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Christopher J. Roederer

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Article

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Christopher J. Roederer*

"All truth is simple."—Is that not a compound lie?
From the military school of life.—What does not kill me makes me stronger.[1]

—Frederick Neietszche

I. Introduction

Fredrick Nietzsche wrote eloquently of using the power of the word as a hammer to smash the false idols of his time, but his hammer was a surgical instrument compared to the wrecking ball of expressive conduct on at least some university campuses today.[2] It is lamentable to see students violently rioting at Berkeley, universities disinviting speakers because of the

* Assistant Professor of Law, University of Dayton School of Law; Visiting Professor of Law, University of the Witwatersrand School of Law. Thanks to former and current Florida Coastal faculty and staff, including Judy Clausen, Ericka Curran, Mary Margaret Giannini, Tammy Hodo, Quince Hopkins, Korin Munsterman, Benjamin Priester, Lucille Ponte, and Greg Pingree, for comments on drafts of the paper. Thanks also to the panelists on *Free Speech on Campus* at the Southeastern Association of Law Schools 2016 Annual Meeting and the participants at the 2017 *Free Speech Discussion Forum* in Budapest, Hungary, particularly: Jenny Carroll, Dieter Dörr, Bill Funk, RoNell Anderson Jones, Robert Kahn, Mark Kende, John Knechtle, Andras Koltay, Ronald Krotoszynski, Carlo Pedrioli, Russel Weaver, and Howard Wasserman. Special thanks to the organizers and presenters at the symposium on *Campus Speech in Uncertain Times: Hopes and Challenges?*, including Robert Kahn, Frederick Lawrence, and Nadine Strossen. I would also like to thank the members of the University of Dayton Law School faculty for helpful feedback on this paper, especially: Erica Goldberg, Susan Newhart Elliott, Tracy Reilly, Jeff Schmitt, Dalindyebo Shabalala, and Lori Shaw. Special thanks as well to my research assistants Christina Heath and Katherine E. McLaurin.

1. Frederick Nietzsche, *Maxims and Arrows*, *in* Twilight of the Idols and the Anti-Christ 23 (R.J. Hollingdale trans., 1968). The original German text of Twilight of the Idols has the subtitle, How to Philosophize with a Hammer. While it is difficult to have a discussion with a hammer, hammers can be constructive while wrecking balls cannot.

2. For the sake of brevity, instead of referring to colleges and universities, I will generally only refer to the latter. When I refer to universities, I intend to include colleges. I retain the term college when discussing the works of others who use the term, or when the term is within a quote.

controversial nature of their views, and administrations suppressing robust discussions of important topics for fear of "hurt feelings." It is also lamentable that public discourse has been reduced to personal attacks, overgeneralizations, and "alternative facts." It is sad to see the pen reduced from a fine instrument for bringing truth to power to a blunt instrument for attacking those people who disagree with our views. It is sad our president is such a poor role model—continuously attacking the media as an "enemy of the people" and accusing it of creating "fake news" when it turns up facts critical of, or inconvenient for, his administration.[3] Some who are offended and hurt by insensitive language have mobilized terms like "racist," "sexist," "microaggression," and "hostile environment," while others combat those terms with labels such as "delicate snowflakes," "political correctness," and "vindictive protectiveness." There are racists and sexists who create hostile learning environments as well as delicate snowflakes who scream out for vindictive protection at the slightest threat to their comfort. I would wager, however, that both are a very small minority. The truth is more complicated. My guess is most people who make the occasional offensive comment are not racists or sexists and do not intend to harass or create a hostile environment, and those who are offended do not intend to bring the full weight of the law down on every person who makes those comments. Most people just want to be understood, to be respected, and to be given the benefit of the doubt. No one wants to be reduced to a label.

Nonetheless, these terms have some appeal because they provide powerful leverage in any discussion. They, like the terms "fake news" and "enemy of the state," are trump cards[4] (pardon the pun) that, at best, deflect or derail the conversation, and at worst, shut down the conversation and silence or discredit the other. This way of speaking perpetuates a bunker

3. *See, e.g.*, Chris Cillizza, *Donald Trump's latest attack on the media is very, very dangerous*, WASH. POST, (Feb. 6, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/06/donald-trumps-suggestion-that-the-media-is-covering-up-terrorist-attacks-is-genuinely-dangerous/?utm_term=.0545e7989571; John Cassidy, *Trump's Attacks on the News Media Are Getting Even More Dangerous*, NEW YORKER (Aug. 31, 2018), https://www.newyorker.com/news/our-columnists/trumps-attacks-on-the-news-media-are-getting-even-more-dangerous; Dave Boyer, *'This is on you': Democrats, media blame Trump for pipe bombs*, WASH. TIMES (Oct. 24, 2018), https://www.washingtontimes.com/news/2018/oct/24/democrats-media-blame-donald-trump-pipe-bombs/.

4. President Trump has used a number of terms and expressions that mobilize people behind his views as well as terms that de-legitimize opposing views. Terms used to mobilize support include identifying terrorist threats against us as radical Islamic terrorist threats and labeling Mexicans as rapists and drug dealers. Jesse Berney, *Trump's Long History of Racism*, ROLLING STONE (Aug. 15, 2017), https://www.rollingstone.com/politics/politics-features/trumps-long-history-of-racism-201446/. In addition to personal attacks on media personalities, he has called the media an enemy of the state, and continuously reiterates his mantra "fake news." *The Trump Administration's War On The Press*, MEDIA MATTERS (Feb. 1, 2017), https://www.mediamatters.org/trumps-war-on-the-press.

mentality, allowing both "sides" to stay in their silos or "safe zones."[5] This undermines both our ability to listen and to be heard. It undermines and/or short-circuits the hope that dialogue can result in more than counterpoints and rise to mutual understanding.

There is evidence this polarized way of talking and thinking has infected our university culture and has begun to affect our law school culture.[6] There are concerns that both the Department of Education and university administrators have gone too far in protecting students from language that causes them discomfort.[7] While some fear we have capitulated too much to the "delicate snowflakes" by being "helicopter professors"[8] and avoiding controversial issues, I would caution against swinging too far back.

The ball has swung from turning a deaf ear to victims of sexual assault and harassment to what has been termed "vindictive protectionism": shouting down, drowning out, and disinviting controversial speakers;[9] demand-

5. The rhetoric of sides also overgeneralizes. The victims of the polarization of our public discourse are those who occupy the vast middle: those who do not identify as radical left or right and really just want the truth and a functioning country. As the 2018 Mueller indictments disclose, Russia sought to undermine our democracy by exploiting this polarization. Matt Apuzzo & Sharon LaFraniere, *13 Russians Indicted as Mueller Reveals Effort to Aid Trump Campaign*, N.Y. TIMES, (Feb. 16, 2018), https://www.nytimes.com/2018/02/16/us/politics/russians-indicted-mueller-election-interference.html. As the prosecutors state, "The Russians stole the identities of American citizens, posed as political activists and used the flash points of immigration, religion and race to manipulate a campaign in which those issues were already particularly divisive . . . ." *Id.* As Deputy Attorney General Rod J. Rosenstein stated, "The indictment alleges the Russian conspirators want to promote discord in the United States and undermine public confidence in democracy. . . . We must not allow them to succeed." *Id.* Russia has continued to sow divisiveness in the wake of the February 2018 Florida school shooting. Geoff Brumfiel, *As An American Tragedy Unfolds, Russian Agents Sow Discord Online*, NPR, (Feb. 16, 2018), https://www.npr.org/sections/thetwo-way/2018/02/16/586361956/as-an-american-tragedy-unfolds-russian-agents-sow-discord-online.

6. *See infra* notes 288-313 (sections IX and X). I argue both the impact on law school culture is different and law school culture is better equipped to address this impact than the general campus culture. *See infra* section X.

7. *See History, Uses, and Abuses of Title IX,* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (June 2016), https://www.aaup.org/file/TitleIXreport.pdf [Hereinafter AAUP Report]. Legal academics, such as Eugene Volokh, have voiced concern over this issue as far back as 1995. Eugene Volokh*, How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563 (1995); *see also* Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights,* 35 J.C. & U.L. 385 (2009); and Benjamin Dower, Note, *The Scylla of Sexual Harassment and the Charybdis of Free Speech: How Public Universities Can Craft Policies to Avoid Liability*, 31 REV. LITIG. (2012).

8. *See* Emily Grant, *Helicopter Professors*, 53 GONZ. L. REV. 1, 2 (2017) ("Helicopter professors, like their parenting counterparts, hover over students, guiding them precisely, and swooping in to rescue them from any hint of failure or challenge. Just as helicopter parenting can be harmful to children, helicopter professoring poses similar threats to students, not the least of which is creating disengaged students dependent on professors for all aspects of their learning and development.").

9. Note while some see this as part of a free speech crisis on campus, others have argued this "crisis" is a fabrication. Chris Ladd, *There Is No Free Speech Crisis On Campus*, FORBES

ing trigger warnings; avoiding difficult topics;[10] and, some claim, an overzealous enforcement of civil rights legislation (namely, Title IX) at the expense of free speech.[11] Now the ball appears to be swinging back again, with the American Association of University Professors (AAUP) criticizing the encroachment of government and the university on free speech,[12] universities declaring "no safe spaces" from unwanted speech,[13] commentators

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(Sept. 23, 2017), https://www.forbes.com/sites/chrisladd/2017/09/23/there-is-no-free-speech-crisis-on-campus/#6593e74428cb. As he argues:

> Having lost the battle of persuasion, and largely swept from the campus environment, right wing speakers have to be foisted onto universities from the outside. When characters like Ann Coulter, Milo Yiannopoulos, and Charles Murray appear on campus, their appearances are funded by extremist donors and their events are orchestrated by outside groups. Finding students among the organizers, attendees, protestors, or counter-protestors is a challenge. This is theater and the university is a prop. There is virtually no support for, or interest in these events at the schools being targeted.

10. *See, e.g.*, Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind: In the name of emotional well-being, college students are increasingly demanding protection from words and ideas they don't like. Here's why that's disastrous for education—and mental health*, THE ATLANTIC (Sept. 2015), https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/.

11. *See* AAUP Report, *supra* note 7.

12. *Id.* There is reason to be concerned the "#MeToo" movement might soon suffer a similar backlash. *See* Emily Yoffe, *Why the #MeToo Movement Should Be Ready for a Backlash,* POLITICO (Dec. 10, 2017), https://www.politico.com/magazine/story/2017/12/10/yoffe-sexual-harassment-college-franken-216057. *See also* Amanda Marcotte, *Conservative backlash against #MeToo is coming, and soon,* SALON (Dec. 18, 2017), https://www.salon.com/2017/12/18/conservative-backlash-against-metoo-is-coming-and-soon/.

13. *See* Letter from John (Jay) Ellison, Dean of Students in the Coll. at the Univ. of Chi., to the Class of 2020, https://news.uchicago.edu/sites/default/files/attachments/Dear_Class_of_2020_Students.pdf. *See also* Richard Perez-Pena, Mitch Smith & Stephanie Saul, *University of Chicago Strikes Back Against Campus Political Correctness*, N.Y. TIMES, (Aug. 26, 2016), http://www.nytimes.com/2016/08/27/us/university-of-chicago-strikes-back-against-campus-political-correctness.html?emc=edit_th_20160827&nl=todaysheadlines&nlid=54025227&_r=0.

> You will find that we expect members of our community to be engaged in rigorous debate, discussion and even disagreement. At times this may challenge you and even cause discomfort. Our commitment to academic freedom means that we do not support so-called 'trigger warnings,' we do not cancel invited speakers because their topics might prove controversial, and we do not condone the creation of intellectual 'safe spaces' where individuals can retreat from ideas and perspectives at odds with their own.

According to FIRE, the following fifty institutions or faculty bodies have adopted or endorsed the Chicago Statement or a substantially similar statement: American University, Amherst College, Appalachian State University, Arizona State University, Ashland University, California State University Channel Islands, Chapman University, City University of New York, Claremont McKenna College, Colgate University, Columbia University, Denison University, Eckerd College, Franklin & Marshall College, Georgetown University, Gettysburg College, Johns Hopkins University, Joliet Junior College, Kansas State University, Kenyon College, Louisiana State University, Michigan State University, Middle Tennessee State University, Northern Illinois University, Ohio University, Princeton University, Purdue University, Ranger College, Smith College, State University of New York at Buffalo, Tennessee Technological University, The Citadel, University of Arkansas at Little Rock, University of Central Florida, University of Colorado System, University of Denver, University of Maine System, University of Maryland, University of Minnesota, University of Missouri System, University of Montana, University of Nebraska, University of North Carolina at Chapel Hill, University of Southern Indiana, University of Virginia College at Wise, University of Wisconsin System, Vanderbilt University, Washington and Lee University,

criticizing the coddling of students as if they were delicate snowflakes,[14] and a new president in the White House who is scaling back the Obama administration's aggressive approach to Title IX protections against gender discrimination and harassment.[15] This about-face with the Trump administration is predictable for a number of reasons:

- Republican administrations have a tradition of underfunding and understaffing agencies responsible for enforcing civil rights laws;[16]
- President Trump selected Jeff Sessions as his attorney general;[17]
- President Trump's own brand of "free speech" is closer to a wrecking ball than a hammer, often in 280 characters or less;[18]

Washington University in St. Louis, and Winston-Salem State University. FIRE*, Chicago Statement: University and Faculty Body Support*, FOUND. FOR INDIVIDUAL RIGHTS IN EDU. (Oct. 25, 2018), https://www.thefire.org/chicago-statement-university-and-faculty-body-support/.

14. *See* Lukianoff & Haidt, *supra* note 10. *See also* Charles Lipson, *The Death of Campus Free Speech—and How to Revive It,* REAL CLEAR POLITICS (June 28, 2016), http://www.realclearpolitics.com/articles/2016/06/28/the_death_of_campus_free_speech_—_and_how_to_revive_it_131029.html.

15. Even though the Obama administration is faulted by some for the over-enforcement of Title IX at the expense of free speech, President Obama came out strongly in favor of free speech on campus and against disinviting controversial speakers or shielding students from content they might not like or agree with. *See* Office of the Press Secretary, The White House, *Remarks by the President at Town Hall on College Access and Affordability* (Sept. 14, 2015*),* https://obamawhitehouse.archives.gov/the-press-office/2015/09/15/remarks-president-town-hall-college-access-and-affordability.

16. The Republican platform of deregulation started with what some term "The Reagan Revolution." *See* Paul Moreno, *Trump Can Succeed Where Even Reagan Failed*, FORBES (Jan. 17, 2017), https://www.forbes.com/sites/realspin/2017/01/17/trump-can-succeed-where-even-reagan-failed/#1e6f738b1e6f. Trump's former chief strategist Stephen Bannon put forward the goal of dismantling the administrative state. *See* Philip Rucker & Robert Costa, *Bannon: Trump administration is in unending battle for 'deconstruction of the administrative state*,' WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/02/23/bannon-trump-administration-is-in-unending-battle-for-deconstruction-of-the-administrative-state/?utm_term=.1e4997bo8oal. *See also* Gregory Korte, *The 62 agencies and programs Trump wants to eliminate*, USA TODAY (Mar. 16, 2017), https://www.usatoday.com/story/news/politics/2017/03/16/what-does-trump-budget-eliminate/99223182/.

17. *See* Adam Serwer, *The Cynical Selling of Jeff Sessions as a Civil-Rights Champion*, THE ATLANTIC, (Feb. 10, 2017), https://www.theatlantic.com/politics/archive/2017/02/the-fiction-of-jeff-sessions-civil-rights-champion/516237/ ("Sessions is on record opposing Supreme Court decisions striking down laws banning homosexual sex and same-sex marriage and he opposed the repeal of the policy forbidding gays and lesbians to serve openly in the military. He voted against the Lilly Ledbetter Act, the Violence Against Women Act, and said it would be a 'stretch' to describe grabbing a woman's genitals, as the president once bragged about doing, as sexual assault."). Sessions has already withdrawn the guidance given under the Obama administration on Title IX and transgender bathrooms. *See* Dep't of Justice, Office of Pub. Affairs, *Statement by Attorney General Jeff Sessions on the Withdrawal of Title IX Guidance*, THE U.S. DEP'T OF JUSTICE (Feb. 22, 2017), https://www.justice.gov/opa/pr/statement-attorney-general-jeff-sessions-withdrawal-title-ix-guidance.

18. There are too many Trump statements over the years depicting women as sexual objects to document here. *See generally,* Claire Cohen, *Donald Trump sexism tracker: Every offensive comment in one place,* THE TELEGRAPH, (Jan. 20, 2017), http://www.telegraph.co.uk/women/politics/donald-trump-sexism-tracker-every-offensive-comment-in-one-place/; Karen Tumulty, *Trump's history of flippant misogyny,* WASH. POST (Aug. 8, 2015), https://www.washingtonpost.com/politics/trumps-history-of-flippant-misogyny/2015/08/08/891f1bec-3de4-11e5-9c2d-ed991d

- President Trump has come out strongly in defense of extreme speakers like Milo Yiannopoulos, threatening to defund the University of California, Berkeley for disinviting him as a speaker;[19] and finally;
- President Trump appointed Betsy DeVos as Education Secretary, who quickly began revisiting the Obama policies in this area.[20]

Is President Trump our free speech hero, or does his brand of free speech threaten to drown out, silence, and marginalize women and minorities on campus? No doubt, part of President Trump's popularity came from a perception that the jackboots of political correctness were silencing significant portions of the electorate—primarily a subset of white men who may feel they are stopped from saying what they want to say in the way they want to say it, or who believe their heritage or privilege is being threatened. But is the antidote to the chilling effect of "political correctness" and the overzealous enforcement of one aspect of Title IX to take the gloves off in all out ad hominem attacks on women, minorities, and anyone else who disagrees with one's views?[21] Does the "Trump approach" to speech on

848c48_story.html?utm_term=.1dbc1e62d123. President Trump announced on Twitter the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military. Donald Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), https://twitter.com/realdonaldtrump. In spite of his comments "we should come together as one," President Trump has received heavy criticism from the Democrats as well as Republicans for his treatment of the event in Charlottesville, VA in August 2017, particularly his condemnation of the "egregious display of hatred, bigotry and violence on many sides — on many sides." *See, e.g.*, Erick Woods Erickson, *What Trump Got Wrong on Charlottesville,* N.Y. TIMES (Aug. 13, 2017), https://www.nytimes.com/2017/08/13/opinion/trump-charlottesville-white-supremacy.html. *See also* Kyle Feldscher, *Republican Senators Call Charlottesville Crash, Domestic Terrorism, Call-out Trump,* WASH. EXAMINER, (Aug. 12, 2017), http://www.washingtonexaminer.com/republican-senators-call-charlottesville-crash-domestic-terrorism-call-out-trump/article/2631371. Approximately three days after the initial statement, President Trump did come out and condemn the KKK, Neo-Nazis and White Supremacists by name. *See, e.g., Trump Condemns White Supremacists, KKK, Neo-Nazis by Name*, FOX NEWS (Aug. 14, 2017), http://insider.foxnews.com/2017/08/14/trump-condemns-white-supremacists-kkk-neo-nazis-name.

19. Trump, via tweet, threatened to deny funds to the University of California at Berkeley for the riots that shut down a scheduled speech by Yiannopoulos. Rebecca Savransky*, Trump threatens funding cut if UC Berkeley 'does not allow free speech',* THE HILL (Feb. 2, 2017), http://thehill.com/homenews/administration/317494-trump-threatens-no-federal-funds-if-uc-berkeley-does-not-allow-free.

20. *See* Sheryl Gay Stolberg, *DeVos Says She Will Revisit Obama-Era Sexual Assault Policies*, N.Y. TIMES (July 13, 2017), https://www.nytimes.com/2017/07/13/us/devos-college-sexual-assault.html. Signaling the view of the Office for Civil Rights, Candice Jackson, who leads the office under DeVos, made the shocking statement that, "90 percent [of sexual assault accusations on campus] fall into the category of 'we were both drunk,' 'we broke up, and six months later I found myself under a Title IX investigation because she just decided our last sleeping together was not quite right.'" *See* Erica L. Green & Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear,* N.Y. TIMES (July 12, 2017), https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html?_r=0. Jackson apologized and DeVos's comments on the topic are more measured.

21. Free speech has costs, if not limits. As Mr. Yiannopoulos has discovered, even the private marketplace has decided enough is enough when it comes to speech that harasses or that condones or makes light of sexual abuse, particularly the abuse of children. Thus, Yiannopoulos

campus actually move the discussion forward? Is this kind of speech designed to move the discussion forward, or is it meant as an assault,[22] or to incite a visceral response, to misdirect our frustrations and anger, and to sidetrack us? Is the asymmetrical expressive conduct of protests, riots, disinvitations, suspensions, firings, or other forms of discipline much worse? Free speech advocates generally think of these forms of expression as heckler's vetoes.[23] While these forms of expression are more blunt or obtuse than some bigoted and sexist speech, both tend to shut down the conversa-

found his Twitter account, the publication of his autobiography, and his appearance at the Conservative Political Action Conference in February 2017 all cancelled. *See* Abby Ohlheiser, *Analysis: The 96 hours that brought down Milo Yiannopoulos*, CHI. TRIB. (Feb. 21, 2017), http://www.chicagotribune.com/news/nationworld/politics/ct-milo-yiannopoulos-resignation-analysis-20170221-story.html. Twitter ultimately cancelled Mr. Yiannopoulos's account (it had been suspended several times before for bigoted comments) after he and other Twitter trolls attacked African American actress Leslie Jones, one of the stars of the new Ghostbusters movie. *See* Mike Isaac, *Twitter Bars Milo Yiannopoulos in Wake of Leslie Jones' Reports of Abuse*, N.Y. TIMES (July 20, 2016), https://www.nytimes.com/2016/07/20/technology/twitter-bars-milo-yiannopoulos-in-crackdown-on-abusive-comments.html. Simon and Schuster cancelled publishing his autobiography after he made comments seemingly endorsing and/or making light of pedophilia. *See* Feliks Garcia, *Milo Yiannopoulos' Book Deal was Just Cancelled*, THE INDEPENDENT (Feb. 20, 2017), http://www.independent.co.uk/arts-entertainment/books/news/milo-yiannopoulos-book-deal-canceled-simon-schuster-paedophilia-podcast-dangerous-a7590706.html. His appearance at the Conservative Political Action Conference in February 2017 was also cancelled soon thereafter for the same reason. Adam Edelman, *Milo Yiannopoulos Disinvited from CPAC After Recording Resurfaces of Him Discussing Pedophilia*, N.Y. DAILY NEWS (Feb. 20, 2017), http://www.nydailynews.com/news/politics/milo-yiannopoulos-disinvited-cpac-pedophilia-comments-article-1.2977414.

22. As R. George Wright notes, "If at least some instances of campus hate speech are, and are intended to be, largely assaultive speech, or akin to the tort of battery committed through the medium of words, the idea of counterspeech may be not only unresponsive, but itself undignified." R. George Wright, *Campus Speech and the Functions of the University*, 43 J.C. & U.L. 1, 20 (2017).

23. While it may seem like hecklers have silenced speech in these cases, many of them are not actual "heckler's veto" cases since the state has not put its coercive force behind the private veto. As Cheryl A. Leanza notes:

> Heckler's veto cases typically consider the appropriate behavior of local law enforcement when a crowd or individual threatens hostile action in response to a demonstration or speaker. In these cases, the First Amendment grants a positive right to the speaker: the local government must take action to protect the speaker against a hostile crowd. The courts do not allow local law enforcement to accede to a heckler's veto.

Cheryl A. Leanza, *Heckler's Veto Case Law as a Resource for Democratic Discourse*, 35 HOFSTRA L. REV. 1305, 1306 (2007) (internal citations omitted). More recently, Brett G. Johnson notes:

> U.S. pundits and free-speech advocates have bemoaned recent examples of private restrictions being placed on controversial—yet otherwise protected—speech due to mass protests from unhappy or offended audiences. Controversial public figures have chosen not to speak at events at both private and public colleges and universities due to intense outcry from student groups opposed to those speakers. Popular social networking sites have been criticized for removing controversial user-generated content from their platforms due to criticism from users who find the content offensive. Artists have been forced to remove their art from display on public property due to public disgust toward the art's controversial (or at least misunderstood) message. . . In the wake of these incidents, the term "heckler's veto" has been used (predominantly by right-leaning media, though also by mainstream outlets) to describe the act of one group attempting to silence the controversial speech of others.

tion.[24] There must be better ways to move the discussion forward on university and law school campuses. Perhaps we could all use some de-escalation training.[25]

This paper addresses a number of questions related to free speech on university and law school campuses:

1. Should campuses be treated the same as public spaces or forums in our broader society?
2. Are the norms, expectations, and limits of free speech the same on university campuses as they are in society?
3. Are law school campuses different yet?
4. Why aren't law schools experiencing the same level of problems with expressive conduct that universities are? (Or are they?)
5. Why hasn't the law school profession had the same reaction to restrictions of speech on campus as the larger academy? (Or has it?)
6. Should society's free speech norms inform law school campus norms, or is there some virtue in law school community norms informing societal norms—or at least university campus norms?
7. Is the answer some form of de-escalation? (Should there be more tailored sanctions for the range of harms and more emphasis on restorative justice?)

