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Persuasive Attack and Defense of Campus Free Speech: Implications for the First Amendment

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Persuasive Attack and Defense of Campus Free Speech: Implications for the First Amendment

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This essay examines controversies and exchanges regarding free speech on college and university campuses in the United States. The authors offer an overview of the general discord about free speech and a review of the most current and relevant jurisprudence. Following this, theories of persuasive attack (Benoit and Dorries, 1996; Legge et al., 2012) and persuasive defense (Benoit, 1995) are used as a lens to characterize the topoi (opportunities for argument) from which attempts to limit or protect campus free speech proceed. Analysis points to future conflicts centered on viewpoint neutrality versus a compelling interest in protecting listeners from potentially harmful speech. While this hardly breaks new ground per se in terms of the viewpoint neutrality standard, the increasing concerns of advocacy groups and administrators in providing for more welcoming environments raise the specter of an augmented "compelling governmental interest" in equality and order which could weigh more heavily in censorship arguments. Finally, the most substantial contribution of this article is its delineation of a new method for identifying potential Constitutional arguments via established theories of communication.

This essay will illuminate the current state-of-affairs in struggles over controversial campus speakers on college campuses. First, we present a campus free speech landscape and review of most current and relevant case

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work. From there we will explicate how two different theories (Persuasive Attack and Persuasive Defense/Image Restoration) can be used as a content-analytic lens for uncovering possible lines of legal argument. The discoveries will point to potential for continuing conflicts centered on perennial questions of liberty versus order and freedom versus equality. While viewpoint neutrality may be binding for the moment, as new claims about inequality rooted in hostile environments gain traction a stronger "compelling governmental interest" might be proffered.

Colleges and universities in the United States now wrestle with the fundamental question of how to protect the free exchange of ideas (including unpopular and inflammatory notions) while simultaneously creating and maintaining an environment where all students feel valued. Not surprisingly, this "conflict" is manifested when issues impacting race, sexuality, class, and gender are in play.

Among others, Goodman (2022) noted the emergence of varying levels of interest by every state legislature (save Delaware) in limiting the teaching of Critical Race Theory, a phrase itself characterized by differences in definition even amongst disciplinary colleagues. Consider also that Myskow (2022) detailed Western Kentucky University's refusal to fire a tenured faculty member making controversial claims about racially based differences in learning styles. While these conflicts over the content of university courses continue to pile up, the scope of this essay is interested in conflicts over speeches delivered under the aegis of (a) student affairs offices, (b) academic registered student organizations, and (c) outside groups renting university facilities. For instance, campus offices dealing with student affairs (housing,

entertainment, health, etc.) may choose to schedule a speaker on accessing mental health on campus or in the community. In contrast, a registered student organization (RSO) recognized by the university may have a decidedly political or social orientation and their invited speakers may likely reflect those viewpoints. Finally, an outside organization such as Moms Demand Action or the Ku Klux Klan may choose to reserve/rent an on-campus space for the purpose of holding an event not sponsored by any university entity. What these scenarios have in common is that they do not constitute scheduled classroom teaching from a faculty member whose course content might undergo scrutiny. While they may enjoy substantial freedom in offering their viewpoints, they do not enjoy academic freedom in the same way as an academic instructor who decides course content.

A 2017 special issue of the *Chronicle of Higher Education* catalogued some of the challenging scenarios witnessed. McMurtrie (2017) noted the conflict surrounding self-described Internet troll Milo Yiannopoulos bringing his "Dangerous Faggot" speaking tour to the University of California at Berkeley. That event was met with hundreds of peaceful protestors as well as dozens of anarchists determined to disrupt the speech, whom university administrators described as outsiders. While the university took no action to pre-empt the event, the violence which ensued resulted in the campus being cleared and the speech ultimately canceled for reasons of safety. President Donald Trump pondered via tweet whether UC-Berkeley ought to lose its federal funding.

Also examining events at Berkeley, Quintana (2017) noted the ultimate cancellation of a speech by commentator Ann Coulter prompted by sponsoring groups (Young America's Foundation and Berkeley College Republicans)

withdrawing support over safety issues. Coulter would claim that the cancellation's blame lay with administrators' lack of commitment to security for the event.

