

4-2018

Defending University Speech Codes: An Essay on Why Universities Speech Codes Make Sense

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Title:

Defending University Speech Codes:

An Essay on Why Universities Speech Codes Make Sense

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DePauw University Honor Scholar Program

Class of 2018

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Acknowledgments

Thank you to my thesis supervisor, debate coach, and general dispenser of wisdom Professor Geoff Klinger.

Thank you to Professor Deepa Prakash. For us to meet only in my senior year is a tragedy -- every conversation that we have had was memorable and genuine.

Thank you to Renee Madison. Your patience and guidance were invaluable to this thesis.

Thank you for Sigal Ben-Porath for changing my mind about university speech codes and for consequently inspiring this thesis.

Thank you to Rachel Higson for keeping me on track.

Thank you to my parents Brian and Kathy Schultz. Each of you have given me enough love and support for a lifetime -- as I get older, I realize how wonderful my life has been, and I have you both to thank for that.

Preface

In 2012, Greg Lukianoff wrote an opinion piece for *Forbes* magazine titled “Speech Codes: The Biggest Scandal on College Campuses Today.”¹ Lukainoff cites among the inspirations for speech codes is the “ignorance” of students and administrators of the First Amendment. He also calls the belief that speech codes protect students and faculty “misguided.”² In that same year, nearly 300 students from Hampden-Sydney college near Richmond gathered outside the Minority Student Union building to protest Barack Obama’s re-election -- they threw glass bottles, burned posters, let off fireworks around the building, and shouted racial epithets. The school ultimately expelled one student and reprimanded three others, but the Dean of Hampden-Sydney called the incident an “episode”³ and refrained from changing university policy.

In a similarly parallel fashion, 2017 saw the release of two books with the same name but different conclusions: Sigal Ben-Porath’s *Free Speech on Campus*,⁴ which argues for common-sense university speech codes, and Erwin Chemerinsky and Howard Gillman’s *Free Speech on Campus*,⁵ which argues against the use of speech codes. Such differing beliefs are both well-intentioned; that is, they both want the best for American universities -- but they disagree on whether or not speech codes will advance or detract from those universities. Both sides have their share of past incidents on which to ground their arguments: groups like

¹ Greg Lukainoff. “Speech Codes: The Biggest Scandal on College Campuses Today.” *Forbes Magazine*. 19 December 2012. Web.

² Ibid.

³ Winter, Michael. “Virginia College punishes 4 in Racial Protest Over Obama Win.” *USA Today*. 13 December 2012. Web.

⁴ Ben-Porath, Sigal. “Free Speech on Campus.” Philadelphia: U of P, 2017. Print.

⁵ Erwin Chemerinsky and Howard Gillman. “Free Speech on Campus.” New Haven: Yale, 2017. Print.

Berkeley's Antifa protest group⁶ have sparked hundreds of responses from media outlets to video makers alike; when Yale students muscled out a tenured professor for apparently offensive remarks, the nation blew up with responses about the "state of American freedom and democracy."⁷ As a consequence of these polarizing incidents, the topic of speech codes has been made unnecessarily divisive: one side wants the implementation of speech codes, the other argues against these speech codes for the sake preserving the power of the First Amendment; the former places an immense amount of value on a person's comfortability in the classroom, the latter places great emphasis on the foundations of academic freedom, which they often argue is impossible when speech codes are undermining necessary, divisive topics. Advocate groups like F.I.R.E. -- the Foundation for Individual Rights in Education -- claim that the speech code debate has high stakes for the future of not only the First Amendment, but also society as a whole. In opposition to speech codes, F.I.R.E. says,

"If universities applied these rules to the letter, major voices of public criticism, satire, and commentary would be silenced on American campuses, and some of our greatest authors, artists, and filmmakers would be banned."⁸

The purpose of this thesis is to offer an alternative to both of these sides. I will argue that it is genuinely possible to both have speech codes *and* preserve academic freedom both inside and outside the classroom. In my attempt to bridge the two binary responses to the

⁶ Paige St. John and James Queally. "Antifa Violence in Berkeley Spurs Soul-Searching Within Leftist Activist Community." *LA Times*. 29 August 2017. Web.

⁷ Hartocollis, Anemona. "Yale Lecturer Resigns After Email on Halloween Costumes." *New York Times*. 7 December 2015. Web.

⁸ "What are Speech Codes?" *F.I.R.E.* n.d. Web.

creation and implementation of speech codes, I will rely on many arguments presented by Sigal Ben-Porath's book *Free Speech on Campus* in which Ben-Porath deconstructs the different binary responses to speech codes in an effort to protect the academic freedom students, faculty, and administration. I agree with his call for proponents on both sides the speech code debate to see the happy medium in the speech code debate -- because universities are so unique, they require special consideration in weighing many variables, including academic freedom, the rights of students and faculty, and the expectations of university administrations. Ben-Porath notes,

Campus free speech deserves its own place within the debate on free speech because of the role that universities and colleges serve in society, because of the population they serve, and also because of some shifts in the social function of campuses.⁹

In making such careful observations, I have payed specific attention to the different physical and academic realms of the university: inside and outside the classroom; in and around student housing; expectations for faculty and administration; and third-party speakers coming to campus. I consider each of these different realms and assess their different needs and expectations -- in doing so, I hope to nuance Ben-Porath's analysis and to warrant my own suggestions for universities torn between the tenements of free speech and student desires.

⁹ Ben-Porath. "Free Speech on Campus." 31. Print.

Chapter 1: Speech on College Campuses

The biggest challenge when discussing the meaningfulness of university speech codes is addressing the uniqueness of a university: the differences between public and private colleges are just a few of the biggest barriers in creating and implementing speech codes. Many opponents of university speech codes will point to their unconstitutionality -- decades of free speech cases and litigation have been building a stronger and stronger case for the side of academic freedom. Indeed, The 20th century produced some of the most important and necessary court cases that gave rise to academic freedom and student rights and have produced invaluable benefits not just for universities, but for society as a whole. For example, *Keyishian v. Board of Regents*¹⁰ in 1967 extended the First Amendment to protect academic freedom. Much later, we see professors being granted great liberties in choosing curriculum: *Axson-Flynn v. Johnson*¹¹ in 2001 extended the rights of academic freedom to include the choosing of curriculum. But while many of these cases were instrumental in founding a strong basis for objective learning and unbiased selection of curriculum and professors, we would be remiss to say that these court cases have closed the book on speech codes.

Of course, we have the very obvious laws already in place that protect students -- and indeed citizens in general -- from speech that is regarded as criminal or disturbing. For example, we place limits on free speech if it constitutes harassment, "true threats," or any other speech that is unprotected by the First Amendment. For this reason, I will direct the bulk

¹⁰ *KEYISHIAN v. BOARD OF REGENTS*. 385 U.S. 589. United States District Court, Western District of New York. 1967. Web.

¹¹ *AXSON-FLYNN v. JOHNSON*. 356 F.3d 1277. United States District Court, 10th Circuit. 2001. Web.

of my criticism on speech that is not already protected by the First Amendment -- for example, I will not spend entire chapters discussing whether or not burning a cross in front of a dorm should be allowed. Clearly egregious displays of hate and intolerance are already widely banned -- or at the very least regulated -- by American universities. My next section addresses the legality of certain kinds of speech as well as expressions that are already outlawed and consequently have no need for further speech regulation.

Can we treat private universities like private companies, where the rules on speech and behavior are up to the reasonable discretion of the campus leaders? Should public universities be subject to the same freedom of speech that is guaranteed by government entities and individual citizens? Public universities have the more difficult time of implementing speech codes because of their reliance on taxes and public funding -- they must adhere strictly to constitutional laws and decisions, most importantly to the rulings on the can's and cannot's of free speech. Private universities, however, have a much wider degree of freedom when deciding what is and is not acceptable on campus. For the sake of not flipping back and forth between the different private and public spheres, my arguments and analysis will not differentiate between the two.

Addressing the Slippery Slope Fallacy

Although there are many arguments against the implementation of speech codes, one that I find particularly unsettling is the idea that speech codes will lead to an overregulatory school system. A very common anti-speech code argument goes like this: “If we allow universities and/or the government to place limits on speech, then the universities and/or government will become too powerful and limit speech even further.” Here is a quote from Erwin Chemerinsky’s *Free Speech on Campus*: “Protecting hate speech is necessary because the alternative -- granting governments the power to punish speakers they don’t like -- creates even more harm.”¹² This statement is an example of the *slippery slope fallacy*: critics like Chemerinsky are suggesting that speech codes, if implemented, will somehow cause greater harm. I believe this argument is weak for a major reason: hate speech -- while it does get a lot of breaks in public due to the First Amendment -- has absolutely no place on a college campus. If at all possible, any kind of hate speech and indeed any hate speakers should be regulated and discouraged by speech codes. While Chemerinsky is right to question the universal ban of hate speech, he is wrong to assume that speech codes at college campuses should be swept under the same category of the general public. The Supreme Court has made itself quite clear on protecting the First Amendment, even if it means a group of Neo-nazis parade through a Jewish neighborhood.¹³ Indeed, the First Amendment broadly protects people on the assumption that most public places are consistent enough to warrant broad legislation. However, the university is -- as I will discuss throughout this paper -- very

¹² Chemerinsky and Gillman. “Free Speech on Campus.” New Haven: Yale, 2017. 108. Print.

¹³ NATIONAL SOCIALIST PARTY OF AMERICA v. VILLAGE OF SKOKIE. 432 U.S. 43. United States Supreme Court. 14 June 1977. Justia Law. Web.

different from the general public sphere, and it does not warrant the same kind treatment as a street corner or a public park. This is not to say that Supreme Court's protection of the First Amendment is negative -- in fact, I agree that the vast majority of cases First Amendment the protect, preserve, and extend the First Amendment have been invaluable to the American people, her government, and even the proliferation of academic freedom at universities. However, to say that all the good that has come of protecting the First Amendment necessitates a ban on speech codes at the university level would be a mistake. Indeed, in implementing speech codes, the goal is to in fact promote discussion and conversation by making students feel comfortable enough to raise their voices.

WHAT KIND OF SPEECH IS ALREADY PROHIBITED ON COLLEGE CAMPUSES?

In the American university's status quo, there are already certain restrictions on free speech -- namely harassment, true threats, and unruly public demonstrations. The point in outlining these already restricted speech forms is twofold: 1.) to recognize that the First Amendment, while it outlaws the most severe and egregious acts of hateful speech, does not protect students from less severe but demonstrably hurtful speech; and 2.) argue for a more specific, circumstantial protection of students on university campuses.