This article begins by assessing Alexander Tsesis's article, *Campus Speech and Harassment*, and his treatment of how traditional doctrine related to protected and unprotected categories of speech informs campus free speech codes.[26] Here, I will argue the law school campus is more akin to a European town square (where free speech rights are balanced against other rights, values, and duties) than to a U.S. town square (where it is sometimes thought free speech is both our first right and the most important right,

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Brett G. Johnson, *The Heckler's Veto: Using First Amendment Theory and Jurisprudence to Understand Current Audience Reactions Against Controversial Speech*, 21 COMM. L. & POL'Y 175, 175-77 (2016).

24. If they do not shut it down, they at least degrade the discussion to the point of a virtual food fight. One need only look at the virtual shouting matches in the comments to articles, blog posts, and Twitter feeds. It is not clear what value this speech has, except as perhaps a way of letting off steam. Even here, it is not clear if this form of venting reduces harm or incites it.

25. *See Los Angeles Police Institute De-Escalation Policy To Avoid Shootings*, NPR NEWS (Apr. 19, 2017), http://www.npr.org/2017/04/19/524751627/los-angeles-police-institute-de-escalation-policy-to-avoid-shootings. *See also* Tom Jackman, *National Police Groups Add 'De-Escalation' To New Model Policy on Use of Force*, WASH. POST, (Jan. 17, 2017), https://www.washingtonpost.com/news/true-crime/wp/2017/01/17/national-police-groups-add-de-escalation-to-new-model-policy-on-use-of-force/?utm_term=.c52278e473ed (interview with Joe Domanick, Associate Director of the Center of Media, Crime and Justice at the John Jay College of Criminal Justice).

26. *See* Alexander Tsesis, *Campus Speech and Harassment*, 101 MINN. L. REV. 1863 (2017).

trumping all else).[27] While I endorse a balancing approach, which I believe is impossible to avoid in this context, I acknowledge it is difficult to get the balance right.[28] Next, I will address a number of legitimate limits on free speech that are particularly salient in the campus context. Then, I will address the AAUP Report, *The History, Uses, and Abuses of Title IX* (the AAUP Report) and its analysis of how the over-enforcement of Title IX by the government and by universities harms free speech on campus and arguably gets the balance wrong. While I am sympathetic to the AAUP Report, I do not agree that the government has gotten it wrong, and I do not agree that the AAUP Report has gotten the balance right in all respects. The problem might not be with the law, as much as it is with campus culture and our broader social culture. While the AAUP Report addressed some of these issues, the problem of campus culture is primarily addressed in the work of other authors. After analyzing this literature, I will turn to law school culture, and argue it is different from our current political culture and the culture on campuses in general. Further, the law school community is well placed to confront many of the challenges raised by the AAUP and others. I argue law school culture may in fact be conducive to a healthier balance between free speech, the missions of institutions of higher learning, and the goals of civil rights legislation to provide equal opportunities to all students.

II. Categories of Unprotected Speech Applied to Campus Speech: The U.S. Town Square

Alexander Tsesis, in *Campus Speech and Harassment*, argues the Supreme Court's First Amendment doctrine on true threats, fighting words, and defamation should inform campus free speech codes and be used to

27. Akhil Reed Amar, *The First Amendment's Firstness,* 47 U.C. Davis L. Rev. 1015, 1017-19 (2014). The First Amendment was the proposed Third Amendment; it only became first in our text because the two preceding amendments did not get enough support for ratification. *Id.* at 1017.

28. I am not advocating that one balance First Amendment free speech rights against a generalized set of harms. This is not a matter of deontological rights versus utilitarian consequences. The balance is often between conflicting rights (e.g. between the free speech rights of individuals and an institution's speech and associational rights; or individual free speech rights and the rights of others to equal educational opportunities). Even authors like Erica Goldberg, who attempts to cabin-in free speech consequentialist analysis, acknowledge an individual's interest in education is a tangible and compelling interest more akin to a conduct harm than a speech harm. Erica Goldberg, *Free Speech Consequentialism*, 116 Colum. L. Rev. 687, 733 (2017). As such, under her analysis, harms to one's educational interests are worthy of protection from unfettered free speech where other speech-related harms are not. *Id.* at 721-25, 739–44. Like the Supreme Court in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999), Goldberg has a very high standard for when speech rises to this level: namely, the *Davis* standard, wherein "a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."

determine their constitutionality.[29] Thus, Tsesis would require that, "For universities to restrict student incitement, there must be a high likelihood that uncensored advocacy will result in imminent illegal conduct or that it will instigate violence."[30] Moreover, for an utterance to be punishable by a public university, "substantive evil must be extremely serious and the degree of imminence extremely high."[31] The university could also punish intentionally threatening speech[32] and fighting words, namely "expressions that are likely to instigate a reasonable listener to respond violently."[33] But, as he notes, merely vulgar insults would not suffice.[34] In the few lower court cases Tsesis addresses, campus codes that have been evaluated against First Amendment free speech doctrine were either void for vagueness[35] or overbroad.[36] These codes failed, in part, because they went beyond prohibiting fighting words, true threats, and incitement of imminent lawless action. These are tough standards to meet, on or off campus.[37] This approach

29. Tsesis primarily addresses Title VI race discrimination on campus rather than Title IX sex discrimination. Tsesis, *supra* note 26.

30. *Id.* at 1892.

31. *Id*. Tsesis goes on to note, "[h]owever, there are alternative First Amendment considerations that allow college administrators to limit other forms of low value speech, even in the absence of imminent illegality." *Id.*

32. *Id.* at 1892-95.

33. *Id.* at 1896.

34. Tsesis, *supra* note 26 at 1896.

35. *See, e.g*., Dambrot v. Central Mich. Univ., 55 F.3d 1177 (6th Cir. 1995) (holding the code was unconstitutionally vague because the term "offensive" was not defined in the code provision that prohibited "intentional or unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile, or offensive educational, employment or living environment."). In *Dambrot*, the Court distinguished the university code from content-neutral fighting-word statutes. *See id*. at 1184. *See also* Tsesis, *supra* note 26, at 1907-08.

36. *See, e.g.*, Doe v. Univ. of Mich., 721 F. Supp. 852, 863-67 (E.D. Mich. 1989) (holding the prohibition of speech that stigmatized or victimized groups or individuals was overbroad because it would allow for the university to proscribe the speech it found offensive). Tsesis, *supra* note 26, at 1903-05. *See also* UWM Post v. Board of Regents of Univ. of Wis., 774 F. Supp. 1163, 1180-1181 (E.D. Wis. 1991) (holding a provision in the campus code that prohibited intentionally making degrading comments based on race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry, or age was overbroad. Although the code included the narrowing scienter requirement of intent, it went beyond the limits of the fighting words doctrine). *Id.* at 1180-81. *See also* Tsesis, *supra* note 26, at 1906-07.

37. Federal law under Title VI provides more room and authority for campuses to regulate speech to avoid "hostile environments." Tsesis, *supra* note 26, at 1897-1903. Tsesis does not directly address Title IX protections for gender and sex discrimination on campus, but Title IX was largely modeled on Title VI. As noted by the Court in *Gebser v. Lago Vista Independent School District*:

> Title IX was modeled after Title VI of the Civil Rights Act of 1964, . . . which is parallel to Title IX except that it prohibits race discrimination, not sex discrimination, and applies in all programs receiving federal funds, not only in education programs. See 42 U.S.C. § 2000d et seq. The two statutes operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds. . . . That contractual framework distinguishes Title IX from Title VII, which is framed in terms not of a condition but of an outright prohibition. Title VII applies to all employers without regard to federal funding and aims broadly to "eradicat[e] discrimination throughout the economy." . . . Thus, whereas Title VII aims centrally to compen-

arguably gives the most protection possible to freedom of speech and stops the government from silencing ideas or views it finds distasteful or offensive.

While there is some virtue to this approach,[38] it tends to oversimplify free speech issues by putting speech into inflexible categories, which presupposes that a campus is akin to the town square or public forum.[39] This approach undervalues other competing constitutional norms grounded in the Equal Protection Clause.[40] It also fails to give sufficient weight to the norms, values, and First Amendment freedoms of educational institutions in

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> sate victims of discrimination, Title IX focuses more on "protecting" individuals from discriminatory practices carried out by recipients of federal funds.

524 U.S. 274, 287 (1998).

38. While Tsesis' article is nuanced, there is a disconnect between these very high free speech standards on the one hand and the more nebulous impact of civil rights legislation on the other. It is not completely clear how he would do the balancing in cases involving civil rights legislation. He does not suggest the detailed approach to balancing that he proposed in *Multifactoral Free Speech,* 110 NW. U. L. REV. 1017, 1030 n.68 (2016) (arguing "judges should apply a rigorous multifactoral test that evaluates whether any relevant communications are likely to result in constitutional, statutory, or common law injuries; whether historical or traditional considerations indicate the speech is protected by the First Amendment; whether there are countervailing government interests; whether the regulation is tailored sufficiently for the government to achieve its stated aims; and whether there are any less restrictive means for achieving underlying policies" in the context of corporate political speech, aggregate political contributions, and commercial communications). His approach in *Multifactoral Free Speech* is similar to the balancing approach which Jud Mathews and Alec Stone Sweet propose for all U.S. constitutional rights infringements in *All things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797 (2011). The Court should also consider our international obligations under Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, which states in part:

> States Parties . . . undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end:
>
> (a) Shall declare as an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination. . .
>
> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law; [and]
>
> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195 (Ratified by the U.S. 1994 (with reservations)).

39. Tsesis appreciates this point and the remaining points in this paragraph. He does acknowledge classrooms are different from cafeterias and sidewalks on campus and he does introduce balancing free speech "with other educational concerns on matters such as civility, self-advancement, creativity, open dialogue, pursuit of social justice, informational acquisition, scholarship, innovation, and acculturation." Tsesis, *supra* note 26, n.126 (citing to R. George Wright, *Campus Speech and the Functions of the University* 5-21 (Ind. Univ. Robert H. McKinney Sch. of Law Research, Paper No. 2016-15, 2016)), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2742891. Goldberg seems to acknowledge dormitories might not be public forums, but she argues that the rest of the campus is a public forum, as least for the students. Goldberg, *supra* note 28, at 740. This is an overstatement. *See infra* section IV.

40. *See, e.g.*, Cass Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 781, 784-87 (1993).

general—and in our case—of law schools in particular.[41] These free speech standards, largely developed in Supreme Court cases involving criminal liability for speech in public forums, seem out of place on a university campus. Universities have a range of forums, many of which are not public. While criminal sanctions and even firing and student dismissals are more like wrecking balls to some, universities have much subtler tools at their disposal. Sanctions can run a very wide gamut, from informal to severe, that serve a wide range of purposes connected with the university mission.[42]

III. Is the Campus Town Square More Like a European Town Square Than a U.S. Town Square?

Campus conduct and speech codes are not typically modeled on fighting words, true threats, and incitement statutes. Their point is not to limit the most dangerous and harmful speech and protect all other speech in some idealized marketplace of ideas. Rather, they seek to foster and maintain healthy learning environments where everyone can benefit from the free exchange of ideas. Many codes go further in limiting speech and expression, especially when speech or expression has the effect of impairing education, particularly the education of minorities and women.

Campus codes must comply not only with the First Amendment but also with federal anti-discrimination legislation found in both Title VI and Title IX.[43] Titles VI and IX bar recipients of federal funds from discriminating based on race or sex. When the federal government provides funding, it can condition that funding on the recipient carrying out the government's message.[44] Arguably, the message of Titles VI and IX is to provide an edu-

41. *See* Paul Horwitz, Grutter*'s First Amendment*, 46 B.C. L. Rev. 461 (2005) (arguing universities are First Amendment institutions that deserve deference with respect to their institutional goals).

42. The vast majority of sanctions against speech on campus involve informal teaching moments, i.e. more speech. While the university might need to bring down the proverbial hammer, it does not need to resort to a wrecking ball. *See infra* note 107, for the range of sanctions. Note Tsesis does not pay much attention to the range of remedies or sanctions available on campus. Many parts of the campus are not public forums. Rather, many spaces on campus are at most limited public forums, where the state does not need to be completely neutral, and where the university can pass reasonable regulations to ensure the forum is preserved for its intended use or purpose (e.g., classrooms, events, etc.).

43. Tsesis acknowledges this and notes speech codes should also be informed by federal statutory law.

44. As the Court stated in *Rosenberger v. Rector and Visitors of University of Virginia*, "When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." 515 U.S. 819, 833 (1995). *See also* United States v. Am. Library Ass'n, Inc., 539 U.S. 194 (2003) (plurality opinion) (upholding the Children's Internet Protection Act under which public libraries could not receive federal funds for internet access unless they installed software to block obscene or pornographic images). As the plurality reasoned, "because public libraries have traditionally excluded pornographic material from their other collections, Congress could reasonably impose a parallel limitation on its Internet assistance programs." *Id.* at 212.

cational environment free from discrimination. As recipients, both private and public universities have an obligation to ensure their students are not harassed and their institutions are not hostile learning environments. The Supreme Court has also noted in the context of government spending/funding cases that the government can "take legitimate and appropriate steps to ensure its message is neither garbled nor distorted by the grantee."[45] It is not a stretch to argue the anti-discrimination message of Titles VI and IX are garbled when a university provides a venue (and thereby a platform) for speakers who argue women and/or other minorities should not be treated equally or should not be allowed equal educational opportunities at that very school.[46] While the message is clearly undermined when a university turns a blind eye to gender- and race-based harassment, threats, and incitement to imminent violence, the message is also garbled when day-to-day racist and sexist slurs and comments are ignored or accepted as part of campus culture. Each and every straw may contribute to creating a hostile environment that breaks the proverbial camel's back of providing equal educational opportunities to all students. This is not to say every slur, negative comment, or use of abusive language requires a formal punishment. The primary duty to maintain an environment that is not hostile to learning lies with the university—not with individual students. This can be achieved, in part, by restricting some forms of speech, but it also may be achieved by promoting other forms of speech or expressive conduct. The institution needs to take a balanced and measured approach to such conduct and speech.

The somewhat delicate balancing approach that takes place between free speech, civil rights legislation, and a university's educational goals may make some free speech purists uncomfortable. Although few have endorsed the absolutist approach to the Free Speech clause as Justice Black did,[47] some believe hate speech is protected speech on campus.[48] Authors

45. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995)).

46. Note that in *Rust v. Sullivan*, the Supreme Court held it was constitutional for the Department of Health and Human Services to promulgate regulations prohibiting organizations receiving federal funding under Title X of the Public Health Service Act from providing abortion counseling and referrals. 500 U.S. 173, 192-94 (1991). If the government can put a gag on healthcare providers who are counseling women on health matters related to their constitutional right to choose, then it should follow that the government can tell colleges and universities that certain types of speech on campus create hostile environments that undermine the message of Titles VI and IX.

47. Justice Black is reputed to be the most extreme free speech absolutist to have sat on the Court. According to Steven B. Lichtman, Justice Thomas has taken over the mantle from Justice Black. Steven B. Lichtman, *Black Like Me: The Free Speech Jurisprudence of Clarence Thomas,* 114 PENN ST. L. REV. 415, 420 (2009). Note even Justice Black was not an absolutist when it came to free speech in schools, as he noted, "I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases." Tinker v. Des Moines Indep. Cmty Sch. Dist., 393 U.S. 503, 517 (1969) (Black, J., dissenting). Justice Thomas took a similar position in Morse v. Frederick, 551 U.S. 393, 419-20 (2007) (Thomas, J., concurring) ("In light of the history of American public education, it cannot seriously be suggested that

like Erwin Chemerinsky and Erica Goldberg are not comfortable with consequentialist balancing. Both authors are concerned that our university campuses will turn into European town squares, resulting in less absolute protection for speech and more hate speech regulation used to suppress unpopular views.[49] They prefer to view universities as public forums where the highest level of protection of speech occurs.[50] As Goldberg states:

> If courts followed the lead of scholars and began to seriously evaluate empirical evidence of the harms of speech and devalue its benefits, America's exceptional commitment to strong free speech protections would be greatly undermined. There is a greater chance for courts, based on their own subjective views or ideological priors, to decide that certain speech, even core speech, is too harmful to be tolerated.[51]

The U.S. is somewhat exceptional in this regard, but it is far from clear that being the only Western democracy which tolerates hate speech is a badge of honor.[52] Europe balances rights and responsibilities to not cause

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the First Amendment "freedom of speech" encompasses a student's right to speak in public schools. . . . Whatever rules apply to student speech in public schools, those rules can be challenged by parents in the political process."). I am not suggesting colleges and universities are identical to public schools, but they are closer to schools than they are to town squares. The Supreme Court in *Widmar v. Vincent* noted in dicta that universities differ in important respects from public forums. 454 U.S. 263, 267 n.5 (1981). Justice Thomas is sympathetic to content-based restrictions on expressive conduct involving the use of burning crosses. Virginia v. Black, 538 U.S. 388, 394-95 (2003) (Thomas, J., dissenting).

48. Erwin Chemerinsky, *Hate speech is protected speech, even on college campuses: My Students trust colleges to control offensive speech. They shouldn't.*, Vox (Oct. 25, 2017), https://www.vox.com/the-big-idea/2017/10/25/16524832/campus-free-speech-first-amendment-protest.

49. *See* Goldberg, *supra* note 28, at 741. While unpopular views are often suppressed in countries like France, French hate speech laws are not intended to prohibit unpopular views, but rather to prohibit the kind of speech that has historically incited racial hatred, violence, and genocide.

50. It is common for those comparing free speech doctrine in the U.S. to that in Europe to note Europe (as well as Canada and South Africa) takes more of balancing of rights approach than a categorical approach to free speech. *See, e.g.*, Kevin W. Saunders, *A Comparative Look at Children and Free Expression*, 22 Transnat'l L. & Contemp. Probs. 455, 456-57 (2013) ("The absolute tone of the First Amendment's direction 'Congress shall make no law' contrasts with provisions of other international constitutions that seem to invite the balancing of interests."). Saunders contrasts the U.S. First Amendment with Canada's Charter of Rights and Freedoms, Article 10, Section 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the German Basic Law. Alexander Tsesis, who argues for a balancing approach in his article, *Multifactoral Free Speech*, notes the European Convention on Human Rights accepts balancing. Tsesis, *supra* note 38, at 1030 n.68. *See also*, Mathews & Sweet, *supra* note 38, at 799–801 (arguing continental Europe, as well as Israel, South Africa, Canada, and the U.K. all employ a proportionality analysis requiring a balancing approach to the limitation of rights, and this approach is preferable to the categorical tiered approach dominating much of U.S. Constitutional law).

51. Goldberg, *supra* note 28, at 702.

52. As Neville Cox notes, "it is well known that the United States asserts a firm constitutional principle that the offensiveness of speech or expressive conduct is never per se a reason to restrict it . . . . However, this viewpoint is not shared by, for example, the German Constitutional Court or the European Court of Human Rights. . . . Rather, these courts have permitted the offen-

harm, while the U.S. generally does not.[53] For instance, the French Declaration of the Rights of Man explicitly balances rights to free speech with the duty not to abuse the right. Thus, while Article 11 states, "The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom," it goes on in the same sentence to state that every citizen, "shall be responsible for such abuses of this freedom as shall be defined by law."[54]

A similar sentiment was echoed in an 1817 debate held in the United Kingdom House of Commons, where William Lamb, otherwise known as Lord Melbourne, stated:

> It was common to speak of the power of the press, and he admitted that its power was great. He should, however, beg leave to remind the conductors of the press of their duty to apply to themselves a maxim which they never neglected to urge on the consideration of government –"that the possession of great power necessarily implies great responsibility." They stood in a high situation, and ought to consider justice and truth the great objects of their labours, and not yield themselves up to their interests or their passions.[55]

Free speech is important, in part, because of the power of the spoken and written word. As Stanley Fish notes, "Total toleration of speech makes sense only if speech is regarded as inconsequential and unlikely to bring about a result you would find either heartening or distressing."[56] Words can do great harm in addition to great good.[57] From an early age, we are taught we cannot simply say whatever we wish, whenever or wherever we wish. There are times and places to speak completely freely. There are also times

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sive or immoral nature of a publication to factor into the question of whether it should be legally prohibited." *See* Neville Cox, *Blasphemy, Holocaust Denial and the Control of Profoundly Unacceptable Speech*, 62 AM. J. COMP. L. 739, 749-50 (2014) (Cox further notes "the American approach to this issue is different to that taken in the texts of all major international human rights treaties where free speech is concerned"). *Id.* at 750.

53. *Id.* This may be an overstatement. The exceptions swallow a large amount of the general rule. *See, e.g.*, Goldberg *supra* note 28, at 703, 703-10 (arguing balancing takes place in current free speech doctrine. As she states, "[h]arms and benefits are weighed when categorizing speech as high or low value, when determining whether speech fits into a particular category, and when applying the scrutiny that corresponds to particular categories of speech."). Legal Historian Robert Palmer notes that at the time of our founding, the individual rights to freedom of speech and press were balanced against the communal need, which was itself conceived of as a right at that time. Robert Palmer, *Liberties as Constitutional Provisions: 1776–1791*, *in* LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 147 (1987).

54. *See* National Assembly of France*, The French Declaration of the Rights of Man,* THE AVALON PROJECT (Aug. 26, 1789), http://avalon.law.yale.edu/18th_century/rightsof.asp.

55. 36 HANSARD'S PARLIAMENTARY DEBATES 1227 (June 27, 1817) (Habeas Corpus Suspension Bill, Speaker: Mr. Lamb (William Lamb)).

56. Stanley Fish, *Fraught With Death: Skepticism, Progressivism, and the First Amendment*, 64 U. COLO. L. REV. 1061, 1071 (1993).

57. *See, e.g.*, Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81; Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 S. CAL. L. REV. 953 (2016).

and places where we need to take responsibility for what we say and how we say it. This is true in the courtroom, the classroom, and on campus[58]—particularly on a law school campus.

Some would much prefer the relatively bright lines of First Amendment free speech protection to the hazy contextual analysis needed to determine if speech rises to the level of harassment or creates a hostile learning environment.[59] The categorical approach to free speech means that unless speech fits into an unprotected category (such as fighting words, incitement to eminent lawless action, obscenity, or true threats), restrictions based on content receive the Court's highest protection of strict scrutiny.[60] Balancing implies something short of strict scrutiny and entails that some free speech may be limited in the name of other rights or values, such as equality or dignity.[61]

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58. *See, e.g.*, Brian Leiter, *The Case Against Free Speech*, 38 SYDNEY L. REV. 407, 409-14 (2016) (noting Western liberal democracies (including the U.S.) have numerous public institutions that "view massive restrictions on speech as essential to realizing the ends of free societies." *Id.* at 409. This includes universities and schools as well as courtrooms, as evidenced by our numerous rules of evidence. *Id.*).

59. *See* Letter from U.S. Dep't of Justice Civil Rights Div. and U.S. Dep't of Educ. Office for Civil Rights to President Royce Engstrom of the University of Montana (May 9, 2013), https://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf.

> Under Title IX's administrative enforcement standard and Title IV's injunctive relief standard, "severe or pervasive" sexual harassment can establish a hostile environment that a university must remedy and prevent from recurring . . . . In determining whether this denial or limitation has occurred, the United States examines all the relevant circumstances from an objective and subjective perspective, including: the type of harassment (e.g., whether it was verbal or physical); the frequency and severity of the conduct; the age, sex, and relationship of the individuals involved (e.g., teacher-student or student-student); the setting and context in which the harassment occurred; whether other incidents have occurred at the college or university; and other relevant factors. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. Indeed, a single instance of rape is sufficiently severe to create a hostile environment.

