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Constitutional Moral Hazard and Campus Speech

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LECTURE

CONSTITUTIONAL MORAL HAZARD AND CAMPUS SPEECH

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INTRODUCTION

One underappreciated cost of constitutional rights enforcement is moral hazard. In economics, moral hazard refers to the increased propensity of insured individuals to engage in costly behavior.[1] This Essay concerns what I call "constitutional moral hazard," defined as the use of constitutional rights (or their conspicuous absence) to shield potentially destructive behavior from moral or pragmatic assessment.[2] What I have in mind here is not simply the risk that people will make poor decisions when they have a right to do so, but that people may, at times, make poor decisions *because* they have a right.[3] Moral hazard is not about how individuals behave in general but on the margins. It concerns the incentive effect of holding security against worst-case scenarios.

Thus, imagine a D.C. parent who, inspired by the Supreme Court's decision in *District of Columbia v. Heller*,[4] keeps a loaded handgun within reach of a toddler. A significant risk of injury to the child is present whether or not handgun possession is constitutionally protected.[5] But, on the margins, the risky behavior may be more likely to occur if prosecution for illegal possession is off the table. Or consider a homeowner who refuses to sell his or her home for an economic development project at a price that he or she would accept in the absence of property protections under the Takings Clause.[6]

The free speech guarantees the First Amendment confers are especially vulnerable to this kind of incentive effect. Courts have interpreted the First Amendment to impose nearly absolute

1. *See* Mark V. Pauly, *The Economics of Moral Hazard: Comment*, 58 AM. ECON. REV. 531, 535 (1968).

2. *See infra* Part I.

3. *See infra* Part I.

4. 554 U.S. 570, 635 (2008).

5. *See* Dylan Matthews, *Living in a House with a Gun Increases Your Odds of Death*, VOX (Nov. 14, 2018, 4:19 PM), https://www.vox.com/2015/10/1/18000520/gun-risk-death [https://perma.cc/5K53-DX8N] (explaining the high rate of firearm accidents among children in the United States).

6. *See* U.S. CONST. amend. V. The Supreme Court construed the "public use" requirement of the Takings Clause liberally in its decision in *Kelo v. City of New London*, 545 U.S. 469, 480-85 (2005), but it still imposes constraints, and its analog has been interpreted more strictly under some state constitutions. *See* City of Norwood v. Horney, 853 N.E.2d 1115, 1138-39 (Ohio 2006); R.I. Econ. Dev. Corp. v. Parking Co., 892 A.2d 87, 104 (R.I. 2006).

protection for speakers from state discrimination on the basis of the content or viewpoint of their speech.[7] At the same time, individuals who engage in provocative speech often do so precisely to garner attention, so ordinary counterspeech or other legally available methods to bring such speakers in line with social norms can prove counterproductive.[8] Speech whose provocative character would otherwise need to be defended on the merits can be defended as a conspicuous exercise of constitutional rights in light of courts' interpretation of the First Amendment. That posture can then encourage counterspeakers to be equally or more provocative, or else to eschew the law altogether and resort to forms of civil or even violent disobedience.[9]

This Essay offers some observations on how to escape this cycle with particular reference to racist or other provocative speech on college campuses. No one is satisfied with the state of play here. Conservatives argue that university life is dominated by liberal professors and administrators who protect cloistered left-wing students from hearing opinions they do not agree with.[10] Progressives counter that right-wing campus groups are not interested in dialogue, but rather seek to recruit provocateurs to assault minorities and women with hate speech.[11] Both sides press their case aggressively and do so in the language of free expression—the freedom to offer controversial opinions on the one hand and the freedom to engage in collective, effective counterspeech on the other.[12] What is

7. *See infra* notes 52-55 and accompanying text.

8. *See infra* Part IV.

9. *See infra* Part III.

10. *See, e.g.*, Bret Stephens, *Diversity, Inclusion and Anti-Excellence*, N.Y. TIMES (Aug. 2, 2019), https://www.nytimes.com/2019/08/02/opinion/university-campus-diversity-inclusion-free-speech.html [https://perma.cc/BB4A-ZNX5].

11. *See, e.g.*, Sean McElwee, *Political Correctness Isn't the Problem*, THE OUTLINE (Nov. 20, 2017, 10:54 AM), https://theoutline.com/post/2503/political-correctness-isn-t-the-problem [https://perma.cc/H8H7-6CRM].

12. *See* Larry Atkins, *There Should Be Free Speech on College Campuses for Conservative Students, Conservative Speakers and Liberal Professors,* HUFFPOST (Aug. 28, 2017), https://www.huffpost.com/entry/there-should-be-free-speech-on-college-campuses-for_b_59a4144fe4b0a62d0987b0b3 [https://perma.cc/B3YP-VB8B] ("Universities should encourage political debate in classrooms and bring speakers of all ideologies to speak on campus."); Jared Sellick, *There Is No Place for Hate Speech on Our Campus*, ORACLE (Feb. 20, 2019), http://www.usforacle.com/2019/02/20/there-is-no-place-for-hate-speech-on-our-campus [https://perma.cc/D323-KJ92] ("If this organization's presence is persistent on campus and they continue to disperse information designed to encourage students to harass and report

more, for both sides, the language of free expression is not just consistent with, but is motivated by, an idealized vision of university life.[13]

As Part I discusses, the danger of moral hazard varies with the proportion of risk borne by third parties. Speech can be produced at a low cost relative to other activities. And even bracketing the potential harm to those who feel burdened or threatened by racist speech, the potential for violence in response to such speech imposes, at times, significant economic costs on universities and law enforcement agencies. Those costs are not internalized by the speakers, who are often seeking exactly the attention that visible security measures produce.

Part II establishes what is already well-known to constitutional scholars, namely that the First Amendment is not absolute. Neither the constitutional text, nor constitutional history, nor even constitutional doctrine establish that the First Amendment is incapable of being sensitive to the institutional context in which speech takes place. Moreover, and contrary to some conventional wisdom, unbridled freedom of speech is ill-suited to a university setting. As Part III elaborates, from admissions decisions, to pedagogical choices, to the hiring of faculty and administrators, universities are quintessential *curators* of speech. In an information environment in which citizens can expect to be flooded with data that is either indiscriminate or calculated to mislead, it is more important than ever for educational institutions to serve their essential function.

Finally, and most significantly, Part IV argues that universities nonetheless should permit provocative speakers on campus. Many of the reasons asserted for permitting such speakers—the line-drawing problems, the capacity for incidents to act as teachable moments, the importance of inculcating tolerance, and so forth[14]—

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other [sic] one another, it should be expected that USF takes swift and decisive action to get these hateful messages off of our campus.").

13. *See, e.g.*, Sebastian Grandias, *Dear College: Reject This Tale of Two World Views*, MIDDLEBURY CAMPUS (Apr. 25, 2019), https://middleburycampus.com/44727/opinion/dear-college-reject-this-tale-of-two-world-views/ [https://perma.cc/5T7K-JSBB] ("Freedom of speech, freedom of inquiry, freedom of academic exploration are on one side.... On the other side is the hope that colleges and universities will not sponsor such dehumanizing ideologies by giving their proponents this kind of unchallenged stage.").