More recently, we have witnessed the emergence of attempts to either cancel or interrupt the delivery [i.e., Heckler's Veto as discussed in Terminiello v. Chicago (1949) or Feiner v. New York (1951)] of an invited speaker. Even schools of law have experienced such incidents. For instance, Stanford University Law School dean Jenny Martinez issued a 10-page defense of controversial campus speakers in a March 22 memo after students shouted down appeals court judge Kyle Duncan during a talk sponsored by the student chapter of the Federalist Society. That particular incident also included Stanford Associate Dean Tirien Steinbach's expression of solidarity with the students who were shouting down Duncan. University of California-Hastings College of Law witnessed a Heckler's Veto of constitutional scholar Ilya Shapiro (Greenberg, October 19, 2022).

As one ponders the extent of university obligations to protect all speech, even or perhaps especially offensive speech, a review of relevant casework is in order. The reader will note that often the right of one party to speak becomes the obligation of another party to guarantee such a right.

Current State of Campus Free Speech Case Law

As mentioned previously, the University of California, Berkely, cancelled an on-campus appearance by right-wing commentator, Milo Yiannopoulos, after agitators caused $150,000 in damages and attacked two members of the Berkeley College Republicans (Park & Lah, 2017). Yale Law School students shouted over and ridiculed a speaker from the Alliance

Defending Freedom, an advocacy group that often holds positions that are anti-LGBTQ+ rights (Moody, 2022). Students at the University of Oregon demanded that campus evangelist, Brother Jed, be banned from campus, which was met with rejection by the university (Wallachy, 2018).

Although it is rare to witness such extreme reactions to campus speakers, those phenomena raise an important question: What are the constitutional limits of free speech on state college campuses? According to Calleros (1995), administrators on state college campuses are state actors and, therefore, are subject to the negative directive of the First Amendment that government shall make no law abridging the freedom of speech. However, the Supreme Court in *Widmar v. Vincent* made it clear that the court has never denied a university's authority to impose reasonable regulations, compatible with their educational mission, upon the use of its campus and facilities (*Widmar v. Vincent*, 1981). Thus, the limitations surrounding First Amendment rights on state college campuses must be addressed by an analysis of current case law.

The Supreme Court in *Tinker v. Des Moines,* albeit adjudicating on an issue regarding students in a public high school setting, set the foundation for future cases that would take up the issue of free speech on university campuses (*Tinker v. Des Moines*, 1969). In protest to the Vietnam war, the Petitioner's in *Tinker v. Des Moines* collectively chose to wear black armbands to school (*Tinker v. Des Moines*, 1969). Upon the school's principal discovering the Petitioner's plan to wear armbands, Petitioners and the principal met, and the principal adopted a policy in which the students could not wear armbands to school (*Tinker v. Des Moines*, 1969). Further, if the Petitioners refused to comply, they

would be suspended until they returned to school without the armband (*Tinker v. Des Moines*, 1969).

Confronted with the issue of whether the principal could restrict the wearing of the black armband due to its symbolic meaning, the Court maintained that it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate (*Tinker v. Des Moines*, 1969). In support of that finding, the Court emphasized that pure speech was at issue in *Tinker v. Des Moines*, not aggressive or disruptive action by students (*Tinker v. Des Moines*, 1969). Although aggressive or disruptive action could have ultimately resulted, the court makes clear that this sort of potentially volatile expression is the basis of our freedoms as Americans, who live in this relatively permissive and often argumentative society (*Tinker v. Des Moines*, 1969).

In *Healy v. James*, during an era where unrest flourished on college campuses, the President of Central Connecticut College refused to recognize a chapter of Students for a Democratic Society (SDS), a group notorious for widespread civil disobedience (*Healy v. James*, 1972). Refusal to recognize the group on campus stemmed from concerns over the relationship between the local chapter and the national chapter of the SDS, if the group were to be recognized (*Healy v. James*, 1972). Although representatives of the local chapter assured campus officials they would remain completely independent, the President denied their recognition, despite the SDS receiving approval from the college's Student Affairs Committee (*Healy v. James*, 1972).

The Supreme Court in *Healy* expanded the *Tinker* holding by maintaining that state colleges and universities are not enclaves immune from

the sweep of the First Amendment (*Healy v. James*, 1972). Additionally, the court emphasized that, although there is a need for affirming the comprehensive authority of the state and its school officials to prescribe and control conduct in schools, the precedents of the court do not suggest First Amendment protections should apply with less force on college campuses than in the community at large (*Healy v. James*, 1972). Thus, the Supreme Court concluded that it was improper for Central Connecticut State College's President to not recognize the chapter of SDS (*Healy v. James*, 1972).