Harassment

Harassment is governed by state laws, which vary by state, but is generally defined as a course of conduct which annoys, threatens, intimidates, alarms, or puts a person in fear of their safety.¹⁴ Harassment is “unwanted, unwelcomed and uninvited behavior”¹⁵ that demeans, threatens or offends the victim and results in a hostile environment for the victim. Harassing behavior may include, but is not limited to, epithets, derogatory comments or slurs and lewd propositions, assault, impeding or blocking movement, offensive touching or any physical interference with normal work or movement, and visual insults.¹⁶ For universities, Title IX covers the majority of harassment cases, especially those involving sexual harassment, which Title IX defines as “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”¹⁷

In *Beauharnais v. Illinois*¹⁸, the Supreme Court ruled to publish any piece of art or writing that disparaged or discredited a group of people defined by “race, color, creed or religion.”¹⁹ Although *Beauharnais v. Illinois* refers to general public spaces as opposed to universities, its decision has felt ripples on universities: in 2017, flyers were circulated around Indiana University’s campus²⁰ that parodied consent and sexual assault. The flyer claimed that “sexual assault occurs when attention whores need extra sympathy and decide to

¹⁴ Equal Employment Opportunity Commission. “Harassment.” *Types of Discrimination*. 2017. Web.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ American Association of University Women. “Know Your Rights: Sexual Harassment And Sexual Assault Under Title IX.” *What We Do*. 2017. Print.

¹⁸ *BEAUHARNAIS v. ILLINOIS*. 343 US 250. Supreme Court of Illinois. 1952. Justia. Web.

¹⁹ Ibid.

²⁰ Lanich, Carley. “Offensive Posters Found on Campus Mocking IU Sex and Consent Flyers.” *Indiana Daily Student*. 2017. Web.

cry rape”.²¹ Although no student was brought to trial, IU immediately condemned the posters and immediately took each one down. So as much as some opponents to speech codes emphasize the importance of hateful rhetoric for the sake of the marketplace of ideas, the current legal system has already placed explicit restrictions on those that commit to paper such hateful, discrediting ideas.

As long as universities have the power to take down hurtful messages and outlaw the use overly provocative language, then why not be able to create speech codes that regulate that speech in the first place? Although it seems reasonable for universities to have such rules, we will see later that courts often strike down such regulations for being overbroad and ambiguous. Despite this, universities like IU continue to deal with these cases circumstantially and take the blame for not doing more to combat hateful, offensive language.

True Threat

The relationship between speech and action is often ambiguous -- when speech happens to insinuate action against another person, that is called a true threat,²² and it is not protected under the First Amendment. A true threat is a threat if it shows an intention to harm another *and* if it has a strong possibility of preceding actual action.

²¹ Ibid.

²² Stanner, Andrew. “Toward an Improved True Threat Doctrine for Student Speakers.” *NYU Law Review*. Hein Online, 2006. Web.

Public demonstrations

While public protesting has gained more traction in recent years, the laws restricting it remain clear -- although the right is a tenement of American free speech, there are strong regulations on public demonstrations that inhibit protesters from infringing the rights of others. In *Frisby v. Schultz*²³, the supreme court ruled that protesters cannot picket or protest at or around someone's personal residence; consequently, students cannot picket outside dorm because students reside inside them. Similarly, you cannot solicit students outside their dorm, nor can you stage a human blockade outside of a dorm. The purpose of these laws is clearly to preserve civility and order around living spaces -- for universities especially, a dorm or university residence requires general peace.

This brings forth a very important concept: it is not lawful -- and generally annoying -- to demonstrate one's views in a personal space. And because most of university student's time is spent not in the classroom, but around campus and in his/her living space. Indeed, the "marketplace of ideas" does not extend to the dorm room. Students eat, sleep, study, and socialize in their living spaces -- hence, universities are not merely factories for knowledge and scholarship; they are also places of personal and social development. Hence, speech does not get a free-pass simply for being on a university campus, per *Frisby v. Schultz*. For much the same reason why it is unlawful to hold a protest in a driveway or on a sidewalk just outside a residence, picketing outside of a dorm is unlawful: in both examples, protesters are irritating the people who live just nearby. The big takeaway from *Frisby v. Schultz* is that we should consider civility as an important part of our discussion on speech codes: whereas all

²³ FRISBY v. SCHULTZ. 487 US 474. United State Court of Appeals, Seventh Circuit. 1988. Justia. Web.

universities have clear restrictions and regulations for *academic freedom*, not all universities have clear guidelines -- if any guidelines -- on the freedoms of speech outside of an academic context. Ben-Porath notes that

“Academic freedom protects much of what happens within the classroom, and it is more central and more significant to the functioning of the university than the general guidelines, where those are available, organizing free speech.”²⁴

Ben-Porath’s distinction between regulations inside the classroom and outside the classroom is noteworthy: speech codes should not be blanket-style regulations that fail to specify between academic and non-academic environments. Although caselaw like *Frisby v. Schultz* pick up the more obvious instances of speech regulation, universities remain mostly unclear on the what, where, and when of speech regulation. As I begin to discuss the different expectations of speakers inside and outside the classroom, let’s keep in mind that universities are accumulations of several different groups with different responsibilities: faculty are the dispensers of knowledge and the facilitators of discussion, students are the learners *and* residents of the university, and administrators must adhere to both faculty and students alike in an attempt to create a safe, conducive learning environment. As with any university, each teacher and students will have his or her own beliefs and personal agendas -- indeed, I do not want to dictate what teachers, students, or administrators should think or believe; I do,

²⁴ Ben-Porath. “Free Speech on Campus.” 85. Print.

however, want to *analyze* the rights and needs of students, faculty, and administrators in an attempt to specify when and where speech codes are needed.

Can Speech Codes Ban Certain Speech?

To invent and implement a speech code that banned certain content -- for example, a speech code that banned universally the utterance of the n-word or the c-word -- would be content-based speech regulation. Content-based speech regulation is “A regulation of speech or expression that is based on the substance of the message being communicated, rather than just the manner or method in which the message being expressed.”²⁵ In other words, Content-based regulation is regulation that limits a person’s ability to speak merely on the basis of *what* they are saying, i.e. the content of their speech. For example, a fictional piece of content-based speech regulation could say “You are not allowed to speak about nazi philosophy.” This piece of regulation prohibits a certain content, that being nazi philosophy. The intention of content-based regulation is almost always to protect a certain group of marginalized people from being ostracized or insulted. But despite these good intentions, the U.S. Supreme Court has repeatedly rejected content-based regulation: after decades of cases involving not just universities, but entire towns advocating for content-based regulation, the Supreme Court has effectively struck down any attempt to implement content-based regulation. Even things that seem very reasonably regulated, such as calling a female student the c-word, should not be regulated merely on the content. The reasoning behind this is that the c-word, although many would argue that the word is inherently and explicitly harmful and

²⁵ Law Shelf Educational Media. “Limitations on Expression.” 2018. Web.

offensive, has its own right to be said in reference and in context. Other countries are much more aggressive in their treatment of hateful speech and groups: Germany has very strict laws banning Nazi symbols, speech, and Holocaust denial. Germany rationalizes their ban on Nazi speech on the assumption that Nazism disrupt the *Volksverhetzung*, or the voices of the people.²⁶ Some critics praise Germany's free speech restrictions as the best way to protect certain marginalized groups from being attacked; plenty of other critics disagree with Germany's speech regulations as unfair.²⁷

American courts seem to have come to the consensus that German-like regulation is overbroad. In *Doe v. University of Michigan*²⁸, the University of Michigan attempted to implement speech codes after an anti-discrimination group attempted to file a class-action lawsuit for racist fliers circulated around campus. These fliers said that it was "open season" on African-American students, and they referred to African-Americans as "saucer lips, porch monkeys, and jigaboos." The university responded with speech codes that prohibited certain words and actions; some rules seem very reasonable, but other rules are admittedly a bit too far-reaching. For example, one of Michigan's codes was commenting "in a derogatory way about a particular person or group's physical appearance or sexual orientation, or their cultural origins, or religious beliefs."²⁹ Evidently, the court found these codes overbroad, and they were subsequently struck down.³⁰ Where I take issue with court decisions like these is the word "overbroad" -- courts believe that being broad is inadequate. As I will argue in several

²⁶ Wildman, Sarah. "Why You See Swastikas in America but not Germany." *Vox*. 16 August 2017. Web.

²⁷ *Ibid*.

²⁸ *John DOE v. UNIVERSITY OF MICHIGAN*. 721 U.S. 852. United States District Court for the Eastern District of Michigan, Southern Division. September 22, 1989. Boston College. Web.

²⁹ *Ibid*.

³⁰ *Ibid*.

places throughout this essay, I do not *being overbroad* reason to strike down speech codes. Furthermore, I believe that there needs to be much more consideration placed not only on how controversial or offensive speech truly contributes to the academic environment, but also to how the student is a part of the university.

General Point about Legality and Speech Codes

Much of my paper references case law in an effort to analyze official legal decisions on free speech on universities. To many speech code opponents, the case law seems like the beginning and end for the speech code debate: if past cases have already decided when and where free speech can be regulated, then why bother analyzing the issue further? Indeed, most if not all attempts to implement speech codes have been struck down by Supreme Court (if and when such cases got that far). Ben-Porath asks this question too:

“Where do we draw the line between acceptable and unacceptable speech? Do legal lines suffice (such as those forbidding libel or threats)? Must the campus also prevent exclusion or harm, and how will the two be differentiated? How do we bridge the distance between what is legally permissible and what is socially harmful and exclusionary to some (while seeming to others to be a simple attempt to present legitimate views or challenge orthodox or entrenched visions)?”³¹

In response to these questions, I say this: although the law is traditionally very clear and objective, the case law for the intersection of free speech, academic freedom, and universities are often circumstantial. I will not question the rationale of judges or the vast historical precedent that addresses free speech -- rather, I will note specific cases where free speech on

³¹ Ben-Porath. “Free Speech on Campus.” Philadelphia: U of P, 2017. 56. Print.

campuses was allowed or disallowed, then analyze those final decisions to find where speech codes can exist within the decisions rendered. I think that what I have found in certain cases points not to a *gotcha* remark about Supreme Court decisions, but rather to a sensible conclusion about the feasibility and value of speech codes.

Chapter 2: Inside the Classroom

There are several ways that we can divide the different environments of a university: between students and faculty, between majors, between gender, etc. But I will follow Ben-Porath's example by dividing up the university into its most basic of spheres: inside the classroom and outside of the classroom. Each of these realms has -- or at least *should* have -- different expectations for faculty and students alike. Although much of what the media has sensationalized -- protests, antifa, chewing out well-meaning faculty -- has happened outside of the classroom, I think that it would be helpful to start inside the classroom and go from there.

