in the immediate wake of the *Charlie Hebdo* attacks showed much lower levels of anti-Semitism—though still about double the U.S. level.<sup>70</sup> Regardless, the results strongly suggest that censorship does not cure bigotry, and refusing to punish hateful speech does not mean that hateful speech will predominate. If we are going to punish people for hateful or offensive speech, could we at least see some evidence that said punishments will actually be effective?

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[http://www.huffingtonpost.com/2015/01/27/free-speech-france-charlie-hebdo\\_n\\_6550240.html](http://www.huffingtonpost.com/2015/01/27/free-speech-france-charlie-hebdo_n_6550240.html).

<sup>66</sup> *Id.*; see also Bleich, *supra* note 64.

<sup>67</sup> *ADL Global 100: A Survey of Attitudes Toward Jews in Over 100 Countries Around the World*, ANTI-DEFAMATION LEAGUE (2014), <http://global100.adl.org/public/ADL-Global-100-Executive-Summary.pdf>.

<sup>68</sup> *ADL Global 100: France*, ANTI-DEFAMATION LEAGUE (2014), <http://global100.adl.org/#country/france/2014>.

<sup>69</sup> *ADL Global 100: A Survey*, *supra* note 67.

<sup>70</sup> *ADL Global 100: 2015 Update in 19 Countries*, ANTI-DEFAMATION LEAGUE (2015), <http://global100.adl.org/public/ADL-Global-Executive-Summary2015.pdf> (demonstrating that France’s index score dropped from 37% in 2014 to 17% in 2015).

## V. TRIGGER WARNINGS AND MICROAGGRESSIONS

Though all of these problems are profound, the most pressing issue with regard to campus speech in the U.S. is the new fervor for trigger warnings and against the use of “microaggressions” on campuses across the nation.<sup>71</sup> Until fairly recently, FIRE’s work was made much easier by the fact that the majority of students did not display much respect for restrictions on their speech. This seems to be changing now, as reflected both in the Buckley survey cited earlier,<sup>72</sup> and in FIRE’s experience on the ground. Advocating for trigger warnings as a moral duty, we all share in an effort to shelter people from hearing things they would rather not hear is shockingly attractive to many students today, but the case for them does not hold up to scrutiny.

A. *Trigger Warnings*

The animating thought behind trigger warnings and microaggressions is the same: that some speech or expression is harmful and unsafe. First, let’s talk about trigger warnings. Trigger warnings are short, up-front statements about the content of material intended to warn people about material that might upset, re-traumatize, or even trigger flashbacks in people suffering from post-traumatic stress disorder, or PTSD.<sup>73</sup>

So, how do we determine what should get a trigger warning? Unfortunately, there is no fixed standard. The idea of these content “trigger warnings” comes from the psychology of PTSD.<sup>74</sup> According

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<sup>71</sup> Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 2015), at 48-50, <http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/> [hereinafter *Coddling*].

<sup>72</sup> See McLaughlin & Associates, *supra* note 6.

<sup>73</sup> See Jenny Jarvie, *Trigger Happy*, NEW REPUBLIC (Mar. 3, 2014), <https://newrepublic.com/article/116842/trigger-warnings-have-spread-blogs-college-classes-thats-bad>.

<sup>74</sup> See *Post-Traumatic Stress Disorder*, NAT’L INST. OF MENTAL HEALTH, [http://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml#part\\_145370](http://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml#part_145370) [hereinafter PTSD: NIMH].

to the U.S. National Institute of Mental Health (NIMH), PTSD is a result of the natural fight-or-flight response that is part of human psychology.<sup>75</sup> According to NIMH:

[I]n post-traumatic stress disorder (PTSD), this reaction is changed or damaged. People who have PTSD may feel stressed or frightened even when they're no longer in danger. PTSD develops after a terrifying ordeal that involved physical harm or the threat of physical harm. The person who develops PTSD may have been the one who was harmed, the harm may have happened to a loved one, or the person may have witnessed a harmful event that happened to loved ones or strangers.<sup>76</sup>

PTSD is caused by serious trauma, often including witnessing death or coming close to dying one's self.<sup>77</sup> NIMH's list of traumatic incidents that may lead to PTSD includes "mugging, rape, torture, being kidnapped or held captive, child abuse, car accidents, train wrecks, plane crashes, bombings, or natural disasters such as floods or earthquakes."<sup>78</sup>

Trigger warnings first appeared on blogs and Internet forums where such traumas were frequently discussed, especially with regard to sexual assault.<sup>79</sup> Nearly anything can be a trigger for PTSD sufferers, including sights, sounds, smells, as well as more nuanced reminders of the original trauma, such as names or objects associated with their traumatic experience.<sup>80</sup> The idea behind the warnings was to give readers an opportunity to avoid the onset of PTSD symptoms if they were triggered by mentions of similar incidents or topics.<sup>81</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Jarvie, *supra* note 73.