In application, the standard from *Healy* has proved to be enduring in protecting free speech on state college campuses. The Supreme Court in *Rosenberg v. University of Va*. emphasized that the chilling of individual thought and expression is especially dangerous in the university setting because they are at the center of our intellectual and philosophical tradition (*Rosenberg v. University of Va.*, 1995). Furthermore, the court applied said principle in response to the university denying a student organization funding for printing a magazine that fostered an atmosphere of tolerance toward Christian viewpoints (*Rosenberg v. University of Va.*, 1995).

In *Widmar v. Vincent*, despite an argument that the University of Missouri at Kansas City's mission is to provide a secular education, the Supreme Court held that the university was unable to justify excluding a religious group from using campus facilities under applicable constitutional standards (*Widmar v. Vincent*, 1981). Moreover, the court reasoned that case law leaves no doubt that the First Amendment rights of speech and association extend to the campuses of state universities (*Widmar v. Vincent*, 1981).

However, the *Healy* standard does not permit unbounded exercise of First Amendment rights. For example, in *Christian Legal Society v. Martinez*, the Christian Legal Society (CLS) at Hastings College of Law, in application for recognition as a Registered Student Organization (RSO), created bylaws to exclude individuals who engage in "unrepentant homosexual conduct," or those who hold religious convictions different from those contained in the organization's statement of faith (*Christian Legal Society v. Martinez*, 2010). Hastings College of Law rejected the CLS's application on the grounds that their bylaws did not comply with the college's "open-access" policy, since it excluded students based on religious beliefs and sexual orientation (*Christian Legal Society v. Martinez*, 2010). Notwithstanding the *Healy* standard, the Supreme Court in *Martinez* concluded that the Hastings College of Law "open-access" policy to gain RSO status was reasonable and viewpoint neutral. (*Christian Legal Society v. Martinez*, 2010).

Furthermore, the Supreme Court in *Healy* recognized that a college has a legitimate interest in preventing disruption on campus (*Healy v. James*, 1972). However, a heavy burden rests on colleges to demonstrate the appropriateness of their action restricting free expression (*Healy v. James*, 1972). The 10th Circuit in *Thompson v. Ragland* applied the following test from *Healy*. Albeit analyzing a distinguishable fact pattern, which presented a relatively greater disruptive course of action, the 10th circuit found that Metropolitan State University of Denver (MSU) did not meet the heavy burden imposed on colleges (*Thompson v. Ragland*, 2022).

Rowan Thompson, a student at MSU, had a dispute with a chemistry faculty member, which ultimately resulted in her dropping the course

(*Thompson v. Ragland*, 2022). Following her withdrawal from the course, Thompson sent an email to her former classmates indicating her displeasure with the faculty member and suggesting that her classmates leave an honest review at the end of the course (*Thompson v. Ragland*, 2022). As a result, the MSU Associate Director for Student Conduct prohibited Thompson from both contacting the professor and discussing the professor with students from the course (*Thompson v. Ragland*, 2022).

The 10th Circuit rejected the argument that Thompson's behavior was disruptive, as her email was a respectful, non-inflammatory email that criticized her professor, while encouraging her classmates to leave honest reviews (*Thompson v. Ragland*, 2022). Citing *Taylor v. Roswell Independent School Dist*., the court in *Thompson* emphasized that such content- based restrictions carry a presumption of unconstitutionality. As a consequence, Ragland was unable to carry their burden to prove the appropriateness of inhibiting Thompson's speech.

While not specifically dealing with campus speech, the Heckler's Veto had its foundation in Terminiello v. Chicago (1949) and Feiner v. New York (1951) and later with Brandenburg v. Ohio (1969). Each of these established standards by which speech could be penalized for its potential to disrupt public order and safety. In the dissent of Beauharnais v. Illinois (1952), Justices Black and Douglas reasserted (though without legally binding effect) that speech must have more than just a likely strong emotional effect in order to be subject to penalty and that individuals, not the state, should determine topics for public discussion.

It is such emotionally laden speech which we address in this essay. The current state of case law regarding free speech on college campuses weighs in favor of the right of students, faculty, etc. to exercise their rights. However, the Supreme Court has not interpreted the First Amendment to allow disruptive speech, although the college must meet a high burden to prove the conduct is disruptive. Nor has the Court interpreted the First Amendment to prevent universities from prohibiting speech through policies that are reasonable and viewpoint neutral. Having reviewed caselaw about campus free speech, it would be useful to identify typologies which could be used to identify how free speech critics engage in verbal attack and how free speech advocates provide verbal defense. The communication literature offers well-established frameworks for understanding these phenomena.