Although more of speech related incident happen outside of the classroom at universities, it is inside the classroom that should be first and foremost worry of students, faculty, and administrators. Ben-Porath explains, "it is inside the four walls of the classroom that the most meaningful and productive opportunities for discussion, the development of knowledge, and the free exchange of ideas take place."³²In his final chapter of *Free Speech on Campus*, Ben-Porath dedicates a small section about "civility" in the classroom³³ in which he discusses what he calls the two main measurements of classroom discussion: intellectual commitments and dignitary commitments. Intellectual commitments are what necessitate a classroom to discuss genuine academic subjects without censorship. Dignitary commitments are a classroom's commitment to hold discussions -- sometimes divisive, sometimes upsetting -- without resorting to speech that is belittling or inflammatory. Ben-Porath briefly outlines

³² Ben-Porath, Sigal. "Free Speech on Campus." Philadelphia: U of P, 2017. 85. Print.

³³ Ben-Porath, Sigal. "Free Speech on Campus." Philadelphia: U of P, 2017. 96-102. Print.

examples different instances where classroom civility can or cannot coexist with proper academic discussion. In this section, I expand upon these instances and provide a bit of background as to what students have or have not historically been permitted to say in the classroom.

Academic freedom protects faculty and students from punishment when they make a challenging, abnormal, or simply weird remarks. Faculty are allowed to teach inflammatory, triggering subjects like rape and hate crimes because a discussion on those topics is conducive to an academic environment. Even personal opinion -- when warranted -- is allowed and often requested by the students. Even topics that are not universally accepted -- like the existence of white privilege and evolution -- should be discussed in the classroom not only because of their influence on contemporary society, but also because of the hearty debate that comes from them. I attempt to distinguish between debate and offensive language for both students and professors in the next section.

Students in the Classroom

What are students allowed to say or not say in the classroom? When I say that something is “not allowed” in a classroom, I almost always mean that something is not explicitly illegal; I say have already outlined what kind of speech would be punishable not just in the university classroom, but in the general public.

Continuing down a list from most obvious to least obvious behavior that warrant speech regulation, one can not verbally attack or insult other students, especially if those insults are racist, sexist, or completely mocking. To stand up and call another student a

“bitch,” an “asshole,” etc., is not illegal in the repercussive sense. Although name-calling may be thought of generally as harassment, the legal definition of harassment often includes the caveat that the speech not be an isolated incident or a one-off altercation.³⁴ However, the school does -- more often than not -- have say in the matter of the offending student’s right to continue to participate in that class. Certain phrases simply have no place in the classroom: calling one’s teacher a bad name is disrespectful, and it completely undermines the safe, inclusive, academic environment for which schools strive. Because name-calling and general debauchery add completely nothing -- and take away much more -- to the classroom, I find it reasonable that universities place restrictions on students’ and faculty members’ rights to use such language even though such language is not objectively illegal. The Supreme Court concluded in *Bethel School District v. Fraser*³⁵ that it was within a school’s right to “prohibit the use of vulgar and offensive terms in public discourse.”³⁶ We make such an seemingly obvious point *now* so that we can build our argumentation on a solid foundation of knowledge. Namely, we *know* that blatantly offensive, derogatory words or phrases -- although they have no explicit illegality -- should be restricted in the classroom, and should therefore have a specific speech code regulating it.

The ambiguity begins when offensive language and personal opinion begin to blur together. Many opinions of students and teachers may be offensive even though they are attempting to forge their own arguments and opinions. For example: if, during a class on the Evolution of Society, a student offers the point that African nations developed slower than

³⁴ Equal Employment Opportunity Commission. “Harassment.” *Types of Discrimination*. 2017. Web.

³⁵ BETHEL SCHOOL DISTRICT v. FRASER. 478 U.S. 675. United States Supreme Court. 7 July 1986. Justia Law. Web.

³⁶ Ibid.

European nations because European peoples were naturally smarter and more capable. Historical and evolutionary fact aside, the student has every right to make the statement, especially if such a statement is what the student truly believes. However, a different student may take serious offense with such a remark; calling European peoples naturally more gifted than African peoples may seem genuinely offensive to certain students. Indeed, any two students that conflict with each other on this topic have the right to discuss the matter with each other and engage in conversation. However, many of us might believe that such a conversation may have a high risk factor involved, meaning that the two students who disagree on such a bold statement will more often than not become heated in their arguments.

Universities must also consider how a student's views or opinions will affect their ability to fulfill their professional responsibilities outside of college. For example, in *Keeton v. Anderson-Wiley*^{37 38}, counseling student Jennifer Keeton sued Augusta State University for requiring her to attend LGBTQ seminars and classes. ASU had asked Keeton to attend such classes because Keeton had verbally expressed her opinion that homosexuality was immoral. Keeton subsequently sued ASU on the grounds that ASU was denying her First Amendment to express her opinion without repercussion and that ASU was actively attempting to change her beliefs.³⁹ The 11th Circuit Court of Appeals denied Keeton and ruled that ASU was correct on the grounds that Keeton, as a potential counselor, should take the LGBTQ classes based on the professional environs.⁴⁰

³⁷ Artis ANDERSON v. Patricia WILEY. United States District Court, Eastern District of Kentucky Central Division. 3 February 2016. Web.

³⁸ Hancock, Kristen. "Students Beliefs, Multiculturalism, and Client Welfare." *American Psychological Association*. 2014. Web.

³⁹ Ibid.

⁴⁰ Ibid.

Does a potential for an argument to become heated necessitate certain rules and regulations in the classroom? No, not explicitly -- topics that may *seem* to be serious do not immediately warrant a speech code that enforces a certain censorship on said topics. Using again the aforementioned example, the student who believes European peoples to be naturally superior to African peoples may be expressing an opinion that can be easily swayed via conversation and scientific, historical facts. Even *if* another student in class is offended or hurt by the former student's comments, that offending student should not face any punishment or reprimandation for stating an opinion in a reasonable environment.

A student who states an opinion with the full audience of the classroom about "superiority" of one people over another in an evolutionary society class would not be completely remiss in making such a statement, even if that statement is easily disproved. However, if a student makes a racial superiority comment -- again, with the full audience of the classroom -- in mathematics class, *and* that comment genuinely offends another student, then the offending student will have a much harder case in defending his or her comments. This kind of differentiation between our two classes -- Evolutionary Society and Linear Algebra -- is, I believe, necessary when deciding the time and place for comments that can be reasonably assumed to incur offensive language. For a student to make an unprompted, one-off comment about the superiority of whites in a Linear Algebra class is much more concerning and exponentially more unreasonable than such a comment being made in a sociology class.

And so we arrive at very interesting intersection between the *marketplace of ideas* the the feelings of students -- when does one end and the other begin? When does student opinion

cross the line from academic discussion to unwarranted, hurtful speech? Indeed, I believe that the marketplace of ideas overlaps with students' feeling of safety. Most instances where the academic nature of the classroom is jeopardized are also instances when students feel uncomfortable. When a subject matter makes a student feels uncomfortable, threatened, or awkward, then he or she will almost certainly participate less in class discussion, and he or she will also be considerably more obtuse in his/her thoughts about the class.

Professors in the Classroom

Just as the role of the university is unique, the role of the professor is complex especially in the context of speech codes. After several important court cases the specifically addressed academic freedom in the 20th century, professors have gained significant freedoms on the content and delivery of their speech.⁴¹ I believe that inside the classroom, professors should have the ability to speak their professional -- and in reasonable circumstance, their personal -- opinion on academic, social, and even circumstantial subjects. On a university made of students and faculty, faculty wield a double-edged sword: they are the dispensers of knowledge and the leaders of intellectual discussion on campuses; but they are also the most closely watched, and they are often at odds with administration and students alike.

Ben-Porath analyzes a specific incident about Professor Christakis of Yale⁴² not in defense of the students or faculty involved, but as a general critique of the way speech-related incidents are treated by university administrations. I'll briefly introduce the incident, then

⁴¹ UNC Charlotte Council of Legal Affairs. "Relevant Cases on Academic Freedom in the Classroom." Office of Legal Affairs, Division of Institutional Integrity. Web.

⁴² Ben-Porath. "Free Speech on Campus."

offer my own analysis of how faculty members could be expected to appear under university speech codes.

In 2015, Yale University sent a campus-wide email to faculty and students before Halloween. The email encouraged students to refrain from wearing costumes that were appropriative or offensive.⁴³ Erika Christakis, a professor of early childhood development, responded to this email with her own email that was also sent to the students and faculty: in her email, Christakis wonders if Yale was using too much of its institutional might to dictate the decisions of Yale students; she asked, “I wonder, and I am not trying to be provocative: Is there no room anymore for a child or young person to be a little bit obnoxious . . . a little bit inappropriate or provocative or, yes, offensive?”⁴⁴

Christakis’s comments, although they were certainly good-natured and had good intentions, were quickly criticized by several students voicing their disapproval of what they believed to be Christakis’s affirmation of appropriative and offensive behavior. Consequently, several students met with Christakis on campus and expressed their disapproval of her.⁴⁵ Although the university did not take any action towards Christakis, she herself decided to leave her teaching position at Yale. The Yale administration sent out their support of Christakis, heralding her as a “well-regarded” professor whose teaching was “highly valued”.

⁴⁶ The article maintained that “she is welcome to resume teaching anytime at Yale, where freedom of expression and academic inquiry are the paramount principle and practice.”⁴⁷

⁴³ Hartocollis, Anemona. “Yale Lecturer Resigns After Email on Halloween Costumes.” *New York Times*. 7 December 2015. Web.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

In the wake of Christakis's leave of Yale, a video⁴⁸ of students yelling at her husband -- who was also a professor at Yale -- went viral: when faced with students who were yelling and shouting at him, Mr. Christakis was apologetic for offending or harming any students. In the middle of students encircling him, Mr. Christakis attempts to apologize and to clarify his statements, and emphasized that he wanted to meet with as many students as possible and fulfill his academic responsibilities to Yale. Students surrounding Mr. Christakis speak up about not feeling safe at Yale, and many of them accused him of being dismissive and irresponsible.⁴⁹ When watching a video of this event, it is difficult to not feel sorry for Mr. Christakis, who seems genuinely sorry for offending students but also tries -- although apparently without his desired effect -- to explain his motivations.