14. *See* Suzanne B. Goldberg, *Free Expression on Campus: Mitigating the Costs of Contentious Speakers*, 41 HARV. J.L. & PUB. POL'Y 163, 166-70 (2018).

are persuasive. The point, though, is that these considerations are best understood not as interpretive arguments about constitutional free speech guarantees but rather as merits arguments in favor of a permissive campus speech policy. Colleges and universities, whether public or private, should have the discretion to reject these arguments in favor of more interventionist approaches. They should also have the discretion to experiment with different approaches to security costs for provocative speech. That is, rejecting or canceling a speaker because of a school's inability to afford security born of a predictive concern about the behavior of protesters should be permitted under the First Amendment, notwithstanding long-standing suspicion of allowing a "heckler's veto."[15] This posture creates an incentive for individuals and groups to engage in or threaten disruptive acts,[16] and so carries its own risk of moral hazard, but whether to abide that risk should fall within a university's discretion.

That discretion is appropriate as a matter of first principles in light of the role colleges and universities play in public life.[17] The discourse of rights in campus policy debates distracts students from the need to persuade each other of the merits of their arguments.[18] Building some distance from that discourse is also helpful in developing best practices around campus speech, permitting policy experimentation otherwise choked off by a more absolutist approach to free speech.[19]

There is a broader point. We are accustomed to thinking about the risk that a government unconstrained by rights will abuse its power. Lee Bollinger emphasized the importance of guarding against this danger in the realm of freedom of speech.[20] For Bollinger, we answer this challenge by "giv[ing] judges as little room to maneuver as possible ... [by] extend[ing] the boundary of the realm of protected speech into the hinterlands of speech in order to minimize the potential harm from judicial miscalculation and

15. *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 140, 142 (1992) (Rehnquist, C.J., dissenting); Terminiello v. City of Chicago, 337 U.S. 1, 4-5 (1949).

16. *See* Goldberg, *supra* note 14, at 184-85.

17. *See infra* Part III.

18. *See* Goldberg, *supra* note 14, at 166-69.

19. *See infra* Part IV.

20. LEE C. BOLLINGER, THE TOLERANT SOCIETY 78 (1986).

misdeeds."[21] Vincent Blasi discussed freedom of speech in similar terms, writing that "the overriding objective at all times should be to equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically."[22] Blasi has termed this point of view "the pathological perspective,"[23] and it is as powerful an idea within First Amendment law as anywhere else.

But the conferral of a right is itself a grant of, at times, extraordinary power to contravene the wishes of public officials or other members of one's community.[24] There are pathologies evident within this practice as well, and they warrant our attention. Our free speech paradigm is an inheritance from the 1960s, a period of radical social and political change.[25] Free and often provocative speech was an engine of that transformation, and college campuses were an important site of such speech.[26] There is good reason, though, for the form of constitutional law to match the kinds of conflicts it is typically, rather than aberrationally, called to police. Curating speech might be not only appropriate, but also necessary in a world in which speech is not scarce but is abundant and paralyzing. Colleges are precisely the institutional actors to experiment with the policy choices appropriate to a twenty-first century social and technological environment. Free speech doctrine should give them the space to do so.

I. A DEFINITION

Moral hazard has its conceptual origins in the insurance business. For nineteenth-century fire insurers, Tom Baker writes, a moral hazard could apply either to individuals or to situations.[27]

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21. *Id.*

22. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449-50 (1985).

23. *Id.* at 449.

24. *See* J. Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 CALIF. L. REV. 277, 279 (2010).

25. *See infra* notes 114-22 and accompanying text.

26. *See infra* notes 114-22 and accompanying text.

27. Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 250 (1996).

According to Baker, "[t]he 'moral' insured was honest, careful, chaste, thrifty, hard working, moderate in habits, and ... did not gamble."[28] Situations giving rise to moral hazard were those that increased the temptation to engage in behavior that caused loss.[29] Early uses of the term meant precisely to emphasize its normative dimensions, and indeed, identifying someone as a "moral hazard" formed the basis for an outright refusal to insure.[30]

The term migrated into the economic theory literature in the 1960s when Kenneth Arrow discussed moral hazard in the context of medical insurance.[31] Arrow observed that the cost of medical care depends not just on the nature of the illness, which we can assume is unpredictable, but also on the choice of doctor and the decision of which medical services to pursue.[32] Such decisions are at least partly within the patient's control and can be expected to be more extravagant if a third party bears the cost.[33] In an influential reply to Arrow, Mark Pauly emphasized that the decision to seek more medical care in the presence of insurance was "a result not of moral perfidy, but of rational economic behavior."[34] In an ordinary insurance model, "the cost of the individual's excess usage is spread over all other purchasers of that insurance," and so "the individual is not prompted to restrain his usage of care."[35] The upshot is that even in an ideal competitive environment, the optimal level of insurance would not be full insurance if—as in a moral hazard situation—the fact of insurance influences its cost.[36]

Arrow's response to Pauly's point about the morality of moral hazard is worth mention, as it bears upon this Essay's themes. Noting that "moral perfidy" and "rational economic behavior" are not mutually exclusive in this context, Arrow wrote that, even if seeking additional medical care because one is insured is rational,

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28. *Id.* at 249.

29. *See id.* at 250-51.

30. *See id.* at 251, 253; Pauly, *supra* note 1, at 535. Insuring people who posed moral hazards was sometimes equated to gambling. *See* Baker, *supra* note 27, at 254-55.

31. *See* Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941, 961 (1963).

32. *Id.*

33. *Id.*

34. Pauly, *supra* note 1, at 535.

35. *Id.*

36. *See id.*

"[i]t does not follow that no constraints ought to be imposed or indeed that in certain contexts individuals should not impose constraints on themselves."[37] An incentive to spend as much as one wants to on medical care with a third party bearing the cost does not lead to a socially optimal allocation of resources, and so, Arrow argued, it makes some sense for insurance companies to exercise some cost control.[38] This regulation could occur through auditing, by leaning on "the professional ethics of physicians," or by relying on "the willingness of the individual to behave in accordance with some commonly accepted norms."[39]

We can translate some of these insights into the very different context of constitutional rights enforcement. To the degree the behavior rights protect is costly to engage in, rights protection of course imposes social costs. These costs may be understood as simply the wages of living in a rights-respecting society. Certain forms of discrimination—on the basis of race, sex, religion, and so forth—are not permitted even if the discriminatory acts are economically efficient and a net positive under some utilitarian calculus.[40] Americans may keep loaded handguns in their homes even if it increases the risk of a tragic outcome.[41] The most extreme example in the free-speech domain may be the disfavoring of the so-called "heckler's veto."[42] Speech is not to be suppressed on the basis of the illegal, violent, or aggressive acts of a hostile audience, even if protecting the speaker from the audience imposes significant costs.[43] Heckler's veto doctrine arose out of the civil rights movement, in which civil rights protesters frequently faced threats from potentially violent mobs of resistors.[44]

Constitutional moral hazard is not about these first-order costs. What it aims at instead is the marginal cost imposed by the presence of the rights regime itself. What it contemplates is an

37. Kenneth J. Arrow, *The Economics of Moral Hazard: Further Comment*, 58 AM. ECON. REV. 537, 538 (1968).

38. *Id.*

39. *Id.*

40. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 191 (1977).