Persuasive Attack

Defining attack as the assignment of blame for some perceived wrongdoing or shortcoming, Benoit and Dorries (1996) offered a theoretical framework for characterizing the nature of persuasive attack. It works from two major premises. First, persuasive attack increases the target's perceived responsibility for the offense. Second, persuasive attack increases the perceived offensiveness of the act. Both strategies have sub-strategies detailed below.

Increasing the Target's Perceived Responsibility for the Act can take several forms. Specifically, the target can be: (1) accused of **committing the act before**; (2) accused of **planning the act**; (3) accused of **knowing the likely consequences** of the act; and (4) accused of **benefitting** from the act.

Increasing the Perceived Offensiveness of the Act also takes several forms. This increase includes: (5) describing the **extent of the damage**; (6) explaining

effects on the audience; (7) pointing out **inconsistency**; (8) characterizing the **victims as innocent/helpless**; and (9) pointing to the **offenders' obligation to protect the victims**. Legge et al. (2012) extended Benoit and Dorries (1996) sub-strategies by adding: (10) characterizing the **victims as dignified/honorable/noble**; (11) **use of a pejorative label** to describe the offender; and (12) **identifying the act as indicative of a harmful ideology**. These two general strategies, comprised of a total of 12 options, constitute the ways that blame can be placed upon a person or organization. See Table 1.

Table 1. Taxonomy of Attack Strategies

Increasing Perceived Responsibility for the Act
Accused Committed act before
Accused planned the act
Accused knew consequences of the act
Accused benefitted from the act
Increasing Perceived Offensiveness of the Act
Extent of the damage
Persistence of negative effects
Effects on audience
Inconsistency
Victims are innocent/helpless
Obligation to protect victims
Victims are dignified/honorable/noble*
Pejorative Labeling*
Pernicious values or ideology*

*Legge et al. (2012) addition to Benoit and Dorries (1996) taxonomy

The most prominent application of this typology is the original offering by Benoit and Dorries (1996) wherein they analyzed attacks on Walmart's "Buy American" campaign by the television news magazine, "Dateline NBC." The accusations served to document both the offensiveness and responsibility of Walmart in advancing a campaign which was deceptive in numerous ways. Also previously mentioned was Legge et al.'s (2012) extension of the typology via a study of attacks on talk radio host Rush Limbaugh following his crass description of Georgetown University student-activist Sandra Fluke. Most recently, Benoit (2022) assessed the nature and function of President Joe Biden's attacks on former President Donald Trump for his role in the January 6, 2021 insurrection attempt on the United States Capitol.

This persuasive attack typology provides a framework for understanding how critics of campus free speech can seek to place limits on discourse of which they do not approve. However, we must also describe how free speech advocates can defend such discourse.

Persuasive Defense

Image restoration theory (known interchangeably with image repair theory) was first fully explicated by Benoit's (1995) offering of a comprehensive typology of strategies which a communicator (person or organization) may choose from in order to repair one's reputation following accusations of wrongdoing. It works from two assumptions: communication is a goal-oriented activity and the maintenance of a favorable reputation is one primary goal (Clark and Delia, 1979).

Image repair consists of five general choices, some of which have sub-strategies. *Denial* may take the form of (1) **simple denial** of a misdeed or (2)

shifting blame to another person/party. *Evading responsibility* may include: (3) **provocation**; (4) **defeasibility** (when the accused claims lack of knowledge or control); (5) claiming the misdeed was an **accident**; and (6) claiming that **good intentions** were behind the misdeed. *Reducing the offensiveness of the event* may include: (7) **bolstering**, pointing out one's good qualities; (8) **minimizing** the misdeed as less serious; (9) **differentiation**, or distinguishing the act from more serious acts; (10) **transcendence**, or framing the misdeed in a larger context; (11) **attacking one's accuser**; and (12) and **compensation** via financial or other form of redress. **Corrective action** (13) occurs when the accused claims they will correct the problem by taking measures to prevent the reoccurrence of wrongdoing. Finally, **mortification** (14) takes place when the accused admits to wrongdoing and asks for forgiveness. These five general strategies, broken into a collection of 14, are a comprehensive inventory of ways accused parties attempt to repair their reputations. See Table 2.