When faculty members are subject to mass amounts of student scrutiny, we may feel justifiably sorry the faculty member that gets criticized for something that they genuinely meant to be harmless. Indeed, the Yale incident is a situation where a faculty member was left to the complete mercy of the students -- although the administration was quick to send out a public word about their support of Christakis, they were evidently unsupportive during his public debate with students. I can certainly say that the situation was handled poorly and inefficiently. We should not expect administrators to be perfect or punctual in such difficult times on a campus, but we should expect them to be consistent and fair in their approval, disapproval, and non-response such circumstances. Indeed, Ben-Porath notices that “[c]ivil dialogue is hard to sustain when many feel that they are not equal parties to the dialogue and

⁴⁸ The Asian Republic. “Yale University - Full Version - New Videos of the Halloween Email Protest.” Online video clip. *Youtube*, 20 September 2016. Web.

⁴⁹ *Ibid.*

when the overall atmosphere on campus is not open to dissenting views.”⁵⁰ Admittedly, I doubt that speech codes could have prevented Christakis’ well-intentioned email -- however, I do think that

How should faculty-related speech codes -- if there should be any at all -- be administered? At an ideal campus, professors, students, and administrators exist in perfect harmony without any outstanding qualms between each other. But the very model of the university often undermines this ideal: because the university is designed to engender debate and conversation, groups will inevitably be at odds. This does not mean that we should laud every divisive opinion or every possibly offensive conversation involving faculty, nor does this mean that the university should allow faculty complete free-range in their interactions with the administration and with students. When we decide the *where, when, and what* of speech codes and faculty, we should start -- as we’ve done with other facets of the university -- with basic examples, then continue to more complicated examples.

At the very basic level, professors do and should say whatever is relevant to a specific class’s material. For professors of science, these materials are mostly straightforward: in an introductory biology class, it is reasonable for a professor to teach evolution, even if the subject of evolution butts heads with certain religious beliefs; in a physics class, it is reasonable for a professor to teach about the vastness of the universe, even if that fact, again, contradicts religious beliefs. Even when science classes delve into moral arguments -- for example, if a genetic biology class discusses the artificial augmentation of a fetus --

⁵⁰ Ben-Porath. “Free Speech on Campus.” Philadelphia: U of P, 2017. 30. Print.

professors should have the power to, at the very least, voice their opinion on the subject as long as they don't purposefully undermine or mock a student's spiritual beliefs.

On a more complex level, let us assume that a professor voices his or her disapproval of a political figure or political leaning. This becomes a trickier situation for two key reasons: (1) A professor's comment on President Trump may be entirely related to the class material; it makes sense that "Political Science in Contemporary Society" class would warrant daily conversations on the president. And (2), it is sometimes difficult to say whether a comment on a political matter is one of academic merit or just an opinion; if a professor said that "Hillary Clinton lost the presidential election because she was a poor candidate," students may take that comment as a reference to Hillary Clinton's personal character, while other students may take the comment as a broader judgment on Clinton's campaign. In either case, teachers should be held to a certain level of professionalism. Ben-Porath mentions briefly the idea of expecting teachers and students to be held to a certain degree of civility⁵¹. Although calling teacher and student decorum "civility" as novel, I will develop two cases related Ben-Porath's discussion of civility; more explicitly, these few court cases made important decisions based on measurements of professionalism.

Here's an extreme but relevant example of when a teacher can and must be relegated according to standards of professionalism: In *Oyama v. University of Hawaii*⁵², Oyama, a candidate for a teaching position at the University of Hawaii, was denied the position because he had expressed the opinion that "online child predation should be legal" and that pre-teenager boys should be able to have a consenting relationships with a teacher. Oyama

⁵¹ Ben-Porath. "Free Speech on Campus." Philadelphia: U of P, 2017. 97. Print.

⁵² Mark L. OYAMA v. UNIVERSITY OF HAWAII. United States District Court of Hawaii. December 29, 2015. Pearl, Steven. "The California Employment Law Blog." 6 January 2016. Web.

sued the University of Hawaii on the grounds that the university violated his First Amendment rights. The court affirmed (thankfully) that University did not violate Oyama's First Amendment rights because

“its decision related directly to defined and established professional standards, was narrowly tailored to serve the University's core mission of evaluating Oyama's suitability for teaching, and reflected reasonable professional judgment.”⁵³

Are we surprised that courts ruled in favor of the University of Hawaii for denying a candidate with pedophilic tendencies? No, we are not. But we should be interested in the court's specific reasoning -- the University of Hawaii had the right to deny Oyama because of “defined and established professional standards.” Although this case does not relate directly to speech codes, I find it interesting that courts themselves find “defined and established professional standards” to be sufficient in denying certain rights to potential employees. When so many speech code opponents are arguing that speech codes are vague and overbroad, there seems to be a clear consensus that simple professional guidelines and expectations are not just clear, but “defined and established.” As long as courts allow Universities to make restrictions on their faculty and students based on professional standards, then why is it so hard to believe that speech codes are too vague or overbroad?

In a less extreme court case -- *Hong v. Grant*⁵⁴ -- a teacher, Hong, sued the University of California-Irvine for alleged violation of his First Amendment rights, but he too was

⁵³ Ibid.

⁵⁴ Juan HONG v. Stanley GRANT. 403 Fed.Appx. 236. United States Court of Appeals, Ninth Circuit. September 2, 2010. Justia US Law. Web.

denied. Hong had been denied a monetary praise and promotion. He believe that he was denied the promotion because in the past he had publicly criticized UC-Irvine about its hiring process as well as other administrative duties.⁵⁵ The ruled in favor of UC-Irvine for the reason that “The First Amendment does not constitutionalize every criticism made by a public employee concerning the workplace.”⁵⁶ Furthermore, “UCI is entitled unfettered discretion when it restricts statements an employee makes on the job and according to his professional responsibilities.”⁵⁷ We notice once again that a summary judgment was ruled in favor of a university based on a teacher’s responsibility to maintain “professional responsibilities,” which -- although the university may very well define these responsibilities, although I doubt that the UC-Irvine explicitly states the protocol when dealing with professors’ who are disgruntled at the administration -- sounds just as vague and overbroad as speech codes that call for safe, academic environments.

From *Oyama v. University of Hawaii* and *Hong v. Grant*, we learn that the courts fully support the enforcement of “professional” policies and standards. For some reason, universities are empowered to enforce these professional standards -- which we have just proven are ambiguous enough to be applied on different ends of the professional spectrum, from possible pedophilia to critiques of one’s administration -- but when universities attempt to implement speech codes, they are struck down for creating broad, overly vague codes.

⁵⁵ American Association of University Professors. “Legal Cases Affecting Academic Speech.” 13 October 2017. Web.

⁵⁶ Ibid.

⁵⁷ Ibid.

Vulgarity in the Classroom

Even in events where a professor's conduct was not tacitly prohibited by a university code, professors have been reprimanded for their speech, specifically if that speech is overly or unnecessarily vulgar. Although vulgar speech in the classroom is nearly universally taboo in American high schools, most American universities do not have explicit rules that ban cussing or other forms of vulgar speech. In *Bonnell v. Lorenzo*⁵⁸, Bonnell, a professor at Macomb Community College was suspended after several students complained about his profane language. On more than one occasion, Bonnell had "taken advantage of the conversations to express his own previous sexual experiences." He had also used the phrases "f*ck, sh*t, c*nt, and p*ssy"⁵⁹ during classroom discussion in his introductory English class. Several students had complained about Bonnell's use of these stories and swear-words, and Macomb University asked Bonnell to refrain. Bonnell did not refrain, so the university suspended him. In response, Bonnell sued the university believing that his First Amendment rights were violated. Indeed, the district court ruled in favor of Bonnell⁶⁰, but the Sixth Circuit Court reversed the decision based on the "legal obligation of a college to guarantee the rights of students to learn in an environment free of sexual harassment and hostility."⁶¹ In short, the court ruled in favor of the students' rights to have an academic experience free of offensive language.

The Sixth Circuit Court faced a similar case later that year, but it ultimately ruled in favor of the professor: in *Hardy v. Jefferson Community College*⁶², Hardy, an adjunct

⁵⁸ John C. BONNELL v. Albert LORENZO. 99 US 2047. United States Court of Appeals, Sixth Circuit. 2001. FindLaw. Web.

⁵⁹ Censorship is my own.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Kenneth E. HARDY v. JEFFERSON COMMUNITY COLLEGE. 00 US 5198. United States Court of Appeals, Sixth Circuit. 2001. FindLaw. Web.

professor, was not renewed for his position after one student complained that he used the offensive words “f*ggot,” “b*tch,” and “n*gger.”⁶³ Interestingly enough, Hardy taught an introductory Communications course, and he argued that he was using offensive language in an attempt to teach students about marginalization.⁶⁴ Ultimately, the Sixth Circuit Court ruled in favor of Hardy, citing the following as their rationale: “Reasonable school officials should have known that such speech, when it is germane to the classroom subject matter and advances an academic message, is protected by the First Amendment.”⁶⁵ It is noteworthy that that Hardy’s class included nine African-American students out of twenty-two total students.⁶⁶ The student who filed the major complaint was African-American, but no other students complained; in fact, students defended Hardy in saying that his discussion was “academically and philosophically challenging.”⁶⁷

The difference, then, between *Bonnell v. Lorenzo* and *Hardy v. Jefferson* is that vulgarity from a university professor seems warranted when such words are conducive to academic discussion; and even in the event when traditionally vulgar words are being used for academic purposes, I believe that the professor should consider students’ needs and desires. *Bonnell*, for example, may have been speaking vulgar language for an academic purpose -- and he probably reached a few students in the process -- but multiple students complained about his language on multiple occasions. For *Bonnell* to not only ignore these complaints but also to continue using the same language warrants a regulation in his speech. Hardy, however, had only one student approach him about his speech. Although I cannot claim to know an

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

objective threshold for *amount of offended students needed to terminate a professor*, I am confident in saying that one and only one offended student in a circumstantial communications class does not warrant the removal a professor. Between *Bonnell v. Lorenzo* and *Hardy v. Jefferson*, the middle-ground for vulgarity is rightfully circumstantial, but being circumstantial does not bar us from making common-sense speech codes on the subject. Consequently, speech codes related to vulgarity deserve room for ambiguity -- or at the very least, they deserve the same amount of ambiguity that courts granted UC-Irvine in *Hong v. Grant* when deciding if Hong met so-called professional standards.

Ben-Porath echoes the Sixth Circuit Court's decision in calling for great "civility in the classroom;"⁶⁸ that being a classroom that "justly forbids outright mocking" and "racist and misogynistic declarations."⁶⁹ But I would push this idea further: I argue that any classroom should have the right to forbid speech that obviously disturbs, offends, or annoys a large portion of students. Although there will always be ideas that are more challenging and divisive than others, I do not see a reason to trump completely the desires of students when it comes to ideas discussed in the classroom. The *marketplace of ideas* cannot exist without the willful participation of the students nor without a comfortable setting in which to learn.