60. Mathews and Sweet note the strict scrutiny framework is defined more by an outcome than as a technique. Mathews & Sweet, *supra* note 38, at 835. The traditional categorical approach asks judges "to sort cases into two bins that represent extremes of stringency and deference." *Id.* at 846-47. Thus, if the speech is unprotected, there is near complete deference to the legislature, and if it is protected, the test is strict and often fatal. For recent First Amendment examples where the Court declined to balance and found the speech protected, see United States v. Stevens, 559 U.S. 460 (2010); Brown v. Entm't Merchants Ass'n., 564 U.S. 786 (2011); United States v. Alvarez, 506 U.S. 709 (2012). Some of the dissents in these cases supported balancing.

61. Balancing is not foreign to U.S. constitutional doctrine, even First Amendment doctrine. It can be found in dormant commerce clause analysis (Pike Balancing), procedural due process analysis (Mathews balancing), and Fourth Amendment criminal due process for searches and seizures; it is evident in intermediate scrutiny analysis and even some forms of strict scrutiny analysis (*e.g.* Justice O'Connor's not fatal in fact), and can be found in the intersection of the Free Exercise Clause and Establishment Clause, as well as in the areas of obscenity, defamation, commercial speech, and in the areas of time manner and place restrictions, secondary effects doctrine, incidental burdens analysis, and arguably child pornography. Although the majority in *District of Columbia v. Heller*, 554 U.S. 570 (2008) rejected a balancing approach to the Second Amendment, the dissent of Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg used a balancing approach to argue the D.C. ban was constitutional. *Id.* at 689-90, 693-719.

As Goldberg points out, unlike other provisions in the Bill of Rights, the text of the First Amendment is absolute and does not appear to invite any balancing.[62] While this is true vis-à-vis restrictions on Congress ("Congress shall make no law . . ."), the text does not aid us in determining the limits on other federal governmental bodies or on the states, nor does it aid us in determining the impact of the Civil War Amendments on that right. In fact, at the time of the founding, the "rights" provisions in many state constitutions were more aspirational than obligatory. They were most commonly stated as constitutional principles, using the term "ought," rather than as guarantees backed by the term "shall," as found in the First Amendment.[63] Further, it was common at the time of the founding for states to balance free speech rights with communal needs.[64]

For some, balancing free speech with other rights and values means less free speech.[65] Thus, a free speech purist might not want any interven-

62. Goldberg, *supra* note 28, at 725-726. *See also* Saunders, *supra* note 50, at 456-57.

63. Palmer, *supra* note 53, at 61-86.

64. *Id.* at 147. *Cf.* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS 299 (2001) (stating he is not convinced by Palmer that the Bill of Rights antecedents in state constitutions were not guarantees). It is questionable whether any of the first thirteen states actually had free speech guarantees. Adams notes every right listed in the Bill of Rights had an antecedent in state constitutions. *Id.* referencing the table of *Antecedents of the Bill of Rights Found in the Revolutionary Declaration of Rights and State Constitutions*, *in* PATRICK T. CONLEY & JOHN P. KAMINSKI, EDS., THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES xvii (1992). However, upon closer inspection, only three states mention free speech in their charters or bills of rights. Two of the three states with a "speech clause" (Pennsylvania and Vermont) were actually protecting the press. As their declarations state: "That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore, the freedom of the press ought not to be restrained." *Pennsylvania Constitution of 1776, Declaration of Rights*, http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss5.html; *Constitution of Vermont*, THE AVALON PROJECT (July 8, 1777), http://avalon.law.yale.edu/18th_century/vt01.asp. Notice the use of term "ought" rather than "shall or must." New York's free speech provision, section 11 of its bill of rights only protected the legislature and no one else, as it stated, "[t]hat the freedom of speech and debates and proceedings in the senate and assembly shall not be impeached or questioned in any court or place out of the senate or assembly." H.D. 1, 1787 Leg., 10th Sess. (Ny. 1987), http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_New-York-Bill-Of-Rights.pdf.

65. It is debatable whether policing speech in the name of other values decreases free speech or increases it. *See, e.g.*, Richard Delgado & Jean Stefancic, *Four Observations About Hate Speech*, 44 WAKE FOREST L. REV. 353, 368 (2009) ("Because one consequence of hate speech is to diminish the status of one group vis-à-vis all the rest, it deprives the singled-out group of credibility and an audience, a result surely at odds with the underlying rationales of a system of free expression."); *see also* Catherine MacKinnon, *Feminist Discourse, Moral Values, and the Law: A Conversation*, 34 BUFFALO L. REV. 11, 28 (1985) (analogizing the silencing effect of pornography on women to a foot on women's necks: "If somebody has got their foot on your neck, what do you do? I don't think you negotiate. I don't think you compromise. I don't think you even address the foot on your neck in your own voice, such as it is, and attempt to persuade it to move off. You try to figure out how to get it up off of you so that you can, among other things, have something to say."); *cf.* Brenda P. Lynch, *Personal Injuries or Petty Complaints?: Evaluating the Case for Campus Hate Speech Codes: The Argument From Experience*, 32 SUFFOLK U. L. REV. 613 (1999) (criticizing offensive speech regulations at the university level as overbroad, stating hate speech regulations should be narrowly tailored and should only apply to offensive speech that has a devastating impact).

tion until conduct or speech has risen to the level of severe harassment and has created an environment that is clearly hostile to learning.[66] Educators and administrators who care about the education and welfare of their students likely prefer that speech *not* be allowed to rise to this level, as it would undermine the educational goals of the institution.

IV. Legitimate Limits on Free Speech on Campus

In addition to not protecting fighting words, true threats, or incitement, the First Amendment allows content-neutral time, manner, and place restrictions. It also permits content-based (but viewpoint-neutral) limitations on limited-public forums and non-public forums. When the government speaks or funds speech—or allows private speech to mix with public speech in certain forums—it can engage in content-based restrictions on speech. In public institutions of higher education, it is legitimate for the state to favor speech that furthers the general mission of such institutions to attain, exchange, and disseminate knowledge and skills, as well as speech that furthers the particular mission of the institution. Further, free speech may be limited by the right to equality and, in particular, to what that right entails in the context of higher education as embodied in civil rights legislation: the right to an equal opportunity to receive the benefits of an education. The values underlying these rights are often found in the mission statements of law schools. Finally, when the primary objectives of limiting speech are to comply with the requirements or objectives of civil rights legislation and/or to ensure the institution completes its mission as an educational institution, limitations can sometimes be justified under the secondary effects doctrine. I address each of these limits in the remainder of this section.

A. Forums: Limited, Non-Public, and Mixed

There are numerous places and events on campus where speech can be limited, be it in the library, the dorm room, or the classroom. Numerous school-sponsored events like orientation, alumni events, or various events in-between are not public forums. As the Supreme Court stated in *Widmar v. Vincent*, "A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities."[67]

66. In other words, no intervention until the speech amounts to a direct threat, face-to-face fighting words, or incitement to eminent lawless action. As the AAUP Report demonstrates, some of the reaction of colleges and universities may be driven by a fear of losing Title IX funding. *See supra* note 7.

67. 454 U.S. 263, 267 n.5. (1981).

Universities—and law schools in particular—are very selective in choosing who gets to study, work, and teach at their institutions. These institutions are not open to all comers. Even once admitted, students are not free to go to any class they wish, much less to speak at any time or on any topic they wish in those classes. Similarly, professors are restricted in what they teach—even what they write.

Likewise, universities can be selective in who they invite to speak. Even though it is disheartening to see some controversial speakers disinvited, most of these cases do not actually implicate First Amendment rights at all. If the university is paying for a commencement speaker, they can choose to invite or disinvite anyone they wish since this would fall under government-funded speech.[68] It is more complicated if a public university has created a public forum by opening its facilities to groups for meetings and/or has a policy of allowing student groups to invite speakers. In these cases, a disinvitation arguably amounts to prior restraint. If the prior restraint is based on the content of the speech, and if the speech does not fall into an unprotected category, then the general rule is it must be narrowly tailored to further a compelling governmental interest.[69] A university could take steps from the outset that would preserve forums for educational purposes, thereby not creating public forums on campus. Instead of giving student groups free reign on their choice of speakers, a university could impose limits and vetting processes on student group choices consistent with the university's mission.[70]

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68. *See, e.g.,* Pleasant Grove City v. Summum, 555 U.S. 467 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."); Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015) ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says."); *See also* United States v. Am. Library Ass'n, Inc., 539 U.S. 194 (2003) (plurality opinion) (upholding content-based filtering of the internet blocked pornography in public libraries because neither the library general collection nor internet access at libraries were public fora for private speech). As the plurality opinion stated, "[i]t provides Internet access, not to 'encourage a diversity of views from private speakers,' but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality." *Id.* at 206 (quoting *Rosenberger*, 515 U.S. at 834).

69. The exceptions to the general rule are numerous, as noted by Marjorie Heines; they include:

> art exhibits on particular themes; research grants for particular projects; merit-based selection decisions by public libraries, broadcast stations, or arts and humanities endowments; tax exemptions for "educational" or "charitable" groups; other tax benefits . . . "limited public for[a]" that are legitimately "reserv[ed] . . . for certain groups or for the discussion of certain topics"; and "academic judgments as to how best to allocate scarce resources," including public school and college curricula.

Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 110-11 (1996).

70. For instance, Robert Post argues a university could impose stringent requirements of professional competence on any speaker that came to campus. Robert Post, *There is no 1st Amendment right to speak on a college campus,* VOX (Oct. 25, 2017), https://www.vox.com/the-big-idea/2017/10/25/16526442/first-amendment-college-campuses-milo-spencer-protests. For example, I doubt there is a First Amendment right for comedians to speak on campus. In addition to serious academics like Professors Lawrence and Strossen, Congress also invited the comedian,

As we saw above, if the government funds speech, it can make content-based restrictions without triggering any heightened scrutiny.[71] In cases involving mixed governmental speech and private speech, the Court has upheld content-based restrictions on private speech. The 2015 case of *Walker v. Texas* is illustrative.[72] In *Walker*, the Texas Division of the Sons of Confederate Veterans sought to have a Confederate battle flag design placed on the Texas license plate. The denial of the application was not based on an unprotected class of speech, but rather on a determination that "the design might be offensive."[73] Although the dissent considered this a public forum akin to a miniature, state-owned billboard,[74] the majority held the license plate was government speech—not a public forum.[75] If Texas can ban a license plate design that includes the Confederate battle flag,

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Adam Corolla, to testify on the issue of free speech on campus, where he told the story of having the "plug pulled" on a show he was trying to do on the California State Northridge campus. *See Challenges to Freedom of Speech on College Campuses*, OVERSIGHT & GOV'T REFORM (July 27, 2017), https://oversight.house.gov/hearing/challenges-freedom-speech-college-campuses/. The implication from the context of his talk was that he was somehow prohibited from doing his show based on what he called the need for "safe spaces" and "stuffed animals." It's not clear, however, if the plug was ever in, or ever pulled. One can actually buy the recording of his "No Safe Spaces" event at Northridge on Amazon at: https://www.amazon.com/Safe-Spaces-California-University-Northridge/dp/B06XDB7PCW. Note there did not appear to be any protests or disruptions during the show. He does make fun of security for making sure he felt safe. I can watch his podcast or his routines on T.V., on the internet, on the radio, and I can travel to go see him off campus. He even has a movie on the topic in the works. *See* Bradford Richardson, *'No Safe Spaces': Carolla, Prager take aim at coddled college students in new film*, WASH. TIMES (June 7, 2017), https://www.washingtontimes.com/news/2017/jun/7/adam-carolla-dennis-prager-take-aim-at-coddled-col/. Is he really interested in being on campus to exchange ideas or to charge students for his show? His testimony before congress begins by calling college students "kids" and "children" and calling on us adults to take control. I am not sure it follows that the adults think there is any need, or right for comedians to rent theatres on campus for their travelling shows. Were universities required to allow Ringling Bros. on campus?

71. *See supra* text accompanying notes 45-47.

72. *Walker*, 135 S. Ct. at 2239.

73. The majority stated:

> The Board explained that it had found explained that it had found "it necessary to deny th[e] plate design application, specifically the confederate flag portion of the design, because public comments ha[d] shown that many members of the general public find the design offensive, and because such comments are reasonable." The Board added, "that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups."

Walker, 135 S. Ct. at 2245 (citations omitted).

74. Conversly, in his dissent, Justice Alito stated:

> While all license plates unquestionably contain some government speech (e.g., the name of the State and the numbers and/or letters identifying the vehicle), the State of Texas has converted the remaining space on its specialty plates into little mobile billboards on which motorists can display their own messages. And what Texas did here was to reject one of the messages that members of a private group wanted to post on some of these little billboards because the State thought that many of its citizens would find the message offensive. That is blatant viewpoint discrimination.

Walker, 135 S. Ct. at 2255–56 (Alito, J., dissenting, joined by the Chief Justice, Justice Scalia, and Justice Kennedy).

75. *Id.,* at 2246, 2250-52.

surely the University of Texas (or any other university) could ban the Confederate flag, Swastikas, nooses, and the like from campus due to their offensiveness or incompatibility with its mission.[76] If the state can disassociate itself from the Sons of Confederate Veterans, shouldn't a university be able to disassociate itself from speakers whose messages are anathema to the institution's mission?[77]

B. The Values of Free Speech on Campus as a Legitimate Limit on Free Speech

Legitimate limits on the free speech of professors, students, and invited speakers include the values that free speech and academic freedom are meant to achieve on campus. Free speech and academic freedom—important ends or values in themselves—are also means to *other* ends. They are instrumental in achieving other important educational values, such as developing best practices for teaching or attaining, exchanging, and disseminating values, skills, and knowledge in the classroom and beyond. Obviously, some ways of speaking encourage not only more speech, but speech that furthers these other important values. Conversely, some ways of speaking

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76. Robert Post gives the example of the students at Yale who marched in front of the women's dormitories chanting "No means yes, yes means anal" noting no sane university would tolerate such expressive conduct on campus and would be entitled to institute disciplinary proceedings. Robert Post, *There is no 1st Amendment right to speak on a college campus,* Vox (Oct. 25, 2017), https://www.vox.com/the-big-idea/2017/10/25/16526442/first-amendment-college-campuses-milo-spencer-protests. Although Post does not say this, it is worth noting that the speech in this example would not fall into the categories of fighting words, incitement, or a true threat.

77. The argument here is not watertight. Part of the analysis in *Walker* revolved around the question of whether license plates have traditionally been forums for government speech or forums for private speech. Public universities are sometimes idealized as public forum paradigms for private free speech and no one thinks public universities are, or should be, forums for government propaganda. It does not follow, however, that universities are akin to the public sidewalk or town square public forum. If they are free speech forums, they are forums that have an overriding purpose or mission to educate. This would justify content-based restrictions that are consistent with that purpose. The challenge would be to create viewpoint neutral restrictions that preserve the forum for its intended purpose of education and pursuing its other missions. *See, e.g.*, Students for Life USA v. Waldrop, 162 F. Supp. 3d 1216, 1234-36 (S.D. Ala. 2016) (finding parts of the University of South Alabama campus to be a non-public [limited public] forum, in particular the front yard periphery, and upholding a university's restrictions on student speech near the perimeter of the campus for the purposes of "(1) maintaining a visually attractive campus periphery; (2) promoting traffic safety; (3) promoting its image as an educational institution in the community; and (4) maintaining an apolitical or neutral viewpoint and avoiding the appearance of favoring or endorsing a particular viewpoint." As the court noted,

> The Perimeter cannot be a designated public forum unless the University purposefully and intentionally opened the Perimeter to general student discourse. The University's intent is determined by evaluating its policy concerning student speech in the Perimeter, its practice concerning student speech in the Perimeter, the nature of the Perimeter, and the Perimeter's compatibility with general student discourse therein.

Id. at 1232. *Cf.* Justice For All v. Faulkner, 410 F.3d 760, 767–69 (5th Cir. 2005) (holding that based on university policies, the University of Texas at Austin was not a limited public forum but a "designated forum for student expression, subject only to time, place, and manner regulations and a small number of enumerated content-based restrictions.").

tend to close off speech, shut down the conversation, and are less fruitful in attaining and or disseminating knowledge. For instance, inflammatory racist, sexist, and bigoted speech that trades in stereotypes, along with any speech that overgeneralizes, can sidetrack or shut down a conversation. While these ways of speaking may lead to more speech, it takes more work to get such conversations back on a fruitful track. Labeling people racist, sexist, or bigoted can have this result for similar reasons.[78] Labels are themselves overgeneralizations if they are meant to—or taken to—reduce a person to a single dimension of their personhood. Labels shut down those who are the objects of overgeneralization and can add limiting filters to anything said by one saddled with the label.[79] Not only is overgeneralized speech of little value, some of it is demonstrably false.[80] While false speech that appeals to our worst instincts may be tolerated in the town square, it is very difficult to justify giving false speech a platform at an educational institution. How could having false speech on campus aid the mission of an educational institution in any way? Thus, free speech, like a free market, may require some form of intervention—or dare I say, regulation—if we wish to optimize its benefits on campus.

C. Balancing Free Speech with Other Rights and Values, Including the Rights and Values Embodied in Titles IX and VI and the Specific Values of the Institution as Embodied in the Institution's Mission

Free speech and academic freedom must be balanced against other rights and values, like the right to equality and what that right entails, namely, fair equality of opportunity[81] and providing equal concern and re-

78. Although it is hard to say, even those people with the most bigoted views have redeeming virtues. They may be very hard workers, be very caring and responsible parents (except of course to the extent they pass on their bigoted views), and they may even be gifted artists or athletes. Take for instance, Babe Ruth, John Wayne, Woodrow Wilson, Walt Disney, or Eric Clapton. Are any of these people reducible to their bigoted views or statements?

79. Who cares to hear what "the racist" has to say? Don't we already know what "the Democrat" or "the Republican" is going to say about any given issue, so why even listen or engage?

80. Leiter, *supra* note 58, at 409 (2016) (arguing most non-mundane speech "has little or no net positive epistemic value (that is, value for helping us discover the truth) and not enough non-epistemic value (either for the speaker or listeners) to justify its expression, regardless of the costs to social welfare."). Leiter does concede one serious argument against the regulation of free speech is the "worry that in society writ large we do not have a reliable epistemic arbiter, and, moreover, any attempt to designate one runs the risk of sacrificing all the other goods associated with free speech insofar as the arbiter is unreliable or makes too many errors." *Id.* at 434. Of course, academic institutions are not society "writ large" and, not unlike courts, are in the business of arbitrating epistemic claims.

81. John Rawls's view of democratic equality is embodied in his two principles of justice. His first principle provides for equal basic liberties, e.g. free speech, while his second principle provides for both fair equality of opportunity and redistribution of wealth to the least well off. JOHN RAWLS, A THEORY OF JUSTICE 60-61 (1971). As Norman Daniels notes, "[F]air equality of opportunity requires that we not only judge people for jobs and offices by reference to their relevant talents and skills, but that we also establish institutional measures to correct for the ways

spect.[82] Title IX, like Title VI, embodies these conceptions of the right to equality grounded in the Fourteenth Amendment.[83] Title IX provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.[84]

Finally, academic institutions must balance the free speech and academic freedom of individual professors and students with the institution's First Amendment rights to have a distinct mission and set of values.[85] Although the scope of a university's First Amendment rights is anything but settled, the Supreme Court has endorsed the First Amendment rights of universities to count diversity as a compelling interest in achieving their educational missions.[86]

George Wright recently collected a wide range of university functions and purposes from university mission statements, the statements of university presidents, and scholars.[87] The culminate list of university functions include:

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in which class, race, and gender might interfere with the normal development of marketable talents and skills." *Democratic Equality: Rawls's Complex Egalitarianism*, *in* 6 THE CAMBRIDGE COMPANION TO RAWLS 241 (Samuel Freeman ed., 2003).

82. Ronald Dworkin has defended the idea that for a democratic government to be legitimate it must treat individuals equally, at least in the sense of providing equal concern and respect. *See* RONALD DWORKIN, SOVEREIGN VIRTUE (2000); *see also* RONALD DWORKIN TAKING RIGHTS SERIOUSLY (1978).

83. Even if as a matter of law, Title IX of the Education Amendments of 1972 is justified under Congress's spending powers, the purpose for the strings attached to the programs funded by Title IX are "to avoid the use of federal resources to support sexually discriminatory practices in education programs, and to provide individual citizens effective protection against those practices." Cannon v. Univ. of Chicago, 441 U.S. 677, 704 (1979).

84. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (West 2018).

85. *See, e.g.*, Horwitz, Grutter*'s First Amendment*, *supra* note 41; Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Some Hard Questions*, 54 UCLA L. Rev. 1497 (2007). Horwitz argues universities should be considered "First Amendment institutions," namely "institutions that play a significant role in contributing to public discourse, and that are both institutionally distinct and largely self-regulating according to a set of internally generated norms, practices, and traditions." *Id.* at 1497. He further argues that courts "should allow universities considerable scope to define the exercise of their autonomy according to their own sense of academic mission." *Id.* at 1549.

86. The Court in *Grutter v. Bollinger* recognized that universities, "occupy a special niche in [the] constitutional tradition of the First Amendment," and are entitled to substantial "educational autonomy." 539 U.S. 306, 329 (2003). Note, however, the First Amendment was not mentioned in the recent cases of *Fisher v. Univ. of Texas at Austin*, 570 U. S. 297 (2013), although the majority of the court still deferred to the University's diversity-related educational goals. While these cases involved public universities, First Amendment free speech rights would attach to both public and private universities vis-a vis the government. In other words, even though private universities are not bound by the First Amendment, they are protected by it. Note that in July of 2018, the Trump administration revoked twenty-four policy documents from the Obama administration, including a memo that supported the use of race as a factor in admissions. Eric Tucker, *Trump revokes Obama policy using race in school admissions*, CHICAGO SUN TIMES (July 3, 2018), https://chicago.suntimes.com/education/affirmative-action-college-school-admissions/.

87. *See* Wright, *supra* note 22, at 4-11.

> [L]earning and research; anti-discrimination; providing educational opportunities and making societal contributions; advancement of knowledge; freedom of expression and communication; promoting economic growth; disinterested scholarship; serving as societal critic; moral cultivation of the students; professional training; preparation for competent democratic citizenship; reflecting or determining status and opportunity hierarchies or promoting social mobility; and fundamental personal transformation.[88]

Law school missions are also shaped by standards that govern all ABA-accredited law schools. For instance, ABA Standard 205(b) requires law schools to "foster and maintain equality of opportunity for students, faculty, and staff, without discrimination or segregation on the basis of race, color, religion, national origin, gender, sexual orientation, age, or disability."[89] Further, ABA Standard 206 requires law schools to:

> [D]emonstrate by concrete action a commitment to diversity and inclusion by providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.[90]

Interpretation 206-2 states in part:

> The commitment to providing full educational opportunities for members of underrepresented groups typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, and programs that assist in meeting the academic and financial needs of many of these students and that create a favorable environment for students from underrepresented groups.[91]

Law schools have a variety of missions, but many emphasize justice and professional ethics. For instance, the University of St. Thomas School of Law mission states, "The University of St. Thomas School of Law, as a Catholic law school, is dedicated to integrating faith and reason in the

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88. *Id.* at 10-11 (internal citations omitted).

89. *See* Am. Bar Ass'n, *ABA Standards and Rules of Procedure for Approval of Law Schools 2014-2015*, https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_chapter2.authcheckdam.pdf.

90. *Id.* Note Interpretation 206-1 goes on to state that:

> The requirement of a constitutional provision or statute purports to prohibit consideration of gender, race, ethnicity, or national origin in admissions or employment decisions is not a justification for a school's non-compliance with Standard 206. A law school is subject to such constitutional or statutory provisions would have to demonstrate the commitment required by Standard 206 by means other than those prohibited by the applicable constitutional or statutory provisions.

Id.