41. *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

42. *See* Reno v. ALCU, 521 U.S. 844, 880 (1997).

43. *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 134-35 (1992).

44. *See* Gregory v. City of Chicago, 394 U.S. 111, 111-12 (1969); Cox v. Louisiana, 379 U.S. 536, 550 (1965); Edwards v. South Carolina, 372 U.S. 229, 231 (1963).

individual who engages in protected behavior at least in part *because* the behavior is protected. It would encompass, for example, a white student who seeks admission to a school for which he or she is not a good fit, because he or she wishes to challenge the school's race-based affirmative action policy. And there are countless examples of individuals acting carelessly with guns in order to make a point about gun rights.[45]

There is good reason to think an analogous response especially tempting in the context of freedom of speech. We need not generally assume that most people are Holmesian bad men,[46] even as the pejorative adjective "moral" sounds bracing and accusatory.[47] In the context of speech, however, not only is the underlying behavior often cheap, but the social cost is often hidden or even, from the perspective of the speaker, desirable.[48] We may assume that at least some challengers to affirmative action programs do not specifically intend to damage the academic prospects of minority students. We may assume that those who tote guns to flaunt their Second Amendment rights do not intend to kill or injure people. By contrast, provocative speakers often want, specifically, to offend their targets, to alter the nature of public discourse, and to trigger a public response.[49]

As in insurance markets, a rational response to constitutional moral hazard would be incomplete coverage; that is, rights that are not absolute but depend on some cost-benefit analysis. Generalizing from Arrow's discussion of medical insurance markets,[50] it might be

45. *See, e.g.*, Marwa Eltagouri, *The Story Behind the Viral Photo of a Kent State Graduate Posing with Her Cap—and a Rifle*, WASH. POST (May 17, 2018), https://www.washingtonpost.com/news/grade-point/wp/2018/05/16/the-story-behind-the-viral-photo-of-a-kent-state-graduate-posing-with-her-cap-and-a-rifle/ [https://perma.cc/A6KX-7QBU].

46. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.").

47. *See* Pauly, *supra* note 1, at 535.

48. *See, e.g.*, Goldberg, *supra* note 14, at 168; John A. Tures, *Have Professional Provocateurs Hurt Colleges and Conservatives?*, HUFFPOST (July 18, 2017, 10:50 AM), https://www.huffpost.com/entry/have-professional-provocateurs-hurt-colleges-and-conserva tives_b_596e1fb9e4b05561da5a5ab8 [https://perma.cc/9T2D-RX7P].

49. *See* Pauly, *supra* note 1, at 535.

50. *See* Arrow, *supra* note 37, at 538.

appropriate for courts (here standing in for insurance companies) to make contextual judgments about the exercise of free speech on campus or for universities (here analogized to physicians) to refer to their own institutional norms to limit potentially costly speech. And, as in the context of medical insurance, we would ordinarily want to rely on social norms to encourage rights bearers to self-regulate.[51]

An initial question for this Essay's area of concern, then, is whether we should understand positive, constitutional law to preclude these kinds of responses to constitutional moral hazard in the particular case of freedom of speech on public university campuses.

II. THE FIRST AMENDMENT'S LIMITS

The First Amendment addresses freedom of speech in its first clause: "Congress shall make no law ... abridging the freedom of speech."[52] Some commentators have taken this language to suggest that the First Amendment codifies a nearly absolute right against government interference with one's ability to speak freely.[53] Analysis of this sort is especially common in comparative work that seeks an explanation for the robust protections U.S. courts give to freedom of speech as compared to other courts around the world.[54] The United States' protection of hate speech and its high bar for liability for acts of defamation against public figures is sometimes said to be baked into the language of the Constitution.[55]

This view is mistaken for several reasons. For one thing, a committed textualist would have to concede that the language of the First Amendment itself does not support absolute protection against government interference with speech. Consider, for example, that the language is addressed to Congress, not to states, executive

51. *See id.*

52. U.S. CONST. amend. I.

53. *See* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960); Wilkinson, *supra* note 24, at 278.

54. *See, e.g.*, Robert Danay, *Copyright vs. Free Expression: The Case of Peer-to-Peer File-Sharing of Music in the United Kingdom*, 8 YALE J.L. & TECH. 32, 42-43 (2006); Edward J. Eberle, *The Architecture of First Amendment Free Speech*, 2011 MICH. ST. L. REV. 1191, 1196-97.

55. *See, e.g.*, Eberle, *supra* note 54, at 1197.

branch officials, or judges.[56] The First Amendment applies to each of these other institutional categories, and they encompass the vast majority of First Amendment cases,[57] but any basis on which the clause might do so absolutely (or nearly so) must be extratextual.

Specifically, the doctrinal route through which freedom of speech applies to state and local actors is the Fourteenth Amendment Due Process Clause.[58] Textually, due process is flexible, requiring a calibration between the substance, weight, and scope of the infringed interest and the process that attends its deprivation. As Justice Felix Frankfurter has explained, giving content to the Due Process Clause requires "striking [a] balance [which] implies the exercise of judgment."[59] Of course, incorporation of the First Amendment against the states presupposes that free speech rights are in some sense "fundamental,"[60] and—at a broad level of generality—that is surely right. But, just as surely, the First Amendment's full scope extends well beyond rights that are "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition."[61] We can only make sense of First Amendment doctrine if particular applications of the general concept of freedom of speech need not meet these tests. The rights to market pharmaceuticals to doctors,[62] to use the corporate form to spend unlimited general treasury sums on electioneering,[63] or to refuse to contribute to the collective bargaining expenditures of the public sector union that negotiates one's employment contract are not "fundamental" in any sense that is respectful of language.[64]

It almost goes without saying that a view of freedom of speech as absolute does not derive from any examination of original meaning or intentions. The best evidence remains that informed members of

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56. *See* U.S. CONST. amend. I.

57. *See, e.g.*, Wisconsin v. Mitchell, 508 U.S. 477, 477-83 (1993); Brandenburg v. Ohio, 395 U.S. 444, 449 (1969); Beauharnais v. Illinois, 343 U.S. 250, 266-67 (1952).

58. *See* Stromberg v. California, 283 U.S. 359, 368 (1931).

59. Sweezy v. New Hampshire, 354 U.S. 234, 267 (1957) (Frankfurter, J., concurring in the result).

60. McDonald v. City of Chicago, 561 U.S. 742, 764 (2010).

61. *Id.* at 764 n.11, 767 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

62. *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011).

63. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 318-19 (2010).