Table 2. Typology of Image Restoration Strategies (Benoit, 1995)

- Denial
  - Simple denial
  - Shift blame
- Evasion of Responsibility
  - Provocation
  - Defeasibility
  - Accident
  - Good intentions
- Reducing Offensiveness of the Event
  - Bolstering
  - Minimizing
  - Differentiation

Transcendence

Attacking accuser

Compensation

Corrective Action

Mortification

Image restoration has been applied broadly across communication genres including the political (Blaney and Benoit, 2001; Kennedy and Benoit, 1997; Benoit and McHale, 1999), corporate (Blaney et al., 2002; Benoit and Brinson, 1994; Nazione and Perrault, 2019), religious (Blaney and Benoit, 1997; Blaney, 2001; Miller, 2002;), sports (Fortunato, 2008; Billings et al., 2018; Jerome, 2008), and entertainment (Benoit, 1997). These studies varied not just in communication genre, but also methodological approach, generalizability/transferability of claims, and the way in which they extended image restoration theory. However, for purposes of this article it serves as an elegant typology for identifying the persuasive defense of free speech.

Our Approach to Free Speech Discourse

With frameworks established for how persuasive attack and defense takes place, we can proceed to an examination of discourse about free speech in higher education for a greater understanding of the nature and function of these *speech-sets*. As Ryan (1982) noted, the *apologia* (defense) in any given situation is best evaluated in light of the *kategoria* (attack) which has been leveled. In this respect, we hope to advance image restoration theory with this analysis, but also identify arguments which free speech jurisprudence may encounter.

Although not a perfect representation of the exchanges between current supporters and detractors of potentially inflammatory speakers on college campuses, the *Chronicle of Higher Education* provides a systematically collected source of discourse in the form of news stories collected about free speech controversies involving outside speakers. Our analysis will consider that discourse. We will examine five articles substantially addressing campus speakers found by searching "controversial speaker" within the *Chronicle of Higher Education* from September 1, 2021 until August 30, 2022. This period of one year produced the set of stories in which a data set might reasonably begin and end. The stories examined are: "A Different Kind of Campus Speaker Controversy" (Bartlett, 2021); "What's the State of Free Expression on Campus" (Gutkin, 2022); "A University Resisted Pressure to Cancel a Controversial Speaker. But It Moved the Event Online" (Adedoyin, 2022); "At This College, the President Will Now Approve Speakers" (Ross, 2022); and "When Privileged Students Protest" (Patel, 2022). While these five stories from *The Chronicle of Higher Education* might appear at first glance as a too limited data set, note two things. First, as the articles are substantial treatments of their topic, they are a combined **8,884 words**. This constitutes a large amount of discourse for consideration. Second, this return of stories from our search was very likely impacted by the fact that so many campuses during the period in question were operating at diminished capacities due to the ongoing pandemic, limited even more so in terms of large campus in-person speaking events. As such, we consider these texts acceptably representative of the types of discourse about free speech on campus during this period despite its limitations.

Analysis will use rhetorical-critical methods as previously employed in the persuasive attack and defense literature. The texts under study will be examined closely for the extent to which the discourse deploys strategies articulated by the lenses offered by Benoit (1995), Benoit and Dorries (1996), and Legge et al. (2012) and replicated so ubiquitously. However, discussion in this article will not be concerned with the usual measures of internal consistency and plausibility. Rather, our analysis will hope to uncover the nature and function of the discourse with an eye toward identifying potential legal issues/conflicts.

Analysis of Campus Free Speech News

In this section, the texts described above will first be considered in terms of the nature and function of the attack on campus free speech. This will be followed by discovery of the nature and function of the persuasive defense of campus free speech.

Persuasive Attack

Analysis of the texts in question point to four primary attacks on free campus discourse and its need to be canceled, curtailed, or otherwise diminished by university actions: (1) the speech poses a threat (psychological and/or physical) to the well-being of students, implicit that the **university has an obligation to protect victims**; (2) the speech jeopardizes the institution's ability to achieve desired ends or had **effects on audience** which prevented the goal of personal and scholarly development; (3) the speech is inconsistent with the university's mission and values **(contains pernicious values or ideology)**; and (4) some free speech advocates are **inconsistent** in the speech they would protect. These attacks are detailed in that order.