91. *Id.*

search for truth through a focus on morality and social justice."[92] The school's values include: professional formation, Catholic service, scholarship, innovation, community, and relationships.[93] On this last point, the University of St. Thomas states:

> We take relationships seriously both inside and outside the classroom. The practice of law is a social endeavor, and we help students to develop the practical skills and emotional intelligence lawyers need to engage and nurture all relationships.[94]

Florida Coastal School of Law's mission statement provides that:

> Florida Coastal sets itself apart on the basis of its culture, a student outcome-centered orientation, a commitment to professional preparation, educational experience, service to underserved communities, and accountability of the faculty for market-leading student outcomes. These distinguishing characteristics aim toward establishing Florida Coastal as the benchmark of inclusive excellence in professional education for the 21st Century. In furtherance of this mission, it is committed to achieving the following objectives:
>
> - Provide a program of legal education designed to qualify graduates for admission to the Bar and enable them to participate effectively in the legal profession.
> - Offer an educational experience that prepares students to deal with both current and anticipated legal problems, responds to globalization, emphasizes skills training and professionalism, and facilitates appreciation for cultural diversity.
> - Attract a diverse student body, faculty, and staff motivated by the law school community's values and ideals.
> - Create an institutional climate that fosters respect, trust, collaboration, and meaningful interaction among students, faculty, and staff. . . .[95]

Both the University of St. Thomas and Florida Coastal have harassment policies that reinforce their missions and objectives and seek to balance them with free speech and academic freedom. For instance, the University of St. Thomas's sexual misconduct policy includes the following clarification:

> The prohibition of sexual harassment does not circumscribe a faculty member's freedom as part of the faculty member's teaching to select, assign or discuss materials or topics that are legiti-

92. *About*, UNIVERSITY OF ST. THOMAS, https://www.stthomas.edu/law/about/ (last visited Oct. 27, 2018).

93. *Id.*

94. *Id.*

95. *Our Mission,* FLORIDA COASTAL SCHOOL OF LAW, https://www.fcsl.edu/our-mission.html (last visited Oct. 27, 2018).

> mately related to the subject being taught. In the classroom and other forums, St. Thomas actively encourages and seeks to facilitate the free expression, challenge and debate of diverse and deeply held beliefs and opinions.[96]

Nonetheless, sexual harassment can be verbal or physical and a single incident can constitute harassment.[97] As one example of harassment, the policy lists "[o]ther severe or pervasive conduct that creates a hostile work or educational environment."[98] Thus, the University of St. Thomas's policy echoes the "Dear Colleague" letter from the Office for Civil Rights of the Department of Education addressed in Section V(A) below.

Florida Coastal's policy defines sexual harassment as "unwelcome[;] [s]exual, sex-based and/or gender-based[;] [v]erbal, written, online and/or physical conduct."[99] Florida Coastal's policy notes harassment can be punished when it creates a hostile environment.[100] The policy further states:

> A hostile environment is created when sexual harassment is:
>
> - Severe, or
> - Persistent or pervasive, and
> - Objectively offensive, such that it unreasonably interferes with, denies or limits someone's ability to participate in or benefit from the School's education or employment opportunities.[101]

Florida Coastal's policy, like that of many other institutions, goes on to address harassment that does not rise to this level or is not based on a protected class. It states, "Addressing such behaviors may not result in the imposition of discipline under the School policy, but will be addressed through respectful confrontation, remedial actions, education and/or effective conflict resolution mechanisms."[102]

These policies clearly limit free speech. Arguably, the limits are based on the content or type of speech. However, the focus is not on the idea, but on the effect of the speech on the educational opportunities of those af-

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96. *See Sexual Misconduct Policies and Procedures*, UNIVERSITY OF ST. THOMAS, http://www.stthomas.edu/title-ix/sexualmisconduct/ (last visited Oct. 27, 2018).

97. *Id.*

98. *Id.*

99. *See Sexual Violence Response and Prevention,* FLORIDA COASTAL SCHOOL OF LAW, http://www.fcsl.edu/student-life-student-affairs-sexual-violence-response-and-prevention.html (last visited Oct. 27, 2018).

100. *Id.*

101. *Id.*

102. *Id.* This language is common. *See, e.g.* the Stetson University policy at: https://www.stetson.edu/other/title-ix/media/titleix-policy-2017-18-updated.pdf. The University of Dayton's nondiscrimination policy has the exact same language in its section on "Other Objectionable Conduct." https://udayton.edu/policies/finance/nondiscrimination-policypage.php#otherobject (last visited Oct. 27, 2018). It simply adds that in addition to these other mechanisms, the conduct may also be "referred to other University officials to address according to applicable University policy." *Id.*

fected. The speech prohibited here does not necessarily fit into, or rise to the level of, the traditional categories of unprotected speech (namely fighting words, incitement, true threats, or obscenity) although some of it may. Nonetheless, if one balances free speech with the need for law schools to provide equal opportunity and an environment conducive to institutional goals, policies prohibiting harassing language are justified.

D. Can These Limits be Addressed under the Secondary Effects Doctrine?

Under the secondary effects doctrine, a law that is facially content-based may be deemed content-neutral if it is aimed at achieving a permissible content-neutral goal and there are reasonable alternative avenues for expression.[103] When the "predominate" concern is with the secondary effects and not with the content, courts have upheld what appear to be content-based regulations.[104] A number of cases have upheld content-based discrimination against adult-oriented businesses in order to "protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life."[105] Given this, does it not follow that universities should be able to discriminate against expressive conduct on campus in order to preserve the quality of campus life and culture?[106] Could a university prevent or deny a lease to an adult/sex shop in the student union if it allowed other private shops? Do campus bookstores have adult sections? Could a public university ban that section if vendors wanted to provide it? If so, could it also decline to lease to a hate group that wished to rent an auditorium for meetings or a speech? If a city or university could "zone out" sex-related expression, shouldn't it be able to "zone" out hate-related expression? Note, students can access nearly every form of speech imaginable online. There are ample YouTube videos of nearly every disinvited speaker on the list maintained by the Foundation for Individual Rights in Education (FIRE). Students can access their literature, websites, blogs, and tweets; they can attend events in venues off-campus and in town. In other words, there are numerous reasonable alternative venues.

Universities have a whole range of mechanisms to address student, faculty, and staff conduct that is inconsistent with the institution's mission

103. *See* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47 (1986) (" '[C]ontent-neutral' time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.").

104. *Id.* at 47.

105. *Id.* at 48; Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 (1976).

106. In Gainesville, Florida, home to the University of Florida, the city has effetely zoned out all adult businesses based on a secondary effects argument. *See* Aaron Albright & Justin Ford, *Strict regulations leave no space for adult stores in Gainesville*, THE INDEPENDENT FLORIDA ALLIGATOR (Apr. 2017), http://www.alligator.org/news/local/article_7dd781f4-24b3-11e7-8a49-0f852a2ec2d3.html.

or values.[107] Institutions have fewer tools for dealing with outside speakers who come onto campus and engage in expressive conduct that undermines its mission.[108] Universities cannot help but engage in content-based discrimination in deciding who to invite to campus to speak. As noted above, the controversy arises when a university decides to disinvite a speaker a student group has chosen to invite, or in some cases where the university declines to rent space to an outside speaker.[109] Partly because universities do have limited tools at their disposal to address speech that violates campus norms, disinvitation may be the only tool available to avoid providing a platform for speech that is antithetical to an institution's mission and duties to its students.[110] Other secondary effects include safety concerns and the risk of serious physical disruption of campus activities. While it is important not to give in to the heckler's veto, if the purpose of the campus visit is to incite disruption and the only way to provide security is at a great cost to the institution and taxpayer, it is worth considering if this kind of speech provides enough light to justify the heat caused by such events.

V. THE AAUP REPORT ON THE HISTORY, USES, AND ABUSES OF TITLE IX, AND ITS IMPACT ON FREE SPEECH

One problem with balancing is that it is difficult to know when the right balance is achieved. Some say we have gone too far in protecting our students, arguing students have become coddled and sheltered.[111] As noted

107. These include disseminating values and policies through various media, training sessions, workshops, counseling, mentoring, working with student leadership and groups, informal meetings, warnings, reprimands, probation, requests for apologies, special learning projects, community service, restriction or revocation of privileges, no contact orders, or separation orders, restitution and reparations, fines, fees, suspension, dismissal, and reporting the above to licensing organizations, such as the state bar.

108. For instance, some universities might consider it contrary to their mission to publicly out undocumented students on campus, or to publicly name and mock transgender students on campus. Mr. Yiannopoulos did the latter at the University of Wisconsin and was alleged to have planned to do the former at U.C. Berkeley. Maya Oppenheim, *UC Berkeley protests: Milo Yiannopoulos planned to 'publicly name undocumented students' in cancelled talk*, INDEPENDENT, (Feb. 3, 2017), http://www.independent.co.uk/news/world/americas/uc-berkely-protests-milo-yiannopoulos-publicly-name-undocumented-students-cancelled-talk-illegals-a7561321.html.

109. *See*, *e.g.*, *Michigan State Refuses to Rent Space to Richard Spencer's Group*, CBS NEWS ,(Aug. 18, 2017), https://www.cbsnews.com/news/michigan-state-refuses-to-rent-space-to-richard-spencers-group/. Note these cases generally assume the space is being rented out as a public forum or a limited public forum and viewpoint discrimination is not allowed. If, however, these university venues are seen as carrying the name and reputation of the institution, then it is difficult to see why they cannot decline to rent to those waving a confederate battle flag in the same way Texas declined to provide space to the flag on its license plates. Note law schools do not have this problem, as a general rule, because they rarely rent out their space to the public.

110. An institution can counter speech with its own speech or encourage other student groups to organize counter events. Some of these tools are detailed in the Southern Poverty Law Center's publication, *The Alt-Right On Campus: What Students Need To Know*, SOUTHERN POVERTY LAW CENTER (Aug. 10, 2017), https://www.splcenter.org/20170810/alt-right-campus-what-students-need-know. The Center counsels against direct engagement. *See infra* note 283.

111. *See* Lukianoff & Haidt, *supra* note 10. *See also* Lipson, *supra* note 14, at 2.

above, the AAUP authored a scathing report on the abuses of Title IX in 2016, arguing the Office for Civil Rights of the Department of Education (OCR), universities have undermined freedom of expression by:

- Failing to make meaningful distinctions between conduct and speech or otherwise distinguish between hostile environment sexual harassment and sexual assault.
- Using overly broad definitions of hostile environment to take punitive employment measures against faculty for protected speech in teaching, research, and extramural speech.
- Tending to treat academic discussion of sex and sexuality as contributing to a hostile environment.
- Adopting a lower evidentiary standard in sexual harassment hearings, i.e. the "preponderance of evidence" instead of the "clear and convincing" standard.
- Increasing the corporatization of the university, which has framed and influenced universities' implementation of Title IX.[112]

While the AAUP Report attributes some of the problem to OCR's interpretation of Title IX, the AAUP Report puts much of the blame on the "corporatization" of university administrations. The AAUP Report argues the entrepreneurial university model, with its focus on service to students as clients and fixation on avoiding investigations and lawsuits, may run counter to universities' educational missions and undermine academic freedom and shared governance. Specifically, the AAUP Report concludes that this undermines rather than improves gender equality.[113]

A. Why Did Title IX Move from Equal Facilities to a Focus on Harassment and Hostile Environments

Before addressing some of the more specific criticisms in the AAUP Report, it is worth addressing why Title IX enforcement, which traditionally focused on providing equal facilities, found its way into campus sexual harassment claims and into conflict with free speech ideals under the Obama administration.[114] Historically, Title IX focused on providing equal or equivalent athletic opportunities for women. If that were still its focus, there would not be much for law schools to talk about, since law schools provide little to no athletic opportunities to students. Over the last several

112. *See* American Association of University Professors, *Executive Summary: The History, Uses, and Abuses of Title IX* (June 2016), https://www.aaup.org/report/history-uses-and-abuses-title-ix. Note the AAUP Report does not lay the blame for these problems at the feet of professors but does call on professors to be part of the solution by circulating the AAUP Report to their colleagues at their institutions, which I have done. *See* AAUP Report, *supra* note 7, at 30-31.

113. *See* AAUP Report, *supra* note 7, at 24.

114. *See* Travis Waldron, *How Obama Took an Existing Feminist Law and Made it Even Stronger,* HUFFINGTON POST (Jan. 7, 2017), http://www.huffingtonpost.com/entry/obama-title-ix_us_585afcd5e4b0eb5864851a93.

years, however, Title IX's focus has shifted away from gender equality in sports to addressing "rape culture" on campuses.[115] The history of cover-ups and impunity for harassment, sexual assault, and rape on campuses eventually led to the heightened enforcement of Title IX over the past half-decade.[116] In April of 2011, the OCR issued what is known as the "Dear Colleague" letter, requiring federally-funded universities to take action on sexual violence or risk losing funding.[117] Athletes—particularly male athletes—still seem to get the most attention even though the culture of abuse is widespread.[118] This focus on athletes is due in part to heightened media attention, but also because universities have often sought to protect athletes in ways they do not protect an average student. For instance, universities

115. I do not want to de-emphasize the very serious problem of rape and sexual assaults on college campuses. I would use the term "rape culture" very carefully, if at all to describe the culture on any given campus. Rape is a horrible crime and to claim a given campus has a rape culture, in many cases, overstates the situation in a way that, in my opinion, is not helpful in making progress. As Deborah Brake notes, there is presently a "culture war" over the extent to which "rape culture" pervades college campuses and the legitimacy of the federal government's enforcement of Title IX in response to it. Deborah L. Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard*, 78 MONT. L. REV. 109, 110 (2017). The central controversy, fueled by competing narratives between student survivors and students accused of sexual assault, is over whether institutional responses to campus sexual assault have gone too far or not far enough. *Id.* For a critique of the term, see Aya Gruber, *Anti-Rape Culture*, 64 U. KAN. L. REV. 1027 (2016). Given the events of 2017, it's hard to avoid the conclusion that we have a sexual harassment culture.

116. *See* Diana Moskovitz, *Why Title IX Has Failed Everyone On Campus Rape*, DEADSPIN (July 7, 2016), http://deadspin.com/why-title-ix-has-failed-everyone-on-campus-rape-1765565925. Note the Obama administration both stepped up enforcement in this area and overturned Bush-era policies that allowed for less reliable means of reporting compliance. *See* Doug Lederman, *Reversing Bush on Title IX*, INSIDE HIGHER ED (Apr. 20, 2010), *https://www.insidehighered.com/news/2010/04/20/titleix; see also* Eric Pearson, *National Review: Benching The Title IX Changes*, NATIONAL PUBLIC RADIO (June 1, 2010), http://www.npr.org/templates/story/story.php?storyId=127306783.

117. *See* Moskovitz, *supra* note 116. The 2011 "Dear Colleague" letter was withdrawn in the September 2017 "Dear Colleague" letter. Letter from Candice Jackson, Acting Assistant Sec'y for Civil Rights, U.S Dep't of Educ. Office of Civil Rights, to Colleague (Sept. 22, 2017), http://www.acenet.edu/news-room/Documents/ED-Dear-Colleague-Title-IX-201709.pdf. The new letter does not provide substantive guidance, but announces a new notice-and-comment process and refers the reader to the "Q&A on Campus Sexual Misconduct, issued contemporaneously with th[e] letter, and will continue to rely on its Revised Sexual Harassment Guidance, which was informed by a notice-and-comment process and issued in 2001, as well as the reaffirmation of guidance in the Dear Colleague Letter on Sexual Harassment issued January 25, 2006." *Id.*

118. *Id.* Note commentators like Ann Coulter continue to make light of sexual assaults on campus. She has argued "there is no campus rape problem" and rape isn't really rape unless the victim has been "hit on the head with a brick." *See also* Joanna Rothkopf, *Coulter: Women who say they are raped are just "girls trying to get attention"*, SALON (Dec. 18, 2014), http://www.salon.com/2014/12/18/ann_coulter_women_who_say_they_are_raped_are_just_girls_trying_to_get_attention/. She also stated rapists on campus are usually "Clintons or Kennedys." *See* The New Civil Rights Movement, *Ann Coulter Denies College Rape Crisis: Rapists Are 'Usually Clintons Or Kennedys'*, http://www.thenewcivilrightsmovement.com/rachelwitkin/ann_coulter_says_that_rolling_stone_article_proves.

may cover up athlete-related incidents or provide different procedures for athletes, in order to protect high profile and lucrative athletic programs.[119]

The "Dear Colleague" letter goes well beyond the treatment by and of athletes: it concerns every student on campus. While no university has actually lost its federal funding, OCR investigations have resulted in costly settlement agreements. Although those settlement agreements often require more than what Title IX requires on its face, they have become models for university administrations on how to comply with Title IX.[120]

The AAUP Report does not oppose gender equality and its drafters do not argue free speech should trump all other rights. Everyone is attempting to find the right balance—the just balance.[121] The drafters of the AAUP Report fear the current approach of the government and of university administrations to Title IX may undermine Title IX goals and exacerbate gender and racial inequities on campus.[122] I am hesitant to fully embrace the AAUP Report for some of the reasons stated by Faculty Against Rape (FAR) in its response letter to the March 2016 draft.[123] My hesitancy is over a fear that the AAUP Report may be exalting faculty interests in free speech, academic freedom, and self-governance over students' well-being, safety, and in particular, right to be free from sexual harassment, discrimination, and a hostile educational environment.[124] I do not believe this was

119. *See* Moskovitz, *supra* note 116. Moskovitz notes although the 2011 Dear Colleague Letter requires the same procedures for all students, Baylor University still had a separate grievance procedure for its athletic program for many years. *Id.* Moskovitz also provides numerous examples of cover-ups and under-enforcement of sexual assault on college campuses. *Id.* The cover-ups of sexual violence at Baylor ended up with the removal of University President Kenneth Starr, as well as the head football coach in 2016. *See, e.g.*, Marc Tracy, *Baylor Demotes President Kenneth Starr Over Handling of Sex Assault Cases*, N.Y. TIMES (May 26, 2016), https://www.nytimes.com/2016/05/27/sports/ncaafootball/baylor-art-briles-kenneth-starr-college-football.html?_r=0. The sad irony of the situation is hard to ignore.

120. Moskovitz, *supra* note 116.

121. Ronald Dworkin's admonition is particularly apt here. Because our controversies over justice are so rich and theories so plentiful, "[p]erhaps no useful statement of the concept of justice is available." RONALD DWORKIN, LAWS EMPIRE 74-76 (1986). Nonetheless, as he goes on to state, "If so, this casts no doubt on the sense of disputes about justice, but testifies only to the imagination of people trying to be just." *Id.*

122. AAUP Report, *supra* note 7, at 10, 23-24.

123. In its conclusion FAR wrote:

> [W]hile we applaud the AAUP for turning its attention to a matter of significant importance, we are seriously concerned about the manner in which it did so, the accuracy of the report's content, its failure to engage with a broad variety of perspectives, including expert scholarship, and its framing may rather serve to entrench existing problems than address them.

Letter from Members of Faculty Against Rape, FAR, to American Association of University Professors, AAUP (Apr. 15, 2016) (on file with author).

124. The stated mission of the AAUP is to:

> [a]dvance academic freedom and shared governance; to define fundamental professional values and standards for higher education; to promote the economic security of faculty, academic professionals, graduate students, post-doctoral fellows, and all those engaged in teaching and research in higher education; to help the higher education community organize to make our goals a reality; and to ensure higher education's contribution to the common good.

the authors' intent, but the appearance is difficult to avoid given the AAUP Report's predominant focus on faculty rather than students.[125]

Part of the challenge in addressing Title IX and free speech concerns is to avoid swinging the wrecking ball, to avoid the false dilemma of choosing between the chilling effects of political correctness/vindictive protectiveness[126] and the rather callous approach to speech that is typified by President Donald Trump and alt-right "free speech fundamentalists" like Milo Yiannopoulos or Candice Jackson, the current head of the Office of Civil Rights.[127] The challenge for professors who aim to professionally prepare their students is to be sensitive to the effects of words on vulnerable people without closing down or avoiding important and difficult conversations.[128] It is easier to choose either the "callous to causing harm" option on the one hand, or the "this is too sensitive to even discuss" option on the other hand, than to address the messy middle ground. These two alternative ways of bracketing off the material are arguably safer for the professor.[129] Nonetheless, neither are appropriate in any educational setting, much less in a law school setting. The challenge is to be able to respectfully and professionally address sensitive issues. This may require more than being careful in how we speak and how we shepherd conversations. It may require vulnerability, some level of bravery, and above all, resiliency when we get it wrong.

See Mission Statement, AM. ASS'N OF UNIV. PROFESSORS, https://www.aaup.org/about/mission-1 (last visited Oct. 27, 2018). Thus, it is not surprising faculty come first in a report by this organization.

125. My hesitation goes more to tone than it does to substance.

126. As Lukianoff & Haidt note, the current movement is not the same as the political correctness movement from the 1980s and 1990s:

> The current movement is largely about emotional well-being. More than the last, it presumes an extraordinary fragility of the collegiate psyche, and therefore elevates the goal of protecting students from psychological harm. The ultimate aim, it seems, is to turn campuses into "safe spaces" where young adults are shielded from words and ideas make some uncomfortable. And more than the last, this movement seeks to punish anyone who interferes with aim, even accidentally.

Supra note 10, at 26.

127. *See* Alexis Okeowo, *Hate on the Rise After Trump's Election*, NEW YORKER (Nov. 17, 2016), http://www.newyorker.com/news/news-desk/hate-on-the-rise-after-trumps-election ("Since Donald Trump won the Presidential election, there has been a dramatic uptick in incidents of racist and xenophobic harassment across the country. The Southern Poverty Law Center has reported there were four hundred and thirty-seven incidents of intimidation between the election, on November 8th, and November 14th, targeting blacks and other people of color, Muslims, immigrants, the L.G.B.T. community, and women."); *See also* Jessica Guynn, '*Massive rise' in hate speech on Twitter during presidential election*, USA TODAY, (Oct. 23, 2016), https://www.usatoday.com/story/tech/news/2016/10/21/massive-rise-in-hate-speech-twitter-during-presidential-election-donald-trump/92486210/; *See also* note 20 (regarding the comments of Candice Jackson, the August 2017 "white supremacist terrorist" attack in Charlottesville, VA, and related incidents.).

128. This is a subset of the overall problem of sailing a middle course between the extremes of protecting free speech and protecting those from sexual harassment as nicely captured by Benjamin Dower in, *The Scylla of Sexual Harassment and the Charybdis of Free Speech: How Public Universities Can Craft Policies to Avoid Liability*, *supra* note 7.

129. Some of us, no doubt, are somewhat delicate snowflakes ourselves.

B. Changes from the OCR that Impact Free Speech on Campus

The OCR has sent out somewhat mixed messages in its "Dear Colleague" letters about the protection of free speech in the pursuit of Title IX objectives. However, its enforcement actions and settlement agreements have spoken louder than the words in their "Dear Colleague" letters in impacting the behavior of university administrators. As the AAUP Report points out, the 2011 "Dear Colleague" letter conflates sexual harassment conduct and speech by defining sexual harassment very broadly.[130] The Report authors note, however, that in 2014, the OCR issued "Questions and Answers on Title IX and Sexual Violence," stating its 2011 "Dear Colleague" letter did not address free-speech issues and that the prior guidance on ensuring free speech from its 2001 and 2003 letters remained in effect.[131] The earlier letters made it clear that "all actions taken by OCR must comport with First Amendment principles, even in cases involving private schools that are not directly subject to the First Amendment" and that "OCR's regulations should not be interpreted in ways that would lead to the suppression of protected speech on public or private campuses."[132] While the OCR discouraged the suppression of free speech at private institutions, it did not prohibit it.[133] As its 2003 letter states, "Any private post-secondary institution that chooses to limit free speech in ways that are more restrictive than at public educational institutions does so on its own accord and not based on requirements imposed by OCR."[134]

Thus, it is worth emphasizing that when it comes to private universities, the institution is free to engage in balancing.[135] Strictly speaking, the

130. AAUP Report, *supra* note 7, at 9.

131. *Id.*

132. *Id.* at 8 (quoting Letter from Gerald A. Reynolds, Assistant Sec'y, U.S. Dep't of Educ. Office for Civil Rights, to Colleague (July 28, 2003) (on file with the Dep't of Educ.)).

133. Letter from Gerald A. Reynolds, Assistant Sec'y, U.S. Dep't of Educ. Office for Civil Rights, to Colleague (July 28, 2003) (on file with the Dep't of Educ.).

134. *Id.* Since the OCR claims to not require restriction on free speech beyond at state institutions, this undermines any claim constitutional rights attach under the state action doctrine. It might be open to argument a given settlement agreement with a private institution limits free speech rights rises to the level of state action, given the state has condoned and authorized the agreement.