64. *See* Janus v. Am. Fed'n of State, Cty., & Mun. Empls., Council 31, 138 S. Ct. 2448, 2459-60 (2018).

the founding generation did not regard even criminal liability for political speech as necessarily an abridgement of the freedom of speech.[65] That generation was more concerned with prior restraints on speech,[66] which, unlike ex post liability, had the effect of denying the jury a role in assigning criminal sanctions.[67] In that sense, the First Amendment, like the rest of the Bill of Rights, was, at the time, better understood as a federalism provision than as an individual rights provision. The incorporation of the First Amendment against the states did not occur doctrinally until the 1930s,[68] and its presumptively absolute protection is an artifact of post-1960s jurisprudence.[69]

I do not mean to resist certain clear propositions of U.S. free speech law. The Supreme Court has not used substantive due process as the vehicle for articulating the scope of free speech protection as applied to state and local governments. Assimilating incorporation and substantive due process in this way was the preferred path of Justice John Marshall Harlan,[70] but it has been rejected in favor of "selective incorporation."[71] Under selective incorporation, because the rights the First Amendment protects are fundamental (at a high level of generality), the amendment applies to the states in just the same way it applies to the federal government.[72] But the key point, for this Essay's purposes, is that this doctrinal reality does not simply follow syllogistically from any textual or historical proposition.[73] It reflects a set of choices that

65. *See* LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 247-48 (1960).

66. *See id.* at 216-17.

67. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 23-24 (1998).

68. *See* Near v. Minnesota, 283 U.S. 697, 707 (1931); Stromburg v. California, 283 U.S. 359, 368 (1931).

69. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that prohibition of incitement requires finding an intention and likelihood of imminent lawless action); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (upholding a prosecution for group libel); Dennis v. United States, 341 U.S. 494, 516-17 (1951) (upholding a federal statute outlawing advocacy of violent overthrow of the government).

70. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 172 (1968) (Harlan, J., dissenting).

71. Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 295-98 (1982).

72. *See id.* at 253.

73. *See id.* at 336.

courts have made over time and that did not solidify until relatively recently.[74]

The First Amendment cannot be absolute in practice, even as to practices that are concededly speech. Speech can be admitted as evidence of a crime, as in conspiracy cases or hate crime prosecutions.[75] A doctor who intentionally misdiagnoses a patient can be sued for malpractice.[76] A magazine that prints falsehoods that damage an individual's reputation can be found guilty of libel.[77] An employer can, through speech, sexually harass a coworker or create a hostile work environment.[78] These are analogs to Justice Holmes's famous "falsely shouting fire in a theatre" hypothetical[79]: speech can cause harm, and sometimes in such instances we choose to label it as action. The choice to do so does not recognize a prepolitical category or existential reality; it simply tracks the social meanings embodied within the law.

Speech is not absolute even when it is not harmful in itself. Freedom of speech is no society's highest value, and so restrictions on speech can, in rare cases, be deemed to satisfy strict scrutiny: if they serve a compelling state interest to which they are narrowly tailored. The most prominent recent example is *Holder v. Humanitarian Law Project*, where the Court upheld application of the USA PATRIOT Act's prohibition on material support to foreign terrorist organizations to a nongovernmental organization that proposed to assist certain groups in seeking peaceful resolutions to political conflicts.[80] Noting that "the Government's interest in combating terrorism is an urgent objective of the highest order,"[81] Chief Justice Roberts wrote for the majority that Congress had good reason to

74. *See id.* at 336-38.

75. *See, e.g.*, Wisconsin v. Mitchell, 508 U.S. 476, 489-90 (1993); Martin H. Redish & Michael J.T. Downey, *Criminal Conspiracy as Free Expression*, 76 ALA. L. REV. 697, 697, 709 (2013).

76. *See* ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 44-45 (2012).

77. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345-49 (1974).

78. *See* Harris v. Forklift Sys., 510 U.S. 17, 21 (1993).

79. *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

80. 561 U.S. 1, 7-8, 40 (2010).

81. *Id.* at 28.

believe that even peaceful support for terrorist organizations would help them advance more malevolent objectives.[82]

Significantly, the compelling interest test does not require government interests to be stated in a constitutional register. It permits free speech to be limited based on an assessment of values external to the First Amendment and even to the Constitution.[83] And so, how we imagine free speech rests on a set of choices we make—and that courts make, in particular—about which activities are worth pursuing and which institutions society should support.

III. UNIVERSITIES AND ACADEMIC FREEDOM

In February 2017, the right-wing writer and provocateur Milo Yiannopoulos canceled a scheduled speech at UC Berkeley after left-wing activists threw Molotov cocktails, set fires, and caused around $100,000 in property damage in protest.[84] Making good on a vow, Yiannopoulos returned to Berkeley later that year as part of his self-promoted "Free Speech Week," for which the school prepared to spend more than $1 million on security.[85] The event was a flop.[86]

Yiannopoulos's antics provide just one example among many involving race-baiting provocateurs that have made the news in recent years. Two months after Yiannopoulos was shouted down at Berkeley, white nationalist and Nazi sympathizer Richard Spencer was the beneficiary of an order from an Alabama district court requiring Auburn University to permit him to speak there.[87] The

82. *See id.* at 29.

83. *See, e.g.*, *id.* at 28-29 (finding that Congress's concerns regarding terrorism were a compelling interest).

84. *See* Rachel Chason, *Berkeley's Mayor Asked UC Berkeley to Cancel Milo Yiannopoulos Speech. The School Said No*, WASH. POST (Aug. 30, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/08/30/berkeleys-mayor-asked-uc-berkeley-to-cancel-milo-yiannopoulos-the-university-said-no/ [https://perma.cc/3WWC-X766]; Katy Steinmetz, *Fighting Words: A Battle in Berkeley Over Free Speech*, TIME (June 1, 2017), http://time.com/4800813/battle-berkeley-free-speech/ [https://perma.cc/6R6T-SK95].

85. *See* Katy Steinmetz, *Milo Yiannopoulos Finally Spoke at Berkeley. But the Protests Were Louder*, TIME (Sept. 24, 2017), http://time.com/4955245/milo-yiannopoulos-berkeley-free-speech-week/ [https://perma.cc/22ZK-8LEF].

86. *See id.*

87. *See* Padgett v. Auburn Univ., No. 3:17-cv-231-WKW, 2017 WL 10241386, at *1 (M.D. Ala. Apr. 18, 2017). It is noteworthy that the proliferation of incidents of this sort has been categorized under the rubric of "campus speech," but that label seems rather like saying the

judge's order in the case dutifully recited the First Amendment case law to the effect that "discrimination on the basis of message content cannot be tolerated" and "listeners' reaction to speech is not a content-neutral basis for regulation."[88] The opinion made no reference to Auburn's status as a university; the reasoning assumed that the school was just like any other state agency or public official.[89]

While far from universal, courts and commentators have often treated the campuses of public colleges and universities as essentially public fora with no constraining institutional status or rules of access.[90] There are hints of this view in the well-known 1957 Supreme Court case of *Sweezy v. New Hampshire*.[91] Paul Sweezy was a University of New Hampshire economics professor who was held in contempt and jailed for defying a subpoena to appear before a state subversive activities inquiry.[92] The Court reversed the contempt conviction.[93] In holding that the Attorney General of New Hampshire lacked authority under the Due Process Clause to compel Sweezy's appearance, Chief Justice Warren described academic freedom in dramatic terms:

Civil War was about "states' rights." The interesting question was what the states wanted a right to do. Here, likewise, the controversy is as much over campus speech as it is over campus racism. *See* John A. Powell, *Worlds Apart: Reconciling Freedom of Speech and Equality*, 85 KY. L.J. 9, 11-12 (1996). To be sure, these incidents are not about racism in some abstract sense, just as the Civil War was not about slavery in the abstract: the racism here is mediated and weaponized through the medium of speech. But we should be clear that it is "racism" and not "speech" that makes the incidents controversial. If Richard Spencer were doing something other than speaking, protesters would be more, not less agitated.