Obligation to Protect Victims. Some statements found within the articles under study point to psychological (and potentially physical) threats that unfettered campus speech can produce. For instance, in an article describing the cancellation of University of Chicago associate professor of geophysics Dorian Abbot's scientific address at the Massachusetts Institute of Technology, Bartlett (2021) noted two particularly relevant points. First, Abbot raised the ire of students at MIT because of his public objections to diversity criteria in the faculty hiring process. Second, the lecture Abbott was to deliver covered the scientific topic of climate, exoplanets, and the potential for life on other planets. The graduate students who demanded the cancellation in a letter to administration described Abbot's seemingly unrelated statements on diversity as harmful. As such, one can see the persuasive attack strategy invoking the alleged need for the university to protect the potential victims (in this case, students) from such harm. Similarly, Wesleyan University President Michael S. Roth spoke to the need to protect students:

> This boogeyman of safe spaces served the University of Chicago well in a branding campaign, but nobody really wants a hyper dangerous environment in which students from underrepresented groups can be assaulted or where women cannot study in peace because the professors find it easier to get dates among undergraduates than among people their own age (in Gutkin, 2022).

Roth was explaining how the verbal environment (read: communication) exhibits potential for cultivating attitudes which make hazardous behaviors more likely, specifically racial and sexual harassment. Again, this implicates the university's obligation to guarantee safety. Roth buttressed the potential for psychological harm: "There's not a perfect formula. But the idea that psychological harm isn't as real as physical harm? That's like an 1860s' idea. Psychological harm is real" (in Gutkin, 2022).

Examples such as these can be found throughout the sample, but these offer clear claims that some speech, speakers, and ideas can harm students. As such, we see that one attack on unfettered campus speech will be tied to the university's obligation to protect potential victims.

Effects On Audience. Returning to the example of Abbot's cancellation at MIT, one notices in the student letter an accusation that his statements were an "aggressive act towards the research and teaching communities" (in Bartlett, 2021). Invoking the primary university activity of research and teaching, this attributes to Abbot's YouTube videos a debilitating effect. Another example is President Roth's statement that "the classroom needs to be safe enough so you can be uncomfortable and deal with dangerous ideas and really fraught issues about which reasonable people disagree" (in Gutkin, 2022). Although "tipping the hat" to the concept of discussing controversial issues, Roth's essential claim is that a "safe enough" environment must exist in order for learning to take place and mitigate the negative effect of lackluster classroom discussions. The means for achieving this safe environment might surely include placing limits on acceptable speakers invited to campus.

Pernicious Values or Ideology. Attacks on free speech also came in the form of a commitment to values and ideology, and in some cases stated institutional values. For instance, Saint Vincent College, a Benedictine and Catholic institution in Latrobe, PA adopted an administrative approval process for "college sponsored" speakers following a speech by Hillsdale College faculty member David Azerrad. In a speech titled "Black Privilege and Racial Hysteria in Contemporary America," Azerrad asserted, among other things, that Kamala Harris only became vice-president due to her race and that "the real

color of visible privilege in America today is Black" (in Ross, 2022). In establishing the new policy in reaction to the speech, the Rev. Paul Taylor asserted that the measure was "to make sure that the message to be delivered is not in conflict with the spirit and mission of the college" (in Ross, 2022). Thus, church teaching can be identified as objecting to what it found pernicious. Likewise, the State University of New York College at Brockport invited Jalil Muntaqim, a former Black Panther convicted of murdering two police officers in a 1971 ambush, to an April, 2022 campus presentation. While initially standing by the controversial speaker, administration eventually opted to move the address online citing "safety concerns." The university also withdrew financial support in the form of a "Promoting Excellence in Diversity Grant" and furthermore ordered a review of that grant program (Adedoyin, 2022). The speech clearly was facing consequences due to the speaker's association with violence against police officers.

Inconsistency. Analysis also revealed accusations of inconsistency as a reason to consider limiting campus speech, albeit in a fashion which cut both ways. Vice-Provost for Equity and Inclusion at the University of Michigan Robert Sellers summarized: "But individuals are more than willing to give up someone else's freedom in order to protect their own safety. And similarly, people are willing to give up other people's safety to protect their own freedom" (in Gutkin, 2022). As such, there appears to be a balanced critique of unfettered speech as people risking the safety of others to benefit their rights to speak. This passage will be visited again in the section on persuasive defense of free speech. Indeed, this quote may succinctly present the constitutional question which courts will be asked to balance.