⁶⁸ Ben-Porath. *Free-speech on Campus*. Print. 96.

⁶⁹ Ibid.

Chapter 3: *Outside the Classroom*

When outside the classroom, the student is enjoying a part of university that is not a part of a structured curriculum -- that is, a student outside the classroom is a student that can enjoy a greater freedom of discussion, mood, and voice than he or she would inside a classroom. If the student wants to be vocal about an sort of issue, he or she does not have to worry about the relevancy of the topic outside the classroom. The realm that we call "outside the classroom" contains the vast majority of a student's time spent on university: studying, visiting the library, eating, exercising, participating in clubs, and socializing are the pillars upon which the American university experience are held, and all happen outside of the traditional classroom. In fact, I argue that, although the educational part of university is clearly the foremost necessary part, the non-educational part -- that is, the part that is spent outside of the classroom -- is the more personally fulfilling of the two. Much of what a student learns about science and humanities happens inside the classroom, but much of the what a student learns about personal growth, personal philosophy, and lifetime expectations happens *outside the classroom*. In lieu of this, I offer that the non-academics of university are comparable in importance with the pure academics, and that they warrant a comparable amount of analysis when deciding what speech regulations should be placed. Inside the classroom, the student can be reasonably expected to adhere to a certain decorum that can be easily outlined in a syllabus or a student handbook. Outside the classroom, however, the rules governing speech becomes more circumstantial: the rules governing speech around a dorm are different than the rules pertaining to public spaces, dining halls, and other student hang-outs

on university property. Once again -- very, very few things should be limited by content-based regulation; but there can be, I believe, common-sense regulation that adequately addresses the needs of students outside of class.

First, I look at the instance when students' speech is made on social media; second, I address the expectations of clubs and extracurriculars when dealing with divisive speech; third, I look at safe space and identify a pragmatic plan for safe space organizers to maximize their effectiveness without intruding on other. Finally, I address the instance where a speaker is a third-party that is unaffiliated with the university at which they are speaking. Because third-party speakers and students are so different in what they mean to a university, I see it fit to specify between the rights of speakers and the rights of students. As for students, the rules outside the classroom is more complicated than those rules inside the classroom, but we can still make a reasonable judgment of when certain speech is allowed.

What about speech that happens off campus?

Ben-Porath heralds the fact that universities are places of great intellectual and personal growth for students -- as I have said before, a university's number one priority should be its students. Even the difference between for-profit and not-for-profit schools: while not-for-profit schools are stereotypically called the more student-focused of the two, even for-profit schools must keep the interest and success of students at the core of its function.

Even so, many universities have limited student speech -- as we can surely tell by previous examples -- and even taken punitive action against students for certain speech.

In *Keefe v. Adams*⁷⁰, the Eighth Circuit Court upheld a university's decision to expel a student for posting rude remarks about other students on Facebook. The student in question referred to another student as a "stupid bitch" and called her stupid enough to fail out of the nursing program in which Craig Keefe and Beth Adams were both studying. Consequently, Keefe was removed from the nursing program on the grounds that "his Facebook posts raised concerns about his professionalism and boundary issues." Keefe sued the nursing program, claiming that his First Amendment rights were being infringed and that his right to post freely on the internet was threatened. The court found that "college administrators and educators in a professional school have discretion to require compliance with recognized standards of the profession, both on and off campus, 'so long as their actions are reasonably related to legitimate pedagogical concerns.'"⁷¹ In this case, the courts favored the university's right to exercise control over a student's speech based on the "standards of profession." In other words, the courts support the idea that, although most universities do not have explicit rules against posting vitriolic things about other students on Facebook, universities *should* be allowed to enforce rules of professionalism that could be said to encompass social media posts. This is yet another example of the courts giving universities the power to enforce ambiguous rules such as those found in their student handbook -- even if that speech happens on the internet!

From *Keefe v. Adams*, I understand that students are not free to speak as they please without universities taking notice -- especially if they, like Keefe, talk explicitly about students on campus. To me, *Keefe v. Adams* upheld a speech code in disguise: if a university is

⁷⁰ Craig KEEFE v. Beth ADAMS. 14 US 2988. United States Court of Appeals, Eighth Circuit. June 10th, 2015. Justia, US Law. Web.

⁷¹ Ibid.

allowed to punish a student based on the ambiguities of professionalism and conduct, then I call that a speech code. But I will reiterate what I have said previously -- as long as courts continue to uphold these cases where not only students, but also faculty are held to standards that are not specifically defined, universities should be allowed to create speech codes that would actually narrow these standards and make them more objective.

Clubs and Extracurriculars

Part of the American university's tenements of academic exploration -- and indeed the college experience -- is the freedom to create and to join clubs on campus. Some clubs are made for hobbies and crafts -- like the Robotics Club or the Knitting Club -- whereas as some clubs are made specifically for students of a certain ethnicity, identity, or ideological stance, such as College Republicans, Catholic Interfaith, or the Global Partners program. Most clubs at the university level have the ability to advertise their club and, if possible, propagate their stances on certain subjects in the form of flyers, emails, or public demonstrations.⁷² For example, the student group called College Republicans at DePauw University created and sold t-shirts that said "Raised Right" on the back; the t-shirt clearly advertised a supposed superiority of the conservative party, and it tacitly suggested that Democrats are raised *wrong*. Such a t-shirt both forwards an agenda *and* antagonizes a political group albeit in a clever way. But despite being intentionally antagonistic, College Republicans is not at fault; their t-shirts -- while they may annoy certain people of a differing ideology -- make a broad statement that ultimately boils down to a "*we're right and others are wrong*," which is a

⁷² Roland, Dave. "Student Fees and Clubs." *Newseum Institute*. March 2017. Web.

statement that does not make incredibly hurtful or demeaning comments. If the College Republicans t-shirt said “F*ck Democrats,” then it would warrant criticism: unlike the phrase “Raised Right,” “F*ck Democrats” is a profane, direct insult that could warrant regulation.⁷³

While the vast, *vast* majority of clubs never come close to issuing an offensive statement or holding a controversial public event, there are several instances where clubs need to be made aware of the negative effects of their choices and actions. The events that followed Milo Yiannopoulos’s scheduled event at Berkeley began when the conservative student-run club Berkeley Patriot asked Milo to speak on campus.⁷⁴ Should someone have stopped Berkeley Patriot from inviting Milo and potentially causing mass student frustration and dangerous riots? No, for the following reason: although many people familiar with Berkeley’s liberal campus may find Berkeley Patriots invitation to Milo as intentionally disruptive, we cannot say that the Berkeley Patriot should have not invited Milo merely because of the obvious ideological clash between Milo and the majority of Berkeley’s students. Because the Berkeley Patriot is made up of students, the group has just as much right to invite speakers as other students have to protest those speakers. Indeed, when inviting a speaker on campus, student-run clubs should be allowed to invite whomever they want. But as I discuss in my next chapter, the last say about who should be allowed to speak on campus is the students themselves, and as we say with Berkeley students and Milo, there was clearly a large number of students who were discontent with Milo’s presence -- if so many students are angry at the

⁷³ Artis ANDERSON v. Patricia WILEY. United States District Court, Eastern District of Kentucky Central Division. 3 February 2016. Web.

⁷⁴ Steinmetz, Katy. “Milo Yiannopoulos Finally Spoke at Berkeley. But the Protesters Were Louder.” *Time*. 25 September 2017. Web.

invitation of speaker that they vehemently dislike, the why should the university persistently sponsor the speaker?

But although certain clubs should not be allowed to bring extremely controversial third-parties in lieu of massive student protests, such clubs *should* be allowed to meet peacefully; that is, clubs should be able to plan and discuss their goings-on without disruption from other students. I make this point in an attempt to distinguish between two very important rights: the existence of certain clubs and the actions of clubs. No university policy should restrict what kinds of clubs can organize. The events and speakers that such clubs organize, however, should not be free of rules and regulation -- when a club invites a speaker to campus, the speaker is not only a representative of the club, but of the campus. Meanwhile, clubs themselves do not represent all of campus. The existence of club entails that a group of students meet, discuss, and attribute a certain title to their similarities. Debate Team members like to debate; Knitting Club member like to knit; and College Republicans discuss. I define clubs into two general categories: ideological clubs and non-ideological clubs. Examples of non-ideological clubs would be Knitting Club or Robotics Club -- although members of these clubs obviously have their own beliefs and agendas, the clubs themselves do not operate on a core ideological belief nor do there day-to-day actions revolve around the preservation or propagation of an agenda. These non-ideological clubs are innocuous and generally cause little to no harm on campus.

The other kinds of clubs are called ideological-clubs: the most important distinction between ideological clubs and non-ideological clubs is their members: members of an ideological club attach an identity to themselves *as member of that club*. So members of

College Republicans identify as Republicans, and they associate themselves with a pre-ordained set of values. Similarly, members of the Black Lives Matter campus-group associate with a very clear platitude, and they identify themselves as part of a greater movement. For all ideological clubs -- even though these clubs have clear messages and agendas that are not universal nor are they accepted by all students -- we should notice that the mere existence of such clubs are not inherently invasive, offensive, or disruptive. The presence of a College Republicans club does not inherently antagonize all democrats on campus, nor does it necessitate regulation. Furthermore, advertisement of these clubs and ideologies are neither offensive, for advertisements -- when done in good taste and without intent to offend -- are simply the easiest ways to garner interest and to attract like-minded individuals.

In summation, student-run clubs exist somewhere in between the academic and extracurricular sphere; consequently, they are not free to act as though they are completely independent of the university itself. Their beliefs -- while not inherently indicative of the majority of the campus -- reflect on the university as well, and therefore the university has the right to restrict speech. The right to restrict speech allows us to conclude that a university would be at no fault in implementing speech codes on these clubs, especially if it meant protecting the interests of other students.

Safe Spaces

Safe spaces remain a topic of debate for students, faculty, and onlookers alike. Surprisingly, there does not appear to be too much case law related to safe spaces, so this chapter will analyze the purpose of safe spaces. With their rising popularity, safe spaces have yet to be tied to a singular definition -- safe spaces can range in purpose depending on the university. Katherine Ho of the *Harvard Political Review*⁷⁵ notes that safe spaces, although they vary in purpose, can almost always be categorized as emotional safe spaces. Emotional safe spaces, Ho explains, are places where students have “the opportunity to feel secure in times of distress and dysfunction, and they also provide a sense of community.” In short, we can think of a safe space is typically the name of a space on a university campus where students can congregate and speak about marginalizations and experiences without feeling judged. Because university can be a place of great stress and great change for a student, I believe that safe-spaces play an emotionally important role on campuses. Ben-Porath notes that “Students must be permitted to organize with their peers if they are to have the power to express their views within the college’s administrative and social structures.”⁷⁶ Indeed, “safe spaces and challenging ideas are not and should not be considered mutually exclusive.”⁷⁷ Where Ben-Porath ends his analysis of safe spaces as fully permissible assemblies of students, I will extend his analysis by arguing that safe spaces should mimic clubs or extracurriculars

⁷⁵ Ho, Katherine. “Tackling a Term: What is a Safe Space?” *Harvard Political Review*. Harvard Politics, 2017. Web.