<sup>80</sup> PTSD: NIMH, *supra* note 74.

<sup>81</sup> Jarvie, *supra* note 73.

It is unclear whether this effort is actually helpful to those it is intended to help. Psychologist Jonathan Haidt says that, “according to the most-basic tenets of psychology, the very idea of helping people with anxiety disorders avoid the things they fear is misguided.”<sup>82</sup> In his September 2015 cover story for *The Atlantic*, co-authored by FIRE President and CEO Greg Lukianoff, Haidt goes on to say that:

Students who call for trigger warnings may be correct that some of their peers are harboring memories of trauma that could be reactivated by course readings. But they are wrong to try to prevent such reactivations. Students with PTSD should of course get treatment, but they should not try to avoid normal life, with its many opportunities for habituation. Classroom discussions are safe places to be exposed to incidental reminders of trauma (such as the word *violate*). A discussion of violence is unlikely to be followed by actual violence, so it is a good way to help students change the associations that are causing them discomfort. And they’d better get their habituation done in college, because the world beyond college will be far less willing to accommodate requests for trigger warnings and opt-outs.<sup>83</sup>

We have since gone far afield from the original purpose of trigger warnings. Although their supporters continue to rely on their origins in PTSD psychology to justify demanding their use on campus, the sorts of warnings now being demanded go far beyond an effort (even if misguided) to avoid invoking symptoms of PTSD. Haidt and Lukianoff point out that students have demanded trigger warnings for Virginia Woolf’s *Mrs. Dalloway* (for “suicidal inclinations”) and Ovid’s *Metamorphoses* (for sexual assault).<sup>84</sup> Oberlin College floated the idea that faculty should put trigger warnings on anything discussing “racism, classism, sexism, heterosexism, cissexism, ableism, and oth-

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<sup>82</sup> *Coddling*, *supra* note 71, at 48.

<sup>83</sup> *Id.* at 48–49.

<sup>84</sup> *Id.*

er issues of privilege and oppression.”<sup>85</sup> The draft guide circulated at Oberlin stated, for instance, “Chinua Achebe’s *Things Fall Apart* is a triumph of literature that everyone in the world should read. However, it may trigger readers who have experienced racism, colonialism, religious persecution, violence, suicide, and more.”<sup>86</sup> At Rutgers, students proposed that *The Great Gatsby* receive a trigger warning for misogynistic violence.<sup>87</sup> Jenny Jarvie of *The New Republic* compiled a list of trigger warnings she found that included “sex, pregnancy, addiction, bullying, suicide, sizeism, ableism, homophobia, transphobia, slut shaming, victim-blaming, alcohol, blood, insects, small holes, and animals in wigs.”<sup>88</sup>

Although it is tempting to simply have fun with the absurdity of giving trigger warnings for things like holes and animals in wigs, it is impossible to escape noticing that the list of topics that purportedly require trigger warnings is, in large part, political. Cissexism? Ableism? Colonialism? Slut shaming? These are all inescapably political topics. Others, such as racism, sexism, and homophobia are all usually politically defined, with some views on those subjects deemed triggering and others not. For instance, does anyone worry about triggering people who are homophobes or racists? I suspect not.

But in my conversations with students, and in reading the student exponents of trigger warnings, I have noticed that huge numbers of today’s students do not even recognize the political nature of the censorship they are demanding. The lack of self-awareness of their own political biases is, frankly, shocking.

For example, this past year at UNC a controversy arose surrounding a pro-life group’s use of chalk to write anti-abortion mes-

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<sup>85</sup> Carlo Davis, *Oberlin Amends its Trigger-Warning Policy*, NEW REPUBLIC (Apr. 9, 2014) <https://newrepublic.com/article/117320/oberlin-amends-its-trigger-warning-policy>.

<sup>86</sup> Alison Flood, *US Students Request “Trigger Warnings” on Literature*, GUARDIAN (May 19, 2014), <http://www.theguardian.com/books/2014/may/19/us-students-request-trigger-warnings-in-literature>.

<sup>87</sup> Philip Wythe, *Trigger Warnings Needed In Classroom*, DAILY TARGUM (Feb. 18, 2014, 12:00 AM), <http://www.dailytargum.com/article/2014/02/trigger-warnings-needed-in-classroom>.