Our analysis of persuasive attacks on free speech identified four of Legge et al.'s (2012) strategies for persuasive attack. Free speech critics spoke to the need to protect potential victims, consider negative effects on the audience, eliminate pernicious speech which threatens university mission, and point to inconsistency of would-be defenders of free speech.

Persuasive Defense

Analysis of the texts likewise uncover two primary defenses of free campus discourse which has come under attack: (1) the presentation of highly contested ideas is essential to the nature of a university **(transcendence)** and (2) the adjudication of what speech should be permitted could be left to arbitrary parties and/or criteria **(attack accuser)**. As the context of this analysis necessarily involves the limiting of discourse, attack accuser will be conceptualized as **attack censor**. These defenses will be addressed in that order.

Transcendence. Patel (2022) reflected on a protest he witnessed while participating in a forum at Sarah Lawrence College called, "Differences in Dialogue." Protesters used the occasion to press university administration for a list of demands issued by a student group called the Diaspora Coalition. Describing the disruption as a "buffet of activist excess," he placed events such as these in a worrisome context: "This should concern us. A college ought to be a place where individuals can share half-formed thoughts, precisely so those thoughts can be fully baked by a community of learners in common pursuit of the truth" (Patel, 2022). Here, the transcendent purpose of higher education as a place for the discernment of ideas (both good and bad) is placed in a context larger than the isolated event. Patel did so again in his *Chronicle* essay, citing

the support of philosopher Alasdair MacIntyre who called the central purpose of higher education "to initiate students into conflict" (in Patel, 2022).

Jonathan Friedman of PEN America (a human rights group defending writers and editors) in sum of the previously mentioned conflict at Brockport offered: "The goal has to be for universities not to run away from hosting controversial and difficult conversations just because one group thinks that some person is not entitled to their platform" (in Adedoyin, 2022). Here, the university's transcendent responsibility to foster exchange of ideas, even potentially troubling ones, is clearly presented. Likewise, Carleton College associate professor Amna Khalid posed the transcendent question: "Who gets to define what is harmful? Who calls the shots on where we want to limit that harm" (in Gutkin, 2022)? This defends the concept of protecting controversial speakers as a matter of protecting the potential loss of important competing ideas. The transcendence strategy as presented in this collection of higher education news coverage is at the forefront of defending the rights of controversial campus speakers as well as the university community's right to hear them.

Attack Accuser/Censor. Khalid also offered a defense of free speech which leveled attack against would-be censors: "Tomorrow people are going to say that Black Lives Matter activists on campus are making us uncomfortable—we feel unsafe, we feel psychologically harmed. It is being deployed and weaponized" (in Gutkin, 2022). In a defensive twist alluded to in the persuasive attack section regarding inconsistency, she points out that the very people wanting censorship for the moment (silencing the "right wing") may find themselves without voice when they wish to present their own controversial

ideas (silencing the "left wing"). Actions taken by the various legislatures mentioned at the outset of this essay may prove a fruitful exemplar.

Attacking the censor can also be found in the Abbot episode mentioned previously in the persuasive attack section. Abbot and Stanford University associate professor Ivan Marinovic publicly offered an alternative to DEI adjudication called "Merit, Fairness, and Equality." They further likened the current cancellation of controversial campus speakers to Nazi attempts to suppress Jewish scholars in Germany in the early 1930s. While certainly incendiary, such a statement clearly exhibits an attack on censor.

With identification of persuasive attacks and defense strategies on campus free speech established, we turn to implications for potential legal and/or administrative conflict.

Discussion

Before commencing with implications of this analysis, we remind the reader of two important assumptions. First, the limited set of texts analyzed are not presented as representative of a comprehensive content analysis of the discourse around controversial campus speakers. For that matter, we did not include every example found within these texts. Generalization is not our objective. As articles from the erstwhile "newspaper of record" about higher education, they provide only the thoughts of administrators and scholars which might be typical of where places of legal argument (*topoi*) may emerge. It is for this reason that some citations present the discourse of the news story authors directly and in other cases subjects of the story are quoted in a secondary fashion from those stories. Second, we must recognize from the outset that potential for legal challenges to university administrators' actions

will differ fundamentally for state-affiliated institutions and private institutions (especially those with a religious affiliation).