⁷⁶ Ben-Porath. “Free Speech on Campus.” 49. Print.

⁷⁷ Ibid.

for the sake of following university guidelines and being protectable under speech codes (if needed).

Designated safe spaces can range in varying degrees of “safeness”: some safe spaces are simple classrooms that groups can reserve for an hour; other safe spaces seem to imply an around-the-clock safe zone -- this seems to be the case when students attempt to make entire dorms a safe space⁷⁸. Within these spaces, there can also be a ranging amount of *emotional support*, taking form sometimes in healthy discussion, other times -- in the case of a Brown University safe space⁷⁹ -- coloring books, videos of puppies, and pillows and blankets.⁸⁰ Safe spaces such as these -- those that push the boundaries of what is acceptable and mature on a college campus -- often aggravate onlookers to thinking that college campuses are babying students and taking away from the academic purpose of a university. Tessa Berenson and Haley Edwards from *Time* magazine question how safe spaces could negatively impact not just other students’ ability to engage with each other, but also professors’ ability to speak freely without backlash from students.⁸¹ However, I think that, with a little reasonable analysis on the purposes and influence of safe spaces, I think that we can arrive a sensible conclusion on what safe spaces should and should not be used for.

To echo what has been said throughout this paper, no university group or space -- safe space or otherwise -- should not ban completely a certain type or category of speech within

⁷⁸ In 2015, Yale students wanted to make an entire dormitory a safe space following the incident with a Yale professor, Christakis. This incident is explained upon and analyzed later in this paper.

⁷⁹ Shulevitz, Judith. “In College and Hiding from Scary Ideas.” *The New York Times*, 2015. Web.

⁸⁰ The safe space was organized after a Brown senior, Katherine Byron, thought that an upcoming debate about campus sexual assault “might prompt memories of trauma” (New York Times) for some students. Byron and several other students work with administrators to create, advertise, and implement the safe space that happened simultaneously with the sexual assault debate.

⁸¹ Tessa Berenson and Haley Edwards. “Exclusive: Yale’s Dean Defends ‘Safe Spaces’ Amid Campus Protests.” *Time*, 2015. Web.

reason. No speech codes should allow safe spaces to limit any students ability to speak up. That being said, I agree with Ben-Porath that safe spaces should not be completely disavowed. While university administration should not implement speech codes that give safe spaces powers over other students, I think that administration could still do good in advocating for spaces where students can discuss amongst themselves in a way that makes them feel safe.

But do safe spaces work? That is, **do safe spaces actually protect students from hateful remarks and make them feel safe?** Ben-Porath noticeably does not address these questions⁸², and perhaps for good reason: does the legitimacy of safe spaces depend entirely on their ability to work? I believe not. If we start measuring the legitimacy of clubs and extracurriculars with the metric of ‘contribution to the marketplace of ideas,’ several clubs will start to seem unnecessary. For example, does the College Democrats club really contribute to the marketplace of ideas? Playing devil’s advocate, we can argue that College Democrats actually takes away from the marketplace of ideas by aligning students to a certain ideology. Should we disallow the assembly of College Democrats for this reason? The same argument could be applied to other clubs like Japanese Club, Robotics Club, or even physical activity oriented clubs like Cycling Club -- if pushed far enough, we can argue that many types of clubs do not necessarily contribute to the marketplace of ideas, and in many instances we could conclude that they take *away* from it. But no one argues to ban College Democrats or Cycling Club because of their contribution to campus -- these clubs exist not solely for intellectual curiosity or for the advancement of agenda. In nearly every instance, I argue, these

⁸² Although Ben-Porath discusses students’ desires for safe spaces, he never addresses the question of ‘Do safe spaces actually work?’

clubs are created and perpetuated for students' enjoyment and even more often as a break from academia.

Consequently, safe spaces should be created and treated as extracurricular activities. In relation to speech codes, safe spaces can exist as extracurriculars for the sake of being easily defined and protected by the university rather than being stuck in the muck for being ambiguous. Consequently, safe space should be specific; that is, a safe space should avoid becoming a perpetual safe haven, a place where an attempt to appease everyone ends with them appeasing no one. Safe spaces need to direct in their purpose -- for example, "We are here to discuss the difficulties and adjustments of students of color on a mostly white campus;" or "we are here to discuss how being homosexual has affected our lives and our experience at this university." In keeping the goal of each safe space specific and time sensitive, students can avoid overgeneralizing students' struggles and alienating other students. When students attempt to make a space an 24/7 safe space -- such as declaring a entire dorm a safe space⁸³ -- they unintentionally downplay any chance for uncomfortable students to feel comfortable enough to engage in discussion. In other words, to make a safe space too large or too all-encompassing (in the example of making a college dorm a safe space) is to trivialize a safe space -- to turn a classroom into a safe space every Thursday from 1-3pm encourages students to treat the safe space as an opportunity; to turn an entire dorm into a safe space all day, every day is to overestimate the physical bounds of a place of discussion. This would be similar to calling a dorm room a "24/7 academic space" -- although dorms can be places of study, they are simply not academic spaces. Similarly, dorms can be

⁸³ See the Yale incident with Professor Christakis.

places of meaningful discussion and intellectual safety, but they cannot be safe spaces all day, every day. Furthermore, students who not feel the need to have a safe space may find such moves alienating and invasive, and rightfully so. We can expect large-scale moves to make living spaces into safe spaces will always fall short of organizers expectations. The same will be found when turning entire academic buildings into safe spaces -- for spaces where so many students live, eat, and study, any attempt to make a safe space will be ineffective.

Safe spaces should mimic the typical club/extracurricular in that they have a specific location and finite meeting time in which to discuss, engage, or simply feel safe. In mimicking clubs, safe spaces can be more readily defended by speech codes when they are challenged.

Chapter 4: *Controversial Speakers on Campus*

Often enough, the controversies surrounding free speech at universities erupt not from students, faculty, or administrations themselves. Third-party speakers unaffiliated with the university have been recently provoking entire campuses into an uproar. Ben-Porath delves deeply into a particular case -- he calls it "The Middlebury Case"⁸⁴ -- where students and alumni alike protested Middlebury College's hosting of Charles Murray, author of *The Bell Curve*,⁸⁵ a book that argued that differences in intelligence were racially influenced.⁸⁶ Ultimately, many students protested Murray's speech on campus violently, resulting in the injury of one faculty member.⁸⁷ Middlebury disciplined sixty-seven students, but none were placed on probation or were expelled.⁸⁸ Rightfully so, the students who incited and participated in the violent protest were denounced by the media -- but many equated the violent protest with a general intolerance that I find presumptuous. For example, *New York Times*' Stephanie Saul called the incident a symbol for "a lack of tolerance for conservative ideas" on university campuses.⁸⁹ Although the protests ended violently, Ben-Porath notes that the students' protest should not be completely discounted:

⁸⁴ Ben-Porath. "Free Speech on Campus." Philadelphia: U of P, 2017. 50-56. Print.

⁸⁵ The full title is *Bell Curve: Intelligence and Class Structure in American Life*. As the title suggests, Murray argues that the difference in IQ from race to race could be observed in crime rates, financial success, and quality of life.

⁸⁶ Charles Murray and Richard J. Herrnstein. "The Bell Curve Explained." *The Bell Curve*, 1994. Reprinted on the *American Enterprise Institute*, 2018. Web.

⁸⁷ Reilly, Kate. "Middlebury College has Sanctioned Students for Shutting Down Charles Murray's Lecture." *Time*. 24 May 2017. Web.

⁸⁸ *Ibid.*

⁸⁹ Saul Stephanie. "Dozens of Middlebury Students Are Disciplined for Charles Murray Protest." *New York Times*. 24 May 2017. Web.

“Their rejection of Murray’s views (again, putting aside the violence, which deserves to be condemned) is an effort to expand the democratic reach of free speech to groups they see as harmed and silenced, not an effort to protect themselves within a liberal cocoon.”⁹⁰

I would add this further comment on Ben-Porath’s statement: as wrong as it was for the Middlebury College students to protest violently, I believe that the college’s administration dropped the proverbial ball when they refrained from heeding the numerous amounts of student and alumni complaints. While the administration should take no blame for the physical violence that occurred -- that falls completely to the students involved -- they should take blame for allowing a speaker on campus that was widely protested *in the weeks and months before* Charles Murray arrived on campus.

To examine this dynamic between student’s voices and the administration’s insistence on allowing third-party speakers onto campus, I examine an incident similar to the Middlebury College protests: the student protests erupting at UC Berkeley when Milo Yiannopoulos was invited to speak. Ben-Porath mentions this incident throughout *Free Speech on Campus*, and I will look at it more closely before breaking down what I believe to be a logical way to view third-party speakers on campus.

Milo Yiannopoulos at UC Berkeley

In 2017, Milo Yiannopoulos was scheduled to speak on UC Berkeley’s campus, first in February and then in September (after his opportunity in February was canceled).⁹¹

⁹⁰ Ben-Porath. “Free Speech on Campus.” Philadelphia: U of P, 2017. 53. Print.

⁹¹ Steinmetz, Katy. “Milo Yiannopoulos Finally Spoke at Berkeley. But the Protesters Were Louder.” *Time*. 25 September 2017. Web.

Yiannopoulos is a popular political commentator; he is also considered alt right,⁹² and he is a common instigator of liberals and democrats.⁹³ Yiannopoulos was scheduled to speak after being requested to do so by a Berkeley student organization called Berkeley Patriot. After much backlash and several public demonstrations by Berkeley students not affiliated with the Berkeley Patriot, the student organization canceled Yiannopoulos's speaking event.⁹⁴ After this cancellation, the nation responded with both backlash and support -- supporters of free speech argued that Yiannopoulos, although divisive and almost certainly instigatory, should have a right to speak as a practice of open discussion. Those who agreed with the cancellation boasted that, while academic freedom and open discussion are both valuable things, Yiannopoulos was either not contributing to academic discussion or speaking views that were more harmful and offensive than conducive, or both.

When controversial speakers are invited to a campus, delicate decisions hang in the balance: to what degree does academic freedom and open discussion harm certain students? How should universities respond? Should universities respond at all?