88. *See Padgett*, 2017 WL 10241386, at *1 (internal quotation marks omitted) (citing Forsyth County v. Nationalist Movement, 505 U.S. 123, 134-35 (1992)).

89. Private institutions are not immune from these controversies. My home institution, Columbia University, witnessed protests in 2017 over campus speeches delivered by anti-Islamic activist Tommy Robinson and alt-right conspiracy theorist Mike Cernovich, both of whom were invited by the College Republicans. *See* Kate Huangpu & Peter Maroulis, *As Hundreds Protest Outside, Mike Cernovich's Columbia Speech Goes on as Planned*, COLUM. DAILY SPECTATOR (Oct. 31, 2017, 3:39 AM), https://www.columbiaspectator.com/news/2017/10/31/as-hundreds-protest-outside-mike-cernovichs-columbia-speech-goes-on-as-planned/ [https://perma.cc/VW78-6TCG].

90. *See* Goldberg, *supra* note 14, at 172-73 ("[C]ourts have not held that educators' discretion extends to excluding invited speakers based on the views those speakers might express.").

91. 354 U.S. 234, 249-50 (1957).

92. *See id.* at 243-45.

93. *See id.* at 254-55.

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.... Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[94]

Justice Frankfurter's concurring opinion in *Sweezy* quotes at length a statement by a group of prominent South African academics then responding to the government's proposed racial segregation of the nation's universities[95]:

> In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates—"to follow the argument where it leads." This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university. The concern of its scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself.[96]

The *Sweezy* case did not concern campus speech or the university as a regulator but, rather, the academic freedom of the university and its faculty in the face of government intimidation.[97] The broader political context of the case was McCarthyism and (as Justice Frankfurter sought to make clear by citing an anti-apartheid

94. *Id.* at 250.

95. *See* Rosaan Krüger, *The Genesis and Scope of Academic Freedom in the South African Constitution*, *in* 8 KAGISANO: ACADEMIC FREEDOM 5, 7 (2013), https://www.che.ac.za/sites/default/files/publications/kagisano_no_8_march_2013.pdf [https://perma.cc/C4ND-7SCX].

96. *Sweezy,* 354 U.S. at 262-63 (Frankfurter, J., concurring in the result) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 10-12).

97. *See id.* at 249-50.

statement) the burgeoning civil rights movement.[98] Yet, language of this sort has migrated into the very different context of the rights of students or even off-campus speakers as against university officials seeking to limit their speech.

The tension between these different contexts is evident in *Doe v. University of Michigan*, the best known of a series of judicial decisions addressing so-called "speech codes" at public universities in the 1980s.[99] Over a three-year stretch, the University experienced a number of disturbing incidents of racial harassment:

> For example, on January 27, 1987, unknown persons distributed a flier declaring "open season" on blacks, which it referred to as "saucer lips, porch monkeys, and jigaboos." On February 4, 1987, a student disc jockey at an on-campus radio station allowed racist jokes to be broadcast. At a demonstration protesting these incidents, a Ku Klux Klan uniform was displayed from a dormitory window.[100]

In response to these incidents and attendant pressure from students, faculty, and legislators, the school instituted a code of conduct that targeted stigmatization, harassment, and intimidation on various protected grounds, including race, religion, sex, and sexual orientation in "educational and academic centers."[101] The policy varied liability and sanctions based on the nature and location of the violation, and it excluded school-sponsored publications from coverage.[102]

A psychology graduate student sued claiming that his discussion of scientific theories implicating racial and sex differences might expose him to sanction, and he won.[103] The district court noted a number of constraints that the government may permissibly impose on speech acts, including those predicated on conduct such as

98. *See supra* note 95 and accompanying text.
99. *See* 721 F. Supp. 852, 854, 856-57 (E.D. Mich. 1989).
100. *Id.* at 854.
101. *Id.* at 856.
102. *See id.*
103. *See id.* at 853-54, 858.

discrimination,[104] imminent lawlessness,[105] fighting words,[106] and obscenity,[107] as well as time, place, and manner restrictions.[108] The opinion goes on, however, to say that "[w]hat the University [cannot] do ... [is] establish an anti-discrimination policy which ha[s] the effect of prohibiting certain speech because it disagree[s] with ideas or messages sought to be conveyed."[109] The court did not suggest that a university has different rights or immunities by virtue of its status as an educational institution, but it did suggest some additional *obligations*. Citing *Sweezy*, the court wrote that "[t]hese principles acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission."[110]

The notion that universities have special duties to permit unfettered speech seems to me quite wrong, as is the use of *Sweezy* to support that proposition. Taking the second point first, *Sweezy* was, as noted, a case about the academic freedom of the university and its faculty. The university—in that case, a public one—was the regulated entity, and other, more coercive state institutions were the regulators.[111] What academic freedom means is that it is not for the government—*including a court*—to decide what is "essential to the [school's] educational mission."[112] There is a suggestion in the *Doe* case that the university adopted its code of conduct under threat of defunding by the legislature.[113] It would be consistent with *Sweezy* to say that the legislature is constitutionally forbidden from

104. *See id.* at 861.

105. *See id.* at 862-63 (citing Brandenburg v. Ohio, 395 U.S. 444 (1969)).

106. *See id.* at 862 (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).

107. *See id.* at 863 (citing Miller v. California, 413 U.S. 15 (1973)).

108. *See id.* (citing Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640 (1981)).

109. *Id.* There is some unacknowledged tension in this formulation. Antidiscrimination law is predicated on the government holding a view about which messages are and are not appropriate for private individuals to convey. *Cf.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring) (suggesting that it impermissibly violates neutrality to scrutinize the anti-gay views of a religious claimant more closely than the anti-homophobic views of a secular one).

110. *Doe*, 721 F. Supp. at 863 (citing Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).

111. *See Sweezy*, 354 U.S. at 236.

112. *Doe*, 721 F. Supp. at 863 (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); *Sweezy*, 354 U.S. at 250; *see also* Grutter v. Bollinger, 539 U.S. 306, 328 (2003) ("The Law School's educational judgment that ... diversity is essential to its educational mission is one to which we defer.").

113. *See Doe*, 721 F. Supp. at 854.

making good on that threat. It would not be consistent with *Sweezy* to say that the university itself cannot forbid certain forms of discriminatory speech based on its own determination that such speech is inconsistent with its educational mission.

The broader proposition that a university is a special site for unabashed freedom of speech is an inheritance of the 1960s.[114] Yiannopoulos picked on Berkeley for a reason. Most obvious is the campus's famously progressive orientation.[115] It could be expected that Berkeley students would react strongly to his presence—be "triggered," in contemporary (often pejorative) parlance—and eliciting such reactions is Yiannopoulos's *raison d'etre*.[116] But Berkeley's symbolism as the host of a putative "free speech week" also owes a debt to its history in relation to freedom of speech specifically.[117] Berkeley was the home of the Free Speech Movement, the student-led uprising that galvanized university student activism in the mid-1960s.[118]

College campuses had a very different reputation before that movement. Indeed, in 1964, officially recognized student groups were not allowed to address off-campus issues on Berkeley's campus.[119] In protest of that ban, thousands of Berkeley students occupied an administration building, picketed, and engaged in sit-ins and other forms of civil disobedience.[120] The Free Speech Movement was the model for mass activism on college campuses later in the decade, particularly in response to the Vietnam War.[121] When commentators today tie college campuses to unfettered

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114. *See generally* THE FREE SPEECH MOVEMENT: REFLECTIONS ON BERKELEY IN THE 1960S (Robert Cohen & Reginald E. Zelnik eds., 2002) [hereinafter THE FREE SPEECH MOVEMENT].