Recall that strategies for persuasive attack on unfettered campus speakers included obligation to protect victims, effects on audience, pernicious ideology, and inconsistency. Two of those strategies can be "taken off the table" in terms of constitutional arguments. An ideology may be pernicious but the court has already established that "viewpoint neutrality" is a requirement for any state imposed limitations on speech (Matal v. Tam, 2017; Ward v. Rock Against Racism, 1989). Likewise, being inconsistent in limiting speech for a given reason may open one to accusations of hypocrisy or double standards, but the Constitution does not require a communicator to meet a particular standard of character or intelligence. This leaves protection of victims and negative effects on audience as remaining potential places of argument to be considered.

Now recall that strategies for persuasive defense included transcendence and attacking accuser/censor. Attacking accuser/censor, while it could involve substantive reasons, typically constitutes *ad hominem* reasons why the accuser/censor lacks credibility to accuse. However, the constitutionality of speech cannot be assessed on qualities of the speaker. Attack accuser/censor as such provides no potential for legal protection. Without question, the purpose of higher education includes the free exchange of ideas and cultivation of the ability to critique ideas as they are introduced. Moreover, the United States Supreme Court stated unanimously that speaking offensively constitutes a viewpoint (Matal v. Tam, 2017). This leaves the

prominent strategy of transcendence as the remaining plausible defense for controversial campus speech.

By deduction, one must predict that the legal struggle around controversial campus free speech will of necessity pit administrators' obligation to protect potential victims (read: students, faculty, and staff) and pernicious effects of controversial/hazardous/hateful speech against the transcendent value of the free exchange of ideas. Given the unanimity in Matal v. Tam (2017), there is to date no evidence that the court will support viewpoint limitation by state actors. However, while the viewpoint neutrality standard is clearly current precedent, the reader should understand the potential challenge to free speech which is present in greater consideration of the negative effects of speech on a university's ability to accomplish its mission. In short, the liberty protected by the viewpoint neutrality standard may be increasingly balanced against a university's increasing interest in an orderly learning environment and equal access to comfort for all students. Viewpoint neutrality enjoys strong support for the moment. The interests in order and equality are not easily dismissed in an education environment.

Notably, the National Council for Education Statistics (2020) reports that 1,660 of the 3,982 two-year and four-year colleges are operated privately, relieving them of First Amendment scrutiny described throughout this essay. In short, St. Vincent College was within their rights to prohibit a speaker deemed racist as a matter of religious exercise and close to half of the colleges/universities in the United States could limit campus speech broadly if they chose to do so. Likewise, the private institution Stanford would have been within its right to shut down Judge Duncan's speech unapologetically.

However, state institutions such as the University of California-Hastings must be ready to protect the viewpoint neutrality of its invited speakers.

Future Directions

State, county, and municipally operated colleges and universities will be tasked with navigating competing interests: the creation/maintenance of a welcoming campus climate for students from historically excluded backgrounds versus the obligation to protect viewpoint neutrality in campus addresses. Until the harm and deleterious effects of controversial/hazardous/hateful speech can be shown to create a governmental interest compelling enough to limit viewpoint neutrality and meet narrowly tailored means for alleviating harm, public college administrators will need to develop campus speaker policies protecting viewpoints while ensuring sufficient campus order. This will be no small task.

Moreover, our analysis demonstrated a double standard of which to be wary. Goodman (2022) pointed to efforts with varying levels of support to prohibit the teaching of Critical Race Theory. First introduced by Bell (1976) and situated in the study of desegregation litigation, many legislators and commentators have taken to condemning CRT without a clear articulation of its tenets and applications. Indeed, even scholars working in CRT have yet to offer a unified definition as it is explicated across varying disciplines with different social contexts. As such, we must surmise that the public critics of CRT, frankly, do not know of what they speak. We choose not to proffer our own definition and critical boundaries. However, we do point to the glaring hypocrisy of those who would decry the cancellation of campus speakers with

racially insensitive points of view while at the same time insisting on the banishment of a particular theoretical lens from any curriculum.

Conclusion

In this essay we offered an analysis of ideas about controversial campus speakers offered in the *Chronicle of Higher Education*. Through application of persuasive attack theory (Benoit and Dorries, 1996; Legge et al., 2012) and persuasive defense/image restoration theory (Benoit, 1995) we identified potential legal arguments in what will surely remain a hotly contested struggle. We hope that readers will find tremendous value in the interdisciplinary merger between free speech law and descriptive typologies of messages which can be used as a legal lens. Finally, we anticipate that future challenges to viewpoint neutrality requirements by state actors will center on the government's *increasing* compelling interests in protecting hearers from potential harm and an institution's ability to carry out its mission.

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