What kind of speakers are there, and how do we know which ones are worth the trouble?

First, we must distinguish when a speaker is invited and sponsored by the university, and when a speaker is sponsored by a student organization: when a speaker is invited and sponsored by the university, the university should have the responsibility of ensuring that the speaker's words, ideas, and influence do not offend a significant amount of students. For example, Andrew Luck, an NFL quarterback who plays for the Indianapolis Colts, was

⁹² "Alt Right." *Southern Poverty Law Center*. 2017. Web.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

invited to DePauw University's campus at the request and support of the university. As a sports figure with no divisive ideologies or criminal history, Andrew Luck was about as sobering and un-offensive as a speaker gets. Luck ultimately spoke about his own history as a football player, and mainly answered questions from the audience.⁹⁵

A slightly more divisive -- but still almost certainly acceptable -- speaker would be one with a clear agenda and political ideology. Let's look at another speaker invited to DePauw University: Malala Yousafzai.⁹⁶ Malala is revered for being an extremely vocal proponent for the rights of young women, specifically advocating for education for all women around the globe. As a recipient of the Nobel Peace Prize, she is revered in nearly every education realm for being a voice for positive change and female empowerment.⁹⁷ She has a clear message and agenda, and most importantly that message does not attack or undermine anyone else's identity. She does not base her support of women as an attack of men, of Middle Eastern religion, or of any other denomination. Her support of women could, in theory, be seen as offensive or divisive to someone who believes that women's rights movements are immoral. However, such a stance is universally denounced in American universities, and would -- as it should -- be seen as a fringe ideology that should not bear any weight on the decision of whether or not to invite Malala. Ultimately, speakers like Malala -- speakers with an ideology that does not offend a vast majority of students or faculty at a typical American university -- will have very few problems in securing a speaking event at a university, despite having a clear agenda and a specific ideology.

⁹⁵ Benbow, Dana. "Andrew Luck's Advice to DePauw Students: 'I'm only 25, I don't have any'." *The Indy Star*. 24 April 2015. Web.

⁹⁶ "Youngest Ever Nobel Peace Prize Recipient, Malala Yousafzai, Shares Message of Peace, Hope, and Tolerance with 5,000 at DePauw." *DePauw University News and Media*. September 4, 2017. Web.

⁹⁷ The Malala Fund. "Our Work." *Malala Fund*. 2018. Web.

And so we arrive at what should be the measuring stick with which speakers or groups are allowed to speak on campus property -- does a sizeable portion of the student body feel offended, uncomfortable, or other-ed by that speaker? If so, then the university should be able to cancel that speaker without indignation.

Opponents of speech codes may say that speakers like Yiannopoulos -- speakers that are extremely divisive and mostly unpopular⁹⁸ -- should be allowed to speak because their ideas, although offensive, are necessary for making a truly academic environment. But we must not forget that, while universities are indeed a place whose primary purpose is to advance intellectual thought and individual growth in its students, universities are also a place where students live, eat, exercise, socialize, and also go to class. To say that universities are place where academic development and the “free marketplace of ideas and discussion” are the end-all-be-all is narrow-minded. Yes, students should be exposed to new, confusing, and oftentimes difficult ideas, and they should wrestle with these new ideas often. However, commentators on the speech code debate must remember that students are human beings who lead complex lives outside of their studies -- they *live* on campus, and their dorm room or their housing is their de facto home. Consequently, university students living on the same campus are all a part of the general campus community. Whether one likes it or not, a university student is part of a community; this means that the university itself is an extension of the students and vice versa. Every decision that the university makes reflects on the students, and vice versa, students reflect on the university.

⁹⁸ “Alt Right.” *Southern Poverty Law Center*. 2017. Web.

When highly controversial speakers come to a campus, and a resounding number of students are protesting that speaker's presence, then the university -- as an institution not only of education but of hospitality and socialization -- has the responsibility to cancel that speaker. If and when a controversial speaker is canceled, how much is genuinely lost? Perhaps the marketplace of ideas is less confrontational; perhaps some very strong language. But do we think that these losses are worse than the confirmation of a student's rights? Of a student right to live a place where they are not confronted with speakers that at worst completely undermine their identity?

Some speaker are worse than others, and a an explicit diagnostic of the "offensiveness" of a speaker should be left to the students. The students at Berkeley protested Milo Yiannopoulos because Milo has, in the past, used very strong and offensive language against many groups, most broadly about women. When Milo says things like "Feminism is cancer,"⁹⁹ I think that many students are qualified in their intolerance of his public presence on their campus. Milo represents what many would believe to be one of the worst options for any university speaker not because of his ideology but because of his delivery. Quite simply, Milo is a provocateur; many people, including himself, find his language to be intentionally offensive. His speech often uses gross analogies and strong comparisons, for example his comparison between feminism and cancer.¹⁰⁰ Besides being offensive to both feminists and victims of cancer, these statements are so strong that their offensive nature is greater than any amount good that it would contribute to the academic university. Milo's statement may

⁹⁹ Streit, Julian. "Milo Yiannopoulos - Feminism is Cancer." Online video clip. *Youtube*, 7 November 2016. Web.

¹⁰⁰Ibid.

resonate with a sizeable group of followers, but I think that we can assume that such ideas are most often not heavily supported by large amounts of students at a given American university.

Of course, some on-campus speakers come without big announcements or a wide audience and still procure a lot of student protest. Some of these speakers manage, because of their delivery, to evade mass protest. Let's look at two examples from DePauw University: on one end of the spectrum of religious circulation, we have a quiet group from the local Catholic parish who hand out pamphlets titled "Who is Jesus?" and "What does the Bible teach?" Much like Malala, these parishioners have a clear agenda and a defined ideology that they are more or less peddling. Once again like Malala, the parishioners are not undermining or targeting certain groups of people. Furthermore, they very passive in their role as speakers; they do not bring megaphones; they do not shout at or accost other students; they never even approach other students, they stand at the street corner and wait for passersby to approach *them*.

This kind of speech is contrasted greatly by another speaker that frequented DePauw's campus twice in 2016. An activist group called Brother Jed's School of Evangelism came to campus with signs and megaphones, and they proceeded to shout homophobic and misogynistic sentiments at students.¹⁰¹ Saying phrases like "Gays go to hell" and "women are whores" were shouted as students walked to and from class. They were not handing out pamphlets or taking questions;¹⁰² indeed, it seemed as though Brother Jed's School of Evangelism had no objective goal on DePauw's campus other than eliciting a response from passersby. During both of their visits to DePauw, Brother Jed and his partners alarmed several

¹⁰¹ Wilson, Nick. "DePauw Students Trump Activist Group." *The Banner Graphic*. 23 September 2015. Web.

¹⁰² *Ibid*.

dozen students, and a counter protest quickly surrounded the group. During their first visit, a student that shoved Brother Jed was tackled by a police officer. After the group left, the then-president of DePauw created an emergency even in response to Campus Ministry. Many students voiced their anger at the university for allowing such an offensive speaker on campus.¹⁰³ On their second visit, no DePauw student engaged physically with Brother Jed's group, but a very large of students shouted counter-chants to drown out Campus Ministry's megaphone use.¹⁰⁴

DePauw's interaction with Campus Ministry, a group whose sole purpose seems to shout powerful, offensive language, is a telling example of the usefulness in limiting certain speakers on campus. Unfortunately for the offended students on DePauw campus, Campus Ministry was demonstrating on public land and roads, so the university had no real jurisdiction over their presence. But we should take the student's clear and present response to Brother Jed as a example of when student opinion matter most: where DePauw had no jurisdiction over Brother Jed, I think that many would agree that, if DePauw had the power to bar Brother Jed from coming to campus, DePauw should have done so. Brother Jed had nothing constructive to say about an academic endeavor or intellectual pursuit; even though his statement may have been of his own opinion, the way in which he delivered those opinions were clearly a huge annoyance and offensive to many students. In fact, even though DePauw made public their denouncement of every one of Brother Jed's tirades against homosexuals, women, etc., several students felt unsafe and cheated out of their voices.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

On this subject, former president Erwin Chemerinsky of the University of California at Irvine, in his book *Free Speech on Campus*, says that censoring speech that is offensive -- even intentionally offensive -- should not be regulated for the sake of promoting the free exchange of ideas. This rationale is popular, and it has led several onlookers to criticize Berkeley and other colleges for reacting harshly to hateful speakers on campus. The idea of limiting speech is too much for many critics -- Chemerinsky echoes these concerns: "There is simply no way to regulate hate speech without censoring ideas."¹⁰⁵ It is worthwhile to inspect this idea in detail. First and foremost: is such a statement correct in the literal sense? Yes -- truly, any kind of regulation will involve censorship, and speech regulation is no different. Indeed, we have already explained how the Supreme Court has made decisions that explicitly censor certain types of speech (see libel, etc.). So we can give Chemerinsky some credit in correctly defining the nature of regulation. However, I argue that we can still not conclude that speech regulation's censorship prohibits us from prescribing certain speech codes at universities, especially if that speech can be classified as hateful speech. It is the concerns of students that we should be most concerned with -- if a sizeable portion of students on campus are genuinely made uncomfortable by speaker, then how can say that their comfort should be sacrificed for the nebulous "marketplace of ideas?" I'll go ahead and say that some ideas can reasonably be censored on a college campus.

¹⁰⁵ Chemerinsky and Gillman. "Free Speech on Campus." 83. Print.

What about counter-protest?

When campuses disagree with a controversial speaker, the idea of counter-protest seems like a reasonable alternative to implementing speech codes. Counter-protest happens when students protest against the words and ideas of a specific speaker. Despite the many of number of counter-protests that end violently, many believe that it is a greater alternative to speech codes that empower students to choose whether or not a speaker should be allowed a podium. Surprisingly, there is little case law that addresses students' recourse when faced with controversial, possibly offensive speakers. One of the few Supreme Court cases on the subject is *Whitney v. California*,^{106 107} decided in 1927. Charlotte Whitney was accused of founding the Communist Labor Party, and she was subsequently convicted.¹⁰⁸ The Supreme Court upheld that Whitney's was an example of clear and present danger -- however, Justice Louis Brandeis made a famous note on free speech and counter-speech in his final judgment:

“[I]f there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied, is more speech, not enforced silence. Only an emergency can justify repression.”¹⁰⁹

¹⁰⁶ WHITNEY v. CALIFORNIA. 274 U.S. 357. United States Supreme Court. 16 May 1927. Justia. Web.

¹⁰⁷ Hudson, David. “Controversial Campus Speakers.” *Newseum Institute*. April 2017. Web.

¹⁰⁸ Ibid.