135. According to Statista, in 2014 about 5.55 million students were enrolled in private colleges and 14.66 million in public colleges. The ratio of public to private colleges has increased slightly over this time, with public colleges making up 67 percent of enrollments in 1965 and 72 percent in 2014. *See* Statista, *U.S. college enrollment statistics for public and private colleges from 1965 to 2016 and projections up to 2027 (in millions)* (2018), https://www.statista.com/statistics/183995/us-college-enrollment-and-projections-in-public-and-private-institutions/. When it comes to law schools, the balance goes the other way. There are 85 ABA accredited public law schools and 119 ABA accredited or provisionally accredited private law schools. *See* The Am. Bar Ass'n, *Private Law Schools* (2017), https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/private_law_schools.html; *see also* The Am. Bar Ass'n, *Public Law Schools* (2017), https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/public_law_schools.html. In other words, only about 40 percent of law schools are public while approximately 60 percent are private.

First Amendment is not in the balance. Contractual agreements to protect free speech might be in the balance, but the university generally dictates those contractual obligations.[136] Even when free speech is explicitly protected, it is limited by, or balanced against, the institution's mission and federal, state, and local laws that, among other things, protect against discrimination.

Messages protecting free speech were largely lost on administrators who understandably focused on the enforcement actions of the OCR and the Department of Justice rather than the words of the "Dear Colleague" letters. For instance, in its watershed enforcement decision against the University of Montana, the OCR defined sexual harassment as "unwelcome conduct or speech of a sexual nature, without regard to whether it creates a hostile environment."[137] In other words, the university could be responsible for a Title IX violation for sexual harassment that fell short of creating a hostile environment. As the OCR stated, "Sexual harassment is unwelcome conduct of a sexual nature. When sexual harassment is sufficiently severe or pervasive to deny or limit a student's ability to participate in or benefit from the school's program based on sex, it creates a hostile environment."[138] The Department of Justice used a similar definition in its April 22, 2016 letter regarding allegations of sex discrimination at the University of New Mexico, stating Title IX required defining sexual harassment as "unwelcome conduct of a sexual nature," including "verbal conduct," "regardless of whether it causes a hostile environment."[139]

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136. While these rights vis-à-vis faculty are arguably negotiated, students do not get to negotiate what is in their student handbook. While private institutions are not bound by the Constitution, if they promise free speech rights in their recruiting materials, handbooks, and codes of conduct, courts may find those institutions bound in contract to live up to those promises. *See, e.g.*, Kelly Sarabyn, *Free Speech at Private Universities*, 39 J. L. & EDUC. 145 (2010); Vurimindi v. Fuqua Sch. of Bus., 435 Fed. Appx. 129, 273 (3rd Cir. 2011); Ross v. Creighton Univ., 957 F.2d 410, 416 (7th Cir. 1992) ("It is held generally in the United States the 'basic legal relation between a student and a private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract.'" (quoting Zumbrun v. Univ. of S. Cal., 25 Cal. App. 3d 1, 10 (1972))). *See also* Guiliani v. Duke Univ., No. 1:08CV502, WL 1292321, at *7-8, (M.D. N.C. Mar. 30, 2010) (requiring the incorporation of Duke's handbooks and policy manuals into a separate contract as in an employment context); Love v. Duke Univ., 776 F. Supp. 1070, 1075 (M.D. N.C. 1991) (academic bulletin did not create binding contract between student and university). These cases involve students' rights and not the rights of professors. As *Guiliani* implies, in the employment context, one would need these to be actually incorporated into the contract. This is often the case with faculty handbooks, which are incorporated by reference in faculty contracts.

137. AAUP Report, *supra* note 7, at 9.

138. *See* letter from Anurima Bhargava, Chief, U.S. Dep't of Justice, and Gary Jackson, Regional Director, U.S. Dep't of Educ., to Royce Engstrom, President, and Lucy France, University Counsel, Univ. of Montana (May 9, 2013) (on file with the Dep't of Justice). This standard is contrary to the decision in Davis v. Monroe Cty. Bd. of Educ., which required conduct that was both severe and pervasive. 526 U.S. 629 (1999).

139. AAUP Report, *supra* note 7, at 10 (citing letter from Shaheena Simons, Chief, and Damon Martinez, U.S. Attorney, U.S. Dep't of Justice, to Robert G. Frank, President, Univ. of New Mexico (Apr. 22, 2016) (on file with the Dep't of Justice)).

According to the AAUP Report, the 2011 "Dear Colleague" letter significantly lowered the evidentiary standard from "clear and convincing" (highly probable or reasonably certain) to a "preponderance of evidence,"[140] but this point is hotly contested and seems to divide the legal and academic community. In addition to the AAUP, FIRE has challenged this lower standard of proof, particularly in light of the fact that the accused have very few procedural rights in campus hearings.[141] However, nearly one hundred law professors from over fifty different schools signed onto a white paper defending OCR's standard, in part on the basis that the preponderance of evidence standard was used for racial discrimination and harassment investigations on campus and schools had already been using the standard for Title IX investigations prior to the 2011 "Dear Colleague" letter.[142] Seventy-nine members of the three hundred member group, FAR, provided feedback critical of the draft AAUP Report and defended OCR's "preponderance of evidence" standard.[143]

The AAUP Report implies this lower standard has a disproportionate impact on racial minorities and that Title IX enforcement initiatives may be unwittingly perpetuating racial biases in the criminal justice system.[144] Jen Sorenson's somewhat distasteful cartoon regarding the Stanford rape case captures the problem graphically: the privileged white student athlete at Stanford gets a "platinum pass" for rape; the poorly educated, athletically challenged, white guy does not; and the male cartoon character with pig-

140. *Id.* at 10. They did so without notice and comment.

141. *See* Joe Cohn, *Responding in Full to 'Preponderance of the Evidence' Advocates*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Oct. 18, 2012), https://www.thefire.org/responding-in-full-to-preponderance-of-the-evidence-advocates/. There are also lawsuits challenging this standard. *See, e.g.*, Complaint, Doe v. Lhoman, No. 1:16-cv-01158 (D.D.C. June 16, 2016).

142. TITLE IX & THE PREPONDERANCE OF THE EVIDENCE: A WHITE PAPER (2016), https://assets.documentcloud.org/documents/3006873/Title-IX-Preponderance-White-Paper-Signed-8-7-16.pdf [hereinafter WHITE PAPER]. They argue it is the standard used by the DOE under Title VI of the Civil Rights Act of 1964, which prohibits race discrimination by educational institutions and Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment, including sexual harassment. Further, according to the WHITE PAPER, the available evidence shows a majority of schools were already using the preponderance of evidence standard when the 2011 OCR letter was written, and they argue the OCR was using this standard in their investigations as far back as 1995. *Id.* at 8-10. While the 1975 regulations and subsequent guidelines did not mandate an evidentiary standard, the guidelines required " 'prompt and equitable' grievance procedures for handling . . . internal complaints of sex discrimination." *Id.* at 9. In a 1995 investigation, they found the use of the higher standard of clear and convincing evidence was a factor in determining the procedure was not equitable. *Id.* at 10.

143. This organization consists of faculty, students, and human rights activists. While they did not take issue with the AAUP's critical stance against the corporatization of universities nor the AAUP Report's criticism of designating most faculty as mandatory reporters, they noted the persistent underreporting of rape on campuses by universities and were concerned that the AAUP Report, "by pitting student concerns for campus safety against faculty interests, reinforce[d] the symptoms instead of addresses the problem." FAR, *supra* note 123. They pointed out a number of what they considered to be factual and legal mistakes as well as selectivity and one-sidedness in the AAUP Report's depiction of cases. *Id.*

144. AAUP Report, *supra* note 7, at 11.

ment in his skin "can get a harsh sentence just for being in the vicinity."[145] Of course, the problem here is not so much the standard of evidence in harassment and sexual assault cases: it is racism. If racism is the problem, then it is not clear that changing the evidentiary standard is the solution.

The AAUP Report quotes Harvard Professor Jeannie Suk (now Suk Gersen), who challenged Harvard's capitulation to the OCR standard of preponderance of evidence.[146] It should be noted that Suk Gersen's concern is not with the standard of proof in the abstract, but rather in the context of a culture that shifted to granting immediate credibility to accusers without affording the protections of due process for the accused. Suk Gersen states:

> Sexual assault is a serious and insidious problem that occurs with intolerable frequency on college campuses and elsewhere. Fighting it entails, among other things, dismantling the historical bias against victims, particularly black victims— and not simply replacing it with the tenet that an accuser must always and unthinkingly be fully believed. It is as important and logically necessary to acknowledge the possibility of wrongful accusations of sexual assault as it is to recognize that most rape claims are true. And if we have learned from the public reckoning with the racial impact of over-criminalization, mass incarceration, and law enforcement bias, we should heed our legacy of bias against black men in rape accusations. The dynamics of racially disproportionate impact affect minority men in the pattern of campus sexual-misconduct accusations . . . . The "always believe" credo will aggravate and hide this context, aided by campus confidentiality norms that make any racial pattern difficult to study and expose. . . . We should be attentive to our history and context, and be open to believing, disbelieving, agreeing, or disagreeing, in individual instances, based on evidence.[147]

The Massachusetts District Court, in the 2016 lawsuit against Brandeis University, echoes Suk Gersen's concerns. The Court noted:

> Like Harvard, Brandeis appears to have substantially impaired, if not eliminated, an accused student's right to a fair and impartial process. And it is not enough simply to say that such changes are appropriate because victims of sexual assault have not always achieved justice in the past. Whether someone is a "victim" is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning. Each case must be decided on its own merits, according to its own facts. If a college student

145. Jen Sorensen, *Cartoon: Sexual Assault Platinum Pass*, DAILY KOS, (June 21, 2016), http://www.dailykos.com/story/2016/06/21/1540835/-Cartoon-Sexual-assault-platinum-pass.

146. AAUP Report, *supra* note 7, at 11. Note that while the AAUP Report references Professor Suk, she now goes by the name of Suk Gersen.

147. AAUP Report, *supra* note 7, at 11 (quoting Jeannie Suk Gersen, *Shutting Down Conversations about Rape at Harvard Law*, NEW YORKER (Dec. 11, 2015) http://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school).

> is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision.[148]

The court held that lowering the standard in such cases was part of "an effort to tilt the playing field against accused students, which is particularly troublesome in light of the elimination of other basic rights of the accused."[149]

The OCR does not side with the AAUP in requiring the clear and convincing evidence standard.[150] Rather, the OCR allows institutions to "apply[ ] either a preponderance of the evidence standard or a clear and convincing evidence standard" for its findings of fact and conclusions in these investigations.[151] Citing *Doe v. Brandeis* approvingly, the OCR does require institutions to provide the same standard in sexual misconduct cases as they apply in other student misconduct cases.[152]

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148. *See* Doe v. Brandeis University, 177 F. Supp. 3d 561, 573 (D. Mass. 2016) Because Brandeis is a private university the court did not decide the case on the basis of constitutional due process, but under the notion of basic procedural fairness for school disciplinary proceedings under Massachusetts law. *Id.* at 602.

149. *Id.* at 607. Note the Court made clear that the problem was not the lower standard per se. As it stated:

> The selection of a lower standard (presumably, at the insistence of the United States Department of Education) is not problematic, standing alone; that standard is commonly used in civil proceedings, even to decide matters of great importance. Here, however, the lowering of the standard appears to have been a deliberate choice by the university to make cases of sexual misconduct easier to prove—and thus more difficult to defend, both for guilty and innocent students alike. It retained the higher standard for virtually all other forms of student misconduct.

Id. While Brandeis had retained its normal processes, for other matters of student discipline:

> [B]y 2014, Brandeis's policy in sexual misconduct cases had eliminated a hearing of any kind. Instead, it had instituted a procedure under which a "Special Examiner" was appointed to conduct an investigation and decide the "responsibility" of the accused. That procedure was essentially a secret and inquisitorial process. Among other things, under the new procedure,
>
> - the accused was not entitled to know the details of the charges;
> - the accused was not entitled to see the evidence;
> - the accused was not entitled to counsel;
> - the accused was not entitled to confront and cross-examine the accuser;
> - the accused was not entitled to cross-examine any other witnesses;
> - the Special Examiner prepared a detailed report, which the accused was not permitted to see until the entire process had concluded; and
> - the Special Examiner's decision as to the "responsibility" (that is, guilt) of the accused was essentially final, with limited appellate review—among other things, the decision could not be overturned on the ground it was incorrect, unfair, arbitrary, or unsupported by the evidence.

Id. at 570.

150. Dep't of Educ. Office of Civil Rights, *Q&A on Campus Sexual Misconduct* 5 (Sept. 2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf?utm_name.

151. *Id.*

152. *Id.* at 5. If schools are required to use the preponderance of evidence standard in race based misconduct cases under Title VI, *see* WHITE PAPER, *supra* note 142, at 1, then oddly enough, this might mean this is the required standard for all student misconduct cases, since they must be the same.

Again, the problem is not so much the shift in burden of proof to a preponderance of evidence standard. That shift is really a change that levels the scales of justice by asking whether the complainant or respondent has the better case. The shift requires the complainant to convince the fact finder that her or his factual contentions are more likely true than not true. This is also the most common standard in civil cases. In contrast, the clear and convincing standard, which arguably was used before by some universities, tilted the scales of justice in favor of the respondent (the alleged perpetrator).[153] The preponderance of evidence standard sends the message that there are equal concerns on both sides of the equation; the clear and convincing standard risks sending a message that an institution is not receptive to claims.[154]

The problem lies not in this perceived evidentiary shift but rather in what appears to be a whole host of other mechanisms that tilt the scales in favor of a complainant. In the opinion of at least some, a cultural shift now mandates one believe whatever an alleged victim claims, no matter the evidence or how messy or complicated a situation may be.[155] Sexual assault and harassment cases involving students are often, if not always, complicated. Most cases involve acquaintances ranging from study partners, friends, or romantic relationships.[156] Alcohol or drugs are sometimes involved. Relationships are often in flux, not only day-to-day, but minute-to-minute in some situations.[157] One temptation in messy situations that call for careful judgment is to fall back on dispositive tests: standards of proof that answer the question for the decision maker. It is easier to hide behind a clear and convincing proof standard, for it allows a decision maker to say, "This was a close case with credible evidence on each side, and since it's hard to tell who has the better argument, we must decide that you have not

153. Note according to Deborah L. Brake the majority of universities and colleges were already using the preponderance of evidence standard before the 2011 Dear Colleague letter. Brake, *supra* note 115, at 129.

154. *Id.* at 133. In tort law, it is common to adjust the burden of proof to a higher standard, depending on the remedy being sought. Most commonly, the burden increases if the plaintiff is seeking punitive damages. If the remedy sought, or the sanction to be imposed, is expulsion, there may be an argument the higher standard is warranted given its punitive nature. Most sanctions short of expulsion arguably have either a compensatory or restorative/educational function and should not require the higher standard.

155. *See* Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 114 (2015).

156. According to the National Institute of Justice, of the U.S. Department of Justice, "[a]bout 85 to 90 percent of sexual assaults reported by college women are perpetrated by someone known to the victim." *Most Victims Know Their Attacker*, Nat'l Inst. Of Just., https://www.nij.gov/topics/crime/rape-sexual-violence/campus/Pages/know-attacker.aspx (last visited Oct. 27, 2018).

157. Professor Shaw, the former Title IX officer at the University of Dayton, documents the "hook-up" culture on campus, binge drinking on campus and how the combination complicates the unwanted sex that often results. Lori E. Shaw, *Title IX, Sexual Assault, and the Issue of Effective Consent: Blurred Lines—When Should "Yes" Mean "No"?*, 91 INDIANA L. J. 1363, 1423 (2016). Unwanted sex always carries the risk of serious emotional harm, even if it does not rise to the level of a sexual assault or rape. *Id.* at 1391.

met this higher burden." As Deborah L. Brake argues, "The risk that a clear and convincing evidence standard would impose insurmountable proof requirements is heightened by the incentives for universities to find accused students not responsible."[158] It is harder to avoid responsibility for one's judgment call when the standard is preponderance of evidence. While victims were silenced or largely ignored on many campuses under the clear and convincing standard and an unhealthy set of campus cultural norms (e.g. "the rape culture"), it does not follow that embracing the preponderance standard means every claim of sexual misconduct is valid or will be successful. The standard does not imply a presumption of guilt. It is not the case that anyone who perceives a harm or feels like they are a victim is, in fact, a victim. Further, it does not follow that there is always a guilty perpetrator or aggressor responsible for that harm, whether it be real or perceived. Sometimes we are equally at fault, sometimes one is more at fault, and sometimes we simply misperceive or misinterpret each other—especially when it comes to speech and other forms of expressive conduct related to sex.[159] Messy situations that call for careful judgment are not alien to legal

158. Brake, *supra* note 115, at 132. The Supreme Court tends to take shortcuts with its use of tests in both the equal protection and free speech arena. While former Justices O'Connor and Marshall argued strict scrutiny should not be fatal in fact (Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (Justice O'Connor quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)), and Justice Stevens argued there was only one equal protection clause analysis, a substantive reasonableness analysis requires balancing (Craig v. Boren, 429 U.S. 190, 211–12 (1976) (Stevens J., concurring)), others like Justice Scalia preferred to place cases in either the strict scrutiny or rational basis buckets, because those buckets diminished the Court's discretion and made it much easier to decide the cases. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179-80 (1989). Strict would be fatal, while rational basis was feeble. In the arena of the First Amendment, the Court, over the past few years has declined the invitation to balance the value of certain types of speech against the harm caused by speech and applied strict scrutiny in cases involving legislation designed to ban animal cruelty videos, the sale of violent video games to children, and falsely claiming to have been awarded the Congressional Medal of Honor. United States v. Stevens, 559 U.S. 460 (2010); Brown v. Entm't Merchants Ass'n., 564 U.S. 786 (2011); United States v. Alvarez, 567 U.S. 709 (2012). In these cases, Gunther's adage appears to be correct, the scrutiny is " 'strict' in theory and fatal in fact." Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

159. *See* Lukianoff & Haidt, *supra* note 10 (discussing emotional reasoning). From a personal-responsibility perspective, I am a fan of "yes means yes" rather than merely "no means no." I am also fully aware there are many ways of saying yes, short of the signed waiver and that, for a multitude of reasons, people rarely communicate clearly in these matters. As Professor Shaw notes, society does not agree on what kind of behavior "unambiguously" signals a willingness to engage in sexual conduct. Shaw, *supra* note 157, at 1412. Professor Shaw describes the results of a 2015 Washington Post and the Kaiser Family Foundation poll of students regarding non-verbal cues might signal consent: "When asked if undressing, getting a condom, and/or nodding in agreement established consent for further sexual activity, over forty percent said 'yes' and over forty percent said 'no.' " *Id.* Professor Shaw argues for a "No means No" standard, based in part on the fact it stakes out a middle ground between jurisdiction where "No" is insufficient to establish criminal liability for sexual assault and the "Yes means Yes" approach as found on many campuses, in part because of the many practical problems of determining if a person has evidenced consent through non-verbal cues, and in part because women surveyed generally prefer the "No means No" standard to a "Yes means Yes" standard. *Id.* at 1409-11, 1413-14.

culture; they are the grist for legal education. Law schools and their administrators should be able to handle them.[160]

C. *Mandatory Reporters All*

Requiring all faculty to be Title IX mandatory reporters is another example where university administrators have come to err on the side of overcompliance. This overcompliance has the potential to chill speech between faculty and students, both inside and outside the classroom. The AAUP Report notes that although Title IX does not require every faculty member be a mandatory reporter, administrators have tended to implement policies requiring just that.[161] This tendency is due in part to the OCR's compliance agreement with the University of Montana, which required mandatory reporting for "all employees who are aware of sex-based harassment, except health-care professionals and any other individuals who are statutorily prohibited from reporting."[162] This somewhat prophylactic requirement was based on past failures of the University of Montana to take sexual harassment seriously.[163]

As the AAUP Report notes, "Such an overly broad definition of faculty members as mandatory reporters, adopted by universities without consultation with the faculty, disregards compelling educational reasons to respect the confidentiality of students who have sought faculty advice or

160. Although Professor Shaw does not address sexual harassment, she does an excellent job addressing the complexities of unwanted sexual contact on campus in her article *Title IX, Sexual Assault, and the Issue of Effective Consent: Blurred Lines – When Should "Yes" Mean "No"? supra* note 157. She not only documents the complexities of unwanted sex on campus given the culture of drinking and hooking up, but she also illustrates these complexities with a scenario involving two students who engaged in sex after consuming alcohol. *Id.* at 1372-78. She describes the scenario from the perspective of the two students involved, from witnesses at the party where they met and from video surveillance at the dorm. *Id.* The situation is complicated and would be a difficult call for any Title IX coordinator. Shaw provides a detailed and well supported proposal for addressing these kinds of cases that is not only sensitive to each party involved, but is informed by an understanding of the dynamics of drinking and sex on campus. *Id.* at 1421-22. Through this lens, what was originally very fuzzy and complicated is much clearer and easier to resolve.

161. AAUP Report, *supra* note 7, at 16.

162. *Id.* The OCR also stated that the Montana agreement would serve as a blueprint for other institutions. *Id.* at 16.

163. As predicted by the AAUP Report, in the Spring of 2015, Florida Coastal School of Law sent an email to the faculty requiring it to include language in all syllabi giving notice to students that faculty cannot keep information about sexual misconduct/violence confidential, and that if you share information with them, they must report this information immediately to the Title IX Coordinator. The faculty training video on Title IX was sent out on November 10, 2015, and the statement for inclusion in our syllabi was sent out on November 11, 2015. Although some faculty urged reconsideration, the administration's response, in part, was that the faculty did not have attorney-client privileges with students, so nothing in the law or a law faculty member's legal ethical duties barred being a mandatory reporter. While some professors raised educational ethics issues with the idea, including student safety and support, these too went unheeded.

counsel."[164] The AAUP Report notes this will cause a chilling effect in classrooms and stifle discussion that might have led a student to disclosing something in the course of the learning process.[165] The AAUP Report argues such a broad definition perpetuates double standards and disproportionately burdens women and LGBTQ faculty who otherwise may be—or appear to be—more responsive, affected, and invested in Title IX's educational objectives.[166] In other words, it negatively impacts the goals of Title IX itself by chilling the speech and interactions of allies to the cause. As the AAUP Report concludes, "If many students view faculty members as 'first responders' in their advising and pedagogical capacities, they should be explicitly classified by institutional policies as 'confidential' rather than 'mandatory' reporters."[167]

This issue is complicated. Dr. Tammy Hodo has raised a number of valid concerns with the idea that faculty members be counted as "confidential" as opposed to "mandatory reporters." Her concerns include:

- Having the tool-kit necessary to truly assist the reporting student;
- Having the investigative skills to ask the appropriate questions when gathering information;
- Being equipped to provide students with community resources to address sexual assault, domestic violence, etc.;
- Having the training in trauma-informed techniques to ensure a reporting party is not re-traumatized;
- Being able to ensure confidentiality and avoid bias, particularly if a faculty member knows both students.[168]

As Dr. Hodo noted, "These are the types of questions that need to be answered when we think about Title IX."[169] Without these tools and skills, the faculty member is not equipped to responsibly act as a confidential resource. Rather, the faculty member should either refer the student to such a resource or inform the student that the member has a duty to report what the student divulges. Dr. Hodo did not imply these concerns applied to all faculty or in all situations, as some faculty members do have the relevant skills, knowledge, and resources to alleviate these concerns. Nonetheless, many do not. These concerns are at their highest strength if faculty are taking over Title IX duties. The concerns could be significantly diminished

164. *Id.* at 16 (citing Colleen Flaherty, *Endangering a Trust*, INSIDE HIGHER ED, (Feb. 4, 2015), https://www.insidehighered.com/news/2015/02/04/faculty-members-object-new-policies-making-all-professors-mandatory-reporters-sexual).

165. *Id.*

166. *Id.* There are, of course, some male faculty who teach and write in these areas and/or who are clearly approachable.

167. *Id.* This point was raised in particular by some of the clinical faculty at the law school whose interactions with clients and students often bring up related issues.

168. E-mail from Dr. Tammy Hodo, Ph.D., Florida Coastal School of Law Title IX Compliance Officer, to author (July 8, 2016) (on file with author).