<sup>88</sup> Jarvie, *supra* note 73.

sages on sidewalks across campus.<sup>89</sup> The group went out at night to write messages including “Preborn Lives Matter” and “All Lives Matter.”<sup>90</sup> By early the next morning, the pro-choice group on campus had washed away the majority of their messages.<sup>91</sup> The reason the pro-choice group’s co-chairperson gave for erasing the messages was that “a lot of what was written was really triggering and not safe for folks to read.”<sup>92</sup> Furthermore, when asked why their group did not respond by using more speech, either through counter-chalkings or by directly speaking with the pro-life group, another co-chairperson went on to say, “Just responding back would be counterproductive . . . We would just go into that cycle of making people with uterus’ bodies a battlefield, which is not something we want to do.”<sup>93</sup>

These students appear to be lacking any awareness that their views are even up for dispute. To claim that the words “preborn lives matter” is a safety issue is to stretch the concept of safety beyond all recognition. The debate over abortion in America is well-known in large part because it is so hotly contested, and because people on both sides have such strong feelings. And yet here are UNC students—presumably informed and intelligent people—claiming that a fairly mild statement of the position of approximately half of all Americans like “preborn lives matter” is too dangerous even to be *seen* by their fellow students. Even if one accepts the premise that the words “preborn lives matter” could be triggering for some number of students, that reaction would not be sufficient to legitimize preventing pro-life students from expressing their views. Not only would it impoverish campus discourse, but it would also be utterly useless—the same people who might be triggered by those words on

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<sup>89</sup> Peter Fricke, *Pro-Life Message Silenced at UNC*, CAMPUS REFORM (Sept. 24, 2015) <http://www.campusreform.org/?ID=6833>.

<sup>90</sup> *Id.*

<sup>91</sup> David Doochin, *Abortion Clash Plays Out In Erased Sidewalk Chalk*, DAILY TAR HEEL (Sept. 25, 2015, 12:25 AM), <http://www.dailytarheel.com/article/2015/09/abortion-clash-plays-out-in-erased-sidewalk-chalk>.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

campus will assuredly have to deal with hearing about the issue for the rest of their lives after their college graduation.

When I bring up points like this, the fallback position for advocates of trigger warnings tends to be, “Well, OK, they should not be required, but they are a good idea, and it is a matter of politeness and consideration.” Perhaps trigger warnings are the only way to be polite under certain definitions of politeness—though not by any definition to which I subscribe—but even then, there is mounting evidence that they are not a good idea. As Haidt and Lukianoff warn in *The Atlantic*:

The expansive use of trigger warnings may also foster unhealthy mental habits in the vastly larger group of students who do not suffer from PTSD or other anxiety disorders. People acquire their fears not just from their own past experiences, but from social learning as well. If everyone around you acts as though something is dangerous—elevators, certain neighborhoods, novels depicting racism—then you are at risk of acquiring that fear too.<sup>94</sup>

Here is an example of how that can work in the academic environment. In a personal blog post, which was reprinted by Salon, Rani Neutill, a former lecturer at both Harvard and Brandeis, penned an eye-opening entry titled, *How Trigger Warnings Broke My Back*.<sup>95</sup> In it, she describes her experience teaching a class on sex and modern cinema at Brandeis.<sup>96</sup> As a professor who moonlights as a rape crisis center volunteer, Neutill wrote:

I entered the course believing in trigger warnings and gave them throughout the class, even though it seemed as though the title of the

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<sup>94</sup> Coddling, *supra* note 71, at 49.

<sup>95</sup> Rani Neutill, *My Trigger Warning Disaster: “9 ½ Weeks,” “The Wire” and How Coddled Young Radicals got Discomfort Wrong*, SALON (Oct. 28, 2015, 06:59 PM), [http://www.salon.com/2015/10/28/i\\_wanted\\_to\\_be\\_a\\_supporter\\_of\\_survivors\\_on\\_campus\\_and\\_a\\_good\\_teacher\\_i\\_didnt\\_realize\\_just\\_how\\_impossible\\_this\\_would\\_be/](http://www.salon.com/2015/10/28/i_wanted_to_be_a_supporter_of_survivors_on_campus_and_a_good_teacher_i_didnt_realize_just_how_impossible_this_would_be/).