115. *See* Emily Deruy, *UC Berkeley Tries to Reclaim Its Free Speech Legacy*, MERCURY NEWS (Aug. 25, 2017, 4:56 AM), https://www.mercurynews.com/2017/08/24/uc-berkeley-tries-to-reclaim-its-free-speech-legacy/ [https://perma.cc/7C8Y-DSE3].

116. *See* Dan Lieberman, *Milo Yiannopoulos Is Trying to Convince Colleges that Hate Speech Is Cool*, CNN (Feb. 2, 2017, 11:54 PM), https://www.cnn.com/2017/02/02/us/milo-yiannopoulos-ivory-tower/index.html [https://perma.cc/FL9W-LJR6].

117. *See* Steinmetz, *supra* note 85.

118. *See* THE FREE SPEECH MOVEMENT, *supra* note 114.

119. *See* Leon F. Litwack, *Preface to* THE FREE SPEECH MOVEMENT, *supra* note 114, at xiii; Deruy, *supra* note 115.

120. *See* Robert Cohen, *This Was* Their *Fight and* They *Had to Fight It: The FSM's Nonradical Rank and File*, *in* THE FREE SPEECH MOVEMENT, *supra* note 114, at 227-28.

121. *See* Leon Wofsy, *When the FSM Disturbed the Faculty Peace*, *in* THE FREE SPEECH MOVEMENT, *supra* note 114, at 350-52.

freedom of speech, they are reflecting the legacy of the Free Speech Movement.[122]

But important as the movement was to its historical moment, the values it represents are not inherent in the mission of an institution of higher education. Indeed, that mission is, if anything, antithetical to the idea of campuses as free speech zones.[123] The purpose of a university is to prepare students for citizenship. Universities do so by curating speech; that is, by discriminating with regard to the content and viewpoint of the speech to which students are exposed consistent with the pedagogical judgments of faculty and administrators.

Begin with admissions. Campus classrooms, auditoriums, and other spaces are typically restricted to members of the university community except to the degree the school chooses, for its own reasons, to make them accessible to the broader public.[124] Students belong to that community by virtue of the fact that they have been selected for admission to the school. A typical college or university does not choose students randomly or indiscriminately. Rather, it makes a judgment about which students are prepared for the school's curriculum, have the potential to succeed within it, are likely to donate to the school or generate revenue through athletics or other extracurricular activities, or will contribute to the educational experiences of other students.[125] As the Supreme Court has

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122. *See* Heidi Kitrosser, *Free Speech, Higher Education and the PC Narrative*, 101 MINN. L. REV. 1987, 2003-04 (2017) (collecting sources linking freedom of speech to college campuses). As Frederick Schauer writes, First Amendment claims within the popular culture extend beyond what doctrine protects: "Academics even at private universities frame their pleas for academic freedom in the language of the First Amendment, just as students at those universities who feel their speech has been restricted make explicit recourse to the First Amendment in articulating their complaints." Frederick Schauer, *Hohfeld's First Amendment*, 76 GEO. WASH. L. REV. 914, 921 (2008).

123. *See* Christian Legal Soc'y v. Martinez, 561 U.S. 661, 702 (2010) (Stevens, J., concurring) ("The campus is ... a world apart from the public square in numerous respects.").

124. *See* Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981) ("A university differs in specific 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."); Bloedorn v. Grube, 631 F.3d 1218, 1233-34 (11th Cir. 2011) ("[A university's] essential function is not to provide a forum for general public expression and assembly; rather, the university campus is an enclave created for the pursuit of higher learning by its admitted and registered students and by its faculty.").

125. *See* Judy Mandell, *What College Admissions Officers Say They Want in a Candidate*,

recognized in the context of race-based affirmative action cases, this last factor in particular incorporates judgments about the perspectives students will bring to discussion both inside and outside the classroom.[126] In other words, universities engage in viewpoint discrimination in admitting students, and they do so pervasively. We need not assume that schools are partisan in their choices, though some may be, but merely that they are attentive to the mix of perspectives students offer and the likely quality of their contribution to the classroom.

Let us not mince words. A student who is demonstrably brilliant but demonstrably racist can and should be denied admission to a university, public or private. Should that racism emerge after the student is admitted, he or she can and should face discipline or possibly expulsion. The judgment that such a student does not belong in a university community is, of course, in part a matter of communicating and demonstrating respect for other students within the community (if not shielding them from actual abuse), but it also reflects a distinctively academic judgment about the quality of that student's contribution to university life. Racist views are worse than non-racist ones, all else equal. Academic freedom includes the freedom of a university to act on that judgment. Paul Horwitz gets it just right when he says that even if, in general, "government should be barred from making judgments about the value of particular speech acts based on the content of the speech," doing so "is exactly the job of universities: to *judge* student speech on its merits—and, often, to find it wanting."[127]

Apart from admissions, the most obvious way in which schools engage in viewpoint discrimination at their very core is in the selection of faculty. Faculty are chosen, ideally, on the basis of their professional quality. Faculty recruitment and retention rewards expertise, creativity, and quality of argument. Faculty who advance and defend outrageous, unsupported, or offensive arguments are

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WASH. POST (Aug. 30, 2016), https://www.washingtonpost.com/news/parenting/wp/2016/08/30/what-21-college-admissions-officers-say-they-want-in-a-candidate/ [https://perma.cc/4HYN-U2UX].

126. *See* Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2208, 2210 (2016) (citing Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2419 (2013)); Grutter v. Bollinger, 539 U.S. 306, 329 (2003) (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 264, 313, 318-19 (1978)); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978).

127. PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 115 (2013).

routinely and appropriately denied positions or refused tenure.[128] Needless to say, faculty hiring is an imperfect process, but some of its failings reflect precisely the cost of granting educational institutions significant discretion to choose their educators. Brilliant but racist or misogynistic faculty members, like students who share these qualities, should not be invited into university communities.

Of course, part of preparing students for democratic citizenship might well include preparing them to be autonomous moral agents, to engage in self-fulfilling activities, to exercise expressive license, and to tolerate the divergent or even repugnant views of others. But cultivating these traits might or might not entail allowing their unfettered exercise on campus.[129] Moreover, the university's mission also includes other aspects of education, including conferring substantive knowledge and helping students to develop empathy, live within a community governed by social norms, and learn to persuade others through argument rather than overwhelm them through offense.[130] Excluding some speakers on the basis of the content of or views expressed within their speech is not just something a university might do to make its students feel better or to prevent emotional or psychological harm to them (though it is those things also); it is a school's affirmative calling.