169. *Id.*

if training and resources are provided to faculty along with guidance on confidentiality, conflicts of interest, and, perhaps, the duty to report under certain conditions.[170] Some faculty may embrace this training and the responsibilities that go with it, while some may shudder at the idea and want nothing to do with it.[171]

The simplistic solution from the administration's perspective is to take it all out of the hands of faculty and put it in the hands of a single person or office. This would appear to get rid of most, if not all, of the aforementioned concerns.[172] The problem is that in some cases there will be no way to avoid some of these responsibilities. If a student happens to break down in front of a professor and triggers something that would require mandatory reporting, the cat is out of the proverbial bag and cannot be easily put back in without a scratch. Does one continue to listen attentively until the student finishes before reminding the student, "I am mandated to report this to the Title IX coordinator," or does one interrupt the student at the first hint, effectively turning a deaf ear? Which is more or less likely to re-traumatize or damage what bond there was that made the student feel safe enough to disclose the information in the first place? In either case, the speech between student and faculty member is chilled.

From the faculty-member perspective, the best way to avoid this is to be the classic kind of law professor: not approachable. This, however, is not the trend. Many law schools expect professors to be both effective teachers and mentors who students will seek out for help and guidance. The more we embody these values (which are somewhat consistent with the student-as-customer model) the more we risk having to betray this implied trust. Law professors generally have the background and skills to take on this training and responsibility, should they desire to. Perhaps those faculty who are willing and able to take on the training and responsibility of being a confidential resource (as opposed to mandatory reporters) should be treated as such.

170. Suppose a student reports to her or his professor "discomfort" with a student within a professor's class and the student wants the professor to do something, such as sanction the student, move them to the other end of the classroom, or move them to another section the professor might be teaching, but the student does not want to involve the administration or the Title IX officer. This, in my opinion, is not a situation the professor should handle alone. If the student wishes to take it further, it should be taken up with the administration. What if, however, the student does not want to take it further and would rather have nothing done than have it reported to the administration? Is the "discomfort" enough to trigger mandatory reporting?

171. We faculty sometimes complain about not enough shared governance, but we also complain about more committee work, training, and responsibilities.

172. Note at least one senior administrator reported to me she was not aware there was a choice about having all faculty be mandatory reporters.

D. Trigger Warnings: Avoiding or Engaging

"Trigger warnings" are warnings given by a professor to the class that upcoming material may trigger uncomfortable or painful emotional responses. While trigger warnings can be a form of coddling by allowing students to avoid things they should confront, this does not need to be the case. Further, the outright dismissal of trigger warnings fails to engage the educational obstacles some material or topics create.[173]

Unsurprisingly, the AAUP Report is highly critical of calls for trigger warnings and draws from its previous report on the issue from 2014 (the 2014 Report).[174] In the 2014 Report, the AAUP concluded:

> The presumption that students need to be protected rather than challenged in a classroom is at once infantilizing and anti-intellectual. It makes comfort a higher priority than intellectual engagement . . . it singles out politically controversial topics like sex, race, class, capitalism, and colonialism for attention. Indeed, if such topics are associated with triggers, correctly or not, they are likely to be marginalized if not avoided altogether by faculty who fear complaints for offending or discomforting some of their students. . . In this way the demand for trigger warnings creates a repressive, "chilly climate" for critical thinking in the classroom.[175]

The 2014 Report also concluded that focusing on trigger warnings was a way of displacing the problem of sexual violence on campus. As it stated, "Trigger warnings will not solve this problem, but only misdirect attention from it and, in the process, threaten the academic freedom of teachers and students whose classrooms should be open to difficult discussions, whatever form they take."[176]

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173. While the authors of the AAUP Report leave it up to professors to decide on trigger warnings, Lukianoff and Haidt recommend that, "[u]niversities should also officially and strongly discourage trigger warnings." Lukianoff & Haidt, *supra* note 10. Goldberg also considers it a violation of academic freedom and free speech rights for a university to impose trigger warnings on professors. Goldberg, *supra* note 28, at 749.

174. *See* AAUP, *On Trigger Warnings* (Aug. 2014), http://www.aaup.org/report/trigger-warnings.

175. AAUP Report, *supra* note 7, at 15. They also noted "[a]lthough all faculty are affected by potential charges of this kind, non-tenured and contingent faculty are particularly at risk." This is linked to the corporatization of education, cost cutting, profit increasing links into a reduction of tenured and tenure track faculty, and an increase of faculty who are less expensive, have less say and are more fungible.

176. *Id.* While the AAUP Report would leave it in the hands of individual faculty members to provide such warnings in class, it was concerned about putting trigger warnings in syllabi, even if used willingly. As predicted by the AAUP Report, Florida Coastal's Title IX Compliance Officer, Dr. Hodo, gave the faculty a short lecture on trigger warnings in the Spring of 2016, asking us to flag potentially unsettling content and to allow students to leave or take a moment if they needed to in classes where the content may trigger an emotional response. A number of faculty commented on the fact that students wishing to be lawyers need to be able to face difficult subjects. The officer appropriately, in my opinion, noted sometimes when emotions are triggered, the student's learning may in fact be impaired.

This takes the point too far. While there is nothing wrong with being attentive to the negative impact of trigger warnings, they do not exclude addressing the problems of sexual violence on campus, nor do they require the avoidance of difficult topics. One can be sensitive to the impact of certain topics and still take on the responsibility of addressing them in a professional manner. The options are not callous disregard for people's sensitivities or complete avoidance. Middle ground may be slightly more difficult but should not be avoided. As my colleague Professor Quince Hopkins points out, there is a distinction to be made between a "warning" and the options for responding to the warning.[177] The purpose of the warning might be to allow a student to gird their emotional/psychological loins in advance of the discussion. For instance, Professor Hopkins provides a trigger warning about dated language ("colored" and "negro") in the *Loving v. Virginia* news clips before she shows them in class.[178] As she put it, the point is not to avoid the topic but rather to put enough of a blanket around the language so that students' learning is not impaired.[179]

In some classes, like constitutional law or family law, one could spend a considerable amount of time giving trigger warnings. Numerous courses and topics in law school can trigger painful emotional responses, be it criminal law, criminal procedure, family law, or even property law and bankruptcy law for those who suffered serious loss in the recent financial crisis.[180] Discussions regarding military conflicts or the "war on terror" may be triggers for those returning from our continued conflicts abroad.

There may be a chilling effect on classes if one needs to constantly police topics and discussions for subjects that might offend students' sensibilities. Sensitive topics are nearly impossible to avoid in certain areas. If the administration signals caution or avoidance rooted in Title IX fears, professors might avoid or downplay sensitive areas, seriously undermining critical engagement with controversial topics core to the law and social justice. If we avoid or sugar coat these issues in the law school environment—where they should be dealt with in a professional manner—how do we expect students to cope with these issues when they arise in practice?

For example, there is a concern that some professors may avoid teaching sexual assault and rape in criminal law courses.[181] The irony, as pointed out in the AAUP Report, is that feminists fought to have this topic included in the curriculum only to now find it is being excluded for being too emo-

177. Interview with Quince Hopkins, Professor of Law, Florida Coastal School of Law (n.d.).

178. *Id.*

179. *Id.* I started giving a trigger warning in the Fall of 2017 and have never had a student leave class on account of the warning.

180. More specialized courses such as international criminal law, gender and the law, sexuality and the law, poverty law, and many of the clinics may trigger strong emotional responses.

181. AAUP Report, *supra* note 7, at 15.

tionally sensitive.[182] Further, discussions looking at the intersection of sexual assault, race, and class are sometimes viewed as insensitive to victims. Thus, these discussions are viewed not only as triggers but also as creating a hostile environment.[183] As a result, very important (if not necessary) discussions related to the realities of sexual assault cases are sometimes avoided.

My guess is most criminal law professors do not avoid the topic. None of the three professors who regularly teach criminal law at Florida Coastal School of Law avoid the topic, and neither do I when I occasionally teach the course.[184] All of us think the topic is too important to avoid. None of us mention trigger warnings in our syllabi, but one of us offers that students who feel they cannot be present for this material may use one of their absences with no questions asked. Another professor does this when addressing domestic violence, since there is no way to address the material without talking about sexual assault. We all advise the class about the need for professionalism and decorum when discussing sensitive issues.[185]

Faculty report mixed stories about students who have actually had painful emotions triggered. Although one professor noted one of her students became very upset during a discussion of battered women's syndrome, she believed the student appreciated the topic was discussed. Another professor noted a veteran became upset after watching a video on the defense of duress that involved following unlawful orders. The professor used this as a teaching moment about the topics that will come up in practice and the need to be able to face such topics as a lawyer.

While some faculty may welcome training and the growth opportunity that comes with a deeper engagement with aspects of law that may trigger traumatic emotional responses,[186] some may see this entire area as outside

182. *Id*. at 15 (citing Jeannie Suk Gersen, *The Trouble with Teaching Rape Law*, NEW YORKER (Dec. 15, 2014), http://www.newyorker.com/news/news-desk/trouble-teaching-rape-law).

183. *Id.* at 15–16. The AAUP Report cites and quotes the work of Jeannie Suk Gersen, *supra* note 182. Suk Gersen begins her article by asking the reader to "[i]magine a medical student who is training to be a surgeon but who fears he'll become distressed if he sees or handles blood." *See also* Jeannie Suk Gersen, *Shutting Down Conversations about Rape at Harvard Law*, NEW YORKER (Dec. 11, 2015), http://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school.

184. My Criminal Law students from the Fall of 2007 presented me with an award for the professor with the most students seeking mental health counseling after the midterm exam. This was not exactly what I was hoping for.

185. While panelist at SEALS did not avoid teaching the topic, one panelist does not test on the topic because of a fear that under the pressure of an exam, the topic could undermine a student's performance.

186. It is not always clear that the emotional response is actually dysfunctional. It is how those emotions are dealt with that are either functional or dysfunctional. Simple avoidance is not functional. *See* Lukianoff & Haidt, *supra* note 10; *see also* Interview with Greg Lukianoff, *Sensitivity or Censorship: How Language Policing on College Campuses is Shaping America's Future,* TO THE BEST OF OUR KNOWLEDGE (July 23, 2017), http://www.ttbook.org/book/sensitivity-or-censorship-how-language-policing-college-campuses-shaping-americas-future.

their expertise and comfort zone. The latter professors may try to avoid triggering topics altogether or simply close their eyes and ears to the emotional harm and damage they may be causing. If "trigger warnings" and the subjects that trigger them are viewed as landmines, rather than as parts of a healthy dialogue, both will be avoided.

Avoidance diminishes both free speech and important educational opportunities. Avoiding these subjects would be a disservice to the entire educational enterprise. As Professor Suk Gersen states in her *Atlantic* article:

> Now more than ever, it is critical that law students develop the ability to engage productively and analytically in conversations about assault. Instead, though, many students and teachers appear to be absorbing a cultural signal that real and challenging discussion of sexual misconduct is too risky to undertake—and that the risk is of a traumatic injury analogous to sexual assault itself.[187]

Professors need to be concerned with more than merely the potential threat of students running to administration to complain about language. As Nicki Monahan points out in an article written in the wake of the recent Orlando night club attack, we not only need to be concerned about polarized discussions in class, we need to be concerned about polarized students coming to class with concealed weapons.[188] Monahan notes it might be time to admit that "safe classrooms" are an illusion.[189] We need to acknowledge that what is needed are brave spaces and courageous conversations.[190] As Monahan explains, "Brave classrooms are places where students and faculty openly share their different perspectives and life experiences for the purpose of learning, fully aware that there is risk involved in doing so."[191] For those of us teaching constitutional law during this new presidential administration, the risks are palpable.[192] And adding the fact that law school is not always the best environment for mental health creates

187. *See* Suk Gersen, *supra* note 182.

188. *See* Nicki Monahan, *Brave Classrooms and Courageous Conversations* (July 6, 2016), http://www.facultyfocus.com/articles/teaching-and-learning/brave-classrooms-courageous-conversations/.

189. As she notes, "Safe spaces have been defined as an 'environment in which students are willing and able to participate and honestly struggle with challenging issues.'" *Id.* (quoting Holley & Steiner, *Safe Space: Student Perspectives on Classroom Environment*, 41 J. Soc. Work Educ. 49–64 (2005)).

190. *Id.* (citing B. Arao & K. Clemens, *Safe Spaces to Brave Spaces: A New Way to Frame Dialogue Around Diversity and Social Justice*, *in* The Art of Effective Facilitation (Lisa Landreman ed., 2013)).

191. *Id.*

192. 2016 appeared considerably less risky, but one student called me a racist on my Constitutional Law I student evaluation, with no explanation. From what I could gather from students in my Constitutional Law II class, it was from a class where I was critical of President Obama's use of predator drones on a U.S. citizen. I was also critical of former President Bush in class, so I was a little surprised by the comment.

particular cause for concern.[193] In a course like constitutional law, it is impossible to avoid discussion of the Trump administration's views on, and policies related to, immigration, LGBTQA communities, certain religious groups, women, racial and ethnic minorities, Supreme Court appointments, and the president's powers as commander-in-chief.

Avoidance is futile, particularly in law school classes, and is also educationally unsound. Callously disregarding the thoughts and feelings of supporters of President Trump, Secretary Clinton, or Bernie Sanders is not wise either; doing so threatens to further polarize students and either will shut them down or bring out emotional responses that are, at best, a threat to the learning process and at worse, a true threat to the safety of students and professors alike. For instance, if the goal is to have students engaged and learning about the potential impact of this last election on the future of the law, we must find a way to bravely and responsibly engage them on these issues. Monahan explains:

> [L]earning does not take place when our firmly held beliefs are never challenged. It is the hallmark of a robust education that students graduate having been exposed to new ideas, differing perspectives, and challenging ways of thinking. This process can and should be difficult, messy, and certainly uncomfortable. In academic terms, it is when we are at the edge of discomfort that learning truly happens.[194]

Learning also does not take place when students are emotionally distraught or filled with anger and rage. Trigger warnings should not be a shield to avoid these difficult topics but rather a tool for navigating them. Healthy discussions are not competitions for pushing each other's buttons, riling up the masses, or talking past each other. This is rarely (if ever) appropriate in any classroom, let alone a law school classroom.

A good argument in a law school classroom, in a moot court brief, in a legal memo, or in front of a judge does not ignore or reduce the opposing view to a straw person. Rather, it takes the opposing view's strong points and one's own weak points seriously. To be effective advocates, lawyers need to be able to confront difficult issues, appreciate what may trigger their own emotions and the emotions of others, and move beyond their own perspective and emotional response. Lawyers need to engage with an argu-

193. According to the A.B.A. *Mental Health and Substance Abuse Toolkit for Law School Students and Those Who Care About Them*, "While students enter law school suffering from clinical stress and depression at a rate that mirrors the national average, the rate sharply increases during the first year of law school. Through the duration of their legal education, the rates of law students grappling with substance abuse and mental health problems increase dramatically." A.B.A. Law Student Division, A.B.A. Commission on Lawyer Assistance Programs & Dave Nee Foundation, *Substance Abuse & Mental Health Toolkit for Law School Students and Those Who Care About Them* (2014), http://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_mental_health_toolkit_new.authcheckdam.pdf.

194. *Id.*

ment if they want to not only advocate but also persuade. This is not a new insight. Law schools have always put a premium on reasoned arguments backed by evidence and authority and have discounted ad hominin attacks and emotional arguments.

E. Disconnected from Faculty Governance: Input, Debate, and Buy-In

The AAUP Report details numerous cases that cut across teaching, research, and extramural speech.[195] The cases are shocking—not because of the behavior of the professor in question, but because administrators overreacted without first seeking input from faculty.[196] As the AAUP Report authors note, "Rather than use mechanisms of faculty governance to carefully construct institutional measures to address problems of sexual harassment and sexual misconduct, university administrations have implemented hastily created procedures in an effort to conform to the OCR's interpretation of Title IX requirements."[197] Title IX administrators often lack faculty standing and are "insulated from faculty members, students, and existing shared governance mechanisms."[198] Accordingly, Title IX policies are not always the result of an engaged process where one would expect input, debate, and buy-in. Rather, these policies are generally announced in emails or at faculty meetings with no, or little, prior discussion.[199] Here, I concur with the AAUP Report that more speech in the form of input and debate would not only result in better policies, but also better buy-in to those policies.

F. Title IX in the Context of the "Corporate" University

The AAUP Report's authors define the corporate university as a new organizational model that is entrepreneurial, focuses more on vocational training than humanistic learning, privileges administrative and managerial

195. AAUP Report, *supra* note 7, at 19-21. The AAUP Report also notes the importance of faculty governance to due process concerns, but is beyond the scope of this paper.

196. *Cf.* Michael H. LeRoy, *How Courts View Academic Freedom*, 42 J.C. & U.L. 1 (2016) (analyzing the results of 339 First Amendment decisions regarding academic freedom from 1964 through 2014, in which schools won 73 percent of the rulings, and noting schools' success was partially due to the schools not taking extreme measures, such as firing, the colleges and universities rarely interfered with "the expression of objectionable and controversial ideas", and some faculty members made "mountains out of molehills" in their complaints. *Id.* at 40-42.). Thus, we might want to be cautious about making too much of the horror stories told on the side of faculty. Administrators also have their horror stories.

197. AAUP Report, *supra* note 7, at 19.

198. *Id.*

199. *See id*. It should be noted, however, Florida Coastal's Title IX coordinator was just hired in 2015 and while her position as a non-faculty member made shared governance institutionally challenging, she was not closed off to faculty and student input. Previous administrators in her position have been a part of the multicultural committee, which has consisted of faculty, staff, and students. In the past, Florida Coastal had a Dean of Multiculturalism who took on many of the duties exercised by Dr. Hodo. The role of Title IX coordinator has only recently come to the fore.

methods and interests, evaluates departments and disciplines in terms of business metrics of economic efficiency, and sees students as consumers whose satisfaction is paramount.[200] This new model has ascended in part due to the reductions in state and federal support for higher education.[201] Both public and private law schools were treated as profit centers for other parts of their universities until the recent crisis in law school enrollment across the country.[202] Thus, the risks associated with this model are in no way unique to the "for profit" law schools, although they may be exacerbated by the explicit corporate structure.

The AAUP Report's treatment of the corporate university begins by noting the danger of overemphasizing compliance with Title IX objectives. It notes there is a serious risk of exacerbating gender, racial, and other injustices.[203] At first, it is unclear what this has to do with the "corporate" university, but as the Report goes on, it is clear that the problem is that universities have taken a too narrow focus on isolated administrative processes rather than a big picture analysis of a problem that overlaps with other areas of discrimination, inequality, and educational goals.[204] As the AAUP Report states, "[C]ollege and university efforts to comply with Title IX have followed the trail blazed by departments of human resources, where the establishment of reporting protocols and internal processes can

200. *Id.* at 21-22.

201. *Id.* at 21. As the authors define it:

> That phrase refers to a new organizational model of university management and governance that is entrepreneurial at its core. In part as a result of reductions in state and federal support for higher education, the model also reflects a vast cultural change in thinking about the value and function of higher education, one that is oriented more toward vocational training than toward humanistic learning. The entrepreneurial model privileges administrative managerial methods and interests; evaluates and reduces or eliminates departments and disciplines according to borrowed business metrics of economic efficiency; and promotes a commercial model of higher education, in which student satisfaction as "education consumers" is paramount.

Id.

202. This is true of public institutions, non-profit institutions, as well as for-profit universities. Evidence of this fact can be found in a piece by David Segal, *Is Law School a Losing Game?* N.Y. TIMES, (Jan. 8, 2011), http://www.nytimes.com/2011/01/09/business/09law.html?_r=0. It can also be found in the resignation letter of the University of Baltimore Dean, Elie Mystal, *A Resigning Law Dean Spills the Beans on the Fleecing of Students*, ABOVE THE LAW, (July 29, 2011), http://abovethelaw.com/2011/07/a-law-dean-resigns-and-spills-the-beans-on-how-his-university-has-been-taking-advantage-of-law-students/. As reported in the Wall Street Journal blog, the University of Baltimore took about forty-five percent of the law school's revenue in 2010. *See* Nathan Koppel, *One Law School Dean's Noisy Withdrawal*, WALL ST. J.: L. BLOG (July 29, 2011), http://blogs.wsj.com/law/2011/07/29/one-law-school-deans-noisy-withdrawal/. This partially explains why law school tuition was still rising in 2012 while demand was falling. This, my guess, is because universities wanted to maintain the revenue they had come to expect from law schools and to do this, the fewer numbers of students would need to pay more. *See* Karen Sloan, *Tuition is Still Growing. Despite Lagging Law School Applications, It Vastly Exceeds Inflation*, THE NAT'L L.J. (Aug. 20, 2012), http://www.nationallawjournal.com/id=1202567898209?id=1202567898209&Tuition_is_still_growing&slreturn=20160603122958.

203. AAUP Report, *supra* note 7, at 21.

204. *Id.* at 22-23.

take precedence over holistic challenges to prevailing gender and sexual norms."[205]

The AAUP Report notes while "Title IX compliance is in the hands of administrators, . . . the courses that might address structures of discrimination and inequality are often marginalized and underfunded."[206] The reasons stated in the AAUP Report have to do with external research funding and employment statistics.[207] At law schools—particularly lower tier schools that have had enrollment and bar pass challenges—outcomes-based metrics on bar passage, gainful employments statistics,[208] and simply the lower number of students[209] have resulted in fewer of these kinds of electives and a narrower focus on black-letter law in courses that are bar tested. It is easier to avoid all Title IX triggers if one sticks to bar-tested, multiple-choice questions.[210] For instance, less than a decade ago Florida Coastal's faculty were strongly encouraged to infuse multicultural materials into all of our courses.[211] However, over the last half decade, this emphasis has faded: now the emphasis fluctuates between bar readiness and practice readiness. This is consistent with the corporate model of shifting towards vocational training with less focus on the humanities.[212]

The authors also note this model tends to put the emphasis on "bureaucratic and legalistic methods" of compliance rather than addressing the big picture of bias and discrimination across race, gender, sexual orientation, and gender identity.[213] They warn this emphasis may in fact exacerbate bias

205. *Id*. at 22.

206. *Id*. at 21.

207. *Id*.

208. For profit law schools are also faced with threats from DOE regulations regarding gainful employment non-profit and state schools are exempt from.

209. According to the New York Times, by 2014, "[e]nrollment numbers of first-year law students . . . sunk to levels not seen since 1973, when there were 53 fewer law schools in the United States, according to the figures just released by the American Bar Association. The 37,924 full- and part-time students who started classes in 2014 represent a 30 percent decline from just four years ago, when enrollment peaked at 52,488." Elizabeth Olson & David Segal, *A Steep Slide in Law School Enrollment Accelerates*, N.Y. TIMES, (Dec. 17, 2014), http://dealbook.nytimes.com/2014/12/17/law-school-enrollment-falls-to-lowest-level-since-1987/?_r=0. In 2015, the numbers fell a further 4.9 percent for J.D. admissions. *See* A.B.A. Section of Legal Education and Admissions to the Bar, *2015 Standard 509 Information Report Data Now Available*, n.d., http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_fall_enrollment_announcement.authcheckdam.pdf.

210. Note professors have also been encouraged to be aware of triggers in multiple choice question stems.

211. This was consistent with Florida Coastal's mission to serve the underserved. The multiculturalism committee worked for several years to create materials that could be used in a number of core curriculum courses. Those materials were last updated in 2010-2011. Although there was an update of the file folder system in 2013, the otherwise well-organized folders are largely empty.

212. *See* discussion *supra* Section V.F.

213. AAUP Report, *supra* note 7, at 23. As pointed out in the WHITE PAPER, "Research confirms violating Title IX by mishandling sexual violence cases has been quite expensive for schools for quite some time, and such violations are getting more expensive for schools, not less." WHITE

and discrimination by perpetuating a narrow view of gender identity.[214] As the authors conclude on this point, "This approach fails to respond to the overarching question: What vision of justice, educational access, and public accountability should the enforcement of Title IX seek to facilitate?"[215]

The problems for free speech and faculty input are compounded under the corporate model due in part to the reduction in tenure track faculty.[216] Non-tenure track faculty tend to be paid less to teach more, and are more easily replaced. This is not merely a phenomenon at for-profit institutions, but has been occurring nationwide, and, from the perspective of Title IX, the impact falls disproportionately on female faculty. According to the AAUP Report, "More than half of all female faculty now hold part-time positions and more than 45 percent of full-time female faculty have non-tenure-track appointments."[217] Faculty with less security of tenure are more risk averse, and this may lead to avoiding these sensitive topics.[218]

VI. Why Haven't Law Schools and Their Associations Pushed Back?

If free speech is to be found anywhere on a university campus, one would expect it at the law school. Further, one would expect law professors to be the first to push back on any encroachments on academic freedom, input into faculty governance, or freedom of speech in their classrooms and scholarship. If laws or regulations are being erroneously interpreted so as to trample on these freedoms, one would expect law professors, law schools, and their associations to be the first to champion restraint and push for more

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Paper, *supra* note 142, at 11. *See also* United Educators, *Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, EduRisk 14 (2015), http://www.ncdsv.org/ERS_Confronting-Campus-Sexual-Assault_2015.pdf; Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 Yale L.J. 2106 (2016).