<sup>96</sup> *Id.*

course was a trigger warning in and of itself. Regardless, I gave them for almost every film I showed. I even gave them for films that really shouldn't have needed them (i.e., *Psycho*).<sup>97</sup>

The crisis really began during the class's study of the first blaxploitation film ever made, *Sweet Sweetback's Badasssss Song*.<sup>98</sup> After she showed an important scene from the film in which an underage black male has willing sex with a 30-year-old woman—in other words, a depiction of statutory rape—two students “left the room in tears” despite being warned beforehand what the scene would contain.<sup>99</sup> Neutill was later asked in her office by another crying student why the class's first depictions of black sexuality had to be so negative (from the student's perspective).<sup>100</sup> To ameliorate this concern, Neutill showed a scene from *The Wire* where Omar, a gay, black character, is tenderly kissing his boyfriend after sex.<sup>101</sup> The student who had cried before made another visit to Neutill's office, again in tears.<sup>102</sup>

Neutill then doubled down on her efforts, giving trigger warnings before every scene she screened, whether or not she thought it was actually triggering.<sup>103</sup> Another student then came to her and said that she should email the trigger warnings the night before class so that survivors would not be “outed” when they left class for a particular scene.<sup>104</sup> Instead of leaving for the scene, the students could then skip class altogether.<sup>105</sup> Amazingly, Neutill did so for every screening session, “detailing which scene [she] was showing, where in the film the scene was, and what the content of the scene included.”<sup>106</sup> But the problems continued. When Neutill showed a scene of consensual sex from the movie *9 ½ Weeks*, stu-

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*



dents claimed it was actually nonconsensual because of the nature of the characters' relationship, which meant that Neutill's trigger warning had to have been inaccurate.<sup>107</sup> Neutill simply could not win.

In the end, this process did not make students safer. Instead, it put roadblock after roadblock in front of students' ability to learn, taught students to skip class if there is any chance that they might be uncomfortable with the material, and drove Neutill out of the profession altogether. This is an entirely predictable result of a regime of even voluntary trigger warnings, and it is entirely depressing.

### *B. Microaggressions*

Censoring microaggressions is, if anything, even more damaging to campus speech, as well as more transparently political, than trigger warnings. Microaggressions are defined by psychologist Derald Wing Sue, probably the foremost exponent of the concept, as "everyday verbal, nonverbal, and environmental slights, snubs, or insults, whether intentional or unintentional, which communicate hostile, derogatory, or negative messages to target persons based solely upon their marginalized group membership."<sup>108</sup> Sue says that microaggressions "can influence the standard of living and quality of life for women and persons of color."<sup>109</sup> A microaggression can be composed of purely non-threatening speech, deployed unintentionally, or even be the result of unconscious stereotypes or bias.<sup>110</sup> The result is a paradigm that creates victims of aggression without the need for any actual aggressive intentions or behaviors. As one might expect, the temptation to define microaggressions politically and to police those who "commit" them is simply too tantalizing for many on campus to pass up.

This past March in upstate New York, the Ithaca College student government proposed an anonymous microaggression report-

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<sup>107</sup> *Id.*

<sup>108</sup> Derald Wing Sue, Ph.D., *Microaggressions: More Than Just Race*, PSYCHOLOGY TODAY (Nov. 17, 2010), <https://www.psychologytoday.com/blog/microaggressions-in-everyday-life/201011/microaggressions-more-just-race>.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

ing system that was envisioned to facilitate disciplinary action against “oppressors.”<sup>111</sup> Oppressors, mind you, who did not necessarily have any idea that they were doing any oppressing. Although the sponsors of the proposal stated that “not . . . every instance will require trial or some kind of harsh punishment,”<sup>112</sup> such a system would give administrators the ability to punish even well-meaning speakers if they are deemed to be sufficiently uninformed about the “correct” way to talk about issues.

Of course, there is no real agreement on what does and does not constitute a microaggression, but the University of California system, which is one of America’s biggest, recently promulgated a list of microaggressions it suggests professors avoid in the name of student safety.<sup>113</sup> This list was not confined to the loaded, high-wattage words. Among the offenses listed are saying, “I believe the most qualified person should get the job”; that “America is the land of opportunity”; or that “[g]ender plays no part in who we hire.”<sup>114</sup> These are cited as microaggressions promoting the “[m]yth of [m]eritocracy.”<sup>115</sup> Using the pronoun “he” to refer to all people is deemed a sexist microaggression.<sup>116</sup> Even the phrase “America is a melting pot” is listed as a microaggression because of its “color blindness.”<sup>117</sup> Most extraordinarily, for reasons I cannot even begin to explain, asking an Asian, Latino, or Native American student to

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<sup>111</sup> Evan Pop, *IC SGA Passes Bill to Create System to Report Microaggressions*, ITHACAN (Mar. 18, 2015), <http://theithacan.org/news/ic-sga-passes-bill-to-create-system-to-report-microaggressions/>.

<sup>112</sup> Noreyana Fernando, *Ithaca College Student Gov. Considers New Reporting System for “Microaggressions”*, ITHACA VOICE (Mar. 15, 2015), <http://ithacavoices.com/2015/03/ithaca-college-student-gov-considers-new-reporting-system-microaggressions/>.