That calling is more urgent in the current information environment. It is not difficult for students to gain exposure to a wide range of ideas. The Internet, books, magazines, television, and social media perform this task very well. What is difficult, rather, is for students to discern valuable information from information that is ill-informed or is tailored to distract or mislead its recipients. A university's decision not to permit carnival barkers or racist speakers on campus is intimately consistent with its role in a democratic society. We need curating more than ever, and universities are the institutions that have long served that function.

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128. *But see* Josie Glausiusz, *Tenure Denial, and How Early-Career Researchers Can Survive It*, NATURE (Jan. 25, 2019), https://www.nature.com/articles/d41586-019-00219-5 [https://perma.cc/TYL8-SVWG] (explaining that some faculty may be denied tenure based on discrimination).

129. *See* Horwitz, *supra* note 127, at 113 ("Universities are not a free or unregulated marketplace of ideas, although the regulations are internal rather than external. They are laboratories *for* democracy, not laboratories *of* democracy: they contribute to democratic discourse, but not by following its rules.").

130. *See* Goldberg, *supra* note 14, at 168-69.

IV. UNIVERSITIES AS SPEECH LABORATORIES

The upshot is that courts should give leeway to both public and private universities to define and execute their academic missions as they see fit.[131] It is not that those missions must include speech codes or must exclude campus speakers on the basis of their viewpoints. Rather, the claim is that these decisions should be made on the merits and not in the long shadow of the First Amendment.

Let us return to the idea of constitutional moral hazard. It refers to the incentive to indulge in constitutionally protected acts because of the fact of rights enforcement. The acts that rights protect impose costs on others, but the conferral of a right disables the government from requiring the actor to bear those costs. In the absence of rights enforcement, those costs can—following Arrow—be contained either through direct regulation of the actor, through private regulation by intermediary parties in a position to exercise leverage, or through social norms.[132] Unmitigated enforcement of campus speech rights prevents regulation of speakers by the government and disempowers universities—the most natural intermediaries—from intervening.[133] And it influences social norms of civility and persuasion in the wrong direction by encouraging students to invest their arguments with the polarizing, zero-sum language of rights. Free speech protection reduces the incentive to persuade skeptics and clouds our thinking about whether and under what circumstances provocative speech is actually a good idea.

The merits argument in favor of applying a light touch to campus speech regulation is powerful. Most significant to my mind is inculcating the value of tolerance.[134] Living in a pluralistic society means being surrounded by people holding views that one disagrees

131. *See* Christian Legal Soc'y v. Martinez, 561 U.S. 661, 702 (2010) (Stevens, J., concurring) ("As a general matter, courts should respect universities' judgments and let them manage their own affairs.").

132. *See* Arrow, *supra* note 37, at 538.

133. *Cf.* Erwin Chemerinsky, *Hate Speech Is Protected Free Speech, Even on College Campuses*, VOX (Dec. 26, 2017, 4:33 AM), https://www.vox.com/the-big-idea/2017/10/25/16524832/campus-free-speech-first-amendment-protest [https://perma.cc/68RU-3BMX] (arguing that even hate speech is protected by the First Amendment, but that colleges can take steps like regulating when and where speech takes place).

134. *See generally* BOLLINGER, *supra* note 20.

with.[135] Democratic politics requires engagement with such people: to negotiate compromises, to develop empathy for them as fellow community members and human beings, and to accept the basic legitimacy of their position when it is politically ascendant. University campuses are often dominated by large majorities who share similar politics and can encourage groupthink.[136] Growing into citizenship within a silo of this sort can ill-prepare students for the real world.

Relatedly, even if one believes that universities should nonetheless distinguish racist or intentionally provocative speakers from those who, say, are seeking to expose students to challenging academic theories, drawing this line is difficult in practice. Racist or sexist theories can be couched in misleading or pseudoscientific terms, and well-supported research can have disturbing implications for racial or gender equality. The administrators making these judgments can be ill-informed or biased, often in ways that are themselves subject to academic contestation. As Heidi Kitrosser writes, "the very nature of the social prejudices that critical theorists describe—specifically, their manifold and deeply ingrained ubiquity—makes the task of line-drawing between actionable and permissible speech content intrinsically precarious."[137]

As noted, regulating campus speech can fall felicitously into the hands of the speakers one wishes most to regulate. A prior restraint calls attention to the targeted speakers. The National Socialist Party, the neo-Nazi group that famously proposed to march in Skokie, Illinois, a town with an unusually large population of Holocaust survivors, received no greater gift than the efforts of both Chicago and Skokie to prevent them from marching.[138] Indeed,

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135. *See* Goldberg, *supra* note 14, at 166-67 ("One might argue that safeguarding this space, where views can not only be expressed but also challenged, takes on special importance at a time when surrounding communities are polarized and many people are increasingly reluctant to engage with views contrary to their own.").

136. Those politics are often, but by no means always, on the left side of the political spectrum. *See* Christopher Ingraham, *The Dramatic Shift Among College Professors That's Hurting Students' Education*, WASH. POST (Jan. 11, 2016), https://www.washingtonpost. com/news/wonk/wp/2016/01/11/the-dramatic-shift-among-college-professors-thats-hurting-students-education/ [https://perma.cc/F4YE-XFUD] (arguing that college professors have become more liberal since 1990, but that the increase has not been as dramatic among students).

137. Kitrosser, *supra* note 122, at 2038.

138. *See* DONALD ALEXANDER DOWNS, NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE

despite the group's court victories eventually leading to a march permit, the Skokie march never took place.[139] For provocateurs, their objective is not primarily to engage with students on a particular campus but rather to generate publicity for themselves and their larger cause. "*What are they afraid of?*," they can say of a school that prevents them from speaking, thereby lending unearned legitimacy to their substantive positions.[140] Apart from the Yiannopouloses and Spencers of the world, the boorish behavior—epithets, harassment, and the like—that often gets swept up in speech codes (frequently under the influence of alcohol) should be universally condemned but instead receives a principled constitutional defense. Kitrosser cites a 1993 *Los Angeles Times* article on the "speech code" at the University of Wisconsin that puts the point succinctly: "Invoked arbitrarily, without consistency or logic, it had made First Amendment martyrs out of drunken yahoos."[141]

The merits case in favor of some speech restrictions on campus is also a strong one. Most prominent, of course, is the school's educational mission and its role as curator of speech, as discussed. The school's role is not just to support experimentation but to encourage civility and to emphasize the role of persuasion in democratic discourse. It amplifies this point to note that the publicity runs in both directions. A poorly supported argument can acquire some heft simply from its setting at a university. "Put another way," Goldberg writes, "providing these speakers with a college or university platform can elevate pseudoscience, debunked methodologies, or falsified historical accounts to students who do not have the knowledge or training to doubt the views being advanced."[142] And the argument that restrictions on speakers can provide a larger platform than permitting them to speak can be overstated in the

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FIRST AMENDMENT 1-2 (1985).

139. *See id.*

140. *See* Goldberg, *supra* note 14, at 170. Yiannopoulos's announcement of "free speech week" after he was deterred from speaking at Berkeley served his publicity ends far better than they would have been served had he simply delivered his remarks without incident.