214. *Id.* at 24 (citing Halley, *supra* note 155).

215. *Id*. at 23-24.

216. For instance, using federal government data, the AAUP found the percentage of full-time tenured faculty fell 8 percent from 1975 to 2011, whereas full-time non-tenure track faculty rose 6 percent, and part-time faculty rose nearly 17 percent, during the same time. Indeed, Kezar and Sam note many universities "have been dismantling the system of tenure through the majority of new appointments are not tenure protected." Adrianna Kezar & Cecile Sam, *Understanding Non-Tenure Track Faculty: New Assumptions and Theories for Conceptualizing Behavior*, 55 Am. Behav. Scientist 1419, 1422 (2011). The American Federation of Teachers notes nearly three-fourths of instructional positions in higher education, including graduate assistants, are not tenure eligible. Even if graduate employees are not considered, over half of teachers in universities are not in tenure-track positions. *See Higher Education Data Center*, American Federation of Teachers, https://www.aft.org/higher-education-data-center (last visited Oct. 27, 2018).

217. *Id*. at 23 (citing to Ernst Benjamin, *The Eroding Foundations of Academic Freedom and Professional Integrity: Implications of the Diminishing Proportion of Tenured Faculty for Organizational Effectiveness in Higher Education*, J. Acad. Freedom 1 (2010), https://www.aaup.org/sites/default/files/Benjamin_0.pdf.).

218. This is in addition to the reduction in free speech that occurs when less faculty are researching and writing, when scholarship is devalued, not required or not recognized as essential to the educational mission.

reasonable interpretations. Yet it is the AAUP—not the American Association of Law Schools (AALS) or the Society of American Law Teachers (SALT)—that issued the scathing Report. The AAUP issued its draft report in March 2016, asking for comment before issuing its final report in June 2016. Outside of the few members on the subcommittee from law schools, there was no systematic effort on the part of legal academia to address the issue.[219]

As noted above, the response to the AAUP Report from the legal profession and legal academia is uncertain at this point. While the American Law Institute (ALI) is working on a project on this topic, it is too early to tell whether the ALI is sympathetic to the AAUP Report.[220] A large number of law professors have signed on to a White Paper defending the OCR's standard of proof in Title IX cases.[221] Some of those signing on to the White Paper are advisors and members of the consultative group to the ALI project.[222] A group called Faculty Against Rape (FAR) is also critical of the AAUP Report, and likewise supports the OCR's standard in Title IX cases.[223]

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219. According to Professor Risa Lieberwitz, General Counsel of the American Association of University Professors, and Chair of the subcommittee that drafted the AAUP Report, individual law professors with expertise on Title IX and related areas commented on the draft. E-mail from Risa L. Lieberwitz, General Counsel, American Association of University Professors to author (Aug. 7, 2016) (on file with author). The AAUP Report notes the concerns raised by a number of Harvard and University of Pennsylvania law professors. AAUP Report, *supra* note 7, at 11. *See* Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html; *see also* David Rudovsky et al., *Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities* (Feb. 18, 2015), http://media.philly.com/documents/OpenLetter.pdf. The topic of Title IX and free speech was also discussed on a panel in the summer of 2016 at the Southeastern Association of Law Schools Annual meeting.

220. The American Law Institute is working on a project concerning sexual and gender-based misconduct on campuses which will address "reporting procedures; confidentiality; relationships with police and local criminal justice; interim measures and support for complainants; investigation and adjudication; the role of lawyers; the creation and maintenance of records; sanctions or remedies; and appeals" among other things. A.L.I., *Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities*, https://www.ali.org/projects/show/project-sexual-and-gender-based-misconduct-campus-procedural-frameworks-and-analysis/ (last visited Oct. 27, 2018). According to the ALI Director Richard L. Revez, members signed up to the consultative group on this project in record numbers. *See* Richard L. Revesz, *Our New Projects*, A.L.I. (Spring 2015), http://www.law.nyu.edu/sites/default/files/upload_documents/2015—ALI-Spring_Quarterly_Letter.pdf.

221. *See* WHITE PAPER, *supra* note 142.

222. *Id.*

223. *See* E-mail from Faculty Against Rape to Association of American University Professors (Apr. 15, 2016), https://docs.google.com/document/d/1yXsrWoVGqN725vepBZfemKuhbUzbgYiMo0ruX38qJJY/edit?pref=2&pli=1. In its conclusion FAR wrote:

> While we applaud the AAUP for turning its attention to a matter of significant importance, we are seriously concerned about the manner in which it did so, the accuracy of the report's content, its failure to engage with a broad variety of perspectives, including expert scholarship, and its framing may rather serve to entrench existing problems than address them.

Thus, while the AAUP argues that the OCR, and universities have used Title IX to abuse free speech, there is no consensus that the OCR's interpretation that Title IX requires merely a preponderance of evidence is either incorrect or the main problem. The problem in part is the heavy stick that the OCR wields should it decide to take away federal funding for non-compliance. As noted above, while no university has lost its funding based on a Title IX violation yet, the threat of that loss has led to settlement agreements that often require more than what Title IX requires on its face.[224] This should not come as a surprise. If a particular university has failed to live up to its duties to ensure its students are not discriminated against in their pursuit of an education, the school would likely need to take more pro-active steps than otherwise required to remediate the situation and make sure it is in compliance.[225] Problems arise when other universities use settlement agreements for the new baseline of compliance, such as when agreements become models for risk-averse university administrators on how to comply with Title IX.[226] Thus, it is not that these institutions are setting out to silence speech, but rather in their attempt to err on the side of compliance, they are providing a more attentive ear to the complaints of those who believe they are being assaulted, harassed, or subjected to a hostile educational environment.

In the balance between free speech and equality, or the First Amendment and Title IX, providing a more attentive and sympathetic ear results in more weight shifting to the equality/Title IX side of the scale. A sympathetic ear is, in effect, a more sensitive and responsive lever to pull on for those seeking gender justice. Those complaining of discrimination and harassment are able to get further than before with their complaints. It stands to reason that a more responsive lever will be used more often by those who believe they have suffered an injustice, which may feed into their view of themselves as righteous victims. If in fact our culture, particularly campus culture, has become more sensitive, overprotective, and coddling, then students may more readily perceive these injustices. If the student is our customer and the customer is always right, then it follows that a student's

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Id.

224. *See* Moskovitz, *supra* note 119.

225. These settlement agreements are similar to the kind of prophylactic injunctions a court might order for similar types of violations. As Thomas notes:

> Prophylaxis is characterized by the specific precautionary measures imposed to address causal factors with a nexus to continued violations. It is differentiated by the use of precautions ordered to address secondary facilitators of harm to provide more effective prevention. The additional steps reaching contributing causes are ordered with the purpose of heading off the harm before it develops.

Tracy A. Thomas, *The Continued Vitality of Prophylactic Relief*, 27 REV. LITIG. 99, 101 (2007). The steps that may be required of a university that has turned a blind eye to, or which has actively covered up, sexual assaults and harassment on campus, are not the same as those that need be taken at other universities that have a record of addressing these matters in a serious and balanced fashion.

226. *Id. See also* AAUP Report, *supra* note 7, at 13, 21.

perception of injustice must be injustice.[227] Students may genuinely perceive that they are being harassed or that they are in a hostile educational environment in situations those of us of an earlier generation would consider to be merely awkward, uncomfortable, or tolerably offensive. Thus, for some critics, it is not the Title IX lever of justice that is the problem, but rather its overuse and the overreaction by universities.[228] For others, the problem is campus culture. After addressing the virtues and shortcomings of the AAUP Report, we will return to look more closely at the culture on university campuses.

As demonstrated above, I do not fully endorse the AAUP Report. In many respects, my differences amount to a matter of tone, attitude, or degree. The legal academy does not fully support the AAUP Report because many of the concerns raised in the AAUP Report are either already being addressed or could be adequately addressed in law schools. I draw on a recent Gallup poll and my own follow-up poll of over 180 law students to show the story is more nuanced on law school campuses than on other campuses. Although not insulated, the culture on law school campuses is different from the wrecking ball approach on university campuses and in society as a whole. Our popular political culture appears to put little value on concepts like professionalism, dignity, debating ideas, and backing up assertions with authority; law schools put a premium on these values. While there is room for heated debate, law school discourse rarely results in protests,[229] disinvitations,[230] or shouting matches. Although bigoted and sexist discourse sometimes occurs, it is contrary to our current professional culture.

On the positive side, because of their culture of debating ideas and valuing evidence and authority, law schools are well placed to guard against

227. *See* Lukianoff & Haidt, *supra* note 10.

228. This is why there are so many countless examples of students and university administrations overreacting to what would otherwise be protected speech. Note however there is likely a gross under-reporting of incidents where college administrators are supporting free speech, or when they get the balance between free speech and equal opportunity right.

229. Recent protests include those at Wittier Law School by students protesting the law school shutting down. *See* Luke Money, *Students Rally to Protest Decision to Close Whittier Law School*, L.A. TIMES (Apr. 21, 2017), http://www.latimes.com/socal/daily-pilot/news/tn-dpt-me-whittier-law-protest-20170421-story.html. Harvard law students protested the law school symbol, which was a family crest of a former slave owner, in part by occupying a student lounge. *See* Rick Riley, *Harvard Law School Concedes to Protests, Drops Seal Tied to Slave Owner Isaac Royall*, ATLANTA BLACK STAR (Mar. 15, 2016), http://atlantablackstar.com/2016/03/15/harvard-law-school-concedes-to-protests-drops-seal-tied-to-slave-owner-isaac-royall/. University of Florida law students protested against police brutality in 2016 with a "die in." *See* Catherine Dickson, *Students stage die-in to protest police shootings*, THE INDEPENDENT FLORIDA ALLIGATOR (Sept. 29, 2016), https://www.alligator.org/news/campus/students-stage-die-in-to-protest-police-shootings/article_b492523e-85fb-11e6-8561-e797d5571b63.html.

230. It is difficult to find examples of law schools disinviting speakers. *See, e.g.*, Foundation for Individual Rights in Education, *Disinvitation Attempts*, https://www.thefire.org/resources/disinvitation-database/#home/?view_2_sort=field_6—desc&view_2_page=1 (last visited Oct. 27, 2018).

the extremes of the wrecking ball because of their culture of debating ideas and valuing evidence and authority. On the negative side, law schools are partially insulated from expressive extremes because they are repressive environments where the stakes are high for those who take on extreme views or who engage in more extreme forms of expressive conduct.[231] While one clearly should not over-glorify law school culture—especially some of its more repressive aspects—perhaps there is value in giving it a closer look.

VII. CAMPUS CULTURE

Arguably, the problem is not so much the law, or the government's enforcement of the law, but rather today's university campus culture. The problem of campus culture is highlighted in the AAUP Report. While the AAUP Report focuses on the administration's role in emphasizing "bureaucratic and legalistic methods" of compliance, other authors focus on the consumer expectations and demands that students and parents are putting on universities.[232] As a result of this consumer approach to education, students are focused on getting the grade, the degree, or credential but not so much on the education itself.[233] Our current university culture is not producing as many students who are willing or able to take on the kinds of challenging learning experiences that lead to gains in thinking skills.[234] They are not as able or willing to deal with ambiguities or to struggle through the process; they want to know the rule or the answer.[235] Not unlike

231. Does this in part explain why it is students at more elite law schools, like Harvard, Yale, and N.Y.U. who are reported as engaging in protests? Are they so privileged they can afford to engage in riskier expressive conduct than law students from lower ranked schools? *See* Terence P. Jeffrey, *Yale Students Protest, Disrupt Pro-Free Speech Event*, CNS: BLOG (Nov. 9, 2015, 10:09 AM), http://www.cnsnews.com/blog/terence-p-jeffrey/yale-students-protest-disrupt-pro-free-speech-event; *see also* Avrahm Berkowitz, *The Day Free Speech Died at Harvard Law School*, OBSERVER (Apr. 3, 2016), http://observer.com/2016/04/the-day-free-speech-died-at-harvard-law-school/. Note, what counts as a law school protest appears to be mild by most any standard. There were some mild protests at the University of Illinois in 2016 when the law school invited Professor Harold Koh to speak. *See* Anna Carrera, *People Protest Law School Speaker* (Oct. 28, 2016, 6:48 PM), http://www.illinoishomepage.net/news/local-news/people-protest-law-school-speaker/602901789. The peaceful protests were based on his role in the Obama administration's predator drone program. It's not clear if any law students participated in the protest and the speech went ahead without incident. In 2017, N.Y.U. law students peacefully protested the inclusion of Immigration and Customs Enforcement recruiters at their job fair in light of President Trump's immigration policies. *See* Kari Sonde & Kyla Bills, *NYU Students Protest Inclusion of ICE Recruiters in Law School Job Fair*, N.Y.U. LOCAL (Feb. 2, 2017), https://nyulocal.com/nyu-students-protest-inclusion-of-ice-recruiters-in-law-school-job-fair-189527647a11.

232. *See* Rebecca Flanagan, *The Kids Aren't Alright: Rethinking the Law Student Skills Deficit*, 2015 BYU EDUC. & L.J. 135, 155 (2015).

233. *Id.*

234. *Id.* at 137.

235. *Id.* at 155.

the helicopter parents who raised this generation, helicopter professors may be feeding the problem.[236]

Greg Lukianoff, Jonathan Haidt,[237] Charles Lipson,[238] and Rebecca Flanagan[239] describe campus culture as overprotective: coddling students and their minds from topics that may cause them discomfort or pain.[240] As noted above, we seem to have gone from turning a blind eye to the "rape culture" on campuses[241] to one of "vindictive protectionism,"[242] where some students—even some law students—request rape not be discussed.[243] When only 16 percent of college students think we do a good job of seeking out and listening to different views, there is a problem.[244] This culture, while unhealthy at all levels of education, is particularly problematic in the law school context.

This may be a problem caused by a vocal and mobilized minority, as an overwhelming majority of college students (78 percent) state, "they preferred a campus 'where students are exposed to all types of speech and viewpoints,' including offensive and biased speech, over a campus where such speech is prohibited."[245] The same study, however, revealed 54 percent of students said the climate on campus keeps students from saying what they believe because others might find it offensive.[246]

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236. *Supra* note 8 ("Helicopter professors, like their parenting counterparts, hover over students, guiding them precisely, and swooping in to rescue them from any hint of failure or challenge. Just as helicopter parenting can be harmful to children, helicopter professoring poses similar threats to students, not the least of which is creating disengaged students dependent on professors for all aspects of their learning and development.").

237. *See* Lukianoff & Haidt, *supra* note 10.

238. Charles Lipson, professor of political science at the University of Chicago, echoes many of the concerns of the AAUP Report regarding threats to free speech on campus and provides a five-step remedy for universities to ensure free speech and academic freedom. *See* Lipson, *supra* note 14.

239. *See* Flanagan, *supra* note 232 (summarizing data and observations suggesting a decline in student preparedness for law school, due in part to the corporate culture of higher education and the consumer attitude of students and their parents).

240. The University of Chicago has joined with the critics of this culture in its letter from the Dean of Students to the Class of 2020. *See* Perez-Peña, Smith & Saul, *supra* note 13.

241. Rape culture is a term that originated in the 1970's to describe the ways in which society blames victims of sexual assault and sees male sexual violence as normal. *See, e.g.*, Zerlina Maxwell, *Rape Culture Is Real*, TIME, (Mar. 27, 2014), http://time.com/40110/rape-culture-is-real/.

242. Lukianoff & Haidt, *supra* note 10.

243. *See* Suk Gersen, *supra* note 147. It may be only students at Harvard are making such demands and I am not aware of any professor who has capitulated to such demands. There have been no such demands at my institution and the professors who teach criminal law all address the subject.

244. *See* KNIGHT FOUND., *Free Speech on Campus: A Survey of U.S. College Students and U.S. Adults* 4 (Apr. 4, 2016), http://www.knightfoundation.org/media/uploads/publications_pdfs/FreeSpeech_campus.pdf.

245. *See id.*

246. *Id.*

VIII. Mentally Ill Campus Culture?

In 2015, First Amendment lawyer Greg Lukianoff and social psychologist Jonathan Haidt foreshadowed many of the observations and conclusions made in the AAUP. Lukianoff and Haidt, however, further included a mental health dimension missing from the AAUP Report.[247] The current approach is not only bad for our students' mental health—which further distorts the speech that takes place—it harms their educational and career prospects.[248] Unlike the AAUP Report, their focus has less to do with administrative structures and more to do with giving students tools to confront opposing and uncomfortable ideas and speech in a healthy (rather than pathological) manner.[249]

Charles Lipson, a political science professor at the University of Chicago, begins his short piece with a description of a class exercise at the University of Northern Colorado where professors asked their students to read Lukianoff and Haidt's article on free speech[250] and to come up with their own list of "difficult topics." The Northern Colorado professors' mistake appears to have been to include transgender issues in a list of examples of difficult topics that included abortion, gay marriage, and climate change.[251] According to Lipson, a student complained, "Transgender is not a 'difficult topic.' It's beyond debate because she views herself that way. To even discuss it would violate her safety."[252] Lipson explains, "'Safety' as it happens, is a magic word on campus. It has its own special meaning, well beyond legitimate concerns about robbery, sexual assaults, and coercive threats."[253] Rather, for some students, it has come to mean, "I feel unsafe because I disagree with your ideas. So, shut up. Right now."[254] Lip-

247. Lukianoff & Haidt, *supra* note 10. The authors' focus is not so much on the Department of Education and administrators as it is on students who have learned to expect trigger warnings, are extra sensitive to microaggressions, and who have become increasingly polarized and closed off to those they disagree with.

248. *Id.*

249. *Id.* As they argue:

> The biggest single step in the right direction does not involve faculty or university administrators, but rather the federal government, which should release universities from their fear of unreasonable investigation and sanctions by the Department of Education. Congress should define peer-on-peer harassment according to the Supreme Court's definition in the 1999 case, *Davis v. Monroe County Board of Education* (526 US 629 (1999)). The *Davis* standard holds a single comment or thoughtless remark by a student does not equal harassment; harassment requires a pattern of objectively offensive behavior by one student interferes with another student's access to education. Establishing the *Davis* standard would help eliminate universities' impulse to police their students' speech so carefully.

Id.

250. Lipson, *supra* note 14.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

son analogizes this to pulling a fire alarm, "but with no sense of what a fire really is and no penalty for false alarms."[255]

Lipson argues the healthy administrative response to a student would be to explain the virtues of free speech in the classroom,[256] provide counseling support, if needed, and provide immediate help for real safety threats. The healthy response, absent any real threat, would be to tell the student, "Do the assignment, develop your own views, buttress them with logic and evidence, and prepare to deal with alternative perspectives."[257] Lipson argues, however, this would not be the likely response. Rather, he argues, "Today, dean-of-students' offices are devoted to comforting delicate snowflakes and soothing their feelings. If that means stamping out others' speech, too bad."[258]

In the article that sparked controversy at the University of Northern Colorado, Lukianoff and Haidt argue the trend towards vindictive protectionism, with its focus on micro-aggressions and trigger warnings,[259] is an unhealthy response to things that offend us and cause us emotional discomfort.[260] Lukianoff and Haidt explain:

> [Vindictive protectionism] prepares [students] poorly for professional life, which often demands intellectual engagement with people and ideas one might find uncongenial or wrong. The harm may be more immediate, too. A campus culture devoted to policing speech and punishing speakers is likely to engender patterns of thought that are surprisingly similar to those long identified by cognitive behavioral therapists as causes of depression and anxiety. The new protectiveness may be teaching students to think pathologically.[261]

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255. *Id.*

256. According to Lipson those virtues would include "having a challenging environment with 'spirited, informed debate,' "and may "occasionally prompt students to rethink their views and offer better reasons for them." *See* Lipson, *supra* note 14.

257. *See id.*

258. *Id.* Although Lipson's recommendations are quite reasonable, his tone is reminiscent of President Business in the Lego Movie, where he states to Emmet (the ultra-ordinary guy, known as "The Special"): "Hey, not so special anymore, huh? Well, guess what? No one ever told me I was special. I never got a trophy just for showing up! I'm not some special little snowflake, no! But as unspecial [sic] as I am, you are a thousand billion times more unspecial [sic] than me!" THE LEGO MOVIE (Warner Bros. 2014).

259. They attribute this change in ethos to a number of factors including: "recent changes in the interpretation of federal antidiscrimination statutes," the shift from "free range" parenting to more protective parenting, (sometimes called "helicopter" parenting) where parents sought to keep their children safe in public and in schools from all things dangerous, including bullying, and the polarization of politics where groups tend to demonize each other. Lukianoff & Haidt, *supra* note 10.

260. *Id.*

261. *Id.* The authors note mental-health directors are almost universally reporting increases in the number of students with severe psychological problems, and:

> 54 percent of college students surveyed said they had 'felt overwhelming anxiety' in the past 12 months, up from 49 percent in the same survey just five years earlier. Students

Distorted pathological thinking is not only bad for one's mental health—it has a distorting effect on speech. When this distortion is not isolated and becomes widespread, the costs to both are potentially exponential. Lukianoff and Haidt's analysis of recent trends in higher education highlights a number of problems, including:

- higher education's embrace of "emotional reasoning,"[262]
- fortune-telling and trigger warnings,[263]
- magnification, labeling, and microaggressions,[264]
- teaching students to catastrophize and have zero tolerance,[265] and
- mental filtering and speaker disinvitations.[266]

Lukianoff and Haidt argue higher education's embrace of "emotional reasoning" teaches students to be hypersensitive and prone to countless drawn-out conflicts that will be damaging to their careers, friendships, and mental health.[267] The situation has developed to where simply stating one is offended becomes a trump card played by each opposing party. According to Lukianoff and Haidt, because universities fear federal investigations, universities have abandoned an objective reasonable person standard of offensiveness, and "are now applying [a subjective standard]—defining unwelcome speech as harassment—not just to sex, but to race, religion, and veteran status as well."[268] The result is trending towards a state of emotional warfare.

Lukianoff and Haidt also criticize trigger warnings. They note, "According to the most-basic tenets of psychology, the very idea of helping people with anxiety disorders avoid the things they fear is misguided."[269]

> seem to be reporting more emotional crises; many seem fragile, and this has surely changed the way university faculty and administrators interact with them.

Id.

262. Emotional reasoning is assuming "that your negative emotions necessarily reflect the way things really are: 'I feel it, therefore it must be true.'" *Id.* (quoting DAVID D. BURNS, THE FEELING GOOD HANDBOOK (1999)). In other words, it is when "your feelings guide your interpretation of reality." *Id.* (quoting ROBERT L. LEAHY, STEPHEN J. F. HOLLAND, & LATA K. MCGINN, TREATMENT PLANS AND INTERVENTIONS FOR DEPRESSION AND ANXIETY DISORDERS (2d ed. 2011)).

263. Fortune-telling is "anticipat[ing] that things will turn out badly" and feeling "convinced that your prediction is an already-established fact." *Id.* (quoting BURNS, *supra* note 262). The authors' note demands for trigger warnings on reading assignments with provocative content is an example of fortune-telling. *See* Lukianoff & Haidt, *supra* note 10.

264. Magnification is "exaggerat[ing] the importance of things," *Id.* (quoting BURNS, *supra* note 262) and labeling is "assign[ing] global negative traits to yourself and others." *Id.* (quoting LEAHY, HOLLAND & MCGINN, *supra* note 262).

265. Catastrophizing is turning "commonplace negative events into nightmarish monsters." *Id.* (quoting BURNS, *supra* note 262).