<sup>113</sup> UCLA Diversity & Faculty Development, *Tool: Recognizing Microaggressions and the Messages They Send*, DIVERSITY IN THE CLASSROOM (2014), [http://www.ucop.edu/academic-personnel-programs/\\_files/seminars/Tool\\_Recognizing\\_Microaggressions.pdf](http://www.ucop.edu/academic-personnel-programs/_files/seminars/Tool_Recognizing_Microaggressions.pdf).

<sup>114</sup> *Id.* at 1.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 2.

<sup>117</sup> *Id.* at 1.

“speak up more” is deemed a microaggression because it asks students to “[a]ssimilate to [the] dominant culture.”<sup>118</sup>

#### V. THE CENSORS’ POLITICAL AGENDA

To the average American who takes a few moments to think about the repercussions of policing such statements, two things become clear. First, any attempt to actually eliminate microaggressions from speech is doomed to total failure. Second, whoever is making the decisions about what constitutes a microaggression has been handed an enormous amount of power to put certain political beliefs off-limits. There are a lot of people out there that believe that America *is* a melting pot, or that the most qualified person *should* get the job. It has not escaped their notice that it is their beliefs and not others’ that have been singled out as harmful.

There is a huge risk here for universities that I do not think they even realize—but they will soon enough. As student resistance to the speech police fails, universities will increasingly appear to be producing lockstep products of indoctrination rather than education—students who spend their time lecturing everyone not sufficiently privileged to go to college about microaggressions, privilege, and “safety.” As a result, the public esteem for universities will recede at an alarming pace, and the funding with it. The beginnings of a slide in political confidence in public universities can already be seen in states like Wisconsin and Texas.<sup>119</sup> Colleges would be wise not to work *too* hard to make sure nobody steps out of line.

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<sup>118</sup> *Id.* at 2.

<sup>119</sup> See, e.g., *UT-Austin at Center of Fight Over the Purpose of College*, USA TODAY (Feb. 2, 2013, 12:38 PM), <http://www.usatoday.com/story/news/nation/2013/02/02/texas-higher-ed-clash/1885923/> (demonstrating how legislators in some places are getting more skeptical of how public universities are being run by describing the funding disputes in Texas and the debate over the \$10k bachelor’s degree plan); see also, Nina Kravinsky, *Controversial Tenure Provisions Become Reality as Gov. Walker Signs Budget*, BADGER HERALD (Jul. 18, 2015), <https://badgerherald.com/news/2015/07/18/controversial-tenure-provisions-become-reality-as-gov-walker-signs-budget/> (discussing Wisconsin’s decision to take tenure out of the realm of state law).

Supporters of censorship, whether in the Victorian era or today, have always been driven by the belief that if they can just ban the expression that seems harmful, a moral utopia is right around the corner. If such a utopia is to be achieved, it most certainly will not happen through the agencies of censorship and groupthink. When students call for campuses to be made into “safe spaces” through the agency of trigger warnings, microaggression policing, and speech codes, they need to realize that what is safe for one person’s psyche is not necessarily safe for another’s—and that creating a cocoon for one’s beliefs is not the foundation of a liberal education. Although advocates of “safe spaces,” microaggressions, trigger warnings, and anti-discrimination policies like to frame their demands as promoting compassion and empathy, that empathy is in short supply for people defined as the “political other.” After a recent speech, a student asked me how we could have both safe spaces and free speech on campus. I responded by saying that I simply do not consider a space where you can be censored or punished for your speech to be safe. It was clear that he had not thought of it from that angle. The idea that people might be punished for expressing themselves just seemed normal to him.

That is what makes censorship so harmful to public discourse, and so alienating to people who are on the receiving end of it. If we actually want a more inclusive environment on campuses, all ideas must be heard and debated. This will inevitably leave some feeling uncomfortable and offended, but America’s history shows us that it’s worth it. Open discourse increases students’ critical thinking skills and their ability to form strong arguments. Discourse, even when it’s contentious or ugly, can advance knowledge or, at the very least, impel students to stand up for one another and to come face to face with the fact that not everyone is equally enlightened—whatever we consider enlightenment to be. Silencing opposition through censorship only isolates that opposition and drives it underground where it lives in a self-amplifying echo chamber that encourages emotional reasoning and the abandonment of logic. That is the polar opposite of what a university is supposed to be doing. I can only hope that FIRE and other supporters of free speech and free thought on campus can get this message across to enough students

soon so that this generation's intellectual development will not be needlessly squandered in the illusory quest for emotional comfort.