¹⁰⁹ WHITNEY v. CALIFORNIA. 274 U.S. 357. United States Supreme Court. 16 May 1927. Justia. Web.

Although *Whitney v. California* was overturned in *Brandenburg v. Ohio*¹¹⁰, many look to Brandeis' words as support for their belief that campus speakers should be allowed to speak regardless of students' desires¹¹¹ -- if counter-protest is an option, then why limit the speaker?

I agree with the belief that counter-protest is important to any campus. However, I disagree with the belief that the existence of counter-protest disqualifies completely student concerns. When UC Berkeley allowed Milo Yiannopoulos to speak on campus despite many, many students asking the university to rescind his invitation, they purposefully ignored their constituency for the sake of preserving the tenuous right of the Berkeley Patriots to being in controversial.

Suggestions for Allowing or Disallowing a Speaker on Campus

Therefore, there is some game theory to be done when deciding whether or not controversial, student-enraging speakers are invited to campus. In a situation where the university must decide between allowing a speaker whom many student openly protest -- thereby worsening their relationship with the students -- to speak on campus, or cancel the speaker and lose any potential contribution to the supposed "marketplace" of ideas.

So, when deciding when a university should allow or disallow a speaker from speaking on its campus, administrators should answer the following questions:

¹¹⁰ BRANDENBURG v. OHIO. 395 U.S. 444. United States Supreme Court. 9 June 1969. Justia. Web.

¹¹¹ Hudson, David. "Controversial Campus Speakers." *Newseum Institute*. April 2017. Web.

1. Does the speaker have an agenda and use their podium as an extension of that agenda?
 - a. Is the agenda divisive?
 - b. If so, does the speaker commonly undermine any groups of people in their speech?
2. Is there a large group of students who dislike this speaker, are often targeted by this speaker, or generally offended by the speaker's words?
3. Would the cancellation of this speaker be a **genuine missed opportunity** for students to discuss something?

In answering these questions, administrators should form an educated decision about the positives and negatives in allowing a speaker to come to campus.

Conclusion

I believe that speech codes have been unjustifiably criticized for being restrictive, un-American, and anti-academia, and that their potential to bring about meaningful, positive change has been stifled by knee-jerk reactions to campus incidents like those at Berkeley. As a senior nearing the end of his undergraduate career, I find many of the anti-speech-code arguments to be surface-level and painfully ignorant of whom universities serve first and foremost: the students. Although I have used several examples of case-law (competently, I hope) in an attempt to build my argument around precedent, my main conclusion boils down to an ideology that Ben-Porath and I both share: at universities, “[d]emocratic practices should be interpreted in light of the unique and evolving mission that these institutions serve and of the population that uses their services.”¹¹² That is, the mission of universities is not solely to impart knowledge to students -- universities are places of personal, emotional, cultural, and spiritual growth. To deny the implementation of speech codes on the basis of academic freedom is to forget the equally as important non-academic spheres of a university. Speech codes deserve to be considered seriously both on the legal and university level -- although I am sure that the courts will not be so easily swayed by an ideological appeal to students’ rights, I think that university administrators should consider rethinking their stances on speech codes. If the general, binary way of thinking about speech codes can be nuanced, I think that administrators could better protect the ideals of diversity and inclusion without sacrificing academic discussion.

¹¹² Ben-Porath. “Free Speech on Campus.” Philadelphia: U of P, 2017. 115. Print.

Works Cited

- American Association of University Professors. "Legal Cases Affecting Academic Speech." 13 October 2017. Web.
- American Association of University Women. "Know Your Rights: Sexual Harassment And Sexual Assault Under Title IX." *What We Do*. 2017. Print.
- Artis ANDERSON v. Patricia WILEY. United States District Court, Eastern District of Kentucky Central Division. 3 February 2016. Web.
- AXSON-FLYNN v. JOHNSON. 356 F.3d 1277. United States District Court, 10th Circuit. 2001. Web.
- BEAUHARNAIS v. ILLINOIS. 343 US 250. Supreme Court of Illinois. 1952. Justia. Web.
- Ben-Porath. "Free Speech on Campus." Philadelphia: U of P, 2017. Print.
- Benbow, Dana. "Andrew Luck's Advice to DePauw Students: 'I'm only 25, I don't have any'." *The Indy Star*. 24 April 2015. Web.
- BETHEL SCHOOL DISTRICT v. FRASER. 478 U.S. 675. United States Supreme Court. 7 July 1986. Justia Law. Web.
- Boomer Sooner. "OU SAE Racist Chant." Online video clip. *Youtube*, 8 March 2015. Web.
- Chapell, Bill. "University Of Oklahoma Expels 2 Students Seen As Leading Racist Chant." *NPR*. 10 March 2015. Web.
- Charles Murray and Richard J. Herrnstein. "The Bell Curve Explained." *The Bell Curve*, 1994. Reprinted on the *American Enterprise Institute*, 2018. Web.
- Craig KEEFE v. Beth ADAMS. 14 US 2988. United States Court of Appeals, Eighth Circuit. June 10th, 2015. Justia, US Law. Web.
- Equal Employment Opportunity Commission. "Harassment." *Types of Discrimination*. 2017. Web.
- Erwin Chemerinsky and Howard Gillman. "Free Speech on Campus." New Haven: Yale, 2017. Print.
- FRISBY v. SCHULTZ. 487 US 474. United State Court of Appeals, Seventh Circuit. 1988. Justia. Web.
- Hancock, Kristen. "Students Beliefs, Multiculturalism, and Client Welfare." *American Psychological Association*. 2014. Web.

- Hartocollis, Anemona. "Yale Lecturer Resigns After Email on Halloween Costumes." *New York Times*. 7 December 2015. Web.
- Ho, Katherine. "Tackling a Term: What is a Safe Space?" *Harvard Political Review*. Harvard Politics, 2017. Web.
- Hudson, David. "Controversial Campus Speakers." *Newseum Institute*. April 2017. Web.
- John DOE v. UNIVERSITY OF MICHIGAN. 721 U.S. 852. United States District Court for the Eastern District of Michigan, Southern Division. September 22, 1989. Boston College. Web.
- Juan HONG v. Stanley GRANT. 403 Fed.Appx. 236. United States Court of Appeals, Ninth Circuit. September 2, 2010. Justia US Law. Web.
- Law Shelf Educational Media. "Limitations on Expression." 2018. Web.
- Lukainoff, Greg. "Speech Codes: The Biggest Scandal on College Campuses Today." *Forbes Magazine*. 19 December 2012. Web.
- Mark L. OYAMA v. UNIVERSITY OF HAWAII. United States District Court of Hawaii. December 29, 2015. Pearl, Steven. "The California Employment Law Blog." 6 January 2016. Web.
- NATIONAL SOCIALIST PARTY OF AMERICA v. VILLAGE OF SKOKIE. 432 U.S. 43. United States Supreme Court. 14 June 1977. Justia Law. Web.
- Paige St. John and James Queally. "Antifa Violence in Berkeley Spurs Soul-Searching Within Leftist Activist Community." *LA Times*. 29 August 2017. Web.
- Reilly, Kate. "Middlebury College has Sanctioned Students for Shutting Down Charles Murray's Lecture." *Time*. 24 May 2017. Web.
- Roland, Dave. "Student Fees and Clubs." *Newseum Institute*. March 2017. Web.
- Saul, Stephanie. "Dozens of Middlebury Students Are Disciplined for Charles Murray Protest." *New York Times*. 24 May 2017. Web.
- Shulevitz, Judith. "In College and Hiding from Scary Ideas." *The New York Times*, 2015. Web.
- Stanner, Andrew. "Toward an Improved True Threat Doctrine for Student Speakers." *NYU Law Review*. Hein Online, 2006. Web.
- Steinmetz, Katy. "Milo Yiannopoulos Finally Spoke at Berkeley. But the Protesters Were

- Louder." *Time*. 25 September 2017. Web.
- Streit, Julian. "Milo Yiannopoulos - Feminism is Cancer." Online video clip. *Youtube*, 7 November 2016. Web.
- The Asian Republic. "Yale University - Full Version - New Videos of the Halloween Email Protest." Online video clip. *Youtube*, 20 September 2016. Web.
- WHITNEY v. CALIFORNIA. 274 U.S. 357. United States Supreme Court. 16 May 1927. Justia. Web.
- Wildman, Sarah. "Why You See Swastikas in America but not Germany." *Vox*. 16 August 2017. Web.
- Winter, Michael. "Virginia College punishes 4 in Racial Protest Over Obama Win." *USA Today*. 13 December 2012. Web.
- Wilson, Nick. "DePauw Students Trump Activist Group." *The Banner Graphic*. 23 September 2015. Web.
- N.A. "Alt Right." *Southern Poverty Law Center*. 2017. Web.
- N.A. "What are Speech Codes?" *F.I.R.E.* n.d. Web.
- N.A. "Youngest Ever Nobel Peace Prize Recipient, Malala Yousafzai, Shares Message of Peace, Hope, and Tolerance with 5,000 at DePauw." *DePauw University News and Media*. September 4, 2017. Web.

Works Consulted

- Benedict, Louis. "Faculty Academic Freedom: Faculty as Employees and Citizens." Bowling Green State University. 2007. Print.
- Feda, Matthew. "Public Employees and Free Speech." *Illinois State Bar Association*. December, 2011. Web.
- Hall, Maximillian. "Keefe v. Adams: Overregulating Off-Campus Speech Under Professional Codes of Conduct." *Minnesota Law Review*, 2017. Web.
- Mill, John Stuart. *Hate Groups: Opposing Viewpoints*. Ed. Tamara L. Roleff. San Diego: Greenhaven, 1999. Print.

- Levinson, Rachel. "Academic Freedom and the First Amendment." *AAUP*. 2007. Web.
- Lipka, Sara. "Campus Speech codes Said to Violate Rights." *Chronicle of Higher Education*. DC, 2007. Web.
- Rabe, Lee Ann. "Sticks and Stones: The First Amendment and Campus Speech Codes." *The John Marshall Law Review*. Chicago: John Marshall Law School, 2003. Web.
- Sternberg, Robert J. *The Psychology of Hate*. Washington, DC: American Psychological Association, 2005. Print.
- Strike, Kenneth. *Ethics and college student life: A Case Study Approach*. NJ: Prentice, 2008. Print.
- Tsesis, Alexander. "Burning Crosses on Campus: University Hate Speech Codes." *Connecticut Law Review* 43.2, 2010. Web.
- United Academics of the University of Oregon. "Academic Freedom in the Classroom." n.d. Web.
- UNC Charlotte Council of Legal Affairs. "Relevant Cases on Academic Freedom in the Classroom." Office of Legal Affairs, Division of Institutional Integrity. Web.