141. Barry Siegel, *Fighting Words: It Seemed Like a Noble Idea—Regulating Hateful Language. But When the University of Wisconsin Tried, Its Good Intentions Collided with the First Amendment*, L.A. TIMES (Mar. 28, 1993), http://articles.latimes.com/1993-03-28/magazine/tm-15949_1_fighting-word/6 [https://perma.cc/V9ZD-VPPT]; *see also* Kitrosser, *supra* note 122, at 2008 (citing *id.*).

142. Goldberg, *supra* note 14, at 182.

current social media environment, in which the imprimatur of institutional intermediaries such as universities can enable a speaker to rise above the cacophony of voices competing for audience attention.[143]

It is also not to be overlooked, of course, that permitting racists on campus imposes harm on students. There is the expressive harm of their university's stamp on speech that demeans or belittles many of its students.[144] There is the burden in time and energy of having to defend against, rebut, or protest claims that stigmatize them, a cost minority students bear to a far greater degree than majority students.[145] There is the emotional harm to students who hear and are offended by racist speech.[146] These harms are not actionable under the First Amendment, and this Essay does not suggest they should be, but we should not let the discourse of rights blind us to the fact that they are indeed harms.[147] It goes without saying that a university generally should have the capacity to protect its students from injury.

And so the case for permitting racist speakers on campus is certainly not an obvious one. Reasonable people, all of whom support liberal values and constitutional democracy, can and do disagree about whether it is appropriate on the merits. Different schools can and should therefore implement different policies with respect to offensive campus speech by both students and other campus speakers. Policies can vary along any number of dimensions: the specific acts covered, the severity of those acts, the level of sanction imposed, the nature of any approval or hearing process, the structure and composition of the administrative decision-making body, the degree of autonomy granted to student groups, how to regulate counterspeech, and policies respecting security arrangements and especially how those arrangements are funded or insured.

This last subject of variation is of special importance for universities. As noted, the first Yiannopoulos appearance at Berkeley ended

143. *See generally* TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS (2016).

144. *Cf.* Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 760-62 (1998).

145. *See* Louwanda Evans & Wendy Leo Moore, *Impossible Burdens: White Institutions, Emotional Labor, and Micro-Resistance*, 62 SOC. PROBS. 439, 452 (2015).

146. *See id.* at 448.

147. *See* BOLLINGER, *supra* note 20, at 39.

up costing $100,000 in property damage, and the school committed to paying $1 million in security for Yiannopoulos's subsequent "Free Speech Week."[148] Other universities may wish not to pay this ransom and prefer instead to deny controversial speakers a place at the dais. Public schools who make that decision have good reason to fear current doctrine, which seems to frown upon refusals to permit someone to speak based on the likelihood of a hostile audience.[149] But as Fred Schauer has pointed out, current doctrine is less clear than it might appear:

> We know that law enforcement must take all reasonable steps before shutting down a speaker whose words have created a dangerous situation, but we know little about what counts as reasonable; what degree of deployment a police department is required to use; and whether a local police department is required to call upon county law enforcement, state law enforcement, or state military (i.e., the National Guard) forces before taking action against the speaker.[150]

A different approach to freedom of speech in this domain can enable variation in approaches to motivate a set of best practices.[151] Opening up space for experimentation by localized institutions is sometimes touted as a benefit of federalism at the level of constitutional structure.[152] Federalism is not as often given a role to play in adjudicating constitutional rights in the United States. We have no doctrine akin to the margin of appreciation that has developed at the European Court of Human Rights and permits some room for

148. *See* Chason, *supra* note 84 and accompanying text.

149. *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 134-35 (1992) (footnote omitted) ("Listeners' reaction to speech is not a content-neutral basis for regulation.... Speech cannot be ... punished or banned, simply because it might offend a hostile mob.").

150. Frederick Schauer, *The Hostile Audience Revisited*, KNIGHT FIRST AMEND. INST. (Nov. 2, 2017), https://knightcolumbia.org/content/hostile-audience-revisited [https://perma.cc/36FY-86S4]; *see also* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1266 (1995) ("Although this focus on 'listeners' reaction' could be a powerful and far-reaching principle, it is not at all clear what it means.").

151. Best practices guidance is needed for both public and private universities, which have much more in common with each other than public schools have in common with other governmental bodies.

152. *See, e.g.*, Steven G. Calabresi & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law*, *in* FEDERALISM AND SUBSIDIARITY 123, 129-30 (James E. Fleming & Jacob T. Levy eds. 2014).

Council of Europe member states to develop human rights law in accordance with local democratic conditions.[153] The absence of any such doctrine in American law may be explained in part by the legacy of *Brown v. Board of Education*.[154] Southern legislators and school boards followed the decision with a campaign of "massive resistance" that emphasized the connection between education and local autonomy.[155] But local autonomy in the service of policy variation around racist speech on campus is simply not the same when it is instead in the service of legally enforced white supremacy.

It is instructive in this regard to note that the movement in favor of campus speech codes dissipated primarily due to self-regulation rather than court decisions.[156] Schools are governed by their own internal norms and face pressure from their own internal ecosystems of faculty, administrators, and students, not to mention external pressure from politicians, citizens, or the demands of a competitive educational market.[157] Overzealous enforcement of speech restrictions generates resistance, and there is little reason to think that such resistance is unlikely to be effective in this space.

CONCLUSION

Moral hazard enables the insured to take advantage of information asymmetries in insurance markets. Constitutional moral hazard enables rights holders to take advantage of asymmetries in constitutional rights. In either case, moral hazard induces a departure from the socially optimal allocation of resources. In the constitutional domain, even if we believe strong enforcement of constitutional rights is necessary for reasons of morality or positive constitutional law, it must be conceded that rights enforcement imposes costs and that rights enforcement itself induces regulated parties to engage in additional costly behavior. The presence of moral hazard is not a reason not to pursue strong rights

153. *See* Judith Resnik, *Federalism(s)' Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations*, *in* FEDERALISM AND SUBSIDIARITY, *supra* note 152, at 390-97.

154. *See* 347 U.S. 483, 495 (1954).

155. *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 150-73 (3d rev. ed. 1974).

156. *See* Kitrosser, *supra* note 122, at 2005-06.

157. *See, e.g.*, Dale Russakoff, *Penn Is Abandoning Speech Code: 'Water Buffalo' Epithet Led to Racial Harassment Charge*, WASH. POST, Nov. 17, 1993, at A1.

enforcement, just as it is not a reason not to insure people against harm. But it is a reason to think carefully about the costs moral hazard imposes in particular contexts, and whether it is possible or desirable to mitigate those costs.

We can expect provocative campus speech to be unusually susceptible to constitutional moral hazard. It is often cheap to produce, and many of its costs—offense to targets, negative publicity, and preventive security measures—are not just borne by third parties but, in fact, are the purpose of the speech acts. We can expect provocative campus speech protected through rights enforcement to occur at a considerably higher rate—with the attendant social loss—than it would occur under mechanisms of direct regulation, intermediary regulation, or social norms.

The appropriateness of this blunt approach is questionable. Colleges and universities, whether public or private, are not best conceived as free speech zones. Universities exert control over the speech environment from the moment of admission for their own academic and pedagogical purposes, and they have enjoyed a measure of constitutional protection in making those choices. Especially in the current information environment, we should view colleges as models not for how to speak freely but for how to speak well.