266. Mental filtering is "pick[ing] out a negative detail in any situation and dwell[ing] on it exclusively, thus perceiving that the whole situation is negative." *Id.* (quoting BURNS, *supra* note 262). As the authors note, this allows for simpleminded demonization. *Id.*

267. Lukianoff & Haidt, *supra* note 10.

268. *Id.*

269. *Id.*

Trigger warnings, they say, may "foster unhealthy mental habits in the vastly larger group of students who do not suffer from PTSD or other anxiety disorders."[270] The authors do not have a problem with identifying topics that trigger emotional responses. They argue, however, identification should not lead to avoidance. It is healthier to confront triggering topics in the relatively safe setting of a classroom than in the world outside. Further, by drawing extra attention to the dangers of certain topics, students who would not normally be triggered may come to fear difficult topics.[271]

Similarly, the authors are not critical of the idea of studying microaggressions but are critical of the way they are magnified. For example, students "focus on [microaggressions] and then relabel the people who have made such remarks as aggressors."[272] It is one thing to raise awareness and another to label those who may inadvertently slight others—due to ignorance or thoughtlessness—as aggressors. Lukianoff and Haidt worry a focus on microaggressions takes away from more serious problems like macroaggressions, a macroaggression simply being an overt or large-scale form of aggression.

William B. Irvine argues for a different approach: students should take a stoic approach to insults, transforming themselves into "insult pacifists."[273] He contends that you minimize the harm and the chances that an insulter will insult you again if you either ignore the comment or respond with laughter.[274] According to Irvine, we react negatively to insults, in large part, because of our concern about social status; if we held better, more stoic values, we would not feel the sting of such insults.[275]

Irvine makes a good point here, but it is worth noting it is much easier for those who already have a relatively high and stable social status to care less about social status or what others think of them. It is easier to "care less" about what others think if your culture already embraces you and gives you the benefit of the doubt. If you are a minority, or if you cut

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270. *Id.*

271. The authors quote the psychiatrist Sarah Roff who states, "One of my biggest concerns about trigger warnings. . .is they will apply not just to those who have experienced trauma, but to all students, creating an atmosphere in which they are encouraged to believe there is something dangerous or damaging about discussing difficult aspects of our history." *Id.*

272. *Id.*

273. *See* WILLIAM B. IRVINE, A SLAP IN THE FACE: WHY INSULTS HURT—AND WHY THEY SHOULDN'T, at ix, 17, 145–231 (2017).

274. *Id.* Irvine makes light of microaggressions by asking "what next, one wonders, Nano-aggression?" *Id.* at viii. Irvine uses the examples of asking a person of color where they are from or complementing their articulateness. While these aren't the worst things to say, the former may imply one is not as "from here" as the person asking (especially if it is followed up with, "no really, where are you from"), and the latter may imply most people like the person complimented are not articulate. Both raise teaching moments. It does not take a great deal of tact to understand that asking someone who appears to have ancestors from the Middle East where they are from is very different from asking someone who appears to have ancestors from northern Europe the same question. Context matters. *Id.*

275. *Id.* at 190-92.

against the grain of the mainstream society, then what other people think of you matters, not only on the psychological level, but also on the level of how you are treated, how your performance is evaluated, and whether or not you can get a good reference or job. So, while micro-insults and micro-indignities are molehills to some, they *can* actually be mountains to others, and for good reason.

Although the AAUP Report does not address it, microaggressions have come to campus. As with trigger warnings, there is nothing wrong with being sensitive to the harm you might cause with your choice of words. It is good to draw attention to and challenge words based on unstated and demeaning premises, stereotypes, and overgeneralizations. The term "microaggression" is a poor term if it is applied to all things said that cause small amounts of emotional harm. The term is defined as "brief and commonplace daily verbal, behavioral, or environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative . . . slights and insults toward people of [a given group]."[276] While the term as defined includes unintentional behavior, the term on its face assumes an aggressor.[277] The term "microaggression" overgeneralizes slights as acts of aggression. Some students have come to take the more literal approach to the term in their desire to see microaggressions taken seriously. As Lukianoff and Haidt note:

> [S]tudent government at Ithaca College . . . went so far as to propose the creation of an anonymous microaggression-reporting system. Student sponsors envisioned some form of disciplinary action against "oppressors" engaged in belittling speech. One of the sponsors of the program said that while "not . . . every instance will require trial or some kind of harsh punishment," she wanted the program to be "record-keeping but with impact."[278]

If those who are concerned about micro-indignities overgeneralize them all as forms of aggression, there is a risk of a backlash by those who may be labeled as aggressors, or those who are sympathetic to those who are so labeled for their poor choice of words. In our ever increasingly polarized world, the result is not appropriate sensitivity to the things that cause harm but a rejection of the claims by those who are "overly sensitive." Calling or labeling someone an aggressor is not conducive to healthy dia-

276. Derald Wing Sue, Christina M. Capodilupo, Gina C. Torino, Jennifer M. Bucceri, Aisha M. B. Holder & Marta Esquilin, *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 (4) AM. PSYCHOL. 271, 271 (May/June 2007). The term originally adopted in the race context has now extended to nearly all social groups. *See, e.g.*, DERALD WING SUE, MICROAGGRESSIONS IN EVERYDAY LIFE: RACE, GENDER, AND SEXUAL ORIENTATION (2010).

277. The authors of *Racial Microaggression* note microaggressions can take the form of microassault, microinsult, and microinvalidation which do not all include intentional harm. Sue, et al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, *supra* note 276.

278. Lukianoff & Haidt, *supra* note 10. Students at Princeton also have a site for students to report microaggressions.

logue about the harm being caused. Rather, it tends to shut down the conversation. If one did not consciously intend the harm they may be open to a claim that one felt hurt by a comment and may even be willing to explore the hidden premise or their ignorance about what their choice of language may imply. They may even become an ally to the cause. This potential for healthy dialogue, learning, and growth is often lost when a claim overgeneralizes or attributes mal-intent when it was not intended. The label of microaggression has itself become a microaggression. Potential allies are now enemies whose minds are closed off to the other's claims.[279]

Focusing on intent might be missing the point. While it is worse when one intends to cause harm or offense, it is not acceptable to hide behind well intended ignorance. Micro-indignities are not only harmful if one imputes intent. Micro-indignities often reinforce negative stereotypes that support and maintain a form of segregation. Here, like in the case of the physical segregation of minorities, separate is decidedly not equal. Acknowledging micro-indignities that reinforce a negative social status for some is worthwhile.

Lukianoff and Haidt warn that focusing on macroaggressions feeds into the mental filtering and demonizing of those who don't share one's views, resulting in a growing trend to disinvite speakers on campus based on a limited number of things they have said or done.[280] They note, "According to data compiled by the Foundation for Individual Rights in Education, since 2000, at least 240 campaigns have been launched at U.S. universities to prevent public figures from appearing at campus events; most of them have occurred since 2009."[281] This widespread trend allows students to avoid diverse viewpoints and conveys a message that speakers should be "pure" and should not offend campus sensibilities. Perhaps worse, it suggests that nothing can be learned from those with opposing views; this mindset does not serve students well for life beyond school.[282]

Here again, I would caution against giving this otherwise legitimate point of view too much weight. The risk (perhaps coming into fruition) is that the backlash against these trends of avoidance will be used to leverage

279. Note the point of the author's study of microaggressions was to look at their negative impact on the development of a therapeutic alliance between therapist and patient. While microaggressions surely threaten relationships so does the abuse of the term in labelling those who cause micro-harm as aggressors.

280. Lukianoff & Haidt, *supra* note 10. This point ties in with Lispon's article where he describes small bureaucracies with Orwellian Titles such as "the Office for Diversity and Inclusion." According to Lipson, these offices are not in fact inclusive of diverse viewpoints, but rather "are university-sponsored advocates for approved minorities, approved viewpoints, and approved grievances. Full stop." Lipson, *supra* note 14. Such offices are likely to take campaigns to disinvite speakers seriously.

281. Lukianoff & Haidt, *supra* note 10.

282. *Id.*

the views (or antics) of hate groups and extremists, such as the alt-right.[283] The alt-right has targeted public universities because the First Amendment gives them access and because universities embrace the ideals they loathe: inclusiveness, diversity, and tolerance.[284] While most speakers would dread a speech that turned hostile, violent, or resulted in being shouted down, the alt-right appears to revel in it. While I am hesitant to completely dismiss the idea that alt-right speakers are on campus to discuss ideas and persuade students to their ways of thinking, some argue they are more interested in the spectacle as a way of playing to their base of supporters off campus.[285] Even a disinvitation is a win of sorts because it allows them to pull out what the Southern Poverty Law Center (SPLC) calls their "favorite bludgeon": political correctness.[286] As the SPLC puts it, they use this bludgeon as a "[a] cheap and easy way to dismiss community norms and basic human decency, and to undermine the fundamental American values of equality, justice and fairness."[287] For those who care about free speech, it is worth being careful about our own rhetoric, lest it provide fuel for the proverbial fire.

IX. If The Problem is Based in Campus Culture, is the Law School Campus Culture Different?

In late 2016, I conducted a survey of 180 law students by adapting a Gallup poll given earlier that year to college students and adults.[288] My results revealed law students preferred a positive learning environment that curtailed some offensive and biased speech (54.27%) to an open environ-

283. As described by the Southern Poverty Law Center (SPLC), the alt-right "revels in notoriety. Much of its drawing power is the provocative and crude manner in which alt-right speakers rail against the established order. Posing as underdogs, they hurl insults against the walls of authority, decency and civil discourse using memes, juvenile humor and pseudo-intellectual arguments to deliver their message." Southern Poverty Law Center, *The Alt-Right on Campus: What Students Need to Know*, S. Poverty L. Ctr. (Aug. 10, 2017), https://www.splcenter.org/20170810/alt-right-campus-what-students-need-know.

284. *Id.*

285. As Chris Ladd, a former GOP precinct committeeman, argues, "Conservatives aren't sending Ann Coulter to Berkeley as a missionary. They are sending her to get B-reel footage they can play in fundraising pitches to aging Alabamans. She is there to incite violence. If no one sets anything on fire, then they've failed." Ladd, *supra* note 9.

286. For instance, the Southern Poverty Law Center provides the following advice for dealing with "alt-right" hate group personalities coming to campus:

> When an alt-right personality is scheduled to speak on campus, the most effective course of action is to deprive the speaker of the thing he or she wants most – a spectacle. Alt-right personalities know their cause is helped by news footage of large jeering crowds, heated confrontations and outright violence at their events. It allows them to play the victim and gives them a larger platform for their racist message.

SPLC, *supra* note 283.

287. The SPLC also states: "They charge that progressive college campuses are mired in meaningless, discriminatory rules as they embrace and protect individual differences. They claim these efforts are appeasements to individuals who might have their feelings hurt." *Id.*

288. *See* Knight Found., *supra* note 244.

ment that allowed such speech (45.73%).[289] Though firmly opposed to policies that restricted "expressing political views that are upsetting or offensive to certain groups" (90.18%), law students were firmly in favor of policies that restrict "using slurs and other language on campus that is intentionally offensive to certain groups" (81.21%).[290] Nonetheless, law students strongly agreed "the climate on campus prevents some people from saying things they believe because others might find them offensive" (60% strongly agree, 18.75% somewhat agree, 13.75% somewhat disagree, and only 7.5% strongly disagree).[291]

Thus, while law students in this small sample believe they do not always say what they believe, they also do not think they should say everything they might believe, or at least should be careful in how they say it. For the law students, free speech does not necessarily trump a positive learning environment. They seemed to appreciate that intentionally offensive slurs did not promote a healthy learning environment. The surveyed law students differentiated between words that were merely offensive or upsetting and the use of slurs and intentionally offensive language. One should be able to talk about politically sensitive topics, and even racially sensitive topics, but not every way of talking about these topics is equally valued or seen as appropriate. Perhaps the law students appreciate that racial slurs simply do not move a conversation forward. A slur has little to no truth content or value, and thus there is little lost in prohibiting it. Rather, there is positive harm by allowing it on campus, as this way of speaking tends to derail the conversation and disrupt a healthy learning environment.[292]

Observations about the current climate on university campuses across the country are not equally applicable to law school campuses. Unquestionably, university corporatization and the relative lack of faculty self-governance or input into policies has impacted the balance between free speech and ensuring compliance with civil rights legislation. But most law profes-

289. The question asked was:

> If you had to choose, do you think it is more important for law schools to: create a positive learning environment for all students by prohibiting certain speech or expression of viewpoints that are offensive or biased against certain groups of people, or to create an open learning environment where students are exposed to all types of speech and viewpoints, even if it means allowing speech is offensive or biased against certain groups of people?

Florida Coastal Law Student Survey from Christopher J. Roederer, L. Professor (Feb. 9, 2017). Note this was a one-time survey of students at one law school. I do not mean to claim they are necessarily representative of law student views in general.

290. The question asked: "Do you think law schools should or should not be able to establish policies that restrict each of the following types of speech or expression on campus?:

- Expressing political views that are upsetting or offensive to certain groups
- Using slurs and other language on campus that is intentionally offensive to certain groups."

Id.

291. *Id.*

292. Of course, these surveys did not address what kinds of sanctions would be appropriate for students who violated such norms or policies.

sors do not seem concerned that their institutions have gotten this balance wrong. This may be because law professors are generally good at getting their voices heard and so might have more local control over the process than other professors within the university. There is no question undergraduate culture impacts law school culture, since this is the path our students travel. They no-doubt bring their undergraduate expectations and baggage with them when they come to law school. But law schools have always confronted the challenge of re-orienting students to law school culture and expectations.

Many aspects of law school culture are designed to address or counteract the concerns raised by the AAUP Report and authors like Lukianoff and Haidt. While there are some issues with requiring all law professors be mandatory reporters, the law professors who have the skills and training (or who are willing to undergo training) should be able to lobby for confidential status. As noted above, law professors can (or should be able to) responsibly engage and navigate trigger warnings without avoiding important issues and topics. Important and difficult topics are at the core of what we address in law school. Thus, we can handle the responsible use of trigger warnings without falling into fortune telling and emotional reasoning. As a rule, we make it a point to reject purely emotional reasoning in the classroom. We should be able to distinguish—and teach our students to distinguish—between true aggression and micro-indignities, even at the micro-level. We should also be able to tailor proportional remedies to such indignities. We can identify when students are using buzz words (like "unsafe" or "harassed") and can look behind the rhetoric for substance, evidence, and support.

X. Beyond the Wrecking Ball: Getting Back to the Hammer in the Classroom

At law schools, the current trend towards coddling or "vindictive protectiveness" (along with all its unhealthy consequences)[293] is itself a reaction (and perhaps an overreaction) to harms caused by the adversative approach to legal education: the traditional Socratic method.[294] As noted by Jamie R. Abrams, the Socratic method has been subjected to "widespread critique from various stakeholders" who have "questioned its pedagogical effectiveness," "criticized its disproportionately marginalizing effect on women and minority law students," and consider it responsible for "the general malaise and depression of modern law students."[295] For those reasons, some faculty have moved away from the traditional Socratic method.

293. *See* Lukianoff & Haidt, *supra* note 10.

294. As Jamie R. Abrams notes, "[t]he Socratic method persists and endures in law teaching, even while it is increasingly surrounded by innovation and its use is declining." Jamie R. Abrams, *Reframing the Socratic Method*, 64 J. Legal Educ. 562, 563 (2015).

295. *Id.* at 566.

The Socratic method is not efficient if students are not adequately prepared.[296] Some research suggests today's students are not as prepared for the rigors of law school as they were a decade ago.[297] Consistent with AAUP Report, Flanagan notes today's college students approach their education with a consumerist orientation.[298] She notes this corresponds to a decline in study time and in what we might term "grit."[299] Flanagan writes, "Students with extrinsic motivation, such as a consumer orientation toward college, are less likely to seek and persist at challenging learning experiences that lead to gains in thinking skills."[300] For law professors, there is a sense that today's students want more spoon feeding, hand holding, and continuous feedback (preferably positive).[301] Some students seem to expect the client letter or memo from their professors and are not all that invested in developing the skills they will someday need to write that letter, or produce that memo. The law school Socratic method, where the professor relentlessly interrogates students but provides little explanation or context, does not jibe well with this type of student. In its harsher forms, the Socratic method displaces one set of extrinsic motivators (e.g. the desire to get good grades in law school so one can someday be a rich lawyer or have a healthy work/life balance) to one that is motivated by the fear that one will be called out and humiliated in class.

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296. Thus, many professors either flip their classes, ask for volunteers, or have groups or rows on call.

297. *See* Flanagan, *supra* note 232, at 139-47. As she notes:

> The lamentation of law professors' students 'just aren't what they used to be' is more than the idle chatter of ageing academics. Most entering law students know less than prior generations of law students. Students have found maximizing grades, minimizing study time, and focusing on the credentialing aspect of college education results in a more pleasurable, less stressful experience, but one leaves them ill-prepared for higher-level intellectual tasks. The undergraduate experience has changed from one of intellectual rigor and exploration to one that focuses on personal pleasure, much like a four-year vacation.

Id. at 170-71.

298. This has taken place since the 1980s. *Id.* at 153-54. She also notes that:

> Many of today's college graduates do not have the fundamental thinking and reasoning skills necessary to master the law school curriculum. College students spend less time studying during their undergraduate years. College students expect higher grades with considerably less effort than previous generations. . . . College students learn to 'game' their education, working less while receiving higher grades, but failing to acquire the thinking skills that provide the foundation for later success.

Id. at 135-36.

299. *See id.* at 136-37; She notes:

> Recent research has found that instrumental motives, or motives extrinsic to the primary activity, weakens internal, intrinsic motivation. When people hold both instrumental motivations, (such as a desire for good grades) as well as intrinsic motivations, (such as a desire to learn and understand) the instrumental motives undermine or "crowd out" the intrinsic motivation, and lead to lower motivation, persistence, and performance.

Id. at 154-55.

300. *Id.* at 155.

301. This is, after all, the trophy generation, where students have been raised to expect positive feedback for showing up. *See* James Bennet, *The Trophy Generation*, THE ATLANTIC (July/Aug. 2011), http://www.theatlantic.com/magazine/archive/2011/07/the-trophy-generation/308542/.

If students are coming into law school with both a skills deficit and an unhealthy consumer attitude, more will be required than simply free speech to prepare them to be functioning lawyers. As Flanagan notes:

> [A] customer orientation reduces the opportunity for students to challenge themselves, to "engage with ambiguities," and risk failure in order to grow intellectually and personally. Because an essential element of legal education is the ability to "grapple with uncertainty in order to develop professional judgment," college students' consumer orientation leaves them unprepared for the pedagogical challenges they must face as law students.[302]

Legal academia needs to be careful at this juncture. The appropriate response to a wrecking ball that has swung to the point of vindictive protectionism is not to swing it back to reckless indifference. Both extremes are associated with poor mental health.[303] The classroom itself does not appear to be the main stressor at law school these days.[304] There is perhaps a little bit of nostalgia for the days when it was: the days when students did not ask questions (inside or outside of class, even about the exam); the days when law professors forged students into sharp legal weapons by continuously hammering them with questions;[305] the days when students were expected to teach themselves the law before coming to class, where their skills and knowledge would be put to the test; the days when it was thought that the Socratic method would best prepare them for the rough and tumble hierarchical adversarial profession.[306] We all want our students to take responsibility for their education, to work harder, to be more prepared, to be more resilient, and to not complain about every little thing that might make them

302. Flanagan, *supra* note 232, at 155.

303. *See supra* text accompanying notes 247-49, 295.

304. According to the Law School Survey of Student Engagement Report, 50 percent of students reported high stress, 46 percent reported medium levels of stress, and 4 percent reported low levels of stress. LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, HOW A DECADE OF DEBT CHANGED L. STUDENT EXPERIENCE 17 (2015), http://lawprofessors.typepad.com/files/lssse-annual-report-2015.pdf. When asked whether the following six common stressors actually caused them stress, only 32 percent listed "classroom environment/teaching" while 33 percent indicated "competition" caused them stress. The remaining stressors received higher percentages, namely "academic performance" at 78 percent, "academic workload" at 74 percent, "job prospects" 62 percent, and "financial concerns/student debt" at 51 percent. *Id.*

305. Or destroyed them in the process. As David Garner notes, "Advocates . . . tout the Socratic method as a form of 'ritualized combat,' a 'civilized battle,' a 'boot camp' of sorts, in which professors utterly 'destroy' students by making 'friendly assault[s]' on their answers." David D. Garner, *Socratic Misogyny?–Analyzing Feminist Criticisms of Socratic Teaching in Legal Education*, 2000 B.Y.U. L. REV. 1597, 1601 (2000) (arguing for reform in the use of the Socratic Method in legal education). Advocates also point out the Socratic method is good for sharpening analytic and critical thinking skills.

306. In the words of Duncan Kennedy, legal education is a training ground for hierarchy. *See* Duncan Kennedy, *Legal Education as Training for Hierarchy*, *in* THE POLITICS OF LAW 54, 54-58 (David Kairys ed., 3d ed., 1998). Note these were perhaps also the days when microaggressions and the traumatizing treatment of delicate materials would go unchallenged.

uncomfortable.[307] However, given the culture our students are coming from, it is doubtful that a return to a hard Socratic method would achieve these goals.

The challenge is to keep the baby in the tub while draining the bath water: to push students, or motivate them, without pushing them over the edge or shutting them down. It is difficult to know how many law students regret going to law school after their first semester yet stay and muddle through due to extrinsic pressure, be it the embarrassment of failure or law school debt.[308] While part of the traditional Socratic method remains, the trend has moved to flipping classrooms,[309] skills exercises, practice simulations, teamwork, and multicultural competencies.[310] Perhaps we have gone too far in making the classroom comfortable, in holding hands with multiple formative and summative assessments and continuous feedback. Nonetheless, swinging back to fourteen callous and cold weeks of interrogation followed by a mystery exam is neither desirable nor likely.

I don't think there is one simple answer. The truth is complicated, and I think students benefit from a variety of teaching methods and approaches across different courses. In addition to the above teaching methods, some have argued the Socratic method could be altered to put clients (instead of rules) at the center, which might help motivate students to engage with the law.[311]

While students can learn from numerous approaches, it is difficult to learn or contribute to the learning of others if one perceives the learning environment to be hostile.[312] Of course, learning environments can be de-

307. At least one panelist at the Southeastern Association of Law Schools conference wished all students watched *The Paper Chase*, so they would appreciate just how good they have it now. *The Paper Chase*, the movie, is based on John Jay Osborn, Jr.'s novel, *The Paper Chase* (1971), and follows the struggles of a first-year law student at Harvard Law. Colleen Walsh, '*The Paper Chase' at 40*, THE HARVARD GAZETTE, (Oct. 2, 2012), http://news.harvard.edu/gazette/story/2012/10/the-paper-chase-at-40/.

308. LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, *supra* note 304.

309. In the flipped classroom, the professor records a lecture students can listen to or watch in advance so class time can be spent working through problems and hypotheticals. Of course, the traditional model of legal education was also flipped in the sense that students were expected to answer their professors' questions rather than ask their own. The difference was students were expected to teach themselves the law by reading and briefing cases before class in preparation for the numerous hypothetical questions they would receive in class.

310. *See* Abrams, *supra* note 294.

311. *Id.* at 563. Abrams goes a bit further and argues the Socratic method could be improved if it were "reframed in three simple ways to make it client focused, research-focused, and skills-sensitization focused." *Id.* at 568. Florida Coastal's Director of Experiential Learning, Professor Curran, notes how much harder students are willing to work in clinics when they see the law in action, faced with actual clients and meaningful work. Abrams argues, "[t]his approach best replicates law practice in which clients' needs and legal authority shape case outcomes and strategy. It also softens the teacher-student hierarchy by positioning the client as the point of inquiry, invites diverse participation, and is more transferable to other law courses and experiences." *Id.*

312. Little things can add up to bigger things if they are left unchecked. Showing a lack of concern for little things can make them big things that distract from the learning environment.

manding and challenging without being hostile, and just because someone perceives an environment to be hostile does not mean it actually is or that anyone intended to make it so. Difficult topics should be learning moments, not landmines. Most law professors have the skills to clear these mines, challenge their students, be rigorous, and hold them accountable without being callous or insensitive to the things that might get in the way of learning.[313]

313. In closing, I cannot help thinking of my own model law professor, Professor Charles Knapp, otherwise nicknamed by his students as the "reasonable person" even though his course was contracts and not torts. His class was not easy, but he was not cruel. He always appeared happy and genuinely interested in the responses he elicited from his students. He always seemed more interested in building students up and raising the level of conversation than in tearing people down. There was nothing particularly fancy or novel in his approach to teaching; it seemed very reasonable to me and to many of my fellow classmates at the time.